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Division III
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NO. 35400-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DAWN HINES,

Respondent,

v.

KADLEC REGIONAL MEDICAL CENTER; KADLEC
CLINIC, LLC; COLUMBIA BASIN IMAGING, P.C.; NORTHWEST
EMERGENCY PHYSICIANS, LLC; NORTHWEST EMERGENCY
PHYSICIANS, INC.; TEAMHEALTH HOLDINGS, INC.; SUSAN
WHITAKER, DO; SCOTT HAMMERSMITH, MD; BRIAN DAWSON,
MD; LARRY NYE, PA-C; LAURA REKA, PA-C; SHAWN JONES,
MD; FREDERICK L. STEPHENS, II, MD; KETAN KALE, MD;
DEBRA STEELE, MD; YOLANDA LARA, ARNP;
KATHLEEN LEDWICK, ARNP,

Appellants.

JOINT BRIEF OF APPELLANTS

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I. INTRODUCTION

Despite the plain language of chapter 7.70A RCW providing for binding arbitration of health care actions, the trial court concluded that Dawn Hines was not required to participate in arbitration proceedings properly commenced when all parties included statements of election in their initial pleadings in compliance with the statute.

The complaint and all seven separate answers filed in this case include statements of election to submit to arbitration. After the arbitration proceedings had commenced with the filing of the final answer, the plaintiff and her attorney claimed that the election was a mistake and asked the trial court's permission to withdraw from arbitration.

Ignoring the language of the statute, the well-settled rules of statutory interpretation, case law regarding the authority of counsel, and the availability to Ms. Hines of a proper remedy against negligent counsel, the trial court concluded that arbitration under chapter 7.70A RCW is conditioned upon "mutual assent," an element of a common law contracts with no connection to the statutory scheme providing for an independent election by each party. The trial court also concluded that Ms. Hines could not be compelled to arbitrate the matter because she lacked "intent."

Because the trial court erred as a matter of law and its ruling undermines the authority of the Legislature to set policy, violates the well-

settled principles of statutory interpretation without providing a means for predictable results, strips a statutory procedure designed for simplicity and efficiency of all utility, and invites protracted litigation, this Court should reverse the trial court's order denying the motion to compel arbitration and reinstate the arbitration proceedings properly commenced in this case.

II. ASSIGNMENT OF ERROR

The trial court erred in denying the defense motion to compel arbitration under chapter 7.70A RCW despite the independent elections included in the complaint and all answers in satisfaction of RCW 7.70A.020(1)(a).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Read together, RCW 7.70A.020(1)(a) and RCW 7.70A.020(2) require each party, when filing its complaint or answer, to make an independent election to either submit to arbitration or not to submit to arbitration. Did the trial court err in requiring "mutual assent" as a condition to enforcement of an election to submit to arbitration that fully complied with the requirements of RCW 7.70A.020(1)(a)?

(2) RCW 7.70A.020 requires an attorney filing a complaint in a medical negligence case to produce written proof of her client's express authority to decline arbitration, but not to elect arbitration. Did the trial

court err in concluding that an arbitration election filed by an attorney is unenforceable based on her client's lack of "intent"?

(3) The plain language of RCW 7.70A.020 establishes that an express waiver of arbitration is not binding. Even if waiver by conduct is possible, does the record establish that Kadlec exercised, rather than impliedly waived, the right to arbitrate?

IV. STATEMENT OF THE CASE

A. Factual Background.¹

On November 6, 9, and 11, 2013, Dawn Hines appeared at the emergency department of Kadlec Regional Medical Center complaining of pain in her back and abdomen. CP 551-55. Several individual health care professionals participated in the evaluation of her condition. *Id.* After her admission to the hospital on November 11, a neurosurgeon diagnosed Ms. Hines on November 12 with spinal epidural abscess and provided treatment until her discharge on November 26. CP 557.

B. Procedural Background.

1. Ms. Hines's complaint including statutory election of voluntary arbitration.

On November 3, 2016, Ms. Hines filed a medical negligence lawsuit in King County Superior Court naming as defendants a total of

¹ As the factual basis for the complaint is not at issue in this appeal, this brief statement is provided merely for context.

seventeen individuals and entities, including Kadlec and several individual health care providers who were involved to some extent in her care before the November 12 diagnosis, as well as their independent employers.² CP 2, 541-60. The complaint contains seven consecutively numbered sections, the last of which is entitled “Election to Submit to Arbitration,” and states: “Pursuant to RCW 7.70A.020, plaintiff hereby elects to submit this matter to arbitration under RCW Chapter 7.70A.” CP 559.

The complaint identifies three separate law firms as Ms. Hines’s “attorneys of record,” a Seattle firm, a Kennewick firm, and a Detroit firm, and indicates that her Detroit attorneys had a pro hac vice application pending. CP 541, 560; *see also* CP 477-84; CP 468; 445-59. The signature of the Seattle attorney, Maria Diamond, appears on all three signature lines of the complaint, indicating that Ms. Diamond signed the complaint on behalf of Ms. Hines’s Kennewick attorney, Jeffrey Sperline, as well as her Detroit attorneys, Brian McKeen and Joel Sanfield. CP 560.

2. Appearances, initial discovery requests, and answers filed by independently represented parties.

On November 8, 2016, counsel for Dr. Brian Dawson, Mr. Larry Nye, and Ms. Laura Reka filed a notice of appearance, a notice of intent to

² Although separately represented, either singly or in groups, by seven separate law firms, the seventeen individually named defendants participated jointly before the trial court on the motion to compel arbitration at issue in this appeal and intend to present joint briefing and argument before this Court. This brief refers to all defendants jointly as “Kadlec” except where reference to individual defendants and counsel is necessary.

videotape depositions, a jury demand, and a statutory jury fee. CP 3, 516, 520, 524. On November 10, counsel for Dr. Susan Whitaker appeared. CP 506. Counsel for Northwest Emergency Physicians, LLC, Northwest Emergency Physicians, Inc., and TeamHealth Holdings, Inc., appeared on November 14, 2016. CP 502. Counsel for Dr. Shawn Jones also appeared on November 14. CP 497. On November 15, 2016, counsel for Dr. Scott Hammersmith and Columbia Basin Imaging, P.C., appeared. CP 470. On November 16, counsel appeared for Kadlec Regional Medical Center, Kadlec Clinic, LLC, Dr. Ketan Kale, Dr. Debra Steele, Ms. Yolanda Lara, and Ms. Kathleen Ledwick. CP 464. Counsel for Dr. Frederick Stephens appeared on December 8, 2016. CP 393.

Between November 21, 2016, and January 7, 2017, counsel representing four of the seven separately represented groups of defendants each served between twenty-one and fifty-four interrogatories and seven to twenty-five requests for production on counsel for Ms. Hines. CP 625-26. Counsel for Ms. Hines did not object or seek relief from the court and no party sought to compel responses.

On January 24, 2017, in seven separately filed answers, CP 315-92, all defendants independently acknowledged Ms. Hines's election of arbitration and included statements electing arbitration under Chapter 7.70A RCW, CP 323-24, 332, 343, 356, 367, 375, 386.

On February 7, 2017, Christopher Mertens, counsel for Dr. Hammersmith and Columbia Basin Imaging, spoke with Mr. Sperline regarding outstanding discovery responses. CP 580, 625. During the conversation, Mr. Mertens discussed the arbitration proceeding and suggested a conference call to address possible arbitrators and the potential for dismissing some defendants. CP 580, 584, 625. Mr. Sperline indicated he would speak to Ms. Diamond and Mr. McKeen. CP 584, 625. Mr. Mertens sent an email memorializing the conversation to Mr. Sperline, Ms. Diamond, and Mr. McKeen on February 8, 2017. CP 584.

Thereafter, on or around February 15, counsel for Ms. Hines received additional interrogatories and requests for production from counsel for Northwest Emergency Physicians and TeamHealth. CP 626.

3. Kadlec's motion for change of venue and Ms. Hines's motion to withdraw from arbitration.

On February 15, 2017, Kadlec filed a motion to change venue to Benton County. CP 269-85. On the same day, Mr. Sanfield sent a letter to defense counsel stating: "We intend to request that the court allow plaintiff to withdraw from elective arbitration. If this is something to which you would stipulate, please advise." CP 37-38.

On February 17, 2017, Ms. Hines filed a "Motion to Withdraw From Elective Arbitration," acknowledging that her complaint included an

election to arbitrate in accordance with the requirements of RCW 7.70A.020, but asking the trial court to consider “the circumstances under which the election to arbitrate was made” and allow her to withdraw from arbitration. CP 217, 225. Specifically, Ms. Hines claimed that the election resulted from her attorney’s error and that her attorneys had not advised her of the option of voluntary arbitration or provided her with a copy of the provisions of chapter 7.70A RCW before filing her complaint. CP 224; *see also* CP 182, 214-15. Ms. Hines argued that compelling her to submit to arbitration under these circumstances would result in a manifest injustice because the \$1,000,000 cap on damages would be inadequate to meet her medical expenses and future care costs; the expiration of the statute of limitations prevented her from voluntarily dismissing her suit and refile; discovery was “in its infancy” and the defense would not be prejudiced; and the “just” determination of an action is “paramount” under the civil rules. CP 217-18. Ms. Hines also pointed out that chapter 7.70A RCW does not prohibit withdrawal from arbitration by a “plaintiff who inadvertently and mistakenly files an election to arbitrate and thereafter requests to opt out.” CP 226.

In support, Ms. Hines stated in a declaration that she “was unaware of the provisions of RCW 7.70A and the election to arbitrate” “[a]t the time the Complaint” was filed on her behalf; that she “had not been made

aware” that the election “could result in compelling [her] to arbitrate contrary to [her] intent or desire”; that she “did not know that the provisions of RCW 7.70A impose a \$1,000,000.00 cap on any potential monetary recovery”; and that her “attorney has advised [her] of their mistaken and inadvertent election to arbitrate without my consent.” CP 214-15.

Ms. Diamond also provided a declaration, in which she stated that she “inadvertently included an election to arbitrate” in the complaint during her “efforts” “to ascertain the correct identities of the potentially culpable defendants and their various legal relationships, and to get her complaint filed before the impending statute of limitations deadline.” CP 182. In particular, while “in a rush to get the complaint timely filed,” a purported “clerical error” “occurred” during “drafting,” which “included a ‘cut and paste’” from a different complaint and a “failure to delete the section relating to the election to arbitrate.” CP 182. Despite stating that “Ms. Hines was not informed of the election to arbitrate before the lawsuit was filed because plaintiff’s counsel did not intend to include an election to arbitrate in the complaint,” Ms. Diamond did not explain why Ms. Hines “was not informed” of the option of arbitration and did not receive “the provisions of RCW 7.70A” before the complaint was filed or why she did not prepare a declaration according to the requirements of RCW

7.70A.020(2)(a) for filing at the time of commencing the action. CP 182. According to Ms. Diamond, “plaintiff’s counsel” first “recognized the inadvertent mistake” on January 24 when the answers were filed and then discussed arbitration and the provisions of RCW 7.70A with Ms. Hines for the first time on February 6, 2017. CP 182.

In response, Kadlec pointed out that (1) all parties to the action had elected to submit the dispute to arbitration under RCW 7.70A.020(1)(a) by including elections in their initial pleadings, that is, the complaint and the answers; (2) under the strict timeline provided in RCW 7.70A.050(1), arbitration proceedings officially commenced on January 24, 2017 when all defendants filed their answers; and (3) if counsel for Ms. Hines had intended to decline arbitration on behalf of Ms. Hines, they violated RCW 7.70A.020(2)(a), which requires written proof that counsel provided a copy of the statute to the “claimant” “before commencing the action and that the claimant elected not to submit the dispute to arbitration.” CP 63-71.

Kadlec argued that (1) allowing any party to withdraw after election cannot be reconciled with the language and purpose of chapter 7.70A RCW indicating that arbitration is intended to be binding; (2) Ms. Hines is properly bound by the mistakes of her attorneys and has a remedy against them in a suit for malpractice; and (3) Ms. Hines’s self-serving

appeals to “justice” and equitable considerations cannot overcome the Legislature’s policy choices embodied in the statute. CP 68-76.

On February 27, 2017, King County Superior Court Judge Susan Amini granted Kadlec’s motion to change venue to Benton County without considering Ms. Hines’s motion to withdraw from arbitration. CP 7-12. Effective April 3, 2017, Ms. Diamond withdrew as attorney for Ms. Hines. CP 561-62.

4. Kadlec’s motion to compel arbitration and Ms. Hines’s motion to amend her complaint.

Kadlec asked the Benton County Superior Court to compel arbitration, pointing out that all parties had elected arbitration in compliance with RCW 7.70A.020(1)(a) and thereafter agreed to an arbitrator within the timeframe provided by RCW 7.70A.030(1). CP 569-71. Kadlec argued that an arbitration proceeding had commenced according to the statute and that Ms. Hines was bound by the actions of her authorized attorneys. CP 573-74. Those attorneys affirmatively requested arbitration in compliance with the statute and failed to fulfill the statutory requirements for declining arbitration. CP 574-75. Relying on Washington case authority stating that the “sins of the lawyer are visited upon the client,” Kadlec argued that the defendants were entitled to rely

on the clear election of arbitration included in the complaint when deciding whether to elect arbitration in their answers. CP 573-74.

Kadlec also pointed out the lack of any mechanism in the statute for withdrawal from an arbitration proceeding properly commenced according to its provisions by independent statements of election by each party, and sought a stay of further proceedings pending the conclusion of arbitration. CP 572, 575.

Ms. Hines then filed a motion to amend her complaint for the sole purpose of deleting the paragraph electing arbitration. CP 593-98, 601, 620. Ignoring the fact that arbitration had commenced according to the statute and that all parties had conditionally agreed on an arbitrator within the statutory timeframe, Ms. Hines claimed that Kadlec would not be prejudiced because it had “only recently answered the complaint,” discovery was “in its infancy” as there had “only been an initial exchange of preliminary written discovery requests,” but no depositions had been scheduled, and no arbitrator had been appointed. CP 595-96. Ms. Hines admitted that she found no case authority holding that a party must be allowed to amend a complaint under CR 15(a) for the purpose of withdrawing from an ongoing arbitration proceeding, but identified some federal cases as “sufficiently analogous.” CP 596-98.

In response to the motion to compel arbitration, Ms. Hines argued for the first time that the statement in her complaint electing arbitration was not an “election” according to dictionary definitions of words in RCW 7.70A.020 including “elect,” “election,” and “may.” CP 636-38. In essence, she argued that the statement was not an election because it was not the result of her own choice but of a mistake by her attorney. *Id.* Based on “the contractual nature of arbitration,” Ms. Hines argued that she could not be compelled to arbitrate because the “request” to arbitrate “resulted from a typographical error” rather than “mutual assent to arbitration.” CP 638-39.

In addition, despite describing the state of discovery as “in its infancy” in her motion to amend her complaint, Ms. Hines argued that Kadlec waived the “affirmative defense” of arbitration by engaging in discovery unrelated to arbitrability and in excess of the limits provided for arbitration proceedings. CP 639; RCW 7.70A.040(2)(a). Finally, Ms. Hines argued that compelling arbitration would violate her constitutional rights to trial by jury and to access to the courts and that her attorneys lacked authority to relinquish her right to a jury trial. CP 640-43.

In reply on both motions, Kadlec (1) identified case authority holding that CR 15(a) may not be used to rectify a substantive defect such as the inadvertent waiver of a jury trial, CP 649-50, 660-61; (2) argued

that resort to dictionary definitions was unnecessary in light of the plain, unambiguous language of RCW 7.70A.020(1)(a) providing a clear, direct mechanism for parties to independently communicate their election of arbitration to the court and to other parties, CP 650; (3) argued that an election of arbitration under chapter 7.70A RCW cannot be, and was not in this case, waived by conduct under case law and theory applicable to arbitration based on mutually agreed contracts governed by chapter 7.04A RCW, CP 651; (4) pointed out the legislature's constitutional authority to provide for waiver of jury trials in civil cases, as well as case authority establishing that an attorney's mistake may result in waiver of a party's right to a jury trial, CP 651-55; and (5) again pointed out that proceedings in the forum of arbitration had already been irrevocably set in motion and that allowing withdrawal would be irreconcilable with the purpose and policy goals of the statute, CP 660-61.

5. The hearing on Kadlec's motion to compel arbitration and Ms. Hines's motions to withdraw from arbitration and to amend her complaint.

On April 21, 2017, the trial court heard arguments on Kadlec's motion to compel arbitration, as well as Ms. Hines's motions to withdraw from arbitration and to amend her complaint. RP 5-6. Kadlec focused on the undisputed statements of election in the complaint and answers in satisfaction of the requirements of RCW 7.70A.020(1)(a) for commencing

arbitration; the lack of any statutory procedure allowing a party to withdraw from chapter 7.70A RCW arbitration after making an election in compliance with the statute; and the authority of the Legislature to choose a policy favoring arbitration and allowing the implied waiver of the right to a jury trial without proof of express consent of a party in addition to that of his or her chosen counsel. RP 6-21.

Essentially, Ms. Hines argued that the statement of election in the complaint was not “a proper election.” RP 35. Ms. Hines acknowledged that Kadlec’s description of “the means of electing arbitration” “has some superficial appeal,” but argued that if such reasoning applied to Ms. Diamond’s “typographical error,” which lacked “intention and volition,” then a party “could validly elect arbitration” “under fraud or other form of duress.” RP 25-27. Ms. Hines argued that the “whole idea of arbitration is premised on the existence of an agreement of mutual assent to resolve a dispute in that particular for[um],” such that arbitration should not be compelled “in the absence of an agreement to arbitrate and the absence of mutual assent – to do so.” CP 29-30.

Recognizing that “there’s no case that makes this precise distinction,” Ms. Hines urged the trial court to distinguish “a typographical error” from a “failure to comply with court rules or violation of a Court’s case scheduling order.” RP 27-28. In addition, Ms. Hines argued that the

trial court should follow cases indicating that an attorney lacks authority to waive a client's substantial right to a jury trial without express consent, such as *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980), and disregard cases demonstrating that an attorney's failure to comply with court rules can result in waiver of a client's jury trial right, such as *Sackett v. Santilli*, 146 Wn.2d, 498, 47 P.3d 948 (2002). RP 32-33.

Indicating that its decision "in determining this statute" is subject to an abuse of discretion standard, the trial court found "that the parties have not mutually assented to the arbitration" based on the declarations of Ms. Diamond and Ms. Hines, and denied the motion to compel arbitration.³ RP 51-52. The trial court later entered an order stating that its finding that "there was no intent by plaintiff or mutual assent to arbitrate" "precludes arbitration under RCW 7.70A." CP 726-27. Kadlec filed a timely notice of appeal.⁴ CP 730-39.

V. STANDARD OF REVIEW

This Court reviews a trial court's denial of a motion to compel arbitration de novo. *Canal Station N. Condo. Ass'n v. Ballard Leary*

³ The trial court also denied Ms. Hines's motion to withdraw from arbitration as moot and granted Ms. Hines's motion to amend her complaint. RP 57-59; CP 720-25. Those orders have not been appealed. See CP 730-39.

⁴ On November 9, 2017, Commissioner Wasson denied Ms. Hines's motion to dismiss Kadlec's appeal on grounds of appealability. On January 17, 2018, a panel of this Court denied Ms. Hines's motion to modify that ruling.

Phase II, LP, 179 Wn. App. 289, 297, 322 P. 3d 1229 (2013). The party opposing arbitration bears the burden of showing that the choice of arbitration is inapplicable or unenforceable. *Id.* Given Washington’s strong public policy favoring arbitration, this Court “must indulge every presumption in favor of arbitration, whether the issue is construction of an arbitration clause or allegation of waiver, delay, or another defense to arbitrability.” *Id.* (citing *Verbeek Props., LLC v. GreenCo Env’tl., Inc.*, 159 Wn. App. 82, 87, 246 P. 3d 205 (2010)).

The meaning of a statute is a question of law that is also subject to de novo review. *Christensen v. Atl. Richfield Co.*, 130 Wn. App. 341, 343, 122 P.3d 937 (2005). To give effect to the Legislature’s intent and purpose, courts consider the statute as a whole, give effect to the statutory language, and compare related statutes. *Id.* at 343-44. “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.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

VI. ARGUMENT

A. Requiring a showing of “mutual assent” as a condition to enforcement of an election of arbitration under RCW 7.70A.020(1)(a) is contrary to the Legislature’s design of chapter 7.70A RCW providing for binding arbitration of health care actions based on an independent election by each party.

1. By its plain language, RCW 7.70A.020(1)(a) is satisfied by a written statement of election like the one included in the complaint here and does not require “mutual assent.”

RCW 7.70A.020(1)(a) provides that a plaintiff in a medical negligence case “may elect to submit the dispute to arbitration under this chapter by including such election in the complaint filed at the commencement of the action.” The plain language of the provision requires nothing more than a simple statement in a complaint; no specific word or phrase is identified as essential. And, nothing in RCW 7.70A.020(1)(a) suggests that the effectiveness of a statement of election in a complaint depends on any other action or requires a plaintiff to notify or confer with any other party before filing the complaint.

RCW 7.70A.020(1)(a) also provides an opportunity for each defendant to “elect to submit the dispute to arbitration” “by including such election in the defendant’s answer to the complaint.” “[I]f all parties to the action” make such independent elections, “[t]he dispute will be submitted to arbitration.” *Id.*

Here, the complaint filed to commence the action includes an “Election to Submit to Arbitration” and refers to both RCW 7.70A.020 and “RCW Chapter 7.70A” and all the answers include statements of election. CP 315-92, 559. In the motion to compel arbitration, Kadlec argued that the statement of election in the complaint and answers satisfied the requirements of RCW 7.70A.020(1)(a), but Ms. Hines urged the trial court to ignore the text of the statute and her complaint and view the election procedure in contractual terms. Without identifying anything in the text of RCW 7.70A.020(1)(a) indicating that the elections did not satisfy its requirements, the trial court concluded that a lack of “mutual assent to arbitrate” “precludes arbitration under RCW 7.70A.” CP 726-27. This was error.

Well-settled principles of statutory interpretation guide courts to execute the intent of the Legislature by implementing the plain language of a statute. *Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). “If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself.” *Id.* Statutory language is unambiguous when it is susceptible to only one interpretation. *State v. Delgado*, 148 Wn.2d 723, 726-27, 63 P.3d 792 (2003). An unambiguous statute “does not require construction,” and courts will follow its plain language without considering outside sources or adding words or clauses

“when the legislature has chosen not to include that language,” assuming the Legislature “means exactly what it says.” *Id.* at 727-28 (quotations omitted). Courts add to a statute “only when absolutely necessary to make the statute rational.” *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 532, 94 P.3d 366 (2004) (citing *McKay v. Dep’t of Labor and Indus.*, 180 Wn. 191, 194, 39 P.2d 997 (1934)); *see also Saucedo v. John Hancock Ins. Co.*, 185 Wn.2d 171, 180, 369 P.3d 150 (2016) (“We have no authority to read a new exception into the statute on policy grounds”).

Although the trial court repeatedly stated that it was exercising its discretion in making its ruling, the question Kadlec presented in the motion to compel arbitration was a legal one: When a complaint including an election to submit the dispute to arbitration is filed, is the procedure described in RCW 7.70A.020(1)(a) satisfied? *See* CP 572-73; RP 49, 51-53, 61; *see also Russell v. Maas*, 166 Wn. App. 885, 891, 272 P.3d 273 (2012) (only question presented by motion to strike a request for trial de novo was the legal question of whether the mandatory arbitration rule providing for such a request was satisfied).

Contrary to Ms. Hines’s contention below, the answer to that legal question does not depend on any interactions between the parties during the drafting of a complaint. The text of RCW 7.70A.020(1)(a) is susceptible to only one interpretation: a plaintiff elects arbitration by

including a written statement of election in a complaint and a defendant elects arbitration by including a written statement of election in answer. Such an election does not result from or constitute a contract. Ms. Hines's complaint includes a clear written statement of election and the answers include written statements of election. As a matter of law, the requirements of the provision were satisfied. The trial court erred by adding a condition of "mutual assent" contrary to the plain language of RCW 7.70A.020(1)(a). *Delgado*, 148 Wn.2d at 727-28.

2. A need for "mutual assent" is incompatible with the text and structure of chapter 7.70A RCW as a whole.

A requirement of mutual assent is also inconsistent with the text and structure of RCW 7.70A.020 and the entire chapter as a whole. RCW 7.70A.010 authorizes arbitration for personal injury actions based on alleged medical negligence "where all parties to the action have agreed to submit the dispute to arbitration" "in accordance with the requirements of RCW 7.70A.020." The reference to an agreement does not suggest that the parties are required to negotiate and mutually agree to enter a contract. Instead, by its plain language, RCW 7.70A.020 requires each party to independently notify the court and the other parties of its initial, unilateral choice of forum, and if all parties choose arbitration, the action will proceed in arbitration.

RCW 7.70A.020 *requires* a plaintiff, or “claimant,” to choose one of only two options *at the time of commencing the action*: either (1) including a statement of election in the complaint; or (2) filing a declaration stating that the attorney representing the claimant provided a copy of the statute to the claimant and that the claimant elected not to submit to arbitration. *Compare* RCW 7.70A.020(1)(a) (claimant “may elect” by including election in “complaint filed at the commencement of the action”) *with* RCW 7.70A.020(2)(a) (claimant “that does not initially elect” arbitration “must file a declaration” “at the time of commencing the action”). This is an independent action. Nothing in the statute suggests that the plaintiff must communicate with any other party before filing a complaint electing or declining arbitration.

A defendant must make the same choice “at the time of filing an answer,” by filing an answer including an election or a declaration meeting the same requirements. *Compare* RCW 7.70A.020(1)(a) (defendant may include election in answer) *with* RCW 7.70A.020(2)(b) (defendant “that does not initially elect” arbitration “must file a declaration” “at the time of filing the answer”). Again, no language suggests that a defendant must consult with any other party before filing an answer; each party may make an independent decision. And, according to RCW 7.70A.050, if all parties independently elect to submit to

arbitration, the arbitration proceeding commences on the date that the answer or answers are filed. RCW 7.70A.050.

Thus, RCW 7.70A.020(1)(a) and (2)(a)-(b) describe the commencement of arbitration proceedings by an initial, unilateral choice by each party, independent of the choice of any other party. The parties “agree” only in the sense that each makes the same individual choice of arbitration. Even the provision describing an agreed election by all parties established by stipulation, RCW 7.70A.020(1)(b), is conditioned upon one or more parties initially, and therefore independently, declining arbitration under RCW 7.70A.020(2). *See* RCW 7.70A.020(2) (“party that does not initially elect” arbitration “*must* file a declaration”) (italics added); RCW 7.70A.020(1)(b) (“*If* the parties do not initially elect” arbitration, “the parties may make such an election” “by filing a stipulation”) (italics added).

RCW 7.70A.020 allows the parties to change their initial choice in only one circumstance: where the parties do not all initially elect arbitration, they may later all agree to elect arbitration and file a stipulation “at any time during the pendency of the action.” *See* RCW 7.70A.020(1)(b). However, nothing in RCW 7.70A.020 or any other part of the statute authorizes a party that has elected arbitration, either by an initial individual election in a pleading or by a later stipulation, to change

that choice at a later time. Even if circumstances could be imagined in which a party would later challenge a stipulation filed under RCW 7.70A.020(1)(b) based on contract principles, nothing in the language or structure of the statute suggests that the initial, separate filings of independent parties under RCW 7.70A.020(1)(a) and (2)(a)-(b) create a contract or must satisfy the integral elements of contract claims.

Viewing the statute as a whole, and giving effect to all of its language, as required, *see, e.g., Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009), the text and structure of the statute shows a legislative intent to encourage arbitration of medical negligence lawsuits by (1) requiring parties to consider arbitration before filing their initial pleadings; (2) providing a simple procedure for parties to independently elect arbitration; and (3) providing an ongoing opportunity throughout the pendency of the action for parties who initially decline arbitration to later agree to arbitration. In this context, the lack of a procedure for revoking an election to submit to arbitration also indicates an intent that such an election be binding.

Imposing a condition of “mutual assent” on the enforcement of an arbitration election, as the trial court did here, is incompatible with the text and structure of the statute in at least two important ways. First, it renders the independent initial election procedure described in RCW

7.70A.020(1)(a) meaningless. If parties must agree with each other before an effective election for arbitration can be made, it makes no sense to require each party to independently address arbitration in its initial pleading. Second, it transforms an exception for mutual agreement designed to allow a party that initially and independently rejects arbitration to later agree with all other parties to elect arbitration into an excuse for a party that has independently elected arbitration to independently withdraw from arbitration when the statute does not provide any procedure for withdrawal under any circumstances. Because courts are not to interpret statutes so as to render one part inoperative or to create new exceptions, the trial court's requirement of "mutual assent" is error. *See Davis v. Dep't of Licensing*, 137 Wn.2d 957, 969, 977 P.2d 554 (1999) (all language of statute must be given effect, with no part rendered inoperative); *Saucedo*, 185 Wn.2d at 180 (courts lack authority to read new exceptions into statutes).

3. Allowing revocation of an election under RCW 7.70A.020 based on lack of "mutual assent" thwarts the purposes of arbitration under chapter 7.70A RCW.

Washington courts have repeatedly acknowledged and approved of the strong public policy in this state favoring arbitration. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 891, 16 P.3d 617 (2001); *see also Adler v. Fred Lind Manor*, 153 Wn.2d 331, 341 n.4, 103 P.3d 773 (2004);

Herzog v. Foster & Marshall, 56 Wn. App. 437, 443, 783 P.2d 1124 (1989). “Encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society.” *Godfrey*, 142 Wn.2d at 892 (quoting *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)). Arbitration is a “more expeditious” alternative to litigation and has as its “very purpose” to “avoid the courts insofar as the resolution of a dispute is concerned.” *Id.* (quoting *Boyd*, 127 Wn.2d at 262, and *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131, 426 P.2d 828 (1967)).

The Legislature has adopted a variety of arbitration schemes for different types of cases and Washington courts have long recognized that “arbitration in Washington is exclusively statutory.” *Godfrey*, 142 Wn.2d at 893; *Optimer Int’l Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 246 P.3d 785 (2011) (“[A]rbitration in Washington is solely a creature of statute; common law arbitration does not exist”). Ultimately, therefore, the rights of parties to a statutorily recognized arbitration proceeding are controlled by the applicable statute. *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 496, 946 P.2d 388 (1997); *N. State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 249, 386 P.2d 625 (1963) (“Arbitration is a statutory proceeding and the rights of the parties to it are controlled by statutes”).

The Legislature enacted chapter 7.70A RCW as part of a comprehensive effort to address the problem of “the rising cost of medical malpractice insurance” and further the important state interest of providing “access to safe, affordable health care” to Washington citizens. Laws of 2006, ch. 8, §1 (notes on findings and intent attached to RCW 5.64.010); RCW 7.70A.900 (referring to notes following RCW 5.64.010); Laws of 2006, ch. 8, §§305-13; Laws of 2006, ch. 8, §402. In addition to prioritizing patient safety and reforming the medical malpractice insurance industry, the Legislature also intended “to provide incentives to settle cases before resorting to court, and to provide the option of a more fair, efficient, and streamlined alternative to trials for those whom settlement negotiations do not work.” Laws of 2006, ch. 8, §1 (notes attached to RCW 5.64.010). Thus, the Legislature specifically designed the arbitration procedure now codified as chapter 7.70A RCW to provide a better alternative to trial in the unique context of medical negligence lawsuits. *Id.*; RCW 7.70A.010.

The Legislature’s intent to comprehensively set out the arbitration rights of the parties to a medical negligence action in chapter 7.70A RCW alone is also demonstrated by its choice to explicitly state that chapter 7.04A RCW, the revised uniform arbitration act (RUAA), does not apply to arbitrations conducted under chapter 7.70A RCW unless specifically

provided. RCW 7.70A.090 (RUAA does not apply to arbitrations under chapter 7.70A RCW unless specifically provided); RCW 7.70A.080 (limiting bases for appeal of arbitrator's decision to certain of those provided in RUAA); *see also, Godfrey*, 142 Wn.2d at 894 (where a more specific statutory enactment on arbitration applies, provisions of uniform act do not apply).

Citing authority identifying mutual assent as an element of common law contract claims and relevant to consideration of arbitration agreements governed by the RUAA, Ms. Hines argued before the trial court that the election procedure described in RCW 7.70A.020(1)(a) should be viewed as a contract and requires mutual assent. CP 637-39; RP 22, 29-30, 36. But, such general, unrelated authority cannot overcome the evidence of the Legislature's intent that the RUAA should *not* apply to arbitrations under chapter 7.70A RCW. *See, e.g., Hansen v. Va. Mason Med. Ctr.*, 113 Wn. App. 199, 207-08 & n.17, 53 P.3d 60 (1995). For example, in *Hansen*, the plaintiff alleged that a doctor made a legally enforceable promise under RCW 7.70.030(2) by telling a patient and his family that he would not die within the year. *Id.* at 200. The defendant argued that the statutory claim required evidence of mutual assent, consideration, and forbearance, despite lack of such elements in the statute defining the cause of action. *Id.* at 207-08 & n.17. The *Hansen* Court

rejected the defendant's argument, noting that authority describing the elements of common law contract claims upon which it relied did not suggest that the statutory cause of action necessarily required the same elements. *Id.*

Here, too, case law resolving contract disputes or determining the enforceability of arbitration agreements subject to the RUAA does not support Ms. Hines's claim that the validity of an election under RCW 7.70A.020(1)(a) can or must be determined on the same kind of legal or equitable grounds. The two separate statutes provide comprehensive rules for arbitration proceedings in very different contexts. In the context of a dispute over an arbitration agreement subject to the RUAA, courts must apply contract principles specifically because the parties' contract is the origin and "source of jurisdiction" for the arbitration proceeding. *Price*, 133 Wn.2d 496; RCW 7.04A.060(1); RCW 7.04A.060(2); RCW 7.04A.070. However, arbitration under chapter 7.70A RCW does not have a contract as its origin or source of jurisdiction and is not subject to the RUAA. Instead, the arbitration proceeding available in a medical negligence lawsuit "traces its existence and jurisdiction" solely to chapter 7.70A RCW, which must provide the answer to any question regarding the efficacy of an election and control the rights of the parties after election. *Cf.*, *Price*, 133 Wn.2d 496; RCW 7.70A.090; *see, e.g., Canal Station*, 179

Wn. App. at 296-97, 302-05 (relying solely on the statute creating the disputed arbitration right to resolve question as to whether all defendants were subject to arbitration).

“[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.” *In re Swanson*, 115 Wn.2d 21, 27, 793 P.2d 962 (1990) (quoting *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). Given the Legislature’s explicit statement in 2005 that grounds existing in law or equity for revocation of a contract may be considered to determine the validity, enforceability, and revocability of an arbitration agreement subject to the RUAA, *see* RCW 7.04A.060 and RCW 7.04A.070, and its explicit limitation on the application of the RUAA to arbitration procedures under chapter 7.70A RCW just one year later, *see* RCW 7.70A.090, there is no logical reason to believe the Legislature intended that courts would resolve disputes as to the validity of an arbitration election under RCW 7.70A.020(1)(a) based on legal or equitable arguments grounded in contract law without an explicit statement. *Hansen*, 113 Wn. App. at 208. (“Presumably, if it had meant to include mutual assent or consideration, the legislature would have similarly enacted an additional section containing these elements for a cause of action under RCW 7.70.030(2)”).

As no contract is involved in this case and the RUAA does not apply, chapter 7.70A RCW alone controls the rights of the parties here. In particular, the question of whether the election of arbitration in Ms. Hines's complaint is valid, enforceable, and irrevocable must be resolved by the statutory provision describing the election procedure at issue in this case, specifically, RCW 7.70A.020(1)(a) and the other provisions of the chapter. *See, e.g., Delgado*, 148 Wn.2d at 726-28 (where an unambiguous statute provides an exclusive list of conditions for its application, the Court assumes the Legislature "means exactly what it says" and cannot add words or clauses to borrow analysis employed by other statutes); *Canal Station*, 179 Wn. App. at 296-97, 302-05.

The trial court erred in deciding that question based on a lack of "mutual assent." The Legislature expressly intended to provide a fair, efficient, and streamlined arbitration process initiated by a simple, straightforward procedure. The text and structure of the statute establish that the Legislature intended to encourage parties to elect arbitration at any time while an action is pending, but purposefully chose not to provide any ground or method for revoking an election to submit to arbitration so that the arbitration proceedings would be binding.

In this case, the requirements of the simple procedure initiating arbitration proceedings were satisfied. To allow Ms. Hines to withdraw

after arbitration commenced based on contractual principles that were not involved in the election makes no sense and cannot provide a workable rule for evaluating similar claims. If an election that complies with RCW 7.70A.020(1)(a) can be revoked at any time after commencement of arbitration proceedings, the procedure loses all value and cannot serve as a legitimate alternative to trial.

- B. In the absence of fraud, an attorney's election of arbitration on behalf of a client in satisfaction of RCW 7.70A.020(1)(a) is binding on the client despite attorney negligence.

The trial court also concluded that arbitration was “precluded” in this case because “there was no intent by plaintiff ... to arbitrate.” CP 726-27. Presumably, this ruling is based on Ms. Hines’s argument that the unambiguous language of RCW 7.70A.020(1)(a) requires intentional conduct. But, her framing of the issue, like the trial court’s ruling, conflates the two relevant legal questions that must be considered to determine the rights of the parties in this case. First, does RCW 7.70A.020 limit authority to elect arbitration to the plaintiff alone, rather than her designated attorney? Second, if attorney negligence results in the filing of a complaint with a statement of election of arbitration in satisfaction of RCW 7.70A.020(1)(a), is the plaintiff bound? Because the plain, unambiguous language of the statute and relevant case authority establish that express authority of the plaintiff is not required to elect

arbitration and the plaintiff must be bound by the mistakes of her chosen representative in order to give effect to the Legislature's intent, the trial court erred as a matter of law in denying Kadlec's motion to compel arbitration.

1. The text, structure, and purpose of RCW 7.70A.020 establish that an attorney must show express authority from her client to decline arbitration, but not to elect arbitration.

Before the trial court, Ms. Hines did not contend that Ms. Diamond lacked authority to file a complaint including an arbitration election, but argued essentially that she alone, and not her attorney, could make an effective election. But, “[a]n attorney appearing on behalf of her client is her client’s representative and is presumed to speak and act on her behalf.” *Clay v. Portik*, 84 Wn. App. 553, 561, 929 P.2d 1132 (1997) (citing *State v. Peeler*, 7 Wn. App. 270, 274, 499 P.2d 90 (1972)). Whether a particular statute requires a plaintiff, as opposed to her attorney, to perform certain acts depends on the language of the applicable statute. *Id.*

RCW 7.70A.020 refers to both the “claimant” and the “attorney representing the claimant.” RCW 7.70A.020(1)(a) refers only to the “claimant” and merely requires a statement of election be included in the complaint. As the drafting and filing of a complaint is a procedural act that “generally would be performed by an attorney, as was the case here,” and the provision does not limit the attorney’s role or require the attorney

to file evidence of her client's explicit authority, it follows that the Legislature intended the general rule to apply, such that RCW 7.70A.020(1)(a) is satisfied when an attorney files a complaint including a statement of election. *Clay*, 84 Wn. App. at 561-62 (although statute referred to both "plaintiff's affidavit of compliance" and "affidavit of the plaintiff," the terms did not require signature of plaintiff rather than plaintiff's attorney as the term "plaintiff" generally refers to plaintiff personally or plaintiff's attorney, who "has full power to represent her client in all matters of practice"); *Peeler*, 7 Wn. App. at 274-75 (counsel is "the representative and alter ego of" the client, "clothed with authority to speak for and act in behalf of" the client in "procedural acts done in the regular and orderly conduct of a case").

In contrast, RCW 7.70A.020(2) refers to both the "claimant" and the "attorney representing the claimant" and requires the attorney representing a claimant "that does not initially elect" arbitration to "present[] the claimant with a copy of the provisions of this chapter before commencing the action," and also requires the filing of declaration stating that the attorney did so and that "the claimant elected not to submit the dispute to arbitration." Not only does this provision implicitly acknowledge that it is the attorney who generally commences an action by filing a complaint, it also plainly requires an attorney representing a

claimant who wishes to decline arbitration to file written proof of her client's express authority to act on her behalf.

Again, the difference in the language used by the Legislature in the two provisions indicates a different intent. *Swanson*, 115 Wn.2d at 27. The unambiguous language indicates that the Legislature intended to require an attorney representing a claimant to file proof of her express authority to act on behalf of her client only when declining the opportunity to arbitrate. The trial court and Ms. Hines misread RCW 7.70A.020 as requiring the client's express participation any decision regarding arbitration. Such an interpretation is inconsistent with the difference in the plain language of RCW 7.70A.020(1)(a) and RCW 7.70A.020(2). To read these distinct provisions as requiring the same proof of express authority would render the difference in their plain words meaningless. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 260, 11 P.3d 762 (2000) ("the court should not embrace a construction causing redundancy or rendering words superfluous"). And, to read RCW 7.70A.020(1)(a) to require a client's express authority to include an election to arbitrate in a complaint would change the meaning of the provision and create a requirement the Legislature did not intend. Because the statute rationally and clearly sets an additional requirement of express authority only when arbitration is declined, but not elected, the trial court

lacked authority to add to the statute or create an exception on policy grounds. *Pavlina*, 122 Wn. App. at 532; *Saucedo*, 185 Wn.2d at 180.

Claiming that RCW 7.70A.020 is unambiguous, and without accounting for the different intent behind RCW 7.70A.020(1)(a) and RCW 7.70A.020(2) regarding an attorney's authority, Ms. Hines argued before the trial court that ordinary dictionary definitions of the words "elect" and "election" necessarily include "the exercise of volition and intentionality, and are incompatible with inadvertence or mistake," such that a plaintiff must personally intend to participate in arbitration in order for an election included in a complaint to be effective. CP 637.

While it is true that chapter 7.70A RCW does not include a definition section,⁵ the plain language of RCW 7.70A.020(1)(a) provides a clear and practical definition of the procedure of electing arbitration. In particular, an election is made "by including such election in the complaint filed at the commencement of the action." RCW 7.70A.020(1)(a). Where, as here, a statute is not ambiguous, courts "need not use a dictionary definition to interpret the statute." *Pavlina*, 122 Wn. App. at 531. When resorting to the dictionary results in a different meaning of an unambiguous statute, a party has the burden of showing the contrary legislative intent. *Id.* Because there is no evidence to suggest that the

⁵ Compare chapter 7.70A RCW (no section of definitions) with chapter 7.70 RCW (including RCW 7.70.020, entitled "Definitions").

Legislature meant to require an attorney to file proof of the claimant's express authority to file a complaint including a statement of election, Ms. Hines cannot meet this burden.

Moreover, a plain reading of RCW 7.70A.020 as requiring an attorney to demonstrate express authority only to decline arbitration, but not to elect arbitration, is consistent with the strong public policy in Washington favoring arbitration as well as the explicit legislative intent behind the statute. Given its stated intent to provide a fair, efficient, and streamlined arbitration procedure, it makes sense that the Legislature would seek to prevent an attorney from surrendering her client's substantial right to arbitration without demonstrating in writing that the client understood her choice *before* the filing of initial pleadings declining arbitration. *See Hertzog*, 56 Wn. App. at 440 (right to arbitrate claims is a substantial right).

2. Because the election at issue resulted from an authorized attorney's negligence, rather than fraud by an opposing party, the general rule that the attorney's acts bind the client should apply.

Generally, if a party has designated an attorney to appear on her behalf, that attorney's acts are binding on the client. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002); *Russell*,

166 Wn. App. at 889. “The attorney’s knowledge is deemed to be the client’s knowledge,” and the parties and the court are entitled to rely on the attorney’s authority until they receive notice that the client has discharged the attorney. *Haller*, 89 Wn.2d at 547.

Where an attorney is authorized to appear and her subsequent actions are “not induced by the fraud of the adverse party,” a client who “did not really give his consent” is bound “at law and in equity” and his only “remedy is against his counsel.” *Haller*, 89 Wn.2d at 547 (quoting 3E. Tuttle, *A Treatise of the Law of Judgments* § 1252, at 2608 (5th ed. rev. 1925)). Where there is no evidence that an attorney’s negligence was brought about by fraud on the part of any opposing party, the opposing parties “should not be penalized for the quality of representation provided by an attorney” who was “voluntarily selected” and authorized to appear as the legal representative of her client. *Lane v. Brown & Haley*, 81 Wn. App. 102, 108, 912 P.2d 1040 (1996). An attorney’s “mistake or negligence does not provide an equitable basis for relief for the client.” *Id.* at 109.

Here, Ms. Hines did not dispute that she authorized Ms. Diamond, Mr. Sperline, Mr. McKeen, and Mr. Sanfield to appear on her behalf. There is also no dispute that those attorneys negligently failed to provide Ms. Hines with a copy of chapter 7.70A RCW and obtain her express

authority to decline arbitration if they intended to commence the action with a complaint that did not include a voluntary election of arbitration. The record also suggests that they negligently failed to sufficiently educate themselves as to the specific provisions of RCW 7.70A.020, negligently failed to sufficiently draft or proofread the complaint, and negligently failed to prepare a declaration proving express authority to decline arbitration in order to meet the plain, unambiguous requirements of the statute. And, although Ms. Diamond attributed her “rush” to draft and file the complaint in a timely manner to Kadlec’s complicated employment relationships with health care providers, the record does not rule out the possibility that negligence of the attorneys contributed to the delay in filing the complaint until shortly before the statute of limitations expired.

In contrast, nothing in the record suggests that Kadlec in anyway contributed to or induced their negligence by fraud. And, Ms. Hines did not contend below that Kadlec induced her attorneys to commit any negligent act. Thus, to the extent Ms. Hines is dissatisfied with her attorneys’ provision of professional legal services, her remedy is a cause of action against her attorneys for legal malpractice. *Haller*, 89 Wn.2d at 547.

Application of this rule in this case will serve the Legislature’s intent to encourage binding arbitration of medical negligence claims, but

creating an exception here will visit the sins of Ms. Hines's attorneys on Kadlec and will effectively prevent the use of arbitration under chapter 7.70A RCW for lack of a predictable rule.

3. Because an election to submit to arbitration under RCW 7.70A.020(1)(a) cannot be analyzed as the unauthorized surrender of a substantial right, the exception in *Graves v. P.J. Taggares Co.* does not require a different result.

Ms. Hines contended below that Ms. Diamond impermissibly surrendered her substantial rights to a jury trial and access to the courts by including the arbitration election in the complaint without her express consent. In particular, Ms. Hines argued that *Graves v. P. J. Taggares, Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980), required denial of Kadlec's motion to compel arbitration because an attorney "cannot relinquish a substantive right of his client without authority." CP 641-43; RP 32-33.

Graves involved an "extraordinary" "course of events," in which an attorney did not oppose a motion for summary judgment despite the moving party's failure to meet its initial burden of proof, and, without his client's knowledge, consent, or authority, stipulated to his client's vicarious liability, to the nature and extent of the plaintiff's injuries, and to the withdrawal of his client's previously filed jury demand. 94 Wn.2d at 301, 304-05. The *Graves* Court applied an exception to the usual rule

binding a client to the acts of an authorized attorney, holding that an attorney lacks authority to surrender a client's substantial rights "contrary to his client's instructions." *Id.* at 304 (quoting *Haller*, 89 Wn.2d at 545). In particular, the Court observed that the evidence in the record, both as to vicarious liability and to the plaintiff's damages, could not support a determination as a matter of law but was subject to such factual dispute that the defendant had a substantial right to have those issues tried. *Id.* at 305. In addition, because the defendant had filed a jury demand, the attorney lacked authority, under the Court's reading of CR 38 and CR 39, to withdraw the jury demand without the client's consent. *Id.*

Graves is distinguishable. The attorney in *Graves* entered stipulations and compromises at the time of trial that prevented any fact finder from considering significant evidence on critical issues of fact relevant to vicarious liability and damages. *Id.* Rather than simply choosing a forum or choosing a bench trial rather than a jury trial, the attorney completely surrendered the client's right to have material issues of fact tried at all, despite the availability of relevant evidence and circumstances that could have supported an effective defense based on the facts. *Id.* (evidence in record indicated driver may have been an independent contractor and may have been fired before the accident; the seriousness of low back pain, as claimed by plaintiff "is often difficult to

objectively demonstrate or deny,” such that large variations in damages depend on the opportunity to present and challenge medical evidence). And, because the client previously demanded a jury trial, and that demand had been properly communicated to the trial court, the attorney’s later withdrawal of the jury demand without the client’s consent violated court rules requiring the client’s consent and was contrary to the client’s previous instruction to the attorney to file the jury demand. *Id.*

Here, by filing the complaint with an arbitration election in satisfaction of RCW 7.70A.020(1)(a), counsel for Ms. Hines did not enter any compromise or stipulation. *See Lane*, 81 Wn. App. at 108 (distinguishing *Graves* where attorney did not enter any stipulation or compromise, but for whatever reason, failed to fully investigate possible sources of evidence and relied on an erroneous legal theory). They did not surrender her right to present a factual dispute before a fact finder. *See Russell*, 166 Wn. App. at 890 (filing request for trial de novo “does not terminate a litigant’s right to recovery”). They did not violate any court rule; the election complied with the applicable statute. And, they did not make any request contrary to any previous instruction by Ms. Hines that had been communicated to the trial court, like a jury demand.

Instead, counsel for Ms. Hines commenced an action on her behalf by filing a complaint including a facially valid election of statutory

arbitration. They asserted her right to participate in an alternative dispute resolution scheme favored by public policy and designed by the Legislature to be preferable to litigation in court. Although choosing the arbitration forum effectively waives the client's opportunity to seek recovery from the court or for a jury trial, it is nothing like the egregious circumstances in *Graves* because it did not terminate her right to present critical fact issues to a fact finder. And, as the filing of the complaint initiated the action, it did not contradict any previous procedural acts they accomplished on her behalf. In other words, because they had not previously filed a jury demand, which is a condition precedent to exercising the right to a jury trial, they were not required by court rules to obtain her express consent to waive a jury trial.

Graves is also inapplicable here because this case involves the tension between competing substantial rights at the initiation of the action. The attorney in *Graves* gave up his client's opportunity to challenge the opposing party's factual allegations on critical issues with known evidence without receiving any benefit. Here, before any discovery had occurred, counsel effectively invoked Ms. Hines's substantial right to arbitration instead of invoking her mutually exclusive right to a trial in court, with or without a jury.

The court's analysis in *Russell v. Maas*, 166 Wn. App. at 887,

demonstrates the difference between exercising a right and waiving a right by stipulation or compromise as in *Graves*. In *Russell*, the plaintiff moved to strike the defendant's request for a trial de novo after mandatory arbitration, arguing that defense counsel had surrendered a substantial right by filing the request without the defendant's express authority. *Id.* at 890. The *Russell* Court disagreed, holding that the timely request for a trial de novo exercised and preserved the client's right to a jury trial in satisfaction of the applicable procedural rule and that such a procedural act is considered to be the act of the client. *Id.* at 890-91.

In other words, exercising a substantial right cannot be properly considered to be a simultaneous surrender of some other substantial right merely for the purpose of invoking the exception to the usual rule that an attorney's actions are binding on the client. Here, in light of the Legislature's stated intent in and design of chapter 7.70A RCW, there is any number of reasons a plaintiff might chose arbitration over a jury trial when initiating a medical negligence action. When an election satisfies the applicable statutory requirements, it is not necessary or proper to invade attorney-client communications regarding that choice, as long as the client does not contend counsel was not authorized to act on her behalf. *See Russell*, 166 Wn. App. at 891-92 (where purely legal question of whether request for trial de novo satisfies court rule is presented and

there is no allegation of fraud, it was improper for trial court to conduct factual inquiry into attorney-client communications); *see also State v. Marshall*, 83 Wn. App. 741, 749-50, 923 P.2d 709 (1996) (legal question of whether criminal defendant's presence could be waived did not require inquiry into attorney-client communications).

Even so, before the trial court, the center of Ms. Hines's argument that compelling her to arbitrate based on her attorney's negligence would be unfair was that arbitration includes a monetary limit of one million dollars on any award of damages. Ms. Hines argued that choosing arbitration would be unreasonable under the circumstances because she had already incurred significant hospital bills and expected to incur additional future costs. But, questions as to whether one forum or another would appear more reasonable under a particular set of circumstances involve subjective considerations that cannot form a rule of law as to which substantial right should be exercised or waived or whether express permission from the client is required to exercise or waive any particular procedural right. As the choice was made here at the beginning of the action, before discovery of any evidence to support a finding of negligence on the part of any defendant, the potential value of the claim is nothing more than speculation. Nothing in *Graves* suggests that such speculation transforms the election of arbitration in compliance with statutory

requirements into an invalid surrender of the right to access the courts or the right to a jury trial.

Finally, contrary to Ms. Hines's arguments below, *Graves* does not stand for the proposition that an attorney may not waive a client's right to a jury trial by negligence or unintentional mistakes. The attorney in *Graves* intended to enter stipulations and compromises without his client's knowledge or consent; the key inquiry is attorney's authority to accomplish the procedural acts at issue, not intentionality or lack thereof.

As *Sackett v. Santilli*, 146 Wn.2d 498, 47 P.3d 948 (2002), demonstrates, an attorney's negligent failure to comply with court rules providing for the invocation of the right to a jury trial is binding on the client. Although defense counsel prepared a jury demand and arranged for timely filing and service, the deadline set by the court rule passed without the jury demand being signed or served. 146 Wn.2d 501. Before the Supreme Court, the defendant argued that the court rule providing for the implied waiver of right to a jury trial based on a failure to timely file a jury demand constitutes an unconstitutional assumption of the Legislature's exclusive power to provide for waiver of the jury trial right in civil cases. *Id.* at 502. The Court noted that the defendant did not contend "that a jury waiver could not be implied without his permission," likely because he understood its previous holding that the Legislature has the power to

provide for express and implied consent to waiver of the civil jury trial right. *Id.* at 503-04 (citing *State ex rel. Clark v. Neterer*, 33 Wash. 535, 540-41, 74 P. 668 (1903)). The Court then held that the Washington constitution grants coextensive authority as between the Legislature and the Court to provide for waiver of the right to a jury trial. *Id.* at 504-08. In other words, both the Legislature and the Supreme Court have authority under the constitution to provide for the implied waiver of the right to a jury trial. And, for the purposes this case, neither the Legislature nor the Court has created an exception to the conditions providing for the implied waiver of the right to a jury trial for attorney negligence.

Because, as discussed above, no statute, court rule, or case authority requires an attorney to obtain her client's express consent before initiating a lawsuit with a complaint including an arbitration election in satisfaction of RCW 7.70A.020(1)(a), *Graves* is not controlling or helpful here. Because the Legislature and the Supreme Court have the authority to provide for the implied waiver of the right to a jury trial in an arbitration election and the Legislature has chosen not to require personal permission of a party in order to imply consent to waive a jury from an attorney's procedural act electing arbitration, the general rule that a client is bound by her authorized attorney's negligence applies in this case and the trial court erred in denying the motion to compel arbitration.

- C. The unambiguous language of RCW 7.70A.020(1)(b) prevents implied waiver of arbitration under chapter 7.70A RCW, but even if waiver is possible, Kadlec did not waive arbitration.

Although the trial court did not reach this issue, Ms. Hines’s claim that Kadlec impliedly waived the right to arbitration by conduct must fail. “‘Waiver’ is the voluntary and intentional relinquishment of a known right” and “may be accomplished expressly or by implication.” *Canal Station*, 179 Wn. App. at 297. Because even an express waiver does not prevent a later arbitration election, chapter 7.70A RCW creates an unwaivable right.

In *Canal Station*, a party that demanded arbitration under the Washington Condominium Act argued that the Act creates a mandatory, unwaivable right to arbitrate. *Id.* at 296-97. Although it did not reach the claim, the Court noted that the sixty-day timeline defined in the Act “clearly contemplates waiver if the party does not make a timely demand as required by the statute.”⁶ *Id.* at 302 & n.4.

In contrast, RCW 7.70A.020(1)(b) provides that parties who “do not initially elect to submit to arbitration” by including an election in a complaint or answer “may make such an election at any time during the pendency of the action.” Because a party who does not initially make an

⁶ The provision states that “the parties shall participate in a private arbitration hearing” if any one of certain types of parties “demands arbitration by filing such demand with the court not less than thirty days and not more than ninety days” after commencement of a lawsuit. RCW 64.55.100.

election in accordance with RCW 7.70A.020(1)(a) *must* file a declaration satisfying the requirements of RCW 7.70A.020(2), the plain language of RCW 7.70A.020(1)(b) allows a party to elect arbitration *after* initially filing a declaration expressly waiving arbitration. This is consistent with the Legislature’s intent to encourage arbitration.

Application of implied waiver under chapter 7.70A RCW, however, would be inconsistent with the Legislature’s policy choice to allow a party who has expressly waived arbitration to later elect arbitration, while not providing a method for a party to revoke an arbitration election. This choice indicates an intent to treat such parties differently. *Swanson*, 115 Wn.2d at 27. Allowing a party like Ms. Hines to effectively withdraw an election based on the application of implied waiver to another party would undermine the Legislature’s authority to make such a choice, penalize parties like Kadlec who fully comply with the statute, and render the arbitration option useless. Such a result will only encourage parties to litigate rather than arbitrate.

Even if implied waiver could be applied here, Kadlec did not waive its right to elect arbitration. At the center of an implied waiver claim is the question of timeliness; a party to a lawsuit must take some action to enforce a right to arbitrate “within a reasonable time after suit is filed.” *Lake Wash. Sch. Dist. v. Mobile Modules Northwest*, 28 Wn. App.

59, 62-64, 621 P.2d 791 (1980) (noting that reasonableness depends on circumstances and delays of 5 months, 10 months, and 2 years had been held not to constitute waiver); *Canal Station*, 179 Wn. App. at 299, 301. Merely engaging in litigation conduct, such as filing potentially dispositive motions before claiming a right to arbitration does not necessarily constitute waiver of an arbitration right if the timing of a later effort to enforce the right to arbitrate is reasonable. *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 463, 268 P.3d 917 (2012); *Canal Station*, 179 Wn. App. at 299-302.

As a matter of law, Kadlec's conduct cannot establish implied waiver because (1) the longest possible time that elapsed between the initial defendant's appearance and the filing of the final answer was 82 days, which, in and of itself, cannot establish waiver, *Lake Wash.*, 28 Wn. App. at 64; (2) untimely filing of the answers under CR 12 does not establish waiver, *see, e.g., Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 244, 178 P.3d 981 (2008); (3) the jury demand filed by the first group of three defendants to appear merely preserved a right and was not inconsistent with an intent to arbitrate given the fact that the other fourteen defendants had not yet appeared and no answer had yet been filed; and (4) the mere service of interrogatories by some defendants in a number potentially exceeding the statutory limit cannot be considered

waiver of intent to arbitrate when no party sought to compel discovery, the statute allows the arbitrator to require additional discovery, and several individual defendants had not yet engaged in any discovery. Because Kadlec elected arbitration within a reasonable time and did not engage in any conduct necessarily consistent with an intent to waive arbitration, and because courts must indulge in every presumption in favor of arbitration when considering possible evidence of waiver, *Canal Station*, 179 Wn. App. at 300-01, the circumstances of this case prevent a finding of implied waiver, even if this Court concludes that the right to elect arbitration under RCW 7.70A.020(1)(a) can be waived by conduct.

VII. CONCLUSION

For the foregoing reasons, the Order Denying Defendants' Joint Motion to Compel Arbitration should be reversed and the parties directed to proceed with arbitration under chapter 7.70A RCW.

RESPECTFULLY SUBMITTED this 19th day of March, 2018.

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