

COURT OF APPEALS  
NO. 40351-0-II  
STATE OF WASHINGTON  
BY *TSB*

87062-4  
NO. 40351-0-II

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DOCTOR'S ASSOCIATES, INC.,

Appellant,

v.

WAQAS SALEEMI & FAROOQ SHARYAR,

Respondents.

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RESPONDENTS' SUPPLEMENTAL BRIEF

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## I. ARGUMENT

As requested by the court, this brief addresses the question whether Appellant or Respondents must prove harmless error.

### A. The Appellant must Prove That Error Is Prejudicial

The answer to that question begins with the bedrock rule that only prejudicial error is reversible. “[E]rror without prejudice is not grounds for reversal.” *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983). Conversely, only prejudicial error is grounds for reversal.

The appellant bears the burden of proving that an error was prejudicial. *See Griffin v. West RS, Inc.*, 143 Wash.2d 81, 91, 18 P.3d 558 (2001) (appellant must prove error was prejudicial); *Raab v. Wallerich*, 46 Wash.2d 375, 383, 282 P.2d 271 (Wash., 1955). This appears to be the rule everywhere. *See Flanigan v. Burlington Northern Inc.*, 632 F.2d 880, 889, (8th Cir., 1980); *cert. den. by Burlington Northern Inc. v. Flanigan*, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed.2d 349 (U.S.Mo. Feb 23, 1981) (appellant bears burden of proving claimed error was prejudicial); *accord R. Zemper & Associates v. Scozzafava*, 28 Conn.App. 557, 563, 611 A.2d 449 (1992); *Richardson v. Brown*, 173 Ind.App. 50, 53, 362 N.E.2d 197 (Ind.App. 1 Dist. May 05, 1977); *Hurst v. Travelers Ins. Co.*, 353 S.W.2d

60, 62, (Tex.Civ.App., 1961). Indeed, there could be no contrary authority because it would be illogical to place the burden of proving prejudice on the respondent, who, presumably, opposes reversal.

**B. Prejudice and Harmlessness are Mutually Exclusive**

Because the appellant bears the burden of proving that an error was prejudicial, the question concerning whether an appellant or respondent bears the burden of proving that an error is harmless is, in most cases, tautological, or moot. If the appellant shows prejudice, the error is necessarily harmful. Conversely, if the appellant fails to show prejudice, the error is necessarily harmless.

In short, prejudice and harmlessness are mutually exclusive; an error cannot be harmless if it is prejudicial, or *vice versa*. Because an appellant's failure to prove prejudice necessarily proves harmlessness, and the appellant bears the burden of proving harm, the burden of showing harmlessness does not fall on the respondent. The harmless error analysis begins and ends with the determination whether the appellant proves prejudice.

**C. A Respondent must Prove Harmlessness If Error Is Presumptively Prejudicial**

An exception to this rule applies when an error is presumptively harmful. When harm is presumed, the respondent can rebut the presumption of harm by showing that the error was, in fact, harmless.

For example, when an appeal is taken from a judgment of conviction in a criminal case, constitutional error is presumptively harmful. *State v. Levy*, 156 Wash.2d 709, 724-725, 132 P.3d 1076 (Wash., 2006). Because the presumption is rebuttable, the burden of proving harmlessness shifts to the respondent. *Id.* This presumption, and burden shifting, exist to protect the constitutional rights of the accused. *Id.*, citing *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also *State v. Maupin*, 128 Wash.2d 918, 929, 913 P.2d 808 (Wash., 1996) (exploring foundation of harmless error analysis that applies in appeal of judgment of conviction). Because this appeal does not arise from a criminal proceeding, or even involve constitutional error, this exception does not apply here.

**D. Only Some Errors are Presumptively Harmful**

Appellant contends that a presumption of harm arises from every trial court error. Appellant bases this contention on *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wash. App. 35, 244 P.3d 32 (Wash. App. Div. 1, 2010), *rev. granted* 172 Wash.2d 1001, 258 P.3d 685 (Wash., 2011). That case does not hold that every error committed in a civil proceeding is presumptively harmful. Rather, Division I recognized that a presumption of harm arises only when a trial court erroneously gives an instruction “on behalf of the party in whose favor the verdict was returned \* \* \*.” *Id.*, at 44. In that limited context, the error is presumed to have been prejudicial, and the respondent can rebut the presumption by showing that the error was harmless. *Id.* Because this appeal does not involve instructional error, this exception does not apply.

Appellant also relies on the decision in *Chunyk & Conley/Quat-C v. Bray*, 156 Wn. App. 246, 232 P.3d 564 (2010). That case also does not hold that all error is presumptively harmful. Rather, the *Bray* decision recognized that “a verdict will not be reversed unless prejudice is shown,” and then related that “[a]n error is prejudicial if it presumably affects the outcome of trial.” *Id.*, at 255. This court supported that proposition with a

citation to *Herring v. Department of Social and Health Services*, 81 Wash.

App. 1, 23, 914 P.2d 67 (Wash. App. Div. 2, 1996), observing:

Even when an instruction given is misleading and therefore erroneous, reversal is not required unless prejudice can be shown and such error is not prejudicial unless it affects or presumably affects the outcome of the trial. *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983).

Thus, this court did not hold that all error is presumptively prejudicial.

Rather, this court held that error is prejudicial only if it is proven to affect, or presumptively affects, the outcome of a trial.

**E. A Venue Error is Not Presumptively Prejudicial**

Appellant asserts that the trial court erroneously ordered the parties to arbitrate their dispute in the wrong venue. Even if that was error, and for the reasons addressed in Respondents' prior briefing it was not, no Washington court has ever said that an erroneous order concerning the venue for a civil proceeding is presumptively harmful. To the contrary, the Washington Supreme Court has said that an appellant who foregoes discretionary review of an order concerning venue cannot obtain reversal of a judgment based on a venue error without proving resulting prejudice. *Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 578, 573 P.2d 1316 (Wash., 1978). Because Appellant did not seek discretionary review of the

trial court's order, Appellant bears the burden of showing that it was harmed by the order to arbitrate in Washington.

**F. An Error Relating to Choice of Law Is Not Presumptively Harmful**

Appellant also asserts that the trial court erroneously ordered the claims to be governed by Washington law, rather than by the laws and remedy limitations specified in the franchise agreements. Even if there was error, and for the reasons addressed in Respondents' prior briefing there was not, an erroneous order concerning the law that applies to a civil proceeding is not presumptively harmful.

Although no Washington case is on point, other courts have considered whether an error relating to choice of law was harmful, and none of those courts applied a presumption of harm. *See, e.g., Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1134-35 (9th Cir. 2003); *Storetrax.com, Inc. v. Gurland*, 397 Md. 37, 51-53, 915 A.2d 991 (2007); *Abel v. Austin*, 2010 WL 2132745 (Ky. App. May 28, 2010). Rather, the harmful error analysis is governed by this observation:

[A] choice of law error sometimes has no effect on the outcome of a proceeding. Requiring the parties to re-arbitrate under such circumstances would substantially and unnecessarily burden both the parties and the arbitration process.

*Coutee*, 336 F.3d at 1134, n. 6; accord *Barnes v. Logan*, 122 F.3d 820, 823, (9<sup>th</sup> Cir., 1997) (arbitrator’s erroneous choice of law was not harmful where law that should have been applied supported result).

**G. This Appeal Does Not Involve Structural Error**

Recognizing that it cannot show any prejudice, Appellant argues that the trial court’s rulings were “structural” and, thus, prejudicial as a matter of law. An error is structural if it necessarily renders a proceeding fundamentally unfair or an unreliable vehicle for resolving a dispute. See *State v. Momah*, 167 Wash.2d 140, 149, 217 P.3d 321 (Wash., 2009), cert. den. by *Momah v. Washington*, 131 S.Ct. 160, 178 L.Ed.2d 40, 78 USLW 3745 (2010). In the civil context, structural error typically involves the denial of a constitutional right. See *In re Detention of D.F.F.* 172 Wash.2d 37, 43 n. 6, 256 P.3d 357 (Wash., 2011).

Appellant does not assert that it was deprived of a constitutional right, and the claimed errors did not make the arbitration an unreliable vehicle for resolving this dispute. Also, as previously explained, courts have frequently determined that errors relating to venue and choice of law were harmless. See *Lincoln*, 89 Wash.2d at 578 (error relating to venue was harmless); *Coutee*, 336 F.3d at 1134, n. 6 (error relating to choice of

law was harmless). Because such errors are not necessarily harmful, are subject to harmless error analysis, and do not involve constitutional rights, such errors are not “structural”.

**H. Appellant Is Not Excused from Proving Harm**

Appellant’s next argument is predicated on the rule that this court’s scope of review is limited to what appears on the face of the award. *See Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (Wash., 1998) (judicial review of arbitration award is limited to what appears on the face of the award); *accord Cummings v. Budget Tank Removal & Environmental Services, LLC*, \_\_\_ Wa. App. \_\_\_, 260 P.3d 220 (Div. 1, 2011). Because of this limited scope of review, Appellant asserts that it cannot prove harm. Thus, Appellant concludes, its assignments of error are not subject to a harmless error analysis.

Determining whether the order concerning choice of law and venue was harmful does not require consideration of the entire arbitration record. To establish that the choice of law ruling was harmful, all Appellant had to show was that the substantive laws of Washington differed from the substantive laws of Connecticut with respect to one of the claims or defenses raised in the arbitration pleadings, and that the difference could

have impacted the disposition.<sup>1</sup> *See, e.g., Coutee*, 336 F.3d at 1134, n. 6  
A comparison of substantive laws does not require consideration of the  
arbitration record. Because Appellant failed to identify any difference in  
the potentially applicable laws, it did not meet its burden of proving harm.

To establish harm from the order directing that the arbitration  
occur in Washington, all Appellate had to do was show that it was not able  
to secure and present evidence because of the location of the arbitration.  
That showing could have been included in the declaration Appellant's  
counsel submitted in support of the Motion to Vacate. No such evidence  
appears in that declaration. *See* CP 236-291.

Appellant contends that the remedy limitation was harmful because  
the arbitrator could have awarded more than \$100,000 of damages for  
breach of a single franchise agreement, and there is no way to tell from the  
face of the award the amount of damages that were awarded for the breach  
of each agreement. Because the remedy limitation was unconscionable,

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1. The choice of law issue only concerns substantive laws because the arbitration  
procedure was governed by the Commercial Rules of the American Arbitration  
Association. CP 35, at ¶ 10.a. The same procedural rules applied regardless  
which state's substantive law applied, and no matter where the arbitrator  
occurred.

and, thus, unenforceable, this court should not reach this issue.<sup>2</sup>

Even if the remedy limitation was enforceable, RCW 7.04A.200(1) authorizes a party to an arbitration to ask the arbitrator to clarify an award. That statute also authorizes the trial court to remand an award for clarification. RCW 7.04A.200(1)(4). Clarification of the award would have allowed Appellant to show whether the arbitrator awarded more than \$100,000 of damages for breach of any single contract. Because clarification would have allowed Appellant to show harm under its theory of the case, and Appellant did not request clarification, Appellant cannot now claim that there was no way for it to prove harm.<sup>3</sup>

Indeed, Appellant invoked this statutory procedure to challenge the arbitrator's award of prejudgment interest. CP 292-303. The trial court concluded that the award of prejudgment interest was improper, vacated the initial arbitration award, and remanded the case to the arbitrator for

- 
2. By limiting the remedies available to Franchisees, the franchise agreements directly violate FIPA, including RCW 19.100.220(2).
  
  3. If this court concludes that the remedy limitation is enforceable, and that the awarded damages are excessive, the matter should be remanded to the arbitrator for a rehearing. RCW 7.04A.230(3) authorizes a court to order a rehearing where, as here, a party to an arbitration contends that the arbitrator exceeded his powers. The trial court used this procedure to direct the arbitrator to remove the prejudgment interest award. This court can invoke this procedure to direct the arbitrator to limit damages to \$100,000 per-contract, if this court concludes that remedy limitation is enforceable.

reconsideration. CP 317. Appellant does not explain why it could not have requested clarification of the amount of damages awarded for its breach of each contract. Had Appellant done so, it may have proven harm under its theory of the case.

**I. The Limited Scope of Review Does Not Excuse Appellant from its Burden to Prove Harm**

Even if, as Appellant contends, it cannot prove harm without the arbitration record, this court's limited scope of review compels affirmance, not reversal. Nothing on the face of the award shows error, let alone harm. That being so, nothing on the face of the award justifies vacating the award. *See* RCW 7.04A.230.

The limited scope of judicial review is one of the consequences of arbitration. Because of that limitation, numerous types of errors that might be committed by an arbitrator are beyond review. A reviewing court generally cannot overturn an arbitration award for an error of law, or because of evidentiary error, or because of insufficiency of the evidence. In a judicial proceeding, these types of claimed errors are all reviewable. But a party to an arbitration forfeits the right to have such questions reviewed. Where, as here, an appeal depends on a showing of harm, a party to an arbitration must bear the consequences of this court's limited

scope of review. It follows that, if, as Appellant contends, it cannot show harm without the record from the arbitration proceeding, Appellant cannot meet its burden of proof.

## II. CONCLUSION

Appellant bore the burden of proving that the claimed errors were harmful. Because Appellant failed to meet that burden, this court should affirm.

DATED this 24<sup>th</sup> day of October, 2011.



Todd S. Baran, WSB #34637  
Attorney for Respondents

**CERTIFICATE OF SERVICE**

I hereby certify that on the 24<sup>th</sup> day of October, 2011, I served the foregoing RESPONDENTS' SUPPLEMENTAL BRIEF upon the attorneys for all parties by depositing in the United States Post Office, Portland, Oregon, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their names:

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