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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Supreme Court No. 87062-4

Court of Appeals No. 40351-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DOCTOR'S ASSOCIATES, INC.,

Petitioner,

v.

WAQAS SALEEMI & FAROOQ SHARYAR,

Respondents.

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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

In the Superior Court, Petitioner/DAI moved to compel arbitration of claims against Respondents/Saleemi. CP 8-9. The Superior Court granted DAI's motion to compel arbitration, but ordered the arbitration to occur in Washington, subject to Washington law, without any contractual limitation on remedies. CP 217-18. DAI did not seek discretionary review of the partial denial of its motion to compel, but instead proceeded to arbitrate its dispute with Saleemi. The arbitration was hard fought, and required Saleemi to expend \$194,373.96 for attorney fees and costs to enforce his contractual rights and to defeat DAI's attempt to wrongfully terminate three franchise agreements. CP 325-26.

After Saleemi prevailed in the arbitration, the Superior Court confirmed and entered a judgment on the arbitration award. In its ensuing appeal from that judgment, DAI challenged the Superior Court's pre-arbitration order. DAI's assignments of error were predicated on the arguments that the Superior Court erroneously ordered the arbitration to occur in Washington, subject to Washington law, without any contractual limitation on remedies. Because DAI failed to show that it was prejudiced by the Superior Court's order, the Court of Appeals affirmed. DAI seeks

discretionary review of that decision. Because the decision below is correct, and the Petition for Review does not merit review under any of the criteria of RAP 13.4(b), this Court should deny review.

II. ARGUMENT AND AUTHORITY

“[E]rror without prejudice is not grounds for reversal.” *Thomas v. French*, 99 Wash.2d 95, 104, 659 P.2d 1097 (1983). This bedrock rule of appellate review prevents the waste of judicial and litigant resources while simultaneously protecting the right of a litigant to a full and fair determination of the merits of a dispute. A litigant who cannot prove that a trial court error caused harm presumably has had a full and fair opportunity to litigate. That being so, that litigant is not entitled to burden the tribunal or opponent with repetitive proceedings.

That is especially true where, as here, the appellant has already imposed a heavy burden on the respondent. It bears remembering that this appeal arises from an arbitration demanded by DAI to enforce its unilateral termination of three franchise agreements with Saleemi. The arbitrator concluded that DAI wrongfully terminated those contracts, but it cost Saleemi nearly \$200,000 in attorney fees and costs to vindicate his rights. The Court of Appeals was well within the law to say that DAI could not put Saleemi to that expense again without establishing that the Superior

Court's pre-arbitration order impacted the outcome of the arbitration.

DAI made no effort to prove harm. Instead, it argued below, and argues in its Petition, that proof of prejudice was unnecessary. The Court of Appeals correctly rejected that argument.

A. Proof of Harm Required to Reverse Venue Ruling

An appellant who foregoes discretionary review of an order concerning venue must prove resulting prejudice. *Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 578, 573 P.2d 1316 (1978). DAI argues that it was error for the Court of Appeals to apply this rule because the *Lincoln* case involved a “failure to seek review by certiorari.” Pet., p. 9. DAI asserts that *Lincoln* is no longer authoritative because “[t]he availability of the former petition for certiorari is simply not the same as the current rules which govern appellate procedure.” Pet., p. 10.

In *Lincoln*, this Court equated a petition for certiorari with the discretionary review procedure available under RAP 2.1(a)(2). See 89 Wash.2d at 578 n.1; accord *Geroux v. Fleck*, 33 Wash.App. 424, 427, 655 P.2d 254 (1982) (petition for certiorari is now called discretionary review). Because of that equivalency, DAI's argument that the adoption of RAP 2.1(a)(2) abrogated *Lincoln* rings hollow.

DAI also asserts that the holding of *Lincoln* does not apply to a trial court decision concerning the venue for an arbitration that is governed by the Federal Arbitration Act (FAA), 9 U.S.C. § 2, *et seq.* That argument is refuted by *Dumont v. Saskatchewan Government Ins.* (SGI), 258 F.3d 880 (8th Cir. 2001). In that case, a federal trial court ordered the parties to arbitrate a dispute in Canada. After the arbitration, the party who opposed the Canadian venue appealed, asserting that the trial court's venue decision was contrary to the FAA. 258 F.3d at 887. Without reaching the merits of that contention, the Eighth Circuit affirmed based on a harmless error analysis. *Id.*, at 888. This decision confirms that, even under the FAA, a trial court's pre-arbitration order concerning venue is subject to post-arbitration review for harmless error.

B. Proof of Harm Required to Reverse Choice of Law Ruling

Under the FAA, proof of harm is also required to reverse a ruling concerning choice of law. *See 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. 2010). 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 (9th Cir. 1997) (arbitrator's erroneous choice of law was not harmful where law that should have been applied supported result).

In this case, the Superior Court concluded that the dispute between DAI and Saleemi was governed by Washington law,¹ and that Washington law did not allow any contractual limitation on remedies. Based on the foregoing authorities, the Court of Appeals correctly concluded that DAI was obligated to establish that these rulings were harmful.

C. DAI Failed to Establish Prejudice

The Court of Appeals concluded that DAI failed to establish that any part of the Superior Court's order compelling arbitration was prejudicial. DAI does not dispute that it failed to show any harm relating to the part of that order that directed the parties to arbitrate in Washington, or to the part of that order that directed the arbitrator to apply Washington law. But, DAI contends, the part of the order that directed the arbitrator to

1. DAI also conceded that Washington law applied. CP 11.

disregard the contract limit on remedies was presumptively harmful because there was no way to determine if the arbitrator awarded more than \$100,000 of damages for its breach of any one of the three franchise agreements. DAI contends that a presumption of prejudice must arise in this context because it would be impossible for DAI to show what damages the arbitrator awarded for a breach of each of the three contracts.

The refutation of this argument is found in RCW 7.04A.200(1). That statute authorizes a party to an arbitration to ask the arbitrator to clarify an award. RCW 7.04A.200(1)(c). That statute also authorizes the trial court to remand an award for clarification if a motion to confirm or vacate the award is pending. RCW 7.04A.200(4)(c). Clarification of the award would have allowed DAI to show whether the arbitrator awarded more than \$100,000 of damages for breach of any single contract. Because DAI did not request clarification, the Court of Appeals correctly concluded that DAI failed to show harm.

Indeed, DAI invoked this statutory procedure to challenge the arbitrator's award of prejudgment interest. CP 292-303. The Superior Court concluded that the award of prejudgment interest was improper, vacated the initial arbitration award, and remanded the case to the arbitrator for reconsideration. CP 317. DAI does not explain why it could

not have requested clarification of the amount of damages awarded for its breach of each of the three contracts.

In sum, because a statutory process was available to DAI to clarify the award and show what damages were awarded for the breach of each of the three franchise agreements, a presumption of harm cannot apply to the part of Superior Court order striking the contractual damage limitation. Also, the Court of Appeals correctly concluded that the face of the award shows that the arbitrator applied the contract limit on remedies, and that the total damages awarded – \$230,000 – was below the \$300,000 of aggregate damages limit of the three franchise agreements. For each of these reasons, the decision below is correct.

D. No Conflicting Decisions

DAI contends that this case is worthy of review because the decision below conflicts with the decision in *ACF Property Management, Inc. v. Chaussee*, 69 Wash.App. 913, 850 P.2d 1387 (1993), *rev. den.*, 122 Wash.2d 1019, 863 P.2d 1353 (1993). In that case, Division I concluded that a Superior Court could refuse to confirm, or could vacate, an arbitration award if the claims that were arbitrated were beyond the scope of the arbitration agreement. Under those circumstances, the court concluded, the arbitration award would be void.

DAI does not contend that any of the claims that were arbitrated were beyond the scope of the arbitration agreement. To the contrary, DAI wants to arbitrate the very same claims all over again. That being so, the decision below does not conflict with *ACF*.

DAI asserts that *ACF* stands for the proposition that a party is not required to seek discretionary review to prosecute an appeal from an order compelling arbitration. No part of the decision below holds to the contrary. Rather, the decision below, consistent with *Lincoln*, simply requires proof of prejudice if a party that disagrees with a trial court order concerning venue proceeds to litigate without seeking review of the venue decision. Because *ACF* did not involve a challenge to a venue determination, the decision below does not conflict with *ACF*.

DAI also asserts that the decision below conflicts with the holding of *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992). That case holds that an appellate court's review of an order confirming or vacating an arbitration award "is limited to that of the court which confirmed, vacated, modified or corrected that award." *Id.*, at 157. The decision below does not run afoul of that rule because that decision was based on review of the Superior Court's pre-arbitration order. An order compelling or denying arbitration is not subject to the limited scope of review that

applies to an arbitrator's award.

Finally, DAI asserts that the decision below conflicts with the holding of *AT&T Mobility, LLC v. Concepcion et ux.*, ___ U.S. ___, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). The issue in that case was whether a class action waiver that is part of the dispute resolution provisions of a consumer contract is unconscionable and, thus, unenforceable under the FAA. The Supreme Court concluded that such a waiver is not unconscionable, and is therefore enforceable. 131 S.Ct. at 1753. Because the proceedings below did not present any issue concerning a class action waiver in a dispute resolution agreement, that decision does not conflict with the holding of *Concepcion*.

DAI relies on *Concepcion* to support the broader proposition that an arbitration agreement should be enforced as written. The decision below does not say otherwise. Indeed, the decision below did not even reach the questions of whether the choice of law and venue selection clauses were unconscionable and, thus, unenforceable. The Court of Appeals did not reach those questions because “[e]ven assuming that the superior court exceeded its authority in addressing the venue, choice of law, and damages-limitation provisions and in concluding that these provisions were unconscionable, we hold that DAI is not entitled to relief

because it fails to establish any possible prejudice.” *Saleemi v. Doctor’s Associations, Inc.*, ___ Wash.App. ___, 269 P.3d 350, 357 (2012). The decision in *Concepcion* does not address the question whether a harmless error analysis applies to a pre-arbitration order voiding part of a dispute resolution agreement. It follows that there is no conflict between the decision below and *Concepcion*.

Because the decision below is not in conflict with a decision of this court, or of any other decision of the Court of Appeals, DAI’s petition does not merit review under RAP 13.4(b)(1) or (2).

E. No Significant Question of Law or Issue of Public Interest

The decision below does not address a significant question of law, or an issue of substantial public interest. To the contrary, the harmless error rules applied in the decision below are well-settled, and the appellate courts are unlikely to ever again see a case raising those issues in this posture. The outcome of the decision below is of interest only to DAI and Saleemi. DAI does not contend otherwise. It follows that this case does not merit review under RAP 13.4(b)(3) or (4).

III. CONCLUSION

DAI had a full and fair opportunity to litigate its dispute with Saleemi. As required by the contracts, the arbitration was governed by

American Arbitration Association (AAA) rules, and was conducted by an AAA panel arbitrator. DAI never asserted that the arbitrator was incompetent to apply the substantive laws that governed the dispute, and offered no evidence or argument as to why arbitrating in Washington placed DAI at some disadvantage. To the contrary, the Superior Court observed that compelling arbitration in Connecticut would have inconvenienced the parties and witnesses. Nevertheless, DAI wants to put Saleemi to the burden of arbitrating again. These are precisely the circumstances that warrant application of a harmful error analysis. Because DAI showed no harm, the Court of Appeals properly affirmed the judgment confirming the arbitration award, and its decision does not merit review.

STATEMENT PURSUANT TO RAP 18.1(A)

Respondents seek attorney fees on appeal, including fees relating to this Petition. This request is based on RCW 19.100.190(3), RCW 19.86.090 and RCW 7.04A.250(3).

DATED this 20th day of March, 2012.



Todd S. Baran, WSB #34637
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2012, I served Respondents' ANSWER TO PETITION FOR REVIEW 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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