

Supreme Court No. 87062-4

Court of Appeals No. 40351-0-II

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DOCTOR'S ASSOCIATES, INC.,

Petitioner,

v.

WAQAS SALEEMI & FAROOQ SHARYAR,

Respondents.

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SUPPLEMENTAL BRIEF OF RESPONDENTS

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STATE OF WASHINGTON

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## I. INTRODUCTION

In the Court of Appeals, Petitioner/DAI asserted that the Superior Court erroneously ordered arbitration between the parties to occur in Washington. Because DAI failed to show that it was in any way harmed by that order, the Court of Appeals affirmed. DAI does not dispute that it failed to prove harm. Instead, it petitioned for review asserting that it was not required to show any harm.

For the reasons identified by the Court of Appeals, for the reasons presented in Respondent/Saleemi's prior briefs, and for the additional reasons that follow, DAI was required to show that the Superior Court's order likely impacted the outcome of the arbitration. Because DAI concedes that it cannot so show, this Court should affirm the rulings below.

## 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). 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

(1955).

**A. The Harmless Error Rule Applies When a Venue Ruling Is Challenged in an Appeal Taken as a Matter of Right**

*Lincoln v. Transamerica Inv. Corp.*, 89 Wash.2d 571, 578, 573

P.2d 1316 (1978), holds that the harmless error rule applies to a post-trial appeal challenging a pre-trial order denying a motion to change venue.

Similarly, in *Dumont v. Saskatchewan Government Ins. (SGI)*, 258 F.3d 880, 887 (8th Cir. 2001), the court concluded that the harmless error rule applies to post-arbitration review of a pre-arbitration ruling on venue in a proceeding governed by the Federal Arbitration Act (FAA), 9 USC §§ 1 - 16. The harmless error doctrine should apply strongly in this context to promote the policy of limiting judicial review of arbitration awards, and the policy favoring finality of such awards.

DAI asserts that applying the harmless error rule in this context penalizes it for not seeking discretionary review of the pre-arbitration venue ruling. That is an unfounded characterization. Applying the harmless error rule in an appeal taken as a matter of right treats DAI the same as any other appellant who takes such an appeal. An appellant who is subject to the same rules of review as every other appellant has not been discriminated against or penalized.

DAI's assessment that it was penalized follows from a misunderstanding of the policies that govern, and the case posture that distinguishes, discretionary review from review as a matter of right. Discretionary review precedes a decision on the merits. Under the RAP 2.3(b) standards that govern acceptance of discretionary review, preventing irreparable harm, substantial prejudice, or a futile proceeding, is a predicate for accepting review. In short, the purpose of discretionary review is to correct error before it causes great harm, and the posture of a case during discretionary review supports that objective. Because discretionary review is intended to prevent harm, and necessarily occurs before the harm has occurred, the harmless error rule logically cannot, and does not, apply in a discretionary review proceeding.

An appeal as a matter of right can only be taken after entry of a final judgment or its equivalent. RAP 2.2(a). When a case is in that posture, the harm, if any, caused by an erroneous ruling necessarily will have occurred before appellate review. If there was no harm, and the judgment is reversed, the resources expended by the tribunal and litigants will have been wasted, and the prior proceedings would have been futile. The potential for reversal for a harmless error would also discourage litigants from seeking discretionary review, and encourage gambling on

the outcome of a trial or arbitration. Thus, proof of harm is required in a appeal taken as a matter of right to prevent the waste of judicial and litigant resources, and to discourage gambling on the outcome of a trial or arbitration.

Preventing the waste of resources, and discouraging outcome gambling, justify application of a harmless error analysis to pre-trial rulings concerning venue in an appeal taken as a matter of right. A litigant who has had his or her day in court (or arbitration) should not be allowed a second bite of the apple without proof that the pre-trial ruling probably impacted the outcome of proceedings. In this regard, a pre-trial ruling concerning venue cannot be distinguished from any other pre-judgment ruling. Indeed, as the *Lincoln* court observed, it is a rarity that an erroneous venue ruling will cause any harm. 89 Wash.2d at 578. Considering the remote possibility that a venue ruling will cause any harm, applying the harmless error rule to a pre-trial venue ruling strongly promotes the policy objectives underlying the rule.

In sum, applying the harmless error rule to a venue ruling in an appeal taken as a matter of right does not penalize the appellant for not previously seeking discretionary review. Rather, applying the harmless error rule in that context promotes the objectives of preventing wasted

resources and discouraging outcome gambling. Applying the harmless error rule in that context also ensures that venue rulings are subject to the same rules of review as other pre-judgment rulings in an appeal taken as a matter of right.

There is no policy justification, or logical reason, why a venue ruling should be subjected to less rigorous review than other pre-judgment rulings. To the contrary, because an erroneous venue ruling is unlikely to cause harm, applying the harmless error rule to a venue ruling in an appeal taken as a matter of right will prevent manifest injustice.

DAI may also be misreading *Lincoln* to hold that the harmless error rule will not apply in an appeal taken as a matter of right, provided the appellant first sought discretionary review. It would be illogical to read *Lincoln* to so hold because the *Lincoln* court recognized that venue rulings rarely cause harm. 89 Wash.2d at 578. Considering that observation, and the policy objectives of preventing waste, futility and injustice, the *Lincoln* court could not have impliedly held that an appellant who seeks, but does not obtain, discretionary review of a pre-trial venue ruling thereby avoids the requirement of proving that the ruling was harmful in a later appeal taken as a matter of right. Rather, *Lincoln*, fairly read, establishes that the same rules of review apply in any appeal taken as a matter of right

regardless whether the appellant previously sought discretionary review. Conversely, an appellant who seeks, and obtains, discretionary review of a venue ruling is not required to show harm because the review will necessarily occur before there could be any harm.

**B. The Record Was Adequate for Review**

DAI asserts that the harmless error doctrine does not apply in this context because it would have been impossible to show harm without a verbatim transcript of the arbitration proceedings. Petition for Review, p. 14. This argument fails because a record of the arbitration proceeding was not required to show potential harm. It also fails because DAI could have created a record adequate for review.

DAI did not require a complete record of the arbitration proceedings to establish likely harm from the Superior Court's venue ruling. No statute or decisional law prevented DAI from submitting evidence of harm to the Superior Court to support its Motion to Vacate. To the contrary, that showing could have been included in the declaration DAI's counsel submitted in support of that motion. *See* CP 236-291.

When a litigant challenges a forum selection clause on the basis of hardship, the litigant must offer extrinsic evidence to establish that litigating in the chosen forum would be unduly burdensome. *See*

generally *Bank of America, N.A. v. Miller*, 108 Wash.App. 745, 748, 33 P.3d 91 (2001). Likewise, a party who is aggrieved by a venue ruling should be required to offer some extrinsic evidence to show why the ruling impacted the presentation of a case. An appellant who fails to present any such evidence should not be excused from showing harm because of the lack of record of the arbitration proceedings.

**C. DAI Could Have Presented a Complete Record of the Arbitration Proceedings**

Even if DAI required such a record, the lack of such a record does not excuse DAI's burden of establishing harm. This conclusion follows from the established rule that an appellant bears the burden of providing a record that is adequate for review. If an appellant fails to provide such a record, the trial court decision must stand. *In re Detention of Halgren*, 156 Wash.2d 795, 805, 132 P.3d 714 (2006).

DAI had an opportunity to create and present for review a verbatim transcript of the arbitration proceedings. DAI demanded arbitration governed by the rules of the American Arbitration Association (AAA). CP 75; CP 35, at ¶ 10.a. The arbitrator followed those rules. CP 222.

Under AAA rules:

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify

the other parties of these arrangements at least three days in advance of the hearing. The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

Commercial Arbitration Rule R-26, App. 1-2. Because AAA rules permit a litigant to obtain a verbatim transcript of the arbitration proceedings, an appellant who claims that a verbatim transcript of an arbitration proceeding is required to establish harmful error must present that transcript to the reviewing court. Conversely, an appellant's failure to present a verbatim transcript does not excuse an appellant's burden to establish prejudicial error.

The decision in *Hotels Nevada v. L.A. Pacific Center, Inc.*, 203 Cal.App.4th 336, 136 Cal.Rptr.3d 832 (Cal.App. 2 Dist., 2012), is right on point. That case arose out of proceedings to confirm an arbitration award in favor of the defendant that was rendered after a trial court granted the defendant's motion to compel arbitration. After the trial court confirmed the award, the plaintiff appealed, asserting that the order compelling arbitration was erroneous. Because the plaintiff failed to present a verbatim transcript of the arbitration proceedings, the California Court of

Appeals concluded that the challenge to the order to compel was not reviewable:

As a threshold matter, we conclude that appellant has forfeited any challenge to the order compelling arbitration due to his failure to provide an adequate record. Appellant has provided us with neither a reporter's transcript of the 16-day hearing nor copies of the documentary evidence offered during that hearing. "It is the duty of an appellant to provide an adequate record to the court establishing error. Failure to provide an adequate record on an issue requires that the issue be resolved against appellant. *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295 [240 Cal.Rptr. 872, 743 P.2d 932]." (*Barak v. Quisenberry Law Firm* (2006) 135 Cal.App.4th 654, 660, 37 Cal.Rptr.3d 688.) This principle stems from the well-established rule of appellate review that a judgment or order is presumed correct and the appellant has the burden of demonstrating prejudicial error. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187, 129 Cal.Rptr.3d 421; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416, 122 Cal.Rptr.2d 167.) By failing to provide an adequate record, appellant cannot meet his burden to show error and we must resolve any challenge to the order against him. (See *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502, 93 Cal.Rptr.2d 97.)

*Id.*, at 842-43.

In this state, as in California, the appellant bears the burden of providing a record that is adequate for review. In *Hotels*, the court concluded that an appellant's burden to provide an adequate record is not excused simply because the appeal involves a challenge to an order

compelling arbitration. Because AAA rules allowed DAI to create a verbatim transcript of the arbitration proceedings, this Court should likewise so conclude. DAI did not present a verbatim transcript of the arbitration proceedings. If DAI required such a transcript to prove harm, it failed to meet its burden of presenting an adequate record for review.

**D. Review for Harm Does Not Contravene “Face of the Award” Rule**

DAI’s alternative argument is that review of the arbitration record is precluded by the rule that “judicial review of an arbitration award is limited to the face of the award. In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified.” *Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998). That rule governs the determination whether there is any statutory basis to vacate an arbitrator’s award under RCW 7.04A.230. In short, it applies when an appeal concerns arbitrator conduct. DAI’s motion to vacate was not based on that statute, or involve any alleged arbitrator error. Rather, its motion to vacate was predicated on the argument that the arbitrator lacked jurisdiction to enter any award because the Superior Court improperly nullified parts of the arbitration agreement. No statute precludes review beyond the face of an arbitration award to determine if an

order compelling arbitration caused any harm.

**E. The FAA Does Not Foreclose Application of the Harmless Error Rule**

DAI also argues that analysis for prejudicial error is inconsistent with the FAA. The FAA makes enforceable arbitration agreements between parties engaged in interstate commerce, subject to state law defenses governing the validity of contracts. *See generally McKee v. AT & T Corp.*, 164 Wash.2d 372, 383-814, 191 P.3d 845 (2008). As identified in *McKee*, an expansive body of decisional law has emerged analyzing enforceability issues under the FAA. That is, there are numerous cases that examine what types of dispute resolution provisions are, or are not, enforceable, under the FAA, and whether a trial court or arbitrator should make the enforceability determination in the first instance. *See, e.g., AT&T Mobility, LLC v. Concepcion et ux.*, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011) (holding that class action waiver in dispute resolution provision is enforceable under the FAA). However, no decisional law holds that the FAA precludes a reviewing court from applying the harmless error doctrine to affirm a trial court, or arbitrator, decision invalidating part of a dispute resolution agreement. Nor does anything in the text of the FAA preclude that.

To the contrary, courts have applied the harmless error doctrine when reviewing decisions enforcing or invalidating dispute resolution provisions. In *Dumont*, the court applied the harmless error doctrine to affirm a lower tribunal's resolution of a forum selection issue. In *Coutee v. Barington Capital Group, L.P.*, 336 F.3d 1128, 1136 (9th Cir. 2003), the court applied the doctrine to affirm an arbitrator's erroneous choice of law. In a similar vein, a federal court has applied a harmless error analysis to affirm confirmation of an arbitration award that the plaintiff challenged on the basis of an arbitrator's undisclosed conflict of interest. *Stone v. Bear, Stearns & Co., Inc.*, 2012 WL 1946938 (E.D.Pa. May 29, 2012).

The foregoing authorities refute DAI's contention that the FAA forecloses application of the harmless error doctrine to trial court, or arbitrator, ruling that is not outcome determinative. To the contrary, the harmless error doctrine should apply strongly in this context to promote the policy of limiting judicial review of arbitration awards, and the policy favoring finality of such awards. DAI advocates for a presumption of harm, and compelled vacatur, following any improper nullification of a dispute resolution provision. Because such a presumption would defeat the laudable policy objectives of arbitration, is not supported by the text of the FAA, and has not been recognized by any court, this Court should

decline DAI's proposed rule.

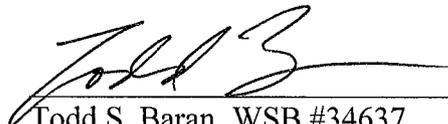
### III. CONCLUSION

This Court should affirm the decisions below, and confirm that an appellant who contends that a trial court erroneously nullified part of a dispute resolution provision must, as an appellant must in every other appeal taken as a matter of right, show that the error was prejudicial.

#### 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 5<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
Todd S. Baran, WSB #34637  
Attorney for Respondents

## **APPENDIX**

1. Excerpts – American Arbitration Association Commercial Arbitration Rules – Rule 26.

### R-23. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person other than a party and its representatives.

### R-24. Representation

Any party may be represented by counsel or other authorized representative. A party intending to be so represented shall notify the other party and the AAA of the name and address of the representative at least three days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

### R-25. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

### R-26. Stenographic Record

Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three days in advance of the hearing.

The requesting party or parties shall pay the cost of the record. If the transcript is agreed by the parties, or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.

#### R-27. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

#### R-28. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

#### R-29. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

#### R-30. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

**CERTIFICATE OF SERVICE**

I hereby certify that on the 5<sup>th</sup> day of July, 2012, I served Respondents' SUPPLEMENTAL BRIEF OF RESPONDENTS 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:

Gary H. Branfeld  
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\_\_\_\_\_  
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