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Supreme Court of Texas.
PERRY HOMES, A JOINT VENTURE, HOME OWNERS MULTIPLE EQUITY, INC., AND WARRANTY
UNDERWRITERS INSURANCE COMPANY,
v.
ROBERT E. CULL AND S. JANE CULL.
No. 05-0882.

March 20, 2007

Appearances:
GEOFFREY H. BRACKEN, Gardere, Houston, TX.
THOMAS M. MICHEL, Griffith, Jay, Michel, & Moore LLP, Fort Worth, TX.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice H arriet O'Neill, Justice Dale Wainwright, Justice Scott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett.

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CHIEF JUSTICE JEFFERSON: Be seated please. The Court is now ready to hear argument in 05-0882, Perry Homes and others v. Robert E. Cull and Jane Cull.

SPEAKER: May it please the Court. Mr. Geoffrey Bracken will present arguments for the petitioners. Petitioners have reserved five minutes for rebuttal

ORAL ARGUMENT OF GEOFFREY H. BRACKEN ON BEHALF OF THE PETITIONER

MR. BRACKEN: Good morning. I represent Perry Homes, a Joint Venture and Home Owners Multiple Equity Inc. and Warranty Underwriters Insurance Company, which was the warranty company that warranted -- that provided warranty service for the Cull's home. It is important for the Court to notice an initial factual matter that Perry Homes has no arbitration clause in its sales contract with the Culls or any of its customers, never has and did not opt out of the judicial system or want to go to arbitration and oppose the same from the get-go of this case. It's important for this Court to try and get some guidance for the trial courts of this state because there's a threshold matter. What happens is people go to the courthouse, plaintiffs or defendants for

that matter, with the knowledge that they have an arbitration clause. And this Court needs to come up with a workable rule for the trial courts in an effort to determine whether or not the party by engaging the judicial machinery waived his or her right to arbitration. We think, in this case, because of the procedural choices that were made in the trial court by the Culls, they have waived the right to arbitration

JUSTICE WAINWRIGHT: So, the basis for your clients' defending the arbitration, going to arbitration is equitable estoppel. It's based on the contracts in the other parties -- the provisions in the other party's contracts. So, what's the basis?

MR. BRACKEN: The basis would be waiver by the Culls with regard to their right to arbitrate against any of the defendants, either the two warranty defendants with whom they had the arbitration clause or Perry Homes with whom they had no arbitration clause.

JUSTICE WAINWRIGHT: Let me put that the other way. What's the - what was the basis for then -- your being -- your client being sent to arbitration?

MR. BRACKEN: The order of Judge Ferar on December 13 --

JUSTICE WAINWRIGHT: Based on what theory?

MR. BRACKEN: Based upon the theory that there was no waiver by virtue of the 13 months of trial conduct by The Culls and visiting Judge Ferar decided that the case shouldn't go to arbitration --

CHIEF JUSTICE JEFFERSON: I think what Justice Wainwright is asking you is you just said that there is no contract by Perry Homes -- between Perry Homes and the Culls specifically in -- in which Perry Homes agreed to arbitrate claims. So, by what theory would Perry Homes be required to arbitrate anyone?

MR. BRACKEN: Yes, Justice Wainwright. In the warranty documents, Perry Homes would have an obligation for the first year after the home was closed to repair certain defects. There is an arbitration clause in the warranty documents, not in the sales contract between Perry Homes and the Culls. And I suspect that what Judge Ferar looked at was the arbitration clause in the warranty documents. Significant point here --

JUSTICE MEDINA: Who did the Culls seek the warranty from?

MR. BRACKEN: The warranty flows for the first year from the builder, in this case, Perry Homes, a Joint Venture, and then for the remaining nine years from the warranty companies, your Honor.

JUSTICE MEDINA: And it seems to me that there is an arbitration clause if -- if Perry Homes is going to be the ultimate beneficiary of that warranty claim.

MR. BRACKEN: That might be true, your Honor, if you were in the first year of the warranty. But in fact, the evidence in this record is that the Culls didn't bring their claim until four years after they -- it relayed a construction defect starting the slack of the ten-year obligation of the warranty company. And it wasn't brought until four years after the purchase. So, it would have been outside of the one-year limited warranty that the builder would give under this sort of warranty.

JUSTICE MEDINA: Okay, so they're outside -- they're outside the contract.

MR. BRACKEN: Yes, sir.

JUSTICE MEDINA: And then they have the right to go to trial.

MR. BRACKEN: Well, they have the right to go to trial based on the litigation conduct of the Culls. Remember, the Culls early on, when the warranty defendants brought before the trial court, the issue of the waiver of the arbitration, it was the Cull's position that it would be

and I think, the language is, affirmably stated in enforcement by the court would be nothing short of ridiculous and absurd. So, in this case, on this record, you have the Culls not only impliedly waiving their right to arbitration but expressedly early on in the litigation saying, don't send this to arbitration. We think that arbitration is unconscionable. Then what happened during the remaining 13 months is they took 11 depositions, they admittedly took discovery, they were not, otherwise, be available to them in the arbitration.

CHIEF JUSTICE JEFFERSON: Okay, I want to ask you about that because you've said that also at -- in your brief that the discovery -- much of the discovery here would not have been available in arbitration. And I just couldn't find support for those assertions. And in most typical arbitration agreements, the arbitrator has free rein with respect to discovery. And was that not the case here and how was it not so?

MR. BRACKEN: The party of the court was well aware issues of arbitration are -- are contractual choices that parties make. Here, the parties chose the arbitrable form to be Triple A. The rule we cited, I think it's 32, your Honor, says that there's -- there's no provision in the rules for depositions. There's certainly no provision in the arbitration rules of the Triple A, commercial industry arbitration rules that provide for request for admissions, request for disclosures under Rule 194, all of which were provided and used by the Culls. And remember, of course, the Culls went to the trial court during that 13-month time period some five times in order to secure discovery orders and resulting in the production of over 2,000 pages of documents. So, if there's a question about whether or not the Culls...

CHIEF JUSTICE JEFFERSON: So you say -- I'm sorry -- you say Rule 32 precludes depositions?

MR. BRACKEN: There is nothing in the arbitration rules, your Honor -- the Triple A rules that provides for depositions.

CHIEF JUSTICE JEFFERSON: So, does it -- does it exclude -- can an arbitrator under Triple A rules order depositions or not or is it just unclear?

MR. BRACKEN: It's unclear, your Honor because the only rule said -- the only rule regarding discovery that I'm aware of in Triple A is the production of documents. That is not to say, your Honor, that arbitrators don't typically allow for depositions but there's no rule in Triple A that specifically allows an arbitrator to [inaudible].

CHIEF JUSTICE JEFFERSON: And in fact, depositions were taken in this case through the arbitration process.

MR. BRACKEN: I believe that fact witnesses -- were all taken in the trial courts, some 11 or 12 of them. And I do believe that there was several expert witness --depositions that were taken incidentally to the arbitration.

JUSTICE MEDINA: And you said they expressively waived their right to arbitration. Why can't -- why can't they change their mind? What binds them to arbitration? Because they take one position during the course of the litigation and for whatever strategic reason change their mind, why can't they do that?

MR. BRACKEN: Well, the court had admitted the trial court judge is burdened with a lot of cases. And you had a party clearly knowing on this record that they were subject to an arbitration clause and brought suit. Cases in the federal district, if what this Court is trying to do is harmonize Texas' law with federal courts, which I think, needs to be done, since [inaudible] with the Federal Arbitration Act says that you can't get the judicial machinery going. You can't institute a suit in

the first instance, take all the discovery to with which you think you're entitled under the Civil Rules, and then use that discovery later on to the detriment of the party in arbitration. And the

JUSTICE: What do you think the cutoff should be?

MR. BRACKEN: If I were king I believe that there should be a presumptive waiver. If a party knowing of an arbitration clause brings suit is what the Cabinetree case says that appears to be where Miller Brewing is going in this Circuit.

JUSTICE O'NEILL: Well, let me follow up on that. The -- the discussion a little bit earlier on about Perry Homes, whether the arbitration clause was in its agreement or in its warranty. Perry Homes could have pursued arbitration itself in this case. Correct? You don't contest that.

MR. BRACKEN: Well, I do contest that because I'm not sure we were governed by an arbitration agreement. But that's the point I'm trying to make, Justice O'Neill, is it's incumbent upon either the plaintiff or the defendant --

JUSTICE O'NEILL: That's why I'm --

JUSTICE O'NEILL: -- is to bring to the attention of the trial court that there's a viable arbitration clause.

JUSTICE O'NEILL: Well, and that's my -- the point I'm getting to here is Perry Homes did that. Perry Homes did say there's an arbitration clause here. Right?

MR. BRACKEN: Or the defendants did, Your Honor, Perry Homes did not. Perry Homes did not. Perry Homes never wanted to go to arbitration in this case.

JUSTICE O'NEILL: Okay, well then, I understand that. But my question is, would they have had the right to compel it? Presume with me that they would have.

MR. BRACKEN: Okay.

JUSTICE O'NEILL: Presume with me that they would have had the right to compel it under our jurisprudence. And presume that they raise it but they don't pursue it. Then if they decide not to go forward with arbitration early on in the proceedings, why should we hold the plaintiff to a different waiver standard than the defendant in that circumstance?

MR. BRACKEN: Well, as you addressed in the City Group Capital Market case, I mean, I think what you need to do is lift the litigation conduct of both parties. And based upon this record, the parties thought they were going to trial. The parties conducted discovery --

JUSTICE O'NEILL: No. I think you misunderstood my question. I understand the waiver by proceeding down the litigation road for too long. But you've made the argument that a plaintiff should be held to a different waiver standard than a defendant. And my question is if the defendant had the right to compel arbitration in his own right but didn't, then why in that situation would we apply a different standard. I can see how a different standard might apply in some circumstances. But if both can compel and neither do until the last minute, shouldn't we evaluate it under how far they've moved down the litigation process as opposed to apply a different standard for the plaintiff?

MR. BRACKEN: I don't think so. I mean, I think you need to look at both of the parties and that brings up the prejudice issue, which is, I think where the court is going. And this is should there be a different standard of prejudice? In my humble opinion, I don't think there should be a prejudice requirement for either the plaintiff or defendant. The reason I say that is if you look at the federal cases that we've cited in our briefs, Cabinetree case in particular, there is no prejudice

requirement. And if we're trying to harmonize this state's law with federal law and other jurisdictions that have addressed this issue, I think the better rule is do not require prejudice and look at simply the waiver and see if the parties have intentionally relinquished a known right.

JUSTICE: Assuming we disagree and think prejudice ought to be required, what record evidence is there specifically that Perry Homes suffered prejudice here?

MR. BRACKEN: If the court will remember, we asked both Judge Ferar and Judge Lowe to take judicial notice of this file. And in that file, which is voluminous, you will see reams of discovery including part of the discovery that I've already explained that would not otherwise be available to someone who's arbitrated. But in addition, you had increased litigation cost of approximately $50,000.,And we have an affidavit of trial counsel on the record to that effect. And it's uncontroverted that the discovery was not used in arbitration because unlike some of the other cases that this Court has considered, we brought the record from the arbitration before you. So, it's not like there is a presumption that that discovery wasn't used. We know it was used.

CHIEF JUSTICE JEFFERSON: Let me -- let me -- just following you up on that point and ask you if we assume that all the discovery and this goes back to an earlier question, all the discovery that actually took place here would have occurred even if the case had immediately preceded arbitration. If that were so, then you wouldn't -- would not have been harmed by arbitrating the case. Is that correct?

MR. BRACKEN: Well, I think if the case is immediately going into 30 days or whenever it was that -- that the Culls are contesting --

CHIEF JUSTICE JEFFERSON: Immediately and assume that all of the same discovery would have taken place then there would have been no harm?

MR. BRACKEN: All the same discovery in the arbitration?

CHIEF JUSTICE JEFFERSON: That took place in the trial court proceeding and in the arbitration, all the discovery that took place here from beginning to end, taking place after arbitration was immediately pursued, then there would be no harm?

MR. BRACKEN: Right. That's not what happened from the factual the matter. And you know it couldn't have happened because we went 13 months.

CHIEF JUSTICE JEFFERSON: I'm just saying what if the arbitrator had entertained all of the motions to compel, answer to interrogatories, compelled depositions, all the same things that the trial court considered and made the same rulings, then there would be no harm.

MR. BRACKEN: That's a possibility, your Honor.

JUSTICE: Counsel --

MR. BRACKEN: Whatever cost, you know -- whatever cost you've incurred in - in --

JUSTICE: But that -- but that would be purely hypothetical. I mean, once the discovery is done, it's done. There's no reason you ask that arbitrator to compel it again.

CHIEF JUSTICE JEFFERSON: And I've -- one other question about Cull and Warranty Underwriters if -- if I understand your argument correctly, the Culls are essentially estopped because they opposed arbitration very early on. Why isn't Cull and Warranty Underwriters similarly estopped because they proposed arbitration early on?

MR. BRACKEN: Well, again, I don't know that estoppel necessarily -

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CHIEF JUSTICE JEFFERSON: Well, maybe -- maybe that's not the right term but --

MR. BRACKEN: -- by the word -- I was trying to explain to Justice Medina. And maybe I didn't do it effectively. The -- the trial court, at some point, has to decide. Am I going to take the case or have the parties made a conscious decision to put the judicial machinery in place? And the truth of the matter is whether the warranty companies filed their motion to compel arbitration and let it lie, it's really irrelevant because we know that at that point in time, they decided to go to trial. They decided to be under the trial court's jurisdiction with all of its procedural safeguards now. And we haven't really touched on that but that's one of the real harm in what the Culls did here is you have procedural safeguards when you're dealing with motions to compel proprietary and confidential information before our trial courts. And we entrust our trial courts to apply the law and apply the rules. You don't have any of those procedural protections in -- in arbitration. And that's why arbitration is what it is. It's kind of what you get with very limited rules as I've already explained.

JUSTICE: Well, you argued earlier for a sort of presumptive cutoff for the defendants. And it strikes me as -- a waiver is really a two-way street, it seems. And it strikes me as sort of fairly audacious for the warranty companies who initially sought arbitration to later complain when the trial court orders exactly that.

MR. BRACKEN: The reason I don't see that such a disconnect, your Honor, is because at one point in time, the parties need to decide, do you want to litigate this matter or do you want to arbitrate this matter? Clearly, the warranty company has decided we want to litigate this matter. We have the trial court. And they proceeded to go to litigation. And it wasn't until four days from the start of the jury trial that the Culls did an about-face and decided they didn't want to go to arbitration. Excuse me, they didn't want to go to trial, they wanted to go to arbitration. So I think, based upon this record you have not only an express renunciation by the plaintiffs of their desire to go to arbitration but impliedly by their litigation conduct, which is addressed in the Lesser case which we cited to the court.

JUSTICE: But why wouldn't a presumptive cutoff that you argued for when plaintiff files a lawsuit -- you say presumptive cutoff, you got -- you got to file a law -- you got to pursue the litigation, why doesn't that presumptive cutoff work on the defense side as well? Why is there a different rule there you're seeking?

MR. BRACKEN: The -- the issue here is not that the warranty company wanted to go to arbitration. On the contrary, when the issue was finally brought before the judge in Tarrant County, all three defendants said, we've been going down this trail for 13 months. We don't want to go to arbitration. Not any of us. And the reason I said presumptive waiver is because as the Court knows, there can be issues about whether or not claims are arbitrable. And so when I use the word presumptive waiver, it's incumbent upon the trial court to state are these claims something that can be arbitrated. And so, it would be incumbent upon the party that brought the suit or wants to engage in judicial machinery to come before the trial court and say, we haven't waived it here because this is not an arbitrable claim. We either don't fall within the scope of the arbitration agreement and, you know, or we had to file the suit because limitations [inaudible]

CHIEF JUSTICE JEFFERSON: Are there -- are there any further questions? Thank you, Mr. Bracken.

MR. BRACKEN: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondents.

FEMALE: May it please the Court. Mr. Thomas Michel [inaudible].

ORAL ARGUMENT OF THOMAS M. MICHEL ON BEHALF OF THE RESPONDENT

MR. MICHEL: May it please the Court. My name is Thomas Michel. And I represent Bob and Jane Cull. I would like to address some quick issues in response to the opening argument. And I think we really should before this Court is not necessarily even whether a waiver occurred or did not occur below. It's whether this Court should even hear that waiver issue at this point. And I'll tell you why. First reason is that if you go back to the motion to compel arbitration here. At that time, they, Perry Homes, the one who filed an opposition, it was five pages long. In that opposition, they did not raise the fact that the Culls objected to arbitration. And I'll get to the merits about whether they did or didn't object to arbitration. But as the case proceeded in front of Judge Ferar, at that hearing, at that motion to compel, the only issue that was raised by Perry Homes was that you have the two prong test. You have to substantially invoke the judicial process and has to operate to be a substantial detriment to the opposing party.

Perry Homes' lawyer stated that -- in brief -- that that was the standard of the trial court was to abide by it. Judge Ferar accepted that standard in his rulings and in fact, quoted it back to Perry Home saying, under your own standard, you don't get their on prejudiced.

JUSTICE BRISTER: Sometimes, people have the nerve not to ask the trial court to reverse the Texas Supreme Court, if that's what we've said the rule is, and wait till they get up here and ask us to reverse ourselves. In fact, we would probably rather the system worked that way. Now, are you -- weren't you, in effect, asked if -- they - to say there is no prejudice requirement, pay no attention to that detrimental alliance, they would have had disregarded some of our cases.

MR. MICHEL: Targetly

JUSTICE BRISTER: Or the judge would have had to just ignore us.

MR. MICHEL: No, I think, I don't -- I don't believe so, your Honor. The cases they're arguing right now -- the cases they've cited to this Court were around for a long time. They were around before this case was even argued to Judge Ferar --

JUSTICE BRISTER: Yeah, but we --we said in In Re: Service Court had merely taking part in litigation is not enough unless you substantially invoke the judicial process to your opponent's detriment. Now, to make an argument to the trial judge, pay no attention to opponent's detriment, you would have to ignore our 2002 opinion, wouldn't you?

MR. MICHEL: Correct, your Honor.

JUSTICE BRISTER: All right. Next start, what's the next start?

MR. MICHEL: -- service was before, before the hearing. In any event, there's no doubt. That issue was not presented to the court. And they raised that argument. The issue --

JUSTICE JOHNSON: Counsel, is your position that we are to review what happened before the arbitration or is it your position that we have to review the arbitrator's award? What is it we're supposed to be

reviewing up here in your -- insofar as you're concerned, if anything?
MR. MICHEL: Yes, your Honor. Yeah, I don't believe the Court should even be reviewing the waiver issue.
JUSTICE JOHNSON: And why not?
MR. MICHEL: First of all, the waiver issue was presented at the motion to compel arbitration. Up until this case and both sides have --
JUSTICE JOHNSON: Well, we're - let's -- are we reviewing what happened before arbitration or is your position we should not even be reviewing what happened before arbitration?
MR. MICHEL: Well, I have multiple arguments, your Honor. Number one, I've raised the issue that waiver is not a statutory ground to set aside --
JUSTICE JOHNSON: Under the FA --
MR. MICHEL: Yes, your Honor.
JUSTICE JOHNSON: But you have two others, one of them being manifest --
MR. MICHEL: Yes, your Honor, manifest --
JUSTICE JOHNSON: -- disregard of the law?
MR. MICHEL: -- disregard of the law.
JUSTICE JOHNSON: So are we reviewing what the arbitrator did or is it -- is it your position we should be reviewing what the arbitrator did under manifest disregard of the law or what the trial court did?
MR. MICHEL: I believe, your Honor, that the -- my first position is that it would be whether the arbitrator had made a manifest disregard of the law when it denied Perry Homes' argument in arbitration that waiver occurred.
JUSTICE JOHNSON: Okay. So that was -- that was in the arbitration?
MR. MICHEL: It was. Yes, it was at the motion to compel arbitration hearing. It was rejected by Judge Ferar. It was presented in front of the arbitrator. It was rejected by the arbitrator.
JUSTICE JOHNSON: Okay. Since we do have an arbitration award here, why are we talking, in your mind, about what happened in the trial court?
MR. MICHEL: I don't think we should be.
JUSTICE JOHNSON: Wasn't there a mandamus in regard to that?
MR. MICHEL: There were two of them and both of them were denied, one by the Court of Appeals, and one by this Court.
JUSTICE BRISTER: Of course.
MR. MICHEL: I don't know why we are talking about waiver right now.
JUSTICE BRISTER: Well, courts don't waive things, do we?
MR. MICHEL: Courts don't waive things?
JUSTICE BRISTER: When we don't grant mandamus, we don't waive the right that what everything you did was right.
MR. MICHEL: No. but this expressed --
JUSTICE BRISTER: The whole purpose -- I mean, the whole purpose of the adequate remedy by appeal is we may change our minds and say it was wrong to have done this.
MR. MICHEL: Well, with all due respect, I don't believe that's the case. This Court has gone at great lengths for the past 15 years to create the appellate or mandamus remedy and to protect the arbitration process and for the past 15 years has granted review of that issue and waiver was presented. And it makes sense. The waiver was presented at the trial court. In all due respect, the record -- and when we'll get to that -- the record at that motion of compel arbitration was incredibly weak. There was no evidence of any prejudice. They didn't --
JUSTICE O'NEILL: I thought you said waiver was not raised at the

trial court.

MR. MICHEL: Yes. It was raised at the trial court at the motion to compel arbitration.

CHIEF JUSTICE JEFFERSON: And your theory is?

MR. MICHEL: That was Perry Homes' defense was that they waived. They put on no evidence, no testimony. They didn't say they had opposed arbitration. They never raised that issue before Judge Ferar. There is no expressed waiver in this case because they never presented it.

JUSTICE O'NEILL: Okay. Wait. But they didn't argue before the Trial Court that the Culls had previously objected arbitration.

MR. MICHEL: Arbitration, that is correct.

JUSTICE BRISTER: Why would -- why would the trial judge not know that?

MR. MICHEL: Number one, he was a visiting judge. It was never presented. It was filed --

JUSTICE BRISTER: Sitting there in the file.

MR. MICHEL: Yes, your Honor. It was never argued in their motion to respond to the motion of compel arbitration. It was never raised.

JUSTICE BRISTER: So, is your argument, that unless, if there is a question of waiver before you go to arbitration and mandamus, unless we grant it in every case, that decision's unreviewable?

MR. MICHEL: I believe in the arbitration, it would be at the most compel arbitration. That is the natural -- natural place.

JUSTICE JOHNSON: Our -- our precedent has never said that our denial of the mandamus petition is law of the case on any legal issue that's been presented up here. That would be pretty astounding to embark on that course.

MR. MICHEL: I did raise that argument in saying that because of the unique situation starting with Anguin where this court tried to fill the appellate gap. That this court for the past --

JUSTICE JOHNSON: But that's when arbitration is denied.

MR. MICHEL: Yes.

JUSTICE JOHNSON: There is not an appellate gap when arbitration is granted.

MR. MICHEL: Well, arguably recently under the Place's decision but also the Fifth Circuit and this Court also left mandamus available even for the unusual circumstances when they grant arbitration.

JUSTICE JOHNSON: Well, it might be but I'm just saying that the gap exists on the others when it's denied.

MR. MICHEL: Right. Right. Yes, your Honor. Yes, your Honor. That's why we tried to fill this -- this Court has tried to fill that gap.

CHIEF JUSTICE JEFFERSON: Let -- I mean, let's assume and -- and maybe you'll convince the Court otherwise that we -- we don't believe that by denying mandamus, all the legal issues were fixed and our determination can't be reconsidered. I'd like to go back to the point in time in which you objected the arbitration by Triple A. You opposed it because Triple A was, among other things, you said, biased. And my question is why should you be better off today than if the trial court had sustained your objection and denied arbitration when you first opposed arbitration in front of Triple A? In other words, had the trial court denied arbitration as you have requested, we wouldn't be here today. And you never withdrew your accusation about Triple A's partiality. So, why should you be better off than if the trial court had sustained that initial objection?

MR. MICHEL: Well, first of all, I think the record is clear. We did not object the arbitration process. and we objected the Triple A.

CHIEF JUSTICE JEFFERSON: That's what I'm saying.

MR. MICHEL: Okay. And number two, the arbitration clause specifically allowed other arbitrators. So, they were -- hey were --

JUSTICE JOHNSON: You went to triple A.

MR. MICHEL: Yes, we did. I don't think that's a -- I don't think that is where a prejudice or an estoppel would argue saying, we oppose Triple A and we would like another arbitrator, which is expressly allowed under the agreement. But to say we are better off, at the end of the day, what happened was we were compelled to go, but, well, we were asked to go to arbitration.

CHIEF JUSTICE JEFFERSON: No. What I'm asking is you -- you told the trial court that you should not be compelled to go to arbitration because Triple A is biased. And I understand that was a reason. Assume with me that the trial court said you're right. We will not send you to Triple A. And we will try the case. You would have gotten the relief that you requested. Why -- why is it different now?

MR. MICHEL: You know, if we would have gone to a different arbitrator.

CHIEF JUSTICE JEFFERSON: Or different arbitrator?

MR. MICHEL: That -- that would have been fine if we had gone to a different arbitrator. They might be appealing that arbitration award.

JUSTICE O'NEILL: But you find that the arbitration process was unenforceable.

MR. MICHEL: No. I believe it was, as typed, this paragraph was titled Objection to Triple A.

JUSTICE O'NEILL: Well, how do you -- what do you think about --

MR. MICHEL: Because Triple A requires so much up-front expenses.

JUSTICE O'NEILL: I understand that, but the language that I picked up was the arbitration clause was unenforceable.

MR. MICHEL: I don't believe --

JUSTICE O'NEILL: And the record will show that. I don't want to get up on that but on International v. Courts, this seems to me like that situation is the exact one presented here. And the first circuit there said, okay, you objected the Triple A but then you have a duty to propose another arbitrator and by not doing that, you waived the right.

MR. MICHEL: We tried to address that in our responsive brief, your Honor. We believe Tyco is a distinguishable present First Circuit, not only did they oppose they Triple A, they opposed arbitration overall as well, which we did not do in this case.

JUSTICE WAINWRIGHT: Petitioners who filed a document called Petitioners' Record Excerpts is titled Plaintiff's Response to Warranty Underwriters' Request for Arbitration?

MR. MICHEL: Yes, your Honor.

JUSTICE WAINWRIGHT: On the second page, it says plaintiff confirms that reported arbitration clause is unconscionable and unenforceable. Is that not your position at trial?

MR. MICHEL: I believe, your Honor, what they did was they took out the excerpts. They only gave you a couple of pages of the excerpts and with the whole --

JUSTICE WAINWRIGHT: The pages we had say --

MR. MICHEL: Yes.

JUSTICE WAINWRIGHT: -- unenforceable which is your position.

MR. MICHEL: It says --

JUSTICE WAINWRIGHT: It's in black and white on the left signature page.

MR. MICHEL: I understand. They left out the middle pages that say objections to Triple A. I mean, they set forth that length the problems with the Triple A, and then only at the conclusion as they go through

about the expense and all of those things, they say such exorbitant charges are in violation to Texas Supreme confirms that the prohibit arbitration process unconscionable and unenforceable. With all due respect, Justice Wainwright, that's -- the exorbitant charges, it's in the same sentence. That's what they are talking about, is it --

JUSTICE WAINWRIGHT: But the relief this, wherefore premises considered, plaintiffs respectfully pray that this court sustain the objections, deny the plea in abatement in its entirety.

MR. MICHEL: Yes, your Honor.

JUSTICE WAINWRIGHT: So the relief you asked for is not to get set to somebody else, it's just not to go tall.

CHIEF JUSTICE JEFFERSON: And if it had been granted, right then and there when he filed that pleading, we wouldn't be here today.

MR. MICHEL: That's, you know, once again, the record speaks for itself but we're left with what the basis of the objection was. If the prayer was they're objecting to its entirety but then obviously the objection was to arbitrate.

CHIEF JUSTICE JEFFERSON: Now I understand that your clients ultimately decided that arbitration would get the case resolved more quickly. And one of my concerns is what about the next case? As a lawyer, could I advise my client that, well let's initially oppose arbitration, take advantage of the free discovery that a State Court proceeding offers, and then go back once all the facts are developed, and move to compel arbitration. That sure would save a lot of money but that would otherwise go to the arbitrator but at what cause to the policy favoring arbitration.

MR. MICHEL: Well, I think that at either point, the -- the opposing party if they want to go arbitration can move for arbitration at that time. But I think once again this Court's precedent about establishing harm is -- is critical. There is, if you want to protect the integrity of the arbitration process, I think the real rule there is what this Court has already established.

JUSTICE HECHT: Before we get to harm, let me just be sure, do you think if the objection in the first instance had not been focused on AAA as the arbitrator but had been focused on just arbitration in general. Would that be a waiver? We've come to prejudice, but would that, in your view, would that be a waiver?

MR. MICHEL: I think under certain circumstances it could be considered that.

JUSTICE HECHT: And - and then before -- again before we get to prejudice, I asked the petitioner where the line should be as far as substantially invoking the judicial process, where do you think the line should be?

MR. MICHEL: I believe it's the line should be, I think as well this Court has stated in about 10 recent opinions about the line should be drawn, I think -- that clear line obviously is they go and seek a resolution on the merits.

JUSTICE HECHT: Move for summary judgment.

MR. MICHEL: Move for summary judgment. This court has held back, the Fifth Circuit has held back. That is a -- I think that is at the heart of the issue because I tell you why. I think --

JUSTICE HECHT: Do you think there is anything short of that?

MR. MICHEL: I think there could be circumstances of getting there.

JUSTICE HECHT: Like what?

JUSTICE: Yeah.

JUSTICE: Like what?

JUSTICE: For example?

JUSTICE: We're worrying about a rule here.

MR. MICHEL: Right exactly, I understand. Well I think, you know, if they do go ahead and take or obtain discovery, obviously that's not obtainable in the arbitration process.

JUSTICE HECHT: How would you -- how would you ever know what's going to be available in a later arbitration process before it starts?

MR. MICHEL: You -- I think there are certain obviously subpoena power problems, things of that nature that you would be able to articulate. Of course, we are trying to get to the prejudice part. We would --

JUSTICE HECHT: And it's almost always completely up to the arbitrator. There maybe no discovery if they don't want it.

MR. MICHEL: Yes, possibly. I think, I mean some of the rules require it obviously. But obviously, you have the prejudice established by the actual discovery that was taken in -- in the litigation. Now, it is also I think setting up a really bad precedent if you are going to come in and say, oh here's the motion to compel arbitration. Oh, defendant you didn't prove waiver, so I'm sending you guys to arbitration. You go to arbitration - you go arbitration for your length of time or a year and then you come back and say, oh, now I'm going to prove waiver again.

JUSTICE MEDINA: So you'd like us to create a laundry list of things that they need to do to establish prejudice, should there be bright-line test?

MR. MICHEL: No. I think it is very differential, Justice Medina, as the U.S. Supreme Court itself, the Fifth Circuit, and this court has repeatedly held. This Court is taking great lengths to protect the integrity of the arbitration process. And to do so; it has had a strong presumption against waiver. I think this Court should stand with that. And additionally, another question about this opposition --

JUSTICE BRISTER: But usually the waiver -- every waiver case I've ever seen, it's just nobody said anything. They just filed the suit. And everybody started to litigate. And somebody discovered an arbitration clause. Are you aware of anyone, any waiver case that's ever addressed or somebody actually objected to it?

MR. MICHEL: No I don't believe the -- well, the Tyco case but no one's -- that there's a Tyco case. Once again --

JUSTICE BRISTER: It seems -- it just seems to me that if we've been arguing for years about waiver from the party maybe even didn't know there was an arbitration clause but they were doing all this discovery. This is a lot stronger where somebody knew there was and objected to it, said, I don't want to go, I want to stay here.

MR. MICHEL: With all due respect, you are talking about a decision that was made back in 2001. No defendant objected to the motion to compel arbitration on the grounds that the Culls opposed it. Judge -- Judge Ferar was making his decision at that point in time based on what the opposing side had -- had -- had objected to. They never raised it.

JUSTICE BRISTER: But -- but --

MR. MICHEL: Are we going to come back seven years later or we are now going to come back seven years later before this Court and say, you know what? You never raised this issue below"? And we're gonna allow you to raise it. You objected it for the first time before the Texas Supreme Court.

JUSTICE BRISTER: But we were, I mean, four days before trial, how can arbitration ever be faster if we don't start it until four days before the case was going to trial?

MR. MICHEL: The record was clear; the case was not going to go to

trail. It is not going to get reached on the docket. And the defendants have filed a motion for continuance. The Culls are an older couple. This was their dream home. It was virtually rendered valueless. And now they are facing for more delays against a very large defendant. They wanted to go to arbitrations to try to get a quick resolution. But once again, we're - we're looking at -- back in 2001. And nobody presented to this judge that they shouldn't go to arbitration because the Culls had opposed it. And now the first time we're hearing about it is before the Supreme Court. Additionally --

JUSTICE HECHT: In your -- let me ask you another question, if I may. In your letter to us, you cite the Hausen case recently. I hope not, that case is not recent but your letter is recent. And I assume if you knew of a case that said that the invocation of the judicial process was a waiver, That issue is to be decided by the arbitrator rather than the judge. You either decide it and you don't. Those cases do use the word "waiver," the Hausen case and the cases you cited. Are you aware of the case like this one where the Court held that it was an arbitrable issue rather than an issue for the court?

MR. MICHEL: I believe the case I cited, the Global case.

JUSTICE HECHT: Global Construction.

MR. MICHEL: Global Construction.

JUSTICE HECHT: It wasn't a delay before trial.

MR. MICHEL: I believe, you know, it's -- it's - it's not entirely clear. It does use the word "delay" and use the word "waiver." Now, I couldn't tell from the opinion whether that was squarely on the plate or not, although they used the words waiver" and -- and "delay."

JUSTICE: This issue has not ran for a while about when substantially invoking the judicial process is a waiver of arbitration. And it's odd that no court has said that that was -- should be reserved for the arbitrator.

MR. MICHEL: You know, we -- I have not found a single case that had brought up the issue of waiver in our current state the way -- after going to arbitration and then they come back to the court and raise "waiver." There's been a national search. No cite--no party has cited for this. That's why, to get back --

JUSTICE O'NEILL: It maybe why courts don't mandamus this.

MR. MICHEL: Well, I would think that that's time to handle it is the mandamus just like this Court has always done. That is the time to resolve the issue. You want to know now why do you waived it or not, right? Otherwise, you got to go through the whole arbitration process --

JUSTICE BRISTER: Well, some -- some people think cases go away on their own if you don't intervene it.

JUSTICE MEDINA: But we are running out of time, I want to hear your most compelling argument and why you should --

MR. MICHEL: My most compelling argument is waiver should not even be raised and addressed postarbitration. It is not part of the -- that's not a ground to vacate the arbitration. Alternatively, Justice Medina, it is an issue for the arbitrator to decide if they can raise it under whether it is a manifest disregarded law. They raised that issue from the trial court below. And that's the oddly -- either approach is fine with us is that you approach either at the motion to compel arbitration stage. And in any event they are tied to that record at that time. If it goes to arbitration, let the arbitrator decide whether waiver occurred or didn't occur because at that point, that can come up the appellate review after arbitration under the standard -- manifest disregard.

JUSTICE HECHT: Do you dispute Mr. Bracken's assertion that the warranty companies initially sought to compel arbitration but Perry Homes did not?

MR. MICHEL: That is correct. I believe that is correct. I will say this at the outset I have never heard that argument until right now but Perry Homes was saying they did not have that -- an arbitration agreement.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, that's all.

REBUTTAL ARGUMENT OF GEOFFREY H. BRACKEN ON BEHALF OF THE PETITIONER

JUSTICE JOHNSON: In account [inaudible] the arbitration are the waiver provision question was in fact presented to the arbitrator. Why should we not review that and defer to the arbitrator and look at it under a manifest disregarded the law process of reviewing the arbitration award as opposed to going back to the trial court?

MR. BRACKEN: Yes sir. There's two things that play here. This Court has determined in 2006 that when a trial court grants arbitration, that you can't raise that by way of mandamus. How I take the Places case to mean is, this is the proper time to bring that issue. And just so we are clear. Perry Homes is complaining about Judge Ferar's initial decision to send us to arbitration in the first place. Therein, with regard to what was the evidence for the record, it is uncontroverted that trial council asked the trial court to take judicial notice of its file, which would necessarily include the Cull's prior express repudiation of arbitration. So, in my opinion Justice Johnson, we have done what the Supremes had asked us to do in terms of the priming to bring this issue before this Court. There was an original motion to compel upon which all the defendants on the record contended that there was waiver. There was -- there - it's in this Court's record as well where trial council pointed out the fact that early on in this litigation, the Culls have rejected arbitration. And it was waiver. And it was unfair to all of the defendants at that time.

JUSTICE O'NEILL: Was that pointed out in the motion?

MR. BRACKEN: In the motion?

JUSTICE O'NEILL: Response to the motion?

MR. BRACKEN: No. Well, what happened, Judge O'Neill, was there was the motion and then there was an actual hearing. And there was testimony taken by trial counsel at that time, which is in this record that pointed out, you know, the procedural history of the case, pointed out the discovery that have been taken. Basically, it was an argument by trial counsel.

JUSTICE: Presented orally but not in the motion.

MR. BRACKEN: True. And in that record, is before the Court. And then there was a subsequent motion for a rehearing or an affidavit that addressed the attorney's fees that has been incurred to date and has been put in before -- before the court as well.

JUSTICE HECHT: Was the issue of the Culls' waiver arbitrated?

MR. BRACKEN: I think it was, Justice Hecht, but -- but here's - here's the procedural question for this Court. The Culls never said while we were before Judge Ferar or Judge Lowe, hey, that's an issue that needs to be considered by the arbitrator. So, there's an additional question or collateral question about whether or not the

Culls have waived their ability to come before here and say, hey, got you Perry Homes and the Warranty defendants. You guys didn't point that out to the trial court at that time. And -- and one of the things that I find particularly distressing in this whole case is --

JUSTICE HECHT: Let me be sure. The -- your position is that the question whether Culls' waived the -- waived arbitration by substantially invoking the judicial process was submitted to the arbitrator for decision?

MR. BRACKEN: I think the issue of waiver, Justice Hecht, was addressed in the body of the -- of the arbitration. The issue about whether substantial litigation conduct was waiver I think is a -- is a question that's peculiarly one for the courts and that certainly was raised.

JUSTICE O'NEILL: Let me make sure I understand that posture.

MR. BRACKEN: Yes ma'am.

JUSTICE O'NEILL: Do I understand that there were expert witness depositions taken during the arbitration?

MR. BRACKEN: Prior to the arbitration.

JUSTICE O'NEILL: So, at the four-day period before trial, there was still discovery yet to be done.

MR. BRACKEN: That's true.

JUSTICE O'NEILL: And was it apparent from the record that the case was going to be continued?

MR. BRACKEN: I think the case was going to be continued for a short time, at least that was the relief that was requested, I think, 30 days or 60 days to complete the expert depositions prior to trial.

JUSTICE O'NEILL: And -- and don't you think that should play into substantial invocation of the litigation process, I mean, if all the discovery is complete and you're picking the jury in four days, that's one situation. The other one is, there is still discovery left to do and you're going to get continued and that's another.

MR. BRACKEN: That's why this Court has the unique opportunity to address the situation when a plaintiff brings suit in the first instance. The cases seem to indicate that if a plaintiff brings suit in the first instance, they have started the judicial machinery. In my opinion, this should --

JUSTICE BRISTER: What if they don't? What if they didn't keep a copy of the contract that they forgot about the arbitration clause, they didn't look? It's not, we don't norm-waivers normally got to be intentional, not by accident.

MR. BRACKEN: Justice Brister on this record, there is no question but that the Culls they knew they had an arbitration clause. So, we don't have that situation here.

JUSTICE O'NEILL: But you could have pushed it, too. You chose not to push your arbitration clause.

MR. BRACKEN: We didn't want to go to arbitration.

JUSTICE O'NEILL: As they didn't push theirs at the time.

MR. BRACKEN: Right. And so the parties now have gone 13 months down -- down the line. They are ready to go to trial, and on the eve of trial, the Culls changed their mind.

JUSTICE BRISTER: How long did the arbitration last?

MR. BRACKEN: I don't know, your Honor. I wasn't present. I don't know.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, counselor. The cause is submitted. And the Court will take another brief recess.

MR. BRACKEN: Thank you, your Honor.

SPEAKER: All rise.

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