

# IN THE SUPREME COURT OF TEXAS

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No. 05-0882

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PERRY HOMES, A JOINT VENTURE, HOME OWNERS MULTIPLE EQUITY, INC.,  
AND WARRANTY UNDERWRITERS INSURANCE COMPANY, PETITIONERS,

v.

ROBERT E. CULL AND S. JANE CULL, RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

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**Argued March 20, 2007**

JUSTICE O'NEILL, concurring.

Most members of the Court agree that the Culls substantially invoked the litigation process before requesting arbitration; the point of disagreement is whether Perry Homes adequately proved it suffered prejudice as a result. I join the Court's opinion, but write separately to note that I believe the proof required to demonstrate prejudice in any given case should be measured by the degree to which the litigation process has been invoked. In some circumstances, a party's invocation of the judicial process may be so substantial that a court could presume the party resisting arbitration has been prejudiced and the right to arbitration has been waived. In my view, such a presumption may

easily be drawn on this record.

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Harriet O'Neill  
Justice

**OPINION DELIVERED:** May 2, 2008