IN THE SUPREME COURT OF TEXAS

NO. 05-0882

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

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

Argued March 20, 2007

JUSTICE JOHNSON, joined by CHIEF JUSTICE JEFFERSON and JUSTICE GREEN, concurring in part and dissenting in part.

I disagree that the trial court abused its discretion in compelling arbitration. I concur with the disposition of part VI-C. I dissent from parts VI-A and VI-B of the Court's opinion and dissent from its judgment.

The parties agree that their arbitration agreement covers the dispute and that the Federal Arbitration Act (FAA) applies. Thus, whether the Culls waived the right to arbitrate is a question of law. *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 574 (Tex. 1999); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703-04 (Tex. 1998). The Court has said previously, and says again today, that prejudice is a required element of waiver of the right to arbitrate cases subject to the FAA.

___ S.W.3d at ___; *see In re Bank One, N.A.*, 216 S.W.3d 825, 827 (Tex. 2007). The party asserting waiver has the burden to prove prejudice. *See In re FirstMerit Bank, N.A.*, 52 S.W.3d 749, 753-54 (Tex. 2001) (noting that if an agreement to arbitrate exists and the party opposing arbitration fails to prove its defenses, then a trial court has no discretion and its only option is to compel arbitration); *In re Bruce Terminix Co.*, 988 S.W.2d at 704 ("Even substantially invoking the judicial process does not waive a party's arbitration rights unless the opposing party proves that it suffered prejudice as a result."). In the context of the issue before us, prejudice means detriment. *See In re Bank One*, 216 S.W.3d at 827 ("A party waives an arbitration clause when it substantially invokes the judicial process to the other party's detriment."). We review a trial court's order compelling arbitration for an abuse of discretion. *See In re Bruce Terminix Co.*, 988 S.W.2d at 705. That standard is in accord with the general practice of reviewing a trial court's actions for an abuse of discretion when a trial court has discretion to grant or deny relief based on its factual determinations. *See Bocquet v. Herring*, 972 S.W.2d 19, 20-21 (Tex. 1998) (noting that the abuse of discretion standard of review as to a trial court's factual determinations applies when a trial court has discretion either to grant or deny relief based on its factual determinations). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the trial court's ruling was proper, but whether the trial court acted without reference to guiding rules and principles. *See Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004). The trial court's ruling should be reversed only if it was arbitrary or unreasonable. *Id*. at 839. Generally, if there is any evidence to support the trial court's ruling then the court did not abuse its discretion. *See In re BP Prods. N. Am., Inc.*, ___ S.W.3d ___, ___ (Tex. 2008) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 211 (Tex. 2002)). That is because it is

only when the evidence is such that the trial court could have made but one decision, yet made another, that we say the trial court abused its discretion. *Id*. Our decisions affording deference to trial court rulings when evidence supports those rulings comport with the standard of review utilized by the United States Fifth Circuit Court of Appeals in regard to whether a party has suffered prejudice for purposes of waiving arbitration rights subject to the FAA. The Fifth Circuit's position is that trial court findings on which the legal conclusion of waiver is based are predicate questions of fact "which may not be overturned unless clearly erroneous." *Price v. Drexel Burnham Lambert, Inc.*, 791 F.2d 1156, 1159 (5th Cir. 1986); *see also Republic Ins. Co. v. Paico Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004) ("[T]he district court's finding that PRLLC would suffer prejudice if arbitration was compelled is not clearly erroneous.").

The waiver issue in this matter is not determined by general waiver elements, but by waiver as that term is used in regard to avoiding arbitration agreements subject to the FAA. Generally, "waiver" is the intentional relinquishment of a right actually or constructively known, or intentional conduct inconsistent with claiming that right. *See Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). The elements of waiver include (1) an existing right, benefit, or advantage held by a party; (2) the party's actual or constructive knowledge of its existence; and (3) the party's actual intent to relinquish the right or intentional conduct inconsistent with the right. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 643 (Tex. 1996). The Culls' actions and their attorneys' statements in court, taken as a whole, present compelling evidence of those elements.

Waiver as that term is used in regard to arbitration agreements subject to the FAA, however, requires more than is required for general waiver—it requires proof that the party asserting waiver

as a defense to arbitration has suffered detriment. ___ S.W.3d at ___; *In re Bank One*, 216 S.W.3d at 827. So, when the Culls finally moved to compel arbitration and proved applicability of an arbitration agreement, Defendants unquestionably had the burden to raise and prove their defense of waiver, including prejudice, if they wanted to avoid arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d at 704.

Defendants recognized that to avoid arbitration they had to prove a defense to the arbitration agreement. As part of their response to the Culls' motion to compel arbitration, Defendants pled that (1) after suit was filed, all parties conducted written and oral discovery, (2) the Culls filed several motions and obtained two hearings and court rulings on discovery-related issues, and (3) a trial setting was imminent. Defendants conceded applicability of the arbitration clause, then cited authorities for and took the position that "Plaintiffs have waived arbitration because they substantially invoked the judicial process to the detriment of Defendants." Subsequently, Defendants more clearly detailed the detriment they were claiming:

> In this case, the *costs incurred by Defendants in responding to the motions to compel* filed by Plaintiffs would not have been incurred during the course of arbitration. Similarly, defendants are prejudiced by the fact that it [sic] was required to comply with the Court's orders on such motions to compel, *when such means and methods would not have been available in arbitration*. Because of Plaintiffs' delay in seeking arbitration, coupled with the resulting *prejudice by Defendants being required to respond to multiple discovery motions and comply with orders thereon,* Plaintiffs cannot now rely on the Limited Warranty Agreement to compel arbitration.

(Emphasis added). A second part of Defendants' response was a motion for continuance of trial to complete discovery.

At the hearing on the Culls' motion to compel arbitration, the trial judge, who noted at the end of the hearing that "I just finished [an arbitration] with the American Arbitration Association," admitted all the evidence offered, and took judicial notice of the court file as requested by Defendants. After evidence was introduced at the hearing, Defendants again argued that there were two factors involved: "whether or not the parties have acted inconsistently with the agreement to arbitrate and then whether those actions and the actions that were taken actually worked to the detriment or prejudice of the party that's opposing transference to arbitration."

During the hearing, the trial judge expressed considerable concern over the Culls' conduct. He discussed the Culls' testimony that they had knowledge of the arbitration clause before suit was filed, the extended time for which the case had been filed, and the impending trial setting. He also discussed the arbitration provision itself,[1] its mandatory nature, and pressed the Culls' attorney about the reason for the delay in requesting arbitration. Finally, he asked about a provision in the arbitration provision that provided "if any party commences litigation in violation of this Agreement, such party shall reimburse the other parties to the litigation for their costs and expenses including attorney's fees incurred in seeking dismissal of such litigation." The Culls' attorney acknowledged the provision and asserted that it would be up to the arbitrator to determine whether the Culls would

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[1] In relevant part, the provision provided for the homeowners, the builder, the administrator of the warranty program, and the warranty insurer to submit to arbitration

> all claims, demands, disputes, controversies, and differences that may arise between the parties to this Agreement of whatever kind or nature, including without limitation, disputes: (1) as to events, representations, or omissions which pre-date this Agreement; (2) arising out of this Agreement or other action performed or to be performed by the Builder, the Administrator or the Insurer pursuant to this Agreement.

As to procedures in arbitration, the arbitration provision provided that "The Arbitration shall be conducted in accordance with the Arbitrator's rules and regulations to the extent that they are not in conflict with the Federal Arbitration Act."

be responsible for such fees and costs of Defendants. Defendants did not dispute the Culls' position. Then, agreeing with the assertions of the parties, the trial judge did not address whether the judicial process had been substantially invoked; rather, the court concluded Defendants had not shown the prejudice they claimed and granted the Culls' motion:

> The question is, I think, when it deals with waiver is *are the defendants prejudiced by this delay, and if they are not prejudiced or if there is not proof of prejudice, then the Court has no alternative but to order the case abated for arbitration purposes*.
>
> And, [counsel for Defendants], *all* I have heard from you insofar as what is the prejudice suffered by people you represent is that *they have participated in litigation activities that may or may not have been required by the arbitrator*. So without anything further, I'm going to grant the motion to abate the case for arbitration.[2]

(Emphasis added).

Perry Homes filed a motion for reconsideration. In their motion, Perry Homes again asserted that "all parties have conducted written and oral discovery under the Texas Rules of Civil Procedure" but did not complain that they had been denied any discovery. Perry Homes' motion recapped the prejudice they were claiming:

> Defendants have in fact been prejudiced by Plaintiffs' last-minute attempt to disclaim their election to file suit and instead choose arbitration. In this case, *the costs incurred by Defendants*—including attorneys' fees and man hours—in attending 16 depositions, responding to multiple sets of written discovery and responding to the motions to compel filed by Plaintiffs *would not have been incurred during the course of arbitration*. *Similarly, Defendants are prejudiced by the fact that they were required to comply with the Court's orders on such motions to compel, when such means and methods would not have been available in arbitration.* The amount of attorney time Perry Homes has invested in responding to Plaintiffs' discovery requests and related motions thus far is 122 attorney hours and 20 paralegal hours.

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[2] The trial court did not order arbitration as to defendants Jerald W. Kunkel, the foundation engineer, and his firm. The Culls agreed the Kunkel defendants were not covered by the arbitration agreement. The Kunkel defendants are not parties to this appeal.

(Emphasis added). An affidavit was attached setting out that the law firm representing Perry Homes had spent 122 attorney hours and 20 paralegal hours in responding to the Culls' discovery requests and related motions.[3] The hours were not broken down and no dates, times, or tasks were set out. There was no specification as to time spent on actions Defendants claimed as prejudice—responding to motions to compel discovery and complying with court orders compelling discovery that would not have been available in arbitration. The docket sheet reflects that the trial court denied the motion, but the record contains neither a transcript from the hearing nor an order ruling on the motion.

The Court agrees that the standard of review applicable to the trial court's order compelling arbitration is abuse of discretion, but its holding that the Culls waived their right to arbitrate misses the mark. In reaching its conclusion, the Court says the question of prejudice is a matter of law because all the relevant facts were undisputed. It seems to me that (1) there was evidence requiring the trial court to make evidentiary determinations as to prejudice, and (2) Defendants did not prove that they were prejudiced or that the Culls obtained an advantage because of the litigation process.

As to the evidence that the trial court was required to weigh and make evidentiary determinations on, the record reveals that Defendants took depositions and engaged in written discovery, as did the Culls. Yet Defendants did not claim prejudice due to the Culls somehow reaping an unfair advantage through discovery. The trial court could have considered the advantages accruing to all parties by depositions and bilateral written discovery and determined that no prejudice

[3] Defendants referenced depositions in their motion for rehearing. They did not take the position or offer proof at the hearing on the Culls' motion to compel arbitration that depositions would not have occurred in arbitration either by permission of the arbitrator or by agreement.

was shown because all parties were more fully prepared to proceed with dispute resolution by knowing what the testimony of witnesses would be, and that such knowledge would shorten arbitration and reduce further costs.

Next, at the time of the hearing on the motion to compel there was an imminent trial setting. But Defendants did not claim they had spent time preparing to go to trial at the December 10 setting and that those hours would be wasted unless they went to trial immediately. At the December 6 hearing on the motion to compel, the parties agreed the case would not be ready for trial at the December 10 setting, and the Culls' attorney stated that, according to the court clerk, the case probably would not be reached for trial. In any event, a trial setting and actually going to trial are different matters. Even though Defendants moved for a continuance and requested the case to be reset in two months, there is nothing in the record to show when the next setting actually would have been, much less when the case would have gone to trial if the motion for continuance had been granted. The Court speculates that trial would have occurred sooner than arbitration took place. To the extent a resetting or actual future trial date should be considered, however, the trial court was in the best position to determine when any new setting would have occurred—whether days, weeks, or months in the future—and to determine the weight to give the setting and a potential trial date along with the other factors.

Further, the Court discounts evidence of a contractual provision in the arbitration clause requiring any party that commenced litigation in violation of the arbitration clause to reimburse other parties' litigation expenses and costs. The clause is not a model of clarity as to exactly what was recoverable:

> Inasmuch as this Agreement provides for mandatory arbitration of disputes, if any party commences litigation in violation of this Agreement, such party shall reimburse the other parties to the litigation for their costs and expenses including attorney's fees incurred in seeking dismissal of such litigation.

It was the trial court's goal, just as it is ours, to ascertain the true intent of the parties to the agreement. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003). The language used in the agreement is the primary evidence of that intent. *See id.*; *National Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). If the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, creating a fact issue on the parties' intent. *See J.M. Davidson*, 128 S.W.3d at 229.

The Court construes the clause as allowing reimbursement for expenses and attorneys' fees incurred in seeking dismissal of the lawsuit, but not for expenses and fees in preparing the suit for trial. However, the clause can also be read as requiring reimbursement of *all* litigation costs and expenses, including but not limited to attorneys' fees incurred in seeking dismissal of the litigation. And that, apparently, is how the parties interpreted the agreement. The trial court questioned the Culls' attorney about whether the Culls would be responsible for the Defendants' attorneys' fees and costs. When the Culls' attorney replied that it was an issue for the arbitrator, the Defendants' attorney did not contend otherwise. *See Mathis v. Lockwood*, 166 S.W.3d 743, 744-45 (Tex. 2005); *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997). The Culls' attorney's representations and lack of protestation by Defendants' attorney is the only evidence in the hearing record about the parties'

intent as to the language in the clause.[4] Under the abuse of discretion standard by which we review the trial court's order, the reimbursement clause and the attorneys' respective representations and silence is part of the entire record which we must consider in determining whether the trial court followed guiding rules and principles. *See Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852 (Tex. 1992); *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992).

But even if the Court is right and the reimbursement clause does not allow for recovery of all Defendants' litigation attorney's fees, an arbitration award would not be subject to being vacated if an arbitrator interpreted the clause to allow recovery of all the fees. If arbitrators simply misinterpret a contractual clause such as the reimbursement clause, that type of error is not one which will justify setting aside an award.[5] *See Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 269

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[4] Although not before the trial court when it ordered arbitration, the arbitration record now before us shows that Defendants considered the clause to provide for recovery of *all* litigation costs and attorneys' fees, not just those incurred in seeking dismissal of the lawsuit. The arbitration record shows Defendants claimed that pursuant to the reimbursement clause they were "entitled to recover or setoff [their] attorney's fees from [the Culls], which were incurred in connection, with the litigation." Perry Homes' attorney submitted an affidavit to the arbitrator in support of the claim for attorneys' fees recovery or setoff. The affidavit mirrored the affidavit submitted as part of Defendants' motion for reconsideration that was earlier filed in the lawsuit. The arbitration affidavit claimed that

> Prior to the Court's order compelling arbitration, Perry Homes incurred one-hundred-twenty-two (122) attorney hours and twenty (20) paralegal hours responding to Claimants' discovery requests and discovery-related motions. Accordingly, Perry Homes is entitled to an offset in the amount of $26,400.00 against any damages awarded to Claimants, due to their violation of the arbitration agreement.

[5] The Federal Arbitration Act provides that an arbitration award may be set aside for limited reasons:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

(7th Cir. 2006) (noting that in reviewing an arbitration award under the FAA, "the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all"). Under the circumstances, it was proper for the trial court to weigh, and the record shows it did, the reimbursement provision and the parties' representations in deciding that Defendants had not proved they suffered prejudice. Regardless of the trial court's interpretation of what costs and expenses would be recoverable under the reimbursement provision, the mere existence of the provision and its reimbursement requirement comprise evidence supporting the decision to order arbitration and properly leave construction and application of the clause to the arbitrator.

In sum, there were decisions for the trial court to make based upon weighing evidence, drawing inferences from it in light of the parties' contentions, determining what the evidence and inferences proved, and drawing a conclusion as to Defendants' claims of prejudice. That situation requires our deferring to the trial court's findings and order when the standard of review is abuse of discretion.

Despite evidentiary matters the trial court had before it which warrant our deferring to its implied and stated findings, the Court sets out factors that were uncontroverted, then concludes, without ever saying exactly how, that Plaintiffs were advantaged or Defendants were prejudiced by the "inherent unfairness" of it all:

> Here, the record before the trial court showed that the Culls objected to arbitration initially, and then insisted on it after the Defendants acquiesced in litigation. They got extensive discovery under one set of rules and then sought to arbitrate the case under another. They delayed disposition by switching to arbitration when trial was imminent and arbitration was not. They got the court to order

> discovery for them and then limited their opponents' rights to appellate review. Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

___ S.W.3d at ___. No one (but the Culls and their attorneys) could seriously disagree that the Culls' conduct smacks of inequity. But even disregarding the evidentiary questions the trial court had to resolve as set out above, when the record is searched for evidence that Defendants suffered prejudice *as Defendants claimed*—by incurring expenses in discovery proceedings, responding to discovery motions, and complying with court orders on discovery when that type of activity would not be available in arbitration—there is none. Nor is there evidence that the Culls were unfairly advantaged. The fact of the matter is that all parties took part in litigation discovery as part of the process to resolve their dispute. The Court discusses at length how the facts are undisputed, how ordering the parties to arbitration resulted in "inherent unfairness" to Defendants, and that such "inherent unfairness" equates to prejudice to Defendants, or conversely, unfair advantage to the Culls. However, the authorities used to support the Court's statements do not cut nearly so broadly as the Court indicates. The cases cited incorporate elements such as delay, expense, damage to a party's legal position, or "tactical advantage" by which to measure prejudice to one party or unfairness to the other party. ___ S.W.3d at ___ n.94 (citing *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 47 n.5 (1st Cir. 2005) ("[A] party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an *unfair tactical advantage* over the opposing party." (emphasis added)); *Doctor's Assocs. v. Distajo*, 107 F.3d 126, 134 (2d Cir. 1997) ("[P]rejudice as defined by our cases refers to the inherent unfairness—*in terms of delay, expense,*

or damage to a party's legal position—that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." (emphasis added)).

The following passage embodies the substance of the Court's opinion as to prejudice or unfair advantage:

> It is also unquestionably true that [the Cull's] conduct prejudiced the Defendants. "Prejudice" has many meanings, but in the context of waiver under the FAA it relates to inherent unfairness—that is, a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage:
>
> > [F]or purposes of a waiver of an arbitration agreement[,] prejudice refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue.
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> Thus, "a party should not be allowed purposefully and unjustifiably to manipulate the exercise of its arbitral rights simply to gain an unfair tactical advantage over the opposing party."
>
> . . . Such manipulation of litigation for one party's advantage and another's detriment is precisely the kind of inherent unfairness that constitutes prejudice under federal and state law.

___ S.W.3d at ___ (citations omitted). As noted previously, the Court does not specify how Defendants proved, at the hearing on the Culls' motion to compel arbitration, detriment from delay, damage to Defendants' legal position or a tactical advantage achieved by the Culls, which perhaps is just as well because Defendants did not claim those types of prejudice in the trial court. Defendants claimed prejudice because of discovery and court hearings that would not have occurred in arbitration. But contrary to the Court's conclusion that discovery would have been limited in arbitration, the broad arbitration clause did not preclude any particular type or level of discovery. It provided that arbitration would be conducted according to the arbitrator's rules so long as they did not conflict with the FAA. Specifically, and by way of example, Defendants did not claim prejudice

from or prove that (1) delay because of litigation interfered with their business activities, caused them loss of evidence, or interfered with their ability to arbitrate; (2) if an arbitrator had ordered the lawsuit discovery pursuant to the arbitration clause, the order would have violated the arbitration clause; (3) had the litigation discovery been requested in arbitration, Defendants would have agreed to it and conferences with the arbitrator would not have been necessary; (4) the litigation discovery was not useable in arbitration; (5) Defendants had already begun trial preparations or taken other litigation related actions that would have been wasted effort if the case went to arbitration; or (6) Defendants suffered compromise of their legal position on the merits of the Culls' claims.

There was not an offer of proof such as by expert testimony, Defendants themselves, their attorneys or otherwise, that all, some, or any arbitrators probably would not have allowed the discovery, that their agreement or a rule limited discovery in arbitration, or Defendants wasted any litigation discovery effort. And to boot, arbitrators do not come free. Disclosure conferences in arbitration might well have cost more than discovery hearings in litigation because arbitrators generally charge for preparing for and attending conferences while trial judges do not. Nor have Defendants claimed that their attorneys would not have charged fees for arbitration discovery activities. So the possibility exists that the disclosure process in arbitration could have ended up costing more than litigation discovery.

The Court questions whether broad discovery is generally available in arbitration, but the parties here do not argue that it is. What *is* argued here is that the parties' contract provided how the arbitration was to be conducted—through adherence to the arbitrator's rules so long as those rules do not conflict with the FAA—and that Defendants did not prove any litigation discovery that would

have been in violation of the contract. The Court says that as of the time of the hearing on the Culls' motion to compel arbitration, what discovery an arbitrator would allow was purely speculative. But arbitration is not new; Defendants could have at least attempted to prove the custom and practice, if any, of arbitrators as to discovery in arbitration, even though each arbitration is governed by the particular agreement between the parties. Even if such evidence might have been ruled speculative, as the Court concludes it would have been, the obligation to overcome the burden of proof still lay with Defendants. *See Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 772-74 (Tex. 2007) (recognizing difficulties of proving asbestos claims against individual defendants, yet requiring plaintiffs to meet that burden).

The Court says that "a party who enjoys substantial direct benefits by gaining an advantage in the pretrial litigation process should be barred from turning around and seeking arbitration with the spoils." ___ S.W.3d at ___. I agree with that statement. The problem is that the Court does not apply the statement in its entirety to this case. The Court assumes, without requiring Defendants to prove, that the Culls obtained some advantage or caused detriment to Defendants by both parties having engaged in discovery activities. It is hard to see how discovery of facts, witness names, documents, and testimony about the controversy can prejudice either party. *See Jampole v. Touchy*, 673 S.W.2d 569, 573 (Tex. 1984) (noting that discovery is done so disputes may be decided by what the facts are, not by what facts are concealed). Defendants neither alleged nor proved that they were prejudiced because some privileged, proprietary, or confidential matter had been disclosed. Discovery in both judicial proceedings and in arbitration facilitates just and reasonable resolutions of disputes and helps prevent unjust and unreasonable resolutions because of ambush, surprise, or

concealment of relevant, nonprotected, nonprivileged evidence which could sway the outcome. Furthermore, I disagree with the idea that merely making discovery disclosures is evidence of wasted effort or other prejudice. Although the extent to which a party engages in litigation discovery plays a significant part in determining whether that party substantially engaged the litigation process, disclosure of relevant, nonprivileged evidence, names of witnesses, and information makes just and reasonable dispute resolution more likely regardless of whether disclosure is strictly voluntary or is made in judicial discovery proceedings or arbitration proceedings.

Evidence at the hearing on the Culls' motion to compel arbitration consisted only of testimony by the Culls and five documents they introduced: the earnest money contract, the application for warranty, the limited warranty agreement containing the arbitration provision, a letter from the warranty company, and a copy of one of Defendants' original answers. The Culls acknowledged in their testimony that discovery and depositions had occurred, but they were unsure of how many depositions and how much discovery. Defendants requested the trial court to take judicial notice of "five separate motions to compel discovery and two separate orders on some, but not all, of the motions to compel." The court took notice of "its file," which at that time mostly consisted of copies of pleadings and discovery requests attached as exhibits to motions. The file contained only one or two of the documents actually produced in discovery. There were two orders on the Culls' motions to compel discovery. The second order referred only to the Kunkel defendants who were not ordered to arbitration. Because the Kunkel defendants were not ordered to arbitration, the trial court could have determined that any orders or motions relating solely to them should not be considered in regard to prejudice as to the other Defendants. In short, the record on which the

trial court ruled on December 6 was not extensive, and although it showed what the Culls *requested*, practically none of the record was of what Defendants *produced* in discovery, which was filed later when Defendants sought to set aside the arbitration award. And Defendants did not allege in the trial court that some or even any of the discovery would not be *useful* in arbitration, only that the discovery would not be *available* in arbitration.

Last, the Court says that requiring Defendants to file detailed proof of the discovery would have made the record more cumbersome and would have entailed more expense, and that to show prejudice, Defendants only had to show substantial wasted effort anyway. The Court then concludes that the record before the trial court at the time of the hearing showed substantial wasted effort, and thus detriment, to Defendants. But in *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759 (Tex. 2006), the Court declined to determine that waiver of the right to arbitrate occurred when the party opposing arbitration failed to introduce any of the discovery documents, present details about them, or contend that the discovery would not be useful in arbitration. The record, the Court stated,

> does not show whether these requests were limited or extensive, whether they sought information for affirmative claims or defensive ones, or even whether they addressed the merits or merely the arbitration issue. Further, [plaintiff] does not allege that the discovery already conducted would not be useful in arbitration; to the contrary, he concedes it would be useful whether the case is arbitrated or tried.

Id. at 763.

Neither party here claimed before arbitration (nor, for that matter, after arbitration) that the litigation discovery would not be useful in arbitration. On the other hand, and as addressed below, Defendants claimed after arbitration that they suffered prejudice because Plaintiffs' attorney used the discovery depositions to prepare for arbitration. In this regard, there are further inferences from

the record that the Court does not credit but that the trial court could have made when it compelled arbitration: both parties would use the litigation discovery and depositions to prepare for arbitration, the discovery would be useful in arbitration, and neither party was unfairly advantaged or suffered detriment from the discovery.

In summary, the Court (1) does not limit its review to Defendants' claims of prejudice made in the trial court, (2) disregards factors that presented the trial court with decisions to make based on evidence allowing for different interpretations and inferences, and (3) assumes "inherent unfairness" equates to Defendants' prejudice or the Culls' unfair advantage from litigation conduct and effectively forgives Defendants' failure to prove detriment to themselves or advantage to the Culls.

Defendants make other contentions not reached by the Court, but none of them warrant holding that the trial court abused its discretion. In their brief to this Court, Defendants reference rules of the American Arbitration Association and urge that the AAA Rules of Procedure provide for limited discovery in that the arbitrator is limited to directing "(i) the production of documents and other information, and (ii) the identification of any witnesses to be called." Defendants also assert that they were prejudiced because during post-arbitration proceedings, the Culls' attorney testified that he reviewed deposition testimony in preparing for the arbitration and depositions are not generally available in arbitration.[6] First, Defendants did not introduce the AAA rules into evidence at the hearing or ask the trial court to take judicial notice of them. Second, to the extent the

[6] Of course, that argument cuts against the idea that discovery was not usable in arbitration.

arguments encompass discovery depositions, Defendants did not complain in the trial court that they were prejudiced by the taking of depositions or that the Culls planned to use them in arbitration, and the argument cannot be raised here. *See* TEX. R. APP. P. 33.1; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 577 (Tex. 2006) (noting that except for fundamental error, appellate courts are not authorized to consider issues not properly raised by the parties). Third, even if the AAA rules had been before the trial court, there was no evidence that all, most, or any arbitrators would have refused to require disclosure of any of the matters disclosed by Defendants. Finally, Defendants' attorneys had access to the same deposition testimony to use for arbitration preparation, so there could not have been an unfair advantage to the Culls by use of the depositions.

I conclude the record is not conclusive either that Defendants suffered prejudice as they claimed or that the Culls obtained an unfair advantage by litigation conduct as the Court holds. I also conclude that evidence before the trial court required the court to weigh and draw inferences from it and that some evidence supports the trial court's determination that Defendants did not prove prejudice to themselves or unfair advantage to the Culls by use of the litigation process. Accordingly, I would hold that the trial court did not abuse its discretion by compelling the parties to arbitrate and I would affirm the judgment of the court of appeals.

Phil Johnson
Justice

OPINION DELIVERED: May 2, 2008