

# 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 WILLETT, concurring in part and dissenting in part.

Arbitration has become a hot-button topic for the Court of late—in this Term alone we have decided at least three arbitration-related cases<sup>1</sup> and heard argument in four more.<sup>2</sup> As the range of opinions in this case demonstrates, the invocation and operation of arbitration provisions can present tricky legal questions that spark honest differences of opinion. I agree with Parts I-V of the Court's decision, and also with much of Part VI regarding waiver. However, I respectfully dissent from the

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<sup>1</sup> See *Chambers v. O'Quinn*, 242 S.W.3d 30 (Tex. 2007); *In re U.S. Home Corp.*, 236 S.W.3d 761 (Tex. 2007). This case is the third.

<sup>2</sup> *In re Gulf Exploration, LLC*, 211 S.W.3d 828 (Tex. App.—Eastland 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (Nov. 2, 2007); *E. Tex. Salt Water Disposal Co. v. Werline*, 209 S.W.3d 888 (Tex. App.—Texarkana 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (Nov. 2, 2007); *Bison Bldg. Materials v. Aldridge*, 2006 WL 641280 (Tex. App.—Houston [1st Dist.] 2006), *pet. granted*, 51 Tex. Sup. Ct. J. 77 (Nov. 2, 2007); *Forest Oil Corp. v. McAllen*, 2005 WL 3435061 (Tex. App.—Corpus Christi 2005), *pet. granted*, 51 Tex. Sup. Ct. J. 667 (Apr. 27, 2007).

Court's ultimate result, not on an arbitration law issue, but on a much more old-fashioned ground—the applicable standard of review.

The Court properly acknowledges that a trial court's order compelling arbitration is reviewed for abuse of discretion. Under this standard, we will reverse the trial court only when “it acts in an arbitrary or unreasonable manner, without reference to any guiding rules or principles.”<sup>3</sup> I agree with the Court, and the trial judge for that matter, that the record clearly shows that the Culls substantially invoked the judicial process. I also agree with the Court that the cost-reimbursement provision in the arbitration agreement does not prevent Perry Homes from showing prejudice resulting from the Culls' arbitration flip-flop. JUSTICE JOHNSON is comforted by the possibility that an arbitrator might (mis)construe this provision to award Perry Homes *all* its litigation-related costs and fees, but I am not. The provision limits reimbursement to “costs and expenses including attorney's fees incurred *in seeking dismissal of such litigation,*” and we cannot plausibly say Perry Homes fails on prejudice because an arbitrator may misread the agreement.

Having said all that, I cannot conclude, as does the Court, that the trial court abused its discretion by compelling arbitration. I believe in waiver-by-conduct, but Perry Homes bore the threshold responsibility of building a record upon which the trial court could find prejudice. The record on appeal is far more extensive than what the trial court considered (and the arguments far more refined), but I agree with JUSTICE JOHNSON that the trial court—sitting where it sat, seeing what it saw, hearing what it heard, reviewing what it reviewed—did not abuse its discretion in

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<sup>3</sup> *In re Nitla*, 92 S.W.3d 419, 422 (Tex. 2002) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985)).

concluding “no prejudice.” Trial courts do not have carte blanche “to send any case to arbitration no matter what has occurred in court,”<sup>4</sup> but I cannot conclude that this trial court acted “without reference to any guiding rules or principles”<sup>5</sup> in ruling that Perry Homes fell short of building a trial-court record that showed prejudice. This is admittedly a close call, and the Court makes the best possible case for going the other way. Given the relevant record, however, I have a difficult time saying the trial court acted arbitrarily or disregarded all guiding standards in not reaching the opposite result. Accordingly, I dissent from the Court’s decision vacating the arbitration award and remanding for trial.

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Don R. Willett  
Justice

Opinion delivered: May 2, 2008

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<sup>4</sup> \_\_\_ S.W.3d \_\_\_.

<sup>5</sup> *Nitla*, 92 S.W.3d at 422.