

ue of the evidence.”). Thus, the trial court did not abuse its discretion in granting Defendants’ motion *in limine*.

Conclusion

For the reasons stated above, we affirm. **AFFIRMED.**

Judges CALABRIA and STROUD concur.



Mark ELLIOTT, Tor and Michelle Gabrielson, Michihiro and Yoko Kashima, on behalf of themselves and all others similarly situated, Plaintiffs,

v.

KB HOME NORTH CAROLINA, INC. and KB Home Raleigh–Durham, Inc., Defendants,

and

KB Home Raleigh–Durham, Inc., Third–Party Plaintiff,

v.

Stock Building Supply, LLC, Third–Party Defendant.

No. COA13–352.

Court of Appeals of North Carolina.

Dec. 17, 2013.

Background: Homeowners filed class action lawsuit against general contractor, alleging breach of contract, breach of express warranties, breach of implied warranties, negligence, negligence per se, unfair and deceptive trade practices, and negligent misrepresentation, based on contention that their homes were improperly constructed in manner that allowed water and moisture to penetrate the exteriors of the houses. The Superior Court, Wake County, John R. Jolly, Jr., J., 2012 WL 5385181, 2012 NCBC 55, denied con-

tractor’s motion to compel arbitration. Contractor filed interlocutory appeal.

Holdings: The Court of Appeals, McGee, J., held that:

- (1) trial court was not required to determine whether Federal Arbitration Act (FAA) or North Carolina Revised Uniform Arbitration Act (NCRUAA) controlled;
- (2) evidence was sufficient to support finding in determining that contractor’s actions were inconsistent with its right to arbitrate;
- (3) evidence was sufficient to support trial court’s findings in determining general contractor waived its right to arbitrate; and
- (4) contractor waived its right to compel arbitration against unnamed class members.

Affirmed.

1. Alternative Dispute Resolution ⇔213(3)

Order denying arbitration is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

2. Alternative Dispute Resolution ⇔202

Trial court was not required to determine whether Federal Arbitration Act (FAA) or North Carolina Revised Uniform Arbitration Act (NCRUAA) controlled in homeowners’ class action against general contractor stemming from alleged improperly constructed homes prior to deciding whether contractor waived its arbitration rights arising from clauses in home purchase agreements and limited warranty agreements, since FAA only applied in federal district court. 9 U.S.C.A. § 3; West’s N.C.G.S.A. § 1–569.1 et seq.

3. Alternative Dispute Resolution ⇔182(2)

When a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused expenditure of significant expense, including attorneys’ fees, strong

public policy in favor of arbitration is thereby diminished.

4. Alternative Dispute Resolution ⇌182(2)

Evidence was sufficient to support trial court's finding, in determining that general contractor's actions were inconsistent with its right to arbitrate claims asserted against it by homeowners in class action stemming from allegedly improperly constructed homes, that contractor did nothing to assert any right to arbitrate over period in which it participated in litigation; issue of arbitration was not raised until more than three years had passed since action was filed.

5. Alternative Dispute Resolution ⇌182(2)

Evidence was sufficient to support trial court's findings, in determining general contractor waived its right to arbitrate claims asserted against it by homeowners in class action stemming from allegedly improperly constructed homes, that homeowners incurred significant litigation expenditures of time and expenses, as factor in determining whether homeowners suffered prejudice, despite contention that findings failed to show how much of incurred expense could have been avoided had contractor sought to compel arbitration at earlier date; contractor delayed request for arbitration until three years after action began, and homeowners incurred approximately \$100,000 in fees litigating claims.

6. Alternative Dispute Resolution ⇌182(2)

General contractor waived its right to compel arbitration against unnamed class members in class action asserted by homeowners stemming from alleged improperly constructed homes, even though much of homeowners' expenditures occurred before class was certified, since class became tangible beneficiaries of that expenditure upon certification; more than three years passed between initiation of class action and contractor's motion to compel arbitration, contractor litigated case during three-year period while sitting on any contractual rights it had to arbitrate, and homeowners invested significant amounts of time and money prosecuting case on behalf of themselves and purported class.

7. Alternative Dispute Resolution ⇌182(1)

Trial court was not required to rule on subcontractor's obligation to arbitrate claims asserted against it as third-party defendant in homeowners' class action against general contractor stemming from alleged improperly constructed homes, since right to arbitrate was waived by contractor.

Appeal by Defendant KB Home Raleigh-Durham, Inc. from order entered 2 November 2012 by Judge John R. Jolly, Jr., in Superior Court, Wake County. Heard in the Court of Appeals 8 October 2013.

Whitfield Bryson & Mason LLP, Raleigh, by Daniel K. Bryson, Scott C. Harris, Gary E. Mason, pro hac vice, Nicholas A. Migliacchio, pro hac vice, and Jason S. Rathod, pro hac vice, for Plaintiffs-Appellees.

Bradley Arant Boult Cummings LLP, Charlotte, by Michael W. Knapp and Brian M. Rowson, for Defendant/Third-Party Plaintiff-Appellant KB Home Raleigh-Durham, Inc.

Hunton & Williams LLP, Charlotte, by A. Todd Brown and Ryan G. Rich, for Third-Party Defendant-Appellee Stock Building Supply, LLC.

McGEE, Judge.

KB Home Raleigh-Durham, Inc. ("Defendant") is a general contractor in the business of building homes. Defendant has contracted with many people over the years to build homes, including Mark Elliott, Tor Gabrielson, Michelle Gabrielson, Michihiro Kashima, and Yoko Kashima ("Plaintiffs"). According to Defendant, each homeowner who purchased a home directly from Defendant "entered into two separate written contracts with [Defendant]: a New Home Purchase Agreement . . . and a New Home Limited Warranty Agreement[.]" Defendant alleged that both of these agreements included enforceable arbitration clauses.

Plaintiffs filed a class action complaint, "on behalf of themselves and all other[s] . . . similarly situated," against Defendant and KB Home North Carolina, Inc. on 5 December 2008, alleging breach of contract, breach

of express warranties, breach of implied warranties, negligence, negligence *per se*, unfair and deceptive trade practices, and negligent misrepresentation. Plaintiffs' complaint was based upon their contentions that their homes, and those of the purported class members, were improperly constructed in a manner allowing water and moisture to penetrate the exteriors of the houses, causing damage. Specifically, Plaintiffs alleged that the HardiPlank concrete siding on their homes had been improperly installed, and that this improper installation was the cause of the water and moisture intrusion into their homes. Defendant and KB Home North Carolina, Inc. filed a motion to dismiss on 6 February 2009. The matter was heard on 22 April 2009. By order filed 17 July 2009, the trial court dismissed KB Home North Carolina, Inc. from this action.

Defendant answered Plaintiffs' complaint on 5 August 2009, denying the majority of the allegations in Plaintiffs' complaint, and pleading twenty affirmative defenses. Defendant requested that the trial court deny Plaintiffs' request for class certification, and that "all issues of fact be tried by a jury[.]" Defendant did not move to compel arbitration in response to Plaintiff's complaint. Defendant and Plaintiffs began the discovery process, and Defendant served its first set of interrogatories on Plaintiffs on 13 October 2009. In this first set of interrogatories, Defendant defined "Plaintiffs" as the named Plaintiffs along with "any other known members of the Class as asserted in Plaintiffs' Complaint[.]" Defendant filed a third-party complaint against Stock Building Supply, LLC ("Stock") on 19 January 2010. Stock was the subcontractor hired by Defendant to install the HardiPlank siding. Defendant alleged that Stock "explicitly agreed to participate in binding arbitration regarding all claims arising from the construction of Plaintiffs' homes." However, Defendant did not demand arbitration at the time it filed its third-party complaint.

This action was designated a complex business case on 17 June 2010. Defendant, Plaintiffs, and Stock jointly filed a case management report with the North Carolina Business Court on 14 September 2010, in

which Defendant and Plaintiffs agreed "that pretrial proceedings and trial will take place at the North Carolina Business Court sitting in Wake County, N.C., unless otherwise agreed to by the parties and the Court[.]" and that "no controversies exist with respect to . . . venue."

It appears that Defendant's first mention of arbitration with respect to Plaintiffs is contained in a supplemental response to Plaintiffs' third set of interrogatories, dated 28 March 2011. Plaintiffs asked: "Identify any contractual obligations that Plaintiffs have failed to perform which is the basis for your [affirmative defense that 'Plaintiffs have failed to perform Plaintiffs' own contractual obligations']." Defendant responded in part: "Plaintiffs, including any unnamed potential class members, have failed to timely mediate and then arbitrate the claims as provided by the terms of the New Home Purchase Agreement and Limited Warranty Agreement." Defendant did not, however, move to compel arbitration at that time. The action proceeded, and the trial court entered an order on 27 February 2012 certifying the class as "[a]ll persons in the State of North Carolina who own a home constructed by Defendant . . . without a weather-restrictive barrier behind the exterior veneer of HardiPlank cement fiber lap siding" (excluding certain potential class members for reasons irrelevant to this appeal). Defendant appealed the order certifying the class on 28 March 2012. Defendant, on 12 April 2012, filed a motion to stay the class certification pending appeal. Defendant's motion to stay was denied by order entered 13 April 2012. Defendant then petitioned this Court for a writ of *supersedeas*, asking this Court to stay the proceedings below. Defendant's petition was denied on 27 August 2012. Defendant also filed a petition for writ of *certiorari* with this Court on 11 July 2012.

In its notice of appeal, Defendant argued the order certifying the class was immediately appealable because it affected a substantial right. Specifically, and for the first time, Defendant contended that the order certifying the class was an "order denying arbitration" because it denied Defendant "its substantial right to bilateral arbitration with the

absent class members.” However, Defendant still had not attempted to enforce any right to arbitration at the time it appealed the class certification order. Defendant finally filed a motion to compel arbitration on 12 April 2012. This was Defendant’s first assertion of its rights pursuant to the arbitration clauses in the two agreements.

Plaintiffs moved this Court to dismiss Defendant’s appeal on 10 July 2012, and argued that Defendant’s petition for writ of *certiorari* should be denied. In response, Defendant argued that the class certification order “did more than just grant class certification. It inherently and simultaneously denied [Defendant’s] substantial right to arbitration. For that separate and independent reason, it is immediately appealable[.]” Plaintiffs’ motion was granted and Defendant’s appeal was dismissed by order entered 28 August 2012. Defendant’s petition for writ of *certiorari* was denied by order entered 30 August 2012.

The trial court denied Defendant’s motion to compel arbitration by order filed 2 November 2012. Defendant appeals.

I.

[1] The present appeal is from an interlocutory order. However, the order denying arbitration “is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.” *Prime South Homes v. Byrd*, 102 N.C.App. 255, 258, 401 S.E.2d 822, 825 (1991) (citations omitted).

II.

[2] Initially, Defendant argues that the trial court erred in failing to determine, prior to deciding the issue of waiver, whether the Federal Arbitration Act (FAA) or the North Carolina Revised Uniform Arbitration Act (NCRUAA) controlled, because the requirements to prove waiver differ under the two acts. The “waiver” provision in the FAA argued by Defendant is contained in Section 3 of that act, but is referred to as “default” rather than “waiver.” 9 U.S.C.S. § 3 (a party may apply for a stay in court proceedings in order to enforce an agreement to arbitrate “providing the applicant for the stay is not in default in proceeding with such arbitration”). Defendant cites *Maxum Foundations, Inc. v.*

Salus Corp., 779 F.2d 974, 981 (4th Cir.1985) for the proposition that: “Although this principle of ‘default’ is akin to waiver, the circumstances giving rise to a statutory default are limited and, in light of the federal policy favoring arbitration, are not to be lightly inferred.” *id.*

However, Section 3 of the FAA only applies in federal district court, not in state court. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 n. 10, 104 S.Ct. 852, 79 L.Ed.2d 1, 15 n. 10 (1984) (“In holding that the [FAA] preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the [FAA] apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.”); *Carter v. TD Ameritrade Holding Corp.*, — N.C.App. —, —, 721 S.E.2d 256, 260 (2012); *Blow v. Shaughnessy*, 68 N.C.App. 1, 17, 313 S.E.2d 868, 877 (1984). Defendant’s argument that the trial court should have determined whether the federal standard in Section 3 applies in the present case fails.

III.

Public policy favors arbitration because it represents “an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys’ fees.” *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992) (citations omitted). “[T]he purpose of arbitration is to reach a final settlement of disputed matters without litigation. . . .” *Gemini Drilling & Found., LLC v. National Fire Ins. Co. of Hartford*, 192 N.C.App. 376, 383, 665 S.E.2d 505, 509 (2008) (citation omitted). The seminal case in North Carolina involving waiver of a contractual right to arbitrate is *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984). In *Cyclone*, our Supreme Court discussed waiver of arbitration, holding:

Waiver of a contractual right to arbitration is a question of fact. Because of the strong public policy in North Carolina favoring arbitration, see N.C. Gen.Stat. § 1-567.3 (1983), courts must closely scrutinize any allegation of waiver of such a favored right. (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.”). Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.

A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration; a party’s opponent takes advantage of judicial discovery procedures not available in arbitration; or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Cyclone, 312 N.C. at 229–30, 321 S.E.2d at 876–77 (citations omitted) (emphasis added). The length of delay in asserting the right to arbitrate has been a factor considered in determining if waiver has occurred. See *HCW Retirement & Fin. Servs. v. HCW Employee Ben.* — N.C. —, —, 747 S.E.2d 236, 239 (2013) (“In *Cyclone Roofing* this Court determined that the filing of pleadings and a month’s delay before moving to compel arbitration did not constitute waiver when no discovery was conducted during the delay and no evidence was lost.”); *Cyclone*, 312 N.C. at 233, 321 S.E.2d at 878; *Estate of Sykes v. Marcaccio*, 213 N.C.App.

563, 569, 713 S.E.2d 531, 536, *disc. review denied*, 365 N.C. 353, 717 S.E.2d 746 (2011); *Gemini*, 192 N.C.App. at 382, 665 S.E.2d at 509.

[3] Despite the language of *Cyclone*, our Supreme Court has not addressed the weight to be given a trial court’s finding of waiver as a fact, in relation to the strong public policy favoring arbitration. However, this Court has applied the general presumption of correctness accorded to a trial court’s findings of fact to its waiver determinations. See *Sykes*, 213 N.C.App. at 567, 713 S.E.2d at 535 (“[w]hether a party has waived [arbitration] is a question of fact, and the trial court’s findings of fact are binding on appeal when supported by competent evidence”) (citation omitted); *Moose v. Versailles Condo. Ass’n*, 171 N.C.App. 377, 382, 614 S.E.2d 418, 422 (2005); *Prime South Homes*, 102 N.C.App. at 258, 401 S.E.2d at 825.¹ Further, when a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of significant expense, including attorneys’ fees, the strong public policy in favor of arbitration is thereby diminished. See *Nucor*, 333 N.C. at 154, 423 S.E.2d at 750.

[4] We review the evidence considered by the trial court in making its factual determination on the issue of waiver. The trial court’s 2 November 2012 order included findings that: (1) Plaintiff initiated this class action on 5 December 2008, (2) Defendant filed a third-party complaint against Stock on 7 January 2010, (3) this case was designated a complex business case on 17 June 2010, (4) the class was certified by order entered 27 February 2012, and (5) Defendant appealed the certification order on 28 March 2012. The trial court included the following addi-

1. We acknowledge that this Court has also treated a determination of waiver as a conclusion of law, sometimes in the same opinion stating that it is a finding of fact. See, e.g., *Prime*, 102 N.C.App. 255, 401 S.E.2d 822. Our Supreme Court has also used language which may be interpreted as treating determination of waiver as a conclusion of law. See *HCW*, — N.C. at —, 747 S.E.2d at 241 (“We conclude that plaintiffs have failed to prove prejudicial actions

and therefore, that the trial court and Court of Appeals erred in finding waiver of contractual arbitration rights.”). We do not find the language in *HCW* to contain sufficient certainty to overrule the clear statement in *Cyclone* that “[w]aiver of a contractual right to arbitration is a question of fact.” *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876. This is an issue to be resolved by our Supreme Court.

tional relevant findings in its 2 November 2012 order:²

[8] On July 30, 2012, the unnamed class members filed the Motion to Intervene, seeking to intervene in this civil action as named plaintiffs to preserve their rights in the event the Order on Class Certification was overturned as a result of the Appeal.

[9] On August 22, 2012, KB Home filed the Second Motion to Stay, seeking to compel arbitration with respect to the unnamed class members in the event the court granted the Motion to Intervene.

[10] On August 28, 2012, the North Carolina Court of Appeals dismissed the Appeal.

[11] As a result of the dismissal of the Appeal, on September 10, 2012, the unnamed class members filed the Motion to Voluntarily Dismiss, seeking to voluntarily dismiss the Motion to Intervene without prejudice.

[12] The Motions have been fully briefed and are ripe for determination.

....

[33] In opposition to the First Motion to Stay, Plaintiffs argue that KB Home waived its right to arbitrate . . . by failing to assert its contractual right to arbitration earlier. KB Home argues that it has timely asserted its right to arbitrate against all Plaintiffs. However, in the alternative, KB Home seeks to persuade the court that even if waiver is found with respect to the named Plaintiffs, waiver should not be found with respect to the unnamed class members because KB Home could not have compelled arbitration against the unnamed class members at any time before the court certified the class.

....

[36] . . . Plaintiffs have neither been forced to bear the expense of long trial, nor have Plaintiffs lost helpful evidence. Consequently, Plaintiffs' principal argument for waiver is that they have been prejudiced by incurring significant litigation expenses to date and that KB Home has engaged in

discovery procedures not available in arbitration.

....

[38] Here, Plaintiffs argue that KB Home's right to arbitrate this dispute arose in December 2008 when the named Plaintiffs filed their Complaint. KB Home did not file the First Motion to Stay until April 12, 2012. That was more than three years after this action was filed and after substantial effort, time and money had been expended by the parties in discovery, motion practice and related procedural pre-trial initiatives. (Although neither required nor determinative, KB Home did not specifically assert its right to arbitration in either its Answer as an affirmative defense, filed on August 5, 2009, or in its response to Plaintiffs' Third Set of Interrogatories and Request for Production of Documents.) KB Home could have asserted its arbitration rights much sooner in this dispute, but chose not to do so. The court finds and concludes that by such delay KB Home acted inconsistently with its arbitration rights. Notwithstanding this conclusion, Plaintiffs must still show that they have been prejudiced by KB Home's delay.

[39] To show prejudicial effect, Plaintiffs have submitted evidence of fees and other expenses incurred by Plaintiffs. In totality, Plaintiffs have incurred approximately \$100,000 in fees and other expenses litigating the Claims. (These fees and expenses accrued from preparing for and attending negotiation conferences, depositions, motions and hearings, as well as fees spent on expert testimony.)[,] The costs that have been incurred are the result of the parties participating in four hearings, (The four hearings held have been on KB Home's Motion to Dismiss, Plaintiffs' Motion to Compel Discovery of KB Home, Plaintiffs' Motion for Class Certification and KB Home's Motion to Stay Pending Appeal.)[,] taking or defending twenty depositions across the country, obtaining and working with expert witnesses and engaging in other discovery. These costs have been in-

2. The trial court included numerous footnotes. We have omitted some footnotes, and included

others as parentheticals within the body of the trial court's findings included herein.

curred by the named Plaintiffs while litigating the Claims on their own behalf and also while litigating the Claims on behalf of the unnamed class members. KB Home's delayed attempt to enforce the arbitration provisions only after Plaintiffs have expended material amounts of time and resources in pursuing their Claims would be prejudicial to Plaintiffs. Such time and resources were expended after KB Home's right to arbitrate accrued and could have been avoided through an earlier demand for arbitration. KB Home could have demanded arbitration as early as 2008, well before the named Plaintiffs actively litigated the Claims. Permitting KB Home to enforce its arbitration rights now would be inconsistent with the principles of waiver outlined in *Servomation*. Accordingly, the court CONCLUDES that KB Home has waived its right to compel the named Plaintiffs to arbitrate their Claims.

The trial court then ruled on whether Defendant had waived its right to arbitration with respect to the unnamed class members:

[40] The court must also consider whether KB Home has waived its right to compel arbitration with respect to the unnamed class members. KB Home argues that it could not have asserted its arbitration rights against the unnamed class members at any time before the court certified the class on February 27, 2012. The court is not persuaded by KB Home's argument.

[41] Permitting KB Home to compel arbitration with regard to the unnamed class members would be prejudicial to the named Plaintiffs. The reality of class-action litigation requires the named Plaintiffs to incur expenses litigating the Claims on behalf of the entire class, which the named Plaintiffs in this case have done for more than three years. Allowing KB Home to compel arbitration with respect to the unnamed class members would render the named Plaintiffs' efforts pursuing the class Claims meaningless. KB Home had knowledge that the named Plaintiffs were litigating the Claims as a class action from the outset and were incurring substantial costs while doing so. (KB Home was on notice no later than December 5, 2008, that

the named Plaintiffs were bringing their Claims as a class action when the Complaint was filed. Moreover, evidence suggests that KB Home had notice of Plaintiffs' class action Claims, even before the Complaint was filed, during informal negotiations to resolve the dispute. . . . ("Throughout the [negotiation] process, Plaintiffs represented that they were acting on their behalf and on behalf of similarly situated homeowners.") Simply put, KB Home sat on its rights to arbitrate for too long. (The court is also concerned by KB Home's attempt to compel arbitration as to the unnamed class members, thereby effectively "undoing" this court's Order on Class Certification and getting the proverbial "second bite at the apple" for class certification. . . . For the same considerations of fairness and the efficient administration of justice outlined by the court in *Kingsbury*, this court cannot accept KB Home's argument that it has not waived its right to arbitrate with respect to the unnamed class members.)[.] Therefore, KB Home is barred from exercising any alleged arbitration rights now, even as to the unnamed class members. For the foregoing reasons, the court further CONCLUDES that KB Home has waived its right to compel the unnamed class members to arbitrate the Claims. Accordingly, the First Motion to Stay should be DENIED with respect to all Plaintiffs. (Citations omitted).

We hold that competent evidence supports the trial court's findings that Defendant, over more than a three-year period in which it participated in the litigation of this action, did nothing to assert any right to arbitrate. We affirm the trial court's determination that Defendant's actions were inconsistent with its right to arbitration. *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876.

[5] Concerning prejudice, the trial court found in the present case that Plaintiffs had incurred substantial costs preparing for litigation in this class action suit:

To show prejudicial effect, Plaintiffs have submitted evidence of fees and other expenses incurred by Plaintiffs. In totality, Plaintiffs have incurred approximately

\$100,000 in fees and other expenses litigating the Claims. (These fees and expenses accrued from preparing for and attending negotiation conferences, depositions, motions and hearings, as well as fees spent on expert testimony.)[.] The costs that have been incurred are the result of the parties participating in four hearings, . . . taking or defending twenty depositions across the country, obtaining and working with expert witnesses and engaging in other discovery. These costs have been incurred by the named Plaintiffs while litigating the Claims on their own behalf and also while litigating the Claims on behalf of the unnamed class members. KB Home's delayed attempt to enforce the arbitration provisions only after Plaintiffs have expended material amounts of time and resources in pursuing their Claims would be prejudicial to Plaintiffs. Such time and resources were expended after KB Home's right to arbitrate accrued and could have been avoided through an earlier demand for arbitration. KB Home could have demanded arbitration as early as 2008, well before the named Plaintiffs actively litigated the Claims. Permitting KB Home to enforce its arbitration rights now would be inconsistent with the principles of waiver outlined in *Servomation*. Accordingly, the court CONCLUDES that KB Home has waived its right to compel the named Plaintiffs to arbitrate their Claims.

This Court, in analyzing whether a party has incurred substantial expense, has required:

[W]hen considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration.

Sykes, 213 N.C.App. at 568, 713 S.E.2d at 536 (citations omitted). We hold that the more than three-year delay in requesting arbitration, and the approximately \$100,000.00 in fees found by the trial court to have been incurred by Plaintiffs in litigating

the claims thus far, constitute significant expenditures of time and expenses.

Defendant argues that the trial court's findings fail to show how much of the approximately \$100,000.00 constitutes expenses that could have been avoided had Defendant sought to compel arbitration at an earlier date. This Court addressed a similar argument in *Sykes*. In *Sykes*, the attorney for Farm Bureau—the party opposing arbitration—filed the following affidavit:

“Farm Bureau took significant steps in this litigation to its detriment and expended a significant amount of money on the litigation, through appearance by the undersigned at numerous hearings in both Halifax County Superior Court and Nash County Superior Court, on multiple motions filed by multiple parties.”

Sykes, 213 N.C.App. at 569, 713 S.E.2d at 536. This Court held that, though the trial court could have been more specific in its determination that Farm Bureau incurred significant expenses in litigation before arbitration was demanded, its findings were minimally sufficient.

While [the affidavit] did not quantify the expenses, the trial court's specific findings regarding what occurred during the superior court proceedings and the . . . affidavit are sufficient to support the ultimate finding that Farm Bureau expended “significant resources,” sufficient to constitute prejudice. We can conclude without specific dollar amounts that attendance by counsel at multiple hearings and defense of a litigation over a two-year period (with the case being twice calendared for trial as well as other hearings) involves “significant resources.” As our Supreme Court has stated, “[J]ustice does not require that courts profess to be more ignorant than the rest of mankind.”

....

Here, we have specific legal proceedings over a two-year period that entailed legal expenses and effort that would have been unnecessary had a demand for arbitration been made earlier. This case is factually similar to *Big Valley Home Ctr., Inc. v. Mullican*, 774 So.2d 558, 562 (Ala.2000), in which the plaintiff filed a complaint on 24

October 1996, and one of the defendants waited for more than two years before filing a motion to compel arbitration. During that time, the co-defendant had answered the complaint, the plaintiff was deposed, the trial was continued five times, two judges were recused, and a settlement offer was made to the plaintiff.

....

We find the reasoning in *Big Valley* persuasive. We hold that the trial court properly concluded that plaintiff waived the right to arbitrate by waiting until the eve of the second trial date to file a motion to compel arbitration, causing Farm Bureau, over more than two years, to prepare for and attend three court hearings and engage in other defense activities, resulting in an expenditure of resources (including time and expense) that would have been unnecessary had plaintiff moved to compel arbitration earlier. While the better practice would be for [Farm Bureau] to provide specific information about the time and expense incurred and for the trial court to make findings of fact based on that information, the findings of fact in this case are minimally sufficient to establish waiver.

Sykes, 213 N.C.App. at 569–70, 713 S.E.2d at 536–37 (citations omitted). We hold that the evidence before the trial court in the present case, and the findings of fact based upon that evidence, are at least as compelling as those in *Sykes*. We affirm the trial court's finding of waiver with respect to Plaintiffs.

IV.

Defendant further argues that it did not waive its right to arbitration with respect to the unnamed class members because: “(1) the right to compel arbitration with unnamed class members did not accrue until they became parties, and (2) there is no evidence in the record that named Plaintiffs or absent class members incurred any expenses after the right to arbitration with the unnamed class members accrued.”

Defendant cites to certain federal opinions for the proposition that it had no right to compel arbitration against unnamed class members before the class was certified. We do not find these cases persuasive, as we do

not hold that Defendant could have, or should have, moved to compel arbitration with respect to the unnamed class members before the class was certified. The specific question before us is whether, in an action initiated as a class action, a defendant's actions constituting waiver of its right to compel arbitration against named plaintiffs can be imputed to the entire class once certification occurs.

Defendant cites an unpublished Northern District of California opinion, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 2011 WL 1753784 (N.D.Cal., May 9, 2011), for the proposition that “litigation conduct with named plaintiffs prior to class certification could not waive arbitration rights as to unnamed class members[.]” However, we find the reasoning in *Edwards v. First American Corp.*, 289 F.R.D. 296, 307–08 (C.D.Cal.2012), more persuasive. In *Edwards*, the federal district court discussed its reasoning for holding that the defendants had waived their rights to arbitration to the unnamed as well as the named plaintiffs.

The Court does not find the reasoning of TFT-LCD to be persuasive. It is true that Defendants likely could not have moved to compel arbitration of the Tower City class members' claims until after the class was certified. Nevertheless, Defendants could have asserted their intention to raise arbitration as a defense at a much earlier stage in the proceeding. Indeed, even after the Ninth Circuit ordered the class certified in June 2010, Defendants [] delayed bringing this motion until April 2011, after this Court denied Defendants' application for a stay. This conduct appears to be highly calculated—Defendants would obviously prefer that Plaintiff's claims be dismissed on the merits, as any such ruling may be used for the purposes of issue preclusion and precedential effect in subsequent actions. Defendants' conduct thus evinced “a conscious decision to continue judicial judgment on the merits.” Only after it appeared to Defendants that this would not be possible did they file the instant motion. The Court cannot sanction such behavior; to do so would only encourage gamesmanship of this type in the fu-

ture, resulting in further waste of judicial resources.

The Court finds the reasoning in *Kingsbury v. U.S. Greenfiber, LLC*, No. CF [CV] 08-00151-AHM (AGRx), 2012 WL 2775022 (C.D.Cal. Jun. 29, 2012), instructive. There the court held that the defendant waived his right to arbitrate when he actively litigated the case “for over four years.” This litigation included discovery, a motion to remand, and four motions to certify a class. The court reasoned that asserting a right to arbitrate was “an argument [defendant] was fully capable of raising in the context of the four motions for class certification. Yet [defendant] did not pursue its defense of arbitration. Its failure to do so was inconsistent with its arbitration rights.”

Just as in *Kingsbury*, Defendants here could have asserted their right, or at the very least their intention, to arbitrate at any number of points in the past five years. Their failure to do so is patently inconsistent with their attempt to exercise that right at this late juncture.

Edwards, 289 F.R.D. at 307 (citations omitted). The Court in *Edwards* also determined that the plaintiffs were prejudiced, holding:

Finally, it is also not disputed that Defendants’ failure to assert their right to arbitrate until now has prejudiced Plaintiff. First and most obviously, granting Defendants’ Motion to Compel Arbitration would eliminate the class members’ opportunity to pursue these claims as a class action. Further, Defendants’ delay in asserting their right to arbitrate has resulted in the expenditure of enormous costs by Edwards and class counsel in litigating this matter at every level of the federal judiciary over the past five years, as well as thousands of hours of attorney time. Forcing the class to arbitrate now would result in those costs being stranded. In short, there is no question that Plaintiff has “relied to [her] detriment on [Defendants’] failure” to assert their right to arbitration before now.

Id. at 307-08 (citation omitted).

[6] While recognizing that the facts in the present case are not identical with those in *Edwards*, we hold that Defendant waived

its right to compel the unnamed class members to arbitration. More than three years and four months passed between the initiation of this class action and Defendant’s motion to compel arbitration. Defendant litigated this case that entire time while sitting on any contractual rights it had to arbitrate. Plaintiffs and their attorneys invested significant amounts of time and sums of money prosecuting this case on behalf of themselves and the purported class. The fact that much of this expenditure occurred before the class was certified does not negate the fact that, upon certification, the class became tangible beneficiaries of that expenditure. We agree with the court in *Edwards* that “gamesmanship” of this kind should not be encouraged. *Edwards*, 289 F.R.D. at 307-08. Holding otherwise would defeat, rather than promote, the public policy behind the favor with which the courts of this state generally view arbitration—expediting an efficient and relatively simple means of resolving disputes without the multitude of costs, in both time and money, generally associated with litigation. See *Nucor*, 333 N.C. at 154, 423 S.E.2d at 750; *Gemini*, 192 N.C.App. at 383, 665 S.E.2d at 509. The trial court did not err in ruling that Defendant had waived any right to arbitrate with respect to the unnamed class members.

V.

[7] Defendant further argues that the trial court erred in “failing to rule on Stock’s obligation to arbitrate.” Defendant’s argument in this regard is entirely premised upon its arguments that the trial court erred in its rulings on the arbitrability of the disputes involving Plaintiffs and the class. Having held that the trial court did not err in ruling that Defendant had waived its rights in this regard, Defendant’s argument concerning Stock necessarily fails.

VI.

We affirm the ruling of the trial court. We note that our holding remains the same in this case regardless of whether we treat

the trial court's decision on waiver as a finding of fact or conclusion of law.

Affirmed.

Judges McCULLOUGH and DILLON concur.



James C. LLOYD, III, Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY, Ergon Trucking, Inc. and Jeremy Ryan Tucker, Defendants.

No. COA13-379.

Court of Appeals of North Carolina.

Dec. 17, 2013.

Background: Railroad engineer brought negligence action against trucking company and tractor-trailer driver for injuries sustained in collision with tractor-trailer after it became stuck on railroad. Trucking company and driver moved for JNOV. The Mecklenburg County Superior Court, 2012 WL 5974430, Jesse B. Caldwell, III., J., denied the motion. Defendants appealed.

Holdings: The Court of Appeals, Steelman, J., held that:

- (1) issue of engineer's mitigation of damages was for jury, and
- (2) damages award of \$865,175 was not excessive.

Affirmed.

1. Damages ⇌208(7)

Issue of whether railroad engineer actively sought to mitigate damages resulting from injuries sustained in collision with tractor-trailer that had become stuck while crossing train tracks was for jury in engineer's negligence action against tractor-trailer driver and trucking company.

2. Damages ⇌62(1)

Under the law in North Carolina, an injured plaintiff must exercise reasonable care and diligence to avoid or lessen the consequences of the defendant's wrong.

3. Damages ⇌62(1)

If plaintiff fails to mitigate his damages, for any part of the loss incident to such failure, no recovery can be had.

4. Appeal and Error ⇌232(2)

Failure by trucking company and tractor-trailer driver to object to admission of certain evidence in negligence action against them constituted waiver of any objection to that evidence on appeal, even though another party did object to the admission of the evidence; in order to preserve the issue for appeal as to themselves, the trucking company and driver were required to enter their own objection.

5. Appeal and Error ⇌232(.5)

Where one party objects to testimony at trial, that objection does not inure to the benefit of another party for purposes of preserving that objection for appellate review.

6. Appeal and Error ⇌204(1)

The admission of evidence without objection waives any prior or subsequent objection to the admission of evidence of a similar character.

7. Damages ⇌127.9

Damages award of \$865,175 to railroad engineer for injuries sustained in collision with tractor-trailer that had become stuck on railroad tracks was not excessive; award consisted of medical bills, lost wages, projected future income, and future lost health insurance.

Appeal by defendants Ergon Trucking, Inc., and Jeremy Ryan Tucker from judgment entered 19 April 2012 and orders entered 11 June 2012 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals on 26 September 2013.