**Opinion issued May 3, 2022.**

**In The**

# Court of Appeals

**For The**

# First District of Texas

---

**NO. 01-21-00002-CV**

---

**LEONARD COURTRIGHT AND PAMELA COURTRIGHT, Appellants**

**V.**

**ALLIED CUSTOM HOMES, INC., DAVID TEEKELL, AND LINDA TEEKELL, Appellees**

---

**On Appeal from the 133rd District Court**
**Harris County, Texas**
**Trial Court Case No. 2018-53527**

---

## MEMORANDUM OPINION

Leonard Courtright and Allied Custom Homes, Inc. ("Allied") filed suit against David Teekell in connection with several agreements executed by the parties involving Allied. After several amended pleadings and motions, Leonard Courtright

and third-party defendant Pamela Courtright (collectively, "Courtrights" or "Appellants") asserted several claims against David Teekell, intervenor Linda Teekell, and Allied (collectively, "Appellees"), and Appellees asserted several counterclaims and third-party claims against the Courtrights all stemming from the sale, ownership, and management of Allied. After two years of litigation, the Courtrights moved to compel arbitration of the parties' pending disputes. Following a hearing, the trial court denied the motion. This appeal ensued.

In one issue, the Courtrights contend the trial court abused its discretion in denying their motion to compel because Appellees failed to satisfy their burden to prove the Courtrights impliedly waived their right to arbitration. We affirm.

## Background

### A. Factual History

David and Linda Teekell (collectively, "Teekells") founded Allied, a residential home repair, maintenance, and remodeling company, in 1988. At the time, the Teekells owned 100% of Allied's stock and David Teekell ("David") served as Allied's President and sole Member of its Board of Directors. In 2007, the Courtrights entered into a series of contractual agreements with the Teekells to purchase Allied. The agreements consisted of a Stock Purchase Agreement, a Shareholders' Buy-Sell Agreement, a Voting Agreement, and an Employment Agreement.

Under the agreements, the Courtrights acquired 10% of the issued and outstanding stock of Allied for $100,000, with the option to acquire up to an additional 65% interest in exchange for $10,000,000 in profit distributions, benefits, and payments to the Teekells. Pursuant to the agreements, David became Allied's Vice President, Secretary, and Chairman of the Board and Leonard Courtright ("Leonard") became Allied's President, Treasurer, and second Board Member. Leonard asserts that under the agreements, he acquired "immediate and absolute control over Allied and its operations" because he acquired "voting control over 75% of Allied's shares."

The Shareholders' Buy-Sell Agreement includes an arbitration clause that states:

> **K. Arbitration.** Any dispute between the parties hereto with respect to this Agreement or the transactions contemplated hereby shall be resolved exclusively by submitting such dispute to binding arbitration in the state of Texas under the rules of the American Arbitration Association as in effect at the time of such dispute. To the extent permitted by the rules of the Association, any dispute shall be resolved by a single arbitrator. The parties shall bear their own legal expenses in connection with the arbitration proceedings shall bear equally all expenses of the arbitrator(s) in connection with the arbitration unless the arbitrator(s) determine that a different allocation of legal and arbitration expenses would be more equitable.

The Voting Agreement also contains the following relevant provision:

> Section 4. Miscellaneous.
>
> . . . .

> (d) Specific Performance. The parties acknowledge that money damages are not an adequate remedy for violations of this Agreement and that any party may, in its sole discretion, apply to a court of competent jurisdiction for specific performance or injunctive or such other relief as such court may deem just and proper in order to enforce this Agreement or prevent any violation hereof and, to the extent permitted by applicable law, each party waives any objection to the imposition of such relief or any requirement for a bond.

On August 3, 2018, following a dispute between the Courtrights and the Teekells over management of Allied, the Teekells sent a letter to Leonard revoking and terminating the Voting Agreement. The letter stated that Leonard "is directed to take no further action and is not authorized to take any further action in respect of the aforementioned voting rights." A few days after, Leonard and Allied filed suit against David.

**B. Procedural History**

On August 10, 2018, Leonard and Allied filed suit against David asserting claims for breach of fiduciary duty and breaches of the Stock Purchase Agreement and Voting Agreement. Leonard and Allied alleged, among other things, that David had ordered Leonard to fire three Allied employees and when he refused to do so, David began to disparage Leonard to Allied employees and installers claiming he was mismanaging Allied and that Allied would go out of business. Leonard and Allied also alleged David had threatened to dissolve Allied, sent Leonard notice of an August 2018 shareholders' and Board of Directors meeting Leonard had neither authorized nor approved, and sent Leonard a notice seeking to revoke and terminate

the Voting Agreement ("Notice of Revocation"). They further contended David was competing with Allied through his other businesses in breach of his fiduciary obligations.

Leonard and Allied sought a declaratory judgment that Leonard "is the president and majority owner and has the right to control the company" and "vote the majority of shares of Allied under the Voting Agreement" which is "valid and enforceable." Allied and Leonard further requested a declaration that David "does not have the authority to fire or otherwise terminate Courtright" and cannot "unilaterally revoke the Voting Agreement." Leonard and Allied also requested a temporary restraining order and injunctive relief to prevent David "from disrupting the business of Allied."

Leonard and Allied attached to their petition copies of the Stock Purchase Agreement, the Shareholders' Buy-Sell Agreement, the Voting Agreement, and a declaration from Leonard. The original petition, which does not mention the arbitration provision in the Shareholders' Buy-Sell Agreement, includes a request for limited discovery to discover who David was communicating with and "the basis for [David's] allegation that the Voting Agreement is unenforceable." It concludes with a general prayer requesting that "on final trial Plaintiffs have judgment as requested herein."

The trial court granted Leonard's and Allied's application for a temporary restraining order prohibiting David from:

> (a) Contacting employees, contractors, and/or customers of Allied; except for the narrow and specific purpose of interviewing and preparing witnesses for the [temporary injunction] hearing[;]
>
> (b) Contacting Leonard Courtright and Pam Courtright, except through counsel of record;
>
> (c) Contacting third-parties to discuss Allied;
>
> (d) Contacting third-parties to discuss Courtright;
>
> (e) Interfering with relationships between Allied and its employees, contractors, and/or customers;
>
> (f) Interfering with relationships between Allied and third-parties;
>
> (g) Firing Courtright from his position as president at Allied;
>
> (h) Dissolving or attempting to dissolve Allied;
>
> (i) Calling or holding a meeting of the Shareholders of Allied;
>
> (j) Calling or holding a meeting of the Board of Directors of Allied; and
>
> (k) Changing, or attempting to change, the corporate structure of Allied in any way.

The trial court also ordered David to appear for deposition and produce documents requested by Leonard before the deposition. The trial court twice granted the parties' joint requests to extend the temporary restraining order "due to the need of the Parties to conduct discovery."

On August 17, 2018, David and intervenor Linda Teekell ("Linda") answered and asserted counterclaims against Leonard for breach of fiduciary duty, breach of the Employment Contract, and for declaratory judgment seeking a declaration that the Voting Agreement "has ceased by operation of law" or that the Notice of Revocation served as "revocation and termination of the Voting Trust Agreement." The Teekells also asserted counterclaims against Leonard and third-party claims against Pamela Courtright ("Pamela") for fraud and injunctive relief seeking to enjoin the Courtrights from engaging in several acts pertaining to Allied and "[r]evoking and terminating the Voting Trust Agreement in order that David Teekell and Linda Teekell can conduct business as the majority shareholders of Allied."[1] They also sought recovery of attorneys' fees and exemplary damages.

The Teekells alleged, among other things, that their profit distributions had declined over the years as a result of the Courtrights' embezzlement of millions of dollars from Allied and their gross mismanagement of the company. The Teekells attached to their pleading copies of the Voting Agreement, the Employment Agreement, the Teekells' Notice of Revocation, and a list providing examples of the hundreds of vendor name changes and miscodings the Courtrights allegedly made in the company's general ledger.

---

[1] The Teekells named Pamela Courtright and John Culver, Allied's Sales Manager, as third-party defendants. Culver is not a party to this appeal.

On September 10, 2018, the Courtrights filed an answer. And on September 14, 2018, they amended their pleadings reasserting Leonard's original claims against David and further alleging the Teekells had misappropriated company funds. They requested the court to enter judgment in their favor "on final trial."

On September 28, 2018, the Teekells filed their first amended pleading, adding a claim for tortious interference against the Courtrights claiming they had interfered with David's franchisor-franchisee business relationship with The Home Mag by delivering "to the franchisor of The Home Mag"[2] a copy of the trial court's temporary restraining order and David's employment agreement with Allied. According to the Teekells, David had a "good-standing relationship with the Home Mag for over 9 years" and the Courtrights made the delivery in "an unscrupulous attempt to interfere with this long-standing relationship."

On September 28, 2018, Allied served its first set of nineteen interrogatories and sixty-five requests for production of documents on David. And on October 9, 2018, Allied unilaterally noticed the depositions of former Allied employees Tracy Webster ("Webster") and Will Kern ("Kern"), serving subpoenas duces tecum on both requesting six categories of documents. The Teekells moved to quash the notices, and the trial court granted the motions. The Courtrights then served several

[2] According to the Teekells, "Home Mag prints and distributes magazines to over 450,000 homes in the greater Houston area that focuses [sic] on home improvement."

amended deposition notices and subpoenas duces tecum on Webster and Kern requesting eighteen and twenty-two categories of documents, respectively.

On October 11, 2018, Allied and Leonard served requests for disclosure on David. Separately, the Teekells filed a notice of intent to take a deposition by written questions on Wells Fargo Bank, NC seeking discovery pertaining to Allied. Allied filed an emergency motion to quash the Teekells' notice of intention to take the noted deposition and for protection.

On November 9, 2018, Allied served its second set of requests for production (eleven) and second set of interrogatories (six) on David. On November 26, 2018, Allied moved to compel David to respond to its first set of interrogatories and requests for production. In its motion, Allied stated that while Allied had produced over 13,000 pages of documents, David had produced only eleven.

The Teekells then moved for partial summary judgment on November 30, 2018, asserting the Voting Agreement was invalid and should be declared null and void. Allied and Leonard filed a motion to continue the hearing on the motion for summary judgment and a motion for sanctions on December 17, 2018, asserting the Teekells had noticed their summary judgment motion for hearing to circumvent the court's decision to hear the Courtrights' motion to compel discovery. Allied and Leonard later amended their motion for continuance and motion for sanctions.

On December 20, 2018, Allied and Leonard filed a verified motion for contempt and to show cause alleging David had violated the trial court's August 10, 2018 temporary restraining order. They amended their motion for contempt on January 29, 2019 and again on February 1, 2019, seeking an order from the court "requiring David Teekell, and those in active concert and participation with him, to appear and show cause as to why Mr. Teekell should not be held in contempt of Court" for violating the court's temporary restraining order and "for all other relief to which [they are] justly entitled."

On December 26, 2018, Leonard served his first set of interrogatories (two) on David seeking information about David's other businesses—Allied Outdoor Solutions and Patio Outdoor Solutions. One month later, on January 29, 2019, Leonard served a second set of interrogatories (three) on David seeking financial information related to Patio Cover Solutions, one of David's other businesses.

On February 1, 2019, non-parties Woodforest National Bank and Joseph Clepper filed objections and a motion for protective order in response to subpoenas served on them by Allied and Leonard seeking financial information about Allied's loan with Woodforest National Bank. Allied and Leonard responded to the motion asking the court to hold Woodforest National Bank and Joseph Clepper in contempt for refusing to appear at a show cause hearing.

On February 4, 2019, Allied and Leonard responded to the Teekells' partial motion for summary judgment. They argued that the Voting Agreement was valid, enforceable, and irrevocable, consistent with the allegations in their then-live pleading seeking a declaration that the "Voting Agreement is valid and enforceable." They also argued the Teekells were equitably estopped from claiming the Voting Agreement lacked consideration and further that the Teekells had waived their claim.

On February 26, 2019, Allied and Leonard noticed the deposition of Mitch Hickman in his individual capacity and as corporate representative of Lansing Building Products, one of Allied's main suppliers. They also issued a subpoena for a deposition on written questions on Verizon Wireless to obtain the Teekells' cell phone records. The Teekells filed a motion for protective order, motion to quash, and objections to the deposition by written questions directed to Verizon Wireless.

On March 4, 2019, Linda filed her Second Amended Petition in Intervention and David his third amended answer, counterclaim, third-party petition, and application for injunctive relief against the Courtrights, adding "specific or affirmative defenses" and omitting their tortious interference claim. On April 17, 2019, Allied served its third set of requests for production on David.

Between March and July 2019, the trial court conducted a multi-day evidentiary hearing on the Courtrights' request for injunctive relief. After "considering all the evidence presented during a week-long hearing," the court

entered an "Order Appointing Receiver" dated July 22, 2019, finding (1) Allied was "in danger of insolvency," (2) Leonard's actions as a governing officer were "illegal, oppressive, or fraudulent," and (3) Allied's property was "being misapplied or wasted." The trial court found the Courtrights' request for an auditor was "wholly insufficient" and appointed Levi J. Benton as receiver over Allied.[3] Mr. Benton then discharged Allied's counsel (who was representing both Allied and the Courtrights) and retained new counsel for the company. On August 21, 2019, the Courtrights filed a motion to file sealed motions and requests for relief related to the trial court's July 22, 2019 order.

On September 16, 2019, Allied, now under the receiver's control and with newly appointed counsel, asserted claims against the Courtrights for breach of fiduciary duty, fraud, violations of the Texas Theft Liability Act, conspiracy, usurpation of corporate opportunities, and breach of the Employment Agreement. On October 17, 2019, the Courtrights filed an answer. And on October 30, 2019, they filed their second amended petition against the Teekells asserting claims for breach of fiduciary duty, usurpation of corporate opportunities, abuse of control, gross mismanagement, waster of corporate assets, negligence, gross negligence, violations of the Securities Act, breach of contract, and declaratory judgment. In

[3] Appellees state "[n]o temporary injunction was entered" by the trial court.

their amended petition, the Courtrights "demand[ed] a jury trial" and stated they had tendered the appropriate jury fee.

On November 7, 2019, the Courtrights moved to quash Allied's deposition upon written questions directed to Amazon.com seeking information about the Courtrights' purchases from Amazon. The trial court denied their motion. On January 13, 2020, the trial court granted Allied's application for issuance of letters rogatory directed to Amazon.com for discovery related to the Courtrights' purchases.

On November 19, 2019, the Courtrights served their first request for production (fifty-six) and first set of interrogatories on Allied. And on December 4, 2019, they moved to compel the appointed receiver to comply with certain duties—specifically to pay the past due amount of two American Express cards used by Allied and for which the Courtrights were liable as guarantors—and for termination of the receivership. The Courtrights set their motion for hearing on January 13, 2020. The trial court denied the Courtrights' motion to terminate the receivership on February 6, 2020.

On January 10, 2020, the Teekells filed their first amended motion for partial summary judgment arguing the parties' Voting Agreement was a trust agreement governed by the Texas Trust Code and that the agreement was revoked, terminated, or invalid as a matter of law. On March 23, 2020, the Courtrights responded to the

Teekells' first amended partial summary judgment motion arguing there was a genuine issue of material fact regarding the validity and enforceability of the Voting Agreement precluding summary judgment. On April 14, 2020, the Courtrights filed their designation of expert witnesses, and on May 15, 2020, the Teekells filed a reply in support of their amended motion for partial summary judgment.

The case was set for trial on November 4, 2019 originally, but it was later re-set to August 17, 2020. Then on June 12, 2020, the parties filed an agreed motion for entry of amended docket control order asking the court to set the case for trial in March 2021. The court granted the parties' request and placed the case on a three-week trial docket beginning March 15, 2021.

On September 9, 2020, Allied filed its third amended original petition adding a claim for breach of the Shareholders' Buy-Sell Agreement. In their live pleading, filed October 30, 2019, the Courtrights also requested a "declaratory judgment . . . as to the rights of the parties under the Buy-Sell Agreement."

On September 24, 2020, the trial court entered an order granting the Teekells' motion for partial summary judgment on the Voting Agreement. The trial court held "that the Voting Trust Agreement effective November 1, 2007, by and between Leonard H. Courtright, as Purchaser, and David A. Teekell and Linda Teekell, is revoked, terminated, and/or invalid as a matter of law and is no longer in force or effect for any purposes."

Several days later, on September 30, 2020, the Courtrights served their first set of interrogatories (fifteen) on Allied and their first set of interrogatories (two) on the Teekells. Then, on October 6, 2020, Allied filed a motion for partial summary judgment on its claim for specific performance. Allied sought enforcement of the Shareholders' Buy-Sell Agreement and requested the trial court to order Leonard to tender to Allied all of his shares of stock in Allied in exchange for the promissory note Allied had provided to him.

On October 21, 2020, while Allied's motion for partial summary judgment on the Shareholders' Buy-Sell Agreement remained pending, the Courtrights moved to compel arbitration of the parties' disputes arguing that a written enforceable arbitration agreement existed and the parties' claims were subject to arbitration.[4] The Courtrights attached to their motion the Stock Purchase Agreement, the Employment Agreement, the Voting Agreement the trial court previously ruled was "revoked, terminated, and/or invalid as a matter of law and is no longer in force or effect for any purposes," and the same Shareholder Buy-Sell Agreement involved in

[4] On October 21, 2020, the Courtrights also objected to the receiver's prior motion to approve and order interim payment to the receiver on the grounds the trial court's order appointing the receiver did not provide for payment of the flat monthly fee the receiver requested and because the receiver had thus far refused to pay the overdue American Express bills for which the Courtrights were personally responsible. On November 11, 2020, the trial court entered an order granting the receiver's motion to approve and order interim payment to the receiver and ordered Allied to pay the receiver's interim fees.

Allied's then pending motion for summary judgment and in the Courtrights' pending declaratory judgment action. On November 24, 2020, the Courtrights also filed their answer to Allied's third amended petition and their response to Allied's motion for partial summary judgment.

Allied and the Teekells responded to the Courtrights' motion to compel arbitration on December 3 and 4, 2020, respectively. They argued the Courtrights had waived their right to compel arbitration. Allied attached to its response the declaration of George Kawaja, Allied's Chief Financial Officer, attesting to the fees and expenses Allied had incurred in litigating the case. The Teekells attached to their response the affidavit of their counsel, Kyle Hawes, attesting to the attorney's fees and expenses the Teekells had incurred and including copies of the discovery the Courtrights had served on the Teekells. On December 7, 2020, the Courtrights replied to Allied and the Teekells' responses arguing they had failed to satisfy their burden to show the Courtrights had waived their right to arbitration.

On December 8, 2020, the trial court held a hearing on the Courtrights' motion to compel arbitration. The trial court held the Courtrights had waived their right to arbitration, stating:

> But I have not seen one this clearly on what I think could be a waiver—and I know that's a very high standard, very high. And in most cases I would think that the arbitration should proceed, and it should be sent to arbitration. But this case has been going on for so long. We've had so many hearings. There has been so much discovery done. I think y'all have done just about everything you can do in a trial,

> from summary judgments to, you know, a week-long temporary injunction hearing to depositions to, you know, of course, then the receiver and then Motions to Dissolve the receivership. I feel like I've kind of had a whole law school class just handling this one case. So I'm going to deny the motion to send it to arbitration and find that the Courtrights have waived their right to pursue the arbitration clause.

The trial court entered an order denying the Courtrights' motion to compel arbitration. That same day, the trial court granted Allied's partial motion for summary judgment ordering that Leonard deliver to Allied all of his shares of stock in Allied, that he execute and deliver to Allied the Stock Purchase Agreement, and that Allied pay Leonard the amount due under the promissory note.

This interlocutory appeal followed.

## Standard of Review and Applicable Law

We review an order denying a motion to compel arbitration for abuse of discretion. *Henry v. Cash Biz, LP*, 551 S.W.3d 111, 115 (Tex. 2018). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985). "We defer to the trial court's factual determinations if they are supported by evidence but review its legal determinations de novo." *Henry*, 551 S.W.3d at 115.

A party seeking to compel arbitration must establish that (1) a valid arbitration agreement exists and (2) the claims in dispute fall within the scope of the agreement. *In re Rubiola*, 334 S.W.3d 220, 223 (Tex. 2011). "If the party

seeking arbitration carries its initial burden, the burden then shifts to the party resisting arbitration to present evidence on its defenses to the arbitration agreement." *Williams Indus., Inc. v. Earth Dev. Sys. Corp*., 110 S.W.3d 131, 134–35 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (quoting *Mohamed v. Auto Nation USA Corp.*, 89 S.W.3d 830, 835 (Tex. App.—Houston [1st Dist.] 2002, no writ) (citing *In re Oakwood Mobile Homes, Inc.*, 987 S.W.2d 571, 573 (Tex. 1999))).

**Waiver**

A party who opposes the enforcement of a valid arbitration agreement based on the defense of waiver bears the burden of proving the defense. *Royston, Rayzor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 499–500 (Tex. 2015). Arbitration rights are contractual, and the law includes a strong presumption against the waiver of those rights. *Adams v. StaxxRing, Inc*., 344 S.W.3d 641, 647 (Tex. App.—Dallas 2011, pet. denied) (citing *In re Bruce Terminix Co.*, 988 S.W.2d 702, 704 (Tex. 1998) (orig. proceeding) (per curiam)). A party may waive its right to arbitration either expressly or impliedly. *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015). Waiver of arbitration may be implied from a party's conduct, so long as the conduct is unequivocal. *Adams*, 344 S.W.3d at 647. When, as here, implied waiver is at issue, the party seeking to establish the waiver defense must show that (1) the party seeking arbitration substantially invoked the judicial process in a manner inconsistent with the right to compel arbitration and (2)

this inconsistent conduct caused the nonmoving party to suffer detriment or prejudice. *G.T. Leach*, 458 S.W.3d at 511–12.

Whether a party waives its right to arbitration by substantially invoking the judicial process depends on the totality of the circumstances. *See id.* at 512; *Perry Homes v. Cull*, 258 S.W.3d 580, 590 (Tex. 2008). We decide the issue case-by-case taking into consideration a multitude of non-exclusive factors, including:

- how long the movant waited before moving to compel arbitration;
- the reasons for the movant's delay;
- whether and when, during the period of delay, the movant knew of the arbitration agreement;
- how much discovery the movant conducted before moving to compel arbitration, and whether that discovery related to the merits;
- whether the discovery would be unavailable or useful in arbitration;
- whether the movant asked the court to dispose of claims on the merits;
- whether the movant asserted affirmative claims for relief in court;
- the extent of the movant's engagement in pretrial matters related to the merits (rather than to arbitrability or jurisdiction);
- the time and expense the parties committed to the litigation;
- whether activity in court would be duplicated in arbitration; and
- when the case is set to be tried.

*G.T. Leach Builders*, 458 S.W.3d at 512; *Perry Homes*, 258 S.W.3d at 591–92. In general, no single factor is dispositive. *RSL Funding, LLC v. Pippins*, 499 S.W.3d 423, 430 (Tex. 2016). Nor must all or most of these factors be present to support waiver. *See Perry Homes*, 258 S.W.3d at 591. Courts look to the specifics of each case. *Henry*, 551 S.W.3d at 116.

The party asserting waiver of arbitration must also prove that it suffered unfair prejudice because of the opposing party's litigation conduct. *G.T. Leach Builders*, 458 S.W.3d at 515. Such inherent unfairness may be manifested "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." *Perry Homes*, 258 S.W.3d at 597. "Detriment or prejudice, in this context, refers to an 'inherent unfairness caused by a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.'" *G.T. Leach Builders*, 458 S.W.3d at 515 (quoting *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 625 (Tex. 2008) (per curiam)) (internal quotations omitted); *Kennedy Hodges, L.L.P. v. Gobellan*, 433 S.W.3d 542, 545 (Tex. 2014) (per curiam). "[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." *Perry Homes*, 258 S.W.3d at 597 (quoting *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46

n.5 (1st Cir. 2005)). The nonmovant must show the fact of prejudice, but not its extent. *Id.* at 599.

## A. Substantial Invocation of Judicial Process

The Courtrights contend the trial court abused its discretion in denying their motion to compel arbitration because their actions did not constitute an intentional waiver of their right to arbitration. Appellees respond that the Courtrights substantially invoked the judicial process by filing their lawsuit in state court, aggressively litigating their claims for more than two years, and only moving to compel arbitration after suffering adverse rulings.

In analyzing whether the Courtrights substantially invoked the judicial process, we consider each factor enunciated in *G.T. Leach Builders.*

### 1. Delay

The Courtrights filed suit against the Teekells on August 10, 2018 and did not move to compel arbitration until October 21, 2020—twenty-six months after first filing suit and after passing both the original trial setting of November 4, 2019, and the second trial setting of August 17, 2020. Courts have found waiver based on shorter periods of delay. *See, e.g.*, *Perry Homes*, 258 S.W.3d at 596 (finding waiver where party delayed request for arbitration fourteen months after filing suit); *Menger v. Menger*, No. 01-19-00921-CV, 2021 WL 2654137, at *5 (Tex. App.—Houston [1st Dist.] June 29, 2021, no pet.) (mem. op.) (finding party's six-month delay before

requesting arbitration supported finding of waiver); *Read v. Sibo*, No. 01-14-00106-CV, 2019 WL 2536573, at *5 (Tex. App.—Houston [14th Dist.] June 20, 2019, pet. denied) (mem. op.) (finding party's approximate twenty-three month delay supported finding of waiver); *Adams*, 344 S.W.3d at 649 (finding party's thirteen-month delay before invoking arbitration supported finding waiver); *In re Christus Spohn Health Sys. Corp.*, 231 S.W.3d 475, 480–81 (Tex. App.—Corpus Christi–Edinburg 2007, orig. proceeding) (finding waiver after fourteen months of litigation and resetting matter for trial three times).

While delay, standing alone, does not constitute substantial invocation of the judicial process, *see G.T. Leach*, 458 S.W.3d at 515, the record shows more than mere delay in this case. The Courtrights knew about the arbitration provision and their corresponding right to arbitrate from the outset. Indeed, they attached the Shareholders' Buy-Sell Agreement with the arbitration provision to their original petition filed in August 2018. Rather than pursuing arbitration, however, the Courtrights chose to pursue their claims in court, filing suit and engaging in significant discovery and motion practice for almost two years before seeking to compel arbitration. *See BBX Operating, LLC v. American Fluorite, Inc*., No. 09-17-00245-CV, 2018 WL 651276, at *6 (Tex. App.—Beaumont Nov. 16, 2017, no pet.) (mem. op.) ("[A] party who is aware of an arbitration clause, yet only files a motion to compel arbitration after having engaged in discovery and filed pleadings . . . and

after having received an adverse ruling . . . has . . . waived its right to arbitrate"); *Prof'l Advantage Software Sols., Inc. v. W. Gulf Mar. Ass'n Inc*., No. 01-15-01006-CV, 2016 WL 2586690, at *4 (Tex. App.—Houston [1st Dist.] May 5, 2016, no pet.) (mem. op.) (noting party is presumed to know contents of agreement it signs).

The Courtrights do not offer a justifiable explanation for their delay in requesting arbitration. *See Pounds v. Rohe*, 592 S.W.3d 549, 555 (Tex. App.—Houston [1st Dist.] 2019, no pet.) (considering among factors weighing in favor of waiver fact that delay was substantial, knowing, and unexplained, and that record did not "suggest a sympathetic reason for [defendants'] decision to wait so long to seek arbitration"). They argue the Voting Agreement gave them the right to seek injunctive relief in trial court and that they filed their original petition because they were seeking injunctive relief and they did "not believe it would be possible to get injunctive relief in arbitration under arbitration rules." But the Courtrights did not merely seek injunctive relief in their original petition, nor was the injunctive relief they sought limited to the Voting Agreement. In his original petition, Leonard sought affirmative claims beyond his request for injunctive relief, including claims against David for breach of fiduciary duty and breach of several agreements.

Moreover, nothing precluded the Courtrights from moving to compel arbitration at any time after Leonard filed his original petition or after he obtained the requested temporary restraining order, which the trial court granted on August

10, 2018–the same day Leonard filed suit. Although the Courtrights concede they waited twenty-six months before moving to compel arbitration, they argue the Court should disregard twenty-two of those months because (1) the trial court did not conclude the hearing on the Courtrights' request for injunctive relief until July 22, 2019, one year after Leonard first filed suit, (2) the trial court did not enter an order allowing them to substitute counsel until October 3, 2019, two months after the injunction hearing, and (3) eight of the twelve months between entry of the court's order allowing substitution of counsel and the Courtrights' filing of their motion to compel arbitration were "spent in COVID related delay." These arguments are unconvincing.

The Courtrights do not explain how the timing of the trial court's ruling on their request for injunctive relief, their retention of new counsel, or Covid prevented them from moving to compel arbitration earlier in the proceedings. We note that in the twelve-month period preceding the filing of their motion to compel arbitration (between October 2019 and October 2020), the Courtrights filed a motion to quash deposition upon written questions, a second amended petition demanding a jury trial, a motion to compel receiver to comply with duties and for termination of receivership, a response to the Teekells' first amended partial summary judgment motion, and its designation of expert witnesses on its affirmative claims. They also joined in Allied's and the Teekells' request for entry of an agreed docket control

order and a March 2021 trial setting. The Courtrights offer no explanation as to why they were able to file these motions and pleadings, but not their motion to compel arbitration, during this twelve-month period.

On this record, we find the Courtrights' delay in moving to compel arbitration supports a finding of waiver.

**2. Discovery**

The Courtrights conducted discovery in the case. The record shows they served forty-seven interrogatories, one hundred thirty-five requests for production, seven deposition notices with subpoena duces tecum, and two subpoenas to non-parties. The Courtrights also conducted five depositions and designated experts on their affirmative claims against the Teekells. The Courtrights also filed several discovery-related motions, including a motion to compel, a motion to quash, motions for contempt, and motions for sanctions.

The Courtrights argue that most of the discovery was conducted in anticipation of the hearing on their request for injunctive relief and not related to the merits of their claims. That is not the case. The record reflects that a number of the Courtrights' discovery requests—including fifty-six requests for production, seventeen interrogatories, a third-party subpoena to Teekell's business Allied Outdoor Solutions, and a subpoena to Verizon for the Teekells' cell phone records—

were served after the hearing on the Courtrights' request for injunctive relief and the trial court's July 22, 2019 order appointing a receiver.[5]

We further note that a party seeking an injunction must establish a likelihood of success on the merits of the party's claims to obtain injunctive relief. *See EMS USA, Inc. v. Shary*, 309 S.W.3d 653, 658 (Tex. App.—Houston [14th Dist.] 2010, no pet.) ("The legal issues before a trial court at a temporary injunction hearing are whether the applicant showed a probability of success and irreparable injury."). While some of the Courtrights' discovery requests predate the July 22, 2019 hearing and ruling, some requests sought information about David's other businesses—Allied Outdoor Solutions and Patio Outdoor Solutions—ostensibly to support the Courtrights' claim that David breached his fiduciary duty to Allied and usurped Allied's corporate opportunities by diverting them to his other businesses as alleged in the Courtrights' pleadings. The discovery requests also sought information related to the Teekells' finances, presumably in connection with the Courtrights' allegation that the Teekells misappropriated Allied's assets. Thus, the Courtrights' discovery leading up to the injunction hearing was not limited solely to the

[5] The Courtrights also argue that the only evidence of discovery the trial court considered consisted of exhibits attached to the Teekells' response to their motion to compel arbitration. To the contrary, the trial court stated at the hearing that it was taking judicial notice of its entire file.

injunction but related to the merits of their claims supporting their request for injunctive relief.

The Courtrights also contend there is no evidence showing who took the alleged five depositions. They further argue that the mere fact parties took depositions, without evidence of the deposition transcripts, does not constitute waiver. The record shows the Courtrights noticed the depositions of Will Kern, Tracy Webster, David Teekell, Mitch Hickman, and William Rose. The reporters' certificates in the record further establish that the Courtrights' attorney conducted many hours of depositions and generated hundreds of pages of testimony.[6]

Finally, citing *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502 (Tex. 2015), the Courtrights contend their designation of experts does not support a finding of waiver. Their argument is unavailing. In *G.T. Leach Builders*, the Texas Supreme Court held that a third-party's designation of experts did not support a finding of waiver because the action was "defensive in nature." *Id.* at 513. By contrast, the Courtrights designated experts to testify in support of their affirmative claims, specifically, that "Mr. Teekell gave up his right to make decisions for [Allied] when he executed the Voting Agreement," "[his] conduct

[6] The trial court took judicial notice of its entire file which included the reporters' certificates.

constituted breaches of his fiduciary duties," and his actions harmed Allied and the Courtrights.

The Courtrights assert "[t]he Texas Supreme Court has consistently rejected the argument that conducting discovery constitutes a waiver of the right to arbitration." In support of their assertion, they cite *Richmont Holdings, Inc. v Superior Recharge Systems*, 455 S.W.3d 573 (Tex. 2014), *In re Fleetwood Homes of Texas, L.P.*, 257 S.W.3d 692 (Tex. 2008), and *In re Bruce Terminex Co.*, 988 S.W.2d 702 (Tex. 1998). The cases are inapposite. Unlike the Courtrights, in each of those cited cases, the party seeking to compel arbitration conducted minimal discovery. *See Richmont Holdings*, 455 S.W.3d at 575–76 (noting movant who propounded one request for disclosure engaged in "only minimal discovery"); *Fleetwood Homes*, 257 S.W.3d 694–95 (holding party failed to overcome presumption against waiver where, among other things, it took no depositions, although it noticed one deposition before cancelling it, and it served one set of written discovery the day before moving to compel arbitration); *Bruce Terminex*, 988 S.W.2d at 704 (concluding party did not waive right to arbitration by propounding one set of eighteen interrogatories and one set of nineteen requests for production).

We find the Courtrights' discovery, designation of experts on its affirmative claims, and motion practice related to discovery support a finding of waiver.

### 3. Affirmative Relief and Pretrial Matters

The Courtrights asserted affirmative claims in the trial court. They acknowledge they sought affirmative relief against the Teekells for misuse of company funds but insist those claims are connected solely to their defense to the Teekells' claims that the Courtrights misused company funds. The record belies their assertion. The Courtrights, as the plaintiffs, asserted affirmative claims against David—breach of contract, breach of fiduciary duty, and declaratory judgment—and chose to pursue them in state court rather than in arbitration. And the Courtrights have since amended their pleadings several times to assert additional claims not only against David but also Linda Teekell for violations of the Texas Securities Act and breach of the Stock Purchase Agreement. They also sought a declaration that the Shareholders' Buy-Sell Agreement is still in force and that, under its terms, they have a right to purchase additional shares or receive an additional 65% of Allied's stock upon payment of $10,000,000 in profit distributions to David. The Courtrights designated experts to testify that David breached his fiduciary duties to Allied thereby harming the Courtrights. Thus, the Courtrights sought affirmative relief. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 785–86, 790–91 (Tex. App.—El Paso 2015, no pet.) (concluding party sought affirmative relief by filing claim for declaratory judgment and seeking constructive trust on disputed monies).

The Courtrights argue they never sought or received a judgment for affirmative relief and that they never moved for summary judgment. Even if true, this fact is not dispositive. "Waiver involves substantial invocation of the judicial *process*, not just judgment on the merits." *Perry Homes*, 258 S.W.3d at 592 (emphasis in original). Moreover, the Courtrights did seek affirmative relief in the form of sanctions and contempt findings, including moving for sanctions against the Teekells for noticing their summary judgment motion allegedly to circumvent the court's hearing on the Courtrights' motion to compel discovery, moving for contempt against David based on his alleged violation of the trial court's temporary restraining order, and moving for contempt against non-parties Woodforest National Bank and Joseph Clepper for their alleged refusal to appear at a show cause hearing. The Courtrights also moved to compel the appointed receiver to pay Allied's American Express expenses for which the Courtrights were guarantors, provide the Courtrights with weekly updates regarding Allied's financial status, and provide the Courtrights with complete access to Allied's financial books and records. And, the Courtrights also moved to terminate the receivership. The trial court denied their motions. *See Read*, 2019 WL 2536573 at *5 (noting movant participated in litigation process and sought affirmative relief by filing motion for sanctions) (citing *CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, Inc.*, 390 S.W.3d 299, 300 (Tex. 2013)); *Adams*, 344 S.W.3d at 650 (concluding evidence supported

finding that party substantially invoked judicial process where, among other things, record showed he asked trial court to find plaintiff in contempt for allegedly violating temporary injunction); *Menger*, 2021 WL 2654137, at *6 (noting movant sought affirmative relief by requesting that party opposing arbitration pay his attorney's fees and be held in contempt, jailed, and fined); *see also In re Christus Spohn*, 231 S.W.3d at 481–82 (finding movant's third-party petition, motion for contempt, and attempt to impose sanctions constituted "specific and deliberate actions that are inconsistent with the right to arbitrate and suggest that Spohn was attempting to achieve a satisfactory result through the judicial process").

We also note the Courtrights did not move to compel arbitration until after the trial court entered rulings adverse to the Courtrights. In its July 22, 2019 order appointing a receiver, the trial court found that Leonard's actions as a governing officer were "illegal, oppressive, or fraudulent" and Allied's property was "being misapplied or wasted." The Courtrights also filed a response to the Teekells' amended partial motion for summary judgment vigorously disputing the Teekells' claim that the Voting Agreement was invalid or terminated. On September 24, 2020, the trial court granted the Teekells' partial motion for summary judgment issuing a ruling adverse to the Courtrights, who originally sought a declaration that the Voting Agreement continued in full force and effect. And on October 5, 2020, Allied filed its motion for partial summary judgment seeking specific performance under the

Shareholders' Buy-Sell Agreement and an order from the court directing Leonard to tender to Allied all of his stock of shares in Allied in exchange for the promissory note Allied previously provided to him.[7]

The Courtrights moved to compel arbitration one month after the trial court granted the Teekells' motion for partial summary judgment invalidating the Voting Agreement, two weeks after Allied moved for partial summary judgment seeking specific performance related to the Shareholders' Buy-Sell Agreement (and while that motion remained pending), and only five months before the parties' agreed trial setting of March 2021.

The Courtrights also participated in pretrial matters related to the merits of their claims. As set out in detail above, they filed extensive pretrial pleadings and motions (original and amended petitions, motions for continuance, motions to compel, motions for contempt, summary judgment responses, motion to quash, motion to withdraw, motion to terminate receivership, and expert designation), participated in evidentiary hearings, and conducted substantial discovery. The record thus reflects the Courtrights sought affirmative relief and participated extensively in pretrial matters.

---

[7] The trial court granted Allied's partial summary judgment motion on December 8, 2020.

### 4. Trial Settings

Trial was set for November 4, 2019 originally, and later re-set for August 17, 2020. On June 12, 2020, the parties filed an agreed motion for entry of an amended docket control order asking the court to set the case for trial in March 2021. The trial court granted the motion and set the case on a three-week trial docket beginning March 15, 2021, as requested by the parties, including the Courtrights. In their last amended pleading, the Courtrights "demand[ed] a jury trial" and stated they had tendered the appropriate jury fee.

On October 21, 2020—*after* the trial court issued its order finding Leonard's actions were illegal, oppressive, or fraudulent, *after* the trial court entered its summary judgment ruling against the Courtrights invalidating the Voting Agreement, during the pendency of Allied's summary judgment motion on the Shareholders' Buy-Sell Agreement, and with a fast-approaching trial setting—the Courtrights moved to compel arbitration for the first time. They set their motion for hearing on December 8, 2020, asking the trial court to enter an order compelling the parties to arbitrate their disputes after more than two years of actively litigating their claims. *See id.* at 481 (considering fact that case was set for trial "on no less than three occasions before Spohn first mentioned the issue of arbitration" in determining that party substantially invoked judicial process); *Interconex, Inc. v. Ugarov*, 224 S.W.3d 523, 534–35 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (concluding

movant acted inconsistently with its right to arbitrate when it requested that case be reset and failed to file motion to compel arbitration until shortly before trial, which it had specifically requested and caused to be set on certain date).

After considering the totality of the circumstances, we conclude the Courtrights substantially invoked the judicial process and waived arbitration. *See Hogg*, 480 S.W.3d at 790 (holding arbitration waived when party participated in litigation "only up until the point that she received an adverse ruling from the district court and was faced with the possibility of having the court impose case-crippling sanctions"); *Okorafor v. Uncle Sam & Assocs., Inc.*, 295 S.W.3d 27, 40 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (concluding defendant substantially invoked judicial process because she pursued aggressive litigation strategy through amended pleadings that sought affirmative relief and abruptly switched to arbitration strategy when facing looming deadline to respond to discovery requests); *Christus Spohn*, 231 S.W.3d at 479 (explaining that actions inconsistent with right to arbitrate may include "some combination of filing an answer, setting up a counterclaim, pursuing extensive discovery, moving for a continuance, and failing to timely request arbitration").

**B. Prejudice**

Having determined the Courtrights substantially invoked the judicial process, we next consider whether Allied and the Teekells established they were unfairly

prejudiced as a result of the Courtrights' conduct. *See G.T. Leach Builders*, 458 S.W.3d at 515; *Perry Homes*, 258 S.W.3d at 595. "Detriment or prejudice, in this context, refers to an 'inherent unfairness caused by a party's attempt to have it both ways by switching between litigation and arbitration to its own advantage.'" *Id.* (quoting *In re Citigroup Global Mkts., Inc.*, 258 S.W.3d 623, 625 (Tex. 2008) (per curiam)); *Kennedy Hodges*, 433 S.W.3d at 545. Such inherent unfairness may be manifested "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." *Perry Homes*, 258 S.W.3d at 597. The nonmovant must show the fact of prejudice, but not its extent. *Id.* at 599.

The Courtrights engaged in substantial discovery serving forty-even interrogatories, one hundred thirty-five requests for production, seven deposition notices with subpoena duces tecum, two subpoenas to non-parties, conducting five depositions, and designating experts on their affirmative claims against the Teekells. They filed several pleadings, including amended petitions and summary judgment responses, as well as numerous motions, including applications for a temporary restraining order and a temporary injunction, motions to quash and for protection, a motion for continuance, motions for sanctions, motions for contempt, a motion to file sealed motions, and a motion to compel the receiver to comply with his duties and to terminate the receivership.

The Teekells attached to their response to the Courtrights' motion to compel arbitration the affidavit of their counsel, Kyle Hawes, who testified that he billed the Teekells for more than 644 hours of attorney time and the Teekells incurred $429,921.19 in attorney and paralegal fees and expenses. Allied attached to its response to the Courtrights' motion the declaration of George Kawaja, Allied's Chief Financial Officer, who attested that Allied had incurred $305,780.95 in legal fees and expenses in litigating the case. *See Christus Spohn*, 231 S.W.3d at 482 (concluding party had made clear showing of prejudice where, among other things, counsel testified by affidavit that client had incurred $60,000 to $70,000 in expenses to develop matter for trial and more than $350,000 in attorney's fees.)

The Courtrights argue that the only evidence the trial court considered were the declaration and affidavit reflecting the litigation expenses incurred which they argue are insufficient to show prejudice. Contrary to the Courtrights' assertion, the trial court made it clear at the hearing that it was taking judicial notice of its entire file. Thus, in considering whether to grant the Courtrights' motion to compel arbitration, the trial court had before it the parties' discovery, numerous pleadings and motions, and the court's prior rulings.

The Courtrights' reliance on *Transwestern Pipeline Co. v. Horizon Oil & Gas Co.*, 809 S.W.2d 589 (Tex. App.—Dallas 1991, writ dism'd w.o.j.) is unavailing. In that case, Horizon sued Transwestern for fraudulent inducement related to the

parties' agreement of pricing disputes. *See id*. at 591. After settlement attempts failed, Transwestern sought to compel arbitration and Horizon moved to stay arbitration. *See id.* The trial court granted Horizon's motion and made findings about Transwestern's waiver of its right to compel arbitration and prejudice to Horizon. *See id.* The court of appeals reversed the trial court's judgment. *See id*. at 593. It concluded that Transwestern's filing of a protective order in response to Horizon's discovery request failed to demonstrate substantial invocation of the judicial process sufficient to constitute waiver. *See id*. at 593. It also held that the mere fact Horizon had expended funds for legal fees was insufficient to establish prejudice because Horizon, as the plaintiff, had voluntarily incurred those expenses. *See id*. ("In deciding to initiate and prosecute its lawsuit, Horizon voluntarily incurred these expenses and assumed liability for these costs. It cannot now be argued that these self-inflicted wounds establish prejudice to Horizon and prevent Transwestern from invoking its right to compel arbitration."). Here, by contrast, the Courtrights—not the Teekells—initiated suit. The Courtrights also engaged in significantly more litigation than the defendant in *Transwestern* who filed a single motion.

The Courtrights also argue the affidavit and declaration attached to the Teekells' and Allied's responses do not segregate the fees and expenses incurred defending against the Courtrights' claims from those expended to prosecute their

own claims, nor do they show the portion of the fees and expenses that would have been avoided had the case been arbitrated or why the work performed could not also be used in arbitration. The Courtrights do not cite any authority to support their assertion that the Teekells were required to segregate their fees in such a manner. Moreover, the fact that Allied and the Teekells did not prove the discovery conducted during litigation (and the attendant costs) would not have occurred in arbitration does not negate a conclusion they were prejudiced by the Courtrights' failure to invoke the arbitration clause timely while actively obtaining discovery under the rules of civil procedure. *See Adams*, 344 S.W.3d at 652; *see also Perry Homes*, 258 S.W.3d at 599 ("This confuses proof of the *fact* of prejudice with proof of its *extent*; the Defendants had to show substantial invocation that prejudiced them, not precisely how much it all was.") (emphasis in original).

Moreover, as noted, the Courtrights moved for arbitration more than two years after filing suit in state court, after engaging in extensive discovery and motion practice, after the trial court granted the Teekells' motion for partial summary judgment on the Voting Agreement, after the trial court entered adverse findings that Leonard's actions were "illegal, oppressive, or fraudulent," and while Allied's motion for partial summary judgment on the Shareholders' Buy Sell Agreement (filed only two weeks prior) remained pending. Reviewing the record before us, we conclude the Courtrights' conduct resulted in substantial prejudice to Allied and the

Teekells. *See Kennedy Hodges*, 433 S.W.3d at 545 (stating prejudice is "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"). The trial court did not abuse its discretion in denying the Courtrights' motion to compel arbitration. We overrule the Courtrights' sole issue.

## Conclusion

We affirm the trial court's order denying the Courtrights' motion to compel arbitration.

Veronica Rivas-Molloy
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.