OKLAHOMA STATE COURTS NETWORK

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DIRTWORKS COMPANY, INC. v. OVERLAND CORPORATION

2026 OK CIV APP 30
Case Number: 123380
Decided: 08/03/2026
Mandate Issued: 09/03/2026
THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA, DIVISION III

Cite as: 2026 OK CIV APP 30, __ P.3d __

PAUL BRIGHTWELL DIRT WORKS, INC. a/k/a DIRTWORKS COMPANY, INC., Plaintiff/Appellee,
vs.
OVERLAND CORPORATION, Defendant/Appellant.

APPEAL FROM THE DISTRICT COURT OF
CARTER COUNTY, OKLAHOMA
HONORABLE RYAN HUNNICUTT, TRIAL JUDGE

REVERSED AND REMANDED

Mike Mordy, Carrie Pfrehm, MORDY, MORDY, PFREHM & WILSON, P.C., Ardmore, Oklahoma, For Plaintiff/Appellee,

Evan B. Gatewood, HAYES MAGRINI & GATEWOOD, Oklahoma City, Oklahoma, For Defendant/Appellant.

THOMAS E. PRINCE, VICE-CHIEF JUDGE:

¶1 Overland Corporation (Defendant/Appellant) ("Overland") has appealed the trial court's Order denying Overland's Motion to Stay Litigation and Compel Arbitration in a subcontract dispute with Paul Brightwell Dirt Works, Inc. a/k/a Dirtworks Company, Inc. (Plaintiff/Appellee) ("Dirtworks"). The trial court denied Overland's Motion following its determination that Overland had waived its contractual right to arbitration, which Overland has challenged on appeal. Based upon our review, we find the trial court exceeded its narrow authority by evaluating Overland's satisfaction of "conditions precedent" to arbitration. The trial court's Order denying Overland's Motion to Stay Litigation and Order Arbitration is, accordingly, reversed and remanded for further proceedings consistent with this Opinion.

BACKGROUND

¶2 From approximately September 10, 2019 through January 12, 2021, Dirtworks and Overland executed four (4) subcontracts for Oklahoma Department of Transportation Projects in Stephens, Seminole, Love, and Caddo Counties, wherein Dirtworks contracted to provide dirt work and pipe installation. All four (4) subcontracts contained binding arbitration agreements which stated, in relevant part:

15.2 AGREEMENT TO ARBITRATE All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, except for claims which have been waived by the making or acceptance of final payment, shall be decided by arbitration in accordance with the Construction Industry Association Rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. Notwithstanding other provisions in this Subcontract, or choice of law provisions to the contrary, this agreement to arbitrate shall be governed by the Federal Arbitration Act, 9 U.S.C. 1 et seq., which shall not be superseded or supplemented by any other arbitration act, statute or regulation.

* * *

15.4 NOTICE OF DEMAND Notice of the demand for arbitration shall be filed in writing with the other party to this Subcontract and with the American Arbitration Association. The demand for arbitration shall be made as required in the Subcontract Documents or within a reasonable time after written notice of the claim, dispute or other matter in question has been given, but in no event shall it be made when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitation. The location of the arbitration proceedings shall be at the office of the American Arbitration Association nearest the office of the Contractor, unless the parties agree otherwise.

¶3 Prior to the initiating of the underlying action, the record reflects several written communications between Dirtworks and Overland beginning in December of 2022 through January of 2025. Dirtworks contacted Overland via email on December 22, 2022, following the completion of the four (4) ODOT projects, identifying the "retainage" [1] which remained unpaid to Dirtworks. On June 19, 2023, Overland contacted Dirtworks via text message and stated that "Overland is going to pay you what you are owed." From May 23-24, 2024, Dirtworks sent Overland three (3) demand letters concerning the outstanding retainage and requested payment. On August 2, 2024, ODOT mailed Overland three (3) separate "Prompt Payment Complaints" concerning the payment owed to Dirtworks, wherein ODOT concluded Dirtworks' three (3) complaints were valid and, consequently, directed Overland to pay Dirtworks by August 20, 2024. On January 22, 2025, counsel for Dirtworks sent Overland a demand letter directing Overland to pay the outstanding payment owed within ten (10) days.

¶4 On March 25, 2025, Dirtworks filed underlying Petition before the Carter County District Court (which Dirtworks subsequently amended on March 31, 2025) raising claims for breach of contract and unjust enrichment based upon Overland's purported failure to pay Dirtworks the retainage owed. Overland, thereafter, filed a Motion to Stay Litigation and Compel Arbitration, citing the arbitration provisions contained in the four (4) subcontracts and contending Dirtworks' claims for breach of contract and unjust enrichment fall within the scope of the arbitration agreement. Overland, accordingly, sought to stay the underlying litigation and compel arbitration pursuant to the subcontracts. On May 5, 2025, Dirtworks filed an Objection to Overland's Motion to Stay Litigation and Compel Arbitration, citing Overland and Dirtworks' pre-litigation communication and Overland's subsequent conduct to contend Overland waived its right to arbitrate. Dirtworks emphasized Overland's failure to dispute Dirtworks' invoices, Overland's own spreadsheet acknowledging retainage owed, and its nonresponse to ODOT directives to pay as conduct contrary to Overland's right to arbitrate. Dirtworks additionally argued Overland failed to satisfy the stipulated procedure contained in the arbitration agreement, which requires the party seeking arbitration provide written notice of its demand "within a reasonable time after written notice of the claim, dispute or other matter in question has been given."

¶5 The trial court conducted a hearing on Overland's Motion to Stay Litigation and Compel Arbitration on July 23, 2025. Prior to the hearing, Dirtworks and Overland filed a Joint Stipulation wherein both parties stipulated that each of the four (4) subcontracts contained valid agreements to arbitrate any claims arising out of or relating to the subcontracts. During the July 23, 2025 hearing, counsel for Overland requested the trial court compel arbitration per the terms of the subcontract, while counsel for Dirtworks' asserted its position that Overland waived right to arbitration. Dirtworks also sought to supplement the written communications between Dirtworks and Overland (attached as exhibits to the pleadings) with testimony from Paul Brightwell, the sole shareholder of Dirtworks, to which Overland objected, contending that waiver presented only a legal issue which did not necessitate evidence in

the form of witness testimony. The trial court overruled Overland's objection, after which Mr. Brightwell testified about the written exchanges between Overland and Dirtworks concerning the outstanding retainage payments. Mr. Brightwell's testimony primarily highlighted Overland's lack of response to the efforts by Dirtworks to receive payment of the retainage, apart from Overland's text message to Dirtworks on June 19, 2023, which stated Overland would "pay [Dirtworks] what [Dirtworks] [was] owed." Ultimately, counsel for Dirtworks contended these communications demonstrated that Dirtworks "continued to make demand on [Overland]" but "[Overland] never raised their right to an arbitration" upon receipt of Dirtworks' payment demands, concluding this conduct constituted waiver of Overland's right to arbitrate. Counsel for Overland, however, emphasized the trial court's limited authority to review arbitration agreements, stating that, "once it's determined that there's an enforceable agreement and the dispute falls within the scope, then arbitration must be compelled."

¶6 The trial court, ultimately, denied Overland's Motion to Stay Litigation and Compel Arbitration via a Summary Order filed on July 29, 2025. Looking specifically at the subcontract's dispute resolution provisions, the trial court concluded the parties could mediate before arbitrating and that any arbitration demand had to be made within 15 days after unsuccessful mediation (or, at most, within a reasonable time). The trial court determined Dirtworks and Overland's pre-suit communications effectively functioned as informal mediation that ended long before Overland filed the underlying Motion, making Overland's arbitration demand untimely and inconsistent with its written agreement that money was owed. The trial court also found Overland's communications with Dirtworks to constitute both waiver of Overland's right to arbitrate based on its conduct *and* a secondary agreement -- separate from the initial subcontract -- which contained no arbitration clause. The trial court notably indicated in its Order that it "stops short of issuing a judgment as to the amount as [the July 23, 2025 hearing] [was] not an evidentiary hearing" because "[t]here [was] enough in the communications examined by the court to excuse [Dirtworks'] obligation to seek arbitration under contract." It is from the trial court's Summary Order denying Overland's Motion to Stay Litigation and Compel Arbitration which Overland timely appeals.

STANDARD OF REVIEW

¶7 Whether a valid agreement to arbitrate the claims in this case exists presents a question of law subject to *de novo* review on appeal. *Greenfield v. CircusTrix, LLC,* **2025 OK CIV APP 19**, ¶ 7, 574 P.3d 18, 22 (*citing Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.,* **2007 OK 12**, ¶ 19, **160 P.3d 936**, 944). *De novo* review accords this Court with plenary, independent, and non-deferential authority to reexamine a trial court's legal rulings. *Greenfield v. CircusTrix, LLC*, **2025 OK CIV APP 19**, ¶ 7, 574 P.3d 18, 22. (*citing Berry & Berry Acquisitions, LLC v. BFN Props. LLC*, **2018 OK 27**, ¶ 12, **416 P.3d 1061**, 1068). Our review of the trial court's determination concerning the existence of facts supporting waiver is deferential in nature. *Howell's Well Serv., Inc. v. Focus Grp. Advisors*, LLC, **2021 OK 25**, ¶ 6, **507 P.3d 623**, 626; *BOSC, Inc. v. Bd. of Cnty. Commissioners of Cnty. of Bernalillo*, 853 F.3d 1165, 1169 (10th Cir. 2017) (holding appellate courts "review the factual findings underlying [a finding of waiver] for clear error"). Finally, whether a trial court should have conducted an evidentiary hearing relating to a party's alleged waiver of its contractual right to arbitrate presents a procedural question left to the discretion of the district court, which we review for an abuse of discretion. *Thompson, Next Friend of Hughes v. Heartway Corp.,* **2025 OK 65**, ¶ 8, **579 P.3d 622**, 627; *McKinzie v. Am. Gen. Fin. Servs., Inc.,* **2012 OK CIV APP 37**, ¶ 15, **276 P.3d 1082**, 1087.

ANALYSIS

¶8 Overland asserts six (6) issues[2] in its Pet.-in-Error which it condensed into four (4) issues in its Br.-in-Chief, from which we gleaned two (2) primary issues necessitating our resolution: (1) whether the trial court's consideration of Overland's pre-suit conduct constituted an evaluation of Overland's alleged waiver of its arbitration rights or a decision concerning Overland's satisfaction of a condition precedent to arbitrability; and (2) whether Dirtworks presented sufficient evidence to satisfy the heavy burden of proof necessary to demonstrate Overland's alleged waiver of its right to arbitrate. We find the trial court erred by considering substantive contract issues beyond its narrow authority to resolve threshold arbitrability issues pursuant to **12 O.S. § 1857**. We further find the record lacks sufficient evidence to satisfy the heavy burden required for Dirtworks to demonstrate Overland had waived its right to arbitrate. Accordingly, the trial court's Order denying Overland's Motion to Stay Litigation and Compel Arbitration is reversed and remanded for proceedings consistent with this Opinion.

A. Facts Related to Waiver vs. Condition Precedent

¶9 The Oklahoma Uniform Arbitration Act, **12 O.S. § 1851** *et. seq.,* provides the procedural underpinning for the enforcement of arbitration agreements and, like its federal counterpart (Federal Arbitration Act, 9 U.S.C. § 1-402 *et. seq*.), recognizes that public policy favors arbitration of private disputes. *City of Muskogee v. Martin*, **1990 OK 70**, ¶ 17, **796 P.2d 337**, 343 ("[d]oubts regarding the arbitrability of disputes will be resolved in favor of arbitration."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 625, 105 S. Ct. 3346, 3353, 87 L. Ed. 2d 444 (1985) (discussing the "liberal federal policy favoring arbitration agreements"). Arbitration is designed "to preclude court intervention into the merits of disputes when arbitration has been provided for contractually." *Harris v. David Stanley Chevrolet, Inc.,* **2012 OK 9**, ¶¶ 6-7, **273 P.3d 877**, 879 (*citing Voss v. City of Oklahoma City,* **1980 OK 148**, ¶ 5, **618 P.2d 925**, 928). Title **12 O.S. § 1857**, serves as the mechanism for enforcing arbitration agreements and delineates the authority of both trial and arbitrators to review arbitration disputes, providing, in relevant part:

> B. If necessary, a court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
>
> C. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

Consequently, a trial court's role in reviewing arbitration disputes is solely that of the "gatekeeper" and is generally limited to determining: (1) whether there is a valid arbitration agreement; and (2) whether the dispute at issue falls within the scope of the arbitration agreement. *McKinzie v. Am. Gen. Fin. Servs., Inc.,* **2012 OK CIV APP 37**, ¶ 12, **276 P.3d 1082**, 1086 (*citing Carter v. Schuster,* **2009 OK 94**, ¶ 8, **227 P.3d 149**, 152). *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.,* **2007 OK 12**, ¶ 22, **160 P.3d 936**, 944--45. By virtue of the trial court's constrained authority to review only "questions of arbitrability[3]", any issues beyond the validity and scope of the arbitration agreement must be decided by an arbitrator. *See, e.g., Signature Leasing, LLC v. Buyer's Grp., LLC,* **2020 OK 50**, ¶ 19, **466 P.3d 544**, 550 (finding an arbitrator bears sole authority to evaluate substantive disputes arising from contracts containing the arbitration provisions); *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S. Ct. 588, 592 (2002) ("'procedural' questions which grow out of the dispute and bear on its final disposition are presumptively *not* for the judge, but for an arbitrator, to decide.")

¶10 Notwithstanding the trial court's limited jurisdiction in arbitration disputes, Oklahoma trial courts also retain narrow authority to consider facts pertaining to a party's alleged waiver of its contractual right to arbitrate. *Booker v. Sumner*, **2001 OK CIV APP 22**, ¶ 14, **19 P.3d 904**, 906 (waiver of the right to arbitrate presents a "mixed question of law and fact"); *Howell's Well Serv., Inc. v. Focus Grp. Advisors, LLC,* **2021 OK 25**, ¶ 8, **507 P.3d 623**, 626. "[T]he right to arbitration, like any other contract right, can be waived." *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 790 F.3d 1112, 1115 (10th Cir. 2015). Thus, a trial court may inquire whether a party has waived its right to arbitrate through a balancing of the following factors:

1. Whether a party has taken actions that are inconsistent with a right to arbitrate;

2. Whether the issue of arbitration was raised only after there had been significant preparation for litigation;

3. Whether the trial date is near or there has been a long delay in raising the issue of contractual arbitration rights;

4. Whether the party invoking the arbitration right has filed pleadings in the litigation without seeking a stay of the proceedings;

5. Whether the party seeking arbitration has engaged in discovery proceedings that are not available in arbitration or participated in other "important intervening steps"; and

6. Whether the opposing party has been prejudiced by the delay.

Howell's Well Serv., Inc. v. Focus Grp. Advisors, LLC, **2021 OK 25**, ¶ 15, **507 P.3d 623**, 627--28 (*citing Northland Ins. Co. v. Kellogg*, **1995 OK CIV APP 84**, ¶ 8, **897 P.2d 1161**, 1162). This balancing test ("the *Northland* test"), accordingly, enables trial courts to evaluate behavioral and procedural evidence extrinsic to the arbitration clause, but stops short of allowing trial courts to consider the substance of or specific terms contained in the arbitration agreement at issue. *Id.*

¶11 A party's waiver of a right to arbitrate, however, should not be conflated with a party's failure to satisfy a "condition precedent" to arbitration contained in the arbitration agreement, which **12 O.S. § 1857**(C) places in the sole province of the arbitrator. *Signature Leasing, LLC v. Buyer's Grp.,* LLC, **2020 OK 50**, ¶ 17, **466 P.3d 544**, 549; *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85, 123 S. Ct. 588, 592 (2002). Courts presume that parties to an arbitration agreement "intend arbitrators, not courts, to decide disputes about the meaning and application of particular procedural preconditions for the use of arbitration", which includes satisfaction of "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 34, 134 S. Ct. 1198, 1207 (2014). As such, trial courts lack authority to evaluate a party's compliance with specific conditions precedent articulated in arbitration agreements. *Magel v. Nuveen*, **2023 OK CIV APP 13**, ¶¶ 35-36, **529 P.3d 928**, 937

¶12 In the underlying appeal, it is undisputed that Dirtworks' claim fell within the scope of a valid arbitration agreement, both because the parties jointly stipulated to the validity of the arbitration agreement and Dirtworks' claims for breach of contract and unjust enrichment are clearly "dispute[s] arising out of or relate[d] to [the] Subcontract[s]". The sole remaining issue which could be considered by the trial court, consequently, was whether Overland had waived its right to arbitration. Both before the trial court and now on appeal, Dirtworks cites primarily to Overland's pre-litigation communications as the basis for its waiver argument in accordance with the first *Northland* factor. More specifically, Dirtworks contends that Overland engaged in conduct "inconsistent with a right to arbitrate" by failing to execute a written demand for arbitration "within a reasonable time" after receiving Dirtworks' demand letters and ODOT's Prompt Payment Complaints. Dirtworks insists its Demand Letters and ODOT's Complaints served as "written notice of [Dirtworks'] claim" triggering the "reasonable" timeframe to demand arbitration per the arbitration agreement. Consequently, Dirtworks maintains Overland's nonresponse to the repeated demands for payment -- in addition to Overland's statement via text that it would "pay [Dirtworks] what [Dirtworks] [is] owed -- demonstrate actions inconsistent with Overland's right to arbitrate.

¶13 While some of the facts pertaining to Overland's conduct may overlap with facts concerning its satisfaction of a "condition precedent" to arbitration, the trial court's Summary Order waded too far into the substance of the arbitration provisions contained in the subcontracts. The trial court went well beyond the factors outlined in the *Northland* test by finding that the singular text message from Overland to Dirtworks stating Overland would "pay [Dirtworks] what [Dirtworks] [is] owed" constituted both: (1) an informal mediation according to Paragraph 15.1 of the arbitration agreement; [4] and (2) a "secondary verbal agreement that money was owed" which contained no corresponding arbitration provision. [5] The trial court also considered the time frame in which the party seeking arbitration must file a written "demand for arbitration", specifically finding Overland "ha[d] not filed for arbitration in a reasonable amount of time" following Dirtworks' initial requests for payment of the outstanding retainage. Overland's satisfaction -- or lack thereof -- of the subcontract's direction to file a written demand for arbitration in a "reasonable amount of time" is undoubtedly a condition precedent to arbitration. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 85, 123 S. Ct. at 592 (2002) (finding that whether a party filed a notice of arbitration within the time limit provided by the arbitration provision "is a matter presumptively for the arbitrator, not for the judge"). Consequently, each of the trial court's conclusions delve into substantive contract issues, both concerning facts related to contract formation/modification and satisfaction of conditions precedent to arbitrability. We find the trial court's Summary Order erroneously engaged in a substantive contract analysis of the arbitration provisions which clearly exceeded the trial court's limited authority to review only the validity, scope, and alleged waiver. Consequently, the trial court's basis for denying Overland's Motion to Stay Litigation and Compel Arbitration must be reversed.

B. Sufficiency of Evidence Concerning Waiver

¶14 Although the trial court exceeded its narrow authority by engaging in a substantive analysis of provisions in the arbitration agreement, we must, nevertheless, determine whether the underlying record contains sufficient evidence demonstrating Overland's alleged waiver of its contractual right to arbitrate. As stated *supra*., waiver of the right to arbitrate presents a mixed question of fact and law which Oklahoma courts evaluate based upon the six (6) *Northland* factors. *Booker v. Sumner*, 2001 OK CIV APP at ¶ 14, 19 P.3d at 906; *Howell's Well Serv., Inc. v. Focus Grp. Advisors*, *LLC*, 2021 OK at ¶ 15, 507 P.3d at 627--28 (*citing Northland Ins. Co. v. Kellogg*, 1995 OK CIV APP at ¶ 8). However, waiver "is not easily inferred", as the party asserting waiver bears the burden of proof and "any doubts concerning the arbitrability of a particular dispute should be resolved in favor of coverage." *Howell's Well Serv., Inc,* 2021 OK at ¶ 8, 507 P.3d at 626; *B.A.P., L.L.P. v. Pearman,* **2011 OK CIV APP 30**, ¶ 20, **250 P.3d 332**, 340.

¶15 Following the filing of a motion to compel arbitration, either party to the arbitration agreement is entitled to request an evidentiary hearing to resolve factual issues -- including facts related to waiver in accordance with the *Northland* factors. *Thompson, Next Friend of Hughes v. Heartway Corp*., **2025 OK 65**, ¶ 43, **579 P.3d 622**; *Howell's Well Serv., Inc.*, 2021 OK at ¶ 15, 507 P.3d at 627--28. Although trial courts possess broad discretion in deciding whether to grant an evidentiary hearing, if facts pertaining to the validity, scope, and waiver of the arbitration provision are in controversy, "then the better procedure is for the district court to conduct an evidentiary hearing before entering an order." *Ameristar Coil Processing, LLC v. William E. Buffington Co., Inc.,* **2012 OK CIV APP 2**, ¶ 22, **269 P.3d 55**, 60--61 (*citing Rogers v. Dell Computer Corp.,* **2005 OK 51**, ¶ 17, **138 P.3d 826**, 830, as corrected (Nov. 16, 2005), as corrected (Nov. 29, 2005)).

¶16 In this case, Dirtworks' evidence of Overland's purported waiver was presented solely through exhibits attached to the parties' pleadings, primarily focusing upon the parties' pre-litigation communications to demonstrate "actions inconsistent with the right to arbitrate" (i.e. the first factor in the *Northland* test). However, as stated *supra*., much of the conduct cited by Dirtworks concerned Overland's satisfaction of a condition precedent to arbitration and not extrinsic conduct related to waiver. In parsing out Overland's waiver-related conduct from facts pertaining to Overland's satisfaction of a condition precedent, Dirtworks' examples of Overland's alleged inconsistent conduct were: (1) Overland's June 19, 2023 text message to Dirtworks stating "Overland is going to pay you what you are owed"; (2) the two year time frame between Dirtworks' initial email requesting payment of the retainage and Overland's Motion to Compel Arbitration; and (3) Overland's nonresponse to Dirtworks' demand letters and ODOT's Prompt Payment Complaints. We note, however, that each of Dirtworks examples of alleged inconsistent conduct occurred prior to its filing of the underlying Petition on March 25, 2025. Overland's first litigation filing was its Motion to Stay and Compel Arbitration on April 21, 2025 -- filed less than a month after Dirtworks initiated the underlying litigation -- which demonstrates conduct consistent with preserving Overland's arbitral rights. Even if Overland had waited longer to file its Motion to Compel Arbitration, the *Howell* Court found that a seventeen-month delay in the midst of litigation did not rise to the level of "inconsistent" conduct because "minimal case activity" had been initiated. *Howell's Well Serv., Inc.,* 2021 OK at ¶ 4, 507 P.3d at 625.

¶17 Beyond the first *Northland* factor, Dirtworks cites to only one other factor, which inquires "whether the opposing party has been prejudiced by the delay." *Howell's Well Serv., Inc.*, 2021 OK at ¶ 15, 507 P.3d at 627--2. "Prejudice" in this context "refers to the inherent unfairness -- in terms of delay, expense, or damage to a party's legal position -- that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that same issue." *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1208--09 (10th Cir. 2016)

¶18 Dirtworks contends Overland's non-response to its requests for payment for over two (2) years prejudiced Dirtworks, in addition to Overland's 2023 text message to Dirtworks which "falsely led [Dirtworks] to believe" Overland would pay the outstanding retainage. Both of Dirtworks' examples of prejudice, however, occurred prior to the start of litigation, while the *Northland* factors focus primarily upon litigation conduct. *Howell's Well Serv., Inc.*, LLC, 2021 OK at ¶¶ 16-18 (*citing Northland Ins. Co. v. Kellogg*, 1995 OK CIV APP at ¶ 8). Based upon our consideration of the *Northland* factors as they apply to the evidence presented by Dirtworks, we conclude Overland acted consistently with its arbitration right, invoked arbitration promptly after Dirtworks filed the underlying Petition,

undertook no meaningful litigation steps, and caused no cognizable prejudice. Dirtworks, therefore, did not meet its heavy burden to demonstrate Overland's alleged waiver of the right to arbitrate. As the record does not support the trial court's finding of waiver, we find the Summary Order constitutes clear error and is, accordingly, reversed and remanded.

¶19 While the trial court conducted a hearing on Overland's Motion to Stay Litigation and Compel Arbitration wherein Dirtworks sole shareholder testified about specific evidence, the trial court explicitly stated in its Summary Order that the trial court "stop[ped] short of issuing a judgment as to the amount [owed to Dirtworks] ***as this is not an evidentiary hearing***." (emphasis added). Further, the record reflects neither Dirtworks nor Overland requested an evidentiary hearing. Because the parties opted not to request an evidentiary hearing before the trial court, we decline to order an evidentiary hearing on remand. There are no "mulligans" where a party bearing the burden of proof chooses not to pursue an opportunity to present evidence through witness testimony. Accordingly, the trial court is directed on remand to grant Overland's Motion to Stay Litigation and Compel Arbitration.

CONCLUSION

¶20 Based upon the foregoing analysis, we find the trial court erred in its denial of Overland's Motion to Stay Litigation and Compel Arbitration. The trial court exceeded its authority by considering substantive elements of the subcontracts' arbitration provisions, including findings related to Overland's satisfaction of "conditions precedent" to arbitrability. We, accordingly, reverse the trial court's Summary Order and remand for proceedings consistent with this Opinion.

DOWNING, P.J., and MITCHELL, J., concur.

FOOTNOTES

THOMAS E. PRINCE, VICE-CHIEF JUDGE:

[1] "Retainage" is a construction industry term defined as "money earned by the contractor but withheld from the progress payments only to be paid "after completion and acceptance by the architect, owner and lender." *E. V. Cox Const. Co. v. Brookline Associates*, **1979 OK CIV APP 66**, ¶ 17, **604 P.2d 867**, 872; *see also* **61 O.S. § 102**(9) (defining "retainage" as "the difference between the amount earned by the contractor on a public construction contract, with the work being accepted by the public agency, and the amount paid on said contract by the public agency"); *see also* **61 O.S. § 222**(6) (defining "retainage" as "the difference between a gross proper invoice amount on a construction contract and the amount paid on said contract").

[2] Overland raised the following allegations of error in Ex. C of its Pet.-in-Error:

1. Whether the trial court erred in denying Overland's motion to stay litigation and compel arbitration;

2. Whether the trial court erred in ruling that Overland's right to arbitration has been waived for failing to comply with the conditions precedent found in section 15.4 of the Subcontracts;

3. Whether the trial court erred in ruling that section 15.4 of the Subcontracts is a condition precedent to Arbitration;

4. Whether the trial court exceeded in its authority by ruling on the applicability of conditions precedent to arbitration found within the Subcontracts;

5. Whether the trial court made improper finding of facts concerning amounts owed by Overland to Dirtworks;

6. Whether the trial court erred in ruling Overland has waived arbitration by failing to comply with section 15.4 of the Subcontracts.

[3] The United States Supreme Court defined the limited role of trial courts in arbitration disputes as resolving "questions of arbitrability", which pertain to the "narrow circumstance[s]" where the parties to the contract "would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 83--84, 123 S. Ct. 588, 592, 154 L. Ed. 2d 491 (2002).

[4] Beyond the trial court's invocation of Paragraph 15.1 of the subcontracts in the Summary Order, neither Dirtworks nor Overland presented any arguments pertaining to Paragraph 15.1 and its "mediation provision". Paragraph 15.1 provides the following:

> **15.1 INTIAL DISPUTE RESOLUTION** If a dispute arises out of or relates to this Subcontract, or the breach thereof, the parties may endeavor to settle the dispute first through direct discussions. The parties may also endeavor to settle the dispute by mediation before recourse to arbitration. Unless the parties agree otherwise, the mediation shall be conducted in accordance with the Construction Mediation Rules of the American Arbitration Association. Mediation will be commenced within the time limits for arbitration stipulated in the Subcontract Documents. The time limits for any subsequent arbitration will be extended for the duration of the mediation process plus fourteen (14) Calander days, or otherwise provided in the Subcontract Documents. Issues to be mediated are subject to the exceptions in Paragraph 15.3 for arbitration. The location of the mediation shall be the same as the location for arbitration identified in Paragraph 15.4

The trial court's consideration of the parties' alleged engagement in an "informal mediation" under Paragraph 15.1 clearly exceeds the trial court's limited authority to evaluate the validity, scope, and alleged waiver of the arbitration agreement, as the trial court made specific considerations concerning both parties' actions as it related to the substantive terms of the contract. For example, Paragraph 15.1 directs parties to conduct the mediation "in accordance with the Construction Mediation Rules of the American Arbitration Association" and "commenced within the time limits for arbitration stipulated in the Subcontract Documents" -- both of which are determinations requiring the trial court to consider factual matters pertaining to the substance of the subcontract.

[5] The trial court's finding that Overland and Dirtworks entered into a secondary agreement did not arise from either Overland or Dirtworks arguments before the trial court, and it is unclear how the trial court reached this conclusion. Whether this text exchange constituted a "secondary agreement" or a modification of the original subcontracts presents questions pertaining to contract formation/modification issues like mutual assent and consideration -- both of which are issues going far beyond this Court and the trial court's authority to review. *See e.g., State ex rel. Oklahoma Capitol Imp. Auth. v. Walter Nashert & Sons, Inc.,* **1974 OK 5**, **518 P.2d 1267**(discussing mutual assent as a requisite element for modifying a contract); *see also, e.g., Tinker Fed. Credit Union v. Johnson*, **2016 OK CIV APP 10**, **368 P.3d 6**(discussing the exchange of additional consideration to modify an original contract). We, like the trial court, can only evaluate the validity, scope, and alleged waiver of the arbitration agreement -- all other substantive issues remain in the sole province of the arbitrator. *See generally Signature Leasing, LLC v. Buyer's Grp., LLC*, **2020 OK 50**, ¶ 17, **466 P.3d 544**, 549.

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Oklahoma Court of Civil Appeals Cases

Cite	Name	Level
2001 OK CIV APP 22, 19 P.3d 904, 72 OBJ 672,	BOOKER v. SUMNER	Discussed
1995 OK CIV APP 84, 897 P.2d 1161, 66 OBJ 2173,	Northland Ins. Co. v. Kellogg	Discussed
2011 OK CIV APP 30, 250 P.3d 332,	B.A.P., L.L.P. v. PEARMAN	Discussed
2012 OK CIV APP 2, 269 P.3d 55,	AMERISTAR COIL PROCESSING, LLC v. WILLIAM E. BUFFINGTON CO., INC.	Discussed
2012 OK CIV APP 37, 276 P.3d 1082,	McKINZIE v. AMERICAN GENERAL FINANCIAL SERVICES, INC.	Discussed at Length
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Oklahoma Supreme Court Cases

Cite	Name	Level
1990 OK 70, 796 P.2d 337, 61 OBJ 1928,	City of Muskogee v. Martin	Discussed
1974 OK 5, 518 P.2d 1267,	STATE EX REL. O.C.I.A. v. WALTER NASHERT & SONS	Discussed
2005 OK 51, 138 P.3d 826,	ROGERS v. DELL COMPUTER CORPORATION	Discussed
2007 OK 12, 160 P.3d 936,	OKLAHOMA ONCOLOGY & HEMATOLOGY P.C. v. US ONCOLOGY, INC.	Discussed at Length
2009 OK 94, 227 P.3d 149,	CARTER v. SCHUSTER	Discussed
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2018 OK 27, 416 P.3d 1061,	BERRY AND BERRY ACQUISITIONS v. BFN PROPERTIES	Discussed
1980 OK 148, 618 P.2d 925,	Voss v. City of Oklahoma City	Discussed
2020 OK 50, 466 P.3d 544,	SIGNATURE LEASING LLC v. BUYER'S GROUP LLC	Discussed at Length
2021 OK 25, 507 P.3d 623,	HOWELL'S WELL SERVICE v. FOCUS GROUP ADVISORS	Discussed at Length
2025 OK 65, 579 P.3d 622,	BEVERLY THOMPSON, Next Friend of CHARLENE HUGHES, an Individual v. HEARTWAY CORPORATION	Discussed at Length

Title 12. Civil Procedure

Cite	Name	Level
12 O.S. 1851,	Short Title	Cited
12 O.S. 1857,	Enforceability, Interpretation of Arbitration Agreements - Arbitration Proceeding During Dispute Over Agreement	Discussed at Length

Title 61. Public Buildings and Public Works

Cite	Name	Level
61 O.S. 102,	Definitions	Cited
61 O.S. 222,	Definitions	Cited