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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2010

1090823

Dudley, Hopton-Jones, Sims & Freeman, PLLP

v.

Andrew J. Knight

Appeal from Jefferson Circuit Court
(CV-10-84)

STUART, Justice.

The accounting firm Dudley, Hopton-Jones, Sims & Freeman, PLLP ("DHSF"), appeals from an order of the Jefferson Circuit Court dismissing with prejudice its action against Andrew J. Knight, a former partner in DHSF. We reverse and remand.

I.

Knight became a partner in DHSF in 1988. The partnership agreement Knight signed at that time contained the following arbitration provision:

> "In the event controversy or claim arises out of or relates to this agreement concerning the value of property or the amount of losses, profits or damages, it shall be submitted to three arbitrators and settled by arbitration in accordance with the rules, then obtaining, of the American Arbitration Association."

Knight left DHSF in April 2000 and, on August 30, 2001, sued DHSF in the Jefferson Circuit Court, alleging that DHSF had not paid him money he was entitled to under the partnership agreement upon withdrawing from the partnership. Without filing an answer, DHSF moved to compel arbitration of Knight's claim pursuant to the arbitration provision in the partnership agreement, and, on February 13, 2002, the circuit court granted DHSF's motion and stayed the case "to permit the parties to arbitrate." It appears that Knight and DHSF thereafter conferred regarding the selection of the arbitrators; however, neither party filed a demand for arbitration with any organization or otherwise took steps to formally initiate the arbitration process. The circuit court

periodically held status conferences and requested status reports on the arbitration proceeding; however, on August 4, 2009, after arbitration proceedings still had not been initiated, the circuit court dismissed Knight's action with prejudice.

Approximately five months later, on January 11, 2010, DHSF initiated the present action by filing a complaint against Knight in the Jefferson Circuit Court, alleging that Knight was liable to the firm for breach of contract, breach of fiduciary duties, and fraudulent misrepresentation. DHSF simultaneously moved the circuit court to stay the case and to refer it to arbitration pursuant to the arbitration provision in the partnership agreement. In that motion, DHSF argued that the arbitration provision encompassed the claims it was asserting against Knight, that the underlying transaction affected interstate commerce, and that the circuit court had previously compelled arbitration based upon that same arbitration provision in the earlier action initiated by Knight.[1] On January 29, 2010, the circuit court granted the

[1]DHSF attached as an exhibit to its motion the motion to compel arbitration it had filed in the earlier action initiated by Knight.

motion and stayed the case pending the outcome of the arbitration proceedings.

On February 3, 2010, Knight moved the circuit court to dismiss the complaint filed by DHSF, arguing that the claims asserted by DHSF were barred both by the applicable statutes of limitations and by DHSF's failure to assert the claims as compulsory counterclaims in the action filed by Knight in 2001. Knight also argued that DHSF failed to assert its fraudulent-misrepresentation claim with the particularity required by Rule 9(b), Ala. R. Civ. P. ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). On March 2, 2010, DHSF filed a response in opposition to Knight's motion to dismiss, arguing that each of Knight's arguments lacked merit and that, in any event, those arguments should be decided by an arbitrator -- not the court -- because the partnership agreement between the parties contained a valid arbitration provision covering the asserted claims.

On March 4, 2010, the circuit court held a hearing on Knight's motion to dismiss. Following that hearing, the circuit court granted Knight's motion and entered a written

order dismissing DHSF's complaint with prejudice on the basis of the arguments made by Knight in his motion to dismiss. DHSF filed its notice of appeal to this Court that same day.

II.

DHSF argues that the circuit court erred in hearing and ruling on Knight's motion to dismiss its complaint because, DHSF argues, that motion raised only issues that, in the context of a dispute falling within the scope of a valid arbitration provision, must be resolved by an arbitrator -- not a court, which is empowered in such cases to rule only on issues of substantive arbitrability. We review the circuit court's judgment de novo. Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601, 604 (Ala. 2009).

We explained the role of the trial court in ruling on a motion to compel arbitration as follows in Brasfield & Gorrie:

> "In ruling on a motion to stay judicial proceedings following a request for arbitration, the court is required to decide matters of 'substantive arbitrability,' that is, (1) whether a valid agreement to arbitrate exists and, if so, (2) whether the specific dispute falls within the scope of that agreement. Dean Witter [Reynolds, Inc. v. McDonald], 758 So. 2d [539,] 542 [(Ala. 1999)]. 'Procedural arbitrability,' on the other hand, involves questions that grow out of the dispute and bear on its final disposition, e.g., defenses such as notice, laches, estoppel, and other similar

> compliance defenses; such questions are for an arbitrator to decide. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (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"'); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (holding that an arbitrator should decide whether the steps of a grievance procedure were completed, where those steps were prerequisites to arbitration)."

35 So. 3d at 604-05. In this case, the circuit court considered DHSF's motion to compel arbitration and the accompanying exhibits, and it initially granted the motion, staying the case so that DHSF could arbitrate its claims against Knight. That decision is supported by the evidence in the record because there is no question but that a valid agreement to arbitrate exists between DHSF and Knight and that the present dispute falls within the scope of that agreement.

However, approximately five weeks after issuing an order compelling arbitration, the circuit court entered a new order granting Knight's motion to dismiss DHSF's complaint on the following grounds: (1) that all DHSF's claims were barred by the applicable statutes of limitations; (2) that all DHSF's claims were barred because they were compulsory counterclaims that were not asserted in a previous action between the

parties; and (3) that DHSF's fraudulent-misrepresentation claim was not pleaded with the required particularity. This order effectively vacated the previous order compelling arbitration, holding instead that Knight did not have to submit to arbitration because he had valid defenses to the claims asserted against him by DHSF. However, as we explained in Brasfield & Gorrie, a trial court in such circumstances is empowered only "to decide matters of 'substantive arbitrability.'" 35 So. 3d at 604. The issue whether DHSF's claims were barred by the applicable statutes of limitations or because they were not asserted in a previous action between the parties, as well as whether DHSF's fraud claim was pleaded with the required particularity, is wholly unrelated to whether a valid agreement to arbitrate exists or whether the identified dispute falls within the scope of that agreement; accordingly, those arguments do not implicate matters of substantive arbitrability, and the circuit court erred by considering those arguments and dismissing DHSF's complaint on that basis. The arguments raised by Knight in his motion to dismiss in fact relate to the ultimate viability of DHSF's claims -- not to the availability of arbitration -- and they

should accordingly be considered and ruled upon by the arbitrators, not by the circuit court.

Knight argues that this Court can nevertheless affirm the judgment of the circuit court because, he argues, DHSF waived its right to arbitrate its claims by not pursuing those claims during the eight-year period in which Knight's action against DHSF was on the administrative docket pending arbitration. DHSF argues that it did not waive its claims and that the issue of waiver, like all the other issues Knight has raised, is for the arbitrators, not the court, to consider.

In Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6, 14 (Ala. 2006), this Court stated that "whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator." We further explained that "[i]n order to show waiver by litigation-related conduct, the party opposing arbitration must demonstrate that the movant has substantially invoked the litigation process ...." 939 So. 2d at 14. Washington therefore represents an exception to the general presumption in arbitration law that arbitrators should decide allegations of waiver. See, e.g., Howsam v. Dean Witter

Reynolds, Inc., 537 U.S. 79, 84 (2002) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)) ("[T]he presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.'").

That exception does not apply in this case, however, because Knight is not arguing that DHSF waived its right to arbitrate its claims by substantially invoking the litigation process. Rather, Knight is arguing that DHSF waived its arbitration rights based on its failure to pursue its claims in a timely fashion. See Knight's brief, p. 15 ("[DHSF's] conduct in sitting on its hands for almost a decade before seeking arbitration of its claims constitutes a waiver of its right to arbitration. Just as parties can waive their contractual right to arbitration by substantially invoking the litigation process, they can also waive such rights through dilatory conduct."). An allegation of waiver such as this falls outside the exception articulated in Washington and is subject to the general rule that arbitrators should decide issues of waiver or delay; accordingly, we cannot affirm the judgment of the circuit court on this basis. See also

Brasfield & Gorrie, 35 So. 3d at 606-07 n.1 (explaining that whether a party has waived its right to arbitration by substantially invoking the litigation process is a matter for the trial court because invoking the litigation process involves matters that occurred under the trial court's watch; such a waiver is therefore distinguishable from a waiver based on other factors not involving litigation conduct).

III.

DHSF's action against Knight alleges breach of contract, breach of fiduciary duties, and fraudulent misrepresentation. The circuit court initially granted DHSF's motion to stay the case so that DHSF could arbitrate its claims pursuant to an arbitration provision in the partnership agreement entered into by the parties, but the circuit court subsequently vacated that order and dismissed DHSF's claims on the basis of the defenses asserted by Knight. However, because the defenses asserted by Knight concerned the ultimate viability of DHSF's claims and not issues of substantive arbitrability, the circuit court erred by considering the merit of those defenses. Because there is no question but that there was a valid agreement between the parties to arbitrate claims such

as those asserted by DHSF, arbitration was the proper forum in which to consider the defenses asserted by Knight. Accordingly, the judgment of the circuit court dismissing DHSF's claims and implicitly vacating its earlier order compelling arbitration is reversed and the cause remanded to the circuit court so that DHSF can arbitrate its claims pursuant to the arbitration provision in the partnership agreement between the parties. All other issues raised by the parties on appeal are accordingly pretermitted.

REVERSED AND REMANDED.

Lyons, Woodall, Smith, and Parker, JJ., concur.

Murdock, J., concurs specially.

Shaw, J., concurs in the result.

Cobb, C.J., dissents.

Bolin, J., recuses himself.

MURDOCK, Justice (concurring specially).

I concur in the main opinion. I write separately (1) to explain my understanding of the concept of "procedural arbitrability" referenced in Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601 (Ala. 2009), as quoted in the main opinion, see ___ So. 3d at ___, and (2) to explain further my unwillingness to embrace, as does Chief Justice Cobb in her dissent, a defense of waiver as a ground for affirming the order of the circuit court.

I first note that the defenses of statute of limitations and failure to assert a compulsory counterclaim (thus giving rise to a res judicata bar), though obviously procedural in one sense, are not "procedural arbitrability" issues as that term has come to be understood since the United States Supreme Court's decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964). Rather, as the main opinion suggests, these are defenses that arise under state law and that ultimately may defeat a claim; they do not per se address the "arbitrability" of the claim.

> "'Procedural arbitrability ... involves questions that grow out of the dispute and bear on its final disposition, e.g., defenses such as notice, laches, estoppel, and other similar compliance defenses;

> such questions are for an arbitrator to decide. See Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (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"'); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) (holding that an arbitrator should decide whether the steps of a grievance procedure were completed, where those steps were prerequisites to arbitration)."

Brasfield & Gorrie, 35 So. 3d at 604-05 (emphasis added).

The Court in Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002), explained as follows:

> "[T]he Court has found the phrase 'question of arbitrability' not applicable in other kinds of general circumstance where parties would likely expect that an arbitrator would decide the gateway matter. Thus '"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. John Wiley [& Sons, Inc. v. Livingston, 376 U.S. 543,] at 557, 84 S.Ct. 909 [(1964)] (holding that an arbitrator should decide whether the first two steps of a grievance procedure were completed, where these steps are prerequisites to arbitration). So, too, the presumption is that the arbitrator should decide 'allegation[s] of waiver, delay, or a like defense to arbitrability.' Moses H. Cone Memorial Hospital [v. Mercury Constr. Corp., 460 U.S. 1,] at 24-25, 103 S.Ct. 927 [(1983)]. Indeed, the Revised Uniform Arbitration Act of 2000 (RUAA), seeking to 'incorporate the holdings of the vast majority of state courts and the law that has developed under the [Federal Arbitration Act],' states that an 'arbitrator shall decide whether a condition precedent to

> arbitrability has been fulfilled.' RUAA § 6(c), and comment 2, 7 U.L.A. 12-13 (Supp. 2002). And the comments add that 'in the absence of an agreement to the contrary, issues of substantive arbitrability ... are for a court to decide and issues of procedural arbitrability, i.e., whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.' Id., § 6, comment 2, 7 U.L.A., at 13."

(Emphasis omitted; emphasis added.)

Howsam gives as an example of a procedural-arbitrability issue a failure to follow a given procedure that, under a collective-bargaining agreement, was part of the process entitling the aggrieved party to arbitrate its dispute. Howsam also refers to "prerequisites" to arbitration, "such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate." 537 U.S. at 84. The reference is to time limits, notice, etc., that are a function of the agreement to arbitrate and thus are "conditions precedent" to the arbitration, not conditions precedent to the claim itself. That is, the reference to "prerequisites" is not intended as a reference to defenses that would simply defeat the claim as a matter of state law in a court, as opposed to defeating merely the ability to

arbitrate the claim. As one treatise explains it, the "more apt phrase" for "procedural arbitrability" is a "gateway procedural issue," and this is intended as a reference to "the institutional rules" of the arbitration process itself, rules that arbitrators are "comparatively more expert about" and "comparatively better than judges to interpret and apply."[2] 92 Am. Jur. Proof of Facts 1, § 42 (3d ed. 2006). The notion of a "gateway" is that of a gateway to the arbitration per se, not a gateway to a viable claim under otherwise applicable state or federal law.[3]

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[2]Obviously, an arbitrator is not "comparatively more expert" than a judge in applying a traditional, statute-of-limitations defense to a claim or in applying a defense that the claimant failed to allege the claim as a compulsory counterclaim in a prior proceeding or with sufficient particularity for purposes of Rule 9(b), Ala. R. Civ. P.

[3]

> "[T]he relevant question here is what kind of arbitration proceeding the parties agreed to. That question does not concern a state statute or judicial procedures, cf. Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 474-476 (1989). It concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide. Cf. Howsam, supra, at 83, 123 S.Ct. 588

(finding for roughly similar reasons that the arbitrator should determine a certain procedural 'gateway matter')."

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 452-53 (2003).

Compare Massachusetts Highway Dep't v. Perini Corp., 444 Mass. 366, 377, 828 N.E.2d 34, 42 (2005)("[T]he question involve[d] the sequence of prerequisites for the dispute's submission to the board, and thus, present[ed] ... an issue of procedural arbitrability similar to 'time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate.'" (citation omitted)).

See generally 13D Charles Alan Wright et al., Federal Practice & Procedure § 3569 (3d ed. 2010)(emphasis added; citations omitted) ("[T]he [Supreme] Court has held that the following issues do not raise questions of arbitrability and thus should (absent agreement to the contrary) be decided in the first instance by the arbitrator: whether a claim is barred by a temporal limitation contained in the arbitration rules of the National Association of Securities Dealers, whether an arbitration agreement's limitation on recovery of punitive damages barred a claim for treble damages under RICO, and whether an arbitration agreement forbids class arbitration. Generally, questions about arbitration procedure should be resolved in the first instance by the arbitrator.").

In Southern United Fire Insurance Co. v. Howard, 775 So. 2d 156, 163-64 (Ala. 2000), this Court gave a nonexhaustive, but illustrative, list of issues that constitute "procedural arbitrability" issues: the rules governing the arbitration proceeding; the arbitrators' fees and other costs associated with the arbitration proceeding; which party is responsible for paying costs other than the arbitrators' fees; what substantive law governs the arbitrators' decision; the qualifications of the arbitrators; the parties' discovery rights; whether or how a record is to be made of the arbitration proceedings; whether the arbitrators are required to make any findings supporting their decision; and the provisions for review or enforcement of the

The state-law defenses of statute of limitations and failure to plead as a compulsory counterclaim asserted in this case do not go to the availability of arbitration per se (i.e., they are not "gateways" to arbitration) and accordingly do not constitute "procedural arbitrability" issues. Nonetheless, as the main opinion concludes, they are issues for the arbitrator to address and to decide because they go to "the ultimate viability of DHSF's claims" themselves.[4]

As for the willingness of the dissent to affirm the circuit court's order on the alternative ground of waiver, I

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arbitrators' decision.

"[M]atters of 'procedural arbitrability,' such as whether a party seeking arbitration has waived its right to arbitration by failing to comply with procedural requirements set forth in the arbitration agreement, are for the arbitrator to decide." Dean Witter Reynolds, Inc. v. McDonald, 758 So. 2d 539, 542 (Ala. 1999).

[4]As for the alleged failure to plead with the particularity required by Rule 9(b), Ala. R. Civ. P., I do not understand the Alabama Rules of Civil Procedure to be applicable in an arbitration proceeding. See 4 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1015 (3d ed. 2002) (explaining that, with certain exceptions, the Federal Rules of Civil Procedure are not applicable to arbitration proceedings conducted under the Federal Arbitration Act.) Thus, if pleading fraud with certain specificity is a "gateway" to arbitration of a fraud claim, it is so as a result of the contractual intent of the parties to the arbitration agreement and properly may be viewed as an issue of "procedural arbitrability."

note that waiver is a defense that entails factual determinations. See, e.g., Nunnelley v. GE Capital Info. Tech. Solutions-North America, 730 So. 2d 238, 241 (Ala. Civ. App. 1999) ("Generally, the issue whether there has been a waiver is a question for the finder of fact."). Accordingly, for this reason, if not others, if waiver was not raised in the circuit court, it cannot serve in the context of this case as a ground for affirming the circuit court's order. Reliance at this stage by this Court upon such a ground, without having given Knight the opportunity to address it both factually and legally, would run afoul of the due-process exception to the general affirm-on-any-valid-legal-ground rule. See Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003) (the general affirm-on-any-valid-legal-ground "rule fails in application only where due-process constraints require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment").[5]

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[5] "On appeal, Bentley raises for the first time

I further note that the waiver issue as presented here[6] appears to be a perfect example of a "procedural arbitrability" question. It is one that grows out of the dispute and, specifically, is a function of the contractual limits intended by the parties on their right to arbitrate a dispute between them. As noted above, "'[p]rocedural arbitrability,' ... involves questions that grow out of the dispute and bear on its final disposition, e.g., defenses such as notice, laches, estoppel, and other similar compliance defenses; such questions are for an arbitrator to decide."

> issues of unconscionability. Unconscionability is an affirmative defense that must be specially pleaded. AmSouth Bank v. Dees, 847 So. 2d 923 (Ala. 2002). Bentley neither pleaded nor argued below unconscionability as a basis for avoidance of the arbitration agreement at issue. This Court can affirm the judgment of a trial court on a basis different from the one on which it ruled, Smith v. Equifax, 537 So. 2d 463 (Ala. 1988), but the constraints of procedural due process prevent us from extending that principle to a totally omitted affirmative defense. Accordingly, we reject Bentley's unconscionability argument."

Ameriquest Mortgage Co. v. Bentley, 851 So. 2d 458, 465 (Ala. 2002).

[6]The argument presented is that DHSF's delay in asserting its claim against Knight constitutes a waiver of its right to arbitrate that claim, not a waiver of the claim itself under general principles of state law.

Brasfield & Gorrie, 35 So. 3d at 604. This question, therefore, is one that the arbitrator, not this Court, must decide.

COBB, Chief Justice (dissenting).

I would affirm the circuit court's judgment dismissing DHSF's claims and implicitly vacating its prior order compelling arbitration. Therefore, I respectfully dissent.

In 2001, Knight sued DHSF, alleging breach of the parties' partnership agreement. DHSF moved to compel arbitration of Knight's claims, and the circuit court granted that motion. Thereafter, the action languished on the circuit court's administrative docket for eight years. During that time, DHSF made periodic status reports to the circuit court, stating that the parties were trying to agree on an arbitrator, but neither party took formal steps to initiate the arbitration process. The circuit court dismissed Knight's action with prejudice in 2009.

In 2010, DHSF sued Knight, asserting claims that, DHSF concedes, were compulsory counterclaims in Knight's 2001 action because they arose out of the partnership agreement that was the subject of Knight's 2001 complaint. Contemporaneously with the filing of its complaint, DHSF moved the court to refer the case to arbitration. Although the circuit court initially granted DHSF's motion and stayed the

case pending arbitration, the circuit court later dismissed DHSF's complaint following oral argument by the parties and the submission of post-hearing briefs, implicitly vacating its earlier order. In his post-hearing brief, Knight argued that DHSF had waived the right to arbitrate its claims by its dilatory conduct in the 2001 action and, further, that its claims were barred by the applicable statutes of limitations and by DHSF's failure to have asserted its claims as compulsory counterclaims in the 2001 action. The circuit court dismissed DHSF's action.

The main opinion rejects Knight's argument that the circuit court was authorized to decide whether "'[DHSF's] conduct in sitting on its hands for almost a decade before seeking arbitration of its claims constitutes a waiver of its right to arbitration,'" ___ So. 3d at ___, because, it concludes, Knight's allegation of waiver does not fall within the rule announced in Ocwen Loan Servicing, LLC v. Washington, 939 So. 2d 6 (Ala. 2006). In Ocwen, this Court stated that "whether a party has waived the right to arbitration by its conduct during litigation is a question for the court and not the arbitrator." 939 So. 2d at 14. Specifically, this Court

in Ocwen held that, "[i]n order to show waiver by litigation-related conduct, the party opposing arbitration must demonstrate that the movant has substantially invoked the litigation process ...." 939 So. 2d at 14. Notwithstanding our use of the phrases "conduct during litigation" and "litigation-related conduct" in Ocwen, this Court's later explanation, in Brasfield & Gorrie, L.L.C. v. Soho Partners, L.L.C., 35 So. 3d 601, 607 n.1 (Ala. 2009), of the reason for the rule allowing the court to decide whether a party has waived arbitration by substantially invoking the litigation process demonstrates that the court's ability to decide questions of waiver is not limited solely to litigation-related matters. In Brasfield & Gorrie, this Court explained:

> "In Alabama, the issue whether a party has substantially invoked the litigation process is a matter for the trial court to decide. This is so because invoking the litigation process involves matters that occurred before the court or under its watch."

35 So. 3d at 607 n.1 (emphasis added). The fact that "matters [occurring] before the court or under its watch" will, more often than not, take place in the context of litigation does not mean that they must arise in that context. Brasfield & Gorrie stated the rationale more broadly to include "matters

that occurred before the court or under its watch" -- that is, matters of which the trial court has knowledge because they occurred in the judicial forum and, therefore, matters the trial court is better suited to decide than is an arbitrator.

Accordingly, I disagree with the implication in the main opinion that the only waiver issue within the purview of the court is whether a party has "substantially invoked the litigation process." A party's substantially invoking the litigation process and a party's doing absolutely nothing to initiate the arbitration process for eight years actually represent two sides of the same coin. Both involve alleged waivers by conduct occurring in the judicial forum that signals an intent not to insist on arbitration as the means of settling the dispute. When that conduct occurs under the trial court's watch, as it did in Ocwen, and as it did in this case, the trial court is better suited than the arbitrator to decide whether a waiver has occurred.

It seems to me that the eight-year period during which the parties took no steps to initiate the arbitration process so far exceeds the reasonable time during which some tardiness, or even some willful delay, could still be

consistent with the notion that the parties were insisting on arbitration as the means of settling their dispute that it virtually dictates the conclusion that they waived their right to arbitration. Nevertheless, the conclusion that I might reach on the facts is unimportant. What is important is that the circuit court, which heard DHSF's status reports over an eight-year period and had the opportunity to assess the bona fides of those reports, was better suited than the arbitrator to determine whether DHSF's dilatory conduct amounted to a waiver.

Because I believe the circuit court correctly, albeit implicitly, vacated its earlier order compelling arbitration, I find no error in the circuit court's considering the merits of Knight's statutes-of-limitations and compulsory-counterclaim defenses. DHSF acknowledges that the contract and tort claims it asserted in the 2010 action accrued in 2000 when Knight left DHSF; it concedes that those claims are compulsory counterclaims that could have been, but were not, asserted in the 2001 action. Nevertheless, DHSF contends that the claims are not barred by the six-year statute of limitations for contracts and the two-year statute of

limitations for torts because, it says, the order compelling arbitration in the 2001 action tolled the statutes of limitations -- not only for Knight's claims, but also for any potential but unasserted counterclaims DHSF may have had against Knight in 2001 -- until such time as Knight's action was dismissed in 2009, when, DHSF says, the statutes began to run again and had not expired in 2010 when DHSF sued Knight, at which time, DHSF asserts, its claims "related back" to the time that Knight filed his complaint in 2001.

Claims asserted in a second action, however, cannot relate back to a prior action; DHSF lost the benefit of the relation-back rule when Knight's 2001 action was dismissed with prejudice. See Ex parte Cincinnati Ins. Cos., 806 So. 2d 376, 379 (Ala. 2001)(stating that "[t]o effect the purpose of Rule 13, [Ala. R. Civ. P., the compulsory-counterclaim rule,] the consequence for failing to assert a compulsory counterclaim is a bar against the assertion of that claim in any other action"(emphasis added)).

I would affirm the circuit court's judgment in all respects; therefore, I dissent.