Amicus Curiarum

VOLUME 38
ISSUE 7 JULY 2021

A Publication of the Office of the State Reporter

Table of Contents

COURT OF APPEALS

COURT OF SPECIAL APPEALS

Return to ToC

COURT OF APPEALS

Kevin Whittington v. State of Maryland, No. 35, September Term 2020, filed June 2, 2021. Opinion by Hotten, J.

https://mdcourts.gov/data/opinions/coa/2021/35a20.pdf

CRIMINAL PROCEDURE – FOURTH AMENDMENT – WARRANT REQUIREMENT

CRIMINAL PROCEDURE – FOURTH AMENDMENT – PROBABLE CAUSE

CRIMINAL PROCEDURE – FOURTH AMENDMENT – GOOD FAITH EXCEPTION

Facts:

Petitioner, Kevin Whittington, ("Whittington") challenged the constitutionality of evidence obtained against him, following an investigation by the Harford County Narcotics Task Force ("Task Force") into suspected drug distribution activity occurring between Harford and Baltimore counties. Task Force detectives had applied for and received an "Application for Court Order" pursuant to Md. Code, Criminal Procedure ("Crim. Proc.") § 1-203.1, to install a Global Positioning Satellite ("GPS") tracking device on Whittington's vehicle. With the aid of the GPS tracking device, Task Force detectives observed Whittington engage in activities consistent with narcotics distribution in Harford and Baltimore counties. Task Force detectives applied for and received a search warrant for certain locations, including Whittington's vehicle and suspected residence at 4 Cloverwood Ct. ("Cloverwood Court") in Essex, Baltimore County, where the detectives had probable cause to believe that Whittington either stored or manufactured narcotics.

Members of law enforcement executed the search warrant and found the presence of cocaine in Whittington's vehicle and at Cloverwood Court. Whittington was arrested and indicted in the Circuit Court for Baltimore County on two counts of Possession of a Controlled Dangerous Substance ("CDS") with Intent to Distribute, and two counts of Possession of CDS. Whittington moved to suppress the evidence, arguing that the GPS tracking of his vehicle violated the Fourth Amendment to the United States Constitution because it was issued pursuant to a "court order," and that the affidavit in support of a search warrant failed to provide probable cause to search his vehicle and the residence at Cloverwood Court, because the detectives did not provide direct

evidence of CDS activity occurring within either his vehicle or that address. The circuit court denied Whittington's motion to suppress. Following the acceptance of a conditional plea, the circuit court found Whittington guilty and imposed a sentence of ten years' imprisonment, suspending all but time already served and five years of supervised probation.

Whittington appealed his conviction to the Court of Special Appeals, which held that the court order issued pursuant to Crim. Proc. § 1-203.1 satisfied the warrant requirement of the Fourth Amendment and determined that Task Force detectives objectively relied on the search warrant in good faith. The Court of Special Appeals affirmed the denial of the motion to suppress and the conviction by the circuit court.

Held: Affirmed.

The Court held that Crim. Proc. § 1-203.1 substantially complied with the warrant requirement of the Fourth Amendment to the United States Constitution, and the label "court order" instead of "warrant" did not render the statute unconstitutional. The Court assumed, without deciding, that a court order issued pursuant to Crim. Proc. § 1-203.1 satisfied Article 26 of the Maryland Declaration of Rights.

The Court also held that the issuing judge had a substantial basis to conclude that a search of Whittington's vehicle and residence would yield evidence of wrongdoing through GPS tracking of Whittington's vehicle traveling to and from suspected stash houses, reasonable inferences from Task Force detectives' professional experience, and first-hand observations of Whittington's suspected involvement in narcotics transactions, evasive driving, and confederation with a known narcotics distributor. Even though Task Force detectives did not observe direct evidence of CDS activity, the Court concluded that there was a substantial basis for the circuit court finding probable cause "from the type of crime, the nature of items sought, the opportunity for concealment, and reasonable inferences about where the defendant may hide the incriminating items." *Holmes v. State*, 368 Md. 506, 522, 796 A.2d 90, 100 (2002).

Finally, the Court held, *arguendo*, that if the underlying warrant lacked a substantial basis to support a finding of probable cause, Task Force detectives reasonably relied on the warrant because it contained observations of Whittington engaged in suspected narcotics activity. The good faith exception to the exclusionary rule of the Fourth Amendment permits the admission of evidence obtained from a court order, issued pursuant to Crim. Proc. § 1-203.1, but later shown to lack probable cause, so long as the detective reasonably relied on the court order issued by a detached and neutral magistrate. *See United States v. Leon*, 468 U.S. 897, 922-24, 104 S. Ct. 3405, 3420-21 (1984).

Return to ToC

Ronnie Hunt v. State of Maryland, No. 21, September Term 2020, filed June 7, 2021. Opinion by Harrell, J.

Watts and Biran, JJ., concur.

https://mdcourts.gov/data/opinions/coa/2021/21a20.pdf

CRIMINAL LAW – WRIT OF ACTUAL INNOCENCE – NEWLY DISCOVERED EVIDENCE – DUE DILIGENCE – MISREPRESENTATIONS OF JOSEPH KOPERA, A STATE'S FIREARMS BALLISTICS EXPERT, OVER DECADES-WORTH OF CASES

Facts:

A Public Defender, working with the Innocence Project, discovered in 2007, in a case unrelated to the present one, that Joseph Kopera, an expert witness for the State, had misrepresented, among other things, his academic degrees. The attorney focused on this topic because she read transcripts of his testimony in earlier cases and detected discrepancies, which lead her to contact the indicated educational institutions to confirm the misrepresentations It so happened that Kopera, whose career as a State's expert in firearms ballistics spanned decades before the 2007 discovery, had made the same misrepresentations in hundreds of cases to that time. One of those cases was Ronnie Hunt's trial in 1991, at which he was convicted.

Hunt filed a petition or writ of actual innocence in 2010 in the Circuit Court for Baltimore City. He asserted that he could not, through the exercise of due diligence, have discovered Kopera's misrepresentations in time to have moved for a new trial. Moreover, he claimed that, had the information been known for his 1991 trial, there would have been a substantial or significant possibility that he would not have been convicted.

The circuit court rejected Hunt's petition solely on the basis that Kopera's fraud could have been discovered by Hunt through the exercise of due diligence in time to have moved for a new trial. The court hypothesized that the fraud could have been unearthed by Hunt through the less than Herculean efforts of faxing the universities involved and awaiting a return fax reply. In support of its ruling, the court relied on an opinion of the Court of Special Appeals in *Jackson v. State*, 216 Md. App. 347, 86 A.3d 97, *cert. denied*, 438 Md. 740, 93 A.3d 289 (2014), which held that:

> In this case, we agree that Mr. Kopera's educational background could have been discovered prior to appellant's trial. That is shown by the fact that another attorney discovered it. Indeed, checking an expert's credentials is reasonable trial preparation. See Hilary Sheard, *Capital Cases*, CHAMPION, January/February 2000, at 52, 56 ("Taking any expert's *curriculum vitae* at face value is ill advised—allow time to call each institution where the expert has studied ... and every professional organization of which he is a member.... Use data bases such as *Westlaw* and *Lexis–Nexis*, use the Internet, conduct courthouse searches.").

> Although there may have been reasons that counsel did not pursue an investigation into Mr. Kopera's credentials, the circuit court did not abuse its discretion in finding that appellant failed to show that the evidence could not have been discovered in the exercise of due diligence. *See Jackson v. State*, 164 Md. App. 679, 690, 884 A.2d 694 (2005) (In analyzing whether newly discovered evidence could have been found using due diligence, "[t]he test, of course, is whether the evidence was, in fact, discoverable and not whether the appellant or appellant's counsel was at fault in not discovering it."), *cert. denied*, 390 Md. 501, 889 A.2d 418 (2006). Appellant's Petition for Writ of Actual Innocence was properly denied on this ground alone.

Id. at 365–66, 86 A.3d 97, 108 (citations omitted).

Hunt appealed. The Court of Special Appeals affirmed in an unreported opinion, finding no abuse of discretion. *Hunt v. State*, No. 2429, September Term, 2018 (filed 26 November 2019). The intermediate appellate court relied on its opinion in *Jackson* and in *Kulbicki v. State*, 207 Md. App. 412, 53 A.3d 361 (2012), *rev'd*, 440 Md. 33, 99 A.3d 730 (2014), *rev'd*, 577 U.S. 1, 136 S.Ct. 2, 193 L.Ed. 2d 1 (2015) (per curiam).

Hunt sought a writ of certiorari from the Court of Appeals. It was granted. 470 Md. 206, 235 A.2d 31 (2020). Two questions were posed:

> 1. In affirming the Circuit Court's denial of Petitioner's petition for writ of actual innocence, did the Court of Special Appeals err in holding that the mere fact that Joseph Kopera's false credential were found years later by another attorney in another case was enough for the trial court to find that Petitioner's trial counsel failed to act with due diligence, as is required of a petitioner to prevail under Md. Code Ann., Crim. Proc. § 8-301(a), where Petitioner's trial took place in 1991, the fact that Kopera had repeatedly lied under oath about his academic credentials was first discovered by the Office of the Public Defender's Innocence Project in 2007, and prior to that disclosure in 2007, neither defense attorneys nor prosecutors had ever questioned Kopera's testimony about his academic credentials in the hundreds of cases in which he had testified?
>
> 2. Does the Court of Special Appeals' holding in this case conflict with this Court's "considered *dicta*" in *State v. Hunt*, 443 Md. 238[, 116 A.3d 477] (2015), including this Court's comments that "[a]s an objective fact, attorneys with unlimited time and resources could have discovered Kopera's fraud at any point during that time. We would avoid, however, the negative inference from the opinions of the Court of Special Appeals that no defense attorney representing a defendant at a trial in which Kopera testified exercised due diligence (prior to the discoveries made by the attorneys of the Innocence Project) in failing to discover his charade"?

Held: Reversed and remanded.

Reversed and remanded to the circuit court for disposition of whether Kopera's misrepresentations created, in the context of Hunt's 1991 trial, a substantial or significant possibility that the result of the trial may have been different had that evidence been known then.

A court addressing the merits of a petition for writ of actual innocence, filed pursuant to Maryland Code (2001, 2018 Repl. Vol.), Criminal Procedure Article ("CP"), § 8-301, must determine whether the evidence presented is newly discovered. Newly discovered evidence "could not have been discovered in time to move for a new trial under Maryland Rule 4-331." Under Rule 4-331(c), a court "may grant a new trial or other appropriate relief on the ground of newly discovered evidence which could not have been discovered by due diligence in time to move for a new trial pursuant to" Rule 4-331(a), that is, within ten days after a verdict. Thus, the actual innocence statute incorporates by reference the due diligence requirement of Rule 4-331(c). "Due diligence" contemplates that the defendant act reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and the facts known to the defendant.

Under the unique circumstance of Joseph Kopera's fraud on the courts of Maryland, which had gone undetected for many years until its fortuitous discovery by a postconviction attorney from the Innocence Project, working on an unrelated case in 2007, we hold that, in this and all similarly situated cases tried prior to the 2007 discovery of Kopera's fraud, in the absence of particularized facts that would have put defense counsel on inquiry notice indicating a need to investigate Kopera's purported academic qualifications, due diligence did not require defense counsel to unearth it prior to 2007.

Return to ToC

Toni Tengeres v. State of Maryland, No. 42, September Term 2020, filed June 17, 2021. Opinion by McDonald, J.

https://mdcourts.gov/data/opinions/coa/2021/42a20.pdf

CRIMINAL PROCEDURE – APPEAL FROM DISTRICT COURT TO CIRCUIT COURT – ABSENCE OF DEFENDANT – DISMISSAL AND REINSTATEMENT OF APPEAL

CRIMINAL PROCEDURE – APPEAL FROM DISTRICT COURT TO CIRCUIT COURT – GOOD CAUSE FOR REINSTATEMENT OF APPEAL

Facts:

Petitioner Toni Tengeres was convicted in the District Court for failing to send her child to school. She appealed that conviction to the Circuit Court for Washington County, which scheduled her case for a trial *de novo*. In early 2020, the Covid-19 pandemic forced the Circuit Court to postpone many criminal cases on its docket, including Ms. Tengeres' appeal for a trial *de novo*.

In an effort to reschedule criminal cases delayed by the pandemic, the Circuit Court held a status hearing in each case to assess which would be resolved without a trial and which needed to be scheduled for a bench or jury trial. Ms. Tengeres did not appear at her status hearing for reasons not disputed by the State – lack of actual notice until the day of the status hearing, when she had no immediate options for childcare or transportation to the courthouse.

At Ms. Tengeres' status hearing, the Circuit Court denied defense counsel's request for a brief postponement and dismissed her appeal. The court later denied her motion to reinstate the appeal and her motion to reconsider that denial, both without explanation.

Because this case involved an appeal to the Circuit Court of a final judgment in the District Court, any further appeal was by a petition for a writ of *certiorari* to this Court pursuant to CJ §12-305.

Maryland Rule 7-112(f)(3) provides that a circuit court may reinstate an appeal for "good cause shown." This appeal concerns whether the Circuit Court correctly applied the "good cause" standard when it denied Ms. Tengeres' motion to reinstate her appeal.

Held: Reversed and remanded.

The Court of Appeals held the Circuit Court abused its discretion when it denied the motion to reinstate Ms. Tengeres' appeal and remanded the case for that court to reinstate her appeal.

As a threshold matter, the Court noted it was unclear whether the Circuit Court actually exercised discretion when it denied Ms. Tengeres' motion to reinstate her appeal. However, given the undisputed facts in the case, the Court concluded it would be an abuse of discretion to not reinstate the appeal.

Pursuant to Maryland Rule 7-112(f)(3), the Circuit Court has discretion to reinstate an appeal upon a timely motion to reinstate and a showing of "good cause." Since Ms. Tengeres' motion to reinstate was timely, the Court examined pertinent caselaw to determine what constituted "good cause." Past caselaw had held that an appeal in a criminal case should not be dismissed as a result of a defendant's failure to appear unless the absence is willful and voluntary. If an appeal is dismissed, the "good cause" standard for reinstatement should be liberally applied based on the totality of the circumstances. *See Mobuary v. State*, 435 Md. 417 (2013); *see also Stone v. State*, 344 Md. 97 (1996).

In finding there to be good cause to reinstate Ms. Tengeres' appeal, the Court explained that Ms. Tengeres' absence was not willful or voluntary. Also, it was undisputed that Ms. Tengeres lacked actual notice until moments before the status hearing. The Court also explained the status hearing did not bear on any factual or legal issue in her case. In addition, the Court noted the status hearing's notice indicated the court would entertain postponement requests "as justice may require." Md. Rule 2-508(a).

Return to ToC

State of Maryland v. Anthony George Ablonczy, No. 28, September Term 2020, filed June 23, 2021. Opinion by Hotten, J.

Barbera, C.J., McDonald and Watts, JJ., concur.

https://www.courts.state.md.us/data/opinions/coa/2021/28a20.pdf

CRIMINAL PROCEDURE – VOIR DIRE – OBJECTIONS – WAIVER.

Facts:

Respondent, Anthony George Ablonczy, was arrested and charged with armed robbery, robbery, first and second degree assault, and theft of less than one thousand dollars. Prior to the commencement of a jury trial in the Circuit Court for Washington County, defense counsel for Respondent submitted *voir dire* questions to be posed to the venire, including a proposed question which addressed the presumption of innocence, burden of proof beyond a reasonable doubt, and the right to remain silent. The trial court declined to pose the question, defense counsel objected, the objection was overruled, and *voir dire* resumed.

At the conclusion of jury selection, the trial court asked whether either party objected to the jury as empaneled. Defense counsel responded "no." On appeal, Respondent argued that, in light of this Court's decision in *Kazadi v. State*, 467 Md. 1, 223 A.3d 554 (2020), the trial court committed reversible error in failing to ask the proposed question. The Court of Special Appeals reversed, prompting an appeal by the State to the Court of Appeals, which granted certiorari to determine whether "accepting a jury as ultimately empaneled waive[s] any prior objection to the trial court's refusal to propound a [*voir dire*] question[]?"

Held: Affirmed.

The Court reviewed its decision in *Stringfellow v. State*, 425 Md. 461, 42 A.3d 27 (2012), its recent examination of waiver pertaining to *voir dire* questions. In *Stringfellow*, the Court explored the category of objections directed "to the inclusion or exclusion of a prospective juror (or jurors) or the entire venire[,]" which are waived by accepting a jury panel, without qualification, at the conclusion of jury selection. The second category of objections, which were "incidental to the inclusion [or] exclusion of a prospective juror or the venire[, are] not waived by accepting a jury panel at the conclusion of the jury-selection process." Objections directly related to a prospective juror or jurors are waived, if not preserved, because the "objection implied necessarily that the venire members would be incapable of sitting on the jury and evaluating the evidence (or lack of certain evidence) fairly and objectively because the pertinent *voir dire* question 'poisoned' the venire by implying [guilt]." Failure to preserve a direct objection, therefore, constitutes a waiver.

The proposed *voir dire* question was never propounded to the venire, and Respondent accepted the jury without qualification. Applying the principles articulated in *Stringfellow*, the Court held that accepting the jury without qualification at the conclusion of jury selection does not waive a prior objection to a trial court's denial of a request to propound a proposed *voir dire* question.

Return to ToC

COURT OF SPECIAL APPEALS

Ann Currie, as Personal Representative of the Estate of Lance Currie Williams v. State of Maryland, Nos. 806, 1168 & 2350, September Term 2019, filed June 30, 2021. Opinion by Arthur, J.

https://mdcourts.gov/data/opinions/cosa/2021/0806s19.pdf

CRIMINAL PROCEDURE – ENFORCEMENT OF PLEA AGREEMENTS

Facts:

The State charged Lance Currie Williams with first-degree assault, attempt to commit a sexual offense, aggravated animal cruelty, and other offenses. Williams entered a plea of not guilty and not criminally responsible.

A psychologist from the Health Department diagnosed Williams with bipolar disorder. The psychologist opined that he was not criminally responsible for his conduct at the time of the offenses. The State elected not to challenge the Department's report.

The State reached a plea agreement under which Williams would be found guilty and not criminally responsible on charges of first-degree abuse of a vulnerable adult and aggravated animal cruelty. The court accepted the plea, found Williams not criminally responsible, and committed him indefinitely for institutional inpatient treatment.

Six months after being committed, Williams's treating psychiatrist recommended that he be released. The psychiatrist concluded that Williams had experienced a substance-induced psychosis at the time of the offenses and that his symptoms had since resolved.

The State moved to vacate the plea agreement, arguing that the agreement was premised on a mutual mistake of fact. The State offered a psychiatrist's opinion that Williams was, in fact, criminally responsible for his conduct at the time of the offenses. After an evidentiary hearing, the circuit court granted the motion and permitted the State to resume its prosecution against Williams. Williams filed a notice of appeal.

Williams moved to dismiss the indictment on the ground of double jeopardy. The court denied his motion. Williams filed a second notice of appeal. Williams entered a conditional guilty plea,

reserving his right to seek review of the order granting the motion to vacate the plea agreement and the order denying his motion to dismiss. Williams filed a third notice of appeal. The Court of Special Appeals consolidated the three appeals.

Williams died after his case had been fully briefed and argued. The personal representative of his estate elected to continue to litigate his appeal and filed a notice of substitution.

Held: Reversed.

The Court of Special Appeals held that principles of double jeopardy and due process generally prohibit the State from relying on a mutual mistake of fact to rescind a plea agreement that has been accepted by the court.

Constitutional protections against double jeopardy ordinarily forbid a second trial for the purpose of affording the prosecution a second opportunity to supply evidence which it failed to present in the first prosecution. Here, jeopardy attached when the circuit court accepted the defendant's plea of guilty and not criminally responsible. The remaining issue was whether some exception might authorize a second prosecution for the same offenses even though jeopardy already attached in the case.

Due process demands that when a plea rests on a promise or agreement of the prosecutor, the promise must be fulfilled. Once a plea is accepted by the court, due process requires the court to honor the plea agreement. Certain exceptions exist in cases of unenforceability or a defendant's repudiation, fraud, or material breach. None of these exceptions were implicated here. Thus, the State and the court were bound to abide by the finding that the defendant was not criminally responsible and by the disposition under which the defendant would be committed for treatment.

The Court rejected the contention that the circuit court could rescind the plea agreement based on a purported mutual mistake of fact. In light of the constitutional principles that govern plea agreements, it is inappropriate to extend ordinary contract principles so far as to permit the government to rely on the doctrine of mutual mistake of fact. Ordinarily, therefore, once a court has accepted a plea agreement, the court may not rescind the agreement at the State's request on the ground of a mutual mistake of fact.

Additionally, even if the State could rely on a mutual mistake of fact to rescind a plea agreement, the State was not entitled to rescind the agreement here. The State bore the risk of a mistake resulting from its reliance on the Health Department's report as to criminal responsibility. A contracting party bears the risk of a mistake when the party is aware, at the time of the contract, that the party has only limited knowledge of the facts to which the mistake relates but treats this limited knowledge as sufficient. Here, the Health Department's report acknowledged uncertainty in the defendant's diagnosis. The State, when it chose to rely on the conclusions in the report, chose to treat its limited knowledge as sufficient.

Return to ToC

The Court reversed the convictions which resulted after the court vacated the plea agreement that it had previously accepted. The Court reinstated the judgments entered as a result of the original plea agreement, under which the court had found that the defendant was not criminally responsible.

Return to ToC

Jocelyn P. v. Joshua P., No. 2125, September Term 2019, filed April 29, 2021. Opinion by Leahy, J.

https://mdcourts.gov/data/opinions/cosa/2021/2125s19.pdf

FAMILY LAW – DISSOLUTION OF MARRIAGE OR PARTNERSHIP – INTERESTS IN PRE-EMBRYOS – BLENDED CONTRACTUAL/BALANCING OF INTERESTS APPROACH

Facts:

In 2015, Jocelyn P. and Joshua P. signed and initialed a form "Agreement and Informed Consent for In Vitro Fertilization, Intracytoplasmic Sperm Injection, Assisted Hatching and Embryo Freezing" ("IVF Contract") with the Fertility Center of Maryland ("FCM") after Jocelyn was diagnosed with primary infertility and the couple was unable to have children through other means. Through the IVF process, Joshua and Jocelyn produced three pre-embryos. The first pre-embryo was lost due to miscarriage; the second was successfully implanted, resulting in the birth of a child in 2016; and the third and final pre-embryo was kept frozen at FCM.

In 2017, the parties separated. After their separation, the parties sought dissolution of the marriage and reached a settlement on all matters, including custody of their child and property disposition, with one exception. They could not agree on what to do with the remaining cryopreserved pre-embryo. Jocelyn wanted the pre-embryo for implantation, whereas Joshua wanted the pre-embryo either destroyed or donated.

On July 29, 2019, the Circuit Court for Baltimore County held an evidentiary hearing to address the parties' dispute over the remaining cryopreserved pre-embryo. On November 20, 2019, the Circuit Court for Baltimore County entered a memorandum opinion and order in which it reviewed and applied the three leading approaches for resolving disputes over pre-embryos: the contractual approach, the contemporaneous mutual consent approach, and the balancing test. Under the contractual approach, the court determined that the IVF Contract was unambiguous and enforceable and required mutual consent of the parties before disposition of the pre-embryo. Then, turning to the contemporaneous mutual consent approach, the court determined, because the parties do not agree, the pre-embryo would remain frozen until the "parties agree on a disposition." In sum, the court determined that "there is no outcome that permits implantation of the embryo against [Joshua's] wishes. . . . Therefore, the frozen embryo should be awarded jointly to the couple, maintaining the status quo, with the parties sharing all expenses associated with storage until mutual consent is reached." The court also ordered that "no transfer, release, or use of the frozen embryo shall occur without the signed authorization of both parties." Jocelyn noted a timely appeal.

Held: Vacated and remanded.

The Court of Special Appeals reached several holdings. First, in light of the unique, countervailing interests inherent in cryogenically preserved pre-embryos, the Court concluded that the frozen pre-embryo cannot be classified simply as an interest in property because it concerns interests of far broader dimension. Rather, the Court agreed with those courts that recognize the special respect due cryopreserved pre-embryos in light of their potential for human life as well as the fundamental and coextensive rights of their progenitors to decide "whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

Second, the Court held that disputes that arise during dissolution of the parties' marriage or partnership involving the custody of cryogenically preserved pre-embryos should be resolved utilizing a blended contractual/balancing-of-interests approach, first enunciated in *Davis v. Davis*, 842 S.W.2d 588 (1992), further refined through the non-exhaustive and inappropriate factors delineated in *In re Marriage of Rooks*, 429 P.3d 579 (2018) and the special considerations concerning third-party form contracts identified in the Court's opinion. The Court instructed that if, upon dissolution of their marriage or partnership, the parties cannot reach agreement about what to do with any remaining pre-embryos that were cryopreserved during their relationship, courts should first "look[] to the preference of the progenitors" in any prior agreement expressing their intent. *Davis v. Davis*, 842 S.W.2d 588, 642 (Tenn. 1992). In analyzing an agreement, courts should take particular care to ensure that it manifests the progenitors' actual preferences. Given the pervasiveness of third-party informed consent agreements, the Court emphasized that the progenitors—not fertility centers—must expressly and affirmatively designate their own intent.

In the absence of an express agreement, courts should seek to balance the competing interests under the following factors: (1) the intended use of the frozen pre-embryos by the party seeking to preserve them; (2) the reasonable ability of a party seeking implantation to have children through other means; (3) the parties' original reasons for undergoing IVF, which may favor preservation over disposition; (4) the potential burden on the party seeking to avoid becoming a genetic parent; (5) either party's bad faith and attempt to use the frozen pre-embryo as leverage in the divorce proceeding; and (6) other considerations relevant to the parties' unique situation. *Rooks*, 429 P.3d at 593-94. Courts should not, however, consider financial and economic distinctions between parties; the number of existing children; or "reasonable alternatives," such as adoption, available to the party seeking to become a genetic parent. *Id.* In adopting this approach, the Court rejected the contemporaneous mutual consent approach employed by a minority of states, and upon which the circuit court based its decision in this case

Finally, the Court held that the IVF Contract does not indicate the parties' preferences in the event of divorce and concluded that the court erred in implying contract terms that do not exist. In contrast to the parties' very specific election under the IVF Contract about what happens to their remaining frozen pre-embryo in the event of death or mental incapacity, the contract is silent in regard to their intentions, as progenitors, in the case of their separation or divorce.

Return to ToC

W.F. Gebhardt & Co., Inc. v. American European Insurance Co., No. 93, September Term 2020, filed May 26, 2021. Opinion by Fader, C.J.

https://www.courts.state.md.us/data/opinions/cosa/2021/0093s20.pdf

INSURANCE POLICES – RULES OF CONSTRUCTION – CONTRACT PRINCIPLES

INSURANCE POLICES – RULES OF CONSTRUCTION – AMBIGUITY – EXTRINSIC EVIDENCE

INSURANCE POLICES – RULES OF CONSTRUCTION – USE OF DICTIONARY DEFINITIONS

INSURANCE POLICES – RULES OF CONSTRUCTION – USE OF DICTIONARY DEFINITIONS – SPECIFIC TERMS

INSURANCE POLICES – PARTICULAR WORDS OR TERMS

Facts:

After acquiring an apartment building in Baltimore in 1966, W.F. Gebhardt & Co., Inc. added a fire escape to the building, including a ladder that descends from the apartment building and terminates on the adjoining property a few feet from the insured premises. After the ladder was destroyed by the owner of the neighboring property, Gebhardt submitted a claim to its insurer, American European Insurance Co. ("AEI"), which denied coverage. Gebhardt sued AEI in the Circuit Court for Baltimore City, alleging that AEI breached its contract when it declined coverage. The insurance policy obligated AEI to cover loss or damage to "covered property at the premises." The circuit court found that because dictionaries provide a range of possible meanings for "at," including "near," the insurance policy was ambiguous. Using "common sense" to resolve the apparent ambiguity, the circuit court reasoned that application and enforcement of the policy would be "problematic to the point that it is non-sensical" if "at" included notions of "nearness and proximity." Given the difficulty of determining what "near" the property might mean under the contract, the court found that this "cannot possibly be what was contemplated by the parties[.]" The circuit court concluded that AEI did not owe coverage because the ladder was not "at" the premises. Gebhardt timely appealed.

Held: Reversed and remanded.

The Court of Special Appeals began its interpretation of the policy by examining the rules of construction applicable to insurance contracts. The Court discussed that Maryland courts construe insurance policies according to contract principles. Using an objective theory of contract interpretation, the policy as a whole is analyzed to determine the intention of the parties

as reflected in the written language of the agreement. If the language of the contract is unambiguous, the contract is interpreted based on what a reasonable person in the position of the parties would have understood the language to mean, not the parties' subjective intent at the time of formation. However, a policy term is ambiguous if, to a reasonably prudent person, the term is susceptible to more than one meaning. If a court determines contractual language to be ambiguous, only then can extrinsic or parol evidence be considered to ascertain the parties' intention.

The Court discussed that in determining whether a policy term is ambiguous, it is typically helpful to consult dictionary definitions to supply the ordinary and accepted meanings of contractual language. The Court explained that if a dictionary provides alternative definitions of a term, the term is not automatically rendered ambiguous. Rather, courts must analyze the context of the contract, including its purpose, character, and the facts and circumstances of the parties at the time of execution, to determine the meaning of the term. The Court also clarified that dictionary definitions provide the common and popular understanding of a contractual term as evidence of what a reasonable person would have understood those words to mean and are not extrinsic evidence of the parties' subjective intent.

Applying these principles to the phrase "at the premises" as used in the AEI-issued policy, the Court concluded that the term was not ambiguous and that the ladder was "at the premises." The Court found that the broad semantic range of "at" is a feature of its meaning, not an indication of ambiguity. Examining the policy in its context, the Court also recognized that other provisions confirmed that the phrase "at the premises" is not strictly limited to property *on* the premises. Additionally, the purpose of the policy (to provide coverage for a commercial property used as a multi-family dwelling in an urban setting) favors interpreting the coverage grant to apply to a city-mandated ladder that is part of a fire escape that is attached to a multi-family dwelling and terminates within feet of the property. Finally, the Court observed that even if the policy were ambiguous, in the absence of extrinsic evidence of the parties' intent, it would be interpreted against the insurer as its drafter.

Return to ToC

ATTORNEY DISCIPLINE

*

By an Order of the Court of Appeals dated June 4, 2021, the following non-admitted attorney is excluded from exercising the privilege of practicing law in this State:

JONATHAN L. FARMER

*

This is to certify that the name of

SARAH RUTH BARNWELL

has been replaced upon the register of attorneys in this Court as of June 7, 2021.

*

By an Order of the Court of Appeals dated June 15, 2021, the resignation of

JONATHAN DAVID SUSS

from the further practice of law in this State has been accepted.

*

By an Opinion and Order of the Court of Appeals dated May 28, 2021, the following attorney has been suspended for six months, effective June 28, 2021:

RUSSELL A. NEVERDON, SR.

*

This is to certify that the name of

LAURA ELIZABETH JORDAN

has been replaced upon the register of attorneys in this Court as of June 29, 2021.

*

Return to ToC

UNREPORTED OPINIONS

The full text of Court of Special Appeals unreported opinions can be found online:

https://mdcourts.gov/appellate/unreportedopinions

	Case No.	*Decided*
A		
Alfasigma USA v. Exegi Pharma	0733	June 11, 2021
Ariosa, Michael v. Md. Dept of the Environment	2105 *	June 17, 2021
Awah, Edmund v. EZ Storage Corp.	0779	June 3, 2021
B		
Baig, Azad A., Jr. v. State	0501	June 8, 2021
Blankumsee, Azaniah v. State	1138	June 4, 2021
Boyd, Joshua v. State	2064 *	June 4, 2021
Breard, Thomas G. v. Homeland Association	0735	June 15, 2021
Briscoe, Maurice Alonso v. Maggie Real Estate	2526 *	June 22, 2021
Brown, Christopher W. v. Simpson	0984	June 28, 2021
C		
Calvary Temple of Baltimore v. Anne Arundel Cnty.	1574 *	June 28, 2021
Carter, Mausean v. State	1360 *	June 9, 2021
Carter, Mausean v. State	1362 *	June 9, 2021
Carter, Mausean v. State	1363 *	June 9, 2021
Carter, Mausean v. State	1364 *	June 9, 2021
Chalk, William David v. Chalk	0297	June 4, 2021
Collis, Torina A. v. Quest Motors	0499	June 2, 2021
Comptroller v. Atwood	0163	June 11, 2021
Cowger, Robert, Jr. v. Pocomoke City	0570	June 21, 2021
D		
Dept. of Juvenile Services v. Hershberger	0731	June 15, 2021
E		
Easter, Louis Pierre v. State	1811 *	June 16, 2021
Easter, Louis Pierre v. State	2255 *	June 16, 2021
Ellis, Malachi Tavon v. State	1014 *	June 4, 2021
Estate of Manley v. Prince George's Cnty.	0678	June 14, 2021

September Term 2020
* September Term 2019

Return to ToC

F		
Falls Road Comm. Ass'n v. CR Golf Club	0116	June 9, 2021
G		
Gittens, Donald v. State	1990 *	June 4, 2021
Gonzalez, Rudy A. v. State	1929 *	June 15, 2021
Grant, Dominique v. State	1090 *	June 21, 2021
Gunter, Robert A., Jr. v. Md. State Ret. & Pension Sys.	0806	June 11, 2021
Gunther, Gregory Michael v. State	0857	June 2, 2021
H		
Hall, Lionel v. State	1609 *	June 2, 2021
Hamel, Jason v. State	0592	June 1, 2021
Hamm, Shamar Terrence v. State	0294 *	June 23, 2021
Harris, Rodney Lee, Jr. v. State	2383 *	June 3, 2021
Harrison, James A. v. State	2421 *	June 15, 2021
Hirshauer, Shirley Annette v. Clemons	0595	June 4, 2021
Holland, Antwane D. v. State	2309 *	June 4, 2021
I		
In re: G.P.	0858	June 11, 2021
In re: J.T.	1023	June 28, 2021
In re: J.T.	1137	June 28, 2021
In re: S.J.	1324	June 29, 2021
J		
Johnson, Melvin v. State	0025	June 3, 2021
Jones, Jay Anthony v. State	0541	June 2, 2021
Jupiter, John Michael, Jr. v. State	0549	June 1, 2021
K		
Katz, Martin v. Kildale	1978 *	June 7, 2021
L		
Loeffler, Jane E. v. Loeffler	0491	June 10, 2021
Lunningham, Stephan Leroy v. State	1606 *	June 8, 2021
M		
Marrow, Todd v. Bank of America, N.A.	2491 *	June 25, 2021

September Term 2020
* September Term 2019

Return to ToC

N		
Nico Banquet Hall v. Prince George's Cnty.	2537 *	June 15, 2021
P		
Preston, Christopher v. Criminal Injuries Comp. Bd.	0768	June 25, 2021
R		
Randolph, Chauncey Purnell, Sr. v. State	2126 *	June 25, 2021
Robinson, Kenneth v. State	0379	June 1, 2021
Robinson, Kenneth v. State	0490	June 1, 2021
Rogers, Dustin Thomas v. State	1931 *	June 25, 2021
Rosenthal, Mark v. Rosenthal	2312 *	June 11, 2021
Russell, Mark W. v. State	0338	June 22, 2021
S		
S.F. v. Balt. City. Dept of Social Servs.	1395 *	June 3, 2021
Sanders, David Lee v. State	1674 *	June 11, 2021
Shawy, Tori v. Chaoui	0596	June 7, 2021
Sherbert, Kari v. Seymour	1041	June 28, 2021
Smith, Anita v. Bay Front, LLC	1272 *	June 15, 2021
Staubs, Mary v. CSX Transportation	0376	June 22, 2021
Sutton, Joel Christopher v. State	0213	June 1, 2021
Sydnor, Frank v. State	0196	June 15, 2021
T		
Trotter, Rita Michelle v. Brito	0533	June 3, 2021
Tyler, DaQuan v. State	0591	June 1, 2021
Tyler, DaQuan v. State	0689	June 1, 2021
U		
Ucheomumu, Andrew N. v. Peter	1111	June 17, 2021
V		
Vaughn, Marcus Logan v. State	2307 *	June 2, 2021
Vogel, Mark v. Estate of Hillman	1902 *	June 16, 2021
W		
Walker, James T. v. Chase Manhattan Mortgage	1487 *	June 2, 2021
Ward, Gary v. State	0504	June 4, 2021
White, Lauretta Z. v. Higher Mission	1682 *	June 25, 2021
Wright, Tayon v. State	0621 *	June 8, 2021

September Term 2020
* September Term 2019

Z
Zaldivar-Medina, Jose v. State 0371 * June 3, 2021

September Term 2020
* September Term 2019