STATE OF MICHIGAN

COURT OF APPEALS

GLORIA KATO KARUNGI,

Plaintiff/Counter-Defendant-Appellant,

v

RONALD LEE EJALU,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
September 26, 2017

No. 337152
Oakland Circuit Court
Family Division
LC No. 2016-841198-DS

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

PER CURIAM.

Plaintiff/Counter-Defendant (Plaintiff) appeals as of right the opinion and order denying her motion for summary disposition, wherein she sought custody of frozen embryos created with defendant/counter-plaintiff (defendant) and granting defendant's motion for summary disposition. We remand to the trial court for further proceedings.

Plaintiff and defendant are the parents of a daughter who was naturally conceived. Plaintiff and defendant were never married, and despite the end of their relationship in 2013, in 2015, they entered into contractual agreements with an in vitro fertilization (IVF) clinic for the cryopreservation of embryos generated through their genetic contributions. Their daughter has been diagnosed with sickle cell disease, and plaintiff seeks implantation of an embryo in order to give birth to a healthy child and then use the stem cells from that child's umbilical cord for transplantation to their daughter to cure her disease.

The present dispute arose when defendant no longer wished to follow through with the IVF. At that time, the parties were in a dispute for support of their daughter, and plaintiff initiated this matter in conjunction with that dispute. Plaintiff did not file a separate or amended complaint, but rather filed a motion as part of her support action contending that the embryos were subject to a custody determination. A consent judgment was entered under the "DS" (support case) designation that addressed parenting time, custody, and support for the parties' daughter, but it did not resolve the embryo dispute. Rather the consent judgment included a paragraph that recognized the existence of a controversy pertaining to the embryos and stated that the "embryo issue is preserved for resolution by this Court in this case." After the judgment

was entered, defendant filed a motion for summary disposition with respect to plaintiff's argument for custody of the embryos, which the trial court granted pursuant to MCR 2.116(I)(2). In a written opinion, the trial court pointed out that the parties were arguing a child custody case under a support case designation and, as such, held that it did not have subject-matter jurisdiction. The trial court reasoned, "[T]he Family Support Act-as written-provides no authority for this court to consider the disposition of embryos in the context of a child support case. Accordingly, the court has no legal authority to award 'custody' of the embryos to either party in this case."

Initially, we note that the trial court's reasoning that it did not have subject-matter jurisdiction based on the fact that this case was captioned as a support dispute rather than a custody dispute is misplaced. Contrary to the trial court's reasoning, "the form of a caption is not particularly significant[.]" *Howard v Bouwman*, 251 Mich App 136, 146; 650 NW2d 114 (2002). Rather, " 'We look to the relief asked.' " *Id*. quoting *Stamp v Mill Street Inn*, 152 Mich App 290, 296; 393 NW2d 614 (1986).[1]

Both parties and the trial court ignored the fact that the parties entered into a contract that governed the parties' interest in the contested embryos.[2] The contract provides in relevant part as follows:

> *Each embryo* cryopreserved as a result of in vitro fertilization *shall be considered the joint property of both recipient and partner who are deemed to be the legal owners*.
>
> If at any time during [sic] one partner should die, the survivor will furnish a valid death certificate and the surviving partner shall have sole ownership of embryos.
>
> If both parties should die, all embryos will be thawed and discarded unless one of the above options is clearly defined by both partners in a valid pre-directive (will).

[1] It also bears noting the trial court added to the misclassification of this dispute. Plaintiff's original pleadings sought to obtain child support from defendant for the parties' daughter and, thus, was identified and properly labeled a "DS" case. When the consent judgment was entered, it reserved resolution of the "embryo issue" for the trial court. Plaintiff filed various documents with the trial court pertaining to this issue, and yet was never instructed or guided by the trial court on the filing of these pleadings or their deficiency regarding the classification. It was not until the matter had proceeded and various motions for summary disposition had been filed that the trial court asserted its lack of authority to address the embryo issue "under the Family Support Act."

[2] We need not consider the Amicus Curiae argument regarding the life status of an embryo because the nature and stage of the proceedings do not require it.

> If at any time the partners divorce, a copy of the final divorce decree must be provided and the embryos will be handled in the manner set forth in the divorce decree.
>
> We further agree that *any and all disputes relating to this agreement or its breach shall be settled by arbitration* in Ann Arbor Michigan in accordance with the then current rule of the American Arbitration Association and judgment upon the award entered by the arbitrators may be entered in any court having jurisdiction. Costs of arbitration as determined by the arbitrator must be paid to the prevailing party. [Emphasis added.]

Two identical contracts containing these provisions were signed by both parties on two separate occasions: the first on October 9, 2015, and the second on November 22, 2015.[3] Because (1) the parties agreed that they each had an interest in the embryos and that they would resolve disputes related to that agreement or its breach by arbitration, and (2) plaintiff sought to extinguish defendant's interest in the embryos, the trial court should have considered this case a contract dispute. See *id*.

"An unambiguous contract must be enforced according to its terms." *DaimlerChrysler Corp v Wesco Distribution*, Inc, 281 Mich App 240, 248; 760 NW2d 828 (2008) (citation and quotation marks omitted). Without deciding the ethical or policy questions embedded in this case, the parties clearly intended for the embryos to be "joint property" and for any dispute regarding the embryos to be "settled by arbitration." See *Bloomfield Estates Improvement Ass'n, Inc v City of Birmingham*, 479 Mich 206, 212; 737 NW2d 670 (2007) ("We respect[] the freedom of individuals freely to arrange their affairs via contract by upholding the fundamental tenet of our jurisprudence . . . that unambiguous contracts are not open to judicial construction and must be enforced as written, unless a contractual provision would violate law or public policy.") (Citation and quotation marks omitted; alterations in original).

The trial court concluded that it lacked subject-matter jurisdiction on the basis that it had "no legal authority to" decide the dispute. But the trial court never addressed the contract between the parties, including the part in which the parties agreed that the embryos were joint property.[4] If the trial court had addressed the contract and properly considered this case as a contract dispute, it may have reached the opposite conclusion. See *Winkler by Winkler v Marist Fathers of Detroit, Inc*, ___ Mich ___, ___; ___ NW2d ___ (2017) (Docket No. 152889); slip op at 12 ("The existence of subject matter jurisdiction turns not on the particular facts of the matter before the court, but on its general legal classification.").

The circuit court is a court of general jurisdiction, MCL 600.151, and has "original jurisdiction in all matters not prohibited by law . . .," Const 1963, art 6, § 13. "Circuit court

[3] Both contracts were filed as exhibits in the trial court.

[4] We use the term "joint property" because that is the term utilized by the parties.

jurisdiction over a particular subject matter is denied only by constitution or statute." *Campbell v St John Hosp*, 434 Mich 608, 614; 455 NW2d 695 (1990). "In construing such statutes or constitutional provisions, retention of jurisdiction is presumed and any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated." *Id.* While the family division of the circuit court has "sole and exclusive jurisdiction" over matters enumerated in MCL 600.1021, that statute does not clearly and unambiguously state that the family division is precluded from addressing other matters. Moreover, MCL 600.1005 states that "[a] circuit judge serving in the family division of circuit court retains all the power and authority of a judge of the circuit court."[5]

Yet we need not reach a decision as to whether the trial court had jurisdiction over this dispute because the record before us is so underdeveloped that we are unable to resolve the parties' underlying contract dispute. For instance, it is unclear on the record before us whether one or both of the parties waived the arbitration provision of their contract, see *Salesin v State Farm Fire & Cas Co*, 229 Mich App 346, 356-357; 581 NW2d 781 (1998), or otherwise acted in a way that may have impliedly amended the contract, see, e.g., *Port Huron Ed Ass'n, MEA/NEA v Port Huron Area Sch Dist*, 452 Mich 309, 312; 550 NW2d 228 (1996) ("We hold that the unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract."). Accordingly, we decline to decide whether the trial court had subject-matter jurisdiction, see *Fred J Schwaemmle Const Co v Dept of Commerce, Corp & Sec Bureau*, 420 Mich 66, 81 n 3; 360 NW2d 141 (1984) (declining to address an issue that was "unnecessary to the resolution of" the case), and remand to the family division to determine whether it has subject-matter jurisdiction over a contract dispute involving joint property between two unmarried parties and, if so, to allow the parties to present evidence on the issue, see *Grebner v Clinton Charter Twp*, 216 Mich App 736, 745; 550 NW2d 265 (1996) ("Because the appropriate award in the present case would turn on . . . a matter apparently not argued before the circuit court, we remand to allow the parties to present evidence regarding this issue.").

[5] It is also worth noting that, because the trial court in this case included language in the original consent judgment preserving the "embryo issue" for itself, the family division was the proper venue in which to raise the issues presented in this case. Otherwise, the civil division of the circuit court would have arguably lacked jurisdiction, and any order from the court would have been void. See *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

Remanded to the trial court to determine whether it has subject-matter jurisdiction over the contract dispute between the parties and, if so, to allow the parties to present evidence on the issue. We do not retain jurisdiction.[6]

/s/ Colleen A. O'Brien

[6] Plaintiff raises a variety of other issues on appeal. However, all of plaintiff's arguments are based on her misconception that this is a custody dispute rather than a contract dispute. In light of our decision to remand to the trial court for further proceedings, it is unnecessary to address plaintiff's remaining claims.

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Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

MURRAY, J. (*concurring*).

The lead opinion's analysis and conclusions properly resolve this appeal. This brief concurrence explains what I believe the majority is, and is not, saying, as the dissent misrepresents our opinion.

First, before delving into the dissent's criticism of the majority opinion, one important principal must be kept in mind: The Court of Appeals is an error-correcting Court, and that is our primary role in the judicial system. See *People v Gioglio (On Remand)*, 296 Mich App 12, 17; 815 NW2d 589 (2012), vacated in part on other grounds by 493 Mich 864 (2012). As a result, the majority opinion, with explicit agreement by the dissent, properly concludes that the trial court's reliance upon the case designation to dismiss the case was in error. This is the only holding of the Court. Thus, having properly concluded that the trial court committed an error in dismissing the case, the proper remedy is to remand for further proceedings. That is what the majority opinion does.

Nevertheless, the majority opinion— much to the chagrin of the dissent—also points out to the parties and the trial court that there could be a legitimate question as to the trial court's primary jurisdiction to decide the issue because of the arbitration provision contained within the IVF agreement signed by both parties. Contrary to the dissenting opinion, this is not an improper issue to raise on the Court's own initiative, for if there is indeed a valid and enforceable arbitration agreement, it is an affirmative defense that would preclude the circuit court from proceeding any further in this matter. See MCR 2.111(F)(3)(a); *Mich Basic Prop Ins Ass'n v Detroit Edison Co*, 240 Mich App 524, 528; 618 NW2d 32 (2000). Courts can, of course, raise primary jurisdiction at any time. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 206; 631 NW2d 733 (2001).

Additionally, I do not read the majority opinion as making any conclusive statements about what the contract provides for or whether it is binding (or waived). Indeed, that is the reason for a remand to the trial court for further proceedings to decide some or all of those issues. Much more often than not it is the practice of this Court not to decide issues for the first time on appeal, *Calvert Bail Bond Agency, LLC v St Clair Co*, 314 Mich App 548, 557; 887 NW2d 425 (2016), and thus a remand on those issues, as well as on the issue of how to address and resolve issues surrounding the embryos if the matter is not sent to arbitration, is best left for the trial court to decide in the first instance. Interestingly enough, it appears that the dissent *has* made conclusions regarding the enforcement and meaning of the IVF agreement, something the majority opinion has not done.

That is also the reason why the dissent is incorrect in asserting that the majority is hesitant to decide the disposition of the frozen embryos. I am not hesitant to decide any issue, but I am also not willing to decide an issue that has not been first decided by the trial court.[1] Following the procedural avenues used in virtually all cases that come before this Court that require a remand is the appropriate form of relief for this appeal.

/s/ Christopher M. Murray

[1] Our Court obviously has the discretion to decide virtually any issue raised (and sometimes not raised) by the parties, but the posture of the case does not warrant the exercise of that discretion.

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RONALD LEE EJALU, Defendant/Counter-Plaintiff-Appellee.	LC No. 2016-841198-DS

Before: O'BRIEN, P.J., and JANSEN and MURRAY, JJ.

JANSEN, J. (*dissenting*)

For the reasons that follow, I respectfully dissent.

The majority's decision rests in large part on the assumption that an agreement plaintiff and defendant entered with the IVF clinic will dictate the outcome of these proceedings. Indeed, without explaining its reasoning or citing any authority, the majority states that "the parties entered into a contract that governed the parties' interest in the contested embryos" as though it were an undisputed fact. I disagree.

Although both plaintiff and defendant signed an agreement with the clinic, the agreement was clearly entered between each individual party and the IVF clinic. By its plain language, the agreement does not bind the parties to a particular disposition of the frozen embryos or to settlement via arbitration. None of the terms indicate that plaintiff and defendant reached an agreement with one another regarding the disposition of the frozen embryos upon their separation. Although the parties here were never married, the divorce provision of the contract is illustrative. It provides: "If at any time the partners divorce, a copy of the final divorce decree must be provided and the embryos will be handled in the manner set forth in the divorce decree." This provision expressly reserves the issue of the embryos' disposition, in the event of separation, for determination by the parties. Under the agreement, the IVF clinic simply agrees to carry out the parties' agreed-upon disposition once a decision has been made.

The majority correctly observes that an unambiguous contract must be enforced according to its terms, before it makes the mistake of reading language into the IVF agreement that simply does not exist. The majority states that "the parties clearly intended for the embryos

to be 'joint property' and for any dispute *regarding the embryos* to be 'settled by arbitration.' " (Emphasis added.) To the contrary, by the plain language of the agreement, the parties agreed *only* that "any and all disputes *relating to this agreement or its breach* shall be settled by arbitration." (Emphasis added.) Nothing in the agreement requires the parties to settle any and all disputes *regarding the embryos* in arbitration. Regardless of the equities of this case, and the majority's hesitation to decide matters related to the disposition of frozen embryos, "the court[] cannot make a contract for the parties when none exists." *Hammel v Foor*, 359 Mich 392, 401; 102 NW2d 196 (1960). Plaintiff's cause of action is not a dispute relating to the IVF agreement or its breach, and the arbitration clause does not apply.

I am troubled by the majority's decision to look beyond the issues raised by the parties and argue plaintiffs' case on her behalf. Neither party raised the issue of contract enforceability in the lower court or on appeal. Plaintiff's request in the lower court was for a declaration of whether the frozen embryos were subject to a custody determination. On appeal, she argues that because the frozen embryos are "persons," the trial court has the legal authority to consider their disposition and reach a custody determination. Defendant, in response, argues that the courts lack jurisdiction to determine custody of the frozen embryos because there is no authority for the proposition that frozen embryos are persons under the law. I do not believe this Court requires additional factfinding by the lower court to enable it to address the legal questions raised by the parties, and I am puzzled by the majority's request for particular facts relating to contractual issues neither party has claimed to exist. Assuming arguendo that the IVF agreement controls the determination of any of the issues presented by the parties, there is no indication, as the majority suggests, that either party waived the arbitration provision or "acted in a way that may have impliedly altered the contract." I would not alter the entire procedural posture, sua sponte, to remand the matter and allow the parties to re-litigate theories they failed to properly raise.

Instead, I would affirm the decision of the trial court to dismiss plaintiff's motion for a custody determination for lack of authority to consider the issue of custody of the frozen embryos. I agree with the majority's conclusion that the trial court's focus on case designation was in error. It is the substance of plaintiff's motion that controls, *Jahnke v Allen*, 308 Mich App 472, 474-475; 865 NW2d 49 (2014), and plaintiff's motion requested a declaration that the frozen embryos were subject to a custody determination. The trial court's grant of summary disposition to defendant for lack of authority, if based only on case designation, was in error. However, this Court affirms lower court decisions when the right result is reached for the wrong reason. *Scherer v Hellstrom*, 270 Mich App 458, 464; 716 NW2d 307 (2006). There is no Michigan law supporting the proposition that frozen embryos are persons subject to a custody determination. The trial court correctly noted that it lacked the legal authority to consider the disposition of the frozen embryos in the context of a support case. The trial court *also lacked legal authority to consider the disposition of the embryos in the context of a custody case*. Dismissal of plaintiff's motion was therefore appropriate.

/s/ Kathleen Jansen