

IN THE COMMON PLEAS COURT OF HAMILTON COUNTY, OHIO

JENNIFER CARTELLONE
c/o Peiffer Wolf Carr & Kane APLC
1422 Euclid Ave., Suite 1610
Cleveland, OH 44115

JOSEPH CARTELLONE
c/o Peiffer Wolf Carr & Kane APLC
1422 Euclid Ave., Suite 1610
Cleveland, OH 44115
and

REBECCA CARTELLONE,
c/o Peiffer Wolf Carr & Kane APLC
1422 Euclid Ave., Suite 1610
Cleveland, OH 44115
Plaintiffs,

v.

INSTITUTE FOR REPRODUCTIVE
HEALTH, LLC,
3805 Edwards Road, Suite 450
Cincinnati, Ohio 45209

and

THE CHRIST HOSPITAL,
2139 Auburn Avenue
Cincinnati, Ohio 45219

and

OHIO FERTILITY PROVIDERS, LLC,
d/b/a Ovation Fertility Cincinnati
3805 Edwards Road, Suite 455
Cincinnati, OH 45209

Defendants.

CASE NO:

COMPLAINT

INTRODUCTION

1. For Christmas, Rebecca Cartellone purchased ancestry.com DNA kits for her family. The results were life-changing: Rebecca learned that she was not related to her father,

Joseph Cartellone.

2. How could this happen? Like millions of Americans, Jennifer and Joseph Cartellone turned to assisted reproductive technology because they could not fulfill their dream of having a child otherwise. They sought fertility services at The Christ Hospital and the Greater Cincinnati Institute for Reproductive Health.¹ They did so with the promise from Defendants that the Institute would utilize Jennifer's egg and Joseph's sperm to create the embryos for transfer to Jennifer.

3. In February 1994, they trusted the Institute to transfer their embryo into Jennifer's uterus. They were overjoyed when Jennifer became pregnant. The pregnancy, which led to Rebecca, resulted from an embryo that The Christ Hospital and the other defendants created from Jennifer's egg and Joseph's sperm—or so the Defendants told the Cartellones.

4. Instead, the Christ Hospital and the other defendants combined Jennifer's egg with the sperm of a complete stranger. They then transferred the material containing the stranger's sperm to Jennifer. Through remarkable perseverance, the Cartellone family has traced the likely biological father to one of a handful of individuals—one of whom worked at the Christ Hospital.

5. IVF is a process involving immense trust between the clients and the provider that the laboratory will use the correct eggs and sperm as directed by the clients to create embryos for the clients. After all, the creation of an embryo is conducted entirely in secret and behind the veil of a laboratory wall. Clients trust the laboratory with their most intimate personal property during this process.

6. At all times following the transfer at the Institute—until their startling discovery

¹ Defendants Institute for Reproductive Health, LLC and Ohio Fertility Providers, LLC, are the successors in interest to the Greater Cincinnati Institute for Reproductive Health.

mere months ago—Plaintiffs Jennifer and Joseph Cartellone believed that Rebecca was biologically related to both of them. Rebecca also believed that she was biologically related to both her parents.

7. When the results returned from the holiday gift for the family, Plaintiffs learned that Defendants had breached their most intimate trust: Rebecca was not biologically related to Joseph. Plaintiffs later verified this result through a paternity test. Given the circumstances surrounding her conception, there is only one possible explanation—Defendants used the sperm of someone other than Joseph.

8. The Defendants' breach of their promise to use Joseph's sperm to create the embryo devastated Plaintiffs' understanding of their own identities and of their family. The defendants' misconduct has caused significant emotional trauma for Plaintiffs. The biological bond that they believed to have existed was a lie. Plaintiffs have many questions, including the medical history of Rebecca's biological father, whose sperm the Defendants inserted into Jennifer and what happened with Joseph's sperm, including whether the Institute inserted it into another client at the Institute.

9. Despite Defendants' gross and obvious misconduct, Defendants have refused to make amends for their mistake. As a result, Plaintiffs bring this action to seek answers regarding the circumstances surrounding this troubling event, as well as to seek restitution for the emotional and other harms suffered by Plaintiffs. Defendants must be held accountable to help ensure that nothing like this happens again.

PARTIES AND VENUE

10. Plaintiffs Joseph and Jennifer Cartellone are natural persons who reside in Delaware, Ohio.

11. Plaintiff Rebecca Cartellone is a natural person who resides in Dublin, Ohio.
12. Defendant Institute for Reproductive Health, LLC is an Ohio for-profit corporation with its principle place of business at 3805 Edwards Road, Suite 450, Cincinnati, Ohio 45209.
13. Defendant The Christ Hospital is an Ohio not-for-profit corporation with its principle place of business at 2139 Auburn Avenue, Cincinnati, Ohio 45219.
14. Defendant Ohio Fertility Providers, LLC is an Ohio for-profit corporation with its principal place of business at 3805 Edwards Road, Suite 455, Cincinnati, Ohio 45209. Ohio Fertility Providers, LLC does business as Ovation Fertility Cincinnati.
15. On information and belief, the Greater Cincinnati Institute for Reproductive Health became the Institute for Reproductive Health, LLC on or about January 12, 1999.
16. On information and belief, in 2018, Defendant Institute for Reproductive Health spun off some portion of its operations to the newly created Ohio Fertility Providers, LLC, which was then acquired as part of the Ovation Fertility Group and renamed Ovation Fertility Cincinnati.
17. As such, Defendants Institute for Reproductive Health, LLC and Ohio Fertility Providers, LLC are the successors in interest to the Greater Cincinnati Institute for Reproductive Health.
18. On information and belief, Defendants Institute for Reproductive Health, LLC and Ohio Fertility Providers, LLC, along with their predecessor entity, conducted their work with The Christ Hospital since at least 1993. The principles of the Institute for Reproductive Health, LLC, including Dr. Sherif Awadalla, the Medical Director of the Institute, Dr. Erica Behnke, the laboratory director, and the physician who oversaw the IVF procedure at issue, are part of “The Christ Hospital Health Network.”²

² <https://www.thechristhospital.com/physician-details?Provider=C21Q0VELZC>

19. Venue is proper in the Hamilton County Court of Common Pleas pursuant to Civil Rule 3(C)(2) & (3), as all Defendants' principle places of business are in Hamilton County, and Defendants conducted the activity that gave rise to the claim for relief in Hamilton County.

BACKGROUND FACTS

20. In October 1993, Joseph and Jennifer contacted the Institute and The Christ Hospital for consultation regarding difficulties the couple was experiencing in conceiving a child.

21. As a result of that consultation, the Cartellones entered into a series of agreements to obtain IVF through The Christ Hospital, to be performed by the Institute, which was the hospital's affiliate at that time. Under these agreements, the Cartellones would submit payment for the IVF services to The Christ Hospital. Joseph and Jennifer were provided an information brochure from Defendants that described the procedures to be performed. The materials specified that both the sperm and eggs to be used would be from the members of the couple only. Joseph and Jennifer were instructed to take an antibiotic prior to the cycle, and both parties were instructed to refrain from alcohol, drug use, smoking, and some over-the-counter medications.

22. As part of the IVF services, Joseph provided and entrusted Defendants with his sperm to create embryos with Jennifer's eggs. On that same day, Dr. Awadalla performed a retrieval surgery on Jennifer to collect her oocytes, commonly known as "eggs," to create embryos for Jennifer and Joseph. Those oocytes were then fertilized in Defendants' laboratory. On February 15, 1994, Dr. Awadalla transferred three of those embryos into Jennifer's uterus, resulting in Jennifer's pregnancy with Rebecca. Rebecca was born later that year.

23. At no point did Defendants provide any indication before or after the pregnancy that Rebecca Cartellone's biological father was anyone other than Joseph Cartellone.

24. In late December 2018, Plaintiffs received ancestry.com DNA testing kits as

holiday presents with the intention of exploring their ancestry. As part of that service, Plaintiffs submitted saliva samples for genetic testing. In February 2019 Plaintiffs received results from ancestry.com indicating that Rebecca was not the biological daughter of Joseph. The Cartellones subsequently obtained a sworn paternity test that confirmed this fact.

25. Prior to receiving their ancestry results, none of the Plaintiffs had any indication, nor reason to believe, that all members of their family were not genetically related. Had it not been for ancestry.com testing the Plaintiffs would not have, and could not have, known anything was amiss.

26. Plaintiffs do not know who is the biological father of Rebecca. However, through their independent recent research, they believe that Rebecca's biological father is likely one of a handful of men—one of whom worked at the time as a doctor at The Christ Hospital. The Cartellones have a good-faith belief that Rebecca's biological father is one of these people.

27. Plaintiffs also do not know what happened with Joseph's sperm. They are tormented with questions concerning whether Joseph's sperm was used for another customer at the Institute and the potential implications (moral, ethical, economic, and otherwise) from that unknown and unauthorized use.

COUNT I

BREACH OF CONTRACT

(on behalf of Plaintiffs Joseph and Jennifer Cartellone)

28. Plaintiffs fully incorporate the foregoing paragraphs and allegations of the complaint as though set forth fully herein.

29. Joseph and Jennifer Cartellone entered into oral and/or written contracts with Defendants wherein Defendants agreed to store, preserve and use Joseph's sperm combined with Jennifer's eggs to create embryos for use in IVF services provided to Jennifer and Joseph.

30. The contractual agreements between Jennifer, Joseph, and Defendants was predicated on Defendants utilizing the sperm of Joseph only as directed by the Jennifer and Joseph. Jennifer and Joseph understood this to be an essential term of the contractual agreement between the parties. When Defendants agreed to store, preserve and use Joseph's sperm combined with Jennifer's eggs to create embryos for use in IVF services provided to the Cartellones. Defendants were aware of the severe emotional distress and/or mental anguish that would result if the Defendants failed to keep those promises and breached the parties' agreement.

31. In consideration for those services, Jennifer and Joseph paid Defendants substantial sums.

32. Jennifer and Joseph performed all the terms, conditions and promises required of them under their contracts.

33. Defendants did not, in fact, utilize sperm from Joseph, but instead fertilized Jennifer's eggs with the semen of some unknown man.

34. In doing so, Defendants breached their contracts with Joseph and Jennifer.

35. Plaintiffs did not know until early 2019 that the embryo implanted in Jennifer had been fertilized by the semen of another man, and thus Defendants breached their contract. Moreover, Plaintiffs had no reason to believe that the embryo had been fertilized by anyone other than Joseph, and thus had no reason to investigate their claim.

36. As such, the statute of limitations for Plaintiffs' breach of contract claim is tolled until early 2019.

37. As a result of Defendants' breach, Plaintiffs have been damaged in an amount to be determined at trial.

COUNT II
PROMISSORY ESTOPPEL

(on behalf of Plaintiffs Joseph and Jennifer Cartellone)

38. Plaintiffs fully incorporate the foregoing paragraphs and allegations of the complaint as though set forth fully herein, except for paragraphs 28-37. Plaintiffs pleads this claim in the alternative to Count I.

39. A promissory estoppel claim under Ohio law requires a clear and unambiguous promise, reliance upon the promise by the person to whom the promise is made, the reliance is reasonable and foreseeable, and the party seeking to enforce the agreement is injured as a result of its reliance.

40. Defendants promised to store, preserve and use Joseph's sperm combined with Jennifer's eggs to create embryos for use in IVF services provided to the Cartellones.

41. Plaintiffs relied upon this promise in electing to entrust Joseph's sperm to Defendants. This reliance was reasonable and foreseeable, as there was no reason to question Defendants' representations that they would use Joseph's sperm only as directed by the Cartellones for use in fertilization of Jennifer's eggs to create embryos, and no independent way to confirm the genesis of the fertilized embryos.

42. Plaintiffs did not know until early 2019 that the embryo implanted in Jennifer had been fertilized by the semen of another man, and thus Defendants breached their contract. Moreover, Plaintiffs had no reason to believe that the embryo had been fertilized by anyone other than Joseph, and thus had no reason to investigate their claim.

43. As such, the statute of limitations for Plaintiffs' claim is tolled until early 2019.

44. As a result of Defendants' misconduct alleged herein, Plaintiffs have been damaged in an amount to be determined at trial.

COUNT III
BATTERY

(on behalf of Plaintiff Jennifer Cartellone)

45. Plaintiffs fully incorporate the foregoing paragraphs and allegations of the complaint as though set forth fully herein.

46. During the course of the IVF process involving Jennifer Cartellone, she had an embryo implanted in her body by Defendants. She consented to this implantation based on the representation that the embryo had been fertilized by her husband's sperm.

47. Jennifer did not consent, and would not have consented, to Defendants placing an embryo in her body that had been fertilized by the semen of some unknown man.

48. Defendants intended to make the contact with Jennifer that forms the basis for the battery claim.

49. As a result, Defendants did not obtain informed consent to the implantation procedure that occurred on or about February 13, 1994. Without such consent, Defendants engaged in a battery on Jennifer Cartellone by implanting the embryo in her body. *See Estate of Leach v. Shapiro*, 13 Ohio App.3d 393, 395, 13 Ohio B. 477, 469 N.E.2d 1047 (9th Dist.1984) (“Not only must a patient consent to treatment, but the patient's consent must be informed consent. There is no legal defense to battery based on consent if a patient's consent to touching is given without sufficient knowledge and understanding of the nature of the touching.”)

50. Jennifer Cartellone did not know until early 2019 that the embryo implanted in her had been fertilized by the semen of another man. Moreover, Plaintiff had no reason to believe that the embryo had been fertilized by anyone other than her husband, and thus she had no reason to investigate her claim.

51. As such, the statute of limitations for Plaintiff's battery claim is tolled until early 2019.

COUNT IV

BAILMENT

(on behalf of Plaintiffs Jennifer and Joseph Cartellone)

52. Plaintiffs fully incorporate the foregoing paragraphs and allegations of the complaint as though set forth fully herein.

53. Plaintiffs delivered to Defendants for safekeeping their personal property consisting of their eggs and sperm to be safely and securely kept and used as directed or redelivered to them on demand. The provision of these materials to Defendants formed a bailment.

54. Plaintiffs did in fact provide their eggs and sperm to Defendants as called for under the bailment. Plaintiffs did so with the direction and understanding that these materials would be used by Defendants to create embryos that would be implanted in Jennifer or stored and returned to them according to their direction. Defendants had a duty to exercise ordinary care in the safekeeping of Plaintiffs' eggs and sperm delivered to them, and Defendants had a duty to either use the eggs and sperm as directed or return them, undamaged, to Plaintiffs.

55. Defendants invited the general public, including Plaintiffs in particular, to entrust eggs and sperm to their care by holding themselves out to be a competent, capable, and established reproductive and storage facility able to handle and care for eggs, sperm, and embryos in a satisfactory manner.

56. While under the Defendants' care, the eggs provided by Jennifer were fertilized by the semen of another man. The sperm provided by Joseph was neither used to fertilize Jennifer's eggs as promised nor returned to the Cartellones. As a result, Defendants breached their duty to exercise ordinary care in the safekeeping of Plaintiffs' eggs and sperm and have failed to redeliver Joseph's sperm to Plaintiffs.

57. Plaintiffs did not know until, at the earliest, January 2019 that the embryos returned by the Defendants had been fertilized by the semen of another man, and thus Defendants breached

their bailment. Moreover, Plaintiffs had no reason to believe that Joseph's sperm had not been used as directed or that the embryos had been fertilized by anyone other than him, and thus had no reason to investigate their claim.

58. As such, the statute of limitations for Plaintiffs' bailment claim is tolled until early 2019.

59. As a result of Defendants' wrongful conduct Plaintiffs were deprived of the opportunity to use Josephs' sperm as directed to create embryos and have suffered and continue to suffer damages in an amount to be determined at trial.

COUNT V
NEGLIGENT MISREPRESENTATION
(on behalf of Plaintiffs Jennifer and Joseph Cartellone)

60. Plaintiffs repeat and reallege the above paragraphs as if fully restated herein

61. On or about February 15, 1994, Defendants represented to Plaintiffs that Defendants' IVF laboratory used Joseph's sperm to create the embryos transferred to Plaintiffs.

62. Plaintiffs relied on Defendants' representations when they decided to have Defendants transfer the embryos to Jennifer on February 15, 1994.

63. As the facts alleged herein show, Defendants' representations were false. Defendants did not use Joseph's sperm to create the embryos transferred to Jennifer on February 15, 1994.

64. As a result, Defendants failed to exercise reasonable care or competence in obtaining or communicating the false information that the embryos transferred to Jennifer had been created using Joseph's sperm.

65. Plaintiff did not know until early 2019 that Defendants' representation was false when they learned that Rebecca was not the biological daughter of Joseph. Moreover, Plaintiffs

had no reason to investigate any of these facts prior to early 2019.

66. As such, the statute of limitations for Plaintiffs' negligence claim is tolled until early 2019.

67. As a proximate result of Defendants' negligent misrepresentation, Plaintiffs suffered and continue to suffer injuries of a personal and pecuniary nature in an amount to be determined at trial.

COUNT VI
NEGLIGENCE
(on behalf of Plaintiff Rebecca Cartellone)

68. Plaintiffs fully incorporate the foregoing paragraphs and allegations of the complaint as though set forth fully herein.

69. "To establish negligence, the plaintiff must prove that the defendant owed a duty of care, that it breached that duty, and that the breach was the proximate cause of the resulting injury." *Neville v. City of Wyoming*, 1st Dist. Hamilton, No. C-020064, 2002-Ohio-4936, ¶ 8.

70. As the facilitator of the conception of children via IVF, Defendants have a duty to ensure that there are reliable means of ensuring that embryos will be fertilized, and thus children born, using the genetic material that is intended for use in the conception of those children.

71. Moreover, Defendants have a duty to keep accurate records of the fertilization embryos to provide children born via IVF information concerning their biological parents, including medical information.

72. As a child conceived using IVF administered by Defendants, Defendants owed those duties to Plaintiff Rebecca Cartellone.

73. Defendants breached those duties to Plaintiff, as she is not the biological daughter of her father as was intended, has no information concerning her biological father, and has no

indication who her biological father is or any medical information regarding her biological father that could be pertinent to her future wellbeing.

74. Plaintiff did not know until early 2019 that she was not the biological daughter of Joseph Cartellone. Moreover, Plaintiff had no reason to investigate any of these facts prior to early 2019.

75. As such, the statute of limitations for Plaintiff's negligence claim is tolled until early 2019.

76. As a result of Defendants' negligence, Plaintiff has suffered damages proximately caused by Defendants' breaches of its duties in a manner and in an amount to be determined at trial.

COUNT VII
NEGLIGENCE
(on behalf of Plaintiffs Jennifer and Joseph Cartellone)

77. Plaintiffs repeat and reallege the above paragraphs as if fully restated herein.

78. Defendants owed Plaintiffs a duty to exercise care with respect to the collection, labeling, screening, recording, preparation and use of sperm to create embryos for Plaintiffs' use.

79. Defendants breached those duties and/or were negligent in one or more of the following acts or omissions:

- i. failing to properly collect, label and/or maintain Joseph's sperm in an identifiable manner for use as directed by Plaintiffs;
- ii. failing to properly safeguard and protect Joseph's sperm;
- iii. failing to keep accurate records of the sperm used to fertilize Jennifer's eggs;
- iv. failing to identify the donor of the sperm used to fertilize Jennifer's eggs, including follow and/or provide required health information to Plaintiffs concerning the donor;

- v. failing to follow known scientific and laboratory procedures for the preparation of sperm and use in IVF; and
- vi. were otherwise careless and/or negligent.

80. Defendants were also grossly negligent and/or reckless for failing to exercise any or very slight care through one or more of the above-listed acts or omissions. Defendants acted willfully and/or wantonly with a conscious or reckless disregard for the rights of Plaintiffs that had a great probability of causing—and did cause—substantial harm.

81. As a proximate result of one or more of Defendants' negligent and/or grossly negligent acts and/or omissions, Plaintiffs suffered and continue to suffer injuries of a personal and pecuniary nature in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully prays for the following:

- (A) Find Defendants liable for the claims asserted above;
- (B) Find and declare that the Defendants breached the contract as described above;
- (C) Find and declare that the Plaintiffs relied on the promise of Defendants;
- (D) For compensatory damages in an amount to be determined at trial;
- (E) For an order requiring Defendants to provide the identity of the donor of the sperm used to create the embryos transferred on February 15, 1994 to Plaintiff Jennifer Cartellone and any available information concerning the medical history of the donor;
- (F) For interest on compensatory damages from the date of injury to the date of judgment;
- (G) For costs of suit herein incurred; and

(H) Such other relief as the law and evidence may justify, and that this Court deems just and proper.

JURY TRIAL DEMANDED

Plaintiffs demand a jury trial on all issues so triable.

Date: August 7, 2019

Respectfully submitted,

/s/ Matthew R. Wilson
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