

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

**AMBER and ELLIOTT ASH, individually
and on behalf of all others similarly
situated,**
c/o DiCello Levitt & Casey LLC
7556 Mentor Ave.
Mentor, Ohio 44060

Plaintiffs,

v.

**UNIVERSITY HOSPITALS HEALTH
SYSTEM, INC.;**
c/o Janet L. Miller, Statutory Agent
3605 Warrensville Center Road,
Shaker Heights, Ohio 44122

and

**UNIVERSITY HOSPITALS
CLEVELAND MEDICAL CENTER d/b/a
as, *inter alia*, University Hospitals
Rainbow Babies & Children’s Hospital
and University Hospitals MacDonald
Women’s Hospital;**
c/o Janet L. Miller, Statutory Agent
3605 Warrensville Center Road,
Shaker Heights, Ohio 44122

and

**UNIVERSITY HOSPITALS AHUJA
MEDICAL CENTER, INC.**
c/o Janet L. Miller, Statutory Agent
3605 Warrensville Center Road,
Shaker Heights, Ohio 44122

Defendants.

CASE NO.:

JUDGE:

**CLASS ACTION COMPLAINT
(JURY DEMAND ENDORSEMENT)**

Plaintiffs, Amber and Elliott Ash (collectively, “Plaintiffs”), individually and on behalf of the other members of the below-defined class (“Class”), for their class action complaint against

Defendants, University Hospitals Health System, Inc. (“University Hospitals,” or “UH”), University Hospitals Cleveland Medical Center d/b/a as, *inter alia*, University Hospitals Rainbow Babies & Children’s Hospital and University Hospitals MacDonald Women’s Hospital (“Cleveland Medical Center”), and University Hospitals Ahuja Medical Center, Inc. (“Ahuja Medical Center”) (collectively, “Defendants”), hereby claim, allege, state, and aver as follows:

NATURE OF THE ACTION

1. This is a class action lawsuit on behalf of Plaintiffs, individually and on behalf of the other Class members who were injured as a result of Defendants’ conduct, which caused irreplaceable damage to their frozen eggs and embryos.

2. Defendants had been preserving, protecting, and storing Plaintiffs’ and the other Class members’ eggs and embryos at a University Hospitals Fertility Center located at the Ahuja Medical Center in Beachwood, Ohio.

3. The damage occurred when the temperature rose in a large storage tank in which Defendants had been preserving, protecting, and storing approximately 2,000 of Plaintiffs’ and the other Class members’ egg and embryo specimens. In what can only be characterized as gross negligence and an utter breach of trust, decency, and responsible stewardship, Defendants destroyed the hopes, dreams, and futures of hundreds, if not thousands, of prospective Ohio parents and families.

4. Recognizing the extent and consequences of its misconduct, Defendants have reached out to Plaintiffs and the other Class members to advise them of Defendants’ misconduct and that the consequence of their misconduct is that Plaintiffs’ and the other Class members’ frozen eggs and embryos—eggs and embryos that they entrusted to Defendants and were relying on Defendants for their preservation and safekeeping—may have been destroyed or irretrievably

damaged. One of University Hospitals' representatives is reported saying, "It's absolutely devastating."

5. Plaintiffs, individually and on behalf of the other Class members, seek damages, equitable relief, and other remedies from Defendants as a result of their misconduct.

JURISDICTION, VENUE, AND PARTIES

6. This Court has general jurisdiction over the common-law claims asserted herein and because money damages are being sought in excess of \$25,000.

7. Venue in this Court is proper under Rules 3(B)(3) and (6) of the Ohio Rules of Civil Procedure, because Cuyahoga County, Ohio is the county in which University Hospitals has its principal place of business and because all or part of the claims for relief arose in Cuyahoga County.

8. At all relevant times herein, Plaintiffs, Amber and Elliott Ash, are/were residents of the City of Bay Village, County of Cuyahoga, and the State of Ohio. Their address is (redacted). Their specific street address will be provided to this Court under seal.

9. On or about March 4, 2018, Plaintiffs' frozen embryo specimens were irreplaceably damaged while being stored at the University Hospitals Fertility Center that is housed in the Ahuja Medical Center, located in Beachwood, Ohio. On March 10, 2018, Defendants advised Plaintiffs that their embryo specimens had been destroyed.

10. Defendant University Hospitals Health System, Inc. is a tax-exempt 501(c)(3) corporation with its principal place of business in Shaker Heights, Ohio.

11. Defendant University Hospitals Cleveland Medical Center is a tax-exempt 501(c)(3) corporation with its principal place of business in Shaker Heights, Ohio. The

Cleveland Medical Center does business as, *inter alia*, University Hospitals Rainbow Babies & Children's Hospital and University Hospitals MacDonald Women's Hospital.

12. At all times relevant to this action, University Hospitals and/or University Hospitals Cleveland Medical Center operated the Ahuja Medical Center, which was opened in 2011.

13. University Hospitals' opening of its Ahuja Medical Center was part of University Hospitals' "Vision 2010," part of which included University Hospitals' rapid expansion, resulting in the opening of several new facilities.

14. Defendant University Hospitals Ahuja Medical Center, Inc. is one of University Hospitals' eleven community medical centers. It is located at 3999 Richmond Road, Beachwood, Ohio. The Ahuja Medical Center offers specialized medical and surgical services, including in-vitro fertilization ("IVF"), to Cleveland's eastern and southeastern communities, as well as Lake and Summit counties. Among its service offerings, the Ahuja Medical Center offers services through the UH Fertility Center.

FACTUAL ALLEGATIONS

15. University Hospitals Fertility Center offers, among other services, an IVF program with IVF and andrology laboratories. University Hospitals claims and represents that its Fertility Center "feature[s] the most advanced technology available."

16. Some of the treatment options University Hospitals offers at its Fertility Center are: (a) embryo cryopreservation, "[w]here excess embryos from a single procedure are frozen for implantation at a later date"; (b) egg freezing, which "[a]llows a woman to electively freeze her eggs at a younger age for use at a later date"; and (c) surrogacy, "[w]hen pregnancy is

inadvisable or impossible for a woman, a couple may choose to have a surrogate carry their child following [IVF].”

17. Plaintiffs went to University Hospitals’ Fertility Center at the Ahuja Medical Center to have IVF prepared in an effort to preserve embryos for later use in trying to conceive a child. Following the birth of their son in 2015, Plaintiffs’ medical team advised them that Plaintiff Amber Ash should not carry another pregnancy, so Plaintiffs were planning on using the embryos that Defendants would be storing for them in order to conceive a child through surrogacy.

18. At all times relevant to this action, Plaintiffs’ embryos were under Defendants’ protection, custody, and control. Defendants stored Plaintiffs’ embryos within a liquid nitrogen storage tank at the Fertility Center that is housed at the Ahuja Medical Center, as were the other approximately 2,000 frozen eggs and embryos.

19. On or about March 9, 2018, University Hospitals notified Plaintiffs that Defendants damaged or destroyed the embryos that Plaintiffs entrusted to Defendants’ custody and care when, on March 3-4, 2018, the temperature in the storage tank in which Defendants were storing those embryos rose to an unacceptable, unsafe, and unsustainable level. On information and belief, University Hospitals provided materially similar notifications to each of the other Class members.

20. The storage tank that Defendants used to store Plaintiffs’ and the other Class members’ eggs and embryos is most commonly used for women storing extra embryos while they undergo IVF. It is also used for egg donors and for women who are delaying pregnancy or concerned about the ability to conceive.

21. On or about March 3-4, 2018, the storage tank heated up. In a March 8, 2018 statement, University Hospitals admitted the temperature fluctuation in that liquid nitrogen storage tank. *See, e.g.,* <http://news.uhhospitals.org/news-releases/university-hospitals-statement-concerning-fertility-clinic.htm>

22. University Hospitals has commenced an investigation to determine why the temperature rose in the tank, destroying or otherwise damaging Plaintiffs' and the other Class members' eggs or embryos. Patricia DePompei, President of University Hospitals' Rainbow Babies & Children's Hospital, said that hospital staff members have consulted with experts to "better understand the cause of this temperature fluctuation and ensure that it doesn't happen again." DePompei admitted to NBC News that, "we do know that the temperature that was measured at a portion of the tank was higher than our acceptable limits."

23. As of the date of this filing, it is unknown whether the temperature problem was caused by human error, mechanical failure, or both.

24. Defendants' above-referenced storage tank has monitors and sensors that set off audible alarms if there is a temperature flux, and they can be remotely monitored.

25. Defendants failed to physically staff its facility housing the storage tank the night of March 3, 2018, nor, on information and belief, did Defendants monitor that storage tank that night in any manner.

26. On the morning of March 4, 2018, an audible alarm alerted embryologists to a temperature change in the storage tank at Defendants' Fertility Center. Defendants subsequently moved Plaintiffs' and the other Class members' eggs and embryos to another storage tank.

27. As of March 8, 2018, University Hospitals admitted that it did not know the viability of Plaintiffs' and the other Class members' eggs and embryos. University Hospitals

further admitted that it would need to thaw those eggs and embryos to determine their viability and that once that is done, they cannot be refrozen.

28. Some Class members' eggs and embryos that have been thawed since March 4, 2018 for planned procedures were found to not be viable. On information and belief, *none* of Plaintiffs' and the other Class members' eggs and embryos in Defendants' above-referenced storage tank remain viable.

29. On or about March 7, 2018, University Hospitals Cleveland Medical Center sent letters, signed by Patricia DePompei, by overnight courier, to all affected patients, including Plaintiffs and the other Class members, disclosing the crisis and implying possible damage and loss. In pertinent part, those letters stated:

Over the weekend, an unexpected temperature fluctuation occurred at our tissue storage bank, where frozen eggs and embryos are stored. We are investigating all of the facts to better understand the cause of this issue. If you have been a patient at the UH Fertility Clinic we know you will have questions . . . We know the community trusts UH for its care and we are sorry that this has happened in any part of our health system.

30. University Hospitals reported the incident to the federal regulators that monitor fertility clinics through Clinical Laboratory Improvement Amendments ("CLIA"). The U.S. Food and Drug Administration, Center for Medicaid Services, and Centers for Disease Control and Prevention, are responsible for CLIA, which regulates lab quality and requires state certification.

31. In a video posted on Facebook, Patricia DePompei, on behalf of University Hospitals, said, "We are so very sorry this happened and we want to do all that we can to support our patients and families through this very difficult time." DePompei is also reported to have characterized the event as being "absolutely devastating."

32. The irreversible damage and destruction to the thousands of eggs and embryos that Plaintiffs and the other Class members entrusted to Defendants is devastating. Not only is removing and freezing a woman's eggs an expensive and laborious process that can cost approximately \$12,000 or more, plus hundreds of dollars in annual storage fees, the value and importance of the eggs and embryos that Plaintiffs and the other Class members entrusted to Defendants' care, and for which Defendants accepted all legal responsibility to store, preserve, and protect, is enormous. Indeed, for some families, these fertility services are their only chance at conceiving a child—a chance now obliterated by Defendants' conduct.

33. When Plaintiffs received Defendants' notification about possible damage to their stored embryos in Defendants' care, Plaintiff Amber Ash described her emotions as follows: "My heart just sank and I felt physically ill. I felt just sick to my stomach. The world of infertility is just [a] very isolating world, it's very lonely it's complete loss of control." When interviewed by CBS on this topic, she further added, "For some this is their last hope, I mean they physically, financially, mentally can't put themselves through that again. I've gone from anger, I've gone through just feeling a sense of loss, grief, I think right now I'm just angry to be honest."

CLASS ACTION ALLEGATIONS

34. Pursuant to Rule 23 of the Ohio Rules of Civil Procedure, Plaintiffs seek certification of a class (the "Class") defined as:

All University Hospitals patients and/or other family members affected by the loss of or damage to their eggs and/or embryos that occurred on or about March 3-4, 2018 at the Ahuja Medical Center.

35. Excluded from the Class are Defendants, their affiliates and subsidiaries, and their officers, directors, partners, employees, and agents; Class counsel, employees of Class counsel's

firm, and Class counsel's immediate family members; defense counsel, their employees, and their immediate family members; and any judicial officer who considers or renders a decision or ruling in this case, their staff, and their immediate family members.

36. **Numerosity: Ohio Rule of Civil Procedure 23(a)(1)**. The members of the Class are so numerous that individual joinder of all Class members is impracticable. Plaintiffs are informed and believe—based upon University Hospitals' press statements and other publicly available information—that there are more than 700 Class members. Those individuals' names and addresses are available from Defendants' records, and Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

37. **Commonality and Predominance: Ohio Rules of Civil Procedure 23(a)(2) and 23(b)(3)**. This action involves common questions of law and fact, which predominate over any questions affecting individual class members, including, without limitation:

- a. Whether the March 3-4, 2018 temperature fluctuation in the storage tank at the Ahuja Medical Center was the result of Defendants' negligence or other wrongful conduct;
- b. Whether Defendants failed to take adequate and reasonable measures to ensure their systems were protected;
- c. Whether Defendants failed to take available steps to prevent and stop the storage tank failure from ever happening;
- d. Whether Defendants knew or should have known that their systems were vulnerable to failure;

e. Whether Defendants failed to disclose the material facts that they did not have adequate procedures and security practices to safeguard Plaintiffs' and the other Class members' eggs and embryos entrusted to its care;

f. Whether Defendants failed to provide timely and adequate notice of the systems failure leading to the destruction of Plaintiffs' and the other Class members' eggs and embryos;

g. Whether Defendants owed a duty to Plaintiffs and the other Class members to protect the eggs and embryos that were entrusted to their care;

h. Whether Defendants breached their duties to protect the eggs and embryos that Plaintiffs and the other Class members entrusted to their care;

i. Whether Defendants breached their contracts with Plaintiffs and the other Class members affected by the March 3-4, 2018 temperature fluctuation in the storage tank at the Ahuja Medical Center;

j. Whether Defendants' conduct, including their failure to act, resulted in or was the proximate cause of the breach of its systems, resulting in the destruction of the eggs and embryos that Plaintiffs and the other Class members entrusted to their care;

k. Whether Defendants' conduct renders them liable for negligence, negligence *per se*, bailment, and/or breach of contract;

l. Whether, as a result of Defendants' conduct, Plaintiffs and the other Class members face a significant threat of harm and/or have already suffered harm, and, if so, the appropriate measure of damages to which they are entitled; and

m. Whether, as a result of Defendants' conduct, Plaintiffs and the other Class members are entitled to injunctive, equitable, declaratory and/or other relief, and, if so, the nature of such relief.

38. **Typicality: Ohio Rule of Civil Procedure 23(a)(3).** Plaintiffs' claims are typical of the other Class members' claims because Plaintiffs and the other Class members were subjected to the same allegedly unlawful conduct and damaged in the same way.

39. **Adequacy of Representation: Ohio Rule of Civil Procedure 23(a)(4).** Plaintiffs are adequate class representatives because their interests do not conflict with the interests of the other Class members who they seek to represent, Plaintiffs have retained counsel competent and experienced in complex class action litigation, and Plaintiffs intend to vigorously prosecute this action. The Class's interests will be fairly and adequately protected by Plaintiffs and their counsel.

40. **Declaratory and Injunctive Relief: Ohio Rule of Civil Procedure 23(b)(2).** The prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudications with respect to individual Class members that would establish incompatible standards of conduct for Defendants. Such individual actions would create a risk of adjudications which would be dispositive of the interests of other Class members and impair their interests. Defendants have acted and/or refused to act on grounds generally applicable to the Class, making final injunctive relief or corresponding declaratory relief appropriate.

41. **Superiority: Ohio Rule of Civil Procedure 23(b)(3).** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The

damages or other financial detriment suffered by Plaintiffs and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Defendants, so it would be impracticable for Class members to individually seek redress for Defendants' wrongful conduct. Even if Class members could afford litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments and increases the delay and expense to all parties and the court system. By contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

CLAIMS FOR RELIEF

COUNT I **(Negligence)**

42. Plaintiffs, individually and on behalf of the other Class members, repeat and reallege Paragraphs 1-41, as if fully alleged herein.

43. Defendants owed to Plaintiffs and the other Class members a duty to exercise the highest degree of care with respect to maintaining, inspecting, monitoring, and/or testing the liquid nitrogen storage tanks used for the preservation of eggs and embryos at University Hospitals' Fertility Center and housed at the Ahuja Medical Center.

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

- a. failing to maintain, inspect, monitor and/or test their liquid nitrogen storage tanks;
- b. permitting the temperature to rise in one of their liquid nitrogen storage tanks "higher than [Defendants'] acceptable limits";

- c. failing to recognize and adequately respond to an alarm that signified a temperature flux in the storage tank;
- d. failing to properly safeguard the eggs and embryos;
- e. failing to follow known scientific and laboratory procedures; and/or
- f. were otherwise careless and/or negligent.

45. Defendants were also grossly negligent 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 and the other Class members that had a great probability of causing—and did cause—substantial harm.

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

COUNT II
(Breach of Contract)

47. Plaintiffs, individually and on behalf of the other Class members, repeat and reallege Paragraphs 1-41, as if fully alleged herein.

48. Defendants entered into contracts with Plaintiffs and each of the other Class members, wherein Defendants agreed to collect, store, preserve, and deliver, at a later date, those eggs and/or embryos to them.

49. In pertinent part, each of those contracts contained the following provision:

If embryos are frozen the embryos will be stored in the in vitro fertilization laboratory in the frozen condition until such time as the physician responsible for your care determines appropriate conditions exist in the Recipient's body for transfer of the embryo to the Recipient's uterus and the Recipient desires placement of the embryos in her uterus. At that time, some or all of the embryos will be thawed.

50. In consideration of Defendants' promises, Plaintiffs and the other Class members agreed to pay, and paid, fees for the services rendered.

51. Plaintiffs and the other Class members performed all of the terms and conditions required of them under their contracts.

52. Based on the conduct described herein, Defendants breached its contracts with Plaintiffs and each of the other Class members.

53. By reason of Defendants' breach, Plaintiffs and each of the other Class members experienced irreplaceable damage to their eggs and embryos that they entrusted to Defendants, in amounts to be determined at trial.

COUNT III
(Bailment)

54. Plaintiffs, individually and on behalf of the other Class members, repeat and reallege Paragraphs 1-41, as if fully alleged herein.

55. Plaintiffs and the other Class members delivered to Defendants for safekeeping personal property to be safely and securely kept and to be redelivered to them on demand.

56. Defendants received eggs and embryos from Plaintiffs and the other Class members on this condition.

57. Plaintiffs and the other Class members agreed to pay, and paid, fees for in exchange for Defendants' promise to keep their eggs and embryos in safekeeping.

58. Defendants had a duty to exercise ordinary care in the safekeeping of Plaintiffs' and the other Class members' eggs and embryos delivered to it, and Defendants had a duty to return the eggs and embryos, undamaged, to Plaintiffs and the other Class members.

59. Defendants invited the general public, including Plaintiffs and the other Class members in particular, to entrust eggs and embryos 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 and embryos in a satisfactory manner.

60. Because of Defendants' wrongful conduct, as set forth herein, Plaintiffs' and other Class members' property was irreplaceably damaged, which precludes redelivery of the property or any party of the property to Plaintiffs and the other Class members.

61. Defendants breached their duty to exercise ordinary care in the safekeeping of Plaintiffs' and the other Class members' eggs and embryos delivered to Defendants and to return the eggs and embryos, undamaged, to Plaintiffs and the other Class members.

62. As a result of Defendants' wrongful conduct, as set forth herein, Plaintiffs and the other Class members have been deprived of the opportunity to use their eggs and embryos. They have suffered and continue to suffer damages in an amount to be determined at trial.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs, individually and on behalf of the other Class members, respectfully request that the Court enter judgment in their favor and against Defendants, University Hospitals Health System, Inc., University Hospitals Cleveland Medical Center, and University Hospitals Ahuja Medical Center, Inc., as follows:

1. That the Court certify this action as a class action, proper and maintainable pursuant to Rule 23 of the Ohio Rules of Civil Procedure; declare that Plaintiffs are proper class representatives; and appoint Plaintiffs' undersigned counsel as Class Counsel;
2. That the Court award Plaintiffs and the other Class members compensatory, consequential, and general damages in an amount to be determined at trial;

3. That the Court award Plaintiffs and the other Class members statutory damages, and punitive or exemplary damages, to the fullest extent permitted by law, in an amount to be determined at trial;

4. With regard to Count I, Breach of Contract, that the Court award Plaintiffs and the other Class members compensatory damages in excess of \$25,000, the total amount to be determined at trial;

5. With regard to Count II, Negligence and Gross Negligence, that the Court award Plaintiffs and the other Class members compensatory damages in excess of \$25,000, as well as punitive damages in excess of \$25,000, the total amounts to be determined at trial;

6. With regard to Count III, Bailment, that the Court award Plaintiffs and the other Class members compensatory damages in excess of \$25,000, the total amount to be determined at trial;

7. That Plaintiffs and the other Class members be granted the equitable relief sought herein;

8. That the Court award to Plaintiffs the costs and disbursements of the action, along with reasonable attorneys' fees, including fees and expenses; and

9. That the Court grant all such other relief as it deems just and proper.

Dated: March 11, 2018

Respectfully submitted,

By: /s/ Mark A. DiCello
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*Counsel for Plaintiffs and the Other
Members of the Proposed Class*

*(*pro hac vice* application to be submitted)

DEMAND FOR JURY TRIAL

Plaintiffs demand a jury trial on all claims so triable.

Respectfully submitted,

By: /s/ Mark A. DiCello
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