

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

	)	<b>Case No.</b>
	)	
<b>LAUREL CLARK AND DUSTIN CLARK,</b>	)	<b>Judge</b>
c/o Peiffer Rosca Wolf Abdullah Carr & Kane,	)	
A Professional Law Corporation	)	
1422 Euclid Avenue	)	<b>CLASS ACTION COMPLAINT</b>
Suite 1610	)	
Cleveland, Ohio 44115	)	<b>Jury trial demanded</b>
	)	
<b>Plaintiffs,</b>	)	
	)	
<b>v.</b>	)	
	)	
<b>UNIVERSITY HOSPITALS HEALTH</b>	)	
<b>SYSTEM, INC.</b>	)	
c/o Janet L. Miller, Statutory Agent	)	
3605 Warrensville Center Road	)	
Shaker Heights, Ohio 44122	)	
	)	
<b>and</b>	)	
	)	
<b>UNIVERSITY HOSPITALS AHUJA</b>	)	
<b>MEDICAL CENTER, INC.,</b>	)	
c/o Janet L. Miller, Statutory Agent	)	
3605 Warrensville Center Road	)	
Shaker Heights, Ohio 44122	)	
	)	
<b>and</b>	)	
	)	
<b>UNIVERSITY HOSPITALS MEDICAL</b>	)	
<b>GROUP, INC.,</b>	)	
c/o Janet L. Miller, Statutory Agent	)	
3605 Warrensville Center Road	)	
Shaker Heights, Ohio 44122	)	
	)	
<b>and</b>	)	
	)	
<b>UNIVERSITY HOSPITALS CLEVELAND</b>	)	
<b>MEDICAL CENTER d/b/a, <i>inter alia,</i></b>	)	
<b>University Hospitals Rainbow Babies &amp;</b>	)	
<b>Children’s Hospital and University</b>	)	
<b>Hospitals MacDonald Women’s Hospital;</b>	)	
c/o Janet L. Miller, Statutory Agent	)	
3605 Warrensville Center Road	)	
Shaker Heights, Ohio 44122	)	
	)	
<b>Defendants.</b>	)	

## **INTRODUCTION**

1. Plaintiffs Laurel and Dustin Clark are among the hundreds of clients of the University Hospitals Fertility Center (the “Clinic”) who trusted the Clinic to safeguard their embryos. Those embryos represented the promise of having children and starting a family. Tragically, the Clinic’s misconduct destroyed the embryos of Laurel and Dustin, along with the embryos and other genetic materials of the rest of the proposed Class (collectively “Plaintiffs”). While nothing will ever return the embryos of the Plaintiffs, this lawsuit seeks to hold the Clinic and the defendants listed above (collectively “Defendants” or “UH”) responsible for this tragedy.

2. Plaintiffs entrusted Defendants with their dreams of having children, as well as their most sensitive and important property: their frozen embryos.

3. This case concerns Defendants’ failure to keep that trusted property safe in the Clinic’s tissue storage bank. On the afternoon of March 3 through the early morning of March 4, 2018, the storage bank suffered a significant temperature fluctuation. While the temperature variance sounded alarms, nobody was at the Clinic to hear or answer those alarms. Instead, the Clinic left to perish Plaintiffs’ approximately 700 frozen eggs and embryos, which were trapped in the storage bank at temperatures above those needed to protect the eggs and embryos from damage.

4. By the time the Clinic’s staff returned on March 4, 2018, it was too late to save the eggs and embryos. The temperature of the storage bank was too high, and the eggs and embryos stored within the bank were irreparably damaged. Their viability was destroyed. The Clinic’s failure to answer the storage bank’s alarms, including responding to any off-site

monitoring, has imperiled Plaintiffs' dreams of becoming parents and destroyed their hope that those eggs and embryos would become future children.

5. Defendants failed to keep their promise to protect Plaintiffs' treasured property. Their negligence and recklessness has left Plaintiffs devastated. Plaintiffs bring this case against Defendants for breach of contract, negligence, conversion and bailment to seek redress for their lost eggs and embryos.

### **PARTIES**

6. Plaintiffs Laurel and Dustin Clark are individuals who are now, and at all relevant times mentioned in this Complaint were, citizens of Pennsylvania. Their specific address will be provided to the Court under seal.

7. Defendants University Hospitals Health System, Inc., University Hospitals Ahuja Medical Center, Inc., University Hospitals Medical Group, Inc., and University Hospitals Cleveland Medical Center d/b/a, *inter alia*, University Hospitals Rainbow Babies & Children's Hospital and University Hospitals MacDonald Women's Hospital were at all times pertinent herein, corporations and/or business entities organized and existing under the laws of the State of Ohio and were licensed to do and were doing business in the State of Ohio, and held themselves out to the public as providers of medical and fertility services through the University Hospitals Fertility Clinic. Such services include cryo-preserving and storing eggs, embryos and sperm.

### **JURISDICTION, VENUE AND AMOUNT IN CONTROVERSY**

8. This Court has jurisdiction over this action because the amount in controversy

exceeds \$25,000 and Defendants are residents and do business in the State of Ohio.

9. Venue in the Cuyahoga County Court of Common Pleas is proper because Defendants reside in and operate their principal places of business in Cuyahoga County.

10. Plaintiffs believe that the Class Action Fairness Act does not apply to this matter because two thirds or more of the members in the proposed class and the Defendants are citizens of Ohio.

11. Plaintiffs seek damages in excess of \$25,000.

### **STATEMENT OF FACTS**

12. Plaintiffs and members of the proposed Class (collectively “Plaintiffs”) are clients of the Clinic and store their eggs and embryos in the Clinic’s storage bank.

13. Plaintiffs froze their eggs and embryos to store them for future use and preserve their dreams of starting a family. Plaintiffs entrusted the Clinic with storing their frozen eggs and embryos.

14. A frozen egg allows a woman to potentially preserve her fertility if she is either not ready or unable to start a family during her peak years of fertility. Some women choose to freeze their eggs before undergoing treatment for cancer or other illnesses.

15. Egg freezing is a process that typically first requires a woman to undergo bloodwork and an ultrasound to prepare for the retrieval process. Next, the woman must stimulate her ovaries often through 10-12 days of fertility injections and monitoring by a fertility clinic. When her eggs are ready, fertility doctors retrieve eggs through a procedure

at a clinic often using sedation. The eggs are then examined and frozen through vitrification. The frozen eggs are then stored in a liquid nitrogen storage bank.

16. Plaintiffs' frozen embryos were stored at the Clinic following in vitro fertilization ("IVF").

17. IVF is an invasive and technical process, involving multiple surgical procedures, laboratory fertilization and manipulation, and an intense drug regimen. The first step for IVF involves several weeks of drug therapy designed to hyper-stimulate the woman's reproductive system into producing multiple eggs as part of her monthly cycle. These eggs are harvested surgically and then fertilized with sperm in a laboratory. Once the eggs have been fertilized into embryos, they are cultured for 2-6 days in a growth medium. At that point, the embryos are either cryo-preserved (vitrified) for later use, or if a fresh transfer is desired, they are then transferred directly into the woman's uterus.

18. IVF is most successful when the eggs used in the egg transfer are extracted from a woman before she is 38 years of age. A 2006 study by the American College of Obstetrics and Gynecology recognizes that eggs become more fragile with age. Rates of live births through IVF improve dramatically when the eggs used are donated by younger women.

19. During the process of cryopreservation, fertilized eggs, or pre-embryos, are preserved for future use. The fertilized eggs are first treated with a solution to protect them from damage during freezing. They are then gradually cooled to a temperature of minus-sixty to minus-eighty degrees centigrade and placed in liquid nitrogen for long-term storage. Once

thawed, the undamaged, fertilized eggs can be transferred into the uterus.

20. IVF is typically an expensive and arduous process, subjecting prospective parents, including Plaintiffs, to both physical and emotional strain. To prepare for the procedure, fertility clients often attend dozens of doctor appointments over the course of several months. During these visits, fertility clients undergo numerous ultrasounds and blood tests, so that doctors can determine when their bodies are ready to begin hormonal injections, as well as to determine their ovulation cycles.

21. In order to increase egg production, and thereby increase the chances for success, the first phase of the treatment involves the use of drugs to stimulate ovulation. The drugs are administered daily by needle for a little over two weeks, thereby stimulating the ovaries to increase egg production. During this time period, fertility clients often had to go to the Clinic nearly every other day for follow-up examinations and blood tests, which were used to calibrate a drug regimen.

22. Added to this inconvenience, the physical and emotional side effects of hormone treatment can be horrible. On direction from doctors, fertility clients often have to give themselves up to three different injections per day, in varying amounts. The shots are painful and cause unnatural stomach bloating and sharp mood swings. Fertility clients can feel like they are on an emotional rollercoaster during this time. The medications also subject fertility clients to other risks, including the possibility of kidney failure, twisting of the ovary, ovarian rupture, and electrolyte problems that could require hospitalization.

23. To prepare for the transfer of a frozen embryo, a fertility client has to undergo

a barrage of bloodwork, tests, and doctor visits. A client takes medication and gives herself estrogen and progesterone injections to prepare her uterus for implantation of the embryo. In addition, a patient is often encouraged to optimize her diet and exercise schedule to make her body the most receptive home for her embryos.

24. The total cost of IVF, including the medications involved and the implantation procedure, is typically very expensive.

25. On the afternoon of March 3 through the early morning of March 4, 2018, the storage bank holding Plaintiffs' genetic material experienced a temperature fluctuation. Although the storage bank sounded alarms, no one was at the facility to hear them.

26. The Clinic also has an off-site monitoring program. That program, however, failed to alert the Clinic's staff of the problem.

27. When the Clinic's staff returned on the morning of March 4, 2018, the staff heard the alarms and discovered that approximately 2000 frozen eggs and embryos belonging to Plaintiffs had been subjected to temperatures above the limit needed to protect the eggs and embryos from damage.

28. The Clinic has discovered that the temperature fluctuation damaged and destroyed the viability of the eggs and embryos within the storage bank.

29. The Clinic contacted Plaintiffs over the next few days, including through a phone call on March 5, 2018.

30. Plaintiffs Laurel and Dustin Clark entrusted their frozen embryos to the Clinic

for storage.

31. On Monday, March 5, 2018, the Clarks planned to embark on the next step of their eight-year long journey towards becoming parents. That morning the Clarks called the Clinic to set an appointment to begin the implantation procedure using their frozen embryos stored in the Clinic's storage bank. Those hopes were destroyed later that evening when the Clinic called the Clarks and told them that their embryos had been destroyed by the temperature fluctuation in the storage bank.

32. The Clarks are devastated and faced with countless emotions extended by the Clinic's failure to protect their embryos and dreams of becoming parents.

33. The Clarks on their personal behalf and on behalf of all potential members of the Class bring this action to seek redress for against the Clinic. They are informed and believe thereon that the Clinic acted recklessly and/or negligently in failing to maintain their frozen eggs and embryos at the appropriate temperature to protect against damage and preserve viability. They furthermore are informed and believe and thereupon allege that the storage procedures (including the alarm system, or lack thereof) adopted by the Clinic, under the direction of Defendants, were obviously insufficient to guard against the risk of improper temperature fluctuations causing damage to cryo-preserved materials in violation of a client's express wishes.

34. Plaintiffs viewed their eggs and embryos as their future children. They have suffered extreme emotional distress and grief regarding the loss of their embryos and the fact that they may now not be able to have as many children as they had hoped—indeed, may not



be able to have any of their own biological children at all.

35. Plaintiffs are now older than they were when they began the IVF process or egg freezing process. Testimonials from doctors on the Clinic's website and medical literature indicates that Plaintiffs' chances for producing viable and strong eggs have decreased over the intervening time. Moreover, the financial and emotional costs of undergoing another painful and drawn-out IVF procedure, during which there is no guarantee that Plaintiffs will be able to produce strong and viable eggs for fertilization and transfer, are daunting.

### **CLASS ALLEGATIONS**

36. This action is brought by Plaintiffs, for themselves and on behalf of all others similarly situated, as a class action pursuant to Rule 23 of the Ohio Rules of Civil Procedure.

#### **Class Definition**

37. The proposed Class (the "Class") is defined as follows:

All clients of the Clinic who had eggs and/or embryos stored at the Clinic in the storage bank affected by the temperature fluctuation on March 3 and March 4, 2018.

38. Excluded from the class are (1) Defendants; (2) any person, firm, trust, corporation, or other entity related to or affiliated with Defendants; and (3) any judge or judicial officer who may hear any aspect of this case and his or her law clerks.

#### **Numerosity**

39. The members of the Class are so numerous and geographically dispersed that joinder of all members is impracticable. While the exact number of Class members remains unknown at this time, it is estimated that the Class includes approximately 700 individuals who

reside in various states. The exact number of the Class members is within the knowledge of Defendants.

### **Commonality**

40. There are common questions of law and fact in this class action that relate to and affect the rights of each member of the Class, including, *inter alia*:

- A. Whether the Clinic breached its standard of care in storing Plaintiffs' eggs and/or embryos in the storage bank at the Clinic;
- B. Whether the Clinic failed to use reasonable care to monitor the temperature of the storage bank that contained Plaintiffs' eggs and/or embryos;
- C. Whether the Clinic or its staff failed to follow standard protocol on March 3 and March 4, 2018 for monitoring the temperature of the storage bank;
- D. Whether the Clinic acted negligently and/or recklessly by failing to protect their eggs and/or embryos from temperature fluctuations in the storage bank; and
- E. What remedies are appropriate compensation for the damages caused to Plaintiffs and each member of the Class.

### **Typicality**

41. The claims of plaintiffs Laurel and Dustin Clark are typical of all Class members. The claims of the Clarks are based on the same fundamental factual allegations and legal theories as the claims of all other members of the Class. The Clarks are situated identically to all members of the Class with respect to issues presented in this case, as Plaintiffs and all members of the Class were clients of the Clinic and had their frozen eggs and/or embryos stored in the storage tank that incurred the temperature fluctuation on March 3 and 4, 2018.

42. All Class members have been adversely affected by the wrongdoing of the Defendants described herein.

### **Adequacy of Representation**

43. Plaintiffs Laurel and Dustin Clark will adequately represent and protect the interests of the Class and have no interests that conflict with or are antagonistic to the interests of the Class.

44. Plaintiffs have retained attorneys who are experienced in, and capable of prosecuting, complex class actions such as this case and who have experience in other cases involving damage and loss of cryo-preserved materials. The attorneys for Plaintiffs and the Class will actively conduct and be responsible for the prosecution of this litigation and the expenses thereof. The attorneys for Plaintiffs have adequate resources, experience and commitment to litigate this matter.

### **Predominance and Superiority**

45. A class action is superior to any other method available for the fair and efficient adjudication of this controversy because it would be impractical and undesirable for each of the individual Class members who have suffered damages to bring separate actions. Moreover, the common issues identified above predominate over individual issues, if any, particular to each class member. The prosecution of separate actions by the individual class members, even if possible, would create a risk of inconsistent or varying adjudications with respect to individual class members against Defendants, and would establish incompatible standards of conduct for Defendants.

### **FIRST CAUSE OF ACTION – BREACH OF CONTRACT**

46. Plaintiffs incorporate all preceding paragraphs by reference.

47. Plaintiffs formed an oral and/or written contract with Defendants, whereby

Defendants were to store and safeguard Plaintiffs' frozen eggs and embryos at the Clinic.

48. There was a meeting of the minds between Plaintiffs and Defendants that the Clinic would use its best efforts to care for and safeguard these eggs and embryos, would notify Plaintiffs immediately if there was any problem, and would utilize and/or dispose of the eggs and embryos only in the manner and at the time directed by Plaintiffs.

49. Plaintiffs provided consideration for these services and upheld their end of the bargain.

50. It was the intent of Plaintiffs and Defendants that both sides would be held to their end of the bargain, *i.e.*, that the parties had a binding legal contract.

51. Defendants breached their obligation and promise by negligently, recklessly, and/or knowingly disregarding the Plaintiffs' express instructions by damaging the precious and irreplaceable property that Plaintiffs had entrusted to Defendants' care.

52. Defendants furthermore breached their obligation and promise by failing to have procedures in place or failing to adequately follow procedures that would prevent a sufficiently long temperature fluctuation in the Clinic's storage bank from damaging Plaintiffs' eggs and embryos.

53. As a direct and proximate result of Defendants' breach of contract, Plaintiffs suffered severe emotional, physical, property, and economic damages in an amount to be proven at trial. Plaintiffs underwent significant and traumatic physical privation in the pursuit of preserving their ability to have children. The process of egg stimulation and retrieval—since rendered useless by Defendants—is painful, traumatic, and scary. It involves

weeks of injections, mood swings from hormone changes, uncomfortable bloating, weight gain, and submission to anesthesia during the actual procedure. When Defendants' damaged Plaintiffs' eggs and embryos, Defendants rendered completely needless all of this pain that Plaintiffs went through. Defendants should compensate Plaintiffs for that pain and suffering, as well as for their property and economic damages.

54. Plaintiffs are entitled to recover all such damages as a result of Defendants' breach of contract.

### **SECOND CAUSE OF ACTION – NEGLIGENCE**

#### **(Against all Defendants)**

55. Plaintiffs incorporate all preceding paragraphs by reference.

56. Defendants had a duty to use reasonable care in the storage and maintenance of Plaintiffs' cryopreserved eggs and embryos. Defendants furthermore had a duty to impose reasonable policies and procedures to ensure that their customers' directives and wishes were competently and faithfully followed.

57. Defendants furthermore have a duty of care based on the fact that they voluntarily undertook to render storage services of cryo-preserved materials to Plaintiffs, and therefore had a duty to perform these services with a reasonable degree of care. Defendants furthermore knew or should have known that failure to exercise such care increased the risk of harm to Plaintiffs' eggs and embryos and Plaintiffs. Moreover, Plaintiffs' undertaking to store the eggs and embryos constitutes a bailment. Accordingly, Defendants had a duty of care with respect to the Plaintiffs' stored eggs and embryos.

58. Plaintiffs relied on all of the Defendants' aforementioned duties of care together in placing their eggs and embryos in Defendants' care.

59. Defendants breached these duties by negligently and/or recklessly failing to protect and maintain Plaintiffs' frozen eggs and embryos at an appropriate temperature to protect against damage and preserve their viability, and by failing to have in place policies and procedures that would have prevented such negligent and/or reckless exposure to temperatures higher than the acceptable limits, and for a sufficiently long period of time, for storage of frozen eggs and embryos.

60. Defendants furthermore breached their duties by negligently and/or recklessly by failing to have procedures in place to monitor the storage bank's temperature and respond to any alarms that the storage bank's temperature was too high before any damage was incurred to the frozen eggs and embryos.

61. As a direct and proximate result of Defendants' negligence, Plaintiffs suffered, as a direct victim, extreme emotional, physical, property, and economic damages in an amount to be proven at trial.

62. Plaintiffs are entitled to recover all such damages as a result of Defendants' negligence.

### **THIRD CAUSE OF ACTION – CONVERSION**

**(Against all Defendants)**

63. Plaintiffs incorporate all preceding paragraphs by reference.

64. Plaintiffs owned their eggs and embryos, which were placed in Defendants'

care for the express purpose of safekeeping and storage until such a time as Plaintiffs directed otherwise.

65. As described above, Defendants converted the eggs and embryos by assuming control over them and harming the embryos and eggs by subjecting them to temperatures that damaged them and destroyed their viability, thereby depriving Plaintiffs of their ownership rights over the property.

66. As a direct and proximate result of Defendants' misconduct, Plaintiffs suffered severe emotional, physical, property, and economic damages in an amount to be proven at trial.

67. Plaintiffs are entitled to recover all such damages as a result of Defendants' conversion.

#### **FOURTH CAUSE OF ACTION – BAILMENT**

**(Against all Defendants)**

68. Plaintiffs incorporate all preceding paragraphs by reference.

69. Plaintiffs formed an oral and/or written contract with Defendants, whereby Defendants were to store and safeguard Plaintiffs' frozen eggs and embryos at the Clinic.

70. There was a meeting of the minds between Plaintiffs and Defendants that the Clinic would use its best efforts to care for and safeguard these eggs and embryos, would notify Plaintiffs immediately if there was any problem, and would utilize and/or dispose of the eggs and embryos only in the manner and at the time directed by Plaintiffs.

71. Plaintiffs froze their eggs and embryos to store them for future use and preserve their dreams of starting a family. Plaintiffs delivered their eggs and embryos to the Clinic and entrusted the Clinic with storing their frozen eggs and embryos.

72. As per the compromised storage conditions discussed above, Plaintiffs' eggs and embryos were irreplaceably damaged. As such, Defendants will not be able to redeliver Plaintiffs' frozen eggs and embryos undamaged to Plaintiffs.

73. As a direct and proximate result of Defendants' misconduct, Plaintiffs suffered severe emotional, physical, property, and economic damages in an amount to be proven at trial.

74. Plaintiffs are entitled to recover all such damages as a result of Defendants' misconduct.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully pray for relief and judgment as follows:

- (a) An order certifying this action as a class under Civil Rule 23;
- (b) An order appointing Plaintiffs as the class representatives;
- (c) An order appointing the undersigned as class counsel;
- (d) Compensatory and property damages in an amount to be proven at trial;
- (e) Emotional damages in an amount to be proven at trial;
- (f) Attorney's fees;
- (g) Costs of suit;
- (h) Pre- and post-judgment interest; and



- (i) Such further relief as this Court deems equitable, just, and proper.

**JURY DEMAND**

A trial by jury is hereby demanded on all issues so triable.

Date: March 12, 2018

Respectfully submitted,

*/s/ Lydia M. Floyd* \_\_\_\_\_

Lydia M. Floyd (OH 0088476)

James P. Booker (OH 0090803)

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