

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOHN DOE and RICHARD ROE,

Plaintiffs,

v.

**NEW ENGLAND FERTILITY INSTITUTE
and GAD LAVY, M.D.,**

Defendants.

Civil Action No.:

COMPLAINT

Plaintiffs John Doe and Richard Roe (collectively “plaintiffs”),¹ by and through the undersigned counsel, Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., by way of Complaint against defendants New England Fertility Institute and Gad Lavy, M.D. (collectively “defendants”), hereby say, state, and aver as follows:

PARTIES

1. Plaintiffs are residents of Brooklyn, New York.
2. Defendant Gad Lavy, M.D., F.A.C.O.G (“Dr. Lavy”) is a duly licensed, practicing fertility specialist in the State of Connecticut, with an office located at 1275 Summer Street, Suite #201, Stamford, Connecticut 06905.
3. Defendant New England Fertility Institute (“NEFI”) is a medical practice with a principal place of business located at 1275 Summer Street, Suite #201, Stamford, Connecticut 06905.

¹ As set forth in the concurrently filed Motion for Leave to Proceed under pseudonyms, in effort to protect plaintiffs’ privacy interests, and that of their child, plaintiffs are referred to pseudonymously herein.

4. Dr. Lavy is medical director and founder of NEFI.

5. At all relevant times, Dr. Lavy acted as an agent, employee or representative of NEFI, which is vicariously liable for his actions and omissions.

JURISDICTION AND VENUE

6. This Court has subject matter jurisdiction based on diversity of the parties, and the amount in controversy exceeds \$75,000.00 as required under 28 U.S.C. § 1332(a)(2).

7. Venue is properly established in this Court pursuant to 28 U.S.C. § 1391(b).

FACTS

8. Plaintiffs are a same sex couple who wished to start a family together.

9. Plaintiffs consulted with Dr. Lavy at NEFI in effort to achieve pregnancy via in vitro fertilization (“IVF”) of donor eggs and gestational carrier.

10. Plaintiffs wished to have two children, with each plaintiff to be the biological father to one child.

11. Plaintiffs’ friend agreed to donate eggs to plaintiffs.

12. On February 28, 2013, to commence the process of starting a family, plaintiffs each separately underwent sperm collection at NEFI. Thereafter, a number of eggs would be fertilized with Doe’s sperm and a separate number of eggs would be fertilized with Roe’s sperm.

13. On May 20, 2013, plaintiffs’ donor underwent an egg retrieval procedure which resulted in retrieval of sixteen eggs, thirteen of which were fertilized and resulted in the creation of eleven embryos.

14. At some point after the sperm collection, or at the time the donor eggs were fertilized, NEFI confused or mislabeled each plaintiffs’ sperm.

15. Within a week or so of the May 20, 2013 egg retrieval and fertilization date, Ellen from NEFI informed plaintiffs that Doe's sperm had fertilized seven eggs, six of which became embryos, and Roe's sperm had fertilized six eggs, five of which became embryos.

16. On January 30, 2014, the gestational carrier underwent transfer of paternal genetic material labeled as Doe's; specifically, six embryos were thawed, three remained normal, one embryo was implanted into the surrogate and two were left frozen.

17. At the time, plaintiffs signed a document entitled "Disposition of Eggs and Embryos" listing both plaintiffs as patients.

18. The Disposition of Eggs and Embryos for subsequent two embryo transfers listed one or the other of the plaintiffs as patient and the other as partner.

19. On April 13, 2014, the gestational carrier underwent transfer of paternal genetic material labeled as Roe's; specifically, five embryos were thawed, one remained normal, one embryo was implanted into the gestational carrier and none were left frozen.

20. On September 22, 2015, a new gestational carrier underwent transfer of paternal genetic material labeled as Doe's; specifically, two embryos were thawed, both remained normal and both embryos were implanted into the surrogate.

21. On June 4, 2016, plaintiffs' daughter, Jane Doe, was born.

22. Plaintiffs and their families were overjoyed about the birth of Jane Doe.

23. Doe's family in particular was relieved that their lineage would be extended by the birth of their granddaughter, thought to be Doe's biological daughter, and they notified all of their friends and family of the joyous news; in fact, the baby was named after Doe's mother in open tribute to Doe's mother, who was then thought to be the child's biological grandmother.

24. In reliance on defendants' representation that Jane Doe's birth was the result of eggs fertilized by Doe, plaintiffs began the IVF process to achieve pregnancy in order to have a second child of which Roe would be the biological father.

25. In December 2017, plaintiffs' friend/egg donor again underwent an egg retrieval procedure.

26. All of the eggs retrieved from the donor were fertilized with Roe's sperm.

27. In September 2018, two embryos are thawed and transferred to the gestational carrier resulting in pregnancy.

28. In early October 2018, the pregnancy was deemed not viable.

29. As Jane Doe grew and thrived, it became apparent that she did not physically resemble Doe.

30. Around the time she approached the age of two and a half Jane Doe's resemblance to Roe was very evident.

31. In early November 2018, plaintiffs' underwent paternity testing which conclusively identified Roe as Jane Doe's biological father.

32. While plaintiffs are overjoyed about having Jane Doe in their lives, this news was shocking and caused emotional distress to plaintiffs and their families.

33. In light of defendants' conduct, plaintiffs unnecessarily expended significant funds in effort to achieve a pregnancy with Roe as the biological father.

34. Further, the passage of time for Doe and the egg donor may result in difficulties achieving a healthy pregnancy in light of increased age.

35. If plaintiffs are fortunate enough to achieve pregnancy again, they may face the risks associated with a high risk pregnancy.

COUNT I

NEGLIGENCE v. DR. LAVY

36. Plaintiffs incorporate by reference all other paragraphs of this complaint as if fully set forth herein.

37. At all times mentioned herein and material hereto Dr. Lavy held himself out to be skillful and qualified to attend, care for, treat and render medical care and services to patients such as plaintiffs.

38. Dr. Lavy is Board Certified in Obstetrics and Gynecology and Reproductive Endocrinology, and practices in the State of Connecticut.

39. At all relevant times, while plaintiffs were under the care, supervision and treatment of Dr. Lavy, plaintiffs suffered injuries as a direct and proximate result of the negligence and carelessness of Dr. Lavy.

40. Dr. Lavy's negligence included, but was not limited to, the following:

- a. Failing to properly maintain plaintiffs' sperm;
- b. Failing to properly label plaintiffs' sperm at the time of collection or at the time of egg fertilization;
- c. Failing to properly inform plaintiffs regarding the identity of father for the successfully transferred embryo resulting in the birth of Jane Doe;
- d. Failing to discover that erroneous information was provided to plaintiffs regarding the identity of Jane Doe's biological father;
- e. Failing to uphold the proper standard of care in the process handling and maintaining biological specimens in the course of sperm collection, egg fertilization and/or embryo transfer;

f. Failing to promulgate rules and procedures for the proper handling and labeling of biological specimens and

g. Failing to properly supervise and control the procedures set forth above.

41. As a direct and proximate result of the carelessness and negligence of Dr. Lavy as set forth above, plaintiffs suffered severe and permanent injuries, including emotional distress, and monetary damages.

WHEREFORE, plaintiffs request judgment in their favor and against Dr. Lavy for an order granting plaintiffs damages and other appropriate relief.

COUNT II

NEGLIGENCE V. NEFI

42. Plaintiffs incorporate by reference all other paragraphs of this complaint as if fully set forth herein.

43. At all relevant times hereto, NEFI acted by and through its agents, servants and employees, including but not limited to Dr. Lavy.

44. NEFI is vicariously liable for the negligence of Dr. Lavy including such acts of negligence described in Count I, above.

45. NEFI is directly liable for failing to monitor and supervise the conduct of all persons who attended to plaintiffs.

WHEREFORE, plaintiffs request judgment in their favor and against NEFI for an order granting plaintiffs damages and other appropriate relief.

COUNT III

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

46. Plaintiffs incorporate by reference all other paragraphs of this complaint as if fully set forth herein.

47. Defendants' conduct, as set forth above, constitutes extreme and outrageous conduct in light of the life-altering and significant results.

48. For example, emotional distress is being caused in social circles where people have begun to insist that plaintiffs are incorrect about their daughter's paternity.

49. Defendants' careless course of conduct in the provision of fertility treatments rises to the level of intent to cause severe emotional distress.

50. Plaintiffs suffered severe emotional distress which is causally connected to defendants' conduct.

WHEREFORE, plaintiffs request judgment in their favor and against defendants, jointly and severally, for an order granting plaintiffs damages and other appropriate relief.

COUNT IV

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

51. Plaintiffs incorporate by reference all other paragraphs of this complaint as if fully set forth herein.

52. Defendants, through their conduct set forth above, were negligent in creating an unreasonable risk of harm.

53. Such conduct was a substantial factor in bringing about emotional distress/mental injuries to the plaintiffs.

54. The injuries are a consequence resulting from defendants' negligent conduct throughout the IVF process as set forth above.

WHEREFORE, plaintiffs request judgment in their favor and against defendants, jointly and severally, for an order granting plaintiffs damages and other appropriate relief.

COUNT V

COMMON LAW FRAUD

55. Plaintiffs incorporate by reference all other paragraphs of this complaint as if fully set forth herein.

56. Defendants made a material, false representation in informing plaintiffs that Doe was the biological father of Jane Doe.

57. Defendants' conduct constitutes an intent to defraud plaintiffs.

58. Plaintiffs reasonably relied on defendants' representation that Doe was the biological father of Jane Doe, and were not only injured emotionally, but, in reliance on the defendants' representation, plaintiffs expended significant sums of money in effort to have a second child with Roe as the biological father.

59. As a result, plaintiffs were damaged.

WHEREFORE, plaintiffs request judgment in their favor and against defendants, jointly and severally, for an order granting plaintiffs damages and other appropriate relief.

Respectfully submitted,

SHERMAN, SILVERSTEIN, KOHL, ROSE &
PODOLSKY, P.A.

/s/ Alan C. Milstein

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