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Verdicts & Settlements

Fertility Clinic Ordered To Pay Father \$108K

By Nora Lockwood Toohar

A Massachusetts jury in a contentious medical malpractice suit has ordered a Boston fertility clinic to pay \$108,000 in damages to a Massachusetts firefighter for impregnating his estranged wife without his permission.

The jury found that the Boston In-Vitro Fertilization Clinic of Brookline, Mass. breached a contract by not getting Richard Gladu's written consent before impregnating his wife with two embryos that had not been used in an implantation two years earlier. The earlier implantation had been successful and produced the couple's second child.

Plaintiff's attorney Lisa G. Arrowood said the dispute represented one of the first court cases in the largely unregulated fertility industry. The Jan. 30 verdict, she said, sends an important message to the industry about the need for stricter consent procedures to avoid liability issues.

"I think the industry needs to understand they are

not just doctors when they do this. They are creating permanent legal and emotional obligations for people. They're creating human life," she said.

"Fertility clinics have to begin to look at this in a differ-

"I think that their argument is hard to buy. A doctor has to get your consent before he gets a mole out of your back, but not before he creates an additional child for you?" said plaintiff's attorney Lisa Arrowood.

ent way than physicians are accustomed to," Arrowood added. "There needs to be more legal protocol."

The verdict came after four days of deliberation at the end of a two and a half

week trial, in which Gladu alleged the procedure was done without his consent.

Both sides claimed a victory from the verdict.

Kevin Reidy, who represented Boston IVF, noted that the award was substan-

tional distress," he said.

Reidy, a partner in a 22-lawyer firm in Boston who specializes in malpractice defense, noted that although the jury found the clinic liable for breach of contract, it cleared the two doctors named in the suit, Merle Berger and Selwyn Os-kowitz, of malpractice and negligence claims. The jury also determined that the doctors did not fail to obtain Gladu's informed consent.

"It certainly was a mixed verdict," Reidy said.

"The jurors thought the clinic should have had a policy, but they didn't think the doctors did anything wrong," said George Annas, chairman of Boston University's Department of Health Law, Bioethics and Human Rights. "On the other hand, somebody should have checked."

"My reaction is that they gave him some money because the contract itself was perhaps somewhat ambiguous, being one of the early contracts drafted for that type of case. So, I think the jury felt that he might have



had some right to complain in that regards," said Brian D. Bixby, an attorney for Gladu's ex-wife, Meredith McLeod, who was not a defendant in the suit.

"However, because they did not give him the millions of dollars he was asking for, it certainly sends the message that a parent should not be able to benefit financially from having a healthy child born," he added.

Boston IVF spokeswoman Constance Jarroway said the clinic is considering whether to appeal the verdict. The clinic's biggest concern with the verdict is that it could set a legal precedent in which patient consent forms are considered contracts, she said.

"The precedent you set from having case law that determines (patient) consent forms to be a contract is enormous," she said, and could open the door to a wave of lawsuits throughout the medical profession.

Liability Issues

Several legal experts said the case illustrates the novel legal issues in the largely unregulated fertility industry.

Twenty-six years after the birth of the first baby created through in vitro fertilization, there are still few laws or regulations governing reproductive technology, Annas said.

"When disputes like this come up that people haven't thought about, we write rules about them. That's the way things develop," he said.

Annas added that he believes it is "inevitable" there will eventually be federal regulations governing the fertility industry.

It is now common for fertility clinics to require explicit consent from both parents before an embryo is implanted, according to Annas. After the lawsuit was filed in 1998, Boston IVF revised its consent procedures to require specific permission from both parties 30 days prior to each embryo implantation.

Arrowood said the verdict achieved the plaintiff's goal of raising awareness about the legal ramifications of embryo implantation.

"The basic principle we were trying to establish is that if a clinic in a situation like this creates a child that a man is obligated to support and care for, the clinic is going to have to pay the financial expense involved," Arrowood said.

Fertility clinics need to be diligent in obtaining legal clearance from both parents before implanting embryos, Bixby agreed.

"The lesson to the clinics from all of this is that to avoid potential liability they probably should check with each parent again before they use each embryo," he said.

Gladu was awarded \$98,000 to support his daughter, now 7, who resulted from the fertility procedure, and \$10,000 for emotional distress.

Shortly after their marriage in 1989, Gladu and McLeod learned that she was infertile. They adopted a daughter, whom they later learned had a rare form of cerebral palsy.

In 1993, the couple went to Boston IVF for help creating a child. Five embryos were created, using donor eggs and Gladu's sperm. Three fresh embryos were implanted and McLeod gave

birth to a son. The two remaining embryos were frozen.

Gladu testified that after the birth of their son, the couple's marriage deteriorated. He filed for divorce, but after attending couple's counseling, dropped the proceedings. Still concerned about the state of their marriage, however, he told McLeod in 1995 that he didn't want more children, he testified.

According to Arrowood, McLeod called the clinic in mid-December 1995 and asked for an appointment while her husband would be away on a hunting trip. On Dec. 28, 1995, the two remaining embryos were implanted without Gladu's presence or specific consent.

Gladu testified that a month later, McLeod called him at the fire station where he worked and told him she was pregnant.

A few months later, Gladu filed for divorce. He said that he has suffered from severe depression, due to the emotional and financial stress caused by the 1996 birth of his daughter.

Plaintiff: Consent Required

The plaintiff's main argument was that the clinic should have had Gladu's consent before the second implantation, which led to an additional child.

During the trial, Gladu testified that no one at Boston IVF called him to get his permission for the second implantation. He said that he had thought the two leftover embryos would be destroyed or donated after the initial 1993 implantation.

The defense claimed that Gladu knew his wife was planning to have another

baby, and that the clinic telephoned the Gladu household and informed him that his wife had an appointment on Dec. 28, 1995. Gladu testified, however, that his wife lied to him when he asked her about the purpose of the appointment.

The defense also argued that Gladu's 1993 consent satisfied any legal obligation the clinic had to obtain his permission for the procedure. Clinic lawyers told jurors that it was Gladu's responsibility to notify the clinic if he changed his mind and did not want additional children, or if his marital status had changed.

Countering that argument, Harold Bursztajn, an expert in medical ethics from Harvard Medical School, testified that Gladu's 1993 consent for the first procedure was not sufficient for the second implantation.

Bursztajn testified that the doctors "departed from accepted medical practice" by not obtaining Gladu's explicit consent for the Dec. 28, 1995 procedure.

"The forms do not indicate that the two parties (Gladu and McLeod) who signed these forms gave consent to serial implantations," he testified.

But a reproductive endocrinologist testified for the defense that the clinic's "informed consent process complied with the standard of care at the time," Reidy said.

Disputed Forms

At the time of the 1993 procedure, the couple signed a variety of consent forms relating to the freezing and future transfer of the remaining embryos.

The consent forms, which

proved a pivotal issue at trial, contained detailed instructions about the disposition of the two remaining embryos should the couple become divorced or should one die. But according to Arrowood, there was nothing in the documents that authorized the clinic to implant the remaining two embryos without Gladu's permission.

"There was nothing about what would happen to the embryos if the couple disagreed, or that said by signing this form we can implant these embryos without contacting you," Arrowood said.

The defense argued that the documents did not constitute a "contract," because they did not contain anything promissory in nature. Reidy argued that there couldn't be any breach of contract, because no contract existed.

"Throughout the case, we've been fighting that it's not a contract case," Reidy said. "There was no evidence that there was a promise that the embryos would be discarded after one successful birth, or that it was for only one child. None of the documents say anything like that."

Susan Donnelly Murphy, an attorney with an eight-lawyer firm in Boston who represented Oskowitz, said her client testified that the 1993 consent form signed by both Gladu and McLeod stated that the clinic would maintain the two remaining embryos for three years. The forms also stated, she said, that the couple would retrieve the embryos within that time frame and transfer the embryos for an additional pregnancy "unless they let the clinic know they changed their minds."

"The clinic and the physicians believed that they were fulfilling the request of this couple," she said.

But Arrowood said the defendants' argument that no specific consent was needed for the second implantation simply wasn't convincing.



AP Photo/Lisa Poole

Plaintiff Richard Gladu claimed that a fertility clinic failed to get his permission before impregnating his estranged wife with frozen embryos fertilized with his sperm.

"I think that their argument is hard to buy," Arrowood said. "A doctor has to get your consent before he gets a mole out of your back, but not before he creates an additional child for you?"

Under direct examination by Arrowood, Oskowitz said his clinic in 1995 had no written policy describing who should be responsible for obtaining consent from clients before a procedure is performed.

Depressed Father

Arrowood said a turning point in the trial was Gladu's testimony about how he

plunged into a deep depression after the birth of his daughter. He told jurors that he loved his new baby, but felt her birth put too much strain on him financially and on his marriage. He is currently paying child support for all three children.

clinic and highlighted specific language during her closing argument.

In addition, each juror had a binder that contained the couple's entire fertility clinic record, including the disputed documents.

Arrowood, who is a partner in a 27-lawyer firm in Boston, specializes in commercial litigation.

"It was like any other contract claim," she said. "I think that it was an advantage for me as a commercial litigator. I was very comfortable with that, not just the negligence issues. I felt instinctively, if I were on the jury, the easiest thing to find for the plaintiff was the contract. And the defendants' interpretation was not reasonable."

Arrowood said that her client has suffered so much emotional stress as a result of the unplanned birth that he is no longer able to work as a firefighter. He is currently working as a maintenance man at a hotel on Cape Cod, she said.

Plaintiff's Attorneys: Lisa Arrowood and Jeffrey Catalano of Todd & Weld in Boston.

Defense Attorneys: Kevin C. Reidy of Martin, Magnuson, McCarthy & Kenney in Boston; Susan Donnelly Murphy of Murphy & Riley in Boston; and Kenneth Weiss of Ficksman & Conley in Boston.

The Case: *Gladu v. Boston In-Vitro Fertilization Clinic*; Middlesex County Superior Court; Judge Julian Houston.

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