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**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

JENNIFER CRUZ, C.F.J., J.T.S., and M.S. &
L.S., Individuals,

Plaintiff,

v.

XYTEX CORPORATION, a Georgia
Corporation, XYTEX CRYO INTERNATIONAL
LTD., a Georgia Corporation; MARY
HARTLEY, an Individual; J. TODD SPRADLIN,
an Individual; and DOES 1-25, inclusive,

Defendants,

CIVIL ACTION FILE NO:
2018CV307445

FINAL ORDER

The above-captioned matter is before the Court on Defendants' Motion to Dismiss Plaintiff's First Amended Complaint and Defendants' Motion to Sever, which were filed on October 24, 2018 and August 22, 2018, respectively. The Court held a hearing on the Motion to Dismiss and Motion to Sever on February 27, 2019, and counsel for all parties appeared and were allowed an opportunity for oral argument. Now, having considered Defendants' Motion to Dismiss and Motion to Sever, Plaintiffs' Responses in opposition thereto, the entire record in this matter, and applicable Georgia law, the Court herein finds as follows:

On or about July 5, 2018, Plaintiffs initiated this lawsuit against Defendants by filing a Complaint for Damages, raising claims for fraud, negligent misrepresentation, products liability (strict liability and negligence), breach of express warranty, breach of implied warranty, battery, negligence, specific performance, false advertising, promissory estoppel, and unjust enrichment.

Defendants filed their first Motion to Dismiss on August 22, 2018. Thereafter, on September 27, 2018, Plaintiffs filed their First Amended Complaint (“Amended Complaint”), asserting the same claims against Defendants in more detail.

On October 24, 2018, Defendants filed the Motion to Dismiss presently before the Court, seeking dismissal of Plaintiffs’ Amended Complaint for failure to state a claim upon which relief can be granted under O.C.G.A. Section 9-11-12. *See* O.C.G.A. § 9-11-12(b)(6).

In accordance with O.C.G.A. Section 9-11-12, a defendant may file a motion to dismiss a plaintiff’s claims when the plaintiff fails to state a claim upon which relief can be granted. O.C.G.A. § 9-11-12(b)(6). When a defendant files a motion to dismiss on this basis, the motion to dismiss “should be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim. We thus construe all the allegations in the complaint in a light most favorable to the complaining party and resolve all doubts in his favor.” Blockbuster Investors LP v. Cox Enterprises, Inc., 314 Ga. App. 506, 506 (2012); Ewing v. City of Atlanta, 281 Ga. 652, 653 (2007) (holding that a motion to dismiss should only be granted if the allegations of the complaint, construed most favorably to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any state of provable facts).

Although the trial court is “required to take the factual allegations in the complaint as true” when considering a motion to dismiss for failure to state a claim, “[a] complaint may be dismissed on motion for failure to state a claim if clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim.” Mabra v. SF, Inc., 316 Ga. App. 62, 66 (2012) (quotations omitted).

Turning now to the claims raised in Plaintiffs' Amended Complaint and accepting as true the well-pleaded material allegations stated therein, the following are the pertinent facts giving rise to this case:

Defendant Xytex Corporation is a sperm bank located in Atlanta, Georgia. Xytex Corporation is a subsidiary of Defendant Xytex Cryo International LTD (hereinafter collectively referred to as "Xytex"). Defendant Mary Hartley is an employee of Xytex, and Defendant J. Todd Spradlin is purportedly a physician and the Medical Director for Xytex.

Plaintiff Jennifer Cruz resides in New York and has one child who was conceived via intrauterine insemination (i.e. artificial insemination) using sperm from an anonymous donor, Donor #4834, purchased from Xytex. Plaintiff C.F.J. resides in Australia and has three children who were conceived by artificial insemination using sperm from Donor #4834 purchased from Xytex. Plaintiff J.T.S. resides in Florida and has one child who was conceived by artificial insemination using sperm from Donor #4834 purchased from Xytex. Plaintiffs M.S. and L.S. also reside in Florida and have one child who was conceived by artificial insemination using sperm from Donor #4834 purchased from Xytex.

Plaintiffs assert that Xytex published Donor #4834's donor profile on the Xytex website, and the profile indicated that this donor had been carefully screened and that he had no personal or family history of autism, developmental or learning disorders, or any other genetic or hereditary condition. Plaintiffs further assert that prior to purchasing semen from Xytex in general and Donor #4834 in particular, Plaintiffs communicated with Defendants and were advised that Donor #4834 had been rigorously screened and evaluated, that the information contained on his online donor profile was accurate, and that he was a desirable and suitable sperm donor.

In reliance upon these communications from Defendants, Plaintiffs purchased the sperm of Donor #4834 from Xytex, and each of Plaintiffs' families then conceived children through artificial insemination of Donor #4834's sperm.

Plaintiffs allege that all of their children who are offspring of Donor #4834 have since manifested symptoms and/or received formal diagnoses of various developmental disorders, including autism, sensory processing disorder, developmental delays, and/or speech delays. Plaintiffs further assert that Donor #4834 has a family history of autism or developmental disorders, and Defendants knew or negligently/recklessly failed to discover this information at the time Defendants sold Plaintiffs the sperm from Donor #4834.

Plaintiffs claim that in July 2016, Plaintiffs learned that all of their children had similar developmental disorders and conditions, demonstrating that Donor #4384 passed on genes that cause or contribute to autism and developmental disorders. Plaintiffs further claim that had they known the true facts about Donor #4834's family history, Plaintiffs would never have purchased his semen or consented to artificial insemination with the semen of Donor #4834.

Plaintiffs allege that the information Defendants provided to them about Donor #4834 was inaccurate and that Defendants failed to take the proper measures to investigate and evaluate Donor #4834 prior to selling his sperm to Plaintiffs.

In furtherance thereof, Plaintiffs initiated this lawsuit against Defendants, seeking monetary relief and punitive damages for Defendants' purported acts and omissions as they relate to Donor #4834 and the conditions and disorders suffered by Plaintiffs' children who were conceived through the use of Donor #4834's sperm.

For the reasons that follow, the Court finds that Plaintiffs' claims against Defendants should be dismissed.

At the outset, the Court is compelled to note that this lawsuit is one of several filed by numerous plaintiffs against these Defendants, both in this Court and in federal court, related to sperm donations purchased from Defendants and the subsequent artificial insemination thereof, which allegedly led to unwanted health and/or mental conditions in the conceived child(ren). All of these cases have resulted in a dismissal of the plaintiffs' claims because, despite how the plaintiffs may have characterized the causes of action in their complaints, each claim amounted to a claim for "wrongful birth," which is not recognized as a viable cause of action in Georgia. *See Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 260 Ga. 711, 713 (1990) (holding that "'wrongful birth' actions shall not be recognized in Georgia absent a clear mandate for such recognition by the legislature").

"Wrongful birth" and "wrongful life" actions are both species of malpractice claims wherein relief is sought for allegedly negligent or intentional treatment or advice that has deprived the parents of the opportunity to abort a fetus and thereby avoid the birth of an impaired child. An action for "wrongful life" is brought on behalf of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant to its parents, the child would never have been born. An action for "wrongful birth" is brought by the parents of an impaired child and alleges basically that, but for the treatment or advice provided by the defendant, the parents would have aborted the fetus, thereby preventing the birth of the child.

Id. at 713.

[A] claim for wrongful birth alleges that a medical provider failed to provide advice, information, or treatment that, had it been provided, would have led the parents to terminate the pregnancy. The Georgia Supreme Court has held that wrongful birth claims are not actionable under Georgia law. In *Abelson*, the court noted two main concerns. One was that the medical provider's actions did not cause the impairment to the child that the parents found objectionable; rather, the cause of the impairment was the child's genetic composition as determined at conception. The other concern echoed the reason why the court refused to allow the costs of child-rearing as damages in wrongful conception actions: the court was unwilling to declare that "life, even life with severe impairments, may ever amount to a legal injury."

Zelt v. Xytex Corp., 2019 WL 423052 at *3 (11th Cir. Feb. 4, 2019) (citing Abelson, 260 Ga. at 714-18).

In this case, Plaintiffs essentially contend that had they known the truth about Donor #4834 and his family history of developmental disorders and/or autism, they would have selected a different donor before undergoing the insemination procedure and would have avoided giving birth to a child with the conditions and/or disorders presently suffered by each of their children who are offspring of Donor #4834. In Georgia, Plaintiffs cannot recover from Defendants based on these contentions.

In sum, our reading of *Abelson* forecloses us from recognizing as a legal injury [Plaintiffs'] children's inheritance from [Donor #4834] of characteristics [Plaintiffs] find objectionable and that their children allegedly would not have inherited from a different sperm donor. Monetizing the detrimental value of these characteristics is a task more properly suited to legislative action, as the legislature offers a forum wherein all of the issues, policy considerations and long range consequences involved can be thoroughly and openly debated and ultimately decided.

Zelt, 2019 WL 423052 at *4 (quotations omitted).

Based on governing Georgia law, the Court find that Plaintiffs' claims alleging injury as a result of their children's inheritance of "objectionable characteristics" from Donor #4834, which the children purportedly "would not have inherited from a different donor," all "suffer from the same fatal flaw: requiring this Court to recognize as an injury the possibility that their children were born with what [Plaintiffs] deem to be undesirable characteristics." Id.

Additionally, to the extent these claims "necessaril[y] that [Plaintiffs'] children somehow are worth less than they would have been worth had they been conceived using a different donor's sperm," "*Abelson* precludes us from recognizing th[ese] claim[s] as well." Id. at *5.

Though this Court agrees with other courts in concluding that the alleged conduct of Defendants was “[r]eckless, reprehensible, and repugnant” and “undoubtedly caused severe emotional harm to [Plaintiffs] and other families,” “we must look to and faithfully apply Georgia law.” Id. As such, until our appellate courts or legislature “decide to recognize wrongful birth claims or claims like [Plaintiffs’] claims for the wrongful and fraudulent sale of sperm,” this Court “cannot recognize as a private legal injury the birth of a child with actual or potential undesirable inherited characteristics.” Id.

Therefore, for the reasons set forth above, IT IS HEREBY ORDERED AND ADJUDGED that Defendants’ Motion to Dismiss is GRANTED, and Plaintiffs’ claims are hereby DISMISSED. Having dismissed Plaintiffs’ claims in this action, the Court finds that it need not reach Defendants’ Motion to Sever, and thus, IT IS HEREBY ORDERED AND ADJUDGED that Defendants’ Motion to Sever is DENIED as moot.

SO ORDERED this 6th day of May, 2019.


SHAWN ELLEN LaGRUA, Judge
Fulton County Superior Court
Atlanta Judicial Circuit

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