

**Destruction of Eggs, Embryos, Hope, Family Planning  
and the Evolving Ohio Law That May Apply**

On March 3-4, 2-18, at University Hospitals Fertility Clinic in Beachwood, Ohio, approximately 700 persons lost approximately 2000 frozen and stored embryos and unfertilized eggs. The eggs and embryos had previously been harvested, processed, entrusted and stored at the fertility clinic in a freezer by individuals and couples for many very individual, personal, and family planning reasons. To date, it appears none of the stored eggs and embryos are viable or salvageable. To date, multiple attorneys have filed lawsuits seeking class action status. To date, many of those who have suffered loss are opposed to class action and, along with their attorneys, and wish to pursue these very individual and personal losses individually and not as a member of any class action. To date, a restraining order involving communications with the hospital has been entered, removed and finally an agreed judgment has been filed. To date, a motion to consolidate all cases and claims has also been filed by the hospital along with a motion to stay discovery pending consolidation and a unified case management plan. And, to date, many of those who have suffered horrific loss with dreams and plans shattered, after having gone through so much emotional, economic and physical sacrifice and suffering, are still attempting to process this loss without the ability to engage in the claim or legal process at this time. Something of this tragic magnitude involving embryo and egg storage has never occurred previously in the United States, much less the State of Ohio. And, it will be up to one or more Judges in Cuyahoga County, Ohio to ultimately determine what law and damage claims apply to any claims or cases that are not resolved prior to that time. The hospital involved will attempt to mitigate their damages by offering reimbursement of past storage charges, offering free services at their facility and/or some other facility to provide services to best put the egg and embryo owners back as close as possible to where they were prior to destruction on March 3, 2018, and offer free future egg and embryo

storage for a period of years at no cost. Other care and options are also likely being considered by them as well as the process as discussions continue. It is also expected the hospital will attempt to resolve as many claims as possible prior to suit and trial.

During this legal process and attempt to consolidate claims, attorneys will also likely be vying for a litigation process that they believe benefits their clients the best. Many are opposed to class action and certification due to the certification requirements not being met. Others may possibly desire class action for efficiency, wishing to emotionally and time-demand-wise distance themselves from the process or some other reason.

The legal claims made to date in the multiple complaints filed include breach of contract, breach of bailment, breach of fiduciary duty, negligence and willful and wanton behavior, *Res Ipsa Loquitor*, conversion and otherwise. Both punitive and compensatory damages have been sought along with class certification in many of the cases.

The cause of embryo and egg loss to date appears to be the result of the freezer failing to maintain the required temperature overnight along with the failure of the alarm system in some fashion to cause the proper noticed individuals to respond to this catastrophic thawing event. Whether third party liability or apportionment of fault to others applies to the facts here is yet to be determined. The hospital itself is conducting an investigation. Outside associations and certifying entities are also conducting investigations. And, counsel representing the Plaintiffs in cases filed wish to pursue written discovery, depositions and subpoena information as soon as possible.

Damages being sought will include both economic and non-economic. These will include claims for loss of eggs, embryos, irreplaceable property, mental anguish, loss of opportunity and chance, lost wages, past and/or future care related costs, lost lineage and/or uniform lineage.

Damages arising from future adverse care events, negligent and/or intentional infliction of emotional and/or severe emotional distress, damages due to future scarring and/or physical and mental injury and pain and suffering are also likely to be considered. It is likely the evolving law in Ohio will be applied while looking at how law in other states has been created and looking to the Restatement of Torts as a guide along the way.

A very important question that will need to be answered is what category do preserved eggs and embryos fall within. Are they property, personhood or something in between? This is especially interesting with the evolving law in Ohio and across the country as to when life begins. Although many believe the law does not provide damages for wrongful death, others may strongly disagree. As society and science evolves and changes so to does the law and assessment of compensable damages. To date, the law in Ohio has not evolved to recognizing loss of embryos reaching that legal compensable status for wrongful death.

Here, the contract and bailment entered into between the hospital and the owners of the eggs and embryos contemplated by both parties a very high and important duty involving the most precious creations possessed by the egg and embryo owners, the loss and damage here was one that was foreseen by all, and serious emotional disturbance was particularly likely to result for embryos and eggs destroyed, especially if there was no replacement option available. See Restatement (Second) of Contracts, §353 and Restatement (Second) of Torts §323.

As such the very unique category involved will need to be determined as will what level and type of damages that apply. The Cuyahoga County Court system will need to determine how to best proceed with each of these cases. And, this very tragic legal process has just begun