

1 Shea C. Meehan, ISB #6407
2 Walker Heye Meehan & Eisinger, PLLC
3 1333 Columbia Park Trail, Ste 220
4 Richland, WA 99352
5 Telephone: (509) 735-4444
6 Fax: (509) 735-7140
7 smeehan@walkerheye.com
8 Attorneys for Plaintiffs

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF IDAHO

12 KELLI ROWLETTE, an individual,
13 SALLY ASHBY, an individual, and
14 HOWARD FOWLER, an individual,

15 Plaintiffs,

16 v.

17 GERALD E. MORTIMER, M.D.,
18 LINDA G. McKINNON MORTIMER,
19 and the marital community comprised
20 thereof, and OBSTETRICS AND
21 GYNECOLOGY ASSOCIATES OF
22 IDAHO FALLS, P.A, an Idaho
23 professional corporation,

24 Defendants.

Cause No.

COMPLAINT

[Demand for Jury Trial]

25 **PARTIES, JURISDICTION & VENUE**

1. Plaintiff Kelli Rowlette (Mrs. Rowlette) is a United States citizen and a married person domiciled in Benton County, within the Eastern District of Washington.

1 2. Plaintiff Sally Ashby (Ms. Ashby) is a United States citizen and a
2 single person domiciled in Benton County, within the Eastern District of
3 Washington.
4

5 3. Plaintiff Howard Fowler (Mr. Fowler) is a United States citizen and a
6 married person domiciled in Benton County, within the Eastern District of
7 Washington.
8

9 4. Defendant Gerald E. Mortimer, M.D., (Dr. Mortimer) is a physician
10 licensed in the State of Idaho, license number M-3709 with a specialty in
11 Obstetrics and Gynecology (OB/GYN).
12

13 5. Dr. Mortimer and Linda G. McKinnon Mortimer (Mrs. Mortimer) are
14 husband and wife, comprise a marital community under the laws of the State of
15 Idaho, are United States Citizens, and are domiciled in Bonneville County, within
16 the District of Idaho. The acts and omissions complained of herein were for the
17 benefit of the marital community.
18

19 6. Defendant Obstetrics and Gynecology Associates of Idaho Falls, P.A.,
20 (OGA) is professional corporation incorporated under the laws of Idaho, domiciled
21 with its principal place of business in Bonneville County, within the District of
22 Idaho. Dr. Mortimer was an employee acting in the course and scope of his
23 employment with OGA when the acts and omissions complained of herein
24 occurred.
25

1 7. The matters in controversy complained of herein exceed \$75,000.00,
2 exclusive of interests and costs, are between citizens of different states, and
3 occurred in Bonneville County, within the District of Idaho.
4

5 8. The Court has jurisdiction pursuant to 28 U.S.C. § 1332.

6 9. Venue is proper pursuant to 28 U.S.C. § 1391.
7

8 **FACTS**

9 10. In 1979 Ms. Ashby and Mr. Fowler were a married couple residing in
10 Idaho Falls, Idaho. At the time, Mr. Fowler was stationed at the Naval Reactors
11 Facility approximately 50 miles northwest of Idaho Falls. The couple were having
12 difficulty conceiving a child and became patients of OGA under the care of Dr.
13 Mortimer, an OB/GYN.
14

15 11. Dr. Mortimer examined Ms. Ashby and Mr. Fowler to ascertain what
16 may be causing their reproductive difficulties. Ultimately, Dr. Mortimer diagnosed
17 Ms. Ashby with a tipped uterus and diagnosed Mr. Fowler with a low sperm count
18 and low sperm motility.
19

20 12. Dr. Mortimer recommended that Ms. Ashby and Mr. Fowler undergo
21 a procedure whereby donor sperm/semen (hereinafter “genetic material”) would be
22 mixed with Mr. Fowler’s genetic material in the medical lab prior to insemination
23 to increase the chances of conception. Dr. Mortimer represented that 85% of the
24 mixture would be Mr. Fowler’s genetic material, while 15% of the mixture would
25

1 be genetic material from an anonymous donor of characteristics selected by Ms.
2 Ashby and Mr. Fowler. Dr. Mortimer would then inseminate Ms. Ashby with the
3 mixture (the Procedure).
4

5 13. Ms. Ashby and Mr. Fowler agreed to try the Procedure, but only if Dr.
6 Mortimer could find a donor with the following characteristics: a college student
7 who physically resembled Mr. Fowler and, to that end, the donor would have
8 brown hair, blue eyes, and would be over six (6) feet tall.
9

10 14. Dr. Mortimer represented to Ms. Ashby and Mr. Fowler that he had
11 access to genetic material from a donor matching their requirements. Relying on
12 this representation from their trusted physician, Ms. Ashby and Mr. Fowler agreed
13 to pay Dr. Mortimer to perform the Procedure with the donor genetic material and
14 Mr. Fowler's genetic material combined. Ms. Ashby and Mr. Fowler also agreed
15 to pay for access to the donor genetic material which was to be used for the
16 Procedure.
17
18

19 15. Dr. Mortimer collected genetic material from Mr. Fowler for use in
20 the Procedure on several occasions.
21

22 16. Dr. Mortimer ultimately performed the Procedure. However, instead
23 of using donor genetic material and Mr. Fowler's genetic material as promised, Dr.
24 Mortimer inseminated Ms. Ashby with his own genetic material. Dr. Mortimer
25 falsely represented that he had used donor genetic material and Mr. Fowler's

1 genetic material, and intentionally concealed this fact from Ms. Ashby and Mr.
2 Fowler. Dr. Mortimer did not match the donor specifications Ms. Ashby and Mr.
3 Fowler agreed to.
4

5 17. Had Mr. Fowler and Ms. Ashby known Dr. Mortimer was going to
6 inseminate Ms. Ashby with his own genetic material, they would not have agreed
7 to the Procedure.
8

9 18. The Procedure was performed every other day for a total of three
10 procedures per month when Ms. Ashby was ovulating. The Procedure was
11 repeated on this basis in the months of June, July, and August, of 1980.
12

13 19. In August of 1980, Ms. Ashby discovered she was pregnant. On May
14 20, 1981, Ms. Ashby gave birth to Kelli Rowlette (maiden name, Kelli Fowler).
15 Dr. Mortimer delivered Kelli Rowlette.
16

17 20. Dr. Mortimer remained Ms. Ashby's OB/GYN for several years. Two
18 years after Kelli Rowlette's birth, Ms. Ashby and Mr. Fowler successfully
19 conceived a son without medical assistance. Ms. Ashby, Mr. Fowler, and their
20 children eventually moved from Idaho Falls, Idaho to the State of Washington. Dr.
21 Mortimer cried when Ms. Ashby informed him they were moving. Dr. Mortimer
22 knew Kelli Rowlette was his biological daughter but did not disclose this to Ms.
23 Ashby or Mr. Fowler. Dr. Mortimer fraudulently and knowingly concealed his use
24 of his own genetic material in the Procedure.
25

1 21. The truth that Dr. Mortimer's use of his own genetic material to
2 impregnate Ms. Ashby remained concealed until July 2017, when Mrs. Rowlette
3 received a notification on Ancestry.com that a DNA sample she had submitted
4 matched with Dr. Mortimer's DNA sample. Ancestry.com predicted a parent-child
5 relationship between Dr. Mortimer and Mrs. Rowlette. Mrs. Rowlette did not
6 know who Dr. Mortimer was at the time and was not aware that her parents had
7 undergone the Procedure to help them conceive.
8
9

10 22. Mrs. Rowlette initially believed the Ancestry.com results were in
11 error. She mentioned the confusing results to Ms. Ashby and relayed her
12 disappointment in the unreliability of the service she had thought she was getting
13 from Ancestry.com. Mrs. Rowlette gave Ms. Ashby access to the results from
14 Ancestry.com. When Ms. Ashby was alone, she accessed the account to
15 investigate further. When Ms. Ashby saw Dr. Mortimer's name, she was
16 devastated.
17
18

19 23. Ms. Ashby contacted Mr. Fowler, her now ex-husband, and relayed
20 the information she obtained from Ancestry.com. Mr. Fowler was also devastated
21 by the news. For several months Ms. Ashby and Mr. Fowler painfully labored
22 over whether to tell Mrs. Rowlette that Dr. Mortimer had been their OB/GYN
23 when she was conceived, and that they had intended on using 15% donor genetic
24 material to aid in conception. Ms. Ashby and Mr. Fowler struggled to cope with
25

1 their own anguish, and had difficulty contemplating the torment the discovery
2 would cause their daughter when and if she found out.

3
4 24. In October 2017, Mrs. Rowlette was at Mr. Fowler's house helping
5 him clean out old papers that had gathered over the course of her life and had been
6 saved in a roll-top desk. Mrs. Rowlette discovered her birth certificate among the
7 stack of papers. Upon inspection, she observed that her birth certificate had been
8 signed by Dr. Mortimer. Mrs. Rowlette was horrified and contacted Ms. Ashby
9 and Mr. Fowler in a panic to relay what she had found.

10
11 25. Since discovering Dr. Mortimer's actions, Ms. Ashby, Mr. Fowler,
12 and Mrs. Rowlette have been suffering immeasurably.

13 CAUSES OF ACTION

14 **Medical Negligence**

15
16 26. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
17 forth under this count and further allege:

18
19 27. Dr. Mortimer had a duty to his patients, Ms. Ashby, Mr. Fowler, and
20 Mrs. Rowlette, to provide health care consistent with the standard of care expected
21 of an OB/GYN in Idaho Falls, Idaho as the standard existed in 1980.

22
23 28. Dr. Mortimer breached the standard of care as to Ms. Ashby, Mr.
24 Fowler, and Mrs. Rowlette by inseminating Ms. Ashby with his own genetic
25 material.

1 29. Dr. Mortimer breached the standard of care as to Ms. Ashby, Mr.
2 Fowler, and Mrs. Rowlette by inseminating Ms. Ashby with a mixture of genetic
3 material from multiple different sources.
4

5 30. Ms. Ashby, Mr. Fowler, and Mrs. Rowlette have suffered damages as
6 a direct and proximate result of Dr. Mortimer's breach of the standard of care.
7

8 **Failure to Obtain Informed Consent**

9 31. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
10 forth under this count and further allege:

11 32. Dr. Mortimer failed to disclose to Ms. Ashby and Mr. Fowler that he
12 was using his own genetic material to inseminate Ms. Ashby.
13

14 33. Ms. Ashby and Mr. Fowler have been damaged as a direct and
15 proximate result of Dr. Mortimer's failure to disclose that he was using his own
16 genetic material to inseminate Ms. Ashby.
17

18 **Fraud**

19 34. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
20 forth under this count and further allege:

21 35. Dr. Mortimer represented to Ms. Ashby and Mr. Fowler that Ms.
22 Ashby would be inseminated with a mixture of genetic material that was 85% from
23 Mr. Fowler and 15% from a donor who was a college student with brown hair, blue
24 eyes, and over six (6) feet tall.
25

1 36. Dr. Mortimer's representation was false, and he instead inseminated
2 Ms. Ashby with his own genetic material without consent.

3
4 37. Ms. Ashby and Mr. Fowler would not have agreed to use Dr.
5 Mortimer's genetic material for the Procedure.

6 38. Dr. Mortimer knew his representation was false and intended that Mr.
7 Fowler and Ms. Ashby would nevertheless rely on his false representation in
8 agreeing to go forward with the procedure.

9
10 39. Ms. Ashby and Mr. Fowler did not know that Dr. Mortimer's
11 representation was false, and justifiably relied on their trusted doctor's
12 representation.

13
14 40. Ms. Ashby and Mr. Fowler were damaged as a direct and proximate
15 result of Dr. Mortimer's fraudulent representation.

16 **Battery**

17
18 41. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
19 forth under this count and further allege:

20 42. Dr. Mortimer intended to inseminate Ms. Ashby with his own genetic
21 material.

22
23 43. Ms. Ashby did not consent to being inseminated with Dr. Mortimer's
24 genetic material.

1 44. Dr. Mortimer's insemination of Ms. Ashby with his own genetic
2 material is harmful and offensive.

3
4 **Intentional Infliction of Emotional Distress**

5 45. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
6 forth under this count and further allege:

7 46. Dr. Mortimer's conduct of inseminating Ms. Ashby with his genetic
8 material without her consent or the consent of Mr. Fowler was extreme and
9 outrageous.
10

11 47. Dr. Mortimer intentionally caused severe emotional distress to Ms.
12 Ashby, Mr. Fowler, and Mrs. Rowlette as a direct and proximate result of his
13 conduct.
14

15 48. Dr. Mortimer recklessly caused severe emotional distress to Ms.
16 Ashby, Mr. Fowler, and Mrs. Rowlette as a direct and proximate result of his
17 conduct.
18

19 **Negligent Infliction of Emotional Distress**

20 49. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
21 forth under this count and further allege:

22 50. Dr. Mortimer owed Ms. Ashby, Mr. Fowler, and Mrs. Rowlette a duty
23 of care as their physician and breached that standard of care through the conduct of
24 inseminating Ms. Ashby with his own genetic material.
25

1 51. Ms. Ashby, Mr. Fowler, and Mrs. Rowlette have been damaged as a
2 direct and proximate result of Dr. Mortimer's breach.

3
4 **Breach of Contract**

5 52. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
6 forth under this count and further allege:

7 53. Dr. Mortimer entered into a contract with Ms. Ashby and Mr. Fowler
8 whereby Dr. Mortimer would obtain genetic material from an anonymous donor
9 who was a college student with brown hair, blue eyes, and was over six (6) feet tall
10 to use in the Procedure. In exchange, Ms. Ashby and Mr. Fowler paid Dr.
11 Mortimer for the donor genetic material.
12

13 54. Dr. Mortimer entered into a contract with Ms. Ashby and Mr. Fowler
14 whereby Dr. Mortimer would inseminate Ms. Ashby with a mixture of 85%
15 genetic material from Mr. Fowler and 15% genetic material from an anonymous
16 donor who was a college student with brown hair, blue eyes, and was over six (6)
17 feet tall to use in the Procedure. In exchange, Ms. Ashby and Mr. Fowler paid Dr.
18 Mortimer for performing the Procedure.
19

20 55. Dr. Mortimer breached the contract between the parties by failing to
21 obtain genetic material from an anonymous donor who was a college student with
22 brown hair, blue eyes, and was over six (6) feet tall to use in the Procedure.
23
24
25

1 56. Dr. Mortimer breached the contract between the parties by failing to
2 inseminate Ms. Ashby with a mixture of 85% genetic material from Mr. Fowler
3 and 15% genetic material from an anonymous donor who was a college student
4 with brown hair, blue eyes, and was over six (6) feet tall.
5

6 57. Ms. Ashby and Mr. Fowler suffered damages as a direct and
7 proximate result of Dr. Mortimer's breach of the contract between the parties.
8

9 **Consumer Protection Act Violation**

10 58. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
11 forth under this count and further allege:
12

13 59. Dr. Mortimer engaged in unfair and deceptive acts and practices in the
14 conduct of his trade and in commerce by selling his own genetic material to Ms.
15 Ashby and Mr. Fowler and leading them to believe they were purchasing genetic
16 material from a college student with brown hair, blue eyes, and a height over six
17 (6) feet tall.
18

19 60. Dr. Mortimer engaged in unfair and deceptive acts and practices in the
20 conduct of his trade and in commerce by inseminating Ms. Ashby with his own
21 genetic material and without the consent of Ms. Ashby and Mr. Fowler, while
22 leading them to believe Ms. Ashby would be inseminated with a mixture of 85%
23 Mr. Fowler's genetic material and 15% genetic material from a college student
24 with brown hair, blue eyes, and a height over six (6) feet tall.
25

1 61. Dr. Mortimer knew or should have known that his acts were unfair
2 and deceptive because they caused a likelihood of misunderstanding as to the
3 source of the donor genetic material.
4

5 62. Dr. Mortimer knew or should have known that his acts were unfair
6 and deceptive because they caused a likelihood of misunderstanding as to the
7 medical community's approval of the practice of mixing of genetic material from
8 multiple donors prior to insemination.
9

10 63. Dr. Mortimer knew or should have known that his acts were unfair
11 and deceptive because he misrepresented the source of the donor genetic material.
12

13 64. Dr. Mortimer knew or should have known that his acts were unfair
14 and deceptive because he misrepresented the medical community's approval of the
15 practice of mixing of genetic material from multiple donors prior to insemination.
16

17 **Respondeat Superior**

18 65. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
19 forth under this count and further allege:

20 66. Dr. Mortimer was operating in the course and scope of his job duties
21 as an employee of OGA when he committed the acts and omissions complained of
22 herein.
23

24 67. As a result, OGA is vicariously liable for the acts of Dr. Mortimer.
25

1 **Negligent Supervision**

2 68. Plaintiffs incorporate all paragraphs of this Complaint as if fully set
3 forth under this count and further allege:
4

5 69. OGA knew of Dr. Mortimer's propensity to use his own genetic
6 material as donor genetic material without patients' consent and failed to exercise
7 due care to control Dr. Mortimer so he would not injure patients.
8

9 **PRAYER FOR RELIEF**

10 WHEREFORE, the Plaintiffs pray as follows:

11 70. For judgment against the Defendants and their respective marital
12 community individually, jointly, and severally in an amount in excess of \$75,000
13 plus costs, disbursements, reasonable attorney fees, interest; and
14

15 71. For such other and further relief as this Court deems just and
16 equitable.
17

18 DATED this 30th day of March, 2018.

19 *s/Shea C. Meehan*

20 Shea C. Meehan, ISB #6407
21 Attorneys for Plaintiffs
22 Walker Heye Meehan & Eisinger, PLLC
23 1333 Columbia Park Trail, Ste 220
24 Richland, WA 99352
25 Telephone: (509) 735-4444
Fax: (509) 735-7140
E-mail: smeehan@walkerhey.com