

Bledsoe v Center for Human Reproduction
2022 NY Slip Op 34242(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 800212/2011
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

-----X

DANA BLEDSOE and NICHOLAS MCKEE,

Plaintiffs,

- v -

CENTER FOR HUMAN REPRODUCTION, AMERICAN
FERTILITY OF NEW YORK, P.C., KUTLUK HAN OKTAY,
M.D., HELEN SHI ZHONG, and JAIME LEE,

Defendants.

-----X

INDEX NO. 800212/2011

MOTION DATE 08/05/2022

MOTION SEQ. NO. 004

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 33, 67, 70, 72, 74, 77, 79, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 102, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122

were read on this motion to/for JUDGMENT - SUMMARY.

In this action to recover damages, inter alia, for negligence, medical malpractice based on departures from good and accepted medical practice, and lack of informed consent, the defendants Center for Human Reproduction (CFHR), American Fertility of New York, P.C. (AFNY), Helen Shi Zhong, and Jaime Lee (collectively the CFHR defendants) move pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against each of them. The plaintiffs oppose the motion. The motion is granted, and the CFHR defendants are awarded summary judgment dismissing the complaint insofar as asserted against them.

By order dated November 10, 2022, and entered November 14, 2022, this court granted the motion of the defendant Kutluk Han Oktay, M.D., for summary judgment dismissing the complaint insofar as asserted against him, on the grounds that the action was time-barred as to him, as well as on the merits. With respect to the merits of the claims asserted against Oktay, who was an employee of CFHR/AFNY, the court determined that Oktay established his prima

facie entitlement to judgment as a matter of law with respect to all causes of action, that the plaintiffs failed to raise a triable issue of fact because they only submitted an expert affidavit from a non-physician embryologist, and that, in any event, the affidavit neither explained with particularity in what way Oktay departed from good and accepted practice or how any such departures caused or contributed to the plaintiffs' losses. Inasmuch as the complaint was thus dismissed against Oktay, any claim premised upon CFHR's or AFNY's vicarious liability for Oktay's negligence must be summarily dismissed on this motion.

As set forth in the November 10, 2022 order, the plaintiffs claimed that, on August 8, 2008, the plaintiff Dana Bledsoe, who had recently been diagnosed with breast cancer, and was about to undergo chemotherapy to treat it, presented to CFHR for a procedure in which her eggs would be retrieved from her ovaries and fertilized with the sperm of her husband, the plaintiff Nicholas McKee. The plaintiffs' plan was that the resulting embryos were to be frozen and stored until Bledsoe was ready to have an embryo implanted, most likely into the uterus of another woman, commonly known as a "gestational carrier." As relevant here, the plaintiffs asserted that the defendant Lee, who was CFHR's supervising embryologist during 2008, and the defendant Zhong, the CFHR embryologist who froze, saved, and stored the frozen embryos, departed from good and accepted medical practice in the manner in which they handled and fertilized 9 of Bledsoe's eggs after 14 of those eggs were retrieved by Oktay, as well as in the manner in which they prepared, froze, and stored the resultant embryos. They contended that these departures resulted in damage to or destruction of the embryos, and the concomitant inability to impregnate a gestational carrier with any of the 9 embryos that ultimately were transported several years later to Yale Medicine Fertility Center (Yale) in New Haven, Connecticut, for thawing and implantation into the uterus of a gestational carrier. They further asserted that CFHR and AFNY were vicariously liable for Zhong's negligence and Lee's negligent supervision and training of Zhong. In addition, the plaintiffs claimed that the CFHR defendants were negligent in grading the quality of the embryos, that they mischaracterized and

misrepresented the quality of the embryos that resulted from CFHR's fertilization procedure, that they mislabeled the straws in which the embryos were kept, and that they departed from accepted practice by failing to recommend a transportation provider who specialized in transporting frozen genetic material.

The facts supporting these allegations, along with all of the other facts relevant to this action, were set forth in great detail in the November 10, 2022 order. The court concludes that, unlike the plaintiffs' claims against Oktay, their claims against the CFHR defendants were timely interposed. In the November 10, 2022 order, the court also analyzed in detail the standards that are applicable to summary judgment motions in general, claims of malpractice in particular, and the necessary qualifications for experts who submit affidavits or affirmations in connection with summary judgment motions. In this regard, the court concludes that the plaintiffs' retained expert embryologist is indeed qualified to render an opinion as to whether Li and Zhong, or CFHR itself, departed from accepted practice in the field of embryology, as well as whether any such departure caused or contributed to the loss, destruction, or deterioration of the plaintiffs' embryos, and the concomitant inability to impregnate a gestational carrier with those embryos. Nonetheless, for the reasons described herein, summary judgment must be awarded to the CFHR defendants.

The CHFR defendants established their prima facie entitlement to judgment as a matter of law with their submissions, which included relevant records of oocyte fertilization and the grading of oocyte and embryo quality. Their submissions also included records of embryo freezing, storage, and transportation, CFHR's written policies for oocyte retrieval, grading, fertilization, freezing, and storage, the expert affirmation of Cristina Matera, M.D., a physician who specializes in obstetrics, gynecology, reproductive endocrinology, and infertility, and the affidavits of embryologist Alexis Adler and cytotechnologist Albert Anouna.

Dr. Matera concluded that CFHR and its employees, including its embryologists, exercised sound judgment in performing Bledsoe's egg retrieval, egg fertilization, and the

maintenance of embryos in culture, as well as in the grading, freezing, labeling, storage, and maintenance of the plaintiffs' embryos after freezing. She opined that the embryologists' conduct did not cause or contribute to the failure of the embryos to implant in the lining of the uterus of a gestational carrier two years later.

With regard to the egg retrieval, Dr. Matera opined that Oktay performed this procedure without fault and at all times comported with the standard of care, and she expressly agreed with the conclusions and opinions that were set forth in the detailed expert affirmation of Joseph Sanfilippo, M.D., that Oktay submitted in support of his motion. She concluded that, based upon Zhong's deposition testimony, Oktay, Zhong, and a CFHR nurse properly performed Bledsoe's egg retrieval procedure, and that obtaining 14 oocytes "was a very acceptable response to the Letrozole stimulation, especially in a 40-year-old woman." Dr. Matera reiterated Dr. Sanfillipo's discussion of the low success rate for egg retrieval and embryo implantation with respect to women in their forties.

Dr. Matera asserted that the determination to freeze the plaintiffs' embryos on day three after retrieval, rather than on day five, was an appropriate exercise of Oktay's medical discretion, and that CFHR's embryologists were bound to follow his orders in this regard in any event. As she explained it,

"[t]he difference between Day 3 and Day 5 embryos is that Day 3 embryos have had enough time to divide into approximately 6-8 cells but Day 5 embryos, if viable, demonstrate continued cell duplication to a quantity of 200-400 cells and organize into a blastocyst which comprises the inner cell mass (which later becomes the fetus/baby) and the trophoectoderm (which later becomes the placenta). Not all embryos that reach an acceptable appearance at day 3 will continue to grow and develop into a blastocyst.

". . . [I]n 2008, freezing embryos on Day 3 was entirely appropriate. Embryos today are typically kept in culture and frozen on Day 5 because their more advanced developmental stage indicates a greater likelihood of implantation, a viable pregnancy and live birth. However, freezing embryos on Day 3 in 2008 was commonly done and not a deviation from customary practices. In fact, Dr. Oktay likely chose to freeze plaintiffs' embryos on Day 3 in order to preserve as many embryos as possible, to enhance [Bledsoe's] chances of an embryo transfer and viable pregnancy derived from her own eggs at a later date."

In this regard, Dr. Matera also noted that, even in light of today's more advanced knowledge of reproductive medicine, in vitro fertilization (IVF), and cryopreservation, had the plaintiffs' day-three embryos developed into blastocysts on day five, "a guaranty of a successful implantation could not be provided to the Plaintiffs." She agreed with Dr. Sanfilippo's opinion that embryologists are at the mercy of the genetics, that is, the quality, of the eggs, and that "although eggs and in turn embryos appear satisfactory at fertilization that does not guarantee future children will result."

Dr. Matera asserted that the plaintiffs' claim that CFHR should have recommended a professional carrier for transporting embryos was "entirely without merit," explaining that she had had patients transport their own eggs or embryos between IVF centers in New York City, and in one case treated a couple who transported their genetic material from America to Israel, without problem. Hence, she concluded that CFHR's recommendation that the plaintiffs transport their own embryos to New Haven was not a deviation from the standard of care. Dr. Matera also noted that the plaintiffs executed consents providing that CFHR "cannot be held responsible for any loss or damage that may occur to the embryos once they have been removed from property of The Center for Human Reproduction," and that, by signing these consents, the plaintiffs agreed to accept full responsibility for obtaining their own shipper to remove the embryos from CFHR and transport them to New Haven.

As Dr. Matera explained it, embryo degeneration, such as that experienced by the plaintiffs' embryos here, can occur for a number of reasons, including poor embryo quality "or for no identifiable reason" whatsoever. Accordingly, she concluded that, although Yale documented the degeneration of some of the embryos that it received, it did not follow that there was any negligence on the part of CFHR or its embryologists. Moreover, Dr. Matera noted that, once the embryos left CFHR, they were no longer the responsibility of CFHR and, thus, it is just as likely that any alleged degeneration occurred during transport or the subsequent thawing at Yale, or simply due to poor embryo quality.

Embryologist Adler opined that Zhong appropriately grew, graded, fertilized, labelled, and froze the plaintiffs' embryos at Oktay's direction, and that CFHR properly maintained, stored, and released the plaintiffs' embryos in accordance with practices typically employed between 2008 and 2011. In this respect, Adler noted that Oktay was able to retrieve 14 oocytes, that Zhong was able to fertilize 9 of them to create 9 embryos, and that “[t]his alone is evidence that the procedures themselves were successful.”

Adler referred to CFHR's “Follicular Aspiration, Oocyte Retrieval” policy, which provided that

“[t]he embryologist is responsible for quickly and accurately assessing the presence or absence of an oocyte and advising the Physician of the findings. Temperature of oocytes and media must be maintained at 37° C at all times. At the conclusion of the retrieval, the oocytes are placed into the appropriate culture plates and maintained at 37°C and 5% CO2 in the culturing incubator.”

She concluded that this policy constituted a typical practice for oocyte retrieval in 2008. Based on Zhong's deposition, Adler asserted that Zhong properly received, from a nurse, the tube containing the oocytes through a small window to maintain sterilization, maintained the tube at 37° C, observed cumulus cells through a microscope, and counted out loud the number of eggs that she observed so that Oktay and nurses were able to hear her report of her observations. Adler averred that Zhong then properly told the plaintiffs how many eggs were retrieved and the number of eggs that would be cultured. Adler further asserted that Zhong properly fertilized the embryos, inasmuch as, if there were any negligence in the course of that procedure, no embryos would have been created, rather than the nine that were indeed generated. Adler averred that CFHR maintained and adhered to its written policies regarding sperm production for IVF that were well within the industry standards employed in 2008, and also maintained and adhered to an appropriate written “Confirmation of Fertilization” policy, leading to the successful insemination of Bledsoe's oocytes with her husband's sperm.

According to Adler, CFHR also properly maintained guidelines in 2008 regarding the best practices for grading, fertilizing, labelling, storing, and freezing genetic material. She noted

that the guidelines provided that “oocytes may be graded by the embryologist during the retrieval although assessments under the dissecting microscope may not be reflective of actual egg maturity.” Adler explained that, according to these guidelines, grading assessments were made employing a five-point system that was based on the appearance of the oocyte, with oocytes displaying a light, fluffy, cloud-like appearance deemed to be “mature,” and assigned a grade of 5, oocytes displaying an intermediate cumulus effect deemed to be “partly mature,” and assigned a grade of 4 or 3, and oocytes displaying an immature cumulus effect deemed to be “immature,” and assigned a grade of 2 or 1. According to Adler, an embryologist was required by the guidelines to visualize an oocyte’s cumulus oophorus, a cluster of cells that surround the oocyte, both in the ovarian follicle and after ovulation, and thereafter arrive at a determination about the cell quality at each stage of this process. As Adler explained it, only 10 of the 14 oocytes retrieved by Oktay and handed off to Zhong were mature and, thus, that only those 10 were candidates for fertilization with McKee’s sperm. She asserted that, although Zhong attempted to fertilize all 10 of those mature oocytes, only 9 of them were successfully fertilized, but that nothing that Zhong did or did not do caused the failure of that one oocyte to be fertilized.

Adler opined that Zhong properly applied CFHR’s five-point grading system to assess the quality of the resultant embryos. Adler referred to Zhong’s testimony, in which Zhong described that grading system, explaining that the system employed a base number, which referred to the number of blastomere cells that had developed in the embryo, and a superscript number that referred to the quality of the embryo on a five-point scale, based on the extent of cell fragmentation. Adler noted that, in this regard, CFHR’s protocol, by its terms, involved a “morphological assessment of embryo grading,” that was the “most traditional and popular method for embryo evaluation” in 2008. As Adler explained it, a grade of 4 indicated a “good” embryo with less than 10% fragmentation, and a grade of 3 indicated a slightly lower level of quality, with more than 25% fragmentation. Adler opined that “the less fragmentation and the

more cells an embryo has," the better the quality of that embryo and the greater its chances for successful implantation.

Adler noted that, after fertilization, Zhong assigned a grade of 8⁴ to four embryos, while one embryo was graded at 8³, three were graded at 6³, and one was graded at 3³. Thus, the four embryos receiving a grade of 8⁴ denoted that each contained eight cells with less than 10% fragmentation and, therefore, were of "good" quality, the three embryos that were graded at 6³ meant that they contained six cells and that the cells were more than 25% percent fragmented, while the embryo graded at 3³ meant that it presented three cells and was more than 25% fragmented. Adler concluded that the "variables by which CHR permitted embryologists to grade embryos was well within the customs employed by other comparable centers in 2008," and "provided a comprehensive assessment guide by which embryologists could grade embryos." She opined that Zhong properly applied this grading system based upon what she observed under the microscope, but noted that, without the benefit of the actual embryos to review, and because grading embryos is entirely subjective, based as it is on a particular embryologist's observations, she could only conclude that, by applying CFHR's grading system, Zhong "would have been able to adequately and efficiently grade plaintiffs' embryos in line with the standard of care practiced in 2008." Adler further concluded that, based on Zhong's interpretation and characterization of the embryos, "only four of the nine embryos created were of a quality with a greater success rate of future implantation," but that even where an embryos properly is graded at 8⁵, there was no guarantee of success for implantation, as these grades do not necessarily correlate to success rates.

As Adler explained it, Zhong had no control over the quality of Bledose's oocytes or how the oocytes and sperm would fertilize to make an embryo, but only was capable of interpreting what she saw under the microscope in order to apply CFHR's grading system to assess the quality of the embryos.

Adler asserted that, while the percentage of surviving embryos can greatly vary, on average, approximately 60% of cryopreserved embryos are expected to survive thawing and become available for transfer into a uterus. She opined that

“[e]mbryo survival is, at least in part, a reflection of embryo quality. Just like embryo quality cannot always be reliably assessed, embryo survival after freezing and thawing is also often unpredictable. In some instances NO embryos will survive.”

Adler further asserted that she did not find any problems or issues with CFHR’s freezing or maintenance techniques and processes and that, in accordance CFHR’s “Cryopreservation and Thawing of Embryos” policy manual from 2008, its embryologists were provided with a complete and detailed 16-step protocol that outlined the best practices for freezing an embryo at day three after fertilization. She concluded that CFHR properly maintained effective guidelines, pursuant to which its embryologists were directed to cryopreserve genetic material, and noted that this policy also advised that, in situations where embryos with increased fragmentation are frozen, a patient should be counseled that the embryos may not survive thaw, which Zhong testified that she did in this case.

Adler agreed with Dr. Matera that, in 2008, it was customary for doctors and IVF centers to recommend freezing embryos on day three after fertilization with a slow-freezing process, rather than on day five. As she explained it,

“[s]low freezing is known as equilibrium freezing due to the exchange of fluids between the extra- and intracellular spaces and results in safe freezing without serious osmotic and deformation effects to cells. Osmotic means the diffusion of fluid through a semipermeable membrane from a solution with a low solute concentration to a solution with a higher solute concentration until there is an equal solute concentration on both sides of the membrane. Slow-freezing therefore would allow for less exchange of fluid between the cells and solution in which the embryos were frozen. In 2008, this freezing technique and freezing at Day 3 was an accepted method of cryopreservation and in my opinion was not a deviation from customary practices. Although, it should be noted that the decision to freeze on Day 3, versus Day 5 would not have been a decision within an embryologist’s control. Here, Dr. Oktay recommended freezing the embryos at Day 3, which was entirely permissible at the time.”

Adler noted that, between August 10, 2008, when the plaintiffs' embryos were frozen, and November 12, 2010, when they retrieved them for transport to Yale, the embryos were routinely monitored and appropriately cryopreserved, that tank logs for 2010 confirm that this monitoring was conducted, and that, although the tank logs from 2008-2009 are no longer in existence, deposition testimony confirmed that there was never any malfunction with the subject tanks, and that no tank alarms were ever triggered during the period of cryopreservation. Adler asserted that CFHR set and maintained appropriate temperature ranges in all areas required for the effective storage and preservation of genetic material, including, but not limited to, incubator, refrigerator, and freezer temperatures, while also requiring that staff perform routine temperature checks on the tanks, as documented in the 2010 logs. She noted that, had there been a failure of CFHR's freezing system, *all* genetic materials, including other cryopreserved embryos stored within the tanks, would have been damaged, but that such an event did not occur. Further, she commented that CFHR underwent random inspections of its equipment and logs by the New York State Department of Health, and never once received a violation.

Adler agreed with Dr. Matera that it was entirely appropriate for CFHR to allow the plaintiffs to transport their embryos to Yale by themselves, that this was a common practice in 2008, and that it is still permitted today. In any event, she concluded that CFHR's decision to permit the plaintiffs to transport their own embryos was not the proximate cause of any alleged deterioration of the embryos. Adler also agreed with Zhong's testimony that, once an embryo is frozen, there is no chance that the number of cells could decrease from eight to six, and no manner by which the fragmentation rate could increase after cryopreservation. Accordingly, she concluded that, once the plaintiffs' embryos had been frozen at CFHR, they remained of the same quality until they were thawed at Yale and, hence, it was possible that any degradation of the embryos was caused as a result of the thawing process performed at Yale. Moreover, she asserted that, had CFHR been negligent in any of the respects claimed by the plaintiffs, the embryologist at Yale "would not have been able find any embryos for implantation," but in fact

was able to find four embryos, three of which were of similar cellular value to those graded at CFHR. Consequently, Adler concluded that, because there was never any breakdown of CFHR's storage tanks, and CFHR did not perform the thaw, "it logically flows that any potential untoward event occurred after the embryos left CHR's facility, and more likely than not occurred during the thaw at Yale Fertility Clinic."

Adler further concluded that CFHR provided Yale with all of the requisite information and instructions necessary to implement CFHR's preferred Cooper Surgical/Life Global embryo thawing protocol. She noted, however, that Yale did not employ that thawing protocol, instead employing the Irvine Scientific thawing method, an option that might have caused the deterioration of the plaintiffs' embryos. In any event, she opined that "this alone is not evidence of malpractice or negligence because embryo degradation can occur for a number of reasons or for no reason at all."

Anouna, the CFHR defendants' retained cytotechnologist, initially opined that there "are no 'industry standards' with regard to storing or transferring embryos as each facility uses their own internal company standards which can vary based on location." He continued that, despite that conclusion, CFHR's storage and transfer procedures "were appropriate for 2008 and properly implemented by staff during that time," as it required its employees routinely to inspect the tank logs and maintain an alarm system that would alert staff of a tank failure.

Based on his review of the parties' deposition testimony, Anouna concluded that neither CFHR nor its employees "in any way caused or contributed to the degradation of plaintiffs' embryos during the thaw process at non-party Yale Fertility Clinic," and that "any type of cell that is cryopreserved, including embryos, may deteriorate during the thaw, for a number of reasons or no reason at all." He asserted that the applicable standard of care did not require CFHR to recommend a professional shipping company to transport the embryos since, in 2008, there were no such specialized companies that handled that sort of shipment. Thus, he reasoned that, at that time, the plaintiffs, if they elected not to transport the embryos

themselves, would only have been able to hire a non-specialized courier or have FedEx handle the shipment. Inasmuch as McKee confirmed during his deposition that CFHR's staff informed the plaintiffs of these options, Anouna opined that CFHR met the standard of care.

Upon Anouna's review of Yale's records, he concluded that "there is nothing contained therein to suggest that the shipment they received was damaged in any way" and, hence, he opined that "CFHR did not cause or in any way contribute to the degradation of the embryos nor can plaintiffs proffer any evidence that an error occurred at CHR prior to plaintiffs transporting the embryos." He thus suggested that "it logically flows that if any alleged degradation occurred it likely took place during the thaw."

In its November 10, 2022 order determining Oktay's motion, this court described, in great detail, the opinions rendered by the plaintiffs' retained expert embryologist, upon which they rely in this action as well. With respect to allegations that the CFHR defendants departed from the applicable standards of care, that expert failed to point to any specific act or omission attributable to Li or Zhong that constituted a deviation from accepted embryological practice. The expert did not claim or point to any evidence that either of those defendants engaged in an improper technique in accepting the oocytes from Oktay and his nurse, preparing the oocytes for fertilization, handling McKee's sperm, performing the fertilization process, placing or inserting embryos into a straw, determining how many embryos could be stored in one straw, applying the freezing agent necessary to freeze the embryos, storing the embryo-containing straws in a proper freezer unit, calibrating the temperature of the unit, maintaining the freezer unit and tanks, or removing the frozen embryos for the purpose of returning them to the plaintiffs for transport. Rather, the expert relied on speculation to conclude that, since one of the straws delivered to Yale did not contain an embryo when it was thawed, some of the other straws contained embryos that had degraded or deteriorated, and yet other straws contained non-degraded embryos that nonetheless could not be successfully implanted into the uterus of the

gestational carrier, Li must negligently have trained Zhong, and Zhong must negligently have performed or failed to perform one of those enumerated tasks.

As explained in this court's November 10, 2022 order with respect to Oktay's motion, the plaintiffs essentially argue, as per their expert's affidavit, that the doctrine of *res ipsa loquitur* should apply to the CFHR defendants, as well as Oktay, because the adverse outcome concerning the quality and effectiveness of the embryos upon thawing could only be explained by someone's negligence (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *see also James v Wormuth*, 21 NY3d 540, 545-546 [2013]; *States v Lourdes Hosp.*, 100 NY2d 208, 211-212 [2003]; *Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987]; *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). As this court further explained in that order, however, it is far more likely than not that frozen embryos will not be successfully stored and implanted to create a live birth *under any circumstances* and, hence, the bad outcome here not only can be explained, but can actually be *expected*, even in the absence of negligence.

The expert also rendered an opinion that, when embryos are not properly frozen, they exhibit crystallization, rather than giving the appearance that a smooth membrane of frozen material enclosing the embryo. Crucially, the plaintiffs and their expert submit no evidence that any of the embryos that were thawed at Yale had crystallized. The Yale medical records do not indicate that any of the embryos were in that condition when they were thawed. Tellingly, the plaintiffs did not submit any affirmation from Aydin Arici, M.D., the supervising physician at Yale, or the Yale embryologist who participated in the thawing procedure, let alone an affirmation that concluded that any of the embryos had indeed crystallized, so as to permit an inference that Li or Zhong negligently performed the freezing process at CFHR. Moreover, all of the reported statements allegedly made by Dr. Arici and the Yale embryologist commenting upon the adequacy of CFHR's grading system, the propriety of CFHR's characterization of the quality of the embryos, the accuracy of CFHR's labeling of the storage straws, and the quality of CFHR's

record-keeping, as well as their purported statements that they had never seen an empty straw or a completely degraded embryo, constituted inadmissible hearsay.

As this court also held in its November 10, 2022 order, the plaintiffs' expert's affidavit failed to raise a triable issue of fact with respect to the issues of whether the alleged poor record-keeping, improper grading of embryos, and mislabeling of straws proximately caused the degradation or deterioration of the plaintiffs' embryos. The court concludes that these departures, even had they occurred, did not cause or contribute to that result, as the embryos would have been in same condition regardless of the nature of the CFHR defendants' record-keeping, the propriety of their grading system, the manner in which the embryos were graded, and the inscriptions placed on the straws. Moreover, even if CFHR's failure to recommend a professional transportation provider constituted a departure from accepted practice in 2010, neither the plaintiffs nor their expert explained what actually occurred during the transportation of the frozen embryos from New York to New Haven that caused, or even might have caused, injury to the embryos.

The plaintiffs' remaining contentions are without merit.

Accordingly, it is

ORDERED that the motion of the defendants Center for Human Reproduction, American Fertility of New York, P.C., Helen Shi Zhong, and Jaime Lee for summary judgment dismissing the complaint insofar as asserted against them is granted, and the complaint is dismissed insofar as asserted against the defendants Center for Human Reproduction, American Fertility of New York, P.C., Helen Shi Zhong, and Jaime Lee; and it is further,

ORDERED that, inasmuch as, by order dated November 10, 2022, the action already has been severed against the movants' sole co-defendant, the action is marked disposed, and the Clerk of the court is directed to enter judgment in favor of the defendants Center for Human Reproduction, American Fertility of New York, P.C., Helen Shi Zhong, and Jaime Lee dismissing the complaint insofar as asserted against them.

This constitutes the Decision and Order of the court.

12/8/2022
DATE



JOHN J. KELLEY J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: