Circuit Court for Montgomery County
Case No. C15CV-22-001022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 563

September Term, 2022

Jingjing Zheng, et al.

v.

Shady Grove Fertility (SGF)

Kehoe,
Nazarian,
Wilner, Alan M.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Wilner, J.

Filed: December 7, 2022

This appeal is from an Order entered by the Circuit Court for Montgomery County that dismissed a *pro se* complaint filed by appellants, Jingjing Zheng and Zhongan Wang, against Shady Grove Fertility Reproductive Science Center, P.C. (SGF). No reasons were given in the Order other than it was based on the court's consideration of appellee's Motion to Dismiss, "any opposition thereto, and the entire record herein."

The Complaint

The complaint is not easy to read or to understand. In its opening paragraph, the complaint alleged that "[t]he plaintiffs are formally accusing [SGF] for fertility fraud with the following four types of facts as evidence:

a.) SGF told us the false test result and failed to show us the evidence of the treatment.

b.) SGF stolen [*sic.*] the extra patient's organs.

c.) SGF mischarged us.

d.) SGF breached the agreement between SGF and the patients.

Therefore, the plaintiffs claim $560,000 compensation for plaintiffs' physical and psychological damage. Plaintiffs ask this honorable Court to consider the claims based on the facts and laws."

Those allegations were supplemented by the following additional averments:

"On the morning of 3/22/2020, I [Shongan Wang] accompanied my wife Jingjing Zheng to the [SGF location in Rockville, Maryland] for the appointment of retrieval

of her eggs for IVF [in vitro fertilization] treatment before 8:00 am."

"After the surgery, the woman doctor who did the egg retrieval told us that 10 eggs were retrieved successfully with her ten gestures. The retrieved number was confirmed by the nurse email as shown below."

The exhibit referred to was an email from Nurse Leah Johnson, purporting to be "your Day 1 fertilization report" which stated "JingJing has 10 eggs retrieved, of those 10, 8 were mature and able to attempt insemination. Five of the eight eggs made it to early embryo stage and we will continue to let them grow in hopes they make blastocyst by fert [*sic*.] day 5, 6, or 7." Th email continued "We do not check the embryos on Day 2, 3, or 4 as studies show they do better at reaching blastocyst (early embryo stage) when we leave them alone until Day 5."

That was followed by an email, undated in the version of the complaint in the record extract, from Nurse Johnson stating that "[d]ue to COVID restrictions, we are not doing any Frozen Embryo Transfers at this time. Nor are we allowed to start cycles new IVF cycles outside of medical necessity guidelines (Jingjing does not meet the age or AMHI requirements for exception). I will update you when the PGTa results[1] are back from the lab (2-3 weeks). Once the State of Maryland restrictions are lifted we can

[1] PGTa is an acronym for Preimplantation Genetic Testing for Aneuplodies performed on embryos created through in vitro fertilization to screen for chromosomal abnormalities. An aneuplody, in turn, is a genetic disorder where the total number of chromosomes in a cell do not equal 46.

discuss transfer or additional IVF cycles (if your insurance allows without transfer, known as embryo banking). Feel free to contact me with any questions or concerns!"

The next event alleged was a call on April 13, 2020 from Dr. Arthur Sagoskin, who informed Mr. Wang that the embryo PGTa test result was abnormal and asked whether Mr. Wang wanted another cycle IVF treatment. Mr. Wang declined at that point but made three requests: (1) send the embryo test report to him; (2) send as well "[p]hotos of container with table of our names"; and (3) transfer the frozen embryo. Those requests were not honored, but, after making a required payment, Mr. Wang did receive the medical IVF treatment records from SGF "via CIOX."[2]

It appears that Mr. Wang did receive a response directly or indirectly, from SGF. In the record is a two-page Embryology Summary that appears to be dated April 15, 2020. (E10-11)

Mr. Wang was not satisfied with the response, and the correspondence continued into May. Mr. Wang expressed doubt that the records he received were those of Ms. Zheng, because no names were provided on the photos that were sent "and "we cannot recognize them as ours." In the Complaint, Mr. Wang added:

> "[W]e viewed the medical IVF treatment records from SGF and found there are no records to indicate when and how the retrieved oocytes were sent to Igenomix and that how many oocytes were sent to Igenomix. In addition, there are no records to indicate when the PGTa test report was received. And the report itself was not found. Therefore, there is no evidence to show that the PGTa test was abnormal. The above facts and evidence have clearly proved that SGF committed fertility fraud."[3]

[2] All we know of CIOX is from an invoice in the record showing it as CIOX Health located in Atlanta, Georgia.

[3] Igenomix is not identified in the record.

In light of that, Mr. Wang sent another letter to Dr. Sagoskin on May 9, 2020, requesting a response. Dr. Sagoskin responded three days later, essentially repeating what the nurse had told Mr. Wang earlier – that "there were 10 eggs retrieved on March 22, 2020, of which eight were mature and were injected with sperm as seen on the screenshot below taken from Jingling's [*sic.*] chart. The information can be found on the Embryo Summary page in the records you received."

Rejecting this response, appellants contend the "facts, evidence, and analysis have clearly proved such conclusion as that SFG told us the false result of PGTa test and that SFG did not do egg fertilization by ICSI."

The appellants alleged:

(1) "SGF stolen [*sic.*] the extra patient's organs. Additionally, the above Embryology Summary shows that 10 oocytes were retrieved, one was cryopreserved, 4 were discarded. Where were the remaining 5 ones? Embryology Summary shows that they have stolen patient's organs in the name of IVF treatments. Stealing organs from patient's body is illegal because oocytes are patients' organs."

(2) "SGF mischarged us. We agreed with SGF for IVF treatment which consisted of medicine stimulation and monitoring, egg retrieval, fertilization by ICSI, cryopreservation, PSTa test, and transfer to patient's uterus. SGF cheated and mischarged us because SGF did not provide us with fertilization by ICSI, PGTa test, and transfer to patient's uterus. SFG

(*sic.*) stopped at the egg retrieval phase of the IVF treatment process and told us a lie unethically and illegally. We paid for the whole processes of IVF treatment by deposit. But we did not get any refund, a part of the paid deposit for the whole processes even though SGF only completed two phases. We should get a refund for the remaining phases of the IVF treatment processes. This is also part of the fertility fraud by SGF."

(3) "SGF breached the agreement between SGF and the patients. SGF and us agreed upon the IVF treatment. And we have paid the itemized costs of the IVF treatment. But SGF cheated us and stopped at the egg retrieval phase, thus did not complete the remaining phases of the IVF treatment. That constitutes of the breach of the agreement of the IVF treatment. Breach of agreements or contracts violates laws of the USA. Breach of agreements is part of fertility fraud by SGF.

Motion to Dismiss

Appellee's response to all of this was a Motion to Dismiss the complaint, which appellee regarded as a medical malpractice action that asserted negligence on the part of SGF in the medical care and treatment of appellants. The motion was based on two defaults or omissions by appellants: first, that appellants failed to submit their complaint to the Health Care Alternative Dispute Resolution Office (HCADRO) as required by Code, Courts Article, §3-2A-02, and second, that they failed to file a Certificate of

Qualified Expert with the Director of that Office, which, under Code, Courts Article, § 3-2A-04(b)(1), is a condition precedent to filing an action in court.

Response

Appellants responded to the Motion to Dismiss. The response begins with the statement that "Defendant distained the Honorable Court by pre-made court order to dismiss plaintiff's complaint by Rachel Viglianti, Esquire as shown below."[4] They added that the proposed Order the appellees submitted had "not gone through the necessary legal procedures and made before the plaintiff has received the defendant's motion to dismiss" and that "the defendant is enforcing the Court to grant the pre-made order, thus it is unlawful." They added that "[t]he Defendant has stolen concepts by changing the fertility fraud into medical malpractice." The essence of their allegation is that this is not a medical malpractice case but one of fraud, as indicated in the Information Report they filed. The clearest statement of their perception of their case is paragraph 3 of their response to the motion:

> "The Plaintiff mentioned the facts and showed the evidence related to somebody. It is clear in the complaint that Dr. Arthur Sagoskin was the primary doctor of the IVF treatment. Other nurses and staff had to carry out the orders by Dr. Arthur Sagoskin. In addition, the complaint files the lawsuit against SGF, not individuals. Defendant tried misleading the Court and judges to the individuals instead of SGF."

Although they claimed that "[t]he written complaint in English is clearly grammatical with no doubt," it is anything but. Much of it is in tiny print in black or

[4] Ms. Viglianti was the attorney for SGF who signed the Motion to Dismiss.

shaded boxes that are nearly impossible to read without a magnifying glass. The best we can make of it is that, although it was Dr. Sagoskin, Nurse Johnson, and possibly other medical personnel who, on behalf of SGF, extracted the eggs and dealt with them, appellants did not sue those individuals but only the corporate entity that employed them, and, that, if what those individuals did was fraudulent in any way, the entity itself was the only fraudulent actor that the plaintiffs sued, and the suit was based solely on fraud, not medical negligence.[5]

The Order

As noted, the court's Order simply granted the motion without any extensive comment.

Analysis

Working through all of this, the only issue legitimately before us is whether, despite all the allegations of fraud in how SGF employees handled the extracted eggs and communicated with appellants, this is nonetheless a medical malpractice case, for if it is, it must be dismissed because of statutory procedural defaults.

Sorting through what we can glean from the complaint, the crux of that complaint is that (1) Ms. Zheng was suffering from infertility; (2) she and Mr. Wang sought relief from that problem through the collection and an in vitro fertilization of Ms. Zheng's

[5] It appears that Dr. Sagoskin was not just an employee of SGF but, along with another physician, was a co-founder of that organization. *See* https://www.shadygrovefertility.com/about-sgf/.

viable eggs; (3) she and Mr. Wang employed SGF, an organization that provided that service through its medical employees, in this case Dr. Sagoskin and Nurse Johnson, to extract eggs from Ms. Zheng's ovaries, fertilize those that were susceptible to fertilization with sperm, and implant the fertilized eggs in Ms. Zheng's uterus; and (4) at least in part through Dr. Sagoskin and Nurse Johnson, SGF acted wrongfully and fraudulently in performing or failing to perform those services.

The wrongful conduct, appellants claim, consisted of SGF, in part through communications from Dr. Sagoskin or Nurse Johnson, lying to them regarding the test results, stealing the eggs retrieved from Ms. Zheng, mischarging them, and breaching their agreement. None of that, they claim, constitutes medical malpractice but simply civil fraud.

Because the trial court's dismissal of the Complaint was devoid of any specific factual or legal findings but contained only a general reference to the record and appellee's motion, that is where we need to look. We take that look, of course, in light of the law that governs the case. Appellant's complaint does allege fraudulent conduct, but it also alleges a breach of the agreement between the parties, which takes us to whether that agreement was for medical services and, if so, whether that alleged breach could constitute medical malpractice.

Medical malpractice claims in Maryland are governed by Code, Courts Article, Title 3, Subtitle 2A. The crux of that statute is § 3-2A-04(a), which requires that "a person having a claim against a **health care provider for damage due to a medical**

injury shall file the claim with the Director [of the Health Care Alternative Dispute Resolution Office]." (Emphasis added).

Determining whether SGF qualifies as a health care provider takes us on a journey through other statutes. We start with Courts Article, § 3-2A-01(f), which states that a health care provider includes "a freestanding ambulatory care facility as defined in § 19-3B-01 of the Health-General Article." Section 19-3B-01(c) defines "freestanding ambulatory care facility" as including "an ambulatory surgical facility." Section 19-3B-01(b), in turn, defines "ambulatory surgical facility" as:

> "any center, service, office facility, or other entity that (i) Operates exclusively for the purpose of providing surgical services to patients requiring a period of postoperative observation but not requiring hospitalization and in which the expected duration of services would not exceed 24 hours following admission; and (ii) seeks reimbursement from payors as an ambulatory surgery center."

Following that definition, §19-3B-01(b) lists five circumstances in which an entity that might fall within the general definition stated above would **not** qualify as an ambulatory surgical facility.

As neither side has even suggested, much less offered any evidence, that any of those circumstances apply in this case and the trial court never mentioned them, we may safely assume that none of them do apply and that SGF therefore qualifies as an ambulatory surgical facility and therefore is a health care provider. We are comfortable in that assumption both from what **is** in the record regarding SGF and the fact that neither side argued otherwise.

We turn, then, to the question of whether this is a medical malpractice case.

We start with the fact that the medical community now recognizes infertility as a disease. *See World Health Organization International Classification of Diseases,* 11th Revision (2018); WHO September 2020 Bulletin, declaring "Infertility is a disease of the male or female reproductive system defined by the failure to achieve pregnancy after 12 month or more of regular unprotected sexual intercourse. . . . In the female productive system, infertility may be caused by a range of abnormalities of the ovaries, uterus, fallopian tubes, and the endocrine system, among others."

The American Medical Association (AMA) agrees. *See* AMA Bulletin, June 13, 2017: "Delegates at the 2017 AMA Annual Meeting voted in support of WHO's designation of infertility as a disease.''[6] *See* also *Definitions of Infertility and Recurrent pregnancy loss: a committee opinion*, Practice Committee of the American Society for Reproductive Medicine, January 2013.[7] It is a disease that requires medical treatment. *See Infertility: An Overview*, A Guide for Patients, Revised 2017, American Society for Reproductive Medicine; also Jennifer Choe and Anthony Shanks, *In Vitro Fertilization*, National Library of Medicine, National Institutes of Health, September 5, 2022.

[6] *See* also American Medical Association Journal of Ethics, Vol 20, No. E1152-1159 December 2018: "Infertility has been unequivocally defined as a disease state by the World Health Organization (WHO). The WHO recognizes that infertility confers a disability, and it is now fifth on the international list of disabilities in women. Moreover, it is a disease with billable codes that physicians can use when charging patients and their insurance companies, as determined by the *International Statistical Classification of Diseases and Related Health Problems.*

Medical treatment is precisely what appellant sought from SGF – the retrieval of Ms. Zheng's eggs through a medical/surgical procedure and the treatment of those eggs by a medical procedure conducted by medical professionals – a physician and a nurse. If, as alleged, they bolluxed up the procedure and then lied about what they did, or did not do, with the result that the procedure was unsuccessful, a medical injury occurred. The case thus squarely falls within the scope of Courts Article, § 3-2A-04(a), requiring that a claim based on what allegedly occurred be filed first with the Director of the Health Care Alternative Dispute Resolution Office, which was not done.

That statute is clear and means what it says. It "creates a condition precedent to the institution of a court action" and is "a mandatory framework for the resolution of health claims." *Tranen v. Aziz*, 304 Md. 605, 611 (1985). *See* also *Carrion v. Linzey*, 342 Md. 266, 276 (1996) and *Davis v. Frostburg Facility Operations*, 457 Md. 275, 280, 287 (2018).

Failure to comply with that requirement requires that the case be dismissed, as it was by the Circuit Court. We shall affirm that judgment.

JUDGMENT AFFIRMED;
APPELLANT TO PAY THE COSTS.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0563s22cn.pdf