

CAUSE NO. 2011-64922

LAYNE HARDIN AND KATHERINE  
LEBLANC

v.

OBSTETRICAL AND GYNECOLOGICAL  
ASSOCIATES, PA, N/K/A OBSTETRICAL  
AND GYNECOLOGICAL ASSOCIATES,  
PLLC, TEXAS ANDROLOGY SERVICES,  
LLC, AND TOBIE DEBALL

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IN THE DISTRICT COURT OF  
  
HARRIS COUNTY, TEXAS  
  
55th JUDICIAL DISTRICT

**PLAINTIFFS' FOURTH AMENDED PETITION**

TO THE HONORABLE JUDGE OF SAID COURT:

Come now, Layne Hardin and Katherine LeBlanc, Plaintiffs, and files this Third Amended Original Petition complaining of Obstetrical and Gynecological Associates, PA, n/k/a Obstetrical and Gynecological Associates, PLLC, Texas Andrology Services, LLC. and Tobie Devall, Defendants, and for causes of action show the following:

**I. Parties**

Plaintiff Layne Hardin is an individual residing in Sulphur, Calcasieu Parish, Louisiana.

Plaintiff Katherine LeBlanc is an individual residing in Sulphur, Calcasieu Parish, Louisiana.

Defendant, Obstetrical and Gynecological Associates, PA ("OGA, PA") was a professional association organized under the laws of the State of Texas. On March 29, 2011, it was converted to Obstetrical and Gynecological Associates, PLLC ("OGA, PLLC") a professional limited liability corporation. Obstetrical and Gynecological Associates, PLLC is a Texas Limited liability company and has already answered herein and may be served with process by serving a copy of this pleading on its counsel of record, James B. Edwards, Edwards

& Stephens, 12603 Southwest Freeway, Suite 200, Stafford, Texas 77477.

Defendant, Texas Andrology Services, LLC, (“Texas Andrology”) is a Texas limited liability company, and has already appeared herein. It may be served by serving its counsel of record, James B. Edwards, Edwards & Stephens, 12603 Southwest Freeway, Suite 200, Stafford, TX 77477.

Defendant, Tobie Devall is an individual residing in Sulphur, Calcasieu Parish, Louisiana. She has already answered herein and can be served by serving her counsel of record, J. Lee Hoffoss, Jr., Hoffoss Devall, LLP, 3205 Ryan St., Lake Charles, Louisiana 70601.

## II. Discovery

Plaintiffs intend to conduct discovery under Level 3 of Texas Rules of Civil Procedure 190.4.

## III. Venue and Jurisdiction

Venue is proper in Harris County, Texas because all or a substantial part of the events giving rise to this litigation occurred in Harris County, Texas. This court has jurisdiction over this matter because the amount in controversy is within the jurisdictional limits of the District Courts of Harris County, Texas.

## IV. Facts

On or about January 25, 2002, Layne Hardin (“Layne”) and Katherine LeBlanc (“Kathy”), his domestic partner at the time, went to West Houston Fertility Center (“WHFC”), now known as Texas Andrology, for the purpose of storing Layne’s sperm prior to his undergoing a vasectomy. Layne and Kathy entered into an agreement with WHFC for sperm cryopreservation and the agreement included consent for sperm cryopreservation and four

separate and distinct instructions regarding the client's wishes as to the disposal and use of the stored sperm. The stated purpose of the signed and initialed consent and instructions was "to provide WHFC with legally binding directions and guidance concerning [the client's] wishes".

The consent states, among other things, the following:

Unless otherwise instructed by a written agreement and delivered to West Houston Fertility Center, Ltd., I, Layne Hardin (patient-male) hereby indicate my wishes for disposition of sperm on the following specified contingencies:

1. In the event of the death, I wish the frozen sperm to be: Placed in the Decisional Authority of Surviving Partner, Kathy LeBlanc.
2. In the event of dissolution of couple or divorce, the frozen sperm will be: Placed in the Decisional Authority of Kathy LeBlanc.
3. In the event of failure to pay storage fees, provide address information to West Houston Fertility Center, or expiration of the storage period, the sperm will be Discarded.
4. In the event of death of both male and female partners, the frozen sperm will be: Discarded.

The WHFC representative, Connie Riegel, quickly went over the agreement and both Layne and Kathy initialed each of the four separate and distinct instructions and both signed the consent on January 25, 2002 along with WHFC representative. On this date, Layne stored eight vials of sperm with WHFC.

In January, 2005 WHFC was apparently sold to Obstetrical and Gynecological Associates, P.A., a Texas professional association. On February 3, 2005, Obstetrical and Gynecological Associates, P.A. ("OGA, PA) filed an assumed name certificate for West Houston Fertility Center. At some point OGA, PA began calling its andrology affiliate Texas Andrology Services in lieu of the name West Houston Fertility Center. On March 29, 2011, Obstetrical and

Gynecological Associates, PA converted itself into a limited liability corporation entitled Obstetrical and Gynecological Associates, PLLC (“OGA, PLLC”).

In sworn affidavits and testimony, officers of Texas Andrology Services, LLC and its owner OGA, PLLC admit that it was the successor to West Houston Fertility Center and further admit that it was in possession of the sperm at issue at the time of the insemination.

On or about February 2006, Kathy LeBlanc and Layne ended their relationship.

At some point, Layne and Tobie Devall began their relationship as domestic partners.

On or about March 3, 2008, Layne and Tobie Devall consulted with Dr. Leah Schenk regarding Tobie Devall’s chances of getting pregnant with insemination.

Tobie continued to visit Dr. Schenk without Layne being present.

At no time did Layne or Kathy give written agreement to the insemination of Tobie Devall with the sperm stored at Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC.

At no time did Layne or Kathy give consent for Tobie Devall to be inseminated with this sperm that was being cryo-preserved.

On or about January 2009 through May 2009, Layne and Tobie Devall were no longer domestic partners and were dating other people.

On or about June 2009 through October 20, 2009 Layne and Tobie Devall were dating but were not domestic partners.

On or about October 20, 2009, Layne and Tobie Devall were no longer dating.

On or about November 19, 2009, Tobie Devall announced to Layne that she was pregnant with his child and that she had been inseminated on October 26, 2009.

Kathy was not contacted for her consent to release the sperm to Tobie or Dr. Schenk.

Neither Dr. Schenk or Texas Andrology or OGA, PA n/k/a OGA, PLLC had seen Layne Hardin since March 3, 2008.

In December, 2009 Tobie Devall's pregnancy was confirmed by a pregnancy test. Shortly thereafter, Layne called Dr. Schenk's nurse and was told that he had six remaining vials of sperm left in storage and she confirmed that two vials were used to inseminate Tobie Devall.

Plaintiffs have learned that Tobie Devall scheduled her insemination; retrieved the sperm from Texas Andrology and that Texas Andrology released the sperm to her without ever verifying that she owned it or had consent to use it. Despite the fact that it was more than 18 months since Layne had accompanied Tobie on her doctor visit, no one bothered to contact him.

In July 2010, a baby boy was born as a result of this insemination and his mother, Tobie Devall, refuses to include Layne, the biological father, in the child's life. In fact, Defendant Devall filed suit in Louisiana to have Plaintiff Hardin's parental rights terminated. To date, Plaintiff Layne Hardin spent more than \$50,000 in legal fees and expenses in fighting the termination.

V.

Texas Andrology, in pleadings and through testimony, has acknowledged that it had possession of, and responsibility for, the eight (8) stored vials of sperm in question, in October 2009.

If Defendants plead or attempt to show that another entity had possession of or responsibilities for the eight (8) stored vials of sperm in issue then Plaintiffs would plead estoppel by record, equitable estoppel, quasi estoppel, estoppel by misrepresentations, and/or estoppel in pais.

Likewise, should Defendants allege a defense of statute of limitations to any of Plaintiffs' causes of action for the benefit of Defendants OGA, PA and/or OGA, PLLC would plead estoppel by record, equitable estoppel by misrepresentation, quasi estoppel in pais, and/or equitable estoppel, Defendants intended Plaintiffs to act on their representations, Defendants intended for Plaintiffs to act without knowledge of concealed facts, Defendants knew or had the means of knowing the real facts, Plaintiffs relied on the pleadings of Defendants and the testimony of Defendants witnesses and did not know nor had that means of knowing the real facts. Plaintiffs substantially, reasonably and detrimentally relied on Defendants sworn testimony and documents filed with this Court.

Likewise, OGA, PA and OGA, LLC are not entitled to a defense of statute of limitations because Defendants are estoppel from asserting this defense in that Defendants' position would be inconsistent with Defendants' positions in sworn testimony and legal documents filed with this Court. Defendants' position would be unconscionable because it disadvantages the Plaintiffs in their claims and causes of action. Furthermore, such actions by Defendants were intentional and deliberate and constitute bad faith as that is defined in the law and which constitutes Fraud by Non-Disclosure.

Finally, Plaintiffs assert that the Defendants are all inter-related entities with overlapping officers, directors and employees and Defendants have been on notice of the causes of actions alleged and the facts giving rise to the claims made the basis of this lawsuit since the filing of the Original Petition. No Defendant can claim to be misled or prejudiced by the misidentifications or misnomer.

VI.

The actions and omissions, liabilities and responsibility of Defendant, Texas Andrology are attributable to and imputed to the Defendants OGA, PA and OGA, PLLC under theories of liabilities including, but not limited to, Respondeat Superior, Joint Enterprise, Violations of DTPA and Conspiracy.

## VII. CAUSES OF ACTION

### Count One – Suit for Breach of Contract Against Texas Andrology Services, LLC, and OGA, PLLC

Plaintiffs sue Texas Andrology and its owner OGA, PLLC for breach of contract. Plaintiffs went to West Houston Fertility Center (“WHFC”), now known as Texas Andrology Services, LLC and owned by OGA, PA n/k/a OGA, PLLC, for the purpose of storing Layne’s sperm prior to his undergoing a vasectomy. Plaintiffs entered into an agreement with WHFC for sperm cryopreservation and the agreement included consent for sperm cryopreservation and four separate and distinct instructions regarding the patient’s wishes as to the disposal and use of the stored sperm. The stated purpose of the signed and initialed consent and instructions was “to provide WHFC with legally binding directions and guidance concerning [the patient’s] wishes”. The consent states, among other things, the following:

Unless otherwise instructed by a written agreement and delivered to West Houston Fertility Center, Ltd., I, Layne Hardin (patient-male) hereby indicate my wishes for disposition of sperm on the following specified contingencies:

1. In the event of the death, I wish the frozen sperm to be: Placed in the Decisional Authority of Surviving Partner, Kathy Leblanc.
2. In the event of dissolution of couple or divorce, the frozen sperm will be: Placed in the Decisional Authority of Kathy LeBlanc.
3. In the event of failure to pay storage fees, provide address information to West Houston Fertility Center, or expiration of the storage period, the sperm will be Discarded.

4. In the event of death of both male and female partners, the frozen sperm will be Discarded.

The consent was signed on January 25, 2002 by Plaintiffs along with WHFC representative Connie Riegel. On this date, Layne stored eight vials of sperm with WHFC. Layne paid for the first year of storage and has continued to pay for storage according to the contract.

Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC breached this contract by releasing two vials of the cryo-preserved sperm without Plaintiffs' consent as directed by the January 25, 2002 agreement. In fact, representatives of Texas Andrology and OGA, PA n/k/a OGA, PLLC admit that a simple review of the contract at issue would have prevented the release of the sperm from occurring. Because Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC breached the contract, Plaintiffs have suffered emotional damages which were such a necessary and natural result of the breach of contract that were within the contemplation of the Defendants at the time the contract was made and economic damages.

Count Two - Suit for Violation of the Texas Deceptive Trade Practices Act (DTPA)  
Against Texas Andrology Services, LLC and Obstetrical and Gynecological Associates, PLLC

Plaintiffs bring suit for false, misleading, and deceptive practices under the Texas Deceptive Trade Practices Act (DTPA). Plaintiffs are consumers under the Texas DTPA because Plaintiffs are individuals who sought or acquired services by purchase. Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC violated the Texas DTPA by engaging in false, misleading, or deceptive acts or practices that Plaintiffs relied on to their detriment. OGA, PA n/k/a OGA, PLLC as the owner is vicariously liable for the actions of Texas Andrology.

Texas Andrology and its owner OGA, PA, n/k/a OGA, PLLC violated DTPA because of



its unconscionable actions or course of actions. Texas Andrology and its owner OGA, PA, n/k/a OGA, PLLC released the cryo-preserved sperm that was in their safekeeping to Tobie Devall in violation of its contract with Plaintiffs, and the wanton disregard for protocols or procedures that would have prevented the loss of the sperm in unconscionable. OGA, PA n/k/a OGA, PLLC as the owner is vicariously liable for the actions of Texas Andrology.

Because Texas Andrology and its owner OGA, PA, n/k/a OGA, PLLC acted knowingly and intentionally, Plaintiffs are entitled to recover treble damages under Texas DTPA, Texas Business & Commerce Code section 17.50(b)(1).

Count Three - Suit for Ordinary Negligence Against Texas Andrology Services, LLC  
and Obstetrical and Gynecological Associates, PLLC

Defendants Texas Andrology, formerly WHEG, and its owner OGA, PA n/k/a OGA, PLLC owed a duty to Plaintiffs, as parties to a written agreement, to perform the services as contracted. The contract was for storage and disposition, as directed in the agreement. Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC breached that duty by failing to exercise reasonable care to avoid a foreseeable risk of injury to others. Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC negligently released the sperm, which was the subject of the agreement, to Tobie Devall – a person with no authority over, or rights to, the sperm. In fact, officers of Texas Andrology and OGA, PA n/k/a OGA, PLLC admit that a simple review of the contract would have prevented the injury that occurred. Defendants Texas Andrology's and its owner OGA, PA n/k/a OGA, PLLC's breach proximately caused Plaintiffs' economic and emotional injury. OGA, PA n/k/a OGA, PLLC as the owner is vicariously liable for the actions of Texas Andrology.

Count Four – Suit for Gross Negligence Against Texas Andrology Services, LLC

and Obstetrical and Gynecological Associates, PLLC

Plaintiffs sue Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC for gross negligence. Defendant's actions amounted to gross negligence and are imputed to its owner OGA, PA n/k/a OGA, PLLC. The Defendant's acts or omissions, when viewed objectively from the Defendant's standpoint, involved an extreme degree of risk, and the Defendant had actual, subjective awareness of the risk but proceeded with a conscious indifference to the rights, safety, or welfare of others.

Defendant's gross negligence proximately caused Plaintiffs' economic and emotional injury.

Count Five - Suit for Conversion against Obstetrical and Gynecological Associates, PLLC, Texas Andrology Services, LLC and Tobie Devall

Plaintiff Kathy LeBlanc sues Defendants OGA, PA n/k/a OGA, PLLC, Texas Andrology and Tobie Devall for conversion.

As a result of the dissolution of Layne and Kathy's relationship, Kathy had decisional authority granted by the January 25, 2002 agreement between Kathy, Layne and Texas Andrology, formerly WHFC, over eight vials of Layne's sperm. The eight vials of cryopreserved sperm were her personal property, by agreement and circumstances, and she had the exclusive right of possession of all eight vials.

Defendant Tobie Devall wrongfully exercised dominion over Plaintiff's sperm when she obtained the sperm and used it to be inseminated after the break-up of her relationship with Plaintiff Layne Hardin. Defendant's acts amounted to a clear repudiation of Plaintiff's rights and a demand for the return of the property would have been useless so a demand for the return of the property is not required.

Defendant Tobie Devall maliciously converted Plaintiff's property when she wantonly and maliciously appropriated the sperm which was not hers to have or use, and was impregnated, and delivered a child.

Defendant Texas Andrology and its owner OGA, PA n/k/a OGA, PLLC wrongfully exercised dominion and control over Plaintiff's sperm when they disregarded their written instructions and instead delivered the sperm to Defendant Tobie Devall, a person with no authority over, or rights to, the sperm.

Defendants' wrongful acts proximately caused injury to Plaintiff, which resulted in the loss of the use of the two vials of sperm.

Count Six – Suit for Intentional Infliction of Emotional Distress against Tobie Devall

Defendant Tobie Devall recklessly or intentionally requested and obtained the sperm and received insemination of the wrongfully procured sperm, knowing that she did not have consent from the sperm donor, was no longer in a relationship with the sperm donor, and had no authority over, or rights to, the sperm.

There were eight vials of frozen sperm in cryo-storage for disposition by Plaintiffs as they directed and now Plaintiff Katherine LeBlanc has only six vials of frozen sperm. The two vials of sperm cannot be returned or replaced.

After clandestinely obtaining Plaintiff Layne Hardin's sperm and having his child, Defendant Tobie Devall sought to deny Plaintiff Hardin access to his child. After successfully banning Plaintiff Hardin from his child without court intervention, Defendant Devall then sought the termination of Plaintiff Hardin's parental rights.

As it stands now, Plaintiff Layne Hardin has a son with whom he is allowed no contact,

no relationship, no ability to parent. Katherine LeBlanc has been denied two (2) vials of sperm that are critical to her ability to have another child biologically matched to her son. The intentional, malicious, and outrageous conduct of Defendant Devall resulted in Plaintiff LeBlanc and her son now having a biological sibling with Devall as the mother. All of which was and is a direct and proximate cause of Plaintiffs' damages as set forth herein.

Defendant's conduct was extreme and outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, as to be regarded as atrocious and utterly intolerable in a civilized community. Defendant's conduct proximately caused Plaintiffs' damage in that it caused Plaintiffs to suffer severe emotional distress. In particular, Defendant's conduct was the direct and proximate cause of severe disappointment, indignation, wounded pride, shame, despair, humiliation, and grief. In addition to severe emotional distress, the Plaintiffs have suffered in the past and will continue to suffer additional damages as a proximate result of Defendant's conduct in that, in all reasonable probability, Plaintiffs will continue to suffer this mental pain and anguish for a long time into the future. There is no alternative cause of action that would provide a remedy for the severe emotional distress caused by the Defendant's conduct. By reason of the injuries described above, Plaintiffs have suffered losses and damages in a reasonable sum that far exceed the minimum jurisdictional limits of the Court, and Plaintiffs sue these defendants, jointly and severally, for this sum.

Further, Plaintiff Layne Hardin has expended more than \$50,000 in attorney fees and expenses fighting the termination of his parental rights. The expenditure of these funds is a direct result of Defendant Tobie Devall's intentional and malicious actions.

VIII. Attorney Fees

Plaintiffs are entitled to recover reasonable and necessary attorney fees against Defendants for breach of contract, violations of the DTPA, and conversion.

IX. Demand for Jury

Plaintiff demands a jury trial.

X. Prayer for Relief

For these reasons, Plaintiffs asks that Defendants be cited to appear and answer and the court award the following damages:

- a) Actual damages;
- b) Nominal damages;
- c) Past mental and/or emotional pain and/or anguish;
- d) Future mental and/or emotional pain and/or anguish;
- e) Exemplary;
- f) Treble damages under DTPA;
- g) Prejudgment and post judgment interest on past and future damages for all claims
- f) Reasonable and necessary attorney fees;
- g) Costs of suit;
- h) All other relief, in law and in equity, to which Plaintiffs may be entitle.

Respectfully submitted,

**THE BERNSEN LAW FIRM**



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ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing has been served on the following counsel of record either electronically, facsimile, or U. S. Postal Service on this the 29<sup>TH</sup> day of March, 2015:

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