

1 O'MELVENY & MYERS LLP
ROBERT C. WELSH (S.B. #130782)
2 MARGARET C. CARROLL (S.B. #170403)
MICHAEL CLIFTON-HARTER (S.B. # 227551)
3 AMY FREEMAN (S.B. #227732)
1999 Avenue of the Stars, Seventh Floor
4 Los Angeles, California 90067-6035
Telephone: (310) 553-6700
5 Facsimile: (310) 246-6779

6 ALBERT GROSS (S.B. #159208)
LAW OFFICE OF ALBERT GROSS
7 503 N. Highway 101, Suite A
Solana Beach, California 92075
8 Telephone: (858) 793-7636
Facsimile: (858) 794-0836

9 JENNIFER C. PIZER (S.B. #152327)
10 LAMBDA LEGAL DEFENSE and EDUCATION
FUND, INC.
11 3325 Wilshire Boulevard, Suite 1300,
Los Angeles, California 90010
12 Telephone: (213) 382-7600
Facsimile: (213) 351-6063
13

F I L E D
Clerk of the Superior Court

MAR 25 2004

By: C. BANKS, Deputy

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SAN DIEGO**

16 Guadalupe T. Benitez,
17 Plaintiff,
18 v.

19 NORTH COAST WOMEN'S CARE
MEDICAL GROUP, INC., a California
20 corporation; SHARP MISSION PARK, a
California corporation; SHARP HEALTH
21 PLAN, a California corporation; DR.
CHRISTINE BRODY, an individual; DR.
DOUGLAS FENTON, an individual; and
DOES 1 through 10, inclusive,
22 Defendants.
23

No. GIC 770165
**DECLARATION OF
GUADALUPE T. BENITEZ IN
OPPOSITION TO
DEFENDANTS' MOTION
FOR SUMMARY
ADJUDICATION AS TO
PLAINTIFF'S SIXTH,
SEVENTH, EIGHTH, NINTH
AND TENTH CAUSES OF
ACTION AND TO
PLAINTIFF'S CLAIM FOR
PUNITIVE DAMAGES**
[Filed Concurrently:
Memorandum of Points and
Authorities; Separate Statement of
Disputed Facts; Declarations of
Guadalupe Benitez and Albert
Gross]

Date: April 9, 2004
Time: 3:00 p.m. (Telephonic)
Dept.: 71
Judge: Hon. Ronald S. Prager
Complaint Filed: July 5, 2001

DECLARATION OF GUADALUPE T. BENITEZ

I, GUADALUPE T. BENITEZ, declare:

1. I am plaintiff in this action and submit this Declaration in Opposition to Defendants' Dr. Christine Brody, Dr. Douglas Fenton and North Coast Women's Care Medical Group, Inc. ("North Coast") (collectively, "Defendants") Motion for Summary Adjudication as to the Sixth, Seventh, Eighth, Ninth and Tenth Causes of Action.¹ Except where indicated, all of the facts set forth in this Declaration are known to me personally, and, if called as a witness, I would testify competently to them.

2. For many years prior to the events at issue in this lawsuit my partner, Joanne Clark, and I had looked forward to starting a family. Initially, during 1998, I had obtained donor sperm from California Cryobank (a sperm bank) and had an intrauterine insemination ("IUI") performed at Pacific Reproductive Services. Subsequently, during 1998 and 1999, I used an ovulation predictor kit and frozen donor sperm and performed intravaginal insemination ("IVI") at least five times at home. At that time, I learned that IUI is significantly more likely to result in pregnancy than IVI.

3. When these efforts did not result in pregnancy, the director of Pacific Reproductive Services suggested that I seek a referral to medical specialists who could try to determine whether there were any treatable causes of my difficulty becoming pregnant. She explained that if I was not ovulating regularly, I might be prescribed drugs to help regulate my menstrual cycle and to stimulate ovulation.

4. As a benefit of my employment by Sharp Mission Park Medical Group, Inc. (hereafter referred to as "Sharp Mission Park"), I was eligible for and obtained health insurance under the Sharp Health Plan (the "Plan").

5. At my request, my primary care physician referred me to an endocrinologist, Dr. Argoud, who diagnosed me as having polycystic ovarian ("PCO") syndrome, a condition that could reduce my ability to get pregnant. He recommended that I take

¹ I do not oppose Defendants' motion with respect to causes of action nine and ten.

1 Glucophage to regulate my menstrual periods. He also discussed some of the treatment
2 options for infertility, and explained that there are drugs such as Clomid to stimulate
3 ovulation.

4 6. After tests showed that I was not ovulating regularly, my primary care
5 physician referred me for fertility treatment to Defendant North Coast which was the only
6 provider of obstetrics and gynecology services under the Plan.

7 7. On or about August 6, 1999, I consulted with Dr. Brody regarding fertility
8 treatment. At the time I first saw Dr. Brody I had tried to become pregnant unsuccessfully
9 for two years. I informed Dr. Brody of my previous attempts (at least five self
10 inseminations at home and one IUI by a medical professional), that I have never had sex
11 with a man, and that I am a lesbian. Given how long I had been trying to become pregnant,
12 I expected that Dr. Brody would recommend IUI without delay. Instead, she told me that
13 she had a religiously based prejudice against assisting a homosexual to conceive a child by
14 artificial insemination.

15 8. I was surprised and profoundly distressed by Dr. Brody's statement that she
16 would not treat me the same as other patients. Joanne and I had come to Dr. Brody's office
17 after a long period of frustration and disappointment, with trust and great hopes that she
18 would take care of me and help my partner and I start our family. Based on my personal
19 history, I was particularly upset by Dr. Brody's references to her religion and the fact that
20 she would permit her religious beliefs to result in a situation where she would withhold
21 medical procedures she provided to her other patients and that she believed it was
22 permissible to treat me differently than her other patients.

23 9. Defendant Brody assured me that although she personally would not
24 perform an IUI for me, all other members of her practice -- whom she said lacked her bias -
25 - would be available.

26 10. Because I understood that the Sharp Health Plan did not include any in-
27 network obstetrics and gynecology providers other than North Coast, and because the
28

1 previous months of self-insemination had been expensive (the two vials of sperm required
2 for each IVI cycle cost \$750.00), I believed I had little choice but to proceed with the North
3 Coast facility. Therefore, based on Dr. Brody's representation that her colleagues would
4 perform an IUI when I needed it, I became Defendant's patient and Dr. Brody created a
5 treatment plan for me (the "Treatment Plan").

6 11. Although it was my understanding that IUI is significantly more likely to
7 result in pregnancy than IVI, Dr. Brody's Treatment Plan recommended that for three
8 monthly cycles I would take Clomid to stimulate my ovaries to produce and to release
9 eggs. After ovulation, I was to perform an intravaginal insemination at home using the
10 same procedure I had used unsuccessfully for two years. According to Dr. Brody's
11 Treatment Plan, if I did not become pregnant after three cycles of self-insemination, I
12 would then progress to cycles in which Clomid intake would be followed by intrauterine
13 insemination ("IUI") at the North Coast facility.

14 12. During my initial visit in which Dr. Brody developed the Treatment Plan
15 involving Clomid and IVI, she did not explain the relative success rates correlated with IVI,
16 with IUI and with other methods of attempting fertilization. Dr. Brody also did not explain
17 any potential health risks associated with Clomid.

18 13. Shortly thereafter I began following the Treatment Plan. I took Clomid as
19 prescribed by Dr. Brody and under her supervision and instruction, I underwent IVI at
20 home, as I had done before, using frozen sperm from an anonymous donor purchased from
21 a sperm bank, for three cycles, all of which failed to result in pregnancy.

22 14. Throughout the treatment, I suffered physical and emotional side effects as a
23 result of taking the Clomid. In addition, I continued to bear the \$750 cost for the sperm
24 required for each IVI cycle.

25 15. But, after those planned cycles were complete, at Dr. Brody's
26 recommendation, the Treatment Plan was not followed. Instead, in November 1999, Dr.
27 Brody suggested that I undergo a hysterosalpingogram ("HSG"), which tests whether the
28

1 fallopian tubes are blocked. It involves forcing a solution containing dye up through the
2 tubes and then the status of the tubes is checked with x-ray. Dr. Brody also raised the
3 possibility that I should undergo additional tests to rule out other potential reasons why I
4 might be having trouble getting pregnant.

5 16. I submitted to the HSG, because Dr. Brody said she believed I should have
6 that test before the IUI. After the HSG test, Dr. Brody informed me that there were no
7 blockages and that my tubes were clear. Because I had completed three cycles of Clomid
8 by then, I expected that my treatment would progress to IUI.

9 17. My treatment did not progress, however. As I moved into 2000, Dr. Brody
10 continued to recommend at each consultation that I stay with the Clomid/IVI cycles. In all,
11 I underwent seven Clomid/IVI cycles under Dr. Brody's care between August 1999
12 through June 2000, all of which were unsuccessful.

13 18. During a visit to the North Coast office for a pregnancy test in
14 approximately March 2000, I told Dr. Brody I was eager to progress to the IUI and that, in
15 addition to becoming frustrated and despondent about the continuing cycles of failure with
16 IVI, I also had started to become concerned about the risk of cancer I had heard was
17 associated with prolonged use of Clomid. My anxiety in this regard was based on what I
18 had heard and also on information gathered from Internet research. After I expressed this
19 worry to her, Dr. Brody gave me some explanation of the various health risks associated
20 with Clomid, including that the correlation with ovarian cancer begins after one year of
21 usage. This discussion was the first information she gave about these potential hazards.

22 19. During this same March 2003 visit, before agreeing to perform the IUI
23 procedure she had promised in August 1999, Dr. Brody advised me that she recommended
24 laparoscopic surgery to determine whether my infertility resulted from a medical condition,
25 endometriosis. She explained that she thought it was advisable that I undergo the surgery
26 before performing the IUI.

27

28

1 20. In this same visit, I told Dr. Brody that I wanted to use the fresh sperm of a
2 friend, Lunice Allen because I understood that using fresh sperm is more likely to result in
3 pregnancy than using frozen sperm.

4 21. Dr. Brody advised me that in order to use Mr. Allen's sperm, he would have
5 to undergo a blood test for certain conditions, including HIV and hepatitis. At that time,
6 Dr. Brody "prescribed" the necessary tests for Mr. Allen. Mr. Allen had the tests
7 performed and the results were sent to Defendants.

8 22. The laparoscopic surgery was performed in April 2000. The procedure
9 involved two incisions into my abdomen, one on each side of my belly button, performed
10 while I was under general anesthesia, and some kind of gas was injected into my abdomen
11 to permit visual inspection. It was fairly painful and required four days of recuperation.
12 No problem was found that would interfere with my fertility.

13 23. On or about April 18, 2000, Dr. Brody stated that I would finally have the
14 IUI procedure I had been expecting since my first visit. However, Dr. Brody informed me
15 for the first time that, despite her previous assurances to the contrary, if she was the doctor
16 "on-call," I could not have the IUI. I found this change of circumstances very distressing
17 and anxiety producing. It felt similar to the helplessness of my first visit with Dr. Brody, as
18 I again believed I had no ability to leave or to insist that I be treated the same as other
19 patients because North Coast was the sole in-network provider available to me and, by that
20 point, I had been under Dr. Brody's care for seven and one half months. As before, my
21 only option seemed to be to hope that, when I ovulated and needed the IUI, the "on-call"
22 doctor would be one who would treat me.

23 24. During the week of May 15-19, 2000, I visited Dr. Brody's office at least
24 twice for monitoring of my eggs by vaginal ultrasounds -- procedures I believed were in
25 preparation for the IUI. These were the first instances of Dr. Brody using ultrasound to
26 monitor my condition.

27
28

1 25. At the second of those two visits, on May 19, 2000, Dr. Brody said, "I have
2 good news and bad news: the good news is we aren't going to miss the cycle. The bad
3 news is that the State of California requires [the medical group to have] a 'tissue license' in
4 order to inseminate [using] known donor sperm" and North Coast did not have the
5 necessary tissue license.

6 26. Dr. Brody's "good news" on May 19, 2000 that "the cycle would not be
7 missed" meant that she was advising me yet again to perform the so far completely
8 ineffective IVI at home. Dr. Brody thereupon administered a shot of human chorionic
9 gonadotropin ("HCG") to induce ovulation and sent me home with instructions to attempt
10 fertilization over the next two days.

11 27. Dr. Brody said nothing to me at this time about any of her colleagues being
12 unwilling to perform IUI or any other procedure for me. But based on Defendants'
13 subsequent conduct I have concluded that Defendants never intended to perform IUI for
14 me.

15 28. After the IVI in May, I earnestly hoped, as I had each previous month, that I
16 was pregnant and, on July 5, 2000, I visited Dr. Brody's office for a pregnancy test and
17 consultation. The pregnancy test was negative. Dr. Brody again promised the IUI at North
18 Coast -- this time with frozen sperm because, according to her, Defendants' still did not
19 have a tissue license. Dr. Brody advised me to call her as soon as my menstrual cycle
20 resumed so she could again proscribe Clomid to be followed by IUI upon ovulation.

21 29. When I began my next menstrual cycle on July 7, 2000, per Dr. Brody's
22 instructions, I telephoned her office to obtain a refill of the prescription for Clomid. The
23 receptionist told me that Dr. Brody was on vacation, but said she would relay the request
24 for the prescription refill to Dr. Fenton.

25 30. During the afternoon of July 7, 2000, I received a telephone call back from
26 Shirley at Defendants' office. Shirley said that Dr. Fenton would not refill the Clomid
27
28

1 prescription. I asked her, "Why? What is the problem? I saw Dr. Brody just two days ago,
2 and she told me to call for the prescription and to arrange for the insemination."

3 31. Shirley replied that she did not know and that Dr. Fenton had asked her to
4 relay the message about the Clomid. I asked Shirley to have Dr. Fenton call me as soon as
5 possible. I was so agitated by Shirley's call, I asked for Dr. Fenton's pager number and
6 Shirley gave it to me.

7 32. I paged Dr. Fenton, and was told that he was delivering a baby. He agreed
8 to call me the next day. When Dr. Fenton finally called the next day, he said that due to
9 Dr. Brody's beliefs and the beliefs of members of the clinic staff, he could not help me.
10 Dr. Fenton said that Dr. Brody and her staff "did not feel comfortable with my sexual
11 orientation." Dr. Fenton never said he would go forward if I used frozen sperm.

12 33. At this time, Dr. Fenton said he had no bias against performing the
13 procedure for me himself. However, he said that due to the beliefs of Dr. Brody and the
14 office staff, I "would not be treated fairly at North Coast and would not get timely care
15 from staff members with objections" to my sexual orientation.

16 34. Dr. Fenton further said I was "entitled to care that was not discriminatory,"
17 and offered to refer me to another physician. When I asked whether Dr. Brody was aware
18 that he was telling me this, Dr. Fenton replied that she was on vacation.

19 35. The abandonment by my doctor, after 11 months of intensive care and at
20 such a critical time was shocking and deeply disturbing to me. I simply could not believe
21 that my patience and the emotional roller coaster of nearly a year on Clomid, with all its
22 effects on my emotional and physical state, had been a pointless waste. I felt manipulated,
23 duped, humiliated and, most of all, that my constant wish to have a child had been flouted
24 deliberately by the person I was relying on to help me. I was devastated and cried for
25 several days. Eventually I sought psychological counseling to assist me in understanding
26 and accepting the insulting, callous and physically harmful conduct of Defendants.

27

28

1 36. Although I had been single-minded and disciplined in my pursuit of
2 pregnancy throughout the previous two years I was so distraught and wary after
3 Defendants' misleading and discriminatory treatment that I was unable to even consider
4 trusting another doctor and resuming infertility treatment for almost five months.

5 37. On August 8, 2000, I filed a complaint with the California Department of
6 Fair Employment and Housing ("DFEH"). Upon learning of the DFEH complaint,
7 Dr. Brody telephoned me and attempted to intimidate me into dropping my complaint
8 against her and her colleagues.

9 38. As I remember it, Dr. Brody interrogated me, asking "How can you do this
10 to me? You're ruining my career. You're making it difficult for me to work. I'm under a
11 lot of stress. This is causing me problems with my co-workers." I explained that I, not she,
12 was the injured party and refused to continue the conversation.

13 39. Ultimately, because she continued to call and to attempt to dissuade me
14 from pursuing my complaint, I asked my DFEH investigator, Scott Cooper, to advise
15 Dr. Brody not to call me any more. After that intervention by Scott Cooper, direct
16 intimidation and harassment by Dr. Brody ceased.

17 40. On or about November 30, 2000, I asked my primary care physician to
18 make a referral to another obstetrician and gynecologist who could provide fertility
19 treatment without the discrimination based on sexual orientation practiced by Defendants.

20 41. Because Sharp Mission Park, the medical group to which my primary care
21 physician belongs, has a contract to exclusively refer obstetrics and gynecology patients
22 who reside in the North County area to Defendants, I had to beg Sharp Mission Park to
23 authorize a referral "off-plan."

24 42. Ultimately, Sharp Mission Park permitted me to receive reproductive
25 therapy from Dr. Michael Kettel "off plan." However, receiving treatment from Dr. Kettle
26 off-plan costs much more than using North Coast did. For example, for "off-plan"
27 treatment I paid \$1,300 to Dr. Kettel for each insemination, as opposed to the few hundred
28

1 dollars in co-payments I would have paid to North Coast on an “in plan” basis. For another
2 example, ultrasound exams at North Coast were completely covered by the Plan, but those
3 services cost approximately \$90 each at Dr. Kettel’s office. Additionally, Dr. Kettel’s
4 office is significantly farther from my home and workplace than is North Coast; thus, the
5 transportation to office visits is more expensive, as well.

6 43. In summary, operating on the assurances by Dr. Brody that her colleagues
7 could and would perform IUI when necessary, I invested my effort, time, physical
8 discomfort, intense emotional vulnerability, and financial resources, to receive treatment by
9 Defendants. I subjected myself to medical risks as well as repeated cycles of hopeful
10 anticipation and crushing disappointment. I would not have begun as a patient of
11 Defendants nor persevered for those many months of treatment, if I had had any idea that
12 Defendants, in fact, would not perform the IUI procedure as promised, and would instead
13 unceremoniously abandon me. The result was that all of my discomforts, inconvenience,
14 expense and misplaced trust – together with the deep emotional wound of failing each
15 month to conceive and the ongoing insult and humiliation of knowing my own doctor
16 considered me unworthy of her care –served only to enrich Defendants, while frustrating
17 my hopes and expectations and constantly refreshing my awareness of being treated
18 unfavorably compared to other patients.

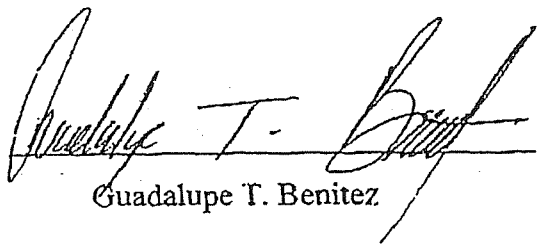
19 44. Based on the Defendants’ conduct, I can only conclude that, from the
20 beginning, Defendants misled me about their true intentions and never intended to provide
21 me with the full range of fertility services they provide to non-lesbians. Over the course of
22 eleven months they provided me with non-standard care in order to delay performing an
23 IUI. When the pattern of delay and deception failed, Defendants abandoned me as a
24 patient.

25 45. As a result, I felt manipulated, deceived, frustrated, abused and very angry.
26 As a consequence of the Defendants’ shameless discrimination, substandard medical care
27 and apparent dishonesty, I have been injured emotionally and financially. I have become
28

1 wary and distrustful of others. My prior difficulties with anxiety and stress-related
 2 headaches, which had resolved and were not in evidence during the period before I became
 3 a patient of Dr. Brody, resumed and continue to trouble me. Even though my home life is
 4 very happy, and my partner and I have great joy raising our two-year old son, I live with a
 5 sense of vulnerability due to my sexual orientation that I did not have before my experience
 6 as a patient of North Coast Women's Care and doctors Brody and Fenton.

7 46. My struggle with infertility rendered me extremely fragile emotionally. I
 8 believe this is true for most women who face this challenge, with its constant cycles of
 9 hope and disappointment, and the way the fertility drugs tend to alter body chemistry. As a
 10 result, the relationship between an infertility patient and her doctor tends to be very
 11 intimate. Even though I knew from the beginning that Dr. Brody would not treat me like
 12 her other patients, I could not help placing my most personal hopes and trust in Defendants.
 13 Defendants were the only help available to me and I had no choice but to rely on them. I
 14 believe anyone who has been in my position would agree that it was outrageous to mislead
 15 and deny me treatment, based on a personal characteristic that has nothing to do with my
 16 medical condition or any other legitimate reason to deny a patient care.

17
 18 Signed this 24th day of March, 2004, in Oceanside, California, under the penalties
 19 of perjury of the State of California.

20
 21
 22 
 23 Guadalupe T. Benitez