

## MEDICAL MALPRACTICE

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### FEATURED VERDICT

#### Failure to Test

Fertility doctor and agency denied fault for infant's birth defects

#### Defense Verdict

*Arango v. Arnold*

San Diego County Superior Court, San Diego

**Plaintiffs' Attorneys** Haytham Faraj; Carpenter, Zuckerman & Rowley, LLP; Beverly Hills, Calif.; Joseph H. Low, IV; Law Offices of Joseph H. Low IV; and Edmond E. Salem; The Salem Law Firm; Santa Monica, Calif.

**Defense Attorneys** Storm P. Anderson and Barton H. Hegeler; Hegeler & Anderson; San Diego; Kenneth R. Pedroza; Cole Pedroza, LLP; Pasadena, Calif.; and Timothy J. Sullivan; Callahan, Little & Sullivan; San Diego

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decision making due to her daily, severe pain in her left hand. She also claimed she suffers from emotional injuries, including anxiety, depression, post-traumatic stress disorder, loss of self-worth and self-esteem, anger, and irritability.

Hill, a former alcoholic, was a prominent, respected and well known alcohol and drug counselor. However, she claimed her injuries rendered her permanently disabled and unable to work at her drug and alcohol rehabilitation business.

Hill sought recovery of \$558,380 for lost earnings, \$73,039 for home maintenance service costs and \$21,863.22 for out-of-pocket medical expenses. She also sought recovery of substantial non-economic damages for her past and future pain and suffering. Hill's husband, Rocky Hill, then 66, also a drug and alcohol counselor, sought recovery of unspecified damages for his loss of consortium.

Defense counsel presented excerpts from the social media accounts of Ms. Hill's family and friends, which included photos and videos. Counsel also presented a sub rosa surveillance video of Ms. Hill. Defense counsel argued that while photos and videos showed that Ms. Hill was disabled, they also should that Ms. Hill was not disabled to the extent she claimed.

The defense's pain management expert opined that Ms. Hill was not pursuing effective therapy and was likely addicted to opioid painkillers, which were not controlling her pain and were inhibiting her ability to return to work.

**RESULT** The jury rendered a defense verdict. It found that Chao and Bruner were not negligent.

|                            |   |
|----------------------------|---|
| <b>DEMAND OFFER</b>        | \$1,000,000 (total, from Bruner and Chao)<br>\$200,000 (by Chao)  |
| <b>INSURER(S)</b>          | ProAssurance for Bruner<br>Doctors Co. for Chao   |
| <b>TRIAL DETAILS</b>       | Trial Length: 14 days<br>Trial Deliberations: 4.5 hours<br>Jury Vote: 10-2 (Chao's negligence);<br>9-3 (Bruner's negligence)<br>Jury Composition: 6 male, 6 female                          |
| <b>PLAINTIFF EXPERT(S)</b> | Eric Alcouloumre, M.D., emergency medicine,<br>Newport Beach, CA<br>Timothy Lanning, M.A., economics,<br>Santa Ana, CA<br>George A. Macer, Jr., M.D.,<br>orthopedic surgery, Long Beach, CA |
| <b>DEFENSE EXPERT(S)</b>   | Laura G. Audell, M.D., pain management,<br>Los Angeles, CA<br>Constantine M. Boukidis, M.A., economics,<br>Los Angeles, CA<br>David J. Kupfer, M.D., hand surgery,<br>San Diego, CA         |

Steven Molina, Ph.D., vocational rehabilitation, Santa Ana, CA  
Raymond L. Ricci, M.D., emergency medicine, Irvine, CA

**EDITOR'S NOTE** This report is based on information that was provided by counsel of Bruner and Chao. Plaintiffs' counsel did not respond to the reporter's phone calls, and the remaining defendants' counsel were not asked to contribute.

-Priya Idiculla

FEATURED VERDICT

FAILURE TO TEST

Failure to Detect — Failure to Communicate — Informed Consent

Fertility doctor and agency denied fault for infant's birth defects

|                              |   |
|------------------------------|---|
| <b>VERDICT</b>               | <b>Defense</b>  |
| <b>CASE</b>                  | Carlos A. Arango; Monica Gherzi; and Naomi Arango-Gherzi, by and through her guardian ad litem, Cecilia Ramirez v. Lori Lynn Arnold, M.D.; California Center for Reproductive Medicine, a Medical Corporation; Marcos Gonzales, M.S. CGC; Origens Genetic Consulting; Reprogenetics; A Perfect Match, Inc.; and Does 1-20, No. 37-2012-00103745-CU-MM-CTL |
| <b>COURT</b>                 | Superior Court of San Diego County, San Diego, CA   |
| <b>JUDGE DATE</b>            | Kevin A. Enright<br>9/14/2017   |
| <b>PLAINTIFF ATTORNEY(S)</b> | Haytham Faraj, Carpenter, Zuckerman & Rowley, LLP, Beverly Hills, CA<br>Joseph H. Low, IV, Law Offices of Joseph H. Low IV, Long Beach, CA<br>Edmond E. Salem, The Salem Law Firm, Santa Monica, CA   |
| <b>DEFENSE ATTORNEY(S)</b>   | Storm P. Anderson, Hegeler & Anderson, San Diego, CA (Lori Lynn Arnold, California Center for Reproductive Medicine, California Center for Reproductive Sciences)<br>Barton H. Hegeler, Hegeler & Anderson, San Diego, CA (Lori Lynn Arnold, California Center for Reproductive Medicine, California Center for Reproductive Sciences)                    |

Kenneth R. Pedroza, Cole Pedroza, LLP, Pasadena, CA (Lori Lynn Arnold, California Center for Reproductive Medicine, California Center for Reproductive Sciences)  
Timothy J. Sullivan, Callahan, Little & Sullivan, San Diego, CA  
(A Perfect Match Inc.)  
None reported (Reprogenetics LLC, Marcos Gonzales, M.S. CGC, Nikolas G. Capetanakis, OriGens Genetic Consulting)

**FACTS & ALLEGATIONS** On June 12, 2011, plaintiff Naomi Arango-Gherzi was born through in vitro fertilization using an egg donor and a surrogate for her parents, plaintiffs Carlos Arango and Monica Gherzi. Six months later, Naomi was diagnosed with genetic abnormalities.

Prior to Naomi's birth, in April 2010, Arango and Gherzi, worked with representatives from A Perfect Match Inc., a non-medical corporation specializing in egg donation and surrogacy, and had selected a potential egg donor and surrogate. Arango and Gherzi were informed that the egg donor was involved in three prior donations and that although two of the babies were entirely healthy, one, a twin, was born in 2007 with microphthalmia, an eye abnormality, and choanal atresia, a congenital disorder where the back of the nasal passage is blocked.

On May 17, 2010, Arango and Gherzi presented to the office of Dr. Lori Arnold, a medical doctor specializing in fertility issues. During the meeting, they discussed the IVF treatment and preimplantation genetic diagnostic testing. Arango and Gherzi signed an informed consent form for the fertilization and transfer of donated eggs to a gestational surrogate on July 27, 2010, and signed the preimplantation genetic diagnosis consent form on Sept. 19, 2010. Four days later, the preimplantation genetic diagnostic testing was performed by Reprogenetics LLC. Five embryos tested "normal" and were determined to have no evidence of a genetic deletion. The two "best quality" embryos were then transferred into the surrogate. The three remaining embryos were frozen.

On Nov. 22, 2010, the surrogate was referred to Dr. Nikolas Capetanakis for obstetrical care and, on Dec. 3, 2010, Capetanakis met with the surrogate and the intended parents. Amniocentesis was not performed at that time.

Naomi was born on June 12, 2011. However, six months later, on Dec. 15, 2011, Naomi was diagnosed with unilateral retinoblastoma, a rare type of eye cancer to one eye that begins in the retina. Testing was performed on Dec. 22, 2011, and it demonstrated a genetic deletion. Naomi's left eye was ultimately removed surgically, while her right eye remains cancer-free.

Arango, Gherzi and Naomi sued Arnold; the medical corporations with which Arnold was affiliated, California Center for Reproductive Medicine and California Center for Reproductive Sciences; A Perfect Match Inc.; Reprogenetics LLC; Capetanakis; the genetic counselor that A Perfect Match consulted with regarding a potential egg donor, Marcos Gonzales; and Gonzales' company, OriGens Genetic Consulting.

Capetanakis settled out of the case. Reprogenetics, Gonzales and OriGens Genetic Consulting were ultimately dismissed. Thus, the matter continued against Arnold, the medical corporations affiliated with Arnold, and A Perfect Match.

Plaintiffs' counsel contended that the Arnold and A Perfect Match were negligent in the screening of the egg donor before the in vitro fertilization process, which was performed by Arnold. Counsel also contended that Arnold and the medical corporations were negligent for failing to fully inform the parents of genetic testing that could have been performed on the fetus after the eggs were implanted in a surrogate.

Arango and Gherzi claimed that A Perfect Match "never told [them] that they failed to properly prescreen the surrogate." Plaintiffs' counsel also contended that A Perfect Match breached its duty by failing to do "all things necessary to assure that the donor egg was not genetically defective" and by "failing to recognize heritable disease." Counsel also contended that A Perfect Match breached its duty by "negligently conducting tests and/or failing to conduct tests that would determine genetic risks," such as failing to perform an amniocentesis or test the embryo. Plaintiffs' counsel argued that A Perfect Match's actions constituted a breach of contract.

The plaintiffs' experts opined that Arnold violated the standard of care by failing to discuss amniocentesis with Arango and/or Gherzi. The plaintiffs' retained cytogenetics expert further testified that amniocentesis would have demonstrated the spontaneous genetic deletion.

Defense counsel noted that Arango underwent genetic testing on March 1, 2012, and that the egg donor underwent genetic testing on May 16, 2013. Both tests demonstrated no evidence of a deletion. Counsel also noted that the plaintiffs' and defense's experts all agreed that, to a reasonable degree of medical probability, the genetic deletion was not inherited from the egg donor and was the result of an unforeseeable spontaneous genetic mutation.

Based on the test findings, Arnold's counsel denied all allegations, and asserted that Arango and Gherzi provided their informed consent and that Naomi's chromosomal abnormality was a result of a spontaneous genetic mutation. Counsel noted that Arnold documented in detail his discussion with Arango and Gherzi regarding IVF treatment and the preimplantation genetic diagnostic testing on May 18, 2010. The discussion included the fact that embryonic testing does not rule out genetic abnormalities and that chorionic villus sampling and amniocentesis are more definitive studies. Arnold's counsel also noted that Arango and Gherzi signed an informed consent form for the fertilization and transfer of donated eggs to a gestational surrogate on July 27, 2010 and that they both initialed the section of the consent form that stated, "I/We understand that the thoroughness and accuracy of the genetic history depends entirely on the donor, and I/we understand that [California Center for Reproductive Medicine] and [California Center for Reproductive Sciences] can make no guarantee or independent representation of any kind about the genetic history of screening, or any, of the donor. I/We

hereby assume all risks of genetic abnormalities that may occur.” Counsel further noted that on Sept. 19, 2010, Arango signed the preimplantation genetic diagnosis consent form that stated, “PGD does not guarantee the birth of a normal baby,” and stated, “We also understand that undergoing PGD does not eliminate the need for standard prenatal testing such as chorionic villous sampling or amniocentesis.”

Arnold’s counsel argued that Arnold reasonably exercised her judgment in utilizing the egg donor that had been selected by Arango and Gheri. Counsel also argued that the plaintiffs did not have the requisite expert testimony to support the proposition that more comprehensive screening of the egg donor would have made a difference and that Arango and Gheri could not factually support their standard of care criticism of Arnold.

Arnold’s counsel noted that it was undisputed that Arnold could not have ordered or performed amniocentesis during the time in which she was involved in Gheri’s care. However, counsel argued that in addition to Arnold discussing IVF treatment and preimplantation genetic diagnostic testing with Arango and Gheri, Arnold discussed amniocentesis with both the intended parents and the treating obstetrician, Capetanakis. Counsel contended that Arnold telephoned Capetanakis to explain, among other things, the potential need for amniocentesis because of the limitations of preimplantation genetic diagnosis and that Capetanakis, through his deposition testimony, claimed that he would have fully discussed the options for genetic testing with Arango and Gheri and that those options would have included amniocentesis. Arnold’s counsel further maintained that Arango and Gheri elected to not have amniocentesis performed and that even if they had elected to undergo the test, to a reasonable degree of medical probability, it would have been negative.

Arnold’s fertility/infertility expert testified that Arnold was qualified and well trained and that Arnold complied with the standard of care in obtaining the informed consent of the intended parents. The expert also opined that the genetic deletion at issue was the result of a de novo (random) mutation that occurred after the creation of the embryos.

Arnold’s pediatric genetics expert, Dr. John Gargus, opined that Naomi’s condition was the result of a de novo mutation and that routine amniocentesis would not have demonstrated the deletion based on the relatively low resolution of the study and the fact that Naomi is likely genetically mosaic, meaning that she does not have the genetic deletion throughout her cells.

Arnold’s expert genetic counselor, Gina Davis, testified that if Arango and Gheri had consulted with her prior to the time the egg donor was selected, she would have performed an extensive literature review and determined that the developmental condition in the twin had a low probability of being a genetic problem. She also testified that had the family elected to discuss the case with a genetic counselor, they would have been reassured that the baseline risk of birth defects — 3 to 5 percent — was not altered by the

history of microphthalmia and choanal atresia. In addition, Davis opined that Naomi experienced a spontaneous genetic deletion that could not have been detected in advance of conception and that the spontaneous genetic deletion was unrelated to the egg donor.

A Perfect Match’s counsel argued that the corporation did not commit any fraudulent acts or do anything with the intent to harm the plaintiffs. Counsel noted that A Perfect Match was not a medical provider and that it could not conduct or prescribe any medical tests on the donor. Counsel argued that A Perfect Match contracted with Arango and Gheri to assist them in choosing an egg donor and surrogate and that it fulfilled its contractual duties. Counsel also argued that A Perfect Match recommended genetic testing in the contract and that the contract disclosed that it could not guarantee that the donor’s questionnaire provided fully accurate information. Counsel further argued that Arango and Gheri were made aware of the risks and that they still chose to enter into a contract with A Perfect Match and move forward with the egg donation and surrogacy.

A Perfect Match’s counsel contended that, through a series of emails, the corporation disclosed to Arango and Gheri that the donor they were considering had a prior donation in which the twin was born with a malformation and that A Perfect Match provided what it understood to be the twin’s diagnosed condition. Counsel also contended that A Perfect Match contacted a genetic counselor, who stated that it was most likely not a genetic condition, and offered to perform research on the twins’ malformation and whether it was a genetic condition, but that Arango and Gheri did not accept the offer and, instead, selected the donor.

A Perfect Match’s reproductive endocrinology expert testified that the twin born with a malformation did not have a history consistent with a genetic defect and that he was comfortable performing a frozen embryo transfer after the twin was born, using eggs from the donor, based on the lack of an apparent genetic cause for the twin’s defect. The expert also opined that the donor was an excellent historian who did not have a known genetic condition and that following the diagnosis of retinoblastoma in Naomi, testing on the donor, which he ordered and authenticated, established that the donor did not “pass on” the condition to Naomi. The expert further testified that he would be comfortable utilizing the embryos created using the donor’s eggs, even at the time of trial, given the lack of any known genetic problem.

**INJURIES/DAMAGES** *birth defect; cancer; enucleation; eye, loss of*

Naomi was born with genetic abnormalities, which will leave her permanently disabled. Specifically, she was diagnosed with unilateral retinoblastoma, a type of eye cancer, which required the surgical removal of her left eye. Her right eye remains cancer free.

Gheri and Arango sought recovery of medical and related expenses against all defendants, on behalf of Naomi, as well as recovery of Naomi’s loss of earnings and earning capacity, and damages for Naomi’s emotional distress and mental

suffering. The also sought recovery of damages against A Perfect Match under a breach-of-contract theory and tort damages in regard to A Perfect Match’s alleged negligence. Specifically, Gheri and Arango alleged a loss of \$150,000, the surrogacy fee, as a result of the breach of contract.

Arnold’s neuropsychology expert testified about how she had conducted a thorough and comprehensive neuropsychological interview, and a battery of neuropsychological tests on Naomi, all in Spanish. The expert testified that, based on the neuropsychological testing, Naomi’s cognition was within the range of normal and that Naomi is on a natural developmental progression and normal developmental trajectory. She also opined that although Naomi was somewhat behind on the curve, Naomi was still on the curve. As a result of her findings, the expert opined that Naomi will attend and graduate from “a normal” high school and that Naomi will function independently as an adult. In addition, the expert opined that the best thing for Naomi is for her to be told that she will be able to live independently, that all the testing supports the fact that she will be capable of independent living, and that informing Naomi that she will have significant limitations in the future is not only baseless, but detrimental.

Arnold’s pediatric neurology expert testified that, based on the neuropsychology expert’s evaluation, he was confident that Naomi would be able to complete high school and live independently as an adult. The expert pediatric neurologist also opined that Naomi does not have medical or neuropsychological conditions that will require an attendant or any other form of supervision as an adult. He further opined that although Naomi will benefit from some therapeutic support during her childhood, such as physical, speech, occupational, and educational therapy, Naomi was being “over-treated” for her minor deficits at the time of trial.

A Perfect Match’s counsel maintained that the plaintiffs should be limited to contract remedies and should not be able to recover damages for their additional tort claims of negligence and lack of consent based on the economic loss rule, which limits recovery to contractual damages when a contracting party brings suit for breach of contract based purely on economic loss due to disappointed expectations. Counsel argued that the plaintiffs could not demonstrate harm above and beyond a broken contractual promise and, therefore, were limited to recover in contract.

**RESULT** The jury rendered a defense verdict. It found that Arnold was not negligent and that A Perfect Match did not fail to do anything that it was required to do under the contract. However, the jury found that A Perfect Match was negligent, but it also found that the corporation’s negligence was not a substantial factor in causing the plaintiffs harm.

|               |  |
|---------------|--|
| <b>DEMAND</b> | \$18,000,000 (present value; during closing arguments) |
| <b>OFFER</b>  | Waiver of costs (C.C.P. § 998)                         |

**TRIAL DETAILS** Trial Length: 22 days  
Trial Deliberations: 2.5 days  
Jury Composition: 6 male, 6 female

**PLAINTIFF EXPERT(S)** Robin D. Clark, Ph.D., genetics, Riverside, CA  
Carina Grandison, Ph.D., neuropsychology, Oakland, CA  
Sharon K. Kawai, M.D., life care planning, Fullerton, CA

**DEFENSE EXPERT(S)** Gina Davis, M.S., L.C.G.C., genetics, San Francisco, CA  
Victor Fujimoto, M.D., fertility/infertility, San Francisco, CA  
John J. Gargus, M.D., pediatric genetics, Orange, CA  
Perry R. Lubens, M.D., pediatric neurology, Long Beach, CA  
Anne A. Turk Noltz, Ph.D., neuropsychology, Pasadena, CA  
Samuel Wood, M.D., reproductive endocrinology, San Diego, CA

**POST-TRIAL** Plaintiffs’ counsel moved for a new trial based on alleged jury misconduct, but the motion was denied. Plaintiffs’ counsel has filed an appeal.

**EDITOR’S NOTE** This report is based on information that was provided by counsel of A Perfect Match, Arnold, the California Center for Reproductive Medicine and the California Center for Reproductive Sciences. Plaintiffs’ counsel did not respond to the reporter’s phone calls, and the remaining defendants’ counsel were not asked to contribute.

—Priya Idiculla

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