

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

A.D.A. *et al.*, Individuals

Appellants,

vs.

XYTEX CORPORATION, a Georgia

Corporation, XYTEX CRYO

INTERNATIONAL LTD, a Georgia

Corporation; MARY HARTLEY, an

individual, J. TODD SPRADLIN, an

individual; and DOES 1-25, inclusive,

Appellees.

Case No. A25A1544

Appeal Taken From:

2021CV345360

2021CV345363

2021CV345435

2021CV347859

(Fulton County Superior Court)

APPELLANTS' BRIEF

On Appeal from an Order in the Fulton County Superior Court Granting
Defendants'/Appellees' Motion to Dismiss and Final Order of Dismissal

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I. INTRODUCTION

These cases arise from false statements sperm bank Xytex Corporation made about the medical, psychiatric, educational, work, and criminal backgrounds of three sperm donors. Relying on profiles that touted high achievement, good health, clean family medical histories, and absence of genetic disorders, the Plaintiffs – eleven families – purchased the donors’ sperm to conceive their children.

Then came the gut-wrenching diagnoses of genetic disorders among the children and the truth emerged:

- Donor # 3116 had multiple genetic abnormalities, including Charcot-Marie-Tooth Disease, an affliction of the nervous system. Muscle weakness, atrophy, and sensory loss, especially in the feet and legs, typically begins in childhood and worsens over time. This donor had the hallmark visual traits indicating he likely suffered from CMT1. A reasonable medical screening would have disqualified him as a sperm donor.
- Donor # 5444 had hereditary symphalangism, a genetic condition that causes the bones of the fingers and/or toes to fuse and limits range of motion in the affected joints. People suffering from the disease can look forward to difficulty making a fist and loss of fine motor skills. This donor also had the hallmark visible traits showing he probably

had the disease, yet the medical screening did not catch it. Scrutiny of his donor application might also have uncovered his lies and deception.

- Donor # 9623 was a repeat player. From 2000 to 2016, Xytex promoted him as a healthy Ph.D. candidate with an IQ of 160 – genius territory. The falsehoods sold sperm, and he fathered at least 36 children via Xytex. The truth wasn't as rosy as his Xytex profile. Donor # 9623 was a college dropout with a criminal record and disabling schizophrenia, a heritable condition. These fact were easy to find online – if Xytex had checked his medical records, contacted the University of Georgia about his student status, or carried out the rigorous qualification procedures the company boasted about on its website. Donor # 9623 was also the one whose sperm was purchased by the plaintiffs in *Norman v. Xytex Corp.*, 310 Ga. 127 (2020), the case that charted the path for the claims in these lawsuits.

The Trial Court dismissed the four Complaints based on its misreading of *Norman v. Xytex*. As set out below, the *Norman* case affirmed that Georgia law does not recognize claims for damages that depend on the child's life as an injury. But *Norman* also established that not all injuries related to a child's birth are barred. Claims arising from specific impairments caused or exacerbated by

defendants' wrongdoing may proceed. Before the *Norman* case got to the Supreme Court, the lower courts had failed to recognize that some of the damages sought by the Normans did not require a recognition of the child's life as an injury. The Trial Court here committed the same error as the lower court's had in *Norman*. The dismissal must be reversed.

II. STATEMENT OF JURISDICTION

This Court has jurisdiction of this appeal from a final judgment in the Fulton County Superior Court. OCGA § 5-6-34. This civil action is not among the class of cases over which the Supreme Court has exclusive appellate jurisdiction pursuant to the Georgia Constitution. OCGA § 15-3-3.1. The trial court issued a final order on May 20, 2024, granting Defendants' Motions to Dismiss as to all counts in all of the four related cases at issue on this appeal. (V3-399-418.) Plaintiffs filed a combined notice of appeal as to the four cases on May 24, 2024. (V1-1.). The appeal was timely. OCGA § 5-6-38.

III. ENUMERATION OF ERRORS

1. The Trial Court erred in dismissing all causes of action as impermissible wrongful birth claims. Under *Norman v. Xytex*, 310 Ga. 127 (2020) – which the Trial Court and all parties agree is the controlling authority – the presence of impermissible wrongful birth claims in the complaint does not allow dismissal of the entire action. “[C]laims arising from specific impairments caused

or exacerbated by defendants' alleged wrongs may proceed, as may other claims that essentially amount to ordinary consumer fraud." *Id.* at 128.

2. The Trial Court's finding that for purposes of Strict Products Liability the Donors are the "manufacturer" of the sperm and Xytex Corp. is the "product seller" (V6-324-325) raises fact-intensive questions that should not be decided on a motion to dismiss. Xytex is deeply involved in planning and supervising the production process. These matters are mostly outside the present record. The Court should overturn the lower court's findings that Xytex has statutory immunity to the Strict Products Liability claim under O.C.G.A. § 51.1.11.1 without prejudice to Xytex's ability to re-assert the defense after Plaintiffs have an opportunity to conduct discovery.

3. The Trial Court erred in dismissing a claim for breach of the implied warranty based on O.C.G.A. § 11-2-316(5), a provision of the Georgia Uniform Commercial Code that applies to transactions in human blood and tissue. As Judge McBurney of the Fulton County Superior Court ruled in *Norman v. Xytex*, semen is not a type of tissue.

4. The Trial Court erred in dismissing a claim under the False Advertising Act on the ground that the statute does not provide for an award of damages. Plaintiffs seek injunctive relief, for which the Act expressly provides. O.C.G.A. § 10-1-423.

IV. STATEMENT OF THE CASE

A. Procedural History and Preservation of Errors for Review

This appeal arises from the lower court's order granting Defendants Xytex Corporation et al.'s motions to dismiss in four related cases. The claims in these cases arise from Defendants' intentional, reckless, and negligent conduct in

recruiting and screening anonymous sperm donors. Defendants collected, promoted and sold semen for artificial insemination. As alleged in each case, Defendants Xytex Corporation et al. concealed and misrepresented the medical, physical, psychological, educational, and (in one case) criminal background of the three donors whose semen was used to conceive Plaintiffs' children. In reliance on these false statements, Plaintiffs purchased the sperm of these donors and used it to conceive their children.

The four civil actions filed in the Superior Court for Fulton County are:

- *A.D.A. et al v. Xytex Corp.*, Case No. 2021CV345360, filed February 3, 2021 (V1-4);
- *L.S.E. et al. v. Xytex Corp.*, Case No. 2021CV345363, filed February 3, 2021 (V2-1)
- *G.P. v. Xytex Corp.*, Case No. 2021CV345435, filed February 4, 2021 (V5-1); and
- *C.E.A. v. Xytex Corp.*, Case No. 2021CV347859, filed April 5, 2021 (V8-1).

The complaints in each case are substantially similar, varying as to donor-specific facts and the specific injuries to the children. Each of the four complaints alleges causes of action for: (1) Fraud; (2) Negligent Misrepresentation; (3) Products Liability -- Strict Liability; (4) Products Liability – Negligence;

(5) Breach of Express Warranty; (6) Breach of Implied Warranty; (7) Breach of Contract; (8) Negligence; (9) Georgia Fair Business Practices Act; (10) Specific Performance; (11) False Advertising; (12) Promissory Estoppel; and (13) Unjust Enrichment.

Defendants filed motions to dismiss in each case. Plaintiffs filed oppositions. (V1-228; V2-223; V5-224; V7-160). Each of the Enumerated Errors set out above was preserved for review by the filing of written oppositions to the motions and oral arguments heard against the motions at the trial court hearing on May 9, 2024. (V9-1-163).

B. Statement of Facts

1. Allegations Common to All Four Cases

Plaintiffs/Appellees are parents who conceived their children through artificial insemination using semen purchased from Defendants Xytex Corporation, Xytex Cryo International, LTD, J. Todd Spradlin, and Mary Hartley. (V2-1-2 [Compl. ¶¶ 1-5].) Defendants are in the business of selling semen for artificial insemination. (V2-2-3 [Compl. ¶¶ 11-13].) The Plaintiffs sought sperm donors who had been medically verified as suitable for conceiving healthy children. Xytex's website promised that the company was "an industry leader in reproductive services with a commitment to unsurpassed quality controls" and the donors' personal health and family history are carefully screened through a comprehensive

medical process developed by the U.S. Centers for Disease Control and Prevention. (V2-4 [Compl. ¶ 14].)

Plaintiffs reviewed detailed representations Xytex made on its website and elsewhere that the sperm bank medically tested, evaluated, analyzed, vetted, and researched the donors of the semen that it sold. Xytex claimed:

- (a) Fewer than 5% of applicants actually became Xytex sperm donors.
- (b) All applicants went through the same rigorous qualification procedure.
- (c) Applicants were subjected to a thorough initial evaluation, and they were subsequently required to submit to “periodic updates throughout the year.”
- (d) Trained counselors subjected all applicants to extensive interviews that were focused on the applicants’ personality, behavior, and health.
- (e) Applicants underwent a comprehensive physical exam for physical abnormalities and evidence of infectious diseases, and samples of applicants’ semen, urine, and blood were collected for laboratory analysis.
- (f) The Xytex medical director reviewed all of the medical information in a process that took about two months to complete.

(g) Xytex's procedure for qualifying a donor was very intense and arduous, and generated voluminous medical, psychological, genetic and social information about donors and their families.

(h) Xytex exceeded its professional and ethical responsibilities, as the quality of its clinical services were validated by state and national government agencies.

(i) All Xytex donors "are enrolled in or have graduated from some of the country's premier universities and medical schools."

(j) When a donor participated in the semen donation program, Xytex required him to undergo repeated lab testing for infectious diseases.

(k) Every six months, donors were subjected to additional physical examinations, and they were required to update their medical history.

(l) If there were any change in a donor's status, Xytex would update the donor's profile with the new information.

(m) When Xytex "learns new information about a donor (either from the donor or from a recipient of his semen) that is deemed medically significant by the Medical Director, a notice is sent to the inseminating doctor and to any patient who used semen from the donor." (V2-4-5 [Compl. ¶ 15].)

Xytex promised and intended to represent to Plaintiffs and the public that it would exercise the utmost care to screen, investigate, and vet the genetic, medical,

psychological, educational, and family history of its donors. As Xytex stated, it wanted its “clients to make the most informed decision possible when selecting a donor.” Xytex declared it was “about people and creating families,” and purchasers would “receive the best possible match to a Xytex donor.” (V2-5-6 [Compl. ¶ 17].)

During the time the Plaintiffs purchased semen from Xytex, the company marketed the selected donors as a suitable and highly desirable. Defendants published a profile for each of the donors stating that Appellees had carefully screened the donor through a comprehensive medical process. (V2-6 [Compl. ¶ 18].)

After complaints arose, Xytex Corporation failed and refused to comply with its commitment to provide Plaintiffs all of the relevant medical information in its possession as to the sperm donors (including information it acquired after the semen purchases). This failure deprives the families of information that is important to the ongoing medical care of their children. (V1-21; V2-17-19; V5-19-20; V8-13-14.)

2. Allegations Specific to Donor # 3116 (Case Nos. 2021CV345360 and 2021CV345363)

Defendants Xytex et al. stated via their website, written materials, and in statements directly to the Plaintiffs that Donor # 3116 had the following characteristics:

- He had an advanced educational degree.
- He was a cytogeneticist.
- He had an impressive health history.
- He did not have any genetic abnormalities. (V2-6 [Compl. ¶ 19].)

Plaintiffs relied on each of the claims, promises, and representations made by Defendants in deciding to purchase the sperm of Donor # 3116 and to conceive children using this sperm. (V2-6 [Compl. ¶ 20].) These statements were false. The truth about Donor # 3116 was:

- He does not possess any advanced degrees.
- He is not a cytogeneticist, which would require advanced degrees and education.
- He worked as a lab technician.
- He had genetic abnormalities, including but not limited to, Charcot-Marie-Tooth Disease (“CMT1”). (V2-6 [Compl. ¶ 21].)

Photographs of Donor # 3116 available to Defendants before they sold his semen to Plaintiffs and others showed that he had the hallmark visual traits indicating he likely suffered from CMT1, which is a hereditary genetic abnormality. (V-2-7 [Compl. ¶ 22].) Defendants stated the childhood and adult photographs included in Xytex’s profile of Donor # 3116 were accurate and authentic. These photographs and Appellees’ observation of him would have made it apparent to a medical professional conducting a reasonable and careful

examination that his genetic abnormality should disqualify him as a sperm donor. (V2-7 [Compl. ¶ 23.]

Contrary to Defendants' representations that Donor # 3116 possessed advanced degrees and worked as cytogeneticist, he was a lab technician without an advanced degree. They had no basis to make these claims and performed no investigation to confirm them. (V2-7 [Compl. ¶¶ 26-27].) Moreover, Defendants promoted, marketed, and sold sperm of Donor # 3116 without performing genetic testing to rule out CMT1, despite the donor's hallmark presentations for CMT1. Despite substantial evidence to the contrary, Defendants promoted Donor #3116 as having no genetic abnormalities and no family history of genetic abnormalities. If Defendants had conducted a thorough examination, review, and investigation as promised, they would have learned that the claims they made about his medical, educational, and family history were false. (V2-7 [Compl. ¶ 27].)

On February 8, 2019, J. Todd Spradlin, M.D., the Chief Medical and Laboratory Director of Xytex, sent a letter to Plaintiffs via email stating, in part:

Recently, we have learned that Donor 3116 is likely a carrier of a chromosome abnormality, which we feel would have increased risk to the offspring of this donor.”

[W]e feel it is highly likely that donor 3116 does carry this microduplication and could pass it on to other offspring.” (V2-8 [Compl. 30.]

On February 11, 2019, Defendant Spradlin, sent an additional letter to Plaintiffs via email stating, in part:

[W]e have learned that Donor 3116 is a carrier of a chromosome duplication which does have risk implications to other offspring. More specifically, the donor was confirmed to have 1.33 Mb microduplication within the short arm of chromosome 17 at band p12.

The donor's specific duplication includes 4 known genes (HS3ST3B1, TEKT2, PMP22, and COX10). Of these genes, the only one known to be clinically relevant is PMP22. Duplications of the PMP22 gene, located in this region, have been associated with Charcot-Marie-Tooth disease type 1a (CMT1a), a neurological condition characterized by distal muscle weakness and atrophy, sensory loss, and slow nerve conduction velocity. (V2-8 [Compl. ¶ 31].)

Seven of plaintiffs' children have since been diagnosed with genetic abnormalities, including those associated with Charcot-Marie-Tooth disease.

- (a) A.A.G., the child of Plaintiffs A.D.A. and G.G., has undergone genetic testing and is positive for CMT1, requiring extensive treatment.
- (b) L.K., the child of Plaintiffs S.K. and E.K., has undergone genetic testing and is positive for CMT1 requiring extensive treatment.
- (c) Z.J.R., the child of Plaintiffs J.M.R. and J.R.R., has undergone genetic testing and has the genetic mutation for CMT1.
- (d) O.K., the child of Plaintiffs L.S.F. and K.L.K., has undergone genetic testing and is positive for CMT1 requiring extensive treatment. (Compl. ¶ 34.)
- (e) M.E., the child of Plaintiffs L.S.E. and K.E., has undergone genetic testing and is positive for the PMP22 duplication associated with CMT1.

(f) E.A.C., the child of Plaintiffs L.A. and A.M.C., has undergone genetic testing and is positive for CMT1 requiring extensive treatment.

(g) J.M.J., the child of Plaintiff A.D.H.J., has undergone genetic testing and is positive for the PMP22 duplication associated with CMT1. (V2-9 [Compl. ¶ 32]; V1-12-13 [Compl. ¶ 34].)

Two other families (S.L.H./A.H. and M.R.H./S.J.H.) created one or more embryos each using the sperm of Donor # 3116. Those embryos have not yet undergone genetic testing, and these families will be required to expend funds to evaluate their embryos. (V2-9 [Compl. ¶ 32].)

Three other children of the Plaintiffs have not yet been thoroughly and completely evaluated for genetic abnormalities, disorders, and diseases. These children are (1) H.M.S.P., the child of M.J.S. and M.J.P; (2) J.D., the child of M.M.H. and R.D; and (3) S.A.H, the child of P.J.M. (V1-12 [Compl. ¶ 34].) Genetic abnormalities may yet be found in these children. At a minimum, Xytex's acts and omissions requires the parents to expend money on medical and genetic evaluation. (V1-12 [Compl. ¶ 34].)

3. Allegations Specific to Donor # 5444 (Case No. 2021CV347859)

During the time the Plaintiff C.E.A. purchased semen from Xytex, the company promoted Donor # 5444 as a suitable and highly desirable donor. (V8-5 [Compl. ¶ 20].) Defendants published a profile for Donor # 5444 stating they had

carefully screened him through a comprehensive medical process. Defendants stated via their website, other materials, and directly to C.E.A. that Donor # 5444 had the following characteristics:

- He had an impressive health history.
- He did not have any genetic abnormalities. (V8-5 [Compl. ¶ 15].)

Plaintiff relied on these claims, promises, and representations in deciding to purchase the sperm of Donor # 5444 and to conceive a child using this sperm. (V8-5 [Compl. ¶ 16].) These statements were false. The truth about Donor # 5444 was that he had genetic abnormalities and conditions and suffered from symphalangism. (V8-5 [Compl. ¶ 17].)

Photographs of Donor # 5444 available to Defendants before they sold Donor # 5444's semen to Plaintiff and others showed that he had the hallmark visible traits that would show that he likely suffered from symphalangism, which is a hereditary genetic abnormality. (V8-5 [Compl. ¶ 18].) Defendants stated that the childhood and adult photographs of Donor #5444 that Xytex possessed and included in the profile were accurate and authentic. These photographs and the opportunity to observe him during the process of qualifying him as a donor made his genetic abnormality apparent to someone conducting a reasonably careful review to qualify a sperm donor. (V8-5 [Compl. ¶ 19].)

Moreover, Defendants promoted, marketed, and sold sperm of Donor # 5444 without performing genetic testing to rule out symphalangism, despite the donor's hallmark presentations for that condition. Despite substantial evidence to the contrary, Defendants promoted Donor #5444 as having no genetic abnormalities and no family history of genetic abnormalities. If Defendants had conducted a thorough examination, review, and investigation as they promised, they would have learned that the claims they made about his medical, educational, and family history were false. (V8-6 [Compl. ¶ 21].)

On April 5, 2019, J. Todd Spradlin, M.D., the Chief Medical and Laboratory Director of Xytex, sent a letter to Plaintiff via email stating, in part:

Recently, we have learned that Donor 5444 has a condition called *sympalangism*, which may be inherited.”

Symphalangism is a rare congenital difference characterized by stiffness of the digits and lack of motion in the affected finger(s). While symphalangism typically affects the fingers, other joints can also be affected and hearing loss due to fusion of the bones in the middle ear is also possible.

[W]hen discussing the symptoms of the condition, the donor did confirm that he, his father, and his paternal grandfather, all have some stiffness of the hands and digits.” (V8-6 [Compl. ¶ 24].)

C.E.A.'s child has been diagnosed with symphalangism. (V8-6 [Compl. ¶ 25].)

4. Allegations Specific to Donor # 9623
(Case No. 2021CV345435)

From 2000 to 2016, Xytex marketed Donor # 9623 as a highly desirable donor. This promotion worked as Donor # 9623 became one of Xytex's top sellers. As a result, Donor # 9623 fathered at least 36 offspring via sperm sold by Xytex. (V5-7 [Compl. ¶ 19].) Donor # 9623's online profile stated, among other things, that (1) he had a Bachelor's Degree, a Master's Degree, and he was working towards his Ph.D. in Artificial Intelligence/Neuroscience Engineering; (2) he had an IQ of 160; (3) he had a clean mental health history; and (4) he had no criminal background. (V5-7-8 [Compl. ¶ 20].)

Plaintiff purchased Donor # 9623's sperm based in large part on the "rigorous qualification procedures" advertised on Defendants' website and on the donor's supposedly sterling credentials and traits. (V5-10-11 [Compl. ¶¶ 26-27].)

The truth was Xytex did very little to verify or corroborate the claims it made about Donor # 9623. In 2000, Donor #9623 filled out a basic questionnaire at Xytex's office. No one from Xytex asked him about his mental health, criminal history, or sought information that could have verified his questionnaire answers. Xytex did not ask him for medical records or to sign a release so that Xytex could obtain these records. The records would have shown that Donor #9623 had been

hospitalized twice for mental health issues and was taking powerful anti-psychotic drugs such as Zyprexa and Depakote. (V5-8-9 [Compl ¶ 22].)

Defendant Mary Hartley interviewed Donor #9623 and coached him on how to fill out the questionnaire. Donor #9623 said he thought his IQ was 130. She told him sperm of intelligent donors with graduate degrees sold better and made clear he would earn more money if he inflated his IQ and education. Mary Hartley told him his IQ was probably 160, i.e. exceptionally gifted or genius. After encouraging his lies, Xytex did not contact the University of Georgia to verify his claimed B.S. and Master's Degree and enrollment in a Ph.D. program in Artificial Intelligence. Xytex and its employees did not even ask to see Donor #9623's driver's license or identification. (V5-6 [Compl. ¶ 17]; V5-9 [Compl.¶ 22].)

Defendants could have conducted a simple internet Google search and discovered through publicly available documents that Donor #9623 was a diagnosed Schizophrenic and a convicted felon with no college degree. (V5-6 [Compl. ¶ 16].) This simple search would have revealed that much of what Xytex said about Donor # 9623 was blatantly false. Contrary to the claims he was a healthy Ph.D. candidate with a 160 IQ, this donor was a convicted burglar who had been diagnosed with schizophrenia, a hereditary condition. (V5-6 [Compl. ¶ 17].) Instead of the impressive academic credentials asserted by Defendants, Donor # 9623 had dropped out of college and had no degree. (V5-8-9 [Compl. ¶ 22].)

During the period that Donor #9623 was regularly selling sperm to Xytex, he was hospitalized for mental health issues and arrested on numerous occasions. Publicly available documents established that, before Xytex sold Donor #9623's sperm to Plaintiff, he had been arrested for burglary, trespassing, DUI, and disorderly conduct. He had also been hospitalized several times for suicidal outbursts and psychotic episodes. In 2002, Donor #9623 was placed on full Social Security Disability for his schizophrenia. (V5-7 [Compl. ¶ 18].)

Even after parents began suing Xytex for fraud and negligence in the sale of Donor # 9623's sperm, Xytex continued to withhold and misrepresent information relevant to the health of children conceived with his sperm. After the first lawsuit was filed in 2014, Donor #9623 produced forged college diplomas, and Xytex accepted the fake documents without question. *Norman v. Xytex, supra*, 310 Ga. at 129. Xytex continued to sell and promote sperm from Donor # 9623 after Donor #9623's troubling psychiatric, educational, and criminal history came to light.

V. ARGUMENT

A. The Trial Court Erred in Finding the Supreme Court's Decision in *Norman v. Xytex* Barred the Complaints.

As the parties and the Trial Court agreed, the Supreme Court decision in *Norman v. Xytex* is the controlling law. Just as in *Norman*, the Complaints in this appeal allege that Xytex failed to adequately screen for heritable diseases and

made false statements about the health of its donors.¹ The *Norman* decision stands for two main points:

First, the Court affirmed the long-standing rule that wrongful birth claims are not allowed under Georgia law. “Georgia law does not recognize claims for damages that depend on [the child’s] life as an injury.” *Norman*, at 133.

Second, despite the rule against wrongful birth claims, “there can be injuries that predate a child’s birth and are not premised on the child’s life as an injury.” *Id.* at 134. Thus, “claims arising from specific impairments caused or exacerbated by defendants’ alleged wrongs may proceed, as may other claims that essentially amount to ordinary consumer fraud.” *Id.* at 128. For that reason, the Court concluded the lower courts erred by “fail[ing] to recognize that some of the damages sought by the Normans would not require a recognition of [the child’s] life as an injury.” *Id.* at 138. As shown below, the Trial Court here committed the same error as the lower court’s in *Norman*.

The Trial Court relied on the following language in *Norman* to dismiss the Complaints:

One of the many allegations the Normans made is that they would not have purchased sperm from Donor #9623 had Xytex revealed the true

¹ Moreover, the *G.P. v. Xytex Corp.* action (Case No. 2021CV345435) was brought by a parent who conceived a child from Donor # 9623 – the same donor used by the Normans. The factual allegations of the *G.P.* complaint are nearly identical to those in *Norman*.

facts about the donor. This is a classic wrongful birth claim because the necessary and direct result of not buying Donor #9623's sperm is that A. A. would not exist. Georgia law does not allow such a claim, and so it is barred.

Id. at 135 (quoted in the Trial Court Order at pp. 16-17 [V3-414-415].)

The Trial Court dismissed the Complaints based on the allegation – nearly identical to one in the *Norman* complaint – that “[h]ad Plaintiffs known the true facts, Plaintiffs would not have purchased the sperm of Donor[s] #3116[, #5444, and #9623] from Defendants.” (V3-414.) The Trial Court’s reasoning went off the rails by stopping there. The lower court failed to consider and apply the next three pages of the *Norman* decision.

Closely following the passage quoted above, on pages 136 to 138, the *Norman* Court goes on to hold the lower courts should not have dismissed the entire complaint. Before delving into specifics, the Supreme Court explained:

But those principles [that a child’s life is not a cognizable injury] do not create blanket immunity for reproductive service providers and do not preclude all claims relating to the birth of a child. Damages may be recoverable as long as plaintiffs sufficiently prove that the Defendants caused the alleged injuries (other than the life of A. A.).

Norman, at 136.

The Complaints in this appeal, just as in *Norman*, allege: (1) Plaintiffs “relied on Xytex’s representations that it screened the medical and mental health

history of its donors”;² and (2) “Xytex represented that it would notify patients . . . if the company received any ‘medically significant’ information about” their donors.³ *See Norman*, at 136.

The Supreme Court concluded these allegations, at least in the context of a motion to dismiss, could state a permissible claim:

It is possible that the Normans could introduce evidence that Xytex knew well before 2014 about “medically significant” information regarding Donor #9623 that had not been communicated to the Normans. . . . [T]here is a possibility that the Normans were harmed by their reliance on Xytex’s representations that (1) it had screened Donor #9623’s medical history when he first started donating his sperm in 2000, or (2) it would update patients with “medically significant” information regarding donors. [Citation] . . . [W]e must accept at this procedural stage that there may exist some evidence that the Normans relied on Xytex’s representations in failing to obtain a diagnosis or treatment sooner for some of A. A.’s conditions. Such delays may have exacerbated pain and other symptoms suffered by A. A.; these injuries could have been avoided or mitigated had the Normans known the truth about Donor #9623’s medical history; and the Normans may have incurred additional expenses as a result of not being told the truth sooner.

² Nearly identical allegations regarding reliance are found throughout the record on this appeal. *See* V2-6 (¶ 20); V2-11 (¶ 39); V2-12 (¶ 44); V5-8(¶ 21); V5-10 (¶ 26); V5-13 (¶ 38); V8-5 (¶ 16); V8-8 (¶ 33); V1-10 (¶ 22); and V1-15 (¶ 41).

³ The allegations that Xytex was supposed to notify Plaintiffs of significant medical information about donors are found in the record at V2-5 (¶ 15(m)); V5-5 (¶ 11(m)); V8-4 (¶ 11(m)); and V1-8 (¶ 17(m)).

Norman, at 136-37.

As another example of permissible relief, the Supreme Court posited Plaintiffs “may be able to recover damages for the difference in price between the cost of the sperm they received and the fair market value of the sperm that Xytex told them they were getting. Xytex represented that Donor #9623 was one of its ‘best’ donors, but the allegations regarding his background show otherwise.” *Id.* at 137.

Finally, like Plaintiffs in this appeal, “the Normans brought a cause of action under the Fair Business Practices Act, OCGA § 10-1-390 et seq. (‘FBPA’), claiming that Xytex misrepresented the quality of its goods and services. The FBPA allows for recovery of injuries that do not depend on recognizing life as an injury, and are therefore not barred by [the policy against wrongful birth claims as set out in] *Graves* and *Abelson*.” *Id.* at 137.

At a minimum, the Normans may have paid more for Donor #9623’s sperm than it was really worth. And if the Normans can prove that they were injured by Xytex’s deceptive conduct, the FBPA provides equitable relief to enjoin Xytex from continuing such deceptive practices. And, based on the allegation that one of Xytex’s employee’s encouraged, if not aided, Donor #9623 to falsify his background, the Normans may also be entitled to punitive damages. See OCGA § 10-1-399 (a).

Id. at 138.

The *Norman* decision is not a model of clarity. That may have contributed to the Trial Court’s misreading of the case. However, the case can (and therefore should) be read to give meaning to all of its parts:

First, as stated in *Norman* and quoted by the Trial Court, the allegation that plaintiffs “would not have purchased sperm from Donor #9623 had Xytex revealed the true facts about the donor” is an impermissible wrongful birth claim because it frames the injury as the birth of plaintiff’s child.

Second, despite the allegation that plaintiffs would not have purchased the sperm if told the truth, other claims for relief based on “specific impairments caused or exacerbated by defendants’ alleged wrongs may proceed.” *Id.* at 128. The permitted claims include:

- Compensatory and punitive damages for “ordinary consumer fraud” (*Id.* at 128);⁴
- Injury from reliance “on Xytex’s representations that it screened the medical and mental health history of its donors.” *Id.* at 136.
- Injury caused by Xytex’s delay or failure to provide families “medically significant information about” their donors. (*Id.* at 136.)
- “[D]amages for the difference in price between the cost of the sperm they received and the fair market value of the sperm that

⁴ See *Jim Walter Corp. v. Ward*, 150 Ga. App. 484, 491 (1979) (in appeal from a trial verdict, affirming award of compensatory and punitive damages in a consumer fraud case [reversed on other grounds, *Jim Walter Corp. v. Ward*, 245 Ga. 355 (1980)].)

Xytex told them they were getting.” (*Id.* at 137.)

- Compensatory and punitive damages and an injunction against Xytex’s unfair and deceptive business practices under the Fair Business Practices Act. (*Id.* at 138.)

The standard for granting a motion to dismiss “is a demanding one.” *Id.* at 130. Unless the Court can find “with certainty” that plaintiff “would not be entitled to relief under any state of provable facts” within the framework of the complaint, the motion must be denied. *Id.* at 131. The Supreme Court left it to the lower courts to parse the *Norman* complaint based on the nature of the damages and other relief sought, but the Court’s instruction was clear: at least “*some* of the damages sought by the Normans would not require a recognition of [the child’s] life as an injury.” *Id.* at 138 (emphasis added). For that reason, the Court must overturn the dismissal.

B. The Trial Court Erred in Finding Alternative Grounds for Dismissal of Counts Three, Six, and Eleven.

- 1. As to Count Three (Strict Products Liability, statutory immunity for sperm banks is a novel question that should not be decided on this record.**

The Trial Court held as a matter of first impression: “The manufacturer of the sperm would be [the] Donors.” (V6-324-325.) The lower court then concluded

Xytex was a “product seller” and enjoyed statutory immunity from strict products liability under O.C.G.A. § 51.1.11.1.⁵

“[F]or strict liability purposes, manufacturers are those entities that have an active role in the production, design, or assembly of products.” *Buchan v. Lawrence Metal Prods.*, 270 Ga. App. 517, 520 (2004). “A product seller is a person who, inter alia, sells, distributes, or assembles a product pursuant to a manufacturer’s plan, intention, design, specifications, or formulation.” *Id.* at 519-20.

The assignment of these roles can range from clearcut to fact intensive. The Court in *Buchan, supra*, reversed summary judgment granted to the defendant under the statute because “[i]t is not clear from the evidence presented that Lawrence Metal’s role in designing and building the posts, and assembling the

⁵ O.C.G.A. § 51.11.1 states in relevant part:

(a) As used in this Code section, the term “product seller” means a person who, in the course of a business conducted for the purpose leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer’s plan, intention, design, specifications, or formulation; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce. This definition does not include a manufacturer which, because of certain activities, may additionally be included within all or a portion of the definition of a product seller.

(b) *For purposes of a product liability action based in whole or in part on the doctrine of strict liability in tort, a product seller is not a manufacturer as provided in Code Section 51-1-11 and is not liable as such.* (Emphasis added)

TensabARRIER system renders it a manufacturer or a mere product seller within the meaning of the strict liability statute. . . . [A] defendant can be both a manufacturer and a seller simultaneously; in such a case, it is not entitled to the protections afforded a mere product seller.” *Id.*

Sperm donation is not the typical cottage industry in which an individual may create, design, and produce a product. Nor is the sperm bank a typical middle-person reseller. Xytex and its employees do more than just recruit the donors. They are deeply involved in planning and supervising the production process. These matters are mostly outside the present record, but Counsel is informed and believes that Xytex:

- Establishes all criteria and standards for selection of donors;
- Controls the location, time, and method of collecting the sperm to assure sterile collections, improve quality, and preserve the product;
- Reserves the right to reject any donation based on its unilateral determination of its quality;
- Controls the frequency of donation to improve the quality and reduce the risk of unwitting incest; and
- Unilaterally sets the compensation for donors.

There are also questions regarding how Xytex enhances, alters, processes, and preserves the semen obtained from donors. At oral argument in the Trial Court, counsel for Appellees conceded Xytex uses a process called “washing” with some semen. They market and sell washed semen as an upgraded product:

[MR. LAVENDER] . . . Washed sperm is – and this is some scientific process that I’m not exactly familiar with, but it takes a full sample of sperm and kind of condenses it down to just the sperm cells and not the fluids that are surrounding the sperm cells. So it is still the donor’s cellular DNA sperm. It’s just what I guess you would call a more concentrated dose of it. (V9-50:7-13.)

The present record is silent as to whether Plaintiffs purchased washed or raw semen and other relevant questions. Plaintiffs should have the chance to conduct discovery to determine whether Xytex meets the definition of a manufacturer for some or all of the sperm at issue in this case.

Turning the donor into the manufacturer for liability purposes is also problematic from a policy perspective. Under Georgia law, a manufacturer is strictly liable for failing to warn consumers of dangers arising from the use of its product. *Deloach v. Rovema Corp.*, 241 Ga. App. 802, 804 (2000). Yet Xytex and other sperm banks are in a better position to discover dangers than the young men selling sperm to supplement their income. How would the donor/manufacturer even identify the consumer? And vice versa, how could an injured consumer seek redress from the donor/manufacturer? In the Xytex system, each is anonymous to the other.

The Court should overturn the lower court’s findings regarding statutory immunity without prejudice to Xytex’s ability to re-assert the defense in a motion after Plaintiffs have the opportunity to conduct discovery.

2. As to Count Six, the Trial Court erred in dismissing the claim for breach of the implied warranty based on a UCC subdivision that applies to transactions in human blood and tissue. Semen is not a type of tissue.

The Georgia Uniform Commercial Code states that implied warranties do not arise from or apply to transactions involving “whole human blood, blood plasma, blood products, blood derivatives, or other human tissue or organs for the purpose of injecting, transfusing, incorporating, or transplanting any of them into the human body.” O.C.G.A. § 11-2-316(5). The Trial Court concluded that “human tissue” includes semen and therefore sellers of semen are not bound by implied warranties.

In support of the proposition that “tissue” includes “semen,” the court cites *Caldwell v. State*, 260 Ga. 278, 283 (1990):

The DNA is chemically extracted from the submitted evidentiary sample— *semen found in the victim*, blood, hair, or *any other tissue* thought to originate from the perpetrator of the crime—and purified.

The language quoted from *Caldwell*, however, is part of a list of the steps involved in a crime lab process. Semen, blood, hair, and tissue are lumped together because each is type of evidence from crime scenes commonly used to identify a suspect through DNA fingerprinting. It is leap of logic from this list to infer that forensic scientists consider semen a type of human tissue.

The judge who presided over *Norman v. Xytex* in the Fulton County Superior Court confronted the same question – is semen a tissue? – when construing both Georgia’s Blood Shield Statute, O.C.G.A. § 51-1-28, and the UCC implied warranty provision. As used in both statutes, he concluded semen was *not* tissue:

The statute on its face explicitly exempts blood and “blood products” from strict liability – but not any other bodily fluids. Xytex seeks refuge in the statute’s term “tissue,” arguing that that term should be read to encompass semen. For authority for that proposition Xytex offers up only a Federal District Court decision from Pennsylvania that asserts ipse dixit that “[s]emen is not a blood derivative; it is considered a human tissue.” *Donovan v. Idant Labs.*, 625 F.Supp.2d 256, 271 (E.D. Pa. 2009). Beyond that mere say-so, *Donovan* provides no statutory, medical, or biological underpinning to support such a claim.

This Court respectfully disagrees with the court in *Donovan*. Tissue is generally defined as “an aggregate of cells usually of a particular kind together with their intercellular substance that form one of the structural materials of a plant or an animal.” *Merriam-Webster Online Dictionary*. Tissue includes portions of the body such as skin, cartilage, and tendons – masses of cells that, through their combination, form a more complex whole. Sperm, on the other hand, are individual cells that combine, if ever, with only one other cell: a human egg. And semen is medically defined as a “secretion,” not a tissue. It is not a “structural material” like skin and bone out of which a human is built. The Court finds that Georgia’s blood shield statute offers no safe harbor to Xytex as an alternative basis to dismiss Plaintiffs’ strict liability product liability claim. Defendants’ motion is DENIED on this ground. (V8-73-75.)

The Court should adopt Judge McBurney’s well-reasoned decision and overturn the order of the lower court.

3. As to Count Eleven, the Trial Court Is Correct that the False Advertising Act Allows Plaintiffs to Seek Injunctive Relief – Which Is What the Complaints Seek.

This last section may have been unintentional error. The Trial Court correctly sets out that injunction relief is available under the False Advertising Act:

Any person, firm, or corporation offering through advertising merchandise, commodities, or services for sale in violation of Code Section 10-1-420, 10-1-421, or 10-1-422 may be enjoined from such advertising by the superior court having jurisdiction, upon the suit of any person aggrieved or about to be aggrieved thereby.

O.C.G.A. § 10-1-423 (emphasis added)

The Trial Court erred, however, in dismissing this cause of action on the grounds that “[t]here are no provisions in O.C.G.A. § 10-1-420 et seq. providing for damages.” (V3-417.) Regarding the relief sought, the Eleventh Cause of Action pleads:

Plaintiffs were injured by these deceptive advertising practices, and now seek relief for their injuries.

Defendants continue to make false and misleading statements about Donor [#3116, #5444, or #9623]. to promote the sale of his semen, and such false advertising should be enjoined.

(V2-19; V8-15; V5-21; V1-22.)

Because the False Advertising Act expressly provides for the injunctive relief sought in the Complaints, there was no basis for the dismissal.

VI. CONCLUSION

For the foregoing reasons, the Court should overturn the Trial Court's order in its entirety and remand the case for further proceedings.

This submission does not exceed the word count limit imposed by Rule 24.

Dated: May 19, 2025

Respectfully submitted,

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IN THE COURT OF APPEALS
STATE OF GEORGIA

A.D.A., et al.,

Appellants,

vs.

Case No. A25A1544

XYTEX CORPORATION; XYTEX CRYO
INTERNATIONAL LTD; MARY HARTLEY;
J. TODD SPRADLIN; DOES 1-25

Appellees.

CERTIFICATE OF SERVICE

Pursuant to Court of Appeals Rule 6, I hereby certify that based on a prior agreement with counsel for Appellees that service of a .pdf copy of this filing via email will be deemed sufficient service. I hereby certify that on this day, I served Appellees a true and correct copy of the within *Appellants' Brief* by email and via Statutory Electronic Service by sending the aforementioned to the following email addresses.

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