IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

RICKY ANDERSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N10C-08-177 JRS
	)	
JEFFREY RUSSELL, M.D., DELAWARE INSTITUTE FOR REPRODUCTIVE MEDICINE, P.A., CHRISTIANA HEALTH SERVICES, INC., and CLASSIE ANDERSON-HARRISON,	)	
	)	
Defendants.	)	

Date Submitted: March 15, 2012
Date Decided: April 18, 2012

Upon Consideration of Defendants, Jeffrey Russell, M.D. and Delaware Institute for Reproductive Medicine, P.A.'s, Motion for Summary Judgment.
GRANTED.

Shawn Dougherty, Esquire, WEIK NITSCHE & DOUGHERTY, Wilmington, Delaware. Attorney for Plaintiff.

Dennis D. Ferri, Esquire, Allyson Britton DiRocco, Esquire, MORRIS JAMES LLP, Wilmington, Delaware. Attorneys for Defendants, Jeffrey Russell, M.D. and Delaware Institute for Reproductive Medicine, P.A.

SLIGHTS, J.

I.

Plaintiff, Ricky Anderson ("Mr. Anderson"), has brought suit against defendants, Jeffrey Russell, M.D. ("Dr. Russell") and his medical practice, Delaware Institute for Reproductive Medicine ("Delaware Institute") (collectively "defendants"), seeking damages for economic and emotional damages he allegedly sustained after Dr. Russell performed an insemination procedure upon Mr. Anderson's ex-girlfriend, Classie Anderson-Harrison ("Ms. Harrison"), with a sperm sample taken from Mr. Anderson and used in the procedure without his consent. Unbeknownst to Mr. Anderson, Ms. Harrison became pregnant. It has now been confirmed through paternity testing that Mr. Anderson is the father of the healthy child that Ms. Harrison delivered. Defendants have moved for summary judgment on the grounds that: (1) they owed no legal duty to Mr. Anderson; and (2) Mr. Anderson's claims are barred by the applicable statute of limitations. For the reasons stated below, defendants' motion for summary judgment must be **GRANTED** on both grounds.[1]

II.

Mr. Anderson and Ms. Harrison were involved in a romantic relationship that

[1] Defendants' Motion In Limine to Exclude Dr. Frishnan as an Expert at Trial, D.I. 41127375, filed simultaneously with the motion *sub judice*, has been rendered moot by this decision.

began in March of 2007 and ended around January of 2008. They were never married nor did they reside together.

During November of 2007, Ms. Harrison intentionally deceived Mr. Anderson into believing that she was pregnant and that he was the father, neither of which was true. Ms. Harrison advised Mr. Anderson that she had cystic fibrosis and that she needed a sample of his sperm for genetic testing to determine if he was a carrier of the disease. According to Mr. Anderson, on November 26, 2007, he and Ms. Harrison both drove to Christiana Hospital so that Mr. Anderson could provide a sample of his sperm for testing. When they arrived at Christiana Hospital, Mr. Anderson went into the bathroom alone and returned with a sperm sample in a medical container Ms. Harrison had given him. Mr. Anderson did not speak with anyone at the hospital and gave the sample directly to Ms. Harrison. She, in turn, told him that she was going to take the sample to the appropriate medical office within the hospital for testing.

Thereafter, according to Mr. Anderson, he received a telephone call from an unidentified woman who advised him that she was calling on behalf of the doctor that was to test his sperm sample. She informed Mr. Anderson that the first sample he had provided could not be used because there was blood in the sample and that he needed to provide a second sample for testing. According to Mr. Anderson, he later learned

that the telephone call was a ruse and that the unidentified woman on the phone was actually a friend of Ms. Harrison. Shortly after the telephone call from the "doctor's office," Ms. Harrison personally requested a second sperm sample from Mr. Anderson. She repeated the story that Mr. Anderson's first sample contained blood and, therefore, a second sample was required.

On February 8, 2008, Mr. Anderson and Ms. Harrison drove to Christiana Hospital for a second time so that Mr. Anderson could provide a second sperm sample. Ms. Harrison indicated that she would take care of having the sample tested because Mr. Anderson did not have health insurance. Mr. Anderson did not meet with anyone at the hospital or sign any consent forms. Instead, he went into the men's bathroom in the lobby of Dr. Russell's office, provided a sperm sample in a container and then gave it to Ms. Harrison who was waiting for him in the lobby. Ms. Harrison then delivered the sample to Dr. Russell's office while Mr. Anderson waited in the lobby.

Later that same day, Ms. Harrison underwent an intrauterine insemination procedure performed by Dr. Russell using the sperm sample supplied by Mr. Anderson. Dr. Russell did not meet with Mr. Anderson at any point prior to the insemination. The procedure was successful and Ms. Harrison became pregnant.

Mr. Anderson met with Dr. Russell, at his office, on August 8, 2008.[2] During this meeting, Mr. Anderson took notes in a notebook that he brought with him. He explained the notes during his deposition:

> The first entry is when I actually first met with Dr. Russell. I went in there understanding what my sperm was used for.
>
> [. . .]
>
> Later he explained to me how he collected three or four samples from Classie, and that's what I wrote down. Because I do remember giving two. So it definitely stood out that he mentioned three or four which sparked something - - that's why I wrote other people involved, because I know I only gave two . . . .
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> Next entry, he thought that we were married. So I wrote down that the doctor thought that we were married, and I know that we were not. And I wrote down that this is my first time meeting him. And then later on in the discussion, he finally came out and said on 2/8 that he performed an IUI, which I had no idea what it was about. That's why I wrote it down, because I thought it was just for testing my sperm because she was already pregnant.
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> So then he says that - - he explained a little later that he kind of knew something was up with Classie's case because he said he rejected her prior or something like that . . . . He said he had something wrong with her situation, and he like discontinued her service of coming in there for some reason. Maybe was giving him wrong information or whatever.[3]

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[2] There is a discrepancy in the record as to whether Dr. Russell and Mr. Anderson first met on August 8, 2008, or August 15, 2008, the ultimate resolution of which has no impact on this decision.

[3] Transcript of the Testimony of Ricky Anderson ("Anderson Dep."), C.A. No. N10C-08-177 JRS (June 27, 2011) at 29:8-31:2.

Mr. Anderson alleges that he was first made aware of Ms. Harrison's insemination procedure on August 8, 2008. It was at this time that he realized his sperm had been used medically to impregnate Ms. Harrison without his consent.

Dr. Russell testified at his deposition that he did not routinely require that couples who were sexually active sign consent forms prior to performing an insemination procedure.[4] For couples who were not sexually active, however, Dr. Russell required both donor and patient to give written consent. As Dr. Russell explained:

> What we do is we ask a couple that's not sexually active to get a contract, okay. We ask them to go see a lawyer, to fill out a contract, since they are not sexually active and trying to conceive on their own. So when a couple are not together sexually, they must come in with a contract from a lawyer outlining the ramifications of what a pregnancy means for both of them, the implications, and the stipulations that will occur if a pregnancy does occur.[5]

It does not appear that Dr. Russell considered Mr. Anderson to be his patient during the time frame that Ms. Harrison was trying to get pregnant, including at the time of the insemination procedure. He did, however, believe that a doctor-patient relationship was formed in August of 2008 when he first met with Mr. Anderson. His

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[4] It appears, based on the record, that Dr. Russell obtained the first sample in November of 2007, during which time Mr. Anderson and Ms. Harrison were still considered a couple and sexually active.

[5] Deposition of Jeffrey B. Russell, M.D. ("Russell Dep."), C.A. No. N10C-08-177 JRS (Oct. 3, 2011) at 14:14-22.

deposition testimony in this regard, however, was less than clear:

> Q. Okay. How about at any time, do you believe that Ricky Anderson was ever your patient at any time?
>
> A. Yes. Ricky Anderson came to see me on August 15, 2008, or August - - let me get the exact date of that he came to visit me in the office. And that was the first time he came into see me as a patient.
>
> Q. Okay. So up until August 15th or 16th of 2008, you never believed that Ricky Anderson was your patient. Is that fair to say?
>
> A. I think that's a pretty difficult question to answer based on that my patient that came to see me was Classie Anderson, and her sexually active partner that she had was Ricky Anderson trying to conceive. So Ricky Anderson was the partner of Classie Anderson, and Classie Anderson was trying to conceive in the office and out of the office with Ricky Anderson. So I'm not sure I can answer that question.
>
> Q. So you don't know whether he was or was not a patient of yours even before August 15th of 2008? Is that a fair assessment, that you don't know?
>
> A. No, I'm saying he was not my patient that came to see me at that time.
>
> Q. Okay. But was he your patient for any other reason?
>
> A. I'm going to say - - I'm going to say no.[6]

Dr. Russell went on to testify that if Mr. Anderson had come to see him at any time prior to August 15, 2008, to discuss the insemination procedure, then he would have

[6] *Id*. at 31:1-32:5 (objections omitted).

considered Mr. Anderson to be his patient at that time.[7]

According to Dr. Russell, he met with Mr. Anderson on August 15, 2008, at which time he believed that a doctor-patient relationship had been formed. Indeed, Mr. Anderson was assigned a "patient number" by Dr. Russell's office. The purpose of the meeting was to discuss the "lab tests" Mr. Anderson believed Dr. Russell had performed on his sperm samples.

Ms. Harrison gave birth to Mr. Anderson's child on October 23, 2008. On November 5, 2008, the Family Court was asked to determine whether Mr. Anderson had any responsibilities to the child as a legal parent or guardian. The case was appealed to the Delaware Supreme Court which ultimately held that Mr. Anderson was not legally obligated to support the child.

Not surprisingly, Ms. Harrison's version of events differs substantially from Mr. Anderson's. According to Ms. Harrison, Mr. Anderson was well aware of the fact that he was giving a sperm sample to Ms. Harrison which she would then provide to Dr. Russell for use in an insemination procedure. She testified that Mr. Anderson did not attend appointments at Dr. Russell's office because he did not have insurance and did not want to be billed personally for any services he might have received. She testified that Mr. Anderson waited for her in the lobby of Dr. Russell's office while

[7] *Id*. at 32:14-33:6.

she delivered the sperm sample to the office staff. She also testified that she and Mr. Anderson remained a couple through April of 2008; they went on a cruise in January of 2008, spent Valentine's Day together in February of 2008 and went out socially as a couple in April of 2008.

On August 18, 2010, Mr. Anderson filed this lawsuit against Dr. Russell, the Delaware Institute, and Ms. Harrison. He filed his Affidavit of Merit in support of his claims of medical negligence on October 22, 2010. He alleges that Dr. Russell and the Delaware Institute were negligent for failing to: (1) meet with, or interview him prior to the insemination; (2) obtain his consent prior to utilizing his sperm sample; (3) notify him of the intent to utilize the sperm samples received from him; (4) refer him to an attorney prior to utilizing his sperm samples; and (5) comply with the applicable standard of care relating to the use of sperm samples in insemination procedures. Mr. Anderson alleges that as a direct and proximate result of the defendants' negligence, he has suffered and will continue to suffer severe psychological and emotional trauma.

III.

Defendants advance alternative arguments in support of their motion for summary judgment depending upon the manner in which the Court characterizes Mr. Anderson's claims. If the Court determines that Mr. Anderson's claims should be

construed under Delaware's medical negligence statute, then defendants argue that the claims fail as a matter of law because: (1) no doctor-patient relationship existed between defendants and Mr. Anderson; (2) Mr. Anderson did not timely file his Affidavit of Merit; and (3) Mr. Anderson did not file his complaint within the applicable statute of limitations. If, on the other hand, the Court concludes that the claims are common law negligence claims, then the claims still fail, according to defendants, because Mr. Anderson has alleged only nonfeasance (failures to act). Based on these allegations, as a matter of law, defendants contend that they owed no duty to Mr. Anderson to take any action to protect him (notwithstanding what any medical expert might say on his behalf). In this regard, defendants argue that they did not maintain a special relationship with Mr. Anderson, as recognized in the Restatement (Second) of Torts ("Restatement Second"), which would trigger a duty to act when one otherwise did not exist.

In response, Mr. Anderson argues that he was a patient of Dr. Russell and that he has properly brought his claims against defendants under Delaware's medical negligence statute. Alternatively, he argues that the record evidence supports several theories of common law negligence against the defendants, as recognized in the Restatement Second, including: (1) § 284(a) (performing "an act" that involved "an unreasonable risk of causing an invasion of [Mr. Anderson's] interest"); (2) § 285

("How Standard of Conduct is Determined"); (3) § 289 ("Recognizing Existence of Risk"); and (4) § 302A ("Risk of Negligence or Recklessness of Others").

IV.

The standard of review on a motion for summary judgment is well-settled. The court's principal function when considering a motion for summary judgment is to examine the record to determine whether genuine issues of material fact exist, "but not to decide such issues."[8] Summary judgment will be granted if, after viewing the record in a light most favorable to the non-moving party, no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[9] If, however, the record reveals that material facts are in dispute, or if the factual record has not been developed thoroughly enough to allow the court to apply the law to the factual record, then summary judgment will not be granted.[10] The moving party bears the initial burden of demonstrating that the undisputed facts support its claims

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[8] *Merrill v. Crothall-American Inc.*, 606 A.2d 96, 99-100 (Del. 1992) (internal citations omitted); *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973).

[9] *Merrill*, 606 A.2d at 99-100; *Dorr-Oliver*, 312 A.2d at 325.

[10] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962). *See also Cook v. City of Harrington*, 1990 WL 35244, at *3 (Del. Super. Feb. 22, 1990) ("Summary judgment will not be granted under any circumstances when the record indicates . . . that it is desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.") (citing *Ebersole*, 180 A.2d at 467).

or defenses.[11] If the motion is properly supported, then the burden shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder.[12]

V.

As stated, Mr. Anderson has presented his claims against the defendants under two alternative and independent theories: (A) statutory medical negligence;[13] and (B) common law negligence. Defendants, therefore, have attacked both theories in their motion. As to the medical negligence theory, defendants have mounted both substantive (no doctor-patient relationship) and procedural (untimely complaint and untimely affidavit of merit) attacks. As to the common law negligence theory, defendants challenge the essence of the claim (the existence of a duty). The Court will consider Mr. Anderson's alternative theories in turn.

A. Medical Negligence

1. The "Doctor-Patient" Relationship

Medical negligence claims are creatures of statute.[14] Thus, in determining

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[11] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979) (citing *Ebersole*, 180 A.2d at 470).

[12] *See Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[13] 18 *Del. C.* § 6001, *et seq*.

[14] *Id.*; *Lacey v. Green*, 428 A.2d 1171 (Del. Super. 1981).

whether Mr. Anderson has properly invoked the medical negligence statute, the Court must first consider the applicable statutory definitions that delineate the medical negligence cause of action. The applicable terms are: "health care," "health care provider," "medical negligence," and "patient":

> (4) "Health Care" means any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.
>
> (5) "Health care provider" means a person, corporation, facility or institution licensed by this State pursuant to Title 24, excluding Chapter 11 thereof, or Title 16 to provide health care or professional services or any officers, employees or agents thereof acting within the scope of their employment . . . .
>
> (7) "Medical negligence" means any tort or breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider to a patient. The standard of skill and care required of every health care provider in rendering professional services or health care to a patient shall be that degree of skill and care ordinarily employed in the same or similar field of medicine as defendant, and the use of reasonable care and diligence.
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> (8) "Patient" means a natural person who receives or should have received health care from a licensed health care provider under a contract, express or implied.[15]

As the statutory definitions reveal, the existence of a doctor-patient relationship

[15] 18 *Del. C.* § 6801.

is a necessary predicate to a medical negligence action.[16] Only in the midst of this relationship will the healthcare provider owe a duty to the patient to render "health care" that meets the applicable "standard of skill and care required of every health care provider . . . [within] the same field of medicine . . . ."[17] The relationship is created by the consensual agreement between doctor and patient that the doctor will treat the patient and the patient will receive treatment by the doctor.[18] In this regard, the doctor must take some affirmative steps towards treating the patient in order to demonstrate his consent to form the relationship:

> Because this relationship may result from an express or implied contract, the voluntary acceptance of the physician-patient relationship by the affected parties creates a prima facie presumption of a contractual relationship between them. . . . The existence of the relationship of physician and patient is a matter of fact depending on the questions whether the patient entrusted himself to the care of the physician and whether the physician accepted the case. The relation is a consensual one, in which the patient knowingly seeks the assistance of a physician and the physician knowingly accepts him as a patient. . . . [B]ecause the express or implied consent of the physician is required, the physician must take some affirmative action with regard to treatment of a patient

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[16] *Murphy v. Godwin*, 303 A.2d 668, 673 (Del. Super. 1973); *Kananen v. Alfred I. DuPont Inst. of Nemours Found.*, 796 A.2d 1, 5 (Del. Super. 2000), *aff'd*, 768 A.2d 470 (Del. 2000); *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. 2005).

[17] 18 *Del. C.* § 6801(7).

[18] *Jennings v. Badgett*, 230 P.3d 861, 865 (Okla. 2010) ("The agreement of the physician to treat and the patient to receive treatment is the basis of the employment contract."); *see also Irvin v. Smith*, 31 P. 3d 934, 937-40 (Kan. 2001) (affirming order of summary judgment in favor of the defendant doctor when the facts made it clear that no relationship existed).

for the relationship to be established.[19]

In *Kananen v. DuPont*, our Supreme Court held that a hospital does not owe a duty to a non-patient bystander.[20] There, the plaintiff took her daughter to the defendant hospital's emergency room to be treated for lacerations on her forehead. The plaintiff began to feel faint at the sight of doctors providing treatment to her daughter. As she went to sit on a nearby stool, she fainted, struck her head, and sustained a fractured skull and injury to her brain. The Court held that the plaintiff was not a patient of the hospital at the time she sustained her injury and, consequently, she could not bring a statutory medical negligence claim as a matter of law.[21]

Clearly, there are bases to distinguish *Kananen* from this case, most notably the fact that the plaintiff in *Kananen* was not directly involved in the medical care being rendered to her daughter (as a donor or otherwise). And yet, there are meaningful similarities between the two cases as well. In *Kananen*, the defendant hospital did not consent to render medical care to the plaintiff and the plaintiff, in fact, did not receive medical care prior to her fall. Similarly, Mr. Anderson was never present in

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[19] 61 AM. JUR. 2D PHYSICIANS, SURGEONS, ETC. § 130 (citations omitted).

[20] 796 A.2d 1, 7 (Del. 2000) (citing 18 *Del. C.* § 6801).

[21] *Id*. at 4.

Dr. Russell's office, nor did he meet with Dr. Russell before Ms. Harrison's insemination. Any relationship that may have existed between Mr. Anderson and Dr. Russell was not a consensual relationship. Mr. Anderson did not knowingly seek out Dr. Russell for treatment, and Dr. Russell does not appear knowingly to have accepted Mr. Anderson as a patient at the time of the alleged injury (the insemination procedure). The fact that Ms. Harrison was Dr. Russell's patient does not automatically make her partner/donor, Mr. Anderson, Dr. Russell's patient. Something more is needed; Mr. Anderson must present evidence of a meeting of the minds - - an implied or express contract - - between himself and Dr. Russell that would reveal the existence of the relationship during the time frame in which the insemination was performed.[22]

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[22] *See id. Cf. Niccoli v. Thompson*, 713 S.W.2d 579, 584 (Mo. Ct. App. 1986) (finding that doctor-patient relationship was established after doctor physically examined the patient); *Cogswell v. Chapman*, 249 A.D.2d 865, 866-67 (N.Y. App. Div. 1998) (holding that doctor-patient relationship was established when doctor gave medical advice to patient over the telephone); *Millard v. Corrado*, 14 S.W.3d 42, 49 (Mo. Ct. App. 1999) (holding that whether a doctor-patient relationship existed when on-call emergency room surgeon did not arrive on time to render treatment is a question of fact). Factually similar decisions from other jurisdictions likewise suggest that no doctor-patient relationship was created between Dr. Russell and Mr. Anderson merely because Dr. Russell used Mr. Anderson's sperm to inseminate Ms. Harrison. *See, e.g.*, *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 872 (Cal. Ct. App. 2000) (holding that a physician-patient privilege did not exist where a sperm donor visited sperm bank in order only to sell his sperm and not for diagnosis or treatment of any physical or mental ailment); *McDonald v. McDonald*, 684 N.Y.S.2d 414, 416 (N.Y. Sup. Ct. 1998) (holding that there was no physician-patient privilege where a husband's wife forged his signature to impregnate herself with a donor egg and sperm; rather than using solely their own sperm and egg in the in-vitro fertilization procedure).

Whether a doctor-patient relationship exists is generally a question of fact.[23] At first glance, the record suggests that no doctor-patient relationship existed between Mr. Anderson and Dr. Russell during the relevant time frame because there is no clear evidence that Dr. Russell rendered treatment to Mr. Anderson until well after Ms. Harrison became pregnant. Yet, when read in a light most favorable to Mr. Anderson, the record becomes less clear. For instance, there is some indication in the record that Dr. Russell wrote a prescription for Mr. Anderson to have a sperm sample taken at the hospital prior to the insemination.[24] Moreover, medical records from Dr. Russell's own office refer to Mr. Anderson as a patient, even though they reflect that medical treatment was only ever provided to Ms. Harrison.[25] Dr. Russell's testimony injected more mud in the water. When initially asked if Mr. Anderson was his patient, Dr. Russell succinctly answered: "I never saw Ricky Anderson, I never treated Ricky Anderson. I was treating his sexually active partner, Classie

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[23] *Murphy v. Godwin*, 303 A.2d at 673-74.

[24] Deposition of Classie Anderson-Harrison ("Harrison Dep."), C.A. No. N10C-08-177 JRS (June 27, 2011) at 17:1-16. Of course, the record also contains Ms. Harrison's testimony that Mr. Anderson provided the sample knowingly and voluntarily outside of a medical facility. *Id.* at 14:23-24, 15:1-8.

[25] Dr. Russell's deposition establishes that there were forms within his office, including a semen specimen collection report, which were completed by Ms. Harrison that listed Mr. Anderson as a patient. The forms suggest Ms. Harrison was unsure of Mr. Anderson's birthday because it was listed as a different date on five separate forms. There was also a form that listed Ricky as a spouse, which Dr. Russell testified reflected the simple fact that the forms had never been updated to state "partner and patient." Russell Dep. at 16:22-21:24.

Anderson."[26] Later in his deposition, however, Dr. Russell offered far less definitive testimony in response to the same question:

> I think that's a pretty difficult question to answer based on that my patient that came to see me was Classie Anderson, and her sexually active partner that she had was Ricky Anderson trying to conceive. So Ricky Anderson was the partner of Classie Anderson, and Classie Anderson was trying to conceive in the office and out of the office with Ricky Anderson. So I'm not sure I can answer that question.[27]

Based on these factual discrepancies, the Court must conclude that genuine issues of material fact exist as to whether a doctor-patient relationship existed between Dr. Russell and Mr. Anderson at the time of the insemination procedure performed upon Ms. Harrison. Thus, the Court must go on to consider whether Mr. Anderson has failed to comply with the procedural requisites of the medical negligence statute as alleged by defendants.

2. The Affidavit of Merit

Delaware's medical negligence statute requires that all complaints alleging medical negligence be accompanied by an affidavit of merit, signed by a qualified expert witness, indicating that reasonable grounds exist to allege that the defendant breached the applicable standard of medical care and that the breach proximately

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[26] *Id.* at 30:7-9.

[27] *Id.* at 31:11-18.

caused the plaintiff's alleged injuries.[28] Pursuant to 18 *Del. C.* § 6853(a)(2), "the Court may, upon timely motion of the plaintiff and for good cause shown, grant a single 60-day extension for the time of filing the affidavit of merit."[29] "A motion to extend the time for filing an affidavit of merit is timely only if it is filed on or before the filing date that the plaintiff seeks to extend."[30] Mr. Anderson filed his initial complaint as a negligence action on August 18, 2010. He then filed an Affidavit of Merit on October 22, 2010, without any motion for extension of time to file. It would appear, therefore, that Mr. Anderson failed to comply with the procedural imperatives of the affidavit of merit statute.[31]

Mr. Anderson argues that it is within the Court's discretion to excuse this failure and to enter an order *nunc pro tunc* that permits him to file his affidavit of merit out of time. There is authority, albeit arguably distinguishable, from our Supreme Court that might support this argument.[32] The Court need not decide the

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[28] 18 *Del. C.* § 6853(a)(1).

[29] 18 *Del. C.* § 6853(a)(2).

[30] *See* 18 *Del. C.* § 6853(a)(3); *Leatherbury v. Greenspun*, 939 A.2d 1284 (Del. 2007).

[31] *Id.*

[32] *See Beckett v. Beebe Med. Center*, 897 A.2d 753, 757 (Del. 2006) (holding that, under the unique facts presented, the trial court had the discretion to excuse untimely filed affidavit of merit even when no motion to extend was filed in order to promote the "public policy that favors a trial on the merits").

issue here, however, because, as explained below, even if the Court permitted Mr. Anderson's untimely filed affidavit of merit to stand, the Court still could not excuse his failure to file his complaint within the applicable statute of limitations.

3. The Medical Negligence Statute of Limitations

Defendants contend that Mr. Anderson's claim is barred by the statute of limitations because Mr. Anderson did not file his claim within two years of the date on which it accrued and there is no basis to extend the limitations period beyond two years. The medical negligence statute of limitations is set forth in 18 *Del. C.* § 6856 ("Section 6856"), and provides in pertinent part:

> No action for the recovery of damages upon a claim against a health care provider for personal injury, including personal injury which results in death, arising out of medical negligence shall be brought after the expiration of 2 years from *the date upon which such injury occurred*; provided, however that; (1) Solely in the event of personal injury the occurrence of which, during such period of two years, was unknown to and could not in the exercise of reasonable diligence have been discovered by the injured person, such action may be brought prior to the expiration of 3 years from the date upon which such injury occurred, and not thereafter . . . .[33]

In *Meyers v. Dambro*, the Supreme Court of Delaware reiterated that, for purposes of Section 6856, an "injury occurr[s]" on "the date on which the allegedly negligent act

[33] 18 *Del. C.* § 6856 (emphasis supplied).

or omission occurred, and not when the injury manifested itself."[34] If the injury is not readily apparent at the time the negligent act or omission occurred, and does not become known (constructively or actually) within the two years following the negligent conduct, then the statute allows the plaintiff an extra year to file his claim.[35]

In this case, the alleged negligent act or omission - - the performance of the insemination procedure without Mr. Anderson's consent - - occurred on February 8, 2008. Accordingly, pursuant to Section 6856, Mr. Anderson's complaint should have been filed on or before February 8, 2010. He did not file the complaint until August 18, 2010, more than six months after the statute of limitations had expired. His only chance to overcome the statute of limitations, therefore, is to avail himself of the so-called "unknown injury" exception built into Section 6856. If applicable, this exception would extend the statute of limitations for an additional year. It is clear from the undisputed facts of record, however, that the "unknown injury" exception was not triggered here.

By his own admission, it is clear that, within a span of less than two years from the date on which the alleged negligent act or omission occurred, Mr. Anderson discovered that: (1) there was an insemination procedure in which his sperm was used

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[34] 974 A.2d 121, 131-38 (Del. 2009).

[35] *Id*. at 130.

without his consent; (2) Ms. Harrison was pregnant; and (3) Ms. Harrison had given birth to his child.[36] Given this undisputed time line, Mr. Anderson cannot claim that his injury was "unknown" within two years of the alleged negligence and, in turn, cannot avail himself of the one year extension of the statute of limitations provided in Section 6856(1). Consequently, his claims of medical negligence against the defendants are time barred and must be dismissed.

B. Common Law Negligence

If the Court concludes that Mr. Anderson's medical negligence claims cannot survive summary judgment, then he urges the Court to view his claims through the lens of common law negligence. Under this view of his claims, Mr. Anderson argues that he would not confront a statute of limitations obstacle because he filed his complaint within two years of the date upon which his cause of action accrued, *i.e.*, within two years of the date he discovered that Dr. Russell had performed an insemination procedure upon Ms. Harrison with a sample of his sperm that was used without his consent. Defendants counter that the Court need not reach the statute of limitations issue because Mr. Anderson has failed to establish a *prima facie* claim of common law negligence in any event. In this regard, defendants challenge the

[36] Anderson Dep. at 30:9-32:12, 46:18- 48:17; Hearing Transcript of Defendants' Motion for Summary Judgment, C.A. No. N10C-08-177, D.I. 43197120 (Feb. 7, 2010) at 63:10-21; 65:22-66:23.

essence of Mr. Anderson's negligence claims by arguing that the undisputed facts of record reveal they owed no duty to Mr. Anderson to take any action to protect him or his interests. Mr. Anderson, of course, disagrees.

In order to bring a claim for negligence, a plaintiff must plead facts sufficient to establish a duty, a breach of that duty, and injury resulting from the breach.[37] Whether a duty exists is a question of law determined by the Court.[38] To resolve this aspect of the controversy, the Court must first determine the nature of Mr. Anderson's negligence claims against the defendants. More specifically, the Court must determine whether Mr. Anderson has alleged misfeasance or nonfeasance. As discussed below, the distinction is critical in that it dictates which path the Court's duty analysis must follow.

1. Malfeasance and Nonfeasance

Delaware courts follow the Restatement Second when determining whether a defendant owed a duty to the plaintiff.[39] Restatement Second § 284 identifies and defines two categories of negligent conduct: (1) "an act which the actor as a

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[37] *Kananen*, 796 A.2d at *5.

[38] *Kuczynski v. McLaughlin*, 835 A.2d 150, 153 (Del. Super. 2003).

[39] *See Rogers v. Christina Sch. Dist.*, C.A. No. N10C-07-177, at 9 (Del. Super. Jan. 20, 2012); *Doe v. Bradley*, 2011 WL 290829, at *4 (Del. Super. Jan. 21, 2011) (citing *Reidel v. ICI Americas Inc.*, 968 A.2d 17, 22 (Del. 2009)); *Furek v. Univ. of Del.*, 594 A.2d 506, 520 (Del. 1991); *Naidu v. Laird*, 539 A.2d 1064, 1072 (Del. 1988).

reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another (misfeasance);" or (2) "a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do (nonfeasance)."[40] As this Court recently explained, our Supreme Court has now settled the common law relating to the duty of care in misfeasance and nonfeasance contexts:

> In *Riedel*, our Supreme Court explained the Restatement Second's disparate treatment of negligent acts and negligent omissions in the context of § 302 and ultimately concluded that Delaware has and continues to recognize the legal difference between so-called "malfeasance" (a negligent act) and "nonfeasance" (a negligent omission): "Although Comment (a) to § 302 notes that § 302 is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk[,] the comment proceeds to explain the dissimilar duties owed by one who merely omits to act versus one who does an affirmative act. As Comment (a) explains, anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act. On the other hand, one who merely omits to act generally has no duty to act, unless there is a special relationship between the actor and the other which gives rise to the duty."[41]

In *Price*, the Supreme Court rejected the plaintiff's argument that his allegations that the defendant failed to prevent its employee from taking asbestos

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[40] RESTATEMENT (SECOND) OF TORTS § 284.

[41] *Bradley*, 2011 WL 290829, at *5 (citing *Riedel*, 968 A.2d at 22; *Price v. E.I. duPont de Nemours & Co.*, 26 A.3d 162, 169 (Del. 2011)) (internal quotations omitted).

fibers home, or to warn the employee's family about the dangers of asbestos, constituted affirmative misconduct i.e., misfeasance.[42] The Court noted that "no amount of semantics can turn nonfeasance into misfeasance or vice versa."[43] Likewise, in this case, "no amount of semantics" can change the fact that Mr. Anderson has alleged that defendants failed to act by failing to obtain his consent to use his sperm in the insemination procedure, and failing to counsel him regarding the possible ramifications of the procedure upon him.[44] These are allegations of nonfeasance.

Mr. Anderson's effort to cobble together a claim of misfeasance by pointing to Dr. Russell's affirmative act of performing the insemination procedure misses the mark. Mr. Anderson has not alleged that the insemination procedure was performed improperly and no evidence in the record would support that allegation if it had been made. Moreover, the procedure was performed upon Ms. Harrison; any claim of misfeasance arising from the procedure would be her's alone to make.[45] The bottom

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[42] 26 A.3d at 169.

[43] *Id.*

[44] *See* Compl. ¶ 8(a)-(e).

[45] *See Riedel*, 968 A.2d at 24 ("We conclude that, although Mrs. Riedel may have presented a theory of misfeasance in characterizing Mr. Riedel's claim [who worked with asbestos himself and with whom his employer interacted on a daily basis], [Mrs. Riedel] presented a nonfeasance theory in characterizing her own."); *Price*, 26 A.3d at 169 (same).

line is that Mr. Anderson has alleged nonfeasance against Dr. Russell and his medical practice. Thus, in the absence of evidence that he maintained a legally significant special relationship with defendants, or that defendants committed themselves to performance of an undertaking, Mr. Anderson will be unable to establish that the defendants owed a duty of care to him.[46] This is so even if Mr. Anderson can demonstrate that the defendants knew or should have known "that action on [their] part [was] necessary for [his] aid or protection."[47]

2. Exceptions To The General "No Duty To Act" Rule

Section 314 of the Restatement Second encompasses the general no duty to act rule and directs the Court to consider exceptions to the rule based on special relations and undertakings in §§ 314A, and 316 to 324A.[48]

a. § 314A Special Relationship

To the extent Mr. Anderson has argued that § 314A applies to his claims, the Court disagrees. Section 314A lists special relations giving rise to an actor's duty to aid or protect another from an unreasonable risk of physical harm and to give first aid

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[46] *See Riedel*, 968 A.2d at 22

[47] *See* RESTATEMENT (SECOND) OF TORTS § 314. *See also Price*, 26 A.3d at 167 (quoting RESTATEMENT (SECOND) OF TORTS § 302 cmt. a) (internal quotations and citations omitted); *Riedel*, 968 A.2d at 22.

[48] RESTATEMENT (SECOND) OF TORTS § 314 cmt. a; *Riedel*, 968 A.2d at 22.

when he "knows or has reason to know" of the other's harm.[49] None of the special relations listed within § 314A apply to the facts of this case.[50] A "*Caveat*" to § 314A, however, allows the Court to contemplate additional relations which impose similar duties.[51] Arguably, a doctor-patient relationship might satisfy the *Caveat*.[52] It is clear, however, that Mr. Anderson's allegations against Dr. Russell, if based on their alleged relationship as doctor and patient, would fall within the parameters of the medical negligence statute and would be time barred under the medical negligence statute of limitations.

b. § 315 Special Relationship

Section 315, likewise, fails to support Mr. Anderson's claims. Section 315 serves as a guide to those special relations giving rise to an actor's duty to control the conduct of third persons.[53] The nature of Mr. Anderson's claims, however, do not

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[49] RESTATEMENT (SECOND) OF TORTS § 314A(1)(a) & (b).

[50] *See* RESTATEMENT (SECOND) OF TORTS § 314A (listing: common carrier/passenger, innkeeper/guest, possessor of land/invited public; and one who takes custody of another).

[51] RESTATEMENT (SECOND) OF TORTS § 314A caveat.

[52] *See, e.g.*, *Murphy v. Godwin*, 303 A.2d at 674 (recognizing the "unique position" of a doctor as a treating physician to his patient).

[53] *See* RESTATEMENT (SECOND) OF TORTS § 315 which provides: "There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between an actor and the other which gives to the other a right to protection." *See also* RESTATEMENT (SECOND) OF TORTS § 315 (continued...)

trigger an analysis under § 315 because Mr. Anderson does not allege that Dr. Russell negligently failed to protect him from harm caused by Ms. Harrison.[54] Mr. Anderson's claims against Dr. Russell are direct negligence claims against the doctor for his failure to take steps (*e.g.* obtaining consent, warning, etc.) to prevent Dr. Russell's own conduct (the performance of the insemination procedure) from causing Mr. Anderson harm. Likewise, Mr. Anderson's claims against Ms. Harrison are direct claims against Ms. Harrison for her negligence. Accordingly, the Court need not delve into the intricacies of §§ 315-320 (all addressing the special applications of the duty to control conduct of third persons) because those concepts simply do not apply here.

c. §§ 323-324A Negligent Undertaking

The Restatement Second provides other exceptions to the general "no duty to act" rule based on the actor's "performance" of an undertaking.[55] Mr. Anderson has

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[53](...continued)
cmts. a-c (referring to the "special relationships" described in Restatement Second §§ 314A and 316 through 320).

[54] *Compare* Compl. ¶ 8(a)-(e) (alleging that Dr. Russell failed to inform, notify and obtain consent from Mr. Anderson before using his sperm in an insemination procedure) *with Naidu*, 539 A.2d at 1066 (affirming jury verdict in favor of plaintiff who had alleged and provided evidence that psychiatrist-defendant was grossly negligent in the care, treatment and discharge of his patient (third person) who, in turn, caused the death of plaintiff's husband).

[55] RESTATEMENT (SECOND) OF TORTS §§ 323, 324, 324A. Section 324 is inapplicable as it applies to a duty stemming from taking charge of another who is helpless. Neither party argues that (continued...)

not argued that Dr. Russell undertook to render services to him beyond his vague assertion that he maintained a doctor-patient relationship with Dr. Russell.[56] If Mr. Anderson is attempting to invoke Section 323[57] by arguing that the alleged "undertaking" was made directly by Dr. Russell (as doctor) to Mr. Anderson (as patient), then the claim would amount to medical negligence thereby triggering the medical negligence statute of limitations.[58] If he is attempting to invoke Section 324A,[59] then that claim likewise fails because Mr. Anderson has provided no

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[55](...continued)
§ 321 and § 322 apply, and the Court agrees. Section 321 contemplates a duty to prevent a risk of unreasonable physical harm from taking effect if that risk has been created by the actor's dangerous conduct. Similarly, § 322 contemplates a duty owed to another put into a more dangerous position by the actor's conduct. There is no evidence that Dr. Russell acted without reasonable care when he learned of Ms. Harrison's fraudulent conduct and, in fact, he admits that he engaged in a doctor-patient relationship with Mr. Anderson after he met with him in August of 2008.

[56] Aside from passing references to §§ 323 and 324A in the briefing and in oral argument, plaintiff did not provide evidence or argument to support application of these provisions to the facts here.

[57] RESTATEMENT (SECOND) OF TORTS § 323 ("One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person . . . is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care [in that] undertaking, if (a) his failure . . . increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.").

[58] 18 *Del. C.* § 6801; 18 *Del. C.* § 6856.

[59] RESTATEMENT (SECOND) OF TORTS § 324A (holding an actor liable *to a third person* when the actor undertakes to render services to *another* which he should recognize as necessary for the protection of the third person and the actor fails to exercise reasonable care in that undertaking, as long as (a) the failure increases the risk of harm, (b) the actor has undertaken a duty owed by the other to the third person, or (c) the harm is suffered because of reliance by the other or the third person upon the undertaking).

evidence that Dr. Russell ever undertook to render services to Ms. Harrison "which he should [have] recognize[d] as necessary for the protection of a third person."[60] Mr. Anderson has not alleged, and the evidence does not suggest, that Dr. Russell performed Ms. Harrison's insemination for the protection of any third person, including Mr. Anderson.[61] Simply stated, the procedure was performed for no other reason than to assist Ms. Harrison in her effort to become pregnant.

CONCLUSION

If Mr. Anderson's claims are deemed to be medical negligence claims, then it is clear from the undisputed facts of record that Mr. Anderson did not file his complaint within the statute of limitations set forth in the medical negligence statute. If Mr. Anderson's claims are deemed to be common law negligence claims, then it is

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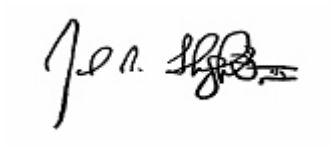
[60] RESTATEMENT (SECOND) OF TORTS § 324A. *See Patton v. Simone*, 626 A.2d 884, 849-50 (Del. Super. 1992) (determining that insurance inspections were not done for the safety or protection of the employer, nor the plaintiff-employee, as required by § 324A); *Furek*, 594 A.2d at 519-20 (finding University's promulgation and enforcement of safety regulations created a duty to protect its students from physical harm under § 323 based on the University's direct relationship with and intent to protect the students, and *not* between the University and the students as third persons under § 324A); *Ricci v. Quality Bakers of America Co-op. Inc.*, 556 F. Supp. 716, 720 (D. Del. 1983) (assuming that the inspection of a conveyor system was undertaken with recognition that it was necessary to protect plaintiff-employee where there were inferences in the record that the inspectors knew or should have known about the conveyor system's malfunctioning and the inspectors had some control over safety guidelines of the plant).

[61] In other words, and as discussed above, any duty Dr. Russell may have owed to protect Mr. Anderson would arise only from a direct doctor-patient relationship between Dr. Russell and Mr. Anderson encompassed within the medical negligence statute, and not from Dr. Russell's separate doctor-patient relationship with Ms. Harrison or his performance of the insemination procedure. *See Furek*, 594 A.2d at 519-20.

clear as a matter of law that neither Dr. Russell, nor Dr. Russell's medical practice, owed a duty of care to Mr. Anderson to act for his protection. Accordingly, defendants' motion for summary judgment must be **GRANTED**.

IT IS SO ORDERED.



Judge Joseph R. Slights, III