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 CEB
	)	
CLASSIE ANDERSON-HARRISON,	)	
	)	
Defendant.	)	

Date Submitted: June 18, 2013
Date Decided: August 15, 2013

MEMORANDUM OPINION.

Upon Consideration of
Defendant's Motion for Summary Judgment.
GRANTED.

Shawn Dougherty, Esquire, WEIK NITSCHE & DOUGHERTY, Wilmington, Delaware.

Norman E. Levine, Esquire, NORMAN E. LEVINE, ATTORNEY AT LAW, Wilmington, Delaware.

BUTLER, J.

INTRODUCTION

Before the Court is the motion of defendant Classie Anderson-Harrison for summary judgment. Defendant alleges that the statute of limitations expired before plaintiff filed his complaint and it must therefore be dismissed. For the reasons set forth below, the Court finds plaintiff's complaint was filed after the statute of limitations had run and accordingly, defendant's motion is hereby **GRANTED**.

FACTUAL BACKGROUND

As the nonmoving party, plaintiff's allegations and all inferences reasonably deduced there from are taken as true for the purposes of deciding the instant motion. Taken together, plaintiff's complaint is as follows.

Plaintiff says that he and defendant Classie Anderson-Harrison were romantically involved and maintained a sexual relationship in 2007, ending in early 2008. Late in 2007, however, defendant informed plaintiff that she was with child and the plaintiff was the father of said child. After their romantic relationship ended in early 2008, defendant told plaintiff that she was a carrier of cystic fibrosis and that a doctor required a sperm sample from plaintiff in order to rule out the possibility that the fetus would be similarly afflicted.[1]

[1] For those seeking the first clue that something is amiss, we note that genetic testing for cystic fibrosis is done with blood or sweat, not semen. Cystic Fibrosis Foundation, Testing for Cystic Fibrosis, http://www.cff. org/AboutCF/Testing/.

At the direction of defendant, the plaintiff reported to the Delaware Institute for Reproductive Medicine P.A. where he made a sperm donation for the purported purpose of determining whether the fetus had cystic fibrosis. Defendant was present and took the sample in to the doctor. A week later, a woman who plaintiff believed to be a nurse from the reproductive institute informed plaintiff that the doctor had determined that the previous sample was deficient and he needed to return to provide a second specimen. Accordingly, on February 8, 2008, plaintiff duly returned to the clinic to provide a second sperm sample and again, defendant took the sample from him and went in to see the doctor.

The discriminating reader may have already figured out that, at least according to the plaintiff, defendant Classie Anderson-Harrison was not in fact pregnant in late 2007 as she reported to the plaintiff. Rather, this was all a ruse by the defendant to obtain a sperm sample from the plaintiff with which to impregnate herself. The "nurse" referred to above was not a nurse from the doctor's office at all but a confederate of the defendant. Dr. Jeffrey Russell[2] of the Delaware Institute for Reproductive Medicine P.A., apparently utilizing sperm procured by defendant Classie Anderson-Harrison in this manner, performed an intrauterine insemination on defendant and she became pregnant by plaintiff's sperm.

[2] Dr. Russell and his employer, the Delaware Center for Reproductive Health and Christiana Health Services were named as defendants when this suit was instituted, but were released when their motion for summary judgment was granted. *Anderson v. Russell*, 2012 WL 1415911 (Del. Super. Apr. 18, 2012).

In early August, 2008, plaintiff was alerted that he may have been "had." While not entirely clear from the record thus far, it may have been defendant's cousin who alerted plaintiff.[3] In any event, plaintiff sought out Dr. Russell and met with him for the first time on August 8, 2008. At that time, Dr. Russell informed plaintiff that he was on track to become a father via the donated sperm. Plaintiff testified that Dr. Russell told him he had attempted the intrauterine insemination on defendant with "three or four" samples provided by defendant which, plaintiff tells us, left his paternal situation at least somewhat ambiguous, as he could only account for two samples.[4]

These are the salient facts for purposes of this motion. Defendant went on to give birth on October 23, 2008, there was a paternity test confirming plaintiff's fatherhood in February, 2009, and plaintiff filed his complaint on August 18,

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[3] According to his deposition testimony, Ricky Anderson communicated with Defendant's cousin, who "just basically said Defendant had a plot to get pregnant through me. And she asked her to help her impregnate herself too, like she was giving her medicine and stuff like that, because I think she was a nurse or something, Jacqueline is. So basically she was saying she would have warned me earlier before I got caught in this situation." Deposition of Ricky Anderson at p. 26.

[4] We note that in defendant's deposition, she was certain plaintiff had provided three samples, not two. Deposition of Classie Anderson-Harrison at p. 20-21.

2010.[5]

ANALYSIS

The defendant argues that the 2 year limitation period for "personal injury" actions applies,[6] while the plaintiff argues that he was entitled to at least 3 years due to defendant's fraudulent conduct.[7] In addition, there is a sharp dispute as to when the "injury" occurred: when the sperm was "obtained" or when the plaintiff learned he was to become a father, or when the child was born or perhaps later, when the plaintiff received DNA confirmation that he was the father. This dispute is significant because while all of these events occurred within 3 years of the filing of the complaint, only the birth of the child and subsequent DNA confirmation occurred within 2 years of the filing.

Plaintiff's somewhat truncated complaint seeks damages for "severe psychological and emotional trauma" and "present and future medical expenses." His deposition testimony was equally opaque as to his damages. He testified that "it hurts me mentally to know that you have a child out there that happened

[5] In addition to a convoluted factual background, the parties also share a lengthy procedural history within the Delaware Courts System. The parties began their disputes in Family Court where defendant's attempts to collect child support from the plaintiff were denied. That decision was affirmed by our Supreme Court. *See*, *Anderson v. Russell*, 2012 WL 1415911 at *3 (Del. Super. Apr. 18, 2012)(summarizing the outcome of defendant's child support claim).

[6] 10 *Del. C.* §8106.

[7] 10 *Del. C.* §8119.

through fraud and the malpractice of a doctor we trust. It hurts to know that people think that I could be a bad father. They don't know my story. All they know is she's carrying around a baby saying 'this is Ricky's baby' but they don't know actually what happened and people look at me bad." [8]

We raise the issue of damages because they directly implicate the issue before us now: what is the statute of limitations for this complaint? Our law books are decidedly thin in the area of a limitations period for the wrongful obtention and subsequent misappropriation of sperm.

We are instructed that in circumstances like this – that is, circumstances in which the plaintiff has alleged harm or injury generally but has been less than, well, direct in his theory of recovery -- to look to the injury claimed in order to determine the appropriate statute of limitations.[9] For just as plaintiff does not allege medical negligence against this defendant, her conduct cannot be called "negligent" in any sense of the word. Rather, if the complaint and its inferences are read fairly, defendant deserves a special place in the pantheon of diabolical schemers.

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[8] Deposition of Ricky Anderson at p. 34.

[9] *See*, *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119, 1123 (Del. 1987) (finding plaintiff's characterization of her injuries to be controlling in establishing the statute of limitations rather than the nature of her underlying cause of action); *Devincentis v. European Performance, Inc.*, 2012 WL 1646347 at *3 (Del. Super. Apr. 17, 2012) (holding it is the nature of the damages and not the cause or type of action instituted that determines which statute of limitations controls).

Excepting the medical negligence statute and a few others,[10] most actions in Delaware are governed by either the 2 year statute of limitations for "personal injuries"[11] or the 3 year statute for everything that is not a personal injury action or otherwise claimed by another statute.[12] Reviewing again plaintiff's complaint, his grievance relates to mental, emotional and related physical trauma. It is, in every sense, a suit for "personal injuries."

Because this conclusion is determinative of this dispute, it is worth examining closely. We find comforting parallels between plaintiff's suit and one for libel or slander: that is, a suit for "personal injuries" that are not accompanied by physical force or impact as one might normally think of an injury. In *DeMoss v. The News-Journal Co.*[13] the Delaware Supreme Court upheld a trial court ruling that a libel action is a suit for "personal injuries" under 10 *Del. C.* §8106 and subject to the 2 year statute of limitations. There is, of course, an alternative: 10 *Del. C*. §8119 provides that the 3 year statute applies to injuries "unaccompanied

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[10] *See e.g.*, *Whittington v. Dragon Grp.*, L.L.C., 991 A.2d 1, 10 (Del. 2009)(addressing the 20-year statute of limitations that governs contracts under seal); *Rohner v. Niemann*, 380 A.2d 549, 554 (Del. 1977) (finding that 10 *Del. C*. § 8110 allows for a 3 year statute of limitations related to the collection of mesne profits).

[11] 10 *Del. C.* §8106.

[12] 10 *Del. C.* §8119.

[13] 408 A.2d 944 (Del. Supr. 1979).

by force." The *DeMoss* Court, however, explicitly rejected the argument that the 3 year statute applies to actions for libel or slander.

The *DeMoss* opinion leaned heavily upon the learned opinion of Judge Caleb Wright in the District Court opinion of *McNeill v. Taramuniez*.[14] In that case, Judge Wright traced the history of the current 3 year limitation period and noted that it was amended in 1947 to add the term "action unaccompanied by force" and delete the term "action upon the case," which readers may recall referred to the historic actions of "trespass" and "trespass on the case." Thus, the issue was whether libel is or ever was an "action on the case." Citing Blackstone's Commentaries, the Court noted that the term "personal injuries" was coextensive with "those rights which are annexed to the person as "*jura personarum*" – rights that include the right to "his life, his limbs, his body, his health and his reputation."[15] Plaintiff's complaint here lies similarly in that area of "personal security" that lies somewhere between direct bodily injury and mere contract or financial damage.

We note too that libel is not the only area in which Delaware Courts have recognized the 2 year personal injury statute to be applicable where the injury is to the personal integrity or reputation of the plaintiff and not simply bodily injury.

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[14] 138 F. Supp. 713 (D. Del. 1956).

[15] *Id.* at 716.

For example, in *Read v. Local Lodge 1284*,[16] Judge Seitz affirmed a district court ruling that an action for breach of the duty of fair representation by a labor union was governed by the 2 year statute for personal injuries, and in *Wright v. ICI Americas*,[17] the Court held that a civil rights claim that is unaccompanied by bodily injury is nonetheless one for "physical injury" and subject to the 2 year statute. In *Carr v. Town of Dewey Beach*,[18] the Court held that state court claims of malicious prosecution, abuse of process, false arrest, intentional infliction of emotional distress, and constitutional false arrest were all barred by the 2 year statute of limitations in a suit brought by a developer against a township over denial of a building permit.

Thus, the Court is satisfied that the 2 year statute for "personal injuries" encompasses a claim for reputational damages and emotional distress caused by the misappropriation of one's sperm.

The only rejoinder to this analysis offered by the plaintiff is that the 3 year statute does – or at least ought to – govern actions for fraud. And, plaintiff reasons, this is a case in which he was most assuredly defrauded. But the problem with plaintiff's position is that section 8119 does not explicitly carve out an

[16] 528 F.2d 823 (3d Cir. 1975).

[17] 813 F. Supp. 1083 (D. Del. 1993).

[18] 730 F. Supp. 591 (D. Del. 1990).

exception to the "personal injury" provision of section 8106 for personal injuries caused by fraud. Neither does it do so implicitly. Even if we were to torture section 8106 enough to conceivably put plaintiff's case within it, section 8106 states explicitly that the 3 year statute applies "subject, however, to the provisions of …§8119 of this title." Thus, as has been noted many times in the past, the 3 year limitations period only applies if the 2 year provision does not.[19] Because this is a suit for personal injuries, it does not matter how those injuries were produced, through fraud, negligence, intentional acts or otherwise.[20]

We turn then to the question of when the 2 year statute of limitations began to run. In *Brown v. E.I. DuPont de Nemours and Company, Inc.*[21] the Supreme Court observed:

> Normally, an "injury" is "sustained" when a wrongful act or omission occurs. Situations arise, however, where the moment of the wrongful act and the plaintiff's discovery of the injury do not occur within close proximity of each other. In appropriate circumstances, this Court has applied an exception to the limitations period by interpreting it to run at the time the plaintiff is on notice that he or she has sustained a tortious injury. As we held in *Layton v. Allen,* Section 8119 is ambiguous because an "injury" is "sustained" either at the time the wrongful act is

[19] *See*, *Read v. Local Lodge 1284, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO*, 528 F.2d 823, 826 (3d Cir. 1975); *Chrisco v. Shafran*, 525 F. Supp. 613, 616 (D. Del. 1981).

[20] *See*, *Cole v. Delaware League for Planned Parenthood, Inc.*, 530 A.2d 1119 (Del. 1987); *Devincentis v. European Performance, Inc.*, 2012 WL 1646347 (Del. Super. Apr. 17, 2012).

[21] 820 A.2d 362 (Del. 2003).

> committed or at the time the plaintiff should have discovered the injury.[22]

This court interpreted *Brown* in *Krugg v. Beebe Medical Center*, holding that "the statute of limitations period began to run when plaintiffs were on notice of a potential tort claim. In the absence of actual notice, plaintiffs are on inquiry notice when they are chargeable with knowing that their rights have been violated."[23] While the parties have actively disputed the date on which the statute of limitations began to run, the Court finds August 8, 2008 to be the operative date. On August 8, 2008 Dr. Russell informed the plaintiff that he had used plaintiff's sperm to impregnate the defendant through artificial insemination. From that moment on, plaintiff was aware the defendant had misappropriated his sperm giving rise to a cause of action and constituting inquiry notice of a tortious injury.

As the Court has found the 2 year statute of limitations to be applicable and that the limitations period began to run on August 8, 2008, plaintiff's last vestige of hope lies with tolling the statute of limitations due to defendant's misrepresentations. Pursuant to Delaware law, our Courts "recognize three doctrines for tolling the statute of limitations: (1) inherently unknowable injuries, (2) fraudulent concealment, and (3) equitable tolling."[24] Plaintiff has not

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[22] *Id.* at 366 (addressing *Layton v. Allen,* 246 A.2d 794 (Del.1968)).

[23] 2003 WL 22410777 at *1 (Del. Super. Sept. 30, 2003).

[24] *Stevanov v. O'Connor*, 2009 WL 1059640 at *9 (Del. Ch. Apr. 21, 2009).

articulated a tolling argument, but even if he were to invoke one of these doctrines, "the limitations period is tolled only until the plaintiff discovers, or by exercising reasonable diligence should have discovered, its injury. That is, the limitations period begins to run when the plaintiff is objectively aware of facts giving rise to the wrong, *i.e.,* is on inquiry notice."[25] As noted above, a plaintiff is on inquiry notice when there are sufficient facts to place a person of ordinary intelligence and prudence on inquiry and if pursued those facts would lead to discovery of the wrong.[26] This analysis takes us back to the August 8, 2008 date when plaintiff was told by Dr. Russell that the sperm plaintiff had provided had been used for insemination, not testing, to impregnate the defendant. Dr. Russell's statements made clear that the plaintiff had been deceived, thus giving rise to the complaint he ultimately filed, 2 years and 3 weeks later.

CONCLUSION

Plaintiff learned from Dr. Russell that his sperm had been utilized to impregnate defendant Classie Anderson-Harrison on August 8, 2008. Because his claim is that the pregnancy is the cause of the damage to his reputational interest and emotional well being, that is the date on which his cause of action accrued. He

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[25] *Smith v. Whelan*, 2013 WL 3169373 at *2 (D. Del. June 21, 2013)(citing *Eluv Holdings (BVI) Ltd. v. Dotomi, LLC*, 2013 WL 1200273 at *7 (Del. Ch. Mar. 26, 2013).

[26] *In re Dean Witter P'ship Litig.*, 1998 WL 442456 at n. 67 (Del. Ch. July 17, 1998) aff'd, 725 A.2d 441 (Del. 1999).

filed his lawsuit on August 30, 2010, approximately 3 weeks after the statute of limitations had run. His complaint must therefore be dismissed and summary judgment for the defendant must issue.

IT IS SO ORDERED.

/s/ Charles E. Butler
Judge Charles E. Butler