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The Birth of Fertility Fraud: How to Protect Washingtonians

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THE BIRTH OF FERTILITY FRAUD: HOW TO PROTECT WASHINGTONIANS

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Abstract: Doctors in multiple states have been accused of using their own sperm to impregnate patients without the patient's consent. Because most states do not have laws prohibiting fertility doctors from using their own sperm to impregnate their patients, families have not been able to seek meaningful legal remedies. State legislatures enacted new fertility fraud laws to deter, criminalize, and provide a legal civil cause of action to those harmed by these actions—but only after these allegations came to light. If the Washington State Legislature creates a law before any similar allegations come to light in Washington, those patients harmed in Washington will have a civil remedy against fertility doctors, unlike patients in other states. To protect Washington patients from the same legal fate, the legislature needs to act proactively and enact a new law against fertility fraud.

INTRODUCTION

The genealogy website industry, which allows users to upload and compare their DNA to databases containing millions of users, has grown exponentially in the last decade.[1] This dramatic uptick in popularity and the increased accessibility of commercial genealogy websites have led many individuals to unintentionally uncover family secrets.[2] Yet, one particular storyline stemming out of genealogy website research is becoming increasingly familiar: an individual, usually one who knows there is a chance they were born from a sperm donor, conducts an at-home DNA test, and uploads their DNA onto a commercial database. Upon receiving the test results, the individual finds out they have many siblings, all of whom have one thing in common—their mothers used the same male fertility doctor. Unbeknownst to the mothers, their fertility doctor

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1. Antonio Regalado, *More Than 26 Million People Have Taken an At-Home Ancestry Test*, MIT TECH. REV. (Feb. 11, 2019), https://www.technologyreview.com/s/612880/more-than-26-million-people-have-taken-an-at-home-ancestry-test/ [https://perma.cc/LY67-F8KB] ("By the start of 2019, more than 26 million consumers had added their DNA to four leading commercial ancestry and health databases . . . .").

2. Amy Dockser Marcus, *When Your Ancestry Test Entangles Others*, WALL ST. J. (Feb. 14, 2020, 11:01 AM), https://www.wsj.com/articles/when-your-ancestry-test-entangles-others-11581696061 [https://perma.cc/HZ3C-S62H].

used his own sperm to impregnate his patients. This increasingly common phenomenon has been coined "fertility fraud."[3]

After discovering this shocking information, victims of fertility fraud are often surprised to learn that no law specifically prohibits this conduct. Fertility fraud cases generally do not satisfy the elements for civil recovery under medical malpractice or fraud. Additionally, the claims are frequently barred by standing disputes or statute of limitations issues. As a result, neither the children nor the mothers victimized by fertility fraud have access to legal remedies. While some doctors have been found criminally liable under theories such as obstruction of justice or mail fraud, other doctors have not faced any liability at all, either criminal or civil.

Legislatures in at least five states, including California, Indiana, Texas, Colorado, and Florida,[4] have responded to this legal predicament by creating fertility fraud laws.[5] These laws criminalize doctors who use their own sperm to impregnate their patients without explicit consent. The Indiana and Colorado laws also create civil causes of action.[6]

Because Washington laws are currently ill-suited for fertility fraud cases, Washington should follow those states and enact a fertility fraud law that creates both civil and criminal liability. Specifically, Washington's fertility fraud law should have a civil component that (1) allows children, mothers, and the mothers' partners at the time of insemination to bring a case for money damages against the fertility doctor; (2) tolls the statute of limitations until paternity is discovered; and

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3. Lauren Bavis & Jake Harper, *Conceived Through 'Fertility Fraud,' She Now Needs Fertility Treatment*, KAISER HEALTH NEWS (Jan. 28, 2020), https://khn.org/news/conceived-through-fertility-fraud-she-now-needs-fertility-treatment/ [https://perma.cc/4YP4-5K4P].

4. In June 2020, Florida passed a law that makes fertility fraud a criminal offense with no civil component. S.B. 698, 2020 Leg., 26th Sess. (Fla. 2020). The law coins fertility fraud, "reproductive battery." *Id.* It makes using unconsented donor sperm a third-degree felony and using a doctor's own sperm a second-degree battery. *Id.* Additionally, the law tolls the statute of limitations until the act is known. *Id.* Lastly, the law specifies that a patient's request for an anonymous donor is not an affirmative defense. *Id.*

5. CAL. PENAL CODE § 367g (Deering 2020); IND. CODE. § 34-24-5-2 (2020); TEX. PENAL CODE ANN. § 22.011(b)(12) (West 2019); H.B. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); S.B. 698, 2020 Leg., 26th Sess. (Fla. 2020); Jody Lyneé Madeira, *Fertility Fraud: An Update*, SOC'Y FOR ASSISTED REPROD. TECH.: LEGALLY SPEAKING (Oct. 21, 2019), https://www.sart.org/news-and-publications/news-and-research/legally-speaking/fertility-fraud-an-update/ [https://perma.cc/V53H-YGC6]; Ellen Trachman, *The U.S. Is Experiencing an Explosion of Fertility Fraud Legislation. And That's a Good Thing.*, ABOVE THE L. (Feb. 12, 2020, 5:16 PM), https://abovethelaw.com/2020/02/the-u-s-is-experiencing-an-explosion-of-fertility-fraud-legislation-and-thats-a-good-thing/ [https://perma.cc/3QUV-TUFD].

6. IND. CODE. § 34-24-5-2 (2020); H.B. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020); *see infra* discussion in Part II.

(3) allows the jury to decide the amount of damages to be awarded, including noneconomic damages. Additionally, Washington's fertility fraud law should have a criminal component that makes fertility fraud a Class B felony. By enacting a fertility fraud law that can be applied retroactively before a fertility fraud case arises in a Washington court, Washingtonians will not encounter the same lack of legal resolution that residents in other states have faced.[7]

This Comment examines the issue of fertility fraud.[8] Part I explains the historical background and context of genealogy websites, artificial insemination, and sperm donation. Part II discusses recent fertility fraud allegations and cases. Part III examines fertility fraud laws enacted in other states. Part IV surveys Washington's existing laws and their applicability to fertility fraud cases. Part V proposes a law that the Washington legislature should enact to protect future fertility fraud victims.

I. HISTORICAL LOOK AT GENEALOGY WEBSITES, ARTIFICIAL INSEMINATION, AND SPERM BANKS

A. Genealogy Websites

A decade ago, the general public could not have envisioned the popularity and accessibility of commercial DNA websites. In 2013, only about 300,000 people had tested their DNA with at-home DNA kits.[9] Six years later, a January 2019 study found that more than twenty-six million people had shared their DNA with one of the four leading ancestry and health databases.[10]

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7. While the federal and Washington State constitutions would bar the state from bringing ex post facto criminal charges against doctors who committed fertility fraud prior to the new law's enactment, ex post facto does not apply to civil causes of action. *See* Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wash. App. 250, 262–63, 255 P.3d 696, 702–03 (2011). To ensure the civil provisions of the fertility fraud law could be applied retrospectively, Washington State Legislature should make their retrospective intent clear when constructing the statute. *See, e.g.*, Howell v. Spokane & Inland Empire Blood Bank, 114 Wash. 2d 42, 47, 785 P.2d 815, 818 (1990) ("Statutory enactments are presumed to be prospective unless there is a legislative intent to apply the statute retroactively or the statute is remedial and retroactive application furthers the remedial purpose." (citing Ferndale v. Friberg, 107 Wash. 2d 602, 732 P.2d 143 (1987))).

8. Instances of fertility fraud have been reported in at least fourteen states and six countries by individuals who have undergone genetic testing. *Doctor Donor Fraud Cases*, DONOR DECEIVED, https://donordeceived.org/doctor-donor-fraud [https://perma.cc/UCM5-4AVQ].

9. Regalado, *supra* note 1.

10. *Id.* (noting a DNA test by a leading commercial ancestry and DNA database company can cost as little as $59).

Among other uses, these increasingly affordable[11] and available tests allow consumers to compare their DNA to DNA profiles uploaded by other individuals.[12] The websites' network effect[13] means that the more users who upload their DNA profiles, the more likely it is that another user will find a DNA match.[14]

The exponential growth of these websites[15] has provided users with more information about their family history than ever before. While these websites have enabled many users to connect with long-lost family members, a growing number of users are finding out a much darker secret: they were conceived not with an anonymous donor's sperm, but instead with the sperm of their mother's fertility doctor.

B. Artificial Insemination

Understanding the urgent need for a fertility fraud statute in Washington requires considering the historical development of artificial insemination and sperm donation banks. Beginning in the 1950s, the public's perception of artificial insemination started shifting from a form of doctor-performed "adultery"[16] to a more favorable and acceptable practice.[17] Nonetheless, decades passed before artificial insemination became a "major technique" doctors used to impregnate patients.[18]

Artificial insemination often requires donor sperm, but in the early days of artificial insemination, doctors did not use sperm banks to find donor sperm.[19] Several reasons are cited for the lack of sperm banks,[20] including (1) general social skepticism surrounding artificial insemination, as

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11. *Id.*

12. *Id.*

13. *See* Caroline Banton, *Network Effect*, INVESTOPEDIA (Oct. 15, 2019), https://www.investopedia.com/terms/n/network-effect.asp [https://perma.cc/T8V6-UWFG] ("The network effect is a phenomenon whereby increased numbers of people or participants improve the value of a good or service.").

14. Regalado, *supra* note 1.

15. This growth has recently leveled-off. *See id.*; *Genealogical Database Growth Slows*, THE DNA GEEK (June 22, 2019), https://thednageek.com/genealogical-database-growth-slows/ [https://perma.cc/98XV-ZZEV].

16. Jody Lyneé Madeira, *Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform*, 39 COLUM. J. GENDER & L. 110, 130 (2020).

17. *Id.* at 131.

18. *Id.* at 129 ("In 1964, Dr. Wilfred Finegold had published a lay guidebook to self-insemination, and insemination had become a 'major technique' at Vanderbilt by 1975.").

19. KARA W. SWANSON, BANKING ON THE BODY 211 (2014).

20. *Id.*

discussed above;[21] (2) the mother and the doctor's desire to know about the donor's health and physical characteristics;[22] and (3) the inability to keep non-fresh sperm viable.[23]

Unlike blood or breastmilk, which already utilized donor banks in the 1950s,[24] doctors believed that sperm was not as "fungible [of a] fluid" as blood.[25] Blood in blood banks was all largely considered equal; one donor's blood was not necessarily "better" than another donor's blood.[26] In contrast, doctors felt that donor-sperm needed to be "anonymous but highly particularized."[27] Doctors selected sperm specifically for their patients to ensure the donor was in good health and, in many circumstances, ideally resembled the husband whose sperm the donor was supplementing or replacing.[28] Doctors believed the "exercise of medical judgment" required when selecting sperm donors bolstered the public's acceptance of this controversial practice.[29] Yet, while doctors claimed to go through an arduous process to select the "right" donor for their patients, reality often unfolded differently.[30] Indeed, because doctors had difficulty recruiting donors, doctors would frequently resort to medical staff or students who were willing and available at the time a donation was needed.[31]

Another reason for the unpopularity of sperm banks was skepticism about the viability of frozen sperm.[32] In the early 1950s, doctors had not figured out how to increase the shelf stability of sperm.[33] Doctors believed that "semen needed to be kept at body temperature once produced and should be used within one to two hours."[34] But in 1954, an Iowa newspaper published a story about babies being born from frozen sperm.[35] Successful pregnancies using frozen sperm were the scientific

21. *Id.* at 210–11.
22. *Id.* at 207.
23. *Id.* at 208.
24. *Id.*
25. *Id.* at 211.
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 211–12.
31. *Id.* at 211.
32. *Id.* at 223–24.
33. *Id.*
34. *Id.* at 208.
35. *Id.* at 214.

advancement necessary to eventually open the first sperm bank in 1971.[36] Yet, even though this discovery enabled sperm banks to open, fresh sperm still had a higher rate of efficacy than frozen sperm.[37]

In part because of the lower success rate of frozen sperm, doctors did not routinely use sperm banks until the 1980s and 1990s, when the HIV/AIDS epidemic gave rise to the modern-day sperm bank.[38] A person's HIV positive status may not show up on a test for months after the initial transmission.[39] Because of the lag in time between transmission, testing, and detection, doctors and donor banks could not (and still cannot) immediately know for certain whether fresh sperm was HIV-free.[40] In the 1990s, the American Fertility Society recommended sperm be quarantined for 180 days to ensure the sperm was not HIV positive.[41] So, "although the chance of pregnancy increased by using fresh sperm," doctors feared the chance of infection through untested sperm also increased with fresh sperm.[42] Ultimately, one factor that led to the rise of sperm banks was this concern that patients would unwittingly contract HIV from fresh donor-sperm.[43]

In 1977, two-thirds of doctors relied on fresh sperm[44] and more than 90% of inseminating doctors surveyed did not allow patients to select their own sperm donors.[45] However, ten years later, fewer than one-quarter of doctors relied exclusively on fresh sperm.[46] And today, the American Society for Reproductive Medicine recommends against using fresh sperm because of the risk of undetected and transmittable ailments.[47]

Sperm banks allow for more thorough virus screening and provide

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36. *Id.* at 219.

37. *Id.* at 223.

38. *Id.* at 226.

39. How long a person must wait to before an HIV positive status would appear on a test appears somewhat disputed. Generally, a person who has contracted HIV will test positive within three months, however it can take six months or longer for some people to test positive. E. J. Smit, *HIV*, 82 SEXUALLY TRANSMITTED INFECTIONS iv42, iv42–iv45 (2006).

40. *Id.*

41. *New Guidelines for the Use of Semen Donor Insemination: 1990*, 53 FERTILITY & STERILITY 1S, 4S (1990).

42. SWANSON, *supra* note 19, at 226.

43. *Id.* at 227.

44. *Id.* at 226.

45. *Id.* at 230.

46. *Id.* at 226.

47. *Id.* Today, the American Society for Reproductive Medicine still recommends quarantining donor semen for six months. AM. SOC'Y FOR REPROD. MED., THIRD-PARTY REPRODUCTION: A GUIDE FOR PATIENTS 10 (2017).

patients with more autonomy in choosing donors, because patients do not have to rely on doctors procuring donors.[48] Indeed, by the 1980s, sperm banks saw the advancement as a business opportunity and began marketing directly to consumer-patients, changing their catalogues from technical to "patient-friendly" language.[49] In conclusion, the landscape of artificial insemination and sperm banks has substantially changed from 1950 to present times.

II. FERTILITY FRAUD CASES AND ALLEGATIONS

Occurrences of fertility fraud in California, Indiana, Texas, and Colorado have led these state legislatures to enact the country's first fertility fraud laws. The enactment of these laws exemplifies the lack of legal recourse patients and their families had under existing laws when the families initially discovered they were victims of fertility fraud.

A. Fertility Fraud Events that Led to Fertility Fraud Laws

1. California

California became one of the first states to experience a form of fertility fraud after three doctors were discovered using patients' eggs and embryos without patient consent. The story broke in 1995 in a news article about three fertility doctors, Dr. Ricardo Asch, Dr. Jose Balmaceda, and Dr. Sergio Stone, who practiced at University of California Irvine's Center for Reproductive Health.[50] The *Orange County Register* story alleged that, starting in the late 1980s, Drs. Asch, Balmaceda, and Stone stole embryos and eggs from patients.[51] The doctors subsequently implanted those embryos and eggs into other women without the "donors'" consent, some of which led to successful pregnancies.[52] Though the number of successful pregnancies is unclear, since 1995, U.C. Irvine has paid out more than $24 million for 137 separate incidents where eggs

48. SWANSON, *supra* note 19, at 230.

49. *Id.* at 231.

50. Susan Kelleher & Kim Christensen, *Baby Born After Doctor Took Eggs Without Consent*, ORANGE CNTY. REG. (May 19, 1995), https://www.pulitzer.org/winners/staff-37 [https://perma.cc/3T7E-3UQJ]; Keith Alan Byers, *Infertility and In Vitro Fertilization: A Growing Need for Consumer-Oriented Regulation of the In Vitro Fertilization Industry*, 18 J. LEGAL MED. 265, 309 (1997); Kimi Yoshino, *UCI Settles Dozens of Fertility Suits*, L.A. TIMES (Sept. 11, 2019, 12:00 AM), https://www.latimes.com/archives/la-xpm-2009-sep-11-me-uci-fertility11-story.html [https://perma.cc/SM7L-DWM5].

51. Kelleher & Christensen, *supra* note 50.

52. *Id.*

or embryos were either unaccounted for or implanted in other women without the donors' consent.[53]

State prosecutors were not certain that state criminal charges could be brought against the doctors under existing criminal statutes.[54] However, federal prosecutors were able to successfully bring federal mail fraud and income tax evasion cases against the physicians[55] for allegedly creating false operative reports as a part of a scheme to bill insurance companies.[56] Ultimately, Dr. Asch fled to Mexico and the U.S. has not successfully extradited him.[57] Dr. Balmaceda escaped to Chile.[58] Dr. Stone was the only doctor to face legal repercussions, but he ultimately avoided a prison sentence, despite being convicted of insurance fraud, and was only fined $50,000.[59]

This U.C. Irvine case differs from subsequent fertility fraud cases because in this case, the doctors covertly used embryos from non-consenting patients rather than implanting their own sperm into non-consenting patients.[60] However, this case illustrates the lack of satisfactory legal recourses available in these types of circumstances under existing law. Similarly, to the California legislature, the case highlighted the need for targeted laws that create criminal liability for fertility doctors who engage in fertility fraud. California's fertility fraud law is further examined in Part III.

2. Indiana

One of the first modern fertility fraud cases that garnered nationwide media coverage came out of Indiana in 2015.[61] In that case, a patient's

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53. Yoshino, *supra* note 50.

54. Byers, *supra* note 50, at 309.

55. Yoshino, *supra* note 50.

56. Hooper, Lundy & Bookman, Inc., *Second Doctor Arrested in UC-Irvine Fertility Scandal*, 9 CAL. HEALTH L. MONITOR, Feb. 26, 2001.

57. Kim Christensen, *Doctor with Ties to Fertility Scandal Won't Be Extradited by Mexico*, L.A. TIMES (Apr. 1, 2011, 12:00 AM), https://www.latimes.com/local/la-xpm-2011-apr-01-la-me-0401-asch-20110401-story.html [https://perma.cc/7VPC-U437].

58. Teri Sforza, *Should UC Go After Fertility Fraud Doctor's Assets?*, ORANGE CNTY. REG. (Jan. 25, 2011, 3:00 AM), https://www.ocregister.com/2011/01/25/should-uc-go-after-fertility-fraud-doctors-assets/ [https://perma.cc/DA2S-94HG].

59. *Id.*

60. Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversation: A Relational View*, 32 LOY. L.A. L. REV. 381, 382 (1999).

61. In 1992, Cecil B. Jacobson of Virginia was accused of, among other things, impregnating patients with his own sperm. *Doctor Is Found Guilty in Fertility Fraud Case*, N.Y. TIMES, Mar. 5, 1992, at A14, https://www.nytimes.com/1992/03/05/us/doctor-is-found-guilty-in-fertility-case.html

daughter, Jacoba Ballard, submitted her DNA to a genealogy website.[62] The results informed her that she had several half-siblings, all of whom were linked to one of the physician's relatives.[63] While the fertility doctor, Dr. Donald Cline, told his patients that he used fresh sperm from an anonymous medical student, he actually used his own sperm to impregnate his patients and produce at least sixty-five children between 1974 and 1987.[64]

After the daughter's discovery, she contacted local law enforcement, who informed her that there was no law in Indiana criminalizing the doctor's use of his own sperm to inseminate his patients.[65] With no other options, the daughter, along with another of Dr. Cline's artificially conceived children, filed a consumer protection complaint with the Indiana Attorney General.[66] Dr. Cline denied the allegations, but the prosecutor obtained a warrant to acquire DNA and confirmed that Dr. Cline was their biological father.[67]

Ultimately, Dr. Cline pled guilty to two counts of felony obstruction of justice for lying when the state investigators accused him of using his own sperm.[68] Despite inseminating over sixty-five patients with his own sperm, he was only fined $500 and sentenced to a year in prison, which was suspended by the judge.[69] Dr. Cline, who was already retired,

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[https://perma.cc/M45A-T8BD]. He was eventually convicted of mail and wire fraud. *Id.*

62. Shari Rudavsky, *Fertility Doctor Pleads Guilty to Obstruction of Justice in Insemination Case*, INDYSTAR (Dec. 14, 2017, 10:45 AM), https://www.indystar.com/story/news/2017/12/14/fertility-doctor-accused-inseminating-own-patients-court-today/951397001/ [https://perma.cc/9KPH-PVML].

63. *Id.*

64. Ariana Eunjung Cha, *Fertility Fraud: People Conceived Through Errors, Misdeeds in the Industry Are Pressing for Justice*, WASH. POST (Nov. 22, 2018, 1:48 PM), https://www.washingtonpost.com/national/health-science/fertility-fraud-people-conceived-through-errors-misdeeds-in-the-industry-are-pressing-for-justice/2018/11/22/02550ab0-c81d-11e8-9b1c-a90f1daae309_story.html [https://perma.cc/2GV6-FJ5E]; Adam Liptak, *When Dad Turns Out to Be the Fertility Doctor*, N.Y. TIMES MAG. (Dec. 11, 2019), https://www.nytimes.com/2019/12/11/magazine/fertility-fraud-sperm.html [https://perma.cc/83JV-TGMQ]; Mihir Zaveri, *A Fertility Doctor Used His Sperm on Unwitting Women. Their Children Want Answers.*, N.Y. TIMES (Aug. 30, 2018), https://www.nytimes.com/2018/08/30/us/fertility-doctor-pregnant-women.html [https://perma.cc/Y5WA-5KE5].

65. Zaveri, *supra* note 64.

66. Jody Lyneé Madeira, *Uncommon Misconceptions: Holding Physicians Accountable for Insemination Fraud*, 37 LAW & INEQ. 45, 49–50 (2019).

67. *Id.* at 50.

68. Steve Jefferson, *Fertility Doctor Pleads Guilty to Lying About Using Own Sperm, Avoids Jail Time*, WTHR (Dec. 14, 2017, 3:49 AM), https://www.wthr.com/article/fertility-doctor-pleads-guilty-to-lying-about-using-own-sperm-avoids-jail-time (last visited Aug. 10, 2020).

69. *Id.*; Madeira, *supra* note 66, at 50.

voluntarily surrendered his medical license[70] and the Indiana State Medical Board barred him from ever getting a license again.[71] This discovery was the catalyst for Indiana's new fertility fraud law that is discussed in Part III.

3. Texas

Three years later, a woman in Texas discovered she was also a victim of fertility fraud.[72] In 2018, Eve Wiley, who was conceived using donor sperm in 1987, took a commercial DNA test.[73] The DNA test connected Ms. Wiley to a first cousin in Texas, who she had not previously known.[74] When Ms. Wiley contacted her newfound first cousin, she discovered another connection: the first cousin's only uncle was Ms. Wiley's mother's fertility doctor.[75]

Ms. Wiley contacted her mother's fertility doctor, Dr. McMorries, who claimed that he mixed his own sperm, which he donated while he was a medical student, with the original donor's sperm.[76] Dr. McMorries wrote to Ms. Wiley explaining, "[i]t is easy to look back and judge protocols/standards used 33 years ago and assume they were wrong in today's environment . . . it was not wrong 33 years ago as that was acceptable practice for the times."[77]

Initially, the Texas Medical Board declined to take action against Dr. McMorries.[78] The Board only agreed to reopen the investigation in October 2019 after an Indiana professor, Jody Lyneé Madeira, a pioneer

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70. *Id.* at 49–50.

71. Zaveri, *supra* note 64.

72. Jacqueline Mroz, *Their Mothers Chose Donor Sperm. The Doctors Used Their Own.*, N.Y. TIMES (Aug. 21, 2019), https://www.nytimes.com/2019/08/21/health/sperm-donors-fraud-doctors.html [https://perma.cc/Y6MY-H8FC].

73. Kyra Phillips et al., *Texas Woman Seeks To Change Law After DNA Test Reveals Shocking Truth About Her Genetic Family Tree*, ABC NEWS (May 3, 2019, 7:55 PM), https://abcnews.go.com/US/texas-woman-seeks-change-law-dna-test-reveals/story?id=62809127 [https://perma.cc/4MAY-DCSN]; Robert T. Garrett, *ABC's '20/20' Features Dallas Woman Who Found Out Her Mother's Fertility Doctor is Her Father*, DALL. MORNING NEWS (May 3, 2019, 4:45 PM), https://www.dallasnews.com/news/politics/2019/05/03/abc-s-20-20-features-dallas-woman-who-found-out-her-mother-s-fertility-doctor-is-her-father/ [https://perma.cc/485C-EGEP].

74. Phillips, *supra* note 73.

75. *Id.*

76. *Id.*

77. *Id.*

78. Robert T. Garrett, *East Texas Doctor Accused of 'Fertility Fraud' May Face Unethical Conduct, But Not Treatment, Investigation*, DALL. MORNING NEWS (Oct. 30, 2019, 6:51 PM), https://www.dallasnews.com/news/politics/2019/10/30/east-texas-doctor-accused-of-fertility-fraud-may-face-unethical-conduct-but-not-treatment-investigation/ [https://perma.cc/W4LV-E24S].

in fertility fraud issues, filed a complaint with the Board.[79] The Board first pointed to the statute of limitations issue in support of its decision to not open an investigation against Dr. McMorries.[80] Specifically, the Board reasoned that it could not review the allegation because it was a standard of care complaint that occurred more than seven years past the medical treatment.[81] However, the Board revised its stance in response to Dr. Madeira's complaint, agreeing to investigate unprofessional and unethical conduct, which does not carry the same statute of limitation restrictions.[82] Dr. McMorries was still practicing medicine in Texas at the time of Dr. Madeira's complaint.[83]

Additionally, Dr. McMorries faced no legal penalties for his action.[84] Like Dr. Cline in Indiana, Dr. McMorries's actions were not explicitly criminal under existing Texas law.[85] Moreover, any attempt to bring a medical malpractice claim was barred by the ten-year statute of limitations.[86] For these reasons, Ms. Wiley could not bring any kind of legal action against Dr. McMorries.[87] However, Ms. Wiley's inability to bring a claim against this doctor prompted her to meet with Texas lawmakers and lobby for new legislation that would criminalize Dr. McMorries's actions. Ms. Wiley's actions ultimately lead the Texas legislature to enact a new law criminalizing fertility fraud.[88] Texas's fertility fraud law is examined in Part III.

B. Fertility Fraud Cases Using Current Laws

Plaintiffs in the fertility fraud cases discussed above were left grasping at legal straws when they attempted to bring claims against their mothers' fertility doctors. In Indiana and Texas, at least some of the patients and their families were told there was no viable case against the physicians

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. Madeira, *supra* note 5 ("It would not be possible to sue a doctor like McMorries under current Texas state law because under state law all medical malpractice claims must be brought within 10 years of the injury—a time period that will have already lapsed for all victims of offenses in the 1970s and 1980s.").

85. *Id.*

86. *Id.*

87. Garrett, *supra* note 73.

88. *Id.*

who committed fertility fraud.[89] In more recent cases currently pending in Idaho and in Colorado, plaintiffs are attempting to bring civil claims against doctors using existing laws.[90] Responses from the courts and the respective parties in pretrial motions shed light on how these claims may move forward. The cases are discussed in turn below.

1. Idaho

In 2017, a family, who had moved to Washington from Idaho, discovered they were victims of fertility fraud. In this case, plaintiffs Sally Ashby and Howard Fowler conceived their daughter, Kelli Rowlette, through artificial insemination in 1980 in Idaho.[91] Their fertility doctor told the parents the sperm was 85% Mr. Fowler's and 15% an anonymous student donor resembling Mr. Fowler.[92] Nearly thirty-eight years after the artificial insemination occurred in 2017, Ms. Rowlette submitted her DNA to Ancestry.com.[93] The results showed a likely parent-child match between herself and her mother's fertility doctor, Dr. Gerald Mortimer.[94] The family concluded that Dr. Mortimer used his own sperm to conceive Ms. Rowlette.[95] Accordingly, in March 2018, the family filed a civil claim against Dr. Mortimer in the United States District Court of Idaho, naming all family members as plaintiffs.[96]

In their lawsuit, the family alleged five different causes of action: medical malpractice, informed consent violations, fraud, intentional infliction of emotional distress, and negligent infliction of emotional distress.[97] Dr. Mortimer responded by filing a 12(b)(6) motion for failure

89. *See id.* In Texas, Eve Wiley, who was born by fertility fraud, was told by an attorney friend that "inserting someone else's sperm in a woman isn't a crime." *Id.* In Indiana, Jacoba Ballard, who was born by fertility fraud, contacted local law enforcement, who informed her that there was no law in Indiana criminalizing the doctor's use of his own sperm to inseminate his patients. Zaveri, *supra* note 64.

90. *See* Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1018 (D. Idaho 2018); Alex Zorn, *Former GJ Doctor Seeks to Have Lawsuit Dismissed*, DAILY SENTINEL (Jan. 25, 2020), https://www.gjsentinel.com/news/western_colorado/former-gj-doctor-seeks-to-have-lawsuit-dismissed/article_bee143a0-3ed3-11ea-a7b6-6bc8e50d6852.html [https://perma.cc/KB87-7KXA]. In contrast, the accuser in the Indiana case felt their only avenue in the legal system was a consumer protection claim. Madeira, *supra* note 66.

91. *Rowlette*, 352 F. Supp. 3d at 1018.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 1019.

96. *Id.*; Madeira, *supra* note 5.

97. *Rowlette*, 352 F. Supp. 3d at 1019.

to state a claim.[98] The court reviewed the plaintiffs' claims and applied Idaho state law to address whether the claims were viable under the circumstances.

a. Standing

The court's opinion first addressed the issue of standing.[99] The family named the patient, her husband, and their subsequent daughter as parties to the case, but the court ultimately found that the daughter did not have standing to bring claims against Dr. Mortimer.[100] The court reasoned that Dr. Mortimer did not owe Ms. Rowlette a duty of care because she was not a patient of Dr. Mortimer at the time of conduct, as she was not yet born.[101] Because Ms. Rowlette was owed no duty, there was no breach, and no tortious claim.[102] Additionally, the court explained that even if Ms. Rowlette could argue she was a patient at the time of conception, she did not have the requisite damages to state a claim.[103] Lastly, the court reasoned that the only way to classify her potential damages was in the form of a wrongful life claim, which is not recognized in Idaho.[104]

Unlike the daughter, the court found the patient's husband, Howard Fowler, did have standing to bring his claims.[105] The court found that the "male spouse" of an artificial insemination patient is a "foreseeable victim" and an "integral part of the procedure," partly because Mr. Fowler's sperm was partially used during the artificial insemination.[106] The court concluded that the difficulty in separating the couple's relationship and Mr. Fowler's role in the procedure was enough evidence to conclude that Dr. Mortimer's malpractice gave rise to a cause of action for both the initial patient (the mother) and her spouse.[107]

Standing is a recurring issue in fertility fraud cases and thus is specifically addressed in some of the emerging fertility fraud laws. Therefore, even though medical malpractice laws already exist, fertility fraud laws are necessary because not all victims can bring a case within

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 1021–23.
102. *Id.*
103. *Id.*
104. *Id.* at 1021 (citing IDAHO CODE § 5-334 (2010)).
105. *Id.* at 1023–24.
106. *Id.* at 1024.
107. *Id.*

the framework of existing medical malpractice laws.

b. Claims

i. Medical Malpractice

While, the plaintiffs in *Rowlette v. Mortimer*[108] brought a variety of claims against Dr. Mortimer, (including medical malpractice, fraud, and intentional infliction of emotional distress)[109] the Idaho court found the plaintiffs' emotional distress and fraud claims constituted torts and were subsumed under Idaho's medical malpractice statute.[110] The Idaho Supreme Court has determined that a plaintiff's medical malpractice claim subsumes other tort claims if "the alleged wrongful act or omission occurred" while the defendant was performing professional healthcare services.[111]

In Idaho, the statute of limitations for medical malpractice claims is generally two years, but there are two exceptions to that rule.[112] The *Rowlette* plaintiffs argued the statute should be tolled under either the fraudulent concealment exception, or under the "some damages" principle.[113] The fraudulent concealment exception can be utilized when the "fact of damage is fraudulently and knowingly concealed from the patient."[114] An action must then be brought within one year of "when the injured party knows or in the exercise of reasonable care should have been put on inquiry regarding the condition or matter complained of."[115] The district court left the question of whether the plaintiffs "should have known" and therefore qualified for the concealment exception to the jury.[116]

The plaintiffs also argued the statute of limitations should be tolled because the statute of limitations "did not accrue until they suffered 'some damage.'"[117] Dr. Mortimer countered by claiming that because DNA testing is available any time after a baby's birth, the statute of limitations

108. 352 F. Supp. 3d 1012 (D. Idaho 2018).

109. *Id.* at 1019.

110. *Id.* at 1026.

111. *Id.* at 1025 (quoting Lapham v. Stewart, 51 P.3d 396, 403 (Idaho 2002)).

112. *Id.* at 1029–30.

113. *Id.* at 1029.

114. *Id.* at 1030.

115. *Id.* (quoting IDAHO CODE § 5-219(4) (2005)).

116. *Id.* at 1031.

117. *Id.*

should not be tolled.[118] However, the court disagreed with Dr. Mortimer's argument, stating that the plaintiffs did not suffer damages until they discovered that their daughter's biological father was their fertility doctor through DNA testing.[119] The court agreed with the plaintiffs, reasoning that because the damage came from finding out their daughter's biological father was their doctor, the damages were not ascertainable until Dr. Mortimer published his own DNA results.[120] For that reason, the court concluded that the "some damages" exception tolled the statute of limitations on the medical malpractice claim until, at the very earliest, when Dr. Mortimer published his DNA results.[121] The court specified that allowing the claim to toll until Dr. Mortimer's publication was narrowly confined to this case.[122]

ii. Lack of Informed Consent

The last issue the *Rowlette* court discussed was informed consent.[123] Unlike the intentional tort claims, a claim alleging a lack of informed consent can coexist with a medical malpractice claim in Idaho.[124] On this issue, though, the court held that the informed consent claim was barred by the two-year statute of limitations, reasoning that the statute of limitations began running when the defendant used his sperm without the plaintiff's knowledge in 1980.[125] In other words, the claim needed to be brought by 1982.[126] Additionally, the plaintiff could not use the fraudulent concealment exception or some damages exception because these exceptions only apply to medical malpractice claims.[127]

Though the court's pretrial orders provide information on what fertility fraud claims may move forward, the final outcome remains unclear as the case moves through the legal system. Yet, even without knowing the final outcome, the *Rowlette* decision provides insights into how fertility fraud cases may fare in states that lack specific fertility fraud protections. To that end, the case highlights several hurdles plaintiffs may face, such as

118. *Id.* at 1032.

119. *Id.*

120. *Id.* at 1032–33.

121. *Id.* at 1033.

122. *Id.* ("[*I*]*n this case* the statute of limitations on the medical malpractice claim did not begin to run until at least the point at which Dr. Mortimer published his DNA results." (emphasis in original)).

123. *Id.* at 1028.

124. *Id.*

125. *Id.* at 1029.

126. *Id.*

127. *Id.*

lack of standing, statutes of limitations, and unrecoverable damages. Several state legislatures contemplated similar legal hurdles when enacting fertility fraud laws, which will be discussed in Parts III, IV, and V.

2. Colorado

A similar situation unfolded in 2018 in Colorado when a number of individuals using genealogy websites to track their DNA found themselves connected through the same fertility doctor.[128] In this ongoing litigation, a fertility doctor was accused of using his own sperm to conceive at least a dozen children between 1975 and 1989.[129] Six families filed a lawsuit against the fertility doctor, Dr. Paul Jones, under theories of medical negligence, lack of informed consent, negligent misrepresentation, fraud, extreme or outrageous conduct, battery, and breach of contract.[130]

Dr. Jones responded to the lawsuit with a motion to dismiss on several grounds, including that the two-year statute of limitations already expired.[131] The plaintiffs argued the statute of limitations was tolled until discovery of the fertility fraud under the "knowing concealment exception."[132] Dr. Jones countered by claiming that the knowing concealment exception is not applicable because he had an obligation to conceal the donor's identity.[133] Dr. Jones further claimed that he had "an obligation to conceal" the donor's identifying information because the mothers requested anonymity.[134]

In light of these new allegations and lack of a specific fertility fraud law, the Colorado legislature proposed and passed a fertility fraud law.[135]

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128. Alex Zorn, *More families join suit against fertility doctor*, DAILY SENTINEL (Nov. 24, 2019), https://www.gjsentinel.com/news/western_colorado/more-families-join-suit-against-fertility-doctor/article_cd5591de-0e81-11ea-a8d8-20677ce85d90.html [https://perma.cc/LY9Z-3SNW] (noting that these allegations came to light in November 2019 and are still developing); *DNA Tests Lead "Disgusted" Families to Doctor Accused of Using Own Sperm to Inseminate Women*, CBS NEWS (Nov. 1, 2019), https://www.cbsnews.com/news/colorado-doctor-paul-jones-accused-of-using-own-sperm-to-artificially-inseminate-women/ [https://perma.cc/ZQ3G-W2EG].

129. *Id.*; Michael Cook, *Another Case of Fertility Fraud, This Time in Colorado*, BIOEDGE (Feb. 1, 2020), https://www.bioedge.org/bioethics/another-case-of-fertility-fraud-this-time-in-colorado/13311 [https://perma.cc/2AKN-K3YZ].

130. *Id.*

131. Zorn, *supra* note 90.

132. *Id.*

133. *Id.*

134. *Id.*

135. Sam Tabachnik, *Proposed Bill Would Finally Make It a Felony for Doctors to Inseminate*

This law is discussed in Part III with other states' fertility fraud laws.[136]

III. FERTILITY FRAUD LAWS

The inability of State Attorneys General and private parties to bring adequate claims against the doctors in California, Indiana, Texas, and Colorado prompted new legislation. Most recently, the Colorado legislature passed a bill to address the onslaught of accusations against Dr. Jones.[137] However, California was the first state to enact a law that addressed fertility fraud, and it did so more than two decades before Colorado.[138]

A. California

Following the scandal at U.C. Irvine where three doctors committed fertility fraud, California became the first state to enact a criminal law prohibiting fertility fraud.[139] The California law does not include a private civil cause of action, but it created a criminal statute enforceable against "anyone [who] knowingly implant[s] sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient."[140] Violators of the law face a term of imprisonment of three to five years, a fine up to $50,000, or both.[141]

B. Indiana

Spurred by the allegations against Dr. Cline, in 2019, Indiana became the second state to criminalize fertility fraud and the first state to provide a civil cause of action for victims of fertility fraud.[142] The law makes fertility fraud a Level six felony,[143] which is the lowest offense level in

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Patients with Their Own Sperm, DENVER POST (Jan. 9, 2020, 3:29 PM), https://www.denverpost.com/2020/01/09/fertility-fraud-paul-jones-sperm-doctor-colorado/ [https://perma.cc/66BR-W6U5].

136. See *infra* Part III.

137. H.B. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

138. CAL. PENAL CODE § 367g (Deering 2020) (originally enacted in 1996).

139. Byers, *supra* note 50, at 311–12 & n.300.

140. PENAL § 367g(b).

141. PENAL § 367g(c).

142. Madeira, *supra* note 5.

143. IND. CODE § 35-43-5-3(b)(2) (2020).

Indiana.[144] Generally, a Level six felon faces a prison sentence ranging from six months to two and half years, and may be fined up to $10,000.[145]

The civil cause of action in the Indiana statute states that an action can be brought "against a health care provider who knowingly or intentionally treated the woman for infertility by using the health care provider's own spermatozoon or ovum, without the patient's informed written consent to treatment using the spermatozoon or ovum."[146] Additionally, the law specifies that the mother who gives birth as a result of fertility fraud; the spouse or surviving spouse of the mother; or their child can bring a claim against the physician.[147] Also, the mother has a separate cause of action for each child born using the physician's sperm without consent.[148]

Notably, the law clarifies the statute of limitations regulating the cause of action.[149] This is an especially important part of the statute because in many fertility fraud cases, the fraud is not discovered until decades after the artificial insemination.[150] The Indiana law dictates that the claim must be brought no more than ten years after the child's eighteenth birthday, or, if the child dies before their eighteenth birthday, within twenty years of the procedure.[151] Most importantly, the statute creates an exception to the ten year statute of limitations.[152] Specifically, the statute of limitations is tolled until (1) the person bringing the claim "first discovers evidence sufficient to bring an action against the defendant through DNA";[153] (2) the person becomes aware of a "recording"[154] that provides sufficient evidence to bring a claim; or (3) the defendant confesses to the crime.[155] The claim must be brought within five years of one of those qualifying

144. *Id.* § 35-50-2-7.

145. *Id.* § 35-50-2-7(b).

146. *Id.* § 34-24-5-2.

147. *Id.* § 34-24-5-2(A)(1)–(4).

148. *Id.* § 34-24-5-5.

149. *Id.* § 34-11-2-15.

150. *See, e.g.*, Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1018 (D. Idaho 2018) (noting that Kelli Roweltte was around thirty-eight when she discovered the identity of her sperm donor); Sarah Zhang, *The Fertility Doctor's Secret*, THE ATLANTIC (Mar. 18, 2019), https://www.theatlantic.com/magazine/archive/2019/04/fertility-doctor-donald-cline-secret-children/583249/ [https://perma.cc/WZL8-AHT5] (noting that Jacoba Ballard was thirty-three when she found out the identity of her sperm donor after looking for half siblings on ancestry websites).

151. IND. CODE § 34-11-2-15(a) (2020).

152. *Id.* § 34-11-2-15(b).

153. *Id.* § 34-11-2-15(b)(1).

154. As defined by section 35-31.5-2-273 of the Idaho Code.

155. *Id.* § 34-11-2-15(b)(2)–(3).

events.[156]

In addition to clarifying the statute of limitations, the law also specifies the damages available to plaintiffs. If the plaintiff prevails against the physician, the Indiana statute entitles the plaintiff to several forms of damages. First, the plaintiff is entitled to attorney's fees and the mother's costs of fertility treatment.[157] Additionally, the statute allows plaintiffs to receive liquidated damages of $10,000, or the plaintiff may seek compensatory and punitive damages at trial.[158] Notably, Indiana has capped damages for medical malpractice cases. If the alleged malpractice occurred before January 1, 1990—and most of the above allegations did—the damages are capped at $500,000.[159] However, the fertility fraud statute is not located within the medical malpractice statutes, so the damages cap arguably may not apply to fertility fraud cases. Indiana's law addresses several civil and criminal aspects of fertility fraud. The bill was initially passed without the criminal provision because lawmakers argued existing laws were sufficient.[160] Yet, the bill was later amended to include the criminal provision, and it passed unanimously through the Senate and House before being signed into law by the Indiana Governor.[161]

C. Texas

Texas was the third state to create a fertility fraud law in July 2019, when its legislature declared fertility fraud a form of felony sexual assault.[162] Specifically, the legislature prohibited healthcare providers from using "reproductive material" from a donor, knowing that the patient had not expressly consented to that donor's reproductive material.[163] One Texas representative explained her support for the sexual assault classification, stating, "[t]here's a physical aspect to it—there is a medical

156. *Id.* § 34-11-2-15(b).

157. *Id.* § 34-24-5-4.

158. *Id.*

159. *Id.* § 34-18-14-3(a)(1); *see, e.g.*, Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1018 (D. Idaho 2018) (noting that plaintiffs were conceived through artificial insemination in 1980); Cha, *supra* note 64 (discussing how fertility fraud-conceived Ballard found fifty people born between 1974 and 1987 who believe Dr. Cline is their father); Phillips, *supra* note 73 (stating that Eve Wiley was born via fertility fraud in 1987); Cook, *supra* note 129 ("About six families are suing Dr Paul Jones for negligence and fraud over artificial insemination procedures between 1975 and 1989.").

160. Associated Press & Ind. L. Staff, *Legislative Panel Deletes Making Fertility Fraud Criminal*, IND. LAW. (Jan. 23, 2019), https://www.theindianalawyer.com/articles/49255-legislative-panel-deletes-making-fertility-fraud-criminal [https://perma.cc/WQ59-9UUV]; Madeira, *supra* note 5.

161. Madeira, *supra* note 5.

162. TEX. PENAL CODE ANN. § 22.011(b)(12) (West 2019).

163. *Id.*

device that is being used to penetrate these women to deliver the genetic material, I equate it with rape, because there's no consent."[164]

The Texas law does not create special statute of limitations provisions for criminal sexual assault by fertility fraud. Furthermore, under Texas law, there is no statute of limitations for criminal sexual assault if probable cause indicates the defendant committed the same or similar sex offense against five or more victims.[165] This provision may eliminate the statute of limitations problem encountered by other litigants in fertility fraud cases because some occurrences of fertility fraud include more than five maternal victims.[166] If there are fewer than five maternal victims, the statute of limitations is ten years from the commission of the offense or two years from the date the offense was discovered.[167] The perpetrator may be sentenced to a range of six months to two years in "state jail," and may be fined up to $10,000.[168] Thus, although Texas did not provide a civil cause of action, it enacted a much stronger criminal law than those enacted in other states.

D. Colorado

The Colorado legislature passed a law criminalizing fertility fraud in June 2020.[169] Colorado's law closely mirrors Indiana's law, creating a civil cause of action and defining fertility fraud as a Class six felony.[170] Like Indiana, this is the least serious felony in Colorado. A Class six felony is punishable by one year to eighteen months in prison, a fine of $1,000 to $100,000, or both.[171] The law also specifies that the statute of limitations for criminal prosecution does not start running until the fraudulent act is discovered, or the most recent occurrence that is discovered if a series of crimes were committed.[172]

The civil component also closely mirrors Indiana's law. The bill allows the birth mother; a spouse or partner; a surviving spouse or partner; or a child born as result, to bring an action against a healthcare provider who

164. Mroz, *supra* note 72.

165. TEX. CODE CRIM. PROC. ANN. art. 12.01(1)(C)(ii) (West 2019).

166. *See* Liptak, *supra* note 64 (referencing Dr. Cline's 65 victims in Indiana); Cook, *supra* note 129 (referencing Dr. Jones in Colorado and his six victims).

167. CRIM. PROC. art. 12.01(2); art. 12.01(7).

168. PENAL § 12.35.

169. H.B. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

170. *Id.*

171. COLO. REV. STAT. § 18-1.3-401(1)(V)(A) (2019).

172. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 16-5-401 (4.5)(y)).

knowingly uses eggs or sperm from a donor to which the patient did not expressly consent.[173] Like the Indiana statute, a separate cause of action can be brought for each child conceived under fraudulent pretenses.[174]

Colorado's bill allows the plaintiff to be awarded attorney fees and either "[a]ll damages reasonably necessary to compensate the plaintiff" including emotional distress damages, or liquidated damages of $50,000.[175] Colorado caps noneconomic damages for medical malpractice claims at $300,000.[176] Furthermore, the law notes that the statute of limitations applied to other medical malpractice claims does not apply to fertility fraud claims, potentially indicating that there is no statute of limitations for fertility fraud cases.[177]

IV. CURRENT WASHINGTON LAWS APPLIED TO FERTILITY FRAUD ALLEGATIONS

A. Medical Malpractice

An important consideration when evaluating if the Washington legislature should create a fertility fraud law is whether a Washington plaintiff could successfully use existing medical malpractice laws instead. Medical malpractice claims seem like a potential avenue for relief in fertility fraud cases because, like medical malpractice claims, fertility fraud claims arise from doctors causing harm to patients. Indeed, due to the lack of a fertility fraud law in Idaho, the *Rowlette* plaintiffs could only attempt to seek a remedy by bringing a standard medical malpractice claim against their fertility doctor.[178]

In Washington, medical malpractice is defined by statute.[179] That statute exclusively governs all claims for "damages for injury occurring as a result of health care."[180] A plaintiff can bring three different kinds of

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173. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 13-21-132(2)).

174. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 13-21-132(4)).

175. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 13-21-132(3)).

176. COLO. REV. STAT. § 13-64-302(c) (2019).

177. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 13-80-102.5).

178. Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1033 (D. Idaho 2018).

179. *See generally* WASH. REV. CODE § 7.70 (2019).

180. *Id.* § 7.70.010. *See generally* Branom v. State, 94 Wash. App. 964, 968–69, 974 P.2d 335, 338 (1999).

medical malpractice claims: (1) a "failed promise"[181] claim, which occurs when a healthcare provider promised the patient, or their representative, that the injury suffered would not occur; (2) an informed consent claim; and (3) a medical negligence claim.[182] At first glance, the most relevant theories of medical malpractice that could be utilized in a fertility fraud case are medical negligence and informed consent. A Washington medical practice plaintiff can seek damages arising from economic losses, as well as noneconomic damages. Washington does not cap economic or noneconomic damages that may be recovered in a medical malpractice claim.[183]

1. Medical Negligence

To successfully allege a claim of medical negligence, plaintiffs must essentially prove the elements of a basic negligence claim: breach of duty; causation; and damages.[184] Specifically, plaintiffs must prove that:

> (1) The healthcare provider failed to exercise that degree of care, skill, and learning expected of a reasonably prudent health care provider at that time in the profession or class to which he or she belongs, in the state of Washington, acting in the same or similar circumstances;
>
> (2) Such failure was a proximate cause of the injury complained of.[185]

A plaintiff alleging medical negligence in Washington does not necessarily have to prove a patient-physician relationship to have standing to bring a medical negligence claim or to argue a physician owed the plaintiff a duty.[186] Instead, a plaintiff can bring a cause of action by showing "injury resulted from the failure of a health care provider to follow the accepted standard of care."[187] Accordingly, some third-party plaintiffs can bring a medical negligence claim against physician.[188] For example, parents who are injured as a result of their child's negligent

181. JEFFREY M. ODOM, WASHINGTON TORTS AND PERSONAL INJURY § 7.05 (2019).

182. WASH. REV. CODE § 7.70.030.

183. *Id.* § 7.70.010; ODOM, *supra* note 181, § 7.09(1).

184. ODOM, *supra* note 181, § 7.04(1).

185. WASH. REV. CODE § 7.70.040.

186. ODOM, *supra* note 181, § 7.02(3). *See generally* Webb v. Neuroeducation Inc., 121 Wash. App. 336, 348, 88 P.3d 417, 422 (2004).

187. *Webb*, 121 Wash. App. at 346, 88 P.3d at 421 (quoting WASH. REV. CODE § 7.70.030(1)).

188. ODOM, *supra* note 181, § 7.02(3). *See generally Webb*, 121 Wash. App. at 348, 88 P.3d at 422.

treatment may have a cause of action.[189] However, these claims are usually brought under a theory of lost consortium, where the plaintiff argues a loss of companionship due to the physician's negligence.

In *Webb v. Neuroeducation Inc.*,[190] for example, the court held that a father could bring a third-party medical negligence claim against his son's physician who implanted false memories of sexual assault.[191] In that case, the court noted the "well settled" principle that, when alleging negligent medical treatment, the plaintiff need not be the actual patient.[192] Further, the court specifically pointed to the relationship between parents and children as a relationship likely to result in standing for a third-party plaintiff in medical negligence cases.[193]

Following the court's reasoning in *Webb*, a child or a spouse in a fertility fraud case may have standing to bring a medical negligence claim in Washington. The child or the spouse of the birth mother may not technically be the fertility doctor's patients. However, both a child and a spouse could reasonably argue that their damages were caused by the doctor's failure to provide an acceptable standard of medical care to the mother. Like the physician's negligent care in *Webb* that caused the patient's father emotional harm,[194] a physician's negligent care in a fertility fraud case could cause the spouse and child emotional harm. However, fertility fraud plaintiffs may have more difficulty proving loss of consortium between the plaintiff and the child based on the physician's actions.

2. Informed Consent

The other potentially applicable medical malpractice claim is a lack of informed consent. To successfully allege a lack of informed consent, a plaintiff must demonstrate the following: (1) a healthcare provider failed to inform the patient about material facts concerning the patient's treatment; (2) the patient consented to the treatment without being fully informed of the material facts; (3) a reasonably prudent patient would not have consented to the treatment if informed of such material facts; and (4) the treatment performed without consent caused injury to the

189. ODOM, *supra* note 181, § 7.02(3). *See generally Webb*, 121 Wash. App. at 348, 88 P.3d at 422.

190. 121 Wash. App. 336, 88 P.3d 417 (2004).

191. *Id.* at 348, 88 P.3d at 423.

192. *Id.* at 346, 88 P.3d at 421.

193. *Id.* at 347–49, 88 P.3d at 421–23.

194. *Id.* at 350–51, 88 P.3d at 423.

patient.[195]

Unlike medical negligence, the informed consent theory requires that the plaintiff is a patient of a physician to bring an informed consent claim against that physician.[196] In other words, only the birth mother can bring an informed consent claim in a fertility fraud case.

Additionally, informed consent cases address different issues than fertility fraud cases. The *Gomez v. Sauerwein*[197] court explained that, in traditional cases, patients allege a lack of informed consent in two general circumstances: (1) the physician fails to inform the patient about risks of the treatment the physician selected, like the possibility of suffering a stroke during surgery; or (2) the physician fails to inform the patient about other treatment options, including no treatment at all.[198] Accordingly, the doctor must provide the patient with information about the risks associated with a treatment and/or treatment options, allowing that patient to make an educated decision to accept the risks and move forward with the treatment, choose an alternative path, or elect to receive no treatment.[199]

While an informed consent claim initially seems like a good fit for fertility fraud, the facts in fertility fraud cases are critically different from traditional informed consent cases.[200] First, fertility fraud cases do not deal with risks or alternative treatments, like traditional informed consent cases. For example, an informed consent plaintiff could bring a claim against the doctor by arguing the patient would have chosen an alternative procedure had they been informed about the risk of a stroke during surgery; a fertility fraud victim could not. Second, in fertility fraud cases, the plaintiff would struggle to prove the requisite injury, as is furthered discussed below. Thus, while at first glance fertility fraud cases appear to fit into the framework of an informed consent claim, because of critical departures from traditional informed consent cases, fertility fraud plaintiffs likely could not bring an informed consent claim under existing laws.

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195. WASH. REV. CODE § 7.70.050(1) (2019).

196. ODOM, *supra* note 181, § 7.02(3).

197. 172 Wash. App. 370, 289 P.3d 755 (2012).

198. *Id.* at 378–79, 289 P.3d at 759–60 (citing Backlund v. Univ. of Wash., 137 Wash. 2d 651, 661, n.2, 975 P.2d 950, 956, n.2 (1999)).

199. *See* Holt v. Nelson, 11 Wash. App. 230, 235–38, 523 P.2d 211, 215–16 (1974). In this case, the plaintiff argued the doctor "fail[ed] to give the parents the opportunity to make the choice of proceeding with the caesarean section at a time earlier than the doctor ultimately made the decision to, and did, perform the operation." *Id.* at 232, 523 P.2d at 214.

200. *Gomez*, 172 Wash. App. at 378–79, 289 P.3d at 759–60.

3. Wrongful Birth and Wrongful Life

Unlike many states, Washington plaintiffs can argue negligence and informed consent claims under a theory of "wrongful life" or "wrongful birth."[201] Parent-patients can bring wrongful birth claims by arguing the doctor failed to inform the parents of crucial information or by arguing that a medical procedure proximately caused the birth of a child with some form of disability.[202] Conversely, under third-party standing, children with a disability can prove a wrongful life claim by arguing medical negligence under a theory that parallels a parent's wrongful birth claim.[203] For example, in *Wuth ex rel. Kessler v. Laboratory Corp. of America*,[204] parent-plaintiffs knew the husband carried a rare genetic disorder that could result in birth defects.[205] When the parents found out they were pregnant, they conducted genetic testing on the fetus to identify if it carried the genetic disease.[206] If the fetus had the disease, the parents planned to abort the pregnancy.[207] The tests erroneously revealed that the fetus did not have the disease, and the child was born with severe disabilities.[208] The parents brought a wrongful birth case against the physician, arguing the doctor had negligently performed the genetic testing.[209] The court affirmed the jury's decision, ultimately finding the plaintiffs successfully alleged the elements of a wrongful birth claim.[210]

Courts limit damages in wrongful birth and life cases to damages arising from a child's disability. For example, in *McKernan v. Aasheim*,[211] the plaintiffs brought a claim when an unsuccessful tubal ligation[212]

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201. ODOM, *supra* note 181, § 7.04(4)(b); Philip J. VanDerhoef, *Washington Recognizes Wrongful Birth and Wrongful Life—A Critical Analysis*—Harbeson v. Parke-Davis, Inc., *98 Wn.2d 460, 656 P.2d 483 (1983)*, 58 WASH. L. REV. 649, 653–54 (1983).

202. *Id.* at 655–56.

203. Harbeson v. Parke-Davis, 98 Wash. 2d 460, 479–80, 656 P.2d 483, 495 (1983).

204. 189 Wash. App. 660, 359 P.3d 841 (2015).

205. *Id.* at 668–69, 359 P.3d at 846–47.

206. *Id.* at 671–72, 359 P.3d at 848–50.

207. *Id.*

208. *Id.* at 675–76, 359 P.3d at 850.

209. *Id.* at 677, 359 P.3d at 850–51.

210. *Id.* at 709–10, 359 P.3d at 866–67. The child's claim on the same facts would be a wrongful life claim. *Id.*

211. 102 Wash. 2d 411, 687 P.2d 850 (1984).

212. "[A]lso known as having your tubes tied or tubal sterilization — is a type of permanent birth control. During tubal ligation, the fallopian tubes are cut, tied or blocked to permanently prevent pregnancy." Mayo Clinic Staff, *Tubal Ligation*, MAYO CLINIC (Mar. 29, 2018), https://www.mayoclinic.org/tests-procedures/tubal-ligation/about/pac-20388360#:~:text=Tubal%20ligation%20%E2%80%94%20also%20known%20as,blocked%20to%20permanently%20prevent

resulted in the birth of a healthy baby.[213] The plaintiffs argued that they should receive damages for the cost of raising a child that was only born as a result of their doctor's negligence.[214] The Court ultimately decided that the jury could not, with the requisite reasonable certainty, determine if the cost of raising a child outweighed the emotional benefits that were conferred by the child.[215] Because of the holding in *McKernan*, parents must demonstrate that their child suffers from some sort of disability or complication due to the physician's negligence in order to recover damages beyond the cost of the pregnancy itself.[216]

A fertility fraud plaintiff using wrongful life or birth to argue a medical malpractice claim would likely be unsuccessful because both claims require showing that the doctor's actions caused a resulting disability to prove damages.[217] Not only would a fertility fraud plaintiff likely run into the same problem as encountered by the *McKernan* plaintiffs, but fertility fraud plaintiffs would potentially face even more challenges. Unlike in *McKernan*, where the parents clearly had not intended to get pregnant, parents in fertility fraud cases clearly want a child enough to obtain expensive fertility treatments to become pregnant. The *McKernan* Court found that, despite the fact that the child was not initially desired by the parents, whether the costs of the child outweighed the emotional benefits conferred by that child could not be calculated."[218] Under this theory, courts are at least as likely to reach the same conclusion as *McKernan* in fertility fraud cases because plaintiff-parents actually pursued parenthood through a fertility specialist. Without legislative intervention, courts will likely continue to struggle to weigh the benefits of parenthood against the unique set of damages incurred.

4. Statute of Limitations

With all medical malpractice claims, statutes of limitations control how long a plaintiff may wait before bringing a claim. In Washington, plaintiffs in medical malpractice cases generally must bring claims within (1) three years of the act alleged to have caused the injury; or (2) the "one-year post-discovery period"—one year after the patient discovered or

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%20pregnancy [https://perma.cc/4QWE-9NT5].

213. *McKernan*, 102 Wash. 2d at 412, 687 P.2d at 851.

214. *Id.* at 413, 687 P.2d at 851.

215. *Id.* at 419–20, 687 P.2d at 854–55.

216. *See id.* at 421–22, 687 P.2d at 855–56.

217. ODOM, *supra* note 181, § 7.04(4)(b).

218. *McKernan*, 102 Wash. 2d at 419–20, 687 P.2d at 854–55.

reasonably should have discovered the injury, whichever is later in time.[219] In addition to the statute of limitations, Washington's statute technically imposes a statute of repose: plaintiff must bring all claims within eight years of the act.[220] While the statute of repose remains in the statute, the Washington Supreme Court found it unconstitutional in *DeYoung v. Providence Medical Center*.[221] To bring a case outside of the eight-year statue of repose, assuming the statute is applicable despite being found unconstitutional, plaintiffs must qualify for an exception by either establishing intentional concealment by the defendant or qualify for the minor exception.[222]

Because most fertility fraud cases are brought decades after conception, plaintiffs in other states have struggled with proceeding past the statute of limitations. Assuming the case was also brought decades after conception, Washington plaintiffs would have to qualify for either the intentional concealment or the minor exception to bring a fertility fraud case within the statute of limitations.

To qualify for the intentional concealment exception, a plaintiff must demonstrate facts relevant to the alleged fraud or intentional concealment that go beyond the facts of the underlying cause of action.[223] A fertility fraud plaintiff would likely struggle to prove that a physician actively concealed the identity of the sperm donor because the exception requires the plaintiff to establish facts that go beyond the mere fact of insemination.

The minor exception generally allows for the statute of limitations to toll until minors are of majority age.[224] However, the exception does not apply if the minor's parent reasonably knew, or should have known, about the injury and could have brought the claim on the minor's behalf.[225] A fertility fraud plaintiff may be able to use the minor exception, assuming the parents did not know, or have reason to know about, the true identity

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219. WASH. REV. CODE § 4.16.350(3) (2019).

220. *Id*. § 4.16.350.

221. 136 Wash. 2d 136, 139, 960 P.2d 919, 920 (1998).

222. WASH. REV. CODE § 4.16.350(3). While section 4.16.190(1) of the Washington Revised Code says that minors' claims are tolled until they are of majority age (18 years old), section 4.16.190(1) of the Washington Revised Code indicates that the tolling does not apply to medical malpractice claims. However, the Washington Supreme Court found this carve out unconstitutional in *Schroeder v. Weighall*. 179 Wash. 2d 566, 316 P.3d 482 (2014). The analysis in this Comment assumes the minor tolling exception applies to medical malpractice cases based on *Schroeder v. Weighall*. *See generally id.*

223. Cox v. Oasis Physical Therapy, PLLC, 153 Wash. App. 176, 188–89, 222 P.3d 119, 125 (2009).

224. WASH. REV. CODE § 4.16.190(1).

225. *Id.* § 4.16.350(3).

of the sperm donor. However, because of the statute of repose, the child still must bring the claim before they turn twenty-six.[226] In the fertility fraud cases cited, at least some of the children were well past twenty-six years old when they discovered the identity of their biological father.[227]

Moreover, Washington courts may weigh the importance of letting victims bring the case to fruition over strict readings of statute of limitation laws.[228] For example, in sexual assault cases, Washington legislatures and courts have reasoned that plaintiffs' suppressed memories from sexual abuse suffered as child should not bar sexual assault claims from being brought.[229] Consequently, Washington courts may not bar a fertility fraud case to ensure plaintiffs have their day in court, and because of the potential unconstitutionality of the statute of repose. Instead, a court faced with a fertility fraud case may apply the one-year discovery rule based on when the plaintiff discovered the true parentage.

B. Tort Actions

In Washington, the medical malpractice statute exclusively governs all healthcare related claims,[230] similar to the structure of Idaho's medical malpractice statute.[231] Because of that exclusivity, an intentional tort claim would not likely succeed in fertility fraud case, but three intentional tort claims that may be brought are (1) battery; (2) intentional misrepresentation; and (3) outrage.

The statute of limitations for all three torts is three years[232] from when the "aggrieved party discovers, or in the exercise of due diligence should have discovered, the fact of fraud, and sustains some actual damage as a result."[233] A material question of fact is what constitutes "should have discovered."[234]

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226. *Id.* The eight-year statute of repose applies once the minor turns eighteen years old. Eight years after the majority age is twenty-six years old.

227. *See* Zhang, *supra* note 150.

228. *See* 14A DOUGLAS J. ENDE, WASHINGTON PRACTICE SERIES: CIVIL PROCEDURE § 5.13 (2018–2019 ed.); WASH. REV. CODE § 4.16.30.

229. ODOM, *supra* note 181, § 7.04(4)(b); *see, e.g.*, WASH. REV. CODE § 4.16.340 (intent of statute).

230. ODOM, *supra* note 181, § 7.02(1); WASH. REV. CODE § 7.70.010 (2019).

231. *See* Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1022 (D. Idaho 2018).

232. WASH. REV. CODE § 4.16.080(2).

233. Young v. Savidge, 155 Wash. App. 806, 821–23, 230 P.3d 222, 229–31 (2010).

234. *Id.*

1. Battery

One exception to the exclusivity of the medical malpractice statute is a medical battery claim. A patient may have a medical battery claim when a doctor failed to obtain any consent from a patient.[235] Battery is an intentional tort that requires the tortfeasor to "intend an offensive touching, and the plaintiff must show there was no consent to the touching."[236] However, if a patient has given broad informed consent, medical battery cannot be claimed unless the patient specifically communicated limitations on their consent.[237] In *Bundrick v. Stewart*[238] the court found that a medical student who performed surgery on a patient did not commit battery because the patient had consented to the surgery in general.[239] The court explained that the patient needed to specifically revoke consent for the particular resident performing surgery after the broad consent was given for the resident to commit medical battery.[240]

For fertility fraud, the facts of the case may affect whether a plaintiff can allege a viable medical battery claim. For example, if the patient gave broad consent to receive unspecified donor sperm, *Bundrick* would likely control the patient's claim and broad consent would likely prohibit the medical battery claim.[241] However, if the patient only consented to a specific donor, the patient's medical battery claim would be stronger because any other donor's sperm was outside the scope of their consent. But, even if the patient's consent was narrow enough to avoid a *Bundrick* issue, the patient may nonetheless have trouble demonstrating the requisite intent for a medical battery claim[242] because the doctor likely did not intend the act to be harmful.

2. Misrepresentation

A misrepresentation claim requires the plaintiff to prove the common law elements of intentional misrepresentation.[243] The elements of a misrepresentation claim are (1) a representation of a material claim that

235. ODOM, *supra* note 181, § 7.08(1).

236. Bundrick v. Stewart, 128 Wash. App. 11, 18, 114 P.3d 1204, 1208 (2005).

237. *Id.*

238. 128 Wash. App. 11, 114 P.3d 1204 (2005).

239. *Id.* at 19, 114 P.3d at 1209.

240. *Id.*

241. *Id.*

242. *Id.* at 18, 114 P.3d at 1208.

243. ODOM, *supra* note 181, § 7.08(2).

the speaker knows is false, but the plaintiff did not know was false, (2) the speaker intends for the plaintiff to rely and act upon the claim, and (3) reliance on the speaker's claim must result in the plaintiff's damage.[244] Because the Washington medical malpractice statute governs healthcare claims,[245] a misrepresentation claim could not be brought in a fertility fraud cause.

While a misrepresentation claim would not be successful in Washington, plaintiffs in Colorado brought a similar claim.[246] In response, the Colorado fertility doctor argued that a doctor cannot logically be required to both keep the donor anonymous and give the donor's identity to the patient.[247] Ultimately, while misrepresentation seems like a logical claim to bring in a fertility fraud case, a misrepresentation claim is not likely to be successful.

3. Outrage

"Outrage" is arguably the last intentional tort that could reasonably be brought in a civil suit against a physician who committed fertility fraud in Washington State. An outrage claim requires the plaintiff to demonstrate that the defendant's extreme and outrageous conduct intentionally or recklessly caused the plaintiff's emotional distress.[248]

Extreme and outrageous conduct is conduct that, when told to the average person, would lead that person to exclaim, "Outrageous!"[249] Case law that instructs how a plaintiff's outrage claim would contend in a fertility fraud case is limited because medical malpractice generally controls all claims in a medical setting.[250] In *Benoy v. Simons*,[251] the plaintiffs brought an outrage claim when the plaintiffs were charged for unnecessary care performed on their terminally-ill infant and told to take the deceased infant's body home on the bus.[252] Despite the shocking facts, the court did not find the plaintiffs had a successful healthcare outrage

244. *Id.* § 12.04.

245. WASH. REV. CODE § 7.70.010 (2019).

246. Zorn, *supra* note 90.

247. *Id.*

248. Christian v. Tohmeh, 191 Wash. App. 709, 735, 366 P.3d 16, 30 (2015)

249. *Id.* (quoting Kloepfel v. Bokor, 149 Wash. 2d 192, 196, 66 P.3d 630, 632 (2003)) ("[T]he recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim, 'Outrageous!'").

250. *See* ODOM, *supra* note 181, § 7.02(1); WASH. REV. CODE § 7.70.010.

251. 66 Wash. App. 56, 831 P.2d 167 (1992).

252. *Id.* at 62, 831 P.2d at 170.

claim,[253] suggesting that patients bringing an outrage claim in a medical setting face a very high bar to succeed.

The lack of successful outrage claims in healthcare settings makes predicting the success of an outrage claim for fertility fraud plaintiffs particularly difficult. Additionally, an outrage claim would likely be a fertility fraud plaintiff's last resort because a plaintiff cannot recover simultaneously from both an outrage claim and another tortious claim.[254]

Ultimately, while current causes of action, like medical negligence and existing tort claims, may seem viable, fertility fraud plaintiffs would face a multitude of problems if forced to bring a case using existing laws.

V. PROPOSED WASHINGTON FERTILITY FRAUD LAW

While a potential fertility fraud plaintiff may be able to use existing law to bring a fertility fraud case, recent fertility fraud cases and a survey of Washington's current laws demonstrates how existing laws are not a perfect fit. Potential fertility fraud plaintiffs encounter two main legal hurdles when attempting to bring a case under existing laws: standing and damages. Therefore, this Comment proposes that Washington join Indiana, Texas, California, Colorado, and Florida and enact a law that protects fertility fraud victims. Moreover, by taking action now, the Washington legislature can provide more meaningful protection to victims by enacting a fertility fraud law before a case emerges in Washington. Specifically, this Comment argues Washington should model a new fertility fraud law after Indiana's law,[255] which (1) allows private parties the opportunity to recover damages from the fertility doctor; (2) clarifies what individuals have standing; and (3) defines some available damages.[256]

Three main reasons support this proposal. First, criminalizing fertility fraud is important for deterrence and norm-setting. By establishing a new criminal statute, Washington's legislature would publicly declare that specific actions are immoral, which may also prevent future instances of fertility fraud.[257] When state legislatures specifically criminalize fertility

253. *Id.* at 63–64, 831 P.2d at 171.

254. ODOM, *supra* note 181, § 2.07(6).

255. IND. CODE § 34-24-5 (2020). The Colorado Legislature's proposed bill also closely follows Indiana's fertility fraud law. H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020).

256. IND. CODE § 34-24-5.

257. *See* Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009). In Danielle Keats Citron's essay about combating online gender harassment, she discusses the value of specifically outlawing behavior despite the ability to technically bring a claim using a different cause of action. *Id.* Citron discusses the important role the

fraud, they signal to society as a whole, and particularly to doctors, that utilizing their own sperm to impregnate their patients without explicit consent is neither socially nor legally acceptable behavior.[258] Second, Washington fertility fraud plaintiffs would likely face substantial obstacles to establishing standing and damages if they attempt to bring a fertility fraud case using Washington's current laws. And third, while criminal statutes signal public opinion on societal norms, purely criminal statutes fall short of addressing all harms that stem from fertility fraud. Civil causes of action allow individuals to bring a claim themselves, retain some control over justice rather than rely on prosecutors, and recover damages directly from the defendant.[259] Furthermore, new civil laws can be applied retrospectively—which allows victims who were harmed before the law was passed to bring a claim. For these reasons, Washington's fertility fraud law should have both civil and criminal components.

A. Criminal Component

Washington should expressly criminalize fertility fraud for two reasons: (1) fertility fraud does not fit under Washington's sexual offense statutes,[260] and (2) to signal that the practice is unacceptable. Other states' criminal fertility fraud laws range from categorizing fertility fraud as a form of sexual assault (Texas)[261] to the lowest level of felony (Indiana).[262] Washington should choose to fall in between Indiana and Texas's laws

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law takes in our society in clarifying and pointing what behavior is socially harmful. *Id.* at 407. She explains that "[law] legitimates harms, allowing the harmed party to see herself *as harmed*. It signals appropriate behavior." *Id.* (emphasis in original). Citron argues that while there are laws that harmed individuals could bring in response to online gender harassment, specifically pointing out the behavior as a crime has social benefits beyond just creating a cause of action. *Id.* For fertility fraud, in addition to creating a cause of action and deterring future behavior, making fertility fraud illegal characterizes the behavior as unacceptable and alerts society to the negative impact the action has on others. *See also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 958–59 (1996) (discussing how legal regulation might be designed to generate good societal norms).

258. *See, e.g.*, Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 2 (explaining how "criminal punishment is intended to promote various social norms of individual behavior by shaping the preferences of criminals and the population at large").

259. *See* Julie Sirrs, *Protecting the Elderly: Should Montana Provide Civil Cause of Action for Elder Abuse?*, 40 MONT. LAW. 15, 15–16 (2014).

260. WASH. REV. CODE § 9A.44 (2019); *Sexual Assault and Consent*, UNIV. OF WASH. (Aug. 16, 2020, 5:54 PM), https://www.washington.edu/sexualassault/reporting/police/sexualassault/ [https://perma.cc/N6BG-G3SB].

261. TEX. PENAL CODE ANN. § 22.011(b)(12) (West 2019).

262. IND. CODE § 35-43-5-3(b)(2) (2020).

and make fertility fraud a Class B felony. A Class B felony is the same level as the majority of crimes defined in the indecent liberties statute and is punishable by up to ten years in prison, $20,000 fine, or both.[263] By making fertility fraud a felony, Washington signals that fertility fraud is unacceptable.[264] However, Washington should follow Indiana, rather than Texas, and focus the majority of its statute on a civil component. A robust civil law more directly deters physicians by allowing for large damages and can be applied retroactively, as will be discussed.

B. Civil Component

1. Standing

As seen in *Rowlette*, standing is a potential barrier for fertility fraud plaintiffs when attempting to hold a doctor accountable.[265] However, Washington legislature can clarify the issue of standing by following the structure of Indiana's fertility fraud law. The civil component of the Indiana law provides standing for the mother-patient, any children born due to fertility fraud, and the spouse of the mother at the time of the treatment.[266] As seen in the cases discussed above, these are often the victims in fertility fraud cases, but not always viable plaintiffs.[267]

Washington's medical malpractice statute already extends standing to third-parties in some circumstances,[268] therefore integrating this principle into a fertility fraud statute is a logical application of similar precedent. Accordingly, the standing portion of Washington's fertility fraud statute should follow closely to Indiana's law and be written as follows: "A cause of action for fertility fraud can be brought by any of the following against a healthcare provider who, knowingly or intentionally, treated a patient by using the healthcare provider's own spermatozoon or ovum, without the patient's informed written consent" that the patient knows the donor

263. WASH. REV. CODE §§ 9A.44.100(2), .20.021(1)(c).

264. *See* Citron, *supra* note 257.

265. *See, e.g.*, Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1021–24 (D. Idaho 2018) (finding the daughter born through fertility fraud did not have standing to bring a case against the fertility doctor).

266. IND. CODE § 34-24-5-2(A).

267. *See Rowlette*, 352 F. Supp. 3d 1012 (finding daughter did not have standing to bring medical malpractice case).

268. *See* ODOM, *supra* note 181, § 7.02(3); *see, e.g.*, Webb v. Neuroeducation Inc., 121 Wash. App. 336, 348, 88 P.3d 417, 422 (2004) (allowing a father to bring a third-party medical negligence claim against his son's physician who implanted false memories of sexual assault); Harbeson v. Parke-Davis, 98 Wash. 2d 460, 656 P.2d 483 (1983) (allowing children to bring wrongful life claims by arguing medical negligence under a theory that parallels a parent's wrongful birth claim).

spermatozoon or ovum belongs to the doctor[269]: (1) A person who gives birth to a child as a result of the actions described; (2) a partner or surviving partner at the time of insemination of the person in (1); or (3) a child born as a result of the actions of the provider described above.

2. Damages

Although the laws in Indiana and Colorado both provide plaintiffs the option of liquidated damages,[270] Washington's fertility fraud statute should not follow this model. Instead, Washington should follow its general approach in medical malpractice cases. Washington's medical malpractice statute gives the finder of fact—usually the jury—the responsibility of deciding how much money a plaintiff should recover in noneconomic damages.[271] As evidence of Washington's reliance on the fact finder, Washington does not set a cap on how much a plaintiff can recover from medical malpractice cases.[272] Therefore, instead of a liquidated damages option, Washington's fertility fraud statute should align with how Washington courts decide medical malpractice damages and the fact finder should determine the noneconomic damages that the fertility fraud victims receive.

While Washington should depart from Colorado and Indiana's use of liquidated damages, Washington should follow Colorado's and Indiana's laws and allow plaintiffs to recover both attorney fees and fertility treatment fees. First, by allowing plaintiffs to recover reasonable attorney fees, plaintiffs will not face the economic challenges of bringing a case against a doctor, thus enabling plaintiffs to both hold physicians accountable and recover. Furthermore, Washington's medical malpractice law allows plaintiffs to collect reasonable attorney fees. Including this provision aligns the fertility fraud law with similar medical malpractice laws and furthers the legislature's interest of rebuking the underlying conduct. Second, because the medical treatment provided in fertility fraud cases was offered under false pretenses, Washington's fertility fraud law should also include recovery for the plaintiff's fertility treatment fees.

Accordingly, the damages portion of Washington's fertility fraud law should read similar to the following: A plaintiff who prevails in a fertility fraud action is entitled to: (1) Reasonable attorney's fees; (2) The costs of the fertility treatment that resulted in the ability to bring this action; and

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269. IND. CODE § 34-24-5-2.

270. *Id.* § 34-24-5-4; H.R. 20-1014, 72d Gen. Assemb., 2d Reg. Sess. (Colo. 2020) (to be codified at COLO. REV. STAT. 13-21-132(3)).

271. Bingaman v. Grays Harbor Cmty. Hosp., 103 Wash. 2d 831, 835, 699 P.2d 1230, 1232 (1985).

272. *See* Brewer v. Dodson Aviation, 447 F. Supp. 2d 1166, 1178 (W.D. Wash. 2006).

(3) Compensatory damages as found by the fact finder at trial.

3. Statute of Limitations

Statutes of limitations have barred potential plaintiffs from bringing cases against doctors who committed fertility fraud in other states. The statute of limitations is a critical issue in fertility fraud cases because the victims have no occasion to suspect their physician's wrongdoing. While Washington tries to address difficult-to-discover medical malpractice offenses with the one-year discovery rule, the statute of repose requires cases to be brought within eight years of the act.[273] Though the statute of repose may be unenforceable because it was found unconstitutional,[274] it is still a current part of the statute. The legislature should protect potential plaintiffs' opportunity to seek justice by stating that the statute of limitations does not start running until parentage is identified.

Both the common law rule in *Rowlette* and the Indiana statute addressed the statute of limitations issue regarding fertility fraud. For example, in *Rowlette*, the court found the statute of limitations began running when the doctor published his DNA on a genealogy website.[275] In contrast, Indiana's fertility fraud law considers when paternity was actually discovered by the plaintiff—not when the paternity was published publicly. Because in fertility fraud cases the child rarely has reason to presume misconduct, Washington's law should include a flexible statute of limitations section. Washington's law should combine the one-year discovery rule for Washington medical malpractice cases with the allowances created in Indiana's fertility fraud law and adopt language similar to the following: A cause of action for fertility fraud may be commenced no later than one year after the earliest date on which: (1) "[A] person [with standing] first discovers evidence sufficient to bring an action against the defendant through DNA . . . analysis";[276] or (2) The defendant confesses to a crime and a person with standing is aware of the confession.

4. Excluding "Anonymous Donor" Defense

Washington's fertility fraud law should specifically exclude any affirmative defense in which the physician claims they did not commit

273. WASH. REV. CODE § 4.16.350(3) (2019).

274. DeYoung v. Providence Med. Ctr., 136 Wash. 2d 136, 139, 960 P.2d 919, 920 (1998).

275. Rowlette v. Mortimer, 352 F. Supp. 3d 1012, 1032–33 (D. Idaho 2018).

276. IND. CODE § 34-11-2-15.

fertility fraud because the patient asked for an anonymous donor. This defense has already been attempted at least by the physician in Colorado, who claimed that he fulfilled his duties by satisfying the mothers' requests for anonymous sperm donors and subsequently had an obligation to conceal identifying information.[277] Specifying that a patient's request for an anonymous donor is not a defense to fertility fraud would close this potential loophole. Therefore, the Washington fertility fraud law should adopt language similar to: It is not a defense to fertility fraud that the patient consented to an anonymous donor.

5. Professional Misconduct

Washington's fertility fraud law should include fertility fraud in both its definition of unprofessional conduct and unprofessional conduct involving sexual misconduct. Washington's Uniform Disciplinary Act[278] intends to regulate professional conduct and licensure of healthcare professions.[279] The Act allows the disciplinary authority to sanction a healthcare provider in a variety of ways upon a finding of professional misconduct, including (1) revocation of the healthcare provider's license, (2) payment of fines, and (3) limiting the provider's license.[280] Additionally, if the professional misconduct constitutes sexual misconduct, the Act requires the provider to disclose the sanction to patients.[281] Washington's fertility fraud law should adopt language similar to the below: Any verdict for the plaintiff of fertility fraud constitutes unprofessional conduct and unprofessional conduct involving sexual misconduct as unprofessional conduct pertains to the Uniform Disciplinary Act.

6. Retrospective Application

Ex post facto criminal charges are unconstitutional, but civil causes of action may be brought retrospectively without offending the federal or state constitution.[282] To ensure the civil provisions of the fertility fraud law could be applied retrospectively, Washington legislature should make

277. Zorn, *supra* note 90.

278. WASH. REV. CODE § 18.130 (2019).

279. *Id.* § 18.130.010.

280. *Id.* § 18.130.060.

281. *Id.* § 18.130.063(1).

282. *See* Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 160 Wash. App. 250, 262, 255 P.3d 696, 702 (2011).

their retrospective intent clear when constructing the statute.[283] This would ensure Washington fertility fraud victims do not meet the same legal challenges that every other fertility fraud victim has had to endure.[284]

Ultimately, this proposed fertility fraud law addresses the main hurdles individuals have faced when attempting to bring fertility fraud cases while still following the framework of Washington medical malpractice laws. The law protects Washingtonians by providing a comprehensive legal remedy against fertility fraud.

CONCLUSION

Doctors in Indiana, Texas, and Colorado have admitted to knowingly using their own sperm to impregnate patients without their patients' consent. When this came to light, patients, their children, their spouses, and the general public were outraged to realize they had little to no meaningful legal remedies to hold these doctors accountable for their actions. In response, legislatures in California, Texas, Colorado, and Indiana have all enacted laws criminalizing these doctors' actions and, in Indiana and Colorado, providing a civil cause of action for those injured in the future. Washington should follow these states' examples and enact a fertility fraud law that criminalizes fertility fraud and creates a civil cause of action for harmed individuals. Washington should learn from other states' missteps and proactively enact a law before a fertility fraud case comes to a Washington court. By enacting this law now, Washington legislature would enable fertility fraud victims to obtain the justice they deserve.

283. *See* Howell v. Spokane & Inland Empire Blood Bank, 114 Wash. 2d 42, 47–48, 785 P.2d 815, 818–19 (1990).

284. *See, e.g.*, WASH. REV. CODE. § 4.20.010 note (2019) ("Retroactive application—This act is remedial and retroactive and applies to all claims that are not time barred, as well as any claims pending in any court on July 28, 2019.").