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Contract Remedies Need Not Undercompensate Aspiring Parents When Cryopreserved Reproductive Material Is Lost or Destroyed: Recovery of Consequential Damages for Emotional Disturbance When Breach of Contract Results in the Lost Opportunity to Become Pregnant with One's Own Biological Child

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**CONTRACT REMEDIES NEED NOT UNDERCOMPENSATE ASPIRING PARENTS WHEN
CRYOPRESERVED REPRODUCTIVE MATERIAL IS LOST OR DESTROYED: RECOVERY
OF CONSEQUENTIAL DAMAGES FOR EMOTIONAL DISTURBANCE WHEN BREACH OF
CONTRACT RESULTS IN THE LOST OPPORTUNITY TO BECOME PREGNANT WITH ONE’S
OWN BIOLOGICAL CHILD**

Joseph M. Hnylka¹

“Not long after University Hospitals called clients to inform them about the cryotank failure, they began gathering in a private Facebook group. It was, according to the would-be parents, a mass tragedy. But unlike other mass tragedies, there is no accepted protocol or language to deal with the loss. ‘I am broken inside.’ ‘when the life you thought, you were going to have is taken away from you, it is truly like a death.’”²

The Center for Disease Control and Prevention (“CDC”) has reported that the use of assisted reproductive technology (“ART”) has doubled over the past decade. In vitro fertilization (“IVF”) is the most prevalent form of ART. During IVF, a woman’s eggs are extracted, fertilized in a laboratory setting, and then implanted in the uterus. Many IVF procedures use eggs or sperm that were stored using a process called cryopreservation. A recent survey reported that cryopreservation consultations increased exponentially during the coronavirus pandemic, rising as much as 60 percent. It is estimated that more than one million embryos are stored in cryopreservation facilities throughout the United States. As the use of cryopreservation increases, so too does the possibility that stored reproductive material will be lost or destroyed. Recently, over four-thousand cryopreserved human embryos inadvertently were destroyed at University Hospital Fertility Clinic in Ohio, and three-thousand-five-hundred eggs and embryos were destroyed when a cryopreservation tank recently malfunctioned at a fertility clinic in California. When reproductive material is lost or destroyed, the aspiring parents’ primary harm is emotional; it is non-pecuniary in nature. The emotional harm is particularly extreme in cases where the loss destroys a couple’s only hope of becoming parents. Despite the severity of the emotional harm suffered due to the loss, aspiring parents often are left without a clear legal basis to recover emotional disturbance damages.

Although emotional disturbance damages are rarely awarded for breach of contract, the article explains why such awards are justified based on the current trend in contract law, as exemplified by Restatement (Second) of Contracts section 353 and posits that clinics and ART professionals are aware at the time of contracting that emotional disturbance is particularly likely in the event of a breach. Scholars have noted that tort damages for emotional harm often are

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²Ariana Eunjung Cha, *These Would-be Parents’ Embryos Were Lost. Now They’re Grieving – and Suing*, WASHINGTON POST (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving--and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019fcfe4_story.html (recounting aspiring parents comments regarding their lost opportunity to have children using their cryopreserved embryos).

unavailable when reproductive material is lost or destroyed, because the emotional harm is not parasitic to a physical injury, nor can aspiring parents overcome the traditional barriers to NIED recovery because they neither were in the “zone of danger” nor were they bystanders at the time of loss. Therefore, for aspiring parents who reside in traditional barrier jurisdictions, breach of contract damages may represent their only hope to recover for emotional harm. This article posits that ART clinics and professionals have actual or constructive knowledge of plaintiffs’ particular reason for storing reproductive material – namely, to achieve a later pregnancy – at the time of contracting, so as to support consequential damages for emotional disturbance. This knowledge of the contract’s purpose, coupled with the nature of the transaction and the surrounding circumstances, put ART clinics and professionals on notice at the time of contracting that emotional disturbance is particularly likely to result from a breach. The article also posits that typical broad, sweeping exculpatory clauses contained in cryopreservation agreements that attempt to negate all liability for freezing and storage of reproductive material, including negligence liability, should not be enforced because such clauses render the agreement illusory and contravene public policy.

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I. INTRODUCTION

Imagine a young man and a young woman, both in their twenties, both diagnosed as having cancer. Both are told that their cancer treatment will render them infertile. However, they are given the promising news that their reproductive material – a man’s sperm, a woman’s eggs, or a couple’s embryo – can be cryogenically preserved and stored, so they may someday become parents despite their looming infertility. They are overcome with joy at the prospect they someday will be parents of their own biological children, which was their lifelong desire. Now, after both receiving the cancer treatments that render them infertile, imagine their emotional pain and devastation when they receive the tragic news that their cryogenically preserved reproductive material was lost or destroyed by those responsible for storing it. They will never be parents of their own biological children! This scenario is, unfortunately, all too common in the United States as reproductive material is lost, destroyed, or rendered unusable due to human error or storage equipment failure. Regarding stored embryos,³ one recent study reported that, in a ten-year period extending from 2009 to 2019, approximately 133 lawsuits were filed in the United States seeking recovery for cryopreserved embryo loss, damage, or destruction.⁴ A few years ago, over four-thousand cryopreserved human embryos were destroyed at University Hospital Fertility Clinic in Cleveland, Ohio, when a storage tank alarm was turned off and the tank’s cooling system later malfunctioned.⁵ Similarly, approximately 3,500 eggs and embryos were destroyed when a cryopreservation tank malfunctioned at a fertility clinic in California.⁶ Although a fertility clinic may apologize

³ The term “embryo” as used in this article includes “pre-embryos”, “pre-zygotes” and “zygotes.” While some court opinions and scholarly works use the term “embryo” to describe a cryopreserved fertilized egg, others use different terminology.

⁴ Gerard Letterie M.D. & Dov Fox, J.D., D. Phil., *Lawsuit Frequency and claims basis over lost, damaged, and destroyed frozen embryos over a 10-year period*, FERTILITY AND STERILITY REPORTS (July 8, 2020, Am. Soc’y Reproductive Med.), [https://www.fertstertreports.org/article/S2666-3341\(20\)30039-8/fulltext](https://www.fertstertreports.org/article/S2666-3341(20)30039-8/fulltext) [hereinafter Letterie & Fox, *Lawsuit Frequency*].

⁵ Holly Yan, *A Cleveland Fertility Clinic That Lost 4,000 Eggs and Embryos Just Got Hit with Two More Lawsuits*, (updated Feb. 5, 2020) <https://www.cnn.com/2020/02/05/us/ohio-fertility-clinic-lost-eggs-embryos-lawsuits/index.html> [hereinafter Yan, *Cleveland Fertility Clinic*]; Ariana Eunjung Cha, *These Would-be Parents’ Embryos Were Lost. Now They’re Grieving – and Suing*, WASHINGTON POST (Aug. 24, 2018), https://www.washingtonpost.com/national/health-science/these-would-be-parents-embryos-were-lost-now-theyre-grieving--and-suing/2018/08/24/57040ab0-733c-11e8-805c-4b67019f4e4_story.html [hereinafter Cha, *Would-be Parents*]; Jessica Ravitz, *New Lawsuits Filed Against Cleveland Fertility Clinic Where 4,000 Embryos Were Lost* (Jan. 24, 2019), <https://www.cnn.com/2019/01/24/health/cleveland-fertility-clinic-embryos-lawsuit-bn/index.html> (last visited Aug. 5, 2021) [hereinafter Ravitz, *New Lawsuits*]; see also John Robertson, *Hospital destroys baby hopes of cancer patients*, SCOTSMAN (Edinburgh, Scotland), 2011 WLNLR 26139152 (Sept. 26, 2012) (faulty storage tank ruins sperm samples); 4/22/21 Can. Press 12:56:39, Section: Lifestyle, *Lab director blames hospital for fertility clinic failure* AP NEWS (Apr. 22, 2021), <https://apnews.com/article/us-news-health-cleveland-science-technology-b15af26f90c64dbdcaf6e55630991bb7>.

⁶ The Associated Press, *\$15M Awarded to Five People who lost eggs, embryos at Fertility Clinic* NBC NEWS (June 11, 2021), <https://www.nbcnews.com/news/us-news/15m-awarded-five-people-who-lost-eggs-embryos-fertility-clinic-n1270439> [hereinafter Associated Press, *\$15M Awarded*]. As this article was being finalized, a federal jury in a tort action recently rendered a trial verdict awarding 15 million to three women who lost eggs and one couple who lost embryos when a storage tank malfunctioned in California. *Id.* The jury found the fertility clinic only 10% responsible for the loss and found the tank manufacturer was 90 % responsible. *Id.* As of the completion of this article, the verdict is not final and likely will be appealed. Although the action was in tort and not in contract, it nevertheless is extremely significant for several reasons, including the fact this was the first such case to go to a jury. *Id.* Most cases involving loss or destruction of reproductive material have either settled or been dismissed. See Letterie & Fox, *Lawsuit Frequency*, *supra* note 4 (noting that, of 90 closed embryo destruction cases between 2009 and 2019, “all but two (97.8%) were settled out of court.”). Also, fourteen-million-dollars of the fifteen-million-dollar award was “damages for pain, suffering and emotional distress.”; *supra* Regardless of the results of an appeal, this case certainly will serve as a warning and wake-up call to fertility clinics, ART professionals, and storage tank manufacturers. The jury’s verdict also confirms that plaintiffs’ primary injury in such cases is emotional. See Derek Hawkins, *Jury Awards \$15 Million in Landmark case over Embryos, eggs Destroyed in Fertility Clinic Tank Failure*, WASHINGTON POST (June 11, 2021), <https://www.washingtonpost.com/health/2021/06/11/fertility-clinic-egg-embryo-verdict/> (noting plaintiffs’ severe

and offer storage fee refunds, free services, and emotional counseling, many aspiring parents lost their only opportunity to become pregnant with their own biological child and want “more than an apology and a refund.”⁷

If these individuals are to receive damages to properly compensate them for their injuries, the damage award must include recovery for emotional disturbance.⁸ In each situation, one can imagine the grief and emotional devastation experienced by aspiring parents who can no longer use the stored reproductive material to have their own biological children. When aspiring parents’ reproductive material is lost or destroyed, the primary harm typically is nonpecuniary in nature; the primary harm is emotional.⁹ The grieving individuals’ main concern usually is not to recover their storage fees and the costs associated with extracting their reproductive material for storage, nor is their focus on the pecuniary value of the lost reproductive material.¹⁰ Instead, the primary harm for which they seek to recover is the severe emotional disturbance¹¹ caused by the loss or destruction of their reproductive material which, in turn, deprived them of the opportunity to use that reproductive material to have their own biological children.

This article focuses on recovery for emotional disturbance based on breach of contract. Of course, attorneys representing aspiring parents whose reproductive material has been lost or destroyed also may pursue recovery for emotional harm in tort.¹² However,

emotional harm and stating the case may “serve as a bellwether” for other similar actions.”).

⁷ Cha, *Would-be Parents*, *supra* note 1. The clinic claimed that the embryos were the victims, not the aspiring parents, and stated any suit should be governed by medical malpractice damage caps and limitations for noneconomic injuries. *Id.* Several aspiring parents filed a wrongful death action claiming the lost embryos should be accorded the status of persons. *Id.* The lawsuit was recently dismissed.

⁸ While some may argue that emotional disturbance should be awarded in such cases as a part of general damages because emotional disturbance flows, of necessity, from all breaches where reproductive material is lost or destroyed, this article instead posits that consequential damage awards for emotional disturbance are more appropriate because not all reproductive material is stored to achieve a later pregnancy. In addition, not everyone who has stored reproductive material does so because they will be rendered infertile. Because plaintiff’s circumstances vary, including the purpose plaintiff used cryopreservation, the existence and severity of plaintiff’s emotional disturbance caused by defendant’s breach will be based on plaintiff’s unique circumstances at the time of contracting. Therefore, consequential damages for emotional disturbance are appropriate.

⁹ See Dov Fox, *Redressing Future Intangible Losses*, 69 DEPAUL L. REV. 419, 457 (Winter 2020) (arguing the principal harm is not the lost capacity to conceive and gestate; instead, the principal harm is the “subjective injuries to individual well-being.”) [hereinafter Fox, *Intangible Losses*]; see also Witt v. Yale-New Haven Hosp., 977 A.2d 779, 785-86 (Conn. Super. Ct. 2008) (discussing the emotional harm aspiring parents experience when deprived of the “opportunity of experiencing pregnancy, prenatal bonding, and the birth of a child”); Perry–Rogers v. Obasaju, 723 N.Y.S.2d 28, 29-30 (2001) (same).

¹⁰ See Cha, *Would-be Parents*, *supra* note 3 (“many people who lost genetic material say they are entitled to something more than an apology and a refund”). Also, as one plaintiff noted: “Sperm [and other reproductive material] has no value if it cannot actually be used.” Robertson v. Saadat, 262 Cal. Rptr. 3d 215, 233 (Cal. Ct. App. 2020).

¹¹ The phrase “emotional disturbance” rather than “emotional distress” is used in this article because the former is used in RESTATEMENT (SECOND) OF CONTRACTS § 353 (Law Inst. 1981) to describe damages for emotional harm caused by breach of contract. Use of the phrase “emotional disturbance” also avoids confusion with stand-alone claims of emotional distress in tort, such as claims for negligent and intentional infliction of emotional distress.

¹² Although a comparison of these two theories of recovery is not the focus of this article, many scholars already have noted serious obstacles to recovery for emotional harm also exist in tort law when aspiring parents seek to recover based on the loss or destruction of their reproductive material. See, e.g., Joseph M. Hnylka, *Restatement (Third) of Torts Section 47(b) Bypasses Traditional Barriers and Offers Aspiring Parents a Clear Path to Recover Stand-Alone NIED when Their Cryopreserved Reproductive Material is Lost or Destroyed*, 46 AM. J. L. & MED 337, 339-40, 345-54 (Issue 4, Nov. 2020) (noting difficulty of stand-alone recovery for NIED) [hereinafter Hnylka, *Traditional Barriers*]; Emma D. McBride, *‘I’d Like My Eggs Frozen’: Negligent Emotional Distress Compensation for Lost Frozen Human Eggs*, 61 B.C. L. REV. 749, 768 (2020)(same)[hereinafter McBride, *Eggs Frozen*]; Shirley Darby Howell, *The Frozen Embryo, Scholarly Theories, Case Law, and Proposed State Regulation*, 14 DEPAUL J. HEALTH CARE L. 407 (2013) (same) [hereinafter Howell, *The*

as scholars have noted, tort law often leaves aspiring parents without compensation for emotional harm when reproductive material is lost or destroyed.¹³ When reproductive material is lost or destroyed, the wrongful conduct typically occurs miles away from the aspiring parents and, therefore, they suffer no physical injury or impact. As a result, recovery for parasitic emotional disturbance typically is unavailable.¹⁴ In addition, because stand-alone emotional harm claims without a physical injury are suspect in many jurisdictions,¹⁵ the courts have adopted traditional barriers to recovery which render recovery for emotional disturbance virtually impossible in most cases involving loss or destruction of reproductive material.¹⁶ When reproductive material is lost or destroyed, aspiring parents suffer no physical injury/impact,¹⁷ are not in the “zone of danger”¹⁸, and cannot meet traditional bystander recovery rules.¹⁹ In these traditional barrier jurisdictions, breach of contract may represent the aspiring parents’ only hope to recover for emotional harm. This article posits that damages for emotional disturbance should not be restricted to tort recovery when reproductive material has been lost or destroyed. Consequential damages for breach of contract should include an award for emotional disturbance when the loss or destruction of cryopreserved reproductive material deprives aspiring parents of

Frozen Embryo]; Colleen M. Quinn, *Tort Liability for Lost or Destroyed Embryos*, 39 FAM. ADVOC. 6 (Fall 2016) (same)[hereinafter Quinn, Tort Liability].

¹³ See, e.g., Fox, *Intangible Losses*, *supra* note 9, at 452 (noting “ just three courts--among scores--have awarded any limited recovery for the negligent infliction of emotional distress” for plaintiffs deprived of procreation, and stating “[t]hese three courts are extreme outliers, and two of them leaned hard on exceptional circumstances of religion and race to justify exempting plaintiffs deprived of procreation from the usual physical injury requirement.”); Hnylka, *Traditional Barriers*, *supra* note 12, at 339-40 (discussing the difficulty faced by aspiring parents who seek tort recovery for emotional harm when reproductive material is lost or destroyed); see also Erika N. Auger, Note, *The “ART” of future life: Rethinking Personal Injury Law For the Negligent Deprivation of a Patient’s Right to Procreation In the Age of Assisted Reproductive Technologies*, 94 CHI-KENT L. REV. 51, 53-54, 63-68, 72-74 (2019) (same) [hereinafter Auger, *Rethinking Personal Injury*].

¹⁴ Plaintiff’s emotional harm is not caused by a physical injury when a plaintiff’s reproductive materials are lost or destroyed, regardless of whether the emotional harm manifests itself with physical symptoms. See *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994), *cited in*, *Hamilton v. Nestor*, 659 N.W.2d 321, 325 (2003). Absent a physical injury, courts use public policy to limit recovery for purely emotional harm. *Consolidated Rail Corporation*, 512 U.S. at 545, *quoted by Hamilton*, 265 Neb. at 761, 659 N.W.2d at 325; see also Fox, *Intangible Losses*, *supra* note 9, at 452 (noting “just three courts--among scores--have awarded any limited recovery for the negligent infliction of emotional distress” for plaintiffs deprived of procreation, and stating “[t]hese three courts are extreme outliers.....”). In tort, the plaintiff may attempt to recover for emotional disturbance parasitic to physical injury or as a distinct claim, such as a stand-alone claim for negligent or intentional infliction of emotional distress. See, e.g., *Consol. Rail Corp.*, 512 U.S. at 544 (distinguishing recovery for NIED from recovery for pain and suffering parasitic to a physical injury); *Hamilton*, 659 N.W.2d at 324–25 (same).

¹⁵ The “fundamental differences between emotional and physical injuries” have led courts to limit recovery for purely emotional harm for public policy reasons. *Consol. Rail Corp.*, 512 U.S. at 545; see also Hnylka, *Traditional Barriers*, *supra* note 12, at 368-70 (discussing courts’ concern that stand-alone emotional injury may be feigned and explaining why this fear is unfounded in cases where reproductive material is lost or destroyed).

¹⁶ For a discussion of the traditional barriers, see *Consol. Rail Corp.*, 512 U.S. at 545-47 (explaining barriers used by jurisdictions to bar or limit NIED recovery); Dale Joseph Gilsinger, Annotation, *Recovery Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another where Bystander Plaintiff must Suffer Physical Impact or be in Zone of Danger*, 89 A.L.R.5th 255 (2001 & Supp. 2020) (discussing barriers to stand-alone NIED recovery and providing list of authorities). At the time of this article’s publication, at least nineteen jurisdictions use the “zone of danger” barrier to recovery which requires plaintiff be at risk to suffer bodily harm in order to recover for NIED. See JACOB A. STEIN, 2 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 10:32 (3d ed. Apr. 2020 Update) (listing cases); Joseph M. Hnylka, *Restatement (Third) of Torts Section 47(b) Bypasses Traditional Barriers and Offers Aspiring Parents A Clear Path to Recover Stand-Alone NIED When Their Cryopreserved Reproductive Material Is Lost or Destroyed*, 46 Am. J.L. & Med. 337, 344-45 (2020) (same); BARRY A. LINDAHL, 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 31:31, *Negligent conduct causing emotional injury--Plaintiff as bystander: Apprehension of harm to another--Impact rule; zone of danger requirement* (2d ed. June 2021 Update) (same).

¹⁷ See Hnylka, *Traditional Barriers*, *supra* note 12, at 345-49.

¹⁸ See *id.*

¹⁹ See *id.* at 349-54.

an opportunity to become pregnant with their biological child.

As will be discussed, when reproductive material is cryogenically preserved and stored, most Assisted Reproductive Technology (“ART”) clinics and practitioners have the aspiring parents sign a contract.²⁰ This article posits that, in situations where reproductive material is cryopreserved to achieve a later pregnancy, ART clinics and practitioners have actual or constructive knowledge at the time of contracting of plaintiffs’ particular reason for storing the reproductive material, so as to support consequential damages for emotional disturbance. This knowledge of the contract’s purpose, coupled with the nature of the transaction and the surrounding circumstances, put ART clinics and practitioners on notice at the time of contracting that emotional disturbance is particularly likely to result from a breach. Such an award will not give the aspiring parents more than they bargained for. Instead, unless aspiring parents are awarded consequential damages for emotional disturbance, breach of contract recovery will leave them undercompensated. The article also posits that typical broad, sweeping exculpatory clauses contained in cryopreservation agreements that attempt to negate any and all liability for freezing and storage of reproductive material, even liability based on a lack of due care, should not be enforced because such clauses arguably render the agreement illusory and contravene public policy.

Part II of this article will discuss the cryopreservation of reproductive material in the United States. Part III will address contract theory’s reluctance to award damages for emotional disturbance caused by a breach. Part IV will address the foreseeability of emotional disturbance damages caused by the breach of a cryopreservation contract. Part V will address exculpatory clauses found in cryopreservation contracts. Part VI contains the conclusion.

II. CRYOPRESERVATION OF REPRODUCTIVE MATERIAL IN THE UNITED STATES

Cryopreservation is the process used to freeze and thaw reproductive material – such as sperm, eggs, and embryos – for later use in in vitro fertilization (IVF).²¹ IVF is an assisted reproductive technology in which a woman’s eggs are extracted, fertilized in a laboratory setting, and then implanted in the uterus.²² IVF is used to treat many causes of infertility.²³ Many IVF procedures use sperm, eggs, or embryos that were cryopreserved.

²⁰ The titles of these contracts vary from clinic to clinic. Some are titled “contract” while others are called “agreement,” “consent form,” “declaration of intent” or something similar. Many examples are available on the internet. See Main Line Fertility Center, *Freezing and Disposition of Embryos Agreement and Declaration of Intent*, <https://mainlinefertility.com/wp-content/uploads/2019/02/SART-Disposition-of-Embryos-2019.pdf> (sample contract) (last visited June 14, 2021) [hereinafter Main Line Fertility Center]; Ovation Fertility, *Reproductive Materials Cryopreservation & Storage Agreement*, <http://www.austinivf.com/wp-content/uploads/2017/12/6.-Freeze-Storage-Agreement-1.5-2018.pdf> (sample contract) (last visited June 14, 2021) [hereinafter Ovation Fertility]; Boston IVF, *Consent Form for Embryo Freezing & Disposition of Eggs, Sperm, and Embryos*, <https://www.bostonivf.com/content/editor/PatientForms/TVFConsents/F-MD-1004-Rev-9-Consent-embryo-freezing.pdf> (sample contract) (last visited June 14, 2021) [hereinafter Boston IVF]. For a more detailed discussion of these agreements, see *infra*, Part III and accompanying notes; see also Auger, *Rethinking Personal Injury*, *supra* note 13, at 64; Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 162 (2017) [hereinafter Fox, *Reproductive Negligence*].

²¹ IRMS Reproductive Medicine, *Cryopreservation of Embryos, Sperm, and Oocytes*, <https://www.sбивf.com/embryo-cryopreservation/> (last visited Aug. 5, 2021).

²² *Id.*

²³ American Society for Reproductive Medicine, *Assisted Reproductive Technology: A Guide for Patients*, at 4 (2018), <https://www.reproductivefacts.org/globalassets/rf/news-and-publications/bookletsfact-sheets/english-fact-sheets-and-info>

Based on the most current data compiled by the CDC, there were 330,773 reported ART cycles performed in 2019 in the United States alone, 121,086 of which involved freezing eggs or embryos for later reproductive use.²⁴ Societal changes, improved cryopreservation techniques, and an increased desire “to preserve fertility” have led to an increased demand for the use of ART.²⁵ According to a recent survey, cryopreservation consultations “increased exponentially” during the coronavirus pandemic, rising between 30 and 60 percent, depending upon the clinic.²⁶ Although the precise number of cryopreserved embryos currently in storage is unknown, it has been estimated that one million embryos were stored in the United States as of 2017.²⁷ The American Society for Reproductive Medicine (ASRM) has reported that “virtually all” cryopreserved embryos are stored at clinics rather than being stored off-site.²⁸ A recent survey of clinics by ASRM noted that “most clinics were able to tell us why embryos were in storage”²⁹ which indicates that most clinics had actual knowledge of intended use of the cryopreserved reproductive material stored at their clinic. The primary reason for cryopreservation of reproductive material such as embryos is to achieve pregnancy using ART.³⁰ In fact, some contracts for the storage of embryos include specific language stating that the purpose of storage is to preserve embryos for a future attempt at pregnancy.³¹ Even when a storage contract does not expressly state the purpose of storage is to achieve a future pregnancy, the purpose often is implied by an agreement’s discussion of IVF and thawing of the reproductive material.³² Some clinics require their clients to execute a separate agreement detailing the later use of the stored materials.³³ Many, if not most, fertility clinics advertisements taut the use of cryopreservation as a method to secure a future pregnancy. As one clinic noted in its online webpage: “Cryopreservation allows for peace of mind about a future family.”³⁴ Couples may store reproductive material to achieve pregnancy for many reasons: these reasons may include

booklets/art-booklet2.pdf [hereinafter *Guide for Patients*].

²⁴ Centers for Disease Control and Prevention, *Assisted Reproductive Technologies (ART): Preliminary 2019 Data*, <https://www.cdc.gov/art/artdata/index.html#preliminary> (last visited Aug. 5, 2021).

²⁵ Ernesto Bosch, Michel De Vos, & Peter Humaidan, *The Future of Cryopreservation in Assisted Reproductive Technologies*, *FRONTIERS IN ENDOCRINOLOGY* (Feb. 20, 2020), <https://www.frontiersin.org/articles/10.3389/fendo.2020.00067/full>.

²⁶ Sarah Perillo, *Lockdowns Sparking IVF Surge*, *HERALD SUN* (June 6, 2021 Melbourne), 2021 WLNR 18230240 (noting “[t]he demand for IVF and egg freezing has spiked as a result of ongoing Covid lockdowns, with many women choosing to freeze their eggs as insurance against lost time.”).

²⁷ Elissa Strauss, *The Leftover Embryo Crisis*, (Sept. 29, 2017), <https://www.elle.com/culture/a12445676/the-leftover-embryo-crisis/>.

²⁸ David I. Hoffman, M.D., Gail L. Zellman, M.D. et al, *Cryopreserved Embryos in the United States and their Availability for Research*, *FERTILITY AND STERILITY REPORTS*, at 1066 (vol. 79, issue 5, May 2003, Am. Soc’y Reproductive Med.), <https://www.fertstert.org/action/showPdf?pii=S0015-0282%2803%2900172-9> (last visited Aug. 5, 2021) (survey results indicate that less than two percent of cryopreserved embryos are stored off-site) [hereinafter Hoffman & Zellman, *Cryopreserved Embryos*].

²⁹ *Id.*

³⁰ *Id.* at 1068 (noting that 88.2% of stored embryos are used by patients to achieve pregnancy). ASRM survey results indicate that less than three percent of cryopreserved embryos are stored for research purposes, and less than one percent are stored for use in quality assurance activities. *Id.*

³¹ *See, e.g.*, Boston IVF, *supra* note 20 (contract states “The purpose of embryo freezing is to save embryos for a future attempt to establish a pregnancy.”).

³² *See infra* Part IV. B. and notes 169-171 and accompanying text.

³³ *See, e.g.*, Ovation Fertility, *supra* note 20 (contract states: “The Client desires to store the reproductive materials for later use or other disposition as instructed by the Client in a separate notarized agreement.”).

³⁴ Loma Linda University, Center for Fertility and IVF, *Cryopreservation: Benefits of Cryopreservation*, <https://lomalindafertility.com/treatments/cryopreservation/> (last visited Aug. 5, 2021).

delay or postpone pregnancy, to increase the likelihood of pregnancy, to provide opportunity for pre-implantation genetic testing, to avoid the negative fertility effects of most cancer treatments, and to overcome medical conditions that prevent traditional pregnancy.³⁵

The cryopreservation process is similar for embryos, eggs (oocytes), and sperm. Embryos may be created and cryopreserved at any time within seven days of egg retrieval.³⁶ To accomplish cryopreservation, the embryo is placed in a cryoprotectant solution and typically is flash cooled in a process called vitrification.³⁷ Embryos are then stored in liquid nitrogen at a temperature of minus 320 degrees Fahrenheit.³⁸ When the embryo is later needed for implantation into the uterus, in excess of ninety percent of embryos survive warming after vitrification.³⁹ The post-vitrification survival rate for eggs is similar, and is between 85 and 90%.⁴⁰ The length of storage reportedly has not diminished the high survival rate, even when eggs and embryos have been stored for many years.⁴¹ ASRM reports that the freezing of sperm, eggs, and embryos is “very safe” and that the risks of disease, birth defects and other anomalies is the same as with pregnancies achieved using fresh sperm, eggs, or embryos.⁴² In addition, the use of cryopreserved sperm to create an embryo has not been shown to reduce the likelihood of pregnancy.⁴³ In fact, it has been reported that sperm is less sensitive to cryopreservation than other types of cells because of sperm’s low water count.⁴⁴ Cryopreservation of sperm has been ongoing since the 1950s, and sperm that has been cryogenically stored may last indefinitely.⁴⁵

III. CONTRACT THEORY’S RELUCTANCE TO AWARD DAMAGES FOR EMOTIONAL DISTURBANCE

Plaintiffs who seek to recover damages for emotional disturbance caused by a breach of contract continue to face an uphill battle. Although emotional disturbance is recognized as a compensable harm, it is the goal of tort law, not contract law, to “make the victim whole.”⁴⁶ Contract law, on the other hand, gives plaintiff the “benefit of her bargain” and the parties to a contract are free to allocate risk as they see fit at the time of contracting.⁴⁷

³⁵ Viera Fertility, *What are the Benefits of Cryopreservation?*, <https://www.vierafertility.com/blog/what-are-the-benefits-of-cryopreservation/> (last visited Aug. 5, 2021).

³⁶ IRMS Reproductive Medicine, *Cryopreservation of Embryos, Sperm, and Oocytes: Embryo Cryopreservation*, <https://www.sbvivf.com/embryo-cryopreservation/> (last visited Aug. 5, 2021).

³⁷ *Id.* Reproductive material may be slow frozen or rapidly (flash) frozen. *Id.* Vitrification involves the latter. *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Guide for Patients*, *supra* note 23, at 12.

⁴³ *Id.* at 14.

⁴⁴ Tennessee Reproductive Medicine, *Sperm Freezing at a Glance*, <https://trmbaby.com/library/preservation/sperm-freezing/>

⁴⁵ *Id.*

⁴⁶ *See, e.g.*, *Bozeman v. State*, 879 So. 2d 692, 695 (La. 2004) (noting the goal of tort law is to make the victim whole); *Cutsinger v. Redfern*, 12 So. 3d 945, 953 (La. 2009) (same); *Schwartz v. Hasty*, 175 S.W.3d 621, 625 (Ky. Ct. App. 2005) (same); *Hancey v. United States*, 967 F. Supp. 443, 445 (D. Colo. 1997) (same).

⁴⁷ *In re POC Properties, LLC*, 580 B.R. 504, 510 (Bankr. E.D. Wis. 2017) (noting that parties to a contract allocate risk and are protected against non-performance by benefit of the bargain damages); *Indiana Dep’t of Transp. v. Shelly & Sands*,

Contracts typically are commercial in nature and involve goods or services offered by professionals or businesses.⁴⁸ Therefore, it arguably makes sense that pecuniary loss is the focus in a breach of contract action, rather than recovery for nonpecuniary emotional disturbance caused by a breach.⁴⁹ However, although damages for emotional disturbance remain unrecoverable in the vast majority of breach of contract actions, the Restatement (Second) of Contracts section 353 reflects the current trend to broaden the availability of such damages.⁵⁰

Section 353 states: “Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”⁵¹ Because the typical situation involving the loss or destruction of cryogenically stored reproductive material occurs at a storage facility when the aspiring parents are not present or aware of the loss, the exception regarding “bodily harm” is inapplicable.⁵² The aspiring parents who learn their reproductive material was lost or destroyed typically suffer no bodily harm caused by the breach. Instead, if damages for emotional disturbance are to be awarded in accordance with the modern trend, it will be because “the contract or the breach is of such a kind that severe emotional disturbance was a particularly likely result.”⁵³ This language reflects the foreseeability approach to consequential damages set forth in the famous case *Hadley v. Baxendale*.⁵⁴ *Hadley* involved a miller’s broken crankshaft which the defendants promised to repair and return by a specific time.⁵⁵ When the crankshaft was not repaired and returned on time, the mill was forced to remain closed, and the miller sought to recover his lost profits. The court denied recovery of the miller’s lost profits and ruled:

Where two parties have made a contract which one of them has broken,
the damages which the other party ought to receive in respect of such
breach of contract should be such as may fairly and reasonably be

Inc., 756 N.E.2d 1063, 1074 (Ind. Ct. App. 2001) (same); C.T. Charlton & Assocs., Inc. v. Thule, Inc., 541 F. App’x 549, 553 (6th Cir. 2013) (same); Lassen v. Nissan N. Am., Inc., 211 F. Supp. 3d 1267, 1281 (C.D. Cal. 2016) (same); Trans World Metals, Inc. v. Southwire Co., 769 F.2d 902, 908 (2d Cir. 1985) (same); Tesoro Petroleum Corp. v. Holborn Oil Co., 547 N.Y.S.2d 1012, 1015 (Sup. Ct. 1989) (same).

⁴⁸ Lamm v. Shingleton, 55 S.E.2d 810, 813 (1949).

⁴⁹ See *id.* at 14; 55 S.E.2d at 813 (noting that pecuniary interests are dominant in a breach of contract action, not recovery for mental anguish).

⁵⁰ See 24 WILLISTON ON CONTRACTS § 64:11 (May 2021 Update) (noting RESTATEMENT (SECOND) OF CONTRACTS § 353 represents “perhaps a more liberal statement of the rule” regarding recovery for emotional disturbance caused by a breach of contract.); see also Stewart v. Rudner, 84 N.W.2d 816, 822 (1957) (stating “objections to recovery for mental disturbance, applicable equally to tort and contract actions, have been so thoroughly demolished in recent years” and noting the “marked trend towards recovery”); Sheely v. MRI Radiology Network, P.A., 505 F.3d 1173, 1201 (11th Cir. 2007) (noting that courts have now begun to “embrace” the idea that emotional disturbance damages may be awarded for breach of personal contracts).

⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 353 (Am. Law Inst. 1981).

⁵² If bodily harm occurs, the plaintiff also has the option of suing in tort, and typically does so. See RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Am. Law Inst. 1981 & June 2021 Update). However, as scholars have noted, the lack of bodily harm to plaintiffs when reproductive material is lost or destroyed also serves as an obstacle to recovery in tort for negligent infliction of emotional distress. See, e.g., Hnylka, *Traditional Barriers*, *supra* note 12, at 345-47 (noting difficulty of stand-alone recovery for NIED); McBride, *Eggs Frozen*, *supra* note 12, at 768 (same).

⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 353 (Am. Law Inst. 1981).

⁵⁴ *Hadley v. Baxendale*, 156 E.R. 145 (1854); see also HOWARD O. HUNTER, MODERN LAW OF CONTRACTS § 13:13 (March 2021 Update) (noting that the RESTATEMENT (SECOND) OF CONTRACTS § 351 and others “give courts considerable discretion” and “may allow courts to be more creative in providing plaintiffs with recoveries that are truly adequate to compensate them for breaches without simultaneously ruining defendants.”) [hereinafter HUNTER].

⁵⁵ *Hadley v. Baxendale*, 1854 WL 7208, 156 E.R. 145 (1854).

considered either arising naturally . i.e., according to the usual course of things , from such breach of contract itself, or as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.⁵⁶

In contracts, damages are either “general” or “special” – the latter also are referred to as “consequential.”⁵⁷ Those damages addressed in *Hadley* which arise naturally from the breach in the ordinary course of events are deemed general damages and are foreseeable by definition.⁵⁸ Special – or consequential – damages are those referenced in the second prong of *Hadley*. Consequential damages are those unique to the plaintiff’s particular circumstances and do not, automatically, in cases of plaintiff’s type, inevitably flow from the breach as foreseeable.⁵⁹ For example, in *Hadley*, the miller’s lost profits were denied as consequential damages because he had only the one crankshaft and this fact, unique to plaintiff’s circumstances, was not known to defendant at the time of contracting.⁶⁰ As the court noted, Plaintiff could have had a spare crankshaft.⁶¹ Lost profits were not inevitable in a case like Plaintiff’s, but instead were due to Plaintiff’s unique circumstances which were unknown to the defendant at the time of contracting. The *Hadley* Court noted: “For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them.”⁶² The test of foreseeability is an objective one; in other words, defendant need not have actually contemplated the particular loss at the time of contracting, the loss need only have been objectively foreseeable.⁶³ Regarding emotional disturbance damages caused by a breach, objective foreseeability may be established by showing “the contract or the breach is of such a kind that serious emotional disturbance was a

⁵⁶ *Id.*

⁵⁷ See, e.g., *Optimal Interiors, LLC v. HON Co.*, 774 F. Supp. 2d 993, 1011 (S.D. Iowa 2011) (equating special and consequential damages); *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 838 (10th Cir. 2016) (same); *Descor Corp. v. Harry W. Trushel Const. Co.*, 413 S.E.2d 85, 89–90 (W. Va. 1991) (same); *Tate & Lyle Americas LLC v. Glatt Air Techniques, Inc.*, No. 13-2037, 2016 WL 7422289, at *3 (C.D. Ill. May 20, 2016) (same); *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 130 (N.Y. 2008) (same); *Giampapa v. Am. Fam. Mut. Ins. Co.*, 64 P.3d 230, 237 n.3 (Colo. 2003) (same); see also RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (Law Inst. 1981) (discussing general and special damages and noting the latter are synonymous with consequential damages).

⁵⁸ HUNTER, *supra* note 54, at § 13:10, *citing*, *Unilever United States Inc. v. Johnson Controls Inc.*, No. 16-CV-01849, 2017 WL 3311038, at *2 (N.D. Ill. Aug. 2, 2017) (explaining that general damages are foreseeable by definition, whereas consequential damages must be reasonably foreseeable at the time of contracting); see also RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (Law Inst. 1981); 24 WILLISTON ON CONTRACTS § 64:16 *Distinction between general and special damages* (May 2021 Update).

⁵⁹ RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (Law Inst. 1981); see also HUNTER, *supra* note 54, at § 13:10.

⁶⁰ *Hadley v. Baxendale*, 156 E.R. 145 (1854).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Lawrence v. Will Darrah & Assocs., Inc.*, 516 N.W.2d 43, 48 (Mich. 1994) (noting that the inquiry into consequential damages “which can reasonably be said to have been in contemplation of the parties at the time the contract was made” is an objective one); *Huskey v. Nat'l Broad. Co.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) (stating that actual or subjective knowledge of consequential serious emotional disturbance is not required; the test is an objective one); see also RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (Law Inst. 1981) (noting that consequential losses that are foreseeable include those “as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know” and stating that the test is an objective one); RESTATEMENT (SECOND) OF CONTRACTS § 353 (noting that recovery of damages for emotional disturbance will be permitted if “the breach is of such a kind that serious emotional disturbance was a particularly likely result.”).

particularly likely result.”⁶⁴ For example, courts have awarded damages for emotional disturbance in breach of contract cases involving innkeepers and guests,⁶⁵ common carriers and passengers,⁶⁶ transportation or burial of a deceased person,⁶⁷ and delivery or non-delivery of messages involving concerning death.⁶⁸ A breach of contract in these situations is one where serious emotional disturbance is “particularly likely.”⁶⁹ Courts have continued to expand the above categories, finding emotional disturbance damages were “particularly likely” in a myriad of other situations.⁷⁰ Some courts have held that emotional disturbance damages were “particularly likely” when the nature of the contract was personal, rather than pecuniary, ruling that emotional disturbance damages are objectively foreseeable at the time of contracting when the contract addresses matters of mental concern, solicitude, and personal feelings.⁷¹ The latter approach has been used to award consequential emotional disturbance damages for breach of service contracts involving prenatal care and childbirth.⁷² In those situations, the Courts recognize that,

⁶⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Law Inst. 1981); see also *Menorah Chapels at Millburn v. Needle*, 899 A.2d 316, 324 (N.J. Super. Ct. App. Div. 2006) (ruling consequential damages for emotional disturbance are available “where the subject-matter of the contract is such as to make it certain or reasonably probable that the parties had in contemplation, at the time of the making of the contract, a pecuniary satisfaction for the anguish and distress of mind ensuing from a breach of its terms”); *Stanczyk v. Prudential Ins. Co. of Am.*, No. 15-CV-0097-CJW, 2017 WL 11454717, at *23 (N.D. Iowa Apr. 20, 2017) (recognizing consequential damages for emotional disturbance are permitted when the “nature of the breach is particularly likely to cause serious emotional disturbance” but holding that breach of insurance contract was not one where such damages were particularly likely.); *Gregory & Swapp, PLLC v. Kranendonk*, 424 P.3d 897, 907 (Utah 2018) (holding consequential damages for emotional disturbance were not foreseeable from the nature of a contract to provide legal representation because the contract did not involve peculiarly personal interests); *Strader v. Union Hall, Inc.*, 486 F. Supp. 159, 164 (N.D. Ill. 1980) (acknowledging reasonably foreseeable consequential damages for emotional harm may be awarded for breach of an insurance contract).

⁶⁵ See, e.g., *Boyce v. Greeley Square Hotel Co.*, 126 N.E. 647, 649 (N.Y. 1920); see also *Pollock v. Holsa Corp.*, 98 A.2d 265, 267, (N.Y. 1984) (recognizing the exception but refusing to apply it to the facts before the court); RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Am. Law Inst. 1981 & June 2021 Update); see also 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

⁶⁶ See, e.g., *Stone v. Cont'l Airlines*, 804 N.Y.S.2d 652, 659 (Civ. Ct. 2005); RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Am. Law Inst. 1981 & June 2021 Update); see also 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

⁶⁷ See, e.g., *Menorah Chapels at Millburn v. Needle*, 899 A.2d 316, 324-25 (N.J. Super. Ct. App. Div. 2006); *Lamm v. Shingleton*, 55 S.E.2d 810, 813-14 (1949); *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906, 908 (D. Mont. 1977); RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Am. Law Inst. 1981 & June 2021 Update); see also 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

⁶⁸ *Russ v. Western Union Telegraph Co.*, 23 S.E.2d 681 (N.C. 1943); *Betts v. Western Union Telegraph Co.*, 83 S.E. 164, 165-66 (N.C. 1914); RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Am. Law Inst. 1981 & June 2021 Update); see also 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

⁶⁹ RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (Law Inst. 1981).

⁷⁰ See, e.g., *Chrum v. Charles Heating and Cooling, Inc.*, 327 N.W.2d 568, 570 (Mich. Ct. App. 1982) (discussing a variety of cases where the contract was held to involve mental concern and solicitude); see also 24 WILLISTON ON CONTRACTS § 64:11 (4th ed. June 2021 Update) (discussing a variety of fact scenarios where courts have permitted breach of contract emotional disturbance damages). Of course, damage awards for emotional disturbance are also available when the breach is willful and wanton. 24 WILLISTON ON CONTRACTS § 64:11 (4th ed. June 2021 Update).

⁷¹ *Lamm v. Shingleton*, 55 S.E.2d 810, 813 (N.C. 1949) (acknowledging that emotional disturbance damages are proper when the contract involves matters of mental concern or solicitude); *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1201 (11th Cir. 2007) (same); *Sullivan v. O'Connor*, 296 N.E.2d 183, 189 (Mass. 1973) (same); *Taylor v. Baptist Med. Ctr., Inc.*, 400 So. 2d 369, 374 (Ala. 1981) (same); see also 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

⁷² See, e.g., *Taylor*, 400 So. 2d 369. In *Taylor*, the plaintiff sued her physician and the hospital to recover for her physical pain and mental anguish when her child was either stillborn or died within moments of birth. 400 So. 2d at 371. Although Plaintiff's physician asked her to go to the hospital when she experienced labor pains at 3:00 a.m., the physician did not arrive at the hospital until approximately 11:40 a.m., ten minutes after plaintiff delivered. *Id.* Plaintiff's child already was dead when her physician arrived. Plaintiff was attended by two nurses during her delivery, without the assistance of her physician. *Id.* Plaintiff sued her physician for breach of contract and sued both her physician and the hospital for negligence. Of particular significance for purposes of this article is Plaintiff's breach of contract claim against her physician, Dr. Hassell. Plaintiff claimed her physician breached his contract to provide her with prenatal, delivery, and postnatal care which caused

although damages for mental anguish typically are not awarded in a breach of contract action, an exception exists when due to the nature of the contract “the contractual duty or obligation is so coupled with matters of mental concern or solicitude, or with the feelings of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering”⁷³ Although a breach of contract by ART practitioners also involves matters of mental concern and solicitude, a service contract, healthcare professionals, and procreative matters, courts remain reluctant to award breach of contract damages for emotional disturbance when cryopreserved reproductive material has been lost or destroyed.

A. *Breach of Contract Cases Addressing Emotional Disturbance Damages and Cryopreserved Reproductive Material*

While there are many cases which address legal ownership and disposition of stored reproductive material,⁷⁴ it must be acknowledged that, at the time this article was written, no cases have been published which provide a detailed discussion regarding the availability of emotional disturbance consequential damages when reproductive material is lost or destroyed. Several cases briefly address the availability of such damages and are discussed below. The first two cases found emotional disturbance consequential damages were unavailable based on the unique facts before the court. The third case permitted an award of emotional disturbance damages; however, the court based its ruling on loss of “irreplaceable property.”

1. *Robertson v. Saadat*

One recent case involving lost reproductive material which addressed

her mental anguish. *Id.* at 369. The trial court granted the physician’s motion for summary judgment, ruling that Plaintiff failed to offer any evidence linking her mental anguish to her physician’s failure to attend and that her distress, instead, was caused by the loss of her child. *Id.* at 371. The Alabama Supreme Court reversed summary judgment on the breach of contract claim and permitted plaintiff’s claim for mental anguish arising from breach of contract. *Id.* at 374. For an extensive discussion of cases involving emotional disturbance damages for breach of a service contract, see Gregory G. Sarno, J.D., Annotation, *Recovery of Compensatory Damages for Mental Anguish or Emotional Distress for Breach of Service Contract*, 54 A.L.R.4th 901 (1987).

⁷³ 400 So. 2d at 374, quoting, *Stead v. Blue Cross – Blue Shield of Alabama*, 346 So. 2d 1140 (Ala. 1977). The Court remanded and held that Plaintiff, upon sufficient proof, “may recover for mental anguish which may have resulted from the breach of Dr. Hassell’s implied contract of care.” *Id.* at 375. In situations where the contract did not involve matters of mental concern or solicitude, emotional distress damages typically will not be awarded. *See, e.g., Brooks v. Hickman*, 570 F. Supp. 619, 620 (W.D. Pa. 1983) (stating breach of brokerage service contract resulting in loss of plaintiff’s “nest egg” for retirement involved financial loss alone; therefore, emotional distress damages will not be permitted, even if the distress was likely to result from the breach).

⁷⁴ *See, e.g., Bilbao v. Goodwin*, 217 A.3d 977, 988 (Conn. 2019) (discussing cryopreservation contract language regarding disposition of embryos after divorce); *Est. of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008) (enforcing husband’s agreement with the company storing his frozen sperm that the sperm was to be destroyed upon his death); *Terrell v. Torres*, 456 P.3d 13, 17 (Ariz. 2020), *as amended* (Feb. 21, 2020) (in divorce situation, “court was required to enforce the parties’ chosen disposition of the embryos as set forth in the [cryopreservation] Agreement.”); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001) (recognizing “persuasive reasons exist for enforcing pre-embryo disposition agreements” after divorce); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (“Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes [after divorce] should generally be presumed valid and binding, and enforced in any dispute between them.”); *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992) (“An agreement regarding disposition of any untransferred pre-embryos in the event of contingencies [including divorce] . . . should be presumed valid and should be enforced as between the progenitors.”); *Szafanski v. Dunston*, 993 N.E.2d 502, 514 (Ill. Ct. App. 2013) (“[T]he best approach for resolving disputes over the disposition of pre-embryos created with one party’s sperm and another party’s ova is to honor the parties’ own mutually expressed intent as set forth in their prior agreements.”); *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. Ct. App. 2006) (enforcing embryo agreement that provides that the frozen embryos are to be discarded in the event of divorce.).

consequential damages for emotional disturbance is *Robertson v. Saadat*.⁷⁵ In *Robertson*, a widow, Sarah Robertson, sued a tissue bank who lost her deceased husband's sperm, which she wished to use to conceive his child.⁷⁶ She asserted several causes of action, including one for breach of contract.⁷⁷ Plaintiff's claims were based on the "loss of her ability to have a child biologically related to her deceased husband."⁷⁸ In her claim for breach of contract, Plaintiff argued that she was entitled to "recover emotional distress damages resulting from a defendant's breach of contract [because]the defendant ha[d] reason to know that, by the nature of the subject matter of the contract, a breach would result in mental suffering by the Plaintiff."⁷⁹ Plaintiff argued the foreseeability of emotional harm was evident at the time of contracting based, in part, on the nature of the contract itself, because the subject matter of the contract directly concerned the "comfort, happiness, or personal welfare of one of the parties. . . ."⁸⁰ Plaintiff noted that courts have permitted emotional distress damages for breach of "certain contracts which so affect the vital concerns of the individual that severe mental distress is a foreseeable result of breach."⁸¹ Plaintiff explained why her contract fell into the latter category:

[a]ny reasonable storage facility preserving a widow's deceased husband's sperm would understand the widow would have hopes of having a future child using her husband's sperm. Therefore, any reasonable storage facility in that position would foresee that, if the facility were to lose the sperm, the widow suffering that lost hope to have that connection with her deceased husband would suffer severe mental distress.⁸²

Defendants filed a series of demurrers and motions to strike which ultimately led to Plaintiff filing a fourth amended complaint.⁸³ The trial court, noting that awards for emotional disturbance are disfavored in breach of contract actions, was adamant that Plaintiff not use breach of contract theory to recover for emotional disturbance. The trial court, when sustaining the Defendants' demurrers and granting the motions to strike,

⁷⁵ *Robertson v. Saadat*, 262 Cal. Rptr. 3d 215 (Cal. Ct. App. 2020).

⁷⁶ *Id.* at 218. Plaintiff's husband, Aaron Robertson, had a potentially life-threatening genetic disease that could potentially be transmitted to his offspring. *Id.* After Aaron suffered a stroke and was in a coma, Plaintiff requested that Aaron's treating physicians withdraw and store his sperm because the couple "always desired to have children together." *Id.* Aaron's condition was terminal, and he died at age 29. *Id.* at 218-19. The medical center's risk management department and ethics panel both approved plaintiff's request based upon cards and letters Aaron had written prior to his coma, in which he stated his desire to have children with plaintiff. *Id.* at 218. Plaintiff wanted to store the sperm to achieve a later pregnancy after medical technology advanced "to prevent Aaron from transmitting his genetic disease to their children." *Id.* The Plaintiff signed a written agreement with the medical center to freeze and store Aaron's sperm. *Id.* at 219. The medical center was later sold to Defendant Saadat, after Plaintiff's original physician retired; the stored sperm was transferred to Saadat's own facility. *Id.* Years later, Plaintiff asked Saadat to transfer the six vials of stored sperm to UCLA medical center so that she could begin her fertility treatment. *Id.* Ultimately, Plaintiff learned the sperm was lost; there was no sperm in storage from her deceased husband. *Id.* at 219-20.

⁷⁷ *Id.* at 220. In addition to breach of contract, Plaintiff sued for professional negligence, intentional and negligent infliction of emotional distress, negligence, fraud, misrepresentation and/or concealment, loss of consortium, conversion, breach of fiduciary duty, conspiracy, and several alleged statutory violations. *Id.*

⁷⁸ *Id.* at 218.

⁷⁹ *Id.* at 233.

⁸⁰ *Id.* at 233 (citing *Windeler v. Scheers Jewelers*, 88 Cal. Rptr. 39 (Cal. Ct. App. 1970)).

⁸¹ *Id.* at 233-34 (quoting *Allen v. Jones*, 163 Cal. Rptr. 445, 448 (Cal. Ct. App. 1980)).

⁸² *Id.* at 234.

⁸³ *Id.* at 222-23.

expressly forbade Plaintiff from attempting to recover consequential damages for emotional disturbance based on breach of contract:

[Plaintiff may file] one last amended Complaint specifying the damages sought as being the loss of the bailment fees and costs (and attorney's fees if part of the bailment contract) and any other specific damages directly from the alleged breach of contract, not to include anything like tort damages, emotional distress, loss of fertility interests, etc. Any attempt to resurrect or re-state or include the types of damages originally sought in this case generally in the nature of consequential damages and/or loss will result in a final dismissal of the Complaint.⁸⁴

Plaintiff chose not to amend the Complaint and the trial court dismissed the case with prejudice.⁸⁵ The Court of Appeals affirmed the dismissal.⁸⁶ However, in its opinion, the Court of Appeals did not directly address plaintiff's consequential damages argument that her severe emotional distress was foreseeable to the defendant at the time of contracting.⁸⁷ Instead, the Court of Appeals side-stepped traditional consequential damages analysis by ruling "plaintiff was not legally entitled to conceive a child posthumously with Aaron's sperm in the first place."⁸⁸ The case, nevertheless, illustrates courts' continued reluctance to abandon the traditional approach which denies recovery for emotional disturbance damages in breach of contract actions. As the trial court noted, such damages are "like tort damages."⁸⁹

2. *Hardin v. Obstetrical and Gynecological Associates P.A.*

Another recent case, *Hardin v. Obstetrical and Gynecological Associates P.A.*,⁹⁰ denied Plaintiffs consequential damages for emotional disturbance when a cryopreservation laboratory wrongfully released a client's sperm to his ex-girlfriend, who

⁸⁴ *Robertson*, 262 Cal. Rptr. 3d at 222-23.

⁸⁵ *Id.* at 223.

⁸⁶ *Id.* at 234.

⁸⁷ Although the court's ruling avoided traditional consequential damages analysis and side-stepped Plaintiff's arguments that her severe emotional was foreseeable to defendants at the time of contracting, the court noted that such a claim might succeed under different facts. In a footnote, the court stated: "We express no opinion regarding the donor's respective rights if the gametic tissue at issue was the product of two donors, such as a pre-embryo." *Id.* at 228 n.12. Although the court made the latter statement in reference to Plaintiff's tort claim, it undoubtedly also has importance to her contract claim. The court noted that her contract claim failed for the same reason as her tort claim; namely, she was not entitled to extract and use her husband's sperm. If, however, his sperm was used to fertilize her egg and a stored embryo was lost, then the court would have been forced to address her claim for consequential damages. The court would have been unable to rule, as they did, that she had no entitlement to the lost reproductive material or its use.

⁸⁸ *Id.* at 234. The appellate court held that, under California law, the donor's intent at the time of death was controlling regarding stored gametic material. *Id.* at 223. According to the court, the facts alleged in the amended Complaint showed Aaron did not consent to the extraction of his sperm or its use to conceive a child after his death; in fact, he was unaware of the extraction and storage of his sperm. *Id.* As a result, the Court ruled Plaintiff was not entitled to have a child with Aaron's sperm. *Id.* at 234. The Court therefore concluded: "[P]laintiff fails to explain how she is entitled to damages for emotional distress based on the loss of an opportunity she never had." *Id.*

⁸⁹ *Id.* at 222-23. *But see Hardin v. Obstetrical and Gynecological Associates P.A.*, 527 S.W.3d 424, 444-45 (Tex. Ct. App. 2017) (denying emotional disturbance damages for breach of a cryopreservation contract which resulted in the birth of a healthy child but ruling that such awards may be possible under different facts).

⁹⁰ *Hardin*, 527 S.W.3d at 444-45 (denying emotional disturbance damages for breach of a cryopreservation contract which resulted in the birth of a healthy child but ruling that such awards may be possible under different facts).

then used the sperm to conceive a healthy child without the client's knowledge or consent.⁹¹ Although the case is not typical because the storage lab's breach of contract resulted in the birth of a healthy child, the case nevertheless is important because the court acknowledged that emotional disturbance damages for breach of contract, while not proper on the facts of the case before the court, may be proper under a different set of facts.

Prior to having a vasectomy, Layne Hardin had his sperm cryogenically stored at the defendant's laboratory.⁹² A contract was signed between the laboratory, Hardin, and his domestic partner, Katherine LeBlanc, which stated LeBlanc had control over the stored sperm, even if the couple's relationship ended.⁹³ Several years after Hardin's relationship with LeBlanc ended, he began to date Tobie Devall, and he told her about his stored sperm.⁹⁴ Hardin took Devall to the lab to discuss her ability to conceive.⁹⁵ However, Hardin and Devall later ended their relationship.⁹⁶ Without Hardin or LeBlanc's knowledge and consent, Devall had Hardin's sperm thawed and used to inseminate her, resulting in the birth of a healthy boy.⁹⁷

One of the causes of action asserted by both Hardin and LeBlanc was against the lab for breach of contract.⁹⁸ Hardin claimed the events were a "nightmare" that would last "forever."⁹⁹ A jury awarded two hundred fifty thousand dollars (\$250,000) each, to both Hardin and LeBlanc, for mental anguish caused by the lab's breach of contract.¹⁰⁰ However, in response to Defendants' motions for judgment notwithstanding the verdict, the trial court overturned the awards, ruling that mental anguish damages cannot be awarded for the birth of a healthy child as a matter of public policy.¹⁰¹ Instead, the court simply awarded Hardin and LeBlanc one thousand nine hundred fifty dollars (\$1,950) for the loss of the two vials of sperm as their breach of contract damages.¹⁰² Although Hardin had a vasectomy after the sperm was stored and both he and LeBlanc claimed their distress was only for the taking of the sperm and not the birth of a healthy child, the trial court rejected their argument. Amazingly, the trial court stated: "[T]he Court suspects that had Devall taken the sperm and thrown it in the trash . . . this case would not have been filed. . . The Court rejects Plaintiff[s'] argument that the mental anguish damages found were unrelated to the 'wrongful pregnancy.'¹⁰³ Hardin and LeBlanc appealed.¹⁰⁴

One of the issues the appellate court addressed was whether Texas law permitted

⁹¹ *Id.* at 427-28.

⁹² *Id.* at 427.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Hardin*, 527 S.W.3d at 427.

⁹⁷ *Id.*

⁹⁸ *Id.* at 428. Hardin and LeBlanc also sued Devall for intentional infliction of emotional distress. *Id.* LeBlanc also sued Devall for conversion. *Id.*

⁹⁹ *Id.* at 427.

¹⁰⁰ *Hardin*, 527 S.W.3d at 432-33.

¹⁰¹ *Id.* at 433.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

Hardin and LeBlanc to recover damages for emotional disturbance based on their breach of contract claim against the lab.¹⁰⁵ Both Hardin and LeBlanc argued that emotional disturbance damages should be recoverable for breach of contract in their case because their special relationship with the lab “touche[d] on familial sensitivities.”¹⁰⁶ Therefore, Plaintiffs argued their situation was analogous to plaintiffs in other cases of familial sensitivity where courts have permitted recovery of emotional distress damages for breach of contract, such as cases involving the mishandling of a corpse.¹⁰⁷ However, the appellate court affirmed the trial court’s grant of judgment notwithstanding the verdict, which denied the award of emotional disturbance damages against the lab for breach of contract.¹⁰⁸ The appellate court, however, left the door open to such awards in other cases where the breach did not result in the birth of a healthy child:

Contracting with an entity to store one’s own gametic material for future use arguably could create a special relationship analogous to contracting to properly handle a family member’s deceased body. But we need not decide that issue because, even if it does, Hardin’s alleged mental anguish that arose from the use of his gametic material was linked to its successful use to create life, thus directly implicating the same public policies discussed above. . .[W]e decline to extend the holding in the corpse-mishandling and illness-notification cases to this case because [of those] . . .public policy concerns.¹⁰⁹

Although the appellate court denied recovery of consequential damages for emotional disturbance, the court limited its holding to the situations where the breach led to the birth of a healthy child. The court noted: “[W]e do not hold that a special relationship can never be created in the context of a contract to store gametic material or there can never be recovery of mental anguish for breach of such a contract. Other fact patterns may create a special relationship and may implicate public policy concerns that do not align with those raised under these facts, in which a healthy child was born.”¹¹⁰ Thus, although the court left the door open regarding recovery of consequential damages for emotional disturbance, the court avoided Plaintiffs’ arguments that such an award was justified by the familial sensitivity and highly personal nature of the storage contract. Again, the holding, based on the public policy of denying emotional distress recovery related to the birth of a healthy child, allowed the court to avoid addressing the difficult question of whether Plaintiffs’ emotional distress damages were foreseeable by the storage laboratory at the time of contracting.

Several other cases have permitted breach of contract claims to move forward when reproductive material was lost or destroyed. However, the courts’ opinions in these cases, while they may permit recovery for general breach of contract damages, do not

¹⁰⁵ *Id.* at 428.

¹⁰⁶ *Hardin*, 527 S.W.3d at 444.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 444-45.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 445. *But see* *Perry-Rogers v. Obasaju*, 282 A.D.2d 231, 231 (2001) (in a tort action, denying defendants’ motion to dismiss which argued Plaintiffs’ sought to recover for emotional harm caused by the creation of human life and held plaintiffs case could proceed to obtain “damages for the emotional harm caused by their having been deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child.....”).

expressly address or endorse recovery of consequential damages for emotional disturbance.¹¹¹ One trial court opinion, however, has discussed and endorsed breach of contract emotional disturbance damages when reproductive material was lost or destroyed: *Frisina v. Women and Infants Hospital of Rhode Island*.¹¹²

3. *Frisina v. Women and Infants Hospital of Rhode Island*

In *Frisina*, the Rhode Island Superior Court consolidated three separate couples' lawsuits against a hospital's *in vitro* fertilization clinic when the couple's embryos were lost or destroyed, and the defendant clinic moved for summary judgment.¹¹³ Plaintiffs based their claims on several legal theories, including breach of contract.¹¹⁴ In each of their claims, including their breach of contract claim, Plaintiffs also sought relief for "severe trauma and emotional anguish, pain and suffering."¹¹⁵ Defendant Women and Infant's Hospital of Rhode Island moved for summary judgment.¹¹⁶

Regarding the Plaintiffs' breach of contract claim, Defendant Hospital argued the well-established traditional rule that Plaintiffs may not recover emotional disturbance damages based on breach of contract.¹¹⁷ Defendant Hospital also contended that Plaintiffs did not suffer a compensable loss because Plaintiffs really sought emotional disturbance damages based on their lost opportunity to achieve pregnancy, which was never guaranteed by the hospital.¹¹⁸ Defendant also noted that Restatement (Second) of Contracts section 353 was not adopted in Rhode Island and, assuming for argument's sake the court chose to follow section 353, that section would not apply to the plaintiffs' situation because plaintiffs suffered no bodily harm and emotional harm was not a "particularly likely" result of the

111 See, e.g., *York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989) (parents stated a cause of action for breach of bailment contract and detinue when seeking possession of cryopreserved human pre-zygote); *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. 2005) (explaining breach of bailment contract survives motion to dismiss when clinic loses five frozen pre-embryos); see also *Andrews v. Keltz*, 838 N.Y.S.2d 363, 371 (2007) (breach of contract action seeking to recover for mental anguish was dismissed without opposition after plaintiff sued clinic, physicians, and other personnel when defendants did not use sperm from her husband to fertilize plaintiff's eggs.).

112 *Frisina v. Women and Infants Hospital of Rhode Island*, Nos. CIV.A.95-4037, CIV.A. 95-4469, CIV.A.95-5827, 2002 WL 1288784, at *1 (R.I. Super. Ct. May 30, 2002). Although *Frisina* is an unpublished opinion, the opinion includes a comprehensive discussion of the legal obstacles confronting courts and aspiring parents when reproductive material is lost or destroyed. In addition, the case is often cited by legal scholars who acknowledge its importance. At the time of this article's submission, *Frisina* was cited in at least twenty-seven scholarly articles. See, e.g., Hnylka, *Traditional Barriers*, *supra* note 12, at 350-51; Dawn R. Swink, J. Brad Reich, *Caveat Vendor: Potential Progeny, Paternity, and Product Liability Online*, 2007 B.Y.U. L. REV. 857, 890 n.162 (2007); Fox, *Reproductive Negligence*, *supra* note 20, at 172; J. Brad Reich and Dawn Swink, *You Can't Put the Genie Back in the Bottle: Potential Rights and Obligations of Egg Donors in the Cyberprocreation Era*, 20 ALB. L.J. SCI. & TECH. 1, 66 n.340 (2010); McBride, *Eggs Frozen*, *supra* note 12, at 774.

113 2002 WL 1288784, at *1. Plaintiffs David and Carol Frisina, the first couple, cryopreserved nine embryos at the clinic to achieve pregnancy at a later date. *Id.* The clinic later informed them that only three of the nine were "available", and that none of those three embryos were "suitable for transfer" to her uterus. *Id.* The second couple, Plaintiffs Robert and Vickie Lamontagne, successfully gave birth to a baby girl after using three of seven fertilized eggs they stored at the clinic. *Id.* However, the clinic admitted it "lost" the couple's four remaining embryos. *Id.* The third couple, George and Susan Doyle, successfully used IVF to give birth to a healthy baby girl at the clinic. *Id.* at *2. However, when the couple later returned to have another child using the five remaining stored embryos, they were told the clinic "inadvertently destroyed" the embryos when the clinic relocated. *Id.*

114 *Frisina*, 2002 WL 1288784, at *2. Plaintiffs' claims included medical malpractice, bailment, loss of irreplaceable property, and breach of contract. *Id.*

115 *Id.*

116 *Id.* at *1.

117 *Id.* at *9.

118 *Id.* Defendant also noted there was an 80% chance that pregnancy would not result and damages would be difficult to assess. *Id.*

breach.¹¹⁹ Regarding the latter point, defendant pointed out the plaintiffs' breach of contract claim did not involve any of the traditional exceptions where the Restatement recognized emotional disturbance was "particularly likely", such as breaches involving common carriers, the mishandling of a corpse, or the delivery of a message concerning death.¹²⁰ Plaintiffs, however, argued the hospital's breach was analogous to the mishandling of a corpse and did result in the same type of severe emotional disturbance:

The IVF experience is physically taxing for the prospective mother and emotionally draining for both prospective parents. Clinics report that couples attempting IVF often show an abnormal attachment to the embryos, sometimes even naming them, and experience deep depression if successful implantation does not occur.¹²¹

The trial court denied Defendant Hospital's motion for summary judgment on the plaintiffs' breach of contract claim. Rejecting the Hospital's argument that no promise of pregnancy was ever made and therefore plaintiffs suffered no loss, the trial court stated: "This court finds that the plaintiffs are seeking to recover for the physical loss of their pre-embryos rather than for the loss of the possibility of achieving pregnancy as claimed by the defendant."¹²² Although the court acknowledged Rhode Island did not typically permit awards for emotional disturbance based on breach of contract, the court ruled such awards are permitted for the "loss of irreplaceable property" and held emotional disturbance damages for "the loss of [Plaintiffs'] pre-embryos [] is permissible under the Rhode Island Supreme Court's holding in *Hawkins v. Scituate Oil* . . ."¹²³ Therefore, Plaintiffs' breach of contract claim seeking emotional distress damages was permitted to proceed to trial.

Although the *Frisina* court's decision to permit recovery of emotional disturbance damages for breach of contract is admirable, the court's decision to base recovery of emotional disturbance damages on the Rhode Island Supreme Court's decision in *Hawkins v. Scituate Oil*¹²⁴ is puzzling. *Hawkins* provides little support for the *Frisina* court's ruling. In fact, *Hawkins* was a tort claim involving damage to real property.¹²⁵ In *Hawkins*, homeowners sued an oil company for negligence which rendered their home uninhabitable after the oil company negligently pumped heating oil into an incorrect pipe, flooding the homeowner's basement.¹²⁶ The case was one of nuisance involving real property where the Court applied the traditional measure of damages for harm to real property, which includes compensation for the property owner's mental anguish, discomfort, and annoyance.¹²⁷ The *Frisina* court

¹¹⁹ *Frisina*, 2002 WL 1288784, at *10.

¹²⁰ *Id.*

¹²¹ *Id.* (quoting Tanya Feliciano, *Davis v. Davis: What about Future Disputes?*, 26 CONN. L. REV. 305, 308-09 (1993)).

¹²² *Id.*

¹²³ *Id.* (citing *Hawkins v. Scituate Oil*, 723 A.2d 771 (R.I. 1999)).

¹²⁴ *Id.* (citing *Hawkins*, 723 A.2d 771 (R.I. 1999)). While the court expressly stated breach of contract emotional distress damages were permissible under *Hawkins*, the court also noted *Buenzle v. Newport Amusement Ass'n*, 68 A. 721 (R.I. 1908), provided some additional support "suggesting that such damages [for emotional distress] might be available in certain factual scenarios." *Frisina*, 2002 WL 1288784, at *10.

¹²⁵ *Hawkins*, 723 A.2d at 771. The *Hawkins* Court summarized the legal issue in that case as follows: "When a tortfeasor's negligence deprives a family of the use and enjoyment of their home, is the family entitled to recover damages for their resulting inconvenience, discomfort, and annoyance?" *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 772.

should have recognized that *Hawkins* was limited to real property harm and did not involve emotional disturbance damages for breach of contract.¹²⁸

The *Frisina* Court's decision to describe the breach of contract loss as one of "irreplaceable property" also creates confusion. Embryos are not typical "irreplaceable property" such as family photographs,¹²⁹ nor would the loss of embryos necessarily cause severe emotional disturbance in every individual plaintiff.¹³⁰ Although the vast majority of individuals cryogenically store reproductive material to achieve pregnancy and give birth to their own biological children,¹³¹ not every person who stores reproductive material stores the material in the hope of someday using that material to have their own biological child. Some people store reproductive material for use in scientific research.¹³² Others store it for medical reasons unrelated to achieving pregnancy.¹³³ Yet others store reproductive material to be donated for another's use.¹³⁴ Arguably, not all of these individuals would experience emotional disturbance when they learn of their reproductive material's loss or destruction and, even if some would experience emotional disturbance, the disturbance most likely would not be at the same level as that experienced by aspiring parents when the breach destroyed their only opportunity to give birth to their own biological children. Similarly,

¹²⁸ In language noted but apparently ignored by the *Frisina* Court, the *Hawkins* decision limited its holding to real property cases:

The necessity for proving some interference with or deprivation of a possessory interest in the property in question as a condition precedent to obtaining damages for any resulting inconvenience, discomfort, or annoyance distinguishes this type of case from those alleging a mere intentional or negligent infliction of emotional distress..... In sum, in cases like this one involving a physical interference with or a loss of a possessory interest in real property, the prevention of trumped-up or specious-damage demands for alleged intangible personal injuries is of less an evidentiary concern than it is in the context of cases alleging a mere intentional or negligent infliction of emotional distress.

Hawkins, 723 A.2d at 773, quoted in part by *Frisina*, 2002 WL 1288784, at *9.

¹²⁹ Courts have addressed the legal status of a stored embryo and disagree whether a stored embryo should be treated as a person, as property, or as "something in-between" deserving "special respect." See, e.g., *Davis*, 842 S.W.2d at 594 (acknowledging the legal quandary of whether an stored embryo is a "person" or "property" and holding pre-embryos "occupy an interim category that entitles them to special respect."); see also *Frisina*, 2002 WL 1288784, at *4-5 (ruling that cryopreserved pre-embryos cannot be classified as victims); *Davis*, 842 S.W.2d at 597 (concluding "that pre-embryos are not, strictly speaking, either "persons" or "property," but occupy an interim category that entitles them to special respect because of their potential for human life."); *York*, 717 F. Supp. at 427 (ruling that plaintiffs cryopreserved pre-zygote created a property interest); *Kurchener v. State Farm Fire & Cas. Co.*, 858 So. 2d 1220, 1221 (Fla. Dist. Ct. App. 2003) (holding that destruction of sperm constitutes property damage in Florida.).

¹³⁰ See, e.g., *Hardin*, 527 S.W.3d at 433 (noting plaintiff's emotional distress was not caused by the loss of his stored sperm and stating the suit likely would not have been filed if defendant had thrown the sperm in the trash.).

¹³¹ *Hoffman & Zellman, Cryopreserved Embryos*, supra note 28, at 1068 (noting that 88.2% of stored embryos are used by patients to achieve pregnancy). ASRM survey results indicate that less than three percent of cryopreserved embryos are stored for research purposes, and less than one percent are stored for use in quality assurance activities. *Id.*

¹³² See, e.g., Cleveland Clinic, *Embryo Cryopreservation: Why is Embryo cryopreservation Done?*, <https://my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation> (noting embryos may be cryopreserved for use in scientific research) (last visited Aug. 5, 2021).

¹³³ See, e.g., *Hoffman & Zellman, Cryopreserved Embryos*, supra note 28, at 1063 (noting that cryopreserved embryos are a source for stem cells "that might be used to grow replacement tissues for people suffering from cancer, Alzheimer's disease, diabetes, and other diseases.").

¹³⁴ Cleveland Clinic, *Embryo Cryopreservation: Why is Embryo cryopreservation Done*, <https://my.clevelandclinic.org/health/treatments/15464-embryo-cryopreservation> (discussing donation of cryopreserved embryos) (last visited Aug. 5, 2021); Midwest Fertility, *Why Freeze your Eggs?*, <https://www.midwestfertility.com/fertility-treatments/cryopreservation-of-eggs/> (same) (last visited Aug. 5, 2021); ASRM Reproductive Facts, *FAQs About Fertility, What are my Options if I Decide Not to use my Stored Embryos?*, <https://www.reproductivefacts.org/faqs/frequently-asked-questions-about-infertility/q11-what-are-my-options-if-i-decide-not-to-use-my-stored-embryos/> (same) (last visited Aug. 5, 2021).

although some aspiring parents may become infertile after storing their reproductive material due to age or illness, other aspiring parents whose reproductive material is lost or destroyed may still retain the ability to have their own biological children; arguably, their reaction to the loss would be less severe than aspiring parents who have lost their only chance to have their own biological children. As a result, the emotional disturbance caused by the breach, if any, varies widely amongst those whose stored reproductive material was lost or destroyed.¹³⁵ In other words, severe emotional disturbance will not automatically result from the breach in every case where reproductive material is lost or destroyed. Instead, emotional disturbance, if any, will be linked to plaintiff's unique circumstances, and the disturbance is particularly likely to occur and be most severe when aspiring parents lose their ability to achieve pregnancy and give birth to their own biological child.¹³⁶ Therefore, if aspiring parents are to recover breach of contract damages for emotional disturbance when their reproductive material is lost or destroyed, those damages most likely will be consequential damages based on the aspiring parents' unique circumstances. Although any breach of contract may cause some emotional disturbance, not every breach resulting in the loss or destruction of reproductive material is, inevitably, as a matter of course, "of such a kind that serious emotional disturbance [is] a particularly likely result."¹³⁷ The availability of damages for emotional harm will have to be examined on a case-by-case basis.

B. Several Helpful Tort Cases that Address Foreseeability of Emotional Disturbance when Cryopreserved Reproductive Material is Lost or Destroyed.

Although no breach of contract case involving lost or destroyed reproductive material has contained in-depth analysis of the availability of consequential damages for emotional disturbance, several cases addressing tort claims for negligent and/or intentional infliction of emotional disturbance have found that emotional disturbance is foreseeable when reproductive material is lost or destroyed.¹³⁸ These cases are from jurisdictions that do not impose the traditional barriers¹³⁹ to recovery for stand-alone emotional harm. Therefore, in these jurisdictions, aspiring parents were permitted to recover for Negligent Infliction of Emotional Distress ("NIED") using a traditional negligence approach in which foreseeability of emotional harm was crucial to establishing defendants' duty.¹⁴⁰ Although the inquiry regarding foreseeability of harm in tort is not identical to the inquiry regarding

¹³⁵ See Fox, *Intangible Losses*, *supra* note 9, at 461 ("Permanent deprivations will tend to cause more acute harms than temporary reproductive setbacks.").

¹³⁶ See Witt v. Yale-New Haven Hosp., 977 A.2d 779, 788 (Super. Ct. 2008) (holding that plaintiffs' emotional distress is due to "the loss of an opportunity to potentially become pregnant, and thereby experience pregnancy, prenatal bonding and the birth of a child. As in *Perry-Rogers* and in *Del Zio*, it is the loss of the opportunity potentially to become pregnant rather than the loss of an actual fetus that caused the emotional distress."). Courts have reached analogous conclusions in wrongful birth cases, noting that the harm "is not the birth of the child, but the parents lost opportunity to decide for themselves whether to continue the pregnancy." *Lodato ex rel. Lodato v. Kappy*, 803 A.2d 160, 166 (N.J. Super. Ct. App. Div. 2002) (citing *McKenney v. Jersey City Med. Ctr.*, 771 A.2d 1153 (N.J. 2001)).

¹³⁷ RESTATEMENT (SECOND) OF CONTRACTS § 353 (Law Inst. 1981); see also HUNTER, *supra* note 52, at § 13:10 (discussing the distinction between general and special damages under *Hadley v. Baxendale*).

¹³⁸ Witt, 977 A.2d at 785-86 (addressing foreseeability of emotional harm); *Perry-Rogers*, 282 A.D.2d at 231-32 (same).

¹³⁹ See *supra* notes 12-19 and accompanying text.

¹⁴⁰ Witt, 977 A.2d at 784-85 (noting foreseeability is the primary focus); *Perry-Rogers*, 282 A.D.2d at 231-32 (acknowledging breach of duty causing emotional harm is required, and ruling that harm was foreseeable); see also *Del Zio v. Presbyterian Hosp.* in New York, No 74 Civ. 3588 (CES), 1978 U.S. Dist. Lexis 14450 at *14 (S.D.N.Y. Nov. 9, 1978) (holding the defendants' intentional conduct "predictably caused severe emotional distress.").

foreseeability of consequential damages in a breach of contract action,¹⁴¹ these cases, nevertheless, contain useful analysis that could help inform the inquiry regarding whether a defendant could foresee at the time of contracting that emotional disturbance was “particularly likely” when a breach results in the loss or destruction of stored reproductive material.

1. *Witt v. Yale-New Haven Hospital*¹⁴²

In *Witt*, a couple sued a hospital fertility center for negligent and intentional infliction of emotional disturbance when the facility discarded Plaintiff Carolyn Witt’s cryogenically stored ovarian tissue.¹⁴³ The couple, who had no children, claimed they suffered emotional disturbance because they “lost [the] opportunity to potentially conceive a child together.”¹⁴⁴ After preserving her reproductive material, Plaintiff Carolyn Witt was rendered infertile due to chemotherapy.¹⁴⁵ She asserted that, at the time the hospital agreed to store her reproductive material, they did so “with the full knowledge that the frozen ovarian tissue it had harvested and stored was their [her and her husband’s] only hope of one day conceiving a child together.”¹⁴⁶ The hospital filed a motion to strike the claims for negligent and intentional infliction of emotional distress.¹⁴⁷ The Connecticut Superior Court allowed the claims for intentional and negligent emotional distress to proceed, striking only the husband’s count for intentional infliction of emotional distress.¹⁴⁸ In its opinion, the *Witt* court addressed the foreseeability of Plaintiffs’ emotional harm to the defendant hospital and analogized the relationship between ART practitioners and their patients to the relationship between immediate family members and a mortician:

[T]he court views the relationship between parents and ART practitioners to be analogous to the relationship shared by immediate family members and a mortician. In both cases, there is an important dignity interest shared by families: caring for human remains in a respectful manner in the case of a relative’s corpse and preserving the potential for human reproduction in the case of a spouse’s ovarian tissue. Moreover, the relationship that a mortician has with the immediate family members of the decedent is akin to the relationship that a fertility physician has with both parents: both relationships involve a class of related people who are particularly vulnerable emotionally and are heavily dependent on the practitioner’s diligence. Most importantly, though, in both situations the practitioner’s duty to the immediate family is predicated on the

¹⁴¹ For a general discussion of the differences, see HUNTER, *supra* note 54, at § 13:9 (noting that in a contract action, unlike a tort, “there must be a more direct connection between the damage and the risks actually assumed by the parties when they entered into the agreement.”); *see also* 24 WILLISTON ON CONTRACTS § 64:17 (4th ed. June 2021 Update) (“For a tort, the defendant becomes liable for all proximate consequences, while for breach of contract the defendant is liable only for consequences that were reasonably foreseeable, at the time the contract was made, as likely to result if the contract were broken”).

¹⁴² 977 A.2d at 781..

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 782.

¹⁴⁶ *Id.* at 785.

¹⁴⁷ *Id.* at 782.

¹⁴⁸ *Id.*

family's shared reliance on the practitioner's professional performance to ensure the desired result. Just as a mother and father would be equally distressed to learn that their deceased child was cremated despite their instructions to the mortician to embalm the child for an open casket wake, so, too, would the same parents be equally distressed to learn that their only hope for having a child together was discarded by their medical provider.¹⁴⁹

In *Witt*, the court noted that foreseeability to the defendant of serious emotional harm was a primary focus.¹⁵⁰ The *Witt* court noted that serious emotional harm was objectively foreseeable to the ART practitioners in the event of breach of duty: “[T]he anxiety the plaintiffs experienced as a result of the lost ovarian tissue was so predictably severe that the defendant should have known it could reasonably lead to illness or physical injury.”¹⁵¹

2. *Perry-Rogers v. Obasaju*¹⁵²

In *Perry-Rogers*, the foreseeability of serious emotional distress caused by an ART practitioner's breach of duty was addressed after ART practitioners mistakenly implanted plaintiffs' embryo in an unidentified third party who became pregnant.¹⁵³ Plaintiffs filed an action for malpractice and sought to recover damages for emotional harm¹⁵⁴ because they could no longer use their embryo to “experience pregnancy, prenatal bonding, and birth of their child.”¹⁵⁵ The trial court denied defendants' motion to dismiss; the appellate division of the New York Supreme Court affirmed and held plaintiffs' claim could proceed, based upon the foreseeable risk of serious emotional harm caused by the ART practitioner's breach of duty:

Here, it was foreseeable that the information that defendants had mistakenly implanted plaintiffs' embryos in a person whom they would not identify, which information was not conveyed until after such person had become pregnant, would cause plaintiffs emotional distress over the possibility that the child they wanted so desperately, as evidenced by their undertaking the rigors of in vitro fertilization, might be born to someone else and that they might never know his or her fate.¹⁵⁶

149 *Id.* at 789–90; *see also Hardin*, 527 S.W.3d at 444–45 (“Contracting with an entity to store one's own gametic material for future use arguably could create a special relationship analogous to contracting to properly handle a family member's deceased body. But we need not decide that issue.....”).

150 977 A.2d at 785 (“As a threshold matter, the court must now resolve the question as to whether the anxiety or fear attendant upon the loss of an opportunity. to potentially conceive a child is sufficiently foreseeable to support a claim of negligent infliction of emotional distress.”) The court based its conclusion on the foreseeability to defendants of plaintiff's serious emotional harm. *Id.* at 784 (“the primary focus for a court is on the question of foreseeability.....”).

151 *Id.* at 788; *see also Del Zio*, 1978 U.S. Dist. LEXIS 14450 at *1, *14 (acknowledging the “substantial certainty” that the destruction of plaintiffs' fertilized ova would cause severe emotional distress).

152 282 A.D.2d 231 (2001).

153 *Id.*

154 *Id.*

155 *Id.*

156 *Id.* at 232; *see also Del Zio*, 1978 U.S. Dist. Lexis14450 at *14 (upholding plaintiffs' jury verdict for intentional infliction of emotional distress when hospital intentionally destroyed plaintiffs' fertilized ova without their knowledge “which predictably caused severe emotional distress.”). However, the court noted plaintiffs must produce evidence “sufficient to guarantee the genuineness of the claim.” *Perry-Rogers*, 723 N.Y.S.2d at 28, 282 A.D.2d at 232.

Although no cases have been published which provide a detailed discussion regarding the availability of emotional disturbance consequential damages when reproductive material is lost or destroyed, the above cases help inform the inquiry regarding whether such damages are foreseeable at the time of contracting. As will be explained below, traditional consequential damages analysis rooted in *Hadley v. Baxendale* supports aspiring parents' recovery of emotional disturbance damages for breach of contract when their stored reproductive material is lost or destroyed. The consequential damages analysis, however, must focus on what was known or reasonably foreseeable to the defendant at the time of contracting. Just as the court in *Hadley v. Baxendale* denied the miller's lost profits as consequential damages because the miller never told the Defendant at the time of contracting that he had only one crankshaft and would be forced to remain closed during repairs,¹⁵⁷ the inquiry in lost or destroyed reproductive materials cases also must focus on what the storage facility knew, or what was reasonably foreseeable to them, at the time of contracting.

IV. FORESEEABILITY OF EMOTIONAL DISTURBANCE DAMAGES CAUSED BY THE BREACH OF A CRYOPRESERVATION CONTRACT

When reproductive material was stored for the purpose of achieving a later pregnancy,¹⁵⁸ a defendant's breach of contract which results in the loss or destruction of the reproductive material should support an award of consequential damages for emotional disturbance. This is particularly true when, due to plaintiffs' age or illness, the loss realistically destroys plaintiffs' opportunity to have their own biological child. Although, as will be discussed later in this article, contractual language plays a key role when determining defendant's liability for damages, when the court examines whether consequential emotional disturbance damages can *reasonably* be said to have been in contemplation of the parties at the time the storage contract was made, courts are free to examine the nature of the underlying transaction, the purpose of the contract, and the surrounding circumstances to aid in the determination of whether consequential damages are foreseeable at the time of contracting, especially when the contract is silent regarding a particular risk of loss.¹⁵⁹ The

¹⁵⁷ *Hadley v. Baxendale*, 156 E.R. 145 (1854).

¹⁵⁸ As discussed *supra*, Part III.A.3, not every individual stores reproductive material to achieve a later pregnancy. Some individuals store reproductive material for use in research, etc. As a result, the emotional disturbance caused by the reproductive material's loss will vary and must be analyzed on a case-by-case basis. However, for couples, who use the cryopreservation process to become parents of their own biological child, the loss of the stored reproductive material typically results in severe emotional distress, as will be explained *infra*, Part IV.A.

¹⁵⁹ *Schonfeld v. Hilliard*, 218 F.3d 164, 172 (2d Cir. 2000) (courts consider "the nature, purpose and particular circumstances of the contract known by the parties."); *Kenford Co. v. Cty. of Erie*, 537 N.E.2d 176, 179 (N.Y. 1989) ("In determining the reasonable contemplation of the parties, the nature, purpose and particular circumstances of the contract known by the parties should be considered."); *Lawrence v. Will Darrah & Assocs., Inc.*, 516 N.W.2d 43, 48-49 (Mich. 1994) (using a "flexible approach" that examines the nature of the underlying transaction, the purpose of the agreement, and the surrounding circumstances); *see also* 24 WILLISTON ON CONTRACTS § 64:17 (May 2021 Update) (acknowledging courts use a flexible approach when determining whether consequential damages were foreseeable, taking into account the nature of the underlying transaction, the purpose of the contract, and surrounding circumstances); CALAMARI & PERILLO, CONTRACTS (3d ed.), § 14-7, p. 599 ("Courts must be aware of the transactional context in which the transactions occur."); 5 CORBIN, CONTRACTS, § 1002, p. 33 (noting that breach of contract damages rules are "very flexible" and stating that courts must consider "the special circumstances of the particular case"); RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. b (Law Inst. 1981) ("The parol evidence rule (§ 213) does not, however, preclude the use of negotiations prior to the making of the contract to show for this purpose [foreseeability of consequential damages] circumstances that were then known to a party.").

Hadley standard of foreseeability is an objective one.¹⁶⁰ In the overwhelming majority of breach of contract cases involving the loss or destruction of reproductive material stored to achieve a later pregnancy, the nature of the transaction, the purpose of the contract, and the surrounding circumstances put defendants on notice at the time of contracting that serious emotional disturbance was “particularly likely” to result from a breach. Finally, aspiring parents should be able to demonstrate with certainty that damages were caused by the breach.

A. *Foreseeability of Emotional Disturbance Damages Based on the Nature of the ART Process.*

The nature of the transaction supports consequential damages for emotional disturbance. At the time ART clinics contract to store aspiring parents’ reproductive material for later use to achieve a pregnancy, it is foreseeable to the ART clinic and its employees that the aspiring parents will suffer emotional disturbance if the reproductive materials are lost or destroyed, eliminating the aspiring parents’ opportunity to use those stored materials to have a child. This foreseeability, in part, is based on the nature of the underlying transaction, which is personal rather than commercial and involves matters of mental concern, solicitude, and high emotions.¹⁶¹ Aspiring parents hire ART professionals to store their reproductive material to achieve pregnancy at a later date. Aspiring parents rely on ART professional’s skill and professional performance to see that their reproductive materials are stored safely and are not harmed, lost, or destroyed. ART professionals acknowledge that the IVF process, including cryopreservation of reproductive material, is wrought with high emotions and likely to produce great emotional upset if the process fails.¹⁶² The ART process has been described as “emotionally draining for both prospective parents.”¹⁶³ These facts are known to ART professionals at the time of contracting or, at minimum, should be known. The American Society for Reproductive Medicine’s Guide

160 *Lawrence*, 516 N.W.2d at 48 (noting that the inquiry into consequential damages “which can reasonably be said to have been in contemplation of the parties at the time the contract was made” is an objective one); *see also* *Huskey v. Nat’l Broad. Co.*, 632 F. Supp. 1282, 1293 (N.D. Ill. 1986) (stating that actual or subjective knowledge of consequential serious emotional disturbance is not required; the test is an objective one); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 351 cmt. a (Law Inst. 1981) (noting that consequential losses that are foreseeable include those “as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know” and stating that the test is an objective one); RESTATEMENT (SECOND) OF CONTRACTS § 353 (noting that recovery of damages for emotional disturbance will be permitted if “the breach is of such a kind that serious emotional disturbance was a particularly likely result.”).

161 *See, e.g., Lamm*, 55 S.E.2d at 813 (acknowledging that emotional disturbance damages are proper when the contract involves matters of mental concern or solicitude); *Sheely*, 505 F.3d at 1200-01 (same); *Sullivan v. O’Connor*, 296 N.E.2d 183, 189 (Mass. 1973)(same); *Taylor*, 400 So. 2d at 374 (same); *see also* 24 WILLISTON ON CONTRACTS § 64:11, *Damages for Mental Suffering* (4th ed. June 2021 Update).

162 *See, e.g., Witt*, 977 A.2d at 788 (noting severe emotional stress that typically accompanies ART procedures); *Perry-Rogers*, 282 A.D.2d at 231-32 (stating plaintiffs suffered severe emotional distress when they were “deprived of the opportunity of experiencing pregnancy, prenatal bonding and the birth of their child.”); Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: Arts, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1, 76 (2003) (noting that when ART practitioners err “the emotional distress is unimaginable.”); Alise R. Panitch, *The Davis Dilemma: How to Prevent Battles over Frozen Preembryos*, 41 CASE W. RES. L. REV. 543, 573 (1991) (“Any spouse ultimately denied the chance to have a child through IVF would probably suffer considerable emotional stress.”); Hnylka, *Traditional Barriers*, *supra* note 12, at 362-63 (discussing the emotional stress aspiring parents experience when problems occur in ART).

163 Tanya Feliciano, *Davis v. Davis: What About Future Disputes?*, 26 CONN. L. REV. 305, 308 (1993); *see also* Supriya Kakkar, *Unauthorized Embryo Transfer at the University of California, Irvine Center for Reproductive Health*, 24 HASTINGS CONST. L.Q. 1015, 1020 (1997) (same); Hnylka, *Traditional Barriers*, *supra* note 12, at 362-63 (same); Suchitra Jittaun Satpathi, *Gliding over Treacherous Ice: Fulfillment and Responsibility in the New Reproductive Era; Why Contractual Ordering Is Appropriate*, 18 TEMP. ENVTL. L. & TECH. J. 55, 58 (1999) (same).

for Patients openly acknowledges that the nature of ART poses a risk of serious emotional harm:

Assisted reproductive technologies involve significant physical, financial, and emotional commitments on the part of the couple. Psychological stress is common, and some couples describe the experience as an emotional roller coaster. The treatments are involved and costly. Patients have high expectations, yet failure is common in any given cycle. Couples may feel frustrated, angry, isolated, and resentful. At times, frustration can lead to depression and feelings of low self-esteem, especially in the immediate period following a failed ART attempt. The support of friends and family members is very important at this time. Couples are encouraged to consider psychological counseling as an additional means of support and stress management. Many ART programs have a mental health professional on staff to help couples deal with the grief, tension, or anxieties associated with infertility and its treatment.¹⁶⁴

If the ART process is already known to be an “emotional roller coaster” and a failed ART attempt is known to cause severe emotional disturbance, then it logically follows that the loss or destruction of aspiring parents’ reproductive material also is particularly likely to cause severe emotional disturbance. The nature of the ART process puts the clinic and ART practitioners on notice at the time of contracting that a breach resulting in the materials loss or destruction is particularly likely to cause aspiring parents severe emotional disturbance.

B. Foreseeability of Emotional Disturbance Damages Based on the Purpose of the Cryopreservation Agreement and the Surrounding Circumstances.

The purpose of the cryopreservation contract and the surrounding circumstances also make the particular likelihood a breach will cause severe emotional disturbance known, or objectively foreseeable, by ART clinics and practitioners at the time of contracting for several reasons: First, most cryopreserved reproductive material is stored at clinics specializing in fertility assistance.¹⁶⁵ Many, if not most, fertility clinic advertisements tout the use of cryopreservation as a method to secure a future pregnancy. As one clinic noted in its online webpage: “Cryopreservation allows for peace of mind about a future family.”¹⁶⁶ The American Society for Reproductive Medicine (ASRM) has reported that “virtually all” cryopreserved embryos are stored at clinics rather than being stored off-site.¹⁶⁷ As a result, these storage facilities have either actual or, at minimum, constructive knowledge of the reason for storage: namely, to achieve a pregnancy at a later date. A recent survey of clinics by ASRM noted that “most clinics were able to tell us why embryos were in storage”¹⁶⁸ which indicates that most clinics had actual knowledge of intended use

¹⁶⁴ *Guide for Patients*, *supra* note 23, at 17; *see also* Hnylka, *Traditional Barriers*, *supra* note 12, at 362-63 (same).

¹⁶⁵ Hoffman & Zellman, *Cryopreserved Embryos*, *supra* note 28, at 1066 (“Virtually all embryos are stored at clinic facilities”).

¹⁶⁶ Loma Linda University, Center for Fertility and IVF, *Cryopreservation: Benefits of Cryopreservation*, <https://lomalindafertility.com/treatments/cryopreservation/> (last visited Aug. 5, 2021).

¹⁶⁷ Hoffman & Zellman, *Cryopreserved Embryos*, *supra* note 28, at 1066 (survey results indicate that less than two percent of cryopreserved embryos are stored off-site).

¹⁶⁸ *Id.*

of the cryopreserved reproductive material stored at their clinic. Also, in the majority of cases where reproductive material is stored, the purpose for its storage is to achieve a later pregnancy. The primary reason for cryopreservation of reproductive material is to achieve pregnancy using ART.¹⁶⁹ For example, one recent study revealed that over eighty-eight percent (88%) of stored embryos are for use to achieve pregnancy.¹⁷⁰ When a couple stores household items at a local storage facility, the facility typically lacks knowledge regarding the purpose for which the items are stored. The same is not true when reproductive material is stored.

Second, language in the cryopreservation contract itself, which is usually drafted by the storage facility's counsel and given to aspiring parents to sign, typically provides notice to the defendant that the reproductive material is being stored to achieve a later pregnancy. Some contracts for the storage of embryos include specific language stating that the purpose of storage is to preserve embryos for a future attempt at pregnancy.¹⁷¹ In fact, a cryopreservation agreement may require the clients to describe in detail the later use of the stored materials.¹⁷² Even when an agreement does not expressly state the purpose of storage is to achieve a future pregnancy, the purpose often is implied by an agreement's discussion of IVF and thawing of the reproductive material. For example, one cryopreservation agreement states that embryo cryopreservation is "part of the usual process of In Vitro Fertilization" and provides an "opportunity for a future embryo transfer cycle" where the "the frozen embryos can subsequently be thawed and transferred to the uterus in either a natural menstrual cycle or a hormonally controlled cycle."¹⁷³ Based on such language, the storage is clearly acknowledged to be for the purpose of achieving a later pregnancy.

Third, storage of cryopreserved reproductive material, unlike the storage of household items at a local storage facility, requires individuals to hire medical professionals. Cryopreservation of reproductive material is a vital part of the ART medical process in which aspiring parents seek the assistance of fertility experts to achieve pregnancy and give birth to a child.¹⁷⁴ Aspiring parents who use ART are referred to as "patients."¹⁷⁵ Healthcare professionals who practice ART include physicians and other fertility experts.¹⁷⁶ As a result, these medical professionals are likely to have actual knowledge of

¹⁶⁹ *Id.* at 1068 (noting that 88.2% of stored embryos are used by patients to achieve pregnancy). ASRM survey results indicate that less than three percent of cryopreserved embryos are stored for research purposes, and less than one percent are stored for use in quality assurance activities. *Id.*

¹⁷⁰ *Id.*

¹⁷¹ See, e.g., Boston IVF, *supra* note 20 (contract states "The purpose of embryo freezing is to save embryos for a future attempt to establish a pregnancy."); see also California Center for Reproductive Health, *Consent for Cryopreservation of Embryos*, at 1 (2018), <https://sa1s3.patientpop.com/assets/docs/65131.pdf> ("We understand that the purpose of cryopreservation (freezing) of embryos is to increase the possibility of achieving pregnancy at a future time.") [hereinafter California Center]; Randy S. Morris, M.D., *Embryo Cryopreservation Agreement*, at 1, <https://www.ivf1.com/pdf/Embryo-freezing-consent.pdf> ("The embryos can later be thawed. . . for an embryo transfer to attempt pregnancy.") [hereinafter Morris].

¹⁷² See, e.g., Ovation Fertility, *supra* note 20, at 1 (contract states: "The Client desires to store the reproductive materials for later use or other disposition as instructed by the Client in a separate notarized agreement.").

¹⁷³ Women's Specialty & Fertility Center Inc., *Consent and Storage Agreement for Embryo Cryopreservation and Storage Program*, at 1 (2015), https://wsfc.com/wp-content/uploads/2020/06/EmbryoCryoStorageAgreement_20200515.pdf [hereinafter Women's Specialty].

¹⁷⁴ See *Guide for Patients*, *supra* note 21, at 3; see also Hnylka, *Traditional Barriers*, *supra* note 12, at 361-62 (discussing ART as a medical process requiring patients to hire physicians and other fertility healthcare professionals).

¹⁷⁵ See *Guide for Patients*, *supra* note 23 (the title of the guide indicates aspiring parents who use ART are "patients").

¹⁷⁶ *Id.* at 20.

the purpose for which reproductive material is stored and they are well aware of the emotional rollercoaster experienced by their patients. Based on the above, clinics and ART practitioners know or at minimum should know that the cryopreserved reproductive material is being stored to achieve pregnancy, and it requires no stretch of the imagination to recognize that these professionals foresee, at the time they require their patients to execute an agreement to cryopreserve reproductive material, that a breach resulting in the loss of the aspiring parents' reproductive material is particularly likely to result in severe emotional disturbance.

Finally, the purpose of the storage agreement, unlike the storage of household items at a local storage facility, is the preservation of the opportunity for reproduction – the stored material represents the opportunity of the aspiring parents to become pregnant with their own biological child. This is why the court in *Witt* found the aspiring parents' relationship with their ART practitioner to be analogous to the relationship immediate family members have with a mortician.¹⁷⁷ Both relationships involve important dignity interests, individuals who are particularly vulnerable emotionally, and individuals who are heavily dependent on the practitioner's diligence. The Restatement (Second) of Contracts section 353 recognizes that a breach of contract by a mortician is a situation where emotional disturbance damages are particularly likely and, as a result, are foreseeable. Therefore, the same should be true regarding a breach by ART clinics and practitioners. The nature of the transaction, the purpose of the contract to store reproductive material, and the surrounding circumstances put defendants on notice at the time of contracting that serious emotional disturbance was “particularly likely” to result from a breach.

C. Certainty

In order for consequential damages to be recoverable, they must meet the test of certainty. It is not sufficient to simply argue that consequential damages for emotional disturbance were foreseeable at the time of contracting. Regarding breach of contract damages, the certainty requirement has two aspects: first, damages must be demonstrated with certainty to have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty.¹⁷⁸ Regarding these two aspects, courts have found that the first aspect is the primary focus; courts have noted the certainty requirement has been held to apply “to situations where the fact of damages is uncertain, not where the amount is uncertain.”¹⁷⁹ The purpose of the certainty requirement is to avoid awards of damages that are fabricated or based upon conjecture or speculation.¹⁸⁰ At first glance, it might appear

¹⁷⁷ *Witt*, 977 A.2d at 789–90.

¹⁷⁸ *Coastal Aviation, Inc. v. Commander Aircraft Co.*, 937 F. Supp. 1051, 1064 (S.D.N.Y. 1996), *aff'd*, 108 F.3d 1369 (2d Cir. 1997) (regarding recovery of lost profits as consequential damages under New York common law, “[f]irst, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes.”); *accord Vanderbeek v. Vernon Corp.*, 50 P.3d 866, 873 (Colo. 2002).

¹⁷⁹ *Vanderbeek*, 50 P.3d at 873; HUNTER, *supra* note 54, at § 13:13 (“Although recovery will not be denied merely because the amount of damages is hard to determine, damages must not be left to speculation and conjecture.”) (citing *Optical Partners Inc., v. Dang*, 381 S.W.3d 46, 55 (Ark. 2011)). *But see* *Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 111 (2d Cir. 2007) (“In addition to proving that the *existence* of damage is reasonably certain, and that the damages were foreseeable and within the contemplation of both parties, a party claiming consequential damages must also prove the *amount* of damage with “reasonable certainty.”).

¹⁸⁰ *Vanderbeek.*, 50 P.3d at 873; *Nora v. Safeco Ins. Co.*, 577 P.2d 347, 350 (Idaho 1978); *Best Beach Getaways, LLC v. TSYS Merchant solutions, LLC*, No. 20-CV-01962-NRN, 2021 WL 3206300, at *10 (D. Colo. July 29, 2021); *In re*

there should be no uncertainty regarding the fact of damages caused by the breach in lost or destroyed reproductive materials cases. After all, the defendant lost or destroyed reproductive material, and this breach resulted in damages. However, the lack of certainty typically does not concern general damages which necessarily flow from the breach such as paid storage fees, but instead is raised when one examines consequential damages, especially those for emotional harm. Are such damages, in fact, caused by the breach or are they speculative and the result of conjecture? Why is there any doubt that the aspiring parents' emotional disturbance damages were, in fact, caused by defendant's breach when defendant lost or destroyed the aspiring parents' reproductive material? As discussed earlier, the most severe disturbance typically will result when a couple loses the opportunity to become pregnant with their own biological child. In such situations, the fact the emotional disturbance damages are caused by defendant's breach is arguably speculative because counsel for ART professionals may contend that, although plaintiffs wished to use the reproductive material in the IVF process, a viable pregnancy is never guaranteed, and a viable pregnancy only results in a small percentage of IVF cases. Therefore, even if plaintiff is suffering severe emotional disturbance, the defendant may argue the disturbance is not causally linked to the breach but instead is based on mere speculation and conjecture regarding a remote possibility of pregnancy. This was the argument made by the defendant in *Frisina v. Women and Infants Hospital of Rhode Island*,¹⁸¹ discussed earlier.¹⁸²

In *Frisina*, when the defendant hospital lost or destroyed three couples' stored embryos, the defendant disturbance was due to the loss of the possibility of achieving pregnancy, and argued the hospital never guaranteed pregnancy.¹⁸³ In fact, defense counsel argued the couples "did not actually suffer any loss" because the chance of pregnancy using the stored material was twenty percent.¹⁸⁴ Based on the above, defense counsel argued that any link between the breach and the couple's emotional disturbance damages was speculative and fails to meet certainty requirements for recovery.¹⁸⁵ However, the *Frisina* court rejected defense counsel's arguments¹⁸⁶ and ruled that the couples were seeking to recover for emotional harm caused by the loss of the embryos, not the loss of the opportunity to achieve pregnancy.¹⁸⁷ Although the emotional harm was indeed caused by the loss of the

Mullins, No. 16-13773-JGR, 2020 WL 5846952, at *30 (Bankr. D. Colo. Sept. 30, 2020), *aff'd*, No. AP 16-01282, 2021 WL 2679137 (10th Cir. BAP (Colo.) June 30, 2021).

¹⁸¹ *Frisina*, 2002 WL 1288784, at *9.

¹⁸² *See supra* Part III.A.3.

¹⁸³ *Frisina*, 2002 WL 1288784, at *9.

¹⁸⁴ *Id.* It should be noted that *Frisina* was decided in 2002 and use of ART has dramatically increased over the past ten years. *See* authorities cited *supra* notes 23-24. Because ART has become more common and techniques continue to be improved and refined, the success rate has continued to increase in every age group. Niven Todd, *Infertility and In Vitro Fertilization: What are the Success Rates for IVF?*, WebMD (Aug. 1, 2021), <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>; *see also* IVF1, *Frozen Embryo Transfer Success*, <https://ivf1.com/frozen-embryo-transfer-success/> ("Frozen embryo transfer success has improved dramatically over the last several years. In the past, the chance for pregnancy using frozen embryos seemed to be lower than the transfer of fresh embryos. More recent data, however, suggests that this is no longer true.") In fact, the rate of success has been linked to a woman's age. Niven Todd, *Infertility and In Vitro Fertilization: Are there Other Issues with IVF to Consider?*, WebMD (Aug. 1, 2021), <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>. For example, a woman under the age of 35 has almost a 40% chance of having a baby using IVF. *Id.* On the other hand, it has been reported that the chance of having a baby using IVF is only 11.5% for a woman over 40. *Id.*

¹⁸⁵ *Frisina*, 2002 WL 1288784, at *9. In addition, defense counsel argued damages would be difficult to calculate. *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at *10.

embryos, the *Frisina* court seems to imply the emotional harm flows naturally from the breach in all such cases because defendant lost or destroyed plaintiffs’ “irreplaceable property.”¹⁸⁸ Perhaps the court wished to sidestep defendant’s argument that the loss was uncertain because a pregnancy was never promised and the likelihood of pregnancy was statistically low. However, the lost opportunity to achieve pregnancy is not speculative but, instead, is a real loss. Although successful pregnancy using IVF was statistically unlikely, one must not confuse a loss of pregnancy — which was never guaranteed — with a loss of *the opportunity to become pregnant* using the lost or destroyed reproductive material. This loss is real, not speculative, and is particularly likely to cause severe emotional disturbance when the lost or destroyed reproductive material represented a couple’s only chance to become pregnant with their own biological child.¹⁸⁹ As the court noted in *Witt*:

Regardless of the likelihood of success [of IVF], the lost opportunity to even attempt utilization of anticipated technologies at all can lead to understandable fear or anxiety, which is especially so in this case in which the recommendation and plan—indeed, the hope—was created by the defendant, and the consequence of the defendant’s alleged action is to foreclose the potential for the plaintiffs to ever conceive a child together. Accordingly, the court concludes that it was reasonably foreseeable for the defendant to appreciate that it’s discarding the ovarian tissue could result in the type of overwhelming anxiety sufficient to cause illness or bodily harm.¹⁹⁰

Thus, the statistical likelihood of achieving pregnancy need not thwart aspiring parents’ attempt to recover consequential emotional disturbance damages based on lack of certainty. The certainty inquiry should not focus on the statistical likelihood of pregnancy, but rather should focus on the lost opportunity itself, which is real, not speculative. In situations where there is no question the defendants lost or destroyed the plaintiff’s reproductive material, that breach deprived plaintiffs the opportunity to use that reproductive material to achieve pregnancy; therefore, plaintiff’s resulting emotional disturbance damages are causally linked to the breach.¹⁹¹

¹⁸⁸ *Id.* But see *Hardin*, 527 S.W.3d at 433 (noting plaintiff’s emotional distress was not caused by the loss of his stored sperm, but instead was caused by the fact that a third party improperly used the sperm to become pregnant; the court noted the suit likely would not have been filed if defendant had thrown the sperm in the trash.). Also, as discussed *supra* notes 125-129 and accompanying text, not every individual will suffer emotional disturbance when reproductive material is lost or destroyed.

¹⁸⁹ One might argue this distinction still suffers from certainty problems because the low probability of achieving pregnancy using IVF also renders the “opportunity” to achieve pregnancy illusory or speculative, at best. However, due to advances in technology and storage techniques, a woman under the age of 35 has almost a 40% chance of having a baby using IVF. Niven Todd, *Infertility and In Vitro Fertilization: Are there Other Issues with IVF to Consider?*, WebMD (Aug. 1, 2021), <https://www.webmd.com/infertility-and-reproduction/guide/in-vitro-fertilization>.

¹⁹⁰ *Witt*, 977 A.2d at 788; see also *Stewart v. New York City Health and Hospitals Corp.*, 207 A.D.2d 703, 704 (N.Y. 1994) (noting that even if the plaintiff lost only a five or ten percent chance of achieving pregnancy naturally, that loss would support emotional disturbance damages); *Estate of Stephenson v. Harrison*, 132 Nev. 966 (2016 unreported) (reversing summary judgment for defendant and ruling that loss of opportunity to experience a live birth is a compensable injury that will support a medical malpractice action); *Brodsky v. Osunkwo*, No. A-4195-10T1, 2012 WL 1161598, at *2 (N.J. Super. Ct. App. Div. Apr. 10, 2012) (stating lost opportunity to store sperm prior to cancer treatment that rendered patient infertile is a compensable injury that will support a cause of action for medical malpractice).

¹⁹¹ Yet another possible solution to the lack of certainty problem when reproductive material is lost or destroyed is to use the loss of chance doctrine currently used in medical malpractice cases. See Fox, *Reproductive Negligence*, *supra* note 20, at 227 (stating that loss of chance doctrine could be used “beyond the medical malpractice paradigm” in cases involving reproductive injuries.) For example, let’s assume plaintiff had a thirty percent chance to achieve pregnancy via IVF using

Even if certainty regarding the fact of damages causally linked to the breach is overcome, must Plaintiffs also establish the amount of their emotional disturbance damages with reasonable certainty? Cases vary on this point.¹⁹² Many courts, including the United States Supreme Court, have adopted the view that as long as there is certainty regarding the fact of damage attributable to the wrong, there is no need to establish the amount of damages with certainty:

It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount.¹⁹³

One reason courts have not denied damages even when the amount could not be ascertained with certainty is that denial of such damages permits the wrongdoer to profit from their

the frozen embryo which defendant lost or destroyed. Under the loss of chance doctrine, plaintiff would not be barred recovery, but should instead be permitted to recover for the lost opportunity, with damages reduced based on the corresponding likelihood of pregnancy. *See Fox, Intangible Losses, supra* note 9, at 464 (endorsing “probabilistic recovery” as a way to compute damages when embryos are lost or destroyed.) In the malpractice context, the doctrine is used when, due to a medical professional’s negligence, a plaintiff loses an opportunity or chance to have a particular medical procedure performed and, as a result of that lost chance, the plaintiff experiences extensive pain and/or suffering. *Est. of Josephine Ruth Stephenson v. Harrison*, 838 P.3d 759 (Nev. 2016) (citing *Greco v. United States*, 893 P.2d 345, 348-49 (Nev. 1995)); *see also Holton v. Memorial Hosp.*, 679 N.E.2d 1202, 1206 (Ill. 1997); *McDaniel v. Ong*, 724 N.E.2d 38, 43 (Ill. Ct. App. 1999). Courts have acknowledged that the loss of chance doctrine is in fact a causation doctrine rather than one focusing on injury or damages. *Dumas v. Cooney*, 1 Cal. Rptr. 2d 584, 593 (Cal. Ct. App. 1991). However, courts also have criticized the doctrine’s use in the medical malpractice context as an improper way to bypass traditional causation requirements. *See, e.g., id.* at 585-86. However, this article posits that a traditional approach to consequential damages need not raise problems of certainty. As a result, while the loss of chance doctrine may prove useful in some reproductive tort actions, the doctrine is not needed to establish entitlement to breach of contract consequential emotional disturbance damages when reproductive material is lost or destroyed.

¹⁹² *See Fred Norton, Assisted Reproduction and the Frustration of Genetic Affinity: Interest, Injury, and Damages*, 74 N.Y.U. L. REV. 793, 843 (1999) (“The contract requirement that damages be shown within reasonable certainty has lost some of its force in recent years, as some courts essentially have abandoned the rule by requiring only that the fact of the loss, as opposed to its extent, be proved with reasonable certainty.”) [hereinafter Norton, *Assisted Reproduction*]. Many cases which require certainty as to the amount of damages are cases involving future loss, such as future lost earnings or profits. *See, e.g., Acoustic Mktg. Rsch., Inc. v. Technics, LLC*, 198 P.3d 96, 98 (Colo. 2008) (in a case for future losses from breach of a royalty agreement, court required “sufficient admissible evidence which would enable the trier of fact to compute a fair approximation of the loss.”); *Kenford Co. v. Erie Cty.*, 493 N.E.2d 234, 235 (N.Y. 1986) (loss of future profits must be capable of proof with reasonable certainty). In fact, one court noted “the reasonable certainty standard was developed in this country in the last century as a device for controlling jury verdicts in lost profits cases.” *Tull v. Gundersons, Inc.*, 709 P.2d 940, 944n.3 (Colo. 1985) (citing *MCCORMICK ON DAMAGES*, Ch. 4, § 25 (1935)).

¹⁹³ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931); *see also Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927) (“A defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible.”); *Tull v. Gundersons, Inc.*, 709 P.2d 940, 943, 945 (Col. 1985) (explaining uncertainty as to amount of damages will not bar recovery); *Bowman v. Zimny*, 628 N.E.2d 384, 388 (Ill. App. Ct. 1993) (“Absolute certainty regarding the amount of damages is not necessary to justify recovery.....”); *JMR Constr. Corp. v. Env’t Assessment & Remediation Mgmt., Inc.*, 585, 198 Cal. Rptr. 3d 47, 59 (Cal. Ct. App. 2015), *as modified on denial of reh’g* (Jan. 28, 2016) (“Where the *fact* of damages is certain the *amount* of damages need not be calculated with absolute certainty.”) *But see Tractebel Energy Mktg., Inc. v. AEP Power Mktg., Inc.*, 487 F.3d 89, 111 (2d Cir. 2007) (recognizing that although certainty as to the amount of damages is not necessary for general damages, but is necessary for consequential damages: “In addition to proving that the *existence* of damage is reasonably certain, and that the damages were foreseeable and within the contemplation of both parties, a party claiming consequential damages must also prove the *amount* of damage with “reasonable certainty.”).

wrongdoing and leaves injured plaintiffs undercompensated.¹⁹⁴ It has been suggested that justice and public policy require that the wrongdoer should bear the risk of uncertainty caused by their own wrongful act.¹⁹⁵ In any event, computing the amount of emotional disturbance damages is a task undertaken by juries throughout the nation on a daily basis. Computation of damage awards for nonpecuniary loss may be difficult, but that is no reason to deny damages. The computation of damages with reasonable certainty “leaves much to the discretion of the fact-finder.”¹⁹⁶ In fact, over one hundred years ago, Judge Cardozo noted “[n]o formula can be framed, regardless of experience, to tell us in advance when approximate certainty may be attained.”¹⁹⁷ Although it may be difficult for a jury to compute the amount of emotional disturbance consequential damages when reproductive material is lost or destroyed, it should be no more difficult than computing nonpecuniary damages in other types of cases where emotional harm is present.¹⁹⁸ Finally, regarding any potential uncertainty as to the amount of damages, such concerns may be addressed by including a liquidated damages clause in the cryopreservation contract.¹⁹⁹

V. EXCULPATORY CLAUSES IN CRYOPRESERVATION CONTRACTS

Most cryopreservation agreements contain broad, sweeping exculpatory clauses that are intended to exculpate clinics and ART practitioners from all liability, including liability based on lack of due care. As explained below, exculpatory clauses will not be enforced if they violate public policy or are used in private agreements that are so important to the public good that the agreement is one which affects or implicates public policy. Both of these grounds for nonenforcement are raised by cryopreservation agreements. Although exculpatory clauses play an important role in the growth, survival, and continued affordability of ART services, including cryopreservation, this section posits that such clauses should not be enforced when they attempt to negate a basic duty of due care regarding the core obligations of clinics and ART practitioners.

A. *Typical Contractual Language Used to Limit Liability*

When reproductive material is cryogenically preserved and stored, most ART clinics and

¹⁹⁴ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 564 (1931).

¹⁹⁵ *Id.* at 565.

¹⁹⁶ *Trans-W. Petroleum, Inc. v. United States Gypsum Co.*, 718 F. App'x 712, 718 (10th Cir. 2018).

¹⁹⁷ *Broadway Photoplay Co. v. World Film Corp.*, 121 N.E. 756, 757 (N.Y. 1919); *Trans-W. Petroleum, Inc. v. United States Gypsum Co.*, 718 F. App'x 712, 718 (10th Cir. 2018).

¹⁹⁸ See Fox, *Intangible Losses*, *supra* note 9, at 455-59 (arguing that damage calculation in cases involving reproductive harm is no more difficult than damage calculations “for claims of nuisance, trespass, or slander – let alone torts like wrongful death, wrongful conviction, and wrongful imprisonment.”); see also Norton, *Assisted Reproduction*, *supra* note 192, at 839-42 (noting that emotional injury damages in actions alleging frustration of genetic affinity may be difficult to compute, but arguably are no more difficult to compute than nonpecuniary injuries on other types of cases).

¹⁹⁹ See Norton, *Assisted Reproduction*, *supra* note 192, at 819-20 (noting that liquidated damages clauses in contracts involving assisted reproduction may be helpful to solve damages valuation problems); see also Ovation Fertility, *supra* note 20, at 3 (containing a liquidated damage clause which states “Client agrees that in no event shall Ovation’s total liability for all damages in any one or more causes of action, whether in contract, tort or otherwise, exceed \$25,000”). Scholars also have suggested other potential solutions. For example, one scholar has suggested using the loss of chance doctrine to adjust the amount of damages. See Fox, *Reproductive Negligence*, *supra* note 20, at 199-200. *But see* In re Medical Review Panel of Zsa Dunjee, 57 So. 3d 541, 552 (La. Ct. App. 2011) (stating although physician was negligent, it was mere “conjecture” that plaintiff would have been able to become pregnant).

practitioners have the aspiring parents sign a written agreement.²⁰⁰ Courts have described the parties' agreement to cryopreserve reproductive material as creating a bailment contract.²⁰¹ As would be expected, one common characteristic of these storage agreements is that they seek to limit the liability of the clinic and ART practitioners for loss or destruction of the stored reproductive materials. The limitation of liability language contained in the Boston IVF contract is typical of many storage agreements. The Boston IVF limitation clause states, in pertinent part:

With any technique requiring mechanical support systems, including the cryopreservation of human embryos, equipment failure and technical problems may occur. Boston IVF, its directors and employees shall not be held liable for any damage, loss or problems due to improper freezing, maintenance, storage, withdrawal, thawing and/or delivery caused by human error, malfunction of the storage tank, failure of utilities, strike by workers, cessation of services or other labor disturbances, any war, acts of public enemy or other disturbances such as fire, wind, earthquake, flooding or other acts of God.²⁰²

Similar limitations of liability are found in most reproductive material storage contracts.²⁰³ For example, the "Consent for Cryopreservation of Embryos" agreement used by the California Center for Reproductive Health also contains broad language absolving the clinic and its employees for any conduct, including human error, that results in the loss or destruction of stored embryos:

We also acknowledge that the freezing of embryos requires the use of mechanical support systems and the involvement of human technicians. We recognize that the practice of medicine is not an exact science and

²⁰⁰ See authorities cited *supra* note 14. In the rare event defendant argues that no written contract exists, courts nevertheless may find a bailment contract exists based on consent forms and other documents signed by the aspiring parents. See, e.g., *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256, 1275 (Ariz. Ct. App. 2005)(finding consent forms and other documents "when considered together, sufficiently demonstrate a written bailment contract needed to withstand a motion to dismiss.....").

²⁰¹ See, e.g., *Jeter*, 121 P.3d at 1275-76 (embryo storage and transfer documents constituted a bailment contract); *York*, 717 F. Supp. at 425 (E.D. Va. 1989) ("[C]ryopreservation agreement created a bailor-bailee relationship between the plaintiffs and defendants.").

²⁰² *Boston IVF*, *supra* note 20, at 1.

²⁰³ See, e.g., *Main Line Fertility Center*, *supra* note 20, at 16 ("We agree to absolve, release, indemnify, protect and hold harmless Main Line Fertility and their respective members, medical staff, managers, agents, and employees in event that any embryo and/or egg(s) frozen and stored with MLF are damaged or destroyed as a result of the events detailed herein, or other potential unforeseen circumstance."); *Ovation Fertility*, *supra* note 20, at 3 (accepting duty of reasonable care but noting "Under no circumstances and legal theory, whether in tort, contract or otherwise, shall Ovation, its suppliers, successors or assignees, be liable to Client or Child born of the reproductive materials or any other person for any indirect, incidental, consequential or special damages whatsoever, arising out of the freezing, shipment, storage, or related services rendered by Ovation."); *Women's Specialty*, *supra* note 173, at 2 (contract notes: "Some accidents may occur in the laboratory, which would jeopardize or destroy the embryos. These include, by way of example but not limited to: 1. Failure of freezing equipment to function normally 2. Failure of the storage system to preserve the embryos 3. Human error"); *Memphis Fertility Laboratory, Inc., Consent to Cryopreservation (Freezing) and Storage of Embryo(s)*, at 2 (April 8, 2015), <http://fertilitymemphis.com/wp-content/uploads/2013/03/Consent-for-Embryo-Freezing-and-Storage-2015.pdf> ("We hereby release MFL, its' agents, servants, or employees from any injury or damage, known or unknown, that might result should the frozen embryo(s) cease to be viable while in the custody of MFL, its agents, servants, or employees."); *California Center*, *supra* note 171, at 1 ("We acknowledge that human error, equipment failure or unknown factors (i.e. catastrophic events such as earthquakes or fires...) could negatively affect the viability of the embryos. We specifically acknowledge and agree that CCRH, its affiliate laboratory, or any of its employees will not be liable for any destruction, damage, or loss to our embryos as a result of freezing, maintenance, storage, removal from storage, thawing, and/or delivery of the frozen embryos, or related services.").

understand that techniques for embryo cryopreservation and thawing are relatively new and are not universally established. We acknowledge that human error, equipment failure or unknown factors (i.e., catastrophic events such as earthquakes or fires...) could negatively affect the viability of the embryos. We specifically acknowledge and agree that CCRH, its affiliate laboratory, or any of its employees will not be liable for any destruction, damage, or loss to our embryos as a result of freezing, maintenance, storage, removal from storage, thawing, and/or delivery of the frozen embryos, or related services. We also acknowledge that any non-viable embryos, as determined by the embryology laboratory, may be discarded.²⁰⁴

The broad, sweeping nature of the exculpatory clauses used in these storage contracts is noteworthy. Not only does the contractual language seek to absolve the clinic, its directors, and its employees for storage tank malfunctions, but also for “human error” which arguably includes ordinary acts of negligence.²⁰⁵ In fact, some cryopreservation storage contracts expressly limit liability for negligence.²⁰⁶ The language places the risk of harm on the aspiring parents “for any damage, loss or problems” not only for risks related to the storage of the reproductive material, but also the freezing, maintenance, withdrawal, thawing, and delivery.²⁰⁷ In short, whether proceeding to recover damages using a tort or contract theory, the clause’s purpose is to insulate the storage facility and ART practitioners from any damages due to harm, loss or destruction of the stored reproductive material. Some storage contracts contain even more specific language, expressly excluding consequential damages, such as damages for emotional harm caused by the loss or destruction. For example, the “Reproductive Materials Cryopreservation & Storage Agreement” used by Ovation Fertility in Austin, Texas, states, in pertinent part: “Under no circumstances and legal theory, whether in tort, contract or otherwise, shall Ovation, its suppliers, successors or assignees, be liable to Client or Child born of the reproductive materials or any other person for any indirect, incidental, consequential or special damages whatsoever, arising

²⁰⁴ California Center, *supra* note 171, at 2.

²⁰⁵ *See, e.g.*, Rodriguez v. Gen. Dynamics Armament & Tech. Prod., Inc., 696 F. Supp. 2d 1163, 1183 (D. Haw. 2010)(equating human error with negligence); Whitley v. Progressive Preferred Ins. Co., 2010-Ohio-356, 2010 WL 396021, at *4 (Ohio Ct. App Feb. 5, 2001)(noting human error “might mean negligence”); Mut. Marine Off., Inc. v. Atwell, Vogel & Sterling, Inc., 485 F. Supp. 351, 354 (S.D.N.Y. 1980)(equating reference to “human error” in exculpatory clause with negligence); DeSmet ex rel. Est. of Hays v. Cty. of Rock Island, 848 N.E.2d 1030, 1040 (Ill. 2006)(noting human error “suggests an assertion of negligence”). Not all storage contracts seek to shield the clinic and its employees from ordinary negligence. *See, e.g.*, Ovation Fertility, *supra* note 20, at 3 (noting “Ovation's obligation to Client is to exercise reasonable care in providing freezing and storage services as set forth in this Agreement.”).

²⁰⁶ *See, e.g.*, Ovation Fertility, *supra* note 20, at 3 (“Client also agrees that in the event of loss or destruction or reduced viability of Client’s reproductive materials by any reason whatsoever including but not limited to negligence, damages as a result thereof would be highly conjectural and speculative and would be difficult to determine.”).

²⁰⁷ *Id.* Regarding non-payment of storage fees, storage contracts typically give the clinic the express right to destroy the reproductive materials after attempts are made to provide notice regarding nonpayment of storage fees. *See, e.g.*, Main Line Fertility Center, *supra* note 20, at 13 (“In situations where there is either: 1) No contact by Patient and/or Spouse/Partner with MLFC for a period of 3 years, or 2) A failure to pay fees for and associated with embryo storage for a period of 3 years and MLFC has made reasonable efforts to contact Patient and Spouse/Partner by mailing the bill to the last known address. We expressly understand, agree, and authorize MLFC to discard our embryo(s) in accordance with its normal laboratory procedures and applicable law without further notice to, or consent required by, Patient or Spouse/Partner”); Boston IVF, *supra* note 20, at 1 (“If there is failure to make payments for two years of embryo storage, after reasonable notification of such nonpayment mailed to our last known address as provided to Boston IVF by us, we understand that Boston IVF reserves the right to thaw and discard the embryos without further notice to us.”); Women’s Specialty, *supra* note 173, at 3 (“If the staff at Women’s Specialty & Fertility Center, Inc., has received no response to these phone calls/letters/emails, and/or we refuse to pay the current charges, the embryos will be considered abandoned and the staff may dispose of the embryos as described under section “Disposition of Frozen Embryos.”).

out of the freezing, shipment, storage, or related services rendered by Ovation.”²⁰⁸ In other words, reminiscent of the recent destruction of embryos at University Hospital Fertility Clinic in Cleveland,²⁰⁹ if an employee failed to turn on the temperature alarm on the cryogenic storage tank, and the storage tank thawed and destroyed all of the stored embryos, the contractual language quoted above was intended to exclude consequential damages for emotional harm. Although one purpose parties choose to contract is to allocate the risks involved in their transaction or relationship, the broad sweeping language contained in a majority of cryopreservation contracts raises the following question: what risks are assumed by the storage facility and ART professionals? Although cryopreservation is a sophisticated scientific process involving fertility experts and other highly trained healthcare professionals, these contracts appear to place all risk on aspiring parents and, in essence, attempt to place the storage of reproductive material on the same footing as storage of household items at a local storage facility. If broad, sweeping exculpatory clauses place all risk of harm, loss, and destruction on aspiring parents, including those attributable to equipment failure and human error/negligence, then the storage facility, in reality, is merely renting storage space in the cryopreservation tank, without any responsibility for “freezing, maintenance, storage, removal from storage, thawing, and/or delivery of the frozen embryos, or related services.” The obvious question is: are these exculpatory clauses enforceable?

B. *Enforcement of Exculpatory Clauses in Cryopreservation Agreements*

Case law addressing the enforceability of exculpatory clauses in cryopreservation agreements is sparse. Most cases which have addressed the enforceability of cryopreservation agreements have dealt with enforceability of language regarding the *disposition* of cryopreserved reproductive material when individuals who stored the material either divorce, separate, or die.²¹⁰ In cases where disposition of cryopreserved reproductive material was at issue, courts have routinely upheld the enforceability of the

²⁰⁸ Ovation Fertility, *supra* note 20, at 3 (accepting duty of reasonable care but noting “Under no circumstances and legal theory, whether in tort, contract or otherwise, shall Ovation, its suppliers, successors or assignees, be liable to Client or Child born of the reproductive materials or any other person for any indirect, incidental, consequential or special damages whatsoever, arising out of the freezing, shipment, storage, or related services rendered by Ovation.”).

²⁰⁹ See *supra* note 5 and accompanying text.

²¹⁰ See, e.g., *Bilbao v. Goodwin*, 217 A.3d 977, 988 (Conn. 2019)(holding cryopreservation contract language regarding disposition of embryos after divorce was enforceable); *Est. of Kievernagel*, 83 Cal. Rptr. 3d 311, 312 (Cal. Ct. App. 2008)(enforcing husband’s agreement with the company storing his frozen sperm that the sperm was to be destroyed upon his death); *Terrell v. Torres*, 456 P.3d 13, 17 (Ariz. 2020), *as amended* (Feb. 21, 2020)(in divorce situation, “court was required to enforce the parties’ chosen disposition of the embryos as set forth in the [cryopreservation] Agreement.”); *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)(recognizing “persuasive reasons exist for enforcing pre-embryo disposition agreements” after divorce); *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998)(“Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes [after divorce] should generally be presumed valid and binding, and enforced in any dispute between them.”); *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992), *on reh’g in part*, No. 34, 1992 WL 341632 (Tenn. Nov. 23, 1992)(“An agreement regarding disposition of any untransferred pre-embryos in the event of contingencies [including divorce] . . . should be presumed valid and should be enforced as between the progenitors”); *Szafranski v. Dunston*, 993 N.E.2d 502, 514 (Ill. Ct. App. 2013)(“The best approach for resolving disputes over the disposition of pre-embryos created with one party’s sperm and another party’s ova is to honor the parties’ own mutually expressed intent as set forth in their prior agreements.”); *Roman v. Roman*, 193 S.W.3d 40, 54 (Tex. App. 2006)(enforcing embryo agreement that provides that the frozen embryos are to be discarded in the event of divorce.). *But see A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000)(holding divorce court “would not enforce an agreement that would compel one donor to become a parent against his or her will” because such an agreement violates public policy.); *Reber v. Reiss*, 42 A.3d 1131, 1136 (Pa. Super. Ct. 2012)(“The section of the informed consent regarding the duration of storage cannot be read as an agreement between Husband and Wife to destroy the pre-embryos at the end of three years” as husband contended when divorcing wife).

cryopreservation agreements.²¹¹ In fact, courts have held disposition language in cryopreservation agreements is *presumptively* valid in disputes between the two aspiring parents.²¹² Disposition language in cryopreservation contracts is presumed to be valid for several reasons, including: the typical dispute regarding disposition is between the two aspiring parent “progenitors” and their wishes always control in matters of disposition of the stored material;²¹³ aspiring parents are typically given choices by storage facilities regarding disposition and disposition language in the contract is, therefore, an expression of choice;²¹⁴ and, the aspiring parents’ choice of contractual language regarding disposition is usually made after lengthy conversation and discussion.²¹⁵ This reasoning does not apply to exculpatory language in a cryopreservation agreement. First, unlike disposition clauses, exculpatory clauses typically are not used in suits between the two aspiring parents, but instead are used *against* the aspiring parents when the aspiring parents sue the storage facility and/or ART professionals for misconduct. This distinction is key. The principal reason courts are willing to enforce disposition language in a suit between the two aspiring parents is because the disposition clause expresses the aspiring parents’ own intent -- memorialized by their selection of a disposition option they agreed upon -- and the aspiring parents’ intent is paramount in disposition cases. The same is not true for exculpatory clauses. Exculpatory clauses are not used in suits between the aspiring parents; they do not express the aspiring parents’ intent and, in suits against ART professionals when reproductive material is lost or destroyed, the honoring of the aspiring parents’ intent is not paramount, as it is in disposition cases. Therefore, the principal reason why disposition clauses are presumed valid does not extend or apply to exculpatory clauses.

Second, unlike language regarding disposition of stored reproductive material, the exculpatory language in a cryopreservation agreement is not an expression of choice. To the contrary, the language usually is drafted by counsel for the storage facility and inserted

²¹¹ See cases cited *supra* note 210.

²¹² See, e.g., *Bilbao*, 217 A.3d at 988 (“[A] disposition agreement between progenitors is presumed enforceable between them.”); *Terrell*, 456 P.3d at 15 (same); *Kass*, 696 N.E.2d at 180 (“Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes [after divorce] should generally be presumed valid and binding, and enforced in any dispute between them.”); *Davis*, 842 S.W.2d at 597 (“An agreement regarding disposition of any untransferred pre-embryos in the event of contingencies [including divorce] . . . should be presumed valid and should be enforced as between the progenitors.”); *Szafranski*, 993 N.E.2d at 515 (“We therefore join those courts that have held that ‘[a]greements between progenitors or gamete donors regarding the disposition of their prezygotes should generally be presumed valid and binding, and enforced in any dispute between them.’”). But see *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000) (holding divorce court “would not enforce an agreement that would compel one donor to become a parent against his or her will” because such an agreement violates public policy.).

²¹³ *Davis*, 842 S.W.2d at 597 (“[P]rogenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.”); *Szafranski*, 993 N.E.2d at 515 (“We believe that the best approach for resolving disputes over the disposition of preembryos . . . is to honor the parties’ own mutually expressed intent as set forth in their prior agreements.”); *Kass*, 696 N.E.2d at 180 (explaining courts should “honor the parties’ expressions of choice, made before disputes erupt, with the parties over-all direction always uppermost in the analysis.”); *Bilbao*, 217 A.3d at 986 (“[P]rogenitors should be the primary decision-makers regarding disposition of their preembryos.”).

²¹⁴ See *Bilbao*, 217 A.3d at 981 (noting the agreement provided four checkbox options for disposition of the pre-embryos upon death or divorce); *Terrell*, 456 P.3d at 14 (stating the agreement described three alternate dispositions of stored reproductive material in the event of separation, divorce, death or incapacitation); *Kass*, 696 N.E.2d at 176, 180 (explaining agreement required aspiring parents to make “informed decisions regarding disposition of the fertilized eggs” and the agreement contained the parties’ “expressions of choice”); *Liftowitz*, 48 P.3d at 263-64 (stating agreement required aspiring parents to select from various options regarding disposition of pre-embryos).

²¹⁵ See *Bilbao*, 217 A.3d at 986 (stating progenitors’ decision regarding disposition promotes serious discussion); *J.B. v. M..B.*, 783 A.2d at 710 (explaining husband claimed to have “long and serious discussions” with his wife regarding disposition and stated they “agreed that no matter what happened the eggs would be either utilized by us or by other infertile couples.”) Also, as a matter of common sense, if a couple is given various choices regarding disposition of their stored reproductive material in the event of separation, divorce, incapacity or death, they most likely would discuss the available choices and agree upon them prior to making their selections in an agreement.

into pre-printed agreements or consent forms. Exculpatory language in cryopreservation agreements usually is not the subject of negotiation. Aspiring parents either accept the language or transfer their entire IVF journey to another clinic, which is no easy task. Third, unlike disposition language, exculpatory language is not agreed upon after lengthy discussion regarding options. The decision regarding disposition of cryopreserved reproductive material in the event of death, divorce, or separation usually sparks conversation. Aspiring parents typically will discuss available options. The same is not true regarding exculpatory language in a cryopreservation contract. Typically, the exculpatory language is not discussed, not open to negotiation, and not explained in depth. As courts have noted: “the parties initial ‘informed consent’ to IVF procedures will often not be truly informed because of the near impossibility of anticipating, emotionally and psychologically, all the turns that events may take as the IVF process unfolds.”²¹⁶ As a result, the inquiry into the validity and enforceability of exculpatory clauses is quite different from the inquiry regarding the validity and enforceability of disposition clauses.²¹⁷ The reasons for presuming the enforceability of disposition clauses do not apply to exculpatory clauses.

When considering the validity and enforceability of an exculpatory clause, it is important to keep in mind that the ability to freely contract is fundamental to the law of contracts.²¹⁸ Therefore, parties are free to allocate risk and also may “avoid some duties and liabilities that would normally be part of the contractual relationship.”²¹⁹ There is a natural tension, however, between contract law’s protection of the fundamental freedom to contract and allocate risk, and the public policy which disfavors contractual language that allows a party to escape liability for their own wrongdoing.²²⁰ Perhaps as a result of this tension, the courts disfavor exculpatory clauses²²¹ but, nevertheless, will typically uphold such clauses unless they violate public policy,²²² such as exculpatory clauses that release a party from

²¹⁶ *Davis*, 842 S.W.2d at 597.

²¹⁷ See *Frisina*, 2002 WL 1288784, at *12 (noting that the validity and enforcement of disposition language in a cryopreservation contract is separate and distinct from an inquiry into the validity and enforcement of exculpatory language.).

²¹⁸ *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1118 (Kan. 1978)(stating the law encourages competent parties to freely contract and “contracts freely arrived at and fairly made are favorites of the law.”); *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 294 P.3d 1111, 1119 (Idaho 2013)(same).

²¹⁹ *Boise Mode, LLC*, 294 P.3d at 1119 (citing *Anderson & Nafziger v. G.T. Newcomb, Inc.*, 595 P.2d 709, 712 (Idaho 1979)); see also *Nomura Home Equity Loan, Inc. v. Nomura Credit & Cap., Inc.*, 92 N.E.3d 743, 748 (N.Y. 2017)(“[C]ourts must honor contractual provisions that limit liability or damages because those provisions represent the parties’ agreement on the allocation of the risk of economic loss in certain eventualities.”); *Metro. Life Ins. Co. v. Noble Lowndes Int’l, Inc.*, 643 N.E.2d 504, 507 (N.Y. 1994)(“A limitation on liability provision in a contract represents the parties’ Agreement on the allocation of the risk of economic loss in the event that the contemplated transaction is not fully executed, which the courts should honor.”).

²²⁰ See *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260, 265 (Tenn. 2018)(discussing this tension, in particular, as it relates to a party being excused from liability for their own negligence).

²²¹ *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1119 (Kan. 1978)(stating “private contracts exculpating one from the consequences of his own acts are looked upon with disfavor by the courts” and will be strictly construed); *Valeo v. Pocono Int’l Raceway, Inc.*, 500 A.2d 492, 493 (Pa. Super. Ct. 1985)(“[C]ontracts providing for immunity from liability are not favorites of the law and will be construed strictly.”); *Frizzell v. DeYoung*, 478, 415 P.3d 341, 346 (Idaho 2018)(same); *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190, 1199 (Pa. 2012)(same); *Maybank v. BB&T Corp.*, 787 S.E.2d 498, 515 (S.C. 2016)(same); see also 8 WILLISTON ON CONTRACTS § 19:21 (4th ed. May 2021 Update).

²²² *Jijun Yin v. Aguiar*, P.3d 911, 927 (Haw. 2020), *reconsideration denied*, No. SCWC-15-0000325, 2020 WL 1903848 (Haw. Mar. 27, 2020) (“When evaluating the validity of such clauses, we “examine[] whether [they] violate public policy.”); *Tayar*, 47 A.3d at 1199 (“the clause must not contravene public policy.”); 8 WILLISTON ON CONTRACTS § 19:21 (4th ed. May 2021 Update).

liability for intentional torts or gross negligence.²²³ Courts also have refused to enforce exculpatory clauses in private contracts that implicate or affect the public interest.²²⁴ Both of these bases for nonenforcement are raised by cryopreservation agreement exculpatory clauses.

1. Exculpatory Clauses that Violate Public Policy

Courts should exercise caution when invalidating exculpatory clauses on policy grounds.²²⁵ Generally, exculpatory clauses have been found to violate public policy when the clause violates a statute, is contrary to a substantial public interest, or is the product of unequal bargaining power.²²⁶ However, there is no universal, bright-line rule that may be used to determine when an exculpatory clause violates public policy, because public policy is based on flexible societal expectations.²²⁷ Acknowledging the fact that public policy is an “amorphous concept”, Professor Williston, in his treatise on contract law, explained when an exculpatory clause typically will be unenforceable because the clause violates public policy:

Despite this [lack of a clear public policy test], it may be broadly stated that whether a particular agreement or provision is void as contrary to public policy depends on all of the facts and circumstances surrounding the making of the agreement; society's expectations; the identity and nature of the parties involved, including their relative education, experience, sophistication, and economic status; and the nature of the transaction itself, including the subject matter, the existence or absence of competition, the relative bargaining strength and negotiating ability of the economically weaker party, and the terms of the agreement itself, including whether it was arrived at through arm's length negotiation or on terms dictated by the stronger party and on an adhesive, take-it-or-leave-it

²²³ *Tayar*, 47 A.3d at 1202 (“[T]he overwhelming majority of our sister states find releases for reckless conduct are against public policy.”); *Jijun*, 463 P.3d at 927 (“[O]ne cannot exempt himself from such liability for harm that is caused either intentionally or recklessly.”); *100 Inv. Ltd. P’ship*, 60 A.3d at 24 (stating a clause may not excuse a party from liability for reckless, wanton, or grossly negligent conduct); RESTATEMENT (SECOND) OF CONTRACTS § 195 (Am. Law Inst. 1981) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”); 8 WILLISTON ON CONTRACTS § 19:24 (4th ed. May 2021 Update) (“An attempted exemption from liability for a future intentional tort or crime or for a future willful or grossly negligent act is generally held void.”). *But see Valeo*, 500 A.2d at 493 (“The language of the exculpatory clause was broad enough to exclude liability for all degrees of negligence [including gross negligence].”).

²²⁴ 8 WILLISTON ON CONTRACTS § 19:23 (4th ed. May 2021 Update); *Tunkl v. regents of Univ. of Cal.*, 383 P.2d 441, 444-45 (Cal. 1963); *Hunter v. Am. Rentals, Inc.*, 371 P.2d 131, 133 (Kan. 1962) (stating trailer hitch rental company “owed a duty, not only to the plaintiff but also to the general public, to see that the trailer hitch was properly installed and the trailer properly attached thereto.....”).

²²⁵ *See Banfield v. Louis*, 589 So. 2d 441, 446 (Fla. Dist. Ct. App. 1991), (citing *Bituminous Cas. Corp. v. Williams*, 17 So. 2d 98, 101–02 (Fla. 1944)).

²²⁶ *Jijun*, 463 P.3d at 927; *see also Tayar*, 47 A.3d at 1199 (stating exculpatory clause cannot violate public policy and “each party must be a free bargaining agent so the contract is not one of adhesion.”); *Copeland*, 565 S.W.3d at 274 (courts will consider public policy and “relative bargaining power of the parties”); *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 530 (Tenn. 1991) (“Unless a private contract tends to harm the public good, public interest, or public welfare, or to conflict with the constitution, laws, or judicial decisions of Tennessee, it does not violate public policy.”).

²²⁷ *See Copeland*, 565 S.W.3d at 275 (noting that public policy is “difficult to articulate” and is based on “flexible” societal expectations that “change over time”); *see also 100 Inv. Ltd. P’ship*, 60 A.3d at 24 (stating when deciding whether an exculpatory clause violates public policy, “[w]e determine what constitutes the public interest under the ‘totality of the circumstances of any given case against the backdrop of current societal expectations.’”).

basis.²²⁸

Courts do not examine exculpatory clauses in isolation. Instead, courts look at the contract as a whole, the nature of the transaction, and the surrounding circumstances.²²⁹ Exculpatory clauses often are strictly construed against the party they benefit, especially when the clause benefits the drafter.²³⁰ The terms in the clause must be clear and unambiguous.²³¹ Exculpatory clauses will not defeat claims which are not explicitly covered by their terms, and the clause must spell out the intention of the parties with particularity.²³² Regarding the relative bargaining strength of the parties, exculpatory clauses will not be enforced in private contracts when there is vast disparity in the parties' bargaining power.²³³ Although such disparity cannot be measured using a precise rule, several courts have noted that two "key criteria" are "the importance of the service at issue for the physical or economic well-being of the party signing the agreement and the amount of free choice that party has in seeking alternate services."²³⁴ For example, although all standardized forms are not per se invalid, "a standardized form offered on a take-it-or-leave-it basis may be invalid if there was great disparity of bargaining power, no opportunity for negotiation, and the services could not reasonably be obtained

²²⁸ 8 WILLISTON ON CONTRACTS § 19:22 (4th ed. May 2021 Update); *Copeland*, 565 S.W.3d at 272.

²²⁹ *Horne v. Elec. Eel Mfg. Co., Inc.*, 987 F.3d 704, 718 (7th Cir. 2021) ("We must construe a contract 'as a whole, viewing particular terms or provisions in the context of the entire agreement.'"), (quoting *Matthews v. Chicago Transit Auth.*, 51 N.E.3d 753, 776 (Ill. 2016)); see also *Copeland*, 565 S.W.3d at 274 ("[E]nforceability of an exculpatory agreement should be determined by considering the totality of the circumstances....."); *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1120 (Kan. 1978) ("In determining the enforceability of any such exculpatory clauses, the trial court may consider the totality of the circumstances surrounding the execution and performance of the contract. . . ."); 8 WILLISTON ON CONTRACTS § 19:21 (4th ed. May 2021 Update); see also 24 WILLISTON ON CONTRACTS § 64:21 (May 2021 Update).

²³⁰ *Frizzell*, 415 P.3d at 346 ("[C]ourts look with disfavor on such attempts to avoid liability and construe such provisions strictly against the person relying on them, especially when that person is the preparer of the document."); *Horne*, 987 F.3d at 718 (same); *Boise Mode, LLC*, 294 P.3d at 1119 (same); *Maybank v. BB&T Corp.*, 416 S.C. 541, 576, 787 S.E.2d 498, 516 (2016) (same). Also, in many jurisdictions, a party who materially breaches a contract cannot take advantage of the terms of the contract which benefit him, such as an exculpatory clause. See, e.g., *Horne*, 987 F.3d at 718, (citing *Goldstein v. Lustig*, 507 N.E.2d 164, 168 (Ill. App. Ct. 1987) (same); *Builder's Concrete Co. of Morton v. Fred Faubel & Sons, Inc.*, 373 N.E.2d 863, 870 (Ill. App. Ct. 1978) (same)).

²³¹ *Copeland*, 565 S.W.3d at 274 ("[C]larity of the exculpatory language, which should be clear, unambiguous, and unmistakable about what the party who signs the agreement is giving up."); 8 WILLISTON ON CONTRACTS § 19:21 (4th ed. May 2021 Update); *Boise Mode, LLC*, 294 P.3d at 1119 (stating exculpatory clause "must speak clearly and directly to the conduct to be immunized from liability."); *Belger Cartage Serv., Inc. v. Holland Const. Co.*, 582 P.2d 1111, 1119 (Kan. 1978) (explaining exculpatory clause must use "clear and unequivocal language").

²³² *Horne*, 987 F.3d at 718. For example, a clause which attempted to relieve a party of liability for any type of injury, wherever it may occur, was found to lack clarity and was unenforceable. *Jesse v. Lindsley*, 233 P.3d 1, 7 (Idaho 2008) ("The clause is too broad and does not speak clearly and directly to the particular conduct of the defendant intended to be immunized."); see also STUART M. SPEISER, CHARLES F. KRAUSE, ET AL, 1A AMERICAN LAW OF TORTS § 5:39, *Preinjury releases, Exculpatory Clauses, and Indemnification from Own Negligence* (March 2021 Update) (stating unmistakable language must be used and acknowledging the courts' stringent standard).

²³³ *Belger Cartage Serv., Inc.*, 582 P.2d at 1119; see also *Whittington v. Sowela Tech. Inst.*, 438 So. 2d 236, 242 (La. Ct. App. 1983) (explaining exculpatory clause unenforceable when "the circumstances attending the execution of the release clearly show that the parties were not dealing at arm's length and upon an equal footing."); *100 Inv. Ltd. P'ship*, 60 A.3d at 25 (stating clause enforced because both parties were commercially sophisticated but "[p]erhaps if there were evidence that the contract was a contract of adhesion, 'drafted unilaterally by the dominant party and then presented on a 'take-it-or-leave-it' basis to the weaker party who had no real opportunity to bargain about its terms,' we would scrutinize the exculpatory language differently."); see also STUART M. SPEISER, CHARLES F. KRAUSE, ET AL, 1A AMERICAN LAW OF TORTS § 5:39, *Preinjury releases, Exculpatory Clauses, and Indemnification from Own Negligence* (Mar. 2021 Update) (addressing disparate bargaining power regarding exculpatory clauses).

²³⁴ *Copeland*, 565 S.W.3d at 274-76; *Schmidt v. United States*, 912 P.2d 871, 874 (Okla. 1996); see also *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982).

elsewhere.”²³⁵ Finally, when an exculpatory clause relieves a party of an express promise at the core of the agreement, courts also have refused to enforce the clause on the ground that it would render the contract illusory.²³⁶

Frisina v. Women and Infants Hospital of Rhode Island,²³⁷ discussed earlier,²³⁸ addressed the enforceability of a clinic’s exculpatory clause in a consolidated action after three couples cryopreserved embryos were lost or destroyed by the hospital’s IVF clinic. In a motion for summary judgment, the hospital argued that several agreements the couples signed placed the risk of loss or destruction of the stored embryos on the plaintiffs.²³⁹ The first agreement, called “Informed Consent: In Vitro Fertilization” stated “a laboratory accident may result in loss or damage to the fertilized egg(s) or pre-embryo(s).”²⁴⁰ A second agreement titled “Informed Consent for Transfer of Frozen Eggs to the Biological Mother” contained identical language regarding the possibility of a “laboratory accident.”²⁴¹ Finally, a third agreement which the couples signed, titled “Informed Consent and Contract for Embryo Freezing,” stated: “Husband and Wife acknowledge, understand and agree that despite the Hospital, its physicians and its employees proceeding with due care, it is possible that a laboratory accident in the Hospital may result in loss or damage to one or more of said frozen embryos.”²⁴² Plaintiffs argued, based on the contractual language, that they did not assume the risk of Defendant’s negligence, even in the event of a “laboratory accident.”²⁴³ The court noted the parties disagreed in their interpretation of the exculpatory language, in particular, regarding the meaning of “laboratory accident.”²⁴⁴ Because the agreement was not sufficiently specific and the parties’ intention to hold them harmless was not “clearly and unequivocally expressed in the contract”, the court refused to rule that plaintiffs assumed the risk of embryo loss.²⁴⁵ The court noted that the parties’ differing interpretation of the contractual language created a genuine issue of material fact on the issue of whether the couples assumed the risk of embryo loss and destruction.²⁴⁶

²³⁵ *Copeland*, 565 S.W.3d at 274; see also *Clinic Masters, Inc. v. District Court*, 556 P.2d 473, 475–76 (Colo. 1976) (same); *LaFrenz v. Lake County Fair Board*, 360 N.E.2d 605, 608 (Ind. Ct. App. 1977) (same); *Ciofalo v. Vic Tanny Gyms, Inc.*, 177 N.E.2d 925, 926 (N.Y. 1961) (same); *Schlobohm v. Spa Petite, Inc.*, 326 N.W.2d 920, 925 (Minn. 1982) (same).

²³⁶ *Horne*, 987 F.3d at 718 (“[A]n exculpatory clause may not relieve a party of material breach of an express promise at the core of the contract, because that would render the contract illusory.”); *Jewelers Mut. Ins. Co. v. Firststar Bank Illinois*, N.E.2d 411, 415 (Ill. 2004) (“A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract” because the contract would be rendered illusory.); (citing *Shorr Paper Prod., Inc. v. Aurora Elevator, Inc.*, 555 N.E.2d 735, 738 (Ill. Ct. App. 1990) (“[W]e have endeavored to prevent Aurora’s duties under the agreement from becoming illusory and meaningless, a result which would be occasioned if Aurora were not liable for failing to perform its obligations sufficiently.”); see also *Frizzell*, 415 P.3d at 346 (explaining exculpatory clause that shielded trustee from liability for all actions taken in his role as trustee rendered his obligations illusory and violated public policy in direct contravention of statute).

²³⁷ *Frisina*, 2002 WL 1288784.

²³⁸ See *supra* Parts III.A.3. and IV.B.

²³⁹ *Frisina*, 2002 WL 1288784, at *11.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at *12.

²⁴⁵ *Id.* at *13.

²⁴⁶ *Id.*

As evidenced by the court's ruling in *Frisina*, any analysis of exculpatory clauses in cryopreservation agreements must begin by acknowledging the language contained in an exculpatory clause is crucial to any determination regarding the clause's enforceability. Because exculpatory clause language and the particular circumstances surrounding each agreement varies, the determination of an exculpatory clause's enforceability must be made on a case-by-case basis. Nevertheless, several useful, general observations regarding exculpatory clauses may be made: First, exculpatory clauses in cryopreservation agreements play an important role in risk management and are vital to the survival of the ART industry. The need for risk management recently was highlighted by an extremely large plaintiffs' verdict in California in the very first jury trial involving destroyed reproductive material.²⁴⁷ Courts have echoed this sentiment in several cases when upholding the enforceability of disposition clauses in cryopreservation agreements: "Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Written agreements also provide the certainty needed for effective operation of IVF programs."²⁴⁸ Without enforceable exculpatory clauses in cryopreservation agreements, the cost of doing business – including the cost of insurance – most likely would skyrocket and be unpredictable. In addition, without the protection that such clauses afford to IVF clinics, patient costs for IVF also undoubtedly would rise.

Second, if a contract merely lists the risks involved with cryopreservation, that list, standing alone, may be held insufficient to establish aspiring parents' intent to hold defendant harmless when those risks materialize. The intent of the parties regarding those risks must be spelled out with particularity.²⁴⁹ Potential claims must be specifically covered.²⁵⁰ Terms in the agreement must be clear and unambiguous.²⁵¹ For example, even when a jurisdiction permits a party to exculpate itself regarding future negligence, the exculpatory clause must make this point clear using express and unequivocal language.²⁵² Therefore, phrases such as "laboratory accident" and "human error" may create problems for a clinic who wishes to rely upon an exculpatory clause to escape negligence liability. Courts require "free and knowing assent" to terms contained in the agreement, in particular when private service contracts implicate public interest.²⁵³ The aspiring parents should be

247 See *Associated Press*, *supra* note 6. Although the verdict was large, it must be noted the jury found the tank manufacturer 90% responsible for plaintiffs' damages and the fertility clinic only 10% responsible. *Id.*

248 *Kass*, 696 N.E.2d at 180; *Roman*, 193 S.W.3d at 46 (same); *Szafanski*, 993 N.E.2d at 506-07 (same).

249 See authorities cited *supra* notes 232-233.

250 See authorities cited *supra* notes 232-233.

251 See authorities cited *supra* notes 232-233.

252 *Philippine Airlines, Inc. v. McDonnell Douglas Corp.*, 234 Cal. Rptr. 423, 424 (Cal. Ct. App. 1987) (citing *Vinnell Co. v. Pacific Elec. Ry. Co.*, 340 P.2d 604, 607 (Cal. 1959)); see also *Alack v. Vic Tanny Int'l of Missouri, Inc.*, 923 S.W.2d 330, 337 (Mo. 1996) ("The exculpatory language must effectively notify a party that he or she is releasing the other party from claims arising from the other party's own negligence."); *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 878 (Iowa 2009) (same); *Goldman v. Ecco-Phoenix Elec. Corp.*, 396 P.2d 377, 379 (Cal. 1964) (same); *Chepkevich v. Hidden Valley Resort, L.P.*, 2 A.3d 1174, 1189 (Pa. 2010) (same); *Winkler v. Appalachian Amusement Co.*, 79 S.E.2d 185, 190 (N.C. 1953) (same); *Carstens v. W. Pipe & Steel Co.*, 252 P. 939, 941 (Wash. 1927) (same). However, some jurisdictions hold use of the term "negligence" is not required. See, e.g., *Sanislo v. Give Kids the World, Inc.*, 157 So. 3d 256, 268 (Fla. 2015) (citing cases from jurisdictions where exculpatory clauses are not required to use the term "negligence").

253 *Jijun Yin*, 463 P.3d at 926 (explaining exculpatory clause must be "knowingly and willingly made"). For a general discussion of this point, see 8 WILLISTON ON CONTRACTS §§ 19:21, 19:23; see also *McCarn v. Pac. Bell Directory*, 4 Cal. Rptr. 2d 109, 111 (Cal. Ct. App. 1992) (listing characteristics which mark a contract as involving the public interest),

aware from the clear language of the contract that they are assuming these risks, not the IVF clinic or cryopreservation facility.

Third, regarding unequal bargaining power, one can hardly deny that the clinics and ART practitioners have the upper hand regarding exculpatory clauses, which are typically non-negotiable and contained in pre-printed forms. However, use of such forms need not render the agreement unenforceable. When assessing disparity in bargaining power, courts have examined “the importance of the service at issue for the physical or economic well-being of the party signing the agreement and the amount of free choice that party has in seeking alternate services.”²⁵⁴ As to the first concern, most would agree that the IVF process through which couples achieve pregnancy, including cryopreservation of reproductive material, is important to the physical and economic well-being of the parties signing the agreement. Regarding the second concern, counsel may choose to add language to the agreement which indicates the aspiring parents’ assent to the exculpatory clause was a deliberate, free choice made to keep costs of service affordable. For example, one practitioner suggested this language, although not in the IVF context: “I have considered that if this waiver of liability was not as broad as it is, the cost for my use of the facility [or participation in the event] would be considerably higher, and as I do not wish to pay a considerably higher cost, I waive the right to bargain for different waiver of liability terms.”²⁵⁵ To avoid the appearance that the agreement was an adhesion contract offered on a take-it-or-leave-it basis, the agreement also should expressly acknowledge that aspiring parents investigated available fertility clinics, had a choice of fertility clinics, freely chose clinic “X”, and are aware they may discontinue participation in clinic “X’s IVF program at any time.”²⁵⁶ The agreement also should include terms regarding transfer of any stored reproductive material to another clinic, which will lessen the likelihood that courts will perceive the aspiring parents’ participation in an IVF program, once begun, as being “locked-in” and coercive.

Finally, broad, sweeping language frequently used in cryopreservation contracts, which attempts to excuse clinics and ART practitioners from any and all future liability, is problematic and should be avoided. Sweeping exculpatory clauses that render the ART practitioners and clinic storage facilities immune from any and all liability regarding the key tasks they promised to perform which comprise the very heart of the agreement render the agreement illusory.²⁵⁷ Unfortunately, many cryopreservation agreements contain such

(citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445-46 (Cal. 1963) (holding exculpatory clause in agreement between hospital and patient implicated the public interest and was unenforceable)).

²⁵⁴ *Copeland*, 565 S.W.3d at 274-76; *Schmidt v. United States*, 912 P.2d 871, 874 (Okla. 1996); see also *Schlobohm*, 326 N.W.2d at 925.

²⁵⁵ Alexander T. Pendleton, *Enforceable Exculpatory Agreements: Do They Still Exist?*, 78 WIS. LAW. at 16, 46 (NO. 8 Aug. 2005).

²⁵⁶ For example, the Boston IVF contract states, in pertinent part: “We acknowledge that we, the undersigned, are voluntarily participating in treatment at Boston IVF in order to conceive a child through IVF.....” Boston IVF, *supra* note 20, at 5. The contract also states “By signing the document, we acknowledge we have had a thorough discussion with our Boston IVF physician. This discussion included information on the risks, benefits, complications, and alternative to embryo freezing.” *Id.*

²⁵⁷ *Horne*, 987 F.3d at 718 (“[A]n exculpatory clause may not relieve a party of material breach of an express promise at the core of the contract, because that would render the contract illusory.”); *Jewelers Mut. Ins. Co.*, 820 N.E.2d at 415 (“A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract” because the contract would be rendered illusory.), (citing *Shorr Paper Prod., Inc. v. Aurora Elevator, Inc.*, 555 N.E.2d 735, 738 (Ill. Ct. App. 1990) ([W]e have endeavored to prevent Aurora’s duties under the agreement from becoming illusory and meaningless, a result which would be occasioned if Aurora were not liable for failing to perform its obligations sufficiently.”); see also *Frizzell*, 415 P.3d at 346 (explaining

sweeping language and attempt to immunize ART practitioners from all conduct related to the very core of the agreement. For example, one typical cryopreservation agreement states, in pertinent part: “[the clinic] its affiliate laboratories, or any of its employees shall not be for any destruction, damage, or loss to our embryos as a result of freezing, maintenance, storage, removal from storage, thawing and/or delivery.”²⁵⁸ Arguably, such language renders the agreement illusory. If the clinic’s obligation is to freeze and store the reproductive material, yet they have no liability for any conduct relating to freezing and storage, then they are immunizing themselves from all liability related to their core obligation. After reading such language, one is left to ask, is there any aspect of the cryopreservation process at all for which the clinic assumes responsibility? What risks of the cryopreservation process, if any, will be borne by the clinic? Are any damages available to plaintiffs in the event of damage, loss, or destruction of their cryopreserved reproductive material? Such sweeping exculpatory language should not be enforced. A clinic should not be able to promise to freeze and store reproductive material – which is the heart of the parties’ agreement – and then exculpate itself from all liability for breach of that very promise. As courts have noted: “This is a specific duty that defendant assumed in the contract, and it formed the heart of the parties’ agreement. A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract.”²⁵⁹ Clinics must use care to ensure their exculpatory clause is not so broad and sweeping as to render the agreement illusory.²⁶⁰ One obvious way clinics may avoid this problem is to assume a duty of due care regarding their core obligations under the agreement.²⁶¹

2. Exculpatory Clauses that Implicate or Affect Public Policy

Although courts may find an individual exculpatory clause may violate public policy, perhaps because the clause was unclear or a great disparity existed in the parties’ bargaining power, the courts also have found exculpatory clauses unenforceable when the agreement itself is one which affects or implicates public policy.²⁶² Typical agreements which affect

exculpatory clause that shielded trustee from liability for all actions taken in his role as trustee rendered his obligations illusory and violated public policy in direct contravention of statute).

²⁵⁸ California Center, *supra* note 171, at 1; *see also* Boston IVF, *supra* note 20, at 1 (“not be liable for any destruction, damage, or loss to our embryos as a result of freezing, maintenance, storage, removal from storage, thawing, and/or delivery”).

²⁵⁹ *Jewelers Mut. Ins. Co.*, 820 N.E.2d at 415, (citing *Shorr Paper Products, Inc.*, 555 N.E.2d at 738).

²⁶⁰ *Horne*, 987 F.3d at 718 (“[A]n exculpatory clause may not relieve a party of material breach of an express promise at the core of the contract, because that would render the contract illusory.”); *Jewelers Mut. Ins. Co.*, 820 N.E.2d at 415 (“A party cannot promise to act in a certain manner in one portion of a contract and then exculpate itself from liability for breach of that very promise in another part of the contract” because the contract would be rendered illusory.), (citing *Shorr Paper Prod., Inc.*, 198 Ill. App. 3d at 14, 555 N.E.2d at 738 (“[W]e have endeavored to prevent Aurora’s duties under the agreement from becoming illusory and meaningless, a result which would be occasioned if Aurora were not liable for failing to perform its obligations sufficiently.”)); *see also* *Frizzell*, 415 P.3d at 346 (explaining exculpatory clause that shielded trustee from liability for all actions taken in his role as trustee rendered his obligations illusory and violated public policy in direct contravention of statute).

²⁶¹ *See, e.g.*, *Ovation Fertility*, *supra* note 20, at 3 (“Ovation’s obligation to Client is to exercise reasonable care in providing freezing and storage services as set forth in this Agreement.”).

²⁶² *Tunkl*, 383 P.2d at 444-45, 447 (stating exculpatory clause in agreement between hospital and entering patient affects the public interest and is unenforceable); *Hunter v. Am. Rentals, Inc.*, 371 P.2d 131, 133 (Kan. 1962) (stating trailer hitch rental company “owed a duty, not only to the plaintiff but also to the general public, to see that the trailer hitch was properly installed and the trailer properly attached thereto.....”); *Philippine Airlines, Inc.*, 234 Cal. Rptr. at 426 (holding contract between two highly sophisticated airline corporations was not contrary to the public interest); *Ciofalo*, 177 N.E.2d at 927 (stating exculpatory clause in gym membership contract was valid and affected “no overriding public interest”). For a general discussion of this topic, see 8 WILLISTON ON CONTRACTS § 19:23 (4th ed. May 2021 Update).

the public interest include those regarding public service obligations, such as public utilities, common carriers, innkeepers, and public warehousemen, and also any agreement deemed “so important to the public good that an exculpatory clause would be patently offensive, such that the common sense of the entire community would ... pronounce it invalid.”²⁶³ Although no universal test exists to determine whether a private contract affects the public interest, many jurisdictions apply the factors used in *Tunkl v. Regents of the University of California*,²⁶⁴ or some variation thereof,²⁶⁵ to determine whether an exculpatory clause is unenforceable because the contract implicates the public interest:

It concerns a business of a type generally thought suitable for public regulation. [footnote omitted] The party seeking exculpation is engaged in performing a service of great importance to the public, [footnote omitted] which is often a matter of practical necessity for some members of the public. [footnote omitted] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. [footnote omitted] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [footnote omitted] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, [footnote omitted] and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [footnote omitted] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, [footnote omitted] subject to the risk of carelessness by the seller or his agents.²⁶⁶

²⁶³ *100 Inv. Ltd. P'ship*, 60 A.3d at 23-24.

²⁶⁴ *Tunkl*, 383 P.2d at 445-46.

²⁶⁵ See *Jones v. Dressel*, 623 P.2d 370, 376 (Colo.1981) (using the *Tunkl* factors to establish “the existence of a duty to the public” but then adding three additional factors: (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language.”); see also *Wolf v. Ford*, 644 A.2d 522 (Md. 1994) (adopting a totality of the circumstances approach); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1109 (N.M. 2003) (adopting the *Tunkl* factors as “guidance”); *Glassford v. BrickKicker*, 35 A.3d 1044, 1050 (Vt. 2011)(*Tunkl* factors are “relevant considerations.”); *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 744 (Conn. 2005)(“[O]ur analysis is guided, but not limited, by the *Tunkl* factors”); *Perry v. Town of E. Haddam*, No. CV146012285, 2016 WL 3266053, at *7 (Conn. Super. Ct. May 19, 2016) (using a totality of circumstances approach and the six *Tunkl* factors).

²⁶⁶ *Tunkl*, 383 P.2d at 445-46; *accord* *K.N. v. Life Time Fitness, Inc.*, No. 2:16-CV-39, 2018 WL 6505395, at *10 (D. Utah Dec. 11, 2018) (adopting the *Tunkl* standard); *Borders v. Alabama Power Co.*, 547 So. 2d 446, 447 (Ala. 1989) (same); *Moore v. Hartley Motor. Inc.*, 36 P.3d 628, 631 (Alaska 2001)(same); *Olson v. Molzen*, 558 S.W.2d 429, 431 (Tenn.1977)(same); *Porubiansky v. Emory Univ.*, 275 S.E.2d 163, 168 (Ga. Ct. App. 1980), *aff'd*, 282 S.E.2d 903 (Ga. 1981)(same); *Wagenblast v. Odessa School District*, 758 P.2d 968, 971-72 (Wash. 1988) (same); *R-1 Assocs., Inc. v. Goldberg-Zoino & Assocs., Inc.*, No. CIV. A. 91-7417-E, 1995 WL 517554, at *4 (Mass. Super. Aug. 16, 1995) (same); *Lucero v. Van Wie*, 598 N.W.2d 893, 897 (S.D. 1999) (same). *But see* *Copeland*, 565 S.W.3d at 273 (ruling the *Tunkl* factors “remain instructive and may be considered when relevant” but are “too rigid” because they “fail[] to consider all the relevant circumstances.”); *Wolf*, 644 A.2d at 527 (same); *Hanks*, 276 Conn. at 330, 885 A.2d at 744 (“[O]ur analysis is guided, but not limited, by the *Tunkl* factors.”); *Perry*, 2016 WL 3266053, at *7 (using a totality of circumstances approach and the six *Tunkl* factors); *Berlangieri*, 76 P.3d at 1109 (adopting the *Tunkl* factors as “guidance”); *Glassford*, 35 A.3d at 1050 (holding *Tunkl* factors are “relevant considerations.”).

All factors need not be present to render the exculpatory clause unenforceable.²⁶⁷ Even jurisdictions which have criticized the *Tunkl* factors as being too restrictive, have found the factors remain helpful and instructive.²⁶⁸ In *Tunkl*, a patient sued two physicians and a hospital for negligence, seeking damages for personal injury.²⁶⁹ Relying upon the release which plaintiff had to sign in order to be treated at the hospital, the jury entered judgment in favor of the hospital and its employees.²⁷⁰ Using the six factors set out above, the court held “the hospital-patient contract clearly falls within the category of agreements affecting the public interest.”²⁷¹ The court noted the agreement met all six factors. The institution, a hospital, was subject to and suitable for regulation; services were offered to members of the public who had a specific need; the hospital held itself out to the public to offer such services; the hospital held a decisive advantage in terms of bargaining and the terms of the agreement were not the subject of negotiation; and the patient was placed in control of the hospital and was subject to their negligence.²⁷²

The six factors used in *Tunkl* to invalidate an exculpatory clause also pose a threat to exculpatory clauses in cryopreservation contracts. Cryopreservation agreements are likely to meet all six *Tunkl* factors, although not every factor must be present to declare an agreement unenforceable. First, like the hospital in *Tunkl*, many IVF clinics are in hospitals and, regardless of hospital affiliation, facilities offering services to the public. As a result, they are subject to regulation.²⁷³ In fact, there have been calls for increased regulation of ART²⁷⁴ and many states have passed legislation addressing various aspects of ART.²⁷⁵ Second, IVF clinics that cryopreserve reproductive material are performing a service that is very important to the public and is a matter of necessity for many individuals. The right

²⁶⁷ *Tunkl*, 383 P.2d at 447 (“[T]he agreement need only fulfill some of the characteristics above outlined [to implicate public policy and be unenforceable].”).

²⁶⁸ *Copeland*, 565 S.W.3d at 273 (ruling the *Tunkl* factors “remain instructive and may be considered when relevant” but are “too rigid” because they “fail[] to consider all the relevant circumstances.”); *Wolf*, 644 A.2d at 527 (same); *Hanks*, 276 Conn. at 330, 885 A.2d at 744 (“[O]ur analysis is guided, but not limited, by the *Tunkl* factors”); *Perry*, 2016 WL 3266053, at *7 (using a totality of circumstances approach and the six *Tunkl* factors); *Berlangieri*, 76 P.3d at 1109 (adopting the *Tunkl* factors as “guidance”); *Glassford*, 35 A.3d at 1050 (holding *Tunkl* factors are “relevant considerations.”).

²⁶⁹ *Tunkl*, 383 P.2d at 442.

²⁷⁰ *Id.*

²⁷¹ *Id.* at 447.

²⁷² *Id.*

²⁷³ For a thorough discussion of this topic, see David Adamson, M.D., *Regulation of Assisted Reproductive Technologies in the United States*, FERTILITY AND STERILITY, Volume 78, Issue 5 (Nov. 1, 2002), <https://www.fertstert.org/action/showPdf?pii=S0015-0282%2802%2904199-7>; Wendy Y. Chang & Alan H. DeCherney, *History of Regulation of Assisted Reproductive Technology (ART) in the USA: A Work in Progress*, HUMAN FERTILITY Volume 6, Issue 2 (May 2003).

²⁷⁴ See, e.g., Lucy Frith & Eric Blyth, *Assisted Reproductive Technology in the USA: Is More Regulation Needed?*, REPRODUCTIVE BIOMEDICINE ONLINE, at 516 Volume 29, Issue 4 (2014) (“[T]he regulatory structure in the USA fails to provide an adequate mechanism for ensuring the ethical and safe conduct of ART services, and that more comprehensive regulation is required.”).

²⁷⁵ See Laura S. Langley, J.D. & Joseph W. Blackston, M.D., J.D., *Sperm, Egg, and A Petri Dish Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 J. LEGAL MED. 167, 193–94 (2006) (discussing state legislation regarding cryopreserved reproductive material). In some states, statutes have identified the legal status of reproductive material. See, e.g., Polina M. Dostalík, *Embryo “Adoption”? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 876 (2011) (discussing Louisiana and Missouri statutes that recognize an embryo as “a person”); see also *McQueen v. Gadberry*, 507 S.W.3d 127, 147-48 (Mo. Ct. App. 2016) (discussing Missouri statutes regarding the status of frozen pre-embryos); Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. LAW. 55, 71 (2018) (discussing legislative attempts to protect cryopreserved reproductive material such as embryos).

to procreate is fundamental,²⁷⁶ and thousands of individuals freeze embryos or other reproductive material each year in the hope they may later have their own biological child.²⁷⁷ The importance of cryopreservation is particularly evident when one considers cryopreservation frequently is used by individuals who no longer are fertile due to age or cancer treatments. Third, IVF clinics offer their services, including cryopreservation of reproductive material, to members of the public as a means to achieve a delayed pregnancy. Members of the public who use IVF are referred to as “patients.”²⁷⁸ The American Society for Reproductive Medicine acknowledges that IVF and cryopreservation of reproductive materials involves healthcare professionals and requires medical expertise²⁷⁹ Fourth, the IVF clinics exercise superior bargaining power and offer an exculpatory clause that usually is not open to negotiation. Typically, no bargaining takes place when the cryopreservation agreements are signed. In fact, most cryopreservation agreements are offered on a take-it-or-leave-it basis. Finally, the property of the patient is placed in the care of the clinic and is subject to carelessness by the clinic. The clinic prepares the reproductive material for storage, controls the freezing process, operates the cryopreservation tanks, and controls the entire storage process, including the operation and maintenance of essential equipment. As a result, it is highly likely, as in *Tunkl*, a court will rule that a cryopreservation contract between two private parties implicates the public interest and, therefore, the agreement’s exclusionary clause is unenforceable, at least in part.

While broad, sweeping cryopreservation exculpatory clauses should not be enforced, reasonable exculpatory clauses in which a clinic acknowledges and accepts a duty of due care regarding their core obligations should be upheld as necessary to the health and survival of the ART industry. This is especially true of clauses whereby a clinic exculpates itself from liability for losses caused by acts of God and storage tank malfunctions. One recent study showed that eighty-four percent of the one-hundred-thirty-three cases filed for loss or destruction of cryopreserved embryos between January 2009 and June of 2019 involved losses due to storage tank failure.²⁸⁰ While clinics should exercise due care in monitoring and maintaining storage tanks, they arguably should not be forced into the position of a product insurer. Clinic liability in the event of tank failure should be limited to circumstances where the clinic failed to exercise due care, such as when a tank failure went unnoticed for days because a clinic employee turned off a tank temperature alarm.²⁸¹ As courts have noted, written agreements “provide the certainty needed for effective operation of IVF programs.”²⁸² To find all exculpatory clauses unenforceable in the cryopreservation context because the agreements implicate public policy would essentially make the clinics insurers of the stored reproductive material.

276 *Skinner v. Oklahoma, ex rel. Williamson*, 316 U.S. 535, 541(1942) (“[T]he right of procreation without state interference has long been recognized as “one of the basic civil rights of man . . . fundamental to the very existence and survival of the race.”); *accord J.R. v. Utah*, 261 F. Supp. 2d 1268, 1272 (D. Utah 2002); *Conservatorship of Maria B.*, 160 Cal. Rptr. 3d 269, 277 (Cal. Ct. App. 2013); *Sullivan v. Benningfield*, 920 F.3d 401, 408 (6th Cir. 2019).

277 See *supra* notes 17-21 and accompanying text.

278 *Id.*

279 *Guide for Patients, supra* note 23, at 3. The IVF process not only involves medical experts, but also increases in complexity when aspiring parents choose to cryopreserve embryos for later use. See *id.* at 4-12, 20.

280 Letterie & Fox, *Lawsuit Frequency, supra* note 4.

281 This is what was stated to have occurred in the tank malfunction embryo loss at University Hospital in Cleveland, Ohio. See authorities cited *supra* note 5.

282 *Kass*, 696 N.E.2d at 180; *Roman*, 193 S.W.3d at 46; *Szafanski*, 993 N.E.2d at 506-07.

VI. CONCLUSION

Courts should award consequential damages for emotional disturbance when a defendant's breach of contract results in the loss or destruction of the reproductive material stored for the purpose of achieving a pregnancy. In the overwhelming majority of breach of contract cases involving the loss or destruction of reproductive material stored to achieve a later pregnancy, the nature of the transaction, the purpose of the contract, and the surrounding circumstances put defendants on notice at the time of contracting that serious emotional disturbance was "particularly likely" to result from a breach. This is particularly true when, due to plaintiffs age or illness, the loss realistically destroys plaintiff's opportunity to have their own biological child.

Although exculpatory clauses used in cryopreservation agreements play an important role in risk management and are vital to the survival of the ART industry, broad, sweeping exculpatory clauses which immunize ART clinics and practitioners from any and all liability related to the very core of the agreement render the agreement illusory and should be avoided. Exculpatory clauses should acknowledge ART clinics and practitioners accept a duty of due care; otherwise, the exculpatory clause runs the risk of contravening public policy. To be enforceable, exculpatory clause language should be clear and precise. The language also should identify with specificity which risks are being assumed by aspiring parents and which risks are assumed by the clinic. Clinics should take care to address the perceived disparity in bargaining power and the appearance that the agreement was an adhesion contract offered on a take-it-or-leave-it basis. Cryopreservation agreements should offer the aspiring parents' choices and language contained in the exculpatory clause should indicate the aspiring parents' assent was a deliberate, free choice made to keep costs of service affordable.