UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALLAN BERMAN, individually and as Personal Representative of the Estate of Kathryn Hamilton

Plaintiff,

v.

THE FRED HUTCHINSON CANCER RESEARCH CENTER, *et al.,*

Defendants,

No. C01-0727L (BJR)

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON INFORMED CONSENT CLAIM

This matter comes before the Court on "Plaintiff's Motion for Partial Summary Judgment of Liability on Informed Consent Claim." Summary judgment is appropriate when, viewing the facts in the light most favorable to the non-moving party, there is no genuine issue of material fact which would preclude summary judgment as a matter of law. Once the moving party haw satisfied his burden, he is entitled to summary judgment if the non-moving party fails to designate, by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995). Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the non-moving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." Triton Energy, 68 F.3d at 1221.

Plaintiff, the husband of Kathryn Hamilton, seeks partial summary judgment against defendant Fred Hutchinson Cancer Research Center ("the Hutch") that defendant failed to obtain his wife's informed consent for her participation in a cancer research study, Protocol 681.1. Under Washington law, plaintiff must show the following elements as part of his informed consent claim:

(a) That the health care provider failed to inform the patient of a material fact or facts relating to the treatment;

(b) That the patient consented to the treatment without being aware of or fully informed of such material fact or facts;

(c) That a reasonably prudent patient under similar circumstances would not have consented to the treatment if informed of such material fact or facts; [and]

(d) That the treatment in question proximately caused injury to the patient.

RCW 7.70.050(1). Whether a particular fact is material depends on a two-step analysis. "Initially, the scientific nature of the risk must be ascertained, *i.e.*, the nature of the harm which may result and the probability of its occurrence . . . . The trier of fact must then decide whether that probability of that type of harm is a risk which a reasonable patient would consider in deciding on treatment." Smith v. Shannon, 100 Wn.2d 26, 33 (1983). What risks exist, their likelihood of occurrence, and the type of harm at issue must be established by a physician or other qualified expert before the factfinder can evaluate the sufficiency of the disclosures that were made. Smith, 100 Wn.2d at 33-34.

On January 6, 1993, Kathryn Hamilton agreed to undergo treatment for recurring Stage IV breast cancer under a human subjects research protocol conducted by the Hutch. The protocol was "designed to determine the maximum tolerated doses of the chemotherapy drugs busulfan and cyclophosphamide when used with drugs which inhibit tumor neurosis factor (Anti-TNF therapy)." Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 6 (consent form). Through the study protocol, the informed consent document, and her discussions with defendants, Hamilton knew that busulfan ("Bu") had been successfully used in bone marrow transplant patients at levels of 14 mg/kg body weight, but that above that level, the chemotherapeutic agents were too toxic, causing extensive cell and organ damage (tumor necrosis) associated with the treatment regimen. In an effort to boost the level of chemotherapeutic agents that could be tolerated by the body, defendants proposed giving patients a combination of two drugs, pentoxifylline ("PTX") and ciprofloxacin ("Cipro"), which preliminary data suggested would protect the patient's organs from damage during treatment. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 (Protocol #681.1), Ex. 3 (12/29/92 conference note), Ex. 5 (1/6/93 admit note), Ex. 6 (consent form).

Plaintiff argues that his wife's consent to participate in Protocol 681.1 was not informed because the Hutch failed to disclose that: (1) the researchers had no idea whether PTX and Cipro would have any protective effect against organ damage; (2) Hamilton would not receive the planned

dosage of PTX if she were unable to ingest the oral version of the drug; (3) seven prior protocol participants had died, one of whom had suffered serious organ damage; and (4) there were alternative treatments that were less risky and were reporting a significantly higher cure rate. Having reviewed the pleadings, declarations, and exhibits submitted by the parties, and having heard the arguments of counsel on June 11, 2002, the Court finds as follows:

1. Whether the Hutch's disclosures regarding the effects of PTX and Cipro were adequate is a matter for the jury to decide. The evidence shows that the purpose of Protocol 681.1 was to determine whether and to what extent PTX, in combination with Cipro, would protect the patient's organs from the toxic effects of the chemotherapeutic agents. Both the protocol and the consent form indicate that, while preliminary data showed that PTX might prove useful as an anti-TNF agent, Protocol 681.1 was an attempt to test that theory and was not based on any proven medical efficacy of PTX. A jury would be entitled to weigh the disclosures that defendant made against plaintiff's evidence regarding the repeated reference to PTX as an anti-TNF agent and the use of terms like "protect" and "blockade" when describing PTX's effect. In addition, assuming plaintiff is able to show the letter Dr. Peter Kalhs published in the November 15, 1992, issue of *Blood* called into question the preliminary data on which Protocol 681.1 was based and/or that defendants had evaluated the data which was ultimately published in October 1993 before Hamilton consented to participate in the study, the jury could consider whether the Hutch's disclosures were sufficient in light of the then-current state of knowledge. See Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Exs. 7 and 9.

2. As described by the Hutch in contemporaneous documents and its opposition papers, the purpose of Protocol 681.1 was to test the theory that a combination of PTX and Cipro, given prior to transplant and extending for some period after transplant, would protect a breast cancer patient's organs from the adverse affects of high dose chemotherapeutic agents. A prior Hutch study had subjected four patients to a regimen of Bu 16 mg/kg and cyclophosphamide ("Cy") 120 Mg/Kg, with the result that two of the four patients had died from regimen related toxicity ("RRT"). Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 3. Hamilton was todl taht the theory behind Protocol 681.1 was that the toxic side effects of high dose chemotherapy could be ameliorated with PTX and Cipro so that the maximum tolerable level of the chemotherapeutic agents could be increased. She consented to treatment with PTX and Cipro at specified doses starting nine days before transplant and extending twenty-one to thirty days,

respectively, after transplant. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 9, Ex. 6 at 2. Hamilton, who had a history of being unable to tolerate certain oral drugs, was told that if the oral PTX caused vomiting such that the patient was unable to absorb the specified dose when taken by mouth, she would receive the dosage intravenously. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 9, Ex. 6 at 2. On the very day she was admitted for treatment, Hamilton was assured that she would receive the proscribed regimen of PTX and Cipro. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 5.

Defendant did not tell Hamilton that its supplier of intravenous PTX had announced two month before she consented to participate in Protocol 681.1 that it would not longer supply the drug to the Hutch. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 9. Defendant argues that this omission was not material because there was no evidence that PTX was effective as an anti-TNF agent.[1] This argument misses the point and would effectively abrogate the informed consent doctrine in the research context. The Hutch's own documents show that its Division of Clinical Research believed the lack of intravenous PTX to be a material fact of which potential study participants should be apprised. Although Protocol 681.1 is not specifically mentioned, other investigators were told to revise their protocols and consent forms to delete any reference to the use of intravenous PTX. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 5. In addition, the steps defendant initially took to ensure that patients received the appropriate doses of PTX show its importance to the study and to the patients. The Hutch recognized that patients might not be able to tolerate the oral version of PTX and, rather than accepting that those patients would be under-medicated, specifically provided that in such circumstances the patient would be given the intravenous form of the drug. This provision was still in the protocol and consent forms provided to Hamilton. Finally, Protocol 681.1 was designed to determine whether PTX had a beneficial effect on outcome. If PTX could not be administered because the patient could not tolerate the oral form of the drug and the intravenous form was unavailable, the patient was not actually being treated as set forth in the protocol and the outcome of her treatment would tell the investigators nothing about the efficacy of PTX as an anti-TNF agent.

[1] Dr. Jones' expert opinion on this point is conclusory and provides no facts of analysis which could persuade the factfinder.

In effect, if all of the study participants were unable to tolerate oral PTX and developed RRT, that outcome would show nothing more than what the researchers knew when they designed Protocol 681.1, namely that "14mg/kg appears to be the maximum tolerable dose of Bu." Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 4. The fact that the effectiveness of PTX as an anti-TNF agent was being tested in the protocol does not justify the failure to disclose to potential patients important and material facts regarding its availability and use.[2]

In Hamilton's case, she became nauseous and vomited after almost every dose of oral PTX. Because the Hutch was unable to provide her with intravenous PTX, she was ultimately subjected to doses of chemotherapeutic agents which had already been proven too toxic without even the hope that PTX would protect her organs from regimen related toxicity. Defendant asks the Court to assume that Hamilton would have agreed to participate in the study anyway because she was desperate. There is no evidence to support such an assertion (in fact, the evidence suggests that Hamilton and her family made every effort to understand and evaluate rationally the options that were available to her) and, even if there were, the Court's inquiry is focused on a reasonably prudent patient in similar circumstances. The Court finds that, as a matter of law, a reasonably prudent prospective study participant would not have agreed to treatment with lethal doses of chemotherapeutic agents if she had been told that she would be deprived of the only potentially beneficial drug being tested in the protocol should she, as expected, be unable to tolerate its oral form. Hamilton's consent to the administration of doses of chemotherapeutic drugs that had already been proven to cause RRT in 50% of recipients was uninformed because she did not know, and was never told, of the risk that she would be denied the only hope for successful treatment offered under the protocol.

The last element of an informed consent claim under Washington law requires plaintiff to

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[2] In a similar vein, defendant argues that, because the researchers had no idea what dosage of PTX was necessary to protect organs from RRT, Hamilton may have ingested enough of the drug to obtain its potential benefits despite the fact that almost every dose was vomited shortly after ingestion. Even if the Court were to assume that PTX is absorbed into the bloodstream almost immediately, it is clear that Hamilton did not receive the doses specified in the protocol, that defendants' assurances that she would be given the proscribed regimen were incorrect, that defendants' current position that Hamilton may have received "enough" PTX is simply conjecture, that the consent Hamilton gave was based on incorrect and misleading disclosures, and that a reasonably prudent person in similar circumstances would want to know that, if unable to tolerate oral PTX, she would receive only what she was lucky enough to absorb prior to vomiting rather that the full dose specified in the protocol.

show "[t]hat the treatment in question proximately caused injury to the patient." RCW 7.70.050(2). Defendants argue that because PTX is now believed to have no anti-TNF effect, the fact that Hamilton did not receive the drug could not have "caused" her organ failure and death. Defendants' focus on a single aspect of a unified treatment regimen appears misplaced in light of the statute's use of the broad term "treatment" rather than "drug" or "procedure." Even if focusing the causation analysis on the precise medication or procedure to which the patient was subjected without informed consent makes sense in the normal therapeutic treatment context, where the patient is being asked to take part in an experimental research study, the failure to disclose material aspects of one element of the protocol can invalidate the patient's consent to participation in the study as a whole. In this case, it is undisputed that Hamilton dies of RRT as a result of her participation in Protocol 681.1. Had defendants fully disclosed the material facts regarding the unavailability of intravenous PTX under the research protocol, Hamilton would not have agreed to the treatment which ultimately killed her. The Court therefore finds that defendant violated Washington's informed consent statute. What damages Hamilton incurred as a result of her participation in Protocol 681.1 must be determined by the factfinder.

3. Plaintiff's broad argument that defendant had an obligation to disclose the outcomes of earlier participants in Protocol 681.1 raises a number of interesting issues, including whether an informed consent process which changes with each new participant produces scientifically valid results and whether early data has any statistical significance.[3] In the circumstances of this case, however, the issue can be framed much more narrowly and turns on whether Hamilton's consent to treatment was invalid because the information defendant chose to provide regarding prior outcomes was incorrect. At the time Hamilton agreed to participate in defendant's study, she was under the mistaken belief that fifteen patients had been treated under Protocol 681.1 with doses of Bu above 14

[3] Because defendants opted to provide outcome information in this case, the Court need not consider whether defendants had an obligation to disclose such information. Disclosures regarding outcome data might have an effect on the study's patient population such that the patients enrolled at the end of the study vary materially from those who enrolled in the beginning. Of potentially greater importance to the informed consent analysis is the fact that the results experienced by a handful of individuals in the early stages of a clinical study may have no statistical relevance to the underlying question. For example, the fact that the first five participants in a new study died may not tell you anything. It's possible that the first five participants in the related control group also died, and that all ten deaths were the result of progressive disease processes or some other cause not related to the treatment regimen. In addition, most studies have a minimum participation level below which the findings are just as likely to be the result of random or unrelated occurrences as the treatment regimen itself. Absent evidence that the early results of an ongoing clinical trial reflect a material risk, plaintiff would be unable to satisfy the first prong of materiality.

mg/kg and that none of them had died or developed RRT. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 4 (conference note). Defendant has not been able to explain where Dr. Sullivan got the numbers she shared with Hamilton the day before she consented to treatment, but it is undisputed that there were, in fact, thirty-one prior participants in Protocol 681.1, seven of whom had died.[4] One of the seven had suffered serious organ damage as a result of the regimen.

Dr. Sullivan's conference not indicates that he told Hamilton and her family that:

> To date, 15 evaluable patients followed at least 60 days have been enrolled. All patients received cyclophosphamide at 150 mg/kg. Four patients received busulfan at 15 mg/kg, 4 at 16 mg/kg, 4 at 17 mg/kg and 3 at the patient's dose of 18 mg/kg. According to Dr. Bensinger, there have been no deaths at any level. All patients have received anti-TNF therapy with ciprofloxacin (day -9 to day +30) and pentoxifylline (day -9 to day +21).

Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 4. There is no admissible evidence that Dr. Sullivan said anything other than what he wrote in this note.[5] The information given to Hamilton was false and misleading. Based on the documents provided by defendant, Hamilton knew that a prior study in which breast cancer patients received Bu 16 mg/kg and Cy 120 mg/kg had resulted in the deaths of all four participants, two from RRT and two from infections (albeit one of whom survived 306 days post transplant). A study in which multiple myeloma was treated with doses of Bu above 14 mg/kg had similar results, with 50% of the participants dying from RRT. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 1 at 3-4. The day before she consented to treatment, Hamilton was told that the experience with Protocol 681.1, in which patients were given PTX and Cipro in order to avoid RRT, was completely different, with no deaths whatsoever, even when the level of Bu had been boosted up

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[4] Dr. Bensinger suggests that the term "evaluable" in Dr. Sullivan's note should be read to exclude all patients who were enrolled in Protocol 681.1 who suffered from Stage II or III breast cancer, who received a syngeneic, rather than autologous, marrow transplant, and who died less than sixty days after treatment. Decl. of William Besinger, M.D., in Support of Defendants' Opposition at ¶ 4. Even if excluding individuals who died quickly of RRT is reasonable, and even if Hamilton understood that the term "excludable" had such an importance in the context of her discussions with defendants, there were still five deaths prior to her agreement to participate that were affirmatively hidden by Dr. Sullivan's representations on January 5, 1993. Decl. of Daniel F. Johnson re: Plaintiff's Motion for Partial Summary Judgment, Ex. 11.

[5] Dr. Appelbaum's speculation about what Dr. Sullivan actually said or meant during the January 5, 1993, family conference has not been considered.

to 18 mg/kg. A reasonably prudent patient in Hamilton's circumstances would attach great significance to the fact that fifteen individuals had been successfully treated with very high doses of Bu under defendant's protocol with "no deaths at any level." These circumstances raise concerns regarding the validity of the consent Hamilton gave for treatment.

The Court cannot, however, find as a matter of law that, had defendants conveyed accurate information regarding the early protocol results, a reasonably prudent patient under similar circumstances would not have consented to the treatment. Had Dr. Sullivan said that there were thirty-one protocol participants, that seven of them had died, and that one of the seven had suffered serious organ damage as a result of the treatment regimen, a prudent person in Hamilton's position might still have consented to the treatment. Prior studies with high dose chemotherapy showed serious organ damage in 50% of the patients: at the time Hamilton consented, Protocol 681.1 had a 3.2% RRT rate. In addition, the early data on Protocol 681.1 showed fewer deaths from the underlying disease process than would be expected without treatment or with more conventional treatment. A reasonably prudent person could look at the outcome data as of the time Hamilton consented and conclude that the protocol offered an increased chance of complete cure with an acceptable risk of regimen related toxicity. Whether Hamilton's consent was informed on this issue must be determined by the jury.

4. The record shows that Hamilton was aware that the University of Washington had been conducting studies using high dose chemotherapy without transplant. The Court cannot assume, in the summary judgment context, that she or her family forgot about that option or was otherwise prevented from contacting the University to determine the current status of the study. Whether defendant had a duty to research other experimental protocols, determine whether the preliminary results were material, and present their regimen, risks, and success rates to Hamilton should be left for the factfinder to decide.

For the foregoing reasons, the Court finds as a matter of law that defendant Fred Hutchinson Cancer Research Center's failure to disclose the unavailability of intravenous PTX invalidated Hamilton's consent to participate in Protocol 681.1. Plaintiff's motion for summary judgment is GRANTED on that prong of the informed consent argument and DENIED as to the other three arguments. All issues related to damages and defenses are reserved for trial. The Court notes, however, that the same clarity of issues that justifies summary judgment on plaintiff's intravenous

PTX claim (such as the drug's critical role in the protocol, the materiality of its availability, the fact that Hamilton did not receive the specified dose, and the impact information regarding its availability would have on a reasonably prudent patient's treatment decision) suggests that plaintiff could have discovered any unknown elements of this particular informed consent claim with only a small investigative effort.

DATED this 8th day of August, 2002.

Robert S. Lasnik
United States District Judge