LAW REPORTER

VOLUME 51, NUMBER 4 MAY 2008

SPOTLIGHT

RECENT CASES

AMERICAN ASSOCIATION for JUSTICE

~ ENDOWED BY SIDNEY GILREATH ~

SPOTLIGHT

False patent claims prevent woman from saving umbilical cord blood for her children's treatment.

Christopher v. PharmaStem Therapeutics, Inc., N.Y., Westchester Co. Sup., No. 22379/05, Mar. 14, 2008.

When Susan Christopher, 31, was pregnant with her third child, Noah, in 2004, she decided to harvest the umbilical cord blood after his birth. Cord blood is a source of stem cells—unspecialized cells that produce all other cells—that can be transplanted to treat over 70 diseases, including leukemia and lymphoma. The unique ability of stem cells to develop into any of the other types of cells in the human body, including heart, muscle, and nerve cells, endows them with the potential to cure diseases such as diabetes and Parkinson's in the future.

Susan was especially interested in saving her umbilical cord blood because her two older children, Quinn and Elizabeth, both suffer from diseases that someday might be treatable with stem cells. Quinn suffers from a profound bilateral sensor neural hearing loss and Elizabeth from retinoblastoma, a rare tumor of the retina that required the removal of her right eye. Ninety-five percent of the time, retinoblastoma affects children under the age of 5, and the risk of a second cancer in the future is substantial.

Prior to Noah's birth in September 2004, Susan contracted with ViaCord, Incorporated, an umbilical cord blood "bank," to cryopreserve the blood. Because the cord blood has to be collected immediately after a woman gives birth, the obstetrician delivering the baby must collect it. The cord blood is then sent to an independent laboratory to be preserved. Susan notified her obstetricians of her intent to cryopreserve so that the doctor attending her birth might collect the blood.

During Noah's delivery, a nurse reminded the attending obstetrician to collect the cord blood, and he asked which company would be preserving it. Upon hearing that it was ViaCord, the doctor refused to collect the cord blood, explaining that he had received a letter earlier that week from a company—PharmaStem Therapeutics, Incorporated—threatening a lawsuit for patent infringement if he collected blood for cryopreservation with ViaCord or certain other entities.

The doctor was one of 25,000 physicians who received this form letter, dated June 1, 2004, from PharmaStem, a company claiming to be "the pioneer in the development of umbilical cord and placental blood preservation for therapeutics." The letter, which stated that "patent infringement occurs when a person or institution practices all or part of a patented process," also referred to an ongoing suit in a federal district court that PharmaStem brought against ViaCord's parent company, ViaCell, Incorporated, and others alleging infringement of two of its patents. *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, No. 1:02-cv-00148 (D. Del. filed Feb. 22, 2002). The letter falsely stated that the court in *PharmaStem* ruled that when umbilical cord blood is collected by an obstetrician, infringement occurs even if cryopreservation and storage is performed by a third party. In reality, the court never made such a ruling. It did, however, issue an order in July 2004—two months before Noah's birth and one month after the form letter was written—finding that the letter contained false and misleading statements. PharmaStem never alerted the letter's recipients to this fact or informed them that there was a pending motion for judgment as a matter of law of noninfringement of the patents.

The day after Noah's birth, the court in *PharmaStem* held that the defendants did not infringe one of the patents under litigation. The Federal Circuit Court of Appeals ultimately affirmed the finding and held that the defendants also did not infringe the remaining patent. *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, 491 F.3d 1342 (Fed. Cir. 2007).

With the help of AAJ members Renee Simon-Lesser and Leonard F. Lesser, both of New York City, Susan sued PharmaStem and its chief executive officer for deceptive business practices. Suit against PharmaStem alleged fraud, negligent misrepresentation, tortious interference with her relationship with ViaCord and her obstetrician, and deceptive acts and practices, in violation of state law. Specifically, Susan alleged that the June 2004 letter was materially misleading because it did not disclose the pending motion, and that it contained false and misleading statements of fact. Even if PharmaStem did not know the statements were materially false and misleading, Susan contended, it was careless in making such statements, which were relied on by her obstetrician when he refused to collect the cord blood.

Defendants initially sought dismissal of the suit, arguing that any misrepresentation made to Susan's doctor was not actionable by Susan. The court denied the motion, finding that Susan's complaint stated valid claims based on the defendants' communications to her physician, which caused him to deny her medical services. *Christopher v. PharmaStem Therapeutics, Inc.*, 824 N.Y.S.2d 761 (N.Y. Sup. 2006).

In December 2007, the court held the defendants in

default for failing to appear at a trial readiness conference and for failing to comply with court discovery orders. The defendants' answers were stricken, and the case was scheduled for a damages inquest.

Lesser says that a problem they faced during preparation for the damages trial was assigning a value for Susan's loss of cord blood. "How does the jury value that loss without definitive evidence that it could be actually used to treat in the future?" he pondered. While they felt they would be able to recover a significant sum from a jury, any large verdict would have been appealed by defendants. Lesser added, "We also knew that PharmaStem had little cash remaining, and its only real assets—its patents—were rejected by the district court and the federal circuit."

The parties mediated a settlement in January 2008, but the company's board delayed approval, which buttressed the attorneys' suspicions that the defendants might be stalling to deplete the company's assets. In February, the court denied the defendants' motions to vacate their default. In addition, the court sanctioned them and their counsel almost $17,700 for frivolous motion practice. Following the court's award of sanctions, the parties settled for $400,000 in March with no admission of liability by the defendants.

While the Christophers are pleased the case is over, Lesser notes that "it's bittersweet for them because money will never replace what was taken." The Christophers' daughter Elizabeth was hospitalized earlier this year and, without the cord blood, the family is left feeling helpless. "PharmaStem's acts robbed the Christophers of their hopefulness," Simon-Lesser says. "The umbilical cord blood preservation industry sells peace of mind," Lesser observes. "You don't know that the [cord] blood will cure, but it's there, and at least you know you've done everything you can for your family."

MELISSA C. HEELAN

Comment: Shortly after the settlement, the U.S. Supreme Court denied PharmaStem certiorari on its patent infringement claim, letting stand the appellate court ruling that other cryopreservation companies did not infringe PharmaStem's patents. *PharmaStem Therapeutics, Inc. v. ViaCell, Inc.*, ___ S. Ct. ___, 2008 WL 102402 (Mar. 17, 2008).

Documents in the *Christopher* case are available through the Court Documents section in the back of this issue, courtesy of plaintiff's counsel.