

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

THE WASHINGTON UNIVERSITY,)
)
 Plaintiff,)
)
 v.) Case No. 4:03 CV 01065 SNL
)
 WILLIAM J. CATALONA, et al.)
)
 Defendants.)

PLAINTIFF'S POST-TRIAL BRIEF

1. The Research Participants Donated Their Tissue And Blood Samples To Washington University, Which Now Owns Them.

(a) *Moore and Greenberg Are The Controlling Precedents.*

While this is an important case, it is not a case of first impression. Two courts have already reviewed the law in this area in painstaking detail, and both of them decided that research participants retain no ownership of the biological specimens they contribute to medical research. *Moore v. Regents of the University of California*, 51 Cal.3d 120, 271 Cal. Rptr. 146, 793 P.2d 479 (1990); *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

In both cases, the research participants asserted a claim for conversion of the tangible tissue specimens they had provided for medical research. In both instances, the court held that (1) the conversion claims failed, (2) the research participants had freely donated the samples to the institution for purposes of research only with no expectation of ever regaining the samples, and (3) the research participants retained no ownership of the tissue samples. *Moore*, 51 Cal.3d 120, 137, 140-41, 271 Cal. Rptr. 146, 156, 159; *Greenberg*,

263 F. Supp. 2d 1064, 1074-76. Likewise here, the research participants donated the prostate tissue and blood samples to Washington University (“WU”) for medical research rather than for patient care, and they had no expectation of ever obtaining the samples back. Under *Moore* and *Greenberg*, WU owns the samples, and the research participants have no right to direct that possession of the samples be transferred to anyone else.

In *Greenberg*, where the plaintiffs supplied tissue and blood samples to the defendants for research on Canavan disease, the Court observed that “these Plaintiffs are more accurately portrayed as donors rather than objects of human experimentation” 264 F. Supp. 2d at 1071. It held that the plaintiffs “have no cognizable property interest in body tissue and genetic matter donated for research under a theory of conversion.” *Id.* at 1074. As the Court explained, “the research participant’s property right in blood and tissue samples also evaporates once the sample is voluntarily given to a third party.” *Id.* at 1075.^{1/}

In *Moore*, the California Supreme Court exhaustively reviewed the law relating to the ownership and use of human tissue. It observed that, because the plaintiff who provided cells for certain research “clearly did not expect to retain possession of his cells following their removal, to sue for conversion he must have retained an ownership interest in them.” 51 Cal. 3d at 136-37, 271 Cal. Rptr. at 155-56. “If the use of cells in research is a conversion, then with every cell sample a researcher purchases a ticket in a litigation lottery.” 51 Cal. 3d at 146, 271 Cal. Rptr. 146, 162-63. See *Miles v. Scripps Clinic & Research Foundation*, 810 F. Supp. 1091, 1097 (S.D. Cal. 1993). *Moore* held the plaintiff had no ownership interest, observing that no reported decision had ever held that a plaintiff retained an ownership interest in cells excised for

^{1/} *Greenberg* distinguished those cases that recognized a continuing property right in a couple’s stored frozen embryos, stating “These cases, however, do not involve voluntary donations to medical research.” (*Id.*)

medical research. 51 Cal.3d at 137, 271 Cal. Rptr. at 156. The Court also noted that the plaintiff could not have an ongoing ownership interest in removed tissue because of the laws requiring the disposal of such materials as hazardous biological waste. 51 Cal. 3d at 40-41, 271 Cal. Rptr. at 158-59.

Significantly, both *Moore* and *Greenberg* found that the research participants had parted with all ownership rights in the tissue samples when they donated them to the institutions, even though there was no provision in the informed consent forms stating either that the participants donated their tissue or waived their rights to ownership of the tissue. With the same of the federal regulations in place as are operative here (45 C.F.R. Part 46, known as the Common Rule) and despite the absence of any language of ownership or donation in the informed consent form, the Courts in both *Moore* and *Greenberg* concluded that the actions of the research participants amounted to the making of a gift to the research institution.

(b) The Research Participants Donated Their Biological Samples To Washington University.

Missouri law is in accordance with the analysis in *Moore* and *Greenberg*. Under Missouri law, a gift requires only donative intent, delivery by the donor, and acceptance by the donee. *Donnelly v. Donnelly*, 951 S.W.2d 650, 653 (Mo. App. 1977). “The essentials of an *inter vivos* gift of personal property . . . are: ‘a present intention to make a gift on the part of the donor, a delivery of the property by the donor to the donee, and an acceptance by the donee, whose ownership takes place immediately and is absolute.’” *Wantuck v. United Savings & Loan Ass’n*, 461 S.W.2d 692, 694 (Mo. banc 1971).

All three elements of a gift are present here. First, the research participants clearly intended to donate their specimens. The research participants had no expectation that their tissue or blood samples would be returned (Tr. 1:134; 1:188-89; 2:78). They understood that

the specimens were a gift for medical research (Patients' Ex. 4 and 6; Tr. 1:164). The participants who provided prostate tissue samples understood that the research would not benefit them personally (because they already had their prostates removed) but could benefit future generations.

Dr. Catalona himself recognized on several occasions that the research participants were making a gift. His February 18, 2003 "Medical Consent & Authorization" form seeking consent for the transfer of samples to him at his new place of employment recited that the research participants had previously "donated" their samples (Pl. Ex. 4, p. 3). His correspondence both with the National Cancer Institute and with his superiors at WU referred to the research participants as having "donated" their samples (Pl. Ex. 6, 18; Tr. 2:35-36; 2:45-46). In his new position, Dr. Catalona regularly uses the consent form of his employer, Northwestern University, which informs research participants that they are "donat[ing]" tissue, blood and urine (Pl. Ex. 19; Tr. 2:46).

Second, the samples were delivered. The research participants agreed in their informed consents to allow WU physicians to save prostate tissue samples and WU nurses to take blood samples. Since the time of delivery, the Urology Division has kept the samples in freezers in the Wohl Building at WU Medical School (Tr. 1:79; 1:87; 2:9). Since the time of delivery, the research participants have never had the samples back in their possession.

Finally, WU accepted the samples. In fact, WU administered the GU Biorepository (Tr. 1:80). Its employees took the samples, preserved them, catalogued them, and stored them in the GU Biorepository. In some cases WU also stored split samples in its Siteman Cancer Center Tissue Procurement Core (Deft's Ex. FFFF). WU faculty members conducted a variety of research protocols using the samples (Pl. Exs. 55, 57, 58).

Having received and accepted the gift, WU owns the samples (Tr. 2:228-29). The three primary indicia of ownership of personal property are title, possession, and control. RESTATEMENT PROPERTY § 10 (1936). Where property is of a type that is not subject to title, exclusive possession and control of personal property creates a presumption of ownership. *Foltz v. Pipes*, 800 S.W.2d 14, 15 (Mo. App. 1990) (exclusive possession and control over property raises a presumption of ownership in the possessor, and anyone else claiming the property has the burden of proof). Since receiving them as gifts, WU has exclusively possessed and controlled the samples. On at least seven separate occasions, Dr. Catalona himself acknowledged WU's ownership of the samples by signing Material Transfer Agreements that expressly say that WU owns the samples (Tr. 1:104-05; 2:20-25, 27-28; *See e.g.*, Pl. Exs. 7, 8, 9, 10, 12, 13, 14).

WU's ownership of the samples became absolute once the research participants donated them because (a) the research participants could never get them back and (b) WU could keep them even if a participant chose to discontinue participation in research. Both federal and Missouri law govern the disposal of hazardous medical wastes. *See* 29 C.F.R. § 1910.1030 (bloodborne pathogens); R.S.Mo. §§ 260.200, 260.203 (infectious waste disposal); 10 C.S.R. § 80-7.010 (infectious waste disposal). These regulations prohibit the return of cancerous prostate tissue or human blood to research participants (Tr. 1:133). Tissue from prostatectomies that is not saved for research must be destroyed as biological waste (Tr. 2:17). *Moore* specifically recognized that these regulatory restrictions preclude a research participant from having any ongoing ownership interest in excised tissue or donated blood. 51 Cal. 3d at 40-41, 271 Cal. Rptr. at 158-59.

In *Cornelio v. Stamford Hospital*, 1997 Conn. Super. LEXIS 1928, the patient brought a replevin action against the hospital seeking to recover pap smear specimen slides containing

her tissue and genetic material. The court granted summary judgment to the hospital. The *Cornelio* court relied on *Moore*, on Connecticut's biological disposal statutes, and on "the practical public policy limitations placed on a patient's use of pathological wastes removed from his or her body." 1997 Conn. Super, LEXIS 1928 *24-25. The court also relied on *McGarry v. J.A. Merger Co.*, 272 Mich. 501, 262 N.W. 296 (1934), a case where the Michigan Supreme Court refused to turn over x-ray negatives to a patient. The *McGarry* court stated that the x-ray negatives:

"are as much a part of the history of the case as any other case record made by a physician or surgeon. In a sense they differ little if at all from microscopic slides of tissue made in the court of diagnosis or treating a patient, *but it would hardly be claimed that such slides were the property of the patient.*" 262 N.W. at 296 (emphasis added)

It is clear, then, that the research participants have no ownership interest in the tissue and blood samples in the GU Biorepository because they donated them to WU for medical research. "At the core, these were donations to research without any contemporaneous expectations of return." *Greenberg*, 264 F. Supp. 2d at 1076. Even defendants' expert, who is a lawyer and a physician, conceded that the conclusion in *Greenberg* was based on the donation made by the research participants.^{2/}

^{2/} "Q. Part of the claim by the plaintiff in both *Moore* and *Greenberg* was a conversion claim, that the defendant had converted the physical tangible sample that they provided, correct?

A. That's correct.

Q. And both of those courts ruled that that conversion claim failed because the research participants had voluntarily donated those samples to the institution, correct?

A. I would say that that's a matter for the judge to decide, but I will say generally yes." (Tr. 1:147-48).

(c) The Research Participants Have No Continuing Right To Transfer The Previously-Donated Samples.

The determinative test is the research participants' intent as manifested at the time they donated their samples, not what they say years after the fact and once they know which answer will assist Dr. Catalona. *Donnelly*, 951 S.W.2d 650, 653 (“[O]nce a gift is made, the donor may not revoke the gift upon a change of mind”); *LeMehaute v. LeMehaute*, 585 S.W.2d 276, 281 (Mo. App. 1979) (“An afterthought of regret does not nullify the passage of title by a delivery and made by the grantor”).

The informed consent forms thoroughly discredit what Dr. Catalona and the testifying patients now say. The forms signed by two of the three testifying patients^{3/} (Messrs. Ward and McGurk) included the unequivocal statement: “By agreeing to participate in this study, you agree to waive any claim you might have to the body tissues [that] you donate.” (Patients’ Exs. 1, 7; Tr. 1:217; 2:75). The form executed by Mr. Ellis talked about his “donation” of blood (Patients’ Ex. 4, p. 2; Tr. 1:164). Under Missouri law, these contemporaneous written acknowledgements trump the patients’ present assertion that they somehow retain the right to control the specimens that they donated many years ago.

Moreover, under applicable federal regulations, WU has the right to keep the samples even when participants withdraw from the research. An informed consent form must advise a participant that he can “discontinue participation” in research at any time without penalty. 45 C.F.R. § 46.116(a)(8). It is undisputed that all of the WU forms

^{3/} The eight patients who joined the case on the side of Dr. Catalona, including the three testifying patients, have made no showing that they represent research participants generally. Unlike many of the research participants who were either patients of other WU physicians or who simply donated serum in response to local ads, the three who testified were patients of Dr. Catalona who expressed a strong personal connection to him (Tr. 1:162-63; 2:73-74). In any event, the patients have proven none of the elements necessary for class treatment. Indeed, they have not even sought class certification.

complied with this requirement by so advising the participants that they may withdraw their consent to participate at any time (Pl. Exs. 27, 56, 57, 58, 59, 61, 98; Deft's Ex. 4, EEE, UUU, JJJJJ; Patients' Exs. 1, 7, 10, 13, 16, 19, 22).

The participants' right to "discontinue participation" in a study neither states nor implies any right (1) to control the future use or disposition of the physical specimen, (2) to direct the handling, storage or location of the specimen, or (3) to direct its transfer elsewhere (Tr. 2:164-65; 2:229-30) The regulations say nothing about such a "right" (Tr. 1:132-33; 2:222-24). No such "right" to transfer samples appears in the medical or ethical literature (Tr. 1:181-83). "Discontinue participation" or "withdraw your consent" mean exactly that — nothing more. Accordingly, because no such right exists, WU never promised a research participant in any consent form that WU would return or transfer the samples upon discontinuation of participation (Tr. 2:102; 2:174).

If a participant withdraws his consent to participate, any one of three things may happen: WU may (1) destroy the sample, (2) store the sample indefinitely without using it any further in the research protocol, or (3) remove all personal identifiers from the sample and continue to use it in exempt "anonymized" research.

WU has the discretion to destroy the sample when a participant discontinues participation (Tr. 1:135-36; 2:224).^{4/} Quite significantly, the experts for both Dr. Catalona (Dr. Goodman) and the defendant patients (Dr. Clayton) conceded that the research institution can properly choose to destroy samples without the approval of the participants who donated the materials (Tr. 1:135-36; 1:194). That is exactly what Dr. Catalona did while

^{4/} Of course, if an informed consent form expressly provides that a sample will be destroyed when a participant discontinues participation and so requests (Pl. Ex. 27; Deft's Exs. Y, Z), WU would be required to abide by that provision of the agreement.

managing the studies at WU. He frequently and regularly purged and destroyed what he determined to be excess blood samples collected in the PSA Study without obtaining any consent from the contributing participants (Tr. 1:87-89). WU's admittedly lawful right to destroy samples serves to confirm WU's ownership and is wholly inconsistent with defendants' assertion that the research participants retain any ownership rights in the samples.

Alternatively, WU can elect simply to store samples indefinitely after the participant discontinues participation (Tr. 1:194; 2:164-65).

Finally, WU could choose to anonymize the samples and continue to use them in research (Deft's Exs. B, C, D; Patients Ex. 66). Controlling federal regulations specifically provide that the following types of research are not considered "human subject research" and are therefore exempt from the federal regulations governing human subject research:

"(4) Research, involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in such a manner that subjects cannot be identified, directly or through identifiers linked to the subjects." 45 C.F.R. 46.101(b)(4)

See also 45 C.F.R. 46.102(f) (not "human subject" research if researcher does not obtain identifiable private information); 45 C.F.R. 164.514 (de-identified samples excluded from HIPAA protected information) (Tr. 1:140-41).

Both Dr. Ludbrook, the chairman of Washington University's Institutional Review Board ("the Human Studies Committee"), and Dr. Prentice, a recognized expert in the field, explained that anonymization is a response available to the research institution when a participant chooses to discontinue participation in research (Tr. 2:164-65; 2:224).

Consistent with this alternative, Dr. Catalona himself is now building a new collection of samples at Northwestern University using consent forms which tell the research participants:

“If you withdraw your permission to use any blood or tissue obtained for the Study, the Principal Investigator will ensure that these specimens are destroyed *or will ensure that all information that could identify you is removed from these specimens*” (emphasis added) (Tr. 2:43-44; Pl. Ex. 16). The Northwestern University consent form specifically and properly recognizes a research institution’s right to anonymize samples; it quite correctly does not say that samples may be transferred at the direction of or returned to research participants (Tr. 2:44-45).

WU does not, of course, wish to anonymize the entire GU Biorepository and has no plans to do so. Currently, the samples are still linked to participants’ identities. While research on linked samples can arguably be scientifically more valuable than research on anonymized samples, scientific value is not to be confused with legal rights. In fact, however, valuable research can proceed even if samples are not irretrievably de-identified. It is possible to ensure anonymity while retaining information about the individual source such as age, ethnic origin and limited clinical data (Tr. 1:146-47). The Material Transfer Agreement for the proteomics research, which NCI wanted to perform before Dr. Catalona raised the specter of this dispute, provided that NCI would not have access to patient identities, and it would have been exempt research (Pl. Ex. 93; Tr. 1:145-46; Tr. 2:141-42).

The exemption at 45 C.F.R. § 46.101(b)(4) applies whenever the researcher is unable to identify the research participants. The Office of Human Research Protection (OHRP) has explained that research is exempt if, for example, a researcher receives samples from an existing collection and the owner of the collection by contract agrees that the researcher will not have access to the donors’ identities (Ex. 94). Important indicia of WU’s ownership are that research participants cannot get the samples back again (they are hazardous medical

waste) and that, when a participant discontinues participation, WU still has the right to destroy the samples, to keep them, and (if anonymized) to use them.^{5/}

(d) The Evidence Belies The “Bailment” Theory.

Confronted with the law and facts demonstrating that WU owns the samples, Dr. Catalona has alleged that WU is a mere bailee (Catalona Counterclaim filed Oct. 21, 2004, Count V, pp. 33-35, ¶ 91-102). One requirement of a bailment is the condition that the property be restored to the bailor according to the bailor’s directions as soon as the purposes for which the property was bailed are served. *Seitz v .Lemay Bank & Trust Co.*, 959 S.W.2d 458, 461 (Mo. banc 1998). The problem, however, is that the facts demonstrate there was no bailment.

The research participants had no expectation that the excised tissue samples would ever be returned to them (Tr. 2:78). Their own expert witnesses conceded that (Tr. 1:134; 1:188-89). Similarly, WU’s witnesses were unaware of any instance where any research participant ever had his samples returned to him (Tr. 2:101-02; 2:166). Dr. Prentice, who has been a consultant to 20-30 research institutions, also is aware of no instance where any institution has returned a sample to a research participant (Tr. 2:222). Dr. Catalona himself could recall only one or two instances over the years where a patient sought the transfer of samples, and that was for *clinical* purposes (Tr. 2:16-17).

Indeed, Dr. Catalona’s entire course of conduct prior to this dispute demonstrates a recognition that the research participants have no ongoing right of control over the samples. First, he routinely purged excess blood samples without the research participants’ knowledge

^{5/} All of defendants’ arguments about anonymization are sound and fury. This Court need not get caught up in the quagmire defendants seek to create because WU’s alternative rights to keep the samples or to destroy them is uncontroverted.

and consent when there was no more room to store those samples (Tr. 1:87-89). There is no way he could do that if the participants truly owned or had the right to control their own samples. Second, just prior to his move to Northwestern, he transferred the remaining active research protocols to one of his colleagues, Dr. Brian Suarez (Pl. Ex. 29). There is no evidence that, in effecting this transfer, he ever sought the consent of the research participants who allegedly owned the research materials. Finally, he signed the long series of Material Transfer Agreements (“MTAs”) acknowledging WU’s ownership of the samples (Pl. Exs. 7, 8, 9, 10, 12, 13, 14, 15; Tr. 1:104-05; 2:20-25, 27-28).

This last point may be the most important. Dr. Catalona used MTAs prepared by WU’s Office of Technology Management (OTM) whenever he wanted to send samples from the GU Biorepository to researchers at other institutions (Tr. 1:103). These agreements often identify Dr. Catalona as the “Provider Scientist,” but they define WU as the “Provider” (*See e.g.*, Exs. 12, 14) and state that the “[t]he material shall remain the property of the Provider” *Id.* Dr. Catalona thus recognized and made his collaborators agree that the GU Biorepository materials are WU’s property.

Dr. Catalona signed many such MTAs in which he expressly acknowledged WU as the owner of the GU Biorepository (Pl. Exs. 7, 8, 9, 10, 12, 13, 14; Tr. 1:104-05; 2:20-25, 27-28). Shortly before he left WU, Dr. Catalona tried to insert language in an MTA making himself “co-owner,” but WU refused that request. Dr. Catalona signed the agreement without the “co-owner” language, though he protested in a separate message that he believed he had “proprietary rights” to the materials (Tr. 2:25-27). Dr. Catalona had signed many MTAs before ever raising this issue (Tr. 2:27). He claimed he signed this last MTA under “duress,” but the only duress was that WU would not sign the agreement with the language he wanted (Tr.2:25-26).

By signing these MTAs, Dr. Catalona made an admission against interest that WU owns the biological materials. *See, e.g., Pillsbury Co. v. Cleaver-Brooks Div. of Aqua-Chem. Inc.*, 646 F.2d 1216, 1218 (8th Cir. 1981) (by signing report, defendant adopted plaintiff's statement even though he was not present during conversation that formed basis for report); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 930 (3d Cir. 1985) (“McQueeney’s signature on each of the cards is an unequivocal adoption of the contents therein.”)

(e) Dr. Catalona Acted In His Capacity As A WU Employee. He Acquired No Personal Proprietary Interest In The Samples.

Everything that Dr. Catalona cited to support his claim of a “proprietary” interest in the samples was done in his capacity as a representative of WU. At all relevant times, Dr. Catalona was an employee of WU. He received his salary and all benefits from WU. He practiced medicine only as a WU employee (Tr. 1:78-79). Dr. Catalona was one of many doctors in the Urology Division (Tr. 2:86-87).

The research participants signed on to participate in studies at WU (Tr. 2:10). Many research participants were patients treated by other WU physicians (Tr. 1:83). Some provided their samples for research in which faculty members other than Dr. Catalona was the Principal Investigator (Pl. Exs. 56, 57, 58, 59; Tr. 1:80-82; 2:94-97). Many research participants were not patients of anyone at WU (Tr. 2:86). The consent forms they signed typically bore the WU Medical Center logo (Pl. Exs. 27, 58, 59, 60, 61, 98; Patients’ Exs. 4, 7, 10, 13, 19, 54, 59, 60). The consent forms stated they were not valid without the stamp of approval of the WU Human Studies Committee. *Id.* These forms advised the participants they could contact the Chairman of the WU Human Studies Committee with any concerns (*id.*). They advised the participants what WU would do to protect their privacy and minimize the burdens of participating in the study (*id.*).

The informed consents don't say the participant is entrusting his samples to Dr. Catalona. In those cases in which he was named as Principal Investigator, the informed consents merely stated: "You are invited to participate in a research study conducted by Dr. William J. Catalona and/or colleagues" (Pl. Exs. 27, 61, 98; Patient's Exs. 1, 7, 10, 13, 16, 19, 22). The disjunctive "or" even indicates that the study may be conducted by someone other than Dr. Catalona. In fact, Dr. Catalona conceded that others at WU made significant contributions to the research and that this work involved collaborative efforts (Pl. Exs. 3, 75; Tr. 1:74; 2:4-8; 2:88).

After the participants gave their samples, WU did what owners do. It kept the GU Biorepository at the medical school (Tr. 1:79; 2:89-90). WU personnel administered the GU Biorepository (Tr. 1:80). The financial reserves of the Urology Division paid for the lion's share of it (Tr. 2:99-100). Those research projects that received external funding were based on grants made to and administered by WU (Pl. Exs. 54, 72, 73; Tr. 1:79-80; 2:100). Even though Dr. Catalona helped raise money for the GU Biorepository, he did that as part of his WU responsibilities, and he does not claim ownership by virtue of being a fundraiser (Tr. 1:71, 80). (In any event, the amount of funds he raised pale in comparison to the amount raised by other WU faculty members, such as Dr. Andriole (Tr. 1:44-45; 2:86)).

WU also bears legal, regulatory, and compliance responsibility and risk for all the research its faculty performs. *See, e.g.*, 42 C.F.R. Part 50 (governing conflicts of interest); 45 C.F.R. Part 689 and 42 C.F.R. Part 50 (governing research integrity and scientific misconduct); 45 C.F.R. Part 46 (human research protections); 45 C.F.R. 46.103 (Assurance). WU is the federally approved and regulated institution for the human-subject research involving the GU Biorepository. WU has been subject to complex and costly regulation throughout the life of the GU Biorepository, implemented through audits and a substantial internal compliance

program. In addition, WU is subject to the federal and state laws and regulations governing the disposal and storage of human biological material, and it is responsible for compliance with such laws and regulations. *See, e.g.*, 29 C.F.R. § 1910.1030 (“Bloodborne Pathogens”); 10 C.S.R. § 80-7.010 (“Infectious Waste Management”).

WU’s internal policies also make it clear that WU — not Dr. Catalona — owns the GU Biorepository. For example, WU Policies and Procedures expressly state: “Investigators who leave the University are prohibited from taking . . . blood or tissue samples . . . unless they have prior written approval from the Vice Chancellor for Research” (Def’t’s Ex. U; Patients’ Ex. 55). WU’s Intellectual Property Policy also makes clear to its employees that WU owns the GU Biorepository (Pl. Ex. 17; Tr. 1:102-03). The Policy provides that tangible research property — including biological materials — belong to WU if (a) significant University resources are used *or* (b) the research was funded by an external grant made to and administered by the University. The GU Biorepository was collected and is maintained both with internal Urology Division funds and with grants provided to WU from external sponsors (Tr. 2:99-100). Under the WU Intellectual Property Policy, both of these sources of funding result in WU’s ownership of the GU Biorepository. Both the WU Policies and Procedures and the Intellectual Property Policy are binding on Dr. Catalona because such university policies are widely recognized as valid and enforceable conditions of employment. *Chou v. University of Chicago*, 254 F.3d 1347, 1356-57 (Fed. Cir. 2001); *Fenn v. Yale University*, 283 F. Supp. 2d 615, 628-29 (D. Conn. 2003); *University of West Virginia v. Van Voorhies*, 84 F. Supp. 2d 759, 771 (N.D. W.Va. 2000). The Urological Research Foundation, of which Dr. Catalona is Medical Director, has also agreed to WU’s Intellectual Property Policy (Def’t’s Ex. AAAA).

Faced with all of this, defendants have been all over the lot on the issue of ownership. Their expert could not say who owns the samples (Tr. 1:128). Dr. Catalona refused to express

an opinion on ownership but then claimed he had “a strong proprietary interest in the broad sense of the word” (Tr. 1:92; 2:91). Despite his own alleged “interest” in the samples, he believes that the research participants’ wishes should control (Tr. 2:13) and that the participants could change their mind and have samples transferred to another prostate surgeon (Tr. 2:95). On the other hand, he was unwilling to say that those same participants could direct their tissues to third parties who are not renowned prostate surgeons (Tr. 2:94).

Dr. Catalona could not say whether he was seeking the samples donated (1) only by those who returned his “Medical Consent & Authorization” form or (2) by everyone who contributed to the Biorepository or (3) by no one (at least until he procured valid informed consents through Northwestern) (Tr. 1:58, 73, 90-91; 2:10-11). At other times, he said he was entitled to the samples of those 6,000 who did sign his “Medical Consent & Authorization” form (Tr. 1:101) because “a true informed consent should not really be necessary” (Tr. 2:61)! In the final analysis, however, this Court has correctly observed that Dr. Catalona already conceded he had no ownership rights himself (Order dated February 11, 2005 at: “[D]efendant . . . conceded[es] that he does not own the subject materials”).^{6/}

2. The Regulatory Guidance Against “Exculpatory Language” Does Not Diminish Washington University’s Ownership Of The Samples.

Dr. Catalona and his co-defendants contend there was no gift to WU because certain language contained in some of the informed consent forms was “exculpatory” and thus

^{6/} In his Answer (Dkt. No. 18), Dr. Catalona “denies he has asserted an ownership interest over the Catalona Collection” (¶ 3). “Dr. Catalona denies that he claims ownership of the Catalona Collection or any samples in any collection now housed with Washington University” (¶ 22). “Dr. Catalona denies he has ever claimed a personal ownership of the Catalona Collection” (¶ 31).

In his Pre-Hearing Brief (Dkt. No. 101), he stated “the Patients have the ultimate right of ‘ownership’ in the samples” (p.3). “[T]he Patients, with this superior right to control their samples, are the ‘owners’ of their samples” (p.4).

prohibited by federal regulations, 45 C.F.R. § 46.116 (Pl. Ex. 39). There are at least five reasons why the defendants are wrong.

First, the presence of such “exculpatory” language is unnecessary to make a gift. In fact, there is no legal requirement of any written acknowledgement of a donation in order to make a gift. Again, a gift of tangible personal property only requires donative intent, delivery, and acceptance. *Donnelly*, 951 S.W.2d at 653 (citing *Duwall v. Henke*, 749 S.W.2d 714 (Mo. App. 1988)). A written instrument, such as a deed, is unnecessary. *Donnelly*, 951 S.W.2d at 653. Both *Moore* and *Greenberg* concluded that the research participants donated their tissue samples to the institution even though there was no express statement to that effect in the consent forms. *Moore*, 51 Cal.3d 120, 132, 271 Cal. Rptr. 146, 152, 154, 159; *Greenberg*, 264 F. Supp. 2d 1064, 1074-76. Thus, even striking the allegedly “exculpatory” language entirely from the informed consent form would not alter the fact that a gift had been made.

Second, the presence of “exculpatory language” in the informed consent does not negate a gift. The requirements for the content of an informed consent are governed by federal law (if federal funds are used for the research). 45 C.F.R. § 46.101(a). But the question of ownership of property — the issue in this case — is a matter of state law. *See e.g., Phillips Petroleum Co. v. Mississippi*, 489 U.S. 469, 484 (1988); *Zaiser v. Miller*, 656 S.W.2d 312, 316 (Mo. App. 1983). Indeed, the eight patients conceded in their pre-hearing brief that this case should be determined on the basis of state law (Patients’ April 4, 2005 Pre-Hearing Br. at 3). Their own expert testified that the rights of these research participants would be governed by Missouri law (Tr. 1:117). Messrs. Ward, McGurk, and other research participants expressly agreed they would have no further ownership interest in the tissue samples they donated (Patients’ Exs. 1, 7). Under the applicable Missouri law, the

statements of Messrs. Ward, McGurk and others expressly donating their samples and relinquishing ownership of them demonstrate rather than negate their donative intent.

Third, any prohibition on “exculpatory” language in informed consent documents does not suggest or establish any ownership rights in the participants. The lone, non-binding guidance document suggesting that informed consent forms ought not include waivers of any rights to samples that research participants may have does not create ownership rights. The guidance document, Deft’s Ex. Q, speaks of rights the participants “may have.” It does not say they “do have” such rights. (*See* Office for Protection from Research Risks, Cooperative Oncology Group Chairpersons Meeting, “Exculpatory Language” in Informed Consent, available at <http://www.hhs.gov/ohrp/humansubjects/guidance/exculp.htm> (Nov. 15, 1996)). The federal regulations and OHRP’s position on ownership of tissue samples are entirely neutral (Tr. 2:170; 2:226-27). Dr. Catalona’s own expert agreed that a prohibition against waiving a right does not imply that the participant has an underlying right (Tr. 1:189-90). Here is what Dr. Goodman said:

“Q. The prohibition on exculpatory language would say you can’t ask a participant in advance to waive liability for medical malpractice in an informed consent form, right?”

A. Correct.

Q. Because that would be exculpatory language, right?”

A. Right.

Q. Now that doesn’t mean that anybody’s committed medical malpractice or the person has a right to sue for it, it just means you can’t ask them to waive it, right?”

A. Right.

Q. So what you can say in terms of exculpatory language doesn't answer the question of what the underlying rights may or may not be between the research participant and the principal investigation or the institution, is that correct?

A. That's correct." (Tr. 1:190).

Fourth, Dr. Catalona is in no position to advance this contention because he sanctioned and even promoted such language when it was to his benefit. As Principal Investigator, Dr. Catalona prepared the consent forms he used with the assistance of his staff (Tr. 1:48). As Principal Investigator, Dr. Catalona used the same language he now decries as "exculpatory" in informed consents for which he was responsible (Tr. 2:19-20; 2:169-70; Pl. Ex. 98). He also advocated the use of what he now claims to be "exculpatory language" when he told Dr. Ludbrook that "I would . . . like to amend the consent forms to state that the patients waive their rights to the use of tissues for the development of commercializable products" (Pl. Ex. 15; Tr. 2:37-39).

Finally, the language in the informed consent documents relied on by Dr. Catalona and the defendant patients is not "exculpatory" within the meaning of the regulations. The single OHRP guidance document on waiver of ownership rights is not the law. Indeed, when it suits their purposes, defendants are dismissive of other OHRP guidance with which they disagree (Tr. 1:144). The guidance document in question, prepared at a Cooperative Oncology Group Chairpersons Meeting on November 15, 1996, cites examples that that group believed were "exculpatory" (Def't's. Ex. Q). These examples do not, however, appear anywhere in the regulations. They were not adopted pursuant to notice and comment rulemaking. Unlike agency rules and adjudications, such informal agency pronouncements "lack the force of law." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). They are not entitled to judicial deference under the doctrine of *Chevron U.S.A., Inc.*

v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). See *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001). Such interpretations are entitled to respect only to the extent they have the “power to persuade.” *Christensen*, 529 U.S. at 587. But the examples are not persuasive because the OHRP website offers no explanation or rationale for them.

The defendants rely on a single example from that informal guidance document, which states: “By consent to participate in this research, I give up any property rights I may have in bodily fluids or tissue samples obtained in the course of the research.” But the governing regulation, 45 C.F.R. § 46.116, is directed against “exculpatory” language in the form of a waiver or release from liability (Tr. 2:225):

“No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive any of the subject’s legal rights, or releases or appears to release the investigation, the sponsor, the institution or its agents from liability for negligence.”

Indeed, an “exculpatory” provision normally refers to just that — relieving a party from liability arising from the consequences of his negligence. *Valbal Corp. v. Sullivan Associates, Inc.*, 44 F.3d 195, 202 (3rd Cir. 1995); *Hornbeck v. All American Indoor Sports, Inc.*, 898 S.W.2d 717, 721 (Mo. App., W.D. 1995)(exculpatory clauses “exonerate a party from acts of future negligence”); Black’s Law Dictionary 608 (8th ed. 2004). A transfer of property by gift is not a negligent or wrongful act.

The regulation’s explicit prohibition of an advance release of liability for negligence reinforces the common meaning of “exculpatory.” Under the principle of *ejusdem generis*, the general reference to “exculpatory language” in the regulation should be construed consistent with the specific example given. NORMAN J. SINGER, SUTHERLAND, STATUTORY CONSTRUCTION, § 47:16 (6th ed. 2000)(“Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in

nature to those objects enumerated by the proceeding specific words. Where the opposite sequence is found, i.e. specific words following general ones, the doctrine is equally available”). Thus, the language in question is not “exculpatory” within the scope and purpose of the regulations.

As Dr. Ludbrook testified, the research community consistently understood the regulation’s prohibition against exculpatory language as a bar against releases from malpractice or other negligence (Tr. 2:168-69, 190-91). The refusal of the WU Human Studies Committee to challenge the non-binding guidance of an agency which controls government funding can hardly be construed as an admission that the guidance is legally correct. What the research participants did was to donate their specimens to WU for medical research. *Moore* and *Greenberg* make that clear. The agency guidance on exculpatory language does nothing to detract from WU’s clear ownership under Missouri law of the donated samples in the GU Biorepository.

3. General Statements Of Ethical Principles Relating To Human Subject Research Do Not Diminish Washington University’s Ownership Of The Samples.

Dr. Catalona relies heavily on the general principles governing human subject research set forth in the Belmont Report, the Declaration of Helsinki and the Nuremberg Code. The Belmont Report is the 1979 report of a Presidential Commission that summarizes the basic ethical principles underlying the conduct of biomedical and behavioral human subject research (Def’t’s Ex. MMMM). The World Medical Association developed the Declaration of Helsinki as a statement of ethical principles to provide guidance to physicians in connection with human subject research (Def’t’s Ex. NNNN). The Nuremberg Code, developed from the war criminal trials before the Nuremberg Military Tribunals, similarly deals with ethical principles governing human subject research (Def’t’s Ex. OOOO).

Neither the Belmont Report, the Declaration of Helsinki, nor the Nuremberg Code are law in this country (Tr. 1:129).

WU's agreement with the Department of Health and Human Services to be guided by the ethical principles in the Belmont Report (Def't's Exh. I) provides no basis for the claims of Dr. Catalona and his eight patients, none of whom are parties to or third-party beneficiaries of any government contract. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999); *Wright v. Fred Hutchinson Cancer Research Center*, 269 F. Supp. 2d 1286, 1290 (W.D. Wash. 2002). Equally important, defendants have made no showing that WU's refusal to turn the GU Biorepository over to Dr. Catalona constitutes a violation of the broad principles set forth in the Belmont Report.

Similarly, both because the federal regulations set forth in 45 C.F.R. Part 46 control and because there is no private right of action for violation of either the Declaration of Helsinki or the Nuremberg Code, neither Dr. Catalona nor his patients can obtain injunctive relief based on any alleged non-compliance with these general ethical principles. As the Court stated in *Ammend v. Bioport, Inc.*, 322 F. Supp. 2d 848, 872-73 (W.D. Wash. 2004) (*quoting Robertson v. McGee*, 2002 WL 535045 (N.D. Okla.):

“The Court agrees with other jurisdictions which have found that there is no private right of action for an alleged violation of international law for the protection of human research subjects under the Declaration of Helsinki and the Nuremberg Code. *See e.g., White v. Paulsen*, 997 F. Supp. 1380, 1383 (E.D. Wash. 1998) and *Hoover v. West Virginia Department of Health and Human Services*, 984 F. Supp. 978, 980 (S.D. W. Va. 1997) *aff'd* 129 F.3d 1259 (4th Cir. 1997). Moreover, the standard in the United States for conducting research on human subjects is contained in the Code of Federal Regulations and thus there is no need for the courts to resort to international law to impute a standard.”

Again, just as there has been no showing that WU's refusal to turn the GU Biorepository samples over to Dr. Catalona violates the Belmont Report, there is no

basis for claiming that such conduct contravenes the Declaration of Helsinki or the Nuremberg Code.

4. No Research Participant Has “Discontinued Participation” In A Legally Effective Way.

Neither the three patients who testified nor the larger group of research participants who signed Dr. Catalona’s disingenuous “Medical Consent and Authorization” form (Pl. Ex. 4) have ever elected to “discontinue participation.” Nothing in that form or anything else in the record states that any research participant seeks to discontinue participation in research. None of the three testifying patients asked to do that.

Rather, as discussed above, Dr. Catalona seeks to use that form to create rights broader than the right to discontinue participation — and which don’t exist under the federal regulatory scheme. In any event, however, that form, which Dr. Catalona sent or published to approximately 60,000 men (Tr. 2:32-33), is legally void. Every expert testified that it was not a valid informed consent (Tr. 1:38; 1:189-90; 1:200-01; 2:175-76; 2:233-35). It was never submitted for the required IRB review or approval (Tr. 1:34; 2:156-58; 2:174-76; 2:232).^{7/} As a result, although he called it an “informed consent” (Pl. Ex. 6; Tr. 2:37), Dr. Catalona had to concede that it was not a valid informed consent (Tr. 1:58, 73; 2:10-11). No IRB could have approved that form because it did not comply with the regulation governing informed consent (Tr. 2:177-78; 2:233-36). The form and the cover letter which

^{7/} Dr. Catalona attempted to justify his failure to obtain IRB approval for this communication to the research participants on the grounds that there was “no change” to the protocol (Tr. 2:11). He said this even though (a) he was no longer the Principal Investigator on any of the studies involving the samples he sought to have transferred, (b) Northwestern had not approved any protocol or informed consent (Tr. 2:11)! Transferring control of samples to someone who is no longer the Principal Investigator and to a different institution that does not have an IRB approved protocol for the study in question is a “change” by any definition of the word (Tr. 2:231-32).

Dr. Catalona sent with it improperly suggested that consent was necessary for the participant's continued personal medical care (Tr. 2:177; 2:235-36). In violation of 45 C.F.R. § 46.116(a)(4), it did not adequately explain alternatives to the consent Dr. Catalona requested, including continuation in the research at WU (Tr. 2:234). In violation of 45 C.F.R. 46.116(a)(8), it did not explain that the participant could discontinue participation in Dr. Catalona's research without any penalty (Compare Pl. Ex. 4 to 45 C.F.R. 46.116(a)(8) set forth in Pl. Ex. 38). In violation of 45 C.F.R. 46.116(a)(1), it did not describe the research to be conducted, its purposes, or its expected duration (Tr. 2:233-34). Instead, Dr. Catalona's letter and "Medical Consent & Authorization" form purported to give Dr. Catalona a blank check to do whatever he wants. Finally, Dr. Catalona was no longer the principal investigator on any open study for which any of the samples were originally collected when he solicited the research participants' "consent" on February 18, 2003 (Tr. 2:33). While he had treated some of the men who signed that form, most of those to whom he sent the form were not his patients (Tr. 1:59-60; 1:69-70).

If Dr. Catalona's invalid letter and consent form were somehow construed as the participants' election to discontinue participation in research (albeit with no evidence of such intent) and then used to create new "rights" never recognized in the regulations or case law, the result would not only be to overturn state law on gifts and ownership but also to create bad policy. For example, unregulated proxy battles could occur. Other urologists at WU could ask research participants to sign forms directing Northwestern to send the samples back to WU (Tr. 1:140; 1:201). The scientists at the National Cancer Institute who had arranged with WU to use some of the samples could also correspond directly with the research participants and ask them to direct that the samples be sent to NCI. Research participants could sell their samples to the highest bidder (Tr. 2:228). Dr. Catalona's interpretation would balkanize large collections of

biological materials, discourage investment in maintaining and collecting them, and promote instability at the expense of scientific progress (Tr. 2:228).

CONCLUSION

For the foregoing reasons, the Court should (1) deny defendants any injunctive relief and (2) declare that (a) Washington University owns the tissue and blood samples in the GU Biorepository, (b) neither William Catalona nor any of the research participants has any ownership interest in the samples, (c) the so-called medical consent & authorization forms are ineffective to transfer ownership or possession of any samples to Catalona or Northwestern University, and (d) none of the defendants shall in any way interfere with WU's rights to use the samples.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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