No. SC92790

IN THE
SUPREME COURT OF MISSOURI

JOHN DOE 1631,

Plaintiff/Appellant
v.
QUEST DIAGNOSTICS, INC., LABONE, INC., and QUEST DIAGNOSTICS CLINICAL LABORATORIES, INC. d/b/a QUEST DIAGNOSTICS,

Defendants/Respondents

Appeal from the Circuit Court of the City of St. Louis,
Cause No. 0822-CC07710,
The Honorable Judge Dennis Schaumann, Judge Presiding

DEFENDANTS/RESPONDENTS' SUBSTITUTE BRIEF

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COUNTERSTATEMENT OF THE FACTS

On July 24, 2006, Appellant Doe had an appointment with Matthew German, MD, Doe's primary care physician and HIV specialist. Doe was on medication to treat HIV. (SLF 521, depo. of M. German, M.D. at 10).[1] Dr. German ordered two tests to be performed on Does' blood "to make sure the medications were working and we can tell if the virus is fully suppressed[.]" (SLF 521, trial depo. of M. German, at 10-11).

Physicians order testing from diagnostic testing laboratories by completing a document known as a "requisition," which is a written order to the laboratory instructing what tests are to be performed, to whom, how and where the results are to be reported. (TR 363).Dr. German and his assistant drafted a requisition to Quest Diagnostics to perform the two tests. A copy of the requisition is provided for the Courts' consideration (SLF 64). Dr. German checked boxes on the requisition form for what tests he wanted to be performed, and "clicked" his name on the requisition form. (SLF 522, trial depo. of M. German, at 17). The rest was completed by his medical assistant, Faith Mustone. *Id.*

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[1] Dr. German's videotaped trial deposition was played for the jury, (TR 317, 322), but was not recorded in the trial transcript. Accordingly, references to Dr. German's trial testimony will be to the pages in his trial deposition provided in the Supplemental Legal File filed by the Respondents ("SLF")).

When Doe left Dr. German's office, he took the requisition with him. Later that day, Doe called Mustone and advised he had lost the requisition. (TR 219). This was not the first time Doe lost his requisition and had to return to Dr. German's office for a replacement. (TR 218, 226). Doe "could be forgetful or lose it." *Id*. Mustone would not usually fax a requisition to a patient because she knew that a requisition is a physician's order, and that handing a requisition to a patient is the safest way to deliver a requisition because it would avoid mistakes. (TR 228). For whatever reason, Mustone failed to follow this rule. (TR 227). Mustone asked Doe if he wanted to return to the doctor's office to get a requisition form or if he would prefer that she fax one to him at the office at the Wayman A.M.E Church, where Doe was the personal assistant to the pastor. (TR 353). Doe asked that the requisition be faxed to him at the church, and gave her the following number: 361-5358. (TR 218-19; 363-64, 385).

Mustone wrote "faxed to 361-5358" on Dr. German's requisition before faxing it to the Church. (TR 219). Mustone knew she was not supposed to write this on the requisition. (TR 236). Mustone testified that the area on the requisition where she wrote that notation is a "clear box, that's an area where [Dr. German's] office will add instructions to the laboratory for things to be done." (TR 229). In fact, Dr. German's office has submitted requisitions that had orders for the laboratory written in that very area. (TR 229-30). Mustone knew that when orders

are written in that area, the laboratory will fulfill those orders. (TR 238-39). Physician's orders are expected to be followed. Mustone testified that if an order was written in that area and it was not followed, Dr. German gets "pretty upset." (TR 231). Dr. German testified "I get fairly pissed off if they don't [follow the order]." (SLF 523, trial depo. of M. German, at 19).

Mustone complied with Doe's request and faxed the requisition to the Church office. Doe received the faxed requisition, then traveled to a Quest Diagnostics' patient service center to have blood drawn. (TR 220). When Doe arrived at the patient service center, he handed the written requisition to an employee. (TR 365, SR 130). Before he submitted the written requisition, Doe did not remove the fax reference, cross it out, white it out, mention it to anyone, or take any steps to ensure that the Respondents did not interpret the order as instructions requiring the results to be faxed to the listed number. (SLF 131). Similarly, Dr. German's office took no steps to clarify the fax reference on the requisition or to advise that Quest Diagnostics should ignore it. The Quest Diagnostics' employee accepted the written requisition from Doe and set him up for the requested blood testing. (SLF 130).

When written requisitions are received, they are treated as orders for testing, and entered into the computer system. (TR 291). The person from whom blood will be drawn (Doe in this case) hands the phlebotomist the requisition form. (TR

247-48). The phlebotomist then enters the information from the physician's requisition into the Care 360 computer system. (TR 249). The phlebotomist prints out a computerized requisition form, draws the blood, and packages the blood specimen and the requisition together so that the ordered tests can be performed. *Id*. The specimen and a copy of the computerized requisition are then transported by vehicle to the laboratory where the testing will be performed. (TR 293).

Phlebotomist Mary Petty drew Doe's blood that day. (TR 253). Ms. Petty interpreted "faxed to 361-5358," written on the requisition as an order to have the results faxed to the number indicated, so she entered "FAX 361-5358" into the Care 360 computer system. (TR 285; 444-50). Ms. Petty's supervisor, Stella Grodinskaya, testified there was no reason for Petty to ask Doe about it, because "we take this [requisition] as an order from the doctor." (TR 268). The area of the requisition in question "is where doctors give us instructions what to do." (TR 262). On the other hand, if Doe had scratched out "faxed to 361-5358" on the requisition, the phlebotomist would have been prompted to call the physician to clarify the order. (TR 270-71).

Petty's supervisor, Ms. Grodinskaya, testified that the word "faxed" can be interpreted in several ways, including that the physician wants the results faxed to the number listed. (TR 253-54). Physicians write orders to fax test results in several ways. Physicians can order test results to be faxed by checking a box on the

requisition form. However, not all physicians check the box. (TR 256). Some physicians use shorthand or abbreviated orders, such as "FX" or "FA" on a requisition as an order to fax. (TR 274). Regardless of the manner in which an order to report by facsimile is written, it must be obeyed. Ms. Grodinskaya explained that if a physician orders test results to be faxed in a manner such as this, as opposed to checking the fax box on the requisition, that order must be obeyed. If a physician ordered fax reporting and Quest Diagnostics did not follow the order, Quest Diagnostics would be "in trouble" for not following the doctor's order. (TR 275).

Operations Director Douglas Hamilton confirmed that physicians use many variations of orders to fax test results, so the computer system is flexible enough to pick up all those variations. (TR 313). If "faxed to 361-5358" were entered into the computer, it would be interpreted as an order for the report to be faxed to that number. (TR 258, testimony of S. Grodinskaya). Operations Director Douglas Hamilton explained that the use of the word fax in the computerized requisition triggers the computer's fax logic to report the test results by facsimile. (TR 295-96).

Appellant's laboratory reports were mailed to Dr. German's office and faxed to 361-5358 on July 26, 2006 with cover letters indicating that the faxes contained confidential medical information. (SLF 152-55). Neither report states or otherwise

indicates that Appellant is infected with HIV. Dr. German explained that the first report, a T cell panel, "wouldn't tell you that a patient had HIV" and does not discuss Doe's HIV status. (SLF 522-23, trial depo. of M. German, at 14-15). The second laboratory report was an "HIV viral load PCR." (SLF 522, trial depo. of M. German, at 15). Dr. German explained that the report indicates that "the viral load is undetectable[.]" (SLF 522, trial depo. of M. German, at 14). Dr. German testified that the results were normal results, and do not indicate that Doe is infected with HIV. (SLF 524, trial depo. of M. German, at 22). Dr. German testified that the report "would be the same results in someone who doesn't have HIV[.]" *Id.* Per the testimony of Appellant's own HIV specialist, one of the two tests was not an HIV test, and the other was a normal result that was consistent with Doe being HIV negative.

Appellant claims that he did not work at the Church for the next few days because he was on vacation. (TR 366, SLF 132, depo of Appellant at 52). Appellant testified that when he returned to work, the laboratory results were in his inbox with cover sheets indicating that they were personal and confidential in nature. (TR 369).

At trial, Appellant produced no direct evidence that anyone, other than himself, his doctor and the Church's Reverend, Dr. Timothy E. Tyler, (to whom he voluntarily showed the reports and had previously informed of his HIV status),

ever read either of the two reports. Even if someone had seen them, it does not mean that person could have interpreted them. Indeed, Dr. German testified that he "cannot see how a layman would be able to interpret these results." (SLF 524, trial depo. of M. German, M.D. at 25). In fact, Dr. German testified that "there are plenty of physicians who probably wouldn't understand" the test results. (SLF 522, trial depo. of M. German, at 15). Doe testified that there are "nurses" and "phlebotomists" in the congregation, but did not identify any of these alleged congregants by name, (TR 391); or offer any evidence that these unidentified persons accessed the fax machine or his mail box, or would have understood the reports even if they had seen them.

In January of 2007, Doe was terminated from his position as personal assistant to Reverend Tyler for financial reasons. (TR 354-55). The Church's financial difficulties preceded the faxing of the reports. The year before the reports, Doe's salary had been cut in half because of financial reasons. (TR 387). Reverend Tyler's knowledge of Doe's HIV status also predated the faxing of the reports, because Doe had told the Reverend. (TR 351). Despite no longer retaining his paid position, Doe remained at the Church in positions of authority. He remained a Church steward, which is a member of "the pastor's cabinet," similar to a "board of directors." (TR 356). He also remained as the pastor's "armor barer [sic] which is the equivalent to being the vice president to the president." (TR 355).

Appellant claimed to have received a few hateful anonymous telephone calls at some time following the faxing of the reports. (TR 373). Doe offered no telephone records substantiating that these calls actually took place. He never called the police or the phone company concerning the alleged abusive telephone calls. (TR 386). Despite the fact that Doe had caller identification on his phone, he still could not produce the name or phone number of an alleged caller. (TR 386). He never discussed the alleged telephone calls with Reverend Tyler. *Id.* He never discussed them with anyone at the Church to determine who was calling him. (SLF 142, depo. of Appellant at 94). If he received anonymous calls as he claims, he did nothing about them other than telling a friend. (TR 386).

Appellant's Amended Petition alleged a violation of RSMo § 191.656, (Count I); breach of fiduciary duty (Count II); invasion of privacy (Count III); and intentional or negligent infliction of emotional distress (Count IV). (LF 12-20). On April 9, 2010, the Respondents moved for summary judgment. (SLF 9-88). On December 1, 2010, Respondents' motion was granted as to Count IV, the negligent infliction of emotional distress claims only. (LF 77-91). On December 6, 2010, the Respondents filed a motion in limine/motion to dismiss seeking dismissal of Appellant's claims for failing to file an affidavit under RSMo § 538.225. (SLF 511-28). That motion was denied. At the close of Appellant's case, the Respondents moved for a directed verdict, arguing that Appellant failed to

introduce evidence of the existence or breach of a fiduciary duty, or evidence of negligence as is required for recovery under RSMo § 191.656. (SLF 540-545). At trial, Doe elected to submit only two claims to the jury: (1) breach of fiduciary duty and (2) wrongful disclosure in violation of Section 191.656. At the close of evidence, the trial court directed a verdict in favor of QDI because it is a separate corporation from QDCL and did not exercise control over QDCL such that piercing the corporate veil would be appropriate. On December 9, 2010, the jury found in favor of QDCL on both counts. (LF 187-89).

On June 26, 2012, the Court of Appeals for the Eastern District affirmed the trial court's judgment in favor of the defendants. On July 11, 2012, Doe filed an application with the Court of Appeals seeking transfer to this Court. The Court of Appeals denied Doe's application on August 7, 2012. On August 22, 2012, Doe filed an application for transfer with this Court. It was granted on September 25, 2012.

POINTS RELIED ON

A. THE COURT SHOULD REJECT APPELLANT'S POINT 1 BECAUSE THERE WAS NO EVIDENCE OF A FIDUCIARY DUTY, THE TORT OF BREACH OF FIDUCIARY DUTY OF CONFIDENTIALITY IS NOT APPLICABLE HERE, AND EVEN IF IT WERE, THE JURY WAS PROPERLY INSTRUCTED.

Brandt v. Medical Defense Assoc., 856 S.W.2d 667 (Mo. 1993)

Fierstein v. DePaul Health Ctr., 949 S.W.2d 90 (Mo. App. E.D. 1997)

Fierstein v. DePaul Health Ctr., 24 S.W.3d 220 (Mo. App. E.D. 2000)

Klemme v. Best, 941 S.W.2d 493 (Mo. 1997)

B. THE COURT SHOULD REJECT APPELLANT'S POINT 2 BECAUSE THE JURY WAS PROPERLY INSTRUCTED ON THE AFFIRMATIVE DEFENSE OF WRITTEN AUTHORIZATION ON APPELLANT'S STATUTORY CAUSE OF ACTION UNDER RSMO § 191.656.

RSMo §191.656 *et. seq*.

Annen v. Trump, 913 S.W.2d 16 (Mo. App. 1995)

45 C.F.R. § 164.506(a)(2)

Acara v. Banks, 470 F.3d 569 (5th Cir. 2006)

C. THE COURT SHOULD REJECT APPELLANT'S POINT 2 BECAUSE THE JURY WAS PROPERLY INSTRUCTED ON THE AFFIRMATIVE DEFENSE OF WRITTEN AUTHORIZATION ON APPELLANT'S STATUTORY CAUSE OF ACTION UNDER RSMO § 191.656.

Mid-Missouri Tel. Co. v. Alma Tel. Co., 18 S.W.3d 578 (Mo. App.

2000)

D. APPELLANT'S POINTS SHOULD BE REJECTED BECAUSE APPELLANT'S CLAIMS SHOULD NEVER HAVE BEEN SUBMITTED TO THE JURY DUE TO APPELLANT'S FAILURE TO FILE THE REQUIRED AFFIDAVIT OF MERIT.

42 U.S.C.A. § 263a.

RSMo § 376.1275

RSMo § 538.225

Devite v. The Orthopedic Ctr. of St. Louis, LLC, 349 S.W.3d 327 (Mo. banc 2011)

Crider v. Barnes-Jewish St. Peters Hosp., Inc., 363 S.W.3d 127 (Mo. App. E.D. 2012)

Payne v. Mudd, 126 S.W.3d 787 (Mo. App. E.D. 2004)

Spears v. Freeman Health Sys., __ S.W.3d ___, 2012 WL 2912099 (Mo. App. S.D. Aug. 14, 2012)

ARGUMENT

A. The Court should reject Appellant's Point 1 because there was no evidence of a fiduciary duty, the tort of breach of fiduciary duty of confidentiality is not applicable here, and even if it were, the jury was properly instructed.

Appellant argues that the jury instructions concerning breach of fiduciary duty were in error and seeks a new trial on that basis. The trial court's instructions were not in error, but even if they were, any error was harmless because Appellant did not make a submissible case and failed to file the required affidavit of merit as detailed in Section D, *infra*. *See White v. Thomsen Concrete Pump Co.*, 747 S.W.2d 655, 661 (Mo. Ct. App. 1988) (holding, in an appeal based upon instructional error, the trial court's instructional error was harmless because plaintiffs did not make a submissible case, so defendants' motions for a directed verdict, filed at the close of all of the evidence, should have been sustained by the trial court).

1. Standard of review

In Missouri, an appellate court "reviews de novo, as a question of law, whether a jury was properly instructed." *Morgan v. State*, 272 S.W.3d 909, 911 (Mo. App. W.D. 2009). However, a reviewing court is required to "view the

evidence in the light most favorable to the submission of the instruction" and to "disregard any evidence and inferences to the contrary." *Bradford v. BJC Corp. Health Servs.*, 200 S.W.3d 173, 178-79 (Mo. App. E.D. 2006). A reviewing court must "resolve all fact issues in accordance with the [trial] court's judgment, which will be affirmed if it can be supported on any reasonable theory of law in accordance with the evidence." *Sanders v. DeLoire Corp*., 634 S.W.2d 225, 226-27 (Mo. Ct. App. 1982) (citing Rule 73.01(a)(2), *Roth v. Roth*, 571 S.W.2d 659, 664, 668 (Mo. App. 1978)). An appeal based upon an alleged improper jury instruction "is conducted in the light most favorable to the submission of the instruction, and if the instruction is supportable by any theory, then its submission is proper." *Bach v. Winfield-Foley Fire Protection Dist.*, 257 S.W.3d 605, 608 (Mo. 2008) (citing *Oldaker v. Peters*, 817 S.W.2d 245, 251-52 (Mo. banc 1991)). "Instructional errors are reversed only if the error resulted in prejudice that materially affects the merits of the action." *Id*. (citing *Ploch v. Hamai*, 213 S.W.3d 135, 139 (Mo. App. 2006)). A verdict will not be reversed for an instructional error "unless the error is prejudicial in that it materially affects the merits of the action." *St. Charles County v. Olendorff*, 234 S.W.3d 492, 495 (Mo. App. E.D. 2007).

2. The Court of Appeals correctly determined that Appellant did not introduce any evidence of the existence of a fiduciary duty on the part of the Respondents.

The Court of Appeals noted that "[a] fiduciary relationship gives rise to a fiduciary duty." *Id.* (citing *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477, 481 (Mo. banc 2005)). The Court noted that "[i]n his briefs, plaintiff has not provided any legal authority indicating that there is a traditionally recognized relationship between a clinical laboratory and the subject of clinical tests, such as that found in a trustee-beneficiary, guardian-ward, agent-principal, attorney-client or physician-patient relationship." *Id.* at 8. "Plaintiff has not adduced any evidence that QDCL had any relationship with plaintiff other than performing a set of laboratory tests ordered by plaintiff's personal physician" and has not "provided any legal authority to support that this limited relationship is that of a fiduciary." *Id.* For that reason, Appellant "failed to demonstrate that he made a submissible case for breach of fiduciary duty" and "was not prejudiced in any way by any error in the verdict-directing instruction on that count." *Id.*

Appellant's Substitute Brief spends six pages attempting to convince this Court that QDCL's relationship with him is fiduciary in nature. Conspicuously absent is any precedent holding that a diagnostic testing laboratory has a fiduciary relationship with regard to persons whose specimens have been tested. Substitute Brief of Appellant at 23-29. While it is true that this Court has ruled that the physician-patient relationship is fiduciary in nature, *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 674 (Mo. banc 1993), and that the Court of Appeals

for the Eastern District, interpreted *Brandt* to extend that duty to hospitals, *Fierstein v. DePaul Health Center*, 949 S.W.2d 90, 92 (Mo. App. E.D. 1997), no Missouri Court has held that the relationship between a laboratory and a person whose specimen was tested is *fiduciary* in nature.

Just because a duty of confidentiality exists does not mean that the duty is fiduciary in nature. For example, Appellant cites *State ex. rel. Delmar Gardens v. Gaertner*, 239 S.W.3d 608 (Mo. banc 2007), which holds that employees have a right to confidentiality in their employment records which employers have a duty to safeguard. However, *Delmar Gardens* does not hold that an employer's duty of confidentiality is *fiduciary*. Similarly, Appellant cites *State ex. Rel. Crowden v. Dandurand*, 970 S.W.2d 340 (Mo. banc 1998) for the principle that employees "have a fundamental right of privacy in his/her employment records." Substitute Brief of Appellant at 25 (citing *Crowden*, 970 S.W.2d at 343). While that right to privacy might be "fundamental," it is not fiduciary in nature. Indeed, this Court specifically rejected the application of the tort of breach of fiduciary duty of confidentiality to such claims. *See Western Blue Print Co. v. Roberts*, 367 S.W.3d 7, 16 (Mo. 2012).

Appellant also cites HIPAA and RSMo § 191.656 for the proposition that a "duty of confidentiality also arises from federal and state statutes." Substitute Brief of Appellant at 27-28. Again, neither federal law via HIPAA nor Missouri

statutory law in Section 191.656 requires that the duty of confidentiality is fiduciary under Missouri common law. In fact, Section 191.656 carries its own enforcement mechanisms that are not fiduciary in nature and require proof of negligence. *Id*.

The issue before this Court is not whether there is a duty to maintain confidentiality of HIV records. The issue is whether, in cases alleging a breach of that duty, the jury is entitled to consider the reasonableness of the actions of the parties, or whether others may bear responsibility. Appellant urges this Court to extend a fiduciary duty to Respondent which has never been done in Missouri or elsewhere and then apply a strict liability test. As is made clear in the following sections, the strict liability test proposed by the Appellant would lead to unjust results, and as such has never been applied to this factual situation by any Missouri court.

3. The tort of breach of fiduciary duty of confidentiality as proposed by Appellant is not applicable in this situation and would lead to unjust results.

a. Application of the de facto strict liability tort proposed by Appellant is inappropriate as it prohibits any consideration of fault.

Appellant argues that he "should only have been required to prove that Quest Diagnostics (1) disclosed confidential information, (2) without his consent, and (3) as a result of such disclosure, Doe sustained damages." Substitute Brief of Appellant at 17-18. In essence, Appellant is asking the Court to impose a strict liability standard.

Under these elements, there is no consideration of whether the defendant acted reasonably or unreasonably, and no consideration of whether other persons, including a plaintiff, were responsible for causing the disclosure. Appellant would have this Court impose strict liability on a diagnostic laboratory even if someone else were at fault. In cases, such as here, that concern the interpretation of an order as to how test results are to be reported in the course of treatment, preventing the jury from being able to consider the issue of fault would lead to unjust results. Strict liability is inappropriate.

b. The cases to which breach of fiduciary duty of confidentiality have been applied are not applicable because they involved disclosures outside the course of the provision of care.

Before turning to the reasons why application of strict liability in cases like this would result in unfair results, a consideration of the situations in which the tort

has been applied is instructive. Importantly, the cases in which the tort of breach of fiduciary duty of confidentiality have applied all fall outside of the course of treatment and instead are cases involving litigation. Their holdings and reasoning do not mandate that issues of reasonableness and fault be ignored in cases such as the one at bar.

Brandt v. Medical Defense Associates, 856 S.W.2d 667 (Mo. banc 1993) involved the balancing of a physician's fiduciary duty of confidentiality and the waiver of medical privileges when suit is filed. In *Brandt*, the plaintiff had sued Dr. Pelican for medical malpractice in an earlier lawsuit. *Id.* at 669. In the course of defending that lawsuit, plaintiff's counsel deposed two of the plaintiff's treating physicians. *Id.* Following their depositions, the defendant's counsel engaged in *ex parte* discussions with those physicians. *Id.* Subsequently, both physicians testified at trial and offered expert opinions against their former patient. *Id.* The patient then sued the doctors and the defendant's insurance company for breach of fiduciary duty and breach of confidentiality.

Obviously, the disclosure in *Brandt* was not made in the course of treatment, but rather made after treatment had ended, in the context of a lawsuit. Further, the *Brandt* court did not articulate the elements of a claim for breach of fiduciary duty of confidentiality. It merely held that "a physician has a fiduciary duty of confidentiality not to disclose any medical information received in connection with

the treatment of his patient." *Id.* at 674. "[I]f any such information is disclosed under circumstances where this duty of confidentiality has not been waived, the patient has a cause of action for damages in *tort*[.]" *Id.* (emphasis added). *Brandt* did not identify what the elements of such a tort claim would be, and in fact never reached the issue because it affirmed the dismissal of the plaintiff's lawsuit due to the recognized rule that once a plaintiff puts his medical condition at issue, there is an implied waiver "of both the testimonial privilege and the physician's duty of confidentiality." *Id.* at 674. The *Brandt* Court referred to this as a tort claim, not a breach of fiduciary duty claim.

Fierstein v. DePaul Health Center, 949 S.W.2d 90 (Mo. App. E.D. 1997) concerned a disclosure of hospital psychiatric records in the course of a child custody lawsuit. Specifically, plaintiff and her ex-husband were involved in child custody litigation. *Id.* at 91. The ex-husband believed that plaintiff suffered from psychological problems that caused her to abuse their minor children. *Id.* The ex-husband's attorney issued a subpoena *duces tecum* to DePaul Health Center for a records custodian to appear for deposition and produce the ex-wife/plaintiff's medical records. *Id.* The attorney wrote a letter stating that in lieu of appearing for the deposition, the records custodian could mail the records to the ex-husband's attorney. *Id.* The custodian claimed that he called the attorney's office and was told that plaintiff's attorney consented to the release of the records. *Id.* at 92. The

custodian then mailed the requested records to the ex-husband's attorney in advance of the deposition date. *Id*. The plaintiff, however, contended that neither she nor her attorney had authorized the release of the records. *Id*. Thereafter, she sued DePaul claiming a breach of fiduciary duty for providing the records to her ex-husband's attorney. *Id*. The trial court granted summary judgment to DePaul, finding that no fiduciary duty existed. *Id*. The plaintiff then appealed.

In *Fierstein* I, this Court reversed the grant of summary judgment, finding that it had already been established as matter of law that a physician has a fiduciary duty "not to disclose any medical information received in connection with the treatment of the patient." *Id*. (citing *Brandt*, 856 S.W.2d at 674). It then remanded the case back to the trial court. *Id*.

Following the remand, the case was tried. *Fierstein v. DePaul Medical Center*, 24 S.W.3d 220, 223 (Mo. App. E.D. 2000) ("*Fierstein* II"). Because duty and breach were already established in *Fierstein* I, the verdict director was simple:

> Your verdict must be for the Plaintiff if you believe:
>
> First, Defendant disclosed plaintiff's records to attorneys for [the ex-husband], and
>
> Second, Defendant made such disclosure without first obtaining Plaintiff's consent to do so, and
>
> Third, as a direct result of such disclosure, plaintiff sustained damage.

Id. at 226. The jury found in favor of the plaintiff. On appeal, the defendant/appellant challenged this instruction as being "too general and prejudicially erroneous." *Id.* at 226. The Court of Appeals held that instruction was proper because it comported with the *Fierstein* I holding. *Id*. The existence of a fiduciary relationship and breach was already established in *Fierstein* I. *See id*. at 224 (noting that "a decision by this court is the law of the case on all points raised and decided and continues to govern through all subsequent proceedings . . . [so] no issue decided in the first appeal will be readdressed on the second."). Notably, the defendant hospital never argued that plaintiff was obligated to prove negligence or that the instruction failed to include the element of negligence. Respondents have always asserted that this is a simple malpractice tort case requiring proof of neglect.

Fierstein, like *Brandt*, involved a physician-patient relationship and a disclosure outside the context of treatment. It too involved an unauthorized disclosure of medical records in the course of litigation. This case, on the other hand, involves the reporting of results as part of treatment. Here, unlike *Brandt* or *Fierstein*, reporting of Doe's test results was expected and required by his physician. Even Appellant acknowledges that Dr. German ordered testing, and ordered that the results of those tests be reported. Appellant cannot deny that he

wanted the results reported to Dr. German. What is fairly at issue in this case is the interpretation of the language of the requisition submitted by Doe and his physician. Neither *Brandt* nor *Fierstein* stands for the proposition that issues of reasonableness and fault cannot be considered in such cases. Indeed, such a holding would lead to unjust results.

c. Application of a strict liability test would unjustly hold Quest Diagnostics responsible for the actions of others, including the Appellant himself.

The disclosure at issue in this case occurred in the course of treatment where test results were ordered to be disclosed. The issue in this case is the interpretation of language on the order for testing which was interpreted as being an order for facsimile reporting and the reasonableness of the disclosure under these circumstances.

The facts of record in this case establish that Appellant's physician, Dr. German, wanted tests performed on Appellant's blood to determine how the medication he prescribed Doe was working. (SLF 521, trial depo. of M. German, at 10-11). He prepared a requisition or order for testing directed to Quest Diagnostics, which identified the tests to be performed and the manner in which the results were to be reported. The requisition was given to Doe, who lost the requisition. (TR 219). Dr. German's assistant, Faith Mustone, knew it was not good practice to fax

requisitions to patients, but did so anyway. (TR 227-28). Mustone wrote "faxed to 361-5358" on Dr. German's requisition before faxing it in an area where physicians write orders to the laboratory, including orders for how results are to be reported. (TR 219, 238-39). Mustone knew she was not supposed to write this on the requisition. (TR 236). Doe received the faxed requisition then traveled to a Quest Diagnostics' patient service center to have blood drawn. (TR 220). When he arrived at the patient service center, he handed the requisition to a Quest Diagnostics employee. (TR 365). He did not explain to anyone at Quest Diagnostics why that fax number was included on the order, or caution them against faxing the results to that number as it was his work fax machine. (SLF 131). It was Dr. German's judgment as to how he ordered the tests to be delivered. Quest Diagnostics followed the physician's orders and reported the results in a manner consistent with those orders. In short, this case involves the reporting of results caused by language on the requisition order for testing submitted by Appellant and drafted by Appellant's physician and staff. That language was interpreted as being an order to have the reports faxed.

The jury found that Quest Diagnostics was not at fault. The jury found for the Respondents following jury instructions requiring consideration of whether the "defendant negligently failed to protect the confidentiality of Appellant's lab results[.]" Substitute Brief of Appellant at 14. By the process of elimination, the

jury's verdict establishes that if anyone was at fault in causing the transmission, the jury believed the fault was Doe's, or Mustone's, or both. If the tort of breach of fiduciary duty of confidentiality were applied to this case with the elements as set forth by Appellant, Quest Diagnostics could be held strictly liable to the Appellant even if Doe, or his physician's office, was responsible for causing the disclosure.

Appellant would have laboratories held strictly liable for innocent disclosures or for disclosures which occur due to the actions of others. Under Appellant's formulation, it would not matter if the reason for the disclosure were Faith Mustone's notation on the requisition. Mustone's notation was in an area where instructions, including reporting instructions, were written. Doe submitted the requisition with the words in question still on it and did nothing to warn Ms. Petty that the fax number was for his Church office. Appellant would have this Court believe that his actions of losing the requisition; his requesting it to be faxed to his Church office; and his failing to remove the fax number from the requisition before submitting it to the lab are all completely irrelevant to the matter before this Court. Appellant's proposed strict liability formulation would hold a laboratory liable even if the disclosure was someone else's fault, including the patient's or if the lab report was stolen out of the mail - Missouri law could not intend such an inequitable result.

d. Missouri law does not prohibit the consideration of reasonableness and fault.

Missouri law does not require the Court to impose a rule prohibiting a jury from considering the reasonableness of a laboratory's actions or the relative fault of others concerned in the requisition process. Notably, more than one type of fiduciary duty is recognized by Missouri law. A duty of loyalty and fidelity has been held to exist in appropriate circumstances. *Klemme v. Best*, 941 S.W.2d 493 (Mo. banc1997), for example, involved an alleged breach of the fiduciary duty of loyalty and fidelity by an attorney. *Id.* at 946. *Costa v. Allen*, 274 S.W.3d 461 (Mo. 2009), also cited by Appellant, also involved an alleged breach of the duties of fidelity and loyalty by a public defender who allegedly failed to secure witnesses for an evidentiary hearing. (The *Costa* court held this failed to state a claim.) Not only do these cases concern the breach of a different fiduciary duty, they describe that cause of action as a constructive fraud. *See, e.g., Klemme*, 941 S.W.2d at 495 (citations omitted).

The tort created (but not described) by the *Brandt* Court was a fiduciary duty of confidentiality. *Brandt* provides no guidance as to what its appropriate elements would be, nor does it create the strict liability cause of action suggested by Appellant. To the extent that the tort of breach of fiduciary duty of confidentiality is to be applied in a claim involving the interpretation of a physician's reporting

order, which involves issues of medical and laboratory practice and a plethora of potential causes of its misinterpretation, a jury has to be able to consider the applicable standard of care and whether it was the laboratory's action that caused the disclosure. *Fierstein* I and II are factually distinguishable, do not address this issue, and do not command the result Appellant seeks. In neither case was the issue of negligence even considered. In fact, there is no record that the hospital ever objected to the verdict director submitted to the trial court for failure to include a negligence requirement.

This Court has observed that the Missouri legislature does not favor the use of strict liability against health care providers. In *Budding v. SSM Health Care System,* 19 S.W.3d 678 (Mo. 2000), the plaintiff attempted to bring a strict products liability claim against a health care provider. This Court held that Section 538.210 imposes "specific limitations on the traditional tort causes of action available against a health care provider." *Id.* at 680. While "nothing in the statute requires the plaintiff to prove negligence . . . it would be an obvious absurdity to require an affidavit of negligence as a condition of proceeding with the cause of action even though negligence need not be provided in order to submit the case to a jury[.]" *Id.* at 681. "On that basis alone, it is reasonable to conclude that the *legislature intended to eliminate liability of health care providers for strict liability*." *Id.* (emphasis added). Here, Appellant asks this Court to apply a strict

liability test, in contravention of the intent of the legislature. That request should be rejected, and considerations of reasonableness and fault considered.

e. Negligence is the appropriate vehicle to bring a claim like Appellant's.

Extension of the tort of breach of fiduciary duty of confidentiality to the claims in this case is unnecessary. In *Klemme* this Court held that "If the alleged breach can be characterized as both a breach of the standard of care (legal malpractice based on negligence) and a breach of a fiduciary obligation (constructive fraud), then the sole claim is legal malpractice." *Klemme*, 941 S.W.2d at 496 (citation omitted). For that reason, *Klemme* described a prima facie breach of fiduciary duty claim as requiring a fifth element, that "(5) no other recognized tort encompasses the facts alleged." 941 S.W.2d at 496 (citing *Johnson v. Smith's Administrator*, 27 Mo. 591, 592–93 (1859); *Swon v. Huddleston*, 282 S.W.2d 18, 25–26 (Mo.1955)).

Appellant's claim is that the Respondents had a duty to keep his medical information confidential, and erred in interpreting the requisition as an order to report the test results by facsimile, which caused him harm. That is the epitome of a negligence claim. Indeed, the trial transcript makes clear that Appellant's counsel spent considerable time attempting to convince the jury of Quest Diagnostics fault.

Negligence, not breach of fiduciary duty, was the applicable cause of action here. Breach of fiduciary duty never should have been submitted to the jury.

Further, if plaintiff had pled and pursued a negligence claim, expert testimony from a laboratory practices expert would have been required to establish the appropriate standard of care of what a laboratory is obligated to do when it receives a testing order with the language in question written on it.

f. Application of the tort of breach of fiduciary duty of confidentiality would lead to unjust results not only in this case, but in future cases as well.

As a policy matter, creating a strict liability tort in disclosures involving the interpretation of testing orders would lead to unjust results in future cases as well. Consider, *arguendo*, a situation in which a physician prepared a requisition for testing, ordering that the test results be mailed to his office, but the physician inverts two of the numbers in the address. Under Appellant's theory, the laboratory would be liable for following that order if the wrong person received the report. The same would be true if the physician transposed the number of the fax machine and the lab faxed the results to the "ordered number" but the number belonged to a third party. Any number of similar situations could be envisioned where a laboratory would be held liable for the mistakes of others because in each instance the jury would be precluded from considering fault. The application of strict

liability in situations such as this would bring the health care system to a standstill. Timely reporting of test results is, quite literally, a matter of life and death in many instances. Beyond its obvious unfairness, application of this tort as proposed by Appellant would have a chilling effect on the delivery of medical care in Missouri.

For all these reasons, this Court should decline to impose strict liability in cases like this. The Appellant's request should be denied, and the jury's verdict affirmed.

4. Instruction No. 6 did not heighten Appellant's burden of proof.

Instruction No. 6 did not heighten Appellant's burden of proof. In fact, the use of a negligence standard lessened the requirement placed upon the Appellant to prevail in that it did not require Appellant to establish the existence of a fiduciary relationship or the appropriate contours thereof.

A submissible claim for breach of fiduciary duty requires a plaintiff to prove the existence of a fiduciary relationship and breach thereof. *Klemme,* 941 S.W.2d at 496; *Brandt,* 856 S.W.2d at 670. Instruction No. 6 relieved Appellant of that burden. Even if the Court were to extend the tort of breach of fiduciary duty of confidentiality to diagnostic testing laboratories for some purposes, it does not follow that that duty is applicable in each and every circumstance. As is detailed *supra*, the cases in which the tort has been applied to physicians and, by extension,

hospitals all involve disclosure outside of the scope of treatment. Even insofar as physicians are concerned, a delineation of the contours of the duty is important. While a physician owes a fiduciary duty of confidentiality to his patient, that duty is not unlimited in scope. For example, a physician does not breach a fiduciary duty of confidentiality if she shares a patient's medical information with other physicians in her practice or members of her staff. She does not breach a duty by disclosing a patient's medical information with other health care providers in a hospital setting. The duty of confidentiality does not prohibit the physician from sharing a patient's medical information with diagnostic testing providers such as radiologists, MRI technicians, or diagnostic testing laboratories.

The factual basis of this claim is clearly distinct from *Brandt* and *Fierstein*. Reporting of the test results was expected and desired by everyone concerned, including Appellant who wanted his results reported to Dr. German. The issue was the interpretation of Dr. German's order. Appellant failed to introduce any expert testimony explaining to the jury how such orders are to be interpreted in the industry and medical community.

Here, Instruction No. 6 relieved Appellant of the need to establish the existence of a fiduciary duty and its contours. Instead, the instruction only required the Appellant to establish that the Respondents failed to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Proving his claim under a duty of ordinary care without the need for expert testimony on the Respondent's conduct, lessened and eased the Appellant's burden of proof. The jury was asked to answer whether the defendant's conduct breached a simple duty of ordinary care and appropriately entered a verdict in favor of the Respondents. No error occurred by Instruction No. 6.

5. The trial court should have granted Respondents a directed verdict on this claim.

Appellant failed to prove that the Respondents acted negligently in this case, and now wants a second bite at the apple in which the Respondents can be held liable even in the absence of negligence. Appellant failed to establish the existence of a fiduciary duty of confidentiality under the circumstances presented in this matter, or what the appropriate contours of that duty would be. Therefore, a directed verdict should have been entered in the Respondents' favor, in which case no instructions would have been given to the jury. The judgment entered on the verdict of the jury should be affirmed.

6. Instruction No. 6 did not prejudice the Appellant.

Appellant suffered no prejudice in any event. Verdicts are not be reversed for an instructional error "unless the error is prejudicial in that it materially affects the merits of the action." *St. Charles County*, 234 S.W.3d at 495. As noted above, the jury found that the Respondents were not negligent in faxing the reports to the

telephone number listed on the requisition. Because the jury found that the Respondents were not negligent, the jury could only have believed that no one was at fault for the disclosure, or that someone other than the Respondents (i.e. Mustone or Doe himself) was at fault. Either way, the only way that Appellant could have been "prejudiced" by the trial court's instruction is if the law were interpreted to hold the laboratory liable for someone else's mistake. For the reasons set forth above, Plaintiff's Point 1 was properly rejected by the Court of Appeals.

In summary, Appellant failed to prove any fiduciary relationship, the claim never should have been submitted to a jury, Missouri does not recognize a fiduciary relationship in this setting, Appellant failed to prove the elements of any breach, and the jury was properly instructed.

B. The Court should reject Appellant's Point 2 because the jury was properly instructed on the affirmative defense of written authorization on Appellant's statutory cause of action under RSMo § 191.656.

Plaintiff's Point 2 takes issue with Instruction No. 9, the affirmative defense to his statutory claim under RSMo § 191.656. The Court of Appeals correctly determined that there was no instructional error in this case. Further, since Appellant failed to produce a submissible case, there was no prejudice in giving this instruction.

1. Standard of review

The standard of review on Appellant's point 2 is the same as on Point 1, namely that a reviewing court is required to "view the evidence in the light most favorable to the submission of the instruction" and to "disregard any evidence and inferences to the contrary." *Bradford,* 200 S.W.3d at 178-79; and must "resolve all fact issues in accordance with the [trial] court's judgment, which will be affirmed if it can be supported on any reasonable theory of law in accordance with the evidence." *Sanders,* 634 S.W.2d at 226-27. "[I]f the instruction is supportable by any theory, then its submission is proper." *Bach,* 257 S.W.3d at 608; and will not be reversed for an instructional error "unless the error is prejudicial in that it materially affects the merits of the action." *St. Charles County,* 234 S.W.3d at 495.

2. There was evidence of a written authorization in this case.

Appellant's first argument is that the instruction concerning the affirmative defense of written authorization under Section 191.656 should not have been given to the jury, because, Appellant argues, there was no evidence of a written authorization. Substitute Brief of Appellant at 31.

The affirmative defense in question was based upon the direct statutory provision that "[u]nless the person acted in bad faith or with conscious disregard, no person shall be liable for violating any duty or right of confidentiality established by law for disclosing the results of an individual's HIV testing . . .

[p]ursuant to the written authorization of the subject of the test result or results[.]" *Id*. § 191.656(2)(c). The term "written authorization" is not defined in the statute.

Doe argues that for a written authorization to be effective, it has to be written by the patient himself. Substitute Brief of Appellant at 32. Doe argues that he did not personally write the authorization, and that "the notation written on the requisition form, 'faxed to 361-5358,' was written by medical assistant, Faith Mustone, not Doe." *Id*. The Court of Appeals rejected this argument, noting that "Plaintiff does not provide any cases supporting his position that a 'written authorization of the subject' under the statute must have been actually written or executed by the subject of the test." Court of Appeals Opinion at 11. The Court of Appeals noted that "[o]n its face, the phrase 'the written authorization of the test subject' does not require the written authorization be actually written or executed by the subject of the test, nor does the language rule out other means of providing written authorization, such as by delivering a written authorization written by another." *Id*.

That is precisely what happened in this case. Doe took possession of the written requisition, receiving it in his fax machine. He then personally handed it to a Quest Diagnostics employee. Doe cannot dispute that he authorized the reporting of the tests, at least insofar as he wanted the results reported to Dr. German. Quest Diagnostics received from Doe himself a written document authorizing the

reporting of test authorization. If the authorship of the requisition were the relevant consideration, then a laboratory could be held liable any time that test reports are issued if the patient did not write the authorization him or herself. Laboratories could never be secure in providing testing for incapacitated or illiterate patients, neither of which could complete the documentation themselves. Who drafts the authorization is not a relevant consideration, particularly when the written authorization is submitted by the patient himself.

Appellant also argues that he did not intend to have the test results faxed to the number listed on the requisition. Substitute Brief of Appellant at 31. His intent is irrelevant for the purposes of this affirmative defense. By way of example, consider if a patient directed the lab to mail a copy of the results to his home, but wrote down the wrong address. If the lab followed that request, they would still be liable under Appellant's theory because he did not intend that result.

Doe's undisputed submission of a written requisition for testing and reporting of his test results is all that was needed for this affirmative defense to be submitted to the jury. There was no error in this regard.

3. Appellant's HIPAA argument was correctly rejected by the Court of Appeals.

a. The Court of Appeals correctly determined that Appellant failed to preserve his argument that a HIPAA-compliant authorization could satisfy the affirmative defense under RSMo § 191.656(2)(c).

Appellant's argument concerning the instruction concerning his statutory claim relates only to an affirmative defense under RSMo § 191.656(2)(c). Specifically, Appellant argues that that the affirmative defense of "written authorization" under Section 191.656(2)(c) had to comply with the privacy rules set out in the Health Information Portability and Accountability Act, 42 U.S.C.§ 1320d-7(a) ("HIPAA"). That argument is not properly before the Court.

The Court of Appeals noted that Doe's HIPAA argument "was not preserved in the trial court because plaintiff did not object on this ground before the jury retired to consider its verdict." Court of Appeals Opinion at 11 (citing Rule 70.03, *Atkinson v. Corson*, 289 S.W.3d 269, 276 (Mo. App. 2009)). Indeed "Plaintiff did not mention HIPAA, much less claim that the evidence did not support the definition of a written authorization under HIPAA, until he moved for a new trial." *Id*. "A claim of error on appeal 'may not enlarge or change the objection made at trial.'" *Id*. (quoting *Berra v. Danter*, 299 S.W.3d 690, 703 (Mo.

App. 2009)). "'When the point on appeal contends that an instruction is erroneous on a different ground than was asserted in the objection made at trial, we may not review that error on appeal.'" *Id.* (quoting *Berra*, 299 S.W. at 703)).

Appellant's Substitute Brief provides no authority or argument that the Court of Appeals erred in this regard. Appellant's argument was not properly preserved, and is not reviewable now.

b. The civil cause of action under Section 191.656 is not affected by HIPAA.

Appellant does not dispute that Section 191.656(2)(c) does not define the term "written authorization," but argues that the "written authorization" required by Section 191.656(2)(c) must be HIPAA compliant.

HIPAA compliant authorizations are not required in every instance. For example, there was no need for an authorization for Quest Diagnostics to report the test results to Dr. German. An individual's consent is not required for a health care provider "to disclose protected health information to carry out treatment . . . or healthcare operations" if "the covered health care provider has an indirect treatment relationship with the individual." 45 C.F.R. § 164.506(a)(2). Quest Diagnostics was reporting the test results to Dr. German in accordance with his orders. The faxing to the church occurred because of what Dr. German's assistant wrote on the requisition itself and Appellant failed to remove this fax number

before the requisition when he submitted it for testing. Therefore, reviewing the facts in the light most favorable to the jury instruction, HIPAA has no applicability to this situation.

In support of his argument, Appellant cites *State ex. rel. Proctor v. Messina*, 320 S.W.3d 145 (Mo. 2010). In *Messina*, this Court considered whether HIPAA preempted a state trial court's order that defense counsel was permitted to engage in ex parte communication with the plaintiff's health care providers when the plaintiffs had not authorized a HIPAA compliant authorization for the attorneys to do so. The *Messina* Court noted that the HIPAA regulations preempt state laws contrary to HIPAA, which include those instances when "[a] covered entity would find it impossible to comply with both State and federal requirements" or when a "provision of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI or Section 264 of Pub.L. 104-191 . . . as applicable." *Id*. at 153 (quoting 45 C.F.R. §160.202). The *Messina* Court found that HIPAA did not preempt state rules permitting ex parte communications between the physicians and counsel because there was no federal prohibition against the practice. *Id*.

Here, Appellant attempted to use the statutory penalty provisions as a private right of action to impose civil money damages on the Respondents. RSMo § 191.656. HIPAA, on the other hand, does not create a private right of action. *See*,

e.g., *Acara v. Banks*, 470 F.3d 569, 571-72 (5th Cir. 2006) (concluding Congress did not intend for private enforcement of HIPAA); *O'Donnell v. Blue Cross Blue Shield of Wyoming*, 173 F.Supp.2d 1176, 1179-80 (D.C. Wyo. 2001); *Brock v. Provident Am. Ins. Co.*, 144 F.Supp.2d 652, 657 (N.D. Tex. 2001); *Means v. Indep. Life and Accident Ins. Co.*, 963 F. Supp. 1131, 1135 (M.D. Ala. 1997); *Wright v. Combined Ins. Co. of Am.*, 959 F. Supp. 356, 362-63 (N.D. Miss. 1997). Plainly, RSMo § 191.656 and HIPAA have different purposes in this regard. If HIPAA preempts Section 191.656, then plaintiff would have no private right of action, and no ability to bring this claim.

The Missouri legislature was free to draft this statute as it did. The Legislature created a limited private right of action and excluded recovery when the disclosure was made at the direction of the patient. The legislature could have enumerated necessary criteria for this affirmative defense, and could have referred to or incorporated HIPAA's requirements, but chose not to. Appellant's argument conflates what the Missouri legislature deems necessary as an affirmative defense in a personal injury lawsuit with federal requirements for which no private right of action even exists.

4. Appellant's statutory claim should have been dismissed at the directed verdict stage because Appellant failed to introduce the expert testimony necessary to prove his claims.

Appellant's claims should never have gone to the jury because he failed to produce expert testimony necessary to support his claims. RSMo § 191.656 provides, in pertinent part, as follows:

> All information known to, and records containing any information held or maintained by, any person . . . concerning an individual's HIV infection status or the results of any individual's HIV testing shall be strictly confidential and shall not be disclosed[.]

RSMo § 191.656. In order to recover civil damages under Section 191.656, a plaintiff must prove that the disclosure was made negligently, recklessly, willfully, or intentionally, with damages varying according to the degree of a defendant's culpability. If "a person has *negligently* violated this section," then the defendant may be found liable for actual damages or liquidated damages of $1,000.00, attorney's fees and court costs, and injunctive relief. *Id.* § 191.656(6)(1)(a) – (c) (emphasis added). If a plaintiff can prove that a person "*willfully* or *intentionally* or *recklessly* violated this section" then that person also may be found liable for exemplary damages. *Id.* § 191.656(6)(2)(a) – (d) (emphasis added). Therefore in order for Appellant to have recovered under this statute, he was required to prove a negligent, reckless, willful or intentional (1) disclosure (2) of records (3) "concerning an individual's HIV infection status or the results of any individual's HIV testing." There was no evidence that Quest Diagnostics intentionally or

willfully reported the test results to any unauthorized person. The evidence showed, at most, that a mistake was made by either Dr. German's assistant, Ms. Mustone for writing the notation on the requisition, or Doe for not removing or explaining it before handing it to Quest Diagnostics, or that Quest simply misinterpreted the requisition. In such cases, establishing the appropriate standard of care is part of a plaintiff's burden of proof.

Appellant failed to introduce the expert testimony needed to establish the applicable standard of care in this case. Expert testimony is required to establish the applicable standard of care where the issues involve matters outside the common experience and knowledge of laypersons. *See, e.g., Annen v. Trump,* 913 S.W.2d 16, 20 (Mo. App. 1995). The applicable standard of care for a diagnostic testing laboratory in reporting test results requires expert testimony. Requisitions are doctors' orders to diagnostic testing laboratories that order what tests are to be performed, the urgency of the request (i.e., whether the test should be performed "stat" or in the regular course of business) and how and to whom the result is to be reported. The uncontroverted testimony was that physicians order "fax" reporting in many different manners, including the use of abbreviations like "FA" and "FX," and that the Care 360 program was designed to catch those contingencies. There was no testimony that the Respondent's activities fell outside accepted industry standards or fell short of the standard of care. Such expert testimony was essential.

Clinical laboratories are a highly regulated industry governed by state and federal law. *See infra* § D1. How requisitions are to be interpreted is a procedure peculiar to the medical profession which requires expert standard of care testimony. One look at the requisition at issue in this case confirms this point. A jury could not decide without expert testimony how the defendant in this case should have interpreted the physician's order, or how clinical laboratories in general are required to accept and interpret a physician order, act on the order, perform requested services, and report them back. An expert in laboratory practices was required to establish that standard or protocol and provide an opinion as to whether the conduct was appropriate within the standard of care of not. Because Appellant lacked the requisite expert testimony, Appellant failed to establish a prima facie claim on liability. His claim never should have gone to the jury. So even if there were instructional error on the affirmative defense, it caused no harm.

In summary, Instruction No. 9 followed the statutory elements of RSMO § 191.656 and was amply supported by the evidence. Further, HIPAA does not apply here and Appellant's argument was not preserved for appeal.

C. The Court should reject Appellant's Point 3 because the trial court properly granted a directed verdict to Quest Diagnostics Incorporated.

Appellant's Point 3 attempts to argue that the trial court should have pierced the corporate veil and held Quest Diagnostics Incorporated liable in this case. Substitute Brief of Appellant at 38-44. Appellant's point is wholly without merit.

1. There was no evidence of tortious conduct by the parent corporation.

Quest Diagnostics Clinical Laboratories Inc. ("QDCL") is, as its name makes clear, a corporation. As Appellant acknowledges, Quest Diagnostics Incorporated ("QDI") is also a corporation, and is the parent of QDCL.

The Respondents have consistently maintained in this case that QDI is not a proper party in this case. *See, e.g.,* LF22 Answer of Quest Diagnostics Incorporated and LabOne, Inc. at ¶ 5 (stating Quest Diagnostics Incorporated "has been improperly identified as a defendant[.]"). Appellant did not develop any evidence to the contrary. Appellant attempts to argue that QDI's 2007 Annual Report indicates that it owns facilities in Missouri and has employees. Substitute Brief of Appellant at 42-43. Those employees do not include the person who Appellant claims erred in this case. Mary Petty was the individual who interpreted Dr. German's requisition and coded into the computer that the test results were to be faxed to 361-5358. (TR 253, 285, 444-50). Ms. Petty was an employee of the

subsidiary, QDCL. (TR 438). Indeed, Appellant's entire case is constructed around the fact that she entered the instruction "FAX to 361-5658" instead of "FAXED to 361-5658."

Appellant further cites the fact that the reports were sent on a QDI form. The form of the results has nothing to do with the issues in this case. Appellant attempts to rely upon the testimony of Stella Grodinskaya and Douglas Hamilton to establish that they were employed by QDI at the time of the incident. Ms. Grodinskaya testified she was employed by QDCL. (TR 240). Mr. Hamilton had no substantive involvement with any of the issues in this case and was not asked about his employer at the time of the incident. Finally, Appellant comments that Notice of Privacy Practices bears a "Quest Diagnostics" service mark and specifically references in the first line "Quest Diagnostics Incorporated and its wholly owned subsidiaries (collectively called "Quest Diagnostics" in this Notice) are committed to protecting the privacy of . . . health information." Appellant fails to explain how this document in any way could cause QDI to be liable. Plainly, there was no direct evidence of any liability on the part of QDI.

2. There is no basis to pierce the corporate veil in this case.

Appellant asks the Court to pierce the corporate veil between parent corporation QDI and subsidiary corporation QDCL. Substitute Brief of Appellant at 41. As Appellant acknowledges, "courts do not lightly disregard the corporate

form and hold a parent liable for the torts of a subsidiary." *Id.* (citing *Mid-Missouri Telephone Co. v. Alma Telephone Co.*, 18 S.W.3d 578, 582 (Mo. App. 2000)).

In Missouri, a plaintiff must prove three elements to pierce the corporate veil. First, the defendant must have control and domination of the corporate entity; second, defendant must have used that control to commit fraud or violate a legal duty; third, the control and breach of duty must be the proximate cause of the injury. *Mobius Mgmt. Sys., Inc. v. West Physician Search, L.L.C.*, 175 S.W.3d 186, 188-89 (Mo. App. E.D. 2005). Appellant adduced no evidence, and does not argue, that QDCL was undercapitalized. Appellant argues that the computer used to generate the reports did so on Quest Diagnostics Incorporated forms. Substitute Brief of Appellant at 43. Again, the forms themselves are irrelevant to the issues in this case. Further, Appellant makes much of the fact that Ms. Petty entered "FAX" instead of "FAXED" into the computer. Even if the Appellant had adduced evidence that the computer was QDI's, Appellant is arguing that incorrect information was entered into that computer by Ms. Petty, a QDCL employee. The computer and forms do not form a basis to pierce the corporate veil. Finally, Appellant again argues, on scant evidence, that Ms. Petty's supervisors were employed by QDI. Appellant is not alleging negligent supervision or hiring in this case. Indeed, Appellant hopes to impose liability on the Respondents without any

consideration of negligence at all. Therefore, if Appellant's arguments accepted, then any potential negligent supervision would be irrelevant.

The plain fact is that Appellant was permitted to proceed against a corporate defendant, QDCL, whose employees were alleged to have caused the harm in this case. Appellant tried, and failed, to convince the jury that of any liability on the part of the Respondents. Appellant's Point 3 is without merit, and should be rejected.

D. Appellant's points should be rejected because Appellant's claims should never have been submitted to the jury due to Appellant's failure to file the required affidavit of merit.

Appellant's allegations of instructional error could not have caused prejudicial error because his claims never should have been submitted to the jury due to failure to file an affidavit of merit as required by RSMo § 538.225. This defense was asserted as an affirmative defense in Respondent's answer, amended answer, motion in limine and motion to dismiss. (SLF 511-28). Because Doe failed to file the required affidavit, his claims never should have gone to the jury. This point is critical, because if his claims should not have gone to the jury, then even if he could establish that the jury instructions were in error, that error was harmless, and any need for a new trial moot.

Section 538.225 requires that "In any action against a health care provider for damages for personal injury or death on account of the rendering of or failure to render health care services, the plaintiff or the plaintiff's attorney shall file an affidavit [of merit] with the court . . . no later than 180 days after the filing of the petition" except upon order of the court for good cause shown. *Id*.

This Court recently considered under what circumstances an affidavit of merit is required in *Devitre v. Orthopedic Center of St. Louis, LLC*, 349 S.W.3d 327 (Mo. banc 2011). In *Devitre*, the plaintiff claimed to have been injured by the defendant physician in the course of an independent medical examination. *Id*. at 330. The trial court dismissed the claim because the plaintiff failed to file an affidavit of merit under RSMo § 538.225. On appeal, the plaintiff argued that an independent medical examination was not the provision of "health care services." *Id*. at 331. This Court held that determination of this issue "depends on whether 'the relationship of the parties is that of a health care provider and recipient and if the "true claim" relates only to the provision of health care services.'" *Id*. (quoting *Gaynor v. Washington Univ*., 261 S.W.3d 650, 653 (Mo. App. 2008)). "This analysis applies regardless of how the plaintiff characterizes his or her claims." *Id*. (citations omitted).

"Health care services" are statutorily defined in Section 538.205, in pertinent part, as "any service that a health care provider renders to a patient in the ordinary

course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized." RSMo § 538.205(5). Plaintiff Devitre argued that he was not a "patient" of the defendants, and therefore they did not provide "health care services" requiring an affidavit. *Devitre*, 349 S.W.3d 327 at 331. This Court noted that "patient" is not defined in the statute, and therefore utilized the dictionary definition of a patient as being, in pertinent part, "a client for medical service." A physician is a health care provider, and "[a]n independent medical examination is a "health care service he provides to patients in the ordinary course of his business." *Id*. at 333. The plaintiff, in undergoing an independent medical examination, was "a client of this medical service that Dr. Rotman provides. Therefore, Mr. Devitre is a patient of Dr. Rotman." *Id*.

The second part of the analysis "is to determine 'if the "true claim" relates only to the provision of health care services.'" *Id*. at 334 (quoting *Gaynor*, 261 S.W.3d at 653). In making that determination, "a pleading is judged by its subject and substance of its recitals and not its rubric or caption." *Id*. (citing *Worley v.Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000)). Despite the fact that the plaintiff pleaded his claim as an assault and battery, this Court determined that he was really alleging medical malpractice which required an affidavit. *Id*. at 334-35.

Applying the principles of *Devitre*, Appellant Doe was required to have filed an affidavit, and should have had his case dismissed before trial, in which case his claims of instructional error are moot.

1. Respondents are "health care providers" under RSMo § 538.225.

The threshold question in determining whether the statute applies is determining whether the claim is being brought against a "health care provider" as defined by the statute. *See* RSMo § 538.225; *Devitre*, 349 S.W.3d at 333; *J.K.M. v. Dempsey*, 317 S.W.3d 621, 625-26 (Mo. App. S.D. 2010) (citing *Jacobs v. Wolff*, 829 S.W.2d 470, 472 (Mo. App. E.D. 1992)). Appellant's Amended Petition specifically pleaded that the Respondents "are health care providers[.]"(LF 18, Amended Petition at ¶41). Before the trial court, Appellant's counsel argued, "This lab is a health care provider. They test blood for doctors, report the information back to the doctors." (TR 94) "We did allege [that Respondents are "health care providers"], we've alleged that all along. . . . [W]e alleged it in the petition and they admitted it." (TR 127). Yet, in his Reply Brief in the Court of Appeals, Appellant argued that Respondents are *not* health care providers under the statute because it defines the term as "any . . . person or entity that provides health care services under the authority of a *license or certificate*[.]" Appellant's Reply Brief at 6 (citing RSMo § 538.205(4) (emphasis added)). Appellant did not make this argument before the trial court. Appellant's argument in that regard

stems from a fundamental lack of understanding of clinical laboratories or their regulation, and is in direct contradiction to the facts pleaded in the Amended Petition.

Clinical laboratories are regulated by the federal government. Under the Clinical Laboratory Improvement Amendments of 1988 ("CLIA-88"), clinical laboratories are required, by federal law, to be certified to perform clinical laboratory testing. 42 U.S.C.A. § 263a. CLIA-88 applies to "laboratories" and "clinical laboratories" which are defined, in pertinent part, as "facilit[ies] for the biological, microbiological, serological, chemical, immuno-hematological, hematological, . . . pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings." *Id*. § 263a (a). Here, QDCL operated a facility that tested a sample of Appellants blood (a "material[] derived from the human body") "for the purpose of providing information . . . for the treatment" of Appellant's HIV infection. Further, Missouri recognizes the federal certification and licensure of clinical laboratories. V.A.M.S. § 376.1275 (requiring, for human leukocyte antigen testing in Missouri, that laboratories be "licensed under the Clinical Laboratory Improvement Act, 42 U.S.C. Section 263a, as amended"). As a matter of federal

and state law, clinical laboratories provide their health care services pursuant to a license or certificate.

At the Court of Appeals, Appellant argued that the Respondents needed to put in evidence their licensure before RSMo § 538.225's requirement of an affidavit of merit would apply. Appellant did not make this argument before the trial court. It also is not an accurate statement of the law. No Missouri opinions hold that a healthcare provider has to submit a license into evidence before a plaintiff has to file an affidavit of merit. To the contrary, the fact that clinical laboratories are an industry that is regulated by laws requiring a license or certificate is all that is required to establish status as a "health care provider." For example, in *Payne v. Mudd*, 126 S.W.3d 787 (Mo. App. E.D. 2004), the Court of Appeals for the Eastern District affirmed a dismissal of a claim against a laboratory that fashioned hearing aids due to the plaintiff's failure to comply with RSMo § 538.225. The *Payne* court distinguished *Stalcup v. Orthotic & Prosthetic Lab, Inc.*, 989 S.W.2d 654 (Mo. App. E.D.1999) in which a prosthetics laboratory fitted and manufactured a prosthetic leg that detached, causing injury. *Id*. at 789. In determining whether the prosthetics laboratory was a "health care provider", the *Stalcup* court looked to the language of Section 538.205.4 which also defines the term as any "'entity that provides health care services *under the authority of a license or certificate*.'" *Id*. (quoting *Stalcup*, 989 S.W.2d at789 (quoting RSMo §

538.205.4) (emphasis in the original)). Applying this definition, the *Stalcup* court found it significant that the prosthetics "lab did not provide its services under the authority of a license or certificate, and that the fitting and manufacturing of orthotic and prosthetic devices was not a regulated profession in Missouri" and therefore it was not a health care provider under Chapter 538." *Id*. (citing *Stalcup*, 989 S.W.2d at 660). The *Payne* court distinguished *Stalcup*, noting that "[u]nlike fitters of prosthetics, hearing instrument specialists . . . are licensed by Missouri[.]" *Id*. at 790. Therefore, the grant of the motion to dismiss was affirmed.

As was the case in *Payne*, clinical laboratories can only perform testing in Missouri (indeed, nationally), pursuant to a license or certificate. On this question of law, nothing more was needed. *See Payne, supra* (which did not require submission of the laboratory's license). Nonetheless, if the Court considers it to be necessary, it may take judicial notice of the fact that at the time period at issue in this case, the federal government granted the laboratory CLIA certificate number 26D0652086, and that the State of Missouri issued its medical director medical license number R2G75. There is no legitimate dispute that, as Appellant admitted in his Petition, the Respondents are health care providers.

2. Respondents provided "health care services" to a "patient."

Section 538.225 applies "[i]n any action against a health care provider for damages for personal injury . . . on account of the rendering of . . . health care

services[.]"RSMo § 538.225. "Health care services" are statutorily defined in § 538.205, in pertinent part, as "any service that a health care provider renders to a patient in the ordinary course of the health care provider's profession or, if the health care provider is an institution, in the ordinary course of furthering the purposes for which the institution is organized." RSMo § 538.205(5). "Health care" is not defined in the statute. Where the statute does not define a term, the common usage of the term should be applied. *See Devitre*, 349 S.W.3d at 333 (utilizing the WEBSTER'S THIRD INT'L DICTIONARY definition of "patient"). Webster's defines "health care" as "any field or enterprise concerned with supplying services, equipment, information . . . for the maintenance or restoration of health." WEBSTER'S COLLEGE DICTIONARY, 2d ed., p. 599 (1997).

As noted above, the Respondents operate licensed clinical laboratories. Performance of laboratory tests and reporting of the results is 'the ordinary course" of "their profession" and the purpose for which they are organized. RSMo § 538.205(5). Dr. German testified that he ordered the diagnostic tests to help him determine if the prescribed medications are working. (SLF 523, trial depo. of M. German, M.D. at 21). Respondents performed diagnostic tests relating to Appellant's health and HIV status, and reported the results as ordered by Doe's physician, Dr. German. *Id*.

Further, the relationship between Appellant and Quest Diagnostics "is one of a health care provider and a patient that would trigger the requirement to file a health care affidavit." *See Devitre*, 349 S.W.3d at 332 (citing *Gaynor*, 261 S.W.3d at 653). As was the case in *Devitre*, Mr. Doe was "a client of this medical service that [Quest Diagnostics] provides." *See id.* at 333.

3. Appellant's "true claim" relates solely to the provision of healthcare services.

The final step of the analysis "is to determine 'if the "true claim" relates only to the provision of health care services.'" *Id.* at 334 (quoting *Gaynor*, 261 S.W.3d at 653). In making that determination, "a pleading is judged by its subject and substance of its recitals and not its rubric or caption." *Id.* (citing *Worley*, 19 S.W.3d at 129).

Appellant pursued claims of breach of fiduciary duty and a statutory claim under Section 191.656. As this Court observed in *Devitre*, health care affidavits may be required in cases of breach of fiduciary duty. *Devitre*, 349 S.W.3d at 332 (citing *J.K.M. v. Dempsey*, 317 S.W.3d 621 (Mo. App. S.D. 2010) (pleading breach of fiduciary duty, assault and battery). The Court also cited other examples of non-medical malpractice cases holding that affidavits were required, including claims of libel, false imprisonment, and tortious interference with contract. *Id.* (citing *Vitale v. Sandow*, 912 S.W.2d 121, 122 (Mo. App. 1995) (libel); *St. John's Reg'l*

Health Ctr., Inc. v. Windler, 847 S.W.2d 168 (Mo. App. 1993) (false imprisonment); *Jacobs v. Wolff*, 828 S.W.2d 470 (Mo. App. 1992) (tortious interference with contract)).

Appellant asserts that the Respondents were not acting as a healthcare provider performing healthcare services when it faxed the test results. That is nonsense. Reporting test results is the provision of health care. Indeed, the legislature, in drafting Section 516.105(2) specifically identified "cases in which the act of neglect complained of is the negligent failure to inform the patient of the results of medical tests[.]" RSMo § 516.105(2); *White v. Zubres*, 222 S.W.3d 272, 275 (Mo. 2007); *see also Stafford v. Neurological Med., Inc.*, 811 F.2d 470, 473 (8th Cir. 1987) (recognizing negligent reporting cause of action in claim where inaccurate report that patient had a brain tumor allegedly caused patient to commit suicide).

At its most fundamental level, medical laboratory testing involves four components: the ordering of testing, obtaining the necessary specimen, testing the specimen, and reporting the results. The record clearly demonstrates that the faxes were part and parcel of the reporting of the test results. Further, the fax number in question indisputably appears on the face of the requisition, interpretation of the requisition and the attendant reporting of the results cannot be separated from the health care services at issue in this case.

Earlier this year, the Court of Appeals for the Eastern District affirmed the need for an affidavit of merit in a claim in which a hearing impaired patient claimed that during her childbirth, the defendant hospital' staff encouraged her to have an epidural, but did not provide an appropriate interpreter to assist the patient in understanding why they believed an epidural was necessary. *Crider v. Barnes-Jewish Hosp.*, 363 S.W.3d 127 (Mo. App. E.D. 2012). Even though the patient brought her claim as a violation of the Missouri Human Rights Act, an affidavit was required because her "true claim" was that "the physician failed to make an appropriate disclosure of risks and benefits," which is in effect a medical negligence issue. *Id.* at 131 (citations omitted). Here, as in *Crider*, Appellant takes issue with transmission of health information. As was the case in *Crider*, an affidavit was necessary.

The real issue is whether Quest Diagnostics appropriately interpreted the requisition for testing with regard to how the results were to be reported. In that regard, the reasoning of the Court of Appeals for the Southern District in the very recent case of *Spears v. Freeman Health Systems*, __ S.W.3d ___, 2012 WL 2912099 (Mo. App. S.D. Aug. 14, 2012) is instructive. In *Spears*, the parent of a child who was sexually assaulted by a 16 year old mental patient brought an action against the facility at which the perpetrator was housed, alleging failure to properly supervise. In determining whether a health care affidavit was required, the Court of

Appeals held, "in our view, the question of whether Defendants should have known Patient posed a danger to other patients and what measures . . . could have been used to minimize any such danger involves a question of professional medical judgment. The fact that Mother's petition characterizes the claim as one of ordinary negligence rather than medical negligence is not determinative." *Id.* at *3. Dismissal of the claim for failure to file an affidavit was affirmed. Here, the telephone number to which the reports were faxed appears on the face of the requisition. The issue is how the requisition should have been interpreted. Appellant argued at trial that it was interpreted incorrectly, and that steps should have been taken to confirm what the notation "FAXED TO: 361-5358" on the requisition meant. Interpretation of requisitions completed by physicians involves the exercise of medical professional judgment.

Appellant's true claim, despite how he is attempting to frame it, falls within the scope of Section § 538.225 which provides that "[i]f the plaintiff or his attorney fails to file such affidavit the court shall, upon motion of any party, dismiss the action against such moving party without prejudice." Respondents filed a Motion in Limine/Motion to Dismiss seeking dismissal of Respondent's claims on this basis. (SLF 511-28). That motion was incorrectly denied by the trial court. In short, Respondent's claims never should have gone forward to trial. The jury should never have been permitted to consider Appellant's breach of fiduciary duty or

statutory claim. Therefore, the alleged instructional errors are immaterial because the alleged errors did not "materially affect[] the merits of the action." *See St. Charles County,* 234 S.W.3d at 495.

CONCLUSION

For all these reasons, the Court should reject Appellant's appeal and affirm Judge Schaumann's entry of judgment in accordance with the verdict of the jury.

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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rules of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. The brief includes the information required by Missouri Rule of Civil Procedure 55.03.

2. This brief complies with Missouri Rule of Civil Procedure 84.06(b).

3. This brief contains approximately 17,032 words according to the Word Count Feature of Microsoft Word.

4. This brief has been prepared in proportionally spaced typeface (14 point Times New Roman) using Microsoft Word 2010 on Microsoft Windows.

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