

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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**Nos. 06-2286 & 06-2301**

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**WASHINGTON UNIVERSITY**  
*Appellee-Plaintiff,*

**v.**

**WILLIAM J. CATALONA,**  
*Appellant-Defendant,*

**and**

**RICHARD WARD, et al.**  
*Appellant-Defendants.*

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**On Appeal from the United States District Court  
for the Eastern District of Missouri, Central Division  
The Honorable Stephen L. Limbaugh, District Judge**

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**BRIEF OF APPELLANT-DEFENDANTS RICHARD WARD, et al.**

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**July 12, 2006**

## SUMMARY OF THE CASE

The eight appellant research participants in this case provided tissue samples for use in the research of Dr. William Catalona, who at the time was affiliated with Washington University. The District Court held that the research participants made an *inter vivos* gift of their tissue to Washington University, and that the University was now free to use the samples for any purpose it chose. That conclusion is erroneous because it contradicts the consent forms signed by the participants, which gave them the right to withdraw their tissue samples from the research, as well as governing federal regulations and the unrefuted testimony of the participants.

Moreover, by giving the University *carte blanche* to use, sell, or dispose of the samples, the District Court has set a disturbing precedent for human subject research. Without the confidence that they can withdraw from studies they find offensive or inappropriate, individuals will not participate in such research. This Court should thus reverse the District Court, enforce the participants' right to withdraw, and allow them to transfer the samples to Dr. Catalona's research program at Northwestern University.

Because of the complexity and importance of this case, the appellant research participants request 30 minutes per side of oral argument time.

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## JURISDICTIONAL STATEMENT

The District Court had jurisdiction over this suit under 28 U.S.C. § 1331 and § 1367. The District Court entered a final judgment in this case on April 14, 2006. Defendants filed timely notices of appeal on May 11, 2006. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

- I. Whether the District Court erred in concluding that the research participants made an *inter vivos* gift of their human tissue, instead of finding that they entered into a straightforward contract that preserved the participants' right to withdraw their tissue?**

*Wantuck v. United Savings & Loan Ass'n*, 461 S.W.2d 692, 694 (Mo. 1971)

*Suits v. Elec. Park Amusement Co.*, 249 S.W. 656, 657 (Mo. 1923)  
45 C.F.R. § 46.116

- II. Whether the research participants' right to withdraw allows them to transfer the samples to the same researcher engaged in research at another qualified institution or, at a minimum, to avoid anonymization of their tissue samples for ongoing use?**

*York v. Jones*, 717 F. Supp. 421 (E.D. Va. 1989)

## STATEMENT OF THE CASE

This case arises out of the research performed by Dr. William Catalona while he was a researcher and physician at Washington University ("WU"). Dr. Catalona investigated the genetic causes of prostate cancer and treated patients who suffered from the disease. Dr. Catalona and his team of

researchers collected thousands of human tissue samples from research participants, many of whom who had been his patients, for use in his research. These participants all signed consent forms that gave them the right to withdraw from the research and to request that their samples be destroyed.

When Dr. Catalona left Washington University to take a position at Northwestern University in 2003, Washington University filed an action against Dr. Catalona to obtain a declaration that it was the owner of the human tissue samples, and was not liable to Dr. Catalona for misuse of the samples. Dr. Catalona counterclaimed on the ground that the research participants were the rightful owners of the tissue. WU filed a summary judgment motion as to the ownership counts of its complaint and stated that resolution of the ownership issues would resolve all of the claims in the case.

Dr. Catalona moved for an order prohibiting WU from “utiliz[ing], disseminat[ing], transferr[ing], dissipat[ing], de-identify[ing] and/or destroy[ing] the serum and genetic material at issue.” Docket Entry No. 39, App. 10. The judge entered such an order on a “temporary” basis, stating that “[i]f after time for responses has passed and there are objections to this order being made permanent, the Court will revisit the issue.” Docket Entry

No. 41, App. 11. When WU objected, the court withdrew the order, cautioning WU that it would be best not to use the materials during the litigation. Docket Entry No. 52, App. 14. The court also “converted” Dr. Catalona’s original motion into a motion for a preliminary injunction and ordered further briefing. *Id.*

Once this briefing was complete, the court had both a summary judgment motion and a preliminary injunction motion pending before it. It issued an order asking the parties which motion should be heard first. Docket Entry No. 82, App 17. WU said the preliminary injunction motion should be heard first, and Dr. Catalona said that the summary judgment motion should be heard first. The court then scheduled a “permanent injunction hearing” on the issue of who owns the biorepository materials, noting that this was the “*only* issue to be argued.” Feb 11, 2005 Order at 2, Docket Entry No. 84, App. 17 (emphasis added). The court also allowed a “short” discovery period focused on this issue alone, and explained that it did not expect testimony from all of the thousands of research participants, but rather wanted “minimal live testimony.” *Id.* at 3. The court denied as moot Dr. Catalona’s request, in response to the summary judgment motion, for a six-month period to take various discovery. *Id.*

After this order was issued, the Defendant-Appellant patients, all of whom had been treated by Dr. Catalona and provided tissue samples for research, moved to intervene. Docket Entry No. 86, App. 18. The court denied their motion, Docket Entry No. 95, App. 19, but added them to the case as necessary defendants – but did not alter the date of the permanent injunction hearing, then only one month away. Docket Entry No. 96, App. 19.

The hearing took place over three days in April 2005. The Court heard testimony from Dr. Catalona, three of the Defendant-Appellant research participant/patients, and several experts. All the testifying research participants stated that they had not intended to make an outright gift of their tissue to Washington University, and that they believed they had the right to withdraw their consent to use the tissues at any time. *E.g.*, Tr. 1:158, App. 67 (“[I]t’s hard to go back in time but I understood very clearly when I signed this document that I could withdraw my participation and that was important to me at that time, that I could withdraw.”) (testimony of James Ellis); Tr. 1:211, App. 80 (testimony of Tom McGurk).

On March 31, 2006, nearly a year later, the District Court granted judgment on all counts to Washington University. It found that Washington University was the owner of the tissue samples and that the Defendant-

Appellant patients had given the samples to the University as an *inter vivos* gift. In considering the consent form language providing a right to withdraw from the research project, the Court concluded that the meant “nothing more [than the right] not to make any more *inter vivos* gifts of donated biological materials to WU.” Op. at 23, Add. 23.

Dr. Catalona and the patients filed separate notices of appeal on April 14, 2006. The appeals were consolidated on May 16, 2006.<sup>1</sup>

## **STATEMENT OF FACTS**

### **A. Dr. Catalona’s Research.**

From approximately 1976 to 2003, Defendant-Appellant Dr. William Catalona provided medical care and conducted research at Washington University (“WU”) in St. Louis, Missouri. Dr. Catalona is one of the preeminent urologists in the country, and during his time at Washington University he performed thousands of surgeries, including prostate cancer surgeries. Op. at 2, Add. 2. Dr. Catalona is also a leading researcher. In 1983, he spearheaded the establishment of a biorepository for the collection and storage of biological research materials relating to prostate cancer research and related areas of inquiry. *Id.*

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<sup>1</sup> Washington University has agreed not to use, modify, or destroy the tissue samples during the pendency of this appeal without providing advance notice (so as to permit the filing of a request for a stay or other judicial relief).

The District Court noted that “[t]here are approximately 3500 prostate tissue samples in the GU Biorepository. . . . There are approximately 100,000 serum samples . . . . 75% of these contributions were made from [research participants] who were not patients of Dr. Catalona or any other WU physician . . . .” Op. at 3, Add. 3. While the court said that 75% of the serum samples were from men who were not personal patients of Dr. Catalona, these men were participants in studies directed or overseen by Dr. Catalona. Tr. 1:87, App. 49; 1:92, App. 50. As Principal Investigator, Dr. Catalona directed research protocols for the prostate cancer research studies and appointed other members of the urology division to projects. Tr. 1:47, App. 39.<sup>2</sup>

Among those whose tissue samples are housed in the biorepository are the eight Defendant-Appellants in this case (the “research participants” or “RPs”). All eight research participants are patients on whom Dr. Catalona performed prostate cancer surgery.

Other samples in the biorepository come not only from prostate cancer surgical patients, but also from the relatives of such patients and from participants who have had blood collected for study but have not contracted prostate cancer. Tr. 1:35, 1:37, App. 36-37. The samples of patients’

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<sup>2</sup> For ease of reference, this brief will refer to all of the samples provided to Dr. Catalona as “tissue samples.”

relatives are useful because “the causes of cancer are genetic and where prostate cancer is passing down through families, it’s very likely the cause of cancer is the same . . . and so if one could identify that, then there would be possibilities of earlier detection.” Tr. 1:35-36, App. 36.

The prostate tissue samples Dr. Catalona obtained from the RPs and others are “linked” samples – that is, the samples are matched via a computer database to the identity of the research participant. Tr. 2:111-12, App. 111. The database contains demographic information as well as “medical information for each particular patient that provided samples” and “very detailed information, [and] very long follow up.” Tr. 2:113, App. 112; Tr. 1:64, App. 43. The “linked clinical data” in the database(s) includes specific medical information for each research participant such as PSA levels, diagnosis or past history of prostate cancer, and clinical follow-up data. Tr. 2:112-13, App. 111-112. The database also maintains the identity of the treating physician for each RP.

Linking the samples to the identity of their owner is important because of the genetic component to cancer. If it were determined, for example, that a certain set of genes predisposed an individual to cancer, it would obviously be important to inform the person from whom the tissue came that he was predisposed to cancer. But it would also be important to

inform the blood relatives of that individual, because they too would be likely to have the same genetic predisposition. Tr. 2:124-126, App. 114-115.

Research participants could also be harmed by the release of such information. For example, if an insurance company found out that a policy holder was genetically predisposed to cancer, it could deny or rescind coverage. *See, e.g.*, Patients' Ex. 58, Add. 34.

For these reasons, the research participants would face irreparable harm either if the samples were destroyed against their will (thus preventing the RPs, their blood relatives, and their descendants from learning about their predisposition to disease) or if the sample information were released (thus placing the RPs, their blood relatives, and their descendants at risk for unfavorable treatment by insurance companies and other institutions).

#### **B. The Regulatory Framework.**

Washington University is a federally approved and regulated institution with respect to the human-subject research that involves the biorepository. Because Washington University receives federal funds, it must comply with regulations issued by the Department of Health and Human Services that govern the manner in which human-subject research takes place. Among other things, the federal regulations impose strict

requirements as to what constitutes informed consent by a research participant to participate in a study, providing that:

Except as provided elsewhere in this policy, no investigator may involve a human being as a subject in research covered by this policy unless the investigator has obtained the legally effective informed consent of the subject or the subject's legally authorized representative. An investigator shall seek such consent only under circumstances that provide the prospective subject or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the subject or the representative shall be in language understandable to the subject or the representative. No informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.

45 C.F.R. § 46.116.

In order to constitute informed consent under the regulations, a consent document must contain certain provisions. One such provision is “[a] statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled.” *Id.*

§ 46.116(a)(8). Where “appropriate” the consent form must also state “[t]he consequences of a subject’s decision to withdraw from the research and procedures for orderly termination of participation by the subject.” *Id.*

§ 46.116(b)(4). Federal regulations also forbid any consent document containing “exculpatory language through which the subject . . . is made to waive or appear to waive any of the subject’s legal rights.” *Id.* § 46.116.

The Office for Human Research Protections, the enforcement arm of the Department of Health and Human Services, issued an authoritative guidance barring waivers of the patient’s property right in tissue samples provided for research. *See Exculpatory Language in Informed Consent*, Office for Human Research Protections, *available at* <http://www.hhs.gov/ohrp/humansubjects/guidance/exculp.htm>.

Pursuant to these governing federal regulations, research participants were presented with consent forms and a brochure drafted by Washington University. As discussed in greater detail below, the forms provided that their tissue samples would be used for prostate and bladder cancer research and that the participants had a right to withdraw from the research later on if they changed their minds. The forms did not state that Washington University (or Dr. Catalona) would own the tissue samples. To the contrary, the forms made clear that the patients retained significant ownership rights

in their tissues, including the right to demand that their samples be destroyed upon their request.

**C. The Present Dispute.**

In early 2003, Dr. Catalona left Washington University to become a professor and director of the Clinical Prostate Cancer Program at Northwestern University in Chicago, Illinois. In February of that year, Dr. Catalona sent a form letter to his patients, the families of his patients, and all others who participated in his research protocols at Washington University. The form letter asked if the recipient would consent to having his tissue transferred from Washington University to Northwestern University. Dr. Catalona also published his request in the medical journal *Quest*. The Defendant-Appellant RPs, along with more than 6000 other research participants, gave their consent to transfer and notified WU of their request to withdraw and transfer the tissue samples. WU refused to honor the requests of the research participants, and subsequently filed the suit that is the basis for this appeal.

**SUMMARY OF ARGUMENT**

The District Court held that the research participants made an unconditional *inter vivos* gift of their tissue samples to Washington University. On the District Court's account, the University may now use

those tissue samples for any purpose it sees fit. That analysis cannot be squared in any way with the applicable law and the undisputed facts. All of the research participants signed consent forms that specifically preserved their right to withdraw from the research and to request that the samples be destroyed. Contrary to the District Court’s analysis, and consistent with the plain meaning of the documents, the governing federal regulations, and the unrefuted testimony of the research participants, the research participants maintained a right to withdraw their tissue from the research program.

As a result, there is no support for the District Court’s erroneous conclusion that the research participants made an *inter vivos* gift of their tissue. Washington University bears the heavy burden of proving the gift by clear and convincing evidence, and it has not done so here. There can be no *inter vivos* gift “where the donor reserves, either expressly or in the circumstances, the power of revocation or dominion over the subject of the gift.” *Cartall v. St. Louis Union Trust Co.*, 153 S.W.2d 370, 384 (Mo. 1941). Yet the consent forms—which the District Court misinterpreted or refused to consider in its analysis—unmistakably demonstrate that the research participants explicitly reserved their gift-defeating right to withdraw their tissue from the research.

Indeed, Washington University has failed to show that the parties satisfied *any* of the requirements for an *inter vivos* gift. The research participants did not have the intention of making such a gift, as shown by the forms and their testimony, nor did they make an absolute delivery of tissue to the University. The research participants even received consideration for providing the tissues in the form of the ability to obtain improved health benefits for themselves and their blood relatives.

Instead of creating an *inter vivos* gift, the parties created a straightforward contract in the form of a bailment. It is a classic bailment arrangement to entrust property—here the tissues—for a limited purpose to another. The District Court erred when it found that no bailment contract could exist because the research participants did not expect the tissue samples to be returned. Leaving aside the fact that the research participants are not asking for the return of the samples, but rather their transfer, Missouri case law has repeatedly recognized a bailment in such a situation.

Having made a contract that includes the right to withdraw, it is plain that right includes the right to transfer the samples to Dr. Catalona for use in the same research at Northwestern University. Given that the participants have the right to request that the tissues be destroyed, they also have the lesser authority to require their transfer. Without the right to transfer, the

RPs must make a cruel choice between destroying a tissue sample that could yield enormous medical benefits for them, their families, and their descendants, and allowing the tissue to be used in a research program to which they did not consent. Moreover, such a transfer would not be in violation of any hazardous waste provision (as the District Court incorrectly concluded), nor would it hinder medical research. To the contrary, it is the District Court's ruling that will hinder research, since potential research participants will refuse to take part in studies knowing that even binding consent form provisions will not protect them from unauthorized and unforeseen uses of their tissue samples.

At a minimum, the right to withdraw means that the research participants have the right to have their samples destroyed (or removed from use), and not merely anonymized, as Washington University has maintained. There is no means of anonymizing tissue that contains human DNA. So long as the tissue exists, research participants will be at risk of having sensitive genetic information revealed to insurers, employers, and other institutions that could use it to the participants' detriment. The right of destruction is specifically provided for in the agreement signed by the research participants. Thus, at the very least, the District Court's ruling that

Washington University may do whatever it likes with the tissue samples must be reversed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW.**

The District Court's legal conclusions are reviewed *de novo* by this Court, as are mixed questions of law and fact. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995). Pure factual findings are reviewed for clear error. *Id.* Under Missouri law, questions of contract interpretation are questions of law. *Unigroup, Inc. v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1220 (8th Cir. 1992).

### **II. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE RESEARCH PARTICIPANTS MADE AN *INTER VIVOS* GIFT OF THEIR TISSUE.**

The District Court concluded that the research participants made an *inter vivos* gift of their tissue samples to WU. That interpretation is indefensible as a matter of law because it contradicts the terms of the operative consent forms and the research participants' statements of their intent.

A gift is “a voluntary transfer of property by the owner to another” without consideration or compensation. *Wills v. Whitlock*, 139 S.W.3d 643, 653 (Mo. Ct. App. 2004) (quoting *Pilkington v. Wheat*, 51 S.W.2d 42, 44

(1932)). The requirements for proving a gift are strict. As a putative donee, WU had the burden of proving by clear and convincing evidence that the samples were the subject of an *inter vivos* gift. *In re Estate of Wintermann*, 492 S.W.2d 763, 767 (Mo. 1973). An *inter vivos* gift requires three elements under Missouri law: 1) “a present intention to make a gift on the part of the donor”; 2) “a delivery of the property by the donor to the donee”; and 3) “an acceptance by the donee, whose ownership takes effect immediately and absolutely.” *Wantuck v. United Savings & Loan Ass’n*, 461 S.W.2d 692, 694 (Mo. 1971); *see also Michaelson v. Wolf*, 261 S.W.2d 918, 925 (Mo. 1953); *Ridenour v. Duncan*, 246 S.W.2d 765, 769-70 (Mo. 1952) (holding that a gift requires “an intention on the part of the donor to part with his right in and dominion over the property immediately and irrevocably” and that a putative donor must relinquish all “dominion and control” over the gift through “a complete and unconditional delivery of the subject matter”).

Applying those standards, and taking into account the language of the relevant documents executed at the time the tissue samples were transferred as well as the unrebutted testimony of the research participants about what they understood when they consented to participate in research by Dr. Catalona and his colleagues, it is impossible to reach the conclusion that WU

received gifts of the tissue samples. The research participants plainly intended to and did retain rights—including the right to “withdraw,” to discontinue participation, and to destroy the samples—that are inconsistent with the notion that they made unconditional *inter vivos* gifts. They had a clear understanding, based on what they were told, that they would remain partners in the research, able to continue to control the fate of their own tissue samples. The forms created a straightforward contractual arrangement in which the research participants entrusted the samples to Dr. Catalona but retained to a right to withdraw from research. Missouri law recognizes this type of relationship as a bailment. *Suits v. Elec. Park Amusement Co.*, 249 S.W. 656, 657 (Mo. 1923); *D.S. Sifers Corp. v. Hallak*, 46 S.W.3d 11, 16 (Mo. Ct. App. 2001).

In reaching its erroneous conclusions, the District Court ignored not only the plain language of the forms and the specific undisputed facts that control the outcome here, but also the evidence presented concerning how medical research on human samples is typically conducted in this country, consistent with mandatory federal guidelines. Despite the fact that these samples contain the research participants’ DNA and could reveal genetic predisposition to disease, the District Court held that there are no limits on the future use of these materials and that the participants have no ability to

withhold consent to the types of research performed on their tissues and no protections of patient confidentiality. Such a state of affairs, even if it were legally permissible (which it is not), certainly should not be seen as what the parties here intended, absent the clearest of evidence. In fact, however, the contractual language and accompanying testimony point strongly the other way. By enforcing the research participants' express agreement, this Court can ensure that future potential research participants will be able to trust that the promises made to them will be kept. Absent such trust, people will no longer participate in research protocols, and future research endeavors will be jeopardized.

Part A of this Section describes the terms of the arrangement entered into by the research participants and explains how the District Court misinterpreted those terms as a matter of law. Part B demonstrates how District Court relied on these misinterpretations to conclude erroneously that the research participants had made an *inter vivos* gift of their tissue to WU. Part C explains that the governing documents create not an *inter vivos* gift, but a straightforward contract in the form of a bailment.

**A. The District Court Improperly Interpreted the Evidence of What the Research Participants Understood about Future Control of Their Tissue Samples.**

The District Court's implausible interpretation of the documentary and testimonial evidence of what the research participants understood about future control of their tissue samples rests on numerous errors and must be rejected. These documents created a contract under familiar legal principles. *See Tinucci v. R.V. Evans Co.*, 989 S.W.2d 181, 184 (Mo. Ct. App. 1998); *Dahl v. HEM Pharm. Corp.*, 7 F.3d 1399, 1404-05 (9th Cir. 1993); *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989); *Grimes v. Kennedy Krieger Inst., Inc.*, 782 A.2d 807, 843-44 (Md. 2001). Their proper interpretation is a question of law. *E.g., Leventhal v. Trustmark Ins. Co.*, 39 S.W.3d 46, 50 (Mo. App. Ct. 2001)

1. The Terms of the Consent to Research.

When the research participants submitted their tissue samples for research, the terms on which the submission took place were set forth in consent forms, Patients' Exs 1-24, and an accompanying "Genetics Research Brochure," Patients' Ex. 58. These documents were drafted by WU and presented for the research participants' signature at the time the tissue samples were transferred. Op. at 5-6, Add. 5-6.

While the terms of the consent forms vary somewhat from RP to RP, the forms are essentially uniform in the relevant elements, including the fact that they grant the research participants the rights to withdraw from the research and request that their tissue samples be destroyed. Specifically, the forms invite the research participants to participate in a “research study conducted by Dr. Catalona and/or colleagues.” *E.g.*, Patients’ Ex. 7 at 1, Add. 31. The forms provide that the “overall purpose” of the study is to “investigate the genetic changes associated with prostate or bladder cancer.” *Id.* The forms also outline “possible benefits to you and society from this research,” including “[t]o add information which one day may allow accurate prediction of the nature or course of the disease in you or others” and “[t]o help counseling your family members regarding cancer risks.” *Id.* at 2, Add. 32. Another section of some of the forms provides that the research participants will not have any rights in commercial products derived from their samples, and states in that connection that the participant “waive[s] any claim [he] might have to the body tissues [he] donate[s].” *Id.* at 1, Add. 31.

As the District Court found, the “typical” consent form provides that a research participant “may choose not to participate in this research study or withdraw your consent at any time.” *Id.* at 2, Add. 32. The form also states

that “[y]ou will be informed of any significant new findings developed during the course of participation in this research that may have a bearing on your willingness to continue in the study.” *Id.* at 3, Add. 33. In addition, the Genetics Research Brochure that the research participants received for signature indicated that they were involved in a continuing research collaboration, and contained the following language:

What if you change your mind?

To request that your tissue no longer be used for research, you should call the investigator listed on the consent form. *Your tissue will be identified and destroyed upon request.* Any research results already obtained cannot be destroyed or recalled.

Op. at 6, Add. 6 (emphasis added); *see also, e.g.*, Genetics Brochure at 2, Add. 35 (noting that researchers “consider you an important partner in the battle against disease”).

None of the consent forms stated that WU would own the samples. Notably, the forms discussed only the use, not the ownership, of the blood and tissue samples by researchers, and invariably identified the samples as belonging to the research participants through use of the possessive personal pronoun “your.” *See, e.g.* Patients’ Ex. 1, Ex. App. 1 (“your blood sample

and pathologic specimen may be used for research”); *see also York*, 717 F. Supp. at 425-26.<sup>3</sup>

Moreover, far from providing that WU would enjoy unfettered rights as an owner of the samples, the forms provided that the tissues would be used for a single purpose: “[t]o investigate the genetic changes associated with prostate or bladder cancer.” *E.g.*, Patients’ Ex. 7, Add. 31. Indeed, to the extent that the forms contemplated that anyone would exercise any control over the samples, it was Dr. Catalona and not WU. The forms consistently stated that the participant was invited “to participate in a research study conducted by Dr. William J. Catalona and/or colleagues.” Many of them also specifically asked the RP whether “I [may] share your tissue and data (with code numbers only) with investigators doing research in similar fields at Washington University and at other research centers” – language that would not have been necessary (or made any sense) had WU

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<sup>3</sup> The District Court erroneously found that the informed consent documents “typically state that by participating, the RP ‘make[s] a free and generous gift of your [blood, tissue and/or DNA] to research that may benefit others.’” Op. at 5 (alterations in original; citation omitted). In fact, the only statement similar to this is found in the Genetics Brochure, Add. 35, which vaguely provides that the RPs are “making a free and generous gift of your tissue *to research that may benefit society*,” Genetics Brochure at 2 (emphasis added), a statement that can hardly be read to create a gift to WU, as opposed to Dr. Catalona, or to override the Brochure’s more specific language permitting the RPs to have their samples “destroyed upon request.”

itself owned the samples. The forms certainly did not provide that WU could use the samples in any way it saw fit.

The oral testimony of the research participants at trial also sheds light on how they understood the arrangement set forth in the forms. Richard Ward testified that at the time he provided tissue samples he had researched his reserved right to withdraw and did not believe he was giving up all rights in the tissue. Tr. 2:71, App. 101. Ward also testified that he “was simply contributing the tissue for Dr. Catalona’s research for his use in that program.” Tr. 2:72, App. 101. James Ellis stated that he knew at the time he agreed to participate in the research he could withdraw his consent at any time. Tr. 1:158-59, 1:161, App. 67, 68. He testified he did not give his tissue to WU. Tr. 1:158, App. 67. Tom McGurk testified he neither intended for WU to own his tissue, nor was he informed at any time that WU would claim ownership. Tr. 2:211, App. 80. His stated intent was for Dr. Catalona to find a cure for prostate cancer. Tr. 1:211-13. App. 80-81.

2. The District Court’s Errors in Interpreting the Terms of the Research Participants’ Arrangement.

In interpreting the relevant documents, the District Court overlooked a great deal of significant language and wholly misinterpreted the parties’ arrangement. For instance, the District Court asserted that “[t]he informed consent forms repeatedly asserted WU’s ownership of the donated

materials.” Op. at 21, Add. 21. This is simply not true. *None* of the forms assert WU’s ownership. In addition, the District Court concluded that the right to withdraw set forth in the consent documents meant only the right not to provide any more samples – a conclusion that is wholly inconsistent with the terms of the documents and with the governing law.

a. *The District Court’s Interpretation of the Withdrawal Language Is Erroneous.* The District Court’s ruling would allow WU to use the samples for any purpose it saw fit despite a research participant’s effort to withdraw, no matter how untethered that purpose was from the particular research protocol that the consent forms described. To pick just a few examples, WU could use the samples in research that the research participants would find morally offensive, or it could sell the samples to some other institution or corporation, or it could publicize the names of the participants. These risks are not trivial. The University’s own genetics brochure spells out the consequences that could result from identifying the owner of a tissue sample: “If this information were to become known outside of the research, you (and family members) may be unable to obtain health, life, or disability insurance. You might also be refused employment or be terminated from your current employment.” Genetics Brochure, Add. 35; *see also, e.g.*, Lori Andrews, *Future Perfect: Confronting Decisions About Genetics* 133

(2001); U.S. Dept. of Health and Human Services, Office for Human Research Protections (OHRP), Protecting Human Research Subjects: Institutional Review Board Guidebook, Chapter 5: “Research – An Overview,” Section H: “Human Genetic Research,” *available at* [http://www.hhs.gov/ohrp/irb/irb\\_chapter5.htm](http://www.hhs.gov/ohrp/irb/irb_chapter5.htm) (explaining that genetic research entails financial and psychological risks to research participants).

The District Court’s vast grant of authority to WU is wholly unsupported. As noted above, the relevant documents do not grant ownership rights to WU, and are unanimous in reserving a right of withdrawal for the research participants that plainly goes beyond a right not to donate additional tissue samples. *See* Patients’ Ex. 1 at 3, Ex. App. 3 (stating that “you may choose not to participate in this research or withdraw your consent at any time”); Genetics Brochure at 3, Add. 36 (“What if you change your mind?” “To request that your tissue no longer be used for research, you should call the investigator listed on the consent form. *Your tissue will be identified and destroyed upon request.* Any research results already obtained cannot be destroyed or recalled.” (emphasis added)); *see also* Patients’ Ex. 10 at 3, Ex. App. 10; Tr. 1:123, App. 58 (testimony of expert that right to withdraw must include right to remove existing samples from research).

This language admits of only one interpretation: the research participants have the right “to take back or take away” their tissue samples by pulling them out of the biorepository and preventing their use by WU for any ongoing or future research. *Merriam-Webster’s Collegiate Dictionary* 1438 (11th ed. 2003) (defining “withdraw”). Any other reading would render significant portions of the documents – which were drafted by WU – utterly superfluous. In particular, under the District Court’s crabbed reading the research participants would have no greater “withdrawal” rights than they already possess as a matter of tort law, which makes any requirement that they donate additional tissue samples against their will a battery. *See, e.g., Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. 2003) (stating that “each term of a contract is construed to avoid rendering other terms meaningless”); *see also, e.g., Greenberg v. Saha*, 84 S.W.3d 474, 476 (Mo. Ct. App. 2002) (holding that contract should be construed against the drafter); *Sonoma Mgmt. Co. v. Boessen*, 70 S.W.3d 475, 481 (Mo. Ct. App. 2002) (holding that a court’s contract interpretation should not reach an “absurd or unreasonable result”) (quotation marks omitted).<sup>4</sup>

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<sup>4</sup> The District Court’s conclusion is also inconsistent with the uncontroverted testimony of the RPs, which reflects that they understood their withdrawal right to permit them to remove their tissue from the biorepository and that

Moreover, the District Court’s interpretation of the documents to give unchecked power over the tissue to WU runs directly contrary to numerous federal regulations. WU is bound by a series of regulations issued by the Department of Health and Human Services (HHS) that purposefully limit the legal rights that research participants are allowed to waive. These regulations mandate a right to “discontinue participation” and “withdraw from the research,” and also require that the research institution seek the consent of the patient with respect to each particular research protocol for which their tissue is used. *See* 45 C.F.R. § 46.116; Tr. 2:252, App. 146 (testimony from WU expert that patients must give consent again before researchers use tissues for protocols not under consideration at the time the consent was given); *see also, e.g.*, 45 C.F.R. § 46.116(a)(8) (requiring that a subject be told that “the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled”); *id.* § 46.116(b)(4) (stating that “when appropriate” the research participant must be informed as to “[t]he consequences of a subject’s decision to withdraw from the research and procedures for orderly termination of participation by the subject”).

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they intended to participate in prostate cancer research conducted by Dr. Catalona. *E.g., Avellone v. John Weisert Tobacco Co.*, 213 S.W.2d 222, 229 (Mo. Ct. App. 1948) (finding that “oral testimony aids in the construction of [an] agreement”).

*b. The District Court's Interpretation of the "Waiver" Language Is Erroneous.* To be sure, some of the research participants received consent forms that contain a provision stating that "[b]y agreeing to participate in this study, you agree to waive any claim you might have to the body tissues that you donate." Patients' Ex. 10 at 1, Ex. App. 8. The District Court found this language binding. Op. at 20-21, Add. 20-21. But the "waiver" language cannot be read to extinguish a research participant's right to withdraw his tissues, for several reasons.

As an initial matter, read in context, this waiver language clearly refers only to a waiver of the research participant's interest in any research or commercial product obtained from the research. The paragraph in which the waiver language is found reads:

This study is also to determine whether any valuable material or process (such as a new drug or new cell line) can be developed. A cell line is a family of cells grown in a laboratory. Cell lines used for research sometimes result in the development of new chemical products. By agreeing to participate in this study, you agree to waive any claim you might have to the body tissues that you donate. Participation in this research means you waive the right to any new material or process developed through research involving your tissues.

*E.g.*, Patients' Ex. 7 at 1, Add. 31. Missouri law requires that contractual language be interpreted as a whole. *Tuttle v. Muenks*, 21 S.W.3d 6, 11 (Mo.

Ct. App. 2000) (“In determining the intent of the parties to a contract, we review the terms of a contract as a whole, not in isolation.”). As a result, the waiver language is best understood to mean only that the research participants cannot claim ownership of the fruits of the research on their tissue samples.

In addition, each consent form that included the general waiver language also included the specific language quoted above providing that the research participant could “choose not to participate in this research or withdraw [his] consent at any time.” Under hornbook rules of contract interpretation, the more specific language trumps the general. *See, e.g., General Am. Life Ins. Co. v. Barrett*, 847 S.W.2d 125, 133 (Mo. Ct. App. 1993). Further, to the extent that there is any conflict between the provisions, the conflict should be resolved against WU as the drafter. *See Greenberg*, 84 S.W.3d at 476.

Finally, the broad waiver language is also limited by the federal regulations governing the scope of informed consent forms. The regulations expressly provide that “[n]o informed consent, whether oral or written, may include any exculpatory language through which the subject or the representative is made to waive or appear to waive any of the subject’s legal

rights, or releases or appears to release the investigator, the sponsor, the institution or its agents from liability for negligence.” 45 C.F.R. § 46.116.

The Office for Human Research Protections, which is the enforcement arm of HHS, has given authoritative guidance regarding the meaning of § 46.116. *See* Exculpatory Language in Informed Consent, Office for Human Research Protections, *available at* <http://www.hhs.gov/ohrp/humansubjects/guidance/exculp.htm>. The guidance document details various waivers that are impermissible under § 46.116. One such impermissible provision is a statement virtually identical to the provision at issue here – a statement that “[b]y consenting 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.”<sup>5</sup> *Id.*

The OHRP’s guidance is not merely precatory. On January 25, 2006, the OHRP directed Louisiana State University Health Science Center Shreveport to remove nearly identical exculpatory language from its informed consent agreements: “By your consent to participation in this research study, you give up your property rights that you may have in your

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<sup>5</sup> In contrast, acceptable language endorsed by the OHRP states, “[b]y consenting to participate, you authorize the *use* of your bodily fluids and tissue samples for the research described above.” Exculpatory Language in Informed Consent, Office for Human Research Protections, *available at* <http://www.hhs.gov/ohrp/humansubjects/guidance/exculp.htm>. (emphasis added).

bodily fluids, substances or tissues.”<sup>6</sup> Indeed, even WU’s own expert conceded that the purported waiver included by WU in the research participants’ consent forms is not “in conformity” with OHRP guidance. Tr. 2:171-172, App. 126.

The District Court took the position that the OHRP’s guidance was not binding because it was “not listed anywhere or referred to anywhere in the relevant federal regulation.” Op. at 9, Add. 9. But as an interpretation of its own regulation, the OHRP’s guidance is entitled to substantial deference under administrative law principles. *See Glover v. Standard Federal Bank*, 283 F.3d 953, 962 (8th Cir. 2002) (stating that an agency’s policy statements interpreting its “own ambiguous regulation are controlling authority unless they are plainly erroneous or inconsistent with the regulation or the purpose

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<sup>6</sup> Letter from Carol J. Weil, Compliance Oversight Coordinator, Division of Human Subject Protections, Office of Human Research Protections, to John C. McDonald, Chancellor/Dean, Louisiana State University Health Science Center Shreveport (Jan. 25, 2006) (on file with the PHS FOIA Office), *available at* [http://www.hhs.gov/ohrp/detrm\\_letters/YR06/jan06a.pdf](http://www.hhs.gov/ohrp/detrm_letters/YR06/jan06a.pdf). Similarly, when the University of Michigan attempted to require research subjects to waive other rights associated with their tissue, the OHRP determined the language was exculpatory in violation of the regulations. Letter from Patrick J. McNeilly, Compliance Oversight Coordinator, Division of Compliance Oversight, Office of Human Research Protections, to Fawwaz T. Ulaby, Vice President for Research, University of Michigan (June 29, 2004) (on file with the PHS FOIA Office), *available at* [http://www.hhs.gov/ohrp/detrm\\_letters/YR04/jun04c.pdf](http://www.hhs.gov/ohrp/detrm_letters/YR04/jun04c.pdf).

of [the underlying statute]”) (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)).

There is certainly no requirement that the agency’s interpretation be “listed” or “referred to” in the federal regulation to command deference. To the contrary, deference is called for where an interpretation takes the form of an informal policy statement, *see, e.g., Chalenor v. University of North Dakota*, 291 F.3d 1042, 1047 (8th Cir. 2002), or even a litigation position in a brief, *see, e.g., Auer v. Robbins*, 519 U.S. 452, 462 (1997). The OHRP policy is plainly a considered one and is consistent with HHS regulations and the underlying statute, both of which are intended to protect participants in research studies. 42 U.S.C. § 289; 45 C.F.R. § 46.101.<sup>7</sup>

Under longstanding Missouri law, contracts are to be interpreted whenever possible to be consistent with governing law. *See Glover v.*

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<sup>7</sup> This analysis is not in any way undercut by the District Court’s flatly incorrect statement – purportedly based on expert testimony – that “the research community consistently understood 45 C.F.R. § 46.116” to do nothing more than “to bar exculpatory language involving releases from malpractice or other negligence.” Op. at 20, Add. 20. This interpretation not only contravenes the agency guidance, to which deference is owed, but also reads the disjunctive “or” – which separates the prohibition against waiver of legal rights from the separate prohibition against releases from negligence – right out of the regulation. 45 C.F.R. § 46.116. It is also inconsistent with the expert testimony that the District Court heard. *See* Tr. 2:169-171 (testimony of WU’s expert witness Dr. Ludbrook that pertinent language in WU’s consent forms was exculpatory within the meaning of the regulation); Tr. 1:148-149, Add. 126 (testimony of expert Dr. Wright-Clayton that the language was “exculpatory” and “improper”).

*American Cas. Ins. & Sec. Co.*, 32 S.W. 302, 305 (Mo. 1895) (“In the interpretation of any instrument or writing, if it is susceptible of two constructions – one legal, the other illegal – the legal should be preferred.”). Thus, the forms must be read to preserve the research participants’ property interest in the tissue samples and their right to withdraw the samples from WU.

**B. The District Court Erred In Concluding that WU Had Absolute Ownership of the Tissue Samples By Virtue Of An *Inter Vivos* Gift under Missouri Law.**

Given the clear language in the consent forms preserving the RPs’ right to withdraw from the research, the District Court’s contrary conclusion that the research participants had made an outright *inter vivos* gift is an error of law. The District Court erred when it held that WU’s mere possession of the samples indicated the existence of a gift and shifted the onerous burden of proof on the issue away from WU. The research participants had no intent to provide a gift of their tissue to WU; did not deliver their tissue to WU; and did not irrevocably relinquish absolute dominion and control of their tissue to WU. Nor was their “gift” given without consideration. Accordingly, WU has not established *any* of the required elements of an *inter vivos* gift by clear and convincing evidence, and the declaratory judgment in WU’s favor must be reversed.

1. WU Must Establish the Existence of an *Inter Vivos* Gift By Clear and Convincing Evidence.

As noted at the outset, Missouri law requires that WU, as the party claiming to be a recipient of an *inter vivos* gift, prove by clear and convincing evidence the elements of such a gift. Although the District Court mentioned this requirement in passing, *see* Op. at 18, Add. 18, it effectively put the burden of proof on the defendants to disprove that they had made a gift. The court reasoned that WU had presumptive ownership rights in the tissue samples because it had possession of the samples. Op. at 12-13, Add. 12-13.

This burden-shifting was plainly error. WU's possession says nothing about the central issues in this case, and is in fact fully consistent with the research participants' position that they entered into a contractual relationship allowing Dr. Catalona to use the tissue for a limited purpose subject to the research participants' right to withdraw from the research. *See, e.g., Michaelson*, 261 S.W.2d at 924 (noting that possession alone does not indicate a gift unless there is "an intention to give"). Until WU interfered with the research participants' rights, they had no reason to exercise those rights. Indeed, WU never acted as if it were the owner of the samples until 2002, when Dr. Catalona was on the verge of leaving the institution, and the research participants were not informed of WU's new

claim to their tissue until they learned of this litigation. When they learned that WU had asserted ownership, over 6000 patients objected and indicated their disagreement by requesting that the samples be transferred away from WU to be used according to their intent.

It begs the question to assert that possession demonstrates ownership when WU would have that possession under the defendants' theory of the case as well as the plaintiff's. *See, e.g., State v. Hughes*, 702 S.W.2d 864, 867 (Mo. Ct. App. 1985) (explaining that under Missouri law a person can maintain legal possession even if another entity has physical possession). Pursuant to Missouri law, WU must be held to the clear and convincing evidence standard for proving the existence of a gift.

2. It Was Legal Error To Interpret the Consent Forms To Support an *Inter Vivos* Gift.

The District Court's legal analysis of the existence of an *inter vivos* gift is seriously flawed on the merits as well. First, with respect to intent, there is no gift without an "intention on the part of the donor to part with his right in and dominion over the subject of the gift." *Thomas v. Thomas*, 18 S.W. 27, 28 (Mo. 1891). Thus, "[t]here is no legally consummated gift *inter vivos* where the donor reserves, either expressly or in the circumstances, the power of revocation or dominion over the subject of the gift." *Cartall v. St. Louis Union Trust Co.*, 153 S.W.2d 370, 384 (Mo. 1941). The consent

documents quoted and discussed at length above could not more clearly establish that the “donor[s] reserve[d] the power of revocation . . . over the subject of the gift.” The statements of the research participants’ right to withdraw – such as the provision that “[y]our tissue will be identified and destroyed upon request” – are wholly at odds with a donative intent.

The District Court, however, deemed the language in the forms “inconsequential” for purposes of its gift analysis. Op. at 20, Add. 20. This was a straightforward error of law and logic. The District Court’s stated ground for casting aside the forms was that there “is no requirement that the gift be made pursuant to any written document.” Op. at 19, Add. 19. While that statement is true as far as it goes, it also true that where there *is* a contemporaneous written document accompanying the transfer, the terms of that document are highly relevant to determining the donor’s intent. *See, e.g., Wantuck*, 461 S.W.2d at 696 (examining effect of bank account certificate); *Ridenour*, 246 S.W.2d at 770 (examining effect of an incomplete deed). By ignoring a contemporaneous statement of intent drafted by WU and reserving significant rights to the research participants, the District Court erred as a matter of law in finding that the participants intended to make an *inter vivos* gift.

Moreover, the District Court committed clear error when it found that the uncontested testimony of the research participants at the trial did not establish that the RPs never intended to make an unrestricted gift of their tissue to WU. The state of mind of the alleged grantor is relevant to determine his intent. *LeMehaute v. LeMehaute*, 585 S.W.2d 276, 281 (Mo. Ct. App. 1979). WU did not present any witnesses (including other patients who had provided tissue samples) who disputed the clear intent of the research participants at the time they provided tissue. And the District Court's argument that the patients' testimony was *refuted* by the language of the consent forms, Op. at 21-22, Add. 21-22, gets it backwards. For the reasons described above, those forms confirm that the parties understood that the research participants had the right to withdraw their tissue from the research, and thus support the participants' testimony that they had not intended to make an unconditional gift of their tissue samples.

The District Court's refusal to take account of the language of the agreement between the parties fatally undermines its conclusions as to the other requirements of the gift analysis as well. In order to conclude that the research participants delivered the tissue samples to WU, in keeping with the second element of an *inter vivos* gift, the District Court needed to find by clear and convincing evidence that the participants had executed their

purported donative intent by “a complete and unconditional delivery of the subject matter” to WU. *Ridenour*, 246 S.W.2d at 770. Yet there is no indication in the forms that the RPs were entrusting their samples to WU, as opposed to Dr. Catalona or other researchers. The consent forms consistently describe the tissue as being entrusted to Dr. Catalona and/or his assistants. They often give the research participant the choice as to whether he wants his “tissue and data [shared] with investigators doing research in similar fields.”

The District Court stressed the fact that the consent forms “typically bore the WU Medical center logo” and that many of the research participants “donated biological materials for research protocols having someone other than Dr. Catalona as the Principal Investigator.” *Op.* at 18, *Add.* 18. These facts hardly show that WU received a complete and unconditional delivery of the subject matter. While there is no doubt that the research took place at WU, the tissue samples were entrusted to Dr. Catalona (or in some cases another researcher appointed by him). The fact that other researchers may have been named on some of the forms does not strengthen WU’s claim that the samples were delivered to it.

In any case, even if the samples were delivered to WU, there was no “acceptance by the donee, whose ownership takes effect immediately and

absolutely.” *Wantuck*, 461 S.W.2d at 694 (quotation marks omitted). WU could not have accepted “absolutely” in light of the plain language of the consent forms that specifically reserved the research participants’ right to withdraw from the research and/or destroy the tissue samples. A gift simply cannot be found where the purported donor expressly reserves the right to change his mind at any time and require destruction of the “gift.” *See, e.g., Donnelly v. Donnelly*, 951 S.W.2d 650, 654 (Mo. Ct. App. 1997) (explaining that a gift is not found where a donor may revoke the gift upon a change of mind); *Martin v. First Nat’l Bank*, 227 S.W. 656, 657 (Mo. Ct. App. 1921).

Finally, the District Court committed legal error by finding a gift where the research participants plainly received consideration for allowing research to go forward on their tissue sample. It is inherent in the concept of a gift that it be given “without any consideration or compensation as an incentive or motive for the transaction.” *Wills*, 139 S.W.3d at 653 (quotation marks omitted). Here, the RPs were told, and believed, that research participation would be beneficial to them. The informed consent forms signed by each participant listed the “benefits” of the research to “you and/or society,” including “help in counseling your family members regarding cancer.” Patients’ Ex. 1, 4, 7, 10, 13, 16, 19, 22, Ex. App. 1-23, Add. 31-33. The participants testified as to the clinical benefits they

expected to receive from research participation. For example, tissue samples provide a record of the state of patients' cancer at the time of their surgery. Comparison of such samples to later tissue biopsies can provide important information about the progress of the disease and response to treatment. Tr. 1:154-55, 1:157, 1:211, 1:213, 2:70-72, App. 66, 67, 80, 81, 101. WU's own witness, Dr. Andriole, agreed that the tissue samples were important to the RPs' future health care. Tr. 2:126, App. 115. (Q: "So this repository became very important to the patient with respect for their future health care; correct? A: The—absolutely. Agree with that wholeheartedly."). To the extent the District Court concluded otherwise, Op. at 3, Add. 3, it clearly erred. The RPs' tissues transfers were not made "without any consideration or compensation as an incentive or motive for the transaction" and cannot be characterized as a gift.

In sum, the District Court made fatal errors of law and fact in finding that the research participants had made an *inter vivos* gift to WU. The major source of the error was the District Court's inexplicable failure to give proper effect to the language of the consent documents that set out the relationship between the parties. Those documents, as well as the testimony of the RPs at the hearing, clearly establish that the RPs did not have a

donative intent but instead reserved rights that are wholly inconsistent with an unconditional gift.

3. Non-Missouri Case Law on Which the District Court Relied Is Wholly Inapposite

The District Court's result, indefensible as a matter of applicable Missouri law, is also not supported by the decisions from other jurisdictions that it found to "provide the most guidance" in this case. Op. at 14, Add. 14 (citing *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2003), and *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479 (Cal. 1990)). Unlike the research participants, the plaintiffs in those cases objected to the creation of patented products derived from their body tissue. No right of withdrawal was retained by the plaintiffs, and nor was there any contemporaneous writing to interpret. The research at issue in those cases was not federally funded research, so the federal research regulations did not apply. And neither *Moore* nor *Greenberg* suggested that body tissues can never be property.

In *Moore*, for example, the plaintiff patient sued a state medical center for using cells extracted from him to create a patented product. Finding that no action for conversion would lie, the court rested its analysis on the conclusion that "existing disclosure obligations . . . protect[] patients' rights of privacy." *Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 494 (Cal.

1990). Clearly, it was error for the District Court to rely on *Moore* and its invocation of enforceable disclosure agreements to ignore the quite different disclosure agreements present in this case.

In *Greenberg*, the plaintiffs brought a claim for conversion against a physician who had received their tissue and used it to isolate a gene and obtain a patent. The court held that the plaintiffs had given up whatever property rights they might have had in their tissue, relying on *State v. Powell*, 497 So. 2d 1188, 1192 (Fla. 1986). See *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1074 (S.D. Fla. 2003). The District Court failed to note that the Missouri courts have expressly rejected *Powell*. See *Mansaw v. Midwest Organ Bank*, No. 97 CV 0271, 1998 WL 386327, at \*4 (W.D. Mo. 1998). In fact, the Court's reliance on *Greenberg* makes no sense given its subsequent conclusion that the research participants here made a gift of their tissue to WU. *Greenberg* found (contrary to Missouri law) that a person does not have a property interest in his tissue. But in order for the RPs to have made a gift of their tissue, they would have to have had an initial property interest in it. Thus, not only is the Court's reliance on *Greenberg* inconsistent with the facts of this case and Missouri law, it is inconsistent with the Court's own analysis of the ownership question.

**C. Rather Than Making an *Inter Vivos* Gift, the Research Participants Entered a Straightforward Contract in the Form of a Bailment.**

In the absence of proof of the elements of an *inter vivos* gift, the question is whether there is any other legally binding arrangement here giving WU unfettered ownership rights in the tissue. There is not. The consent forms and research brochure that the research participants signed at the time they transferred their tissue samples constitute a contract. *See supra*. This contract, in the form of a bailment, reserves important rights to the participants, contrary to the District Court's erroneous ruling.

Under the terms of the contract, RPs entrusted their tissue samples to be used in Dr. Catalona's prostate cancer research, but retained the right to withdraw the samples from the study at any time. Missouri law recognizes this type of contractual relationship as a bailment. "A bailment may be defined as a delivery of personalty for some particular purpose, or on mere deposit, upon contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it, or otherwise dealt with according to his directions or kept until he reclaims it, as the case may be." *Suits*, 249 S.W. at 657 (quotation marks omitted). Like other contracts, a contract for bailment may be express or implied. *D.S. Sifers Corp.*, 46 S.W.3d at 16.

The District Court found that there was no bailment here because the research participants had no “expectation of receiving back the subject of the bailment.” Op. at 25; Add. 25. That conclusion misstates the law. There is nothing inherent in a bailment contract that requires the bailor to expect the direct return of an entrusted item. Bailment requires only that the item be entrusted to another for a given purpose, and that “after the purpose has been fulfilled it shall be redelivered to the person who delivered it, *or otherwise dealt with according to his directions or kept until he reclaims it, as the case may be.*” *Suits*, 249 S.W. at 657 (emphasis added) (quotation marks omitted); *see also, e.g., State v. Edwards*, 137 S.W.2d 447, 451 (Mo. 1940). Indeed, this Court has found “a quintessential bailment contract” under Missouri law in a case in which there was no expectation of return whatsoever. *See Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 713 (8th Cir. 2001) (explaining that steel held by the bailee was not expected to be returned to the bailor but rather to be delivered to third party).<sup>8</sup>

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<sup>8</sup> Even if a potential delivery back to the owner were required to establish a bailment, there would be nothing to prevent delivery of tissue to the RPs. In *York*, the court held that the plaintiffs had “a right to immediate possession” of their pre-zygote under a detinue claim, indicating that human tissue can be delivered back to the people who provided their tissue. *York*, 717 F. Supp. at 427; *see also Mansaw v. Midwest Organ Bank*, No. 97 CV 0271, 1998 WL 386327, at \*16 (W.D. Mo. July 8, 1998) (holding that in Missouri

The District Court also incorrectly rejected the existence of a bailment on the ground that “the medical research community itself has never considered the relationship between an RP and a medical research institution to be one of bailment.” Op. at 25, Add. 25. What the District Court seemed to mean by this was that it would not be expected for the research participants to seek to physically possess the samples. But the participants have not asked for possession of the samples; they have asked that the samples be transferred to Dr. Catalona’s program at Northwestern University, an institution that is just as capable as WU of providing an adequate environment to house the samples for research. In addition, the medical research community plainly does view the relationship between a researcher and a research participant who has provided tissue as an ongoing one, requiring not just an initial consent but continuing agreement to keep participating in the project. If this were not so, the governing regulations would not provide for an unambiguous right to withdraw from research. *See* 45 C.F.R. § 46.116; *supra* at 29-32; *cf. York*, 717 F. Supp. at 426-27

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next of kin have a property right in a decedent’s body and organ for burial purposes). As discussed below, hazardous waste laws in Missouri do not prevent an RP from receiving his tissue samples personally, *see infra* at 50 - 51, but even if they did, the RP could contract with another lab to store the samples, use them for other research, or use them in furtherance of his treatment.

(holding that informed consent document created a bailor/bailee relationship regarding human biological material).

But regardless of whether a bailment was the particular type of contract that was created here, it is clear, as discussed above, that the research participants have entered into a contractual relationship that does not give plenary ownership rights to WU, but rather reserves the RPs' right to withdraw their samples from the research at any time.<sup>9</sup> The District Court's contrary conclusion is erroneous and should be reversed.

**III. THE RESEARCH PARTICIPANTS' RIGHT TO WITHDRAW ALLOWS THEM TO TRANSFER THE SAMPLES TO THE SAME RESEARCHER ENGAGED IN RESEARCH AT ANOTHER QUALIFIED INSTITUTION OR, AT A MINIMUM, TO AVOID ANONYMIZATION OF THEIR TISSUE SAMPLES FOR ONGOING USE.**

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<sup>9</sup> Assuming *dubitante* that this Court rejects the argument that the parties entered into a bailment and is inclined to accept some aspects of the District Court's gift analysis, it is plain that – at the very least – any “gift” that the RPs gave was a limited one, restricted to use of their tissue samples by Dr. Catalona himself. Indeed, the evidence presented at the hearing compels the conclusion that the RPs' tissue was provided with the intent that Dr. Catalona was to be involved in the research, both in his role as a personal physician and as Principal Investigator. See Ward testimony Tr. 2:67-68, App. 100; Ellis testimony Tr. 2:154, App. 122; McGurk testimony Tr. 1:206, App. 79. This limitation on any gift, which is fully enforceable, plainly can no longer be honored at WU, and WU therefore must forfeit rights to the tissue. See, e.g., *Lumsden v. Arbaugh*, 227 S.W. 868, 868 (Mo. Ct. App. 1921); *Bredell v. Kerr*, 147 S.W. 105, 108 (Mo. 1912); *Frey v. Huffstutler*, 748 S.W.2d 59, 63 (Mo. Ct. App. 1988); see also, e.g., *Stock v. Augsburg College*, C1-01-1673, 2002 Minn. App. Lexis 421, at \*14 (Minn. Ct. App. Apr. 16, 2002).

Because the terms of the contract plainly provide for the research participants' right to withdraw their tissue samples, the participants necessarily hold the right to transfer the samples to the same researcher engaged in research at another qualified institution. Alternatively, at a minimum, the right to withdraw includes the right to require destruction of the samples (or at least prevention of their further use)—and anonymization of the samples for ongoing use in WU's research cannot be a permissible means of effecting the withdrawal right. The District Court erred in concluding otherwise.

**A. The Right to Withdraw Necessarily Encompasses the Right to Transfer.**

The research participants were told in their informed consent documents they could transfer tissue from other institutions to WU, and many did. Some participants transferred tissue out of the biorepository for their use at other institutions by calling Dr. Catalona. Tr. 2:16-17. App. 87-88. The RPs' right to such a transfer of tissue on request is a necessary consequence of the right to withdraw from research.

Indeed, given that the operative documents give the RPs the right to require the *destruction* of the samples, it would be very odd indeed to say that the RPs could require that ultimate step without being able to take an intermediate one. Without the right to transfer, the RPs must make a

Hobson's choice in which they either must destroy a tissue sample that could yield enormous medical benefits for them, their families, and their descendants, *see, e.g.*, Catalona testimony, Tr. 1:64, App. 43, or they must allow the tissue to be used in a research program to which they did not consent. The RPs are entitled under the agreement they signed to withdraw from the study: not allowing them to transfer the materials to another research program needlessly and wrongly requires the misuse or the non-use of the samples.

There is good precedent for treating a bailment contract as allowing the type of transfer the research participants seek. In an almost identical situation, a Virginia court found that informed consent documents created a bailment with respect to human tissue. *York*, 717 F. Supp. at 424-426. In *York*, the plaintiffs had taken part in an in-vitro fertilization program. As part of the program, they signed a research informed consent document that provided for the freezing of a pre-zygote created with their egg and sperm. *Id.* at 424. Under the agreement, the plaintiffs had the right to withdraw from the research at any time. The plaintiffs attempted to exercise that right by transferring their pre-zygote to another institution.

The medical institution opposed the transfer, arguing that the plaintiffs' only choices were to destroy the pre-zygote or to allow the

institution to use the pre-zygote for research of its own choosing. The court found for the plaintiffs, holding that there was a bailor/bailee relationship between the parties, and that the plaintiffs' right to withdraw included the right to transfer the pre-zygote to another institution. *Id.* at 426. The Court stressed that the purpose of the bailment arrangement was to "achieve pregnancy" and that it was appropriate under the agreement to allow the plaintiffs to attempt to achieve that goal at a different clinic that they believed would be superior to the defendant's. *Id.* at 427. The very same situation arises here. The RPs transferred their tissue so that Dr. Catalona could carry out a specific research protocol. Like *York*, it should be permissible for the RPs to transfer their material to another institution – namely Dr. Catalona's – so as to better accomplish that goal.<sup>10</sup>

The District Court erroneously suggested that regulations governing hazardous waste would bar the transfer of the samples to Northwestern University. *Op.* at 25, *Add.* 25. Yet that cannot be correct, as the Court itself recognized that there were mechanisms in place to allow Dr. Catalona

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<sup>10</sup> Transfer is required under a gift analysis as well as a bailment analysis. As discussed above, to the extent that any gift took place at all here (which it did not), the donative intent of the RPs was strictly limited to allowing the continued use of their tissue for medical research on prostate cancer under the supervision of Dr. Catalona and colleagues he designated. Because this limitation cannot be honored at WU, the RPs' tissue must be transferred to Northwestern University, where the RPs' original intent of furthering Dr. Catalona's research on prostate cancer can be realized. *See supra* at 22-23.

to request the samples from WU. Op. at 28 n.23, Add. 28 (“Nothing in this opinion or the Court’s ultimate findings shall be construed to prohibit Dr. William Catalona from seeking said samples through the ordinary and regular channels normally available to any medical researcher requesting approval of a research protocol from WU.”). If transfer were barred by other regulations, there would be no “ordinary and regular channels” for such a transfer.

In fact, the regulations cited by the Court have no bearing here. *See generally* Moore, 793 P.2d at 492 (Cal. 1990) (explaining that hazardous waste statutes may not be used by an institution “to permit ‘scientific use’ contrary to the patient’s expressed wish”); *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 281 (Cal. Ct. App. 1993); *see also* *Mansaw*, 1998 WL 386327, at \*16. The federal regulation cited by the district court, 29 C.F.R. § 1910.1030, applies to employers, not to the research participants. It covers occupational exposure to potentially infectious materials and has no relevance to an individual’s possession rights or property rights over his own biological samples. There is certainly no evidence here that the tissue samples at issue are infectious.

The Missouri statutes and regulation cited by the court are similarly inapplicable because they concern waste, not valuable tissue samples. The

provisions define “[i]nfectious waste” as “*waste . . . including isolation wastes, cultures and stocks of etiologic agents, blood and blood products, pathological wastes, other wastes from surgery and autopsy, contaminated laboratory wastes, sharps, dialysis unit wastes, discarded biologicals known or suspected to be infectious.*” Mo. Rev. Stat. § 260.200 (emphasis added); *id.* § 260.203 (applying § 260.200); 10 C.S.R. § 80-7.010 [Mo. Code Regs. Ann. tit. 10, § 80-7.010] ; *see also* § 80-7.010(1)(A)(3) [Mo. Code Regs. Ann. tit. 10, § 80-7.010(1)(A)(3)] (defining the blood and blood product subject to waste regulation as “[a]ll *discarded* blood and blood products,” and defining cultures and stock of infectious agents as infectious waste only “when *discarded.*” (emphasis added)). The valuable tissues at the center of the parties’ dispute are plainly not waste.<sup>11</sup>

Nor would allowing the right to transfer hinder medical research. The District Court speculated that allowing research participants to transfer their samples would turn “highly-prized biological materials [into] nothing more than chattel going to the highest bidder” and would inject “prejudicial influences into medical research.” Op. at 27, Add. 27. The research

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<sup>11</sup> Additionally, the other two Missouri statutes cited by the court apply only to solid waste management – and “solid waste” is defined as “garbage, refuse and other *discarded* materials.” Mo. Rev. Stat. §§ 260.200, 260.203 (emphasis added). The waste statutes and regulations are designed to protect garbage collectors from unexpected exposure to pathogens and to protect the environment. Neither of these concerns is at issue in this case.

participants respectfully submit that the District Court misunderstood the policy interests at stake here. There would be no samples for research if research protocols followed the Court's approach and allowed research institutions to use samples in whatever way they wanted without an RP's consent. RPs would simply refuse to participate in research that posed the risk that their samples might be used for purposes with which they disagree. Moreover, the right to transfer that the RPs are claiming here is a very narrow one. The RPs are not seeking to transfer their samples to a different researcher engaged in a different protocol. On the contrary, they are seeking to transfer their samples to the same researcher who is engaged in the same kind of research that was outlined in their initial consent forms. This case does not present, and this Court does not need to reach, questions of authority to transfer where the transfer will lead to a discontinuity of research.

In sum, the right to withdraw is the right to transfer. By transferring the samples, the RPs would allow the research to which they consented to go forward. No hazardous waste statute or regulation bars the transfer; indeed, even the Court recognized that research universities commonly transfer samples of this sort. Conversely, barring the transfer can mean only that the RPs must choose between allowing their tissue samples to be used in

research to which they did not consent or blocking the use of the tissues and forgoing the medical benefits the research provides to themselves, their relatives, and society.

**B. At A Minimum, The Right To Withdraw Means That The Patients Have The Choice As To Whether Their Samples Should Be Destroyed or Anonymized.**

Even if the right to withdraw were not found to encompass the right to transfer (as it plainly must), the research participants still have the right to decide whether their samples should be destroyed (or taken out of use) or whether they should be anonymized. WU has claimed that when a research participant wishes to withdraw, it is WU's choice as to whether that withdrawal is carried out by destroying, anonymizing, or suspending use of the tissue. Yet these choices will have a profound impact on the research participants, and are theirs to make under the terms of the consent forms and brochure.

First, the brochure states that the tissue samples can be identified "and destroyed upon request" of a patient. Patients' Ex. 58, at 3, Add. 56; *see also, e.g.*, Patients' Ex. 10 at 3, Ex. App. 10. Thus, documents drafted by WU plainly give the right to destroy to the RPs, not to WU. Similarly, the brochure discusses "anonymized tissue donation" as a "level[] of

participation” for research subjects to consider. Patients’ Ex. 58, at 3, Add.

56. Again, the choice to anonymize is the research participants’.<sup>12</sup>

Second, these rights are important. Many RPs will not want their samples to be used, even anonymously, for research projects by WU. Federal law recognizes this interest by requiring that an institution seek the consent of the RP again before using the sample in a new protocol. *See supra*. There is no exception to this requirement for anonymizing samples. *See* Testimony of Dr. Kenneth Goodman, 1:175, App. 71 (“[It would] violate the rules of disclosure . . . [which] are that subjects or participants get to find out what’s going to happen to their parts after they have submitted them. . . . [T]he rule generally is you, therefore, ought to obtain [consent to] anonymize samples.”).

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<sup>12</sup> The district court stated that there was undisputed testimony that anonymization was permissible in response to a request to withdraw – but this was erroneous. Op. at 10, Add. 10. Expert Ellen Wright-Clayton testified that where the RP has been informed that the RP wants to withdraw, WU had no rights to keep the RPs’ tissue. Tr. 1:117, App. 57. She also said that “in a setting like this where the patients have said they want to withdraw their samples . . . Washington University does not have the right to withdraw – to remove identifiers and continue to use the samples for research.” Tr. 1:124, App. 58. Dr. Goodman similarly testified that it would “violate the rules of disclosure for the purposes of research” to allow the samples to be anonymized and subsequently used after the participant requests to withdraw from research. “The rules of consent are that subjects or participants get to find out what’s going to happen to their parts after they have submitted them and if you are able to obtain consent, the rule generally is you, therefore, ought to obtain it [to] anonymize samples. In order to not obtain consent would be seen [as] an end run around that rule.” Tr. 1:175, App. 71.

Notably, anonymized use may not protect a research participant's identity in any case because it is no longer even possible to fully anonymize any tissue samples that contain DNA, which all the samples at issue in this case do. The federal research regulations were adopted in the 1970s, before the development of new, widely accepted genetic technologies made anonymization impossible. This Court and the Missouri Supreme Court (as well as any viewer of CSI) recognize that DNA contains genetic information that provides identification of the individual. *See United States v. Beasley*, 102 F.3d 1440, 1447-48 (8th Cir. 1996); *State v. Davis*, 814 S.W.2d 593, 598-99 (Mo. 1991). As noted above, the University's genetics brochure states that "[i]f this information were to become known outside of the research, you (and family members) may be unable to obtain health, life, or disability insurance. You might also be refused employment or be terminated from your current employment." Patients' Ex. 58 at 2, Add. 35.

Because research on bodily tissue creates an ongoing relationship between the researcher and the research participant, anonymization in the face of a request to withdraw is a form of conscription into research that the law simply does not allow. The District Court's contrary determination is erroneous and should not be permitted to stand.

## **CONCLUSION**

For all of the foregoing reasons, the District Court's judgment should be reversed, and the case remanded for entry of the permanent injunction sought by the Defendants and for judgment in their favor. In the alternative, the Patients join in the argument made by Dr. Catalona that the District Court's judgment should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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July 12, 2006

## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the applicable type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief was prepared using a proportionally spaced type (Times New Roman, 14 point). Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 12,926 words, according to the word count function of Microsoft Word (2002).

Respectfully submitted,

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Paul M. Smith

**CERTIFICATION OF COMPLIANCE WITH CIRCUIT RULE  
28A(D)**

A PDF digital version of Appellants' brief, excluding the addendum and unpublished opinions, has been furnished on a CD-ROM and produced to this Court. Duplicate CD-ROMs have been produced to the Appellee's counsel and Appellant Catalona's counsel. The CD-ROMs have been scanned for viruses using the McAfee 8.0 program and are virus free.

Respectfully submitted,

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Paul M. Smith

## CERTIFICATE OF SERVICE

I certify that on July 12, 2006, I caused to be served two copies of the brief and appendices of Appellants Richard Ward, *et al.*, on counsel of record for Appellee Washington University and Appellant William J. Catalona herein by mailing said copies via first class U.S. mail postage prepaid, addressed to the following:

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I also served them with electronic copies of the brief on CD-ROMs enclosed in the same mailing, and served them with a courtesy electronic copy of the brief via email on this day.

\_\_\_\_\_  
Paul M. Smith