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# Aids: A Threat to Blood Donor Anonymity

## I. INTRODUCTION

With the advent of AIDS (Acquired Immune Deficiency Syndrome) has come an enormous increase in lawsuits concerning discrimination in the areas of employment, housing, health care, insurance, and education.<sup>1</sup> In addition, tort actions have been brought for the wrongful death of AIDS patients,<sup>2</sup> and for alleged negligence in exposing others to the disease.<sup>3</sup> Because receiving transfused blood is a recognized cause of AIDS,<sup>4</sup> blood banks, and inevitably blood donors, are sometimes viewed as having proximately caused the AIDS victim's agonizing death. Consequently, when the suspected source of AIDS is transfused blood, the victim seeking legal recourse may often request the identities of the blood donors through discovery to determine if any of the donors have AIDS or are an AIDS carrier.

The rules of discovery in a large majority of states are substantially similar to the Federal Rules of Civil Procedure.<sup>5</sup> The rules of discovery allow litigating parties to obtain any information relevant to the subject matter of the pending case<sup>6</sup> or reasonably calculated to lead to the discovery of admissible evidence.<sup>7</sup> The scope of discovery is

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1. See generally, Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36, 40 (June 1986).
  2. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987); Hyland Therapeutics v. Superior Court., 175 Cal. App. 3d 509, 220 Cal. Rptr. 590 (1985) (lawsuit brought against the supplier of plasma products that caused AIDS in the victim).
  3. See, generally, Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36, 40 (June 1986).
  4. The Center for Disease Control has reported that 849 cases of AIDS in the United States have been identified as being caused by blood transfusions. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome-United States*, 36 *Morbidity and Mortality Weekly Report* 522, 525 (1987), AIDS is transmitted through the exchange of blood, semen, and possibly other body fluids through sexual intercourse, the sharing of hypodermic needles, and transfusion. *Special Report: Acquired Immunodeficiency Syndrome*, 314 NEW ENGLAND JOURNAL OF MED. 931 (1986).
  5. J. COURD, J. FRIEDENTHAL, & A. MILLER, *CIVIL PROCEDURE* 643 (3d ed. 1980).
  6. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).
  7. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 243 (3d ed. 1985).

broadly defined in order to facilitate the disclosure of the true facts of a controversy rather than allow their concealment.<sup>8</sup> A liberal application of the rules helps to eliminate surprise at trial, simplify the issues, and promote the settlement of cases.<sup>9</sup>

Discovery of relevant matter is subject to two distinct limitations. If the information sought is privileged or if discovery of the information would result in annoyance, embarrassment, oppression, or undue burden or expense, the information is protected from disclosure.<sup>10</sup> An individual's interest in avoiding disclosure of personal matters is a privacy interest protected under the rules of discovery.<sup>11</sup> Lying somewhere in the "gray zone" between the AIDS victim's right to all relevant information and the defendant's right to avoid disclosure are the rights of volunteer blood donors who want to remain anonymous.

The Florida Supreme Court and the Florida Court of Appeals, in *South Florida Blood Service, Inc. v. Rasmussen*,<sup>12</sup> considered the question of whether blood banks can, in response to a discovery request in a private civil tort action, be compelled to release the names of volunteer blood donors. The Florida courts held that the donors' interest in anonymity, combined with the nation's interest in maintaining an adequate blood supply, outweighed a private litigant's right to discover the names and addresses of donors whose blood was the possible source of the plaintiff/victim's AIDS.

The precedential value of *Rasmussen* has somewhat been limited by recent developments in the serological detection of AIDS. The injury to Rasmussen occurred in 1982, when blood banks were not yet able to respond to the AIDS problem. It wasn't until March of 1983 that the U.S. Public Health Service responded to the threat of AIDS from blood transfusions by publishing guidelines to be used by blood banks in screening donors for the disease.<sup>13</sup> Under these recommendations, blood banks attempt to promote voluntary restraint from donating by alerting individuals in high-risk groups of the potential harms caused by their donation.<sup>14</sup> This method of encouraging self-

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8. *City of Edmond v. Parr*, 587 P.2d 56, 57 (Okla. 1978).

9. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *Bond v. District Court ex rel County of Denver*, 682 P.2d 33, 40 (Colo. 1984).

10. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985); F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 244 (3d ed. 1985).

11. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984); *South Florida Blood Serv., Inc. v. Rasmussen* 500 So. 2d 533, 536 (Fla. 1987).

12. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So.2d 798, 801 (Fla. Dist. Ct. App. 1985), *aff'd* 500 So. 2d 533, 534 (Fla. 1987).

13. Centers for Disease Control, *Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Interagency Recommendations. 32 Morbidity and Mortality Weekly Report* 101-03 (1983).

14. *Id.* High-risk individuals are members of groups in which there is a high incidence of AIDS. AIDS occurs most often in two frequently ostracized groups—

deferral<sup>15</sup> was the only method of screening blood donations until 1985, when serologic testing of donated blood and plasma for HIV antibody was implemented.<sup>16</sup> The *Rasmussen* case preceded any of the currently used methods of attempting to create an AIDS-free blood supply.

An AIDS-free blood supply would eventually eliminate the need to discuss donor confidentiality because transfusion-related AIDS would not occur. However, the issue of donor confidentiality is still relevant for three important reasons: (1) because AIDS antibody testing began so recently, many cases that arose before testing was implemented are still pending; (2) AIDS is a very latent disease—persons infected via transfusions prior to AIDS antibody testing may not yet have the disease,<sup>17</sup> and most importantly; (3) AIDS antibody testing is not 100% effective in detecting AIDS.<sup>18</sup>

Because transfusion-related AIDS is not a “thing of the past,” the issue of donor confidentiality and the right to avoid discovery is not a

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homosexual men and intravenous drug users. *Special Report: Acquired Immunodeficiency Syndrome*, 314 NEW ENGLAND J. OF MED. 931 (1986).

15. “Self-deferral” is used in medical literature when referring to voluntary restraint from donating blood by members of high-risk groups. See, e.g., Melief & Goudsmit, *Transmission of Lymphotropic Retroviruses (HTLV-I and LAV/HTLV-III) by Blood Transfusion and Blood Products*, 50 *Vox Sanguinis* 1, 7 (1986).
16. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome—United States*, 35 *Morbidity and Mortality Weekly Report* 17, 20 (1986). The viral agent for AIDS was previously known as HTLV-III/LAV. The HTLV-III/LAV terminology has been replaced by an internationally used term, “HIV”. This was done to allow accurate monitoring and communication regarding AIDS on a world-wide basis. The international classification of diseases was implemented on January 1, 1988. Centers for Disease Control, *Revision of HIV Classification Codes*, 36 *Morbidity and Mortality Weekly Report* 821 (1988). Hereinafter, this article will refer to the cause of AIDS under the HIV terminology although the articles referenced may use the term HTLV-III.
17. Over 46,000 cases of AIDS have been reported to the CDC since 1981. The average length of time between infection with HIV and the onset of AIDS is over seven years. Since blood banks only began testing for AIDS in 1985, incidences of AIDS resulting from transfused blood that was never tested for HIV antibody could occur until the early 1990's or even later.
18. The HIV Antibody test is not a diagnostic test for AIDS. The test being used to screen for AIDS is an enzyme-linked immunosorbant assay (called ELISA for short) which can test for the antibody to AIDS but not the disease-causing virus itself. The test is very sensitive, but false negative results can be obtained. (A “false negative” is a negative test result on blood from patients who have the actual disease the test is designed to detect. HENRY, *CLINICAL DIAGNOSIS AND MANAGEMENT BY LABORATORY METHODS* 528(16th ed. 1979)). In one study, two percent of AIDS victims tested negative for AIDS antibody. These false negatives may result from the character of the test or may be a result of the latency period of the disease — the time period between exposure to the disease and the infected person's formation of the antibody. Levine & Bayer, *Screening Blood: Public Health and Medical Uncertainty*, 15 HASTINGS CTR. RPT. 8 (Sp. Supp. Aug 1985). The antibody forms within two to three months of the first exposure to the virus. Centers for Disease Control, *Transfusion-Associated Human T-Lymphotropic*

moot issue. In evaluating the topic, this article is written exclusively for application to volunteer blood donor systems and does not address the rights of paid donors. The analysis will parallel the approach of the Florida Court of Appeals by discussing the interests asserted by: the plaintiff; the blood bank on behalf of its volunteer donors; and the state.

## II. SOUTH FLORIDA BLOOD SERVICE, INC. V. RASMUSSEN

### A. Statement of Case

South Florida Blood Service, Inc. appealed from a trial court decision compelling the disclosure of the names and addresses of fifty-one volunteer blood donors. The discovery request was made in preparation for a wrongful death action brought on behalf of the appellee, Donald Rasmussen.

The accident occurred on May 24, 1982, when Rasmussen was struck by a vehicle while sitting on a bus bench.<sup>19</sup> As a result of the accident, Rasmussen was hospitalized for a number of months, receiving fifty-one units of blood during his stay. The blood had been supplied to the hospital by South Florida Blood Service, Inc. Rasmussen was diagnosed as having AIDS in July of 1983 and subsequently died of the disease in June of 1984.

During discovery in the wrongful death action brought on Rasmussen's behalf,<sup>20</sup> the plaintiff served a Subpoena Duces Tecum on South Florida Blood Services for the names and addresses of the fifty-one

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*Virus Type III/Lymphadenopathy-Associated Virus Infection from a Seronegative Donor-Colo-rado*, 35 *Morbidity and Mortality Weekly Report* 389 (1986).

American Red Cross Blood Services laboratories have reached a specificity of 99.8% on blood donor AIDS testing. "However, in a population with a low prevalence of infection, even a specificity of 99.8% does not provide the desired predictive value for a positive test." Centers for Disease Control, *Update: Serologic Testing for Antibody to Human Immunodeficiency Virus*, 36 *Morbidity and Mortality Weekly Report* 833, 834 (1988). At the time of this writing, one unfortunate case had been reported to the Centers for Disease Control of a patient who acquired AIDS from a unit of blood that tested negative for the disease. The donor had been recently infected with AIDS and had not formed any detectable antibodies at the time of HIV antibody testing by the blood bank. Centers for Disease Control, *Transfusion-Associated Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection from a Seronegative Donor-Colo-rado*, 35 *Morbidity and Mortality Weekly Report* 389 (1986).

Another source of test inaccuracy is the element of human error. Negligence by the blood bank personnel performing the testing will remain a constant threat to the goal of an AIDS-free blood supply.

19. *Amended Brief of Petitioner, Donald Rasmussen*, at 3, South Florida Blood Serv., Inc v. Rasmussen, 500 So 2d 533 (Fla. 1987).

20. A wrongful death action was brought against the driver and the owner of the vehicle involved in the accident. The plaintiff was seeking aggravated damages for the subsequent death due to AIDS.

donors whose donated blood had been transfused into Rasmussen. The plaintiff asserted that, without the names and addresses of the sources, he would be unable to prove that the transfused blood was the source of his AIDS.<sup>21</sup> The blood bank asserted that the information was confidential and private and moved to quash the subpoena, or in the alternative, receive a protective order regarding the scope of its disclosure.<sup>22</sup> From an order of the trial court compelling disclosure, the blood bank appealed to the Third District Court of Appeals of Florida. The appellate court held that the information requested was not discoverable.<sup>23</sup> Rasmussen appealed this decision to the Florida Supreme Court, which unanimously affirmed the appellate court's decision.

## B. Holding

The question presented on appeal before the Florida Supreme Court and Court of Appeals was stated by the majority of the district court panel as follows:

Do the privacy interests of volunteer blood donors and a blood service's and society's interest in maintaining a strong volunteer donor system outweigh a plaintiff's interest in discovering the names and addresses of the blood donors in the hope that further discovery will provide some evidence that he contracted the AIDS from transfusions necessitated by injuries which are the subject of the suit?<sup>24</sup>

The Florida Supreme Court affirmed the appellate court's decision to disallow disclosure of the identities of the blood donors. However, the supreme court's opinion differed in two respects: (1) the supreme court refused to base its decision on constitutional grounds as the appellate court had, and: (2) the supreme court was unwilling to state that complete nondisclosure of the donors' names was the only effective way of preserving their privacy interests and society's interest in the volunteer donor system.

The appellate court had specifically stated that "[c]ourt orders which compel, restrict or prohibit discovery constitute state action which is subject to constitutional limitations."<sup>25</sup> Possibly to avoid affirming this statement, the supreme court, while agreeing that the donors' rights were constitutionally protected, specifically stated that its holding was not based on a constitutional analysis but rather on the

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21. *Amended Brief of Petitioner, Donald Rasmussen*, at 5, South Florida Blood Serv., Inc v. Rasmussen, 500 So 2d 533 (Fla. 1987).

22. South Florida Blood Serv., Inc. v. Rasmussen, 467 So.2d 798, 800 (Fla. Dist. Ct. App. 1985).

23. *Id.* at 804.

24. South Florida Blood Serv., Inc. v. Rasmussen, 500 So. 2d 533, 534 (Fla. 1987).

25. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 803 (Fla. Dist. Ct. App. 1985).

Florida discovery rules.<sup>26</sup> Under either courts' opinion, the determination required a balancing of the plaintiff's interest in full recovery, the interests of the volunteer blood donors in remaining anonymous, and the impact upon the volunteer donor system that disclosure could cause.

The courts quickly dismissed the plaintiff's interests as being insufficient.<sup>27</sup> The appellate court noted that none of the fifty-one donors now have AIDS and that, even if the names and addresses were made available and the plaintiff found that some of the donors were in the high risk group, the evidence would still be insufficient to establish that any one of them has AIDS or that they transmitted it to Rasmussen.<sup>28</sup> The claim that the identities of the blood donors had significant probative value was therefore "dubious at best."<sup>29</sup> Because the information sought lacked probative value, it was given very little weight in comparison to the interests of the volunteer donors and the volunteer blood system.

The Florida discovery rules prohibit discovery that is annoying, embarrassing, oppressive, or that causes undue burden or expense.<sup>30</sup> The court held that the donors had a privacy interest in their anonymity; disclosure of their names and addresses could lead to discrimination and embarrassment in light of the social stigma surrounding AIDS.<sup>31</sup> The inevitable result of disclosure would be the subpoenaing of the fifty-one donors.<sup>32</sup> The supreme court noted an even more damaging prospect; the information would be extracted by questioning friends and fellow employees.<sup>33</sup> Because such questions would involve probing into sensitive areas of the donors' lives,<sup>34</sup> and include references to their sexual practices, drug use, and medical history,<sup>35</sup> both courts found that the donors had a significant privacy interest in being

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26. South Florida Blood Serv., Inc. v. Rasmussen, 500 So. 2d 533, 534-35 (Fla. 1987).

27. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 537 (Fla. 1987).

28. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985).

29. South Florida Blood Serv., Inc. v. Rasmussen, 500 So. 2d 533, 538 (Fla. 1987).

30. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985), *aff'd* 500 So. 2d 533, 535 (Fla. 1987); FLA.R.Civ.P. § 1.280(c); § 1.410(b), § 1.410(d)(1) (Reissue 1967). Note that the Florida rules parallel the federal rules as do the rules in the majority of the states. *See supra* note 5.

31. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 537 (Fla. 1987).

32. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985).

33. South Florida Blood Serv., Inc. v. Rasmussen, 500 So. 2d 533, 537 (Fla. 1987).

34. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985), *aff'd* 500 So. 2d 533, 537 (Fla. 1987).

35. South Florida Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985).

free from this intrusion.<sup>36</sup>

In determining the interest of society, the courts recognized the volunteer blood system as essential to public health. In light of the need for a constant blood supply, it is "in the public interest to discourage any serious disincentive to volunteer blood donations."<sup>37</sup> The potential intrusion into the private lives of blood donors could result in such a disincentive. The privacy interests of the donor and the need to maintain a volunteer blood supply far outweigh the value of the information to the plaintiff.<sup>38</sup>

With regard to the extent of disclosure, the appellate court held that a complete denial of discovery was necessary to protect the privacy interests of the donors.<sup>39</sup> However, the supreme court was unwilling to rule out the possibility of a limited disclosure. It is important to note that the issue presented to the Florida Supreme Court was limited to two alternatives—total nondisclosure or total disclosure. Given these choices, the court decided that nondisclosure was necessary for the protection of the donors' privacy interests.

It can be inferred from dicta in the supreme court opinion that a method of restricted disclosure was preferred. The court stated that a method could be formulated to verify whether any of the donors were AIDS victims while preserving the confidentiality of the donors' identities.<sup>40</sup> Since the subpoena in question was free of restrictions, the supreme court felt compelled to affirm the appellate court's decision, reasoning that the injury caused by unrestricted disclosure far outweighed the interests of the plaintiff.<sup>41</sup>

Chief Judge Schwartz of the appellate court registered the only dissenting opinion. The crux of his argument was that the plaintiff's rights to discovery should not be withheld because of its speculative adverse effect on the blood supply.<sup>42</sup> In his opinion, the plaintiff must secure information that one or more of the donors has or is carrying AIDS if he is to recover. Once the names and addresses were supplied to the plaintiff's attorney, the dissent reasoned, the attorney would likely be able to immediately identify those in the high risks groups without any further intrusion into the donors' lives.<sup>43</sup> If further prob-

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36. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 538 (Fla. 1987).

37. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533 (Fla. 1987).

38. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 804 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 540 (Fla. 1987).

39. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 804 (Fla. Dist. Ct. App. 1985).

40. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 537 (Fla. 1987).

41. *See, id.* at 538.

42. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 805 (Fla. Dist. Ct. App. 1985) (Schwartz, C.J., dissenting).

43. *Id.*



ing is attempted, the court can then be requested to step in, but until this occurred, the donors' claims to a privacy right had not yet ripened.<sup>44</sup> However, if the donor was the cause of the AIDS, they themselves would want to know, and, more importantly, they should pay for the harm they have done.<sup>45</sup>

Judge Schwartz further referred to the speculation of adverse effects on the blood supply as the "carnival of horrors"<sup>46</sup> and found no basis in the concern. The disclosure of the names and addresses of donors would not be harmful to the donors unless they were members of the high-risk groups, therefore no disincentive should result. In contrast, those in the high-risk groups may be discouraged from donating by the fear of disclosure.<sup>47</sup> Overall, in his opinion, any concerns about a decreasing blood supply were too speculative to provide a basis for denying the plaintiff's right to discovery. The fear of disclosure will not injure the donor who is not in the high-risk group, but may deter and even punish the high-risk group donors.

### III. ANALYSIS

The Florida courts, in ruling on the right of volunteer blood donors to remain anonymous, were faced with a novel question. Do blood donors have a right to keep their names and addresses out of civil litigation? Cases can be found in which donors were trial witnesses in actions against the blood bank,<sup>48</sup> but no cases have addressed whether and under what circumstances the names and addresses of the donors could be subjected to discovery.

This complex issue has been raised in response to the serious threat of AIDS in our society. The disease involves certain agonizing death for its victims.<sup>49</sup> Victims and their families look to the legal system for recourse. Yet, in conflict with the victim's right to recover is the altruistic blood donor's fear of being "labelled" as having AIDS. The disease has caused havoc in the lives of its victims because of the panic and stigma with which it is associated.<sup>50</sup> Against this backdrop,

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44. *Id.*

45. *Id.*

46. *Id.* at 806.

47. *Id.*

48. See, e.g., *Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (1977); *Gilmore v. St. Anthony Hosp.*, 598 P.2d 1200 (Okla. 1979). Both cases involved plaintiffs who were suing the blood bank for damages due to transfusion-related serum hepatitis. The blood donors, who were the sources of the transfused blood, offered testimony at the trials.

49. No one has ever recovered from AIDS and 80% die within two years of being diagnosed. Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36 (June 1986).

50. A September 1985 Harris survey indicated that the country is deeply absorbed with the question of AIDS, indicating something of a national crisis atmosphere. Seventy-three percent of the public felt that AIDS was a "very serious" national

the Florida courts were forced to make a decision.

Resolving issues in which opposing parties have legitimate yet conflicting interests requires a weighing and balancing of the competing interests.<sup>51</sup> The question ultimately addressed is whether the extent of harm to the plaintiff by denial of disclosure outweighs the harm caused to the persons seeking protection if disclosure is compelled. The final consideration is whether significant state interests will be affected by the decision.

#### A. The Plaintiff's Interest

The parents of Rasmussen sought damages for the wrongful death of their son. The element of damages is undeniable and significant. AIDS medical bills are overwhelming.<sup>52</sup> The disease results in the loss of liberties and livelihood.<sup>53</sup> Fear of death and ostracism from society prevails in those stricken.<sup>54</sup> In addition, the families are forced to watch slow deterioration and eventual death of a loved one.<sup>55</sup>

The request for disclosure of the names and addresses of the blood donors was in response to the need of Rasmussen to prove the element of causation. Although not specifically addressed in the case, the disclosure could also result in Rasmussen identifying another potentially liable tortfeasor. In any litigation, the purpose of discovery is to assemble information and expose the merits of claims and defenses. To carry out this purpose, the scope of discovery must be very broad.<sup>56</sup> The discovery rules are an attempt to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."<sup>57</sup> The key determination is whether the information sought is relevant to the case, whether it is relevant to the subject matter of the action or if there is a reasonable possibility that the information requested will lead to other admissible and relevant evidence.<sup>58</sup>

The plaintiff's argument was that, without the names and ad-

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problem and nearly 95% expressed deep concern about the disease. Harris, *Public Concern Over AIDS Reaches National Crisis Level, The Harris Survey*, Sept. 19, 1985 at 1.

51. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987). *See also*, *Whalen v. Roe*, 429 U.S. 589 (1977); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570. (3d Cir. 1980).

52. The average medical bill for an AIDS patient is more than \$200,000. Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36 (June 1986).

53. *See generally id.*; *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So.2d 798, 800 (Fla. Dist. Ct. App. 1985).

54. Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36 (June 1986); Goldman & Beachy, *One Against the Plague*, *Newsweek*, July 21, 1986.

55. Goldman & Beachy, *One Against the Plague*, *Newsweek*, July 21, 1986.

56. A. MILTZ, *ART OF ADVOCACY*, DISCOVERY § 2.03 (1986).

57. *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

58. *Ex parte Dorsey Trailers, Inc.*, 397 So. 2d 98, 103 (Ala. 1981).

dressess of the donors, it would be impossible to prove that the AIDS was the result of a blood transfusion.<sup>59</sup> This argument is strengthened when one notes that the plaintiff was an alleged intravenous drug user and therefore already at high risk of contracting AIDS.<sup>60</sup> As a practical matter, this required the plaintiff to prove that it was the blood, not intravenous drug use, that caused the disease. The names and addresses of the donors were certainly relevant to determining if the donors were in the high-risk groups and could likely have transmitted AIDS to a recipient.

While cognizant of the problem of proving causation, the Florida courts held that the names and addresses would not significantly aid the plaintiff in proving his case.<sup>61</sup> The Florida supreme court offered no explanation for this conclusion. The appellate court noted that expert testimony was available in support of a finding that the decedent's AIDS was transfusion related.<sup>62</sup> The appellate court further based its decision on two separate findings: (1) none of the fifty-one donors had been identified as having AIDS, and; (2) even if the discovery revealed that some of the donors were in the high risk groups, that would not establish that any one of them has AIDS, much less that they transmitted it through transfusion.<sup>63</sup>

The courts' holdings were applied narrowly to the facts of the *Rasmussen* case and leave some questions unanswered. The first question is whether the result would have changed if expert testimony had not been available to the plaintiff. Without expert testimony, the plaintiff may have a difficult (if not impossible) problem establishing the cause of AIDS. Although Rasmussen was successful in retaining an expert, other plaintiffs may be unable to retain expert testimony because of the lack of information regarding the donors' identities and medical backgrounds. Physicians may, in many cases, be unwilling to speculate as to the cause of AIDS in a particular individual without an opportunity to first research the blood sources.

Limiting the plaintiff to expert testimony in proving the cause of AIDS deprives him of the use of the best evidence available. Expert testimony is commonly relied on in medical malpractice actions because it is the only evidence of the professional standard available, and it serves to explain difficult concepts to the jury. However, these cases often become a battle of opposing expert opinions, leaving the jury to decide which expert is more credible. The use of this inaccurate

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59. *Amended Brief of Petitioner, Donald Rasmussen* at 5, *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, (Fla. 1987).

60. *Id.* at 6.

61. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 538 (Fla. 1987).

62. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 n. 6 (Fla. Dist. Ct. App. 1985).

63. *Id.* at 801.

method of deciding claims may be unjustified when more accurate evidence is available. Knowing whether any of the donors currently have AIDS would be of considerable probative value, and also gives testifying experts a basis for an opinion.

The second question unanswered in *Rasmussen* is whether all the names would have been released if even one of the donors did have AIDS. If one of the donors was an AIDS patient or victim, that donor's name and address would be highly probative. However, the real problem lies in the plaintiff's ability to investigate the question. The supreme court agreed that *Rasmussen* should not have to rely on the Blood Service's statement that none of the donors had AIDS.<sup>64</sup> Absent some court intervention to verify the blood bank's statement, there is no avenue available to the plaintiff in corroborating this information. As the only entity with access to the donor identities, the blood bank is assumed to be absolutely trustworthy in contacting all the donors and in truthfully reporting the results of its inquiry.<sup>65</sup>

Although unarticulated in *Rasmussen*, the plaintiff has a further interest in identifying the donor who is responsible for transmitting the AIDS. It is certainly conceivable that individuals may negligently or intentionally donate AIDS-infected blood. Total nondisclosure serves to protect the donor but deprives the plaintiff and society of placing the liability for the injury caused on the tortfeasor. Because the plaintiff and society both have interests in revealing donors who place their unknown recipients at risk of contracting AIDS, total nondisclosure of the donors' names and addresses is not an effective method of dealing with the issues of transfusion-related AIDS. There is very little reason to protect donors who intentionally or negligently transmit AIDS to others from liability for these acts.

## B. The Interests of the Volunteer Blood Donors

Assuming that the requested information is relevant on the issue of causation, two possible theories can be asserted by the blood bank to prevent disclosure of the names and addresses of the donors. It can assert that compelled discovery will result in an invasion of privacy.<sup>66</sup> Under this theory, the Supreme Court has recognized that the right to discovery may be outweighed by an individual's interest in avoiding disclosure of personal matters.<sup>67</sup> The right to privacy serves the purpose of protecting an individual from annoying, embarrassing, or op-

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64. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 537 n.8 (Fla. 1987).

65. The appellate court dissent noted the concern of allowing the blood bank to unilaterally investigate the backgrounds and medical conditions of the donors. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 805 n.1 (Fla. Dist. Ct. App. 1985) (Schwartz, C.J., dissenting).

66. *Whalen v. Roe*, 429 U.S. 589, 598 (1977).

67. *Id.* at 599.

pressive discovery.<sup>68</sup> The blood banks of many states may also request protection from disclosure by asserting that communications between the blood bank and its donors are privileged.<sup>69</sup>

### 1. *Invasion of privacy*

The court of appeals in *Rasmussen* conceded that the issuing of a court order is a state action,<sup>70</sup> and therefore enforcing the order may possibly subject a person to an unconstitutional invasion of privacy. The supreme court, basing its opinion on the rules of discovery, stated that the ability to "limit or prohibit discovery in order to 'protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,' " gives the court the authority to protect the privacy interests of individuals.<sup>71</sup> Therefore, under either courts' reasoning, the remaining question is whether the donors have a privacy right worthy of protection.

The Supreme Court has recognized that pretrial discovery has a significant potential for abuse. The abuse is not limited to causing delay and expense at trial, but may seriously implicate the privacy interests of litigants and third parties.<sup>72</sup> There is an opportunity for litigants to obtain information that is not only irrelevant, but if publicly released, could cause damage to a person's reputation and privacy.<sup>73</sup> The essential worth and dignity of every human being is supported when a person's right to protect his reputation from unjustified injury and wrongful hurt is preserved.<sup>74</sup>

The typical invasion of privacy case involves direct acquisition of information that is private in nature. Private information includes information about one's body and state of health as revealed, for example, in medical records,<sup>75</sup> communications made to a psychiatrist,<sup>76</sup>

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68. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, n.21 (1984); *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533, 535 (Fla. 1987).

69. Privileged matter is not discoverable. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 244 (3d ed. 1985). The identity of an organ donor was considered privileged information in *Head v. Colloton*, 331 N.W.2d 870 (Iowa 1983) (discussed *infra*).

70. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 803 (Fla. Dist. Ct. App. 1985).

71. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 535 (Fla. 1987).

72. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984).

73. *Id.* at 31.

74. *Howard v. Des Moines Register & Tribune Co.*, 283 N.W.2d 289, 301 (Iowa 1979) (quoting the concurring opinion of J. Stewart in *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966)).

75. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980); *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1974); *Wood v. Superior Court*, 166 Cal. App. 3d 1138, 212 Cal. Rptr. 811 (1985); *City of Edmond v. Parr*, 587 P.2d 56 (Okla. 1978).

76. *Bond v. District Court ex rel County of Denver*, 682 P.2d 33 (Colo. 1984).

and information regarding the identity of natural parents.<sup>77</sup> The release of an individual's identity can result in an intrusion into the person's "zone of privacy" if the context of the release is damaging to his reputation.<sup>78</sup> The discovery request in *Rasmussen* requires disclosing the names and addresses of the donors and may independently result in not only damage to reputation, but loss of employment, housing, and the ability to be free from social ostracism. In addition, the subsequent use of the information can allow further depositions of the donors to obtain private information. The *Rasmussen* courts held that these intrusions into the donors' lives constituted an invasion of privacy.<sup>79</sup> However, the Florida Supreme Court would have allowed the release of the names under conditions that restricted dissemination,<sup>80</sup> possibly alluding to the use of *in camera* procedures at the trial court level to preserve confidentiality.

Generally, release of a name and address reveals no information damaging to an individual's reputation. However, the Supreme Court, in *Whalen v. Roe*,<sup>81</sup> acknowledged that reputational harm can result from the disclosure of a name or address when the context of the release associates an individual with certain activities or characteristics. *Whalen* discussed the privacy interest in anonymity of individuals using Schedule II drugs. The case challenged the constitutionality of requiring that the state be provided with a copy of every prescription filled for certain types of regulated drugs. Physicians and patients argued that patients had a privacy interest in remaining anonymous and unassociated with Schedule II drug use and that the fear of identity disclosure may discourage potential patients from seeking necessary medical treatment.<sup>82</sup>

The Supreme Court rejected this argument for three reasons. First, the court determined that monitoring the use of dangerous drugs served a valid state interest — deterrence of potential violations.<sup>83</sup> Second, the Court noted that the scope of the release of information was very limited. Health Department officials were given access to the information and judicial supervision was sufficient to protect against any unwarranted disclosures, including the use of the information in judicial proceedings.<sup>84</sup> Finally, it is already an accepted and essential part of modern medical practice to disclose private medi-

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77. *In re Application of Maples*, 563 S.W.2d 760 (Mo. 1978).

78. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 536 (Fla. 1987) (citing *Lora v. Board of Educ.*, 74 F.R.D. 565, 580 (1977)).

79. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985) *aff'd* 500 So. 2d 533, 537 (Fla. 1987).

80. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 537 (Fla. 1987).

81. 429 U.S. 589 (1977).

82. *Id.* at 600.

83. *Id.* at 597-98.

84. *Id.* at 600.

cal information to doctors, hospital personnel, insurance companies and public health entities.<sup>85</sup> In weighing the privacy interest threatened and the consequences of nondisclosure, the Court held that the disclosure of the names and addresses was constitutionally acceptable.

*Rasmussen* resembles *Whalen* in that in both cases the reputational harm is caused by associating the identity of a person with an "undesirable" activity or condition. In *Rasmussen*, the Florida court noted that release of the names and addresses, when associated with the potential for carrying AIDS, could cause severe reputational harm.<sup>86</sup> This holding is subject to some scrutiny. Being one of fifty-one donors who could be responsible for AIDS transmission, it is argued, does not create a very strong implication that one is an AIDS carrier. The implication is much stronger if only two donors are involved.

However, even as an individual donor in a group of 51, damage caused by unrestricted disclosure could be very great. Even a donor who is confident that he is not in a high-risk group may question whether he is one of the unfortunate few AIDS victims not identified with a high-risk group.<sup>87</sup> The donor may further question the fidelity of his or her sex partner or be requested to submit to a deposition concerning his sexual preferences and drug use.<sup>88</sup> To avoid being deposed or to protect his own interests during the deposition, the donor may need to seek legal counsel and expend time and money to assert his privacy interest. Finally, reputational injury may result when friends or co-workers of the donor are investigated. While asking such probative questions, "[i]t will be functionally impossible to prevent occasional references to AIDS."<sup>89</sup>

The inevitable probe into the volunteer donors' lives prompted the *Rasmussen* courts to recognize the donors' need for protection. Although its decision was based on state statutory grounds, the Iowa supreme court discussed similar reasoning in *Head v. Colloton*.<sup>90</sup> A leukemia patient brought suit to compel a hospital to disclose the identity of a possibly compatible marrow donor. The dying patient requested the name in order to make a personal plea for the marrow.

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85. *Id.* at 602.

86. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So.2d 798, 802 (Fla. Dist. Ct. App. 1985).

87. The percentage of AIDS victims not in high-risk groups is increasing. See graph on distribution of AIDS, Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome-United States*, 35 *Morbidity and Mortality Weekly Report* 17, 20 (1986).

88. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So.2d 798, 802 (Fla. Dist. Ct. App. 1985).

89. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 537 (Fla. 1987).

90. 331 N.W.2d 870 (Iowa 1983).

The name was withheld to protect the donor, who had chosen to remain anonymous and not to donate on behalf of strangers. The court recognized that this was a privacy interest.<sup>91</sup> Similar reasoning has been used to refuse disclosure of the names of natural parents who have given up their children for adoption. The right to remain anonymous and free from subsequent communication with their natural offspring is a privacy interest.<sup>92</sup>

The right not to be implicated as having AIDS is at least as great as the right to avoid requests to donate marrow or the privacy afforded a natural parent who has placed its child up for adoption. Unrestricted disclosure of donor identity can lead to severe consequences because of the stigma attached to AIDS. The social ostracism experienced by AIDS patients is derived from two sources: the stigma associated with being a member of the high risk groups,<sup>93</sup> and the fear of the disease itself.<sup>94</sup> Mistaken beliefs have led to discrimination in employment, education, housing, and even medical treatment.<sup>95</sup> The severe and unjustified adverse consequences to the AIDS patient make it very important that confidentiality be maintained.<sup>96</sup> Although, by requesting the names and addresses of the donors, no one is diagnosing the donors as having AIDS, the implication of being a potential carrier of AIDS could result in the same embarrassment and social stigma. Volunteer donors therefore have a privacy right in not having their identity associated with AIDS.

## 2. *Privileged Information*

Closely linked to the concept of invasion of privacy is the recognition that some communications are intended to be confidential and protected from discovery. Privileges concern confidential communications between persons holding confidential relationships to one another: a husband and wife, an attorney and client, and fellow jurors.<sup>97</sup> In addition, there exists a statutory privilege accepted in the majority

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91. *Id.* at 876.

92. *In re Application of Maples*, 563 S.W.2d 760 (Mo. 1978).

93. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So.2d 533, 537 (Fla. 1987).

94. A sizable number of people (37%) believe that AIDS can be contacted by simply working side by side with an AIDS victim. Harris, *Varying Degrees of Apprehension over AIDS Transmittal*, *The Harris Survey*, Sept. 23, 1985, at 1. Seventeen percent believe that AIDS victims should be given the historic treatment given to lepers — ostracism, to separate islands. Harris, *Majority Favors Crash Government Program to Treat AIDS*, *The Harris Survey*, Sept. 26, 1985, at 1.

95. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 802 (Fla. Dist. Ct. App. 1985). See also, Freedman, *Wrong Without Remedy*, 72 A.B.A.J. 36 (June 1986).

96. *Special Report: Acquired Immunodeficiency Syndrome*, 314 NEW ENGLAND J. OF MED. 931, 932 (1986) (discussing the need of medical professionals to keep the results of AIDS antibody testing confidential).

97. F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 246 (3d ed. 1985).



of states: the physician/patient privilege.<sup>98</sup> This is the only established privilege that could possibly be applied to the communications between a blood donor and a blood bank.

Since Florida is one of the minority of states that do not recognize a physician/patient privilege, the *Rasmussen* court quickly dismissed any defense of privilege.<sup>99</sup> In those states that do recognize the privilege, it is extended to the "treatment" of "patients" by a "physician."<sup>100</sup> The difficulty in applying the concept to blood banks is obvious: a blood bank is not a "physician," a donor is not a "patient," and donation is not "treatment." The relationship between a patient and physician is based on the patient's need for the physician's expertise. This differs from the relationship between a donor and blood bank. The donor and blood bank work together not to afford a benefit to either of them, but to a third person.

Yet the policies behind the patient/physician privilege apply equally well to the blood bank's relationship with its donors. In light of the current threat of AIDS, it is essential that volunteer donors feel free, if not compelled, to disclose information concerning their sexual activity, drug use, and any other activities that have been linked to AIDS. The primary purpose of the physician/patient privilege of confidentiality is to encourage the free disclosure of information between the physician and patient and to protect the patient from the embarrassment and invasion of privacy the disclosure would cause.<sup>101</sup> If patients believe that private communications to physicians are not kept confidential, they will be deterred from disclosing the information.<sup>102</sup>

Once a donor has unquestionably placed himself under the control of laboratory personnel, he must rely on their professional skills as in any other hospital-patient relationship.<sup>103</sup> In discussing the confidential relationship between the hospital and a donor, the court reasoned in *Head v. Colloton* that the "treatment" of a donor encompasses any step in applying medical arts to a person.<sup>104</sup> When a person submits to a hospital procedure, a fiduciary relationship is developed. The duty owed a donor should not depend on whether the procedure is for the

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98. 81 AM. JUR. 2d *Witnesses* § 230 (1976).

99. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So.2d 798, 801 (Fla. Dist. Ct. App. 1985). The physician-patient privilege has been accepted in Nebraska. *See*, NEB. REV. STAT. § 27-504 (1985).

100. *See, e.g.*, NEB. REV. STAT. § 27-504 (1985). For a discussion of the scope of physician-patient privileges in the various states see 81 AM. JUR. 2d *Witnesses* § 230-31 (1976).

101. *Parkson v. Central DuPage Hosp.*, 105 Ill. App. 3d 850, 853, 435 N.E.2d 140, 143 (1982); 81 AM. JUR. 2d *Witnesses* § 231 (1976).

102. *Hughson v. St. Francis Hosp.*, 93 A.D.2d 491, 496, 463 N.Y.S.2d 224, 228 (N.Y. App. Div. 1983).

103. *Id.* at 876; *Smith v. Hospital Auth. of Walker, Ect.*, 160 Ga. App. 387, 287 S.E.2d 99 (1981) (malpractice action brought by a donor against the laboratory).

104. *Head v. Colloton*, 331 N.W.2d 870, 875 (Iowa 1983).

person's benefit or the benefit of someone else.<sup>105</sup> The *Colloton* court recognized the existence of a confidential relationship between the hospital and its marrow donors.

Donating blood requires medical procedures to be performed on the donor by trained nurses and laboratory personnel. It is probable that most individuals view the blood bank as an integral part of the health care field. Under any other similar circumstance, the public infers that disclosures are kept private. Such inferences have been held to create a warranty on the part of physicians that information will remain confidential. The patient, in turn, has a right to rely on this warranty.<sup>106</sup>

Currently, blood banks are relying on the self-deferral of potential carriers as a means of decreasing the threat of AIDS from transfused blood.<sup>107</sup> Even when donors are aware that they are in high-risk groups, under certain common circumstances donors feel compelled to donate anyway. Suppose, for example, that a corporation periodically sends its employees to the blood bank to donate. Among the group is a homosexual who has never revealed his sexual preference to his fellow employees for fear of ridicule or loss of employment. A donor may be willing to make up an excuse on one given day, but to use phony excuses on every periodic donation day will appear very suspicious. There will be considerable pressure on the employee to donate despite his knowledge of the risk involved. A similar situation exists with respect to requests from family members to donate on behalf of an ailing relative or friend. Admittedly, such excuses for donating are ridiculous, but unfortunately they occur and systems must be developed to limit the damage caused. If the blood bank is prepared to provide ways for these individuals to discretely inform the blood bank concerning the risk of using the blood,<sup>108</sup> and the donor is assured that the infor-

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105. *Id.* at 879.

106. *Hammonds v. Aetna Casualty & Surety Co.*, 243 F. Supp. 793 (N.D. Ohio 1965).

107. Melief & Goudsmit, *Transmission of Lymphotropic Retroviruses (HTLV-I and LAV/HTLV-III) by Blood Transfusion and Blood Products*, 50 *Vox Sanguinis* 1, 7 (1986). Authorities, noting that the HIV antibody test is not 100% effective in detecting donors with recent infections, place a great deal of reliance on donor-deferral programs. All prospective donors are informed of the practices associated with AIDS. The system has worked to substantially decrease the number of high-risk individuals donating, but a few high-risk individuals continue to donate. Centers for Disease Control, *Transfusion-Associated Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infection from a Seronegative Donor-Colorado*, 35 *Morbidity and Mortality Weekly Report* 389, 390 (1986).

108. A method of subsequent disclosure currently used by many blood banks is to give every donor a card, stamped with the unit number, to be filled out before leaving the blood bank. The donor is asked to indicate on the card if there is any reason why the blood that has already been drawn should not be used. Blood banks believe this will alleviate some of the disastrous effects of pressured donations.

mation will remain confidential, the system of self-deferral will be more effective.

The fear of tort liability could be a useful tool in deterring those in high-risk groups from donating. The dissenting appellate court judge stated that a possible benefit of disclosure would be discouraging high-risk individuals from donating.<sup>109</sup> Although the statement is logically sound, this method of promoting self-deferral may also discourage many healthy donors.<sup>110</sup> The length, expense, and unpredictability of attempting to avoid further probing discovery is more than donors want to be exposed to, especially when the exposure results from what the donor views as a voluntary, altruistic act. A strong argument can be made that the more efficient method of encouraging self-deferral, without alienating healthy donors, is to provide an atmosphere of confidentiality between the donor and blood bank.

The release of the donor names in *Rasmussen* would have been done in the course of searching for an AIDS victim or carrier on whom to place the guilt. The context of this disclosure would have implicated the donors as having AIDS. Institutions, as caretakers of medical records, have standing to assert the rights of individuals to avoid disclosure of their records through discovery processes.<sup>111</sup> With access to the names and addresses, the plaintiff's attorney, upon showing that the information is relevant to determining the cause of AIDS, can subpoena the donors to ascertain whether they are in high-risk groups. If a physician/patient privilege can be asserted by the blood bank, release of the names and addresses would result in a breach of a confidential relationship.

### c. Waiver of the Right of Privacy or Privilege.

A remaining question is whether donors waive or lose their right of confidentiality and privacy upon donating. A privacy right can be lost when one willingly or unwillingly becomes involved in a matter of legitimate public interest.<sup>112</sup> However, the cases allowing an involuntary waiver of the right to privacy usually involve the countervailing first amendment right of the freedom to publish information of legitimate

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109. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 806 (Fla. Dist. Ct. App. 1985).

110. The dissenting judge of the appellate court strongly disagreed. In his opinion "no one not in a risk group would be likely to have any hesitancy in giving blood no matter what we do in this case." *Id.*

111. *Marcus v. Superior Court*, 18 Cal App. 3d 22, 95 Cal Rptr. 545 (1971); *Parkson v. Central DuPage Hosp.*, 105 Ill. App. 3d 850, 853-54, 435 N.E.2d 140, 142 (1982); *Head v. Colloton*, 331 N.W.2d 870 (Iowa 1983); *City of Edmond v. Parr*, 587 P.2d 56 (Okla. 1978).

112. *Hurley v. Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd* 398 F.2d 346 (8th Cir. 1968); Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, 33 (1974).

public concern.<sup>113</sup>

When private information becomes a matter of legitimate public concern, the individual's privacy right in that information is lost.<sup>114</sup> Applying this rule to *Rasmussen*, an argument can be made that the identities of the donors is a legitimate public concern. The identity of the donor or donors who were the source of Rasmussen's AIDS is definitely of legitimate public concern. Whether the donor knowingly or unknowingly donated AIDS-infected blood, he or she is a source for the further spread of the disease. While it is true that the donor has a privacy interest in the facts regarding his or her health, that interest may be lost to the public's need to control the disease.

The same analogy does not apply to the healthy donors. The practice of donating blood is not unique and in the case of healthy donors, is not dangerous to the public. Further, knowing the identities of the healthy donors in *Rasmussen* would add nothing to the plaintiff's case. Therefore, there is no public interest involved in knowing the identities of the healthy donors that can justify subjecting them to a loss of their interest in privacy.

Distinct from the concept of a loss of privacy rights is the principle of waiver. Waiver is a voluntary and intentional relinquishment of a known right and is manifested expressly or impliedly by the conduct of the party.<sup>115</sup> An implied waiver can only arise when the conduct clearly manifests an intent to waive a legal right.<sup>116</sup>

In the context of patient-physician privileges, when a patient initiates a lawsuit for damages resulting from allegedly negligent medical care, he has waived his right of privacy and confidentiality.<sup>117</sup> The waiver does not extend into areas of medical history that the patient has not voluntarily disclosed,<sup>118</sup> but is limited so as not to unreasonably intrude on the patient's right of privacy.<sup>119</sup> Waiver has also been discussed in the context of the constitutional right of associational privacy.<sup>120</sup> For example, when the plaintiff impliedly waives his right of privacy by bringing a legal action placing his financial affairs at issue, the scope of the waiver will be narrowly construed so that plaintiffs will not be deterred from bringing legitimate lawsuits.

Overall, it appears that to waive a right of privacy for the purposes

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113. See, e.g., *id.*; *Werner v. Times-Mirror Co.*, 193 Cal. App. 2d 111, 14 Cal. Rptr. 208 (1961).

114. Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, 33 (1974).

115. *Anderson v. Low Rent Housing Comm'n*, 304 N.W.2d 239, 249 (Iowa 1981).

116. Annotation, *Waiver or Loss of Right of Privacy*, 57 A.L.R. 3d 16, 41 (1974).

117. *Jones v. Thornton*, 172 Ga. App. 412, 323 S.E. 2d 217 (1984); *Glenn v. Kerlin*, 248 So. 2d 834 (La. Ct. App. 1971).

118. *Jones v. Superior Ct.*, 119 Cal. App. 3d 534, 551, 174 Cal. Rptr. 148, 158 (1981).

119. *Id.*

120. *Moskowitz v. Los Angeles County Superior Court*, 137 Cal. App. 3d 313, 187 Cal. Rptr. 4 (1982).

of discovery, there must be a voluntary intent to do so. When the privacy interest is waived, the scope of the waiver will be limited. In the *Rasmussen* case, the voluntary donors, by donating blood, probably did not intend to simultaneously waive their privacy rights. It can be argued that voluntarily donating blood waives the right of privacy in the blood product and any knowledge of the donor that may affect the safety of that blood. In order for their voluntary act of donating to imply a waiver of the privacy right in their identity, donors must recognize that the donation could ultimately result in the release of their names. Donors are notified that their identities may be released to public health officials but are not told that it could be released for other purposes. The donors are often led to believe that their identities will be kept confidential by blood bank personnel. Confidentiality is also inferred from the fact that donor units are not identified by name but by number. Although donors realize that their blood will be given to other patients, they have every reason to believe that their individual identities will not be released to any entity but public health agencies.

In light of the willingness of courts to narrowly construe the scope of a waiver of privacy rights, the voluntary donating of blood is probably not a waiver of a privacy right. In addition, simply because donors consent to a release of their identities to public health officials does not mean that they have waived their right of privacy as to anyone requesting the information.

### 3. *The State Interest:*

A state may properly assert important interests to safeguard the health of its people.<sup>121</sup> In *Whalen*, the Court upheld mandatory recording of Schedule II drug prescriptions because of the strong state interest in deterring drug abuse. Likewise, in *Rasmussen*, the court rested more on public policy concerning the health of society than on either the plaintiff's or donor's rights in the action. However, society's interests in *Rasmussen* are twofold: the interest in maintaining an adequate blood supply and the interest in maintaining a healthy blood supply.

The *Rasmussen* supreme court held that society's interest in maintaining an adequate blood supply was protected by total nondisclosure rather than the unrestricted disclosure of the donor names and addresses. The disregard of the donors' privacy interests could result in a serious disincentive to donate. The majority opinion reveals the crucial concern of maintaining the volunteer blood system in the United States. In 1974, the United States adopted the National Blood Pol-

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121. *Roe v. Wade*, 410 U.S. 113, 154 (1973); *Whalen v. Roe*, 429 U.S. 589 (1977).

icy,<sup>122</sup> a system devised to insure that the nation's demands for blood products are served through volunteer sources. Experience had revealed that paid donors were often in poor health and dependent on drugs and alcohol.<sup>123</sup>

A return to using paid donors as a source of blood could result in a serious threat to a healthy blood supply. If the volunteer blood supply does not meet demands, reliance on blood from paid donors will be necessary. Because paid donors often include more individuals in poor health or using illegal drugs, the use of blood from paid sources could actually increase the prevalence of diseases, including AIDS, in the blood supply.<sup>124</sup>

The volunteer blood donors are motivated by a sense of altruism or duty. They do not receive a monetary reward for donating blood. On the contrary, donating blood requires time and conscious effort on the part of the donor. The volunteer blood system has proven very successful, with the vast majority of blood provided in the United States now coming from volunteer sources.<sup>125</sup> However, some metropolitan areas receive significant portions of their blood supply in the form of "Euroblood" — blood imported from European sources.<sup>126</sup> The recent AIDS scare has had an impact on some blood markets. An erroneous belief exists that one can acquire AIDS from giving blood.<sup>127</sup> The Surgeon General has responded to this threat of decreases in the blood

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122. 39 Fed. Reg. 32701 (Sept. 10, 1974).

123. R. TITMUS, *THE GIFT RELATIONSHIP* 114 (1971). Of extreme importance in establishing an AIDS-free blood supply is a volunteer donor system. The volunteer blood system was first promulgated to lower the risks of infectious hepatitis in donor blood. Purchasing blood attracts alcoholics, addicts, and undernourished persons who are willing to give fictitious names, addresses, and medical histories in order to sell their blood. *Id.* at 114-15.

124. The rate of hepatitis infection was three times as likely when the donations came from commercial sources. *BLOOD POLICY: ISSUES AND ALTERNATIVES* 18 (D. Johnson 1976). The significance of this statistic lies in comparing the composition of the high-risk groups in hepatitis and AIDS. The high-risk groups for the disease of hepatitis are identical to those of AIDS: drug abuse, male homosexuality, and blood transfusion. *Id.* at 19. From this it can be inferred that if paying donors attracts individuals that are at high-risk of carrying hepatitis, it will also attract individuals who are at a high-risk of carrying AIDS. In addition, the current testing of units for hepatitis yields many false negatives. Even if the HIV Antibody testing could help to eliminate AIDS-infected blood, the use of paid donors may well increase the disease of hepatitis in the blood supply.

125. In 1979, 95.5% of all blood collected was derived from volunteer donors. *U.S. Dep't. of Health and Human Services, NIH Publication No. 85-2028, The Nation's Blood Resource*, 8 (March 1985).

126. In 1975, Euroblood accounted for over twenty percent of all the blood used in New York City. *BLOOD POLICY: ISSUES AND ALTERNATIVES* 178 (D. Johnson 1976). The total imported blood supply from Europe in 1979 was 258,000 units. *U.S. Dep't. of Health and Human Services, NIH Publication No. 85-2028, The Nation's Blood Resource*, 10 (March 1985).

127. *Blood Banks Still Cope with AIDS Fears and Myths*, 60 *Hospitals* 74 (Jan. 5, 1986).

supply by publishing the following statement in newspapers across the nation.

There is no way that a donor can contract AIDS or any other disease by giving a pint of blood. Despite the known safety of donating blood, some people are afraid to give. In fact, blood donations are down from a year ago, and there is evidence that some previous donors are staying away from blood drives because they are afraid they will get AIDS.<sup>128</sup>

Product supply is as vital to a safe blood bank system as product safety.<sup>129</sup> From a purely statistical analysis, even a minor decrease in blood supply will effect more patients in the United States in one year than the total number of transfusion-related AIDS cases reported in this country to date. The total number of units transfused in 1979 was 13,389,224.<sup>130</sup> Even a 1% decrease in blood supply will affect the lives of over 100,000 patients per year. In contrast, recent statistics show that over the last six years combined, less than 1500 cases of blood-product-associated AIDS have occurred. Transfusions have caused 849 cases of AIDS, and an additional 364 cases have occurred among patients with coagulation disorders who receive blood plasma products.<sup>131</sup>

The dissent in *Rasmussen* demonstrated a total misunderstanding of this AIDS dilemma in blood banking. First, a vehement denial of the potential for causing an inadequate supply of blood was issued, and reference to the concern as projecting a "carnival of horrors," was made.<sup>132</sup> The dissent argued that no restrictions should be placed on the release of the donors' identities until there was sound evidence of its adverse effect on the blood supply.<sup>133</sup> This short-sighted opinion basically proposes that disclosure should be allowed, and if the blood supply drops as a result, blood banks can then struggle to regain the public's confidence. In the meantime, blood banks would be forced to rely on paid donors to maintain an adequate supply.

Perhaps the most erroneous point in Judge Schwartz's opinion is his "good versus evil" approach to the problem. To paraphrase his opinion, it is beneficial to disclose the names of donors to discourage high-risk individuals from donating. On the other hand, those not in the high-risk groups should not be discouraged from donating, pre-

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128. *Public Health Service, Department of Health and Human Services, Donate Blood Regularly* (December 1984), reprinted in *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533, 538 n.11 (Fla. 1987).

129. Miller & Simon, *AIDS, Ethics, and the Blood Supply*, 25 *Transfusion* 174, 175 (1985).

130. *U.S. Dep't. of Health and Human Services, NIH Publication No. 85 - 2028, The Nation's Blood Resource*, 11 (March 1985).

131. Centers for Disease Control, *Update: Acquired Immunodeficiency Syndrome-United States*, 36 *Morbidity & Mortality Weekly Report* 522, 525 (1987).

132. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 806 (Fla. Dist. Ct. App. 1985) (Schwartz, J., dissenting).

133. *See id.*

sumable because they have nothing to hide. The protection this approach affords the donor is negligible. For example, in *Rasmussen* fifty-one blood donors were involved. Chances are, however, that only one of these fifty-one donors carried the AIDS which caused the transfusion death. Once all fifty-one names are disclosed and the privacy interests of the healthy donors have been injured, it is too late to restore their loss of privacy interest.

The judge further challenged the necessity of protecting donors at all by placing reliance on a test that does not exist — a test for the AIDS virus that is 100% accurate.<sup>134</sup> Presumably, he is referring to the HIV antibody testing which cannot test for the virus and can produce erroneous results.<sup>135</sup> The test can never insure that “no one will ever acquire AIDS and no future donor will therefore have reason to be discouraged” from donating blood.<sup>136</sup>

4. *Alternative Methods of Balancing the Interests of the Plaintiff, Blood Donors, and Society.*

The state has a valid concern in maintaining blood quality and identifying those who negligently or intentionally donate AIDS infected blood, thereby increasing the spread of AIDS in our society. By allowing total nondisclosure, the appellate court effectively eliminated the state's ability to monitor this type of activity. Without the identities of the unhealthy donors, the state cannot act to insure that the donor does not donate again. Limiting the choices concerning disclosure to either nondisclosure or unrestricted disclosure effectively limits the states' ability to protect both the supply and the quality of blood.

Following the *Rasmussen* case, hearings were presented before the subcommittee on Health and the Environment concerning the issue of blood donor confidentiality. Numerous authorities made statements indicating a genuine concern for maintaining the confidentiality of donors. The reasons expressed included respecting the dignity of those who altruistically give and their right to be free from invasion of their privacy.<sup>137</sup> The presentations also expressed a concern for the blood supply if these rights were ever abrogated through the process of discovery.<sup>138</sup> The ultimate requests were for a federal statutory right of

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134. *Id.* n.4.

135. See Centers for Disease Control, *supra* note 16.

136. *South Florida Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 806 n.4 (Fla. Dist. Ct. App. 1985) (Schwartz, J., dissenting).

137. *Protection of Confidentiality of Records of Research Subjects and Blood Donors: Hearings before the Subcommittee on Health and Environment of the Committee on Energy and Commerce*, 99th Cong., 1st Sess. 164 (1985) (Statement of Frank E. Young, M.D., Ph.D., Commissioner of Food and Drugs, Dept. of Health and Human Services).

138. *Protection of Confidentiality of Records of Research Subjects and Blood Donors:*



confidentiality to be extended to blood donors and research donors. To date, this type of federal bill has not been passed.

HIV antibody testing in blood banks has certainly provided a new reservoir of information concerning the sources of AIDS. Discussions of the scope of the confidentiality of the records reveal that there are multiple viewpoints on whether the information should be confidential, even from health officials.<sup>139</sup> Some believe that, at most, only public officials should be allowed to know the results of an HIV antibody test.<sup>140</sup> Others specifically noted *Rasmussen* and expressed a concern that the information should not be available for use in tort litigation.<sup>141</sup>

It appears from the discussions that blood banks are advocating total nondisclosure of donor identities as an attempt to protect donor confidentiality and maintain blood quality and supply. The opposing argument, as exemplified by the dissenting opinion in *Rasmussen*, suggests that complete disclosure, even for tort litigation, may improve blood quality yet not injure the blood supply or the donor's privacy interest. It would seem that a compromise must exist between these two opposing stances.

One effective compromise would be the use of a protective order restricting the dissemination of the donors' identities. The protective order is an effective way of avoiding the abuse, oppression, and injustice that results from revealing the identities of third parties to an action.<sup>142</sup> In *Whalen*, the court's ability to limit the scope of disclosure and regulate the use of the information was considered adequate protection of the privacy interests.<sup>143</sup>

The trial judge is the appropriate entity to receive any records regarding donor identities and to analyze the probative value of the information. *Rasmussen* should not be forced to rely on the Blood Service's statement that none of the donors have AIDS,<sup>144</sup> yet the donors should not be forced to relinquish control of their privacy interests to the plaintiff. In *Rasmussen*, the plaintiff had argued that his inquiry "may never go beyond comparing the donors' names against a list of known AIDS victims" or against other public records such as conviction records regarding intravenous drug use.<sup>145</sup> The judge is

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*Hearings before the Subcommittee on Health and Environment of the Committee on Energy and Commerce*, 99th Cong., 1st Sess. 177-83 (1985).

139. *Id.* at 130.

140. *Id.*

141. *Id.* at 113-14.

142. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984).

143. *Whalen v. Roe*, 429 U.S. 589, 601-02 (1977). The *Whalen* Court indicated that once the Health Department had the information, the use of the information for litigation purposes was to be protected by the judicial system. *Id.*

144. *South Florida Blood Serv., Inc. v. Rasmussen*, 500 So. 2d 533 (Fla. 1987).

145. *Id.*

equally equipped to compare the names to these lists without ever revealing the names to anyone else, including the plaintiff.

To the extent possible, the trial judge can attempt to discern which donors may have been responsible for the victim's AIDS.<sup>146</sup> The identities of the healthy donors are not relevant to finding the cause of transfusion-related AIDS and therefore should not be disclosed. However, if a donor is found that negligently or intentionally donated AIDS-infected blood, both the state and the plaintiff have a very strong interest in knowing the unhealthy donor's identity. Because the blood bank records are the only source of this information and the information is of legitimate public concern, a strong argument exists that the unhealthy donor's identity should be released. A donor who has acted so irresponsibly as to effectively kill another human being should not be allowed to exploit the right of privacy to escape punishment.

The result of restricting disclosure to an *in camera* viewing by the trial judge is that the state can guard the quality of blood with only a minimum invasion of the donors' privacy. Consequently, healthy donors will not experience the disincentives to donate that full disclosure would cause. Restricted disclosure can therefore serve to protect both the quantity and quality of blood resources.

#### IV. CONCLUSION

Because of the inconsistency caused when courts attempt to balance the competing interests in proving the cause of AIDS, there is an immediate need for legislatures to make a determination of the rights of volunteer blood donors. Until this is done, donor records will continue to be the source of litigation. With the increase in AIDS-related litigation, it is likely that the frequency of cases like *Rasmussen* will also increase. Plaintiffs will request the information and blood banks will expend large sums of money on legal fees to protect the privacy interests of the donors, each time taking a risk that donor confidentiality will not be upheld.

*Rasmussen* demonstrates that the federal and state governments are lagging far behind the eminent issues of AIDS. The disease that

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146. The judicial system has accepted the role of reviewing information that could be confidential and private in nature and determining if the benefits of its release outweigh the interests in privacy and the state's interest. See, e.g., *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (judiciary to review information asserted by the president to be private in determining what evidence was relevant to the grand jury investigation. Irrelevant information was to remain confidential). *In Re Application of George*, 625 S.W.2d 151 (Mo. Ct. App. 1981) (Trial judge directed to make contact with the natural parents of a child in need of a marrow transplant. The identity of the parents were not to be disclosed to anyone else unless the parents allowed the disclosure).

has swept the country with epidemic proportions of death and caused a general state of panic has also squarely presented a question as to the privacy rights of blood donors. Twelve years ago, federal health officials promulgated a program asking citizens to voluntarily give blood to protect society as a whole from disease. It is difficult to justify subjecting those who voluntarily and altruistically donate blood to an unbridled invasion of their privacy right to be free from the reputational harm and stigma associated with AIDS.

No doubt a strong interest lies in eliminating AIDS from the blood supply. However, this goal can certainly be carried out more efficiently by allowing only restricted disclosures of information. The potential damage of an unrestricted disclosure will discourage not only high-risk group donors but also healthy donors. A decrease in volunteer donors will increase the necessity of using paid donors to meet blood demands, thereby perpetuating the problem of AIDS in the blood supply.

Education of the public could help dramatically in reducing the AIDS virus in the blood supply. With understanding of the actual causes of the disease comes an ability on the part of individuals at risk to make a thoughtful decision regarding self-deferral. In addition, an educated public is less likely to harbor the fallacies and fears associated with AIDS. The attitude and treatment of AIDS victims could change to less ostracism and more empathy, resulting in more honesty on the part of those who are in high-risk groups or carry the AIDS virus.

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