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NO. 87-1314

IN THE
SUPREME COURT OF THE STATE OF MARSHALL
OCTOBER TERM 1987

LAWRENCE A. WILSON, d/b/a SENTRY SERVICES,
Petitioner,

-vs.-

JOHN SLATER,
Respondent.

On Leave Appeal from the
Marshall Appellate Court
for the first Judicial Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether Lawrence Wilson's administration of an Acquired Immune Deficiency Syndrome (AIDS) test to a sample of John Slater's blood was an actionable intrusion upon seclusion when Slater had voluntarily submitted the blood sample for fitness-for-duty testing?
2. Whether Lawrence Wilson's reasonable and valid business interests in assuring the safety of his employees and the economic well-being of his business outweighed John Slater's privacy interests in a sample of his blood which he had voluntarily submitted for fitness-for-duty testing?
3. Whether Lawrence Wilson's disclosure of John Slater's test results to fellow Lincoln County businessmen seated at Wilson's table at a Chamber of Commerce meeting was an actionable public disclosure of private facts?

STATEMENT OF THE CASE

John Slater filed a two count complaint in Lincoln County District Court against his former employer, Lawrence A. Wilson. (R. 1). Slater's first count alleged that Wilson intruded on his seclusion when Slater's blood was tested for the AIDS antibody without his consent. (R. 3). Slater's second count alleged that Wilson invaded Slater's privacy when Wilson publicly disclosed the private fact that Slater tested positive for the AIDS antibody. (R. 3). Both parties filed cross motions for summary judgment and Judge Helms of the Lincoln County District Court granted Wilson's motion for summary judgment on both counts. (R. 1). Slater appealed. On appeal,

the Marshall Appellate Court for the First Judicial Circuit reversed Judge Helm's decision and granted summary judgment to Slater on both counts. (R. 7). This appeal follows this Court's order granting Wilson leave to appeal.

STATEMENT OF THE FACTS

Lawrence Wilson owns Sentry Services, a private security guard and night watch service. (R. 1). John Slater is a former employee of Wilson who worked for Sentry Services for approximately four years. (R. 1, 3). Slater left the company on April 30, 1987, to complete the requirements for his business degree from the University of Marshall and begin his search for employment. (R. 1, 3).

Prior to his departure, Slater took the company's annual physical fitness test, as did all of Wilson's employees. (R. 2). Slater did not object to the physical examination which included blood testing. (R. 2). In past years the employees' blood was tested for cholesterol levels and hypoglycemia. (R. 2). Employees with cardiovascular or blood-sugar disorders were given leaves of absence until they could safely return to work. (R. 2). For the 1987 physical exams, Wilson, at the suggestion of the Lincoln Medical Laboratory, decided to screen his employees' blood for the Human Immunodeficiency Virus (HIV) which is believed to cause AIDS. (R. 2). Wilson did not tell Slater that his blood was being screened for the AIDS virus in addition to the cholesterol and hypoglycemia screenings. (R. 2).

After Slater left the company, the laboratory informed Wilson that Slater had tested positive for the AIDS antibody. (R. 3). Wilson immediately informed Slater of the test results. (R. 3).

On May 6, 1987, one week after Slater left the company, Wilson attended the monthly luncheon of the Lincoln County Chamber of Commerce. (R. 3). At least 75 people attended the luncheon. (R. Appendix 1). People at Wilson's table began discussing AIDS during lunch. (R. 3). During the conversation, Wilson mentioned that one of his former employees, John Slater, had tested positive when the company began using HIV tests as part of the company's physical examination.

SUMMARY OF THE ARGUMENT

For John Slater to prove an actionable intrusion upon seclusion he must prove both a *prima facie* case under the tort and a lack of justification for the commission of the tort. Slater fails to meet the burden of proof. Initially, Slater fails to prove the three elements which constitute a *prima facie* case of intrusion upon seclusion: (1) an intrusion; (2) upon the solitude or seclusion of another; (3) which

would be highly offensive to a reasonable person.

First, Wilson's administration of the AIDS test to Slater's blood was not an "intrusion" because Slater consented to have his blood tested as part of an annual physical testing program administered to determine if he were physically fit to work. That initial waiver extended to the AIDS test because it was naturally relevant to the matter which brought about the waiver.

Second, Wilson's administration of the AIDS test to Slater's blood did not intrude upon any "solitude or seclusion," either as to his private affairs or concerns. Because Slater waived his right to privacy in the physiological data found in his blood, he did not "throw about his person or affairs" a veil of seclusion. Slater did not represent the physiological data in his blood as being a secluded matter, nor did he have a reasonable expectation of privacy in the data in his blood.

Third, even if Wilson's testing of Slater's blood constituted an intrusion upon seclusion, the intrusion was not highly offensive to a reasonable person. Because Slater already consented to blood testing, the addition of an AIDS test for the same purposes was reasonable. As a matter of law, the testing was not "highly offensive to a reasonable person." At the very least, application of the reasonable man standard to Wilson's action is a function for the trier of fact.

Assuming, *arguendo*, Wilson did not intrude upon Slater's seclusion, Wilson's right to acquire information concerning Slater's ability to perform his job and Wilson's right to protect his business far outweigh any expectation Slater may have had concerning the privacy of his medical biography contained in his blood. Wilson had valid and reasonable business and safety concerns which justified his intrusion.

As a private employer, Wilson had a right to test his employee Slater's blood for fitness for duty. Wilson had a reasonable need to know that his employees were fit in order to make proper planning and training decisions, to prevent labor relations problems, and to protect the economic existence of his business. Wilson's reasonable business concerns justified the intrusion upon Slater's seclusion.

Wilson also had valid and reasonable safety concerns which justified his intruding upon Slater's seclusion. Wilson owed a duty to his employees to provide a safe workplace free from hazards which might cause harm or death. Wilson owed a similar duty to his clients and the public. Administration of prehospital emergency care to Slater in the event of his being wounded would subject anyone who came in contact with his blood to the possibility of contracting AIDS. Wilson justifiably and reasonably acted to protect the health and safety of his employees, his clients, and the public.

Wilson's disclosure of Slater's blood test results to fellow Lincoln County businessmen does not give rise to an invasion of privacy claim based upon the public disclosure of private facts. Wilson disclosed the facts concerning Slater's blood test to a group of businessmen sitting at his table at a Chamber of Commerce luncheon. Wilson did not disclose the test results to the public at large, as the tort requires.

Even if the court finds that Wilson's disclosure was a "public" disclosure, Wilson still cannot be held liable because he had a first amendment privilege to disclose Slater's test results which are a matter of legitimate public concern. AIDS is constantly in the news, as are reports about AIDS victims. This reality leads to the logical conclusions that such matters are of legitimate public concern and are not an offensive topic of discussion.

Because Slater's condition is of particular concern to the employers of Lincoln County, Wilson had a qualified privilege to discuss Slater's blood test results with fellow Lincoln County businessmen. Slater is pursuing a degree in business. Upon graduation, Slater will be looking for a job. The Lincoln County businessmen who were told of Slater's test results were in fact potential future employers of Slater at the time Wilson made his comments. Therefore, the employers had a legitimate business interest in learning of Slater's test results. Under these facts, Wilson had a qualified privilege to tell his fellow businessmen about Slater's blood test results.

Summary judgment in Slater's favor is inappropriate on the issue of public disclosure of private facts. At the very least a jury question has been presented as to whether Slater's test results are a matter of legitimate public concern. Furthermore, summary judgment for the defendant, Mr. Wilson, is appropriate on the issue of public disclosure of private facts if the court rules as a matter of law that Wilson had a qualified privilege to disclose Slater's blood test results to potential future employers of Slater.

ARGUMENT

I. LAWRENCE WILSON'S ADMINISTRATION OF THE AIDS TEST TO JOHN SLATER'S BLOOD WAS NOT AN ACTIONABLE INTRUSION UPON SECLUSION.

Section 652A(2)(a) of the Restatement (Second) of Torts defines one type of tortious invasion of privacy as being an "unreasonable intrusion upon the seclusion of another." Section 652B further defines the tort of intrusion upon seclusion as, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, [one who so intrudes] is

subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

To make out a *prima facie* case of intrusion upon seclusion, one must prove *all* of the elements of the tort. More specifically, one must prove: (1) an intrusion; (2) upon the solitude or seclusion of another; (3) which would be highly offensive to a reasonable person. Even if Slater could prove a *prima facie* case for an intrusion upon seclusion, Wilson's valid business interest justified the intrusion in this instance. Because Sentry's testing of Slater's blood for AIDS as part of a routine, annual physical fails to constitute an actionable intrusion upon seclusion, this Court should reverse the Marshall Appellate Court's order of summary judgment in favor of Slater and enter an order of summary judgment in favor of Wilson.

A. *Wilson's Administration of the AIDS Test to Slater's Blood Was Not an "Intrusion" Because Slater Consented to Have His Blood Tested As Part of An Annual Physical Testing Program Administered to Determine if He Were Physically Fit to Work.*

Wilson provides an annual physical testing program that includes a blood test. Wilson provides the test for the narrow purpose of determining if his employees are in adequate physical condition for their jobs. In past years, Wilson tested his employees' blood for cholesterol levels and hypoglycemia. In the four years Slater worked for Wilson, he never objected to the company physical. On the advice of the laboratory which conducted the tests, Wilson decided to include the HIV tests for AIDS in the 1987 battery of tests. Wilson did not inform his employees of the decision to include the AIDS testing as part of the routine blood analysis. As a result, Slater contends that the AIDS test was an invasion of his privacy.

The State of Marshall recognizes the tort of invasion of privacy as described in § 652A of the Restatement (Second) of Torts. For an action to lie for intrusion upon seclusion, Wilson must have committed an intrusion. If Slater consented to the alleged intrusion or waived his right to privacy in the physiological biography contained in his blood, then he cannot accuse Wilson of an intrusion. The Georgia Supreme Court was the first state court of last resort to recognize the tort of invasion of privacy in *Pavesich v. New England Life Insurance Co.*, 122 Ga. 190, 50 S.E. 68 (1905). While recognizing the right to privacy, the Court went on to say that

> The right to privacy, however, like every other right that rests in the individual, may be waived by him . . . This waiver may be either express or implied, but the existence of the waiver carries with it the right to an invasion of privacy only *to such an extent as may be legit-*

> *imately necessary and proper in dealing with the matter which has brought about the waiver.*

Id. at 199, 50 S.E. at 72 (emphasis added).

Slater waived his right to privacy in the physiological biography contained in his own blood. He knowingly allowed Wilson to test his blood for diseases which would either affect his ability to perform on the job or which would make him susceptible to illnesses which could directly affect his ability to perform on the job. The need for both Wilson and Slater to know if Slater were physically able to do the job was the "matter which brought about the waiver." Slater's consenting to blood tests for four years is indicative of his understanding that Wilson's interests in ensuring the fitness of his employees required a waiver of Slater's right to privacy in the physiological biography found in his blood. Because Slater waived his right to privacy in the information found in his blood, that waiver carried with it the right of Wilson to test Slater's blood "to such an extent as [was] legitimately necessary and proper" to determining if Slater was physically fit to work. Testing Slater's blood for AIDS was "legitimately necessary and proper" for that purpose; therefore, Slater's waiver extended to any act on the part of Wilson which was "legitimately necessary and proper" in carrying out the agreed upon purpose.

The *Pavesich* waiver principle was applied in *Acosta v. Cary*, 365 So. 2d 4 (La. Ct. App. 1978). In *Acosta*, an employee filed a Workmen's Compensation claim against his employer. As a result, the employee was required to submit to a physical examination by a physician chosen by the employer. The question became to what extent the employee waived his right to privacy in medical information about himself when he consented to the physical for the purpose of determining the cause and extent of his injury. The Court answered by saying,

> An employee who claims Workmen's Compensation for a work-connected injury waives any right of privacy, vis-a-vis the employer against whom the claim is made, *in respect to every matter relevant to the claim.* By presenting himself to be examined by the physician selected by the employer for the very purpose of evaluating the injury and determining its extent and whether or not it is attributable to that employer's employment, the employee necessarily consents that the physician may disclose to the employer any medical circumstances relevant to his claim.

Id. at 5 (emphasis added).

Similarly, by consenting to blood tests for the purpose of determining his fitness for work, Slater waived his right to privacy in the information in his blood in respect to *every matter* relevant to the central purpose of determining his physical fitness for duty.

B. *Wilson's Administration of the AIDS Test to Slater's Blood Did Not Intrude Upon Any "Solitude or Seclusion", Either as to Slater's Person or as to His Private Affairs or Concerns.*

The second element for making out a *prima facie* case for intrusion upon seclusion is the requirement that the offending party intrude upon another's seclusion or solitude. According to comment c of § 652B of the Restatement (Second) of Torts, "The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs." Because of the nebulous character of the terms "solitude" or "seclusion," an attempt to define them for general application is difficult, if not impossible. Nevertheless, the plain meaning of comment c seems to envision the tort's applying only where the intrusion is into a locale or physical location which is generally recognized as private, or where the intrusion is into a seclusion or zone of privacy created by the reasonable expectations of the violated party. In either case, Wilson's testing of Slater's blood for AIDS did not constitute an invasion of any solitude or seclusion.

Although the physiological data contained in one's blood might very well be private information protected by a right to privacy, in this instance Slater had not "thrown about his person or affairs," i.e., his blood, a veil of seclusion. Slater cannot credibly argue to have "thrown" a private seclusion around the data in his blood when he knowingly consented to having his blood tested. To continue to characterize the information as private once a person gives another access to that information through blood testing defies reason. Once Slater gave Wilson access to the physiological data in his blood through testing, Slater no longer had a reasonable expectation that the data would remain private. In effect, the data became discoverable information for the limited purpose of determining Slater's fitness for work.

C. *Even if Wilson's Testing of Slater's Blood Constitutes an Intrusion Upon Seclusion, the Intrusion Was Not Highly Offensive to a Reasonable Person.*

The final element of a *prima facie* case for intrusion upon seclusion is the requirement that the intrusion be highly offensive to a reasonable person, or as comment d to § 652B states, "[t]here is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object." Restatement (Second) of Torts § 652B comment d (1977).

As discussed above, Wilson did not intrude nor did he invade Slater's solitude or seclusion. Sentry is entitled to summary judgment on these issues. If, however, this Court recognizes that a question exists as to whether there has been an intrusion upon seclusion, the application of the reasonable man standard is required to determine if that intrusion is actionable. A reasonable person would not be *highly offended* by Wilson's act of testing Slater's blood for one more disease when Slater had already agreed to the testing of his blood for other diseases.

A recent case decided by the District Court for the District of Columbia is nearly identical to the case at bar. In *Local 1812, American Federation of Government Employees v. Department of State*, No. 87-0121 (D.D.C. April 22, 1987) (available Aug. 20, 1987, on LEXIS, Genfed library, Courts file), the union representing State Department employees moved for a preliminary injunction to bar mandatory blood testing for the AIDS virus. The tests were conducted to determine if the employees had any diseases which might affect their fitness for duty. In conformity with the Department's purpose for blood testing, it added the AIDS test to its battery of tests already performed on its employees' blood. The court refused to grant the preliminary injunction stating,

> The testing involves only an additional examination of a blood sample that the person undergoing an examination must provide as a matter of course under procedures already established for a number of years. On the evidence presently before the Court, inclusion of the test for HIV infection appears rational and closely related to fitness for duty.

If the State Department's inclusion of the test appeared "rational and closely related to fitness for duty," an argument that the testing would be highly offensive to a reasonable person is illogical. Because Wilson simply added the AIDS test to the battery of tests already performed on Slater's blood, and the AIDS test was performed for the same reasons which justified the prior blood testing, Slater's contention that the AIDS test is highly offensive to a reasonable person is illogical.

The Court of Appeals of Arizona also articulated a standard for determining if an action is highly offensive to a reasonable person so as to constitute an actionable intrusion upon seclusion. In *Valencia v. Duval Corp.*, 132 Ariz. 348, 645 P.2d 1262 (1982), the Court affirmed the lower court's order of summary judgment in favor of an employer who was charged with an intrusion upon the seclusion of one of its employees when it sought medical verification for an alleged illness suffered by the employee. The Court held that for an action to lie, "the defendant's conduct must meet the test necessary to state a claim for intentional infliction of emotional distress, i.e., extreme and outrageous conduct." *Id.* at 350, 645 P.2d at 1264. The

Court further wrote that the employer's conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*; Restatement (Second) of Torts § 46 comment d (1977). To characterize Wilson's testing of Slater's blood as "extreme and outrageous" stretches the imagination when the District Court for the District of Columbia has characterized AIDS testing in a similar context as "rational and closely related to fitness for duty."

If reasonable minds could differ as to whether or not the intrusion was one which would offend a reasonable man, the resolution of the question lies with the trier of fact. The granting of summary judgment in favor of Slater by the Marshall Appellate Court on this issue was therefore inappropriate.

In *Knight v. Penobscot Bay Medical Center*, 420 A.2d 915 (Me. 1980), a woman who had delivered a baby alleged an invasion of privacy against the hospital, doctor, nurse and the nurse's husband when the nurse's husband viewed the birth from outside an observation window. The nurse's husband was unable to see anything but the baby's being raised up by the doctor after birth. The mother's body was covered at all times except for her hands and face. In light of the circumstances, the court held that a determination of whether the viewing was a "substantial" intrusion was one capable of varying resolutions. In short, reasonable minds could differ as to whether the intrusion was substantial. The court stated, "the presiding justice [in the court below] acted correctly in leaving for jury determination whether in light of all the circumstances any of the defendants had intentionally intruded on the solitude, or seclusion of either of the plaintiffs in a manner highly offensive to a reasonable person" *Id.* at 918.

D. *Assuming Arguendo that Slater Does Have a Privacy Interest in the Medical Information Contained in His Blood and That Wilson Invaded That Privacy Interest, Wilson's Reasonable Business Interests in Acquiring That Same Information Outweighed Slater's Privacy Interests.*

AIDS is a disease which erupted into our consciousness just six years ago in 1981. The disease has bred uncertainty and fear in both the medical community and the public at large. AIDS has raised legal questions such as employers' rights to testing which, to date, have gone unanswered. Although the state of Marshall may determine that employees do have privacy rights as against private employers' testing, such a broad proscription is the duty of the Marshall legislature. The legislature has unfortunately been silent.

The medical community is uncertain as to the contagiousness of AIDS. AIDS is a bloodborne disease which appears to be spread by exposure to contaminated blood, sexual contact, and prenatal transmission from mother to fetus, not by casual contact. The AIDS virus has been isolated in tears, saliva, blood, urine, semen, and mother's milk. U.S. Department of Health and Human Services, Public Health Service, *Recommendations for Preventing Transmission of Infection with Human T-Lumphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Report 681 (1985) [hereinafter cited as *Recommendations*]. AIDS is caused by a biologic agent (the AIDS virus) which can be spread by a number of routes, including cuts, eyes, and mouth. Most experts agree that exposure to contaminated blood products and sexual contact are the most likely methods of communicability. Homosexuals, drug IV users, and hemophiliacs would appear to be those individuals with the highest risk of contracting the disease. While casual contact seems an unlikely means of contracting the disease, expert opinions are openly uncertain and leave much room for doubt and fear. The pathogenesis of AIDS remains unknown, while fears about the disease multiply. *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 703, 467 N.Y.S.2d 302, 307 (1983). The high mortality rate and reports of stricken children and others who do not fit into the high-risk groups only serve to increase anxiety. *Id.*

Although medical uncertainty exists as to AIDS' communicability, testing on a routine basis is unnecessary to protect the public workforce. There are a limited range of workplaces, however, where such tests would be relevant to on-the-job safety. Leonard, *AIDS and Employment Law Revisited*, 14 Hofstra L. Rev. 11, 42-43 (1985).

Although not completely infallible, "two ELISA tests followed by a Western blot test are 99.9 percent reliable in determining whether someone has been exposed to AIDS." *American Council of Life Insurance v. District of Columbia*, 645 F. Supp. 84, 87 (D.D.C. 1986). The presence of these antibodies is a reliable signal of the presence of live, infective virus. Sicklick & Rubenstein, *A Medical Review of AIDS*, 14 Hofstra L. Rev. 5, 7 (1985). In fact, individuals who repeatedly test positive for the HTLV-III antibody "should be considered both infected and infective." 645 F. Supp. at 87.

The *Recommendations* recognizes certain workplaces which pose risks of infection. Workers in workplaces which pose a significant threat of exposure to blood are warned to take certain precautions. Providers of prehospital emergency health care, e.g., law enforcement personnel and paramedics, are cautioned to prevent exposure to blood or other bodily fluids by wearing plastic gloves.

Because mouth-to-mouth resuscitation poses a risk of salivary transmission, such personnel are warned to use disposable airway equipment or resuscitation bags. *Recommendations, supra* p. 14, at 685.

The Marshall legislature has been silent on the issue of private-employer testing of employees. Amid the fears and controversy generated by AIDS, private citizens and employers like Wilson have little guidance. Presently, there is no case concerning AIDS testing for valid business concerns in the private sector. The public employment cases concerning AIDS for the most part address discrimination and fourth amendment search and seizure considerations. The case law concerning testing in general in the private sector is sparse. California and Florida have enacted statutes which ban the use of AIDS-related testing for employment purposes; however, such foreign statutes do not bind this court. Cal. Health & Safety Code §§ 199.21-199.23 (West 1986); Fla. Stat. § 381.606 (1986). Maine has enacted a statute which prohibits relating the results of AIDS tests, but, even if it were binding, the Maine statute offers no guidance to Wilson concerning administration of the test. Me. Rev. Stat. Ann. tit. 501, §§ 17001, 17003, 17004, 17006 (1985). Wisconsin's AIDS statute is the most helpful to an employer in Wilson's position. Wis. Stat. § 103.15(1) and (2) (1985). Wisconsin bans the use of employer AIDS testing *unless* there is a significant risk of transmitting the disease to the public or other employees.

In this milieu of uncertainty, Wilson protected his business, his employees, and his customers by the most reasonable means available to him, i.e., he added the HIV test into the battery of tests already being performed on his employees' blood. The issue at bar is not whether employer testing should be proscribed, for such an issue is a matter for the Marshall legislature. The issue is whether Wilson acted in a reasonable manner in view of all the circumstances.

1. Wilson, as a private employer, had a right to test Slater's fitness for duty as a condition of Slater's employment.

Private-sector employers may require drug testing without individualized suspicion as a condition of employment. *American Federation of Government Employees, AFL-CIO v. Weinberger*, 651 F. Supp. 726, 737 (D. Ga. 1986). In fact, physical fitness tests related to minimum standards of employment are recognized as a business necessity or purpose which will excuse a failure to hire a person under anti-discrimination laws. *Smith v. Olin Chemical Corp.*, 555 F.2d 1283, 1288 (5th Cir. 1977). Wilson's use of a blood test as a condition of employment to determine fitness for duty was neither unprecedented nor unlawful. Requiring the blood test was within his prerogative as an employer, so Wilson's testing of Slater's blood was

neither outrageous nor atrocious.

Wilson had the right to seek out personal information regarding Slater when the importance of the information to valid business concerns outweighed Slater's right to keep the information private. *Bratt v. International Business Machines*, 392 Mass. 508, 520, 467 N.E.2d 126, 135 (1984). The reasonableness of Wilson's requiring the disclosure of Slater's private facts must be weighed against Wilson's valid business interests. *Cort v. Bristol-Meyers Co.*, 385 Mass. 300, 307-308, 431 N.E.2d 908, 913 (1982). An employee of a private company does not have an absolute right of privacy to be free from testing. *International Chemical Workers Union v. Olin Corp.*, No. 87C5745 (N.D. Ill. July 16, 1987) (available Aug. 20, 1987, on LEXIS, States library, Omni file). Wilson's business interests outweighed any right of privacy Slater might have had. Wilson has two valid business interests, i.e., his duty to his business and his safety concerns.

2. Wilson had valid business concerns which outweighed Slater's right to privacy.

Wilson had a valid business concern relating to his testing of Slater's blood, i.e., his concern for his business. Only an *unwarranted invasion* of privacy constitutes a legal injury. *Texas Dept. of Mental Health & Mental Retardation v. Texas State Employees Union*, 708 S.W.2d 498, 508 (Tex. 1986) (emphasis in original). Wilson's invasion of Slater's privacy was not unwarranted. Wilson needed to know if any of his employees had AIDS in order to protect his business.

a. Wilson needed the information for planning purposes.

Wilson needed to know the AIDS information for manpower planning purposes. His business needed to be protected against absenteeism, poor performance, high turnover rates, and the increased costs of hiring and training. All of these considerations are reasonable business concerns. An employer's intrusions on an employee's privacy rights for work-related purposes should be judged by their reasonableness under all the circumstances. *O'Connor v. Ortega*, 107 S. Ct. 1492, 1502 (1987). Wilson had an overriding right to plan for his business.

In *Pitcher v. Iberia Parish School Board*, the Court of Appeals of Louisiana upheld a school board's policy of requiring its teachers to submit to medical examinations. The court held that the board's invasion of a teacher's privacy interest was reasonable because all the points covered by the medical examination were directly or indi-

rectly related to the teacher's present or future ability to perform her job. The fact that the medical exam also informed the board of a number of personal matters unrelated to Pitcher's proficiency as a teacher was outweighed by the board's reasonable and ample reasons for requiring the exam. *Pitcher v. Iberia Parish School Board*, 280 So. 2d 603, 608 (La. Ct. App. 1973). Wilson's need to know medical information regarding his employee's present and future abilities to perform their jobs is just as great as the Iberia Parish school board's need. Wilson needs to determine whether he can accommodate his AIDS-stricken employees or whether it would be more beneficial to the operations of his business to plan otherwise.

Wilson, like any employer, needs the information to make long-range scheduling plans for work assignments and training courses. The District Court for the District of Columbia recently denied a motion for injunction by a federal employees' union. *Local 1812, American Federation of Government Employees v. Department of State*, No. 87-0121 (D.D.C. 1987) (available Aug. 20, 1987, on LEXIS, Genfed library, Courts file). The union objected to the Department of State's use of AIDS testing as a means of determining fitness for duty in the Foreign Service. The court concluded that the Foreign Service had a valid interest in knowing which of its employees had AIDS. Those interests included the scheduling and assigning of employees to duty posts. Wilson has the same valid interests in scheduling and assigning his employees.

b. Wilson needed the information to prevent labor relations problems.

Wilson had another valid business interest in guarding against strikes or failures to report to work on the part of his other employees. Fear of the AIDS disease is almost as epidemic as the disease itself. The Justice Department issued a memorandum in June 1986 contending that fear of contagion, however irrational, was a bona fide reason for discrimination. Cooper, *Memo from Assistant Attorney General Cooper on Application of Section 504 of Rehabilitation Act to Persons with AIDS*, Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986). Wilson has made no attempt at discrimination; however, he does need to plan against his workers' fears. The uncertainty in the medical community concerning the communicability of AIDS and the vague assurances that the risk of infection is minimal leave room for discomfort among those ordered to work with and around AIDS victims. *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 703-04, 467 N.Y.S.2d 302, 307 (1983). In *LaRocca*, the court recognized that a prisoner's fears of contracting AIDS from other inmates was understandable considering the uncertainty in the medical community. *Id.* Wilson's employees will experience this same understanda-

ble fear, and Wilson needs to undertake counteractive measures before his employees learn of Slater's condition.

Wilson has a duty to his customers to assure them that his employees are on the job and that their property is protected. A balance must be struck between Slater's asserted right of privacy and Wilson's clear responsibility to his customers. In *Elmore v. Atlantic Zayre, Inc.*, that balance was struck in favor of business owner. *Elmore v. Atlantic Zayre, Inc.*, 178 Ga. App. 25, 341 S.E.2d 905, 906 (1986). In *Elmore*, the court held that an employer's duty to his customer's rights was greater than an individual's right to privacy in certain situations. Wilson's invasion of Slater's right to privacy was for the purpose of investigating Slater's fitness for duty. Such a reasonable purpose balances against Slater's right to privacy. Wilson's need to keep his employees on the job and his clear responsibility to his customers outweighs Slater's privacy interest.

c. Wilson needed the information to protect the economic existence of his business.

Wilson also had a reasonable responsibility to the continued existence of his business. The average cost of treating victims of AIDS in 1986 was estimated to be between $60,000 and $75,000 per person per year. Schatz, *The AIDS Insurance Crisis: Underwriting or Overrreaching?*, 100 Harv. L. Rev. 1782, 1794 (1987). Although this price may not seem exorbitant to large industries which deal with staggering amounts of health care costs every year, a sole proprietor of a small business should reasonably worry about such costs. The nature of a sole proprietorship renders Wilson personally liable for any debts his business incurs. Dealing with the medical costs involved with AIDS under an employee health benefit plan could wipe out the economic life of Wilson's business. Such costs could potentially send Wilson into personal bankruptcy. Although cost concerns may not be a reasonable reason for large companies' invasions of employees' privacy rights, Wilson, as a sole proprietor, was very reasonably concerned about costs.

Aside from Wilson's pecuniary liability as a health insurer, he faces possible pecuniary liability to his clients and members of the public. Courts have recognized a cause of action against employers for negligent hiring or retention of employees who pose a threat to the public. *Easley v. Apollo Detective Agency, Inc.*, 69 Ill. App. 3d 920, 931, 387 N.E.2d 1241, 1248 (1979). The plaintiff in *Easley* was attacked by a security guard hired by a private security agency. The court held that "an employer will be held to the exercise of care reasonably commensurate with the perils and hazards likely to be encountered in the performance of the agent's duty; that is, such

care as a reasonably prudent person would exercise in view of the consequences that might reasonably be expected to result . . ." *Id.* at 1249. The guard in *Easley* had a prison record. The court reasoned that in view of the guard's being issued a gun and passkeys, the employer should have foreseen the possibility of attack. Moreover, because the employer did not inquire into the guard's criminal record, the employer wantonly disregarded the safety of his clients. In the case at bar, the danger of spilled blood is a consequence which might reasonably be expected to result in the performance of a security guard's duty. Wilson could face liability for negligently retaining Slater in a position with such a possibility. Wilson would be considered negligent for not discovering a potential danger to his clients.

In *Local 1812*, the court concluded that an additional examination of a blood sample provided yearly as a matter of course appeared rational and closely related to fitness for duty. *Local 1812, American Federation of Government Employees v. Department of State*, 87-0121 (D.D.C. April 22, 1987) (available Aug. 20, 1987, on LEXIS, Genfed library, Courts file). The test's focus was not on the prevention of AIDS but on determining fitness for duty in a specialized government agency, the Foreign Service. The court reasoned that the tests were not administered for a discriminatory purpose and there was sufficient prospect of harm to the Department of State's mission and to its employees to warrant continued testing. The court found that the balance of the equities warranted continuation of the testing.

As in *Local 1812*, Wilson did not administer this test for a discriminatory purpose; there is a sufficient prospect of harm to his clients and employees; and, this test was an additional test of a blood sample already taken. Just as surely as the balance of equities weighed in favor of the federal government with all its fourth amendment constraints, so too do they weigh in favor of Wilson's right to test.

3. Wilson had valid safety concerns which outweighed Slater's right to privacy.

The nature of law enforcement, or quasi-law enforcement, jobs carries a very real possibility of physical injury. Security guards carry handguns which they are trained to use. Security guards also face a significant risk of hand-to-hand combat in dealing with intruders upon property they are hired to protect. In the event of injury to Slater, prehospital emergency care would be administered by his fellow employees, paramedics or possibly even clients. The *Recommendations* provides that the risk of infection to prehospital

health care givers should be minimal *if* appropriate precautions are taken to prevent exposure to blood or other body fluids. *Recommendations, supra* p. 14, at 685. Appropriate precautions include the wearing of plastic gloves and the use of disposable airway equipment for resuscitation purposes. *Id.* Wilson had a valid concern that Slater might have been injured on the job. Wilson would need to warn emergency care givers so they could take precautions to minimize their exposure to the virus. Wilson had a valid business interest in the safety of his employees and his clients.

a. Wilson had a duty to provide a safe workplace for his employees.

Wilson owes a statutory duty to his employees to furnish a place of employment which is free from hazards which are likely to cause death or serious physical harm. Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (1970). Congress' purpose in enacting the OSHA statute was to assure safe and healthful working conditions by encouraging employers to institute new programs to provide such working conditions. S. Rep. No. 1282, 91st Cong., 2d Sess., *reprinted in,* 1970 U.S. Code Cong. & Ad News 5177. When Wilson's blood testing certifies that Slater is fit for duty, he is certifying to his other employees that Slater's health poses no threat to his carrying out his duties. Even in discrimination cases, the courts have upheld the right of an employer to discriminate against a handicapped employee who would pose a substantial threat to safety if hired. *Bucyrus-Erie Company v. State Department of Industry, Labor and Human Relations,* 90 Wis. 2d 408, 280 N.W.2d 142, 147 (1979). In *Thomas v. General Electric Company,* 207 F. Supp. 792 (W.D. Ky. 1962), the court found that the defendant's photographing of plaintiff's discharging of his customary duties could be an intrusion of the employee's seclusion in certain circumstances. The intrusion in *Thomas,* however, was solely to study means of promoting the safety of the defendant's employees, so the defendant was not guilty of an invasion of the employee's privacy. Wilson's testing of Slater's blood was for the purpose of promoting the safety of his employees. As such, Wilson's testing was not an unreasonable invasion of Slater's privacy. Safety of employees is a paramount concern to an employer. Wilson acted reasonably in taking precautions to ensure his employees' safety.

b. Wilson had a duty to protect his clients and the public.

Slater has a right to privacy as to his personal affairs so long as he does not violate the rights of others or of the public. *Harrison v. Humble Oil & Refining Co.,* 264 F. Supp. 89, 91 (D.S.C. 1967). Exposing emergency health care givers to the risk of AIDS violates

their rights and overbalances Slater's privacy interest. In addition, when Slater chose to become involved in a pervasively-regulated industry such as the security industry, he must have realized that his justified expectation of privacy was diminished. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986). Security guards are subjected to regulations ranging from their behavior to their carrying of firearms. In public employment, with all its fourth amendment constraints, warrantless administrative searches such as drug and alcohol testing are permissible where the justified privacy expectation of an employee has been reduced because of the pervasive regulation of the industry. *Rushton v. Nebraska Public Power District*, 653 F. Supp. 1510, 1524 (D. Neb. 1987). The court in *Rushton* found that the employer had a great interest in ensuring the safety of the public and that individuals working in highly regulated industries have reduced expectations of privacy. *Id.* Wilson has a great interest in the safety of his employees and clients.

The security guard business is one which has historically been highly regulated because of its use of firearms. Slater had a reduced expectation of privacy in that he knew Wilson had to determine his fitness for duty. Slater could not have expected Wilson to send him out into the public with a firearm without first being certain that Slater was no threat to the public.

Wilson owed a duty to his employees, his clients, and the public to maintain safety. The public is put in peril every time a law enforcement officer with AIDS goes on duty because the nature of his job makes the possibility of bleeding much more real than in the common workplace. Slater was a threat to the safety of Wilson's employees, clients, and the public. Wilson acted reasonably in protecting the safety of his employees and clients by determining Slater's fitness for duty.

II. LAWRENCE WILSON'S DISCLOSURE OF JOHN SLATER'S TEST RESULTS TO FELLOW LINCOLN COUNTY BUSINESSMEN SEATED AT WILSON'S TABLE DID NOT VIOLATE SLATER'S RIGHT OF PRIVACY BY PUBLICLY DISCLOSING PRIVATE FACTS.

Four requirements must be met in order for a plaintiff to recover for an invasion of privacy in a case where there has been an alleged public disclosure of embarrassing private facts. Prosser, in his hornbook on torts, has identified three of the prerequisites for recovery. First, the disclosure of the private facts must be a public disclosure and not a private one. Second, the facts disclosed must be private facts, not public facts. Third, the matter made public must be one which would be highly offensive and objectionable to a rea-

sonable person of ordinary sensibilities. Prosser & Keeton, Torts § 117, at 875 (5th ed. 1984). In the Second Restatement of Torts, there is an additional requirement that the public must not have a legitimate interest in having the information made available. Restatement (Second) of Torts § 652D comment d (1977).

The plaintiff, John Slater, has failed to state a valid privacy law claim against Wilson. Wilson did not disclose Slater's medical information to the public. Even if Wilson's comments to his business associates are deemed to have been public comments, Wilson nonetheless had a first amendment privilege to discuss Slater's medical test results because they were a matter of legitimate public concern. At the very least, Wilson had a qualified privilege to disclose his former employee's test results to his Lincoln County business associates, all of whom were potential future employers of Slater.

A. *Wilson's Disclosure of Slater's Test Results to Fellow Lincoln County Businessmen at a Chamber of Commerce Luncheon Was Not a "Public" Disclosure as the Term is Used in Privacy Law.*

For an action to lie for publicly disclosing private facts, the tort must be accompanied by publicity in the sense of communication to the public in general or to a large number of persons as distinguished from one individual or a few. A "mass exposure" is required. *Kinsey v. Macur*, 107 Cal. App. 3d 265, 270-271, 165 Cal. Rptr. 608, 611-12 (1980).

Communicating a fact concerning the plaintiff's life to a single person or even to a small group of persons is not an invasion of privacy. Restatement (Second) of Torts § 652D comment a (1977); *Tureen v. Equifax, Inc.*, 571 F.2d 411, 417 (8th Cir. 1978). An "invasion of privacy requires publicity in the broad, general sense of the word 'public.' " 571 F.2d at 418. In *Tureen*, the court quoted Black's Law Dictionary in defining the term "public." " 'Public'—Pertaining to a state, nation or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; . . . [omitting citations]." *Id.* at 418 n.10; Black's Law Dictionary 1393 (5th ed. 1979).

In the present case, Wilson's disclosure of Slater's test results to fellow members of the Lincoln County Chamber of Commerce was not a "public" disclosure. Although at least 75 people attended the luncheon, certainly not all of them sat at Wilson's table. Thus, the statement was not made to the luncheon guests as a whole. Only those at Wilson's table were privy to Wilson's remarks concerning Slater.

Wilson did not make the statement concerning Slater's test re-

sults to the public in general. *Kinsey*, 107 Cal. App. 3d at 270, 165 Cal. Rptr. at 611. A "mass exposure" did not occur. *Id.* at 271, 165 Cal. Rptr. at 612. Although the Record does not show exactly how many people heard Wilson's remarks, Wilson did not publicize Slater's test results in the broad, general sense of the word "public." *Tureen*, 571 F.2d at 417. Wilson merely told a group of fellow businessmen that he had tested his employees for the AIDS antibody and that one, John Slater, had tested positive. Wilson did not broadcast this fact to the public at large as the tort of public disclosure requires. He simply told a group of friends sitting at his table who happened to be discussing the topic of AIDS. This was a private conversation. Allowing an action for public disclosure in this case would unduly dilute the requirement that the disclosure be truly public. *See* Prosser & Keeton, Torts § 117, at 875 (5th ed. 1984).

B. *Assuming Arguendo that Wilson's Disclosure of Slater's Test Results to Fellow Businessmen at the Lincoln County Chamber of Commerce Luncheon was a "Public" Disclosure of Private Facts, Wilson Nonetheless Had a First Amendment Right to Tell His Friends of Slater's Test Results Because Those Results Were a Matter of Legitimate Public Concern.*

In a suit for an invasion of privacy, the plaintiff may not prevail if the public had an interest in having the disclosed information made available. Restatement (Second) of Torts § 652D comment d (1977). This is because the first amendment mandates a constitutional privilege applicable to those torts of invasion of privacy that involve publicity. *Campbell v. Seabury Press*, 614 F.2d 395, 397 (5th Cir. 1980); *see also, Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The constitutional privilege applies to the tort of public disclosure of private facts. *Cox Broadcasting*, 420 U.S. at 489. The first amendment protection of free expression applies to state privacy law vis-a-vis the fourteenth amendment. *See id.* at 495.

The right of privacy, therefore, does not prohibit any publication of a matter which is of public or general interest. *Brents v. Morgan*, 221 Ky. 765, 299 S.W. 967, 970 (1927). The inquiry to determine whether a disclosure of information overrides an individual's privacy interest asks whether the truthful information of legitimate concern to the public is publicized in a manner that is not highly offensive to a reasonable person. *Campbell*, 614 F.2d at 397.

When deciding these issues, a court weighing privacy interests against free-expression interests must remember that the "balance is always weighted in favor of free expression." *Briscoe v. Reader's Digest Association*, 4 Cal. 3d 529, 542, 483 P.2d 34, 43, 93 Cal. Rptr.

866, 875 (1971). "Some utterances are protected not because of their merit or truth but because a free, open society elects to take calculated risks to keep expression uninhibited." *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967). Tolerance for error is to be afforded. *Id.*

Certainly Mr. Wilson's conversation with his friends at the Chamber of Commerce luncheon should be protected. AIDS is a topic of national discussion, a concern of all employers. AIDS may affect employee absenteeism and safety in the workplace. That one of Mr. Wilson's former employees, Slater, had tested positive for the AIDS virus is also a matter of legitimate public interest, especially to the employers of Lincoln County who may have future contacts with Mr. Slater once he obtains his business degree. The news media are constantly relating stories of people who have contracted the AIDS virus. To declare that Wilson's comments are a violation of Slater's privacy rights would be to effectively chill the discussion of AIDS in the press.

The first amendment "privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." *Campbell*, 614 F.2d at 397. Allowing Wilson the privilege to speak on Slater's condition would be consistent with the broad mandate of the first amendment. That a member of the community has tested positive for the AIDS virus is a matter of legitimate public concern, given the present interest that AIDS has aroused. *See, Brents*, 221 Ky. 299 S.W. at 970. AIDS and known AIDS victims are often the subject of public discussion which shows that such communication is not offensive to a reasonable person. *See, Campbell*, 614 F.2d at 397. If talking about these matters were offensive, then AIDS obviously would not be a prolific topic of discussion.

Given that the law has just begun to deal with the legal problems created by AIDS, the court should be cautious when weighing the privacy rights of AIDS victims against long established first amendment privileges. The balance should be weighed in favor of free expression. *Briscoe*, 4 Cal. 3d at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875. Newsworthy information may be disclosed despite a person's privacy interests. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). The Second Restatement of Torts recognizes "rare diseases" as "news." Restatement (Second) of Torts § 652D comment g (1977). If AIDS is news, then logically so are AIDS victims. The first amendment protects persons who talk about and disclose such news. *See, Virgil*, 527 F.2d at 1128-29. As long as disclosure of information does not become a morbid, sensational prying into private lives with which a reasonable

amendment will protect the disclosure. *Id.* at 1129; Restatement (Second) of Torts § 652D comment h (1977).

In the present case, the businessmen of Lincoln County have a legitimate concern about AIDS and those in the community who have tested positive for the virus. If the court cannot rule as a matter of law that Slater's test results were a matter of legitimate public concern, then at the very least the case should be presented to a jury to determine if the information about Slater is newsworthy. *Virgil*, 527 F.2d at 1130. In either case, summary judgment for Slater is inappropriate.

C. *Wilson Had a Qualified Privilege to Tell Fellow Lincoln County Businessmen About Slater's Test Results Because the Results Were a Legitimate Business Concern of the Potential Future Employers of Slater.*

The law is well settled that a qualified privilege is usually accorded to a communication by a former employer who, in the regular course of business, replies to an inquiry from a prospective employer. *Holland v. Marriott Corp.*, 34 Fair Empl. Prac. Cas. (BNA) 1763, 1767 (D.D.C. 1984). Although *Holland* was a libel case, the right of privacy does not prohibit the communication of any private matter when the publication is made under circumstances which would render it a privileged communication according to the law of libel and slander. *Senogles v. Security Benefit Life Insurance Co.*, 217 Kan. 438, 536 P.2d 1358, 1362 (1975). Further evidence that employers have a qualified privilege in privacy law actions is the decision in *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), where the court held that a determination of what is a matter of public concern [in a privacy suit] is similar in principle to qualified privilege in libel cases. *Id.* 159 S.W.2d at 295. Furthermore, the Second Restatement recognizes qualified privileges in privacy law actions. Restatement (Second) of Torts § 652G (1977).

"A communication made in good faith on any subject in which the person communicating has an interest . . . is qualifiedly privileged if made to a person having a corresponding interest." *Senogles*, 217 Kan. 536 P.2d at 1362. In *Holland v. Marriott Corporation*, the court held that a qualified privilege exists when there are reasonable grounds for making the statement, such as the legitimate interest of the person uttering it or of the person to whom it was communicated. 34 Fair Employ. Prac. Cas. at 1767.

In *Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (1984), the court held that a qualified privilege to disclose private information exists where the publisher and recipient share a commonality of interests and the communication is rea-

sonably calculated to protect that interest. *Id.* at 131, 470 N.E.2d at 232. In *Knecht*, the plaintiff, a patient in a medical center, sued an employee of the center for disclosing to the employee's son private medical information concerning the plaintiff. The plaintiff suffered from a venereal disease and the defendant learned that her son may have had sexual relations with the patient. The court held that the defendant and her son had a commonality of interests that overrode the patient's interest in keeping her medical records confidential. *Id.*

Even courts that do not recognize a "conditional privilege" in privacy law degree that legitimate countervailing business interests may render the disclosure of personal information reasonable and not actionable. *See, e.g., Bratt v. International Business Machines Corp.*, 392 Mass. 508, 519-520, 467 N.E.2d 126, 135 (1984).

Occasionally courts have taken a narrower view of the qualified privilege. In *Levias v. United Airlines*, 27 Ohio App. 3d 222, 276, 500 N.E.2d 370, 374 (1985), the court held that medical information concerning an individual should not be disclosed unless the person receiving the information has a compelling reason to know the information.

A qualified privilege is more likely accorded when the statement is in response to an inquiry, rather than when it is volunteered. *Brown v. Collins*, 402 F.2d 209, 211-12 (D.C. Cir. 1968). In the present case, people at Wilson's table began discussing AIDS. This discussion prompted Wilson to disclose the information concerning Slater to his friends. He did not bring up the discussion himself. His statement was a natural extension of the topic already being discussed.

The facts of this case demonstrate that Wilson had a qualified privilege to discuss Slater's medical condition with fellow Lincoln County businessmen. Slater was pursuing a business degree at the time Wilson commented on Slater's blood test. Slater was a possible future employee of a Lincoln County employer. Wilson had an interest in Slater's test results as did employers in Lincoln County. This interest is not an illegitimate one and is therefore qualifiedly privileged. *See, Holland*, 34 Fair Employ. Prac. Cas. at 1767; *Senogles*, 217 Kan. 536 P.2d at 1362.

Further, Wilson had a commonality of interests with other Lincoln County businessmen. *See, Knecht*, 14 Ohio App. 3d at 131, 470 N.E.2d at 232. These employers have a legitimate interest in the health of their employees and the safety of their workplaces. The holding in *Levias* can be distinguished from the case at bar in that the plaintiff had a personal medical problem that was in no way dangerous to other people. The company doctor was the only one who had a true need to know of her medical condition. In the pre-

sent case, AIDS may present a hazard to the workplace. Employers should be aware of the potential danger.

Finally, Wilson made his comments about Slater's blood test in good faith. *See Senogles*, 217 Kan. 536 P.2d at 1362. AIDS was a topic of discussion at Wilson's table prior to Wilson's disclosure about Slater. He did not bring up the subject of AIDS himself. Wilson merely participated in a discussion of a topic of general public interest and contributed to the conversation what pertinent information he possessed. This good faith disclosure did not destroy his qualified privilege.

D. *The Court Should Grant Wilson's Motion for Summary Judgment by Ruling as a Matter of Law that Wilson Had a Qualified Privilege to Disclose Slater's Test Results to Fellow Lincoln County Businessmen.*

Whether or not a communication is privileged is a question of law for the court. *Mosrie v. Trussell*, 467 A.2d 475, 477 (D.C. 1983). Furthermore, the burden of proving an abuse of the qualified privilege rests on the plaintiff. *Walsh v. Consolidated Freightways*, 115 L.R.R.M. (BNA) 5045, 5048 (Or. 1977). Slater has not met his burden of proof. Mr. Wilson had legitimate business reasons to disclose the information about Slater to his fellow Lincoln County businessmen. These businessmen had a legitimate business reason to know about Slater's test results. Slater is a potential future employee of the Lincoln County businessmen. The court should not sustain the order of summary judgment in Slater's favor on the issue of qualified privilege, given Slater's burden. Because Slater has not met his burden, this court should grant Wilson's motion for summary judgment by ruling as a matter of law that Wilson had a qualified privilege to disclose Slater's test results to fellow Lincoln County businessmen.

If the court cannot grant Wilson's summary judgment motion on the qualified privilege issue, then the case should be remanded for a jury determination. On a summary judgment motion, the court is to decide whether reasonable minds could differ on a question of fact presented in the case. If reasonable minds could not differ, then summary judgment is appropriate. If reasonable minds could differ, then a jury determination is required. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1130-31 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). In the case at bar, a factual issue has been raised on which reasonable minds may differ. That issue is the question of whether Slater's test results are newsworthy. *See, supra* p. 34. Thus, at the very least, summary judgment in Slater's favor was inappropriate and the case should be remanded for a jury determination on the newsworthiness

issue.

CONCLUSION

For the reasons stated, the Petitioner respectfully requests that the order of the Marshall Appellate Court for the First Judicial Circuit granting Respondent's motion for summary judgment be reversed, and that the order of the Lincoln County District Court granting Petitioner's motion for summary judgment be affirmed. Alternatively, the Petitioner requests that the case be remanded to the District Court for a jury determination of the questions of fact referred to in this brief.

Respectfully submitted,

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