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Brief for Respondent, 21 J. Marshall L. Rev. 983 (1988)

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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 Appeal from the
Marshall Appellate Court
for the First Judicial Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. WHETHER THE MARSHALL APPELLATE COURT PROPERLY HELD THAT PETITIONER, LAWRENCE A. WILSON d/b/a SENTRY SERVICES, VIOLATED MR. SLATER'S RIGHT TO PRIVACY BY INTRUDING INTO HIS SECLUSION THROUGH IMPOSITION OF A BLOOD TEST FOR THE AIDS ANTIBODY WITHOUT NOTICE OR CONSENT.

II. WHETHER THE MARSHALL APPELLATE COURT PROPERLY HELD THAT PETITIONER VIOLATED MR. SLATER'S RIGHT TO PRIVACY BY INDISCRIMINATELY PUBLICIZING HIS PRIVATE MEDICAL INFORMATION TO UNRELATED THIRD PARTIES WHO HAD NO LEGITIMATE NEED FOR THIS INFORMATION.

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The opinion of Judge Helms of the Lincoln County District Court granting Petitioner's motion for summary judgment on both counts of the Complaint is unreported.

The unanimous opinion of the Marshall Appellate Court for the First Judicial Circuit reversing the decision of the District Court and ordering the District Court to enter summary judgment in favor of Respondent on the issue of liability and further ordering that trial be held on the issue of damages is also unreported. This opinion is set forth at pp. 1-7 of the Record and is reproduced in Appendix A.

JURISDICTION

A formal statement of jurisdiction is omitted pursuant to Rule III(F) of the Rules of the 1987 John Marshall (Benton) National Moot Court Competition in Information Law and Privacy.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Although there are no constitutional provisions directly involved with this action, the following constitutional provision is indirectly discussed and is set forth in Appendix C: U.S. Const. amend. I.

STATEMENT OF THE CASE

In April, 1987, without his knowledge or consent, Respondent, John Slater [hereinafter "Mr. Slater"] was subjected to a Human Immunodeficiency Virus Test [hereinafter "HIV test"] by his employer Lawrence Wilson d/b/a Sentry Services [hereinafter "Petitioner" or "Sentry"] (R. 2). Petitioner's application of this test and the subsequent publication of its positive results constitute the gravamen of Mr. Slater's complaint (R. 3).

Mr. Slater initiated this action on June 12, 1987 alleging that Petitioner had intruded into his seclusion by subjecting his blood sample to an Acquired Immune Deficiency Syndrome [hereinafter "AIDS"] antibody test without his consent (R. 1, 3). He further alleged that Petitioner had violated his expectation of privacy by disclosing confidential medical information to unrelated third parties in the business community (R. 1, 3).

Both parties filed cross motions for summary judgment (R. 1, 3). In support of his Motion, Mr. Slater submitted a copy of the *Recommendation for Preventing Transmission of Infection with*

Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associate Virus in the Workplace [hereinafter "CDC Report"] (See Appendix E), prepared by the Center for Disease Control (R. 3). Petitioner submitted no evidence to contravene the report (R. 3-4).

The trial court granted Petitioner's motion for summary judgment on both counts (R. 1). The Marshall Appellate Court for the First Judicial Circuit [hereinafter "Marshall Appellate Court"] reversed the trial court on both counts (R. 7). The appellate court directed the trial court to enter summary judgment in favor of Mr. Slater on the issue of liability, and ordered a trial on the issue of damages (R. 7).

On July 17, 1987, this court granted Petitioner leave to appeal, ordering the parties to address all issues raised in the opinion of the Marshall Appellate Court (order dated July 17, 1987, reproduced in Appendix B).

Mr. Slater was hired by Sentry in 1983 and subsequently left Petitioner's employ on April 30, 1987 to complete his education and pursue employment related to his degree (R. 1, 3). Sentry provides private security guard services in four counties in the State of Marshall. It is operated as a sole proprietorship by Petitioner (R. 1).

Sentry provides an annual physical examination program for its employees that includes a blood test (R. 2). In examinations prior to the incident in question, employees' blood had only been tested for cholesterol and hypoglycemia (R. 2). Employees were always informed of the targeted information of the blood tests (R. 2). Any employee who tested positive for a cardiovascular or blood-sugar disorder was given a leave of absence until the company physician approved the employee's return to work (R. 2). Petitioner recorded test results in its employee personnel files and regarded this medical information as confidential (R. 2). Mr. Slater never objected to this physical examination procedure (R. 2).

A dramatic change in the established procedures began in December 1986. At that time the Lincoln Medical Laboratory, retained by Petitioner for purposes of its physical examination program, suggested that Petitioner include an HIV test in the April, 1987 series of tests (R. 2). This test determines the existence of AIDS antibodies within a person's system, but is not a test for the disease (R. 2, N. 1). Petitioner included the HIV test in Sentry's testing procedure in April 1987 without informing its employees (R. 2). Mr. Slater surrendered a blood sample without notice or knowledge of the additional test, and with prior understanding that all test results would be kept confidential (R. 2).

The day after Mr. Slater left his employment with Sentry, May 1, 1987, Petitioner learned that Mr. Slater had tested positive for

the AIDS antibody (R. 3). Petitioner then contacted Mr. Slater and informed him of this finding (R. 3).

On May 6, 1987, Petitioner attended a monthly luncheon of the Lincoln County Chamber of Commerce (R. 3). The luncheon was attended by more than seventy-five area businessmen (R. Appendix 1). During lunch, prior to the start of a business meeting, Petitioner informed his business colleagues that his company had tested employees for the AIDS antibody, and that one had tested positive (R. 3). Petitioner went on to breach his company's policy of confidentiality by naming Mr. Slater as the employee who tested positive to the HIV test (R. 3).

SUMMARY OF ARGUMENT

The State of Marshall recognizes a cause of action for invasion of privacy through an intrusion into seclusion, and also provides recovery for publicity given to private facts. Mr. Slater is a private figure. His blood and the information contained therein are private matters. Petitioner violated Mr. Slater's right to be left alone by intruding upon his seclusion and by giving publicity to purely private medical information.

Petitioner intruded upon Mr. Slater's seclusion by disguising an unwarranted AIDS antibody investigation as a seemingly routine physical examination. Petitioner failed to notify Mr. Slater or obtain his consent before subjecting him to this unnecessary and highly offensive procedure.

Petitioner neither suspected that Mr. Slater had been exposed to the AIDS virus, nor had any reason to believe that he posed a health risk to other company employees. Petitioner lacked any bona fide occupational interest in requiring his employees to undergo such a degrading and invasive examination.

Petitioner aggravated this injury by giving unwarranted publicity to the information obtained. Petitioner indiscriminately disclosed Mr. Slater's positive test results at a Chamber of Commerce luncheon to individuals who had no need for the information. In so doing, Petitioner breached his long standing company policy that all employee medical records would remain private.

The publicity given to Mr. Slater's HIV test results constituted an invasion of his right to privacy. The businessmen present during the luncheon were sufficient in number to insure publicity of the private facts. The personal nature of the information released to unrelated third parties in the business community was highly prejudicial to Mr. Slater, and exceedingly offensive to the reasonable person. No legitimate public concern required Petitioner to publicize such personal information about a former employee who posed no

threat to the community.

Petitioner's highly offensive disclosure of Mr. Slater's private physiology failed to advance any legitimate interest of the Petitioner, the businessmen to whom it was publicized, or the public at large. Petitioner's offensive action conferred a benefit upon no one, but caused Mr. Slater irreparable injury.

Additionally, Petitioner can not shield himself with conditional privileges, because the only party with an established interest in the information was Mr. Slater. The appellate court correctly refused to confer a privilege to Petitioner because of his blatant release of Mr. Slater's name along with his medical information. The appellate court correctly found that Petitioner abused any narrow privilege exception, and determined that Mr. Slater was entitled to recovery as a matter of law for his irreparable injuries. Petitioner abused any purported privilege he may have had. The decision below must be affirmed.

ARGUMENT

I. THE APPELLATE COURT PROPERLY HELD THAT THE COMPULSORY BLOOD TEST FOR THE AIDS ANTIBODY INITIATED BY PETITIONER, WITHOUT GIVING NOTICE TO OR OBTAINING THE CONSENT OF MR. SLATER, CONSTITUTED A VIOLATION OF MR. SLATER'S RIGHT OF PRIVACY BY INTRUDING INTO HIS SECLUSION.

Petitioner initiated a blood testing procedure that was imposed upon Mr. Slater without his knowledge or consent. The Marshall Appellate Court held, as a matter of law, that Petitioner's appropriation of the information from the HIV test was a violation of Mr. Slater's privacy interests because it intruded into his seclusion. The court correctly determined that when the evidence is viewed in a light most favorable to Petitioner, Mr. Slater's privacy interests outweighed any legitimate interest Petitioner may have had. Based upon the undisputed facts and uncontroverted evidence, Mr. Slater is entitled to summary judgment as a matter of law.

The United States Supreme Court first recognized a right of privacy in *Griswold v. Connecticut*, 381 U.S. 479 (1965). This right of privacy has been described as "the most comprehensive of rights and the right most valued by civilized man." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The Court has described the privacy right as one of those fundamental rights that are " 'implicit in the concept of ordered liberty' such that 'neither liberty nor justice would exist if [they] were sacrificed.' " *Bowers v. Hardwick*,

106 S. Ct. 2841, 2844 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

In *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), the Court recognized that the right of privacy encompasses at least two different kinds of interests, "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions."

These landmark decisions establish the constitutional magnitude of the right of privacy. The protections afforded by this right, to be free from unwarranted intrusions and from disclosures of personal matters, have been abridged in this action.

The fundamental right of privacy can be effectively protected without the necessity of constitutional scrutiny. The common law provides for an effective tort remedy through an intrusion into seclusion claim. The same policies that underlie the interests protected by the constitutional right of privacy are applicable to privacy at common law and the intrusion into seclusion interests embodied within this right.

A. THE STATE OF MARSHALL RECOGNIZES THE TORT OF INVASION OF PRIVACY AND PROTECTS AGAINST SUCH UNWARRANTED AND OFFENSIVE INTRUSIONS INTO SECLUSION AS THOSE IMPOSED UPON MR. SLATER.

The State of Marshall has joined the majority of jurisdictions that recognize the Restatement (Second) of Torts common law right of privacy (R. 4). Restatement (Second) of Torts § 652A (1977). The origin of this right, which was not expressly recognized at early common law, can be directly traced to an 1890 article which reviewed a number of English and American cases purporting to have protected the right of privacy or what was called the right to be "let alone." Warren & Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). By 1966, scholars recognized the importance of this tort as a cause of action at common law. Kalven, *Privacy in Tort Law-Were Warren and Brandeis Wrong*? 31 Law & Contemp. Probs. 326 (1966).

Marshall courts have adopted Restatement (Second) of Torts § 652B providing that:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Liability under this section attaches when a person "has intruded into a private place, or has otherwise invaded a private seclusion

that the plaintiff has thrown about his person or affairs." Restatement (Second) of Torts § 652B comment c (1977). The Restatement additionally requires that "the interference with the plaintiff's seclusion be 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).

The unwarranted appropriation of Mr. Slater's blood for additional testing was a substantial intrusion into Mr. Slater's seclusion that would offend a reasonable person. The Michigan Supreme Court acknowledged the concept of the right of privacy and the liability that attaches thereto in the landmark case of *De May v. Roberts*, 46 Mich. 160, 9 N.W. 146 (1881). In that case, Mrs. Roberts gave birth in her home and the attending physician allowed a young man, who had accompanied him to carry his bags, to remain in the room during the delivery. In affirming a verdict in favor of Mrs. Roberts based on an invasion of privacy, the court held that:

> It would be shocking to our sense of right, justice and propriety to doubt even but that for such an act the law would afford an ample remedy. To the plaintiff the occasion was a most sacred one and no one had a right to intrude unless invited or because of some real and pressing necessity . . . . The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it . . .

De May, 9 N.W. at 165-66.

Petitioner's actions in the present case are equally, if not more, "shocking" and offensive. Mr. Slater was confronted with a bodily intrusion of the kind which is physically offensive. A reasonable person would find this intrusion to be highly offensive. The offensiveness lies in the fact that Mr. Slater believed he was being tested for hypoglycemia and cholesterol, when in fact he was also being tested for the AIDS antibody. Such intrusions are violative of the secret and secluded areas Mr. Slater has a right to keep private. *Nelson v. Maine Times*, 373 A.2d 1221, 1223 (Me. 1977).

B. MR. SLATER'S SECLUSION WAS INTRUDED UPON WHEN PETITIONER ENTERED INTO HIS PRIVATE PHYSIOLOGICAL BIOGRAPHY, AN AREA IN WHICH MR. SLATER HAD A REASONABLE EXPECTATION TO BE LEFT ALONE.

The United States Supreme Court has specifically recognized "blood" and "bodily fluids" as areas entitled to privacy protection. *Schmerber v. California*, 384 U.S. 757, 767 (1966). In *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), *aff'd* 809 F.2d

1302 (8th Cir. 1987), the court held that intrusions authorized by a Department of Corrections' policy which subjected employees to urinalysis and blood tests upon request of the Department officials, constituted intrusions into areas in which employees had a reasonable and legitimate expectation of privacy. The underlying rationale is that "[o]ne's anatomy is draped with constitutional protection." *United States v. Afanador*, 567 F.2d 1325, 1331 (5th Cir. 1978). Accordingly, the Marshall Appellate Court correctly found that "the physiological biography contained in the blood of an individual is private information which an individual can reasonably expect to be left alone . . ., [and that] Slater's private physiological biography is a matter entitled to seclusion . . ." (R. 5).

A majority of jurisdictions have considered four factors in determining whether an intrusion into the solitude or seclusion of another has occurred. First, liability for an invasion of privacy occurs when there is an intrusion upon private, intimate affairs and the intrusion is one to which an ordinary man would reasonably expect to be left alone. Prosser, *Privacy*, 48 Calif. L. Rev. 383, 389 (1960).

The common thread of this recognized factor for an intrusion into seclusion action is whether the intrusion was reasonable. "Unwarranted" intrusion is actionable when it is highly offensive to a "reasonable" person. *Gill v. Snow*, 644 S.W.2d 222 (Tex. Ct. App. 1982). Where such an invasion takes place the validity of the findings are irrelevant. A claim exists regardless of whether the information is ultimately published. The invasion, in and of itself, merits relief.

In *Harkey v. Abate*, 131 Mich. App. 177, 179, 346 N.W.2d 74, 76 (1983), the court held that the installation of a hidden viewing device in a ladies room constituted a sufficient wrongful intrusion into the seclusion or solitude of plaintiff and her daughter. The court reversed a summary judgment to defendant despite the absence of proof that the device had been utilized. Petitioner's intrusion through the egregious application of the HIV test presents an even stronger argument in support of Mr. Slater.

Second, a cause of action may also be sustained in privacy without proof of any physical contact or violation. *Hall v. Citizens Ins. Co. of Am.*, 141 Mich. App. 676, 368 N.W.2d 250 (1985); *see also* Prosser & Keeton, Torts § 117 (5th ed. 1984). Similar to reasoning under the Fourth Amendment, the tort is intended to protect people, not places. *Katz v. United States*, 389 U.S. 347 (1967). Jurisdictions generally recognize that what a person seeks to preserve as private, even an area accessible to the public such as a fitting room, is entitled to protection. *See, e.g., Lewis v. Dayton Hudson Corp.*, 128 Mich. App. 165, 339 N.W.2d 857 (1983). Mr. Slater's physiology is such a protected area considering the intimacy of one's blood and

bodily fluids. *Schmerber v. California*, 384 U.S. 757 (1966). Here, unlike the potential invasion in *Lewis*, there has been an actual physical contact.

Third, the content of what an intruder learns by means of an intrusion is not necessarily controlling when fixing liability. In *Pearson v. Dodd*, 410 F.2d 701, 705 (D.C. Cir.), *cert. denied*, 395 U.S. 947 (1969), the court held that "[a]n eavesdropper to the marital bedroom may hear marital intimacies, or he may hear statements of fact or opinions of legitimate interest to the public; for purposes of liability that should make no difference." AIDS may be of legitimate interest to the public, however, the manner by which Petitioner obtained his information remains reprehensible.

Finally, there is general agreement that unlike other invasions of privacy, intrusion does not require publicity of the information obtained. In *Hall v. Post*, 85 N.C. App. 610, 355 S.W.2d 819 (1987), the court held that intrusion into seclusion "does not depend upon any publicity given a plaintiff or his affairs but generally consists of an intentional physical or sensory interference with, or prying into, a person's solitude or seclusion or his private affairs." *Id.* at 823. *Accord Hester v. Barnett*, 723 S.W.2d 544 (Mo. Ct. App. 1987).

Mr. Slater is entitled to relief upon establishing that Petitioner invaded a defined area or place which is protected from physical intrusion. *Nelson v. Maine Times*, 373 A.2d 1221 (Me. 1977). The undisputed facts in this action establish that Petitioner has initiated an investigation or examination into Mr. Slater's private concerns. The Marshall Appellate Court correctly relied on these undisputed facts in granting summary judgment to Mr. Slater.

C. THE HIGHLY OFFENSIVE NATURE OF PETITIONER'S ADMINISTRATION OF THE HIV TEST WAS ESTABLISHED AND HEIGHTENED BY THE ABSENCE OF KNOWLEDGE AND CONSENT.

Petitioner's compulsory blood test was an offensive intrusion not simply because it involved a bodily violation, but also because Mr. Slater did not consent. Petitioner lacked any bona fide occupational reason to justify the administration of the test. Such an intrusion into Mr. Slater's private affairs constitutes an invasion of privacy which is highly offensive to a reasonable person.

Mr. Slater was subjected to an HIV test of which he had no prior knowledge and to which he did not consent. Blood tests are, by their very nature, intrusive and, absent consent, highly offensive. *Schmerber v. California*, 384 U.S. 757 (1966). Such an invasion into Mr. Slater's physiological biology, without his consent, must be regarded as a highly offensive intrusion upon his seclusion. In deter-

mining this issue, the Marshall Appellate Court correctly held that the non-consensual intentional blood test for the AIDS antibody was an intrusion. This result, as found by the appellate court, is compelled "[e]ven if the employer had an interest in determining whether its employees had been exposed to the AIDS antibody, its interests are not so great as to justify its administration of such tests without notice or consent." (R. 5).

Consent is a key element in determining whether intrusions are highly offensive to a reasonable person. *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985), *aff'd*, 809 F.2d 1302 (8th Cir. 1987). If consent were not a vital element, Mr. Slater's privacy rights would be subject to the whims of those with power over him or who are in a position to invade his privacy. Tests administered in Petitioner's fashion cannot be condoned, even though AIDS is a serious national problem.

An assertion that Mr. Slater impliedly consented to the administration of the blood test is devoid of merit. Mr. Slater consented to the administration of the blood test with the knowledge and understanding that the test's scope would remain fixed as in prior years. Petitioner must not be permitted to arbitrarily and unilaterally expand the scope of his annual blood test to embark on unwarranted surveillance of his employees.

In *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), the court held that an actionable intrusion existed where the press gained entrance by subterfuge to the home of an accused, photographed him there, and published the photographs without his consent. In determining that the defendant could not be insulated from liability, the court held that, "clandestine photography of the plaintiff in his den and the recordation and transmission of his conversation without his consent resulting in his emotional distress warrants recovery for invasion of privacy . . ." *Id.* at 248. *See also Barber v. Time, Inc.*, 348 Mo. 1199, 1202, 159 S.W.2d 291, 295-96 (1942) (the right of privacy must include the right to have information kept from publication unless there is consent). Mr. Slater is entitled to similar protection from Petitioner's clandestine blood test.

Petitioner took blood samples from employees, leaving them with a false sense of security. Once Petitioner gained entry into the employee's privacy he exceeded the original scope of the test and became intrusive.

Mr. Slater's failure to object to the initial blood test, does not constitute a blanket waiver of any future blood tests. "Advance consent to future *unreasonable* searches is not a reasonable condition of employment." *McDonell v. Hunter*, 612 F. Supp. at 1131 (emphasis in original). Petitioner must not be provided carte blanche to in-

trude into the physiology of Mr. Slater's bodily fluids without his express knowledge or consent. The Marshall Appellate Court correctly held that Petitioner's additional test for the AIDS antibody constituted an intrusion into Mr. Slater's private affairs.

D. PETITIONER LACKED ANY LEGITIMATE BUSINESS INTEREST FOR IMPOSING AN HIV TEST BECAUSE THE TEST DOES NOT DETERMINE IF A PERSON HAS AIDS, AIDS CANNOT BE TRANSMITTED THROUGH CASUAL WORKPLACE CONDUCT, AND THE TEST CAN NOT MEASURE IMPAIRMENT.

The HIV test is a series of three blood tests designed to detect the presence of HTLV-III/LAV antibodies that develop in a person's blood. *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and Aids*, 36 Morbidity & Mortality Weekly Rep. 509 (1987) [hereinafter *"Guidelines"*] (See Appendix F); *see also* Clifford & Iuculano, *AIDS and Insurance: The Rationale for AIDS-Related Testing*, 100 Harv. L. Rev. 1806, 1812 n. 35 (1987). No commercially available blood test currently exists to identify the presence of the AIDS virus. *See* Schatz, *The AIDS Insurance Crisis: Underwriting or Overreaching?*, 100 Harv. L. Rev. 1782 (1987).

The presence of HTLV-III antibodies does not necessarily indicate active infection, nor does it indicate whether a person has or will contract AIDS. Weiss, Goedert, Sarngadharan, Bodner, Gallo & Blattner, *Screening Test for HTLV-III (AIDS Agent) Antibodies*, 1986 J. A.M.A. 262. (See Appendix G). Clinical evidence demonstrates that a person with a positive test result may be immune from the effects of the AIDS virus, be only a carrier of the virus, develop AIDS in the indefinite future, or simply be reacting to something other than the AIDS virus ("a false positive"). McCray, *Occupational Risk, of the Acquired Immunodeficiency Syndrome Among Health Care Workers*, 314 New Eng. J. Med. 1127 (1986) (See Appendix H).

The inability of Petitioner to determine which employees are likely to be infected or who, among his employ, practice "high-risk behaviors," is strong evidence that Petitioner has no valid reason to administer the HIV test based on a policy of reducing further spread of infection. *See Guidelines* at 510. Routine screening for the HTLV-III/LAV antibody is impractical due to (1) the inability of an employer to determine which of his employees have been exposed to the virus and (2) the general lack of risk in connection with the employment of individuals with AIDS. *Guidelines* at 511; Morgan, Lewis & Bockius, *AIDS in the Workplace: A Medical-Legal Over-*

view, 1986 AIDS L. Litigation Rep. 279 [hereinafter "Morgan"].

Petitioner's actions in the instant case are particularly troubling because of the considerable widespread fear of AIDS or what has been termed "AIDSphobia." Kandel, *AIDS in the Workplace*, 11 Employee Rel. L. J. 678, 686 (1986). The effects of widespread fear of "contagious" diseases was discussed in *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123 (1987). *Arline* was litigated under the Rehabilitation Act of 1973 and held that a person afflicted with the contagious disease of tuberculosis may be a "handicapped individual" within the meaning of the Act. Citing the legislative history, the Court noted that Congress had acknowledged society's myths and fears about diseases and that their myths and fears were as "handicapping" as the physical limitations resulting from the disease itself. *Id.* at 1129 n. 11.

> Few aspects of a handicap give rise to the same level of a public fear and misapprehension as contagiousness. Even those who suffer or have recovered from such noninfectious diseases as epilepsy or cancer have feared discrimination based on the irrational fear that they might be contagious.

Id. (footnotes omitted).

Even though AIDS was not at issue before the Court in *Arline*, the same "irrational fear" of contagion exists. Indeed, the American Medical Association in its Amicus Curiae Brief to the Court in *Arline* emphasizes and warns that employment decisions about persons infected with the AIDS virus, like decisions about any communicable disease, should be based on reasonable medical judgments and the potential risk to others. A.M.A. Amicus Curiae Brief in Support of Petitioners, *School Bd. of Nassau County v. Arline*, 107 S. Ct. 1123 (1987), *reprinted in* Daily Lab. Rep. (BNA) No. 135, at D1-D9 (July 15, 1986). Petitioner's fears and concerns must give way to the privacy interests that are encroached upon by his actions. Petitioner is duty bound to objectively evaluate the issue of testing for the AIDS antibody according to the evidence gathered and not be influenced by unsubstantiated and irrational fears of others.

Petitioner's unjustified and arbitrary administration of the HIV test to Mr. Slater's blood sample lacked a legitimate occupational interest. There is overwhelming agreement in the medical community that AIDS cannot be transmitted through casual workplace contact. *Recommendations for Preventing Transmission of Infection with Human T-Lymphotrophic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Rep. 682 (1985) [hereinafter "CDC Report"]. Legal authorities have been persuaded by this learned body of evidence. In *LaRocca v. Dalsheim*, 120 Misc. 2d 697, 467 N.Y.S.2d 302 (Sup. Ct. 1983), the court held that AIDS cannot be transmitted by casual

contact. More recently, in *District 27 Community School Bd. v. Bd. of Educ.*, 130 Misc. 2d 398, 502 N.Y.S.2d 325 (Sup. Ct. 1986), the court agreed with the Commissioner of Health that children with AIDS should not be excused from regular classrooms based on the lack of transmissibility of the disease via casual contact. The court based its decision on clinical evidence and medical data concluding that:

> Reinforced by the total absence of documented cases of HTLV-III/LAV having been transmitted in any way other than by sexual intercourse, by injection of contaminated blood products, including needle sharing, or by an infected mother to her child before or during birth, the experts unanimously agree that the virus is not transmitted by casual interpersonal contact or airborne spread, such as breathing, sneezing, coughing, shaking hands or hugging. After almost five years of experience, the surveillance data . . . forwarded to the CDC, as well as epidemiologic studies . . . speak strongly against transmission of AIDS through casual (non-sexual) contact.

Id. at 403 (footnote omitted). *Accord* Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 New Eng. J. Med. 344 (1986) (See Appendix I); Sande, *Transmission of AIDS: The Case against Casual Contagion*, 314 New Eng. J. Med. 380 (1986) (See Appendix J). These reports indicate that despite the common sharing of objects which contact the human body, AIDS or ARC can not be casually transmitted. *See also* Hammett, *AIDS and the Law Enforcement Officer: Concerns and Policy Responses*, 1987 Issues & Practices in Crim. Justice 49.

A CDC panel representing business, industry, labor and the medical community issued guidelines on November 15, 1987. CDC Report. These guidelines were primarily directed toward health care, but the Panel made clear that they were equally applicable to employment concerns. CDC Report at 681. The guidelines establish that routine screening of employees for the AIDS antibody is unnecessary and unwarranted. This conclusion is amply supported by the finding that, "[r]outine serologic testing of FSWs [Food Service Workers] for antibody to HTLV-III/LAV is not recommended to prevent disease transmission for FSWs to consumers." CDC Report at 694. As a consequence, even "[w]orkers known to be infected with HTLV-LLL/LAV should not be restricted from work solely based on this finding. Moreover, they should not be restricted from using telephones, office equipment, toilets, eating facilities, and water fountains." CDC Report at 694.

This report is highly relevant and is undisputed in this case (R. 3-4). It establishes, beyond any reasonable doubt, that the compulsory and nonconsensual HIV test imposed upon Mr. Slater served

no legitimate business interest.

The findings of the CDC and similar reports have provided the foundation for state legislation in a number of jurisdictions. California, Texas, Massachusetts and Wisconsin have recently enacted legislation prohibiting employers from requiring employees or job applicants to be tested for exposure to the AIDS antibody. (See Appendix K). Many of these statutes impose a penalty upon employers who administer such a test as a condition of beginning or maintaining employment. Virtually all such legislation, at a minimum, requires the written consent of the subject prior to imposition of any test procedures.

Petitioner lacked a reasonably justifiable belief that Mr. Slater posed a threat to Petitioner's business interests or to other employees. Lacking such a belief, the HIV test was not reasonably related to any legitimate business interest Petitioner may have had. Such a relationship is essential. The Texas Supreme Court has noted that, "polygraph tests are not sanctioned if they are unrelated to the employee's duties or if they are otherwise clearly unreasonable." *Talent v. City of Abilene*, 508 S.W.2d 592, 596 (Tex. 1974). The HIV test was not reasonably grounded in a determination that Mr. Slater's performance would be affected by the presence of the AIDS antibody. As a result, Petitioner's HIV test was not specifically, directly and narrowly related to Mr. Slater's official duties.

Unlike blood-alcohol testing, an HIV test does *not* in any way measure whether a person is impaired due to AIDS. *Guidelines* at 514. Nor can an HIV test determine whether a person has been exposed to the AIDS virus or even if a person exposed will develop AIDS. *Guidelines* at 509. It merely indicates one fact—that an identifiable antibody is present in a person's system. Consequently, Petitioner had no justification to administer an HIV test. There was no factual basis for believing that Mr. Slater would be unable to satisfactorily perform the duties of his job without affecting his safety or the welfare of other employees.

The court in *McDonell v. Hunter*, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985), *aff'd*, 809 F.2d 1302 (8th Cir. 1987) stated:

> Taking and testing body fluid specimens . . . would help the employer discover drug use and other useful information about employees. There is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.) That potential, however, does not make a[n] . . . employer's search of an employee a constitutionally reasonable one.

If Petitioner's actions in this instance were sanctioned the privacy rights of every employee, present and future, would be eviscerated. This case concerns the limits of an employer's power to inquire

into and keep close watch over the details of its employees' personal lives. Petitioner's inability to discern the proper limits is evidenced by initiation of an HIV test without notice or consent (R. 2). The lack of restraint and sensitivity displayed by Petitioner portrays a cavalier disregard for an ordinary citizen's right of privacy and indicates that he considered such rights of no particular importance.

Petitioner has adequate alternatives through employee education. AIDS anxiety and concerns about AIDS in the workplace can be effectively combatted through seminars, lectures and distribution of medical literature. Education is certainly less costly than annual imposition of HIV tests. Even more importantly, these alternatives do no encroach upon employees' privacy rights.

Petitioner should not be able to administer an HIV test for the AIDS antibody absent notice and consent. Moreover, Petitioner should not be allowed to administer an HIV test without a bona fide occupational justification. If Petitioner has any legitimate business interest at all for imposing such a test, this interest is outweighed by the administration of the test without notice and consent. The Marshall Appellate Court correctly held that Mr. Slater's right of privacy was intruded upon when Petitioner tested his blood for the AIDS antibody without obtaining his consent. For these reasons affirmance of the Marshall Appellate Court is mandated.

II. PETITIONER INVADED MR. SLATER'S PRIVACY WHEN HE INDISCRIMINATELY REVEALED MR. SLATER'S PRIVATE MEDICAL INFORMATION TO UNRELATED THIRD PARTIES WHO HAD NO LEGITIMATE NEED FOR THE INFORMATION.

The right of privacy necessarily includes the right of the individual to have information concerning his health matters kept private without disclosure. Due to the stigmatized nature of AIDS and the population it affects, medical information concerning AIDS is considered a private health matter. *Cronan v. New England Telephone*, 1 Individual Empl. Rts. Cases (BNA) 658 (April 11, 1986). The need to protect the identity of those individuals positively diagnosed as having the AIDS antibody, AIDS Related Complex [hereinafter "ARC"], or AIDS is paramount. Several states have enacted statutes prohibiting unauthorized public disclosures of names or test results of persons submitted to the HIV test. (See Appendix K). However, the privacy interests of those diagnosed as having AIDS, ARC, or the presence of the AIDS antibody can be more readily and expeditiously protected by the application of common law.

The states are nearly unanimous in recognizing a common law cause of action for invasion of privacy for publicity given to private

facts. The State of Marshall has joined the majority of states in recognizing the tort as defined by the Restatement (Second) of Torts, which provides that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Restatement (Second) of Torts § 652D (1977).

Most jurisdictions recognize four elements controlling the existence of a claim for violation of one's right to be free of publicity regarding private matters: (1) publicity, given to (2) private facts, (3) which would be highly offensive to a reasonable person and (4) is not of legitimate concern to the public. *Wells v. Thomas*, 569 F. Supp. 426 (E.D. Pa. 1983); *Sipple v. Chronicle Publishing Co.*, 154 Cal. App. 3d 1040, 201 Cal. Rptr. 665 (1984). The Marshall Appellate Court correctly held that the application of the undisputed facts to the elements of the tort entitled Mr. Slater to relief. Its decision must be affirmed.

A. MR. SLATER'S BLOOD SAMPLE AND THE UNWARRANTED TEST RESULTS DERIVED THEREFROM CONSTITUTE PRIVATE FACTS WHICH MR. SLATER REASONABLY EXPECTED TO BE KEPT CONFIDENTIAL.

A private fact is one that has not already become public or left open to the public. *Harris v. Easton Publishing Co.*, 335 Pa. Super. 141, 483 A.2d 1377 (1984). The private fact or privacy interest involved in the tort of publicity is the information generated from the blood sample rather than the blood test. The fact that Mr. Slater had tested positive to the AIDS antibody test was a private fact not already public nor left open to the public eye. *See Huskey v. National Broadcasting Co.*, 632 F. Supp. 1282 (N.D. Ill. 1986); *Killilea v. Sears, Roebuck & Co.*, 27 Ohio App. 3d 163, 499 N.E.2d 1291 (1985).

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the Court left open the question of liability for publicity torts where the disclosed information is not a matter of public record. The sole exception to liability expressed by the Court was for truthful information contained in open public records within the purview of the First and Fourteenth Amendments. *Id.* at 495. In *Time, Inc. v. Hill*, 385 U.S. 374 (1967), the Court recognized the possibility of tort liability for unwarranted publicity of the truth when it stated, "revelations may be so intimate and so unwarranted in view of the victim's position as to outrage the community's notion of decency." *Id.* at 383 n.7

(citing *Sidis v. F-R Publishing Corp.*, 113 F.2d 806 (2nd Cir.), *cert. denied*, 311 U.S. 711 (1940)).

A clear majority of courts recognize that a person's private medical information constitutes a private fact. *See e.g., Levias v. United Airlines*, 27 Ohio App. 3d 222, 500 N.E.2d 370 (1985). A cause of action for disclosure of private facts will survive despite First Amendment mandates. *See, e.g., Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971). In *Division of Medical Quality, Bd. of Medical Quality Assurance v. Gherardini*, 93 Cal. App. 3d 669, 678, 156 Cal. Rptr. 55, 64 (1979), the court states that "a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." Publication of Mr. Slater's "medical profile" is precisely the issue herein.

In *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C. App. 1985), the court held that a cause of action existed where a plastic surgeon and department store used before and after photographs of a patient's cosmetic surgery without her consent. Concerning the privacy of the facts involved the court stated that, "[c]ertainly if there is any right of privacy at all, it should include the right to obtain medical treatment at home or in a hospital for an individual personal condition . . . without personal publicity." *Id.* at 588 (quoting *Barber v. Time, Inc.*, 348 Mo. 1199, 1206, 159 S.W.2d 291, 295 (1942)).

It is clear from the record that both parties believed the contents of employee medical records were private information. The record indicates that all employee medical files were guarded as confidential (R. 2). Petitioner's own policies were predicated on the privacy of these records. Petitioner violated his own company policy by divulging private information. This court must not protect such behavior by cloaking personnel files of a private company with the benefits of public document garb.

B. PETITIONER'S DISCLOSURE OF MR. SLATER'S PERSONAL MEDICAL INFORMATION TO UNRELATED THIRD PARTIES CONSTITUTED PUBLICITY OF A PRIVATE FACT WHICH A REASONABLE PERSON WOULD FIND OFFENSIVE.

The uncontested facts establish that there was an unreasonable and offensive publicity of a private fact concerning Mr. Slater. Publicity requires that information be made public by a communication to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge. *Tureen v. Equifax, Inc.*, 571 F.2d 411 (8th Cir. 1978); *Brown v. Mul-*

larkey, 632 S.W.2d 507 (Mo. Ct. App. 1982). Where a communication involving a private fact reaches, or is sure to reach, the public, then publicity has been given to a party's private life. *Wells v. Thomas*, 569 F. Supp. 426 (E.D. Pa. 1983).

There is no specific requirement as to the number of persons to which a private fact must be communicated before it is deemed publicized. The essence is that there be a communication to a body of persons substantial enough in the overall context so as to assure a degree of public knowledge. A publication to only seventeen persons meets the publicity requirement. *Harris v. Easton Publishing Co.*, 335 Pa. Super. 141, 483 A.2d 1377 (1984).

In *Harris*, suit was brought for invasion of privacy after the defendant newspaper publicized facts concerning the private lives of a welfare applicant and her family. The court found that even though the newspaper did not specifically name the complainant in the article, at least seventeen people were able to identify her and her family. The court found publicity as a matter of law. *Id.* at 1385-86.

Similarly, in *Vassiliades v. Garfinckel's, Brooks Bros.*, 492 A.2d 580 (D.C. App. 1985), the court sustained an invasion of privacy on analogous principles. In holding that a publication had occurred the court stated, "the nature of the publicity ensured that it would reach the public . . . [and] that the fact that Mrs. Vassiliades presented only two witnesses who learned of her plastic surgery . . . does not defeat her claim." *Id.* at 588. The release of Mr. Slater's personal medical information to pillars of the business community easily satisfies the audience requirement of publicity. *Contra Vogel v. W.T. Grant Co.*, 458 Pa. 124, 327 A.2d 133 (1974), where the court's flawed analysis rejected publicity based on the relatively small number of recipients.

Additionally, the matter publicized must be of the kind that would be highly offensive to a reasonable person. Restatement (Second) of Torts § 652D (1977). When applying this standard, the protection afforded to privacy interests must be related to the customs of the time and place, to the occupation of the plaintiff and the habits of his neighbors and fellow citizens. Restatement (Second) of Torts § 652D comment c (1977). The element of offensiveness is satisfied when the publicity given is such that a reasonable person would feel justified in feeling seriously aggrieved by it. As one court noted:

> Men fear exposure not only to those closest to them; much of the outrage underlying the asserted right to privacy is a reaction to exposure to persons known only through business or other secondary relationships. The claim is not so much one of total secrecy as it is of the right to *define* one's circle of intimacy . . .

Briscoe v. Reader's Digest Ass'n, Inc., 4 Cal. 3d 529, 534, 483 P.2d

34, 37, 93 Cal. Rptr. 866, 869 (1971) (emphasis in original).

Within the context of Mr. Slater's second cause of action, that of publicity given to private facts, Petitioner's act of disclosing Mr. Slater's positive test results at a Chamber of Commerce luncheon is equally or more offensive than the initial act of obtaining the information. Mr. Slater's private medical information and interests, relative to the customs of time and place, deserve protection. Society's extreme fear of AIDS, and the stigmatization and ostracism logically flowing from Petitioner's disclosure, have certainly caused mental suffering, shame, and humiliation to Mr. Slater.

The offensiveness of Petitioner's disclosure is further compounded by society's ignorance regarding the transmissibility of the disease. "[T]he kind of nonsexual person-to-person contact that generally occurs among workers and clients or consumers in the workplace does not pose a risk for transmission of HTLV-III/LAV." CDC Report at 694. This fact is largely unknown or ignored by the public.

The facts establish that Petitioner, while attending a Chamber of Commerce luncheon, disclosed Mr. Slater's private medical information in a way which insured that his communication would extend beyond the immediate forum of discussion. Petitioner advised an entire table of colleagues, among the more than seventy-five persons attending, that he had tested his employees for the AIDS antibody and that Mr. Slater had tested positive (R. 3, Appendix 1). The character of these people, as both business and community leaders, and the overall excitement generated by the AIDS epidemic, guarantees that Mr. Slater's name and his private medical profile will be swiftly disclosed throughout the community.

Imposition of this indignity must not be countenanced. This court must not allow this offensive disclosure to trample Mr. Slater's privacy rights. The decision of the Marshall Appellate Court must be affirmed.

C. PETITIONER'S COMMUNICATION WAS NOT CONDITIONALLY PRIVILEGED BECAUSE IT DID NOT CONTAIN INFORMATION OF PUBLIC CONCERN.

The State of Marshall recognizes some form of conditional or qualified privilege defense to public disclosure invasions of privacy (R. 6). No such defense is available to Petitioner. The concept of conditional privilege emerged from the related field of defamation, and has been extended to disclosure of private fact torts by a small number of courts. *See, e.g., Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (1984); *Senogles v. Security Benefit Life Ins. Co.*, 217 Kan. 438, 536 P.2d 1358 (1975). Gener-

ally, the conditional privilege defense allows an individual to escape tort liability for disclosing facts about another's private life when the statement published affects the legitimate interests of the publisher or a third person.

Most jurisdictions recognize that an action for disclosure of private facts must be based on information other than that which the public ahs an interest in having made available. *Virgil v. Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). The presence of a public interest is the foundation for any conditional privilege. *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006 (6th Cir. 1984). The Restatement recognizes a conditional privilege where the disclosing party reasonably believes that there is a sufficient public interest involved, and where the disclosure is made to a public officer or private citizen authorized to take action. Restatement (Second) of Torts § 598 (1977). The public must possess a legitimate interest in the contents of the information in order for Petitioner to avoid disclosure liability. *McCabe v. Village Voice, Inc.*, 550 F. Supp. 525 (E.D. Pa. 1982). The facts of the case at bar fail to establish that a public interest exists.

A number of courts and commentators have resolved publicity questions by application of a "newsworthiness" or "public interest" standard. *Beresky v. Teschner*, 64 Ill. App. 3d 848, 381 N.E.2d 979 (1978). *See also* Comment, *Privacy: The Search for a Standard*, 11 Wake Forest L. Rev. 659 (1975).

A "public interest" privilege has been extended to newspapers and broadcasters in reporting of matters of public concern. *See Pierson v. News Group Publications, Inc.*, 549 F. Supp. 635 (S.D. Ga. 1982); *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70 (W. Va. 1984). However, even newspapers and broadcasters, who generally receive relaxed applications of limiting rules, may invade upon interests so private that any public interest must yield. This is true, even in light of First Amendment considerations. *See Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971).

The privilege to publicize matters of legitimate public interest is not absolute. *Gilbert v. Medical Economics Co.*, 665 F.2d 305, 307 (10th Cir. 1981). Certain private facts about a person should never be publicized. Even facts concerning matters which are, or relate to legitimate public interests, may not be publicized under all circumstances. *Virgil v. Time, Inc.*, 527 F.2d 1122, 1131 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976). Names of persons involved in reported events are generally beyond the purview of public interest unless the persons are public figures or persons who have otherwise become legitimate targets of public interest. *Hall v. Post*, 85 N.C. App. 610, 355 S.E.2d 819 (1987).

In *Hall*, the court stated that "there are private matters so intimate or personal that the obvious bounds of propriety and decency require their protection from public scrutiny in the absence of any compelling justification for their revelation." *Id.* at 825. The instant case presents no compelling justification for disclosure nor any allegation that Mr. Slater was a public figure. Private medical information concerning Mr. Slater did not constitute a legitimate public interest.

The CDC Report indicates that the infecting agent in AIDS is transmitted through sexual conduct, intravenous drug use, infected blood or blood components, and by transmission from mother to neonate. Epidemiological evidence has implicated only blood and semen in transmission. The virus has also been isolated from saliva, tears, and urine, but extensive studies of non-sexual or "casual contact" situations in households and workplace have not indicated transmission by this route. CDC Report at 682.

With the medical community in unanimous agreement that the AIDS virus is not transmitted through casual contact, there was no reason to advise local businessmen of the fact that one individual tested positive. The identify of the individual was beyond the pale of any imaginable need. Non-existent public interests can not be allowed to condone Petitioner's outrageous conduct. No conditional privilege exists to insulate Petitioner from liability.

D. NO CONDITIONAL PRIVILEGE EXISTS TO EXEMPT PETITIONER FROM LIABILITY BECAUSE NO LEGITIMATE OCCUPATIONAL OR PRIVATE INTEREST REQUIRED MR. SLATER'S PRIVATE MEDICAL INFORMATION TO BE DISCLOSED.

1. *No private or occupational conditional privilege excuses Petitioner's wrongful release of sensitive private information.*

Where a disclosure is outside of the scope of public interest, a speaker will only be protected by privilege if the disclosed information protects the legitimate interests of the speaker or a related third party. *See Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (1984). Petitioner's disclosure was outside the scope of any privilege and is unprotected.

Under the Restatement, three relevant privileges must be explored. Restatement (Second) of Torts §§ 594-596 (1977). The pivotal point regarding these conditional privileges is that either the speaker, the recipient, or some combination thereof must have a legitimate interest in the information disclosed. In addition, the recip-

ient must be someone who the speaker may reasonably expect to be able to act upon the information lawfully or be one entitled to the information. *See Klump v. Schwegmann Bros. Giant Supermarkets, Inc.*, 376 So. 2d 514 (La. Ct. App. 1979), *writ denied*, 378 So. 2d 1391 (La. 1980). The instant case establishes a legitimate interest only in Mr. Slater, not in Petitioner, the Chamber of Commerce, or in the public at large. By the time Petitioner received Mr. Slater's test results, Petitioner no longer had any legitimate interest in their contents, because Slater had already left the company's employ (R. 3). Any prior incidental contact that Slater may have had with fellow employees is irrelevant in light of the Center of Disease Control's findings that casual workplace contact is not a vehicle for transmissibility for the virus. CDC Report at 681. As health and safety are not implicated, Petitioner can not logically assert employee health and safety as a creator of his interest. Petitioner's disclosure of Mr. Slater's test results were beyond the scope of either his interest or any privilege.

In *Bratt v. International Business Machs. Corp.*, 785 F.2d 352 (1st Cir. 1984), the court found a limited intracorporate disclosure actionable under a state privacy statute after an IBM employee, at his supervisor's suggestion, consulted a doctor retained by the company. The doctor informed the company that the employee was paranoid and should immediately consult a psychiatrist. When company employees learned of the doctor's conclusion, a publication occurred and an actionable disclosure of private facts existed. The court noted that a disclosure is not actionable under the privacy statute if "the employers legitimate business interest in obtaining and publishing the information [outweighs] . . . the substantiality of the intrusion on the privacy resulting from disclosure." *Id.* at 358 (quoting *Bratt v. International Business Machs. Corp.*, 392 Mass. 508, 517, 467 N.E.2d 126, 135 (1984). The court recognized that a legitimate business interest could consist of an employer's "substantial and valid interest in aspects of employee health that could affect the employee's ability to effectively perform job duties." *Id.* at 361 (quoting *Bratt*, 392 Mass. at 519). *Accord Cronan v. New England Telephone Co.*, 1 Individual Empl. Rts. Cases (BNA) 658 (April 11, 1986). A similar balancing analysis led the Marshall Appellate Court to determine that Petitioner had not presented an outweighing interest.

Where a disclosure does not act to protect legitimate personal interests, a communication is privileged only if necessary to protect the recipient's or other third parties interests. *Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (1984). Where a recipient has a legitimate interest in the information and is legally entitled to obtain the information or is a person to whom its

publication is otherwise within generally accepted standards of conduct, a conditional privilege will exist. *Bichler v. Union Bank & Trust Co.*, 745 F.2d 1006 (6th Cir. 1984).

Petitioner did not offer information which "affects a sufficiently important interest" of the businessmen seated at his table, nor did the personal information concerning Mr. Slater affect any interest of the seventy-five businessmen attending the luncheon. The record is barren of any suggestion that any of the businessmen seated at Petitioner's table were sexual partners of Mr. Slater. Nor does the record suggest that any of these persons were a part of the relevant medical community that would be entitled to notice for health care reasons. Petitioner cannot escape liability by cloaking his actions in a justification predicated upon the recipient's interests.

The facts of this action make clear that any expansion of the conditional privilege through the concept of "commonality of interests," as expressed in Restatement (Second) of Torts § 596 comment c (1977), is improper. The commonality rule enables individuals to gain knowledge from associates where there is a common interest between them even though the information gained may not advance the objectives of that interest. *Rogers v. International Business Machs. Corp.*, 500 F. Supp. 867 (W.D. Pa. 1980); *Creps v. Waltz*, 5 Ohio App. 3d 213, 450 N.E.2d 716 (1982). To be applicable, a common interest must be ascertainable. The generalized business interests of those who are members of the Chamber of Commerce fall far short of any such common interest.

In *Knecht v. Vandalia Medical Center, Inc.*, 14 Ohio App. 3d 129, 470 N.E.2d 230 (1984), the court applied the conditional privilege defense to allow a medical secretary to divulge a patient's venereal disease. The disclosure was to her own son who she reasonably believed to be having relations with the patient. In explaining the "common interest" privilege, the court noted that " '[a] publication is conditionally or qualifiedly privileged where circumstances exist, or are reasonably believed by the defendant to exist, which cast on him the duty of making a communication to a certain other person to whom he makes such communication in the performance of such duty . . .' " *Id.* at 232 (quoting *West v. People's Banking & Trust Co.*, 14 Ohio App. 2d 69, 72, 236 N.E.2d 679, 681 (1967).

A close relationship or concrete common interest is not present in the instant case. The disclosure in question was not made to persons who had a "common interest" with Petitioner, but to completely unrelated individuals. The only bond that Petitioner had with the other luncheon guests is the fact that they were businessmen in the same community. Were this a sufficient nexus the exception would be broader than the rule. Any asserted common interests of the parties involved is illusory and not deserving of conditional

privilege protection. Petitioner's conduct is indefensible under the conditional privilege exception.

2. *Petitioner's outrageous disclosure was an abuse of any conditional privilege.*

Even if this court should determine that a conditional privilege is available to Petitioner, the Marshall Appellate Court's decision must nevertheless be affirmed because Petitioner abused this privilege. One is not permitted to avail oneself of the privilege if it is abused. Restatement (Second) of Torts § 598 comment a (1977). Abuse occurs whenever (1) the disclosure is not made to protect the privileged interest; or (2) there is excessive publication; or (3) the recipients are unrelated and lack a need for the information. Restatement (Second) of Torts §§ 603-605 (1977). Petitioner violated these sections by releasing Mr. Slater's name and private medical information to his business colleagues. The Marshall Appellate Court correctly found that Petitioner abused the privilege by disclosing information to persons who had no need to know (R. 6).

In *Barber v. Time, Inc.*, 348 Mo. 1199, 159 S.W.2d 291 (1942), the court faced a similar question where the media had invaded the plaintiff's right to privacy by publishing certain photographs. In upholding a verdict for the plaintiff, the court stated "[w]hile plaintiff's ailment may have been a matter of some public interest because unusual, certainly the identity of the person who suffered the ailment was not." *Id.* at 1206. Similarly, though there is a general and legitimate public interest in AIDS it does not extend to Mr. Slater's identity. Petitioner released Mr. Slater's identity more for its conversational value than for any legitimate informational purpose. The release of this information by Petitioner crossed the line of decency, and resulted in abuse of any purported privilege.

Furthermore, in *Bratt v. International Business Machs. Corp.*, 785 F.2d 352 (1st Cir. 1984), the court pointed out that where a company establishes that certain information is private and sets up rules to protect against the use of such information, the company has imposed on itself a heavy burden of justification to warrant a violation of its own rules. *Id.* at 361. Petitioner now seeks to escape liability for violating its once confidential employee medical files without adequate justification. Neither the factual nor medical data presented provides any such justification. Such conduct is highly offensive to a reasonable person and can not be condoned.

Petitioner's actions also constituted excessive publication. Not only did he disclose the AIDS information at his table, but the disclosure could have been overheard by, or repeated to, any one or more of the seventy-five businessmen attending the luncheon. Publi-

cation of such vital personal information to leaders of the business community is highly prejudicial to Mr. Slater. The likelihood of his being able to obtain employment in the area has been substantially reduced if not eliminated. Where there is literally no reason to disclose to a single person, then it logically follows that disclosure to a larger group must be deemed excessive.

The record fails to disclose the existence of any viable conditional privilege to support the publication by Petitioner of vital personal information concerning Mr. Slater. Assuming that such a conditional privilege can be located, it can not be allowed to protect Petitioner as the nature of his use of that privilege was abusive. For these reasons the decision of the Marshall Appellate Court for the First Judicial Circuit must be affirmed.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this court to affirm the decision of the Marshall Appellate Court for the First Judicial Circuit reversing the decision of the district court and ordering the district court to enter summary judgment in favor of Respondent on the issue of liability and further ordering that trial be held on the issue of damages.

Respectfully submitted,

Matthew W. Nakon
Laura J. Steffe
Steven R. Yoo

Counsel for Respondent

CERTIFICATE OF SERVICE

We hereby certify that a Measuring Brief and five (5) copies of the foregoing Brief of Respondent have been served on the John Marshall (Benton) Committee and on each team participating in the Competition, in accordance with Rules IV (A) and (B) of the Competition rules, on this 25th day of September, 1987.

Matthew W. Nakon
Laura J. Steffe
Steven R. Yoo

COUNSEL FOR RESPONDENT

APPENDIX A

NO. 9713
IN THE MARSHALL APPELLATE COURT
FOR THE FIRST JUDICIAL CIRCUIT

JOHN SLATER,	)	
	)	
Plaintiff-Appellant,	)	
	)	On Appeal From the
vs.	)	Lincoln County
	)	District Court
LAWRENCE A. WILSON d/b/a	)	
SENTRY SERVICES,	)	Honorable David Helms
	)	Judge Presiding
Defendant-Appellee.	)	

OPINION

MURRAY, Judge.

Plaintiff, John Slater, filed a two count complaint in Lincoln County District Court against his former employer for taking and disclosing the plaintiff's private physiological information. The parties filed cross motions for summary judgment. Judge Helms granted defendant's motion for summary judgment on both counts. This appeal followed.

I.

The following facts were stipulated by the parties. Sentry Services ("Sentry") is a private security guard and night watch service operated as a sole proprietorship by its owner, Lawrence Wilson. John Slater is a former employee of Sentry. Slater, hired by Sentry in 1983, worked the night shift while pursuing a business degree at the University of Marshall.

Sentry has about 140 employees and nearly thirty regular clients in Benton Bay, Lincoln County and three adjacent counties. Sentry's employees generally work in eight hours shifts, with most of the employee working in the evening or early morning hours.

To ascertain whether its employees are in adequate physical condition, Sentry provides an annual physical testing program that includes a blood test. In past years, as employees were informed, blood was tested for cholesterol levels and hypoglycemia, a disorder associated with diabetes. The test results were recorded in each em-

ployee's personnel file. This medical information was always kept confidential. Any employee with a cardiovascular or blood-sugar disorder was given a leave of absence until the company physician informed the employer that the employee could safely return to work. Slater never objected to the company physical.

In December of 1986, the Lincoln Medical Laboratory, retained by Sentry for purposes of its testing program, suggested that Sentry include the HIV[1]

Slater left the company on April 30, 1987 to complete his exams and begin his search for employment related to his degree. On May 1, 1987, Wilson was informed by the laboratory that Slater tested positive for the existence of the HIV antibody ("AIDS antibody"). Wilson contacted Slater that same day, informing him of the test and the test results.

Subsequently, on May 6, 1987, Wilson attended the monthly luncheon of the Lincoln County Chamber of Commerce held at a local restaurant. During lunch, before the start of the business meeting, people at Wilson's table began discussing AIDS. Wilson informed his friends that he had tested his employees for the AIDS antibody and that one, John Slater, had tested positive.

Slater's complaint, filed June 12, 1987, alleged that Wilson had invaded Slater's privacy in two ways. First, Slater alleged that Wilson intruded on his seclusion when Slater was tested for the AIDS antibody without his consent. Second, Slater alleged that Wilson invaded Slater's privacy when Wilson publicly disclosed the private fact that Slater tested positive for the AIDS antibody. Slater and Wilson filed cross motions for summary judgment. In support of his motion, Slater submitted a copy of the *Recommendation for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace* prepared by the Center for Disease Control. Wilson submitted no evidence to contravene the report, but argued that the report itself was irrelevant to the determination of the issues.

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1. "Human Immunodeficiency Virus (HIV) is the internationally recognized name for the virus that is believed to cause AIDS. The virus has also been called LAV (Lymphadenopathy-Associated Virus type III) and HTLV-III (Human T-Lymphotropic Virus)." Schatz, *The Aids Insurance Crisis: Underwriting or Overreaching?*, 100 Harv. L. Rev. 1782 n. 3 (1987). The "HIV" test to determine the existence of the antibody is comprised of a series of three tests, known as the ELISA-ELISA-Western Blot series. "A person with two positive ELISA tests and a positive WB [Western blot] is a true confirmed positive with 99.9% reliability." Clifford and Iuculano, *AIDS and Insurance: The Rationale for Aids-Related Testing*, 100 Harv. L. Rev. 1806, 1812 (1987).

II.

INTRUSION INTO SECLUSION

The trial court granted defendant's motion for summary judgment on Count I of the plaintiff's complaint on the grounds that disease information contained in Slater's blood did not constitute a privacy interest protected by the tort of intrusion into seclusion. It further stated that "even if the plaintiff proved a prima facie case of invasion of privacy, this Court is not persuaded that the plaintiff's privacy interest outweighs the employer's right to acquire the information." We disagree with the trial court in both respects.

Along with many other jurisdictions, the State of Marshall recognizes the tort of invasion of privacy. *See* Restatement (Second) of Torts sec. 652A comment (a) (1977). The Restatement of Torts provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another of his private affairs or concerns, 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 sec. 652B (1977). Recovery under this tort "requires proof of an actual invasion of 'something secret, secluded or private pertaining to the plaintiff . . . .' " *Nelson v. Times*, 373 A.2d 1221, 1223 (Me. 1977).

The issue with respect to this count is whether the private physiological biography contained in the body fluids of an individual can be a seclusion which the individual reasonably expects to be left alone. In the few cases that have considered the matter, the courts have generally concluded that "[o]ne clearly has a reasonable and legitimate expectation of privacy in . . . personal information contained in his body fluids." *McDonnell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985). Therefore, we hold that the physiological biography contained in the blood of an individual is private information which an individual can reasonably expect to be ft alone.

Having found that Slater's private physiological biography contained in the blood of an individual is private information which an individual can reasonably expect to be left alone.

Having found that Slater's private physiological biography is a matter entitled to seclusion, we need only find whether Sentry's actions amounted to an intrusion. An intrusion is an unpermitted entry by any means into the seclusion of another. Restatement (Second) of Torts sec. 652B. We hold that Sentry intruded when it intentionally tested Slater's blood for the AIDS antibody without Slater's consent. Even if the employer had an interest in determining whether its employees had been exposed to the AIDS antibody, its interests are not so great as to justify its administration of such

tests without notice and consent. We therefore conclude that Sentry invaded Slater's privacy when it tested Slater's blood for the AIDS antibody without first obtaining his consent. The trial court's decision as to County I is accordingly reversed.

III.

PUBLIC DISCLOSURE OF PRIVATE FACTS

The trial court noted that the Center for Disease Control (CDC) had found that AIDS is transmitted only through body fluids. Nonetheless, the court concluded that "because (1) AIDS is lethal; (2) research into AIDS is, by virtue of its novelty, incomplete; and (3) the public is terrified of infection regardless of the current evidence as to the transmissibility of AIDS, the public's need to be informed outweighs any privacy interest" that Slater may have. We disagree.

Individuals have the right to be free from public disclosure of facts relating to private medical information. *Levias v. United Airlines*, 27 Ohio App.3d 222, 500 N.E.2d 370 (1985). While a narrow privilege exists allowing disclosure of such information to one who can show need, the privilege to disclose is abused when the disclosure is to persons who have no need to know the information. *Id.* (citing Restatement (Second) of Torts §§ 605, 652G (1977)).

Admittedly, some individuals may have a legitimate interest in knowing Slater's condition, but the publication here can hardly be said to have been given to those in need of the information. Wilson informed the general public of Slater's condition when he discussed the test results at a business luncheon.

The CDC has stated that the HIV virus is "transmitted through sexual contact, parenteral exposure to contaminated blood or blood products, and perinatal transmission from infected mothers to their offspring . . . . [It has not] been shown to be transmitted by casual contact in the work place, contaminated food or water, or airborne or fecal-oral routes." *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/ Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Rep. 682-83 (1985). Consequently, only Slater's sexual partners or those people who are likely to have contact with Slater's blood can show a need for results of the HIV tests. The public at large has no need. Moreover, none of the recipients of the information was Slater's sexual partner or likely to be exposed to Slater's blood. Accordingly, we reverse the decision of the trial court as to Count II the plaintiff's complaint.

As a matter of law, based on the stipulated facts, we find that defendant's actions constituted an intrusion into seclusion and a

public disclosure of private facts. It is therefore ordered that the District Court enter summary judgment in favor of the plaintiff on the issue of liability. It is further ordered that trial be held on the issue of damages.

Judges Washington and West concur.
This memorandum may be cited as Appendix 1 of the Record.

1. How is anonymity assured given the requirement that the names of the participating school and individual participants must appear on the measuring brief and five duplicate copies?
   - Upon receipt, each brief is given a confidential identification number. The Competition Committee cuts out the names of the schools and team members with a scissors before submitting the briefs to the brief graders. The identification code is kept in a secure file under the control of the committee.
2. Can a student, who has an undergraduate law degree from England but is not eligible to take the bar exam in either the United States or England, participate as a member of a team.
   - Yes
3. Does use of computerized citation and spelling checking violate the rules on assistance?
   - No
4. Must participating schools brief and argue the issue of damages?
   - No
5. Is Mr. Slater still alive?
   - Yes
6. According to the Benton fact pattern, Mr. Slater never objected to the company physical; however I would like to know if Slater ever signed any type of a medical release form.
   - No
7. How many people attended the Lincoln County Chamber of Commerce luncheon?
   - In excess of 75 people
8. How many people were seated at Mr. Wilson's table who were informed of Mr. Slater's rest results?
   - The record is silent
9. Did these people know Mr. Slater or have any reason to come into contact with Mr. Slater?
   - The record is silent
10. What was Mr. Slater's reaction to the news that he tested positive?
    - The record is silent
11. Was there any outrage at the fact that he was tested?
    - The record is silent

12. Were any other employees notified of the testing after the fact?
    - The record is silent
13. Does the court have knowledge of any response of any other employee over the testing?
    - No
14. The Record on Appeal states that trial will be held on the issue of damages. Does this mean that no evidence as to lost job opportunities, lost companionship, actual harm to his reputation, either socially or professionally, or other form of damage was presented in to the lower courts?
    - See the Record.

APPENDIX B

NO. 87-1314
IN THE SUPREME COURT
OF THE
STATE OF MARSHALL

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

Petitioner,

versus

JOHN SLATER,

Respondent.

ORDER

The Supreme Court of the State of Marshall hereby grants petitioner, Lawrence A. Wilson d/b/a Sentry Services, leave to appeal. The parties shall address all issues raised in the opinion of the Marshall Appellate Court.

David J. Bosworth
Chief Justice

Dated: July 17, 1987

APPENDIX C

AMENDMENT I [1791]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

Restatement (Second) of Torts

§ 594. Protection of the Publisher's Interest

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important interest of the publisher, and
(b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

§ 595. Protection of Interest of Recipient or a Third Person

(1) An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) There is information that affects a sufficiently important interest of the recipient or a third person, and

(b) the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct.

(2) In determining whether a publication is within generally accepted standards of decent conduct it is an important factor that

(a) the publication is made in response to a request rather than volunteered by the publisher or

(b) a family or other relationship exists between the parties.

§ 596. Common Interest

An occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information that another sharing the common interest is entitled to know.

§ 598 Communication to One Who May Act in the Public Interest

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important public interest, and

(b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

§ 603. Purpose of the Privilege

One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given.

§ 604. Excessive Publication

One who, upon an occasion giving rise to a conditional privilege for the publication of defamatory matter to a particular person or persons, knowingly publishes the matter to a person to whom its publication is not otherwise privileged, abuses the privilege unless he reasonably believes that the publication is a proper means of communicating the defamatory matter to the person to whom its publication is privileged.

§ 605. Necessity for Publication and Purpose of Privilege

One who upon an occasion giving rise to a conditional privilege publishes defamatory matter concerning another, abuses the privilege if he does not reasonably believe the matter to be necessary to accomplish the purpose for which the privilege is given.

§ 652A. General Principle

(1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.

(2) The right of privacy is invaded by

(a) unreasonable intrusion upon the seclusion of another, as stated in § 652B; or

(b) appropriation of the other's name or likeness, as stated in § 652C; or

(c) unreasonable publicity given to the other's private life, as stated in § 652D; or

(d) publicity that unreasonably places the other in a false light before the public, as stated in § 652E.

§ 652B. Intrusion upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

§ 652D. Publicity Given to Private Life

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his pri-

vacy, if the matter publicized is of a kind that

(a) would be highly offensive to a reasonable person, and

(b) is not of legitimate concern to the public.

Editor's note: Appendixes E-K are not included, but consisted of the following material:

Appendix E: *Recommendations for Preventing Transmission of Infection with Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus in the Workplace*, 34 Morbidity & Mortality Weekly Rep. 681 (1985)

Appendix F: *Public Health Service Guidelines for Counseling and Antibody Testing to Prevent HIV Infection and AIDS*, 36 Morbidity & Mortality Weekly Rep. 509 (1987)

Appendix G: Weiss, Goedert, Sarngadharan, Bodner, Gallo & Blattner, *Screening Test for HTLV-III (AIDS Agent) Antibodies*, 1986 J. A.M.A. 262

Appendix H: McCray, *Occupational Risk of the Acquired Immunodeficiency Syndrome among Health Care Workers*, 314 New Eng. J. Med. 1126 (1986)

Appendix I: Sande, *Transmission of AIDS: The Care Against Casual Contagion*, 314 New Eng. J. Med. 380 (1986)

Appendix J: Friedland, Saltzman, Rogers, Kahl, Lesser, Mayers & Klein, *Lack of Transmission of HTLV-III/LAV Infection to Household Contacts of Patients with AIDS or AIDS-Related Complex with Oral Candidiasis*, 314 New Eng. J. Med. 344 (1986)

Appendix K: Selected State Statutes and City Ordinances

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