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Joseph A. Durkin

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RASMUSSEN v. SOUTH FLORIDA BLOOD SERVICE:* THE BALANCE BETWEEN BLOOD, PRIVACY, AND THE NEED TO KNOW

The United States Supreme Court recognizes the right of an individual to conduct his life in a private manner without unnecessary intrusion from others.¹ This individual right of privacy, however, often directly conflicts with the need of other persons to access information.² The conflict between an individual's right to confidentiality and another person's need of information is especially apparent in judicial discovery proceedings.³ The Supreme Court of Florida, in

* 500 So. 2d 533 (Fla. 1987).

1. The United States Supreme Court, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), first recognized that the right to privacy emanates from the United States Constitution. The Court characterizes this right as man's most complete and most valuable right. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969). The Court's newest approach to privacy describes the privilege as a fundamental right which unquestionably stems from the concept of ordered liberty. *Bowers v. Hardwick*, 106 S.Ct. 2841, 2844 (1986). *Cf. Moore v. East Cleveland*, 431 U.S. 494 (1977) (fundamental liberties viewed as those which are deeply rooted in history and tradition).

Even though there is no express constitutional right to privacy, *Whalen v. Roe*, 429 U.S. 589, 607-08 (1977) (Stewart, J., concurring), it has long been considered a fundamental right. *Griswold*, 381 U.S. at 479. *See also Union Pac. R. Co. v. Botsford*, 141 U.S. 250 (1891) (one of the first cases recognizing a personal right of privacy). This fundamental guarantee of personal privacy extends to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

2. In *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973), the United States Court of Appeals recognized an individual's possession of a reasonable expectation of privacy and freedom from harassment. *Id.* at 995. Interference with the right of privacy must be no greater than necessary to support overriding interests. *Id.* at 995. *See* U.S. CONST. amend. I (Congress shall not prohibit free speech); U.S. CONST. amend. V (no person shall be deprived of life, liberty, or property without due process of law); U.S. CONST. amend. XIV, § 1 (privileges and immunities guaranteed to citizens).

Circumstances arise, however, requiring full disclosure of facts in order to obtain full and fair adjudication on the merits of litigation. *See, e.g., Hickman v. Taylor*, 329 U.S. 495 (1947) (public policy may support reasonable and necessary inquiry into a person's files and records); *Mitsler v. Mancini*, 111 Ill. App. 3d 228, 443 N.E.2d 1125 (1983) (discovery justified in order to aid an action pending in another state). In fact, the very essence of discovery is to supplement the pleadings and to disclose real points of dispute, thereby creating a sufficient foundation in preparing for trial.⁴ J. MOORE, J. LUCAS, & G. GROTHER, *MOORE'S FEDERAL PRACTICE* ¶ 26.02 (2nd ed. 1986) [hereinafter *Moore's Federal Practice*].

3. For example, one court dealt with whether a trial court justifiably sanctioned reporters for failing to disclose confidential sources. *Dalitz v. Penthouse*, 168 Cal. App. 3d 468, 214 Cal. Rptr. 254 (Cal. Ct. App. 1985). The plaintiffs requested the information in order to ascertain the truth of statements characterizing the plaintiffs as mobsters. *Id.* at 472, 214 Cal. Rptr. at 256. Ultimately, the court held the sanctions constitutional on the grounds that discovery requiring reporters to disclose confidential sources was not overbroad. *Id.* at 475, 214 Cal. Rptr. at 258.

Rasmussen v. South Florida Blood Services,⁴ recently addressed this conflict. The issue in *Rasmussen* was whether a blood recipient who contracts Acquired Immune Deficiency Syndrome⁵ ("AIDS") after a series of blood transfusions could obtain the identities of the blood donors.⁶ The court held that disclosure of material indicating the names and addresses of blood donors would compromise the donors' constitutionally protected privacy interests.⁷

On May 24, 1982, a motor vehicle struck Donald Rasmussen while he was sitting on a park bench.⁸ As a result of his injuries, Rasmussen was hospitalized for several weeks.⁹ During the course of his hospitalization, Rasmussen received fifty-one units of blood via transfusion.¹⁰ Subsequently, he was diagnosed as having AIDS and died of that disease in 1984.¹¹

See also *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982) (the right to privacy versus the need to prove the falsity of information); *Mountain States Tel. v. Dep't of Pub. Serv. Reg.*, 634 P.2d 181 (Mont. 1981) (conflict between disclosure of public utility's trade secrets and the right to individual privacy).

4. 500 So. 2d 533 (Fla. 1987).

5. AIDS is a viral disease which prevents a person's immune system from functioning properly and victimizes the individual with a variety of opportunistic diseases. Johnson, *AIDS*, 52 MEDICO-LEGAL J. 3 (1984). It is believed that the virus is transmitted through the exchange of bodily fluids such as sperm, blood, tears, and through the use of unsterilized needles. Centers for Disease Control, U.S. Pub. Health Serv., *World Health Organization Workshop: Conclusions and Recommendations on Acquired Immunodeficiency Syndrome*, reprinted in 253 J.A.M.A. 3385 (1985).

The AIDS virus permeates the T-4 lymphocyte cells which normally stimulate most of the immune system's disease-fighting mechanisms. Marwick, "Molecular Level" View Gives Immune System Clues, 253 J.A.M.A. 3371-3375 (1985). Once infected, these cells generate the AIDS virus instead of fighting it. *Id.* Eventually, a victim's immunity system becomes so suppressed, that his life may be ended by an often-treatable illness. *Id.*

AIDS originated in Africa and primarily strikes homosexual and bisexual men, intravenous drug abusers, and hemophiliacs. Seligmann, *Tracing the Origin of AIDS*, NEWSWEEK, May 7, 1984, at 101.

6. *Rasmussen*, 500 So. 2d at 534. The first transfusion-associated case transpired in December of 1982. A two-week old infant who was not in a high risk group received a transfusion for Rh incompatibility and died of AIDS twenty months later. R. ECKERT & E. WALLACE, *SECURING A SAFER BLOOD SUPPLY: TWO VIEWS* (1985).

As of November 1986, blood-product recipients filed almost 90 liability suits against blood suppliers, hospitals, physicians, and even a municipality. Mathews & Neslund, *The Initial Impact of AIDS on Public Health Law in the United States-1986*, 257 J.A.M.A. 344, 346 (1987). See also Bony, *Transfusion-Associated AIDS Suits Arise*, AM. MED. NEWS 22 (1986).

7. *Rasmussen*, 500 So. 2d at 535.

8. *Id.* at 534. The driver of the vehicle was fleeing from a prior motor vehicle accident. Amended Brief of Petitioner at 3, *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533 (Fla. 1987) [hereinafter Petitioner's Brief].

9. *Rasmussen*, 500 So. 2d at 534.

10. *Id.*

11. *Id.* Rasmussen died on June 11, 1984 and a suggestion of death was subsequently filed. *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798, 800 n.2 (Fla. Dist. Ct. App. 1985). *Id.* His estate proceeded with the action. *Id.* Consequently, Rasmussen's name is used throughout this casenote. See *Rasmussen*, 500 So.2d at 534. See also *Rasmussen*, 467 So.2d at 800 n.2

Before his death, Rasmussen filed a personal injury suit against the driver of the vehicle.¹² In an attempt to prove that he had contracted AIDS as a direct consequence of the accident,¹³ Rasmussen served South Florida Blood Service ("South Florida") with a *subpoena duces tecum*¹⁴ seeking the names and addresses of the blood donors.¹⁵ South Florida petitioned the trial court to either quash the subpoena or to issue a protective order barring disclosure on the grounds that Rasmussen had not shown good cause or justifiable reason for the invasion of confidential records.¹⁶ The court denied the motion and ordered the blood service to produce the requested information.¹⁷ On certiorari, the Third District Court of Appeals balanced the privacy, institutional, and societal interests involved and concluded that the order should be quashed.¹⁸ The Supreme

12. Petitioner's Brief, *supra* note 8, at 3.

13. Tort law has established that a tortfeasor may be held liable for the foreseeable complication of injuries which he caused, including negligent medical treatment of the injuries. W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, PROSSER AND KEETON ON TORTS 309-10 (5th ed. 1984). "Where the injured plaintiff subsequently contracts a disease. . . . If the injury renders the plaintiff particularly susceptible to the diseases . . . there is little difficulty in holding the defendant [liable] for the consequences of the disease and its treatment." *Id.* at 310.

14. *Rasmussen*, 500 So. 2d at 534. The subpoena demanded "any and all records, documents and other material indicating the names and addresses of the blood donors." *Id.* This type of subpoena requires a witness to bring to court any relevant documents that are under the witness' control. BARRON'S LAW DICTIONARY (1984).

15. *Rasmussen*, 500 So. 2d at 534. Rasmussen has neither alleged negligence on the part of the blood service nor brought South Florida in as a party to the underlying litigation. *Id.*

16. *Id.* Perhaps South Florida's adamant efforts to oppose donor identification stems from a self-motivated interest. Petitioner's Brief, *supra* note 8, at 9. The potential failure to screen high risk groups from donation and the blood service's inevitable culpability would never appear if donors identities were totally confidential and completely nondiscoverable. *Id.*

17. *Rasmussen*, 500 So. 2d at 534.

18. *Id.* The Florida Court of Appeals discussed Florida Rule of Civil Procedure 1.280 which "allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action." *Rasmussen*, 467 So. 2d at 801 (emphasis added). The court then explained that discovery may be limited or prohibited if it would cause "annoyance, embarrassment, oppression or undue burden of expense." *Id.* See *infra* note 39 and accompanying text.

Next, the court stated that a person objecting to discovery may show good cause in order to prevent disclosure. *Rasmussen*, 467 So. 2d at 801. Then, balancing the competing interests to be served in granting or denying discovery, establishes whether or not good cause has been shown. *Id.* See also *Dade County Medical Ass'n v. Hlis*, 372 So. 2d 117, 121 (Fla. Dist. Ct. App. 1979) (proper balancing of the competing interests will determine whether discovery is appropriate); *Lukaszewicz v. Ortho Pharmaceutical Corp.*, 90 F.R.D. 708 (E.D. Wis. 1981) (a family's privacy interest in its medical records outweighs a manufacturer's need for them).

Finally, the *Rasmussen* court characterized the competing interests as: 1) the plaintiff's need to obtain discovery in order to pursue full recovery for his injuries; 2) the donors' constitutionally based privacy rights to preclude disclosure of personal matters; and 3) the institutional and public concern in securing a safe and adequate blood supply. *Rasmussen*, 467 So. 2d at 801-04.

Court of Florida granted review in order to respond to the developing problem of how an individual's personal information is used.¹⁹ The court decided whether the privacy interests of individuals, along with societal interests, outweigh a plaintiff's interest in discovering donor information.²⁰ The supreme court affirmed the district court's decision barring disclosure of the requested information in South Florida's records.²¹ The court concluded that disclosure of donor identities would result in more damage than benefit in light of potential discrimination from co-workers, friends, employers and others.²²

In upholding the district court's decision, the court applied a balancing test applied in two earlier cases involving discovery in a medical context.²³ These cases properly balanced the competing in-

19. *Rasmussen*, 500 So. 2d at 534.

20. *Id.* at 536. The *Rasmussen* court reiterated Chief Justice Overton's remarks at the opening session of Florida's 1977-78 Constitution Revision Commission: "There is public concern about how personal information concerning an individual citizen is used, whether it be collected by government or by business. The subject of individual privacy and privacy law is in a developing stage . . . It is a new problem that should probably be addressed." *Rasmussen*, 500 So. 2d at 536 (quoting Address by Chief Justice Ben Overton, Constitution Revision Commission (July 6, 1977)).

The first major medical report suggesting that AIDS might be transmitted in blood was published in *The New England Journal of Medicine* in 1984. Response of Amicus Curiae Council of Community Blood Centers to Order to Show Cause Why Petition for Certiorari Should Not Be Granted, *South Florida Blood Serv. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1984).

The report recognized that there were a significant number of people with AIDS who did not belong to any of the high risk groups for the disease. 310 *NEW ENG. J. MED.* 69 (1985). Many of these people received blood components within five years before the onset of the illness. *Id.* This evidence led to the finding that AIDS may be transmitted through blood and blood transfusions. *Id.*

21. *Rasmussen*, 500 So. 2d at 534.

22. *Id.* at 537. The Florida Supreme Court stated:

The threat posed by the disclosure of the donors' identities goes beyond the immediate discomfort occasioned by third party probing into sensitive areas of the donors' lives. Disclosure of donor identities in any context involving AIDS could be extremely disruptive and devastating to the donor. If the requested information is released, and petitioner queries the donors' friends and fellow employees, it will be functionally impossible to prevent occasional reference to AIDS.

Id.

23. The Supreme Court of Florida dealt with a hospital's challenge to an order which required it to answer an interrogatory concerning the contents of its admission records of patients. *North Miami Gen. Hosp. v. Royal Palm Beach Colony*, 397 So. 2d 1033 (Fla. 1981). The patients were not involved in the underlying action which the hospital brought against an insurer for misrepresenting the financial status of a certain patient. *Id.* at 1034. The hospital objected to the interrogatory on the basis of oppressiveness and irrelevance. *Id.* The court reasoned that the expenditure of time and money necessary to carry out the order would be burdensome and oppressive and could not be justified absent a showing of clear necessity. *Id.* at 1035.

Likewise, the District Court of Appeal of Florida dealt with whether a medical association should be required to produce records of its Ethics Committee, which concerned two physicians, in order for respondent to go forward with his underlying personal injury case. *Dade County Medical Ass'n v. Hlis*, 372 So.2d 117 (Fla. Dist. Ct.

terests served in granting or denying discovery.²⁴ Furthermore, the court recognized that the possible breach of confidentiality and society's interest in efficient medical treatment outweighed a plaintiff's interest in obtaining a patient's medical records.²⁵

Relying on this precedent, the *Rasmussen* court first examined the nature and importance of the donors' rights.²⁶ The court stated that the right of privacy encompasses at least two different kinds of interests: first, an individual's right to autonomously make certain kinds of decisions;²⁷ and second, an individual's right to prevent disclosure of personal matters.²⁸ The court did not discuss the right to make autonomous decisions, but found the latter to be applicable to the present case.²⁹ The court further noted that the Florida State Constitution independently protects a citizen's right to privacy³⁰ by providing an explicit foundation for those privacy interests which are not inherent in the concept of ordered liberty.³¹ The *Rasmussen*

App. 1979). The medical association produced all records requested except those of the Ethics Committee. *Id.* at 118. They protested that those records must remain confidential in order to achieve the committee's purpose of investigating, discussing, and considering issues of the professional conduct of its physicians. *Id.* at 119. The court rationalized that the potential discouragement of complaints and free discussion concerning the activities of physicians outweighed the chimerical grounds asserted for their discovery. *Id.* at 121.

24. See generally *Tucson Medical Center v. Misevch*, 113 Ariz. 34, 545 P.2d 958 (1976) (the overwhelming interest in maintaining confidentiality requires a showing of necessity to justify disclosure); *American Health Plan, Inc. v. Kostner*, 367 So. 2d 276 (Fla. Dist Ct. App. 1979) (the revelation of documents concerning patients who have no connection with the litigation would compromise their right to confidentiality).

25. *Rasmussen*, 500 So. 2d at 535. The court placed great weight on the donors' right to privacy wording the privilege as "the most comprehensive of rights and the right most valued by civilized man." *Id.* (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) which cited *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

26. *Rasmussen*, 500 So. 2d at 535.

27. *Id.* See *Whalen v. Roe*, 429 U.S. 589 (1977).

28. *Rasmussen*, 500 So. 2d at 535. See *Roe v. Wade*, 410 U.S. 113 (1973). See generally *Henkin, Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974) (diminishing the concept of right to privacy and discussing independence and immunity to governmental regulation).

29. *Rasmussen*, 500 So. 2d at 535. The general right to privacy includes an immensely broad area of personal action and belief. *Id.* at 536. See, e.g., *Stanley v. Georgia*, 394 U.S. 557 (1969) (the right to receive information and ideas is generally free from governmental intrusion); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to privacy encompasses the right to use contraception); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (the right to educate one's children falls under the right to privacy).

30. FLA. CONST. art. I, § 23 (1980) provides that "every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." *Id.*

31. *Rasmussen*, 500 So. 2d at 536. See, e.g., Fla. Const. art. I, § 12 (limitations upon unreasonable search generally protect against invasions of privacy during criminal investigations).

court then intertwined this right of privacy with the calamitous problem of AIDS, explaining the stigma of disclosing the blood donors' identities within the same context of this horrid disease.³² The court recognized that the potential damage to the blood donors' reputations was too great of a consequence to justify discovery.³³ The *Rasmussen* court further noted that society has a vital interest in maintaining a healthy blood supply through discouraging any disincentive to volunteer blood donation.³⁴ The court reasoned that any inquiry into one's private life and the potential association with AIDS would deter blood donation.³⁵ Consequently, denying the discovery of donors' identities upholds society's indispensably vital interest of maintaining a healthy blood supply.

The court analogized Rasmussen's interest in proving a causal connection between his disease and the motor vehicle accident to the state's interest in providing full compensation for victims of negligence.³⁶ The potential harm that disclosure of identities would cause to the reputations and other liberty interests of the fifty-one donors would, however, compromise their due process rights.³⁷ Accordingly, the harm in permitting disclosure significantly outweighed the probative value of the discovery which Rasmussen sought.³⁸

32. *Rasmussen*, 500 So. 2d at 537.

33. *Id.* See *supra* note 22 and accompanying text.

34. *Rasmussen*, 500 So. 2d at 537. Rasmussen argued that neither South Florida Blood Service nor the Council of Community Blood Centers claimed that they had maintained the confidentiality of donors' identities in the past. Petitioner's Brief, *supra* note 8, at 8-9 (citing *Tufaro v. Methodist Hosp.*, 368 So. 2d 1219 (La. Ct. App. 1979)). In fact, blood donor confidentiality has not been granted in previous litigation concerning other diseases acquired during blood transfusions. *Id.* In support, Rasmussen stated: "If donor names have been supplied in the past by other blood banks, both in AIDS-related cases and also those concerning malaria and serum hepatitis without the hypothetical 'chilling' effect on donors, why should we now image such a threat?" *Id.* at 9. Rasmussen did not, however, explain that his argument applied to paid rather than voluntary donors. See *infra* note 83 and accompanying text.

35. *Rasmussen*, 500 So. 2d at 537. The court explained that the number of donors was decreasing, due to the necessary exclusion of potential donors through screening and testing, as well as the unnecessary reduction as a result of the fear that donation itself could transmit the disease. *Id.* See generally Ehrlichman, *Why It's Safe To Give Blood*, *PARADE MAG.*, July 6, 1986, at 12-13 (many Americans believe that donating blood is dangerous due to the AIDS epidemic).

In 1974, The Department of Health, Education and Welfare ("HEW") issued the National Blood Policy in response to a finding that blood supplies were inadequate and blood quality was uneven. Brief of Amicus Curiae Council of Community Blood Centers at 37, *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533 (Fla. 1987) [hereinafter Brief of CCBC].

HEW's policy outlines, *inter alia*, measures for an all-voluntary blood donor system, assurances for ample donation of blood and plasma, and methods to eliminate commercialism in the acquisition of blood. National Blood Policy, 39 *FED. REG.* 32,702 (1974).

36. See *supra* note 13 and accompanying text.

37. *Rasmussen*, 500 So. 2d at 538.

38. The court realized that Rasmussen had a legitimate interest in obtaining

While the court's reasoning in *Rasmussen* is very persuasive, it also contains certain flaws. The court correctly determined that the rules of civil procedure allow a court to limit or prohibit discovery in order to protect the privacy of individuals.³⁹ Although the court also applied a clear balancing test for determining whether a protective order is suitable in a particular situation, the Constitution mandates a strict scrutiny analysis which would have enhanced this decision's precedential value.⁴⁰ Nevertheless, the court properly concluded that the potentially disastrous consequences of disclosure outweighed the plaintiff's interest in obtaining the requested information. The court, however, overlooked the advent of contemporary donor-screening methods.⁴¹

the information. *Id.* Its weight was mitigated however, since there was no evidence that discovery would lead to the establishment of causation. *Id.*

It is important to note that *Rasmussen* already had the testimony of the Chief of the Division of Infectious Diseases at Mt. Sinai Medical Center stating that *Rasmussen's* AIDS was probably due to the multiple blood transfusions he received in the hospital. *Rasmussen*, 467 So. 2d 798, 801 n.6 (Fla. Dist. Ct. App. 1985).

39. Rule 26(b) allows for discovery of material that is not privileged. MOORE'S FEDERAL PRACTICE, *supra* note 2. A sound public policy may outweigh the need for access to relevant information. *Id.* FED. R. CIV. P. 26(b) ¶ 26.60[3]. Consequently, discovery may be disallowed if it would create an unwarranted invasion of privacy. *Id.* See also *New York Stock Exch. v. Sloan*, 22 Fed. R. Serv. 2d 500 (S.D.N.Y. 1976) (construing FED. R. CIV. P. 26 to conclude that discovery of personnel files disallowed since it would discourage future candid communication); *Reed v. Smith Barney*, 50 F.R.D. 128 (S.D.N.Y. 1970) (construing FED. R. CIV. P. 26 to prohibit discovery of broker's files containing names and describing transactions of clients where it would invade private dealings of non-litigants).

In the District Court of Appeals, Judge Schwartz in his dissent argued that the majority based its decision upon unsupported public policy. *Rasmussen*, 467 So. 2d at 805. He asserted that revelation of the donors' identities to the blood bank in the first place constituted a waiver of any privilege concerning the information. *Id.* He also stated that no adverse effects of disclosure have occurred in the past and that in the event of unfavorable consequences, it would then be time for the court to step in. *Id.* at 806.

Judge Schwartz failed to realize that if judicial intervention was necessary, it would be too late to prevent the disastrous dissemination of the donors' identities. See Brief of Respondent on the Merits at 23, *Rasmussen v. South Florida Blood Serv.*, 500 So. 2d 533 (Fla. 1987) [hereinafter Respondent's Brief]. In addition, a party does not waive a privilege in relation to medical records unless he voluntarily discloses or consents to disclosure of the privileged material. *Buffington v. Gillette Co.*, 101 F.R.D. 400 (W.D. Okla. 1980).

40. See *infra* text accompanying notes 63-64.

41. In March of 1985, the Secretary of Health and Human Services granted the first license to manufacture human T-lymphotropic virus type III/lymphadenopathy-associated virus (HTLV III) antibody test kits to detect exposure to the AIDS virus. Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131 (1986).

The advent of the serologic test promises to essentially end AIDS transmission in blood. Brief for CCBC, *supra* note 35, at 14. According to the Director of the AIDS Clinic of San Francisco General Hospital, the test will largely eliminate blood transfusions as a source of future AIDS cases. *Id.* at 15. Prior to this standard screening test, blood centers employed the best possible methods available to decrease the risk of AIDS in transfusions. *Id.* at 13-14. Medically trained interviewers would ask potential blood donors if they had experienced any described symptoms of AIDS. *Id.* If the

The *Rasmussen* court properly reasoned that although the blood donors' rights of privacy are constitutionally protected,⁴² the rules of discovery also protect the societal interests involved.⁴³ The federal rules allow discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action."⁴⁴ In addition, several cases support the proposition that discovery lies in the discretion of the trial judge,⁴⁵ and in performing such discretion, the court will grant the remedy of discovery where the movant shows need.⁴⁶ Courts have construed this rule liberally, exercising broad discretion in granting discovery requests.⁴⁷ In accordance with the federal rules, however, the court may limit or prohibit discovery in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."⁴⁸ Consequently, this

potential donor's answer was positive or "suggestive", then he would be deferred. *Id.* Second, the potential donor would be given written information explaining that persons in high risk groups of AIDS victims should refrain from donating blood. *Id.* The prospective donor was then free to either leave the blood center without explanation, or discuss the matter with a professional. *Id.* If the potential donor was ever deferred, it was done without further questioning. *Id.* Excluding possible AIDS carriers was the main purpose of this process, in addition to maintaining a level of privacy in an individual's personal habits and sexual preferences. *Id.* The screening procedure effectively filtered out those with the highest risk of AIDS from donating blood. Office of Technology and Assessment, Blood Policy and Technology, H.R. DOC. NO. 260, 99th Cong., 1st Sess. 101 (1985).

42. Florida has adopted a freestanding right to privacy to protect those interests that are inherent in the concept of ordered liberty and which may not be safeguarded by specific constitutional provisions. *Rasmussen*, 500 So. 2d at 536. Three other states have adopted similar legislation. See Alaska Const. art. I, § 22 (1972); CAL. CONST. art. I, § 1 (1984); Mont. Const. art. II, § 10 (1972).

Several other states - Arizona, Hawaii, Illinois, Louisiana, South Carolina, and Washington - safeguard privacy to a lesser extent. See Note, *Toward a Right of Privacy as a Matter of State Constitutional Law*, 5 FLA. ST. U.L. REV. 631, 636-637 (1977).

The Florida Amendment guarantees a right of privacy broader in scope than that of the Federal Constitution. *Winfield v. Div. of Para-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544 (Fla. 1985). The amendment was intentionally phrased in strong terms to make the privacy right as strong as possible. *Id.* at 548.

43. See *supra* note 39.

44. FED. R. CIV. P. 26(b)(1).

45. See *Herbert v. Lando*, 441 U.S. 153 (1979) (due to the current Rules of Civil Procedure, reliance upon the trial judge is needed in order to prevent abuse of discovery); *Hickman v. Taylor*, 329 U.S. 495 (1947) (construing FED. R. CIV. P. 30(b) to find that courts should not neglect the power to restrict discovery); *Galella v. Onassis*, 487 F.2d 986 (2nd Cir. 1973) (discovery is within the trial court's discretion).

46. See, e.g., *Galella*, 487 F.2d at 997 (harassment by photographer justifies the grant and nature of protection given to plaintiff with respect to discovery); *Mitchell v. Superior Court*, 37 Cal. 3d 585, 690 P.2d 635, 208 Cal. Rptr. 162 (1984) (exhaustion of alternative sources would lead to discovery of newsperson's confidential sources); *GT, Inc. v. Superior Court of Santa Cruz County*, 151 Cal. App. 3d 748, 198 Cal. Rptr. 892 (where good cause is shown, trial court may prevent disclosure of financial information).

47. *Tele-Radio Systems v. DeForest Electronics*, 92 F.R.D. 371 (D.C.N.J. 1981). See 27 C.J.S. *Discovery* § 22 (1959).

48. Fla. R. Civ. P. 1.280(c) allows a court to protect against any undue invasion of a person's privacy. *Springer v. Greer*, 341 So. 2d 212, 214 (Fla. Dist. Ct. App. 1976).

court's ruling sufficiently protects blood donors from incurring such problems.

Parties have raised similar privacy claims in opposition to discovery requests in situations involving medical,⁴⁹ financial,⁵⁰ administrative,⁵¹ and legal⁵² information. In each of these situations, courts have recognized the need to reject disclosure on the grounds of irrelevancy,⁵³ privilege,⁵⁴ or undue burden⁵⁵ on the party ordered to produce the information. The important policy these decisions have promoted include objectives such as the efficient treatment of medical patients,⁵⁶ the candid and forthright consultation between client and attorney,⁵⁷ and the high quality of hospital care.⁵⁸ These decisions recognize that, although discovery is important, the courts

49. *Argonaut Ins. Co. v. Peralta*, 358 So. 2d 232 (Fla. Dist. Ct. App. 1978), cert. denied, 364 So. 2d 889 (Fla.).

50. *Colonies Condominium Ass'n v. Clairview Holdings, Inc.*, 419 So. 2d 725 (Fla. Dist. Ct. App. 1982).

51. *Sherman v. Dist. Court*, 637 P.2d 378 (Colo. 1981).

52. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 432 N.E.2d 250 (1982).

53. In *Colonies*, the court upheld a protective order with respect to financial records which had relevance to an accounting, but not to the plaintiff's right to an accounting. *Colonies*, 419 So. 2d at 762. The court held that a party must show that he is entitled to an accounting before he is allowed to discover financial records. *Id.* If the petitioner cannot meet this burden, then he will not obtain the data even though the documents are somewhat relevant. *Id.*

54. In *Consolidation*, the Supreme Court of Illinois explained that the attorney-client privilege generally precludes discovery of an attorney's notes and memoranda. 89 Ill.2d at 110, 432 N.E.2d at 253. The burden of obtaining the privilege lies with the claimant who must show that communication originated in confidence, was made to an attorney who was acting in a legal capacity, and that the communication remained confidential. *Id.* at 119, 432 N.E.2d at 257.

55. In *Argonaut*, the court reasoned that while the rules of discovery are to be construed liberally, requiring the petitioner to produce medical records for the past eleven years was beyond reason. *Argonaut*, 358 So. 2d at 233.

56. State statutes protect medical information from disclosure in order to prevent embarrassment and to encourage full disclosure. See, e.g., D.C. CODE ANN. § 14-307(a) (1981) (statute protects any information that physician has acquired while administering to a patient); ILL. REV. STAT. ch. 110, § 8-802 (1985) (statute applies to information obtained by a physician attending to any patient in a professional capacity). See also *Parkson v. Central DuPage Hosp.*, 105 Ill.App.3d 850, 435 N.E.2d 140 (1st Dist. 1982) (patients must be able to disclose information knowing that their expectation of privacy will be protected). For an extensive commentary on the concepts of confidentiality and privacy and how they relate to medical records, see Win-slade, *Confidentiality of Medical Records*, 3 J. LEGAL MED. 497 (1982).

57. The purpose of the attorney-client privilege "is to encourage full and frank disclosure by securing a cloak of confidentiality, thereby aiding the proper functioning of the adversary system." Moore's Federal Practice, *supra* note 2, § 26.60[2]. See also *Synair Corp. v. Am. Indus. Tire*, 645 F. Supp. 1080 (S.D. Tex. 1986) (one of the primary purposes of the attorney-client privilege is to permit consultation in furtherance of achieving a legal defense); *Standard Chartered Bank v. Ayala Int'l Holdings*, 111 F.R.D. 76 (S.D.N.Y. 1986) (disclosure of attorney-client communications allowed only if benefit outweighs injury to attorney-client relationship).

58. The Supreme Court of Colorado stated that considerations of public policy may determine the issue of discovery in hospital inspection committees. *Sherman*, 637 P.2d at 383.

will prohibit disclosure where it is necessary to do so to advance indispensable interests. Applying this analysis, the *Rasmussen* court properly reasoned that nondisclosure advances the more important objective of maintaining voluntary blood donations.

In weighing the relevant interests served in granting or denying discovery, the *Rasmussen* court properly asserted that federal⁵⁹ and state⁶⁰ constitutions protect a blood donor's right to privacy. The United States Supreme Court, in *Griswold v. Connecticut*,⁶¹ set forth various fundamental guarantees which create zones of privacy.⁶² Because the right to privacy is a fundamental right, any governmental intrusion upon the right is justified only if it is "necessary" to fulfill a "compelling" state interest.⁶³ Governmental infringement occurs when a state court takes action to encroach upon an individual's rights absent the requisite compelling or necessary interest.⁶⁴

59. See *supra* note 1.

60. See *supra* note 30 and accompanying text. The Florida Amendment was definitely intended to safeguard the right to ascertain whether sensitive information about oneself may be disseminated to others. *Rasmussen*, 500 So. 2d at 536.

61. 381 U.S. 479 (1965).

62. The Court stated that certain guarantees create various zones of privacy, stating:

The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of the privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Id. at 484.

The Court then set forth the test for determining a fundamental right: "In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] as to be ranked as fundamental' ". *Id.* at 493 (Goldberg, J., concurring) (quoting *Snyder v. Com. of Massachusetts*, 291 U.S. 97, 105 (1934)).

Finally, we are provided with a further analysis of ascertaining such rights: "The inquiry is whether a right involved 'is of such a character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' ". *Griswold*, 391 U.S. at 493 (Goldberg, J., concurring) (quoting *Powell v. State of Alabama*, 287 U.S. 45, 67 (1932)).

63. *Griswold*, 381 U.S. at 497 (Goldberg, J., concurring). "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Id.* (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960)).

64. See *Shelley v. Kraemer*, 334 U.S. 1 (1948). "It is doubtless that a State may act through different agencies, - either by its legislature, its executive, or its judicial authorities; and the prohibitions of the [fourteenth] amendment extend to all action of the state denying equal protection of the laws." *Id.* at 14 (quoting *Virginia v. Rives*, 100 U.S. 313, 318 (1880)).

Thus, the *Rasmussen* court reasoned that compelling discovery of the donors' identity constitutes governmental action within the meaning of the fourteenth amendment.⁶⁵ Consequently, Rasmussen would have had to show a compelling interest in order to justify donor discovery. Although the court did not directly apply this analysis, three reasons support the proposition that Rasmussen would have failed to meet this strict scrutiny. First, other methods exist in order to serve his purpose.⁶⁶ Second, it is unnecessary to disclose donors' identities in the damaging context of AIDS and, therefore, subject them to ridicule and discrimination.⁶⁷ Third, his interest was not compelling enough to overcome the consequential decrease in voluntary blood donations.⁶⁸

First, the *Rasmussen* court justifiably recognized the plaintiff's interest in obtaining full compensation for his injuries.⁶⁹ Nevertheless, alternative methods could enhance these interests at a lesser cost than discovery without the subsequent invasion of donors' lives.⁷⁰ For instance, South Florida Blood Service supplied the peti-

65. The fourteenth amendment provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

66. First, Rasmussen already had the testimony of a Center for Disease Control employee and a physician of Mt. Sinai Hospital that the AIDS was transfusion-related. Respondent's Brief, *supra* note 39, at 21. Second, Rasmussen should have had no problem in obtaining one or more experts to testify in the same way. *Id.*

67. See *supra* note 22 for a discussion of protecting donors' identity.

68. Rasmussen's need for the information is miniscule. Respondent's Brief, *supra* note 39, at 17. Petitioner failed to see that a tortfeasor's liability is not limited to negligent medical treatment following the initial injury. *Id.* The original wrongdoer is responsible for injury which flows from the tortious conduct. *Id.* Therefore, Rasmussen need not prove negligence in the donation of blood. *Id.* Furthermore, Rasmussen would not be able to prove that he obtained AIDS from the blood transfusions since it was not until March of 1985 that there was any method available to detect infectious blood. *Id.*

69. See *supra* note 38 for a discussion of the policy of full compensation for injured plaintiffs. The court incorrectly explained, however, that this interest would not be advanced if the discovery was allowed. *Rasmussen*, 500 So. 2d at 538. Discovery would increase Rasmussen's element of causation. Additionally, he would increase his ability to defeat defenses such as illness from other sources. Petitioner's Brief, *supra* note 8, at 5-7.

Nevertheless, Judge Schwartz felt that the court did not give enough weight to the plaintiff's interest. *Rasmussen*, 467 So. 2d at 805. See Petitioner's Brief, *supra* note 8, at 6. He explained that the court unfairly considered Rasmussen's claim in light of the defendant's attempt to prove that Rasmussen's affliction resulted from intravenous drug abuse or homosexuality. *Rasmussen*, 467 So. 2d at 805. Judge Schwartz stated that it is of absolute necessity to the plaintiff and his survivors that they obtain the information whether one or more of the donors is a potential carrier or is a sufferer from AIDS. *Id.* The judge was concerned that the mere representation of such an idea would hinder Rasmussen's interest if he did not have supporting proof. *Id.*

70. A plaintiff is not required to prove beyond a reasonable doubt that a blood

tioner with a report that none of the donors is a known AIDS victim.⁷¹ This report established prima facie that Rasmussen did not obtain contaminated blood and that his need for discovery was dubious at best.⁷² Past courts have ruled that the disclosure of personal information is prohibited when the information sought is obtainable from other sources.⁷³ Likewise, the *Rasmussen* court observed that implementing another method to verify the Blood Service's report while maintaining the confidentiality of the donors' identities is possible.⁷⁴ Therefore, a plaintiff's accessibility to information elsewhere precludes the extraneous intrusion into an individual's life.

Second, the court purposefully recognized that there was a serious threat that a plaintiff would conduct an unlimited and extremely disruptive investigation of the donors, beyond the mere discovery of identities, in order to prove aggravation of his injuries. As the court stated, "the potential for invasion of privacy is inherent in the litigation process."⁷⁵ Perhaps the most exigent matter the court deterred is the defense's persistent interruption and investigation of a person's life in the underlying litigation.⁷⁶ Moreover, the the policy behind donor discovery would absolutely terminate an individual's solitude. The minute the plaintiff's investigation of the donor estab-

transfusion was the proximate cause of death. *Mississippi Baptist Hosp. v. Holmes*, 214 Miss. 906, 55 So. 2d 142 (1951). Additionally, a civil action only requires the finder of fact to believe from the greater weight of evidence that the injury complained of was proximately caused by the negligent act of the defendant. *Id.* Rasmussen had all the evidence he needed in order to establish this. *See supra* note 66. Moreover, courts have recognized negligence as an adequate theory upon which to base an action to recover for adverse effects from blood transfusions. *See* Annotation, *Blood Transfusion - Liability*, 45 A.L.R.3d 1376 (1972) The doctrine of *res ipsa loquitur* may be held applicable in these types of cases. *Id.* at 1379.

71. *Rasmussen*, 500 So. 2d at 537.

72. Even if Rasmussen could determine that one or more of the donors had AIDS or was in a high risk group, this evidence has no probative value since it does not establish that the individual had AIDS and was infectious in 1982 or when he donated the blood. Respondent's Brief, *supra* note 39, at 21.

73. *See* *Eastern Auto Distrib., Inc. v. Peugeot Motors of Am.*, 96 F.R.D. 147 (E.D. Virg. 1982). *See also* *Eglin Fed. Credit Union v. Contor Fitzgerald Sec. Corp.*, 91 F.R.D. 414 (N.D. Ga. 1981) (production of material not compelled since plaintiff failed to present evidence that personal information was not readily obtainable elsewhere); *Smith v. Bader*, 83 F.R.D. 437 (S.D.N.Y. 1979) (compelling need for information established when the data is not otherwise readily obtainable).

74. *Rasmussen*, 500 So. 2d at 537.

75. *Id.* at 535.

76. The Federal Rules of Evidence allow for inquiry into a person's conduct, upon cross-examination, in order to establish an individual's reputation or character trait. FED. R. EVID. 405. In addition, any party may, by way of opinion or reputation, attack the credibility of a witness. FED. R. EVID. 607, 608. The opportunities provided to defense counsel would propel him to make the most invading type of inquiries into a person's life in order to defend his client (*i.e.*, questioning employers, family, friends, and acquaintances). *See* Petitioner's Brief, *supra* note 3, at 7. Moreover, the defendant below did assert the defense of alternative sources for Rasmussen's disease. *Id.* at 6.

lished the existence of AIDS in that person, the defendant would then drag the individual through a devastating experience, attempting to establish that his disease did not manifest itself until after the time of donation.⁷⁷ In addition, everyone affiliated with the donor would be investigated regarding incredibly private information. The result would lead to overwhelming consequences for all involved. The Supreme Court of Pennsylvania determined that certain hospital records are discoverable, provided they do not "blacken the character of a patient."⁷⁸ Because donor discovery, in a case such as *Rasmussen*, would most likely tarnish the reputation of everyone involved, disclosure should remain prohibited.

Third, the plaintiff's discovery interest was not sufficiently compelling to overcome society's interest in sustaining a healthy donor program. The Supreme Court held in *Nixon v. Administer of General Services*,⁷⁹ that balancing the extent of disclosure, the protections against additional disclosure, and the public interest favoring disclosure determines whether a constitutional invasion of privacy has occurred.⁸⁰ The *Rasmussen* court's realization of society's interest in discouraging disincentive to voluntary blood donation mirrors the policy set forth in *Nixon*. In *Rasmussen*, disclosure would extend beyond a reasonable limit allowing arbitrary investigation into the donors' lives.⁸¹ Moreover, the plaintiff in *Rasmussen* never promised protection against additional disclosure, and even if he had, the blood donors could not be guaranteed that further disclosure would not inadvertently occur. The public interest in maintaining a strong blood supply definitely favors nondisclosure in order to encourage the voluntary donation of blood to meet the requisite needs of society. Although donor discovery has previously occurred in several circumstances,⁸² each situation involved donors who were paid for their services.⁸³ Because society is most interested in main-

77. See *supra* note 76.

78. *In re The June 1979 Allegheny County Investigating Grand Jury*, 490 Pa. 143, 415 A.2d 73 (Pa. 1980). Accord *Pennsylvania Dental Ass'n v. Commonwealth Dep't of Health*, 461 A.2d 329 (Pa. Commw. Ct. 1983) (dental records discoverable since they would not tend to blacken the patient's character); *State v. Gotfrey*, 598 P.2d 1325 (Utah 1979) (patients have an interest in keeping confidential revelations from public scrutiny).

79. 433 U.S. 425 (1977).

80. *Id.* at 465.

81. See *supra* note 22.

82. See, e.g., *Tufaro v. Methodist Hosp.*, 368 So. 2d 1219 (La. Ct. App. 1979) (court allowed plaintiffs to locate blood donors in order to allege negligent screening methods); *Moore v. Underwood Memorial Hosp.*, 147 N.J. Super. 252, 371 A.2d 105 (1977) (unit of blood traced to the donor to establish negligence, strict liability in tort, and breach of warranty).

83. In *Tufaro*, the witnesses were commercial donors and were paid five dollars per unit. *Tufaro*, 368 So. 2d at 1220. The witnesses gave incredible testimony. *Id.* Likewise, in *Moore*, the individual donated his blood for commercial gain. *Moore*, 147 N.J. Super. at 253, 371 A.2d at 107. Accord *Gilmore v. St. Anthony Hosp.*, 598 P.2d

taining a strong voluntary program⁸⁴, however, the paid donor cases are not analogous.

Since the discovery of AIDS, panic and social havoc have dominated the realm of the disease.⁸⁵ Discrimination of AIDS victims has run rampant in several areas such as employment, insurance, and housing.⁸⁶ Discrimination upon grounds of "sexual orientation" and fear of contagion also fuel this panic.⁸⁷ Thus, the desire to punish the donor who transmitted the AIDS may motivate increased requests for blood donor records. A number of jurisdictions make it a crime to knowingly or recklessly harm another through viral transmission.⁸⁸ While these statutes only apply to venereal diseases, they do set a precedent of criminal penalties in a public context. Because a vast number of people do not know their own seropositive status,⁸⁹ they should not be held liable for transmitting contaminated blood when they voluntarily donate.⁹⁰ In addition, it would only be a matter of time before this type of legislation was set forth in connection with transfusion-related AIDS. The *Rasmussen* court's ruling will help quash the natural extension of criminal liability of the individual donor.

In weighing the relevant interests, the *Rasmussen* court did not address the availability of a serological test which depicts the presence of AIDS antibodies in donated blood.⁹¹ This test has been determined to be 99.8 percent accurate⁹² and would, therefore, alleviate most need for discovery subsequent to the introduction of the exam.⁹³ This test, however, could only be effective in avoiding "seri-

1200 (Okla. 1979) (facts disclosing that blood donor was paid for his contribution).

84. A major goal of the National Blood Policy, initiated by the federal government in 1973, was to establish an all-volunteer blood collection system because commercially collected blood was more likely to be contaminated. Petitioner's Brief, *supra* note 8, at 7.

85. See Dreele, *AIDS and Public Policy*, NAT'L REV., July 8, 1983, at 796.

86. See MATHEWS & NESLUND *supra* note 6, at 347-49.

87. See Dreele, *supra*, note 85, at 796.

88. See, e.g., CAL. HEALTH & SAFETY CODE § 3198 (West 1979) (illegal to expose another to infectious diseases); FLA. STAT. ANN. § 384.02 (West 1986) (unlawful to have sexual intercourse with the knowledge that one is afflicted with a venereal disease); N.Y. Public Health Law § 2307 (McKinney 1985) (misdemeanor for an individual who is knowingly infected with a contagious disease to have sexual intercourse); PA. STAT. ANN. tit. 35, § 521.20 (Purdon 1977) (penalties and prosecutions for violating disease control laws); and TEX. REV. CIV. STAT. ANN. art. 4445 (Vernon 1976) (no person shall expose another to infection with any venereal disease).

89. See *infra* note 93.

90. It has been held that blood donors are not liable to donees for transmitting contaminated blood unless the donor knows or has reason to know of the disease. *Hubbell v. South Nassau Communities Hosp.*, 46 Misc.2d 847, 260 N.Y.S. 2d 539 (N.Y. Sup. Ct. 1965).

91. See *supra* note 41.

92. Wallis, *AIDS: A Growing Threat*, TIME, Aug. 12, 1985, at 44.

93. Macklin, *Predicting Dangerousness and the Public Health Response to AIDS*, 1986 HASTINGS CENTER REP. (Special Supplement at 20).

ous disincentive to volunteer blood donation"⁹⁴ if it would alleviate all need for discovery. The 0.2 percent (or greater) margin leaves the door wide open for future discovery and serious probing into people's lives which would deter them from giving blood. In fact, the mere presence of this litigation in the courts will make people think twice before entering a blood bank. Therefore, because donor-screening methods fail to extinguish *all* possibility of AIDS transmission, donor discovery cannot be justified.

The most important issue in donor discovery cases is the court's perspective when approaching problems such as those raised in *Rasmussen*. A court may view donor discovery from the perspective of the need for discovery or from the perspective of protecting the interests of society along with an individual's privacy expectations. The need for discovery approach will erode constitutionally protected interests, as well as provide serious disincentive to volunteer blood donations. Courts facing the issue in the future must fully comprehend the *Rasmussen* court's logic in upholding these respective interests. In essence, acknowledgement of the *Rasmussen* decision must extend beyond rhetoric in order to establish a strong policy of upholding the most basic and necessary interests known to mankind.

Joseph A. Durkin

94. *Rasmussen*, 500 So. 2d at 538.

