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IN THE SUPREME COURT OF
FLORIDA

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CASE NO. 67,081

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DONALD RASMUSSEN,
Petitioner,

vs.

SOUTH FLORIDA BLOOD
SERVICE, INC.,
Respondent.

* * *

DISCRETIONARY PROCEEDING TO REVIEW A
DECISION OF THE THIRD DISTRICT COURT OF APPEAL

* * *

BRIEF OF AMICUS CURIAE, FLORIDA ASSOCIATION OF BLOOD BANKS

* * *

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE PUBLIC INTEREST IN ENSURING A RELIABLE AND STEADY SUPPLY OF BLOOD FAR OUTWEIGHS RASMUSSEN'S NEED FOR IDENTITIES OF BLOOD DONORS.	6
A. Public Interest in Reliable Blood Supply	6
B. Interest of RASMUSSEN for Information	9
C. Application of Rules of Discovery	14
II. BLOOD DONORS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY IN THEIR IDENTITIES AND PERSONAL LIVES.	18
A. Standing	18
B. State Constitutional Protection	19
C. Federal Constitutional Protection	22
III. THE FLORIDA LEGISLATURE HAS EVIDENCED AN INTENT TO PROTECT THE CONFIDENTIALITY OF DONOR IDENTITIES IN RECENTLY ENACTED LEGISLATION.	24
A. Legislative and Administrative Response	24
B. Retroactive Application of Statute	28
CONCLUSION	30
CERTIFICATE OF SERVICE	32

TABLE OF AUTHORITIES

Cases	Page
Argonaut Insurance Company v. Peralte, 358 So. 2d 232 (Fla. 3d DCA 1978), cert. denied, 364 So. 2d 622 (Fla. 1978)	14
Calderbank v. Cazares, 435 So. 2d 377 (Fla. 5th DCA (1983)	23
Carey v. Population Services International, 431 U.S. 678 (1977)	18
Craig v. Boren, 29 U.S. 190 (1976)	18
Dade County Medical Association v. Hlis, 372 So 2d 117 (Fla. 3d DCA 1979)	15
Deerfield Medical Center v. City of Deerfield Beach, 661 F. 2d 328 (5th Cir. 1981)	18
Equifax Corporation v. Cooper, 380 SO. 2d 514 (Fla. 5th DCA 1980)	15
Florida Board of Examiners Re: Applicant, 443 So. 2d 71 (Fla. 1983)	20
Forsberg v. Housing Authority of City of Miami Beach, 455 So. 2d 373 (Fla. 1984)	20,21,22
Gilmore v. St. Anthony Hospital, 598 P.2d 1200 (Ok. 1979)	23
Head v. Colloton, 331 N.W. 2d 870 (Iowa 1983)	23
Lempshire v. Proctor & Gamble Co., 94 F.R.D. 58 (N.D. Ga. 1982)	20
Love v. Jacobson, 390 So. 2d 782 (Fla. 3d DCA 1980)	29
Lukaszewicz v. Ortho Pharmaceutical Corp., 90 F.R.D. 708 (E.D. Wisc. 1981)	16
McCarty v. Estate of Shultz, 372 So. 2d 211 (Fla. 3d DCA 1979)	15
Miami v. Florida Public Service Commission, 226 So. 2d 217 (Fla. 1969)	15
Michel v. Douglas, 464 SO. 2d 545 (Fla. 1985)	21

TABLE OF AUTHORITIES

Cases	Page
Moore v. Underwood Memorial Hospital, 147 N.J. Sup. Ct. 252, 371 A.2d 105 (1977)	23
NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958)	18
Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777 (1977)	22
North Broward Hospital District v. Lucus, 448 So. 2d 622 (Fla. 4th DCA 1984)	14
Plant v. Gonzalez, 575 F.2d 1119 (5th Circuit 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047 (1979)	22
Pomponio v. Claridge of Pompano Condominium, 378 So. 2d 774 (Fla. 1979)	29
Prest v. Rotary, 98 F.R.D. 755 (N.D. Calif. 1983)	20
Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (M.D. Calif. 1976)	16
Rose Printing Company v. D'Amato, 338 So. 2d 212 (Fla. 3d DCA 1976)	14
Seattle Times Company v. Rhinehart, ___U.S.___, 104 S.Ct. 2199 (1984)	16
Senfield v. Bank of Nova Scotia Trust Company, 450 So. 2d 1157 (Fla. 3d DCA 1984)	29
Shevin v. Byron, Harlis, Schaefer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980)	20
South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798 (Fla. 3d DCA 1985)	2,6,8,9,10, 15,16,19,20, 25
Springer v. Greer, 341 So. 2d 212 (Fla. 4th DCA 1976), appeal dismissed, 351 AO. 2d 406 (Fla. 1977)	15

TABLE OF AUTHORITIES

Cases	Page
State v. Lavazzoli, 434 SO. 2d 321 (Fla. 1983)	28
Surf Drugs, Inc. v. Vermetti, 236 So. 2d 108 (Fla. 1970)	14
Trustees of Tufts College v. Triple R Ranch, Inc., 275 SO. 2d 521 (Fla. 1973)	28
Tufaro v. Methodist Hospital, Inc., 368 So. 2d 1219 (La. Ct. App. 1979)	23
Wade v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1976)	22
Walker v. Walker, 439 So. 2d 963 (Fla. 1st DCA 1983)	14
Florida Statutes	
Chapter 85-52, Laws of Florida (1985)	5,22,25,28
Chapter 119, Florida Statutes (1983)	20
Section 381.601(3)(c), Florida Statutes (1983)	7
Section 381.601(6)(b), Florida Statutes (1983)	22
Section 381.606(4)(a), Florida Statutes (1985)	25,26
Section 397.053, Florida Statutes (1983)	21
Section 397.096, Florida Statutes (1983)	21
Section 455.241, Florida Stautes (1983)	21
Periodicals	
Adler, et al., The AIDS Conflict, Newsweek (September 23, 1985)	8
As Fear of AIDS Spreads, People Change Ways They Live and Work, Wall Street Journal, p. 35 (October 10, 1985)	8

TABLE OF AUTHORITIES

	Page
Periodicals	
Carlson, et al., AIDS Serology Testing in Low- and High Risk Groups, J.A.M.A., Vol. 253, No. 23, pp. 3405-3408 (June 21, 1985)	12
Johnson, AIDS, 52 Medico-Legal Journal 3 (1984)	10
Other Authorities	
Article I, Section 23, Florida Constitution	4,19,20
CBS Evening News, October 3, 1985	8
Rules 10D-3.62(1)(a); 10D-41.34(5)(c), Florida Administrative Code	21,25
Rules 1.280(b)(1); 1.280(C); 1.410(b), Florida Rules of Civil Procedure	14,15
Staff Analysis, Florida House of Representative Committee of Health and Rehabilitative Services, April 4, 1985, HRS PCB 1	7

STATEMENT OF THE CASE AND FACTS

This case arose out of a personal injury action brought by Petitioner, DONALD RASMUSSEN (hereinafter referred to as "RASMUSSEN"), against the driver of a vehicle with whom RASMUSSEN was involved in an automobile accident. Due to injuries sustained in the automobile accident, RASMUSSEN was hospitalized at St. Francis Hospital in Miami Beach, Florida, from May 24, 1982 until October 7, 1982.

At St. Francis Hospital RASMUSSEN received blood transfusions amounting to fifty-one (51) units. In June of 1983, RASMUSSEN was diagnosed as having Acquired Immune Deficiency Syndrome. One of RASMUSSEN's treating physicians concluded that in all medical probability the disease was caused by the blood transfusions. (A. 18-19). Based on that conclusion, RASMUSSEN served the Respondent, SOUTH FLORIDA BLOOD SERVICE, a non-party to the personal injury action, a subpoena duces tecum seeking "any and all records, documents and other material indicating the names and addresses of the blood donors identified on the attached records of St. Francis Hospital regarding the Plaintiff herein, Donald Rasmussen." (A. 11).

Because SOUTH FLORIDA BLOOD SERVICE was not a party to the personal injury law suit, and because the records were private and confidential records of the SOUTH FLORIDA BLOOD SERVICE and its donors, SOUTH FLORIDA BLOOD SERVICE moved to quash the subpoena duces tecum or for a protective order on

the grounds that there was no good cause stated or justifiable reason for disclosure of these documents. The Circuit Court denied the motion and ordered SOUTH FLORIDA BLOOD SERVICE to produce the documents.

SOUTH FLORIDA BLOOD SERVICE petitioned the Third District Court of Appeal to review the order of the Circuit Court denying the motion to quash and for protective order. The Third District Court of Appeal granted SOUTH FLORIDA BLOOD SERVICE'S petition for certiorari and quashed the Circuit Court order on the grounds that the probative value of the evidence which might be discovered was questionable, and on grounds that the privacy interests of the donors and the institutional and societal interests in an adequate blood supply far outweighed any interests or need of RASMUSSEN for the donor identities. The Third District Court of Appeal, finding the issue presented to be of great public importance, certified the following question to this Court:

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

South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798, 804 n. 13 (Fla. 3d DCA 1985).

This Court granted the Florida Association of Blood Banks' Motion for Leave to File Brief as Amicus Curiae.

SUMMARY OF ARGUMENT

This controversy is one of many which has its origin in the confusion surrounding the universally feared disease known as Acquired Immune Deficiency Syndrome ("AIDS"). AIDS is forcing society to re-evaluate many social and legal relationships. The relationship under scrutiny here involves balancing an injured Plaintiff's right to discover information which may have some bearing on his claim with society's need to assure an adequate blood supply. The issue at the heart of this case is whether RASMUSSEN's need for the names of donors outweighs the risk to society that blood donors, faced with the knowledge that their most private activities will become the focus of public scrutiny, will become reluctant to donate desperately needed blood. This very real threat far outweighs any interest which RASMUSSEN may have in acquiring the names of the blood donors.

Blood banks work diligently to motivate an adequate number of volunteer donors to meet the blood needs of the state. The public concern regarding AIDS has made meeting this need an increasingly difficult task. Any circumstances which might decrease the motivation of donors to donate blood must be viewed with alarm. Discovery of donors' names and ultimately the most intimate details about their personal lives can only impair motivation to be a blood donor. In light of the total dependence on the goodwill of volunteer blood donors to meet the needed blood supply, the threat of

examination of the most intimate details of the donor's private life will undoubtedly lead to a serious reduction of volunteer donations and the consequent damage to the ability of health care professionals to provide life-saving transfusions and other blood related services.

Florida courts have routinely held that discovery may not be used as an opportunity to conduct a "fishing expedition." RASMUSSEN admits that he intends inquiry into the personal lives of each donor in what can be only described as a "fishing expedition." Discovery is even more limited against non-parties such as SOUTH FLORIDA BLOOD SERVICE. The discovery of evidence which may otherwise be relevant or non-privileged is prohibited in order to prevent annoyance, embarrassment, oppression, undue burden or expense. Because the probative value of donor identities can at most only support evidence already before the trier of fact, and because the potential for annoyance and embarrassment of donors and the resultant risk to the blood supply is so great, the information is not discoverable under the Florida Rules of Civil Procedure.

The Federal and Florida Constitutions provide a right to privacy in protecting disclosure of the identities of blood donors by blood banks. Article I, Section 23, of the Florida Constitution clearly protects the privacy interests in avoiding disclosure of personal matters. Furthermore, the United States Supreme Court has consistently held that the United States Constitution protects against public disclosure

of personal matters. In circumstances such as those presented here, the courts conduct a balancing test to determine whether the interests sought to be protected outweigh the need for the information.

The State of Florida has recognized the serious need to protect donors from inquiry such as that sought here by enacting legislation creating a privilege of confidentiality for persons donating blood. The legislature, in enacting Chapter 85-52, Laws of Florida (1985), recognized that confidentiality of donor identities and characteristics was essential in maintaining an adequate supply of blood donations. Although that statute was enacted after RASMUSSEN filed suit and issued the subpoena duces tecum seeking disclosure of donor identities, retroactive application of the statute is permissible under the Florida Constitution. In the present case, retroactive application of the statute providing for confidentiality of information about blood donors will not cut off any vested rights of RASMUSSEN, but instead will serve to remedy a vital social concern.

ARGUMENT

I. THE PUBLIC INTEREST IN ENSURING A RELIABLE AND STEADY SUPPLY OF BLOOD FAR OUTWEIGHS RASMUSSEN'S NEED FOR IDENTITIES OF BLOOD DONORS.

A. Public Interest in Reliable Blood Supply

The Third District Court of Appeal, in reversing the Circuit Court's denial of SOUTH FLORIDA BLOOD SERVICE's motion for protection from discovery, held that "after balancing all of the interests involved, the requested material should not be discovered. The complete denial of discovery is necessary to ensure the protection of both the donor's privacy interests and society's interest in a strong and healthy volunteer blood donation program." Rasmussen, supra at 804. (emphasis supplied). The Third District Court of Appeal thus recognized the dilemma which is at the heart of this case, viz, whether society can afford to take the risk under the circumstances presented here that blood donors, faced with the knowledge that their most private activities will become the focus of public scrutiny, will become reluctant to donate desperately needed blood. Any other holding has the potential for disastrous consequences for the blood supply and ultimately for the future of health care of the citizens of this State. This very real threat far outweighs any interest which RASMUSSEN may have in acquiring the names of the donors.

As indicated in Florida Association of Blood Banks' Motion for Leave to File Brief as Amicus Curiae, the Florida

Association of Blood Banks is a statewide, professional association representing twenty-seven (27) community non-profit blood centers providing virtually all of the blood and blood components and related services to patients in Florida. It is a non-profit organization.[1] The membership of the Florida Association of Blood Banks also includes physicians, medical technologists, nurses, donor recruiters, and administrators. It is responsible for the collection of over 600,000 pints of blood annually for use in hospitals, transfusion centers, clinics and dialysis centers. Member blood banks depend exclusively on volunteers for donations.[2] Donations are strictly voluntary and are based only upon altruistic motives.

If donor names are disclosed, the most confidential medical and personal habit histories of donors will become available for indiscriminate and unnecessary scrutiny as is sought here. The Florida Association of Blood Banks is certain that this will result in a significant decrease in the number of volunteer blood donors. A decrease in blood donations will have drastic consequences. As the Third District Court of Appeal pointed out in its opinion, "it is

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[1]The Association does not include for profit plasma centers, which are primarily involved in manufacturing blood products from plasma. Staff Analysis, Florida House of Representatives Committee on Health and Rehabilitative Services, April 4, 1985, HRS PCB 1.

[2]Section 381.601(3)(c), Florida Statutes (1983), mandates use of only volunteer donors.

in the public interest to discourage any serious disincentive to voluntary blood donation. . . ." Rasmussen, supra at 804.

Given the hysteria which pervades even the mere mention of AIDS and the association of certain high risks groups with this disease,[3] it is not conjecture that donors will become wary and reluctant to donate once they become aware that they risk inquiry into their sexual habits, drug usage and other personal habits. RASMUSSEN argues to this Court that such a reaction is improbable and that any adverse consequences are either too remote to be considered or are merely speculative. However, the membership of the Florida Association of Blood Banks, who are responsible for meeting the blood needs of the state, could not advocate more strenuously their opposition to RASMUSSEN's arguments. In view of the emerging evidence that donors are becoming increasingly reluctant to donate because of their misunderstanding that AIDS can be transmitted by the donation process,[4] the decision of the SOUTH FLORIDA BLOOD SERVICES to resist disclosure of donor identities is valid and prudent.

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[3]AIDS is forcing society to reevaluate many social and legal relationships. See, for example, references in recent periodicals and broadcasts. Adler, et. al, The AIDS Conflict, Newsweek, (September 23, 1985); CBS Evening News, October 3, 1985; As Fear of Aids Spreads, People Change Ways They Live and Work, Wall Street Journal, p. 35 (October 10, 1985). See also Rasmussen, supra at 800 n. 5.

[4]Id.

This Court must not lose sight of the fact that once donors are discouraged from donating there is no alternative remedy. Blood will not be available for surgery and other necessary therapeutic uses. Even if only a small percentage refrains from donating, the damage is irreversible and not remediable. There is no substitute for blood donors.

B. Interest of RASMUSSEN for Information

It is crucial in evaluating the competing policies and interests to analyze the real need RASMUSSEN has for the names and private medical and personal histories of donors of the blood which he received. Upon analysis, it becomes clear that what RASMUSSEN really seeks is not the names of the donors in and of themselves, but rather the donors' identities so that he can conduct an inquiry of each and every donor to determine if he or she has contracted AIDS, is an AIDS virus carrier, or is a member of a high risk group. This kind of activity has the potential to harass, intimidate and unnecessarily involve donors and will have a disastrous effect on blood banking within the State of Florida.

RASMUSSEN has already been provided information that none of the donors had AIDS[5] or were aware that they had

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[5]See Rasmussen, supra at 801 n. 7.

the AIDS virus at the time of their donation.[6] Furthermore, RASMUSSEN has elicited testimony from two experts that "in all medical probability . . ." the AIDS was due to blood transfusion and that the case has been diagnosed as "transfusion related."[7] This testimony exists even though evidence has been presented that none of the donors have been diagnosed as having AIDS.[8]

Under these circumstances, what further information can be obtained by providing direct access to donors? It is obvious that simply confirming that AIDS was transfusion related is not the real purpose because RASMUSSEN already has this information. If this is the only reason then the information is supportive of other testimony at best and redundant at worst. But further, even if a donor's name was obtained and the donor revealed that he or she was a member of a high risk group which was not made known to the blood bank, such a revelation would not reveal AIDS. Every member of a high risk group is not necessarily a carrier or infected with AIDS.[9]

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[6]Blood banks routinely exclude high risk donors or persons having symptoms of AIDS from donating.

[7]Testimony of Gus Sirmos (A. 39-40); testimony of Dr. Kenneth Ratzan (A. 18-19).

[8]There is substantial evidence that a person may be a carrier of the AIDS virus and yet not have symptoms or disease associated with the virus. Johnson, AIDS, 52 Medico-Legal Journal 3 (1984).

[9]See Rasmussen, supra at 801.

Alternatively, the donor may reveal that he or she was diagnosed as having AIDS after the donation. This information could have been obtained from other sources by asking the blood bank, the Center for Disease Control, or the county health department whether a donor providing blood for transfusion to RASMUSSEN had subsequently been diagnosed as having AIDS.[10] Also, this information does nothing more than confirm expert testimony.[11] In short, RASMUSSEN already has evidence that his death was transfusion related. Questioning donors plows no new ground but simply supports that which is already established.

A more interesting question exists where following inquiry, no donor is identified as having contracted AIDS. This does not mean that the case is not transfusion related. AIDS may have a long latency period.[12] Similarly, as discussed above, the fact that a donor was identified as a member of a high risk group would establish nothing. Further, a finding that the donor had developed an antibody associated with AIDS would not establish the existence of AIDS. At most, medical science posits that the presence of certain antibodies is associated with the development of AIDS

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[10] See footnote 5, supra.

[11] See footnote 7, supra.

[12] See footnote 8, supra.

in some circumstances.[13] Thus, an inquiry into the personal habits and details of donors' lives adds little additional evidence which is probative of the question whether the case is transfusion related.

This Court should not lose sight of the fact that RASMUSSEN's questioning of the donor about his or her personal habits would not logically conclude merely with the donor's name. This is because information which could be obtained simply from the donor's identity (i.e. whether he or she had contracted AIDS) is already available from County Health Departments and the Center for Disease Control. It is therefore apparent that RASMUSSEN's only reason for obtaining the information is to allow him to conduct a more in depth investigation of each donor. This would include an in depth investigation of individual donors regarding their most intimate private personal habits. While this could have been argued at one time to have benefit in exposing high risk donors, this argument no longer has validity given the effectiveness of the HTLV-III test and other procedures used to screen donors for exposure to the AIDS virus.[14] Conversely, the harm which would be done to the remaining vast majority of donors who maintain the volunteer blood supply would be devastating.

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[13]Carlson, et. al., AIDS Serology Testing in Low-and-High-Risk Groups, J.A.M.A., Vo. 253, No. 23, pp. 3405-3408 (06/21/85).

[14]Id.

It is not difficult to discern ulterior motives on the part of RASMUSSEN in obtaining this information. In fact they are suggested in RASMUSSEN's brief, where he implies that the names of donors are needed in order to bring a cause of action against the donor (if subsequently diagnosed as having AIDS), or against the blood bank for failing to screen the donor who may have carried the AIDS virus. (RASMUSSEN's Brief, p. 9). Certainly to countenance this discovery is to approve the worst kind of a "fishing expedition."

With respect to RASMUSSEN's assertion that a blood bank protects its own interests by protecting the confidentiality of donor identities, it should be pointed out that an action against a blood bank for negligence does not focus on the donor, but rather, on the reasonableness of screening and testing procedures performed by the blood bank. If RASMUSSEN has reason to believe the blood bank was negligent, certainly the courts are available.

In short, in light of the delicate dependence on the goodwill of the volunteer blood donor, the threat of exposing the most intimate details of the donor's private life will undoubtedly and inevitably lead to a drastic reduction of volunteer donations and serious damage to the ability of health care professionals to provide life saving transfusions and other blood related services. This threat must be balanced against the insignificant need of RASMUSSEN for this information in maintaining his cause of action against the defendants in the personal injury action.

C. Application of Rules of Discovery

As discussed, any information which RASMUSSEN might gain would be at best cumulative and of tenuous probative value. Thus, under the Florida Rules of Civil Procedure, this information may not be discovered. Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that "[p]arties may obtain discovery regarding any matter not privileged, that is relevant to the subject matter of the pending action . . . ." Florida cases construing this rule have established the following requirements for permitting disovery:

1) Only parties are within this broad provision;

2) The information must be relevant;

3) The information must not be privileged.

Rose Printing Company v. D'Amato, 338 So.2d 212 (Fla. 3d DCA 1976); Surf Drugs, Inc. v. Vermette, 236 So.2d 108 (Fla. 1970); Walker v. Walker, 439 So.2d 963 (Fla. 1st DCA 1983).

Florida courts have uniformly held that discovery is more limited where non-parties are involved. SOUTH FLORIDA BLOOD SERVICE is clearly not a "party." Rose Printing Company v. D'Amato, supra.; Argonaut Insurance Co. v. Peralte, 358 So.2d 232 (Fla.3d DCA 1978), cert. denied 364 So.2d 889 (Fla. 1978); North Broward Hospital District v. Lucus, 448 So.2d 622 (Fla. 4th DCA 1984). Therefore, RASMUSSEN has a heavier burden under the rules of discovery to demonstrate a need to obtain the requested documents from SOUTH FLORIDA BLOOD SERVICE, a non-party. This is a burden which RASMUSSEN cannot meet in this case.

Fundamental to the law of discovery is that the party seeking discovery may not use it as an opportunity to conduct a "fishing expedition." McCarty v. Estate of Shultz, 372 So.2d 210 (Fla. 3d DCA 1979); Miami v. Florida Public Service Commission, 226 So.2d 217 (Fla. 1969); Equifax Corporation v. Cooper, 380 So.2d 514 (Fla. 5th DCA 1980). As outlined above, the information pertaining to the identities of the donors has little probative value given the medical and scientific testimony regarding the transmission of AIDS through blood transfusions in this case. Furthermore, any information obtained would be at best duplicative of expert medical testimony already available.

Discovery of evidence which otherwise may be relevant or non-privileged is also prohibited in order to prevent annoyance, embarrassment, oppression or undue burden or expense. Rule 1.410(b), Rule 1.280(c), Florida Rules of Civil Procedure; Dade County Medical Association v. Hlis, 372 So.2d 117 (Fla. 3d DCA 1979). As pointed out by the Third District Court of Appeal, the courts have authority to prevent discovery in cases in which harassment and undue invasion of privacy would result. Rasmussen, supra at 803. See also, Springer v. Greer, 341 So.2d 212 (Fla. 4th DCA 1976), appeal dismissed, 351 So. 2d 406 (Fla. 1977). That is precisely the case before this Court. When a person seeking to prevent discovery establishes "good cause," a court may act to protect the privacy of the affected person. In making this determination, the court must balance competing

interests served by the granting or denying of discovery. Lukaszewicz v. Ortho Pharmaceutical Corp., 90 F.R.D. 708 (E.D. Wisc. 1981); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (M.D. Calif. 1976). Because the probative value of the donor identities is minimal, and because the threat of annoyance and harassment of the donors and the resultant risk to the blood supply is great, the information is not discoverable under the Florida Rules of Civil Procedure.

More importantly, as discussed more fully below, the constitutionally protected privacy interest of the donors far outweighs the slight probative value of the requested information. As noted by the Third District Court of Appeal in Rasmussen, supra at 803, the United States Supreme Court has held that a court order which compels discovery constitutes state action subject to constitutional limitations. Seattle Times Co. v. Rhinehart, ___U. S. ___, 104 S.Ct. 2199 (1984). Thus, an order compelling discovery "could infringe on the constitutionally protected right to disclosural privacy." Rasmussen, supra at 803. As stated by the Supreme Court, because pretrial discovery has a "significant potential for abuse," a court has the authority to restrict discovery to protect a person from annoyance, embarassment, oppression or undue burden or expense. Rhinehart, supra at 2208. Because of the significant potential for abuse of the blood donors in the present case, and the infringement of constitutionally

protected rights to disclosural privacy which would result, the information is not discoverable.

II. BLOOD DONORS HAVE A CONSTITUTIONALLY PROTECTED RIGHT TO PRIVACY IN THEIR IDENTITIES AND PERSONAL LIVES.

A. Standing

SOUTH FLORIDA BLOOD SERVICES has standing to raise the blood donors' constitutionally protected right to privacy. Standing to raise the rights of third parties is permitted where it is necessary because of the relationship between the third party and the party asserting the right, the inability of the third party to vindicate his own rights, or the risk that the rights of the third party would be diluted or adversely affected if third party standing is not allowed. Deerfield Medical Center v. City of Deerfield Beach, 661 F.2d 328 (5th Cir. 1981); Carey v. Population Services International, 431 U.S. 678 (1977); Craig v. Boren, 429 U.S. 190 (1976); NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449 (1958).

In the present case, all three factors are present. First, the relationship between the blood donors and the blood bank demands that the blood bank assert the right of privacy on behalf of the blood donors. As discussed above, the blood bank is totally dependent on the goodwill of the blood donors, and they, in turn, expect that the blood bank will respect and protect their privacy. Without that guarantee of protection, many would refuse to donate blood and the blood bank -- as well as society at large -- would suffer the

consequences. Second, the blood donors cannot vindicate their own rights without defeating the very thing they wish to protect -- their privacy. Only the blood bank can vindicate the blood donors' rights to privacy without destroying that privacy in the process. Finally, unless the blood bank asserts these rights, the blood donors' right to privacy will be violated by an unwarranted and unwanted intrusion into their private lives. As a consequence, the number of blood donors will decrease, the available blood supply will diminish, and society will bear the harm.

B. State Constitutional Protection

The Third District Court of Appeal held that "the state and federal constitutions are sources of privacy interests which must be scrutinized when raised in challenge of a discovery order." Rasmussen, supra at 803. The Court, in holding that the identity of the donors must not be revealed, applied the same balancing test which prevents the disclosure of these identities under the Florida Rules of Civil Procedure.

The right to constitutional protection arises under both the Federal and State of Florida constitutions. The Florida Constitution, Article I, Section 23, provides:

> 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. (emphasis supplied)

This provision of Florida law, approved by the electors of the state, clearly prohibits government intrusion into private lives such as would occur if RASMUSSEN were granted access to the names and addresses of the blood donors from SOUTH FLORIDA BLOOD SERVICE. This provision establishes the "privacy of personhood," which includes the power to control what, to whom, and for what purpose personal intimacies are revealed. Cf., Shevin v. Byron, Harlis, Schaefer, Reid & Associates, Inc., 379 So.2d 633 (Fla. 1980).

The Florida Constitution clearly protects the privacy interests in avoiding disclosure of personal matters. See Forsberg v. Housing Authority of City of Miami Beach, 455 So.2d 373 (Fla. 1984); Florida Board of Bar Examiners Re: Applicant, 443 So.2d 71 (Fla. 1983). Because the type of information which RASMUSSEN seeks to elicit from the donors would, in the words of the Third District Court of Appeal, "probe into the most intimate details of the donors' lives," Rasmussen, supra at 802, this would constitute an unjustifiable intrusion into the sanctuary of privacy. Prest v. Rotary, 98 F.R.D. 755 (N.D. Calif. 1983); Lempshire v. Proctor & Gamble Co., 94 F.R.D. 58 (N.D. Ga. 1982).

Unlike the present case, those cases finding no per se disclosure privacy right under the Florida or Federal constitutions involved "public records" requests under the Florida Public Records Act, Chapter 119, Florida Statutes (1983). Because Article I, Section 23, expressly provides that public records are exempt from its provisions, this court has held

that no right to privacy exists in public records. See, Forsberg, supra; Michel v. Douglas, 464 So. 2d 545 (Fla. 1985). However, where, as in this case, there are no public records involved, the right to disclosural privacy would attach to the donors' identities. As this court has stated, "prior to the addition of Article I, Section 23 to the state constitution, this court had refused to find a general right of disclosural privacy provided for in that document." Forsberg, supra at 374. (emphasis supplied).

This Court has also indicated that although there may be no per se right to privacy under the Federal constitution, "a balancing test is used on a case-by-case basis." Id. This is precisely the balancing test used under the discovery rules discussed more fully above. Thus, under the facts of this case, as outlined above, the right to disclosural privacy far outweighs the need for the information sought by RASMUSSEN. Under these circumstances this Court should find a right to privacy under the Florida Constitution in the identities and personal information of the donors.

Furthermore, Florida has expressly recognized by statute the confidentiality of similar information. Section 455.241, Florida Statutes (1983), and Rule 10D-41.34(5)(c), Florida Administrative Code, prohibit the disclosure of patient medical records. Also, Sections 397.053 and 397.096, Florida Statutes (1983), protect the confidentiality of records of drug abusers and patients of drug abuse treatment and education prevention programs. Further, as discussed

more fully below, Florida has recently expressly recognized the interest in maintaining the confidentiality of donors in enacting a specific donor confidentiality provision, Chapter 85-52, Laws of Florida (1983). Finally, the privileged nature of a blood donor's medical records was at least implicitly acknowledged in legislation dealing with disclosure of financial information, Section 381.601(6)(b), Florida Statutes (1983).

C. Federal Constitutional Protection

The blood donor's right to privacy in this case is also protected by the Federal constitution. The United States Supreme Court has consistently held that the United States Constitution protects public disclosure of personal matters. Wade v. Roe, 429 U.S. 589, 97 S.Ct. 869 (1976); Nixon v. Administrator of General Services, 433 U.S. 425, 97 S.Ct. 2777 (1977); Plant v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1047 (1979).

The courts conduct a balancing test to determine whether the interest sought to be protected outweighs the need for the information. Forsberg, supra at 374. In the present case, the interest in protecting the confidentiality of the blood donor's identity far outweighs RASMUSSEN's need for the information. In situations such as this, where discovery sought would infringe on constitutionally protected

rights of privacy, protective orders must be issued to prevent such disclosure. Calderbank v. Cazares, 435 So.2d 377 (Fla. 5th DCA 1983).

Although no case has specifically considered the issue of confidentiality of blood donor identities,[15] the case of Head v. Colloton, 331 N.W. 2d 870 (Iowa 1983) is analogous. In Head, the Supreme Court of Iowa refused to order the disclosure of the bone marrow donor registry. In reaching this conclusion, the Court held that a donor has a constitutionally protected right of privacy. As indicated by the court, "a valuable part of the right of privacy is the right to avoid publicity concerning private facts." Id. at 876. In the present case, as in Head, the blood donors are protected by a constitutional right to avoid publicity concerning private, intimate details of their personal lives.

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[15]Cases cited by RASMUSSEN at pages 8-9 of his brief do not involve requests for records of blood donor identities and the donors' rights of privacy were not at issue. Tufaro v. Methodist Hospital, Inc., 368 So. 2d 1219 (La. Ct. App. 1979); Moore V. Underwood Memorial Hospital, 147 N.J. Sup. Ct. 252, 371 A. 2d 105 (1977); Gilmore v. St. Anthony Hospital 598 P. 2d 1200 (Ok. 1979). Therefore, these cases are inapposite to the present case.

III. THE FLORIDA LEGISLATURE HAS EVIDENCED AN INTENT TO PROTECT THE CONFIDENTIALITY OF DONOR IDENTITIES IN RECENTLY ENACTED LEGISLATION.

A. Legislative and Administrative Response

Against the growing wave of public hysteria regarding the infectious disease known as AIDS, this Court is being asked to balance the procedural rights of RASMUSSEN against the legitimate societal interests of both a safe and adequate blood supply. Neither the medical community nor the courts are able to understand or comprehend all of the ramifications of the medical phenomenon known as AIDS. As is apparent in reading any periodical or newspaper,[16] the cause, source and impact of this infectious disease is little understood by the medical and scientific community. What is apparent, however, is that AIDS is a medical problem of very serious and potentially staggering proportions.[17]

Given the magnitude of this problem, this Court should consider and weigh the affected societal interests. As was pointed out both by the majority and the dissent below, resolutions of matters such as the one at issue are best left to the branch of government having responsibility for their resolution, i.e., the legislative and executive branches.

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[16] See footnote 3, supra.

[17] See footnote 1, supra.

Rasmussen, supra at 802, 806. Since the decision below was rendered, both the legislative and executive branches of government have addressed and meaningfully responded to this issue. The response of each branch of the government has been to preserve the blood supply by protecting the confidentiality of donors. These responses must bear heavily on the issues before this Court in evaluating the competing societal and individual interests.

The Florida Legislature, in enacting Chapter 85-52, Laws of Florida (1985), and The Florida Department of Health and Rehabilitative Services, in proposing Section 10D-3.62(1)(a), Florida Administrative Code, have very cogently considered, evaluated and balanced the competing interests and have acted in favor of protecting the privacy interests of the donor. By statute, the confidentiality of donors is now preserved[18]:

> No person may be compelled to identify or provide identifying characteristics which, if disclosed, would identify any individual who receives or has received a serologic test. Any person who discloses a serologic test result to another person, unless the disclosure is to the person receiving the test, is guilty of a misdemeanor of the first degree, punishable as provided in Section 775.082, 775.083, or 775.084. Section 381.606(4)(a), Florida Statutes (1985).

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[18]The statute applies where serologic tests are required for diseases designated as infectious by the Department of Health and Rehabilitative Services. Rule 10D-3.62(1)(a), Florida Administrative Code, designates AIDS as an infectious disease. Since AIDS has been deemed an infectious disease and serological test procedures for AIDS (HTLV-III) are routinely administered to all blood donations, the confidentiality provision applies to all blood donations and transfusions.

The legislative hearings and staff reports which were considered in enacting this provision are revealing as to the concerns which the legislature addressed.[19] These concerns should be considered by this Court in determining whether the privacy interests of donors should be protected. The legislative hearings demonstrated that there was a definable reason for maintaining the confidentiality of donors. In response to federal government recommendations that high risk group individuals exclude themselves from donating blood, blood banks within the state have developed screening procedures to exclude high risk individuals, including a procedure in which high risk individuals can disclose their membership in such a group in a confidential manner likely to produce candor and avoid embarrassment or worse to the donor.[20] Because of these and other concerns, the legislature made the identity and identifying charactistics of donors confidential. Section 381.606(4)(a), Florida Statutes (1985).

Thus, without question, at present a statutory privilege exists with respect to the confidentiality of a donor's name and identifying characteristics. While RASMUSSEN might argue that such legislation should not be applied retroactively here, RASMUSSEN cannot reasonably argue that the underlying societal interests identified in the

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[19] See footnote 1, supra.

[20] See footnote 2, supra.

legislative hearings and ultimately the legislation did not exist at the time of the subpoena in question here.

Furthermore, RASMUSSEN's suggestion that blood banks may have previously disclosed the names of donors in response to similar discovery requests misses the basic concern addressed herein. At the time of RASMUSSEN's transfusions AIDS was only emerging as a potentially serious infectious disease. Concern over transmission of AIDS by blood transfusions was not prevalent, and the public concern over AIDS had not begun. This is no longer the case as public concern grows daily. It is imperative for this Court to realize that the societal interest to be protected is one which has very rapidly evolved. Thus, even if the names of donors were routinely revealed pursuant to subpoena at some previous date, it would not justify revealing this information now. Societal interests have changed because of AIDS. The need for confidentiality between a blood bank and its donors has had to change.

There is one other aspect of the recently enacted legislation which should be considered by this Court. The statutory language very carefully protects only the "identity" and "identifying characteristics" of the donor. This would not preclude inquiry from the blood bank regarding information as to whether anyone who had donated blood had been subsequently determined to have contracted AIDS. Further, it would not preclude a blood bank from producing information regarding the performance of test procedures,

questions asked of donors, medical histories, and other pertinent information, provided the identity of the donor was not revealed. The only conclusion which can be drawn from this distinction is that the Florida Legislature recognized the potential for invasive and harassing discovery inquisitions which, as RASMUSSEN phrases it, "begins with the discovery of the names and addresses of the donors." (RASMUSSEN's Brief, p. 2.) This is precisely the type of discovery activity which the legislature prohibited.

B. Retroactive Application of Statute

The enactment by the Florida Legislature of Chapter 85-52, Laws of Florida (1985), has one further impact on the present case. The prohibition against disclosure of the identities of persons should be retroactively applied. Although enacted subsequent to the circumstances giving rise to this appeal, retroactive application of this statute is permissible under the Florida Constitution.

It is well established that in the absence of clear legislative expression to the contrary, a law is presumed to operate only prospectively. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). However, this rule is generally applied to situations where retrospective operation of a law would impair or destroy existing rights. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521 (Fla. 1973). If a

statute does not affect vested rights or create new obligations it may be applied retroactively. Love v. Jacobson, 390 So.2d 782 (Fla. 3d DCA 1980). Remedial statutes are also exceptions to the general rule against retrospective operation of statutes. Senfeld v. Bank of Nova Scotia Trust Co., 450 So.2d 1157 (Fla. 3d DCA 1984). In cases where a law is enacted to remedy a broad, generalized economic or social problem, a statute may be applied retroactively. See Pomponio v. Claridge of Pompano Condominium, 378 So.2d 774 (Fla. 1979).

In the present case, retroactive application of the statute providing for confidentiality of donors will not cut off any vested rights of RASMUSSEN, but instead will serve to remedy a broad generalized social problem. As discussed more fully above, the discovery rules do not create substantive rights in favor of disclosure, particularly in cases where the persons from whom discovery is sought are not parties to the lawsuit. This is especially true in the present case in which vital public policies are served by retroactive application of this statute to prevent the otherwise serious damage to the blood supply which would result from disclosure of donor identities. On this basis alone, this Court should deny discovery.

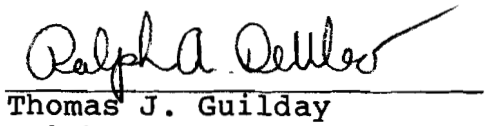
CONCLUSION

Blood is not a product or commodity for which there is a substitute. An inadequate supply translates immediately into no surgery and certain death for many patients. The source of this supply would be seriously endangered if the donors were faced with inquisitions of the most personal details of their private lives.

The Florida Legislature has acted to protect the confidentiality of medical records and donor identities. The Florida and Federal Constitutions also clearly protect blood donors from disclosure of confidential information pertaining to their identities and personal lives. To overcome these policies and constitutional protections in the present case would require a far greater showing of necessity and prejudice than is possible by RASMUSSEN. Furthermore, it is doubtful whether, on public policy grounds, confidential information pertaining to blood donors should be disclosed on any grounds.

Therefore, for the reasons set forth above, amicus curiae, Florida Association of Blood Banks, respectfully submits that the decision of the Third District Court of Appeal should be upheld and the Circuit Court's order for the production of the records and information pertaining to blood donors' identities should not be reinstated.

Respectfully submitted,



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