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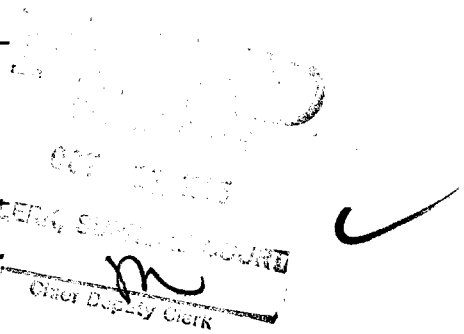
IN THE
SUPREME COURT OF FLORIDA

CASE NO 67,081



DONALD RASMUSSEN,

Petitioner,

vs.

SOUTH FLORIDA BLOOD SERVICE, INC.,

Respondent.

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

BRIEF OF AMICI CURIAE
AMERICAN ASSOCIATION OF BLOOD BANKS
AND AMERICAN NATIONAL RED CROSS

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I. STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Rasmussen seeks access to the names and addresses of 51 individuals who voluntarily donated their blood to respondent South Florida Blood Service, Inc., a non-profit community blood bank which provided the blood needed to save Rasmussen's life, after he was hit by an automobile. South Florida Blood Service, Inc. is not a party to the litigation in which the demand for discovery was made: that action is between Rasmussen (and now his personal representative) and the driver and owner of the motor vehicle. Petitioner contends that the present request is limited to production of the donors' names and addresses only. Amici will argue that production of even this information was properly denied, and will further present information contradicting petitioner's claim that donor names and addresses alone would materially assist him for purposes of the underlying litigation. The issue before the Court is as framed by the District Court of Appeal, Third District, including the status of the requested information as privileged information under Florida law.

II. INTEREST OF AMICI, AMERICAN ASSOCIATION OF BLOOD BANKS AND AMERICAN NATIONAL RED CROSS

Both the American Association of Blood Banks ("AABB") and the American National Red Cross ("ANRC") are national organizations. AABB is a non-profit corporation organized in Illinois, and ANRC is a non-profit corporation chartered by Act of Congress. AABB institutional members and ANRC together provide approximately 90% of the blood required in the United States by almost 3,000,000 patients each year. AABB, ANRC and the Council of Community Blood Centers ("CCBC") -- comprised of certain large community blood banks, including respondent (which is also an AABB institutional member) -- are dedicated to the

provision of blood by volunteer donors, and cooperate in numerous scientific, administrative, and other blood banking activities.

Tremendous national concern about the potential consequences of this Court's ruling compel amici's appearance. This Court is asked to consider the protected rights of the individuals who voluntarily serve as blood donors. Furthermore, this Court should consider the public's overwhelming interest in maintaining a blood supply which depends entirely on the continued willingness of individuals to donate blood for transfusion without compensation or reward. This is the first instance in which an appellate court has been asked to focus upon the unique characteristics of the modern American blood banking system. Amici desire to present information which bears upon this Court's consideration of this vital activity. We ask the Court to consider the consequences to society if the privacy of the approximately 12,000,000 individuals who voluntarily donate their blood each year cannot be maintained.

III. ARGUMENT

A. Evolution and Definition of Blood Banking.

Blood banks did not exist before World War II. The demand for blood, experience in collection and transfusion, and accompanying technological advances prompted the formation of blood banks in the mid-1940s, both by local community organizations (particularly medical societies) and by the Red Cross. Before the War, transfusions were infrequent, and hospitals arranged for their own donors. Although the non-profit sector has always had primary responsibility for meeting patient needs, commercial blood banks provided a significant amount of blood for transfusion until at least the mid-1970s. Some non-profit blood banks also paid donors. By the early '70's, a strong movement had developed nationally to dispense with payment to donors. Acting in response to a 1972 directive from the President, the Secretary of Health, Education and Welfare announced a national blood policy in June 1973. The Secretary declared, in part,

> It is the policy of the United States government:
>
> (1) To encourage, foster, and support efforts designed to bring into being an all-voluntary blood donation system and to eliminate commercialism in the acquisition of whole blood and blood components for transfusion purposes. The ultimate aims of this policy are improvement in the quality of the supply and blood products and development of an appropriate ethical climate for the increasing use of human tissues for therapeutic medical purposes.

Today, it is estimated that paid donors provide less than one percent of all blood transfused. For practical purposes, and particularly because of the efforts of all three Amici organizations, America now has an all-volunteer blood supply. Those entities which pay donors are almost exclusively commercial concerns engaged in plasmapheresis and activities supplying material needed for the preparation of pharmaceutical products and test reagents. The case which is presented to this Court seeks information about the donation of blood by volunteer donors, for transfusion to ill and injured patients.

Blood banking is therefore a unique activity. The organizations which supply blood for transfusion are almost exclusively non-profit. These blood banks, in turn, are wholly dependent upon the public's willingness to donate blood voluntarily, for no direct personal benefit, in time to meet patient needs. Despite scientific advances and research, there is no safe or effective substitute for human blood or its components when transfusion is required. Blood has a very limited shelf life, and it is a constant struggle to maintain necessary inventories, distributed amongst various blood types.

B. The Provision of Blood Is A Medical Activity.

In declaring the National Blood Policy, the Secretary opens with this statement:

> Blood transfusion and other forms of blood-based therapy are appropriately regarded as the earliest and presently most highly developed aspect of human tissue transplantation.

In regulating blood banks, the federal government has also expressly recognized that the activity addressed by Petitioner's request, including the selection and drawing of donors, is a medical procedure.

> 21 CFR §640.3 Suitability of donor.
>
> (a) Method of determining. The suitability of a donor as a source of Whole Blood (Human) shall be determined by a qualified physician or by persons under his supervision and trained in determining suitability. Such determination shall be made on the day of collection from the donor by means of medical history, a test for hemoglobin level, and such physical examination as appears necessary to a physician ...
>
> 21 CFR §640.4 Collection of blood.
>
> (a) Supervision. Blood shall be drawn from the donor by a qualifying physician or under his supervision by assistants trained in the procedure.

AABB's Standards for Blood Banks and Transfusion Services are recognized internationally as authoritative, and historically have been the basis for regulations adopted by both federal and state governments. These standards are the basis for the inspection and accreditation of blood banks under AABB's own

program, and are regarded as authoritative by ANRC and other blood banking organizations. The Standards state:

> All procedures and policies of the blood bank or transfusion service shall be under the direction of a licensed physician, qualified by training and/or by experience, who shall be responsible for all medical, technical and clerical services. These responsibilities shall included compliance with these standards, recruitment and selection of blood donors, and the collection, storage, processing, distribution and, where possible, transfusion of blood and blood components. The director shall be responsible for providing or obtaining adequate consultation for special problems. Special services, such as phlebotomy for autologous transfusion, or pheresis techniques and any deviation from the Standards in this book, shall be approved by the Director.

C. Donor Information Is Privileged Information, And Is Intended To Be Confidential.

The only reported decision presenting issues similar to the case at hand is Head v. Colloton, 311 N.W.2d 870 (Iowa 1983), in which the Iowa Supreme Court considered a demand for information as to a donor's identity. A leukemia victim sought disclosure of this information from a public hospital, relying upon an Iowa statute affording access to public records. Information regarding this donor had been acquired when she was typed to determine her suitability as a blood platelet donor. The same information had been transposed to a parallel file in the bone marrow transplant registry. A leukemia victim in desperate need of a bone marrow transplant learned that the registry identified a donor as suitable. The donor refused consent to disclosure of her identity by the hospital, and an action was brought to compel disclosure.

The Iowa Supreme Court's refusal to permit disclosures was predicated upon both donor privacy rights and Iowa statutes, pertaining to "hospital records and medical records of the

condition, diagnosis, care, or treatment of a patient or former patient, including outpatient." We quote the opinion at some length, because the court also defined the relationship between the donor and the recipient institution, and the responsibilities which are imposed upon that facility and the physicians who supervise it:

> We agree with plaintiff that the only hospital records made confidential by the statute are those "of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient." Four considerations influence this interpretation. One is our duty to give the exemption a narrow interpretation. Limiting the kind of hospital records subject to the exemption gives effect to this duty. Another consideration is the use of the word "outpatient" in the qualifying language. The term ordinarily means a person treated at a clinic or dispensary connected with a hospital who is not a hospital inmate. See Webster's Third New International Dictionary 1603 (1976). Use of this word would be superfluous in section 68A.7(2) unless the qualifying language modifies the term "hospital records" as well as "medical records." A third consideration is that in both ordinary and professional usage the term hospital record means the hospital's medical record relating to a patient. See E. Hayt and J. Hayt, Legal Aspects of Medical Records 1-35 (1964). A final consideration is the unlikelihood that the legislature intended to create a blanket exemption to all records of a public hospital, whether they relate to patients or not. Accordingly we conclude that the only hospital records made confidential by section 68A.2(7) are those "of the condition, diagnosis, care, or treatment of a patient or former patient, including outpatient."
>
> . . .
>
> The critical issue is whether Mrs. X was a hospital patient for purposes of section 68A.7(2) when she submitted to tissue typing as a potential platelet donor. The

ordinary meaning of the word "patient" is "a person under medical or surgical treatment." See Travelers' Insurance Co. of Hartford v. Bergeron 25 F.2d 680, 683 (8th Cir.), cert. denied, 278 U.S. 638, 49 S.Ct. 33, 73 L.Ed. 553 (1928). The word "treatment" is broad enough to embrace all steps in applying medical arts to a person. See Webster's Third International Dictionary 2435 (1976) ("treat" - "to care for (as a patient or part of the body) medically or surgically: deal with by medical or surgical means....") ("treatment" - "the action or manner treating a patient emdiall or surgically....").

The evidence show the hospital believed Mrs. X became a patient when she submitted to tissue typing. Dr. Roger Gingrich, director of the hospital's bone marrow transplant program, testified she was a patient. he said: "I would regard any person who interfaces themselves with the medical profession and out of that interaction there's biologic information obtained about the ... person, in fact to be a patient, to [have] established a doctor-patient relationship." Dr. James Armitage, former director of the unit, testified to the same effect. Although this testimony is not conclusive on the issue, it is consistent with the broad dictionary definition of the treatment concept.

It is also consistent with case law that recognizes the same duty between physician and donor as exists between physician and patient generally. See, e.g., Fleming v. Michigan Mutual Liability Co., 363 F.2d 186 (5th Cir. 1966); Bonner v. Moran, 75 App.D.C. 156, 126 F.2d 121 (1941); Smith v. Hospital Authority of Walker, Dade, and Catoosa Counties, 160 Gal.App. 387, 287 S.E.2d 99 (1981). In the Smith case the court said the relationship is the same: "Once a [blood] donor is accepted (medical reasons rule out some donors) his person is unquestionably placed under the control of the hospital personnel operating the laboratory, and he must rely on their professional skills as in any other

hospital-patient relationship."). Id. at 389-90, 287 S.E.2d at 101-02.

> Perhaps even more importantly the doctors' testimony is consistent with the reality of the situation. When a person submits to a hospital procedure, the hospital's duty should not depend on whether the procedure is for that person's benefit or the potential benefit of someone else. The fiduciary relationship is the same, and the standard of care is the same. In addition, just as with patients generally, a potential donor has a valuable right of privacy. (Emphasis added.)
>
> An individual's interest in avoiding disclosure of personal matters is constitutionally based. See Whalen v. Larsen, 260 N.W.2d 816 (Iowa 1977). A valuable part of the right of privacy is the right to avoid publicity concerning private facts. See Howard, 283 N.W.2d at 301-302. This right can be as important to a potential donor as to a person in ill health. The Hippocratic Oath makes no distinction based on how medical confidences are acquired. See Horne v. Patton, 291 Ala. 701, 708, 287 S.2d 824, 829 (1973). Nor does the American Medical Record Association make such a distinction in its model policy for maintenance of confidentiality of patient health information adopted in 1977. See 26 Medical Trial Technique Quarterly 195 (Fall 1979).
>
> The conclusion that a potential donor is a patient and should have the privacy rights of a patient is merely re-enforced by the testimony in the present record concerning the possible chilling effect of disclosure upon medical research. That evidence is not determinative of the issue.
>
> We conclude that the hospital record of Mrs. X is the hospital record of the "condition, diagnosis, care or treatment of a patient, or former patient" within the meaning of section 68A.7(2). Therefore the record is confidential.

Applying Florida's statute pertaining to patient records, FSA §455.241, it is apparent that this donor information

is confidential. "Blood banking" is a medical subspecialty recognized by the American Medical Association and the American Board of Medical Specialities. From the moment of donor selection, the records containing the information which petitioner seeks are medical records. The requirements of both law and good medical practice assign the tasks which these records document to a physician. In Alice P. v. Miami Daily News 447 So.2d 1300 (1983), it was recognized that reports by midwives attesting to activities under the supervision of a licensed physician, which could only be accomplished under such supervision, are entitled to confidentiality under §455.241, as constituting the records of a physician. The Florida Blood Transfusion Act, FSA §381.601(6)(b) expressly recognizes the privilege afforded medical information in blood bank records.

D. AIDS And Its Significance To Blood Banking

It is now known that AIDS is a major health problem, with calamitous potential. The linkage between blood and AIDS presents blood banks with both scientific and pragmatic problems. The scientific issues were identified first. The practical problems which confront blood banks became manifest by mid-1984, at about the time the subpoena which petitioner seeks to enforce was served.

AIDS was virtually unknown before mid-1981, when the Centers for Disease Control published reports which first alerted investigators to the apparent existence of a new disease. The scientific community, including the Amici organizations, tried to establish the nature of the disease, and the method of transmission. Even before it was determined that AIDS could be transmitted through blood transfusion, the Amici organizations (and later the federal government) took steps to avert the risk. On January 13, 1983, the American Association of Blood banks, the American Red Cross and the Council of Community Blood Centers issued a joint statement, recommending measures to avoid the collection of blood from individuals or groups apparently at

risk for AIDS. In March, 1983, the U.S. Public Health Service made similar recommendations, and later in the same month, the Food & Drug Administration required blood banks to implement the programs previously recommended by Amici organizations. These efforts to screen out donors in AIDS high risk groups, and increasing attention to the AIDS problem generally, began to worry the public. Concern was not limited to chances of receiving AIDS through a transfusion. Blood donors -- and potential donors -- worried about contracting AIDS if they gave blood. A survey commissioned by the American Association of Blood banks and conducted by Dominion Research Corporation, was completed in March, 1984. That survey revealed that 36% of representative individuals questioned believed they could get a disease by donating blood, with 47.3% of this number saying explicitly that they believed they could get AIDS by donating blood.

On the scientific front, AIDS' probable cause was identified in April, 1984. Health & Human Services secretary Margaret Heckler announced at an April 23 press conference that the "probable cause of AIDS has been found - a variant of a known human cancer virus called HTLV-III." The identification of this virus finally ended speculation as to the transmissibility of AIDS through blood transfusion. The incidence of such transmission, incidentally, was very low. Only 40 cases had been identified as likely to have been due to blood transfusion, as of January 1, 1984. However, the incubation period may be quite long. We do not know how many cases of transfusion-related AIDS may arise. However, HTLV-III screening tests were licensed by the FDA in March, 1985. In subsequent months, the nation's blood banks have instituted HTLV-III testing. As a result, Secretary Heckler announced on July 31, 1985 that the nation's blood supply is believed to be AIDS-free. While we hope this is indeed the case, it will be some time before information is available to support a firm conclusion. We will for some time be confronted by AIDS cases attributed to transfusions before the HTLV-III test

become available. Additionally, there is still much to be learned about the AIDS disease itself.

The importance of protecting the privacy of donor information does not depend upon the AIDS problem, but the AIDS issue does make this a more crucial matter. By June, 1984, when the subpoena before the court was served, blood banks recognized that their donor records and the confidentiality of those records had taken on a new dimension. By the time this subpoena was served, it had become apparent that the disclosure of donor information in any context involving AIDS could be extremely damaging to the individual donor. Furthermore, it had become apparent that donors -- and prospective donors -- had new attitudes regarding blood donation. Irrational fear about contracting AIDS was already a problem. If donors are also given reason to believe that their voluntary donation invites a third party's inquiry into such intimate matters as medical history and sexual contacts, the prospects are devastating. Much of the blood which is drawn is obtained by blood drives in "mini-communities" such as businesses, factories, colleges, churches, etc. These donors talk to each other. Invasions of privacy will become known.

E. The Donor's Protected Right Of Privacy Precludes Disclosure

The question certified to this Court distinguishes between the donor's interests and the interests of blood banks and society. We regard the interest of blood banks and society as synonymous. The disclosure which plaintiff seeks should be denied on grounds of both donor interests and societal interests. We will first address the protected interests of donors.

As the recipient of donor confidences and the custodian of donor records containing those confidences, the blood bank is obligated to assert the donor's right of privacy in opposition to the request for discovery. Even if the blood bank were not

subject to the obligations of the physician-patient privilege recognized in Head, supra, the blood bank would have standing to assert the donor's privacy rights, for the same reason that Westinghouse Electric Corporation had standing to assert employee privacy rights in United States of America v. Westinghouse Electric Corporation, 638 F.2d 570 (1980). Failure to comply with a subpoena would subject it to the penalty of a contempt sanction. Furthermore, it has an ongoing relationship with its donors (upon which it depends) and the blood bank would be adversely affected by an adverse decision on the merits of the constitutional claim regarding the donor's right to privacy: not only would the flow of medical information be affected (as in Westinghouse), but the flow of donors would be affected. As a practical matter, the blood bank is the only party in a position to raise the privacy claim.

1. Personal injury plaintiffs are routinely denied access to nonparty medical records

Personal injury plaintiffs are routinely denied access to medical records or information pertaining to third parties, even though that information may have some pertinence to the personal injury suit. See, for example, Marcus v. Superior Court, 18 Cal.App.3d 22 (1971); Boddy v. Parker, 358 N.Y.S.2d 218 (1974), Parkson v. Central DuPage Hospital, 435 N.E.2d 140 (Ill. 1982), City of Edmond v. Parr, 587 P.2d 56 (Okla. 1978) and Tucson Medical Center, Inc. v. Rowles, 520 P.2d 518 (Ariz. 1974). In some cases, information has been provided under circumstances which precluded identification of individual patients: Community Hospital Association v. District Court, 570 P.2d 243 (Colo. 1977), Osterman v. Ehrenworth, 256 A.2d 123 (N.J. 1969) and Gourdine v. Phelps Memorial Hospital, 363 N.Y.S.2d 316 (1972) are illustrative cases.

Plaintiff apparently contends that this case is different, because Rasmussen "has a direct physical link to a person whose name he is attempting to discover", (amended brief

p. 2). The brief is crafted to suggest that all Rasmussen wants are the names and addresses of 51 donors. However, nowhere does Rasmussen say that this is all he wants. In fact, names and addresses alone are unlikely to be of value to Rasmussen.

What Rasmussen wants is "the ability to reasonably discover the source of his affliction." (Amended Brief, P.67.) Donor identities alone will not suffice. A logical inquiry must include the review of the medical records maintained by the blood bank, particularly those records dealing with the donor's medical history. Presumably these medical histories and other records of the screening process will not identify any donor as a potential source of AIDS. Were this the case, the blood would not have been transfused.

Since blood bank records are unlikely to provide definitive information, Rasmussen would logically proceed to investigate or depose the donors. Since the matter at issue is the possibility that a given donor may have transmitted AIDS, Rasmussen would presumably inquire into the donor's sexual orientation or contacts; spousal relationships; and the donor's complete medical history. Rasmussen may also want to force the donor to provide a blood specimen, to be tested under the now available test for the antibody to the HTLV-III virus.

2. Constitutionally protected privacy rights are violated by the mere disclosure of identity, as well as by any subsequent disclosure which Rasmussen is likely to require.

The constitutionally protected "zone of privacy" has most often been discussed in cases which involve governmental efforts to obtain otherwise confidential information, where privacy rights were measured against regulatory schemes required for public purposes. Even though this case does not rise to such a level, the privacy cases involving governmental regulation are instructive.

Whalen v. Roe, 429 U.S. 589 (1977) still the leading case, characterized cases protecting "privacy" as involving

either the individual interest in avoiding disclosure of personal matters, or the interest in independence in making certain important decisions. Whalen was analyzed in Lora v. Board of Ed. of City of New York, 74 F.R.D. 565 (1977), which is regularly cited when privacy rights are discussed. Lora, interestingly, required the court to balance privacy rights of emotionally handicapped children in diagnostic and referral files, despite the fact that it was stipulated that names and identifying data would first be redacted. The Lora discussion (579 et seq.) points out that it is not the disclosure of embarrassing or damaging information which is usually objectionable, but "rather the concomitant disclosure of identifying data", noting that "This desire of the individual to prevent disclosure of his identity in a damaging context has been protected under the federal statutory and case law". (580)

By the very nature of the case before this court, the disclosure of donor identities is disclosure in a damaging context. Rasmussen had AIDS. AIDS could have been transmitted by blood transfusion. Fifty-one individuals provided the blood that Rasmussen received. Arguably, any of these persons may have transmitted the AIDS. In Marcus v. Superior Court, supra the requested disclosure was the identity of patients who had received a specified test. In denying discovery, the court recognized that "the disclosure of patient's name does not necessarily violate the privilege ... In the case at bench, it is not merely the disclosure of the name and address, but the joining of that information with the limitation in the question that these were patients who had received the specified tests". The joinder which immediately occurs if disclosure of donor identities is permitted is joinder with the supposition that the donor -- until eliminated -- either has AIDS or is a person who can transmit AIDS. As we are seeing in repeated cases where children with AIDS seek to attend school, identification as an AIDS patient has devastating results. Identification as a person who can transmit AIDS has the same consequences, and further

infers a sexual orientation which a significant segment of the public finds offensive.

Even though this linkage is merely speculative, the damage is done. The donor cannot rid himself of the albatross which has been hung upon him without surrendering both categories of protected privacy rights. Protected personal information regarding medical care and history and sexual conduct, including information about the marriage relationship, must be surrendered. Furthermore, the donor may conclude that he or she has little choice but to submit to the HTLV-III test, to dispel the accusation. In this event, the donor surrenders independence in making an important decision. Although Dullus v. Quan Yoke Fong, 237 F.2d 496 (1956) applied federal discovery rules in denying a request that a nonparty submit to a blood test, it is equally true that privacy rights lead to the conclusion that "The court has no jurisdiction to compel a person not a party to the action to yield his body to the invasion of a physician's instruments." 499. If donor identities are disclosed, 51 donors face Catch-22: They can assert privacy rights in refusing demands for further disclosures, thereby exposing themselves to extremely harmful conjecture by relatives, friends and the public at large, or they can seek to prove that they were not responsible for Rasmussen's affliction by surrendering rights which have constitutional protection. The damage is done as soon as identities are disclosed. We emphasize that the blood bank is not being sued. The question before the court is not a request for information about the process utilized by the blood bank in the screening of donors. It is a request for "names and addresses of the blood donors". If Rasmussen were interested in information about donor selection, that information could be provided following the examples in cases cited above, where patient identities are protected.

"Rasmussen states that "In litigation concerning diseases other than AIDS acquired through blood transfusions, blood donor confidentiality has apparently not been granted blood banks" (Amended Brief, pg.8.), citing three cases: Tufaro v.

Methodist Hospital, Inc., 368 S.2d 1219 (LA Ct.App.1979); Moore v. Underwood Mem. Hosp., 371 A.2d 105 (1979); and Gilmore v. St. Anthony Hospital, 598 P.2d 1200 (1979). We suggest that AIDS cases are distinguishable because of the particularly "damaging context" of the disclosure. Furthermore, all three cases were suits against blood banks. Most importantly, all three cases involved paid donors, not voluntary donors. The last point is crucial: protecting the privacy of volunteer donors, who have different motivations and reasonable expectations in donating blood, is vital to maintenance of the volunteer system which has replaced the system which existed when these cases were decided.

F. The Interests of the Blood Bank and Society Warrant Maintenance of Confidentiality.

Rasmussen contends that the blood bank's need to maintain confidentiality of donor identities is outweighed by his need for names and addresses. This court must weigh these conflicting needs. Professor Wigmore has set forth four conditions necessary to the establishment of a privilege against the disclosure of communications. They are: (1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship should be one that society considers worthy of being fostered; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. 8 J. Wigmore, Evidence §2285 at 527 (McNaughton rev. 1961), as cited in IN RE DOE, 711 F.2d 1187, 1193 (1983). The right of confidentiality asserted by the blood bank meets these tests.

1. Donor communications are made in the belief that they will not be disclosed.

We have already described the donor selection process, and its status as a medical procedure. It is disingenuous to pretend that Rasmussen will not extend his inquiry further.

Rasmussen argues that donors did not expect confidentiality, saying that "each donor voluntarily submitted his name and address to the South Florida Blood Service without reliance or apparent concern with anonymity" (Amended Brief, p. 12). As discussed supra, the donor's expectation with respect to privacy includes two components, donor identity and linkage with potentially embarrassing and damaging information. Rasmussen is not simply seeking the identities of all South Florida Blood Bank donors. He is seeking the identities of donors who may ultimately be linked to the transmission of AIDS. The individuals who voluntarily donate their blood for the benefit of others should reasonably expect that the blood bank will not disclose their identities in a context which exposes them to embarrassment and the prospect of public rejection.

2. Confidentiality is essential to the maintenance of the relationship between the blood bank and voluntary donors

Confidentiality is essential to the maintenance of this relationship because blood banks depending upon volunteers to meet community needs cannot reasonably expect donors to subject themselves to the processes which are likely to follow if Rasmussen is given donor identities. Although seventy percent of the population require blood during their lifetime, only five percent of the eligible public presently volunteer their blood. If these donors are to be penalized by potential embarrassment, or the uncertainties or accusations which Rasmussen's inquiry may predictably prompt, the price of this community service is too great.

3. The relationship between South Florida Blood Service and its donors is worthy of societal protection.

As the National Blood Policy made clear more than a decade ago, it is imperative that America's blood needs be meet

by an all volunteer system. That system now exists. Paid donors have been eliminated. The system is maintained by non-profit organizations, including Amici and their members such as South Florida Blood Service. These non-profit blood banks, in turn, can exist only in symbiotic relationship with the public in the communities they serve. The nation's blood banks depend upon a relationship of trust with the nation's blood donors. The destruction of that relationship in any significant degree will seriously impair the ability of Amici to meet patient needs.

4. The injury caused by disclosure of identities is disproportionate to Rasmussen's benefit.

The disclosure of donor identities to Rasmussen will not of itself permit him to identify any donor as an individual responsible for the transmission of AIDS. Rasmussen must go further with his inquiry, and even then his chances of identifying a donor as potentially responsible are problematical, particularly if donor rights are to be protected at all. On the one hand, we weigh the interests of 51 individuals who provided the blood which saved Rasmussen's life, and the interests of all patients who depend upon the existing system to provide volunteer donors to provide the blood they will need. In this case of first impression, the court's decision in the balancing of these interests will have national significance. Despite Wigmore's recognition that the public has a right to everyone's evidence, the benefit to Rasmussen if identities are disclosed is at the expense of patients with equal claim who may die not from AIDS, but from the lack of blood when it is needed. It is difficult enough to maintain a supply when donors fear that giving blood may cause AIDS. It may become impossible when the privacy of donors who have given is stripped from them.

IV. CONCLUSION

The case before this Court is limited to the request of a personal injury plaintiff, suing the driver who hurt him, for the names and addresses of the donors who gave the blood which saved his life. Although the Rasmussen brief (page 9) suggests "a self-motivated interest" on the blood bank's part and the possibility of "a blood bank's potential total failure to screen high risk groups", this is not a suit against a blood bank. Donor identities must be protected even if the blood bank is sued, but relevant information can be provided without breaching the confidentiality of third party donors. Further, the Court is not being asked to weigh donor rights or privacy against the need for specified information in a regulatory scheme devised to protect the public against the spread of disease. If that were the case, the Court would review safeguards for the protection of information in governmental hands, and other considerations which weigh upon permissible invasion of privacy rights. The invasion of privacy rights sought by petitioner, as to donors themselves, is repugnant to constitutional principles. When societal interests are laid in the balance, plaintiff's request must be denied.

The volunteer donor system which compassionate members of the public have created, particularly in the last decade, merits that protection.

Dated: October 8, 1985

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the BRIEF OF AMICI CURIAE AMERICAN ASSOCIATION OF BLOOD BANKS AND AMERICAN NATIONAL RED CROSS was mailed to the following parties on the 9th day of October, 1985:

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