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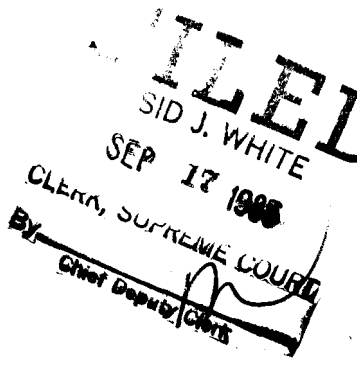

IN THE SUPREME COURT

OF FLORIDA

* * *

CASE NO. 67,081

* * *

DONALD RASMUSSEN,
Petitioner,

vs.

SOUTH FLORIDA BLOOD SERVICE, INC.,
Respondent

* * *

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

* * *

AMENDED BRIEF OF PETITIONER, DONALD RASMUSSEN

* * *

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SUMMARY OF ARGUMENT

Before this Court for review is a decision of the Third District Court of Appeals reported as South Florida Blood Service, Inc. v. Rasmussen, 467 So.2d 798 (Fla. 3d DCA 1985), which certified the following question to be of great public importance:

> "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 injuries which are the subject of his suit?"

Proposed more even-handedly the question was stated by Judge Schwartz as:

> "Whether a plaintiff who presents a colorable claim that he acquired AIDS through blood transfusions required by treatment of injuries sustained in an accident may discover the names and addresses of the blood donors in an action against the party allegedly liable for the accident?"

However phrased, the central issue presented is resolved by balancing the vital need of the petitioner in seeking discovery with the interests served by denying the discovery.

Rasmussen's need for the discovery is absolute. Defendants below will vigorously attempt to prove an alternative source of Rasmussen's affliction and will rely heavily on the South Florida Blood Service's voluntary statement of "fact" that none of Rasmussen's donors have become victims of AIDS. Plaintiff's primary source of contrary evidence begins with the discovery of the names and addresses of his donors.

Balanced against Rasmussen's vital need to the information in question are hypothetical results envisioned by the court below if discovery is allowed. Other blood services have voluntarily supplied to the Center for Disease Control names of donors to transfusion-AIDS victims. In litigation arising out of other diseases, names of donors have been discovered. No significant decrease in voluntary blood donation is presented by South Florida Blood Service.

In balancing Rasmussen's interests and the interests of the undisclosed donors, it should be remembered that he has a direct physical link to a person whose name he is attempting to discover. That person donated blood which caused disease and death to plaintiff below.

It must be remembered also that each donor voluntarily submitted his name and address to the South Florida Blood Service. Naturally, their rights can and should be protected from abusive discovery; but those rights have not yet been asserted, and it is premature to cut off vital discovery by hypothesizing abuse of unasserted rights.

STATEMENT OF THE CASE AND FACTS

Donald Rasmussen suffered severe personal injuries when struck by a motor vehicle on May 24, 1982. The motor vehicle in question was being driven by Leonel Monterroso and was allegedly owned by William DeLoatche.

Rasmussen at the time of this accident was a pedestrian sitting on a bus bench and Monterroso was fleeing from a prior motor vehicle accident. Rasmussen has sued DeLoatche and Monterroso for personal injuries he sustained in the subject accident.

Rasmussen was transported to St. Francis Hospital in Miami Beach, Florida, where he remained hospitalized from May 24, 1982, until October 7, 1982. While hospitalized and as a result of the injuries sustained in the accident, Rasmussen received fifty-one (51) units of blood. In July of 1983, Rasmussen was diagnosed as having Acquired Immune Deficiency Syndrome ("AIDS"), and died as a result of that disease on June 11, 1984.[1/]

In an attempt to prove the source of his disease was necessary medical treatment as a result of his personal

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1/ On October 29, 1984, B. Diane Rosch was appointed Personal Representative of the Estate of Donald Rasmussen. The Petition for Writ of Common Law Certiorari had been filed at that time. Consequently, Rasmussen's name was used throughout the opinion below to describe the party seeking discovery, and Rasmussen's name will similarly be used throughout this brief.

injuries in the subject accident, Rasmussen served respondent, South Florida Blood Service (SFBS), 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. 15-21). SFBS moved to quash the Subpoena or, alternatively, for a protective order stating that Rasmussen had failed to show good cause or justifiable reason for the discovery and claimed that its donor records were private and confidential. The motion was denied and SFBS was ordered to produce the material.

The Third District Court of Appeals granted a Petition for Certiorari to review the trial court's order and subsequently quashed the order based on a balancing of the interests of Rasmussen in access to the discovery necessary to prove his case against the alleged donors' privacy interests and society's interest in a volunteer blood donation.

ARGUMENT

I. RASMUSSEN'S INTEREST IN OBTAINING THE REQUESTED DISCOVERY IS ABSOLUTELY ESSENTIAL TO HIS SURVIVOR'S ABILITY TO RECOVER FOR HIS WRONGFUL DEATH.

Florida has long recognized that an increase or aggravation of an injury caused by the negligence, mistake, or lack of skill of medical attention given to an injured party is recoverable against the original wrongdoer and the original negligence is the proximate cause of the damage flowing from the subsequent improper treatment. J. Ray Arnold Corp. v. Richardson, 105 Fla. 204, 141 So. 133 (1932).

Full recovery for Rasmussen's death against the defendants below will, therefore, turn on the answer to a single question: What was the source of Rasmussen's AIDS? Petitioner must prove the source to be blood received at St. Francis Hospital. The court below admits in its opinion that the names and addresses of blood donors to Rasmussen are relevant and non-privileged.

The known causes of "AIDS" are varied and increasing. The majority opinion below points out that victims of "AIDS" have thus far been identified as, principally, homosexual or bisexual males with multiple sexual partners; intravenous drug users; hemophiliacs; heterosexual partners of AIDS victims; and blood transfusion recipients. If the defendants

below prove the source or Rasmussen's AIDS was anything other than the blood transfusions he received at St. Franicis Hospital, his wrongful death action will totally fail.[2/]

An in depth investigation into Rasmussen's entire life is available to the defendants below, including full discovery into Rasmussen's sexual habits, social habits, work habits and any other aspect of his life which defendants below deem possible to create a doubt as to the source of his "AIDS".

The length to which Rasmussen's personal life has been attacked is illustrated in the amicus curiae response brief filed by the Council of Community Blood Centers below. In the introduction to their response brief, they venomously state that "Plaintiff himself had a high risk of AIDS because he was a user of intravenous drugs."[3/] Presumably defendants below will launch a similar attack in defense of their clients.

The defendants below have been supplied additional ammunition in avoiding plaintiff's claims by the respondent. The SFBS apparently at some unspecified time in the past checked an unidentified list of persons whose blood was received by Rasmussen at St. Francis Hospital and have

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2/ On November 6, 1984, an Amended Complaint for Wrongful Death was filed by B. DIANE ROSCH, as Personal Representative of the Estate of DONALD RASMUSSEN, deceased, for the benefit of BLAKE NOELLE McFREDERICK-RASMUSSEN, surviving minor daughter. Blake Noelle McFrederick-Rasmussen is 3 years old and is Donald Rasmussen's sole surviving beneficiary.

3/ Amicus curiae response brief of Council of Community Blood Centers at p.1.

stated as a "fact" that none of those unidentified persons appear in lists of identified AIDS victims. This "fact" first appears as "note 1" to the amicus curiae response brief of the Council of Community Blood Centers. It apparently was adopted as "fact" by the majority opinion below when it stated:

> "First, none of the 51 donors have been identified as AIDS victims." (A. 4).

Once again, the defendants below will undoubtedly rely heavily on this "fact" at the time of the wrongful death trial and Rasmussen is denied all ability to contradict or dispute that "fact".

In order to overcome a defense built around "innuendo" concerning Rasmussen's past life and unilaterally proffered "facts" concerning the health of his blood donors, Rasmussen must have the ability to reasonably discover the source of his affliction. Denied the identity of the sources of the blood Rasmussen received, all reasonable and meaningful discovery is eliminated.

II. THE COURT BELOW BALANCED RASMUSSEN'S VITAL NEED TO THE INFORMATION IN QUESTION AGAINST HYPOTHETICAL RESULTS ENVISIONED IF DISCOVERY IS ALLOWED. THOSE HYPOTHETICAL RESULTS DO NOT JUSTIFY DENIAL OF DISCOVERY.

A. DONORS' NAMES AND ADDRESSES HAVE BEEN PRODUCED IN THE PAST.

The South Florida Blood Service and the Council of Community Blood Center claim that confidentiality of blood service records and blood donors' identities are essential if they are to maintain a voluntary blood donation system. However, neither the SFBS or the CCBC claim in either of their briefs below that they have, in fact, maintained the confidentiality of donors' identities in the past. Quite to the contrary, it appears that blood centers other than the South Florida Blood Service do, in fact, release the names and addresses of donors whose blood was supplied to transfusion AIDS victims. (A. 35).

In litigation concerning diseases other than AIDS acquired through blood transfusions, blood donor confidentiality has apparently not been granted to blood banks. In Tufaro v. Methodist Hospital, Inc., et al., 368 So.2d 1219 (La. Ct. App. 1979), plaintiff contracted malaria from blood she received in a transfusion and suit was brought for damages against a blood bank. The four donors of blood received by the plaintiff were not only identified, but two of the four testified at trial. This same donor identification has also

apparently occurred with some regularity in litigation concerning plaintiffs who suffer serum hepatitis and seek information from the donors of the blood the victims received. Moore v. Underwood Memorial Hospital, 147 N.J.Super. 252, 371 A.2d 105 (1977) and Gilmore v. St. Anthony Hospital, Okl., 598 P.2d 1200 (1979).

What motive exists for the SFBS to so violently now oppose donor identification? The answer could possibly lie in a self-motivated interest on the part of SFBS to avoid even the most reasonable and relevant questioning of donors whose blood was transferred into patients who have developed AIDS. A blood bank's potential total failure to screen high risk groups from donation by available methods would never surface if the donors' names were to become totally confidential and non-discoverable.

Setting the question of motive aside, 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 imagine such a threat? Not one fact is presented by the SFBS to support that chimerical result.

B. CASE LAW RELIED UPON BY THE MAJORITY BELOW IN BALANCING IN FAVOR OR RESPONDENT'S POSITION IS TOTALLY DISTINGUISHABLE FROM OUR PRESENT FACT SITUATION.

At the conclusion of its opinion, the majority below determined:

> "Numerous courts have found the interest in the free flow of information, ideas and advice sufficient to overcome the interest of the discovery of the reports of investigating committees and researchers."

Cases cited by the court in support of its conclusion are Andrews v. Eli Lilly & Co., 97 F.R.D. 494 (N.D. Ill. 1983); Lampshire v. Procter & Gamble Co., 94 F.R.D. 58 (N.D. Ga. 1982); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976); Dade County Medical Association v. Hlis, 372 So. 2d 117 (Fla. 3d DCA 1979) and Head v. Colloton, 331 N.W. 2d 870 (Iowa 1983).

The discovery requested by Rasmussen is different and far more directly related to the proof of Rasmussen's injuries than any of the cases cited above. A probability has been demonstrated that Rasmussen has a direct physical link to a person who donated blood which caused him disease and ultimately death. Petitioner at trial must prove to a jury the link exists or Rasmussen's wrongful death claim will fail.

To the contrary, in each and every case cited above, no

link existed between the person seeking discovery and the person whose identity was sought to be kept secret. Generally, the cases cited deal with research projects, the results of which were as a whole used as evidence against the parties seeking discovery. The subject of the research had no direct link or effect on the party seeking discovery. The discovery was sought to discredit reports or research projects.

In Andrews and Richards of Rockford actual pledges of confidentiality were made to the "donors" of information. The donors of blood to Rasmussen have voluntarily revealed their identities to the SFBS without reservation or prohibition.

In Hlis, an opinion which was written by the author of the dissent below, the party seeking discovery was a defendant in a personal injury automobile accident. The defendant was attempting to obtain records of an investigation by the Ethics Committee of the Dade County Medical Association in an apparent attempt to discredit the treating doctors of the plaintiffs in the personal injury litigaiton they were defending.

Rasmussen's discovery seeks the source of his illness and death, and his need for that information is not comparable to the factual circumstances in the cases cited above.

III. THE ALLEGED, UNEXERCISED INTERESTS OF DONORS IN SECRECY SHOULD NOT BE A BASIS OF DENIAL OF DISCOVERY.

As has been stated, each donor voluntarily submitted his name and address to the South Florida Blood Service without reliance or apparent concern with anonymity. Their rights to protection from unjustified probe or investigation can and should be fully exercised when and if the need should arise. That unexpected potentiality should not, however, terminate plaintiff's discovery with such premature finality.

The Centers for Disease Control has established a program in other areas of the country with the cooperation of blood collection centers under which the CDC conducts investigation of donors to AIDS patients with a blood transfusion history.[4/] On April 12, 1984, Gus G. Sermos, a public health advisor for the Centers for Disease Control of the Public Health Service, was deposed by counsel for the defendants below. (A. 22-51). Mr. Sermos, an epidemiologist, testified that he himself had classified Rasmussen's case as a "blood transfusion case." (A. 41). Mr. Sermos also testified that he himself has attempted to obtain the names and addresses of blood donors from whom Rasmussen received his transfusions

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4/ The initial report of this study appeared in the New England Journal of Medicine, Vol. 310, #2; January 12, 1984.

at St. Francis Hospital, but the SFBS has set complicated conditions under which they will supply the identity of Rasmussen's blood donors. (A. 34-35, 42-44).

Apparently the donors of blood to transfusion AIDS patients are being investigated in other areas of the country without the calamitous results proposed by the SFBS.

In any event, it is certainly premature at this point to hypothesize an abuse, and based upon that abuse exercise a thus far non-asserted personal right of donors.

The Amicus Curiae, the Miami Herald Publishing Company (MHPC), has provided this Court with a comprehensive argument illustrating that no constitutionally-protected disclosural privacy interest exists with respect to the information the trial court ordered produced in this matter. In its brief, MHPC details the limitations of the federal right to disclosural privacy and the absence of an applicable state constitutional right to disclosural privacy with respect to the information sought by Rasmussen. Those arguments will not be here repeated except to the extent petitioner restates that the Third District Court of Appeals erred in relying on Seattle Times Co. v. Rhinehart, __ U.S. __, 81 L.Ed. 2d 17, 104 S.Ct. 2199 (1984) which does not limit a party's right to obtain information through discovery but rather limits the timing of the dissemination of that information obtained through discovery.

CONCLUSION

Based upon the foregoing reasons, the decision of the Third District Court of Appeals should be reversed and the Circuit Court's Order ordering the production of the records and information sought should be reinstated.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the Amended Brief of Donald Rasmussen, Petitioner, was mailed to the following parties on the 16th day of September, 1985:

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