AIDS—CONFIDENTIALITY—INDIVIDUALS INFECTED WITH ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) THROUGH BLOOD TRANSFUSIONS MAY OBTAIN LIMITED DISCLOSURE OF DONOR'S IDENTITY DURING PRETRIAL DISCOVERY—*Snyder v. Mekhjian*, 125 N.J. 328, 593 A.2d 318 (1991).

I. INTRODUCTION

Since the detection of Acquired Immune Deficiency Syndrome (AIDS)[1] in 1981,[2] AIDS-related problems have presented novel issues in our nation's courts.[3] One such issue originates

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[1] Acquired Immune Deficiency Syndrome (AIDS) is defined as "the occurrence of a variety of specific infections and/or malignancies which take advantage of acquired defects in the immune system, now known to be caused by a virus named Human Immunodeficiency Virus (HIV-1) (formerly called Human T Cell Lymphotropic Virus III (HTLV III))." Allan Gibofsky & Jeffrey C. Laurence, *AIDS: Current Medical and Scientific Aspects*, 9 J. LEGAL MED. 497, 497 (1988).

To fully appreciate the complexity of the legal issues involved in a case such as Snyder v. Mekhjian, 125 N.J. 328, 593 A.2d 318 (1991) (per curiam), it is essential to have some understanding of AIDS and how it operates. AIDS is the term given to various health problems caused by the Human Immunodeficiency Virus (HIV), which destroys a person's natural immune system. Sharon L. Dieringer, Comment, *Blood Donation: A Gift of Life or a Death Sentence?*, 22 AKRON L. REV. 623, 624 (1989). An individual's immune system is situated in white blood cells called lymphocytes. *Id.* Lymphocytes are comprised of T-cells and B-cells, the white blood cells that together generate the antibody protein that detects and destroys disease-causing organisms. *Id.* HIV viral infection results in a gradual destruction of T-4 helper cells, which are necessary for proper immunological response. *Id.* This crippling effect increases the vulnerability of HIV-positive individuals to many infections or malignancies, which are referred to as opportunistic diseases. *Id.* Normally, opportunistic diseases such as pneumocystis crinii pneumonia and Kaposi's sarcoma are not a real threat to an individual's health. *Id.* These opportunistic diseases, however, become more significant to the HIV-positive person whose immune system progressively weakens. *Id.*

The fatal phase of the disease is diagnosed as AIDS. *Id.* at 625. At this stage, opportunistic diseases have overwhelmed a person's depressed immune system. *Id.* These diseases ravage the body and eventually cause the individual's death. *Id.* at 624. The life expectancy of an individual diagnosed with AIDS is approximately one year. *Id.* at 625. Ninety percent of those individuals who acquire AIDS die within two years. *Id.* Currently, there is no known cure or vaccine for the disease. *Snyder*, 125 N.J. at 331, 593 A.2d at 319. Hence, the number of individuals ultimately to be infected is incalculable. *See id.*

[2] Miriam G. Waltzer, *Acquired Immune Deficiency Syndrome and Infection with Human Immunodeficiency Virus*, 36 LOYOLA L. REV. 55, 56 (1990). Acquired Immune Deficiency Syndrome (AIDS), now frequently referred to as Human Immunodeficiency Virus (HIV), was recognized in the United States in 1981 after first being detected in Central Africa (Zaire and Uganda). *Id.*

[3] *See, e.g.*, Government of Virgin Islands v. Roberts, 756 F. Supp. 898, 904 (D.V.I. 1991) (compelling defendant to undergo a blood test to determine whether alleged rape victim was exposed to the HIV virus did not violate Fourth Amendment restraints on unreasonable searches); Doe v. Coughlin, 697 F. Supp. 1234,

when an individual contends to have contracted the HIV virus, the cause of AIDS, through a blood transfusion.[4] In this situation, the blood recipient may sue the blood bank that supplied the contaminated blood.[5] Proving the causation element often

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1243 (N.D.N.Y. 1988) (mandatory segregation of HIV-positive prisoners revealed their medical condition and thereby violated their constitutional privacy rights); Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666, 685 (1990) (a state statute which permitted HIV virus testing of persons who bit public safety employees did not violate Fourth Amendment restrictions on unreasonable searches); Phipps v. Saddleback Valley Unified School Dist., 251 Cal. Rptr. 720, 724 (1988) (affirming the issuance of a permanent injunction requiring a school district to allow an HIV-positive student to attend school); State v. Mercer, 544 A.2d 611, 618 (Conn. 1988) (holding that a criminal defendant was not deprived of a fair trial because the trial court informed prospective jurors prior to voir dire that the defendant was suffering from AIDS); R.E.G. v. L.M.G., 571 N.E.2d 298, 305-06 (Ind. Ct. App. 1991) (it is inappropriate to divide marital property unequally in favor of the wife based upon a risk that the wife may have been infected with the HIV virus by the husband); Stewart v. Stewart, 521 N.E.2d 956, 966 (Ind. Ct. App. 1988) (evidence of a father's infection with the HIV virus was inadequate to support complete termination of visitation rights); Guardianship of Anthony, 524 N.E.2d 1361, 1363-64 (Mass. 1988) (determining that a probate court exceeded its jurisdiction by ordering medical staff at a school for the mentally retarded to conduct HIV testing on residents alleged to be sexual partners); New York State School Bds. Ass'n. v. Sobol, 570 N.Y.S.2d 716, 717-18 (App. Div. 1991) (a state statute which required representatives from religious groups to be included on AIDS advisory boards did not violate the Establishment Clause of the First Amendment); Brunner v. Al Attar, 786 S.W.2d 784, 785-86 (Tex. Ct. App. 1990) (discharging an at-will employee who refused to discontinue volunteer work with an AIDS group was not improper).

[4] *See infra* note 139 (discussing the outcome in courts which have confronted pretrial discovery issues during blood transfusion-related AIDS litigation).

[5] *See generally* Harold Edgar & Hazel Sandomire, *Medical Privacy Issues in the Age of AIDS: Legislative Options*, 16 AM. J.L. & MED. 155, 202-03 (1990) (discussing disclosure of HIV-positive blood donor identities in connection with transfusion-related AIDS litigation and the blood supply system). There are numerous statutes pertaining to the liability of blood banks and other blood suppliers. Generally, these statutes restrict an individual to a negligence action while eliminating the possibility to sue on strict liability or breach of warranty theories. States that have enacted such statutes include: Alabama, ALA. CODE § 7-2-314(4) (1984); Alaska, ALASKA STAT. § 45.02.316(e) (1986); Arizona, ARIZ. REV. STAT. ANN. § 36-1151 (1986); Arkansas, ARK. CODE ANN. § 20-9-802 (Michie 1987); California, CAL. HEALTH & SAFETY CODE § 1606 (West 1990); Colorado, COLO. REV. STAT. ANN. § 13-22-104(2) (West 1989); Connecticut, CONN. GEN. STAT. ANN. § 19a-280 (West 1986); Delaware, DEL. CODE ANN. tit. 6, § 2-316(5) (1975); Florida, FLA. STAT. ANN. § 672.316(5) (West Supp. 1991); Georgia, GA. CODE ANN. § 51-1-28 (Michie 1982); Hawaii, HAW. REV. STAT. § 325-91 (1985); Idaho, IDAHO CODE § 39-3702 (Supp. 1991); Illinois, ILL. ANN. STAT. ch. 111-1/2, para. 5102 (Smith-Hurd 1988); Kansas, KAN. STAT. ANN. § 65-3701 (1985); Kentucky, KY. REV. STAT. ANN. § 139.125 (Michie 1991); Louisiana, LA. REV. STAT. ANN. § 9:2797 (West 1991); Maine, ME. REV. STAT. ANN. tit. 11, § 2-108 (West Supp. 1990); Maryland, MD. HEALTH-GEN. CODE ANN. § 18-402 (1990); Massachusetts, MASS. GEN. LAWS ANN. ch. 106, § 2-316(5) (West 1990); Michigan, MICH. COMP. LAWS ANN. § 333.9121(2) (West 1980); Minnesota, MINN. STAT. ANN. § 525.928 (West 1975); Mississippi, MISS. CODE ANN. § 41-41-1 (1981); Missouri, MO. ANN. STAT. § 431.069 (Vernon Supp.

necessitates discovering the identity of the individual who donated the contaminated blood.[6] Pursuant to discovery sections of the Federal Rules of Civil Procedure[7] or parallel state procedural rules,[8] the blood recipient can move to acquire this information.[9] A court confronted with such a motion will have to

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1991); Montana, MONT. CODE ANN. §§ 50-33-102 to -104 (1991); Nebraska, NEB. REV. STAT. § 71-4001 (1990); Nevada, NEV. REV. STAT. ANN. § 460.010 (Michie 1986); North Dakota, N.D. CENT. CODE § 41-02-33(3)(d) (1983); Ohio, OHIO REV. CODE ANN. § 2108.11 (Anderson 1990); Oklahoma, OKLA. STAT. ANN. tit. 63, § 2151 (West 1984); Oregon, OR. REV. STAT. § 97.300 (1989); Pennsylvania, 42 PA. CONS. STAT. ANN. § 8333 (1982); Rhode Island, R.I. GEN. LAWS § 23-17-30 (1989); South Carolina, S.C. CODE ANN. § 44-43-10 (Law. Co-op. 1985); South Dakota, S.D. CODIFIED LAWS ANN. § 57A-2-315.1 (1988); Tennessee, TENN. CODE ANN. § 47-2-316(5) (1979); Texas, TEX. CIV. PRAC. & REM. CODE ANN. § 77.003 (West 1986); Utah, UTAH CODE ANN. § 26-31-1 (1989); Virginia, VA. CODE ANN. § 32.1-297 (Michie 1985); Washington, WASH. REV. CODE ANN. § 70.54.120 (West 1975); West Virginia, W. VA. CODE § 16-23-1 (1985); Wisconsin, WIS. STAT. ANN. § 146.31(2) (West 1989); Wyoming, WYO. STAT. § 35-5-110 (1977).

6 *See* Boutte v. Blood Systems, Inc., 127 F.R.D. 122, 125 (W.D. La. 1989) (discovery relating to blood donor was necessary to ascertain whether blood screening procedures were adhered to in support of the claim); Belle Bonfiles Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1013 (Colo. 1988) (holding it is necessary for the plaintiff to gain information from the blood donor to prosecute claim); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (ordering discovery from blood donor to learn whether donor screening safeguards were performed by blood bank), *appeal granted*, 577 A.2d 890 (1990).

7 FED. R. CIV. P. 26-37.

8 *See* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 29 (1984) ("Most states . . . have adopted discovery provisions modeled on Rules 26 through 37 of the Federal Rules of Civil Procedure."). *See, e.g.*, CAL. CIV. PROC. CODE §§ 2016 to 2036 (West 1983); KY. R. CIV. P. 26.01-37.04; PA. R. CIV. P. 4003.1-4012; VT. R. CIV. P. 26-37. *See infra* note 37 (stating that the New Jersey rule covering scope of discovery contains the same text as the federal rule).

9 *See* Edgar & Sandomire, *supra* note 5, at 163-73. In part because most states have enacted statutes which provide for the confidentiality of medical records pertaining to contagious diseases, sexually transmitted diseases, or AIDS patients, blood-gathering organizations will oppose releasing information concerning the blood donor's identity. *Id.* These states include: Alabama, ALA. CODE § 22-11A-54 (Supp. 1991); Arizona, ARIZ. REV. STAT. ANN. § 36-664 (Supp. 1991); Arkansas, ARK. CODE ANN. § 20-15-904 (Michie Supp. 1991); California, CAL. HEALTH & SAFETY CODE § 199.20 (West 1990); Colorado, COLO. REV. STAT. ANN. § 25-4-1404(3) (West Supp. 1991); Connecticut, CONN. GEN. STAT. ANN. § 19a-583 (West Supp. 1991); Delaware, DEL. CODE ANN. tit. 16, § 1203 (Supp. 1990); Florida, FLA. STAT. ANN. §§ 381.609(3)(d), (f), (g) (West Supp. 1991); Georgia, GA. CODE ANN. § 24-9-40.1 (Michie Supp. 1991); Hawaii, HAW. REV. STAT. § 325-101 (Supp. 1990); Idaho, IDAHO CODE §§ 39-606, 39-610 (Supp. 1991); Illinois, ILL. ANN. STAT. ch. 111 1/2, para. 7309 (Smith-Hurd Supp. 1991); Indiana, IND. CODE ANN. § 16-1-9.5-7 (West 1992); Iowa, IOWA CODE ANN. §§ 141.10, 141.23 (West 1989 & Supp. 1991); Kansas, KAN. STAT. ANN. §§ 65-6003, 65-6004 (Supp. 1990); Kentucky, KY. REV. STAT. ANN. § 214.420 (Michie 1991); Louisiana, LA. REV. STAT. ANN. §§ 1062.1(C), 1065(A) (West Supp. 1992); Maine, ME. REV. STAT. ANN. tit. 22, § 1032 (West 1980); Maryland, MD. HEALTH-GEN. CODE ANN. § 18-338.1(h) (Supp. 1991); Massachusetts, MASS. GEN. LAWS ANN. ch. 111, § 70F (West Supp. 1991);

consider statutory limitations, general public policy concerns and constitutional privacy rights in making its decision.[10]

Recently, in *Snyder v. Mekhjian*,[11] the New Jersey Supreme Court determined whether a medical patient who receives HIV-positive blood from a transfusion could acquire limited discovery of the donor's identity in a negligence suit against the blood bank.[12] Specifically, the court considered whether section 26:5C-9(a) of the AIDS Assistance Act of New Jersey,[13] which allows disclosure in narrow circumstances, applied and whether it in-

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Michigan, MICH. COMP. LAWS ANN. § 333.5131 (West Supp. 1991); Minnesota, MINN. STAT. ANN. § 144.658 (West 1989); Missouri, MO. ANN. STAT. § 191.656 (Vernon Supp. 1992); Montana, MONT. CODE ANN. § 50-16-1009 (1991); Nebraska, NEB. REV. STAT. 71-503.01 (Supp. 1991); Nevada, NEV. REV. STAT. ANN. § 441A.220 (Michie 1991); New Hampshire, N.H. REV. STAT. ANN. § 141-F:8 (1990); New Jersey, N.J. STAT. ANN. § 26:5C-7 (West Supp. 1991); New Mexico, N.M. STAT. ANN. § 24-2B-6 (Michie Supp. 1991); New York, N.Y. PUB. HEALTH LAW § 2782 (McKinney Supp. 1992); North Carolina, N.C. GEN. STAT. § 130A-143 (1989); North Dakota, N.D. CENT. CODE § 23-07-02.2 (1991); Ohio, OHIO REV. CODE ANN. § 3701.243 (Anderson Supp. 1990); Oklahoma, OKLA. STAT. ANN. tit. 63, § 1-502.2 (West Supp. 1992); Pennsylvania, PA. STAT. ANN. tit. 35, § 7607 (Supp. 1991); Rhode Island, R.I. GEN. LAWS § 23-6-17 (1991); South Carolina, S.C. CODE ANN. § 44-29-135 (Law. Co-op. 1985); South Dakota, S.D. CODIFIED LAWS ANN. § 23A-35B-5 (Supp. 1991); Tennessee, TENN. CODE ANN. § 68-10-113 (Supp. 1991); Texas, TEX. HEALTH & SAFETY CODE ANN. § 81.103 (West Supp. 1992); Utah, UTAH CODE ANN. § 26-6-20.5 (Supp. 1991); Vermont, VT. STAT. ANN. tit. 12, § 1705 (Supp. 1991); Virginia, VA. CODE ANN. § 32.1-36.1 (Supp. 1991); Washington, WASH. REV. CODE ANN. § 70.24.105 (West Supp. 1991); West Virginia, W. VA. CODE § 16-3C-3 (1991); Wisconsin, WIS. STAT. ANN. §§ 146.022(3), 146.025(5) (West Supp. 1991); Wyoming, WYO. STAT. § 35-4-107 (1977).

[10] Elizabeth M. Tobin, Comment, *Confidentiality of Blood Donor Identity: Plaintiff v. National Blood Supply*, 23 SUFF. U.L. REV. 183, 185-87 (1989) (noting that the physician-patient privilege, constitutional right to privacy constraints and society's interest in an adequate blood supply system are considerations analyzed by the courts in blood donor discovery situations).

[11] 125 N.J. 328, 593 A.2d 318 (1991) (per curiam).

[12] *Id.* at 329, 593 A.2d at 319 (Pollock, J., concurring).

[13] N.J. STAT. ANN. §§ 26:5C-1 to -14 (West 1987 & Supp. 1991). Section 26:5C-9(a) addressed disclosure of information relating to AIDS and HIV infection by court order and stated:

> The record of a person who has or is suspected of having AIDS or HIV infection may be disclosed by an order of a court of competent jurisdiction which is granted pursuant to an application showing good cause therefor. At a good cause hearing the court shall weigh the public interest and need for disclosure against the injury to the person who is the subject of the record, to the physician-patient relationship, and to the services offered by the program. Upon the granting of the order, the court, in determining the extent to which a disclosure of all or any part of a record is necessary, shall impose appropriate safeguards to prevent an unauthorized disclosure.

§ 26:5C-9(a).

fringed a blood donor's constitutional right of privacy.[14] The *Snyder* court held that under careful court supervision, limited discovery of the blood donor's identity was appropriate and did not unduly prejudice the donor's privacy rights.[15]

II. FACTUAL BACKGROUND

On August 23, 1984, William Snyder (Snyder) entered St. Joseph's Hospital in Paterson to undergo elective coronary bypass and valve replacement heart surgery.[16] Several hours after the initial surgery, Snyder developed a bleeding artery that required a second surgical procedure.[17] Because of blood loss, Snyder required a substantial blood transfusion.[18] St. Joseph's Hospital received its blood supply from the Bergen Community Blood Center (BCBC), a member of the American Association of Blood Banks (AABB).[19] Snyder recuperated successfully and St. Joseph's Hospital discharged him a few weeks later.[20]

In March 1985, a reliable test became available for the nation's blood banks to analyze donated blood for the HIV virus.[21]

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14 *Snyder*, 125 N.J. at 336, 593 A.2d at 322 (Pollock, J., concurring).

15 *Id.* at 329-30, 593 A.2d at 319 (Pollock, J., concurring). In a per curiam decision, the New Jersey Supreme Court affirmed without opinion the judgment of the New Jersey Superior Court, Appellate Division. *Id.* The supreme court indicated that its reasons were substantially the same as those articulated by Judge Pressler in Snyder v. Mekhjian, 244 N.J. Super. 281, 582 A.2d 307 (App. Div. 1990). *Snyder*, 125 N.J. at 329, 593 A.2d at 319.

16 *Mekhjian*, 244 N.J. Super. at 284, 582 A.2d at 309.

17 *Id.* at 284-85, 582 A.2d at 309. In his complaint, Snyder contended that the second operation was due to his physician's negligence in failing to properly suture an artery in the first operation. Plaintiffs' First Amended Complaint at 2-3, Snyder v. Mekhjian (No. L-37610-88) (N.J. Super. Ct. Law Div. 1989).

18 *Mekhjian*, 244 N.J. Super. at 284-85, 582 A.2d at 309. In his complaint, Snyder asserted that he experienced substantial blood loss during a six hour period between the initial heart surgery and the corrective procedure. Plaintiffs' First Amended Complaint at 3, Snyder v. Mekhjian (No. L-37610-88) (N.J. Super. Ct. Law Div. 1989).

19 *Mekhjian*, 244 N.J. Super. at 285, 582 A.2d at 309. The Bergen Community Blood Center (BCBC) is a non-profit entity that collects and distributes donated blood to area hospitals. *Id.* The American Association of Blood Banks (AABB) is a national non-profit organization which is comprised of non-profit blood banks. *Id.* AABB collects approximately one-half of the nation's donated blood, while the American Red Cross acquires the remaining half. *Id.* at 285-86, 582 A.2d at 309.

20 *Id.* at 285, 582 A.2d at 309.

21 *Id.* The enzyme-linked immunosorbent assay (ELISA) test for the HIV virus was licensed by the Food & Drug Administration in March 1985. Warren R. Janowitz, *Safety of the Blood Supply*, 9 J. LEGAL MED. 611, 613 (1988). Because the ELISA test was first used to screen blood, it was deliberately calibrated low to minimize false-negative results. Theodore M. Hammett, *HIV Antibody Testing: Procedures, Interpretation, and Reliability of Results*, NAT'L INST. OF JUST., AIDS BULL. (U.S. Dep't

After participating in a nationwide "Look Back" blood analysis program,[22] BCBC informed St. Joseph's Hospital that the donor of unit number 29FO784 currently tested positive for the HIV virus.[23] St. Joseph's Hospital subsequently examined its records and discovered that Snyder had received unit number 29FO784 blood during his operation.[24] Shortly thereafter, St. Joseph's Hospital notified Snyder's physician.[25] The physician ascertained that Snyder, now living in Florida, had tested positive for the HIV virus.[26] The physician also noted that Snyder had none of the risk factors associated with the virus.[27]

In February 1989, Snyder sued St. Joseph's Hospital, BCBC, and AABB in New Jersey Superior Court, Law Division, alleging strict liability and negligence.[28] Snyder requested production of BCBC's records pertaining to the donor of unit number 29FO784.[29] After BCBC redacted the donor's name and ad-

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of Justice, Washington, D.C.), Oct. 1988, at 4. The twice-repeated positive ELISA test results are confirmed by the Western Blot test. *Id.* The confirmatory Western Blot test is performed because the ELISA test produces a high false-positive rate. *Id.* Centers for Disease Control estimates that the ELISA test, twice performed, is more than 99% effective in screening for the HIV virus. *Id.* at 5.

22 Snyder v. Mekhjian, 125 N.J. 328, 332, 593 A.2d 318, 320 (1991) (Pollock, J., concurring). The "Look Back" program was conducted by the American Association of Blood Banks (AABB). *Id.* Under this program, blood banks were able to ascertain if individuals currently testing positive for the HIV virus had donated blood prior to March 1985. *Mekhjian*, 244 N.J. Super. at 285, 582 A.2d at 309. In cases where this occurred, the blood bank would determine which hospital received that donor's blood and would notify the hospital. *Id.*

23 *Mekhjian*, 244 N.J. Super. at 285, 582 A.2d at 309. In its letter to St. Joseph's Hospital, BCBC noted that it had supplied the infected blood to the hospital on August 23, 1984, the same day of Snyder's open heart surgery. *Id.*

24 *Id.*

25 *Id.* In its notification to Snyder's physician, St. Joseph's Hospital offered its resources for testing, as well as counselling services. *Id.* Snyder was eventually counselled by a physician in Florida. *Id.*

26 *Id.* The Centers for Disease Control encouraged all individuals who received blood transfusions prior to ELISA screening (March 1985) to be tested for the HIV virus. *Id.* Snyder tested positive and his wife and two sons tested negative. *Id.*

27 *Id.* High-risk factors include the following: homosexual or bisexual men, Haitian immigrants, intravenous drug-users, hemophiliacs, and sexual contact with other high-risk individuals. Snyder v. Mekhjian, 125 N.J. 328, 331, 593 A.2d 318, 319 (1991) (Pollock, J., concurring).

28 *Mekhjian*, 244 N.J. Super. at 285-87, 582 A.2d at 309-10. Snyder also claimed consumer fraud and sought punitive damages against BCBC and AABB because of their "knowing and irresponsible failure to protect the blood supply from AIDS contamination." *Id.* at 287, 582 A.2d at 310.

29 *Id.* The New Jersey rule of discovery governing production of documents stated in relevant part:

> (a) Scope. Any party may serve on any other party a request . . . to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents . . . ,

dress, it forwarded the records to Snyder and objected to further discovery.[30] Snyder then filed a motion to compel discovery seeking to depose and interrogate the blood donor.[31]

The trial court denied Snyder's motion.[32] On appeal, the New Jersey Superior Court, Appellate Division, reversed and remanded.[33] The appellate court held that where a litigant's dis-

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> or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of [discovery] and which are in the possession, custody or control of the party upon whom the request is served. . . .
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> (b) Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

N.J. CT. R. 4:18-1.

[30] *Snyder*, 125 N.J. at 332, 593 A.2d at 320 (Pollock, J., concurring). Among the documents provided to Snyder was a pre-screening questionnaire pertaining to a person's suitability to donate which was completed by the anonymous blood donor. Appellant's Supplemental Brief at 3, Snyder v. Mekhjian, 125 N.J. 328, 593 A.2d 318 (1991) (per curiam) (No. 32,876). Additionally, Snyder received results of all lab tests rendered on the donated blood. *Id.* Finally, Snyder obtained screening and testing procedures performed by BCBC during the time the donor gave blood. *Id.*

[31] Appellant's Supplemental Brief at 3, Snyder v. Mekhjian, 125 N.J. 328, 593 A.2d 318 (1991) (per curiam) (No. 32,876). Rule 4:18-1 provides that upon objection to discovery, "[t]he party submitting the request may move for an order under R. 4:23 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested." N.J. CT. R. 4:18-1(b).

[32] *Mekhjian*, 244 N.J. Super. at 287, 582 A.2d at 310. The trial court also dismissed all claims except the negligence claims against BCBC, AABB and the surgeons, and the punitive damage assertions against BCBC and AABB. *Id.* Additionally, the trial court held that BCBC was not immune as a non-profit corporation or association organized solely for charitable, educational, hospital or religious purposes. *Id.* (citing N.J. STAT. ANN. § 2A:53A-7 (West 1987)). The trial court further asserted that BCBC was not subject to the $10,000 damages limitation for non-profit corporations organized exclusively for hospital purposes. *Id.* (citing N.J. STAT. ANN. § 2A:53A-8 (West 1987)).

[33] *Id.* at 297, 582 A.2d at 315. The appellate court affirmed the dismissal of all strict liability claims. *Id.* Specifically, the appellate court stated that the physicians were exempt from a strict liability claim. *Id.* at 292, 582 A.2d at 313 (citing Newmark v. Gimbel's, Inc., 54 N.J. 585, 597, 258 A.2d 697, 703 (1969) (the nature, usefulness, and need of services performed by doctors precluded imposition of strict liability in tort)). The appellate court also found that St. Joseph's Hospital could not be held strictly liable. *Id.* at 292-93, 582 A.2d at 313 (citing Johnson v. Mountainside Hosp., 239 N.J. Super. 312, 321, 571 A.2d 318, 322 (App. Div. 1990) (a hospital in the business of providing health care is not subject to theories of strict liability)). The appellate division further held that strict liability was inapplicable to

covery needs were essential to the cause of action and could only be provided by the donor, limited discovery under prudent court supervision was proper and justifiable.[34] The New Jersey Supreme Court granted the defendant's motion for leave to appeal[35] and affirmed.[36]

III. THE COMPETING INTERESTS

The Federal Rules of Civil Procedure state that the scope of discovery in civil litigation covers any non-privileged matter relevant to the controversy in dispute.[37] A litigant's right to discover the identity of an HIV infected blood donor thus hinges upon balancing the interest served by the state action in compelling discovery[38] against any other competing interests.[39] These other

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BCBC. *Id.* at 291-92, 582 A.2d at 312-13 (citing Brody v. Overlook Hosp., 127 N.J. Super. 331, 340, 317 A.2d 392, 397 (App. Div. 1974) (the product a blood bank supplies is not unreasonably dangerous, especially when there is no recognized method of detecting the defect), *aff'd*, 66 N.J. 448, 332 A.2d 596 (1975)). Finally, the appellate court held that AABB could not be held strictly liable because it neither supplied nor tested blood. *Id.* at 292, 582 A.2d at 313.

[34] *Id.* at 296, 582 A.2d at 314-15.

[35] Snyder v. Mekhjian, 126 N.J. 318, 598 A.2d 879 (1991).

[36] Snyder v. Mekhjian, 125 N.J. 328, 329, 593 A.2d 318, 319 (1991) (per curiam). Justice Pollock wrote a separate concurring opinion. *Id.* at 329, 593 A.2d at 319 (Pollock, J., concurring). Justice Garibaldi wrote a dissenting opinion. *Id.* at 347, 593 A.2d at 328 (Garibaldi, J., dissenting).

[37] FED. R. CIV. P. 26. Rule 26(b), covering the scope of discovery, states in pertinent part:

> (b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
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> (1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim on defense of any other party .... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Id. Compare N.J. CT. R. 4:10-2 (containing the same text as FED. R. CIV. P. 26(b)(1) dealing with the scope of discovery). *See* Sylvia B. Pressler, *Current N.J. Court Rules* 4:10-2 cmt. 1 (1991). *See also supra* note 8 and accompanying text.

[38] *See, e.g.*, Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (a court order that compels or curtails pretrial discovery is state action and is therefore subject to constitutional limitations).

[39] Bradway v. American Nat'l Red Cross, 132 F.R.D. 78, 80 (N.D. Ga. 1990) ("[c]onsideration of a motion for a protective order always involves a balancing of one party's interest in disclosure against the opposition's desire to maintain confidentiality"); Doe v. American Red Cross, 125 F.R.D. 646, 649 (D.S.C. 1989) (in deciding whether to grant a protective order, a court must balance the competing interests involved); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1010 (Colo. 1988) (balancing test employed to decide litigant's ability to dis-

interests included the physician-patient privilege, society's interest in an adequate volunteer blood supply system, and the blood donor's right to privacy.[40]

A. The Physician-Patient Privilege

At common law, the physician-patient privilege did not exist.[41] Under most state statutes, however, the communication between a physician and patient is now privileged.[42] The rationale

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cover a blood donor's identity); Rasmussen v. South Fla. Blood Serv., 500 So.2d 533, 535 (Fla. 1987) ("the court must balance the competing interests that would be served by granting discovery or by denying it"); Doe v. University of Cincinnati, 538 N.E.2d 419, 423 (Ohio Ct. App. 1988) (court must balance the interests served by allowing discovery against any resulting harm); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (invoking a balancing test to determine whether donor discovery was proper).

[40] Richard C. Bollow & Daryl J. Lapp, *Protecting the Confidentiality of Blood Donors' Identities In AIDS Litigation*, 37 DRAKE L. REV. 343, 345 (1987) (discussing the physician-patient privilege, federal and state constitutional right to privacy constraints, and abuse-of-discovery rules as issues raised in blood donor identity challenges); Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871, 874-75 (1989) (blood donor's right to privacy and safeguarding the professional-patient relationship are values favoring the confidentiality of donor health care information); Denise C. Andresen, Note, *AIDS-Related Litigation: The Competing Interests Surrounding Discovery of Blood Donors' Identities*, 19 IND. L. REV. 561, 563 (1986) (emphasizing that a blood donor's right to privacy and society's interest in maintaining a sufficient blood supply system cannot preclude a plaintiff's right to obtain discovery); Tobin, *supra* note 10, at 185-87. *See also infra* note 139.

[41] 8 JOHN H. WIGMORE, EVIDENCE § 2380 at 818-19 (John T. McNaughton rev. ed. 1961).

[42] *Id.* at 820-28. The following states have adopted a physician-patient privilege: Alaska, ALASKA R. EVID. 504; Arizona, ARIZ. REV. STAT. ANN. § 12-2235 (1982); Arkansas, ARK. R. EVID. 503; California, CAL. EVID. CODE § 992 (West 1966); Colorado, COLO. REV. STAT. ANN. § 13-90-107 (West 1989); Connecticut, CONN. GEN. STAT. ANN. § 52-146*o* (West 1960); Delaware, DEL. UNIF. R. EVID. 503; District of Columbia, D.C. CODE ANN. § 14-307 (1989); Florida, FLA. STAT. ANN. § 455.241(2) (West 1991); Georgia, GA. CODE ANN. § 24-9-40 (Michie 1982); Hawaii, HAW. R. EVID. 504; Idaho, IDAHO CODE § 9-203(4) (1990); Illinois, ILL. ANN. STAT. ch. 110, para. 8-802 (Smith-Hurd 1984); Indiana, IND. CODE ANN. § 34-1-14-5 (West 1983); Iowa, IOWA CODE ANN. § 622.10 (West 1950); Kansas, KAN. STAT. ANN. § 60-427 (1983); Louisiana, LA. REV. STAT. ANN. § 13:3734(B) (West 1991); Maine, ME. R. EVID. 503; Maryland, MD. HEALTH-GEN. CODE ANN. § 19-344(g) (1990); Massachusetts, MASS. GEN. LAWS ANN. ch. 112, § 12g (West 1983); Michigan, MICH. COMP. LAWS ANN. § 600.2157 (West 1986); Minnesota, MINN. STAT. ANN. § 595.02(1)(d) (West 1988); Mississippi, MISS. CODE ANN. § 13-1-21 (1972); Missouri, MO. ANN. STAT. § 491.060(5) (Vernon 1952); Montana, MONT. CODE ANN. § 26-1-805 (1991); Nebraska, NEB. REV. STAT. § 27-504 (1989); Nevada, NEV. REV. STAT. ANN. §§ 49.215-.245 (Michie 1986); New Hampshire, N.H. REV. STAT. ANN. § 329:26 (1984); New Jersey, N.J. STAT. ANN. § 2A:84A-22.2 (West 1976); New York, N.Y. CIV. PRAC. L. & R. 4504(a) (McKinney Supp. 1991); North Carolina, N.C. GEN. STAT. § 8-53 (1986); North Dakota, N.D. R. EVID. 503; Ohio, OHIO REV. CODE ANN.

for the privilege is typically stated as the encouragement of open communication between the physician and patient to disclose all information which may be helpful for the person's diagnosis and treatment.[43] Because the privilege can impede discovery, statutes and judicial interpretation generally limit its scope to situations where the patient is seeking diagnosis and treatment.[44]

In *Krygier v. Airweld, Inc.*,[45] a New York Supreme Court addressed application of its physician-patient privilege statute[46] to the discovery of an alleged HIV-positive blood donor's identity.[47] In *Krygier*, the deceased plaintiff's estate brought a wrongful death action against a blood bank, claiming that the decedent's transfusion resulted in his contracting the HIV virus.[48] In reaching its decision, the *Krygier* court asserted that society had a strong interest in the continuous exchange of information between the physician and patient because it helped ensure effective diagnosis and treatment.[49] The *Krygier* court also recognized

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§ 2317.02(B)(1) (Anderson 1991); Oklahoma, OKLA. STAT. ANN. tit. 12 § 2503 (West 1980); Oregon, OR. REV. STAT. ANN. § 40.235 (1989); Pennsylvania, 42 PA. CONS. STAT. ANN. § 5929 (1982); Rhode Island, R.I. GEN. LAWS. § 5-37.3-4 (Supp. 1991); South Dakota, S.D. CODIFIED LAWS ANN. §§ 19-13-6 to -7 (1987); Texas, TEX. REV. CIV. STAT. ANN. art. 4495b § 5.08 (West Supp. 1991); Utah, UTAH CODE ANN. § 78-24-8(4) (1987); Virginia, VA. CODE ANN. § 8.01-399 (Michie 1984): Washington, WASH. REV. CODE. ANN. § 5.60.060(4) (West 1963); Wisconsin, WIS. STAT. ANN. § 905.04 (West 1975); Wyoming, WYO. STAT. § 1-12-101(a)(i) (1977).

Under Federal Rule of Evidence 501, federal courts will apply the relevant state law governing evidentiary privileges. FED. R. EVID. 501.

43 EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 98, at 244 (3d ed. 1984).

44 *See, Developments In The Law-Privileged Communications*, 98 Harv. L. Rev. 1450, 1532-39 (1985) (discussing the history and scope of the physician-patient privilege); United States v. Nixon, 418 U.S. 683, 710 (1974) ("Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for the truth.").

45 520 N.Y.S.2d 475 (Sup. Ct. 1987).

46 N.Y. CIV. PRAC. L. & R. 4504(a) (McKinney Supp. 1991). The relevant portion of the New York statute states:

> (a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

Id.

47 *Krygier*, 520 N.Y.S.2d at 476.

48 *Id.* at 476. The decedent entered the hospital after being severely burned in an explosion. *Id.* In the course of treatment, the decedent received twenty-one units of blood. *Id.* Plaintiff alleged that death resulted from complications associated with AIDS. *Id.*

49 *Id.* (citing Greene v. New England Mutual Life Ins. Co., 437 N.Y.S.2d 844, 847 (Sup. Ct. 1981)).

the potential inequity of exposing a donor, who altruistically donated blood, to the embarrassment and insinuation associated with the HIV virus and AIDS.[50] Hence, the *Krygier* court held that New York's physician-patient privilege statute precluded discovery of information exchanged between blood banks and donors.[51]

Construing a similar physician-patient privilege statute,[52] the Supreme Court of Louisiana in *Laburre v. East Jefferson General Hospital*[53] analyzed facts analogous to those in *Krygier* but reached a contrary conclusion with respect to the statute.[54] In *Laburre*, the plaintiff allegedly contracted hepatitis through blood transfusions during the course of surgery.[55] During discovery among the various defendants, the blood bank refused to provide names and addresses of the blood donors.[56] The Louisiana Supreme

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[50] *Id.* at 476-77. For a discussion of the social stigma attached to the HIV virus and AIDS, *see infra* note 148.

[51] *Id.* at 476-77. The court pointed out that if the physician-patient privilege statute was inapplicable, the donor's right to privacy and society's interest in maintaining an all-volunteer blood supply system would still preclude discovery. *Id.* at 477. It should be noted that New York was the first state to adopt a physician-patient privilege statute in 1828. *See* WIGMORE, *supra* note 41, § 2380, at 819.

[52] The relevant portion of the Louisiana physician-patient privilege statute states:

> Except as hereinafter provided, in civil cases, . . . a patient or his authorized representative, has a privilege to refuse to disclose and to prevent a health care provider from disclosing any communication, wherever made, relating to any fact, statement or opinion which was necessary to enable that health care provider or any other health care provider to diagnose, treat, prescribe or act for the patient.

LA. REV. STAT. ANN. § 13:3734(B) (West 1991).

[53] 555 So.2d 1381 (La. 1990).

[54] *Id.* at 1383-84.

[55] *Id.* at 1382. Specifically, the plaintiff entered East Jefferson General Hospital and received several blood units after surgery. *Id.* Two blood units had been bought from the Blood Center of Southeast Louisiana [Blood Center] and another from Mercy Hospital. *Id.* Two months later, the plaintiff was diagnosed as having chronic non-A, non-B hepatitis. *Id.* Shortly thereafter, the plaintiff sued East Jefferson Hospital, Mercy Hospital and the Blood Center asserting strict liability. *Id.* Although the plaintiff did not contract the HIV virus, the court discussed the issues confronted when a person acquires HIV through blood transfusion administration. *See id.* at 1384-85.

[56] *Id.* at 1382. Mercy Hospital attempted to depose the Blood Center's records custodian. *Id.* Also, Mercy sent a subpoena duces tecum to the Blood Center. *Id.* After deleting blood donor names and addresses, the Blood Center forwarded donor cards and follow-up questionnaires prepared by the two donors who supplied the blood. *Id.* The Blood Center supported its opposition to discovery by asserting that the information was privileged or otherwise confidential. *Id.* Mercy then filed a motion to compel disclosure of blood donor names and addresses. *Id.* The trial court denied the motion. *Id.* After granting Mercy's application for writ to review, the court of appeals entered judgment mandating the Blood Center to reveal the

Court posited that a blood donor was not a patient seeking treatment or therapy from blood bank personnel.[57] Additionally, the supreme court emphasized that the free flow of information did not benefit the blood donor in these cases as it benefitted a patient in a physician/patient relationship; rather, it helped the recipient of the donated blood.[58] Consequently, the *Laburre* court determined that a blood donor was not shielded from discovery by the Louisiana physician-patient privilege statute.[59]

B. Societal Interest in the Blood Supply System

The primary objective of blood-gathering organizations is to ensure a safe and adequate supply of blood to society.[60] It is said that donor confidentiality effectively promotes this goal.[61] Because blood donor disclosure may disserve these interests, courts carefully scrutinize this issue in HIV infection litigation and pretrial discovery conflicts.[62]

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requested information. *Id.* at 1382-84. In its holding, the appellate court stated that the information was not privileged under Louisiana's physician-patient privilege statute, LA. REV. STAT. ANN. § 13:3734 (West 1991). *Laburre*, 555 So.2d at 1383. Further, the court of appeals opined that there was no undue harm to the public welfare by granting disclosure. *Id.* Finally, the appellate court stated that the issuance of protective orders would protect the donors' privacy rights. *Id.*

[57] *Id.* at 1384. The court defined a patient as "a person who is in need of medical care." *Id.*

[58] *Id.* The court pointed out that the legislature was better equipped to determine whether a special privilege pertaining to the exchange of information during the blood donation process was necessary. *Id.* n.4.

[59] *Id.* at 1384. The court went on to preclude discovery, however, based on a right-to-privacy analysis. *Id.* at 1384-85.

[60] *See* National Blood Policy, 39 Fed. Reg. 32,702, 32,702 (U.S. Dep't of Health, Educ. & Welfare 1974) (statement noting the policy's ultimate goals of improving the quality and the quantity of donated blood).

[61] Karen S. Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131, 161 (1986). The author noted the important role confidentiality serves in ensuring an adequate blood supply: "[c]onfidentiality . . . ensures that donors will not be deterred from donating by the possibility that information that could have a significant impact upon their employment, insurability, reputation in the community, and personal relationships will be publicly disclosed. Confidentiality thus ensures the adequacy of the nation's blood supply." *Id.* The author also made the following observations pertaining to quality:

> [E]nsuring confidentiality maintains the integrity of the health history screening process and, therefore, the safety of the blood supply, by creating an environment in which prospective donors will feel free to be completely honest and accurate about their health histories without concern that information in the health history might be disclosed to persons not connected to the donation process.

Id.

[62] *See* Coleman v. American Red Cross, 130 F.R.D. 360, 362 (E.D. Mich. 1990) ("disclosure of donors' identities could severely impair the volunteer blood sup-

A Pennsylvania court in *Taylor v. West Penn Hospital*[63] was the first to premise its holding on the effect donor discovery would have on the blood supply system.[64] In *Taylor*, the plaintiff contracted the HIV virus through blood transfusions performed in the course of open heart surgery.[65] During discovery procedures, the blood bank sought a protective order to preserve the donor's anonymity.[66] In precluding discovery, the *Taylor* court

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ply"); Boutte v. Blood Systems, Inc., 127 F.R.D. 122, 126 (W.D. La. 1989) (discounting a defendant's argument that donor discovery would rapidly destroy a blood bank's ability to collect adequate quantities of blood to meet state and national needs.); Doe v. American Red Cross Blood Serv., 125 F.R.D. 646, 653 (D.S.C. 1989) ("assurances of confidentiality play a central role in maintaining a healthy and adequate blood supply"); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1012 (Colo. 1988) (weighing society's interest both in maintaining an abundant supply of donated blood and in preserving a safe blood supply, then granting donor discovery); South Florida Blood Serv. v. Rasmussen, 467 So.2d 798, 804 (Fla. Dist. Ct. App. 1985) (confidentiality of blood donor records was essential to ensure an adequate blood supply capable of meeting society's demands), *aff'd*, 500 So.2d 533 (Fla. 1987); Laburre v. East Jefferson Gen. Hosp., 555 So.2d 1381, 1384 (La. 1990) ("fear by volunteers of being called into litigation and subjected to questioning about intimate details of their personal lives could drastically affect the supply of blood donations"); Krygier v. Airweld, Inc., 520 N.Y.S.2d 475, 477 (N.Y. Sup. Ct. 1987) (society's interest in maintaining adequate volunteer blood supplies combined with the blood bank's interest in donor anonymity outweighed the need for discovery); Doe v. University of Cincinnati, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (society's interest in the blood supply, a vital public interest, favored denying discovery); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) ("the need to protect our blood supply is a real and important concern"), *appeal granted*, 577 A.2d 891 (1990); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178, 190-91 (C.P. 1987) (society's interest in a safe and adequate blood supply prevented donor discovery); Gulf Coast Regional Blood Ctr. v. Houston, 745 S.W.2d 557, 560 (Tex. Ct. App. 1988) (holding that society's interest in the blood supply was not paramount to the plaintiff's right to blood donor discovery); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (injury to society's interest by granting a discovery order did not outweigh the plaintiff's need for information).

63 48 Pa. D. & C.3d 178 (C.P. 1987).

64 *Id.* at 186.

65 *Id.* at 178. Two months after the plaintiff's operation, the donor of the blood used during the operation donated blood once more. *Id.* This donation, however, tested HIV-positive. *Id.* The plaintiff was notified immediately and was found to test positive for the HIV virus. *Id.*

66 *Id.* at 179. The blood bank voluntarily gave the plaintiff all of the information requested except the donor's name. *Id.* The plaintiff scheduled a deposition of blood bank employees designed to discover the identity of the blood donor. *Id.* The court noted that discovering the donor's identity would permit the plaintiff to determine whether the donor was in a high risk category when the donation was made. *Id.* at 180. The court posited that if the donor was a high risk and was informed not to donate by the blood bank but did so anyway, the plaintiff would

stressed that disclosure would deter one's volition to donate.[67] First, the *Taylor* court noted that the public would hesitate to donate blood if test data could be revealed to third parties and donors could be involved in litigation.[68] Second, the *Taylor* court stressed that the possibility of disseminating information that could result in stigmatization will deter potential blood donors.[69] Thus, the *Taylor* court precluded donor discovery because of the potential chilling effect that disclosure would have on the nation's blood supply system.[70]

In *Doe v. American Red Cross Blood Services*,[71] a federal district court considered the potential effect that granting donor discov-

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probably sue the donor. *Id.* Further, the court perceived that this donor could be an important witness during the trial. *Id.* at 180-81.

To analyze the issue, the court recognized Pennsylvania's rule defining the scope of discovery. *Id.* at 181. The rule states in pertinent part:

> [A] party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, *including* the existence, description, nature, content, custody, condition and location of any books, documents, or other tangible things and the *identity and location of persons having knowledge of any discoverable matter.*

PA. R. CIV. P. 4003.1 (emphasis added).

The court, however, noted that this rule was subject to limitations set forth in PA. R. CIV. P. 4011. *Taylor*, 48 Pa. D. & C.3d at 181. Rule 4011 precludes discovery which relates to privileged matter, would be embarrassing, annoying, oppressive or cause undue expense, or is sought in bad faith. PA. R. CIV. P. 4011.

67 *Taylor*, 48 Pa. D. & C.3d at 187-88. The court began by highlighting the policy of the federal government in maintaining the confidentiality of the records of blood donors. *Id.* at 187 (citing *AIDS Issues: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 99th Cong., 1st Sess. 111-202 (1985)). *See also supra* note 60.

68 *Taylor*, 48 Pa. D. & C. 3d at 189.

69 *Id.* The court asserted that "[p]ersons who test positively for AIDS are likely to be socially ostracized and to lose their jobs if this information becomes known." *Id.*

70 *Id.* at 186. Specifically, the court justified its holding by first stating that screening mechanisms would become less effective if donors were deterred from giving complete and honest answers. *Id.* at 190. The court next articulated that possible disclosure of information to persons not connected to the blood donation process would deter people from donation. *Id.* The court also enunciated that the best strategy to combat the spread of AIDS was to encourage people most likely infected to be tested and educated about the disease. *Id.* The court charged that confidentiality was the cornerstone to this strategy. *Id.* Finally, the court stressed that prohibiting discovery did not significantly interfere with the plaintiff's cause of action. *Id.* at 191. The court stated that information already provided was enough for a jury's determination of reasonableness and compliance with blood donation screening procedures. *Id.*

71 125 F.R.D. 646 (D.S.C. 1989).

ery would have on the blood supply system.[72] In *Doe*, the plaintiff contracted the HIV virus through a blood transfusion during spleen and gall bladder surgery.[73] The plaintiff attempted to obtain the identity of the donor through written interrogatories but the Red Cross objected.[74] The *Doe* court perceived that permitting discovery of blood donors would undermine the maintenance of both the quantity and quality of the blood supply.[75] The *Doe* court initially observed that confidentiality was essential to support an all-volunteer system able to meet society's demands.[76] Next, the *Doe* court articulated that confidentiality strengthened the quality of blood supplied by enhancing the in-

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[72] *Id.* at 652-53.

[73] *Id.* at 647. The thrust of plaintiff's negligence suit focused on the procedures utilized by the American Red Cross during the blood donation in which the contaminated blood was acquired. *Id.* at 647-48. Upon reporting to a mobile Red Cross site, the donor was given a pamphlet concerning suitability to donate blood. *Id.* at 647. This pamphlet specifically detailed illnesses which could spread through blood transfusions (hepatitis and HIV). *Id.* The blood donor also completed a health history questionnaire. *Id.* at 648. The donor's questionnaire answers did not immediately disqualify him. *Id.* Next, the questionnaire was reviewed by a nurse with the donor. *Id.* During the review, the donor indicated that he had previously tested positive for the "Australian antibody." *Id.* Because of uncertainty surrounding this term, the donor was precluded from donating indefinitely pending more research. *Id.* After follow-up questions with the blood donor, research by the head nurse and head of technical services, the donor was permitted to donate several weeks later. *Id.* The donor subsequently made three donations. *Id.* The second donation infected the plaintiff and the third tested HIV-positive under the newly developed ELISA test. *Id.*

[74] *Id.* at 649 n.4. After objection, the plaintiff filed a motion to compel answers to the interrogatories or, alternatively, for a "veiled" deposition. *Id.* The Red Cross argued that discovery violated the blood donor's privacy rights under the state and federal constitutions. *Id.* at 649. The Red Cross further asserted that the information was privileged and therefore not discoverable under Rule 26(b)(1) of the Federal Rules of Civil Procedure. *Id.* Finally, the Red Cross contended that the discovery request was "unduly annoying, embarrassing, oppressive, and burdensome." *Id.* (citing FED. R. CIV. P. 26(c)).

[75] *Id.* at 652-53. As to quantity, the court cited expert testimony and other cases emphasizing that assurance of confidentiality is necessary to support a volunteer donation system capable of meeting society's demands. *Id.* at 652. As to quality, the court found that disclosure of the donor's personal history would result in an unwillingness to supply accurate information during blood screening examination. *Id.* at 653.

[76] *Id.* at 652-53 (citing Rasmussen v. South Florida Blood Serv., 500 So.2d 533 (Fla. 1987); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178 (C.P. 1987)). The court also asserted that the federal government endorsed the all-volunteer blood supply system. *Id.* at 650 (citing National Blood Policy, 39 Fed. Reg. 32,702, 32,702 (U.S. Dep't of Health, Educ. & Welfare 1974)). In announcing its National Blood Policy, the Department of Health, Education, and Welfare stated that "it is the policy of the United States Government . . . [t]o encourage, foster, and support efforts designed to bring into being an all-voluntary blood donation system." National Blood Policy, 39 Fed. Reg. at 32,702.

tegrity of information being submitted by the donor.[77] Accordingly, the *Doe* court denied discovery by finding that disclosure would destroy confidentiality and adversely affect the blood supply system.[78]

C. *Blood Donor's Right To Privacy*

The Constitution does not expressly provide for a person's right to privacy.[79] The United States Supreme Court, however, has construed at least two privacy interests in the Constitution.[80] First, an individual has a right to make certain important decisions.[81] Second, a person has a right to be free from governmental disclosure of personal matters.[82] In HIV infection-related litigation surrounding blood donor discovery, the constitutional challenge has focused upon the donor's disclosural privacy

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77 *Doe*, 125 F.R.D. at 653. The court asserted that the integrity of information concerning the donor's health history would be low if there were fear that personal aspects of one's life could be disclosed. *Id.* Also, the court noted that disclosure of a donor's health history may be made to individuals not associated with the blood donation process. *Id.* Finally, the court perceived that confidentiality encouraged those most likely to be infected with AIDS to get voluntarily tested. *Id.*

78 *Id.* at 657.

79 JOHN E. NOWACK ET AL., CONSTITUTIONAL LAW 417-18 (1978); *see also* Griswold v. Connecticut, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring) (explaining that, although the Constitution does not explicitly guarantee a right to privacy, it was nevertheless proper for the Court to recognize this right).

Although the United States Constitution does not expressly grant a person a right to privacy, it should be noted that states are free to provide for such a right in their own constitutions. *See, e.g.*, ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23; HAW. CONST. art. I, § 6; ILL. CONST. art. I, § 6; LA. CONST. art. I, § 5; MONT. CONST. art. II, § 10; S.C. CONST. art. I, § 10; WASH. CONST. art. I, § 7.

80 Whalen v. Roe, 429 U.S. 589, 598-600 (1977).

81 *Id.* at 599-600. This aspect of an individual's right to privacy has been limited to areas of fundamental importance. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (contraception); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535, 541-42 (1942) (procreation); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (child rearing and education).

82 *Whalen*, 429 U.S. at 599. In *Whalen*, a New York State statute authorized the operation of a central computer file containing names and addresses of individuals obtaining prescriptions for certain drugs in which both a lawful and an unlawful market existed. *Id.* at 591. The Court held that New York's statutory scheme did not violate any Fourteenth Amendment right or liberty interest. *Id.* at 606. Discussing the disclosural right to privacy, the Court highlighted that medical information is typically disclosed to hospital personnel, doctors, insurance companies, and other public agencies as a matter of routine administration. *Id.* at 602. The Court found that disclosure of information to state employees responsible for administration of the computer file did not amount to an improper invasion of one's privacy rights because such a situation was not distinguishable from disclosure occurring in other facets of the health care industry. *Id.*

right.[83]

In *Rasmussen v. South Florida Blood Service*,[84] the Florida Supreme Court considered whether a blood donor's privacy rights precluded discovery.[85] The plaintiff, Donald Rasmussen, received fifty-one units of blood through transfusions after being struck by an automobile while sitting on a park bench.[86] One year later, Rasmussen was diagnosed with AIDS.[87] The South Florida Blood Service objected to a subpoena duces tecum which requested all documents concerning the blood donors.[88] The Florida Supreme Court precluded discovery, basing its holding on the donor's privacy interests.[89] The court initially noted that an amendment to the state constitution expressly provided for an individual's right of privacy.[90] Construing the Florida and United States Constitutions, the court observed that when cer-

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[83] *See* Boutte v. Blood Systems, Inc., 127 F.R.D. 122, 125 (W.D. La. 1989) ("[t]he donor clearly has a privacy interest in remaining anonymous"); Rasmussen v. South Fla. Blood Serv., 500 So.2d 533, 536 (Fla. 1987) (federal and state privacy rights extend protection, under certain circumstances, against exposure of personal matters); Doe v. University of Cincinnati, 538 N.E.2d 419, 423-24 (Ohio Ct. App. 1988) (a person's concern in avoiding exposure of personal matters arises in the disclosure of information context); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 534 (Pa. Super. Ct. 1989) (one's interest in eluding disclosure of personal matters and privacy rights were implicated in exposure of medical records); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178, 185 (C.P. 1987) ("we find to be substantial the blood bank's claim that the identity of its blood donor is constitutionally protected"); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 678-79 (Tex. Ct. App. 1987) (one's right to privacy extends to medical records and disclosure of personal information).

[84] 500 So.2d 533 (Fla. 1987).

[85] *Id.* at 534.

[86] *Id.* Rasmussen sued the driver and owner of the automobile for personal injuries. *Id.*

[87] *Id.* at 534. Rasmussen died of AIDS one year after the diagnosis. *Id.* After his death, his estate proceeded with this lawsuit. *Id.* n.1.

[88] *Id.* at 534. The subpoena duces tecum requested from the South Florida Blood Service "any and all records, documents and other material indicating the names and addresses of the [51] blood donors identified on the attached records of St. Francis Hospital regarding the plaintiff herein, Donald Rasmussen." South Fla. Blood Serv. v. Rasmussen, 467 So.2d 798, 800 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So.2d 533 (Fla. 1987). The Blood Service filed a motion to quash the subpoena or grant a protective order. *Rasmussen*, 500 So.2d at 534. The motion was denied by the trial court, and an order requiring the Blood Service to disclose the requested information was made. *Id.* On certiorari review, the court of appeals reversed the trial court order. *Id.* In reaching its decision, the appellate court employed a balancing test. *Id.*

[89] *Rasmussen*, 500 So.2d at 538.

[90] *Id.* at 536. The right to privacy clause of the Florida Constitution states:

> Right of Privacy—Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to

tain personal matters are at issue, privacy rights afford protection.[91] The Florida Supreme Court stressed that the potential exposure of permitting discovery extended beyond a third party seeking information and could reach the donor's family, friends and coworkers.[92] Thus, the *Rasmussen* court held that allowing discovery impermissibly infringed upon the blood donor's privacy rights.[93]

Approximately one year later, in *Belle Bonfils Memorial Blood Center v. District Court*,[94] the Colorado Supreme Court confronted the same issue.[95] In *Belle Bonfils*, the plaintiff, K.W., received blood contaminated with the HIV virus during an emergency hysterectomy.[96] Within a year, K.W. tested HIV-positive and sought disclosure of blood donor identities after filing suit

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limit the public's right of access to public records and meetings as provided by law.

FLA. CONST. art. I, § 23.

91 *Rasmussen*, 500 So.2d at 535-36 (citations omitted). Specifically, the court referred to independence in making important decisions and avoiding disclosure of personal information. *Id.* at 535 (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)).

92 *Id.* at 537. The court found: "[i]f the requested information is released, and [the plaintiff] queries the donors' friends and fellow employees, it will be functionally impossible to prevent occasional references to AIDS." *Id.* The court explained that the impact of this exposure was magnified because of the stigma associated with AIDS. *Id.* The court enunciated that such exposure may be "extremely disruptive and even devastating to the individual donor." *Id.* For further discussion on the stigma associated with HIV and AIDS, *see infra* note 148.

93 *Rasmussen*, 500 So.2d at 537. The court acknowledged the plaintiff's need but concluded that the probative value of the information sought was low, and did not advance Rasmussen's cause of action. *Id.* at 538.

94 763 P.2d 1003 (Colo. 1988).

95 *Id.* at 1004.

96 *Id.* Specifically, K.W. gave birth in February, 1985. *Id.* One month later K.W. entered the same hospital for a postpartum hemorrhage. *Id.* During the second hospital admission, an emergency hysterectomy was performed with the aid of six units of blood supplied by the Belle Bonfils Memorial Blood Center. *Id.* One of the six units of blood was contaminated with the HIV virus. *Id.*

K.W. brought suit, contending that Belle Bonfils failed to adhere to established screening procedures before accepting the infected donor's blood. *Id.* at 1007. Belle Bonfils screening procedures primarily consisted of requiring the donor to fill out a health history questionnaire consisting of thirty yes/no inquiries. *Id.* An unsatisfactory answer to any one question would support a temporary or permanent bar from donating blood. *Id.* Belle Bonfil technicians would discuss unsatisfactory responses with the potential donor before reaching a conclusion. *Id.* The infected donor's questionnaire in the instant case indicated four unsatisfactory responses. *Id.* Specifically, the answers and follow-up questioning showed that the donor had recently taken the drug lopresser, suffered from high blood pressure, visited Germany, Denmark and Copenhagen in the past three years, and finally, had suffered from gonorrhea. *Id.*

against the blood bank.[97] Unlike the *Rasmussen* court, the Colorado Supreme Court held that K.W. was entitled to discovery from the donors.[98] The supreme court acknowledged the donor's privacy interest, especially in light of the potential humiliation and embarrassment associated with identification as an HIV carrier.[99] Nevertheless, the Colorado Supreme Court justified its holding because donor discovery was essential for K.W. to effectively litigate the claim.[100]

In *Doe v. Borough of Barrington*,[101] a New Jersey federal district court analyzed the privacy rights of an individual suffering from HIV infection.[102] In *Barrington*, while police officers searched the plaintiff's husband incident to an arrest, he exclaimed that he was HIV-positive and that the police should be careful of skin lesions.[103] Subsequent conversations involving police officers re-

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97 *Id.* at 1005. K.W. sought discovery of the identities of six blood donors and production of each donor's records. *Id.* Belle Bonfils objected, but supplied donor cards with the name, address, and other personal information redacted. *Id.* K.W. subsequently sought a court order to compel discovery, seeking blood donor identification and completed record cards. *Id.* The trial court granted K.W.'s motion to compel discovery. *Id.* Specifically, the trial court ordered Belle Bonfils to produce a completed donor card pertaining to the infected donor. *Id.* Also, the trial court order permitted K.W. to contact the donor to determine the donor's medical history. *Id.* Finally, the trial court order instructed K.W.'s attorney to maintain the confidentiality of information obtained. *Id.* Belle Bonfils then filed a petition to the Colorado Supreme Court for a rule to show cause why the information was not confidential and privileged. *Id.* at 1004.

98 *Id.* at 1013. The supreme court allowed K.W. to submit written questions to the district court clerk. *Id.* at 1014. The district court clerk would be given the name and address of the infected donor. *Id.* The court clerk would then mail the questions to the infected donor. *Id.* After the blood donor completed the questions, he would mail them back to the court clerk. *Id.* The supreme court mandated that the court clerk keep the infected donor's name and address in strictest confidence. *Id.*

99 *Id.* at 1012 n.12 (quoting Rasmussen v. South Fla. Blood Serv., 500 So.2d 533, 537 (Fla. 1987)). For further discussion concerning the stigma associated with HIV and AIDS, *see infra* note 148.

The supreme court also noted that a blood donor's name, address and telephone number are not protected by the physician-patient privilege. *Id.* at 1009 (citing COLO. REV. STAT. § 13-90-107(1)(d) (1987)). In the court's view, such information was not "acquired in attending the patient" nor was it "necessary to enable him [the physician] to prescribe or act for the patient." *Id.* (quoting COLO. REV. STAT. § 13-90-107(1)(d) (1987)).

100 *Id.* at 1013. The court recognized that the information was necessary for K.W. to determine whether screening procedures were followed from the donor's perspective. *Id.* The court stressed that K.W.'s negligence claim focused upon the contention that established screening procedures were not adhered to before accepting blood from the infected donor. *Id.* at 1007.

101 729 F. Supp. 376 (D.N.J. 1990).

102 *Id.* at 382-91.

103 *Id.* at 378. While driving through the Borough of Barrington, James Tarvis,

sulted in disclosure of the husband's identity throughout the community via word of mouth, newspaper, radio and television.[104] The plaintiff sued, claiming civil rights violations under the United States Constitution pursuant to 42 U.S.C. section 1983.[105] The district court initially acknowledged the plaintiff's constitutional right of privacy in medical information.[106] The district court determined that no compelling state interest existed to justify the government's disclosure of the plaintiff's medical condition.[107] Accordingly, the court found that disclosure of plaintiff's illness violated his right to privacy.[108]

Jane Doe, and her husband were stopped by a police officer and questioned. *Id.* The police officer arrested Jane Doe's husband and impounded the automobile; at this time, the husband stated that he tested HIV-positive. *Id.* The police later released James Tarvis and Jane Doe, but detained Doe's husband for unlawful possession of a hypodermic needle and pursuant to an Essex County burglary detainer. *Id.* Later that day, James Tarvis drove to Jane Doe's home and left his car engine running in the driveway. *Id.* Apparently, the car slipped into gear, rolled down the driveway, and crashed into a neighbor's fence. *Id.* Police arrived on the scene shortly thereafter, responding to a radio call. *Id.*

104 *Id.* at 378-79. The police told the neighbor whose fence was damaged that Doe's husband had AIDS. *Id.* at 378. The police also exclaimed that the neighbors should wash themselves with disinfectant for protection. *Id.* The neighbors became upset and contacted parents in the community because Jane Doe's four children attended the same school as their own children. *Id.* at 379. The community panicked; eleven parents removed their children from the school. *Id.* Further, the media covered the story reporting it in the local newspapers and on television. *Id.*

105 *Id.* This section provided:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

106 *Barrington*, 729 F. Supp. at 382 (citing In Re Search Warrant (Sealed), 810 F.2d 67 (3d. Cir.), *cert. denied*, 483 U.S. 1007 (1987); Trade Waste Management Ass'n, Inc. v. Hughey, 780 F.2d 221 (3d Cir. 1985); United States v. Westinghouse, 638 F.2d 570 (3d. Cir. 1980)). In asserting this, the district court opined that a person has a right to be free from disclosure of personal matters. *Id.* (citing Whalen v. Roe, 429 U.S. 589 (1977)). Accordingly, the district court found that disclosure of one's medical condition, in particular with respect to AIDS, was a personal matter. *Id.*

107 *Id.* at 385. The defendant asserted that the advice to neighbors to wash themselves was to prevent the spread of AIDS. *Id.* The district court acknowledged that while preventing the spread of AIDS was a proper state objective, it was not effectively satisfied by the officer's comments. *Id.* The district court reasoned that there was no real risk of HIV and AIDS through casual contact. *Id.* Further, scientific knowledge supporting this conclusion was available at the time of the incident. *Id.*

108 *Id.* In so holding, the district court granted summary judgment for the plaintiff. *Id.* at 378. The district court rejected various defenses raised by the police

D. *The AIDS Assistance Act*

In response to the AIDS epidemic, the New Jersey legislature promulgated the AIDS Assistance Act (Act) in 1984.[109] Like most other state legislatures, New Jersey provided guidelines for educational programs on AIDS, disclosure of AIDS case records by written consent and penalties for improper disclosure of patient medical records.[110] Moreover, the Act expressly provided for the confidentiality of AIDS case records.[111] Generally, unless written consent is obtained, or the Act explicitly permits disclosure,[112] any disclosure is improper and actionable at law.[113] Sec-

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officer and the town. *Id.* at 386-87. Specifically, the police officer claimed that the plaintiff lacked standing, that a finding of misconduct was a prerequisite to liability under § 1983, that the information was "published" when Jane Doe's husband exclaimed he had AIDS, and, finally that because no conclusive facts about AIDS existed, his warning was justified. *Id.* The town further asserted that because other municipalities did not have policies that trained police about AIDS, no obligation to institute one existed. *Id.* at 390. The town noted that no federal or state law mandated formulation of such a policy. *Id.* at 390-91.

109 N.J. STAT. ANN. §§ 26:5C-1 to 14. (West 1987 & Supp. 1991). The legislature listed its findings in a preliminary section of the Act:

> a. The effective identification, diagnosis, care and treatment of persons who have contracted acquired immune deficiency syndrome, commonly known as "AIDS," is of paramount public importance;
>
> . . . .
>
> f. People who have already been infected might not be aware of their exposure and may unknowingly infect hundreds more individuals;
>
> g. Resultantly, the outbreak of AIDS has reached alarming proportions because of its highly contagious nature with New Jersey ranking fourth in the nation of the number of reported cases.

§ 26:5C-2.

110 §§ 26:5C-1 to -14. *See* Edgar & Sandomire, *supra* note 5 (examining state legislation governing AIDS and HIV infection-related issues in medical privacy and discrimination law).

111 § 26:5C-7. The section states in part, "[a] record . . . which contains identifying information about a person who has or is suspected of having AIDS or HIV infection is confidential and shall be disclosed *only for the purposes authorized by this act*." *Id.* (emphasis added).

112 § 26:5C-8. The Act states that disclosure without prior written consent of the individual who is the subject of the record is proper:

> (1) To qualified personnel for the purpose of conducting scientific research . . . .
>
> (2) To qualified personnel for the purpose of conducting management audits, financial audits or program evaluation . . . .
>
> (3) To qualified personnel involved in medical education or in the diagnosis and treatment of the person who is the subject of the record. . . .
>
> (4) To the department as required by State or federal law.
>
> (5) As permitted by rules and regulations adopted by the commissioner for the purposes of disease prevention and control.
>
> (6) In all other instances authorized by State or federal law.

tion 26:5C-9(a) of the Act, however, provides for disclosure by court order when good cause is shown.[114] Most importantly in disclosure cases, this provision codifies a balancing test under which a court must weigh the public's interest and the moving party's need for disclosure against the physician-patient privilege and the donor's privacy interest.[115] Consequently, as AIDS related litigation increased in New Jersey, section 26:5C-9(a) provided courts with the proper analytical framework to resolve issues that arose during pretrial discovery conflicts.[116]

IV. JUDICIAL CONSTRUCTION OF SECTION 26:5C-9(a) IN *SNYDER*

It was against this backdrop of litigation, legislative pronouncement and the AIDS epidemic, that the New Jersey Supreme Court decided *Snyder v. Mekhjian*.[117] In *Snyder*, the court was summoned to decide whether section 26:5C-9(a) permitted disclosure of a donor's identity and whether the statute infringed upon a blood donor's constitutional right of privacy.[118] Several of the justices stressed the sensitivity of the issue, noting that the public interest in confidentiality and a blood donor's privacy rights were significant considerations.[119] Nevertheless, the majority held that limited access under prudent court supervision was appropriate and justified.[120]

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§ 26:5C-8(b).

113 § 26:5C-14.

114 *See supra* note 13 and accompanying text.

115 *Id.*

116 Snyder v. Mekhjian, 125 N.J. 328, 334, 593 A.2d 318, 321 (1991) (Pollock, J., concurring). Justice Pollock succinctly stated, "Unlike other courts, we have the benefit of legislative guidance." *Id.*

117 *Id.* at 329, 593 A.2d at 319.

118 *Id.* at 336, 593 A.2d at 322 (Pollock, J., concurring).

119 *Id.* at 346-47, 593 A.2d at 327-28 (Pollock, J., concurring). Justice Pollock recognized the dissent's concern that granting discovery may result in an action against the blood donor. *Id.* at 346, 593 A.2d 327 (Pollock, J., concurring). The justice, however, emphasized that attorneys for the plaintiff had denied such intentions during oral argument. *Id.* The concurring justice declared that Snyder entered the hospital for corrective heart surgery and was now HIV positive. *Id.*, 593 A.2d at 328 (Pollock, J., concurring). Justice Pollock described Snyder's situation as a living medical tragedy. *Id.*

Justice Garibaldi discussed the substantial suffering both Snyder and the blood donor had endured because of HIV infection. *Id.* at 358, 593 A.2d at 333 (Garibaldi, J., dissenting). The justice further acknowledged the "innocent" mode in which Snyder was infected. *Id.* Finally, Justice Garibaldi stressed that because of this fact-sensitivity, no rigid bright-line test was appropriate in determining when donor discovery is appropriate. *Id.*, 593 A.2d at 334. (Garibaldi, J., dissenting).

120 Snyder v. Mekhjian, 244 N.J. Super. 281, 296, 582 A.2d 307, 314-15 (App. Div. 1990) (citing Boutte v. Blood Systems, Inc., 127 F.R.D. 122 (W.D. La. 1989);

The New Jersey Supreme Court indicated in a per curiam announcement that it substantially adopted the reasoning of the New Jersey Superior Court, Appellate Division.[121] In that opinion, Judge Pressler of the appellate division first examined Snyder's need for further information.[122] The judge observed that the defendants had increased Snyder's information requirements by repeatedly denying that unit number 29FO784 was contaminated with the HIV virus.[123] Judge Pressler also highlighted that proof of BCBC's negligence hinged upon discovering whether routine examination procedures were followed.[124] Finally, the appellate court judge noted not only that Snyder's discovery needs were pertinent to the issue but that the donor himself or herself was the sole source of the information.[125]

Judge Pressler next turned to the AIDS Assistance Act[126] for guidance.[127] The judge initially recognized those provisions of the Act intended to protect donors' confidentiality while making limited information available for important scientific and health reasons.[128] The appellate court judge noted that if information could not be obtained through the specific provisions of section 26:5C-8,[129] then the information sought could be obtained only under the good cause exception of section 26:5C-9(a).[130] The judge added that upon finding good cause, a court must deter-

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Mason v. Regional Medical Ctr., 121 F.R.D. 300 (W.D. Ky. 1988); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531 (Pa. Super. Ct. 1989), *appeal granted*, 577 A.2d 891 (1990); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987)). *See also Snyder*, 125 N.J. at 347, 593 A.2d at 328 (Pollock, J., concurring).

121 *Snyder*, 125 N.J. at 329, 593 A.2d at 319.

122 *Mekhjian*, 244 N.J. Super. at 294, 582 A.2d at 314.

123 *Id.* The court noted that although the defendants did not deny that the donor of unit number 29FO784 was currently infected with the AIDS virus, defendants were forcing Snyder to prove that this donor was HIV-positive in 1984. *Id.* Judge Pressler reasoned that defendants' refusal to admit this point should entitle plaintiffs to pursue direct proof. *Id.*

124 *Id.* at 294-95, 582 A.2d at 314. The court noted that by 1983, medical science was aware that swelling of lymph nodes and various skin disorders were early symptoms of the HIV viral infection. *Id.* Moreover, the court highlighted that in 1983 blood banks routinely examined donors in search of these symptoms. *Id.* at 295, 582 A.2d at 314.

125 *Id.*

126 N.J. STAT. ANN. §§ 26:5C-1 to -14 (West 1987 & Supp. 1991). *See supra* notes 109-16 and accompanying text.

127 *Mekhjian*, 244 N.J. Super. at 295-96, 582 A.2d at 314.

128 *Id.* at 295, 582 A.2d at 314. The judge referred, in general terms, to §§ 26:5C-5 to -14. *Id.* at 295, 582 A.2d at 314.

129 *Id.* (citing § 26:5C-8). *See supra* note 112.

130 *Id.* (citing § 26:5C-9(a)). *See supra* note 13.

mine the scope of disclosure and impose appropriate safeguards to protect the donor.[131]

Judge Pressler held that Snyder's application for limited donor discovery satisfied the good cause requirement.[132] The judge outlined specific limitations the trial court might apply in the instant case.[133] For example, the appellate court noted that if the donor had died, the trial judge should obtain information concerning the stage of the donor's illness in 1984, his membership in risk groups and other relevant data.[134] On the other hand, the judge stated that if the donor was alive, the trial court should ascertain appropriate means of providing Snyder with required information while maximizing the donor's protection.[135] Judge Pressler concluded that Snyder was entitled to limited discovery in his effort to seek redress from those who injured him.[136]

In an informative concurrence, Justice Pollock of the New Jersey Supreme Court supplemented Judge Pressler's reasoning.[137] The justice wrote to accentuate the court's reliance upon balancing the competing interests under section 26:5C-9(a).[138] Justice Pollock noted that, without legislative guidance, other state courts were divided on the donor discovery issue.[139] The

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131 *Mekhjian*, 244 N.J. Super. at 296, 582 A.2d at 314. The statute stated that "[u]pon the granting of the order, the court, in determining the extent to which a disclosure of all or any part of a record is necessary, shall impose appropriate safeguards to prevent an unauthorized disclosure." § 26:5C-9(a).

132 *Mekhjian*, 244 N.J. Super. at 296, 582 A.2d at 314-15.

133 *Id.* at 296-97, 582 A.2d at 315.

134 *Id.* at 296, 582 A.2d at 315. The judge also acknowledged that the personal representative of the deceased donor must be apprised of these proceedings. *Id.*

135 *Id.* at 296-97, 582 A.2d at 315. Specifically, Judge Pressler suggested that the donor's identity could be kept confidential through the use of a "veiled" deposition or written interrogatories. *Id.* at 297, 582 A.2d at 315.

136 *Id.* The judge highlighted that Snyder had only asserted claims against parties who stood protectively between himself and the blood donor. *Id.* The judge further recognized the degree of Snyder's injury and the urgent need for the information sought. *Id.*

137 Snyder v. Mekhjian, 125 N.J. 328, 329-30, 593 A.2d 318, 319 (1991) (Pollock, J., concurring).

138 *Id.* at 330, 593 A.2d at 319 (Pollock, J., concurring). Justice Pollock emphasized balancing the blood donor's privacy interest, Snyder's interest in meaningful discovery and compensation for injuries suffered, and society's interest in the blood supply system. *Id.*

139 *Id.* at 333, 593 A.2d 320-21 (Pollock, J., concurring). Some courts have denied discovery. *See, e.g.*, Coleman v. American Red Cross, 130 F.R.D. 360, 363 (E.D. Mich. 1990) (discovery denied due to society's interest in an adequate and ample supply of blood); Bradway v. American Nat'l Red Cross, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (court denied discovery because of the donor's privacy interests); Doe v. American Red Cross Blood Serv., 125 F.R.D. 646, 657 (D.S.C. 1989) (society's in-

justice, however, quickly noted that the New Jersey courts were guided by the AIDS Assistance Act.[140] The concurring justice recognized that, in the past, the high court deferred to legislation in bioethical questions.[141] Accordingly, the justice noted that

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terest in an adequate volunteer blood supply system and the donor's privacy interest outweigh permitting discovery); Rasmussen v. South Fla. Blood Serv., Inc., 500 So.2d 533, 538 (Fla. 1987) (the donor's privacy interest and society's interest in a volunteer blood donation system precluded enforcing a subpoena duces tecum requiring the blood bank to furnish the victim with donor names and addresses); Laburre v. East Jefferson Gen. Hosp., 555 So.2d 1381, 1384-85 (La. 1990) (the potentially adverse effect on the volunteer blood donation system prevented disclosure of donor names and addresses); Krygier v. Airweld, Inc., 520 N.Y.S.2d 475, 476 (N.Y. Sup. Ct. 1987) (the physician-patient privilege statute precluded an order granting discovery); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178, 186 (C.P. 1987) (court prevented discovery because of the adverse effect on the nation's blood supply system).

Other courts, however, have permitted discovery. *See, e.g.*, Boutte v. Blood Sys. Inc., 127 F.R.D. 122, 126 (W.D. La. 1989) (discovery was permitted to promote justice and increase the standards of the nation's blood supply system); Mason v. Regional Med. Ctr., 121 F.R.D. 300, 303 (W.D. Ky. 1988) (blood donor's privacy rights did not preclude discovery of blood donor information); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1009, 1013 (Colo. 1988) (physician-patient privilege and other statutes held inapplicable, and the victim's interest outweighed the donor's right of privacy); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537, 539 (Pa. Super. Ct. 1989) (physician-patient privilege was inapplicable and the donor's privacy right would not be violated by granting discovery), *appeal granted*, 577 A.2d 891 (1990); Gulf Coast Regional Blood Ctr. v. Houston, 745 S.W.2d 557, 559-61 (Tex. Ct. App. 1988) (court order granting discovery did not violate the donor's right to privacy and no other privileges existed to preclude disclosure).

The concurring justice further acknowledged that commentators were also split on blood donor discovery conflicts. *Snyder*, 125 N.J. at 333, 593 A.2d at 321 (Pollock, J., concurring). *See, e.g.*, Turkington, *supra* note 40, at 907-08 (granting discovery does not necessarily impinge upon the blood donor privacy rights); Andresen, *supra* note 40, at 586-87 (ordering disclosure would not violate a blood donor's right to privacy and a plaintiff's interest in pursuing meaningful discovery weigh in favor of discovery) Robert K. Jenner, *Identifying HIV-Infected Blood Donors*, TRIAL, June 1989, at 47, 53 (permitting discovery results in a safer blood supply by discouraging high risk people from donating); Marla S. Kirsh, Note, *AIDS: Anonymity in Donation Situations-Where Public Benefit Meets Private Good*, 69 B.U. L. REV. 187, 211-12 (1989) (granting donor discovery would conflict with the donor's right to privacy and society's interest in a safe and adequate blood supply); Bollow & Lapp, *supra* note 40, at 374-75 (ordering blood donor discovery would contravene the physician-patient privilege, the donor's privacy rights, and the preservation of an adequate blood supply system).

[140] *Snyder*, 125 N.J. at 334, 593 A.2d at 321 (Pollock, J., concurring). *See supra* notes 109-16 and accompanying text.

[141] *Snyder*, 125 N.J. at 335, 593 A.2d at 321-22 (Pollock, J., concurring) (citing In re Jobes, 108 N.J. 394, 529 A.2d 434 (1987); In re Peter, 108 N.J. 365, 529 A.2d 419 (1987); In re Farrell, 108 N.J. 335, 529 A.2d 404 (1987); In re Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); In re Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976)). The justice recognized that this case posed questions of competing legal and ethical concerns. *Id.* at 335, 593 A.2d at 321 (Pollock, J., concurring).

resolution of the issue required application of section 26:5C-9(a), and an inquiry into its potential conflict with a blood donor's constitutional privacy rights.[142]

Justice Pollock scrutinized the physician-patient privilege using section 26:5C-9(a)'s balancing test.[143] The justice articulated that for the privilege to apply, the communication between a blood bank and donor must pertain to diagnosis and treatment.[144] The concurring justice emphasized that an individual's blood donation benefitted another and thus did not involve any diagnosis or treatment within the statute's meaning.[145] The justice, therefore, dismissed application of the physician-patient privilege to blood donations.[146]

Justice Pollock then proceeded to weigh the blood donor's privacy interests with the need for information.[147] Initially, the justice recognized the unique stigma placed upon persons testing HIV-positive and those with AIDS.[148] The concurring justice explained that because the HIV virus was transmitted through drug

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The concurring justice then considered the appropriate roles courts and legislators should assume when considering these concerns. *Id.* Justice Pollock pointed out that as an elected representative body, the legislature was better equipped than the judiciary to balance competing values. *Id.* The justice, however, perceived that when the legislature is silent, the judiciary could still resolve conflicts predicated on constitutional rights or the common law. *Id.* Finally, Justice Pollock stressed that even in situations where the legislature had acted, courts could scrutinize legislation to determine whether it abridged constitutional rights or supplemented common law rights. *Id.*

142 *Id.* at 336, 593 A.2d at 322 (Pollock, J., concurring).

143 *Id.* at 336-37, 593 A.2d at 322 (Pollock, J., concurring). The relevant portion of the New Jersey physician-patient privilege statute stated:

> [A person] has a privilege . . . to refuse to disclose, and to prevent a witness from disclosing, a communication, if he claims the privilege and the judge finds that (a) the communication was a confidential communication between patient and physician, and (b) the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis of the condition of the patient or to prescribe or render treatment therefor . . . .

N.J. STAT. ANN. § 2A:84A-22.2 (West 1976).

144 *Snyder*, 125 N.J. at 337, 593 A.2d at 322-23 (Pollock, J., concurring).

145 *Id.*, 593 A.2d at 323 (Pollock, J., concurring).

146 *Id.* at 338, 593 A.2d at 323 (Pollock, J., concurring). The supreme court justice noted that the majority of courts scrutinizing the identical issue were in accord with his decision. *Id.* at 337, 593 A.2d at 323 (Pollock, J., concurring) (citing Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988); Laburre v. East Jefferson Gen. Hosp., 555 So.2d 1381 (La. 1990); Doe v. University of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531 (Pa. Super. Ct. 1989), *appeal granted*, 577 A.2d 891 (1990); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987)).

147 *Id.* at 338, 593 A.2d at 323 (Pollock, J., concurring).

148 *Id.* The justice stated that "no disease in modern history has engendered so

use and sexual contact, the privacy needs of the donor regarding these matters normally precluded discovery.[149] Justice Pollock, however, opined that various factors, including the absence of a

much attention, fear, and even hysteria as AIDS." *Id.* Justice Pollock noted that HIV-positive individuals are frequently ostracized. *Id.*

Other courts have similarly characterized the social impact of HIV and AIDS on victims. *See, e.g.*, Government of Virgin Islands v. Roberts, 756 F. Supp. 898, 902 (D.V.I. 1991) ("to conclude that persons with AIDS or HIV are stigmatized is an understatement; they are widely stereotyped as indelibly miasmic, untouchable, physically and morally polluted"); South Fla. Blood Serv. v. Rasmussen, 467 So.2d 798, 802 (Fla. Dist. Ct. App. 1985) ("AIDS is the modern day equivalent of leprosy. AIDS, or a suspicion of AIDS, can lead to discrimination in employment, education, housing and even medical treatment"), *aff'd*, 500 So.2d 533 (Fla. 1987); Doe v. Roe, 526 N.Y.S.2d 718, 722 (Sup. Ct. 1988) (noting not only the social stigma attached with AIDS carriers, but also emphasizing that "the psychological impact of learning that one is [HIV-positive] . . . has been compared to receiving a death sentence"); *see generally* Warren R. Janowitz, *Safety of the Blood Supply*, 9 J. Legal Med. 611, 611 (1988) (describing the AIDS epidemic as a "modern day biblical plague").

For further illustrations of the stigma and hysteria HIV infection and AIDS provokes *see, e.g.*, Chalk v. United States District Court, 840 F.2d 701, 703 (9th Cir. 1988) (teacher with AIDS was relieved of teaching duties by the school district); Poff v. Caro, 228 N.J. Super. 370, 373, 549 A.2d 900, 901 (Law. Div. 1987) (landlord declined renting an apartment to three gay men because of fear of AIDS); Gail Appleson, *Litigation Imminent on AIDS Issues*, NAT'L L.J., July 25, 1983, at 3 (police officers, in some California cities, demanded rubber gloves and masks be used when handling gay men); David M. Freedman, *Wrong Without Remedy*, A.B.A. J., June 1986, at 36, 40 (Florida judge required AIDS victims to wear masks in his courtroom); John Parry, *AIDS as a Handicapping Condition*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 402, 402 (1985) (Los Angeles paramedics refused prompt assistance to a heart attack victim because they believed the individual had AIDS); Amy Tarr, *AIDS: The Legal Issues Widen*, NAT'L L.J., Nov. 25, 1985, at 1 (as of 1985, children suffering from AIDS had been precluded access to schools in Connecticut, Denver, Georgia, Indiana, and New Jersey); *AIDS Spreads to the Courts*, NEWSWEEK, July 1, 1985, at 61 (healthy gay men reporting to work with skin rashes or common colds were being fired because of AIDS phobia); Ted Gest, *As Cases Mount: AIDS Triggers Painful Legal Battles*, U.S. NEWS & WORLD REP., Mar. 24, 1986, at 73 (Michigan police filed attempted murder charges against an AIDS victim who spat on four officers); John Holusha, *A Gauntlet Against Contamination*, N.Y. TIMES, Feb. 11, 1990, § 3, at 10 (E. I. du Pont de Nemours offered surgical gloves manufactured with Kevlar, a substantial ingredient in bullet-proof vests, to nurses and doctors concerned about contracting HIV and AIDS); Stephen Koepp, *Living with AIDS on the Job*, TIME, Aug. 25, 1986, at 48 (AIDS victim's co-workers refused to use a truck previously driven by the victim and threatened to kill the victim should he return to work after a leave of absence) (lawsuit settled, Cronan v. New England Telephone, No. 80332 (Mass. Super. Ct. 1986)); Myra MacPherson, *The Children and the Flames of Fear*, WASHINGTON POST, Sept. 11, 1987, at B1 (family residing in Florida whose hemophiliac children tested HIV-positive had their house firebombed and were chased out of town); Reginald Stewart, *Haitians, Seeking Freedom and Jobs Find Heartaches Instead in America*, N.Y. TIMES, June 28, 1983, at A18 (Haitians were not hired because of fear of AIDS); *Undertakers' Unit Warns of AIDS*, N.Y. TIMES, June 18, 1983, at A27 (funeral directors were encouraged not to embalm the corpses of AIDS victims).

149 *Snyder*, 125 N.J. at 338, 593 A.2d at 323 (Pollock, J., concurring).

confidentiality guarantee from the blood bank and the trial judge's ability to limit discovery, vitiated the donor's privacy interest.[150] Furthermore, the justice dismissed arguments suggesting that donor discovery may detrimentally affect the volunteer blood bank system[151] as speculative.[152] Justice Pollock, therefore, explained that both the balancing test of section 26:5C-9(a) and Snyder's need to question the donor favored limited disclosure in which the trial court placed limited controls on discovery.[153] Specifically, the justice noted that the statute gave weight to society's interest in indemnifying individuals for the negligence of others[154] and that Snyder needed limited disclosure to prove his case.[155]

Justice Pollock next analyzed the blood donor's constitutional right to privacy.[156] The concurring justice pointed out that the United States Supreme Court has recognized two constitu-

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150 *Id.* Specifically, Justice Pollock explained that BCBC made no guarantees of confidentiality to this particular donor. *Id.* Also, Justice Pollock reiterated Judge Pressler's suggested limitations on discovery. *Id.* at 339, 593 A.2d at 323-24. (Pollock, J., concurring) (quoting Snyder v. Mekhjian, 244 N.J. Super. 281, 296-97, 582 A.2d 307, 315 (App. Div. 1990)). *See supra* note 135.

151 *Id.* at 339-40, 593 A.2d at 324. (Pollock, J., concurring). The defendants contended that discovery would discourage blood donations and lead to dishonest answers in questionnaire screening procedures, thereby enhancing the danger of donating infected blood. *Id.* at 339, 593 A.2d at 324 (Pollock, J., concurring).

152 *Id.* at 340, 593 A.2d at 324. (Pollock, J., concurring). The justice noted that no studies or statistics corroborated the defendant's assertions. *Id.* Moreover, Justice Pollock perceived that persons most likely to be disinclined from donating blood would be those who are members of high-risk groups or already infected. *Id.*

153 *Id.* at 340-42, 593 A.2d at 324-25. (Pollock, J., concurring). The justice stressed that a complete denial of discovery could undermine the pursuit of facts in civil litigation. *Id.* at 341, 593 A.2d at 325. (Pollock, J., concurring). The concurring justice further emphasized that the goals of tort law to discourage negligence and compensate injured persons could also be subverted. *Id.*

154 *Id.* at 340, 593 A.2d at 324. (Pollock, J., concurring) Justice Pollock stated, "[a]lthough [§ 26:5C-9(a)] does not define 'public interest,' the phrase encompasses society's interest in compensating victims injured by the negligence of others. A corollary to that interest is the right to full discovery." *Id.*

155 *Id.* at 340-41, 593 A.2d at 324-25. (Pollock, J., concurring). In stating this, Justice Pollock applauded and extensively quoted Judge Pressler's opinion which discussed the plaintiff's need for discovery in the instant case. *Id.* (quoting Snyder v. Mekhjian, 244 N.J. Super. 281, 294-95, 582 A.2d 307, 314 (App. Div. 1990)). The concurring justice also pointed out that Snyder had not requested the donor's name and address. *Id.* at 341, 593 A.2d at 325. (Pollock, J., concurring). Justice Pollock perceived that without a showing of specific need, discovering the donor's identity would probably contravene the statute. *Id.* at 341-42, 593 A.2d at 325. (Pollock, J., concurring). The justice recognized that less intrusive procedures, such as written interrogatories or a "veiled" deposition would be proper. *Id.* at 342, 593 A.2d at 325 (Pollock, J., concurring).

156 *Id.*

tional rights of privacy: autonomy and confidentiality.[157] Stating that this case involved only confidentiality, Justice Pollock emphasized the United States Supreme Court's reluctance to nullify a statute for infringing upon this right.[158] Thus, the justice noted that, if section 25:5C-9(a) was reasonable, a constitutional challenge of infringement on one's privacy rights by the statute would fail.[159]

Justice Pollock further observed that federal appeals courts have similarly refused to find that disclosure laws violate fundamental rights.[160] The justice observed that several of these courts have used a balancing test to scrutinize privacy interests.[161] The concurring justice also distinguished recent district court decisions that found violations of constitutional privacy interests where the state made unlimited disclosures of the victim's identity and where the disclosures did not serve any government interests.[162]

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157 *Id.* The justice defined autonomy as " 'the interest in independence in making certain kinds of important decisions.' " *Id.* (quoting Whalen v. Roe, 429 U.S. 589, 599-600 (1977)). Furthermore, the court noted that autonomy is limited to specific fundamental rights such as contraception, marriage, family relationships, child rearing, and education." *Id.* (citing Paul v. Davis, 424 U.S. 693, 713 (1976); Roe v. Wade, 410 U.S. 113, 152-53 (1973)). The concurring justice defined confidentiality as " 'the individual interest in avoiding disclosure of personal matters.' " *Id.* (quoting *Whalen*, 429 U.S. at 599). Justice Pollock noted that governmental interference in these areas could only be justified upon the showing of a compelling interest. *Id.* (citing *Roe*, 410 U.S. at 155-56).

158 *Id.* at 342-43, 593 A.2d at 325-26 (Pollock, J., concurring). The justice noted that the Supreme Court analyzed an individual's confidentiality interest only three times during the past fifteen years and never invalidated the statute at issue. *Id.* at 342, 593 A.2d at 325. *See* Nixon v. Adminstrator of Gen. Serv., 433 U.S. 425, 483-84 (1977) (a federal statute which mandates archivist to study presidential documents, even personal ones, was constitutional); *Whalen*, 429 U.S. at 605-06 (New York statute authorizing compilation of a computer database containing names and addresses of individuals obtaining prescription drugs from doctors was not unconstitutional); *Paul*, 424 U.S. at 713-14 (state can publicize records of official acts, including arrests).

159 *Id.* at 343, 593 A.2d at 326 (Pollock, J., concurring). *See* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW § 18.30, at 605 (3d ed. 1986) (noting that governmental activity pertaining to collection and distribution of information, unless impairing first amendment rights or constitutional limits on the criminal justice system, need only be reasonable).

160 *Snyder*, 125 N.J. at 344, 593 A.2d at 326. (Pollock, J., concurring).

161 *Id.* (citing Fadjo v. Coon, 633 F.2d 1172 (5th Cir. 1981); United States v. Westinghouse Elec. Corp., 638 F.2d 570 (3d Cir. 1980); Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979)). *See also supra* note 39 and accompanying text.

162 *Snyder*, 125 N.J. at 344-45, 593 A.2d at 326-27 (Pollock, J., concurring) (citing Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988) *aff'd*, 899 F.2d 17 (7th Cir. 1990); Doe v. Borough of Barrington, 729 F. Supp. 376 (D.N.J. 1990)). In *Woods*,

In closing, Justice Pollock distinguished his position from Justice Garibaldi's dissenting opinion.[163] The concurring justice first posited that Justice Garibaldi should not have substituted her own analysis for that provided in section 26:5C-9(a).[164] Justice Pollock then proceeded to disagree with the dissent's proposition that discovery should be denied because Snyder could not currently prove defendant's negligence.[165] Justice Pollock stressed that the purpose of discovery was to help parties ascertain facts relevant to the alleged negligence.[166] Finally, Justice Pollock reiterated that Snyder's discovery request was not an attempt to hold the donor liable for his medical condition.[167] Accordingly, the justice found that Snyder was entitled to limited discovery from the blood donor.[168]

In a sympathetic dissent, Justice Garibaldi declared that disclosure was inappropriate in the instant case but acknowledged that access to donor information would be proper in rare cases.[169] The justice first observed that the court must balance a litigant's need for data against the intrusiveness of discovery

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prison medical staff revealed to non-medical staff and inmates that the plaintiff, a prisoner, had tested HIV-positive. 689 F. Supp. at 874-75. In denying the defendant's motion for summary judgment, the court found that no important governmental interest was served by defendants' discussion of plaintiff's medical condition. *Id.* at 876. The court stressed that, although a prisoner, the plaintiff had a right to privacy concerning his medical records. *Id.* For a discussion of *Doe*, *see supra* notes 101-108 and accompanying text.

Justice Pollock emphasized that, although the *Woods* and *Doe* courts found that disclosure of one's infection with HIV violated the person's privacy right, these cases did not involve limited disclosure under the guidelines of a statute. *Snyder*, 125 N.J. at 345, 593 A.2d at 327 (Pollock, J., concurring). The justice also stated that the factual circumstances of these federal district court decisions illustrated no important public or governmental interest. *Id.* Consequently, Justice Pollock rejected the outcome in these courts and found that § 26:5C-9a provided sufficient protection of a blood donor's privacy interest to withstand a constitutional challenge. *Id.*

163 *Id.* at 346, 593 A.2d at 327 (Pollock, J., concurring).

164 *Id.* The justice objected to the dissent's categorization of § 26:5C-9(a) as just one of several factors in its analysis. *Id.* Justice Pollock explained that, because the legislature is a co-equal governmental branch, the court is required to follow the analysis set forth by the legislature in the statute. *Id.*

165 *Id.*

166 *Id.* The justice emphasized that this goal of discovery would be undermined should a plaintiff have to prove negligence before sending interrogatories and taking depositions. *Id.*

167 *Id.* The justice pointed out that during oral argument, the plaintiff had stated his intent not to hold the donor liable. *Id.*

168 *Id.* at 347, 593 A.2d at 328 (Pollock, J., concurring).

169 *Id.* at 350, 593 A.2d at 330 (Garibaldi, J., dissenting).

upon the other party.[170] The dissenting justice highlighted the donor's health, the financial burdens of hiring an attorney and the effect on immediate family members as relevant factors in analyzing the donor's burden.[171]

Justice Garibaldi then recognized the importance of the statutory framework protecting the confidentiality of people testing HIV-positive.[172] The justice noted that other courts with similar rules have rejected identical discovery requests.[173] Hence, in Justice Garibaldi's view, a trial court must find a compelling reason to substantiate a limited discovery order.[174]

Justice Garibaldi next pointed to the probative value of the information sought to be discovered.[175] The justice observed that because HIV blood testing became reliable and routine in 1985, the time period for litigation in this area dates back six or more years.[176] Justice Garibaldi, therefore, posited that even favorable discovery may be of little value if the factfinder's confi-

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170 *Id.* at 351, 593 A.2d at 330 (Garibaldi, J., dissenting) (citing In re W.C., 85 N.J. 218, 426 A.2d 50 (1981)).

171 *Id.* The justice pointed out that the donor, if alive, is likely to be very ill, and that the burden of discovery will thus be magnified. *Id.* Justice Garibaldi noted that in New Jersey, 90% of the individuals diagnosed with AIDS in 1985 are now deceased, and that approximately 70% of those persons diagnosed in 1988 have also died. *Id.*

172 *Id.* at 351-52, 593 A.2d at 330 (Garibaldi, J., dissenting) (citing the AIDS Assistance Act, §§ 26:5C-6.5 to -9). The justice emphasized that even provisions expressly permitting disclosure of HIV or AIDS case medical records were extremely narrow. *Id.* (citing § 26:5C-8). Justice Garibaldi also discussed the denial of a discovery motion under N.J. Ct. R. 4:10-3. *Id.* at 352, 593 A.2d at 330-31 (Garibaldi, J., dissenting). The rule stated that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." N.J. Ct. R. 4:10-3.

173 *Id.* at 352-53, 593 A.2d at 331 (Garibaldi, J., dissenting) (citing Coleman v. American Red Cross, 130 F.R.D. 360 (E.D. Mich. 1990); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646 (D.S.C. 1989); Rasmussen v. South Fla. Blood Serv., Inc., 500 So.2d 533 (Fla. 1987); Laburre v. East Jefferson Gen. Hosp., 555 So.2d 1381 (La. 1990); Krygier v. Airweld, Inc., 520 N.Y.S.2d 475 (Sup. Ct. 1987); Doe v. University of Cincinnati, 538 N.E.2d 419 (Ohio Ct. App. 1988); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178 (C.P. 1987)). Justice Garibaldi opined that courts that have permitted discovery determined either that the data was essential to the cause of action or evidence showed some wrongdoing on the part of the blood bank or donor. *Snyder*, 125 N.J. at 354-55, 593 A.2d at 331-32 (Garibaldi, J., dissenting) (citing Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003 (Colo. 1988); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675 (Tex. Ct. App. 1987)).

174 *Id.* at 355, 593 A.2d at 332 (Garibaldi, J., dissenting).

175 *Id.*

176 *Id.*

dence in the donor's ability to recall is low.[177] The dissenting justice emphasized that evidentiary concerns were an important factor to consider, especially when a person's privacy rights were involved.[178] Additionally, Justice Garibaldi recognized that permitting discovery may lead to a lawsuit by the plaintiff against the donor.[179]

Justice Garibaldi further noted the substantial danger to society's interest should discovery be granted.[180] The dissenting justice emphasized that confidentiality was the cornerstone of the voluntary blood donation process.[181] Accordingly, the justice found blood donor anonymity central to assuring a safe and sufficient blood supply.[182]

In conclusion, Justice Garibaldi opined that discovery should be granted only upon proving a compelling need, showing a reasonable probability that the information sought existed and exhausting all alternative means to gain the data.[183] The dissenting justice also posited that the blood bank should inform the infected donor of the lawsuit and discovery request to provide the donor with an opportunity to voluntarily comply.[184] Finally, Justice Garibaldi asserted that even upon showing a compelling need, any court-ordered disclosure must maximize the blood do-

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177 *Id.*

178 *Id.* at 356, 593 A.2d at 332 (Garibaldi, J., dissenting) (citing State v. R.W., 104 N.J. 14, 514 A.2d 1287 (1986)). Specifically, the justice stated that Snyder must show that an order compelling discovery would *likely* result in material evidence. *Id.* at 355-56, 593 A.2d at 332 (Garibaldi, J., dissenting).

179 *Id.* at 356, 593 A.2d at 332 (Garibaldi, J., dissenting). Justice Garibaldi charged that a plaintiff's attempt to obtain discovery may actually be an avenue "to cast a broad net to expose the liability of any party in the donation process and to create the basis for an additional lawsuit against the donor." *Id.*

180 *Id.* The dissenting justice saw the removal of confidentiality as having a chilling effect on potential blood donors. *Id.*, 593 A.2d at 332-33 (Garibaldi, J., dissenting).

181 *Id.* at 356, 593 A.2d at 332 (Garibaldi, J., dissenting). Justice Garibaldi explained that confidentiality is important because highly personalized data is accumulated from donors during the screening process. *Id.* Further, the justice emphasized that courts should be wary of creating precedent which causes a disincentive to donate. *Id.* at 356-57, 592 A.2d at 333 (Garibaldi, J., dissenting).

182 *Id.* at 357, 593 A.2d at 333 (Garibaldi, J., dissenting) (citing Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 653 (D.S.C. 1989)).

183 *Id.* at 359, 593 A.2d at 334 (Garibaldi, J., dissenting). The justice further perceived that parties would rarely be able to prove a compelling need, as well as justification, for donor discovery. *Id.*

184 *Id.* The dissenting justice recognized that upon learning about the lawsuit and discovery request, the blood donor may waive privacy protection and answer a plaintiff's request. *Id.*

nor's confidentiality.[185]

V. CONCLUSION

The court in *Snyder* clearly acknowledged the tragic circumstances underlying blood transfusion-related AIDS litigation.[186] Unfortunately, as the number of individuals contracting HIV infection through blood transfusion continues to swell, courts will frequently be confronted with this issue.[187] Hence, it is essential to lay a foundation of guidelines for courts to follow. The *Snyder* court properly delineated the factors set forth in section 26:5C-9(a)[188] and arrived at the correct ruling.

Physician-patient privilege statutes cannot be extended to information exchanged between blood banks and donors. To invoke the privilege, a patient must consult a physician for diagnosis and treatment.[189] Initially, a blood donor may never speak with a licensed physician and the privilege, generally, does not apply to nurses.[190] More importantly, it is clear that a donor has not sought consultation from the blood bank for diagnosis and treatment. Instead, the blood donor has aided the treatment of a third person rather than oneself. Put simply, extending the treatment of the blood recipient to the donor is without legal foundation. Accordingly, the information exchanged between blood-gathering organizations and donors cannot comport with statutory requirements for the physician-patient privilege to preclude discovery.

Permitting limited disclosure will not curtail public support for the nation's all-volunteer blood supply system. To assert that fear of identification and questioning in future litigation will deter donors is moot. Current blood screening tests for the HIV

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185 *Id.* The dissenting justice enunciated that courts must be extremely wary when granting disclosure because of the various complexities involved with AIDS-related discovery conflicts. *Id.*

186 *Snyder*, 125 N.J. at 346-47, 593 A.2d at 327-28 (Pollock, J., concurring); *Id.* at 358, 593 A.2d at 333-34 (Garibaldi, J., dissenting).

187 FRANCES J. DUNSTON, NEW JERSEY STATE DEP'T OF HEALTH, NEW JERSEY: A STATE ORGANIZING TO FIGHT AIDS 18 (1991) (recommendations of the State Commissioner of Health to Governor Jim Florio). Cumulative AIDS case infections projected for New Jersey in 1992 indicated that 17,400 persons may have HIV or AIDS. *Id.* Approximately 783 (or 4.5%) of the individuals in this estimate could represent blood transfusion-related transmission. *See id.*

188 *See supra* note 13 and accompanying text.

189 EDWARD W. CLEARY, MCCORMICK ON EVIDENCE § 98, at 244 (3d ed. 1984).

190 *Id.* at 250 n.7. *See also* STEVEN H. GIFIS, LAW DICTIONARY 345 (1984) (stating that, in general, the physician-patient privilege is not applicable to communication exchanged between a nurse and patient).

virus are over 99% accurate.[191] Such a high degree of accuracy means, in effect, that virtually all HIV contaminated blood will be diverted from the blood supply system at the time of donation.[192] Therefore, the present threat of litigation and questioning is low.

Additionally, to contend that confidentiality underpins the volunteer blood donation system is fallacious. It is mere speculation and conjecture to state that blood donors predicate their decision to donate upon confidentiality.[193] Many, if not all, blood donors see their donation as an altruistic deed. In fact, blood banks frequently utilize generosity and humanitarian themes in attempting to increase donation.[194] Hence, other more important factors influence a person's volition to donate.

In short, some people may stop donating. Individuals who discontinue donating, however, will most likely be those who fit into high-risk groups.[195] Consequently, blood donor disclosure can have a positive effect on the overall donor pool by increasing the quality of donated blood.

The disclosural right to privacy must be recognized for what it is: a weak extension of the United States Supreme Court's interpretation of a privacy right. There is no universal constitutional right to privacy.[196] Rather, a right to privacy has only been applied to specific constitutional guarantees. The United States Supreme Court has limited extension of the right to privacy to areas of fundamental importance: marriage, procreation, contraception, family relationships, child rearing and education.[197]

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191 *See supra* note 21. ELISA and Western Blot blood screening tests for the HIV virus are typically described as "extremely accurate." REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC 80 (1988).

192 NEW JERSEY STATE DEPARTMENT OF EDUCATION, DOING THE RIGHT THING: TEACHING ABOUT AIDS 4 (1989) (report issued by the Department of Education as a guide to local school districts for putting into effect AIDS education). The New Jersey State Department of Education has acknowledged that "screening of all blood donations has *greatly reduced* the chance of [HIV] infection from a blood transfusion." *Id.* (emphasis added).

193 *See, e.g.*, Snyder v. Mekhjian, 125 N.J. 328, 340, 593 A.2d 318, 324 (1991) (Pollock, J., concurring) (noting that no study or statistics had been performed to support an assertion that confidentiality encouraged a person to donate); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (stating "[w]e can perceive of no correlation between . . . [donor discovery] and a reduced number of blood donations. . . ."), *appeal granted*, 577 A.2d 891 (Pa. 1990).

194 New York Blood Center, Leaflet No. x-862, *Don't Forget the Gift of Life. Give Blood.*

195 *Snyder*, 125 N.J. at 340, 593 A.2d at 324 (Pollock, J., concurring); *see* Jenner, *supra* note 139, at 53.

196 *See supra* note 79 and accompanying text.

197 *See supra* note 81 and accompanying text.

Further, the Court has never upheld the disclosural right to privacy.[198] Decisions extending the disclosural privacy right to the medical, drug use and sexual histories of blood donors are not easily reconciled with the Court's reasoning in analyzing this interest.[199] Hence, predicating non-disclosure upon a constitutional right to privacy is a tenuous argument.

Finally, an individual's concern in pursuing meaningful discovery during litigation must be given the attention it deserves. If donor discovery is essential to a cause of action, it would contravene the goals of civil litigation and tort law to deny the request.[200] It is a person's common law right to bring an action against an offending party and this guarantee should not be abrogated by a procedural impediment. The rules of discovery recognize the need to obtain relevant facts.[201] Further, it is settled law that discovery rules are given broad and liberal treatment.[202] Most importantly, courts have wide discretion in molding the form and scope of discovery. In cases like *Snyder*, the names of the blood donors can be protected and the form of questioning can be controlled. Accordingly, the right to seek redress against another at law should not be obstructed.

In sum, the reality of William Snyder's situation illustrates the fact that HIV infection and AIDS do not differentiate among their victims.[203] The contraction of the HIV virus through blood

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198 *See supra* note 158 and accompanying text.

199 *See id.*

200 *See supra* note 5 (noting that most state statutes preclude a cause of action in strict liability or breach of warranty and allow for recovery only in negligence).

201 FED. R. CIV. P. 26(b). *See also supra* note 37 and accompanying text.

202 *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 176-77 (1979) (the discovery rules are to be given broad and liberal treatment and in some cases, superseding even the First Amendment privilege of freedom of the press); Hickman v. Taylor, 329 U.S. 495, 507 (1947) ("discovery rules are to be accorded a broad and liberal treatment").

203 *See, e.g.*, Martha M. Curley, Note, *Establishing Relief for the Most Innocent of All AIDS Victims: Liability for Perinatal Transmission of AIDS*, 28 J. FAM. L. 271 (1990) (discussing potential legal theories of recovery for infants who contract HIV while in utero); Peter Applebome, *Dentist Dies of AIDS, Leaving Florida City Concerned but Calm*, N.Y. TIMES, Sept. 8, 1990, at I1 (Kimberly Bergalis claimed to have contracted the HIV virus through common dental treatment from Dr. David J. Acer, who was suffering from AIDS); Chuck Conconi, *Personalities*, WASHINGTON POST, March 17, 1988, at D3 (John Holmes, a pornographic film star who claimed to have copulated with 14,000 women, died from AIDS probably acquired during his movie encounters); *Freddie Mercury 45, Lead Singer of the Rock Band Queen, Is Dead*, N.Y. TIMES, Nov. 25, 1991, at D12 (lead singer for a popular rock band during the 1970's died from AIDS); Dirk Johnson, *Ryan White Dies of AIDS at 18; His Struggle Helped Pierce Myths*, N.Y. TIMES, April 9, 1990, at D10 (Ryan White, an eighteen year old hemophiliac boy who contracted the HIV virus through a blood transfusion and vigor-

transfusions in the early 1980s, however, could have been minimized. Indeed, experts have noted that the initial response to HIV contaminated blood by the blood bank industry was "unnecessarily slow."[204] Hence, the industry should be held to furnish discovery in litigation concerning its inadequate attention to a situation of monumental importance.

Lincoln A. Terzian

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ously fought to be allowed to attend public schools died of AIDS); Richard W. Stephenson, *Magic Johnson Ends His Career, Saying He Has AIDS Infection*, N.Y. TIMES, Nov. 8, 1991, at A1, B12 (Ervin "Magic" Johnson, typically described as one of the world's greatest athletes, suddenly retired from the Los Angeles Lakers of the National Basketball Association stating that he had acquired the HIV virus through heterosexual contact).

[204] REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNO-DEFICIENCY VIRUS EPIDEMIC 78 (1988).