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Recent Development


I. Introduction

In the decade since Acquired Immune Deficiency Syndrome (AIDS) was first identified, 202,843 cases of AIDS have been reported to the Centers for Disease Control, 1,436 of which have been attributed to blood transfusions. 2 Many of these transfusion-related AIDS cases have


AIDS "is a specific group of diseases or conditions which are indicative of severe immunosuppression related to infection with the human immunodeficiency virus." HIV/AIDS Surveillance Report, supra, at 1. The human immunodeficiency virus (HIV) is the causative agent of AIDS. John Howard, HIV Screening: Scientific, Ethical, and Legal Issues, 9 J. Legal Med. 601, 601 (1988) (citing Samuel Broder & Robert Gallo, A Pathogenic Retrovirus (HTLV-III) Linked to AIDS, 311 New Eng. J. Med. 1292 (1984)). An individual who is infected with HIV is described as having "an asymptomatic condition characterized by laboratory abnormalities only." Id. at 601 n.1 (citing Centers for Disease Control, Classification System for Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus Infections, 35 Morbidity & Mortality Wkly. Rep. 394 (1986)). An individual is described as having AIDS when his or her immune system fails and secondary conditions, such as opportunistic infections, arise. Gregory Woods & Ann Thornton, Deadly Blood: Litigation of Transfusion-Associated AIDS Cases in Texas, 21 Tex. Tech. L. Rev. 667, 675 (1990).

Suits can be instituted against blood suppliers when the plaintiff merely tests positive for HIV. Although a clear clinical difference exists between testing HIV-positive and having the disease termed AIDS, for purposes of this article, no distinction will be drawn between the two conditions.

generated litigation in which the blood recipient seeks to recover dam-

was recalled, it was found that HIV-contaminated plasma from one donor, who donated blood more than 50 times in 1982 and 1983, was present in more than 65,000 vials of a blood product used to treat Hemophilia A. *Id.* at 620 n.20.

With the discovery that HIV could be transmitted by blood transfusion, blood banks became concerned about their potential liability to those who received HIV-infected blood products. Karen S. Lipton, *Blood Donor Services and Liability Issues Relating to Acquired Immune Deficiency Syndrome*, 7 J. LEGAL MED. 131, 140-42 (1986). In response to this concern, and in an effort to reduce the transmission of AIDS through blood products, the Food and Drug Administration (FDA) issued its first set of recommendations to blood collecting organizations. *Id.* at 144. These recommendations were designed to develop educational programs to inform persons at increased risk for AIDS that they should not donate blood, to educate donor screening personnel to detect signs and symptoms of AIDS, and to require the quarantine and proper disposal of all blood collected from donors who were known to have, or who were suspected of having, AIDS. *Id.* (citing OFFICE OF BIOLOGICS, FEDERAL DRUG ADMINISTRATION, RECOMMENDATIONS TO DECREASE THE RISK OF TRANSMITTING ACQUIRED IMMUNE DEFICIENCY SYNDROME (AIDS) FROM BLOOD DONORS (1983)). The FDA recommendations are significant because the resolution of negligence causes of action for the transmission of HIV through blood products collected after March 1983 focuses in part upon how effectively defendant blood suppliers implemented these recommendations. *See id.* at 145. For a discussion of the negligence cause of action in the context of transfusion-related AIDS litigation, see *infra* note 14.

In early 1985, blood supply organizations began to manufacture Human T-Lymphotropic Virus Type III/Lymphadenopathy-Associated Virus (HTLV III/LAV) antibody test kits to detect HIV antibodies in donated blood. *See Lipton, supra*, at 131. The use of the enzyme-linked immunosorbant assay (ELISA) and supplemental Western Blot tests currently screens out more than 99% of HIV-infected blood. Alinka F. Baker, Comment, *Liability Without Fault and the AIDS Plague Compel a New Approach to Cases of Transfusion-Transmitted Disease*, 61 U. COLO. L. REV. 81, 82 (1990) (citing 36 MORBIDITY & MORTALITY WKLY. REP. 137, 139 (1987)). According to statistics collected by the American Red Cross, before the ELISA test became available, recipients of blood transfusions had a one out of 550 chance of receiving HIV-contaminated blood. *Id.* at 82 (citing RANDY SHILTS, AND THE BAND PLAYED ON 547 (1988)). With the advent of testing procedures in March, 1985, this risk dropped to one in 40,000. *Id.* (citing THE BUSINESS JOURNAL-PHOENIX & THE VALLEY OF THE SUN, July 11, 1988, at 2).

Notwithstanding these procedures, some HIV-positive blood donations continue to elude detection. Aside from errors committed in the testing process, false negative test results may occur in situations in which a person has been exposed to HIV, but antibody production in response to this exposure has not reached a sufficient level so as to be detected by testing. *See Allan Gibofsky & Jeffrey C. Laurence, AIDS: Current Medical and Scientific Aspects, 9 J. LEGAL MED. 497, 499 (1988).* In most instances, HIV antibody production will begin within seven to 40 days after exposure to the virus. *Id.* Nonetheless, antibodies to HIV must reach a significant level in order to be detectable by test methodologies, and experts have reached no consensus regarding the length of time that must elapse between exposure to the virus, antibody production and a positive test result. *See id.* at 499 (detectable antibody production may not occur for as long as nine to twelve months after viral exposure); Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework For Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871, 881 (1989) (antibody production detectable by test procedures may not occur for as long as thirty-six months after infection); Baker, Comment, *supra*, at 82 (suggesting 12-week period between exposure and positive test result). Moreover, false negative test results have occurred in persons in the later stages of infection who appear to have “lost”
ages from the blood supplier. In such cases, however, the plaintiff

their HIV antibody positivity after previously testing positive for the disease. See Janowitz, supra, at 615. This finding suggests that such individuals might have a latent form of AIDS that is undetectable by testing, but is still capable of transmission. Id.

Considering all defects in the testing process, in 1987 it was estimated that, at worst, as many as four out of 96 HIV-infected blood donors would not be detected by antibody testing. Joseph R. Bove, Transfusion Associated Hepatitis and AIDS, 317 New Eng. J. Med. 242, 244 (1987) (noting that better methods for detecting HIV in donated blood would not completely eliminate risk of transmission).

AIDS is not a frequently reported complication of blood transfusions. Id. at 243. Furthermore, the number of transfusion-related AIDS cases reported to the Centers for Disease Control may be lower than the actual number. This underreporting is due to the tendency of physicians to decline to disclose such information, and because cases must meet a rigid case-surveillance definition of AIDS to be included in the report. Id. at 243-44.

Case law indicates that individuals have contracted AIDS from blood that had tested falsely negative for antibodies to the virus. See, e.g., Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 123 (W.D. La. 1989) (plaintiff brought suit against community blood bank for negligence after plaintiff contracted AIDS from blood that had tested negative for HIV antibody); Michael B. Coakley, Patients Got Blood Tainted With HIV, PHILA. INQUIRER, Nov. 21, 1991, at 12- BR (two Lancaster General Hospital patients tested HIV-positive after receiving blood from patient who had tested falsely negative for HIV).

AIDS may also be transmitted when blood center personnel fail to perform blood testing prior to transfusion. See, e.g., Mason v. Regional Medical Ctr., 121 F.R.D. 300, 301 (W.D. Ky. 1988) (finding that after infusion of several units of untested blood product into plaintiff, tests performed on blood revealed one unit contaminated with AIDS virus).


blood recipient’s ability to recover is often hampered at the discovery stage of litigation when the defendant blood supplier refuses to release pertinent blood donor information to the plaintiff. Defendant blood suppliers resist such discovery requests by claiming that nondisclosure of blood donor information should be favored by the courts in order to further important public policies, such as the donor’s privacy rights, the physician-patient privilege, and/or the future adequacy and safety of the nation’s blood supply. When the courts do not permit such discov-

HIV-contaminated blood donations that elude testing methodologies, in addition to those made before testing procedures were implemented, have resulted in virtual death sentences to persons who have been transfused with these blood products. Such blood donations have also resulted in potential liability to persons and organizations within the health care industry. Woods & Thornton, supra note 1, at 676; see, e.g., Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 647 (D.S.C. 1989) (involving negligence suit brought by HIV-contaminated blood recipient against hospital and blood center); Mason v. Regional Medical Ctr., 121 F.R.D. 300, 301 (W.D. Ky. 1988) (involving suit brought by HIV-contaminated blood product recipient against medical center in which plaintiff alleged negligent care, strict liability, breach of implied warranty of fitness, and loss of consortium); Belle Bonfils, 763 P.2d at 1004 (involving suit brought by HIV-contaminated blood recipient against blood center for negligence in screening donors and testing donated blood); Snyder v. Mekhjian, 582 A.2d 307, 309 (N.J. Super. Ct. App. Div. 1990) (involving suit brought by HIV-contaminated blood product recipient against blood bank, hospital, and others for negligently supplying blood and seeking limited discovery from donor), aff’d per curiam, 593 A.2d 318 (N.J. 1991); Krygier v. Airweld, Inc., 520 N.Y.S. 2d 475, 476 (N.Y. App. Div. 1987) (involving wrongful death action brought by decedent’s widow against blood bank for decedent’s contraction of AIDS from blood transfusion and seeking disclosure of donors’ names).

Potential liability for contraction of AIDS is not limited to those individuals and organizations within the health care industry. In one case, a plaintiff brought a suit against the driver and owner of an automobile for personal injuries the plaintiff’s decedent sustained when he was struck by defendant’s automobile. Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 534 (Fla. 1987). While hospitalized for these injuries, plaintiff’s decedent received 51 units of blood; he was later diagnosed with and subsequently died of AIDS, allegedly as a result of receiving HIV-contaminated blood. Id. Plaintiff sought to prove that AIDS was essentially an aggravation of the decedent’s injuries, in that the source of his disease was the necessary medical treatment he received in response to the injuries he sustained in the accident. Id. Thus, plaintiff sought to hold these personal injury defendants responsible for the decedent’s contraction of AIDS.

4. For a discussion of the necessity of blood donor information to plaintiff’s recovery, see infra note 8 and accompanying text.

5. For a discussion of blood donors’ privacy rights, see infra notes 28-39 and accompanying text.

6. For a discussion of the physician-patient privilege in the context of litigation involving contraction of AIDS from blood transfusions, see infra notes 40-49 and accompanying text.

7. For a discussion of the impact of discovery of blood donor information on the safety and adequacy of the nation’s blood supply, see infra notes 50-58 and accompanying text.
ery, plaintiffs are often precluded from recovery because the defendant
blood suppliers retain exclusive control over the blood donor informa-
tion necessary to establish liability.8

In Snyder v. Mekhjian,9 a plaintiff blood recipients sought informa-
tion regarding an unidentified donor from the defendant blood supplier
in order to garner the evidence necessary to prove the blood supplier's
negligence in providing the plaintiff with AIDS-infected blood.10 The
Supreme Court of New Jersey affirmed per curiam a Superior Court of
New Jersey decision granting the plaintiff blood recipient limited discov-
ery of blood donor information.11

8. Woods & Thornton, supra note 1, at 677. In transfusion-related AIDS
cases, the blood donor is often the only unbiased individual able to provide the
factual information necessary to determine the liability of health care entities.
See, e.g., Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003,
1007 (Colo. 1988) (stating that only donor and blood center technician who in-
terviewed donor knew whether blood center followed its screening procedures
before accepting blood from infected donor); Stenger v. Lehigh Valley Hosp.
Ctr., 563 A.2d 531, 535 (Pa. Super. 1989) (finding that donor is only individual
with information to refute claims of defendant that donor was carefully and com-
pletely evaluated prior to donation), aff'd, 609 A.2d 796 (Pa. 1992); Gulf Coast
(finding that plaintiff "possesses a legitimate interest in the identity of the blood
donors" and stating that plaintiff asserted that blood donors possessed relevant
facts required to prosecute cause of action against blood center); Tarrant
County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (rea-
soning that without discovery from blood donors, plaintiff would not likely be
able to prosecute cause of action against defendant).

9. 593 A.2d 318 (NJ. 1991). For a thorough discussion of the Snyder opin-
ion, see infra notes 65-125 and accompanying text.

10. Snyder, 593 A.2d at 320 (Pollock, J., concurring). During discovery, the
defendant blood bank produced the donor's records, but deleted the donor's
name and address. Id. (Pollock, J. concurring). The blood bank opposed fur-
ther discovery and thereby impeded plaintiffs' ability to prove their case. Id. at
320, 324 (Pollock, J., concurring). The blood bank claimed that the donor did
not have AIDS at the time he donated the unit of blood that was ultimately trans-
fused into plaintiff. Id. at 324 (Pollock, J., concurring). This assertion was made
by the blood bank at the same time it maintained control over the information
necessary for plaintiffs to challenge this contention and meet their burden of
proof. Id. (Pollock, J., concurring).

1990), aff'd per curiam, 593 A.2d 318 (N.J. 1991). In affirming the decision of the
superior court, the Supreme Court of New Jersey expressly stated that its ration-
ale was substantially the same as was expressed by Judge Pressler for the super-
ior court. Snyder, 593 A.2d at 319. Justice Pollock authored a separate concurring
opinion in order "to emphasize the court's reliance on the statutory
balance of the donor's privacy interest, the plaintiffs' interest in full discovery
and compensation for the injuries they have sustained, and society's interest in a
safe and adequate blood supply." Id. (Pollock, J., concurring). Because Justice
Pollock's concurrence adopts and expands upon the analysis of the lower court,
this author has chosen to concentrate her analysis on the concurring opinion.
For a discussion of Justice Pollock's concurring opinion, see infra notes 65-113
and accompanying text. For a discussion of the lower court's decision, see infra
note 85.
The Supreme Court of New Jersey’s decision in *Snyder v. Mekhjian* indicates that a plaintiff’s need for disclosure, and the interest of the public in obtaining this donor information, may outweigh the privacy rights of blood donors and the interest of blood banks in attracting voluntary blood donors.\(^\text{12}\) This ruling opens the door to recovery by plaintiffs who have contracted AIDS through blood transfusions—a door that may have otherwise remained closed because blood suppliers have previously been permitted to withhold from discovery information that is essential to the imposition of liability.\(^\text{13}\)

II. BACKGROUND

In most transfusion-related AIDS litigation, the plaintiff blood recipient sues the defendant blood supplier under theories of negligence,\(^\text{14}\) breach of implied warranty,\(^\text{15}\) and strict liability.

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12. For a thorough discussion of *Snyder*, see infra notes 65-125 and accompanying text. For a discussion of the plaintiffs’ interests in discovery of relevant information, see infra notes 59-64 and accompanying text. For a discussion of blood donors’ rights to confidentiality and privacy, see infra notes 28-39 and accompanying text.

13. For a discussion of the projected impact of *Snyder* on future litigation, see infra notes 126-31 and accompanying text.


15. *See, e.g.*, Mason v. Regional Medical Ctr., 121 F.R.D. 300, 301 (W.D. Ky. 1988) (plaintiff who received transfusion of blood product infected with AIDS virus sued medical center alleging breach of implied warranty of fitness); *Stenger*, 563 A.2d at 533 (blood recipient and family sued hospital and blood center under theory of breach of warranty after recipient, husband and son tested positive for HIV); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 676 (Tex. Ct. App. 1987) (decedent’s estate brought suit for wrongful death against hospital alleging breach of implied warranty in hospital’s failure to provide wholesome blood product).

Plaintiff blood recipients assert implied warranty causes of action premised
on two principles of contract law. The first of these principles is the implied warranty of merchantability, under which the Uniform Commercial Code (U.C.C.) provides that “a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.” U.C.C. § 2-314(1) (1989). In order for goods to be merchantable, they “must be at least such as . . . are fit for the ordinary purposes for which such goods are used.” Id. § 2-314(2)(c). The second principle is the implied warranty of fitness for a particular purpose under which the U.C.C. provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is . . . an implied warranty that the goods shall be fit for such purpose.

Id. § 2-315.

The distinction between the two principles appears negligible, but is indeed significant. Under the warranty of fitness for a particular purpose principle, the seller warrants that the goods sold are suitable for a special purpose of the buyer; under the warranty of merchantability principle, the seller warrants only that the goods are reasonably fit for general purposes for which they are sold. Pritchard v. Liggett & Myers Tobacco Co., 295 F.2d 292, 296 (3d Cir. 1961). Thus, in the blood donation context, because suppliers distribute blood for the general purpose of maintaining health and life, an implied warranty claim should focus upon the warranty of merchantability principle. Compare U.C.C. § 2-314 with U.C.C. § 2-315.

As explained by one commentator, in a claim under breach of the warranty of merchantability theory to recover damages for the transfusion of HIV-positive blood, plaintiff blood recipients must show that:

The providing of blood and blood products is tantamount to a sale for which the implied warrant[y] attach[es]. By providing the blood disseminated to the plaintiff, the supplier impliedly warrant[s] that the blood was merchantable . . . for the ordinary purposes for which it was to be used. Additionally, plaintiffs argue that the supplier, at the time of the sale, knew that the plaintiff was relying on its skill and judgment to select and furnish suitable blood. Presumably, because the blood provided to the plaintiff was contaminated with the AIDS virus and resulted in his or her death, it was not merchantable . . . for its intended use.

Woods & Thornton, supra note 1, at 691.

Under both implied warranty and strict liability theories, the seller is liable for any injury resulting from the use of the defective product without regard to the seller’s fault or negligence. Lipton, supra note 2, at 132-33. The imposition of strict liability in implied warranty theory reflects the social policy that the costs of physical injuries resulting from defective goods should be borne by those who placed the goods into the stream of commerce. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 692-93 (5th ed. 1984). For a discussion of the effect of blood shield legislation on implied warranty claims, see infra note 17 and accompanying text.
ability. Due to the enactment of blood shield statutes in the majority

16. See, e.g., Mason v. Regional Medical Ctr., 121 F.R.D. 300, 301 (W.D. Ky. 1988) (HIV-contaminated blood recipient sued medical center in strict liability for supplying unreasonably dangerous product); Hyland Therapeutics v. Superior Court, 220 Cal. Rptr. 590, 591 (Cal. Ct. App. 1985) (decedent's heirs brought wrongful death action against laboratory on strict product liability theory for providing decedent with HIV-contaminated blood products); Snyder, 582 A.2d at 309 (strict liability suit brought against hospital, physicians and blood bank for infusing plaintiff with HIV-infected blood product); Stenger, 563 A.2d at 533 (family brought strict liability claim against hospital and blood center for providing HIV-positive blood to family member).

Strict liability permits the imposition of liability for the non-negligent sale of defective products. See John W. Wade, On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing, 58 N.Y.U. L. REV. 734, 739 (1983). This form of liability is based upon the assumption that imposing strict liability upon manufacturers will be a financial incentive to market safe products. Lynn Shodahl, Note, Liability for Transfusion-Transmitted Disease, 14 WM. MITCHELL L. REV. 141, 163 (1988) (arguing that strict liability is inappropriate for determining liability in cases involving transfusion-transmitted diseases). Section 402A of the Restatement (Second) of Torts sets forth the cause of action for strict liability of a seller of a product for physical harm to the user or consumer:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (1965). Under the Restatement (Second) of Torts, a blood supplier may be shielded from strict liability if it can be established that (1) the product's utility outweighs its inherent risks; (2) the risks are known; (3) the product's benefits are not achievable in any other manner; and (4) the risks are unavoidable pursuant to present knowledge. See id. § 402A cmt. k. It is likewise undetermined if New Jersey courts will recognize implied warranty causes of action to compensate plaintiffs for the transfusion of HIV-contaminated blood products.

17. Forty-eight states have enacted legislation that effectively precludes blood recipients from asserting an implied warranty and/or strict liability cause of action against blood suppliers. Janowitz, supra note 2, at 617. Such legislation is generally termed “blood shield” legislation; however, it can take one of several forms. See id. The causes of action under the Uniform Commercial Code are often eliminated by statutorily classifying the provision of blood or blood products as a service rather than as a sale of goods, thereby removing them from the application of the implied warranties. Id.; see U.C.C. § 2-102 (Article 2 “applies to transactions in goods”). Other statutes expressly limit recovery under both strict liability and implied warranty theories. Janowitz, supra note 2, at 617.

For example, Delaware's blood shield statute provides:
The implied warranties of merchantability and fitness shall not be applicable to a contract for the sale of human blood, blood plasma or other human tissue or organs from a blood bank or reservoir of such other tissues or organs. Such blood, blood plasma or tissue or organs shall not
of jurisdictions, the negligence theory has become the most viable means by which a plaintiff can recover from blood suppliers responsible for wrongfully releasing tainted blood products for transfusion.\(^{18}\)

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\(^{18}\) To successfully recover under a negligence theory, a plaintiff must establish that (1) the defendant had a duty to conform to a standard of conduct in order to protect others from unreasonable risk of harm; (2) the defendant breached this duty by not conforming to this standard; (3) a causal link existed between the defendant’s conduct and the plaintiff’s injury; and (4) the plaintiff incurred damages. See KEETON ET AL., supra note 15, § 30, at 164-65. This relatively simple negligence analysis becomes correspondingly more complex when applied to transfusion-related AIDS litigation. This is due to the variation over time of the medical community’s knowledge of the disease. See LIPTON, supra note 2, at 140-41. As scientific knowledge became more advanced, the duty that the blood center owed to a potential recipient of a transfusion likewise expanded. See id. Each individual factual scenario must be subjected to the negli-
Because a known potentiality for false negative AIDS testing results exists, non-negligent donor screening pursuant to industry standards requires that blood suppliers obtain a complete medical history from potential donors. Therefore, plaintiffs often desire direct access to the medical history of a donor. 

19. For a discussion of the inherent problems in AIDS testing due to false negative test results, see supra note 2.

20. Federal regulations require that all donors must be screened for "freedom from any disease transmissible by blood transfusion, insofar as can be determined by history and examinations." 21 C.F.R. § 640.3(b)(6) (1991). The suitability of the donor is to be determined in part by means of obtaining a medical history from the donor, as well as by "such physical examination as appears necessary to a physician." Id. § 640.3(a).

Screening of donors to obtain relevant medical histories is accomplished by asking blood donors questions designed to elicit information concerning potential exposure to, or history of, diseases transmissible by blood. See Lipton, supra note 2, at 161 n.123.

Questions asked of donors in order to determine potential exposure to or history of AIDS include:

1. Have you ever had night sweats?
2. Have you ever had unexplained fevers?
3. Have you ever had unexpected weight loss?
4. Have you ever had persistent diarrhea?
5. Have you ever had generalized lymph node enlargement or unusual skin lesions, especially purple bumps under the skin that seem to spread locally or to be present in widely separated areas?
6. Have you ever had intimate or sexual contact with an individual at increased risk for AIDS? Responses to this question are clarified by asking the following questions as well:

a. Have you had sex with a prostitute in the past six months?
necessary information from the blood donors themselves in order to prove whether the defendant blood suppliers exercised due care in carefully questioning the donors about their medical histories.\textsuperscript{21}

New Jersey plaintiffs may utilize the New Jersey AIDS Assistance Act (the Act) to glean this vital information from blood donors. Pursuant to the Act, "[t]he 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

\begin{itemize}
\item[b.] Have you had sexual contact with homosexual or bisexual men since 1977?
\item[c.] Have you lived in a country such as Haiti or Africa since 1977 where heterosexual activity is thought to play a major role in transmission of HIV?
\item[7.] Are you a past or present abuser of intravenous drugs?
\item[8.] Are you a hemophiliac?
\end{itemize}


\textsuperscript{21} Woods & Thornton, \textit{supra} note 1, at 713 (arguing that blood donor's testimony is important because "blood donors may be witnesses to some of the most important events surrounding the donation process"). The donor could likely relate to the plaintiff whether the blood supplier informed the donor that members of high-risk groups should not donate blood, and whether the blood supplier carefully explained these high-risk groups so that the donor could ascertain whether he or she fit within any such group. \textit{Id.} at 713-14. The donor could also disclose his or her true physical condition on the date of the donation, whether he or she answered all of the screening questions that the blood bank asserts were answered, and whether these questions were answered in the manner indicated in the blood bank's records. \textit{Id.}

As a result of the donor's knowledge as to the circumstances surrounding his or her donation, plaintiffs frequently seek to question donors about the donation process in order to establish liability of blood suppliers. \textit{See, e.g.}, Bradway \textit{v. American Nat'l Red Cross}, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (blood recipient argued for need to question donor about accuracy and negligence of Red Cross' blood screening and testing procedures in order to be able to bring cause of action); Coleman \textit{v. American Red Cross}, 130 F.R.D. 360, 361 (E.D. Mich. 1990) (plaintiff requested donor be identified so that he might be questioned concerning Red Cross' donor screening procedures and whether donor should have been deferred); Boutte \textit{v. Blood Sys.}, Inc., 127 F.R.D. 122, 125 (W.D. La. 1989) (recipient of blood transfusion sought discovery of donor information concerning medical examination and questions asked of donor prior to donation); Doe \textit{v. American Red Cross Blood Servs.}, 125 F.R.D. 646, 649 (D. S.C. 1989) (blood recipient requested right to question donor about acts or omissions of Red Cross in donor screening process); Belle Bonfils Memorial Blood Ctr. \textit{v. District Court}, 763 P.2d 1003, 1007 (Colo. 1988) (plaintiff sought to question donor to ascertain if blood center followed its own blood donor screening procedures); Stenger \textit{v. Lehigh Valley Hosp. Ctr.}, 563 A.2d 531, 534 (Pa. Super. Ct. 1989) (plaintiff requested right to question blood donor as to what screening procedures donor was subjected to prior to donating blood), \textit{aff'd}, 609 A.2d 796 (Pa. 1992); Taylor \textit{v. West Penn Hosp.}, 48 Pa. D. & C.3d 178, 180 (Allegheny County 1987) (plaintiff likely to learn from donor if he or she was within high-risk group at time of donation, and if so, if he or she was informed by blood bank not to donate blood, as well as if blood bank took a personal history). \textit{But see} Rasmusen \textit{v. South Fla. Blood Servs.}, Inc., 500 So. 2d 533, 537 (Fla. 1987) (blood recipient sought only to discover list of names of blood donors in order to compare such listing with list of known AIDS victims and illegal drug users).
good cause therefor. 22 The Act further states that a showing of "good cause" is established by balancing 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. 23 Although no New Jersey court prior to Snyder had interpreted the Act, many courts in other jurisdictions have addressed the various issues inherently implicated by its statutory provisions; namely, the blood donor’s right to confidentiality and privacy, 24 the physician-patient privilege, 25 society’s interest in an adequate and safe blood supply, 26 and the plaintiff’s interest in discovery of information relevant to his or her case. 27

A. The Blood Donor’s Right to Confidentiality and Privacy

In transfusion-related AIDS litigation, the constitutionally-based privacy right of an individual to be free from involuntary public disclosure of private matters is implicated. 28 This privacy interest has been

23. Id. § 26:5C-2 to 5C-12. This Act provides in relevant part:

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.

Id. § 26:5C-9(a).

This Act also states that "[e]xcept as provided in subsections a. and b. of this section, a record shall not be used to initiate or substantiate any criminal or civil charges against the person who is the subject of the record or to conduct any investigation of that person." Id. § 26:5C-9(c).

Under subsection b., a court may authorize disclosure of a patient’s medical record for investigating or prosecuting a crime that the patient is suspected of committing if (1) the crime is a first degree crime; and (2) "there is a reasonable likelihood that the record in question will disclose material information or evidence of substantial value in connection with the investigation or prosecution." Id. § 26:5C-9(b).

24. For a discussion of the blood donor’s right to confidentiality and privacy, see infra notes 28-39 and accompanying text.
25. For a discussion of the physician-patient privilege, see infra notes 40-49 and accompanying text.
26. For a discussion of society’s interest in an adequate and safe blood supply, see infra notes 50-58 and accompanying text.
27. For a discussion of the plaintiff’s interest in discovery of information relevant to his or her case, see infra notes 59-64 and accompanying text.
28. See Whalen v. Roe, 429 U.S. 589, 598-99 (1977) (asserting that one kind of interest protected by zone of privacy "is the individual interest in avoiding disclosure of personal matters"); Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").
RECENT DEVELOPMENT

defined as "essentially an interest in confidentiality." Assurances of confidentiality upon blood donation encourage donors to feel free to honestly and accurately convey information concerning their health histories without fear of disclosure to persons outside of the donation process. This confidentiality is especially meaningful with the advent of AIDS, because disclosure of a donor’s HIV-positive status could potentially impact his employment, insurability, reputation in the community and personal relationships. One commentator has opined that public

In Whalen, the United States Supreme Court addressed the constitutionality of a practice of the State of New York whereby the names and addresses of all persons who were prescribed drugs, for which there existed both a lawful and unlawful market, were recorded in a centralized computer file. Whalen, 429 U.S. at 591. This information was to be used solely by the New York Department of Health to assist in preventing the unlawful prescription and use of dangerous drugs. Id. at 592. Plaintiffs, who were lawfully prescribed drugs by physicians, feared that disclosure of this information would cause them to be labeled as drug addicts. Id. at 595. The Whalen Court recognized that a right to privacy exists in avoiding the disclosure of personal matters. Id. at 599-600. The Court also recognized that a person’s reputation may be harmed if the person’s identity and prescription data are made publicly known. Id. at 600. Nevertheless, the Court found that no constitutional invasion of privacy existed in this instance because the statute contained provisions that made the risk of public disclosure of this information remote. Id. at 603-04.


30. Lipton, supra note 2, at 161. The medical history is utilized to determine if the prospective donor has potentially been exposed to diseases transmissible by blood, such as hepatitis B and AIDS. Id. at 161 n.123. Because both hepatitis and AIDS are transmitted primarily by sexual contact, admitting exposure to either of these diseases could be embarrassing and detrimental to a prospective donor. Id. at 161 & n.124.

31. Id. at 161; see, e.g., Edward E. Hollowell & James E. Eldridge, Constitutional Law: Subsistence, Equal Opportunity, and the Individual Diagnosed with HIV, 9 J. LEGAL MED. 561, 561-62 (1988) (employment, housing, medical care and education rights may be affected by one’s HIV-positive status); Lipton, supra note 2, at 161 n.124 (affirmative indication of exposure to, or history of, AIDS could have potential impact on employment and insurance); Turkington, supra note 2, at 882 (persons infected with AIDS virus or who suffer from full-blown disease have been subjected to “intolerance, ostracism, discrimination and violence”); Shodahl, Note, supra note 16, at 141 (public fear has resulted in ostracism of those with AIDS).

cation of AIDS-related information constitutes the most serious invasion of privacy, because one's infection with such a communicable, incurable and fatal disease reflects upon the infected person's most basic sense of identity and security.\textsuperscript{32}

Several courts have addressed the issue of a blood donor's right to confidentiality within the context of determining whether a plaintiff blood recipient may compel discovery from a blood donor.\textsuperscript{33} Thus far, several courts have determined that the donor's privacy interest is constitutionally-based, but have ultimately relied on local discovery rules, rather than constitutional principles, to resolve underlying discovery issues.\textsuperscript{34}

\textsuperscript{32} Turkington, \textit{supra} note 2, at 880-81. Because AIDS is known to be transmissible through anal and vaginal sexual intercourse, intravenous drug use with contaminated syringes, transfusions of contaminated blood products and from mother to child during pregnancy, the fact that someone is infected with HIV constitutes very intimate information. \textit{Id.} at 881.

\textsuperscript{33} For a discussion of cases addressing the issue of a donor's right to confidentiality, see \textit{infra} notes 34-39 and accompanying text.


In \textit{Rasmussen}, the Florida Supreme Court sought to determine the privacy rights of 51 unidentified blood donors from whom plaintiff blood recipient sought information in order to determine whether he contracted the AIDS virus from any of them when transfused with their donated blood. \textit{Rasmussen}, 500 So. 2d at 534. The \textit{Rasmussen} court agreed with the lower court's finding that the donors' rights of privacy were protected by the Constitution. \textit{Id.} at 534-35. The court, however, based its decision to reject plaintiff's discovery request on the grounds of the state's discovery rules, thus avoiding a traditional constitutional analysis of the issues presented in the case. \textit{Id.} at 535.

In \textit{Taylor}, the court was again confronted with a plaintiff blood recipient who sought to discover the identity of a blood donor. \textit{Taylor}, 48 Pa. D. & C.3d at 178-79. The \textit{Taylor} court found that "the [defendant] blood bank's claim that the identity of its blood donors is constitutionally protected carried substantial weight." \textit{Id.} at 185. But, as in \textit{Rasmussen}, instead of undertaking a constitutional analysis, the \textit{Taylor} court premised its decision to deny disclosure of this information upon the Pennsylvania discovery rules. \textit{Id.} at 186. The \textit{Taylor} court concluded that disclosure of the identity of blood donors would have a "chilling" effect on the blood bank's ability to maintain a sufficient supply of blood from voluntary donors. \textit{Id.}

Therefore, although courts have found constitutional implications inherent in the disclosure issue, no court has ventured to base its decisions solely upon this ground. Moreover, courts have disagreed with the \textit{Taylor} and \textit{Rasmussen} courts' inclination that constitutional rights may be implicated by the discovery of blood donor information. \textit{See, e.g.}, Mason v. Regional Medical Ctr., 121 F.R.D. 300, 303 (W.D. Ky. 1988) (claim of constitutionally protected blood donor privacy is beyond boundaries of right of privacy as established by United States Supreme Court); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 679 (Tex. Ct. App. 1987) (order compelling identification of blood donors not impermissible violation of their rights to privacy).

If a blood donor's constitutional rights are to be contemplated in this context, an issue arises as to whether the defendant blood suppliers have standing to assert the constitutional rights of the blood donor. As stated by one commentator, "the blood donors' constitutional rights are being asserted, without their
In considering the issue of blood donor discovery, most courts have relied on Federal Rule of Civil Procedure 26(c) and similar local rules.\(^3\)\(^5\) Rule 26(c) provides that when discovery is sought, a court may make any order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."\(^3\)\(^6\) In order to determine the appropriate level of protection to be afforded blood donors, courts must consent or knowledge, by an institution which may have an ulterior motive for opposing discovery." Denise C. Andreson, Note, AIDS-Related Litigation: The Competing Interests Surrounding Discovery of Blood Donors' Identities, 19 IND. L. REV. 561, 584-85 (1986) (demonstrating that case law does not support Rasmussen's extension of disclosural right to privacy and arguing that societal interest in maintaining adequate blood supply would not be compromised by allowing discovery).

In order for a litigant to properly assert a constitutional right of a third party, the litigant must show that (1) the litigant and third party are inextricably bound up with the activity the litigant wishes to pursue, and (2) some obstacle exists to the third party asserting his or her own rights. Singleton v. Wulff, 428 U.S. 106, 114-16 (1975). The Taylor court specifically addressed the issue of standing, concluding that the defendant blood bank had standing to raise its donors' privacy claims because these rights would not otherwise be protected. Taylor, 48 Pa. D. & C.3d at 181. The Rasmussen court, however, failed to discuss the blood center's standing to assert the donors' constitutional rights. Rasmussen, 500 So. 2d 533 (Fla. 1987).

35. See, e.g., Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 125 (W.D. La. 1989) (in applying Rule 26(c), privacy interest of donor must be weighed against plaintiff's right to obtain relevant information); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 649 (D.S.C. 1989) ("In deciding whether to issue a Protective Order under Rule 26(c), the court must balance the competing interests."); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1010 (Colo. 1988) (Colorado discovery rule similar to Rule 26(c) mandates balancing of competing interests served by granting or denying discovery of blood donors' identities); Rasmussen, 500 So. 2d at 555 (court must balance competing interests that would be served by granting or denying discovery when deciding whether protective order under Florida discovery rule similar to Rule 26(c) is appropriate); Taylor, 48 Pa. D. & C.3d at 187 (decision whether or not to compel discovery pursuant to Pennsylvania rule similar to Rule 26(c) depends upon balancing competing interests).

36. FED. R. CIV. P. 26(c). Rule 26(c) provides:
(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the
balance the inherently competing interests of privacy and discovery.\textsuperscript{37}

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

\textit{Id.}

\textsuperscript{37} See, e.g., \textit{Boutte}, 127 F.R.D. at 125 (in applying Rule 26(c), privacy interest of donor must be weighed against plaintiffs’ right to obtain relevant information); \textit{American Red Cross Blood Servs.}, 125 F.R.D. at 649 (“In deciding whether to issue a Protective Order under Rule 26(c), the court must balance the competing interests.”); \textit{Belle Bonfils}, 765 P.2d at 1010 (when applying Colorado discovery rule similar to Rule 26(c) to determine extent information sought to be discovered may be protected, “the trial court must balance the competing interests that would be served by granting or denying discovery” of blood donors’ identities); \textit{Rasmussen}, 500 So. 2d at 535 (court must balance competing interests that would be served by granting or denying discovery when deciding whether protective order under Florida discovery rule similar to Rule 26(c) is appropriate); \textit{Taylor}, 48 Pa. D. & C.3d at 187 (decision whether or not to compel discovery pursuant to Pennsylvania rule similar to Rule 26(c) is dependent upon balancing competing interests).

In \textit{Belle Bonfils}, for example, the Supreme Court of Colorado reviewed a trial court’s grant of a discovery order which allowed a plaintiff, who had contracted AIDS from a blood transfusion, to contact the blood donor and attempt to determine his or her medical history. \textit{Belle Bonfils}, 763 P.2d at 1005. The court noted that the donor had a strong privacy interest in remaining anonymous and avoiding the embarrassment of being identified as an AIDS carrier. \textit{Id.} at 1012. The court further recognized as important the interest of the blood center and society in maintaining an adequate blood supply, society’s interest in maintaining a safe blood supply, and the plaintiffs’ right to discovery of all information needed to pursue the case. \textit{Id.}

The \textit{Belle Bonfils} court specified that society’s interest in a safe blood supply favored discovery because the blood center should not be immune when it is in the business of providing a product capable of transmitting disease. \textit{Id.} at 1012-13. The court favored discovery because, without the identity of the HIV-infected donor, the plaintiffs would not be able to discover whether the defendant blood center followed the screening procedures as to this donor and would have insufficient information to prosecute their claim. \textit{Id.} at 1013. Thus, the court found that the plaintiffs’ interest in discovery outweighed the privacy interests of the blood donor. \textit{Id.} The \textit{Belle Bonfils} court, however, tailored discovery so as to protect the donor as much as possible. \textit{Id.} at 1013-14. The court determined that the donor could be deposed by written questions submitted to the court by plaintiffs and forwarded by the court to the donor. \textit{Id.} Thus, the donor’s identity could be protected while allowing the plaintiffs to obtain relevant information to proceed with their claim. \textit{Id.}

Like other courts that have permitted discovery from blood donors who have tested HIV-positive, the \textit{Belle Bonfils} court has seemingly adhered to the view that discovery should be more limited when directed at third persons who are not parties to litigation. See \textit{Dart Indus. Co. v. Westwood Chem. Co.}, 649 F.2d 646, 649-50 (9th Cir. 1980) (stating that although discovery should not be “unnecessarily” restricted, “the ‘necessary’ restriction may be broader when a nonparty is the target of discovery”); \textit{Collins & Aikman Corp. v. J.P. Stevens & Co.}, 51 F.R.D. 219, 221 (D.S.C. 1971) (finding that discovery should be more limited to protect third parties from harassment, inconvenience or disclosure of confidential documents).
In addition to considering constitutional mandates and discovery rules in addressing a plaintiff blood recipient’s discovery request, some courts have decided this issue on the basis of the donor’s expectation of privacy that arises when he or she is assured by the blood supplier that his or her identity and medical history will remain confidential. Such decisions comport with precedent establishing that one’s expectation of privacy should be considered when determining his or her privacy rights.

B. The Physician-Patient Privilege

A physician-patient privilege has been statutorily adopted by almost every state. In general, such statutes provide legal protection against the compelled disclosure of confidential medical records and other information arising out of a physician-patient relationship. The in-

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In Laburre, the Supreme Court of Louisiana stated that the assurances of confidentiality that blood centers give blood donors during the screening process concerning blood donors’ medical histories, drug use and sexual activity gave rise to an expectation of privacy for blood donors. Laburre, 555 So. 2d at 1384. The court further stated that a “strong possibility” existed that without these assurances, blood donors would not honestly answer the questions posed by screeners. Id.

39. See Humphrey v. Riverside Methodist Hosp., 488 N.E.2d 877, 879 (Ohio 1986) (per curiam) (finding that non-party patients had substantial right not to disclose that they have Legionnaires’ Disease); State v. Port Clinton Fisheries, Inc., 465 N.E.2d 865, 865 (Ohio 1984) (concluding that “the government may assert the right to withhold the identities of informants in civil actions brought by the state pursuant to its police powers to protect a public trust”).

The Humphrey court, in holding that patients who were not parties to the litigation had a substantial right to confidentiality, emphasized that “a substantial right is affected where a request for disclosure of sensitive information is involved, when that information was initially given upon a promise of anonymity.” Humphrey, 488 N.E.2d at 879.

40. Laburre, 555 So. 2d at 1383 (citing Scott N. Stone & Ronald S. Liebman, Testimonial Privileges § 7.02 (1983)).

41. Lipton, supra note 2, at 164, 166. Some statutes are very broad and apply to any confidential information obtained by a physician from a patient. Id. (citing D.C. Code Ann. § 14-307(a) (1981)). Other statutes are less broad and apply to information that “would tend to ‘blacken the character’ of the patient.” Id. (quoting 42 Pa. Cons. Stat. Ann. § 5929 (1982)). A third category of statutes requires that the information be “communicated” from physician to patient. Id.

In addition to protecting medical information of the patient, most physician-patient privilege statutes also protect against disclosure of patient names and identifiers if such disclosure would “inevitably link” the patient to the confidential information. Id. at 165. The privilege can be asserted by the physician on behalf of the patient. Id.
tended effect of the physician-patient privilege is to encourage a patient to fully disclose his or her symptoms to a physician in order for the physician to properly diagnose and treat the patient, without the patient fearing that the information disclosed may later be used to his or her embarrassment and/or legal detriment. For example, in New Jersey the relevant statute limits the application of the physician-patient privilege to situations in which “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.”

Application of this privilege to blood donation situations has been largely unsuccessful. A blood donor is not usually seen by a physician.

42. See Laburre, 555 So. 2d at 1383-84. The Laburre court recognized that the threat of disclosure of patient confidences may deter patients from revealing humiliating or embarrassing information, or information which could be the basis for legal liability. Id. at 1383 (citing SCOTT N. STONE & RONALD S. LIEBMAN, TESTIMONIAL PRIVILEGES § 7.02 (1983)). The court duly noted that it is not conducive to treatment or therapy for patients to withhold relevant information from their physicians. Id. at 1384.

43. N.J. STAT. ANN. § 2A:84A-22.2(b) (West 1976). The text of this section provides:

Except as otherwise provided in this act, a person, whether or not a party, has a privilege in a civil action or in a prosecution for a crime or violation of the disorderly persons law or for an act of juvenile delinquency 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, and (c) the witness (i) is the holder of the privilege or (ii) at the time of the communication was the physician or a person to whom disclosure was made because reasonably necessary for the transmission of the communication or for the accomplishment of the purpose for which it was transmitted or (iii) is any other person who obtained knowledge or possession of the communication as the result of an intentional breach of the physician’s duty of nondisclosure by the physician or his agent or servant and (d) the claimant is the holder of the privilege or a person authorized to claim the privilege for him.

Id. § 2A:84A-22.2 (emphasis added).

44. Lipton, supra note 2, at 169 (arguing that while cases do not extend privilege to blood donors, “the reasons for so extending the privilege do exist and should control”); see Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1009 (Colo. 1988) (concluding that physician-patient privilege is inapplicable to blood donations because donor not seen by physician and did not receive medical care as required by Colorado legislation establishing privilege); Laburre, 555 So. 2d at 1383-84 (concluding that Louisiana physician-patient privilege is not applicable because blood donor not patient within contemplation of act); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (finding that Pennsylvania physician-patient privilege does not extend to blood donation setting because donor not patient and blood center employee is not physician), aff’d, 609 A.2d 796 (Pa. 1992); Doe v. University of Cincinnati, 538 N.E.2d 419, 422-23 (Ohio Ct. App. 1988) (finding that Ohio’s physician-patient privilege requiring elements of physician, patient and...
when donating blood. Thus, it is difficult to establish that a physician-patient relationship was created. In addition, a blood donor is not often considered a patient in the blood donation setting because he or she is not seeking diagnosis or treatment.

Thus far, only a New York trial court has denied discovery of blood donors' identities on the basis of the physician-patient privilege. No-communication for purpose of diagnosis or treatment are not fulfilled in course of blood donations); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 677 (Tex. Ct. App. 1987) (holding that Texas physician-patient privilege is not applicable to blood donors because donors are not considered patients and are not seen by physicians as defined by act). For a discussion of a case extending the physician-patient privilege to the blood supplier-blood donor relationship, see infra notes 48-49 and accompanying text.

Blood suppliers have difficulty invoking the physician-patient privilege in the blood donation setting because suppliers may be found to lack standing to assert this privilege on behalf of their donors. Unfortunately, the only court that has thus far permitted a blood supplier to assert the physician-patient privilege on behalf of its donor failed to discuss the blood supplier's standing to do so. See Krygier v. Airweld, Inc., 520 N.Y.S.2d 475 (N.Y. Sup. Ct. 1987). However, authority does exist for the proposition that a hospital may assert the physician-patient privilege on behalf of a patient. See Division of Medical Quality v. Gherardini, 156 Cal. Rptr. 55, 58 (Cal. Ct. App. 1979) (hospital had standing to assert physician-patient privilege on behalf of absent non-consenting patients). Even under Gherardini, uncertainty exists as to whether blood suppliers could also assert an applicable physician-patient privilege on behalf of their donors. This uncertainty exists because it is possible to distinguish the hospital in Gherardini from blood suppliers on the factual basis that the hospital in Gherardini was not a defendant facing potential liability for negligence surrounding the treatment of these patients. See id. at 57.

45. See Lipton, supra note 2, at 166. Federal regulations do not expressly indicate what type of professional must head blood banks and blood centers. See 21 C.F.R. § 600.10 (1991) (stating only that "[a] person shall be designated as the responsible head . . . of the establishment").

46. See Lipton, supra note 2, at 166. Even the most broadly-worded physician-patient privilege statutes require that a physician, not a nurse or technician, attend the patient in order for the privilege to be invoked. Id. Several courts, by focusing on the absence of a physician attending the patient during the blood donation process, prevented defendant blood suppliers from invoking the privilege. See, e.g., Stenger, 563 A.2d at 537 (finding that there was no indication that blood donation procedure was performed by physician as required by statute to invoke physician-patient privilege); University of Cincinnati, 538 N.E.2d at 422-23 (finding that one of elements of physician-patient privilege was absent because donor's blood not drawn by physician); Tarrant County, 734 S.W.2d at 677 (Texas privilege requires patient be seen by physician, and no evidence was brought forth to show that donor consulted physician upon blood donation).

47. See, e.g., Laburre, 555 So. 2d at 1384 (stating that "blood donor is not a patient who consults blood bank personnel for treatment or therapy" within meaning of Louisiana physician-patient privilege statute); University of Cincinnati, 538 N.E.2d at 422-23 (concluding that blood donor not considered patient and information provided by blood donor not communication as defined by Ohio statute); Tarrant County, 734 S.W.2d at 677 (because blood donor did not consult physician for medical care upon donation, he could not qualify as patient pursuant to Texas statute).

tably, one of the reasons why this court relied on the physician-patient privilege as a basis for its decisions was because the defendant blood supplier had a physician present at all times for the final approval of all of its donors.49

C. Society's Interest in an Adequate and Safe Blood Supply

AIDS-related litigation has spawned a tremendous amount of speculation regarding the potential effect that discovery of information from blood donors might have on the nation's blood supply. One view in favor of permitting discovery is that society's interest in a healthy blood supply may be promoted by “proving sloppy or careless donor screening procedures and by allowing a court to award punitive damages.”50 A Louisiana district court relied on this proposition, finding that disclosure of information from an infected donor would promote a just outcome to the plaintiff infected with AIDS.51 The court also opined that discovery would ensure that blood suppliers would establish and imple-

49. Krygier, 520 N.Y.S.2d at 476. Moreover, the Krygier court found that the person who attended the donor at this blood bank must have been either a physician, registered nurse, licensed practical nurse or phlebotomist. Id. The court, however, did not specifically discuss how a phlebotomist could qualify as a protected health care professional under the statute. See id. In addition, when stating that a physician is present at the blood bank “for the final clearance of all donors,” the court did not specify if the blood bank's policies required a physician to clear all donors for donation, or if only suspect donors were referred to a physician. See id.

Even if the Krygier decision can be taken at face value to mean that the presence of a physician to clear all donors for donation allows invocation of the physician-patient privilege, it must be noted that federal regulations do not require that the medical director of a blood bank or center be a physician. See 21 C.F.R. § 600.10 (1991). Therefore, it is unlikely that many blood suppliers would presently meet the Krygier criterion.

50. Woods & Thornton, supra note 1, at 715 (setting forth possible arguments plaintiff in AIDS litigation case could make concerning disclosure of donor information, including assertion that society has interest in provision of disease-free blood).

51. Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 126 (W.D. La. 1989) (holding that “[d]iscovery of relevant information from the subject donor is therefore appropriate, although a protective order will be entered to preserve the confidentiality of the donor's identity”).

http://digitalcommons.law.villanova.edu/vlr/vol37/iss2/3
ment the highest standards in the collection and sale of blood. 52

Many courts, however, have deemed disclosure to be so detrimental to the future of the nation's blood supply that any discovery from the blood donor has been precluded. 53 This result is due in part to the perception that the promotion of an all-voluntary blood donation system is necessary in order to ensure the safety and adequacy of the nation's blood supply. 54 This perception is based on the presumption that the blood of volunteer donors is less likely to be contaminated with infectious diseases than that of paid donors. 55 As enunciated by one district court, "[t]he specter of becoming involved in litigation, whether as a party or a witness, along with the potential for probing questions concerning a person's private life would certainly serve to dampen any charitable disposition toward donating blood." 56 Moreover, as another district court found, disclosure of blood donor information could affect

52. Id.
53. See, e.g., Bradway v. American Nat'l Red Cross, 132 F.R.D. 78, 80 (N.D. Ga. 1990) (denying discovery of donors' identities out of concern for nation's blood supply); Coleman v. American Red Cross, 130 F.R.D. 360, 362 (E.D. Mich. 1990) (finding that potential danger to volunteer blood supply should donors' identities be disclosed outweighs plaintiff's discovery needs); Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 653 (D.S.C. 1989) (concluding that erosion of confidentiality of blood donor information may affect not only quantity of blood supply, but also its safety); South Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 804 (Fla. Dist. Ct. App. 1985) (finding that need for free flow of donated blood combined with interests of donors outweighs plaintiff's interests in discovering names and addresses of blood donors), aff'd, 500 So. 2d 533 (Fla. 1987); Laburre v. East Jefferson Gen. Hosp., 555 So. 2d 1381, 1384-85 (La. 1990) (finding that prospect of blood donors being questioned by lawyers about drug use, sexual practices and lifestyle will present significant disincentive to donate blood); Doe v. University of Cincinnati, 538 N.E.2d 419, 425 (Ohio Ct. App. 1988) (concluding that denial of discovery of donor's name and address will further society's interest in encouraging future voluntary blood donors); Taylor v. West Penn Hosp., 48 Pa. D & C.3d 178, 186 (Allegheny County Bank 1987) (concluding that plaintiff's discovery request must be denied because of chilling effect disclosure of blood donor's identity would have on ability of blood bank to obtain sufficient supply of blood from voluntary donors).
54. See Rasmussen, 467 So. 2d at 803-04 (federal and state governments encourage voluntary blood donations because it has been determined that volunteer donors' blood is less likely to contain infectious agents than that of paid donors).
55. Id.
56. Coleman, 130 F.R.D. at 362. At least one other court has agreed with this proposition. See American Red Cross Blood Servs., 125 F.R.D. at 653. The District Court of South Carolina found that the practice of permitting discovery of donors would compel blood banks to warn donors of potential future discovery should their blood contaminate the recipient in order to ensure that donors confer informed consent before donating their blood. Id.

Considering the personal and intimate questions donors must now answer in order to donate blood, it must be noted that the questions asked of blood donors in the course of permitted discovery would be likewise personal and intimate. For an example of screening questions that individuals may be asked prior to being accepted as blood donors, see supra note 20.
not only the quantity of available blood, but also its safety, because some donors might be reluctant to reveal accurate information to the blood supplier due to fear that personal aspects of their lives might later be divulged.\(^{57}\)

In judging the impact that disclosure of a donor's identity could have upon the blood supply, one appellate judge wisely pointed out that "a determination of injury to society's interest by . . . limited discovery . . . is no less speculative than a determination that . . . [limited discovery] would benefit society by discouraging blood donations by those infected with AIDS."\(^{58}\)

D. The Plaintiff's Interest in Discovery of Relevant Information

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . [including] the identity and location of persons having knowledge of any discoverable matter."\(^{59}\) The United States Supreme Court has explicitly stated

\(^{57}\). \textit{American Red Cross Blood Servs.}, 125 F.R.D. at 653 (quoting \textit{Taylor v. West Penn Hosp.}, 48 Pa. D. & C. 3d 178, 189-90 (Allegheny County 1987)). The district court noted that the laws of its state do not permit the identity of the donor of HIV-infected blood to be disclosed. \textit{Id.} at 651 (quoting \textit{S.C. CODE ANN.} \S 44-29-90 (Law. Co-op. Supp. 1988)). The court further stated that such laws "reflect the belief that the best strategy for limiting the spread of infectious diseases is to encourage the segments of the population most likely to be infected to come forward voluntarily for testing." \textit{Id.} at 653.

As amended in 1988, one of the South Carolina statutes construed by the court in \textit{American Red Cross Blood Services} states in part:

To the extent resources are available to the Department of Health and Environmental Control for [the] purpose [of isolating persons infected or suspected of being infected with a sexually transmitted disease], when a person is identified as being infected with Human Immunodeficiency Virus (HIV), the virus which causes Acquired Immunodeficiency Syndrome (AIDS), his known sexual contacts or intravenous drug contacts, or both, must be notified but the identity of the person infected must not be revealed. Efforts to notify these contacts may be limited to the extent of information provided by the person infected with HIV.

\textit{S.C. CODE ANN.} \S 44-29-90 (Law. Co-op. Supp. 1991) (emphasis added). The court recognized that this, and similar statutes, are directed at the Department of Health and Environmental Control and not at the courts, so that under these statutes, the identities of donors are not \textit{absolutely} privileged against discovery in the context of negligence actions against blood banks. \textit{American Red Cross Blood Servs.}, 125 F.R.D. at 651. The effect of the court's decision, however, was to extend the privilege against disclosure to reach these actions because it found that "[c]ourts decisions that permit discovery of donors infected with the AIDS virus, even if they are narrowly drafted, will undermine [the] strategy [of limiting the spread of infectious diseases] to some degree." \textit{See id.} at 653.


\(^{59}\). \textit{FED. R. CIV. P.} 26(b)(1).
that discovery rules are to be given broad and liberal construction.\(^{60}\)
Moreover, as stated by one district court, "[t]he private litigant and the public have a strong interest in the fair and efficient resolution of civil disputes in courts of law."\(^{61}\)

Within the context of transfusion-related AIDS litigation, the actual blood donors are very likely the sole unbiased source of information as to the blood suppliers' potential liability.\(^{62}\) A plaintiff in such an action typically sues in negligence, alleging that the blood supplier responsible for releasing tainted donated blood for medical use was negligent in failing to adequately screen and test the donor for HIV.\(^{63}\) Thus, plaintiffs involved in these cases have a strong need to access information from the donor himself.\(^{64}\)

III. ANALYSIS OF SNYDER V. MEKHJIAN

A. Facts

_Snyder v. Mekhjian_\(^{65}\) presents the first situation in which plaintiffs utilized the New Jersey AIDS Assistance Act\(^{66}\) as a means of discovering


\(^{62}\) For a discussion of the assertion that blood donors are often the sole unbiased source of information concerning blood supplier liability, see _supra_ note 8.

\(^{63}\) For a discussion concerning the rationale for relying upon a negligence cause of action in transfusion-related AIDS litigation, see _supra_ notes 17-18 and accompanying text.

\(^{64}\) For example, in _Belle Bonfils_, the Supreme Court of Colorado set forth the following examples of questions that the plaintiffs might be able to ask the blood donor:

1. Was a sufficient medical history taken?
2. Is the medical history taken accurately recorded in the blood center's records?
3. Were answers in response to the blood center's questionnaire the subject of discussion at the time of donation, and if so, to what extent?
4. Did the donor give the same or different medical history before donating blood in the past?
5. Were the questions asked of the donor upon this donation the same as those asked for past donations?
6. Were the dangers involved in donating HIV-positive blood discussed?
7. At any point during the interview did the interviewer recommend the donor not give blood?


\(^{66}\) For a discussion of New Jersey's AIDS Assistance Act, see _supra_ notes 22-23 and accompanying text.
information from a blood donor with AIDS. During pre-trial discovery, an interlocutory order by the trial court denied plaintiffs' motion to discover information from a blood donor whose blood likely resulted in the plaintiff blood recipient's HIV-positive status.67 On appeal, the New Jersey Superior Court reversed the trial court's order with regard to the discovery issue, granting the plaintiffs the right to limited discovery from the blood donor.68 The Supreme Court of New Jersey affirmed the opinion of the superior court per curiam.69 Justice Pollock, however, authored an informative concurring opinion.70

In August, 1984, William Snyder was transfused with donated blood products, including platelets, while undergoing open heart surgery at St. Joseph's Hospital in Paterson, New Jersey.71 These blood products had been supplied to St. Joseph's by Bergen Community Blood Center (BCBC).72 Two years later, a blood donor, from whom Snyder received platelets during this surgery, again donated blood at BCBC.73 By this time, AIDS screening tests had been implemented, and the donor tested positive for HIV antibodies.74 From its records, BCBC ascertained that St. Joseph's Hospital had received previous blood products from this donor.75 BCBC contacted St. Joseph's, which in turn determined that William Snyder had been one of the recipients of platelets from this donor.76 St. Joseph's Hospital notified William Snyder's physician of this development, and in 1987, William Snyder, who was not otherwise at risk for contracting AIDS, tested HIV positive.77

68. Id. at 314-15.
69. Snyder, 593 A.2d at 307 (Pollock, J., concurring). For a discussion of the lower court's opinion, see infra note 85.
70. See Snyder, 593 A.2d at 319-28 (Pollock, J., concurring).
71. Id. at 319 (Pollock, J., concurring). This transfusion took place in 1984 when it was known that AIDS could be transmitted in blood products, but when testing was not yet available to detect antibodies to the virus in blood. This is important because a blood supplier's duty under a negligence cause of action will vary depending upon the knowledge of AIDS and HIV testing capabilities at the time of a particular transfusion. For a discussion of the changing duties owed blood recipients by blood suppliers, see supra note 18.
72. Snyder, 593 A.2d at 319 (Pollock, J., concurring). BCBC is a member of the American Association of Blood Banks (AABB), which collects approximately one-half of the nation's blood supply. Id. (Pollock, J., concurring). The remainder is collected by the American Red Cross. Id. (Pollock, J., concurring). The AABB was also joined as a defendant in this case. Id. at 318.
73. Id. at 320 (Pollock, J., concurring).
74. Id. (Pollock, J., concurring).
75. Id. (Pollock, J., concurring). BCBC traced the donor's previous donations pursuant to a nationwide "look back" program. Id. (Pollock, J., concurring). This program was implemented to assist in identifying blood recipients who received blood from donors who later test positive for HIV antibodies. Id. (Pollock, J., concurring).
76. Id. (Pollock, J., concurring).
77. Id. (Pollock, J., concurring).
In 1989, William Snyder and his wife filed suit alleging, inter alia, that BCBC had been negligent in screening its donors for HIV. BCBC denied that the donor's blood product received by William Snyder in 1984 contained the virus, even though BCBC acknowledged that this donor tested positive for HIV in 1986. Therefore, the plaintiffs sought pre-trial discovery of the donor to determine whether the donor had likely been infected with HIV at the time of his or her 1984 donation.

In addition to their negligence claim, plaintiffs asserted a strict liability cause of action against all defendants, claiming that donor screening techniques could have been undertaken at the time of William Snyder's transfusion to render the donated blood supply safe from AIDS contamination. Plaintiffs further alleged that because the blood supply could have been made safe, all entities and individuals participating in the chain of collection and distribution of this infected blood product should be held strictly liable. The court granted summary judgment to all defendants on the strict liability claim. This dismissal was affirmed on appeal.

In their negligence claim, plaintiffs alleged that William Snyder's physicians were negligent for failing to advise him of the risks inherent in receiving contaminated blood and failing to allow him the option of arranging to have family members donate blood for his use. Also, negligence was asserted specifically against William Snyder's surgeon for failing to repair a bleeding artery during his first surgery. This negligence resulted in a subsequent operation during which the contaminated transfusion was given. Plaintiffs claimed BCBC and AABB were negligent for failing to implement available risk-reducing procedures in the blood collection process, and that BCBC was also negligent for failing to follow screening procedures it did have in place. The negligence claim against all defendants survived summary judgment.

In addition, plaintiff asserted consumer fraud and punitive damages claims against all defendants based on their knowing and irresponsible failure to protect the blood supply from AIDS contamination. The punitive damages claims against the physicians and hospital were dismissed, but those against AABB and BCBC survived. The consumer fraud claims were dismissed against all defendants. Thus, at the time the Supreme Court of New Jersey affirmed the superior court's discovery decision, only the negligence claims against Snyder's physicians, AABB and BCBC remained, as well as the punitive damages claims against AABB and BCBC.

Apparently, BCBC preferred to take the position that the donor contracted AIDS after he or she donated the blood transfused to plaintiff, and that plaintiff was exposed to HIV by another means.

The superior court's opinion in this matter set forth a number of questions which plaintiff William Snyder would need to ask the blood donor to formulate his case against BCBC:

1. Did the donor have symptoms of lymph-node swelling or skin disorders, which are suggestive of early AIDS infection, at the time of this donation? If so, was he asked about them?
2. Was the donor physically examined to determine if he had the above symptoms?
3. Was the donor given the appropriate high-risk group self-screening...
BCBC also claimed that it had supplied an information sheet to all donors in 1984, which delineated the high-risk groups for AIDS and requested that persons voluntarily refrain from donating blood if they fell within any of these groups. In addition, BCBC claimed that it obtained a medical history from every donor to discover whether he or she was a member of any high-risk group. Thus, plaintiffs also sought pre-trial discovery of the blood donor to determine whether BCBC had followed these screening procedures in accepting this donor’s blood in 1984. Plaintiffs specified that they neither sought the donor’s identity, nor did they intend to sue the donor.

The New Jersey Supreme Court, apparently persuaded by the plain-information, which might have indicated that he or she should not donate?
4. Was a reasonable effort made to determine if he or she was in a high-risk category?
5. Were his or her responses to the medical history questions accurately recorded?
6. Were the questions adequately explained?
7. Would present screening requirements, notwithstanding laboratory testing for the AIDS antibody, have revealed his or her AIDS infection?

Snyder, 582 A.2d at 314.

81. Snyder, 593 A.2d at 319-20 (Pollock, J., concurring). This list specified that the following individuals were at risk of having AIDS: those with signs and symptoms of AIDS; sexual partners of those with AIDS; sexually active homosexual and bisexual men with more than one partner; Haitian entrants to the U.S.; present or past intravenous drug abusers; hemophiliacs; and sexual partners of those at increased risk of AIDS. Id. at 319 (Pollock, J., concurring). This listing concluded with the following statement:
Your blood bank is asking that you voluntarily refrain from donating at this time if you are in any of the currently identified high-risk groups.
Although the majority of members of these groups are not carriers, there is presently no means of detection and thus no mechanism to identify those few who may be at risk.

Id. (Pollock, J., concurring).

82. Id. at 319-20 (Pollock, J., concurring). BCBC asserted that it asked a series of twenty-nine questions in the course of soliciting a donor’s medical history. Id. at 319 (Pollock, J., concurring). These questions included: “Are you in general good health? Ever injected yourself with any drugs? Signs of swollen glands or Kaposi’s sarcoma [an AIDS-related disease]?” Id. at 319-20 (Pollock, J., concurring).

These specific questions were asked to discover if the donor was a member of any identified high-risk groups for contracting AIDS. Id. at 320 (Pollock, J., concurring). BCBC contended that the donor gave negative responses to each of these questions. Id. (Pollock, J., concurring).

83. Id. (Pollock, J., concurring).

84. Id. (Pollock, J., concurring). The plaintiffs’ claim that they did not seek to sue the blood donor is important because New Jersey’s AIDS Assistance Act strictly prohibits disclosure “to initiate or substantiate any criminal or civil charges against the person who is the subject of the record or to conduct any investigation of that person,” except in certain circumstances. N.J. STAT. ANN. § 26:5C-9(c) (West Supp. 1991). For the relevant text of the New Jersey AIDS Assistance Act, see supra notes 22-23 and accompanying text. As noted by Justice Pollock, absent a showing of specific need, discovery of the donor’s identity
RECENT DEVELOPMENT

Recent arguments, affirmed the superior court's decision granting the plaintiffs limited discovery of information from the blood donor. Unfortunately, the court did not express its reasoning in its per curiam opinion. An analysis of Justice Pollock's concurring opinion, however, while not binding on the court in future decisions, may be helpful in hypothesizing the court's reasoning.

Justice Pollock was guided by the New Jersey AIDS Assistance Act in reaching his decision regarding the propriety of the plaintiffs' discovery request. Justice Pollock noted that the court's role under the Act was to determine whether "good cause" existed to disclose the donor's record. To determine good cause, the court is required to: (1) evaluate the effect of disclosure on the physician-patient relationship, the donor's privacy interest and the nation's blood supply, and (2) weigh these

would contravene the New Jersey AIDS Assistance Act. Snyder, 593 A.2d at 325 (Pollock, J., concurring).

Snyder, 593 A.2d at 319. The New Jersey Superior Court began its analysis of the donor discovery issue by noting that BCBC had already supplied plaintiffs with the donor's registration form, from which the donor's name and identifying information had been deleted. Snyder, 582 A.2d at 313. The court, however, found compelling the plaintiffs' claim that additional information about the donor was needed to prove causation and negligence on the part of BCBC. Id. at 314-15.

Because BCBC refused to admit that the donor was HIV-positive at the time of the donation that was ultimately transfused into William Snyder, the court determined that plaintiffs were entitled to seek direct proof that the donor's blood caused William Snyder's HIV-positive status. Id. at 314. Moreover, the court found persuasive the notion that plaintiffs required highly relevant and pertinent information about the donor screening process in order to prove BCBC negligent, and that this information was not available from any source other than the donor himself. Id.

The court noted that the New Jersey AIDS Assistance Act requires that the plaintiffs' need for disclosure and the public interest be balanced against potential injury to the donor, to the physician-patient relationship, and to the blood donation process. Id. For a discussion of the New Jersey AIDS Assistance Act, see supra notes 22-23 and accompanying text. Without considerable discussion as to the procedure used in balancing these interests, the court found that "where, as here, a litigant's discovery need cannot otherwise be met and it is possible to accommodate that need with limited and controlled intrusion, some access under careful court supervision is appropriate and justifiable." Snyder, 582 A.2d at 314-15. The court recommended limited discovery in the form of "veiled" depositions or depositions on written questions wherein the interests of the public and the donor's privacy would not be unduly prejudiced. Id. at 315. The court rationalized its decisions by stating that:

The degree of plaintiff's injury, his right to redress from those who may have negligently failed to protect him, and his need for information which only the donor can provide if redress is to be obtained, all justify the limited disclosure we here sanction without unduly prejudicing the interest of the public and the donor's privacy rights.

Snyder, 593 A.2d at 319.

For the text of relevant sections of the New Jersey AIDS Assistance Act, see supra notes 22-23 and accompanying text.

Snyder, 593 A.2d at 322 (Pollock, J., concurring).
concerns against the public interest and the plaintiff's need for limited discovery from the blood donor. 89

Justice Pollock first addressed the physician-patient privilege issue, noting that "the purpose of the privilege is to permit patients to disclose facts necessary for diagnosis and treatment." 90 Citing the precedent of other jurisdictions, Justice Pollock asserted that a blood donation by a person for the benefit of another does not involve diagnosis or treatment as contemplated by New Jersey's physician-patient privilege. 91 Thus, Justice Pollock found that the New Jersey physician-patient privilege is inapplicable in the blood donation setting. 92

Turning to the issue of the donor's privacy interest, Justice Pollock concluded that "various considerations qualify the donor's expectation of privacy." 93 Among these considerations, Justice Pollock noted that the record did not show that BCBC had assured the donor of confidentiality in his or her responses to questions that were asked in order to elicit the donor's medical history and potential high-risk status. 94 Moreover, Justice Pollock considered the fact that limited discovery measures were possible so as not to excessively impinge upon the donor's privacy

89. Id. (Pollock, J., concurring).
90. Id. (Pollock, J., concurring) (quoting State v. Dyal, 478 A.2d 390, 394 (N.J. 1984)). For the text of the New Jersey physician-patient privilege statute, see supra note 43. For a general discussion of the application of this privilege to AIDS-related litigation, see supra notes 40-49 and accompanying text.
91. Snyder, 593 A.2d at 323 (Pollock, J., concurring); accord Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1009 (Colo. 1988) (finding that physician-patient privilege is not applicable to blood donation setting because donor was not seen by physician and did not receive medical care as required by Colorado legislation establishing privilege); Laburre v. East Jefferson Gen. Hosp., 555 So. 2d 1381, 1383-84 (La. 1990) (concluding that Louisiana physician-patient privilege is not applicable because blood donor is not patient within contemplation of act); Doe v. University of Cincinnati, 538 N.E.2d 419, 422-23 (Ohio Ct. App. 1988) (stating that Ohio physician-patient privilege requires elements of physician, patient and communication for purpose of diagnosis or treatment, none of which are fulfilled in course of blood donations); Stenger v. Lehigh Valley Hosp. Ctr., 563 A.2d 531, 537 (Pa. Super. Ct. 1989) (finding that Pennsylvania physician-patient privilege does not extend to blood donation setting since donor is not patient and blood center employee is not physician), aff'd, 609 A.2d 796 (Pa. 1992); Tarrant County Hosp. Dist. v. Hughes, 734 S.W.2d 675, 677 (Tex. Ct. App. 1987) (finding that Texas physician-patient privilege inapplicable to blood donors because they are not patients and are not seen by physicians as defined by act).
92. Snyder, 593 A.2d at 323 (Pollock, J., concurring).
93. Id. (Pollock, J., concurring).
94. Id. (Pollock, J., concurring). Justice Pollock did point out, however, that despite failing to give such assurances, the standard practice for blood collection agencies is to maintain donor confidentiality. Id. (Pollock, J., concurring). For a discussion of the interpretation by some courts that plaintiffs may not discover the identity of blood donors when the donors have been assured that all information disclosed will remain confidential, see supra notes 38-39 and accompanying text. For a general discussion of blood donors' privacy interests as determined by other jurisdictions, see supra notes 28-39 and accompanying text.
interests. For example, the trial court could make use of "veiled" depositions wherein the donor's name would not be disclosed; the court would then limit the areas of questioning and impose other conditions to ensure the donor's anonymity. In the alternative, the trial court could permit a deposition on written questions where the court would rule on the questions before submission to the donor, and permit an alias identification and oath.

Justice Pollock then addressed the defendants' assertion that the New Jersey AIDS Assistance Act violated the donor's constitutional right to privacy. Justice Pollock concluded that the statute afforded sufficient protection to the donor's privacy interests. To support his conclusion, Justice Pollock noted that United States Supreme Court precedent did not support the conclusion that HIV-infected blood donors possess a fundamental right of privacy so as to preclude them from participating in discovery proceedings. Rather, Justice Pollock determined that such precedent supported the conclusion that the legislature determines the protection of the privacy concerns of donors. Therefore, if an enacted statute is reasonable, it should withstand a constitutional challenge. Justice Pollock then determined that the New Jersey

95. Snyder, 593 A.2d at 323 (Pollock, J., concurring).
96. Id. (Pollock, J., concurring) (quoting Snyder, 582 A.2d at 315).
97. Id. at 324 (Pollock, J., concurring) (citing Snyder, 582 A.2d at 315).
98. Id. at 325 (Pollock, J., concurring).
99. Id. at 326 (Pollock, J., concurring). Although Justice Pollock recognized the hysteria associated with AIDS in our society, he determined that utilization of protective measures to shield the donor's identity would sufficiently protect the donor's privacy interests. Id. at 323 (Pollock, J., concurring). For a discussion of the impact that disclosure of one's AIDS status might have on the individual, see supra note 31 and accompanying text.
100. Snyder, 593 A.2d at 323 (Pollock, J., concurring). Justice Pollock noted that, in the last 15 years, the United States Supreme Court has addressed the individual's interest in confidentiality three times and as yet, the Court has never found that a statute impermissibly infringed upon such interest. Id. at 325; see Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 465, 484 (1977) (upholding constitutionality of statute that authorizes offices of Executive Branch to take custody of presidential papers and tape recordings and promulgate regulations that provide screening by archivists and determine conditions upon which public may access papers and recordings); Whalen v. Roe, 429 U.S. 589, 603-04 (1977) (upholding constitutionality of New York statute that required persons taking drugs having both lawful and unlawful market to provide the state with copy of prescription); Paul v. Davis, 424 U.S. 693, 694 (1976) (holding that plaintiff was not deprived of liberty protected by the Fourteenth Amendment when police circulated flyer containing photograph of plaintiff to warn merchants of possible shoplifters). Justice Pollock concluded his analysis of these cases by stating that "[t]hese cases suggest that the Court considers a person's right of nondisclosure of personal matters not to be a fundamental right that triggers strict scrutiny." Snyder, 593 A.2d at 325 (Pollock, J., concurring). For a discussion of Whalen, see supra note 28.
101. Snyder, 593 A.2d at 326 (Pollock, J., concurring).
102. Id. (Pollock, J., concurring) (citing Ronald D. Rotunda et al., Treatise on Constitutional Law Substance and Procedure § 18.30, at 605 (1986).
AIDS Assistance Act on its face afforded sufficient protection to the donor’s privacy interests.\textsuperscript{103}

In considering the potential effect of permitting discovery of blood donors upon the blood supply, Justice Pollock concluded that no support existed for the defendants’ claim that subjecting donors to discovery would significantly affect the safety or adequacy of the blood supply.\textsuperscript{104} Justice Pollock argued that the quality of the blood supply could be elevated by donor discovery, because donors with AIDS or those within high-risk groups might be discouraged from donating blood.\textsuperscript{105}

Justice Pollock finally considered the public and plaintiffs’ interest and need for disclosure, as required by the New Jersey AIDS Assistance Act.\textsuperscript{106} He noted that society has a legitimate interest in compensating victims injured by the negligence of others.\textsuperscript{107} This interest is most effectively promoted by allowing full discovery within the course of litigation.\textsuperscript{108} Justice Pollock recognized that if the plaintiffs in this case were not permitted to question the donor, their prima facie case of negligence would be based merely on inferences of breach of duty and causation.\textsuperscript{109} He found that the donor was likely to possess highly relevant information that was not available from any other source: “A complete

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\item \textsuperscript{103} Id. at 327 (Pollock, J., concurring). Justice Pollock was influenced by the section of the New Jersey AIDS Assistance Act that states, “[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.” N.J. STAT. ANN. § 26:5C-9(a) (West Supp. 1991).
\item \textsuperscript{104} Snyder, 593 A.2d at 324 (Pollock, J., concurring). For a discussion of how other jurisdictions have interpreted the effect that donor discovery may have upon the adequacy and safety of the blood supply, see supra notes 50-58 and accompanying text.
\item \textsuperscript{105} Snyder, 593 A.2d at 324 (Pollock, J., concurring). \textsuperscript{106} Id. (Pollock, J., concurring). For a discussion of how other jurisdictions have evaluated a plaintiff’s interest in blood donor discovery, see supra notes 59-64 and accompanying text.
\item \textsuperscript{107} Snyder, 593 A.2d at 324 (Pollock, J., concurring). As Justice Pollock recognized, this societal interest is implied by the New Jersey AIDS Assistance Act. \textsuperscript{108} Id. (Pollock, J., concurring).
\item \textsuperscript{109} Id. (Pollock, J., concurring). Justice Pollock further stated that “the Legislature mandates that a court should weigh ‘the public interest and need for disclosure.’ ” \textsuperscript{109} Id. (Pollock, J., concurring) (quoting N.J. STAT. ANN. § 26:5C-9(a) (West Supp. 1991)).
\end{itemize}

Justice Pollock also noted that the plaintiff had a compelling need to question the donor in order to prove causation and negligence. \textsuperscript{109} Id. (Pollock, J., concurring). The blood donor may assist the plaintiff in this case to establish causation since the defendant blood center denied that the unit of blood product transfused to the plaintiff was HIV-positive. \textsuperscript{110} Id. (Pollock, J., concurring). Moreover, the blood donor may assist the plaintiff in proving negligence because only the donor can instruct the plaintiff whether the blood center negligent screened the donor prior to donation. \textsuperscript{110} Id. at 325 (Pollock, J., concurring) (quoting Snyder, 582 A.2d at 315).

\textsuperscript{109} See id. at 325 (Pollock, J., concurring).
denial of discovery of the donor could subvert both the search for truth in civil litigation and the goals of tort law to deter negligence and to compensate injured parties.

Upon consideration of the above factors, Justice Pollock concluded that the superior court's decision should be affirmed, thereby permitting William Snyder to seek limited discovery from the donor. Justice Pollock determined that this discovery should proceed upon implementation of whatever protective mechanisms the trial court deemed appropriate to protect the donor's privacy and identity. In summation, Justice Pollock stated: "William Snyder entered St. Joseph's for heart surgery. He now tests HIV positive and is living a medical tragedy. The judicial system cannot restore his health, but it can provide him with a reasonable opportunity to discover if defendants were negligent.

Justice Garibaldi filed a dissenting opinion in which she acknowledged that in some situations the blood donor is the only individual who can provide information to prove the blood supplier's negligence for the transfusion of HIV-infected blood. Justice Garibaldi, however, did not find discovery to be warranted in this case. Justice Garibaldi determined that the court must balance the party's need for the particular discovery against the intrusiveness of the process to the party subject to the discovery. Justice Garibaldi noted, however, the possible intrusive nature of such discovery to the blood donor, who may be so ill that discovery may be unduly burdensome. Justice Garibaldi also noted that the donor may incur financial difficulty if he or she prefers legal representation in responding to discovery, and that discovery may result in the donor's loss of confidentiality if it is revealed to unaware family and friends that the donor is HIV-positive.

Moreover, Justice Garibaldi specified that the section of the AIDS Assistance Act relied upon by Justice Pollock was merely a narrow exception to the overall non-disclosural posture of the Act. For a discussion of Justice Pollock's

110. Id. (Pollock, J., concurring).
111. Id. at 319 (Pollock, J., concurring). Justice Pollock stated that "I concur with [the per curiam] opinion [affirming the lower court's decision] and write separately to emphasize the Court's reliance on the statutory balance of the donor's privacy interest, the plaintiffs' interest in full discovery and compensation for the injuries they [sic] have sustained, and society's interest in a safe and adequate blood supply." Id. (Pollock, J., concurring).
112. Id. at 323-24 (Pollock, J., concurring) (quoting Snyder, 582 A.2d at 315).
113. Id. at 328 (Pollock, J., concurring).
114. Id. at 329-30 (Garibaldi, J., dissenting).
115. Id. at 330 (Garibaldi, J., dissenting).
116. Id. (Garibaldi, J., dissenting).
117. Id. (Garibaldi, J., dissenting).
118. Id. (Garibaldi, J., dissenting).
119. Id. (Garibaldi, J., dissenting).
ibaldi asserted that the section of the Act permitting disclosure of information of those who are HIV-positive must be read in conjunction with those sections that explicitly acknowledge and protect the rights of such persons.\textsuperscript{120}

Justice Garibaldi stressed that those courts that have permitted some level of disclosure of this type of information have first found either that the donor information was critical to the plaintiff’s cause of action, or that evidence already existed demonstrating wrongdoing on the part of the blood bank or blood donor, both of which are contrary to the facts of this case.\textsuperscript{121} In addition, Justice Garibaldi noted that courts must consider the probative value of the information sought prior to permitting disclosure.\textsuperscript{122} She suggested that a trial court faced with having to apply a balancing test “must remain sensitive to the possibility that plaintiffs’ discovery motion might actually be an effort 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.”\textsuperscript{123}

Justice Garibaldi concluded by noting that the decision of whether to authorize disclosure of donor information is “best left to the trial court,” and that the trial court in this case did not abuse its discretion in denying discovery of the blood donor.\textsuperscript{124} Justice Garibaldi was not persuaded that the plaintiffs had demonstrated a compelling need for the donor information to justify its disclosure.\textsuperscript{125}

\textsuperscript{120} Snyder, 593 A.2d at 330 (Garibaldi, J., dissenting). Justice Garibaldi profiled various sections of the New Jersey AIDS Assistance Act in support of her contention that the legislative history of the Act illustrates a compelling need for non-disclosure of HIV-information. \textit{Id.} (Garibaldi, J., dissenting). Justice Garibaldi first noted that the Act provides that “records maintained by a blood bank that contain identifying information about a person who has or is suspected of having AIDS or HIV infection are confidential.” \textit{Id.} (Garibaldi, J., dissenting) (citing N.J. STAT. ANN. § 26:5C-7 (West Supp. 1991)). Moreover, “[w]ithout prior written consent of the donor, the Act permits disclosure under extremely limited conditions.” \textit{Id.} (Garibaldi, J., dissenting) (citing N.J. STAT. ANN. § 26:5C-8 (West Supp. 1991)). Justice Garibaldi also noted a statutory provision requiring that an HIV-positive donor’s name only be placed on a deferral list maintained by a particular blood bank in order to ensure confidentiality, rather than be automatically transferred to a statewide deferral list without the Department of Health deeming such transfer appropriate. \textit{Id.} (Garibaldi, J., dissenting) (citing N.J. ADMIN. CODE tit. 8, § 8-6.5(f)(2) (1991)).

\textsuperscript{121} \textit{Id.} at 331 (Garibaldi, J., dissenting).

\textsuperscript{122} \textit{Id.} at 332 (Garibaldi, J., dissenting).

\textsuperscript{123} \textit{Id.} (Garibaldi, J., dissenting).

\textsuperscript{124} \textit{Id.} at 334 (Garibaldi, J., dissenting).

\textsuperscript{125} \textit{Id.} (Garibaldi, J., dissenting). Justice Garibaldi noted that rarely will a plaintiff be able to establish a compelling need for donor information, and even when this burden is met, the court must ensure maximum protection of the donor’s confidentiality by narrowly limiting discovery. \textit{Id.} (Garibaldi, J., dissenting).
RECENT DEVELOPMENT

B. Impact

The Snyder opinion is an important development for New Jersey plaintiffs and their attorneys who require discovery from blood donors in order to proceed against blood suppliers in transfusion-related AIDS litigation. No longer will defendant blood suppliers in situations factually similar to Snyder be permitted to completely shield blood donors from plaintiffs under the guise of promoting donor confidentiality, preventing harm to the physician-patient relationship, or maintaining the future adequacy and safety of the nation's blood supply. Such a decision is of special significance to New Jersey plaintiffs because New Jersey ranked fourth in the nation in the number of reported cases of AIDS when the New Jersey AIDS Assistance Act was enacted.\(^\text{126}\)

The Snyder opinion provides important precedent concerning donor discovery in situations in which a plaintiff has alleged negligence following contraction of AIDS from a blood transfusion prior to the availability of AIDS testing. Considering that a person may be infected with HIV for up to ten years before he or she is diagnosed with AIDS,\(^\text{127}\) many of these transfusion-related AIDS suits probably have yet to be instituted.

While Justice Pollock addressed many of the issues the Snyder case raised, many questions still remain unanswered. Because Snyder dealt with a person who contracted AIDS from a blood transfusion performed before methods of testing donated blood were available, it is uncertain how the New Jersey courts will decide the blood donor discovery issue in cases involving persons who contracted AIDS from blood transfusions performed after testing became available in 1985. The Snyder rationale, however, should also be applicable to situations after 1985, in which donor blood has been tested for HIV antibodies, but the resulting negative test results were inaccurate.\(^\text{128}\) Due to the inherent problems in the AIDS testing process, blood donation centers are still required to carefully screen blood donors based upon their medical histories. Therefore, blood centers should still be subject to negligence suits based upon their failure to exercise due care in screening out those donors at high risk for AIDS.\(^\text{129}\)

It is also unclear whether New Jersey plaintiff-blood recipients will be restricted to negligence causes of action for contraction of AIDS in

\(^{126}\) N.J. STAT. ANN. § 26:5C-2(g) (West 1987). This provision states that "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." Id.

\(^{127}\) See Baker, Comment, supra note 2, at 83 (citing Study Predicts 99 Percent of Infected Men to Get AIDS, 3 AIDS POL'Y & L. (BNA) No. 11, at 2 (June 15, 1988)). The average incubation period of AIDS is 7.8 years. Id.

\(^{128}\) For a discussion of instances in which donor blood may test falsely negative for the antibody to HIV, see supra note 2.

\(^{129}\) For a discussion of the importance of donor medical history screening even after the implementation of AIDS testing, see supra note 2.
the post-testing era. New Jersey has not enacted blood shield legislation which would bar strict liability and implied warranty causes of action for the provision of all blood products.\textsuperscript{130} New Jersey precedent involving strict liability causes of action has termed blood an unavoidably unsafe product only with regard to transfusions during the \textit{pre-testing} era when there existed up to a one in 550 chance that HIV-positive blood would be released for transfusion.\textsuperscript{131} Under AIDS testing methodologies, it is yet to be determined if the current less than one in 40,000 chance that HIV-positive blood may be released for transfusion will also result in blood being labelled an unavoidably unsafe product, thus barring strict liability causes of action for the transfusion of HIV-contaminated blood that tested falsely negative.

\section*{IV. Conclusion}

The Centers for Disease Control have estimated that up to one and one half million Americans are infected with HIV, many of whom are unaware of their condition.\textsuperscript{132} AIDS will continue to infiltrate our society and, as a result, the New Jersey courts can expect to receive requests from many other plaintiffs like William Snyder who wish to question the donors of transfused blood. Many blood recipients exposed to HIV by blood transfusions during the pre-testing era may still not know of their HIV-positive status. Furthermore, due to the fallibility of current testing procedures, donors will continue to test falsely negative, and their blood will inadvertently be released by blood suppliers to infect others. Moreover, this problem is not limited to the blood donation setting. HIV may also be transmitted by way of organ donations, skin grafts and artificial insemination, when the donors for these procedures either are not tested or test falsely negative for antibodies to the virus.\textsuperscript{133} Thus,

\begin{itemize}
  \item \textsuperscript{130} For a discussion of blood shield legislation, see supra note 17.
  \item \textsuperscript{131} For a discussion of New Jersey law which classifies blood as an unavoidably unsafe product during the pre-testing era of AIDS, see supra note 17.
  \item \textsuperscript{132} Baker, Comment, supra note 2, at 99.
  \item \textsuperscript{133} See Centers for Disease Control, \textit{Semen Banking, Organ and Tissue Transplantation, and HIV Antibody Testing}, 259 JAMA 1301, 1301 (1988) (making recommendations regarding need to test prospective donors of organs, tissues and semen pursuant to reports by Public Health Service that HIV has been transmitted through donations of organs, tissues and semen); Prem Kuman, M.D. et al., \textit{Transmission of Human Immunodeficiency Virus by Transplantation of a Renal Allograft, with Development of the Acquired Immunodeficiency Syndrome}, 106 \textit{ANNALS OF INTERNAL MED.} 244, 244 (Feb. 1987) (report of kidney transplant recipient who contracted AIDS from donated organ); G.J. Stewart et al., \textit{Transmission of Human T-Cell Lymphotropic Virus Type III (HTLV-III) by Artificial Insemination by Donor}, \textit{THE LANCET}, Sept. 14, 1985, at 581 (finding that four out of eight recipients of artificial insemination with semen from symptomless carrier of HIV had antibody to virus).
\end{itemize}
the breadth of potential plaintiffs who will seek donor discovery pursuant to New Jersey’s AIDS Assistance Act has yet to be realized.

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