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I. COURT ALLOWS DISCOVERY FROM VOLUNTEER BLOOD DONORS IN TRANSFUSION-RELATED AIDS LITIGATION

In *Watson v. Lowcountry Red Cross*[1] the Fourth Circuit Court of Appeals affirmed a district court order granting plaintiff's motion to compel certain discovery from a volunteer blood donor.[2] The court held that allowing direct discovery from an anonymous blood donor did not violate either Rule 26(c) of the Federal Rules of Civil Procedure[3] or the United States and South Carolina Constitutions.[4] The court concluded that the discovery did not violate the donor's constitutional right to privacy,[5] that no significant evidence demonstrated that allowing the discovery would lead to a dangerous depletion of the blood supply,[6] and that the discovery sought by the plaintiff was "'reasonably calculated to lead to the discovery of admissible evidence.'"[7]

The *Watson* decision appears to contradict *Doe v. American Red Cross Blood Services*,[8] in which the South Carolina Federal District Court denied a plaintiff's similar discovery request, holding that disclosure of the requested information would destroy confidentiality and adversely affect the nation's blood supply.[9] However, the cases may not be inconsistent because the two courts used similar reasoning in deciding whether to allow the discovery, but reached opposite conclusions based on factual differences. The following factors appeared determinative in each case: (1) the degree of intrusiveness of the requested discovery method, and (2) the plaintiff's need for the information, considering other available discovery and its sufficiency. The plaintiff in *Doe* requested that the donor's identity be revealed or that a "veiled deposition" take place,[10] whereas Watson sought and was granted discovery in the form of limited interrogatories with the donor's name remaining undisclosed.[11] Further, the *Doe* court questioned the need for the requested discovery because of the availability of other sufficient discovery;[12] whereas

1. 974 F.2d 482 (4th Cir. 1992).
2. *Id.* at 489.
3. FED. R. CIV. P. 26(c)(1).
4. *Watson*, 974 F.2d at 487-88.
5. *Id.* at 488.
6. *Id.* at 485-87.
7. *Id.* at 489 (quoting FED. R. CIV. P. 26(c)(1)).
8. 125 F.R.D. 646 (D.S.C. 1989).
9. *Id.* at 657.
10. *Id.* at 649.
11. *Watson*, 974 F.2d at 484 (the donor's identity would be divulged only to the court and to the lawyer representing the donor).
12. *See Doe*, 125 F.R.D. at 654.

the *Watson* court deemed the discovery necessary, if not crucial, to Watson's case.[13]

The *Doe* decision does not represent a policy of denial in all cases, however.[14] The *Watson* and *Doe* decisions are consistent with the majority of courts that have addressed the volunteer blood donor discovery issue. These decisions represent a compromise between the donor's interest in privacy and the nation's interest in a safe and adequate blood supply on one side, and the plaintiff's interest in pursuing litigation and the preservation of the adversarial system on the other side.[15]

The plaintiff, Cynthia Watson, brought this wrongful death action against Lowcountry Red Cross ("Red Cross") and the Medical University of South Carolina[16] following the death of her infant twin son, Trevor. A premature infant, Trevor remained hospitalized for approximately two months following his birth, during which time he received numerous blood transfusions. Trevor tested positive for Human Immunodeficiency Virus (HIV) in 1986, and died of Acquired Immune Deficiency Syndrome (AIDS) in 1988.[17]

In pursuing a negligent screening theory of liability against the Red Cross, Watson claimed that the already-completed discovery was inadequate and sought information from the "implicated donor"[18] regarding the donor's background and the donation process.[19] When the Red Cross objected to the donor discovery, the matter was referred to a magistrate who "dismissed as

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13. *See Watson*, 974 F.2d at 488.

14. *See Doe*, 125 F.R.D. at 657 ("Unfortunately, there are cases in which society's interest must take precedence over the interests that a few individuals may have in pursuing pretrial discovery in order to prosecute their claims for compensatory damages. This is such a case.")

15. *See id.* at 649 (deciding to grant a protective order for the donor's protection after balancing the competing interests involved); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1010 (Colo. 1988) (en banc) (balancing of interests used to determine whether to disclose donor's identity); Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 535 (Fla. 1987) (balanced competing interests in deciding whether to grant or deny discovery). For a more expansive list of cases, see Lincoln A. Terzian, Note, *AIDS—Confidentiality—Individuals Infected with Acquired Immune Deficiency Syndrome (AIDS) Through Blood Transfusions May Obtain Limited Disclosure of Donor's Identity During Pretrial Discovery*—Snyder v. Mekhjian, 125 N.J. 328, 593 A.2d 318 (1991), 22 SETON HALL L. REV. 999, 1006-07 n.39 (1992).

16. The Medical University of South Carolina was not a party to this appeal.

17. *Watson*, 974 F.2d at 483.

18. Pursuant to ordinary procedures, the Red Cross conducted a look-back investigation and found that only one of the six donors whose blood was used in Trevor's transfusions might have been HIV-positive at the time of the donation. *See id.* at 484.

19. *Id.* Neither of the two nurses deposed could recall any information about the particular donor or the donation process. Further, other nonidentifying information, including a questionnaire, pamphlet, and health history card, failed to provide the needed information. *Id. But see Doe*, 125 F.R.D. at 648 (concluding that the necessary information was provided when nurses recalled a discussion with the donor to determine his eligibility and statements by the donor that he had a positive Australian antibody test).

factually unfounded the Red Cross's claims that the invasion of the donor's privacy would seriously jeopardize the nation's blood supply."[20] The district court accepted the magistrate's recommendation that the court allow discovery in the form of limited interrogatories, leaving the donor unidentified.[21] The Red Cross appealed.

In affirming the district court's order permitting limited donor discovery, the Fourth Circuit addressed three main questions in light of the particular discovery scheme set forth in the protective order: (1) whether Watson's interest in the discovery outweighed the nation's interest in an adequate and safe blood supply; (2) whether Watson's interest in the discovery outweighed the donor's right to privacy; and (3) whether the discovery would be relevant and authorized by Rule 26(c) of the Federal Rules of Civil Procedure.[22] First, the court dispensed with the Red Cross's argument that the fear of possible disclosure of donor identity and possible involvement in tort actions would deter volunteers from donating blood, thus reducing the blood supply. Although the Red Cross cited cases supporting its view,[23] "[no] mention of any statistical or empirical underpinning for the stated concerns about the effect on the blood supply" existed to substantiate the merits of this claim.[24]

The court also rejected the Red Cross's second argument that disclosure of the donor's identity violated the donor's constitutional privacy rights.[25] The court held that "the invasion of the donor's privacy is minimal, and this interest is greatly outweighed by the plaintiff's need for the information and the related public interest in seeing that injuries are compensated."[26] The safeguards and precautions mandated in the protective order rendered the risk of public disclosure remote.[27] The court also rejected the Red Cross's allegation that the interrogatories would "harass and embarrass" the donor on two grounds. First, the donor consented to similar interrogation at the

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20. *Watson*, 974 F.2d at 484.

21. For a reproduction of the protective order, see *id.* at 489-92. The protective order provides for maintenance of the donor's confidentiality, requires appointment of an attorney for the donor, and lists eighteen questions for the donor to answer concerning prior donations, the particular donation in question, and limited aspects of the donor's personal history. *See id.*

22. *Id.* at 488.

23. *See* Coleman v. American Red Cross, 130 F.R.D. 360 (E.D. Mich. 1990), *aff'd*, 979 F.2d 1135 (6th Cir. 1992); Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987). In both cases, the danger to the blood supply outweighed the plaintiff's discovery needs.

24. *Watson*, 974 F.2d at 486.

25. *Id.* at 488.

26. *Id.*

27. The protective order required disclosure of the donor's identity only to court and the donor's lawyer. *Id.* at 489-92; *cf.* Whalen v. Roe, 429 U.S. 589, 598-602 (1977) (upholding a New York statute which required physicians to disclose the identity of patients receiving certain prescription drugs to the state health department).

donation site.[28] Second, absent public disclosure, any embarrassment or harassment suffered by the donor does not implicate constitutional concerns.[29] Therefore, the court concluded that because no public disclosure would result, no privacy violation would occur.[30]

Finally, the court reviewed the relevancy of the evidence under Rule 26(c) of the Federal Rules of Civil Procedure and found no abuse of discretion by the district court.[31] The court observed that denying donor discovery would in effect grant blood donor centers "blanket immunity from donation-related liability."[32] Furthermore, the plaintiff's case depended on discovery of the donor's identity.[33]

While no consensus exists regarding the importance of the various conflicting interests that arise in transfusion-related AIDS cases,[34] most courts agree that a balancing-of-interests approach, coupled with close attention to the facts of each case, is the proper method.[35]

Blood centers frequently argue that possible disclosure will deter donors from giving blood, which will result in depletion of the blood supply.[36] The blood centers further argue that possible disclosure will jeopardize the quality of the blood supply because it renders blood donors unwilling to provide accurate health histories.[37] While the *Watson* court glossed over these arguments as unfounded for lack of statistical data,[38] many courts have given significant weight to or premised their holdings on this issue.[39]

Addressing the adequacy and safety of the nation's blood supply, the *Doe* court asserted that compromising donor confidentiality would threaten not only

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28. *Watson*, 974 F.2d at 488.

29. *Id.*; *see also Whalen*, 429 U.S. at 602 (finding disclosure of private medical information distinguishable from mere unpleasant privacy invasions incidental to health care).

30. *Watson*, 974 F.2d at 488.

31. *Id.* at 489.

32. *Id.*

33. *Id.*

34. *See id.* at 484 (noting the lack of consensus among the numerous courts and law reviews addressing the issue).

35. *See supra* note 15 for cases applying the balancing test; *see also* Terzian, *supra* note 15, at 1006-07 n.39.

36. Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 652-53 (D.S.C. 1989).

37. *Id.* at 653.

38. *See supra* text accompanying note 24.

39. *Doe*, 125 F.R.D. at 653; *see also* Coleman v. American Red Cross, 130 F.R.D. 360, 362 (E.D. Mich. 1990) (admitting donor discovery could severely impair the volunteer blood supply), *aff'd*, 979 F.2d 1135 (6th Cir. 1992); Krygier v. Airweld, Inc., 520 N.Y.S.2d 475, 477 (Sup. Ct. 1987) (society's interest in maintaining the blood supply outweighed the plaintiff's need for donor discovery); Taylor v. West Penn Hosp., 48 Pa. D. & C.3d 178, 186 (Pa. Ct. C.P. Allegheny Cty. 1987) (society's interest in maintaining the blood supply prevented discovery of donor's identity).

the quantity of the blood supply, but also the safety of the blood supply.[40] Volunteer donors are preferred over paid donors because volunteer donors are less likely to be infected than paid donors, and volunteer donors are more likely to provide truthful information during the screening process than paid donors.[41] The *Doe* court acknowledged the federal government's encouragement of an all-volunteer blood supply system.[42] The longstanding practice of maintaining and protecting the blood supply system, along with statutes enacted to protect donor confidentiality, evidenced this intent.[43]

Of the courts giving significant weight to the argument concerning the nation's interest in the blood supply, the safety/quality issue persuaded courts more than the donor deterrence/quantity issue.[44] Safety and quantity do not always go hand-in-hand, and safety is the primary goal. In *Borzillieri v. American National Red Cross*,[45] a New York district court stated that, while "[d]efendants stress[ed] the need for a plentiful blood supply, . . . it is equally, if not more important to ensure that the blood that is donated is healthy."[46] While the interest in maintaining an adequate quantity of blood is great, a blood supply cannot be adequate if it is not safe. Therefore, it is beneficial to deter donors from giving blood if they might be contaminated.[47] Moreover, aside from any suggested deterrence based on fear of disclosure, screening measures used to detect AIDS over the last few years have significantly reduced the donor base.[48] With improved AIDS testing methods, the donors deterred by possible disclosure will likely already be labeled "at risk" and excluded from the donor base without regard to the fear of identity disclosure.[49]

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40. *Doe*, 125 F.R.D. at 653.

41. *Id.* at 652-53. The court's main concern lies with the *volunteer* blood supply because paid donors are distinguished and are not entitled to this degree of special protection.

42. *Id.* at 652 (citing National Blood Policy, 39 Fed. Reg. 32,701 (1974)).

43. *Id.* at 652-53.

44. *See* Amy L. Fisher, Note, *AIDS: The Life and Death Conflict Between the Confidentiality of Blood Donors and the Recovery of Blood Recipients*, 42 WASH. U. J. URB. & CONTEMP. L. 283, 303-05 (1992) (deterring donations from those in high-risk groups furthers the safety of the blood supply); Belle Bonfils Memorial Blood Ctr. v. District Court, 763 P.2d 1003, 1012 (Colo. 1988) (en banc) (noting society's interest in maintaining a safe blood supply).

45. 139 F.R.D. 284 (W.D.N.Y. 1991).

46. *Id.* at 291 (citing Boutte v. Blood Sys., Inc., 127 F.R.D. 122, 126 (W.D. La. 1989) and *Belle Bonfils Memorial Blood Ctr.*, 763 P.2d at 1011).

47. *See, e.g.*, Fisher, *supra* note 44 and accompanying text.

48. Fisher, *supra* note 44, at 302-04.

49. *See* Coleman v. American Red Cross, 130 F.R.D. 360, 362 (E.D. Mich. 1990) (recognizing reduction of the donor pool due to AIDS testing), *aff'd*, 979 F.2d 1135 (6th Cir. 1992); Doe v. Puget Sound Blood Ctr., 819 P.2d 370, 377 (Wash. 1991) (en banc) (recognizing that some healthy donors might be excluded because of comprehensive and extra-precautionary measures).

In summary, the *Watson* court correctly stated that no statistical data evidenced a significant negative impact on the safety or adequacy of the blood supply, although it failed to adequately consider meritorious concerns and dispensed with the issue in a cursory manner.[50] The *Doe* court's emphasis on the blood supply considerations cannot be reconciled with *Watson*, but may be explained by the different facts and circumstances of each case and the desire for different outcomes.[51]

With the onset of the AIDS epidemic, most jurisdictions, including South Carolina, enacted statutes to protect the confidentiality of persons testing HIV-positive. These statutes provide procedures for disclosure of AIDS case records upon written consent, impose penalties for improper disclosure of medical records, and set forth guidelines for AIDS educational programs.[52] The statutes primarily seek to encourage AIDS testing and to protect confidentiality of patients. The protective statutes provide additional argument for blood centers seeking to protect complete donor confidentiality. For example, in *Irwin Memorial Blood Bank v. Superior Court*,[53] a California court held that even limited interrogatories from an anonymous blood donor constituted "identification" within the meaning of the AIDS protection statute, and therefore denied the requested discovery.[54] While the *Watson* court did not consider section 44-29-90[55] or legislative concerns,[56] the *Doe* court relied on this statute as evidence of legislative intent to provide for and protect an all-volunteer blood donation system.[57] Courts in other jurisdictions have acknowledged the effect of AIDS protection statutes in limiting or denying

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50. *See supra* notes 23-24 and accompanying text; *see also* Snyder v. Mekhjian, 593 A.2d 318, 324 (N.J. 1991) (per curiam) (Pollock, J., concurring) (no study or statistics show that confidentiality encourages people to donate blood).

51. *See supra* text accompanying notes 8-13.

52. South Carolina's AIDS statute provides in pertinent part:

> To the extent resources are available to the Department of Health and Environmental Control for this purpose, 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 use contacts, or both, must be notified but the identity of the person infected must not be revealed.

S.C. CODE ANN. § 44-29-90 (Law. Co-op. Supp. 1992); *see also* FLA. STAT. ANN. ch. 381.004(3)(f) (Harrison 1993) (containing a similar provision).

53. 279 Cal. Rptr. 911 (Ct. App. 1991).

54. *Id.* at 913.

55. S.C. CODE ANN. § 44-29-90 (Law. Co-op. Supp. 1992).

56. The court may have deemed these issues irrelevant after finding that no disclosure of or intrusion into confidentiality would occur.

57. Doe v. American Red Cross Blood Servs., 125 F.R.D. 646, 651 (D.S.C. 1989) (discussing requirements and procedures for protecting confidentiality of AIDS victims under the statute).

donor discovery because the statutes tend to balance the scale in favor of privacy.[58]

While the United States Constitution does not explicitly guarantee a right to privacy, the Supreme Court found that privacy rights exist in two areas: (1) decision-making regarding fundamentally important areas, and (2) the right to freedom from government disclosure of personal information.[59] Further, the South Carolina Constitution articulates an express right to privacy that the United States Constitution does not.[60] AIDS transfusion-related litigation emphasizes a person's privacy interest in avoiding disclosure of personal matters protected by these constitutions, either explicitly or implicitly. In *Watson* the court of appeals refused to hold that the donor's privacy rights would be violated because anonymous discovery from an anonymous donor was simply outside the scope of privacy. The nature of the discovery was limited, and the identity of the donor would not be revealed.[61] In the alternative, even if the donor's privacy rights were implicated, the plaintiff's interest in pursuing the litigation outweighed any privacy interest.[62] In contrast, *Doe* utilized the privacy right to deny donor discovery.[63] *Rasmussen v. South Florida Blood Services, Inc.*[64] outlined the privacy issue in detail in deciding that the donor's privacy outweighed the plaintiff's interest in discovery.[65] In *Rasmussen*, the plaintiff, who received fifty-one units of blood after an automobile accident and was later diagnosed with AIDS, sought to obtain all records containing the names and addresses of the fifty-one blood donors.[66] The court denied the plaintiff's request, reasoning that this

58. *See, e.g.,* Rasmussen v. South Fla. Blood Serv., Inc., 500 So. 2d 533, 537 (Fla. 1987); *see also* Richard C. Turkington, *Confidentiality Policy for HIV-Related Information: An Analytical Framework for Sorting Out Hard and Easy Cases*, 34 VILL. L. REV. 871, 899-902 (1989).

59. Whalen v. Roe, 429 U.S. 589, 598-600 (1977). *Whalen* involved the constitutionality of a New York statute requiring physicians to identify patients with prescriptions for certain classes of drugs. Although the Supreme Court acknowledged that the statute "threatens to impair both [the patients'] interest in the nondisclosure of private information and also their interest in making important decisions independently," the Court found no constitutional violation. *Id.* at 600.

60. S.C. CONST. art. I, § 10 states: "The right of the people to be secure in their persons, houses, papers, and effects against . . . unreasonable invasions of privacy shall not be violated . . . ." This section also addresses unreasonable searches and seizures, while the comparable portion of the United States Constitution, the Fourth Amendment, does not contain any express language regarding privacy rights. *See* U.S. CONST. amend. IV.

61. Watson v. Lowcountry Red Cross, 974 F.2d 482, 487 (4th Cir. 1992).

62. *Id.*

63. Doe v. Am. Red Cross Blood Servs., 125 F.R.D. 646, 657 (D.S.C. 1989).

64. 500 So. 2d 533 (Fla. 1987)

65. *Id.* at 538.

66. S. Fla. Blood Serv., Inc. v. Rasmussen, 467 So. 2d 798, 800 (Fla. Dist. Ct. App. 1985), *aff'd*, 500 So. 2d 533 (Fla. 1987).

discovery would violate the donors' privacy rights under the United States and Florida constitutions.[67]

However, in *Belle Bonfils Memorial Blood Center v. District Court*[68] the Colorado Supreme Court addressed the privacy issue, and although acknowledging that the donor had a right to privacy, it permitted the plaintiff's discovery.[69] *Belle Bonfils* and *Watson* are distinguishable from *Rasmussen* because the court orders in both cases required that confidentiality be maintained,[70] and also because the discovery was necessary to litigate the claims.[71] In cases such as *Belle Bonfils* and *Watson*, in which donor identity remains undisclosed, plaintiffs have a strong argument that no privacy interest is involved, or at least that any privacy invasion is minimal. The court must weigh the degree of invasion of privacy that would occur under the proposed discovery plan against the plaintiff's interest in obtaining the discovery. This weighing is consistent with the balancing test applied in most AIDS transfusion-related litigation.[72] If some alternative means that do not require donor privacy invasion can provide the plaintiff with sufficient information, then the court should employ the alternative means. While the shockingly invasive discovery requested (names of 51 donors) in *Rasmussen* may have determined the court's decision, *Watson* and *Belle Bonfils* involved less invasive discovery techniques.

In conclusion, the *Watson* court followed the balancing-of-interests approach, and through the protective order safeguarding the donor's identity, achieved a compromise solution. The limited donor discovery could benefit the plaintiff, one hopes without invading the donors privacy to a substantial degree. The *Watson* court may have been a bit too optimistic in stating that the limited, anonymous discovery granted to the plaintiff would have virtually no harsh effects on the donor or the blood supply. All solutions present a down-side to some extent. One hopes, because current HIV testing is over ninety-nine percent accurate, the number of AIDS transfusion-related cases will soon decrease substantially.[73]

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67. *Rasmussen*, 500 So. 2d at 535-36.

68. 763 P.2d 1003 (Colo. 1988) (en banc).

69. *Id.* at 1013.

70. Watson v. Lowcountry Red Cross, 974 F.2d 482, 487-88 (4th Cir. 1992); *Belle Bonfils Memorial Blood Ctr.*, 763 P.2d at 1013-14.

71. *Watson*, 974 F.2d at 489; *Belle Bonfils Memorial Blood Ctr.*, 763 P.2d at 1013.

72. *See supra* note 15 and accompanying text.

73. *See* Terzian, *supra* note 15, at 1032-34.