Filed 8/23/04

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

JOHN B., Petitioner, v. SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES, Respondent; BRIDGET B., Real Party in Interest.	B169563 (Los Angeles County Super. Ct. No. BC271134)

ORIGINAL PROCEEDING in mandate. Lawrence W. Crispo, Judge. Petition granted in part.

Garrard & Davis and Donald A. Garrard; Eric S. Multhaup for Petitioner.

No appearance for Respondent.

Grassini & Wrinkle and Maryann P. Gallagher for Real Party in Interest.

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Bridget B., the wife of John B., filed an action against John B. in which she contends that John infected her with HIV. Bridget seeks discovery that is described below and to which John objected on various grounds. The trial court entered orders that granted Bridget the discovery that she sought. John filed a petition for writ of mandate in which he seeks to reverse the orders granting Bridget the discovery that she seeks. We grant the petition in part.

THE PERMISSIBLE SCOPE OF DISCOVERY

"Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." (Code Civ. Proc., § 2017, subd. (a).) Discovery must relate to the subject matter involved in the pending action, instead of the issues. (2 Hogan and Weber, Cal. Civil Discovery (1997) Reporter's Note to [Code Civ. Proc.] Section 2017, pp. 371-372.)

THE SUBJECT MATTER OF THE PENDING ACTION

The subject matter of Bridget's action is shown by the facts and legal theories on which Bridget's action is based. We turn to Bridget's complaint for the facts and legal theories upon which Bridget's action is predicated.

Bridget and John met in 1998 and married in July 2000. They had sexual relations prior to their marriage and, at John's request, discontinued using condoms. The last time that Bridget and John had intercourse was during their honeymoon in July 2000. Prior to their marriage, John told Bridget about prior relationships he had with women. Bridget alleges that prior to the marriage John was never sick, that he was athletic and active, and that he took medications only for his allergies.

In May or June 2000, someone called claiming to be from a doctor's office, and asked Bridget to tell John that his HIV tests results were negative.

In September 2000, Bridget began to suffer from exhaustion and high fevers. She was tested for HIV in October 2000. The tests showed she had HIV. The examining

physician, who held himself out to be an expert on HIV/AIDS, told her that she had brought HIV into the marriage. Bridget informed John, who then began to take medications. Bridget was not offered treatment since she was told that she had had the illness for a long time.

In September 2001, John began to tell others that Bridget had brought HIV into the marriage. In October 2001, John began to get very sick, and developed sores on his face and scalp. In November 2001, Bridget learned that the probability that she had brought HIV into the marriage was .03 percent.

In December 2001, John admitted to Bridget for the first time that had had sexual relations with men before their marriage.

In February 2002, Bridget was told by a hospice medical worker that it was unlikely that John got HIV from Bridget on their honeymoon, as he claimed, since his HIV would not have advanced so rapidly to AIDS.

The first cause of action is for the intentional infliction of emotional distress. In material part,[1] this cause of action alleges that John "knew all along he had HIV" and that he infected Bridget with the illness. Bridget alleges that before and during their marriage, and without her knowledge, John "engaged in a homosexual and promiscuous lifestyle that put her at great risk for HIV, AIDS, syphilis, and other sexually transmitted diseases." She also alleges that before and during their marriage John engaged in sexual relations with men and solicited homosexual relationships on the Internet. This cause of action alleges that John's conduct was outrageous and was intended to cause, and did cause, Bridget extreme mental distress.

The second cause of action is for negligent infliction of emotional distress. Bridget alleges that John had unprotected sexual relations with her without telling her he had HIV, and that this was negligent conduct on his part. This cause of action alleges that "[a]t all times defendant [John] knew or had a reasonable belief that he had HIV."

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1 We disregard allegations of the complaint that are not material to our opinion and decision, even though they may be otherwise material.

The third cause of action for fraud alleges that John falsely represented to Bridget that he did not have any communicable diseases, including HIV, AIDS or syphilis, that Bridget relied on these false representations and engaged in unprotected sex with John, and that she was infected with HIV as a result. This cause of action also alleges that John represented that he wanted a heterosexual, monogamous relationship with Bridget, which included having children, and that these representations were false in that John engaged in homosexual relationships while married to Bridget, which put her at risk of acquiring HIV, AIDS and syphilis.

The fourth cause of action for negligence incorporates the foregoing allegations. This cause of action alleges that John ". . . owed plaintiff [Bridget] a duty of care to disclose to plaintiff the fact that he was HIV positive before he engaged in unprotected sexual relations with plaintiff."

THE DISCOVERY SOUGHT AND THE TRIAL COURT'S RULINGS

1. The Special Interrogatories (Motion #102)

On June 30, 2003, Bridget served special interrogatories that required John to state (1) the name, telephone number and address of every man he had sexual relations with in the last 10 years; (2) the date of his first sexual encounter with a man; (3) the date of his last sexual encounter with a man; (4) the name, telephone number and address of every man with whom he had unprotected sex in the last 10 years; (5) the date on which he first became aware that he was HIV-positive; (6) the date on which he first became aware he had AIDS; (7) the date on which he first told Bridget that he had engaged in unprotected sex with men; (8) the name, address and telephone number of every man with whom he had unprotected sex who has HIV; and (9) the name, address and telephone number of every man with whom he had unprotected sex who has AIDS. The special interrogatories also asked the following questions: (10) How many sexual encounters did you [John] have with men in the five years prior to your relationship with Bridget? (11) When was the last encounter you had with a man prior to the date of your engagement to Bridget? (12) List the

date of every sexual encounter you had with a man between your engagement to Bridget and your marriage; and (13) How many sexual encounters have you had with men since the time you first met Bridget?

In his responses, John objected to each and every interrogatory on privacy grounds. As to some interrogatories, John also raised an objection based on Health & Safety Code section 120975.[2] He did, however, state in his responses that he first learned he had tested HIV-positive on October 13, 2000 (i.e., shortly after Bridget tested positive).

Bridget filed a motion to compel responses to these interrogatories. This motion was denominated Motion #102. The referee recommended that all of John's objections should be overruled, and that John should be required to answer all of these interrogatories. The court agreed, and ordered John to answer these interrogatories.

2. The Requests for Admission (Motion #103)

Bridget served requests for admission in which she sought admissions that (1) John had unprotected sex with multiple men in the ten years prior to meeting Bridget; (2) John never told Bridget that he had sexual relationships with men prior to the time they were married; (3) John had AIDS prior to the time he first had unprotected sex with Bridget; (4) John knew he had AIDS prior to the time he first had unprotected sex with Bridget; (5) John transmitted AIDS to Bridget; (6) John transmitted HIV to Bridget; (7) John never told Bridget that he had unprotected sexual encounters before he had unprotected sex with Bridget; (8) John knew that his lifestyle prior to the time he met Bridget put him at risk for developing HIV; (9) John never told Bridget prior to having unprotected sex with her about

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[2] Section 120975 provides: "To protect the privacy of individuals who are the subject of blood testing for antibodies to the probable causative agent of acquired immune deficiency syndrome (AIDS) the following shall apply: [¶] "Except as provided in Section 1603.1 or 1603.3, as amended by Chapter 23 of the Statutes of 1985, no person shall be compelled in any state, county, city, or other local civil, criminal, administrative, legislative, or other proceedings to identify or provide identifying characteristics that would identify any individual who is the subject of a blood test to detect antibodies to the probable causative agent of AIDS."

All undesignated statutory references are to the Health and Safety Code.

his lifestyle of having unprotected sex with men; (10) John had unprotected sex with men after he was married; (11) Prior to his marriage, John hid his sexual relations with men from Bridget; (12) John knew at the time he accused Bridget of transmitting HIV that he had a history of unprotected sexual relations with men that put him at risk of developing HIV; (13) John has AIDS; (14) John knew he had AIDS before he married Bridget; and (15) John hid his sexual relations with men from Bridget prior to the marriage.

John objected to each of these requests. The referee recommended that John's objections be overruled, and that John should be required to respond. The court agreed and adopted the referee's recommendation. These requests and the objections thereto were included in what was denominated Motion #103.

3. Deposition Questions (Motion #101)

Bridget sought orders compelling John to answer questions asked during his deposition that he was instructed not to answer by his attorney. Instead of listing the questions asked and not answered, Bridget's motion to compel answers sets forth 14 categories which purport to be descriptive of groups of questions that were asked. The motion may have taken this approach because, according to the motion, 124 questions asked during the deposition were objected to and not answered on advice of counsel. The referee recommended that John respond to the questions; the court agreed and adopted the referee's recommendation. This motion was denominated Motion #101.

4. John's Medical and Employment Records

Bridget also subpoenaed John's medical and employment records. The subpoenas to health care providers specifically included requests for results of any HIV tests administered to John. John filed a motion to quash the subpoenas.[3]

[3] Shortly before Bridget subpoenaed John's medical records, John subpoenaed Bridget's medical records. Bridget moved for a protective order.

5. Discovery Is Sought About the Identities of Previous Sexual Partners and Circumstantial Evidence That John Knew He Had HIV/AIDS.

The discovery sought by Bridget can be classified into two groups. First, Bridget seeks to discover the identities of John's previous sexual partners. Second, Bridget has propounded discovery that seeks to find direct and circumstantial evidence that John knew that he had HIV.

6. Proceedings in the Superior Court and This Petition

John filed timely objections to the referee's report, but the trial court judge did not receive them before approving the report and recommendations in April 2003. John then filed a motion to vacate the order approving the report.

In August 2003, the trial court conducted a very brief hearing to consider the merits of John's objections, after which it denied the motion to vacate the order approving the report.

The court agreed to stay the order for two weeks so John could seek writ relief from this court.

John then filed this writ petition. In the petition, John contends that the "maximum permissible scope is the discovery of information tending to directly show that defendant <u>knew</u> he had an STD [sexually transmitted disease] at the time of engaging in a sexual relationship, e.g., discovery of communication of medical diagnoses to the defendant." (Emphasis in original.) John contends that discovery that exceeds these bounds infringes on privacy rights protected by the state and federal constitutions.

Bridget contends in reply to the petition that John's medical records and the results of his tests for HIV are discoverable. Bridget also contends that John should be required to respond to questions whether he has HIV or AIDS and, if so, when he acquired these diseases. Bridget goes on to claim that the identities of John's male sexual partners should be disclosed in discovery because he might have told these persons about his HIV status. Finally, Bridget contends that John's sexual conduct with males is the proper subject of discovery because, if John engaged in such activity, it is likely that it was he who infected Bridget, and not Bridget who infected him. This relates to Bridget's cause of action for the

intentional infliction of emotional distress, in which she alleges that John's conduct in accusing her of infecting him was outrageous.

We entered a stay. Following briefing and oral argument, we addressed the following question to the parties: "There is a duty to disclose to a sexual partner that a person had a sexually transmitted disease. [] Is there a duty to disclose to a sexual partner information received from, or observation made of, another sexual partner that would lead a reasonable person to believe that the person has a sexually transmitted disease?" Both parties responded to this question in supplemental briefs.

THE RIGHT TO SEXUAL PRIVACY AS A LIMITATION ON DISCOVERY

Article I, section 1 of the California Constitution recognizes a number of inalienable rights. Among these rights is the right of privacy. "California's privacy protection . . . embraces sexual relations." (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841 (*Vinson*).) "The constitutional right of sexual privacy, both within and without the marital relationship, is a fundamental liberty arising from both the United States and the California Constitutions. (*Griswold v. Connecticut* (1965) 381 U.S. 479 []; *Eisenstadt v. Baird* (1972) 405 U.S. 438 []; . . . *Fults v. Superior Court* [(1979)] 88 Cal.App.3d [899] at pp. 903-904.)" (*Boler v. Superior Court* (1987) 201 Cal.App.3d 467, 473.) Interrogatories that seek to reveal the identity of a person's sexual partners impinge on the "zone of privacy" of one's sexual relations. (*Fults v. Superior Court*, *supra*, 88 Cal.App.3d at p. 904 (*Fults*).)

Answers to questions about a person's sexual relations, including the identities of former partners, may not be required absent a compelling state interest that is promoted by requiring a response. (*Fults*, *supra*, 88 Cal.App.3d at p. 904.) A compelling state interest is the historically important interest in facilitating the ascertainment of truth in a legal proceeding. (*Ibid*., citing *In re Lifschutz* (1970) 2 Cal.3d 415, 432.) However, even where the compelling state interest is present, "[p]recision of [compelled disclosure]" is required so that the right of privacy is not curtailed except to the extent necessitated by the legitimate governmental objective. (*Fults*, at p. 904, citing *Britt v. Superior Court* (1978) 20 Cal.3d 844, 856, original brackets.) Disclosure is not warranted simply because the information may lead to relevant information. (*Fults*, at p. 904.) It must be shown that it is reasonable

to infer that the inquiry will be productive. "Simple speculation that an answer may uncover something helpful is not enough." (*Id.* at p. 905.) The possibility that evidence otherwise admissible might be excluded at trial under Evidence Code section 352 or some other evidentiary objection is not a relevant consideration. (*Norton v. Superior Court* (1994) 24 Cal.App.4th 1750, 1760.)

DISCOVERY OF THE IDENTITIES OF PREVIOUS SEXUAL PARTNERS IS PRECLUDED AT THIS TIME

It has been held that discovery that seeks the revelation of the identity of a person's previous sexual partners may violate the constitutionally protected zone of privacy of a person's sexual relations. (*Fults*, *supra*, 88 Cal.App.3d at p. 904.)

Bridget supports her demand for the discovery of the identities of John's previous sexual partners by claiming that John may have told these persons that he had HIV. However, it is as likely, if not more likely, that John said nothing of the kind to previous sexual partners. If the inference that he disclosed his condition is as likely as the inference that he did not, the inference Bridget seeks to draw is speculative. (*Leslie G. Perry & Associates* (1996) 43 Cal.App.4th 472, 483.) In any event, Bridget offers nothing to support the suggestion that John may have disclosed his condition at an undisclosed time to an undisclosed person. Moreover, Bridget's demand for the disclosure of the identities of John's previous sexual partners is extremely broad and unlimited. Under these circumstances, we decline to subordinate the right of privacy to Bridget's alleged need for this information. (*Fults*, *supra*, 88 Cal.App.3d at p. 904.)

Accordingly, John may decline to answer interrogatories 1, 4, 8 and 9.

DISCOVERY OF CIRCUMSTANTIAL EVIDENCE THAT JOHN KNEW OR SHOULD HAVE KNOWN THAT HE HAD HIV IS PERMITTED WITH CERTAIN LIMITATIONS

The allegation that John knew, or reasonably should have known, that he had HIV before he had sexual relations with Bridget is fundamental to the causes of action for the intentional and negligent infliction of emotional distress, fraud and negligence.

John does not contest that if he knew that he had HIV and did not disclose that to Bridget, he is liable. (*Doe v. Roe* (1990) 218 Cal.App.3d 1538, 1543.)

John is also liable if he reasonably should have known that he had HIV and engaged in sexual relations with Bridget without taking measures that would have prevented the transmission of this disease to Bridget.

"In determining whether a duty should be imposed, the courts are guided by the basic principle expressed in Civil Code section 1714 that everyone is responsible for injury occasioned to another by his own want of ordinary care or skill. (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 434 [].) Departures from this rule are warranted only by balancing a number of policy considerations, including the foreseeability of the harm suffered, the degree of certainty the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the consequences to the community of imposing a duty to exercise care. (*Ibid*.)" (*Doe v. Roe, supra*, 218 Cal.App.3d at pp. 1543-1544.)

In *Doe v. Roe*, *supra*, the defendant knew he had herpes but he believed that as long as he did not have lesions, he would not transmit the disease. (218 Cal.App.3d at pp. 1544-1545.) The trial court found that the defendant had been negligent in either not disclosing that he was infected with herpes or not taking measures that would have prevented its transmission, and the Court of Appeal affirmed. (*Id.* at pp. 1542, 1545.) In *Kathleen K. v. Robert B.* (1984) 150 Cal.App.3d 992, 996, the Court of Appeal held that the plaintiff stated a cause of action when she alleged that the defendant had infected her with herpes in "either negligently or deliberately failing to inform her" that he was infected with this disease.

John is "responsible for injury occasioned to another by his own want of ordinary care or skill." Bridget is entitled to endeavor to show that John injured her "by his [] want of ordinary care or skill." Information received from, or observations made of, another sexual partner that would lead a reasonable person to believe that the person has a sexually transmitted disease is relevant to the subject matter of the action since certain diseases, like HIV, are transmitted sexually. Such information or observations may be circumstantial evidence that John injured Bridget by a want of ordinary care and skill. While we express

no opinion on the admissibility or the probative value of such evidence, it is relevant to the subject matter of Bridget's action, and it appears to be reasonably calculated to lead to the discovery of admissible evidence.

In light of the foregoing, interrogatories 2, 3, 5, 6, 7, 10, 11, 12 and 13, set forth in Motion #102, seek information that is discoverable. The same is true of the requests for admission contained in Motion #103, with the exception of requests 8 and 9, which we address separately below.

The interrogatories and requests for admission that we hold discoverable seek information that unquestionably probes into the zone of privacy that protects John's right to sexual privacy. However, the right of sexual privacy is not absolute. (*Boler v. Superior Court*, *supra*, 201 Cal.App.3d at p. 473.) Disclosure is permitted if it serves the compelling interest of the facilitation of the truth-finding process in court proceedings and if it may be reasonably inferred that the inquiry will likely be productive. (*Ibid.*; *Fults*, *supra*, 88 Cal.App.3d at p. 904.) The disclosure should be narrowly drawn to assure the maximum protection of the right to sexual privacy. (*Ibid.*)

The interrogatories and requests for admission that seek discoverable information meet these tests. They are narrowly drawn in the sense that they do not seek the disclosure of the identities of former sex partners and the information they seek is limited to concrete events.

It is likely that the interrogatories and requests for admission that are discoverable will be productive. A number of the interrogatories and requests for admission bear directly on the question when John acquired HIV/AIDS. (E.g., interrogatories 5 and 6 and requests 1, 3, 4 and 5.) A denial or admission of these requests will serve to define the issues to be tried. The same can be said of other requests for admission that are probative on the question whether John transmitted HIV/AIDS to Bridget. (E.g., requests 6, 10 and 12.)

The information that we hold discoverable serves the compelling state interest of ascertaining the truth of Bridget's claim that John injured her by the lack of ordinary care in the conduct of his sexual activities.

John contends that since there is no "established body" of research that shows that there is a high rate of transmission of STD, i.e., HIV, there is no basis to impose a duty to disclose information or observations about a previous sexual partner.

This contention confuses admissibility and probative weight with the test that is at issue in the instant proceedings, i.e., whether the information sought is relevant to the subject matter of the action and whether it is reasonably calculated to lead to the discovery of admissible evidence. Central to each of the four causes of action asserted by Bridget is whether John knew or should have known that he had HIV. If he had HIV, it is likely that he acquired it in the course of sexual activity, since other modes of transmission have not been suggested in this case. Thus, observations made, and information obtained, in the course of John's sexual activity are relevant to the subject matter of the action. It is also true that such observations and information may lead to the discovery of admissible evidence.

John also contends that since the likelihood of transmission of HIV "between infected partners is 10% or less," we should not impose a "duty to disclose."

The duty we impose is a duty to disclose specific information in the course of discovery. That information is composed in this case of the specific interrogatories and requests for admission that we hold should be answered, and the medical records and information that should be provided. (See text, *infra*, as to medical records.) This is not to be confused with a "duty" in terms of the law of negligence. We do not hold that the standard of care was breached if John did not disclose his observations of, or information about, his previous partners. That issue is not before us, and we do not address it, nor do we intend to intimate how it should be resolved.

INQUIRIES ABOUT "LIFESTYLE" ARE VAGUE AND AMBIGUOUS AND IMPERMISSIBLY INTRUSIVE

Request for admission 8 requests John to admit or deny that he knew that his lifestyle prior to the time he met Bridget put him at risk for developing HIV. Request for admission 9 requests John to admit or deny that he never told Bridget prior to having unprotected sex with her about his lifestyle of having unprotected sex with men.

The word “lifestyle” is vague and ambiguous. To the extent that it suggests a sexual orientation, it is offensive and impermissibly intrusive into John’s zone of sexual privacy.

THE MATTER OF THE DEPOSITION QUESTIONS SHOULD BE RESOLVED IN A MANNER CONSISTENT WITH THE VIEWS EXPRESSED IN THIS OPINION

The problems with the approach taken by Motion #101 regarding the deposition questions that John was directed not to answer are that the descriptions of the 14 categories of questions are frequently ambiguous and that there is no assurance of the accuracy of the descriptions. As an example, one category is described as “HIV or AIDS acquisition.” It is impossible to tell from this category what questions may have been propounded on “HIV or AIDS acquisition.” We are obviously not able to decide, nor should we speculate, whether a question should be answered in John’s deposition since Bridget’s motion did not specify to what questions she sought further responses. John’s motion to vacate the court order approving the referee’s report should have been granted with respect to Motion #101 (deposition questions). The trial court and counsel should be guided by our treatment of Motions ## 102 and 103 and the subpoenas of medical records and HIV tests in resolving controversies arising from questions asked during John’s deposition that John refuses to answer on his counsel’s advice.

THE SUBPOENAS OF MEDICAL RECORDS AND RESULTS OF HIV TESTS

John challenges that portion of the discovery order denying his motion to quash the subpoenas of his medical records, including the results of any HIV tests he took. John claims the compelled disclosure of this information violates his constitutionally protected right of privacy, as well as section 120975. We disagree.

There is no question that John has a legally protected privacy interest in the information contained in his medical records. (E.g., *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 41 [“A person’s medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected,” quoting *Board of Medical Quality Assurance v. Gherardini* (1979) 93 Cal.App.3d 669, 678]; *Johnson v. Superior Court* (2000) 80 Cal.App.4th 1050, 1068 [“A person’s medical history undoubtedly falls within the recognized zones of

privacy"].) He also has a legally protected privacy interest in information concerning his HIV status. (See *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1140 ["There can be no doubt that dis[c]losure of HIV positive status may under appropriate circumstances be entitled to protection under article I, section 1" of the California Constitution]; see also § 120975.)

However, when a party to litigation affirmatively places his or her medical condition in controversy, that party has a "substantially lowered" expectation of privacy in medical records relating to that condition. (*Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 43-44.) In fact, it has been held that when a party to litigation affirmatively places his or her medical condition in controversy, that party waives the right to prevent disclosure of what would otherwise be constitutionally protected medical information. (See *Vinson*, *supra*, 43 Cal.3d at pp. 839-844; see also *Britt v. Superior Court*, *supra*, 20 Cal.3d at pp. 858-859.) Thus, a defendant may place certain medical facts at issue as part of a defense to a lawsuit. (See *Vinson,* at pp. 839-840 [discussing *Schlagenhauf v. Holder* (1964) 379 U.S. 104 [85 S.Ct. 234, 13 L.Ed.2d 152] and noting that the defendant "driver had not asserted his mental condition in support of or in a defense of a claim"]; *id*. at p. 119 ["A plaintiff in a negligence action who asserts mental or physical injury . . . places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim"].)

John affirmatively claimed in his answer to the complaint that Bridget had infected him with HIV. More importantly, he specifically relied on what he claimed were his negative HIV test results in support of a summary judgment motion he brought. By doing so, John has waived his right to prevent disclosure of the very medical records and test results that could refute (or support) his contentions.

We also recognize that the scope of the waiver should be narrowly construed and should apply only when the information sought is directly relevant to the litigation. (See *Britt v. Superior Court*, *supra*, 20 Cal.3d at pp. 858-859; *Tylo v. Superior Court* (1997) 55

Cal.App.4th 1379, 1387.) In this case, the medical information sought is directly relevant to the case. Indeed, it is critical.

In light of the above, we conclude that the trial court did not abuse its discretion in compelling the disclosure of John's medical records that may contain information about his HIV status.

We reach the same conclusion with respect to the disclosure of the results of John's HIV tests. John claims disclosure of the test results is barred by section 120975. We agree with the trial court that disclosure was not barred in this case.

The purpose of section 120975 is "[t]o protect the privacy of individuals . . ." who are tested for AIDS by prohibiting the compelled disclosure of information "that would identify any individual . . ." who has taken such a test. In this case, John's identity and his positive HIV status are already known to those seeking to obtain the test results. Moreover, John waived the right to rely on the protection of section 120975 by affirmatively claiming in his answer to the complaint that Bridget had infected him and by relying on his own allegedly negative HIV test results in seeking summary judgment. John may not affirmatively rely on the results of his HIV tests, while at the same time prevent discovery that can test the truthfulness of his contentions.

DISPOSITION

The petition for writ of mandate is granted as to (a) special interrogatories 1, 4, 8 and 9 of Motion #102; (b) requests for admission 8 and 9 of Motion #103; and (c) Motion #101 (deposition questions). As to the deposition questions, on remand the respondent court is directed to determine, consistent with the views expressed herein, which questions require a further response. Before doing so, the court should require Bridget to identify with specificity the questions for which she seeks further responses. The court's order approving the referee's report with respect to Motion #101 (deposition questions) is vacated. To the extent the petition has not been specifically granted, the petition is denied. The case is remanded for further proceedings consistent with this opinion. The temporary stay order of August 28, 2003, is vacated. The parties shall bear their own costs in this writ proceeding. (Cal. Rules of Court, rule 56.4.)

CERTIFIED FOR PUBLICATION

FLIER, J.

We concur:

RUBIN, Acting P.J.

BOLAND, J.