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CPLR 3121: In a Child Custody Action, Production of a Potential Custodian's Hair Sample for Drug Testing Is Reasonable and Relevant

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may be governed by the two-year wrongful death statute of limitations. Overall, however, the *Bongiorno* decision will improve judicial efficiency to the extent that courts will not have to spend time deciding issues extraneous to the merits and litigants will not waste judicial resources by asserting unwarranted statute of limitations defenses.

Olympia Bizekis

CPLR 3121: In a child custody action, production of a potential custodian's hair sample for drug testing is reasonable and relevant

CPLR 3121(a) permits a party to an action to compel the physical, mental, or blood examination of another party[1] when the latter's physical, mental, or blood condition is in controversy.[2] A

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[1] CPLR 3121(a) (McKinney Supp. 1988). Although CPLR 3121(a) makes no explicit provision for the testing of corporeal samples other than blood, any relevant test given as part of a physical examination authorized by this provision generally would be permitted. *See id.*, commentary at 571 (McKinney 1970); 3A WK&M ¶ 3121.02, at 31-430 (1988); *see, e.g.*, Adlerstein v. South Nassau Communities Hosp., 109 Misc. 2d 158, 164, 439 N.Y.S.2d 605, 610 (Sup. Ct. Nassau County 1981) (in medical malpractice action alleging sterility, plaintiff required to submit semen sample for physical examination); Cardinal v. University of Rochester, 188 Misc. 823, 825-26, 71 N.Y.S.2d 614, 615-17 (Sup. Ct. Monroe County 1946) (X-rays, urine sample, stomach pumping), *aff'd*, 271 App. Div. 1048, 69 N.Y.S.2d 352 (4th Dep't 1947).

[2] CPLR 3121(a) (McKinney Supp. 1988); *see, e.g.*, Fisher v. Fossett, 45 Misc. 2d 757, 758, 257 N.Y.S.2d 821, 822 (Sup. Ct. Erie County 1965) (in property damage action where driver's defense would be based on blacking out, physical condition was in controversy).

The moving party bears the burden of proving that the condition is in controversy. *See* Soybel v. Gruber, 132 Misc. 2d 343, 346, 504 N.Y.S.2d 354, 356 (N.Y.C. Civ. Ct. N.Y. County 1986). This showing may be made either by reference to the other party's affirmative injection of the matter into dispute or by offering substantiation of the condition's relevancy. *Cf. id.* (plaintiff landlord's unsupported assertion that eighty-four-year-old tenant too ill to maintain her apartment did not place tenant's condition in controversy). An allegation of personal injury in a suit for damages subjects that party to a physical examination at the request of the other party. *See, e.g.*, Evens v. Denny's, Inc., 129 Misc. 2d 767, 768, 494 N.Y.S.2d 67, 68 (Sup. Ct. Erie County 1985) (plaintiff initiating personal injury action brings physical condition into controversy); *Adlerstein*, 109 Misc. 2d at 161, 439 N.Y.S.2d at 608 (same). In cases not involving personal injury, a party may affirmatively inject his or her physical condition into dispute by referring to it either during pretrial examination or in the pleadings. *See, e.g.*, Wegman v. Wegman, 37 N.Y.2d 940, 941, 343 N.E.2d 288, 288, 380 N.Y.S.2d 649, 649 (1975) (in divorce action, wife who counterclaimed for alimony alleging her poor health put her condition in controversy); Nalbandian v. Nalbandian, 117 App. Div.

party can avoid a compelled physical examination by securing a protective order,[3] which requires a showing either that the threshold discovery requirements of CPLR 3101 have not been met[4] or

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2d 657, 657, 498 N.Y.S.2d 394, 395 (2d Dep't 1986) (in claim for maintenance, plaintiff wife put her psychiatric condition in issue by asserting in pretrial testimony that it prevented her from working).

If the party to be examined does not affirmatively raise the issue, the moving party must offer information to sustain his burden of proof; a mere allegation that the condition is relevant is insufficient. *See, e.g.*, Koump v. Smith, 25 N.Y.2d 287, 300, 250 N.E.2d 857, 864, 303 N.Y.S.2d 858, 869 (1969) (in personal injury action, defendant's alleged intoxication not in controversy where supported only by plaintiff's pleading and sworn statement of plaintiff's attorney); Lohmiller v. Lohmiller, 118 App. Div. 2d 760, 760, 500 N.Y.S.2d 151, 152 (2d Dep't 1986) (in child custody action, defendant's failure to offer evidence of wife's psychiatric disability warranted protective order barring further mental examination); Anonymous v. Anonymous, N.Y.L.J., Feb. 15, 1989, at 25, col. 2 (Sup. Ct. Westchester County) (in action where custody of child in issue, plaintiff's motion to compel defendant to submit to radioimmunoassay testing denied where affidavits in support of motion based upon speculation and surmise); Turner v. Town of Amherst, 62 Misc. 2d 257, 261, 308 N.Y.S.2d 547, 552 (Sup. Ct. Erie County 1970) (Department of Motor Vehicles' records on unrelated accident and affidavit of plaintiff's attorney lacking personal knowledge insufficient to place defendant's eyesight in controversy). *But see, e.g.*, Shalhoub v. Viverito, 133 Misc. 2d 765, 767, 508 N.Y.S.2d 135, 137 (Sup. Ct. Queens County 1986) (denial in answer to plaintiff's unsupported complaint that defendant infected her with genital herpes was enough to place condition in controversy).

[3] *See* CPLR 3103(a) (McKinney 1970). CPLR 3103(a) provides: "The court may . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." *Id.*

[4] *See* CPLR 3101(a) (McKinney Supp. 1988). CPLR 3101(a) requires "full disclosure of all evidence material and necessary in the prosecution or defense of an action" by the parties to the action. *Id.* The threshold requirements have been broadly construed to afford liberal discovery of matters in dispute in order to further the goal of achieving the speedy and inexpensive disposition of cases on their merits. *See* Rios v. Donovan, 21 App. Div. 2d 409, 411, 250 N.Y.S.2d 818, 820 (1st Dep't 1964). "The purpose of disclosure procedures is to advance the function of a trial to ascertain truth and to accelerate the disposition of suits." *Id.* Although the statute speaks of "evidence" as being discoverable, the term has been judicially expanded to include material that might lead to the discovery of admissible evidence. *See* West v. Aetna Casualty & Sur. Co., 49 Misc. 2d 28, 29, 266 N.Y.S.2d 600, 602-03 (Sup. Ct. Onondaga County 1965), *modified*, 28 App. Div. 2d 745, 280 N.Y.S.2d 795 (3d Dep't 1967). In *West*, the plaintiff sued to recover the cost of a gravestone under a auto insurance policy that provided for the payment of funeral services, and sought disclosure of the insurer's documents relating to such payments. *Id.* at 29, 266 N.Y.S.2d at 602. The insurer argued that such information was not material and necessary to the trial of the action because the scope of the term "funeral services" was purely a matter of law. *See id.* The court held that the documents were to be disclosed:

> The word "evidence" as used in the statute has not been held equivalent to that evidence which might be admissible upon the trial of the action. Disclosure extends to all relevant information calculated to lead to relevant evidence. . . . If the information is sought in good faith for possible use as evidence in chief or in rebuttal or for cross-examination, it should be considered material and necessary in the prosecution or defense of the action. If there is some doubt of admissibility

that the examination would be abusive.[5] Recently, in *Burgel v.*

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upon the trial of the action, Special Term should permit discovery leaving the ultimate decision to the trial court.

Id. at 29, 266 N.Y.S.2d at 602-03.

Three years after the trial court's decision in *West*, the Court of Appeals held that any relevant evidence is discoverable. *See* Allen v. Crowell-Collier Publishing Co., 21 N.Y.2d 403, 407, 235 N.E.2d 430, 432-33, 288 N.Y.S.2d 449, 452 (1968). The *Allen* court interpreted the words "material and necessary" liberally, requiring disclosure "of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay." *Id.* at 406, 235 N.E.2d at 432, 288 N.Y.S.2d at 452.

[5] *See* CPLR 3103(a) (McKinney 1970). In the context of civil litigation, deciding whether a particular physical test is abusive has been a recurring problem. Apparently, most courts balance the probative value of the test against the potential physical harm or discomfort to the party to be examined. Usually, the probative value of the test has been assumed because the requested test commonly was used in the medical profession. The courts' discussions have centered instead on the issue of risk or discomfort. In older cases where protective orders have been granted, the proposed tests were either dangerous to life or constituted a physical intrusion to the body, or both. *See, e.g.*, Carrig v. Oakes, 259 App. Div. 138, 138-39, 18 N.Y.S.2d 917, 918 (4th Dep't 1940) (cystoscopic examination of plaintiff denied because test potentially painful and sometimes fatal); Bartolotta v. Delco Appliance Corp., 254 App. Div. 809, 809, 4 N.Y.S.2d 744, 744 (4th Dep't 1938) (plaintiff not required to ingest barium before undergoing X-rays); Grill v. Mathieson Alkali Works, Inc., 243 App. Div. 853, 853-54, 278 N.Y.S. 775, 776 (4th Dep't 1935) (denied request to compel plaintiff to undergo breathing test using specific "oxygen dilution method" because no showing test was safe). The rationale continues to be applied in more recent cases. *See, e.g.*, Lefkowitz v. Nassau County Medical Center, 94 App. Div. 2d 18, 22, 462 N.Y.S.2d 903, 906 (2d Dep't 1983) (per curiam) (hysterosalpingogram barred because it posed threat to plaintiff's health); Goldman v. Linkoff, 45 App. Div. 2d 709, 709, 356 N.Y.S.2d 101, 102 (2d Dep't 1974) (plaintiff protected from procedure in nature of myelogram because procedure was physical intrusion to spine).

Where tests have been challenged but permitted, they generally have been unintrusive tests, perceived as not imposing a threat to the patient's health or comfort. *See, e.g.*, Feinberg v. Fairmont Holding Corp., 272 App. Div. 101, 102, 69 N.Y.S.2d 414, 415 (1st Dep't 1947) (X-rays); McCabe v. Brooklyn & Queens Transit Corp., 252 App. Div. 760, 760, 298 N.Y.S. 861, 862 (2d Dep't 1937) (eye examination); Gimenez v. Great Atl. & Pac. Tea Co., 236 App. Div. 804, 804, 259 N.Y.S. 597, 597 (2d Dep't 1932) ("X-ray photography has become a common and generally accepted procedure in medical and surgical diagnosis"); *Adlerstein*, 109 Misc. 2d 164, 439 N.Y.S.2d at 610 (semen test not invasive and posed no risk to patient).

In two cases, courts explicitly have balanced probative value against risk where the test in question, a galvanic skin response test, was not a regularly used diagnostic method and the reliability of the results was subject to doubt. In Habersham v. Grimaldi, 18 App. Div. 2d 615, 234 N.Y.S.2d 599 (1st Dep't 1962), the court approved the use of a galvanic skin response test to assess the plaintiff's hearing loss, describing the test as "objective" and possibly "of great assistance in reaching a just disposition of the cause." *Id.* at 615, 234 N.Y.S.2d at 599. The plaintiff was held not to be unduly burdened because the test was brief, painless, and safe. *Id.* Less than two years after *Habersham*, the Second Department addressed the same issue in Carpinelli v. Manhattan Bottling Corp., 21 App. Div. 2d 792, 250 N.Y.S.2d 756 (2d Dep't 1964). The defendant had moved to have the plaintiff's hearing evaluated by a psychogalvanic skin reaction test. *Id.* at 792, 250 N.Y.S.2d at 756. At Special Term, the discovery request was denied on the ground that the psychogalvanometer, the

Burgel,[6] the Appellate Division, Second Department, held that neither showing had been made in a child custody action in which a parent who had admitted to previous cocaine use was requested to submit samples of her hair for drug analysis in order to determine whether such drug use had continued.[7]

In *Burgel*, the plaintiff wife sued for divorce, and both parties sought custody of their two children.[8] The defendant alleged that the plaintiff had habitually and continually used cocaine and moved for an order to have a physician cut several strands of the plaintiff's hair so that radioimmunoassay ("RIA") and confirmatory tests might be performed, purportedly to show whether she had continued to use cocaine.[9] The plaintiff opposed the motion, admitting to prior occasional cocaine use but maintaining such use had stopped several months earlier.[10] She also provided sworn statements of two experts who claimed the proposed laboratory

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instrument used in the test, had not yet received general acceptance in the scientific community such that the results of the test could be admitted into evidence. *Id.* at 793,250 N.Y.S.2d at 757. The Second Department reversed, stating that "[i]t is not disputed that these tests are of some value . . . and that they may result in important evidence of the . . . plaintiff's condition." *Id.* The court noted that "[t]here is no requirement that the results of the tests be decisive or invulnerable. For present purposes it is sufficient if . . . such results *may be* admissible and *may be* of material assistance in the administration of justice." *Id.* Admissibility would be determined at trial. *See id.*, 250 N.Y.S.2d at 757-58. The court added that the parties did not dispute that the tests were harmless and would lead neither to pain nor discomfort. *Id.*, 250 N.Y.S.2d at 757; *see also Adlerstein*, 109 Misc. 2d at 163, 439 N.Y.S.2d at 609-10 (approving of reasoning in *Carpinelli*).

[6] 141 App. Div. 2d 215, 533 N.Y.S.2d 735 (2d Dep't 1988).

[7] *See id.* at 218-19, 533 N.Y.S.2d at 737.

[8] *Id.* at 216, 533 N.Y.S.2d at 735.

[9] *Id.* In his affidavit supporting the motion for an order compelling the test, "the defendant stated that he had removed hair specimens from the drains of a sink and bathtub used by the plaintiff and had forwarded them to an expert for testing." *Id.* at 219, 533 N.Y.S.2d at 738 (Sullivan, J., dissenting). According to the sworn statement of the defendant's expert who tested the hair sample, RIA analysis showed "high, off-scale readings of cocaine or cocaine-related substances from *in* the hair itself." *Id.* (Sullivan, J., dissenting).

In the RIA test, a radioactively tagged target drug (or drug metabolite) is mixed with the biological specimen along with antibodies that react to the drug. *See* K. ZEESE, DRUG TESTING LEGAL MANUAL § 2.02[1] (1988). The non-tagged drugs in the specimen, if any, compete with the tagged drug to bind with the antibodies. *See id.* After separation of the bound antibodies from the specimen, the radioactivity is measured, thus showing the ratio of tagged drug to drugs found naturally in the specimen. *See id.* Because the RIA test can give a false positive result, a confirmatory test "is essential." *Id.*; *see* Hanson, *Drug Abuse Testing Programs Gaining Acceptance in Workplace*, Chem. & Eng'g News, June 2, 1986, at 9. The most accurate confirmatory test is gas chromatography/mass spectrometry, which, when used properly, approaches ninety-nine percent accuracy. K. ZEESE, *supra*, § 2.02[6].

[10] *Burgel*, 141 App. Div. 2d at 216, 533 N.Y.S.2d at 735.

tests were unreliable.[11] In reply, supported by several scientific articles, the defendant contended that RIA testing could provide a "calendar" of plaintiff's cocaine use.[12] The Supreme Court, Westchester County, granted the defendant's motion to compel the plaintiff to appear at the offices of a physician and submit hair samples.[13] The plaintiff appealed this order.[14]

The Appellate Division affirmed, holding that because the examination was reasonable, relevant, and minimally intrusive, the Supreme Court's grant of the defendant's request was proper.[15] Writing for the court, Justice Balletta noted that CPLR 3101 had long been construed to afford liberal discovery, "limited by the test of materiality to one of usefulness and reason."[16] Because the children's welfare was in issue, Justice Balletta added, discovery of the facts surrounding the plaintiff's cocaine use went "to the very heart of the custody dispute."[17] The court also noted that, despite the novelty of the test and possible inadmissibility of the results, the test could be performed because the rules for admissibility differ from the rules of discovery in that admissibility is determined at trial.[18]

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[11] *Id.* at 220, 533 N.Y.S.2d at 738 (Sullivan, J., dissenting).

[12] *Id.* (Sullivan, J., dissenting). The defendant contended that RIA testing of various segments of plaintiff's hair samples, when analyzed in conjunction with the average growth rate of hair, could provide a "calendar" or "timetable" of the plaintiff's cocaine use. *Id.* (Sullivan, J., dissenting). *See generally* K. ZEESE, *supra* note 9, § 2.03[5] (hair provides historical record showing when drug use occurred).

[13] *Burgel*, 141 App. Div. 2d at 218-19, 533 N.Y.S.2d at 737. A separate order was later entered to permit the defendant to have a female representative present when the hair samples were taken. *Id.*

[14] *Id.*

[15] *See id.*

[16] *Id.* at 216, 533 N.Y.S.2d at 735. The court relied on Hoenig v. Westphal, 52 N.Y.2d 605, 422 N.E.2d 491, 439 N.Y.S.2d 831 (1981), for the proposition that disclosure "procedures advance the truth-determining function of trial and speedy disposition of cases." *Id.* at 608, 422 N.E.2d at 493, 439 N.Y.S.2d at 833.

[17] *Burgel*, 141 App. Div. 2d at 217, 533 N.Y.S.2d at 736. The court stated that the physical and mental conditions of both parties were in issue because each was seeking custody of the children. *See id.* at 216, 533 N.Y.S.2d at 735; *see also* Rosenblitt v. Rosenblitt, 107 App. Div. 2d 292, 293-94, 486 N.Y.S.2d 741, 743 (2d Dep't 1985) ("parties to a contested custody proceeding place their physical and mental conditions in issue" because parental health is relevant).

[18] *Burgel*, 141 App. Div. 2d at 218, 533 N.Y.S.2d at 736-37; *see also* Suzuki Performance of Huntington, Ltd. v. Utica Mut. Ins. Co., 121 App. Div. 2d 530, 530-31, 504 N.Y.S.2d 25, 26 (2d Dep't 1986) (deposition of defendant's employees relevant and discoverable even if possibly inadmissible); McKinney v. State, 111 Misc. 2d 382, 387, 444 N.Y.S.2d 386, 390 (Ct. Cl. 1981) (personnel files concerning state worker discoverable although admissibility in doubt). *See generally* SIEGEL § 344, at 421 (1978) (discussing disclosure criteria under CPLR

In dissent, Justice Sullivan agreed with the majority that CPLR 3101 permits broad discovery at the discretion of the trial court, that this was particularly important in custody disputes, and that the question of the ultimate admissibility of the evidence was not before the court.[19] Nevertheless, the dissent argued that compelling the production of corporeal samples for a test that was "bizarre and unrecognized" and "wholly experimental" crossed beyond the limits of permissible discovery.[20] Justice Sullivan urged that the order compelling the examination be reversed and the matter remanded for a preliminary hearing and judicial determination of the reliability and validity of the RIA test,[21] thereby suggesting the established standard in New York criminal cases be followed.[22]

The *Burgel* decision reaffirms the policy of the courts to permit discovery which will expedite the disposition of a case without unduly prejudicing the other party.[23] The question of the plaintiff's cocaine use was clearly in controversy: not only was this a

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3101(a)).

[19] *Burgel*, 141 App. Div. 2d at 220-21, 533 N.Y.S.2d at 738-39 (Sullivan, J., dissenting).

[20] *Id.* at 221, 533 N.Y.S.2d at 739 (Sullivan, J., dissenting).

[21] *See id.* at 225, 533 N.Y.S.2d at 741 (Sullivan, J., dissenting). Justice Sullivan also would have reversed that part of the order permitting the defendant's female representative to take custody of the sample, concluding that the disinterested physician who takes the sample could adequately preserve the chain of custody. *See id.* (Sullivan, J., dissenting).

[22] In calling for an evidentiary hearing, the dissent referred to two criminal cases adopting a similar standard. In *In re* Abe A., 56 N.Y.2d 288, 437 N.E.2d 265, 452 N.Y.S.2d 6 (1982), the Court of Appeals held that a court order to obtain blood samples of a criminal suspect may be issued only if there exists probable cause to believe the suspect committed the crime, a clear indication that material evidence would be found, and proof that the test is reliable and safe. *Id.* at 291, 437 N.E.2d at 266, 452 N.Y.S.2d at 7. In Barber v. Rubin, 72 App. Div. 2d 347, 424 N.Y.S.2d 453 (2d Dep't 1980), an extraction of hair from the head of a criminal suspect was permitted where there was "probable cause for the necessity of the procedure," supported in part by showing both that the hair found in the victim's hand was not her own and that the proposed test was reliable and safe. *Id.* at 352-55, 424 N.Y.S.2d at 457-59. The *Burgel* dissent conceded that the fourth amendment concerns which are applicable to criminal cases do not apply to civil cases, but contended that in the type of case at bar "no less compelling reasons . . . warrant a determination as to the relevancy, reliability, and validity of the procedure . . . before the plaintiff can be required to submit to it." *Burgel*, 141 App. Div. 2d at 222-23, 533 N.Y.S.2d at 740 (Sullivan, J., dissenting). Justice Sullivan did not elaborate upon his reasons for this contention, however, stating only that application of such a standard would be particularly appropriate in matrimonial actions where the potential for discovery abuse is substantial. *See id.* (Sullivan, J., dissenting). The *Burgel* majority rejected the dissent's reasoning, concluding that in this civil matter neither the potential for abuse nor the alleged novelty of the test provided a plausible analogy to the fourth amendment considerations found integral to the decisions in *In re Abe A.* and *Barber*. *Id.* at 217-18, 533 N.Y.S.2d at 736.

[23] *See supra* notes 15-16 and accompanying text.

custody dispute in which the issue was injected by the very nature of the cause,[24] but also the plaintiff conceded that she had used cocaine.[25] Furthermore, the moving party had provided a foundation for the test through the affidavit of the expert who had tested her hair sample.[26] No privilege applied to prevent disclosure since the plaintiff had placed the issue into controversy herself, both by her admission and by contesting custody.[27] The information sought was discoverable because it might have led to the production of admissible evidence.[28] Moreover, despite doubt as to the ultimate admissibility of the results, it is submitted that the test could have led to a settlement of the case. For example, if a high reading were found, rather than risk the issue of admissibility, the plaintiff might have chosen to concede custody in exchange for more liberal visitation rights.[29] It is submitted that, despite the dissent's characterization of the test, the cutting of the plaintiff's hair would have been no more intrusive than a blood test[30] or a semen test,[31]

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[24] *See supra* note 17 and accompanying text.

[25] *Burgel*, 141 App. Div. 2d at 216, 533 N.Y.S.2d at 735; *see* Wegman v. Wegman, 37 N.Y.2d 940, 941, 343 N.E.2d 288, 288, 380 N.Y.S.2d 649, 649 (1975); *supra* note 2 and accompanying text.

[26] *Burgel*, 141 App. Div. 2d at 219, 533 N.Y.S.2d at 738 (Sullivan, J., dissenting); *see* Koump v. Smith, 25 N.Y.2d 287, 300, 250 N.E.2d 857, 864, 303 N.Y.S.2d 858, 869 (1969); *supra* note 2 and accompanying text.

[27] CPLR 3101(b) provides an exclusion for information protected by a privilege, such as the patient-physician privilege recognized in CPLR 4504. *See* CPLR 3101(b) (McKinney 1970). However, where a party places his or her condition in controversy in the pleadings or by some affirmation during pretrial testimony, the patient-physician privilege is deemed waived. *See Koump*, 25 N.Y.2d at 294, 250 N.E.2d at 861, 303 N.Y.S.2d at 864; 3A WK&M ¶ 3121.01, at 31-427.

[28] *See supra* note 4. The *Burgel* court did not refer to *Carpinelli*, 21 App. Div. 2d 792, 250 N.Y.S.2d 756 (2d Dep't 1964), which had permitted a similarly disputed test (*i.e.*, galvanic skin response). It is suggested that the galvanic skin response test at issue in *Carpinelli* is analogous to the RIA test, with respect to both reliability and harmlessness.

[29] Information that is neither admissible nor likely to lead to admissible evidence has been held discoverable when disclosure would be likely to encourage settlement or lead to a more efficient trial. *See, e.g.*, Falcone v. Repetti, 61 Misc. 2d 407, 408, 410, 305 N.Y.S.2d 784, 787, 788 (Sup. Ct. Nassau County 1969) (disclosure of medical reports with "nugatory" evidentiary value compelled because "paramount policy of complete pretrial discovery must be adhered to—each party should know as much about the other's claim as is fairly and appropriately possible").

[30] *See, e.g.*, Hayt v. Brewster, Gordon & Co., 199 App. Div. 68, 72, 191 N.Y.S. 176, 179 (4th Dep't 1921) (pinprick blood test safe).

[31] *See, e.g.*, Adlerstein v. South Nassau Communities Hosp., 109 Misc. 2d 158, 164, 439 N.Y.S.2d 605, 610 (Sup. Ct. Nassau County 1981) (semen test not a physical invasion). The RIA test does not appear analogous to the types of tests that have been disallowed. *See, e.g.*, Lefkowitz v. Nassau County Medical Center, 94 App. Div. 2d 18, 22, 462 N.Y.S.2d 903, 906 (2d Dep't 1983) (hysterosalpingogram: X-ray of uterus after injection of radiopaque sub-

both of which have received judicial approval. Moreover, requiring a preliminary hearing and judicial determination of the reliability and validity of the test as a prerequisite to granting or denying defendant's discovery request, as suggested by the dissent, would conflict with one of the key goals of discovery, namely, the speedy disposition of the case.[32] Finally, the court recognized that it retained the power to deny or limit a request if it found, in the particular case, that it would be abusive.[33]

While the contours of the *Burgel* decision remain to be defined for situations involving more intrusive drug testing or noncustodial disputes, the court's message is clear: no reasonable request will be refused, and what is reasonable is to be broadly defined.

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stance); Goldman v. Linkoff, 45 App. Div. 2d 709, 709, 356 N.Y.S.2d 101, 102 (2d Dep't 1974) (myelogram: X-ray of spinal cord after injection of radiopaque dye into spinal membrane); Carrig v. Oaken, 259 App. Div. 138, 138-39, 18 N.Y.S.2d 917, 918 (4th Dep't 1940) (cystoscopy: inspection of interior of bladder with lighted tubular instrument).

[32] *See* CPLR 104 (McKinney 1972). CPLR 104 provides that the CPLR "shall be liberally construed to secure the just, speedy and inexpensive determination of every civil judicial proceeding." *Id.*

[33] *Burgel*, 141 App. Div. 2d at 218, 533 N.Y.S.2d at 737; *see supra* note 3 and accompanying text.