

PA Superior Court Holds Attorney-Client Communications in Divorce Records are Discoverable in Medical Malpractice Case

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On September 23, 2019, the Pennsylvania Superior Court in *Corey v. Wilkes-Barre General Hospital* held that divorce records, including attorney-client communications, were discoverable. The Superior Court's decision in *Corey* stemmed from a Luzerne County trial court order compelling the disclosure of communications between the plaintiff and her divorce attorney, finding that the loss of consortium claim created an exception to the attorney-client privilege.

In *Corey*, the plaintiff brought a medical malpractice lawsuit in connection with the death of her estranged husband, asserting claims for wrongful death, survival and loss of consortium. During the course of discovery, the defendants learned the plaintiff filed a divorce action against the decedent several months before his death based on an irretrievable breakdown and indignities. The defendants subpoenaed the divorce records and, over objection, the plaintiff eventually produced non-privileged divorce documents along with a privilege log listing documents claimed to be protected by attorney-client privilege. Following a motion to compel and an *in camera* review of the claimed privileged documents, the trial court ordered production of the documents, which included attorney-client communications. According to the court, the documents were relevant to the alleged loss of consortium, and therefore discoverable, as the communications directly reflected the status of the marriage at the time of the decedent's death.

In the 2:1 decision affirming the trial court's order, the Superior Court explained that in order to ultimately prove her loss of consortium claim, the plaintiff must first establish the existence of consortium. In *Corey*, the plaintiff placed her marital relationship at issue by alleging the defendants caused her to suffer marital injury during the pendency of her divorce proceedings. The Superior Court stated that the plaintiff cannot hide behind attorney-client privilege where she was the one who placed her marital relationship at issue by including a loss of consortium claim in her complaint. As noted by the Superior Court, allowing the plaintiff to invoke attorney-client privilege in this circumstance would give the plaintiff an unfair advantage and prejudice the defendants' ability to defend against the loss of consortium claim.

In a concurring and dissenting opinion, Judge Carolyn Nichols agreed that the information sought by the defendants could be relevant, but she emphasized that relevance alone is not enough to direct disclosure of attorney-client communications. Rather, Judge Nichols noted that a trial court must consider whether there is a compelling need for the document to be disclosed under the particular circumstances of a case. Judge Nichols argued that the matter should have been remanded so the trial court could make an individual determination as to the compelling need for disclosure of each specific document at issue.

If you have questions or would like more information, please contact Dan Ferhat (ferhatd@whiteandwilliams.com; 215.864.6297), Laura Hutchinson (hutchinsonl@whiteandwilliams.com; 215.864.6231) or another member of the Healthcare Group.

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