

JOYCE A. BLAIR, Individually and as the	:	IN THE COURT OF COMMON PLEAS OF
Executrix of the Estate of BRENDA BLAIR,	:	LYCOMING COUNTY, PENNSYLVANIA
deceased, JOSEPH BLAIR, Individually,	:	
and CATHERINE WINNIE, Individually,	:	
Plaintiffs	:	
	:	
vs.	:	NO. 03-00,954
	:	
	:	
PANKAJ G. MEHTA, M. D., et al.,	:	
Defendant	:	MOTION TO COMPEL

*Date: June 23, 2005*

**OPINION and ORDER**

Before the court for determination is Plaintiffs’ Motion to Compel Deposition Testimony and to Request Other Relief as Authorized by Pa.R.C.P. 4019(5) filed June 3, 2005. The court denies in part and grants in part the motion because the objection raised at the deposition regard spousal privilege is sustained and the objection re an impermissible expert opinion is denied.

**Background**

This is a medical malpractice action against the named Defendants regarding the care rendered Brenda Blair. Dr. Todd Fausnaught provided Brenda Blair medical care during the period of time at issue. At the time, Dr. Fausnaught was a first year resident with the internal medicine teaching service. He reported to both Drs. Haussmann and Finn.

Plaintiffs’ counsel deposed Dr. Fausnaught on May 11, 2005. During the deposition, Plaintiffs’ counsel asked Dr. Fausnaught about conversations he had with two people. Dr. Fausnaught was asked whether he discussed the case with his wife and if during this discussion he criticized any aspect of the medical care provided Brenda Blair. Deposition of Todd

Fausnaught, M.D., 17, 20 (May 11, 2005). Plaintiffs' counsel also asked Dr. Fausnaught if he had a conversation with Dr. Haussman and if during that conversation whether he offered any criticisms of the care given to Brenda Blair. Fausnaught Deposition, 20.

Objections were raised to both of these inquiries. The question regarding any conversation Dr. Fausnaught had with his wife was met with two objections. First, the question sought testimony that was covered by the spousal privilege. Counsel for Defendants Dr. Pankaj Mehta and Women's Health Care Associates, P.C. initially raised this objection. Fausnaught Deposition, 18. Counsel for Dr. Fausnaught raised the objection when Plaintiff's counsel asked Dr. Fausnaught the question again. *Id.* at 20. Second, Dr. Fausnaught's counsel objected because the question impermissibly sought an expert opinion from Dr. Fausnaught. Dr. Fausnaught's counsel also raised the second objection to the question regarding the conversation with Dr. Haussmann.

### *Discussion*

The court will first address the objections to the question regarding the conversation Dr. Fausnaught had with his wife. The court will sustain the objection on the basis that the testimony sought is protected by the spousal privilege. This determination moots the objection that the question impermissibly sought an expert opinion; therefore, the objection will not be addressed as it would pertain to this question.

A party may obtain discovery regarding any relevant matter so long as it is not privileged. Pa.R.C.P. 4003.1(a). Concerning civil matters, the spousal privilege is codified at 42 Pa.C.S.A §5923. It states:

Except as otherwise provided in this subchapter, in a civil matter neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon trial.

42 Pa.C.S.A. §5923. “Communications between spouses are presumed to be confidential, and the party opposing application of the rule disqualifying such testimony bears the burden of overcoming this presumption.” *Commonwealth v. McBurrows*, 779 A.2d 509, 514 (Pa. Super. 2001), *app. denied*, 815 A.2d 632 (Pa. 2002), *cert.denied*, 540 U.S. 829 (2003). In order for a communication to be viewed as a confidential communication, the knowledge must be gained through the marital relationship and in the confidence which that relationship inspires. *Ibid*; *Commonwealth v. Dubin*, 581 A.2d 944, 946 (Pa. Super. 1990), *app. denied*, 588 A.2d 912 (Pa. 1991). To be a confidential communication, the communication must be “... imbued with an aura of a sharing disclosure precipitated largely due to the closeness spouses share ....” *McBurrows*, 779 A.2d at 514.

Plaintiffs have failed to carry their burden and overcome the presumption that the conversation Dr. Fausnaught had with his wife concerning the case and the medical care of Brenda Blair was protected by the spousal privilege. The subject matter of the conversation involved a sensitive subject. The conversation centered on a medical malpractice action involving Dr. Fausnaught’s colleagues and his opinions regarding their conduct. Because of the subject matter’s nature, Dr. Fausnaught would not have intended for this conversation to be disclosed. He relayed information and expressed his opinions to his wife because of the trust he placed in her based upon their marital relationship. Accordingly, the objection is sustained on the basis of spousal privilege.

The court will now address the objection lodged to the question regarding Dr. Fausnaught’s conversation with Dr. Haussmann. The court will deny the objection. As stated earlier, a party may obtain discovery regarding any matter relevant to the subject matter involved in the case. Pa.R.C.P. 4003.1(a). The criticisms Dr. Fausnaught relayed to Dr.

Hausmann are relevant to the case. The ultimate issue is whether the medical care Defendants provided to Brenda Blair was negligent. Dr. Fausnaught possesses expertise regarding medical care and the treatment of patients. Dr. Fausnaught also possesses knowledge regarding particular facts of the medical care and treatment Brenda Blair received. Dr. Fausnaught can apply his medical expertise to his knowledge of Brenda Blair' care and form an opinion as to the adequacy of that care. This opinion would go to the ultimate issue in the case. Therefore, Dr. Fausnaught's criticisms relayed to Dr. Hausmann are relevant and discoverable.

The fact that Dr. Fausnaught's criticisms and opinions may not be admissible at trial does not mean that they are not discoverable. "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Pa.R.C.P. 4003.1(b). Dr. Fausnaught's opinions and criticisms may lead to the admissibility of other evidence. Because of Dr. Fausnaught's involvement with the actual care of Brenda Blair, his opinions and criticisms may provide insight into the appropriateness of that care that may have been overlooked. Plaintiffs' expert witness could examine Dr. Fausnaught's opinions and criticisms and possibly use them to prepare or supplement their expert opinions if the opinions and criticisms are of significance. Accordingly, the objection is denied, as the criticisms and opinions are discoverable.

### **Conclusion**

Accordingly, the motion to compel will be denied in part and granted in part.

**ORDER**

It is hereby ORDERED that Plaintiffs' Motion to Compel Deposition Testimony and to Request Other Relief as Authorized by Pa.R.C.P. 4019(5) filed June 3, 2005 is DENIED IN PART and GRANTED IN PART.

The motion is DENIED IN PART in that any conversation Dr. Todd Fausnaught had with his with is covered by the spousal privilege and not discoverable.

The motion is GRANTED IN PART in that any conversation Dr. Todd Fausnaught had with Dr. Haussmann, including Dr. Fausnaught's criticisms of the care rendered Brenda Blair, are discoverable.

Dr. Fausnaught shall appear at a deposition to be scheduled by the parties. Plaintiffs shall be permitted to inquiry of Dr. Fausnaught information regarding the conversations he had with Dr. Haussmann and of any criticisms he may have expressed to Dr. Haussmann concerning the care of Brenda Blair.

BY THE COURT:

William S. Kieser, Judge

cc: Clifford A. Rieders, Esquire; C. Scott Waters, Esquire  
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Christian J. Kalas, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)