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### Communications Between Attorney and Expert Not Discoverable

On November 23, 2011 the Superior Court of Pennsylvania reversed the trial court's decision in Barrick v. Holy Spirit Hospital and held that communications between an attorney and an expert witness are not discoverable under Rules 4003.3 or 4003.5 of the Pennsylvania Rules of Civil Procedure. See Barrick v. Holy Spirit Hospital, Docket No. 1856 MDA 2009 (Pa. Super., November 23, 2011) (en banc).

In Barrick, the trial court held that communications between plaintiff's attorney and an expert witness who had been designated for trial were discoverable. Barrick appealed, arguing that correspondence between his counsel and the expert falls outside of the scope of expert discovery permitted by the Pennsylvania Rules of Civil Procedure and is protected from disclosure by the work product doctrine.

The Superior Court reversed. The Superior Court concluded that correspondence between a party's attorney and an expert witness is not discoverable because such correspondence is "beyond the permissive scope of Pa. R.C.P. 4003.5." The Superior Court stressed that a party may only require an opposing party's expert witness to "state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." See Rule 4003.5(a)(1). The Superior held that a request for correspondence between an opposing party's attorney and an expert witness would go beyond the limitations of Rule 4003.5(a)(1).

Furthermore, while Rule 4003.5(a)(2) permits "further [expert] discovery by other means," such further discovery is contingent upon a showing of good cause and a court order before a discovery request is made. Because Holy Spirit never made a showing of good cause, the Superior Court held that its discovery request was beyond the scope of 4003.5(a)(2).

In addition, the Superior Court agreed with Barrick that "forcing the disclosure of any communications between counsel and an expert witness violates the work product privilege contained in Pa. R.C.P. 4003.3." The Superior Court noted that work product "may be discoverable if the work product itself is relevant to the underlying action." But the Superior Court found that Barrick's "action relies upon the opinions and analysis of the expert witness, not those of [the] attorneys." Thus, the Court held that the attorney work product contained in correspondence from Barrick's counsel to the expert is not relevant to the lawsuit and would not be discoverable even if Holy Spirit had made a good cause showing under Rule 4003.5(a)(2). Rather, "Pa. R.C.P. 4003.3 immunizes from discovery any work product contained within the correspondence."

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