Defense Association Of New York

2019 Essential C.P.L.R. Updates

November 20, 2019
5:30 pm – 6:30 pm

by David Paul Horowitz

McNamara & Horowitz, LLP
125 Broad Street
New York, N.Y. 10004
Telephone: 212-682-7050
Facsimile: 212-867-5987
david@newyorkpractice.org

Author Biography

David Paul Horowitz

DAVID PAUL HOROWITZ (david@newyorkpractice.org) is a member and managing partner of McNamara & Horowitz in New York City. Mr. Horowitz has represented parties in personal injury, professional negligence, and commercial cases for over thirty years. In addition to his litigation practice, he acts as a private arbitrator and mediator, and as a discovery referee appointed by courts to oversee pre-trial proceedings. He is the author of *Bender's New York Evidence* and *New York Civil Disclosure* (LexisNexis), and the most recent supplement to *Fisch on New York Evidence* (Lond Publications). Since 2004 he has authored the monthly column *Burden of Proof*, first in the NYSBA *Journal* and, since 2018, in *The New York Law Journal*. Mr. Horowitz teaches New York Practice and Electronic Evidence & Discovery at Columbia Law School and, on behalf of the New York State Board of Bar Examiners, presents the lecture on New York Practice that all candidates for the Uniform Bar Exam since July, 2016 are required to attend. He lectures statewide for the New York State Judicial Institute to judges, law secretaries, and referees. He serves as an expert witness in legal malpractice and legal fee dispute actions, and is a frequent lecturer and writer on civil practice, evidence, ethics, and alternative dispute resolution issues. He has previously taught evidence, professional responsibility, and electronic evidence and disclosure at Brooklyn, St. John's, and New York Law Schools. He serves on the Office of Court Administration's Civil Practice Advisory Committee, is active in a number of bar associations, and served as Reporter to the New York Pattern Jury Instruction (P.J.I.) Committee.

2019 Update

I. 2019 CPLR Amendments

a. New CPLR 4540-a

Effective January 1, 2019, CPLR 4540-a will be available to simplify authentication, and admissibility:

> Rule 4540-a. Presumption of authenticity based on a party's production of material authored or otherwise created by the party. Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility.

CPLR 4540-a is the result of a proposal by the Chief Administrative Judge upon the recommendation of the Advisory Committee on Civil Practice.[1] The Assembly memorandum in support of the proposed legislation explained, "CPLR 4540-a is designed to eliminate the needless authentication burden often encountered by litigants who seek to introduce into evidence documents or other items authored or otherwise created by an adverse party who produced those materials in the course of pretrial disclosure.'"

The supporting memorandum explained that the new rule "would codify and expand upon caselaw that has been overlooked by many New York courts, practitioners, and commentators:"

> The idea that a party's production of his or her own papers serves to authenticate them is a specific application of the general rule that the authenticity of a document may be established by circumstantial evidence. (Citation omitted). The

[1] Full disclosure: I have been a Committee member since 2001.

> New York Court of Appeals recognized the probative value of a party's production of its own documents in Driscoll v. Troy Housing Auth. (citation omitted), where the issue was the authenticity of an unsigned, undated "roster card" describing the status of a civil service employee. The card was produced by the civil service commission from its files, where it had been kept for eight years. The Court held that "its authenticity must be presumed, or we have presumed wrongdoing rather than honesty on the part of the public official." (Citation omitted). The Court's ruling was bolstered by the presumption of regularity that attaches to the acts and records of public agencies, but the authentication-by-production doctrine was also recognized with respect to private documents in Ruegg v. Fairfield Securities Corp. (Citation omitted). There, the Court observed that the authenticity of a copy of a letter "produced from defendant's own files" was "unquestioned."

Critically, CPLR 4540-a acknowledges the possibility that records proffered for admission may not be authentic, or may suffer from some other infirmity barring admissibility, thus the presumption of admissibility is a rebuttable one:

> CPLR 4540-a creates a rebuttable presumption that accomplishes two goals. First, when the item at issue is one that has already been produced by a party in the course of pretrial disclosure, and such item purportedly was authored or created by that party, the opposing party is thereby relieved of the need, ab initio, to come forward with evidence of its authenticity. Second, the rebuttable nature of the presumption protects the ability of the producing party, if he or she has actual evidence of forgery, fraud, or some other defect in authenticity, to introduce such evidence and prove, by a preponderance, that the item is not authentic. A mere naked "objection" based on lack of authenticity, however, will not suffice. Shifting the burden of proof to the producing party makes sense because that party is most likely to have better access to the relevant evidence on the issue of forgery or fraud. Furthermore, the presumption recognized by the statute applies only to the issue of authenticity or genuineness of the item. A party is free to assert any and all other objections that might be pertinent in the case, such as lack of relevance or violation of the best evidence rule.

b. New CPLR 4511(c)

Effective December 28, 2019, new subsection (c) is added to CPLR 4511:

Rules 4511(c)

(c) When judicial notice shall be taken based on a rebuttable presumption. Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented.

The presumption established by this subdivision shall be rebutted by credible and reliable evidence that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove.

A party intending to offer such image or information at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the request for judicial notice of such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, the court shall take judicial notice of such image or information.

c. Amendment To CPLR 2305

Effective August 24, 2018, CPLR 2305 was amended to add new subsection (d):

(d) Subpoena duces tecum for a trial; service of subpoena and delivery for records. Where a trial subpoena directs service of the subpoenaed documents to the attorney or self-represented party at the return address set forth in the subpoena, a copy of the subpoena shall be served upon all parties simultaneously and the party receiving such subpoenaed records, in any format, shall deliver a complete copy of such records in the same format to all opposing counsel and self-represented parties where applicable, forthwith.

d. New CPLR 208(b) – Child Victims Act

Effective February 14, 2019, new subsection (b) was added to CPLR 208:

(b) Notwithstanding any provision of law which imposes a period of limitation to the contrary and the provisions of any other law pertaining to the filing of a notice of claim or a notice of intention to file a claim as a condition precedent to commencement of an action or special proceeding, with respect to all civil claims or causes of action brought by any person for physical, psychological or other injury or condition suffered by such person as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against such person who was less than eighteen years of age, incest as defined in section 255.27, 255.26 or 255.25 of the penal law committed against such person who was less than eighteen years of age, or the use of such person in a sexual performance as defined in section 263.05 of the penal law, or a predecessor statute that prohibited such conduct at the time of the act, which conduct was committed against such person who was less than eighteen years of age, such action may be commenced, against any party whose intentional or negligent acts or omissions are alleged to have resulted in the commission of said conduct, on or before the plaintiff or infant plaintiff reaches the age of fifty-five years. In any such claim or action, in addition to any other defense and affirmative defense that may be available in accordance with law, rule or the common law, to the extent that the acts alleged in such action are of the type described in subdivision one of section 130.30 of the penal law or subdivision one of section 130.45 of the penal law, the affirmative defenses set forth, respectively, in the closing paragraph of such sections of the penal law shall apply.

e. Practice Issues In Child Victim Act Cases

Child Victims Act One-Year Window Opens: Now What? (Part One)
by David Paul Horowitz and Lukas M. Horowitz

Child Victims Act: You Can Sue. Now What?
(Part Two)
by David Paul Horowitz and Lukas M. Horowitz

Child Victim Act: Discovery & Evidentiary Issues (Part Three)

I. Obtaining Records

a. Age of Records

With a look back period encompassing multiple decades, the simple fact that many records sought will be very old presents multiple problems. These include loss or damage occasioned by the passage of time, documents fading into illegibility, electronic records maintained in storage media for which hardware and software no longer exist, and misplacement.

b. Document Destruction/Retention Policies

Einstein v 357 LLC, 2009 NY Slip Op 32784[U], *24 (Sup Ct, NY County 2009)

There is no dispute that the Corcoran Defendants intentionally discarded emails in the ordinary course of business. While the deletion of emails is not per se improper, particularly when such deletions occur in the ordinary course of business, the matter is quite different when litigation has commenced or is reasonably anticipated. At that point, a party must take additional steps to preserve potentially relevant emails.

c. Medical Record Retention Policies

d. Spoliation Issues & Penalties

Pegasus Aviation I v Varig Logistica, 26 NY3d 543 (2016)

A party that seeks sanctions for spoliation of evidence must show [1] that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, [2] that the evidence was destroyed with a 'culpable state of mind,' and [3] that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.

Matter of NY City Asbestos Litig., 2018 NY Slip Op 00346, *1-2 (1st Dep't 2018)

In or around the 1990's, JMM lost and destroyed numerous banker's boxes containing the records of the manufacture, sale, and marketing of pipe which contained asbestos, a line of business it purchased from Johns-Manville in the 1980s. Although the first claim by an end user for personal injuries was not made with regard to that pipe until 2000, plaintiff adduced evidence that JMM was on notice that the records might be needed for future litigation, and thus JMM's behavior constituted spoliation (citations omitted). JMM was well aware of the long history of personal injury claims arising from other Johns-

Manville asbestos-containing products, and the Worker's Compensation claims filed by individuals who worked in the manufacture of the pipes at issue.

JMM contemplated the possibility of litigation, having entered into a litigation cooperation agreement with Johns-Mansville at the time it purchased the pipe business, and internal memos from the 1980's show that executives and lawyers at JMM discussed the risk-benefit of continuing the product line, as well as the possibility that its insurance carriers would withdraw liability coverage for the product (citations omitted). Accordingly, the motion court did not abuse its broad discretion in directing that the jury be charged with an adverse inference at the time of trial (citations omitted).

II. Admitting Records

a. Business Record Rule (CPLR 4518)

Issues for Admissibility – Difficulty in Satisfying Elements of Business Record Foundation

CPLR 4518. Business Records

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

b. Dead Mans Statute (CPLR 4519)

CPLR 4519. Personal transaction or communication between witness and decedent or mentally ill person

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his title or interest from,

through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication. A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof. No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him. A party or person interested in the event or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his own behalf or interest, or in behalf of the party succeeding to his title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.

Bars a trial witness who is interested in an event from testifying against the personal representative of a decedent with respect to a transaction or communication with the decedent.

What is Dead Man's Statute's effect on a tortfeasor's admission or declaration against interest?

III. Testimonial Issues

a. Admissions & Declarations Against Interest

An extra judicial admission is defined as follows:

An act or an oral or written statement made by a party prior to trial inconsistent with, or disprobative of, one of the relevant or material propositions he seeks to establish. It is not required, however, that it be against the interest of the declarant at the time made. An

exception to the hearsay rule, admissions are received against the declarant for the truth of the matter asserted therein.

Fisch on New York Evidence®, 2nd Ed., Horowitz (2008) § 790.

An admission is a party's prior acknowledgment of a probative fact, or an acknowledgment by another person with whom a party has a relationship of agency, or privity of interest, that contradicts the position the party is attempting to prove in litigation. In general, any act or statement, whether spoken or written, including silence, by a party, or by another person binding upon the party, is potentially admissible in evidence as an admission of a material fact. Admissions are admissible in criminal (***People v. Chico***, 90 N.Y.2d 585 [1997]) and civil actions. As the Court of Appeals explained in ***Reed v. McCord***, 160 N.Y. 330, 54 N.E. 737 [1899]:

> [T]he admissions by a party of any fact material to the issue are always competent evidence against him [or her], wherever, whenever, or to whomsoever made (citations omitted).

A declaration against interest is defined as follows:

> An extra-judicial statement by a person, unavailable as a witness, as to a relevant matter of fact which he recognized to be contrary to his pecuniary, proprietary or penal interest. The evidentiary use of these statements constitutes one of the oldest exceptions to the hearsay rule, the oath and cross-examination being deemed unnecessary on the theory that no one would make a false declaration regarding a matter contrary to his own pecuniary, proprietary or penal interest. Although one English judge characterized this reason as "sordid and unconvincing" since "(m)en lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets," the exception is generally thought to rest on a sound foundation.
>
> Declarations against interest are sometimes confused with personal and vicarious admissions or with "admissions against interest," a term occasionally used to denote an admission disserving to the interest of the declarant when made. Unlike declarations against interest, admissions are receivable even though the declarant is not unavailable, and even though the statement was not contrary to his interest when made. Moreover, an admission will not be received unless made by a party or someone related in a certain legal respect to a party, whereas a declaration against interest is admissible even when the declarant is not a party, and regardless of the existence of privity or any other kind of relationship between him and the litigants. While declarations against interest may be used in favor of the proponent or against others than the declarant, an admission may never be used in any way except against the declarant or someone identified in legal interest with him.

Fisch on New York Evidence®, 2nd Ed., Horowitz (2008) § 891

b. Negative Hearsay

Chiu-Caranese v DeMeo, 2 AD3d 766 (2nd Dep't 2003)

> Further, the trial court properly admitted the testimony of two drug company representatives that, after searching their own records and causing other persons with a business duty to accurately report to them to search their records, they could find no record of Dr. DeMeo receiving samples of two prescription medications (citations omitted). Under the circumstances of this case, since the drug companies were not parties to the action and were disinterested as to its outcome, the trial court properly credited the witnesses' testimony that the searches were performed in the regular course of business (citations omitted). Their testimony corroborated other evidence in the record that the plaintiffs lacked credibility.

c. Excited Utterance

Excited utterances are admissible as an exception to the hearsay rule because of the presumed reliability of such statements:

> Extra-judicial assertions made under the influence of a startling event, occasion or condition are admissible when uttered so spontaneously as to exclude the idea of fabrication. Admissibility of spontaneous declarations as an exception to the hearsay rule rests on the hypothesis that the declarant had no opportunity to reason or deliberate. The excitement or shock of the event is thought to so control the mind that the utterance is made under its domination and the declarant to have lost the capacity to fabricate or contrive statements in his own interest. For this reason the time interval between the event and the declaration is a significant factor. It is possible, however, that the emotional stress of the situation may have impaired the accuracy of the declarant's observation. The need for this testimony is found in the superior trustworthiness of the extra-judicial declaration rather than in the unavailability of the declarant.
>
> Fisch on New York Evidence®, 2nd Ed., Horowitz (2008) § 1000.

In ***People v. Hernandez***, 28 N.Y.3d 1056, 43 N.Y.S.2d 237, 65 N.E.3d 1272 (2016), the Court of Appeals set forth the relevant criteria for the exception:

> That exception permits a court to admit an out-of-court statement made in response to a startling or upsetting event, if the circumstances surrounding the statement reveal that it was made while the declarant was under the stress of excitement and "lack[ed] the reflective capacity essential for fabrication" (citation omitted). The decision to admit hearsay as an excited utterance is left to the sound judgment of the trial court, which must consider, among other things, the nature of the startling event, the amount of time between the event and the statement, and the activities of the declarant in the interim (citation omitted). "Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made

under the impetus of studied reflection" (citation omitted).

The elapsed time between the startling event and the statement whose admission is at issue is critical. Statements made shortly after a physical attack and under the immediate and uncontrolled domination of the senses were admissible as excited utterances, ***People v. Lopez***, 285 A.D.2d 356, 728 N.Y.S.2d 145 (1st Dep't 2001):

> At defendant's trial, complainant's statements in the apartment to a police officer were admitted over defendant's hearsay objection. Out-of-court statements about startling events, made while the speaker's excitement persists, may be admitted to prove the matters asserted (citations omitted). The "decisive factor" determining whether such statements are admissible is "whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection" (citation omitted). Here, the statements in the apartment were made shortly after a physical attack and while complainant was still suffering from injuries. The surrounding circumstances establish that they were made "under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection" (citation omitted).

c. Prompt Outcry Hearsay Exception

Prompt outcry is an exception to the hearsay rule limited to cases of sexual assault, ***People v. Rice***, 75 N.Y.2d 929 (1990):

> Evidence that the victim of a sexual attack promptly complained of the crime has long been deemed admissible as an exception to the hearsay rule, the premise being that prompt complaint was "natural" conduct on the part of an "outraged female," and failure to complain therefore cast doubt on the complainant's veracity; outcry evidence was considered necessary to rebut the adverse inference a jury would inevitably draw if not presented with proof of a timely complaint (citations omitted).
>
> ***
>
> As is apparent from its rationale, the exception permits evidence that a timely complaint was made. It does not allow the further testimony concerning details of the incident that was given here. Such testimony goes beyond the limited purpose of the exception, which is simply to show that a complaint was made (citation omitted).

A statement may qualify for admission both as a prompt outcry and an excited utterance, ***People v. Brewer***, 28 N.Y.3d 271 (2016):

> Finally, defendant argues that the trial court erred in allowing the mother to testify about MD disclosing the abuse to her. Generally, the "prompt outcry exception" to the hearsay rule is limited to testimony that a timely complaint was made, and "does not allow the further testimony concerning details of the incident" (citation omitted). But the People argued that the disclosure was also an excited utterance because it came immediately on the heels of an abusive encounter, while MD was crying and sad, "made while the victim was under the continuing influence of the stress and excitement generated by the initial

event" (citations omitted). The court allowed the testimony as both a prompt outcry and excited utterance. Here, this brief account of what MD told her mother can be viewed as both a prompt outcry and an excited utterance, and thus the admission was proper.

Prompt outcry evidence is "evidence that a victim of sexual assault promptly complained about the incident is admissible to corroborate the allegation that an assault took place" (*People v McDaniel*, 81 NY2d 10, 16 [1993]).

Is prompt outcry evidence admissible in civil cases?

What is the scope of evidence that is permissible under prompt outcry?

IV. Privileges

a. Fifth Amendment Privilege

Can tortfeasor defendant invoke Fifth Amendment at deposition?

Can tortfeasor defendant invoke Fifth Amendment at trial?

Consequences of invocation (*El-Dehdan v El-Dehdan*, 26 NY3d 19 [2016]):

The Fifth Amendment of the United States Constitution provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." However, the right against self-incrimination does not automatically insulate a party to a civil action from potential liability. Both the United States Supreme Court, in *Baxter v Palmigiano* (425 US 308, 318, 96 S Ct 1551, 47 L Ed 2d 810 [1976]), and this Court, in *Marine Midland Bank v Russo Produce Co.* (50 NY2d 31, 42, 405 NE2d 205, 427 NYS2d 961 [1980]), have held that a negative inference may be drawn in the civil context when a party invokes the right against self-incrimination. Here, defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the January 2010 order so as to avoid civil contempt liability (*United States v. Rylander*) 460 US 752, 758, 103 S Ct 1548, 75 L Ed 2d 521 [1983] [invocation of Fifth Amendment does not "substitute for evidence that would assist in meeting a burden of production"]; *Access Capitol v DiCheccio*, 302 AD2d 48, 51, 752 NYS2d 658 [1st Dept 2002]["(w)hile a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence"]). As we have explained, defendant relied on his conclusory statements that he no longer has the proceeds of the transfers and that he has no funds to deposit with the respondent's attorney. He cannot seek to avoid the consequences of this failure to proffer sufficient evidence by invoking his Fifth Amendment right.

We might view this case differently if defendant had sought relief from Supreme Court to avoid the prejudice he now claims was the result of a joint civil and criminal contempt hearing. If defendant was concerned about the spillover effect of invoking his Fifth Amendment right, he could have sought to bifurcate the hearing so that the court would first consider plaintiff's criminal contempt allegations (CPLR 2201; *Britt v. International Bus. Servs.*, 255 AD2d 143, 144, 679 NYS2d 616 [1st Dept 1998]). He chose not to do so. Instead, he seeks reversal of the contempt determination, or, in the alternative, that we grant a new hearing solely on civil liability. The latter is essentially a request for the very remedy he could have sought from Supreme Court if he had filed a request to bifurcate. Thus, because he failed to seek this relief before Supreme Court, in the first instance, he cannot complain that Supreme Court erred in drawing negative inferences specifically allowed by law.

b. Spousal Privilege (CPLR 4502)

CPLR 4502. Spouse

(a) Incompetency Where Issue Adultery. A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense.
(b) Confidential Communication Privileged. A husband or wife shall not be required, or, without consent of the other if living, allowed, to disclose a confidential communication made by one to the other during marriage.

c. Attorney-client privilege (CPLR 4503)

CPLR 4503. Attorney

(a)
1. Confidential Communication Privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

d. Physician-patient privilege (CPLR 4504)

CPLR 4504. Physician, dentist, podiatrist, chiropractor and nurse

(a) Confidential information privileged. Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and

2. "insurance benefits" shall include payments under a self-insured plan.

(b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

e. Priest-penitent privilege (CPLR 4505)

CPLR 4505. Confidential communication to clergy privileged

Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed disclose a confession or confidence made to him in his professional character as spiritual advisor.

f. Parent-child privilege (common law)

KEY QUESTIONS TO ASK WITH RESPECT TO ANY PRIVILEGE:

1. To whom does the privilege belong?
2. Who has the burden of establishing whether the privilege applies?
3. What is the particular burden associated with the particular privilege?
4. Was the privilege waived?

II. Scope Of Disclosure

Court Rules That Defendants Have Failed To Meet Their Burden To Establish That Plaintiff Has Placed Her Prior Knee Injuries In Controversy

Brito v. Gomez, 168 A.D.3d 1, 88 N.Y.S. 166 (1st Dep't. 2018)

Background: Plaintiff Benedicta Brito was allegedly involved in a motor vehicle accident on May 5, 2014. She commenced this action against defendants Rafael Gomez and Don Thomas Buses, Inc. to recover damages for personal injuries allegedly sustained in the accident. In her bill of particulars, plaintiff alleges injuries only to her cervical spine, lumbar spine and left shoulder.

Over her counsel's objection, plaintiff testified at her deposition that in October 2009 she had surgery on her left knee and began to ambulate with the aid of a cane. After a 2012 accident, plaintiff had surgery to her right knee. Plaintiff testified that the knee surgeries may have affected her ability to wear heels. Her back and neck injuries prevent her from wearing heels and also have made it more difficult to walk.

On March 14, 2016, defendants served a Supplemental Notice for Discovery and Inspection and Demand for Authorizations (Supplemental Notice for Discovery). As relevant to this appeal, defendants demanded "[a]uthorizations for all facilities where plaintiff received medical treatment for her knees, including, but not limited to, the hospital where her knee surgeries were performed."

On April 13, 2016, plaintiff filed a note of issue, certifying that the matter was ready for trial and represented that there were "no outstanding requests for discovery." On May 9, 2016, defendants timely moved to vacate the note of issue and to compel compliance with their Supplemental Notice for Discovery. Plaintiff opposed the motion on June 6, 2016 and responded to the Supplemental Notice for Discovery on June 3, 2016, objecting to the discovery demand for unrelated medical treatment.

By letter dated June 23, 2016, defendants noted that plaintiff had made "multiple claims relating to loss of enjoyment of life in the bill of particulars, including, but not limited to, 'impairments and negative effects upon plaintiff's pre-accident enjoyment of life, day-to-day existence, activities, functions, employment and involvements; limitation, diminution and/or effect of functions, activities, vocation, avocation and all other activities in which the plaintiff engaged prior to the underlying accident.'" The letter referred to plaintiff's deposition testimony concerning her prior left knee surgery in October 2009 and right knee surgery in 2012, her reliance on a cane, bilateral knee pain, and limited ability to wear heels, which was also a post-accident complaint. The letter demanded authorizations for facilities where plaintiff received treatment for her knees.

On June 28, 2016, Supreme Court ordered plaintiff to provide authorizations for medical treatment plaintiff received for her knees. Nor did Supreme Court grant the request to vacate the note of issue. Defendants appeal.

Holding:

> When the mental or physical condition of a litigant is in controversy, a notice for a medical exam or for the inspection of records may be served (*CPLR 3121[a]*). A party's right to discovery of a litigant's mental or physical condition is subject to the physician-patient privilege. The "privilege exists to protect important policies—namely, uninhibited and candid communication between patients and medical professionals, the accurate recording of confidential information and the protection of patients' reasonable privacy expectations" (cit.om.) The privilege was codified "on the belief that fear of embarrassment or disgrace flowing from disclosure of communications made to a physician would deter people from seeking medical help" (cit.om.)
>
> However, the privilege is waived where a party affirmatively places his or her physical or mental condition in controversy (cit.om.) "In order to effect a waiver, the party must do more than simply deny the allegations in the complaint—he or she must affirmatively assert the condition either by way of counterclaim or to excuse the conduct complained of ..." (cit.om.) The burden is on the party seeking the disclosure to make an evidentiary showing that the parties' physical condition is in controversy (cit.om.)
>
> We have consistently followed the waiver rule as enunciated by the Court of Appeals (*see Spencer v. Willard J. Price Assoc., LLC*, 155 A.D.3d 592, 63 N.Y.S.3d 854 [1st Dept. 2017] [the plaintiff's diabetic condition and high blood pressure were not placed in controversy since she sought to recover for orthopedic injuries]; *Kenneh v. Jey Livery Serv.*, 131 A.D.3d 902, 16 N.Y.S.3d 726 [1st Dept. 2015] [the plaintiff's diabetic condition, anxiety and other symptoms were not placed in controversy as she sought to recover for injuries to the right knee, shoulders and spine]).
>
> Contrary to defendants' argument, neither plaintiff's bill of particulars nor her deposition testimony places her prior knee injuries in controversy. In paragraph 10 of her bill of particulars, plaintiff limits the injuries she sustained in the 2014 accident to her cervical spine, lumbar spine, and left shoulder. Accordingly, the specified bodily injuries that are affirmatively placed in controversy are the spinal and shoulder injuries. The claims for lost earnings and loss of enjoyment of life alleged in the bill of particulars are limited to these specific injuries. Plaintiff does not mention her prior knee treatments. Nor does she claim that the injuries to her knees were exacerbated or aggravated as a result of the 2014 automobile accident.
>
> Defendants cite to Second Department precedent in support of their argument that the condition of plaintiff's knees is material and necessary to their defense. The Second Department has held that a party places his or her entire medical condition in controversy through "broad allegations of physical injuries and claimed loss of enjoyment to life due to those injuries" (cit.om.)

We are not persuaded by the reasoning of the Second Department. In our view, the Second Department's precedent cannot be reconciled with the Court of Appeals' rulings that the physician-patient privilege is waived only for injuries affirmatively placed in controversy.

Accordingly, the order of the Supreme Court, Bronx County, entered on or about June 30, 2016, which, to the extent appealed from as limited by the brief, denied defendants' motion to strike the note of issue and to compel plaintiff to provide discovery relating to prior treatment of her knees, should be affirmed, without costs.

REVERSED

Brito v. Gomez, ___N.Y.3d___, 2019 NY Slip Op 06452 (2019)

Plaintiff affirmatively placed the condition of her knees into controversy through allegations that the underlying accident caused difficulties in walking and standing that affect her ambulatory capacity and resultant damages (*see generally Arons v Jutkowitz*, 9 NY3d 393, 409, 880 N.E.2d 831, 850 N.Y.S.2d 345 [2007]; *Dillenbeck v Hess*, 73 NY2d 278, 287, 536 N.E.2d 1126, 539 N.Y.S.2d 707 [1989]).

Under the particular circumstances of this case, plaintiff therefore waived the physician-patient privilege with respect to the prior treatment of her knees and the discovery sought by authorizations pertaining to the treatment of plaintiff's knees is "material and necessary" to defendants' defense of the action (CPLR 3101 [a]). Accordingly, Supreme Court erred in denying defendants' motion to compel plaintiff to provide discovery related to the prior treatment of her knees.

