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COURT GIVES GUIDANCE ON INADVERTENT WAIVERS: PRIVILEGE AT RISK IN CERTAIN SITUATIONS

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In *Walton v. Mid-Atlantic Spine Specialists, P.C.*, 2010 Va. LEXIS 63 (Va. June 10, 2010), the Supreme Court of Virginia considered "whether the defendant doctor waived the attorney-client privilege for a letter he wrote to his attorney regarding potential negligence in his examination of key x-rays when that letter was produced to the plaintiff during discovery." Adopting a five-part balancing test, the Supreme Court held that although "the doctor's disclosure of the letter was inadvertent," the "doctor waived his attorney-client privilege by failing to take sufficient precautions to prevent the inadvertent disclosure."

Factual Background of the Decision

Angela Walton suffered a workplace injury to her wrist and began treatment with Jeffrey Moore, M.D., an orthopedic surgeon, and his practice group, Mid-Atlantic Spine Specialists, P.C. Dr. Moore treated Walton's broken wrist from November 1998 to May 1999. Walton filed a workers' compensation claim and later filed a lawsuit against the doctors, seeking damages for medical malpractice associated with the examination, diagnosis, and treatment of her wrist injury.

On November 24, 1998, Dr. Moore took an x-ray of Walton's wrist. Dr. Moore took another x-ray of Walton's wrist on December 1, 1998. After Walton's December 1, 1998 appointment, Dr. Moore noted in her medical record that: "Radiographs were taken in plaster. The thumb looks unremarkable. Do not see any fracture here. The overall alignment looks good." However, after reviewing the x-rays almost three years later, Dr. Moore wrote a letter to his attorney on October 30, 2001, in which he explained his thought process in the treatment he provided her. In reference to the December 1st x-ray, Dr. Moore wrote: "I made a comment that the overall alignment looks 'good.' I am not convinced I was actually looking at the x-ray from 12/01/98, and may have actually been looking at comparison film of 11/24/98, and mistakenly thought it was the recent follow-up x-ray on that day in the office. I simply cannot remember these events, but I do not consider her overall alignment as looking 'good' on 12/01/98." According to Dr. Moore, he kept his file copy of this letter in a separate white binder, while Walton's medical records were contained in a manila folder.

During discovery in the workers' compensation case, a subpoena *duces tecum* was issued to Mid-Atlantic. Mid-Atlantic hired Smart Copy Corporation to gather the subpoenaed

documents. Smart Copy obtained a copy of the letter and produced it to the attorney for Walton's employer in the workers' compensation case. The record did not show how Smart Copy obtained a copy of the letter. The letter was first produced to Walton's counsel in the medical malpractice case in November 2004. Walton also asserted that she notified the doctors that she was in possession of the letter in her June 2006 answers to interrogatories.

In November 2007, the doctors filed a motion for a protective order "against the use and/or distribution of [the] letter," alleging that it was protected by the attorney-client privilege, and "contain[ed] retrospective critical analysis of the case by [Dr. Moore] and his attorney." The circuit court held several hearings on the doctors' motion and ultimately concluded that the document was privileged.

The Supreme Court of Virginia's Analysis

In holding that the issue of whether inadvertent or involuntary disclosure of a privileged document constitutes a waiver of the attorney-client privilege was a "mixed question" of law and fact subject to *de novo* review, the Supreme Court reversed and remanded the case.

The Supreme Court initially drew the distinction between "involuntary" and "inadvertent" disclosure. To this end, the Court held that "in the waiver context, involuntary means that another person accomplished the disclosure through criminal activity or bad faith, without the consent of the proponent of the privilege." In contrast, "[i]nadvertent disclosure of a privileged document includes a failure to exercise proper precautions to safeguard the privileged document, and does not require that the disclosure be a result of criminal activity or bad faith. While knowingly, but mistakenly, producing a document may be an inadvertent disclosure, unknowingly providing access to a document by failing to implement sufficient precautions to maintain its confidentiality may also result in an inadvertent disclosure." Under the facts articulated above, the Court held that an "inadvertent" disclosure had occurred.

"Once the trial court determines that a disclosure of one or more communications is inadvertent, it must then determine whether the attorney-client privilege has been waived for the items produced." Generally, the Supreme Court held that "waiver may occur if the disclosing party failed to take reasonable measures to ensure and maintain the document's confidentiality, or to take prompt and reasonable steps to rectify the error." More specifically, the Court ruled that the "following factors are to be included in the court's consideration: (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, (4) the extent of the disclosure, and (5) whether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances." The Court observed that no one fact is independently dispositive and other material factors may be relevant depending on the case. (In passing, the Court also stated that forthcoming Va. Code § 8.01-420.7 "implements" these same standards.)

In concluding that the proponents of the privilege had failed to "reasonably" protect the document from disclosure and also failed to "reasonably" rectify the error, the Court ruled that a

waiver of the privilege had occurred based upon its analysis of the facts as applied to the five-factor test. First, the Court noted that Dr. Moore failed to reasonably prevent the disclosure of the relevant document because the binder containing the document was not marked "privileged or confidential," nor was the letter itself marked "privileged or confidential." Also, the Court found significant that neither the doctors nor their counsel conducted a privilege review of the documents gathered by Smart Copy before they were produced.

Second, the Court noted that, at the latest, the doctors were made aware of the disclosure of the letter in June 2006 through Walton's answer to interrogatories. However, "a year and a half passed between service of the answers to interrogatories to the doctors and their filing of a protective order." The Court held that the doctors should have taken "immediate action" to attempt to maintain the privilege attached to the letter.

Third, the Court ruled that the scope of discovery "was not expedited or extensive," and there was no evidence of "any time constraints or of any other factor impeding the doctor's ability to monitor the documents being produced."

Fourth, the Court determined that the extent of the disclosure was "complete," and there was "no indication that the document [had] not been copied, digested, and analyzed." Therefore, the privilege had been "permanently destroyed."

Fifth, the Court held that the "interest of justice" did not militate in favor of privilege because the doctors had attempted to use an assertion of privilege as both a "sword" and a "shield." In particular, the Court stated that parties should "not be permitted to use the privilege as both a shield, preventing the admission of evidence, and as a sword to mislead the finder of fact by allowing evidence that would be impeached by the privileged information if it had not been suppressed." Because the Court had a concern that the doctors potentially had "misled" the jury in this manner, they could not claim that the "interests of justice" favored their position.

Walton's **Teaching Points**

The decision in *Walton* added significant substance to Virginia law in what was formerly an area of law informed largely by federal and foreign precedent. Post-*Walton*, the following practical considerations should drive attorney conduct with respect to the inadvertent disclosure of privileged documents.

No bright line rule exists for what constitutes a waiver. The Court emphasized that courts must evaluate the specific facts and circumstances in the particular case before deciding whether a waiver of occurred.

Time is of the essence. In *Walton*, the Supreme Court made clear that protective actions should occur "immediately" upon the discovery of the inadvertent disclosure. Thus, although parties may have a tendency to defer their review of discovery, particularly if a dispositive motion is pending with the trial court, such action should not be delayed in order to avoid any waiver of privilege relative to any inadvertent disclosure that may have occurred.

Mark, handle and treat privileged documents appropriately. As a matter of common sense, the Court emphasized that the notebook at issue was not marked as confidential or privileged. The prudent practice is to treat privileged documents for what they are – documents intended to remain confidential and be treated specially.

The decision in *Walton* was not pro-plaintiff. Although there may be a tendency to view the decision in *Walton* as one that favored the plaintiff, the holding of the case was decidedly neutral. At bottom, discovery obligations in litigation apply with equal force to the parties on both sides of the case, and the inadvertent disclosure of an otherwise-privileged document can come from either a plaintiff or a defendant. Therefore, both plaintiffs and defendants are affected by the decision in *Walton* in equal measure.

Third-party vendors must be supervised. As has become common practice in modern-day litigation, parties frequently employ outside vendors to facilitate their response to discovery requests. These external vendors can offer significant cost saving, which makes the utilization of such vendors desirable. The decision in *Walton*, however, should give pause to parties who fail to supervise the activities of such outside vendors or have no policies in place to prevent an inadvertent production by a copy service. At the very least, counsel should undertake to review the final production proposed by an outside vendor before such production occurs.

The Court recognizes that inadvertent disclosure will inevitably occur, particularly in document-intensive actions. Prefacing its analysis of the salient issue, the Court noted that "[t]he inadvertent production of a privileged document is a specter that haunts every document intensive case." Moreover, the Court gave significant attention to the fact that the production obligations in *Walton* were not "extensive." Sensibly, therefore, a sliding scale has been created where litigants will be afforded somewhat greater protection from a waiver of privilege in the context of a large-scale document production.

A party's conduct at trial can affect the pre-trial determination of waiver. Even if a party is able to initially retain the protection of attorney-client privilege relative to documents that were inadvertently disclosed, a party's conduct at trial can alter this legal conclusion. Specifically, the Supreme Court held that a party cannot claim privilege with respect to such documents while simultaneously proffering evidence to the trier of fact that could be impeached by the suppressed documents. For this reason, parties should be circumspect regarding the evidence introduced at trial if that evidence could be discredited by the information over which a claim of privilege was previously asserted, as misleading the trier of fact in this manner will counsel in favor of waiver.

An involuntary disclosure occurs when someone other than the holder of the privilege produces a document by criminal activity or bad faith without the privilege holder's consent. The Court rejected a more lax standard for an involuntary disclosure based on the privilege holder's mere mistaken production. As the Court stated, "[t]he determination whether the disclosure was involuntary does not rest on the subjective intent of the doctors."