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Weber 
Gallagher

Can you claim loss of consortium if you're separated, but not divorced, from your spouse?

Did you ever have someone warn you about trusting a person who talks out of both sides of his or her mouth? Basically, they are advising you to stay away from people who are constantly contradicting themselves. That concept in a divorce context is addressed in Corey v. Wilkes Barre Hosp., No. 1980 MDA 2017 (Pa. Super. Decided September 23, 2019).

The Corey case arises out of wrongful death and medical malpractice action filed by a wife as administratrix of the husband's estate and on her behalf as the decedent's wife. One of the wife's claims is for loss of consortium. A claim for loss of consortium is a claim for money damages based on the loss of the company, affection and conjugal relationship between a husband and wife; more simply put, it is a claim for the loss of companionship and sexual relations between a married couple.

The twist in the Corey case is the parties were separated and a divorce action pending when the alleged medical malpractice occurred. Defense counsel for the hospital and the doctor subpoenaed a series of emails between the wife and her divorce attorney to explore the validity of the wife's loss of consortium claim. The wife asserted attorney-client privilege, but the trial court ordered the wife and her divorce attorney to release the emails. The Superior Court affirmed the Order directing release of the emails on the theory that the wife placed the marital relationship at issue in claiming loss of consortium; she now had to prove that there was "consortium" to claim its loss. The wife could not hide behind attorney-client privilege to protect the communications with her divorce attorney.

If there is a moral to the story, it is this: There are implications to being "separated" for divorce purposes going beyond the appropriate date to determine what is and is not a marital asset. If you are contemplating divorce, consider this when you decide to separate or, if you are an attorney, consider this when advising a client as to his or her date of separation. You don't want yourself in the embarrassing position of getting caught talking out of both sides of your mouth.