

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

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U.S. DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
CHARLESTON, SC

IN RE: LIPITOR (ATORVASTATIN)	MDL No. 2:14-mn-02502-RMG
CALCIUM) MARKETING, SALES)	
PRACTICES AND PRODUCTS)	CASE MANAGEMENT ORDER NO. 22
LIABILITY LITIGATION)	
)	This Order relates to all actions.
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)	

Spousal Communications Privilege in Cases with Loss of Consortium Claims

1. A party may implicitly waive a privilege “by placing a privileged communication ‘at issue’ in a case.” *Hege v. Aegon USA, LLC*, No. 8:10–cv–1578, 2011 WL 1791883 at *4 (D.S.C. May 10, 2011); *see also City of Myrtle Beach v. United Nat. Ins. Co.*, No. 4:08–1183, 2010 WL 3420044 at * 5 (D.S.C. Aug. 27, 2010) (“[I]f a [party] voluntarily injects an issue in the case, whether legal or factual, [that party] voluntary waives, explicitly or impliedly, the attorney-client privilege.”). The burden is on the party asserting the privilege to establish the lack of waiver. *Hege*, 2011 WL 1791883 at *4. This “at issue” doctrine is “based on notions of fairness and truth-seeking.” *United States v. White*, 944 F. Supp. 2d 454, 459 (D.S.C. 2013) (quoting *In re Long Point Road Limited Partnership v. RTC Land Assets Trust*, 1997 WL 33344311 at *3-4 (Bkrtcy. D.S.C. 1997)).
2. The Court finds that by bringing a loss of consortium claim, Plaintiffs have waived the spousal communications privilege as to any communications that relate to the marital relationship or are relevant to the loss of consortium claim because they have put such communications at issue. *See Restatement (Second) of Torts § 693* (1977) (“The major

element of damages in [a loss of consortium action] is any loss or impairment of the other spouse's society, companionship, affection and sexual relations.”); *see also Johansen v. E.D. Restaurant Corp.*, 2001 WL 1007396 at *2 (N.Y.Sup. July 16, 2001) (loss of consortium claim entitles defendant to discovery marital counseling session records and communications with clergymen that discuss the marital relationship).

3. However, Plaintiffs have not waived the privilege as to all communications, regardless of their nature or their relevance to the loss of consortium claim. *See Curlee v. United Parcel Service, Inc.*, 3:13-cv-344-P, 2014 WL 4262036 at * 6 (N.D. Tex. Aug. 29, 2014) (finding no waiver of privilege after the court conducted an *in camera* review of the communication and determined that it was “not being used to protect information concerning Plaintiffs’ loss of consortium claim”). In particular, the spousal communications privilege is properly asserted in response to a question as to whether a spouse has discussed the risks of smoking. This question goes to the products liability claim and is not relevant to the loss of consortium claim. Because it is not relevant to the loss of consortium claim, Plaintiffs have not put the communication at issue and the privilege is not waived.

Discovery Pool Plaintiffs’ Document Production

4. It is undisputed that after the Court, at the August 15, 2014 Status Conference, ordered Plaintiffs’ counsel to go back to the fourteen Plaintiffs in Discovery Pool cases and make a very specific inquiry regarding the Plaintiffs’ search for and collection of responsive documents, the Lopez McHugh LLP firm did not do so. Therefore, IT IS ORDERED THAT an attorney from the Lopez McHugh LLP firm who is admitted pro hac vice before this Court go back to each of the firm’s clients in the Discovery Pool cases and

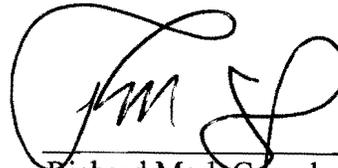
make a specific inquiry as ordered by this Court, provide a certification that they have done so within ten (10) days of the date of this Order, and properly supplement their document productions accordingly.

5. IT IS FURTHER ORDERED THAT every Plaintiff in this litigation be sent a letter by counsel explaining the client's obligation to preserve relevant documents and providing examples of documents that may be relevant to this litigation.

Pfizer's Apex Objection

6. Within seven (7) days of the date of this Order, Pfizer will submit a letter brief on its Apex objection to the deposition of Joseph Feczko. Within seven (7) days of Pfizer's submission, Plaintiffs will file a response.

AND IT IS SO ORDERED.



Richard Mark Gergel
United States District Court Judge

October 24, 2014
Charleston, South Carolina