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Supreme Court of Texas.
In re Christus Spohn Hospital Kleberg, Christus Spohn Health System Corporation
d/b/a Christus Spohn Hospital Kleberg, Relator.
No. 04-0914.

November 30, 2005

Appearances:
Deborah R. Sundermann, Corpus Christi, TX, for relator.
Todd Taylor, Johanson & Fairless, LLP, Sugar Land, TX, for real party in interest.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister

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COURT MARSHALL #1: We proceed. The Court is ready to hear argument in 04- 0914, In re Cristus Spohn Hospital.
COURT MARSHALL #2: May it please the Court. Ms. Deborah R. Sundermann will present argument for the relator. Relator have reserve five minutes for rebuttal.

ORAL ARGUMENT OF DEBORAH R. SUNDERMANN ON BEHALF OF THE PETITIONER

MS. SUNDERMANN: May it please the Court. The central issue submitted to this Court was held in court room to interpret, construe and apply the language provided to in the rule on discovery expert documents in 192.3.
JUSTICE: For review.
MS. SUNDERMANN: For reviewed.
JUSTICE O'NEILL: All right. And and let me, let me just ask that question. It is hard to, to say many parts are glanced at it, whereas as I reviewed it.
MRS. SUNDERMANN: Because there is no indication, no record whatsoever, that she ever read the substance of the materials. It would be no different from sitting in an attorney's office with the expert, and saying, "Okay you need the medical records?" "Yes." "Okay here." "Do you need the depositions?" "Yes." "Here." "Do you need the in-house

investigative report?" "No, set them aside." She didn't get anymore information than that which to include deposition. And the credibility on that is readily apparent because weeks prior to their deposition before she have had it realize what have happened. She prepared her expert report, she listed what she actually reviewed and it was the things like the medical record in the depositions. The first part is what things and there's a no mentioning of the Northcutt documents in her list of what she reviewed.

JUSTICE: But you could see that she, she hadn't reviewed on it not simply glanced that on and it would be clearly discoverable. Do you concede that point?

MS. SUNDERMANN: I would say that it's a much more difficult issue. I don't think we did there and know there's some authorities saying that if you review it you have taken into consideration of substance. And even rejecting it not relying on it still makes it discoverable. I understand that here, we don't have that level of substantive review. It's a very unique situation.

JUSTICE O'NEILL: Is that disputed or does everybody agree? It sounds like your saying, "She did not read that."

MS. SUNDERMANN: She did not read them. And she said ...

JUSTICE O'NEILL: And does that agree? Does everybody agree she did not read that?

MS. SUNDERMANN: The other side does not agreed to that but what they are relying on is advocacy right of an evidence. They're saying, "Well, she said, 'I reviewed this stuff in the box'." That, that's enough to say that she read every page.

JUSTICE: Why shouldn't we presume that it's been read if it's been delivered?

MS. SUNDERMANN: Because she specifically testified that she did not review it. She did not read it. We have-- not only the expert report than days before and weeks before the deposition.

JUSTICE: I'm not, I'm not challenge in her, in her credibility. It seems to me that most be void perhaps in the situation say that they didn't review the document. Why shouldn't it will be not. Why shouldn't it will be that it's presumed that the documents had been read if "it's been delivered an error.

MS. SUNDERMANN: Because I don't understand what legitimate purpose would be served that much a presumption. In our rules we try to avoid the dodges ...

JUSTICE: Well, but the purpose it would be served. Would you avoid disputes like this?

MS. SUNDERMANN: Well, it would be a presumption that goes directly contrary to Rule 192.3. So if you have an inadvertent disclosure ...

JUSTICE: Well, no, it just 193.3 is a different it perhaps solved the different problem. But clearly 192.3(c) is very different from the prior word.

MS. SUNDERMANN: It's different only in respect to those words provided to as far as what we're arguing here today. And I would submit to the Court that not only do we want to abort dodges we need a meaningful standard. So you-- if you want to apply some sort of a bright line part of standard it needs to be meaningful and that she substantively reviewed the information if she did not actually read it. Then there's nothing to be gain, there's no reason from the context of the rule to say that it's relevant to the cross-examination of the expert.

JUSTICE O'NEILL: And what happens if you do have the swearing match in that instance? What's the default position?

MS. SUNDERMANN: The swearing match would have to have the actual expert in front of the Trial Court to observe the demeanor and we don't have that in this case. We have the deposition, the report and her affidavit, a cold record. So the Trial Court's decision to the extent that you can call it a, in fact question does not deserve any sort of deference because the Trial Court's in no better position than this Court to read those documents that determined the credibility of this witness.

JUSTICE: Ms. Sunderman, in 192.3, in what meaning do you give this phrase provided to the expert in anticipation of a testifying expert's testimony. What is the fair meaning of an "anticipation of a testifying expert's testimony?" Is that a really kind of bearing on ...

MS. SUNDERMANN: Well, I think that it's to the, the context of the entire rule as being her interesting in the materials that play a part in the expert's position and opinion in this case. And so if it's provided for instance to the expert outside the context of the case, then it has no relevance. And with that multiple cases there we have parties wouldn't have named the experts. And the Court has to determine what-- how much of what this person has reviewed is now relevant to a cross-examination and the, the decision there is always been what have they rely on and told you their opinion.

JUSTICE: Well, then why would Court changed the rule? Looks like if that's what we meant we were stuck of 166(b).

MS. SUNDERMANN: I don't think the Court did change the rule.

JUSTICE: Why would put -

MS. SUNDERMANN: I've ...

JUSTICE: - provided to that there-- that's different ...

MS. SUNDERMANN: Well, and that may have been just to talk about the timing on anticipation of this testimony of when that expert gets this information and from who. There's nothing in the comments that says, this changes the rule that we've been looking at previously that says, you going to have some sort of reliance-- some sort of a substantive review. Nothing in, in the comments that said overruling those cases whereas in the comments to the other rules there are multiple instances or other cases are cited and, and there's a discussion of how the, the new language is suppose to interplay with the old cases. And here we have no indication that there's suppose to be a change.

JUSTICE: Would you think 193.3(d) applies to? Right?

MS. SUNDERMANN: I think 193.3(d) applies to ...

JUSTICE: In this situation.

MS. SUNDERMANN: Yeah. Every time that you have an inadvertent disclosure of privilege.

JUSTICE: Well, that, that ...

JUSTICE: So even if it's not-- even if provided to means that a privilege was this is material multitude got to produced that you wouldn't met, otherwise had produce. Do you think 193.3(b) they should act before that, were errors that problem.

MS. SUNDERMANN: Well, I believe that, that-- okay then you have the actual conflict between the privilege and the discover ability of the expert's opinions. And that takes me back to the same issue of whether or not they-- this is relevant to an expert's opinion which didn't read it. So even if the mere possession of the document in the expert's hands is enough under 192.3 which I think is part to liberal standard. You still have 193.3 that says, "Okay that was intended to be privileged. We still have a chance to get it back."

JUSTICE O'NEILL: Where in the record does she say, "She did not

read it?"

MS. SUNDERMANN: In her affidavit attached to the second amended objection ...

JUSTICE: She said she claims them, now what's the distinction?

MS. SUNDERMANN: She glanced at it to see what it was.

JUSTICE: So that's where the Court ...

MS. SUNDERMANN: And then through this act. And, and her example in her deposition was, you know counsel says, "Okay, this document, did you read it?" And she says, "No. I glanced at it just like you did right now."

JUSTICE: Not just glanced it but glanced at it nearly to identify what it was. Right?

MS. SUNDERMANN: Right. To decide whether or not she wanted to read it and she just not read it. Now if counsel at that time in the deposition had taken 20 minutes to read through this stuff, he could have said on the record, "Let the record reflect I just took 20 minutes to read this." And that's not in the record, that's not what happened. It was, "This is-- this sort of document, did you review it?" "Oh, no I set it aside."

JUSTICE: So but-- saying she glanced at it that means she read enough to realize what it was. But she had to read -

MS. SUNDERMANN: Just read it ...

JUSTICE: - a part of it to be able to say, "No, I haven't read it before."

MS. SUNDERMNANN: Right. Then she ...

JUSTICE: Maybe she read the title, maybe she read, she read some part of it but not entirely.

MS. SUNDERMANN: I mean she may have read the titles of this privileged investigation. And she might have long enough to know that she ought not to be reading that because of the waive of the privilege that she did.

JUSTICE: But the record doesn't specify what parts of the document she read when she says she glanced it?

MS. SUNDERMANN: She just glanced at it to identify it, decide whether or not she wanted to read it and she didn't. She just threw it back in the box and forgot that it was there.

JUSTICE: Let's go back to 193.3. Regarding asserting of privilege. In 192.3(e)(6) regarding scope discovery for testifying the resulting expert documents. You said anytime a privilege document is provided without intending to waive the privilege that is inadvertent production that the "snap back", "snap back" provision applies and the privilege is not waived.

MS. SUNDERMANN: Right.

JUSTICE: Isn't that too broad, what if the document is inadvertently, privileged document inadvertently provided to an expert, expert reads it and says, "Ahah, this is central to my opinion." Laura calls up a week later and says, "Well, I didn't mean to sent that to you. Give it back." But the experts' says, "No I'm relying on it."

MS. SUNDERMNANN: Well, then I think you would ...

JUSTICE: So to say, just inadvertent production rights itself. If an expert has relied on it, read it, central to the expert's opinion is too broad, isn't it?

MS. SUNDERMANN: I think that it is within the power of this Court to say that the privilege trumps that reliance by the expert. The Ohio Court apparently had taken that position. They're in the minority. But yeah, I think there is a problem if you go beyond the level of review that she gave it which was just to find out what was and not to read

it.

JUSTICE: What is that deal with the expert?

MS. SUNDERMANN: I'm sorry.

JUSTICE: So you say the expert read this privilege document, it's, it's not bad. Well, the expert's opinion is it informed by the document which is held to declare a privilege. Does that disqualify the expert?

MS. SUNDERMANN: I think 193.3 gives the Trial Court the discretion to determine whether or not there has been a substantive review of the document to weigh against the inadvertence and a "snap back." I don't know that the "snap back" rule has to be just applied without that sort of discretion. And in this case the discretion is not necessary because she didn't actually read it. With the cause [inaudible] ...

JUSTICE: As I understand, I understand that the documents have two things. One, a list of this is what employees a, b and c told me about the incident. Two, is this is my analysis of what we did right, what we wrong-- did wrong, what would might be found liable for. Anything other than that the documents?

MS. SUNDERMANN: Well, there are attorney-client communication to that before, between ...

JUSTICE: But I mean what would you do in investigation for other than that? You would say this is what the witnesses say, "A, b, c and d." And this is what my analysis of the weaknesses of our case are.

MS. SUNDERMANN: Right.

JUSTICE: I mean if the, if the thing didn't and the witnesses, are they changing their story? Another term we had in this file. If the witnesses aren't changing their story no harm there. This fight is really about counsels or the investigators opinion about the weaknesses of our case which of course they now know. But the issue is going to be: Can they admit it at trial? And if we could exclude that from trial, why are we having this fight?

MS. SUNDERMANN: Well, there's also the issue that they want to go ahead and oppose the woman who wrote the investigative report. And we've also got some indication in the record that this investi--

JUSTICE: But they're, but they're you know, they're going to answer again, "Then you say in there you thought that was this weak, and this was weak, and this was weak." If we did exclude all that is having nothing to do this person is not authorized to make admit guilt on behalf of the hospital. If only that's excluded at trial, we don't really need to have this dispute doing.

MS. SUNDERMANN: Well, to-- in this dispute we get the documents back right now before there's any further erosion of the privilege and I think that's very important.

JUSTICE: I agree that's important. But in the final analysis what difference is going to make on case?

MS. SUNDERMANN: Can we fix this another way, it's possible. But then we're going back to at Trial Court who has said, "Okay. I said, it wasn't privileged and that's the end of the story, the Supreme Court agree with me and went on."

JUSTICE O'NEILL: Well, you could get another expert?

MS, SUNDERMANN: The deadline to, doesn't make experts to passed.

JUSTICE: Do you see any potential for review said if we decide that a "snap back" rule trumps and applies here. Any potential Court reviews for unscrupulous Counsel to try to influence in color their own expert's views if they can let her 20 minutes burdens stake on our part. But, but that truly the safeguards the other side having chance to cross-examine on at the Court or the Court proving further. I mean allowing parties to kind of share their thoughts and strategies with

their own expert and whether claim inadvertence.

MS. SUNDERMANN: Absent better ...

JUSTICE: Is there any potential for reviews there?

MS. SUNDERMANN: Absent better signs on the lie detector tests and applying those to every expert. I don't know there's a way to prevent abuse through the rules. I mean if this expert really wanted to lie about this she could have left those documents in her office and they were never in the box at the deposition, just our rule. So there's a potential for abuse no matter what.

JUSTICE: Let, let me take a start with the Justice Willet's prior question and take another step from there-- in, in 192.3(e)(6) he has whether the in anticipation of a testifying expert's testimony modified to provide it to a reviewed by language in that provision. They'd recall that question?

MS. SUNDERMANN: Yes.

JUSTICE: Let me ask a question following up on that. Is it possible that, that relates to whether the reports-- here documents where provided inadvertently or where provided because you wanted this expert to help you with the litigation that is an anticipation and could it be pointing to the inadvertence test to 1923.3(d)?

MS. SUNDERMANN: Well, I think it does because that gets back to this whole idea of construing their rule but then the context of which it is you know, promulgated. And you got to what you want is to find out what the expert is being ask to look at and why. And in this case we had a mistake. And I'll-- and if you'll indulge me I know my time is up. There's an interesting issue in this because we have apparently what we sent the stuff. And you have something in that causation problem because when she sent the stuff nothing happened. Because the expert didn't review with notice at, they was still secret.

JUSTICE: About a year wasn't it?

MS. SUNDERMANN: Correct. And then the actual disclosure happens at the deposition for other reasons entirely meaning that counsel did not gone through the box first. And didn't know it was there and was caught flat footed which under the comments of the rule is absolutely a good reason to import the step.

JUSTICE: Further questions? Thank you, Counsel. The Court is ready to hear argument from the Real Party.

COURT ATTENDANT: May it please the Court. Mr. Todd Taylor to present arguments with the Real Party.

ORAL ARGUMENT OF TODD TAYLOR ON BEHALF OF THE RESPONDENT

MR. TAYLOR: May it please the Court. Good morning, my name is Todd Taylor from Law Firm Johanson and Fairless at Sugarland, Texas, System Office. Co-counsel Mr. Chris Bolton, we're here to present our presentation on this issue. I think the Justices have already gotten right to the key issues in this case. And one of the things that I believe we all have to keep in mind in evaluating this scenario is it what the relators want to happen 'cause they want to keep their expert, they want their document back, they want to use the same expert to come in and testify in the presence of the jury. And this expert make makes no mistake about it. This expert is going to annoy the hospital fell free.

JUSTICE O'NEILL: Well, do you agree that the expert did not read

these documents?

MR. TAYLOR: I, I don't Justice O'Neill I, I do not. I asked these experts several questions and Justice a little bit of background. When I, when I got to this deposition, there was literally a box of information there and unfortunately for me about six inches of the docket never seen before and I know it was suggested a minute ago that I could have taken 20 minutes to read six inches or how the much title work was in there, I didn't try to do that. What I simply did was since it was branded me it hadn't produce anytime prior. I marked these documents and it start it talking the expert about what I was already prepared to talked to her, her about. What I did asked her about was, "Did you reviewed your files?" That's on page 17 of the expert's deposition she said, "Immediately upon receipt of the box I reviewed the boxes contents." And then called the lawyer and told him, "Yes I can help you on this case." I didn't asked her some specific questions about the documents in particular and she said, "Yes." Her exact words where, "Yes I glance through everything in the box." Of course, there were breaks in this deposition, we all know about that and they should have filed subsequent to the deposition. As the expert communicates more and more with the lawyer it--what, what ends up happening is, is there's more and more distance from-- did I read it or not? And, and I, I think you-- your touching on something that's actually very critical here. This Court handed out some pretty important opinions in the late %Laniege iRobinson [inaudible]. This Court was instrumental in changing these rules to broaden these rules. Why, why were we broadening these rules as regard experts? What was the importance of raising the bar for experts?

JUSTICE O'NEILL: Well, I-- and certainly I think that your entitled to question on anything that looked at and read. I think it agreed it, it,-- if you felt like they having them read then they'd be not form in snapping back. That's the purpose of the rule as I deserved wouldn't be served they had not read them. But question is determining whether they really have or really haven't.

MR. TAYLOR: Justice O'NEILL I-- I'm not respectfully disagree to that. And here's why, just like the statute limitations applies to me. I might inadvertently missed the statute limitations but we all know what happens if I come here and complain about inadvertent missing statute limitations. The complaint here is the inadvertent production of the otherwise privilege document to an expert. We as lawyers can all read this rules, rule 1923 and the disclosure rule say. And warned the lawyer on the front side, if you provide your expert a document that is otherwise privilege it ...

JUSTICE O'NEILL: But, but we have no law or jurisprudence that says, "Inadvertent missing statute limitations can be snap back." Anyway we do have a rule here that's designed to prevent mistakes in somebody being hurt by the states that no harm can found.

MR. TAYLOR: Okay, agree it-- my, my point is this, the lawyers know on the front side. Every case has a lesson, every matter in front of this Court has a lesson. And the lesson is lawyers have to read the rules and be familiar for what they say. The lesson is rule 1923 and the disclosure rule say, "If you provide a document to an expert whether it's inadvertent or not, you waived-- you haven't waived the purposes of-- is no longer privilege ...

JUSTICE: Why do you did this? Does it have anything in it other than employees a, b, c, and d told me this and I think the hospitals has got problems-- three problems.

MR. TAYLOR: Justice Brister, I mentioned that in two parts. I--

I'll answer it globally in the State of Texas and it get's back to what I was referring to about raising bar with the expert. I think it's just as important to cross an expert witness on what's in their file that they say, they say this is what I relied on, this is what's the performance basis on my opinions.

JUSTICE: Which-- there's no question here she's going to say, "I didn't rely on this one page."

MR. TAYLOR: She couldn't Judge. She can't come in to the courtroom and annoyed the hospital fault three. And, and have any, any reliance at all in this document it undermines for vary opinions, it undermines her core opinion ...

JUSTICE: Right. So what do you want as I suspected? What you want is some investigator who is not authorized by the hospital to admit liability says, "I think we've got this problem, this problem, this and you want to use this investigator to cross-examine the expert so that they will have a fight between an investigator and the expert." Isn't that exactly what we don't want don't have happen?

MR. TAYLOR: That-- with respect, Judge Brister that's not what I want. What I want is to be able to expose the ju-- these experts hired as a spaces, Judge.

JUSTICE: Mr. Taylor, you sound like your surprised. She's got annoyed that the hospital is not liable. You would never have heard of her unless she was going to find the hospital -

MR. TAYLOR: Nobody in this -

JUSTICE: - by file.

MR. TAYLOR: Nobody in this Courtroom would [inaudible] ...

JUSTICE: Every expert you've deposed is going to say that.

MR. TAYLOR: Correct, Judge.

JUSTICE: So now what is it you need this paper?

MR. TAYLOR: So that I could show ...

JUSTICE: You know, what this investigator thought were the problems. So now you can question the expert -

MR. TAYLOR: Certainly, Judge.

JUSTICE: - on this problems. Why do you need to bolster your opinion was some low level investigator was not authorized to admit liability on that facts?

MR. TAYLOR: I, I don't to bolster my opinion, Judge. I need to expose to the jury the motivations behind this expert. Ask the jury to ask themselves why would this expert choose to pass this document back in the box. Is this expert reliable? Can we trust what this expert says at $250 an hour? Why would it be?

JUSTICE: Because you can do that. You can, you can point out how much his making. What is it, what is it you need the ec-- is the, is the investigator a nursing expert?

MR. TAYLOR: The investigator is a registered nurse, your Honor.

JUSTICE: Do we know anything about their-- that's what you-- you want to establish the mis-expert by taken her deposition?

MR. TAYLOR: Actually no, Judge. The focus of my pursuit of this issue before this Court is to ensure that I can use the document when the expert takes the stand to show that here's the document that clearly is contrary to this expert's opinion it's part of her file and ...

JUSTICE: What can-- when you do that with your own expert?

MR. TAYLOR: Clearly, clearly this document would be ...

JUSTICE: Wouldn't it be-- what is more important at trial? Whether the hospital was negligent or whether the investigator looked into this hospital was correct?

MR. TAYLOR: I think they're equally important, Judge because ...

JUSTICE: That-- and in fact that's what's going to happen. The trial is going to be about whether the ins-- investigator was right. Not about whether the hospital was negligent.

MR. TAYLOR: No, your Honor. I, I don't-- frankly I don't think the investigator will ever sees the lot of day in this Courtroom. That issue isn't before this Court. Judge Banales still has, still has the authority or right to exclude any other testimony on this issue from any other witness. What we know is going to be heard by the jury is this expert's opinions and what I should be able to cross-examined her on what was in her file. And that's why I think the rules changed in 1999. Judge Brister, we want to be able to fully cross-examine this experts on everything in their file notice what they chosen to decide may change, may or helps in with your position. We want to be able to cross-examine this experts on the stuff they chose to ignore and expose to the jury that the reason they chose to ignore was because you know, what it kills their case. And it ...

JUSTICE: With respect to 193.3 though, if the hospital had given you the documents at period of time.

MR. TAYLOR: Yes. Absolutely.

JUSTICE: And so why shouldn't you be able to get them back that means exactly. When they've been show the [inaudible].

MR. TAYLOR: And, and Justice Hecht, the reason is because this-- the, the change in the rules in 1999 clearly tell the attorney ahead of time under 1923(e), that if you provide it to your experts, if we look to the work product of portion of that, that rule directly under 1923(e), 1925(c)(1) it says, "Exceptions to privilege if though discoverable under 1923 concerning experts. Even if my aid to prepared an anticipation litigation is not work product previous protected." And the disclosure rule say the same thing, Judge and the point is that-- excuse me, your Honor-- the point is the warning is there for the lawyer.

JUSTICE: Well, yes I understand that. But the warning is there it has been for ever since there was a privilege that he can show it to anybody else. If it looses it's confidentiality then your not going be able to assert privilege anymore and 193.3 changes that since now no, no. You know, mistakes are going to happen particularly with lots of discovery and we don't even play this game. Let's, let's when there something happens and it won't suppose to happen unless the fact before you can unring the bell but you can at least try to correct the mistake as much as possible.

MR. TAYLOR: And I, I certainly that is the relators argument he just say I think that, that same the biggest point behind that is the, the, the "snap back" provision. And, and the way-- while I read this rule I believe the way this Court would interpret this rule, it won't apply once the document has been provided by the expert. Once the document has been provided to the expert are no longer -

JUSTICE: What's ...

MR. TAYLOR: - protected by the proofs.

JUSTICE: If you are right in the rules, what would be different about giving it to an expert that would have that resolved versus giving it to the other side? That would have a different result.

MR. TAYLOR: I think the distinction is just want you just pointed out, Justice Hecht. We have to treat our experts different. We have our file, we have our opposing counsel, we have our lawyers. If we make mistakes the rule which set that up or we can snatch that information back. Over here we have an expert, we have a hired gun, we already know

what Justice Brister pointed out. They're going to sing our song. So if we make mistakes, if we as lawyers don't read the file before we signatory experts, shame on us, we should have.

JUSTICE: Why, why shouldn't the Trial Judge give the hospital the option if, if though some serious question about whether expert reviewing the option of disqualifying the expert in getting the materials back or disclosing materials and keeping the expert.

MR. TAYLOR: And I think that's the, I think that's the delaying test that relators was facing with, Justice Hecht. Had the lawyer done in my opinion what typical lawyer-- and keep in mind-- I, I can only speak perhaps their my excerpts but I, I read everything that follow with him before were-- before I present my expert for deposition. The reason is I want to know what's in there too. Had the lawyer identify the document before the deposition took place and I walked in to take the deposition and said, "Mr. Taylor we have a problem." And then he approaches the Judge at that moment and I, I think your own point. I think the answer is yes. He gets to undo the wrong at that moment, but once he allows this expert to be sworn in tight positions create deposition that's what we knows and this for all purposes in this trial then the harm is undo.

JUSTICE: Well, it's an undo belief if you disqualify the expert.

MR. TAYLOR: Well, if, if the Judge were going to look pass his designation deadline and so I don't think it fresh rebutted the act in here. Perhaps that would work for the relators. But the Judge's argument is clear because we were literally Justice Hecht indict from trial. And the Judges made it clear were not on going to read to the expert, were going to start over with this, this is what's happened. I overrule here in searching of privilege, let's move forward.

JUSTICE: Counsel if, if, if your position is correct once you get--once it's gone to the expert at that point regardless of this qualifation-- qualification of the expert or withdrawn of the expert the document has lost it's privilege status and your entitled to guard it off.

MR. TAYLOR: That, that is one way to look at. Yes, your Honor.

JUSTICE: So you can take the document and oppose the nurse or even without the document oppose the nurse who did the examination. Then may say that she, she can't testify and object on that. But once the waiver is good, why where the doctor insures it's not?

MR. TAYLOR: Well, I think the distinction here is that under the disclosure rule and under the, under the scope of discovery rules that talked about once you provide to an expert then decide in it. I think the distinction here is Justice Hecht is already narrow down. If the lawyer identifies the inadvertent reduction before we take the next step, before the expert ...

JUSTICE: Let me ask you question on it. This-- as I understand you identified the document for purposes of deposition in market before the expert testified. You just went through the box the seizure, seizure, seizure or did you do that after the-- I mean if, if you-- like in a difference of when and how, don't we have to look at that?

MR. TAYLOR: Well, I think is this, Justice Johnson. I swore to witnessing and then grab the box and, and, and marked as an exhibit and then started asking witness questions. That is ...

JUSTICE: Okay. Now I was thinking that you said if before the witness testifies the other lawyers said, "We got a problem here." One difference does that make, if the expert has already looked at the document and it's-- in that to the extent in the expert's fund. What differs does it like when or how. The other lawyer -

MR. TAYLOR: Well, ...

JUSTICE: - says, I have a problem. What has been furnished to the expert, the expert has looked at under your theory. At that point, isn't it waived, if they produced the expert and produced that document?

MR. TAYLOR: I, I think that strict reading of our rules, Justice Johnson is, yeah sure.

JUSTICE: But at-- is that your position? That's my question.

MR. TAYLOR: Well, I, I, I think actually I would flaw more relies on what Justice Hecht has already pointed out in the reason. I would say that Justice Johnson ...

JUSTICE: Explain to me what position you would take me. What is your position?

MR. TAYLOR: I think it's the lawyer were to identify the problem in advance the deposition, in advance of presenting the witness. And the reason I'm taking this position ...

JUSTICE: Well, let me ask you this. Where is that in the rules? We're going to have to stretch the rules to get to your position.

MR. TAYLOR: Where-- where we are?

JUSTICE: You "snap back" or it's disclosed it seems to me like, this what the rule say.

MR. TAYLOR: And, and, and if I can explain myself, Justice Johnson. The only guidance I have on this is the Missouri Court's, Supreme Court. And that was the position they took again and maybe that's why I'm falling into the trap you've presented for me, I feel like your Honor. If you strictly read these rules, you're right. You're absolutely right. If you don't read the file before you send it over to your expert then it's done. As strictly in our rules it, it is and, and that's how-- and that's how ...

JUSTICE: Unless you get to the exerts deposition say, "Whop-- we undesignate this expert or withdrawn the expert's we don't get anything."

MR. TAYLOR: My ...

JUSTICE: No.

MR. TAYLOR: I think the court could theory in that faction. My position is, and your correct. My position is most provided to the expert in two different locations in our rules procedure. It tells us that any work product privileges are no longer this, like you can't assert in what product to [inaudible] some [inaudible] request for disclosure you can't assert a [inaudible] ...

JUSTICE: What happens, what happens when the find expert is also the claim? Doctor whose been sued is going to testifying expert, I guess you can't-- counsel can't fight the maladery report.

MR. TAYLOR: Well, I ...

JUSTICE: Were going to, were going to have to just make an exception for that. Were, were not going to be able to adopt your rule for every testifying expert, because otherwise the lawyer could no longer ride his own client.

MR. TAYLOR: I, I can say that, Justice Brister. I can say the problem in, in that environment-- I hadn't, I hadn't say the doctor takes a stand and, and, and take position on and also on my own expert ...

JUSTICE: But if we say anything you sent to any testifying expert somebody is also a donor.

MR. TAYLOR: Someone will do that.

JUSTICE: How, how do you compare ...

JUSTICE: Could have some phase-- there some I think suggestions--

let me just make sure that I'm clear. No question that Northcutt-- the Northcutt documents have furnished, your not disputing that to this Court.

MR. TAYLOR: I believe there are privilege when created. Yes, Justice Wainwright.

JUSTICE: No dispute that the production of the Northcutt documents was in advertent. You don't dispute that.

MR. TAYLOR: I don't dispute-- where I'm taking that position.

JUSTICE: So, so you don't dispute that the--when the hospital sent the documents to the expert that was an in-- inadvertent production of the Northcutt documents.

MR. TAYLOR: I, don't dispute that.

JUSTICE: And there's no dispute that the hospital timely objected when it found out about the documents. I didn't see any dispute to that point.

MR. TAYLOR: Well, I disagree I guess a different way to read my brief is Judge-- Justice Wainwright oppose in front of the District Court Judges Office. Rule 1933(d) and access Justice Wainwright doesn't even come into play because the damage is done.

JUSTICE: Although, let's come to your interpretation of 193.3(d) make you said in response to Justice Hecht questions that if, if the hospital had sent this Northcutt documents to you that have the right to get them back under the "snap back" provision.

MR. TAYLOR: Correct.

JUSTICE: But because they sent them to it's own expert.

MR. TAYLOR: [inaudible] make, make that ...

JUSTICE: They'll sue me everything else has met of course. If they sent the documents says, here to their own expert your position is that they can't get the documents back under the "snap back" provisions.

MR. TAYLOR: Correct.

JUSTICE: So your position is that they can get the documents back after the more damaging disclosure to opposing counsel, but they cannot get the documents back after the least damaging disclosure to their expert. What's -

MR. TAYLOR: Then ...

JUSTICE: - what's the rationale?

MR. TAYLOR: Then if you were or not, Justice Wainwright. I think you have to keep in mind that experts are different and, and we as the opposers of expert's have to be able to expose the problem with expert's juries. We have to show them that the bar is high and that these experts have to show me reliable. If I had cross-examined this witness on documentation in her file that under my observe position then I am severely careful in my advert to show she is unreliable.

JUSTICE: The risk the other side of that point, the risk is undermining privileges and we know how important privileges are in, in the legal profession. And yes experts are help to different standard be-cause they're paid to give opinion a courtroom unlike any other witness in the courtroom. But that doesn't mean you should do undo damage to privilege, should we?

MR. TAYLOR: I don't think were doing undo damage to privilege here, Justice Wainwright. I think what were doing here is to examine lawyers pay attention to what your saying to your expert because in two locations in our rules it says, "You can't asserts your privilege lighter."

JUSTICE: What language in 192.3(d) indicates to you that experts should not covered by the "snap back" provision? Just point that out.

MR. TAYLOR: I don't think it's necessary in 1933(d). Your Honor, I

think it's the conflict created in 1925(c)(1) it's sections privilege. And the disclosure rule themselves which in the comment say you can't assert a privilege.

JUSTICE O'NEILL: I have a quick question.

MR. TAYLOR: Yes, Ma'am.

JUSTICE O'NEILL: Is this trully inadvertent disclosure? I mean it seems to be the documents will meant to be sent to the expert to be relied on.

MR. TAYLOR: That's right.

JUSTICE O'NEILL: It's just that ultimately it was done for stake of law. I mean the fair legal thought that you had to do that and so-- or does it matter. Shall we treat them as inadvertent or-- I mean it's a difference in inadvertent in terms of we produce the statute, we didn't realize this document was in or says, we know were giving it to the expert and find out why that there's a mistake in law.

MR. TAYLOR: Right. And, and your touching on the issue of the potential of gangmanship, Justice O'Neill on my assessment whether it's inadvertent or intentional. What we don't want to allows, lawyers to do scriptless or not is to behind the sames prior deposition. On the strength of some opinion this Court hands down to pulled documents out of filed that are in the expert that are-- that, that we either at the time thought we were private privilege or now, we want to assert for product privilege. The expert needs to read everything in their file. The expert shouldn't be picking in choosing what they decide is important. If they did stuck the documents from the lawyer they need to read all of them anyway. Justice O'Neill, we're not there to decide what's important, what's not. They're there to read it also that they can be fair to all parties, that's the idea.

JUSTICE: Mr. Taylor, really quickly and look at the last seven words of 192.3(e)(6). The same question I asked, Ms. Sundermann awhile ago. What limiting affect if didn't you give the last seven words of that rule which say, "In anticipation of a testifying expert's testimony, is there any sort of context that provide for this Court to consider if they construe that rule?"

MR. TAYLOR: Well, I think it-- I, I think it, it-- it's a broad context, Justice Willet. I think, I think that if it's provided in anticipation of test mode ...

JUSTICE: What is, what is an "anticipation" means? Just prior to or in preparation for? I mean this advan-- just, just for fair legal had sent a copy of her-- her diary or attorney's take out in you or whatever that be. And accidentally attached to that to what she sent to the expert. Would that be in anticipation of the testimony?

MR. TAYLOR: I think it-- what. I think whatever is in the pocket is in the pocket. And the only reason the expert received the package, Justice Willet is because it was anticipated they will testify.

JUSTICE: But the content as a matter is simply matter of time. If they received it before the testimony then the presumes will have-- will be that ...

MR. TAYLOR: I believe that's correct and I think the same rule will apply Justice Willet, if they chose not to even use this expert. And so this is production to regard bar and none bar. If even they chose not to use this particular expert, if the production state applies, the privilege is no longer applied.

JUSTICE: Further questions?

MR. TAYLOR: I think they're not.

REBUTTAL ARGUMENT OF DEBORAH R. SUNDERMANN ON BEHALF OF PETITIONER

MS. SUNDERMANN: I like to clear the couple of questions just with the comment that the Court issued with Rule 193, this are two sentences. The focus is on the intent to waive the privilege not the intent to produce the material information. So the fact that the fair legal sent the information is not the issue which intent to waive the privilege and you may have show which she did not. The other sentence is following that one, a party that fails to diligently explain documents before producing them does not play the claim of privilege. So all this language that she heard about lawyers are be better lawyers and, and be perfect and review everything is specifically extended by the Courtroom with the promulgation of rules, not to be the issue because we have big cases wiht lots of documents then this is one of those. It's a serious medical malpractice case mostly doctors that trigger her and all kinds of medical records several admissions to the hospital. And so the mere fact that the box was not gone through prior to deposition does not create a problem where 192.3 "snap back" is not applied. You heard several references that who wants to be able to cross-examine it-- cross-examine this expert on to review these documents. His had that opportunity. He was there the deposition with the documents in the stand, he asked her, "Did you read those?" She said, "No." I glanced at them, I put them in the box. The cross-examination is already taken plus. These documents have no relevance to this ...

JUSTICE O'NEILL: But the-- wouldn't be there some relevance if, if she was free to read them? And if someone says-- you know there's a document that says, hospital is liable, they requesting negligenct here, that was the title of it and she tossed it back in the box and chose not to read it. Isn't it more important that someone be able to question them about that? I mean what documents the expert chooses to rely on or not to rely on. They have some relevance to the value of her testimony.

MS. SUNDERMANN: Well, I then think you answered. And if you won't asked that they-- you didn't read this, why didn't you read it? But they didn't bother to do that.

JUSTICE O'NEILL: But what-- that you want to snap it back so we can ask that question.

MS. SUNDERMANN: We'll have the chance though. The depositions are already taken place, the documents must there, the expert was there, for the rest of the question they didn't do it. And so we're saying our inadvertence we think the snap it back him ever, minimize the damage because it never should have gone in the first place. And there is no harm because when his dealing with this the laws of a "Women Law." And that's not a harm again, it's not a harm to complainant. We've never should have seen this documents because the expert never considered that in any substantive form and ...

JUSTICE: If you have another-- if you have more time to designate another expert, should your expert be disqualified? We question at this materials liable.

MS. SUNDERMANN: I don't believe they're just having the materials available is enough.

JUSTICE: It's going to be hard, it's going to be hard in indication. This going to have them both sides the document is going to be hard in any case to determine from an expert whether he or she had

looked at and influenced if I considered stuff that now everybody knows. It is very important that he or she did not consider.

MS. SUNDERMANN: And in those cases you can have a Trial Court all the expert in and evaluate demeanor. That here with them from beginning to end from the time that report was written to the time that deposition was taken and it was taken to discover to the affidavit following all along saying, "I reviewed some documents, not this." And there is no actual evidence that any of these documents that are issued were actually read.

JUSTICE O'NEILL: So if we would hold that the documents are not-- they, they can't be snapped back then you have no problem with this expert taking the stand and they question about here the documents that were provided to you. You did not read this one, I mean look at the content of it but they can't question why didn't you read this document entitled to hospital investigation. Because they are entitled to show that she was not interested in the investigation.

MS. SUNDERMANN: Well, first that say, "I'm must be the one making this decision on, on how to present the expert if we go forward from here." But I think once you show that it's a privilege document, it never should have been there in the first place and you snap it back so that really undermines the whole "snap back" procedure. But then say, "Why you can use it to talk about it, but let me suppose to look at it." You snap it back, you snap it back now that can be the end of the story.

JUSTICE: Any further questions? Thank you both counsel. The case will be submitted and all cases for this morning will be submitted to the partial analysis.

COURT ATTENDANT: All rise, oyez, oyez, oyez. The honorable, the Supreme Court of Texas now defense the jury.

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