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*Passion. Preparation. Persistence.*

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## THE BASSETT BULLETIN™

### CONFIDENTIAL COMMUNICATIONS

Here is the situation. You have been searching and searching and searching for just the right expert to prove your theory that your company was not liable and that you did nothing wrong. You retained the expert and provided him or her with all the documents he/she needs, and also provided the expert with privileged documents—some that they *did not* need.

This issue was raised in a case captioned *In Re: Christus Spohn Hospital Kleberg on Petition for Writ of Mandamus*.

### BACKGROUND

In this case, the Plaintiff, Mona Palmer, alleged that Christus Spohn Hospital Kleberg, “Hospital,” caused the death of her daughter, Brandi Lee Palmer. Subsequent to her notifying the Hospital, the Hospital’s internal investigator, Sandra Northcutt, conducted an investigation. Ms. Northcutt’s investigation resulted in the generation of many documents, some of which were labeled, “CONFIDENTIAL COMMUNICATION PREPARED IN ANTICIPATION OF LITIGATION.” The labeling of these documents formed the bases for a Writ of Mandamus action.

The Northcutt documents included the internal investigator’s interviews with Hospital employees and her correspondence to and from hospital counsel. A newly hired paralegal, employed by the Hospital’s counsel, sent the documents to the Hospital’s only expert witness on standard-of-care issues, Nurse Kendra Menzies. Apparently, the paralegal had recently moved to Texas from California. In California, the rules state that materials forwarded to an expert witness remained confidential. The paralegal assumed that these same rules applied in Texas.

The expert’s report that was produced to the Plaintiffs in this case listed documents that the expert nurse used in forming her opinion. However, the confidential documents did not appear on the list.

The Plaintiff’s counsel wanted to depose Nurse Menzies and issued a Subpoena Duces Tecum requesting all documents that were furnished to and reviewed by Nurse Menzies in connection with her expert work in the lawsuit. In compliance, Nurse Menzies brought the confidential Northcutt documents to the deposition.

At the deposition, both the Hospital’s and Palmer’s counsel learned that the privileged documents had been forwarded to the expert nurse. In her deposition, the nurse testified that she did not read the documents but glanced through everything in the box.

Immediately thereafter, the Hospital filed an “Objection, an Assertion of Privilege, and Motion to Return Privileged Documents.” This was filed pursuant to Texas Rules of Civil Procedure Rule 193.3(d), the “snap-back” provision. The snap-back provision’s ultimate goal was to recover documents mistakenly produced to in discovery.

At the hearing on this issue, the nurse testified that she only “glanced” at the documents to identify them. Upon learning that they were irrelevant, she “tossed them back into the box.”

The trial court overruled the Hospital’s claim of privilege. The trial court stated that it was unclear as to whether or not the expert saw the certain specified documents. The Court of Appeals also denied the Hospital’s request for Mandamus Relief.

The Supreme Court granted the Hospital’s request for Mandamus Relief to consider the application of Rule 193.3(d) to the Northcutt documents. The Supreme Court stated that, “Mandamus is appropriate if we conclude that the documents are in fact privileged, and have been improperly ordered disclosed by the trial court.”

## **THE HOSPITAL’S ARGUMENT**

In presenting its argument, the Hospital asserted that the documents were generated in anticipation of litigation. Therefore, the work product privilege should shield them from discovery. TEX. R. CIV. p.192.5(a),(b). The Hospital also argued that the documents were inadvertently produced and, therefore, the privilege was not waived and the “snap-back” provision applied. Finally, the Hospital argued that Rule 192.3(e)(6), which mandates disclosure of all documents provided to a testifying expert witness be disclosed, did not apply to this case because the documents were not prepared by or for the expert. Additionally, if they were, Nurse Menzies did not read them.

## **PALMER’S ARGUMENTS**

Palmer did not dispute the nature of the privileged documents. Further, she did not challenge the Hospital’s assertion that the “snap-back” rule 193.3(d) applied. Her argument was that Rule 193.3(d)’s “snap-back” provision did not apply to information that was provided to a testifying expert. In other words, once the information was produced to a testifying expert, Palmer argued that it cannot be “snapped back.”

Palmer also challenged the statement that the expert did not read the documents. The fact that she reviewed the documents was enough to prevent the snap-back provision. Palmer further stated that it was irrelevant whether or not Nurse Menzies actually relied upon the documents in forming her opinion. Rule 192.3 states that the documents an expert chooses to regard and those she chooses to disregard in forming her opinion are both relevant, and necessary for effective cross examination.

## **THE SUPREME COURT’S RULING**

After hearing the arguments, the Hospital’s Petition for Return of the Northcutt Documents was denied. The reasoning of the Supreme Court of Texas was as follows:

- (1) The Court said that work product is carefully protected from discovery. However, when work product is produced to a testifying expert, it loses its status.
- (2) The Court also stated that documents and tangible things provided to a testifying expert lose their work product designation irrespective of the intent that accompanied their production.
- (3) Once an expert is hired by a party, and the party continues to rely on that expert for trial, anything produced may not be retrieved, even though it was produced in an effort.

## WHAT DOES THIS MEAN?

According to the Supreme Court's ruling, anything produced to a testifying expert is discoverable.

This means you need to triple check and be certain that what you are producing to others is not privileged. Make sure that there are safe guards in place to ensure that there is no overproduction of privileged documents sent to your testifying expert.

What can you do on your end to ensure the confidentiality of your work product?

- (1) Have all documents that you are about to produce reviewed prior to them being forwarded to the testifying expert.
- (2) Flag certain documents that you are unsure of so that an attorney can follow-up with you and provide a privilege opinion.
- (3) Provide training to your staff on privileged documents.

### **The Bassett Firm**

*Two Turtle Creek Village  
3838 Oak Lawn Avenue  
Suite 1300  
Dallas, Texas 75219  
(214) 219-9900 Telephone  
(214) 219-9456 Facsimile  
Toll Free: 1-800-310-9769  
[www.thebassettfirm.com](http://www.thebassettfirm.com)*

### **ATTORNEYS**

- **MIKE H. BASSETT**
- **JENNIFER R. ELDRIDGE**
- **CANDACE M. MURPHY**
- **MICHAEL J. NOORDSY**
- **MATHEW SAMUEL**
- **JEFF A. WELLS**



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Information regarding *The Bassett Bulletin* <sup>TM</sup> is available from **Diane Dalling** ([ddalling@thebassettfirm.com](mailto:ddalling@thebassettfirm.com)) at (214) 219-9900. ©2004 The Bassett Firm. All rights reserved.

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