

EXHIBIT P

FULL AND FINAL RELEASE

In consideration of the payment of the total sum of 75,000, the payment of which is specified below, and other consideration as defined and set out below, Plaintiffs Ben Beard, David Bailey and Dan Petrosky (hereinafter "Payees") do hereby release and forever discharge James F. Scherr, Noel A. Gage, Gage, Beach & Ager, Home Insurance Company, Coregis Insurance Company (hereinafter "Payors") and their attorneys of record from any consequence arising out of James F. Scherr and Noel A. Gage's representation of Payees in the underlying lawsuit styled Rhodes v. American General Insurance Co., et al, Cause No. 88-7707 in El Paso County, Texas.

IT IS UNDERSTOOD AND AGREED that the parties and their counsel specifically contract and agree as follows:

That the sum of \$675,000 will be paid by the Defendants to the Plaintiffs in full and final settlement of the claims contained in the lawsuit styled Beard v. Scherr, et al, Cause No. 94-03110, filed in Houston, Harris County, Texas; These monies will be paid by the Defendants as follows:

The monies currently on deposit with the Court's registry will be released in their entirety to Plaintiffs (this amount consists of three hundred seventy thousand dollars and NO/100 (\$370,000) from various settlements reached in Cause No. 88-7707, styled Rhodes v. American General Insurance Co., et al. The interest accrued on these monies will constitute a shared credit toward the monies to be paid by the Defendants, which credit shall be shared equally by James F. Scherr and the Gage Defendants (specifically, Noel A. Gage and Gage, Beach & Ager). The Registry funds will be released in two separate drafts, one for \$370,000 to the Plaintiffs and the law firm of Jones & Georges, P.C., and one for the total amount of interest earned on these monies which will be paid to James F. Scherr and Noel A. Gage.;

Home Insurance Company, the professional liability

carrier for James F. Scherr, will pay \$50,000 to the Plaintiffs and the law firm of Jones & Georges, P.C. on or before November 30, 1995;

James F. Scherr will pay to the Plaintiffs and the law firm of Jones & Georges, P.C. the amount of \$117,500, payable on or before November 1, 1995. This amount has been paid and payment confirmed as of the date of signing this Release;

Noel A. Gage will pay to the Plaintiffs and the law firm of Jones & Georges, P.C. the amount of \$137,500 on or before November 1, 1995.

2. The parties herein agree that Plaintiffs will amend their Seventh Amended Original Petition to include claims of negligence and mental anguish and will withdraw any and all claims of breach of fiduciary duty and fraud as against all Defendants.
3. The contents of this Release shall remain confidential to the extent that they have not previously been released. Specifically, there shall be no release to any person, entity or organization of the amount of said settlement. Additionally, all counsel of record and parties to this lawsuit agree to decline interviews with any media organization or member of the press.
4. James F. Scherr agrees to indemnify and hold harmless Plaintiffs, their attorneys herein, and/or any of their agents or representatives for any claims made previously or brought in the future by Dr. Wilford LaRock, Dr. Joseph Superville, and/or Dr. Walter Rhodes regarding any entitlement that any of those persons may have to any of the monies referenced above on deposit with the Registry of the Court.
5. Noel A. Gage and Gage, Beach & Ager agree to dismiss with prejudice all claims against Jones & Georges, P.C. and Marjorie Georges and Luther Jones, individually currently on file with this Court, and separated from the main cause of action by Court Order. Furthermore, Noel A. Gage and Gage, Beach & Ager agree to dismiss with prejudice all counter-claims against Plaintiffs herein and/or their counsel currently on file with this Court and separated from this cause of action by Court Order.
6. James F. Scherr agrees to dismiss with prejudice all third-party claims against Jones & Georges, P.C. and Marjorie Georges and Luther Jones, individually currently on file with this Court, and separated from the main cause of action by Court Order. Furthermore, James F. Scherr agrees to dismiss with prejudice all counter-claims against Plaintiffs

and/or their counsel herein currently on file with this Court and separated from this cause of action by Court Order.

7. Noel A. Gage, Gage, Beach & Ager, and Gage, Herzfeld & Rubin agree to not pursue the cause of action known to all parties herein as "the New York lawsuit." Said lawsuit has been dismissed from the New York forum in which it was filed on the grounds of forum non conveniens. Noel A. Gage, Gage, Beach & Ager, and Gage, Herzfeld & Rubin agree not to refile this cause of action in Texas or any other forum for any reason.
8. Each party agrees to be responsible for his own costs of court incurred in this matter.
9. All copies of the deposition of Renee Wolfe will be returned to counsel for James F. Scherr, all copies of the deposition of David Escobar will be returned to counsel for Plaintiffs, and all copies of the deposition of Robert Schuwert will also be returned to counsel for Plaintiffs. Additionally, all other depositions taken in connection with this cause of action will remain confidential pursuant to Judge Greg Abbott's order of confidentiality entered in connection with these depositions. Said confidentiality order is incorporated fully herein by reference and recognized as binding by all parties hereto.
10. Plaintiffs and their counsel of record agree to notify the State Bar of Texas of their desire to withdraw claims and grievances previously filed by them and currently pending against James F. Scherr. It is understood by all parties herein that such notification may not result in a dismissal of said claims and grievances, as the final decision regarding such action rests with the State Bar Grievance Committee. Plaintiffs and their counsel agree to provide James F. Scherr with a copy of their written notification to be submitted to the State Bar on or before November 3, 1995.


IT IS FURTHER UNDERSTOOD AND AGREED that the payment of consideration as outlined above by said Payors is not to be construed as an admission of liability on the part of said Payors, but that said payment is in compromise and settlement of Payees' claims, which are not admitted, but are denied and disputed by said Payors, and that this Release is being given by

Payees voluntarily and is not based upon any representations of any kind made by Payors or their representatives as to the merits, legal liability or value of Payees' claims or any other matter relating thereto, and in making this settlement said Payees rely wholly upon their own judgment, belief and knowledge of their rights, after being advised about them by their attorneys.

IT IS FURTHER UNDERSTOOD AND AGREED that the settlement proceeds paid by Scherr, Gage, and Gage, Beach & Ager herein are in response to Plaintiffs' claims for mental anguish.

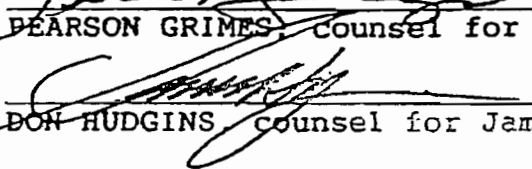
IT IS FURTHER UNDERSTOOD AND AGREED that in consideration for the execution of this Full and Final Release all claims and counter-claims encompassed in Cause No. 94-03110 are hereby dismissed with prejudice and a formal Motion and Order to that effect shall be executed by all parties herein and entered by the Court on or before November 1, 1995.

Signed and agreed to by all counsel of record on this the 25th day of October.


MARTIE GEORGES, counsel for Plaintiffs


LUTHER JONES, counsel for Plaintiffs


PEARSON GRIMES, counsel for Plaintiffs


DON HUDGINS, counsel for James F. Scherr

Bon Wilhelm by Counsel

BON WILHELM, counsel for James F. Scherr

Phil Werner

PHIL WERNER, counsel for Gage, Beach & Ager

Teresa Ford

TERESA FORD, counsel for Noel A. Gage

OCT 26 '95 12:07PM HOHMANN, WERNER & TRUBE

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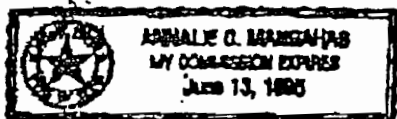
B. Beard
BEN BEARD

STATE OF TEXAS
COUNTY OF EL PASO

§
§
§

BEFORE ME, the undersigned authority, on this day personally appeared Ben Beard and in all other capacities, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein stated, specifically, that he fully read and understood the document in its entirety.

26 SWORN TO AND SUBSCRIBED TO BEFORE ME by Ben Beard on this the 26 day of October, 1995.



Annalie C. Mangalala
NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

DAVID BAILEY

STATE OF TEXAS
COUNTY OF EL PASO

§
§
§

BEFORE ME, the undersigned authority, on this day personally appeared David Bailey and in all other capacities, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein stated, specifically, that he fully read and understood the document in its entirety.

SWORN TO AND SUBSCRIBED TO BEFORE ME by David Bailey on this the ____ day of October, 1995.

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

Dan Petrovsky
DAN PETROVSKY

STATE OF TEXAS
COUNTY OF EL PASO

§
§
§

BEFORE ME, the undersigned authority, on this day personally appeared Dan Petrovsky and in all other capacities, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein stated, specifically, that he fully read and understood the document in its entirety.

SWORN TO AND SUBSCRIBED TO BEFORE ME by Dan Petrovsky on this the 31 day of October, 1995.

William M. Petrovsky
NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS

66
5. 8. 99

BEN BEARD

STATE OF TEXAS

§
§
§

COUNTY OF EL PASO

BEFORE ME, the undersigned authority, on this day personally appeared Ben Beard and in all other capacities, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein stated, specifically, that he fully read and understood the document in its entirety.

SWORN TO AND SUBSCRIBED TO BEFORE ME by Ben Beard on this the _____ day of October, 1995.

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

David Bailey
DAVID BAILEY

STATE OF TEXAS

§
§
§

COUNTY OF ~~EL PASO~~ BLAZOS

BEFORE ME, the undersigned authority, on this day personally appeared David Bailey and in all other capacities, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed and in the capacities therein stated, specifically, that he fully read and understood the document in its entirety.

SWORN TO AND SUBSCRIBED TO BEFORE ME by David Bailey on this the 5th day of October, 1995.
NOVEMBER

Sheryl J. Kirk
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS

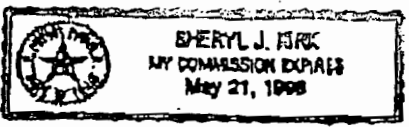


EXHIBIT Q

Cause No. 94-03110
Beard, et al v. Scherr, et al
Houston, Harris County, Texas

AGREED MOTION FOR DISMISSAL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs Ben Beard, David Bailey and Dan Petrosky, and Defendants James F. Scherr, Noel A. Gage and Gage, Beach & Ager and submit this their Agreed Motion for Dismissal in the above entitled and numbered cause and in support thereof would show unto the Court the following:

I.

All claims and causes of action in this matter have been fully and finally compromised. Therefore, all parties to this cause agree to dismiss all claims and counter-claims with prejudice, as no party wishes to pursue any claim encompassed in the instant case.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs and Defendants herein respectfully request that the Court dismiss with prejudice all claims and counter-claims encompassed by this cause of action, and further, that each party be responsible for their own costs of court incurred herein.

Respectfully Submitted,

JONES & GEORGES, P.C.

By: 

Marjorie Georges
State Bar No: 21453075
Luther Jones
State Bar No: 10928000
303 Texas Avenue, Suite 800
El Paso, Texas 79901
915/534-0040
915/534-0055 (fax)

COUNSEL FOR PLAINTIFFS BEN BEARD,
DAN PETROSKY AND DAVID BAILEY

HUDGINS, HUDGINS & WARRICK

By: 

Donald M. Hudgins
State Bar No: 10149000
24 Greenway Plaza, Suite 1007
Houston, Texas 77046
713/623-2550
713/623-2793 (fax)

COUNSEL FOR DEFENDANT
JAMES F. SCHERR

ONSTAD, KAISER & FONTAINE

By: 

Donald Wilhelm
State Bar No: 21475250
1350 Post Oak Blvd., Suite 700
Houston, Texas 77056

COUNSEL FOR DEFENDANT
JAMES F. SCHERR

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

Philip Werner
State Bar No: 21190200
1300 Post Oak Blvd., Suite 700
Houston, Texas 77056
713/961-3541
713/961-3542 (fax)

COUNSEL FOR DEFENDANT
GAGE, BEACH & AGER

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

Teresa I. Ford
State Bar No: 00784069
1300 Post Oak Blvd., Suite 700
Houston, Texas 77056
713/961-3541
713/961-3542 (fax)

COUNSEL FOR DEFENDANT
NOEL A. GAGE

EXHIBIT R

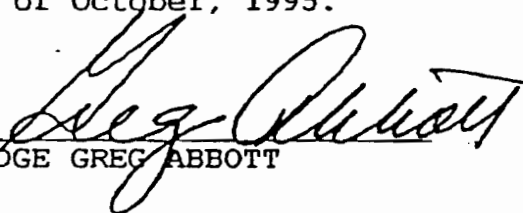
Cause No. 94-03110
Beard, et al v. Scherr, et al
Houston, Harris County, Texas

AGREED ORDER OF DISMISSAL

Came on to be heard on this the 25th day of October
Plaintiffs' and Defendants' Agreed Motion for Dismissal in the
above styled and numbered cause. The Court, after considering
said Motion, is of the opinion that it is meritorious and should
be in all things GRANTED. It is, therefore,

ORDERED that all claims and counter-claims encompassed in
the above-styled and numbered lawsuit are hereby dismissed with
prejudice and the parties' Agreed Motion for Dismissal is in all
things GRANTED. All relief not specifically granted herein is
denied.

Signed on this the 25th day of October, 1995.


JUDGE GREG ABBOTT

* This dismissal applies to the claims
of Beard, Bailey & Petrosky, the
counterclaims of Scherr, Gage & Gage
Beach & Ager, the 3rd party claims of
Scherr, Gage & Gage Beach & Ager.

This ~~does~~ does not dismiss the
claims asserted in the Intervention.

APPROVED AS TO FORM AND CONTENT:

JONES & GEORGES, P.C.

By: 

Marjorie Georges
State Bar No: 21453075
Luther Jones
State Bar No: 10928000
303 Texas Avenue, Suite 800
El Paso, Texas 79901
915/534-0040
915/534-0055 (fax)

COUNSEL FOR PLAINTIFFS BEN BEARD,
DAN PETROSKY AND DAVID BAILEY

HUDGINS, HUDGINS & WARRICK

By: 

Donald M. HUDGINS
State Bar No: 10149000
24 Greenway Plaza, Suite 1007
Houston, Texas 77046
713/623-2550
713/623-2793 (fax)

COUNSEL FOR DEFENDANT
JAMES F. SCHERR

ONSTAD, KAISER & FONTAINE

By: 

Donald Wilhelm
State Bar No: 21475250
1350 Post Oak Blvd., Suite 700
Houston, Texas 77056

COUNSEL FOR DEFENDANT
JAMES F. SCHERR

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

Philip WERNER
State Bar No: 21190200
1300 Post Oak Blvd., Suite 700
Houston, Texas 77056
713/961-3541
713/961-3542 (fax)

COUNSEL FOR DEFENDANT
GAGE, BEACH & AGER

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

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State Bar No: 00784069
1300 Post Oak Blvd., Suite 700
Houston, Texas 77056
713/961-3541
713/961-3542 (fax)

COUNSEL FOR DEFENDANT
NOEL A. GAGE

EXHIBIT S

REM

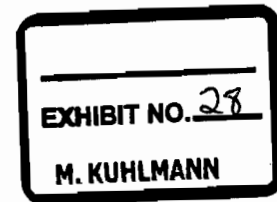
Risk Enterprise
Management
Limited

2925 Briarpark, Suite 850, Houston, Texas 77042
Tel: (713) 787-7800 Fax: (713) 787-7851
Mailing Address:
P.O. Box 4357
Houston, Texas 77210

February 2, 1996

CERTIFIED MAIL/
RETURN RECEIPT REQUESTED

James F. Scherr
109 North Oregon
Suite 800
El Paso, TX 79901



RE: REM's Principal: The Home Insurance Company
Claim No.: 640-L-600813-174
Insured: James Scherr
Claimant: Ben Beard, et al.
Policy Limits: \$200,000 each claim; \$600,000 aggregate
Deductible: \$5,000

Dear Mr. Scherr:

I am writing in response to Attorney Jim Darnell's December 10, 1995, letter.

Additionally, this letter will also inform you of the company's position concerning coverage under the policy issued by The Home Insurance Company, Policy Number LPLF878124.

Your policy's limits of liability are \$200,000 per claim and \$600,000 in the aggregate. Your limits of liability are self-liquidating. Accordingly, as defense costs accrue, your available limits for continued defense and indemnity are correspondingly decreased.

On behalf of The Home Insurance Company, Risk Enterprise Management Limited (REM) has paid \$203,639.20 in defense costs and loss payment. Please refer to the following section in your policy:

E-Limits of Liability

I. Limits of liability - each claim

The liability of the company for each claim first made

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REM

Risk Enterprise
Management
Limited

against the insured and reported to the company during the policy period, and including the optional reporting period, if such is purchased, shall not exceed the amount stated in the declaration for each claim and shall include all claim expenses. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the insured, and the insured agrees, as a condition to the issuance of this policy, to accept such tender.

On October 18, 1995, we received your letter of October 16, 1995, forwarding us the plea and intervention filed by Joe Archer for 17 chiropractors in the above-captioned matter. The court severed the plea and intervention to a separate trial. Please be advised that it is The Home Insurance Company's position that the plea and intervention suit does not represent a new claim because related acts, errors or omissions are treated as a single claim. Please refer to the following provision in your policy:

Section E-Limits of Liability

IV. Multiple Insureds, Claims, and Claimants

The inclusion herein of more than one insured or the making of claims or the bringing of suits by more than one person or organization shall not operate to increase the company's limit of liability. Related acts, errors of omissions shall be treated as single claim. All such claims, whenever made, shall be considered first made during the policy period or optional reporting, in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

In view of the fact that we have paid \$203,639.20, we believe that we have fulfilled our obligation under the policy pursuant to the aforementioned policy provisions. Therefore, we will not be participating in the further defense handling of this matter.

REM

*Risk Enterprise
Management
Limited*

If you have information that would indicate that our position is in any way incorrect, we encourage you to present such information for our consideration.

Very truly yours,

RISK ENTERPRISE MANAGEMENT LIMITED

Oscar Allen
Claim Manager

cc: Donald M. Hudgins
Hudgins, Hudgins & Warrick

James Darnell

HO1696kd.dl

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EXHIBIT T

BEN BEARD, DAVID BAILEY and DAN PETROSKY,

Plaintiffs,

v.

JAMES FRANKLIN SCHERR, NOEL GAGE and GAGE, BEACH & AGER,

Defendants.

IN THE 129TH JUDICIAL DISTRICT COURT OF HARRIS COUNTY, TEXAS

CLERK OF DISTRICT COURT
HARRIS COUNTY, TEXAS
NOV 23 2 02 PM '94
4010

PLAINTIFFS' NINTH AMENDED ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Ben Beard, David Bailey, and Dan Petrosky, Plaintiffs, and file this their Ninth Amended Original Petition against James Scherr, Noel Gage, and Gage, Beach and Ager, Defendants, and in support thereof would respectfully present the following:

PARTIES

1. Ben Beard is an individual residing in Houston, Texas and David Bailey is an individual residing in College Station, Texas. Dan Petrosky is an individual residing in El Paso, Texas. Defendant James Scherr is an attorney who has previously been served in this case and has filed an answer. Noel Gage is an attorney who has previously been served and who has filed an answer and Gage, Beach & Ager is a partnership which also has been served and has filed an answer.

VENUE

2. Plaintiffs' action against Defendants is properly maintainable in the county of suit for the following reasons: Negotiations that formed the basis of the contract between Ben Beard and Defendant Scherr occurred in Harris County, Texas. Therefore, venue is appropriate in Harris County.

FACTS

3. Defendants are attorneys licensed to practice law in the State of Texas. Defendant James Scherr entered into Contingency fee contracts to represent Plaintiffs in certain causes of action against numerous insurance companies enumerated in Cause No. 88-7707, *Dr. Walter Rhodes et al v. American General Fire and Casualty Company et al* in the 243rd Judicial District Court of El Paso County, Texas, hereinafter referred to as "Cause No. 88-7707". Defendant Scherr entered into an agreement with Defendant Gage, and his law firm Defendant Gage, Beach & Ager, to assist him in representing Plaintiffs. All of the Defendants acted as counsel of record for Plaintiffs in Cause No. 88-7707 and an attorney-client relationship existed between each Plaintiff and each Defendant. During the course of representing the Plaintiffs, Defendants violated the duty owed to plaintiffs to exercise the ordinary care and diligence exercised by other attorneys practicing in the same or similar circumstances, and was negligent in the following particulars: failing to properly account for monies collected by Defendants on behalf of the Plaintiffs and favoring specific other clients at the expense of Plaintiffs. Further, it is believed by Plaintiffs that Defendants wrongfully appropriated, for the benefit of Defendants, certain funds collected on behalf of Plaintiffs. Defendants were negligent by causing Plaintiffs to become involved in the Class Action lawsuit upon the false representation that its prosecution would lead to an end of the discriminatory practices of various insurance companies and further by failing to inform the Plaintiffs of their relationship with two Co-Plaintiff class representatives -- LaRock and Superville -- in Cause No. 88-7707.

NEGLIGENCE

4. Defendants were specifically negligent in their representation of Plaintiffs in the

following respects:

- (1) Defendants were negligent in that they assigned the principal responsibility for the management of the class to an attorney who admitted under oath that she had no experience in this type of litigation;
- (2) Defendants were negligent in failing to keep Plaintiffs adequately informed of the progress of the litigation;
- (3) Defendants were negligent in that they negotiated settlements that did not achieve the stated purposes of the litigation;
- (4) Defendants Scherr and Gage were negligent in that they did not adequately prepare Plaintiffs for their respective depositions;
- (5) Defendants were negligent in failing to exhaust their administrative remedies prior to commencement of the litigation;
- (6) Defendants were negligent in that they never conducted a hearing for the purposes of certification; and
- (7) Defendants were negligent in failing to maintain records required by the Texas Rules of Civil Procedure in class action litigation;
- (8) Defendants were negligent in failing to inform the named members of the class of the legal consequences of the settlements they negotiated;
- (9) Defendants were negligent in failing to acknowledge and respond to objections made by various class members to the settlements that were being negotiated;
- (10) Defendants were negligent in undertaking a class action of the nature envisioned in Cause No. 88-7707 when they did not have adequate financial capacity to maintain the class action; and
- (11) Defendants were negligent in obtaining the participation of Ben Beard, David Bailey and Dan Petrosky upon the false pretext of what the class action would accomplish and that their principal clients LaRock and Superville would advance \$100,000.00 of the initial costs.

MENTAL ANGUISH AND DAMAGES

5. As a direct and proximate result of Defendants' negligence as described above, Plaintiffs have suffered damages in the form of mental anguish in an amount in excess of this Court's minimum jurisdictional limits.

PREJUDGMENT INTEREST

6. Plaintiffs would show that they are entitled to recover prejudgment interest in this cause and specifically plead for prejudgment interest recovery.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs request that Defendants be cited to appear and answer, and that, after trial, plaintiffs have judgment against Defendants for the maximum amount of \$2,303,900.00 and further:

1. Cancellation of Defendant James Franklin Scherr's attorney lien in the \$200,000.00 recovered by Martie Georges in Cause No. 88-7707;
2. Pre and post judgment interest as allowed by law;
3. Such further relief to which Plaintiffs may be entitled.

Respectfully submitted,

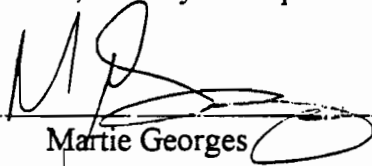
Jones & Georges
303 Texas Ave., Ste. 800
El Paso, TX 79901
(915)534-0040
FAX: 534-0055

By: 

Marjorie Wilcox Georges
State Bar No. 21453075
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was forwarded to Phillip Werner at 1300 Post Oak Blvd., Ste. 700, Houston, Texas 77056, fax number (713)961-3542 and Donald M. Hudgins, 24 Greenway Plaza, Suite 1007, Houston, Texas 77046, fax number (713) 623-2793 on this the 31st day of October, 1995 by telecopier transmission.



Martie Georges

EXHIBIT U

REM

Risk Enterprise
Management
Limited



October 20, 1995

SENT VIA AIRBORNE EXPRESS AND
CERTIFIED MAIL
RETURN RECEIPT REQUESTED P174 714 388
James F. Scherr
109 North Oregon, Suite 800
El Paso, TX 79901

Re: REM's Principal: The Home Insurance Company
Claim No.: 640-L-600813-174
Insured: James Scherr
Claimant: Ben Beard, et al.
Policy Limits: \$200,000 each claim/\$600,000 aggregate
Deductible: \$5,000

Dear Mr. Scherr:

Please be advised that Risk Enterprise Management Limited (REM) has been appointed to manage the business of The Home Insurance Companies. Future correspondence on this matter will be on REM letterhead.

This correspondence confirms our telephone conversation of October 19, 1995, relative to the captioned matter.

The Home Insurance Company is providing you with a defense under reservation of rights. The reservation of rights is based upon allegations in plaintiff's seventh amended original petition. The petition alleges actual and constructive fraud; conversion; action to avoid contingency fee contract; among other allegations. Additionally, the petition seeks to recover exemplary damages and compensatory damages in excess of your policy limits.

Please refer to the following provisions in your policy:

Section B - Coverage

Professional Liability and Claims Made Clause:

To pay on behalf of the insured all sums in excess of the deductible amount stated in the declarations, which the insured shall become legally obligated to pay as damages as a result of claims first made against the insured during the policy period and reported to the company during the policy period caused by any act, error or omission for which the insured is legally responsible, and arising out of the rendering or failure to render professional services for others in the insured's capacity as a lawyer or notary public;

Damages:

Whenever used in this policy, means a monetary judgment or settlement, including any such judgment or settlement for personal injury, and does not include fines or statutory penalties, or sanctions whether imposed by law or otherwise, nor the return of or restitution of legal fees, costs and expenses.

Section C - Exclusions:

I. This policy does not apply:

- (a) To any judgment or final adjudication based upon or arising out of any dishonest, deliberately fraudulent, criminal, maliciously or deliberately wrongful acts or omissions committed by the insured;

This case proceeded to trial on October 5, 1995. It is the Home Insurance Company's understanding that the defendants extended an offer that involved giving up their claim for expenses and attorney fees, concerning the funds deposited into the registry of the court. The offer also involved a contribution from the Home Insurance Company and Coregis Insurance Company (insurer for Noel Gage). However, the offer was rejected with a counter by the plaintiffs in the amount of \$900,000. Nothing the company may have done in connection with the investigation or defense of any matter arising out of the allegations made against you in the lawsuit or in connection with the handling of any claim or litigation through the courts, including investigation or negotiations for settlement, shall be construed or considered as a waiver of any of the company's rights or defenses under its policy of insurance, nor shall such action require it to pay any claim or judgment which may be rendered against you.

Section E - Limits of Liability

I. Limits of Liability - Each Claim:

The liability of the company for each claim first made against the insured and reported to the company during the policy period, and including the optional reporting period, if such is purchased, shall not exceed the amount stated in the declaration for each claim and shall include all claim expenses. If the limits of liability are exhausted prior to settlement or judgment of any pending claim or suit, the company shall have the right to withdraw from the further investigation or defense thereof by tendering control of such investigation or defense to the insured, and the insured agrees, as a condition to the issuance of this policy, to accept such tender.

The policy's limits of liability are \$200,000 per claim and \$600,000 in the aggregate. Your \$5,000 deductible applies to defense costs and lost payments per claim. Please recognize that your limits of liability are self-liquidating. Accordingly, as defense costs accrue, your available limit for continued defense and indemnity are correspondingly decreased.

Section E - Limits of Liability:

II. Limits of liability/aggregate:

Subject to Section E, I, Limits of Liability - each claim, the liability of the company shall not exceed the amount stated in the declarations as aggregate as a result of all claims first made against the insured and reported to the company during the policy period and including the optional reporting period, if such is purchased.

III. Deductible:

00048

The deductible amount stated in the declarations shall be paid by the named insured and shall be applicable to all damages and claim expenses, for each and every claim, whether or not loss payment is made for claims first made during the policy period. The deductible shall be deemed to be applied first to the damages and/or claim expenses.

On October 18, 1995, we received your letter of October 16, 1995, forwarding us the Plea in Intervention filed by Joe Archer for 17 chiropractors in the above-captioned matter. The court severed the Plea in Intervention to a separate trial. Please be advised that it is the Home Insurance Company's position that the Plea in Intervention suit does not represent a new claim because related acts, errors or omissions are treated as a single claim. Please refer to the following provision in your policy:

Section E - Limits of Liability

IV. Multiple Insureds, Claims and Claimants:

The inclusion herein of more than one insured or the making of claims or the bringing of suits by more than one person or organization shall not operate to increase the company's limit of liability. Related acts, errors or omissions shall be treated as a single claim. All such claims, whenever made, shall be considered first made during the policy period or optional reporting, in which the earliest claim arising out of such act, error or omission was first made, and all such claims shall be subject to the same limits of liability.

Again, the damages sought exceed your per claim or aggregate limit of liability. If you have relevant excess insurance, you should place that carrier on notice. Similarly, you have, at your own cost and expense, the right to retain counsel to represent your uninsured interests in this matter. Should you decide to do so, please have your counsel communicate directly with counsel retained on your behalf by the company.

Furthermore, the Home reserves any and all other rights it may now have or subsequently acquire, and including the right to deny coverage and withdraw from the defense of this matter. The Home shall assert such rights if and when circumstances warrant. The Home also reserves its right to reimbursement from you of any expenses paid in the defense of this action, if it is later determined that this claim is not covered under your policy.

Therefore, for the reasons set forth above, and for such other good and sufficient reasons as may hereafter appear, this company is continuing to provide you with a defense under a full reservation of all of its rights with respect to coverage.

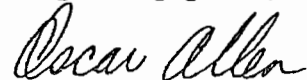
Should you feel that any of the information upon which this reservation has been made is in error, or there is any further information you wish to bring to our attention which may impact our coverage determination, please forward same promptly and we will review our position at that time. Please do not hesitate to contact the undersigned directly should you determine that such a re-evaluation is in order.

00049

Page 4
October 20, 1995

We look forward to continuing working with you toward an amicable and satisfactory conclusion to this matter.

Very truly yours,



Oscar Allen
Claim Analyst
(713) 787-5940

OA:pbcc-2

00050

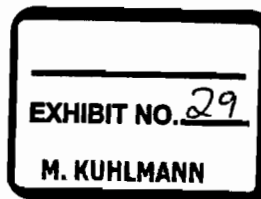
Page 5
October 20, 1995

cc: Don Huggins
Hudgins, Hudgins & Warwick
24 Greenway Plaza, Suite 1007
Houston, TX 77046

00051

EXHIBIT V

AFFIDAVIT



THE STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared DONALD M. HUDGINS, who being duly sworn according to law upon his oath deposed and stated:

"My name is Donald M. Hudgins, I am over the age of 18 years, of sound mind, and I have never been convicted of a felony crime or of a misdemeanor crime involving moral turpitude. I have personal knowledge of the facts contained in this Affidavit and they are all true and correct.

I am an attorney licensed to practice law in the State of Texas. I am lead counsel for Defendant James F. Scherr in Cause No. 94-03110 pending in the 129th Judicial District Court of Harris County, Texas. Pursuant to an Order previously entered by Judge Greg Abbott, the claims of Plaintiffs Dr. Ben Beard, Dr. David Bailey and Dr. David Petrosky against James F. Scherr and against Defendants Noel Gage and Gage, Beach & Ager (as well as certain counterclaims and/or Third-Party Actions by and between those parties) were tried separately from the claims of Intervenor Richard Gillespie, et al. The claims of Beard, Bailey and Petrosky were tried to a jury beginning in September of 1995. In October of 1995, the jury deliberated but did not complete its deliberation, with only a partial verdict being returned. However, no judgment was ever rendered based upon that partial jury verdict. The claims of the Plaintiffs were settled prior to rendition of judgment and disposed of by way of an Agreed Order of Dismissal. A true and correct copy of the Agreed Motion for Dismissal and Agreed Order of Dismissal pertaining to the claims of Beard, Bailey and Petrosky and signed by Judge Abbot is attached to this Affidavit as Exhibit "1" and incorporated herein by reference."

Further Affiant Sayeth Not.

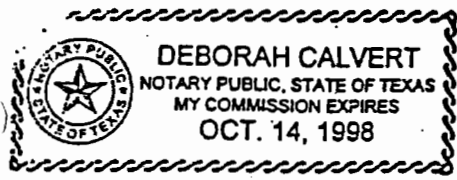
[Signature]
DONALD M. HUDGINS

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 3rd day of May, 1996, to certify which witness my hand and seal of office.

[Signature]
Notary Public in and for
The State of Texas

Printed Name: DEBORAH CALVERT

My Commission Expires: 10-14-98



Cause No. 94-03110
Beard, et al v. Scherr, et al
Houston, Harris County, Texas

AGREED MOTION FOR DISMISSAL

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Plaintiffs Ben Beard, David Bailey and Dan Petrosky, and Defendants James F. Scherr, Noel A. Gage and Gage, Beach & Ager and submit this their Agreed Motion for Dismissal in the above entitled and numbered cause and in support thereof would show unto the Court the following:

I.

All claims and causes of action in this matter have been fully and finally compromised. Therefore, all parties to this cause agree to dismiss all claims and counter-claims with prejudice, as no party wishes to pursue any claim encompassed in the instant case.

WHEREFORE, PREMISES CONSIDERED, Plaintiffs and Defendants herein respectfully request that the Court dismiss with prejudice all claims and counter-claims encompassed by this cause of action, and further, that each party be responsible for their own costs of court incurred herein.

Respectfully Submitted,

JONES & GEORGES, P.C.

By: 

Marjorie Georges

State Bar No: 21453075

Luther Jones

State Bar No: 10928000

303 Texas Avenue, Suite 800

El Paso, Texas 79901

915/534-0040

915/534-0055 (fax)

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DAN PETROSKY AND DAVID BAILEY

HUDGINS, HUDGINS & WARRICK

By: 

Donald M. Hudgins

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Houston, Texas 77046

713/623-2550

713/623-2793 (fax)

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JAMES F. SCHERR

ONSTAD, KAISER & FONTAINE

By: 

Donald Wilhelm

State Bar No: 21475250

1350 Post Oak Blvd., Suite 700

Houston, Texas 77056

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JAMES F. SCHERR

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

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GAGE, BEACH & AGER

HOHMANN, WERNER & TAUBE, L.L.P.

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713/961-3542 (fax)

COUNSEL FOR DEFENDANT
NOEL A. GAGE

Cause No. 94-03110
Beard, et al v. Scherr, et al
Houston, Harris County, Texas

AGREED ORDER OF DISMISSAL

Came on to be heard on this the 25th day of October
Plaintiffs' and Defendants' Agreed Motion for Dismissal in the
above styled and numbered cause. The Court, after considering
said Motion, is of the opinion that it is meritorious and should
be in all things GRANTED. It is, therefore,

ORDERED that all claims and counter-claims encompassed in
the above-styled and numbered lawsuit are hereby dismissed with
prejudice and the parties' Agreed Motion for Dismissal is in all
things GRANTED. All relief not specifically granted herein is
denied.

Signed on this the 25th day of October, 1995.


JUDGE GREG ABBOTT

* This dismissal applies to the claims
of Beard, Bailey & Petrosky, the
counterclaims of Scherr, Gage & Gage
Beach & Ager, the 3rd party claims of
Scherr, Gage & Gage Beach & Ager.

This ~~does~~ does not dismiss the
claims asserted in the ~~judgment~~.

APPROVED AS TO FORM AND CONTENT:

JONES & GEORGES, P.C.

By: 

Marjorie Georges
State Bar No: 21453075
Luther Jones
State Bar No: 10928000
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El Paso, Texas 79901
915/534-0040
915/534-0055 (fax)

COUNSEL FOR PLAINTIFFS BEN BEARD,
DAN PETROSKY AND DAVID BAILEY

HUDGINS, HUDGINS & WARRICK

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713/623-2793 (fax)

COUNSEL FOR DEFENDANT
JAMES F. SCHERR

ONSTAD, KAISER & FONTAINE

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JAMES F. SCHERR

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By: 

Phillip WERNER

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713/961-3542 (fax)

COUNSEL FOR DEFENDANT
GAGE, BEACH & AGER

HOHMANN, WERNER & TAUBE, L.L.P.

By: 

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Houston, Texas 77056

713/961-3541

713/961-3542 (fax)

COUNSEL FOR DEFENDANT
NOEL A. GAGE

EXHIBIT W

AFFIDAVIT

THE STATE OF TEXAS

§
§
§

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared JAMES F. SCHERR, who being duly sworn according to law upon his oath deposed and stated:

"My name is James F. Scherr, I am over the age of 18 years, of sound mind, and I have never been convicted of a felony crime or of a misdemeanor crime involving moral turpitude. I have personal knowledge of the facts contained in this Affidavit and they are all true and correct.

I am an attorney licensed to practice law in the State of Texas. I was one of the attorneys representing the named Plaintiffs in Cause No. 88-7707 formerly pending in the 234th Judicial District Court of El Paso County, Texas. The Court in Cause No. 88-7707 never conducted a class certification hearing and no class was ever certified.

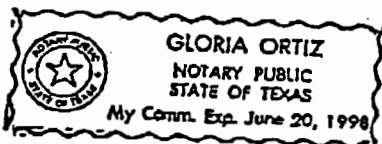
Sometime after Cause No. 88-7707 was filed, attorney Marjorie Georges of the El Paso, Texas law firm Jones & Georges entered an appearance as counsel of record for some of the Plaintiffs in Cause No. 88-7707, Dr. Ben Beard, Dr. David Bailey and Dr. David Petrosky. Sometime after Ms. Georges entered an appearance as counsel of record for Dr. Beard, Dr. Bailey and Dr. Petrosky, she filed a Motion to Dismiss Cause No. 88-7707. Cause No. 88-7707 ended on a Final Judgment presented to the Court by Ms. Georges, a true and correct copy of which is attached hereto as Exhibit "1" and incorporated herein by reference. The final judgment provided that the rights of the putative class members were not prejudiced by entry of the judgment. I did not participate in or file any motion for entry of a final judgment in Cause No. 88-7707."

Further Affiant Sayeth Not.

[Handwritten Signature]

JAMES F. SCHERR

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 3rd day of May, 1996, to certify which witness my hand and seal of office.



Notary Public and for
The State of Texas

Printed Name: GLORIA ORTIZ

My Commission Expires: 6-20-98

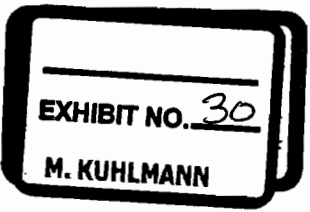
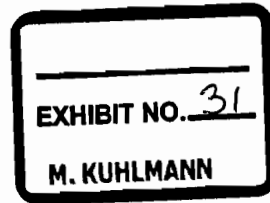


EXHIBIT X

AFFIDAVIT



THE STATE OF TEXAS §
 §
COUNTY OF HARRIS §

BEFORE ME, the undersigned authority, on this day personally appeared JAMES F. SCHERR, who being duly sworn according to law upon his oath deposed and said as follows:

"My name is James F. Scherr. I am over the age of 18 years, of sound mind and I have never been convicted of a felony crime or of a misdemeanor crime involving moral turpitude. I have personal knowledge of the facts contained herein and they are all true and correct.

I am an attorney licensed to practice law in the State of Texas and have been so licensed since 1976.

In the lawsuit styled Dr. Walter Rhodes. et al. v. American General Fire & Casualty Co., et al., under Cause No. 88-7707, I represented Dr. Walter Rhodes, Dr. Dan Petrosky, Dr. Ben Beard, Dr. David Bailey, Dr. W.C. LaRock, Dr. Joseph Superville and Coronado Chiropractic Clinic. These are the only parties that I ever represented in the Rhodes case.

As an attorney licensed to practice law in the State of Texas, I am familiar with the duties owed by lawyers to their clients under Texas law. Because the Rhodes case was never certified as a class action, I never represented any putative class member who had no written contract of employment with me. Until certification of the class occurred, I did not represent unnamed members of a putative class in the Rhodes case who never executed a contract with me.

During the pendency of the Rhodes case, another attorney, Marjorie Georges, substituted in to represent Ben Beard, David Bailey and Dan Petrosky. An offer was made to the remaining named Plaintiffs that I represented, which offer was accepted by my clients and their claims were dismissed prior to the entry of final judgment in the Rhodes case. After the claims of the named Plaintiffs that I represented were dismissed in the Rhodes case, I no longer represented any party in the Rhodes case, the only remaining named Plaintiffs at that point being Ben Beard, David Bailey and Dan Petrosky. At the time that my participation in the Rhodes case ended, that case was still pending as a potential class action suit. No class action certification hearing had been held and no ruling had been made by the Court as to whether the putative class would in fact be certified. After my clients settled their claims in the Rhodes case, Ms. Georges and her clients entered into an Agreed Final Judgment dismissing what remained of the Rhodes case, a true and correct copy of which is attached hereto as Exhibit "1" and

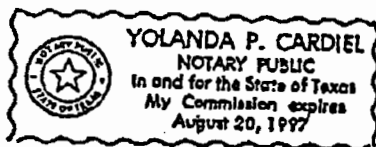


incorporated herein by reference. I was not involved in the representations which Ms. Georges made, nor was I involved in the final judgment which she filed. With regard to the lawsuit styled *Beard et al. v. Scherr et al.*, pending under Cause No. 94-03110 in the 129th Judicial District Court of Harris County, Texas, I was a Defendant in that case and I am familiar with the procedural history of that case. That case was disposed of by way of an agreed settlement, an agreed dismissal and no final verdict was ever returned, nor was any final judgment ever entered".

Further Affiant Sayeth Not.

[Handwritten Signature]
JAMES F. SCHERR

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 7 day of June, 1996, to certify which witness my hand and seal of office.



[Handwritten Signature]
Notary Public in and for
The State of Texas

Printed Name: Yolanda P. Cardiel

My Commission Expires: 8-20-97

c:\ack\beard\scherr.gjf

the settlement had been paid in full. The parties also requested that the Court approve the settlement and dismissal of this action and requested from the Court a judgment that the plaintiffs take nothing, with the parties to bear their own court costs.


After considering the verified Joint Motion to Dismiss and for Entry of a Judgment and argument of counsel, the Court hereby grants the motion and approves the settlement and dismissal of this action. The Court further finds that this action shall not be considered as a class action under Tex. R. Civ. P. 42, since no class has been certified and no hearing has been held on class certification, and no prejudice would be caused to the putative class members by entry of a Judgment. The Court further finds that the consideration for the settlement of the individual claims is fair and reasonable.

It is, therefore, ADJUDGED that Dr. David Bailey, Dr. Ben Beard, and Dr. Dan Petrosky take nothing by reason of this suit against the defendants and the parties bear their own costs of court.

It is further ADJUDGED that the parties are denied all relief not expressly granted by this judgment, whether the relief was requested or whether it could have been requested in this case.

The parties, in open court and through their undersigned counsel, waive the provisions of Rule 306a(4) of the Texas Rules of Civil Procedure, as amended.

SIGNED on this 21 day of January, 1994.



PRESIDING JUDGE

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS

243RD JUDICIAL DISTRICT

Filed 3-28 A.D. 1994
at 10:14 o'clock A M

DR. WALTER RHODES, ET AL..)

Plaintiffs.)

v.)

Cause No. 88-7707

AMERICAN GENERAL FIRE AND)
CASUALTY COMPANY, ET AL..)

Defendants.)

MAD

JUDGMENT

This case came before the Court for a final adjudication. the full names of the parties being as follows: Plaintiffs. Dr. David Bailey, Dr. Ben Beard, Dr. Dan Petrosky and the remaining defendants, American General Fire & Casualty Company; Allstate Insurance Company; American Motorists Insurance Company; Kemper Group Insurance Companies; Lumbermens Mutual Casualty Company; CIGNA Insurance Company of Texas; Crawford & Company Insurance Adjusters. Crum & Forster; Argonaut Insurance Company; U.S. Insurance Group; U.S. Fire Insurance Company; National Standard Insurance Company; National Union Fire Insurance of Pittsburgh, Pennsylvania; International Rehabilitation Associates, Inc. ("Intracorp"); Safeco Insurance Company of America; Hartford Fire Insurance Company; Liberty Mutual Insurance Company; Liberty Mutual Fire Insurance Company; North River Insurance Company, New Jersey; Aetna Casualty & Surety Company; and Dr. Bill W. Timberlake. The parties appeared, waived trial by jury, and jointly moved to dismiss and for entry of a judgment since all matters in controversy had been settled and the consideration for

EXHIBIT
1

MOUNCE & GALATZAN

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STUDEARD & MELBY, INC.

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CIGNA Insurance Company of Texas

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North River Insurance Company,
New Jersey

APPROVED AND AGREED TO:

JONES & GEORGES

By: Marjorie Wilcox Georges
Marjorie Wilcox Georges
State Bar No. 21453075

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Beard and Dr. Dan Petrosky

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Insurance Company

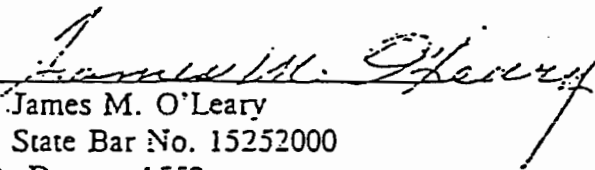
FULBRIGHT & JAWORSKI L.L.P.

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Casualty and Surety Co.

SHAFER, DAVIS, McCOLLUM, ASHLEY,
O'LEARY & STOKER

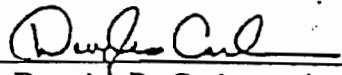
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Counsel for Defendants Lumbermens Mutual
Casualty Company, American Motorists
Insurance Company, and Kemper Group
Insurance Companies

WILDMAN, HARROLD, ALLEN &
DIXON

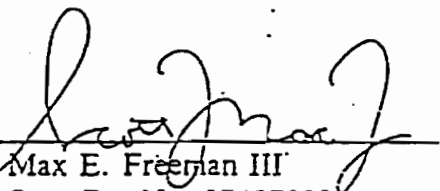
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Company

GWIN & ROBY

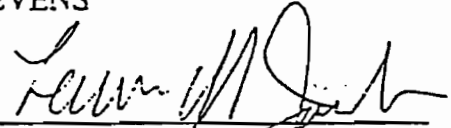
By:


Max E. Freeman III

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Scott W. MacLaren
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Counsel for Dr. Bill W. Timberlake

DUDLEY, DUDLEY, WINDLE &
STEVENS

By:


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MARTIN, FARR, MILLER & GRAU

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JACKSON & WALKER

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Mutual Insurance Company and
Country

BAKER & BOTTS. L.L.P.

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Counsel for Defendant CIGNA Insurance
Company of Texas



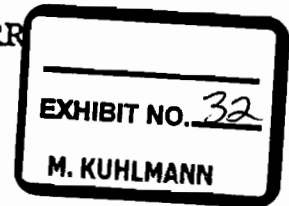
EXHIBIT Y

SUPPLEMENTAL AFFIDAVIT OF JAMES F. SCHERR

THE STATE OF TEXAS

§
§
§

COUNTY OF HARRIS



BEFORE ME, the undersigned authority, on this day personally appeared JAMES F. SCHERR, who being duly sworn according to law upon his oath deposed and stated:

"My name is James F. Scherr, I am over the age of 18 years, of sound mind, and I have never been convicted of a felony crime or of a misdemeanor crime involving moral turpitude. I have personal knowledge of the facts contained herein and they are all true and correct.

I am an attorney licensed to practice law in the State of Texas and have been so licensed since 1976.

In the lawsuit styled Dr. Walter Rhodes, et al v. American General Fire & Casualty Co., et al., under Cause No. 88-7707, I represented Dr. Walter Rhodes, Dr. Dan Petrosky, Dr. Ben Beard, Dr. David Bailey, Dr. W.C. LaRock, Dr. Joseph Superville and Coronado Chiropractic Clinic. These are the only parties that I ever represented in the Rhodes case.

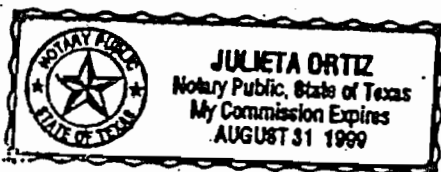
I am familiar with the procedural history of Cause No. 88-7707. ~~To my recollection,~~ there were at least 2 class certification hearings scheduled in Cause No. 88-7707. The first hearing was postponed to permit Defendants to do discovery. The second hearing never occurred because Dr. Beard withdrew and a Motion for Recusal was filed by the Defendants which prevented Judge Marsh from continuing with the scheduled hearing."

Further Affiant Sayeth Not.

[Handwritten Signature]

JAMES F. SCHERR

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 21st day of August, 1996, to certify which witness my hand and seal of office.



[Handwritten Signature]

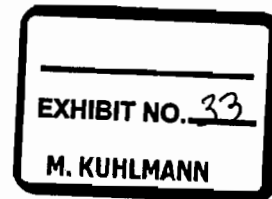
Notary Public in and for
The State of Texas

Printed Name: Julietta Ortiz

My Commission Expires: 8/31/99



EXHIBIT Z



LEXSEE 987 sw2d 130

**DR. RICHARD GILLESPIE, ET AL., Appellants v. JAMES FRANKLIN SCHERR,
NOEL GAGE AND GAGE, BEACH & AGER, Appellees**

NO. 14-97-00479-CV

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

987 S.W.2d 129; 1998 Tex. App. LEXIS 8089

December 30, 1998, Rendered

December 30, 1998, Majority and Dissenting Opinions Filed

SUBSEQUENT HISTORY:

[**1]

Petition for Review Denied December 2, 1999.
Appellant's on Motion for Rehearing Overruled February
4, 1999, Reported at: *1999 Tex. App. LEXIS 703*.

PRIOR HISTORY:

On Appeal from the 129th District Court. Harris County,
Texas. Trial Court Cause No. 94-03110.

DISPOSITION:

Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Appellant intervenors challenged a decision from the 129th District Court. Harris County, Texas, which granted summary judgment to appellee attorneys on their legal malpractice claim.

OVERVIEW: Appellants were unnamed plaintiffs in a class action suit filed by appellee attorneys against insurance companies. The class was never given certification. When named plaintiffs sued appellees for legal malpractice, appellants intervened. The trial court granted summary judgment to appellees and intervenors appealed. The court found that appellees did not owe a professional duty to appellants because neither a client-attorney relationship nor a fiduciary relationship existed between appellants and appellees. Until the trial court determined that all prerequisites to certification, there was no class action. Thus, appellees had no authority to act on behalf of unnamed members of the class. Two named appellants alleged they had contracts with

appellee attorney. In reviewing the pleadings liberally in favor of appellants, the court found that appellants had failed to mention any contractual relationship, except casually, had not based their claim for liability upon the relationship, and had no evidence to support the contention.

OUTCOME: The court affirmed the decision granting summary judgment to appellee attorneys because appellant unnamed class members failed to establish an attorney-client relationship or any duty owed to them when the class was not certified in the underlying proceeding.

CORE CONCEPTS

Civil Procedure > Summary Judgment > Summary Judgment Standard

A summary judgment may be granted if the evidence referenced in the motion or response shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. Tex. R. Civ. P. 166a(c).

Civil Procedure > Summary Judgment > Summary Judgment Standard

In reviewing a summary judgment, the court takes as true all evidence favorable to the nonmovant and indulge every reasonable inference in favor of the nonmovant.

Civil Procedure > Appeals > Standards of Review > De Novo Review

When a plaintiff and defendant both move for summary judgment and the trial court grants one motion and

denies the other, the reviewing court should review the summary judgment evidence presented by both sides, determine all questions presented, and render such judgment as the trial court should have rendered.

Torts > Malpractice Liability > Attorneys

A lawyer's professional duty generally does not extend to persons whom the lawyer never represented, even if the lawyer's work was intended to benefit them.

Civil Procedure > Class Actions > Judicial Discretion

A class action may be maintained as such only by order of the trial court. Tex. R. Civ. P. 42(c)(1).

Torts > Malpractice Liability > Attorneys

Civil Procedure > Class Actions > Judicial Discretion

Until a trial court determines that all prerequisites to certification are satisfied, there is no class action, the case proceeds as an ordinary lawsuit, and attorneys for named class members have no authority to represent or otherwise act on behalf of the unnamed class members.

Civil Procedure > Justiciability > Standing

Civil Procedure > Class Actions

Potential class members do not have an interest in the litigation unless and until the class is certified.

Civil Procedure > Summary Judgment > Summary Judgment Standard

In the absence of a special exception being filed by defendant, the court construes the pleadings liberally in favor of plaintiffs and uphold their petition as to a cause of action that may reasonably be inferred from what is stated even if an element of the claim is not specifically alleged.

COUNSEL:

David M. Gunn -of Houston, TX, Joseph F. Archer -of Houston, TX, James C. Ferrell -of Houston, TX, for appellants.

Michael D. Hudgins -of Houston, TX, Mary C. Thompson -of Houston, TX, for appellees.

JUDGES:

Richard H. Edelman, Justice. Panel consists of Justices Anderson, Edelman, and O'Neill. Harriet O'Neill, Justice, dissenting.

OPINIONBY:

RICHARD H. EDELMAN

OPINION:

[*130] MAJORITY OPINION

In this legal malpractice case, appellants n1 appeal a take-nothing summary judgment granted in favor of James Franklin Scherr, Noel Gage, and Gage, Beach & Ager, on the grounds that: (1) appellants had an attorney-client relationship with appellees; (2) appellees breached their fiduciary duty to, and committed fraud against, appellants; (3) appellants were damaged by appellees' actions; and (4) appellants Stewart Stephenson and Richard Ivy had contracts of representation with appellees. We affirm.

n1 The appellants in this case are: Kathryn Keith-Arden, George Aubert, William Colgin, C. X. Domino, Richard Gillespie, Kurt Griesser, Kenneth N. Huete, Richard Ivy, John P. Johnston, George Junkin, David Niekamp, Odion Ojo, Tracy Sanders, L. S. Stancil, Stewart Stephenson, Ted Stephenson, Gene Chapman, and A. Kent Rice.

[**2]

Background

Appellants are chiropractors licensed to practice in Texas. Appellees are two attorneys and a law firm who filed a class action in El Paso (the "class action") on behalf of all chiropractors in Texas against insurance companies who refused or delayed payment of the chiropractors' bills for services to patients. However, the class was never certified, [*131] and, during the six year period between filing and dismissal of the class action, settlements were entered into and approved for some of the named plaintiffs (the "settling plaintiffs").

Thereafter, other named plaintiffs (the "Beard plaintiffs"), who were left out of the settlements, sued appellees in Harris County for fraud and breach of fiduciary duty. Appellants, who were not named plaintiffs, intervened in that case asserting similar claims, and a separate trial was ordered for their claims. The claims of the Beard plaintiffs were tried in 1995, and the jury rendered a partial verdict in favor of the plaintiffs, but the case was settled before judgment was entered.

In 1996, appellants and appellees filed cross motions for summary judgment in this case. Appellees' motions argued that they had no attorney-client relationship [**3] with appellants and that appellants sustained no damage as a result of appellees' actions. The trial court granted appellees' motions and entered a take-nothing judgment against appellants in April of 1997.

Standard of Review

A summary judgment may be granted if the evidence referenced in the motion or response shows that

there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or response. See TEX. R. CIV. P. 166a(c). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference in favor of the nonmovant. See *American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). When a plaintiff and defendant both move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review the summary judgment evidence presented by both sides, determine all questions presented, and render such judgment as the trial court should have rendered. See *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997).

Implied Duty

The first of appellants' [**4] four points of error argues that summary judgment was improperly granted for appellees because appellants had an attorney-client relationship with appellees. Appellants contend that appellees' actions in purporting to file a class action on behalf of all Texas chiropractors established an implied attorney-client relationship with all potential class members. Appellants' second point of error argues that summary judgment should have been granted in their favor because appellees breached their fiduciary duty to, and committed fraud against, appellants by failing to seek class certification in a timely manner and by failing to apprise appellants of the settlement and account for and distribute the settlement funds to them.

Appellants have cited and we have found no case finding an implied attorney-client relationship to exist before class certification between an attorney who files the class action and any unnamed class members. n2 Appellants urge us to follow federal decisions n3 which, in the context of class certification, recognize the general existence of a fiduciary duty to unnamed class members once a class action suit is filed. See, e.g., *In re General Motors Corp. Pick-up [**5] Truck Fuel Tank*, 55 F.3d 768, 801 (3rd Cir. 1995) (stating that class attorneys owe the entire class a fiduciary duty once the class complaint is filed), cert. denied, 516 U.S. 824, 116 S. Ct. 88, 133 L. Ed. 2d 45 (1995). However, appellants have cited and we have found no decision which has defined the scope of such a duty or addressed it with regard to an actual claim for recovery against an attorney for its breach. Although not cited by either side, the only case we have found in which [*132] the issue was addressed held that lawyers for named plaintiffs in an uncertified class action owe no duty to unnamed class members. See *Formento v. Joyce*, 168 Ill. App. 3d 429, 522 N.E.2d 312, 317, 118 Ill. Dec. 857 (Ill. App. Ct. 1988). Similarly, in Texas, a lawyer's professional duty generally does not extend to persons

whom the lawyer never represented, even if the lawyer's work was intended to benefit them. See *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) (holding that an attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries in the will or trust). n4

n2 Appellants' reliance on *Bloyed* to support their contention is misplaced because *Bloyed* involved a class action in which the class had been certified. See *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 952 (Tex. 1996). [**6]

n3 While Texas courts may draw upon the precedents of any federal or state court, they are obligated to follow only higher Texas courts and the United States Supreme Court. See *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993).

n4 Cf. *Huie v. DeShazo*, 922 S.W.2d 920, 925-26 (Tex. 1996) (holding that the trustee who retains an attorney to advise him in administering the trust, rather than the trust beneficiary, is the attorney's client for purposes of asserting the attorney-client privilege).

Moreover, a class action may be maintained as such only by order of the trial court. See TEX. R. CIV. P. 42(c)(1). Until a trial court determines that all prerequisites to certification n5 are satisfied, there is no class action, the case proceeds as an ordinary lawsuit, n6 and attorneys for named class members have no authority to represent or otherwise act on behalf of the unnamed class members. Under these circumstances, we decline to hold that named plaintiffs' attorneys owe a recertification duty to unnamed class members. We therefore overrule appellants' first point [**7] of error and need not address appellants' second and third points of error concerning breach of duty and existence of damage.

n5 The prerequisites to maintaining a class action are that: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. See TEX. R. CIV. P. 42(a). These requirements apply equally to settlement classes as to litigation classes. See *Bloyed*, 916 S.W.2d at 954-55.

n6 Before certification, suits brought as class actions are governed by rules of procedure applicable to lawsuits generally rather than those specific to class actions. *See America Online, Inc. v. Williams*, 958 S.W.2d 268, 273 (Tex. App.--Houston [14th Dist.] 1997, no writ). Until the trial court certifies a class, a suit brought as a class action is treated as if it were brought by the named plaintiffs suing on their own behalf. *See id.* Thus, potential class members do not have an interest in the litigation unless and until the class is certified. *See, e.g., American Express Travel Related Services Co., Inc. v. Walton*, 883 S.W.2d 703, 707 (Tex. App.--Dallas 1994, no writ) (holding that because the trial judge, who was a cardholder, did not have an interest in the litigation until he certified the class, he was not an interested party at the time he certified the class, and was thus not disqualified to do so).

[**8]

Contractual Relationship

Appellants' fourth point of error argues that the summary judgment evidence created a fact issue as to whether appellants Ivy and Stephenson had an attorney-client relationship with appellee Scherr based on executed contracts of representation. Scherr argues that the summary judgment was proper because: (1) Ivy and Stephenson never pled the existence of an attorney-client relationship based on an express contract; (2) that contention does not appear in their summary judgment response, but only their cross-motion for summary judgment; (3) they did not produce a copy of the contract establishing the relationship; and (4) Ivy and Stephenson suffered no damage as a result of Scherr's actions.

In the absence of a special exception being filed by Scherr, we will construe the pleadings liberally in favor of Ivy and Stephenson and uphold their petition as to a cause of action that may reasonably be inferred from what is stated even if an element of the claim is not specifically alleged. *See Boyles v. Kerr*, 855 S.W.2d 593, 601 (Tex. 1993). Appellants' third amended plea in intervention makes no mention of any agreements between Scherr, Ivy, [**9] and Stephenson or of any other facts suggesting the existence of a contractual relationship. Rather, it alleges liability only on the basis that appellees filed suit "purporting to represent [appellants] in a class action suit." The only reference to a contractual relationship in the plea in intervention is in the paragraph entitled "Damages" which states that, in "addition to their contractual damages and extra-

contractual damages," appellants were entitled to recover [*133] pre-judgment and post-judgment damages.

Appellants' motion for partial summary judgment states in part:

Intervenors [Ivy and Stephenson] had contracts with [appellees]. However, Intervenors believe that [appellees] created an attorney client relationship with all intervenors via their actions. Thus [appellees] owed all Intervenors the duty to perform as ordinary, prudent attorneys, and to exercise that performance in the utmost good faith. Intervenors claims for negligence and for breach of fiduciary duty are by there [sic] very nature based on "violation of a standard imposed, not by agreement, but by societal norms." On a claim for breach of fiduciary relationship, "it is immaterial whether the undertaking [**10] is in the form of a contract."

(citations omitted). Appellants' motion makes no other mention of any contractual relationship and has no evidence attached to it to support the contention that Ivy and Stephenson had contracts with any of the appellees.

In appellants' reply to Scherr's motion for summary judgment, the section entitled "Background Facts," states that "none of the unnamed class members, some of whom had signed contracts with Defendants, received any of the settlement proceeds" Attached to this reply are: (i) affidavits of Stephenson and Ivy in which each of them state that they signed a contract of employment for Scherr to represent them in the class action; and (ii) a letter from Scherr's office acknowledging receipt of Ivy's executed contingency fee contract. However, the body of the reply does not otherwise mention any contractual relationship but addresses only Scherr's contention that appellants suffered no damage as a result of his actions.

Even under a liberal construction, the alleged agreements between Scherr and Ivy and Stephenson are mentioned in appellants' pleadings and summary judgment motion and responses, if at all, only in passing, and are [**11] not asserted as a basis for the attorney-client relationship upon which liability is claimed. Instead, appellants' sole basis for asserting liability against appellees, as reiterated in the quoted passage above, is appellees' actions in filing the class action on behalf of all potential class members, and that basis is asserted as being common to all appellants. Therefore, we find no merit in appellants' challenge to the summary judgment against the purported claims based on Ivy's and Stephenson's alleged contracts of representation with the appellees because no such claims were asserted. Accordingly, appellants' fourth point of error is overruled, we need not address Scherr's cross point of error, and the judgment of the trial court is affirmed.

Richard H. Edelman

Justice

Judgment rendered and Opinion filed December 30, 1998.

Panel consists of Justices Anderson, Edelman, and O'Neill.

DISSENTBY:
Harriet O'Neill

DISSENT:

DISSENTING OPINION

Because I believe a fact issue exists as to whether Ivy and Stephenson had an attorney-client relationship with appellee Scherr based upon alleged contracts of representation, I respectfully dissent. Otherwise, I concur in the majority opinion. [**12]

/s/Harriet O'Neill

Justice