HUDGINS, HUDGINS & WARRICK
a professional corporation
ATTORNEYS AT LAW
24 GREENWAY PLAZA, SUITE 1007
HOUSTON, TEXAS 77046
(713)623-2550 FAX (713)623-2793

EXHIBIT NO. 25
M. KUHLMANN

October 26, 1995

Mr. Oscar Allen (VIA FAX 787-7851)
Risk Enterprise Management Ltd.
P. O. Box 4357
Houston, Texas 77210

RE: Claim No. : 640-L-600813-174
Insured : James Scherr
Policy No. : LPL-F878124
Claimant : Beard, et al

Dear Oscar:

As I advised you by phone, the above case was settled for $675,000.00, with Home's portion of the settlement amounting to $50,000.00. Please issue and forward to me your draft in the amount of $50,000.00, payable to Ben Beard, David Bailey, Dan Petrosky and their attorneys, Jones & Georges, P.C. I will provide you with the executed settlement documents upon my receipt of same. As I also advised, this does not settle the intervenors' claims.

Additionally, please be advised that there is a confidentiality agreement involving this settlement.

Yours very truly,

Donald M. Hudgins

DMH/jb

CAUSE NO. 94-03110

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

EXHIBIT NO. 26
M. KUHLMANN

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

CAUSE NO. 94-03110

BEN BEARD, DAVID BAILEY and DAN PETROSKY, Plaintiffs, v. JAMES FRANKLIN SCHERR, NOEL GAGE and GAGE, BEACH & AGER, Defendants, AND JAMES F. SCHERR Counter-Plaintiff, v. BEN BEARD, DAVID BAILEY and DAN PETROSKY Counter-Defendants, AND JAMES F. SCHERR Third-Party Plaintiff, v. MARJORIE GEORGES and JONES & GEORGES, P.C. Third-Party Defendants, NOEL A. GAGE Counter Plaintiff DR. RICHARD GILLESPIE ET AL. Intervenors	§ §	IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS 129TH JUDICIAL DISTRICT

EXHIBIT NO. 27
M. KUHLMANN

00032

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 dayof October, 1995 by telecopier transmission.

Martie Georges

FIRST AMENDED PLEA IN INTERVENTION

TO THE HONORABLE COURT:

Comes now, Dr. Richard Gillespie; Dr. Stewart Stephenson individually and as representative of Accident and Industrial Injury Center, Inc. and Accident and Injury Center, Inc.; Accident and Industrial Injury Center, Inc; Accident and Injury Center, Inc.; Dr. Ted Stephenson; Dr. Odion E. Ojo, individually and as representative of Astrodome Chiropractic and Sports Clinic Inc.; Astrodome Chiropractic and Sports Clinic Inc.; Dr. Richard G. Ivy; and, Dr. Carlos Xavier Domino; Dr. Kathryn L. Keith-Arden individually and as representative of Mesa Hills Chiropractic and Back Care Clinic; Mesa Hills Chiropractice and Back Care Clinic; Dr. David Niekamp; Dr. Gregory D. Peter, individually and as representative of Huntsville Chiropractic Health Care; Huntsville Chiropractic Health Care; Dr. Kenneth N. Huete, individually and as representative of Doctors Chiropractic Health & Rehabilitation Center and Doctors Chiropractic Health Center; Doctors Chiropractic Health & Rehabilitation Center; Doctors Chiropractic Health Center, Dr. Kent Rice, individually and as representative of Cy-Fair Chiropractic Association; Cy-Fair Chiropractic Association, as well as others to be named later, and file, as Intervenors, this Plea in Intervention and would show the Court as follows:

PARTIES

Intervenors are individual chiropractors and their businesses whose names, addresses, and principal place of businesses are as follows:

Intervenor, Dr. Richard Gillespie, 1520 Ranch Road, Suite 12, San Marcos, Texas 78666.

Intervenor, Dr. Stewart Stephenson, Accident & Industrial Injury Center, Inc., 2005 South Texas Street, Bryan, Texas 77801.

Intervenor, Dr. Ted Stephenson, 1313 Briarcrest, Bryan, Texas 77802.

Intervenor, Odion E. Ojo, Astrodome Chiropractic & Sports Clinic, 2630 Westridge, Houston, Texas 77054.

Intervenor, Dr. Richard G. Ivy, 124 North West Newton, Burleson, Texas 76028.

Intervenor, Dr. Carlos Xavier Domino, 5271 Memorial Drive, Houston, Texas 77007.

Intervenor, Dr. Katherine L. Keith-Arden, 6512 North Mesa St., El Paso, Texas 79912.

Intervenor, Dr. David Niekamp, 3815 Reveille, Houston, Texas 77087.

Intervenor, Dr. Gregory D. Peter, 901 Normal Park, Suite 201, Huntsville, Texas 77340.

Intervenor, Dr. Kenneth N. Huete, 3429 West Holcombe, Houston, Texas 77025.

Intervenor, Dr. Kent Rice, 1125 West Road, Building J, Houston, Texas 77065.

Plaintiff Ben Beard is an individual residing in Houston, Texas. Plaintiff David Bailey is an individual residing in Bryan, Texas. Plaintiff Dan Petrosky is an individual residing in El Paso, Texas. Defendants have been served and answered herein.

BACKGROUND FACTS

Defendants are attorneys licensed to practice law in the State of Texas. Defendants filed suit purporting to represent Intervenors in a class action suit for certain causes of action against numerous insurance companies in **Cause No. 88-7707, *Dr. Walter Rhodes, et al. v. American General Fire and Casualty, et al.*, in the 243rd Judicial District Court of El Paso County, Texas**, hereinafter referred to as "Cause No. 88-7707."

On July 28, 1988, Defendants brought Cause No. 88-7707 on behalf of all Texas chiropractors alleging that certain insurance companies had engaged in a civil conspiracy aimed at cutting chiropractic services and charges. Defendants herein, alleged among other things that

chiropractors suffered damages due to the insurance companies' non-payment and slow payment of chiropractors' bills; and, that the chiropractic profession was defamed and maligned by acts of certain insurance companies.

Suit was filed on behalf of all Texas chiropractors with Drs. La Rock and Superville named as class representatives.

Defendants had a prior referral relationship with the named representatives LaRock and Superville. After settlements on behalf of the class were made, settlement proceeds were either taken as attorneys' fees or distributed to LaRock and Superville. None of the unnamed class members received any of the settlement proceeds and, in some circumstances, Defendants retained one hundred percent of the settlement proceeds. In March of 1994, Defendants entered into an agreed final dismissal of the class action suit.

A portion of the settlement proceeds that rightly belong to the Intervenors are in the registry of this Court. Intervention herein is essential to effectively protect the Intervenors' interest.

CAUSES OF ACTION

NEGLIGENCE

Defendants were jointly and severally negligent in proximately causing Intervenors' damages. Defendants were negligent in one or more of the following ways:

(1) Defendants were negligent in that they failed to certify, or even attempt to certify, a class action suit.

(2) Defendants were negligent in their representation of the class.

(3) Defendants were negligent in that they settled class causes of action without the consent of the class or without a denial of certification of the class.

(4) Defendants were negligent in that they did not do adequate discovery.

(5) Defendants were negligent in that they failed to maintain records required by the Texas Rules of Civil Procedure in a class action litigation.

(6) Defendants were negligent in not properly distributing settlement proceeds among the class.

(7) Defendants were negligent in their representation of the class in that they failed to acknowledge and respond to objections made by various class members to the settlements that were being negotiated.

(8) Defendants were negligent in undertaking a representation of the class action when they did not have, or were unwilling to commit, adequate financial resources to maintain the class action.

(9) Defendants were negligent in settling the suit for a fraction of its actual value for the benefit of certain class representatives.

(10) Defendants were negligent in selection and retention of Drs. LaRock and Superville as class representatives.

(11) Defendants were negligent in using a purported class action as leverage for settlement for a chosen few.

BREACH OF FIDUCIARY DUTY

In addition to the negligence committed by Defendants in Cause No. 88-7707, Defendants jointly and severally breached their fiduciary duties to Intervenors' at least in the following respects:

(1) in failing to promptly and accurately account for settlement proceeds;

(2) in failing to promptly distribute settlement proceeds;

(3) in failing to provide the class with an accurate account of claimed expenses;

(4) failing to inform Intervenors of settlement negotiations;

(5) in favoring LaRock and Superville over all other class members;

(6) in taking more fees than they were permitted to do under the fee contract.

(7) in failing to do proper discovery

(8) in settling the suit in the manner in which it was settled

(9) by appointment of inadequate counsel

(10) in naming improper class representatives

Defendant Gage failed to inform Plaintiffs that he had a special relationship with LaRock and Superville. More specifically, Defendant Gage failed to inform the Intervenors that he served in a special corporate counsel relationship to Coronado Chiropractic Clinic; that he was engaged in extensive litigation involving Coronado Chiropractic, including defense of a suit by the Attorney General of Texas alleging deceptive trade practices and fraud against LaRock and Superville; that he was representing the clinic in at least a dozen other causes of action, both offensive and defensive; that he was counsel for LaRock and Superville in a cause of action against other members of the putative class; that his principal purpose in participating in the class action litigation was collection of unpaid fees claimed by Coronado Chiropractic; that he communicated on a regular basis with LaRock and Superville but not with other members of the class; or that he was the recipient of referrals of legal business from Coronado Chiropractic.

ACTUAL AND CONSTRUCTIVE FRAUD

Defendants represented to Intervenors that they intended to represent all chiropractors in the State of Texas in Cause No. 88-7707, when in actuality, the sole beneficiaries of this suit were to be Defendants and Drs. La Rock and Superville. Defendants also stated that any proceeds from Cause No. 88-7707 would be divided among the class. These representations were false; Defendants knew that the representations were false when they were made, or made them recklessly without any knowledge of their truth and as a positive assertion. These representations were made with the intention that the Intervenors would act upon them, and the Intervenors did in fact act upon them.

Defendants committed fraud against Intervenors by collecting more fees than they were entitled under the term of the contingent fee contract and making all distributions to LaRock and Superville. Defendants fraudulently misrepresented their intentions in filing Cause No. 88-7707 as indicated above. Defendants also fraudulently concealed their true relationship with La Rock and Superville.

Defendants breached the above stated fiduciary duties owed to Intervenors and thereby committed constructive fraud, as well as actual fraud upon Intervenors. Defendants have proximately caused Intervenors actual damages as a result of these acts.

CONSPIRACY

In addition, Defendants participated in a conspiracy to defraud Intervenors. Intervenors' damages were a proximate result of this conspiracy. The acts of civil conspiracy are set out in the preceding paragraphs.

VIOLATION OF THE TEXAS DECEPTIVE TRADE PRACTICES ACT

Furthermore, at all times material hereto, Intervenors were "consumers" of goods and services as that term is defined in the DTPA. Plaintiffs allege that Defendants violated the following provisions of the DTPA:

1. Sec 17.46(b)(2), to wit: "causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;"

2. Sec. 17.46(b)(5), to wit: "representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities which they do not have or that a person has sponsorship, approval, status affiliation, or connection which he does not;"

3. Sec. 17.46(b)(7), to wit: "representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;" and

4. Sec. 17.46(b)(12), to wit: "representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."

In addition, Defendants committed unconscionable actions and courses of actions as defined by § 17.45(5) DTPA. Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages.

Defendants' violation of the DTPA was a producing cause of Plaintiffs' damages. Plaintiffs are suing for additional damages, as Defendants' conduct was committed knowingly. Plaintiffs are therefore entitled to three times their actual damages that exceed $1,000.00, as well as court costs and attorneys' fees.

CONVERSION

Defendant Scherr has appropriated and/or is attempting to appropriate as expenses substantial sums of money collected on behalf of Intervenors - more specifically the sums of $86,500.00, $50,000, $75,000.00 and $95,000, all received in separate settlements in Cause No. 88-7707- - expenses for which there is no accounting or inadequate accounting. All Defendants have wrongfully converted all sums they claim or claimed as expenses in Cause No. 88-7707 and accordingly, Plaintiffs seek a judgment of this Court denying claims for expenses in Cause No. 88-7707 and payment of all such sums to Intervenors.

ACTION TO VOID ATTORNEYS' FEES

As the Defendants violated their fiduciary duties to Intervenors, Intervenors seek a judgment of this Court that the payment of any attorneys' fees to Defendants in Cause No. 88-7707 is against the public policy of this State and that the lien of Defendants Scherr and Gage against the $200,000.00 in the registry of the Court be extinguished and that the all attorneys fees and\or expenses be returned to this Honorable Court.

DAMAGES

Intervenors are entitled to their actual damages including their share of the monies in the registry of the Court, punitive or exemplary damages, additional and treble damages under the Deceptive Trades Practices Act, costs of court and expense of litigation, repayment of all settlement proceeds distributed, and attorney's fees of thirty-three percent.

In addition their its contractual damages and extra-contractual damages, Intervenors are entitled to recover from Defendants both prejudgment interest and post judgment interest at the maximum rate allowed by law.

These damages exceed the minimum jurisdictional limits of this Honorable Court.

JURY DEMAND

Pursuant to Rule 216 of the Texas Civil Rules of Procedure Intervenors hereby demand a jury.

NO ELECTION OF REMEDIES

The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

WHEREFORE, PREMISES CONSIDERED, Intervenors pray that after hearing hereon, they be awarded the above-mentioned damages and any further relief, both at law and in equity, to which they may show themselves to be entitled under the facts and circumstances of this case.

Respectfully submitted,

ARCHER, WALDNER & VICKERY, L.L.P.

Joe Archer

JOSEPH F. ARCHER
State Bar No. 0129200
2929 Allen Parkway, Suite 2410
Houston, Texas 77019
Phone: (713) 526-1100
Fax: (713) 523-5939

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing pleading has been served upon all counsel of record via FAX, U.S. Mail, postage prepaid; or, certified mail, return receipt requested on November 9th, 1995.

Joe Archer

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

EXHIBIT NO. 28
M. KUHLMANN

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

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 our 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

EXHIBIT NO. 29
M. KUHLMANN

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 Intervenors 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.

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.

Deborah Calvert
Notary Public in and for
The State of Texas

DEBORAH CALVERT
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
OCT. 14, 1998

Printed Name: DEBORAH CALVERT

My Commission Expires: 10-14-98

c:\ack\beard\affidavi.dmh

EXHIBIT D

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

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.

Greg Abbott

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 not dismiss the

04619

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: _____
Phillip 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

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.

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.

GLORIA ORTIZ
NOTARY PUBLIC
STATE OF TEXAS
My Comm. Exp. June 20, 1998

Notary Public in and for
The State of Texas

Printed Name: GLORIA ORTIZ

My Commission Expires: 6-20-98

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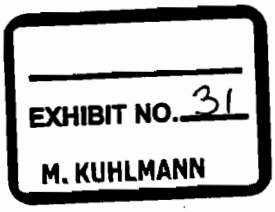
EXHIBIT NO. 30
M. KUHLMANN

TOTAL P.09

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

EXHIBIT
A

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.

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.

YOLANDA P. CARDIEL
NOTARY PUBLIC
In and for the State of Texas
My Commission expires
August 20, 1997

Yolanda P. Cardiel
Notary Public in and for
The State of Texas

Printed Name: Yolanda P. Cardiel

My Commission Expires: 8-20-97

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TOTAL P.10

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.

AMERICAN GENERAL FIRE AND CASUALTY COMPANY, ET AL.,

Defendants.

Cause No. 88-7707

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

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SONNENSCHEIN, NATH AND ROSENTHAL

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Telecopier: 312/876-7934
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STEWART. COLANERI & RENWICK. P.C.

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Counsel for Defendants Liberty Mutual Insurance Company and ~~Company~~

BAKER & BOTTS. L.L.P.

By: _____

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Telecopier: 713/229-1522
Counsel for Defendant CIGNA Insurance Company of Texas

SUPPLEMENTAL AFFIDAVIT OF JAMES F. SCHERR

EXHIBIT NO. 32
M. KUHLMANN

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.

JAMES F. SCHERR

SWORN TO AND SUBSCRIBED BEFORE ME, on this the 29th day of August, 1996, to certify which witness my hand and seal of office.

JULIETA ORTIZ
Notary Public, State of Texas
My Commission Expires
AUGUST 31 1999

Julieta Ortiz
Notary Public in and for
The State of Texas

Printed Name: Julieta Ortiz

My Commission Expires: 8/31/99.

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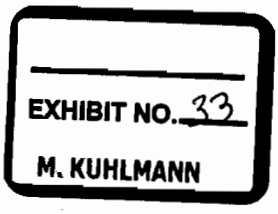
EXHIBIT A



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 precertification 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

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