

EXHIBIT FF

to

Claimant Scherr's Amended Brief in Support of Coverage

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
205TH JUDICIAL DISTRICT

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JAMES F. SCHERR,)
)
Plaintiff,)
)
v.) Cause No. 98-377
)
THE HOME INSURANCE COMPANY,)
)
Defendant.)

ORAL AND VIDEOTAPED DEPOSITION OF
DONALD M. HUDGINS
OCTOBER 22, 2002

COPY

ORAL AND VIDEOTAPED DEPOSITION of DONALD M. HUDGINS,
produced as a witness at the instance of the Defendant
and duly sworn, was taken in the above-styled and
numbered cause on the 22nd day of October, 2002, from
10:05 a.m. to 12:07 p.m., before Michele W. Kuhlmann,
CSR in and for the State of Texas, reported by machine
shorthand, at the offices of Hudgins, Hudgins & Warrick,
24 Greenway Plaza, Suite 1707, Dallas, Texas 77046,
pursuant to the Texas Rules of Civil Procedure and the
provisions stated on the record or attached hereto.

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25 *Retained in the custody of Mr. Burgain Hayes

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FOR THE PLAINTIFF:
Mr. Jim Darnell
Jim Darnell, P.C.
310 N. Mesa, Suite 212
El Paso, Texas 79901
(915) 532-2442

FOR THE DEFENDANT:
Mr. Burgain G. Hayes
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Austin, Texas 78701
(512) 391-1999

ALSO PRESENT:
Mr. Robin Bear, Videographer

1 (Exhibits 1, 2 and 3 marked.)

2 THE VIDEOGRAPHER: The time is five
3 minutes after 10:00 a.m. We're on the record.

4 MR. DARNELL: I'm Jim Darnell. I
5 represent the plaintiff in this lawsuit, Jim Scherr.

6 MR. HAYES: My name is Burgain Hayes, and
7 I represent the defendant in this lawsuit.

8 Would you please swear in the witness,
9 ma'am?

10 DONALD M. HUDGINS,
11 having been first duly sworn, testified as follows:

12 EXAMINATION

13 BY MR. HAYES:

14 Q. Would you please state your name for the
15 record, sir?

16 A. Donald M. Hudgins.

17 Q. And where are we taking this deposition today,
18 sir?

19 A. In my offices in Houston, Texas.

20 Q. And what kind of office is this, sir?

21 A. It's a law office.

22 Q. And you are, I assume, a lawyer?

23 A. I am.

24 Q. We are here to take your deposition as a result
25 of a prior representation that you had. Is that not

1 correct, sir?

2 A. That's my understanding.

3 Q. Now, I'm going to hand you what has been marked
4 as Exhibit No. 1 to your deposition, Mr. Hudgins. And
5 I'm, also, going to not go through the litany that we
6 lawyers go through with lay witnesses. I assume if you
7 don't understand a question, et cetera, you'll take care
8 of it.

9 A. I will.

10 Q. But would you look at that notice right there
11 and see whether or not we're in the right place and you
12 are the right fellow?

13 A. That's correct.

14 Q. All right. And what I am going to do is keep
15 this available in case you want to refer to it in terms
16 of the information in the lawsuit you may not be as
17 familiar with, and that's the lawsuit that's been filed
18 by your former client, Mr. Scherr, against his --
19 against his professional insurance carrier. Is that
20 okay?

21 A. That's fine.

22 Q. Secondly, I would assume that if I were to ask
23 you a series of questions that I might accidentally run
24 afoul of what we call the attorney-client privilege.
25 Would you explain for the ladies and gentlemen of the

1 jury what that is?

2 A. That's a privilege between an attorney and his
3 client that the information that the attorney receives
4 is privileged, and it's not going to be told or given to
5 anybody else without the client's permission.

6 Q. Now, what I'm going to do is hand you Exhibit
7 No. 2, which is something that I believe Mr. Darnell is
8 aware of, I'm aware of and I provided to you, and I'm
9 going to ask you whether or not you think, and
10 Mr. Darnell agrees, that this protective order deals
11 with that subject insofar as this deposition is
12 concerned?

13 A. Well, it is an agreed protective order. It
14 goes to two different issues, actually. It goes to the
15 confidentiality agreement that was entered into as a
16 result of the settlement of the underlying case.

17 Q. All right.

18 A. Or in connection with the settlement of the
19 underlying case. And this also allows me to go into
20 issues that might be -- may very well be protected by
21 the attorney-client privilege in the underlying case.

22 THE WITNESS: Mr. Darnell's here, and is
23 that -- my understanding, is that correct?

24 MR. DARNELL: It is my understanding --

25 THE WITNESS: And that you-all are waiving

1 the privilege for purposes of this deposition?

2 MR. DARNELL: I don't know that we're
3 waiving it in all accounts, but certainly to the extent
4 necessary to get the information about the underlying
5 lawsuit, yes, sir.

6 THE WITNESS: Okay. If there's an area
7 that is in contravention of this order that you wish to
8 not waive the privilege, would you speak up --

9 MR. DARNELL: Absolutely.

10 THE WITNESS: -- at that point so that I
11 can be free with you being Mr. Scherr's lawyer here to
12 assume that the court wants me to go forward and give
13 testimony that might in normal situations be a
14 contravention of the --

15 MR. DARNELL: Absolutely.

16 THE WITNESS: -- attorney-client
17 privilege?

18 A. But with this order I can try to answer my
19 questions -- your questions as best I know how.

20 Q. (By Mr. Hayes) And since it is the privilege
21 of Mr. Darnell's client and you were Mr. Darnell's
22 client's prior lawyer, what I would do is ask you to
23 understand that it is not my intention to violate any
24 privileges. But if you feel that you need to either
25 fail to answer or -- I will certainly be quiet and let

1 you do so, and we can deal with that issue later. I
2 just --

3 A. Okay.

4 Q. -- want to make sure that for the record that
5 you are comfortable that your attorney-client privilege
6 issues are resolved by the judge in this particular
7 case, to the extent that order covers them, and that we
8 may proceed.

9 A. Right. And if something comes up that I think
10 it may be an issue, we can take it up with the two of
11 you-all, or if need be, we can take it up with the court
12 if I don't think it's covered by the order.

13 But this order has one point in it that I
14 previously discussed with you and Mr. Darnell. That
15 would be Paragraph No. 5. It says: (Reading) At the
16 conclusion of the litigation all copies produced by
17 defense counsel for use by other persons will be
18 retrieved by me with confirmation of said retrieval
19 provided to plaintiff's counsel within five working
20 days.

21 Since you guys are going to be in Austin
22 and El Paso, I don't think I'll have any idea when this
23 case is concluded; and so, that puts somewhat of an
24 onerous burden on me. It's my understanding that
25 you-all will either amend this order or by agreement

1 you-all will allow Mr. Darnell to be the party that will
2 retrieve all the copies of the deposition within five
3 working days.

4 MR. HAYES: Well, for the record, I am in
5 agreement that Mr. Darnell can assume the obligation
6 that was placed on you in the order, if that is
7 acceptable to Mr. Darnell.

8 MR. DARNELL: That's fine.

9 MR. HUDGINS: Fine. Thank you.

10 Q. (By Mr. Hayes) Have we dealt with that issue?

11 A. We have.

12 Q. Exhibit No. 3, prior to your deposition I and
13 my firm sent you some materials, and I believe those
14 materials have been shown to Mr. Darnell prior to this
15 deposition. Is that not correct?

16 A. That's correct.

17 Q. And is Exhibit No. -- would you just explain to
18 us what Exhibit No. 3 is?

19 A. That's the notebook you-all sent me with some
20 of the pleadings and the charge of the court and some
21 correspondence.

22 Q. I believe you received one letter from our El
23 Paso office and a second letter from my office. Is that
24 correct?

25 A. That's correct. And I believe these -- these

1 are -- both letters are inside the notebook, and I think
2 one of the letters was the "Add Suit Approaching Trial
3 Report" and the -- an affidavit that was attached.

4 Q. And that's from me?

5 A. That's from you, yes.

6 Q. And I believe --

7 A. I think you also faxed over to me a copy of the
8 agreed protective order at my request (indicating).

9 Q. All right. Then have we disclosed for the
10 record and for Mr. Darnell's benefit all of the
11 materials that I provided you prior to this morning?

12 A. Well, there was a -- that you have provided me?

13 Q. Yes, sir.

14 A. Now, I don't know who sent it, but prior to
15 this I got a subpoena -- well, actually it was a notice
16 with a -- a notice for deposition with a duces tecum
17 attached several months ago. Okay?

18 Q. All right. I assume that we're operating under
19 the notice that's been marked as Exhibit No. 1.

20 A. That's correct.

21 Q. Okay.

22 A. Not that prior, no, which nothing ever
23 happened -- to my knowledge nothing ever came of that,
24 nothing was ever produced, nobody ever followed up.
25 That's where we are.

1 Q. All right. Is there -- just so the record is
2 clear and to save Mr. Darnell some time, are there any
3 materials that you have received from Mr. Darnell or
4 anyone on his behalf prior to this deposition?

5 A. Oh, yes. I received many, many documents from
6 Mr. Darnell and from his client, Mr. Scherr, prior to
7 this deposition.

8 Q. I've asked a bad question, and I appreciate
9 your pointing it out by your response.

10 In terms of this deposition today, has
11 Mr. Darnell since the conclusion of your representation
12 of Mr. Scherr provided you any materials similar to the
13 ones that I provided in Exhibit No. 3 for you to review
14 prior to your deposition today?

15 A. Oh. Let me put it this way. In the past
16 several months there's been nothing that I've received.

17 Q. Okay. And I --

18 A. Back prior to that I really don't remember
19 whether there's been anything sent to me by Mr. Darnell
20 or not, to be honest with you.

21 Q. Well, obviously, one lawyer to another, I'm
22 simply trying to seek those materials --

23 A. Out?

24 Q. -- that you have reviewed prior to your
25 deposition and make sure that we have them here on the

1 table.

2 A. This is it.

3 Q. And I believe we have?

4 A. This is it.

5 Q. Okay. Additionally, you and I have had two
6 telephone conversations --

7 A. Right.

8 Q. -- correct?

9 A. That's correct.

10 Q. And obviously you are free to share whatever
11 discussions we had with Mr. Darnell. And we all three
12 met together this morning. Is that correct?

13 A. That's correct. That's correct.

14 Q. I would assume that we are all three equally
15 privy to what has transpired, at least insofar as any
16 discussions with you are concerned?

17 A. Yes.

18 Q. Okay.

19 A. Yeah.

20 THE WITNESS: As a matter of fact, I
21 think -- did I mention to you, Jim, that they've agreed
22 to pay me --

23 MR. DARNELL: Yes.

24 THE WITNESS: -- for my time?

25 MR. DARNELL: You did.

1 THE WITNESS: Okay.

2 A. And that was a part of our discussion that we
3 had when we discussed the fact that I would be paid for
4 lost time and the time to review the documents and the
5 time to conference with you-all prior to the deposition.

6 Q. (By Mr. Hayes) And that is agreeable.

7 And just so -- it is appropriate. For the
8 record, that is the standard professional courtesy that
9 one of us would extend to another should that person be
10 placed in a position of being deposed as a result of a
11 prior representation.

12 A. And I appreciate that.

13 Q. Well, the point I make is there's nothing
14 extraordinary here.

15 A. No.

16 Q. This is just simply --

17 A. Nothing at all.

18 Q. This is the way we do --

19 MR. DARNELL: We'll stipulate --

20 Q. (By Mr. Hayes) -- business as lawyers?

21 MR. DARNELL: -- to that.

22 A. I -- I wouldn't do it without Mr. Darnell's
23 agreement, though.

24 Q. (By Mr. Hayes) And obviously I would not
25 undertake the obligation to pay you if I hadn't

1 scheduled this deposition. Mr. Darnell would be doing
2 it.

3 A. Right.

4 Q. Okay. Now that we have all that settled, why
5 don't you tell us a little bit about what a lawsuit is
6 for the benefit of the jury. And then I'm going to ask
7 you next to explain to me how you came to represent Mr.
8 Scherr.

9 A. All right. Well, a lawsuit takes on a lot of
10 different forms. But basically in the context of this
11 particular case, there is a claim by a plaintiff that
12 somebody has breached a duty, a duty that's owed to
13 another person, and the breach of that duty has caused
14 damages to somebody, and as a result of that a person
15 can file what we call a lawsuit. And a lawsuit is done
16 by simply writing out what your complaints against the
17 other side are and what your damages are and you file
18 that down at the courthouse. And that, to me, is the
19 essentials of a lawsuit.

20 Lawsuits are for lots of different
21 reasons. They can be based on negligence. They can be
22 based on breach of contract. They can be based on
23 intentional acts. It can be for any type of a breach of
24 duty that a person owes to another.

25 (Exhibit 4 was marked.)

1 Q. (By Mr. Hayes) All right. I'm going to hand
2 you Exhibit No. 4, and I'm going to ask you a question
3 before you answer anything about Exhibit No. 4. And my
4 specific question to you is: Did you come to represent
5 Mr. Scherr in such a lawsuit?

6 A. Such a lawsuit as Exhibit No. 4?

7 Q. As the lawsuit you just described, where
8 somebody would make a claim against somebody else, file
9 a pleading, and did you come to represent Mr. Scherr in
10 a lawsuit formally filed?

11 A. I did.

12 Q. Not the one in front of you.

13 A. I did.

14 Q. Would you please explain to me and to the jury
15 how Exhibit No. 4 relates to the lawsuit, is connected
16 somehow to the lawsuit that you ultimately represented
17 him in?

18 A. Jim undertook to represent a group of
19 chiropractors and I believe he was in the process of
20 getting it certified as a class action against a number
21 of insurance companies in Texas, and as a result of that
22 representation which -- a claim grew out of that
23 representation whereby he was sued for a claim that he
24 breached his duty to his clients.

25 Q. And what is Exhibit No. 4?

1 A. That appears to be a copy of the plaintiff's
2 original class action petition. That's what it's named.

3 Q. And who filed that particular document, sir, as
4 the lawyer?

5 A. This is Jim Scherr, James F. Scherr.

6 Q. And who are his clients in that particular
7 document as that pleading, Exhibit No. 4, would
8 indicate?

9 A. Well, it's styled and actually in the body of
10 the petition it says it is brought on behalf of
11 Dr. W. C. LaRock, Dr. Joseph Superville and Coronado
12 Chiropractic Clinic, plaintiffs, individually and on
13 behalf of all other Texas chiropractors, and they have
14 brought the -- that's who brought the class action. I
15 don't have a copy of his contract here in front of me,
16 but I just -- I'm assuming that if he filed the lawsuit
17 he probably did so with the permission of those
18 particular individuals and probably had a
19 attorney-client relationship with them.

20 Q. Okay. I'm --

21 A. At least the individuals. I don't know about
22 the class members at that stage.

23 (Exhibit 5 was marked.)

24 Q. (By Mr. Hayes) I'm going to hand you Exhibit
25 No. 5 and ask you to tell me what that would appear to

1 be based upon your education and experience and
2 comparing the cause number to Exhibit No. 4.

3 A. I understand.

4 Well, it's an interesting document. It's
5 called a judgment and it starts out the "case came
6 before the Court for a final adjudication," but then in
7 the body of the agree- -- the document it says, "After
8 considering the verified Joint Motion to Dismiss and
9 Entry of a Judgment and argument of counsel ..."

10 I guess they granted the motion to dismiss
11 and then they approved a settlement. And then it goes
12 on to say that the three plaintiffs would take nothing
13 by the judgment. So it's, in effect, a take-nothing
14 judgment based upon the settlement of the case.

15 Q. And that is a standard document, I believe,
16 that's filed by lawyers when there is a separate
17 settlement agreement that indicates what, if any,
18 consideration has been paid by one party to another to
19 conclude a controversy. Is that correct?

20 A. Yeah. I don't know if I'd call it exactly
21 standard in this case because it --

22 Q. How about -- can I amend my question to meet
23 your concern?

24 A. The way I do it, I usually end up -- I do one
25 of two things. I either enter a take-nothing judgment

1 or I do a dismissal with prejudice. This seems to be a
2 combination of the two. But it serves the same purpose,
3 and I would call it ordinary in the course of the
4 settlement of a case to do something like that.

5 Q. Does it appear to be the document that resolves
6 the underlying dispute that is described in Exhibit No.
7 4?

8 A. Can't tell. I don't think so.

9 Q. Does it appear to resolve the dispute for
10 some individuals named in Exhibit No. 5 who were a
11 participant in the underlying lawsuit that was begun
12 with Exhibit No. 4?

13 A. I can't tell.

14 The plaintiffs in the judgment, it says,
15 is Dr. David Bailey, Dr. Ben Beard and Dan Petrosky.
16 And then this -- the class action has got Dr. LaRock,
17 Dr. Joe Superville and Coronado Chiropractic Clinic.
18 There's different names in the different judgments
19 (indicating).

20 Q. Did you as you represented -- well, let's go to
21 the next exhibit for a second.

22 A. Sure.

23 Q. And then we'll -- would you hold those two out
24 to the side --

25 A. Sure. Sure.

1 Q. -- just for a second.

2 (Exhibit 6 was marked.)

3 Q. (By Mr. Hayes) I'm going to hand you what has
4 been marked as Exhibit No. 6 and ask you if you're able
5 to identify that based upon your representation of Mr.
6 Scherr?

7 A. It appears to be the plaintiffs' original
8 petition in the suit filed by the doctors Ben Beard,
9 David Bailey and Dan Petrosky --

10 Q. All right.

11 A. -- against Mr. Scherr and others.

12 (Exhibit 7 was marked.)

13 Q. (By Mr. Hayes) Let me hand you Exhibit No. 7,
14 and see if you can identify that and tell me what that
15 is and compare and contrast it to Exhibit No. 6.

16 A. Well, there's a lot of writing on this in the
17 inside.

18 Q. And I under -- I would like you to ignore the
19 writing --

20 A. Okay.

21 Q. -- because the only copy I have has that
22 scribbling on it.

23 A. Okay.

24 Q. I'm trying to deal with that as an underlying
25 document without the handwritten notations.

1 A. This is an amended petition. I assume it
2 either adds or drops some additional claims that were in
3 the first one. Without comparing them paragraph by
4 paragraph, that would be my assumption.

5 Q. My specific question to you is: Number one,
6 what is an amended pleading; and number two, is Exhibit
7 No. --

8 A. 7.

9 Q. Sev- --

10 A. 7.

11 Q. Is Exhibit No. 7 a pleading that would have
12 been filed in the same lawsuit as Exhibit No. 6 but
13 filed after it?

14 MR. DARNELL: Object to form.

15 Q. (By Mr. Hayes) Let me try it again.

16 What I -- number one, what is an amended
17 pleading?

18 A. That's where you come in and you either add or
19 drop various counts of the claims or the damages, where
20 you change a part of what your complaints are or change
21 what your damages are. Sometimes you become more
22 specific. Sometimes you add or drop issues that were
23 not in the first one. But what an amended pleading
24 does, it takes the place of the first one.

25 Q. All right. Now let's go back to Exhibit No. 6.

1 Exhibit No. 6 is styled "Plaintiffs' Original Petition."

2 Is that correct?

3 A. That's correct.

4 Q. What is a plaintiffs' original petition in
5 terms of its legal effect?

6 A. It -- that's what you do when you file your
7 lawsuit. You call it the original petition.

8 Q. And it is filed by somebody -- is this the
9 document in which you list your complaints or your --
10 you list the reasons you feel you have a claim against
11 somebody else?

12 A. You can.

13 Q. All right. And are you telling me that Exhibit
14 No. 7 is a successor document to Exhibit No. 6, meaning
15 it would replace it in the same lawsuit?

16 A. Right. But there has obviously been some other
17 things that have occurred between the first amended
18 petition and the plaintiffs' original petition because
19 based upon the style here we've got counter-plaintiffs,
20 counter-defendants -- and I don't know if there had been
21 a counterclaim -- a third-party claim filed. Something
22 happened in between the two.

23 Q. All right. Now, my next question to you is:
24 Is the cause number the same?

25 A. Yes.

1 Q. What is a cause number?

2 A. The cause number is the number given by the
3 court. In this particular case looks like the court in
4 Harris County uses -- they put the year and then they
5 put the next number of the case.

6 Q. Okay. Now --

7 A. There is a difference in the cause numbers,
8 though.

9 Q. And why would there have been a difference in
10 the cause numbers, if you know?

11 A. I don't know. And I'm not sure there is a
12 difference other than the way it's stamped. This looks
13 like it's either a "603" or "003." The one that is
14 amended, I read it as a "03." In other words, there's a
15 zero missing.

16 (Exhibit 8 was marked.)

17 Q. (By Mr. Hayes) Perhaps I could hand you
18 Exhibit No. 8, let you tell me what that is and see if
19 that resolves the issue.

20 A. Yeah, it looks like it. It looks like they
21 just added an extra zero in the cause number, which
22 doesn't make any difference because the last four
23 numbers are the ones, and I guess when it gets to the
24 fifth number then it would be that many more lawsuits
25 that have been filed.

1 Q. What is Exhibit No. 8?

2 A. Plaintiffs' third amended original petition.

3 Q. In what case?

4 A. In the case in Harris County involving
5 Dr. Beard, Dr. Bailey and Dr. Petrosky against Mr.
6 Scherr and others.

7 Q. Okay. At the risk of asking you what we would
8 call a leading question but in an attempt to get all
9 this -- get our arms around all this, is it fair to say
10 that Exhibit No. 6 is the initial pleading by the
11 plaintiffs Drs. Beard, Bailey and Petrosky against Mr.
12 Scherr in a lawsuit in which you represented Mr. Scherr?

13 A. Well, looking at the documents -- I would
14 assume that based on the document, but there have been
15 times where people have filed the plaintiffs' original
16 petition and an amended petition, for whatever purposes,
17 at the same time. I was not the attorney of record, I
18 don't think, early on in this case.

19 (Exhibit 9 was marked.)

20 Q. (By Mr. Hayes) Well, let me ask you -- hand
21 you Exhibit No. 9 and perhaps you can tell us when you
22 joined the train.

23 A. Somewhere around October, 1994.

24 Q. And what is Exhibit No. 9?

25 A. That's a letter, acknowledgment letter, to the

1 carrier, The Home Insurance Company, who hired me to
2 represent Mr. Scherr.

3 Q. And did you submit a pleading that is in front
4 of you with an exhibit sticker on it along with that
5 particular letter?

6 A. I did.

7 Q. What exhibit sticker -- or what exhibit did you
8 submit to the carrier?

9 A. The third amended petition.

10 Q. And what is the exhibit number of that?

11 A. No. 8.

12 Q. So at least in terms of someone who was present
13 and defending someone in a lawsuit, you are now a
14 participant in this litigation as of Exhibit No. 8. Is
15 that correct?

16 A. Well, no, not really, because I got a copy of
17 it. And I say I received it, and I don't know whether
18 it was sent to me by plaintiffs' counsel when they filed
19 it or whether Mr. Scherr gave me a copy of it when I was
20 in El Paso. But I got involved in the case. I attended
21 depositions October 13th and 14th in El Paso and we were
22 in the process of getting the motion to substitute filed
23 with the court so if I already had the third amended
24 petition it had already been filed. And looking on the
25 third amended petition, it says it was served February

1 9th, 1994, so it was actually filed before I got in the
2 case, the third one was.

3 Q. Well, is it safe to say that when you began to
4 defend the case you began to defend the allegations or
5 complaints in the third amended original petition, which
6 is Exhibit No. 8?

7 A. I don't know. I'd have to look and see when
8 the fourth was filed.

9 Q. Okay. Let me see.

10 MR. DARNELL: You're going to get us out
11 of order.

12 MR. HAYES: Yeah, that's gonna. But I'll
13 tell you what I'm going to do. I'm going to go ahead
14 and --

15 Q. (By Mr. Hayes) I'm going to loan you -- I'm
16 going to mark my way into this --

17 A. Why don't you do this? Why don't you just look
18 at it and see when it was filed?

19 Q. How about I hand to it to you and we'll agree
20 that you --

21 A. I'll just look at it and see when it was filed,
22 if I can tell.

23 Q. And make sure it's the fourth because,
24 remember, we're missing a couple.

25 MR. DARNELL: I think that's the fifth.

1 A. This is the fifth.

2 Q. (By Mr. Hayes) Well, I don't have the fourth.

3 A. Look and see what date the fifth was filed.

4 Q. Okay.

5 A. I didn't look at that.

6 Q. Sure.

7 A. This was sent on the 2nd day of June so,
8 yeah -- 1995 -- so I was in the case at that point in
9 time.

10 Q. All right. Now --

11 A. And it was also sent to Jim Scherr at that
12 time, which he was -- I thought I was representing him.

13 Q. Well, he may have been representing himself
14 individually. And --

15 A. He may have been because there were some cross
16 actions and counterclaims and I don't think I was
17 involved in those as counsel for him in that.

18 (Exhibit 10 was marked.)

19 Q. (By Mr. Hayes) Well, let me hand you Exhibit
20 No. 10, which has your name on the back, and let me get
21 you to explain to me what Exhibit No. 10 is as you would
22 understand it.

23 A. It's a letter to Jim Scherr.

24 Q. From whom?

25 A. Oscar Allen.

1 Q. And who is Oscar Allen?

2 A. He was the -- I believe the claims person with
3 The Home Insurance Company at the time I was involved in
4 this case.

5 Q. And what type of letter would you call that as
6 a lawyer who is familiar with the insurance industry and
7 litigation? Does the term "reservation of rights
8 letter" come to mind?

9 A. Well, it does, but you know, reservation of
10 rights is a -- sort of a generic term. This letter has
11 a reservation in it, okay, but it also has additional
12 information telling that they retained me to represent
13 Jim Scherr, stuff like that. So, that in itself is not
14 the reservation. That's acknowledging that they've
15 received it and acknowledgment of the third amended
16 petition. So it's a combination of an acknowledgment
17 letter, assignment letter and a reservation of rights
18 letter.

19 Q. Okay. And what is a reservation of rights
20 letter?

21 A. Good question. I'm not exactly sure what a
22 reservation of rights letter would be. If you're
23 talking about a generic letter --

24 Q. I'm talking about a generic letter.

25 A. Okay. If you're talking about a generic

1 letter, it's usually where a person doesn't want to
2 commit themselves to a position. They want to reserve
3 any rights without being estopped to later raise an
4 issue if it determines that there is either coverage or
5 not coverage.

6 Q. Okay. Is it a method -- is it a mechanism by
7 which an insurance company can defend under a policy and
8 yet reserve until later the issue of the extent of
9 coverage? Is that a fair statement?

10 A. Well, that's something they try to do.

11 Q. Is that a fair representation of what their
12 intention is, whether you agree with it or disagree with
13 it?

14 A. I would assume that's what they're going to do
15 here.

16 Q. Okay. And you, of course, as the lawyer --
17 well, let me ask a series of questions just so that the
18 jury understands.

19 Specifically who is your client in this
20 matter, the insurance company or Mr. Scherr?

21 A. Mr. Scherr.

22 Q. To whom do you owe your obligation and
23 allegiance as you view it?

24 A. Mr. Scherr.

25 Q. And is that the -- and what relationship do you

1 have with The Home Insurance Company?

2 A. They pay my bills.

3 Q. Do you have an obligation to report to them on
4 the status of the claim filed by Drs. Beard, Bailey and
5 Petrosky?

6 A. I do. On behalf of Mr. Scherr I report to them
7 the status of the claim so that they can make their own
8 decisions insofar as paying the indemnity in the case.

9 Q. Is there also not a body of law that suggests
10 that you are assign -- you are not allowed to tell the
11 insurance company things that you learned in your
12 representation of Mr. Scherr that might benefit the
13 insurance company later in a coverage dispute?

14 A. I don't understand the question.

15 Q. Let me restate it.

16 A. Okay.

17 Q. In your position as an attorney that represents
18 Mr. Scherr --

19 A. Okay.

20 Q. -- if facts were to come to your attention that
21 would be facts that could later operate to benefit an
22 insurance company, The Home Insurance Company, in its
23 potential dispute with Mr. Scherr about the extent of
24 the coverage of the policy, are you allowed to provide
25 that information to the insurance company?

1 A. It depends.

2 Q. Well, how do you view your obligation in that
3 instance?

4 A. Well, I mean, you know, if we've got a case --
5 the reservation of rights letters are written for the
6 amount of coverage. Okay? And if I'd look at a case
7 and it looks like the case is going to, for example,
8 exceed the amount of coverage that Mr. Scherr had, I
9 think it would benefit Mr. Scherr, my client, to tell
10 the insurance company that this case looks like it might
11 exceed the policy limits.

12 Don't you think I would be helping my
13 client's interests by letting the insurance company know
14 that? And the reservation of rights letters are written
15 all the time on the basis of the amount of coverage. So
16 that's -- that's that duty I owe to Mr. Scherr to keep
17 the carrier advised of the value of the claim so that
18 this claim might be settled within the policy limits.

19 Q. I think that the problem is I'm trying to not
20 lead you.

21 A. I understand.

22 Q. And yet I'm going to take a leap of faith here.
23 Is it not correct that we as lawyers who are defending
24 an insured have an obligation to not develop information
25 and feed it to the insurance company which could hurt

1 our client in a later controversy about coverage and we
2 recognize that?

3 A. If we recognize that the information we're
4 feeding them could hurt the client, yeah, I agree with
5 that proposition.

6 Q. What I'm trying to do for the benefit of the
7 jury is let them understand the lengths to which you
8 would go to protect your client even if it meant not
9 providing insurance -- the insurance company
10 information.

11 Now that you understand that, why don't
12 you give us your take on that, on what your obligations
13 were under that.

14 A. Right. The lawyer would never want to do
15 anything that would intentionally hurt the client,
16 the client being Mr. Scherr. So if I saw there was
17 information that was being developed that would hurt
18 Mr. Scherr's position with the carrier, it's not
19 something I would want to divulge.

20 Q. And the carrier understands that obligation --

21 A. Sure they do.

22 Q. -- doesn't it?

23 A. The should understand it.

24 Q. Because that's the law in the state of Texas?

25 A. That's the law.

1 Q. Now, now that we know your allegiance and your
2 loyalty is to Mr. Scherr and that that is recognized by
3 the insurance company --

4 A. I assume it is.

5 Q. -- I assume that they relied on your
6 professional judgment in how to handle Mr. Scherr's
7 case?

8 MR. DARNELL: Object to the form.

9 A. I mean I -- well, how to handle Mr. Scherr's
10 case, that's a very complicated question because --

11 Q. (By Mr. Hayes) Well, let me reask it.

12 A. Yeah. Okay.

13 Q. I assume that they are not lawyers -- this
14 gentleman you wrote at The Home Insurance Company, he's
15 not a lawyer. He's an adjuster. Is that correct?

16 A. I think he's more than an adjuster. I think he
17 was claims manager or he was a claims analyst. But you
18 know, I've known Oscar Allen for a long time, worked
19 with him. He probably knows a lot more than a lot of
20 lawyers, but I don't think he is an attorney. You know,
21 again, I don't know but --

22 Q. Well, who did Mr. Scherr and the insurance
23 company look to to evaluate the case, make decisions on
24 what the facts meant in terms of the current pending law
25 and advise Mr. Scherr on how best to defend himself?

1 Who did they look to in this matter?

2 MR. DARNELL: You're talking exclusive of
3 any coverage questions?

4 MR. HAYES: Of course.

5 A. Yeah, and you're -- well, they --

6 Q. (By Mr. Hayes) I'm talking about in the
7 defense of Mr. Scherr.

8 A. You need to break that down because the
9 insurance company, obviously, I would hope that they
10 would listen to me as far as tactical information and
11 things that I think are in my area of determining
12 whether or not we should -- or how we should defend the
13 case.

14 But ultimately, and whether or not an
15 insurance company is going to pay a claim, I don't write
16 the checks. It's their checkbook. And as I understand
17 it, most insurance companies give authority to adjusters
18 to make a certain decision up to a certain point, and
19 beyond that they may have committees that these things
20 go to that may be comprised of attorneys. But
21 ultimately the insurance company makes a decision on
22 how much to pay. I make recommendations.

23 Q. Okay. And --

24 A. And the same thing with the other issues in the
25 case. Normally we make recommendations on cases that we

1 think should be tried, and then they ultimately make
2 that other decision.

3 How we try the case, I've never had a real
4 problem with any of these carriers. They look to me to
5 see what people to depose, what experts to hire, things
6 of that nature. So they pretty much give us that
7 authority because without that authority I wouldn't want
8 to represent a client because I feel like those are
9 things that a lawyer has to make the decision on.

10 Q. And you make reports to the insurance
11 company --

12 A. I do.

13 Q. -- from time to time?

14 A. I do.

15 Q. On your activity?

16 A. I do.

17 (Exhibit 11 was marked.)

18 Q. (By Mr. Hayes) And is Exhibit 11 -- what is
19 Exhibit 11?

20 A. It's just a report, status report.

21 Q. And that's how Mr. Allen knows what you're
22 thinking and what's --

23 A. Yeah.

24 Q. -- occurred. Is that correct?

25 A. Yes.

1 Q. Okay. Now, there is a point Mr. Darnell made
2 just a second ago, and I would assume that as you do not
3 assist the insurance company in terms of a dispute over
4 the policy against Mr. Scherr you in this instance did
5 not represent Mr. Scherr against The Home Insurance
6 Company insofar as his coverage was concerned. Isn't
7 that correct?

8 A. Repeat that.

9 Q. Who represented Mr. Scherr in terms of any
10 issues associated with the reservation of rights letter
11 sent to him by the insurance company?

12 A. I don't know. I didn't ask. I have --

13 Q. Did he have -- did he have private counsel?

14 A. You know, I don't know. I mean, Jim Darnell
15 was involved in the case on the grievance hearings.
16 Whether Jim was discussing with him other issues
17 pertaining to coverage, I -- you know, you'd have to
18 talk to Jim about that.

19 Q. Was there anyone else who was representing Mr.
20 Scherr in terms of the counterclaim issues?

21 A. You mean that was attorney of record in the
22 case?

23 Q. Yes, sir.

24 A. Not to my knowledge, but again, I -- it's been
25 a long time ago. I'd have to go back and take a look.

1 Q. Well, perhaps -- what if I were to throw the
2 name Don Wilhelm out?

3 A. Yes, he was involved in the case. I don't know
4 when and where, at what point in time he came in.

5 Q. Okay. Would you dispute that he was the person
6 that was involved in the counterclaim that Mr. Scherr
7 had against persons later in the case? When I say
8 "later in the case," I mean after they plead -- most
9 recent pleading you hold in your hand.

10 A. Oh, okay. Don Wilhelm was involved in the
11 case, and I believe -- you know, I know this is hard to
12 imagine, but I think this occurred back in 1994, '95.
13 It's been seven years ago. And to be honest with you, I
14 believe he was but I'm not absolutely certain. At some
15 point in time he came in. I know he was active in the
16 case. I think by the time we got to the trial of the
17 case that was his bailiwick, he was handling the
18 counterclaims.

19 Q. Okay. Now --

20 A. Exactly when and how I don't remember.

21 (Exhibit 12 was marked.)

22 Q. (By Mr. Hayes) I'm going to hand you Exhibit
23 No. 12 and ask you if you can identify Exhibit No. 12
24 chronologically and factually and tell me what it is?

25 A. That's a suit approaching trial report, a

1 standard form that they send us.

2 Q. For the members of the jury, would you explain
3 what those words mean to you as a trial lawyer?

4 A. Well, they -- it's just another status report
5 that we send to tell them what's going on, an overview
6 of the case.

7 Q. And who are you sending it to?

8 A. To Mr. Allen.

9 Q. And what are you telling Mr. Allen? I don't
10 mean specifically in that letter. What kinds of things
11 are you discussing with Mr. Allen?

12 A. Just talking about depositions that have
13 occurred, things that have happened, things that may
14 have an impact on the case.

15 Q. Do you have any information in that particular
16 letter that discusses your view of the risk associated
17 with this particular case?

18 A. Well, the letter speaks for itself, you know,
19 and again I'd have to read the whole letter to see.

20 Q. Well, why don't you skim it and just see if you
21 have what we would call any evaluation information in
22 it? And this isn't a test. I'm just trying to --

23 A. No, I understand.

24 Q. -- determine if you've gotten to that point --

25 A. Yeah.

1 Q. -- yet in your recommendation.

2 A. Well, everything you put in there when you talk
3 about the additional investigation and discovery, that's
4 sort of your analysis and your evaluation. That's part
5 of it.

6 Appraisal of the litigants, okay, talking
7 about who the plaintiffs' attorney is, that's part of
8 the evaluation process. In this case I see that she's a
9 competent, capable attorney and I make comments about
10 that.

11 Opinion of liability, I -- in this case it
12 sets out what my thoughts were on the liability in the
13 last paragraph on page 2.

14 Q. And what is the date of that letter, sir?

15 A. May 25th, 1995.

16 Q. Okay. May the 25th?

17 A. Uh-huh.

18 (Exhibit 13 was marked.)

19 Q. (By Mr. Hayes) I'm going to hand you Exhibit
20 No. 13, which admittedly is within a couple of weeks of
21 your letter.

22 A. Okay.

23 Q. And I'm going to let you look at Exhibit No. 13
24 and then I'm going to ask a question that's going to
25 call for you to kind of give us a sense of what you're

1 dealing with here because my --

2 A. Okay.

3 Q. -- specific question is going to be: We --
4 I believe you are far enough in this litigation as a
5 defense lawyer to have an understanding of what the
6 basic issues are. Is that correct?

7 A. I believe I was.

8 Q. And you --

9 A. You know, as far as I remember back then.

10 Go ahead.

11 Q. Well, I'm certainly not suggesting that your
12 memory today would be as --

13 A. Absolutely.

14 Q. -- as focused --

15 A. That's a given.

16 Q. -- on the issues as your letter that we've
17 marked in front of you.

18 A. That's a given.

19 Q. But in a global sense, for the benefit of
20 the --

21 A. Okay.

22 Q. -- ladies and gentlemen of the jury, what is
23 this lawsuit all about that is encompassed in Exhibit
24 No. 13, understanding it was filed about two weeks
25 later?

1 A. Basically what they were saying -- and again
2 this goes back to my memory -- they were saying that Jim
3 Scherr and Noel Gage had settled the case for three of
4 the defendants and that they in effect -- Beard, Bailey
5 and Petrosky were entitled to get that money. Also I
6 think there's another issue about the expenses in the
7 case being out of line. That's my foggy memory of what
8 occurred.

9 Q. Okay. Now, when you say "the case" --

10 A. Yeah.

11 Q. -- are there any --

12 A. The underlying class action case.

13 Q. Exhibit number what -- exhibits number --
14 remember I asked you to hold out --

15 A. Yeah.

16 Q. -- two items that were like --

17 A. Yeah, but I've been shuffling them since then.

18 Q. Well, could you go find -- I believe it's --

19 MR. DARNELL: Are you looking for the
20 class petition?

21 MR. HAYES: Yes, sir.

22 MR. DARNELL: That is Exhibit 4.

23 Q. (By Mr. Hayes) And 5.

24 A. I got it.

25 MR. DARNELL: Is the judgment.

1 Q. (By Mr. Hayes) Look for 5, which is the
2 judgment.

3 Can you relate -- I'd like you to relate
4 the lawsuit that is encompassed in Exhibit No. 13, which
5 is an amended pleading, and relate it to the best that
6 you can to Exhibits No. --

7 Is it 4 and 5, sir?

8 MR. DARNELL: 4 and 5.

9 Q. (By Mr. Hayes) -- 4 and 5.

10 A. I don't understand the question. What do you
11 mean "relate it"?

12 Q. Well, when I -- is there any linkage between
13 the two, the lawsuit that you're defending and the
14 lawsuit that is discussed in Exhibits No. --

15 A. Well, sure. The lawsuit I was defending arose
16 out of claims by the plaintiffs in the lawsuit I was
17 defending that Jim Scherr had not -- had committed
18 malpractice while handling the underlying lawsuit.

19 Q. And would you identify the underlying lawsuit
20 by exhibit number, please, sir?

21 A. Exhibit No. 4.

22 Q. How about 5? Is 5 linked to it as well, the
23 judgment?

24 A. Yeah. Again, I'm having some problems because
25 of the way -- the style of No. 4 and No. 5.

1 Q. Is the cause number the same?

2 A. Yes, the cause number is the same.

3 Q. For 4 and 5?

4 A. Yes.

5 Q. Okay.

6 Okay. Now, holding 4 and 5 in your hand,
7 explain to me how that -- and I'll use the word was
8 "involved." That to me is a nonprovocative word. How
9 was it involved --

10 A. Well, these were the --

11 Q. -- in the lawsuit you were defending?

12 A. That was the underlying lawsuit, okay, that
13 gave rise to a claim by three of the plaintiffs in the
14 underlying lawsuit, that Mr. Scherr had somehow -- Mr.
15 Scherr, Noel Gage and the other defendant somehow
16 committed malpractice.

17 Q. Okay. And it also included an allegation of a
18 misallocation of expenses or an inability to explain
19 expenses --

20 A. I believe --

21 Q. -- associated with the underlying -- can we
22 agree that when we call -- when we talk about the
23 underlying lawsuit, we're meaning the lawsuit --

24 A. Sure.

25 Q. -- that is described in Exhibit 4 and 5?

1 A. Right.

2 MR. DARNELL: Could we go off the record a
3 minute?

4 MR. HAYES: Sure.

5 THE WITNESS: Sure.

6 THE VIDEOGRAPHER: Going off the record at
7 ten minutes before 11:00 a.m.

8 (Discussion off the record.)

9 THE VIDEOGRAPHER: Going back on the
10 record at nine minutes before 11:00 a.m.

11 Q. (By Mr. Hayes) Mr. Hudgins, for the record,
12 why don't you explain why you are far more comfortable
13 in simply relying on Exhibit No. 4 to describe the
14 underlying lawsuit as opposed to Exhibit No. 5 and --
15 because I think that's helpful to the jury?

16 A. Well, No. 4 was the -- looks like what was
17 originally filed by Mr. Scherr on behalf of all of his
18 clients, at least the ones that are set out in there,
19 and the judgment that was entered in the case -- and
20 Mr. Darnell has helped us while we were off the record
21 to clarify this, but it looks like that was a judgment
22 that was entered into after Martie Georges (sic) took
23 over representation of some of the plaintiffs in the
24 original case.

25 Q. Okay. Let me -- I'm going to ask a question

1 which is -- and I'm going to ask Mr. Darnell's
2 indulgence, but I think this will clarify the issue. As
3 I understand it, when Exhibit No. 4, the underlying
4 lawsuit, was filed, the plaintiffs were Dr. LaRock,
5 Dr. Superville and the Coronado Chiropractic Clinic.
6 Does that appear to be accurate?

7 A. That's what it says.

8 Q. After that time a Dr. Walter Rhodes, a Dr. Ben
9 Beard, a Dr. David Bailey and a Dr. Dan Petrosky became
10 plaintiffs as well. Is -- do you under- -- is that your
11 understanding?

12 A. That's my understanding generally.

13 Q. At some time after that Drs. Beard, Bailey and
14 Petrosky changed lawyers from Mr. Scherr to someone by
15 the name of Marjorie Georges. Is that correct?

16 A. That's correct.

17 Q. And what you're telling me is that Exhibit No.
18 5 is the settlement that Marjorie Georges developed on
19 behalf of Drs. Beard, Bailey and Petrosky so it's only a
20 partial judgment insofar as the Exhibit No. 4 underlying
21 lawsuit is concerned?

22 A. That's my understanding.

23 Q. With that and Mr. Darnell's indulgence, we will
24 move on.

25 A. Very good.

1 Q. So when I talk about the underlying lawsuit,
2 can we agree I'm talking about the lawsuit that was
3 begun with Exhibit No. 4?

4 A. Right, and then that the other three plaintiffs
5 were added into later.

6 Q. Okay.

7 A. Okay. Now, I don't see a pleading here on
8 that.

9 Q. I understand. Let me ask this question, then:
10 Would you explain to me how the lawsuit that was filed
11 and you were defending Mr. Scherr on, the one filed by
12 Drs. Beard, Bailey and Petrosky, how that in your mind
13 is in any way, shape or form associated with Exhibit No.
14 4, the underlying lawsuit, so we have that on the
15 record?

16 A. My understanding is that those three plaintiffs
17 were later added to this lawsuit. Okay?

18 Q. Yes, sir.

19 A. And so for a period of time Mr. Scherr
20 represented them as representatives of the class that
21 they hoped to get in the class action.

22 Q. Okay.

23 A. Okay? And I don't know what period of time he
24 represented them, but he did -- they were his clients.
25 And I think it was during that period of time that they

1 somehow became disenchanted with what he was doing and
2 hired Martie Georges. She substituted in or either took
3 over the case. Again, I don't remember how the
4 mechanics went.

5 Q. I understand.

6 A. Okay.

7 Q. And the reason I have asked this question is:
8 You are familiar -- we're getting ahead again, but
9 you're familiar with an intervention that was filed in
10 the lawsuit you were defending, are you not?

11 A. Well, I knew there was one. I'm not that
12 familiar with it. It's been that long.

13 Q. Well, the Gillespie intervention. I'm going to
14 call it the Gillespie intervention for purposes of our
15 discussion.

16 A. Okay. Those are the other -- some other
17 chiropractors?

18 Q. Correct.

19 A. Okay.

20 Q. And I believe that there was an opinion
21 rendered, which we're going to get to, by the Houston
22 Court of Civil Appeals that dismissed their claims
23 against Mr. Scherr because the court took the position
24 they were not his clients. Is that not correct?

25 A. Well, actually, as I recall the case, the trial

1 court dismissed it.

2 Q. Excuse me. You're right.

3 A. Then -- and then we ^{they (?)} appealed it.

4 Q. And it was upheld on appeal?

5 A. Right. That's correct.

6 Q. Now, what I'm trying to make sure we all
7 under- --

8 A. And again, I don't remember as we sit here the
9 reasons that the trial court dismissed it. I have not
10 gone back and looked at the judgment on the summary
11 judgment or the motion of the summary judgment or
12 anything else, but that's just my recall at this point.
13 Okay?

14 Q. But based upon your defending Mr. Scherr, I
15 would assume you determined factually that Drs. Beard,
16 Bailey and Petrosky, at least at some time, were his
17 clients in what we have been calling the underlying
18 lawsuit that's represented by Exhibit No. 4. Is that
19 correct?

20 A. I assume that. Like I say, it's been a long
21 time ago.

22 (Exhibit 14 was marked.)

23 Q. (By Mr. Hayes) Okay. Now, we're going to the
24 next exhibit, which is Exhibit No. 14, and I'm going to
25 ask you what this is. And I guess I better give you

1 Exhibit No. --

2 A. Just a cover--

3 Q. -- 15 at the same time.

4 (Exhibit 15 was marked.)

5 A. Cover letter. Went to Mr. Allen with the fifth
6 amended petition.

7 Q. (By Mr. Hayes) Okay. Is that fifth amended
8 petition in -- and what term would you like me to use to
9 describe the lawsuit in which you're defending Mr.
10 Scherr so that we don't confuse it with the underlying
11 lawsuit which is --

12 A. Just call it the legal malpractice case.

13 Q. All right. The legal malpractice case.

14 MR. HAYES: Is that acceptable,
15 Mr. Darnell?

16 MR. DARNELL: Certainly. Or the Beard
17 case, whatever is easier.

18 MR. HAYES: Okay.

19 THE WITNESS: Whatever makes you feel
20 good.

21 MR. HAYES: Well, I just -- I want a
22 little empathy as I'm trying to get through this, so
23 whatever.

24 THE WITNESS: Excuse me just a second.
25 Let me get some water.

1 Jim, just --

2 MR. DARNELL: You betcha.

3 MR. HAYES: Why don't we take a break?

4 THE WITNESS: Why don't we just keep
5 going?

6 MR. HAYES: Let's just take a break. It's
7 five minutes. It's fine.

8 THE WITNESS: No, I don't -- let's keep
9 going because I want to get it over with.

10 MR. HAYES: All right. That's fine.

11 Q. (By Mr. Hayes) All right. So we have you in
12 your position as a lawyer receiving a copy of the fifth
13 amended original petition -- or the fifth amended
14 petition in the legal malpractice case, or the Beard
15 case, and you're sending it on to the insurance company.
16 Is that correct?

17 A. That's correct.

18 (Exhibit 16 was marked.)

19 Q. (By Mr. Hayes) I'm going to hand you Exhibit
20 No. 16, ask you to look at that and tell me what this
21 is. And your name is on the last page of it.

22 A. That's correspondence from the insurance
23 company to Mr. Scherr.

24 Q. And could you characterize generically what
25 kind of correspondence that is?

1 A. Well, again, I think you were referring to it
2 earlier as a reservation of rights letter. I think this
3 is an acknowledgment letter together with the
4 reservation of rights.

5 Q. Okay.

6 A. Okay?

7 Q. In other words, it's an acknowledgment that the
8 insurance company has received the pleading and it is a
9 reservation of rights associated with that pleading. Is
10 that a fair characterization?

11 A. I think so, yeah.

12 Q. Okay. Now, continuing, I assume the matter
13 continued and you continued to defend it. Is that
14 correct?

15 A. As far as I recall.

16 (Exhibit 17 was marked.)

17 Q. (By Mr. Hayes) Okay. Exhibit No. 17, tell me
18 what Exhibit No. 17 is.

19 A. That's the seventh amended original petition
20 that was filed in the case.

21 (Exhibit 18 was marked.)

22 Q. (By Mr. Hayes) Exhibit No. 18, what is that?

23 A. That was just a cover letter to Mr. Allen and
24 also telling him again the case has been reset till
25 September 18th.

1 Q. Who is it from?

2 A. Me.

3 (Exhibit 19 was marked.)

4 Q. (By Mr. Hayes) And Exhibit No. 19, which I
5 believe your name is on, what is that?

6 A. That's a reservation of rights letter with an
7 acknowledgment combination.

8 Q. All right. Covering that particular pleading?

9 A. Yeah. Yeah.

10 Q. You can put it down, sir.

11 A. (Witness complies.)

12 (Exhibit 20 was marked.)

13 Q. (By Mr. Hayes) Now we're going to get to what
14 I have characterized as the Gillespie intervention, if
15 that's an acceptable term of art, Exhibit No. 20. Tell
16 us what that is and how that happened.

17 A. We were getting ready to go to trial, as I
18 recall, and I think one of the complaints, underlying
19 complaint, was -- no, I don't remember the underlying
20 complaint. Just some other chiropractors intervened in
21 the case. And I guess what their claim was, that they
22 were wanting part of the moneys that were in the
23 registry of the court or either part of the settlements
24 that were made in the case.

25 Q. Would you compare that with the last pleading

1 that we have had against Mr. Scherr on behalf of Drs.
2 Beard, Bailey and Petrosky, and I used a term when you
3 and I met earlier.

4 A. Mirrored.

5 Q. I mean Beard. I'm sorry.

6 A. No, it mirrored it.

7 Q. Mirrored it?

8 A. Right.

9 Q. I said it was a copycat pleading?

10 A. Yeah.

11 Q. What do you mean -- what do we mean by that as
12 lawyers when it mirrored it?

13 A. Well, I don't know if the lawyer used the same
14 pleadings, but he -- it appears to have some of the same
15 wordings.

16 Q. Okay.

17 A. Okay? It gets to the same point.

18 (Exhibit 21 was marked.)

19 Q. (By Mr. Hayes) Now, I'm going to hand you
20 Exhibit No. --

21 A. And I have not compared these. I'm just using
22 what you said earlier. Okay?

23 Q. I understand that.

24 A. All right. Did you want me to look at them and
25 see?

1 Q. Well, I would like you to look at it to the
2 extent that you can feel, one, the intervention appears,
3 whether or not you agree with my contention, it's based
4 on the underlying seventh amended -- the underlying
5 pleadings in the Beard case, or the malpractice case.

6 MR. HAYES: I had a couple of extras over
7 here in case any of them -- in case you didn't get
8 something, I think I just had some extras.

9 MR. DARNELL: Okay.

10 MR. HAYES: Have you had everything that
11 I've got so far?

12 MR. DARNELL: I've had everything so far.

13 MR. HAYES: Okay.

14 Q. (By Mr. Hayes) And I'll be candid with you.
15 I didn't have to go much further myself than the
16 background facts or facts section to get a sense that
17 there were -- somebody was using a pleading as a
18 template.

19 A. Well, the -- I looked at the negligence
20 section, and that's what caused me a little bit of a
21 problem because under the negligence section in the
22 Gillespie case it says, "Defendants were negligent in
23 that they failed to certify, or even attempt to certify,
24 a class action suit."

25 Do you see that on page 4?