

1 Q. Yes, sir.

2 A. And in looking at the negligence on page 5, I
3 don't see that claim.

4 MR. DARNELL: You're talking about page 5
5 of?

6 THE WITNESS: Of the seventh --

7 MR. DARNELL: Of the seventh?

8 THE WITNESS: -- amended petition, which
9 seems to me to be clear that they were claiming --

10 A. Although they claim that they should have
11 undertaken this class action. So it would sound like to
12 me that there was a separate and completely different
13 claim.

14 Q. (By Mr. Hayes) Well, would you look at page 6?

15 A. Yeah, maybe it's somewhere else.

16 Q. Look at page 6.

17 MR. DARNELL: Of which one are we looking?

18 A. Which one are we on, Gillespie?

19 Q. (By Mr. Hayes) On the -- no, no, on the
20 seventh amended.

21 A. Okay.

22 Q. We're going to call it the Beard suit versus
23 the Gillespie.

24 A. Page 6. Okay.

25 Q. Look at page 6 of the Beard suit.

1 A. Okay.

2 Q. "Defendants Scherr and Gage were negligent and
3 breached their fiduciary duty to Plaintiffs in ... they
4 never conducted a hearing for the purposes of
5 certification."

6 It's Item No. 6.

7 A. Yeah, I see that.

8 Q. Isn't that similar to what you're suggesting,
9 "Defendants were negligent in that they failed to
10 certify, or even attempt to certify, a class action
11 suit"? Isn't that similar?

12 A. No, it's totally different.

13 No. 6 says that they breached their duty
14 in that they never conducted a hearing for the
15 purpose -- or the purposes of certification, that they
16 never conducted a hearing. And No. 1 says they were
17 negligent in that they failed to certify, or even
18 attempt to certify, a class action. And in this
19 particular case -- I do have a memory of the underlying
20 case. It seems like there was some attempts to get a
21 hearing to certify it by Scherr and Gage.

22 And that was -- actually, that was a big
23 contention at the point that -- on they were saying they
24 were negligent, breached their duty to plaintiffs in
25 that they never conducted a hearing. As I recall, the

1 biggest problem was the defendants kept putting off the
2 certification hearing in the underlying case.

3 And again, that's been a long time ago but
4 I remember that. And that's why I think that in
5 their -- it's not really a copycat pleading on that
6 point, that's a different point, where they say they
7 never conducted a hearing for the purposes of
8 certification.

9 See, it was true that they never conducted
10 a hearing. And whether they were negligent in not
11 conducting it, that's a different issue. Now, and that
12 they failed to certify, or even attempt to certify, a
13 class action, those are two different things in my mind.

14 Q. Okay.

15 A. You know, I mean I -- and again, there are some
16 other issues here I have to look through. A lot of the
17 others were the same.

18 Q. Well, let me ask you this question: If you
19 intervene in a lawsuit --

20 A. Okay.

21 Q. -- and your claims are not at all related
22 to the lawsuit in which you intervene, then your
23 intervention is subject to being stricken, is it not?

24 A. No.

25 Q. In other words, if you're going to intervene in

1 a lawsuit, by your intervention you are suggesting that
2 you have rights that are being adjudicated in an
3 underlying lawsuit?

4 A. Not necessarily. I've seen interventions in
5 cases where they had the same defendant but they all
6 wanted to go against that particular defendant. I've
7 seen it where actually separate causes of actions are
8 set up in interventions.

9 Q. Okay.

10 A. I mean, you can envision that.

11 Q. Let me ask this question.

12 A. That's sort of a generic. But I would say
13 normally a person intervenes because, you know, they're
14 part of it like you've got two plaintiffs in a case. I
15 just got an intervention in yesterday where we've got
16 a -- the wife now has intervened. The two children
17 filed a lawsuit, now the wife has intervened. And it
18 all arose out of the same transaction. Okay?

19 But --

20 Q. Okay.

21 A. -- sometimes, especially in other types of
22 cases, contract cases, things of that nature, there
23 might be a series of different transactions in the case.

24 Q. All right. Look at the part of the lawsuit
25 that discusses the facts on page 2 of the Beard suit --

1 A. Okay.

2 Q. -- and background facts that's on page 3 of the
3 intervention.

4 A. Okay. I can't see 3. It's got a line through
5 it, but I assume it's -- is it 00451?

6 Q. 00413.

7 A. On page 3?

8 Q. Yeah, page -- yeah.

9 A. 3. And on the Gillespie it's 00451?

10 Q. No. No. On --

11 MR. DARNELL: I think we're on the
12 wrong --

13 Q. (By Mr. Hayes) On the plea in intervention
14 it's 00413.

15 A. Okay. I got that.

16 Q. Okay? And on the other suit it's 00424.

17 MR. DARNELL: I think you're looking at
18 the wrong pleading, Don.

19 A. Okay. Let's get something else.

20 Q. (By Mr. Hayes) Seventh. You're supposed to be
21 looking at the seventh amended.

22 A. I'm on the fifth.

23 MR. DARNELL: Exhibit 17.

24 A. I'm on the fifth.

25 Q. (By Mr. Hayes) Go to seven, the seventh.

1 That may be the problem that you're having
2 in terms of the analysis that you did, to some extent,
3 but that's fine.

4 Let's go ahead. I'd like you to
5 compare --

6 A. No, I had this one earlier. I had the same one
7 earlier.

8 Q. Okay. That's fine.

9 A. I'm sorry. I just flipped it over.

10 Q. No problem. No problem.

11 A. Okay.

12 Q. Look at facts on 00424 Bates number.

13 A. 424. Okay.

14 Q. And 00413 Bates number.

15 A. (Witness complies.)

16 Q. Okay.

17 A. Okay.

18 Q. It would appear to me that they all are an
19 outgrowth of the way Mr. Scherr handled Cause No.
20 88-7707, Dr. Walter Rhodes, et al., versus American
21 General Fire and Casualty, et al., in the 243rd Judicial
22 District Court of El Paso County, Texas, hereinafter
23 referred to as Cause No. 88-7707. And I believe that --
24 I -- that language appears in both pleadings, does it
25 not?

1 A. The -- it starts off in both period -- both
2 pleadings, okay, if you go all the way down through El
3 Paso County, hereinafter referred to as cause number
4 such and such. Okay?

5 And then on the seventh amended petition
6 it continues on, "Defendant Scherr entered into an
7 agreement with Defendant Gage," et cetera, et cetera.
8 Okay? I don't see -- that's different in the
9 intervention.

10 Q. Well, the focus --

11 A. Is that first sentence?

12 Q. Yeah, my focus --

13 A. That's correct.

14 Q. -- is that they're both --

15 A. That's the same thing.

16 Q. -- related to the same. And that's what we
17 have been calling --

18 A. They both start out --

19 Q. -- the underlying lawsuit. Is that correct?

20 A. Right.

21 Q. Okay.

22 A. They both start out by in effect describing
23 the underlying lawsuit, and then they go on -- in the
24 intervention -- it -- they obviously didn't copy that
25 part of it. They did their own -- they typed up their

1 own deal.

2 Q. Do you know whether or not the intervenors were
3 all chiropractors?

4 A. I have no memory of that one way or the other.

5 Q. Okay.

6 A. I can go back and look at the intervenors and
7 sees what it says.

8 Q. Well, no, no. I just --

9 A. I don't -- just don't --

10 Q. This isn't a test.

11 A. Yeah.

12 Q. I'm just trying to ask a question.

13 A. I just don't remember, to be honest with you.

14 Q. That's fine.

15 A. They probably were, but you know, I don't have
16 any recollection.

17 Q. Do you think the intervention is complaining
18 about the way Mr. Scherr handled the Rhodes case, the
19 underlying case, or Mr. Scherr and Mr. Gage and
20 Mr. Gage's law firm?

21 A. Sure. The causes of action were negligence and
22 somehow they caused the intervenors' damages.

23 Q. Okay.

24 A. And they say failure to certify the class
25 action case, which was the underlying case, and they

1 were negligent in their misrepresentation -- or their
2 representation of the class and that they settled it.
3 Yeah, it -- it -- they're complaining about the handling
4 of the underlying case.

5 Q. When you used the term earlier "the same
6 transaction" in the explanation of the intervention you
7 received recently in your law firm here, earlier --

8 A. Right.

9 Q. -- in this deposition, both the intervention
10 and -- in other words, the Gillespie intervention and
11 the malpractice case, or we've been calling it the Beard
12 or the legal malpractice case -- both of those are
13 associated with the same underlying transaction, meaning
14 Mr. Scherr's, Mr. Gage, Mr. Gage's law firm's handling
15 of the Rhodes case, or the underlying case. Isn't that
16 correct?

17 A. I would say they both go to the handling of the
18 underlying case by Mr. Scherr and Mr. Gage.

19 Q. Okay. Now --

20 A. What specifics, again, you'd have to go back to
21 the pleadings to look at that to see what -- the
22 specifics they were complaining about.

23 Q. And I assume you could lay the pleadings side
24 by side and someone could analyze that pleading?

25 A. Well, it would take a few -- more than just a

1 couple minutes looking at them because --

2 Q. No, no, no, no, no.

3 A. -- they're lengthy.

4 Q. We're misspeaking. I'm saying somebody could
5 undertake that task from the standpoint of doing a legal
6 analysis of the case. It's doable?

7 A. Sure.

8 Q. Okay. That's my only question.

9 A. Yeah. No problem.

10 Q. Okay. We're not going to do it here today.

11 MR. DARNELL: That makes all of us happy.

12 MR. HAYES: I agree.

13 Q. (By Mr. Hayes) Exhibit No. 21. Why don't you
14 tell me what Exhibit No. 21 is?

15 A. That's a suit approaching trial report that we
16 send in just to update status with recommendations and
17 tell them about what's going on.

18 (Exhibit 22 was marked.)

19 Q. (By Mr. Hayes) Okay. And we have another
20 one of these letters from the insurance company to
21 Mr. Scherr. Tell me what that is, again just
22 generically, Exhibit No. 22.

23 A. Well, it talks about a change from The Home
24 Insurance now to Risk Enterprise Management. They --
25 apparently there was a purchase of a carrier and so they

1 formed a new company called Risk Enterprise Management
2 Limited, known as REM, and Mr. Scherr is being advised
3 of this by -- I guess it was by Oscar Allen -- he's now
4 with REM and telling that it's been changed. And
5 then -- I believe then they go on to talk about a
6 reservation of rights, again generically.

7 Q. Dealing with the seventh amended pleading?

8 A. Well, it -- I -- apparently it was -- I don't
9 know because the other one --

10 Q. May I see it?

11 A. -- the other one was generated after I had sent
12 another pleading to them, you know.

13 And did you have a letter where I sent the
14 seventh amended pleading to them and then they followed
15 up with that?

16 Q. You know what? I don't have it. My problem
17 is --

18 A. Okay.

19 Q. -- I don't have it.

20 A. That's all right.

21 Q. I'm sure you did, and I don't have it.

22 Now, did this matter go to trial?

23 A. Yes.

24 Q. Okay. And is -- am I correct in assuming --
25 and I've got a time line here, but am I correct in

1 assuming that it goes to trial in October of 1995?

2 A. I have no clue. As we sit here today, I don't
3 have any records to tell me that.

4 (Exhibits 23 and 24 were marked.)

5 Q. (By Mr. Hayes) Okay. There -- I have been
6 told that on October the 5th of 1995 the trial began,
7 and I am going to hand you a document which I am going
8 to mark -- unfortunately it doesn't have a date on it --
9 the 20 -- No. 23. But I'm going to give you Exhibit No.
10 24, let you look at the two of them --

11 (Exhibit 25 was marked.)

12 Q. (By Mr. Hayes) -- and No. 25 and see if we can
13 reconstruct roughly the time that the trial occurred and
14 what happened.

15 So I'll let you look at 23, 24, 25. I'd
16 like you to tell us what they are first and then see if
17 they help you explain to us what happened in terms of
18 the trial.

19 (Exhibit 26 was marked.)

20 Q. (By Mr. Hayes) And then I'm going to give you
21 No. 26 as well because I think this goes with that
22 grouping of documents. But if I'm wrong, you tell me
23 I'm wrong.

24 A. Okay. Well, 23 was the charge of the court.
25 This is what -- it's the form that the court uses to

1 charge the jury. They're required to use verbatim a
2 special charge, instructions that are given to the jury,
3 and together with that there are special issues or
4 questions that go to the jury, questions that are ones
5 that the lawyers and the judge get together to try to
6 resolve to see how it's going to go to the jury.

7 Sometimes as a defense lawyer we get a
8 charge that we like, and sometimes the plaintiff gets
9 the charge that they like. Sometimes we both get
10 charges neither one of us likes, but it's something you
11 try to work out.

12 Of course, once the judge comes up with
13 the charge, if you don't like it then you object to it
14 to protect the record, if you think he's wrong in the
15 way he's charging it. But basically what a charge has,
16 the questions are questions that pertain to liability,
17 questions that pertain to damages, and these are
18 questions in the form of special issues that a jury
19 answers to -- for the court to reach a verdict.

20 Q. Okay.

21 A. Or a judgment.

22 Q. Now, did this -- can you give me a time frame?
23 I mean, can we say October of '95, based on the release,
24 in terms of when this case was tried?

25 A. Yeah, I think October of '95 would be a pretty

1 accurate estimate.

2 Q. And again I'm not trying to put words in your
3 mouth because Mr. Darnell --

4 A. Go ahead.

5 Q. -- would object to it.

6 A. He won't care.

7 Q. But the point I'm making is the trial began and
8 the trial continued through the jury receiving a charge
9 and going back into a room and answering questions. Is
10 that correct?

11 A. That's correct.

12 Now, this case was -- as I recall, I
13 believe it was bifurcated.

14 Q. What does that mean?

15 A. That means that the jury would come up with
16 questions and answers but if those questions were
17 answered a certain way that the jury might be sent back
18 to answer additional questions pertaining, for example,
19 to other damages.

20 Q. Okay. What factually happened in this
21 particular case after the jury came back and answered
22 the questions that it did in Exhibit No. --

23 Where is the charge?

24 A. The charge is No. 23.

25 Q. Okay. In No. 23? What happened next,

1 factually speaking? Just get me through it
2 chronologically to Exhibit No. 24. Something had to
3 happen in between 23 and 24.

4 A. Well, I think the jury came back with their
5 answers and the answers indicated that the counterclaims
6 were washed out. The jury found liability in the case
7 and --

8 Q. Against Dr. Scherr and Dr. Gage?

9 A. Against Dr. --

10 MR. DARNELL: Mr. Scherr.

11 A. Mister.

12 Q. (By Mr. Hayes) Excuse me. Mr. Scherr?

13 A. Mr. Scherr.

14 Q. Dr. Gage?

15 A. Dr. Gage.

16 MR. DARNELL: Mr. Gage.

17 Q. (By Mr. Hayes) Dr. Gage's law firm?

18 A. And they found damages.

19 Q. All right. And did something occur to give
20 rise to Exhibit No. 24?

21 A. Yes. After the charge and after we got these
22 answers, the case then was settled before it went back
23 for further adjudication of any other issues.

24 Q. Who negotiated the settlement?

25 A. I don't remember.

1 Q. Well, do you have a memory of negotiating the
2 settlement yourself?

3 A. No.

4 Q. Did Mr. Darnell participate in negotiating the
5 settlement?

6 A. I don't remember.

7 Q. Did Mr. Scherr negotiate the settlement?

8 A. I just -- I really don't remember. I've got to
9 be honest with you. I think there were some
10 discussions. I was involved. I remember talking to
11 Mr. Allen about this. I remember talking to Ms.
12 Georges. I remember talking to Mr. Scherr. But I don't
13 remember how we finally put it to bed, to be honest with
14 you.

15 Q. Okay.

16 A. And Wilhelm was there. He was involved in the
17 trial.

18 Q. Wilhelm was Mr. Scherr's personal lawyer?

19 A. Yes. He was --

20 Q. And when I say that, I mean he wasn't paid by
21 The Home Insurance Company or its successor insurance
22 company?

23 A. To be honest with you, I don't know if they
24 paid him or not. I didn't see his bills, if he sent
25 them to The Home -- and I don't know what arrangement

1 Jim may have had with Wilhelm vis-a-vis The Home
2 Insurance, but I assume that Jim was paying his bills.

3 Q. Okay.

4 A. Yeah.

5 Q. So the matter was settled?

6 A. It was settled.

7 Q. Okay. And I assume that -- does the release
8 say where the moneys came from, or does it merely just
9 say moneys are paid?

10 A. Well, let's see. The release speaks for
11 itself. Let's --

12 Q. Well, why don't you look at your letter which
13 follows that, Exhibit No. -- is that 25?

14 A. Yeah.

15 Q. Does that help your memory in terms of where
16 the money came from?

17 A. No. It just says that Home paid 50,000 of it.
18 I don't know where the rest of it came from.

19 Q. Would you feel safe in assuming that some of it
20 came from Mr. Scherr and some of it came from Mr. Gage?

21 A. No, I wouldn't. I don't know who paid what.
22 I'll be honest with you.

23 Q. All right.

24 A. There's no -- you may have another letter or
25 something like that, but I can't recall. I don't have

1 anything either. If you had something to refresh my
2 memory on that, who paid what. I recall that there was
3 money in the registry of the court, for example.

4 Q. Okay.

5 A. And so I know a portion of it came out of the
6 registry of the court, or at least I thought it did.

7 Q. Explain the money in the registry of the court
8 and how that fit into the overall lawsuit, if you can.

9 A. I can't.

10 Q. Okay.

11 A. I don't remember how that got there. But I
12 think at some point in time there must have been some
13 settlement negotiations and somebody agreed let's just
14 escrow the money and just see if we can work something
15 out.

16 Q. Okay.

17 A. And I don't even remember how much it was.

18 Q. All right. What is the next exhibit after your
19 letter by number?

20 A. 22, 24, 23, 24.

21 Well, 26 is here. That's the ninth
22 amended petition. Is that it?

23 Q. Where is 25?

24 A. I'm just doing my old document shuffle we've
25 been doing all day. Here it is, 25.

1 Q. What's 25?

2 A. That's the letter that -- the \$50,000 letter --

3 Q. Okay.

4 A. -- where Home's portion, they paid 50,000.

5 Q. Okay. What is 26?

6 A. 26 is the ninth amended petition.

7 Q. Well, why would you file a ninth amended
8 petition after the case has already been settled?

9 MR. DARNELL: Object to the form.

10 Q. (By Mr. Hayes) If you know? And I'd like you
11 to compare and contrast that last pleading with whatever
12 pleading we have here that was a live pleading before
13 the ninth. We don't have the eighth. Look at the
14 seventh, which is exhibit number something. What
15 exhibit number is --

16 A. It's No. 17.

17 Q. Okay.

18 A. Okay. I'm looking at the two.

19 Q. Compare 17 and 26 and tell me, if you can, why
20 would someone after the case is settled, releases have
21 been signed, why would they file a ninth amended
22 petition in the underlying -- or in the -- not the
23 underlying, in the legal malpractice case or the Beard
24 case?

25 A. Well, the case was settled on -- let's see the

1 date. The 25th of October is when it was signed off on
2 by -- no, that's the dismissal. Okay. The case was
3 dismissed on the 25th of October. The 26th of October
4 is when the -- 25th of October was when the plaintiffs
5 signed off on the release. Okay?

6 Q. And what's the date of the ninth amended?

7 A. The ninth amended -- can't tell -- it was -- I
8 don't know.

9 Q. Well, go to the certificate of service.

10 A. Well, I didn't -- oh, down at the bottom. 31st
11 of October. Okay.

12 So it was filed -- it was done after the
13 settlement, and it was probably agreed upon that they
14 could do that if they wanted to. We didn't care. It
15 was actually filed after the court dismissed the case,
16 though. I thought that was interesting. Most lawyers
17 would hold off on it.

18 Q. Hold off on the dismissal till they filed it?

19 A. Yeah. Yeah.

20 Q. Well --

21 A. I don't know if I would --

22 Q. -- why would any lawyer want to do that, if you
23 know? And if you don't know and it just would be rank
24 speculation, that's fine. But if you have a sense based
25 upon your many years of practice as to why that

1 occurred, I would like you to answer the question.

2 A. I mean, it would be pure speculation why Martie
3 Georges did it, to be honest with you. But I know there
4 are lawyers that do that. They like to amend the
5 pleadings and take out the allegations of either
6 intentional acts where they're not dealing with a
7 punitive award or punitive settlement so that -- they
8 seem to think that there's not the same tax
9 consequences.

10 Q. Okay.

11 A. In this case, however, where the awards were
12 for money damages and for payment of bills and things,
13 I'm not sure that that was an issue anyhow because they
14 weren't suing for personal injuries, per se, they were
15 suing for losses that were actually business losses,
16 business revenue, things of that nature, so it was
17 probably going to be taxable anyhow.

18 So again, that -- you know, if you think
19 about it, in a personal injury case they do that, but
20 this was a different situation. And I don't make any
21 determination as to the taxableness of the award.
22 That's up to the plaintiffs and their lawyer.

23 Q. And the IRS?

24 A. And the IRS.

25 Q. I'm going to hand you --

1 MR. DARNELL: Sometimes only up to the
2 IRS.

3 THE WITNESS: Yeah.

4 (Exhibit 27 was marked.)

5 Q. (By Mr. Hayes) I'm going to hand you a first
6 amended plea in intervention.

7 A. Okay.

8 (Exhibit 28 was marked.)

9 Q. (By Mr. Hayes) And I'm going to hand you
10 Exhibit No. 28 and ask you whether or not you were
11 defending Mr. Scherr in that intervention suit?

12 A. I was.

13 Q. Okay. And what is -- so what is that amended
14 pleading in the intervention? Did the intervention not
15 get settled at the time that the other lawsuit --

16 A. No, it did not.

17 Q. -- was settled?

18 A. No. The judge severed the intervention when we
19 tried the case.

20 Q. What does that mean when the judge severs
21 intervention?

22 A. He just -- it severs and says, "Hey, you guys
23 have your own case later. We're going to try this case
24 now."

25 And his reasoning was that there had been

1 a tremendous amount of discovery done without the
2 intervenors in the case and he figured that there was
3 going to have to be more inter- -- more discovery done
4 for their case, and I think he even told us that. And
5 so, as a result, he said, "They can do it later, and I'm
6 leaving the bench and you-all can -- somebody else can
7 handle this."

8 Q. All right. What is Exhibit No. 28?

9 A. That's a letter from -- from REM, from Oscar
10 Allen to REM (sic).

11 Q. And what is the general purpose of that letter?
12 Is it a reservation of rights/acknowledgment letter?

13 A. Again the letter speaks for itself, but let's
14 see. Let me read it and see.

15 Just told him from now on he's on his own.

16 Q. Pardon?

17 A. They said from now on you're on your own.
18 We've paid our money is what it says.

19 Q. We have exhausted the limits of the policy?

20 A. Well, they say they paid --

21 Q. I mean, I'm not saying that's factually
22 accurate. I'm saying is that what the letter says?

23 A. Well, the letter, like I say, speaks for
24 itself. It says they paid \$203,639.20 of defense costs
25 and ~~lost payment so they were not going to pay any more~~

1 money.

2 (Exhibit 29 was marked.)

3 Q. (By Mr. Hayes) Okay. Now, Exhibit No. 29, is
4 that an affidavit of yours? And I should have handed
5 that to you earlier when we were talking about when the
6 case started.

7 A. Yeah, that's my affidavit.

8 Q. Under what circumstances was that affidavit
9 required?

10 A. I have no clue.

11 Q. Well, I don't either. I was hoping you could
12 tell me.

13 A. I'd just be speculating. It's been a long
14 time, but I would speculate on the basis it might have
15 had something to do with the -- a subsequent motion for
16 summary judgment that we filed in the --

17 Q. Intervention?

18 A. -- intervention case.

19 Q. Okay.

20 A. I mean, that affidavit's to do that because I'm
21 attaching a copy of this agreed motion for dismissal,
22 and you know, maybe we had to show that as part of it.
23 Again, that may have been something my law department
24 people and the people that handled the motion for
25 summary judgment asked me to do. But everything I say

1 in there I believe is correct.

2 Q. Well, I wasn't --

3 A. Yeah.

4 Q. -- trying to take umbrage with what you said.

5 A. No, I understand.

6 Q. I was just trying to get a sense of why it was
7 done.

8 A. It seems somewhat -- it's rather neutral. And
9 maybe it's for authentication purposes, you know, but it
10 doesn't really say that.

11 (Exhibits 30, 31 and 32 were marked.)

12 Q. (By Mr. Hayes) I'm going to hand you --

13 A. Or does it? Wait a second.

14 Q. -- Exhibits 30, 31 and 32 and ask you whether
15 you have ever seen or participated in the developing of
16 these, which I would indicate to you are affidavits of
17 your client, Mr. Scherr? And I believe I have them in
18 order, chronologically in order.

19 A. Okay.

20 Q. Did you participate in the preparation of those
21 affidavits or -- and did you participate in the legal
22 endeavor that would call for those affidavits as you sit
23 here today?

24 A. You're talking about the --

25 Q. The Scherr affidavits.

1 A. I don't know. I really don't remember.

2 I know I participated in mine. Again, I
3 would just have to surmise or guess that these are
4 affidavits that may have been done in connection with
5 our handling of the underlying -- the Gillespie matter.

6 Q. Okay. Do the facts related in Mr. Scherr's
7 affidavit -- are they consistent with your memory of the
8 facts on those issues? And I'm not trying to look for a
9 disagreement. I assume you're going to say you're in
10 agreement.

11 A. Okay. Let me see.

12 Q. But I just want to make sure that you have an
13 opportunity --

14 A. I believe he was over the age of 18, of sound
15 mind, and I think -- he's an attorney.

16 Q. Which exhibit are you looking at?

17 A. I'm looking at 31.

18 Q. Okay. If there's something there that you're
19 either unable to confirm or you disagree with, I'd like
20 you to tell me.

21 A. To be honest with you, I just -- it's been so
22 long I just don't know if I can agree with or disagree
23 with any of it in here. But generally it sounds like it
24 was correct.

25 Q. Okay. Would you look at the next one?

1 A. (Witness complies.)

2 Q. And then look at the last one. The same
3 request.

4 You have three affidavits.

5 A. Oh, I'm sorry.

6 Q. Would you again enunciate the numbers of the
7 three affidavits, or say them for us?

8 A. Well, 30 -- there's 30, 31 and 32.

9 Q. All righty.

10 A. Okay. Let me look at them real quick.

11 Q. Sure. I mean, some of the same issues are
12 discussed in your affidavit; and so, I assume if you can
13 look at your affidavit and your affidavit's accurate --

14 A. 30 is correct. I mean it looks like it tracks
15 my affidavit.

16 Q. All right.

17 A. Now, whether that was for authentication or
18 what, I just don't remember.

19 Let's see. And the next one, 31 ...

20 Q. And is 31 the one that explains how Marjorie
21 Georges got involved with --

22 A. Yes.

23 Q. -- Mr. Beard, Bailey and Petrosky?

24 A. Yeah. And again --

25 Q. Does that seem to comport with your memory

1 of --

2 A. See --

3 Q. -- the facts as you learned them?

4 A. As far as I know, yeah. Everything I got, you
5 know, secondhand, but as I recall that sounds like it.
6 I just don't remember whether her case was settled -- I
7 mean whether she dismissed it after Jim Scherr settled
8 the cases or before. I just don't have any memory of
9 that one way or the other.

10 Q. Okay.

11 A. So I couldn't really tell you.

12 Q. And it strikes me that he is making an effort
13 in this affidavit -- is that 32 we're talking about?

14 A. I'm on 32 now.

15 Q. Okay. And in affidavit No. 32 it strikes me
16 that what he's doing is setting up the position for the
17 Gillespie motion for summary judgment.

18 MR. DARNELL: Wait. This is -- 32 is the
19 third one.

20 MR. HAYES: I'm sorry.

21 MR. DARNELL: 31 is the longer one.

22 THE WITNESS: Long one. 31 is the long
23 one.

24 MR. HAYES: 31 is the long one?

25 THE WITNESS: Yeah.

1 MR. DARNELL: And 32 is the last one.

2 MR. HAYES: Okay. 30 is the short one.

3 30 is --

4 MR. DARNELL: May 3rd.

5 MR. HAYES: May the 3rd.

6 Okay. Thank you. Let me restate it,
7 then.

8 Q. (By Mr. Hayes) In 31 it strikes me that he is
9 setting up factually the position that he never had an
10 attorney-client relationship with intervenors who were
11 potential class members, according to him, but not his
12 direct clients. Is that how you see 31?

13 "Because the Rhodes" -- I'm reading from
14 the one, two, three -- fourth paragraph. "Because the
15 Rhodes case was never certified as a class action, I
16 never represented any putative class members who had no
17 written contract of employment with me. Until
18 certification of the class occurred, I did not represent
19 unnamed members of a putative class in the Rhodes case
20 who never executed a contract with me."

21 So he's saying the intervenors are a group
22 of persons who say they had a legal relationship with me
23 as their attorney but because of the law in Texas they
24 were not my client because I didn't have a contract with
25 them and there was no class certification. Is that what

1 that is suggesting?

2 A. I mean, that's what it suggests.

3 Q. Okay. Is that not the basis for the motion for
4 summary judgment?

5 A. You know, you were talking about that earlier,
6 and I just don't remember the basis for the summary
7 judgment.

8 Q. Well, let me --

9 A. I'd have to look at the summary judgment.

10 Q. Let me hand you the appellate court decision in
11 Gillespie --

12 A. Okay. Uh-huh.

13 (Exhibit 33 was marked.)

14 Q. (By Mr. Hayes) -- 33, and see whether or not
15 that appears to you -- what is 33?

16 A. 33 is an appellate court decision from the
17 court of appeals.

18 MR. DARNELL: In fact, why don't we
19 take -- once he identifies it, why don't we take a
20 break?

21 THE WITNESS: 33.

22 MR. DARNELL: He's going to read this.

23 MR. HAYES: Okay. Sure.

24 MR. DARNELL: Let's let him read it.

25 THE WITNESS: Yeah, that's fine.

1 MR. HAYES: Not a problem. I agree.

2 MR. DARNELL: You can go ahead and get it
3 identified, if you want to, and then we can just take a
4 break for a few minutes.

5 MR. HAYES: Yeah, not a problem.

6 Q. (By Mr. Hayes) Identify it and then we'll take
7 a break so you can read it off the record. I think
8 Mr. Darnell wanted you to read it --

9 A. Oh, it's No. 33. That's fine. No, I can just
10 sit here and read it and then we can go back on the
11 record.

12 THE VIDEOGRAPHER: Want to go off the
13 record?

14 THE WITNESS: Yeah.

15 THE VIDEOGRAPHER: Going off the record at
16 twenty-three minutes before 12:00 p.m.

17 (Break taken.)

18 THE VIDEOGRAPHER: Going back on the
19 record at seven minutes before 12:00 p.m.

20 Q. (By Mr. Hayes) Mr. Hudgins, we've taken a
21 brief recess and I believe you have looked at Exhibit
22 No. --

23 A. 33.

24 Q. -- 33?

25 A. I have.

1 Q. What is Exhibit No. 33?

2 A. That's an opinion by the Court of Appeals of
3 Texas, Fourteenth District in Houston, Texas.

4 Q. And what case does that opinion deal with?

5 A. This is on the Gillespie case.

6 Q. On the intervention?

7 A. Yes.

8 Q. And do you remember earlier when I asked you to
9 refer to one of Mr. Scherr's affidavits? And I believe
10 it's the longer affidavit.

11 A. Yes.

12 Q. And I asked you whether or not -- part of the
13 purpose of that affidavit appeared to me to be making
14 the factual position that he did not have a contractual
15 relationship, attorney-client relationship, with persons
16 who were potential class members in an uncertified
17 class?

18 A. Yes.

19 Q. Is that issue in the appellate opinion on
20 Gillespie, Exhibit 33?

21 A. I think it was a side issue, yes.

22 Q. Okay. What -- did the court, the underlying
23 trial court in the Gillespie intervention, rule on a
24 motion for summary judgment filed by lawyers on Mr.
25 Scherr's behalf?

1 A. Yes.

2 Q. And what did the court rule?

3 A. They granted summary judgment on behalf of Mr.
4 Scherr.

5 Q. And what does that mean legally?

6 A. That there are no issues of fact and as a
7 matter of law Mr. Scherr was entitled to a summary -- or
8 a judgment in the case.

9 Q. In other words, he won?

10 A. Yes.

11 Q. And that was appealed?

12 A. Yes.

13 Q. It was appealed by the losing side, the --

14 A. Yes.

15 Q. -- chiropractors?

16 A. Yes.

17 Q. And -- the intervenors?

18 A. That's correct.

19 Q. I said "chiropractors," and that's not an
20 established issue.

21 A. They were no longer intervenors. Then they
22 became the plaintiffs in the case because the case had
23 been severed; and so, they were the only parties.

24 Q. All right. And what did the appellate court
25 do with the appeal from the plaintiffs in the severed

1 Gillespie case when it --

2 A. They --

3 Q. -- received it?

4 A. They affirmed the underlying trial court.

5 Q. And was the matter dismissed at that point?

6 A. No. I believe the appellees filed an
7 application for a writ of error to the Texas Supreme
8 Court.

9 Q. And then what happened?

10 A. And I don't believe the writ was granted.

11 Q. And then was the case dismissed?

12 A. The case was over.

13 Q. Okay. And --

14 A. The judgment became final at that point.

15 Q. Okay. And I believe no money -- was any money
16 paid by Mr. Scherr to the intervening Gillespie
17 plaintiffs to your knowledge?

18 A. I don't know.

19 Q. Well, given --

20 A. We did not --

21 Q. Given the procedure --

22 A. -- have it at the end. There was another firm
23 that took over after the court of appeals handled the
24 case. We turned over the case to an Austin firm because
25 that's where the supreme court's located, and an Austin

1 firm handled it at that point. I don't think that
2 anything was paid, but again --

3 Q. Well, logically speaking, if the -- if a
4 summary judgment is filed and a summary -- or if a
5 motion for summary judgment is filed in a trial court,
6 the trial court grants it, it is appealed to the
7 appellate court, the appellate court sustains it, it is
8 appealed to the supreme court and the supreme court
9 refuses to take the case, the effect then is that the
10 plaintiffs lose. Is that correct?

11 A. That's correct.

12 Q. It would be highly unlikely for Mr. Scherr to
13 volunteer to pay plaintiffs that have lost under those
14 circumstances, wouldn't it?

15 A. I understand. That's what -- it would not make
16 much sense, but on the other hand, people do a lot of
17 different things.

18 Q. I understand. Your point is you just factually
19 don't know the answer to that question?

20 A. I do not know the answer to that question. I
21 can speculate that nothing was paid.

22 Q. Okay. Have you understood my questions?

23 A. I have.

24 Q. Have I given you a reasonable opportunity to
25 answer them?

1 A. You have.

2 Q. Do you think that we have fairly well and
3 accurately laid out the procedural, factual history of
4 this case as you understand it?

5 A. Based on an old man's memory, as best I can do.

6 Q. Well, is there anything -- for the record and
7 for the benefit of the jury, is there anything that you
8 can think of that I have left out that is, to your mind,
9 important that you need to raise and insert
10 chronologically in this matter?

11 A. Nothing that I can recall at this time.

12 MR. HAYES: Okay. I will pass the witness
13 to Mr. Darnell and I'll thank you for your time.

14 EXAMINATION

15 BY MR. DARNELL:

16 Q. Mr. Hudgins, I just have a couple of questions
17 and then I'll reserve most everything I've got.

18 Just trying to summarize these two
19 lawsuits, one the Beard case and the other the Gillespie
20 case, is the Beard case complaining about the split of
21 moneys from settlements?

22 A. That's what it appeared to me to be.

23 Q. And did the Gillespie case complain about the
24 class never being certified?

25 A. Well, again, I looked at that pleading and

1 that's what it said. The Gillespie intervention
2 indicated that.

3 MR. DARNELL: Okay. I'll reserve the rest
4 of my questions.

5 FURTHER EXAMINATION

6 BY MR. HAYES:

7 Q. Let me ask this question of you: Number one,
8 if you were -- you told me initially that you did not
9 sit down here today and analyze the Gillespie
10 intervention pleading and the Beard intervention
11 pleading to determine the degree to which they were
12 copycats of each other. Is that correct?

13 A. Right. What I told you is that number one
14 claim, negligence claim, it sort of jumped out at me.
15 And when I saw that, you know, I was looking back at the
16 other pleading.

17 They had a lot of the same issues, but
18 generally speaking, I think the claim that Martie
19 Georges' clients were making had to do with the money
20 that we talked about. I remember now that it was put in
21 the registry of the court. They were fighting over the
22 money that was put in the registry of the court.

23 Q. Was there also not some complaints by the Beard
24 plaintiffs that expenses were not properly accounted
25 for?

1 A. Yes.

2 Q. Okay. And the complaint by the Gillespie
3 intervenors, slash, plaintiffs, that particular
4 complaint was found by the appellate court to be without
5 merit, isn't that correct, because there was no
6 attorney-client privilege between them and Mr. Scherr?

7 A. Yeah. What I think they said, that putative
8 class members are not the attorney's clients until the
9 case is certified.

10 Q. Is that another way of saying that the
11 Gillespie intervenors, slash, plaintiffs have no
12 standing to sue Mr. Scherr as an attorney for any of the
13 conduct by him in the underlying lawsuit?

14 A. Yes.

15 Q. When you discussed the issue of class
16 certification, I just want to make sure I understand
17 your point. Is it your point that in one pleading there
18 may be a complaint that there was never an attempt to
19 certify the class and in another pleading there may be a
20 complaint that while you may have tried to certify the
21 class you didn't get the job done? Is that the nuance
22 that you were giving me?

23 A. I think that's about it, yeah.

24 Q. But it all boils down to whether or not a class
25 was certified, doesn't it, ultimately?

1 A. Well, the original plaintiffs, Beard, they were
2 complaining about moneys that came about as a result of
3 the settlements prior to a certification. Okay?

4 It sounded like to me that the Gillespies
5 were concerned -- the Gillespie plaintiffs, the
6 intervenors, were concerned that, failing to get the
7 case certified, they didn't receive any moneys because
8 if it had been certified then there would have been
9 money that would have gone to all the class members,
10 potential class members, and they didn't get anything.

11 And going back to what happened in the
12 underlying case, when we severed the case the judge
13 indicated that, you know, they could try their case
14 later but we were trying the case in this case over the
15 moneys that were in the registry of the court and based
16 on what the discovery had been done through that point.

17 Q. Let me ask this question, though. It strikes
18 me that in the Gillespie intervention those plaintiffs
19 kind of got cut off at the knees before they really got
20 well into the race because Mr. Scherr said, "You were
21 not my client. I owed you no duty as a matter of law.
22 Forget what I did." Isn't that what factually occurred?

23 A. I believe so.

24 Q. If Mr. Scherr had lost on that issue, if the
25 court had said, "We find there was a contractual

1 relationship between Mr. Scherr and the Gillespie
2 intervenors or some of the Gillespie intervenors," then
3 that case would have become developed, potentially, to
4 the extent that the Beard case was, wouldn't it?

5 MR. DARNELL: Object to form.

6 A. Well, you'd have a whole new set of cases then.
7 In that situation the case within a case would be what
8 the entire class action would be worth, not what Beard's
9 case was worth or those individual chiropractors' cases.
10 You'd have to then determine how the class as a whole
11 was damaged because you have the case certified.

12 I mean, that's a different, totally
13 different, situation. And once it's certified, you're
14 looking at all the different -- every chiropractor in
15 the state of Texas, who I think they were trying to
16 include in the class. So if those were the people that
17 were going to be all the plaintiffs, your damages would
18 be different, and how that would play out I'm not sure
19 at this point.

20 Q. (By Mr. Hayes) Well, how would Mr. Scherr be
21 any more responsible for that than Ms. Georges who was a
22 lawyer representing putative class members?

23 A. Good point. Because she's the one that
24 dismissed the entire action as I understand it.

25 Q. Do you -- have you been requested -- if this

1 matter is tried before a jury, have you been asked to
2 come to El Paso --

3 A. No.

4 Q. -- and try the case?

5 A. No.

6 Q. Or participate in the trial?

7 A. I spoke to Mr. Darnell, I believe, one time
8 about this case when he called me and I told him that
9 you and I were going to meet for an hour or so before
10 the deposition and I said he's invited to come down. I
11 have not talked to him any more. Everything you've
12 heard from me you heard -- he's hearing for the first
13 time today probably.

14 Q. You missed the import of my question.

15 A. Yeah.

16 Q. I'm not suggesting --

17 A. I have not --

18 Q. -- you've had any --

19 A. I have not been asked to come to trial.

20 Q. Okay. He just said, "I reserve my questions."

21 A. Yeah.

22 Q. And as lawyers we understand that normally
23 means that I'll ask my questions later when you're
24 sitting there at trial.

25 A. Okay.

1 Q. And I just want to know whether or not if the
2 matter's tried at trial you, as you sit here today, have
3 a present intention of getting on an airplane and flying
4 out to El Paso and testifying live in front of the jury
5 or whether that's something you haven't even thought
6 about because nobody's asked you.

7 A. Nobody's asked me. I haven't thought about it.
8 But I will tell you this. Mr. Scherr and I had a pretty
9 good relationship in -- during the course of the trial.
10 And he ended up hiring our firm subsequent to the actual
11 trial, even though we had lost the case, you know, so I
12 felt like we had a good rapport. And so, we were going
13 to go forward and if we would have had to, we would have
14 tried the other case and we handled that other case all
15 the way up on appeal. He paid my fees as we sent them
16 to him.

17 So, I mean, I wouldn't say that if Mr.
18 Scherr asked me if I would fly out to El Paso to be a
19 witness in this case that I wouldn't do it. I would
20 probably do it. I mean, I don't see any reason why I
21 wouldn't.

22 Same way if The Home Insurance asked me to
23 fly up to Oklahoma and testify in a case that somehow
24 they felt I needed to be involved in I would do it for
25 them because I did a lot of work with The Home Insurance

1 for over a period of years so --

2 Q. Okay.

3 A. -- that's sort of my answer, you know.

4 Q. I think I understand.

5 A. Yeah.

6 MR. HAYES: I don't have any further
7 questions.

8 MR. DARNELL: Me neither.

9 THE WITNESS: Good.

10 THE VIDEOGRAPHER: Going off the record at
11 six minutes after 12:00 p.m.

12 (Discussion off the record.)

13 MR. HAYES: By agreement of counsel, No. 3
14 will be withdrawn, will be retained by Mr. Hayes and
15 provided to Mr. Darnell upon reasonable notice.

16 THE WITNESS: That's good.

17 MR. HAYES: How does that sound?

18 And then what we'll do is you can send
19 that back to me.

20 MR. DARNELL: Okay.

21 (Deposition concluded at 12:07 p.m.)

22

23

24

25

1 Mr. Jim Darnell - 1 minute

2 That \$ 605.55 is the deposition officer's
3 charges to the Defendant for preparing the original
4 deposition transcript and any copies of exhibits;

5 That pursuant to information given to the
6 deposition officer at the time said testimony was taken,
7 the following includes counsel for all parties of
8 record:

9 Mr. Jim Darnell, Attorney for Plaintiff;
10 Mr. Burgain G. Hayes, Attorney for Defendant.

11 That a copy of this certificate was served
12 on all parties shown herein on October 29, 2002 and filed
13 with the Clerk pursuant to Rule 203.3.

14 I further certify that I am neither counsel
15 for, related to, nor employed by any of the parties or
16 attorneys in the action in which this proceeding was
17 taken, and further that I am not financially or
18 otherwise interested in the outcome of the action.

19 Certified to by me this 28th day of
20 October, 2002.

21 Michele W. Kuhlmann

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