No. 05-02-01683-CV

IN THE COURT OF APPEALS

OF THE

FIFTH DISTRICT OF TEXAS

UDO BIRNBAUM

Appellant,

v.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.,
G. DAVID WESTFALL,
CHRISTINA WESTFALL AND STEFANI PODVIN,
Appellees.

APPELLEES' BRIEF

Law Office of Frank C. Fleming
Frank C. Fleming
State Bar No.00784057
6611 Hillcrest Avenue, #305
Dallas, Texas 75205-1301
(214) 373-1234
(214) 373-3232 Fax
Attorney for Appellees

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APPELLEES' BRIEF

Appellees, THE LAW OFFICES OF G. DAVID WESTFALL, P.C., G. DAVID WESTFALL, CHRISTINA WESTFALL, AND STEFANI PODVIN, submit this their brief in response to the brief filed by Appellant, UDO BIRNBAUM. Appellant and Appellees will be referred to by name.

STATEMENT OF THE CASE

Nature of the case. The Law Offices of G. David Westfall, P.C. (the "Law Office") sued Udo Birnbaum ("Birnbaum") on a sworn account to collect overdue legal fees. (CR 16-17, 229-37). Birnbaum's denied the allegations and asserted the affirmative defense of fraud, among other defenses. (CR 20). Birnbaum filed a counterclaim against the Law Office and third-party claims against G. David Westfall ("D. Westfall"), Christina Westfall ("C. Westfall"), and Stefani Podvin ("Podvin"), for fraud and violation of the federal civil RICO law, among other allegations. (CR 20-22). Christina Westfall was David Westfall's wife. Stefani Podvin was David Westfall's daughter. The Law Office, D. Westfall, C. Westfall, and Podvin all filed general denials. (CR 53-60).

Course of proceedings. All of Birnbaum's claims against C. Westfall and Podvin were dismissed by Summary Judgment. (CR 117-22, 123-28, 421).[1] A jury ruled in favor of the Law Firm and against Birnbaum for unpaid legal fees. The jury denied all Birnbaum's claims against the Law Firm and D. Westfall. (CR 348-51).

Trial Court disposition. The trial court rendered judgment on the jury verdict in favor of the Law Office. (CR 421-27). Following the trial, D. Westfall, C. Westfall, and Podvin filed Motions for Sanctions against Birnbaum for a frivolous lawsuit in Birnbaum's counter-claim. Sanctions were awarded to both C. Westfall and to Podvin. (CR 432; RR 6-7).[2]

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[1]The Order granting their Motions for Summary Judgment was not included in the appellate record but was included in the Appellant's Appendix at page 4.

[2]D. Westfall died in May 2002 after the entry of the Final Judgment and before the hearing on the Motion for Sanctions.

ISSUES PRESENTED

REPLY TO ISSUE 1: THE $59,280.66 JUDGMENT WAS LAWFUL BECAUSE IT DID CONFORM TO THE PLEADINGS AND TO THE VERDICT.

REPLY TO ISSUE 2: THERE WAS SUFFICIENT EVIDENCE IN THE TRIAL COURT'S RECORD TO SUPPORT THE COURT'S NON-DECISION ON THE ISSUE OF THE DEFENDANT'S REQUEST FOR A COURT-APPOINTED AUDITOR UNDER TEX. R. CIV. P. §172.

REPLY TO ISSUE 3: THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S SUMMARY JUDGMENT DISMISSAL OF THE DEFENDANT'S CIVIL RICO CLAIMS

REPLY TO ISSUE 4: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING SANCTIONS AGAINST BIRNBAUM UNDER T.R.C.P. 13, and/or TEX. CIV. PRAC. REM. CODE, §10.001, et seq.

REPLY TO ISSUE 5: THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF.

REPLY TO ISSUE 6: THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENTERING JUDGMENT ON THE JURY'S FINDINGS.

REPLY TO ISSUE 7: THE TRIAL COURT'S SUMMARY JUDGMENT RULINGS ON THE CIVIL RICO CLAIMS AND THE LACK OF EVIDENCE RULING, DID NOT VIOLATE BIRNBAUM'S RIGHT OF DUE PROCESS.

ISSUE 8: RULE 296 PRECLUDES FINDINGS OF FACT AND CONCLUSIONS OF LAW IN A JURY TRIAL.

STATEMENT OF FACTS

Birnbaum seriously misstated the facts in his brief. In his brief, Birnbaum argued the facts the same way he argued the facts at trial. Birnbaum asserts his personal opinion as a fact without ever providing any other evidence to support his opinion. The jury's verdict obviously reflected that the jury totally rejected Birnbaum's version of events. The Law Office, D. Westfall, C. Westfall, and Podvin, challenge all factual statements made in Birnbaum's brief as provided in T. R. A. P. 38.1(f).

Birnbaum retained the Law Office to represent him in an ongoing legal matter that he had initiated pro se. (CR 365-67). Birnbaum did not dispute the existence of the attorney-client agreement, the contents of the agreement, nor that legal service had been performed on his behalf by the Law Firm. (Appellant's Brief, p. 14). Instead, Birnbaum argued that he was excused from paying the outstanding balance of attorney fees because he did not like the result and because the legal service had no worth.[3] (Id.). Birnbaum's counterclaim against the Law Firm was clearly intended to intimidate, harass, and inconvenience the Law Office in its attempt to collect past due balances. Birnbaum's third-party claims against D. Westfall, C. Westfall, and Podvin were clearly intended to intended to intimidate, harass, and inconvenience all of the parties. This was evidenced by Birnbaum's failure to present ***any*** evidence of a conspiracy, scheme, or any act or omission by which the attorney individually,

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[3]Birnbaum argues that because some of the defendants in the underlying cause of action were judges and that judges have judicial immunity, the legal services provided him were of no value. (Appellant's Brief, p.14-15). Birnbaum admits that only 2 of the 20 or more defendants in that case were judges. (Appellant's Brief, p.15).

the attorney's wife, or the attorney's daughter ever caused any harm to Birnbaum. For this reason, the trial court imposed sanctions against Birnbaum for having brought a frivolous counter-claim against C. Westfall (the wife) and Podvin (the daughter). (CR 432-33, RR 6-7).

SUMMARY OF THE ARGUMENT

Birnbaum seeks an appellate reversal based upon several cleverly concealed arguments that are all essentially based upon a lack of evidence standard review. Considering the legal argument basis of his appeal, Birnbaum failed to provide this Court with a sufficient appellate record for the Court of Appeals to properly review the trial court proceeding. Birnbaum only brought forth on appeal a partial reporter's record and failed to include in the request a statement of the points or issues to be presented on appeal, as required by T.R.A.P. 34.6(c)(1). (CR 500). Thus, since Birnbaum failed to comply either with 34.6(c)(1) or with the requirement to file a complete reporter's record, the Court of Appeals **must** presume that the omitted portion of the record would have contained relevant portions to the disposition of the appeal and that those relevant portions would have supported the appellees' position on appeal. *Christiansen v. Prezelski,* 782 S.W.2d 842, 843 (Tex. 1990). By failing to list any points or issues to be presented on appeal, when Birnbaum only requested a partial reporter's record, Birnbaum then waived his right to prevail on any appellate any issue that attacked the legal and/or factual sufficiency of the evidence presented at trial.

The only portion of the reporter's record, from the trial, that was included in the appellate record, was the closing argument. None of the actual testimony was included. Birnbaum also brings forth on appeal a partial transcript from the hearing on the Motion for Sanctions. That hearing occurred three months after the trial had been concluded. Birnbaum failed to bring forth on appeal any record of the actual testimony and evidence that had been presented to the jury during the three days of trial itself.

The burden was on Birnbaum to present a sufficient appellate record to show error requiring reversal. T.R.A.P. 33.1(a). All of Birnbaum's appellate issues essentially involved an attack on the legal and factual sufficiency of the evidence. Birnbaum cannot prevail on appeal without a complete transcript from the trial proceeding that Birnbaum failed to bring forward.

ARGUMENT

Birnbaum failed to meet the heavy burden to provide the appellate court with a sufficient record to support the issues presented on appeal by the Appellant. Birnbaum failed to request and bring up a complete record of the trial testimony. (See incomplete appellate record that speaks for itself). Birnbaum failed to include a list of the issues he would be presenting on appeal in his request for a partial reporter's record, as required under T.R.A.P. §34.6(c)(1). (CR 500).

The Appellant had the burden of bringing up the whole record on appeal to support his argument, and if the record brought up shows only the proceedings in part, then every presumption will be indulged in favor of the ruling below, and a reversal will not be ordered unless it appears that upon no possible state of the case, could the ruling be upheld. *Stovall v. Scofield,* 325 S.W.2d 221 (Tex.App.--Fort Worth 1959, no writ)

Not only did Birnbaum fail to order and bring forth a complete appellate record, but the only transcript of a proceeding that he brought forth was from the closing argument on April 11, 2002 and a partial transcript from the hearing on sanctions held on July 30, 2002. Birnbaum failed to bring forth any of the transcript of the actual evidence from the testimony presented during the trial or a transcript of the testimony and evidence presented at the sanctions hearing.

For three days the jury listened to testimony and the presentation of evidence, *but none of the actual jury trial proceedings, other than closing arguments, were included in the appellate record.*(RR both volumes).

When an Appellant chooses to bring forward an incomplete record, the points of error that are dependant on a sufficiency of the evidence argument will be deemed to have been waived. *Favaloro v. Com'n for Lawyer Discipline,* 13 S.W.3d 831, 840 (Tex.App.--Dallas 2000, no writ).

Birnbaum's decision to not provide the Court of Appeals with a complete reporter's record of all the evidence with which to review the final judgment entered, leaves the Court of Appeals with only one option. The Court of Appeals must find that Birnbaum has waived review of all of his issues presented to the Court of Appeals that were based in whole or in part upon the factual and/or legal sufficiency of the evidence.

REPLY TO ISSUE 1

THE $59,280.66 JUDGMENT WAS LAWFUL BECAUSE IT DID CONFORM TO THE PLEADINGS AND TO THE VERDICT.

Appellees incorporate herein by reference all previous argument recited in this Brief. The standard of review for reviewing the factual sufficiency of a trial court's findings of fact is the same as the standard for reviewing jury findings. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996). In reviewing the factual sufficiency of the evidence, an appellate court considers all of the evidence in the record. *Id; Burnett v. Motyka,* 630 S.W.2d 735, 736 (Tex. 1980). Reversal would only be appropriate where the finding was so against the great weight and preponderance of the evidence as to be manifestly unjust. *Cain v. Bain,* 709 S.W.2d 175, 176 (Tex. 1986).

Appellate courts are mandated to interpret jury findings so as to hold up the trial court

judgment whenever possible. *Rice Food Markets, Inc. d/b/a Pricebusters, Inc. v. Ramirez,* 59 S.W.3d 726, 733 (Tex.App.--Amarillo 2001, no writ). In reviewing the legal sufficiency of the evidence supporting a jury's finding, the court only considers the evidence and inferences that support the jury's finding and the Court disregards all evidence and inferences to the contrary. *Davis v. City of San Antonio,* 752 S.W.2d 518, 522 (Tex. 1988). If there was more than a scintilla of evidence to support the finding, then the no-evidence challenge fails. See: *Stafford v. Stafford,* 726 S.W.2d 14, 16 (Tex. 1987); *Komet v. Graves,* 40 S.W.3d 596, 600 (Tex.App.--San Antonio 2001, no writ.).

Birnbaum had a heavy burden to reverse on appeal an adverse jury finding on the basis of a lack of a legal sufficiency ground when the record reflected **some** evidence to support the jury's finding. *Brown v. Havard,* 593 S.W.2d 939, 942-43 (Tex. 1980) (stating that even with the existence of controverting evidence, the "record, when viewed under the 'no evidence' test, fully supported the [jury's] findings.").

The Plaintiff pleaded and proved the existence of a contract. The jury found the Defendant to be in breach of contract and awarded the Plaintiff $15,817.60 plus $41,306.91 in legal fees.

The amount of damages the jury found was sufficiently supported in the trial record. However, the testimony of witnesses and the admission of the contract as evidence were not made a part of the appellate record, thereby, denying Appellees the opportunity to demonstrate specifically to the Appellate Court what occurred at trial that supported the Appellees' position. The only portion of the Reporter's Record that was included as part of

the appellate record in this matter were the transcripts from the April 11, 2002 "Closing Arguments from Jury Trial," and excerpts from the sanctions hearing on July 30, 2002. The Appellant had the burden of bring up the whole record, and if the record brought up showed the proceeding only in part, then every presumption will be indulged in favor of the ruling below. *Stovall v. Scofield,* 325 S.W.2d 221 (Tex.App.--Fort Worth 1959, no writ).

The Appellees did not request an amendment/supplementation to the appellate record. It was not their duty to request and pay for an expensive record that supported the jury finding and the judgment entered in their favor. An appellee has no duty to help an appellant perfect his appeal, and may require an appellant to meet all requirements of law in carrying its case to the appellate court. *Dyche v. Simmons,* 264 S.W.2d 208, 213 (Tex.App.--Fort Worth 1954, writ ref'd n.r.e.). It would be contrary to public policy to require the Appellees to request and pay for the entire record to be brought up to defend themselves for a second time.

The amount of damages the jury found was supported by the evidence presented at trial. The Law Firm called David Westfall to the witness stand to testify. David Westfall was cross- examined by Birnbaum at trial. Birnbaum testified at trial. Birnbaum has waived his right to argue lack of factual sufficiency by failing to comply with T.R.A.P. §34.6(c)(1). See also *Favaloro* at 840.

Birnbaum has also argued that the trial court judgment did not conform to the pleadings or to the verdict because there was no jury finding on how much was owed. (Appellant's Brief, p. 26). Birnbaum stated that, "[t]he jury answers are irrelevant." (*Id.*).

Birnbaum misstates the facts in his argument.

The Law Office filed its Original Petition and Amended Petition as a suit on a sworn account. (CR 16, 229). Birnbaum's argument in his appeal brief suggests that Birnbaum does not recognize this cause of action as falling under the umbrella of a breach of contract lawsuit. Birnbaum is wrong. A suit on a sworn account is merely a specific type of a breach of contract lawsuit. The amount of money Birnbaum owed the Law Office for breach of contract was, in fact, determined by the jury: $15,817.60. (CR 348).

The fact that the Court's Charge used the language "damages" does not mean that the amount owed was determined under any other theory other than a contract and/or a sworn account, which was the basis of recovery pled in the lawsuit filed by the plaintiff, the Law Office. (CR 229-37).

Appellees respectfully request that the Court deny Appellant's Issue No. 1.

REPLY TO ISSUE 2

THERE WAS SUFFICIENT EVIDENCE IN THE TRIAL COURT'S RECORD TO SUPPORT THE COURT'S NON-DECISION ON THE ISSUE OF THE DEFENDANT'S REQUEST FOR A COURT-APPOINTED AUDITOR UNDER TEX. R. CIV. P. 172.

Appellees incorporate herein by reference all previous argument recited in this Brief. In this case there were not an overwhelming number of accounts to be reviewed. It was simply a 6 page billing statement, detailing the hours worked on the case, amounts paid, and the remaining balance due. (CR Vol. 1, p. 26-31). There was nothing unusual or extensive about the bill presented to the Defendant by the Plaintiff. The bill, and the account it

represented, were not the type that were contemplated by Rule 172. An auditor should only be appointed in a suit involving numerous or unusual matters of account. *Whitaker v. Bledsoe,* 34 Tex. 401 (1871). The types of cases where the courts have properly appointed auditors under Rule 172 have included: a suit by a parent corporation against the insurance broker for debts allegedly owed to several subsidiary insurance companies (*Villiers v. Republic Financial Services, Inc.,* 602 S.W.2d 566 (Tex.App.--Texarkana 1980, writ ref'd n.r.e.)); breach of contract action in joint- venture construction projects (*Lovelace v. Sabine Consol., Inc.*, 733 S.W.2d 648 (Tex.App.--Houston [14th Dist] 1987, writ denied)); partnership dissolution (*Sanchez v. Jary,* 768 S.W.2d 933 (Tex.App.--San Antonio 1989, no writ)); and a complicated divorce proceeding (*Padon v. Padon,* 670 S.W.2d 354 (Tex.App.--San Antonio 1984, no writ)); (*Jones v. Jones,* 890 S.W.2d 471 (Tex.App.--Corpus Christi 1994, *writ denied*)).

The commentary to *Cooper, Hensley & Marshall's Texas Rules of Civil Procedure Annotated* (2002) states that the type of cases that Rule 172 contemplated involved those such as receiverships, partnership dissolutions, or other types of commercial litigation. The billing and/or balance owed, in the underlying suit, did not fall within the purview of Rule 172, as the Rule has been historically interpreted, by the Courts of Appeals.

Further, Birnbaum has waived all trial court error on this point. On the day of trial, Birnbaum announced ready. Birnbaum did not announce ready, subject to his disappointment over the fact that the judge had never appointed an auditor prior to trial. Birnbaum waived appellate review by failing to warn the trial court judge of any continuing objection he had

to starting trial. Birnbaum merely went to trial and now seeks to reverse the verdict on this technicality due to his displeasure with the jury's verdict. Failing to warn the trial court judge of his objection, Birnbaum has attempted to have a trial run at the tax payers expense and then ask for a second bite at the apple when he did not like the result. Birnbaum's failure to raise the issue again prior to trial, did not allow the trial court to take any preventative action to avoid an appellate issue. Thus, Birnbaum waived any error committed by the trial court.

Appellees respectfully request this Court to deny Appellant's Issue 2.

REPLY TO ISSUE 3
THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S SUMMARY JUDGMENT DISMISSAL OF THE DEFENDANT'S CIVIL RICO CLAIMS.

Appellees incorporate herein by reference all previous argument recited in this Brief. Birnbaum argued that the law did not allow a judge to weigh the evidence to grant a summary judgment on a civil RICO claim. (Appellant's Brief, p. 28-29). In fact, that is exactly what T.R.C.P. §166a permitted the trial court to do. Specifically, "the judge may at the hearing examine the pleadings, examine the evidence on file, interrogate counsel, ascertain what material fact issues exist, and make an order specifying the facts that are established as a matter of law," where as here, the summary judgment was not rendered upon the whole case or for all the relief asked and a trial was still necessary. T.R.C.P. §166a(e).

The burden was upon Birnbaum to point the Court of Appeals toward any evidence to support Birnbaum's contention that the dismissal of the Summary Judgment was not warranted by the trial court. Just as Birnbaum failed to provide evidence at the summary

judgment hearing, again, Birnbaum failed to provide the Court of Appeals with any evidence in the record that would support a reversal of the trial court's ruling.

The burden was on the appellant to establish on appeal that a trial court's ruling in favor of a summary judgment was not supported by the summary judgment evidence by pointing the Court of Appeals to the summary evidence in the record which supports the appellant's argument. Instead, Birnbaum merely supports his argument with more argument, not evidence. Birnbaum has failed completely in directing the Court of Appeals toward any summary judgment evidence that supported his Appellant position in this appeal.

The reason Birnbaum failed to direct the Court of Appeals to any evidence to support his argument is the same reason the summary judgment was granted at the trial court level. Birnbaum failed completely to present any evidence in proper summary judgment form to support ANY of his contentions as to why the summary judgment should not be granted. Birnbaum's defenses to the Motions for Summary Judgment were long on argument, opinion, conjecture, and belief, but totally lacking in supportable evidence.

Birnbaum failed to present this issue in his request for a partial reporter's record, and as such, Birnbaum has waived this issue. T.R.A.P. §34.6(c)(1); see also *Favaloro* at 840.

In fact, the Motions for Summary Judgment filed by Podvin and C. Westfall did contain very detailed outlines of the elements about which they alleged that there was no evidence. (CR 120, 126). Both C. Westfall and Podvin alleged that there was no evidence that either or both of them:

1) participated in the operation or management of the enterprise; and engaged in

the pattern of racketeering activity, as alleged;

2) had an association with the enterprise that facilitated the commission of racketeering acts; and,

3) ever received any income from Birnbaum or the alleged racketeering enterprise. (CR 120, 126).

Additionally both C. Westfall and Podvin asserted that there was no evidence that Birnbaum had suffered any damage as a result of their alleged activity. (CR 120, 126).

Birnbaum failed to present evidence in summary judgment form to support the necessary elements of his claims.

Appellees respectfully request that this Court deny Appellant's Issue 3.

REPLY TO ISSUE 4
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY GRANTING SANCTIONS AGAINST BIRNBAUM UNDER T.R.C.P. 13, and/or TEX. CIV. PRAC. REM. CODE, §10.001, et seq.

Appellees incorporate herein by reference all previous argument recited in this Brief. The trial court's imposition of sanctions was within the discretion of the court and will be set aside on appeal only upon a showing of a clear abuse of discretion. T.R.C.P. 13; *Monroe v. Grider,* 884 S.W.2d 811, 816 (Tex. App.--Dallas 1994, writ denied).

Birnbaum only supports his argument with more of his opinions, not with any citation to the record of any evidence or lack of evidence and not to any authorities. Birnbaum failed to bring forth on appeal, the testimony and evidence presented at the motion for sanctions hearing. Birnbaum's position on appeal was without support in the record and without

support from prior authority. By failing to provide a complete record, Birnbaum has again waived his appellate argument.

Appellees respectfully request this Court deny Appellant's Issue 4.

REPLY TO ISSUE 5
THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF.

Appellees incorporate herein by reference all previous argument recited in this Brief.

Birnbaum furnished the Court of Appeals with **no evidence** as to why Judge Paul Banner should have been recused in this matter. Birnbaum only furnished argument, not evidence or citation to authority. If there had been any legitimate grounds for the advancement of Birnbum's argument, then Judge Ron Chapman would have considered and weighed that evidence at the hearing on Judge Banner's recusal. Birnbaum's argument gave Judge Banner no basis on which to recuse himself from presiding over this lawsuit and therefore, his continuance as the trial judge in this proceeding was proper.

Appellees respectfully request this Court deny Appellant's Issue 5.

REPLY TO ISSUE 6
THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ENTERING JUDGMENT ON THE JURY'S FINDINGS.

Appellees incorporate herein by reference all previous argument recited in this Brief.

Birnbaum failed to refer to any matter in the record on appeal that supported Appellant's argument for Appellant's Issue 6. Therefore, Appellee was unable to cite the Court of Appeals to any evidence to counter Appellant's argument to any matter in the record on appeal regarding Issue 6. Again, Birnbaum merely uses his opinions as argument and fails

to support those opinions with any evidence from the record to support them or any citation to authority to validate them.

Appellees respectfully request this Court deny Appellant's Issue 6.

REPLY TO ISSUE 7

THE TRIAL COURT'S SUMMARY JUDGMENT RULINGS ON THE CIVIL RICO CLAIMS AND THE LACK OF EVIDENCE RULING, DID NOT VIOLATE BIRNBAUM'S RIGHT OF DUE PROCESS.

Appellees incorporate herein by reference all previous argument recited in this Brief.

Birnbaum failed to refer to any matter in the record on appeal that supported Appellant's argument for Appellant's Issue 7. Therefore, Appellee was unable to cite the Court of Appeals to any evidence to counter Appellant's argument to any matter in the record on appeal regarding Issue 7. Again, Birnbaum merely uses his opinions as argument and fails to support those opinions with any evidence from the record to support them or any citation to authority to validate them.

Therefore, Appellees respectfully request this Court deny Appellant's Issue 7.

ISSUE 8

RULE 296 PRECLUDES FINDINGS OF FACT AND CONCLUSIONS OF LAW IN A JURY TRIAL.

Appellees incorporate herein by reference all previous argument recited in this Brief. Despite his request, Birnbaum was not entitled to Findings of Fact and Conclusions of Law from the jury trial portion of the award regarding damage findings. The rule precludes Findings of Fact and Conclusions of Law in a jury trial. Texas Rule of Civil Procedure 296. By its terms, Rule 296 would only be applicable to a case tried without a jury. *Favaloro v. Com'n for Lawyer Discipline,* 13 S.W.3d 831, 840 (Tex.App.--Dallas 2000, no writ). Since the presentation of testimony and evidence was made for three days to the jury, upon which they deliberated and gave a verdict; and upon which the judge entered a judgment, Birnbaum would not be entitled to Findings of Fact and Conclusions of Law, and there would be no error on this issue.

Appellees respectfully request this Court deny this issue as presented by the Appellees.4

PRAYER

Appellees request that this case be affirmed and that all costs be taxed against Appellant, that Appellant be ordered to pay the Appellees attorney's fees for this appeal in the amount conditionally awarded by the trial court jury in the event of such an appeal,

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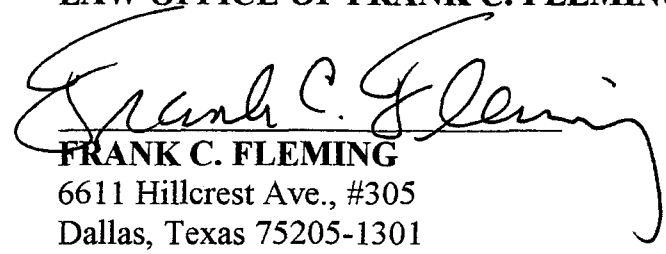
4 While the jury trial verdict did not require findings of facts and conclusions of law to be filed in order to support the verdict on appeal, the Court's ruling on the sanctions motions should be accompanied by findings of facts and conclusions of law. This point has been recognized by the Appellees and late findings of fact and conclusions of law are now being requested from the trial judge. The trial court can file findings of fact after the deadline to file them has expired. (*Jefferson Cty. Drainage Sist. v. Lower Neches Valley Auty.*, 876 S. W. 2d 940, 959 (Tex.App.—Beaumont 1994, writ denied); *Morrison*

which amount was $20,000.00, and for such other and further relief as may be proper.

Respectfully submitted,
LAW OFFICE OF FRANK C. FLEMING



FRANK C. FLEMING
6611 Hillcrest Ave., #305
Dallas, Texas 75205-1301
(214) 373-1234
(214) 373-3232 Fax
State Bar No.00784057

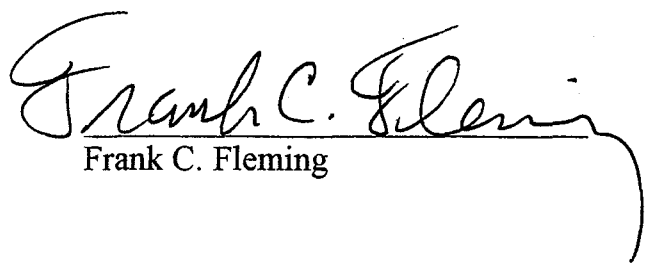
ATTORNEY FOR APPELLEES

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, Appellees' Brief, has been served upon all counsel of record via:

_____	Certified Mail/Return Receipt Requested
_____	Facsimile Transfer
X	First Class Mail
_____	Federal Express
_____	Courier
_____	Hand-delivery

on this the 20th day of June, 2003.



Frank C. Fleming

v. Morrison, 713 S.W.2d 377, 380 (Tex.App.—Dallas 1986, writ dism'd).