No. 05-02-01683-CV

In the Court of Appeals
Fifth District of Texas at Dallas

UDO BIRNBAUM
Defendant, Counter-claimant, Third Party Plaintiff - Appellant

vs.

THE LAW OFFICES OF G. DAVID WESTFALL, P.C.
Plaintiff, Counter Defendant - Appellee

G. DAVID WESTFALL
Third Party Defendant, Sanction Movant - Appellee

CHRISTINA WESTFALL
Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN
Third Party Defendant, Sanction Movant - Appellee

Appeal from the 294th Judicial
District Court of Van Zandt County, Texas
The Honorable Paul Banner, by assignment
Trial cause no. 00-00619

Appellant's [RCP Rule 298] Response and Objection to Appellees' Motion to Allow the Filing of the Trial Judge's Findings of Facts and Conclusions of Law

These ***Findings*** of "bad faith", just made, have no support in the trial court record, and are in direct conflict with a prior determination of "well-intentioned"

Because of the harm and prejudice that could be caused by Judge Banner's belated ***Findings and Conclusions***, I PETITION THAT THIS ENTIRE DOCUMENT BE PRESENTED TO THE ENTIRE PANEL IN THEIR CONSIDERATION UPON THE ENTIRE APPEAL. (One original and SIX copies are being provided)

I petition for such regardless of this Court's ruling on ***Appellees' Motion***, as their ***Motion***, and this ***Response*** relates directly to the matters on Appeal. (lawlessness)

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IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C.[1] Plaintiff, Counter-defendant	Frank C. Fleming[2] PMB 305, 6611 Hillcrest Ave. Dallas, Texas 75205-1301 (214) 373-1234 (214) 373-3232 (fax)
Udo Birnbaum[3] Defendant, Counter-claimant, Third party plaintiff	Udo Birnbaum, *pro se* 540 VZ 2916 Eustace, Texas 75124 (903) 479-3929 (903) 479-3929 fax
G. David Westfall[4] Third party defendant	Frank C. Fleming
Stefani Podvin[5] Third party defendant	Frank C. Fleming
Christina Westfall[6] Third party defendant	Frank C. Fleming
Hon. Paul Banner[7], trial judge	

[1] Suit initially brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid OPEN ACCOUNT for LEGAL FEES. There of course never was an open account, not with a $20,000 NON-REFUNDABLE prepayment "for the purpose of insuring our [lawyer's] availability", and the lawyer reserving the "right to **terminate**" for "your [Birnbaum] **non-payment** of fees or costs".

[2] Somehow appeared as "co-counsel" for the "Law Office" shortly before trial. Then the only lawyer. But no document "of record" of his appearance for the "Law Office".

[3] Nincompoop for having let G. David Westfall talk him into paying non-refundable $20,000 UP FRONT money for a **civil racketeering** suit against state judges and other state officials. (suit had ***no worth***)

[4] Told me I had "a very good case" in suing 294th District Judge Tommy Wallace, and others under civil RICO, for what they had done to me with their "BEAVER DAM" scheme on me.

[5] Attorney daughter of G. David Westfall, and OWNER of the "Law Office" (at least on paper).
[6] Wife of G. David Westfall and long time BOOKKEEPER at the "Law Office"

[7] "Visiting judge", literally. Did not go through regular court-coordinator Betty Davis, nor had clerk or bailiff present during trial. Did it all by himself. See Appeals issues.
Listed as a participant because of Appeals Issue 5 (denied motion for recusal). Also because of unlawful (**punitive**, not coercive) $62,255 "frivolous lawsuit" sanction (Issue 4)

Appellant's [RCP Rule 298] Response and Objection to Appellees' Motion to Allow the Filing of the Trial Judge's Findings of Facts and Conclusions of Law

These ***Findings*** of "bad faith", just made, have no support in the trial court record, and are in direct conflict with a prior determination of "well-intentioned"

To this Honorable Appeals Court:

Please forgive my trying to address this matter at a little higher and concise level. Details can be found on your computer docket sheet and my previous briefs and motions.

Introduction and summary

1. The essence of this ***Response and Objection*** is that Appellees' motion to allow the trial judge to now make ***findings*** is a continuation of their lawlessness in the trial court:

- These new ***Findings*** were belatedly crafted to paint me as some sort of monster.
- These new ***Findings*** are not supported by the trial court record .
- These new ***Findings*** are not supported by the rules and law that apply to sanctions.
- These new ***Findings*** are in conflict with the trial record[8] of "well-intentioned"
- These new ***Findings*** come as a surprise, and may cause harm to Appellant, lest this ***[RCP Rule 298] Response and Objection*** be presented in its entirety to the entire panel for consideration of this entire Appeal. (SIX copies provided)

Background

2. The essence of my ***Appeal Brief*** (April 23, 2003) was that I was not given due process in the trial court. Judge Paul Banner had a jury sitting there, but he did not use it [9]. Also that the two (2) judgments against me were each unlawful.

3. The essence of my ***Reply Brief*** (July 17, 2003) was that Appellees' contentions in their ***Response Brief*** (June 20, 2003) do not "fit", i.e. they were quoting something out of a law book

[8] *"[A]lthough Mr. Birnbaum may be **well-intentioned** and may believe that he had some kind of real claim as far as **RICO** there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such **sanctions** as I've determined are appropriate."* Close of hearing on Motion for Sanctions, July 30, 2002. (attached).

[9] Wrong jury questions, would not let me show my best case, evidence, etc. Also the judge himself decided the civil RICO issue, i.e. whether my claim was "frivolous" as Appellees TWO YEARS LATER claimed (but NOT in their pleadings!), or bona fide RACKETEERING as I was trying to show. (I had asked that the civil RICO issue be tried by JURY).

that sounds good, but that their answers do not "fit" the appeals issues. Also that they were lying[10] when they told this Appeals Court that they were at that time (June 20, 2003) in the process of having Judge Banner make ***Findings***. (as indicated by their now bringing "findings")

4. I submitted ***Appellant's Motion to Have the Trial Judge Produce Findings and Conclusions*** (Aug. 5, 2003) as to how Judge Banner came up with his two judgments[11] totaling $122,000. My motion was denied. Appellees had **not** responded.

5. Next the Appellees come into this Appeals Court with ***Appellees' Response to Appellant's [DENIED] Motion to have Trial Judge Produce Findings and Conclusions*** (Sept. 24, 2003), asking that *"the Court **allow**[12] Judge Banner to file his Findings of Fact and Conclusions of Law in this matter, etc."*, with their letter[13] to Judge Banner and a proposed[14] eight (8) page vituperation[15] ("finding", Exhibit "A") they have concocted out of thin air to paint me as some sort of monster to the judicial system. My response letter[16] to Judge Banner gives details. (attached)

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[10] Their footnote 4, page 25, reads: "While a jury trial verdict did not require finding 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. Etc)"* (emphasis added)

[11] Regarding the **first** judgment, over my objections, Judge Banner did not ask the right questions to the jury. In the **second** judgment, whether there was indeed a violation of RICO as I claimed, and whether I was "injured in my property or business by reason [thereof]", Judge Banner did not allow me to take this to the jury, and Judge Banner himself decided that the evidence showed that there had been **no** RICO violation, and unconditionally punished me. But I had asked for determination by jury.

[12] "Wherefore, premises considered, Respondent prays this Court deny the relief sought by the Movant [**to make Judge Banner to make Findings!!!!!**] in delaying the Court's consideration of this matter except to the extent that the Court **allow Judge Banner to file his Findings** of Fact and Conclusions of Law in this matter, and for such other and further relief … … etc. (Their ***Response***, page 3, last paragraph).

[13] Attached to this Response

[14] Attached to this Rfesponse

[15] **Vituperation** (Webster's Dictionary): "sustained and **bitter railing and condemnation**", an act or instance of vituperating, i.e. to **abuse or censure severely or abusively** : BERATE: **syn** ABUSE: **to use harsh condemnatory language syn** SCOLD

[16] And also the rapid faxes passing between Frank Fleming and Judge Banner, made an attachment to this document.

6. On September 30, 2003 I filed ***Motion for Recusal of Judge Banner***[17] to put an end to the sudden backstage maneuvering. (My motion summarizes the events).

7. Now (October 6, 2003) Appellees come into this Appeals Court with ***Appellees' Motion to Allow The Filing of the Trial Judge's Findings of Facts and Conclusions of Law***, accompanied by an Exhibit "A", a seven (7) page[18] signed ***Finding and Conclusions***.

8. Attached to this ***Response and Objections*** are copies of the rapid-fire documents being put before Judge Banner, with my handwritten notations thereto. I am also providing a copy of Judge Banner's prior determination regarding my conduct during the entire proceeding: **"well-intentioned"**. (Judge Banner's last words, just after he sanctioned me $62,000 for having made a civil RICO claim)

Regarding Judge Banner's latest *Findings*

9. This groundless ***Finding*** now being flashed by Appellees has no particularity or specificity or detail whatsoever, only a general condemnation for my having made a *"RICO civil conspiracy claim"*. (their phrase for "civil RICO", I presume). The real issue in this Appeals Court, however, is how Judge Banner arrived at the TWO (2) judgments.

10. In his ***Finding***, again and again Judge Banner now finds violations of *"§ 9.000 et seq. Civ. Prac. Rem. Code, § 10.000 et seq. Civ. Prac. Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas"*.

As shown below, NONE of this law applies to the facts in this case. Also note that §9.000 et seq. Civ. Prac. Rem. Code is the only statutory provision that allows attorney fees for an entire proceeding (Judge Banner's sanction of $62,000).

11. Regarding **§ 9.000 et seq. Civ. Prac. Rem. Code:**

- Section **§**9.000 et seq. of course **only applies** to "injury, property damage, or death", under any cause of action, and to **TORT** causes of action (my pleading was civil RICO, statutory law).

[17] Attached

[18] Judge Banner apparently communicated with them, but not me, and got them to remove some of their hyper-ridiculous words.

- Section §9.000 also specifically excludes Texas DTPA claims (a mini-RICO). Also it has a 90-day **"safe-harbor"** provision, and applies only **after** a determination of "frivolous pleadings", which Judge Banner never made, except now in this ***Finding***, after everything is finished! I had of course asked for appointment of an auditor, to show that the "collection" suit against me was frivolous.
- Also it specifically states that section $9.000 does not apply if Rule 13 is involved.
- (This section is also the **only one that allows attorney fees for the entire proceeding**, after a "frivolous lawsuit" determination, which there was not, and opportunity to withdraw an supposedly offending pleading).
- **So much for monetary sanctions under §9.000 et seq.**

12. Regarding **§10.000 et seq. Civ. Prac. Rem. Code:**
    - Section §10.000 et seq. only applies to attorney fees **in obtaining** a §10.000 sanctions
    - Sanctions under §10.000 require the naming of the conduct which violated §10.000, which the Sanctions Order did not. (It gave NO REASON WHATSOEVER)
    - **So much for monetary sanctions under §10.000 et seq.**

13. Regarding **T.R.C.P. Rule 13:**
    - This Rule states that "No sanctions under this rule may be imposed except for good cause, the particulars of which must be stated in the sanctions order".
    - No "particulars" were stated in the Sanction Order of $62,000 (nor in this ***Finding***)
    - The "appropriate sanctions available" are those under Rule 215-2b, which **only** include the court issuing Orders (**of which there were none**), and payment for damages caused for violation of an ORDER (**of which there was none**)
    - **So much for monetary sanctions under T.R.C.P. Rule 13.**

14. Regarding **"and/or the common law":**
    - **The "common law" does not provide for the imposition of sanctions**.

Regarding the trial court record

15. The trial record, however, gives the true reason Judge Banner PUNISHED[19] me $62,000, namely for making a civil RICO pleading when I was sued:

> *"[A]lthough Mr. Birnbaum may be **well-intentioned** and may believe that he had some kind of real claim as far as **RICO** there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such **sanctions** as I've determined are appropriate."* Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

Note:

- My civil RICO claim was against *"the individuals"*, i.e. that "The [three] Westfalls" were using their Law office as a RICO "enterprise". (More precise language in my ***Brief***). This was the only claim I made against *"the individuals"*
- Again note, that I was found **"well-intentioned"**.

[19] It is also a CRIMINAL type sanction (UNCONDITIONAL, not "coercive"), imposed without due CRIMINAL process, including a finding of "beyond a reasonable doubt". See my Appeal Brief.

- Also note, there is no record of anything other than "well-intentioned" in the entire proceeding, except this newest Finding which Judge Banner is trying to now bring to this Appeals Court.

Regarding the Appeals Issue
(and the Finding I was trying to have Judge Banner make)

16. The core of the issues in my ***Appeal*** is how Judge Banner arrived at the two (2) judgments against me. As I asked in my ***Notice of Past Due Findings and Conclusions***":

"Your Honor, please let the record know what ***findings of fact***, and ***conclusions of law*** you made to come up with the **two** judgments you awarded against me in this case:

- How, upon a pleading of an **unpaid open account**, and absent a finding to you by an Auditor under RCP Rule 172 regarding such claimed **unpaid open account**, and absent a finding by a jury as to the state of the account, what ***findings of fact***, and what ***conclusions of law*** did you make to award a judgment totaling **$59,280.66** against me upon such pleading, **an issue I had asked to be resolved by jury?**

- How upon my cross and counter claim under 18 U.S.C. § 1961, et seq. ("civil RICO"), against three (3) persons, and having **dismissed such three (3) persons** on November 13, 2001, what ***findings of fact*** and what ***conclusions of law*** did you **now make**, on August 21, 2002, so as to entitle these **dismissed parties** to a **$62,885.00** second judgment against me, in the same case, on **an issue I had asked to be resolved by jury?**

17. My ***Appellant's Brief*** shows in detail why the $62,000 Sanction Judgment is not only UNLAWFUL, but is a punitive (criminal, not "coercive") sanction, imposed on me without full due criminal process.[20]

Conclusion

18. My briefs and motions detail a flagrant abuse of the judicial system against me. This is really a very simple case once one recognizes the pattern of FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression and unlawful judgments against pro

[20] See my briefs for case law and details

se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.

19. It is clear what Appellees and their lawyer are up to now, namely trying to "undo" the finding of **"well-intentioned"**, and blaming me for their sins of the whole proceedings. Please recognize that the evil is on their side of the telescope.

20. This whole matter on me started with a fraudulent "beaver dam" case against me in 1995 (still in the 294th EIGHT (8) years later). Then this fraudulent case against me claiming an unpaid **"open account"** for legal fees.

21. There is no underlying damage. There is no underlying OPEN ACCOUNT. All fraudulent "legal fees" and more "legal fees" for "collecting" on fraudulent legal fees. It is past time to call on the U.S. Justice Department.

PRAYER

WHEREFORE, Respondant/Appellant Birnbaum prays that this court deny Appellees' Motion and disallow the making by Judge Banner of ***Findings*** so contrary to the trial court record.

I have provided, for this Court's consideration, ***Birnbaum's [RCP Rule 298] Response to Judge Banner's Findings***. I provide such since I would under normal circumstances have a right and opportunity under RCP Rule 298 to request additional or amended findings of fact and conclusions of law. Please forgive the somewhat rough and incomplete nature of that document.

Because of the harm and prejudice that could be caused by Judge Banner's belated ***Findings and Conclusions***, I PETITION THAT THIS ENTIRE DOCUMENT BE PRESENTED TO THE ENTIRE PANEL IN THEIR CONSIDERATION UPON THE ENTIRE APPEAL. (One original and SIX copies are being provided)

I petition for such regardless of this Court's ruling on ***Appellees' Motion***, as their ***Motion***, and this ***Response*** relates directly to the matters on Appeal. (lawlessness)

_____

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Attachments:

1. Trial court **record** of "well-intentioned" - caught by the court reporter
2. ***Order on Motion for Sanctions*** - $62,000 sanctions without ANY particularity
3. Fleming's Sept. 24, 2003 **fax** to Judge Banner - with proposed Findings (really wild)
4. Fleming's Sept. 29, 2003 **fax** to Judge Banner - with somewhat toned-down proposed Findings
5. My (Birnbaum) Sept. 30, 2003 ***Motion for Recusal of Judge Banner*** - filed 7:56 a.m. Oct. 1, 2003, and immediately also presented to the court-coordinator
6. My (Birnbaum) Sept. 30, 2003 **letter** to Judge Banner - filed 8:27 a.m. and also immediately presented to the court-coordinator

7. Judge Banner's Sept 30, 2003 8:52 a.m. **fax** to Fleming and Birnbaum. (He could have simply mailed or faxed his signed ***Findings*** to the Clerk of Court)
8. Fleming's Oct. 6, 2003 **fax** to this Appeals Court - with fax of signed Findings (**This is the first time that I got semi-official notice of what Judge Banner had actually signed**)
9. Fleming's Oct 6, 2003 **letter** to the 294th Clerk - with ***Findings*** - did not actually get filed ("signed with the clerk") until Oct. 8, 2003 12:14 p.m.

Certificate of Service

This is to certify that on this the _____ day of October, 2003 a copy of this document was sent by Regular Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301. A copy of this document has also been provided to Judge Paul Banner through Pam Kelly, Court Coordinator for the 294th District Court in Canton, Texas.

_____
Udo Birnbaum