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

v.

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 REPLY BRIEF

OTHER SEPARATE DOCUMENTS:

Civil Appendix is bound separately
Trial Closing Argument (transcription)
"Frivolous Lawsuit" Sanction Hearing
(see Index page 4)

UDO BIRNBAUM
PRO SE
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929

Appellant Birnbaum petitions for ORAL ARGUMENT to detail the abuse of the judicial system upon him as shown within

IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C. Plaintiff, Counter-defendant	Frank C. Fleming[1] PMB 305, 6611 Hillcrest Ave. Dallas, Texas 75205-1301 (214) 373-1234 (214) 373-3232 (fax)
Udo Birnbaum 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[2] Third party defendant	Frank C. Fleming
Stefani Podvin[3] Third party defendant	Frank C. Fleming
Christina Westfall[4] Third party defendant	Frank C. Fleming
Hon. Paul Banner[5] Trial Judge	

[1] Suit brought by attorney G. David Westfall in behalf of the "Law Office", claiming an unpaid open account debt of $18,121 for "legal services". Fleming became "co-counsel" shortly before trial, then apparently the only attorney, although Westfall was the only attorney ever "of record" for the "Law Office" or for "G. David Westfall"
[2] Originally representing self and the "Law Office"
[3] Attorney daughter of G. David Westfall
[4] Bookkeeper wife of G. David Westfall
[5] Visiting judge, by assignment. Listed as a participant because of Appeals Issue 5 (denied motion for recusal). Also because of unlawful and retaliatory $62,255 "frivolous lawsuit"sanction (Issue 4)

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[6] Appellees did NOT list my Issues, simply gave "Reply to Issue No. ?", and frequently their "Reply" "DOES NOT FIT" . For completeness in my REPLY ARGUMENT, I provide MY ISSUE, MY CONTENTION, then their REPLY TO ISSUE NO. **("All answers SHALL be proceeded by the QUESTION")** .

OTHER SEPARATE DOCUMENTS

CLOSING ARGUMENTS from the jury trial of April 11, 2002
D. Keith Johnson, RDR, CRR (provided directly to this Appeals Court)

EXCERPT FROM [SANCTION] HEARING held 7-30-02
Barbara J. Roberson (provided directly to this Appeals Court)

CLERK'S RECORD (Volume 1 and Volume 2)

INDEX OF AUTHORITIES

STATEMENT OF THE CASE

A pattern of flagrant abuse of the judicial system

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

Birnbaum stands by the "Statement of the case" in his Appellant's Brief. In reply to Frank C. Fleming's "Statement of Facts", Birnbaum shows the following:

Frank Fleming claims that *"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. (Appellees' page 8 line 4)*

NOT TRUE. Birnbaum made the following claims: (

- **Law Office**: Texas DTPA and FRAUD
- **D. Westfall**: Texas DTPA and FRAUD
- **D. Westfall, C. Westfall, and Podvin** ("The Westfalls"): **CROSS** and **third party** claims under civil RICO. (same "enterprise", "scheme", etc. but different **damages**. Holding them responsible for the "Law Office".)

See Appellant's Brief page 6 for details).

Frank Fleming states *"Christina Westfall was David Westfall's wife. Stefani Podvin was David Westfall's daughter"*

MISLEADING AND NOT THE WHOLE TRUTH:

- **C. Westfall** was D. Westfall's longtime bookkeeper at the "Law Office"
- **Podvin** was D. Westfall's attorney daughter, OWNER of the Law Office, and as such had appointed D. Westfall TEN YEARS IN A ROW, as the ONLY OFFICER ("director") of the "Law Office".

My civil RICO claim alleged that C. Westfall and Podving were FACILITATORS ("principals") to the "pattern of racketeering activity" See Appellant's Brief as to how to find my pleadings and evidence, particularly my summary judgment Appendix (CR 213-228). Also see Clerk's Record 282-316 and the Affidavits therein. Also D. Westfall having

been sanctioned by federal judge Jorge Solis for abuse of the judicial system. (CR 300-306)

Fleming states *"A jury ruled in favor of the Law Firm and against Birnbaum for unpaid legal fees" (Appellees' page 8 line 11)*

NOT TRUE. The jury ruled on "damages" for "failure to abide" by an "agreement". See the issues in these briefs.

Fleming states *"Following the trial, D. Westfall, C. Westfall, and Podvin filed Motions for Sanctions against Birnbaum for frivolous lawsuit in Birnbaum's counter-claim. Sanctions were awarded to both C. Westfall and to Podvin."*

MISLEADING AND INCOMPLETE: D. Westfall, C. Westfall, and Podvin had **long ago** been **removed** from the case by summary judgment. See the issues in these briefs. Also, the "American Rule" does not allow for attorney fees for having been granted "summary judgment".

Trial Court disposition:

Apparently Appellees are at this time trying to make Judge Banner make **findings of facts and conclusions of law** regarding the $62,255.00 "frivolous lawsuit" sanctions against me. See footnote 4, Appellees' page 25.

However there is nothing filed in the court that I know of, and I certainly have not been served with any documents to that effect.

ISSUES PRESENTED

1. WHETHER THE $59,280.66 JUDGMENT IS UNLAWFUL
It does not conform to the pleadings and the verdict

2. WHETHER DEFENDANT BIRNBAUM HAD A RIGHT TO A COURT-APPOINTED AUDITOR
Due process demanded appointment of an auditor per RCP Rule 172 to address the issue of fraud

3. WHETHER THE "RICO RELIEF" SUMMARY JUDGMENT IS ALSO UNLAWFUL
I have the Right to show my best defense, claim, and evidence. The Rules of Procedure and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

4. WHETHER THE $62,255.00 "SANCTION" JUDGMENT IS ALSO UNLAWFUL
It is a criminal punishment without due process for having made a civil RICO claim

5. WHETHER THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE
For not abiding by statutory law, the Rules of Procedure, and the mandates of the Supreme Court

6. WHETHER THERE WAS FRAUD, FRAUD, AND MORE FRAUD
FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

7. WHETHER DUE PROCESS DEMANDS A NEW TRIAL
I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

8. RULE 296 PRECLUDES FINDINGS OF FACT AND CONCLUSIONS OF LAW IN A JURY TRIAL (NEW APPELLEE'S ISSUE)[7]

[7] I take this almost as a **response** to the CONCLUSION in my Brief, where I was pointing out my ***Notice Of Past Due Findings Of Fact And Conclusions Of Law.*** Note footnote 4, Appellees' page 25:
"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)"*
NOTE: If there was indeed such request, I am not aware of it. NOTHING HAS BEEN FILED OR SERVED.

STATEMENT OF FACTS

In response to Fleming's statements in Appellees' Brief

Birnbaum stands by the "Statement of Facts" in his Appellant's Brief. In reply to Frank C. Fleming's "Statement of Facts", Birnbaum shows the following:

(1) Fleming's replies don't fit the Issues.

(2) Fleming lies.

Fleming's pattern is to make up an issue, copy something out of a law-book that sounds good, BUT IT DOES NOT FIT.

"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" (page 10, line 1)
Good sounding opinion, but let us await Fleming's "evidence".

"The jury's verdict obviously reflected that the jury totally rejected Birnbaum's version of events.
Good sounding opinion and position. But Judge Banner NEVER ALLOWED the jury to SEE Birnbaum's "version of events" (a finding by an AUDITOR or his civil RICO defense and cross-claim) See issues in Birnbaum's Brief and this Reply Brief.

The Law Office, D. Westfall, and Podvin, challenge all factual statements made in Birnbaum's brief as provided in T.R.A.P.38.1(f) (page 10, next)
Sounds good. But does not have much "specificity" or "particularity".

"Birnbaum retained the Law Office to represent him in an ongoing legal matter that he had initiated pro se (CR 365-67)
ANOTHER LIE and **NOT THE WHOLE TRUTH**. Good sounding statement, but it is a **LIE.** Birnbaum did NOT "retain the Law Office", but G. David Westfall. The "Law Office" was the FRONT "enterprise" for G. David Westfall's "pattern of racketeering activity".

Honorable Judges, look just past Fleming's citation at CR 365-67, and read the short excerpt from ***Deposition of G. David Westfall*** (CR 368-375). It shows that the "Law Office" DID NOT EVEN HAVE AN ACCOUNTING SYSTEM, and that everything about "The Law Office" was a **FRAUD**. Then I get sued by David Westfall, in the name of his "Law Office", claiming an unpaid OPEN ACCOUT! And Fleming knew it all, for he "officed" right there out of Westfall's "Law Office."

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)"

ANOTHER LIE and **NOT THE WHOLE TRUTH**. Just LOOK at the cited page 14. Birnbaum there stated exactly why it was NOT an "open account" (as the "Law Office" was suing), but a $20,000 NON-REFUNDABLE PREPAID RETAINER AGREEMENT.

Just LOOK at the cited page 14: ***"[Westfall] reserved the right to terminate the attorney-client relationship for non-payment of fees or cost."*** This is NOT an OPEN ACCOUNT at all, NOR A CONTRACT, and I show the details right there, with references to the RECORD. That it was for the purpose *"of insuring our availability in your matter"*.[8]

*"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** (followed by Fleming's footnote 3)*

ANOTHER LIE. There is not a word about **"excused"** anywhere on or near Birnbaum's page 14. I only raised the "excused" issue when Fleming fraudulently brought jury issues sounding in BREACH OF CONTRACT (which he had of

[8] *Letter agreement between Westfall and Birnbaum* 5-5-99 (Civil Appendix 15, also various other places)

course not even pleaded. See issues in my Appellant's Brief, and in this Reply Brief)

*Fleming footnote 3, bottom of his page 10): "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)"*
ANOTHER LIE. Just LOOK at Appellant's Brief page 15:

"The defendants included **three state judges**, **one ex state judge**, a **district attorney**, **two attorneys**, the **court coordinator** and a **court reporter**. The suit (No. 3-99-CV0696-R) was dismissed on September 20, 1999 by judgment under Federal Rule 12(b)(6) ("failure to state a claim"), by reason of absolute and derived judicial immunity, i.e. even if all things were as stated, it would still "fail to state a claim".

The suit had **no worth**. Also there were "only" ten (10) defendants, and all were claiming either absolute or derived judicial immunity.

*"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." (Fleming p. 10)*

"Birnbaum's third-party claims against D. Westfall, C. Westfall, and Podvin were clearly 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, the attorney's wife, or the attorney's daughter ever caused any harm to Birnbaum"*
MORE LIES. Birnbaum went into EXCRUTIATING DETAIL is his FOUR (4) responses to each of these parties motions for summary judgement, designating specific "material of record" as to each "issue of fact" in his civil RICO cross and third party claims, and supplied an EXCRUTIATINGLY DETAILED Appendix with his responses to the motions for summary judgment.

Just LOOK at the Appendix to my responses to the motions for summary Judgment against me, (CR 213-228). It has Affidavits in there that make ONE'S

HAIR STAND UP! There were SEVENTEEN (17) VOLUMES (See CR 213) of Exhibit, including HAIR RAISING depositions, and specifically Exhibit 9 (CR 215, "Regarding G. David Westfall Conduct"):

Judge Banner kept me from showing all this stuff to the jury by granting SUMMARY JUDGEMENT on my civil RICO claim, and even when I tried to show just some of the pieces to the jury, he would not let me. See details in my Appellant's Brief.

*"For this reason **["failure to bring any evidence"]**, 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, RR6-7)*
ANOTHER LIE: Christina Westfall was the **book-keeper** for G. David Westfall, and Podvin, FRONTING as the OWNER of the "Law Office", would for TEN YEARS in a row appoint G. David Westfall as the ONLY "director". All in my responses to the four (4) motions for summary judgment against my civil RICO claim. EXCRUTIATINGLY DETAILED. Also see CR 282-316, CR 213-228.

Again, Judge Banner kept me from showing this, MY BEST EVIDENCE, and BEST CAUSE, to the jury.

"For this reason, … …"
The sanctions Order gives **NO REASONS** as required by RCP Rule 13. More details in my Brief and this Reply Brief. It is also patently UNLAWFUL because it is not "coercive", but PUNITIVE. Details in my Brief. Also note Footnote 4, Appellees' page 25, Appellees now suddenly wanting ***Findings***!

And since Fleming gave his "reason" as to why Judge Banner imposed sanctions, I will give mine:

Judge Banner just did not like me because I brought a civil RICO defense and claim, claiming, of all things, RACKETEERING by an attorney regarding that HOLIEST of HOLIES, **"legal fees"**.

Also, PLEASE NOTE that in footnote 2, page 8, Fleming states ***"D. Westfall died in May 2002 after the entry of the Final Judgment and before the hearing on the Motion for Sanctions"***. How Fleming can speak for a dead man and a dead "Law Office" is beyond me. Also as to how he can keep on lying for them in this Appeals Court.

In short, (1) Fleming's replies don't fit the Issues, and (2) Fleming lies.

SUMMARY OF THE ARGUMENT

Appellant Birnbaum makes the following replies to the statements by Frank C. Fleming in Appellees' Brief:

Appellees want this Court to believe that *"Birnbaum seeks an appellate reversal based upon several cleverly concealed arguments that are all essentially based upon a **lack of evidence standard** review."* (Appellee's page 12, Summary of the Argument, first sentence)

Appellees also contend that *"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"* (page 12, line 5) and that thereby somehow *"when Birnbaum only requested a partial reporter's record, Birnbaum then waived his right to prevail on any appellate issue that attacked the legal and/or factual sufficiency of the evidence presented at trial"*. (page 12, line 12)

Also, that *"Birnbaum cannot prevail on appeal without a complete transcript from the trial proceeding that Birnbaum failed to bring forward."* (page 13, line 3)

NOT TRUE. Birnbaum is **not** attacking any "legal and/or factual sufficiency of the evidence AT ALL. As detailed in the issues, what Birnbaum is appealing is upon the general **LAWLESSNESS** of the whole proceedings that one can see from

just the Clerk's record provided: That the judgment is **UNLAWFUL** because it "does not conform to the pleadings and the verdict', that the "Sanction judgment" is **UNLAWFUL** because it flies in the face this very Fifth Appeals Court ruling in *Westfall v. King Ranch* (Same "The Westfalls"), the Rules of procedure, and Constitutional Rights as clearly established by the U.S. Supreme Court, etc.

Furthermore, if I only request the court reporter to provide the "argument" portion of the proceeding, it is clear that my issue is upon opposing council's ARGUMENT. Also, in my ***Notice of Appeal*** (Record 436), and ***First Amended Notice of Appeal Regarding The $59,280.66 Judgment*** (record 490), I notified Appellants as to my issues. More notices as to the issues were in ***Notice of Appeal Regarding the $62,255 [Second] Judgment*** (record 490), ***Motion for New Trial*** (record 444), and ***Supplement To Motion For New Trial*** (record 459), and specifically **"Point 10, incurable jury argument"**.

Also ***Notice of Official Oppression and Unlawful Judgments Against Me*** (record 497), which includes a copy of my complaint to the **Criminal District attorney** of Van Zandt County.

I made it clear as to my appeals issues : RAMPANT LAWLESSNES as shown by the Clerk's record provided, and ***incurable jury argument*** as shown by the Court Reporter's record of Appellees' argument (Frank C. Fleming).

IF AN AMERICAN CAN BE DEPRIVED OF HIS RIGHT TO APPEAL UPON THE ISSUE OF HAVING BEEN ROBBED OF HIS RIGHT TO DUE PROCESS AND TO BE FREE FROM LAWLESSNESS IN A COURT OF LAW, SIMPLY BECAUSE HE ONLY FILED A *"PARTIAL REPORTER'S RECORD"*, GOD HELP US ALL.

ARGUMENT

NOTE: The below assumes that the reader has (Appellee **Plaintiff Law Office's**) pleadings and the Court's Charge before him/her. Also Appellant's and Appellee's BRIEFS as to the issues. Also re-read ***"Fraud in submission of jury issues"***, Appellant's Brief pages 18-20.

[Appellant's] ISSUE 1
WHETHER THE $59,280.66 JUDGMENT IS UNLAWFUL

Birnbaum's Contention:

The $59,280.66 judgment is unlawful. It does not conform to the pleadings and the verdict. The jury answers are irrelevant). See Brief.

Fleming's "Reply to Issue 1":

"The 59,280.66 judgment was lawful because it did conform to the pleadings and to the verdict."

Fleming: *In reviewing the factual sufficiency of the evidence, an appellate court considers all the evidence in the record. Ortiz v. Jones, Burnett " (Appellees page 15, Issue 1, par 1, line 4)*

Birnbaum's issue is UNLAWFULNESS, not "factual sufficiency"

Fleming: *"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" (next sentence, Appellees page 15, Issue 1, par 1, line 6)*

Birnbaum is not arguing upon the "finding" or "weight and preponderance of the evidence", but as to the UNLAWFULNESS of the **judgment** in light of the PLEADINGS and the VERDICT (including **jury issues**)

Fleming: *"Appellate courts are mandated to interpret jury findings so as to hold up the trial court judgment whenever possible. Rice Food Market v. etc" (Appellees page 15, last line)*

Appellate courts are mandated to strike down UNLAWFUL judgments that do not conform to the pleadings and the verdict.

Fleming: *"The plaintiff pleaded and proved the existence of a contract.." Appellees page 16, line 14 from top of page.*

NOT TRUE. Plaintiff pleaded UNPAID OPEN ACCOUNT.

Fleming: *"The jury found the defendant to be in breach of contract". Appellees page 16, line 14 from top.*

NO! The judge put questions to the jury that presumed a *contract*, that presumed Birnbaum had *failed to abide*, and that presumed Birnbaum was not *excused* by Plaintiff's prior breach. (THREE ELEMENTS of a breach of contract, and at a JURY trial, the judge would not let the JURY decide!)

Also re-read "Fraud in submission of jury issues, Appellant's brief 18-20.

Fleming: *"The Law Office filed its Original Petition and Amended Petition as a **suit on a sworn account**". Appellees page 18, line 2 from top.*

This is directly CONTRARY to what Fleming said just above (breach of contract)!

Fleming: *"A suit on a sworn account is merely a specific type of a breach of contract lawsuit". Appellees page 18, line 5 from top.*

NO, a VERY "specific type" of suit that requires the element of "sale and delivery", which Fleming fraudulently pleaded, but certainly did not prove in the jury verdict. Also, a prepaid and non-refundable $20,000 attorney retainer agreement, for "insuring our availability in your matter", certainly does not even contemplate "SALE AND DELIVERY", nor a CONTRACT!)

Fleming: *"The fact that the Court's charge used language "damages" does not mean that the amount owed was determined under any other theory other than a contract and/or sworn account ….." Appellees page 18, line 8 from top.*

NO. The fact that the Court's charge did not use the word "owed", nor any question or instructions as to **"open account"**, nor **sale** or **delivery**, means that the jury's answers do NOT relate to "owed", nor "open account".

There was **no finding by the jury** regarding Plaintiff's claim[9] of the state of the accounts, i.e. how much is **owed:**

The elements of an action on account are: (1) that there was a **sale** and **delivery**, (2) that the amount alleged on the account is just, i.e., the prices charged are consistent with an agreement, or in the absence of agreement, are usual, customary and reasonable prices for the things **sold** and **delivered**; and (3) that the amount alleged is unpaid. See Maintain, Inc. v. Maxson-Mahoney-Turner, Inc., 698 S.W.2d 469, 471 (Tex. App.--Corpus Christi 1985, writ ref'd n.r.e.). *Milligan v. R&S Mechanical, NO. 05-87-01341-CV, Court of Appeals, Fifth District of Texas, Aug. 11, 1998*.

The $59,280.66 judgment does not conform to the pleadings and the verdict.

[Appellant's] ISSUE 2
WHETHER DEFENDANT BIRNBAUM HAD A RIGHT TO A COURT-APPOINTED AUDITOR

Birnbaum's Contention:

Defendant Birnbaum had a right to a court-appointed auditor. And particularly so in light of his claim of FRAUD, DECEPTIVE TRADE PRACTICES, and RACKETEERING by THREE persons, and his call for the U.S. JUSTICE DEPARTMENT, motion for RECUSAL of the judge, and petition for writ of MANDAMUS to make the judge abide by the LAW!

Fleming's "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"

*"[S]ufficient **evidence** in the trial court's record to support the court's **non-decision** …… ". (in the"Reply to Issue 2, just above)*

What sort of mumbo-jumbo is *"non-decision"*? How can evidence support a *"non-decision"*? And was this not to be a jury trial? So what entitles the judge to weigh anything, including determining if it was *"sufficient"* enough?

Fleming: *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 Rule172. An auditor should only be appointed in a suit involving **numerous or unusual matters of account**. Whitaker v. Bledsloe,*

[9] Plaintiff's petitions (Appendix 18, Record 16), also (Appendix 20, Record 229)

34 Tex. 401, (1871) … … Villiers v. Republic Financial Services, Inc., 602 S.W.2d 566, etc. (Appellees page 18, 2nd line from bottom, continuing into page 19)

Villiers uses the phrase "complicated nature of this suit as it **appeared from the pleadings before trial**, and the **time and difficulty** involved in resolving the disputed accounts in a jury trial".

My claim of FRAUD, DECEPTIVE TRADE PRACTICES, and a PATTERN OF RACKETEERING ACTIVITY by THREE (3) persons, should surely have put it in the ***"unusual matters of account"*** category.

So should my civil RICO claim on its own. Any civil RICO cause is a complaint of CRIMES (injury "by reason of " violation of the RICO LAW), and my complaint of CRIMES was for ABUSE OF THE JUDICIAL PROCESS, by a "pattern of racketeering activity", which required an AUDITOR (and a CRIMINAL DISTRICT ATTORNEY!)

Fleming: *"Birnbaum waived appellate review by failing to warn the trial judge of any continuing objection he had to starting trial." (Appellees page 19, 2nd line from bottom)*

NOT SO. Birnbaum moved for recusal of Judge Banner for failing to abide by "the Rules of Procedure, Statutory Law, and the Mandates of the Supreme Court".

Birnbaum next moved for Writ of Mandamus upon Judge Banner on the same issues, to be ultimately "sanctioned" $62,000 for having made a civil RICO defense and claim TWO YEARS EARLIER! Birnbaum "got the attention" of Judge Banner, but instead of doing the RIGHT thing, Judge Banner PUNISHED Birnbaum. (See Appellant's Brief, and especially "Conclusion", starting page 40 of appellants original Brief, and repeated in its entirety in this Reply Brief)

IF THERE EVER WAS A CASE that REQUIRED appointment of an AUDITOR in the INTEREST OF JUSTICE, and to preserve precious judicial resources, THIS CASE WAS IT! (read RCP Rule 172)

Defendant Birnbaum had a Right to a court-appointed auditor under the pleadings and circumstances of this case.

[Appellant's] ISSUE 3
WHETHER THE "RICO RELIEF" SUMMARY JUDGMENT IS ALSO UNLAWFUL

Birnbaum's Contention:

The "RICO Relief" Summary Judgment Is Also Unlawful. I have the Right to show my best defense, claim, and evidence. The Rules of Procedure and the law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims. See Appellant's Brief, Issue 3.

Fleming's "Reply to Issue 3":

"There Was Sufficient Evidence To Support The Trial Court's Summary Judgment Dismissal Of The Defendant's Civil Rico Claims."

"Sufficient evidence to support …… summary judgment dismissal …"

What sort of MUMBO-JUMBO is this? Is not dismissal by "summary judgment" supposed to be upon lack of evidence to an ELEMENT of a cause of action? And is not the burden on the Movant?

Fleming: *"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 tha 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

WHAT MUMBO-JUMBO. These are **not elements**, but "**issues of fact**" as to the RICO violation, such "issues of fact" (upon proper instructions) to be

considered by the JURY in saying YES or NO regarding the RICO violation ("essential element" number 1, just below).

The "elements" of a civil RICO action are: (as stated in Birnbaum's brief on page 30)

> "There are **three essential elements** in a private action under this chapter: 1) a violation of this chapter; 2) direct injury to plaintiffs from such a violation; and 3) damages sustained by plaintiffs." *Wilcox Development Co. v. First Interstate Bank of Oregon, N.A., D.C.Or.1983, 97 F.R.D. 440.*

Note: Fleming does not even state the "issues of fact" correctly. For correct "issues of fact", see Appellant Birnbaum's FOUR (4) responses[10] to each of Appellee's motions for summary judgment, DESIGNATING specific evidence to EACH and EVERY "issue of fact" required to be found per "pattern jury instructions for civil RICO".

Fleming: *"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, 1260*

This is of course a jury issue as to whether Birnbaum was injured "by reason" of their violation of 18 U.S.C. $ 1962 ("RICO"):

> "**Material issues of genuine fact** existed with respect to existence of an **enterprise** as defined by this chapter, **association** of defendant printing company with such enterprise, **association** of the alleged enterprise with organized criminal activity, the **intent** and **knowledge** of defendant concerning the **underlying predicate acts** and the existence of **injury** caused by alleged violation of this chapter, **precluding summary judgment** in favor of defendant in action alleging the kickback scheme. *Estee Lauder, Inc. v. Harco Graphics, Inc., D.C.N.Y.1983, 558 F.Supp.83.* (additional EMPHASIS added)
> (See Birnbaum Brief, pages 28-31)

The "RICO Relief" Summary Judgment Is Also Unlawful. I have the Right to show my best defense, claim, and evidence. The Rules and the Law do not allow a judge to weigh the evidence to grant summary judgment on civil RICO claims.

[Appellant's] ISSUE 4
WHETHER THE $62,255.00 "SANCTION" JUDGMENT IS ALSO UNLAWFUL

[10] Record 129,143, 165, 189, 213

Birnbaum's contention:
It is a criminal punishment without due process
for having made a civil RICO claim

Fleming's "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."

Fleming keeps wanting to talk about "discretion". My ISSUE is that it is UNLAWFUL, because it is not **"coercive"**, but **PUNITIVE**, unconditionally imposed on me. That I do not "have the keys to my own release", that it is for a COMPLETED ACT, TWO YEARS AGO! See my Appeal Brief, which is VERY SPECIFIC.

Also note that I was PUNISHED for speaking out on RACKETEERING, an "issue of great public importance", and just because I did it with a civil RICO counter and cross-claim, it is still FIRST AMENDMENT SPEECH, and I WAS PUNISHED FOR IT!

JUDGE BANNER EVEN STATED THAT I was being punished for my civil RICO claim, although Judge Banner COMPLETELY FAILED to put into the SANCTION ORDER[11] (per RCP Rule 13) what I was supposed to have done wrong! See my Brief, Section 3, pages 20-22).

Also this Honorable Fifth Appeals Court itself ruled in *Westfall Family Farms, Inc. v. King Ranch*, Inc. 852 S.W.2d 857 (1993) that a court could not impose severe sanctions without having first tried **and imposed** lesser sanctions. (Same "The Westfalls", ***"King Ranch alleges that for almost eighteen months the Westfalls engaged in a campaign of delay, deceit, and disobedience to prevent King Ranch from getting the requested discovery"***). See my Brief.

[11] Appendix 11, not in the Clerk's record

Fleming: *"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."*

NOT SO. Birnbaum quotes the U.S. Supreme Court in *United Mine Workers v. Bagwell*, the Texas Court of Criminal Appeals, RCP Rule 13, this Fifth Appeals Court in *Westfall*, etc.

Fleming: *"By failing to provide a complete record, Birnbaum has again waived his appellate argument" page 23 near top.*

NOT SO. One does not WAIVE one's Constitutional Rights to be free of **UNLAWFUL** SANCTIONS, by not providing a "complete record". I do not need a "complete record" to show UNLAWFUL. All one has to look at is the ***Sanction Order*** and the transcript of the last hearing, all provided to this Appeals Court.

This sanction is patently UNLAWFUL because it is not a civil sanction at all, but a CRIMINAL sanction, imposed on me without full due criminal process, including a finding beyond a reasonable doubt:

> Whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. **U.S. Supreme Court** in *United Mine Workers v. Bagwell, 512 U.S. 821 (1994)*

> The distinction between civil and criminal contempt has been explained as follows: The purpose of civil contempt is remedial and **coercive** in nature. A judgment of civil contempt exerts the judicial authority of the court to persuade the contemnor to obey some order of the court where such obedience will benefit an opposing litigant. Imprisonment is conditional upon obedience and therefore the civil contemnor carries the keys of (his) prison in (his) own pocket. In other words, it is civil contempt when one may procure his release by compliance with the provisions of the order of the court. Criminal contempt on the other hand is punitive in nature. The sentence is not conditioned upon some promise of future performance because the contemnor is being **punished** for some **completed act** which **affronted** the dignity and authority of the court. The **Texas Court of Criminal Appeals**, No. 73,986 (June 5, 2002)

The $62,255.00 "sanction" is an UNLAWFUL criminal punishment without due process for having made a civil RICO counter claim after **being sued**.

HONORABLE APPEALS COURT, SOMETHING IS HORRIBLLY WRONG IN THE TRIAL COURT! Also let this **UNLAWFUL** sanction serve as a window to the **UNLAWFUL** nature of the entire proceeding.

[Appellant's] ISSUE 5:
WHETHER THE TRIAL JUDGE SHOULD HAVE BEEN RECUSED FROM THE CASE

Birnbaum's contention:

The Trial Judge Should Have Been Recused From The Case. For not abiding by statutory law, the Rules of Procedure, and the mandates of the Supreme Court.

Fleming's "Reply to Issue 5":

"The Trial Judge Did Not Abuse His Discretion In Refusing To Recuse Himself."

My issue is not whether he *"abused his discretion"*, but whether he should have been removed from the case for having shown that he cannot or does not want to abide by the rules of procedure, statutory law, nor the mandates of the Supreme Court.

Fleming: *"If there had been any legitimate grounds for the advancement of Birnbaum's argument, then Judge Ron Chapman would have considered and weighed that evidence at the hearing on Judge Banner's recusal"*

ANSWER: By this time Fleming may be wishing that Judge Chapman had gotten Judge Banner off this case. Anyhow, that was before Tulio, Texas, and a whole lot of hanky-panky going on there, and Judge Ron Chapman letting free a whole bunch of wrongly convicted prisoners. And perhaps Judge Chapman hearing my complaint about Judge Banner made Judge Chapman see things in Tulio as

they really were. Anyhow, if it had not been for Judge Banner, I would not be before this Appeals Court in this manner.

Fleming: *"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" page 23*

ANSWER: Birnbaum gave Judge Banner a full "basis" with all the stuff I put in the motion for recusal, and in my petition for writ of mandate to make him obey the law. I surely gave him a "basis".

Judge Paul Banner should have been recused from my case, for having demonstrated, before the trial, that he would or could not abide by statutory law, the Rules of Procedure, and the mandates of the Supreme Court.

[Appellant's] ISSUE 6
WHETHER THERE WAS FRAUD, FRAUD, AND MORE FRAUD

Birnbaum's contention:
There was fraud, fraud, and more fraud. FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

Fleming's "Reply to Issue 6":
"The trial court did not abuse its discretion by entering judgment on the jury's findings."

Birnbaum Reply:

My Issue 6 is not about *"abuse of discretion"*, but about FRAUD.

Fleming: *"Birnbaum failed to refer to any matter in the record on appeal that supported Appellant's argument for Appellant's Issue 6".*

Honorable Appeals Court, go look for yourself at my Issue 6. It is full of footnotes pointing to the record.

Fleming: *"Again, Birnbaum merely uses his opinions as argument and fails to support those opinions with any evidence from the record to support them or <u>any citation to authority to validate them</u>.*

Honorable Appeals Court, go look for yourself at my Issue 6. It is full of "citations to authority to validate them". (RCP Rule 185, Rule 172, footnotes to my various documents)

There was fraud, fraud, and more fraud. FRAUD from start to finish, intrinsic and extrinsic, turning into retaliation by official oppression

[Appellant] ISSUE 7
<u>WHETHER DUE PROCESS DEMANDS A NEW TRIAL</u>

<u>Birnbaum's contention</u>:

Due process demands a new trial. I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

<u>Fleming's "Reply to issue 7"</u>:

"The <u>trial court's summary judgment rulings</u> on the civil RICO claims and the lack of evidence ruling, did not violate Birnbaum's right of due process."

<u>Birnbaum reply to Fleming's Brief</u>:

Fleming is NONRESPONSIVE. I am talking about TEN (10) POINTS as to a NEW TRIAL, <u>not</u> the *"trial court's summary judgment <u>rulings</u>"*. Also:

Fleming: *"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, ……etc."*

Look for yourself, Honorable Appeals Judges. I have ten (10) points in my Appellant's Brief, quoted there for Fleming and everyone to see, coming directly out of my ***Motion for New Trial*** (properly cited and **<u>in the record</u>**):

THE TEN (10) POINTS in my ***Motion for New Trial*** (as listed in my <u>Issue 7</u>):

Point 1: For not appointing an auditor as required by RCP Rule 172.

Point 2: For not making Plaintiff abide by the rules of discovery.

Point 3: For granting summary judgment on my civil RICO claims and cross-claims.

Point 4: For allowing Plaintiff to submit "surprise" jury issues not in its pleadings.

Point 5: For not allowing submission to the jury of my "excused" issue

Point 6: For not allowing submission to the jury of my "no worth" issue

Point 7: For jury misconduct by the judge himself.

Point 8: For not allowing my evidence of DTPA "false, misleading, or deceptive act or practice".

Point 9: For absurdly excessive "legal fee" damages.

Point 10: For incurable jury argument:.

Fleming's incurable jury argument
lying and just making things up in closing argument:

- *"When you're analyzing what the truth is, just like those judges in that 12(b)(6) motion had to analyze what the truth is …. …".*

Upon a federal 12(b)(6) motion judges do not *"analyze what the truth is"*, and Fleming knows it. What they do is to take everything in the claim to be true, and it still did not "state a claim" because of judicial immunity. The suit had no worth!

- *"It didn't turn out to be true, as far as what the federal magistrate and the federal judge thought."*

As shown above, Westfall's civil RICO suit (the one he was trying to get $18,121.10 more "legal fees" on top of the $20,000 up front prepayment) was dismissed on 12(b)(6) judicial immunity grounds, not because it was not true, as Fleming was telling the jury. Judges are immune from suit. Westfall's "legal services" had NO WORTH, AND FLEMING KNEW IT.

- *"And Mr. Collins got his message. He changed …. …. He changed his lawsuit".*

Fleming is saying I should have let Mr. Westfall "change" my lawsuit (by dropping judges) just like he "changed" Collins'. Well, Westfall did not drop all the judges, and got sanctioned $2500 for being the *"cornucopia of evil that is plaguing the judicial system*" even after he *"changed"* it. Fleming is hiding from the jury that Westfall's two civil RICO suits (mine was one) HAD NO WORTH, and he knew it, and is hiding all of this from the jury. (Clerk's record 300-306).

- *"But Mr. Birnbaum has alleged a lot of conspiracies all throughout his 15 years of living here in Van Zandt County. Not one of them has come true yet."*
  (Fleming's last statements before jury deliberations)

Not true, and there was no testimony to this effect. Fleming just keeps making up more "facts".

- **"A Beautiful Mind"**

"I have to admit I haven't seen it yet, but I feel like I have, there's been so much talk about it, a great movie out, **"A Beautiful Mind."**. I imagine some of y'all have seen it.

"You know, some people have a **beautiful mind** to do certain things. Mr. Birnbaum has a **beautiful mind**. And, boy, when you go into integrated circuits and you go into electronics, he has **a beautiful mind**. And he came to Mr. Westfall and convinced Mr. Westfall that he had a **beautiful mind**, and "I know all about this corruption down here in Van Zandt County, and I know how to do a lot of my legal research. And with my **beautiful mind** and your legal abilities, we're going to get this case going and we're going to make a million dollars, Mr. Collins [should be Mr. Birnbaum] thought, "using my **beautiful mind**.

"Well, you know sometimes that **beautiful mind** doesn't work as good in other areas as it does in some areas.

"You know, they also say that **a mind is a terrible thing to waste**. And I would argue with you that Mr. Birnbaum has spent a whole lot of time wasting his **beautiful mind** in courtrooms in Van Zandt County, in Tyler, in Dallas County, in federal court, and a lot of other places."

"I think it's just like Mr. Westfall said. If Mr. Birnbaum thinks something, if **he conceives of it in his head**, he's already jumped to the conclusion that it's true.

"But Mr. Birnbaum has alleged **a lot of conspiracies** all throughout his 15 years of living here in Van Zandt County. **Not one of them has proved true yet**. I think you need to send a message to Mr. Birnbaum, "Take your **beautiful mind** and quit putting it to waste in the courtroom. Pay your legal fees, and go on about your life."

* * * * * * *

Judges permit lawyers to lie. Their objective in lying is to make their lies believable to a jury. However, **NO honest**, **honorable judge** would ever permit a

lawyer to tell a jury that the person his client had filed a **civil suit against** was a **child molester**, **rapist** or **serial killer**.

Fleming cleverly told the jury what could have been perceived as a compliment to a non-movie-goer. That jury had seen the award winning movie, **"A Beautiful Mind"**, and knew it was not about the scientific accomplishments of John Nash. They knew it was about a man who conceived things in his head that were not true, but believed them - a **paranoid schizophrenic**.

Fleming told the jury, " think it's just like Mr. Westfall said. If Mr. Birnbaum thinks something, if he conceives of it in his head, he's already jumped to the conclusion that it's true."

The jury heard nothing else except that Mr. Birnbaum was a paranoid schizophrenic. And the Judge knew it.

Due process demands a new trial. I am entitled to appointment of an auditor, enforcement of the rules of discovery, and my best defense, claim, and evidence under civil RICO.

[Apellee] ISSUE 8
"RULE 296 PRECLUDES FINDINGS OF FACT AND CONCLUSIONS OF LAW IN A JURY TRIAL"

Appellant Birnbaum does not know what to make of this issue or contention brought by Appellees, particularly in light of Appellees statement that ***"Appellees respectfully request this Court deny this issue as presented by the Appellees"***.[12]

[12] I take this almost as a **response** to the CONCLUSION in my Brief, where I was pointing out my ***Notice Of Past Due Findings Of Fact And Conclusions Of Law.*** Note footnote 4, Appellees' page 25:
"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

Appellant Birnbaum believes that what Appellees are CONCERNED about (and should be concerned about, as should this Appeals Court), were the matters in Birnbaums CONCLUSION, particularly the direct quote Birnbaum made from his ***Notice Of Past Due Findings Of Fact And Conclusions Of Law.***

Therefore Birnbaum will close with exactly the same CONCLUSION, including the exact same direct quote out of his ***Notice Of Past Due Findings Of Fact And Conclusions Of Law***, except that the quote, this time, is in BOLDER TYPE**.**

CONCLUSION

A pattern of flagrant abuse of the judicial system

The failure of the trial judge to appoint an auditor under RCP Rule 172, together with me not being allowed to show my best evidence under civil RICO because of "RICO relief" summary judgment, together with wrong jury questions, resulted in an unlawful $59,280.66 judgment. I was not allowed to show the Westfalls' prior "pattern of racketeering activity", to show that their alleged "collection" suit was nothing but fraud stemming from more fraud in their involuntary bankruptcy proceedings, and just another "predicate act" in their "pattern of racketeering activity", and that my damages flowed from that pattern.

The whole proceedings could of course have been nipped in the bud if the trial judge had appointed an auditor as he was required to do with a suit claiming an unpaid open account, with two diametrically opposed affidavits as to the "state of the accounts". And if the judge truly believed there was *"no basis in law"*, he could have dismissed my civil RICO pleadings two years ago, instead of letting the case drag on with the Westfalls running up legal fees.

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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)"*
NOTE: If there was indeed such request, I am not aware of it. NOTHING HAS BEEN FILED OR SERVED.

The following directly from my ***Notice Of Past Due Findings Of Fact And Conclusions Of Law***[13] pretty much sums up this issue (emphasis as in original):

"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:

1. 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?**

2. 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?**

(End of direct quote)

* * * * * * * *

As shown above, not only the two judgments, but the entire process was LAWLESS. If there is a problem that any judge has in complying with the objectives of civil RICO as interpreted by the Supreme Court of the United States ("private attorneys general")[14], he has the right to recuse himself. If there is a judge who is concerned about being the one opening up Pandora's box in Texas district courts with civil RICO, because the Texas Rules of Civil Procedure do not allow early dismissal by a rule such as federal rule 12(b)(6) for "failure to state a claim", let him recuse himself.

[13] Appendix 93, Record 492

[14] *Rotella v. Wood et al.* 528 U.S. 549 (2000)

But a trial judge does <u>not</u> have the right to take it out on me for following the Supreme Court's urging in *Rotella v. Wood* that victims injured "by reason of a violation" of RICO file civil RICO claims. I am entitled to a new trial by a judge who will abide by the law and the rules of procedure.

The same matter is of course pretty much summed up in Constitutional terms in the Prayer of my ***Motion to Reconsider the $62,885 "Frivolous Lawsuit" Sanctions Against Me***[15]**:**

> *"I am being punished for the sins of this entire proceeding. If, after reconsideration, this Court still feels that what I did was so sanctionable,* ***<u>please advise me as to other views I am also not allowed to voice, whether to this Court, on Appeal, or elsewhere, lest I unknowingly risk being subjected to further sanctions</u>"*** *[for being a whistle-blower*[16]*].*

<u>PRAYER</u>

So here we are, my asking this Appeals Court, on the same issue I pleaded in my motion to recuse the trial judge, i.e. that I was not being given DUE PROCESS.

I petition this Appeals Court to free me from the <u>TWO</u> unlawful judgments upon me, to <u>reverse</u> the unlawful "RICO relief" summary judgment, and to <u>remand</u> the case back to the trial court, with a recusal of Judge Paul Banner, and in the

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[15] CR 441, 443; also Civil Appendix 78, 80

[16] We are reminded from time to time about "whistle-blowers" in giant corporations, even in the FBI. But a civil RICO suit, by its very nature, is <u>also</u> a complaint of CRIMES. My complaint in this case is of course upon the abuse of the judicial system itself, presenting the issue of complaining TO the very institution one is complaining ABOUT. I have of course complained of CRIMES in this matter from the beginning, starting with the "beaver dam" scheme, to Judge Wallace, Van Zandt District Attorney Leslie Dixon, the Texas Bar, Dan Morales, then Texas Attorney General, Pat McDowell and James B. Zimmermann then at the First Administrative Judicial Region, the Commission on Judicial Conduct, Judge Zimmermann and Judge McDowell when they came to sit on the case, Judge Paul Banner, Dallas Federal Bankruptcy Judge Harold C. Abramson, where this whole fraudulent "collection suit" (source of the "legal fees") came out of a fraudulent bankruptcy proceeding, the FBI, the U.S. Attorneys Office, Judge Ron Chapman at a recusal hearing, Dallas Federal Judge Henry Buchmeyer and Magistrate Paul Stickney via the underlying federal RICO suit, various judges at the U.S. Fifth Court of Appeals, Petition for Writ of Certiari to the U.S. Supreme Court, to the U.S. Senate Judiciary Committee, and various others, ALL TO NO AVAIL. See my web site OpenJustice.US for details and copies of the documents .

alternative, very strong guidance as to due process in a civil RICO environment.

> 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 se Birnbaum for having made a civil racketeering ("civil RICO") defense against a fraudulent suit by lawyers.
>
> Assessing a [criminal] punishment of $62,255 for having made a civil RICO defense is NOT "OBJECTIVELY REASONABLE", and especially so in light of a finding that ***"Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim"***. Also see the judge's VERY LAST WORDS, below, and my replies thereto[17].
>
> Apparently even the Appellees are concerned. Their footnote 4, their 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)

NOTE: If there was indeed such request, I (Birnbaum) am not aware of it. **NO SUCH REQUEST BY APPELLEES HAS BEEN FILED OR SERVED**.

APPELLANT PETITIONS
FOR ORAL ARGUMENT
TO DETAIL THE FRAUD

Sincerely,

_____

Udo Birnbaum, *pro se*
540 VZ 2916
Eustace, Texas 75124
(903) 479-3929 phone and fax

[17] The trial judge NEVER made ***Findings of fact and conclusions of law***. I provide answers to maybe allow this Appeals Court to make an intelligent review of the trial judge's actions.

THE TRIAL JUDGE'S LAST WORDS IN THE CASE

(End of the 7-30-02 "frivolous lawsuit sanction" hearing. Brackets [] and emphasis added)[18]

THE COURT: Now, I am told that this Court should not engage in the discussion of why the Court did or didn't do something. **[1] The testimony, as I recall** before the jury, absolutely **was that Mr. Birnbaum** entered into a contract, which the signature is referred to, **agreed that he would owe some money** that -- for attorneys' fees.

Mr Westfall, on behalf of the P.C., testified to the same. **[2] There was no dispute as to the contract or its terms**. What was in dispute is whether or not Mr. Westfall's P.C. **[3] would have been entitled to any residual amount. That's what was submitted to the jury**. The jury resolved that issue and found a figure. And therefore, I think **[4] what was submitted to the jury is appropriate and subject to review**. And that's it. This Court stands in recess.

MR. FLEMING: Thank you, Your Honor. END OF HEARING

[1] NO! Mr. Birnbaum was claiming **fraud**, **deceptive trade practices**, and **racketeering**, and asked for appointment of an **AUDITOR** and that you call on the **U.S. Justice Department**!

[2] NO! Mr. Birnbaum claimed that Plaintiff **had breached the agreement** long ago, and you did not allow submission of Mr. Birnbaum's ***"excused"*** (because of plaintiff's prior breach) and also Mr. Birnbaum's ***"no worth"*** issues!

[3] NO! The question you put to the jury was **not regarding *"residual"*** (state of the account), but **breach of contract**, which **Plaintiff did not plead**!

[4] YES, "**what was submitted to the jury is appro priate and subject to review**".

Documents in the cause on file with the clerk. If the trial judge had duly appointed an AUDITOR per RCP Rule 172, it would have cut through all the fraud of "open account" for "legal services" *(*Westfall: *"We just simply keep time records")*[19], and the suit against me not expanded as it did!

[18] Civil Appendix 14, "page 8". Also provided by the court reporter, Barbara Roberson, re the 7-30-02 hearing

[19] Deposition of Westfall, Civil Appendix starting page 66, and specifically page 73 line 11 through page 74 line 8. Part of my summary judgment evidence. (Clerk's Record 213, Exhibit 9, 215 Exhibit 9A: "Account Work Sheet")

AFFIDAVIT

I, Udo Birnbaum, certify that all statements in this brief are made upon personal knowledge acquired under the described circumstances and upon diligent investigation of the facts and the law, and that my statements are true, correct, and complete to the best of my ability, and that the exhibits I have provided in the referenced Civil Appendix are true copies of the originals.

_____
Udo Birnbaum

STATE OF TEXAS

COUNTY OF VAN ZANDT

Before me, a notary public, on this day personally appeared Udo Birnbaum, known to me to be the person whose name is subscribed to the foregoing document, and being by me first duly sworn, declared that the statements therein contained are true and correct.

Given under my hand and seal of office this _____ day of July, 2003

_____
Notary in and for The State of Texas

Certificate of Service

This is to certify that on this the _____ day of July, 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.

_____
Udo Birnbaum