

No. 05-02-01683-CV

§

In the Court of Appeals
Fifth District of Texas at Dallas

UDO BIRNBAUM

Defendant, Counter/Cross-claimant, Third Party Plaintiff - Appellant

v.

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

G. DAVID WESTFALL

Cross/Third Party Defendant, Sanction Movant - Appellee

CHRISTINA WESTFALL

Cross/Third Party Defendant, Sanction Movant - Appellee

STEFANI PODVIN

Cross/Third Party Defendant, Sanction Movant - Appellee

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

MOTION FOR ORAL ARGUMENT
(there is no "waiver" of anything on my part)

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IDENTITY OF PARTIES AND COUNSEL

The Law Offices of G. David Westfall, P.C.¹
Plaintiff, Counter-defendant

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Udo Birnbaum³
Defendant, Counter-claimant,
Third party plaintiff

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G. David Westfall⁴
Third party defendant

Frank C. Fleming

Stefani Podvin⁵
Third party defendant

Frank C. Fleming

Christina Westfall⁶
Third party defendant

Frank C. Fleming

Hon. Paul Banner⁷, 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)

MOTION FOR ORAL ARGUMENT
(there is no "waiver" of anything on my part)

I.

This motion is prompted in part by the entry posted on this Appeals Court's web site about July 31, 2003. I read this posting as indicating that I had somehow supposedly "waived" my right to ORAL ARGUMENT:

EVENT INFORMATION for Case Number: 05-02-01683-CV

Cal	Date	Time	Reason	Or. Arg						
* SMIS	10/21/2003	03:00	<u>SUBMISSION</u>	N						
Date	Procdg	Event	By	Disp.	M#	Bk	/	Pg	O	E
* 07/29/2003		SUBMISSION	WAIVER					/N		

I have, of course, become sensitized to any issue regarding "waiver", particularly upon Appellees' lawyer trying to tell this Court in their Brief that "*by failing to list any points or issues to be presented on appeal, in his request for a partial [court] reporter's record, Birnbaum has waived any and all issues presented on appeal*". (Appellees' Brief page 2, etc)

II.

So I called the Clerk's Office and asked what that "waiver" entry on the web site meant. "It means that there will be no oral argument", I was told.

I stated that I was not a lawyer, but that I knew "waiver" did not mean that, that "waiver" means that someone is knowingly giving up some right, and that I surely was not intending to do that. She repeated what she had said, and so did I. I asked if she was a lawyer, and she said "no".

III.

So she connects me to a Claudia McCoy, who turned out to have been the person who had sent me the letter dated July 29, 2003, stating that "*The Court has determined that oral argument will not significantly aid, etc*", but it had nowhere used the word "waiver".

I asked her whether that October 21 date for "submission" was a "hearing", to which I received words but no answer. Phrasing it differently, I asked whether it was public, to be told it was not.

I likewise asked her what that "waiver" meant, to again be told the same thing, i.e. that there will be no oral argument. I likewise told her that I was not a lawyer, but that "waiver" had nothing to do with oral argument. And after likewise going around once again, she politely hinted that I was arguing with her.

"No, I am not trying to argue with you. I am trying to get before the judges to hear me". Then the discussion went to me having to file a motion, which this document is.

IV.

I did, however, ask about that letter to me, what that phrase "The Court has determined, etc." meant, as to what court document existed that made her write that phrase. I was informed that it was a "list of cases" which "the judges" had, listing the cases to which there was to be a letter like mine, I guess, and that it was just "internal". I asked her if she was a lawyer, and she told me "no".

V.

I, of course, have personal experience with lawyers (and the trial judge, in this case) not following the law, as outlined in my Appellant's Brief and my Reply

Brief, and much more detail of unlawfulness, denial of due process, and retaliation in the trial court than I was able to present under the format and limits of a paper-only appeal (My Appellant's Brief and Reply Brief).

VI.

In the underlying civil RICO case⁸ that is the basis of the supposed "legal fee" matter in this case, THREE judges in that case in the U.S. Fifth Circuit, miraculously EACH found an "adverse judgment" in a frivolous "beaver dam" case against me, when there was NO judgment at all, with NO ONE even claiming that there was. And EACH ONE of the THREE judges somehow "found" that the "nucleus of operative facts" in the civil racketeering case was the same as in the "beaver dam" case, and so "inextricably intertwined", that under the *Rooker-Feldman*⁹ doctrine the civil RICO suit was a "collateral attack against an adverse state court judgement" so as to preclude the Dallas Federal Court to have had subject matter jurisdiction over the civil RICO case in the first place.

Then they proceeded, EACH OF THE THREE JUDGES, to affirm the judgment of the Dallas Federal Court they had just found lacked jurisdiction!

I am convinced that NO JUDGE ever saw my case, not in the Dallas Federal Court¹⁰, nor the New Orleans Fifth¹¹, BUT ONLY SOME SINGLE CLERK!

⁸ Racketeering claims against state actors, including the elected district judge of the trial court and the "visiting judge" in the BEAVER DAM case.

⁹ Under the *Rooker-Feldman* claims preclusion doctrine, whereas civil RICO is statutory law, with completely different "nucleus of operative facts" (issues, parties, cause of action, damages, etc.)

In the BEAVER DAM case it was whether somebody was damaged by supposedly "my" beavers.

In the civil RICO case it was whether there was "racketeering" going on around the courthouse.

¹⁰ Northern District of Texas, Dallas Division, *Udo Birnbaum v. Richard L. Ray et al*, No. 3:99-CV-0696-R

¹¹ *Udo Birnbaum v. Richard Ray*, et al, U.S. Fifth Court of Appeals No. 99-11180. U.S. Supreme Court Petition for Writ of Certiorari No. 00-982, DENIED.

VII.

With such said as a background, I ask for judicial notice, that my Appeal in THIS court is NOT of the "garden variety" type. It is upon the issue of abuse of the judicial system itself upon me. That I was UNLAWFULLY punished (sanctioned) \$62,255, for the completed act of having made a civil RICO defense and cross-claim nearly TWO years earlier, a clearly completed act, followed by a punitive (not coercive) sanction, all without DUE PROCESS. And for speaking out, via my civil RICO claim, at the urging of no less than the U.S. Supreme Court:

"[A] Congressional objective [in enacting civil RICO with treble damages] of encouraging civil litigation not merely to compensate victims but also to turn them into private attorneys general, supplementing Government efforts by undertaking litigation in the public good." Rotella v. Wood et al., 528 U.S. 549 (2000)

PRAYER

WHEREAS, as an American, I ask to be allowed to detail these matters directly before the panel in this Appeal. I will not "waiver" ANY of my rights, including my Right to complain to a higher court, of LAWLESSNESS by a lower court.

The BEAVER DAM case against me was and still is frivolous, and I pray that I am being heard. This mindset I am complaining about does not have to become another "Watergate"¹².

¹² Or "**Beaver-gate**". It started with a frivolous beaver dam suit (Jones v. Birnbaum, 294th 95-63) on me. Then my being lured into a federal civil racketeering suit (Dallas Federal No. 3:99-CV-0696-R) upon, among others, the District Judge. Then this frivolous (294th 00-0619) "open account" for "legal fee" claim against me, with my civil RICO cross claim. Now also civil RICO suit (Birnbaum v. Fleming, 294th No. 03-00082) against the lawyer in this case, plus mandamus (Fifth Circuit at Dallas, No. 05-02-00937-CV), and civil RICO (Birnbaum v. Ray, 294th No. 03-0460) against the lawyer in the "beaver dam" scheme case. But it is past time to bring these matters to an end.

Note: **Beaver dam** case STILL UNRESOLVED. Filed 1995, verdict in 1998. Trial judge recused himself this July 9, 2003. Now waiting on assignment of a new judge.

My being suddenly "sanctioned" (punished) \$62,255 for having spoken out with my civil RICO claims, TWO YEARS EARLIER, and in my defense, is ludicrous at best.

Sincerely,

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

Certificate of Service

This is to certify that on this the _____ day of August, 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 this day been provided for Judge Paul Banner through Pam Kelly, Court Coordinator for the 294th District Court in Canton, Texas.

Udo Birnbaum