

**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 294<sup>th</sup> Judicial  
District Court of Van Zandt County, Texas  
The Honorable Paul Banner, "visiting judge"  
Trial cause no. 00-00619

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**APPELLANT'S MOTION TO HAVE THE TRIAL JUDGE  
PRODUCE FINDINGS AND CONCLUSIONS**  
And permit Appellant to respond thereto, including oral presentation  
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**UDO BIRNBAUM  
PRO SE  
540 VZ CR 2916  
Eustace, TX 75124  
(903) 479-3929**

## IDENTITY OF PARTIES AND COUNSEL

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

Frank C. Fleming<sup>2</sup>  
PMB 305, 6611 Hillcrest Ave.  
Dallas, Texas 75205-1301  
(214) 373-1234  
(214) 373-3232 (fax)

Udo Birnbaum<sup>3</sup>  
Defendant, Counter-claimant,  
Third party plaintiff

Udo Birnbaum, *pro se*  
540 VZ 2916  
Eustace, Texas 75124  
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G. David Westfall<sup>4</sup>  
Third party defendant

Frank C. Fleming

Stefani Podvin<sup>5</sup>  
Third party defendant

Frank C. Fleming

Christina Westfall<sup>6</sup>  
Third party defendant

Frank C. Fleming

Hon. Paul Banner<sup>7</sup>, Trial judge

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<sup>1</sup> 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".

<sup>2</sup> 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".

<sup>3</sup> 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)

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

<sup>5</sup> Attorney daughter of G. David Westfall, and OWNER of the "Law Office" (at least on paper).

<sup>6</sup> Wife of G. David Westfall and long time BOOKKEEPER at the "Law Office"

<sup>7</sup> "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 MOTION TO HAVE THE TRIAL JUDGE  
PRODUCE FINDINGS AND CONCLUSIONS**

And permit Appellant to respond thereto, including oral presentation

**PLAINTIFF The Law Offices of G. David Westfall, P.C.** ("Law Office") claimed an UNPAID OPEN ACCOUNT<sup>8</sup> for "legal services" in the amount of \$18,121.10 and pleaded no other cause of action.

**DEFENDANT Udo Birnbaum** ("Birnbaum") answered by denying such alleged "open account" under oath, asserted defenses of FRAUD, counter-claimed under the Texas Deceptive Trade Practices Act (DTPA), and made cross and third party claims under 18 U.S.C. § 1964(c) ("civil RICO") against three (3) persons associated with the "Law Office" (G. David Westfall, Christina Westfall, and Stefani [Westfall] Podvin, "The Westfalls"), and asked for trial by jury. Birnbaum also moved for APPOINTMENT OF AN AUDITOR per RCP Rule 172 to investigate and report on the alleged OPEN ACCOUNT to show that there existed no open account at all, nor systematic records, etc. as claimed, but only a \$20,000 prepaid non-refundable retainer paid to a lawyer named G. David Westfall, for the purpose "*of insuring our availability in your matter*".<sup>9</sup>

**The trial judge, Hon. Paul Banner**, over Appellant Udo Birnbaum's objections<sup>10</sup> submitted jury<sup>11</sup> issues NOT sounding in open account (sale, delivery, systematic records, amount owed), and somehow arrived at a judgment of **59,280.66** against Birnbaum, regardless.

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<sup>8</sup> *Plaintiff's Original Petition* 9-20-00 (Civil Appendix 18, Clerk's Record 16-17) and *First Amended Original Petition* 9-05-01 (Civil Appendix 20, Record 229-237), ONE YEAR LATER, no difference except for attached exhibit "A" and verification. **There is of course no such thing as an OPEN ACCOUNT for "legal services", not with a \$20,000 non-refundable prepayment.**

<sup>9</sup> *Letter agreement between Westfall and Birnbaum* 5-5-99 Civil Appendix 15, paragraph 2.

<sup>10</sup> *Defendant Birnbaum's Objections etc.* Civil Appendix 35, Clerk's Record 339.

Also *Objections to today's plaintiff's court charge*, Civil Appendix 37, Clerk's Record 344

<sup>11</sup> *Court's Charge*. Civil Appendix 38, 41. Clerk's Record 345, 348.

Other issues too numerous to detail aside, **Judge Banner** ultimately unconditionally sanctioned<sup>12</sup> Birnbaum by additional **\$62,885** judgment for having made civil RICO cross and third party claims TWO YEARS early, without stating ANY reasons, without ever having warned Birnbaum about anything, without ANY disobedience EVER on the part of Birnbaum. Such unconditional sanction is of course punitive, not coercive, and patently UNLAWFUL on Constitutional DUE PROCESS grounds , in addition to violating this own circuit's *Westfall Family Farm, Inc. v. King Ranch, Inc.*, 852 S.W.2d 587 (1993) (same "The Westfalls")

On Sept. 3, 2002 Birnbaum asked for ***Finding Of Facts and Conclusions Of Law***<sup>13</sup> as to how Judge Paul Banner came up with such judgments. The issue is perhaps best summed up in Birnbaum's ***Notice of Past Due Findings Of Fact and Conclusions Of Law***<sup>14</sup>:

"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?**

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<sup>12</sup> *Order on Motions for Sanctions*, Civil Appendix 11, Clerk's Record 432. NO "PARTICULARITY" AT ALL.

<sup>13</sup> *Request For Finding Of Fact And Conclusions Of Law* Clerk's Record 461

<sup>14</sup> *Notice Of Past Due Findings Of Fact And Conclusions Of Law*, Civil Appendix 93, Clerk's Record 492.

The LAWLESSNESS of sanctioning me for having voiced my civil RICO complaint is perhaps best summed up in my *Motion To Reconsider The \$62,885 'Frivolous Lawsuit Sanction' Against Me*<sup>15</sup>

"If, after reconsideration, this Court still feels that what I did was so sanctionable, *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*".

It was at the July 30, 2002 "sanctions hearing"<sup>16</sup> (after the Apr. 8-11 trial, and after having pronounced the first judgment), that Judge Banner somehow weighed<sup>17</sup> the evidence (see quote next paragraph), and somehow "found" that I had no basis in law or in fact<sup>18</sup> to make a civil RICO claim, and unconditionally punishes me \$62,255 for having made such civil RICO claim 14 months earlier on Apr. 30, 2001<sup>19</sup>. In pronouncing sanctions<sup>20</sup> (\$62,255.00) on July 30, 2002, Judge Banner states:

"[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." <sup>21</sup>

This short statement is the ONLY hint in the entire proceeding as to why I was sanctioned! (This Motion is of course to have Judge Banner make more

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<sup>15</sup> *Motion To Reconsider The \$62,255.00 "Frivolous Lawsuit" Sanction Against Me* Civil Appendix 78, 80, Clerk's Record 441, 443.

<sup>16</sup> This was after the Apr. 8-11, 2002 trial at which Judge Banner would not let me show the jury my civil RICO claim and evidence. (Summary Judgment "RICO relief" on 9-7-01, Civil Appendix 4)

<sup>17</sup> Whether he thought my evidence showed "**frivolous**", as the Westfalls claimed, or "**bona fide racketeering**", as I was claiming, I guess. I had of course asked for **trial by jury**.

<sup>18</sup> Is not civil RICO the law? And does not the law say that only the **jury** is to weigh the evidence?

<sup>19</sup> *Udo Birnbaum's Third Party Plaintiff civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin* 4-30-01, amended by *Udo Birnbaum's Amended Third Party Plaintiff civil RICO Claim against G. David Westfall, Christina Westfall, and Stefani Podvin* 7-11-01 (Record 100)

<sup>20</sup> Civil Appendix 11, Clerk's Record 432

formal findings of fact and conclusions of law ). Apparently even the Appellees are becoming 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)

However, **NO SUCH REQUEST** has been FILED or SERVED! Also why the Appellee Westfalls believe that Judge Banner would favor them with a finding, when he would not do it for me.<sup>22</sup> ALL SMOKE AND MIRRORS.

### **SUMMARY**

**FINDINGS** by the trial judge are MANDATORY for an intelligent review of this case by this Appeals Court, and higher courts, should I have to take it there.

**Findings** not only regarding the SANCTION JUDGMENT, but also regarding the FIRST JUDGMENT, the "open account" pleading issue, for it was NEVER SUBMITTED TO THE JURY, and Judge Banner just came up with it on his own, despite my wanting it heard by JURY!

It is also fundamental that I be allowed to respond to such FINDINGS, by Briefing this Appeals Court upon such findings.

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<sup>21</sup> Transcription of ending of sanctions hearing of 7-30-02, Civil Appendix 13, also separately provided by court reporter Barbara J. Roberson to the Fifth Court of Appeals

<sup>22</sup> *Request For Finding Of Fact And Conclusions Of Law* Clerk's Record 461. Also *Notice Of Past Due Findings Of Fact And Conclusions Of Law*, Civil Appendix 93, Clerk's Record 492.

This case has become far more than a matter between parties. I am pleading to this Honorable court about UNLAWFUL judgments put on me by a judge, whom I had previously tried to get recused<sup>23</sup> off my case for having shown that he CANNOT or WILL NOT abide by statutory law, the Rules of Procedure, nor the mandates of the Supreme Court of the United States.

### **PRAYER**

WHEREFORE, Appellant Birnbaum moves this Appeals Court:

1. That trial judge Paul Banner produce **Findings** regarding BOTH judgments.
2. That I be allowed a SUPPLEMENTAL BRIEF to address the issues raised by such **Findings**.
3. That I be allowed to ARGUE to this Appeals Court, upon the **Findings**, as a minimum. THIS IS NOT A GARDEN VARIETY APPEAL.
4. That submission before the panel now scheduled for October 21 be deferred, if necessary, to allow for me to SUPPLEMENT my Brief.
5. AND IN THE ALTERNATIVE, for this Court to ORDER the appointment of an Auditor, as the trial court should of course have done under RCP Rule 172, with diametrically opposite sworn affidavits as to the "state of the account" staring at each other, and especially so with the complex nature of the pleadings (civil RICO).

NOTE: I am also providing, under separate cover, my *Motion To Consider*, re the "waiver" entry (regarding ORAL ARGUMENT) appearing on your Fifth Circuit web site. This case deserves more than being a mere "blip" (number) on a "list of cases" handed to a clerk at the front desk to mail out generic letters. See my *Motion To Consider* for details. I have the Right to be heard in a higher court, upon LAWLESSNESS upon me by a lower court.

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<sup>23</sup> *Motion For Recusal Of Hon. Paul Banner*. Clerk's Record 263. Also *Docket Sheet*, Civil Appendix 1, Clerk's Record 1.

Sincerely,

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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 been provided to Judge Paul Banner through Pam Kelly, court coordinator for the 294<sup>th</sup> District Court in Canton, Texas.

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Udo Birnbaum