

No. 04-0078
IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

UDO BIRNBAUM, Petitioner, vs.

VERIFIED MOTION

THE LAW OFFICES OF G. DAVID WESTFALL, P.C., et al., Respondents

On appeal from the 5th Court of Appeals, Dallas No. 05-02-01683-CV
Trial court: 294th District Court of Van Zandt County, No. 00-00619

MOTION FOR REHEARING

1. Even as this case is in the **Supreme Court of Texas, Hon. Ron Chapman**, by special assignment, is presiding in this cause in the **trial court**:

In the absence of ALL jurisdiction, TWO Senior ("visiting") judges, ONE hearing a motion to recuse the OTHER, ONE from the bench, the OTHER from the witness box, manage to assess a **\$125,770 FINE** ("sanction") against Birnbaum, a 67 year old non-lawyer, on April 1, 2004! (**Exhibit 1**)

2. Furthermore, at the hearing, Judge Chapman issued the following warning (**Exhibit 2**):

"You (now) have the keys on whether there are any further proceedings in this case in the future. Please be aware that any further actions might result in further sanctions."

3. Birnbaum has NO means to appeal the new sanctions in this cause!

4. Also, this FINE ("sanction") is on top of a an unconditional FINE of \$62,885 by senior judge **Hon. Paul Banner** at a hearing on July 30, 2002 (after final JUDGMENT at the trial of April 11, 2002), where **Judge Banner** found Birnbaum "**well-intentioned**", only that he did not see the evidence as showing Birnbaum's civil RICO claim. (**Exhibit 3**). Birnbaum had of course asked for determination by JURY!

5. Unconditional punishment (not "coercive") is of course UNLAWFUL by civil process.

6. All this started with a 1995 fraudulent suit against Birnbaum over a **BEAVER** dam (not a cause of action!) The jury said ZERO damages, yet the lawyer wants \$10,000 in legal fees, and **Judge Chapman** has JUST been assigned (**Exhibit 4**) to the case! All "legal fees" and "legal fees" for collecting on fraudulent "legal fees"!

7. At the time of such suit, Birnbaum, a retired electrical engineer, lived peaceably on his farm in Van Zandt County, taking care of his cows and ninety (90) year old invalid mother, and had only known the courthouse from getting auto license tags.

Facts

Details among the hereto attached documents

8. This whole matter grew out of a dispute over a **BEAVER** dam. My neighbor trapped and killed eleven of the things, dynamited their dam, flushed the whole mess down on me, bulldozed the whole area, then got himself a shyster lawyer, and sued me under the Texas Water Code, claiming that I had, as a person, built a dam, and was causing "sand, driftwood, and debris" to wash **onto** my neighbor, who was entirely **upstream** at that!

9. At the trial the lawyer kept flapping about beavers. When I tried to tell the jury what I was hauled into court for, namely for violating the Texas Water Code, the judge ruled that I could not tell the jury:

THE COURT: " They can't be -- The documents can't be given to you. **They can't be read to you, and they can't be told to you.** Now, Mr. Birnbaum has persisted in talking about those documents, and talking about my rulings, and talking about what he refers to as -- I guess, procedures or rules of procedure.

"Mr. Ray has now raised a concern, which I frankly share, that because of the way -- because of the last few things that Mr. Birnbaum has said, that you may get the idea that either the Plaintiff or the Court is trying to hide something from you. Now, I don't know how really to go much further, except to say that what these documents are, are what are called pleadings.

"To make a pleading, you put a piece of paper in a typewriter and you type on it anything you want to -- And you come down to the courthouse. You give it to this lady right over here, the District Clerk. She puts a file stamp on it. It's a pleading. The law says that pleadings are not evidence. They are the very allegations that you've been summoned down here to address.

That is exactly what the lawyer had done, "put a piece of paper in a typewriter", and made the whole thing up.

10. Along comes a big-time Dallas lawyer, **G. David Westfall**, and talks me into paying him a non-refundable \$20,000 to sue everybody, including the district judge, under the civil racketeering statute, 18 U.S.C. § 1964(c). But the Dallas federal court dismisses the case under really weird circumstances, like a judgment that stays discovery and authorizes the amendment of the pleading, and I fire the lawyer and appeal the case myself, and wave bye-bye to my non-refundable \$20,000 retainer.

11. Then about a year later, G. David Westfall, in the name of a "The Law Offices of G. David Westfall, P.C." suddenly sues me (this case), claiming an unpaid OPEN ACCOUNT of \$18,121.10 for "legal services". There of course was no sale and delivery as required as elements in a suit on a sworn account. Neither was there a contract, not with a \$20,000 retainer, and the lawyer reserving the "right to terminate" for "your [Birnbaum] non-payment of fees or costs".

12. I make claims under civil RICO, and ultimately get FINED \$62,885 for my claim, and now this FINE of \$125,770 on April 1, 2004. Further details are to be found among the documents attached at the end of this Motion for Rehearing:

Exhibit 5, Letter 10-21-03 to Judge Banner, "What is going on?"

13. The \$62,885 Order on Motions for Sanction had provided NO particularity at all, as required by RCP Rule 13, and the court reporter had caught Judge Banner's finding that I was "well-intentioned".

This document shows the ex-parte in the trial court as the case was in the appeals court, and gives the basis of my motion to recuse, to STOP opposing lawyer Frank C. Fleming and Judge Banner communicating ex-party and just making things up.

Exhibit 6, Complaint for Declaratory Relief - Tyler Federal Court

14. This document details the circumstances surrounding the \$62,885 sanction by Judge Banner, and why it is unlawful, because it is not "coercive" at all, but unconditional, for a completed act, namely having made a civil RICO claim two years earlier.

This document provides the law to show that filing a lawsuit is constitutionally protected conduct.

This document is also included because at the hearing on "Motion to Recuse", at which I was sanctioned the \$125,770, opposing lawyer was trying to, and succeeded in painting me as some sort of monster, for "suing Judge Banner", when all I was seeking was declaratory relief.

Exhibit 7, Petition for Review - Less Appendix thereto

Attached for handy reference is my *Petition for Review*.

CONCLUSION

See Exhibit 7 for details

16. This *Petition* (and this *Motion for Rehearing*) is NOT about mere "error in the judgment of the court of appeals", but about "an error of law committed by the court of appeals of such importance¹ to the jurisprudence of the state as to require correction". (Tex. Gov't. Code § 22.001(a)(6))

17. When a court of appeals upholds a \$62,885 FINE for having made a civil RICO claim, it has committed an error of law against the First Amendment.

"clearly established that filing a lawsuit was constitutionally protected conduct." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73, 76 n.8 (1990), **U.S. SUPREME COURT**

18. When a court of appeals upholds an unconditional FINE of \$62,885 imposed by civil process, it has committed an error of law against the Fifth Amendment.

"criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt." *Hicks v. Feiock*, , 485 U.S. 624 (1988), **U.S. SUPREME COURT**

19. When a court of appeals finds that a \$62,885 FINE "does not meet the requirements of rule 13", yet states that "This error, however, may be waived", it has committed an error of law. "Waived" means knowingly giving up a right. I surely did not knowingly give up my right regarding that unlawful fine.

PRAYER

This case is about a pattern of abuse of the judicial system to run over a person who had enough faith in the judicial system to stand up for what is right.

This case is about judicial officers, who know better, yet have chosen "to hell with the law, we got a man that is rocking our boat, and he needs to be stopped, never mind the Constitution".

This is an issue of law that should to be addressed by this court, and this case is as good as any to do it. When high officials start not going by the law, there soon follow the likes of

¹ The law now provides that our general appellate jurisdiction extends only to those cases where an error of law committed by the court of appeals is of such importance to the jurisprudence of the state as to require correction (Tex. Gov't. Code § 22.001(a)(6)). No longer is any error in the judgment of the court of appeals sufficient. From TomPhillips.com.

Hitler, Mussolini, Stalin, Milosovich, Saddam, and who knows what next. History tells us such disease has proven fatal.

WHEREFORE, petitioner Birnbaum moves that this honorable Court reconsider his Petition for Review, hear this case, and send a clear message that NO ONE is above the law, not even judges.

Sincerely,

Udo Birnbaum, *Pro Se*
540 VZ CR 2916
Eustace, Texas 75124
(903) 479-3929 phone and fax

VERIFICATION

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 above, and being by me first duly sworn, declared that all the statements in the above complaint are true and correct to the best of his ability, and that the attached exhibits are true and correct copies of the originals (except for obvious mark-ups).

Udo Birnbaum

Given under my hand and seal of office this _____ day of April, 2004

Notary in and for The State of Texas

Certificate of Service

This is to certify that on this the _____ day of April, 2004 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