

Look at pages 2 and 3. Judge Banner actually admits to "ex-parte" working with opposing lawyer. To turn his "well-intentioned" - into all that CRAP in his Findings - see page 26 etc. below

October 20, 2003

To: Judge Paul Banner

To: Judge John Ovard, APJ

To: Judge Ron Chapman
(all through 294th District Court)

Cc: Frank Fleming

Re: 00-619 294th The Law Offices v.

Judge Banner:

Your letter¹ to me of Oct. 14, 2003 is puzzling, as is your handwritten notation² of "Tried 3 times to fax. Then mailed."

You start with, "I note your motion to recuse me. I am referring the motion to the APJ³". Had you not been informed of my motion to recuse way back on Sept. 30, 2003? And had Judge Ron Chapman not already been actually assigned on Oct. 8, 2003 to hear the motion? So what is the need to try to fax "3 times", and more so, the need in telling me that you "Tried 3 times to fax"?

And why would you have need to fax⁴ me on September 30, 2003, at 8:52 a.m., to tell me that you had "signed and mailed to Mr. Fleming the Findings of Fact and Conclusions of law as received from Mr. Fleming". Why would you need to tell me the exact time at which you received the proposed fax the night before? ("fax 9 29 03 17:41")

And what happened to my statutory three (3) days to respond to Mr. Fleming's input?

And why would you not mail or fax your Finding directly to the 294th to be provided to the parties, or fax or at the least mail me a copy? The way you did it,

¹ Copy attached

² Handwritten notation by Judge Banner, top right-hand corner of Oct. 14, 2003 letter to me

³ Administrative Presiding Judge, i.e. Judge John Ovard, First Administrative Judicial Region, the "APJ"

⁴ Copy attached

NOTE TO ALL THIS PAPER FLYING:

1. Judge Banner put a \$62,885 SANCTION on me, ruling me "well-intentioned" - just that HE did not see my evidence as showing my counter-claim.
2. Bringing a claim is a First Amendment Right.
3. A court cannot punish on the merit of a claim.
4. A court can only "punish" - upon CONDUCT.
5. Even then, such "punishment" in CIVIL process can ONLY "coerce" - cannot be unconditional - such requiring FULL CRIMINAL PROCESS.
5. All this stuff by Judge Banner is a CYA - for Banner having imposed such unlawful Sanctions - and then having CONCEALED such unlawfulness by transmogrifying them into JUDGMENTS.
6. To Wit: All that CRAP in his \$62,885 Finding. Also all that same CRAP in Judge Ron Chapman's \$125,770 (2 x 62,885) "all-in-one" job. There was not even a case left in the court! Not even at the time of Judge Banner's \$62,885 sanction!

See highlight below
and on next page

it was not until Oct. 6, 2003 that I received a copy of what you actually signed, and it did not get to the 294th Clerk until Oct. 8, 2003!

You state "*The reason for copying you [Birnbaum] on all of the evolution was to provide you [Birnbaum] an opportunity to make whatever input you desired so that these would be correct based on the trial record*". So what happened to my statutory three (3) days to respond? Also "*the trial record*" was not at issue, but "*the RECORD in the trial court*".

It may well be possible that you have with time actually come to believe all that horrible stuff you said about me in your *Findings*, but all you ever told me was that I was "**well-intentioned**"⁵.

It is of course an entirely different matter as to how attorney Fleming came up with all that stuff in his proposed findings, with nothing other than your [Judge Banner] "**well-intentioned**" in the record.

You state, "*There was no ex parte discussion of this case with Fleming*". Is it possible that Fleming, starting with no more than "**well-intentioned**", independently came up with what is now inside your mind?

It is possible, but no more so than someone winning the lottery three times in a row, and with the same identical winning numbers!

You state, "*You [Birnbaum] received whatever I [Banner] received and whatever I [Banner] sent to Fleming*". Such is NOT true. I did not receive a copy of the communication you sent to Fleming, conveying what all needed to be said and not said in Fleming's proposed finding.

I did not believe you would, and you did not sign Fleming's original proposed findings with "*vacuous*", "*manufactured*", "*simply for spite*", "*mean-spirited*", "*vindictive*", etc in there.

Had I known you were working with Fleming to "tweak" his proposed finding, I would have taken "an opportunity to make whatever input", as you write, THEN AND THERE, and asked for your recusal, THEN AND THERE.

⁵ "[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." Close of hearing on Motion for Sanctions, July 30, 2002. Note: My civil RICO claim was against "*the individuals*", and "*the individuals*" ONLY. I made NO other claim against "*the [three The Westfall] individuals*".

Aha - you DID communicate with opposing attorney ex-parte (i.e. without my presence)

I would not have had to rush to the Courthouse to file at 7:56 a.m. on September 30, 2003 my *Motion for Recusal*, and rush to the court coordinator, with instructions to IMMEDIATELY notify you of my *Motion*, and to also rush to you a copy of my 8:27 a.m. filed letter to you.

All before you at 8:52 a.m. faxed me, "*I have this date signed and mailed to Mr. Fleming the Findings of Fact and Conclusions of law as received from Mr. Fleming. He was kind enough to revise the same as I requested (fax 9 29 03 17:41)*"

All this rush occurring while this case had been OUT of the trial court for nearly ONE YEAR, and my Motion for you to make findings before you longer than that, and my even having put a motion⁶ in the Appeals Court to have you make findings!

Dear Judge Banner: There is no way, Mr. Fleming - starting with no more than your "well-intentioned" should have proposed anything other than your "well-intentioned". All that CRAP in your "signed" - per your to him requested "revise"? Else Fleming already knowing - that you would NOT sign a "well-intentioned"?

The essence of my *Response*⁷ to the Appeals Court, regarding Fleming's *Motion*⁸ to ALLOW you to make findings, is that your latest *Findings* are "vacuous", "manufactured", "simply for spite", "mean-spirited", "vindictive", etc, although I like you, removed such HATE words from the official document.

And coming back to your "*I am referring the motion to the APJ*". Where IS your RCP Rule 18 Order of Referral? And absent an Order of Referral, why would or could Judge Ovard assign Judge Chapman? Or IS this Oct. 14, 2003 letter your Order of Referral, or in lieu of one?

And why should I even have to ask for your recusal while this matter is on Appeal? To keep you from signing findings that have no support in the record, or basis in fact or in law.

Remember Fleming asking the jury at closing argument if they had seen "A Beautiful Mind", the award winning movie, and comparing me to John Nash, the

⁶ *Appellant's Motion to have the Trial Judge Produce Findings and Conclusions - and permit Appellant to respond thereto, including oral presentation.* No. 05-02-01683-cv, Aug. 5, 2003. (Motion denied)

⁷ *Appellant's [RCP Rule 128] Response to Appellees' Motion to Allow the Filing of the Trial Judge's Findings of Facts and Conclusions of Law.* Oct. 13, 2003. I provided such to Judge Banner through the 294th. Also available at my web site, *OpenJustice.US*, as are most of the documents in this cause.

⁸ *Appellees' Motion to Allow the Filing of the Trial Judge's Findings of Facts and Conclusions of Law*, Oct. 6, 2003

Nobel Prize winning economist and mathematician, who had periods of just seeing things that were only in his own mind, i.e. a paranoid schizophrenic.

It would be just as inappropriate for me, at this time, to make such comparison about Judge Banner and Fleming, as it was totally out of line to have an attorney incite the jury, at closing argument, with a medical diagnosis.

UDO BIRNBAUM, Pro Se
540 VZ CR 2916
Eustace, TX 75124
(9030 479-3929 (phone and fax))

att: (watch the lightning-fast exchange)

- Judge Banner's **Oct. 14, 2003** letter to me - the subject of this response Same Oct. 14, 2003, as I carried my *[RCP Rule 298] Response* (see below) and my Appeal *Response to Fleming's Motion* (to allow Judge Banner to file findings) to the 294th District Court to Judge Banner.
- Fleming's **17:16 Sept. 29, 2003 fax** to me - re latest proposed findings Same fax apparently to Judge Banner **17:41 Sept. 29, 2003**. (Fleming fax clock actually slow by 1 hour)
- My *Motion for Recusal of Judge Banner* - filed 7:56 a.m. Sept. 30, 2003. Immediately handed to court-coordinator to IMMEDIATELY fax to Judge Banner. (She did)
- My **Letter** to Judge Banner - filed 8:27 a.m. Sept. 30, 2003 Immediately handed to court-coordinator to RUSH to Judge Banner
- Judge Banner's **8:52 a.m. Sept. 30, 2003 fax** to me - *"I have this date signed and mailed to Mr. Fleming the Findings of Fact and Conclusions of law as received from Mr. Fleming. He was kind enough to revise the same as I requested (fax 9 29 03 17:41)"*
- My *[RCP Rule 298] Response* to Judge Banner's *Findings* - has all of Judge Banner's text - followed by request for clarification and amendment thereto. Provided to Judge Banner through 294th on **Oct. 14, 2003**. (See Judge Banner's Oct. 14, 2003 letter to me, above)
- Judge Banner's last words in the case - July 30, 2002 - **\$62,000 sanction** despite my being "*well-intentioned*" (That is **2002**, not 2003. Been waiting for findings and conclusions on that for over a year!) My position in the Appeals court is that it is an unlawful **CRIMINAL** punishment, (unconditional, not coercive) imposed without due process.

Guide to Attachments

watch the lightning-fast exchange

on Page
number

1. Judge Banner's Oct. 14, 2003 letter to me - the subject of this response
Same Oct. 14, 2003, as I carried my *[RCP Rule 298] Response* (see
below) and my Appeal *Response to Fleming's Motion* (to allow Judge
Banner to file findings) to the 294th District Court to Judge Banner.

5

2. Fleming's 17:16 Sept. 29, 2003 fax to me - re latest proposed findings
Same fax apparently to Judge Banner 17:41 Sept. 29, 2003.
(Fleming fax clock actually slow by 1 hour)

6

3. My *Motion for Recusal of Judge Banner* - filed 7:56 a.m. Sept. 30, 2003.
Immediately handed to court-coordinator to IMMEDIATELY fax to Judge
Banner. (She did)

7

4. My Letter to Judge Banner - filed 8:27 a.m. Sept. 30, 2003
Immediately handed to court-coordinator to RUSH to Judge Banner

8

5. Judge Banner's 8:52 a.m. Sept. 30, 2003 fax to me -
*"I have this date signed and mailed to Mr. Fleming the Findings of Fact
and Conclusions of law as received from Mr. Fleming. He was kind
enough to revise the same as I requested (fax 9 29 03 17:41)"*

11

6. My *[RCP Rule 298] Response* to Judge Banner's *Findings* -
has all of Judge Banner's text - followed by my request for clarification
and amendment thereto. Provided to Judge Banner through 294th on Oct.
14, 2003. (See Judge Banner's Oct. 14, 2003 letter to me, above)

12

7. Judge Banner's last words in the case - July 30, 2002 - **\$62,000 sanction**
despite my being *"well-intentioned"* (That is 2002, not 2003. Been
waiting for findings and conclusions on that for over a year!)
My position in the Appeals court is that it is an unlawful CRIMINAL
punishment, (unconditional, not coercive) imposed without due process.

23

8. Judge Banner's Sept 30, 2003 (not 2002)
HORRIBLE Finding regarding me

25

Handwritten initials

This page not numbered

Paul Banner
Senior Judge
PO Box 1793
Gladewater, Texas

903 845 2009 Office
903 845 5982 Fax
903 450 6469 Cell

October 14, 2003

Mr. Udo Birnbaum
Fax 903 479 3929

Re: 00 619 Westfall vs Birnbaum, Van Zandt County

Dear Mr. Birnbaum:

I note your motion to recuse me. I am referring the motion to the APJ.

If any error was made in the findings and conclusions, I can not now correct this. Your motion freezes me from any action.

The reason for copying you on all of the evolution was to provide you an opportunity to make whatever input you desired so that these would be correct based on the trial record. **There was no ex parte discussion of this case with Fleming.** You received whatever I received and whatever I sent to Fleming.

Paul Banner

Cc: Frank Fleming 214 265 1979

Hon. John Ovard, APJ

*Tried 3 times to fax
Then mailed
PK*

Dear Judge Banner:
You putting inputs INTO Fleming - without my PRESENCE - then and there - IS ex-parte communication.

Dear Judge Banner:
You sending "suggestions" to Fleming - even initiating "suggestions" - whether by mouth, email, snail mail, by carrier pigeon - IS "ex parte discussion" - the INSTANT he responds to you - by executing on your to him "suggestions"

5

FRANK C. FLEMING
ATTORNEY AND COUNSELOR

6611 Hillcrest Ave. #305
Dallas, TX 75205-1301
lawyrfc@aol.com

Voice: 214/373-1234
Fax: 214/373-3232
or Fax: 214/263-1979

September 29, 2003

The Hon. Paul Banner,
Senior Judge, 196th District Court
Sitting for the 294th District Court,
24599 CR 3107
Gladewater, TX 75647

Re: Cause No. : 00-00619
294th District Court
Law Offices of G. David Westfall, P.C.
v. Udo Birnbaum

Dear Judge Banner:

As you have requested, I have attached a copy of the Findings of Facts and Conclusions of Law with the edited changes that you requested. I am also faxing to Mr. Birnbaum a copy of the edited changes.

If this edited change meets with your approval, please file a signed version with the district court in Canton and fax me a copy of the signed version so that I can file it with the Court of Appeals in time for their scheduled consideration of this appeal on October 21, 2003.

Please contact me if you have any questions.

Very truly yours,

Frank C. Fleming 

FRANK C. FLEMING

cc: Udo Birnbaum

Via Fax w/edited proposed findings and conclusions

c:\...westfall\udo\banner07.ltr

6

It was upon THIS one page motion - that Judge Ron Chapman, with Judge Paul Banner present - imposed a \$125,770 additional FINE - on top of the \$62,885 Banner had imposed.

The Law Offices of G. David Westfall, P.C
v. Udo Birnbaum
v. The Three Westfalls

)
)
)

In the 294th District Court.
Of Van Zandt County
AM 7:56

Motion for Recusal of Judge Banner

This motion is by reason of Judge Banner **communicating ex-parte** with opposing counsel to plot a **vituperative finding** against Birnbaum's **conduct**, such finding diametrically opposite his prior finding of Birnbaum being **WELL-INTENTIONED**, such prior finding made **extemporaneously** and **in the heat of battle** and caught by the court reporter at the close of the Sanction Hearing on July 30, 2002.

Also by reason of Judge Banner having **previously retaliated** with a \$62,000 sanction against Birnbaum for having exercised his statutory and Constitutional Right to make a **civil RICO** pleading, i.e. protected activity. Judge Banner's words that he imposed such sanction because Birnbaum had made a civil RICO pleading were also caught by the court reporter at the same hearing.

Also by having demonstrated that he **cannot or will not** abide by statutory law, the Rules of Procedure, or the mandates of the Supreme Court of the United States. Details are in my prior Motion for Recusal (denied) and in my prior petition for writ of mandamus (denied) to make him go by the law.

Also for now trying to "undo" his finding of my [Birnbaum] being **well-intentioned**, and with opposing counsel paint me as some sort of monster to the judicial system, all while the cause is **on appeal** in the Dallas Fifth, and **while he has NO JURISDICTION**.

Details to follow shortly.

Udo Birnbaum

UDO BIRNBAUM, *Pro Se*
540 VZ CR 2916
Eustace, TX 75124
(903) 479-3929

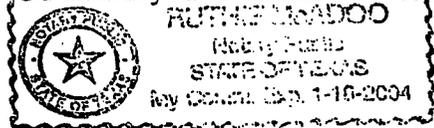
STATE OF TEXAS
COUNTY OF VAN ZANDT

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 the matters in his Motion for Recusal of Hon. Paul Banner are true and correct.

Udo Birnbaum

Udo Birnbaum

Given under my hand and seal of office this 30 day of September, 2003



Ruthie McAdoo
Notary in and for The State of Texas

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this document has been served via Reg. Mail on this the 30 day of September, 2003 upon Frank C. Fleming, 6611 Hillcrest, Suite 305, Dallas, Texas 75205-1301.

Udo Birnbaum
UDO BIRNBAUM

7

FILED FOR RECORD
03 SEP 30 AM 7:56

September 30, 2003

The Hon. Paul Banner
Senior Judge, 196th District Court
Sitting for 294th District Court
c/o 294th District Court
Canton, Texas 75103

cc. Fleming

Re: Cause No. 00-00619
294th District Court
The Law Offices of G. David Westfall, P.C. v. Udo Birnbaum v. etc

Honorable Judge Banner:

This letter is in response to a copy of a letter I received from opposing attorney in this matter. According to Fleming he mailed the same letter¹ to you, with an enclosed eight (8) page proposed *Findings* for you to make².

This matter has been in the Dallas Fifth Appeals Court for nearly a year. Over three (3) months ago, June 10, 2003, Attorney Fleming told the Appeals Court³ that he was having you make *Findings*. As you see by his current letter he obviously was not successful in having you do so, or else he never asked you. Your *Findings* is the subject of my Reply Brief, i.e. that Fleming is simply blowing smoke⁴ to the Appeals Court.

Attorney Fleming is now blaming me for you not having previously made *Findings*. Correct me if I'm misunderstanding Fleming, but Fleming is saying⁵ I did not submit proposed *Findings* to you as to the reasons you sanctioned me \$62,000 !

¹[Fleming] Letter Sept. 24, 2003. (attached) .

² [Fleming Proposed] Findings Of Fact And Conclusions Of Law (attached)

³ [Fleming Appeals Court Response Brief]: "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) Fleming Appeals Reply Brief, June 10, 2003, Footnote 4, page 25

⁴ "NO SUCH REQUEST BY APPELLEES HAS BEEN FILED OR SERVED". Appellant's Reply Brief, on my web site OpenJustice.US , as are most of the documents in the case.

⁵ [Fleming Sept 24, 2003 Letter]: "I [attorney Fleming] was also under the impression that the requesting party was supposed to submit the first draft for your consideration which Mr. Birnbaum never submitted". Sept. 24, 2003 Letter, first paragraph.

8

Frankly, Your Honor, I have no idea how anyone could prepare a document for you to sign that stated what was on your mind. In your first hearing, two years and two months ago, you did state that you simply "did not like civil RICO claims". And you went on to say, "I have never seen one [civil RICO claim] that had any merit."

And equally as frank, I have no idea how anyone could prepare a document for you to sign that stated all of the reasons you sanctioned me, especially considering the fact that never once did you order me to do or not do anything. I was never disobedient and you never warned me about disobedience or anything. In fact, it was you who ordered me to take the depositions of the Westfalls. For that and other issues, you unconditionally punished me three months after you had signed final judgment!

Again, I have no idea how attorney Fleming intends to put all those thoughts into your mind, when he heard you say no more than what I heard you say, that "Mr. Birnbaum may be well-intentioned"⁶. Nowhere did you ever say anything about "bad faith"⁷.

Again and again, Fleming is obfuscating the real issue in the Appeals Court, and keeps on trying to paint me as some sort of monster for making a civil RICO claim in state court, when all I was doing is representing myself under the civil RICO law when I was sued. The real issue in the Appeals Court, however, is upon what you did, as I stated to you in my *Notice Of Past Due Findings Of Fact And Conclusions Of Law*⁸ :

"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?

⁶ "[A]lthough Mr. Birnbaum may be well-intentioned and may believe that he had some kind of real claim as far as RICO, there was nothing presented to the court in any of the proceedings since I've been involved that suggest he had any basis in law or in fact to support his suits against the individuals, and I think -- can find that such sanctions as I've determined are appropriate." Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

⁷ Fleming uses the term xxx times in his proposed finding. You never used the word even once in the entire proceedings.

⁸ Appendix 93, Record 492

I am providing you the referenced documents by attaching *Appellee's Response To Appellant's Motion To Have Trial Judge Produce Findings And Conclusions*, another document sent to me by Fleming.

It is noteworthy that the Appeals Court long ago already denied my *Motion* [to have you make findings]. Also when I contacted them they informed me that no such *Response* [by Fleming] had been filed in the Appeals Court, and also that you, at this point, do not have jurisdiction over this case.

Then on careful reading of Fleming's *Response*, I note that he [Fleming] is now asking them to allow⁹ you [Judge Banner] to make Findings. The problem I am having is that Fleming is already flashing his [Fleming's] "findings" in the Appeals Court, without your signature, as if he [Fleming] is asking them [Appeals Court] permission for you to affix your signature to it. Sort of like you not filing *Findings* was like a clerical oversight, like you just did not "get around to" filing this document.

But the issue in the Appeals Court is how you came up with the two judgments you made, NOT my conduct. You already made a finding upon that:

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

Close of hearing on Motion for Sanctions, July 30, 2002. (attached)

Sincerely,

Udo Birnbaum

UDO BIRNBAUM

540 VZ CR 2916

Eustace, Texas 75124

(903) 479-3929 phone

(903) 479-3929 fax

⁹ Now in his belated Response to the Appeals Court, Mr. Fleming is asking that "the Court allow Judge Banner to file his Findings of Fact and Conclusions of Law in this matter". *Appellees' Response*, page 3, last paragraph.

Note the sudden hurry after nearly ONE YEAR!

September 30, 2003

Mr. Frank Fleming @ fax 214 265 1979

Mr. Udo Birnbaum @ fax 903 479 3929

Re: Westfall vs. Birnbaum Van Zandt County Findings

Gentlemen:

I have this date signed and mailed to Mr. Fleming the Findings of Fact and ~~Conclusions of law as received from Mr. Fleming.~~ He was kind enough to revise the same as I requested (fax 9 29 03 17:41).

Mr. Fleming will kindly file the same and provide Mr. Birnbaum with a copy.

Paul Banner
903 450 6469 Cell

903 845 5982 fax

Sep 30 03 09:01A

why would Judge Banner want to tell me when he received Fleming's fax?

September 30, 2003

Mr. Frank Fleming @ fax 214 265 1979

Mr. Udo Birnbaum @ fax 903 479 3929

Re: Westfall vs. Birnbaum Van Zandt County Findings

Gentlemen:

Did not get to the clerk till October 8!

I have this date signed and mailed to Mr. Fleming the Findings of Fact and Conclusions of law as received from Mr. Fleming. He was kind enough to revise the same as I requested (fax 9 29 03 17:41).

Mr. Fleming will kindly file the same and provide Mr. Birnbaum with a copy.

Paul Banner
903 450 6469 Cell

903 845 5982 fax

App. 28

The Law Offices of G. David Westfall, P.C
v. Udo Birnbaum
v. The Three Westfalls

)
)
)

In the 294th District Court.
Of Van Zandt County

Udo Birnbaum's RCP Rule 298 Request for Clarification and Amendment regarding Judge Banner's Findings of Fact and Conclusions of Law

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

Note: I have repeated each and every sentence of Judge Banner's Findings of Fact and Conclusions of Law. (There was no emphasis in the original Findings and Conclusions) For details as to my responses below, please refer to my briefs

Introduction and summation

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

As shown below, NONE of this law applies to the facts in this case. Also note that §9.000 et seq. Civ. Prac. Rem. Code is the only statutory provision that allows attorney fees for the damage in an entire proceeding (but only after a finding of "frivolous", and after a 90-day "safe-harbor" period!)

Also that punishment, for a completed act, unconditionally imposed, is a criminal sanction, requiring full due CRIMINAL process, including a finding of "beyond a reasonable doubt".

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

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

Regarding §10.000 et seq. Civ. Prac. Rem. Code:

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

App. 144

12

Regarding T.R.C.P. Rule 13:

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

Regarding "and/or the common law":

- The "common law" does NOT provide for the imposition of sanctions.

* * * * *

Udo Birnbaum's RCP Rule 298 Request for Clarification and Amendment regarding Judge Banner's *Findings of Fact and Conclusions of Law*

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

"The above-captioned cause came on for trial to a jury on April 8, 2002. At the conclusion of the evidence, the Court submitted questions of fact in the case to the jury."

- Yes, Judge Banner had a jury sitting there, but he did not use it. Wrong jury questions, missing jury questions, missing instructions, etc. Also my civil RICO claim and evidence was not allowed to go to the jury. ("The [three] Westfalls" were dismissed by summary judgment seven (7) months earlier)

"In addition to the matters tried to the jury the Court took under consideration the Motion filed by David Westfall, the Plaintiff (the "Plaintiff"), and Christina Westfall, and Stefani Podvin (Christina Westfall and Stefani Podvin collectively referred herein as the "Counter-Defendants") concerning the filing of a frivolous lawsuit and Rule 13 Sanctions."

- David Westfall was NOT the Plaintiff. "Plaintiff" was "The Law Offices of G. David Westfall, P.C.". David Westfall was one of "The Westfalls", as he was in *Westfall v. King Ranch*, Texas Fifth Circuit No. 05-92-00262-CV (1993) "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". Same in this cause.
- In responding to the use of the word "Counter-Defendants", I will use "The [three] Westfalls" (G. David Westfall, wife Christina, and his daughter Stefani-Podvin). Again, please note that David Westfall was NOT the Plaintiff, and that the "The [three] Westfalls" were cross and third-party defendants under my civil RICO claim against them.

The combined issues of the counter-claim on frivolous lawsuit and the Rule 13 Motion were tried together to the Court on July 30, 2002.

- No. The [three] Westfalls made NO counterclaim in any of their pleading. Their pleadings were a GENERAL DENIAL. Besides that, they had already been removed from the case by SUMMARY JUDGMENT over ten (10) months earlier (Sept. 20, 2001).

At the proceedings on July 30, 2002, the Plaintiff appeared by counsel, the Counter-Defendants appeared in person and were also represented by their attorney. At the proceedings on July 30, 2002, Udo Birnbaum (the "Defendant/Counter-Plaintiff"), the Defendant/Counter-Plaintiff, appeared pro se.

- G. David Westfall was deceased at this time, as was the "Law Office". Westfall had claimed he was the ONLY shareholder of "The Law Office", was its ONLY officer ("director"), and the ONLY attorney associated with "The Law Office". **THE LAW OFFICE was DEAD.** Westfall died May 2002, shortly after the April 2002 trial.

After considering the pleadings, the evidence presented at the trial to the jury as well as the evidence presented at the summary judgment hearings and the sanctions hearing before the Court, in response to a request from the Defendant/Counter-Plaintiff, the Court makes its findings of fact and conclusions of law as follows:

- These findings are not in response to my Motion. My Motion had been long ago denied. Also my request was upon how Judge Banner came up with the TWO JUDGMENTS against me, not a finding as to my conduct. He had already made such at the close of the Sanctions Hearing :

"[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."

(Note: My civil RICO suit was upon "the individuals", i.e. "The [three] Westfalls", and "The Westfalls" only. No civil RICO claim was made against the "Law Office" plaintiff.

Findings of Fact

1. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin (the wife and daughter of the Defendant/Counter-Plaintiff's former attorney, David Westfall) were groundless and totally unsupported by any credible evidence whatsoever.*

- "Credibility" determinations are of course the prerogative of the JURY, whether as to witnesses, documents, or whatsoever.
- Also I did not make "**RICO civil conspiracy claims**". My claim was for "injury to property or business by reason of a violation" [of RICO], i.e. stemming or flowing from a "pattern of racketeering activity", i.e. "produced by", etc. (no proximate cause required). See my Brief
- Also my civil RICO claim was against all three "The Westfalls". Cross-claims upon what they were now trying to get from me through their Law Office "enterprise" (fraudulent "collection suit"), plus third-party claims for what they had already done to me previously (\$20,000 retainer paid for a no-worth suit against Texas district judges). Same "enterprise" (Law Office), same "pattern of racketeering activity", same scheme.
- Also Christina Westfall and Stefani Podvin were far more than only "wife and daughter". Christina (wife) was long-time book-keeper at the Law Office, and Stefani Podvin (daughter) the only shareholder "owner" of the Law Office, at least on paper. (So G. David Westfall could be "bullet-proof"

from judgment, and engage in his unlawful "pattern of racketeering activity". (Evidence in my huge summary judgment Appendix)

2. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin were without merit and brought for the purpose of harassment, delay, and to seek advantage in a collateral matter by attempting to cause the original Plaintiff, David Westfall to drop his claim for un-reimbursed legal services provided to the Defendant.*

- The "Plaintiff" was not David Westfall, but "The Law Office"
- "un-reimbursed legal services"? Plaintiff (The Law Office P.C.) were claiming an unpaid OPEN ACCOUNT! There was no OPEN ACCOUNT, and the JURY certainly made no finding of an OPEN ACCOUNT, and how much money was OWED. See my Appeal Brief.

3. *The Defendant/Counter-Plaintiff was afforded numerous opportunities to marshal his evidence and present any facts to support his allegations concerning RICO civil conspiracy claims against the wife and daughter of the Defendant/Counter-Plaintiff's attorney, David Westfall.*

- NO. Judge Banner did not allow me to show my VOLUMES of Evidence to the Jury, particularly the HISTORY OF FRAUD by David Westfall as shown by document in the INVOLUNTARY BANKRUPTCY proceedings against him, the findings of BAD FAITH by Federal Judge Jorge Solis, and numerous sanctions for FRAUD and suspensions of his law license.

The Defendant/Counter-Plaintiff wholly failed to provide any such credible evidence at either the summary judgment phase of the lawsuit or at the hearing on the motion for sanctions.

- I had asked that my evidence to my civil RICO claim be weighed by a JURY, not by Judge Banner.

4. *The attempt to provide testimony by the Defendant/Counter-Plaintiff concerning RICO civil conspiracy claims were his own opinions and totally uncorroborated by any other evidence.*

- What about the findings by Federal Judge Jorge Solis, Federal Bankruptcy Judge Harold C. Abramson, other findings of fraud, the AFFIDAVITS I presented? All this, and my civil RICO claim, Judge Banner would NOT ALLOW ME TO SHOW TO THE JURY!
- "The attempt ... were his own opinions"???

5. *The Defendant/Counter-Plaintiff never established that he had suffered any economic damages as a result of an alleged conspiracy.*

- "economic damages" is of course a matter to be determined by the JURY. I had claimed the \$20,000 non-refundable retainer I had been tricked into paying, and other moneys.
- Also I was not alleging damages "as a result of a conspiracy", but as a result of G. David Westfall's RICO violative conduct, i. e. "by reason of the RICO violation", i.e. flowing from the alleged "pattern of racketeering activity".

The Defendant/Counter-Plaintiff was sued by his former counsel to collect money for legal work which had been performed for the Defendant/Counter-Plaintiff for which the Defendant/Counter-Plaintiff had not paid his attorney in full.

- "not paid his attorney"? I was sued by a "Law Office".
- I was not sued for "money I had not paid to my attorney", but for money supposedly OWED on an OPEN ACCOUNT at a "Law Office". All FRAUD! ("open account" requires sale and delivery).

What had existed was a \$20,000 pre-paid, non-refundable attorney retainer agreement "to ensure our availability", and the attorney had "reserved the right to terminate for non-payment". That was his only remedy. No open account, no contract either.

The jury found that the work had been performed by the attorney, the amount charged to the client was reasonable, and that there was an amount owed by the Defendant/Counter-Plaintiff to the Plaintiff.

- NO. The jury was NOT asked how much money was OWED. They certainly received NO INSTRUCTIONS as to what constitutes an OPEN ACCOUNT. (sale and delivery, systematic records, etc. See my Appeal Brief.

The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims had no bearing on whether or not the Defendant/Counter-Plaintiff received the legal services and owed the balance of the outstanding attorney's fees.

- My civil RICO claim HAD a bearing. In a civil RICO suit the JURY can reach back TEN (10) years into Westfall's past CONDUCT, to establish whether his CONDUCT was VIOLATIVE OF RICO, to reveal the scheme and the pattern of racketeering activity, to show that my injury flowed from his RICO violative conduct (i.e. his "pattern of racketeering activity"), and that this fraudulent "collection suit" was in the "pattern" of his "pattern of racketeering activity".

6. *The filing of the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy was a blatant and obvious attempt to influence the outcome of the Plaintiff's legitimate lawsuit against the Defendant/Counter-Plaintiff and to cause harassment to the Plaintiff and his family members.*

- My civil RICO claim was to show that the lawsuit against me was a "predicate act" in a "pattern of racketeering activity" that could only be seen by reaching back into David Westfalls CONDUCT of a "pattern of racketeering activity", to show the SCHEMES he was using, and that this suit was part of his pattern.
- My civil RICO claim was not to "cause harassment", but to hold "The [three] Westfalls" accountable for what they were doing through their RACKET of using the LAW OFFICE in perpetrating this fraudulent suit on me. Their RACKET of course can only be seen by allowing me to show ALL of my evidence to the JURY, in the form of my civil RICO claim.

7. *The behavior of the Defendant/Counter-Plaintiff in filing claims concerning RICO civil conspiracy in this lawsuit have been totally without substantiation on any cause of action pled.*

- "Behavior ... have been without substantiation" What sort of MUMBO-JUMBO did attorney Fleming put down for Judge Banner to sign? Besides I asked for "substantiation" by JURY, not by JUDGE.
- *As if a civil RICO claim has to have "substantiation" on another cause of action???*

8. *The conduct of the Defendant/Counter-defendant giving rise to the award of punitive damages was engaged in willfully and maliciously by the Defendant/Counter-Plaintiff with the intent to harm the Plaintiff and the Counter-Defendants.*

- Emphatic statement, but no SPECIFICITY or PARTICULARITY as required by Rule 13. Not in this statement, nor in anything in any of the previous statements. Also Judge Banner, at the close of the Sanction Hearing, found me to be "well-intentioned".

The amount of actual damages, attorney's fees, suffered by the Counter-Defendant was proven to be reasonable and necessary by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The amount of actual damages awarded was in an amount that was proven at the hearing.

- The amount of sanctions are to be reasonable and necessary to be sufficiently "**COERCIVE**" to prevent a repetition of conduct, NOT to punish for any "damages" or "attorney's fees" that may have been "suffered" by The [three] Westfalls".
- The U.S. Supreme Court has of course ruled that the purpose of civil sanctions is to COERCE, not to PUNISH. And that any sanction, when unconditionally imposed to PUNISH, not to COERCE into compliance, is a CRIMINAL sanction, requiring full due CRIMINAL process, including a finding BEYOND A REASONABLE DOUBT. See my Brief.

10. *The amount of damages for inconvenience awarded by the court was proven at the hearing by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The court awarded damages for inconvenience in an amount the Court found to be reasonable and necessary, supported by evidence, and appropriate considering the circumstances.*

- Not much specificity or particularity as to what is "reasonable and necessary" "considering the circumstances". Also not much specificity and particularity as to the exact "circumstances", i. e. WHAT WAS IT I WAS SUPPOSED TO HAVE DONE WRONG, WHICH ORDER, IF ANY, I WAS SUPPOSED TO HAVE VIOLATED, etc.
- "Not challenged"? See my *Oral Pleading in Writing*, and my *Closing Pleading in Writing*, in which I pleaded retaliation by official oppression.

11. *The amount of punitive damages awarded by the Court were found to be supported by the evidence and necessary under the circumstances to attempt to prevent similar future action on the part of the Defendant/Counter-Plaintiff.*

- Not much specificity or particularity as to "under the circumstances" or "similar future action"
- Also, these were not awards based on The Westfalls' pleadings, but **PUNITIVE SANCTIONS** imposed as a result of a MOTION FOR SANCTIONS, intended to "CHILL" my First Amendment and statutory right to access to the courts.

12. *The sanction award is directly related to the harm done.*

- A civil sanction is to COERCE compliance. This is a sanction for supposed "**harm done**", making it a CRIMINAL sanction, imposed without full CRIMINAL due process.

13. *The sanctions award is not excessive in relation to the harm done and the net worth of the Defendant/Counter-Plaintiff.*

- "Net worth" was never raised in any of the pleadings or proceedings. And again "**harm done**".
- And of course the trial judge is there so that there is no "harm done" in a civil proceeding. At least not to the tune of \$62,000. Without Judge Banner ever WARNING or REPRIMANDING or ORDERING me to do or not do anything, and in fact finding me to be "well-intentioned", while at the same time pronouncing a \$62,000 sanction against me for having made a civil RICO pleading TWO years before!

14. *The sanctions award is an appropriate amount in order to gain the relief which the Court seeks, which is to stop the Defendant/Counter-Plaintiff and others similarly situated from filing frivolous lawsuits.*

- A civil sanction is to coerce compliance in the PROCEEDINGS. A criminal sanction is to PUNISH and set an EXAMPLE for "others similarly situated". This is a CRIMINAL sanction!
- What is the "message" the Court is trying to send? **DO NOT MAKE CIVIL RICO CLAIMS**, even if you have a First Amendment and statutory right to do so!

15. *The amount of the punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.*

- "conduct to be punished"? "tailored to the harm caused"? "punitive damage"?
- Is not a civil sanction to be tailored to coerce someone into compliance with a judge's order, and to be the least amount necessary to accomplish such compliance?
- And a court cannot impose severe civil sanctions without having tried (and actually imposed!) lesser sanctions to see if they will accomplish such compliance?
- And an unconditional punishment or for a completed act is a criminal sanction, requiring full CRIMINAL process, including a finding of "beyond a reasonable doubt".

Does not Judge Banner know anything about Due Process, and the right of access to the courts, free from fear of unlawful punishment? Or is this whole "Finding" just "stuff" put down by attorney Frank C. Fleming, on a piece of paper, and Judge Banner just signed it.

16. *The Counter-Defendants suffered both economic and emotional damages as a result of the Defendant/Counter-Plaintiff's lawsuit and specifically the frivolous nature of the lawsuit caused damages which included expenses in addition to taxable court costs, attorney's fees, harassment, inconvenience, intimidation, and threats.*

- "specifically the frivolous nature of the lawsuit caused intimidation, and threats"?
- Not much specificity and particularity in this finding, as required by RCP Rule 13, particularly regarding such "intimidation" and "threats".

17. *The Counter-Defendants established a prima facie case that this lawsuit was filed by the Defendant/Counter-Plaintiff without merit and for the purpose of harassment. The prima facie case was made by the testimony and documents introduced as evidence by the Counter-Defendants at the summary judgment proceedings as well as at the hearing on sanctions on July 30, 23002.*

- The only "prima-facie" case is the one I am making by this response.
- That I was punished for engaging in "protected activity", i.e. for filing my civil RICO claim
- And that such punishment is RETALIATION as a matter of law.

18. *After the Counter-Defendants established their prima facie case, the Defendant/Counter-Plaintiff failed wholly to provide any credible evidence to support the legal theories of the Defendant/Counter-Plaintiff.*

- Credibility determinations are of course the prerogative of the JURY, whether about witnesses or documents, or whatsoever
- Also civil RICO is not a "legal theory", but STATUTORY LAW, clearly established by the U.S. Supreme Court.

Conclusions of Law

1. *The Defendant/Counter-Plaintiff wholly failed to provide any credible evidence to substantiate any of his claims concerning a RICO civil conspiracy claim.*
 - Credibility determinations are of course the prerogative of the JURY
 - Whether there was a violation of RICO, and whether I was injured "by reason of" such violation was of course an issue I asked to be made by the JURY
2. An essential element of each of Defendant/Counter-Plaintiff's claim was damages.
3. *The Defendant/Counter-Plaintiff failed to prove any damage as a direct result of any action or inaction caused by the Plaintiff or the Counter-Defendants.*
 - I did not make a civil RICO claim against the Plaintiff [Law Office]
 - "damage" is of course a JURY issue, as is "direct result". (proximate cause)
 - Also, civil RICO does not require "damage as a direct result of any action or inaction", but "injury by reason of" the RICO violative conduct, i.e. flowing from the "pattern of racketeering activity", i.e. more like producing cause.
4. *All of Defendant/Counter-Plaintiff's claims were as a matter of law unproved and untenable on the evidence presented to the Court*
 - "as a matter of law unproved"? What sort of MUMBO-JUMBO is this that Fleming put down for Judge Banner to sign?
 - And had I not asked for determination by JURY?
5. *Based upon the facts presented to support Defendant/Counter-Plaintiff's claim concerning RICO civil conspiracy charges, the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were completely untenable.*
 - Is this a conclusion of law (as to my civil RICO claim) made by Judge Banner, "upon the facts presented"?
 - But I had asked for a finding of fact (as to my civil RICO claim) to be made by a JURY, "upon the facts presented"
6. *The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy charges were not based upon the law, were not a good faith extension of existing law, and were brought and continued to be urged for the purpose of harassment.*
 - Not based on the law??? Civil RICO IS the law! 18 U.S.C. § 1964(c)
7. *The court concludes as a matter of law that Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were brought for the purpose of harassment.*
 - Since when has the filing of a civil RICO claim become "harassment" "as a matter of law"???
8. *The Defendant/Counter-Plaintiff's behavior in bringing and prosecuting this frivolous lawsuit was a violation of one or more of the following: \$9,000 et seq. Civ. Prac. & Rem. Code, \$10,000 et seq. Civ. Prac. & Rem. Code, and/or Rule 13, T.R.C.P.*

RCP Rule 298 Request for Clarification and Amendment

8
19

APP 51

- \$9,000 et seq. does not apply to my civil RICO nor my DTPA cause of action pleaded (in essence because it is not a tort but a statutory law claim). Also the court has to first give me a warning under \$9,000, and a 90 day opportunity to withdraw any pleading.
- "behavior" does not have much specificity or particularity.
- Even if it were a "violation", Judge Banner cannot unconditionally punish me for a completed act.
- Such unconditional punishment, without full criminal process, is outlawed as a matter of law.]

9. *The Court has the power to award both actual and punitive damages against the Defendant/Counter-Plaintiff for the filing and prosecution of a frivolous lawsuit. This authority stems from one or more of the following \$9.00 et seq. Civ. Prac. & Rem. Code, \$10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.*

- YES, but only to COERCE, not to unconditionally punish or for a completed act, without full due CRIMINAL process.
- So says the U.S. Constitution and U.S. Supreme Court!

10. *The behavior and attitude of the Defendant/Counter-Plaintiff in filing and prosecuting this claim against the Counter-Defendants calls out for the award of both actual and punitive damages to be assessed against the Defendant/Counter-Plaintiff.*

- Judge Banner found me "well-intentioned".
- Also, I did not get to "prosecute" this claim. Judge Banner granted summary judgment.

11. *The Counter-Defendants were successful in presenting a prima facie case to the Court on the issue of sanctions. After the prima facie case was made, the burden of proof shifted to the Defendant/Counter-Plaintiff and the Defendant/Counter-Plaintiff failed in its effort to prove good faith in the filing of the RICO civil conspiracy claims.*

- There is no "burden-shifting" upon a motion for sanctions!
- It is not up to me to prove good faith. Good faith is "presumed". Judge Banner even found "well-intentioned"!

12. *The appropriate award for actual damages as a result of the filing and full prosecution of this frivolous lawsuit is an award of \$50,085.00 in attorney's fees. The Court makes this award under power granted to the Court by \$9.000 et seq. Civ. Prac. & Rem. Code, \$10.000 et seq. civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.*

- Damages only come into play under \$9,000. This section however does not apply, as there was no finding of bad faith under the "safe-harbor" provision of this section. The other sections do not allow for assessing attorney's fees for "damages", ONLY to "coerce"
- Under the "common law"?????

13. *The appropriate sanction for the inconvenience suffered by the Counter-Defendants for the filing and full prosecution of this frivolous lawsuit is an award of \$1,000.00 to Christina Westfall and \$1,800.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.*

- See above

14. The appropriate punitive sanction for the filing and full prosecution of this frivolous lawsuit is an award of \$5,000.00 to Christina Westfall and an award of \$5,000.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.

- "Full prosecution"? Judge Banner granted summary judgment.

15. The award of punitive damages is directly related to the harm done.

- The only legal sanctions are of course those to "coerce", and they do NOT relate to the harm done, but to what is necessary to "coerce" into compliance. I never disobeyed NOTHING!

16. The award of punitive damages is not excessive.

- See above

17. The award of punitive damages is an appropriate amount to seek to gain the relief sought which is to stop this Defendant/Counter-Plaintiff, and others like him, from filing similar frivolous lawsuits.

- Judge Banner had found me "well-intentioned"
- Are there special sanctions for filing "similar" frivolous suits, i.e. civil RICO?

18. The amount of the punitive damage award is narrowly tailored to the harm done.

- Does not the law say it should be tailored to "coerce", and that a sanction for "harm done", i.e. a "completed act", is by law a CRIMINAL sanction?

19. Authority for the punitive damage award is derived from \$10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

- No specificity and particularity as to just exactly what I was supposed to have done.
- No "authority" of course over-rides the Constitution and the Supreme Court, i.e. that a punitive (as opposed to "coercive") sanction cannot be imposed except by full CRIMINAL process.

Any finding of fact herein which is later determined to be a conclusion of law, is to be deemed a conclusion of law regardless of its designation in this document as a finding of fact. Any conclusion of law herein which is later determined to be a finding of fact, is to be deemed a finding of fact regardless of its designation in this document as a conclusion of law.

SIGNED THIS _____ day of September, 2003

JUDGE PRESIDING

continued next page
w/ signature & Certificate of Service.

Udo Birnbaum

UDO BIRNBAUM

540 VZ CR 2916

Eustace, Texas 75124

(903) 479-3929 phone

(903) 479-3929 fax

Certificate of Service

This is to certify that on this the ¹⁴/₁₅ day of October, 2003 a copy of this document was sent by Regular Mail to attorney Frank C. Fleming at PMB 305, 6611 Hillcrest Ave., Dallas Texas 75205-1301. A copy of this document has also been provided to Judge Paul Banner through Pam Kelly, Court Coordinator for the 294th District Court in Canton, Texas.

Udo Birnbaum
Udo Birnbaum

Compare this to the 1 year later proposed "Findling"

1 damages, \$5,000.00 in punitive and the joint and several
2 \$50,085.00 in attorneys' fees. Mr. Birnbaum's sanctions as
3 against Mr. Fleming or against the P.C. is denied and nothing
4 is ordered.

5 In assessing the sanctions, the Court has
6 taken into consideration that although Mr. Birnbaum may be
7 well-intentioned and may believe that he had some kind of
8 ~~claim~~ as far as RICO there was nothing presented to the
9 court in any of the proceedings since I've been involved that
10 suggest he had any basis in law or in fact to support his
11 suits against the individuals, and I think -- can find that
12 such sanctions as I've determined are appropriate. And if
13 you will provide me with an appropriate sanctions order, I
14 will reflect it.

15 Now, as far as relief for sanctions on behalf
16 of Mr. Westfall, individually, that is specifically denied.

17 Any relief sought by any party by way of
18 sanctions which have not been specifically addressed either
19 by the granting or the denial of same -- such is denied.

20 Okay. How soon can I expect an order because
21 I gather this matter will go up to whatever appropriate
22 appeals court for review?

23 MR. FLEMING: I will give Mr. Birnbaum the
24 statutory three days. I'll submit it to him. And if I don't
25 hear back from him, I'll submit it to you after.

\$62,000 punishment for well-intentioned?
Unconditional - makes it criminal/punishment!

Appendix 1 (23) 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. 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. There was no dispute as to the contract or its terms. What was in dispute is whether or not Mr. Westfall's P.C. 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 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.

No! Was not submitted to the jury!
 Jury questions sounded in breach of contract.
 (Not pleaded, Not proved)
 Judge did not allow my "excused" issue
~~to be heard~~

Appendix 2 (24) (4) 14

in response to a request from the Defendant/Counter-Plaintiff, the Court makes its findings of fact and conclusions of law as follows:

Findings of Fact

1. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin (the wife and daughter of the Defendant/Counter-Plaintiff's former attorney, David Westfall) were groundless and totally unsupported by any credible evidence whatsoever.
2. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims against Christina Westfall and Stefani Podvin were without merit and brought for the purpose of harassment, delay, and to seek advantage in a collateral matter by attempting to cause the original Plaintiff, David Westfall to drop his claim for un-reimbursed legal services provided to the Defendant.
3. The Defendant/Counter-Plaintiff was afforded numerous opportunities to marshal his evidence and present any facts to support his allegations concerning RICO civil conspiracy claims against the wife and daughter of the Defendant/Counter-Plaintiff's attorney, David Westfall. The Defendant/Counter-Plaintiff wholly failed to provide any such credible evidence at either the summary judgment phase of the lawsuit or at the hearing on the motion for sanctions.
4. The attempt to provide testimony by the Defendant/Counter-Plaintiff concerning RICO civil conspiracy claims were his own opinions and totally uncorroborated by any other evidence.
5. The Defendant/Counter-Plaintiff never established that he had suffered any economic damages as a result of an alleged conspiracy. The Defendant/Counter-Plaintiff was sued by his former counsel to collect money for legal work which had been performed for the Defendant/Counter-Plaintiff for which the Defendant/Counter-Plaintiff had not paid his attorney in

26

full. The jury found that the work had been performed by the attorney, the amount charged to the client was reasonable, and that there was an amount owed by the Defendant/Counter-Plaintiff to the Plaintiff. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy claims had no bearing on whether or not the Defendant/Counter-Plaintiff received the legal services and owed the balance of the outstanding attorney's fees.

6. The filing of the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy was a blatant and obvious attempt to influence the outcome of the Plaintiff's legitimate lawsuit against the Defendant/Counter-Plaintiff and to cause harassment to the Plaintiff and his family members.

7. The behavior of the Defendant/Counter-Plaintiff in filing claims concerning RICO civil conspiracy in this lawsuit have been totally without substantiation on any cause of action pled.

8. The conduct of the Defendant/Counter-Plaintiff giving rise to the award of punitive damages was engaged in willfully and maliciously by the Defendant/Counter-Plaintiff with the intent to harm the Plaintiff and the Counter-Defendants.

9. The amount of actual damages, attorney's fees, suffered by the Counter-Defendant was proven to be reasonable and necessary by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The amount of actual damages awarded was in an amount that was proven at the hearing.

10. The amount of damages for inconvenience awarded by the court was proven at the hearing by a preponderance of the evidence and not challenged by the Defendant/Counter-Plaintiff at the hearing on sanctions. The court awarded damages for inconvenience in an amount the Court found to be reasonable and necessary, supported by evidence, and appropriate considering the circumstances.

Findings of Fact and Conclusions of Law
PAGE 3 of 7

27

11. The amount of punitive damages awarded by the Court were found to be supported by the evidence and necessary under the circumstances to attempt to prevent similar future action on the part of the Defendant/Counter-Plaintiff.
12. The sanctions award is directly related to the harm done.
13. The sanctions award is not excessive in relation to the harm done and the net worth of the Defendant/Counter-Plaintiff.
14. The sanctions award is an appropriate amount in order to gain the relief which the Court seeks, which is to stop the Defendant/Counter-Plaintiff and others similarly situated from filing frivolous lawsuits.
15. The amount of the punitive damage award is an amount narrowly tailored to the amount of harm caused by the offensive conduct to be punished.
16. The Counter-Defendants suffered both economic and emotional damages as a result of the Defendant/Counter-Plaintiff's lawsuit and specifically the frivolous nature of the lawsuit caused damages which included expenses (in addition to taxable court costs), attorney's fees, harassment, inconvenience, intimidation, and threats.
17. The Counter-Defendants established a prima facie case that this lawsuit was filed by the Defendant/Counter-Plaintiff without merit and for the purpose of harassment. The prima facie case was made by the testimony and documents introduced as evidence by the Counter-Defendants at the summary judgment proceedings as well as at the hearing on sanctions on July 30, 2002.
18. After the Counter-Defendants established their prima facie case, the Defendant/Counter-Plaintiff failed wholly to provide any credible evidence to support the legal theories of the Defendant/Counter-Plaintiff.

Conclusions of Law

1. The Defendant/Counter-Plaintiff wholly failed to provide any credible evidence to substantiate any of his claims concerning a RICO civil conspiracy claim.
2. An essential element of each of Defendant/Counter-Plaintiff's claim was damages.
3. The Defendant/Counter-Plaintiff failed to prove any damage as a direct result of any action or inaction caused by the Plaintiff or the Counter-Defendants.
4. All of Defendant/Counter-Plaintiff's claims were as a matter of law unproved and untenable on the evidence presented to the Court.
5. Based upon the facts presented to support Defendant/Counter-Plaintiff's claim concerning RICO civil conspiracy charges, the Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were completely untenable.
6. The Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy charges were not based upon the law, were not a good faith extension of existing law, and were brought and continued to be urged for the purpose of harassment.
7. The court concludes as a matter of law that Defendant/Counter-Plaintiff's claims concerning RICO civil conspiracy were brought for the purpose of harassment.
8. The Defendant/Counter-Plaintiff's behavior in bringing and prosecuting this frivolous lawsuit was a violation of one or more of the following: §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, and/or Rule 13, T.R.C.P.
9. The Court has the power to award both actual and punitive damages against the Defendant/Counter-Plaintiff for the filing and prosecution of a frivolous lawsuit. This authority stems from one or more of the following: §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

Findings of Fact and Conclusions of Law
PAGE 5 of 7

westfall\udo\judgment\findings of facts2

29

10. The behavior and attitude of the Defendant/Counter-Plaintiff in filing and prosecuting this claim against the Counter-Defendants calls out for the award of both actual and punitive damages to be assessed against the Defendant/Counter-Plaintiff.

11. The Counter-Defendants were successful in presenting a prima facie case to the Court on the issue of sanctions. After the prima facie case was made, the burden of proof shifted to the Defendant/Counter-Plaintiff and the Defendant/Counter-Plaintiff failed in its effort to prove good faith in the filing of the RICO civil conspiracy claims.

12. The appropriate award for actual damages as a result of the filing and full prosecution of this frivolous lawsuit is an award of \$50,085.00 in attorney's fees. The Court makes this award under power granted to the Court by §9.000 et seq. Civ. Prac. & Rem. Code, §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

13. The appropriate sanction for the inconvenience suffered by the Counter-Defendants for the filing and full prosecution of this frivolous lawsuit is an award of \$1,000.00 to Christina Westfall and \$1,800.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.

14. The appropriate punitive sanction for the filing and full prosecution of this frivolous lawsuit is an award of \$5,000.00 to Christina Westfall and an award of \$5,000.00 to Stefani Podvin, to be paid by the Defendant/Counter-Plaintiff to the Counter-Defendants.

15. The award of punitive damages is directly related to the harm done.

16. The award of punitive damages is not excessive.

17. The award of punitive damages is an appropriate amount to seek to gain the relief sought which is to stop this Defendant/Counter-Plaintiff, and others like him, from filing similar frivolous lawsuits.

Findings of Fact and Conclusions of Law
PAGE 6 of 7

30

westfall\hudo\judgment\findings of facts2

- 18. The amount of the punitive damage award is narrowly tailored to the harm done.
- 19. Authority for the punitive damage award is derived from §10.000 et seq. Civ. Prac. & Rem. Code, Rule 13, T.R.C.P., and/or the common law of Texas.

Any finding of fact herein which is later determined to be a conclusion of law, is to be deemed a conclusion of law regardless of its designation in this document as a finding of fact. Any conclusion of law herein which is later determined to be a finding of fact, is to be deemed a finding of fact regardless of its designation in this document as a conclusion of law.

SIGNED THIS 30 day of September, 2003.



JUDGE PRESIDING

31