

REPORTER'S RECORD

VOLUME 1 OF 1 VOLUMES

TRIAL COURT CAUSE NO. 95-63

Exhibit
"C"

1 WILLIAM B. JONES) (IN THE DISTRICT COURT OF
2 VS.) (VAN ZANDT COUNTY, TEXAS
3 UDO BIRNBAUM) (294TH JUDICIAL DISTRICT

8 AMENDED MOTION FOR ENTRY OF JUDGMENT
9 -----

10 On the 6th day of October, 1998, the Hearing on
11 came on to be heard outside the presence of a jury,
12 in the above-entitled and -numbered cause; and the
13 following proceedings were had before the Honorable
14 JAMES ZIMMERMANN, Judge presiding, held in CANTON,
15 VAN ZANDT County, Texas:

16 Proceedings reported by COMPUTERIZED STENOTYPE
17 MACHINE; Reporter's Record produced BY
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20 LYNDA K. BRAGG, Texas CSR #3774-Exp. 12/31/00
21 Official Trial Reporter - 294th Judicial District

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25 **FILE COPY**

A P P E A R A N C E S:

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-AND-

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E X H I B I T I N D E X

OCTOBER 6TH, 1998

HEARING ON PLAINTIFF'S MOTION

FOR AMENDED JUDGMENT ON VERDICT

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P R O C E E D I N G S:

1 THE COURT: Jones against Birnbaum?

2 MR. BENNETT: Good morning, Judge.

3 THE COURT: Good morning.

4 MR. BENNETT: Judge, I'm Martin
5 Bennett. Mr. Birnbaum has finally
6 gotten around to hiring an attorney.

7 *(WHEREUPON, an off-the-record*
8 *discussion was had.)*

9 THE COURT: Mr. Jones, make
10 yourself comfortable. I've got lawyers
11 on both sides now.

12 MR. JONES: I want to keep him out
13 of trouble, if I can.

14 THE COURT: What's your pleasure?

15 MR. BENNETT: Judge, I don't know
16 whether you've had the opportunity -- I
17 faxed to you, yesterday, a brief in
18 support of our motions here today. We
19 have a motion for entry of judgment,
20 that I believe we're considering --

21 THE COURT: I now have what?

22 MR. BENNETT: I believe Mr. Ray has
23 a counter reply brief to the points that
24 I raised in that. But the motion that I
25

1 have on file here, is for motion for
2 entry of judgment, and also a motion not
3 withstanding the verdict.

4 I believe the three issues,
5 basically, that we're looking at, is
6 whether attorney's fees should be
7 awarded, whether a permanent injunction
8 should be granted, and whether costs of
9 the court should be awarded.

10 THE COURT: Okay.

11 MR. BENNETT: But we're ready to
12 proceed. I believe there was a motion
13 for continuance that was set for today,
14 also, but we're ready to proceed.

15 MR. RAY: Judge, we're certainly
16 ready to proceed.

17 THE COURT: All right. As you can
18 tell, I've got a 12 page criminal
19 docket. I've worked my way through a
20 good portion of it, and I don't want
21 to -- How long do you think it will
22 take?

23 MR. BENNETT: Judge, I think that
24 we ought to have it argued, both sides,
25 within 30 minutes, I would think.

1 MR. RAY: I'd think so too, Judge.
2 We won't be bogged down, hopefully this
3 time, with Mr. Birnbaum wanting to
4 examine me on the witness stand. It
5 shouldn't take very long. As I see it,
6 Judge, we're at the stage where it's the
7 Court's ministerial duty to go ahead and
8 enter a judgment based on the verdict.

9 I think a number of the issues that
10 we're raising here, are really probably
11 more appropriately addressed, motion for
12 new trial. I anticipate that coming
13 after the entry of the judgment, Judge.

14 THE COURT: I'm just trying to
15 figure out the timing. You're from --

16 MR. BENNETT: Athens.

17 THE COURT: You don't practice with
18 Fred Head; do you?

19 MR. BENNETT: No, Judge. I'm
20 partners with Hank Skelton.

21 THE COURT: Well, I just wanted to
22 ask to be sure. We're off the record.

23 *(WHEREUPON, an off-the-record*
24 *discussion was had.)*

25 THE COURT: How about 11 o'clock?

1 MR. RAY: That will be fine, Judge.

2 THE COURT: Maybe I'll be through
3 with all of this by then.

4 MR. BENNETT: Thank you, Judge.

5 (WHEREUPON, a recess was had
6 at this time in this case.)

7 THE COURT: We come now to Cause
8 No. 95-63; Jones against Birnbaum. Let
9 the record reflect, that both parties
10 are present, together with their respect
11 respective counsel. We have motions for
12 entry of judgment on file from both
13 parties, together with Mr. Birnbaum's
14 motion for judgment N.O.V. and briefs
15 from both sides in support, thereof.
16 Are both sides ready to argue those
17 motions?

18 MR. RAY: Yes, Your Honor.

19 MR. BENNETT: Mr. Birnbaum is
20 ready, Your Honor.

21 THE COURT: Do you have any
22 agreement as to what the order of
23 argument will be? Mr. Ray's motion for
24 judgment was filed first. It's my
25 intention to let both sides say

1 everything they want to say.

2 MR. BENNETT: Judge, I have no
3 objection to Mr. Ray proceeding first,
4 if that's his wish.

5 MR. RAY: Judge, essentially, our
6 motion for entry of the judgment, quite
7 frankly, is simply to have the Court
8 perform it's administerial act, based on
9 the verdict from the jury.

10 Now, concerning the motion N.O.V,
11 we've got a response and brief to that,
12 Judge, but that's not my motion. So I
13 don't know if you want me to try to
14 argue my response.

15 THE COURT: No. I'll let him argue
16 the motion -- the N.O.V. motion, and you
17 can go ahead and argue for your motion
18 for judgment. The reason I said it that
19 way, was, I think --

20 MR. RAY: Judge, I think our motion
21 was filed first.

22 THE COURT: No question about that.
23 Mr. Birnbaum has also filed, in addition
24 to the N.O.V. motion, a motion for entry
25 of judgment. So you go ahead and argue

1 your motion and I'll let him take a shot
2 at his.

3 MR. RAY: Your Honor, the Plaintiff
4 has presented the proposed judgment
5 based on the findings of the jury. And
6 the jury answered in response to
7 Question 1 and in Question 3, as you
8 know, affirmative findings in Question
9 2, and did not -- and entered zero on
10 damages, Judge.

11 So I'm prepared to present to the
12 Court, a proposed judgment based upon
13 those findings. One, to provide for a
14 mandatory injunction, based upon the
15 fact finding of the jury. And also, a
16 permanent injunction concerning the
17 free-flowing stream, and concerning the
18 erection or construction of dams or the
19 allowance of such, with respect to the
20 property of Mr. Birnbaum. The overflow
21 of it would result into Mr. Jones'
22 property. I believe that to be the
23 finding of the jury, with respect to the
24 fact issue that the jury found in
25 special Question No. 1.

1 In addition, Your Honor, we have
2 entered attorney fees. I think the
3 attorney fees are going to be where the
4 real bone of the contention lies, Judge.
5 I think the issue is going to revolve
6 around, number one, was there statutory
7 authority supporting attorney fees.

8 I think probably what we're going
9 to discover, Judge, is that attorney
10 fees -- we argued that they're allowable
11 in this instance, because there was no
12 objection ever made by Mr. Birnbaum,
13 either at the time the evidence was
14 offered concerning attorney fees, or at
15 the time whenever that particular
16 question was submitted to the jury.

17 Because of that, he has waived his
18 right now -- and that's our position,
19 Judge. And, of course, our -- under
20 injunction, you're not entitled to
21 attorney fees. So that presents a
22 dilemma, as I see it, for the Court. Of
23 course, it will be the Court's
24 determination as to what's occurred
25 there.

1 Judge, our position probably is
2 best tracked, and even one case that I
3 have, which is the case that essentially
4 is our case, except it was tried to the
5 Court. It involves 11.086 of the Water
6 Code.

7 In that particular instance, the
8 attorney representing the party that was
9 in the same position as I am in this
10 case, the attorney sought attorney fees.
11 The person's side was representing by
12 counsel. They especially accepted to
13 attorney's fees based on their argument
14 that attorney fees were not authorized.

15 Then that attorney came back and
16 amended his pleadings, and tried to make
17 it fit under declaratory judgment action
18 by adding an additional count. The
19 Court went ahead and awarded the
20 attorney fees, based on it being a
21 declaratory judgment act, over the
22 objection of the opposing party's
23 counsel.

24 The Court of Appeals reversed,
25 based on the objection. The difference

1 in this case, is no objection has been
2 made up until now -- or any argument
3 made, that attorney fees would not be
4 allowable.

5 Now, I've tried to do such research
6 in our brief, Judge, essentially goes to
7 citing all of those cases. That says,
8 if you don't object during the trial, so
9 the trial Court has the opportunity, at
10 that point, to make a determination, you
11 just go ahead and allow the evidence in
12 and allow it to be submitted as has
13 occurred to this point, which you've
14 waived that objection.

15 Judge, so it's our position; one,
16 that we're certainly entitled to the
17 injunction in whatever form the Court
18 really thinks it should be, based on the
19 fact findings concerning the damming up
20 of the stream and the potentiality for
21 it in the future.

22 Number two, we believe we're still
23 entitled to our attorney fees, because
24 Mr. Birnbaum failed to ever object to
25 the submission of the issue or the

1 submission of evidence -- admission, of
2 course, is in the trial record.

3 THE COURT: Thank you, Mr. Ray.

4 MR. BENNETT: Thank you, Judge,
5 Mr. Ray. Judge, the question -- I
6 believe Mr. Ray and I do agree upon the
7 fact that the attorney's fees being
8 granted in this case is legally
9 insufficient. Under Article 38.001 of
10 the Code of Civil Remedies, there are
11 certain specific requirements where a
12 plaintiff can recover attorney's fees.
13 Mr. Jones does not fit in any of those
14 categories.

15 So from a legally sufficient point
16 of view, I do not believe that he
17 qualifies for attorney fees. That is
18 the only pleadings that's on file with
19 this court is under Section 38.001.

20 The question that was specifically
21 presented to the jury was, "What sum of
22 money, if any, do you find from the
23 preponderance of the evidence, would be
24 reasonable and necessary attorney's fees
25 for the services, if any, performed by

1 Plaintiff's attorney".

2 There is no question as to whether
3 they should be presented or not be
4 presented. The only question is how
5 much money is reasonable and necessary.

6 I believe it is a question for the
7 Court to decide if attorney's fees
8 should be granted or not be granted.
9 And once again, we go to the general
10 rule, that the movants are responsible
11 for each -- for their own attorneys
12 fees, unless there is a contract or a
13 specific statute, that's going to
14 approve of attorney's fees.

15 There is no contract in this case.
16 The specific statute that the Plaintiff
17 seems to be relying on in this case,
18 does not qualify him. He does not fit
19 into any of the categories that is
20 listed in 38.001.

21 So as a matter of law, we come to
22 you to say, that really, there is no
23 choice. There is no legally sufficient
24 evidence. There is no parameters at all
25 where he can recover -- whether the jury

1 thought that that is reasonable and
2 necessary attorney's fees or not. The
3 question is presented -- that the jury
4 didn't answer, is whether he should be
5 granted those attorney's fees to start
6 with.

7 We then go on to the question of
8 whether a judgment -- or excuse me, a
9 permanent injunction should be granted
10 against Mr. Birnbaum. The requirements
11 for a permanent injunction is that there
12 be serious injury. This extraordinary
13 remedy that is asked for, is required
14 that there be serious and permanent
15 injury to Mr. Jones. I don't believe
16 that that is the case.

17 The evidence in this case seems to
18 present that there was some minor
19 flooding of the land. This is the type
20 of serious injury that is expected to
21 grant this type of extraordinary remedy.

22 There also needs to be a
23 requirement, that there is no adequate
24 remedy of law. There is an adequate
25 remedy of law for Mr. Jones. He can

1 come to court. If there is any future
2 damage to his land; he can come back to
3 this court again and ask for damages, so
4 he does have a remedy.

5 The fact of trying to get a
6 permanent injunction against
7 Mr. Birnbaum to remove dams that are
8 occasionally built by beavers, is
9 putting a burden on him. So I don't
10 believe that that extraordinary remedy
11 is called for -- and that we ought to
12 see if any damages do occur in the
13 future -- hopefully, they will not, but
14 if they do, Mr. Jones certainly has his
15 remedy.

16 There's also in the judgment that
17 Mr. Ray has presented to the Court, a
18 cost of the court provision, that the
19 defendant be responsible for all costs
20 of the court. I have provided you a
21 specific case, Judge, in my brief. That
22 states that the Plaintiff in this case
23 was not a successful party -- and that
24 is the requirement for them to recover
25 costs of court. They must be a

1 successful party.

2 The code, in saying -- of the case
3 that I cited to you in my brief, is that
4 even if a party prevails on the question
5 of negligence, if they do not receive
6 any damages, they are considered to be
7 an unsuccessful party. So since they
8 are unsuccessful, I believe that also
9 goes to the issue of attorney's fees.

10 If they were a successful party,
11 and even did qualify under 38.001, which
12 they do not, they would need to be a
13 successful party before being eligible
14 for those attorney's fees. That's
15 within your discretion.

16 We know that the issues, once
17 again, were presented as to the
18 attorney's fees -- Judge, if you want me
19 to, I can proceed on with my J.N.O.V,
20 because the arguments are of course very
21 similar. But if the Court believes that
22 the jury did answer the question that
23 attorney fees should be granted in this
24 case -- which, once again, we state the
25 question never was asked of the jury as

1 to whether they should be or shouldn't
2 be, but if the Court determines that
3 they came close enough to answering that
4 question, we believe that it is within
5 your power to render a judgment,
6 notwithstanding that verdict.

7 In fact, the plaintiff is legally
8 not entitled to such recovery. Thank
9 you.

10 THE COURT: You get to open and
11 close on your motion -- and I'm going to
12 give him the last word, if any more he
13 has to share on the NOV Motion.

14 MR. RAY: Thank you, Judge. Judge,
15 the Court hasn't had the opportunity to
16 this case -- and I would like to go
17 ahead and present it to the Court at
18 this time. I'll go ahead and give a
19 copy of that to Mr. Bennett.

20 Judge, this is that particular case
21 that I was arguing about a second ago --
22 and I should have approached the bench
23 and give it to you then.

24 Judge, that is the case that tracks
25 very closely the exact facts that we

1 have before us here in this particular
2 case.

3 Judge, I think we're at a point
4 now, where what is an administerial duty
5 of the Court at this stage in entering
6 this judgment. Does it precede to enter
7 the judgment based on findings of the
8 jury. I think the findings of the jury
9 are clear. That still leaves open the
10 consideration of a motion for new trial,
11 which I thoroughly expect is going to be
12 filed by Mr. Birnbaum's Counsel.

13 But, I think that at this stage,
14 Judge, I think the Court's
15 responsibility is really an
16 administerial duty more than it is
17 anything else. That's just really to
18 enter that judgment. Of course, if the
19 issue of attorney fees are raised again,
20 a motion for new trial, I think that
21 will -- and I anticipate it will be,
22 then we're going to have to finally deal
23 with that at some point.

24 Our continued position is going to
25 be that it is waived, because there was

1 no objection ever made. That's the
2 purpose for our brief, Judge, is to
3 really support that position.

4 Had Mr. Birnbaum had counsel, we
5 wouldn't be in this predicament. I feel
6 certain his counsel would have taken one
7 look and said, "We're going to object to
8 submission of the attorney fees. We're
9 going to object to any evidence coming
10 out. We want you to show what statutory
11 authority you have to seek attorney
12 fees". That didn't happen.

13 As a result, we've gone through the
14 complete trial. We've got a verdict
15 from the jury. I think it was the clear
16 intention of the jury, that it awarded
17 attorney fees, because it did not award
18 any actual damages.

19 Now, concerning which party
20 prevailed, the primary desire of the
21 Plaintiff, Mr. Jones, was to obtain an
22 injunction, so that he wouldn't have to
23 repeatedly come back to the court to
24 keep his property from being flooded.

25 The jury made a fact finding, which

1 I believe was favorable to him, and
2 supports the entry of an injunction.

3 The jury did not find any damages.
4 And Mr. Bennett seems to think that if
5 the jury didn't find any actual damages
6 to the land, that therefore, Mr. Jones
7 was not a willing party.

8 However, I don't think the jury had
9 that impression at all when they
10 returned the verdict. Because the jury
11 came back after that, and went ahead and
12 awarded substantial attorney fees.

13 Mr. Jones, himself, I think, as I
14 recall, testified that the creek
15 receded. The dam had apparently been
16 removed after the suit was filed. So as
17 a result, he didn't have overflow water
18 right now.

19 So Judge, our request and our
20 desire, is that the Court go ahead and
21 enter the judgment in the form that
22 we're presenting to the Court. And then
23 at that point, we can begin the steps of
24 appeal. The Court still has
25 jurisdiction over the case under a

1 motion for new trial to reconsider
2 whatever it thinks appropriate.

3 I think we've got to really have
4 the judgment entered to get into that.
5 Otherwise, I don't know what's going --
6 I don't see how we can resolve the case
7 really, Judge. Because we're left with
8 our remedies being a writ of mandamus or
9 something.

10 If the Court should choose not to
11 grant attorney fees, I would vastly
12 rather deal with it, Judge, on the other
13 side of the judgment entered that
14 reflected what the jury's findings were,
15 and deal with it through a motion for
16 new trial on the other side.

17 THE COURT: Mr. Ray, let me ask one
18 question.

19 MR. RAY: Yes, sir.

20 THE COURT: If in the ordinary
21 course of events -- let me strike that.
22 If in the usual course of events, by
23 which I mean, had Mr. Birnbaum had
24 counsel at the time of the trial, and
25 had counsel, as you suggested, made a

1 timely objection about the submission of
2 attorney's fees, then as you point out,
3 we probably wouldn't be in -- at least
4 that part of the dilemma.

5 Now, what that says, as I
6 understand the law, is that had the case
7 been tried properly from Mr. Birnbaum's
8 standpoint, given the final outcome,
9 Mr. Jones would not be entitled to
10 attorney's fees -- or you would not be
11 entitled to attorney's fees. Now given
12 that, help me understand how waiver
13 operates to change that.

14 MR. RAY: Judge, that's -- excuse
15 me. Judge, that's the purpose of our
16 brief. We've cited, in our brief, a
17 number of cases. Those cases indicate
18 that if you waive the submission and you
19 waive the admissibility of all the
20 evidence that comes in to establish it,
21 that you have waived the ability to
22 raise it.

23 One of the reasons is -- The new
24 appellate rules, I believe it's Rule 33,
25 essentially says, that if an objection

1 is not timely made, then at that point,
2 you've lost the right to raise it on
3 appeal.

4 So as a result, it's not something
5 that would create reversible error. I
6 think the reason for that, is because
7 the trial court should know if there's
8 an objection timely, so the trial Court
9 can rule on it; rather than us reaching
10 this point, where suddenly the discovery
11 is made, and the Court has tried the
12 case. Judge, I can go into my brief, if
13 you would like.

14 THE COURT: That's all right. I
15 know you have a brief, and I
16 obviously -- since it was just handed to
17 me minutes ago, have not had a chance to
18 study either one of your briefs.

19 I wanted you to touch on that and I
20 appreciate it. Do you have anything
21 else, Mr. Bennett?

22 MR. WRIGHT: Yes, Judge. To
23 specifically address your issue that you
24 bring up, Rule 379 of the Texas Rules of
25 Civil Procedure states -- in the last

1 part of that rule -- that a claim that
2 the evidence was legally or factually
3 insufficient to warrant the submission
4 of any question, may be made for the
5 first time after verdict; regardless of
6 whether the submission of such question
7 was requested by the complainant.

8 So I believe it's within your
9 discretion to ignore the submission of
10 the question, particularly if it's
11 irrelevant, Judge.

12 The Court, in rendering judgment,
13 may disregard questions that are
14 immaterial. McDonald's Texas Civil
15 Practice states that a question is
16 immaterial when it should not have been
17 submitted, or, though properly
18 submitted, it has been rendered
19 immaterial by other findings.

20 The other findings in this -- first
21 of all, I state that the question should
22 have never been submitted. I believe
23 Mr. Ray is agreeing with me that it
24 should never have been submitted. But
25 we also come to the question, is it

1 rendered immaterial by other findings.

2 One of the findings, that again, we
3 don't have in this case, as to whether
4 the jury even said should attorney's
5 fees ever be awarded to start with.
6 They have not specifically answered that
7 question.

8 The only fact they answered is that
9 the 10 thousand dollars is the
10 reasonable amount. The question is
11 still begs, should they be presented at
12 all.

13 That's where we say that they have
14 not answered the question. We don't
15 believe your duty here is simply
16 ministerial. You have an administerial
17 duty to enter a judgment, but not any
18 particular judgment. It's within your
19 discretion to determine which judgment
20 you will enter -- and that's the purpose
21 for our hearing today.

22 So we ask you, then, to rule, of
23 course, that the attorney's fee were
24 immaterial when being asked for to start
25 with.

1 THE COURT: Thank you, sir.

2 MR. RAY: Judge, when you consider
3 that, I'd like for you to take a look --
4 We also cite McDonald. It's 27.65.

5 In that particular area, Judge, it
6 concerns the jury verdict, the Court's
7 responsibility -- and it even says,
8 Judge, that the trial court may feel
9 compelled later to set an entire
10 judgment aside, but it's judgment still
11 should reflect the findings of the jury,
12 originally.

13 THE COURT: Tell me that citation,
14 again.

15 MR. RAY: Judge, that is 27,
16 McDonald Texas Civil Procedure -- or
17 rather, Civil Practice, Section 65B.
18 Judge we cited right close to the
19 conclusion of our brief.

20 THE COURT: Oh, it's in your brief?

21 MR. RAY: Yes, sir.

22 THE COURT: I just sent your
23 brief -- or briefs out with Ms. Young,
24 the clerk, to get copies made for me.
25 Anything else, gentlemen, on this?

1 MR. RAY: Nothing further from the
2 Plaintiff, Your Honor.

3 MR. BENNETT: Nothing further on
4 the motion for entry of judgment.

5 THE COURT: Let me see ya'll up
6 here. For the record, this completes
7 this hearing. The Court will take it
8 under advisement and will read your
9 authorities, and will have a decision
10 for you as quickly as I can -- but let
11 me visit with you up here. This is off
12 the record, Lynda.

13 *(WHEREUPON, this hearing was*
14 *recessed for the day.)*

1 THE STATE OF TEXAS)

2
3 COUNTY OF VAN ZANDT)

4 I, Lynda Kay Carson-Bragg, Certified
5 Shorthand Reporter, State of Texas, do hereby
6 certify that the above and foregoing contains a
7 true and correct transcription of ALL THE
8 PROCEEDINGS in the above styled and numbered
9 cause, all of which occurred in open Court or in
10 Chambers, and were reported by me.

11 I FURTHER CERTIFY that this transcription
12 of the record of the proceedings truly and
13 correctly reflects the exhibits, if any, offered
14 by the respective parties.

15 WITNESS My hand, this the _____ day of
16 _____, 1999.

18 _____
19 LYNDA KAY BRAGG, CSR
20 CSR #3774
21 Rt. 2 Box 18-A
22 Jacksonville, Texas 75766

23 I FURTHER CERTIFY that the cost of this
24 Statement of Facts to _____ is _____.

25