No. 18-1811

In the
United States Court of Appeals
for the Seventh Circuit

DONALDSON TWYMAN,

Plaintiff-Appellee,

v.

S&M AUTO BROKERS, INC.,
Defendant.

APPEAL OF: JOEL ALAN BRODSKY

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:16-cv-04182.
The Honorable Virginia M. Kendall, Judge Presiding.

PETITION FOR A PANEL REHEARING BY JOEL ALAN BRODSKY

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-1811

Short Caption: Donaldson Twyman v. S&M Auto Brokers, Appeal of Joel Alan Brodsky

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Joel Alan Brodsky (Note Joel Alan Brodsky is appearing pro se in a Petition for Rehearing)

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Gordon Rees Scully Mansukhani, LLP by Ryan Brown, appeared in the district court and this court. He will not be representing Joel Alan Brodsky in the petiton for rehearing.

Joseph Lopez appaered in the district court

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Attorney's Signature: S/ Joel Alan Brodsky Date: 01/20/2019

Attorney's Printed Name: Joel Alan Brodsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

As this Court will notice, the appellant, Attorney Joel A. Brodsky, is no longer represented by Ryan Brown in this appeal. I am presenting this Petition for Rehearing *pro se*. I pray that the Court will not put this brief aside at this point, not only because there are some important issues that I believe were overlooked, but also because my former attorney made two (2) material misrepresentations to this Court during oral arguments that may have caused this Court to make conclusions that are not true, and may have affected this Court's ruling. As the Court will see the misrepresentations are relevant to, and support, the legal reasons that this Court should grant me a rehearing.

During oral argument my former attorney Ryan Brown falsely informed this court that I had taken the anger management course pursuant to the district courts order. Not only have I never taken the class, Attorney Brown later admitted to me in an e-mail that he knew the representation he made to this Court was false when he made it. The other false representation made by my former attorney Mr. Brown's was in response to the Court's question during oral arguments where he was asked him if I owned a house in France or Italy. His answer that my wife was from Europe and I had access to her family's property there was completely fabricated. What made him make this false representation is baffling. My wife is an Assyrian Christian from Tehran who escaped from Iran with her family when the Shah fell from power. Her family owns no property in Europe, so I obviously cannot have access to their property in Europe. My wife and I do not own, or have any interest in, any house, apartment, or other property, in France, Italy, Europe, or even in the United States for that matter. In fact the $50,000 punitive fine affirmed by this Court is more than twice my entire net worth!

Having everything taken from me after thirty-six (36) years of practice is also not what I expected to happen. Having this extremely large sanction broadcast all over the media (and therefore the internet for anyone to "google") is not how I wanted to be known or remembered. I understand and appreciate that this Court's ruling is "nonprecedential", and that it is not being published. However, with the media interest in this story, the internet, with this Court publishing nonprecedential orders on its website, and with companies like Nexis-Lexis providing unpublished opinions as part of its service, that does not mean as much as it used to. In fact the Order has already been in the media, and on the front page of the Law Bulletin. I pray that this Court will read and consider my arguments in this Petition for Rehearing and do the just thing.

ARGUMENT

A. The Sanction of $50,000 is Contrary to U.S. Supreme Court and Seventh Circuit Precedent:

A fifty thousand dollar ($50,000) sanction was affirmed by this Court, even though as was acknowledged in this Court's Order affirming the sanction, there was no basis for amount set forth in the district court's ruling. If *Goodyear Tire & Rubber Co. v. Haeger*, __ U.S. __. 137 S. Ct. 1178, 1186, 197 L. Ed. 2d 585 (2017), means anything, it stands for the proposition that a Court's inherent authority to sanction is not without limits, and that any sanction must be tied to a measure of some sort. Without any limitation, what is to prevent a court from sanctioning a lawyer to 90 days in jail? More to the point what is to prevent a court from issuing a sanction that will take every last penny a lawyer has, and still leave tens of thousands of dollars still to pay? A sanction has to be tied to some reasonable measure. "To facilitate an appropriate review, the district court should impose sanctions with some precision." *Ins. Ben. Adm'rs v. Martin*, 871 F.2d 1354, 1359 (7th Cir. 1989)

In this Court's Order, it stated that "it would have been preferable for this court to state expressly the basis for the size of its fine". I agree. Remember in this case there are no damages to be rectified, or fees remaining to be paid. Everything was settled and released, including the case, fees, and motions for sanctions. (Doc. 202 and Doc. 223). The only other measure for sanctions is the minimum necessary to prevent the behavior the Court found troubling from occurring in the future. "We read these earlier decisions as recognizing "fundamental limitations on the remedial powers of the federal courts. 425 U.S., at 293. Those powers could be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and the extent of that violation." *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 399, 102 S. Ct. 3141, 3154 (1982)

The point is that one of the items that the district court is required to take into account determining the amount of sanctions, which it didn't consider, or was horribly mistaken about, is my wealth, or lack thereof. In a case dealing with inherent authority sanctions, this Court has held that "Courts take account of a defendant's wealth when "an amount sufficient to punish or to deter one individual may be trivial to another." *ZAZU Designs v. L'Oreal S.A., 979 F.2d 499, 508 (7th Cir. 1992)* "The aim of penalties, whatever form they take (fines, punitive damages, or, as in this case, statutory penalties), is to deter; and the poorer the defendant, the lower the penalty can be set and still deter wrongdoers in the same financial stratum." *Leister v. Dovetail, Inc., 546 F.3d 875, 883 (7th Cir. 2008)* (Also see *Yund v. Covington Foods, Inc., 193 F.R.D. 582, 585 (S.D. Ind. 2000)* "As noted above, the Supreme Court in TXO Production and City of Newport recognized that evidence of a defendant's wealth is traditionally considered relevant and admissible when assessing punitive damages.")

This brings into focus the district court's incorrect assumption in the ruling under appeal that I own a vacation home in Italy. It also spotlights my former attorney's false representation to this Court that I have access to my wife's family's home(s) in Italy or France. Why my former attorney said this is beyond my imagination. Why he didn't argue about my ability to pay in the initial brief, especially in light of precedent cited above is also troubling. As stated in my reply brief, (footnote 14), I do not have any vacation home in Italy, (nor France, nor anywhere else for that matter). I do not even own any property in the USA. My financial status is not what people seem to believe it is. This is not the place to lay out my personal financial situation, but the district court is (and should have been). Whatever my behavior may have been, my behavior in one case in 36 years, egregious or otherwise, which did not cause any party any financial loss, does not call for the "financial death penalty".

B. The District Court's Ruling Did Not Take Into Account the Other Consequences of its Ruling or Other Options:

"Available sanctions range from such judicial actions as an off-the-record reprimand to reprimand on the record, to monetary assessments or penalties." *Ins. Ben. Adm'rs v. Martin*, 871 F.2d 1354, 1359 (7th Cir. 1989) This Court, in *Martinez v. City of Chi.*, 823 F.3d 1050, 1053 (7th Cir. 2016), made a good point that sanctions orders have consequences well beyond the penalty they assess and compliance with the order. In *Martinez*, id, the attorney, an assistant state's attorney, was assessed a compensatory inherent authority sanction of $35,522 for purposely lying to the court, and hiding material evidence from the court and plaintiffs, in a wrongful conviction case of public importance. No punitive sanction was assessed. The entire compensatory sanction was paid by her employer, the States Attorney's office. This Court affirmed the sanction order saying that the public rebuke created enough future problems for the

attorney (which the opinion enumerated in detail), and was enough to deter her repeating her behavior in future.

In my case the public rebuke from the Court, which was widely reported in mainstream media, was more than sufficient.[1] As the *Martinez* court noted, such even non-monetary sanctions must be reported when applying for admission to courts, to the executive committee and the ARDC. In addition, if asked by judges, potential clients, or potential employers whether my professional conduct has been the subject of an investigation or for employment, the sanction would have to be disclosed.

> "In short, because a finding of attorney misconduct in a sanctions order can seriously impair an attorney's professional standing, reputation, and earning possibilities, such an order can't be brushed off as easily as a gnat. ……. But the sanctions order contains detailed findings of professional misconduct by her, findings likely to inflict a significant reputational injury having adverse financial consequences for her. *Martinez v. City of Chi.,* 823 F.3d 1050, 1053 (7th Cir. 2016)

Trust me when I say that Judge Kendall's ruling has had significant collateral consequences. **Judge Kendall's ruling came down on the very day of my 20th wedding anniversary**, causing the cancellation of the event, and ruining that once in a lifetime occasion for myself, and more importantly for my wife. Further, because nobody hires a lawyer without "googling" that lawyer first. My business and income has been adversely affected. There were no

[1] In the case of *Maurice Salem v. Kozlov, Brodsky et. al., No. 15 C 8997, 2016 U.S. Dist. LEXIS 104266 (N.D. Ill. Aug. 8, 2016)*, attorney Maurice Salem sued the ARDC, its attorney, and Joel Brodsky, because I reported the fact that Mr. Salem was practicing law in Illinois courts without a license. His compliant was full of false allegations, including that the ARDC lawyer physically assaulted him, (which I was able to help refute). The case was dismissed as frivolous, but my motion for attorney's fees and sanctions against Mr. Salem was **denied** with a mere warning to Mr. Salem in footnote 10 of the order, which alluded to Salem's long history of making false charges in pleadings in many different cases, to wit: "There are numerous examples of such mischaracterizations and misrepresentations in the record of this case and others on the part of Salem. The Count considers Salem to be on notice that such behavior will not be tolerated in the future." *id at footnote 10* My former malpractice insurer cancelled my policy because of that case, even though all I did was report someone practicing law without a license to the ARDC. I have to ask why am I, who has never before this case been found to have filed an improper pleading, being singled out? After seeing the ruling in *Salem, id*, how was I to ever imagine that I could get hit with $50,000 punitive sanction?

vacations in 2018. If that wasn't enough, now some unscrupulous lawyers, (and this has already happened a couple of times already), will attach a copy of Judge Kendall's ruling to motions filed in a cases where I represent clients in an *ad hominem* attack on me, even though it is totally irrelevant to my client's case. If the district court wanted to make a point by her ruling, she has more than has accomplished her task. No monetary penalty was or is needed.

In the instant case is it necessary to drive me into bankruptcy and eviction court to achieve the ends that the court wishes to? I have no idea how or why people have the idea I am a wealthy man, with a villa in Florence, an apartment in Paris. I have no idea why anyone would think that I can just sit down and write a check for $50,000, like so much spare change. Even my former attorney, who knew better, couldn't divest himself of perpetuating this illusion in his misrepresentation to this Court. It truly boggles my mind. Perhaps people think that someone who has been in the public eye, and who appears on the news every so often, must be rich? Also, Just because I took a vacation to Italy and Paris in the last two (2) years does not mean I have money. My children (four girls), are all grown and on their own. A couple can spend a month in Florence, or two (2) weeks in Paris, for as little as $5000 (five thousand dollars), airfare included. That does not require wealth, just good planning. I have no access to anyone's property in Europe. My wife and I own no house, or other property, in France, Italy, or the United States for that matter. The $50,000 fine affirmed by this Court is more than twice my entire net worth. I am not rich, and I can prove it. Just ask to look at my tax returns! To make its point, and to be a deterrent, the district court doesn't have to invoke a financial "death penalty" The district court failed to weigh the non-monetary effect of the sanctions order in determining what the minimum necessary sanction was.

A district court imposing sanctions "*sua sponte*" is generally limited to several thousand dollars "absent extraordinary circumstances." *Vollmer v. Selden*, 350 F.3d 656, 663 (7th Cir. 2003) (citing *In re Bagdade*, 334 F.3d 568, 571-72 (7th Cir. 2003); *Powers v. Duckworth*, No. 90-2492, 1995 U.S. App. LEXIS 23061, at *3 (7th Cir. 1995); *Burda v. M. Ecker Co.*, 2 F.3d 769, 776 (7th Cir. 1993)) When invoking the inherent power to punish conduct which abuses the judicial process, a court must exercise discretion in fashioning an appropriate sanction. *Chambers v. Nasco, Inc*., 501 U.S. 32, 44 (1991). In *Degen v. United States*, 517 U.S. 820, 823 (1996), the Court stated that where "alternative means" of accomplishing a court's objectives exist, no "necessity" justifies a harsher sanction." The Supreme Court has also rejected other specific forms of sanctions "where 'means more narrowly tailored to deter objectionable . . . conduct are available.'" *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988)

C. The Representation of My Prior Attorney Ryan Brown Was Tainted by his Actions and I Received Ineffective Assistance of Counsel in the District Court;

The baffling behavior of my former Attorney, Ryan Brown, in misrepresenting to this Court during oral arguments that I somehow have access to my wife's family property in Europe, and in saying that I took the anger management class when he knew I did not, is something that is very troubling to me. I cannot figure out why he would say these things. The fact that he was hired by my insurance company[2] as "ethics counsel", only makes this situation worse. What do you do when your ethics counsel lies to the court? I have concluded that this behavior by my former attorneys shows that there is something wrong with him regarding my case.

It is not initially apparent that a party can raise ineffective assistance of counsel in a civil matter. However, this is not a civil matter. The sanction order applying $50,000 in sanctions is

[2] The insurance company hires and pays for the attorney, but it does **not** cover or pay for sanctions.

punitive. The case of *Mackler Prods., Inc. v. Cohen, 146 F.3d 126, 130 (2d Cir. 1998)*, holds that any non-compensatory punitive sanction in excess of $10,000 requires the full protections of the constitution for criminal matters. (See *Bradley v. Am. Household, Inc., 378 F.3d 373, 379 (4th Cir. 2004)*

> **If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court**, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order. These distinctions lead up to the fundamental proposition that **criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings,** including the requirement that the offense be proved beyond a reasonable doubt. *Hicks v. Feiock, 485 U.S. 624, 632, 108 S. Ct. 1423, 1429-30 (1988)* (emphasis added)

The $50,000 sanction in this case is punitive, and therefore the due process protections for criminal cases apply. In *Int'l Union v. Bagwell, 512 U.S. 821, 840 (1994)*, the Court in reversing fines that were not "calibrate[d]" to losses caused by the misconduct, held that noncompensatory fines constitute criminal sanctions that require the protection of basic criminal due process. *Id.* at 834, 837, 838. Therefore, the analysis of ineffective assistance of counsel is applies to this case.

In *Bloom v. Illinois, 391 U.S. 194, 205, 88 S. Ct. 1477, 1484 (1968)*, the Supreme Court held that one of the rights that a person is entitled to when facing a charge which is criminal in nature (i.e. punitive), is assistance of counsel. In *In re Troutt, 460 F.3d 887 (7th Cir. 2006)* this Court held that in an attorney disciplinary case where the sanction imposed was punitive, it was in essence a criminal contempt proceeding and due process rights, including a right to counsel, were required. Also, in a case which involved $50,000 sanction against an attorney the Court held:

> Furthermore, a $ 50,000 sanction, which is payable to the clerk of the court and not concretely tailored to compensate the court for actual costs resulting from the misconduct has characteristics of a criminal penalty which other courts have held to require the procedural protections of a criminal trial. *Baycol Steering Comm. v. Bayer Corp., 419 F.3d 794, 808 (8th Cir. 2005)*

It goes without saying that if someone is constitutionally entitled to representation by an attorney in a case where all the legal protections of a criminal case apply, that he is entitled to a constitutionally effective representation by that attorney. "For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984)*

I did not get effective assistance of counsel before the district court (or this court for that matter). To be clear, I am not saying this because I fault my attorney for whatever I did or filed in the district court. However, I am sure this Court, with its long experience, understands very well that there are two (2) sides to every story. Because of ineffective assistance of counsel I never got to tell my side. My side of the story has never been told. I firmly believe that if the district court, and this court, heard my side of the story, it would not have issue sanctions, or at the very lease the sanctions would not have been so harsh and condemning. I have no doubt of it.

In this Court's Order affirming the district court, it points to the fact that I did not testify at the hearing on the sanction issue, and that no evidence was presented at that hearing in support of, or explaining, my actions. The reason for this is because Attorney Ryan Brown was totally ineffective in representing me at the sanction hearing. Attorney Ryan Brown:

> A. Did not know what the issues were, or if punitive sanctions were being considered, before the sanction hearing was held and did make a motion to find out;
>
> B. As he admitted in the briefs and at oral argument, he had no idea what I was charged with doing regarding the sanction hearing (at oral augments Brown said it would have been nice to have had been given the charges I was faced with. Indeed!)

C. Not knowing what I was charged with, he failed to make a motion to the district court to clarify or specify the charges;

D. He did not conduct any discovery (none), no interrogatories, no request for production, no, request to admit, nor did he take any depositions, and therefore had no idea what evidence or testimony was going to be presented at the sanction hearing;

E. He did not know what type of hearing it would be, if it would it be formal, evidentiary, informal, adversary, etc., nor did he make a motion to clarify what type of hearing it would be

F. He did not prepare any exhibits for introduction (even though we had hundreds of pages of relevant documents)

G. He did not file any motions *in limine* to exclude irrelevant and immaterial evidence;

H. He did not file any pre-hearing motions to define or narrow the issues or find out what and what did not constitute sanctionable conduct;

I. He did not prepare to cross examine any witnesses, and did not effectively cross-examine the witnesses who testified against me; (regarding an attorney witness he said "I take no pleasure in cross-examining another lawyer" Doc. 217 page 68. Hardly the words of a zealous advocate)

J. He did not object to the introduction of irrelevant, immaterial, hearsay, or other inadmissible testimony or evidence.

K. He did not call or subpoena any witnesses to testify at the hearing on my behalf;

L. He did not introduce one piece of evidence on my behalf.

M. He did not discuss what was going to happen at the sanction hearing with me, and he did not prepare me for the hearing;

N. He never discussed testifying with me or asked me if I wanted to testify;

O. He did not prepare me to testify (since I absolutely would have wanted to testify)

P. He prevented me from testifying, stating that he was not going to let me testify, (a position I have never understood)

Also, I ask the Court to review pages one (1) through eight (8) of my Reply Brief, where the record in this case is gone into regarding the factual circumstances in the underlying case.

These are the issues that should have been developed on cross-examination, and in my case with testimony, exhibits, and witnesses. This is indicative of ineffective assistance of counsel. [3]

I could go on and on, but the point is made. My attorney Ryan Brown walked into court on the date of the sanction hearing like a deer caught in the headlights. He was absolutely unprepared, and had no idea what was going to happen. The greatest regret of my life is that the day after the sanction hearing I did not call the insurance company and fire Ryan Brown.

While this Court did not hear an ineffective assistance argument before, as Mr. Brown was still my counsel, it will obviously be brought up in a motion to vacate or a collateral attack on the sanction order of the type brought in criminal cases. For the purpose of judicial economy this Court should consider remanding this matter so that the issue of whether or not I received an effective defense considering all that has come to light with Attorney's Brown, including his misrepresentations to this Count. Given the due process concerns in punitive sanction matters and the applicability of the ineffective assistance issue, *Bagwell*, id., this cannot be ignored.

D. The District Court Did Not Consider or Give Credit For Actions Taken After It Voiced Her Complaint:

After Judge Kendall voiced her displeasure in the underlying case, I did the following:

- promptly engaged ethics counsel (through my malpractice insurance, which pays for attorney, but does **not** cover or pay for sanctions)
- settled all issues with Szczesniak on May 17, 2017;
- worked with the principals of S&M Auto Brokers, Inc. to ensure that alternate, independent counsel was engaged (prior to withdrawing as counsel for S&M Auto Brokers, Inc. on May 25, 2017);
- attempted to withdraw all offending filings against Szczesniak (twice);
- sought guidance from the Court on how best to mitigate any damage resulting from the offending filings (while concurrently avoiding prejudice to any party);

[3] Judge Kendall noted that I was looking at my phone during the hearing, and she held that as evidence supporting the sanction. I was on my smartphone **not** because I was surfing the net. What I was doing was frantically googling the witness's names and purported cases looking for evidence to cross-examine them on because my attorney, Ryan Brown was so totally unprepared he had nothing prepared to cross-examine the witnesses on.

- personally apologized to the District Court, Plaintiff's counsel, and Szczesniak on July 7, 2017; and
- worked with the parties and counsel to settle all issues among them (on June 1, and August 23, 2017).

If the Court will also look at the Statement of Facts in my initial brief you will see in great detail all the things I did after learning of district courts annoyance. I would submit that anyone can get carried away on occasion, or make a mistake. To the extent that happened in this case, absent getting into a time machine, what else could I have done? In addition I did everything my lawyer Ryan Brown told me to do, (even when I disagreed with his advice). I did everything I was told to do, and that could be done. Even though my side of the story has not been told, and even assuming that worst regarding my actions, what message is being sent when a person gets carried away or makes a mistake in one case, and then stops and tries everything possible to correct things, and then he still gets hit with world record sanctions? The behavior to be looked at is what the person does after he realizes he has gone too far, or made a mistake, and before a court lowers the boom. Certainly it would not be just to hold the person who takes immediate remedial measures to the same standard as the person who does nothing. If that is was the case, then why should someone try to correct a mistake if it makes no difference in the long run?

Where "alternative means" of accomplishing a court's objectives exist, no "necessity" justifies a harsher sanction. *Degen*, 517 U.S. at 827, 828; *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 398-99 (1982) (discussing "fundamental limitations on the remedial powers of the federal courts" which "could extend no farther than required by the nature and the extent of th[e] violation") In *Link v. Wabash R. Co.*, 370 U.S. 626, 630-631 (1962)) It was error for the district court not to give me credit for, and take into account, all the actions taken after

she expressed her displeasure. I did everything that could be done, and I followed my lawyer's instructions to the letter. No monetary sanction was called for, let alone a $50,000

E. The Lack of Due Process Protections Regarding Failure to Testify Was Not Subject to the Correct Harmless Error Analysis:

This Court stated that it did not find that the lack of procedural due process protections were not relevant because no case had been made that the results would have been any different if they had been provided. (Order, footnote 1). However this Court, and the district court, both pointed to the fact that I did not testify as a reason for imposing or affirming the sanctions. This is contradictory, since if the due process protections that apply in criminal cases were applied, then I did not have to testify, and the fact that I did not have to testify could not have been held against me. The case of *Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967)* holds that that holding a person's failure to testify against themselves must be shown to be harmless beyond a reasonable doubt, or reversal is required. (Also see *Anderson v. Nelson, 390 U.S. 523, 88 S. Ct. 1133 (1968)* Judges comment on failure to testify cannot be harmless error.) The correct harmless error analysis was not applied by this Court.

I did not testify, and this was held against me both at the district level and by this Court. This is proof positive that the proceedings would have been different if the due process protections required by *Int'l Union v. Bagwell*, 512 U.S. 821, 840 (1994) and it's progeny were provided. Certainly it is proof that holding my failure to testify against me was not harmless beyond a reasonable doubt. *Chapman*, id.

A party's right to testify, or if he does not testify then not to have that decision held against him, is a personal right, which cannot be waived by his attorney, and a violation of this right is never harmless. *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) The record in this case is clear that (a) I was never asked if I wanted to waive my right to testify, and (b) the fact

that I did not testify was held against me. If I did testify, the decision in this case would certainly have been different as I could have explained in detail my reasons for everything I did. (See Reply Brief pages 1-8). Even if that did not eliminate the sanctions or the Court's feelings about my actions, it would have substantially reduced the harshness of the order since I would have been apparent that nothing was done maliciously.

In the following cases punitive sanctions were overturned because there was a violation of due process rights. *Bradley v. Am. Household, Inc., 378 F.3d 373 (4th Cir. 2004); Mackler Prods., Inc. v. Cohen, 146 F.3d 126 (2d Cir. 1998) ; In re Troutt, 460 F.3d 887 (7th Cir. 2006 Steering Comm. v. Bayer Corp., 419 F.3d 794 (8th Cir. 2005)* In my research I was unable to find a single case where an attorney was denied his or her due process rights in a sanction matter, were the sanction was not reversed and remanded.

F. Jurisdiction:

As is noted in the Appellant's Brief, this case started as a federal question case. The federal claim was dismissed, and then it became a diversity case. This case involved, as there is no disagreement, on a car purchased for $35,000. Diversity rested on a claim for punitive damages of at least $40,000. Defendant did make a motion to dismiss. If this Court wishes to, it can re-examine if the federal courts has diversity jurisdiction over this case.

G. Closing Argument

To be clear, I am not trying to avoid blame for whatever I have done in this case. Certainly I could have used other less offensive language. No matter what the provocation, I should not have let Mr. Lubin "get my goat". Further, the issue with the witness should have been handled in a *daubert* motion, and not through the method I used (even if it were invited by the Court. Dkt. #110). However, I am only human and I make mistakes. What I would like the

court to realize from the record in this case is that when I realize a mistake, I don't hide it, I take action do whatever I can to correct the situation (See Appellant Brief pgs. 10 through 15). I made mistakes in this case, I took every action I was advised to take, and I apologized.[4] I had no idea it would get to this point.

There are two sides to every story. I would have liked nothing more than to have had this case handled by an attorney who actually defended me, and put on a defense. I am sure that the no sanction would have been entered, or would not have been so harsh. Not firing Attorney Ryan Brown when he showed up at the sanction hearing unprepared and did not put up any defense is the worst mistake of my life. But he was provided by my carrier, so I didn't have much choice. In retrospect I would have been better served *pro se*.

Reputations are a funny thing, and for people that have some public exposure it are even more so. Those reputations are mostly without basis. People think they know me, but they do not. I don't know why people think I am wealthy, or think other things about me that are simply not true. I ask and pray that this Court not destroy my career and financial life because of this one case in a thirty-six (36) year career.

CONCLUSION

For the foregoing reasons, Appellant Joel A. Brodsky respectfully requests that:

- the District Court's March 28, 2018 order be reversed and remanded in total; or that
- the $50,000 punitive fine imposed by the District Court in its March 28, 2018 Opinion and Order be stricken in its entirety, substantially reduced, or that the matter be remanded for a re-consideration of the matter of monetary sanctions; and
- the March 28, 2018 Opinion and Order be stricken or modified to eliminate any requirement for Brodsky to attend an anger management class;

[4] In the Order under appeal, the district court found that my apology was not sincere, however, at the hearing when I made the apology, she stated; "I will accept his statement of apology and remorse." Doc. 217, page 95) What caused the district court's change of heart is beyond my understanding.

Dated: January 27, 2019

Respectfully submitted,

/s/ Joel A. Brodsky
Joel A. Brodsky

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CERTIFICATE OF RULE 32 COMPLIANCE

Pursuant to Rules 32 and 40 of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the stated page limitations. The text of this brief was prepared in Times New Roman 12 point font, with footnotes in Times New Roman 11 point font. All portions of the Petition for Rehearing, other than the Disclosure Statements, Table of Contents, Table of Authorities, and the Certificates of Counsel, contain 15 pages.

Dated: January 27, 2019

Respectfully submitted,

/s/ Joel A. Brodsky
Joel A. Brodsky

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2019, I caused a true and correct copy of the foregoing PETITION FOR REHEARING OF APPELLANT JOEL A. BRODSKY to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: January 27, 2019

Respectfully submitted,

/s/ Joel A. Brodsky
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