No. 17-2802
United States Court of Appeals, Seventh Circuit.

Tiberiu KLEIN, Plaintiff-Appellant,
v.
Daniel E. O'BRIEN, et al., Defendants-Appellees.

Argued February 20, 2018
Decided March 9, 2018

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 11008—**Harry D. Leinenweber**, *Judge*.

Attorneys and Law Firms

John S. Xydakis, Attorney, Law Office of John S. Xydakis, Chicago, IL, for Plaintiff–Appellant.

Michael D. Sanders, Thomas Underwood, Richard Jacob VanSwol, Attorneys, Purcell & Wardrope, Eric D. Kaplan, Christopher S. Wunder, Stacie E. Barhorst, Attorneys, Kaplan, Papadakis & Gournis, Paul Bozych, Attorney, Nielson, Zehe & Antas, P.C., Paul V. Esposito, Robert L. Reifenberg, Attorneys, Clausen Miller, Rebecca Rothmann, Alexander Reich, Attorneys, Wilson Elser Moskowitz Edelman & Dicker LLP, Whitney Leigh Burkett, David F. Ryan, Attorneys, Patton & Ryan, Chicago, IL, for Defendants–Appellees.

Before Wood, Chief Judge, and Easterbrook and Barrett, Circuit Judges.

Opinion

Easterbrook, Circuit Judge.

In 2002 a Greyhound bus struck and killed Claudia Zvunca in Colorado. Her daughter, Cristina Zvunca, witnessed the accident. Cristina was seven at the time. Now an adult, she is the administrator of her mother's estate. In 2016 Cristina settled all claims against Greyhound and other potentially responsible persons for approximately $5 million. But Tiberiu Klein, who was Claudia's husband at the time of the accident and is Cristina's stepfather, believes that Cristina allocated too much of the settlement to herself (via damages for emotional distress) and not enough to him or Claudia's estate, from which he would benefit. He contends in this federal suit under 42 U.S.C. § 1983 that Cristina conspired with state judges, law firms, Greyhound, and just about anyone else who had anything to do with the accident or the litigation, to exclude him from financial benefits to which he claims entitlement.

Sixteen years is a long time to deal with an accident, but litigation in state court went off the rails when Klein sued as the purported administrator of Claudia's estate. This spawned a host of problems, for Klein had not been appointed as administrator. Eventually Klein and Cristina became co-administrators, but Klein was soon removed by a state judge, leaving Cristina in charge. That has not prevented Klein from continuing to describe himself as co-administrator of Claudia's estate—this very suit was filed using that false description—and from attempting to manage or block the tort litigation. The district judge's thorough opinion describes the many state-court suits and decisions. 2017 U.S. Dist. LEXIS 121233 at *3–8 (N.D. Ill. Aug. 1, 2017). Those details do not matter for current purposes.

Defendants asked the federal judge to dismiss this suit as barred by the *Rooker-Feldman* doctrine—the rule that only the Supreme Court of the United States has jurisdiction to review the decisions of state courts in civil litigation. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). Klein did not ask the federal judge to set aside any particular state judgment; instead he wants damages for injury that he traces not only to Claudia's death but also to events in or concerning the state litigation. But defendants contended that any federal suit whose issues overlap those in the state litigation must be dismissed.

Aware that the Supreme Court has understood the *Rooker-Feldman* doctrine as limited to federal proceedings that ask state judgments themselves to be changed, see, e.g., *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005); *Lance v. Dennis*, 546 U.S. 459, 126 S.Ct. 1198, 163 L.Ed.2d 1059 (2006); *Skinner v. Switzer*, 562 U.S. 521, 531–33, 131 S.Ct. 1289, 179 L.Ed.2d 233 (2011), the district court addressed the merits rather than dismissing for lack of jurisdiction. See also *Milchtein v. Chisholm*, 880 F.3d 895 (7th Cir. 2018) (deprecating arguments that all matters intertwined with state cases are outside federal jurisdiction). Although the district court's opinion is long, it boils down to a simple proposition: if anything went wrong during the state litigation, the proper step is to ask the rendering court to modify its judgment to correct the problem. See, e.g., *Harris Trust & Savings Bank v. Ellis*, 810 F.2d 700, 705–06 (7th Cir. 1987); *Mains v. Citibank, N.A.*, 852 F.3d 669, 676–77 (7th Cir. 2017).

Collateral litigation in federal court is blocked not only by principles of preclusion—Klein is bound by the state judiciary's decisions about what goes into Claudia's estate and whether Klein can act as the estate's administrator—but also by the rule articulated in *Rooker* that errors committed during the course of state litigation cannot be treated as federal constitutional torts:

> If the constitutional questions stated in the [federal suit] actually arose in the [state] cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication.

263 U.S. at 415, 44 S.Ct. 149.

Because the district court dismissed the suit on the merits rather than for lack of jurisdiction, we expected Klein's brief to engage the merits. But it did not. Instead Klein argued at length that the *Rooker-Feldman* doctrine does not foreclose federal jurisdiction. Where's the beef? Instead of briefing issues decided in his favor, Klein had to brief those issues on which he lost. We do not think that he had much prospect of upsetting the district court's decision, but an appellate brief that does not even *try* to engage the reasons the appellant lost has no prospect of

success. All of Klein's federal contentions have been forfeited.

The long and tangled history of the wrongful-death litigation, which the district court's opinion recounts, has been caused by Klein's (or his lawyer's) inability or unwillingness to litigate as statutes and rules require. That in this suit Klein's attorney John Xydakis pretended that Klein is a co-administrator of Claudia's estate, then forfeited all of his client's substantive arguments, are just the latest manifestations of these problems. Xydakis also named himself as a plaintiff in this suit, though he has no conceivable standing to sue. The district court dismissed Xydakis's claim for lack of jurisdiction; after appealing on his own behalf as well as Klein's, Xydakis filed a brief ignoring the question whether he is entitled to litigate as a party. After oral argument Xydakis moved to dismiss himself as a litigant. We grant that motion but record the episode to show how far Klein and his lawyer have strayed from the norms of litigation.

When asked at oral argument why his brief addressed the *Rooker-Feldman* doctrine, on which Klein had prevailed, rather than the merits, on which he had lost, Xydakis told us that because the defendants invoked the *Rooker-Feldman* doctrine that *must* have been the district court's ground of decision, no matter what the judge's opinion said. That's nonsense. If Xydakis believed that the district judge erred in making a substantive decision in response to a jurisdictional motion, he should have asked the judge for an opportunity to brief the merits, or he might have contended on appeal that the judge erred by denying him that opportunity. Instead Xydakis chose to pretend

that his client lost on a jurisdictional ground. Pretense gets a lawyer nowhere.

Just to be sure that this case *had* been decided on the merits rather than for lack of jurisdiction, we turned to the back of Klein's brief to find the judgment. It is not there, despite Circuit Rule 30(a), which requires the judgment to be attached to the appellant's brief, and Circuit Rule 30(d), which requires counsel to certify that all materials required elsewhere in Rule 30 have indeed been included. Xydakis so certified, falsely. At oral argument we asked him why; he did not explain. It soon became clear that Xydakis has no idea what a "judgment" is. The afternoon of oral argument he sent a letter to the court stating that he had been asked where the district court's "opinion" could be found and that it is attached to the brief. But he had been asked about the judgment, which under Fed. R. Civ. P. 58 is distinct from the opinion. We tracked down the judgment and found that it corresponds to the opinion: it resolves the suit in defendants' favor on the merits rather than dismissing, without prejudice, for lack of jurisdiction.

Klein and Xydakis have caused havoc in the tort litigation. They are not entitled to divert the time of federal judges, too, from the needs of more deserving litigants. Klein and Xydakis must understand that they have reached the end of the line in federal court. Any further federal litigation related to the 2002 accident, and the state suits to which it gave rise, will be penalized under Fed. R. Civ. P. 11(c), Fed. R. App. P. 38 and 46(b), (c), 28 U.S.C. § 1927, *758 and other sources of authority to deal with frivolous and repetitious suits.

Affirmed

Case No. 16 C 11008
United States District Court,
N.D. Illinois, Eastern Division.

Tiberiu KLEIN, Individually; Tiberiu Klein, as Co-Administrator of the Estate of Claudia Zvunca; and John Xydakis, Plaintiffs,

v.

Daniel E. O'BRIEN; Winters Salzetta O'Brien & Richardson, LLC; Adam Powers; Steven Laduzinsky; Laduzinsky & Assocs. PC.; Greyhound Lines, Inc.; First Group PLC Laidlaw Corp.; Paul Bozych; Clausen Miller, LLP; Wilson Elser Moskowitz Edelman & Dicker LLP; Nielson Zehe & Antas PC; Michael Vranicar; Motor Coach Ind. Inc.; Motor Coach Ind. Int'l Inc.; Patton & Ryan LLC; and Cristina Zvunca, Defendants.

Signed 08/01/2017

Attorneys and Law Firms

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Ryan, Whitney Leigh Burkett, Ms., Patton & Ryan, LLC, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

Harry D. Leinenweber, Judge

I. BACKGROUND

This case arises out of a tragic accident that occurred in January 2002 in Colorado. Claudia Zvunca was struck and killed by a Greyhound Bus. Her daughter, Cristina Zvunca ("Cristina"), who was eight years old at the time, witnessed the accident. Claudia's heirs were her husband, Tiberiu Klein ("Klein" or "Plaintiff"), and Cristina. Cristina, who was a step-daughter, had no blood relationship with Klein. The bus driver was Wesley Jay Tatum ("Tatum"). The bus had been designed and manufactured by Motor Coach Industries, Inc., and Motor Coach Industries International, Inc. (collectively, "MCI").

One would think that such a straightforward wrongful death case would be uncomplicated. Nothing could be further from the truth. Unbelievably, this case has spawned at least 15 or more separate lawsuits in both state and federal court, and a multitude of appeals numbering at least 25. Three Illinois Appellate Court opinions, *Cushing v. Greyhound Lines, Inc., et al.*, 965 N.E.2d 1215 (Ill. App. 1st. Dist. 2012) ("*Cushing I*"), *Cushing v. Greyhound Lines, Inc., et al.*, 991 N.E.2d 28 (Ill. App. 1st Dist. 2013) ("*Cushing II*"), and *Klein v. Motor Coach Industries, Inc., et al.*, 2017 IL App. (1st) 153617-U (Ill. App. 1st Dist. June 28, 2017) ("*Klein I*") have attempted to describe the convoluted history of this litigation, which this Court once described as "a

convoluted attorney-created procedural labyrinth." *MB Financial, N.A. v. Stevens*, No. 11 C 798, 2011 WL 5514059, at *1 (N.D. Ill. July 5, 2011). So as not to extend this opinion needlessly and confuse the reader, the Court will not attempt to describe the procedural background except as pertinent to the instant case.

A. Procedural History

On May 3, 2002, Klein, purportedly as Executor of his late wife's estate, filed a suit in the Circuit Court of Cook County pursuant to the Illinois Wrongful Death Act, 740 ILCS 180/1, against Greyhound and Tatum. Defendants removed the case to federal court and, on a *forum non conveniens* basis, it was transferred to the District of Colorado. In 2003, at the same time that his Colorado suit was pending, Klein opened a probate estate for Claudia in Cook County Probate Court and had Greg Marshall, a paralegal from the law firm representing him at the time, appointed administrator. In 2004, Marshall filed a wrongful death case against MCI, Number 04 L 3391 in the Circuit Court of Cook County. Later Greyhound and Tate were added to the case as additional defendants. In 2007, this case, apparently at Klein's behest, was voluntarily dismissed and refiled as Case No. 07 L 3391 (the "2007 suit")—likewise against Greyhound, Tate, and MCI—asserting wrongful death, survival claims, and a negligent infliction of emotional distress claim on Cristina's behalf.

The next seven years saw numerous changes in attorneys, guardians, and administrators, substitutions and recusals of judges, and numerous appeals, including *Cushing I* and *Cushing II*. By 2014, Cristina had attained her majority and was appointed Supervised

Administrator of her mother's estate by the Probate Court. Defendant O'Brien and his firm were granted leave to substitute in as Cristina's attorneys for the 2007 suit. It was also at this time that the case was reassigned to Judge John P. Kirby.

Also in 2014, Klein's Colorado suit was involuntarily dismissed under Fed. R. Civ. P. 12(b)(1), because Klein had "no legal authority to pursue [the] wrongful death action and that lack of capacity [had] not been cured." As it turned out, Klein had not sought nor received an appointment as executor from the Probate Court.

Klein, acting *pro se*, refiled his suit in Cook County Circuit Court on August 12, 2014, and was given Case No. 14 L 8478 (the "2014 suit"). The 2014 suit was assigned to Judge John P. Callahan. It added a claim under the Colorado Wrongful Death Act and added defendants—MCI and Laidlaw and First Group PLC, the owners of Greyhound. On March 17, 2014, Cristina and Klein were appointed Co-Administrators of Claudia's estate by the Cook County Probate Court. Klein had previously been appointed administrator. On May 15, 2014, the Probate Court revoked Klein's letters in favor of making Cristina Supervised Administrator of her mother's estate.

Klein next moved to consolidate his 2014 suit with the 2007 suit over which Cristina was now the supervised administrator. Judge Callahan denied his motion on August 13, 2015. On January 21, 2016, Judge Callahan dismissed Klein's suit (the 2014 suit) with prejudice, pursuant to 735 ILCS 5/2-619, stating as the reason for dismissal that "the Illinois [Wrongful Death] Act clearly describes a single action brought by the personal representative on behalf of the surviving spouse and next of kin." The opinion went on to state

that Klein could not proceed because Cristina was the "duly appointed representative of her mother's estate.... To allow such a secondary suit to proceed would be to allow improper claim splitting." On February 22, 2016, Attorney John Xydakis ("Xydakis"), on behalf of Klein, filed a notice of appeal with the Appellate Court of the First District. In addition to the dismissal of his suit with prejudice, Klein and Xadakis named nine other orders which they sought to appeal. All of these matters, including the dismissal of the 2014 case, were resolved by the Appeals Court on June 28, 2017 in *Klein I*.

In April 2016, Cristina, through her lawyers, negotiated a settlement in principle in the 2007 case for a total of $4.95 million. She filed motions to have the settlement approved and for a dependency hearing on April 20, 2016. The court ordered that Klein be served with the motions to allocate the settlement and for a dependency determination. After Klein was served with the motion, he removed the 2007 case to federal court as Case No. 16 CV 5304 and attempted to mount a collateral attack on the settlement. The federal judge immediately remanded the case back to the Cook County Circuit Court because Klein was not a party to the 2007 case. After remand, Klein filed motions seeking to quash service of process on him, for dismissal of the allocation petition, to substitute out Judge Kirby, for a change of venue, and filed a document he called a "Standing Objection to Court Jurisdiction, Authority and to Motion or Proceeding for Dependency and Allocation."

On August 25, 2016, Judge Kirby handed down a decision on dependency and allocation. The Complaint does not disclose the terms of this decision. On October 14, 2016, Judge Riley, a Probate Judge, entered an

order in Claudia's estate approving the wrongful death portion of the settlement. On October 21, 2016, Judge Kirby ruled that all of the orders he had issued were final and appealable. Klein filed a notice of appeal as to all of Judge Kirby's orders, but at the same time sought reconsideration of Kirby's various orders and Judge Callahan's order denying consolidation of the 2014 case with the 2007 case. On March 21, 2017, Judge Kirby ruled that he lacked jurisdiction to hear Klein's motions because of the pending appeal. This appeal of Klein's remains pending in the Illinois Appellate Court.

Plaintiffs in this case are Klein, both in his individual capacity and as Co-Administrator of Claudia's estate (despite the fact that his letters of administration have been revoked), and his current attorney, Xydakis. Defendants include Klein's stepdaughter, Cristina; her current attorneys and their law firms; Greyhound, Laidlaw Corp, and First Group PLC (the current corporate owners of Greyhound) along with their attorneys and their law firms; and MCI, its attorneys, and their law firms.

B. The First Amended Complaint

The First Amended Complaint (the "FAC") gives a rather disjointed and incomplete procedural and substantive history of the 2007 and 2014 cases, and includes quotes from some of the pleadings filed by certain of the Defendants, along with quoted passages from the rulings of both the Colorado federal court and the various Cook County judges. The FAC alleges that Klein's filing of the original case in Illinois Circuit Court, which was later removed and transferred to Colorado federal court, was proper because an Illinois Administrator was not necessary in light of the fact

that Klein, as a surviving spouse, was the real party in interest (FAC ¶¶ 10-11); that in 2004, Cristina filed a wrongful death suit in Illinois, and Defendants Greyhound and MCI sought dismissal of her suit due to Klein's prior Colorado case, which motion the Cook County Court denied (*id.* ¶¶ 13-15); that the Illinois Appellate Court in 2004 denied a motion for a stay of Cristina's case that was based on the alleged duplicative actions (*id.* ¶ 16); and that a year later, MCI unsuccessfully appealed a denial of a motion to dismiss, arguing that maintaining duplicative cases constituted *forum non conveniens* and forum shopping (*id.* ¶ 17).

Several other judicial actions are referred to in the FAC. In 2010, a Cook County Judge, Judge Haddad, who was then presiding over Cristina's case, was asked if he was trying to settle Klein's case, to which he responded "no." However, a few days later he entered a settlement order, supposedly settling Klein's case for $52,735.00. This settlement was overturned by the Illinois Appellate Court. (FAC ¶¶ 18-20.) In 2014, Klein's Colorado case was dismissed for lack of subject matter jurisdiction. Several months later, Klein "refiled" this case in the Circuit Court of Cook County. (*Id.* ¶ 22.) The Probate Court of Cook County appointed Cristina as Supervised Administrator for her mother's estate to pursue the 2007 case. The FAC cites to an order of the Probate Division providing that Klein and Cristina were "ordered" to maintain each's separate suits and not pursue claims for the other, that two separate suits could be maintained, and that Cristina—by serving as "administrator of her wrongful death claim, and also for her own negligent infliction of emotional distress claim"—had a conflict of interest prohibiting her from representing Klein's interest as well as her own. (*Id.* ¶¶ 23-24.) The case was then

reassigned to another judge who recused himself because Cristina's attorney, Daniel O'Brien ("O'Brien"), donated thousands of dollars for the judge's reelection. (*Id.* ¶ 26.) The case was then reassigned to Judge Kirby. O'Brien told Klein that he had connections "with Kirby and several other Cook County judges." (*Id.* ¶ 26.) O'Brian "repeatedly" assured Klein that Klein was not involved in Cristina's case and amended the Complaint to disclaim Klein's interest. (*Id.* ¶ 27.) All parties objected to Klein's Motion to Consolidate the 2014 case with the 2007 case. The judge denied the Motion and said that "Klein should be thrown in jail." In 2015, Kirby denied Klein's Motion to Intervene because Klein was not a dependent beneficiary in Cristina's case and thus lacked standing. (*Id.* ¶ 28.)

The FAC further alleges that neither Greyhound nor MCI would settle Cristina's case as long as Klein's case was alive, so it was necessary for the Defendant lawyers and Kirby to "try to find a way around this." (FAC ¶ 31.) Kirby vacated the January 2016 trial date for the 2017 case and "[t]hen on information and belief, Kirby, O'Brien, Vranicar and Bozych get Klein's judge to dismiss Klein's case with prejudice. Kirby and that judge share the same law clerk. The dismissal order states Klein's interests must be pursued in Cristina's case in front of Kirby." (*Id.* ¶ 32). Paragraph 33 reads as follows: "O'Brien tells Klein that he must also disclaim any interest in Cristina's case to ensure his rights cannot be adjudicated there. Klein provides him with one. O'Brien then ensures Klein and others cannot contact Cristina." The next paragraph alleges that O'Brien arranged for an apartment for Cristina when she visited Chicago but refused to disclose her address, that O'Brien then got an order barring Klein from communicating with

Cristina, and that, when a notice for Cristina's deposition was issued (presumably by Klein), "Powers and Laduzinsky (presumably at O'Brien's request) threatened sanctions." (*Id.* ¶ 34.) From February through April 2016, Kirby allegedly held *ex parte* discussions with O'Brien, Bozych, and Vranicar to settle Cristina's case. "When they see Klein or his agents in the courtroom, they close the conference room door so that they cannot hear what is going on." (*Id.* ¶ 35). "In approximately June 2016, Kirby, O'Brien, Bozych, and Vranicar 'settle' Cristina's case without prior notice to Klein. The settlement allocates 60% of the proceeds to wrongful death, and 40% to Cristina's negligent infliction of emotional distress claim." (*Id.* ¶ 36.) To avoid the Probate Court order barring Cristina from pursuing Klein's case, O'Brien hired Powers and Laduzinsky to represent Cristina in the "dependency hearing" phase; O'Brien, however, controlled them and paid them. (*Id.* ¶ 37.) Powers and Laduzinsky presented the petition to approve the settlement even though they were not the wrongful death attorneys. (*Id.* ¶ 38.) Klein filed a Motion to Substitute Judge Kirby, which Judge Kirby denied without briefing on the grounds that Klein lacked standing as a non-party. (*Id.* ¶ 39.) On August 25, 2016, Judge Kirby held a hearing with O'Brien, Powers, Laduzinsky, Bozych, and Vranicar present. Powers and Laduzinsky argued that Cristina deserved the whole settlement. Judge Kirby ruled that Klein should not receive anything because he disclaimed his interest. (*Id.* ¶ 40.) According to Plaintiffs, Judge Kirby, O'Brien, Bozych, Vranicar, Powers, and Adams intended to injure Klein and deprive him of his rights, and acted jointly, knowingly, maliciously, and ratified each other's conduct (*Id.* ¶ 43.)

Finally, in paragraph 44, Klein lists 15 acts on the part of Kirby that he contends violated his constitutional rights:

> 44. Other actions reveal O'Brien, Bozych, Vranicar, Powers, and Adams participation, aid, and/or complicity with Kirby to violate Klein's due process, equal protection, and other rights including, without limitation:
>
> a. *Sua sponte*, Kirby raises Klein's "disclaimer;"
>
> b. No briefing was ever done on any "disclaimer" issue. Instead, they wait until after Cristina's case settles to argue that the "disclaimer" bars Klein from recovering. However, after Klein learns the "disclaimer" is used by O'Brien, Adams, Powers, and Kirby to allege Klein had an interest in Cristina's case and it was "disclaimed," Klein revoked the "disclaimer." In addition, Klein then produced a "disclaimer" signed by Cristina that O'Brien claimed to revoke. Despite this, Kirby held Klein's "disclaimer" was effective;
>
> c. *Sua sponte*, Kirby orders O'Brien, Bozych and Vranicar to provide him with any transcripts for any proceedings in Klein's case, presumably so Kirby can decide issues based on his own private investigation and knowledge;
>
> d. Kirby also orders O'Brien to provide him with documents in Klein's case and attend Klein's proceedings in front of another judge. O'Brien then repeatedly appears and interferes in Klein's proceedings claiming he

is there as a “friend of the court” and argues against Klein's interests;
e. When Klein's attorney files motions in Kirby's case or when motions were filed addressing Klein's attorney, Kirby refuses to allow the requisite time to respond mandated by the Cook County Local Rules. Kirby would often “reset” the motion date Klein's attorney spindled and then strike the motion if Klein's attorney failed to appear;
f. Kirby, O'Brien and Bozych allow Greyhound's motion to dismiss Cristina's case based on claim splitting to pend for over a year and Kirby never rules on it;
g. Kirby awards O'Brien 1/3 of the total settlement even though O'Brien did little work on the case and was unprepared for trial. Kirby then slashes the other attorney's fees to a fraction of what they seek and holds several more *ex-parte* discussions regarding fee issues without attorneys present;
h. Kirby repeatedly allows “emergency motions” by O'Brien, Powers and Laduzinsky. For example, from January 2016, Kirby allows roughly a dozen non-emergency motions to be heard as “emergencies.” The motions are invariably filed late in the day and Kirby hears them outside normal courtroom hours the next day in the early morning;
i. Kirby's [*sic*] repeatedly enters “*nunc pro tunc*” orders for O'Brien, Adams, Powers, and Bozych, not to correct clerical errors, but to add judicial actions. Many are entered on “oral motions” or apparently done *sua sponte*;

j. Kirby allows O'Brien's costs for reimbursement of over $25,000 to house and feed Cristina and her grandparents in Chicago for two years, claiming it is a litigation expense, even the Illinois Rules of Professional Conduct prohibit an attorney from loaning or giving money to a client;

k. Kirby, O'Brien, Bozych, Vranicar, Powers and Laduzinsky violate the Probate Order barring Cristina's [*sic*] from seeking relief for Klein;

l. Kirby, O'Brien, Bozych, Vranicar, Powers and Laduzinsky claim Klein is a dependent beneficiary even though when denying Klein's petition for intervention and withdrawal of his attorney, Kirby entered an order stating Klein is not a "dependent beneficiary;"

m. O'Brien obtains an *ex-parte* injunction without even a motion seeking injunctive relief barring Klein from contacting Cristina;

n. Kirby, O'Brien, Bozych, Vranicar, Powers and Laduzinsky claim Klein is a dependent beneficiary, even though the operative Complaint in Cristina's case specifically disclaims seeking any relief on behalf of Klein. Instead, they wait until after Cristina's case "settle" [*sic*] to claim Klein has an interest; and/or

o. Kirby allows O'Brien to represent Cristina as administrator and in her own individual claims, and allegedly to represent Klein's interests before the dependency phase, even though attorneys have been disciplined for such actions.

II. DISCUSSION

Plaintiffs' theory as set forth in the First Amended Complaint is that the defendant lawyers conspired with a Cook County Circuit Judge, John Kirby, to violate Klein's Fourteenth Amendment due process and equal protection guarantees, as well as to commit fraud and intentionally interfere with Klein's expectancy in pursuing his own claim for damages. In Count I, he brings a Section 1983 claim that his rights to due process were denied by a conspiracy consisting of all Defendants, including the lawyers, their law firms, the parties, and Judge Kirby, to deny him the right to recover for the loss of his wife. In Count II, Klein brings a Section 1983 denial of equal protection claim against the same group. Count III, a state law claim against the same Defendants, is based on common law fraud. Count IV claims that the same Defendants intentionally interfered with "Klein's expectancy in pursuing his own case for damages." In Count V, Xydakis sues Cristina for what appears to be a portion of her settlement on a *quantum meruit* theory for the work he performed as her attorney. In all of the counts, Klein is seeking money damages, costs, and attorney's fees. In addition to seeking money damages in Counts I and II, Klein asks for a declaration that he "may seek relief for his damages relating to the death of his wife in a separate proceeding and his rights were not adjudicated with Kirby's case."

Defendants have moved to dismiss based on this Court's lack of jurisdiction to hear the case under the familiar *Rooker-Feldman* doctrine. *See, Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). This doctrine forbids lower federal courts from

exercising jurisdiction over cases brought by state court losers challenging state court judgments rendered before commencement of the district court proceedings. The rationale for the doctrine is that no matter how wrong a state court judgment may be under federal law, only the Supreme Court of the United States has jurisdiction to review it. *Brown v. Bowman*, 668 F.3d 437, 442 (7th Cir. 2012). Defendants point out that the cases have been proceeding in state court for more than 15 years and have finally have been brought to a conclusion with a state-court-approved settlement and with the First District appellate decision in *Klein I* handed down on June 28, 2017, which affirmed the state trial court's dismissal of Klein's case with prejudice.

Klein however contends that he is not trying to undue the state court judgment. Instead, he says that he is relying on an exception to *Rooker-Feldman* announced in *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir. 1995). In that case, Judge Posner described a hypothetical case that was not covered by *Rooker-Feldman*. If a plaintiff were to complain that the defendants had corrupted the state judicial process by which they were able to obtain a favorable judgment, such a claim would not be foreclosed by *Rooker-Feldman* so that he would be able to attempt to vindicate his rights in federal court despite the fact that he lost in state court.

A. Count I—Due Process

In attempting to parse Klein's Complaint here, it does appear that he is complaining of being dealt a losing hand by a conspiracy of lawyers and Judge Kirby. Of course, it is necessary that he include Judge

Kirby, who has absolute immunity, in order to have a state actor; otherwise there would be no basis for a Section 1983 claim for damages. According to the Complaint, Judge Kirby was assigned the case in August 2014, which was about the time that Cristina's current attorneys entered appearances in the wrongful death case. Therefore, the "conspiracy" would not have commenced prior to August 2014. Thus, the historical allegations made in the Complaint—consisting of Klein's objections to orders, legal positions, and statements taken and made by Defendants and their lawyers along with rulings and statements made by judges other than Judge Kirby, including a so-called settlement that was allegedly forced upon Klein in 2010 (which involved none of the lawyer Defendants) and was invalidated by the Illinois Appellate Court in *Cushing II* – would not be a part of the conspiracy.

This leaves as acts of the conspiracy allegations that Cristina's attorneys failed to prepare adequately for trial, took litigation positions and made statements that Klein believes are incorrect, and kept Klein away from Cristina. Also, the acts of conspiracy include allegations that Judge Kirby and Judge Callahan, who dismissed Klein's case (the 2014 suit), "share[d] the same law clerk;" that Kirby held "*ex-parte* discussions" with the defendant lawyers in an attempt to settle the case from which "Klein or his agents" were excluded; that in June 2017 the parties settled the case without prior notice to Klein, allocating 60% to the wrongful death claim and 40% to Cristina's negligent infliction of emotional distress claim; that Judge Kirby denied Klein's motion to intervene; that Cristina as supervised administrator had a conflict of interest; that Defendant O'Brien hired lawyer Defendants Powers and Luduzinsky to represent Cristina at the dependency

phase; that the Defendant lawyers changed positions from contending that Klein did not have an interest in the dependency phase to contending that he did; that Judge Kirby raised the disclaimer issue; that Judge Kirby ordered Defendant O'Brien to attend hearings in the 2014 case; that Judge Kirby set Klein's motions without adequate time for him to "respond," in violation of local rules; that Judge Kirby failed to rule on a Greyhound motion to dismiss the 2007 case; and that Judge Kirby allowed multiple non-emergency motions to be heard as emergencies and used *nunc pro tunc* orders for non-clerical corrections. Klein makes a number of other "objections" that either have been specifically ruled on in the June 28, 2017 Appellate Court ruling or were not relevant to the status of 2007 suit presided over by Judge Kirby.

The question is whether these so-called orders, actions, statements, and rulings—taken as true for the purposes of this motion to dismiss—rise to the point where it can be said that Klein's due process rights were violated. While Defendants' Motion to Dismiss is based on lack of jurisdiction and is brought pursuant to Fed. R. Civ. P. 12(b)(1), nevertheless even if a plaintiff can get by the jurisdictional bar of Rooker-Feldman and issue preclusion, he still must state a claim on the merits; in other words, he must state a claim upon which relief could be granted. *See, Mains v. Citibank, N.A.*, 852 F.3d 669, 677 (7th Cir. 2017) ("In short, even if aspects of the TILA claim fall outside the scope of *Rooker-Feldman*, it survives the jurisdictional bar only to be dismissed on the merits.")

It is clear that all of Klein's grievances when added together, including the ones that are obviously subject to claim preclusion, fall far short of establishing a violation of his rights to due process. Many of his

complaints have already been decided by the Appellate Court's June 28, 2017 opinion in *Klein I*, including the dismissal of the 2014 suit, the denial of consolidation, and denial of his loss of consortium claim. Other claims are either constitutionally irrelevant—the alleged improper use of *nunc pro tunc* orders, the alleged violation of Cook County Local Rules, the use of emergency motions, and the entry of an injunction to prevent Klein from contacting Cristina—or are contrary to the requirements of the Illinois wrongful death statute (740 ILCS 180-2) and the holding in *Klein I*. For example, he claims that where the administrator of a wrongful death case is one of the beneficiaries, a special administrator must be appointed. He fails to cite to any provision of the Act or any court decisions that might support such a position. Specifically, the statute says that the wrongful death action "shall be brought by and in the names of the personal representatives of such deceased person...." There is no provision in the statute that divests the personal representative, who also happens to be a beneficiary, of her office. *Johnson v. Provena St. Therese Medical Center*, 778 N.E.2d 298 (Ill. App. 2nd Dist. 2002), holds that it is the duty of the trial court to protect the interest of the beneficiaries, exercise of which is subject to the abuse of discretion standard. *See also, In re Estate of Williams*, 585 N.E.2d 235, 238 (Ill. App. 5th Dist. 1992). If the beneficiaries are dissatisfied and think the exercise of discretion was abused, they have the right to appeal the trial court dependency determination. *Mortensen v. Sullivan*, 278 N.E.2d 6 (Ill. App. 2nd Dist. 1972). Klein also states that a beneficiary has "an absolute right to present [his] damages before any settlement or trial, not just at a dependency hearing...." However, all the statute says is that "[t]he amount recovered in any such action shall be

distributed by the court in which the cause is heard, or, in the case of an agreed settlement, by the circuit court, ... in the proportion, as determined by the court...." There is no requirement that a beneficiary be allowed to participate in the settlement talks, particularly where, as here, there is animosity between the beneficiaries, and Klein cites no authority stating otherwise. Here the Probate Court approved the settlement amount, and the Circuit Court held a hearing to determine the percentage of dependency of the two beneficiaries. That is all the law requires. If a beneficiary is unhappy with his allocation he has the right to take an appeal to the Appellate Court. *See generally*, *Mortensen.* The Cook County Circuit Court sought to hold a dependency hearing. Klein tried to thwart it by unsuccessfully seeking reconsideration of his motion to consolidate the 2014 case with the 2007 case. Poignantly, Klein does not allege that he was denied the right to a dependency hearing. It would be difficult for him to do so since he sought to stop the dependency phase by removing the 2007 case to federal court where he attempted to launch a collateral attack against the settlement. The district judge promptly remanded the case back to the Cook County Court, noting that Klein was not a party to the case. Remarkably, Klein fails to disclose what occurred after remand in the Circuit Court with respect to a dependency hearing or whether he took an appeal after such a hearing. He also does not allege whether he appealed the decision of the Probate Court to approve the settlement of the wrongful death claim.

Klein appears to be contending that the apportionment of the settlement between the wrongful death count and Cristina's negligent infliction of emotional distress claim was unfair to him. He certainly

was within his rights to object to the decision of the Probate Court judge, and he would be within his rights to appeal the approval. As previously noted, the Complaint does not state whether he filed such an appeal. Klein could certainly argue during the dependency phase that, in exercising discretion when assessing the future needs of the two beneficiaries and deciding the allocation between Cristina and Klein, the court should take into consideration that Cristina will have $2 million (less attorney's fees) as an asset.

The answer to Klein's effort to rescue his case lies with the state courts. *Mains*, 852 F.3d at 676 *(*"The state's courts are quite capable of protecting their own integrity.") The procedural history of this case amply demonstrates that Illinois courts are capable of insuring justice to their litigants. The Illinois Appellate Courts on at least two occasions in this very case have reversed trial court rulings on several important matters, including the 2010 attempt to settle Klein's case. The availability of appeals under Illinois law supplies all of the due process Klein requires. He has demonstrated that he is not afraid of using the appeals process to attempt to vindicate his rights. He has filed multiple appeals during the tortuous course of this 15 year procedural nightmare, both *pro se* and through counsel.

If the federal courts granted to state court litigants who feel or believe that they have been treated unfairly by a state court judge, the right to bring Section 1983 cases in lieu of state court appeals, we would open the floodgates to a massive amount of duplicate litigation. While state court judges (as well as federal judges) can become aggravated by the conduct of recalcitrant litigants whom they believe to be abusing trial and appellate procedures by needlessly

obfuscating and prolonging lawsuits—and it is also a fact that aggravated judges can be irritable and perhaps rude at times—irritability and rudeness do not rise to violations of due process. As stated earlier in this Opinion, this case has been pending for more than 15 years, and has engendered countless motions, lawsuits, and appeals as well as apparent animosity between the attorneys and between Cristina and Klein. An eight-year-old girl lost her mother in a tragic accident, and she has had to wait more than 15 years for a resolution of this case. Fifteen years is too long, and this matter has to come to a resolution. To conclude, this Court believes that Klein has not been denied due process but instead has received far more than is due. Count I is dismissed.

B. Count II—Equal Protection

In Count II Klein brings a Section 1983 constitutional tort claim based on alleged denial of equal protection by Defendants, conspiring with Judge Kirby. Under traditional equal protection analysis, a governmental body may not treat classes of people differently without the difference being rationally related to a legitimate governmental interest. *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). Klein does not allege that he is a member of any specific group or class, such as race or religion, that has been discriminated against. While there are cases involving class of one equal protection claims, see, *Del Marcelle v. Brown County Corp.*, 680 F.3d 887 (7th Cir. 2012), Klein does not plead such a claim. In fact, he merely relies upon the same factual predicates underlying Count I. However, even if Klein attempted to do so, he would fail. In order to bring a class of one equal protection

claim, there must be underlying discriminatory treatment alleged that is different from what others similarly situated receive and not rationally related to a legitimate governmental interest. Certainly the courts of Cook County have a legitimate interest in running their court system efficiently and bringing legal proceedings to a timely conclusion. In order to insure fairness to litigants, the state provides a complete appellate review system. As we have seen in the discussion of Count I, Klein has raised no set of facts that demonstrate that he was treated unfairly or irrationally. For these reasons, Count II is dismissed.

Both Counts I and II also seek "a declaration that Klein may seek relief for his damages relating to the death of his wife in a separate proceeding and his rights were not adjudicated within Kirby's case." This of course flies in the face of the holding in *Klein I*, where the Illinois Appellate Court specifically held that Klein's wrongful death action, the 2014 case, had been properly dismissed because he had no authority to file such a case separate from the personal representative of the estate. Clearly, such a declaration is foreclosed by claim preclusion (or possibly *Rooker-Feldman*).

Since the Court has dismissed the two federal claims, the Court will exercise its discretion and dismiss the state law claims prayed in Count III and Count IV.

There is no Motion brought regarding Count V.

III. CONCLUSION

For the reasons stated herein, Defendants' Motion to Dismiss [ECF No. 39] is granted and Counts I, II, III, and IV are dismissed.

IT IS SO ORDERED.

No. 17-2802
United States Court of Appeals, Seventh Circuit.

Tiberiu KLEIN, Plaintiff-Appellant,
v.
Daniel E. O'BRIEN, et al., Defendants-Appellees.

4/9/2018

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 16 C 11008—**Harry D. Leinenweber**, *Judge*.

Before Wood, Chief Judge, and Easterbrook and Barrett, Circuit Judges.

On March 23, 2018, plaintiff/appellant filed a motion to disqualify and a petitionfor rehearing and reheari-ng en banc. Each member of the panel has individually considered the motion to disqualify, insofar as it sought his or her recusal, and each judge has voted to deny the motion. See Liteky v. United States, 510 U.S. 540 (1994). No judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to deny panel rehearing.

IT IS ORDERED that the motion to disqualify is DENIED.

IT IS FURTHER ORDERED that the petition for reh -earing and rehearing en banc is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Tiberiu Klein, et al, Plaintiff(s), v. Daniel E. O'Brien, et al, Defendant(s).	Case No. 16 C 11008 Judge Harry D. Leinenweber

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

☐ in favor of defendant(s) and against plaintiff(s)

Defendant(s) shall recover costs from plaintiff(s).

☒ other: in favor of defendants' Daniel E. O'Brien, et al and against the plaintiffs'.

This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Harry D. Leinenweber on a motion by defendants' to dismiss.

Date: 8/1/2017 Thomas G. Bruton, Clerk of Court

Wanda Parker, Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TIBERIU KLEIN et al.	)	**Case No. 17-2802**
Plaintiffs-Appellants	)	
vs.	)	
DANIEL E. O'BRIEN et al.	)	
Defendants-Appellees	)	

PLAINTIFFS-APPELLANTS' MOTION TO DISQUALIFY

NOW COME Plaintiffs-Appellants, Tiberiu Klein individually, Tiberiu Klein as the Co-Administrator of the Estate of Claudia Zvunca, and John Xydakis, by and through their attorney, John Xydakis, and in moving for disqualification, or alternatively recusal, of Judges Easterbrook, Wood, and Barrett, pursuant to 28 U.S.C. §455(a) or (b)(1), state as follows:

I. Panel Opinion Accuses Parties & Attorney of Misconduct.

On March, 9, 2018 a Seventh Circuit panel (Easterbrook, Wood, Barrett) issued an Opinion (*Klein v. O'Brien* et al. Case 17-2802) authored by Judge Easterbrook. Exhibit 2, Ex.A.

Judge Easterbrook claimed plaintiff and his attorney "pretended" plaintiff was an administrator,

plaintiff's attorney "falsely" certified the record was complete, and the attorney has "no idea what a 'judgment' is." All are mistaken (See Petition for Rehearing or Rehearing *En Banc*).

II. Standard- Whether Reasonable Person Has Significant Doubt.

A judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a). The language lacks any "discretion." *In re U.S.* 158 F.3d 26, 36 (1st Cir. 1988)(dissent). It is a "directive that allows for no deviation." *Id.*

What matters "is not the reality of bias or prejudice but its appearance." *Liteky v. U.S.*, 510 U.S. 540, 548 (1994). The appearance need not be "extrajudicial." A judicial opinion's "high degree" of "antagonism" suffices if it reveals a clear "inability to render fair judgment." *Id.* at 555. The judicial system endeavors to prevent not only unfairness, but the "probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

The appearance of impropriety is "an objective standard." *Caperton v. A.T. Massey*, 129 S.Ct. 2252, 2266 (2009). A disinterested person's viewpoint, not a disinterested judge's, is used. *Pepsico v. McMillen*, 764 F.2d 458, 460 (7th Cir. 1985). The test is whether this disinterested observer "would entertain a significant doubt that justice would be done in the case" should the judge remain on the case. *Pepsico* at 460. A reasonable, disinterested person is "less inclined to credit judges' impartiality and mental discipline than the judiciary." *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990). The

"appearance of impropriety" is to ensure the public justice is done. *Id.*

Alternatively, a judge must disqualify himself if "he has a personal bias or prejudice concerning a party." 28 U.S.C. §455(b)(1). Because the judge's own inquiry into actual bias is not one the law "can easily superintend or review," "objective rules" are applied here as well. *Caperton* at 2266. Similarly, a "finding of bias, however, is not precluded merely because the judge's remarks were made in a judicial context." *Gardiner v. A.H. Robins*, 747 F.2d 1180, 1189 (8th Cir. 1984).

Actual "impartiality concerns the mental state of a particular judge." *Wersal v. Sexto*n, 674 F.3d 1010, 1022 (8th Cir. 2012). However, the "appearance of impartiality arises from the public's perception of that judge." *Id.* Impartiality protects the "due process rights of actual parties to a case." *Id.* On the other hand, "maintaining the appearance of impartiality" protects "the judiciary's reputation for fairness in the eyes of all citizens." *Id.*

III. Hostile, Demeaning and Humiliating Words Violate Seventh Circuit Standards.

The Opinion violates the following Seventh Circuit Judicial Conduct Standards[1]:

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[1]http://www.ca7.uscourts.gov/forms/Seventh_Circuit_Standards_for_Professional_Conduct.pdf (last accessed March 17, 2018)(hereafter "Standards," p. 5) and http://www.uscourts.gov/sites/default/files/guide- vol02e-ch03.pdf (last accessed March 17, 2018)(hereafter "Rules," p.9). Ethical standard have long been admissible in a host of civil proceedings. *Rogers v. Robson*, 74 Ill.App.3d 467, 473 (3rd Dist. 1979) *aff'd* 81 Ill.2d 201 (1980).

Seventh Circuit's Standards for Professional Conduct

Courts' Duties to Lawyers

* * * *

"2. We will not employ hostile, demeaning, or humiliating words in opinions..."

Seventh Circuit Judicial Conduct Rules

"Examples of judicial misconduct include:

* * * *

* treating litigants or attorneys in a demonstrably egregious and hostile manner;"

Any hostile language is not "merits related" "while on the bench."

Despite this, the Opinion wrongly uses "false," "falsely," "pretend[]" and "no idea." In other situations, deviations from an entity's "own internal" procedures is circumstantial evidence" for actual bias or prejudice, much less the lower "appearance of impropriety" standard. *Rudin v. Lincoln*, 420 F.2d 712, 727 (7th Cir. 2005).

The Standards also require letting the lawyers "make a complete and accurate record" and give the issues "deliberate, impartial, and studying analysis and consideration." In this case, as noted in the attached Petition for Rehearing & Rehearing *En Banc* (Exhibit 2), all the inflammatory words were based on a misreading of the record.[2]

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[2] In other areas, "evidence that calls truthfulness into question" may be "quite persuasive" evidence of bias or prejudice. *O'Neal v. New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002); *Reeves v. Sanderson*, 530 U.S. 133, 147 (2000).

The Opinion also does not mention that the District Court specifically stated only subject matter jurisdiction should be briefed. Both Plaintiffs and Defendants believed the District Court dismissed for lack of subject matter jurisdiction based on the *Rooker-Feldman* doctrine. Defendants' response briefs in the district court and on appeal were solely based on *Rooker-Feldman*.

At oral argument, Defendants' attorney also stated, "I do believe that Judge Leinenweber's ruling contains elements of *Rooker-Feldman* argument." "[F]or instance, on page 21, of the Opinion," he said, the [District Court] said, 'The answer to Klein's effort to rescue his case lies with the state courts." *Id.*

However, the Opinion does not mention Defendants' position nor employ hostile language against their attorneys (six law firms). Instead, the Opinion goes out of its way to claim to use hostile and demeaning language – "falsely," "pretense," "havoc," attorney "has no idea what a judgment is" -- to impugn Plaintiffs and their attorney. Selective retaliation or enforcement of standards for similarly situated persons

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In addition, the Opinion first claims Xydakis falsely certified the appendix was complete when the Rule 58 document was not included, then contradicts itself by claiming the Rule 58 document is not included because Xydakis has no idea what a judgment is. Shifting or inconsistent explanations evidence bias or prejudice. *Appelbaum v. Milwaukee*, 340 F.3d 573, 579 (7th Cir. 2003).

The Opinion (p.5) also claimed the judgment had to be "tracked down." Likewise, the Opinion (p.6) claimed "Xydakis and Klein have caused havoc in the tort litigation." If so, these were improper independent investigations outside the record. *Bonhiver v. Rotenberg*, 461 F.2d 925, 928–29 (7th Cir. 1972). Judges cannot evade this prohibition by having clerks do it instead. *Kennedy v. Great A & P*, 551 F.2d 593, 598 (5th Cir. 1977).

presumes bias. *Coleman v. Donahue*, 667 F.3d 835, 858 (7th Cir. 2012). Moreover, all of these accusations were gratuitous. Only the dismissal based on subject matter jurisdiction was at issue on appeal, not any sanctionable conduct. All the accusation misread the record (see Exhibit 2).[3]

IV. Hostility at Oral Argument Mandates Disqualification.

At oral argument, Judge Easterbrook was hostile, cut off counsel, continuously snickered and laughed, and made facial gestures indicating disbelief in arguments.[4]

The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias." Commentary Canon 3A(3). Treating "litigants or attorneys in a demonstrably egregious and hostile manner while on the bench" is misconduct. *Rules* at *9.

Bias against an attorney "can reasonably be imputed to a party" as well. *U.S. v. Sykes*, 7 F.3d 1331, 1339 (7th Cir. 1993). A judge so hostile to a lawyer so as to doom the client to defeat deprives the client of the

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[3] For attorneys, it would be sanctionable to mislead the court by "a misrepresentation[,]" "pregnant omission" or omitting facts "relevant to an accurate characterization." *In re Lightfoot*, 217 F.3d 914, 917 (7th Cir. 2000); *In re Ronco*, 838 F.2d 212, 218 (7th Cir. 1988). The Opinion's statements need not rise to the level of a tort or sanctionable conduct to evidence an appearance of bias or prejudice.

[4] http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=&casenumber=&period=Past+month (last accessed March 17, 2018). For Judge Easterbrook, audio at approx 3:20, 4:12, 4:29, 7:54, 15:07. Judge Wood appears to laugh at approximately 3:30.

right to an impartial tribunal and should be disqualified. *Walberg v. Israel*, 766 F.2d 1071, 1076-1077 (7th Cir. 1985)

V. Opinion's Language Was Sanction. Threat of Future Sanctions Inappropriate.

The Panel's claim an attorney's conduct was fraudulent "in effect beg[ins] a disciplinary proceeding against the lawyer." *Bolte v. Homes*, 744 F.2d 572, 573 (7th Cir. 1984). Likewise, "criticism of an attorney in an opinion is a form sanction." *Chicago Council of Lawyers* at 701. In fact this sanction "can, in practical terms, be more damaging than a formal but unpublicized censure or remand." *Id.* at 701.

Similarly, a "federal judge's derogatory statement, entered of record, [is] equivalent to a penalty that must be preceded by due process of law." *Fleury v. Clayton*, 847 F.2d 1229, 1233 (7th Cir. 1988)(Easterbrook, J.). Even an "*en banc* reversal of the panel opinion" does not prevent a "lawyer's career from being damaged by the equivalent of a sua sponte sanctioned, given without notice and an opportunity for counsel to explain the conduct." *Council* at 700.[5]

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[5] The Opinion's hostile and critical language and threat of future sanctions violates the notice and opportunity requirements for all sanctions. Roadway v. Piper, 447 U.S. 752, 767 (1980). For example, Rule 11(c) requires "notice and a reasonable opportunity to respond." If the court initiates sanctions, Rule 11(c)(1)(B) requires an "order describing the specific conduct" allegedly sanctionable.

Similarly, 28 U.S.C. §1927 requires "prior notice and an opportunity to respond." *Larsen v. Beloit*, 130 F.2d 1278, 1286 (7th Cir. 1997). Even "inherent power" sanctions requires "a rule to show cause or similar procedure" rather than "sudden imposition of sanctions with no opportunity to respond." *Id.* at 1286-1287.

Even the discretion to begin seeking sanctions "must be exercised according to the law." *In re Milwaukee*, 112 F.3d 845, 849 (7th Cir. 1997). The law requires any "penalty" first provide "procedural guarantees" and proof beyond a reasonable doubt. *Goodyear v. Haeger*, 137 S.Ct. 1178, 1186 (2017).

The Opinion's threat of future sanctions for any future litigation is also inappropriate misconduct. Parties have a constitutional right of access to the courts. *Surita v. Hyde*, 665 F.3d 860, 878 (7th Cir. 2011). Moreover, federal courts lack "supervisory authority" over state court proceedings. *Wallace v. Kern*, 499 F.2d 1345, 1351 (2nd Cir. 1974).[6]

Moreover, on appeal, sanctions should be limited by the Federal Rules of Appellate Procedure so as not to discourage appeals and produce anomalous results. *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 407 (1990). For example, an appeal of a district court's Rule 11 sanction "may frequently be frivolous" because the appellate court reviews under an abuse of discretion standard, even though the appeal has merit. *Id.*

Even so, Federal Rule of Appellate Procedure 38 requires a "separately filed motion or notice from the court and reasonable opportunity to respond" before sanctions can issue. Similarly, Federal Rule of Appellate Procedure 46(c) requires giving the "attorney reasonable notice, and opportunity to show cause to the contrary, and, if requested, a hearing" before imposing any discipline.

[6] A court's power extends "no further than is necessary to control those practices and proceedings before it." *Knott v. State*, 731 So.2d 573, 576 (Miss. 1999). Parties cannot be "sanctioned" for conduct that did not take place in proceedings before it. *Id.* One judge cannot infringe on another judge's power over the case or courtroom. *State v. Ngo*, 27 P.3d 1002, 1009 (N.M.App.Ct. 2001).

Likewise, the first court doesn't get to dictate to the second court "the preclusion consequences of its own judgment." *Smith v. Bayer*, 564 U.S. 299, 306 (2011)(quoting treatise). Also, Federal courts cannot enjoin State court litigants. 28 U.S.C. §2283. Any "relitigation exception" to the Anti-Injunction Act is "strict

VI. Overly Hostile Opinions Show Appearance of Impropriety.

The Opinion evidences a hostility and disregard of the law evidencing prejudice towards the parties and attorney. Moreover, almost all the accusations were gratuitous. Subject matter jurisdiction was the only issue on appeal, not sanctions. The District Court never used this inappropriate language in its opinion. Exhibit 3. The panel's using inappropriate language that "does not seem relevant on its face" is misconduct. *Rules* at *9.

A civilized society insist that civility "be visibly maintained in its courts[,]" even when ruling against a party. *U.S. v. Thomas*, 956 F.2d 165, 167 (7th Cir. 1992). Overly hostile comments and misstating the record evidence the judges were "unable to hold the balance" and should be disqualified or recuse themselves. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974).

Others have repeatedly voiced similar concerns of inappropriate misreading of the record and conduct at oral argument (see Exhibit 1) by a panel member (Judge Easterbrook). However, this does not negate the bias or prejudice in the present case. Bias or prejudice merely requires opinions not based on evidence or that "yield to evidence[,]" not that other persons have also been unfairly subjected to egregious remarks or misstatements of the record. *People v. Washington*, 121 Ill.App.2d 479, 486 (1st Dist. 1984).

A published finding accusing attorneys of incompetence or "falsely" doing something and "pretending" is especially serious to their livelihood.

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and narrow" and "every benefit of the doubt goes toward the state court" litigants. *Smith* at 306-07.

Paters v. U.S., 159 F.2d 1043, 1057 (7th Cir. 1998). If accusing attorneys of misconduct in a district court hearing suffices to disqualify a judge, accusing an attorney of repeatedly lying in a published Opinion should suffice as well. *In re U.S.*, 614 F.3d 661, 665–66 (7th Cir. 2010).

Seventh Circuit opinions should be a mode of professionalism, not exceed the "pettiness and a lack of civility" in briefs that courts condemn. *RLJCS v. Professional*, 438 F.Supp.2d 903, 905 (N.D. Ill. 2006). The Opinion and oral argument violate the Seventh Circuits own Standards and Rules for judicial conduct.

"No reasonable person would fail to perceive a significant risk that the judge's rulings in the case might be influenced by his unreasonable fury toward the" Plaintiffs and their counsel. *In re U.S* at 666. Judges Easterbrook, Wood and Barrett should be disqualified, or recuse themselves.

WHEREFORE, Plaintiffs-Appellants move for disqualification, or alternatively recusal, of Judges Easterbrook, Wood, and Barrett, pursuant to 28 U.S.C. §455(a) or (b)(1), and for any further and equitable relief as may be just.

Respectfully Submitted,
Tiberiu Klein as Co-Administrator
Tiberiu Klein
John Xydakis

BY: /s/ John Xydakis
John Xydakis, Attorney for Appellants

Law Office of John S. Xydakis
Attorney for Plaintiffs-Appellants
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ARDC No. 6258004

CERTIFICATE OF SERVICE

The undersigned, an attorney, does hereby certify under penalties of perjury as provided b law, that he served a copy of this document upon all parties entitled to notice of the same that have appeared in the above-captioned case by filing it with the United States Court of Appeals for the Seventh Circuit's CM/ECF system on March 23, 2018.

BY: /s/ John Xydakis
John Xydakis, Attorney for Appellants

DECLARATION

Pursuant to 28 U.S.C. § 1746, I, John S. Xydakis, declare under penalty of perjury that the attached Exhibits are true and correct copies of the documents they represent.

Executed on March 23, 2018.

BY: /s/ John Xydakis

EXHIBIT 1

'Pattern of misstated facts found in opinions of renowned U.S. Judge Easterbrook' Injustice Watch[7]

"The result: Injustice Watch documented a pattern of misrepresented facts in Easterbrook's opinions. Injustice Watch uncovered 17 cases since 2010 in which opinions authored by Easterbrook misstated the facts, omitted facts, or made assumptions that were contrary to the trial record." p.2

"An analysis by Injustice Watch of 3,465 signed opinions by Seventh Circuit judges over a five-year period ending March 2016 short opinions authored by Easterbrook prompted petitions for reconsideration more than opinions by any other judge on the court." p.2

"It was by studying these petitions that Injustice Watch identified cases involving allegations of significant factual errors in Easterbrook's opinions." p.3.

'How Frank Easterbrook Kept George Ryan in Prison' Univ. of Chicago Professor Albert Alschuler8

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[7] https://www.injusticewatch.org/projects/2017pattern-of-misstated-facts-found-in-probe-of-renowned-federaljudges-opinions/ (last accessed March 17, 2018)

[8] https://scholar.valpo.edu/cgi/viewcontent.cgi?article=2397&context = vulr (last accessed March 17, 2018)

"Judge Easterbrook persistently presents wildly inaccurate, made up statements as unquestionable statements of fact." p.15. "If questioned or challenged, he [Judge Easterbrook] is likely to double down and push his bluff further." p.17.

"Judge Easterbrook's colleagues should view everything he says with skepticism and should recognize the serious problem his conduct poses for their court." p.16.

"Judge Easterbrook's bullying rests on stuff he just makes up. The truth is not in him." p. 29.

Judge Easterbrook is a stickler for rules who breaks the rules. The other judges of the Seventh Circuit should enforce the rules, respect the basic principles of the adversary system, and check Judge Easterbrook's penchant for confabulation. 28 U.S.C. § 46(b) does not put three judges on a panel to promote 'collegiality.'" p. 87.

'Evaluation of the United States Court of Appeals for the Seventh Circuit – Report' Chicago Council of Lawyers[9]

"[T]he result in many of Judge Easterbrook's opinions appear to be based on unproven factual assumptions and/or hypotheses not obtained from the record in the case." pp. 750- 751.

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[9]http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1869&context =law-review (last accessed March 17, 2018)

"Judge Easterbrook's opinions have been criticized for not accurately reflecting the record or controlling precedents." p. 757.

"Judge Easterbrook is willing to assume facts that are not part of the record in order to support the conclusion he apparently wishes to reach." p. 759.

"Judge Easterbrook is one of the court's chief practitioners of deciding issues that have not been briefed by the parties. He apparently does this to present his views of legal issues as soon as possible, and to preempt consideration of other viewpoints after briefing and argument." p.756.

"[T]he Council is deeply troubled that Judge Easterbrook appears less concerned about the actual facts and issues presented in the appeals before him than about advancing his own philosophy." p.747.

"Judge Easterbrook communicates a lack of appreciation for the litigants as real human beings with real-life problems. He can also communicate a lack of respect for the facts of a case and for president. In addition, he has been resoundingly criticized for his poor judicial demeanor. Both at oral argument and in his writing, Judge Easterbrook displays a contempt for attorneys and, to some extent, the litigants as well." P. 747.

"The tone of Judge Easterbrook's opinions can be particularly harsh, especially in cases in which he is dissatisfied with the conduct of counsel." p. 760.

"All too often, particularly when he disregards the facts of the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and limit his diversions from the facts and issues specifically presented." p. 761.

"Judge Easterbrook has consistently displayed a temperament that is improper for a circuit judge." p. 760.

Judge Easterbrook "has been resoundingly and repeatedly criticized as being extremely rude to attorneys at oral argument." p. 760.

"Judge Easterbrook goes well beyond asking pointed questions; rather, he 'attacks' lawyers in an attempt to establish that the advocate has not understood the case or that the judge's knowledge is superior to that of the advocate." p. 769.

'Richard Posner'

William Domnarksi, (Oxford Univ. 2016)

"More than half of the lawyers interviewed complained about Easterbrook's demeanor. There were complaints that he made comments at the expense of the lawyers arguing, that 'he will sometimes tilt back his head, laugh and look at his law clerks and encourage them to laugh at what the lawyer has said.'" "Lawyers noted that he was abrasive, rude, condescending, and flip…" p. 170

"In the 2002 edition [Almanac of the Federal Judiciary] only a minority of the lawyers interviewed spoke well of him [Judge Easterbrook]. Those who did not

commented that 'he is one of the meanest human beings you will ever encounter,' that he treats lawyers 'with utter contempt, that he 'lies in wait [for lawyers] and treats them mercilessly,' and that 'he displays a brutal lack of civility.'" p. 214.

"'He [Judge Easterbrook] likes to circle his kill and gives a nod and a wink to his clerk when he catches his prey. Another lawyer describes how he 'berates lawyers and shows off to his clerk's how powerful and smart he is. If he is on your side it can be fun, but if his position opposes yours, watch out, the rules of civility have not worked on him.'. . 'It is almost a game to him.'" p. 214.

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Case No. 17-2802

TIBERIU KLEIN indiv. TIBERIU KLEIN as Co-Administrator of the Estate of Claudia Zvunca Plaintiffs-Appellants vs. DANIEL E. O'BRIEN WINTERS SALZETTA O'BRIEN & RICHARDSON LLC. ADAM POWERS STEVEN LADUZINSKY LADUZINSKY & ASSOC. P.C. GREYHOUND LINES, INC. FIRST GROUP PLC LAIDLAW CORP. PAUL BOZYCH CLAUSEN MILLER LLP WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP NIELSEN ZEHE & ANTAS PC MICHAEL VRANICAR MOTOR COACH IND. INC. MOTOR COACH IND. INT'L. INC. PATTON & RYAN LLC	)	Appeal from the U.S. District Court Northern District of Illinois Eastern Division Honorable Judge Leinenweber Civil Action No. 16 CV 11008

CRISTINA ZVUNCA)
Defendants-Appellees

)

APPELLANTS' PETITION FOR REHEARING & SUGGESTION FOR REHEARING *EN BANC*

Attorney for Plaintiffs-Appellants
John Xydakis
Law Office of John S. Xydakis
Suite 402
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(312) 488-3497

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: **17-2802**

Short Caption: ***Tiberiu Klein v. Daniel O'Brien***

(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 the item #3): John Xydakis (standing for allegations made in panel opinion), Tiberiu Klein

(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: John Xydakis of the Law Office of John S. Xydakis

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

Attorney's Printed Name: **John Xydakis**
Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ___.
Address: Suite 402, 30 N. Michigan Ave., Chicago, IL 60602
Phone Number: **(312) 488-3497**
E-Mail Address: **johnxlaw@gmail.com**

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STATEMENT RESPECTING REHEARING & REHEARING *EN BANC*

Rehearing and Rehearing *en banc* is warranted because:

1. The case presents a question of exceptional importance:
   a. When the Seventh Circuit Standards state, "[w]e [Seventh Circuit Judges] will not apply hostile, demeaning, or humiliating words in opinions[,]" let the parties "make a complete and accurate record" and give the issues "deliberate, impartial, and studying analysis and consideration[,]"[10] and
   b. The Seventh Circuit Rules states, it is misconduct to treat "litigants or attorneys in a demonstrably egregious and hostile manner,"[11]
   c. Can a panel decision claim an attorney "falsely" certified an appendix was complete, "pretend[ed]" and "false[ly] claim a person was administrator, and assert he "has no idea what a judgment is" -- based on a misreading the record.

2. The panel decision (Exhibit A) conflicts with:
   a. *Peckmann v. Thompson*, 966 F.2d 295, 298 (7th Cir. 1992) -- It is "erroneous" for a district court to make "clear that the only inquiry before it is

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[10] Seventh Circuit Standards of Professional Conduct (pp.5-6) http://www.insd.uscourts.gov/sites/insd/files/Standards%20for%20Professional%20Conduct.pdf (last accessed March 17, 2018)

[11] Rules Judicial Conduct. http://www.uscourts.gov/sites/default/files/ guide-vol02e-ch03.pdf (last accessed March 17, 2018).

whether it had subject matter jurisdiction[,]" and then turn around without notice and "reach[] the merits of plaintiffs' claims." *Id.* District courts cannot "base their decisions on issues raised in such a manner that the losing party never had a real chance to respond." *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir. 2012). A party can "assum[e]" and "is justified in not presenting" merit arguments "to the Court of Appeals" if the district court dismissed for lack of jurisdiction. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). It is "essential" parties have an opportunity in the district court to offer all the evidence they believe relating to the issues," *Id.*

b. *Gross v. FBL*, 557 U.S. 167, 173 fn.1 (2009) - The issues presented on appeal "comprise every subsidiary" issue fairly included within it. The issue need not be "explicitly mentioned" as long as it was "essential to the analysis of the decisions below" or the "correct disposition of other issues." *Sherill v. Oneida*, 544 U.S. 197, 214 fn.8 (2005).

c. *Steel Co. v. Citizens*, 523 U.S. 83, 101 (1998) -- Courts cannot turn to merits before explicitly deciding jurisdiction. "Hypothetical jurisdiction -- even if the court had jurisdiction, it doesn't matter, because it can dismiss on other grounds --- is not allowed.

d. *Nesses v. Shepard*, 68 F.2d 1003, 1004-05 (7th Cir. 1995) – A claim "people involved in "State court proceedings "violated some independent" right – "to be judged by a tribunal" that is uncorrupted --- is not "blocked by the *Rooker-Feldman* doctrine."

INTRODUCTION

In 2002, in Colorado, a Greyhound bus ran over and killed Claudia Zvunca with her sevenyear- old daughter (Cristina) present. Claudia was married to Tiberiu Klein. Klein is not Cristina's adoptive or biological father.

Several months later, Klein filed a wrongful death case in Cook County against Greyhound, who removed it to Colorado. Two years later, Cristina filed a wrongful death case in Cook County against Greyhound and the bus maker ("MCI"). MCI claimed Cristina's case was barred by Klein's case. The Court disagreed, "[w]hile multiple suits for a single incident are not expedient, they are not prohibited in Illinois."

In 2005, the Illinois Appellate Court held, "[f]ollowing the decedent's demise, Klein and [Cristina] Zvunca legal strangers." In 2006, the Appellate Court again held, Cristina and Klein are "not the same plaintiffs." "The Colorado action was brought by the surviving spouse and the plaintiffs here [Cristina] have no connection to that case."

In 2012, when settling Cristina's case, the parties claimed to "settle" Klein's case for $52,734. The Appellate Court reversed, published e-mails from attorneys claiming influence over judges, ordered the opinion be sent to the ARDC "to further consider the actions of the attorneys," and remanded with an order the reassignment be "made by a judge other than" the presiding judge. *Cushing v. Greyhound*, 2013 IL App (1st) 103197, ¶380. The presiding judge and another judge "resigned" thereafter. The Chicago Tribune ran a Sunday cover story exclusive.

Klein refiled his Colorado case in Cook County after it was dismissed for lack of subject matter

jurisdiction. Cristina's Cook County complaint stated her case was "brought only for the benefit of Cristina Zvunca pursuant to the Probate Court's order of May 15, 2014 (See Attached Order.)" The Order mandated that Klein and Cristina maintain separate cases.

After Cristina "settled" her case, Cristina's attorneys claimed Klein was included in Cristina's case and had to appear to claim his portion of the settlement. Klein refused. The judge gave Klein $0 anyways. Klein sued Cristina's attorneys here, claiming they again conspired with State agents to take away his separate case. The Panel claimed the District Court dismissed for failure to state a claim, the parties claim the dismissal was for lack of subject matter jurisdiction.

REASONS FOR GRANTING REHEARING & REHEARING EN BANC

I. Panel Mistakenly Claims Lawyer "Pretended" District Court Did Not Limit Issues.

> "If Xydakis believed that the district judge erred in making a substantive decision in response to a jurisdictional motion . . . he might have contended on appeal that the judge erred by denying him that opportunity. Instead, Xydakis chose to pretend that his client lost on a jurisdictional ground. Pretense gets a lawyer nowhere."

> "Aware that the Supreme Court has understood the *Rooker-Feldman* doctrine is limited to Federal proceedings then ask state judgments themselves to be changed, the district court

addressed the merits rather than dismissing for lack of jurisdiction."

Defendants' Rule 12(b)(1) motion to dismiss was "for lack of subject matter jurisdiction" (R.39) pursuant to the District Court's directive:

> COURT: That would be my suggestion, yes, to brief the jurisdictional issue and then to -- we are encouraged to get that out of the way first.
>
> DEFENDANT: Right.
> PLAINTIFF: I think that's the proper procedure, Judge.
>
> COURT: So it would be a motion to dismiss under 12(b)(2) [meant 12(b)(1)].
>
> DEFENDANT: Correct.
> * * * * * *
> PLAINTIFF: I have to look at that, your Honor. Your Honor, can we make clear, though, that the motions are going to be limited to the jurisdictional issue at this point?
>
> COURT: Yes, let's keep it at the jurisdiction.
>
> DEFENDANT: Keep it at the jurisdiction.
>
> COURT: Yes.

> DEFENDANT: Leave the 12(b) stuff out of it.
>
> COURT: 12(b)(2) [meant 12(b)(1)] motion.
>
> DEFENDANT: Okay. And we'll do one motion, Judge --
>
> COURT: Right, one motion for --
>
> DEFENDANT: Okay. R38:55-56.

Once the District Court announced this procedural path of subject matter jurisdiction, "it is objectively reasonable for the attorney to proceed in the manner made known to the court." *Pacific v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994). The District Court's memorandum opinion (R.61) similarly states:

1. "Defendants have moved to dismiss based on this Court's lack of jurisdiction to hear the case under the familiar Rooker-Feldman doctrine." p.14;
2. "[E]ven if plaintiff can get by the jurisdictional bar," the claims fail. p.18;
3. Section 1983 claims cannot be brought "in lieu of state court appeals" because it would "open the flood gate to a massive amount of duplicate litigation." p. 22; and
4. "The answer to Klein's effort to rescue his case lies with the state courts." p.22.

Defendants' (six law firms) also read the District Court's opinion similarly. Defendants' briefs in the

district court and on appeal solely argued *Rooker-Feldman*. At oral argument, Defendants' stated, "I do believe that Judge Leinenweber's ruling contains elements of *Rooker- Feldman* argument." "[F]or instance, on page 21, of the Opinion," the [District Court] said, 'The answer to Klein's effort to rescue his case lies with the state courts." *Id.*

Federal courts must decide subject matter jurisdiction before proceeding "to any action respecting the merits of the action." *Cook v. Winfrey*, 141 F.2d 322, 325 (7th Cir. 1998). Hypothetical jurisdiction -- even if the court had jurisdiction, it doesn't matter, because it can dismiss for failure to state a claim -- - is not allowed. *Steel Co.* at 101. The District Court's hypothetical jurisdiction "produces nothing more than a hypothetical judgment" an "ultra vires" act "disapproved" by the Supreme Court "from the beginning." *Id.*

II. Panel Decision Conflicts With Prior Decisions On Sua Sponte Dismissal.

The District Court granted "Defendants' Motion to Dismiss [ECF No. 39]," for lack of subject matter jurisdiction. R.61:25. Decisions outside of the issues and briefing should not even be considered dicta as they lack "full airing of all the relevant considerations." *Monell v. Department*, 436 U.S. 658, 709 fn. 6 (1978)(concurrence). The adversary process is the best means of "minimizing the risk of error." *Mackley v. Montrym*, 443 U.S. 1, 13 (1979).

To accept the District Court reached the merits without notifying the parties, the District Court would have had to:

i. reverse its decision that only subject matter jurisdiction was to be addressed;

ii. convert Defendants' Rule 12(b)(1) motion into a Rule 12(b)(6) motion; and
iii. convert the Rule 12(b)(6) motion into a Rule 56 motion for summary judgment, all without notifying the parties.

However, Rule 12(d) lacks any provision to convert a Rule 12(b)(1) into a Rule 12(b)(6) motion. Rule 12(d) only allows converting Rule 12(b)(6) and Rule 12(c) motions into Rule 56 motions. Moreover, if the district court converts, "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed.R.Civ.Pro. 12(d). No notice was given here.

It is "erroneous" for a district court to make "clear that the only inquiry before it is whether it had subject matter jurisdiction[,]" and then turn around without notice and "reach[] the merits of plaintiffs' claims." *Peckmann at* 298. Dismissal is "improper when it comes as a surprise to the adverse party." *Id.*

Finally, Plaintiffs cannot raise issues on appeal that have not been raised below. *Singleton* at 120. If the parties brief and the district court decides subject matter jurisdiction, a party can "assum[e]" and "is justified in not presenting" merit arguments "to the Court of Appeals." *Id.*

It is "essential" parties have an opportunity in the district court to offer all the evidence they believe relating to the issues" below. *Id.* District courts cannot "base their decisions on issues raised in such a manner that the losing party never had a real chance to respond." *Smith* at 903.

III. Panel Misconstrued Appellants' Cause of Action & Relief Sought.

> Klein "believes that Cristina allocated too much of the settlement to herself (via damages for emotional distress) and not enough to him or Claudia's estate, from which she would benefit."
>
> The "proper step is to ask the rendering court to modify its judgment to correct the problem."

The Panel's premise is mistaken. Klein sued the attorneys here claiming they once again wrongly conspired with a State court judge to settle his case, not that he was not allocated enough in Cristina's case. R.4. Klein maintains he was not part of Cristina's case. R.4.

Defendants and the Cook County court could not "settle" Klein's claims. Not only were the cases separate, Klein had a loss of consortium claim that was constitutional protected and which only he could settle. *Kubian v. Alexian*, 272 Ill.App.3d 246, 255–56 (2nd Dist. 1995).

Klein had a right to prove he would have succeeded had Defendants not interfered. *Carey v. Piphus*, 435 U.S. 247, 258 (1978). The "right to a particular decision reached by applying rules to facts [] is 'property'" protected by due process. *Fleury v. Clayton*, 847 F.2d 1229, 1233 (7th Cir. 1988). Due process is not satisfied by the mere passage of time, as the panel claimed.

Parties have a constitutional right of access to courts. *Ryland v. Shapiro*, 708 F.2d 967, 971- 971 (5th Cir. 1983). State agents cannot interfere with the "exercise of [a] constitutionally protected right to institute a wrongful death suit" or even "prejudice a

litigant's rights in state court." *Id.* at 974. Similarly, if State agents act or help "defeat or prejudice a litigant's rights in state court, that would amount to a denial of equal protection of the laws." *Dinwiddie v. Brown*, 230 F.2d 465, 469 (5th Cir. 1956).

IV. District Courts Should Only Decide Issues Presented By Parties.

Judicial opinions usually decide "only questions presented by the parties." *Greenlaw v. U.S.*, 554 U.S. 237, 244 (2008). The opinion "must be read in light of the issues that were before the court for determination" *Nix v. Smith*, 32 Ill.2d 465, 470 (1965). Subject matter jurisdiction ("*Rooker-Feldman*") was the only issue before the District Court.

A claim "people involved in the" State court proceedings "violated some independent" right – "to be judged by a tribunal" that is uncorrupted --- is not "blocked by the *Rooker-Feldman* doctrine." *Nesses* at 1004. Plaintiffs can "sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm." *Id.*

Because *Rooker-Feldman* often overlaps with the merits and *res judicat*a, Klein's briefs (eg. Op.Br.pp.36-39, Reply.Br.pp.15-25) extensively argued why Klein can state a claim and was not bound by Cristina's settlement. For example, parties cannot "conclude the rights of strangers to the proceedings." *Richards v. Jefferson*, 517 U.S. 793, 798 (1996). Moreover, an "extreme application of state-law *res judicata* principles violates the Federal Constitution." *Id.* at 804.

The issues presented on appeal "comprise every subsidiary" issue fairly included within it. *Gross* at 173. The issue need not be "explicitly mentioned" as long as it was "essential to the analysis of the decisions below" or the "correct disposition of other issues." *Sherill* at 214. Briefs should be "read liberally with respect to ascertaining what issues are raised on appeal." *Kincade v. General*, 635 F.2d 501, 504 (5th Cir. 1981).

Also, waiver limits the parties, not the court. *Mikels v. Evan*s, 2009 WL 87462 at *6 (N.D. Ill. Jan.13, 2009). Moreover, "good cause" exists to "relieve litigants" of any manifest injustice that takes place, especially when both parties followed the District Court's directive that only subject matter jurisdiction was at issue. Fed.R.App.Pro. 2, Comm.Notes.

If an appeals court perceives "the issues on appeal" differently from the parties, it is an abuse of discretion not give notice to the parties "of the court's concern about those issues and to present arguments on them." *Sua Sponte Decisions by Appellate Courts*, 69 Tenn.L.Rev. 245, 268 (2002). This is "precisely the type of situation for which the rehearing process was created." *Id.* at 304-05. Otherwise, "the end result is a violation of due process." *Id*. at 305.

V. Opinion Mistakenly Claims Clerk's Rule 58 Document Decided Issue.

> "We tracked down the judgment and found that it corresponds to the opinion: it resolves the suit in defendants' favor on the merits rather than dismissing, without prejudice, for lack of jurisdiction."

> "It soon became clear that Xydakis has no idea what a 'judgment' is."

With few exceptions, Rule 58 requires judgments be "set out in a separate document." Rule 58(b)(2) requires the court "approve the form of the judgment" only for certain verdicts and relief not mentioned in Rule 58(b).

Rule 58(b)(1) lets the clerk alone -- "[w]ithout awaiting the court's direction" --- "sign and enter the judgement" if the "court denied all relief." Rule 58(b)(1)(C). Here, the Judge's clerk alone drafted and entered the judgment because Judge Leinenweber denied all relief.

The judgment did not "resolve the suit in defendants' favor on the merits" as the panel claimed:

> **JUDGMENT IN A CIVIL CASE**
>
> Judgment is hereby entered (check appropriate box):
>
> ☒ other: in favor of defendants' Daniel E. O'Brien, et al and against the plaintiffs'.
>
> This action was *(check one)*:
>
> ☐ tried by a jury with Judge presiding,

and the jury has rendered a verdict.

☐ tried by Judge without a jury and the above decision was reached.

☒ decided by Judge Harry D. Leinenweber on a motion by defendants' to dismiss.

Date: 8/1/2017 Thomas G. Bruton, Clerk of Court

Wanda Parker, Deputy Clerk

As noted above, the case was "decided by Judge Harry D. Leinenweber on a motion by defendants' to dismiss." R.62. That motion was "Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction." R.39.

A "distinction" exists between "the judgment itself" and the "'filing' or the 'entry' of the judgment." *10 Fed. Pract. & Proc*, §2651. The "[e]ntry of judgment involves a ministerial duty by the clerk." *Butler v. Stover*, 546 F.2d 544, 548 (7th Cir. 1977). "[C]ourts render judgments; clerks only enter them on the court records" *Burke v. C.I.R.*, 301 F.2d 903 (1st Cir. 1962).

A "'Memorandum Opinion' signed by" a district judge adjudicating "all the matters in controversy" "is [t]he] judgment of the court." *Steccone v. Morse-Starrett*, 191 F.2d 197, 200 (9th Cir. 1951). Rule 58's "sole purpose" is "to clarify when the time for appeal" begins to run. *Banker's v. Mallis*, 435 U.S. 381, 384 (1978).

Parties are "free to waive" the Rule 58 document and appeal anyways. *Id.* Judgment is effective the

earlier of the Rule 58 document or "150 days have run from the entry in the civil docket." Rule 58(c)(2). A clerk's Rule 58 document "may do no more" than enter the prior judgment, not expound or clarify it. *U.S. v. F&M*, 356 U.S. 227, 233 (1958).

The Rule 58 document did not need to be "tracked down." It was included in the electronic record on appeal. R.62. "What is determinative [] is the action of the court, not that of the clerk." *Burke* at 903. Judgments may be "embodied in an opinion." *Id.* at 904. No specific words are required "to constitute a judgment." *Id.* If ambiguity exists, appeals court should look at the briefs, transcripts, and the "opinion, findings and conclusions in the case[,]" not a Rule 58 document drafted and entered solely by the clerk. *Security v. Century*, 621 F.2d 1062, 1066 (10th Cir. 1980).

VI. Appendix Was Not Falsely Certified as Panel Claimed.

> "It [the Rule 58 document] is not there, despite Circuit Rule 30(a), which requires the judgment to be attached to the appellant's brief, and Circuit Rule 30(d), which requires counsel to certify that all materials required elsewhere in Rule 30 have been included. Xydakis so certified, falsely."
>
> "At oral argument we asked him why; he did not explain. It soon became clear that Xydakis has no idea what a 'judgment' is." *Id.*

Circuit Rule 30(a) requires the appendix contain "the judgment or order under review." Similarly, Federal Rule 30(a)(C) requires the appendix contain "the judgment, order, or decision in question." 'Or' is "almost always disjunctive" and "the words it connects are to be given separate meanings." *Loughrin v. U.S.*, 134 S.Ct. 2384, 2390 (2014).

The appendix included the "Memorandum Opinion and Order" necessary for review. R.61. A Rule 58(b)(1)(C) document reflecting "entry of judgment" is merely the "recording in a docket" that a "judgment has been rendered[,]" not the judgment itself. *Houston v. Greiner*, 174 F.2d 287, 288 (2nd Cir. 1999).

Also, 'judgment' means "different things in different contexts." *Timmeran v. Neth*, 755 N.W.2d 798, 801 (Neb. 2008). A 'judgment' is a "determination of the rights and obligations of the parties in a case" by the court. *Black's Law Dict.* Courts can even "orally enter[] judgment" and direct a "formal decree be drafted, to be entered *nunc pro tunc* to the date of the oral judgment." *Cummins v. Falcon*, 305 F.2d 721, 722 (7th Cir. 1962).

Rule 54 defines a 'judgment' as a "decree and ***any order*** from which an appeal lies." Fed.R.Civ.P. 54(a)(emphasis added). For Rule 54 purposes, a district court's final decision is appealable regardless of any Rule 58 separate document entry. *Bankers* at 304.

The Opinion said, "[a]t oral argument we asked him why; he did not explain. It soon became clear that Xydakis has no idea what a 'judgment' is." A published finding accusing attorneys of incompetence or "falsely" doing something and "pretending" is especially serious to their livelihood. *Paters v. U.S.*, 159 F.2d 1043, 1057 (7th Cir. 1998).

An opinion criticizing an attorney is a sanction possibly "more damaging than a formal but unpublicized censure or remand." Even an "*en banc* reversal of the panel opinion" does not prevent a "lawyer's career from being damaged by the equivalent of a sua sponte sanction"[3]

As shown above, this claim is also inaccurate. Documents labeled 'judgments" do not become so "merely because" they are "so entitled." *Baker v. Castaldi*, 185 Cal.Rptr.3d 17, 21 (Ca.App.Ct. 2015). A "'Memorandum Opinion' signed by" a district judge adjudicating "all the matters in controversy" "is [t]he judgment of the court." *Steccone* at 200.

VII. Panel Opinion Wrongly Claims Plaintiff "Falsely" "Pretended" to be Administrator

> "Klein had not been appointed as administrator." *Id.* at *2.
>
> "That has not prevented Klein from continuing to describe himself as co-administrator of Claudia's estate – this very suit was filed using that false description – and from attempting to manage or block the tort litigation." *Id.* at *2.
>
> "[I]n this suit Klein's attorney John Xydakis pretended that Klein is a

[3] *Evaluation of the Seventh Circuit*, Chicago Council of Lawyers (http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1869&context=law-review (last accessed March 17, 2018))(pp.700-701).

> coadministrator of Claudia's estate.." *Id.* at *4.

Plaintiff's complaint (R.4:¶8) stated "Klein was also appointed as an administrator of the Estate of Claudia Zvunca by a Nevada state court." Defendants admitted Klein opened a "second probate case" for Claudia's estate "in Nevada in 2015." R.39:5.

Yet, the panel claimed this was a "false description" and Klein's attorney "pretended that Klein is a coadministrator of Claudia's estate." The Order and Letters of Administration appointing Klein as co-administrator of Claudia's Estate in Nevada can be judicially noticed. Fed.R.Evid. 902 (see also Exhibits B and C). *Opoka v. I.N.S.*, 94 F.3d 392, 395 (7th Cir. 1996). This is neither "false" nor "pretense." Nor is seeking redress for Defendants' interference or Klein's refiling after the Colorado dismissal for lack of subject matter jurisdiciton "havoc," as the panel claimed.

Two estates for one decedent is allowed. *Wisemantle v. Hull*, 103 Ill.App.3d 878, 881 (1st Dist. 1981). It is "textbook law" each estate is "wholly independent of the other[]." *Id.* at 882 (quoting article). "[N]o privity" exists between them. *Id.* A judgment for or "against the representative of one of the decedent's other estates is not binding on the decedent's other estates or representatives." *Id.*

VIII. Xydakis had Conceivable Standing to Sue for Attorney's Fees.

> "Xydakis also named himself as a plaintiff in the suit, though he has no conceivable standing to sue."

> "Xydakis filed a brief ignoring the question on whether he is entitled to litigate as a party. After oral argument Xydakis moved to dismiss himself as a litigant. We grant that motion but record the episode to show how far Klein and his lawyer have strayed from the norms of litigation."

From 2010 through 2014, Xydakis represented Cristina both through her guardian, and when she became an adult. R1. This case was first filed by Xydakis seeking attorney's fees. R1. Cristina is "a citizen of Romania and is domiciled in Romania." R1:1(¶3). Xydakis is an Illinois citizen and resides here. R1:1(¶3). Xydakis has a "conceivable standing to sue" because diversity existed and the amount in controversy exceeded $75,000. R1. 28 U.S.C. §1332(a)(2).

However, the court dismissed (R.37) for "lack of subject matter jurisdiction[,]" which permits refiling in State court or federal court plaintiff can "satisfy the requirements for Federal subject matter jurisdiction." *Bryant v. Ally*, 452 Fed.Appx. 908, *2 (11th Cir. 2012)(concurrence). Xydakis could, and did, refile another case instead. Because he pursued another case, Xydakis moved to dismiss himself on appeal. A decision not to pursue an unpaid attorney's fees case within Klein's case for §1983 and State law claims against sixteen defendants does not "stray[] from the norms of litigation."

WHEREFORE, Appellants pray the court rehear this case *en banc*, reverse the prior panel

decision, grant rehearing, withdraw the prior panel opinion and state the withdrawal is necessary because of the panel opinion's inaccuracies, or correct the inaccuracies noted above.

Respectfully Submitted,
Tiberiu Klein individually,
Tiberiu Klein as the Co-Administrator
of the Estate of Claudia Zvunca
John Xydakis

BY: _____/s/ John Xydakis_____
John Xydakis, attorney for Plaintiffs-Appellants

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Exhibit A (7th Cir. Opinion)
Exhibit B

ORDR
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Attorney for TIBERIU KLEIN and CANDY GALAVIZ, Petitioners

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of CLAUDIA MARIA ZVUNCA, Deceased.	Case No. P -15-086657-E Dept PC1

ORDER APPOINTING SPECIAL ADMINISTRATORS AND FOR THE ISSUANCE OF LETTERS OF SPECIAL ADMINISTRATION

Date of Hearing: NA
Time of Hearing: NA

Based upon the ex parte application of

TIBERIU KLEIN and CANDY GALAVIZ, and good cause appearing therefor;

IT IS HEREBY ORDERED that:

1. TIBERIU KLEIN and CANDY GALAVIZ are appointed as the Special Administrators for the estate of CLAUDIA MARIA ZVUNCA, Deceased, and Petitioners are authorized to pursue and manage litigation in a wrongful death action on behalf of the Decedent. Attorney John S. Xydakis is representing the Decedent and her estate;
2. Petitioners shall petition the court for approval of any settlement;
3. The Special Administrators are authorized and directed to execute all documents and do all things necessary in accordance with the foregoing;
4. The requirement of bond is waived; however should the Special Administrators gain access to any liquid assets, the same shall be deposited into the JEFFREY BURR CLIENT TRUST ACCOUNT until further Order from this Court.

DATED:_____ 2015.

_____
DISTRICT JUDGE

JEFFREY BURR, LTD.

_____
Corey Schmutz, ESQUIRE
Nevada Bar No. 012088

2600 Paseo Verde Parkway, Suite 200
Henderson, NV 89074

There are no social security numbers contained in this document.

Estate of CLAUDIA MARIA ZVUNCA, Deceased
Case No

EXHIBIT C

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Attorney for TIBERIU KLEIN and CANDY GALAVIZ, Petitioners

DISTRICT COURT
CLARK COUNTY, NEVADA

In the Matter of the Estate of CLAUDIA MARIA ZVUNCA, Deceased.	Case No. P -15-086657-E **LETTERS OF SPECIAL ADMINISTRATION**

On October 29, 2015, an Order of the Court was entered appointing TIBERIU KLEIN and CANDY GALAVIZ as the Special Administrators of the Estate of the Decedent and who having duly qualified are hereby authorized to act and have the authority and shall perform the duties of such Special Administrators for the purposes of pursuing wrongful death litigation.

Attorney John S. Xydakis is representing the Decedent and her estate. Bond has been waived; however should the Special Administrators gain access to any liquid assets, the same shall be deposited into the JEFFREY BURR CLIENT TRUST ACCOUNT until further Order from this Court.

In testimony of which, I have this date signed these Letters and affixed the seal of the Court.

CLERK OF COURT

By: _____
xxxx Clerk Date

OATH

I, TEBERIU KLEIN, whose mailing address is 6914 N. Kolmar Ave, Lincolnwood, IL 60712, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator.

_____
TIBERIU KLEIN

SUBSCRIBED AND AFFIRMED before me this _____ day of _____2015.

_____
NOTARY PUBLIC

OATH

I, CANDY GALAVIZ, whose mailing address is 2600 Paseo Verde Pkwy, #200, Henderson, NV 89074, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator.

_____
CANDY GALAVIZ

SUBSCRIBED AND AFFIRMED before me this _____ day of _____2015.

_____
NOTARY PUBLIC

There are no social security numbers contained in this document.

OATH

I, TIBERIU KLEIN, whose mailing address is 6914 N. Kolmar Ave, Lincolnwood, IL 60712, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator,

_____
TIBERIU KLEIN

SUBSCRIBED AND AFFIRMED before me this _____ day of _____2015.

_____
NOTARY PUBLIC

OATH

I, CANDY GALAVIZ, whose mailing address is 2600 Paseo Verde Pkwy, #200, Henderson, NV 89074, solemnly affirm that I will faithfully perform according to law the duties of Special Administrator.

_____
CANDY GALAVIZ

SUBSCRIBED AND AFFIRMED before me this _____ day of _____2015.

_____
NOTARY PUBLIC

There are no social security numbers contained in this document.

Exhibit 3 (District Court Decision)

'How Frank Easterbrook Kept George Ryan in Prison'

Univ. of Chicago Professor Albert Alschuler[12]

- "Judge Easterbrook persistently presents wildly inaccurate, made up statements as unquestionable statements of fact." p.15. "If questioned or challenged, he [Judge Easterbrook] is likely to double down and push his bluff further." p.17.

- "Judge Easterbrook's colleagues should view everything he says with skepticism and should recognize the serious problem his conduct poses for their court." p.16.

- "Judge Easterbrook's bullying rests on stuff he just makes up. The truth is not in him." p. 29.

- "Judge Easterbrook is a stickler for rules who breaks the rules. The other judges of the Seventh Circuit should enforce the rules, respect the basic principles of the adversary system, and check Judge Easterbrook's penchant for confabulation. 28 U.S.C. § 46(b) does not put

[12] *How Frank Easterbrook Kept George Ryan in Prison*, Univ. of Chicago Professor Albert Alschuler, 50 Val. U. L. Rev. 7, 49 (2015) (https://scholar.valpo.edu/cgi/viewcontent.cgi?article=2397&context=vulr)(last accessed July 1, 2018).

three judges on a panel to promote 'collegiality.'" p.87.

'Pattern of misstated facts found in opinions of renowned U.S. Judge Easterbrook'

Injustice Watch[13]

- "The result: *Injustice Watch* documented a pattern of misrepresented facts in Easterbrook's opinions. *Injustice Watch* uncovered 17 cases since 2010 in which opinions authored by Easterbrook misstated the facts, omitted facts, or made assumptions that were contrary to the trial record." p.2

- "An analysis by *Injustice Watch* of 3,465 signed opinions by Seventh Circuit judges over a five-year period ending March 2016 short opinions authored by Easterbrook prompted petitions for reconsideration more than opinions by any other judge on the court." p.2

- "It was by studying these petitions that *Injustice Watch* identified cases involving allegations of

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[13] *Pattern of misstated facts found in opinions of renowned U.S. Judge Easterbrook*, *Injustice Watch* (https://www.injusticewatch.org/projects/2017/pattern-of-misstated-facts-found-in-probe-of-renowned-federal-judges-opinions/)(last accessed July 1, 2018).

significant factual errors in Easterbrook's opinions." p.3.

'Evaluation of the United States Court of Appeals for the Seventh Circuit – Report'

Chicago Council of Lawyers[14]

- "[T]he result in many of Judge Easterbrook's opinions appear to be based on unproven factual assumptions and/or hypotheses not obtained from the record in the case." pp. 750-751.

- "Judge Easterbrook's opinions have been criticized for not accurately reflecting the record or controlling precedents." p. 757.

- "Judge Easterbrook is willing to assume facts that are not part of the record in order to support the conclusion he apparently wishes to reach." p. 759.

- "Judge Easterbrook is one of the court's chief practitioners of deciding issues that have not been briefed by the parties. He apparently does

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[14]*Chicago Council of Lawyers valuation of the United States Court of Appeals for the Seventh Circuit– Report*, 43 DePaul. L. Rev. 673, 650-751 (1994)

(http://via.library.depaul.edu/cgi/viewcontent.cgi?article=1869&context=law-review)(last accessed July 1, 2018)

this to present his views of legal issues as soon as possible, and to preempt consideration of other viewpoints after briefing and argument." p.756.

- "[T]he Council is deeply troubled that Judge Easterbrook appears less concerned about the actual facts and issues presented in the appeals before him than about advancing his own philosophy." p.747.

- "Judge Easterbrook communicates a lack of appreciation for the litigants as real human beings with real-life problems. He can also communicate a lack of respect for the facts of a case and for president. In addition, he has been resoundingly criticized for his poor judicial demeanor. Both at oral argument and in his writing, Judge Easterbrook displays a contempt for attorneys and, to some extent, the litigants as well." P. 747.

- "The tone of Judge Easterbrook's opinions can be particularly harsh, especially in cases in which he is dissatisfied with the conduct of counsel." p. 760.

- "All too often, particularly when he disregards the facts of the law, he acts like the worst of judges. Judge Easterbrook needs to control his demeanor and limit his diversions from the facts and issues specifically presented." p. 761.

- "Judge Easterbrook has consistently displayed a temperament that is improper for a circuit judge." p. 760.

- Judge Easterbrook "has been resoundingly and repeatedly criticized as being extremely rude to attorneys at oral argument." p. 760.

- "Judge Easterbrook goes well beyond asking pointed questions; rather, he 'attacks' lawyers in an attempt to establish that the advocate has not understood the case or that the judge's knowledge is superior to that of the advocate." p. 769.

Richard Posner

William Domnarksi, (Oxford Univ. 2016)

- "More than half of the lawyers interviewed complained about Easterbrook's demeanor. There were complaints that he made comments at the expense of the lawyers arguing, that 'he will sometimes tilt back his head, laugh and look at his law clerks and encourage them to laugh at what the lawyer has said.'" "Lawyers noted that he was abrasive, rude, condescending, and flip…" p. 170

- "In the 2002 edition [Almanac of the Federal Judiciary] only a minority of the lawyers interviewed spoke well of him [Judge Easterbrook]. Those who did not commented

that 'he is one of the meanest human beings you will ever encounter,' that he treats lawyers 'with utter contempt, that he 'lies in wait [for lawyers] and treats them mercilessly,' and that 'he displays a brutal lack of civility.'" p. 214.

- "'He [Judge Easterbrook] likes to circle his kill and gives a nod and a wink to his clerk when he catches his prey. Another lawyer describes how he 'berates lawyers and shows off to his clerk's how powerful and smart he is. If he is on your side it can be fun, but if his position opposes yours, watch out, the rules of civility have not worked on him.'. . 'It is almost a game to him.'" p. 214.