

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 01 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

DANIEL W. DUGAN,

Petitioner - Appellee,

RICHARD W. LEWIS,

Plaintiff-counter-defendant -
Appellee,

v.

DAVID ANTONUCCIO; LOUIS
MORTILLARO; NEVADA
PSYCHOLOGICAL EXAMINERS
BOARD; DENNIS ORTWEIN; CHRISTA
PETERSON; ELIZABETH RICHITT;
RICHARD WEIHER,

Defendants,

And

LINDA DUFF; TYRONE DUFF,

Defendants-counter-claimants -
Appellants.

No. 04-15326

D.C. No. CV-99-00386-ECR

MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Nevada
Edward C. Reed, District Judge, Presiding

Submitted April 7, 2006**
San Francisco, California

Before: SCHROEDER, Chief Judge, TROTT, Circuit Judge, and RHOADES***,
District Judge.

Tyrone Duff and Linda Duff (the Duffs) appeal pro se the district court's
default judgment entered in favor of Richard Lewis.

Notwithstanding the Duffs dilatoriness, default judgment was not the
appropriate sanction in this case. See In re First T.D. & Investments, Inc., 253
F.3d 520, 532 (9th Cir. 2001). Given the district court's previous orders dismissing
the state actors--rendering it impossible for Lewis to prevail on the merits--
imposing default judgment for the amount of \$330,000 as a sanction for not
participating is incongruous and ultimately excessive. See id. Although a sanction
in this case is appropriate, requiring the Duffs to pay \$330,000 dollars to Lewis
proves too much. We recognize district courts' inherent need to have the ability to
curtail dilatory conduct that would slow impermissibly the wheels of justice. We

** This panel unanimously finds this case suitable for decision without
oral argument. *See Fed. R. App. P. 34(a)(2).*

*** The Honorable John S. Rhoades, Sr., Senior United States District
Judge for the Southern District of California, sitting by designation.

recognize also this district court's need to address the Duffs' feckless approach to this action. However, allowing Lewis to collect nearly a third of a million dollars based on a legal theory that has no potential for success is unreasonable and unfair. Accordingly, we remand the case to the district court for the imposition of a more appropriate sanction against the Duffs and a determination based on the merits.

REVERSED and REMANDED.