

No. 13-16181
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD W. LEWIS, PhD.,
Plaintiff/Appellee,

vs.

TYRONE DUFF and LINDA DUFF,
Defendants/Appellants

and

ELIZABETH RICHITT, PhD., RICHARD WEIHER, PhD.,
DAVID ANTONUCCIO, PhD., LOUIS MORTILLARO, PhD.,
DENNIS ORTWEIN, CHRISTA PETERSON, PhD., STATE
OF NEVADA, BOARD OF PSYCHOLOGICAL EXAMINERS,
Defendants.

**DEFENDANTS-APPELLANTS' PETITION FOR PANEL
REHEARING AND REHEARING EN BANC**

On Appealed from the United States District Court, District of Nevada
U.S.D.C. Case No. CV-N-99-0386-LRH

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INTRODUCTION AND STATEMENT OF (COUNSEL) APPELLANTS

Defendants-Appellants, Tyrone Duff and Linda Duff (“Duff Defendants”) In Pro Se, hereby petition for panel rehearing, pursuant to Fed. R. App. P. 40 and rehearing *en banc*, pursuant to Fed. R. App. P. 35 that one or more of the situations described in the ‘purpose’ section for petition for panel rehearing and rehearing *en banc* exists a material point of fact or law that has never been resolved in prior appeals before another panel in the same case, this Court overlook a serious question of exceptional importance did its decision, filed May 4, 2015, superseded the Eleventh Amendment to the Constitution of the United States when it held the district court has federal jurisdiction, under 28 USC §1331, for compelling the Duff Defendants to remain the only defendants in plaintiff’s §1983 action, fourteen (14) years after its order (#139)(ERT Vol. I-49), filed July 12, 2001, held:

“On May 1, 2001, defendant the State of Nevada filed a motion to dismiss (#111) on the basis that the State is not a person for purpose of 42 USC §1983. Eleventh Amendment immunity bars the suit against the State, and the State did not waive its sovereign immunity as to Richard W. Lewis’ (“plaintiff”) claim. On June 8, 2001, Plaintiff filed a response indicating his agreement that the State is not a person for purposes of section 1983. On June 13, 2001, the State of Nevada filed a reply indicating that based on that agreement, it should be dismissed with prejudice. It is therefore hereby ordered that the motion to dismiss (#111) is granted. The State of Nevada is dismissed, with prejudice, from this action.”

Further, this Court overlooked a serious question of exceptional importance did the district court supersede its order (#139) that granted Defendant State of Nevada sovereign immunity under the Eleventh Amendment in its order (#382) (ERT Vol. III-624), September 4, 2008, that held:

Before this court is a motion to dismiss for lack of subject matter jurisdiction (#379) filed by Linda and Tyrone Duff (the “Duff”). No opposition filed. This court has jurisdiction pursuant to 28 USC §1331 as this action arose under the laws of the United States. Specifically, plaintiff Richard Lewis brought this action under 42 USC §1983. The fact that Plaintiff cannot prevail in this action does not affect the court’s subject matter jurisdiction.”

It was clearly evident in the order (#382) the district court superseded its order (#139) in order to affirm its sanctions against the Duff Defendants in favor of the plaintiff, which this Court knowingly affirmed in its decision, filed May 4, 2015, that undermined the Constitution and rule of law. This involves a serious question of exceptional importance for rehearing *en banc*.

This Court's decision held it rejected the Duff Defendants contentions that the district court lacked jurisdiction over the underlying action and to sanction them and will not revisit those arguments as it was resolved in a prior appeal before another panel in the same case, which overlooked a material point of law this Court cannot erroneously decide the district court's federal jurisdiction under 28 USC §1331 in this matter was resolved without affirmatively demonstrating on the record a "state action" remained before the district court in plaintiff's §1983 action against the Duff Defendants only (see *Paratt v. Taylor*, 4451 U.S. 527(1980)) after its order (#139) granted Defendant State of Nevada sovereign immunity under the Eleventh Amendment that barred the plaintiff's §1983 suit against the State, July 12, 2001 and the State did not waive its sovereign immunity as to the his claim. See *Michel v. State*, 193 Misc. 834, 84 N.Y.S. 2d 533 (N.Y. Ct. of Claims N.Y. 1948).

It is affirmatively demonstrated herein, this Court's decision, filed May 4, 2015, superseded the Eleventh Amendment that undermined the Constitution and rule of law, when it affirmed the district court's order and judgment awarding sanctions against the Duff Defendants in the amount of \$7716.66 in favor of the plaintiff that was barred by Defendant State of Nevada sovereign immunity under the Eleventh Amendment in the order (#139), filed July 12, 2001.

Further, this Court overlooked a material point of law in its decision the district court by the very essence of its order (#277)(ERT Vol. I-136), filed February 27, 2003, held "Tyrone and Linda Duff who are the only remaining defendants in this case", acknowledged it no longer had federal jurisdiction under

28 USC §1331, when the plaintiff could not plead a colorable claim arising under the Federal Constitution or laws against the Duff Defendants, who are not clothed with the authority of the State. In total disregard to its order (#277), the district court proceed in the hearing four months later on June 19, 2003, exercising an usurp authority and for the exercise of such authority when the want of jurisdiction was known to the judge, no excuse was permissible, rendering its orders and judgments absolutely void in the fullest sense of the term for want of jurisdiction.

It was clearly evident this Court superseded the order (#139) and affirmed the order (#382) in order to affirm the district court's sanction against the Duff Defendants in the amount of \$7716.66 in favor of the plaintiff that was not a sanction at all but extortion, which this Court knowingly affirmed in its decision, filed May 4, 2015.

This case involves a serious question of exceptional importance that warrants a rehearing *en banc* when the district court failed to delineate where the governmental sphere ended and the private sphere began (*see, e.g. Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 627-28 (1991)) in order to sanction the Duff Defendants for not attending the hearing, June 19, 2002, that it had no jurisdiction under 28 USC §1331 to hold said hearing after the order (#139), filed July 12, 2001, granted Defendant State of Nevada sovereign immunity under the Eleventh Amendment that barred the plaintiff's §1983 suit against the State nor does Section 1983 supersede the Eleventh Amendment. Had the hearing held June 19, 2003 been "colorable", the State Defendants would have had to appear as the only defendants clothed with authority of the State. Any sanctions for nonparticipation would first have to be brought against the State Defendants as the Duff Defendants are not clothed with the authority of the State. *See Anderson v. Warner*, 451 F.3d 1063, 1068 (9th Cir. 2006).

Further, under what authority did this Court assert the State's Eleventh Amendment immunity does not affect the district court's jurisdiction under 28

USC §1331 nor does it affect this Court's inherent power to compel the Duff Defendants to remain the only defendants in plaintiff's §1983 action, fourteen (14) years, after the order (#139) dismissed Defendant State of Nevada with prejudice from his §1983 action, July 12, 2001, based on the State's sovereign immunity under the Eleventh Amendment, warrants a rehearing *en banc*.

PETITION FOR REHEARING AND REHEARING *EN BANC*

Duff Defendants' petition for rehearing and rehearing *en banc* of the May 4, 2015 panel (Goodwin, Bybee and Christen) decision overlooked a material point of law this Court lacked judicial discretion and inherent power to affirm any orders and judgments filed by the district court that superseded its order (#139) that dismissed Defendant State of Nevada with prejudice from the plaintiff's §1983 action based on the State's sovereign immunity under the Eleventh Amendment, which barred plaintiff's §1983 suit against the State. In *Thomas v. Devries*, 834 F. Supp (M.D. GA 1993) held "Eleventh Amendment prevents plaintiff from reaching . . . essential elements since the State did not consent or waive immunity . . . a §1983 action against defendants may not be entertain in federal court. . . Neither does the Fourteenth Amendment supersede the Eleventh Amendment in actions alleging §1983."

The constitutionality of the district court's orders and judgments that compelled the Duff Defendants to remain the only defendants in the plaintiff's §1983 action, now fourteen (14) years, after the order (#139) dismissed Defendant State of Nevada with prejudice based on the State's sovereign immunity under the Eleventh Amendment (*Simmons v. Sacramento County Superior Court*, 318 F.3d 1156, 1161 (9th Cir. 2003))(private parties are not acting under color of law), has never been resolved by this Court for the district court to continue to assert it has federal jurisdiction under 28 USC §1331 to hold the Duff Defendants accountable for the purpose of sanctions to be entered against them for not participating in the hearing on June 19, 2003, that superseded Defendant State of Nevada's sovereign

immunity under the Eleventh Amendment that barred the plaintiff's §1983 suit against the State that was decided in the order (#139), filed July 12, 2001.

1. Sanctions Against the Plaintiff

This Court held in its decision that it will “not consider arguments and allegations raised for the first time on appeal or in the reply brief”. This Court overlooked a material point of fact, sanctions against the plaintiff were raised before the lower court (see ERT Vol. IV- 695) and plaintiff elected not to oppose.

This goes to the district court's inherent power “to manage [its] own affairs so as to achieve the orderly and expeditious disposition of the plaintiff's §1983 action (*Chambers v. NASCO, Inc.*, 501 U.S. 43 (1991)), specifically “to deter meritless maneuvers, reduce frivolous claims, defenses and motion”, thereby avoid delay and unnecessary expense in litigation (*Christian v. Mattel, Inc.*, 286 F.3d 1118, 1131 (9th Cir. 2002)(quoting *Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801 F.2d. 1531, 1537 (9th Cir. 1986)) when it held the plaintiff's §1983 action “was not colorable” and was “initially baseless” and the federal question under 28 USC §1331 was resolved when its order (#139) dismissed Defendant State of Nevada with prejudice, July 12, 2001, based on the State's Eleventh Amendment immunity.

Further, the district court's inherent power “to manage” the plaintiff's §1983 action ceased to exist on two points. First, when the district court's order (#139) granted Defendant State of Nevada sovereign immunity under the Eleventh Amendment that barred plaintiff's §1983 suit against the State and the State did not waive its sovereign immunity as to plaintiff's §1983 claim nor does Section 1983 supersede the Eleventh Amendment. Second, when the district court allow the plaintiff to continue “in bad faith” (*B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1107 (9th Cir. 2002)) to litigate his §1983 action against the Duff Defendants only that it held “was not colorable” and “initially baseless” for fourteen (14) years after it dismissed Defendant State of Nevada with prejudice, in its order (#139) July 12,

2001, based on his agreement with the Nevada Attorney General's office.

Therefore, sanction against the plaintiff is appropriate for initiating and continuing the pleading process, in "bad faith", after the order (#139) dismissed Defendant State of Nevada with prejudice based on his agreement with the Nevada Attorney General's office, while he continue on with his multiple and duplicate pleading against the Duff Defendants only in his §1983 action that were dismissed with Defendant State of Nevada, July 12, 2001, causing the Duff Defendants to respond in their defense of his frivolous motions and claims. *Shields v. Shelter*, 120 F.R.D. 123, 127 (D. Colo. 1988).

2. Sanctions Against Duff Defendants

This Court held that sanctions against the Duff Defendants were resolved in prior appeals before another panel in the same case and it will not reconsider this matter. This Court overlooked a material point of law and fact that involves a serious question of exceptional importance that the district court's jurisdiction under 28 USC §1331 did not exist, as the issue of the *federal question* was resolved after Defendant State of Nevada was dismissed with prejudice in the order (#139) based on the State's sovereign immunity under the Eleventh Amendment. The essential element of 28 USC §1331 requires a "colorable claim arising under federal constitution or laws" which the district court held plaintiff's §1983 action "was not colorable" and was "initially baseless".

The inherent power of the district court to sanction the Duff Defendants for their dilatory conduct suffers two folds. First, the jurisdictional predicate under 28 USC §1331 was found lacking with the dismissal of Defendant State of Nevada with prejudice, in the order (#139), filed July 12, 2001, based on the State's sovereign immunity under the Eleventh Amendment. Further, the district court held the plaintiff could not state a deprivation of a constitutional right or maintain a §1983 claim nor could he produce any admissible evidence that supported his claim of conspiracy with malicious intent. ERT Vol. I-88 The district court

recognize the Duff Defendants were the only remaining defendants in plaintiff's §1983 action (ERT Vol. I-136) and do not possess power by the virtue of state law (*Kernats v. O'Sullivan*, 35 F.3d 1171, 1175 (7th Cir. 1994)(quoting *West v. Atkins*, 487 U.S. 42, 49-50 (1988)) for the district court to continue in plaintiff's §1983 action against them only.

Second, it was not in the best interest for the Duff Defendants to keep the plaintiff's §1983 action going, in fact they had made repeated inquiries into what remain before the district court for it to continue to compel them to remain the only defendants in plaintiff's §1983 action fourteen (14) years after the order (#139) dismissed Defendant State of Nevada with prejudice, July 12, 2001, in order for them to adequately prepare a defense, which was denied by the district court. In spite of the district court holding the plaintiff could not state a deprivation of a constitutional right or maintain a §1983 claim nor produce any admissible evidence that supported his claim of conspiracy was with malicious intent, continue with plaintiff's §1983 action without a "*federal question*" jurisdiction under 28 USC §1331 or a "colorable claim".

ARGUMENT

Federal courts have "*federal question*" jurisdiction, which means that federal courts will hear cases that involve issues touching on the Constitution or other federal laws.

Federal courts have limited subject matter jurisdiction. Under 28 USC §1331 federal subject matter jurisdiction exists only when the lawsuit asks the court to decide a federal question, which the district court decided was not colorable in its order (#139) that granted defendant State of Nevada sovereignty immunity under the Eleventh Amendment (*Edelman v. Jordan*, 451 U.S. 651, 663 (1974)) nor does Section 1983 supercede the Eleventh Amendment (*Will v. Michigan*, 491 U.S. 58, 66, 70-71 (1989)), which barred the plaintiff's §1983 suit against the State and the State did not waive its sovereign immunity as to the plaintiff's "colorable claim".

Therefore, the *federal question* no longer existed in plaintiff's §1983 action before the district court to continue to assume federal jurisdiction under 28 USC §1331 against the Duff Defendants that it held was a "baseless action". For fourteen (14) years, this Court has compelled the Duff Defendants to remain the only defendants (*Briley v. State of California*, 564 F.2d 849 (9th Cir. 1977))("private parties are not acting under color of law") in the plaintiff's §1983 action after the district court's order (#139) dismissed defendant State of Nevada with prejudice, July 12, 2001, based on the State's sovereign immunity under the Eleventh Amendment, which this Court lacked authority to supersede.

This Court held it will not reconsider matters resolved in prior appeals before another panel in the same case citing *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1392 (9th Cir. 1995).

It has never been resolved by this Court the federal jurisdiction under 28 USC §1331 the district court continues to assert, in plaintiff's §1983 action, exists after the order (#139) granted Defendant State of Nevada sovereign immunity under the Eleventh Amendment that barred the plaintiff's §1983 suit against the State. Any action taken by the district court after the order (#139) superseded the State of Nevada's Eleventh Amendment immunity and violated the due process clause of the Fourteenth Amendment. The district court continues to uphold a "colorable claim" that was "no longer colorable" for the sole purpose of maintaining jurisdiction under 28 USC §1331 in the plaintiff's §1983 action after the order (#139) dismissed Defendant State of Nevada, with prejudice, July 12, 2001. See *Cannon v. Univ. of Chicago*, 559 F.2d 1063 (7th Cir. 1976); *Braden v. Univ. of Pittsburgh*, 552 F.2d 948 (3rd Cir. 1977)(en banc).

This Court's decision did not address a material fact of law the State of Nevada's Eleventh Amendment immunity barred the district court's order and judgment on appeal. Specifically when a colorable claim "arising under" Federal Constitution or laws "is not colorable" and made solely for purpose of maintaining

jurisdiction after the order (#139), must be dismissed for want of jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006) (“A claim invoking federal question jurisdiction under 28 U.S.C. § 1331, *Bell* held, must be dismissed for want of subject matter jurisdiction if it is not colorable”). See, e.g., *Hagans v. Lavine*, 415 U.S. 528, 555 (1974) (“Of course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction”)(citation omitted).

The district court abused its discretion when the record contains no evidence and cited no specific law to support its decision that it maintains jurisdiction under 28 USC §1331 (*MGIC v. Moore*, 952 F.2d 1120, 1122 (9th Cir. 1991)), thereby violating the Constitution. Therefore, this Court overlooked a matter point of law that federal jurisdiction under 28 USC §1331, could not be invoked, in Plaintiff’s §1983 action, after the order (#139) dismissed defendant State of Nevada with prejudice, July 12, 2001, unless this Court is superseding defendant State of Nevada’s sovereign immunity under the Eleventh Amendment. *See Frigard v. United States*, 862 F.2d 201, 204 (9th Cir. 1988)(per curiam)(lack of subject-matter jurisdiction based on defendant’s sovereign immunity) A like analysis is used in cases where the alleged federal right is so frivolous as to be non-colorable. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (“Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is “so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.” As proven in the order (#320)(ERT Vol. III-547) and default judgment (#321)(ERT Vol. III-549)); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 285 (1993); *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666 (1974); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959); *Bell v. Hood*, 327 U.S. 678, 682–83 (1946); *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913).

This Court has demonstrated more interested in affirming the district court's sanctions against Duff Defendants for exercising and defending their constitutional rights before the district court that lacked jurisdiction under 28 USC §1331 then to vindicate the district court's inherent power to manage the plaintiff's §1983 action by sanctioning the plaintiff for his malicious abuse of the legal process through his dilatory conduct and freckles approach in filing what it held was a "baseless" action and continue to litigate his §1983 action against the Duff Defendants only when the district court held plaintiff could not state a deprivation of a constitutional right or maintain a §1983 claim nor produce any admissible evidence that supported his claim of conspiracy was with malicious intent¹ but continue with his §1983 action without a federal question jurisdiction under 28 USC §1331 or a "colorable claim".

The order (#139) is incontrovertible evidence the district court's order (#424) and judgment (#425) awarding the plaintiff attorney fees in the form of sanctions in the amount of \$7716.66 against the Duff Defendants is criminal in nature because it involves including but not limited to conspiracy against our constitutional rights under color of law, extortion, fraud and the deprivation of their constitutional and civil rights under color of law that this Court knowingly affirmed in its decision, filed May 4, 2015, which is a willful obstruction of justice.

It continues to be a miscarriage of justice when issues of federal jurisdiction under 28 USC §1331 and the statutory law enacted by Congress governing an action for redress under 42 USC §1983 are sweep under the carpet in order for this Court to hold the issues were resolved in favor of the plaintiff against the Duff Defendants.

¹ NRS 641.318 any person who initiates a complaint concerning the discipline of a psychologist unprofessional conduct is immune from any civil action, if the person acted without malicious intent. The district court held plaintiff could not present any admissible evidence to support his claim of conspiracy with malicious intent. (ERT Vol. I-88). Thereby the Duff Defendants have absolute immunity from plaintiff's §1983 action, which the district court continually deny.

Therefore, no sanctions should be imposed against the Duff Defendants who have proven herein this Court has overlook material points of facts and law that involves questions of exceptional importance that were never resolved by this Court before another panel in the same case.

CONCLUSION

For the foregoing reasons, the Duff Defendants respectfully request rehearing and rehearing *en banc* of the issues identified, as appropriate for reasons set forth above.

DATED this 18th day of May, 2015.

By: /s/ Tyrone Duff

TYRONE DUFF

By: /s/ Linda Duff

LINDA DUFF

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Appellants/Defendants In Pro Se

CERTIFICATE OF COMPLIANCE

We, hereby, certify that attached Petition for Rehearing and Rehearing En Banc has been prepared using proportionately double-spaced 14 point Times New Roman typeface and contains 3555 words pursuant to Circuit Rules 35-4 and 40-1.

Dated this 18th day of May, 2015.

/s/ Tyrone Duff

TYRONE DUFF

/s/ Linda Duff

LINDA DUFF

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CERTIFICATE OF SERVICE

Pursuant to FRAP 25(b), the undersign hereby certifies that on this 18TH day of May, 2014, they mailed a true and correct copy of the foregoing **DEFENDANTS-APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC**, in 9TH Circuit case no. 13-16181/D.C. case no. 3:99-cv-00386-LRH-WGC via first class postage, fully prepaid, to the last known addresses of the following:

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/s/ Linda Duff
Linda Duff In Pro Se