

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD LEWIS, Ph.D.,

Plaintiff/Counter defendant/
Appellee

vs.

9th Cir. Case NO. 13-16181
D.C. Case No. 3:99-cv-0386-LRH-RAM

TYRONE DUFF AND LINDA DUFF

Defendants/Counter Claimants/
Appellants

and

ELIZABETH RICHITT, Ph.D.,
RICHARD WEIHER, Ph.D., DAVID
ANTONUCCIO Ph.D., LOUIS
MORTILLARO, Ph.D, STATE OF NEVADA
BOARD OF PSYCHOLOGICAL EXAMINERS,

Defendants.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF NEVADA**

APPELLEE'S ANSWERING BRIEF

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Taylor v. Sentry Life Insurance Co., 729 F.2d 652, 655-56 (9th Cir.1984) 4

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STATUTES:

28 USC §1927 4, 6, 7

OTHER:

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I

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal is from an order and judgment for sanctions against the Appellants, Tyrone and Linda Duff. IV ERT 734-735. The specific relief the Duffs are seeking by this appeal are:

1. That the district acknowledge the jurisdictional defect and dismiss the complaint;
 2. That the district court prove it had federal jurisdiction to enter sanctions;
- and
3. That the district court declare Plaintiff a vexatious litigate and impose Rule 11 and 28 USC §1927 sanctions against the Plaintiff.

Appellants Opening Brief at p. 28.

II

STATEMENT OF THE CASE

The Duffs appeal is from the Order of the District Court dated May 8, 2013 which imposed sanctions in the amount of \$7,716.766. IV ERT 727-728. In that Order the District Court provided a succinct background of this matter:

This case has an extensive factual and procedural history. On July 10, 2003, United States District Judge Edward Reed entered a default judgment against the Duffs in this civil rights action. Doc #299. As a

sanction for the Duff's refusal to participate in this action, the court awarded Lewis \$280,000 in compensatory damages and \$50,000 in punitive damages. Doc. #320. The Duffs appealed this award (Doc.#343) and the Ninth Circuit reversed and remanded this action for the imposition of more appropriate sanctions. (Doc. #376, Exhibit A).

On remand, this action was reassigned to this court which issued an order awarding sanctions against the Duffs in the amount of \$23,149.98 - three times Lewis' identified costs. Doc. #383. In response, the Duffs appealed. Doc. #389. On appeal, the Ninth Circuit vacated the sanctions award finding that an award of sanctions equal to three times Lewis' costs was criminal in nature. Doc. #410. This order follows that history.

Order IV ERT 727-728.

The district court then imposed monetary sanctions against the Duffs in the amount of \$7,716.66. IV ERT 728. Judgment was then entered in favor of Lewis and against the Duffs. IV ERT 729.

This appeal is from that order and judgment IV ERT 734-735.

III

SUMMARY OF ARGUMENT

The Court must deny the Duffs the relief they seek and affirm the judgment. The "law of the case" doctrine precludes this Court from revisiting the issue of jurisdiction that was raised and ruled on in the previous appeal.

The issue of sanctions must also be rejected as the issue was not raised below.

IV

ARGUMENT

a. **The issue of jurisdiction was decided in the prior appeal.**

The Duffs bring this appeal contending that the district court lacked jurisdiction over the claims against them in the underlying matter. This is an issue that has already been raised the Duffs in an earlier appeal, 9th Circuit Case Number 08-17314.

This Court previously ruled on this identical issue in its Memorandum dated March 18, 2011: “The Duffs’ contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit”. IV ERT 691. This ruling acts as the law of the case. Under that doctrine, the Court is precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir.1990).

Under the “law of the case” doctrine, one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case. (quoting *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir.1991), quoting *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), cert. denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979)). “For the doctrine to apply, the issue in question must have been ‘decided either expressly or by necessary implication in [the] previous disposition’”.

Thomas v. Bible, 983 F.2d 152, 154 (9th Cir. 1993).

The law of the case doctrine clearly applies to the issue of the district court's jurisdiction in the present appeal, which was expressly decided in the prior appeal.

The law of this case is clearly that the district had jurisdiction over the underlying action. The Court should not revisit this issue.

b. This Court cannot consider an issue that was not raised below.

The Duffs next ask this Court to direct the district court to enter Federal Rules of Civil Procedure Rule 11 and 28 USC §1927 sanctions against Lewis. AOB 28. This is not a proper issue in this appeal. The issue of Rule 11 sanctions and/or 28 USC 1928 sanctions was not raised below. There is no citation whatsoever to the record where the Duffs motioned for such sanctions and they were denied. That is because it never happened.

The Court will not review an issue not raised below unless necessary to prevent manifest injustice. *Kline v. Johns-Manville*, 745 F.2d 1217, 1221 (9th Cir.1984), quoting *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 812 (9th Cir.1982). “Before this court will address such an issue, the proponent ‘must show exceptional circumstances why the issue was not raised below.’ *Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985), quoting *Taylor v. Sentry Life Insurance Co.*, 729 F.2d 652,

655-56 (9th Cir.1984). There are no exceptional circumstances that excuse the Duffs from failing to raise these issues below. Because the issues of Rule 11 and 28 USC §1927 sanctions was never raised in the district court, they cannot be considered by this Court now.

1. Rule 11 sanctions were never raised below.

Federal Rule of Civil Procedure Rule 11 imposes stringent notice and filing requirements on parties seeking sanctions. A party seeking Rule 11 sanctions does so in the district court by a motion must be separate from other motions and must describe the specific conduct alleged to violate Rule 11(b). FRCP 11(c)(1)(A). Further the Rule has a safe harbor provision which requires parties filing Rule 11 motions to give the opposing party 21 days first to withdraw or correct the document. *Id.* The safe harbor provision is strictly enforced. *Radcliffe v. Rainbow Const. Co.*, 254 F.3d 772, 788-89 (9th Cir.2001) (*citing Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir.1998)). An award of sanctions cannot be imposed when the party fails to comply with the safe harbor provisions, even if the underlying filing is frivolous. *Barber*, 146 F.3d at 711.

In this case the Duffs did not file a Rule 11 motion, nor did they give safe harbor notification of any intent to seek sanctions under Rule 11. They cannot, now on appeal, raise this issue for the first time and request sanctions that are not

available.

2. The Court cannot consider 28 USC §1927 sanctions

The Duffs also seek sanctions against Lewis under 28 USC §1927. This issue was also never raised before the district court. Even if it had been, this is not a remedy that is available against Lewis. Section 1927 only applies to “Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct”. *Id.* Dr. Lewis is not admitted to practice before any court. He is not an attorney . The Duffs could not have obtained sanctions against Lewis in District Court under 28 USC §1927 even if they had ever sought them in the lower court.

In any event, the court cannot consider this issue because the Duffs never filed a motion for 28 USC §1927 sanctions in the district court.

V

CONCLUSION

The district court’s order and judgment must be affirmed,. The Duffs raise issues that cannot be considered by the Court of Appeal. The issue of jurisdiction was decided in a prior appeal and thus became the law of the case that cannot be

disturbed in this appeal.

The issue of Rule 11 sanctions was never raised below, and therefore cannot be considered. There was not even a 21 day safe harbor notice in the underlying case, much less a Rule 11 motion. Similarly, the Duffs never sought 28 USC §1927 sanctions against Lewis in the lower Court. even if they had, this remedy is not available against one who is not admitted to practice before the court.

Wherefore, Appellee Lewis respectfully requests that the Court affirm the judgment of the district court for sanctions against the Duffs in the amount of \$7,716.66.

Respectfully submitted this 26th day of November, 2013.

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By /s/ Marie Mirch
Counsel for Appellee
Richard Lewis

STATEMENT OF RELATED CASES

Lewis v. Duff, Ninth Circuit Case No. 04-15326; District Court case number 3:99-cv-0386-LRH- RAM

Lewis v. Duff, Ninth Circuit Case No.08-17314; District Court case number 3:99-cv-0386-LRH- RAM

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the opening brief is proportionately spaced, has a typeface of 14 points or more and contains 1955 words.

DATED this 26th day of November, 2013.

BY /s/ Marie Mirch
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CERTIFICATE OF SERVICE

Service of the Answering Brief was made via U.S. mail addressed to the following:

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Dated November 26, 2013

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