6/16/11

No. 10-1547

IN THE
SUPREME COURT OF THE UNITED STATES

TYRONE DUFF, LINDA DUFF,
Petitioners,

v.

RICHARD W. LEWIS, PhD.,
Respondent.

On Petition For Writ of Certiorari To The
United States Court Of Appeals For the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

TYRONE DUFF
LINDA DUFF
P.O. Box 2512
Bellingham, WA. 98227
(360) 752-1775

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QUESTION PRESENTED

1. Whether federal subject matter jurisdiction continues to exist in an action for redress under 42 U.S.C. §1983 against lay defendants after the State Defendants were dismissed with prejudice as the prevailing party at summary judgment.

PARTIES TO PROCEEDING

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceed proceeding in the court whose judgment is the subject of this petition is as follows:

Defendants/Counter Claimants/Appellees Cross Appellants/Petitioners: Tyrone Duff and Linda Duff

Plaintiff/Counter Defendants/Appellant Cross Appellee/Respondent: Richard W. Lewis, PhD.

Defendants/Appellees: Elizabeth Richitt, PhD.: Richard Weiher, PhD., David Antonuccio, PhD., Louis Mortillaro, PhD., Christa Peterson, PhD., Dennis Orwein, State of Nevada, Board of Psychological Examiners

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CORPORATE DISCLOSURE STATEMENT

No parties are corporations, Sup. Ct. R. 29.6

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully prays that a writ of certiorari issue to review the memorandum of the United States Court of Appeals for the Ninth Circuit and the orders and judgments of the United States District Court, District of Nevada, where there is a real need for a uniformity of the federal statute 42 USC §1983

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Ninth Circuit are reprinted in Appendix to Petition ("App.") at 1a-3a, 4a and are unpublished. The order of the Ninth Circuit denying rehearing en banc is reprinted in the App. at 48a-49a and is unpublished. The opinions of the United States District Court, District of Nevada are reprinted in the App. at 8a-19a, 20a.

JURISDICTION

The memorandum of the United States Court of Appeals was entered on May 18, 2011 and reprinted in the App. at 1a. A timely petition for rehearing en banc was denied by the United States Court of Appeals for the Ninth Circuit on May 18, 2011. The jurisdiction of this Court is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in part: ". to be informed of the nature and cause of the accusations."

The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 42 Section 1983 of the United States Code provides in part: "Every person who, under color any statute, ordinance, regulation, custom, or usage, of any State subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ."

Nevada Revised Statute (N.R.S.) – 41.031(2) provides in part: "An action may be brought under this section against the State of Nevada or any political subdivision of the State. In any action against the State of Nevada, the action must be brought in the name of the State of Nevada on relation of the particular department . . . . board or other agency of the State whose actions are the basis for the suit. An action against the State of Nevada must be filed in the county where the cause or some part there of arose . . ."

Nevada Revised Statute (N.R.S.) – 41.0337 provides in part: "State or political subdivision to be named party defendant. No tort action arising out of an act or omission within the scope of his

public duties or employment may be brought against any present or former: 1) Officer or employee of the State or of any political subdivision; 2) Immune contractor; or 3) State Legislator, unless the State or appropriate political subdivision is named a party defendant under NRS 41.031."

Nevada Revised Statute (N.R.S.) – 641.318 provides in part: "Immunity of certain persons from civil liability. In addition to any other immunity provided by the provisions of chapter 662A of NRS, the Board, a review panel . . or any other person who . . initiates a complaint or assists in any lawful investigation or proceeding concerning licensing of a psychologist or the discipline of psychologist for . . . . . professional incompetence or unprofessional conduct is immune from any civil action for that initiation or assistance or any consequential damages, if the person . . acted without malicious intent."

Nevada Supreme Court Rule (S.C.R.) – 170 (currently Rules of Professional Conduct (R.P.C.) 3.1): provides in part: "A lawyer shall not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith ar- gument for an extensions, modification or reversal of existing law.

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STATEMENT OF THE CASE

1. Factual Background History

Plaintiff on July 16, 1999 sued Duff Defendants for redress under 42 USC §1983 of the Nevada State Board of Psychological Examiner's Findings of Fact, Conclusions of Law and Order (Judgment), entered July 20, 1995, on his disciplinary hearing May 20,

1995, because he alleged members of the Board and of the Nevada Attorney General's office (State Defendants) conspired together, on or about, July 14, 1995, to induce Mr. Duff to file a false complaint against him on August 26, 1993. The Board, in his disciplinary hearing, found him guilty of giving false testimony against Mr. Duff on July 6, 1993 in state court. Plaintiff was represented by counsel and never appealed and the Board's decision has never been overturned. Plaintiff alleged the conspiracy violated his constitutional rights under color of state law, which was a de – facto appeal of the Board's decision.

State Defendants, on December 20, 1999, filed a motion to strike the Plaintiff's initial complaint, in its entirety, for redress under §1983 of the Board's decision, based upon their absolute immunity, which the district court granted on January 7, 2000. Plaintiff filed an Amended Complaint, but in and about February 2000, asked the defendants to forbear responding because it appeared based upon recent decisions,his claims against the State Defendants were barred by absolute immunity, where he lacked any admissible evidence they acted with malicious intent which NRS 641.318 provides Duff Defendants with the same absolute immunity as State Defendants. After the court's involvement in October 2000, the Plaintiff was permitted to file a Second Amended Complaint (complaint), which he asserted only one (1) claim, section 1983 conspiracy to deprive him of his constitutional right.

The Nevada Attorney General's office, on May 1, 2001, filed its motion to dismiss Defendant State of Nevada with prejudice from the Plaintiff's complaint where he failed to comply with NRS 41.031(2) and NRS 41.0337. On July 12, 2001, the district court granted the Nevada Attorney General's office's motion to dismiss Defendant State of Nevada with prejudice. App. 46a.

On September 20, 2001, the Nevada Attorney General's office filed a motion for summary judgment to dismiss remaining State Defendants, with prejudice, arguing Plaintiff lacked any admissible

evidence of a conspiracy and failed to allege a deprivation of a constitutional right. Therefore, the Plaintiff was barred, where he could not penetrate the State Defendants' absolute/qualified immunity, the doctrine of res judicata and collateral estoppel.

On March 28, 2002, the Duff Defendant's filed a motion to dismiss Plaintiff's complaint for redress under §1983 with prejudice for lack of federal subject matter jurisdiction after the district court dismissed Defendant State of Nevada, with prejudice, July 12, 2001. Duff Defendants argued pursuant to NRS 41.0337, the Plaintiff could not maintain an action for redress under section 1983 against them, where he could not assert a cause of action against a person, who acting under color of state law, deprived him of a right guaranteed under the Constitution without naming the State of Nevada a party defendant under NRS 41.031(2). Therefore, Plaintiff could not penetrate Duff Defendants' absolute immunity provided under NRS 641.318, where he lacked any admissible evidence they acted with malicious intent.

On July 5, 2002, the district court denied the Duff Defendants' motion to dismiss for lack of federal subject matter jurisdiction, holding the "Plaintiff sued the Duff's under section 1983 in this action because he alleges that they were part of the conspiracy" with the State Defendants "to deprive him of his constitutional rights under section §1983. This court undisputably has jurisdiction over this claim." App. 44a

On the same day, July 5, 2002, the district court granted the Nevada Attorney General's office motion for summary judgment, dismissing the remaining State Defendants with prejudice (App. 36a) holding they are the prevailing party in this §1983 action because Plaintiff's complaint was legally frivolous, unreasonable and without foundation and totally lacked merit, since he lacked any admissible evidence of a conspiracy and failed to allege a deprivation of a constitutional right, which the Eleventh Circuit agreed "the assertion of a federal civil rights claim

when it is clear that there is no cognizable claim for the deprivation of a federal constitutional right is frivolous and without foundation." [1] The district court entered its judgment (App. 43a) on July 8, 2002.

The district court, on July 5, 2002, denied Duff Defendants' motion to dismiss for lack of federal subject matter jurisdiction holding, Plaintiff sued the Duff's under section 1983 in this action because he alleged they were part of the conspiracy with the State Defendants to deprive him of his constitutional rights under section §1983."This court undisputably has jurisdiction over this claim" and on the same day granted the Nevada Attorney General's office motion for summary judgment, dismissing the remaining State Defendants, with prejudice, holding they are the prevailing party in this section1983 action because Plaintiff's complaint was legally frivolous, unreasonable and without foundation and totally lacked merit, since he lacked any admissible evidence of a conspiracy and failed to allege a deprivation of a federal constitu-tional right.

The district court, on July 5, 2002, entered two conflicting orders that segregated the Duff Defendants from the State Defendants, leaving them the only remaining defendants in Plaintiff's §1983 action after it held Plaintiff's complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit. This caused the Duff Defendants to appeal, in case no. 02-16558, on August 7, 2002.

After July 22, 2002, State Defendants no longer responded to any orders or pleadings filed in this case, except with respect to their attorney fees as the prevailing party.

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[1] *See e.g. Head v. Medford*, 62 F.3d, 351, 356 (11th Cir. 1995); *Dangler v. Yorktown Central Schools*, 777 F.Supp. 1175, 1177-78 (S.D.N.Y. 1991); *Carter v. Rollins Cablevision of Massachusetts, Inc.,* 634 F.Supp. 944 (D. Mass. 1986).

2. Proceedings After Entry Of Summary Judgment

On September 23, 2002, the district court, without a motions pending before it, filed its Willingness To Reconsider (App. 34a) before the Ninth Circuit that held:

> ". . . it appears that our Order (#232) is incorrect insofar as it ordered that judgment be entered in this action. Our order (#232) grants summary judgment as to all remaining defendants except for the defendants, the Duffs. It appears that the action has not been terminated as to the defendants . . Duffs. Therefore, our order (#232) should be amended to delete the order to the Clerk to enter judgment. Our order (#232) is otherwise correct. . . "

On October 8, 2002, the Duff Defendants filed an opposition to the district court's Willingness To Reconsider arguing it violated due process to remanded the Duff Defendants to the district court for further proceedings in Plaintiff's §1983 action after State Defendants were dismissed with prejudice, as the prevailing party at summary judgment July 5, 2002, holding his complaint was legally frivolous. It was impossible for the Plaintiff's complaint to be legally frivolous against the State Defendants and at the same time meritorious against Duff Defendants, where the Ninth Circuit held a §1983 action cannot be invoked by purely private conduct alone in *Briley v. State of California,* 564 F.2d 849 (9th Cir. 1977). Therefore, it was impossible for the Plaintiff to articulate a constitutional right giving rise to a claim under this statute against the Duff Defendants after the State Defendants were dismissed at summary judgment, which is the primary inquiry in a §1983 analysis. This Court agreed in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 26 L.Ed. 2d 142, 90 S.Ct. 1598 (1970) that the Plaintiff must prove the Duff Defendants has deprived him of a right secured by the Constitution and that they deprived him of this right

under color of state law and that they acted under color of state law.

On November 20, 2002, the Ninth Circuit entered its order that held, in light of the fact that judgment entered in this case should be vacated – see Order – Willingness to Reconsider (#267), it appears that the filing of documents is now premature until the matter of vacating judgment is resolved. The Ninth Circuit entered its order and judgment on December 19, 2002, remanding the Duff Defendants to the district court for further proceedings in the Plaintiff's §1983 action, without vacating the order granting the State Defendants summary judgment on July 5, 2002, that held his complaint was legally frivolous.

On January 8, 2003, the district court held the judgment previously entered on July 8, 2002 (App. 43), should be vacated. The Duff Defendants shall have 20 days to file disposition motions with respect to claims against them in this case, without vacating the order granting summary judgment July 5, 2002.

The Duff Defendants filed a motion to dismiss on March 25, 2003, arguing the district court lacked federal subject matter jurisdiction in the Plaintiff's §1983 action without vacating its order dismissing the State Defendants at summary judgment on July 5, 2002 that held his complaint was legally frivolous and lacked any basis in law and fact and totally lack merit, since he lacked any admissible evidence of a conspiracy and failed to allege a deprivation of a constitutional right. Therefore, it was legally impossible to vacate the judgment entered July 8, 2002 without vacating the order granting State Defendants summary judgment, which the record reflects there was never an order filed vacating the judgment.

On May 2, 2003, the district court ordered the Duff Defendants' motion to dismiss for lack of fed-

eral subject matter jurisdiction stricken in its entirety. On May 16, 2003, Duff Defendants filed a motion for reconsideration that was denied on May 20, 2003.

On May 27, 2003, the district court set an evidentiary hearing for June 19, 2003 on the Plaintiff's claims he asserted against the Duff Defendants in his §1983 action. On June 3, 2003, Duff Defendants filed a motion for clarification of what specific claims remained before the district court in the Plaintiff's §1983 action against them that were not addressed and dismissed with prejudice with the State Defendants at summary judgment on July 5, 2002, where it held his complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit, since he lacked any admissible evidence of a conspiracy and failed to alleged a deprivation of a constitutional right. On June 5, 2003, the district court denied their motion without explanation where the subject matter jurisdiction it asserted in Plaintiff's §1983 action arose from after it held his complaint was legally frivolous at summary judgment, specifically where the Ninth Circuit held the district court could not create a case or controversy where none existed in *Lasar v. Ford Motor Co.*, 399 F.3d. 1101 (9th Cir. 2005).

Duff Defendants announced to the district court they could not participate in the hearing set for June 19, 2003, where they were denied their Sixth Amendment Rights – to be clearly informed of the nature and cause of the accusations alleged against them that wasn't addressed and dismissed with prejudice at summary judgment on July 5, 2002, which this Court agreed with in *Cole v. Arkansas*, 333 U.S. 196 (1948). The Duff Defendants argued it was legally impossible for the Plaintiff to maintain a section 1983 action against them after the color of state law was dismissed with prejudice with the State Defendants at summary judgment.

The district court, after its evidentiary hearing, entered its order (App. 29a) and default judgment (App. 32a) January 30, 2004, awarding $280,000.00

dollars in compensatory damages and $50,000.00 dollars in punitive damages against Duff Defendants in favor of Plaintiff and his business, Western Counseling Services, LLC, for the loss of an alleged contract with the State of Nevada Division of Child and Family Services. The order and default judgment reiterated the exact same subject matter that was stricken, in its entirety, in the order, filed January 7, 2000 and address and dismissed again with prejudice at summary judgment on July 5, 2002.

On February 12, 2004, Duff Defendants appealed the district court's order and default judgment, entered January 30, 2004, to the Ninth Circuit in case no. 04-15326, arguing the default judgment awarding Plaintiff and Western Counseling Services, LLC $330,000.00 for a loss of an alleged contract with the State of Nevada Division of Child and Family Services was not a protected federal constitutional interest giving rise to an action for redress under 42 USC §1983. And further argued the district court lacked federal subject matter jurisdiction for the issuance of its order and default judgment, where it lacked a cognizable cause of action under color of state law remaining before it, after the State Defendants were dismissed with prejudice as the prevailing party at summary judgment on July 5, 2002. And further argued the Plaintiff could not penetrate their absolute im muity provided under NRS 641.318.

The Ninth Circuit, on May 1, 2006, entered its Memorandum (App. 25a) that held:

> "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 $330,000.00 as a sanction for not participating is incongruous and ultimately excessive. *In First T.D. & Investments, Inc.*, 253 F.3d 520, 532 (9th Cir. 2001). Although a sanction in this case is appropriate, requiring the Duffs to pay $330,000.00 dollars to Lewis proves too much."

The Ninth Circuit modified the district court's order and default judgment from compensatory and punitive damages awarding $330,000.00 to Plaintiff and his business, Western Counseling Services, LLC, to sanctions payable to the Plaintiff in the amount of $330,000.00. The word "sanction" does not appear in order or default judgment nor did Duff Defendants appeal sanctions which was not raised before the lower court.

Four years after the district court entered summary judgment on July 5, 2002 holding Plaintiff's complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit, the Ninth Circuit, on August 28, 2006, entered its Judgment (App. 28a) that reversed and remanded the Duff Defendants to the district court for the imposition of a more appropriate sanction and a determination on the merits.

On September 7, 2006, the Duff Defendants filed their petition for writ of certiorari before the United States Supreme Court, case no. 06-329. This Court, on February 20, 2007, denied their petition for writ of certiorari.

This case sat dormant before the district court until Plaintiff filed two (2) requests for case status on September 18, 2007 and February 4, 2008.

On April 23, 2008, Marie C. Mirch, Esq. filed notice of change in license status to the district court pursuant to Supreme Court Rule (SCR) 115 that on April 10, 2008, the Nevada Supreme Court filed its Order of Disbarment of the Plaintiff's lead attorney, Kevin J. Mirch, Esq. in case no. 49212, which concluded Kevin J. Mirch, Esq. has a pattern of filing false and frivolous lawsuits that were scandalous and unsupported and lacked any basis in law and fact and were legally frivolous, in which the Nevada

Attorney General's office brought criminal charges against him in state court case no. CR07-1197 *State of Nevada v. Kevin Mirch*. The Nevada Supreme Court found Kevin J. Mirch, Esq. guilty in violation of former SCR 170 (currently Rules of Professional Conduct (RPC) 3.1), which stated:

> "The state lawsuit filed by Mirch was frivolous and lacked any basis in law and fact. As a result, violation occurred and discipline is proper. The disciplinary panel rethat Mirch be disbarred for his misconduct. Based on the circumstances surrounding Mirch's filing of the lawsuit, in connection with evidence that this action represented only one instance in a pattern of similar conduct by Mirch, we approve the disciplineary panel's recommendation and disbar Mirch."

Even after the Plaintiff's lead attorney, Kevin J. Mirch, Esq. was disbarred for filing frivolous lawsuits, where he has a pattern of similar conduct, the district court continued to act in the Plaintiff's action for redress under §1983 against the Duff Defendants six years after the State Defendants were dismissed with prejudice, as the prevailing party at summary judgment July 5, 2002, that held his complaint was legally frivolous and lacked any basis in law and fact and otally lacked merit, since he lacked any admissible evidence of a conspiracy and failed to allege a deprivation of a constitutional right, which is the same misconduct that Kevin J. Mirch, Esq. was disbarred for.

The district court, on July 29, 2008, ordered Duff Defendants to show cause why their conduct does not warrant sanctions and further ordered Plaintiff to submit to the court an itemization of attorney time, services, fees and expenses incurred that were directly related to his §1983 action against the Duff Defendants during the period following the grant of summary judgment to the State Defendants on July 5, 2002 but prior to their appeal of default judgment, entered January 30, 2004 and further ordered a

hearing on the sanctions against the Duff Defendants. App. 22a

The Duff Defendants, in response to the order to show cause, on August 11, 2008, filed their motion challenging the district court's subject matter jurisdiction it asserted in the Plaintiff's §1983 action six years after it dismissed the State Defendants with prejudice as the prevailing party at summary judgment on July 5, 2002. Lack of federal subject matter jurisdiction cannot be waived and federal subject matter jurisdiction cannot be conferred upon a federal court by consent, inaction, or stipulation. 28 USC §1332. The district court could not proceed at all without proper jurisdiction but could only note the jurisdictional defect,[2] where the order granting summary judgment held his complaint was legally frivolous and dismiss the Plaintiff's §1983 action against the Duff Defendants, with prejudice, where no sanctions or penalties can be imposed upon them because of their exercise of constitutional rights. [3]

On September 2, 2008, without the State Defendants or the Duff Defendants present and without the district court rendering its disposition on the Duff Defendants pending motion, proceeded with its hearing for show of cause on.

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[2] See *e.g., Capron v. Van Noorden*, 2 Cranch 126 (1804); *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997); *Bell v. Hood*, 327 U.S. 678 (1946);*National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 465 n.13 (1974); *Norton v. Mathews*, 427 U.S. 524, 531 (1976); *Secretary of Navy v. Avrech*, 418 U.S. 676, 678 (1974)(per curiam); *United States v. Augenblick*, 393 U.S. 348 (1969); and *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 86, 88 (1970), distinguished.

[3] *See e.g., Boyd v. United States,* 116, U.S. 616, 6 S.Ct. 524 (1886); *Mallory v. Hogan*, 378 U.S. 1, 84 S.Ct. 1489 (1964); *Spevack v. Klein*, 385 U.S. 511, 87 S.Ct. 625 (1967).

The district court's order filed September 4, 2008 (App. 21a) modified Duff Defendants pending motion challenging its subject matter jurisdiction it asserted after the entry of summary judgment on July 5, 2002 to a motion to dismiss for lack of subject matter jurisdiction, which held, "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."

On September 4, 2008, the district court filed its order on the show of cause hearing (App. 8a) holding "long after the State Defendants in the action secured summary judgment in their favor (July 5, 2002, Order (#232)), the Duff Defendants still remained in the case . . . It now appears that Lewis cannot win, that the Duff Defendants cannot escape sanctions . . in what was a baseless action." The district court held Duff Defendants cannot escape sanctions for exercising their constitutional rights in defense of it continuing to act six (6) years without federal subject matter jurisdiction after it held at summary judgment Plaintiff's complaint was legally frivolous. The district court further held:

> "The Ninth Circuit reversed default judgment against the Duffs, citing *In re First T.D. & Inv, Inc.*, 253 F.3d 520, 532 (9th Cir. 2001). *First T.D.* holds, 'If an action against the answering defendants is decidcided in [the answering defendants'] favor favor, then the action should be dismissed against both answering and defaulting defendants.' *Id.* Therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)), the court dismisses Lewis's action against the Duffs with prejudice."

The district court held Plaintiff's claims against the Duff Defendants are dismissed with prejudice,

citing *In First T.D.,* yet ordered them to pay the Plaintiff a monetary sanction in the amount of $23,149.98 for attorney fees, costs, etc. that directly related to his §1983 action against them during the period following the grant of summary judgment to the State Defendants on July 5, 2002 but prior to their appeal of default judgment entered January 30, 2004. The district court, on September 5, 2008, enter judgment in favor of the Plaintiff in the amount of $23,149.98. App. 20a.

On October 20, 2008, Duff Defendants appeal the district court's order and judgment, entered September 5, 2008 to the Ninth Circuit in case no. 08-17314 arguing after the district court ordered the Plaintiff's claims against Duff Defendants are dismissed with prejudice, it lacked lawful authority to order them to pay the Plaintiff a monetary sanction of $23,149.98 for attorney fees, costs, etc. in defending what it held was initially a baseless action, specifically after the entry of summary judgment on July 5, 2002. Therefore sanctions should not be entered against the Duff Defendants for exercising their constitutional rights, but rather should be entered against the Plaintiff and his attorneys of record for filing a frivolous complaint against them for redress under 42 USC §1983 in violation of Rule 11, where the district court confirmed his complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit on July 5, 2002 and confirmed again in its order on September 4, 2008 it was initially a baseless action. It violated the due process clause of the Fourteenth Amendment for the district court to enter sanctions against Duff Defendants for exercising their constitutional rights in their defense of it continuing to act in the Plaintiff's §1983 action against them after it entered summary judgment on July 5, 2002. No opposition or response was filed by Plaintiff to the Duff Defendants opening brief.

On November 23, 2010, the Ninth Circuit filed its Memorandum (App. 4a) vacating the $23,149.98 sanction imposed and the entry of the pre-filing review order against the Duff Defendants and reverse and remand them to the district court for further

proceedings, where it held "the amount of sanction was a "serious criminal penalt[y]. . . . . Because the sanction was criminal in nature and the amount was a "serious" penalty, the Duffs were entitled to the full due process protections of a criminal jury trial, . . which they did not receive."

The Duff Defendants filed their Petition for Rehearing, on December 7, 2010, arguing the Ninth Circuit's memorandum held "On remand, the district court may reinstitute criminal sanction proceedings so long as the Duffs are provided the requisite protecttions" or alternatively, it may impose a monetary sanction that is civil in nature or not "serious," without further proceedings. "The Duff contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit" nine years after the district court held the Plaintiff's complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit at summary judgment on July 5, 2002 and confirmed in its order, filed September 4, 2008 (App. 8a) that his complaint was initially a baseless action.

On March 18, 2011, the Ninth Circuit denied the Duff Defendants' Petition for Rehearing in its order (App. 48a) and filed its Memorandum (App. 1a) reversing and remanding them to the district court for further proceedings, as set forth in its prior Memorandum, filed November 23, 2010.

The Ninth Circuit, on March 28, 2011, filed its' Mandate (App. 7a) holding "The judgment of this Court, entered November 23, 2010 (App. 4a), takes effect this date." The only judgment entered in this case by the Ninth Circuit was on August 28, 2006 (App. 28a).

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REASONS FOR GRANTING THE PETITION

This case has been ongoing for twelve years and nine years since the State Defendants were dismissed with prejudice at summary judgment on July 5, 2002, where the district court held summary judgment is not proper if material factual issues exist for trial citing *B.C. v. Plumas Unified Sch. Distr.*, 192 F.3d 1260, 1264 (9th Cir. 1999). The district court in deciding whether to grant summary judgment must take three necessary steps: 1) it must determine whether a fact is material; 2) it must determined there exists a genuine issue for the trier of facts, as determined by the documents submitted to the court; and 3) it must considered that evidence in light of the appropriate standard of proof. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The district court knew, after dismissing State Defendants with prejudice at summary judgment on July 5, 2002 holding the Plaintiff's complaint for redress under §1983 was legally frivolous, it lacked subject matter jurisdiction to proceed beyond that point. Therefore, no sanction can be imposed upon the Duff Defendants for the district court continuing to act in the Plaintiff's §1983 action after it held on July 5, 2002, his complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit. The mere recital of the district court that it has subject matter jurisdiction conflicts with *Frow v. Del Vega*, 82 U.S. 522 (1872) holding the principle be applied where the defendants have been alleged only as jointly liable. When two or more obligors are alleged jointly, it means that they are "undivided" and "must therefore be prosecuted in a joint action against them all." Which the record clearly reflects that it lacked subject matter jurisdiction the prior nine years to proceed against the Duff Defendants in this action after it dismissed the State Defendants with prejudice at summary judgment July 5, 2002.

Even in *Harlow v. Voyager Communications V, Inc.*, 127 N.C. App. 623, 492 S.E. 2d 45 (1997) held if one liable, then all must be liable, and if one is not liable, then all are not liable. Reasonable minds would conclude that the Duff Defendants would be dismissed along with the State Defendants at summary judgment, where no genuine issues of material fact remain in dispute (Fed.R.Civ.P. 56 (c)) and the fact the Duff Defendants have the same absolute immunity as the State Defendants provided under NRS 641.318. Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. Fed.R.Civ.P. 50(a). Where reasonable minds can differ on the material facts at issue, however, summary judgment should not be granted. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

In this §1983 action, summary judgment was entered, where the district court held Plaintiff's complaint was legally frivolous and lacked any basis in law and fact and totally lacked merit, since he lacked any admissible evidence of a conspiracy and failed to allege a deprivation of a federal constitutional right. Yet, the district court, on May 27, 2003, set an evidentiary hearing for June 19, 2003, on the Plaintiff's claims he asserted against the Duff Defendants in his §1983 action that were not dismissed with prejudice with the State Defendants at summary judgment on July 5, 2002. Therefore, summary judgment should not of issued in this case, where the district court, after July 5, 2002, continues to assert there are genuine issues of material fact that remain in dispute for trial. *Id.* It was impossible for the district court to have federal subject matter jurisdiction in Plaintiff's §1983 action after his cause of action under color of state law was dismissed with prejudice with the State Defendants at summary judgment on July 5, 2002.

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th Cir. 1994). But

despite the effort of the Duff Defendants' attempts to have the Plaintiff's complaint §1983 action dismissed against them since entry of summary judgment July 5, 2002, the district court continued to act without a cognizable cause of action under color of state law for nine years. Even after the Ninth Circuit's ruling that the Duff Defendants be dismissed along with State Defendants citing *In re First T.D.*, it held sanctions should be entered against them for exercising their constitutional rights for refusing to appear at a hearing that by the district court's own admission lacked subject matter jurisdiction to hold after July 5, 2002 citing the Plaintiff's complaint was legally frivolous what was initially a baseless action.

The district court's contentions along with the Ninth Circuit's is that sanctions be imposed against Duff Defendants for standing their ground, where at every bend of the road, the district court denied their efforts to know what cause of action under color of state law remained before it that wasn't addressed and dismissed with prejudice at summary judgment on July 5, 2002, to order them to attend hearings on issues that it held were legally frivolous and totally lacked merit. Specifically, where this Court held in *Powell v. McCormack*, 395 U.S. 486, 497 (1969) "[A] case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome."

It is well established case law, the district court does not acquire jurisdiction by a mere recital contrary to what is shown in the record, the record of the case is the determining factor as to whether it had jurisdiction (See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 497 N.E. 2d 1156 (1986)), where it recited it had subject matter jurisdiction in several orders over the prior nine years but refused to prove on the record it existed. In this case, the record clearly reflects the district court lacked federal subject matter jurisdiction after the entry of summary judg-ment on July 5, 2002.

Summary

This Court should grant certiorari to determine whether federal subject matter jurisdiction continues to exist before the district court in Plaintiff's §1983 action against the Duff Defendants in 2011, nine years after the State Defendants were dismissed, with prejudice, as the prevailing party at summary judgment on July 5, 2002 holding his complaint was legally frivolous, then held on September 4, 2008 (App. 21a) the fact that Plaintiff cannot prevail in this action does not affect the court's subject matter jurisdiction . . even though it held what was initially a baseless action.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

TYRONE DUFF
LINDA DUFF
P.O. Box 2512
Bellingham, WA. 98227
(360) 752-1775

No. 08-17314

D.C. No. 03:99-cv-00386-LRH

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants-Appellants,

and

DAVID ANTONUCCIO; et. al.,

Defendants.

Appeal from the United States District Court

for the District of Nevada

Larry R. Hicks, District Judge, Presiding

Submitted November 16, 2010 **

File Date: March 18, 2011

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R.36-3.

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

Before: TASHIMA, BERZON, and CLIFTON, Circuit Judges

Tyrone and Linda Duff appeal pro se from the district court's judgment imposing monetary sanctions and entering a pre-filing review order against them under its inherent power. We have jurisdiction under 28 U.S.C. §1291. We review for an abuse of discretion. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.,* 244 F.3d 1128, 1135 (9th Cir. 2001); *De Long v. Hennessey,* 912 F.2d 1144, 1146 (9th Cir. 1990). We vacate and remand.

The district court did not clearly err by finding that the Duffs engaged in bad faith by willfully refusing to appear at hearings and by filing duplicative and frivolous documents, and thus the court had the inherent power to sanction them. *See Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001). The Duffs' contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit.

However, we vacate the $23,149.98 sanction imposed. The sanction was criminal in nature, because it was intended to punish the Duffs for their conduct and to vindicate the court's authority, not solely to compensate plaintiff or coerce the Duffs into compliance with a court order. See *F.J. Hanshaw Enters., Inc. v. Emerald River Dev.,Inc.,* 244 F.3d at 1137-38. The amount of the sanction was a "serious criminal penalt[y]." *See id.* at 1138. Because the sanction was criminal in nature and the amount was a "serious" penalty, the Duffs were entitled to the full due process protections of a criminal jury trial, *see id.*, which they did not receive. On remand, the district court may reinstitute criminal sanction proceedings so long as the Duffs are provided the requisite protections. *See id.* at 1141-42. Alternatively, the district court may impose a monetary sanction that is civil in nature or not "serious," without further proceedings, because the Duffs were previously given adequate notice

and an opportunity to be heard. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110-12 & n.7 (9th Cir. 2005).

We also vacate the entry of the pre-filing review order, because the district court did not comply with the factors set forth in *De Long*. *See* 912 F.2d at 1147-48. On remand, the district court may consider whether to impose a narrowly-tailored pre-filing review order after expressly addressing the relevant factors.

The Duff shall bear their own costs onappeal.

VACATED and REMANDED.

No. 08-17314

D.C. No. 03:99-cv-00386-LRH

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants-Appellants,

and

DAVID ANTONUCCIO; et. al.,

Defendants.

Appeal from the United States District Court

for the District of Nevada

Larry R. Hicks, District Judge, Presiding

Submitted November 16, 2010 **

File Date: November 23, 2010

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

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

Before: TASHIMA, BERZON, and CLIFTON, Circuit Judges

Tyrone and Linda Duff appeal pro se from the district court's judgment imposing monetary sanctions and entering a pre-filing review order against them under its inherent power. We have jurisdiction under 28 U.S.C. §1291. We review for an abuse of discretion. *F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.,* 244 F.3d 1128, 1135 (9th Cir. 2001); *De Long v. Hennessey,* 912 F.2d 1144, 1146 (9th Cir. 1990). We vacate and remand.

The district court did not clearly err by finding that the Duffs engaged in bad faith by willfully refusing to appear at hearings and by filing duplicative and frivolous documents, and thus the court had the inherent power to sanction them. *See Gomez v. Vernon*, 255 F.3d 1118, 1133-34 (9th Cir. 2001). The Duffs' contentions that the district court lacked jurisdiction to sanction them or jurisdiction over the action are without merit.

However, we vacate the $23,149.98 sanction imposed. The sanction was criminal in nature, because it was intended to punish the Duffs for their conduct and to vindicate the court's authority, not solely to compensate plaintiff or coerce the Duffs into compliance with a court order. See *F.J. Hanshaw Enters., Inc. v. Emerald River Dev.,Inc.,* 244 F.3d at 1137-38. The amount of the sanction was a "serious criminal penalt[y]." *See id.* at 1138. Because the sanction was criminal in nature and the amount was a "serious" penalty, the Duffs were entitled to the full due process protections of a criminal jury trial, *see id.*, which they did not receive. On remand, the district court may reinstitute criminal sanction proceedings so long as the Duffs are provided the requisite protections. *See id.* at 1141-42. Alternatively, the district court may impose a monetary sanction that is civil in nature or not "serious," without further proceedings, because the Duffs were previously given adequate notice

and an opportunity to be heard. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110-12 & n.7 (9th Cir. 2005).

We also vacate the entry of the pre-filing review order, because the district court did not comply with the factors set forth in *De Long*. *See* 912 F.2d at 1147-48. On remand, the district court may consider whether to impose a narrowly-tailored pre-filing review order after expressly addressing the relevant factors.

The Duff shall bear their own costs on appeal.

VACATED and REMANDED.

No. 08-17314

D.C. No. 03:99-cv-00386-LRH

U.S. District Court of Nevada, Reno

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

DAVID ANTONUCCIO; et. al.,

Defendants,

and

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants-Appellants.

The judgment of this Court, entered November 23, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellant Procedure.

FOR THE COURT;

Molly C. Dwyer
Clerk of Court

Rhonda Roberts
Deputy Clerk

CASE NO. 03:99-cv-00386

HON. LARRY R. HICKS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA AND TYRONE DUFF,

Defendants.

I. Factual and Procedural History

On July 10, 2003, United States District Judge Edward Reed entered default judgment against Linda and Tyrone Duff ("the Duffs") in an action brought by Plaintiff Richard Lewis ("Lewis") alleging civil rights violations. (July 11, 2003, Min. Order (#299).). Long after the other defendants in the action secured summary judgment in their favor (July 5, 2002, Order (#232)), the Duffs still remained in the case.

The Duffs failed to appear before the court despite repeated warnings, *see, e.g.,* (June 19, 2003, Min. Order (#296)), failed to r easonably participate in discovery, *see, e.g.* (Mot To Compel (#171)), failed untimely pleadings, *see, e.g.,* (Mot. To Dismiss (#279)), filed duplicative and legally frivolous pleadings, *see, e.g.,* (Resp. (#313)), accused the presiding judge of corruption and "mental impairment," *id.* at 22:6, accused the United States District Court, District of Nevada of being a "criminal enterprise," *id.* at 22:9, and proclaimed to the court their refusal to personally participate in the action (Resp. (#283)). The court warned the Duffs that

continued refusal to participate would result in default judgment and ordered the Duffs to participate in the production of the Pretrial Order (May 6, 2003, Min. Order (#286)), but the Duffs, though still filing documents, continue to refuse personal participation (Report & Recommendation (#294)). In a hearing on damages following default judgment, at which the Duffs did not appear, the court awarded Lewis $280,000 compensatory damages and $50,000 in punitive damages (June 27, 2004, Hr'g (#320)).

The Duffs appealed this award (#343). The Ninth Circuit reversed the default judgment and remanded for the imposition of a "more appropriate sanction" against the Duffs. (Sec. Req. for Case Status (#376), Ninth Circuit Memo. Ex. A.) Judge Reed subsequently recused, and the case was reassigned to this court for determination upon remand (#366). On July 29, 2008, this court ordered the Duffs to show cause as to why their conduct does not warrant sanctions. The Duffs, consistent with their prior treatment of this litigation, failed to respond.

II. Legal Standard

There are three sources of general sanctioning power: Rule 11 of the Federal Rules of Civil Procedures, 18 U.S.C. §1927, and a court's inherent power to regulate itself. *United States v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen and Helpers of America, AFL-CIO,* 948 F.2d 1338, 1343 (2nd Cir. 1991). Ordinarily, a court should rely on the rules or statutory authority unless these sources are not "up to the task." *Chambers v. NASCO*, Inc., 501 U.S. 32, 50 (1991).

A. Rule 11

The first source of sanctioning power is Rule 11. One of the fundamental purposes of Rule 11 is to "reduce frivolous claims, defenses or motions and to deter costly meritless maneuvers," thereby avoiding 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)).

Rule 11 provides, in pertinent part,

(b) By presenting to the court a pleading, written motion, or other paper-whether by signing, filing, submitting, or later advocating it an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . .

(c)(4) . . . The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of partor all of the reasonable attorney's fees and other expenses directly resulting from the violation.

Fed.R.Civ.P. 11. By its terms, Rule 11 sanctions apply only to documents parties submit to the court, not to the conduct of those parties. *Christian*, 286 F.3d at 1130. The court may consider the deficiencies of each contentions individually, rather than of the document as a whole, in determining sanctions. *Townsend v. Holman Consulting Corp.*, 927 F.2d 1358, 1364-65 (9th Cir. 1990) (en banc). Each party has a duty prior to filing a document to conduct a reasonable factual investigation and to perform adequate legal research confirming that the positions taken in the document are warranted by existing law or a good faith alteration of existing law. *Id.* at 1126. In determining whether the factual and legal inquiry was reasonable, the court applies an objective standard of reasonableness. *Brotherhood*, 948 F.2d at 1344.

Rule 11 sanctions are applicable to nonattorney pro se parties under a somewhat lessened standard of reasonableness, though sanctions are appropriate if a filing is clearly frivolous. *See Warren v. Guelker*, 29 F.3d 1386, 1390 (9th Cir. 1994). In addition, the court may impose sanction on its own initiative only after issuing a show cause order, detailing the sanctionable conduct and inquiring as to why sanctions should not be imposed. Fed.R.Civ.P. 11 advisory committee notes subsections (b) and (c). Rule 11 sanctions must be aimed at deterrence, not punishment. Fed.R.Civ.P. 11(c)(4).

B. 28 U.S.C. §1927

Sanctions are also available through 28 U.S.C. §1927. Section 1927 provides,

> 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 re-

> quired by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. A §1927 sanction differs from a Rule 11 sanction by requiring a heightened showing of bad faith, by allowing the court to impose an award of fees sua sponte, and by bringing conduct outside of the pleadings within the ambit of sanctionable activities. *See Georgene M. Vairo, Rule 11 Sanctions: Case Law, Perspectives, and Preventative Measures* 760-62 (Richard G. Johnson ed., 3d ed. 2003).

As a penal statute, §1927 discourages unnecessary delays in litigation by requiring the offending party to compensate other litigants for costs due to the dilatory conduct. *See Roadway Express Inc. v. Piper,* 447 U.S. 752, 759-62 (1980). In this circuit, a pro se litigant is subject to a §1927 sanction. *See Wages v. I.R.S.*, 915 F.2d 1230, 1235-36 (9th Cir. 1990); *Brown v. Adidas Int'l*, 938 F. Supp. 628, 636 (S.D. Cal 1996),

A sanction under §1927 requires a showing that the offending party (1) multiplied the proeedings (2) in a vexatious manner, causing (3) an increase in the cost of proceedings. *Shields v. Shetler,* 120 F.R.D. 123, 127 (D. Colo. 1988). A "vexatious" multiplication of the proceedings occurs when the party acts recklessly or with bad faith. *B.K.B. v. Maui Police Dep't,* 276 F.3d 1091, 1107 (9th Cir. 2002). Before a court imposes § 1927 sanctions, the offending party must be given notice and an opportunity to be heard. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*, 809 F.2d 626, 638 (9th Cir. 1987). Apprisal by the court that an offending party stands accused of having acted in bad faith is sufficient to achieve notice. *See In re DeVille*, 361 F.3d 539, 549 (9th Cir. 2004).

C. Inherent Power

A third source of sanctioning authority lies in the court's inherent power "to manage [its] own fairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991). In this circuit, courts have the discretion to rely on their inherent authority instead of rule-based or statutory authority. *Fink v. Gomez*, 239 F.3d 989, 993 (9th Cir. 2001); *but see Klein v. Stahl GmbH & Co. Maschinefabrik*, 185 F.3d 98, 108 (3d Cir. 1999) (holding inherent sanctioning power is a sanctioning power of last resort). A sanction pursuant to the court's inherent power requires a showing of subjective bad faith and must comply with the strictures of due process: notice and an opportunity to defend. *In re Deville*, 361 F.3d at 548-50. Since the scope of the inherent-power sanction is broad–encompassing, for example, the imposition of attorney's fees if a court finds that "the very temple of justice has been defiled," *In re DeVille*, 361 F.3d at 545 (quoting *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 580 (1946)) – courts favor restraint and discretion in its exercise, often requiring a particularized showing of bad faith. *See Brotherhood,* 948 F.2d at 1345; *see also Christian*, 286 F.3d at 1131.

III. Discussion

A. Sanctions

There have been nearly 400 filings in this case, many of which have meandered to 150 pages and beyond. *See, e.g.*, (Resp. (#313)). Approximately half of the filings have limped along on the waning legitimacy of the dispute between Lewis and the Duffs. It now appears that Lewis cannot win, that the Duffs cannot escape sanctions, and that yet another court must address the dregs of what was initially a baseless action. *See* (July 5, 2002, Order (#232)).

This action has clogged the court for nearly ten years. The public's interest in expeditious resolution of litigation, the court's need to manage its docket, and the insufficiency of less drastic alterntives warrant the complete disposition of this case without further filings by the parties. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (discussing sanctions pursuant to Fed.R.Civ.P. 16). Moreover, the requirement of "just, speedy, and inexpensive" disposition of cases, enshrined in the Federal Rules, suggests that the court ought to resolve this action's loose ends as quickly as possible. Fed.R.Civ.P. 1; *see also People of State of N.Y. v. Operation Rescue Nat'l* 80 F.3d 64, 73 (2d Cir. 1996). After all, "[e]ven the Trojan War lasted only ten years." *Indiana Harbor Belt R. Co. v. American Cyanamid Co.*, 916 F.2d 1172, 1183 (7th Cir. 1990).

In light of this court's mandate to impose sanctions and reluctance to encourage further filings, Rule 11 sanctions are inappropriate. Rule 11 sanctions reach only the parties' filings. *Christian,* 286 F.3d at 1130. Here, while the Duffs' filings certainly provide fodder for Rule 11, the Duffs' failure to appear ultimately generated the default judgment. See (May 6, 2003, Min. Order (#286)). As a failure to appear constitutes conduct outside of the filings, Rule 11 is not "up to the task" of sanctioning the Duffs' most egregious misconduct. *Chambers,* 501 U.S. at 50.

Similarly, § 1927, while a possible basis for sanctions against pro se parties, *Wages,* 915 F.2d at 1235-36, is not the best source for sanctioning the Duffs. Section 1927's purpose is to penalize the offending party by forcing him or her to compensate the party who incurred extra expenses as a result of the misconduct. *See Roadway Express*, 447 U.S. at 759-62. Here, however, both parties arguably "multiplied the proceedings" unnecessarily, increasing costs on both sides. Therefore, the Duffs' sanctions should mainly address their abuse of the court – their defilement of "the very temple of justice" – rather than compensation due

Lewis. The court, not the opposing party, suffered the brunt of the Duffs' "feckless" conduct. (Sec. Req. for Case Status (#376), Ninth Circuit Memo. Ex. A.)

A court's inherent power may be an alternative ground, rather than a last-resort ground, for imposing sanctions. *Fink*, 239 F.3d at 993. In order to impose sanctions pursuant to its inherent power, a court must find subjective bad faith on the part of the offending party and respect the twin pillars of due process: notice and an opportunity to be heard. *In re Deville*, 361 F. 3d at 548-50. Factors to consider in deciding whether to impose sanctions and what kind of sanctions to impose include

> [w]hether it was part of a pattern of activity, or an isolated event; whether it infected the entire pleading, or only one particular count or defense; whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; what amount is needed to deter similar activity by other litigants.

Fed.R.Civ.P. 11 advisory committee notes subsections (b) and (c).

In the present case, the Duffs have shown subjective bad faith. First, the Duffs threatened the court with their absence in the event the court denied their motion to dismiss: "Should the court Deny the Duff Defendants' fourth (4th) Motion to Dismiss, with prejudice, they will not participate in this action any further." (Resp. (#283) at 4:3-4.) Following this salvo, the court warned the Duffs

that continued absences would merit a default judgment. (May 6, 2003, Min. Order (#386).) The Duffs' failed to personally appear at any subsequent hearings, even after the court repeatedly called the Duffs, left messages for the Duffs, and offered to allow telephonic appearances. (May 27, 2003, Min. Order (#289); Rep. & Rec. (#294).) The Duffs' refusal to personally participate in an action in which they frequently filed voluminous objecttions, motions, and requests demonstrates disrespect for the court, abuse of the judicial system, and an obstinacy amounting to bad faith.

Second, the Duffs filed untimely pleadings, *see e.g.*, (Mot. to Dismiss (#279)), filed duplicative and legally frivolous pleadings even after they had been given notice that such pleadings were duplicative and frivolous, *see, e.g.*, (Resp. (#313), Rep. to Mot. to Dismiss (#314)), accused the presiding judge of corruption and "mental impairment" (Resp. (#313) at 22:6), and accused the United States District Court, District of Nevada of being a "criminal enterprise," *id.* at 22:9. Nor is this the first time that the District of Nevada has suffered such barbs from the Duffs. *See* Docket #3:04-CV-00059-LRH-RAM. This pattern of conduct, substituting ad hominem attacks and unsupported screeds for argument, implicates a bad faith use of the judicial system, the needless occupation of the court's time and effort at the expense of more deserving litigants, and an intent to defile "the very temple of justice" in retaliation for adverse rulings.

The Duffs have also had adequate notice of specific allegations of bad faith conduct. Judge Reed warned the Duffs that sanctions–in the form of default judgment–could follow their continued failure to personally appear. (May 6, 2003, Min. Order (#386).) Moreover, the Duffs' awareness that they "stood accused of having acted in bad faith," shown by their reply to Judge Reed's warning (#287), is sufficient notice itself. *In re Deville*, 361 F.3d at 550. The Ninth Circuit's rul-

ing, instructing this court to impose "more appropriate sanctions," further puts the Duffs on notice of impending sanctions. (Sec. Req. for Case Status (#376), Ninth Circuit Memo. Ex. A.) Finally, this court ordered the Duffs to show cause as to why their conduct does not warrant sanctions. The court invited the Duffs to include a statement of their financial resources. Nevertheless, the Duffs failed to respond.

The Duffs have also been afforded ample opportunity to defend against sanctions. Indeed, the Duffs' have already defended against the specific allegation of their failure to appear. *See* (Objection to Report & Recommendation (#298)). That the Duffs defended against sanctions brought forth on a different legal basis–but predicated on the same conduct–is immaterial. *See In re Deville*, 361 F.3d at 550. Finally, the Duffs have made no attempt to explain their conduct or their filings even after receiving notice that the Ninth Circuit had directed this court to impose sanctions and this court's entering of an order to show cause.

In consonance with the grounds for the default judgment, the court finds the Duffs' intentional failure to appear to be their primary sanctionable conduct. Additionally, however, sanctions are warranted for the Duffs' legally duplicative and frivolous filings. Appropriate sanctions, therefore, are the following: first, and primarily, all future documents filed pro se by the Duffs – now residents of the state of Washington – with the District of Nevada must be reviewed by the court prior to being accepted by the clerk. *See, e.g., Williams v. Revlon Co.*, 156 F.R.D. 39, 44-45 (S.D.N.Y. 1994); *Pusch v. Social Sec. Admin.*, 811 F. Supp. 383, 388 (C.D. Ill. 1993); *McKeown v. LTV Steel Co.*, 117 F.R.D. 139, 144 (N.D. Ind. 1987). This sanction addresses the kernel of the Duffs' sanctionable conduct by ensuring that the Duffs cannot continue to file frequent and voluminous documents with the court while failing to adhere to the court's rules. In addition, as the Duffs' failure to appear was no doubt made more likely

by their pro se status, this sanction applies only to documents filed pro se.

Second, the Duffs are fined three times Lewis's increased costs specifically tied to the Duffs' dilatory conduct which was determined upon the entry of default judgment. Lewis has filed an itemized statement of attorney time, services, and costs incurred as a result of the Duffs' conduct. This documents shows that Lewis incurred $7,566.66 in fees. Additionally, counsel for Lewis indicated that she spent an additional forty-five minutes of time in connection with this court's order to show cause. Thus, Lewis is entitled to $150 for this additional time. As Lewis incurred $7,716.66 in actual fees, the court will award Lewis $23,149.98 as a reasonable sanction for the conduct of the Duffs' throughout this litigation. This sanction will serve the purpose of compensating Lewis and, more importantly, deterring such conduct. The court will further give Lewis leave to seek any additional fees and costs in attempting to collect upon this award from the Duffs.

B. Judgment

The Ninth Circuit reversed default judgment against the Duffs, citing *In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001). *First T.D.* holds, "If an action against the answering defendants is decided in [the answering defendants'] favor, then the action should be dismissed against both answering and defaulting defendants." Id. Therefore, since the court dismissed the answering defendants at summary judgment (July 5, 2002, Order (#232)), the court dismisses Lewis's action against the Duffs with prejudice.

IT IS THEREFORE ORDERED that Lewis's claims against the Duffs are DISMISSED with prejudice.

IT IS FURTHER ORDERED that all future documents filed with the District of Nevada by Tyrone Duff or Linda Duff, when filed pro se, must be reviewed by the court prior to being accepted by the clerk.

IT IS FURTHER ORDERED that Linda and Tryone Duff pays Lewis a monetary sanction of $23,149.98. Judgment shall be entered in favor of Lewis in this amount. Lewis may also seek recovery for reasonable fees and costs incurred in seeking to satisfy the judgment in his favor against the Duffs.

The Clerk of the court shall enter judgment accordingly.

IT IS SO ORDERED.

DATED this 3rd day of September 2008.

"s/LARRY R. HICKS"

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

CASE NO. 03:99-cv-00386

HON. LARRY R. HICKS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA AND TYRONE DUFF,

Defendants.

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that Lewis's claims against the Duffs are DISMISSED with prejudice. IT IS FURTHER ORDERED that all future documents filed with the District of Nevada by Tyrone Duff or Linda Duff, when filed pro se, must be reviewed by the court prior to being accepted by the clerk. IT IS FURTHER ORDERED that Linda and Tyrone Duff pay Lewis a monetary sanction of $23,149.98. Judgment shall be entered in favor of Lewis in this amount. Lewis may also seek recovery for reasonable fees and costs incurred in seeking to satisfy the judgment in his favor against the Duffs.

September 5, 2008

LANCE S. WILSON

Clerk

"s/D.R. Morgan"

D.R. Morgan

Deputy Clerk

CASE NO. 03:99-cv-00386

HON. LARRY R. HICKS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA AND TYRONE DUFF,

Defendants.

Before the court is a motion to dismiss for lack of subject matter jurisdiction (#379) filed by Linda and Tyrone Duff (the "Duffs"). No opposition has been 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 IS THEREFORE ORDERED that the Duff's' motion to dismiss (#379) is hereby DENIED.

IT IS SO ORDERED.

DATED this 3rd day of September, 2008.

"s/LARRY R. HICKS"

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

CASE NO. 03:99-cv-00386

HON. LARRY R. HICKS

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA AND TYRONE DUFF,

Defendants.

On April 7, 2006, the Ninth Circuit remanded this action to the court in order to determine an appropriate award f sanctions. Upon considering the issue, the court will order Defendants Linda and Tyrone Duff ("the Duffs") to show cause as to why the conduct detailed below does not warrant sanctions pursuant to Federal Rule of Civil Procedure 11, 28 U.S.C. § 1927, or the court's inherent power to control its affairs.

On July 10, 2003, United States District Judge Edward Reed entered default judgment against Linda and Tyrone Duff in an action brought by Lewis alleging civil rights violations. (July 11, 2003, Min. Order (#299).) The Duffs failed to appear before the court despite repeated warnings, see, e.g., (June 19, 2003, Min. Order (#296)), failed to reasonably participate in discovery, see, e.g., (Mot. to Compel (#171)), filed untimely pleadings, see, e.g., (Mot. to Dismiss (#279)), filed duplicative and legally frivolous pleadings, see, e.g., (Resp. (#313)), accused the presiding judge of corruption and "mental impairment," id. at 22:6, accused the United States District Court, District of Nevada of being a "criminal enterprise," id. at 22:9, and pro-

claimed to the court their refusal to personally participate in the action, (Resp. (#283)).

The court warned the Duffs that continued refusal to participate would result in default judgment and ordered the Duffs to participate in the production of the Pretrial Order, (May 6, 2003, Min. Order (#286)), but the Duffs, though still filing documents, continued to refuse personal participation, (Report & Recommendation (#294)). In a hearing on damages following default judgment, at which the Duffs did not appear, the court awarded Lewis $280,000 in compensatory damages and $50,000 in punitive damages. (June 27, 2004, Hr'g (#320).)

The Duffs appealed this award (#343). The Ninth Circuit reversed the default judgment and remanded for the imposition of a "more appropriate sanction" against the Duffs. (Sec. Req. for Case Status (#376), Ninth Circuit Memo. Ex. A.) Judge Reed subsequently recused, and the case was reassigned to this court for determination upon remand (#366).

The Duffs are ordered to show cause as to why they should not be sanctioned for the following conduct:

- their failure to appear (June 19, 2003, Min. Order (#296));
- legally duplicative and frivolous filings, see, e.g., (Resp. (#313)).

IT IS THEREFORE ORDERED that the Duffs show cause as to why the foregoing conduct does not warrant sanctions. The Duffs' submission is due to the court no later than August 22, 2008.

IT IS FURTHER ORDERED that the Duffs may include with their submission a statement of financial resources. Any such statement shall be under oath.

IT IS FURTHER ORDERED that Lewis submit to the court, no later than August 22, 2008, an itemization of attorney time, services, fees and expenses incurred that are directly related to

Plaintiff's action against the Duffs during the period following the grant of summary judgment to the state defendants (July 5, 2002, Order (#232)) but prior to the Duffs' appeal of default judgment (#326).

IT IS FURTHER ORDERED that a hearing on sanctions against the Duffs is hereby set for Tuesday, September 2, 2008, at 1:30 p.m. in Courtroom 5 of the Bruce R. Thompson Federal Courthouse in Reno, Nevada.

IT IS SO ORDERED.

DATED this 28th day of July 2008

"s/LARRY R. HICKS"

LARRY R. HICKS

UNITED STATES DISTRICT JUDGE

No. 04-15326

D.C. No. 03:99-cv-00386-ECR

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DANIEL W. DUGAN,

Petitioner-Appellee,

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

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

Defendants,

And

LINDA DUFF; TYRONE DUFF,

Defendants-counter-claimants-Appellants,

* 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.

DECIDED: May 1, 2006

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.

DECISION

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 $330,000.00 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 $330,000.00 dollars to Lewis proves too much.

** This panel unanimously found 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.

We recognize district courts' inherent need to have the ability to curtail dilatory conduct that would slow impermissibly the wheels of justice. We 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 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 on the merits.

REVERSED and REMANDED.

No. 04-15326

D.C. No. 03:99-cv-00386-ECR

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

DAVID ANTONUCCIO; et. al.,

Defendants.

And

LINDA DUFF, et. al.,

Defendants-counter-claimants-Appellants,

Appeal from the United States District Court

for the District of Nevada (Reno)

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada (Reno) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED, REMANDED.**

Filed and entered 05/01/06

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA DUFF AND TYRONE DUFF,

Defendants.

DATED: January 27, 2004

PRESENT: Edward C. Reed, Jr., Senior U.S. District Judge, Courtroom Deputy: Colleen Larsen; Court Reporter: Cathy Worken; Counsel for Plaintiff: Kevin Mirch; Marie Mirch: Counsel for Defendant: None Appearing

MINUTES OF EVIDENTIARY HEARING WITH RESPECT TO DAMAGES:

At 10:09 A.M. Court convenes; defendants are not present, nor represented by counsel.

The Court notes for the record that a document (#319) entitled "Notification to the Court" was filed on January 23, 2004, by defendants, indicating they will not participate in this hearing.

RICHARD W. LEWIS is called by counsel for plaintiff, sworn and testifies.

Argument is presented.

At 11:30 A.M. Court recesses; at 12:20 P.M. Court reconvenes.

The Court makes its findings for the record.

IT IS ORDERED

That damages sought for lost income from the contract of Western Counseling Services and the State of Nevada is found to be $150,000.00 The Court awards, for lost income on the sale of the business, $30,000.00.

The Court finds that doctor Lewis, the Plaintiff, has suffered damages on account of loss of his forensic business, due to the conduct of the Duffs, in the amount of $100,000.00.

The Court finds that plaintiff is not entitled to recover legal fees incurred in the State Court action with the Duffs. Such was not pled in the complaint, and further, the usual practice is that such damages have to be recovered in the action where they were incurred, rather than an independent action.

The Court denies recovery of damages on account of the Duff unpaid invoice, this was not pled in the complaint.

The Court finds an aware of punitive damages, in the amount of $50,000.00, will be made.

The Court finds an award of future damages does not appear to be appropriate.

The Clerk will enter judgment as follows:

In the amount of $280,000.00 for compensatory damages, and in the amount of $50,000.00 for punitive damages, in favor of the plaintiff and against defendants Linda Duff and Tyrone Duff.

In favor of all other defendants in the case, and against plaintiff as to the claims of plaintiff against the defendants other than the Duffs.

At 1:00 P.M. Court adjourns.

LANCE S. WILSON, CLERK

"s/COLLEEN LARSEN"

COLLEEN LARSEN

Deputy Clerk

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED, JR

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

LINDA AND TYRONE DUFF,

Defendants.

DATED: January 27, 2004

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That judgment is hereby entered in the amount of $280,000.00 for compensatory damages, and in the amount of $50,000.00 for punitive damages, in favor of the plaintiff, and against defendants Linda Duff and Tyrone Duff.

That judgment is further entered in favor of all of the other defendants in this case, and against plaintiff, as to the claims of plaintiff against the defendants, other than the Duffs.

LANCE S. WILSON, CLERK

"s/COLLEEN LARSEN"
COLLEEN LARSEN
Deputy Clerk

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED, JR

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

RICHARD W. LEWIS,

v.

ELIZABETH RICHITT, PhD., et. al.

MINUTES OF THE COURT

DATED: SEPTEMBER 23, 2002
PRESENT: EDWARD C. REED, JR.
U.S. DISTRICT JUDGE
Deputy Clerk: Oma L. Rose
Reporter: None
Counsel for Plaintiff (s): NONE APPEARING
Counsel for Defendant (s): NONE APPEARING

MINUTES ORDER IN CHAMBERS

WILLINGNESS TO RECONSIDER

Upon review of the files in this case, it appears that our order (#232) is incorrect insofar as it ordered that judgment be entered in the action. Our order (#232) grants summary judgment as to all remaining defendants except for the defendants, the Duffs. It appears that the action has not been terminated as to the defendants, the Duffs. Therefore, our order (#232) should be amended to delete the order to the Clerk to enter judgment. Our order (#232) is otherwise correct. The judgment should be vacated. A copy of this order shall be transmitted by the Clerk of the Court of Appeals in connection

with the pending appeal.

LANCE S. WILSON, CLERK

"s/OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

ELIZABETH RICHITT, RICHARD WEIHER, DAVID ANTONUCCIO, LOUIS MORTILLARO, DENNIS ORTWEIN, CHRISTA PETERSON, STATE OF NEVADA, BOARD OF PSYCHOLOGICAL EXAMINERS, LINDA DUFF, TYRONE DUFF,

Defendants.

I. Background

This case is based upon the complaint filed against Dr. Lewis by Mr. Tyrone Duff arising out of Dr. Lewis's testimony at Mr. Duff's child custody hearings. Dr. Lewis claims that various members of the Nevada Board of Psychological Examiners and members of the Nevada Attorney General's office conspired together to induce Mr. Duff to file his complaint, which Dr. Lewis claims was false. This conspiracy is alleged to have violated Dr. Lewis's civil rights under 42 U.S.C. § 1983. The remaining defendants filed a motion for summary judgment (#177) claiming that Dr. Lewis could not demonstrate any constitutional deprivation, and, therefore, could not state a claim under section 1983. Dr. Lewis opposed (#205) and the defendants replied (#206).

II DISCUSSION

A. Summary Judgment Standard

Summary judgment allows courts to avoid unnecessary trials where no material factual dispute exists. Northwest Motorcycle Ass'n v. U.S. Department of Agriculture, 18 F.3d 1468, 1471 (9th Cir. 1994). The court must view the evidence and the inferences arising therefrom in the light most favorable to the nonmoving party, Bagdadi v. Nazar, 84 F. 3d 1194, 1197 (9th Cir. 1996), and should award summary judgment where no genuine issues of material fact remain in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Judgment as a matter of law is appropriate where there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party. Fed.R.Civ.P. 50(a). Where reasonable minds could differ on the material facts at issue, however, summary judgment should not be granted. Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 116 S.Ct. 1261 (1996).

The moving party bears the burden of informing the court of the basis for its motion, together with evidence demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the party opposing the motion may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts showing that there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Although the parties may submit evidence in an inadmissible form--namely, depositions, admissions, interrogatory answers, and affidavits--only evidence which might be admissible at trial may be considered by a trial court in ruling on a motion for summary judgment.

Fed.R.Civ.P. 56(c); Beyene v. Coleman Security Services, Inc., 854 F.2d 1179, 1181 (9th Cir. 1988).

In deciding whether to grant summary judgment, a court must take three necessary steps: (1) it must determine whether a fact is material; (2) it must determine whether there exists a genuine issue for the trier of fact, as determined by the documents submitted to the court; and (3) it must consider that evidence in light of the appropriate standard of proof. Anderson, 477 U.S. at 248. Summary judgment is not proper if material factual issues exist for trial. B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1264 (9th Cir. 1999). As to materiality, only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Disputes over irrelevant or unnecessary facts should not be considered. Id. Where there is a complete failure of proof on an essential element of the nonmoving party's case, all other facts become immaterial, and the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S. at 323. Summary judgment is not a disfavored procedural shortcut, but rather an integral part of the federal rules as a whole. Id.

B. Section 1983

Section 1983 creates a cause of action against a person who, acting under the color of state law, deprives another of rights guaranteed under the Constitution. 42 U.S.C. §1983. Section 1983 does not create any substantive rights, rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials. The primary inquiry in a section 1983 analysis is whether the plaintiff has articulated a Constitutional right giving rise to a claim under this statute. Baker v. McCollan, 443 U.S. 137, 140 (1979). Therefore, a conspiracy, even if established by a plaintiff, will not give rise to section 1983 liability unless the plaintiff can show an actual deprivation of constitutional rights. Woodrum v. Woodward County, Oklahoma, 866 F.2d 1121, 1126 (9th Cir. 1989).

C. Due Process

At the start we make a distinction not made by Dr. Lewis between substantive due process and procedural due process. Substantive due process involves a challenge to a law on the basis that it is fundamentally unfair. Substantive due process is not implicated in this case. Procedural due process is implicated when a plaintiff has a property right or entitlement that the government seeks to take away. In those cases the plaintiff is entitled to notice and some type of hearing before being deprived of his property right or entitlement. In this case, Dr. Lewis was given notice of the board's actions. He was given a formal hearing, and in the end the board did not deprive him of his license, nor limit his practice in any way. Therefore, even if deliberations among board members; (2) incorrect findings of fact we were to apply the Matthews v. Eldridge, 424 U.S. 319, 335 (1976) balancing test we would conclude that Dr. Lewis could not state a violation of his procedural due process rights.

D. Other Constitutional Vio1ations

Nonetheless, Dr. Lewis claims that his constitutional rights were violated by a conspiracy to have Mr. Duff file a false claim with the board. Dr. Lewis presents the following as the conduct that violated his constitutional violations: (1) improper deliberations among board members; (2) incorrect findings of fact and conclusions of law; (3) a violation of the duty to disclose conflicts of interest; (4) prior disclosures which violated due process; (5) failure to follow the proper procedures for holding the disciplinary hearing which violated due process; (6) obstructing a witness; (7) discussions between board members and members from the attorney general's office; (8) deprivation of judicial review by trick which violates due process; and (9)the change of the punishment from a private reprimand to a public reprimand without a hearing in violation of due process. None of these examples states a protected constitutional interest.

The defendants have absolute immunity for all actions taken in their quasi-judicial function as board members. Mishler v. Clift, 191 F. 3d 998, 1004 (9th Cir. 1999). Therefore, because actions (1)-(7) were actions taken by the defendants in their role as board members involving the claims against Dr. Lewis, those actions cannot be the basis of a constitutional deprivation. All claims based on those actions are barred by absolute immunity.

Dr. Lewis's alleged deprivation of his rights to appeal by trick does not state a constitutional deprivation. Dr. Lewis was not prevented from filing an appeal. His reasons for chasing not to pursue an appeal are irrelevant. The option for appealing was open to Dr. Lewis and he chose not to pursue it.

Finally, Dr. Lewis cannot base his section 1983 on the allegation that the Psychology Board changed his punishment from a private reprimand to a public reprimand because there is no evidence to support his claim.[1] Pursuant to NRS 641.280 all disciplinary hearings of psychologists are public record. Therefore, Dr. Lewis cannot claim a right to keep private any of the information disclosed at the hearing. Dr. Lewis did not produce any evidence to demonstrate that his private letter of reprimand was made public.

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[1] Even if we were to consider the evidence attached to Dr. Lewis's opposition we would find that the board did not change the punishment. The evidence conclusively demonstrates that although the board published the results of the disciplinary hearing in the monthly journal the formal punishment of Dr. Lewis was still a private letter of reprimand. Further, the testimony of Deputy Attorney General Moore establishes that because the board hearings are public meetings the results are often published, even if the formal punishment issued by the board is a "private" letter.

Dr. Lewis cannot state a deprivation of constitutional rights, and, therefore, cannot maintain a section 1983 claim.

In addition to his failure to state a constitutional violation, Dr. Lewis's claims of conspiracy suffer from two timing problems, and a failure of proof.

First, Mr. Duff filed his complaint with the board in 1993. Dr. Lewis alleges that the conspiracy began in 1995 after he asked for payment from the Division of Child and Family services. There Dr. Lewis alleges that the conspiracy began in 1995 after he asked is no way that a complaint filed in 1993 could be the basis for a conspiracy that began in 1995.

The second timing problem is that the only evidence that Dr. Lewis ever asked for payment indicates that payment was requested several months after the disciplinary proceedings were initiated.[2] It is impossible that a demand for payment made after the initiation of an investigation could be the triggering point of an investigation.

Dr. Lewis also claims that even though the complaint was filed in 1993 he was cleared of any wrongdoing soon after that complaint was filed. Therefore, Dr. Lewis claims that part of the conspiracy was the revival of the complaint against him. To begin, this is not the basis for Dr. Lewis's complaint. Dr. Lewis's complaint specifically refers only to a filing of a complaint in 1995, not a revival of a past complaint and Dr. Lewis never moved to

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[2] Dr. Lewis's affidavit makes a statement that after he requested payment they resurrected the complaint against him. This statement is not admissible evidence because it does not state any specific facts, only a conclusory allegation.

amend his complaint to add this new basis for liability.

However, even if we were to consider the newly proposed theory of liability, there is no evidence presented that indicates that the board completed an investigation of Dr. Lewis and found him to be cleared. Dr. Weiher's deposition is not properly authenticated, see Orr v. Bank of America, 285 F.3d 764 (9th Cir. 2002), and plaintiff presents no other properly authenticated evidence of being cleared from the initial complaint. Therefore, Dr. Lewis has not produced any admissible evidence that supports his claim of conspiracy.

IT IS, THEREFORE, HEREBY ORDERED THAT, the motion for summary judgment (#177) is **GRANTED**. The clerk shall enter judgment accordingly.

DATED: July 3, 2002.

"s/EDWARD C. REED"

EDWARD C. REED

UNITED STATES DISTRICT JUDGE

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RICHARD W. LEWIS,

Plaintiff,

v.

ELIZABETH RICHITT, et. al.

Defendants.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to be considered before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT THE MOTION FOR SUMMARY JUDGMENT (#177) IS GRANTED.

DATED: July 8, 2002

LANCE S. WILSON,

CLERK

"s/OMA L. ROSE"

OMA L. ROSE

Deputy Clerk

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

RICHARD W. LEWIS, PhD.

Plaintiff,

v.

ELIZABETH RICHITT, PhD., et. al.

Defendants.

MINUTES OF THE COURT

DATE: July 3, 2002
PRESENT: EDWARD C. REED, JR.
U.S. DISTRICT JUDGE
Deputy Clerk: Oma L. Rose
Reporter: None
Counsel for Plaintiff (s): NONE APPEARING
Counsel for Defendant (s): NONE APPEARING

MINUTE ORDER IN CHAMBERS:

Defendants Tyrone and Linda Duff (hereinafter "the Duff's") filed a motion to dismiss the plaintiffs second amended complaint with prejudice for lack of jurisdiction (#224). Dr. Lewis opposed (#228), the State of Nevada filed a statement of no position (#226) and the Duff's replied (#229). The motion is denied.

This court has jurisdiction for cases that arise under federal law. A claim under 42 U.S.C. § 1983 arises under federal law. Plaintiff sued the Duff's under section 1983 in this action because he alleged that they were part of the conspiracy to deprive him of his constitutional rights under section 1983. This court undisputably has jurisdiction over this claim.

IT IS THEREFORE HEREBY ORDERED THAT, the motion to dismiss for lack of jurisdiction (#116) is **DENIED**.

IT IS THEREFORE BERBBY FURTHER ORDERED THAT, the motion to set aside all orders and or judgments (#225) for lack of jurisdiction is **DENIED**.

LANCE S. WILSON, CLERK

"s/OMA L. ROSE"

OMA L. ROSE

Deputy Clerk

CASE NO. 03:99-cv-00386

HON. EDWARD C. REED

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

RENO, NEVADA

RICHARD W. LEWIS, PhD.

Plaintiff,

v.

ELIZABETH RICHITT, PhD., et. al.

Defendants.

MINUTES OF THE COURT

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's ("plaintiff") claim.

On June 8, 2001, plaintiff filed a response, indicating his agreement that the State is not a person for purpose 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.

LANCE S. WILSON, CLERK

"s/OMA L. ROSE"
OMA L. ROSE
Deputy Clerk

No. 08-17314

D.C. No. 03:99-cv-00386-LRH

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD W. LEWIS,

Plaintiff-counter-defendant-Appellee,

v.

TYRONE DUFF; LINDA DUFF,

Defendants-counter-claimants-Appellants,

and

DAVID ANTONUCCIO; et. al.,

Defendants.

Filed Date: March 18, 2011

Before: TASHIMA, BERZON, and CLIFTON, Circuit Judges

The memorandum disposition filed on November 23, 2010, is withdrawn. A replacement memorandum disposition will be filed concurrently with this order.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition

for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed.R.App.P. 35.

Tyrone and Linda Duffs' petition for panel rehearing and petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.