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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By____________

No. 34345-6-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant,

vs.

WASHINGTON STATE BAR ASSOCIATION, *ET AL.*

Respondents.

PETITION FOR DISCRETIONARY REVIEW BY SUPREME COURT UNDER WASH. CONSTITUTION ART. IV, SECTION 2(a) RAP 13.3(a), RAP 13.4(a)

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I. IDENTITY OF PETITIONER

Stephen Kerr Eugster asks the court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Petitioner seeks review of parts of the decision of the Court of Appeals in *Eugster v. Wash. State Bar Ass'n* (Wash. App., 2017). Appendix 1 – 26. A Motion for Reconsideration of the Decision was filed within the time allowed by court rule. Appendix pages 27 – 35. The Order Denying Reconsideration was rendered on June 6, 2017. Appendix 43 – 44.

III. WASHINGTON CONST. ART. IV, § 2(A)

The Supreme Court, for purposes of this particular review, should be a temporary Supreme Court created for the purposes of this matter. The judges of the Supreme Court have a conflict of interest in this appeal. The appeal involves the unconstitutionality of the exercise of appellate jurisdiction. It is asserted the work of the Court of Appeals was finished when it decided the Superior Court had jurisdiction over Mr. Eugster's Civil Rights complaint against the Washington State Bar

Association defendants. At that point, the appellate jurisdiction the Court of Appeals came to an end. It did have jurisdiction to make any further decisions in the matter.

The Justices of the Supreme Court have a conflict of interest. The members of this Court are faced with the same jurisdictional concerns in the Court's "retention of jurisdiction" after its decision in *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227, 262 (2012). The Justices of the Supreme Court are aware their authority under the constitution has been questioned as being in excess of its appellate jurisdiction. Wash. Const. art. IV, § 6.

In such circumstances, Wash. Const. art. IV, § 2(a) comes into play. It provides:

> When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court, and to authorize any superior court judge to perform judicial duties in any superior court of this state.

Wash. Const. art. IV, § 2(a) is to be used when the court has a conflict. *Yelle v. Kramer*, 83 Wash. 2d 464, 465-66, 520 P.2d 927 (1974). It has also been used in *In Re Disciplinary*

Proceeding Against Sanders, 135 Wash. 2d 175, 955 P.2d 369 (1998), and in *In re Disciplinary Proc. Against Sanders*, 159 Wash. 2d 517, 145 P.3d 1208 (2006). In each case, it was pointed out that "Judge C. Kenneth Grosse [author of the opinion] and each member of the en banc court are serving as justices pro tempore of the Supreme Court pursuant to Washington Constitution Article IV, Section 2(a) and Discipline Rules for Judges 13." In *Yelle v. Kramer*, *supra*, the Court discussed why and how Section 2(a) applied in each case.

> In *Yelle* "[w] each member of the Washington State Supreme Court announced his disqualification because of a personal interest in the decision to be made in this case, it was submitted to a pro tempore Supreme Court composed of two retired Supreme Court justices and seven retired Superior Court judges.
>
> In 1962, amendment 38 was added to article 4 of our state constitution. It provides:
>
> > When necessary for the prompt and orderly administration of justice a majority of the Supreme Court is empowered to authorize judges or retired judges of courts of record of this state, to perform, temporarily, judicial duties in the Supreme Court . . . .
>
> Superior and Court of Appeals judges could not be designated to serve in the Supreme Court, for this

case involves the salary of every active judge of a court of record in the state; hence, they, too, were disqualified for personal interest.

How the personnel of the pro tempore Supreme Court was determined is not an issue. [1] [[1]]

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[1] Footnote 1 provides:

In short, the pro tempore Supreme Court was selected as follows: the name of each retired judge of a court of record, not practicing law, was placed in a blank envelope; counsel in the case alternately drew from a large bowl nine envelopes which were numbered as drawn. A second group of nine was then drawn and numbered in the same manner. These constituted possible alternates.

The Clerk of the Supreme Court immediately contacted the judges seriatum whose names had been drawn. The first three declined to act for personal reasons; the next could not be reached within the time limit--he was traveling someplace in Europe; the next two agreed to serve; the seventh declined; the next two accepted.

The panel of nine was completed from the alternates in the same manner.

All nine justices of the Supreme Court then signed an order appointing the justices pro tempore thus selected.

The geographic distribution of justices is excellent. There is one justice pro tempore from eastern Washington, one from north central, two from northwestern Washington, two from Seattle, one from across Puget Sound, and two from the capital city.

Yelle v. Kramer, 83 Wn.2d at 465-66.

Thus, Wash. Const. art. IV, § 2(a) must be utilized for all purposes of the Petition for Discretionary Review. That is to say, it is to be used for purposes of consideration of the petition and, if review is granted, for purposes of the review.

IV. ISSUES PRESENTED FOR REVIEW

1. Once the Court of Appeals decided that the trial court had jurisdiction over Eugster's Civil Rights Action contesting the constitutionality of the Washington State Bar Association Washington Lawyer Discipline System, was the case on appeal was?

2. Assuming for the sake of argument, the court could take over the case from the trial court, did the court commit error? It would seem so, because in order to apply its res judicata conclusion (wrong as it was), the court had to have first decided the system was not unconstitutional as Eugster contended.

3. Does the court have authority to apply res judicata to a proceeding if the proceeding itself is yet to be decided by the

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Yelle v. Kramer, 83 Wn.2d 464, 485 (1974).

trial court?

V. STATEMENT OF THE CASE

Mr. Eugster filed a civil rights action under 42 U.S.C. § 1983 in Spokane County Superior Court. The order of the court provided:

> Based on the foregoing conclusions, The Court hereby ORDERS that Defendants' Motion to Dismiss Complaint is GRANTED and that this action is dismissed with prejudice, with each party to bear its own attorneys fees and costs.

Appendix 38 at 41.

In paragraph 12 under the heading 'Conclusions of Law,' the court said, "Based on the foregoing, defendants are entitled to dismissal of Plaintiff's claims with prejudice under CR 12 (b)(1) and CR 12(b)(6). Dismissal with prejudice is appropriate because no further amendment to Plaintiff's complaint could cure the legal deficiencies upon which dismissal is based." *Id.*

Yet exercising jurisdiction, the court concluded that plaintiff could not recover damages against Defendants as a result of GR 12.3 – claiming quasi judicial immunity if the Supreme Court would have had immunity in performing the same functions. *Id.*

And in Conclusions of Law, paragraphs 4 through 11, the court generally concludes that the Washington State Supreme Court has exclusive jurisdiction over lawyer discipline. *Id.*

Obviously, there is a bit of an inconsistency in the court's thinking.

On appeal, Chief Justice George Fearing, writing for the Court, ruled that the Superior Court did in fact have jurisdiction over the Civil Rights action.

Chief Justice Fearing did not stop there; the court did not remand the case to the Superior Court. Instead, the opinion went into a long discussion concerning about the concept of res judicata. It reached the conclusion that because Mr. Eugster did not raise his constitutional claims in the disciplinary action against him which began in 2005, he was foreclosed from raising the constitutional claims in this proceeding.

Judge Fearing did not address the issue of whether the disciplinary system violated procedural due process of law as complained by Mr. Eugster in his complaint.

He did not address any due process claim which sought to establish that the disciplinary system itself, that the system

"qua" the system, violated procedural due process and thus the Fifth Amendment to the United States Constitution.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The primary reason why this Court under Wash. Const. art. IV, § 2(a) should accept review is this: the Court of Appeals went beyond its appellate jurisdiction in this case. After it decided the primary issue, whether the trial court had original jurisdiction over the Mr. Eugster's Civil Rights Action Complaint under 42 U.S.C. § 1983 and instead of remanding the case, the Court of Appeals exercised trial court original jurisdiction to hold that case should be dismissed.

The Court of Appeals did not have jurisdiction to make this decision because its appellate jurisdiction was over, and the jurisdiction of the trial court was once again active. This Court should rule that the Court of Appeals remand the case to the trial court.

Second, assuming the court disagrees with the foregoing, the Court of Appeals erroneously ruled that Mr. Eugster was prevented from bringing his Civil Rights Action because he should have done so in the WSBA Discipline System proceedings

brought against him circa 2005 – that he was barred from doing so under res judicata principles.

Third, further assuming for the purposes of argument, the Court of Appeals court could consider res judicata, it was error for the Court to do so because the main issue in the case, whether the WSBA Discipline System in and of itself, that is qua the System, violated Eugster's Fifth Amendment Right to procedural due process of law, was never decided.

A. Background.

The trial court dismissed the case because it concluded the court did not have jurisdiction. The WSBA said the Supreme Court had exclusive jurisdiction. Under the heading "Subject Matter Jurisdiction" at page 15, the Court discussed whether the Trial Court had subject matter jurisdiction. On page 26 the Court concluded "[t]herefore, we hold that the superior court possessed subject matter jurisdiction over Eugster's complaint or amended complaint." Decision at 14, App. 14.

At this point in the decision, the court took itself to the heading "Res Judicata" starting at page 18. In the Decision at page 25, the Court says, "[b]ecause we hold that res judicata

bars this suit we do not address the WSBA's other arguments of lack of justiciability, immunity, and failure to state a claim Decision." And then at Decision 26, App. 26, the Court says, "[o]n the ground of res judicata, we affirm the trial court's dismissal of Stephen Eugster's complaint."

B. Jurisdiction of the Court of Appeals.

The Court in this appeal does not have original jurisdiction in the case. It only has appellate jurisdiction.

Wash. Const. art. IV, § 30 (Court of Appeals) provides:

> (1) Authorization. In addition to the courts authorized in section 1 of this article, judicial power is vested in a court of appeals, which shall be established by statute.
>
> (2) Jurisdiction. The jurisdiction of the court of appeals shall be as provided by statute or by rules authorized by statute.
>
> (3) Review of Superior Court. <u>Superior court actions may be reviewed by the court of appeals or by the supreme court as provided by statute or by rule authorized by statute</u>. . . . [Emphasis added.]

The statutes pertaining to the Court of Appeals are found in RCW Chapter 2.06. RCW 2.06.030 sets forth the jurisdiction of the Court of Appeals:

> Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all

> cases except [in certain cases - [this case is not excepted].

The Washington Supreme Court confronted the issue of what "appellate jurisdiction" means in *City of Seattle v. Hesler,* 98 Wash. 2d 73, 81-82, 653 P.2d 631 (1982):

> Appellate jurisdiction is defined in Black's Law Dictionary 126 (rev. 4th ed.1968) as
>
> > [t]he power and authority to take cognizance of a cause and proceed to its determination, not in its initial stages, but only after it has been finally decided by an inferior court, i.e., the power of review and determination on appeal, writ of error, certiorari, or other similar process.

C. The Court Exceeded its Appellate Jurisdiction.

Once the Court ruled that the Trial Court had subject matter jurisdiction, its appellate jurisdiction was over. The case was to be remanded. RAP 12.2 and RAP 12.5.

On remand, the Trial Court would proceed in the case; it would then address Defendants' Motion to Dismiss under "CR 12(b)," which was a part of the original jurisdiction of the Trial Court. Defendants' Motion to Dismiss Complaint, CP 40 – 43.

But the Court of Appeals did not remand the case.

Instead, it conducted an analysis under its "Res Judicata" heading. It discussed facts which were not facts in the proceeding; it discussed the application of the law to the facts. It concluded the Trial Court was right to dismiss the case.

Not only did the Court not have jurisdiction to do this, it has acted improperly.

The record on appeal includes the Motion to Dismiss based on CR 12(b). CP 40. When the Court held the Trial Court had subject matter jurisdiction, the case came back to the record before the Trial Court prior to its dismissal of the case based on the exclusive jurisdiction of the Supreme Court in attorney discipline matters. That record included the Motion to Dismiss. CP 40.

CR 12(b)(6) permits a trial court to dismiss a complaint when it fails to "state a claim upon which relief can be granted." *Nissen v. Pierce County*, 183 Wash. App. 581, 597, 333 P.3d 577 (2014), *aff'd*, 183 Wash. 2d. 863, 872, 357 P.3d 45 (2015).

Dismissal under CR 12(b)(6) is appropriate only if the trial court concludes beyond a reasonable doubt that on the face of the plaintiff's complaint, he or she cannot prove any set of

facts that would justify recovery. *J.S. v. Vill. Voice Media Holdings*, L.L.C., 184 Wash. 2d 95, 100, 359 P.3d 714 (2015) (internal quotations and citations omitted); *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings*, Inc., 180 Wash. 2d 954, 962, 331 P.3d 29 (2014). The trial court is to take all facts alleged in the complaint as true and may consider hypothetical facts that support the plaintiff's claims. *FutureSelect*, 180 Wash. 2d at 962. If a plaintiff's claim remains legally insufficient even under hypothetical facts, dismissal under CR 12(b)(6) is appropriate. *FutureSelect*, 180 Wash. 2d at 963.

If the Court of Appeals had authority, assuming it had authority to proceed with the de novo review of CR 12(b)(6), it did not do so. Furthermore, Court of Appeals did not do so properly, it violated the standards applicable to a decision under CR 12(b)(6). It did not have the authority to do so, and had it done so correctly under CR 12(b), the issue of the jurisdiction of the Trial Court would have to be based on the constitutionality of the WSBA Discipline System. Which, of course is the issue in the case before the Trial Court.

> One of our oldest dogmas is that if a court has no jurisdiction of the subject matter of an action its pretended judgment or decree is a nullity.
>
> > Bernard C. Gavit, *Jurisdiction of the Subject Matter and Res Judicata*, 80 U. PA. L. REV. 386 (1931-1932).
> >
> > . . .
> >
> > "The dismissal of a suit for lack of jurisdiction is not res judicata."
> >
> > *Peacock v. Piper*, 81 Wash. 2d 731, 734, 504 P.2d 1124 (1973) citing *Williams v. Minnesota Mining & Mfg. Co.*, 14 F.R.D. 1, 8 (D.C.1953): ("The long-settled general rule is that a judgment of dismissal for want of jurisdiction is not res judicata as a final decision upon the merits, and consequently does not operate as a bar to a subsequent action before some appropriate tribunal.")

VII. CONCLUSION

The Supreme Court, made up under Wash. Const. art. IV, § 2(a), should accept review of this case.

The court should conclude that Court of Appeals appellate jurisdiction does not allow the Court of Appeals' original jurisdiction to decide that Mr. Eugster was prevented from pursuing his Civil Rights Action because he, according to the court, should have presented it long ago in the discipline action against him going back to 2005.

Further, the decision is of no consequence because the claim that the WSBA Discipline System was unconstitutional had yet to be tried and determined. There can be no res judicata if the court does not have jurisdiction if the **"system itself"** is unconstitutional.

July 3, 2017.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that on July 3, 2017, by previous agreement of counsel, I emailed, the foregoing document including its appendix (which follows this Proof of Service to counsel listed below at their respective e-mail addresses:

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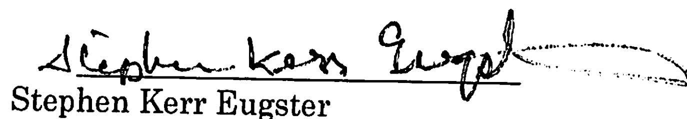

Stephen Kerr Eugster

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