No. 16-35542
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEPHEN KERR EUGSTER,
Plaintiff-Appellant,

and

PAULA LITTLEWOOD, EXEC, DIR. WASHINGTON STATE BAR ASSOCIATION, *et al.*,
Defendants-Appellees

Appeal from United States District Court for the
Eastern District of Washington
Civil Case No. 2:15-cv-00352-TOR (Honorable Thomas O. Rice)

REPLY OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Constitutional Provisions

Rules

Other Authorities

I. INTRODUCTION

The WSBA Defendants concede that the decision of the trial court must be reversed because the order the court used for res judicata purposes was not a decision on the merits and thus unusable.

Anticipating it might be contended by Defendants that this Court might consider upholding the trial court on other grounds, Eugster explained in his Opening Brief why the Court could not, should not, do so.

This Reply will supplement Eugster's previous arguments as to the contentions.

II. REPLY ARGUMENT

A. Res Judicata and *Eugster* III.

Lawyers for the Defendants say Eugster cannot bring this case because he should have included it in *Eugster* III or *Eugster* I.

The rules of res judicata in Washington are as follows:

> A judgment has claim preclusive effect only if the proponent can show that two successive proceedings are identical in '(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.' [1]

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[1] Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805, 813 (1985). Kathleen M. McGinnis, *Revisiting*

Res judicata is applicable whenever there is "(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties." *W. Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997).

Eugster III is a Civil Rights Action under 42 U.S.C. § 1983 for violation of Eugster's fundamental constitutional rights of freedom of non-association and speech under the First and Fourteenth Amendments to the United States Constitution. WSBA Defendants contend the action in the present case – a Civil Rights Action for violation of Eugster's rights of procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution – should have been brought in *Eugster* III.

Their argument is that at the time *Eugster* III was commenced in early March 2015, "a grievance had been filed against [him] and an investigation had been commenced." Appellee's Brief 15. In saying this, Defendants are supposing that because of the grievance and the investigation Eugster had standing to make the claims herein in Eugster III. Eugster would not have had standing to bring the due process claims in *Eugster* III because they were not imminent. *Eugster* II.

But, let us look at the matter from another perspective. Would Eugster

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Claim and Issue Preclusion in Washington, 90 WASH. L. REV. 75, 81 (2015).

have had standing simply because a grievance had been filed against him and the bar was investigating the grievance? No, because a grievance and an attendant investigation is not base for a claim. As we know from *Eugster* II, an action against Eugster would have to be imminent. There is nothing in a grievance and an investigation which says the bar is going to file a proceeding against Eugster.

Further, it is abundantly clear than a grievance and investigation thereto is not an ongoing action. If it was, as Defendants mistakenly assume, Eugster's claim would have been dismissed pursuant to the *Younger* abstention doctrine. See the discussion below – **C. Younger Abstention Doctrine** – starting at page 5.

It is worth it to note that the grievance was filed in September 2014. Eugster responded to the grievance showing that he had not done what the grievant claimed he had done. Also, Eugster provided extensive documentation of what he had done. This documentation was expanded on two more occasions. There were no further requests for responses. The investigation of the grievance had come to an end. A new lawyer was brought into the case and a new investigation begun, only after, Eugster filed and served *Eugster* III. The actions were retaliation. Amended and Restated Complaint, ER 24, paragraphs 122-159.

Thus, there is no res judicata in connection with *Eugster* III. Eugster was

not obligated to file a claim based on the claim in this action in *Eugster* III.

B. Res Judicata and *Eugster* I.

For their second res judicata argument, WSBA Defendants contend Eugster cannot bring this case because he should have brought it in *Eugster* I, the discipline proceeding against Eugster which was decided over seven years ago.

Defendants' basis for this argument is something the trial judge "observed" in his order dismissing the state court case, *Eugster* IV. Appellee's Brief at 15. What the trial judge may have said he observed has absolutely no basis either in law or in fact.

First, the order was an order of dismissal because the judge concluded the Washington Superior Court lacked jurisdiction. Order, ER 19.

Second, what the judge said in the order is found in the Conclusions of Law section of the order commencing at ER 20.

Under CR 52(a)(5)(B) findings of fact and conclusions of law are unnecessary on decisions on motions under CR 12 or CR 56 "or any other motion."

> (5) When Unnecessary. Findings of fact and conclusions of law are not necessary: . . . (B) Decision on motions. On decisions of motions under rules 12 or 56 or any other motion, except as provided in rules 41(b)(3) and 55(b)(2). [The exceptions do not apply.]

The order here was based on a CR 12 motion. Findings of fact and conclusions of law are not necessary on summary judgment, CR 52(a)(5)(B), and, if made, are superfluous and will not be considered by the appellate court. *Duckworth v. Bonney Lake*, 91 Wash.2d 19, 21-22, 586 P.2d 860 (1978); *Dodd v. Gregory*, 34 Wash. App. 638, 641, 663 P.2d 161, *review denied*, 100 Wash.2d 1007 (1983). *See also, Donald v. City of Vancouver*, 43 Wash. App. 880, 719 P.2d 966 (1986).

C. Younger Abstention Doctrine.

Defendants say the Court should dismiss the case on the basis of the *Younger* abstention doctrine. Defendants make two arguments. First, that there was an ongoing WSBA proceeding against Eugster when this case was filed on December 22, 2015. ER 65. Second, they argue that Eugster's "objections may be litigated in his disciplinary proceeding." Appellee's Brief at 19. Both arguments are in error.

The *Younger* abstention doctrine is described as follows:

> In civil cases, therefore, *Younger* abstention is appropriate only when the state proceedings: (1) are ongoing, (2) are quasi-criminal enforcement actions or involve a state's interest in enforcing the orders and judgments of its courts, (3) implicate an important state interest, and (4) allow litigants to raise federal challenges. *See Sprint*, 134 S. Ct.

> at 593–94; *Gilbertson*, 381 F.3d at 977–78.

Readylink Healthcare, Inc. v. State Comp. Ins. Fund, 754 F.3d 754, 759 (9th Cir., 2014).

Defendants' "ongoing" proceedings argument fails completely because there were no ongoing proceedings filed against Eugster when this case was filed. ER 65. Additionally, there were no "ongoing" proceedings filed when Eugster's Amended and Restated Complaint was filed on March 3, 2016. ER 24.

> Each element must be satisfied, *AmerisourceBergen*, 495 F.3d at 1148, and the date for determining whether Younger applies "is the date the federal action is filed," *Gilbertson*, 381 F.3d at 969 n. 4.

Id.

The ongoing state proceedings requirement is not met. This rule is tested at the time the action is brought. A proceeding is not ongoing, if was not going on at the time of the filing. Further, there is no authority which indicates that a court can claim its jurisdiction is lost because the state started a proceeding after the filing. In this regard, no proceeding had been commenced against Eugster at the time of the filing. Indeed, the proceeding began when a Formal Complaint was served on Eugster. The Formal Complaint was not filed until June 16, 2016. Add.

at 1. See Eugster's Motion to Take Judicial Notice, Appendix 1.

Defendants contend that because an investigation was taking place at the time the complaint herein was filed, the "ongoing" proceeding requirement was met. However, an investigation is not a proceeding. This was addressed in *Mulholland v. Marion Cnty. Election Bd.*, 746 F.3d 811 (7th Cir., 2014). There, the court said:

> The possibility that a state proceeding may lead to a future prosecution of the federal plaintiff is not enough to trigger *Younger* abstention; a federal court need not decline to hear a constitutional case within its jurisdiction merely because a state investigation has begun. *See Steffel v. Thompson*, 415 U.S. 452, 454, 472, 94 S. Ct. 1209, 39 L. Ed.2d 505 (1974) (*Younger* does not prevent federal declaratory relief "when a state prosecution has been threatened, but is not pending").

Id. at 817.

Second, Eugster is not allowed to raise his federal challenges in the Discipline Proceeding against him. As the records in the WSBA discipline action show, Eugster is not able to raise his Civil Rights claims in the discipline proceeding. Eugster's Motion for Judicial Notice filed in conjunction with the filing of this Reply. See Eugster's Motion to Take Judicial Notice 1 - 6 and the items listing therein in the Appendix at the pages cited.

D. Violations of Due Process.

WSBA Defendants argue the Eugster "has failed to state a valid claim for relief by not identifying any procedural deficiency within Washington's lawyer discipline system, let alone a deficiency of constitutional magnitude." Appellee's Brief at 20. This argument has no basis. The system is replete with due process deficiencies as laid out in the Amended and Restated Complaint.

Pursuant to Fed. R. Civ. P. 12(b)(6), all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). *See also, Warren v. Fox Family Worldwide*, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003).

Eugster provides extensive and specific allegations which must taken as true for the purposes herein as to considerable due process failures of the WSBA Washington Lawyer Discipline System. Amended and Restated Complaint, ER 24 and following pages, paragraphs 16 - 191. The allegations also describe situations in which it is clear that the Supreme Court does not allow any independent decision making concerning these matters. *Id.; see especially*, paragraphs 116 - 121.

E. Eugster's Claims are Ripe.

All of Eugster's claims are ripe. See discussion immediately above and

Eugster's Amended and Restated Complaint ER 24, paragraphs 16 - 191, especially paragraphs 116 - 121 and the Counts in the complaint, pages 50 - 58. Also, Eugster's claim for damages and other relief under the declaratory judgments count is certainly ripe. The allegations must be taken as true and damages for violation of the Civil Rights of Eugster may be "nominal." *Cummings v. Connell*, 402 F.3d 936, 942-43 (9th Cir. 2005). Nominal damages include token damages, let us say a $1.00. "Nominal damages" are defined as "[a] trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated." BLACK'S LAW DICTIONARY 447 (19th ed. 2009).

III. CONCLUSION

The Court should reverse the trial court.

December 22, 2016.

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PROOF OF SERVICE

I hereby certify that on December 22, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following at their email addresses.

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December 22, 2016.

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