No. 34345-6-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STEPHEN KERR EUGSTER,

Appellant,

vs.

WASHINGTON STATE BAR ASSOCIATION, *et al.*

Respondents.

REPLY TO ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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FOREWORD

The WSBA's Answer to the Petition for Discretionary Review (Answer), consists of multiple fallacies of logic. Perhaps the most significant fallacy of logic has to do Petitioner's fundamental basis for the Petition. Eugster says the Court of Appeals exceeded its appellate jurisdiction. The WSBA does not deny this. Rather, the WSBA lawyers ignore the point.

WSBA defends itself by going off on a logic of its own. The WSBA begins its Answer to the Petition with a fallacy of logic - a Fallacy of Omission known as Stacking the Deck. The WSBA stacks the deck in its favor by purposely ignoring the fundamental question, whether the Court of Appeals acted outside the scope of its appellate jurisdiction. RCW 2.06.080 ("the court shall have exclusive appellate jurisdiction in all cases except. . . .").

Eugster's Reply to the Answer will follow its headings and subheadings (in quotes).

EUGSTER'S REPLY

I. "INTRODUCTION AND IDENTITY OF RESPONDENT"

At the outset of their Answer, lawyers for the WSBA Respondents, introduce their logic of the matter at hand. They completely ignore

Eugster's logic: that the Court of Appeals acted beyond its appellate jurisdiction. Instead, they say the case is about "settled principles of law that were properly applied, and do not warrant discretionary review." Answer at 1. The lawyers for the WSBA are going to tell us about the settled principles (but not really as we shall see), but they are not going to tell us what their position is concerning the Court of Appeal's violation of action in excess of its appellate jurisdiction.

Thus begins the Respondents' fallacies of logic - the first is a Fallacy of Omission known as Stacking the Deck.[1] It is a deliberate deception rather than an accident of logic, matters which prove a point are simply ignored. The fallacy is like the Straw-Man Argument, the attempt to prove an argument by failure to acknowledge the opponent's argument.

II. "COUNTER STATEMENT OF THE ISSUE"

In this part, the WSBA attorneys do what they have said they were going to do.

The WSBA lawyers say:

> "Whether discretionary review should be denied when Eugster fails to address any of this Court's mandatory grounds for such review and he is challenging (1) the Court of Appeals' well-established authority to affirm on an alternative ground and

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[1] *See* L. Kip Wheeler, LOGICAL FALLACIES HANDLIST, https://web.cn.edu/kwheeler/fallacies_list.html (2017/08/15). The Handlist in contained in the Appendix hereto at 22.

(2) the routine application of res judicata to a claim that should have been raised in a prior proceeding." Answer 1.

In this, the Respondent lawyers tell what they are going to do. They are going to move the Court away from the main issue – whether the Court of Appeals violated its jurisdiction, its appellate jurisdiction. This they do with Stacking the Deck and Straw Man fallacies of logic.

The logic of the Petition for Discretionary Review is grounded in the Issues presented in the Petition. These are restated with corrections as shown as follows:

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 court's appellate jurisdiction concluded]?

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, 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 the authority to apply res judicata to a proceeding which has not been determined to have jurisdiction? For there

to be res judicata, it must be established the WSBA Discipline System had jurisdiction to consider the case Eugster was supposed to have brought his concerns to.

III. "STATEMENT OF THE CASE"

The WSBA lawyers' "Statement of The Case", in its purpose and entirety, is a Fallacy of Relevance, the fallacy appeals to evidence, examples, information which is not relevant to the Argument.

The purpose of the Statement of the Case is to create in the mind of the Court that Eugster is quite a bad fellow because of his cases, pro se and otherwise, involving the WSBA. The idea sought to be conveyed is similar to the quotation Chief Judge George Fearing placed at the beginning of his opinion in the case. "*Endless litigation leads to chaos.*"[2] The quotation is a fallacy of logic, a Component Fallacy known as Slippery Slope, if A happens, B . . X, Y, and Z will happen.

The Statement of The Case, in its entirety and in its purpose, is to mount a Fallacy of Relevance consisting of a Personal Attack

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[2] *Schroeder v. 171.74 Acres of Land, More or Less,* 318 F.2d 311, 314 (8th Cir. 1963) (emphasis added). *Eugster v. Wash. State Bar Ass'n,* No. 34345-6-III, Court of Appeals of Washington, Division Three, 198 Wn. App. 758; 2017 Wash. App. LEXIS 1024, May 2, 2017, Filed, Modified by, Motion granted by *Eugster v. Wash. State Bar Ass'n*, 2017 Wash. App. LEXIS 1308 (Wash. Ct. App., June 6, 2017) Reconsideration denied by *Eugster v. Wash. State Bar Ass'n,* 2017 Wash. App. LEXIS 1306 (Wash. Ct. App., June 6, 2017).

(*Argumentum Ad Hominem*) against Eugster. Here is what the lawyers say – "This case is one of multiple lawsuits Eugster has brought against the WSBA and its officials in recent years, ever since being disciplined for professional misconduct as a lawyer." "One year later. . . Eugster filed suit against the WSBA attacking the discipline system." "In 2015, Eugster filed suit against the WSBA again. . ." "Eugster then initiated this lawsuit against the WSBA and three WSBA officials." "In the meantime, Eugster has filed and pursued multiple additional lawsuits against the WSBA and its officials. . . ." See Answer, pages 1 - 5.

Referring to *Caruso and Ferguson v. WSBA et al*, No. 2:17-cv-00003, 2017 WL 19570777 (W.D. Wash. May 12, 2017) (The case is *Caruso v. Wash. State Bar Ass'n*, No. 2:17-CV- 00003, 2017 WL 1957077 (W.D. Wash. May 11, 2017), appeals docketed, No. 17-35410 (9th Cir. May 12, 2017), No. 17-35529 (9th Cir. June 26, 2017), the lawyers tell us:

> Most recently, the Western District of Washington sanctioned and awarded fees against Eugster for asserting a frivolous due process claim akin to the one he alleges here, involving "vague claims of bias without specific facts." *Caruso*, 2017 WL 1957077, at *4.

Answer at 5.

The fees against Eugster were gained by the WSBA because of a fraud on the District Court perpetrated by the lawyers for the WSBA. The pleading in which the fraud first appears is found in Plaintiff Caruso's

Response to Motion to Dismiss and Opposition to Plaintiffs' Motions for Summary Judgment and Preliminary Injunction. Appendix 133. Eugster has appealed the order against him. *Eugster v. WSBA*, No. 17-35529 (9th Cir. June 26, 2017). On August 4, 2017, Eugster filed a Response to Motion to Consolidate the two appeals. The Response explains that the lawyers for the WSBA perpetrated a fraud on the District Court and that is one reason why consolidation of the appeals will not work. Response to Motion to Consolidate, Appendix 1.

IV. "ARGUMENT"

A. "The Court Need Not Appoint a Substitute Panel to Hear Eugster's Challenges to Routine, Settled Procedural Issues."

Having put their Stacking the Deck and Slippery Slope fallacies of logic into the mind of the Court and others who assist in the decision making and opinion writing, the lawyers for the WSBA dismiss the need to use WASH. CONST. art. IV, § 2(a), with this:

> [Eugster] identifies no valid basis for appointing substitute justices case. Eugster's petition raises only issues relating to routine and settled principles of legal procedure, not issues that are personal to any of the Justices of this Court.

Answer at 6.

The lawyers know better. The Justices of this Court cannot decide this case. The case is about the application of the Washington State Constitution, and the limit placed on appellate jurisdiction and statute on

the Court of Appeals. The case is not about "only issues relating to routine and settled principles" as the lawyers would have us believe under their Stacking the Deck and Slippery Slope fallacies of logic.

And, there is more to be said about whether the Court can avoid art. IV, § 2(a).

1. A Person Cannot Be a Judge in His Own Case.

The Court cannot decide the case. *Nemo Judex In Causa Sua* (Or *Nemo Judex In Sua Causa*). These legal maxims "mean[], literally, 'no-one should be a judge in his own cause.' It is a principle of natural justice that no person can judge a case in which they have an interest."[3]

This remains a principle of law in the State of Washington. The Court cannot be the judge in its own case. *State ex rel. Beam v. Fulwiler*, 76 Wash. 2d 313, 456 P.2d 322 (1969); *see also, State ex rel. Barnard v. Board of Education of City of Seattle*, 19 Wash. 8, 17, 52 P. 317, 320 (1898).

The Court would be a judge in its own case because in *McCleary v. State*, 173 Wash. 2d 477, 269 P. 3d 227 (2012) (*McCleary*), the Court is violating the Washington Constitution because it too, just as the Court of

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[3] *Nemo iudex in causa sua* - Wikipedia, https://en.wikipedia-.org/wiki/Nemo_iudex_in_causa_sua.

Appeals has done, is exercising power beyond the reach of its appellate jurisdiction. Supreme Court, WASH. CONST. art. IV, § 4; Court of Appeals, WASH. CONST. art. IV, § 30 and RCW 2.06.080.

2. *McCleary v. State.*

The lawyers were made aware of the problem the Justices have regarding the limit of appellate jurisdiction in *McCleary*. Eugster pointed out the Court had a conflict in the case because of the position it was taking in retaining jurisdiction after the case was decided in violation of its limited appellate jurisdiction. See the discussion the Court's role in *McCleary* in the Eugster's Petition for Discretionary Review. Appendix 33.

The WSBA did not mention this discussion. They were aware of the issue because they have told the Court that one of Eugster's lawsuits is *Eugster v. Supreme Ct. of the State of Wash.*, No.17-2-00228-34 (Thurston Cnty. Super. Ct. Feb. 3, 2017) (voluntarily dismissed by Eugster). A copy of the complaint can be found in the Appendix at 54. The main issue raised in the complaint is the Court's violation of its jurisdiction. It is acting as though it has original jurisdiction because it is acting outside of its authority.

Despite the non-suit, Eugster will pursue this matter further.

3. Violations of Code of Judicial Conduct and Law.

The Court must utilize WASH. CONST. art. IV, § 2(a), it does not have a choice.

The Washington Code of Judicial Conduct, CJC RULE 1.1, Compliance with the Law, provides: "A judge shall comply with the law, including the Code of Judicial Conduct. 'Law' encompasses court rules as well as statutes, constitutional provisions, and decisional law."

Judges of the Supreme Court are required to take an oath of office. WASH. CONST. art. IV, § 28:

> Every judge of the supreme court, and every judge of a superior court shall, before entering upon the duties of his office, take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington, and will faithfully and impartially discharge the duties of judge to the best of his ability, which oath shall be filed in the office of the secretary of state.

See also, WASH. CONST. art. IV, § 30, and RCW 2.04.085 for the oath judges of the Court of Appeal must take:

> I do solemnly swear (or affirm, as the case may be), that I will support the Constitution of the United States and the Constitution of the State of Washington, and that I will faithfully and impartially discharge the duties of the office of judge of the court of appeals of the State of Washington to the best of my ability.

The justices of the Washington Supreme Court in *McCleary v. State* are violating WASH. CONST. art. IV, § 4 because, by retaining jurisdiction in the case, they are exceeding the Court's appellate jurisdiction. ("The supreme court shall have original jurisdiction in habeas corpus, and quo

warranto and mandamus as to all state officers, and appellate jurisdiction in all actions and proceedings, . . .") *Id.*

The judges of the Court of Appeals in this case have also violated its appellate jurisdiction. RCW 2.06.030 provides in pertinent part:

> The court shall be vested with all power and authority, not inconsistent with said rules, necessary to carry into complete execution all of its judgments, decrees and determinations in all matters within its jurisdiction, according to the rules and principles of the common law and the Constitution and laws of this state. Subject to the provisions of this section, the court shall have exclusive appellate jurisdiction in all cases except. . . . [Emphasis added.] [The exceptions do not apply.]

Washington State Constitution – Original and Appellate Jurisdiction, Separation of Powers. "The judicial power of the state shall be vested in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may provide." WASH. CONST. art. IV, § 1. The Supreme Court has been vested with defined parts of "judicial power." The Supreme Court "shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers" and "appellate jurisdiction in all actions and proceedings, . . ." WASH. CONST. art. IV, § 4.

The concept of "appellate jurisdiction" has long been known in American jurisprudence. *See, e.g.*, U. S. CONST. art. III, § 2.

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). There, the court said:

> 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." *Id.*

The United States Constitution is illustrative of judicial power and how this power is separated into parts. "In *Scott v. Sandford*, 60 U.S. 393, 401, 15 L. Ed. 691, 699 (1857) it was held that 'neither the legislative, executive nor judicial Departments of the Government can lawfully exercise any authority beyond the limits marked out by the Constitution.'" Fred L. Fox, *Separation of Powers*, 5 WASH. & LEE L. REV. 185, 186 (1948).

Judge Fox, continued with explanation of separation of the judicial power, and using *Kilbourn v. Thompson*, 103 U.S. 168, 190-191, 26 L. Ed. 377, 387 (1881), further elaborated on separation of power:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers in trusted to Government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and-that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the

power appropriate to its own department and no other. [Emphasis added.]

B. "Eugster Fails to Identify, Let Alone Demonstrate, Any Valid Basis for Discretionary Review."

WSBA lawyers say: "Even if the Court proceeds to consider Eugster's Petition despite his failure to address the governing standards, it still should conclude that none of the bases for discretionary review are satisfied." Answer 8. This statement is a fallacy of logic. It assumes Eugster's Petition failed to address the bases for discretionary review.

1. "The Court Of Appeals' Decision To Affirm On The Alternative Ground Of Res Judicata Does Not Conflict With Precedent."

The lawyers for the WSBA say that the Court of Appeals can approve a trial court's decision based on "any ground" or "any theory." This is not accurate. The "on any ground or any theory" concept requires a record in the trial court. The Appellate Court does not have a right to make a record, to decide facts, to decide the law as to a record it purports to have made.

The lawyers have failed to disclose the requirements which must be met for an affirmance on any theory or any ground. These terms are limited to the record of the trial court. The Court of Appeals cannot, under appellate jurisdiction, make trial court decisions as to what the record is. The record must be the source of "any theory or any ground" of the

decision.

The lawyers for the WSBA have an interesting self-important way of making their arguments. For example, they say, "[b]ut it is a well-established general rule of appellate practice" in Washington that an appellate court may affirm a trial court ruling on "any theory," even if different from what was relied on by the trial court. They cite *Sprague v. Sumitomo Forestry Co.*, 104 Wash. 2d 751, 758, 709 P.2d 1200 (1985); yet, the case requires a record.

> It is a general rule of appellate practice that the judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge. *Cheney v. Mountlake Terrace*, 87 Wash. 2d 338, 552 P.2d 184 (1976). Although the jury verdict cannot be upheld under the resale method of determining damages, we find that the record supports the verdict under the alternate method of establishing damages, computed by measuring the difference between the market price and the contract price as provided in RCW 62A.2-708. [Emphasis added.]

The WSBA lawyers cite *Nast v. Michels*, 107 Wash. 2d 300, 308, 730 P.2d 54 (1986). There, the court said:

> Although the PDA does not control the copying charge issue, an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court. *Reed v. Streib*, 65 Wash. 2d 700, 709, 399 P.2d 338 (1965). *Id.*

The WSBA also cites *Hannum v. Friedt*, 88 Wash. App. 881, 889–90, 947 P.2d 760 (1997) (affirming dismissal for failure to state a claim even though trial court dismissed on the basis of immunity). The

court said:

> The trial court dismissed Hannum's suit against Gerrish on summary judgment based on Gerrish's absolute immunity from suit. Although dismissal of the claim by summary judgment was correct, the proper ground for dismissal was Hannum's failure to state a claim upon which relief could be granted. We can affirm on any grounds established by the pleadings and supported by the proof. [Emphasis added.] *Id.*

" We can affirm on an alternate theory if it is established by the pleadings and supported by proof." *State v. Collins*, 110 Wash. 2d 253, 258 n. 2, 751 P.2d 837 (1988). *See also, State v. Marks*, 95 Wash. App. 537, 977 P.2d 606, 607 (1999).

The WSBA lawyers want the court to uncritically look at what they say. They look at the case in a way which suits them best, but it is wishful thinking. They desire to have the Court adopt their wishful thinking. Sometimes, it is quite awful. *See* Response to Motion to Consolidate. Appendix 1.

The WSBA lawyers claim "Eugster ignores this precedent" and that under RAP 12.2 an "'appellate court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require.'" Answer 9. The lawyers claim RAP 12.2 allows the court to overlook the rules under which it conducts its constitutional work. They want this court to ignore the shear incontrovertible fact, the court does not have authority to act in excess of

its jurisdiction, which is not original jurisdiction, rather it is appellate jurisdiction. WASH. CONST. art. IV, § 6.

"Eugster also argues that the Court of Appeals erred in determining that his lawsuit is barred under the res judicata doctrine. The lawyers have no idea what they are talking about. However, they would like the court to agree with them, Eugster should have brought his claims up at the time he was disciplined in commencing in 2005 and finally ending when he was reinstated in 2011. Eugster did not know at the time the WSBA Washington Lawyer Discipline System was so unfair as it was, in and of itself, a violation of a lawyer's right under the Fifth Amendment to procedural due process of law. This was fact asserted by Eugster in his complaint. Appendix 86.

This brings us to this issue: How can the court claim Eugster was bound to have brought the issue up to the Hearing Officer and keep at it throughout his experience with the hearing officer, the review committees, the Disciplinary Board and the Supreme Court. Where are the facts, what does the record say, what does Eugster's complaint say?

The Court of Appeals has no power to claim res judicata, because the court supposedly from which the "res judicata" flowed, did not have jurisdiction. Or to put it another way, the court even if it could do what it did (try the case as if it had original jurisdiction), would have a trial on the

issue of the constitutionality of the system.

2. "Eugster Raises Settled Issues of Appellate Procedure and Preclusion, Not Significant Constitutional Questions."

Surely proper enforcement of limitations of "appellate jurisdiction" is a significant question under the Washington constitution. It is even more significant because of the retention of jurisdiction in spite of the limitation of appellate jurisdiction. The court is violating separation of power under the Washington constitution. Under the constitution, the power of a court on appeal does not have constitutional power to exercise original jurisdiction.

3. "Eugster's Appeal Does Not Implicate a Substantial Public Interest."

The appeal implicates a substantial public interest regarding the implications of the Court of Appeals or the Supreme Court using a power neither has. One must consider: What happens when the Supreme Court decides to retain jurisdiction? The Court moves into the political realty and uses its power to dictate to the Washington Executive and Legislature what its political power says things should be like. Political power on an arbitrary basis. The implications are frightening. The concern regarding tyranny by the court is now a part of the jurisprudence of the Supreme Court and the Court of Appeals.

V. "CONCLUSION"

The WSBA's Conclusion is the product of fallacies of logic and an effort to gain the court's attention, just as Chief Judge Fearing began his opinion with "*Endless litigation leads to chaos.*"

EUGSTER'S CONCLUSION

The Court must impanel a temporary Supreme Court under WASH. CONST. art. IV, § 2(a) for the purpose of determining whether the Petition for Discretionary Review should be granted.

Even if the court believed the Court of Appeals had a right to affirm on any ground, including grounds, which are not a part of the trial court record, it cannot do so without first addressing the issue of whether the WSBA Lawyer Discipline System was, or was not, in violation of Eugster's right to due process of law under the Fifth Amendment.

An affirmance based on "any theory," "any ground," requires the ground based on the record and proof before the court. Here, the court has gone outside of the record and assumed a fact to be in existence – that the WSBA Lawyer Discipline System did not violate Eugster's Fifth Amendment fundamental right to the procedural due process of law.

Coming back to Judge Fearing's beginning quotation -- *"Endless litigation leads to chaos*" – one must conclude Judge Fearing and the concurring judges have taken the quotation and have turned it into the rule of the case. They have decided that when the WSBA commences a

disciplinary action as it did regarding Eugster, Eugster must raise his constitutional concerns in his discipline proceeding. Because he did not, he cannot raise them now. .

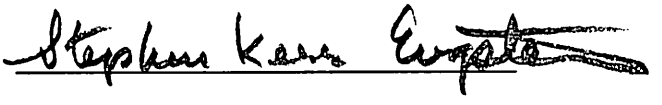
They are saying "endless litigation" consists of the action brought against Eugster and the claim which Eugster could have raised. Thus, in Eugster's case and every other case involving the same set of facts, "chaos" is avoided.

Or stated another way, the rule established by the Court of Appeals is this: A lawyer cannot bring a claim against the WSBA unless she brings it in the first discipline proceeding brought against her by the WSBA.

Surely, WASH, CONST. art. IV, Section 2(a) will be acknowledged as the step this Court must take at this point in the proceedings.

August 16, 2017.

Respectfully submitted,



Stephen Kerr Eugster, WSBA # 2003
Appellant, Pro Se

PROOF OF SERVICE

I at this moment certify that on August 16, 2017, by previous agreement of counsel, I emailed, the preceding document including its Appendix (which follows this Proof of Service to counsel listed below at their respective e-mail addresses. I also certify that I filed the preceding document including its Appendix electronically with the Clerk of the Supreme Court of the State of Washington.

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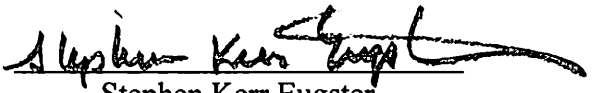

Stephen Kerr Eugster

APPENDIX