SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STEPHEN KERR EUGSTER, Plaintiff, v. WASHINGTON STATE BAR ASSOCIATION, *et al.*, Defendants	No. 18-02-00542-1 RESPONSE TO DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. MY INTRODUCTION

Defendants approach of their motion to dismiss is classic. It follows the same courseI used by the defendants in each of the cases which they have been involved in. The first thing they do is to make sure that the trial court understands exactly what opinion they have of me. In every case they make sure that the court knows about the disciplinary action against me which resulted in a suspension for 18 months from the practice of law. They make it known what the details of the disciplinary action were. Generally, this so-called "contextual evidence" is all permissible and welcome. It is nothing but an ad hominem attack on me. They want to be sure the court knows that I am a person with the stigma of having been disciplined by the Washington

Eugster Law Office
2418 West Pacific Avenue
Spokane, Washington 99201-6422
(509) 624-5566 / Eugster@EugsterLaw.com.

State Bar Association. None of this, of course, it is relevant. All of this, of course, is a violation of the rules of professional conduct.

The second thing they do is to make sure that the court thinks that I am the one responsible for bringing the cases that I have brought. For the time being the cases which I am talking to talking about our Eugster II, Eugster III, Eugster IV, and Eugster V. These cases were not a part of a series, each was conditioned upon a purpose which had be pursued in order to protect my rights.

But here is the real story. In March 2015 I filed an action against the defendants asserting that the case of *Lathrop v. Donohue*, 367 US 820 (196), the case which upheld in a plurality opinion that an Integrated Bar Association like that of the Washington State Bar Association did not violate a lawyers First Amendment right of freedom of association and in my case, non-association.

As soon as the case was filed, within a few days, the WSBA informed me that it was going to assign a new lawyer to work on a grievance that had been filed against me in September 2014, and that it was going to reinstitute an investigation of the grievance. That went on until late in the fall of 2015 at which time the WSBA informed me that they were possibly going to recommend to a review committee of the disciplinary board that the grievance go to hearing before a WSBA hearing officer. To protect myself, I filed an action in Superior Court in Spokane County claiming that the Bar Association was violating my civil rights.

The case was interesting to me because the Bar Association had always taken the position that the Superior Court of the state of Washington did not have any jurisdiction over anything

having to do with the Bar Association lawyer discipline. That, according to Bob Weldon, the former general counsel to the Bar Association, was an axiomatic truth. I know the basis for that truth. It was nothing more than a legal fiction, but one that apparently for years no one had questioned. The court of appeals overruled the trial court and held that Superior Courts in Washington have concurrent jurisdiction over civil rights actions under 42 U.S.C.

When it became imminent that the Bar Association was indeed going to request the review committee of the disciplinary board to order the grievance to hearing, I filed an action in District Court in Spokane asserting pretty much the same allegations I had asserted in the Superior Court sans the claim for damages. The point of this was that I was not doing anything other in bringing these cases than trying to protect my constitutional rights.

Another aspect of the defendant's approach to the has been to ignore the obvious facts of the evolution of the Washington State Bar Association. Whether the Bar Association is acting constitutionally or unconstitutionally regarding the rights of its members depends on what the Bar Association is. Up until January 1, 2017, the Bar Association was an association of lawyers only. After January 1, 2017, the Bar Association became an integrated association of lawyers, Limited Practice Officers, and Limited License Legal Technicians. The constitutional issues concerning that grouping of members were different, is different, from the constitutional issues of an Integrated Bar Association. The constitutional issues, under those circumstances, will be tested under strict scrutiny, that is the infringements will only be allowed if the court determines that the infringements can be justified under strict constitutional scrutiny. Of course, the Bar Association is extremely afraid of this. Thus they have always relied on convincing the court; I hardly know how they did this: into thinking that nothing has changed and that every one of the

cases I have brought and all cases which I might bring are all controlled by an entirely strange and sophomoric notion of what the standards of res judicata are.

Another part of their approach is to spend a good deal of time convincing the court that if the case was dismissed by the court that means that the case has decided the issue that I raised in the case and that the decision can be used for purposes of res judicata. This is highly frightening because not one of the decisions of a court I was before consisted of a decision on the merits. You cannot say that an order has res judicata effect unless the decision rendered by the court was on the merits. Even case three is not a decision on the merits of anything other than the court's determination that it would not overrule *Lathrop v. Donahue*, *supra.*

Well so it goes, I trust the court will have an open mind even though I bear quite a stigma as far as the Washington State Bar Association and its leadership and lawyers are concerned, and which they surely want everyone to know about even though their conduct is illogical and violates law because it is not relevant.

II. DEFENDANTS' "INTRODUCTION"

See my Declaration filed herewith.

III. DEFENDANTS' "BACKGROUND AND PROCEDURAL HISTORY"

See my Declaration filed herewith.

IV. STANDARD OF REVIEW

I find the standard of review defendants have suggested for a CR 12(b)(6) motion to be a bit slim. Thus. I offer a better one:

Joint Defendants motion to dismiss is brought under CR 12(b)(6). This rule has operated under specific standards adopted by Washington courts over time. In 2015, the Washington Supreme Court in *J.S. v. Vill. Voice Media Holdings*, L.L.C., 184 Wash.2d 95, 359 P.3d 714 (2015), opined in some detail about standards applicable motions to dismiss under CR 12(b)(6).

[1] "A trial court's ruling to dismiss a claim under CR 12(b)(6) is reviewed de novo." *Kinney v. Cook*, 159 Wash.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 329–30, 962 P.2d 104 (1998)).

[2] At this stage, "we accept as true the allegations in a plaintiff's complaint and any reasonable inferences therein." *Reid v. Pierce County*, 136 Wash.2d 195, 201, 961 P.2d 333 (1998) (citing *Chambers–Castanes v. King County*, 100 Wash.2d 275, 278, 669 P.2d 451 (1983); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wash.2d 959, 961, 577 P.2d 580 (1978)).

[3] "CR 12(b)(6) motions should be granted 'sparingly and with care' and 'only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.'" *Cutler v. Phillips Petrol. Co.*, 124 Wash.2d 749, 755, 881 P.2d 216 (1994) (quoting *Hoffer v. State*, 110 Wash.2d 415, 420, 755 P.2d 781 (1988)).

[4] "Dismissal under CR 12(b)(6) is appropriate only if 'it appears beyond a reasonable doubt that no facts exist that would justify recovery.' " *In re Parentage of C.M.F.*, 179 Wash.2d 411, 418, 314 P.3d 1109 (2013) (quoting *Cutler,* 124 Wash.2d at 755, 881 P.2d 216).

V. RESPONSE TO DEFENDANTS' ARGUMENT

A. Defendants Erroneously State The Statements Forming Basis Of All Claims In The Case Are Those Contained In Their Motion To Dismiss And Opposition To Plaintiffs' Motions For Summary Judgment And Preliminary Injunction.

Defendants are quite keen on this effort to make the fact of the case the statements in their Motion To Dismiss And Opposition To Plaintiffs' Motions For Summary Judgment And Preliminary Injunction. It is not true. They never miss an opportunity. Defendants begin their discussion of absolute privilege with a false statement. They say I have identified as the basis for all my claims "attorney statements in legal briefing submitted to the district court in *Caruso*." Defendants' Memorandum at 6. This is false, the statements so identified were and are merely a part of the Common Facts of my complaint and additional facts set forth in the cause of action parts. See Complaint paragraphs 32 – 36, and see each cause of action.

"The Complaint asserts several causes of action that all stem from the central allegation that the WSBA's Motion to Dismiss ("Motion") in *Caruso* contained defamatory statements that defrauded the court." Motion to Dismiss 2, lines 7-9.

"The statements Eugster identifies as the basis for all his claims are attorney statements in legal briefing submitted to the district court in *Caruso.* Motion to Dismiss 6, lines 23-24.

"Eugster's claims are also barred under the doctrine of collateral estoppel." "Again, all of his claims stem from the central allegation that the WSBA's Motion in *Caruso* contained defamatory statements about Eugster that defrauded the court. *See* Compl. at 5-9." Motion 7, lines 23-25.

B. Common Facts And Additional Facts In Each Claim Are The Basis For My Claims

My complaint sets forth five causes of action, each of which is based on "Common Facts" of the complaint, paragraphs 10 – 42, and the additional facts stated within the five causes of action stated in the complaint.

Also, my complaint details a conspiracy which culminated in finding a way to bring me into the case so that I could be used as the scapegoat in the case. One product of the conspiracy was Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction. The complaint also sets for facts that Defendants have been using the same approach in all previous cases in which I was the plaintiff. Defendants could not do the same in Caruso, so they conjured up their approach to the case so that I was brought into the case.

What was expressed in the Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction was a way to bring me into the case

C. Absolute Privilege

For the sake of argument let us assume the items contained in Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment and Preliminary Injunction are the only facts in the case.

Defendants set out what they believe are the standards applicable to the concept of absolute privilege:

> Such statements cannot form the basis of a subsequent, separate action because attorney statements in court filings that are "pertinent" to the lawsuit are absolutely privileged. *E.g.*, *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 1980) (noting such statements "are absolutely privileged and cannot form the basis for a damage action"). This privilege "is based upon a public policy" of giving attorneys "the utmost freedom in their efforts to secure justice for their clients." Id. This privilege "avoids all liability." Id.
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> For a statement to be pertinent, it need only have "some relation to the judicial proceedings" in which it was used and "any bearing upon the subject matter of the litigation." *Johnston v. Schlarb*, 7 Wn.2d 528, 540, 110 P.2d 190 (1941) (emphasis omitted). The statement need not even be legally relevant, and all doubts are resolved in favor of the speaker. Id. at 538-39.

Motion to Dismiss 6-7.

The standards include more than those expressed by Defendants.

In *McNeal* the court said "[t]he fact that statements made in pleadings are absolutely privileged does not mean that an attorney may abuse the privilege with impunity." 95 Wn2d at 267.

In *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 110, 796 P.2d 426 (1990) the court said "allegedly libelous statements, spoken or written by a party or counsel in the course of a judicial proceeding, are absolutely privileged if they are pertinent or material to the redress or relief sought, whether or not the statements are legally sufficient to obtain that relief.*McNeal,* 95 Wn.2d at 267." "A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation."

A statement is pertinent if it has some relation to the judicial proceedings in which it was used, and has any bearing upon the subject matter of the litigation. *Johnston v. Schlarb*, 7 Wash.2d 528, 540, 110 P.2d 190, 134 A.L.R. 474 (1941). The court went on:

> The privilege ... is confined to statements made by an attorney while performing his function as such. Therefore it is available only when the defamatory matter has some reference to the subject matter of the proposed or pending litigation, although it need not be strictly relevant to any issue involved in it. Thus the fact that the defamatory publication is an unwarranted inference from the evidence is not enough to deprive the attorney of his privilege.... On the other hand, the privilege does not cover the attorney's publication of defamatory matter that has no connection whatever with the litigation.
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> Restatement, supra § 586, comment c.

Demopolis v. Peoples Nat'l Bank of Wash., supra 59 Wn. App. 110

"The absolute privilege, while broad in scope, has been applied sparingly. 'Absolute privilege is usually confined to cases in which the public service and administration of justice require complete immunity.' " *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 177, 736 P.2d 249 (1987)(quoting *Bender v. Seattle*, 99 Wash.2d 582, 600, 664 P.2d 492 (1983)). The privilege does not extend to statements made in situations for which there are no safeguards against abuse. *Story*, 52 Wash.App. at 338-39, 760 P.2d 368. Thus, an absolute privilege is allowed only in "situations in which authorities have the power to discipline as well as strike from the record statements which exceed the bounds of permissible conduct."*Twelker v. Shannon & Wilson, Inc.*, 88 Wash.2d 473, 476,

Moreover, in the particular circumstances of this case, there are no safeguards to protect against an abuse of the absolute privilege. Here there could be no protection because the trial judge was taken in by the deceptive statements of Defendants. And, because the case is still subject to being overturned because of fraud on the court. Rule 60(d)(3).

Finally, what Defendants have done is not pertinent to the litigation. The Defendants sought to corrupt the litigation, they sought to deprive the court of its rightful authority.

D. Collateral Estoppel

Defendants say my "claims are also barred under the doctrine of collateral estoppel. There is no collateral estoppel because the court was without jurisdiction. The court had been defrauded. That fact is still subject to Rule (60)(d)(3). Also, the court made no findings of fact. These would be a necessity in such circumstances.

E. Failure to State A Claim

Defendants say "Eugster's Complaint also should be dismissed for failure to state a **valid claim** for relief. Each of Eugster's claims here requires proof of false statements as a necessary element. For defamation or false light invasion of privacy, a false statement is required. *See, e.g.*, *Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 640, 376 P.3d 430 (2016).

They go on "[s]imilarly, Eugster's claim for abuse of process is based on his contention that the WSBA "lied" and "failed to tell the whole truth . . . ." Compl. at 7-8.

And next "[f]inally, Eugster's claims for conspiracy and under 42 U.S.C. § 1983 are derivative claims, based on his claim that the WSBA conspired to defame him with false statements and in doing so violated his civil rights. Compl. at 8-9.

Defendants say "[a]s a matter of law, Eugster cannot establish that the statements at issue were false." There is no citation for this, and I have never heard it said before. Nor have I ever read anything like it.

Eugster complains that the WSBA characterized his conduct as "meritless" and "frivolous." Compl. at 6. It is nonsense to say the statements were not true because defendants claim these were fair and reasonable characterizations given Eugster's long history of unsuccessful suits against the WSBA. The court in *Caruso* has made no findings as such. Also, the *Caruso* decision remains subject to a Rule 60(d)(3) fraud on the court motion, and possible grant of Petitions for Rehearing En Banc.

Next, they say "Eugster also objects to the notion that he "enlisted" the two named plaintiffs for the *Caruso* lawsuit. I denied the statement in a declaration. And, the court made no finding of fact as to enlistment.

as in the prior suits. *Caruso* was the first case brought contending the WSBA following January 1, 2017, was an integrated bar association of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

They say, "But as multiple courts have determined, Eugster's claimed distinction—that the WSBA amended its bylaws to include limited-license practitioners as members and thus transformed into a new entity—is without merit and irrelevant to the substance of his claims. *See Caruso*, 2017 WL 1957077, at *2-3; *Eugster* VIII, 2018 WL 2187054, at *4-5." This statement is meaningless. It made no difference whether the bar was the same entity or a new entity (which by the way was not claimed by me). It was an integrated bar association of lawyers, Limited Practice Officers, and Limited License Legal Technicians.

F. WSBA and Littlewood Immunity

My claim for civil rights damages under 42 U.S.C. § 1983 is proper under the law. Each of the defendants, except the WSBA and Pacifica Law Group LLLP, is named individually and sued in his or her official capacity. See the Complaint paragraphs 5 through 8. And, see paragraph 74 – under color of law.

VI. CONCLUSION

In light of the preceding and the law, Defendants' Motion to Dismiss should be denied.

June 11, 2018.

Respectfully submitted,

Stephen Kerr Eugster WSBA# 2003

Eugster Law Office PSC