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SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR SPOKANE COUNTY

STEPHEN KERR EUGSTER, Petitioner, vs WASHINGTON STATE BAR ASSOCIATION (WSBA) (a legal entity under RCW 2.48.010); and PAULA C. LITTLEWOOD, WSBA Executive Director, Respondents.	Case No.: 17-2-04631-5 RESPONSE TO RESPONDENTS' MOTION FOR ATTORNEYS FEES

I. INTRODUCTION

The court dismissed the action and denied the petitioner's motion for summary judgment. Now the respondents seek attorneys' fees from petitioner under the Washington frivolous action statute, RCW 4.84.185. As will be shown, under the standards applicable to RCW 4.84.185, respondents are not entitled to what they seek.

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II. FACTS AND PROCEDURE

A. Petitioner

Petitioner is an active member of the WSBA who has a right to seek election to the WSBA Board of Governors. As an active member petitioner has a right to vote, hold office and otherwise participate in the affairs of the bar as provided by WSBA Bylaws. Eugster as a member may be appointed to serve on any committee, board, panel task force, act in bar matters, and hold office all as provided by WSBA Bylaws. Petitioner cannot pursue these rights unless he can communicate with his fellow members of the WSBA. See Declaration of Stephen K. Eugster.

B. Procedure

Petitioner filed a motion for summary judgment asserting he had a right to a declaratory judgment by the court under RCW Ch. 7.24. The issue before the court was whether Petitioner as an active member of the WSBA as a right to the names, congressional district, and email addresses of the active members of the WSBA. And, whether the Respondents must provide this information in electronic format and a data file which can be used in Microsoft Excel as requested by Petitioner. Petitioner also asserted that the WSBA has a policy regarding public records which it packages and makes available outside of the provisions of GR 12.4. The policy is referred to as the Member Data And Contact Information Policy. Petitioner asserts that the Member Data And Contact Information Policy violates Petitioner's right to equal

protection of the law under the Fifth and 14th amendments to the United States Constitution.

III. ISSUE PRESENTED

The issue presented by respondents' motion for fees under RCW 4.84.185 is whether the statute applies. It, decidedly, does not.

IV. DISCUSSION

A. Respondents Have A False Impression of RCW 4.84.185.

At the beginning of their Argument, Respondents set forth why they think they are entitled to fees and expenses under RCW 4.84.185. They assert:

> The WSBA should be awarded its attorney fees and expenses in this matter under RCW 4.84.185. That statute provides in pertinent part:
>
> > In any civil action, the court . . . may, upon written findings by the judge that the action . . . was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action....

In the paragraph which follows Respondents assert:

> The statute's purpose is to "discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases." *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974 P.2d 872 (1999) (internal quotes omitted). A lawsuit is frivolous for this purpose and warrants a fee award if "there are no debatable issues . . . and there is so little merit that the chance of

reversal is slim." *Id.* at 416. Respondent's Memorandum of Authorities in Support of Motion for Attorney Fees and Expanse[1] 3-4.

In the Conclusion to the Memorandum, Respondents say "Eugster's advancement of meritless claims and his failure to conduct a reasonable inquiry into the legal basis for those claims was in violation of RCW 4.84.185." Respondent's Memorandum 5.

Respondents are wrong. Respondents statements about RCW 4.84.185 are general. They give no hint of the standards applicable to the statute as developed by case law.

B. Respondents Ignore Standards of Law Developed in Connection with RCW 4.84.185.

Respondents ignore the standards concerning RCW 4.84.185 which have been developed by decisions of the Washington Supreme Court and Court of Appeals.

These standards are discussed in an article by Philip Talmadge; Emmelyn Hart-Biberfeld; Peter Lohnes, *When Counsel Screws Up: The Imposition and Calculation of Attorneys Fees as Sanctions*, 33 SEATTLE U. L. REV. 437, 449 (2010). The author's state:

> CR 11 's goal of deterring vexatious litigation is reinforced by RCW 4.84.185. [105] In enacting the statute, [106] the legislature expressed

[1] Herein "Respondents' Memorandum."

concern about the baseless claims and defenses confronting the courts. [107] It designed the statute to discourage frivolous lawsuits and to compensate victims forced to litigate meritless cases. [108] Unlike CR 11, the action must be frivolous in its entirety for the statute to apply. [109] If any claim has merit, then the action is not frivolous under RCW 4.84.185. [110] While the concept of "frivolity" may be amorphous, it is neither vague nor unconstitutional. [111] By contrast, CR 11 may apply to a single issue. [112]

The substantive standard for a frivolous action .under the statute largely mirrors the standard articulated in CR 11.[113] But unlike most CR 11 sanctions, the client, not the attorney, pays the sanctions imposed under RCW 4.84.185. [114] If the issue in the case is "debatable" and there is a rational argument under the law and the facts to support it, fees must be denied.[115] Similarly, issues of first impression are not frivolous.[116] The decision whether to award attorney fees for a frivolous lawsuit is within the trial court's discretion and will not be disturbed absent a clear showing of abuse. [117] [Footnotes omitted] [Emphasis added.]

C. Elaboration of the Standards

These standards will be discussed and elaborated upon in the following materials.

1. Frivolousness Must Be Entire

The primary requirement for RCW 4.84.185 is that the action must be frivolous in its entirety for the statute to apply. *State ex rel. Quick-Ruben v. Verharen*, 136 Wash. 2d 888, 903-04, 969 P.2d 64 (1998); *Biggs 1,* 119 Wash. 2d at 136; *Jeckle v. Crotty*, 120 Wash. App. 374, 85 P.3d 931 (2004). "The lawsuit or defense, in its entirety, must be determined to be frivolous and to have been advanced without reasonable

cause before an award of attorneys' fees may be made pursuant to the frivolous lawsuit statute, RCW 4.84.185" *Biggs v. Vail (Biggs 1)*, 119 Wash. 2d 129, 133, 134-37 (1992) (reviewing and interpreting the legislative history of RCW 4.84.185 (1991)).

2. The Action Is Not Frivolous If Any Claim Has Merit

If any claim has merit, then the action is not frivolous under RCW 4.84.185. *In re Cooke*, 93 Wash. App. 526, 530, 969 P.2d 127 (1999). *See also Biggs 1,* 119 Wash. 2d at 137 (finding that although three of four claims were frivolous, the action as a whole could not be deemed frivolous).

Eugster has raised several claims which have merit. You asked or asserted that the public record rule of GR 12.4 did not apply a member of the W SBA. It is certainly not frivolous to claim that members should have rights different from rights of the general public. A member has property rights which a member of the public does not have. A member needs to communicate with his fellow members to adequately and effectively communicate with those members on an efficient basis. Plaintiff needed the member lists to compute community communicate as a member of the board of governors of the WSBA or simply as a member who needed to bring things before the membership which might or might not benefit the members and the W SBA.

3. Issues Must Not Be Debatable

If the issue in the case is "debatable" and there is a rational argument under the law and the facts to support it, fees must be denied." *Bill of Rights Legal Found. v. Evergreen State Coll.*, 44 Wash. App. 690, 696-97, 723 P.2d 483 (1986). prevent for fees because one or more of the standards apply to the facts of the case and proficient respondents from making the fees claim.

4. Matters of The First Impression

Issues of first impression are not frivolous. *Collinson v. John L. Scott, Inc.*, 55 Wash. App. 481, 488, 778 P.2d 534 (1989) (holding that a claim of obstruction of view as nuisance not frivolous as one of first impression).

Eugster's complaint presents issues of first impression. It is a question of first impression as to whether GR 12.4 excluded a member of the Bar Association from access to the email addresses of W SBA. It is a matter of first impression as to whether the common law aspect of these matters should be applied in the state of Washington.

5. Issues of Substantial Public Importance

Issues of substantial public importance cannot be said to be frivolous. *Moorman v. Walker*, 54 Wash. App. 461, 465-66, 773 P.2d 887 (1989) (holding that a

claim of mother's representation of inability to conceive to be novel and of substantial public importance, thus not frivolous).

Eugster's complaint raises questions of substantial public importance concerning the W SBA. It is a matter of substantial public importance to ensure that members of the W SBA can effectively communicate with the members of the organization concerning matters important to the organization and the members served by the organization.

D. The WSBA Acknowledges RCW 4.84.185 Does Not Apply.

At pages 4 and 5 of their Memorandum Respondents acknowledge they do not have a meritorious claim under RCW 4.84.185. Respondents' Memorandum 4 and 5. In the paragraphs at 4 and 5, Respondents enter into discussions concerning the issues. The discussions show the issues were debatable, that there were counter-arguments to Respondents points of view. In any event, the arguments of counsel establish that under the standard discussed about there is no right to attorney fees under RCW 4.84.185. The claimed frivolously is not entire as to the case. Claims asserted certainly have merit. The matters are debatable. They are matters of first impression; they concern matters of substantial public importance.

Let us take a look at what Respondents are saying:

> First, as the WSBA explained in its motion to dismiss, a plain reading of GR 12.4 establishes that it is the exclusive remedy for obtaining WSBA records. In particular, the rule states that it "governs the right of public access to Bar records" and that "*all* records requests" for bar records "shall be submitted" to the WSBA's public records officer. GR 12.4(b), (e)(1) (emphasis added). Eugster was aware of this rule, and even invoked it previously to request the same records. App. at 1. His decision to simply ignore the rule demonstrates frivolity and warrants a fee award here. *See Kearney*, 95 Wn. App. at 417 & n.12 (fee award was warranted because plaintiff's case was contrary to "plain reading" of applicable statute).

Eugster asserted that GR 12.4 did not apply to members of the WSBA. He said member rights trumped GR 12.4. This is a matter of first impression. It is also a matter of substantial public importance.

> Second, Eugster's theory of a common law right to inspect WSBA records is contrary to binding precedent. As detailed in the WSBA's motion to dismiss, Washington courts have limited the common law right of inspection to ordinary corporations with shareholders, as opposed to quasi-public entities subject to governmental supervision such as the WSBA. *See State ex rel. Wicks v. Puget Sound Sav. & Loan Ass'n*, 8 Wn.2d 599, 602-03, 113 P.2d 70 (1941); *Save Columbia CU Comm. v. Columbia Cmty. Credit Union*, 134 Wn. App. 175, 193, 139 P.3d 386 (2006); Mem. at 9-10. This precedent directly foreclosed Eugster's theory of the case, further warranting a fee award here. *See Highland*, 149 Wn. App. at 313-14 (fee award was warranted because binding case law precluded plaintiff's legal theory "even if the context was slightly different").

Eugster asserted that the common law of Washington included the common law as to the rights of a member of an association to inspect membership records. He asserted the law of Washington should be advanced

to recognize the right to inspect and that the records should be provided in electronic format, Microsoft Excel for example.

> Third, any reasonable inquiry would have revealed to Eugster that the myriad foreign cases and business statutes he relied upon were inapplicable to the WSBA. Those authorities concern private stock corporations, shareholder meetings, and antiquated roles in old England (such as a "burgess" or "alderman")—not a mandatory bar association such as the WSBA. *See* Mem. at 7-10. Eugster even relied on a treatise that expressly disclaims any applicability to bar associations. *See* Resp'ts' Reply at 3 (discussing 6 AM. JUR. 2D *Associations & Clubs* Summary (2018)). A reasonable inquiry should have revealed to him that these authorities were inapplicable and his claims were baseless. *See Kearney*, 95 Wn. App. at 416-17.

It is highly debatable as to what a reasonable inquiry would reveal. Eugster does have ownership of the assets of the WSBA. *See, e.g., Associations and Clubs*, 6 AM JUR 2d § 23, 448 (1963). This gives him standing vis a vis the WSBA. Also, see this:

> All the members of a voluntary association are presumed to be equally interested in promoting the welfare of the association, and all should be accorded equal privileges in the association for these purposes. Hence, the. List of members of a society or club should be at proper times open to the inspection of all members, thereby affording to each of them an opportunity to aid in carrying out the object of the organization as set forth in its charter.

Id. 6 AM JUR 2d § 20.

V. CONCLUSION

Respondents have no right to attorney fees under RCW 4.84.185.

September 13, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on September 13, 2018, by previous agreement of counsel, I emailed the preceding pleading to the attorneys for Respondents to their email addresses as set forth below.

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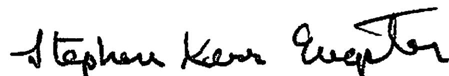

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