

No. 94733-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN KERR EUGSTER,
Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, et al.
Respondents.

ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. INTRODUCTION AND IDENTITY OF RESPONDENT

Petitioner Stephen K. Eugster (“Eugster”) fails to identify any basis on which this Court should accept review of his Petition for Review under Rule of Appellate Procedure (“RAP”) 13.4. Instead, Eugster challenges the Court of Appeals’ ability to affirm the dismissal of his lawsuit on a different ground than the trial court. He also questions whether res judicata may be applied to a claim he did not raise—but could and should have raised—in prior proceedings. These are settled principles of law that were properly applied and do not warrant discretionary review. This Court’s review is not needed to ensure the consistent application of the law, to answer any significant constitutional questions, or to serve the public interest. Eugster’s Petition for Review should be denied.

II. COUNTERSTATEMENT OF THE ISSUE

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

III. STATEMENT OF THE CASE

This case is one of multiple lawsuits Eugster has brought against Respondent the Washington State Bar Association (“WSBA”) and its

officials in recent years, ever since being disciplined for professional misconduct as a lawyer. In 2005, the WSBA charged Eugster with numerous counts of misconduct. *In re Disciplinary Proceedings Against Eugster*, 166 Wn.2d 293, 307, 209 P.3d 435 (2009) (“*Eugster I*”). A hearing officer concluded Eugster violated multiple rules of professional conduct and, in 2009, this Court suspended Eugster for 18 months. *Id.* at 307; 327-28. Eugster did not challenge the WSBA disciplinary system at that time.

One year later, after another grievance had been filed against Eugster, Eugster filed suit against the WSBA attacking the lawyer discipline system. *See Eugster v. Wash. State Bar Ass’n*, No. CV 09-357-SMM, 2010 WL 2926237, at *1-2 (E.D. Wash. July 23, 2010) (“*Eugster II*”), *aff’d*, 474 Fed. Appx. 624 (9th Cir. 2012). In particular, Eugster alleged that the discipline system violated his due process rights. *Id.* at *2. The United States District Court for the Eastern District of Washington dismissed the case, holding that Eugster lacked standing because he was not seeking “redress for an actual or imminent injury.” *Id.* at *8. The United States Court of Appeals for the Ninth Circuit (“Ninth Circuit”) affirmed. 474 Fed. Appx. at 625.

In 2015, Eugster filed suit against the WSBA again, this time challenging the constitutionality of mandatory bar membership and

licensing fees. *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722, at *2 (W.D. Wash. Sept. 3, 2015) (“*Eugster III*”), *aff’d*, No. 15-35743, 2017 WL 1055630, (9th Cir. Mar. 21, 2017), *cert. denied*, No. 16-1388, 2017 WL 2256164 (U.S. June 26, 2017). This time, Eugster alleged claims under 42 U.S.C. § 1983 and identified the structure of the disciplinary system as an example of the harm caused by compelled WSBA membership. *Id.* at *2, 4. The United States District Court for the Western District of Washington dismissed the complaint after finding that Eugster had “grossly misstate[d]” and “misconstrued” governing precedent. *Id.* at *5. The Ninth Circuit affirmed. No. 15-35743 at *1.

Eugster then initiated this lawsuit against the WSBA and three WSBA officials on November 9, 2015, in Spokane County Superior Court, again challenging the discipline system as unconstitutional, and seeking an injunction and damages under 42 U.S.C. § 1983 and state law. Pet. for Disc. Rev. (“Pet.”), Appendix (“App.”) at 6-7. The WSBA moved to dismiss, arguing that the superior court lacked jurisdiction to entertain a collateral attack against this Court’s discipline system, that Eugster’s claims were not justiciable because he lacked standing and the claims were not ripe, that Eugster failed to state a claim upon which relief could be granted, that res judicata barred the claims, and that the WSBA enjoys immunity from such claims. *Id.* at 7.

The superior court dismissed Eugster's lawsuit with prejudice. *Id.* at 62. The court dismissed all claims for damages based on General Rule 12.3, which grants immunity to the WSBA and its employees. *Id.* at 60. The superior court dismissed all remaining claims for lack of subject matter jurisdiction, ruling that this Court possesses exclusive jurisdiction over the discipline system. *Id.* at 60-61. The trial court also noted that constitutional claims previously have been raised in discipline cases, and concluded that Eugster had the opportunity to raise his constitutional objections with this Court in his prior discipline case. *Id.* at 61.

Eugster appealed. *Id.* at 57. The Court of Appeals affirmed the dismissal based on two narrow rulings. *Id.* at 3. First, the court concluded that superior courts have jurisdiction to consider claims brought under 42 U.S.C. § 1983 that challenge the lawyer discipline system in general rather than a particular, pending proceeding. *Id.* at 11, 13, 16. Second, the court held that Eugster's challenge was barred by res judicata because he could have asserted his same arguments during his earlier discipline proceeding in *Eugster I.* *Id.* at 18, 24. The Court of Appeals did not address the alternative grounds for dismissal of lack of justiciability, immunity, or failure to state a claim. *Id.* at 25.

Eugster now petitions this Court for discretionary review. Eugster first requests the appointment of a pro tempore substitute panel due to an

alleged conflict of interest. Pet. at 2. Eugster then argues that the Court of Appeals should have remanded the case rather than consider whether res judicata barred his claims. *See, e.g.*, Pet. at 8. He further argues that res judicata does not apply, both because he did not challenge the lawyer discipline system in his disciplinary proceeding and because the “system itself” was and is unconstitutional. *See, e.g., id.* at 9, 15.

In the meantime, Eugster has filed and pursued multiple additional lawsuits against the WSBA and its officials, all of which have been dismissed at the pleadings stage. *See Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016), *appeal docketed*, No. 16-35542 (9th Cir. July 5, 2016); *Eugster v. Wash. State Bar Ass’n*, No. 2:16-CV-01765 (W.D. Wash. Nov. 15, 2016) (voluntarily dismissed by Eugster); *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); *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). 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.

IV. ARGUMENT

A. **This Court Need Not Appoint a Substitute Panel to Hear Eugster’s Challenges to Routine, Settled Procedural Issues.**

Eugster first argues that this Court should appoint substitute justices to hear this matter. Pet. at 1. But he identifies no valid basis for appointing substitute justices in this case. Eugster’s Petition raises only issues relating to routine and settled principles of legal procedure, not issues that are personal to any justices of this Court.

Under the Washington Constitution, this Court is “empowered” to assign temporary judges when “necessary for the prompt and orderly administration of justice” Const. art. IV, § 2(a). As Eugster’s own cited authorities demonstrate, such substitution is appropriate when an issue presents a significant personal conflict for a panel member, such as a direct financial or interpersonal interest. *See Yelle v. Kramer*, 83 Wn.2d 464, 465-466, 520 P.2d 927 (1974) (case required review of an appropriation bill that would increase the Justices’ salaries); *In re Disciplinary Proceedings Against Sanders*, 135 Wn.2d 175, 178, 955 P.2d 369 (1998) (substitute panel required to review disciplinary proceeding against fellow Justice); *In re Disciplinary Proceedings Against Sanders*, 159 Wn.2d 517, 519, 145 P.3d 1208 (2006) (same).

Here, Eugster fails to explain how a substitute panel is necessary to the prompt and orderly administration of justice. He asserts only that the

justices of this Court have a conflict because his appeal raises issues of appellate jurisdiction. *See* Pet. at 2. Contrary to this assertion, Eugster’s arguments regarding appellate jurisdiction involve only routine and settled procedural matters that do not pose a conflict for this Court. Specifically, Eugster challenges the Court of Appeals’ decision to affirm on an alternative ground and its holding that res judicata barred his lawsuit. *See, e.g.*, Pet. at 8-9. These issues do not implicate any sort of personal conflict for the justices of this Court. Because there is no basis for appointment of a substitute panel, Eugster’s Petition should be decided by this Court and without delay.

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

Pursuant to RAP 13.4, this Court will accept a petition for discretionary review “only” if the Court of Appeals’ decision conflicts with Supreme Court or Court of Appeals precedent, or if the decision involves a significant constitutional question or an issue of substantial public interest. RAP 13.4(b). These are the sole bases upon which discretionary review will be granted. *Id.*

The party requesting review must not only state why review should be granted under one or more of the above grounds but also must support this assertion with argument. *See* RAP 13.4(c)(7). Eugster fails to

mention any of the grounds for discretionary review, let alone explain how any ground for review is satisfied. *See generally* Pet. Review should be denied for this reason alone. *See* RAP 13.4(c)(7) ; RAP 10.3(a)(6); *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (appellate court does not consider issues lacking reasoned argument).

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. First, the Court of Appeals' decision to affirm dismissal of Eugster's claims on the alternative ground of res judicata does not conflict with this Supreme Court or Court of Appeals precedent. Second, affirmance on an alternative ground, and the application of res judicata to claims that should have been previously raised, are routine procedural issues rather than significant constitutional questions warranting review by this Court. Third, review of this matter would only hinder rather than advance the public interest by wasting judicial and WSBA resources.

1. The Court of Appeals' Decision to Affirm on the Alternative Ground of Res Judicata Does Not Conflict with Precedent.

Eugster fails to identify any conflict with Supreme Court or published Court of Appeals precedent. Instead, Eugster merely asserts that the Court of Appeals was obligated to remand this case after it

concluded the superior court had jurisdiction over his 42 U.S.C. § 1983 claim. Pet. at 8, 11-12. But 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. *Sprague v. Sumitomo Forestry Co.*, 104 Wn.2d 751, 758, 709 P.2d 1200 (1985); *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986); *Hannum v. Friedt*, 88 Wn. App. 881, 889–90, 947 P.2d 760 (1997) (affirming dismissal for failure to state a claim even though trial court dismissed on basis of immunity).

Eugster ignores this precedent, and instead relies on RAP 12.2 and RAP 12.5 to argue that the Court of Appeals was required to remand. Pet. at 11-12. But these procedural rules do not support his contention. RAP 12.2 governs disposition on review and states that 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.*” (emphasis added). RAP 12.5 governs mandates and has no apparent relevance to this issue.

Eugster also argues that the Court of Appeals erred in determining that his lawsuit is barred under the res judicata doctrine. In particular, Eugster objects that his due process claim “was never decided” in his discipline proceeding. Pet. at 9, 15. As the Court of Appeals correctly

determined, however, res judicata bars litigation of issues that could and should have been litigated in prior proceedings but were not raised. Pet., App. at 21; *Berschauer Phillips Constr. Co. v. Mutual of Enumclaw Ins. Co.*, 175 Wn. App. 222, 228, 308 P.3d 681 (2013); see also *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc.*, 118 Wn. App. 617, 631 n.28, 72 P.3d 788 (2003) (noting res judicata applies “to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time” (internal quotations omitted)). Constitutional challenges may be raised during the course of disciplinary proceedings. See *In re Disciplinary Proceedings Against Pfefer*, 182 Wn.2d 716, 724-726, 344 P.3d 1200 (2015). Thus, the Court of Appeals’ conclusion that Eugster could and should have brought his due process challenge to the WSBA disciplinary system during his disciplinary proceeding in *Eugster I* is consistent with precedent. Pet., App. at 20-21.

In sum, Eugster does not identify any conflict with Supreme Court or Court of Appeals precedent to justify discretionary review. See Pet. at 10-14. Accordingly, review is not warranted under RAP 13.4(b)(1) or (2).

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

Eugster's Petition also fails to present a significant question of constitutional law. The issues Eugster raises are routine civil procedural matters concerning the scope of appellate review and the proper application of res judicata, not constitutional issues. *See* Pet. at 8-9. Moreover, as explained above, these issues are settled, not significant.¹ Accordingly, review also is not warranted under RAP 13.4(b)(3).

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

This appeal would hinder, rather than promote, the public interest. Eugster does not present issues of importance to the general public or that raise vital opportunities or rights. Rather, he challenges routine procedural rulings concerning the scope of appellate review and the application of a preclusion principle.² Reviewing the Court of Appeals' procedural rulings

¹ Eugster does not ask this Court to adjudicate his underlying due process claim on review. Regardless, that claim does not present a significant constitutional question. Under Washington's system, lawyers are afforded robust due process protections: attorneys are given notice and afforded the opportunity to respond; to develop facts; to raise arguments, objections, and motions; and to be represented by counsel. *See, e.g.*, ELC 10.1(a), 10.5, 10.8, 10.11, 10.12, 10.13, 11.9, 11.14. Attorneys are also afforded the ability to challenge hearing officers for good cause and an avenue for obtaining independent review before this Court, ensuring requisite impartiality. *See* ELC 10.2(b), 12.1, 12.3. With all these protections, Washington's system comports with minimum due process requirements, notwithstanding Eugster's conclusory assertions to the contrary.

² Even as to his underlying due process claim, Eugster's case lacks broad public importance. As this Court has previously stated, "the general public has little, if any direct interest in the [attorney discipline] process." *In re Disciplinary Proceedings against Starczewski*, 177 Wn.2d 771, 785, 306 P.3d 905 (2013) (differentiating between

would only waste judicial and WSBA resources reviewing settled issues of law.

Moreover, ultimately there are multiple grounds for dismissal in this case, including failure to state a claim, immunity, and lack of standing or ripeness. *See* Pet., App. at 3; *see also Eugster II* at *8 (holding Eugster lacked standing where he was not seeking “redress for an actual or imminent injury”). There is no substantial public interest in accepting review of a matter where multiple grounds support its dismissal. Accordingly, because Eugster has failed to identify an issue of substantial public interest in this case, review also is not warranted under RAP 13.4(b)(4).

V. CONCLUSION

Eugster has failed even to address the requisite grounds for discretionary review. Regardless, none of those grounds applies here. The Court of Appeals’ decision to dismiss this case based on the alternative ground of res judicata is not in conflict with precedent, does not raise any significant constitutional questions, and does not implicate the public interest. For these reasons, the WSBA respectfully requests that the Court deny Eugster’s Petition for Discretionary Review.

appearance of impropriety by prosecutor in criminal case versus by special counsel in attorney discipline case because attorneys have voluntarily subjected themselves to regulation under this system).

RESPECTFULLY SUBMITTED this 2nd day of August, 2017.

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