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No. 362311

COURT OF APPEALS OF THE
STATE OF WASHINGTON DIVISION III

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, *et al.*,

Respondents.

REPLY OF APPELLANT

Stephen Kerr Eugster
WSBA 2003
Appellant Pro se

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**ARGUMENT IN REPLY TO
BRIEF OF RESPONDENTS / CROSS-APPELLANTS**

I. INTRODUCTION

The lawyers for the Appellees¹ are confident that the order dismissing Appellant’s complaint was right. They use the adjective “properly” more than seven times; they use the adjective “correctly” more than ten times.

The following will establish, however, that in every respect, the order of dismissal was neither proper nor correct but that the order dismissing the claim for fees under RCW 4.84.185 was proper and correct.

II. STATEMENT OF THE CASE

Stephen Kerr Eugster, Plaintiff (“Eugster”) filed his Complaint for Damages in the matter on February 12, 2018. CP 1-13.

Appellees, Joint Defendants, filed a joint motion to dismiss pursuant to CR 12(b)(6) (“failure to state a claim upon which relief can be granted.”) CP 14-16. No affidavits or declarations were filed in support of the motion. The trial court, by order, dismissed the complaint with prejudice. CP 266-70.

On August 9, 2018, Joint Defendants filed a motion for attorney fees and expenses. The motion was denied September 3, 2018. Joint

¹ In their Response, Respondents/Cross-Appellants refer to themselves as “Appellees.”

Defendants filed their notice of cross-review on October 3, 2018. CP 403-09.

III. STANDARDS OF REVIEW

Several legal standards have application in this reply. Some will be described here, some will be identified but their description will be tied to and described in a specific reply to an argument in Appellees' Response.

A. CR 12(B)(6) Failure to State A Claim

Evans v. Tacoma Sch. Dist. No. 10, 380 P.3d 553, 557 (Wash. Ct. App. 2016) provides a good summary of the standards applicable to a failure to state a claim motion. ("We review de novo a CR 12(b)(6) order dismissing a claim. *J.S. v. Vill. Voice Media Holdings, LLC*, 184 Wash. 2d 95, 100, 359 P.3d 714 (2015). We accept as true all facts alleged in the plaintiff's complaint and all reasonable inferences from those facts. *Id.* We also (may consider hypothetical facts supporting the plaintiff's claim. (*FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash. 2d 954, 962, 331 P.3d 29 (2014). The question is whether there are facts that conceivably could be raised that would support a legally sufficient claim. *Worthington v. WestNET*, 182 Wash. 2d 500, 505, 341 P.3d 995 (2015). Dismissal under CR 12(b)(6) is appropriate only if the plaintiff cannot allege any set of facts that would justify recovery. *Id.* For instance, CR 12(b)(6) applies when the plaintiff's allegations involve some

legal bar to recovery. *See J.S.*, 184 Wash. 2d at 100, 359 P.3d 714.”)

In *McCurry v. Chevy Chase Bank*, 169 Wn. 2d 96, 101 (Wash. 2010) further refinement of the standards can be found. (“Under CR 12(b)(6) a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint. *See Halvorson v. Dahl*, 89 Wash. 2d 673, 674, 574 P.2d 1190 (1978) (“On a [CR] 12(b)(6) motion, a challenge to the legal sufficiency of the plaintiff’s allegations must be denied unless no state of facts which plaintiff could prove, consistent with the complaint, would entitle the plaintiff to relief on the claim.”); *see also Christensen v. Swedish Hosp.*, 59 Wash. 2d 545, 548, 368 P.2d 897 (1962) (citing *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).”)

B. Affirmative Defenses and Burden of Proof

Excelsior Mortgage Equity Fund II, LLC v. Schroeder, No. 29633-4-III, at *8 (Wash. Ct. App. Jan. 24, 2012) (“Moreover, in Washington the party raising an affirmative defense has the burden of proving the defense elements. *August v. U.S. Bancorp*, 146 Wash. App. 328, 343, 190 P.3d 86 (2008). The court’s summary judgment order shows [the party’s] defenses were considered; the trial court did not err. In short, [the party] did not meet his affirmative defense burden.”)

The nature and burden of affirmative defenses in Washington are

further described in *Estate of Sly v. Linville*, 75 Wash. App. 431, 438 (1994) (“Because the statute of limitation is an affirmative defense, the burden is on the party asserting it to prove the facts which establish it. *Haslund v. Seattle*, 86 Wash. 2d 607, 547 P.2d 1221 (1976).”) *Tacoma Commercial Bank v. Elmore*, 18 Wash. App. 775, 778 (1977) (“Usury is an affirmative defense, and the burden of proof is upon the party who asserts it. *Malotte v. Gorton*, 75 Wash. 2d 306, 450 P.2d 820 (1969).”)

C. Res Judicata.

Ensley v. Pitcher, 152 Wash. App. 891, 898-99 (2009) (“Filing two separate lawsuits based on the same event — claim splitting — is precluded in Washington.” *Landry v. Luscher*, 95 Wash. App. 779, 780, 976 P.2d 1274 (1999). “The doctrine of res judicata rests upon the ground that a matter which has been litigated, or on which there has been an opportunity to litigate, in a former action in a court of competent jurisdiction, should not be permitted to be litigated again. It puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings.” *Marino Prop. Co. v. Port Comm'rs of Port of Seattle*, 97 Wash. 2d 307, 312, 644 P.2d 1181 (1982) (quoting *Walsh v. Wolff*, 32 Wash. 2d 285, 287, 201 P.2d 215 (1949).”)

Spokane Research Fund v. City of Spokane, 155 Wash. 2d at 99, 117 P. 3d 1117 (2005) “Thus, a subsequent action should be dismissed if it is

identical with the first action in the following respects: (1) persons and parties; (2) cause of action; (3) subject matter; and (4) the quality of the persons for or against whom the claim is made."

Action Neighbors v. Hearings Bd., 262 P.3d 81, 86-87 (Wash. Ct. App. 2011) (“ ‘When a subsequent action is on a different claim, yet depends on issues which were determined in a prior action, the relitigation of those issues is barred by collateral estoppel.’ ”)

Further, “[c]ollateral estoppel, or issue preclusion, requires “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wash. 2d at 792, 193 P.3d 1077 (2008).

D. Litigation Privilege.

Litigation privilege is an affirmative defense the burden of proof for which is on the proponent. This will be discussed below and standards of litigation privilege will be discussed below at 6.

E. Collateral Estoppel.

Standards of collateral estoppel will be discussed below at 8.

IV. MAIN ARGUMENTS

A. Litigation Privilege.

Joint Defendants say the statements were absolutely privileged citing *McNeal v. Allen*, 95 Wash. 2d 265, 621 P.2d 1285 (1980). They are wrong. Moreover, statement is insupportable because it does not comply with the standards applicable to the affirmative defense of privilege.

In *Pleas v. Seattle*, 112 Wash. 2d 794, 802, 774 P. 2d 1158 (1989), the court laid out the standards applicable to the privilege defense.

Any justification or privilege the defendant might have is treated as an affirmative defense which a defendant must prove. This is the general approach of the first RESTATEMENT and of most courts. [Citations omitted] 45 AM.JUR.2d *Interference* § 56 (1969) ("The burden is on the defendant to sustain by proof his allegations of justification or privilege."). *Id.*

Mohr v. Grant, 153 Wash. 2d 812, 831 (2005) ("At common law in Washington State, liability existed for defamation so long as the plaintiff demonstrated that the statements complained of were (1) false, (2) defamatory, and (3) published. *See Taskett v. KING Broad. Co.*, 86 Wash. 2d 439, 458, 546 P.2d 81 (1976) (Horowitz, J., dissenting). The defendant, however, could raise two affirmative defenses: truth or privilege. *Taskett*, 86 Wn.2d at 458; *see also* PROSSER AND KEETON ON THE LAW OF TORTS 802, 815 (W. Page Keeton ed., 5th ed. 1984).")

Eugster v. City of Spokane, 121 Wash. App. 799, 811-12 (2004)

("A claim for tortious interference is established "when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of improper means." *Pleas*, 112 Wn.2d at 804 (quoting *Top Serv. Body Shop, Inc. v. Allstate Ins. Co.*, 582 P.2d 1365, 221371 (Or. 1978)). "No question of privilege arises unless the interference would be wrongful but for the privilege[;] . . . [e]ven a recognized privilege [however] may be overcome when the means used by the defendant are not justified by the reason for recognizing the privilege." *Id.* However, the court held "matters of privilege or justification continue to be affirmative defenses to be raised by the defendant." *Pleas*, 112 Wn.2d at 804.")

Appellees have not met their burden of proof. They have even failed to address the main points of Eugster's Opening Brief, to wit, the court under the common law of Washington recognizes appropriate situations where litigation privilege cannot be applied and should not be applied here.

B. Collateral Estoppel.

1. Standards.

Christensen v. Grant County Hosp, 152 Wash. 2d 299, 305-7 (2004) ("Whether collateral estoppel applies to bar relitigation of an issue

is reviewed de novo. (citations omitted).”

For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Reninger v. Dep't. of Corrections*, 134 Wash. 2d at 449 (1980); *State v. Williams*, 132 Wash. 2d 248, 254, 937 P.2d 1052 (1997); Trautman, *Claim and Issue Preclusion*, WASH. L. REV. at 831.”).

2. Appellee’s False Assignment of Error Assertion.

Appellees say “Eugster has failed to assign error to the superior court’s decision to dismiss his claims based on collateral estoppel and failure to state a claim.” Next they say “Eugster has thus waived any objections to these independent grounds for dismissal.” Brief of Respondents/Cross-Appellants 11.

Eugster assigned error to the order of the trial court which was as follows:

Based on the foregoing conclusions, the Court hereby ORDERS that Defendants' Joint Motion to Dismiss is GRANTED and that this action is dismissed with prejudice.

Schumm v. Spiller, No. 50174-1-II, at *18 (Wash. Ct. App. May. 30, 2018) (“Findings of fact are superfluous on a motion for summary judgment. *Fabre v. Town of Ruston*, 180 Wn. App. 150, 158, 321 P.3d 1208 (2014). CR 52(a)(5)(B) states that findings of fact and conclusions of law are not necessary 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).”)

“Findings of fact "are superfluous on appeal from an order of summary judgment because of the de novo nature of our review." *Old City Hall LLC v. Pierce County AIDS Found.*, 181 Wash. App. 1, 14-15, 329 P.3d 83 (2014).

3. Conclusion.

There can be no collateral estoppel. The statements which Appellees refer to are from the *Caruso* case. Eugster was not a party to the case. He was the attorney for the plaintiffs. Once again appellees have failed to meet their burden of proof. They have failed to show any one of the assertions of collateral estoppel can be applied in this matter.

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding – the issues were not identical – they could not have been because the requirement of a nucleus of facts was missing ; (2) the earlier proceeding ended in a judgment on the merits - none of the issues were the result of a judgment on the merits; (3) the party

against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; – Eugster was not a party to the Caruso proceeding and he was not in privity with a party, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied – a grave injustice would take place; Eugster would be severely and unjustly hurt, and the sanctity of the judicial process and courts would be lastingly harmed.

C. Failure to State a Claim.

The Appellees contend that “the statements Eugster complains of cannot be considered false. To the contrary, each statement was demonstrably reasonable and based on disclosed facts subject to judicial notice.” Brief of Appellees 21.

1. “Eugster’s primary objection is that the WSBA characterized his conduct as duplicative, meritless, and frivolous. CP 8.”
2. Eugster also objects to the notion that he “enlisted” the two named plaintiffs for the *Caruso* lawsuit.” CP 8.
3. “Eugster similarly complains that the WSBA described him as a “disgruntled lawyer.” CP 8.
4. “Finally, Eugster complains about a phone call during which the WSBA’s counsel indicated that if the *Caruso* case proceeded, the WSBA intended to seek sanctions against him. CP 5.”

Each statement is true as required by the standards of CR 12(B)(6).

V. RESPONSE TO OTHER ASSERTIONS

A. Pleading Amendment.

The trial court was wrong in not allowing Eugster to amend his pleading. *Gutierrez v. Icicle Seafoods, Inc.*, 394 P.3d 413, 417 (2017) (“A trial court's discretion under CR 41(a)(4) to order dismissal with prejudice should be exercised only in limited circumstances where dismissal without prejudice would be pointless.”)

B. RCW 4.84.185.

Appellees contend that fees should be awarded under RCW 4.84.185. They cite *Kearney v. Kearney*, 95 Wash. App. 405, 974 P.2d 872 (1999) and say an award of attorney fees “is warranted under RCW 4.84.185 when a ‘reasonable inquiry’ would have revealed that the plaintiff’s position was untenable.” *Kearney*, 95 Wash. App. at 416-17.

Appellees must know what they say about *Kearney* is wrong. In fact, the court completely said otherwise.

Attorney fees are available under RCW 4.84.185, only when the action is advanced without cause and the action as a whole can be deemed frivolous. [*Biggs v. Vail*, 119 Wn.2d 129, 136-37, 830 P.2d 350 (1992)].

Kearney v. Kearney, 95 Wash. App. 405, 416 (1999).

In and article by Phillip 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, 499 (2010), the authors write about RCW 4.84.185:

CR 11 's goal of deterring vexatious litigation is reinforced by RCW 4.84.185.[] In enacting the statute¹⁰⁶ the legislature expressed 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 un-constitutional."¹¹¹ By contrast, CR 11 may apply to a single issue.¹¹² [footnotes omitted].

It cannot be said Eugster's complaint is frivolous. In his complaint Eugster stated that a meeting had taken place in February 27, 2017 and that if Eugster pursued the action wherein he was the attorney for Caruso counsel for the WSBA would seek fees against Eugster. That they have done, and in spades.

C. Immunity Issue.

Appellees assert the WSBA and its Executive Director are also immune from Eugster's claim under 42 U.S.C. § 1983 as a state agency and state official. They cite *Beuchler v. Wenatchee Valley College*, 174 Wash. App. 141, 155, 298 P.3d 110 (2013) ("A state agency or individual

acting in his or her official capacity is not a ‘person’ for purposes of § 1983.”). They are wrong.

Buechler v. Wenatchee Valley Coll., 298 P.3d 110, 118 (2013) says otherwise. (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress. A state agency or individual acting in his or her official capacity is not a “person” for purposes of § 1983. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Ms. Buechler can assert a civil rights claim only against Dean Capelo and Mr. Azurdia in their individual capacities.” Emphasis added. .

In White v. State, 131 Wash. 2d 1, 9 (1997), the court said: “[t]he federal Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a cause of action for damages against any person who, under color of law, subjects another to the deprivation of any right guaranteed under the Constitution.”

Color of law refers to an act done under the appearance of legal authorization, when in fact, no such right existed. It applies when a person is acting under real or apparent government authority. Color of Law Law

and Legal Definition | USLegal, Inc.

<https://definitions.uslegal.com/c/color-of-law/>.

The executive director is not immune.

VI. CONCLUSION

The superior court improperly and incorrectly dismissed Mr. Eugster's complaint. The superior court properly and correctly denied a fee award under RCW 4.84.185.

February 1, 2019

Respectfully submitted,

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CERTIFICATION OF SERVICE

I certify that on February 1, 2019, I emailed the foregoing to counsel at their designated email addresses in the online Washington State Bar Association lawyer directory and that the JIS system will also notify counsel by email upon filing.

February 1, 2019

s/Stephen Kerr Eugster
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