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No. 36231-1

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STEPHEN KERR EUGSTER,

Appellant,

v.

WASHINGTON STATE BAR ASSOCIATION, et al.,

Respondents/Cross-Appellants.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

After his allegations were summarily rejected in federal court, Appellant Stephen K. Eugster (“Eugster”) filed this collateral lawsuit claiming that the Washington State Bar Association (“WSBA”) defamed him in legal briefing. In the prior federal court case (“*Caruso*”),¹ acting as an attorney for two other lawyers, Eugster brought systemic challenges to Washington’s bar that he had already lost repeatedly on his own behalf. In defending against *Caruso*, the WSBA detailed Eugster’s history of litigating the same meritless claims and moved for sanctions. Eugster then accused the WSBA of fraud and defamation. The federal district court in *Caruso* rejected these unfounded accusations, dismissed the complaint, and sanctioned Eugster for filing it—decisions the U.S. Court of Appeals for the Ninth Circuit subsequently affirmed. In response, Eugster filed this collateral suit in Spokane County Superior Court, seeking damages against Appellees the WSBA, its Executive Director, and its attorneys for the allegedly defamatory statements made in *Caruso*.

The superior court correctly dismissed this case with prejudice for at least three independent reasons. First, the WSBA and its attorneys are absolutely immune from liability, because Eugster’s claims all arise from statements made in furtherance of the prior litigation. Second, collateral

¹ *Caruso v. Wash. State Bar Ass’n*, No. C17-003 RSM, 2017 WL 1957077 (W.D. Wash. May 11, 2017), *aff’d*, 716 F. App’x 650 (9th Cir. 2018).

estoppel bars Eugster's claims, because the Ninth Circuit already rejected Eugster's core allegations of fraud and defamation as meritless and unsupported. Third, Eugster has failed to state a claim, because he has not alleged any arguably unlawful conduct. On appeal, Eugster challenges only the first ground for dismissal, asserting that the WSBA's statements were not privileged. Accordingly, Eugster has waived his right to challenge the two other independent grounds for dismissal—collateral estoppel and failure to state a claim—and this Court should affirm the superior court for this reason alone. Regardless, each of the superior court's grounds for dismissal was correctly decided.

Additionally, although the superior court correctly dismissed Eugster's claims, the court abused its discretion in denying the WSBA and its counsel a fee award under RCW 4.84.185, based on frivolity. This suit is an improper attempt to undermine the prior federal court proceedings in *Caruso* with baseless, repetitive claims. The WSBA and its attorneys respectfully request that this Court affirm the dismissal of Eugster's claims and reverse the denial of fees.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the superior court correctly dismissed Eugster's claims with prejudice, when (a) the claims are based on statements made in a prior court case in support of the relief obtained, (b) the Ninth Circuit

already rejected Eugster's core assertions of fraud and defamation, and (c) Eugster has failed to allege any facts showing unlawful conduct.

1. Whether the superior court abused its discretion in denying an award of attorney fees under RCW 4.84.185, given the absence of any viable legal theory or precedent in support of this collateral suit.

III. COUNTERSTATEMENT OF THE CASE

A. Eugster files a frivolous federal lawsuit against the WSBA, resulting in sanctions against him.

In January 2017, among numerous other suits Eugster has filed against the WSBA in recent years, he filed a lawsuit in federal court in his capacity as an attorney. *See Caruso v. Wash. State Bar Ass'n*, No. C17-003 RSM, 2017 WL 1957077 (W.D. Wash. May 11, 2017). As with Eugster's other suits, this suit challenged mandatory bar membership, license fees, and Washington's lawyer discipline system. *Id.* at *1. Eugster filed the case initially as a putative class action on behalf of all WSBA members, naming Plaintiffs Robert Caruso and Sandra Ferguson as proposed class representatives. *Id.* Shortly thereafter, Eugster abandoned the class claims in an amended complaint. *Id.*

The WSBA moved to dismiss and sought fees against Eugster, explaining he had already raised the same systemic challenges on his own behalf in multiple prior lawsuits. *See CP 5-6; Caruso*, 2017 WL 2256782, at *1, 4 (W.D. Wash. May 23, 2017) (citing and describing cases). One of

the prior suits challenged mandatory bar membership and license fees, and was dismissed with prejudice for failure to state a claim. *See Eugster v. Wash. State Bar Ass'n*, No. C15-0375JLR, 2015 WL 5175722 (W.D. Wash. Sept. 3, 2015), *aff'd*, 684 F. App'x 618 (9th Cir. 2017). Three of the suits challenged the discipline system, and were dismissed for multiple reasons including lack of ripeness and preclusion under the res judicata doctrine. *See Eugster v. Wash. State Bar Ass'n*, No. CV 09-357-SMM, 2010 WL 2926237 (E.D. Wash. July 23, 2010), *aff'd*, 474 F. App'x 624 (9th Cir. 2012); *Eugster v. Wash. State Bar Ass'n*, No. 15204514-9 (Spok. Cnty. Super. Ct. 2015), *aff'd*, 198 Wn. App. 758, 397 P.3d 131 (2017); *Eugster v. Littlewood*, No. 2:15-CV-0352-TOR, 2016 WL 3632711 (E.D. Wash. June 29, 2016), *aff'd*, 724 F. App'x 602 (9th Cir. 2018).

The WSBA argued that the decisions in Eugster's prior cases were persuasive precedent and established numerous grounds for disposing of the claims asserted in *Caruso*. CP 7. Given that *Caruso* raised the very same arguments and claims, the WSBA characterized it as part of a pattern of "meritless" and "frivolous" litigation. CP 8. And because Eugster had filed all these suits after being suspended for misconduct, had repeatedly alleged his dissatisfaction with Washington's bar structure and rules, and had ignored repeated dismissals of the same claims, the WSBA described

him as a “disgruntled lawyer.” *Id.*; see *In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009).

The WSBA also pointed out that Eugster was using two other attorneys as named plaintiffs to re-argue the same failed claims. CP 8. As the WSBA explained, Eugster had filed a nearly identical complaint on his own behalf just a few months before filing *Caruso*. Compare CP 47, with 96-97.² As in *Caruso*, that complaint asserted the same challenges to bar membership, license fees, and the discipline system that Eugster had already litigated in multiple prior suits. *See id.* Eugster voluntarily dismissed that case—one day after filing *Caruso* as a putative class action. CP 54. The WSBA argued that the result should be the same, notwithstanding the fact that Eugster had “enlisted two other disciplined lawyers as named plaintiffs” to resurrect his failed theories. CP 6-7.

In response, Eugster argued that the WSBA had submitted false statements to the district court, and he sought sanctions for the allegedly false statements. *See* CP 142-43, 107-11. Eugster disputed whether *Caruso* was part of a pattern of serial litigation raising duplicative claims

² The WSBA and its attorneys included relevant public filings from Eugster’s prior cases in an appendix to the memorandum in support of the motion to dismiss, without objection. CP 28. These documents were and are subject to judicial notice for the purpose of adjudicating the motion to dismiss, both because they are referenced in Eugster’s complaint and because they cannot reasonably be questioned as public court filings. *See*, Evid. Rule 201(b); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 844-45, 347 P.3d 487 (2015); *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008).

that had already been rejected. CP 108-10. Eugster also disputed that he had “enlisted” his clients as named plaintiffs—notwithstanding the fact that he had named them as proposed class representatives and alleged claims identical to those he had raised on his own behalf in prior suits. CP 56, 66-67, 88-104, 108. Based on the statements that he insisted were false, Eugster requested sanctions against the WSBA. *See, e.g.*, CP 107.

The district court granted the WSBA’s motions, dismissing the case with prejudice for failure to state a claim and sanctioning Eugster for filing a frivolous complaint. As to the merits, the district court expressly disregarded the “tangential facts and arguments raised by the parties” and instead focused on the complaint, holding it failed to state a valid claim for relief, as demonstrated in part by one of Eugster’s prior cases. *Caruso*, 2017 WL 1957077, at *2-4. In a separate order, the court sanctioned Eugster, finding that he had “previously raised” the same meritless claims without success, that the *Caruso* lawsuit was “legally and factually baseless from an objective perspective,” and that “Eugster could not have conducted a reasonable and competent inquiry before signing and filing” the complaint. *Caruso*, 2017 WL 2256782, at *4. After reiterating that the WSBA’s arguments for dismissal and for sanctions “had merit,” the district court also ruled that Eugster had “failed to put forth adequate grounds” to sanction the WSBA. *Id.* at *5.

B. The Ninth Circuit affirms the district court and rejects Eugster’s allegations of fraud and defamation.

Eugster appealed the dismissal (on behalf of his clients) and the sanction (on his own behalf) to the Ninth Circuit. In both appeals, Eugster argued that the WSBA defamed him and defrauded the district court. In his opening brief on the merits, Eugster argued that “the lawyers for the WSBA have been successful in getting the Court to act favorably toward the WSBA and dismiss the case against it on the basis of their defamations and other fraudulent conduct.” CP 152-53. Similarly, in his opening brief on the sanction award against him, Eugster listed as the first issue on appeal “[w]hether the WSBA and its lawyers perpetrated a fraud on the court and defamed Pro se Eugster.” CP 181. To support his claims of fraud and defamation, Eugster relied on the same statements in the WSBA’s briefing that he had disputed before the district court. CP 196-97. Based on these allegedly false and defamatory statements, Eugster again sought sanctions. CP 210-12, 230-31.

The Ninth Circuit affirmed the district court’s orders. In doing so, the court expressly rejected Eugster’s allegations of fraud and his request for sanctions as meritless and unsupported. *See Eugster v. Wash. State Bar Ass’n 1933*, 716 F. App’x 645, 646 (9th Cir. 2018) (“We reject as without merit and unsupported by the record Eugster’s contentions that he

is entitled to sanctions, [and] that defendants committed fraud on the court”); *see also Caruso v. Wash. State Bar Ass’n 1933*, 716 F. App’x 650, 651 (9th Cir. 2018) (“We reject as without merit Caruso’s contentions of fraud upon the district court.”).

C. Eugster files this lawsuit in state court seeking damages for the WSBA’s statements in the prior federal suit.

After he failed to obtain the relief he sought in *Caruso*, Eugster filed this lawsuit in Spokane County Superior Court against the WSBA, its Executive Director, and the lawyers who represented the WSBA in *Caruso*. CP 1. The complaint asserts five claims: defamation, false light invasion of privacy, intentional abuse of process by false statements, civil conspiracy, and civil rights damages under 42 U.S.C. § 1983. CP 7-11. The purported basis for each claim is the exact same set of statements Eugster raised to the district court and Ninth Circuit in *Caruso*. CP 8. Eugster alleges that these statements defamed him, abused the judicial process, resulted from an unlawful conspiracy, and violated his constitutional rights. CP 7-11. The only other facts alleged in the complaint are that early in the *Caruso* litigation, the WSBA’s counsel explained to Eugster on a phone call that the WSBA would seek fees against him if he proceeded with the *Caruso* lawsuit. CP 5.

D. The superior court dismisses the complaint with prejudice but refuses to award fees for frivolity.

The WSBA and its attorneys moved to dismiss the complaint on the grounds of absolute immunity, collateral estoppel, and failure to state a claim. CP 14. On July 11, 2018, after hearing argument, the superior court dismissed Eugster's claims with prejudice on three alternative grounds. CP 266-69. First, the court concluded that the statements Eugster complains of are "privileged under absolute immunity." CP 267-68. Noting that statements in litigation having "any bearing upon the subject matter of the litigation" are privileged, the court reasoned that the statements at issue here "were used to provide the court in *Caruso* with historical context and to describe the WSBA's perception of the issues and conduct pertinent to the case," and were thus privileged. CP 267. Second, the court concluded that collateral estoppel barred Eugster's claims because the Ninth Circuit already decided that his accusations of fraud and defamation were meritless and unsupported. CP 268. Third, the court concluded Eugster failed "to allege any facts supporting" his assertions of "unlawful conduct," and thus failed to state a claim for relief. CP 268.

In light of the baseless and unprecedented nature of this lawsuit, the WSBA and its attorneys also moved to recover fees under RCW 4.84.185, Washington's frivolous lawsuit statute. CP 278. On September

20, 2018, the superior court heard argument on the motion for fees and denied the request. Verbatim Report of Proceedings (“VRP”) at 27-28. The court’s only stated reason for denying the request was that it was “debatable” whether the WSBA’s statements in *Caruso* were pertinent to that litigation. *Id.*; CP 406-08.

On July 20, 2018, Eugster timely filed a notice of appeal of the superior court’s order dismissing the case. CP 271. On October 3, 2018, the WSBA and its attorneys timely filed a notice of cross review of the attorney fee decision. CP 403.

IV. STANDARDS OF REVIEW

Dismissal of a complaint is reviewed de novo. *Trujillo v. Nw. Trustee Servs., Inc.*, 183 Wn.2d 820, 830, 355 P.3d 1100 (2015). Under Civil Rule 12(b)(6), dismissal is appropriate when, even assuming the factual allegations are true, the complaint fails to state a valid claim for relief. *Trujillo*, 183 Wn.2d at 830. Moreover, a court has discretion to dismiss with prejudice when “amendment would be futile,” including when the plaintiff cannot “identify any additional facts” to support his claims. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 730, 189 P.3d 168 (2008).

A superior court’s ruling on a motion for attorney fees is reviewed for abuse of discretion. *Kearney v. Kearney*, 95 Wn. App. 405, 416, 974

P.2d 872 (1999). An award of attorney fees is warranted under RCW 4.84.185 when a lawsuit is advanced without reasonable cause and is frivolous. *Id.* This standard is satisfied when a “reasonable inquiry” would reveal that the plaintiff’s position is untenable, *Kearney*, 95 Wn. App. at 416-17, or when binding case law precludes the claims asserted, *see Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 313-14, 202 P.3d 1024 (2009). A superior court abuses its discretion in denying fees under such circumstances when governing law “clearly demonstrates” that the plaintiff’s claims were invalid. *Kearney*, 95 Wn. App. at 416-17.

V. ARGUMENT

A. **The superior court correctly dismissed Eugster’s complaint with prejudice.**

Eugster bases this appeal solely on the claim that the WSBA’s statements in *Caruso* were fraudulent and defamatory and not privileged. *See Op. Br.* at 2. On appeal, however, 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. *See id.*; CP 268. Eugster has thus waived any objections to these independent grounds for dismissal. *See Calhoun v. State*, 146 Wn. App. 877, 890, 193 P.3d 188 (2008) (holding court “need not review” alternative grounds for dismissal when appellant has “failed to assign error” to those grounds and thus “waived any issue pertaining to dismissal of his claims on those grounds”). Eugster cannot

revive these issues in his reply brief. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”). Accordingly, this Court may affirm dismissal on this basis alone. *See Calhoun*, 146 Wn. App. at 890.³

Even if this Court decides to review further the superior court’s decision to dismiss Eugster’s complaint, the superior court correctly based that decision on three independent grounds for dismissal. Specifically, the superior court properly dismissed Eugster’s complaint because the statements Eugster complained about were absolutely privileged, collateral estoppel separately barred his claims, and Eugster failed to allege any facts in support of his conclusory assertions of unlawful conduct. Eugster also failed to identify any additional facts that could save his complaint. The superior court thus acted well within its discretion in dismissing Eugster’s complaint with prejudice.

1. The statements forming the basis of Eugster’s claims were made in litigation and are absolutely privileged.

The superior court properly dismissed this case because the statements Eugster complains about are absolutely privileged. The statements Eugster has identified as the basis for liability are attorney

³ *See also, e.g., Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n. 1 (9th Cir. 2008) (noting appellant did not challenge and thus waived alternative ground for dismissal); *Abdul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 290 (4th Cir. 2018) (same).

statements that were made in the course of litigating *Caruso*. CP 7-11. As a matter of law, such statements cannot form the basis of a subsequent, separate action, because any statements made in litigation 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 rule “is based upon a public policy” of giving attorneys “the utmost freedom in their efforts to secure justice for their clients.” *Id.* To that end, the privilege “avoids all liability.” *Id.*

The privilege applies broadly to statements made within litigation, covering any statement pertinent to the lawsuit in which it was made. For a statement to be pertinent for this purpose, it need only have “some relation” to the proceedings and “any bearing upon the subject matter of the litigation.” *Johnston v. Schlarb*, 7 Wn.2d 528, 540, 110 P.2d 190 (1941). The truth or falsity of the statement and the motives of the speaker are irrelevant. *See id.* at 536-37. The statement need not even be legally relevant. *Id.* at 538-39. Moreover, any and all doubts about pertinence are resolved in favor of the speaker. *Id.*

Here, every statement at issue was pertinent to the *Caruso* litigation and easily satisfies the standard of having “some relation” to that suit. The statements all concerned the claims asserted in *Caruso*,

including the duplicative and frivolous nature of those claims, Eugster's motives for filing those claims, Eugster having enlisted other attorneys to pursue those claims as named plaintiffs, and the WSBA's expressed intent to seek fees against Eugster if the case proceeded. *See* CP 7-8. There can be no question that all these statements were pertinent to *Caruso*.

Eugster argues that the WSBA made statements about his prior lawsuits, including characterizations of those suits as meritless and having been "dismissed with prejudice or something of the kind." Op. Br. at 16. Regardless of Eugster's disagreements with these descriptions, however, the statements clearly related to the WSBA's arguments regarding the meritless and duplicative nature of the claims asserted in *Caruso* and the propriety of sanctions, which is more than sufficient to be pertinent. *See Johnston*, 7 Wn.2d at 540 (noting that "any bearing upon the subject matter of the litigation" is sufficient for pertinence).⁴

Eugster also objects that the WSBA made statements about his motives and conduct, specifically that the *Caruso* lawsuit was an attempt to relitigate his failed claims as a disgruntled lawyer, and that he enlisted his clients to serve as named plaintiffs. CP 7-8. Again, Eugster might disagree with these statements, but they all clearly related to the *Caruso* litigation, including the duplicative and meritless nature of the claims

⁴ It also cannot be reasonably disputed that Eugster's prior cases were dismissed at the pleadings stage, including numerous dismissals with prejudice. *See supra*, at 3-4.

asserted and the propriety of sanctions. Statements about an opposing lawyer's motives or conduct in litigation are necessarily pertinent and thus privileged. *See Johnston*, 7 Wn.2d at 540; *see also, e.g., Dixon v. DeLance*, 84 Md. App. 441, 448, 579 A.2d 1213 (1990) (“[I]t is absolutely essential to the administration of justice that [attorneys] should be allowed the widest latitude in commenting on the character, the conduct and motives of parties and witnesses and other persons directly or remotely connected with the subject-matter in litigation.”); *Dworkin v. State*, 34 A.D.3d 1014, 825 N.Y.S.2d 296 (2006) (attorney's statement in briefing that opposing counsel's motion suggested “instability and paranoia” was privileged because it was pertinent).

Eugster cites repeatedly to *Demopolis v. Peoples Nat'l Bank of Wash.*, 59 Wn. App. 105, 796 P.2d 426 (1990), but that case is distinguishable for multiple reasons and does not support his position here. Op. Br. at 9-10. In *Demopolis*, an attorney in a court hallway accused an opposing party of being a convicted perjurer. 59 Wn. App. at 107. In a subsequent defamation action, the *Demopolis* court held that the litigation privilege did not apply, because the accusation had no apparent nexus to the ongoing litigation, was not made in furtherance of litigation, and was made “off the record and out of the courtroom,” all of which meant there were inadequate safeguards against abuse. *Id.* at 112-13.

Here, in contrast, the statements Eugster complains about all related to ongoing litigation in federal court and were made in furtherance of that litigation. *See* CP 5-7. In fact, all but one of the statements were made in signed pleadings submitted directly to the federal district court. *See id.* The Washington Supreme Court has made clear that adequate safeguards exist in court proceedings so that the absolute privilege applies to statements made in the course of such proceedings. *See Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 177-78, 736 P.2d 249 (1987) (noting “the judiciary has the sanctions of perjury and contempt to deter wanton defamation in judicial proceedings”); *see also McNeal*, 95 Wn.2d at 267. Indeed, Eugster availed himself of those very safeguards by challenging the disputed statements in *Caruso* before the district court and the Ninth Circuit, and both courts rejected those challenges.⁵

Finally, Eugster attempts to analogize to the doctrine of judicial immunity. Op. Br. at 11-12. As an initial matter, the authorities Eugster cites do not supersede the authorities cited above defining the litigation privilege at issue here. In any event, Eugster’s cited cases only undermine

⁵ The one disputed statement not made in a court filing was a statement by the WSBA’s counsel in a telephone conference with Eugster, indicating that the WSBA would seek fees against him if the *Caruso* case proceeded. *See* CP 5. This statement was directly related to the litigation and how it would proceed, and was thus pertinent and absolutely privileged. *See, e.g., Weiler v. Stern*, 67 Ill. App. 3d 179, 182, 384 N.E.2d 762 (1978) (noting absolute privilege covers “communications preliminary to a proposed judicial proceeding” including “conferences” (quoting Restatement of Torts and citing cases)). In any event, the statement on the call was also patently true and is not actionable. *See infra*, at 22-23.

his position, indicating that to protect the role of judges, absolute immunity applies to any judicial act unless done ““in clear absence of all jurisdiction.”” Op. Br. at 11 (quoting *Adkins v. Clark County*, 105 Wn.2d 675, 677-78, 717 P.2d 275 (1986)). Likewise, to protect the role of attorneys, immunity applies to any statements made in judicial proceedings that are at all pertinent, allowing for zealous advocacy without fear of reprisal.

In sum, the statements Eugster complains about in this lawsuit are absolutely privileged. The WSBA and its attorneys are thus immune from all potential liability, and the superior court correctly dismissed Eugster’s complaint on this basis.⁶

2. Collateral estoppel separately bars Eugster’s claims.

The superior court properly concluded that collateral estoppel also bars Eugster’s claims because the Ninth Circuit already rejected Eugster’s central, underlying allegations of fraud and defamation. Eugster fails to

⁶ In addition to absolute immunity under the litigation privilege, 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. *See Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under § 1983.”); *Beuchler v. Wenatchee Valley College*, 174 Wn. 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.”). The WSBA briefed this as a distinct basis for dismissal, CP 26-27, and the Court may therefore affirm on this alternative ground, *see, e.g., Yurtis v. Phipps*, 143 Wn. App. 680, 690, 181 P.3d 849 (2008) (“[A]n appellate court may sustain the trial court’s judgment upon any theory that is established by the pleadings and supported by the record.”); Rule of Appellate Procedure 12.2.

address this independent ground for dismissal and this Court should affirm the superior court's decision on this ground alone.

The collateral estoppel doctrine protects litigants from the burden of “relitigating an identical issue” and “promot[es] judicial economy” by “preventing needless litigation.” *State Farm Fire & Cas. Co. v. Ford Motor Co.*, 186 Wn. App. 715, 721-22, 346 P.3d 771 (2015). In Washington courts, the law of the jurisdiction that issued the prior judgment governs preclusion analysis—in this case, the law of the Ninth Circuit. *Loveridge v. Fred Meyer, Inc.*, 72 Wn. App. 720, 724-25, 864 P.2d 417 (1993). Under Ninth Circuit law, collateral estoppel applies when an identical issue was decided in a prior action, that action ended in a final judgment on the merits, and the party against whom collateral estoppel is asserted was a party to that earlier action or in privity with one. *Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885 (9th Cir. 2000).

Here, the Ninth Circuit twice rejected Eugster's argument that the WSBA's statements in *Caruso* were fraudulent and defamatory. Eugster made that argument based on the same statements that he complains about here. *See* CP 149-50, 179-81. In fact, Eugster quoted to the Ninth Circuit the very same statements he quotes in his complaint, which he asserted were “a great fraud on the court and defamation of Pro se Eugster” that warranted sanctions. CP 194-97. The Ninth Circuit disagreed, expressly

rejecting that accusation as both meritless and unsupported. *See Eugster*, 716 Fed. App'x. at 646. Thus, the Ninth Circuit already decided that Eugster's allegations of fraud and defamation were baseless, and collateral estoppel bars him from raising the same issue again here.

Eugster concedes that the Ninth Circuit already decided the issue against him, but insists that, “[n]o matter what,” he may still challenge that decision in an independent action or in *Caruso* itself “under Fed. R. Civ. P. Rule 60(b) or Rule 60(d)(3) . . . for fraud on the court.” Op. Br. at 26. This argument ignores that Eugster already raised his contentions of fraud in particular in *Caruso*, and the Ninth Circuit rejected them as meritless and unsupported. Under the collateral estoppel doctrine, Eugster is now precluded from re-litigating this issue, especially in a separate action. The superior court thus correctly dismissed Eugster's complaint on this additional, alternative basis.

3. Eugster also failed to state a valid claim for relief.

The superior court also properly dismissed Eugster's complaint for failure to state a valid claim for relief. As the superior court concluded, the complaint “fails to allege any facts” to support Eugster's legal conclusion that the WSBA “engaged in unlawful conduct.” CP 268; CP 264-65. The superior court's conclusion was proper because the statements Eugster complains about were, as a matter of law, fair and

reasonable rather than false and actionable. Again, Eugster fails to address this independent ground for dismissal and this Court can and should affirm the superior court's decision on this basis alone.

As an initial matter, each claim Eugster asserts requires a false statement for liability to attach. For defamation or false light invasion of privacy, a false statement is a necessary element. *See, e.g., Emeson v. Dep't of Corr.*, 194 Wn. App. 617, 640, 376 P.3d 430 (2016). Similarly, Eugster's claim for abuse of process is based on his contention that the WSBA "lied" and "failed to tell the whole truth" CP 9-10. Finally, Eugster's claims for conspiracy and violation of 42 U.S.C. § 1983 are entirely derivative, based on his theory that the WSBA conspired to defame him with false statements and in doing so violated his civil rights. CP 10-11.

Dismissal is appropriate when a false statement is necessary for the plaintiff's claims but the statements at issue cannot be considered false, either because they were demonstrably fair or because they were mere characterizations based on disclosed facts. *See Clapp v. Olympic View Pub. Co., LLC*, 137 Wn. App. 470, 473-75, 154 P.3d 230 (2007) (affirming dismissal because allegedly defamatory article was "accurate and fair" as a matter of law); *Dunlap v. Wayne*, 105 Wn.2d 529, 537-41 & n.2, 716 P.2d 842 (1986) (affirming dismissal because lawyer's

characterizations of plaintiff's identified activities were "nonactionable opinion" as a matter of law). Here, 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.

Eugster's primary objection is that the WSBA characterized his conduct as duplicative, meritless, and frivolous. CP 8. But these were necessarily fair characterizations given Eugster's history of unsuccessful and repetitive suits against the WSBA leading up to the *Caruso* lawsuit. *See, e.g., Caruso*, 2017 WL 2256782, at *1-2, 4 (citing cases). In fact, the district court in *Caruso* subsequently sanctioned Eugster for these very reasons, and the Ninth Circuit affirmed. *See id.* at *3-4; *Eugster*, 716 Fed. App'x. at 646. Moreover, the statements were made in legal briefing and were expressly based on Eugster's prior litigation history, which the district court was able to assess for itself. This alone precludes Eugster's claims. *See Dunlap*, 105 Wn.2d at 540 ("Arguments for actionability disappear when the audience members know the facts underlying an assertion and can judge the truthfulness of the allegedly defamatory statement themselves.").

Eugster also objects to the notion that he "enlisted" the two named plaintiffs for the *Caruso* lawsuit. CP 8. But again, this was a fair and

reasonable description, given that the *Caruso* complaint asserted the same claims and arguments that Eugster had already raised on his own behalf, including in a *pro se* suit filed shortly beforehand, which he voluntarily dismissed immediately after filing *Caruso*. The statement that he enlisted the two named plaintiffs also was true because *Caruso* was initially filed as a class action with the named plaintiffs as proposed class representatives. And again, the statement was made in legal briefing, based on Eugster's prior lawsuits and the pleadings in *Caruso*, all of which the district court was able to assess for itself.

Eugster similarly complains that the WSBA described him as a "disgruntled lawyer." CP 8. But this too was a fair and reasonable characterization, given that Eugster had filed numerous suits against the WSBA after being suspended for misconduct, had repeatedly alleged his dissatisfaction with Washington's bar structure and rules, and had ignored repeated dismissals of the same claims. *See, e.g., Caruso*, 2017 WL 2256782, at *1-2, 4; *Eugster*, 198 Wn. App. at 763-69; CP 46-48. Once again, this characterization was also made in briefing and expressly based on disclosed facts subject to judicial notice.

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. Eugster does not suggest

that this statement was false. Nor could he, given that the WSBA subsequently moved for and obtained a fee award against him. *See Caruso*, 2017 WL 2256782, at *1. Notifying a party in advance that fees will be sought for a frivolous filing, and then moving for such an award, cannot be considered false or improper. *See* RCW 4.84.185.

Beyond Eugster's failure to identify any arguably false statements, his claims also fail for lack of other necessary elements. The claims for defamation and false light invasion of privacy require publication to a third party, but neither a court filing nor a conference call between counsel qualifies. *See, e.g., LaMon v. City of Westport*, 44 Wn. App. 664, 667-69, 723 P.2d 470 (1986). The claim for abuse of process requires "malicious perversion" of a "regularly issued process" to obtain an improper "result," but Eugster has not identified any process, perversion, or result that could qualify. *Rock v. Abrashin*, 154 Wash. 51, 53, 280 P. 740 (1929). The conspiracy claim requires an "agreement" to accomplish an "unlawful purpose" or pursue "unlawful means," but again, Eugster does not identify any such agreement. *Woody v. Stapp*, 146 Wn. App. 16, 22, 189 P.3d 807, 810 (2008). Finally, the claim under 42 U.S.C. § 1983 would require an unlawful deprivation of Eugster's right to petition the government, *see* CP 8, but he does not identify how that right was even arguably infringed.

In sum, the WSBA's characterizations of Eugster's conduct were reasonable and, as a matter of law, not actionable. The superior court properly determined that Eugster failed to state a claim for relief, and this Court should affirm the dismissal of Eugster's claims for this additional, alternative reason.⁷

4. The superior court properly dismissed the complaint with prejudice.

Eugster fails to argue, much less establish, that the superior court abused its discretion by dismissing his claims with prejudice. Even if this Court decides to review that issue, however, the superior court's decision was correct. Courts typically exercise their discretion to dismiss claims with prejudice when "amendment would be futile," including when the plaintiff cannot "identify any additional facts that might support [his] claims." *Rodriguez*, 144 Wn. App. at 730. Here, for each and all of the reasons set forth above, the superior court properly determined that Eugster could not remedy the multiple, fundamental deficiencies of the complaint through amendment. CP 269.

Although Eugster does not directly address the superior court's decision to dismiss his claims with prejudice, his Opening Brief makes

⁷ In his Opening Brief, Eugster argues at length about whether "fees on fees" should be awarded on appeal in *Caruso*. See Op. Br. at 21-25. In addition to mischaracterizing the proceedings in that appeal and applicable federal law, the discussion has no relevance to the issues before this Court.

vague allusions to “hypothetical facts” that might save his claims. Op. Br. at 13-14. But Eugster identified no such facts below to the superior court, and still has not identified any specific facts he could plead that would possibly salvage his claims. Accordingly, Eugster has not established that the superior court’s decision was “manifestly unreasonable” or “exercised on untenable grounds,” as necessary to show an abuse of discretion, and this Court should thus affirm. *Escude ex rel. Escude v. King Cty. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003); *see also, e.g., Green v. Holm*, 28 Wn. App. 135, 140, 622 P.2d 869 (1981).

B. The superior court erred in denying a fee award.

While the superior court correctly dismissed Eugster’s claims with prejudice, the court abused its discretion in denying the WSBA and its attorneys a fee award for frivolity. Such an award is warranted under RCW 4.84.185 when a “reasonable inquiry” would have revealed that the plaintiff’s position was untenable. *Kearney*, 95 Wn. App. at 416-17; *see also Highland*, 149 Wn. App. at 313-14. The purpose of such an award is to “discourage frivolous lawsuits and to compensate the targets of such lawsuits for fees and expenses incurred in fighting meritless cases.” *Kearney*, 95 Wn. App. at 416 (internal quotes omitted). A finding of “bad faith” or “bad motivation” is not required. *Highland*, 149 Wn. App. at 311-12. A superior court abuses its discretion in denying fees when

governing law “clearly demonstrates” the plaintiff’s claims were invalid. *Kearney*, 95 Wn. App. at 416-17.

Here, the superior court denied the WSBA’s requested fee award on the sole basis that it was “debatable” whether the attorney statements made in *Caruso* were pertinent and thus privileged. *See* VRP 26-28. But the superior court failed to consider its own alternative grounds for dismissal, which also established an alternative basis for the fee award. Specifically, Eugster already had raised the same contentions of fraud and defamation in *Caruso* without success, *see* CP 107-11, 142-43, 275, and his complaint failed to allege any arguably unlawful conduct, *see* CP 5-8, 264-65, 275. Under these circumstances, Eugster knew or should have known that his contentions were meritless, and the superior court erred in failing to award fees on these grounds.

Regardless, the superior court’s determination that the pertinence of the statements was debatable does not comport with established legal standards governing this issue. The superior court reasoned that pertinence was “debatable” here because Eugster was “the attorney” rather than “a party to the action” in *Caruso*. VRP 26-28. But Eugster was the attorney *in the lawsuit in which the statements were made*, and the statements were about his motives and conduct *in pursuing that lawsuit*. This clearly satisfied the pertinence requirement, which only demands

“*some* relation” to the proceedings and “*any* bearing upon the subject matter of the litigation.” *Johnston*, 7 Wn.2d at 540 (emphases added); *see also Dixon*, 84 Md. App. at 448; *Dworkin*, 34 A.D.3d at 1014. The superior court also overlooked that any doubts about pertinence are resolved in favor of the speaker. *Johnston*, 7 Wn.2d at 540. This means that even if pertinence were debatable here, which it is not, Eugster’s claims would still be invalid and frivolous.

A superior court’s denial of fees should be reversed when, as here, the plaintiff’s claims were clearly invalid under established law. In *Kearney*, the plaintiff asserted a privacy claim that was contrary to the plain language and legislative history of the governing statute. 95 Wn. App. at 411-17. As a result, the Court of Appeals held the lower court abused its discretion in denying fees under RCW 4.84.185. *See id.* at 417. Here, Eugster’s claims had already been rejected and had no basis in fact, and they were directly contrary to established law on absolute immunity. To discourage such frivolous suits and to compensate the WSBA and its attorneys for being forced to defend themselves, an award of fees should have been granted. As in *Kearney*, the superior court abused its discretion and its denial of fees should be reversed.

VI. CONCLUSION

The superior court correctly dismissed this improper collateral lawsuit with prejudice, but erred in denying a fee award. This Court should affirm dismissal based on the unchallenged grounds of collateral estoppel and failure to state a claim, either of which is independently sufficient to affirm the superior court's decision. The Court also should affirm the superior court's decision because the attorney statements that formed the basis of Eugster's claims are absolutely immune from liability. In light of these deficiencies, this entire suit was frivolous, Eugster should not have filed it, and the WSBA and its attorneys should not have been forced to incur substantial expense defending against it. The WSBA and its attorneys respectfully request that this Court affirm dismissal with prejudice, reverse the denial of a fee award under RCW 4.84.185, and remand for the superior court to determine an appropriate fee award.

RESPECTFULLY SUBMITTED this 2nd day of January, 2019.

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PROOF OF SERVICE

I am and at all times hereinafter mentioned was a citizen of the United States, a resident of the State of Washington, over the age of 21 years, and not a party to this action. On the 2nd day of January, 2019, I caused to be served, via the Washington State Appellate Court's Portal System, a true copy of the foregoing document upon all parties of record via electronic mail.

Dated this 2nd day of January, 2019.



Tricia O'Konek

PACIFICA LAW GROUP

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