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

STEPHEN KERR EUGSTER,

Appellant/Cross-Respondent,

v.

WASHINGTON STATE BAR ASSOCIATION, et al.,

Respondents/Cross-Appellants.

CROSS-APPELLANTS' REPLY BRIEF ON FEES

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I. INTRODUCTION

Washington law is clear: a superior court abuses its discretion in denying attorney fees under RCW 4.84.185 when any legal ground renders the entire complaint untenable. Here, Cross-Respondent Stephen K. Eugster (“Eugster”) filed a complaint that was untenable under not one but three such grounds. In refusing to award attorney fees, the superior court ignored two of those grounds and misapplied the third, and thus abused its discretion. Under *Kearney v. Kearney*, 95 Wn. App. 405, 974 P.2d 872 (1999), the proper remedy in such circumstances is reversal of the fee decision. Accordingly, Cross-Appellants the Washington State Bar Association and its counsel (collectively, the “WSBA”) respectfully request that this Court reverse the denial of fees in this frivolous suit.

II. ARGUMENT IN REPLY

A. **A denial of fees must be reversed when any single legal ground renders the entire complaint untenable.**

As the WSBA has explained, fees are warranted under RCW 4.84.185 when a lawsuit is frivolous and advanced without reasonable cause. Resps.’ Br. at 10-11. This standard is satisfied when a “reasonable inquiry” would have revealed that the plaintiff’s position was untenable. *Id.* (quoting *Kearney*, 95 Wn. App. at 416-17). Eugster argues only that the “the action as a whole” must be frivolous. Reply Br. at 11-12 (quoting *Kearney*, 95 Wn. App. at 416). But the WSBA does not

dispute that aspect of the standard; instead, the WSBA's argument is that *all* of Eugster's claims in this lawsuit were frivolous, based on multiple alternative legal grounds. *See* Resps.' Br. at 25-27.

Here, the superior court abused its discretion in denying fees by ignoring two of these alternative grounds and misconstruing a third. A lower court abuses its discretion if it takes a view no reasonable person would take or applies the wrong legal standard to an issue. *E.g., Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 775, 275 P.3d 339 (2012). In the context of a request for fees under RCW 4.84.185, a superior court's discretion is broadest when frivolity is based on a failure of proof at a hearing or trial. *See, e.g., Zink v. City of Mesa*, 137 Wn. App. 271, 276-77 152 P.3d 1044 (2007) (noting that in such a case the appellate court does "not enjoy the vantage point of the trial court"). In contrast, when a legal ground renders the entire complaint untenable under preexisting law, fees are warranted as a matter of law, and a superior court abuses its discretion in ruling otherwise. *See Kearney*, 95 Wn. App. at 416-17. When such abuse occurs, the proper remedy is reversal of the denial of fees. *Id.*

Eugster does not address the *Kearney* case in substance, but it is especially instructive here. In *Kearney*, the plaintiff alleged that his right to privacy under state law had been violated when secretly recorded conversations of him were "divulged" to a court. *Id.* at 408-09. Yet the

plain language of the governing statute prohibited only intercepting or recording conversations, not divulging them, and the legislative history only confirmed this point. *Id.* at 408-09, 417. The entire complaint was thus untenable for failure to state a claim. *Id.* at 416-17. As a result, the Court of Appeals reversed the superior court's denial of fees. *Id.*

As in *Kearney*, this Court should reverse the superior court's denial of fees because Eugster's entire complaint was legally untenable at the outset. In *Kearney*, there was only one legal ground that rendered the entire complaint frivolous. *See id.* Here, there were three such grounds, two of which the superior court did not even consider, and one that it misconstrued. *See Resps.' Br.* at 25-27. The superior court thus applied the wrong legal standards in rendering its decision on fees, and its denial of fees should be reversed based on each and every one of the legal grounds for frivolity applicable here.

B. The superior court ignored multiple independent grounds for dismissal that rendered the complaint untenable.

The superior court applied the wrong legal standard when it ignored two of the three legal grounds for dismissal of Eugster's entire complaint. A suit is frivolous if *any* ground renders the entire complaint indefensible, regardless of whether some other ground for dismissal also applies. *See, e.g., Kearney*, 95 Wn. App. at 417 (noting, without deciding,

that alternative defense of immunity “likely” also applied). Here, the superior court denied fees on a single basis: that it was “debatable” whether the attorney statements Eugster complains about in this lawsuit were pertinent to the prior federal lawsuit between the parties, and thus privileged. Resps.’ Br. at 26 (citing Verbatim Report of Proceedings (“VRP”) at 26-28). But the superior court failed to consider two alternative grounds for dismissal, each of which on its own rendered Eugster’s complaint untenable and thus frivolous.

1. The superior court ignored Eugster’s failure to state a claim.

The first such ground is that Eugster failed to state a valid claim for relief because he did not allege a single fact showing the WSBA engaged in unlawful conduct. CP 5-8, 275. As the WSBA has explained, each claim Eugster asserted—defamation, false light invasion of privacy, abuse of process, conspiracy, and 42 U.S.C. § 1983—required proof that the statements in dispute were false. *See* Resps.’ Br. at 20. But each statement was demonstrably reasonable and based on disclosed facts subject to judicial notice, and thus, cannot be considered false. *Id.* at 20-23.

In his appellate briefing, Eugster concedes the statements were true, confirming the frivolity of his entire complaint. Reply Br. at 11 (listing the statements disputed in this lawsuit and then conceding that

“[e]ach statement is true”). Eugster’s only argument in support of his claims is that the WSBA’s counsel informed him the WSBA would seek fees and then did so. *Id.* at 12. But counsel’s indication that the WSBA would seek fees was true, and thus, could not form the basis of liability for any of Eugster’s claims. Merely informing a party of an intent to seek fees, and then requesting such fees, simply cannot be considered fraudulent or actionable. *See* RCW 4.84.185.

In addition to failing to allege facts to support that the statements at issue were false, Eugster’s claims also lacked other necessary elements, such as publication to a third party or a malicious perversion of a regularly issued process. *See* Resps.’ Br. at 23. In response, Eugster fails to overcome this deficiency, or to address this issue at all, further underscoring the frivolity of his entire complaint. By ignoring Eugster’s abject failure to state a claim, the superior court overlooked an independent ground for finding this lawsuit untenable and thus frivolous, warranting a fee award.

2. The superior court ignored that collateral estoppel barred Eugster’s complaint.

The second ground rendering Eugster’s lawsuit untenable that the superior court ignored is that Eugster’s core assertion of fraudulent and defamatory statements had already been rejected in federal court and was

thus barred under the doctrine of collateral estoppel. Resps.’ Br. at 17-19. As the WSBA has explained in detail, collateral estoppel applies when (1) an identical issue was decided in a prior action, (2) that action ended in a final judgment on the merits, and (3) the party against whom collateral estoppel is asserted was a party to that earlier action or in privity with one. *See id.* (citing cases). These elements were clearly met here based on the prior federal litigation between the parties, further barring Eugster’s claims and rendering his complaint entirely untenable. In response, Eugster insists that no element of collateral estoppel is present and that fees are therefore unwarranted, but he is wrong as to each element. Reply Br. at 9-10.

First, Eugster argues that no identical issue was decided in the prior federal case, *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). In *Caruso*, however, Eugster already litigated whether the statements the WSBA made in that case (which are the same statements Eugster challenges in this case) were false, and both the district court and the Ninth Circuit rejected his position. In an order issued well before Eugster filed this suit, the district court rejected Eugster’s argument that the WSBA “failed to put forth adequate factual support” for the statements in its briefing. 2017 WL 2256782, at *4, 5 (May 23, 2017), *aff’d*, 716 F.

App’x 645 (9th Cir. 2018). In doing so, the district court expressly acknowledged the WSBA’s arguments that the same claims had already been “rejected by other courts in Eugster’s past actions,” that Eugster should be deterred from trying to “recruit other disciplined attorneys” to assert such claims, and that the suit appeared to be “a back door attempt” to further Eugster’s “personal agenda” against the WSBA—the same points Eugster complains about in this suit. *Id.* at *3. The district court ruled that the WSBA’s arguments had “merit,” and thus that there was no basis for the court to sanction the WSBA for its statements. *Id.* at *5. On appeal, the Ninth Circuit affirmed and similarly found Eugster’s allegations of fraud and defamation, again based on the same statements at issue here, were “without merit” and “unsupported by the record.” 716 F. App’x at 646. Accordingly, the key issue here—whether the WSBA’s statements in *Caruso* were unsupported and false—was already decided against Eugster by both the district court and the Ninth Circuit.¹

As to the second element, Eugster wrongly suggests, without explanation or support, that the issue was not resolved in a final judgment on the merits. *See* Reply Br. at 9. Under Ninth Circuit law, however, any judgment is final when it is “sufficiently firm” to be given conclusive

¹ The Ninth Circuit issued its decision after Eugster filed this lawsuit but before the superior court ruled on the WSBA’s motion to dismiss. *See* CP 3, 266-69. Eugster’s failure to withdraw his complaint in the wake of the Ninth Circuit’s decision only confirms the frivolity of his lawsuit and the necessity of awarding attorney fees.

effect, especially when the parties have been “fully heard” and the court’s decision is reasoned and appealable. *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1040 (9th Cir. 1983) (internal quotations omitted).

Further, a decision qualifies as “on the merits” when it is “general, and not based on any technical defect or objection, and the parties had a full legal opportunity to be heard on their respective claims and contentions.” *Wight v. Montana-Dakota Utils. Co.*, 299 F.2d 470, 477 (9th Cir. 1962) (internal quotations omitted). Here, the district court’s order denying Eugster’s request for sanctions in *Caruso* was a final judgment on the merits, given that the parties were heard, the court issued a written opinion explaining its rejection of Eugster’s position, the decision was not based on a technicality, and the Ninth Circuit affirmed on appeal in a reasoned opinion that itself became part of the final judgment in the case.

As to the third and final element, Eugster suggests a lack of privity, but he was both a party and in privity with a party in *Caruso*. As an initial matter, Eugster acted “on his own behalf” in the sanctions portion of the *Caruso* litigation. 2017 WL 2256782, at *1; *see also* 716 F. App’x 645. He was thus a party in *Caruso*. In addition, Eugster was in privity with the plaintiffs in *Caruso* as their attorney—an issue that already has been decided against him in prior litigation, which he is thus collaterally estopped from re-litigating here. *See Eugster v. Littlewood*, 2:17-CV-

0392-TOR, 2018 WL 2187054, at *5 (E.D. Wash. May 11, 2018) (finding “sufficient privity” between Eugster and his clients in *Caruso* for purposes of preclusion (citing cases)), *appeal pending*, No. 18-35421 (9th Cir.). The elements of collateral estoppel are thus met and bar Eugster’s entire complaint in this lawsuit.

Eugster erroneously argues that collateral estoppel does not apply unless an additional fourth factor is present: that there would be no injustice in applying the doctrine. Reply Br. at 5. Eugster cites to Washington law on this point. *Id.* As the WSBA has explained, however, the law of the Ninth Circuit applies here and does not require a fourth factor, so long as the three above elements have been met. *See Resps.’ Br.* at 18. Moreover, even if such a factor were separately required—which it is not—it would be easily satisfied here because this suit is an attempt to raise in state court the same objections about legal briefing that were already rejected in federal court. If anything, allowing Eugster to undermine prior federal court proceedings in this collateral suit would be an injustice to the WSBA, its counsel, and the judicial system.

Finally, separate from the application of collateral estoppel, the district court’s prior rejection of Eugster’s arguments also necessarily put Eugster on notice that his claims were meritless. This is an additional reason that Eugster’s complaint was frivolous and warranted sanctions.

See Reid v. Dalton, 124 Wn. App. 113, 123, 100 P.3d 349 (2004) (holding that because Eugster “knew his action was barred” and “nevertheless proceeded with his action,” the suit was frivolous). Eugster’s decision to proceed under such circumstances further confirms that the superior court’s denial of fees was an abuse of discretion.

In sum, the superior court abused its discretion in failing to consider the alternative legal bases for dismissing Eugster’s complaint, each of which on its own rendered the entire complaint untenable. Under *Kearney*, the denial of fees should be reversed on either or both of these grounds.

C. The superior court also misconstrued the scope of the absolute litigation privilege.

The superior court also abused its discretion by reasoning that it was “debatable” whether the attorney statements Eugster complained about were pertinent to the *Caruso* lawsuit and thus privileged. As the WSBA has explained, statements made in litigation that are pertinent are absolutely privileged as a matter of law and cannot form the basis of a separate suit. Resps.’ Br. at 13. A statement is pertinent so long as it has “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). To the extent there is any doubt about pertinence, that doubt must be resolved in favor of the speaker. *Id.*

Here, Eugster was counsel in *Caruso* and all the statements he complains about concerned the *Caruso* lawsuit, including the meritless nature of the claims asserted, Eugster’s motives for filing the case, and the WSBA’s expressed intent to seek attorney fees against Eugster if he proceeded with the suit. *See* CP 7-8. The statements clearly had “*some* relation” to *Caruso* and easily met the standard of having “*any* bearing” upon the lawsuit. *Johnston*, 7 Wn.2d 528 at 540 (emphases added). And even if there were any doubt as to the pertinence of the statements—which there is not—that doubt would need to be resolved in favor of pertinence. *Id.* at 539. There is thus no question that the statements at issue were absolutely privileged under Washington law. Eugster’s complaint was untenable for this reason alone, and the superior court abused its discretion in ruling otherwise.

In response, Eugster asserts that the WSBA has not met its burden to prove the affirmative defense of privilege. Reply Br. at 3-7. But a complaint may be barred on the ground of absolute privilege based solely on the allegations set forth in the complaint. *See, e.g., Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 834, 420 P.2d 698 (1966). Here, the WSBA properly relied on the allegations in Eugster’s complaint in this

case as well as judicially noticeable documents to establish that absolute privilege applies. *See* Resps.’ Br. at 5 n.2. Moreover, as the WSBA has explained, the allegations in Eugster’s complaint fatally undermined his own claims. *See id.* at 12-17. Again, his claims are based on statements that admittedly were made by attorneys in furtherance of litigation. CP 7-11. Eugster “has therefore pleaded himself out of court,” because his allegations concede the elements necessary for absolute privilege to apply. *Dunlap v. Sundberg*, 55 Wash. 609, 614, 104 P. 830 (1909) (holding that factual concession in complaint demonstrated failure to state a claim).

In sum, there is no question under the law that the statements were absolutely privileged and that Eugster’s complaint was therefore untenable in its entirety based on that additional ground. The denial of fees should be reversed on this basis alone.

III. CONCLUSION

In this serial lawsuit arising from prior legal advocacy in federal court, the superior court applied the wrong legal standards and therefore abused its discretion in denying a fee award for frivolity. The superior court ignored two distinct grounds that rendered Eugster’s complaint untenable under the law—his total failure to state a claim, and the preclusive effect of the federal court orders in *Caruso*. The superior court also misconstrued the law of absolute privilege in questioning whether the

attorney statements at issue—all of which concerned the substance and motivations behind the *Caruso* lawsuit—were pertinent to that litigation. Each of these three grounds independently rendered Eugster’s complaint indefensible and thus frivolous in its entirety. Under *Kearney*, this Court should reverse the denial of fees and remand to the superior court for a determination of the specific amount of fees to be awarded to Cross-Appellants.

RESPECTFULLY SUBMITTED this 4th day of March, 2019.

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