

No. 84380-5

[Thurston County Superior Court No. 09-2-02873-4]

SUPREME COURT OF THE STATE OF WASHINGTON

STEPHEN K. EUGSTER, Appellant,

vs.

STATE OF WASHINGTON; WASHINGTON COURT OF APPEALS and
DIVISIONS I, II and III, thereof, Respondents.

STATEMENT OF GROUNDS FOR DIRECT REVIEW
BY THE SUPREME COURT

Stephen K. Eugster, Pro Se

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RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 MAR 31 AM 8:00
BY RONALD R. CRISPENTER
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Stephen K. Eugster, appellant (plaintiff), seeks direct review of the decisions of the Thurston County Superior Court in the above contained in paragraphs one and three of the "Ordered" portion of the Order of Dismissal entered on March 18, 2010. Notice of Appeal attached.

I. Nature of the Case and Decision

This case is a declaratory judgment action. Appellant asked the court to declare that the Wash. Const. art I, § 19 applies to the election of judges to the Washington Court of Appeals.

The trial court, Judge Richard D. Hicks of the Thurston County Superior Court, decided Wash. Const. art I, § 19 does not apply to the election of judges to the Washington Court of Appeals.¹ Judge Hicks decided that the election of judges does not have to be fair and equal, does not have to comply with one person - one vote. Instead he decided that the election of judges was controlled by the privileges and immunities clause of the

¹ His decision is attached to the Notice of Appeal attached.

Washington Declaration of Rights, Wash. Const. art. I, § 12, and that that clause was animated by the Federal Constitution and that the equal protection clause of the Fourteenth Amendment does not apply the one person - one vote rule to the election of judges.

Citing *Wells v. Edwards*, 347 F.Supp. 453 (M.D.La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

In so doing, the court ignored the independent and superior state constitutional requirement of art. I, § 19 that all elections, including the election of judges, are to be fair and equal, that is that the principle of one person - one vote applies to such elections.

See the discussion below starting at page 4.

II. Issue Presented for Review

The issue presented for review is:

Whether Wash. Const. art. I, § 19² which specifically provides that "[a]ll Elections shall be free and equal" applies to the election of judges to the Washington Court of Appeals.³

² "All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

³ Wash. Const. art. IV, § 30. The parties are in agreement there is only one Washington Court of Appeals.

III. Grounds for Direct Review

The reasons for granting direct review are as follows:

A. Case Involves Fundamental Issue

The case is a "case involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination." RAP 4.2 (a). Surely, whether judges are elected to the Washington Court of Appeals in compliance with Wash. Const. art. I, § 19 is a fundamental matter which must, of necessity, be decided by the highest court of the state of Washington.

This case presents an issue of first impression with regard to the election of judges to the Washington Court of Appeals. It is one which must be decided by this court.

At the present time, the election of judges to the Washington Court of Appeals⁴ violates the principle of one person - one vote as required by Wash. Const. art. I, § 19.

Plaintiff's case was dismissed because the court reasoned that the case of *Wells v. Edwards, supra* at 2, applied. In that case,

⁴ The parties agree that there is only one Washington Court of Appeals. Wash. Const. art IV, § 30.

the United States Supreme Court summarily affirmed (but with strong dissenting opinion) that the equal protection clause of the Fourteenth Amendment did not require that the election of judges be subject to the requirements of one person - one vote. The trial judge further reasoned that *Wells v. Edwards* was compelling because the privileges and immunities provision of the Washington Declaration of Rights was an equal protection provision.

The court's decision was in error. It was an error because even if the federal equal protection clause does not require result sought by plaintiff in the action the court would have had to find that under the Washington State Constitution there are separate and independent grounds for applying the principle of one person - one vote to the election of judges. The court has said "[o]ur interpretations of the state privileges and immunities clause have followed the federal interpretation of the equal protection clause. However, Const. art. 1, § 19 provides additional protection for voting rights." *City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985).

Article I, § 19 provides that "[a]ll Elections shall be free and

equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The court has further said, "[w]e have interpreted this provision separately from the equal protection clause of the federal constitution and have stated that it "provides additional protection for voting rights." *Seattle*, 103 Wn.2d at 672-73." *Grant Co. Fire Prot. Dist. v. Moses Lake*, 145 Wn.2d 702, 717, 42 P.3d 394 (2002).

In *Brower v. State*, 137 Wn.2d 44, 68, 969 P.2d 42 (1998) the court said:

Article I, section 19 provides that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." The right to vote is fundamental, and art. I, sec. 19 provides greater protection for a free and equal vote than does the federal constitution's one person-one vote equal protection right. *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984). Article I, section 19 requires "that otherwise qualified voters who are significantly affected by the results of an election be given an opportunity to vote in that election." *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985). [Emphasis added.]

Wash. Const. art. I, § 19 provides that elections are to be fair and equal. Washington Court of Appeals judges are elected. Thus, the election of judges to the Washington Court of Appeals is

subject to art. I, § 19.

There is no exception in the constitution which says that art. I, § 19 does not apply to election of judges to the Washington Court of Appeals. Certainly, it applies to the election of judges to the Washington Supreme Court and to the election of judges to the various Washington Superior Courts. Such elections are at large so the requirements of art. I, § 19 are fulfilled. Wash. Const. art IV, §§ 3 and 5. Judges of the Court of Appeals are elected thus the fair and equal provisions of art. I, § 19 must be complied with.

If there is an election for a state position or state office Wash. Const. art. I, § 19 must be applied to the election. The right to vote is fundamental, and art. I, § 19 provides greater protection for a free and equal vote than does the federal constitution's one person-one vote equal protection right. *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 687 P.2d 841 (1984).

Article I, § 19 requires "that otherwise qualified voters who are significantly affected by the results of an election be given an opportunity to vote in that election." *City of Seattle v. State*, 103 Wn.2d 663, 673, 694 P.2d 641 (1985).

The right to vote in Washington is subject to "fair apportionment" and "[w]hether the right to vote is in fact so apportioned is subject to strict judicial scrutiny." *Foster v. Sunnyside Valley Irrig. Dist.*, 102 Wn.2d 395, 410, 687 P.2d 841 (1984).

B. Case Urgent and of Broad Public Import

The issue is urgent and broad public import which requires prompt and ultimate determination.

The judges of the Court of Appeals cannot decide this case.

First, the judges are not legally elected and thus do not have jurisdiction to decide. An understanding of how the Washington courts view the election of judges is to be found in *Spokane v. Rothwell*, 141 Wn. App. 680, 170 P.3d 1205 (2007). There, the issue before the court was whether a judge who is not properly elected has jurisdiction to act as a judge. Division III held that a judge who was not properly elected did not have jurisdiction to act.⁵ On petition for review to the Washington Supreme Court, the decision was reversed, but on other grounds. *City of Spokane v. Rothwell*,

⁵ *But see*, Brown, J., concurring in part and dissenting in part (exception for defacto judge "where the office is created by a flawed legislative act or municipal ordinance") 141 Wn. App. at 687.

166 Wn.2d 872, 215 P.3d 162 (2009).

Second, the issue is one which the Supreme Court must decide because judges currently elected to the Washington Court of Appeals have a conflict of interest and must recuse themselves from acting. See CJC Canons 1, 2, and 3, and especially Canon 3 (D)(c).

In this matter, the judges of the Court of Appeals have a personal interest. The terms of the offices which they now hold may be affected by decision in the case. Thus, they cannot decide the case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (insurance company's due process violated where a supreme court justice affirmed a jury award against the insurer although he had a personal financial stake in a pending class action suit involving the same issues).

Also, there are these basic maxims – "no man can be a judge in his own case," and "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955); see also, *Public Utility Dist. v. W.W.P. Co.*, 20 Wn.2d 384, 404, 147 P.2d 923 (1944).

IV. Conclusion

Appellant requests the court accept direct review.

March 29, 2010.

Respectfully submitted,

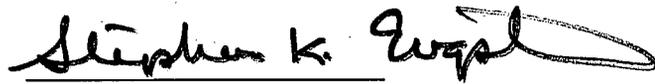
A handwritten signature in black ink that reads "Stephen K. Eugster". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served a copy of the foregoing on the attorneys for the defendants in these proceedings at their addresses of record by U.S. Mail postage prepaid and first class and also by e-mail to their e-mail addresses of record on the date below.

March 29, 2010.

A handwritten signature in black ink that reads "Stephen K. Eugster". The signature is written in a cursive style with a large, sweeping flourish at the end.

Stephen K. Eugster

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

STEPHEN K. EUGSTER,)

Plaintiff,)

No. 09-2-02873-4

vs.)

STATE OF WASHINGTON;)

NOTICE OF APPEAL TO THE
WASHINGTON SUPREME
COURT

WASHINGTON COURT OF APPEALS and)
DIVISIONS I, II and III, thereof;)

JUDGES OF WASHINGTON COURT OF)
APPEALS, DIVISION III, namely, STEPHEN)
BROWN, KEVIN M. KORSMO, TERESA C.)
KULIK, JOHN A. SCHULTHEIS, and)
DENNIS J. SWEENEY;)

JUDGES OF WASHINGTON COURT OF)
APPEALS, DIVISION I, namely, SUSAN R.)
AGID, MARLIN J. APPELWICK, MARY)
KAY BECKER, RONALD E. COX,)
STEPHEN J. DWYER, ANNE ELLINGTON,)
C. KENNETH GROSSE, LINDA LAU, J.)
ROBERT LEACH and ANN SCHINDLER;)
and,)

JUDGES OF WASHINGTON COURT OF)
APPEALS, DIVISION II, namely, DAVID)
ARMSTRONG, C. C. BRIDGEWATER,)

Stephen K. Eugster
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ELAINE HOUGHTON, J. ROBIN HUNT,)
JOEL PENOYAR, CHRISTINE)
QUINN-BRINTNALL, and MARYWAVE)
VAN DEREN,)
)
)
Defendants.)
)

Stephen K. Eugster, plaintiff, seeks review by the Washington Supreme Court of the Order on Motions for Summary Judgment and Dismissal dismissing plaintiff's case entered on March 18, 2010 with respect of the paragraphs 1 and 3 of the "Ordered" portion of the Order. A copy of the Order is attached to this notice.

March 26, 2010.

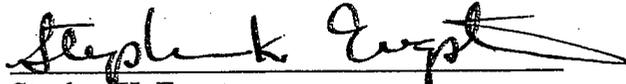


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CERTIFICATE OF SERVICE

I, Stephen K. Eugster, certify that I served a copy of the foregoing plus attachment to the attorneys for the defendants in these proceedings at their addresses of record by U.S. Mail postage prepaid and first class and also by e-mail to their e-mail addresses of record on the date below.

March 26, 2010.



Stephen K. Eugster

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ATTORNEY GENERAL
OF
WASHINGTON

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SUPERIOR COURT
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**STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT**

STEPHEN K. EUGSTER,

Plaintiff,

v.

NO. 09-2-02873-4

STATE OF WASHINGTON;

WASHINGTON COURT OF APPEALS
and DIVISIONS I, II and III, thereof;

JUDGES OF WASHINGTON COURT
OF APPEALS, DIVISION III, namely,
STEPHEN BROWN, KEVEN M.
KORSMO, TERESA C. KULIK, JOHN A.
SCHULTHEIS, and DENNIS J.
SWEENEY;

JUDGES OF WASHINGTON COURT OF
APPEALS, DIVISION I, namely, SUSAN
R. AGID, MARLIN J. APPELWICK,
MARY KAY BECKER, RONALD E.
COX, STEPHEN J. DWYER, ANNE
ELLINGTON; C. KENNETH GROSSE,
LINDA LAU, J. ROBERT LEACH and

ORDER ON MOTIONS
FOR SUMMARY
JUDGMENT AND
DISMISSAL

1 ANN SCHINDLER; and,
2
3 JUDGES OF WASHINGTON COURT OF
4 APPEALS, DIVISION II, namely, DAVID
5 ARMSTRONG, C.C. BRIDGEWATER,
6 ELAINE HOUGHTON, J. ROBIN HUNT,
7 JOEL PENOYAR, CHRISTINE QUINN-
8 BRINTNALL, and MARYWAVE VAN
DEREN,
9
10 Defendants.

11 This matter came on for hearing on February 5, 2010, on the motion of the
12 Plaintiff for partial summary judgment and the motions of the Defendants for
13 dismissal. The Court considered the motions filed, the memoranda of counsel,
14 together with attachments and other material submitted, the pleadings on file, and
15 the arguments of counsel. Specifically, the Court considered:

- 16 1. The Summons and Complaint;
- 17 2. The Answer;
- 18 3. Plaintiff's Motion for Partial Summary Judgment;
- 19 4. The Declaration of Stephen Eugster, together with attachments;
- 20 5. Defendants' Motions to Dismiss and Cross Motion for Summary
21 Judgment;
- 22 6. Plaintiff's Reply Memorandum;
- 23 7. The oral arguments of counsel.

24 Based on the foregoing, it is hereby ORDERED that

- 25 1. The Plaintiff's motion for partial summary judgment is DENIED.
- 26

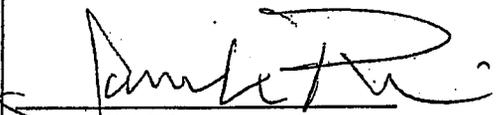
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- 2. The Defendants' motion to dismiss all of the individually named Court of Appeals judges is GRANTED.
- 3. The Defendants' motion for dismissal for failure to state a claim on which relief can be granted is GRANTED.

DATED this 18 day of March, 2010.

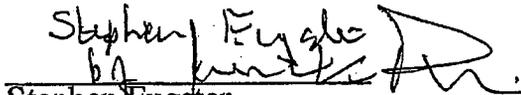
RICHARD D. HICKS
Judge Richard D. Hicks

Presented by:



James K. Pharris
Deputy Solicitor General
Attorney for Defendants

PRESENTATION WAIVED
AND APPROVED AS TO FORM


Stephen Fugster
Attorney for Plaintiff *Per authorization*