

No. 62919-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

CALISTA PHAIR,

Appellant,

v.

MARY ALICE HEUSCHEL, et al.,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Calista Phair appeals the trial court's denial of her motion to vacate its order of summary judgment dismissing her claims against Respondents. The trial court's order should be affirmed because Phair has made no showing that the trial court abused its discretion in denying her motion to vacate.

II. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The appellant's opening brief does not include assignments of error.

III. STATEMENT OF THE CASE

A. PROCEEDING IN THE TRIAL COURT

On August 8, 2008, Calista Phair, plaintiff below and appellant here, filed a notice of appeal with the trial court seeking review of alleged actions on the part of the "Renton School District Staff and Board of Directors," in connection with her request for reconsideration of instructional resources used in the Renton School District. On November 14, 2008, Renton School District Superintendent Mary Alice Heuschel and the other named defendants moved for summary judgment dismissing Phair's appeal. Despite having been properly served with the defendants' motion for summary judgment, Phair failed to file a brief in response to the motion and failed to appear for oral argument on the motion. On

December 12, 2008, the trial court granted the motion for summary judgment, dismissing Phair's claims in their entirety.

On December 24, 2008, Phair filed a Motion to Produce Proof of Service and Vacate Summary Judgment Order. On December 29, 2008, the trial court entered an order denying the Motion to Produce Proof of Service and Vacate Summary Judgment Order.

On January 9, 2009, Phair filed a second motion to produce proof of service captioned "Motion to Produce Proof of Service to Plaintiffs, Pro Se." On January 26, 2009, the trial court entered its Second Order Denying Plaintiff's Motion to Produce Proof of Service to Plaintiffs. It is from the trial court's order of December 29, 2008, denying her motion to vacate that Phair now appeals.

B. STATEMENT OF FACTS

On July 27, 2007, Calista Phair delivered to the Renton School District a written Request for Reconsideration of Instructional Materials Used ("Request for Reconsideration") requesting that the district withdraw The Adventures of Huckleberry Finn by Mark Twain from school use. Clerk's Papers ("CP") at 83-85. On August 8, 2008, Phair filed a notice of appeal in the trial court below, seeking review of alleged actions on the

part of the "Renton School District Staff and Board of Directors," in connection with her request for reconsideration. CP at 27-30¹.

On Friday November 14, 2008, Renton School District Superintendent Mary Alice Heuschel and the other named defendants filed and served on Ms. Phair a motion for summary judgment seeking dismissal of her claims in their entirety. CP at 33-58. On Monday November 17, 2008, Phair filed a motion for reconsideration seeking reconsideration of the trial court's denial of her motion to produce agency record² and affidavit of prejudice. CP at 59-63.

On November 20, 2008, the trial court denied Phair's motion for reconsideration and rejected her affidavit of prejudice, noting that the affidavit had been brought after the court had made a discretionary ruling in the case. CP at 64. On November 26, 2008, before Phair was required to file any opposition to the defendants' motion for summary judgment, the presiding judge of the trial court issued an Order on Transfer of Individual Judge Assignment, indicating that effective January 12, 2009,

¹ While the caption in Phair's notice of appeal to the superior court contained the name of Beatrice Clark as a plaintiff, nothing in the notice of appeal or statement of claim signed by Phair set forth any facts related to a claim on the part of Beatrice Clark. In their motion for summary judgment the defendants, therefore, requested that the trial dismiss Clark from the action for failure to state a claim. Only Phair appealed to this Court the trial's court denial of the motion to vacate.

² On November 6, 2008, the trial court denied Phair's motion to produce agency record on grounds that "there was no final decision made by the Renton School District, due to the Plaintiffs' failure to pursue and exhaust administrative remedies available to them." CP at 79.

Phair's case would be transferred from Judge Andrea Darvas' courtroom to Judge William Downing's courtroom. CP at 65.

Despite having been properly served with the defendants' motion for summary judgment, Phair failed to file affidavits or a memorandum of law in opposition to the motion and failed to appear for oral argument on the motion. CP at 66-67. On December 12, 2008, the trial court granted the motion for summary judgment, dismissing Phair's claims in their entirety. Id.

On December 24, 2008, Phair filed a Motion to Produce Proof of Service and Vacate Summary Judgment Order. CP at 68-74. Phair claimed that "[o]n November 26, 2008 [the plaintiffs] were granted an Order on Transfer of Individual Judge Assignment from Judge Andrea Darvas based on an Affidavit of Prejudice filed against her[.]" and that the plaintiffs never received the defendants' motion for summary judgment. CP at 70.

On December 29, 2008, the court entered an order denying the Motion to Produce Proof of Service and Vacate Summary Judgment Order, citing the following reasons for its decision:

- 1) The defendants' motion for summary judgment contained a certificate of service signed under penalty of perjury by Alice Wells, which certified that the motion for summary judgment was both hand delivered

and sent via US Mail to plaintiffs. A copy of this certificate of service will be attached to the copy of this Order that is sent to plaintiffs. Plaintiffs' motion to produce proof of service is redundant, in that proof of service already has been filed.

2) The court entered an order on November 20, 2008 denying plaintiffs' affidavit of prejudice (as well as plaintiffs' motion for reconsideration of the court's previous order denying the motion to compel production of the administrative record). An affidavit of prejudice may only be filed against a judge who has not previously made any discretionary ruling in a case, and plaintiffs filed their affidavit of prejudice after the court had considered and denied plaintiffs' motion to compel production of the administrative record in this case. See RCW 4.12.050

The Order on Change of Judge that was entered by Judge Hilyer was a routine administrative matter in connection with the undersigned's transfer to the Maleng Regional Justice Center beginning January 12, 2009. The order for change of judge was not a grant of the plaintiffs' affidavit of prejudice, and it stated further that reassignment of this case was not effective until January 12, 2009.

CP at 75-76.

On January 9, 2009, Phair filed a second motion to produce proof of service, this time captioned "Motion to Produce Proof of Service to Plaintiffs, Pro Se." CP at 1-20. On January 26, 2009, the trial court

entered its Second Order Denying Plaintiff's Motion to Produce Proof of Service to Plaintiffs. CP at 78.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appellate court reviewing a trial court's denial of a motion to vacate a judgment on an order under CR 60(b) reviews the matter solely for abuse of discretion.³ See Lockett v. Boeing Co., 98 Wn. App. 307, 309, 989 P. 2d 1144 (Div. I 1991); also see State ex rel. Turner v. Briggs, 94 Wn. App. 299, 302, 971 P. 2d 581 (Div. II 1999). "A trial court abuses its discretion when it bases its decision on untenable grounds or untenable reasons." Weems v. North Franklin School District, 109 Wn. App. 767, 777, 37 P.3d 354 (Div. III 2002); also see Lockett, supra at 309-311, citing to Lane v. Brown & Haley, 81 Wn. App. 102, 105, 912 P. 2d 1040 (Div. II 1996). In the absence of a showing of an abuse of discretion the trial court's order should stand.

B. CALISTA PHAIR HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED HER MOTION TO VACATE ITS ORDER GRANTING SUMMARY JUDGMENT.

The Supreme Court has held that:

³ Phair brought her motion to vacate under CR 59. CP at 6. Her motion was, however, untimely under CR 59 given that she filed it more than ten days after the trial court's order granting the defendants' motion for summary judgment. Even assuming, arguendo, that Phair's motion was timely under CR 59, motions for reconsideration under CR 59, like motions to vacate under CR 60, are reviewed for an abuse of discretion. Holaday v. Merceri, 49 Wn. App. 321, 324, 742 P.2d 127 (1987).

Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. . . . Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 29 Wn.2d 12, 26, 482 P.2d 775 (1971).

Phair has failed to demonstrate that the trial court based its denial of her motion to vacate on untenable grounds. Phair based her motion to vacate on her claim that defendants did not serve her with their motion for summary judgment. The trial court gave tenable reasons for denying Phair's motion to vacate, finding that the motion for summary judgment contained a certificate of service that certified under penalty of perjury that the defendants both hand delivered motion and sent it via U.S. Mail to the plaintiffs. The trial court, therefore, did not abuse its discretion in denying Phair's motion to vacate, and its denial of Phair's motion to vacate should stand.

V. CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court affirm the Superior Court's order denying Appellant's motion to vacate.

DATED: September 21, 2009

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CERTIFICATE OF SERVICE

I, Alice Wells, declare as follows: on September 21, 2009, I caused to be served upon Calista Phair, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

BRIEF OF RESPONDENTS

| | | |
|--------------------------|-------|--------------------------------|
| Calista Phair | _____ | Via hand delivery |
| 2828 N.E. 3rd St., #B303 | X | Via U.S. Mail, Certified Mail, |
| Renton, WA 98056 | | Return Receipt Requested, |
| Phone: (253) 761-3093 | _____ | Postage Prepaid |
| Fax: (253) 761-3097 | _____ | Via Overnight Delivery |
| | _____ | Via Facsimile |
| | _____ | Via E-filing |

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 21st day of September, 2009.



Alice Wells