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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 315282

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

CITY OF KAHLOTUS, et al.

Respondent,

vs.

SHARON M. LIND,

Appellant.

RESPONDENT'S REPLY BRIEF

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I. STATEMENT OF CASE

Appellant Sharon Lind owns lots 6, 7, 8, 9, 10, 11, 12, and 13, located in Gillock's Addition to Hardersburg (present day Kahlotus), according to the records of Franklin County. (CP 454, 449). Gillock's Street is an alley/street which separates lots 6, 7, 8, and 9 from lots 10, 11., 12 and 13 in Gillock's Addition¹. Id. Gillock's Street is the subject of this litigation.

The following is a comprehensive description of the procedural history for which this litigation progressed. Such exhaustive statement is necessary to properly describe and frame the issues to which Ms. Linds attempts to present on appeal. Likewise, the city requests an award of fees and costs on appeal and therefore the procedural history serves as a factual basis for such award due to the ongoing repeated attempts to cause the same underlying issues back before the court for re-litigation and/or reconsideration.

¹ Throughout this brief, the street/alley in dispute shall be referred to as "Gillock's Street".

On December 31, 2009, the city of Kahlotus filed a complaint for abatement of nuisance and injunction against Sharon Lind. (CP 454-457). The complaint alleges that Gillock's Street, a street owned by the city of Kahlotus, was blocked by Sharon Lind (hereinafter Lind). (CP 454). The city sought an injunction to prevent Lind from continuing to block the street. (CP 455). Sharon Lind retained attorney, John Ziobro, and filed an answer and counterclaim on February 11, 2010. (CP 449-451). In her answer, Lind sought an order quieting title in regards to the street as well as damages pursuant to a § 1983 claim. Shortly thereafter, third parties, Robert and Marsha Hagans as well as John Greer were added to the suit by Sharon Lind.

On September 22, 2010 the city of Kahlotus filed a motion for summary judgment to determine, as a matter of law, that the city is the fee simple owner to the street/alley subject to the

lawsuit. (CP 393-394). In the event the court found that the city of Kahlotus had vacated the Gillock's Street, the city requested summary judgment that it had acquired ownership by virtue of adverse possession. Finally, the city moved for summary judgment on Lind's §1983 claim. In support of the city's motion, the declaration of Sharon McCaleb, City

Clerk was filed with supporting property records. (CP 395-448).

In response, Lind filed an affidavit and memorandum in opposition to the City's motion on October 14, 2010. (CP 336-370, CP 371-390). Lind further requested the court grant relief in her favor as to ownership of the Gillock's Street. Numerous city and county records obtained through public records requests and/or discovery as well as other discoverable materials (i.e. requests for admission/responses to interrogatories) were submitted by Lind and her attorney in support of Lind's position. (See CP 322-370). The City replied by filing a rebuttal memorandum and declaration of Steve Marks, an employee of the Franklin County Assessor's office. (CP 320-321).

Oral arguments were presented by each side at the summary judgment hearing held October 25, 2010 before Commissioner Jerri Potts. (CP 296-297). However, no recording of the hearing was made so the parties, through their legal representatives, were allowed to again present oral arguments for the record on November 22, 2010. (CP 294-295). The court then took the matter under advisement. Id.

On November 29, 2010, Commissioner Potts ruled in open court with all parties present. She granted summary judgment to the City

regarding ownership of Gillock's Street and dismissed Lind's §1983 claim. (CP 290). Counsel for the City volunteered to prepare an order and findings. Id.

The parties returned for presentment of the findings on December 15, 2010. (CP 283). Counsel for Lind only objected to section (d) of the proposed findings. Id. The court removed section (r) and adopted the findings establishing "judgment that the City of Kahlotus is the fee simple owner of all right, title, and interest to the street/alley known as Gillock's Street and that the defendants do not have any right, title, interest, estate, or interest in or lien upon the Gillock's Street...." (CP 278-282). The findings were filed December 15, 2010. Id.

Thereafter, on April 22, 2011, Lind personally sent a letter to Commissioner Potts describing a 1993 lawsuit between other parties. (CP 277). Court administration wrote a letter in response to indicate that the letter was considered ex parte contact, no official court response would be given, and that the letter would be made part of the case file. (CP 276).

In light of the court's ruling, the City then motioned for summary judgment on its original request for an injunction. A summary judgment hearing was held May 9, 2011 before the Honorable Judge Vic

Vanderschoor. (CP 275). The court heard arguments from both attorneys and ruled in open court for the City. *Id.* Thus, on May 9, 2012, Findings of Fact and Conclusions of Law Granting Plaintiff's Motion for Summary Judgment and Injunction were entered by the Court to prevent Lind from placing cones and other obstructions across the street. (CP 273-274).

In response, Lind then motioned for leave to amend her complaint. (CP 272). A hearing was held on June 20, 2011, with all attorneys present to address the motion. (CP 271). Judge Vanderschoor denied Lind's motion. *Id.* On July 22, 2011, a formal order was signed by Judge Vanderschoor, Lind's attorney, John Ziobro, and counsel for the City. (CP 186-187). No appeal was ever filed relating to the denial of this motion.

The following court action occurred on September 9, 2011, wherein attorney John Ziobro filed a notice to withdraw as counsel of record for Sharon Lind. Proceeding pro se, Sharon Lind filed a motion to vacate judgment pursuant to CR 60(b)(3)² and (4)³ regarding both Commissioner Potts' December 15, 2010 order as well as Judge

² CR 60(b)(3) provides: "Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)."

³ CR 60(b)(4) provides: "Fraud, misrepresentation, or other misconduct of an adverse party."

Vanderschoor's May 15, 2011 order. (CP 184-185). Specifically, Lind's motion was based upon "[t]he evidence provided for this is what has already been presented to the Court, and placed in the Superior Court file for this case, and in forthcoming Declarations". Id. Lind also filed a declaration of Sharon Lind to support her position. (CP 171-183).

The City filed its response to Lind's motion to vacate on December 9, 2011. (CP 168-170). The City argued that Lind failed to follow the proper procedure outlined in CR 60 motions as follows: 1) to obtain and serve a show cause order, 2) the motion must be made within a reasonable time and for reasons indicated in CR 60(b)(1), (2), or (3) not more than one year after judgment, order or proceeding was entered or taken, and finally 3) all the evidence now relied upon by Lind was available and discoverable by Lind prior to entry of the judgments. Id. Thus, Lind's motion is not timely or proper. The third party defendants also filed a response to Lind's motion with arguments along the same lines. (CP 165-167).

Lind's motion to vacate was heard by the Honorable Carrie Runge on December 12, 2011. (CP 164). Judge Runge denied the motion. Id. Four days thereafter, on December 16, 2011, Lind filed a motion to

reconsider. (CP 161-163). Judge Runge issued her ruling on December 22, 2011 denying Lind's motion for reconsideration. (CP 158-159).

Undeterred and mistaken, Lind filed an additional declaration to support her previous motion for reconsideration on December 29, 2011. (CP 148-157). To finalize the record, the City noted a hearing to present an order denying Lind's motion to vacate the former orders. A presentment hearing was held January 3, 2012. (CP 147). Attorney for the City and Sharon Lind were both present. Id. Judge Runge signed the order denying Lind's motion to vacate judgments. (CP 145-146). The court found that Lind had not presented any newly discovered evidence by which due diligence could not have been discovered in time to move for a new trial under CR 59(b); that most, if not all, the evidence presented by Lind in support of her motion was available in the public records which could have been discovered with due diligence; that the argument and evidence presented by Lind did not show any fraud, misrepresentation, or other misconduct of the City; and that Lind's motions were brought nearly a year after its entry such was not considered reasonable time. Id.

Again, undeterred and mistakenly assuming she had opportunity to respond to the court's latest order, Lind filed another motion for

reconsideration and supplemental declaration in furtherance of her motion to vacate on January 26, 2012. (CP 139-144). In response, Judge Runge authored a letter to Ms. Lind describing that her January 26, 2012 motion failed to meet the 10 day deadline for reconsideration to her January 3, 2012 ruling. (CP 127).

Sharon Lind first sought appeal with Division III of the Court of Appeals on February 3, 2012. (CP 129). Presumably, Lind appealed the order denying her motion to vacate. However, Lind references her four arguments to the Superior Court. *Id.* Commissioner Joyce McCown issued her ruling on behalf of the Court of Appeals on April 9, 2012. (CP 107-108). The ruling provided that Ms. Lind had failed to establish extraordinary circumstances as required by RAP 18.8(b) that would warrant an extension of time for the filing of a notice of appeal and therefore the City's motion to dismiss was granted. (CP 108). Said decision became final on October 30, 2012. (CP 106).

Meanwhile, the third party defendants sought relief by way of sanctions and attorney fees for the ongoing motion practice exercised by Lind. (CP 130-138). On December 13, 2012, Lind filed a motion for show cause for motion to amend judgments/orders. (CP 103-105). Sharon Lind

relentlessly sought to change the court's ruling over and over. In said motion for show cause, Lind attempted to showcase a new argument wherein her property was outside official city limits. Id. However, Lind claimed therein that "[m]uch of the evidence provided for this is what has already been presented to the Court and can be found in the Court files for this case...."

The City filed its response to Lind's second motion to vacate on December 31, 2012. (CP 73-75). The City requested attorney fees for the ongoing redundant motions. Id. The City cited RCW 4.84.185 for frivolous claims/motions, CR 11 for sanctions, and fairness as the motion had previously been raised and adjudicated in support of its motion for fees. Id. Lind's second motion to vacate was denied by the Honorable Vic Vanderschoor on December 31, 2012. (CP 70).

Sharon Lind again filed for reconsideration on January 4, 2013. (CP 64-68). Said reconsideration motion ostensibly seeks reconsideration of the court's December 31, 2012 ruling but re-argues Lind's position surrounding the summary judgment rulings. Id. Judge Vanderschoor denied Lind's reconsideration motion on January 14, 2013. (CP 61-62).

On January 25, 2013, the City obtains an order denying Lind's

motion to vacate and granting sanctions. (CP 50-54). Accordingly, Lind seizes the opportunity to move again for reconsideration on February 4, 2013. (CP 49). Judge Vanderschoor again denies reconsideration the same day. (CP 46-47). In response, Lind files another motion for reconsideration on February 15, 2013 seeking the court reconsider its previous denial of her last motion for reconsideration. (CP 37-40). On February 27, 2013, Judge Vanderschoor again denies Lind's third motion for reconsideration. (CP 34-35).

Finally, Lind files her forth and last motion for reconsideration on March 1, 2013. (CP 25-33). On March 4, 2013, Judge Vanderschoor again denies the fourth motion for reconsideration and comments "do not request reconsideration again - try the court of appeals". (CP 22-23). Following such judicial advise, Sharon Lind attempts the appeal process for the second time by filing a notice of appeal to the order denying Lind's motion to vacate and order granting sanctions on March 25, 2013. (CP 6).

II. ARGUMENT

A. LIND'S APPEAL IS UNTIMELY AND SHOULD BE DISMISSED.

Sharon Lind's first appeal to this court dated February 2, 2012 has

been resolved. (See CP 129 and 106-108). The issues thereto should not be presented nor re-addressed herein. However, Ms. Lind again requests this court to examine the court's previous rulings on summary judgment decided long ago. *See* Appellant's Appeal Brief (corrected). RAP 18.8(b) governs disposition of untimely appeals. State v. Ashbaugh, 90 Wash.2d 432, 438, 583 P.2d 1206 (1978). RAP 18.8(b) provides:

“The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal ... The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section.”

The court applies this test rigorously. Consequently, there are very few instances in which Washington appellate courts have found that this test was satisfied. *See* Reichelt v. Raymark Indus., Inc., 52 Wash.App. 763, 765, 764 P.2d 653 (1988). The burden is on Lind to provide “sufficient excuse for [his] failure to file a timely notice of appeal” and to demonstrate “sound reasons to abandon the [judicial] preference for finality.” Schaeferco, Inc. v. Columbia River Gorge Comm'n, 121 Wash.2d 366, 368, 849 P.2d 1225 (1993). Lind has failed to meet this burden with regard to the previous issues already determined as well as the latest orders

she seeks review.

The orders Lind appeals this time concern the January 25, 2013 order denying Lind's motion to vacate and granting sanctions. Lind timely sought reconsideration of said order by filing on February 4, 2013. However, the court denied her motion for reconsideration on February 5, 2013. While Lind inappropriately continued to file repeated motions for reconsideration after each subsequent denial, such action does not extend the time for appeal. See RAP 5.2(e). Thus, Lind had 30 days from February 5, 2013 to file a timely notice of appeal. RAP 5.2(a). Lind's notice of appeal dated March 25, 2013 is untimely and therefore should be denied.

B . IN THE EVENT THE AMENDED ORDERS GRANTING SANCTIONS AND JUDGMENT DATED MARCH 14, 2013 ARE USED FOR PURPOSES OF CALCULATING TIME, LIND FAILS TO SHOW THAT THE COURT ABUSED ITS DISCRETION.

The standard of review for a decision granting a motion to vacate under CR 60(b) is abuse of discretion. Luckett v. Boeing Co., 98 Wash.App. 307, 309, 989 P.2d 1144 (1999). A court abuses its discretion

when its decision is based on untenable grounds or reasoning. Lockett, 98 Wash.App. at 309, 989 P.2d 1144; Barr v. MacGugan, 119 Wash. App. 43, 45-46, 78 P.3d 660, 662 (2003). Ms. Lind fails to identify this issue and/or argue that the lower court has abused its discretion with regard to its refusal to vacate the judgment she seeks.

Nevertheless, on review of an order denying a motion to vacate, only ‘the propriety of the denial not the impropriety of the underlying judgment’ is before the reviewing court.” State v. Gaut, 111 Wash.App. 875, 881, 46 P.3d 832 (2002) (quoting Bjurstrom v. Campbell, 27 Wash.App. 449, 450-51, 618 P.2d 533 (1980)). There is simply nothing in the record indicating that the lower court acted wrongfully in any way or based its decision on untenable grounds. While Ms. Lind wishes to re-litigate her case in whole, such issues are not before this court. Hence, she has not provided a sufficient basis to warrant review of the lower court’s discretionary ruling.

CR 60(b) permits a court to vacate a final judgment for reasons such as excusable neglect, unavoidable casualty or misfortune preventing the party from prosecuting or defending, or any other reason justifying relief from the operation of the judgment. CR 60(b)(1), (9), (11). “The use

of CR 60(b) (11) “should be confined to situations involving extraordinary circumstances not covered by any other section of the rule.” Gustafson v. Gustafson, 54 Wash.App. 66, 75, 772 P.2d 1031 (1989) (*quoting In re Marriage of Flannagan*, 42 Wash.App. at 221, 709 P.2d 1247 (1985)). Ms. Lind further fails to address any potential CR 60 concerns to justify review of the lower court’s ruling denying her vacation. As a result of Ms. Lind’s insufficient showing, the appeal must be denied.

C. THE CITY SHOULD BE AWARDED FEES AND COSTS.

Given this is the extensive motion practice after final judgment was rendered in the underlying case, this second appeal attempt by Sharon Lind further justifies and supports an award of fees and costs for the City of Kahlotus. Specifically, RAP 14.2 allows for an award of costs to the party that substantially prevails on review. The lower court, in its discretion, awarded fees and costs based on the ongoing, relentless, and unnecessary, motion practice driven by Sharon Lind pursuant to RCW 4.84.185 and CR 11. The principles underlying the statute and court rule continue to apply.

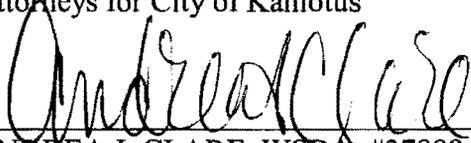
III. CONCLUSIONS

The Court of Appeals should dismiss Ms. Lind's appeal and/or affirm the trial court's denial of the motion to vacate. Additionally, an award of fees/costs should be awarded in favor of the City.

DATED this 22ND day of August, 2013.

Respectfully submitted,

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Attorneys for City of Kahlotus



ANDREA J. CLARE, WSBA #37889

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF BENTON)

The undersigned, being first duly sworn on oath, deposes and says:

That on August 22, 2013, affiant deposited in the mails of the United States a properly stamped and addressed envelope directed to:

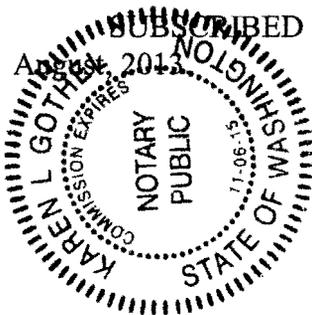
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containing a true and correct copy of Respondent's Reply Brief, and this Affidavit of Mailing.

Kristi L Flyg
KRISTI L. FLYG



SUBSCRIBED AND SWORN TO before me this 22nd day of August 2013

Karen L Gotthel
Notary Public in and for the state of Washington, residing at Kennewick
Karen L Gotthel
NAME OF NOTARY PUBLIC (TYPE OR PRINT)
My commission expires: 11/16/2015