

FILED

OCT 28 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 316289

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON



PHYLLIS MCRAE,

Respondent

v.

TAHITIAN LLC,

Appellant,

APPELLANT TAHITIAN LLC'S REPLY BRIEF

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I. REPLY ARGUMENT

The Tahitian's argument on appeal is very simple. The jury specifically found an award of zero damages against the Tahitian on all claims under Verdict Form A. Because Ms. McRae did not challenge the jury's verdict prior to discharge or file any post-trial motions, the only authority for the trial court to set aside the verdict fell under CR 59. While CR 59 permits the trial court to act on its own initiative, the relief is limited to ordering a hearing on a proposed order for a new trial under CR 59(d).

Here, however, the trial court decided *sua sponte* to not only set aside the verdict without a hearing on a proposed order for a new trial, but then found that the Tahitian was liable for more than \$35,000 in damages plus attorneys' fees on a wrongful termination claim; a claim that was not even mentioned in the verdict forms. This was done without a prior motion by Ms. McRae, without prior notice to the Tahitian, and ended with the trial court stating that it would not even entertain a motion for reconsideration.

Despite the above, Ms. McRae's brief simply refuses to address the authority of the trial court to act as it did in light of CR 59, or her failure to object to the jury's verdict prior to discharge. Instead, she is asking this

Court to simply ignore these infirmities and allow for a windfall because the trial court's error was favorable.

In support of this result, Ms. McRae makes the following arguments: 1) that the Tahitian waived its right to the present appeal by not challenging the jury's verdict; 2) the trial court properly harmonized the verdict forms, and; 3); that that the Tahitian is not entitled to a new trial or JNOV. After arguing that Ms. McRae has failed to address the procedural issues raised by the present appeal, each of these arguments is addressed under separate headings below.

A. Ms. McRae's responsive brief does not address the procedural question of the present appeal

The Tahitian's first assignment of error argues that the trial court did not have the authority to act *sua sponte* by amending the jury's award of zero damages. Ms. McRae's responsive brief does not address the merits of whether the trial court had the authority to act as it did. Rather, Ms. McRae's simply states: "Appellants cite no authority for this, other than CR 50 and CR 59, in the section of their briefing relating to their first assignment of error." *Respondent's Brief at 11.*

While this may be true, the Tahitian argues that the boundaries of CR 50 and CR 59 are controlling. When acting on its own initiative, the trial court was simply precluded from ordering any relief other than a new

trial under CR 59. Ms. McRae has not offered any arguments or authorities to the contrary. Given Ms. McRae's failure to address the merits of this argument, the present appeal should be granted.

B. The Tahitian did not waive its right to appeal by failing to challenge the jury verdict prior to discharge

Ms. McRae argues that the Tahitian waived its right to appeal by failing to object to the jury's verdict prior to discharge. However, Verdict Form A related specifically to the Tahitian and awarded zero damages. Because the Tahitian believes that Verdict Form A is dispositive, there was no cause to object to the jury's verdict.

What the Tahitian does challenge is the trial court's decision to set aside the verdict by shifting liability between defendants after the jury was discharged. This shifting of liability occurred during the hearing on defendant Fen Li's post-trial motion under CR 59. Here, the jury originally awarded damages against Fen Li which totaled \$35,980.53. The trial court granted Fen Li's motion to the extent that the damages were reduced by \$35,902.12.

However, the trial court then ruled *sua sponte* that the amount of the reduction (\$35,902.12) should be applied against the Tahitian based on a claim for wrongful termination against public policy. The Tahitian immediately objected on both procedural and substantive grounds.

Based upon the above, the Tahitian had no cause to challenge the jury's verdict prior to discharge. The jury plainly stated that its intent was to award zero damages against the Tahitian. And, the Tahitian's basis for the present appeal arose *after the fact*, when the trial court subsequently decided *sua sponte* to shift damages between defendants. Because the Tahitian immediately objected to the trial court's ruling, Ms. McRae's argument that the Tahitian did not preserve its right to appeal should be rejected.

C. The trial court did not have the authority to amend the jury's verdict on the basis of a clerical or scrivener's error

Ms. McRae's second argument is that the trial court had the authority to amend the jury's verdict based upon a clerical or scrivener's error. Notably, she does not argue that the trial court had the authority to amend the jury's verdict *sua sponte* without a prior motion and notice. Even then, Ms. McRae does not explain what clerical or scrivener's error would justify switching liability between defendants. In fact, Ms. McRae relies upon authorities that actually reject the authority of the trial court to amend Verdict Form A on its own initiative.

According to Ms. McRae: "The appellate court strongly presumes the jury's verdict is correct." *Respondent's Brief at 9*, quoting *Bunch v.*

King County Dept. of Youth Services, 155 Wn.2d 165, 116 P.3d 381 (2005). This presumption would of course apply to Verdict Form A, which found zero liability against the Tahitian. Ms. McRae then places her principal reliance on *City Bond & Share v. Klement*, 165 Wn. 408, 5 P.2d 523 (1931), which is even more favorable to the Tahitian:

A verdict in a civil case which is defective or erroneous in a mere matter of form, *not affecting the merits or rights of the parties*, may be amended by the court to conform to the issues and give effect to what the jury *unmistakably found*. The court, however, *has no power to supply substantial omissions*, and the amendment in all cases must be such as to make the verdict conform to the real intent of the jury. If a general verdict is returned and the amount which should have been found is a matter of *mere computation and over which there is no controversy*, the court may amend. *But the court cannot, under the guise of amending a verdict, invade the province of the jury or substitute his verdict for theirs.*

Id. at 410-11 (1931) (emphasis added).

Here, the jury awarded zero damages against the Tahitian under Verdict Form A, bolstered by the fact that the jury foreman specifically crossed out and initialed an unintended entry of damages. Therefore, the jury “unmistakably found” in favor of zero damages against the Tahitian. *Id.* Similarly, switching liability between Fen Li and the Tahitian substantially “affect[ed] the merits of rights of the parties.” *Id.* And, this was not a matter of “mere computation over which there is no controversy,” because there is a clear dispute based on the jury’s finding of zero damages against the Tahitian under Verdict Form A. *Id.*

This Court should equally reject Ms. McRae's related argument that the switching of liability between defendants should be upheld because a special verdict should control over a general verdict. Interestingly, Ms. McRae's brief does not quote the special verdict form. Rather, she provides a citation to the special verdict form in support of the statement that "on the special verdict form, the jury found that the Tahitian and Li willfully paid McRae a lower wage than they were obligated to pay, and that Li was an officer, vice principal, or agent of the Tahitian." *Respondent's Brief at 4*. While true, this statement is limited to the wage claim, and is a far cry from the jury finding that the Tahitian was liable for wrongful termination. The jury simply never found against the Tahitian on a wrongful termination claim.

D. Ms. McRae incorrectly argues that the Tahitian waived its right to the present appeal by failing to object to the trial court's ruling on JNOV or CR 59

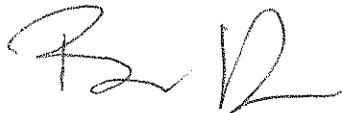
Ms. McRae's final argument is that the Tahitian has waived its right to challenge the trial court's denial of its motions under CR 50 or CR 59. First, the denial of the Tahitian's motion under CR 50 occurred prior to the trial court's *sua sponte* shifting of liability between defendants. Second, even after the trial court's adverse ruling, the court stated that it would not even entertain a motion for reconsideration under CR 59, and

that the matter should be decided by this Court. Regardless, the Tahitian filed a timely notice of appeal of the trial court's final decision.

E. Ms. McRae is not entitled to attorney's fees on appeal or otherwise

Ms. McRae's request for attorney's fees both at the trial level and on appeal should be denied. Ms. McRae's request for fees is based on the tort claim of wrongful termination in violation of public policy. However, attorney's fees are not allowed a claim for wrongful discharge, which is a common tort law, absent employment contract. *Roberts v. Dudley*, 140 Wn.2d 58, 7, 993 P.2d 901.

October 24 2013



Benjamin Dow, WSBA #39126
Attorney for Tahitian, LLC

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COURT OF APPEALS DIVISION III
STATE OF WASHINGTON

In re:)	
)	Superior Court No. 11-2-51131-9
MCRAE, PHYLLIS,)	
)	Court of Appeals No. 316289
Plaintiff,)	
and)	DECLARATION OF
)	SERVICE
TAHITIAN LLC, et all,)	
)	
Defendant)	

I, Brian Gieszler, hereby declare as follows:

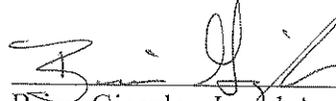
1. I am over the age of eighteen (18) years of age, I make these statements on personal knowledge, and I am competent to testify to the matters stated herein.

2. That on the 25th day of October, 2013, I provided true and correct copies of the **Appellant's Reply Brief** upon Eric Eisinger, Attorney for Phyllis McRae, by faxing copies and mailing copies through the United States mail at Richland, Benton County, Washington, with first class postage prepaid to:

Eric Eisinger
1333 Columbia Park Trail, Ste 220
Richland, WA 99352

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

6 Dated this 25 day of October, 2013 at Richland, Washington.

8 

10 Brian Gieszler, Legal Assistant to
12 Ben Dow, Attorney for Defendant