

**FILED**

**AUG 29 2013**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 316289

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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PHYLLIS MCRAE,

Respondent

v.

TAHITIAN LLC.

Appellant.

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APPELLANT TAHITIAN LLC'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

**No. 1.** The trial court erred as a matter of law by *sua sponte* amending the jury verdict in favor of the defendant, Tahitian Inn, LLC from zero damages to \$35,903.13.

**No. 2.** Even had a proper motion been filed to amend or alter the jury verdict, the trial court erred as a matter of law by amending the jury's verdict in a manner which affected the substantive rights of the Tahitian Inn, LLC.

## **II. STATEMENT OF CASE**

The plaintiff Phyllis McCrae ("McCrae") worked as a hotel employee for the defendant Tahitian Inn, LLC ("the Tahitian"). The Tahitian was owned and operated by the defendants Fen Li and Ming Li. The specific causes of action pled in McCrae's amended complaint were stated as: "Personal Injury," "Wrongful Termination in Violation of Public Policy," "Constructive Discharge," "Wage Claim," and "Tort of Outrage/Intentional Infliction of Emotional Distress." *Supp. CP at 557-62.* McCrae pled each claim against each of the defendants. *Id.*

A five day jury trial began on November 2, 2012. At the conclusion of McCrae's case in chief, the defendants moved for judgment as a matter of law pursuant to CR 50, seeking the dismissal of all claims

against all defendants. In response, McCrae's attorney Eric Eisinger stipulated to dismissing all claims against defendants Fen Li and Ming Li, except for the statutory wage claim:

**MR. EISINGER:** The only claim personally against the Lis is the wage claim, and I did not hear that the wage claim was an issue. So these other four claims we're not seeking liability against Mrs. Li or against Mr. Li.

**THE COURT:** So it could be dismissed as to them?

**MR. EISINGER:** So the way that I would ask that this be set up is we are seeking the four claims: The termination, the constructive discharge, the tort of outrage, and the personal injury claim that the Tahitian be the defendant and solely the Tahitian. For the wage claim, we are pursuing the wage claim against the Tahitian and the Lis, both individually and as their marital capacity.

...

**THE COURT:** So I could dismiss against the Lis as to all of the other claims?

**MR. EISINGER:** Except as to the wage claim.

Thereafter, the court denied the CR 50 motion, with the exception of dismissing all claims against the Lis but for the statutory wage claim: "All right. Thank you. Except as indicated, I'm going to deny the motion to dismiss[.]" *RP at 307-309.*

Ultimately, the jury returned a verdict in favor of all defendants and on all claims with the exception of Fen Li. Verdict Form B was a defense verdict stating "We, the jury, find for the defendants." *CP at 553.*

Verdict Form A related specifically to the Tahitian, and awarded zero in damages. Notably, the presiding juror initially began to write “\$35,” in the column for past economic damages, which was then crossed out and initialed. *CP at 552.*

Verdict Form C related specifically to Fen Li and the statutory wage claim. Here, the jury awarded the \$78.40 sought in unpaid wages. However, the jury further awarded an additional \$35,903.13 with the notation “(4/11-9/12).” Finally, the presiding juror included a notation stating “\*Medical not added due to personal injury not proved.” *CP at 554.*

After the jury rendered its verdicts and was dismissed, McCrae did not file any post trial motions challenging the award of zero damages against the Tahitian. However, Fen Li filed a motion for JNOV under CR 50, or in the alternative for a new trial under CR 59. *CP at 538-46.*

In ruling on Fen Li’s motion, the trial court looked to Verdict Form C and determined that the \$78.40 related to the wage loss claim. *RP at 489.* The trial court then decided that the notation of “(4/11-9/12)” referred to lost wages, which were for the wrongful termination claim. *Id.* However, the wrongful termination claim had been previously dismissed against Fen Li.

Although McCrae had not filed any post-trial motions, the Court nonetheless ruled that the \$35,903.13 in damages erroneously awarded against Fen Li should be charged against the Tahitian: “And this is where the Court has to infer a little bit, but I conclude that that is for the wrongful termination claim, and read with the special verdict form that’s an appropriate judgment, the \$35,902 against the Tahitian.” *Id.* The court ultimately granted Fen Li’s request for relief by reducing the jury award against her by \$35,980.53, but amended the zero award against the Tahitian by adding the \$35,903.53. *RP at 492-93.*

In response to the Court’s ruling, the Tahitian argued that the Court did not have the authority to *sua sponte* amend the verdict forms which related to the Tahitian without a proper motion and notice by McCrae. Here, the Tahitian’s attorney Ben Dow made the following argument:

I think procedurally and substantively the Court is barred from making much of the ruling it just made, because they haven’t filed a motion to that effect. They never filed a motion to amend or alter the judgment...They should have filed a motion. We should have had a chance to respond to that motion, because there’s some dynamite case law out there about why you cannot switch defendants among verdict forms and how you cannot get around, you know, what the jury says. And if you’re going to try to do it, you can’t do it from the bench. We have to have a new trial. So I would ask the Court to reconsider that issue.

*RP at 492.* Later, the Court addressed the request for subsequent reconsideration by stating: “I feel like we’ve already addressed it. I’m

going to deny your motion to reconsider, and I'm just going to let you take your motion to the Court of Appeals." *RP at 499.*

### **III. ARGUMENT**

As argued below, the Court's decision to amend the jury verdict against the Tahitian *sua sponte* was a clear violation of both due process and the civil rules of procedure. Furthermore, even if McCrae had brought a proper motion the Court's ruling abrogated the inviolate principal that it may not simply substitute its own judgment for that of a jury.

Accordingly, the Tahitian requests that this Court reverse and remand for the entry of a judgment consistent with the jury's verdict.

#### **A. The trial court erred by amending the jury verdict *sua sponte***

Under the civil rules and existing case law, there is no authority for a trial court to set aside or amend a jury verdict *sua sponte*. Rather, the only authority for a trial court to achieve such a result is pursuant to CR 50 or CR 59. Because neither rule was properly invoked prior to the Court amending Verdict Forms A and B, reversal is appropriate.

Under CR 50, the Court may grant judgment as a matter of law, but only upon motion of a party during a trial by jury or after the entry of judgment. Notably, the rule does not allow the Court to enter judgment as a matter of law on its own motion.

On the other hand, CR 59 does allow the Court to act on its own accord, but only to the extent of ordering a new trial when there is no evidence or reasonable inference from the evidence to justify the verdict or where it is contrary to law. CR 59(a)(7). Even here, the Court is required to give proper notice and opportunity to be heard:

Not later than 10 days after entry of judgment, the court on its own may order a hearing on its proposed order for a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

CR 59(d).

Significantly, then, while CR 59 allows the Court to act *sua sponte* when ordering a *new trial*, it does not allow the Court to act *sua sponte* when amending or altering a verdict without a new trial. Furthermore, the rule explicitly recognizes a mandate of due process in any court action that could result in an amended jury verdict. Accordingly, even if this Court's action was premised upon CR 59, it would have been limited to granting a new trial, and only upon proper notice and opportunity to be heard. To the contrary, however, the Court amended the jury verdicts without notice, a new trial or due process. *RP at 490.*

In conclusion, then, Ms. McRae did not file a motion under CR 50 or CR 59. Therefore, the Court's decision to amend the jury verdicts *sua sponte* was both contrary to the civil rules, and lacking authority under existing case law.

**B. The trial court was precluded from amending the jury verdicts even upon proper motion**

Even if Ms. McRae had filed a proper motion under CR 50 or CR 59, the Court was prohibited from amending the jury verdicts in a manner which affected the substantive rights of the Tahitian.

Under a long line of controlling case law, a court may not alter or amend a jury verdict in a manner that has a substantive affect on the rights of an aggrieved party. *Hendrickson v. Smith*, 111 Wash. 82, 88, 189 P. 550 (1920)(“Judges of courts cannot, without violating the fundamental law, substitute their opinions, on disputed questions of fact, for the opinion of juries, and enter judgment contrary to verdicts of such juries.”); *Belinger v. Shield*, 164 Wash. 147, 153, 2 P.2d 681 (1931)(“After a jury has been discharged, the authority of the court to amend or correct its verdict is limited strictly to matters of form or clerical error”); *Bond & Share, Inc. v. Klement*, 165 Wash. 408, 411, 5 P.2d 523 (1931)(“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.”) *Worthington v. Caldwell*, 65 Wn.2d 269, 273, 396 P.2d 797 (1964)(“Questions of damages should be decided by the jury and, once the jury renders its verdict, a statutory presumption exists that they have found correctly.”); *Alger v. The City of Mukilteo*, 107 Wn.2d 541, 551, 730 P.2d 1333 (1987)(“Only when the trial judge, using his sound discretion finds that the jury had forsaken sensible thought and reached its verdict out of outrage, animosity or spite...should [the court] interfere with a jury verdict because of its size.”); *Marvik v. Winkelman*, 126 Wn.App. 655, 660, 109 P.3d 47 (2005)(“Although under proper circumstances the court may amend the verdict to conform with the jury’s intent, the court has no power to supply substantial omissions, particularly where the portion of the verdict at issue relates to controverted issues of fact in the case.”)

Here, the jury returned with Verdict Form A, which specifically awarded zero damages against the Tahitian. *CP at 552*. While it appears that the jury considered awarding damages against the Tahitian on Form A, the amount of “35,” was crossed out. *Id.* This is consistent with Verdict Form B, which found in favor of all of the defendants. *CP at 553*. In other words, the verdict forms not only state that the Tahitian was not liable for damages, but actually show that the jury intentionally refused to award

damages by crossing out the initial amount of “35,” on Verdict Form A.

*Id.*

Instead of upholding the award of zero damages against the Tahitian, the Court determined the jury actually meant to find the Tahitian liable for \$35,902.13 in damages based on the wrongful termination claim. *RP at 489.* The Court arrived at this conclusion only after deciding that the same amount could not be assessed against Fen Li because the sole action against her was a \$78.40 wage claim. *RP at 490.*

According to the Court, it decided that the \$35,902.13 which was improperly awarded against Fen Li should be assessed against the Tahitian because “it’s the responsibility of the Court to attempt to harmonize the verdicts and the special verdict forms, which carry more weight. The special verdict form clearly indicates that there was liability against the Tahitian.” *RP at 488.* However, the conclusion that there was clearly liability against the Tahitian on the wrongful termination claim is wholly without merit.

Importantly, the Special Verdict Form does not address the wrongful termination claim whatsoever. *CP at 555, 556.* Rather, the Special Verdict Form asks questions which are limited to the statutory wage and personal injury claims. It cannot be said, then, that the Court based its determination upon an attempt to harmonize conflicting verdict

forms; the only relevant verdict forms found a zero award of damages in favor of the Tahitian.

#### IV. CONCLUSION

In conclusion, the Tahitian was never given notice that the trial court may amend the jury's award of zero damages. The only reason the parties were before the trial court in the first place was upon Fen Li's proper motion to amend the erroneous verdict against her, which was granted. The trial court's *sua sponte* ruling was contrary to the civil rules, which would have limited its ruling to a new trial. And, even had the proper procedure been employed in placing the matter before the trial court, there is no legal authority for the trial court to amend the jury verdict in favor of the Tahitian in a manner that substantively affected its rights. This is all the more true when McCrae never filed a motion for a new trial or to amend or alter the verdict. Accordingly, the trial court should be reversed, and the matter remanded with instructions to enter a judgment consistent with the jury verdicts on their face.

August 26 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.

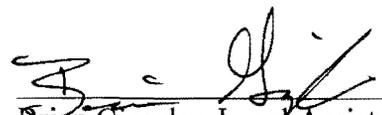
2. That on the 26<sup>th</sup> day of August, 2013, I provided true and correct copies of the **Appellant Brief** upon Eric Eisinger, Attorney for Phyllis McRae, by faxing copies and mailing copies through the United States mail at Richland, Benton County, Washington, with first class postage prepaid to:

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

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

Dated this 26 day of August, 2013 at Richland, Washington.



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