

**FILED**

OCT 01 2013

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

No. 316289

COURT OF APPEALS DIVISION III  
OF THE STATE OF WASHINGTON

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PHYLLIS J. MCRAE, Plaintiff

v.

TAHITIAN, LLC, Defendant

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BRIEF OF RESPONDENT

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ERIC B. EISINGER, WSBA #34293  
Attorney for Respondent

Walker Heye Meehan & Eisinger, PLLC  
1333 Columbia Park Trail, Suite 220  
Richland, WA 99352  
(509) 735-4444

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## I. STATEMENT OF THE CASE

The sole issue in this appeal is whether the judgment entered in this matter is consistent with the jury's verdict. The background facts are as follows. In August 2010, respondent Phyllis McRae ("McRae") was hired as a front desk clerk at the Tahitian Inn in Pasco, Washington. RP at 51. The Tahitian Inn is owned and operated by the Tahitian, LLC ("Tahitian"). McRae worked as a front desk clerk until March 17, 2011, when she was promoted to motel manager and received raise from minimum wage to \$10.00 an hour. RP at 81. One week later, on March 24, 2011, McRae was attacked by a motel guest with a knife. RP at 85.

Victoria Landon, the motel guest in question, had exhibited assaultive behavior with other guests and employees in the twenty-four hours leading up to the assault. RP at 85-90. When McRae arrived at work, Fen Li ("Li"), who owns the Tahitian along with her husband Jianming Li, instructed McRae to evict Landon. RP at 91. McRae asked Li if she could call the police to assist her with the eviction. Li responded that it sounded like McRae was "not up to doing (her) job today." RP at 91-92. As a result, McRae was forced to do the eviction herself. RP at 92. McRae went to the motel room, knocked on the door and Landon answered. RP at 93. When McRae told Landon that she needed to leave the motel the door swung open wide and Landon lunged at McRae with a

knife. RP at 93. McRae jumped back, and Landon chased her out into the parking lot. RP at 93-96. McRae then called the police. RP at 96. The police arrived minutes later, and had to break down the door to subdue Landon. RP 27-28. After speaking with the police, McRae returned to the motel office, where Li had remained during the entire incident. RP at 98. Li told McRae “that’s what you get when you call the police.” RP at 100.

At trial, the appellants admitted that McRae had been responsible for creating the work schedule for all of the employees at the Tahitian, but that after the assault Li took that responsibility away from McRae and no longer allowed her to create the employee work schedule. CP at 209-10, 332-34. Appellants further admitted that in the following weeks, Li reduced McRae’s hours to zero. CP at 209-10, 332-34. The last day McRae worked at the Tahitian was on or about April 15, 2011. During the last weeks of her work, McRae’s wage stubs indicated that she was paid \$9.32 an hour instead of \$10.00 an hour. CP at 435-437. Respondent argued at trial that Li essentially scheduled McRae out of her job.

Respondent proceeded to trial against appellants on claims of personal injury (under the deliberate intent exception to the Industrial Insurance Act, RCW 51.24.020), wrongful termination in violation of public policy, constructive discharge, wage claim and the tort of outrage. CP 203-208.

At the conclusion of the trial, the jury returned a verdict for respondent in the amount of \$35,980.53, as indicated on verdict form C. CP 129. The jury filled out two other verdict forms, and a special verdict, indicating their verdict for the plaintiff on the wage claim and wrongful termination claim, and for the defendants on the personal injury claim. CP 127-28, 130-31.

When the jury concluded their deliberation and appeared to announce their verdict, the court asked whether the jury had completed verdict form A, and then asked the jury to retire to complete that form before reading the verdicts into the record. RP at 447.

THE COURT: May I ask the foreperson to please stand. Has the jury reached verdicts in this case?

JUROR 5: Yes, we have.

THE COURT: Would you please hand that to the bailiff, please, and then you can be seated again.

OK. We need one more form. Is there a verdict form A?

JUROR 5: It's left in the room.

THE BAILIFF: Why don't you --

THE COURT: Why don't you go ahead and get it.

THE CLERK: Well.

THE COURT: Oh, do you have it there? Is this it?

JUROR 5: Yes, sir.

THE COURT: All right. I'm going to simply ask the jurors to retire to the jury room and complete verdict form A. And it appears that the decisions are made, but I do need to have the verdict form completed. RP at 447.

Following this exchange, the jury took the verdict forms back to the jury room, and returned with the following responses. On verdict form

A, on the line for past economic damages, the presiding juror wrote “35,” which was lined out with the presiding juror’s initials and a zero (“0”) to the right. CP at 127. Verdict form A further indicates answers of zero (“0”) for future economic damages and for past and future noneconomic damages against the Tahitian, LLC. CP at 127. Verdict form B indicates that the jury found for the defendants. CP at 128. Verdict form C indicates that the jury found for plaintiff against Fen Li in the amount of \$35,980.53 for past economic damages. CP at 129. The jury made a notation at the bottom of the form specifying that \$35,902.13 was for “4/11 -> 9/12,” and \$78.40 for “wage,” and a further note which read “\*Medical not added due to personal injury not proved.” CP at 129. Lastly, 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. CP at 130-31.

Following the verdict, the jury was polled and all twelve jurors indicated that these were their verdicts and the verdicts of the jury. RP at 449-51. Appellants did not object to the use of the verdict forms submitted to the jury during the instructions conference with the court. RP at 436-39. Further, appellants did not raise any issues related to the jury’s verdicts until after the jury was excused, at a series of post-trial motion

hearings on February 11, 2013, March 11, 2013 at April 16, 2013. RP at 451-52.

During the March 11, 2013, hearing, after oral argument related to the respondent's motion for entry of judgment and attorney fees and costs and appellants' motions for a new trial and for judgment as a matter of law, the court ruled as follows:

All right. Thank you very much. Thank you for your arguments. And this is one of those cases I think where looking at these verdict forms here closely, when I heard the verdict I wasn't confused at all, but I looked at the verdict form when these motions were filed. I saw that. I can see the basis for the motion.

But nevertheless these motions are brought after the jury's gone, and I think it's the purpose of the Court to try, and I don't want to say divine, that's true strong a word, but to infer what's appropriate from what's in front of me here.

So, and as counsel says, 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. And so the question is whether the jury was confused, given the number of original claims, these different verdict forms. And I think there's an indication of that. You can see on the verdict form A against the Tahitian, started to write \$35,000 in there, but then this is set up for personal-injury type recovery, past and future economic damages. That's typically the personal injuries.

The jury did not find on major claim in this case, which was the personal injury case. They found for the defense on that, which is reflected also in Verdict Form B. Verdict Form C seems to collect the special verdicts form and place

it in one, because they clarify that judgment for past economic damages. They clearly limited it to past economic damages, and they break it out between the 78-40 wage loss claim and the 35,902.13 wage loss between. And they talk about -- now this is in the past, but it was after the incident from April 2011 to September of 2012. 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. And I'm going allow that judgment to stand, the 39,902.13, as well as the wage loss. RP at 488-89.

## II. SUMMARY OF ARGUMENT

The jury determined that McRae is entitled to damages because she was wrongfully terminated from her job as the manager of the Tahitian Inn. The evidence presented at trial showed that McRae was fired from her job after being ordered to remove a violent guest from the motel, that she was subsequently attacked by that guest, and that she called the police to protect herself and others. Following the trial, the jury awarded McRae \$35,902.13 in damages for her wrongful termination and \$78.40 for her wage claim. This verdict should be upheld and the trial court judgment affirmed because appellant failed to raise any issues relative to the verdict until after the jury was polled and because the trial court properly harmonized the verdicts when it entered judgment for respondent.

### III. ARGUMENT

#### A. **Standard of Review.**

The trial court's entry of judgment in this matter is subject to review for an abuse of discretion. "When the trial court remits an award it invades the province of the jury, making the less deferential standard of review appropriate. When the trial court refuses to remit, then our case law says the verdict is strengthened and the discretion of the trial court should be respected." *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381 (2005).

#### B. **Appellants Failure to Challenge the Jury's Verdict at the Time the Jury was Polled Constituted Waiver of the Issue on Appeal.**

When a jury verdict is internally inconsistent, a party who does not object will be held to have waived the right to challenge the verdict. *Gjerde v. Fritzsche*, 55 Wn. App 387, 394, 777 P.2d (1989). *Gjerde* was a medical malpractice case. At the conclusion of the trial the jury rendered a defense verdict, although in a special verdict form the jury assigned comparative negligence to the plaintiff at 45 percent. *Id.* at 390. The verdict was received without either counsel or the court responding to the apparent inconsistency and the jury was excused. *Id.* at 390. Plaintiff moved for a new trial. *Id.* at 390. This was denied by the trial court and judgment was entered on the verdict for defendant, which was upheld on

appeal. *Id.* at 391. The court affirmed the trial court's denial of the motion for a new trial with the following explanation:

When the jury returned its verdict, the magistrate permitted counsel to examine the replies to the interrogatories. If counsel who had submitted the questions saw no inconsistency and raised no objection to the discharge of the jury, we can, at least under the circumstances of this case, see no reason why he should be permitted to try his luck with a second jury. Proper respect for the jury verdict and for the court's responsibility to manage its caseload fairly and expeditiously militate against such a course. *Id.* at 394, citing *Strauss v. Stratojac Corp.*, 810 F.2d 679, 683 (7<sup>th</sup> Cir. 1987).

As such, the court held that a party's failure to object to inconsistencies in the verdict before the discharge of the jury waives the issue on appeal.

Here, the court specifically instructed the jury to return to the jury room to complete verdict form A. RP at 447. The jury apparently did so, and then returned to pronounce their verdict. RP at 448-51. After the jury was polled, appellants failed to raise or object to any apparent inconsistency in the verdicts, although appellants did ask the court provide a written survey to the jury and to interview them after the trial. RP at 451-53. Consequently, appellants have waived their right to contest the verdict on appeal.

**C. The Trial Court Properly Harmonized the Verdict Forms to Give Effect to the Jury's Verdict.**

The courts of this state have long recognized the importance of upholding the decision reached by a jury. "The appellate court strongly presumes the jury's verdict is correct." *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381 (2005). However, in the case of a clerical error or scrivener's error, the court may amend the verdict to conform to the jury's intent.

A verdict in a civil cause which is defective or erroneous in a mere matter of form, not affecting the merits of 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. *City Bond & Share v. Klement*, 165 Wn. 408, 410-11, 5 P.2d 523, 524 (1931).

In other case, courts have properly denied motions to amend a verdict where jurors subsequently reported that the intended verdict was something different than what was indicated on the verdict form. *Marvik v. Winkelman*, 126 Wn. App 655, 109 P.3d 655 (2005); *Begliger v. Shield*, 164 Wn. 147, 2 P.2d 681 (1931). Evidence from a juror of this nature

indicates that the jury actually had a different intent than what was stated on the verdict form. Where there is question as to the amount of the verdict, amendment is improper and a new trial may be an appropriate remedy. However, no such evidence is presented in this case, even though appellants' counsel interviewed the jury afterwards. RP at 452-53.

Where the proper verdict may have been written on the wrong form, or on the wrong line, but the jury's intent is clear, it is appropriate for the Court to enter a judgment consistent with that verdict. "When the jury's answers are consistent with each other, but not consistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict." *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App 777, 800, 6 P.3d 583 (2000), *aff'd* 144 Wn.2d 907, 32 P.3d 250 (2001). "In the event the special verdict is inconsistent, a court will harmonize the verdict to the extent possible." *Id.* Here, the trial court specifically considered that on the special verdict form the jury returned an answer that Fen Li was an officer, vice principal or agent of the Tahitian, consistent with the court's instructions to the jury that the acts of its officers (Fen Li and her husband Jianming Li) were attributable to the LLC. RP at 488.

Moreover, verdict form A and verdict form C both reflect the jury's intent to award damages to McRae in the amount of \$35,980.53,

albeit with some confusion as to which form and line on which to place this figure. The presiding juror started to write this number on verdict form A, writing “35,” and then placed his initials and a zero off to the right. Verdict form C then states the full amount to be awarded as damages to McRae, which is \$35,980.53, with the jury’s explanation written below.

As such, the trial court found that it was the jury’s intent to award a judgment in favor of McRae against the Tahitian in the amount of \$35,902. RP at 489. “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. And I’m going allow that judgment to stand, the 39,902.13, as well as the wage loss.” RP at 489.

**D. Appellants are Not Entitled to a New Trial or Judgment as a Matter of Law.**

Appellants’ brief does not seek review of the trial court’s denial of their motion for judgment as a matter of law under CR 50 or for a new trial under CR 59. Instead, appellants claim that the court erred by amending the jury verdict *sua sponte*. 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. *Appellant’s Brief* at 7-9. Moreover, the cases cited by appellant relating to their second assignment of error

support the rule of law that the Court is to give effect to the jury's verdict by correcting clerical or procedural errors, but that the court may not change the substance of the verdict. Appellants do not assign any error to the trial court's denial of their motion for judgment as a matter of law or for a new trial in their opening brief, and as such the court should consider these issues waived. RAP 10.3(a),(c); *Bercier v. Kiga*, 127 Wn. App 809, 103 P.3d 232 (2004).

**E. Respondent Should be Awarded Attorney Fees and Costs on Appeal.**

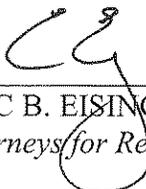
Lastly, respondent moves this court for attorney fees and costs on appeal. As the prevailing party, McRae is entitled to the costs of her suit pursuant to RCW 4.84.030, *Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wn. App. 718, 723, 75 P.3d 533, 536 (2003), and *Fraser v. Edmonds Cmty. Coll.*, 136 Wn. App. 51, 53, 147 P.3d 631 (2006).

Signed this 50<sup>th</sup> day of September, 2013.

Respectfully Submitted,

WALKER HEYE MEEHAN & EISINGER, PLLC

By: \_\_\_\_\_

  
ERIC B. EISINGER, WSBA #34293  
*Attorneys for Respondent*

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COURT OF APPEALS OF WASHINGTON  
DIVISION III

PHYLLIS J. MCRAE,  
  
Plaintiff,  
  
v.  
  
TAHITIAN, LLC, a Washington Limited  
Liability Company d/b/a TAHITIAN INN;  
and FEN LI and JIANMING LI,  
individually and as a marital community.  
  
Defendants.

Superior Court No. 11-2-51131-9  
Court of Appeals No. 316289  
DECLARATION OF SERVICE

On the 30<sup>th</sup> day of September, 2013, I served a true copy of *Brief of Respondent*.

Via hand-delivery to the law office of:

Greg Dow  
Dow Law Firm  
1060 Jadwin Ave Ste 125  
Richland, WA 99352

I certify the foregoing to be true and correct under the penalty of perjury under the laws of the State of Washington.

Executed this 30<sup>th</sup> day of September, 2013, at Richland, Washington.

  
HOLLY R. HARRIS, Legal Assistant