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COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

Donald Canfield, Appellant,

v.

Michelle Clark et al., etc., Respondent.

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
JUL 16 2019

Donald Canfield, Appellant/Cross-Respondent,

v.

*Seattle Public Schools, a municipal corporation, Respondent
Cross-Appellant*

REPLY BRIEF OF CROSS-APPELLANT

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ORIGINAL

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I. ARGUMENT

The respondent/cross-appellant Seattle Public School (“the District”) will endeavor to confine its reply as required by RAP 10.3(c).¹ The appellant, however, has not designated a distinct section of the briefing devoted to the merits of the motion for summary judgment filed by the District in the trial court.

The cross-appeal of the District asserts that the trial court could and should have granted the District summary judgment pre-trial for the same reasons that Judge Heller granted the motion for judgment as a matter of law post-trial. Washington law as applied to the operative undisputed facts does not support a claim for retaliation by Mr. Canfield.

If the Court somehow concludes that Judge Heller was powerless to rule on the validity of the retaliation claim against the District after the rendition of the jury verdict, this Court should review the denial of the District’s motion for summary judgment as it relates to the claim for retaliation based on RCW 49.52.050 and

¹ This approach contrasts with the tack taken by Mr. Canfield in his “reply” to the respondents’ brief. Entirely new arguments based on jury instructions given (*see* Canfield reply at 7-8), the misrepresentation of an otherwise routine stipulation (*id.* at 6) and new argument on the law of the case doctrine (*id.* at 8-11) are proffered **for the first time** as a means to avoid the legally correct post-trial ruling of Judge Heller in this case. These arguments should be stricken and not considered by the Court. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The District has filed concurrently herewith a separate motion to strike those parts of the Canfield reply.

RCW 49.46.100 and conclude that the trial court erred in denying summary judgment for the District on those claims.

A. Cross-Review Is Proper

Where the issue is purely an issue of law with no dispute of fact implicated, the court will review the denial of a motion for summary judgment after a jury verdict. *Washburn v. City of Fed. Way*, 169 Wn. App. 588, 609, 283 P.3d 567 (2012) (“An appellate court reviews de novo a grant or denial of summary judgment. Such an order is subject to review ‘if the parties dispute no issues of fact and the decision on summary judgment turned solely on a substantive issue of law.’” [citations omitted]).

As a matter of law, the trial court should have granted the District summary judgment on the following basic, undisputed facts:

(1) Mr. Canfield was not terminated.²

(2) Mr. Canfield did not complain about violations of the Minimum Wage Act in that

(a) he did not complain that he had not been paid overtime and

(b) he did not complain that he had been paid less than minimum wage.

These fundamental facts were never in dispute.³ In opposing the motion for judgment as a matter of law, Mr. Canfield

² Under the *White v State, supra*, he had no common law claim for the tort of retaliation.

essentially conceded that the issue was identical to the one that the trial court considered and rejected pre-trial. See, CP 877:

First, Defendant's Motion for Judgment as a Matter of Law is for the most part, a legal argument that has been raised by Defendant on Summary Judgment and denied by Judge Craighead.

The District's position has been consistent. The trial court should have granted summary judgment to the District prior to trial. The trial court erred; and the error was compounded when it refused reconsideration as requested by the District.

B. Same Law Governed Resolution of Summary Judgment on Undisputed Facts

The District's argument in its respondent's brief sets out the pertinent law. Nothing new is raised by way of a substantive response to the cross-appeal by Mr. Canfield.

Judge Heller ultimately ruled correctly and the case against the District ultimately was dismissed. Mr. Canfield complains that on appeal that the trial court did not have the power to make a ruling under CR 50. That argument is part of Mr. Canfield's appeal. The District's respondent's brief refutes his argument completely. The District's briefing is incorporated by reference here as though fully set forth.

³ The recognition of that proposition was the sole purpose of the stipulation entered into between Mr. Canfield and the District, referenced in Mr. Canfield's reply. "[T]he factual predicates articulated by Judge Heller on the record in deciding the CR 50 motion as a matter of law were undisputed." See, February 10, 2012 stipulation.

Additional authority provided the Court supports the proposition that a denial of a motion for summary judgment simply is not the law of the case and can be reversed. Contrary to the position of Mr. Canfield, the District is not prevented from seeking a correct application of the law in the trial court before entry of a final judgment.

If the trial court had ruled correctly on summary judgment before trial, a needless trial might have been avoided. Just how needless is illustrated by reference to the appellant's opening brief. The arguments made concerning whether Mr. Canfield had a statutory retaliation claim under RCW 49.52.050 and RCW 49.46 are identical to the ones made by Mr. Canfield in opposition to the motion for judgment as a matter of law. *Compare*, appellant's brief at 29-37 with CP 882-887. By his own admission, the issue in that briefing was identical to the one presented initially by the District's motion for summary judgment. CP 887, *quoted ante*.

To summarize, the Washington does not recognize a common law tort of wrongful retaliation in violation of public policy unless the Plaintiff was discharged from employment. See, respondents' brief at 26-27 for argument in support. This was briefed in the District's motion for summary judgment. See CP 25.

The argument for affirming the trial court's judgment as a matter of law is the one that the previous judge should have accepted pre-trial in ruling on the District's motion for summary

judgment. See, respondents' brief at 28-34 for statutory argument; compare CP 27 ("no adverse employment action" section in the District's motion for summary judgment); CP 456-58 (reply to opposition arguments); CP 649-653 (section of motion requesting reconsideration of denial of summary judgment on retaliation claim).

Mr. Canfield's counsel stated to Judge Heller that the same legal issue was briefed pre-trial as in the motion for judgment as a matter of law. See, RP 11-12; see also, CP 877. The Canfield opposition to motion for summary judgment was submitted as an exhibit to Mr. Canfield's response to the motion for judgment as a matter of law. CP 892-966.

The entirety of the briefing on the lack of any legal basis for the retaliation claim of Mr. Canfield mirrors the appellate issue presented now. If this Court were to rule that trial court Judge Heller did not have the authority to rule on the District's CR 50 motion for judgment as a matter of law, however, then the District must be entitled to argue that this Court should reverse Judge Craighead and find that Summary Judgment should have been granted to the District.

C. Cross-Review Is Required If the Court Rules Judge Heller Could Not Decide CR 50 Motion for Judgment As a Matter of Law.

The District filed a notice of cross-review after the adverse summary judgment ruling. CP 1044-1050. The notices of review were deemed premature by the Court. After trial, the District ultimately prevailed, moving under CR 50 for judgment as a matter of law during and after jury trial and (formerly known as motions for directed verdict and for judgment notwithstanding the verdict). CP 823-841, 7/21/11 RP 4.

From the time of briefing the motion for summary judgment through trial, no new evidence emerged. The outcome determinative facts are fundamental.

The District should have obtained summary judgment in April for the same legal reason that Judge Heller properly entered judgment as a matter of law when he did. The District never waived its argument about the error of the trial court on summary judgment in April by defending the judgment as a matter of law which Judge Heller entered in August.

In briefing before the Court Commissioner in an effort to compel a specification of points on appeal pursuant to RAP 9.2, the District preserved its position. See District's Reply Regarding Motion to Compel RAP 9.2(b) Specification of Issues at 3-4.

The District seeks affirmance of the dismissal of all claims for whatever reasons this court finds appropriate in its *de novo*

review of the legal issues. If Canfield now argues that the notice of cross-review is somehow defective, the court clearly has the power under RAP 2.4(a) to consider the issue of the trial court's denial of summary judgment to the District on the retaliation claims:

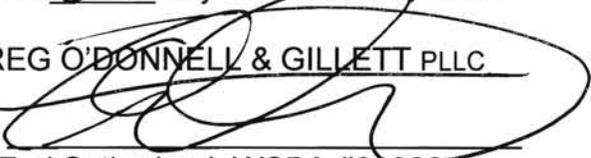
The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) **if demanded by the necessities of the case.** [Emphasis added]

The notice of appeal by the District of the denial of the motion for summary judgment (CP 1044-1050) has about the same status as the notice of appeal by Mr. Canfield as to the grant of summary judgment to Michelle Clark. CP 702-710. Both were premature. A subsequent notice of cross-review, as well as the briefing in this Court, also put Mr. Canfield on notice of the District's cross-appeal.

Only if the Court finds that Judge Heller was powerless to enter the CR 50 judgment as a matter of law post-trial would the Court even reach this cross-appeal issue. The judgment in favor of the District dismissing all claims against it by Mr. Canfield should be affirmed. The District does not believe that the Court needs to reverse the trial court's denial of summary judgment with directions to enter summary judgment now, unless the Court finds judgment as a matter of law improper.

Respectfully submitted this 2d day of November, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true copy of the foregoing

1. Reply Brief of Cross-Appellant;

to be served on the following parties in the manner indicated below

on the 2nd of November, 2012:

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DATED this 2nd day of November, 2012.

By 
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