**ORIGINAL**

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

| | |
|---|---|
| Michael Howes,<br><br>Plaintiff/Appellant,<br>v.<br><br>Kelly Services, Inc.,<br><br>Defendant/Appellee. | Supreme Court No. 20020014<br>Burleigh Co. No. 99-C-01636 |

20020014



APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE THOMAS J. SCHNEIDER
JUDGMENT DATED JANUARY 4, 2002;
ORDER GRANTING JUDGMENT AS A MATTER OF
LAW DATED NOVEMBER 8, 2001; AND
ORDER CONDITIONALLY GRANTING DEFENDANT'S
MOTION FOR A NEW TRIAL DATED DECEMBER 14, 2001

# REPLY BRIEF OF APPELLANT

Dated this 6th day of May, 2002.

DICKSON & PURDON LAW OFFICE
Timothy Q. Purdon (ND Bar ID# 05392)
Thomas A. Dickson (ND Bar ID# 03800)
107 West Main, Suite 150
P.O. Box 1896
Bismarck, ND 58502-1896
Phone: (701) 222-4400

MICHAEL G. LIFFRIG (ND Bar ID# 04334)
ATTORNEY AT LAW
2815 28th Street
Mandan, ND 58554
Phone: (701) 663-1038

Attorneys for Appellant

By: Tim Purdon
Timothy Q. Purdon

## TABLE OF CONTENTS

Page(s)

## TABLE OF AUTHORITIES

**Cases:** **Page(s)**



**Other Authorities:** **Page(s)**

## ARGUMENT

### I. The Jury's finding of negligence by Kelly was supported by the weight of the evidence, and the District Court's granting of Kelly's Motion for Judgment as a Matter of Law should be reversed.

#### A. Levi did not work at Farmer's Union on the date Howes was injured.

Kelly argues that Jeremy Levi was at the accident scene because its internal records say so. What Kelly ignores is the fact that Levi's own testimony establishes that he was not there. As set forth in Howes' original brief:

1) Levi unloaded a truck with dog food and cat food; the only items on the truck in which Howes was injured were large rear-wheel tractor tires.

2) The truck Levi unloaded arrived late; the truck in which Howes was injured was on time.

3) The truck Levi unloaded used the loading dock; the Howes truck did not use the dock.

4) No one was injured unloading Levi's truck; Howes was badly injured on March 9, 1998, and everyone at the scene knew about the injury.

See, Appellant's Brief, pp. 7-8. Levi may have unloaded a truck at Farmer's Union; however, his own testimony establishes that it was not on the date Howes was injured. Kelly's documentation, which puts him at Farmers Union on that date, is wrong. Given this, the Jury determined that Kelly's records putting Levi at the accident scene were simply not credible and rendered its verdict accordingly.

Before trial in this matter, Kelly made a motion for summary judgment arguing, as it does now, that there was insufficient evidence that a Kelly temp pushed the tractor tire onto Howes. (Trial Docket Nos. 43 and 44). The District Court denied the summary judgment motion on the basis that a question of fact existed on this issue. (Trial Docket No. 64). A trial was held to resolve this factual question, and the Jury resolved it by

finding that it was a Kelly temp who pushed the tire. Determination of these questions of fact -- Who pushed the tire? Did Levi really work on the date Howes was injured? Are Kelly's records credible? -- are the province of the jury, not the judge. Therefore, the District Court's granting of Kelly's Motion for Judgment as a Matter of law should be reversed.

### B. Howes does not have to prove agency by clear and convincing evidence in this case.

Kelly argues that Howes is required to prove that the person who pushed the tire was an agent of Kelly by clear and convincing evidence. This argument applies the wrong standard to this situation. Howes is not trying to prove that the Kelly temp was an agent authorized to act for Kelly in signing a contract or enter some other business arrangement which would require proof of the Kelly temp's "authority" by clear and convincing evidence under the law of agency. Rather, Howes only had to prove that the person who pushed the tire was employed by Kelly. A plaintiff must prove an employer-employee relationship for purposes of *respondeat superior* liability only by a preponderance of the evidence, not by clear and convincing evidence.[1] Volkswagen Iowa City, Inc. v. Scott's Inc., 165 N.W.2d 789, 762 (Iowa 1969); Watts v. Zadina, 139 N.W.2d 290, 292-93 (Neb. 1966); See also, 57B Am Jur 2d, §1759.

[1] Kelly's argument also fails because the Court actually instructed the Jury that agency must be proven by clear and convincing evidence. Closing Instructions to the Jury, p. 7, Docket No. 107. The law assumes that the jury followed the jury instructions given it in returning its verdict. State v. Ellis, 2001 N.D. 84, 625 N.W.2d 544.

### C. The cases cited by Kelly are distinguishable.

The presence of evidence in the record that the person who pushed the tire was a Kelly temp is sufficient to distinguish this case from the Connecticut Supreme Court's decision in Paige v. St. Andrews, 734 A.2d 85 (Conn. 1999). In Paige, there was no evidence in the record to place an employee of the defendant in the boiler room (the scene of the negligent act of turning on the boilers) at the time of the injury. In this case, as set forth above, the record is replete with evidence, direct and circumstantial, placing an employee of Kelly in the truck with Kemper and Howes at the time the tire was pushed onto Howes. Additionally, the Paige Court also based its reversal of the jury verdict, in part, upon the jury's answers to several special interrogatories that limited the theories of negligence upon which the jury could have found for the plaintiff. No such facts are present in this case.

The other case cited by Kelly, Walls v. Jacob North Printing, Co., Inc., 618 N.W.2d 282 (Iowa, 2000), is distinguishable as well. Walls involved an appeal by the plaintiff from a grant of summary judgment to the defendant. As such, the Walls Court was not required to exercise the favorable standard of review involving deference to a jury's verdict that the this Court is required to apply.

### D. Kelly conceded below that there is no evidence that Levi sent someone in his place to Farmers Union on the date Howes was injured.

Kelly also argues that perhaps Levi sent someone in his place to Farmers Union on the date Howes was injured and that he lacked the authority to do so. However, there was NO evidence in the record to support this theory. Kelly conceded this fact at the oral argument on Kelly's Motion for Judgment as a Matter of Law when Kelly's

lawyer stated "I didn't hear any evidence that that [Levi sending someone else to Farmer's Union] happened. There just isn't any evidence." Transcript of Hearing on Motion for Judgment as a Matter of Law, October 17, 2001, p. 22, Supreme Court Docket No. 5. As there was no evidence produced at trial to support this theory, it should be rejected.

## II. A trial court's granting of a motion for new trial based on sufficiency of the evidence when there is sufficient evidence in the record to support the verdict is an abuse of discretion.

Generally the standard of review for an appellate court in reviewing a trial court's decision on a motion for new trial is abuse of discretion. Okken v. Okken, 325 N.W.2d 264 (N.D. 1982). However, the North Dakota Supreme Court has lowered this standard of review in cases where the motion for new trial is based on sufficiency of the evidence. Appellant's Brief, p. 18; Barnes v. Mitzel Builders, Inc., 526 N.W.2d 244, 246 (N.D.1995)("Our review of questions of fact is limited to consideration of whether there is substantial evidence to sustain the Jury's verdict. In making that determination, we view the evidence in the light most favorable to the verdict.").

Other courts have recognized the need for a slightly different standard of review in cases where the trial court has taken the case away from the jury by granting a new trial. In Tri County Indus., Inc. v. District of Columbia, 200 F.3d 836, 843 (D.C.Cir. 2000), the D.C. Circuit held that, while a ruling on a motion for new trial was reviewed for abuse of discretion, "[a] more searching inquiry is required if the new trial is granted than if denied, however, because of the concern that a judge's nullification of the jury's verdict may encroach on the jury's important fact-finding function." 200 F.3d at 843 (internal quotations omitted). Further, the Second Circuit reviews a trial court's granting

of a motion for new trial under a de novo standard of review. Shade v. Housing Authority of City of New Haven, 251 F.3d 307, 312 (2nd. Cir. 2001).

In light of the governing standard of review, the Trial Court's decision to grant a new trial should be reversed. The Trial Court engaged in no analysis of the evidence in this matter and, instead, summarily took the case away from the Jury in the space of two sentences. (App. 207). The District Court's decision to ignore the evidence, which supported the verdict, was an abuse of discretion.

## III. In the alternative, the Court should limit the new trial to the issue of liability only.

Kelly concedes that the District Court DID NOT grant a new trial on the issue of damages by stating "The Trial Court Abused its Discretion When it Failed to Grant New Trial on Damages Issue." Appellee's Brief, p. 25. The District Court specifically denied Kelly's Motion for New Trial on the issue of damages below. (App. 207).

Kelly claims that this denial was an abuse of discretion because Kelly contested Howes' claim for damages through "cross-examination," Appellee's Brief, pp. 20-21. However, Kelly's claims that it produced evidence through cross-examination to challenge damages are not accompanied by citations to the record. Appellee's Brief, pp. 20-21. This is in violation of N.D.R.App.P. 28(e), and this Court should not accept allegations which are not supported by citations to the record.

Kelly produced a miniscule amount of evidence, if any, to support its challenge to Howes' claim of damages. Howes, on the other hand, introduced substantial evidence to support his damages claim, Appellant's Brief, pp. 8-10. Therefore, the District Court's ruling that Kelly is not entitled to a new trial on the issue of damages was not an abuse of discretion and should be affirmed. This being the case, the District Court's ruling

denying a new trial on the issue of damages will stand, and any new trial of this matter should be limited to the issue of liability.

## IV. There was sufficient evidence to support the Jury's findings as to fault.

Kelly claims that the District Court abused its discretion when it failed to grant a new trial because the Jury failed to assess fault to other parties. Its argument is based upon Kelly's claim that neither Kemper, the truck driver, or Howes himself gave the Kelly temp who pushed the tire onto Howes any instruction. This is not true. Kemper testified that he told the Kelly temp behind the tires not to touch anything while he and Howes caught their breath after freeing the tire that had been stuck. (App. 105, ll. 2-6). By ignoring this instruction, the Kelly temp was negligent, and the Jury determined that this negligence was the cause of Howes' injures. (App. 85-87). Kelly cannot show that the District Court's acceptance of the Jury's finding on this issue was an abuse of discretion.[2]

## V. There was no error by the Court concerning the evidence surrounding Howes' Workers Compensation claim.

### A. Information concerning Farmers Union's failure to challenge Howes' Workers Compensation claim was relevant.

Howes submitted a claim form to the North Dakota Worker's Compensation Bureau explaining that he had been injured at work when a Kelly temp pushed a tire on him. He submitted this claim under penalty of perjury. His employer, Farmers Union,

[2] Howes addressed Kelly's other arguments for new trial on (1) the six-person jury, Appellant's Brief, pp. 25-28; (2) the Court's refusal to give Kelly's untimely jury instruction on Request for Admissions, Appellant's Brief, pp. 28-29; (3) the issue of damages, Appellant's Brief, pp. 29-31; and (4) the propriety of Howes' closing argument, Appellant's Brief, pp. 32-35, in Howes' prior briefing.

submitted a similar claim form. At trial, Howes' counsel asked a representative of Workers Compensation whether Farmers Union had ever challenged Howes' version of how he had been injured. (Trial Tr. p. 62, Trial Docket No. 138). Kelly objected claiming the question was irrelevant but was overruled. (Trial Tr. p. 62, Trial Docket No. 138). This question is relevant as the central issue of the case was whether a Kelly temp pushed the tire onto Howes. Howes' employer's failure to challenge his version of the incident as submitted to Workers Compensation is circumstantial evidence that Farmers Union agrees with Howes that a Kelly temp pushed the tire. Therefore, the Court's overruling of the relevance objection was proper.

Howes' reference to Farmers Union's failure to challenge his version of the incident as presented in his Workers Compensation claim form in his closing argument was proper. As set forth above, this information is relevant. Further, Kelly failed to request a curative instruction in connection with its objection to the portion of Howes' closing argument at issue. (Trial Tr. pp. 444-45, Trial Docket No. 140). This failure results in a waiver of this argument by Kelly. Ali by Ali v. Dakota Clinic, Ltd., 1998 ND 145, 582 N.W.2d 653 ("In general, counsel must make a timely objection to an improper argument and must ask the trial court to give a curative instruction to the jury. Failure to object waives the improper argument." 582 N.W.2d at 655; (quoting Blessum v. Shelver, 567 N.W.2d 844 (N.D. 1997))).

### B. The Jury was not told that Kelly had never contested Howes' Workers Compensation claim.

The Workers Compensation representative was asked whether Workers Compensation has a fraud hotline. (Kelly App. 17-18). Kelly objected, but the witness responded yes prior to the ruling. (Kelly App. 17-18). Kelly did not make a motion to strike the answer. Kelly's argument is that the Jury was prejudiced by the implication that Kelly had not challenged Howes' Workers Compensation claim. However, there was no testimony to this effect. The Court prohibited Howes' attorney from asking, and the witness did not testify that Kelly had never contested Howes' Workers Compensation claim. (Kelly App. 17-18). Quite simply, the alleged prejudice Kelly claims as error never actually occurred at trial.

Further, Kelly's failure to move to strike or request a curative instruction on the witness' affirmative answer as to the existence of a fraud hotline results in a waiver of this argument by Kelly. In Interest of S.W., 290 N.W.2d 675, 678 (N.D. 1980) (". . . Rule 103 N.D.R.Evid., which provides that error may not be predicated upon a ruling which admits evidence . . . unless a timely objection or motion to strike appears of record, stating the specific ground for objection [if not apparent]. . . ."). See also, Fargo v. Erickson, 1999 ND 145, 598 N.W.2d 787(Sandstrom, concurring).

## VI. Conclusion.

For the reasons set forth above and in Howes' prior briefing, the Court should: (1) reverse the District Court's granting of Kelly's Motion for Judgment as a Matter of Law; (2) reverse the District Court's conditional granting of Kelly's Motion for New Trial based on insufficiency of the evidence; and (3) affirm the District Court's denial of Kelly's Motion for New Trial on all other grounds. In the alternative, any new trial in this matter should be limited to the issue of Kelly's liability.

Respectfully submitted this 6th day of May, 2002.

DICKSON & PURDON LAW OFFICE
Timothy Q. Purdon (ND Bar ID# 05392)
Thomas A. Dickson (ND Bar ID# 03800)
107 West Main, Suite 150
P.O. Box 1896
Bismarck, ND 58502-1896
Phone: (701) 222-4400

MICHAEL G. LIFFRIG (ND Bar ID# 04334)
ATTORNEY AT LAW
2815 28th Street
Mandan, ND 58554
Phone: (701) 663-1038

Attorneys for Appellant

By: _____
Timothy Q. Purdon

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

| | | |
|---|---|---|
| Michael Howes,<br><br>Plaintiff/Appellant,<br>v.<br><br>Kelly Services, Inc.,<br><br>Defendant/Appellee. | ) | Supreme Court No. 20020014<br>Burleigh Co. No. 99-C-01636<br><br>**AFFIDAVIT OF SERVICE** |

20020014
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 7 2002
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA )
: ss
COUNTY OF BURLEIGH )

Laurie L. Stroh, being first duly sworn, deposes and says that on the 6th day of May, 2002, she served the attached:

**REPLY BRIEF OF APPELLANT**

upon the following person(s) by placing a copy of same in the US mails at Bismarck, ND, with sufficient postage attached, in envelope addressed as follows:

Mr. Jerome C. Kettleson
PEARCE & DURICK
P.O. Box 400
Bismarck, ND 58502-0400

Laurie L. Stroh

Subscribed and sworn to before me this 6th day of May, 2002.

Michele Sigl, Notary Public
State of North Dakota
My Commission Expires: 9/22/04

(SEAL)