ORIGINAL

20020014

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

APPELLANT'S PETITION FOR REHEARING

Dated this 29th day of August, 2002.

DICKSON & PURDON LAW OFFICE
04334)
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#
ATTORNEY AT LAW
2815 28th Street
Mandan, ND 58554
Phone: (701) 667-4499

By: _____
Timothy Q. Purdon

Attorneys for Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

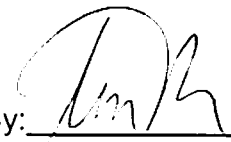
APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
HONORABLE THOMAS J. SCHNEIDER
JUDGMENT DATED JANUARY 4, 2002;
ORDER GRANTING JUDGMENT AS A MATTER OF
LAW DATED NOVEMBER 8, 2001; AND
ORDER CONDITIONALLY GRANTING DEFENDANT'S
MOTION FOR A NEW TRIAL DATED DECEMBER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

APPELLANT'S PETITION FOR REHEARING

Dated this 29th day of August, 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) 667-4499



By: _____
Timothy Q. Purdon

Attorneys for Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

INTRODUCTION

Michael Howes ("Howes") files this Petition for Rehearing under N.D.R.App.P. 40. Howes incorporates his prior briefing by reference.

The Supreme Court entered an opinion in this case on August 15, 2002. Howes v. Kelly Services, Inc., 2002 ND 131. The Court addressed two issues in its opinion. The Court reversed the District Court's granting of Judgment as a Matter of Law, finding that there was sufficient evidence to support the Jury's verdict in Howes' favor. However, the Court also reversed the District Court's denial of a Motion for New Trial on the basis that the Jury below had consisted of six members rather than nine. Howes seeks rehearing on the Court's decision on this second issue. Howes respectfully requests that the Court revisit this ruling and find that the trial of this matter to a jury of six was proper, or, in the alternative, that the seating of a six-person jury was harmless error.

ARGUMENT

I. The trial court did not abuse its discretion in seating a jury of six.

A. The Supreme Court found that N.D.R.Civ.P. 38(e) and Fed.R.Civ.P. 38(d) were analogous and, therefore, looked to federal law for guidance in interpreting N.D.R.Civ.P. 38(c).

At issue in the Court's determination of Defendant Kelly Services, Inc.'s ("Kelly") claim for a new trial on the basis that the District Court erred in seating a jury of six was Court's the interpretation of N.D.R.Civ.P 38(c). Howes v. Kelly Services, Inc., 2002 ND 131, ¶ 14. In interpreting this rule, the Court looked to Fed.R.Civ.P. 38, the analogous Federal Rule of Civil Procedure. Howes v. Kelly Services, Inc., 2002 ND 131, ¶ 14. The Court noted that the corresponding federal rule allows a party to rely upon a jury demand made by another party. Id. While recognizing that cases interpreting this rule applied to the question of the total denial of a jury[1] as opposed to the number of jurors, the Court reasoned that these federal decisions were premised on language similar to N.D.R.Civ.P. 38(e), which provides that a demand for a jury trial may not be waived without consent of counsel. Howes v. Kelly Services, Inc., 2002 ND 131, ¶ 16. Based upon this analogy, the Court held that, despite the fact that Kelly had not included a request for a jury of nine in its Answer, Kelly had not waived its right to a jury of nine and the trial court's decision to seat a jury of six was an abuse of discretion.

[1] Total denial of a jury, unlike the denial of a jury of nine and the seating of a jury of six, raises constitutional concerns not applicable to Kelly in this case. Kelly did receive a jury trial by a jury of six, a number that is constitutionally sufficient. See N.D. Const., Art. I, § 13. It is axiomatic that trial by a jury of six is constitutionally acceptable in civil matters. Wright, Kane and Miller, Federal Practice and Procedure, § 2491; 47 Am Jur.2d Jury, §211-15; 50A C.J.S. Juries, § 264.

B. Under Federal law, the trial court's decision to seat a jury of six was not error.

Further research into federal law reveals that the Eighth Circuit has held that a trial court's seating of a jury of six does not constitute reversible error even in the face of a party's actual demand for a jury of nine.

In Krumwiede v. Mercer County Ambulance Service, Inc., 116 F.3d 361, 362 (8th Cir. 1997), Krumwiede, a former employee, filed suit in the United States District Court for the District of North Dakota, alleging violations of the Age Discrimination in Employment Act (ADEA) against her former employer. After the jury returned a verdict in favor of the former employer, Krumwiede appealed and argued the district court abused its discretion in denying her actual demand for a nine-member jury. Id. at 363. Krumwiede relied upon N.D.R.Civ.P. 38(c), which allows a party to demand a nine-member jury. Id. The Eighth Circuit looked at Fed.R.Civ.P. 48, which provides that "a court shall seat a jury of not fewer than six and not more than twelve members." Id. The Court also acknowledged Rule 47.1(c)(1) of the Local Rules of the United States District Court for the District of North Dakota, which provided that, "in all jury cases, the size of the jury shall be determined at the discretion of the presiding judge consistent with the language of Fed.R.Civ.P. 48." Id. Based upon this analysis, the Eighth Circuit held the district court's decision to limit the jury to six members was consistent with the federal and local rules of civil procedure and the Seventh Amendment. Id.

This is not the only instance in which federal law supports the proposition that a trial court does not commit error in seating a jury of less than what is specifically requested by a party. Numerous other U.S. District Courts have local

rules adopting language similar to Federal Rule 48 that provides a range between six and twelve from which the district court can choose or simply defer to Rule 48. Wright, Kane and Miller, Federal Practice and Procedure, § 2491 (citing various local rules of district court that grant a district court discretion in choosing the number of jurors to be empanelled). Accordingly, a further analysis of federal law establishes that a district court's decision to seat a jury of six does not constitute error. This is the case even when a party has made an actual demand for a specific number of jurors.[2]

Therefore, under the cases interpreting the federal law relied upon by the Court in its decision, the District Court's decision to seat a jury of six rather than nine was not an abuse of discretion.

II. The trial of this matter to a jury of six was harmless error.

In this case, the District Court's seating of six jurors rather than nine was harmless error. North Dakota Rule of Civil Procedure 61 states that:

> no error or defect in any ruling or order or in anything done or omitted by the court . . . is grounds for granting a new trial . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect on the proceeding which does not affect the substantial rights of the parties.

N.D.R.Civ.P. 61.

This Court has addressed the application of Rule 61 to the very issue in the present case. In Allen v. Kleven, 306 N.W.2d 629 (1981), Allen was injured in an auto accident while a passenger in a car driven by Williams. Id. at 632.

---

[2] In contrast, Kelly did not actually demand a jury of nine in its answer. See, App. 25-28. This failure squarely plants any error in this case on Kelly. Such

Williams' car was hit by a vehicle driven by Kleven after Kleven drove through a red light. Id. Allen sued Kleven for damages and did not ask for a jury trial in her complaint. Id. Kleven's answer demanded a jury trial without specifying a number of jurors desired. Id. Kleven then filed a third-party action against Williams alleging negligence and requesting contribution in the event Kleven was found liable for Allen's injuries. 306 N.W.2d at 632. Williams answered by denying negligence and requested a twelve-member jury. Id. Later, at the pretrial conference, Williams agreed to have the number of jurors reduced to six. Id.

As part of Allen's appeal from the jury verdict, she argued the trial court erred when it allowed the number of jurors to be reduced from twelve to six. Id. at 634. Allen relied upon N.D.R.Civ.P. 38(e), which provides that "a demand for a trial by jury made as herein provided may not be withdrawn without the consent of the parties."[3] Id. Allen argued that, when Williams agreed with Kleven to have the matter tried by a jury of six, Allen, as a party, did not consent to such a withdrawal, but rather affirmatively objected to it. Id. Kleven and Williams argued that, under N.D.R.Civ.P. 38(e), Allen waived any right she might have had regarding the number of jurors because, like Kelly in this case, at no time did she make an actual demand for a jury trial. Allen, 306 N.W.2d at 634.

---

sharp practices should not entitle Kelly to receive a new trial in this matter. Burgener v. Bushaw, 545 N.W.2d 163, 169 (N.D. 1996).

[3] At the time of the Allen case, N.D.R.Civ.P. 38(c) provided that, unless a specific request for a 12-member jury is made, a 6-member jury will be empanelled. While the language of Rule 38(c) has been amended to allow for a specific request for a 9-member jury rather than a 12-member jury, this change does not affect the resolution of the issue in the present case.

The Allen Court looked to N.D.R.Civ.P. 61 and found it was not necessary to address Allen's arguments. Id. The Court held that the reason's advanced by Allen to establish there should have been twelve jurors were conjectural and did not demonstrate that the alleged error was prejudicial to her. Id. The Allen Court recognized on appeal that "the appealing party has the burden of proof of establishing not only that the trial court erred but that such error was highly prejudicial to his cause." Id. (citing Zimmer v. Bellon, 153 N.W.2d 757 (N.D. 1967)(emphasis supplied)). Therefore, the Court held that, if an error was made by the trial court when it allowed the jury to be reduced from twelve to six members, it was harmless error. Id.

In the present case, Kelly, while arguing it was error by the trial court when it empanelled a jury of six rather than nine, has not provided any evidence that such alleged error by the trial court was "highly prejudicial to its cause." Allen, 306 N.W.2d at 634. Accordingly, this Court's holding in Allen supports the finding that any error on the part of the District Court in this case was harmless error.

The Allen decision is consistent with prior holdings in North Dakota and in other jurisdictions. See, Sathern v. Behm Propane, Inc., 444 N.W.2d 696 (N.D. 1989) (holding a new trial was not required due to a juror's erroneous answer on voir dire); Hanson v. Parkside Surgery Center, 872 F.2d 745 (6th Cir. 1989) (finding harmless error in seating two extra jurors in violation of Fed.R.Civ.P. 47(b) and the local rule); United States v. Olano, 507 U.S. 725 (1993) (holding the presence of alternate jurors during jury deliberations, in violation of

Fed.R.Crim.P. 24(c), did not affect the defendant's substantial rights and was not prejudicial).

Kelly received a trial with a constitutionally sufficient jury, despite the fact that it never asked for one. Kelly claims that the fact that there were not nine jurors is reversible error. However, this Court has previously held that, in such a situation, any error by the district court is harmless error under N.D.R.Civ.P. 61.

CONCLUSION

Based on the foregoing, Howes respectfully requests that the Court grant this Petition for Rehearing and reconsider its ruling reversing the District Court's denial of the Motion for New Trial.

Respectfully submitted this 29th day of August 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) 667-4499

By: _____
Timothy Q. Purdon

Attorneys for Appellant

20020014

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUG 29 2002
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Michael Howes,

Plaintiff/Appellant,

v.

Kelly Services, Inc.,

Defendant/Appellee.

Supreme Court No. 20020014
Burleigh Co. No. 99-C-01636

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
: ss
COUNTY OF BURLEIGH)

Laurie L. Stroh, being first duly sworn, deposes and says that on the 29th day of August, 2002, she served the attached:

APPELLANT'S PETITION FOR REHEARING

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 August, 2002.

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

(SEAL)