

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

Calvin Wahl and Laurie Wahl,	)	Supreme Court Case No. 20100295
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
Northern Improvement Company, a/k/a	)	
McCormick Incorporated and United	)	
Rentals Highway Technologies, Inc.,	)	
	)	
Defendant-Appellees.	)	
_____	)	

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**BRIEF OF APPELLEE**  
**UNITED RENTALS HIGHWAY TECHNOLOGIES, INC.**

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**APPEAL FROM THE AMENDED ORDER FOR JUDGMENT DATED  
JULY 20, 2010, THE AMENDED JUDGMENT ON JURY VERDICT DATED  
JULY 22, 2010, AND MEMORANDUM OPINION AND ORDER GRANTING  
TAXATION OF COSTS AND DISBURSEMENT DATED OCTOBER 5, 2010  
HONORABLE ZANE ANDERSON, PRESIDING  
STATE OF NORTH DAKOTA  
STARK COUNTY DISTRICT COURT**

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## **STATEMENT OF THE CASE**

1. Defendant United Rentals Highway Technologies, Inc. adopts and incorporates by reference the “STATEMENT OF THE CASE” set forth in the brief of Defendant Northern Improvement Company a/k/a McCormick Incorporated.

## **STATEMENT OF FACTS**

2. Defendant United Rentals Highway Technologies, Inc. adopts and incorporates by reference the “STATEMENT OF THE FACTS” set forth in the brief of Defendant Northern Improvement Company a/k/a McCormick Incorporated.

## **STATEMENT OF ISSUES<sup>1</sup>**

3. Whether the Trial Court abused its discretion in continuing closing arguments and jury deliberation twelve days after all the evidence had been presented to the jury?

## **LAW AND ARGUMENT**

### **I. The Trial Court did not Abuse its Discretion by Continuing Closing Arguments and Jury Deliberations Twelve Days after the Evidence had been Presented to the Jury, but Before it had Received the Case.**

4. The Plaintiffs complain that the Trial Court abused its discretion by scheduling the trial for four days instead their preference for five days. A trial court has broad discretion over the presentation of evidence and the conduct of a trial or hearing. Niemann v. Niemann, 2008 ND 54, ¶ 19,

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<sup>1</sup> Although the Plaintiffs appealed the Trial Court’s awarding of costs and disbursements, they concede in their Brief they are not contesting costs and disbursements to United Rentals Highway Technologies, Inc. (Appellant’s Brief at pg. 11)

746 N.W.2d 3. In exercising that discretion, the court may impose reasonable restrictions upon the length of the trial or hearing and upon the number of witnesses allowed. Manning v. Manning, 2006 ND 67, ¶ 30, 711 N.W.2d 149.

5. At the pretrial conference, Plaintiffs advised the Court they thought four days would not be enough. When the Court responded the parties had the four days as scheduled, Plaintiffs' attorney did not object but instead responded, "[w]e'll just have to get it done." (Pretrial Conference Tr. at 50) While it turned out that four days was not enough time to complete the entire trial, all three parties were able to complete their cases in chief. Only closing arguments, jury instruction and deliberation carried over to a fifth day.

6. The four days set aside by the trial court did not limit the Plaintiffs in their presentation of evidence to the jury. They do not claim they were prevented from introducing certain evidence or calling additional witnesses. They were afforded a meaningful and reasonable opportunity to present their evidence. The Plaintiffs were not in fact prejudiced, nor have they shown the trial court abused its discretion in giving the parties four days for the trial. However, if there was any error, the Plaintiffs' failure to object constitutes a waiver. See Westby v. Schmidt, 2010 ND 44, ¶ 12, 779 N.W.2d 681 (party must object at the time of the alleged error occurs to allow the district court to take appropriate action to remedy any prejudice that may have resulted); See also Ohio Casualty Ins. Co. v.

Horner, 1998 ND 168, ¶ 26, 583 N.W.2d 804 (issues not raised in the trial court cannot be raised for the first time on appeal)

7. The Plaintiffs next claim the trial court abused its discretion by continuing the trial for twelve days and separating the jury during that time. As noted previously, all parties had completed their cases-in-chief, and only closing arguments, jury instruction and deliberation were continued. The continuance was necessary because of the trial court's schedule. The parties agreed that the trial should be completed as soon as possible, but there was no objection to the continuance.
8. Plaintiffs' reliance on N.D.C.C. § 28-14-18 is misplaced, because that statute governs situations where the case has been submitted to the jurors and deliberations are in progress. Here, all the evidence was in, but the case had not yet been submitted to the jurors.
9. Plaintiffs' reliance on Keyes v. Amundson, 343 N.W. 2d 78 (N.D. 1983) is likewise misplaced. In that case, after the jury had received the case and retired for deliberations, the trial court, over the objection of the plaintiff's counsel, dismissed the jurors for the weekend. Id. at 81. The North Dakota Supreme Court held that N.D.C.C. § 28-14-18 does not authorize a trial court to allow for a weekend separation after they have begun deliberations. Id.
10. While the Supreme Court in Keyes found that the trial court had in fact abused its discretion by allowing the jurors to separate for a weekend, it also required the plaintiff to show that he had been prejudiced by the

error. Id. at 82. The plaintiff had produced affidavits from certain jurors that, over the weekend, they had investigated the accident scene and reported the conditions to the other jurors once the jury had reconvened. Id. Based on the juror affidavits, the Court determined that there was a reasonable probability that extrinsic information could have affected the verdict of a “hypothetical average jury,” thus warranting a new trial. Id. at 86.

11. Whether to permit the jury to separate is a matter left to the discretion of the trial court, and “[f]or separation to constitute reversible error, there must be an objection supported by an affirmative showing that the [party] was prejudiced because of the separation.” State v. Bonner, 361 N.W.2d 605, 611 (N.D. 1985) (upholding a trial court’s decision to continue the trial for 55 days and allow the jurors to separate during that time). In Bonner, the North Dakota Supreme Court noted the presumption that a jury performs its duty in accordance with the law and is not influenced by outside events or evidence. Id. at 611. The Court went on to find that Bonner had failed to show that that he had been prejudiced by the delay and jury separation. Id.

12. Here, the trial court had the authority to permit the jury to separate for the twelve days between the close of evidence and the closing arguments, jury instruction and deliberation. Furthermore, the Plaintiffs have made no showing that anything occurred during the twelve day delay and separation that would be capable of prejudicing the jury’s verdict in



favor of the Defendants. Moreover, the Plaintiffs failed to object to the continuance and jury separation and therefore waived any claim of error.

**CONCLUSION**

13. The trial court did not abuse its discretion in continuing the last day of the trial for twelve days and separating the jury during that time. Accordingly, Plaintiffs' appeal should be denied.

Dated this 13<sup>th</sup> day of April, 2011.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

The undersigned, as the attorney representing Appellee, North Dakota Workforce Safety and Insurance Fund, and the author of the Brief of Appellee North Dakota Workforce Safety and Insurance Fund, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 1,111 words from the portion of the brief entitled “Statement of the Case” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 13<sup>th</sup> day of April, 2011.

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