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**FORT PECK COURT OF APPEALS  
ASSINIBOINE AND SIOUX TRIBES  
FORT PECK INDIAN RESERVATION  
POPLAR, MONTANA**

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WILLIAM RATHERT,  
Appellant/Defendant,

vs.

**APPEAL No. 006**

RON KEISER,  
Appellee/Plaintiff

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Wolf Point, Montana. JUDGE MARY E. GOURNEAU presided.

FOR APPELLANT: DAVID IRVING, Attorney, Drawer B, Glasgow, Montana 59230.

FOR APPELLEE: MARY L. ZEMYAN, Attorney, P. O. box 1094, Wolf Point, Montana 59201 and Leighton Reum, Lay Advocate, P. O. box 675, Wolf Point, Montana 59201.

On or about January 17, 1986, Appellant filed a Memorandum in Support of the Petition for Review. On or about August 26, 1986, Appellee submitted a Supplemental Memorandum. Appellant and Appellee submitted no briefs. Appellant and Appellee presented oral arguments.

OPINION by Arnie A. Hove, Justice, joined by Julian H. Brown, Chief Justice, and Daniel R. Schauer, Justice.

**DEFAULT JUDGMENT VACATED AND REMANDED FOR NEW TRIAL**

On or about July 16, 1985, APPELLEE filed a Civil Action against APPELLANT claiming \$51,540.00 for damages. A hearing was set for the 30th day of July, 1985 at 10:00 o'clock A.M. On July 29, 1985, the APPELLANT signed a Motion for Continuance with his counsel, W. Gene Theroux, requesting an extension to Wednesday, August 14, 1985 at 10:00 o'clock A. M.

The Appellant never received notice that his Motion for Continuance was granted or that a trial was set for August 14, 1985 at 3:00 o'clock P.M. At the trial, a Default Judgment was entered. The Judgment By Default on Failure of Defendant to Appear at Trial After Notice was dated September 10, 1985 and signed by Judge Mary E. Gourneau. A Certificate of Service indicates that Appellant received notice of the Default Judgment on the 12th day of September, 1985.

Appellant appealed the Default Judgment and presented the following issue on appeal:

- I. Whether Procedural Due Process and Title IV, Chapter 1, Section 103(e)(2) Comprehensive Code of Justice (hereinafter CCOJ), required notice of hearing, trial or subsequent trial date to be served on the parties by the Clerk of Tribal Court.

Appellee presented the following two (2) issues on appeal:

- I. Can the Court Recognize the "Motion for Continuance" filed by a person not authorized to practice before the Tribal Court?
- II. If the answer is yes, can the Court find "excusable neglect" sufficient to set aside the Default Judgment?

I.

The law both parties argued applied to the present case was Title IV, Chapter 1, Section 103(e)(2) CCOJ. reads in part as follows:

Section 103. Hearing

At the time the verified complaint is filed, the clerk shall schedule a hearing on the claim not less than fifteen (15) days after the complaint is filed. The clerk shall furnish the Plaintiff with a copy of the notice showing the time and place of the hearing and shall affix such notice to the copy of the complaint to be served on each Defendant. At the hearing, the presiding Judge shall ascertain whether:

...(e) The claim is ready for trial;...

...(2) If the claim is not ready for trial, the Judge shall set a subsequent date for trial and order such preparation by the parties as he deems necessary.

Upon reviewing the record and after oral arguments, it appears that Appellant received notice of a Default Judgment dated September 10, 1985 which was also the time Appellant received notice of the trial held August 14, 1985 at 3:00 o'clock P.M. During oral arguments, Appellee's counsel admitted they did not know whether Appellant had actually received notice of the trial. Also Appellee argued that it was the duty of the Appellant to determine the time of the trial since Appellant had filed the Motion for Continuance.

Upon the filing of a complaint, it is inferred from the language in Title IV, Chapter 1, Section 103(e)(2) CCOJ, that the Clerk of the Tribal Court is to serve on each of the parties a notice of hearing, trial and any subsequent trial dates. From this inference and even though Defendant and his counsel did file a Motion for Continuance, it would continue to be the duty of the Clerk of the Tribal Court to give notice of any subsequent trial date if said Motion was granted. To construe the aforementioned section to place the above duty of giving and obtaining notice on attorneys and lay counsel, would require that they be in constant contact with the Tribal Court to determine if a trial has been postponed and thereafter notify each

other. This would clearly be an unreasonable burden, create confusion and permit entry of default judgments without due process as in the instant case.

II.

Appellee alleges the Motion for Continuance was filed by Appellant's counsel who was not authorized to practice before the Tribal Court. Appellee argues this Court must adhere to the clear statement of the Code that prohibits practice of persons who have not been duly admitted.

Title 1, Chapter 5, Section 503 CCOJ reads in full as follows:

Any person at his own expense may have assistance of counsel in any proceeding before the Tribal Court. The Tribal Court in its discretion may appoint counsel to defend any person accused of a crime.

The above section does not require that a person have assistance of counsel in a proceeding before the Tribal Court. Appellant's Motion for Continuance dated July 29, 1985, was signed by Appellant, William Rathert, and his then counsel, W. Gene Theroux. Although W. Gene Theroux was not an attorney admitted to practice before the Tribal Court, Appellant did sign his own Motion for Continuance. Therefore, Appellee's argument is without merit.

III.

Appellee argues that if the Court recognizes the Motion for Continuance, the Court cannot find "excusable neglect" that would justify setting aside the Default Judgment.

At a trial August 14, 1985 at 3:00 o'clock P.M., Appellee obtained a Default Judgment in the amount of \$51,540.00 against Appellant when Appellant received no notice and was not present at the trial. It is clear in the Court's determination of the first issue that Appellant was not afforded due process and that Appellee's argument is without merit.

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THIS COURT ORDERS THAT THE DEFAULT JUDGMENT ENTERED AGAINST APPELLANT IN TRIBAL COURT SEPTEMBER 10, 1985, BE AND THE SAME HEREBY IS VACATED AND THAT THIS ACTION IS HEREBY REMANDED FOR A NEW TRIAL.

DONE this 29th day of August, 1986.

**BY THE COURT OF APPEALS:**

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Julian H. Brown, Chief Justice

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Arnie A. Hove, Associate Justice

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Daniel R. Schauer, Associate Justice

