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

LAYTON PAYNE, SUSIE SYMINGTON,
CLEO MACDONALD, TOM PAYNE
GLORIA URBANIAK and FAITH
TALL WHITEMAN

Plaintiffs/Appellees

Appeal No. 253

vs.

CARL PAYNE,

Defendant/Appellant

****
O P I N I O N
****

This appeal arises from an order issued on April 8, 1996, by the Honorable Leland Spotted Bird denying defendant/appellant's Motion for Summary Judgment. Arnie A. Hove, Esq. of Circle, MT for appellees (herein "plaintiffs") and Donald L. Netzer, Esq. of Sidney, MT for appellant (herein "defendant" or "Carl").

Justice Sullivan writes the following opinion for an unanimous Court.

FACTUAL OVERVIEW AND PROCEDURAL HISTORY

This is the second appeal that has evolved from an ongoing intra-familial dispute. In Payne I (**FPCOA #212**), this Court affirmed[1] an order issued on May 19, 1994, by the Honorable Leland Spotted Bird. The Court found that defendant had obtained various items of personal property under false pretenses from his father Layton Payne (hereafter "Layton"), who is one of the plaintiffs/appellees herein. The Court directed Carl to return the items and to sign over title to the vehicles and equipment to Layton. The Court also found that Carl had obtained forty-nine (49) cows and two (2) bulls from Susie Symington (Carl's sister and also one of the plaintiffs/appellees herein) under false pretenses. It

also found that he had branded the cattle and bulls with his brand without authorization from Susie, the legal owner. The Court ruled that if Carl retained ownership of the cattle and bulls, he would be unjustly enriched. Accordingly, it ordered Carl to return the cattle and bulls to Susie. Carl was also to execute a bill of sale to her for those head that he had branded. The Court further ordered Carl to release to Susie his claim to a check in the amount of $34,635.01 representing proceeds from the sale of certain calves.

In addition to the items awarded to them by the Court, Plaintiffs' first complaint (94-1-005) alleged that Carl owed them for seed wheat, custom summer fallowing for various years, and one-half (½) of the income from custom harvesting for various crop years. The Tribal Court in its' decision on May 19, 1994, failed to rule on these claims. Plaintiffs contend that the Tribal Court refused to allow them to submit evidence relative to these claims, instructing them that they would need to address these claims in a subsequent action.

On September 14, 1995, plaintiffs filed a second complaint (95-9-144) which included, inter alia, these same, previously omitted, claims[2]. In his answer, Carl set forth various affirmative defenses, including res judicata as to plaintiffs' claims for "seed wheat", "summer fallowing", and "custom combining". Carl also filed a cross complaint. During discovery, Carl propounded a "Combined Discovery Request" which included a request that plaintiffs admit that they had previously sued Carl for these same items. Carl also requested an admission that the transactions regarding the personal property in plaintiffs' complaint had taken place in 1990 and they were therefore barred by the statute of limitations. Plaintiffs failed to file a response. Carl then moved for Summary Judgment on the basis that, 1) the Statute of Limitations barred that portion of plaintiffs' claims concerning the items of personal property, and 2) res judicata barred that portion of plaintiffs' claims that had been included in their first complaint (namely, the seed wheat, summer fallowing, and custom combining). On April 8, 1996, the Tribal Court held a pre-trial conference. In denying Carl's summary judgment motion, the Court stated that neither party had submitted sufficient evidence to establish the date of the transactions to conclusively prove that the claims were barred by the statute of limitations. It went on to say that "(t)he Court after reviewing Court documents finds that particular issues involving Summer Fallow, Seed Wheat, Custom Combining, and the 1993 Wheat Crop were not issues raised in a previous lawsuit."

On April 23, 1996, after a two day trial, the jury returned a verdict of $48,800 in plaintiffs' favor, with nothing going to Carl on his cross complaint.

Carl now petitions this Court for review of the Tribal Court's order denying his summary judgment motion, further contending that the jury's award to plaintiffs was not supported by substantial evidence.

ISSUES PRESENTED

Carl's Petition for Review raises three issues for this Court to address:

1. **Did the Tribal Court err in denying Carl's summary judgment motion based on his affirmative defense that certain claims were barred by the Statute of Limitations?**
2. **Did the Tribal Court err in denying Carl's summary judgment motion based on his**

affirmative defense that certain claims were barred by res judicata?

3. **Was the jury verdict supported by substantial evidence?**

STANDARD OF REVIEW

Title I CCOJ Section 201 provides: "The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review *de novo* all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court if such determinations are supported by substantial evidence.**"**

We note that defendant did not brief, nor did he discuss even in passing, the contention raised in his Petition for Review regarding whether the jury verdict was supported by substantial evidence. We assume from defendant's silence on this issue that he has decided to withdraw that portion of his appeal. Accordingly, we need not set forth the standard of review for a jury verdict.

DISCUSSION

1. **Did the Tribal Court err in denying Carl's summary judgment motion based on his affirmative defense that certain claims were barred by the Statute of Limitations?**

The law underpinning summary judgment proceedings is well established and we begin our analysis with a brief review. Essentially, the doctrine attempts to determine whether there is any need for a full adversarial hearing on the merits. If there are no material issues of fact that need to be decided, then summary judgment is proper; the matter should be disposed of summarily, without further time and expense to the parties. On the other hand, if there are one or more "triable issues", then the trial should go forward and summary judgment must be denied.

As can be seen, this doctrine provides a summary dismissal procedure to the very same Court which is in place to insure full and fair justice to all litigants by affording them their "day in court". It is for this reason that Courts of Review have consistently stated that summary judgment is a drastic measure and should be used sparingly and with great caution. To be sure, summary judgment must not be a substitute for a full and fair trial.

Customarily the Tribal Court Judge makes the requisite determination by examining the pleadings[3] and other moving papers (which usually contain affidavits or declarations) in support of the motion for summary judgment. If the Court finds that the motion is properly supported, then the Court, using the finest legal comb, must carefully inspect the opposing party's papers to determine whether a triable issue of *material*[4] fact exists. If none exists, then summary judgment is proper. Conversely, If a triable issue of fact exists, then summary judgment must be denied. In short, the moving party bears the burden of proving that the claims of the adverse party are entirely without merit on any legal theory.

There are two important rules to be applied to summary judgment motions: 1) all pleadings and supporting papers of the moving party are *strictly construed* and 2) all pleadings and papers of the opposing party are *liberally construed*. All doubts and conflicts must be resolved in favor of the party

opposing the summary judgment motion.

In our analysis of whether defendant's Motion for Summary Judgment was properly denied, we address three (3) important questions.

1. Which issue(s) constructed by the pleadings and moving papers must be responded to by the opposing party, and to which, a showing must be made that such issue or remedy is "without merit on any legal theory" or that a complete defense to such issue or remedy exists?
2. Next, did the moving party unequivocally demonstrate that their opponent's claim or defense was "without merit on any legal theory" or did the moving party establish a complete defense to such issue or remedy?
3. Finally, assuming a prima facie showing that the pleadings and moving papers justify summary judgment, did the opposing party, nonetheless, demonstrate that a triable issue of material fact exists?

Plaintiffs claim in their January 14, 1995 amended complaint that on or about January 1, 1994, Carl was going to "fail…(or) refuse…(to) turn over certain personal property consisting of a one-half (1/2) interest in one 1981 F-250 Ford pickup, a one-half interest in a Big Butch Chemical Sprayer, and a 1979 Medallion trailer house. Defendant filed a timely answer[5], pleading the statute of limitations as an affirmative defense to these claims. On January 22, 1996, the Tribal Court held a "Section 103[6]" hearing wherein it ordered that all discovery be completed by March 22, 1996, that pre-trial motions must be made prior to April 8, 1996, that a pre-trial conference would be held on April 8, 1996 and that the trial would commence on April 22, 1996. On February 20, 1996, defendant filed his First Combined Request for Discovery wherein plaintiffs were requested to admit that the transactions involving the 1981 F-250 Ford pickup, the Big Butch Chemical Sprayer, and the Medallion trailer house, all took place in 1990. Plaintiffs failed to file timely answers in accord with **FRCP Rule 36**. On March 26, 1996, defendant submitted his Notice of Admission of Facts (deemed admitted by Rule 36) along with his Motion for Summary Judgment. On March 27, 1996, plaintiffs filed their Motion for Additional Time to answer defendant's discovery request, requesting that they be given until April 5, 1996, to file a response. On April 8, 1996, the Tribal Court denied defendant's Motion for Summary Judgment and allowed plaintiffs until April 15, 1996, to file their response to defendant's First Combined Discovery Requests.

Thus, the issue was framed by the moving papers: Were the claims for the 1981 Ford F-250 pickup, the Big Butch Chemical Sprayer and the Medallion trailer house[7] barred by the statute of limitations[8] because they took place four (4) years prior to filing the complaint? As previously shown, plaintiffs' verified complaint alleged that plaintiffs had not learned of defendant's refusal to return the personal property until on or about January 1, 1994. Thus, a conflict arises amid the pleadings and moving papers as to the operative date that would trigger the statute of limitations. This conflict was sufficient for the Tribal Court to find that a triable issue of material fact existed, making denial of defendant's summary judgment motion mandatory. In view of defendant's failure to establish the first rung on this "summary judgment" ladder, it is unnecessary to continue the analysis.

We now turn to defendant's plea that three (3) of plaintiffs' claims are barred by the doctrine of *res*

judicata.

"Res judicata" is a product of common law and was historically referred to as "estoppel by judgment". The underlying theory was that once a matter had been tried and resolved in the form of a judgment, it would be fundamentally unfair to allow any of the litigants in the initial action to regroup and "give it another go". It is often repeated that "(t)he rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy". Thus, the previously obtained judgment should "estop" any party to the original action from vexing their opponents and/or privies from relitigating the same claims. Eventually, the doctrine of "estoppel by judgment" became known as "res judicata"[9].

There is a dual aspect to this doctrine. On the one hand, it precludes parties or their privies from relitigating a *cause of action* or *claim* that has been determined with finality by a court of competent jurisdiction. This is now known as "res judicata" and is often referred to as "claim preclusion".

Additionally, any *issue* which was decided in previous litigation between the parties, is conclusively determined as to the parties or their privies if it is raised in a subsequent lawsuit, even if the subsequent litigation involves a different cause of action. This, more narrow version of the doctrine, is known as "collateral estoppel" and is often referred to as "issue preclusion[10]".

The defense of res judicata is a complete bar to an action; whereas collateral estoppel, "is concerned with the conclusiveness of a prior determination of a particular issue". (See **Solari v. Atlas-Universal Service, Inc. (1963) 215 Cal.App.2d 587, 592; 30 Cal.Rptr. 407**).

Our analysis of this doctrine requires a three step process. First, we must determine whether the parties and/or their privies in the previous action are the same as those in the instant action. Next, were the claims or issues decided in the previous litigation the same claims or issues presented in the instant action? And finally, did the previous action result in a final judgment on the merits?

1. **Did the Tribal Court err in denying Carl's summary judgment motion based on his affirmative defense that certain claims were barred by res judicata?**

For the reasons set forth below, we answer this question affirmatively with regard to the claims for "seed wheat", "summer fallowing", and "custom combining".

It is without dispute that the parties in the previous action are identical to the parties in the instant action. Thus, the first element of res judicata is met.

As noted earlier, plaintiffs claimed that Carl owed them for seed wheat, summer fallowing, and custom combining in their first complaint (94-1-005, paragraphs 5H, 5I, & 5J). Plaintiffs argue in their brief that "it is clear from the previous proceedings and the instant case that the personal property and monies requested (in their second action) were not a part of any previous proceeding." (**Appellees' Response to Appellant's Appeal Brief, lines 18 through 20, page 3**). A comparative review of both complaints reveals that these same claims (i.e. seed wheat, summer fallowing, and custom combining)

were also contained in their second complaint (95-9-144, paragraphs IIIb, IIIe, and IIIf). Thus, plaintiffs' contention that these claims "were not a part of any previous proceeding" is clearly contradicted by the record. Thus, inasmuch as plaintiffs' claims for seed wheat, summer fallowing, and custom combining were identical in the two complaints, the second element of res judicata has been met.

Finally, did the previous action result in a judgment on the merits regarding these claims? Defendant says yes. Plaintiffs say no. During oral argument, plaintiffs' attorney clarified their position by contending that, although three of the claims were identical, the Tribal Court in the previous action would not let them proceed with the presentation of evidence on these claims; that the Tribal Court, for reasons not disclosed by our record, told them that these claims were not properly presented; and that they must bring those claims on another day. Accordingly, plaintiffs obliged the Tribal Court by bringing these claims in the instant action some nineteen (19) months later. We find no support for this contention in the record.

A review of the trial transcript reveals that at one point the Tribal Court Judge did sustain a defense objection to the introduction of evidence regarding a New Holland 995 combine which was not included in either the initial complaint (94-1-005), filed *pro se* by the plaintiffs on January 19, 1994, or the amended complaint, filed by their attorney of record on February 24, 1994. (**Trial Transcript, 94-1-005, Payne v. Payne, 5/6/94, line 16, page 48 through line 19, page 52**) However, at no point in the proceeding was testimonial or documentary evidence concerning plaintiffs' claims for "seed wheat", "summer fallowing", and "custom combining" objected to by the defense attorney, or denied by the Tribal Court. On the contrary, we found the record replete with testimonial evidence referencing "seed wheat", "summer fallowing", "custom combining" and "wheat crop". Layton Payne gave such testimony on direct examination (*id* @ lines 9 through 18, page 71), cross examination (*id.* @ lines 11 through 15, page 73 and lines 4 through 21, page 75), as well as re-direct examination (*id.* @ lines 4 through 20, page 77). Another plaintiff, Tom Payne, also gave such testimonial evidence (*id.* @ line 19, page 96 through line 7, page 97). No less than four (4) defense witnesses were examined regarding these same issues: the defendant, Carl Payne (*id.* @ line 14, page 125 through line 9, page 126; lines 13 through 23, page 130, line 18, page 132 through line 9, page 133, lines 8 through 10, page 134 [on direct examination] and lines 7 through 25, page 136, line 17, page 156 through line 14, page 159 and line 4, page 162 through line 1, page 163 [on cross examination]); Mike Long (*id.* @ line 5, page 177 through line 1, page 178 on cross examination); Roger Flynn (*id.* @ lines 8 through 11, page 179 on direct examination); and Bernard Long (*id.* @ line 24, page 182 through line 8, page 183 on direct examination). In addition to the cited testimony, each of the attorneys commented on these claims during their closing arguments (Hove for the plaintiffs *id.* @ line 22, page 187 through line 22, page 188 and Netzer for defendant *id.* @ line 24, page 190 through line 11, page 191).

However, notwithstanding the fact that these three claims were contained in plaintiffs' complaint in the previous action and that evidence was proffered on these claims by both sides, we find no reference to these claims[11] in either the Court's "Findings of Fact" or "Order". It appears that the Tribal Court failed to rule on these claims. Does this failure to rule on claims that are properly before the Court, with evidence having been presented by both sides, constitute a "final judgment" as to these claims? Can it be said that these claims, which do not appear in the final judgment, nonetheless, are to be considered as having been adjudicated "on the merits"? Our holding today requires that both of these questions be answered affirmatively.

"The law of res judicata expresses the terms for assessing whether the procedural system afforded the contending party an adequate opportunity to litigate. In the now accepted phrase, the question is whether that opportunity was 'full and fair'." (**Restatement Second Judgments, Chapter 1, p. 9.**) An important component in applying this doctrine measures just how far the principle of "finality of judgments" should be taken. Thus, in applying this doctrine an attempt is made

> "…to state the conditions under which the possibility of failure of civil justice is so substantial as to justify remedial action in the form of relitigation. On the one hand, judgments must in general be accorded finality despite flaws in the processes leading to decision and the unavoidable possibility that the results in some instances were wrong. On the other hand, a judgment in a particular case must be subject to reexamination in the name of substantial justice if the initial engagement of the merits was inadequate." (**id. Chapter 1, p. 12**)

However, balancing between the finality of judgments and allowing relitigation because the "initial engagement" was flawed requires more than the intuition and discretion of our Courts.

> "A measure of intuition and discretion, to be sure, is required in administering the law of res judicata, as the rules in this Restatement frankly acknowledge. However, a policy of reasonable finality requires rules that take into account the complex substantive and procedural considerations going into a civil judgment. The law of res judicata is thus a mirror of legal justice itself." (**ibid.**)

Thus, "the policy of the modern law of res judicata is summed up in @26(f) of this Restatement, ***allowing relitigation*** of a claim (except on other specific grounds) ***only if it is 'clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason***.' " (**id. @ Chapter 1, p. 10.**)(**our emphasis**)

We have previously applied the rules of res judicata and found that all three required elements are present. We now examine whether the facts in this case "clearly and convincingly" show that the policies favoring finality have been overcome for an "extraordinary reason".

Plaintiffs strongly urge this Court to find that, although three (3) of their claims are identical in the two different actions, no final adjudication was made on those three (3) claims in their first case (94-1-005). They further contend that the Tribal Court refused to accept their evidence on those claims in the first action, therefore they have not had their "day in court". Thus, the principles of res judicata simply do not apply. Reluctantly, we must reject plaintiffs argument for two reasons.

We have already shown that the record does not support plaintiffs' contention that the Tribal Court refused to accept their evidence on the subject claims. We have also shown that both plaintiffs and defendant proffered evidence on these claims. We readily agree with plaintiffs' contention that the subject claims were not adjudicated because the Tribal Court failed to rule on these claims. However, these claims were properly before the Tribal Court. We are not privy to the reasons for the Tribal

Court's failure to rule on these claims: did it simply reject plaintiffs' evidence in support of these claims and then fail to announce its' rejection in the Order? Or did it fail to announce its' acceptance of plaintiffs' evidence[12]? Or did it simply fail to rule on these claims? The failure is as mysterious to us as it must have been to the plaintiffs and defendant. However, plaintiffs' remedy for this failure was readily available in the form of a timely appeal. As was succinctly stated by the California Supreme Court:

> "The claim that appellants have never had their day in court cannot be sustained for it was their duty at the previous hearing to tender each item of evidence tending to support their claims and if the decision was unfavorable to seek review by appeal. Having failed to do so, they are now foreclosed from such action. They have had their day in court… Nor are the reasons assigned by the trial court for the making of its findings and the rendition of its judgment proper matters for consideration." **Ernsting v. The United Stages, Inc., et al., (1929) 206 Cal. 733, @737-738; 276 P. 103 @105-106.**[13]

In **Ernsting** the facts are even more compelling: two (2) plaintiffs who were not involved in the first action, but were privies of the original plaintiffs, were barred from bringing their claims against the defendants. The **Ernsting** Court states that these two (2) plaintiffs "have had their day in court" *even though they never actually appeared in the first action*!

Additionally, we note that even if plaintiffs had not brought their claims in the previous litigation, they would still have been precluded from bringing them "originally" in the instant (second) action. As early as 1940, the U.S. Supreme Court stated:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties *and in which they could have raised it* and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end' (Citation omitted)." **Chicot County Drainage District v. Baxter State Bank, et al. (1940) 308 U.S. 371,@377; 60 S. Ct. 317; 84 L. Ed. 329.**

Accordingly, plaintiffs everywhere are required to mitigate the costs of the litigation process by consolidating all of their claims and bringing them together into one single action. Thus, the doctrine of res judicata also serves to prevent "piecemeal" litigation.

However, notwithstanding the above decisions, this Court is not insensitive to plaintiffs' plight. They brought their claims timely in the first action. From the plaintiffs' perspective, the Tribal Court, whether right or wrong and for whatever reason, effectively denied them their "day in court" by not ruling on all of their claims. We hear plaintiffs' asking, "why shouldn't we be allowed to come now and present these claims anew? If there is justice, then where will justice be if we are again denied our day in

court?" As one might guess, in plaintiffs' eyes, justice will be denied. We can understand perfectly how lay persons, especially the plaintiffs herein, might view this decision. It is for that reason that we feel compelled to spend at least a few moments elaborating on the very important reason that dictates our actions.

It is axiomatic that the task of our Tribal Court system is to administer justice, not only to plaintiffs, but to the defendant, and indeed, to all litigants who come before the Courts. Further, it is important to us that all of our litigants, not only are dealt with justly, but to the extent possible, understand the reasons and rationale underlying the laws that impact upon them. In our opinion, a large part of "administering justice" is to not only "do justice", but to explain the "justice we do". This is particularly important in those cases when the law requires us to make decisions that appear "just" only to those who are trained in the law.

"Justice" takes on many different meanings depending on who's dictionary we use. There are those who define justice as what happens when they win. To those, our words will be meaningless. It is to those that sincerely care whether their judicial system works that we address our additional remarks.

First, we note that justice in our legal system is not some vague sense of right or wrong, nor is it a feeling that one gets as they listen to opposing sides advocate their positions. To administer justice is "to do justice", and "to do justice" in our legal system means to treat *everyone* adequately, fairly, and with full appreciation *before the law.* No one stands above the law, no one stands below the law. *All* are treated equally before the law. And most importantly, it is not our feelings of right and wrong that guide us (even though it has been said, "a clean conscience cleanses the soul and makes us do right"). Nor are we led by the hands of those who are in the majority—since "justice" is not counted by majority. The only way that we can "do justice" is to allow established legal principles and doctrines to be our guiding light and to adhere passionately to them at all times. Only then, can we confidently say, "Justice has been done". And when justice has been done, all of our litigants are winners.

It is important for our litigants herein to know that the doctrine of res judicata would have allowed us to correct a "grave injustice about to be done to (them) by this doctrine" by granting them relief. However, we can allow "relitigation of a claim, (but) only if it is 'clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason." Plaintiffs imply that the Tribal Court's failure to rule on their claims in the previous action constitutes the "extraordinary reason" that should entitle them to a second chance. We must respectfully disagree.

The fact that Courts routinely make mistakes is attested to by the vast appellate structure within our system of jurisprudence. It is not "extraordinary" for any Court to make a mistake, nor is it "extraordinary" for litigants to make mistakes. It is when both the Court and the litigants make mistakes, *in the same matter* , that the result is exacerbated and becomes far more egregious. Such is the case before us.

It is clear that the Tribal Court erred, either in its' failure to rule on all of plaintiffs' claims, or its' failure to disclose its' ruling on those claims. Regrettably, plaintiffs compound that error with one of their own—their failure to seek appellate relief. Thus, plaintiffs are now faced with being barred forever from having their claims heard. But if we are to hear and act upon plaintiffs' cry for help, the law of res

judicata constrains us to grant relief *only* "if the initial engagement of the merits was inadequate." Not merely because the result or action by the Court was wrong. Not merely because the plaintiffs compounded the Court's error with one of their own. But *only if* the proceeding was inadequate. In spite of the Court's error in failing to rule on all of plaintiffs' claims, we sincerely believe that the "engagement on the merits" was full and fair in that plaintiffs could have filed an appeal and sought relief. They filed an appeal in the very same action requesting this Court to reverse the decision of the Tribal Court with regard to a tribal pasture lease. Why not *also* seek relief from the error committed by the Court in its' failure to rule on the proffered evidence on the subject claims? Surely they must have noted the omission at that time. It was the plaintiffs' call and they made it. They chose not to appeal, but to remain silent and file yet another complaint. If we were to find "extraordinary reason" in plaintiffs' failure to file an appeal, we would place a premium on "judgment calls", regardless of their soundness. We dare not venture into such a legal maze. If plaintiffs had been precluded from presenting evidence on their claims and then left with no remedial action of any kind, we would be far more willing to find an "extraordinary reason" to allow them to re-litigate their claims. However, under the facts and circumstances before us, we cannot "state…that the possibility of (the) failure of civil justice is so substantial as to justify remedial action in the form of relitigation". In short, there is no extraordinary reason to overcome the presumption in favor of precluding the second action.

In the instant matter we have applied the legal principles to the facts and regardless of our own sensibilities, we have adhered "passionately" to those principles. Whether the result is "right" or "wrong" to those who apply their own feelings and backlog of experience to the matter, we are convinced that the result is consistent with the law and therefore "just".

Accordingly, we find that there was a final judgment reached in the previous action (94-1-005) and that said judgment included all claims that plaintiffs actually presented. Specifically, we hold that plaintiffs' claims for seed wheat, summer fallowing, and custom combining, are all barred by the doctrine of res judicata. We note that defendant did not raise the defense of res judicata regarding plaintiffs' claims for the "wheat crop", 1981 F-250 Ford pickup, Big Butch Chemical Sprayer, and the 1979 Medallion trailer house. Inasmuch as res judicata is an affirmative defense, the failure to plead results in a waiver of the defense as to those claims. (See **FRCP Rule 12**)

The jury verdict as to that portion granting judgment in favor of plaintiffs for the seed wheat ($6,500), custom harvesting ($15,000) and summer fallowing ($15,000) is set aside and the matter is remanded to the Tribal Court with instructions to grant defendant's Motion for Summary Judgment consistent with this opinion and order.

The remainder of the jury's verdict in favor of plaintiffs for the wheat crop ($7,500), as to one-half interest in 1981 F-250 Ford pickup ($800), one-half interest in Big Butch Chemical Sprayer (($250), and 1979 Medallion trailer house ($3,750) is AFFIRMED.

IT IS SO ORDERED.

Dated: April _____ , 1997

BY THE COURT OF APPEALS:

GARY P. SULLIVAN
Associate Justice

GARY M. BEAUDRY
Chief Justice Justice

GARY JAMES MELBOURNE
Associate Justice

[1] It should be noted that a portion of the Court's order regarding a tribal lease was reversed.

[2] Additionally, the plaintiffs sought recompense for the 1993 wheat crop of 3,000 bushels of wheat at $2.50 per bushel ($7,500) and the return of various personal property items. These claims *did not* appear in the first complaint.

[3] We note that some Courts, such as those in California, do not consider the pleadings, relying *only* on the moving papers. We reject this position as placing a premium on redundancy. When the pleadings are verified, as required by **Title IV CCOJ § 101**, there is no need to require that party to restate that which is already on the record. We note that California allows the filing of unverified complaints which may explain their position.

[4] There are many disputed issues in most every case. Not all of these issues are *material* to the merits of the claims and defenses raised by the parties. While the Tribal Court may note various issues in dispute, only those which address the merits of the claims and defenses of the parties warrant proceeding to trial.

[5] Defendant also filed a cross-complaint which is not in issue.

[6] **Title IV CCOJ § 103** provides for what might be loosely labeled as an "all purpose" pre-trial hearing.

[7] Plaintiffs subsequently amended their complaint to identify the sprayer as a "John Deere" and the trailer house as a "Champion".

[8] **Title IV CCOJ § 601** requires that an action be "brought" within three (3) years. See also **Todd v. General Motors FPCOA #215.**

[9] The term "res judicata" is loosely translated "the thing has been adjudged" and was coined in the Restatement of Judgments.

[10] See Rest.2d Judgments, ch. 1, p. 1, wherein the dual aspects of "res judicata" are referred to as "claim preclusion" and "issue preclusion".

[11] We note the possibility that the Tribal Court may have been addressing these claims when, in its' Order it states, "THAT, the Court has no jurisdiction over the Three Buttes farm and ranch and any wheat or income off said property described as {legal description follows}. Property being Fee Patent

Land." (**Order, dated December 14, 1994, 94-1-005, @ lines 21 through 26, page 3**.) Assuming this possibility, our analysis would be somewhat different, however our holding would remain the same.

[12]Such evidence must have been substantial in that the jury in the second action awarded plaintiffs most of the value of these claims.

[13]The facts in **Ernsting** differ from those in the instant case, in that, two plaintiffs in the subsequent action *were not* plaintiffs in the previous action, but were barred, nonetheless, because they were privies of the plaintiffs in the original action. While we note this difference, we find that the principles quoted above are equally applicable in the case at bench.