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

RUBICK LEASING CO., INC.,
Plaintiff/Appellant,

vs.

Appeal No. 045

CROWE-CULBERTSON CHIEF KWIK NAY, QUENTIN CROWE and GENE CULBERTSON,
Defendants/Appellees.

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Lawyer-Judge Julian H. Brown presided.

FOR APPELLANT: Laura Christoffersen, Attorney at Law, P. 0. Box 997, Wolf Point, Montana 59201.

FOR APPELLEES: Kevin Razor, Lay Counselor, P. 0. Box 427, Wolf Point, Montana 59201.

Argued April 22, 1988; Decided April 22, 1988.

CIVIL: MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING VERDICT PROPERLY DENIED; UCC TO BE APPLIED TO LEASE AGREEMENTS WHICH FALL WITHIN SALE OF' GOODS PROVISION; ALL INDIAN JURIES ARE NOT UNFAIR OR UNCONSTITUTIONAL OPINION by Arnie A. Hove, Chief Justice, joined by Daniel P. Schauer, Justice, and Gary James Melbourne, Justice.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT THIS MATTER BE REMANDED TO THE TRIBAL COURT FOR A NEW TRIAL WITHIN THIRTY (30) DAYS OF THE DATE OF THIS OPINION ANT) THE UCC SHALL BE APPLIED IN THE SUBSEQUENT TRIAL. THE JUDGE OR JURY IS DIRECTED TO DETERMINE THE AMOUNT OF THE DEFICIENCY, INTEREST, ATTORNEY FEES AND COSTS OF SUIT APPELLANT IS ENTITLED TO UNDER THE LEASE AGREEMENT AND OFFSET ANY AMOUNT OWED APPELLEES IF DETERMINED APPELLANT FAILED TO CONDUCT A COMMERCIALLY REASONABLE SALE UNDER THE UCC BY ITS FAILURE TO RETRIEVE THE COOKER FOR FOUR MONTHS.

Rubick Leasing Co., Inc. (hereinafter Appellant) of Billings, Montana appeals from a jury verdict entered on the November 5, 1987, wherein Appellant was denied judgment against Crow-Culbertson Chief Kwik Way (hereinafter Chief Kwik Way),

Quentin Crow and Gene Culbertson (hereinafter Appellees). We reverse and remand for a new trial. The record discloses the following pertinent facts.

Appellees operated a business known as Chief Kwik Way that conducted business within the exterior boundaries of the Fort Peck Indian Reservation. On or about July 15, 1985, Appellees entered into a written lease agreement with Appellant for the lease of a Flavor Crisp Chicken Cooker.

On May 20, 1986, Chief Kwik Way and Appellees breached the lease agreement by tailing to make the payment due on that date, and have since made no payments. As a result of the breach, under the terms of the lease agreement Appellant is entitled to the sum of $1,974.69, for the deficiency resulting from the sale of the cooker, interest, attorney fees and costs of suit. From May 20, Appellant waited four months before retrieving the cooker.

A jury trial was held on November 5, 1987. The Jury denied Appellant its request for a judgment against the Appellees for the deficiency, interest, attorney fees and costs of suit. The Appellant appealed from this jury verdict on two issues which this Court will address in the following. The Appellant raised a third issue in the trial regarding all lndian juries which will also be addressed since it was raised in the oral arguments.

I.

WHETHER THE LONER COURT ERRED TN NOT GRANTING APPELLANT'S MOTIONS FOR A DIRECTED VERDICT AND JUDGMENT NOT WITHSTANDING VERDICT.

On July 15, 1985, Appellees both signed the lease agreement for Chief Kwik Way. The Tribal code provides for jurisdiction as prescribed in l CCOJ 107. This section reads,

> "The Court shall have jurisdiction over any action where one party to the action shall be an Indian, or a corporation or entity owned in whole or in substantial part by an Indian or the Tribes or a corporation or entity chartered by the Tribes; and
>
> "...
>
> "(b) an Indian party to the action resides on the Fort Peck Reservation."

In this case, the Tribal Court had jurisdiction over this matter since it involved two Indians (Appellees residing on the Fort Peck Indian Reservation and an entity, Chief Kwik Way, owned in whole or in substantial part by both Appellees. The law which would apply in this case is the CCOJ if it addressed the area of contracts, however, it is silent and the lease agreement reflects that the parties agree the laws of the State of Montana would govern their agreement and the place of performance is Billings, Yellowstone County, Montana. The clause of the lease agreement setting forth the above reads in full as follows:

> "This Agreement shall be construed under and governed by the laws of the State of Montana. The place of performance is hereby declared to be Billings, Yellowstone County, Montana."

Under the TV CCOJ 501, the Tribal Court is allowed to follow Montana law. This section reads in part as follows:

"In determining any case over which it has Jurisdiction, the Court shall give binding effect to

"...

"(d) where appropriate, the court may in its discretion be guided by statutes, common law or rules of decision of the state in which the transaction or occurrence giving rise to the cause of action took place."

In the instant case, it would be appropriate that the Court follow Montana law since it was the intent of the parties that Montana law be applied to construe and govern their lease agreement. The portion of the provision setting forth the place of performance, as Billings, Yellowstone County, Montana, would be unenforceable had Appellant attempted to establish jurisdiction in a state court.

Civil jurisdiction over commercial activities Presumptively lies in the tribal courts unless affirmatively limited by a specific treaty, provision or federal statute. Iowa Mutual Ins. Co. v. LaPlante, ___ U.S. ___ , 107 S.CT. 971, 978, 94 L.Ed.2d 10, 16 (1987). The civil jurisdiction of the tribal court in this matter has not been affirmatively limited by a specific treaty, provision or federal statute, therefore, the clause attempting to establish jurisdiction in state court although unenforceable is not unconscionable The effect of unenforceable or unconscionable clauses in agreements will be discussed below after determining whether the Uniform Commercial Code (hereinafter UCC) or contract law should be applied to construe the provisions of the lease agreement.

The lease agreement in the instant case contained the following provision:

"No right, title or interest in the leased property shall pass to Lessee other than, conditioned upon Lessee's compliance with and fulfillment of the terms and conditions of this Agreement, the right to maintain possession and use the leased property for the full tease term.

In a Montana Supreme Court case, there was a lease agreement containing similar language and the same was determined to have been a sales agreement. This case was Beneficial Commercial Corporation vs. Cottrell, ___ Mont. ___ , 688 P2d 1254, 41 St. Rptr. 1888 (1984). In Beneficial, the Defendants had leased from Plaintiff a large offset printing press. A summary judgment was entered against Defendants which made them liable for a lump-sum tease payment in the amount of $9,351.60. The Court reversed on the grounds that the transaction involved was actually a sales agreement and that a genuine issue of fact exists under sections 30-2-601 and 602, MCA, as to whether the printing press was properly and timely rejected because it was alleged to be defective.

In Beneficial, the Court set out its basis for the determination that the lease agreement was a sales agreement and therefore governed by the UCC. The Court stated,

"The lease agreement here contained an option to purchase for a small sum at the end of the lease agreement, and so it falls within the sale of goods provisions of the Uniform Commercial Code, codified in this state as section 30-2-101, et seq., MCA. See Mid-Continent Refrigerator Co. vs. Way (1974), 263 S.C. 101, 208 S.E.2d 31. Although the

lease provided that "...nothing [in the agreement] shall be construed as conveying to leasee any right, title, or interest..." in the printing press, the purchase option clause establishes the underlying transaction to be a sale. Therefore it must be governed by the Uniform Commercial Code sales provisions." Id. ___ Mont. ___ , 688 P.2d at 1256, 41 St. Rptr. at 1890.

Again, the language in the lease agreement signed by Appellant and Appellees contains similar language to that in the Lease agreement in Beneficial. The lease agreement in Beneficial was construed to be a sales agreement, therefore, the UCC sales provisions applied. In this case, Appellant's lease agreement with Appellees is also a sales agreement and therefore governed by the UCC. Because the UCC applies, Section 30-2-302, MCA on the Montana UCC will apply to determine the effect, if any, of unenforceable or unconscionable clauses in sales agreements. This section reads,

> "(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

As previously acknowledged, the lease agreement made the place of performance Billings, Yellowstone County, Montana, and improperly and incorrectly placed jurisdiction in Yellowstone County, Montana. Although this provision was unenforceable, the remainder of the lease agreement will be enforced.

At the trial, Appellees were not represented by counsel, however, Appellees did raise several defenses which made genuine issues of material fact and would have precluded granting Appellant's motions for directed verdict and judgment not withstanding verdict. The first defense was whether or not the sales contracts were made out properly and named the appropriate parties. In attempting to object to Plaintiff's Exhibit 4, Appellant, Quentin Crowe, stated the following:

> JUDGE BROWN: Is there any legal objections to Plaintiff's exhibit four to being admitted?
>
> QUENTIN CROWE: No! Just some of that stuff, I don't know if it makes any difference but some of that stuff is put down as Crowe-Culbertson Chief Kwik-way. And some papers are just Chief Kwik-way. It should have been all Chief Kwik-way, instead of reading a double title.
>
> JUDGE BROWN: Very Well! I'll overrule that objection. You may be raising a defense about the entities or parties or whatever, it may be something that you could Plaintiff's exhibit 4 is admitted.

(Transcript, Page 33, Lines 10-18.)

In attempting to raise a second defense and under Section 30-2-302, MCA, Appellants indicated that the lease agreement may have been unconscionable when Gene Culbertson raised an objection to the price of the chicken cooker in that they may have paid an excessive price or interest rate. Gene Culbertson stated,

> GENE CULBERTSON: Wally, you know, when we first got into this, we have never seen your face. Is that standard practices for Leasing . . . if you are going to lease us something, you know, like a car or something, would explaint (sic) the terms of the agreement, the terms of the payments and everything like that. All we got was your voice on the phone and the guy that come and put it in never said anything to us. We were anxious to get going on the chicken business. We probably should have checked on the price of it but it seemed like, you know, the price of the chicken-cooker, which is like buying a pretty expensive car. I believe that anybody with leasing equipment should have been there with a pen in their hand asking us, you know, do you understand the lease and stuff like that. We never did get to see you. This is the first time I ever got to see you, when you walked in.
>
> WALLEY RUBICK: I've attempted to call you or talk to you forty-two (42) times on the telephone.
>
> GENE CULBERTSON: And we have replied. They only time is when we would get your chicken-cooker in May and in June . . . we have witnesses that called. . . .
>
> JUDGE BROWN: Mr. . . . MR. Culbertson, I will ask you will have your chance to present . . . you may ask any question . . . you have asked a question, I don't think it's been answered, your initial questions, whether it is standard procedure to not physically see for other people leasing, to not physicaally (sic) see Mr. Rubick. And I don't know if that was answered. But . . you may ask questions, but you will have your chance to present your side.
>
> GENE CULBERTSON: Well, answer the question, is it standard leasing practices that you don't contact the people that you are doing business with?
>
> WALLY RUBICK: Probably 80% of the people that I do business with, I never see personally. The same percentage of my business comes through equipment dealers who sell a piece of equipment that they sold to you and offer my Leasing services and when the customer, you, says that they are interested in leasing it, then I prepare the Leasing papers, then there signed and seldom do I see my customers.
>
> (Transcript, Pages 41, Lines 8-28, Page 42, Lines 1-10.)

Because Appellants' raised this defense, an instruction regarding Section 30-2-302, MCA would be appropriate at the subsequent trial. Other sections of the UCC which appear to be applicable in view of the circumstances of this case and which appropriate instructions should be given the jury are Section 30-2-703 and 30-2-709, MCA.

Section 30-2-703, MCA, reads in full as follows:

"Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (30-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

"(a) withhold delivery of such goods;

"(b) stop delivery by any bailee as hereafter provided (30-2-705);

"(c) proceed under the next section respecting goods still unidentified to the contract;

"(d) resell and recover damages as hereafter provided (30-2-706);

"(e) recover damages for nonacceptance (30-2-708) or in a proper case the price (30-2-709);

"(f) cancel.

Section 30-2-709, MCA reads in full as follows:

"(1) When the buyer fails to pay the price as it becomes due the seller may recover, together with any incidental damages under the next section, the price:

"(a) of goods accepted or of conforming goods lost or damaged within a commercially reasonable time after risk of their loss has passed to the buyer; and

"(b) of goods identified to the contract if the seller is unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing.

"(2) Where the seller sues for the price he must hold for the buyer any goods which have been identified to the contract and are still in his control except that if resale becomes possible he may resell them at any time prior to the collection of the judgment. The net proceeds of any such resale must be credited to the buyer and payment of the judgment entitles him to any goods not resold.

"(3) After the buyer has wrongfully rejected or revoked acceptance of the goods or has failed to make a payment due or has repudiated (30-2-610), a seller who is held not entitled to the price under this section shall nevertheless be awarded damages for nonacceptance under the preceding section.

The rules of decision in Montana have indicated that a Lease agreement such as that between Appellant and Appellee is actually a contract for the future sale of goods and should be governed by the UCC. This was also agreed to by both attorney for Appellant and lay counselor for Appellees. Under the UCC, Appellant had the right to resell the chicken cooker. The sale

had to be commercially reasonable and Appellees raised questions regarding the reasonableness of Appellant's reselling of the chicken cooker after repossession. Therefore, the Appellant's motions were properly denied under the circumstances of this case and the law which should have been applied, however, the jury did improperly find for Appellees and a new trial appropriate.

At a new trial a decision is to be reached in accordance with the following direction. The following provision of the lease shall be applied by the judge or jury in determining the amount owed by Appellees and reads,

> "Leasee agrees that upon Leasee's breach of this Agreement, Leasee shall immediately pay to Leasor all damages which Leasor has sustained or will sustain by virtue of such breach, which damages are hereby agreed to be and shall be the total amount of all lease payments for the full term of the lease, less the lease payments theretofore paid. Leasee further agrees that upon such breach Leasee shall immediately pay to Leasor such other charges, fees, and taxes as chargeable to Leasee by the terms of this Agreement plus a reasonable attorneys fee for legal expenses which were necessitated by repossession of the leased property, enforcement of this Agreement or the breach thereof."

Appellant must present evidence to establish the damages it has sustained as a result of Appellee's breach, such other charges, tees and taxes as chargeable to Appellee by the terms of the lease agreement plus a reasonable attorney fee. The judge or jury can then deduct from the amount owed Appellant any damages that the evidence establishes were sustained by Appellees as a result of a commercially unreasonable sale or Appellant's failure to retrieve the cooker for four months. Again, the Tribal Court is directed to guide itself or give jury instructions in conformity with this opinion and reach a fair and impartial judgment and/or verdict.

II.

> WHETHER THE LOWER COURT ERRED IN FAILING TO GIVE A CAUTIONARY INSTRUCTION ON THE LEGAL CONSEQUENCES OF REPOSSESSION.

In addressing Issue No. I, this Court established that the Lease agreement was a sale contract and governed by the UCC. Therefore, Appellant would have had to comply with the UCC on the repossession and sale of the chicken cooker.

The Appellants raised the issue that Appellees should not have been allowed to testify that when a vehicle or other item is repossessed the contract ends and the owner owes nothing. The record does indicate that Appellee Culbertson did testify to this effect and Appellant objected. (See Trial Transcript, Page 64, Line 9-14.) This Court agrees with Appellee that this testimony was a legal conclusion and may have prejudiced the jury by their belief Appellants understood the law and they ruled in accordance with what Appellants advised. Therefore, the Tribal Court erred in refusing to give the cautionary instruction.

III.

> WHETHER IT IS UNFAIR TO NON-INDIAN LITIGANTS THAT II CCOJ 501(b) REQUIRES JURORS IN TRIBAL COURT TO BE TRIBAL MEMBERS.

At the trial (See Transcript, Page 15, line 6 to Page 17, line 9) and during oral argument, Appellant raised the above issue. Title IV CCOJ 201 sets forth trial procedure in civil cases and subpart (c) of this same section discusses when jury trials are appropriate and reads,

> "Civil cases shall be tried before a judge and not a jury, except that either party has the right to a jury trial if the amount in controversy in the claim or any counterclaim exceeds $2,500, and the Court in its discretion may grant a jury trial where the amount in controversy is less that $2,500. If a jury trial is granted, the Court shall follow the provisions of Section 907 of Chapter II. The compensation and expenses of the jurors shall be taxes as court costs, and assessed against the parties as provided in the judgment in the case."

For whatever reason under IV CCOJ 201, a jury trial was granted. Title II CCOJ 507(b) lists the qualifications for tribal court jurors and reads,

> "An eligible juror is a tribal member who has reached the age of 18 years, but is less than 70 years of age, is of sound mind and discretion, has never been convicted of a felony, is not a member of the Tribal Council, or a judge, officer or employee of the Court or an employee of the reservation police force or reservation jail, and is not otherwise disqualified according to standards established by the Court."

Appellant's counsel had indicated that there was federal case law which found that it was unfair for a non-Indian litigant to have to seek and obtain relief or remedy from an all Indian jury. This Court was never presented with the federal case law, however, Dry Creek Lodge, Inc. v. Arapahoe & Shoshone Tribes 623 F.2d 682 1980) and Chief Judge James F. Battin's decision in Little Horn State Bank vs. Crow Tribal Court an Dan Old Elk, Sr. rendered July 21, 1988 address tribal court systems refusing to provide a forum or failing to function fairly when non-Indian litigants are involved.

In Dry Creek Lodge, the U.S. District Court asserted jurisdiction over a matter involving non-Indians against Indian tribes for alleged violations of constitutional rights by the Indian tribes, when a road from the non-Indian property was blocked and the non-Indians were denied access to tribal court and the state court action was moved to federal court. In Little Horn State Bank, the Court found the facts of the case supported a gross violation of the non-Indian plaintiff's due process rights and issued a permanent injunction restraining, enjoining and prohibiting the Indian defendants from enforcing a Crow Tribal Court Order.

In this case, Appellant has a forum in the Fort Peck Tribal Court system. Appellant has made no specific allegation that an all Indian jury is a violation of any constitutional right. In any event such an allegation would be without merit since an individual or entity in state and federal courts has no constitutional right to a jury consisting of at least one of his/her own race, creed, or color. Also, the circumstances of this case do not support a finding there was a violation of the non-Indian Appellant's due process rights. This all Indian jury was not presented with the appropriate law as discussed in Issue in issue No. 1.

Therefore, it is the opinion of this Court that because there is a tribal and appellate court system in place on the Fort Peck Indian Reservation where Indian and non-Indian parties have a forum to seek and obtain relief or a remedy and appeal from an unfair verdict, that this issue is properly answered in the negative. It is not unfair to non-Indian litigations that II CCOJ 501 (b) requires jurors in tribal court to be tribal members.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT THIS MATTER BE REMANDED TO THE TRIBAL COURT FOR A NEW TRIAL WITHIN THIRTY (30) DAYS OF THE DATE OF THIS OPINION AND THE UCC SHALL BE APPLIED IN THE SUBSEQUENT TRIAL. THE JUDGE OR JURY IS DIRECTED TO DETERMINE THE AMOUNT OF THE DEFICIENCY, INTEREST, ATTORNEY FEES AND COSTS OF SUIT APPELLANT IS ENTITLED TO UNDER THE LEASE AGREEMENT AND OFFSET ANY AMOUNT OWED APPELLEES AS A RESULT OF APPELLANT'S FAILURE TO CONDUCT A COMMERCIALLY REASONABLE SALE UNDER THE UCC BY ITS FAILURE TO RETRIEVE THE COOKER FOR FOUR MONTHS.

DONE this _____ day of November, 1988.

BY THE COURT OF APPEALS:

_____
Arnie A. Hove, Chief Justice

_____
Daniel R. Schauer, Justice

_____
Gary James Melbourne, Justice