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

MARJORIE BUCKLES,
Plaintiff/Appellant,

vs.

Appeal No. 053

FORT PECK TRIBAL COURT and the, HONORABLE JUDGE JULIAN BROWN, Presiding,
Defendants/Appellees.

THIS APPEAL is from a May 10, 1980 order denying Appellant Buckles' Motions for Summary Judgment dated April 20, 1988 and May 6, 1988. The Honorable Julian H. Brown presiding.

FOR RESPONDENT (Elizabeth Marr): Jack E. Sands, Attorney at Law, 2508 Third Avenue North, Billings, MT 59101.

FOR RESPONDENT (Robin Dean Perry, a/k/a Robin Dean Crowe): Mary L. Zemyan, Attorney at Law, P.O. Box 1094, Wolf Point, MT 59201.

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

CIVIL: IT IS APPROPRIATE TO GRANT SUMMARY JUDGMENT PURSUANT TO F.R.Civ.P. 56(c) WHERE THERE IS NO GENUINE ISSUE AS TO ANY MATERIAL FACT; AN ORDER GRANTING OR DENYING A MOTION FOR SUMMARY JUDGMENT IS A FINAL ORDER OF THE TRIBAL COURT AND REVIEWABLE UNDER A WRIT OF SUPERVISORY CONTROL PURSUANT TO I CCOJ 202; AND A PARTY TO NOT PROPERLY A PARTY OF AN ACTION SHOULD NOT BE FORCED TO EXPEND THE COSTS OF DEFENSE.

Argued: September 12, 1988 Decided: September 12, 1989

OPINION by Arnie A. Hove, Chief Justice, joined by Associate Justice Gary James Melbourne.

HELD: APPELLANT'S MOTION FOR SUMMARY JUDGMENT IS DENIED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A JURY TRIAL WITHIN SIXTY (60) DAYS FROM THE DATE OF THIS OPINION UNLESS OTHERWISE STIPULATED AND ORDERED BY THE TRIBAL COURT.

FACTS

This action arose out of a single vehicle accident on August 5, 1984 just outside of Wolf Point, Montana. The cause of the accident may have been alcohol and excessive speed. The vehicle was a 1984 Ford pickup, license #17—1531, titled and registered in the name of Appellant Marjorie Buckles who was made a defendant in the action. Although Appellant paid for the pickup and it was titled in her name, Appellant alleges that she had given it to her son, Morris Buckles, and that he purchased the insurance for it, maintained it, and was paying her back for it.

Appellant and her son allege that defendant Robin Dean Perry had stolen the pickup hours before it was involved in the fatal accident.

Elizabeth Marr (hereinafter Respondent Marr), plaintiff in the underlying action, is the personal representative for the estate of Paul Marr who was thrown from the vehicle when it hit a bridge and was killed immediately. The other occupant of the vehicle, the Respondent Robin Dean Perry, received cuts and abrasions. He took off running after the accident and was found 1/4 to 1/2 mile from the scene of the accident. He denies that he was driving the vehicle and states that it was being driven by the deceased. It is Marr's contention that Mr. Perry was driving the vehicle.

Appellant moved the Tribal Court for summary judgment dismissing her from the case. She made the request on the basis that she did not own the vehicle involved in the accident which killed Marr. She relied on 61-1-310 MCA, 61-1-311 MCA, and 61-3-105 MCA and Montana case law.

There were two hearings held on the motion for summary judgment. A second was required because Appellant's attorney objected to the first hearing on the basis that there was no record made of the hearing, and because she wished to make specific reference to portions of a deposition transcript. Judge Brown scheduled a second hearing. In the meantime, Appellant's attorney filed a second motion for summary judgment. A second hearing was held, and both motions were again denied on the basis that questions of fact remained and on the holding in Farmers Insurance Exchange v. Janzer, 697 P.2d 460 (Mont. 1985).

On May 23, 1988, Appellant filed an Application for Writ of Supervisory Control. The issues presented for review were as follows:

> "1. Is an owner of a motor vehicle responsible for damages incurred by a driver using that vehicle when the owner consented to the use of the vehicle by a third party, absent any showing of negligence on the part of the owner of the vehicle?
>
> "2. As defendant Buckles successfully rebutted the presumption of ownership of the vehicle and thus should she be dismissed from this action?"

On May 23, 1988, Appellant filed a Request for Stay, an Order Granting Stay pending a decision from the Appellant Court. On June 10, 1988, Respondent Marr filed a Response to Request for a Writ of Supervisory Control. On June 15, 1988, Respondent Perry filed a Response to Request for a Writ of Supervisory Control. On July 6, 1988, this Court entered is Order Granting Application for Writ of Supervisory Control and Setting a Briefing Schedule of Date and Time for Oral Argument. Oral arguments were set for July 20, 1988, however, rescheduled to and held on September 12, 1988. On September 11, 1988, Judge Brown made and filed with this Court an Order After Pretrial Conference setting forth the contentions of Respondent Marr, Respondent Perry and Appellant.

The issues to be addressed by this Court will include one previously addressed both of which are as follows:

1. Whether a Writ of Supervisory Control is appropriate under I CCOJ 202.

2. Whether the Tribal Court erred in denying Appellant's Motion for Summary Judgment.

I.

In the July 6, 1988 Order Granting Application for Writ of Supervisory Control and Setting a Briefing Schedule, this Court determined a Writ of Supervisory Control was appropriate under I CCOJ 202. Title I CCOJ 202 reads in part as follows:

> "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. The Court of Appeals, or the Chief Justice alone, shall have jurisdiction:
>
> "(a) to take all necessary steps to preserve and protect the jurisdiction of the Court;
>
> "...
>
> "(c) to make any order appropriate to preserve the status quo or to protect any ultimate judgment of the Court of Appeals."

Under the Applicable laws Section of IV CCOJ 501, this Court has adopted and followed the Federal Rules of Civil Procedure (hereinafter F.R.Civ.P.) until such time as the Tribal Executive Board adopts its own rules of civil procedure for the Tribal Court.

A party in Tribal Court can properly move for summary judgment and Appellant moved for summary judgment under F.R. Civ.P. 56(c). An order granting summary judgment and dismissing a party from an action would be a final order as contemplated by I CCOJ 202. In turn, an order denying summary judgment to a party who is not properly a party in an action in Tribal Court because of the law, i.e. the Tribes under I CCOJ 110, or lack of facts (substantial evidence) which brings a person outside the Fort Peck Indian Reservation under the jurisdiction of the Court under I CCOJ 108 would also in effect be a final order. A party aggrieved and required to incur additional defense cost when summary judgment was clearly appropriate under the law and facts and the same was denied would be appealing a final order.

In that event, under I CCOJ 202(c), this Court would have authority to make an order to preserve the status quo and review de novo the Tribal Courts determination on the law or set aside any factual determination not supported by substantial evidence. Therefore a Writ of Supervisory Control would be appropriate in certain situations where a motion for summary judgment was in effect a final order or judgment denying or granting the same.

II.

Appellant contends her motion for summary judgment was based on several facts she felt were clearly undisputed, uncontroverted and should be received by the Tribal Court as fact. Appellant contends Montana law provides that the certificate of title for a motor vehicle is prima facie evidence of ownership of the vehicle which can be rebutted by proof of possession, control, care, custody, maintenance and use of the vehicle by another person. There are several problems with Appellant's contentions when reviewing the contentions set forth in the Tribal Court's Order After Pretrial Conference dated September 11, 1988.

In the order the Court set forth the following facts which were admitted, true, and not required to be proven:

> "a. Plaintiff Elizabeth Marr is the natural mother of Paul Morale marr (sic) and is the duly appointed personal representative for his estate, having been appointed on the 26th day of August, 1985.
>
> "b. Paul Marr was killed in a single vehicle accident occurring on 5 August 1984 on U.S. Highway 2 near Wolf Point, Montana.
>
> "c. The vehicle involved in the accident was a 1984 Ford pickup, license number 17T-153l, titled in the name of Defendant Marjorie Buckles.
>
> "d. At the time of the described accident, there were two occupants in the pickup -- Paul Marr and Defendant Robin Dean Perry.
>
> "e. Defendants Robin Dean Perry and Marjorie Buckles are enrolled members of the Assiniboine and Sioux Tribes of the Fort Peck Indian /Reservation and reside in Poplar, Montana, within the exterior boundaries of the Fort Peck Indian Reservation."

In the order, the Tribal Court also set forth the contentions of each of the individual parties. Plaintiff Elizabeth Marr contended the following facts were true:

> "a. Defendant Robin Dean Perry was driving the vehicle when it crashed into a bridge killing Paul Marr, who was a passenger.
>
> "b. As a result of Defendant Perry's willful or reckless or negligent driving, Paul Marr was thrown from the vehicle and killed almost instantly.
>
> "c. Defendant Marjorie Buckles was the owner of the vehicle driven by Defendant Perry, and she had impliedly consented to Defendant Perry driving it.
>
> "d. Because she was the owner of the vehicle and consented to its use by Defendant Perry, Defendant Buckles is liable for the damages caused by its willful, reckless, or negligent use.
>
> "e. Plaintiff was damaged in an amount to be determined at trial."

Defendant Robin Dean Perry contended the following facts were true:

> "a. Early in the morning on 5 August 1984, Paul Marr and Defendant Robin Perry traveled in the described vehicle from Poplar, Montana, to Wolf Point, Montana.
>
> "b. Prior to leaving Poplar, both Paul Marr and Defendant Perry had been drinking, each at separate locations.
>
> "c. During the trip to Wolf Point, Paul Marr offered a marijuana cigarette, or "joint," to Defendant Perry, and both persons participated in smoking the marijuana.
>
> "d. As a result of smoking the marijuana provided by Paul Marr, Defendant Perry became tired and requested that Paul Marr drive the vehicle.
>
> "e. Paul Marr agreed to exchange places with Defendant Perry. They did change places in the vehicle at a tractor lot located on U.S. Highway 2 in Wolf Point.
>
> "f. The vehicle then left the tractor lot and proceeded east at a high rate of speed, being driven by Paul Marr.
>
> "g. The vehicle hit the Misquito (sic) Creek bridge directly east of Wolf Point.
>
> "h. Paul Marr died instantly when he was thrown from the vehicle and it rolled over him. His body was left lying in the middle of the road.
>
> "i. Paul Marr died as result of his own willful or reckless or negligent driving.
>
> "j. Defendant Perry is not liable to Plaintiff Personal Representative Marr."

Defendant Marjorie Buckles contended the following facts were true:

> "a. Defendant Buckles did not own the within vehicle and therefore did not have authority to consent to its use by either of the other parties.
>
> "b. The within Tribal Court lacks subject matter jurisdiction over the within claim."

In view of the various contentions of the parties, summary judgment was not appropriate. There is clearly an issue of material fact as to ownership and consent of the use of the vehicle by the parties.

Title IV CCOJ 501 permits this Court in its discretion to be guided by statutes or rules of decision of the State in which the occurrence giving rise to the cause of action took place.. Appellant cites Montana statutes and rules of decision and suggests this Court be guided thereby. Respondent Marr addressed Appellant's cited statutes and rules of decision in Montana and cited her own while acknowledging it was discretionary with this Court whether to be guided by the same.

In the instant case, had there been no insurance and because there is no liability insurance requirement on vehicles for tribal members on the Fort Peck Indian Reservation, it would be inappropriate to be guided by statutes or rules of decision of Montana. Because there is insurance and Montana is the state in which the accident occurred, it is appropriate to be guided by the statutes or rules of decision of Montana.

It is uncontested that the registration of the vehicle was in the name of Appellant, that the title was in her name, and that she paid for the pickup. Appellant cites 61-1-310 M.C.A. for the proposition that "the owner is a person in whom is vested right of possession of control [of the vehicle]". This statute is not applicable to the instant case when read in its entirety:

> "Owner means a person who holds the legal title to a vehicle. If a vehicle is the subject of an agreement for the conditional sale thereof with the right of purchase upon performance of the conditions stated in the agreement and with an immediate right of possession vested in the conditional vendee, or in the event a vehicle is subject to a lease, contract, or other legal arrangement vesting right of possession or control, for security or otherwise, or in the event a mortgagor of a vehicle is entitled to possession, then the owner is the person in whom is vested right of possession or control."

In the instant case, Appellant bought and paid for the pickup outright in cash (Depo. of Marjorie Buckles, p. 5). The first sentence of the cited section is clear and unequivocal: "Owner means a person who holds the legal title to a vehicle." Appellant holds the legal title to the vehicle (Depo. of Marjorie Buckles, p. 5), and therefore she is, by the express terms of the statute cited by her, the owner.

Section 61-6-301 M.C.A. requires every owner of a motor vehicle in Montana to continuously provide insurance against loss resulting from liability imposed by law for bodily injury or death. Section 61-6-103(2), M.C.A. requires that such policy of liability insurance "insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, maintenance, or use of such motor vehicle .

Thus, Montana law clearly requires Appellant, as the owner of the vehicle, to maintain insurance on it for liability arising out of its use as long as the vehicle was used with the express of implied permission of the owner. Appellant clearly gave permission for her son Morris to use the vehicle; in fact the depositions of Appellant and Morris Buckles indicate that he had the virtual exclusive use of it. Robin Dean Perry who was in the vehicle at the time that it crashed and killed Paul Marr alleges that he was driving it with the permission of Morris Buckles which is denied by Buckles. As correctly contended by Respondent Marr, this creates a question of fact inappropriate for resolution in a motion for summary judgment.

Assuming Appellant was the owner of the vehicle and that Respondent Perry was driving it with the permission of the owner, the question arises whether Buckles is a proper party. Montana case law is relevant on this point. In Cascade Insurance Company v. Glacier, 479 P.2d 259 (Mont. 1971) the owner of the vehicle had purchased insurance for a car used by her son, and told him not to let any friends use it. Nonetheless, he did let a friend use the car, and it was involved in an accident where someone was injured. There, the court stated, "the use to which the first permittee put the automobile in a loan to a college friend with whom the first permittee was to share an apartment was a reasonably foreseeable use to be anticipated by the insured. Considering the family relationship between the insured and the first permittee, together with the unfettered dominion over the automobile away from home, this insured clothed the first permittee with the ostensible authority to engage in the simple transaction of permitting a friend to use the automobile. This is true particularly when it was not

shown that any restrictions were within the knowledge of the second permittee and, in fact, he had used the automobile on at least one other occasion." Id. at 263.

Since Morris Buckles had unfettered dominion over Appellant's vehicle, he clearly had the authority to allow another to use it under the facts of the present case.

In Cascade, the Court went on to quote with approval from another case and stated, "Provisions for omnibus coverage in an automobile liability insurance policy reflects a legislative policy to protect the public where a motor vehicle is operated by one other than the insured owner with his consent. * * * In those jurisdictions where the insertion of an omnibus clause is required by statute in a liability insurance policy, it is liberally construed so as to effectuate the manifest public policy of broadening the insurance coverage." Id. at 262.

In a more recent case Farmers Insurance Exchange v. Janzer, 697 P.2d 461 (Mont. 1985), the parties 14 year-old son ran away from home and stole his parents' car. The Court ruled that it was inappropriate to grant summary judgment concluding that the parents' insurance policy did not provide coverage for the injuries caused by the son's operation of the motor vehicle. At p. 464 the court stated that section 61-6-103, M.C.A. "reflects legislative policy to protect the public when a motor vehicle is operated by one other than the insured owner with his consent." Id. at 464. For a similar conclusion, see Mountain West Farm Bureau v. Farmers Insurance Exchange, 680 P.2d 330 (Mont. 1984).

Although summary judgment was not appropriate in this case, there are general rules of law regarding motions for summary judgment cited in Farmers Insurance Exchange. Those general rules of law are set forth below to be reviewed and applied by the Tribal Court before granting or denying a motion for summary judgment.

> 1. "The party moving for summary judgment has the burden of showing the complete absence of any genuine issue as to all facts which are deemed material in light of those substantive principles which entitled him to a judgment as a matter of law (Citations omitted)." Id at 461.
>
> 2. "The initial burden of proof must attach to the movant, however, that burden shifts where the record discloses no genuine issue of material fact. The party opposing the motion must come forward with substantial evidence raising the issue (Citations omitted)." Id at 462.
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> 3. "The testimony presented must be reviewed in a light most favorable to the party opposing the summary judgment. The right of the opposing party to present the merits of his case to the fact finder must be preserved. (Citations omitted)." Id at 462.
>
> 4. "Summary judgment is never to be used as a substitute for trial if a factual controversy exists. (Citations omitted)." Id at 464.

In reviewing an appeal from an order granting or denying a motion for summary judgment, the foregoing rules would control.

In this case, Appellant had the burden of showing the complete absence of any genuine issues as to all facts. Appellant did not meet that burden. Because of the above and the initial burden of proof attaching to the Appellant, the burden of proof did not shift to Respondents requiring them to come forward with substantial evidence. Finally, in reviewing the testimony in the

light most favorable to the Respondents, the testimony in the depositions of Morris Buckles and Appellant revealed no express permission to Respondent to drive the vehicle owned by Appellant implied consent remains a genuine issue of material fact. This issue must properly be placed before a jury.

In conclusion, as the owner of the vehicle listed on the title, Appellant is involved in the lawsuit because of the insurance. If the insurer felts it was inappropriate to defend this action, it would have brought a declaratory judgment action. Therefore, summary judgment is not appropriate in this case and the Tribal Court did not err when denying the same.

APPELLANT'S MOTION FOR SUMMARY JUDGMENT IS HEREBY DENIED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A JURY TRIAL WITHIN SIXTY (60) DAYS FROM THE DATE OF THIS OPINION UNLESS OTHERWISE ORDERED BY THE TRIBAL COURT.

DATED this _____ day of June, 1989.

BY THE COURT OF APPEALS:

_____
ARNIE A. HOVE, Chief Justice

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GARY JAMES MELBOURNE, Associate Justice