

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

GERTRUDE CLARK,
Plaintiff/Appellee

VS.

APPEAL No. 065

SKAGGS ALPHA BETA, d/b/a BUTTREY FOODS,
a Delaware corporation,
Defendant/Appellant

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER DENYING PETITION FOR REVIEW**

On November 22, 1988, in the above-entitled matter the Appellant filed a Petition for Review. On November 29, 1988, Appellee filed Plaintiff's Objection and Response to Petition for Review. This Court having reviewed the same and all pleadings filed herein and finding no reason for scheduling a formal hearing hereby makes the following:

FINDINGS OF FACT

1. On or about November 23, 1987, Appellee filed a Complaint and Demand for Jury Trial against Appellant for injuries allegedly sustained from slipping on ice that accumulated in Appellant's parking lot.
2. On May 27, 1988, Appellant filed an Answer to Appellee's Complaint which made a general denial of all the allegations contained therein and did not raise any affirmative defenses.
3. On July 2, 1988, an initial pretrial conference was held pursuant to IV CCOJ 103 before Lawyer Judge Julian H. Brown. No oral affirmative defenses were raised by Appellant at said hearing and the hearing was continued until September 7, 1988, as a result of an agreement by counsel.

4. The Court's July 20, 1988 Order relative to the continuance of the hearing held nineteen (19) days earlier stated: "Defendant has filed a written* Answer to the Complaint. If the within action is not settled, Defendant may file an amended answer." No date for the amended answer was set forth in the July 20, 1988 Order.
5. A Notice of Final Pretrial Conference was contained in the July 20, 1988 Order and the final pretrial conference was held on September 7, 1988.
6. Prior to the September 7, 1988 hearing, Appellant filed no amended answer. At the hearing, Appellant raised no oral affirmative defenses.
7. On September 8, 1988, Appellant filed a Motion to Reconsider and requested that the Court reconsider its Order of September 7, 1988 and allow the Appellant to amend its answer to include the affirmative defenses of Contributory Negligence (Comparative Negligence) and Assumption of Risk.
8. An affidavit dated September 8, 1988 by Appellant's counsel in support of the Motion to Reconsider fails to state absolutely that affirmative defenses were raised prior to or at the IV CCOJ 103 hearing either in writing or orally.
9. There is no transcript before this Court which would indicate there were affirmative defenses raised orally.
10. On September 13, 1988, Appellant filed a Motion for Leave to File Amended Answer.
11. Counsel for defendant recognized the Tribal Court's ultimate discretion to ascertain affirmative defenses at a IV CCOJ 103 hearing in his September 13, 1988 Motion For Leave To File Amended Answer when he stated:

This is obviously a matter that falls within the discretion of the Court and it is evident that such an exercise of the discretion by the Court would in no way jeopardize the plaintiff's case, whatever it may be. (Emphasis Added.)
12. On November 7, 1988, Lawyer Judge Brown issued an Order Denying Motion which denied Appellant's request for leave to file an amended answer to the answer on file dated May 27, 1988.
13. On November 22, 1988, Appellant filed a Petition for Review pursuant to I CCOJ 207 and

requested this Court to review the Order signed by Lawyer Judge Brown dated November 7, 1988 in which the Appellant's Motion to Amend its Answer was denied without comment by the Court.

14. Appellant alleges in the Petition for Review that Lawyer Judge Brown adopted the more restrictive Federal Rules of, Civil Procedure in denying the motion to amend and allow the pleading of affirmative defenses.

From the foregoing FINDINGS OF FACT, this Court makes the following:

CONCLUSIONS OF LAW

1. A IV CCOJ 103 hearing was held on July 2, 1988 and continued to September 7, 1988.
2. At the IV CCOJ 103 hearing, the presiding judge, is to ascertain whether:

"The defendant has any defenses to the claim, or wishes to present any counterclaim against the plaintiff or cross-claim against any other party or person concerning the same transaction or occurrence;

"...."

3. At the IV CCOJ 103 hearings held on July 2, 1988 and continued "to September 7, 1988 in this matter, Lawyer Judge Julian H. Brown properly exercised discretion and determined that the Defendant did not wish to raise the affirmative defenses of Contributory Negligence (Comparative Negligence) and Assumption of Risk.

4. FRCP 8(c) in part reads,

"In pleading to a preceding pleading, a party shall set forth affirmatively. . . assumption of risk, contributory negligence, . . . and any other matter constituting an avoidance or affirmative defense. (Emphasis Added.) When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

5. As a general principle under FRCP 8(c), an affirmative defense must be pleaded specifically in the first responsive pleading or it is deemed waived and excluded an issue in the case. 9th Circuit — Brooks v. Woods (1950, CA9 Cal) 181 F2d 716. Other citations at 27 Fed. Proc., L.Ed. 236, 237 are omitted.

6. FRCP 15(a) in part reads,

[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires"

7. Tribal court judges should grant leave to amend a pleading, i.e. an answer to include affirmative defenses, when justice so requires.

8. Title I CCOJ 202 states,

"The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court...."

9. Interlocutory Order is defined as,

"An order which decides not the cause, but only settles some intervening matter relating to it...."

10. An Order denying a Motion to Reconsider and a Motion for Leave to File an Amended Answer are not final orders as contemplated by the CCOJ.

11. It is the duty of the party appealing a matter to this Court to see that a transcript is prepared especially if allegations are made as to what is actually stated by the parties and/or counsel at IV CCOJ 103 hearings and would be useful in supporting or refuting contentions raised in issues presented to this Court.

From the foregoing **CONCLUSIONS OF LAW IT IS HEREBY ORDERED, ADJUDGED AND DECREED**

1. Defendant's Petition for Review is denied.

2. This matter is remanded to Tribal Court for the final determination of a trial date herein.

3. The final trial date in this matter is to be set within thirty (30) days of the filing of this Order.

4. The final trial date is to be held no later than ninety (90) days from the filing of this Order unless otherwise stipulated to by the parties herein and ordered by the Tribal Court.

DATED this 21st day of February, 1989.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary J. Melbourne, Associate Justice
