CIVIL

Pre-Trial Decision

7. Affirmative Defenses

We review de novo a District Court's decision to convert a counterclaim to an affirmative defense. **Johnson v. Dist. VII, Human Res. Dev. Council**, 2009 MT 86, ¶ 18, 349 Mont. 529, 204 P.3d 714; **Yellowstone Cnty. v. Drew**, 2007 MT 130, ¶ 11, 337 Mont. 346, 160 P.3d 557.

We review findings on the viability of an affirmative defense under an abuse of discretion standard. **Ammondson v. Nw. Corp.**, 2009 MT 331, ¶ 30, 353 Mont. 28, 220 P.3d 1. Under this standard, a district court abuses its discretion if it "acts arbitrarily without conscientious judgment or exceeds the bounds of reason resulting in substantial injustice." **Ammondson**, ¶ 30 (internal citation omitted).

In **State ex rel. Farm Credit Bank of Spokane v. Dist. Court of Third Judicial Dist. of State in & For City of Powell**, the Montana Supreme Court reviewed a district court decision that a lender's failure to comply with statutory provisions incorporated by reference into a mortgage instrument could constitute an affirmative defense to a subsequent foreclosure action. 267 Mont. 1, 21–24, 881 P.2d 594, 606–08 (1994). In this case, we determined that we would "not reverse the trial court unless its standard of review ha[d] been misapprehended or grossly misapplied." **Farm Credit Bank**, 267 Mont. at 24, 881 P.2d at 608.

In **Chandler v. Madsen**, the Montana Supreme Court reviewed a district court decision that a counterclaim failed in the face of a "failure of consideration" affirmative defense. 197 Mont. 234, 241, 642 P.2d 1028, 1033 (1982). In this case, we determined that the district court decision "was unsupported by the evidence." **Chandler**, 197 Mont. at 241, 642 P.2d at 1033. In Chandler the respondent did not affirmatively plead the "failure of consideration" defense and therefore could not rely upon the defense. **Chandler**, 197 Mont. at 241, 642 P.2d at 1033.

In **Plumb v. Fourth Judicial Dist. Court** the Montana Supreme Court concluded that a district court decision allowing a respondent to amend its answer and assert an affirmative defense was a conclusion of law and therefore reviewable for correctness. 279 Mont. 363, 371, 927 P.2d 1011, 1016 (1996) (superseded by statute on other grounds). In this case, a plaintiff brought a tort claim against the Southgate Mall arising out of a slip-and-fall incident. The Mall motioned to amend its answer, adding an affirmative defense alleging that an unnamed third party was negligent. **Plumb**, 279 Mont. at 371, 927 P.2d at 1016. We

concluded that the district court order granting the Mall's motion was "tantamount to a determination that the 1995 amendments to [the Montana Code] satisfied this Court's constitutional concerns about the assignment of fault to unnamed and unrepresented third persons." **Plumb**, 279 Mont. at 371, 927 P.2d at 1016. Because this was in effect a conclusion of law, we reviewed the conclusion for correctness. **Plumb**, 279 Mont. at 371, 927 P.2d at 1016.