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COURT OF APPEALS
DISTRICT III

02-14-2011

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

John N. Kroner,

Plaintiff-Appellant,

Appeal No. 2010AP002533

v.

Oneida Seven Generations Corporation,

Defendant-Respondent.

Appeal from the Circuit Court for Brown County,
Circuit Court Case No.: 2008-CV-002234
Honorable Donald R. Zuidmulder, Presiding

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Defendant-Respondent, Oneida Seven Generations Corporation ("OSGC"), does not request oral argument.

OSGC believes that publication may be helpful to the bar.

STATEMENT OF THE CASE

A. OSGC is not a Wisconsin corporation.

OSGC's Statement of the Case is in response to Plaintiff-Appellant, John N. Kroner's, ("Kroner") Statement of the Case, and seeks to correct errors and mischaracterizations in Kroner's Statement of the Case instead of providing a separate Statement of the Case. Contrary to Kroner's characterization, OSGC is a far cry from a corporation formed under Chapter 180 of the Wisconsin Statutes. In quoting from OSGC's Standard Operating Procedures, Kroner omits some pertinent provisions, including that OSGC was formed to perform "business ventures on behalf of the Oneida Nation." (R. 6.1, Ex. G, P. 2). In that document, the purpose of OSGC is stated as follows:

The purpose of our formation is to promote and enhance business and economic diversification directly or as a holding company for real estate assets, management of related assets, or as a holding company for other business ventures of the Oneida Nation.

(R. 6.1, Ex. G, P.2)

OSGC is controlled by the Oneida Business Committee, on behalf of the Tribe, its sole shareholder. (R. 6.1, Ex. F, P. 1 of 7) The board of directors for OSGC made the decision to fire Kroner (R. 6.1:1), so, since the board of directors is answerable to the Tribe, the decision to terminate Kroner ultimately rests with the Tribe. All net revenues of OSGC are paid over to the Tribe's general fund. (R. 6:4) There is nothing in the record to suggest any influence or control over OSGC in any person or entity outside of the Tribe.

B. Kroner Was an Employee of OSGC Only.

Kroner implies the requirement that he interact with non-tribal entities is significant in this dispute over his employment. He states he "performed work for, and on behalf of, approximately thirteen (13) limited liability companies (LLC's) owned or partially owned by OSGC: all of these LLCs were formed under Wisconsin law." (Appellant Br., P. 3) He also claims the fact his employer had business relations with non-tribal entities is somehow relevant to his status as an employee of OSGC. The fact of the matter is, however, that Kroner was, and has never denied that he was, an employee of an Oneida tribally

chartered corporation, nothing more, nothing less. As such, he should have expected the Oneida Tribe, the sole shareholder of that corporation, would have more than a little to say about the terms of his employment. The court recognized as much in making its ruling on the transfer motion:

Now, in this case, the plaintiff chose to become employed by a wholly owned corporation of the Oneida Nation. He fully knew that it was a corporation incorporated by the Oneida Nation. He invokes -- in his own Complaint and in all the summary judgment material as I recall he invokes all the doctrines of the Oneida Nation as a basis upon which he would ask this court to find in his favor.

(R. 55:6)

This court, like the circuit court, must reject out of hand any attempt by Kroner to distance his employment relationship with a tribal entity. Regardless of what business activities that entity may have engaged in, it remains a tribal entity. Such outside activities have nothing to do with his claims of internal operations of that entity, in this case, the alleged wrongful termination of his employment.

C. The Blue Book is a Uniquely Tribal Document.

Kroner premises his claim on an alleged violation of procedures in the Oneida Personnel Policy and Procedure book (the "Blue Book"). OSGC denies the Blue Book applies

to Kroner. That disagreement notwithstanding, what cannot be denied is that the Blue Book is a document replete with procedures governing Tribal action. It also clearly calls for grievance appeals to be heard by the Personnel Commission of the Tribe. (R. 6, Ex. B, P. 23). As such, Kroner's attempt to characterize the Blue Book as nothing more than a garden variety employee handbook or manual is far from accurate.

D. Kroner Has Not Been Precluded From Preparing His Case and OSGC's Position is not New.

Kroner claims he will have to start litigation all over if he is required to bring his claim in tribal court. There is nothing in the record to suggest he has been precluded from performing discovery and otherwise preparing his case for trial, however. The implication Kroner will have a long delay if he goes to tribal court finds no support in the record. The circuit court characterized his case as being "well formed up" and simply needed submission to the tribal court. (R. 55:11) Moreover, OSGC did not at the last minute spring on Kroner its argument that tribal court is the appropriate forum. On September 30, 2008, in its brief in support of its motion to dismiss, OSGC maintained tribal court is the proper forum for this dispute (R. 5:2), a proposition Kroner has doggedly

resisted ever since. This case could have been in tribal court over two years ago had Kroner submitted to tribal court jurisdiction.

E. OSGC is Not Responsible for Any Delay in the Circuit Court.

In Section H, page 8 of his brief, Kroner implies the delay between April 29, 2009, after the tribal court responded to a letter addressed to it by OSGC at the direction of the Court, and July 8, 2010, when OSGC submitted a formal motion to transfer, was attributable to OSGC. The letter itself requested the court enter a transfer order under §801.54, Wis. Stats., however, but that transfer was not forthcoming.

Any delay in the circuit court is attributable to the court itself, which, for reasons unknown to OSGC, did not respond to the tribal judge's solicitation for a discretionary transfer under §801.54, Wis. Stats. When the matter came before the court on April 20, 2010, the court requested more information about the sovereign immunity issue OSGC had raised earlier. In response to that request, OSGC formally filed a specific request to transfer under the statute on July 8, 2010. (R. 29) Moreover, as noted above, OSGC requested a transfer to tribal court as an alternative remedy in the motion to dismiss it filed on

September 30, 2008. Under the circumstances, OSGC cannot be held responsible or penalized for that delay.

Kroner criticizes the circuit court, trying to hold the court to vague statements made by the court at a previous hearing regarding the court's inclination to retain the case if OSGC were not asserting a sovereign immunity defense, but as the court explained:

Well, the only response I can tell you is I took time today to thoroughly go through the file and to refresh my memory with regard to the arguments that I've heard. This whole thing got started, and the thing that caused me pause is that, you know, these relationships are works in progress, and I would be the first to acknowledge that this is taking painfully unnecessarily long to get a simple thing done, Mr. Schober, but that's because we are trying to establish a relationship between the circuit court and the Oneida Tribal Court.

(R. 55:8-9)

This statement demonstrates the court had given thorough consideration of the matter and concluded, once the question of OSGC's sovereign immunity was no longer an issue, that circuit court was not an appropriate one for trial in this case. It would be unfair to the court to hold it to random statements made at a previous hearing when the focus of the case was not on a transfer under §801.54, Wis. Stats.

ARGUMENT

A. Concurrent Jurisdiction Exists In This Case.

Kroner asserts there is no concurrent jurisdiction of the tribal and circuit courts over this controversy, or, at least that OSGC has failed to demonstrate such jurisdiction exists. He also maintains that concurrent jurisdiction can exist only when there are cases actually pending in two different forums. He is wrong on all counts.

In *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, ¶35, 265 Wis.2d 64, 665 N.W.2d 899, the Supreme Court said:

Generally, the minimum contacts analysis, which applies to an assertion by a state court of jurisdiction over citizens of another state, established in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), has also been used when courts have considered the power of a tribal court to exercise jurisdiction over persons who are not members of the tribe.

In *Teague*, the court was satisfied the tribal court had both personal and subject matter jurisdiction over the non-tribal member plaintiff, where the contracts were signed on the reservation, the services were to be performed on the reservation and *Teague* was in charge of the tribe's biggest business. Like *Teague*, Kroner was in charge of what he has himself portrayed as a business that grew to significant levels under his management. There was no written contract

governing Kroner's employment, but to the extent Kroner relies on the Blue Book, the controlling document is a purely tribal creation.

Whether concurrent jurisdiction exists depends not on the pendency of two separate proceedings, but on the nature of the claim that can be made in a proceeding. Numerous federal claims can be enforced either in federal or state court. As a result, the courts enjoy concurrent jurisdiction of such claims. "In the absence of an express congressional provision to the contrary, there is a presumption in favor of state court concurrent jurisdiction over civil causes of action arising under federal statutes." *Weyenberg Shoe Mfg. Co. v. Seidl*, 140 Wis.2d 373, 384, 410 N.W.2d 604, 609 (Ct. App. 1987). If transfers of cases between courts of different systems required cases making the same claims to be pending in each jurisdiction, removal of cases from state court to federal court would be impossible. The same concepts must apply to concurrent jurisdiction of tribal and circuit court. If claims could be brought in either court, concurrent jurisdiction exists.

Here, there is clearly subject matter jurisdiction over the claim. The Tribe's involvement in OSGC, both from a control and operational standpoint, is so pervasive, the

tribal court must have jurisdiction over this claim. Further, because Kroner bases his claim on violations of the Blue Book, the tribal court not only has jurisdiction, but is the preferred forum for trial, because the Tribe is in the best position to rule on the interpretation and application of the manual that governs tribal employees. In view of that fact alone, concurrent jurisdiction exists, as found by the court.

B. The Court Had Good Grounds to Transfer the Case.

Kroner argues the case cannot be transferred to tribal court because the trial judge failed to consider all of the factors set out in §801.54, Wis. Stats. While it is true the circuit court did not make a specific finding or include a specific discussion of each factor, it is clear from the record all factors were presented to the court for its consideration. The record, on the whole, provides sufficient support for the court's decision to transfer the case to tribal court. There is no reason to think the court did not properly exercise its discretion in deciding to transfer the case.

Kroner is rearguing the equities under the statute in tabular format on pages 21 through 23 of his brief. He contends the equities favor him. OSGC has consistently

disagreed with that position. The mechanical analysis suggested by Kroner should not be required in this case, however, because there is no reason to suspect the court would change its decision merely by articulating its reaction to each factor listed in §801.54(2), Wis. Stats. Contrary to Kroner's arguments, he himself is delaying the ultimate decision on his case by filing this appeal of the court's discretionary ruling, without suggesting any reasons why he cannot receive a just resolution of his claim in tribal court. To the contrary, *Teague* makes clear tribal court judgments are to be given full faith and credit with very limited exceptions. *Teague*, 2003 WI 118, ¶50. Kroner's reluctance to go to tribal court is no justification for not transferring the case there.

The entire record provides both the circuit court and this court with sufficient information to satisfy transfer to tribal court under all the factors listed in §801.54, Wis. Stats. It is important to bear in mind the court has discretion in considering those factors. As Justice Abrahamson pointed out in her concurring opinion in *Teague*, from which the §801.54, Wis. Stats. factors derive, "the weight to be given each factor will vary from case to case..." *Id.* ¶71.

The first factor is whether issues in the action require interpretation of the tribe's laws, including the tribe's constitution, statutes, bylaws, ordinances, resolutions or case law. The application of the Blue Book to Kroner's employment has only been dealt with in one written decision of which OSGC is aware, *Beverly J. Schoen v. Oneida Airport Hotel Corp.*, No. 98-EP-0022, 6 O.N.R. 3, 134-150 (2000)¹, a case which coincidentally dealt with an Oneida chartered subsidiary corporation. The record does not indicate any case in which the circuit court or any other court in Wisconsin has dealt with the issue before this court. The tribal court would be considering the policies and procedures the tribe has adopted for its employees, and, as the court noted, is in a far better position to interpret and rule on questions relating to those documents.

Certainly, the court felt strongly about this factor, which weighed heavily in the court's determination to transfer the case to tribal court:

My point being, that in reviewing that, I refreshed myself with what was the critical issue that I emphasize on my record, and that is the arguments of the plaintiff and the pleadings of

¹ *Schoen v. Oneida Airport*, 6 O.N.R. 3 (2000) located at <http://www.oneidanation.org/uploadedFiles/appeal-2000.pdf>

the plaintiff all require this court to interpret Oneida Nation rules, documents, legislation, tribal policies, all of those items, and the court continues to take the position that if what the Oneida Nation was being asked to do in a case would be to interpret the Wisconsin Statutes and all -- and administrative rules and regulations, I would hope that the Oneida Nation would concede that this is a better forum to do that than they are, but by the same token, I am quick to concede that they are far better equipped to listen to and thoughtfully consider the arguments made by the plaintiff because it will affect not only the plaintiff but all members of the Oneida Nation and all the employees of the Oneida Nation and everything in the future, and to me they're the place that should make that decision because they're the ones that are going to be impacted on it.

(R. 55:9-10)

The court has the discretion to apply appropriate weight to the factors to be considered when a motion under §801.54, Wis. Stats. is made. Here, it is obvious the court simply did not believe that circuit court was an appropriate place for this dispute to be resolved. It would appear the court believed hearing the case would be tantamount to an invasion of the tribal court's domain, given the broad effect the decision could have on the Tribe.

The second factor is whether the action involves traditional or cultural matters of the tribe. It is hard to determine if the case involves such issues, because the manner in which Kroner was treated may involve cultural differences between the parties. Certainly, Kroner has

alleged his termination may have had something to do with him not being a tribal member. (R. 9:4) Having injected that concept into the case, Kroner should not be allowed to claim Indian culture has nothing to do with his dismissal.

The third factor is whether the action is one in which the tribe is a party, or whether tribal sovereignty, jurisdiction, or territory is an issue in the action. While the Tribe is not a direct party, it for all intents and purposes is one, to the extent OSGC is a wholly owned subsidiary of the Tribe, controlled by a board of directors answerable to the Tribe, and existing for the sole financial benefit of the Tribe. A successful result for Kroner would result in the Tribe receiving less money than it would otherwise receive from OSGC, so the Tribe has a vested interest in this case. The court should not put form over substance in considering this factor, and clearly, the court did not do so, as is evident from its comments regarding the first factor.

The fourth factor is the tribal membership status of the parties. For the reasons set forth in the preceding paragraph, this case involves a corporation wholly owned by the Tribe. Ignoring that fact and insisting the parties must be individual tribal members would unjustifiably limit the scope of this factor.

The fifth factor is where the claim arises. Kroner simply states the claim was filed in circuit court. This confuses the genesis of the claim with the location of the place the claim will be adjudicated. In fact, the claim arose when OSGC allegedly breached a contract of employment it allegedly had with Kroner, that contract being based on the Blue Book. The claim should be deemed to have arisen at OSGC's business location.

The sixth factor is whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute. There is no contract addressing this factor, but, again, to the extent Kroner claims OSGC violated the Blue Book, the procedures in that manual, clearly call for a grievance procedure to be administered by the Tribe's Personnel Committee. So, accepting Kroner's view of the basis of his claim, at least in the first instance, the parties agreed they would resolve disputes using tribally mandated and administered procedures.

The seventh factor is the timing of any motion to transfer, taking into account the parties' and court's expenditure of time and resources, and compliance with any applicable provisions of the circuit court's scheduling orders. For the reasons set forth in Section E of the Statement of the Case above, the timing of the transfer

motion favors neither party. Certainly, OSGC had requested transfer to tribal court as an alternative form of relief when it filed its motion to dismiss in September, 2008. Since Kroner is apparently ready for trial, or could have been ready within three and a half months of the court's order to transfer the case, Kroner has expended most of the effort necessary to try the case in either forum. Transfer will not violate any scheduling order of the circuit court. There have been few court hearings to date, no rulings on any motion of substance, with the case instead focusing on procedural issues or simply waiting for disposition through no fault of OSGC. As such, transfer now will not cause any great loss or duplication of efforts.

The eighth factor is the court in which the action can be decided most expeditiously. While it is true the case in circuit court was scheduled for trial three and a half months after the hearing on the motion to transfer, as stated above, Kroner was apparently ready or nearly ready to try its case. There is nothing in the record to suggest the tribal court could not have accommodated Kroner with a reasonably expeditious trial, and the circuit court definitely took into account and showed concern for the timing of a hearing in tribal court. (R. 55:10-11) Certainly, OSGC would not have to start all over, as he has

claimed. Even if this factor favors Kroner, it is not enough alone, to overturn the court's decision.

The ninth factor is the institutional and administrative interests of each court. The tribal court system would seem to have a far greater interest in the outcome of this case than the circuit court. This case involves interpretation and application of the employee manual developed by the Tribe to a large number of employees of the Tribe and tribally chartered entities. Precedent in this case would have a more specific effect on the Tribe than on Wisconsin residents generally. It would add to precedent and would confirm that non-tribal employees of the Tribe and its corporate subsidiaries are subject to the rule of the *Schoen* case.

The court also took into account the institutional considerations of deciding the issue in circuit court and concluded the matter could be addressed far more efficiently in tribal court. The court noted:

And my final point is that I, you know, to the extent that I can extend to the plaintiff my hope of success, the other point is that if the Oneida Nation Tribal Court determines these are his rights, then the road is clear. We -- there should be no obstacles or no -- nothing put in the way of a resolution of this case whereas I'm satisfied if I were involved in this, I would be having to have -- potentially invite testimony from various members of the tribal legislature and others about what the history of this was and

who wrote it and what the whole idea of it was and this is not the forum to do that.

(R. 55:10)

Whether Kroner agrees with the court's reasoning, the court's concern for the administrative burden the case would impose on the circuit court and the relative ease with which the tribal court could dispose of the dispute is undeniable.

The tenth factor is the relative burdens on the parties, including cost, access to and admissibility of evidence, and matters of process, practice, and procedure, including where the action will be heard and decided most promptly. The tribal court sits in Brown County, Wisconsin, the same county as the circuit court. There is no reason to believe Kroner would be precluded from presenting his case in full to the tribal court. To suggest Kroner could not obtain a full and fair hearing in tribal court would constitute an attack on the very integrity of the tribal court system. As stated earlier, Kroner's statement he would be forced to start over in a new forum overstates that situation. With discovery having been performed, there is no reason to believe Kroner will have to go back to square one if his claim is heard in tribal court. The circuit court recognized this fact,

characterizing the case as "well formed up" and "simply needs to be submitted." (R.55:11). In the end, the only unresolved issue under this factor is the precise timing of Kroner's hearing in tribal court. While that hearing was never scheduled because Kroner filed this appeal instead of proceeding in tribal court, the circuit court did indicate it wanted the case scheduled in tribal court within 30 days of its decision to transfer the case, and ordered a status conference within 45 days of its order transferring the case to ensure the case was moving along in tribal court. (R. 55:10-11, and R. 38:1) Moreover, OSGC agreed the case could be expedited by treating it in tribal court as if it had been moved there for purposes of trial. (R. 55:5-6) Clearly, the court considered timing of the matter in tribal court and believed the hearing could take place without delay.

The final factor is "any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial." There is no other information in the record, nor need there be. The record fully supports the trial court's decision and should be upheld.

C. Kroner Has Asked For Inappropriate Relief.

After making an extensive argument about the court's failure to make specific findings under each of the factors listed in §801.54, Wis. Stats., Kroner turns around and asks the appellate court to mandate the case remain in circuit court. If Kroner's argument that the court failed to make specific findings were correct, the only appropriate relief would be a remand to the circuit court for such findings to be made. Requiring the matter to stay in circuit court would be contrary to Kroner's essential argument.

CONCLUSION

Kroner chose to be employed by a tribal entity. When he was terminated by that entity, he chose to file an action premised primarily on a tribally prepared employment manual, and yet he insists tribal court is not a proper place for his claim to be heard. The trial court recognized the inconsistency in Kroner's position. This court should, too. The record supports the court's decision even if the court did not specifically identify the §801.54, Wis. Stats. factors individually. The court demonstrated in its decision that it had considered those factors and ruled accordingly. Therefore, the order of the

circuit court transferring this case to tribal court should
be affirmed.

Respectfully submitted,

Dated this 14th day of February, 2011.

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CERTIFICATION OF LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a monospaced font. The length of this brief is 20 pages.

Dated this 14th day of February, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 14th day of February, 2011.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on February 14, 2011, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of Court of Appeals within 3 calendar days. I further certify that the brief was correctly addressed as follows:

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I further certify that on February 14, 2011, this brief was deposited in the United States mail for delivery to all counsel as follows:

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