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SUPREME COURT OF WISCONSIN

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**CLERK OF SUPREME COURT
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John N. Kroner,
Plaintiff-Appellant-Petitioner,

District: 3
Appeal No. 2010AP002533
Circuit Court Case No. 2008CV002234

v.

Oneida Seven Generations Corporation,
Defendant-Respondent.

ON APPEAL FROM THE CIRCUIT COURT OF BROWN COUNTY,
THE HONORABLE DONALD R. ZUIDMULDER,
CIRCUIT JUDGE, PRESIDING

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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STATEMENT OF THE ISSUES

I. Could the Defendant-Respondent successfully move to transfer the case from Brown County Circuit Court (where it had been for almost two years) to start anew in the Oneida Tribal Judicial System (“Tribal Court”) per the tribal transfer statute Wis. Stat. § 801.54, when the Defendant- Respondent did not address, and the Circuit Court did not consider, “all relevant factors” required by Sec. 801.54(2)?

TRIAL COURT ANSWER: Yes.

COURT OF APPEALS ANSWER: Yes.

II. Did the Circuit Court properly exercise its discretion in deciding to transfer this case to a tribal forum given that, of those factors of Sec. 801.54(2) that were considered, the evidence and argument shows those factors did not favor transfer to the tribal forum, and that this case indisputably involves a Wisconsin resident, Wisconsin businesses, and Wisconsin contract-law claims that could be effectively resolved by the Circuit Court?

TRIAL COURT ANSWER: Not answered.

COURT OF APPEALS ANSWER: Yes.

III. Was the Sec. 801.54 threshold criterion of “concurrent jurisdiction” established, despite the fact the movant (and the record as a whole) did not provide legal authority showing subject matter jurisdiction or personal jurisdiction for this matter existed in the Oneida Tribal Court?

TRIAL COURT ANSWER: Yes.

COURT OF APPEALS ANSWER: Yes.

IV. Did the Circuit Court's decision effectuate a retroactive application of Sec. 801.54, and an impermissible retroactive application of a statute that was substantive in nature, impaired contracts or disturbed vested rights?

TRIAL COURT ANSWER: Not addressed.

COURT OF APPEALS ANSWER: Not addressed.

STATEMENT OF FACTS

Plaintiff-Appellant-Petitioner John Kroner (“Kroner”) is a Wisconsin resident, and was hired by Defendant-Respondent Oneida Seven Generations Corporation (“OSGC”) in 2001 to be Chief Executive Officer. (R. 1-2, R. 9-3.) When Kroner started work at OSGC, its prior year's revenue was about \$450,000. (R. 9-4.) In the year 2007, under Kroner’s leadership, OSGC’s yearly revenue was about \$2,270,000. (R. 9-4.)

A. For-Cause Employment, and Job Termination Without Cause

OSGC’s Board of Directors (which had hired Kroner) never took action during Kroner’s employment that required or indicated his employment would be at-will. (R. 9-3.) Kroner had always assumed that, because of certain documentation provided to him by OSGC (discussed below), he could not have his employment terminated unless there was cause. (R. 9-3.)

On May 7, 2008, OSGC terminated Kroner’s employment. (R. 9-4.) OSGC provided no reason, other than saying it wanted to go in a "different direction." (R. 9-4.) There was no cause for the termination. (R. 9-4.)

B. Wisconsin Contract Claims Filed; Sovereign Immunity Withdrawal

On September 10, 2008, Kroner filed a complaint in Brown County Circuit Court. (R. 1.) The complaint alleges contract-based claims relating to his job termination. (R. 1-3, 4.) One claim is for breach of contract, per Wisconsin law

that an employer's policies and procedures (e.g. in a handbook) can create an employment contract. (R. 1-3, 4.) The other claim is for wrongful discharge in violation of Wisconsin public policy. (R. 1-4.)

The litigation included a lengthy sovereign immunity defense (since abandoned) by the OSGC, which has a relationship with the Oneida Tribe of Indians of Wisconsin ("Oneida Tribe"). (R. 4, R. 5, R. 10, R. 11, R. 13, R. 34, R. 36, Pet. App. 22-23.)

C. OSGC's Corporate Status Involving Wisconsin Law and Business

OSGC was chartered under Oneida Tribal law, and established under the laws of the State of Wisconsin. (R. 9-1.) OSGC is primarily a real estate management and investment company. (R. 9-1.)

According to OSGC's Standard Operating Procedures:

The goal of Seven Generations is to develop good sound business relationships and long-term income streams for the corporate stockholders. The tribal corporation was established under the laws of the State of Wisconsin to enable it to do business in a normal fashion with other businesses in the area.

(R. 6.1-1, 11.)

D. Kroner's Status As a Wisconsin Resident, Regularly Conducting Business For and With Wisconsin Entities While Working With OSGC

Kroner is a Wisconsin resident, and is not a member of the Oneida Tribe. (R. 1-2, R. 9-4, R. 43-3, 4.)

When he was last employed with OSGC, it owned or partially owned approximately thirteen (13) limited liability companies (LLCs). (R. 9-3, 4.) All these LLCs were formed under Wisconsin law. (R. 9-4.) Most of these LLCs are

jointly owned by OSGC and non-tribal entities. (R. 9-4.) Kroner performed work for, and on behalf of, these Wisconsin-law LLCs. (R. 9-4.) The LLCs did not have their own employees. (R. 9-4.)

E. OSGC Admits Oneida Law/“Blue Book” Legal Procedures for Job-Termination Disputes Are Not Applicable Here; the “Blue Book” and Bylaws Are Alleged to Be Evidence for Wisconsin Contract Law Issues Concerning At-Will Versus For-Cause Employment

OSGC admits the Oneida-law procedures the Tribe customarily applies for job-discipline- and job-termination- related disputes—the legal procedures described in the Oneida Personnel Policy and Procedure book, also called the “OPPP” or “Blue Book”—do not apply in this matter. (R. 5-1, R. 6-2, R. 6.1-2, 11-50.)

There are no Oneida-law claims pending—Blue Book- procedural claims or otherwise—as only Wisconsin-law contract claims are asserted. (R. 1-3, 4.)

Kroner’s allegations about the Blue Book do not assert that it gives him access to Oneida-law claims or Oneida-law rights, but rather that this handbook serves as evidence in support of Wisconsin-law contract claims. (R. 1-3, 4.) Kroner was provided a copy of the Blue Book for his use after he started employment. (R. 9-3.) He was also provided a copy of OSGC’s Bylaws. (R. 6.1-2, 3-9, R. 9-3.)

Kroner has alleged that both the Blue Book handbook and Bylaws indicate *cause* is required for a worker to be discharged: he thus alleged that under Wisconsin law, both documents evidence for-cause rather than at-will

employment. (R. 10-2, 5-6, R. 6-2, 29-33, R. 6.1-2, 6.) OSGC has alleged that another handbook-type document—the Oneida Seven Generations Corporation Employee Guidelines ("Guidelines")— applied to Kroner’s employment, and is evidence his employment was at-will. (R. 5-1, R. 6.1-1, 12.)

Kroner has disputed this. (R. 9-3.) He alleges he was never subject to the Guidelines. (R. 9-3.) As he has attested, he *himself* drafted the Guidelines, in his capacity as CEO, with the intent they would apply to the two employees of OSGC who worked beneath him. (R. 9-3.) OSGC’s Board never took action on or approved the Guidelines during Kroner’s employment. (R. 9-3.)

One anticipated dispute for trial is whether Kroner (as CEO) was an employee or an *officer* of OSGC, as the Bylaw’s for-cause provision applies to the termination of “an officer of the Corporation.” (R. 6.1-2, 6.)

F. Sovereign Immunity Waiver Provision; Abandonment of Sovereign Immunity Defense

OSGC’s Corporate Charter ("Charter") included language that stated, in material part:

The powers of the Corporation [OSGC] are:

...

(E) To waive only the sovereign immunity the Corporation possesses for the purposes of dispute resolution or contract enforcement in contracts, agreements or other similar documents for the furtherance of the Corporation's business and/or purpose.

...

(J) To sue and be sued in its Corporate name as herein specifically provided to the extent allowed by Oneida tribal, state or federal law upon any contract, claim or obligation of the Corporation arising out of the accomplishment of its purposes...

(R. 6-3, 68.)

Initially, and for twenty-three months into this litigation, OSGC claimed it had not waived sovereign immunity, neither by the above Charter language or otherwise. (R. 4, R. 5, R. 11, R. 30-1, 2, Pet. App. 17-18, R. 36-1, Pet. App. 22.)

On August 26, 2010, OSGC (in its transfer motion reply) withdrew its sovereign immunity argument, and acknowledged the Circuit Court's jurisdiction. (R. 36-1, Pet. App. 22.)

G. Tribal Court's Letter Regarding Transfer, and Fourteen-Month Period Before Defendant Moved for Transfer

The Honorable Winnifred L. Thomas of the Oneida Tribal Court wrote a letter dated April 29, 2009 ("Letter") to the Circuit Court, which was also provided to the parties. (R. 19, Pet. App. 26.) The Letter indicated the Tribal Court would be "willing to assume jurisdiction of this case" via the Wis. Stat. § 801.54 discretionary transfer statute. (R. 19, Pet. App. 26.)

The Letter was one-page long, and did not reference any legal authority other than Sec. 801.54. (R. 19, Pet. App. 26.) The Letter is the only information from the Oneida Tribal Court in the Circuit Court's record. (R. 19, Pet. App. 26.)

OSGC did not submit its motion to transfer until July 8, 2010,¹ over fourteen months after the Tribal Court's Letter. (R. 19, Pet. App. 26, R. 29.)

¹ The July 8, 2010 motion to transfer was filed before the scheduling order's August 2, 2010 motion deadline. (R. 28-1, R. 29.) Defendant- Respondent submitted its motion reply brief on August 26, 2010. (R. 36, Pet. App. 22-23.) At the point transfer-motion briefing was done, no new motions (or supporting evidence or arguments) were allowed per the scheduling order deadline. (R. 28-1.)

During that period, Kroner conducted written and oral discovery and proceeded with his case. (R. 35-3, R. 36-1, Pet. App. 22.)

Also during this period, there was an April 20, 2010 hearing for sovereign immunity arguments. (R. 53.) At this hearing, the Circuit Court indicated OSGC could raise more sovereign immunity arguments, but the Court discouraged transfer:

15 THE COURT: That's [Plaintiff counsel's] point. Your
16 clients advanced the argument to me that I had no jur --
17 no jurisdiction, not concurrent jurisdiction but no
18 jurisdiction, and so in -- in light of that argument, and
19 I'm being frank, that was part of what was motivating me
20 sending it to the tribal court because I was going to get
21 the best of both worlds, but if you were asserting
22 sovereign jurisdiction, and -- and even on -- and even if
23 that didn't work, arguably you had concurrent jurisdiction
24 if you --

25 MR. SCHOBBER: Yeah.

1 THE COURT: Okay? But then when your
2 de -- when the tribal court comes back and says we're only
3 doing this because we have concurrent jurisdiction, what
4 counsel for the -- for the plaintiff says, well, then --
5 then there's an internal inconsistency with the position
6 of the tribe because the defendant is saying the tribal
7 court has exclusive jurisdiction because we're invoking
8 sovereign immunity. We cannot be sued in a state court.
9 So that -- that was part of my thinking.
10 So when this letter comes as counsel points out saying,
11 well, you know, if you think you want us to handle this,
12 well, then we will, but it's kind of concurrent
13 jurisdiction. If you don't want us to handle it under
14 that section as he points out, well, then that -- I mean
15 the communication the plaintiff is making to me is, well,
16 then that's fine with us. Well, to be frank, if the
17 plaintiff doesn't want to go there, which I take it the
18 plaintiff doesn't --

19 MR. BROWN: It does not.

20 THE COURT: -- then it seems to me that I
21 can't just throw him into the tribal court because I'm

22 trying to avoid my responsibility to the plaintiff. I
23 mean I'm just sharing my thoughts, okay?
24 So you can review this with your clients, and then if
25 you wish to come back and make argument to me or review
1 this issue of, you know, the sovereign immunity whether
2 you're continuing to assert that or whatever you want to
3 do, I'm going to let you do that.

4 MR. SCHOBBER: Hm-hmm.

5 THE COURT: But today because this thing
6 has just been languishing, I'm going to give you a formal
7 scheduling order, and then if -- if something's called to
8 my attention that requires me to reconsider this, I'm not
9 precluding -- precluding that from happening, but I just
10 want to get this thing moving. Okay?

(R. 53:7-9.)

As this transcript portion indicates, at the April 20, 2010 hearing, the Circuit Court did not find sovereign immunity applied. (R. 53:7-9.) But the Circuit Court did allow for the possibility OSGC could come back with more argument for reconsideration as to the issue of sovereign immunity. (R. 53:7-9.)

OSGC did not revisit sovereign immunity argument. (R. 36-1, Pet. App. 22.) Instead, OSGC waited several months, and submitted its motion for transfer dated July 8, 2010. (R. 29.) OSGC's transfer motion was filed after the January 1, 2009 effective date of Wis. Stat. § 801.54, although this case started before the effective date; the Complaint was filed September 10, 2008. (R. 1, 29.)

On August 16, 2010, consistent with OSGC's non-revisiting of sovereign immunity issues, the Circuit Court entered an order denying OSGC's long-pending motion to dismiss based on sovereign immunity. (R. 29, 34.)

OSGC formally withdrew its sovereign immunity defense in its transfer motion reply brief dated August 26, 2010. (R. 29, R. 36-1, Pet. App. 22.)

By the time of the Circuit Court's Order granting transfer on August 31, 2010, the case was about three and one-half months from trial at the Circuit Court, as the scheduled trial date was December 13, 2010. (R. 28-1, R. 38, Pet. App. 1.)

H. OSGC's Motion Documents Did Not Provide Evidence or Argument Per Sec. 801.54(2)(g)-(j) As to How the Timing, Costs and Efficiency Could Favor Transfer As of that Point in Time

OSGC's transfer motion documents and argument at the August 31, 2010 hearing did not provide evidence or argument in support of the following Sec. 801.54(2) factors:

- 801.54(2)(g) 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.
- 801.54(2)(h) The court in which the action can be decided most expeditiously.
- 801.54(2)(i) The institutional and administrative interests of each court.
- 801.54(2)(j) 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.

(R. 29, R. 30, Pet. App. 17-21, R. 36, Pet. App. 22-23, R. 40, Pet. App. 24-25, R. 54, Pet. App. 4-16.)

OSGC's transfer motion documents and hearing arguments did not at all address 801.54(2)(j) (regarding the relative burdens on the parties, including issues of cost, evidence, procedure and where the action will be heard and decided most promptly) or 801.54(2)(i) (regarding institutional and administrative interests of each court). (R. 29, R. 30, Pet. App. 17-21, R. 36, Pet. App. 22-23, R. 40, Pet. App. 24-25, R. 54, Pet. App. 4-16.)

OSGC's motion documents and arguments included only the following statements about 801.54(2)(g) (regarding timing and expenditure of time and resources) and 801.54(2)(h) (regarding the court that can decide the action most expeditiously):

Section 801.54(2)(g) is applicable. The timing for transfer is appropriate because no significant discovery has occurred and the transfer has been approved by both courts. Section 801.54(2)(h) is neutral: the case can be expeditiously handled in either court.

(R. 30-4, Pet. App. 20.)

OSGC clarified the following about discovery in its reply brief:

With respect to Plaintiffs concerns about discovery, he has conducted both written and oral discovery. We have produced records for him and he took a deposition on August 24, 2010 of Brenda Buckley, the former president of Oneida Seven Generations Corporation. We will be scheduling the deposition of the current president, William Cornelius, as soon as Mr. Cornelius returns from his vacation out of the area. (R. 36-1-2, Pet. App. 22-23.)

Kroner's response brief had stated the following:

If Defendant were to finally concede jurisdiction [of the Circuit Court] later - in a reply brief, at the hearing, or otherwise- Plaintiff would move that the Court permit him leave for sur-reply and a new (long) hearing on those reply and sur-reply issues. This would be necessary to address many additional § 801.54 facts and criteria that Defendant's transfer request does not fulfill.

To address just a few, Defendant has not established the Tribal Court has jurisdiction or shares concurrent jurisdiction. Moreover, as of the upcoming August 31 hearing, almost

two years will have passed since Plaintiff's Complaint, along with three hearings and related briefing, and significant discovery. (Plaintiff's first discovery was issued the day of the April 20 hearing, and he has had additional discovery actions since then). Plaintiff has had financial losses relating to wages and health insurance premiums, and more financial losses have accrued as time moves on. In sum, there are multiple reasons transfer per § 801.54 is improper, especially at this late date.

At this point, Plaintiff seeks to promptly address substantive issues, rather than starting over on day one with the Tribal Court.

(R. 35-2.)

Kroner's motion to reconsider brief stated, in pertinent part, the following regarding 801.54(2) factors:

Plaintiff was not able to address all these [Sec. 801.54(2)] equitable factors at the August 31 hearing. These factors include:

Delay: Transfer was first raised by the Tribal Court as a potential option back in April 2009, but Defendant waited until well over a year later to file its motion. During that time, Plaintiff conducted extensive discovery and otherwise proceeded with his case. If the Court grants the motion, Plaintiff has to start all over again in a new forum after almost two years' work here. The long and needless delay unfairly benefits Defendant and disadvantages Plaintiff. The delay has caused Plaintiff excessive expenditure of time and resources, and transfer should be denied on that basis per 801.54(2)(g).

(R. 43-2.)

OSGC submitted a two-page response to Kroner's motion to reconsider brief. (R. 40, Pet. App. 24-25.) The response did not reference any of the 801.54(2)(a)-(j) factors referenced above. (R. 40, Pet. App. 24-25.)

I. No Complaint in Tribal Court; References to Tribal Jurisdiction

No complaint has been filed in the Oneida Tribal Court. (R. 43-1.) Kroner had argued, in his transfer response brief, and motion to reconsider brief, that the Tribal Court does not have jurisdiction over this case. (R. 35-3, R. 43-1-2.)

The Tribal Court, in its Letter, stated this about jurisdiction:

The Oneida Tribal Judicial System is willing to assume jurisdiction of this case. However, in order to avoid any problems or controversies, we would be more comfortable if the transfer took place pursuant to Wis. Stat. § 801.54 (2009). This statute governs discretionary transfers from state to tribal court in cases, such as this one, where there is not a case pending in the tribal jurisdiction.

(R. 43-1.)

Kroner's motion to reconsider brief stated, regarding Tribal jurisdiction:

Defendant's position is apparently that the Tribal Court somehow has jurisdiction over this matter. Plaintiff submits the Tribal Court does not have jurisdiction.

...

The Tribal Court's position is the same as Plaintiffs. The Tribal Court, in its letter dated April 29, 2009 (Exhibit A), admits the Tribal Court's own view is it does not have jurisdiction over this matter. Specifically, the letter references "...cases, such as this one, where there is not a case pending in the tribal jurisdiction." Exh. A, p. 1.

Because this case- according to the Tribal Court itself- "is not a case pending in the tribal jurisdiction," there is no concurrent jurisdiction as required by Wis. Stat. § 801.54. Defendant thus does not meet this threshold requirement of Wis. Stat. § 801.54 and Defendant's Motion must be denied.

(R. 43-1-2.)

OSGC's response to the motion to reconsider asserted the Tribal Court had jurisdiction, but did not refer to any legal authority that allegedly conferred the Tribal Court's jurisdiction. (R. 40, Pet. App. 24-25.) The response stated:

1. There is no requirement that two actions be pending for the court to transfer a case under the transfer statute. Any case can be transferred back and forth between the courts. This is done between state and federal courts all the time.
2. The reasons why the Tribal Court jurisdiction is appropriate have been previously addressed and the court has made its ruling already.
3. Any confusion over the sovereign immunity defense is now eliminated. Both courts have jurisdiction over this type of case.
4. The Tribal Court is not limited to resolving disputes only between tribal members. Conversely, the fact that a party is not a tribal member is not a ground for eliminating the Tribal Court's jurisdiction.

(R. 40-1, Pet. App. 24.)

J. Decisions By Circuit Court and Court of Appeals; This Court's Granting of Petition for Review and Order As to New Issue

The Circuit Court granted OSGC's Motion to Transfer to Tribal Court per Sec. 801.54, and denied Kroner's Motion to Reconsider, with Judgments entered August 31, 2010 and September 10, 2010, respectively. (R. 38, Pet. App. 1, R. 41, Pet. App. 3.) At the August 31, 2010 hearing during which the Circuit Court granted transfer, the Circuit Court asked that OSGC's counsel "get the [draft] transfer order to me today." (R. 54, Pet. App. 13.) The Circuit Court further asked OSGC's counsel to seek the Tribal Court's indication "that within 30 days they indicate that this case has been scheduled and will be heard within the next 45 days." (R. 54, Pet. App. 13.) The Circuit Court clarified it did not expect the case to be heard at *trial* within 45 days, but rather that "I want it scheduled. I want to know when it is so that we know it's moving along." (R. 54, Pet. App. 14.) OSGC's counsel agreed. (R. 54, Pet. App. 14.) The Circuit Court's written Order dated August 31, 2010 stated, pertinent to Tribal Court scheduling:

3. The parties are ordered to report back to this Court that upon transfer to the Oneida Tribal Judicial System, the matter has been scheduled for a status conference within forty-five (45) days.

4. Subject to the foregoing, this matter is hereby transferred to the Oneida Tribal Judicial System.

(R. 38, Pet. App. 1-2.) Kroner filed his appeal on October 13, 2010. (R. 45). On June 1, 2011, The Court of Appeals issued its decision ("Decision"), which affirmed the transfer decision. (Pet. App. 27.)

On December 5, 2011, this Court granted Kroner's petition for review, requiring that Kroner brief issues set forth in his petition, and ordering that Kroner must also address the following question:

Whether the facts that the case was pending in Brown County Circuit Court for nearly two years, and was pending at the time Wis. Stat. § 801.54 became effective, have any bearing on the applicability of § 801.54?

(Pet. App. 41.)

ARGUMENT

Statutory interpretation and the application of a statute to the facts found are questions of law to be reviewed de novo, without deference to the circuit court. State v. Reed, 2005 WI 53, ¶ 13, 280 Wis. 2d 68, 695 N.W.2d 315. Similarly, the interpretation of a statute created via this Court's rule-making authority presents a question of law to be reviewed by this Court independently, albeit benefitting from the Circuit Court's and the Court of Appeals' analyses. Trinity Petroleum, Inc. v. Scott Oil Company, Inc., 302 Wis. 2d 299, 314-315, 735 N.W.2d 1 (2007), citing Snopek v. Lakeland Medical Center, 223 Wis. 2d 288, 293, 588 N.W.2d 19 (1999). Whether a defect in failing to follow a statutory directive is fundamental or technical is also a question of law for independent review. Warehouse II, LLC v. State Dept. of Transp., 2006 WI 62, ¶ 4, 291 Wis. 2d 80, 715 N.W.2d 213, citing Schaefer v. Riegelman, 2002 WI 18, ¶ 25, 250 Wis. 2d 494, 639 N.W.2d 715.

OSGC's transfer motion failed to fulfill several technical requirements of the tribal transfer statute at Wis. Stat. § 801.54. Wis. Stat. § 801.54(2) (2009-

2010). First, OSGC did not (nor did the record) provide basis to conclude “concurrent jurisdiction” existed, as is a threshold requirement before a Sec. 801.54 transfer can be granted. Wis. Stat. § 801.54(2). Another technical failure occurred in that the statute’s plain language required that a list of equitable factors enumerated at 801.54(2)(a)-(k) – “*all*” of the factors—be addressed per a transfer motion. Yet here the record shows multiple factors were not addressed or considered. This fact, that all required factors were not addressed, also warranted denial per nuts-and-bolts statutory operation.

Of note, there are some discretionary aspects within the statute: namely, Sec. 801.54(2) gives a circuit court discretion to consider and weigh the listed factors. However, because “all” factors were not addressed in the motion or record, and because “concurrent jurisdiction” was not demonstrated, OSGC’s motion should have been denied per each of these threshold, technical requirements of Sec. 801.54 before the motion ever reached a point of discretionary weighing. Further, those (limited) factors that *were* considered and weighed under the Circuit Court’s discretion did not favor transfer to the Oneida Tribal Court. Finally, Sec. 801.54 must not be applied in this case because applicable law prohibits (as occurred here) the retroactive application of a statute that impairs a litigant’s (here, Kroner’s) substantive and/or contractual rights.

I. THE TRIBAL TRANSFER MOTION DID NOT ADDRESS, AND THE CIRCUIT COURT DID NOT CONSIDER, “ALL” THE FACTORS UNDER SEC. 801.54(2) AS THE PLAIN LANGUAGE OF THE STATUTE REQUIRES, AND THE MOTION MUST BE DENIED ON THAT BASIS.

Section 801.54(2) of the Wisconsin Statutes sets forth various factors, enumerated at subsection (2)(a)-(k), “all” of which a Circuit Court must consider before transferring a case to a tribal forum. Wis. Stat. § 801.54(2).

Preceding the listed (2)(a)-(k) factors, Section 801.54(2) states:

If concurrent jurisdiction is found to exist, unless all parties stipulate to the transfer, in the exercise of its discretion the circuit court *shall consider **all** relevant factors*, including but not limited to...

(emphasis added) Wis. Stat. § 801.54(2).

OSGC’s motion did not address, nor did the Circuit Court consider, “*all*” the factors under § 801.54(2) as the statute requires. (R. 29, R. 30, Pet. App. 17-21, R. 36, Pet. App. 22-23, R. 40, Pet. App. 24-25, R. 54, Pet. App. 4-16.)

Review of OSGC’s transfer motion briefs and the motion hearing transcript show OSGC did not provide evidence or argument about, much less prove in its favor, factors at Sec. 801.54(2)(g)-(j).² (R. 29, R. 30, Pet. App. 17-21, R. 36, Pet. App. 22-23, R. 40, Pet. App. 24-25, R. 54, Pet. App. 4-16.) Evidence and argument as to these factors (g)-(j)—which involve timing, costs and efficiency of litigation in light of a transfer—were not only technically required by the statute’s

² OSGC’s motion to transfer Brief, transfer Reply, and reconsider motion response are included at Appendix pages 17 to 25. (R. 30, Pet. App. 17-21, R. 36, Pet. App. 22-23, R. 40, Pet. App. 24-25.)

plain language (that “all” 801.54(2) factors be considered), but they were crucial for OSGC to address under the circumstances.

The timing of OSGC’s transfer motion occurred almost two years into Circuit Court litigation, and over a year after the transfer was raised as a possibility. Given this, Kroner asserts it was particularly important OSGC support how it could be equitable under Sec. 801.54(2), in terms of time, efficiency, and cost, to cease prolonged litigation in one forum and start anew in another.

The Court of Appeals disagreed, and stated:

Kroner’s primary argument falls under factor (j). He argues, as he did in the circuit court, that it is inequitable for him to “have to start all over again in a new forum after almost two years of litigation.” Kroner asserts, without explanation, that the case will take longer and be more costly. Seven Generations responds that the tribal court is located in the same county as the circuit court, that Kroner’s pretrial discovery is still usable, and that the circuit court recognized the case was “well formed up [and] simply needs to be submitted” Further, the court expressed concern with prompt adjudication upon transfer, requiring Seven Generations to obtain a scheduling conference in the tribal court to be heard within forty-five days of the transfer, and to report back to the circuit court.

(Decision, pp. 13-14, ¶¶30-31, Pet. App. 39-40.)

Of note, the suggestion Kroner’s case would proceed expeditiously, based on the factors cited above, was *not based on any information from the Oneida Tribal Court*. Again, the only information from the Tribal Court in the Circuit Court’s record was the one-page Letter, which stated nothing about how the Tribal Court would conduct procedures or scheduling for Kroner’s matter. (R. 19, Pet. App. 26.) As such, there was no information showing *the Tribal Court* deemed this case to be one that “simply need[ed] to be submitted,” the Tribal Court intended to create an expedited schedule or would not schedule a lengthy period of

discovery (of note, OSGC conducted no discovery of its own per Circuit Court proceedings), and so on.

Neither the movant OSGC, nor the record, addressed the Oneida Tribal Court's specific procedures, scheduling, or discovery, and because of this there was no information about Oneida proceedings to compare to Wisconsin Circuit Court proceedings, or to argue which were comparably more efficient. Such information and argument were required by factors 801.54(2)(g)-(j).

These were pressing equitable issues for Kroner. He opposed transfer to the Tribal Court, and did not want to start again in a new forum. He had an equitable interest in having a reasonably efficient and prompt resolution to his complaint and Wisconsin contract claims after what had already been almost two years of Circuit Court litigation. OSGC's transfer motion documentation and argument did not address these issues, despite this being explicitly required by Sec. 801.54(2).

OSGC's transfer motion documents and argument did not at all address 801.54(2)(j) (regarding the relative burdens on the parties, including issues of cost, evidence, procedure and where the action will be heard and decided most promptly) or 801.54(2)(i) (regarding institutional and administrative interests of each court).³ Wis. Stat. § 801.54(2).

³ The Court of Appeals Decision stated "Seven Generations also notes that Kroner's argument that he wishes to proceed expeditiously to a trial—his primary contention here and in the circuit court—is undercut by his choice to appeal" and further stated Kroner did not reply. (Decision, p. 14, ¶ 30; Pet. App. 40.). Kroner is aware of no reply that could refute this view: any litigant who

OSGC's transfer motion documents made a few statements about 801.54(2)(g) (regarding timing and expenditure of time and resources) and 801.54(2)(h) (regarding the court that can decide the action most expeditiously), but they were conclusory, and unsupported by evidence, information, detail or argument.⁴

In short, OSGC's motion failed to present evidence or argument as to "*all*" the required factors under 801.54(2). To the extent the Tribal Court could have supplemented the record on these issues, it did not do so, as its sole Letter said nothing as to the Sec. 801.54(2) factors. (R. 19, Pet. App. 26.) As such, OSGC's motion did not fulfill the requirements of the statute, and must be denied.

The Court of Appeals nonetheless found the following:

Here, the circuit court set forth reasons for its decision, but did not discuss all of the statutory factors that it was required to consider. We are satisfied, however, that the court did consider all of the requisite factors and properly exercised its discretion. In fact, the circuit court observed at the hearing: "I took the time today to thoroughly go through the file and to refresh my memory with regard to the arguments that I've heard."

...

When determining whether to transfer a case to tribal court under WIS. STAT. § 801.54(2), the better practice is for a circuit court to individually address each of the statutory factors. This will minimize the potential for error, reduce appeals, and ease appellate review. Nonetheless, having considered the record and the statutory factors, we are satisfied the circuit court properly exercised its discretion in this case.

appeals as to factor 801.54(2)(j)— and who asserts that the Circuit Court should have found the case would be decided more promptly in that Court than the tribal forum— could be subject to OSGC's same view that the subsequent act of appealing (which necessarily extends case time) undercuts case expedience.

⁴ OSGC's transfer motion brief stated only the following about these two factors: "Section 801.54(2)(g) is applicable. The timing for transfer is appropriate because no significant discovery has occurred and the transfer has been approved by both courts. Section 801.54(2)(h) is neutral: the case can be expeditiously handled in either court." (R. 30-4, Pet. App. 20.)

(Decision, p. 11, ¶ 22; p. 14, ¶ 32; Pet. App. 37, 40.)

Kroner's situation cannot be a magic-words scenario of the type the Court of Appeals suggests, where a trial court's mere reference to exercising discretion and reviewing the record is sufficient for statutory compliance. In Kroner's situation, the record itself was incomplete, lacking evidence and argument necessary to address or fulfill Sec. 801.54 factors. OSGC, as the movant, needed to supply the (sparse) case record with the kind of information necessary for the Trial Court to review "all" required Sec. 801.54 factors. Because this did not occur, transfer was not warranted and OSGC's motion must be denied.

II. THE CIRCUIT COURT DID NOT PROPERLY EXERCISE ITS STATUTORY DISCRETION IN DECIDING TO TRANSFER THIS CASE, AS THE (LIMITED) FACTORS OF SEC. 801.54(2) THAT THE COURT DID CONSIDER HAD FAVORED PLAINTIFF AND SHOWED TRANSFER WAS INEQUITABLE.

Even had OSGC's transfer motion not failed to address "all" factors under Sec. 801.54, it still should have been denied, as those factors that *were* addressed and considered by the Circuit Court had favored Kroner.

The chart below states the Sec. 801.54(2) factors, and summarizes this case record's information as applied to those factors.

| 801.54(2): “If concurrent jurisdiction is found to exist, unless all parties stipulate to the transfer, in the exercise of its discretion the circuit court shall consider all relevant factors, including but not limited to:” | | |
|---|--|---|
| Factor | Legal Requirement | Evidence & Argument in Motion Documents and Hearing |
| 801.54(2)(a) | (a) Whether issues in the action require interpretation of the tribe's laws, including the tribe's constitution, statutes, bylaws, ordinances, resolutions, or case law. | <input type="checkbox"/> Wisconsin law contractual claims are asserted; no Oneida-law claims asserted. <input type="checkbox"/> Oneida Tribe's customary ("Blue Book") legal procedures for job-termination claims do not apply. <input type="checkbox"/> OSGC withdrew sovereign immunity defense; acknowledged Wisconsin Courts’ jurisdiction over pending Wisconsin law contract claims. <input type="checkbox"/> No legal interpretation of Oneida law is required to decide these Wisconsin contract claims. <input type="checkbox"/> Wisconsin contract law addresses issues here as to whether a handbook and bylaws create for-cause employment in Wisconsin. |
| 801.54(2)(b) | (b) Whether the action involves traditional or cultural matters of the tribe. | <input type="checkbox"/> Kroner is not a Tribal Member, and is a Wisconsin resident. <input type="checkbox"/> Kroner did work for 13 LLCs owned by OSGC; these LLCs were formed under Wisconsin law. <input type="checkbox"/> OSGC "was established under the laws of the State of Wisconsin to enable it to do business in a normal fashion with other businesses in the area." |

| | | |
|--------------|---|---|
| 801.54(2)(c) | (c) 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. | <input type="checkbox"/> Oneida Tribe is not a party. <input type="checkbox"/> OSGC is a corporation chartered under Oneida Tribal law, and established under the laws of the State of Wisconsin. <input type="checkbox"/> OSGC withdrew sovereign immunity defense. |
| 801.54(2)(d) | (d) The tribal membership status of the parties. | <input type="checkbox"/> Kroner is not a Tribal Member, and is a Wisconsin resident. <input type="checkbox"/> OSGC is not a Tribal Member. |
| 801.54(2)(e) | (e) Where the claim arises. | <input type="checkbox"/> The complaint was filed in a Wisconsin Circuit Court. |
| 801.54(2)(f) | (f) Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute. | <input type="checkbox"/> OSGC's Charter specifies state court is available forum for contract claims: The powers of the Corporation [OSGC] are: ... (E) To waive only the sovereign immunity the Corporation possesses for the purposes of dispute resolution or contract enforcement in contracts, agreements or other similar documents for the furtherance of the Corporation's business and/or purpose. ... (J) To sue and be sued in its Corporate name as herein specifically provided to the extent allowed by Oneida tribal, state or federal law upon any contract, claim or obligation of the Corporation arising out of the accomplishment of its purposes... |

| | | |
|--------------|--|--|
| 801.54(2)(g) | (g) 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. | <input type="checkbox"/> No evidence or argument provided by OSGC. <input type="checkbox"/> Circuit Court proceedings lasted almost two years; Plaintiff had conducted oral and written discovery. <input type="checkbox"/> Plaintiff contested transfer on basis Circuit Court proceedings were only three and one-half months from trial. |
| 801.54(2)(h) | (h) The court in which the action can be decided most expeditiously. | <input type="checkbox"/> No evidence or argument provided by OSGC. <input type="checkbox"/> Circuit Court proceedings were only three and one-half months from trial. |
| 801.54(2)(i) | (i) The institutional and administrative interests of each court. | <input type="checkbox"/> No evidence or argument provided by OSGC. |
| 801.54(2)(j) | (j) 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. | <input type="checkbox"/> No evidence or argument provided by OSGC. <input type="checkbox"/> Circuit Court proceedings had lasted almost two years; Plaintiff had conducted oral and written discovery. <input type="checkbox"/> Plaintiff contested transfer on basis Circuit Court proceedings were only three and one-half months from trial. <input type="checkbox"/> Costlier and more time-consuming for parties to start over in new forum. |

| | | |
|--------------|--|---|
| 801.54(2)(k) | (k) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial. | <input type="checkbox"/> No information from Tribal Court (from April 29, 2009 Letter or otherwise) about its trial proceedings, or how Tribal proceedings would occur for this matter. |
|--------------|--|---|

The equities, and the consideration of Sec. 801.54 factors above, do not favor transfer of this case. At the point of the Circuit Court’s transfer decision, this case had involved almost two years of litigation in a Wisconsin forum, and had indisputably concerned a Wisconsin resident, Wisconsin business, and Wisconsin-law claims.

It is undisputed the Circuit Court had the jurisdiction and authority to decide the Wisconsin claims involved, as again OSGC has withdrawn any sovereign immunity defense. But if the Circuit Court’s granting of the motion were upheld by this Court, that would effectuate a decision that requires a Wisconsin-resident litigant (Kroner) to restart in a new tribal forum despite the tribal-affiliate OSGC having withdrawn a sovereign immunity defense, despite the Tribal Court at issue having provided limited input or interest in the case, and despite almost two years of litigation having passed in the Circuit Court. Accordingly, OSGC’s motion should be denied because the Circuit Court did not properly weigh those equitable factors it considered under Sec. 801.54(2), as those factors favored non-transfer.

III. THE THRESHOLD REQUIREMENT OF “CONCURRENT JURISDICTION” WAS NOT ESTABLISHED, AND TRANSFER MUST BE DENIED ON THAT BASIS, BECAUSE THE RECORD SHOWS NO LEGAL AUTHORITY SUPPORTING EITHER PERSONAL OR SUBJECT MATTER JURISDICTION BY THE ONEIDA TRIBAL COURT.

Section 801.54(2) requires the “circuit court must first make a threshold determination that concurrent jurisdiction exists” before a decision to transfer a case to tribal court. Wis. Stat. § 801.54(2).

During Circuit Court proceedings, Kroner asserted that OSGC failed to show this “concurrent jurisdiction” requirement was fulfilled— for example, this assertion was referenced by the Circuit Court in the cited transcript language above, and Kroner’s transfer motion response brief stated the following:

To address just a few [§ 801.54 issues], Defendant has not established the Tribal Court has jurisdiction or shares concurrent jurisdiction.

(R. 53:7-9; R. 35-2.)

In this case, the Circuit Court determined that “concurrent jurisdiction” *did* exist in both Circuit Court and the Oneida Tribal Court. (R. 54:3-7, Pet. App. 6-10.) However, prior to that determination, there had been no information in the Circuit Court record— nothing from OSGC, from the Tribal Court or from any other source— that identified basis or authority for the Tribal Court’s presumed jurisdiction.

There also had been no indication to the Circuit Court of *personal* jurisdiction existing in the Tribal Court: there was no complaint filed in Tribal

Court, nor any summons or other record issued pursuant to any Tribal Court proceeding.

As to *subject matter* jurisdiction, there similarly was no showing to the Circuit Court that it exists. Whether a tribal forum has subject matter jurisdiction over a non-tribal member (here, Kroner) is ultimately not a matter of tribal law but of federal law. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 324, 128 S.Ct. 2709 (2008) (“[W]hether a tribal court has adjudicative authority over nonmembers is a federal question”), citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15, 107 S.Ct. 971 (1987), and National Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 852-853, 105 S.Ct. 2447 (1985).

The U.S. Supreme Court recognizes “the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe... [although] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations.” See, Montana v. United States, 450 U.S. 544, 565, 101 S.Ct. 1245 (1981). Thus, federal law recognizes only “some” instances where a tribe could have subject matter jurisdiction over a nonmember like Kroner. Id.

However, after OSGC’s transfer motion was before the Circuit Court, there was *no* information on record showing: (1) how, under federal law, this type of dispute is one of the limited forms of disputes over which a tribe has civil jurisdiction over a non-tribal member; and (2) what Oneida law exists, if any, that is consistent with federal law parameters and that shows the Oneida Tribe confers

subject matter jurisdiction over the type of contract claims here (akin to claims in Wisconsin cases Clay, Ferraro, and Bass finding handbook or bylaw language can create for-cause employment) as brought by a non-tribal member. Clay v. Horton Mfg. Co., Inc., 172 Wis. 2d 349, 354, 493 N.W.2d 379 (Ct.App. 1992), Ferraro v. Koelsch, 124 Wis. 2d 154, 169-70, 368 N.W.2d 666 (1985), Bass v. Ambrosius, 185 Wis. 2d 879, 885-886, 520 N.W.2d 625 (Ct.App. 1994).

The Oneida law OSGC had repeatedly cited in its support, albeit in arguing issues other than jurisdiction, was the case of Beverly J. Schoen v. Oneida Airport Hotel Corporation, 6 O.N.R. 3 – 134-136, 143 (2000) (R. 30 [Exhibit 1]). Schoen involved a litigant-employee who was an Oneida tribal member, seeking to assert Oneida-law employment claims, and suing a corporation chartered under Oneida law. 6 O.N.R. 3 – 134-136, 143. Because Schoen involved two Tribal-affiliated parties, it could not be relevant to or satisfy federal-law parameters for tribal jurisdiction over a *non-tribal member* like Kroner. Montana, 450 U.S. 544, 565.

The Court of Appeals described tribal jurisdiction as a matter of subject matter jurisdiction, and further stated the following:

At the transfer motion hearing, the circuit court indicated it believed there was concurrent jurisdiction. Kroner, however, emphasizes that the court failed to give any rationale for that conclusion, and argues there was no evidence in the record on which to base it. Additionally, Seven Generations' transfer motion and brief failed to set forth any basis for the tribal court's jurisdiction.

On the other hand, Kroner's brief opposing the transfer motion merely asserted Seven Generations had not established jurisdiction, without providing any argument or citation to authority.

(Decision, p. 6, ¶12-14, Pet. App. 32.)

In other words, the Court of Appeals deemed Kroner at least equally responsible to *disprove* subject matter jurisdiction to the Circuit Court as it deemed OSGC responsible to prove it. This rationale was in error per federal law at Plains Commerce Bank v. Long Family Land and Cattle Co., in which the United States Supreme Court found a *burden* rested with a tribal party:

Given Montana's “ ‘general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe,’ ” Atkinson, *supra*, at 651, 121 S.Ct. 1825 (quoting Montana, *supra*, at 565, 101 S.Ct. 1245), efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are “presumptively invalid,” Atkinson, *supra*, at 659, 121 S.Ct. 1825. The burden rests on the tribe to establish one of the exceptions to Montana's general rule that would allow an extension of tribal authority to regulate nonmembers on non-Indian fee land. Atkinson, 532 U.S., at 654, 121 S.Ct. 1825.

554 U.S. 316, 330, 128 S.Ct. 2709.

Application of Wis. Stat. Sec. 801.54 can be (and must be) consistent with this burden, and OSGC was required— as a tribal-affiliated party subject to Plains, and as the party bringing the Sec. 801.54 motion— to affirmatively substantiate the Tribal Court had subject matter jurisdiction over the claims of the non-member (Kroner) being brought to that forum. But again, OSGC provided no such authority showing the Oneida forum met a limited Montana exception allowing for subject matter jurisdiction over non-tribal member Kroner’s type of contract claims.

The Court of Appeals acknowledged this, stating:

[T]he tribal court was provided copies of relevant case documents and informed the circuit court it was willing to accept jurisdiction. We may therefore assume the tribal court believed it had jurisdiction over the matter.[FN 6]

...

[FN 6]

While helpful, we do not suggest, however, that the tribal court’s jurisdiction

determination is binding. *See National Farmers Union*, 471 U.S. at 856-57.

(Decision, p. 9, ¶ 19, FN 6, Pet. App. 35.)

Because the Court of Appeals did not find subject matter jurisdiction existed in the Oneida Tribal Court per Montana standards, the Court of Appeals should have denied OSGC's motion for transfer on that basis alone. Federal law requires that subject matter jurisdiction be demonstrated in a tribal forum (here, the Oneida Tribal Court) before claims as to a non-member like Kroner can be heard there. Plains, 554 U.S. at 330.

The Court of Appeals described Montana's standards that apply to OSGC:

First, “[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.” Second, a tribe may exercise “civil authority over the conduct of non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.” These rules have become known as the Montana exceptions[.]

[citing Plains Commerce Bank, 554 U.S.] at 329-30, quoting Montana, 450 U.S. at 565-66).

(Decision, p. 9, ¶ 18, Pet. App. 35.)

These Montana standards were unmet in regard to Kroner, as the Oneida Tribe did not exert regulatory authority over Kroner's employment as a non-tribal member, and OSGC's own position is it did not enter a contract with Kroner (who OSGC claims was an at-will employee). OSGC has admitted in this litigation that the Oneida Tribe's regulatory law applying to tribal-member employees, i.e. the Oneida-law procedures referenced in the Tribe's “Blue Book” handbook, did not apply to Kroner. Kroner agrees. He has not filed a claim per the Blue-Book's

referenced procedural law, and has not asserted any Oneida-law claim, through that process or otherwise. **The fact that the Oneida Tribe did not regulate Kroner's employment means the Oneida Tribal Court *cannot adjudicate claims regarding his employment.*** Plains, 554 U.S. at 330. ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction").

Further, given OSGC's position that Kroner was an at-will employee, this means Kroner had (per OSGC's position) no contract or contract-law rights with regard to his employment. In sum, OSGC had not demonstrated to the Circuit Court that the Oneida Tribe had regulatory or contractual authority, per Montana standards above, over non-tribal member Kroner's employment. Indeed, OSGC *could not* have demonstrated this to the Circuit Court, had OSGC tried, given the case record and OSGC's own positions asserted.

The Court of Appeals did not examine or conclude this however, and instead found Kroner "forfeited his right to argue the tribal court lacked subject matter jurisdiction," because he "raise[d] the issue for the first time on appeal." (Decision, pp. 6-7, ¶¶ 12-15; Pet. App. 32-33.) This finding was in error. Kroner raised the issue of subject matter jurisdiction with the Circuit Court, on multiple occasions, in referencing OSGC's failure to show tribal jurisdiction and concurrent jurisdiction. For one example, Kroner's transfer motion response brief stated:

To address just a few [§ 801.54 issues], Defendant has not established the Tribal Court has jurisdiction or shares concurrent jurisdiction.

(R. 53:7-9; R. 35-2.)

While Kroner's raising of the issue OSGC had not established "the Tribal Court has jurisdiction" does not specify "subject matter jurisdiction," this is not necessary per applicable law. As the Court of Appeals noted:

Whether tribes may exercise judicial authority over nonmembers has been described as a question of subject matter jurisdiction. *See, e.g., Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 12 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855 (1985). More recently, however, the Supreme Court referred instead to "tribal court jurisdiction," "tribal jurisdiction," "tribal civil authority," "tribal sovereignty," "tribal civil jurisdiction," and other like terms. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008).

(Decision, p. 6, ¶12, Pet. App. 32.)

The Circuit Court record shows Kroner raised concepts similar to those above, which were likewise sufficient to identify the issue of subject matter jurisdiction. Further, subject matter jurisdiction is an arguable subcomponent of "concurrent jurisdiction" referenced in Sec. 801.54, although the statute does not define "concurrent jurisdiction" or explicitly reference "subject matter jurisdiction." Thus, Kroner's specific references in Circuit Court as to OSGC not showing "concurrent jurisdiction" was sufficient notice to preserve argument on appeal as to subject matter jurisdiction (or personal jurisdiction or other arguable component of "concurrent jurisdiction").

Of note, for much of the Circuit Court motion process, jurisdictional argument was focused on OSGC taking positions that were inconsistent (in Kroner's view and the Circuit Court's view), as OSGC was claiming (1) sovereign immunity applied, meaning the Circuit Court *had no jurisdiction* (2) yet,

paradoxically, OSGC at the same time was claiming the Circuit Court shared concurrent jurisdiction with the Tribal Court. In retrospect, Kroner would prefer he had engaged in significant argument as to subject matter jurisdiction, but again that issue was sufficiently raised and it was OSGC's burden to demonstrate that issue per its motion. Plains, 554 U.S. at 330.

Assuming subject matter jurisdiction is deemed by this Court to be a required component of Sec. 801.54 "concurrent jurisdiction", then Kroner submits that transfer-movant OSGC, and the Circuit Court case record, do not indicate basis for subject matter jurisdiction for this case and transfer should be denied on that basis as well. In summary, OSGC had not provided the Circuit Court, in support of OSGC's motion, any specific information or legal authority—as to either personal jurisdiction or subject matter jurisdiction—to back OSGC's conclusive assertions the Tribal Court had jurisdiction over this matter. Nor did the Tribal Court.

All the Circuit Court had to consider from the Oneida Tribal Court was the one-page Letter, which made brief and inconclusive references about jurisdiction. (R. 19, Pet. App. 26.) In fact, the Letter referenced jurisdiction as a *future* circumstance that *had not yet occurred*; it stated the Tribal Court was "willing to assume jurisdiction," and referenced this case as "not a case pending in the tribal jurisdiction." (R. 19, Pet. App. 26.) From these statements, the Tribal Court appeared to regard "jurisdiction" in terms of *personal* jurisdiction. If a complaint were filed in the Tribal Court, then personal jurisdiction is something the Tribal

Court could of course at that point “assume,” and there could then be a “case pending in the tribal jurisdiction.” As to *subject matter* jurisdiction, the Tribal Court’s Letter (1) does not specifically assert that subject matter jurisdiction exists; or (2) describe any basis or authority upon which subject matter jurisdiction could exist. (R. 19, Pet. App. 26.)

From the record the Circuit Court had before it, there simply was no information or authority that supported either personal jurisdiction or subject matter jurisdiction existed in the Tribal Court. Of note, concurrent personal *and* subject matter jurisdiction were deemed to be present in the case of Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians (commonly referenced as “Teague III”) that preceded formation of Sec. 801.54. 2003 WI 118, ¶¶ 11, 36, 265 Wis. 2d 64, 665 N.W.2d 899.

In Teague III, the plaintiff Teague (who was not a tribal member) filed a complaint in State court, and the tribal defendant filed a complaint in tribal court seeking declaratory judgment. Id. at ¶¶ 3, 35. This Court addressed issues of jurisdiction, and found that “Teague acknowledged personal service of the [tribal] band's complaint,” and the Court was “satisfied that the tribal court had both personal and subject matter jurisdiction.”⁵ Id. at ¶¶ 11, 36.

⁵ In its Decision, the Court of Appeals stated:

[] Seven Generations’ response brief on appeal asserts there was subject matter jurisdiction under the *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), federal minimum contacts analysis, discussed in *Teague*, 265 Wis. 2d 64, ¶35 (citing *Hinshaw v. Mahler*, 42 F.3d 1178 (9th Cir. 1994)). Kroner, however, opted not to file a

Teague III dealt with a potential "race to judgment" between two forums, tribal and State; both forums had complaints filed, and had concurrent jurisdiction established. Id. at ¶¶ 11, 36, 68. In this case, the Oneida Tribal Court has no complaint pending, and has not been joined to a "race."

Given the Circuit Court here did not have on hand such a "race" or a record showing any basis for concurrent personal and subject matter jurisdiction, OSGC's transfer motion must be denied.

The Court of Appeals found to the contrary, and stated (as part of its rationale) that Kroner's argument was undeveloped as to concurrent jurisdiction. (Decision, p. 7, ¶ 16; Pet. App. 33.) However, Kroner's appellate brief did reference authority and argument material to the issue of concurrent jurisdiction—including reference to the cases Plains Commerce Bank, Iowa Mut. Ins. Co., National Farmers Union Ins. Cos., Montana, and Teague. (Kroner's App. Brief, pp.25-28). The Court of Appeals had cited these cases in its decision and within its discussion (although it significantly differed from Kroner's argument) of concurrent jurisdiction. (Decision, pp. 6-9, ¶¶ 12-18; Pet. App. 32-35.) Of note,

reply brief. This constitutes a concession of the argument. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

(Decision, p. 7, ¶¶15-16; Pet. App. 33.)

On this point, Kroner submits that while his initial appellate brief did not explicitly reference International Shoe and its federal minimum contacts analysis, the initial brief did cite the above-referenced Teague case, and did (as in this Brief) cite language pertinent to jurisdiction in the Teague case at 265 Wis. 2d 64, 2003 WI 118, ¶¶ 3, 11, 35, 36 and 68. (Kroner App. Brief, pp. 27-28).

OSGC’s appellate response brief did not cite these cases, with the exception of Teague. (OSGC’s App. Response, pp. 7, 10.)

Kroner again submits that OSGC, as the transfer- movant and burden-carrier, failed to cite information or law to the Circuit Court from which a determination of concurrent jurisdiction—whether that entailed personal jurisdiction, subject matter jurisdiction, or both— could have been specifically based. As such, because the Circuit Court lacked such information from the movant or record, the transfer motion must be denied per failure to support the threshold “concurrent jurisdiction” requirement at Section 801.54(2).

IV. THE MOTION SOUGHT RETROACTIVE APPLICATION OF A STATUTE (SEC. 801.54) THAT WAS SUBSTANTIVE IN NATURE, AND AS SUCH THE MOTION MUST BE DENIED ON THAT BASIS AS WELL.

As an initial matter, in this case Sec. 801.54 was applied retroactively, to conduct that occurred before Sec. 801.54’s January 1, 2009 effective date. That is, Kroner’s filing of his Complaint and claims in Brown County Circuit Court on September 10, 2008 was the conduct (i.e. establishment of his Circuit Court case) that OSGC’s July 8, 2010 motion ultimately addressed (i.e. it sought to transfer Kroner’s case out of that Circuit Court). As the Court of Appeals noted, “Indeed, for a transfer issue to arise under WIS. STAT. § 801.54 in the first place, the case must have been filed in the circuit court.” (Decision, p. 13, ¶27, Pet. App. 39.)

Relatedly, the language of Wis. Stat. 801.54(2) states:

(2) DISCRETIONARY TRANSFER. *When a civil action is brought in the circuit court of any county of this state*, and when, under the laws of the United States, a tribal court has concurrent jurisdiction of the matter in controversy, *the circuit court may*, on its own motion or the motion of any party and after notice and hearing on the record on the issue of the transfer, *cause such action to be transferred to the tribal court*. ...

(emphasis added) Wis. Stat. § 801.54(2).

Kroner filed his Complaint September 10, 2008, and this conduct would have fulfilled the statutory criterion above—i.e. “a civil action is brought in the circuit court of any county of this state”—but this conduct occurred before the statute’s January 1, 2009 effective date. As such, the application of this statute to Kroner was retroactive. The statute Sec. 801.54 itself, and the Supreme Court Order 07-11 that created it, are both silent about whether the statute should be retroactively applied to conduct occurring prior to its effective date. Wis. Stat. § 801.54; Sup. Ct. Order No. 07-11, 2008 WI 114 (filed 7-31-08, eff. 1-1-09).

This Court considered an equivalent scenario in Trinity Petroleum, Inc. v. Scott Oil Company, Inc., a case “in which the conduct occurred prior to the new rule’s effective date and the motion was made after the new rule’s effective date.” 302 Wis. 2d 299, 323, 735 N.W.2d 1. This Court considered whether the rule at issue in Trinity — the new Wis. Stat. § 802.05 frivolous action statute, which (like Sec. 801.54) was created by this Court per Wis. Stat. § 751.12 rule-making authority — was substantive or procedural in nature. Id. at 303, 316.

This Court stated:

The general, well-recognized rule in Wisconsin jurisprudence is that “if a statute is procedural or remedial, rather than substantive, the statute is generally given retroactive application.”

Id. at 316-317, quoting Gutter v. Seamandel, 103 Wis. 2d 1, 17, 308 N.W.2d 403 (1981).

This Court further indicated that “[a] procedural law is that which concerns the manner and order of conducting suits or the mode of proceeding to enforce legal rights and the substantive law is one that establishes the rights and duties of a party.” Id. at 318, quoting Norman J. Singer, Sutherland Statutory Construction, § 41.4 at 398 (6th ed.2001).

This Court found that rules governing the award of attorneys' fees do not affect parties' substantive rights, and “[a]ccordingly, we conclude that the court did not modify or eliminate any vested rights belonging to any party when it repealed Wis. Stat. §§ 802.05 and 814.025 (2003-04) and replaced them with new Wis. Stat. § (Rule) 802.05 (2005-06).” Id. at 326.

However, the rule in Trinity concerned issues of frivolousness and attorneys fees that were narrow and procedural, whereas Kroner's matter involves the very existence or non-existence (through tribal transfer) of his right to bring substantive Wisconsin-law claims to decision in a Wisconsin Court. Kroner's whole-ball-of-wax situation differs substantially from the limited procedural issues in Trinity, and is more akin to a situation such as whether a statute of limitations allows a Wisconsin case to proceed or not—a matter addressed by this Court in Betthauser v. Medical Protective Co. 172 Wis. 2d 141, 149, 493 N.W.2d 40 (1992). In Betthauser, it was found “This court views statutes of limitation as

substantive statutes because they create and destroy rights.” See, 172 Wis. 2d 141, 149, 493 N.W.2d 40 (1992).

Here, the application of the rule (Wis. Stat. 801.54) at issue would destroy Kroner’s rights. When Kroner’s case was active in Circuit Court, he held the right to pursue substantive contract-law claims per Wisconsin-specific precedent, i.e. claims for wrongful discharge and claims per the Ferraro line of cases providing that handbook or bylaw language can create for-cause employment. In the Oneida Tribal Court, those claims and rights do not exist. Even if remotely similar lines of case precedent existed in the Oneida Tribal Court (and there has been no indication they do), any such cases, like Schoen, would very likely involve *tribal member employees*, and thus scenarios irrelevant to any Montana exception that must be met as to Kroner. Again, the Oneida Tribe has no authority— regulatory, contractual, or judicial— over non-tribal member Kroner’s employment with OSGC. Moving Kroner’s case to the Oneida Tribal Court would therefore remove his substantive rights, demonstrating Sec. 801.54 and its effects are substantive in nature.

When this Court created Sec. 801.54, as indicated by Supreme Court Order 07-11, this occurred by a 4-3 decision. Sup. Ct. Order No. 07-11, 2008 WI 114, p. 11. The Dissent argued the creation of the new rule Sec. 801.54 was contrary to rule-making authority at Wis. Stat. § 751.12(1), which does not allow creation of rules that modify substantive rights of any litigant. Id. at pp. 20-21. There was no case or controversy before this Court during Sec. 801.54’s creation, but Kroner’s

case illuminates how the rule causes substantive impairments to the rights of a litigant like him.

Even if this Court disagreed and found Sec. 801.54 *procedural* despite its effect on Kroner, it still must not be applied retroactively. As this Court indicated in Trinity, “Retroactive application of procedural rules is not, however, an absolute rule... [and] ... a procedural statute will not have retroactive application if it impairs contracts or disturbs vested rights.” Trinity, 302 Wis. 2d at 323. OSGC’s transfer motion, if granted, would impair Kroner’s Wisconsin-law contract claims and rights, as he would be prevented from asserting those rights and sent to a Tribal Court where those claims and rights do not exist. In summary, this Court should deny OSGC’s transfer motion, on basis that the statute Sec. 801.54 is substantive (and even if deemed procedural, it impairs his Wisconsin contract-law rights), and must not be retroactively applied.

CONCLUSION

Based on the legal standards above, this Court should reverse the decisions by the Circuit Court and Court of Appeals and deny OSGC’s tribal transfer motion. To the extent OSGC may seek remand, for yet another opportunity to argue to the Circuit Court that tribal jurisdiction could somehow exist despite Montana and all the other contrary information above, said events would be prejudicial to Kroner. At the point of the Circuit Court’s Order on August 31, 2010, the motion briefing deadline had passed, and with it a very long period in

which OSGC and/or the Tribal Court could have asserted that some specific authority supported tribal jurisdiction over non-tribal member Kroner's employment and claims.

Kroner had already prosecuted his case for almost two years within the Circuit Court, a forum for which the case record supports jurisdiction— and undisputedly so, given OSGC's waiver of sovereign immunity defense. If this Court allows OSGC to transfer the case to the Tribal Court, or allows remand for yet another opportunity for OSGC to try what it failed to do before, either such decision would give little confidence or comfort to individuals and businesses who are not tribal members and who believe (at their peril) that a waiver of sovereign immunity and a burden of showing tribal jurisdiction are concepts with meaning in a Wisconsin Court.

Dated this 3rd day of January, 2012.

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CERTIFICATION

I certify that this brief conforms to the rules contained in Sec. 809.19(8)(b) and (c), Wis. Stats., for a brief produced using the following font:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 character per full line of body text. The length of this brief is 10,379 words.

Dated this 3rd day of January, 2012.

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I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of s. 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 3rd day of January, 2012.

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