

STATE OF WISCONSIN
SUPREME COURT
DISTRICT III

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**CLERK OF SUPREME COURT
OF WISCONSIN**

John N. Kroner,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 2010AP002533

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 FACTS

The Statement of Facts submitted by the Plaintiff-Appellant, John N. Kroner, ("Kroner") is lengthy and argumentative. Rather than argue each point set forth in Kroner's statement of facts, there are a few points that will focus the appeal.

A. Status of Oneida Seven Generations Corporation ("OSGC").

Oneida Seven Generations Corporation is a tribally chartered corporate entity, wholly owned by the Oneida Tribe of Indians. It is not chartered under Wisconsin statutes but is given the authority by charter to operate as other Wisconsin corporations would operate and have similar powers. (R. 6, Ex. E) For instance, it has the right to enter contracts, to sue or be sued and its primary purpose is to manage land owned by the Oneida Tribe. (R. 6:3, ¶5.) The officers and board members of OSGC are selected by the Tribe through its business committee. (R. 6:2, ¶3)

Another Tribal corporation, the Oneida Airport Hotel Corporation, operates the Radisson Hotel and Conference Center in Green Bay. That corporation employed Beverly Schoen, the plaintiff in the Tribal proceeding referred to in Kroner's brief. The rules relating to discharge of employees of tribally chartered corporations are laid out in *Beverly J. Schoen v. Oneida Airport Hotel Corp.*, No. 98-EP-0022, 6 O.N.R. 3, (2000) and are applicable to Kroner who was an employee of OSGC.

**B. Employment of Plaintiff-Appellant-Petitioner,
John Kroner**

Kroner's brief correctly describes the employment relationship Mr. Kroner had with Oneida Seven Generations Corporation starting in 2001. He worked for approximately seven years and was discharged as an at will employee. Oneida Tribal corporations are permitted to enter at will employment relationships with their employees, that right having been upheld by the Oneida Tribal Judicial system in *Schoen, Supra*.

Mr. Kroner was not an officer of the corporation but he operated as Director or Property Manager of OSGC. See *Cooper v. Oneida Seven Generations Corp.*, No. 08-AC-008, ¶11 (Oneida Appeals 06/30/2008). His termination was not for cause. Mr. Kroner contends he was a corporate officer,

which OSGC disputes. This issue would be a factual issue for trial.

The principal place of business of OSGC is on the Oneida reservation. (R. 6, Article IV, P. 1) Corporate powers are listed at R. 6, Article VI, P. 2. The majority of the board members must be Tribal members. (R. 6, Article VII(D))

C. Nature of Blue Book.

There are a number of references in the briefing to the Oneida Personnel Policy and Procedure Book ("OPPP"), also called the Blue Book. This employment manual governs the terms of employment for direct employees of the Oneida Tribe. It does not apply to employees of the subsidiary tribal corporations. (R. 6:2, ¶¶3-4) A copy of the OPPP is included in the record at R. 6, Ex. B)

Kroner made allegations in his complaint that he was governed by the rules and procedures of the OPPP, a position he appears to have withdrawn. The OPPP is significant, however, because a direct employee of the Tribe is not an employee at will. The OPPP sets forth a number of ways an employee may challenge a discharge, including a right to appeal the ruling of the Personnel Commission to the Oneida Tribal Court system.

In the course of the case in the courts below, the references to the OPPP led the trial judge to conclude the Oneida Appeals Commission was more experienced in handling issues under the OPPP than a state court. (R. 55:9-10)

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 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)

D. Fourteen Month Delay in Seeking Transfer.

There is no question the case suffered from a delay of over a year between the time the Oneida Appeals Commission issued its letter accepting the case as a Chapter 801.54 transfer and the time the court actually granted a motion to transfer. The question of transfer to the tribal court was before the trial court at a much earlier stage in the

proceedings, however. As early as September, 2008, OSGC moved to dismiss in part to permit the case to be commenced in tribal court. In its brief dated September 30, 2008 in support of its motion, OSGC made the following request (R. 5:7)

Conclusion

The Court should dismiss this case based on considerations of sovereign immunity. Even if that weren't the case, comity would require that this matter be dealt with through the tribal judicial system. Whether the OPPP applies as Kroner contends to create an employment contract, or whether the OSGC's Employee Guidelines apply which expressly make Kroner an employee-at-will, it is clear the decision involves interpretation of tribal law and tribal governance considerations such that this court should dismiss this action to allow Kroner's claim to be asserted in the tribal system.

(R. 5:7)

Since the case was commenced before Chapter 801.54 became effective on January 1, 2009, the discussion of transfer was before the trial court, but not under §801.54.

OSGC cannot explain why the delay in the transfer occurred except to note there may have been some changes in the Circuit Court office which prevented the case from coming back on the court's calendar. As noted by the Court of Appeals in its opinion, OSGC indeed anticipated the follow-up to the tribal court's letter would be generated

by the trial court itself, without any further input from the parties. (See Pl. Appx. 39:13, ¶29)

ARGUMENT

I. THE CIRCUIT COURT AND THE COURT OF APPEALS ADEQUATELY CONSIDERED ALL THE FACTORS UNDER §801.54(2).

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. Moreover, the Court of Appeals did consider and weigh each factor and independently determined the case was better heard in tribal court.

Kroner 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.

The decision of the Court of Appeals supports this proposition. 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 v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, ¶50, 265 Wis. 2d 64, 665 N.W.2d 889 makes clear tribal court judgments are to be given full faith and credit with very limited exceptions. Kroner's reluctance to go to tribal court is no justification for not transferring the case there.

The entire trial and appellate court record provides both this court sufficient information to satisfy transfer to tribal court under all the factors listed in §801.54, Wis. Stats. 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 OPPP 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, 134-50 (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 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

¹ *Schoen v. Oneida Airport*, 6 O.N.R. 3 (2000) located at <http://www.oneidanation.org/uploadedFiles/appeal-2000.pdf> (last accessed Jan. 19, 2012)

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. Having injected that concept into the case, Kroner should not now 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, neither the trial court nor the appellate court did so.

The fourth factor is the tribal membership status of the parties. As stated in the preceding paragraph, this case involves a corporation wholly owned by the Tribe and organized and existing under tribal law. Ignoring that fact and insisting the parties must be individual tribal members would ignore the vested interest of the Tribe in this case and unjustifiably limit the scope of this factor. As noted by Judge Warren in *Barker v. Menominee Nation Casino*, 897 F.Supp. 389 (E.D. Wis., 1995).

The Commission and Casino, in turn, were issued a corporation charter by the Legislature through a tribal ordinance and pursuant to the Tribal Constitution; because "an action against a tribal

enterprise is, in essence, an action against the tribe itself."

Id. at 393 (internal citations omitted)

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 OPPP. The claim should be deemed to have arisen at OSGC's business location, not off the reservation.

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 OPPP, 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. 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 already 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 and 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 far broader applicability to the Tribe than to Wisconsin residents generally. It would add to precedent and would confirm non-tribal employees of the Tribe and its corporate subsidiaries are subject to the rule of the *Schoen* case.

The trial 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 trial 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.

Viewed as a simple exercise of discretion, the trial court had valid reasons for focusing on the tribal court as the appropriate forum to interpret tribal documents in ordering the transfer and the Court of Appeals properly agreed. This court should not disturb the exercise of discretion by those courts.

II. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN APPLYING THE VARIOUS FACTORS UNDER §801.54.

Kroner argues at length that, in addition to not addressing all factors under §801.54, the trial court abused its discretion by giving the wrong weight to the factors it did consider. OSGC's argument in response to Issue No. I addresses this argument. To reiterate, the trial court clearly put great weight on the fact the tribal court was in a better position to interpret documents developed by the Tribe than was the trial court.

Kroner also appears to have forgotten the case was nearly dismissed by the trial court at a motion hearing on March 31, 2009. (R. 13:24-25)

THE COURT: I think the -- the least -- I think the most efficient thing is to find out about this issue of the transfer, and if there's going to be a transfer, then what I would do is have you prepare an order transferring the case, and then the order should indicate that the transfer -- seeks a dispositive determination by the appeals commission. If that doesn't happen -- so if that doesn't happen, then I would like you to indicate that there were findings of fact which

were that the doctrine of sovereign immunity applied based upon the record and that a finding of fact that based upon all the submittals the court was satisfied even if that wasn't true that the plaintiff is in a position of an employee at will under the law of this state, and, therefore, based upon that finding of fact, the conclusion of law is that the case should be dismissed on its merits. All right? (Emphasis added)

MR. OLSON: Okay.

(R. 13:24-25)

Rather than dismiss the case, the court ultimately ordered the transfer. This discretionary ruling afforded Kroner an opportunity to make his argument concerning his rights under the OPPP to the entity that ordinarily interprets the OPPP. Rather than have his case dismissed under Wisconsin law, Kroner got a chance to make his novel argument in tribal court, which, contrary to his contention, preserves his claim. Certainly, OSGC would have preferred the trial court dismiss the case in September 2009. Instead, OSGC was left to defend the case, albeit in a different forum once the transfer order was entered.

It is also of great significance that the Court of Appeals considered all the §801.54 factors, weighed them and independently found against Kroner. It exercised its own discretion in affirming the trial court. (P APP 37-40) The Supreme Court generally affirms the Court of Appeals'

decision affirming a discretionary ruling by a trial court. *State v. Outlaw*, 108 Wis.2d 112, 120, 321 N.W.2d 145 (1982). It generally will also not review discretionary decisions of the Court of Appeals. *State v. McConnohie*, 113 Wis.2d 362, 369, 334 N.W.2d 903 (1983). Thus, whether this court is considering the affirmance of the trial court's exercise of discretion or the independent discretionary decision of the Court of Appeals in this case, the court should pause before even considering disturbing those rulings.

III. BOTH COURTS HAVE SUBJECT MATTER AND PERSONAL JURISDICTION.

Although the appellate court discussed Kroner's argument that the trial court had no subject matter jurisdiction (and found it did), it correctly noted Kroner had forfeited his right to argue the tribal court lacked subject matter jurisdiction. Likewise, the Supreme Court should refuse to entertain Kroner's argument as a basis for overturning the trial court's decision.

If this Court is inclined to engage in a discussion of subject matter jurisdiction, it should rule in favor of OSGC. In its simplest terms, Kroner's jurisdictional argument can be summarized as follows:

1. The tribal court has no action pending and therefore no subject matter jurisdiction

over this case while it was pending in state circuit court.

2. The tribal court could not have jurisdiction over him as a non-tribal member

There is no question the Oneida Tribal Court had no personal jurisdiction over any of the parties in this case for the simple reason there was no action pending in tribal court. The transfer of the case would have given the tribal court jurisdiction over both parties, however, subject to the Supreme Court cases cited by Kroner.

The U.S. Supreme Court recognizes two exceptions to the general rule that tribal authority over nonmember activities taking place on the reservation is restricted. Tribes may exercise their jurisdiction over non-Indians on their reservations, even on non-Indian fee lands, as follows:

First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of non-members 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.

Plains Commerce Bank v. Long Family Land Cattle Co., Inc., 554 U.S. 316, 329-30, (2008) quoting *Montana v. United States*, 450 U.S. 544, 565-66 (1981).

The facts involved in Kroner's claim fit squarely within the first *Montana* exception. Kroner worked for a tribally created and owned entity for seven years. He alleges his termination violated some vested right he enjoyed with that entity. Clearly, he had a consensual relationship with the Oneida Tribe and the duties of his employment were purely commercial in nature. Although he worked for a tribally chartered corporation, not the Tribe itself, he nevertheless is very similar to Mr. Teague. *Teague*, 2003 WI 118, ¶36. It was reasonable for him to foresee that he would be subject to tribal court jurisdiction. As noted above, Kroner's complaint commences a suit against the Tribe under *Barker v. Menominee Nation*, 897 F.Supp. 389 and *Williams v. Lee*, 358 U.S. 217 (1959).

Moreover, by basing his claim on rules set forth in the OPPP, he concedes those rules apply to him. Ironically, OSGC disagrees, contending throughout that Kroner was an employee at will, subject to all of the common law rules of employment in Wisconsin. It is Kroner, not OSGC, who raised the question of construction of the OPPP. Given his assertion of some coverage under those documents, the conclusion of the trial court that the tribal judicial system is a better place to construe those documents, makes perfect sense.

There is concurrent jurisdiction in this case. 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 (Ct. App. 1987). Kroner's argument that there can be no concurrent jurisdiction because there was no case pending in tribal court is wrong. 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. That is the case here.

Kroner does not argue the tribal court does not have jurisdiction over employment issues arising from the subsidiaries. His reference to the *Schoen* case concedes

that fact. He contends, however, that since he is not a tribal member, *Montana* prevents the tribal court from having any jurisdiction over his employment issues with OSGC. The trial court and the Court of Appeals recognized the realities of the situation and rejected Kroner's attempt to make theoretical distinctions regarding the true nature of his employment.

Kroner's reliance on cases dealing with tribal regulation of non-tribal members on tribal reservation land that may or may not be owned in fee by tribal members are not applicable to this case. As an employee of OSGC for seven years, Kroner clearly had a long-standing relationship with a major tribal entity. His claim is based on rights he claims arise out of a document drafted by the Tribe. He cannot ignore these facts. The trial court and the Court of Appeals recognized the significance of these essential facts and determined Kroner's claim is subject to the jurisdiction of the tribal court. Those decisions should both be affirmed.

IV. SECTION 801.54, WIS. STATS. IS A PROCEDURAL STATUTE THAT CODIFIES THIS COURT'S DECISION IN *TEAGUE*.

As pointed out by Kroner, the courts make a distinction between the retroactive enforcement of procedural and substantive statutes. While it is true

§801.54 became effective on January 1, 2009 after this case had been commenced, it is also true that as early as September 30, 2008, OSGC had raised the question of transfer to the tribal court. To rule on OSCG's request, the court would simply have applied the analysis called for in *Teague, Supra.*, which are essentially the same as those in §801.54. Although the trial court focused on the factors it considered most significant, it is clear the trial court reviewed the entire matter before making its transfer ruling. That action was affirmed by the Court of Appeals in its decision, but the Court of Appeals went further, independently making specific findings on the §801.54 factors. Thus, there exists a clear record based on the facts presented, that all of the relevant factors were considered and weighed. Even if Kroner were correct about the trial court's handling of the motion, he cannot deny the Appellate Court sua sponte followed the appropriate procedure.

The Court's order granting this petition for review directed Kroner to answer this 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. Stats. §801.54 became effective, have any bearing on the applicability of §801.54? (Pl. Appx. 41)

The pendency of the action for two years has no bearing on the timing of the motion. Unlike other parts of Chapter 801, there is no time limitation in §801.54. In this case, the transfer issue came up as an alternative to dismissal and there was a fourteen (14) month delay in completing the process. The delay is unfortunate but not determinative.

CONCLUSION

OSGC respectfully requests the Court affirm the Court of Appeals decision and order the transfer of the case to the Oneida Tribal Judicial System as ordered by the trial court.

Respectfully submitted,

Dated this 20th day of January, 2012.

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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 24 pages.

Dated this 20th day of January, 2012.

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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 20th day of January, 2012.

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I hereby certify that on January 20, 2012, this brief was delivered to a third-party commercial carrier for delivery to the Clerk of Court of the Supreme Court within 3 calendar days. I further certify that the brief was correctly addressed as follows:

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CERTIFICATION OF MAILING

I further certify that on January 20, 2012, this brief was deposited in the United States mail for delivery to all counsel as follows:

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