SUPREME COURT OF WISCONSIN

John N. Kroner,
Plaintiff-Appellant-Petitioner,

v.

Oneida Seven Generations Corporation,
Defendant-Respondent.

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

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

REPLY BRIEF OF PLAINTIFF-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

United States Supreme Court Cases

Wisconsin Supreme Court Cases

Oneida Tribal Judicial System

STATUTES

ARGUMENT

I. THE ONEIDA TRIBE HAD NOT ENACTED LAW THAT REGULATES NON-TRIBAL EMPLOYEES LIKE KRONER, THUS PER FEDERAL LAW THE ONEIDA COURT DOES NOT HAVE JURISDICTION TO ADJUDICATE HIS ISSUES AND TRANSFER MUST BE DENIED.

OSGC's response brief, at pages 19-20, references the United States Supreme Court case of Montana v. United States, and a Federal law standard that applies to this matter: the "first *Montana* exception." Montana v. United States, 450 U.S. 544, 565-66, 101 S.Ct. 1245 (1981). The first Montana exception was stated in the Wisconsin Court of Appeals' decision in this matter as follows:

> **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 v. Long Family Land & Cattle Co., 554 U.S. 316, 329-30, 128 S.Ct. 2709 (2008), quoting Montana, 450 U.S. at 565-66].

(emphasis added) (Court of Appeals Decision, p. 9, ¶ 18, Pet. App. 35.)

Importantly, and pertinent to the first *Montana* exception's language that a "tribe *may regulate*" nonmembers who enter specified relationships with the tribe, the Supreme Court has also determined that **"[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction."** (emphasis added) Plains, 554 U.S. at 330. In other words, a tribal court such as the Oneida Tribal Court cannot have subject matter jurisdiction over a nonmember like Kroner

unless the tribe at issue (here the Oneida Tribe) had also exercised *legislative* authority over the nonmember.

OSGC's response brief assumes the Oneida Tribal Court can *adjudicate* this case involving Kroner's former employment, yet OSGC fails to address the Montana perquisite requirement that the Oneida Tribe had ever *regulated* Kroner's employment. There has been no showing the Oneida Tribe had enacted any regulations or legislation as to employment issues concerning non-tribal members like Kroner. In fact, the Oneida case OSGC references, Schoen, has language indicating there is a *lack of any Oneida tribal legislation* as to employees (whether tribal members or not) who work for Oneida's tribal-affiliated corporations. Beverly J. Schoen v. Oneida Airport Hotel Corporation, 6 O.N.R. 3 – 134-136, 143 (2000) (R. 30 [Schoen decision attached as Exhibit 1]).

In Schoen, the Oneida Appeals Commission/Appellate Court stated:

> … [D]espite the laudable goal and ideal of for-cause employment, such spirit can only be enforced against the Respondent [Oneida Airport Hotel Corporation] if the Blue Book applies to the Respondent's employment practices. The Blue Book was created to govern the employee relations for Tribal employees of the Oneida Nation. Radisson Inn employees are not considered Tribal employees, they are Corporate employees. As such, this appellate body can only apply the laws as they are and cannot dictate what might be a desirable result based upon presently inapplicable laws. Such a policy decision lies with The Oneida Business Committee and/or General Tribal Council, given its review authority over the actions of the Respondent, not with the judicial body.
>
> [space added]
>
> Had the legislative branch specifically considered this issue upon creation of the corporation or the assertion of management control of the Radisson Inn by the Respondent, this intent would have been clearly established. This body would therefore not have had to infer the intent.
>
> [space added]

> It is the considered opinion of this court that the [Oneida] legislative branch should examine the issue of 'at will' applicability. In order to avoid future contested cases or simplify the resolution of such cases, the Tribe should clearly establish its public policy with respect to its corporate employees.
>
> Schoen, 6 O.N.R. 3-134, 148.

In making these statements, the Oneida Appellate Court indicates that Oneida legislative entities had *not* enacted laws or regulations applying to employees of tribe-affiliated corporations. OSGC has not alleged or showed the Oneida Tribe, since the Schoen decision and its language above, has enacted any legislation that regulates the employment of tribal-affiliated corporations' employees.

In summary, Federal law requires a tribe show that the tribe regulated (via legislation) the affairs of a non-tribal member before that tribe's court could ever exercise adjudicative authority or subject matter jurisdiction over that non-tribal member. Plains, 554 U.S. at 330. In this matter, OSGC has provided no proof or authority that the Oneida legislature has ever enacted regulations or laws that applied to nonmember Kroner's employment with tribal-affiliate corporation OSGC. Because of this absence of Oneida regulatory authority, it follows there is an absence of tribal subject matter jurisdiction per Federal law requirements. Accordingly, OSGC's motion must be denied, as it seeks transfer to a tribal court that lacks jurisdiction under Federal law standards.

II. OSGC MAKES THE CONCLUSORY ASSERTION THE CIRCUIT COURT RECORD CONTAINED INFORMATION AS TO "ALL" SEC. 801.54(2) FACTORS, BUT FAILS TO SHOW WHERE THE RECORD CONTAINED INFORMATION AS TO MULTIPLE FACTORS, AND THE MOTION MUST BE DENIED BASED ON THE INFORMATION'S ABSENCE.

As the plain language of Wis. Stat. §801.54 indicates, a Circuit Court must consider "*all*" equitable factors listed at Sec. 801.54(2) before the Court could permit transfer. OSGC states the following at page 6 of its response brief: "While it is true the circuit court did not make a specific finding or include a specific discussion of each factor [under Sec. 801.54(2)], it is clear from the record all factors were presented to the court for its consideration."

OSGC's phrasing, "it is clear from the record all factors were presented," is conclusory. OSGC has failed to show *where*, in the record, there was evidence or information addressing factors (2)(g)-(j). For specific example, and as Kroner's initial brief noted, factor (j) requires consideration of "[t]he 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." This factor requires information about the *Tribal Court's* "process, practice, and procedure." Otherwise, there can be no comparison and assessment (as required) as to which court would have "the action … heard and decided most promptly."

There was no information in the Circuit Court's record about the Oneida Tribal Court's "process, practice, and procedure." Had OSGC (or the Oneida Court) wished to do so, they presumably could have informed the Circuit Court, for example, whether the Oneida Tribal Court would have scheduled Kroner for trial, what type of trial, and what scheduled obligations and deadlines would precede that trial. Similarly, information could have been provided as to whether the Oneida Tribal Court would or would not allow a period of discovery, and if so, how long that period would be. Also lacking was any information as to whether the Oneida Tribal Court would have afforded OSGC a new dispositive motion calendar in the Tribal Court, despite OSGC's dispositive motion in Circuit Court having been denied and the motion deadline there having expired. Such information was important to know.

At the point transfer motion briefing was completed, the Circuit Court case was just about three and one half months from trial. (R. 28-1, R. 38, Pet. App. 1.) It was essential that Tribal Court procedural information like that above be provided, because what was unknown could have worked to Kroner's disadvantage, e.g. whether he would have had to pay higher litigation costs associated with any new discovery period, or face new delay or risk due to a new dispositive motion schedule, etc. Yet there was no information in the Circuit Court record whatsoever, from OSGC or elsewhere, as to these issues or any other information concerning the Oneida Tribal Court's "process, practice, and procedure."

OSGC seeks to gloss over such holes in the record, like the absence of factor (j) information as noted above, in making the conclusory assertion "it is clear from the record all factors were presented." OSGC further asserts, at page 6 of its response: "[T]here 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."

Of note, Kroner's appeal is *not asking* for this scenario, where the matter is remanded for the Circuit Court to re-evaluate the record, and to (like OSGC suggests) merely state magic words that a discretionary review of all 801.54 factors took place. It would be impossible for the required discretionary review to occur, because the record did not contain the information necessary for the Circuit Court to consider all 801.54(2) factors as required. OSGC's motion must be denied outright, as the (incomplete) record following OSGC's motion submissions would not allow for a proper discretionary review or a magic-words correction.

III. CONTRARY TO WHAT OSGC'S RESPONSE SUGGESTS, OSGC HAD NOT MOVED TO TRANSFER BASED ON TEAGUE OR ANY OTHER BASIS AT ANY TIME BEFORE THE SEC. 801.54 EFFECTIVE DATE, AND OSGC'S (ONLY) MOTION SEEKING TRANSFER MUST BE DENIED BECAUSE IT SOUGHT RETROACTIVE APPLICATION OF A STATUTE (SEC. 801.54) THAT WAS SUBSTANTIVE IN NATURE.

At pages 36-40 of Kroner's initial brief, he argued that this Court should deny OSGC's transfer motion because Sec. 801.54 is substantive— and even if deemed procedural, that the statute impairs his Wisconsin contract-law rights—

and as such, must not be retroactively applied as OSGC's motion seeks. OSGC's response did not address most of Kroner's arguments or cited authority on these issues concerning retroactive application of Sec. 801.54.

Instead, in addressing issues of timing, OSGC's response focused on a different line of argument. OSGC founded its argument on the suggestion that OSGC had previously sought transfer to the Oneida Tribal Court, at a time *prior to* its transfer motion at issue here, and a time prior to the effective date of Sec. 801.54. At pages 4-5 of its response, OSGC states:

> 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.

OSGC's response further states, at pages 22-23:

> 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.

Kroner disputes these assertions. The September 2008 motion OSGC references was a motion to dismiss, not a motion to transfer. (R. 4.) Later, in April 2009, the Oneida Tribal Court wrote its Letter that mentioned Sec. 801.54 transfer as a possibility. (R. 19, Pet. App. 26.) OSGC waited over fourteen months after that Letter before filing its (first and only) motion to transfer. (R. 19, Pet. App. 26, R. 29.) That Sec. 801.54 motion is the motion at issue here. That motion— as Kroner's initial brief described, and as OSGC's response did not refute— seeks

retroactive application of Sec. 801.54, which is impermissible under applicable law because the statute is substantive in nature.

Kroner disputes OSGC's premise above that some motion other than the (retroactive) Sec. 801.54 motion was at issue, and he further disputes OSGC's assertion above that had the Circuit Court applied standards from Teague to this case, then transfer would have been warranted per those standards. Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians, 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899 (2003). An analysis under Teague would have required denial of a transfer motion on several grounds, one of which being the Oneida Tribal Court's lack of personal jurisdiction.

In Teague, 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 found "Teague acknowledged personal service of the [tribal] band's complaint" in tribal court and this Court was satisfied the tribal court had personal jurisdiction. Id. at ¶¶ 11, 36.

If an analysis and finding of personal jurisdiction as had occurred in Teague were required in this case, OSGC's attempt to transfer would fail. It is indisputable that no complaint was ever filed in the Oneida Tribal Court as to Kroner and OSGC's dispute, and that no personal jurisdiction was ever established in the Tribal Court. Thus, even had OSGC made a motion to transfer before the Sec. 801.54 effective date (which OSGC did not), such a motion would have necessitated denial if subject to the analysis of Teague.

CONCLUSION

Based on the reasons and legal standards above, and for those stated in Kroner's initial brief, this Court should reverse the decisions by the Circuit Court and Court of Appeals and deny OSGC's tribal transfer motion.

Dated this 30rd 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 2,174 words.

Dated this 30th 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 30th day of January, 2012.

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