

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2533

Cir. Ct. No. 2008CV2234

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JOHN N. KRONER,

PLAINTIFF-APPELLANT,

V.

ONEIDA SEVEN GENERATIONS CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Brown County:
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. John Kroner appeals an order transferring his civil suit to the Oneida Tribal Judicial System pursuant to WIS. STAT. § 801.54,¹ titled,

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

discretionary transfer of civil actions to tribal court. Kroner argues the circuit court erred because the record did not support its determination that the tribal court had concurrent jurisdiction. Kroner further contends the court failed to properly consider the statutory discretion factors. We conclude the record supports the circuit court's exercise of discretion, and affirm.

BACKGROUND

¶2 Oneida Seven Generations Corporation is a tribally chartered corporation. It is controlled by the Oneida Business Committee on behalf of the Oneida Tribe, the corporation's sole shareholder. Seven Generations' net revenue is paid to the tribe's general fund. Seven Generations' purpose "is to promote and enhance business and economic diversification directly or as a holding company for real estate assets, management of related assets, or as a holding company for other business ventures of the Oneida Nation."

¶3 Kroner was Seven Generations' chief executive officer from 2001 to 2008, when his employment was terminated. Kroner sued in September 2008, alleging breach of contract because Seven Generations failed to follow policies and procedures set forth in "the Blue Book," the tribe's employee manual.² Kroner is not a member of the tribe.

¶4 In lieu of an answer, Seven Generations moved to dismiss, asserting the complaint failed to state a claim. Seven Generations argued that the Blue Book was inapplicable to Kroner; that if any document applied, it was Seven Generations' employee guidelines; and that those guidelines provided that all

² The Blue Book is also known as the Oneida Personnel Policy and Procedure book.

employees were at-will. Additionally, Seven Generations asserted the action was barred by sovereign immunity.

¶5 The circuit court conducted a hearing on the motion to dismiss in March 2009. The court reserved ruling on the motion and suggested the parties apply to the tribal court to accept transfer of the case. In April, Seven Generations' counsel sent two letters to Winnifred Thomas, Chief Judicial Officer of the Oneida Tribal Judicial System. Counsel also delivered copies of pertinent case documents. The letters indicated:

Judge Zuidmulder asked that I contact the Oneida Tribal Judicial System to indicate that he was willing to transfer the matter to the Tribal System as a matter of comity prior to rendering any decision in the matter. In the event you did not want to assume jurisdiction he would then formally render his decision. ...

Because there are issues regarding the use of the [Blue Book] to establish an employment contract in this case, and issues regarding the existence of and potential waiver of sovereign immunity, it was felt the Tribal System should be given an opportunity to take over the case if it desired.

I would ask that you review the enclosed materials and then let [us] know whether you would like to assume jurisdiction. ...

....

[T]he circuit court would like to know if you would accept jurisdiction of this matter and hear this case on the merits.

That same month, Thomas replied:

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.

¶6 No immediate action was taken in response to the tribal court's letter. Kroner conducted written and oral discovery. The circuit court held a hearing in April 2010 at which it gave the parties a scheduling order for pretrial motions, discovery, and trial. In July, fourteen months after receipt of the tribal court's letter, Seven Generations moved to transfer under WIS. STAT. § 801.54. In August, the court denied the still-pending motion to dismiss. Later that month, the court conducted a hearing on the § 801.54 motion and granted Seven Generations' request to transfer. Following the denial of his motion to reconsider, Kroner appeals.

DISCUSSION

¶7 The discretionary transfer statute, WIS. STAT. § 801.54, is new to Wisconsin law. In fact, the statute, created by supreme court order, did not become effective until approximately three months after this action was commenced, after Seven Generations had moved to dismiss.³ See S. CT. ORDER, 2008 WI 114 (eff. January 1, 2009).

¶8 The transfer statute provides that in cases where there is concurrent jurisdiction between a circuit court and a tribal court, the circuit court may, "in its discretion," transfer the action to the tribal court when warranted. WIS. STAT. § 801.54(1). A circuit court may transfer a case to tribal court on its own motion or the motion of any party. WIS. STAT. § 801.54(2). To do so, the court "must

³ The order adopting the discretionary transfer statute was the subject of a three-justice dissent, which, inter alia, expressed concern that the statute provides inadequate guidance for determining concurrent jurisdiction, particularly when, as here, one party is not a tribal member. See S. CT. ORDER, 2008 WI 114, ¶¶1-27 (eff. January 1, 2009) (Roggensack, J. dissenting), available at <http://www.wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=33638>.

first make a threshold determination that concurrent jurisdiction exists.” *Id.* If that determination is made, “in the exercise of its discretion the circuit court shall consider all relevant factors, including but not limited to” multiple enumerated factors. *Id.*

¶9 Kroner first contends the court mistakenly concluded the tribal court had concurrent jurisdiction. Second, he argues that the court failed to consider and apply all of the statutory discretion factors, and that proper consideration demonstrates transfer was inappropriate.

Whether the tribal court had concurrent jurisdiction

¶10 Kroner first asserts the tribal court lacked personal jurisdiction because there was not a separate action concurrently pending in the tribal court. Kroner does not articulate an adequate legal argument in support of his assertion that “concurrent jurisdiction” in WIS. STAT. § 801.54 refers to personal jurisdiction. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶11 In any event, the transfer statute does not require, much less mention, concurrent pending actions. The situation contemplated by the transfer statute is akin to cases where state actions might be removed to federal court—without any requirement that cases be pending in both jurisdictions. *See, e.g., Sliwinski v. City of Milwaukee*, 2009 WI App 162, ¶7, 321 Wis. 2d 774, 777 N.W.2d 88; *Meyers v. Bayer AG*, 2007 WI 99, ¶¶15-16, 303 Wis. 2d 295, 735 N.W.2d 448. Moreover, when related actions are already pending in both the circuit and tribal court, the issue is instead one of comity, to be resolved under the rationale of *Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 2003 WI 118, 265 Wis. 2d 64, 665 N.W.2d 899.

¶12 Kroner next argues the tribal court lacked subject matter jurisdiction. 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).

¶13 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.

¶14 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. At the motion hearing, and again in his motion for reconsideration, Kroner only argued there was no jurisdiction because there were not concurrent cases pending. On appeal, Kroner again emphasizes that neither the circuit court nor Seven Generations provided any basis for the tribal court’s jurisdiction. However, neither does Kroner develop any argument that the tribal court lacks jurisdiction.

¶15 Because he raises the issue for the first time on appeal, Kroner forfeited his right to argue the tribal court lacked subject matter jurisdiction.⁴ *See State v. Huebner*, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727. Additionally, as Kroner fails to develop a proper legal argument, we need not address his contention. *See Flynn*, 190 Wis. 2d at 39 n.2. Moreover, 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 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).

¶16 Despite Kroner’s forfeiture, undeveloped argument, and concession by silence, the concurrent jurisdiction issue is of sufficient public interest to merit further discussion. *See Binder v. City of Madison*, 72 Wis. 2d 613, 618, 241 N.W.2d 613 (1976). “[W]hether a tribal court has adjudicative authority over nonmembers is a federal question;” it is not decided under state law. *Plains Commerce Bank*, 554 U.S. at 324. As a general proposition, the inherent

⁴ A party may not waive or forfeit the issue of whether the circuit court had subject matter jurisdiction and may raise the issue for the first time on appeal, and an appellate court “can and should reach an issue of subject matter jurisdiction even where neither party raises it.” *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 534-35, 280 N.W.2d 316 (Ct. App. 1979). That rule, however, is not implicated here. There is no dispute that the *circuit court* had subject matter jurisdiction. Further, following transfer, Kroner might be able to renew his objection to tribal jurisdiction before the tribal court. Regardless, after exhaustion of his tribal court remedies, Kroner may then challenge tribal court jurisdiction in the federal courts. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 19 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 855-57 (1985); *see also Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (“If the tribal court is found to lack such jurisdiction, any judgment as to the nonmember is necessarily null and void.”).

sovereign powers of a tribe do not extend to the activities of nonmembers; however, tribes retain power to exercise some forms of civil jurisdiction over nonmembers on their reservations. *Montana v. United States*, 450 U.S. 544, 565 (1981).

¶17 “Indian tribes [are] ‘distinct, independent political communities,’ qualified to exercise many of the powers and prerogatives of self-government.” *Plains Commerce Bank*, 554 U.S. at 327 (citations omitted). However, “the ‘sovereignty that the Indian tribes retain is of a unique and limited character;’ it centers on the land held by the tribe and on tribal members within the reservation.” *Id.* (punctuation modified; citations omitted). As part of their residual sovereignty, tribes retain power to legislate and to tax activities on the reservation, including certain activities by nonmembers; to determine tribal membership; to regulate domestic relations among members; and to exclude outsiders from entering tribal land. *Id.* at 327-28. “But tribes do not, as a general matter, possess authority over non-Indians who come within their borders.” *Id.* at 328.

¶18 “This general rule restricts tribal authority over nonmember activities taking place on the reservation[.]”⁵ However, the Supreme Court has “recognized two exceptions to this principle, circumstances in which tribes may

⁵ As stated, the rule restricting tribal civil authority is a *general* rule. As the Supreme Court previously explained:

[T]he existence and extent of a tribal court’s jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers Union, 471 U.S. at 855-56 (footnote omitted).

exercise ‘civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands.’” *Id.* at 329.

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[.]

Id. at 329-30 (quoting *Montana*, 450 U.S. at 565-66).

¶19 Here, Kroner consensually entered into employment with a tribal entity, on tribal lands. Kroner himself asserts that relationship is governed by contract under the tribe’s Blue Book. This demonstrates a reasonable basis for tribal jurisdiction under the first *Montana* exception. Additionally, the 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.⁶

Consideration of the relevant factors

¶20 The discretionary transfer statute requires that the circuit court “shall consider” the following factors when deciding whether to transfer a case to tribal court:

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.

- (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.
- (b) Whether the action involves traditional or cultural matters of the tribe.
- (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.
- (d) The tribal membership status of the parties.
- (e) Where the claim arises.
- (f) Whether the parties have by contract chosen a forum or the law to be applied in the event of a dispute.
- (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.
- (h) The court in which the action can be decided most expeditiously.
- (i) The institutional and administrative interests of each court.
- (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.
- (k) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

WIS. STAT. § 801.54(2)(a)-(k). Kroner argues the circuit court erroneously ordered transfer because the court did not explicitly reference the statute or its factors in its oral decision, and failed to address the substance of multiple factors. He further argues that proper consideration of the statutory factors militates against transfer.

¶21 The statute repeatedly indicates that the transfer decision is discretionary. When reviewing discretionary determinations, we bear in mind the following:

In the first place, there must be evidence that discretion was in fact exercised. Discretion is not synonymous with decision-making. Rather, the term contemplates a process of reasoning. This process must depend on facts that are of record or that are reasonably derived by inference from the record and a conclusion based on a logical rationale founded upon proper legal standards.

McCleary v. State, 49 Wis. 2d 263, 277, 182 N.W.2d 512 (1971). Further, a court erroneously exercises its discretion if it fails to address the factors on which the decision should be properly based. *Schmid v. Olsen*, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). Nonetheless, we generally have a duty to then determine whether the record supports the circuit court’s discretionary decision. *Id.* at 238.

¶22 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.”

¶23 Kroner fails to acknowledge that all factors were presented to the circuit court for its consideration. Seven Generations’ transfer motion brief not only cited WIS. STAT. § 801.54(2), but recited all of the factors set forth in paras. (a)-(k). The brief also argued that factor (a) was the most important in this case. It then briefly addressed factor (b) in the next section, and devoted the third section of its analysis to the remaining factors, asserting, “The other factors to be considered either do not apply or favor [Seven Generations].”

¶24 The hearing transcript demonstrates that the circuit court agreed, placing primary emphasis on factor (a), concerning interpretation of tribal law:

I am well satisfied that [Kroner] himself by the manner in which he has pled this case and the issues that he has engaged provide this court with more than adequate basis to conclude that the proper forum is the Oneida Tribal Court because the plaintiff himself desires to have interpreted rights and rules and regulations of the Oneida Nation as he would assert they apply to his circumstance.

The court later reiterated that was “the critical issue,” and stated it believed the tribal court was “far better equipped” to “interpret Oneida Nation rules, documents, legislation, [and] tribal policies[.]” The court’s observation in this regard also bore on factors (h) and (i), concerning the comparative interests and abilities of the circuit and tribal courts. The court indicated there would be no obstacles for the tribal court, whereas “if I were involved in this, I would be having to ... 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”

¶25 The court did not address factor (b), regarding whether the action involved tribal cultural matters. Seven Generations notes that Kroner has asserted his termination may have been related to his status as a nonmember of the tribe. Kroner did not argue the relevance of this factor in his brief, and failed to file a reply brief. It appears this factor is of minimal importance in this case.

¶26 Factors (c) and (d) are related. While the tribe is not directly a party, it exercises direct control over the tribally chartered corporation and receives all of Seven Generations’ revenue. Additionally, the court observed this case would “affect not only [Seven Generations] but all members of the Oneida Nation and all the employees of the Oneida Nation and everything in the future” Thus, for

purposes of para. (c) of the transfer statute, the tribe is essentially a party. Alternatively, we might reasonably consider Seven Generations a member of the tribe under para. (d). Kroner is a nonmember. However, as the court emphasized, he knowingly “chose to become employed by a wholly owned corporation of the Oneida Nation.” Although not a member, Kroner had a substantial relationship with the tribe, acting on its behalf. These factors support transfer.

¶27 Factor (e) also favors transfer. Seven Generations argues Kroner’s claim arises from his employment and termination by a tribal entity, on tribal lands. Kroner does not dispute this, noting only that the complaint was filed in a circuit court. That is irrelevant. 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.

¶28 Factor (f) does not apply. There was no contractual choice of law or forum.

¶29 Factor (g) is neutral. Seven Generations certainly could have moved for transfer earlier, but its motion was filed in accordance with the court’s scheduling order. Moreover, it appears Seven Generations may have initially believed a transfer motion was unnecessary because the court was intending to act on its own motion, based on the letters to and from the tribal court. As noted above, the statute permits the circuit court to initiate transfer on its own motion. *See* WIS. STAT. § 801.54(2).

¶30 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.⁷ 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. To all of this, Kroner fails to reply.⁸

¶31 The final factor, (k), is a catchall provision. Neither party asserts this factor applies.

¶32 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.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

⁷ The transferring circuit court maintains jurisdiction over the parties, even after transfer. See WIS. STAT. §§ 801.54(3), (5).

⁸ Factor (j) also refers to matters of evidence, process, practice, and procedure. It appears neither party introduced any evidence of the tribal court’s practices and procedures.

