

SUPREME COURT OF WISCONSIN

NOTICE

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No. 07-11

In the matter of the petition to create a rule governing the discretionary transfer of cases to tribal court

FILED

JUL 31, 2008

David R. Schanker
Clerk of Supreme Court
Madison, WI

On July 24, 2007, A. John Voelker,¹ Director of State Courts, on behalf of the State-Tribal Justice Forum,² petitioned

¹ In keeping with the court's usual practice, A. John Voelker, Director of State Courts, frequently submits petitions for rules on behalf of court entities. See, e.g., petition nos. 06-01 (In re amendment of SCR 72.01 Regarding Record Retention), 06-07 (In the matter of the Creation of a Court Rule Authorizing Use of Electronic Signatures by Court Officials), 06-08 (In the matter of the Creation of a Court Rule Governing Electronic Filing in the Circuit Courts), 07-05 (In the matter of the Amendment of Supreme Court Rule 32.09 regarding continuing education for Wisconsin Judiciary), 07-12 (In the matter of the petition to create a rule governing the use of videoconferencing in the courts), 07-14 (In the matter of the Amendment to SCR 70.14(2) formalizing vice-chairperson position on the Planning and Policy Advisory Committee (PPAC)), and 08-01 (In the matter of the Amendment of Rules of Pleading, Practice and Procedure: Wis. Stat. Rule Ch. 756, Juries). Furthermore, as the court considers a petition, it is the court's practice to assign a court commissioner or the clerk or chief deputy clerk of the supreme court to staff the petition, communicate with interested persons, and redraft the proposed rule in accordance with the court's instructions.

the court to create a rule governing the discretionary transfer of cases to tribal court, pursuant to the court's rulemaking authority under Wis. Stat. § 751.12. On October 1, 2007, the court issued an order scheduling the petition for a public hearing on January 8, 2008.

On October 31, 2007, the Clerk of the Supreme Court issued a letter to 34 agencies and organizations potentially having an interest in the petition to solicit comment and offer the opportunity to appear in person at the public hearing. The court received comments from several recipients of this letter and others, all writing in favor of the proposed rule: (1) Honorable James R. Habeck, Circuit Court for Menominee and Shawano counties (November 5, 2007); (2) Jerry P. Lang, District Court Administrator, Fourth Judicial District (December 6, 2007); (3) Honorable Leland Wigg-Ninham, President, Wisconsin Tribal Judges Association (December 7, 2007); (4) Attorney Paul Stenzel (December 7, 2007); (5) James Botsford, Indian Law Office Director, Wisconsin Judicare, Inc. (December 10, 2007); (6) Honorable Eugene L. White-Fish, Chief Judge, Forest County Potawatomi Tribal Court (December 10, 2007); (7) Winnifred L. Thomas, Chief Judicial Officer, Oneida Tribal Judicial System (December 11, 2007); (8) Honorable Gerald Ptacek, Chief Judge,

² The State-Tribal Justice Forum is a joint committee of state and tribal court representatives established by Chief Justice Abrahamson in 2005 to promote and sustain communication, education, and cooperation among tribal and state court systems. The committee consists of five circuit court judges, five tribal judges, one tribal attorney, one legislative liaison, one district court administrator, and the director of state courts.

Circuit Court of Racine County, on behalf of the Committee of Chief Judges (December 17, 2007); (9) Thomas J. Basting, Sr., President, State Bar of Wisconsin (January 3, 2008); and (10) John S. Swimmer, Chairman, Indian Law Section, State Bar of Wisconsin (January 3, 2008). No comment was received opposing the petition.

At the hearing at 9:30 a.m. on January 8, 2008, the petition was presented to the court by Honorable James Mohr, LacCourte Orielles Tribal Court, Chairperson, State-Tribal Justice Forum. Judge Mohr testified in favor of the petition and responded to questions posed by individual justices. Six other individuals testified in favor of the petition and were questioned: (1) Honorable Eugene White-Fish, Forest County Potawatomi Tribal Court; (2) Honorable John Anderson, Bayfield County Circuit Court; (3) Representative Gary Sherman, member of Legislative Council Special Committee on State-Tribal Relations; (4) Attorney Kenneth J. Artis, Black River Falls, Wisconsin; (5) Honorable Stanley Webster, Oneida Tribal Judicial System; and (6) Huma Ahsan, Deputy Director, Great Lakes Indian Law Center, University of Wisconsin Law School and former Chief Justice of Turtle Mountain Court of Appeals, Bellacourt, North Dakota. No individual or representative of any group testified in opposition to the petition.

Following the hearing, the court held an open administrative conference to discuss the petition. After discussion, the court voted to request further comment on three issues raised during the court's discussion of the petition:

First, under what circumstances is jurisdiction concurrent between tribal and state courts or exclusive in tribal or state court? Second, is there a right under the United States or Wisconsin constitution to have a case heard in state court rather than tribal court? Third, how does the proposed rule impact the application of Wis. Stat. § 806.245 (full faith and credit)? On January 11, 2008, the Clerk issued a letter to agencies and organizations with a potential interest in the petition requesting that comments on these issues be submitted to the court.

The court received three responses to its request. On February 15, 2008, the State-Tribal Justice Forum, writing to help the court "move forward with this historic rule," provided a seven-page single-spaced discussion of the current legal status, case law, and history of the jurisdictional and constitutional issues raised by the court, with two substantive attachments. The first attachment was a tribal court directory—a court-by-court index of Wisconsin's tribal courts, including the names of the judges, prosecutors, and tribal attorneys, the court's source of power, the areas of subject matter and personal jurisdiction, and tribal membership criteria. The second attachment was a United States Department of Justice memorandum regarding Public Law 83-280, which conferred jurisdiction on certain states, including Wisconsin, over most or all of Indian country within their borders. On February 15, 2008, the Great Lakes Indian Law Center filed a 29-page single-spaced report "to assist the court with building a solid legal

foundation for the proposed rule" and focusing on "the interplay between the State court and the Tribal court justice systems located in Wisconsin." On February 22, 2008, the Department of Justice provided an 11-page single-spaced examination of the jurisdictional and constitutional issues raised by the court, including recommendations for revision to resolve these issues.

In response to these comments, the Clerk prepared a revised draft of the proposed rule and, on March 5, 2008, provided it to the three commenting parties. On March 11, 2008, the State-Tribal Justice Forum responded with further suggestions and comments. On March 18, 2008, the Department of Justice provided further comments. On April 2, 2008, Representative Terry Musser, Chair of the Joint Legislative Council's Special Committee on State-Tribal Relations, submitted an 11-page single-spaced memorandum from the Wisconsin Legislative Council containing technical comments about the original and revised drafts of the proposed rule. Representative Musser indicated that the Special Committee has not taken a position on the petition.

On April 15, 2008, the court discussed the proposed rule and the commentary at its open administrative conference. The court voted on specific changes to the proposed rule and examined the possibility of adapting an existing statute, Wis. Stat. § 801.63, to accommodate the transfer of cases from state court to tribal court as an alternative to the creation of a new rule. The court charged the Clerk with the task of drafting alternative versions of the rule: (1) a redraft of the proposed

rule Wis. Stat. § 801.54 incorporating changes discussed and voted upon by the court, and (2) a draft of Wis. Stat. § 801.63 revised to include transfers to tribal court. At the court's request, on May 29, 2008, the Clerk submitted these drafts to Justice Crooks, who, upon reviewing these materials, determined that a revision of Wis. Stat. § 801.63 was not a feasible mechanism for transfer of cases to tribal court.

On June 24, 2008, the court received a comment on the proposed rule from Attorney Meg Vergeront on behalf of the Village of Hobart, asking that the court not approve the proposed rule in its current form and instead schedule a public hearing so that certain issues could be explored. On June 25, 2008, the court discussed Attorney Vergeront's comment and the alternative drafts at an open administrative conference. After discussion, the court voted to adopt the petition, as modified. Justice Roggensack dissented from the adoption of the petition; Justice Prosser and Justice Ziegler have joined in the dissent. Finally, the court ruled that the effective date of this rule shall be January 1, 2009, and that the court will review the operation of this rule in two years from the effective date.

Therefore,

IT IS ORDERED that effective January 1, 2009:

SECTION 1. 801.54 of the statutes is created to read:

801.54 Discretionary transfer of civil actions to tribal court. (1) SCOPE. In a civil action where a circuit court and a court or judicial system of a federally recognized American Indian tribe or band in Wisconsin ("tribal court") have

concurrent jurisdiction, this rule authorizes the circuit court, in its discretion, to transfer the action to the tribal court when transfer is warranted under the factors set forth in sub. (2). This rule does not apply to any action in which controlling law grants exclusive jurisdiction to either the circuit court or the tribal court.

(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. The circuit court must first make a threshold determination that concurrent jurisdiction exists. 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:

(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.

(3) STAY OF PROCEEDING IN CIRCUIT COURT. When a circuit court transfers an action to tribal court under this rule, the circuit court shall enter an order to stay further proceedings on the action in circuit court. Jurisdiction of the circuit court continues over the parties to a proceeding in which a stay has been ordered under this section until a period of 5 years has elapsed since the last order affecting the stay was entered in the court. At any time during which jurisdiction of the court continues over the parties to the proceedings, the court may, on motion and notice to the parties, subsequently modify the stay

order and take any further action in the proceeding as the interests of justice require. When jurisdiction of the court over the parties and the proceeding terminates by reason of the lapse of 5 years following the last court order in the action, the clerk of the court in which the stay was granted shall without notice enter an order dismissing the action.

(4) APPEALS. The decision of a circuit court to transfer an action to tribal court may be appealed as a matter of right under s. 808.03(1).

(5) EFFECT OF TRANSFER. When a circuit court orders the transfer of an action to tribal court under this rule, the circuit court shall retain the circuit court filing fee and shall transmit to the tribal court a copy of all circuit court records in the action.

(6) POWERS, RIGHTS AND OBLIGATIONS UNAFFECTED. Nothing in this rule is intended to alter, diminish, or expand the jurisdiction of the circuit courts or any tribal court, the sovereignty of the state or any federally recognized American Indian tribe or band, or the rights or obligations of parties under state, tribal, or federal law.

SECTION 2. The following Comment to Wis. Stat. § 801.54 is not adopted, but will be published and may be consulted for guidance in interpreting and applying the statute:

COMMENT

The purpose of this rule is to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as efficiently as possible where appropriate. In considering the factors under sub. (2), the circuit court shall give particular weight to

the constitutional rights of the litigants and their rights to assert all available claims and defenses.

IT IS FURTHER ORDERED that the circuit courts, tribal courts, litigants, and attorneys affected by this rule shall advise the court, in writing, regarding their experience of this rule on or before January 1, 2011.

IT IS FURTHER ORDERED that notice of creation of Wis. Stat. § 801.54 be given by a single publication of a copy of this order and the dissent thereto in the official state newspaper and in an official publication of the State Bar of Wisconsin.

Dated at Madison, Wisconsin, this 31st day of July, 2008.

BY THE COURT:

David R. Schanker
Clerk of Supreme Court

¶1 PATIENCE DRAKE ROGGENSACK, J. (*dissenting*). Four Wisconsin Supreme Court justices, who constitute a majority of this court today, legislate to create a rule by which circuit courts may transfer jurisdiction of pending civil cases from Wisconsin circuit courts to any tribal court in Wisconsin, even when the litigants object to the transfer. I write in dissent because: (1) Rule 801.54 is inadequate and misleading in regard to addressing tribal court concurrent subject matter jurisdiction, which jurisdiction is extremely limited in scope when nonmembers are parties to the action; (2) Rule 801.54 impermissibly alters the substantive rights of tribal members, as well as nonmembers, contrary to the provisions of Wis. Stat. § 751.12(1) (2005-06),³ which limits the court's rule-making power; (3) Rule 801.54 undermines federal and state constitutional and statutory rights of litigants; and (4) a majority of the court has pushed this rule-change through before the end of the 2007-08 term of the court, even though the court has been presented with no information about the substantive rights and civil procedures that are available in tribal courts.

I. BACKGROUND

¶2 Tribal courts provide meaningful dispute resolution to many tribal members in courts that have well-grounded appreciations for the traditions so important to tribal justice.

³ All subsequent references to the Wisconsin Statutes are to the 2005-06 version unless otherwise indicated.

The Rule that the court implements today does not detract from their significant contributions.

¶3 However, today the court legislates through rule-making in response to Rules Petition 07-11. In so doing, four justices who constitute a majority of the court empower Wisconsin circuit courts to transfer pending civil actions to tribal courts, even when parties object to being subject to tribal court jurisdiction. The majority pushes forward under Rule 801.54, even though the conduct that forms the basis for the action may not have occurred on tribal land; even though all parties are not tribal members; even though this court has been provided no information about how the various tribal courts operate; and even though the United States Supreme Court in Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. ___, 128 S. Ct. 2709 (2008),⁴ appears to have narrowed the occasions when tribal courts have concurrent subject matter jurisdiction in civil matters.⁵ Why has a majority of this court pushed this rule change through notwithstanding the inadequacy

⁴ Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. ___, 128 S. Ct. 2709 (2008), bears Supreme Court Case Number 07-411 and was issued June 25, 2008.

⁵ The majority refers to a document provided by the tribal courts as listing the areas over which the tribes assert they have subject matter jurisdiction. See majority op., p. 4. However, this listing has no affect on whether a tribe has concurrent subject matter jurisdiction with a circuit court. This is so because, while the tribes may identify the matters over which they assert that they exercise subject matter jurisdiction, whether they actually have concurrent subject matter jurisdiction is a question of federal law, not tribal law. Id. at 2716.

of the information provided to the court? I do not know, but I suspect there is a reason that is not apparent from the materials submitted and considered by the court in open conference. Time will tell.

II. DISCUSSION

A. Concurrent Jurisdiction

¶4 Rule 801.54, created by a majority of the court, requires that before a circuit court may transfer jurisdiction of a pending matter to a tribal court, the circuit court must determine that the tribal court has concurrent subject matter jurisdiction.⁶ Because Rule 801.54 is very broad, on its face it has the potential to be applied to non-tribal as well as tribal members for conduct that occurs off as well as on tribal land.

¶5 Under "Public Law 280," Wisconsin courts have subject matter jurisdiction over civil actions that arise on tribal land

⁶ The rule states in relevant part: "In a civil action where a circuit court and a court or judicial system of a federally recognized American Indian tribe or band in Wisconsin ('tribal court') have concurrent jurisdiction, this rule authorizes the circuit court, in its discretion, to transfer the action to the tribal court" Rule 801.54(1).

between tribal members, or where a tribal member is a party.⁷ Public Law 280 expands the scope of Wisconsin courts' jurisdiction into subject matters that in some states are handled by federal courts, but Public Law 280 does not address the subject matter jurisdiction of tribal courts. Tribal court subject matter jurisdiction is established by other federal laws and United States Supreme Court precedent. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 851-52 (1985). Stated otherwise, "whether a tribal court has adjudicative authority over nonmembers is a federal question"; it is not decided under state law or tribal law. See Plains Commerce Bank, 128 S. Ct. at 2716 (citing Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 15 (1987)).

¶6 The United States Supreme Court has explained that tribal court concurrent jurisdiction is extremely limited when non-tribal members are among the parties to an action. Montana v. United States, 450 U.S. 544, 565-66 (1981). The Court

⁷ Public Law 280, a portion of which is set out in 28 U.S.C. § 1360, provides in relevant part: "[Wisconsin] shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country [within Wisconsin] to the same extent that [Wisconsin] has jurisdiction over other civil causes of action, and those civil laws of [Wisconsin] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within [Wisconsin]." 18 U.S.C. 1151 defines "Indian Country." (Public Law 280 does not include the Menominee Tribe due to "retrocession of jurisdiction by the State of Wisconsin." Panzer v. Doyle, 2004 WI 52, ¶12 n.6, 271 Wis. 2d 295, 680 N.W.2d 666).

recently has affirmed that tribal court jurisdiction over nonmembers for conduct that occurs off tribal land is almost nonexistent, having been upheld on only one occasion. Plains Commerce Bank, 128 S. Ct. at 2722. The Court has also said, "[T]ribes do not, as a general matter, possess authority over non-Indians who come within their borders: '[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.'" Id. at 2718-19 (quoting Montana, 450 U.S. at 565).

¶7 Even when nonmember conduct occurs on tribal land, the general rule is that tribes lack subject matter jurisdiction over nonmembers. Montana, 450 U.S. at 565. Tribes "may" have concurrent subject matter jurisdiction over nonmembers: (1) to "regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," and (2) to regulate nonmember conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 565-66. But as the Court's discussion of Montana in Plains Commerce Bank shows, the exceptions to the lack of subject matter jurisdiction are not to be broadly interpreted, but rather, they are extremely limited. Plains Commerce Bank, 128 S. Ct. at 2720.

¶8 In Plains Commerce Bank, tribal members (the Longs) sued a nonmember (Plains Commerce Bank) in tribal court, alleging that the bank discriminated against them when it sold

property. Id. at 2715. The Longs further alleged that the property sales had arisen directly from their preexisting commercial relationship with the bank, and accordingly, the sales fell within the first Montana exception to the general rule that tribes lack jurisdiction over nonmembers. Id. at 2715-16. The tribal jury awarded \$750,000 in damages. Id. at 2716. The bank then brought a declaratory judgment action in federal court asserting that the tribal court lacked subject matter jurisdiction to adjudicate the claims, and therefore, the judgment was void. Id.

¶9 The Supreme Court agreed with the bank. The Court began by explaining that the sovereign powers of tribes are limited by virtue of the tribes' "incorporation into the American republic."⁸ Id. at 2719. In so incorporating, the

⁸ The court in Plains Commerce Bank, 128 S. Ct. at 2721, cited two limited types of exceptions that involved the regulation of nonmember activities on reservation land "that had a discernable effect on the tribe or its members": Williams v. Lee, 358 U.S. 217 (1959) (concluding the tribe had jurisdiction over a contract dispute about "the sale of merchandise by a non-Indian to an Indian on the reservation"); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) (upholding tribal determination of the taxing authority of the tribe for activities by non-Indians on reservation land). The Court cited other cases that also upheld tribal determinations involving taxes for activities within tribal land.

tribes generally lost the right to govern persons coming within tribal territory except for tribal members.⁹ Id.

¶10 In any attempt to exert jurisdiction over nonmembers, "[t]he burden rests on the tribe to establish one of the exceptions to Montana's general rule" that precludes jurisdiction over nonmembers. Id. at 2720. The burden of proof rests with the tribe to establish concurrent jurisdiction in tribal courts because of the general rule that tribal courts do not have jurisdiction over nonmembers. Rule 801.54 is in conflict with that requirement of federal law because under Rule 801.54(2), a circuit court can transfer a case to tribal court on its own motion. Therefore, the tribe would not be a moving party who carries the burden explained by the United States Supreme Court in Plains Commerce Bank. The circuit courts of Wisconsin cannot make a discretionary transfer to tribal courts, sua sponte, and still comply with this aspect of federal law because meeting that tribal burden is one prerequisite for the exercise of subject matter jurisdiction by tribal courts.

¶11 Notwithstanding the directive of the United States Supreme Court that the tribe has the burden of establishing that it has concurrent jurisdiction with the circuit court, the stated purpose of Rule 801.54 is "to enable circuit courts to transfer civil actions to tribal courts in Wisconsin as

⁹ In Plains Commerce Bank, the Court pointed out that tribal courts lack jurisdiction over: a "tort suit involving an accident on non-tribal land"; the regulation of "hunting and fishing on non-Indian fee land"; taxation of nonmember activities on non-Indian fee land. Id. at 2722.

efficiently as possible where appropriate." Comment to Rule 801.54. "Where appropriate" is determined by the factors set out in sub. (2) of the Rule, which factors appear to presume that there is concurrent jurisdiction in tribal court. This apparent presumption is contrary to federal law, which holds that as a general rule tribes have no jurisdiction over nonmembers. Plains Commerce Bank, 128 S. Ct. at 2719. By implying that the factors set out in sub. (2) should be the focus of a circuit court's decision-making, Rule 801.54 is misleading and has significant potential to cause a circuit court to transfer a pending case to tribal court when the tribal court has no subject matter jurisdiction to adjudicate the claims and defenses made.

¶12 The Supreme Court also has explained that "a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Id. at 2720. This is an important principle because if a tribe could not pass a law that bound the conduct and the parties whose claims and defenses a tribal court attempts to adjudicate, then the tribal court lacks subject matter jurisdiction over those claims and defenses.¹⁰ Id.

¶13 It is not a simple matter for a circuit court to determine whether a case fits within one of the two very narrow Montana exceptions to the tribal courts' lack of subject matter

¹⁰ In Plains Commerce Bank, the tribe lacked "the civil authority to regulate the Bank's sale of its fee land," and therefore, the tribal court could not adjudicate the circumstances under which the land sales were made. Id. at 2720-21.

jurisdiction over nonmembers. Rule 801.54 is completely inadequate in addressing this major obstacle to the exercise of tribal court jurisdiction over nonmembers; yet, it is a critical decision that must be made before any such action may be heard in tribal court. This is so because the contention that a court lacked subject matter jurisdiction may be raised at any time, even after judgment. See Arbaugh v. Y&H Corp., 546 U.S. 500, 506-07 (2006); see also Fed. R. Civ. P. 12(c)(3). Furthermore, subject matter jurisdiction cannot be created by waiver or consent. See United States v. Hazlewood, 526 F.3d 862, 864 (5th Cir. 2008). The majority gives the circuit courts no financial resources and no legal guidelines to assist with this weighty legal task.

¶14 At the open administrative conference on June 25, 2008, the majority appeared to take comfort in Rule 801.54(4), which provides that decisions transferring cases to tribal court are appealable as of right.¹¹ However, an appeal is small comfort to litigants who are already overburdened with legal fees; and it provides no guidance to the circuit courts on the

¹¹ The right to appeal a circuit court's decision that concurrent jurisdiction exists may appear to present the review of a discretionary decision. However, a court erroneously exercises its discretion when it incorrectly applies the law. Brookfield v. Milwaukee Sewerage Dist., 171 Wis. 2d 400, 422, 491 N.W.2d 484 (1992). And, whether concurrent jurisdiction exists is a question of law. Plaines Commerce Bank, 128 S.Ct. at 2716. Questions of law are subject to an independent review on appeal. Hoida, Inc. v. M&I Midstate Bank, 2006 WI 69, ¶23 & n. 12, 291 Wis. 2d 283, 717 N.W.2d 17. Therefore, the review of whether concurrent jurisdiction exists in a tribal court is subject to independent review.

critical issue of whether there is concurrent tribal court subject matter jurisdiction.

B. Wisconsin Stat. § 751.12(1)

¶15 This court's power to legislate, which we label as "rule-making," is derived from Wis. Stat. § 751.12(1), which provides in relevant part:

The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice, and procedure in judicial proceedings in all courts, for the purposes of simplifying the same and of promoting the speedy determination of litigation upon its merits. The rules shall not abridge, enlarge, or modify the substantive rights of any litigant.

(Emphasis added.)

¶16 Prior to the creation of Rule 801.54, all litigants who satisfied the statutory provisions for jurisdiction in Wisconsin courts had a statutory right to avail themselves of the Wisconsin court system. See Wis. Stat. § 801.04. The open courthouse doors of Wisconsin provide a significant, substantive right for tribal as well as non-tribal litigants. However, when Rule 801.54 goes into effect, the courthouse doors of Wisconsin may be closed to some litigants, both tribal members and nonmembers. This change in the substantive rights of litigants is contrary to the express provisions of Wis. Stat. § 751.12(1), which provides that any "rule" this court creates "shall not abridge, enlarge, or modify the substantive rights of any litigant."

¶17 Black's Law Dictionary's definition of "substantive law" supports my conclusion that the right to litigate in the courts of Wisconsin is a substantive right. Black's defines substantive law as:

The part of the law that creates, defines, and regulates the rights, duties, and powers of parties. . . . "So far as the administration of justice is concerned with the application of remedies to violated rights, we may say that the substantive law defines the remedy and the right, while the law of procedure defines the modes and conditions of the application of the one to the other."

Black's Law Dictionary 1470 (8th ed. 2004) (quoting John Salmond, Jurisprudence 476 (Glanville L. Williams ed., 10th ed. 1947)). The power to litigate and the duty to defend actions brought in Wisconsin courts fit squarely within Black's definition of substantive rights.

¶18 Furthermore, Rule 801.54 is contrary to our obligation to uphold the constitutions of the United States and the State of Wisconsin. As the United States Supreme Court has held, the United States Constitution is not binding on tribal courts. Talton v. Mayes, 163 U.S. 376, 382-83 (1896). However, litigants in Wisconsin courts are protected by the United States Constitution and the Wisconsin Constitution. See Dep't of Admin. v. WERC, 90 Wis. 2d 426, 434-35, 280 N.W.2d 150 (1979). The constitutions provide the framework in which the courts of the state of Wisconsin are obligated to operate. See State v. Cockrell, 2007 WI App 217, ¶34 n.10, 306 Wis. 2d 52, 741 N.W.2d 267. That constitutional framework includes the United States

Constitution's Bill of Rights and the Wisconsin Constitution's Declaration of Rights. Helgeland v. Wis. Municipalities, 2008 WI 9, ¶13, 307 Wis. 2d 1, 745 N.W.2d 1. However, as separate sovereigns antedating the Constitution, Indian tribes have "historically been regarded as unconstrained by those [federal] constitutional provisions framed specifically as limitations on federal or state authority." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

C. Lack of Information and Failure to Heed Concerns

¶19 I also am deeply troubled by the majority's willingness to create Rule 801.54 when this court has engaged in no fact-finding to determine the procedures available in the tribal courts of Wisconsin and has ignored the concerns expressed by others over the Rule's adoption. Further troubling is that, in adopting Rule 801.54, the court has not adhered to the usual procedure for drafting and adopting court rules.

¶20 First, a majority of the court rushes ahead to create Rule 801.54 even though the court has not been provided with descriptions from the Wisconsin tribes about the procedures employed in the various tribal courts in Wisconsin. Although the majority is correct in its assertion that it received several responses to Petition 07-11, not one of those responses provided information about the procedures by which each of the various tribal courts operate. For example, the court has not been presented information that provides when, or if, a litigant

may have a jury trial.¹² The court has not been presented information that shows whether each tribe has a written code of laws or a constitution and if those exist, what provisions they contain. The court has not been presented with information about what types of evidence may be introduced during a trial. The court has not been presented with the educational or experiential backgrounds of the persons who serve as tribal court judges. The list of what the court has not investigated goes on and on.

¶21 At the open conferences on Petition 07-11, I repeatedly requested that the court require that the tribes provide specific information about how the court of each tribe operates, before the court voted on Petition 07-11. However, a majority of the court determined that its lack of information about tribal courts' procedures should not prevent it from adopting Rule 801.54. I do not understand the majority's willingness to create a law that sends Wisconsin litigants into tribal courts when the majority lacks knowledge about the operation of those courts and over which courts this court has no control or power of judicial review. This seems to me an

¹² Our lack of information in this regard is further troubling and problematic, because a litigant may be compelled to appear before a jury whose composition is less than that provided for under Wisconsin statute. In Wisconsin state courts, civil litigants who request a jury trial are guaranteed at least six jurors. Wis. Stat. 756.06(2)(b). If tribal courts employ juries comprised of less than six persons, litigants in tribal courts may be compelled to relinquish a state statutory right.

abdication of the court's obligation to protect the constitutional and statutory rights of litigants who have chosen to file actions in Wisconsin circuit courts.

¶22 Second, the majority has ignored the responses of those who were opposed to the creation of Rule 801.54 based on the Rule's failure to guarantee individual rights. For example, Attorney Meg Vergeront, who wrote on behalf of the Village of Hobart, expressed concern that while Article I, Section 5 of the Wisconsin Constitution preserves the right to trial by jury in all cases at law if the right to a jury trial existed at the time the Constitution was adopted, there is no provision in Rule 801.54 to guarantee this right in tribal courts.

¶23 In addition, the Wisconsin Department of Justice's comments on Petition 07-11 have been largely ignored. On February 22, 2008, the Department of Justice addressed its concerns about, "Under what circumstances is jurisdiction concurrent between tribal and state courts or exclusive in tribal or state court?" Rule 801.54 does not attempt to address this important and complicated question. See my discussion above in ¶¶4-14.

¶24 The Wisconsin Department of Justice also addressed whether there was "a right under the United States or Wisconsin Constitution to have a case heard in state court rather than tribal court?" The Department of Justice pointed out that a "state may not arbitrarily restrict or deny access to its courts, nor may it limit such access where that access is necessary for the exercise of fundamental constitutional

rights." The majority ignores this concern as well because it has been provided with no information about what, if any, constitutional rights are available in tribal courts.¹³ I am dismayed that the court appears not to have given due regard to the concerns expressed by Attorney Vergeront, the Department of Justice and others who have pointed out the inadequacies of Rule 801.54, and instead, appears to have heeded only those who support the law the majority creates.

¶25 Finally, the procedures employed in adopting Rule 801.54 deviated from our usual procedures for rule adoption. Petition 07-11 was drafted by the Director of State Courts, not the State-Tribal Justice Forum, and Rule 801.54 was created by the court's own redrafting of the rule proposed in Petition 07-11 through the efforts of the Clerk of the Supreme Court. Neither of these actions comports with our usual procedure for rule adoption. And lastly, Rule 801.54 was created even though there was no showing that there was any need to send those who chose to litigate in circuit court to tribal court.

III. CONCLUSION

¶26 I write in dissent because: (1) Rule 801.54 is inadequate and misleading in regard to addressing tribal court concurrent subject matter jurisdiction, which jurisdiction is extremely limited in scope when nonmembers are parties to the

¹³ However, as I explained in ¶18, the United States Supreme Court has concluded that the United States Constitution is not binding on tribal courts. Talton v. Mayes, 163 U.S. 376, 382-83 (1896).

action; (2) Rule 801.54 impermissibly alters the substantive rights of tribal members, as well as nonmembers, contrary to the provisions of Wis. Stat. § 751.12(1), which limits the court's rule-making power; (3) Rule 801.54 undermines federal and state constitutional and statutory rights of litigants; and (4) a majority of the court has pushed this rule-change through before the end of the 2007-08 term of the court, even though the court has been presented with no information about the substantive rights and civil procedures that are available in tribal courts.

¶27 I am authorized to state that Justices DAVID T. PROSSER and ANNETTE KINGSLAND ZIEGLER join in this dissent.

