No. 12-60668

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOLGENCORP, INC. AND DOLLAR GENERAL CORP.
Plaintiffs-Appellants

v.

THE MISSISSIPPI BAND OF CHOCTAW INDIANS; THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS; CHRISTOPHER A. COLLINS, IN HIS OFFICIAL CAPACITY; JOHN DOE, A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE,

Defendants-Appellees

Appeal from the United States District Court
For the Southern District of Mississippi
Civil Case No. 4:08-cv-22
The Honorable Tom S. Lee Presiding

ORIGINAL BRIEF OF PLAINTIFFS - APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case:

1. Dollar General Corp.
2. Dolgencorp, Inc.[1]
3. KKR & Co. (owner of more than 10% of Dollar General Corp.)
4. The Mississippi Band of Choctaw Indians
5. The Honorable Christopher Collins
6. John Doe
7. John Doe's Parents
8. Edward F. Harold, Esq.
9. Fisher & Phillips, LLP
10. Bryant Rogers, Esq.
11. VanAmberg, Rogers, Yepa, Abeita & Gomez, LLP
12. Terry Jordan, Esq.
13. Brian Dover, Esq.
14. Donald Kilgore, Attorney General, Mississippi Band of Choctaw Indians

These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

s/Edward F. Harold
EDWARD F. HAROLD

[1] Since this case began, Dolgencorp, Inc. changed its corporate structure and is now Dolgencorp, LLC.

STATEMENT REGARDING ORAL ARGUMENT

The instant lawsuit centers on an attempt by the Tribal Court of the Mississippi Band of Choctaw Indians to stretch its limited jurisdiction over a non-Indian company in a personal injury suit for money damages brought by an individual tribal member. The limited jurisdiction of tribal courts has significant history, but the issues here are ones of first impression in the Fifth Circuit. No court has ever upheld a Tribal Court's jurisdiction over a non-Indian in a straight forward personal injury tort case. The determination of this issue will have ramifications far beyond the instant dispute. Under these circumstances, Plaintiffs/Appellants submit that oral argument may well assist the court in understanding the nuances of the law as it applies to the particular facts of this claim and requests the Court hold oral argument.

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JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit has jurisdiction over the appeal filed by Appellant/Plaintiff as it is an appeal from an Order of the United States District Court for the Southern District of Mississippi that was a final judgment disposing of all claims as to all parties. As such, it is directly appealable to this Court pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction of this action pursuant to 28 U.S.C. § 1331 as it was a suit seeking review of a decision of a Tribal Court as to its jurisdiction over a non-Indian. This appeal is timely as Plaintiffs/Appellants filed a Notice of Appeal on August 24, 2012 within thirty days of the District Court's Judgment being appealed that was entered on July 30, 2012.

STATEMENT OF THE ISSUES

The District Court erred when it concluded the Tribal Court of the Mississippi Band of Choctaw Indians has jurisdiction over Plaintiffs/Appellants in the tort claims brought by John Doe through his parents in the following ways.

1) The District Court failed to properly apply the Supreme Court's dictates in *Plains Commerce Bank v. Long Family Land and Cattle Co.*[2] Particularly, the District Court concluded that the consensual relationship exception to the *Montana* rule could be applied to provide jurisdiction in the absence of a finding that the issues in the underlying litigation "implicates tribal governance and internal relations."

2) The District Court reached the wrong conclusion as to the jurisdiction of the Tribal Court over Dollar General for the Doe's claims because Doe's claims do not implicate tribal governance and internal relations.

3) The District Court incorrectly concluded there was a sufficient nexus between the alleged torts in the Does' Tribal Court claims and Dollar General's participation in the Choctaw Youth Opportunity Program to establish Dollar General consented to Tribal Court jurisdiction.

[2] 554 U.S. 316, 128 S.Ct. 2709 (2008).

5) The District Court incorrectly concluded the Tribal Court has jurisdiction over Does' negligence claims because the Does presented no evidence of any conduct related to these claims occurring on the reservation.

6) The District Court incorrectly concluded Dollar General's participation in the Choctaw Youth Opportunity Program was a commercial relationship sufficient to support the jurisdiction of the Tribal Court.

7) The District Court erred in not recognizing that allowing a case to go forward in a tribal court where the tribal court has no jurisdiction over the primary tortfeaser and seeking punitive damages violates Dollar General's Due Process rights under the U.S. Constitution.

STATEMENT OF THE CASE

In January 2005, John Doe, through his parents John Doe Sr. and Jane Doe, instituted a tort action in the Tribal Court of the Mississippi Band of Choctaw Indians against Dollar General Corp., Dolgencorp, LLC, and Dale Townsend. All Defendants then filed motions to dismiss in the Tribal Court asserting that the Tribal Court lacked jurisdiction over them. On July 25, 2005, the Tribal District Court denied the motions of Dollar General Corp. and Dolgencorp, LLC. He reserved ruling on part of Mr. Townsend's motion.

In August 2005, in accordance with the Tribal Court's Rules of Civil Procedure, the Dollar General entities filed a Petition for Permission to Appeal with the Supreme Court of the Choctaw Tribal Court. Mr. Townsend also filed a similar Petition out of an abundance of caution as the Tribal District Court had not issued a complete decision on his motion.

On November 16, 2007, the Choctaw Supreme Court held oral argument on the Motions for Permission to Appeal. On February 8, 2008, it granted the Petitions for Permission to Appeal and in the same Order, ruled on the jurisdictional issue concluding the Choctaw Tribal Court had jurisdiction over both the Dollar General entities and Mr. Townsend.[3]

[3] The Tribal Supreme Court considered Mr. Townsend's motion to have been denied by the District Court.

On March 10, 2008, Dollar General and Mr. Townsend filed suit in the District Court for the Southern District of Mississippi against the Tribe, the Tribal Court, the Tribal Court Judge (in his official capacity only), and the Does seeking both temporary and permanent injunctive relief prohibiting any of them from taking any further steps in the action instituted in Tribal Court. The parties then briefed the issues for the District Court on the temporary relief sought. Some time later, the U.S. Supreme Court issued its most recent decision parsing tribal court jurisdiction, *Plains Commerce Bank*, and the parties submitted supplemental briefing on the impact of that decision. On December 19, 2008, the District Court issued its ruling denying Dollar General's request for preliminary injunctive relief but granting Mr. Townsend's request for preliminary injunctive relief.[4]

Following some discovery, Dollar General moved for summary judgment seeking a permanent injunction against any further proceedings in tribal court. Defendants filed cross motions for summary judgment seeking to dismiss all Dollar General's claims. On December 21, 2011, the District Court issued its order and reasons granting Defendant's Motions and Denying Dollar General's Motion. The District Court ultimately entered a final judgment on July 30, 3012.[5]

[4] The parties agreed to allow the decision on Mr. Townsend to control the issue of his request for permanent injunctive relief. That decision was later reflected in the final judgment, but has not been appealed.

[5] The delay in the issuance of the judgment was caused by an error in the original judgment issued in February 2012 in its failure to adjudicate the claims against Dale Townsend. As such, it was not a final judgment. It took some time to resolve this issue.

STATEMENT OF FACTS

I. THE UNDERLYING LAWSUIT FILED IN TRIBAL COURT

Plaintiff/Appellant Dolgencorp, LLC operates a retail store selling basic household merchandise and grocery at the Town Center on the reservation of the Mississippi Band of Choctaw Indians. [6] It leases the store space from the Tribe.[7] In 2003, Dale Townsend was employed as the Store Manager and was responsible for store operations.[8]

The Tribe operates a job training program known as the Youth Opportunity Program.[9] The YOP is conducted by the educational branch of the Choctaw Tribal government.[10] The purpose of the YOP was "to hire young people to get into positions for a short time with mentors or someone who would supervise them and help them with the different job positions. The other thing was the program was designed to not only do that, but also to help them set goals and objectives for their lives."[11]

Each year the YOP would identify employers in the area that might want the additional help of the Choctaw youth by means of a survey sent to local

[6] Original Tribal Court Complaint, Exhibit 1 to Federal Complaint. Vol. 1 USCA5 pp.23-26.
[7] Vol. 1 USCA5 pp. 53-76.
[8] Vol. 1 USCA5 p. 862.
[9] Vol. 1 USCA5 p. 861.
[10] Vol. 1 USCA5 p. 861.
[11] Wilson Deposition p. 13. Vol. 1 USCA5 p. 834.

employers.[12] Employers responded to the mailing if they desired to participate.[13] The employers entered into no written contracts relative to their participation in the program.[14] The YOP determined whether or not to assign participants to particular employers.[15] The YOP also employed site monitors who traveled among the various worksites checking on the participants.[16] The employer's role was to teach the participant work skills, to provide work for the participant to perform, to report on his hours, and to provide feedback to the participant.[17] The job training portion of the YOP lasted only six weeks.[18] The Program had no impact on either the Tribe's governance or internal relations.[19] Businesses participating in the program benefited by receiving six weeks of temporary labor by the youth paid for by the Tribe.[20]

In the spring of 2003, the store's then manager, Dale Townsend responded to an inquiry seeking to have Dollar General participate in the YOP program and agreed to participate.[21] Allowing minors to work in a Dollar General store is a

[12] Wilson Deposition p. 25. Vol. 1 USCA5 p. 841.
[13] *Id.*
[14] Wilson Deposition pp. 26 – 27. Vol. 1 USCA5 pp. 842-843.
[15] Wilson Deposition p. 25; 28. Vol. 1 USCA5 pp. 841, 844.
[16] Wilson Deposition pp. 31 – 32. Vol. 1 USCA5 pp. 847-848.
[17] Wilson Deposition pp. 28 – 29. Vol. 1 USCA5 pp. 844-845.
[18] Wilson Deposition p. 22. Vol. 1 USCA5 p. 838.
[19] Wilson Deposition p. 48; 71. Vol. 1 USCA5 pp. 853, 856.
[20] Wilson Deposition pp. 72 – 73. Vol. 1 USCA5 pp. 857-858.
[21] Wilson Deposition pp. 35 – 36. Vol. 1 USCA5 pp. 851-852.

terminable offense under its policies.[22] As such, Mr. Townsend's conduct was unauthorized.[23]

Defendant John Doe is a member of the Mississippi Band of Choctaw Indians and was a participant in the Tribe's Youth Opportunity Program (YOP).[24] At the time Doe participated, the Program had 400 youth participating.[25] The YOP assigned Doe to the Dollar General store toward the end of the 6 week program.[26] Dollar General did not pay Mr. Doe. Rather, the Youth Opportunity Program paid Mr. Doe's wages.[27] Mr. Doe alleges that in July 2003, during his assignment at the store, Mr. Townsend made sexual advances toward him and sexually assaulted him.[28]

Mr. Doe and his parents reported the alleged advances and assault to Tribal authorities on August 26, 2003. At this time, the Tribe's Attorney General's Office met with Mr. Townsend to discuss the allegations.[29] They requested that Mr. Townsend voluntarily agree to an order of exclusion from the reservation based on

[22] Vol. 1 USCA5 p. 859.
[23] Vol. 1 USCA5 p. 872.
[24] Original Tribal Court Complaint, Exhibit 1 Page 5 to the Federal Court Complaint. Vol. 1 USCA5 p. 23.
[25] Wilson Deposition p. 24. Vol. 1 USCA5 p. 840.
[26] Doe had previously been assigned and moved from two other workplaces in the first four weeks of the program. Wilson Deposition pp. 57 – 58. Vol. 1 USCA5 pp. 854-855.
[27] Wilson Deposition p. 20. Vol. 1 USCA5 p. 836.
[28] Original Tribal Court Complaint, Exhibit 1 to Federal Complaint. The Court previously concluded Mr. Townsend was not subject to the jurisdiction of the Tribal Court. Vol. 1 USCA5 pp. 23-26.
[29] Vol. 1 USCA5 p. 260.

the allegations.[30] Mr. Townsend agreed based upon representations made to him by the Attorney General's Office that the Order of Exclusion would be the end of the matter.[31] As a result of the Order of Exclusion, Mr. Townsend was no longer allowed to come onto the reservation for any reason, including to perform his job, and his employment with Dollar General was terminated.[32]

II. DEFENDANTS EXHAUST THEIR REMEDIES IN TRIBAL COURT

In January 2005, Mr. Doe filed suit against Dollar General and Mr. Townsend in the Choctaw Tribal Court. Both responded with motions to dismiss challenging the Tribal Court's jurisdiction over them. On July 28, 2005, Tribal Court Judge Collins orally ruled that the Tribal Court had jurisdiction over Dollar General and Mr. Townsend under *Montana*. The only issue remaining after that hearing was the question of the impact of the Order of Exclusion against Mr. Townsend on that jurisdiction. Although the parties submitted a proposed Order on the *Montana* issue, Judge Collins did not sign it. Likewise, the parties submitted additional briefing on the Order of Exclusion. Again, Judge Collins did not issue any ruling.

The Tribal Code provides "15 days from the action giving rise to the appeal" to seek interlocutory review. Tribal Code §7-1-10. There is no definitive answer within the Code to whether that 15 days ran from the date of the Judge's oral ruling

[30] Vol. 1 USCA5 p. 260-263.
[31] Vol. 1 USCA5 p. 261.
[32] Vol. 1 USCA5 p. 36-38.

denying the motions to dismiss or from the date on which the Judge issued a written order. Since the Judge had not signed a written order as of 15 days from the date of the oral ruling, Dollar General filed a petition seeking interlocutory appeal. Mr. Townsend joined in that Petition expressly stating that he was doing so only out of an abundance of caution and noting clearly on the face of his joinder that the issue related to the Exclusion Order remained pending before the District Court.[33]

More than two years later, the Choctaw Supreme Court set and heard oral argument on the Petition for Interlocutory Appeal. During that two years, the District Court had never issued any further rulings on the Exclusion Order issue. The Choctaw Supreme Court then ruled not only on the Petition for Appeal, which it granted, but on the merits of every jurisdictional issue as well. It ordered that the suit go forward in Tribal Court. Dollar General and Mr. Townsend were never given an opportunity to file an appellate brief on the merits before the Choctaw Supreme Court. There is no procedure for a rehearing in the Choctaw Supreme Court. See Tribal Code, Chapter 7. As such, Dollar General and Mr. Townsend filed suit in the District Court for the Southern District of Mississippi seeking an injunction against further proceedings in Tribal Court.

[33] Exhibit 1 to the Complaint, pp. 127-128. Vol. 1 USCA5 pp. 145-146.

SUMMARY OF THE ARGUMENT

Tribal courts are courts of limited jurisdiction and the burden of establishing jurisdiction lies on those asserting it exists. *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 128 S.Ct. 2709 (2008). The jurisdiction of a tribal court does not extend to non-members of the tribe except in two narrowly defined circumstances. *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245 (1981). The one circumstance at issue here is, "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." *Id.* at 565 – 566. This "consensual relationship" exception is not broad. "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another--it is not 'in for a penny, in for a pound'." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825 (2001).

Finding jurisdiction under the consensual relationship exception requires three elements: a commercial consensual relationship, *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001); a nexus between the claim sought to be adjudicated and the relationship, *Atkinson Trading Co.*, 532 U.S. at 656; and that the conduct being adjudicated "implicates tribal governance and internal relations." *Plains Commerce Bank*, 128 S.Ct. at 2724. None of these factors are present here. The

relationship between Dollar General and the Tribe was to participate in a six week job training program for tribal youth. No money changed hands. This is not a commercial relationship. The conduct at issue, an alleged sexual assault, an intentional criminal act, has no direct nexus to that agreement. Nor does the alleged negligent training, hiring, and supervision because, under the companies policies, no minors were supposed to have been working in the store. Finally, Doe's claim has absolutely no bearing on tribal self-government and internal relations. It is simply a civil tort claim for money damages by one member of a tribe against a non-member.

Additionally, jurisdiction cannot exist over the negligent hiring, training, and supervision claims because there is no allegation in the Complaint, nor is there any evidence, that this conduct occurred on the reservation. Tribal courts have no adjudicative jurisdiction over off reservation conduct.

Finally, subjecting Dollar General to tribal court jurisdiction would violate its constitutional due process rights because Doe seeks punitive damages. Punitive damages are a punishment and tribal courts do not have jurisdiction to punish non-Indians. Moreover, the bill of rights does not apply in tribal court. Thus, forcing Dollar General to litigate in a foreign forum without the U.S. Constitutional due process protections against an excessive award of punitive damages in and of itself violates due process.

The irony of this case is that Dollar General is being hailed into tribal court to answer for the conduct of one of its employees who himself cannot be sued in tribal court. That employee, Mr. Townsend, is the person who both purportedly agreed on behalf of Dollar General to participate in the YOP, in violation of Dollar General's policies, and allegedly committed the torts at issue. Dollar General cannot subpoena him to trial nor can it file any claims for indemnity against him. It is left to defend a case against a tribal member in front of a tribal jury with no witness to counter his testimony. There is no due process in this scenario.

ARGUMENT

I. STANDARD OF REVIEW

The decision of the district court was made on cross motions for summary judgment based on the Complaint in addition to undisputed facts.[34] The Court reviews the granting of a summary judgment *de novo*, applying the same standards as the District Court. *Poole v. City Of Shreveport*, 691 F.3d 624 (5th Cir. 2012)

The Fifth Circuit has not addressed the standard of review to be used when reviewing a tribal court's ruling on its own jurisdiction. The Circuits who have addressed the issue view the question of tribal court jurisdiction as a federal question of law subject to *de novo* review. *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1130 (9th Cir. 2006); *Duncan Energy v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir. 1994); *Mustang Production Company v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996). If the decision is based on findings of fact, they are reviewed for clear error. *Smith* at 1130.

These standards are mainly consistent with the standard the Fifth Circuit uses to review a district court's decision on federal subject matter jurisdiction. However, with the regard to factual determinations, the Fifth Circuit's review depends upon how the district court reached its decision.

[34] Dollar General accepted the factual allegations of the Complaint as true only for purposes of its motion to dismiss for lack of jurisdiction.

> A motion to dismiss for lack of jurisdiction may be decided by the district court on one of three bases: the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404,413(5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981). In this case, although the court held a hearing on the government's Rule 12(b)(1) motion, the order granting the motion does not include any findings of fact. The basis for the dismissal, in accordance with the legal reasoning outlined by the district court in its order, is, however, evident from undisputed facts in the record. In such a circumstance, our review is limited to determining whether the district court's application of the law is correct and whether the facts are indeed undisputed. *Id.* Our review of the district court's application of the law is, of course, de novo.

Ynclan v. Department Of Air Force, 943 F.2d 1388, 1390 (5th Cir. 1991). In this case, the Choctaw Supreme Court ruled on the pleadings alone. However, the District Court accepted additional evidence adding to the record. As such, the appropriate standard of review appears to be determining if the facts were undisputed and reviewing the legal decisions *de novo.*

II. THE BASIC PARAMETERS OF TRIBAL COURT JURISDICTION OVER NON-MEMBERS OF THE TRIBE

A. THE NATURE OF TRIBAL COURTS

Formal tribal courts are a relatively recent development. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S. Ct. 1011 (1978). Since this time, many tribal courts have been established with the consent of the

Federal Government on the principal that Indians on reservations have the right to make their own laws and be governed by them. *Williams v. Lee*, 358 U.S. 217, 220 (1959). Tribes enjoy the right to "make their own substantive law in internal matters and to enforce that law in their own forums." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55–56, 98 S. Ct. 1670 (1978).

Many tribal courts also purport to have civil jurisdiction over individuals who are not members of the tribe in civil claims brought by tribal members. The parameters of tribal courts' possible civil jurisdiction over non-members has been developed in a line of Supreme Court cases beginning with *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245 (1981) and currently ending with *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 128 S.Ct. 2709 (2008). While continuously acknowledging the theoretical possibility that tribal courts might have civil jurisdiction over a non-member, the Supreme Court has yet to hold that a tribal court has civil adjudicatory authority over a non-member.

There is good reason for this. As Justice Souter has noted, non-members forced to litigate in tribal courts face a variety of challenges *Nevada v. Hicks*, 533 U.S. 353, 384-385, 121 S. Ct. 2304 (2001). "Tribal courts also differ from other American courts (and often from one another) in their structure, in the substantive law they apply, and in the independence of their judges. Although some modern

tribal courts 'mirror American courts' and 'are guided by written codes, rules, procedures, and guidelines,' tribal law is still frequently unwritten, being based instead 'on the values, mores, and norms of a tribe and expressed in its customs, traditions, and practices,' and is often 'handed down orally or by example from one generation to another.' Melton, Indigenous Justice Systems and Tribal Society, 79 Judicature 126, 130-131 (1995). The resulting law applicable in tribal courts is a complex 'mix of tribal codes and federal, state, and traditional law,' National American Indian Court Judges Assn., Indian Courts and the Future 43 (1978), which would be unusually difficult for an outsider to sort out."[35]

B. THE MONTANA RULE

The underpinnings of tribal court jurisdiction over a non-member starts with the proposition, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981).[36] Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-

[35] It is significant to note that while the events giving rise to these claims arose in 2003, and the jurisdictional argument has been pending for some seven years, a Mississippi state court forum has always been available. There are no questions of jurisdiction in that forum and the merits of these claims could have been pressed forward immediately. The Does have never even attempted to avail themselves of that forum and it is now too late. Their all or nothing press to keep this matter in tribal court speaks volumes of their belief as to fairness of the forum to Dollar General.

[36] Pursuant to the Tribal Code of the Mississippi Band of Choctaw Indians, the jurisdiction of its courts extends only so far as that jurisdiction is authorized by federal law. The Tribal Code, in Chapter 2, contains specific provisions regarding subject matter jurisdiction and personal jurisdiction expressly stating that they are subject to federal law. See Choctaw Tribal Code §1-2-5(l) (subject matter jurisdiction is subject to limitations contained in federal law); Choctaw Tribal Code §1-2-3 (personal jurisdiction is subject to limitations contained in federal law).

government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Nevada v. Hicks*, 533 U.S. 353, 358-359 (200l)(citations omitted, emphasis in original). Additionally, tribal courts have no jurisdiction over conduct that does not occur on the tribe's reservation. "Montana and its progeny permit tribal regulation of *non-member* conduct inside the reservation…." *Plains Commerce Bank*, 554 U.S. at 332.

In his concurrence in *Hicks*, Justice Souter explained the policy behind the rule. "[I]t has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383. He then recognized the clear "presumption against tribal-court civil jurisdiction [which] squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be 'protected…from unwarranted intrusions on their personal liberty." *Id*. at 384. This statement of tribal court authority has become known as the "*Montana* rule."

C. THE MONTANA RULE HAS TWO LIMITED NARROW EXCEPTIONS

Under the *Montana* rule, a tribal court can exercise jurisdiction over a non-member such as Dollar General only in two circumstances:

> 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. … A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its 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.

Montana, 450 U.S. at 565-566. The two exceptions have come to be known as the "consensual relationship," or "first" exception and the "self-governance" or "second" exception. Only the consensual relationship exception is at issue here.[37]

The consensual relationship exception is a narrow one. "A nonmember's consensual relationship in one area thus does not trigger tribal civil authority in another--it is not 'in for a penny, in for a pound'." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825 (2001) (citation and internal quotation marks omitted). "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id.* at 656.

Montana's consensual relationship exception only applies to "commercial dealing, contracts, leases, or other arrangements." *Atkinson Trading Co.,* 532

[37] The District Court rejected the Appellees' argument below that the self-governance exception applied. Appellants do not anticipate that part of the district court's ruling be challenged by Appellees. If it is, Appellants will address the issue in their reply brief.

U.S. at 655. "Other arrangements" must also be of a commercial nature. *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001).[38]

In *Plains Commerce*, the Court provided additional strictures to be utilized in the "consensual relationship" analysis. It emphasized that meeting the "consensual relationship" exception cannot rest solely on consent. Rather, because non-Indians have no participation in Indian government, jurisdiction must also be based in the need of the tribe to protect its and its members interests.

> [N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.[39]

III. THE DISTRICT COURT'S DECISION

The District Court held that the Choctaw Tribal Court has jurisdiction over Dollar General under the consensual relationship exception. In so doing, he made three critical decisions. First, the District Court concluded that Townsend's agreement to participate in the YOP program was "commercial dealing, contracts, leases, or other arrangements."

> Dale Townsend, purportedly on behalf of Dolgen, agreed with the Tribe to participate in the Tribal Youth

[38] A separate panel of the Ninth Circuit internally disagreed with this statement later in *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1137 (9th Cir. 2006).
[39] *Id* at 2724.

> Opportunity Program, and that based on such agreement, John Doe was placed in the Dollar General store under Townsend's direct supervision.[1] Doe did not thereby become an employee of Dolgen, but he functioned as an unpaid intern or apprentice, receiving job training from Dolgen and in turn provided free labor to Dolgen for the period of his assignment. In the court's opinion, as a consequence of this arrangement, Dolgen implicitly consented to the jurisdiction of the Tribe with respect to matters connected to this relationship.[40]

Second, with no analysis of the facts or legal theories, the District Court concluded that the underlying tort claims bore a sufficient nexus to participating in the YOP to allow for jurisdiction.

> The court is further of the opinion that the tort claims which the Does seek to pursue in the Tribal Court, being based on Townsend's alleged molestation of John Doe during his tenure at the store, arise directly from this consensual relationship so that the requirement of a sufficient nexus between the consensual relationship and exertion of tribal authority is satisfied.[41]

Finally, the District Court concluded that in *Plains Commerce*, the Supreme Court did nothing to change the *Montana* consensual relationship rule and that the only issue in applying that rule was the nexus analysis set out in *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825 (2001). In so doing, he accepted the following analytical framework.

> The exception, [Defendants] submit, does not ask whether depriving a particular tribal court of jurisdiction to adjudicate a particular dispute arising from a particular

[40] District Court Opinion p. 7. Vol. 1 USCA5 p. 1058.
[41] District Court Opinion p. 8. Vol. 1 USCA5 p. 1059.

> consensual relationship would interfere with the tribe's right of self government, but whether depriving a tribe's courts of such jurisdiction in general to resolve such disputes would undermine that tribe's right of self government. In the court's opinion, defendants have the better of this argument.

This conclusion cannot stand in light of *Plains Commerce.*

The District Court also erred in holding the Tribal Court had jurisdiction over Doe's negligence claims because there was no allegation or other evidence of any conduct forming the basis of these claims occurring on the reservation.

The District Court also rejected, without any analysis or mention in either of his decisions, Dollar General's contention that the fact Plaintiff seeks punitive damages in tribal court is sufficient in and of itself to reject tribal court jurisdiction. Particularly, Dollar General argued that because the specter of punitive damages calls into play its due process rights, and because those rights do not apply in tribal court, it would be unconstitutional for it to be subjected to such a claim there. Likewise, because Mr. Townsend, the alleged bad actor, cannot be summoned to the Tribal Court to testify at trial, proceeding in tribal court violates Dollar General's due process rights.

IV. THE RULING OF THE DISTRICT COURT SHOULD BE REVERSED BECAUSE ITS EXPANSIVE INTERPRETATION OF TRIBAL COURT JURISDICTION IS AT ODDS WITH THE MOST RECENT SUPREME COURT PRECEDENT

A. NEITHER TORT HAS A DIRECT LOGICAL NEXUS TO DOLLAR GENERAL'S PARTICIPATION IN THE YOP

For the consensual relationship exception to apply, there must be a "direct logical nexus" between the relationship and the cause of action. *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1825 (2001). Additionally, in *Plains Commerce*, the Supreme Court noted that when, as here, the alleged consent to jurisdiction is based on conduct, as opposed to express consent, the regulation of the conduct must be reasonably anticipated by the non-member. Finally, the *Montana* exceptions are not to be read so as to cause the "exception to swallow the rule." *Atkinson*, 532 U.S. at 655. But the District Court's conclusion does just this.

The District Court spent no time analyzing the facts of or the nature of Doe's underlying tort claims. Instead it dismissed the facts and arguments presented by Dollar General as "bearing on the merits, not jurisdiction."[42] This was a critical error. The Eighth Circuit has explained:

> The starting point for the jurisdictional analysis is to examine the specific conduct the Tribe's legal claims would seek to regulate. The *Montana* exceptions focus on "'the *activities* of nonmembers' or 'the *conduct* of non-Indians.'" *Plains Commerce Bank*, 128 S.Ct. at 2720 (*quoting Montana*, 450 U.S. at 565-66, 101 S.Ct. 1245) (emphasis in original). Each claim must be analyzed

[42] Decision footnote 4. Vol. 1 USCA5 p. 1065.

> individually in terms of the *Montana* principles to determine whether the tribal court has subject matter jurisdiction over it. *See Hicks*, 533 U.S. at 367 n. 8, 121 S.Ct. 2304 (limitations on tribal jurisdiction "pertain[] to subject-matter, rather than merely personal, jurisdiction"); *Plains Commerce Bank*, 128 S.Ct. at 2724-25 n. 2; *cf. Myers v. Richland County*, 429 F.3d 740,747-48 (8th Cir. 2005) (examining federal court subject matter jurisdiction claim by claim).

Attorney's Process & Investigation v. Sac & Fox Tribe, 609 F.3d 927, 937 (8th Cir. 2010).

Dollar General is being hailed into tribal court because of two different sets of conduct allegedly leading to Mr. Doe's harm. The first is a claim that Dollar General itself failed to properly hire, train, or supervise Mr. Townsend. That claim is based on the conduct of individuals other than Mr. Townsend, *i.e.*, Mr. Townsend's supervisors. To prevail, Doe will have to prove both that Mr. Townsend committed the acts and that Dollar General was negligent in hiring, supervising or training him and was the proximate cause of Doe's harm.[43] Second, Dollar General is being asked to respond directly for the harm caused by Mr. Townsend's alleged criminal sexual assault on the grounds it is vicariously liable for that conduct. In this claim, to prevail, Doe will have to prove that Mr.

[43] This analysis assumes that the elements of the tort under tribal law are similar to the United States common law. Whether that assumption is accurate is unknowable.

Townsend committed the alleged acts and that he was in the course and scope of his employment when acting.[44]

The allegations against Mr. Townsend are that he sexually assaulted Doe. This is an allegation of intentional criminal conduct. Intentional criminal conduct has no logical nexus whatsoever to any decision to participate in the YOP. The institution of the tort is the decision made by that individual. There is simply no chain of events from which a nexus could form. The alleged criminal conduct is an independent, stand alone act, having no relationship to any alleged decision to participate in the YOP program.

The issue of an alleged nexus between participating in the YOP and the negligence claims requires a different analysis. It analyzes whether it was foreseeable to Dollar General that by participating in the YOP, it would be called into tribal court to defend itself for failing to properly hire, train, or supervise one of its employees with regard to sexually assaulting a minor. In this regard, the particular circumstances of how Dollar General came to participate in the YOP are important.

[44] This, of course, assumes that the Tribal Court will apply the commonly accepted precepts underlying negligent hiring, training, and supervision, and employer vicarious liability. This is by no means certain, but Appellants have no way of knowing what traditional tribal law says about its liability under these circumstances.

The evidence shows that no one other than Mr. Townsend himself agreed to participate in the YOP.[45] There were no written agreements between the company and the Tribe over its participation.[46] In fact, Mr. Townsend's allowing these youth to work in the store violated Dollar General's policies and was grounds for immediate termination.[47]

Under the facts of this case, it cannot be said that it was foreseeable for Dollar General to anticipate in operating a retail outlet on the reservation that: 1) one of its managers would violate its policies on allowing minors to work in the store; 2) that the manager would then allegedly commit a sexual assault against one of those minors.

As such, the only nexus between Dollar General's relationship to Doe and the alleged assault is "but for" causation. That is, had Doe not participated in the program, he would not have been harmed. "But for" causation is not enough. For example, in *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th Cir. 2006), the Ninth Circuit examined tribal court jurisdiction over a student's tort claim against SKC, a college owned and operated by the Tribe, arising out of injuries he suffered while driving one of the tribal college's vehicles. The court held "[a]ny contractual relationship Smith had with SKC as a result of his student status is too remote from

[45] Wilson Deposition p. 35. Vol. 1 USCA5 p. 851.
[46] Wilson Deposition pp. 26-27. Vol. 1 USCA5 pp. 842-843.
[47] Policy Attached as Exhibit B. Vol. 1 USCA5 p. 859.

his cause of action to serve as the basis for the Tribe's civil jurisdiction." Even though the plaintiff would not have been driving the vehicle, but for his relationship with the college, that relationship was simply not enough to support jurisdiction over his claims. A tribal member's being injured while in a relationship with a non-Indian is simply not a sufficient nexus, and that is all that is alleged here.

The District Court's failure to parse each claim separately also resulted in its failure to assess where the allegedly tortious conduct underlying each claim occurred. The alleged assault is purported to have occurred on the reservation. However, the Complaint contains no factual allegations that the negligent hiring, training, or supervision of Mr. Townsend took place on the reservation. The Tribe and the Doe's submitted no evidence in this regard. The complaint in the Tribal Court did contain a wholly conclusory allegation that "all the conduct" occurred on the reservation, but "for … [a] complaint to allege jurisdiction adequately, it must contain non-conclusory facts…." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, (6th Cir. 2012). Because the Tribe and the Does bore the burden of proving the existence of jurisdiction, this absence of factual allegations and evidence is fatal to jurisdiction over the negligence claims. *See e.g., Attorney's Process & Investigation Servs. v. Sac & Fox Tribe,* 809 F. Supp.2d 916 (N.D. Iowa 2011)(tribe's failure to present evidence to prove that conversion of funds occurred

on tribal land was fatal to the assertion of tribal court jurisdiction over the conversion claim).

B. THE DISTRICT COURT'S CONCLUSION THAT *PLAINS COMMERCE* DID NOT LIMIT THE CONSENSUAL RELATIONSHIP EXCEPTION TO THE *MONTANA* RULE FLIES IN THE FACE OF THE LANGUAGE OF THE DECISION

Even were there sufficient nexus between Dollar General's conduct and the alleged torts to establish implied consent, standing alone this is insufficient to support jurisdiction. Rather, *Plains Commerce* explained because non-Indians have no participation in Indian government, jurisdiction must **also** be based in the need of the tribe to preserve tribal self-government and control internal relations.

> [N]onmembers have no part in tribal government—they have no say in the laws and regulations that govern tribal territory. Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions. **Even then, the regulation must stem from the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations.**[48]

The Supreme Court explained why the activity must implicate the tribe's "internal relations or threaten tribal self-rule."

> The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) **may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent**

[48] *Plains Commerce Bank,* 128 S.Ct. at 2724. Emphasis added.

> **they do, such activities or land uses may be regulated.** See *Hicks*, *supra*, at 361 ("Tribal assertion of regulatory authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them"). Put another way, certain forms of nonmember behavior, even on non-Indian fee land, may sufficiently affect the tribe as to justify tribal oversight. While tribes generally have no interest in regulating the conduct of nonmembers, then, they may regulate nonmember behavior that implicates tribal governance and internal relations.[49]

Thus, it is not enough when considering the first exception merely to examine consent, whether express or tacit. The exercise of jurisdiction must also be consistent with "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations."[50] The consensual relationship must "intrude on the internal relations of the tribe or threaten tribal self-rule."[51]

Authors of many law review articles have discussed this language. One author (who was critical of the decision) states that the language of *Plains Commerce Bank* narrows the scope of the consensual relationship exception.

> Although this language indicates that the case can and should be limited to instances where a tribe is trying to regulate the sale of non-member fee land, additional language in the Court's opinion is more ominous and may indicate that the existence of consensual relations is not enough to vest a tribe with jurisdiction unless the tribe can also regulate the underlying conduct giving rise to

[49] *Id. at* 2723. (emphasis added)
[50] *Id at* 2724.
[51] *Id.*

> the claim. Thus, **the Court not only restricted the first exception to non-member *conduct,* but also seemed to tie the consensual relation exception to instances where tribal jurisdiction is needed for tribal self-government.**[52]

In another article, the authors concluded:

> Although [*Plains Commerce Bank]* does not definitively answer the question of whether a tribal court could have jurisdiction over a non-member defendant, it seemingly makes the barriers to that more formidable without outright prohibiting the possibility. The opinion appears to narrow the *Montana* exceptions by interpreting them with language that tends toward a more limited reading of the text of the exceptions. By doing so, the *Plains* opinion necessarily strengthens the general rule from *Montana* that tribes generally lack authority over non-members.[53]

Likewise, many critics of the decision have indicated a belief that the *Plains Commerce Bank* decision reflects a change in the law.

- "In addition, the majority's ruling appeared to diverge from the plain meaning of the *Montana* consensual agreement exception."[54]
- "The Court's questionable interpretation of *Montana v. United States* may remove from tribal jurisdiction cases which, under a traditional

[52] Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond The Reservation Borders* 12 LEWIS & CLARK L. REV. 1003, 1011- 1012 (2008)(emphasis added).
[53] Paul A. Banker and Christopher Grgurich, *The Plains Commerce Bank Decision And Its Further Narrowing Of The Montana Exceptions As Applied To Tribal Court Jurisdiction Over Non-Member Defendants*, 36 WM. MITCHELL L. REV. 565, 586 - 589 (2009-2010).
[54] Frank Pommersheim, *Plains Commerce Bank v. Long Family Land And Cattle Company, Inc.: An Introduction With Questions*, 54 S.D. L. Rev. 365, 373 (2009).

> interpretation of *Montana*, would have been within a tribe 's authority to adjudicate."[55]
>
> - "[T]he Court narrowed the 'consensual relations' exception to *Montana's* 'general rule'."[56]

Thus, there is strong support among the scholarly community that *Plains Commerce Bank* did narrow the consensual relationship exception.

While the District Court acknowledged this body of scholarly work, it rejected it by reading a presumption in favor of tribal court jurisdiction into *Montana*.

> *Montana* identified nonmembers' consensual relationships with tribes and their members, which involve conduct on the reservation (and particularly on Indian trust land), as a circumstance that warrants tribal civil jurisdiction over matters arising from those relationships. **Montana reflects a legal presumption that it would materially undermine tribal rights of self-government to deprive tribal courts of jurisdiction in general as an exercise of tribal sovereignty to adjudicate such claims.**[57]

Montana recognized no such presumption. To the contrary, *Montana* declared tribal courts have no jurisdiction over non-members. The policy actuating this rule was to protect non-members from unwarranted invasions on their liberty, not to

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[55] Lisa M. Slepnikoff, *More Questions Than Answers: Plains Commerce Bank v. Long Family Land And Cattle Company, Inc. And The U.S. Supreme Court's Failure To Define The Extent Of Tribal Civil Authority Over Nonmembers On Non-Indian Land*, 54 S.D. L. Rev. 460 (2009)

[56] Jesse Sixkiller, *Procedural Fairness: Ensuring Tribal Civil Jurisdiction After Plains Commerce Bank*, 26 ARIZ. J. INT'L & COMP. L. 779, 797 (2009).

[57] District Court Opinion p. Vol. 1 USCA5 pp.1064-1065.

protect tribal courts. *Montana* then gave tribal courts back some limited jurisdiction to protect the internal relations of the tribal members and their land. *Plains Commerce* explains "The logic of *Montana* is that certain activities on non-Indian fee land (say, a business enterprise employing tribal members) or certain uses (say, commercial development) **may intrude on the internal relations of the tribe or threaten tribal self-rule. To the extent they do, such activities or land uses may be regulated."**

The District Court rejected this reasoning based on his conclusion that the several post-*Plains Commerce* cases did not change their analysis of the consensual relationship exception. But none of these cases actually analyzed *Plains Commerce's* impact on tribal jurisdiction. In *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927 (8th Cir. 2010), the Eighth Circuit did not address the consensual relationship exception instead remanding the matter to the district court for an initial analysis. The district court then concluded the consensual relationship was not met because of lack of proof that the activity at issue, a conversion of funds, occurred on tribal lands. (*Attorney's Process & Investigation Servs v. Sac & Fox Tribe*, 809 F. Supp.2d 916 (N.D. Iowa, 2011). In *Philip Morris United States* v. *King Mountain Tobacco Co.*, 569 F.3d 932 (9th Cir. 2009) and *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011), the courts concluded the subject matters of the lawsuit in tribal court had no

relationship whatever to the non-member's consensual relationships on the reservation. As such, they never reached the issues of whether the *lawsuit* involved a matter of tribal governance. *Water Wheel*[58] involved a suit by the tribe in a dispute with a non-member who was unlawfully occupying a piece of economically valuable tribal land. There was no need to parse *Plains Commerce Bank* because the subject of the suit so clearly implicated the tribe's interests. None of these cases actually held that *Plains Commerce Bank* did not mean what it said as did the District Court here.

The District Court's analysis of the consensual relationship exception is also undermined by a second false premise. That is, the District Court framed the issue as "whether depriving a tribe's courts of such jurisdiction in general to resolve such disputes would undermine that tribe's right of self government." But the analysis of tribal court jurisdiction is not one of generalities when faced with a particular case. As the Eighth Circuit has explained, tribal court jurisdiction must be analyzed based on the particulars of the conduct attempted to be regulated.

Based on these errors, the District Court concluded, "In this case, a consensual relationship exists; and the claims at issue arise from that relationship. Accordingly, the court concludes that the Tribe has sufficiently demonstrated applicability of the first Montana exception and thus the existence of tribal

[58] *Water Wheel Camp Rec. Area, Inc. v. Larance*, 642 F.3d 802 (9th Cir 2011)

jurisdiction." Analyzing the issues correctly by both looking at the particular facts of the underlying lawsuit and by recognizing that the consensual relationship exception requires more than a consensual relationship and some connection leads to the contrary conclusion.

C. THE DISTRICT COURT REACHED THE WRONG CONCLUSION BECAUSE IT IGNORED THE REQUIREMENT THAT JURISDICTION ONLY EXISTS WHERE THE MATTER "IMPLICATES TRIBAL GOVERNANCE AND INTERNAL RELATIONS"

There can be no question that Dollar General's agreement to participate in the YOP is not a relationship that "intrude[s] on the internal relations of the tribe" or "threaten[s] tribal self rule." The best evidence of this is the District Court's explication on the self-governance exception in his Order denying preliminary injunctive relief. The District Court wrote: "In the case at bar, in no sense can it reasonably be said that the Tribal Court's assuming jurisdiction over the Does' claim against Dolgen or Townsend is necessary to protect tribal self-government or control internal relations. Manifestly, this is a far broader application of Montana's second exception than is warranted."[59] Thus, it is clear that the tort claim has no connection tribal self-government and internal relations. Likewise, participation in the six-week Youth Opportunity Program had no bearing on the internal relations and tribal self-governance.

[59] Opinion at p. 8. Vol. 1 USCA5 p. 626.

The testimony of the Director of the Youth Opportunity Program, Louise Miller, bears this out. She explained the purpose of the program.

> The program was designed to hire young people to get into positions for a short time with mentors or someone who would supervise them and help them with the different job positions. The other thing was the program was designed to not only do that, but also to help them set goals and objectives for their lives.[60]

She then explained the role of an employer such as Dollar General in the program.

> the supervisor at The Dollar Store usually makes sure that they -- their time sheets. They sign in and sign out, more or less supervise them on those things, and then give instructions as to what to do while they're employed within their program.
>
> And the other thing that is instructed is to teach them. If there is anything that needs to be taught within that program to teach them. For instance, if it's going to be cash register, to teach them how to use the cash register. Or stamping things or something like that, to teach them all of those and give instructions. It's more or less we expect the supervisors to teach them and to keep their time. The other thing is that if they are not in -- not doing their work or if other things come up that they are -- they are instructed or they should know to inform them that there are consequences to face if they don't do their job.[61]

Ms. Miller admitted that the Youth Opportunity Program did not have any direct impact on tribal self-government, an elected chief, the Miko, and a tribal council.

[60] Wilson Deposition p. 13. Vol. 1 USCA5 p. 834.
[61] Wilson Deposition pp. 28 – 29. Vol. 1 USCA5 p. 844-845

> Q. And does the operation of the Youth Opportunity Program in any way come into play in the election of council members?
>
> A. None other than our 18-year-olds voting for officials.[62]
>
> While the loss of the Youth Opportunity Program would reduce employment opportunities for tribal youth, it would not impact the Tribe's viability.
>
> Q. Would the elimination of the Youth Opportunity Program threaten the financial viability of the tribe?
>
> A. No.
>
> Q. Would the elimination of the Youth Opportunity Program damage government relations?
>
> A. No.[63]

In *Plains Commerce Bank,* the Court stated that a business entity employing tribal members "**may** intrude on the internal relations of the tribe or threaten tribal self-rule." (emphasis added). The Court did not hold employment relationships always would intrude. The relationship here was for a total of a six-week period. Three tribal youth were placed with Dollar General, two for six weeks, and Doe for two days. There is simply no evidence that this relationship had any connection to the tribe's governance or internal relationships and as such, that agreement cannot support a finding that by participating, Dollar General consented to the jurisdiction of the Tribal Court over Doe's tort claims.

[62] Wilson Deposition p. 71. Vol. 1 USCA5 p. 856.
[63] Wilson Deposition p. 48. Vol. 1 USCA5 p. 853.

D. PARTICIPATING IN THE YOUTH OPPORTUNITY PROGRAM IS NOT THE TYPE OF OTHER ARRANGEMENT SUFFICIENT TO FORM A CONSENSUAL RELATIONSHIP SUPPORTING TRIBAL COURT JURISDICTION

The District Court erred in holding that Dollar General's receipt of some economic benefits from its participation in the YOP created a sufficient consensual relationship to support tribal court jurisdiction. The consensual relationship exception requires the relationship be "commercial dealing, contracts, leases, or other arrangements." *Atkinson Trading Co.,* 532 U.S. at 655 (2001). "Other arrangements" must be of a commercial nature. *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001). As explained above, the Youth Opportunity Program was not "commercial" in nature. It was a civic program designed to provide job training and skills to tribal youth. It lasted six weeks. While Dollar General received the benefit of some free labor, it provided training in return for that labor. No money changed hands between the tribe and Dollar General. Dollar General did not implicitly consent to tribal court jurisdiction for tort claims by agreeing to do what the Tribe asked it to.

E. THE TRIBAL COURT HAS NO JURISDICTION BECAUSE PLAINTIFF'S SEEK PUNITIVE DAMAGES

In his suit, John Doe seeks an award of punitive damages. (*See* Complaint, at para. VII). In *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011 (1978), the United States Supreme Court held that tribal courts do not have

jurisdiction "to try and to punish non-Indians." Punitive damages, while a civil remedy, are punishment designed to alter future conduct, not recompense for damages already caused. Thus, under *Oliphant*, the Tribal Court does not have jurisdiction over this case because it has no jurisdiction to punish a non-Indian.

The protections of the United States Constitution do not apply to proceedings in tribal courts (a point enthusiastically noted by the Choctaw Supreme Court). Rather, they are constrained only by the Indian Civil Rights Act and their own constitutions. In his concurring opinion in *Hicks*, Justice Souter (joined by Justices Kennedy and Thomas) stated that "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383. He then recognized the clear "presumption against tribal-court civil jurisdiction [which] squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be 'protected…from unwarranted intrusions on their personal liberty." *Id*. at 384.

Justice Kennedy expressed similar concerns in *Duro v. Reina*, 495 U.S. 676, 693, 110 S. Ct. 2053 (1990).

> The special nature of the tribunals at issue makes a focus on consent and the protections of citizenship most appropriate. While modern tribal courts include any familiar features of the judicial process, they are influenced by the unique customs, languages and usages of the tribes they serve. Tribal courts are often

> "subordinate to the political branches of tribal governments," and their legal methods may depend on "unspoken practices and norms." It is significant that the Bill of Rights does not apply to Indian tribal governments. The Indian Civil Rights Act of 1968 provides some statutory guarantees of fair procedure, but these guarantees are not equivalent to their constitutional counterparts.

A claim for punitive damages implicates a defendant's constitutional protections against "excessive punishment" as guaranteed by the Due Process Clause of the Fourteenth Amendment. *BMW of North America v. Gore*, 517 U.S. 559, 562, 116 S.Ct. 1589, 1592 (1996). Simply put, an excessive award of punitive damages can result in "an arbitrary deprivation of life, liberty or property in violation of the Due Process Clause." *Id*. at 586 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 113 S.Ct. 2711, 2718 (1993). Because these protections are not present in tribal court, federal recognition of tribal court jurisdiction over non-Indians in claims for punitive damages would in and of itself violate the Due Process clause. The federal government simply cannot waive a citizen's constitutional right by making them subject to the jurisdiction of a court where constitutional rights do not apply.[64]

[64] For a fuller discussion of this issue, see the Brief of Amicus Curiae Mountains States Legal Foundation filed in the *Plains Commerce Bank v. Long Family Land & Cattle Co.*matter which may be found on the Supreme Court's website at http://www.abanet.org/publiced/preview/briefs/april08.shtml#plains.

CONCLUSION

Put simply then, the question here is whether the Choctaw Tribal Court has the power to determine if Dollar General is liable to a tribal member and order Dollar General to pay money to that tribal member. The Does' underlying lawsuit has no bearing on the internal relations of the tribe or tribal self-governance. The Supreme Court has never held any tribal court has such authority. To the contrary, its most recent pronouncements on the jurisdiction of tribal courts over non-members move unerringly in the direction of increasing protection for non-members against the unfamiliar and unknowable tribal laws. The Choctaw Tribal Court has no jurisdiction over Dollar General on the Does' claims.

Wherefore, Appellants/Plaintiffs Dolgencorp, Inc. and Dollar General Corporation respectfully request this Court enjoin Appelles/Defendants forevermore from taking any action or any step in the prosecution of that certain case "*John Doe through his parents and next friends John Doe Sr. and Jane Doe v. Dale Townsend and Dolgencorp Inc.*" Docket No. CV-2-05 currently pending in the Tribal Court for the Mississippi Band of Choctaw Indians including, but not limited to, engaging in discovery, seeking any relief, filing any motions, issuing any orders, making any findings of fact or conclusions of law and for such other relief as the Court may deem just and proper.

Respectfully submitted this 13th day of November 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2012 I have filed the foregoing Original Brief of Appellants/Plaintiffs with the Clerk of Court through the CM/ECF system that will send notice of this filing to:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 9,634 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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