No. 12-60668

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOLGENCORP INC., DOLLAR GENERAL CORPORATION, AND DALE TOWNSEND,
Plaintiffs/Appellants

VERSUS

THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE TRIBAL COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS, THE HONORABLE CHRISTOPHER A. COLLINS (in his Official capacity), and JOHN DOE, A MINOR, BY AND THROUGH IS 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

PRINCIPAL BRIEF OF TRIBAL COURT APPELLEES

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CERTIFICATE OF INTERESTED PARTIES

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.

3. KKR and Co. (owner of ore 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.

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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 disqualifications or recusal.

s/ C. Bryant Rogers
C. BRYANT ROGERS

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STATEMENT OF THE ISSUES

(1) Whether the District Court properly upheld the exercise of Choctaw Tribal Court civil jurisdiction over Dolgen in *Doe, et al. v. Dollar General Corp., et al.*, CV 02-05 under *Montana v. U.S.*, 450 U.S. 544 (1981) and its progeny, including *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008), and the "nexus" test of *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656 (2001).

(2) Did *Plains Commerce* impose an additional requirement that tribal court jurisdiction can be sustained under *Montana's* first (consensual relationship) exception only when a separate showing of specific injury to the tribe's rights of self-governance or control of its internal relations is also shown, even when the nexus test is also satisfied?

STATEMENT OF THE CASE

Tribal Court Defendants[1] supplement Appellants'[2] ("Dolgen's") Statement of the Case as follows:

CHOCTAW COURT PROCEEDINGS

The Does' Amended Choctaw Court Complaint pled *inter alia:*

I.

[1] The term "Tribal Court Defendants" is used in this brief as shorthand for the Mississippi Band of Choctaw Indians, its courts and Choctaw Civil Judge Christopher Collins, sued in his official capacity. The Does are represented by separate counsel.

[2] Dale Townsend appears in the caption, but is not a party to this appeal. Appellants Dolgen Corp., Inc. and Dollar General Corporation are hereinafter referred to collectively as "Dolgen."

> Your Plaintiff alleges and charges that as a thirteen year old minor on July 14, 2003, that he was employed with the Youth Opportunity Program and was assigned to the Dollar General Store at Choctaw Towne Center on the Pearl River Reservation located within the exterior boundaries of the Choctaw Indian Reservation. Further, this Honorable Court has jurisdiction of the parties and subject matter in that all occurrences giving rise to Plaintiff's cause of action occurred within the confines of the Choctaw Indian Reservation.
>
> II.
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> That the minor Plaintiff was assigned to Dollar General's store and that Dale Townsend was the immediate supervisor of the minor at Dollar General Store.
>
> * * * *
>
> III.
>
> That at all times complained of herein, the Defendant, Dale Townsend, an adult, was the manager in charge of the Dollar General Store at Choctaw Towne Center, and at all times acted as the agent, servant, and alter-ego of the Defendant, Dollar General Corporation, and that all acts complained of were intentional and amounted to gross negligence on the parts of Dale Townsend and Dollar General Corporation, jointly and severally.
>
> * * * *
>
> VI.
>
> Defendant, Dollar General Corporation, negligently hired, trained or supervised Defendant Townsend. (Emphasis added)

Paragraphs IV, V and VII of the Does' Choctaw Court Complaint then set out their factual allegation respecting the several sexual assaults he sustained at the Dollar General store at the hands of Dale Townsend, and their aftermath.[3].

At no time during the Choctaw Tribal Court proceedings did Dolgen seek discovery or make any kind of factual attack on the Choctaw Court's jurisdiction.[4]

[3] Vol. 1 USCA5 pp. 23-26

[4] Vol. 1 USCA5 pp. 19-180, 303-386

Instead, it sought dismissal by motion under Choctaw Rule of Civil Procedure 12(b)(1), per which all factual allegations of the Complaint (and reasonable inferences therefrom) must be taken as true.[5]

At all times material Dolgen has had the right to engage in discovery (including to depose Dale Townsend) either via the Choctaw Rules of Civil Procedure or via a bill of discovery in the Mississippi Courts.[6]

The Choctaw Supreme Court has ruled that the Does' claims against Dolgen cannot proceed in the Tribal Court until the Exclusion Order barring Dale Townsend from coming onto the reservation had been modified to permit his participation in the trial and discovery proceedings as a witness.[7]

Dolgen admitted in oral argument before the Choctaw Supreme Court that there existed an employment type relationship between the minor child and Dolgen Corp./Dollar General which they expected to support a worker's compensation exclusive remedy defense which they planned to raise in CV-02-05 if their jurisdictional motion was denied:

> The Plaintiff filed a complaint in Choctaw Tribal Court alleging that he was assaulted at a Dollar General Store that is located on the Reservation. Dollar General operates a store on the Reservation. There was, at that time, an employee by the name of Dale Townsend; and the Plaintiff alleges that Mr. Townsend had assaulted him. We respectfully submit that Dollar General would not have any liability in

[5] Vol. 1 USCA5 p. 29
[6] Vol. 1 USCA5 pp. 777-778, 783-803, 806-807
[7] Vol. 1 USCA5 pp. 191-193, 199 and fn.8; *see also*, pp. 296, 303-311 and 562-563

> this case, regardless, under the Plaintiff's allegations due to worker's comp. exclusive remedy and the fact that if, in fact, it did happen—if, in fact, there was an assault that occurred, that would have been an intentional tort that obviously could not be in the course and scope of his employment, Mr. Townsend's employment.[8]

After extensive briefing on Dolgen's jurisdictional arguments in the Choctaw Trial court and in connection with Dolgen's Petition for Interlocutory Appeal and Oral Argument,[9] the Choctaw Supreme Court ruled (prior to the U.S. Supreme Court's decision in *Plains Commerce*) that the Choctaw Courts could properly exercise jurisdiction over the Does' claims against Dolgen and its reservation store manager Dale Townsend under both exceptions to *Montana's* general rule.[10] The Court's ruling relied in part upon the consensual relationship evidenced by Dolgen's agreement with the Tribe and Doe to participate in the Tribe's YOP.[11]

DISTRICT COURT PROCEEDINGS

The District Court initially denied Dolgen's Motion for Temporary Restraining Order/Preliminary Injunctive Relief, ruling that since "Dolgen has failed to demonstrate a substantial likelihood of success on the merits of its assertion that the tribal court lacks jurisdiction over the Does' lawsuit, Dolgen's

[8] Vol. 1 USCA5 p. 320
[9] Vol. 1 USCA5 pp. 42-187
[10] Vol. 1 USCA5 pp. 194-197, 199
[11] Vol. 1 USCA5 p. 195

motion for preliminary injunction will be denied."[12]. The Court, however, granted injunctive relief in favor of the store manager "as the absence of tribal court jurisdiction over Dale Townsend is manifest."[13] Neither of those rulings were appealed.

Later, after permitting discovery bearing on "the particulars of the Tribe's and John Doe's relationship(s) with [Dolgen] as a result of John Doe's placement with [Dolgen] pursuant to the Tribal Youth Opportunity Program,"[14] the District Court ruled that Dolgen had by and through its store manager agreed to participate

[12] Vol. 1 USCA5 p. 635.
[13] Vol. 1 USCA5 pp. 635-636.
[14] Vol. 1 USCA5 pp. 806-808. In light of the District Court's ruling (over the Tribal Court Defendants' objection) allowing Dolgen to pursue limited discovery in connection with the summary judgment proceedings below the, the Tribal Court Defendants faced a conundrum. They still believed for the reasons set out in their prior objection (Vol. 1 USCA5 pp. 638-665, 767-905) that it was inappropriate for the District Court in ruling on the *Montana* jurisdictional question to permit discovery or to consider new evidence not previously presented to or considered by the Choctaw Courts during exhaustion of its tribal remedies. *See, Water Wheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 817 and n.9 (9th Cir. 2011) (District Court erred in considering evidence "which was not before the tribal court" in ruling on *Montana* jurisdiction question as this violated admonition of *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) that "[T]he orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed."); *see* authorities cited at Vol. 1 USCA5 pp. 638-665, 767-805. Yet, the Tribal Court Defendants faced a summary judgment motion relying in part upon such new evidence plus additional evidence not obtained during that discovery process, but which was also not presented to the Choctaw Court. (*See*, the Summary Judgment Exhibits at Vol. 1 USCA5 pp. 891, 920-926). The conundrum is that Tribal Court Defendants were then obliged to respond to Dolgen's summary judgment motion in connection with which the District Court had authorized another look at the nature of the consensual relationships involved. This of necessity required Tribal Court Defendants to address and present evidence on that issue that was also not considered by the Tribal Court. The Tribal Court Defendants continue to believe that Doglen should have been required to seek discovery on these issues in the Choctaw Courts based on the authorities cited *supra.*

in the Choctaw YOP program,[15] that the YOP agreement constituted a qualifying consensual relationship with the Tribe and John Doe, a tribal member, under *Montana's* first exception;[16] and, that the Does' tort claims had a direct logical nexus to that consensual relationship.[17]

On that basis, the District Court ultimately entered summary judgment for the Tribal Court Defendants and against Dolgen on the *Montana* jurisdictional test, ruling that the Tribal Court could properly exercise jurisdiction over the Does' claims pled there against Dolgen under *Montana's* first ("consensual relationship") exception.[18]

STATEMENT OF THE FACTS

Dolgen's Statement of the Facts is supplemented as follows:

(1) Dolgen agreed to participate in the Tribe's Youth Opportunity Program and to accept and supervise Appellee Doe as a program participant in its Dollar General Store on the Choctaw Indian Reservation.[19]

(2) Other supervisory employees of the Dollar General store on the Choctaw Reservation were aware of Dolgen's involvement with the Choctaw YOP

[15] Vol. 1 USCA5 p. 1058. In its final submission in the summary judgment proceedings, Dolgen abandoned its argument that Townsend had no authority to bind Dolgen to participate in the YOP: "Dollar General has not argued at this juncture that it did not consent to participate in the YOP." (Emphasis added). Vol. 1, USCA5 p. 1001.
[16] Vol. 1 USCA5 p. 1064.
[17] Vol. 1 USCA5 pp. 1059, 1065.
[18] Vol. 1 USCA5 pp. 1066, 1067; Vol. 2 USCA5 pp. 29-30.
[19] Vol. 1 USCA5 pp. 1053-1058; *see*, DG Br. fns 24-28.

program and themselves participated in supervising various Choctaw YOP students in 2003. This is evidenced by the "supervisor's signatures" on YOP worker timesheets of Dale Townsend, of Amanda Martise [sp?] and of Debbie McGee, all of whom were Dolgen employees having some supervisory authority at the Dollar General Store on the reservation in 2003.[20]

(3) Dolgen recognized in 2003 that it was a foreseeable risk that its employees and supervisors might violate company rules, including company rules on employing minors or sexually assaulting co-employees. [21]

(4) Dolgen received a commercial benefit from the work of John Doe (and other YOP participants) while they were assigned to work at the Dollar General store on the reservation.[22]

(5) Dolgen's business lease with the Tribe included provisions by which Dolgen agreed that "[e]xclusive venue and jurisdiction shall be in the tribal court of the Mississippi Band of Choctaw Indians," as to lease related disputes between Dolgen and the Tribe, and by which Dolgen acknowledged that the Dollar General store was located on land held into trust for the Tribe by the United States and was subject to tribal law.[23]

SUMMARY OF ARGUMENT

[20] Vol. 1 USCA5 pp. 927-931 (Exhibit 4) (Exhibits 3 and 4 appended to the referenced summary judgment submissions were erroneously stickered as Exhibits 4 and 3.
[21] Vol. 1 USCA5 pp. 920-926 (Exhibit 3).
[22] Vol. 1 USCA5 pp. 857-859, 862, 912-913.
[23] Vol. 1 USCA5 pp. 53, 67-70.

The core of Dolgen's argument is that the District Court erred in failing to accept and enforce Dolgen's anomalous interpretation of the consensual relationship exception to the *Montana* rule. In Dolgen's view after *Plains Commerce* to find Tribal Court jurisdiction under

> …the consensual relationship exception requires three elements: a commercial 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 the conduct being adjudicated "implicates tribal governance and internal relations." *Plains Commerce Bank*, 128 S.Ct. at 274. (Emphasis added).

Dolgen is simply mistaken. The District Court correctly ruled that it is an essential governmental function of tribal governments to provide forums for the adjudication of civil disputes between members and nonmembers arising from nonmember conduct on their reservations arising from consensual relations between nonmembers and the tribe or tribal members.[24] This is especially true as to nonmember conduct on reservation (trust) land (as here) as to which the tribes retain the sovereign authority to set conditions on entry. *Plains Commerce, supra* at 335 ('"A "tribe's 'traditional an undisputed power to exclude persons' from tribal land…gives it the power to set conditions on entry to that land.'");

The District Court correctly interpreted and applied the consensual relationship exception to *Montana's* main rule in the circumstances of this case

[24] Vol. 1 USCA5 pp. 1058-1065.

since the Does' claims arise from Dolgen's private voluntary consensual relationships with the Does and the Tribe, and those claims have a logical nexus to those consensual relationships.[25]

The Court in *Plains Commerce* did not alter the consensual relationship test as it existed before *Plains Commerce*. The Court did not actually make any ruling about the consensual relationship test because it reconfigured the focus and facts in the case into a dispute about whether the Tribe could regulate (or adjudicate disputes respecting) the sale of non-member owned fee land by one nonmember party to another. The Court said that kind of transaction did not involve *any kind of nonmember conduct on reservation lands* covered by *Montana*; hence, was beyond the reach of tribal court jurisdiction under either exception to *Montana's* main rule. *Plains Commerce*, *supra* at 332-337.

The District Court correctly rejected Dollar General's interpretation in part, because that interpretation would in essence transmute the two exceptions to *Montana's* Main Rule into one—requiring that tribes prove on a case by case basis as to each separate consensual relationship (which otherwise satisfied the consensual relationship exception test and the nexus requirement) that depriving tribal courts of jurisdiction to adjudicate that particular dispute arising from that particular contract (or consensual relationship) would cause a collapse of tribal

[25] *Id.* and Vol. 1 USCA5 pp. 1059-1060.

government or have some other calamitous affect on the tribes' right to self government. The District Court properly concluded that this latter requirement only applies to *Montana's* second exception.[26]

No Court has ever imposed any such additional proof requirement on tribes seeking to uphold their civil jurisdiction based on *Montana's* consensual relationship exception.

The key point underlying *Montana's* first ("consensual relationship") exception is that it is critical to the survival of tribal governments and to tribal self-government that tribes retain authority to adjudicate civil disputes arising from voluntary consensual relationships between tribes and their members and nonmembers. This is a core attribute of tribal sovereignty.

The District Court correctly ruled that the consensual relationship exception does not turn on the question whether depriving a particular tribal court of jurisdiction to adjudicate a particular dispute arising from a particular consensual relationship would interfere with that tribe's right of self government. Instead, the District Court properly ruled that the first exception to *Montana's* main rule reflects the recognition that depriving tribal courts of jurisdiction to resolve such disputes would undermine tribes' inherent rights of self government and their authority to make and enforce their own civil laws on their reservations. *Nevada v.*

[26] Vol. 1 USCA5 pp. 1062-1065.

Hicks, 533 U.S. 353, 361 (2001) (paramount among the interests, the *Montana* exceptions were intended to protect is the right of Indian tribes "to make their own laws and be governed by them").[27]

The District Court properly ruled that Dolgen's agreement to participate in the YOP constituted a qualifying consensual relationship with the Tribe and the Does sufficient to anchor the exercise of Tribal Court jurisdiction under *Montana* over the Does' tort claims as pled in the tribal court because those claims have a logical nexus to those consensual relationships.

Dolgen did not raise or preserve its "punitive damages" argument, its "due process" argument, its "off-reservation conduct" argument or its "only commercial consensual relationships can invoke the first *Montana* exception" argument in the summary judgment proceedings giving rise to the sole judgment appealed from and those arguments are otherwise meritless; hence, Dolgen may not secure any relief here based on those arguments.

Dolgen did not exhaust its tribal remedies as to its "due process" argument or its "only commercial consensual relationships can invoke the first *Montana* exception" argument; hence, Dolgen may not secure any relief here based on those arguments.

ARGUMENT

[27] Vol. 1 USCA5 p. 1064.

I. STANDARD OF REVIEW

The Tribal Appellees concur in Appellants' statement regarding the Standard of Review applicable to this Appeal.

II. BACKGROUND ON THE MISSISSIPPI CHOCTAW COURTS

In regard to Appellants' opening comments on "the nature of tribal courts" (DG BR pp. 15-17), the Tribal Courts of the Mississippi Band of Choctaw Indians were established in 1984 incident to enactment of the Tribe's initial Tribal Code.[28] The Tribe's judiciary consist of several trial level courts and the Choctaw Supreme Court.[29] Civil cases are handled pursuant to the Choctaw Rules of Civil Procedure[30] and the Tribal Code. This includes § 1-1-4, Choctaw Tribal Code, which provides:

> Law Applicable in Civil Actions
>
> In all civil actions the Choctaw Court shall apply applicable laws of the United States and authorized regulations of the Secretary of the Interior, and ordinances, customs, and usages of the Tribe. Where doubt arises as to the customs and usages of the Tribe, the court may request the advice of persons generally recognized in the community as being familiar with such customs and usages. Any matter not covered by applicable federal law and regulations or by ordinances, customs, and usages of the Tribe, shall be decided by the court according to the laws of the State of Mississippi.[31]

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[28] *See*, Vol. 8, Jackson Miller, Encyclopedia of Mississippi Law, Mississippi Practice Series, Tribal Courts, § 72.6 (hereinafter, "Jackson Miller").
[29] *Id.* at p. 380 and §§ 1-3-1 – 1-3-4, Title I, Chapter 3, Choctaw Tribal Code; The entire Choctaw Tribal Code is available at http://www.choctaw.org/government/court/code.html.
[30] Title VI, Chapter 1, Article V- Depositions and Discovery, Rules 26-37, Choctaw Tribal Code.
[31] Vol. 1 USCA5 p. 417 and n.4.

Civil Judges must be attorneys duly admitted to practice law in Mississippi or in some other state. Two of the three Choctaw Supreme Court justices likewise must be attorneys duly admitted to practice in Mississippi or in some other state.[32]

The conduct of Tribal Judges is governed by the Tribe's Judicial Code of Ethics.[33] *See, Martha Williams-Willis v. Carmel Financial,* 139 F.Supp.2d 773, 781 and n.6 (S.D.Miss. 2001).

The Tribe has enacted a written Code of Laws and looks to Mississippi common law for guidance on matters not governed by federal law or the Tribe's own Constitution and laws.[34]

The Tribe and its courts are bound to accord all persons the due process protections required by the Tribe's Constitution and by the Indian Civil Rights Act, 25 U.S.C. § 1302, and do not hesitate to enforce those rights.[35]

III. THE DISTRICT COURT PROPERLY INTERPRETED AND APPLIED THE *MONTANA* TEST

[32] Sections 1-3-1 – 1-3-4, Title I, Chapter 3, Choctaw Tribal Code; *see,* fn.29.
[33] Section 1-6-7, Choctaw Tribal Code; *see,* fn. 29.
[34] Art. IX, § 1(h), Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians. A copy of the Tribal Constitution is available at http://www.choctaw.org/government/court/constitution.html; *See,* Vol. 1 USCA5 pp. 417 and n.4, 423-424; *see,* Jackson Miller, *supra* at 72.12.
[35] Jackson Miller, *supra* at § 72.24; *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 65 (1978) ("Tribal forums are available to vindicate the rights created by the ICRA and § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply"); *Wanda Sharp v. Mississippi Band of Choctaw Indians,* No. S.C. 2002-02 (reversing Choctaw Trial Court's ruling against non-Indian employee in re termination dispute on grounds the tribal government's actions caused "a denial of procedural due process as required by the due process guarantees recognized in the [Tribal] Constitution at Art. X, § 1(h), as well as the Indian Civil Rights Act at 25 U.S.C. § 1302(8)). (Copy attached as Appendix 1 to this Brief).

A. The District Court Properly Interpreted and Applied the "Consensual Relationship" Exception to *Montana's* General Rule.

Montana's general rule is that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S. at 565. The Supreme Court also observed that, where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id*. at 564.

The Court then carved out two exceptions to *Montana's* general rule under which:

> 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 and welfare of the tribe.
>
> *Montana, supra* at 566

The Court in *Atkinson, supra* at 645 and 656 later ruled that to invoke *Montana's* first exception also requires that the exercise of tribal authority "have a nexus to the consensual relationship itself," or as the Court later observed:

> [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'.

Montana's general rule originally applied only when a tribe sought to regulate or adjudicate non-Indian conduct occurring on non-Indian owned fee land. *Montana, supra* at 557, 566; *Strate v. A-1 Contractors*, 520 U.S. 438, 445-447, 454 (1997); *Atkinson, supra* at 646 and 653. Now, although there has never been a clear U.S. Supreme Court holding to that effect, *dicta* in *Nevada v. Hicks*, 533 U.S. 353, 373 (2001) (Souter, J. concurring) and in *Plains Commerce, supra* at 328-331 (2008) have given rise to the view that *Montana's* general rule now also applies to non-Indian conduct occurring on reservation trust land. Both the Choctaw Supreme Court and the District Court below have so ruled.[36]

Nonetheless, when the dispute in question arises on reservation trust land (as here), the Tribe faces a lower bar in sustaining its jurisdiction than when the tribe is attempting to regulate non-Indian conduct on non-Indian fee land, because in the reservation trust land circumstance tribal jurisdiction is bolstered by the tribe's inherent authority to exclude or condition entry of non-members onto reservation lands. *Plains Commerce, supra* at 328-331; *Nevada v. Hicks, supra* at 360, 382 and n.4 (Souter, J. concurring); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148-149 (1982) (tribe had inherent power to impose oil and gas severance tax on non-Indian lessee of reservation land over and above lease payments under oil and gas

[36] Vol. 1 USCA5 pp. 193, 624 and n.1, pp. 1064-1065. Tribal Court Defendants do not challenge that interpretation on this appeal.

lease which was silent as to tribe's taxation authority); A*ttorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927, 938-940 (8th Cir. 2010) (reiterating that "tribal civil authority is at its zenith when the tribe seeks to enforce regulations stemming from its traditional powers as a landowner" whether it does so via positive law or adjudication of civil tort claims).

In applying the consensual relationship test a tribal court is authorized to exercise civil jurisdiction over all claims between members (or a tribe or tribal entity) and nonmembers which have a logical nexus to the consensual relationship involved. *Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas, et al.*, 78 F.Supp.2d 589, 600, and n.4 (E.D. TX 1999) (ruling in part that if tribal court properly existed, the tribal court would have had jurisdiction to adjudicate oil and gas lease disputes between Comstock and tribe under Montana's first exception), *aff'd in part on other grounds, Comstock Oil & Gas, Inc. v. Alabama and Coushatta Indian Tribes of Texas, et al.*, 261 F.2d 567 (5th Cir. 2001); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 684 (5th Cir. 1999) (applying Montana consensual relationship exception to require exhaustion of tribal remedies on disputes arising from cigarette sales contrtact); *Graham v. Applied Geo Technologies, Inc., 593 F.Supp.2d 915, 919 (2008)* ("Thus, while a tribal court generally does not have jurisdiction over nonmember parties, there is an exception

in that the tribe may regulate activities of nonmembers who enter consensual relationships with the tribe or its members through commercial dealing, contracts, leases, or other arrangements"). *Bank One, N.A. v. Lewis, 144 F.Supp. 2d 640 (S.D.Miss. 2001), aff'd sub nom Bank One, N.A. v. Shumake, 281 F.3d 507 (5th Cir. 2002), r'hrg en banc den'd, 34 Fe. Appx. 965 (5th Cir. 2002), cert. den'd., 537 U.S. 818 (2002)* (affirming District Court's ruling that Tribal Court had "colorable jurisdiction" under Montana test to decide satellite sales credit contract fraud and breach claims filed by tribal members against bank; hence, exhaustion of tribal remedies was required); accord, *Martha Williams-Willis v. Carmel Financial Corporation, 139 F.Supp.2d 773 (S.D.Miss. 2001)*. To like effect is *Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes of Texas, 72 F.Supp.2d 717 (1999)*.

Adjudication of contract and tort claims which have a logical nexus to a qualifying consensual relationship are a recognized "other means" by which a tribe may regulate the conduct of non-Indians who have entered into such relationships with a tribe or its members on their reservation. *Strate v. A-1 Contractors, Inc.*, 520 U.S. 438, 453 (1997) (where the Court read its precedents as standing "for nothing more than the unremarkable proposition that, where tribes possess authority to regulate the activities of nonmembers civil jurisdiction over disputes arising out of such activities presumptively lies in the tribal courts."); *Attorney's Process, supra* at 938:

> If the Tribe retains the power under *Montana* to regulate such conduct, we fail to see how it makes any difference whether it does so through precisely tailored regulations or through tort claims such as those at issue here.

To like effect is *Farmers Union Oil Company v. Guggolz,* 2008 WL 216321 (D.S.D.) (ruling that adjudicating a tort claim based on a premises liability theory was a kind of "other means" for exercising tribal jurisdiction where the tort claim had a logical nexus to underlying consensual relationships between the tribe and tribal members and an on-reservation convenience store operator).

B. Dolgen's Interpretation of the Consensual Relationship Exception is Neither Required by Nor Permitted by *Montana* and its Progeny

Dolgen advocates a radical departure from this approach, arguing that *Plains Commerce* has imposed a new rule which fundamentally departs from how *Montana's* "consensual relationship" exception has historically been interpreted and applied. According to Dolgen, after *Plains Commerce* proof of an express agreement or of an implied agreement (based on the existence of a qualifying "consensual relationship") to tribal court jurisdiction is not enough to support the exercise of such jurisdiction even (as here) over claims which have a logical nexus to that consensual relationship otherwise sufficient to invoke *Montana's* first exception; and, even though in *Plains Commerce* the Court reemphasized that a nonmember can become subject to tribal court jurisdiction either by express

agreement or by consent implied from his action under the *Montana* test. *Plains Commerce, supra* at 336-337:

> …But the key point is that any threat to the tribe's sovereign interests flows from changed uses or nonmember activities, … The tribe is able fully to vindicate its sovereign interests in protecting its members and preserving tribal self-government by regulating nonmember activity on the land within the limits set forth in our cases. (Emphasis added).
>
> ****
>
> …Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his action. 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. *See Montana*, 450 U.S., at 564. (Emphasis added). *Id.* at 19.

Thus, the rule of *Montana* remains that where the first *Montana* exception is satisfied, the non-member's consent to tribal court civil jurisdiction is implied as to all claims having a logical nexus to the qualifying consensual relationship. *Plains Commerce.* Dolgen, however, contends—without citation to any authority—that *Plains Commerce* now requires tribes to make an additional showing of special harm to the tribe's right of self-governance or its internal relations that would occur if its courts were barred from adjudicating a particular case arising from a particular consensual relationship. (DG Br., pp 8-9).

As the District Court held, Dolgen has fundamentally misread *Plains Commerce, Montana* and its progeny.[37] *Montana's* consensual relationship

[37] Vol. 1 USCA5 pp. 13-14.

exception does not require any such additional showing because *Montana* (and key cases it identifies as paradigms supporting tribal jurisdiction) recognize that it is integral to a tribe's right of self-government that tribes be able to regulate voluntary consensual relationships between nonmembers and the tribe (or tribal entities) or tribal members on their reservations, and that their courts be available to adjudicate claims involving disputes between tribal parties and nonmembers arising from such relationships.

These cases clearly validate the exercise of tribal jurisdiction over all claims arising from the conduct or activities of nonmembers occurring on Indian reservations as evidenced by such consensual relationships so long as the *Atkinson* nexus test is also satisfied. This is clear because several of the cases which the *Montana* court (and later Supreme Court cases) cited as paradigms for the consensual relationship exception expressly so hold. *Montana*, *supra* at 565-566; *Nevada v. Hicks*, *supra* at 372 (2001); *Plains Commerce*, *supra* at 332-333. Those cases include *Buster v. Wright*, 135 F. 947, 949 (8th Cir. 1905) (held: the tribal interest of self-government authorized a tribe to "prescribe the terms upon which noncitizens may transact business within its borders." [and] "The authority of the Creek Nation to prescribe the terms upon which noncitizens may transact business within its borders did not have its origin in acts of Congress, treaty or agreement of the United States. It was one of the inherent and essential attributes of its original

sovereignty."); *Williams v. Lee*, 358 U.S. 217 (1959), where the Court ruled that a dispute arising from an on-reservation transaction between a tribal member and a nonmember could not be heard in State Court because:

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. *Cf* Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations.

The Supreme Court's repeated citation to these cases as noted above makes clear that Dolgen's position is fundamentally inconsistent with the Court's rulings on this issue. *See also, National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (promotion of tribal self-government and self-determination required that the tribal court have "the first opportunity to evaluate the factual and legal basis for the challenge" to its jurisdiction); *accord*, *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 13-15, 16 (1987) ("Tribal courts play a vital role in tribal self government…tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty…civil jurisdiction over such activities presumptively lies in the tribal courts…"); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978) ("Tribal Courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes

affecting important personal and property interest of both Indians and non-Indians").

C. *Plains Commerce* Did Not Impose an Additional "Special Proof" Requirement for Invoking *Montana's* First Exception

Did any holding in *Plains Commerce* alter *Montana's* general rule and exceptions? No. While the U.S. Supreme Court could have directly addressed and ruled upon—affirming, repudiating or altering—the "consensual relationship" exception as it had previously been interpreted and applied—it did none of those things. Instead, by reconfiguring the facts and claims involved, it avoided saying anything which altered the consensual relationship test as applied to nonmember conduct arising in connection with such on-reservation relationships.[38] *See*, Krakoff, "Tribal Civil Jurisdiction over Nonmembers: A Practical Guide for Judges," 81 University of Colorado Law Review, 1187, 1223 (2010):

[38] The Supreme Court did redefine the second *Montana* exception and significantly narrowed the circumstances in which it can be invoked to sustain the exercise of tribal jurisdiction. *Plains Commerce, supra* at 340-341:

> The second exception authorized the tribe to exercise civil jurisdiction when non-Indians' "conduct" menaces the "political integrity, the economic security, or the health or welfare of the tribe." *Montana,* 450 U.S. at 566, 101 S.Ct. 1245. The conduct must do more than injure the tribe, it must "imperil the subsistence" of the tribal community. *Ibid.* One commentator has noted that "th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences." Cohen § 4.02[3][c], at 232, n. 220.

Tribal Court Defendants do not rely upon the second exception to support tribal jurisdiction in this appeal.

> Rather, the Court stated, *Montana's* exceptions allow the tribe to regulate "nonmember *conduct* inside the reservation that implicates the tribe's sovereign interests."
>
> * * * *
>
> *Plains Commerce* left *Strate's* doctrinal approach intact, but carved out one particular category of nonmember action—ownership of non-Indian land—from qualifying for the *Montana* exceptions. Activity or conduct by nonmembers on non-Indian lands may have sufficient effects on the tribe or its members to trigger tribal authority, but tribal sovereign interests do not extend to ownership of non-Indian lands. (Emphasis added).

To like effect is Furnish, "Sorting out Civil Jurisdiction in Indian Country After *Plains Commerce*: State Courts and the Judicial Sovereignty of the Navajo Nation," 33 American Indian Law Rev. 385, 408-410 (2008-2009):

> Note carefully what the majority backed away from in *Plains Commerce Bank.* As the majority stated in the case, however much it may have twisted the facts to do so, *Plains Commerce Bank* deals with a transaction between two nonmembers, the same as in *Strate.* That formulation does not confront the first *Montana* exception, it avoids it.
>
> * * * *
>
> As it stands, *Plains Commerce Bank* represents no disagreement over the *Strate-Montana* doctrine. The two exceptions continue untouched. The five-justice majority excluded the first *Montana* exception by finding that the case involved a sale of fee land between nonmembers. Four justices thought it was more and saw facts that would have triggered the first exception.
>
> Lower courts should apply the *Strate-Montana* doctrine as before, mindful that the Supreme Court of the United States has passed on a chance to overrule that doctrine. (Emphasis added).

The District Court correctly ruled that cases involving disputes arising from consensual relationships after *Plains Commerce* are still deemed to properly fall within tribal regulatory and adjudicatory jurisdiction because such cases inevitably

impact the ability of tribal governments to "make their own laws and be ruled by them"—including the resolution of disputes involving nonmembers engaged in on-reservation activities involving such consensual relationships.[39] This satisfies *Montana's* over-arching theme that tribal jurisdiction over nonmember activities on their reservations is appropriate because regulating such activities in the context of such consensual relationships is integral to protecting tribal rights of self-governance as enunciated in *Merrion v. Jicarilla Apache Tribe, supra; Williams v. Lee, supra; Buster v. Wright, supra* and reinforced in *Nevada v. Hicks, supra* at 361.

The District Court thus also correctly noted that "although a number of post-*Plains Commerce Bank* cases have considered the consensual relationship exception, none has identified the additional showing advocated by plaintiffs as a prerequisite to its application." To be clear—no case before or since *Plains Commerce* has held that tribal court jurisdiction based on the consensual relationship exception must also be bolstered by the kind of additional proof as argued by Dolgen where the nexus test is satisfied.[40] *Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance, et al.*, 642 F.3d 802, 810-820 and n.6 (9th Cir. 2011) (affirming tribal court jurisdiction over contract and tort claims

[39] Vol. 1 USCA5 pp. 1063-1066

[40] Dolgen's citation to commentary reading *Plains Commerce* more restrictively (DG BR pp. 29-31), does not constitute case authority for Dolgen's position. As shown in text, no post-*Plains Commerce* case has embraced the interpretation reflected in that commentary or here suggested by Dolgen.

under both *Montana* exceptions as regards on-reservation lease and post-lease disputes between tribe and non-member parties, rejecting arguments that *Plains Commerce* changed the rules regarding the consensual relationship exception, and ruling that unwritten arrangements between a tribe or its members and non-members can satisfy the consensual relationship test); *Crowe & Dunlevy, P.C. v. Stidham,* 640 F.3d 1140 (10th Cir. 2011) (affirming district court's application of the consensual relationship test after *Plains Commerce* where the tribal defendant failed to establish that a tribal court order requiring Crowe & Dunlevy to disgorge certain legal fees had a nexus to a consensual relationship between that law firm and the tribe which would satisfy that exception. The Court summarized the first exception to the *Montana* test as requiring proof of a "consensual relationship" and "a sufficient 'nexus' between that relationship" and the subject tribal court order, without any suggestion that separate proof of special harm to the tribe's right of self-governance or internal affairs was required); *Attorney's Process, supra* at 936, 937-946 (8th Cir. 2010) (recognizing that *Plains Commerce* left intact the basic *Montana* framework and its two exceptions, then ruling that the tribal court had jurisdiction over all the trespass and trade secret claims under the second *Montana* exception, remanding to the district court the question whether tribal court jurisdiction existed over the tribe's claim for conversion of tribal funds based on the first ("consensual relationship" exception where that argument had not been

raised below); *Phillip Morris USA, Inc. v. King Mountain Tobacco,* 509 F.3d 932, 937, 940-942 (9th Cir. 2009) (the tribal jurisdiction "teachings of three supreme court cases; *Montana, Strate,* and *Hicks*…are affirmed in important respects by the Court's most recent tribal jurisdiction decision in *Plains Commerce;*" expressly rejecting the argument that a special showing of significant harm to the tribe's political existence or internal relations is required to invoke the consensual relationship exception); *Fine Consulting v. Rivera,* 2013 WL 142869 (D.N.M.) (dismissing non-Indian plaintiffs' suit for failure to exhaust tribal remedies regarding their business tort claims seeking individual capacity relief against tribal officials and tribal entity employees since tribal court had colorable jurisdiction under consensual relationship exception where tort claims had logical nexus to underlying contracts between tribal gaming enterprises and plaintiffs; and, describing the requirements for invoking the consensual relationship exception as follows: "Pursuant to the first exception to the *Montana* rule, two elements must be shown: (1) that Plaintiffs have a consensual relationship with the tribal entity; and, (2) that Plaintiffs' claims against the Defendants in this matter have a logical relationship (nexus) to the underlying consensual relationship." *Dish Network Corporation v. Tewa,* 2012 WL 5381437 (D. Ariz.) (requiring exhaustion of tribal remedies based on the existence of colorable tribal court jurisdiction under *Montana* and *Plains Commerce* based on consensual relationships formed by Dish

Network Satellite Systems contracts with tribal members and satisfaction of nexus text in tribal court suit seeking to require that Dish Network obtain tribal business license and otherwise comply with tribal laws on billing and disclosure requirements, without requiring any separate proofs of special harm to tribe's rights of self-governance or internal affairs); *Fox Drywall & Plastering, Inc. v. Sioux Falls Construction Company*, 2012 WL 1457183 (D. S.D.) (upholding tribal jurisdiction under *Montana's* consensual relationship test over non-Indian contractor's third party claim against non-Indian sub-contractor in suit by tribe seeking damage for breach of construction contract for casino hotel constructed on reservation lands involving contracts and subcontracts in which all parties consented to tribal law and to any forum with jurisdiction over all parties to such disputes. No showing of special harm to the tribe's right of self-governance was required to sustain tribal jurisdiction); *Admiral Insurance Company v. Blue Lake Rancheria Tribal Court*, 2012 WL 1144331 (N.D. Cal.) (requiring exhaustion of tribal remedies based on colorable tribal jurisdiction under *Montana's* consensual relationship test against worker's compensation insurance carrier re tribal entity plaintiff's (MBS') direct action against carrier (Admiral) for refusing to cover certain injured tribal entity employees based on indemnity agreement between tribal plaintiff and non-Indian contractor (WRI) insured by Admiral. No showing of special harm to the tribe's right of self-governance and internal relations was

required); *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 (D. Ariz.) (ruling that tribal jurisdiction could not be sustained over non-Indian customer's tort suit against Frito-Lay based on Frito-Lay's consensual relationship with tribal member's retail store where customer claimed slip and fall injury based on a Frito-Lay box on the floor of the tribal member's store. The court ruled that the customer had no consensual relationship with Frito-Lay hence the exercise of tribal court jurisdiction over customer's claim could not be anchored to the tribe's rights of self-governance or control of internal relations by invocation of *Montana's* first exception; and, rejected application of *Montana's* second exception in part because the single tort injury to the non-Indian customer did not satisfy the special proof requirements to show "catastrophic" consequences for "tribal self-government" that must be shown to invoke *Montana's* second exception); *Otter Tail Power Company v. Leech Lake Band of Ojibwe*, 2011 WL 2490820 (D. Minn.) (exhaustion of tribal remedies not required in suit by tribe against power company because the tribal court did not have colorable jurisdiction over tribal suit to enjoin power line construction on non-Indian fee land within reservation under *Montana's* first exception where there existed no consensual relationship between the tribe or a tribal member and the power company regarding that land; and, the tribe's proofs did not satisfy *Montana's* second exception because there was no showing that power company's actions "will imperil the sustenance of the tribe's community");

Ford Motor Credit Corporation v. Poitra, 2011 WL 799746 (D.N.D), at p. 3 (affirming tribal court jurisdiction over tribal member suit against lender grounded in the "consensual relationship" exception; rejecting lender's argument that after *Plains Commerce* "tribal courts do not have jurisdiction over nonmember companies" even when a consensual relationship under *Montana* is shown); *Red Mesa Unified School District v. Yellowhair,* 2010 WL 3855183 (D.Ariz) (reaffirming pre-*Plains Commerce* rules regarding consensual relationship test; holding that only private consensual relationships—not those stemming from inter-governmental relations—can satisfy *Montana's* first exception); *Graham v. Applied Geo Technologies, Inc.,* 593 F.Supp.2d 915 (S.D.Miss. 2008) (holding Choctaw tribal entity had shown the existence of colorable tribal jurisdiction under *Montana's* "consensual relationship" test sufficient to require exhaustion of tribal remedies without any extra proof of special harm to tribal self-government or internal relations beyond proof of an employment relationship between the tribal entity and the nonmember plaintiff, and a logical nexus between the claims pled and that relationship); *First Specialty Insurance Corporation v. Conf. Tribes of the Grand Ronde Community of Oregon,* 2007 WL 3283699 (D.Or.) (affirming tribal court jurisdiction to adjudicate arbitration disputes arising from contract, securities law and tort claims based on allegations of fraud and negligent misrepresentation re financial services consulting agreement with the tribe and on-reservation

conduct of financial advisors since there was a logical nexus between the arbitration disputes adjudicated in the tribal court suit and the underlying consensual relationship).

In *Phillip Morris*, *supra* at 940-942 the court applied the same *Montana* "consensual relationship" exception after *Plains Commerce* as existed before, noting that the Indian entity plaintiff (King Mountain) had no consensual relationship with Phillip Morris and that the tribal court claims pled against Phillip Morris by King Mountain had no relationship to the consensual relationships Phillip Morris did have with various (other) tribal members. The case contains no suggestion that had a consensual relationship meeting the *Montana* requirements been shown, that King Mountain would also have had to show that adjudication of that particular dispute (or regulation of the conduct involved) was necessary to prevent some other or further intrusion upon the affected tribe's rights of self-governance or its internal relations.

Instead, as shown above, the post-*Plains Commerce* cases recognize that it is only when tribal jurisdiction is founded on *Montana's* second exception—invoking the political integrity, economic security, health and welfare test—that a separate showing of significant harm to the tribe's political existence or internal relations (e.g. to its right of self-governance) must be made. But that showing is not extra under *Montana's* second exception—its integral to the second exception. *Plains*

Commerce Bank, supra, 128 S.Ct. at 2726 (to invoke the second exception requires proof that the "nonmembers' conduct…'must imperil the subsistence of the tribal community'"); *Attorney's Process & Investigation Services, Inc., supra* at 939 (allegations that nonmember defendants were involved in effort to seize control of the tribal government and economy by force…[stated claims that] pled "direct attack on the heart of tribal sovereignty, the right of Indians 'to protect tribal self-government'" which invoked *Montana's* second exception).

Thus, once (as here) a "consensual relationship" under *Montana,*[41] is shown, all claims which are logically connected to (derivative of) that relationship are subject to tribal court jurisdiction based on the first *Montana* exception. *Id.; Nevada v. Hicks, supra* at 361.

Moreover, Dolgen's argument proves too much. There is no discernable standard by which Dolgen's test could be applied to individual contracts or consensual relationships on a case by case basis in order to determine if Dolgen's version of the test were satisfied, e.g. would the Smoke Shop contract at issue in

[41] Dolgen's November 7, 2000 lease with the Tribe is also a consensual relationship under *Montana's* first exception. Vol. 1 USCA5, pp. 53, 67-70. Tribal Appellants do not argue that this lease is by itself sufficient to anchor tribal jurisdiction under *Montana* over the Does' tort claims, even though "but for" that lease, the Dolgen store would not have been operating on the reservation. Instead, tribal jurisdiction exists here based on Dolgen's agreement with the Does and the Tribe to participate in the YOP program and to provide appropriate supervision of the YOP students placed there in Dolgen's reservation store. However, the referenced Dolgen lease provisions certain put Dolgen on notice it was operating in the Choctaw Indian Country subject to tribal law and tribal jurisdiction for all disputes and matters arising from the lease and the lease evidences Dolgen's long term presence on the reservation.

TTEA, supra, have met that test? Would the trading post billing dispute in *Williams v. Lee,* 358 U.S. 217 (1959) have met that test? Would the satellite financing contracts at issue in *Bank One, NA v. Shumake,* 281 F.3d 507 (5th Cir. 2000) have met that test? How big would the contract have to be in dollar terms to satisfy the Dolgen test? How many employees would have to be affected to satisfy Dolgen's test? What kind of particular financial impact on the tribe would have to be shown to satisfy Dolgen's test?

No prior decision of any court has offered any guidance on these questions because they are not relevant to the *Montana* consensual relationship test. This further illustrates why Dolgen's attempt to reformulate the *Montana* consensual relationship exception was properly rejected by the District Court.

No one would argue and no one could prove that depriving a tribal court of jurisdiction to adjudicate a single civil dispute in one case would materially undermine a tribe's right of self-government, and the Tribal Court Defendants do not so argue here. Instead, the *Montana* test reflects the 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 when one of the *Montana* exceptions (including the nexus test) is satisfied; and, that requiring tribes to prove that barring a tribal court from ruling on a particular case when the consensual relationship test and the nexus

requirement are otherwise satisfied would be an impossible burden—tantamount to a ruling that the consensual relationship test can never be satisfied. Dolgen's argument that this is now the rule of *Montana* after *Plains Commerce* is simply wrong. *Plains Commerce, supra* and *Nevada v. Hicks, supra* foreclose any such outcome.

Thus, Dolgen's argument that after *Plains Commerce* tribal court jurisdiction can be sustained under *Montana's* first (consensual relationship) exception only when a separate showing of specific injury to the tribe's rights of self-governance or control of its internal relations is also shown, was properly rejected by the District Court.[42]

IV. DOLGEN'S "OFF-RESERVATION" CONDUCT ARGUMENT FAILS

A. Dolgen Did Not Raise or Preserve its Off-Reservation Conduct Argument in the District Court and Did Not Exhaust its Tribal Remedies as to That Argument

At no time either before the Choctaw Tribal Courts or before the District Court did Dolgen ever raise or argue that the Doe plaintiffs had "presented no evidence of any conduct related to these claims occurring on the reservation." Dolgen has for the first time raised that argument here. (DG Br. 32). Dolgen has,

[42] Dolgen (DG Br. 7) makes much of the Tribal YOP Director's comment that operation of the program had no impact on the Tribe's right of self-governance or internal relations. But the issue here is not what kind of impact *that program* had or didn't have on the Tribe's rights. The issue is whether disputes arising from Dolgen's agreement to participate in that program are the kind of disputes which the Supreme Court has recognized that tribal courts should have the opportunity to resolve in aid of tribal rights of self-governance. *Nevada v. Hicks, supra* at 361. In this case, the answer is "yes."

therefore, not preserved this issue for appeal *Lofton v. McNeil Consumer & Specialty Pharmaceuticals*, 672 F.3d 372, 380-381 (5th Cir. 2012) ("The Fifth Circuit has a 'virtually universal practice of refusing to address matters raised for the first time on appeal.'"); *see*, *General Universal Systems, Inc. v. Lee*, 379 F.3d 131, 158, and n. 86 (5th Cir. 2004) (citing and applying ruling in *FDIC v. Mijalis*, 15 F.3d 1314, 1327 (5th Cir. 1994) that "to preserve error for appeal, 'the litigant must press and not merely intimate the argument during the proceedings before the district court. If an argument is not raised to such a degree that the district court has an opportunity to rule on it, [the appellate court] will not address it on appeal.'"). There exist no "extraordinary circumstances" that would warrant deviation from this rule under *General Universal Systems v. Lee*, *supra*, since Dolgen has always had (and will still have) the opportunity to raise this argument in the Choctaw Courts.

Moreover, Dolgen had and still has a duty to first present this argument in the Choctaw Courts and to give those courts the opportunity to first rule upon this issue. Instead, Dolgen originally challenged tribal jurisdiction in the Choctaw Courts based on the legal equivalent of a Rule 12(B)(1) motion.[43] In that context, the factual allegations of the Does' Complaint in CV-02-05 had to be taken as true. This includes the allegations of ¶ I of the Tribal Court Complaint that "all

[43] Vol. 1 USCA5 p. 29.

occurrences giving rise to Plaintiffs' cause of action occurred within the confines of the Choctaw Indian Reservation." *Crawford v. U.S. Dept. of Justice*, 123 F.Supp.2d 1012 (S.D. Miss. 2000) (on Rule 12(b)(1) motion asserting facial attack on jurisdiction factual allegations of complaint "are taken as true"); *Benton v. U.S.*, 960 F.2d 19 (5th Cir. 1992) (a claim may not be dismissed based on facial attack on jurisdiction "unless it appears certain that the plaintiff cannot prove any set of facts that would entitle him to relief").

Allowing Dolgen to secure relief in this appeal based on this argument would not only violate the "universal" rule of *McNeil* and *Mijalis*, but would also violate the Supreme Court's clear mandate that non-members seeking to challenge Tribal Court jurisdiction must first raise in the Tribal Courts the arguments they rely upon and allow those courts the full opportunity to rule upon them based on the record developed in the Tribal Court. *National Farmer Union, supra* at 856:

> Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination. That policy favors a rule that will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge. Moreover the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court before either the merits or any question concerning appropriate relief is addressed. (Emphasis added).

See also, Iowa Mutual, supra at 6, 15-16 ("Promotion of tribal self-government and self-determination required that the Tribal Court have 'the first opportunity to

evaluate the factual and legal bases for the challenge' to its jurisdiction." *Id.*, at 856, 105 S.Ct. at 2454.); *Attorney's Process*, *supra* at 936, 937-946. In *Attorney's Process, supra* at 934 and 937, the Court ruled:

> The extent of tribal court subject matter jurisdiction over nonmembers of the Tribe is a question of federal law which we review de novo…in deciding the jurisdictional issue we review findings of fact by the tribal courts for clear error and defer to their interpretation of tribal law. (Citations omitted).
>
> * * * *
>
> In analyzing the jurisdictional issue we rely on the record developed in the tribal courts and the allegation in the Tribe's complaint. Questions of subject matter jurisdiction often require resolution of factual issues before the court may proceed…, and that is particularly true of inquiries into tribal jurisdiction. It is therefore both necessary and appropriate for the parties and the tribal court to ensure that "a full record [is] developed in the tribal court. …Here the parties were afforded discovery in the tribal trial court. (Citations omitted). (Emphasis added).

B. The Tort Claims Pled Occurred on the Choctaw Indian Reservation

Moreover, Dolgen's argument fails on the merits. The pivotal questions which must be affirmatively answered to anchor tribal jurisdiction under *Montana's* first exception are (a) was there an on-reservation consensual relationship between the non-Indian party and the tribe or tribal members? And, (b) did the tort sued upon occur in connection with the performance of the non-member's obligations arising from that consensual relationship? If so, the "nexus" test is satisfied and tribal court jurisdiction exists to adjudicate that claim. The District Court properly ruled that the correct answers to these questions in this case

were "yes;" and, therefore, correctly ruled that the nexus test was satisfied and properly sustained the exercise of tribal court jurisdiction here.[44]

This ruling is directly in line with the rulings of this court and other courts applying the *Montana* test in similar circumstances. *Bank One, supra* (allegation that Bank's predecessors in interest had presented fraudulent and misleading financing contracts to tribal members on the reservation established colorable tribal court jurisdiction over fraud and breach claims based on those documents, even though it was obvious that the creditor's conduct in preparing those documents (and corporate oversight of the salesmen) occurred off-reservation)*; Ford Motor Company v. Todecheene,* 474 F.3D 1196 (9TH Cir. 2007) (withdrawing prior ruling in *Ford Motor Company v. Todocheene,* 394 F.3d 1170 (9th Cir. 2005) that Navajo Courts plainly lacked jurisdiction over products liability claim filed by parents of tribal police officer based on death of officer allegedly caused by defective vehicle leased by the Navajo Nation for use of its Police Department)*;* and, *Ford Motor Company v. Todecheene,* 488 F.3d 1215 (9th Cir. 2007) (remanding to District Court to require exhaustion of tribal remedies because tribal court had colorable jurisdiction over tribal member's tort claims arising from on-reservation auto accident as described above even though it was obvious that any corporate errors leading to product defects occurred at other locations off-reservation).

[44] Vol. 1 USCA5 pp. 1058, 1065.

The common thread which ties together all of these cases is the conjunction of (1) an on-reservation consensual relationship and (2) a tort claim arising from that consensual relationship where the Indian plaintiff seeking recovery claims injury based on the non-member's defective performance regarding the very product or service the non-member party undertook to provide on the reservation based on the parties' underlying consensual relationship. In *Bank One* it was a fraudulent sales pitch and financing documents brought into the reservation. In *Todocheene* it was a defective vehicle sent into the reservation—delivered pursuant to the fleet leasing contracts by which those vehicles were obtained by the Tribe for the Tribe's Police Department. In this instance, moreover, the grounds for exercise of tribal jurisdiction are much stronger than in *Todocheene*, because Dolgen's store operations and its breach of its YOP obligations to the tribe and the Does all clearly occurred at its Dollar General store on the Choctaw Indian Reservation and were to be wholly performed at that on-reservation loation.

Dolgen was at all times material a corporation.[45] As such it could only act by and through its officers and employees. Dolgen is, however, deemed to be located in and acting in any jurisdiction in which it is doing business via its Dollar General stores—notwithstanding that it was a Tennessee corporation and that some of its corporate officers or employees are located in other places. *E.g*, *Frierson v. Dollar*

[45] *See*, DG Br. p.i, fn.1.

General Corporation, 2009 WL 3805549 (S.D. Miss.). Dolgen is subject to suit in state courts in the locations where its stores are placed and operated. *Id.; Kekko v. K&B Louisiana Corp.*, 716 So.2d 682 (Miss. App. 1998) (ruling that Mississippi courts could not exercise jurisdiction over premises liability claim filed against Louisiana corporation based on alleged slip and fall which occurred in Louisiana store; but, leaving no doubt that Mississippi's courts could have exercised jurisdiction over the claim had the incident occurred in a Mississippi store owned by the Louisiana corporation). This is true no matter that some non-party corporate decision makers who may have contributed to commission of a tort were located elsewhere. *See, McCurtis v. Dolgencorp, Inc.*, 968 F.Supp. 1158 (S.D. Miss. 1997) (before removal to U.S. District Court, Dolgencorp was subject to suit in Jasper County Circuit Court of Mississippi on products liability claim based on allegations of injury from a defective cigarette lighter sold in a Raleigh, Mississippi Dollar General Store, even though any corporate actions which could have caused product defects would have occurred outside of Mississippi); *Woods v Interstate Realty Co.*, 337 U.S. 535 (1949) (federal district court cannot exercise diversity jurisdiction over a suit removed from state court if the state court could not have properly exercised jurisdiction and granted relief over the same claims); *Iowa Mutual, supra* at 975.

Likewise, where civil claims derive from a corporate defendant's on-reservation actions or inactions, the exercise of tribal jurisdiction over claims arising from those actions or inactions is justified so long as *Montana's* first exception and the nexus test are satisfied. The fact that some of the corporation's decision makers were located elsewhere does not undermine the Tribe's right to exercise jurisdiction even if those decision makers caused or contributed to commission of the tort by the corporation on the reservation. *See, Iowa Mutual, supra* at 974-975, 977-978 (tribal court had colorable jurisdiction to adjudicate insurance coverage dispute arising from insurance policy issued to on-reservation Indian-owned ranch company even though any coverage decisions were made off-reservation at insurance company's Iowa headquarters); *Allstate Indemnity Company v. Stump*, 191 F.3d 1071 (9th Cir. 1999) (sale of insurance policy to on-reservation Indian resident created a consensual relationship under *Montana's* first exception and tribal court had jurisdiction to adjudicate coverage claims respecting on-reservation car accident if those claims arose from that insurance policy, even though coverage dispute arose from decisions of off-reservation insurance company employees and insurance carrier did not have a place of business on the reservation).

The Does are not suing Dolgen's off-reservation officers or employees individually for their own off-reservation torts. They are suing Dolgen for torts

committed on the reservation for which it is legally responsible. Dolgen voluntarily came into the reservation and engaged in its business operations there in part through its store manager and otherwise up through its chain of command. The Does in effect allege that Dolgen brought into the reservation (and maintained there) a defective store manager and thus provided defective management and oversight services respecting the YOP program students—the very supervision Dolgen agreed to provide as part of the YOP program—all as the result of Dolgen's negligent hiring, training and supervision of Mr. Townsend as set out in the unchallenged allegations of the complaint. Those allegations and the other evidence adduced in discovery established that Mr. Townsend was a defective manager providing a defective management function at Dolgen's reservation store as regards his supervision respecting the YOP students placed there, that Townsend's tortious conduct caused harm to John Doe, and that Dolgen was at all times material legally responsible for that defective management performance. *See*, Parts V and VI of this Brief, *infra.*

These facts and circumstances establish a clear basis for the exercise of tribal court jurisdiction in this case under *Montana.* They clearly satisfy the rule that "[A] tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 142 (1982). This Court does not have to endorse a conclusion that

the tribal courts in *Todecheene* (a products liability claim) and *Iowa Mutual* and *Stump* (insurance coverage disputes) would ultimately have jurisdiction to adjudicate those claims in order to uphold tribal jurisdiction in this appeal. None of those cases involved claims which arose from on-reservation consensual relationships anchored to an on-reservation place of business of the non-member party to the underlying consensual relationship and none of those cases involved obligations arising from those consensual relationships which a corporate party agreed to perform on the reservation.

These circumstances also distinguish the Eighth Circuit's ruling in *Attorney's Process, supra* at 936, 937-946 and the *Iowa* District Court's ruling on remand in that action. *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 809 F.Supp.2d 916 (N.D.IA. 2011**).** There, the District Court ruled that the tribal court had no jurisdiction to adjudicate a tort claim based on the non-Indian party's off-reservation conversion of tribal funds. In *Attorney's Process* there was no evidence that the non-member defendants' unauthorized receipt and retention of tribal funds—the gravamen of the tribe's conversion claim—occurred on the reservation, even though the District Court had previously ruled (and the Eighth Circuit had previously confirmed) that an on-reservation consensual relationship existed between the non-member defendants and the ousted tribal chairman who had hired them; and, that the non-member's

on-reservation conduct per that consensual relationship properly anchored tribal jurisdiction over certain trespass and trade secret claims. Since there was no evidence that the core elements of the Tribe's separate conversion claim occurred on the reservation, *Montana* jurisdiction was found lacking. *Id.* at 929-932.

Dolgen's long term presence on the reservation (*see,* fn. 41, *supra*), and its agreement to participate in the Tribe's YOP there also distinguish the Ninth Circuit's ruling in *Phillip Morris* that the tribal court had no jurisdiction to adjudicate a federal statutory claim filed by Phillip Morris against a tribal member's company (Kings Tobacco) based on the member's off-reservation sales and marketing in violation of the Lanham Act, where there existed no on-reservation consensual relationship between Phillip Morris and the tribal member or his company.

Thus, nothing in Dolgen's "off-reservation" conduct argument undermines the tribal court's power to exercise jurisdiction under *Montana's* first exception as ruled by the District Court.

V. THE DISTRICT COURT CORRECTLY RULED THAT DOLLAR GENERAL'S AGREEMENT TO PARTICIPATE IN THE CHOCTAW YOP WAS A CONSENSUAL RELATIONSHIP WHICH SATISFIED THE FIRST EXCEPTION TO THE *MONTANA* RULE.

A. Dolgen Did Not Preserve its Argument That Only Commercial Consensual Relationships Can Invoke the First *Montana* Exception and Did Not Exhaust its Tribal Remedies as to that Argument

Dolgen here raises only one other argument for attacking the District Court's ruling that Dolgen's agreement to participate in the YOP was a sufficient consensual relationship to anchor Tribal Court jurisdiction under the first exception to the *Montana* rule. That argument is the contention that only "commercial" consensual relationships invoke that rule, and that Dolgen's agreement to participate in the YOP was not a "commercial" consensual relationship. Dolgen never raised this argument in the summary judgment proceedings that gave rise to the sole judgment appealed from,[46] nor did Dolgen present this argument to the Choctaw Courts.[47] This again invokes the rule of *McNeil* and *Mijalis* that arguments raised for the first time on appeal will not be considered and the rule of *National Farmers Union* and *Iowa Mutual* that parties seeking to attack tribal court jurisdiction must give the tribal courts the first opportunity to rule upon the arguments relied upon in those attacks. Thus, Dolgen cannot secure relief here based upon this argument.

B. *Montana's* First Exception is not Limited to Commercial Consensual Relationships

If this argument were properly before this Court the short answer to it would be that it ultimately doesn't mater (in applying the *Montana* test) whether the

[46] Vol. 1 USCA5 pp. 827-877, 995-1008. Dolgen did raise this argument in earlier proceedings before the District Court (Vol. 1 USCA5 pp. 226-227), but it was not renewed in the summary judgment proceedings giving rise to the final judgment appealed from.
[47] Vol. 1 USCA5 pp. 19-180, 303-386.

consensual relationships here at issue are properly characterized as commercial or noncommercial in nature. The U.S. Supreme Court has never adopted such a limiting rule. Krakoff, "Tribal Civil Jurisdiction over nonmembers: A Practical Guide for Judges, "81 University of Colorado Law Review, 1187, 1226 (2010); *Nevada v. Hicks, supra* at 359, n. 3, only noting that a qualifying consensual relationship must be a "*private consensual relationship;*" *Fine Consulting, Inc. v. Rivera, supra* at 15:

> …This first [consensual relationship] exception has been applied to support jurisdiction whether the relations are commercial or noncommercial, as long as the claim arose out of that relationship. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 4.02[3][c][ii] n.95 at 236 (Neil Jessup Newton ed., 2012)(hereinafter, COHEN'S HANDBOOK).

Dolgen's sole authority for the contrary proposition is *Boxx v. Long Warrior,* 265 F.3d 771, 776 (9th Cir. 2001) (DG Br. 37). However, the Ninth Circuit expressly repudiated that holding of *Long Warrior* in *Smith v. Salish Kootenai Community College,* 434 F.3d 1127, 1137, n.4 (9th Cir. 2006) (*en banc*):

> FN4. To the extent our opinion in *Boxx v. Long Warrior,* 265 F.3d 771, 776 (9th Cir. 2001), states that *Montana's* first exception is limited to "commercial dealing, contracts, leases, or other arrangements" and that "such [other] arrangements also must be of a commercial nature," we disprove the statement. We think the Court's list in *Montana* is illustrative rather than exclusive.

This was not just the ruling of a "separate panel" as suggested by Dolgen (DG Br., p. 20, fn. 38). It was an *en banc* ruling of the full Ninth Circuit.

C. Dolgen's Agreement to Participate in the Tribal YOP Was a Commercial Consensual Relationship

Moreover, even if only "commercial" relationships qualify, Dollar General financially benefited from its decision to participate in the Tribe's Youth Opportunity Program (1) by receiving work from John Doe that Dollar General didn't have to pay for[48] and (2) because John Doe's presence at the store on the reservation as a Choctaw tribal member working there likely provided positive public relations for Dollar General which could be reasonably expected to lead to increased patronage by tribal members there.

It is generally recognized that businesses which participate in such job training programs do benefit from them over and above the benefits flowing to the placement agency or the student, and that such arrangements are akin to employment arrangements.[49] *Walls v. North Mississippi Medical Center*, 568 So.2d 712 (Miss. 1990) (student nurse assigned to work at medical center under an

[48] Vol. 1 USCA5 pp. 857-859, 862, 912-913.

[49] The Tribal Court Defendants raised this second argument during the earlier preliminary injunctive relief proceedings in the District Court (Vol. 1 USCA5 pp. 414-415). The argument was rejected by that court in its original ruling (Vol. 1 USCA5 p. 663) and this argument was not renewed by the Tribal Court Defendants during the later summary judgment proceedings. However, this Court may affirm the District Court ruling appealed from on grounds different than relied upon by the parties or by the lower court itself, but which are otherwise supportable based on the record. *See, United Industries, Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, n.6 (5th Cir. 1996) ("We will not reverse a judgment if the district court can be affirmed on any ground, regardless of whether the district court articulated the ground."); *Lifecare Hospitals, Inc. v. Health Plus of Louisiana*, 418 F.3d 436, 439 (5th Cir. 2005) (citing *Forsyth v. Barr*, 19 F.3d 1527, 1534, n.12 (5th Cir. 1994) for the rule that "even if we do not agree with the reasons given by the district court to support summary judgment, we may affirm the district court's ruling on any grounds supported by the record.").

unwritten student intern program constituted "a consensual relationship between the parties to the arrangement," of a "mutually beneficial nature" and under which she performed services in the hospital under the supervision of the hospital's nurses, was an apprentice employee of the hospital as a matter of law for purposes of workers compensation benefits even though she was not paid any wages by the medical center).

It is also well-settled that any kind of on-reservation employment relationship between a tribal member and a non-Indian business constitutes a consensual relationship validating the exercise of tribal court jurisdiction under *Montana's* consensual relationship exception as to all claims by such tribal members against the employer arising from that relationship. *Graham, supra* (plaintiffs employment with tribal entity was a consensual relationship under *Montana*); *FMC v. Shoshone-Bannock Tribes,* 905 F.2d 1311 (9th Cir. 1990) (FMC's leases with the Tribes or their members for raw materials and FMC's employment of tribal members in its on-reservation businesses were consensual relations sustaining tribal regulation of FMC's employment activities under *Montana*); *MacArthur v. San Juan County*, 497 F.3d 1057, 1071 (10th Cir. 2007):

> There is no doubt that an employment relationship between two parties is contractual in nature. ... In fact, the common law tort cause of action for interference with contractual relations encompasses interference with employment, even where the employment is at will... Consequentially, Montana's consensual relationship exception

> applies to a nonmember who enters into an employment relationship with a member of the tribe. (Citations omitted).

VI. THE DISTRICT COURT CORRECTLY RULED THAT THERE WAS A DIRECT LOGICAL NEXUS BETWEEN DOLGEN'S AGREEMENT TO PARTICIPATE IN THE YOP AND THE DOEs' CLAIMS THAT DOLGEN IS LIABLE FOR ITS STORE MANAGER'S TORTIOUS CONDUCT AT THE STORE DURING STORE HOURS.

The District Court properly ruled that Dolgen's agreement to participate in the Tribal Youth Opportunity Program was an "other arrangement" which satisfies the Tribe's burden to show … that there existed a "consensual relationship" with the Tribe or its members (the Does) which supports the exercise of tribal court jurisdiction over the Does' lawsuit "with respect to matters connected to that relationship."[50] The Does' claims arise directly from Dolgen's consensual relationship with the Tribe and John Doe *viz.* the YOP. Indeed, Dolgen's own employee handbook in 2003[51] recognized that being sexually or otherwise assaulted by supervisors or co-employees was a foreseeable risk of employment in its stores. The Does' allegations are that this is precisely what happened to John Doe during working hours on the store premises.

The Does claim that Dolgen's own negligence in connection with its hiring, training and supervising its store manager, renders Dolgen liable both directly and vicariously for the store manager's tortious conduct in the store which occurred

[50] Vol. 1 USCA5 p. 1058.
[51] Vol. 1 USCA5 pp. 920-926.

while both Townsend and Doe were on duty there, and while Doe was working under the store manager's supervision (and ultimately under Dolgen's supervision). Such claims clearly have a logical relationship (nexus) to the consensual relationships Dolgen had with the Tribe and John Doe via Dolgen's participation in the YOP, and break no new ground as to the basis on which Doe seeks to impose liability on Dolgen. *Walls v. North Mississippi Medical Center, supra*, *Gulledge v. Shaw*, 880 So.2d 288 (Miss. 2004) ("The doctrine of respondeat superior has its basis in the fact that the employer has the right to supervise and direct the performance of the work by his employee in all its details; this right carries with it the correlative obligation to see to it that no torts shall be committed by the employee in the course of the performance of the character of work which the employee was appointed to do."); *Ferrell v. Shell Oil Co.*, 1996 WL 75586 (E.D.La. 1996) ("The focus of the vicarious liability inquiry cannot be on the tortious act itself. If it were, employers could evade liability in most cases, since employers obviously do not include violating company policy or harming one's co-workers among their employees' job duties.").

Moreover, being subjected to an assault by a co-employee during business hours at the employer's place of business (as John Doe claims occurred here) is a known risk incident to all such employment relationships as to which Mississippi

law (and derivatively Choctaw law)[52] permits a common law tort remedy. *Goodman v. Coast Materials Company,* 858 So.2d 923 (Miss. App. 2003) ("After Newell there is still a recognized right to bring a civil suit against an employer for some intentional torts committed by co-employees. . . Miller and subsequent cases have held that intentional acts by those who are not strangers to the employment relationship may be the basis for such tort suits. Goodman has brought suit for what he alleges was an intentional assault by his co-employee. We find no argument under the present state of the law to dismiss this suit."); *Gulledge v. Shaw, supra*; *Davis v. Pioneer, Inc.,* 834 So.2d 739 (Miss. App. 2003):

> Nevertheless, in our opinion, receipt of these medical benefits [awarded under the workers compensation program] does not preclude compensation for the damages that are not compensable under the Act because they are alleged to have been caused by wilful [sic] and intentional acts [of a co-employee]. The damages stemming from the assault and battery are not compensable under the Act because they stem from a wilful [sic] and intentional act, not a negligent or grossly negligent act. *Blailock,* 795 So.2d at (¶ 6). Of course, any claim for injuries that are compensable under the Act are still subject to the jurisdiction of the Workers' Compensation Commission. *Id.* (Inserts added).

Dolgen's tribal lease and business license—additional commercial consensual relationships with the Tribe—were necessary for Dolgen to engage in business through its Dollar General store operations on the reservation. Engaging in a retail business necessarily involves hiring employees. Inherent in such

[52] *See,* § 1-1-4, Choctaw Tribal Code, p. 12, *supra.*

employment relationships is the risk of one employee assaulting another, as John Doe claims occurred here. *See,* authorities cited *supra.*

Moreover, an employer cannot escape either vicarious liability or liability for its own direct negligence solely by evidence that its employee's tortious conduct violated a store policy or store rule. *Williams v. U.S.*, 352 F.2d 477, 480 (5th Cir. 1965) ("In Georgia, as in most jurisdictions, the mere fact that a servant's negligent act is expressly forbidden by the master does not absolve the master of vicarious liability."); *Buchanan v. Stanhips, Inc*., 744 F.2d 1070, 1075, iv.4 (5th Cir. 1984) ("Nor will the promulgation of a company rule or policy forbidding an activity excuse the employer's inaction when he knows or should know that his employees are engaging in that activity. 'That an employee's conduct violates the employer's express rules is not conclusive of the issue of scope of employment.'" quoting *Normand v. City of New Orleans*, 363 So. 2d 1220, 1222 (La.App. 4th Cir. 1978)); *Gulledge v. Shaw*, *supra* ("The focus of the vicarious liability inquiry cannot be on the tortious act itself. If it were, employers could evade liability in most cases, since employers obviously do not include violating company policy or harming one's co-workers among their employees' job duties.")*; Ferrell v. Shell Oil Co., supra* ("The doctrine of respondent superior has its basis in the fact that the employer has the right to supervise and direct the performance of the work by his employee in all its details; this right carries with it the correlative obligation to

see to it that no torts shall be committed by the employee in the course of the performance of the character of work which the employee was appointed to do."); and, an employer can be held vicariously liable for injury caused by an employee's tortious conduct which could have been prevented or mitigated if the employer itself had not been negligent in regard to its own hiring, training or supervision functions.

Nor (by analogy) does evidence a tribal employee violated his employer's rules constitute a basis for evading tribal jurisdiction where the tribal employee is the defendant in claims filed by a non-member contractor. *Fine Consulting, Inc. v. Rivera, supra.* There the District Court held that the tribal court had colorable jurisdiction over business tort claims filed by non-Indian parties against tribal officials and employees of tribal gaming enterprises because a logical nexus tied those tort claims to the underlying contracts between plaintiff and the tribal gaming enterprises which constituted the qualifying consensual relationship, and ruled:

> Tribal jurisdiction under the first exception in *Montana*—and a plaintiff's duty to exhaust tribal remedies to give a tribal court the first opportunity to rule on that jurisdiction—do not evaporate just because a plaintiff alleges that a defendant engaged in misconduct or otherwise acted outside the scope of his/her authority.
>
> Given the fact that the "consensual-nexus" test has been met, the Court concludes that *Montana's* first exception has been satisfied.

Dolgen asserts that Appellees seek to sustain tribal court jurisdiction solely on the grounds that Doe was "injured while in a relationship with [Dolgen]." (DG

Br. 27). Dolgen is mistaken. Appellees' argument is and the District Court's ruling was that there in fact exists a direct nexus between the several consensual relationships which existed as between the Tribe or tribal member John Doe and the Plaintiffs here and the Does' claim that the injuries John Doe says were inflicted upon him by his supervisor (store manager) Dale Townsend while on duty at Dollar General's on-reservation store during business hours; and, as shown by the foregoing case law and evidence this kind of harm was clearly foreseeable by Dolgen. *See, Carden v. De la Cruz*, 671 F.2d 363 (9th Cir.), *cert. den'd*, 459 U.S. 967 (1982) (held: to satisfy "consensual relationship" test a direct link must exist between the tribal regulation and the particular activity regulated (foreshadowing Justice Scalia's nexus test in *Atkinson*) and ruled that "a non-Indian owner of a grocery store on fee land inside the reservation was subject to the enforcement of tribal health regulations because he had "entered into (unwritten) 'consensual relations' with tribal members 'through commercial dealings' manifested by the store owner's invitation to tribal members to come into the store for his products."); *accord, Farmers Union Oil Co. v. Guggolz, supra*.

VII. DOLGEN'S PUNITIVE DAMAGES ARGUMENT IS UNAVAILING

A. Dolgen Did Not Raise or Preserve its Punitive Damages Argument in the District Court

Dolgen's Federal Court complaint did plead a challenge to the Choctaw Tribal Court's jurisdiction based on the notion that a tribal court could not properly

adjudicate a claim which involved a request for punitive damages.[53] The parties briefed that argument in connection with the preliminary injunction proceedings in the District Court.[54] However, Dolgen did not renew or assert that argument in connection with the summary judgment proceedings which give rise to the sole judgment appealed from. Arguments not presented or preserved in the District Court may not be relied upon on appeal. *McNeil, supra; Mijalis, supra*.

B. The Imposition of Punitive Damages Does Not Involve the Exercise of Criminal Jurisdiction

Even if Dolgen's punitive damages argument were properly before this Court, an award of punitive damages in civil tort litigation does not in any sense involve the exercise of criminal jurisdiction or manifest punitive governmental action. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263-276 (1989) (punitive damage award 100 times actual damages did not violate 8th Amendment's prohibition on excessive fines because that prohibition only applies to fines imposed in proceedings involving the "prosecutorial powers of government" and private tort plaintiffs are not part of the "criminal law functions of government.") The Court in *Browning-Ferris* repeatedly emphasized the distinction between fines imposed in criminal proceedings and punitive damages imposed in civil proceedings. *Id.*

[53] Vol. 1 USCA5 p. 15.
[54] Vol. 1 USCA5 pp. 226-227, 425-427.

Thus, contrary to Dolgen's argument (DG Br. 37-39), nothing in the prohibition against Indian tribes' exercise of criminal jurisdiction over non-Indians as held in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978) is implicated by the Does' prayer for punitive damages in the Choctaw Court proceedings in CV-02-05. *Oliphant* held only that Indian tribes could not exercise criminal jurisdiction over non-Indians.

Moreover, in none of the post-*Montana*, post-*Oliphant* cases in which actual and punitive damages were sought against non-Indians in Tribal Court civil proceedings has there been any ruling that punitive damages claims would not be permissible in a case over which a Tribal Court would otherwise have jurisdiction under *Montana*. *See, El Paso Natural Gas Company vs. Neztsosie*, 526 U.S. 473, 477-485 (1999) (holding that since Price Anderson Act made federal courts' exclusive forum for adjudicating tort claims involving exposure to radioactive materials from mining operations, Navajo Courts could not hear private tort claims filed by tribal members seeking compensatory and punitive damages under Navajo tort law based on injury from radioactive waste from uranium mining, and therefore exhaustion of tribal remedy was not required; but expressing no view that tribal courts could not otherwise have adjudicated such tort claims, including claims for punitive damages claims, in cases otherwise properly before those courts under *Montana*); *see, Bank One, N.A. v. Shumake, supra*, requiring

exhaustion of tribal remedies as to non-Indian Bank's argument that the Choctaw Tribal Court could not properly exercise jurisdiction over a civil suit in which tribal members sought actual and punitive damages against non-Indian business on contract and fraud claims arising from on-reservation satellite sales financing contracts.

If it were true (as argued by Dolgen) that based on *Oliphant* and *Montana* tribal courts can never adjudicate tort cases in which plaintiffs seek punitive damages, then exhaustion of tribal remedies would not have been required as to that aspect of those arguments. Yet, exhaustion was required in *Bank One* based on this Court's finding of colorable jurisdiction in the Choctaw Court, and would have been required in *Neztsosie* but for the Price Anderson Act provision which forbad adjudication in the tribal courts of the particular kind of tort claims there at issue.

The Tribal Court Defendants acknowledge that there exist theoretical due process concerns as regards the potential for imposition of "excessive" punitive damages in civil cases. *BMW of North America v. Gore*, 517 U.S. 559 (1996) (establishing "guideposts" for evaluating whether punitive damages awards are excessive). However, as recognized by the Choctaw Supreme Court, essentially the same due process protections as inhere in the Due Process clauses of the U.S. Constitution in the Fifth and Fourteenth Amendments (which do not directly apply to Indian tribes) are found in the Indian Civil Rights Act, 25 U.S.C. § 1302(8) and

in the Tribe's own Constitution, and the Choctaw Courts are duty bound to enforce those protections.[55]

If at some point in the future a punitive damage award were made and upheld in the Choctaw Tribal Trial Court in CV-02-05, any argument that such award violated the (presently) amorphous "excessive" punitive damages standard as articulated by the U.S. Supreme Court, would have to be addressed in the Choctaw Supreme Court if and when such an award and an "excessive" punitive damages argument were made. Plaintiffs cannot evade the jurisdiction of the Choctaw Courts on this issue by speculative arguments that *they may in the future be subjected to an excessive punitive damage award* or by implications (DG Br., p. 39) that the Choctaw Tribal Courts will violate Dolgen's due process rights with respect to any such award. (DG Br., pp. 38-39); *Iowa Mutual Ins. Co. v. LaPlante, supra* at 18-19; *Martha Williams-Willis v. Carmel Financial Corporation, supra; Bank of Oklahoma v. Muscogee (Creek) Nation*, 972 F.2d 1166, 1170 (10th Cir. 1992) (*Iowa Mutual* requires a non-Indian party alleging bias on the part of the tribal court to litigate these issues in tribal court).

To the extent Dolgen were to later suffer any material violation of its due process rights during subsequent tribal court proceedings involving the imposition of punitive damages Dolgen will have the right after fully exhausting its tribal

[55] *See*, fns. 34 and 35, *supra.*

remedies to avoid enforcement of any damages award entered without due process or otherwise in excess of the Tribal Court's jurisdiction. *Iowa Mutual, supra* at 19 (after exhaustion is completed parties may seek federal court review of a tribal court's ruling that it had jurisdiction); *Burrell v. Armijo*, 456 F.3d 1159 (10th Cir. 2006) (district court erred in giving *res judicata* effect to tribal court proceedings where non-Indian parties were denied a full and fair opportunity to litigate their claims in tribal court); *MacArthur v. San Juan County*, 309 F.3d 1216, 1225 (10th Cir. 2002) (ruling that Tenth Circuit is "unwilling to enforce judgments of tribal courts acting beyond their authority."); *Wilson v. Marciando*, 127 F.3d 805, 810 (9th Cir. 1997) (federal courts will not enforce tribal court judgments where the defendant was not afforded due process or the tribal court did not have personal and subject matter jurisdiction over the case).

VIII. DOLGEN DID NOT RAISE OR PRESERVE ITS "DUE PROCESS" ARGUMENT RE THE DALE TOWNSEND EXCLUSION ORDER IN THE DISTRICT COURT AND HAS OTHERWISE ABANDONED THAT ARGUMENT; AND, THAT ARGUMENT IS OTHERWISE WITHOUT MERIT.

Dolgen suggested in the summary of its argument that:

> 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. (DG Br., 13).

If this issue were otherwise properly before this Court, it has been waived because Dolgen did not address or develop this argument in the balance of the brief and provides no citation to authority that might support it. Hence, it cannot be considered in this appeal. *L & A Contracting v. Southern Concrete Services,* 17 F.3d 106, 113 (5th Cir. 1994) (issues inadequately briefed are deemed waived); *General Universal Systems, Inc. v. Lee, supra.*

Moreover, this argument was not raised by Defendants in the summary judgment proceedings which gave rise to the sole order appealed from.[56] This is another reason it cannot be relied upon by Dolgen in this appeal. *General Universal Systems, Inc. v. Lee, supra; McNeil, supra; Mijalis, supra.*

The argument also fails on the merits. The Choctaw Supreme Court has (in consideration of Dolgen's due process concerns) ruled that the civil proceedings in CV 02-05 cannot proceed until and unless the Exclusion Order entered respecting Dale Townsend is amended to permit his participation in trial and discovery proceeding as a witness[57] The Court was also properly sensitive to the Does' due process rights, noting that their right to proceed against Dolgen could not properly

[56] Vol. 1 USCA5 pp. 226-227, 425-427.
[57]. Vol. 1 USCA5 pp. 191-193, 199 and fn.8; *see also,* pp. 296, 303-311 and 562-563; *see, Wanda Sharp v. Mississippi Band of Choctaw Indians,* No. S.C. 2002-02 (enforcing due process guarantees against the Tribe) (Appendix 1).

be circumscribed by the exclusion order entered in CV No. 1318-2003, since they were not parties to that proceeding.[58]

Dolgen may seek to secure Dale Townsend's testimony in person by pushing for amendment to the existing Choctaw Court Exclusion Order entered in Civil No. 1318-2003. The Tribe has supported, by and through the Choctaw Attorney General's Office (and will continue to support) any such effort by either Dolgen or the Doe Plaintiffs to secure an amendment to that Exclusion Order to permit Mr. Townsend to enter the reservation and testify in CV-02-05. A motion seeking that relief has been filed.[59] Those proceedings, however, have also been delayed by the ongoing proceedings in this Court as the Choctaw Court has been careful not to proceed in either of the Tribal Court cases until proceedings in the federal courts have been concluded.[60]

If an amendment to the Exclusion Order is entered to permit Mr. Townsend to enter the Choctaw Reservation to testify in person in CV-02-05, either party may seek the issuance of a Tribal Court subpoena to compel Mr. Townsend's attendance in that case. Again, the Tribe, through the Choctaw Attorney General's Office, will cooperate with the party obtaining the subpoena to seek its enforcement through the Tribal and State Courts via appropriate proceedings.

[58] Vol. USCA5 pp. 191-193, 199; 338-339; 346-349
[59] Vol. 1 USCA5 pp. 273-275.
[60] Vol. 1 USCA5 pp. 213-214.

In the alternative to compelling Mr. Townsend to appear in person as a witness in the Tribal Court proceedings, either party (the Does or Dolgen) will have the right and authority under existing Mississippi case law to secure Mr. Townsend's deposition via the Mississippi Courts through a Bill of Discovery in Neshoba County Chancery Court. *Moore v. Bell Chevrolet-Pontiac-Buick-GMC, LLC,* 804 So.2d 939 (Miss. 2004) (Complaint for Discovery remains a viable Chancery Court procedure for obtaining discovery for use in a separate proceeding if party seeking such discovery can show that they have been "diligent and made reasonable efforts to exhaust other avenues of obtaining the information..." before resort to that procedure); *Shotlander v. Allstate Insurance Company,* 2007 WL 1521132 (S.D. Miss.) (unpublished) (Mississippi procedural law allows "complaint for discovery" as means to obtain information unavailable from any other source).

Further, as noted *supra*, no Choctaw Court judgment entered without affording Dolgen a full and fair opportunity to litigate its defenses in accord with core due process principles will be enforceable. *Burrell v. Armijo, supra; Wilson v. Marciando, supra.*

Thus, nothing as regards the Dale Townsend Exclusion Order or the undeveloped due process argument it ostensibly supports warrants any ruling barring the exercise of Tribal Court civil jurisdiction in CV 02-05 respecting the Does' claims against Dolgen.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

DEFENDANT/APPELLEE

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CERTIFICATE OF SERVICE

I, CARL BRYANT ROGERS, do hereby certify that I have served a true and correct copy of the above and foregoing through United States Mail, postage fully prepaid, and electronically through the ECF system to the following counsel:

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32 and 5th Cir. R. 32.2.

1. Exclusive of the exempted portions under Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2, the brief contains 13,611 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point type for text and 12-point type for footnotes.

3. The undersigned understands a material misrepresentation completing this certificate, or circumvention of the type-volume limits, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

s/ C. Bryant Rogers
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