No. 12-60668

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOLGENCORP, INC. AND DOLLAR GENERAL CORP.

Plaintiffs-Appellants

v.

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

Defendants-Appellees

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

REPLY BRIEF OF PLAINTIFFS – APPELLANTS

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REPLY TO APPELLEES' BRIEF

I. THE TRIBAL DEFENDANTS PAY ONLY LIP SERVICE TO THE LIMITED JURISDICTION OF TRIBAL COURTS AND IGNORE *PLAINS COMMERCE*

The Tribal Defendants'[1] brief only casually mentions the general rule of *Montana* that **tribal courts do not have jurisdiction over nonmembers**. The tone of the brief suggests that Dollar General bears the burden of proving the absence of jurisdiction. To the contrary, the Tribal Defendants bear the burden of affirmatively establishing jurisdiction. Yet nowhere do they even attempt to argue that tribal court jurisdiction over the Does' tort claim arises out of "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Plains Commerce Bank v. Long Family Land and Cattle Co.,* 554 U.S. 316, 337, 128 S.Ct. 2709 (2008). They cannot, and so they argue instead that *Plains Commerce* did not mean what it said. The failure of the Tribal Defendants to even attempt to address this language speaks volumes. *Plains Commerce* means what it says and the Choctaw Court does not have jurisdiction here.

[1] The term Tribal Defendants is used to encompass all parties who were Defendants in the District Court including the Doe's.

II. THE TRIBAL DEFENDANTS' WAIVER AND EXHAUSTION ARGUMENTS FAIL TO ACKNOWLEDGE THE ISSUES HERE ARE SUBJECT MATTER JURISDICTION

A. ARGUMENTS ON SUBJECT MATTER JURISDICTION CANNOT BE WAIVED

The Tribal Defendants spends much of their brief arguing that Appellants have waived numerous arguments because they were not raised in District Court. This argument is wrong on two counts. First, the question of a tribal court's authority over a non-member in a particular case is one of subject matter jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 367, n. 8 (2001). The "concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court." *United States v. Cotton*, 535 U.S. 625 (2002). Thus, the one argument not raised below, that there were no allegations to support any act of negligence by Dollar General occurred on the reservation, is properly considered now.

B. DOLLAR GENERAL PRESSED ITS ARGUMENTS IN THE DISTRICT COURT

Second, as the Tribal Defendants' brief admits, all the arguments made here by Dollar General, with the one exception, were made in the District Court during briefing of Dollar General's request for a preliminary injunction.[2] The Tribal

[2] See Appellees' Original Brief fn.'s 46, 49, p. 66 first sentence.

Defendants offers no authority for the proposition that in order to preserve an issue for appeal, a party must raise every argument it has at every stage of the litigation even if the court has already rejected the argument. Rather, the issue is whether the argument was adequately pressed and the district court had an opportunity to rule on it. "Although no bright-line rule exists for determining whether a matter was raised below, for a litigant to preserve an argument for appeal, it must press and not merely intimate the argument during the proceedings before the district court[.] The argument must be raised to such a degree that the district court has an opportunity to rule on it." *Rosedale Missionary Baptist Church v. New Orleans City*, 641 F.3d 86, 89 (5th Cir. 2011) (citations and internal quotation marks omitted).

Here, with the one exception, Dollar General did press all its arguments in the District Court in either its Motion For Preliminary Injunction or Motion For Summary Judgment seeking a permanent injunction. Because the District Court ruled against Dollar General on its request for preliminary injunction, re-raising identical arguments with no new evidence or facts would have wasted both resources and time of all involved. Instead, Dollar General focused its Motion for Summary Judgment on the arguments impacted by the discovery conducted and the shift in the burden of proof.

C. NO FURTHER EXHAUSTION OF TRIBAL REMEDIES IS REQUIRED

The Tribal Defendants argue this Court should not address any arguments not made first in the Choctaw Court. In so doing, they ignore many facts. The Does never argued in the Choctaw Court that Dollar General's participation in the Youth Opportunity Program was grounds for jurisdiction.[3] This basis for jurisdiction was raised *sua sponte* by the Choctaw Supreme Court. In commenting on this, the District Court noted: "it appears the Tribal Supreme Court made what purports to be a definitive determination of tribal jurisdiction on, inter alia, the basis of a 'consensual relationship' under the first Montana exception in the absence not only of proof, but also of any factual allegation regarding the specific nature of John Doe's placement with Dollar General or any allegation that such placement gave rise to a 'consensual relationship' such as would support tribal jurisdiction."[4] Dollar General's exhaustion efforts should not be discounted based on an argument it had no opportunity to address in Tribal Court.

Nor would the principles supporting tribal court exhaustion be served by remand. In the eight years since the Does first filed their Complaint, the law of tribal court jurisdiction has been ruled on in dozens of cases that were not available

[3] See Plaintiff's Opposition to Motion to Dismiss for Lack of Jurisdiction, Record p. 87. The Tribe was not a party to the underlying Tribal Court lawsuit.
[4] Record p. 807.

to either party at the time of briefing in the Choctaw court, including *Plains Commerce*. The comity principles underlying the doctrine of exhaustion do not support bouncing cases like basketballs back and forth between courts simply because of developments in the law. This would fly in the face of the principal of the orderly administration of justice tribal court exhaustion is supposed to serve.[5]

While it is true that Dollar General did not raise the off reservation conduct issue in tribal court, the principal that tribal courts have no civil jurisdiction over off reservation conduct is now settled law. Exhaustion is not required where "it is otherwise clear that the tribal court lacks jurisdiction so that the exhaustion requirement 'would serve no purpose other than delay'." *Burrell v. Armijo,* 456 F.3d 1159, 1168 (10th Cir. 2006).

III. *PLAINS COMMERCE* MEANS WHAT IT SAYS

A. THE TRIBAL DEFENDANTS' STRAW MAN ARGUMENT

The Tribal Defendants repeatedly refer to Dollar General's reading of *Plains Commerce* as requiring "harm" to the governmental interests to support the application of the consensual relationship exception.[6] But Dollar General has never used the term "harm" in expounding upon the requirements of the consensual relationship exception. This is a classic straw man. What *Plains Commerce*

[5] *See National Farmers Union Ins. Co., v. Crow Tribe,* 471 U.S. 845, 856 (1985).
[6] Original Brief of Appellees pp. 19, 25, 26, 27 (three times), 29, 30.

unequivocally states, and what Dollar General posits, is that for a tribe to have the authority to regulate a consensual relationship, the consensual relationship at least must "**implicate[s]** tribal governance and internal relations." *Plains Commerce*, 554 U.S. at 335. (emphasis added).

B. THE TRIBAL DEFENDANTS ARGUMENTS ARE AN ATTEMPT TO AVOID, NOT ADDRESS, THE LANGUAGE OF *PLAINS COMMERCE*

The Tribal Defendants claim Dollar General's argument is "made without citation to any authority" (obviously ignoring the citation to *Plains Commerce)* and posits not a single case since *Plains Commerce* has adopted Dollar General's position. It then dismisses the myriad of scholarly articles Dollar General cites in support of its position as "not constitute[ing] case authority." This tack allows the Tribal Defendants to claim the language of *Plains Commerce* means nothing while not directly addressing it. None of these assertions stands up to scrutiny.

Dollar General's position is not a "radical departure" from prior Supreme Court jurisprudence. It is a direct outgrowth of *Montana. Montana* held that, "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." *Montana v. United States,* 450 U.S. 544, 564 (1981)(emphasis added). Both exceptions derive directly from these two principles. *Plains Commerce*

reiterated this aspect of *Montana*. "While tribes generally have no interest in regulating the conduct of non-members, then, they may regulate non-member behavior that implicates tribal governance and internal relations." *Plains Commerce*, 554 U.S. at 335.

Plains Commerce is simply the next case in the continuing line of jurisprudence whereby the Supreme Court has slowly outlined the parameters of tribal court jurisdiction over non-members. To this date, **the Supreme Court has never held that a tribal court has jurisdiction over a non-member**. *Plains Commerce* does not depart from this direction.

C. THE ONLY COURT DECISION TO ADDRESS THE ISSUE HERE AGREED WITH DOLLAR GENERAL'S POSITION

The Tribal Defendants cite a litany of post *Plains Commerce* cases applying the consensual relationship exception, but only one of those cases addresses the issue here.[7] That case, contrary to the Tribal Defendants' contention, does accept

[7] The Tribal Defendants cite *Philip Morris USA v. King Mountain Tobacco*, 569 F.3d 932 (9th Cir. 2009) asserting it expressly rejects "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." Tribal Defendant's Original Brief p. 26. It does no such thing. There, the court simply concluded that the matters sought to be regulated in tribal court had no nexus at all to the defendant's on reservation activities. It did not reject the proposition that the activity sought to be regulated must have an impact on tribal governance to fall within the exception.

Dollar General's position. In *Rolling Frito Lay Sales v. Stover,*[8] the District Court wrote:

> Also important to the analysis is the notion of consent. Non-Indian defendants, after all, are often United States citizens. *See United States v. Lara*, 541 U.S. 193, 212, 124 S. Ct. 1628, 1640 (2004)(Kennedy, J., concurring); *see also Duro v.Reina*, 495 U.S. 676, 692-94, 110 S. Ct. 2053, 2063-64 (1990) (superceded by statute on other grounds). These defendants do not lose their citizenship or renounce its protections simply by stepping foot on an Indian reservation. Non-Indians, by virtue of their non-member status, do not play any role in tribal government and "have no say" in tribal laws and regulations. *Plains*, 554 U.S. at 337, 128 S. Ct. at 2724. "Consequently, those laws and regulations may be fairly imposed on nonmembers only if the nonmember has consented, either expressly or by his actions." *Id*. But consent alone is not enough. "Even then, the regulation must stem from the tribes' inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." *Id.*

Other than this one case agreeing with Dollar General, there is no discussion in any case accepting or rejecting Dollar General's position. Silence is not precedent. "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Svcs., Inc.*, 543 U.S. 157, 170, 125 S.Ct. 577 (2004) *citing Webster v. Fall*, 266 U.S. 507, 511(1925).

[8] 2012 WL 252938 (D. Ariz.) pp. 6 – 7.

The cases the Tribal Defendants cite that have found jurisdiction, have readily apparent tribal governance interests because, in all but four of the cited cases, the tribe or a tribal entity was a party in the tribal court litigation and the non-member's conduct involved a tribal undertaking.[9] In three of the cases that did not involve a tribe or tribal entity as a party,[10] the courts found no basis for tribal court jurisdiction. In only one case where no tribal entity was a party did a court find jurisdiction existed.[11] In that case, the nonmember's conduct at issue was instituting proceedings in tribal court as a plaintiff. The court found jurisdiction

[9] In all the following cases cited by the Tribal Defendants, a tribe, tribal political entity, or corporation wholly owned by the tribe was a party in the underlying tribal court litigation. *Admiral Insurance Company v. Blue Lake Rancheria Tribal Court*, 2012 WL 1144331 (N.D. Cal.); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 809 F.Supp.2d 916 (N.D. Ia. 2011); *Attorney's Process & Investigation Services, Inc. v. Sac & Fox Tribe of the Mississippi in Iowa*, 609 F.3d 927 (8th Cir. 2010); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140 (10th Cir. 2011); *Dish Network Corporation v. Tewa*, 2012 WL 5381437 (D. Ariz.); *Fox Drywall & Plastering, Inc. v. Sioux Falls Construction Company*, 2012 WL 1457183 (D. S.D.); *Graham v. Applied Geo Technologies, Inc.*, 593 F.Supp.2d 915 (2008); *Otter Tail Power Company v. Leech Lake Band of OJibwe*, 2011 WL 2490820 (D. Minn.); *Water Wheel Camp Recreational Area, Inc., et al. v. Gary LaRance*, et al.,642 F.3d 802 (9th Cir. 2011)

[10] *Philip Morris USA* v. *King Mountain Tobacco*, 569 F.3d 932 (9th Cir. 2009)(Philip Morris's on reservation conduct had no relationship to claims tribal court plaintiff sought to assert); *Red Mesa Unified School District* v. *Yellow Hair*, 2010 WL 3855183 (D.Ariz)(*Montana* does not apply to question of tribal court jurisdiction over public bodies of the state of Arizona operating on the reservation; lack of jurisdiction was manifest)*;Rolling Frito-Lay Sales LP* v. *Stover*, 2012 WL 252938 (D. Ariz.)(tribal court had no jurisdiction in tort suit by non-member against non-member for negligence occurring on the reservation).

[11] *Ford Motor Credit Corporation v. Poitra*, 2011 WL 799746 (D.N.D)

because "A non Indian cannot utilize a tribal forum to gain relief against a tribal member and then attempt to avoid that jurisdiction when it acts negligently in that same action resulting in potential harm to the tribal member."[12] The tribal governmental interest was resolving matters arising out of a tribal court lawsuit initiated by the nonmember, hardly a surprising result.

Of the numerous scholarly articles written that consider the impact of *Plains Commerce* on the consensual relationship exception, two opine it should not change to how the lower courts had been applying the exception. The Tribal Defendants cite both as authoritative.[13] Their only response to the significantly greater number of scholarly articles opining that *Plains Commerce* did indicate a more restrictive interpretation of the consensual relationship exception is to state they are "not case authority" and to suggest no case has "embraced the interpretation reflected in that commentary."[14] Again, they cite no case that has rejected Dollar General's position, and they cite no judicial authority for the proposition that *Plains Commerce* did not mean what it said when it clearly and explicitly tied any assertion of tribal jurisdiction over non-members (regardless of the applicable Montana exception) to setting conditions on entry, preserving tribal

[12] *Id.* at *8.
[13] Original Brief of Appellees p. 23.
[14] Original Brief of Appellees p. 24 n. 40.

self-government, or controlling internal relations." *Plains Commerce*, 554 U.S. at 337.

D. JURISDICTION MUST BE BASED ON THE IMPACT ON THE TRIBE OF THE NONMEMBER CONDUCT THE TRIBE SEEKS TO REGULATE, NOT ON THE GENERAL PROPOSITION TRIBAL COURTS ARE IMPORTANT

Because the Tribal Defendants cannot squarely address the language of *Montana* and *Plains Commerce*, they have created out of whole cloth a concept that a tribal court's ability to adjudicate disputes arising out of consensual relationships is the tribal interest actuating the application of the consensual relationship exception. They consistently repeat the mantra that "it is critical to the survival of tribal governments and to tribal self-government that the tribes retain authority to adjudicate civil disputes arising from voluntary consensual relationships between tribes and their members and nonmembers."[15]

The District Court agreed with this reasoning holding,

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

[15] Original Brief of Appellees p. 10. See also pp. 8, 9, 20, 24,

> general as an exercise of tribal sovereignty to adjudicate such claims.[16]

As explained in Dollar General's Original Brief, this holding was error.

The Tribal Defendants attempt to buttress the District Court's reasoning citing *Iowa Mutual* for the proposition, "… tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty … civil jurisdiction over [non-member activity on tribal land] presumptively lies in the tribal court…."[17] But this conclusion cannot be squared with the rule of *Montana* that "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. at 565. Likewise, it directly contradicts *Plains Commerce's* statement, "…efforts by a tribe to regulate nonmembers, especially on non-Indian fee land, are 'presumptively invalid'." *Plains Commerce,* 554 U.S. at 330. Not having civil adjudicatory authority over nonmembers does not "materially undermine tribal rights of **self**-government" because the general rule is tribal courts have **no** jurisdiction over non-members.

The Tribal Defendants also cite *Nevada v. Hicks* in support of their position. But they very selectively quote that case for the proposition that the *Montana* exceptions support the right of tribes to "make their own laws and be governed by

[16] District Court Opinion pp. 13 – 14. Rec. pp. 1064-1065.
[17] Appellees' Original Brief p. 21.

them." The entirety of that passage shows this protection has nothing to do with civil adjudicatory jurisdiction over nonmembers. "[W]hat is necessary to protect tribal self-government and control internal relations can be understood by looking at the examples of tribal power to which Montana referred: tribes have authority "[to punish tribal offenders,] to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." 533 U.S. at 360 – 361. (Citations omitted). Nowhere does *Hicks* state that civil jurisdiction over a nonmember protects tribal self-government and internal relations.

Finally, the Tribal Defendants cite *Santa Clara Pueblo v. Martinez*[18] claiming it supports their assertion of the importance of tribal court jurisdiction over nonmembers. *Santa Clara* was decided prior to *Montana* and involved a claim by a tribal member against her tribe under the Indian Civil Rights Act pertaining to recognition of children as members of the tribe. The importance of tribal courts on a question of tribal membership, perhaps the ultimate issue for a sovereign, is clear. *Santa Clara* has no relevance to issues of tribal court jurisdiction over nonmembers.

The tribal interest in the general concept of asserting civil jurisdiction to adjudicate claims over nonmembers is not an interest from which the consensual

[18] 436 U.S. 49 (1978)

relationship exception can derive. The tribe's interest must be the impact on the tribe of the nonmember's activities that the tribe seeks to regulate. *Plains Commerce,* 554 U.S. at 332.

E. DETERMINING IF A TRIBAL INTEREST EXISTS IS NO HARDER THAN DETERMINING IF A NEXUS EXISTS

The Tribal Defendants argue that the question of whether a tribal interest exists in a particular case is impossible to answer. "There is no discernible 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…."[19] To the contrary, the standard is clearly set out in *Montana.* The relationship must derive from a matter that "implicates tribal government and internal relations."

This test is not impossible to apply. Courts exist to apply rules of law to the specific set of facts in each individual case. This is particularly true with questions of jurisdiction. As the Eighth Circuit noted, "Each claim must be analyzed individually in terms of the *Montana* principles to determine whether the tribal court has jurisdiction over it." *Attorney's Process & Investigation v. Sac & Fox Tribe,* 609 F.3d 927, 937 (8th Cir. 2010). Thus, even where two different legal claims in one lawsuit arise out of the same consensual relationship, jurisdiction

[19] Tribal Defendants' Original Brief p. 31.

may exist over one and not the other. Claiming the analysis would be difficult does not justify ignoring the question.

F. THE DOES' CLAIMS AGAINST DOLLAR GENERAL DO NOT IMPLICATE ANY TRIBAL INTEREST

In rejecting Dollar General's position, the District Court did not analyze whether Mr. Townsend's alleged conduct and/or Dollar General's alleged negligence implicates tribal government. Nor do the Tribal Defendants make any attempt to argue that Townsend's or Dollar General's conduct satisfies the *Plains Commerce* standard. They could not. The alleged conduct, an intentional tort, does not impact or diminish in any way the Tribe's rights to "set conditions on entry, reserve tribal self-government, and control internal relations." The Tribe, in fact, did exercise its tribal authority to ban Mr. Townsend (with his consent) from the reservation. This fully satisfies the tribal interest arising out of the events. Contra, there is no tribal interest in Mr. Doe's individual claims for money damages against Dollar General.

IV. THE DOES' CONCLUSORY ALLEGATIONS OF ON RESERVATION CONDUCT ARE INSUFFICIENT TO SUPPORT JURISDICTION

In an attempt to save jurisdiction over the Does' negligence claims against Dollar General, the Tribal Defendants spend seven and one-half pages attempting to rewrite the Does' Complaint. They assert that Dollar General placed a "defective

manager providing a defective management function" on the reservation.[20] They assert that the company breached its YOP obligations to the tribe.[21] They assert that Dollar General's negligent conduct must have occurred on the reservation because they were a company doing business on the reservation.[22] The problem they cannot face and do not address is that none of these characterizations are based on factual allegations in the Complaint.

The Does' Complaint contains no factual allegations of any act occurring on the reservation that might constitute negligent hiring, training, or supervision. Rather, the Complaint simply makes the assumption that the allegation Mr. Townsend committed a tort requires that Dollar General must have done something wrong in its hiring, training, or supervision. They conclusorily assert these undefined acts occurred on the reservation. The burden is on the parties asserting jurisdiction to establish it. The Does' Complaint is woefully deficient in this regard.

The Tribal Defendants cite to many state court cases for the proposition that Dollar General can be sued wherever it is doing business and causes harm even if decision makers responsible for the harm are not in a particular state. But tribal courts are not state courts. State courts are courts of general jurisdiction and have

[20] Tribal Defendant's Original Brief p. 41.
[21] Tribal Defendants Original Brief p. 38.
[22] Tribal Defendant's Original Brief pp. 38 and 39.

the broadest jurisdiction to adjudicate civil claims allowed by the U.S. Constitution. "The sovereign authority of Indian tribes is limited in ways state and federal authority is not." *Plains Commerce*, 554 U.S. at 340. Nonmembers can conduct business on the reservation and still not be subject to civil adjudicatory jurisdiction for their negligent activities on the reservation. *See e.g., Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 (D. Ariz.)(tribal court had no jurisdiction over claim based on nonmember's on reservation negligence).

Contrary to the Tribal Defendants' contentions, this case is no different than *Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 809 F. Supp.2d 916 (N.D. Iowa 2011). The Does bore the burden of alleging facts, not conclusions, sufficient to establish that the conduct they sue over occurred on the reservation. This is a tort case, not a breach of contract claim, and the tribal court has no jurisdiction over conduct not occurring on the reservation. They did not.

V. PARTICIPATING IN THE YOUTH OPPORTUNITY PROGRAM IS NOT THE FORM OF CONSENSUAL RELATIONSHIP REQUIRED UNDER MONTANA

Smith v. Salish Kootenai College did not reject the holding of *Boxx v. Long Warrior*. "Simply entering into some kind of relationship with the tribes or their members does not give the tribal courts general license to adjudicate claims involving a nonmember. *See Boxx v. LongWarrior*,265 F.3d 771,776(9th Cir. 2001) (a non-Indian's "socially consensual" relationship with an Indian cannot

serve as the basis for tribal civil jurisdiction)." *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1138 (9th Cir. 2006).[23] While the case did, in a footnote, "disapprove" of the statement the relationship must be commercial, it did not explain why the reasoning of *Boxx* was wrong except to state that the listing in *Montana* was "illustrative." *Id.* at n. 4.

The reasoning of the panel decision in *Boxx* is solid. It noted that all the relationships contemplated in *Montana* were commercial. *Boxx v. Long Warrior*, 265 F.3d at 776. It followed that "other arrangements," at the end of a listing of commercial activities, was not intended to broaden the scope to non-commercial relationships.

Agreeing to participate in the Youth Opportunity Program is simply not the form of relationship contemplated by *Montana*. It is not "commercial dealing, contracts, leases, or other arrangements…." It was a social program of the Tribe, and while intended to be mutually beneficial, the purpose was not to generate a profit. Finding tribal court jurisdiction could arise out of this relationship would expand tribal court jurisdiction into areas, social programs, that no court has ever authorized.

[23] The Tribal Defendants are correct that this was an *en banc* decision. Dollar General's statement it was another panel of the Ninth Circuit was in error.

VI. VICARIOUS LIABILITY REQUIRES ESTABLISHING MORE THAN AN EMPLOYEE COMMITTED A TORT DURING WORKING HOURS

The direct logical nexus to the consensual relationship derives from being able to reasonably anticipate that the defendant might be hailed into a tribal court. It is not enough that there is some connection. Otherwise, the nexus requirement is meaningless because, as Justice Scalia once observed, "everything is related to everything else." *California Labor Stds. Enf. v. Dillingham Constr.*, 519 U.S. 316, 335 (1997)(Scalia, J. concurring opinion). Thus, in *Plains Commerce*, the Court held that the tribal court had no jurisdiction over the defendant bank because it could not reasonably anticipate being hailed into tribal court based on its sale of non-Indian fee land. *Plains Commerce*, 554 U.S. at 338.

The Tribal Defendants spend a great deal of time in attempting to establish that vicarious liability for the intentional torts of Mr. Townsend is a foreseeable risk of participating in the Youth Opportunity Program. These arguments rely on the proposition that any intentional tort committed by any employee while he is on duty is the responsibility of the employer. They further note that because Dollar General prohibited this type of conduct, it was foreseeable. This interpretation of the law is too broad and untenable.

Assuming the Tribal Court applies the Mississippi law on vicarious liability, and there is no way for Dollar General to know if this will occur, it is:

> An employer is liable for the torts of his employee only when they are committed within the scope of employment. To be "within the scope of employment," the act must have been committed in the course of and as a means to accomplishing the purposes of the employment and therefore in furtherance of the master's business. Also included in the definition of "course and scope of employment" are tortious acts incidental to the authorized conduct. Stated another way, a master will not be held liable if the employee "had abandoned his employment and was about some purpose of his own not incidental to the employment." That an employee's acts are unauthorized does not necessarily place them outside the scope of employment if they are of the same general nature as the conduct authorized or incidental to that conduct.

Adams v. Cinemark USA, 831 So.2d 1156, 1159 (Miss. 2002)(citations omitted). It is indisputable, and the Tribal Defendants do not argue otherwise, that sexually assaulting a minor was not incidental to the performance of Mr. Townsend's duties as a Store Manager.

Foresseability cannot be considered generically or in hindsight. The fact intentional assaults can occur in every workplace does not make it foreseeable to Dollar General that in participating in the Youth Opportunity Program would result in it being hailed into tribal court over an intentional tort committed by one of its employees that had no relationship to carrying out the duties of Store Manager. There is no allegation in the Complaint that Mr. Townsend's actions served Dollar General in any way.

VII. DUE PROCESS PROHIBITS TRIBAL COURT JURISDICTION

The Tribal Defendants response to the Due Process issues raised by the Does' claim for punitive damages is to once again cite cases that are silent on the issue. There is no case holding a tribal court has jurisdiction to make an award of punitive damages against a nonmember. The Tribal Defendants next argue that there are protections in place through review of a judgment in the federal courts after full proceedings on the issue in tribal court. This ignores the harm sought to be enjoined, defending a punitive damages claim in tribal court. "It would be anomalous indeed to require plaintiff to first suffer the loss of the very right for which it seeks protection (to be free of tribal jurisdiction) before affording an opportunity to protect its right." *Rolling Frito-Lay Sales LP v. Stover*, 2012 WL 252938 p. 3 (D. Ariz.).

The actuating intent of *Montana* is to protect nonmembers, not the tribe. "[A] presumption against tribal-court civil jurisdiction squares with one of the principal policy considerations underlying Oliphant, namely, an overriding concern that citizens who are not tribal members be "protected . . . from unwarranted intrusions on their personal liberty….."*Nevada v. Hicks,* 533 U.S. 353, 384 (Souter, J. concurring) *citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210, 98 S. Ct. 1011 (1978). It is simply inconsistent with the policies actuating *Montana* and general principles of Due Process to require Dollar General to defend

substantively against a claim for punitive damages in tribal court, based on the alleged intentional torts of a former employee who has been banned from the reservation and cannot be compelled to appear in court.

The Tribal Defendants also assert that the due process concerns based on the lack of jurisdiction over the alleged tortfeaser, Mr. Townsend, have not been briefed sufficiently. Some arguments do not require pages of prose and citations to dozens of cases. Due process is a well understood concept. Simply put, the Tribal Court has no jurisdiction over Mr. Townsend. Under the circumstances here, the lack of due process is manifest. Even assuming the Order of Exclusion were amended to permit Mr. Townsend to attend trial as the Tribal Defendants suggest, the Tribal court cannot compel his attendance at trial or even to a deposition because they have no jurisdiction over him. There is no guarantee that a Mississippi court will grant a petition for discovery as the Tribal Defendants suggest. Thus, Dollar General would be forced to attend a trial without a witness to deny the plaintiff's allegations.

VIII. CONCLUSION

The Tribal Defendants have the burden of establishing the existence of tribal court jurisdiction over Dollar General based on the conduct sought to be regulated, not a general interest in providing a civil forum for adjudication of claims. Tribal court jurisdiction over the Doe's tort claims here cannot be justified under

Montana's limited grant of jurisdiction arising out of the "the tribe's inherent sovereign authority to set conditions on entry, preserve tribal self-government, or control internal relations." The judgment of the District Court must be reversed.

Wherefore, Appellant Dollar General respectfully requests this court grant the relief prayed for in its Complaint forever enjoining Defendant/Appellees from taking any further action in the Doe's tribal court lawsuit.

Respectfully submitted this 13th day of February 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2013, I have filed the foregoing Reply Brief of Appellants/Plaintiffs with the Clerk of Court through the CM/ECF system that will send notice of this filing to:

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

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