IN THE SUPREME COURT OF THE MISSISSIPPI BAND
OF CHOCTAW INDIANS

No. CV-02-05

JOHN DOE, JR., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOHN DOE, SR. AND JANE DOE, Plaintiff/Appellee	)	
VS.	)	MEMORANDUM OPINION AND ORDER
DOLLAR GENERAL CORPORATION; DOLGENCORP, INC.; AND DALE TOWNSEND, INDIVIDUALLY AND JOINTLY AND SEVERALLY WITH DOLLAR GENERAL CORPORATION AND DOLGENCORP, INC., Defendants/Appellants	)	

Per Curiam (Chief Justice Rae Nell Vaughn and Associate Justices Roseanna Thompson and Frank Pommersheim)

I. Introduction

The Plaintiff John Doe was thirteen years old in the summer of 2003. At that time, as a member of the Mississippi Band of Choctaw Indians Tribe and participant in the Tribe's Youth Opportunity Program, he was assigned to the Dollar General Store in the Choctaw Town Center in order to gain experience and to learn work skills. John's supervisor at Dollar General was Mr. Dale Townsend, a non-Indian adult, who resided outside the Reservation in Philadelphia, Mississippi.

During this time period, Dollar General was engaged in retail business at this store pursuant to a commercial lease wherein Dolgencorp, a non-resident foreign corporation, leased store space from Choctaw Shopping Center Enterprise, a wholly-owned entity of the Mississippi

Band of Choctaw Indians. The leased premises are located completely within the exterior boundaries of the Mississippi Band of Choctaw Indian Reservation and are located on land owned by the Tribe and held in trust by the United States government for the benefit of the Tribe. In addition, at all relevant times herein, Dollar General possessed a valid Tribal business license, which permitted it to engage in commercial activities within the Choctaw Reservation. Such business license is required by § 14-1-3(1) of the Tribal Code.[1]

It is alleged, that during the time of John Doe's placement by the Tribe at the Dollar General Store, Mr. Dale Townsend made repeated and unsolicited sexual advances toward this minor. It is further alleged that these unsolicited advances caused substantial physical and emotional harm to John Doe. Subsequent to these events and on or about January 6, 2005, the minor John Doe, through his parents, John Doe Sr. and Jane Doe, brought a civil action against Mr. Townsend and the Dollar General Store in the Mississippi Band of Choctaw Indians Tribal Court. The lawsuit sought damages, including punitive damages, against the defendants for the alleged tort of (sexual) assault.

Prior to the filing of this lawsuit by the Plaintiff in early 2005, the Tribe, acting through its Attorney General's office, brought an action in the Tribal Court pursuant to § 20-1-2 of the Tribal Code, which sought to "exclude" Mr. Townsend from the Mississippi Band of Choctaw

[1] Section 14-1-3(1) of the Tribal Code provides:

> Any person who engages in any business or activity on reservation lands should apply to the commissioner for a permit to engage in and to conduct any business or activity upon the condition that the payment of tax accruing to the Mississippi Band of Choctaw Indians under the provisions of the Code shall take place, and shall keep adequate records of such business or activity as is required by the commission. Upon receipt of such permit, the applicant shall be duly licensed to engage in and conduct such business or activity. Said permit shall continue in force so long as the person to whom it is issued shall continue in the same business at the same location, unless revoked by the commissioner for cause.

Indians Reservation. Mr. Townsend did not oppose the exclusion action and said exclusion order was signed by Judge Christopher Collins on September 22, 2003.

Subsequently, both Defendants filed a motion to dismiss the civil action for lack of subject matter jurisdiction. This motion to dismiss was denied in an oral opinion delivered by Judge Collins on July 28, 2005. This appeal followed. Oral argument was heard on November 16, 2007.

II. Issues

This appeal raises four issues: namely whether this is a proper matter for an interlocutory appeal; what is the effect, if any, of the exclusion order on the Court's (personal) jurisdiction over defendant, Dale Townsend; whether there is proper subject matter jurisdiction over the lawsuit as a matter of federal law; and whether a claim for *punitive* damages against non-Indian defendants is foreclosed as a matter of federal (constitutional) law.

Each issue will be discussed in turn.

III. Discussion

A. Interlocutory Appeal

Whether a matter is a proper one for interlocutory appeal is governed solely by Tribal law. Such law is embedded in the Mississippi Band of Choctaw Tribal Code at § 7-1-10(d)(1), which provides that an interlocutory appeal

> shall be granted only if the lower court has committed an obvious error which would render further lower court proceedings useless or substantially limit the freedom of a party to act and a substantial question of law is presented which would determine the outcome of the appeal.

It is clear to the Court that the necessary predicate of "obvious error" committed by the trial court is not satisfied in the instant case. Neither *Montana v. United States*, 450 U.S. 544 (1981) nor *Nevada v. Hicks*, 533 U.S. 353 (2001) (or any other case for that matter) establish any

black letter rule that forecloses potential tribal court jurisdiction in this matter. These cases merely provide relevant tests to be applied to determine whether tribal court jurisdiction is appropriate in any particular instance. The facts in the instant case, as well as legal landscape of the Mississippi Band of Choctaw Indians Reservation, are readily distinguishable from both *Montana* and *Hicks* and thus there is no possibility of establishing "obvious error." For example, *Montana* involved a claim of jurisdiction over non-Indians for matters occurring on fee land and *Hicks* involved jurisdiction over *state* officials for actions that took place on trust land. Neither set of facts are analogous to those of the instant case. In fact, the Court in *Hicks* recognized as much, when it noted that "our holding in this case is limited to the question of tribal-court jurisdiction over the officers enforcing state law. *We leave open the question of tribal-court jurisdiction over non-members in general*." *Id.* at 358 n.2 (emphasis added).

Despite this analysis, it is nevertheless true that there has been an inexplicable delay in hearing argument on the interlocutory appeal issue. As a result of this unaccounted for delay of more than a year, the Court finds that for reasons of judicial economy and in order to avoid further delay and potential (procedural) unfairness to the parties, the Court accepts the (interlocutory) appeal, because of its unique circumstances and procedural posture.[2]

B. Exclusion Order

Defendant/Appellant Dale Townsend argues that the exclusion order against him constitutes a 'waiver' of (personal) jurisdiction.[3] Mr. Townsend argues that such waiver results from actions by the Tribal court, but that cannot be so. Courts do not waive (personal) jurisdiction requirements. Thus there is a troubling oddity at hand and that is that a plaintiff in a

[2] In other words, this part of the decision has no precedential value as to the general issue of what constitutes a meritorious interlocutory appeal under the Mississippi Band of Choctaw Indians Tribal Code.
[3] Defendant/Appellant Dollar General contends that the exclusion order against Dale Townsend effects its interests as well because Mr. Townsend is a necessary and indispensable party to the proceeding against it.

lawsuit (John Doe) is subject to a claim that personal jurisdiction over the Defendant has been waived by a non-party (the Tribe).

While a plain reading of the text of the exclusion order appears to provide no exception to its categorical language which states "that the Respondent [Dale Townsend] be and he is hereby excluded from inside the boundaries of the Mississippi Band of Choctaw Indians Reservation lands," such a narrow reading may *not* be warranted in this instance. It would seem to defy both common sense and due process[4] for the Tribe to insist on the apparent absolute terms of the exclusion order it sought, which now potentially jeopardizes the right of a Tribal member to seek civil (redress) against a non-member for actions that took place on Tribal trust land within reservation boundaries. The fact that the exclusion order was entered more than one year previous to the filing on the complaint in this matter may well explain the Tribe's failure to seek any language of exception or limitation. Yet in order to avoid any misunderstanding on this issue and to provide due respect to a co-ordinate branch of Tribal government, the Court requests that the Attorney General's office inform this Court whether it does in fact insist on the absolute terms of the exclusion order and is opposed to a limited exception to the exclusion order for the *sole* purpose of permitting Defendant Townsend to come onto the Reservation to defend this lawsuit or whether it is amenable to such a narrow exception. Such a limited exception to an exclusion order is clearly permitted under the Tribal Code. *See* § 20-1-3(2).

C. Subject Matter Jurisdiction Under Federal Indian Law

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[4] *See* the Mississippi Band of Choctaw Indians Constitution at Art. X Sec. 1(h) which provides that the "Tribe shall not deny to any persons within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."
See also the Indian Civil Rights Act at 25 U.S.C. § 1302(8), which provides that "no Tribe shall deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law."

The issue of the trial court's subject matter jurisdiction as a matter of federal Indian law principles involves the now familiar routine of parsing the entrails of the 'pathmarking' cases of *Montana v. United States*, 450 U.S. 544 (1981) and *Nevada v. Hicks*, 533 U.S. 353 (2001) and their application to the particular facts at hand in the instant case. Such analysis also requires an examination of this Court's opinion in *Williams v. Parke-Davis*, #1142-01 (2004) and its relevant jurisdictional analysis.

The basic 'rules' of the Supreme Court's decisions in *Montana* and *Hicks* are relatively straightforward. Tribal civil jurisdiction over non-Indian activities that take place on land within the reservation is appropriate *only* if the non-Indian activity satisfies either or both of the prongs of the well-known *Montana* proviso.

Originally, *Montana* analysis was only required when non-Indian activities took place on fee land within the Reservation. Subsequent cases[5] expanded the territorial reach of *Montana*, which culminated in *Hicks*' requirement that *Montana* analysis was always required, regardless of where the non-Indian activity took place. The *Hicks* case morphed *Montana's* primary concern with *place* into a primary concern with (non-Indian) *persons*, where place was still relevant, but not determinative or dispositive. *Hicks*, 533 U.S. at 360. Needless to say, this developing jurisprudence has neither constitutional nor statutory roots, but rather is the product of generally (unarticulated) judicial common law decisionmaking.

This common law approach appears to be guided not by the normal (federal) understanding that the primary role of common law decisionmaking is to fill gaps in the relevant substantive law,[6] but rather to vindicate a conscious judicial policy to significantly insulate the non-Indians from civil accountability in Tribal courts. This concern is manifest in both *Montana*

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[5] *See, e.g.*, South Dakota v. Bourland, 508 U.S. 679 (1993) and Strate v. A-1 Contractors, 520 U.S. 438 (1997).
[6] *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION 363-68 (5th ed. 2007).

and *Hicks*. In *Montana*, this was couched in language describing the fact that non-Indian settlers on the Crow Reservation would never have envisioned being subject to tribal regulatory authority on fee land. *Montana*, 450 U.S. at 559-60. Likewise in *Hicks*, there was apparent concern to protect (non-Indian) state employees, who were legitimately carrying out state functions (*i.e.* executing a joint state- tribal search warrant) on the Reservation from accountability in tribal courts. *Hicks*, 533 U.S. at 364-65.

Such concerns, however questionable they might be, are not present in the instant case. Dollar General voluntarily signed a commercial lease with Choctaw Shopping Center Enterprise, a wholly-owned Tribal entity, and came on the Reservation for said commercial activities. The notion of surprise or lack of foreseeability so central to the Court's thinking in *Montana* and *Hicks* is simply not present in the instant case. Of course, these observations do *not* obviate the necessity of *Montana* analysis, but they do provide a relevant context in which to anchor and to evaluate the required *Montana* analysis.

1. *Montana* Analysis

Classic *Montana* analysis requires an inquiry as to whether the non-Indian activity at issue satisfies either or both of the prongs of the well-known *Montana* proviso, which provides:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. 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. *Williams v. Lee*, *supra* at 223; *Morris v. Hitchcock*, 194 U.S. 384; *Buster v. Wright*, 135 F. 947, 950 (CAS); *see Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152-54. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. *See Fisher v. District Court*, 424 U.S. 382, 386; *Missoula County*, 200 U.S. 118, 128-29; *Thomas v. Gay*, 169 U.S. 264, 273.

Montana, 450 U.S. at 565-66 (footnotes omitted).

Clearly, the commercial lease between Dollar General and Choctaw Shopping Center Enterprise constitutes a consensual agreement, but does that consensual agreement include the plaintiff, an individual Tribal member, who is not a party to the agreement? The Supreme Court in both *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), and *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001), cautioned against expansive interpretations as to the reach of consensual agreements. In this vein, Chief Justice Rehnquist used a pithy aphorism to note that "[a] nonmember's consensual agreement in one area this does not trigger tribal and civil authority in another—it is not 'in for a penny, in for a pound.'" *Id.* at 656. While hewing to this formulation, the unique facts in this case nevertheless justify a conclusion affirming Tribal court jurisdiction.

The alleged tort in this case took place on the leased premises that are subject of the consensual agreement and the individual tortfeasor was an employee, indeed the manager of the leased premises. Thus there is a considerable nexus between the alleged tort and the commercial lease. And in fact, the victim of this alleged tort was not a customer or private employee hired directly by Dollar General, but a Tribal minor placed at the store by the Tribe to receive job training. This fact tightens the nexus even further.

Indeed, it is reasonable to conclude that in addition to the consensual agreement embodied in the lease between Choctaw Shopping Center Enterprise, the wholly owned Tribal entity, and Dollar General, there is also an (unwritten) consensual agreement between the Tribe and Dollar General. The essence of such agreement being that when the Tribe places a Tribal minor with Dollar General for job training purposes, that it would be mutually understood that any issues relative to Dollar General's relationship to the minor regarding such things as training, wages, or potential harm would be resolved in Tribal court.

Such a reading is reinforced by the fact that Dollar General not only entered into a written lease with a wholly owned Tribal entity, but it also operated under a business license granted by the Tribe and required by Tribal law. Such a license is, of course, a quintessential consensual arrangement, which is necessary to engage in commercial activities on the Reservation. Such a business license presumably does *not* authorize (intentional) torts allegedly committed by the licensee's manager against a Tribal minor placed with the licensee for training and skill development. It strains credulity to somehow assert that the licensee is not accountable within the legal structure of the sovereign, who granted the license in the first instance, for an alleged wrong that took place at the very premises where the licensed commercial activities took place.

In this regard, for example, see the Eighth Circuit's decision in *Plains Commerce Bank v. Long Family Land and Cattle Company*, 491 F.3d 878 (8th Cir. 2007). In that case, the Court unanimously held that a non-Indian entity is subject to Tribal court jurisdiction for a *tort* that occurred in the context of a consensual commercial relationship:

> Here, the Tribe was doing just that and exercising its inherent authority. By subjecting the bank to liability for violating tribal antidiscrimination law in the course of its business dealings with the Longs, the Tribe was setting limits on how nonmembers may engage in commercial transactions with members inside the reservation. The fact that we are dealing with the common law of torts rather than a licensing requirement or other statutory provision makes no substantive difference here. Tort law is after all both a means of regulating conduct, *see, e.g,* W. Page Keeton, et al., Prosser and Keeton on Torts 25 (5th ed. 1984) (Prosser), and an important aspect of tribal governance.

Plains Commerce Bank, 491 F.3d 878, 887 (8th Cir. 2007).

Much of the above applies with equal force to analysis under the second prong relative to "direct effect on the political integrity, economic security, or the health or welfare of the tribe." The "health or welfare of the tribe" is certainly a function of the "health or welfare" of its individual members. If the Tribe cannot protect the "health or welfare" of its members by

insuring the availability of a Tribal forum for disputes when it places a Tribal minor with a non-Indian commercial venture, who is on the Reservation *solely* as a result of a commercial lease with a Tribal entity, then this exception becomes essentially meaningless. It becomes no more than a bankrupt formalism. This Court believes otherwise. It believes that the Supreme Court in *Montana* meant this prong of its proviso to have potential consequences in the real world.[7] The Court considers the facts in this case to constitute such a real world situation.

2. *Parke-Davis* Analysis

Not only does the above *Montana* discussion support Tribal court jurisdiction in this case, said jurisdictional finding is also required by the Court's own precedent in the case of *Williams v. Parke-Davis*, C.A. 1142-01 (2004). In *Parke-Davis*, this Court found *both* as a matter of federal and Tribal law that the Tribal court had subject matter jurisdiction over a tort lawsuit brought by a Tribal member against a non-resident corporate entity, whose representative came onto the Reservation, and convinced Tribal officials to distribute the drug Rezulin at the Tribal pharmacy located on trust land.

The central facts in the case at bar are analogous to those in *Parke-Davis*. In both cases, the defendant specifically wanted to do business on the Mississippi Band of Choctaw Indians Reservation and made targeted efforts to do so. In both cases, the defendants were successful in such efforts. In *Parke-Davis*, Rezulin was distributed at the Tribal pharmacy. In the instant case, Dollar General obtained a written commercial lease to engage in business on leased Tribal land within the Reservation. In both cases, an alleged tort resulted from interaction between

[7] Note in this regard, Justice Ginsburg's statement in C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 532 U.S. 411, 422 (2001), relative to the enforceability of an arbitration clause that it "has a real world objective, it is not designed for regulation of a game lacking practical consequences."

Tribal members and the business enterprise or its product. The result in *Parke-Davis* requires an affirmation of Tribal court jurisdiction in the case at bar.

As noted in *Parke-Davis*,

> Parke-Davis, it seems, would like to secure the benefits of doing business on the Reservation without any attendant responsibility. Such an asymmetrical approach by a party would clearly be impermissible in any state or federal situation and it should be no less so in a tribal situation. Respect and parity cannot be one-sided *for* the state and federal sovereign but *against* the Tribal sovereign.

Parke-Davis, Slip Opinion at 8.

D. Punitive Damages

Dollar General asserts that the fact that the plaintiff is seeking punitive damages raises federal constitutional issues relevant to the due process's proscription against 'excessive punishment.' Such a claim is both unwarranted and somewhat fanciful. As a general proposition, constitutional protections do not apply against Tribal governments. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). In addition, said proscription against 'excessive punishment' appears in both the Indian Civil Rights Act of 1986, 25 U.S.C. § 1302(8) and the Mississippi Band of Choctaw Indians Constitution at Art. X Sec. 1(h). As noted in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), no *federal* remedy is available in tribal civil matters, except in Tribal court:

> Tribal forums are available to vindicate rights created by the ICRA, § 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal forums have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

Id. at 65.

IV. Conclusion

For all the above-state reasons, the (interlocutory) appeal is dismissed and the case is remanded[8] for immediate trial on the merits.

IT IS SO ORDERED.

FOR THE COURT:

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Frank Pommersheim
Associate Justice

Dated: February 8, 2008.

[8] Note that no actual trial shall be scheduled until the Tribe's Attorney General's office has responded to its position on the "exclusion" order, discussed *supra* at 4-5, and this Court has ruled on any potential modification of said order.