UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

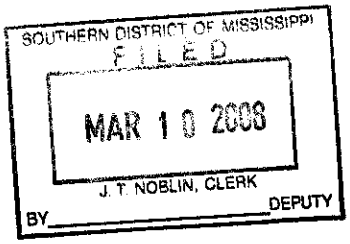
DOLGENCORP INC., DOLLAR GENERAL CORPORATION AND DALE TOWNSEND,

Plaintiffs,

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 HIS PARENTS AND NEXT FRIENDS JOHN DOE SR. AND JANE DOE

Defendants.



CIVIL ACTION NO. 4:08cv22TSL-JCS

MEMORANDUM IN SUPPORT OF
REQUEST FOR ISSUANCE OF TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The United States Supreme Court has never held that a tribal court has jurisdiction to hear civil tort claims against non-members of the tribe.[1] This case presents a perfect example of why. The Choctaw Supreme Court has ruled that it has jurisdiction over Plaintiffs Dollar General Corporation, Dolgencorp, Inc. (collectively "Dollar General") and a former Dollar General store manager, Dale Townsend, for tort claims brought by tribal member, "John Doe." In reaching that decision, it referred to United States Supreme Court precedent as a "pithy aphorism" and derided

[1] *Nevada v. Hicks*, 533 US 353, 358 n.2 (2001).

it as having "neither constitutional nor statutory roots.[2]" Its application of Supreme Court precedent, not surprisingly, is wholly incongruous with what that precedent holds. Additionally, five years ago, Mr. Townsend consented to the Tribal court issuing an order forever banning Mr. Townsend from coming onto the reservation with no exceptions. The Choctaw Supreme Court feels no compunction against amending this order five years later, without Mr. Townsend's consent, for the sole purpose of allowing a tribal member to seek money from Mr. Townsend. Having exhausted their tribal court remedies contesting jurisdiction, Dollar General and Dale Townsend are now petitioning this court for relief.

It should be noted that the U.S. Supreme court recently granted certiorari in the case of *Plains Commerce Bank v. Long Family Land and Cattle Company*, 491 F.3d 878 (8th Cir. 2006), cert granted January 6, 2008.[3] The question presented by that case is the scope of Tribal Court jurisdiction for tort claims against non-Indians. Oral argument is scheduled for April 14, 2008. The decision in that case will likely have a significant impact on the issues presented by the instant case, and for that reason alone, warrants an order staying any proceeding in Tribal Court pending the outcome of that decision.

II. BACKGROUND

Plaintiffs Dale Townsend and Dolgencorp, Inc. have been sued in the Tribal Court for the Mississippi Band of Choctaw Indians by John Doe, an unidentified minor[4] alleged to be a member of the tribe, through his parents. Townsend formerly worked as a store manager at Dollar General's store located on the reservation. Doe's chosen claims are tort claims for assault and battery arising out of alleged incidents on a single day in 2003 wherein Doe claims

[2] The entire record of proceedings in the Tribal Court has been filed in this case as an Exhibit to the Complaint. The opinion of the Choctaw Supreme Court can be found at pages 170 to 181 of that Exhibit.
[3] Docket No. 07- 411 on the Docket of the U.S. Supreme Court.
[4] Dollar General does not know if Doe remains a minor.

Defendant Townsend sexually assaulted him.[5] Doe seeks to hold Dollar General liable for Townsend's alleged actions under various negligence theories and respondeat superior liability.[6] Doe seeks both compensatory and punitive damages.[7] In October of 2003, in response to Doe's claims, Mr. Townsend consented to the entry of an order of exclusion by the Tribal Court forever barring him from coming onto the reservation.[8]

Plaintiffs excepted to the Tribal Court's jurisdiction by responding to the suit with a motion to dismiss. In July of 2005, the trial court denied that motion. Plaintiffs then sought permission to appeal the trial court's ruling from the Choctaw Supreme Court. The petition was granted and the Choctaw Supreme Court concluded it has jurisdiction to hear Doe's claims against Townsend and Dollar General. Plaintiffs have no further avenue of contesting jurisdiction in Tribal Court.

Having exhausted their available Tribal Court remedies, Plaintiffs now file suit in this court under its federal question jurisdiction seeking a judgment barring the tribal court and John Doe from proceeding with the prosecution of the action on the grounds that the tribal court does not have jurisdiction over Plaintiffs for these claims. Due to the denial of the motion to dismiss and the decision of the Choctaw Supreme Court upholding that ruling, Plaintiffs will soon[9] become obligated to answer the tribal court suit and begin participating in discovery and other pre-trial proceedings. Plaintiffs seek a temporary restraining order to maintain the status quo pending a final determination on whether the tribal court has jurisdiction over them for these

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[5] Doe chose to bring his claim under tort law rather than federal anti-discrimination laws over which Tribal Court would not have jurisdiction.

[6] See pages 5 to 8 of Exhibit 1 to the Complaint. Interestingly, were Doe to try to bring such claims against the Tribe, there would be no claim since the Tribal Tort Claims Act provides an employee engaging in a criminal act is not acting in the course and scope of his employment. See Tribal Code of the Mississippi Band of Choctaw Indians §25-1-3(2). The Tribal Code is available on the Tribe's website, www.choctaw.org.

[7] *Id.*

[8] Exhibit 1 to the Complaint pages

[9] March 18, 2008.

claims. Without such an order, Plaintiffs will be forced to incur the expenses of defending themselves in a court without jurisdiction with no avenue for seeking recompense for the expenditures.

ARGUMENT AND LAW

III. THE STANDARDS NECESSARY FOR THE GRANT OF A TEMPORARY RESTRAINING ORDER

The Fifth Circuit requires that Plaintiff clearly show the existence of four factors to establish temporary injunctive relief is appropriate. They are (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the non-movant; and (4) that the injunction will not undermine the public interest. *Valley v. Rapides Parish School Bd.*, 118 F.3d 1047, 1051 (5th Cir. 1997) *citing*, *Roho Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir.1990). Each will be addressed in turn.

IV. ALL FACTORS SUPPORTING THE GRANTING OF INJUNCTIVE RELIEF ARE PRESENT

A. PLAINTIFFS WILL PREVAIL ON THE MERITS BECAUSE SUPREME COURT PRECEDENT MAKES CLEAR THAT NON-INDIANS CANNOT BE SUBJECTED TO SUIT IN TRIBAL COURT BY TRIBAL MEMBERS FOR TORT CLAIMS

1. The General Parameters of Tribal Court Jurisdiction

Tribal courts are courts of limited, not general, jurisdiction. Particularly, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258 (1981).[10] Where nonmembers are concerned, the "exercise of tribal power beyond what is necessary to protect

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

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." *Nevada v. Hicks*, 533 U.S. 353, 358-359, 121 S.Ct. 2304, 2309 - 2310 (2001)(citations omitted, emphasis in original). This statement of Tribal Court authority has become known as the "*Montana* rule."

For a time, some courts did not apply the *Montana* rule to the civil jurisdiction of tribal courts over non-members when the non-members were being sued for torts committed on Indian land. Those courts held that the *Montana* rule was only applicable to incidents within reservation boundaries on non-Indian land, *i.e.*, land that had been sold or otherwise demised out of the tribe's ownership. In *Nevada v. Hicks*, the Supreme Court rejected this parsing of the *Montana* rule and held the rule "applies to both Indian and non-Indian land." *Nevada*, 533 U.S. at 360, 121 S.Ct. at 2310. The Court noted this holding had been "clearly impl[ied]" in the *Montana* decision. *Id.*

In *Hicks*, the Court noted "[t]he ownership status of land...is only one factor to consider" in applying the Montana rule. *Id.* If the activity occurred on non-Indian land, the ownership factor was essentially "dispositive." "[T]he absence of tribal ownership has been virtually conclusive of the absence of Tribal civil jurisdiction; ...[and] we have never upheld under *Montana* the extension of tribal civil authority over nonmembers on non-Indian land." *Id.* Conversely, the Court made clear that "the existence of tribal ownership is not alone enough to support ... jurisdiction over nonmembers" and proceeded to apply the *Montana* rule to activities occurring on Indian land.

There is no question after *Hicks* that the *Montana* rule applies to claims arising on Indian land, as well as non-Indian land. As Justice O'Connor stated in acknowledging that this issue had finally been resolved:

Choctaw Tribal Code §1-2-3 (personal jurisdiction is subject to limitations contained in federal law).

> Today, the Court finally resolves that *Montana v. United States*, 450 U.S. 544,l0l S.Ct. 1245, 67 L.Ed.2d 493 (1981), governs a tribe's civil jurisdiction over nonmembers regardless of land ownership. *Ante*, at2309-2310. This is done with little fanfare, but the holding is significant because we have equivocated on this question in the past. *Nevada*,533 U.S. at 387, l2l S.Ct. at2324-2325.

The Choctaw Supreme Court correctly, albeit reluctantly, acknowledged that the *Montana* rule controlled the assessment of its jurisdiction over Townsend and Dollar General. Nevertheless, it openly expressed its disagreement with the decision.

> 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, but rather to vindicate a conscious judicial policy to significantly insulate non-Indians from civil accountability in Tribal courts.
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> Such concerns, **however questionable they might be**, are not present in the instant case.

Decision of the Choctaw Supreme Court p. 7. (emphasis added). This attitude of disrespect for U.S. Supreme Court precedent permeates the opinion of the Choctaw Supreme Court as it attempted to assert jurisdiction that has been denied it.

2. Pursuant To The Montana Rule The Tribal Court Has No Jurisdiction Over Plaintiffs

Under the *Montana* rule, the Choctaw Tribal Court can exercise jurisdiction over Plaintiffs only in two circumstances:

> A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. … A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, 454 U.S. at 565 - 566. The Choctaw Supreme Court found both prongs satisfied. Their decision is wrong.

3. The Tribal Court Has No Jurisdiction Under The "Consensual Relationship" Exception To The Montana Rule

a) Civil Jurisdiction for Tort Claims Is Not An "Other Means of Regulation" Allowed By Montana's First Exception

Montana involved the issue of whether a Tribe could regulate hunting and fishing by non-members on reservation land that had been sold to non-Indians. It did not involve the assertion of jurisdiction by a Tribal court. The first *Montana* exception spoke to this type of regulatory activity, *i.e.*, licensing and taxing. The Court listed cases fitting within the exception including: a tribal permit tax on nonmember owned livestock within boundaries of the Chickasaw Nation; a Tribe's permit tax on nonmembers for the privilege of conducting business within Tribe's borders; a Tribe's authority to tax on reservation cigarette sales to non-members; and a lawsuit arising out of an on reservation sales transaction between a nonmember **plaintiff** and member defendants. *See, Strate v. A-I Contractors*, 520 U.S. 438, 117 S.Ct. 1404,137 L.Ed.2d 661 (1997).

In order to find that the first Montana exception is applicable here, one would have to conclude that civil jurisdiction over tort claims is an "other means" within the first exception. Reading the terms *in pari materia* compels a conclusion it is not. In each of the examples given in *Montana,* the non-Indian has an absolute right to make an informed decision to enter into the regulated relationship. Even in the one example involving a lawsuit, the non-Indian chose to sue in Tribal court, thereby voluntarily and knowingly entering into the relationship. Tort claims against a non-member do not involve such a choice. Making a decision on a contested claim

between two parties is a far cry from charging a tax on a pack of cigarettes.[11] The Choctaw Supreme Court's decision simply ignored this and concluded without discussion that this exception could provide for civil jurisdiction of the Tribal Court over tort claims.

b) Dollar General's Lease With The Choctaw Shopping Center Enterprise Does Not Contain Consent To Tribal Court Jurisdiction Over Tort Claims Made By Doe

Dollar General leases the space for its store on the reservation from the Choctaw Shopping Center Enterprise. The lease provides no broad consent to tribal court jurisdiction. Rather, the lease simply contains a section entitled, "Governing Law," which contains a forum selection clause for disputes arising under "this agreement." Specifically, the section states:

> This agreement and any related documents shall be construed according to the laws of the Mississippi Band of Choctaw Indians and the State of Mississippi (pursuant to Section I-l-4, Choctaw Tribal Code). Exclusive venue and jurisdiction shall be in the Tribal Court of the Mississippi Band of Choctaw Indians. This agreement and any related documents is subject to the Choctaw Tribal Tort Claims Act.[12]

No provision of the lease suggests that this forum selection clause extends to a tribal member bringing a tort claim against Dollar General, its employees, or its former employees.[13] Rather, the clear language and import of the lease's jurisdictional statement is that, if a dispute arises between the Lessor (Choctaw Shopping Center Enterprise) and the Lessee (Dollar General) under the lease, their dispute shall be decided in the Tribal Court.

The "consensual relationship" exception is a narrow one. The U.S. Supreme Court has explained, "[a] nonmember's consensual relationship in one area thus does not trigger tribal civil

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[11] This issue is currently before the Supreme Court in the case of *Plains Commerce Bank v. Long Family Land and Cattle Co., Inc.* No. 07-411. A much more thorough examination of this issue can be found in the Petitioner's Brief and in the Amicus Brief of the State of Idaho et al., that are published on the Supreme Court's website at http://www.abanet.org/publiced/preview/briefs/april08.shtml#plains.

[12] Lease Section XXVII, Governing Law.

[13] The Tribal Tort Claims Act referenced in the provision limits the liability of the Tribe in its dealings with Dollar General. See Choctaw Tribal Code §25. It has no relevance to a tort claim by a member Indian against a non-

authority in another--it is not 'in for a penny, in for a pound'." *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645, 656, 121 S.Ct. 1525 (2001) (citation and internal quotation marks omitted). "*Montana*'s consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself." *Id.* at 656. Agreeing to litigate disputes with the Choctaw Shopping Center Enterprise over the lease does not trigger consent to a tort claim by a stranger to the lease, nor against Mr. Townsend, a stranger to the lease.

The Choctaw Supreme Court concluded the required nexus was established by the alleged occurrence of the tort on the leased premises. But this is exactly the type of attenuated "but for" nexus rejected as sufficient in *Strate v. A-I Contractors*, 520 U.S. 438, 117 S.Ct. 1404,137 L.Ed.2d 661 (1997). In *Strate,* the Court concluded that the defendant's contracts with the Tribe for construction work did not constitute a sufficient nexus to confer jurisdiction over a tort suit stemming from the contractor's employee's car accident. While the employee would not have been on the reservation but for the contract, the accident was foreign to the contract.

Place is simply not a sufficient nexus. In *Ford Motor Credit Co. v. Todecheene*, 394 F.3d 1170 (9th Cir. 2005), *withdrawn on other grounds Ford Motor v. Todecheene*, 488 F.3d 1215 (9th Cir. 2007),[14] a tribal member died when the truck she was driving was in a roll over accident on tribal land. The parents brought a wrongful death action in Tribal Court. The Tribe leased the truck from Ford Motor Credit. The plaintiffs argued the jurisdictional agreement in the vehicle lease between the Tribe and Ford Motor Credit included the product liability claims underlying their wrongful death action. The Ninth Circuit had little trouble rejecting this contention.

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member.

[14] While the cited *Todecheene* opinion has been withdrawn on the grounds the Plaintiff had not adequately exhausted administrative remedies, the reasoning in the opinion is unassailable.

> Although the Ford Expedition was financed through the contract, Todecheene was not a party to the contract and this action involves her parents' lawsuit against Ford, not any lawsuit initiated by the Tribe. In addition, although "but for" the lease agreement Todecheene would not have been driving the Ford Expedition, this product liability action is considerably removed from the agreement itself.

Ford Motor Credit v. Todecheene, 394 F.3d at 1180. Likewise here, although the lease covers Indian Trust land, the action itself has no connection to that land excepting the attenuated "but for" connection rejected in *Ford Motor Credit*. It has no connection whatsoever to the terms of the lease; it does not arise under the lease; and neither John Doe nor Dale Townsend are parties to the lease. In short, John Doe's claims do not have a sufficient nexus to the lease to conclude *Montana's* consensual relationship applies.

c) The Choctaw Supreme Court's Application Of The Consensual Relationship Exception Has No Basis In The Law Or The Facts

In reaching the opposite conclusion, the Choctaw Supreme Court wholly ignored the language of the lease and did not discuss the scope of Dollar General's consent. It barely touched on the fact that John Doe and Dale Townsend were not parties to the lease. Instead, it found the nexus to the lease based solely on the incident's alleged occurrence on the leased premises. What the court ignored was the lack of a nexus between Dollar General's consent to jurisdiction in the lease (to Tribal court jurisdiction over disputes with the lessor regarding the lease itself) and the alleged tort.

Perhaps recognizing the weakness of relying on Lease's language, the Court "found" other consensual agreements supporting its assertion of jurisdiction.

> there is also an (unwritten) consensual agreement between the Tribe and Dollar General. The essence of such an 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.[15]

To the contrary, Dollar General had no such understanding and there is not an iota of support in the record for this conclusion or even any evidence of the existence of an agreement between Dollar General and the Tribe for the placement of minors for training. Indeed, Dollar General's understanding was that it could only be haled into Tribal court for actions between the Choctaw Shopping Center Enterprise and it over its Lease. Had it (or perhaps more importantly, the Tribe) understood that Dollar General was subject to the jurisdiction of the Tribal court merely by reason of conducting business on the reservation, there would have been no reason for the Lease's language on jurisdiction in the first place.

The Court created another justification for its decision by reference to a "business license" required by the Tribal code. There was no evidence of the existence of such a license or its terms in the record. Overlooking this apparently minor impediment, the Court concluded

> 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.[16]

While it is perhaps possible that a Tribe could require consent to jurisdiction in Tribal court as a condition to granting a business license, there is no evidence that is the case here (and indeed it is not). The decision points to no provision in the Tribal Code supporting this conclusion. It cites to no language in the license itself supporting such a conclusion (it could not as the license is not in the record). Again, if such a result were accomplished by the issuance of a business license, there would have been no reason for the jurisdictional language in the lease. Rather, by judicial fiat,

[15] Exhibit 1 to the Complaint, p. 177.
[16] Exhibit 1 to the Complaint, p. 178.

the Choctaw Supreme Court has decreed that if a business has a license, it is subject to the general jurisdiction of the Tribal court for tort claims by Tribal members against it.

The U.S. Supreme Court has rejected similar reasoning. In *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645,656,121 S.Ct. 1525 (2001). There, the Court held an Indian Trader license authorizing a company to do business with the Navajo nation did not constitute consent to the Tribe's taxing power.

Perhaps the greatest failing in the Court's analysis is its refusal to acknowledge the nature of John Doe's claim has nothing to do with the business Dollar General was doing on the reservation. This is not a suit arising out of a product Dollar General sold. This is not a suit arising out of a defect in the leased premises. This is not a collection suit for non-payment of goods sold to Dollar General's reservation store.[17] This is a suit alleging an intentional tort by an employee that in no way, shape, or form could be considered to be within the course and scope of employment. Any employee of any business doing any activity on the reservation could have been accused of the same thing. There is simply an insufficient nexus between any of the imagined consensual relationships and the tort to support the application of the first *Montana* exception.

4. The Tribal Court Has No Jurisdiction Under The "Self-Governance" Exception To The Montana Rule

The Supreme Court has explained the tribal self-governance exception:

> what 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," ... These examples show, we said,

[17] Dollar General is not conceding that the Choctaw Tribal Court would have jurisdiction to entertain claims arising out of these activities. Rather, they are presented as examples of activities that are at least part of Dollar General's business.

> that Indians have " 'the right ... to make their own laws and be ruled by them. . .[,]' [and] [t]ribal assertion of [this] authority over nonmembers must be connected to that right of the Indians to make their own laws and be governed by them.

Nevada, 533 U.S. at360-361, 121 S.Ct. at 2311 (citations omitted)(emphasis added).

The tribal self-government exception to Montana applies only when the conduct at issue "threatens or has some direct effect on the political integrity the economic security, or the health or welfare of the tribe." *Montana*, 420 U.S. at 566,101 S.Ct. at 1258.

John Doe's claims are for money damages for an alleged assault against a member of the tribe by a non-member, Dale Townsend. Doe seeks to hold Dollar General vicariously liable for this assault or, alternatively, liable due to some unexplained negligence with regard to the employment of Mr. Townsend. These allegations have no connection to tribal self-government or internal tribal relations.

The Choctaw Supreme Court held that this exception was satisfied because, " 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." But once again, the Choctaw Supreme Court's conclusion flies directly in the face of Supreme Court precedent. Providing a judicial forum for the resolution of civil disputes is simply not necessary for the protection of Tribal self-government and internal relations. As Justice Ginsburg explained in *Strate,*

> Gisela Fredericks may pursue her case against A-1 Contractors and Stockert in the state forum open to all who sustain injuries on North Dakota's Highway. Opening the Tribal Court for her optional use is not necessary to protect tribal self-government; and requiring A-1 and Stockert to defend against this commonplace state highway accident claim in an unfamiliar court is not crucial to "the political integrity, the economic security, or the health or welfare of the [Three Affiliated Tribes]."

Recompense for an individual tribal member's damages is simply insufficient to satisfy this prong. "[T]he tribal court plaintiff's status as a tribal member alone cannot satisfy the second exception. Nor is it sufficient to argue...that the exception applies because the tribe has an interest in the safety of its members." *County of Lewis v. Allen*,163 F.3d 509, 515 (9th Cir. 1998).[18]

Nor does the fact the tort occurred on tribal lands lead to a different result. "The ownership status of land ... is only one factor to consider in determining whether regulation of the activities of nonmembers is 'necessary to protect tribal self-government or to control internal relations'." *Nevada v. Hicks*, at 360. *See also Burlington Northern Railroad Co. v. Red Wolf,* 196 F.3d 1059 (9th Cir. 2000)(protection of interests of tribal members killed in railroad crossing accident insufficient to satisfy *Montana* exception).

There is no connection here between the alleged liability of Dollar General, whether based on vicarious liability or negligence, and the property where the tort is alleged to have occurred. The location of the occurrence is merely coincidental to the tort and, therefore, does not call into play the Tribe's authority over the land. As such, the coincidence of location does not implicate tribal self-government and control.

The Tribal Court's assertion of jurisdiction over this case is not necessary to protect the Tribe's right to "make their own laws and be governed by them." Rather, this case simply presents one tribal member's tort claim for money damages against non-members in a forum he (perhaps correctly) believes will be friendly to his claims. This scenario is not what the self-governance exception protects and the Tribal Court has no jurisdiction over this case.

[18] The Tribe certain did take the action it believed as necessary to protect its members by forever barring Mr. Townsend from coming on the reservation.

5. Tribal Jurisdiction Does Not Exist Because Doe Seeks Punitive Damages

In his suit, John Doe seeks an award of punitive damages. (*See* Complaint, at para. VII). In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011 (1978), the United States Supreme Court held that tribal courts do not have jurisdiction "to try and to punish non-Indians." Punitive damages, while a civil remedy, are punishment designed to alter future conduct, not recompense for damages already caused. Thus, under *Oliphant*, the Tribal Court does not have jurisdiction over this case because it has no jurisdiction to punish a non-Indian.

The protections of the United States Constitution do not apply to proceedings in Tribal Courts (a point enthusiastically noted by the Choctaw Supreme Court). Rather, they are constrained only by the Indian Civil Rights Act and their own constitutions. In his concurring opinion in *Hicks*, Justice Souter (joined by Justices Kennedy and Thomas) stated that "it has been understood for more than a century that the Bill of Rights and the Fourteenth Amendment do not of their own force apply to Indian tribes." *Hicks*, 533 U.S. at 383, 121 S.Ct. at 2323. He then recognized the clear "presumption against tribal-court civil jurisdiction [which] squares with one of the principal policy considerations underlying *Oliphant*, namely, an overriding concern that citizens who are not tribal members be 'protected…from unwarranted intrusions on their personal liberty." *Id.* at 384, 121 S.Ct. at 2323.

A claim for punitive damages implicates a defendant's constitutional protections against "excessive punishment" as guaranteed by the Due Process Clause of the Fourteenth Amendment. *BMW of North America v. Gore*, 517 U.S. 559, 562, 116 S.Ct. 1589, 1592 (1996). Simply put, an excessive award of punitive damages can result in "an arbitrary deprivation of life, liberty or property in violation of the Due Process Clause." *Id.* at 586 (citing *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453, 113 S.Ct. 2711, 2718, 125 L.Ed.2d 366 (1993). Because these protections are not present in Tribal Court, federal recognition of Tribal Court

jurisdiction over non-Indians in claims for punitive damages would in and of itself violate the Due Process clause. The federal government simply cannot waive a citizens' constitutional right by making them subject to the jurisdiction of a court where constitutional rights do not apply.[19]

6. The Tribe Waived Any Jurisdiction It May Have Had Over Mr. Townsend By Forever Barring Him From The Reservation

The Tribe has jurisdiction to exclude individuals from the reservation. It has enacted laws providing for proceedings in Tribal court to exercise that authority. [cite] Based upon Doe's allegations, the Tribe, through its Attorney General, decided to seek such an order excluding Mr. Townsend from the reservation. Mr. Townsend was asked to meet with the Attorney General's office to discuss the order. At that meeting, which took place at the office of counsel for Doe, the Attorney General requested that Mr. Townsend agree to the order and represented that if he did, there would be no further legal proceedings against him. Mr. Townsend agreed to the entry of the order.

As part of his motion to dismiss, Mr. Townsend pointed out that under the Order of Exclusion, it was unlawful for him to come on the reservation to defend himself against Doe's allegations. The Order did not contain any exception for Doe's lawsuit in spite of the fact that such exceptions for legal proceedings were contemplated by the Choctaw Tribal code. See Choctaw Tribal Code §20-1-3(2). It is axiomatic that excluding a civil litigant from a trial violates the United States Constitution's Due Process clause. *Preferred Properties v. Indian River Estates*, 276 F.3d 790, (6th Cir. 2002). This right is particularly acute where the defendant is the primary, and potentially only, witness available to refute the charges being leveled at him

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

by the plaintiff. There is no authority that the Due Process provision of the Indian Civil Rights Act would not also be violated by this situation.

Even counsel for Doe recognized the serious due process issues with the Tribal court attempting to assert jurisdiction over a non-Indian who had been forever banned from the reservation. As such, an overture was made to the Choctaw Attorney General's office seeking to have the Order of Exclusion modified. Assistant Attorney General Melissa Carleton, the individual who had met with Mr. Townsend regarding the order, responded negatively to this inquiry. On August 15, 2005, she wrote, "The Tribe is not inclined to file a motion to modify the exclusion order … We are not opposed to the exclusion order being modified for the specific purpose of Mr. Townsend defending the lawsuit, if the court finds that justice will be served by making the modification."

As of the date of oral argument before the Choctaw Supreme Court on November 16, 2007, the Tribe had made no effort to seek an amendment to the Order of Exclusion. At oral argument, it became apparent that the Order of Exclusion was seen as an impediment to the Tribal court having subject matter and/or personal jurisdiction over Mr. Townsend. Likewise, if Mr. Townsend could not appear, Dollar General would be unable to directly refute the allegations made by Doe impairing its constitutional rights to due process and a fair trial.

On December 13, 2007, with no forewarning, and prior to any decision being issued by the Choctaw Supreme Court, the Choctaw Attorney General's office changed its mind and sought to modify the order of exclusion. It filed a motion to amend the order claiming amending the Order was in the "best interest of all the parties" and that Doe "would be denied relief in Tribal court without a modification of the order."

Mr. Townsend is a party to the proceeding resulting in the Order of Exclusion. He consented to the Order that was entered. In agreeing to the Order of Exclusion, Mr. Townsend waived valuable rights to defend himself against the allegations being made against him. He gave up the right to tell his side of the story and to confront his accuser. He gave up his right to appeal a decision to exclude him. He gave up his rights to ever come back to the reservation to play golf, or gamble, or conduct business. **He lost his job** because it necessitated his presence on the reservation. The Order he ***agreed*** to certainly did not contemplate his being called back into Choctaw Tribal Court to defend himself against the very same allegations. Had he been apprised that the very same allegations being made in the Petition for Exclusion would later be made in a civil suit seeking money damages against him, his decision could easily have been different. He opposed the motion to amend because he did not agree to the terms the Tribe now sought to impose and the District Judge has not ruled on that motion. But apparently Mr. Townsend's objections and arguments are of no moment if they would prevent Doe from having his claims heard in a Tribal forum.

Notwithstanding that the Order remains in place, and arose out of a proceeding not before it, the Choctaw Supreme Court had little trouble suggesting what should be done.

> 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 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 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 520-1 -3(2).

Following this, the Attorney General did file a notice of the Tribe's acquiescence in the Choctaw Supreme Court's suggestion. Immediately thereafter, without providing any opportunity for Dollar General or Mr. Townsend to respond, the Choctaw Supreme Court modified an Order in a proceeding not before it on which the District Judge had not ruled.

It is clear from this action that the Choctaw Supreme court is more concerned about providing a home court to Mr. Doe than it is in protecting Mr. Townsend's and Dollar General's due process rights. More importantly, it shows even rudimentary concepts of civil procedure and jurisdiction will not be adhered to. This reeks of prejudice.

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF FORCED TO LITIGATE IN A COURT WITH NO JURISDICTION

Because the Tribal Court has no jurisdiction in this matter, Plaintiffs will suffer irreparable harm if forced to litigate there. During the process, Plaintiffs will incur significant costs and fees. Dollar General employees will be called upon to spend significant amounts of time and effort working on the matter. Should Plaintiffs be subjected to a judgment in Tribal Court, that judgment could be executed upon by Tribal authorities against whom Plaintiffs would have no recourse due to the Tribe's sovereign immunity. Plaintiffs' constitutional rights are not protected in Tribal Court because a defendants rights in tribal court are not co-extensive with the rights of a litigant in a state or federal court.[20] Moreover, should Plaintiffs ultimately prevail at

[20] *UNC Resources Inc. v. Bennally*, 514 F. Supp. 358 (D.N.M. 1981) *citing, Oliphant v. Suquamish Indian Tribe*,

trial in tribal court, the victory could be reversed on appeal due to the lack of jurisdiction giving Doe a second bite at the apple by bringing suit in state court.[21]

Courts have routinely concluded that this situation presents irreparable harm sufficient to support the granting of temporary injunctive relief. One court explained,

> Without an injunction, UNC would be forced to appear and defend in Tribal Court; were it not to appear, the Navajo plaintiffs there could obtain default judgments that the tribe might attempt to execute against UNC's interests on the reservation. The burden on UNC of defending numerous Tribal Court actions would be substantial. Any judgments obtained against UNC after trial might also be executed by the tribe. In such a closed system, it would be difficult if not impossible for UNC to find recourse to another forum that could protect it from the tribe's overreaching jurisdiction. The only way adequately to protect UNC from this potentially irremediable injury is to enjoin the defendants from proceeding further in Tribal Court.

UNC Resources Inc. v. Bennally, 514 F. Supp. 358 (D.N.M. 1981). *See also Kerr-McGee Corporation v. Farley*, 88 F.Supp.2d 1219 (D.N.M. 2000)("The Court finds that Kerr-McGee will suffer irreparable damage if Tribal Claimants are not enjoined from proceeding in Navajo Court, as demonstrated by the expense and time involved in litigating this case in tribal court."); *Seneca-Cayuga Tribe Of Oklahoma v. State of Oklahoma*, 874 F.2d 709 (10th Cir. 1989)("The Tribes would also be forced to expend time and effort on litigation in a court that does not have jurisdiction over them...."); *Chiwewe v. The Burlington Northern and Santa Fe Railway Co.*, 2002 WL 31924768 (D.N.M.)(same).

C. THE BALANCE OF HARMS SUPPORTS ENJOINING THE PROCEEDING IN TRIBAL COURT

John Doe will suffer no unfair prejudice from the proceeding in tribal court from being enjoined. He can file his suit in the Mississippi courts for the same relief he seeks in tribal court.

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435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978).

[21] It is Plaintiff's understanding that while Doe was a minor, the statute of limitations on bringing a state court action

At most, there is only the delay occasioned by the change in forums about which he can complain. Since what he seeks is money, any damage caused by delay is compensable in interest should he ultimately obtain a judgment.

D. THE PUBLIC INTEREST WILL NOT BE HARMED BY ENJOINING THE TRIBAL COURT PROCEEDING

There is little public interest in a tort dispute between private parties. There is, however, public interest in the resolution of the jurisdictional limits of the tribal court and preventing it from attempting to exercise jurisdiction where it has none. One court posed the question as "Essentially, the Court must weigh the public's interest in permitting the Navajo tribal court to adjudicate any matter brought before it against the extension of civil tribal court jurisdiction to non-consenting nonmembers." *Ford Motor Company v. Todocheene,* 258 F.Supp.2d 1038, 1057 (D. Ariz. 2002). Courts have routinely answered that the public interest is served by preventing tribal courts from proceeding in cases where they lack jurisdiction. *See, e.g. UNC Resources Inc. v. Bennally*, 514 F. Supp. 358 (D.N.M. 1981) ("Nor will the public interest be harmed by an injunction preventing the defendants from participating in an unlawful exercise of tribal power."); *Chiwewe v. The Burlington Northern and Santa Fe Railway Co.*, 2002 WL 31924768 (D.N.M.)(same); *Kerr-McGee Corporation v. Farley*, 88 F.Supp.2d 1219 (D.N.M. 2000).

V. CONCLUSION

Plaintiffs' request for temporary injunctive relief satisfies all four prongs necessary for the granting of that relief. They will prevail on the merits because tribal court jurisdiction is unquestionably lacking. They face irreparable harm if forced to proceed with the defense of the suit in a forum with no jurisdiction. Contra, there is little if any harm (and certainly none that is unfair) to John Doe who may pursue these claims in state court. Finally, the public interest would

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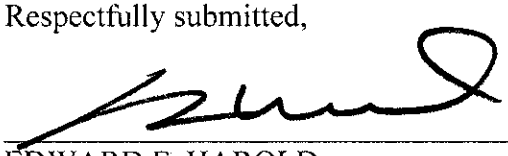
did not run against him.

be well served by a pronouncement on the jurisdiction of the tribal court to entertain civil tort claims against non-Indians.

Wherefore, Plaintiffs pray their request be granted and this court temporarily enjoin Defendants from taking any further steps in the prosecution of the pending action in tribal court until such time as a hearing can be held on Plaintiffs request for declaratory judgment and permanent injunctive relief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of March 2008, I forwarded a copy of the foregoing Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction via facsimile and U.S. Mail on the following:

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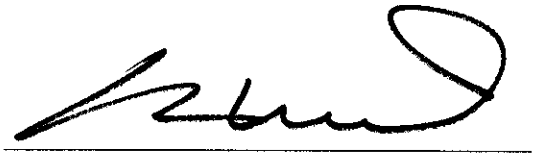

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