UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

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. 4:08-cv-22-TSL - JCS**

PLAINTIFFS DOLGENCORP, INC. AND DOLLAR GENERAL CORPORATION'S REPLY TO THE TRIBAL DEFENDANTS' OPPOSITION TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. INTRODUCTION

The crux of the Tribal Defendants' argument in favor of Tribal Court jurisdiction is the contention that an alleged sexual battery on a minor directly arose out of Plaintiff Dollar General's[1] operation of a retail store on the reservation. They do not attempt to explain how operating a store selling basic consumables such as detergent, light bulbs, and some food items is directly connected to the alleged battery. Rather, they use a "but for" causation analysis as the

[1] Plaintiff Dolgencorp, Inc. is actually the operator of the store.

link, *i.e.*, if Dollar General had not opened the store, Doe and Townsend would not have come into contact with each other (although that cannot be said for certain). They then try to buttress this connection by imagining a host of obligations Dollar General "agreed" to when it allowed the Tribe's Youth Opportunity Program to place Doe in the store.[2] Assuming these imagined aspects of Dollar General's consensual relationships could ever form the basis of Tribal Court jurisdiction, "but for" is not enough to establish the **direct** nexus demanded by *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 66l (1997).

The Tribal Defendants also make numerous procedural arguments designed to avoid scrutiny of Plaintiffs' claims. As will be shown, none of these procedural arguments are remotely sufficient to avoid review of the substantive allegations of Plaintiffs' Complaint.

II. ARGUMENT AND LAW[3]

A. THE *MONTANA* ANALYSIS

1. Consensual Relationship Exception

a) Montana's Consensual Relationship Exception Requires Express Consent to the Jurisdiction of the Tribal Court.

The Tribal Defendants' argument on *Montana's* consensual relationship exception relies on the existence of numerous unwritten "consensual" relationships. They admit that Dollar General has never expressly consented to Tribal Court jurisdiction over non-lease related issues – none of which are presented in this case. Rather, they pose that Dollar General, by its conduct, somehow consented to the jurisdiction of the Tribal Court for tort claims.

Montana's **rule** – and the starting presumption for any analysis of Tribal Court jurisdiction - is that Tribal Courts do not have jurisdiction over non-Indians. The consensual

[2] Defendants cannot an do not allege that there is any written agreement between Dollar General and the Tribe or any Tribal entity relating to participation in the Youth Opportunity Program.

relationship **exception to that rule** says nothing at all about regulating activities of non-Indians through civil adjudication of tort claims. Defendants contend that the company should have understood that by operating an on reservation store, it was agreeing to be hauled into Tribal Court for any claim, no matter how tangentially related to its business. That is simply not the case. There has never been a U.S. Supreme Court case holding that a Tribal Court has jurisdiction over a non-Indian in a civil tort claim. While there may be circumstances where jurisdiction is appropriate through express consent (such as in Dollar General's lease related to disputes over the lease itself), the reading of *Montana's* first exception urged by Tribal Defendants would cause the "exception to swallow the rule." *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 655 (2001). Tribal courts would have civil jurisdiction over every non-Indian who had any commercial relationship with a Tribal member on the reservation. This cannot be squared with *Montana's* overarching rule that no such jurisdiction exists.

b) The Relationship Between Doe and the Company Does Not Support the Application of Montana's Consensual Relationship Exception

One aspect of *Montana's* consensual relationship exception that is absolutely unassailable is that it only applies to "commercial dealing, contracts, leases, or other arrangements." *Atkinson Trading Co.,* 532 U.S. at 655 (2001). "Other arrangements" must also be of a commercial nature. *Boxx v. Long Warrior*, 265 F.3d 771, 776 (9th Cir. 2001). The Tribal Defendants argue that John Doe's assignment to Dollar General's store by his employer, the Choctaw Youth Opportunity Program, is such an "other arrangement."[4] They create out of thin

[3] The Tribal Defendants address only one of the four prongs required for the entry of preliminary injunctive relief, whether Plaintiffs will prevail on the merits. They thus have acknowledged that should Plaintiffs prevail on that point, preliminary injunctive relief is appropriate.

[4] The Tribal Defendants spend an inordinate amount of their brief arguing about Doe's status as an "employee." There are a myriad of definitions of "employee" for the purposes of different laws. State workers' compensation laws generally define the term broadly to protect as many injured employees as possible. The Fair Labor Standards Act also contains a broad definition of "employee," but it is different. So, for purposes of worker's compensation,

air a host of purported "benefits" to Dollar General by virtue of this relationship, *e.g.*, "good publicity" so that they can term it "commercial." But there is no allegation of those benefits in the Complaint, nor was any evidence of them submitted to the Tribal Court. The nature of what Dollar General is alleged to have done is to allow the Choctaw Youth Opportunity Program to place Doe temporarily in its store, *i.e.*, it participated in a civic program designed by the Tribe for the benefit of the Tribe, not Dollar General, through the provision of job training to its younger members. This participation is not "commercial dealings, contracts, leases, or other arrangements."

Defendants contend that an on-reservation "employment" relationship is sufficient to satisfy the first *Montana* exception for all claims arising from the relationship. The first case they cite for this proposition, *State of Montana v. Bremer,* 971 F. Supp. 436 (D. Mont. 1997), was summarily reversed by the Ninth Circuit who concluded that the employment relationship was insufficient to support *Montana's* consensual relationship exception for a tort claim. *State of Montana v. Bremer,* 152 F.3d 929 (table), 1998 WL 385442 (text) (C.A.9 (Mont.)) The second case, *FMC v. Shashone Bannock Tribes*, 905 F.2d 1311 (9th Cir. 1990) involved the application of Tribal legislation, not tort liability. Finally, despite the language Defendants quote from *MacArthur v. San Juan County,* 497 F.3d 1057 (10th Cir. 2007), that decision ultimately concluded that there was no Tribal Court jurisdiction over the Tribal member's claim against his employer. Thus, there is no authority that employing a Tribal member on a reservation – and Dollar General did not "employ" Doe – automatically subjects the employer to Tribal Court jurisdiction over tort claims by the employee.

Doe might be determined to be an "employee" whereas under the FLSA, he might be considered an "intern" not entitled to the protections of that act. Regardless, putting a label on the relationship does not change the actual nature of what he is alleged to be, an unpaid participant in the Youth Opportunity Program placed in Dollar General's store for job training purposes.

c) The Nexus Between The Alleged Tort and the Relationship Between Doe and Dollar General Is Insufficient to Apply the Consensual Relationship Exception

The Tribal Defendants acknowledge there must be a "direct logical nexus" between the relationship and the cause of action to support the application of *Montana's* consensual relationship exception. What they wholly fail to do is to explain what that nexus is here. Rather, they try to manufacture the nexus by arguing about Dollar General's purported liability for the tort.

The Tribal Defendants claim that "being subjected to an assault by a co-employee during business hours at the employer's place of business is a known risk incident to all such employment relationships."[5] From this, they conclude the alleged assault has the requisite nexus to Dollar General's operations. What they ignore is that being assaulted is a known risk incident to any activity any person engages in when others are present. A person can be assaulted walking down the street, in a bar, in a church, at home, or while waiting for the bus. No aspect of operating a retail store (receiving merchandise, stocking shelves, waiting on customers, cleaning the store, performing inventory) invites an assault. An assault is an intentional act by one person against another. It is not a derivative of working in a retail store. It is a derivative of one person's decision to hurt another.

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

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

The Tribal Defendants attempt to buttress their nexus argument by asserting that the law provides a remedy for Doe's claims. No case has ever suggested that the existence of a remedy is a factor in assessing Tribal Court jurisdiction. More importantly, the Tribal Defendants are wrong on the law. Under Mississippi common law (that Defendants assert will or should be applied to this case even in Tribal Court), an employer is only vicariously liable for an intentional assault by an employee where that employee's conduct was either 1) authorized, 2) actuated by an intent to serve the employer or 3) incidental to the job. *Adams v. Cinemark USA*, 831 So.2d 1156, 1159 (Miss. 2002). It is ludicrous to assert the conduct Doe alleges Townsend committed fits any of those categories. He was not authorized to assault Doe. The nature of the allegation defies any suggestion that it was to serve Dollar General's interest. Finally, sexually assaulting a minor is simply not incidental to the job of store manager.

2. Health, Welfare and Integrity of the Tribe Exception

The Tribal Defendants' only argument under *Montana's* health and welfare exception is that providing a Tribal Court forum to members of the Tribe for tort claims is necessary to protect the "political integrity of the Tribe." The lack of merit of that argument is addressed fully in Plaintiff's Original Memorandum in Support of Its Application For TRO/Preliminary Injunction.

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[5] Brief p. 17.

B. DEFENDANTS' PROCEDURAL ARGUMENTS ARE MERITLESS

1. Sovereign Immunity

While Defendants claim that the Tribe and the Tribal Court have sovereign immunity to some of the claims plead, this is simply not the law in the Fifth Circuit. Tribal sovereign immunity protects tribes only against suits for damages, not suits for declaratory or injunctive relief. *TTEA v. Pueblo,* 181 F.3d 676, 680 - 681 (5th Circuit 1999). Likewise, "in the Fifth Circuit, tribal officials are not immune from suits for declaratory and injunctive relief." *Comstock v. Coushatta and Alabama Indian Tribes,* 261 F.3d 567 (5th Cir. 2001). As such, Defendants have no sovereign immunity from this suit, that seeks only injunctive relief and does not seek damages. *See* Complaint, Prayer for Relief.

2. This Court Has Jurisdiction Over All Plaintiffs' Claims

The Tribal Defendants' Brief tries to make a distinction between what it calls *Montana* claims and the claims of waiver and estoppel related to the Order of Exclusion entered against Mr. Townsend. Based on this purported distinction, the Tribal Defendants assert this Court does not have jurisdiction over the waiver and estoppel claims based on the Order of Exclusion.[6] There is no basis for this assertion. The validity of the underlying original agreed Order of Exclusion is not before this Court. What is before the Court is the impact of that Order on the jurisdiction of the Tribal Court over Mr. Townsend. All questions related to the jurisdiction of the Tribal courts are federal questions. *National Farmers Union v. Crow Tribe,* 471 U.S. 845, 850 – 853 (1985). The fact this jurisdictional issue arises out of a unique set of circumstances never before passed upon by any court does not transform it into a non-jurisdictional claim.

[6] Tribal Defendants' Brief p. 30.

3. Plaintiffs Have Fully Exhausted Tribal Court Remedies

Defendants also suggest that Plaintiffs have failed to exhaust their Tribal remedies over the Exclusion Order. They do not dispute that Plaintiffs have argued from the outset of this proceeding in Tribal Court and here that the Exclusion Order is an impediment to jurisdiction. They do not dispute that the Choctaw Supreme Court issued a ruling addressing the Exclusion Order, amending it, and concluding that it was no bar to jurisdiction. They do not dispute that this was a final ruling and that there is no procedure in Title VII of the Choctaw Tribal Code for seeking a rehearing from the Choctaw Supreme Court. They do not dispute that at the time the Complaint in this matter was filed, Plaintiffs had been ordered to proceed to trial in Tribal Court. Rather, Defendants base their arguments for lack of exhaustion on actions taken by the Tribe **after the filing of this suit**.

The Tribal Defendants have recognized that the Choctaw Supreme Court's decision vis-à-vis the Order of Exclusion was a gross error. They are now backpedaling as fast as they can from what the Choctaw Supreme Court did. But their after-the-fact conduct does not change the situation that existed when Plaintiffs filed this Complaint.

Defendants also suggest that Plaintiffs have not exhausted remedies with respect to some of the arguments made here. Preliminarily, this argument is without merit. Dollar General has contended from the outset of this litigation that the Tribal Court lacked jurisdiction over Dollar General and Townsend in connection with Doe's claims. That Dollar General's arguments have been refined over time, particularly in response to the decision of the Choctaw Supreme Court, does not support the conclusion that Dollar General has failed to exhaust its Tribal Court remedies. Contrary to Defendants' position, the exhaustion doctrine does not require the complete identity of arguments and issues. *See Nord v. Kelly,* 474 F.Supp.2d 1088, 1099 (D.

Minn. 2007)(fact argument not made as comprehensively in tribal court as in federal court did not support a claim of failure to exhaust).

Moreover, in light of the total disjointedness of the proceedings in Tribal Court, this argument is a difficult one to accept. There is no question that on July 28, 2005, Judge Collins orally ruled that the Tribal Court had jurisdiction over Dollar General and Mr. Townsend under *Montana.* The only issue remaining after that hearing was the question of the impact of the Order of Exclusion on that jurisdiction. Although the parties submitted a proposed Order on the *Montana* issue, Judge Collins did not sign it. Likewise, the parties submitted additional briefing on the Order of Exclusion. Again, Judge Collins did not issue any ruling.

The Tribal Code provides "15 days from the action giving rise to the appeal" to seek interlocutory review. Tribal Code §7-1-10. There is no definitive answer within the Code to whether that 15 days ran from the date of the Judge's oral ruling denying the motions to dismiss or from the date on which the Judge issued a written order. Since the Judge had not signed a written order as of 15 days from the date of the oral ruling, Dollar General filed a petition seeking interlocutory appeal. Mr. Townsend joined in that Petition expressly stating that he was doing so only out of an abundance of caution and noting clearly on the face of his joinder that the issue related to the Exclusion Order remained pending before the District Court.[7]

More than two years later, the Choctaw Supreme Court set and heard oral argument on the Petition for Interlocutory Appeal. During that two years, the District Court had never issued any further rulings on the Exclusion Order issue. The Choctaw Supreme Court then ruled not only on the Petition for Appeal, which it granted, but on the merits of every jurisdictional issue as well. Plaintiffs here were never given an opportunity to file an appellate brief on the merits before the Choctaw Supreme Court. This action would be akin to the U.S. Supreme Court acting

on writ applications without merits briefs. To suggest that Plaintiffs cannot make arguments where they never had the opportunity to fully brief those arguments reeks of gamesmanship (and does not bode well for Plaintiffs due process rights in Tribal Court). Additionally,

Defendants also complain that Plaintiffs did not try to raise the Choctaw Supreme Court's error in modifying the order before the Choctaw Supreme Court.[8] This completely ignores the fact that Plaintiffs were never afforded the opportunity to address this error. There is no procedure for a rehearing in the Choctaw Supreme Court. See Tribal Code, Chapter 7. Plaintiffs could not be aware of what the Choctaw Supreme Court would do until after it had done it.

Moreover, Mr. Townsend did try to address the Order of Exclusion. The Tribe's Attorney General responded to the Choctaw Supreme Court's request for its position on Wednesday, February 27, 2008. Counsel for Plaintiffs did not receive a copy of the Attorney General's filing until Friday, February 29, 2008 at 11:13 am.[9] On Monday afternoon, March 3, 2008, (3 days later including a weekend) Dale Townsend's counsel placed a reply to the Attorney General's position into overnight delivery to the Choctaw Supreme Court.[10] Unbeknownst to counsel for Plaintiffs, that same day, the Choctaw Supreme Court had already issued an order modifying the Order of Exclusion without providing an opportunity for Plaintiffs to respond to the Attorney General's position. Thus, while Mr. Townsend had attempted to point out the procedural and legal impediments to the Choctaw Supreme Court, these efforts were thwarted by the Choctaw Supreme Court acting prior to Plaintiffs being given a reasonable opportunity to respond.

Exhaustion of remedies is prudential and not jurisdictional. *Strate v. A-1 Contractors*, 520 U.S. 438, 453, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997) ("[T]his Court recognized . . . that

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[7] Exhibit 1 to the Complaint, pp. 127 – 128.
[8] Tribal Defendant's Brief p. 34.
[9] Exhibit 1.
[10] Exhibit 2.

the exhaustion rule stated in *Nat'l Farmers* was `prudential,' not jurisdictional.") It is subject to exceptions including futility. *Nat'l Farmers union v. Crow Tribe*, 471 U.S. 845, 856 n. 1 (1985). The Choctaw Supreme Court's opinion clearly indicates that, assuming the Tribe's Attorney General was amenable, it sees no impediment to amending the Order of Exclusion. The Attorney General's submission to the Choctaw Supreme Court made clear the amendment of the order of exclusion was pending before the District Court in a separate action. Thus, it is disingenuous to assert that the Choctaw Supreme Court merely made a procedural error. Rather, it deliberately took action to circumvent the other proceeding to allow Doe's claim to proceed. There is no evidence or reason to believe that the Choctaw Supreme Court's opinion on the substance of that issue would change because it came before it in the proper case. As such, it is abundantly clear that further proceedings in Tribal Court would be futile and no further exhaustion should be required.

4. Due Process Arguments

Defendants dismiss out of hand Plaintiffs lack of Due Process arguments asserting the Due Process protections of the Indian Civil Rights Act and the Choctaw Tribal Constitution are sufficient protection. That is small comfort to Plaintiffs whose experience to date in Tribal Court has shown complete lack of adherence to any process at all, much less due process. For example, the Tribal Code calls for a decision on a Petition for Interlocutory Appeal to be made in 30 days. Plaintiffs did not get a decision on their Petition for Interlocutory Appeals for two-and-a-half years. When the decision did come down, even the Tribe had to admit that the Choctaw Supreme Court made a serious procedural error. The Tribal Court's proceedings to date are themselves the strongest evidence that Plaintiffs Due Process concerns are warranted and should be recognized.

III. CONCLUSION

The Tribal Defendants theorize that Tribal Court jurisdiction under *Montana's* consensual relationship exception is limited only by a lawyer's ability to imagine the parameters of someone's "consent." This flies in the face of the concept. Consent requires an active decision, not an *ex post facto* rationalization. Moreover, they define the "direct nexus" requirement as merely "but for" causation. Accepting these parameters would lead to *Montana's* exception swallowing the rule. Any on reservation tortious conduct by a non-Indian would lead to Tribal Court jurisdiction over him. This cannot be squared with the general rule and presumption that the jurisdiction of Tribal Courts does not generally extend to the activities of non-Indians.

Wherefore Plaintiff's pray that their motion be granted and that this Court enjoin Defendants from taking any further action in the case of *John Doe v. Dollar General Corp. et al.*, No. 05-02 on the docket of the Tribal Court of the Mississippi Band of Choctaw Indians.

Respectfully submitted,

s/Edward F. Harold
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CERTIFICATE OF SERVICE

I, Edward F. Harold do hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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And I hereby certify that I have mailed via United States the document to the following non-ECF participants:

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This 25th day of April 2008.

s/Edward F. Harold