IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO. 4D23-0437

SEMINOLE TRIBE OF FLORIDA,

Appellant,

v.

JOSEPHINE PUPO,

Appellee.

APPELLEE'S ANSWER BRIEF

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County

EATON & WOLK, PL
BY: DOUGLAS F. EATON
FBN #:0129577
DANIEL R. SCHWARTZ, ESQ.
FBN: 124512
Attorneys for Appellee
2665 S. Bayshore Dr., Ste. 609
Miami, Florida 33133
Telephone: (305) 249-1640
Telecopier: (786) 350-3079
Email: deaton@eatonwolk.com

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Page

AUTHORITIES

I. STATEMENT OF THE CASE AND FACTS

The trial court in this case correctly denied the Seminole Tribe of Florida's (the "Tribe's") motion to dismiss Josephine Pupo's ("Pupo" or "Plaintiff) slip-and-fall case because the Tribe waived any non-compliance due to its own failure to comply with the notice provisions in the 2010 Gaming Compact (the "Compact") which governs tort claims against the Tribe. Further, there is no Florida law which would require dismissal of Plaintiff's claim rather than abatement, and there was no need for abatement because the instant case was filed after the one year pre-suit period had expired.

The Tribe's statement of the case and facts, while generally accurate, is incomplete. We will fill in the relevant blanks below. On March 26, 2021, Pupo was injured at the Tribe-owned Seminole Hard Rock Hotel & Casino. After the date of the fall, and prior to April 19, 2021, Pupo downloaded a claims form from the tribe's website, (App. 82-83)[1] which stated, in pertinent part:

> You must complete this form and return it to the Seminole Tribe of Florida's Risk Management Department, in a reasonable period of time, but no later than three (3) years

[1] References to the Tribe's Appendix will be designated (App._). References to Pupo's Supplemental Appendix will be designated (Supp.App.__)

> from the date of the incident, giving rise to the claimed injury or illness or the claim will be forever barred from recovery. The Tribe will provide you with a written response within thirty (30) days and will forward the claim to the Tribe's insurance carrier for processing. The Tribe will use its best efforts to assure that the insurance carrier contacts you within a reasonable period of time, subject to the provisions in Part VI of the 2010 Gaming Compact between the Seminole Tribe of Florida and the State of Florida. There is a four year statute of limitation on the filing of a gaming patron tort claim. Receiving this form does not automatically assume eligibility of claim. By signing this form this acknowledges the receipt of the gaming patron claim form.

(App.83) (emphasis in original) At the time she downloaded the form, neither the claims form nor the website mentioned the one year pre-suit provision the Tribe relies upon. (See discussion, *infra*, at 8-12) The Tribe's website and claim form were updated on April 19, 2021, and now includes a reference to the one year pre-suit period, but Pupo did not receive this notice.

The form was sent by Pupo's attorney to the Tribe on April 20, 2021. On May 3, 2021, the Tribe formally acknowledged Pupo's claim. (Supp.App.003) The response did not provide the updated claim form, nor did it contain any notice of the one year pre-suit period or the consequences for failing to abide by the pre-suit period.

On February 2, 2022, Pupo filed her initial complaint. She

subsequently voluntarily dismissed it without prejudice, on March 22, 2022, in order to permit the one-year pre-suit period to elapse, which it did on April 20, 2022.

On September 8, 2022, after the pre-suit period had run, Pupo refiled her complaint against the Tribe. The Tribe moved to dismiss the complaint, asserting that the complaint was forever barred under the Compact since Pupo filed her initial complaint prior to the end of the one year pre-suit period. At a court ordered case management conference set prior to the hearing date noticed for the Tribe's motion to dismiss, the trial court denied the motion. The Tribe now appeals the denial of its Motion to Dismiss.

II. SUMMARY OF ARGUMENT

The Tribe waived any non-compliance with its procedures because the Compact mandates that the Tribe provide notice to claimants like Pupo that the expiration of the one year pre-suit period is a prerequisite to filing a lawsuit. Neither the Tribe's website nor its downloadable claims form provided notice to Pupo that she was required to wait one year to file suit after submitting her claim. Further, in the Tribe's May 3, 2021, response to Pupo's claim, the Tribe failed to provide notice of the one year presuit period.

By failing to provide the required notice, the Tribe waived any potential remedies it was entitled to as a result of Pupo's premature filing. Although this is a case of first impression, this Court can find guidance from analogous cases considering NICA, the Equine Activity Immunity Act, and the Agritourism Operator Act, which uniformly hold that the failure to provide a required notice to potential claimants results in a waiver of a limitation of remedy or immunity that would have been otherwise available.

Finally, even if the Tribe had not waived its remedy for a premature filing, the Tribe would not have been entitled to a dismissal. Rather, in line with Florida policy, the lawsuit should have been abated until the completion of the one year pre-suit period. Because the instant case was filed after the one year period, the Tribe's request for relief is moot, as Pupo already cured any alleged non-compliance with the Compact's pre-suit obligations.

The Tribe's complaint that the trial court entered its order without providing the Tribe due process is meritless. The Court simply heard the matter prior to its scheduled hearing date. The Tribe was allowed to argue its motion, even though the law didn't require the court to hear it.

III. ARGUMENT

A. STANDARD OF REVIEW.

Pupo agrees with the Tribe that the standard of review of the denial of the Tribe's motion to dismiss is *de novo*. *See DeSantis v. Geffin*, 284 So. 3d 599, 602 (Fla. 1st DCA 2019).

B. THIS COURT RECENTLY DECLINED TO SANCTION A PLAINTIFF THAT HAD FILED A CLAIM AGAINST THE TRIBE WITHOUT FIRST GOING THROUGH PRE-SUIT UNDER THE COMPACT.

This is a case of first impression, though this Court just recently addressed a similar, though not identical, fact pattern in *Seminole Tribe of Florida v. Manzini*, 2023 WL 3856423, (Fla. 4th DCA June 7, 2023). In *Manzini,* the plaintiff had amended an existing personal injury complaint against the Tribe to add claims arising after the filing of the original complaint, "without having provided any pre-suit notice to the Seminole Tribe of the claim and without observing the Compact's required one-year period for pre-suit investigation and settlement procedures." *Manzini* at *4.

This Court held that the newly filed negligence count was subject to dismissal "for two reasons: (1) the pre-suit notice of the claim was not properly provided under the procedures outlined in the Compact; and (2) the negligence count was filed before the one-year

period during which the Tribe was entitled to investigate and try to resolve the claim without the necessity of suit." *Manzini* at *4. Pointedly, this Court stated that it was declining to address "the Seminole Tribe's argument that a [new] negligence suit [for the injuries alleged in the dismissed claim] is forever barred." *Id.*

Presumably, if this Court had agreed with Tribe's argument that Manzini's failure to pre-suit his second claim prior to filing suit forever barred him from doing so, it would have said so. The fact that this Court passed on the opportunity to do so, where, unlike here, the Plaintiff had failed entirely to send the pre-suit notice form, speaks volumes. It suggests that if pressed to answer the question, this Court would follow the numerous cases that have held that failure to provide proper pre-suit notice under Fla. Stat. 768.28 prior to filing suit is not fatal so long as the failure is cured prior to the running of the statute of limitations. *See City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389, 394 (Fla. 4th DCA 2003) (Cataloging cases holding that "where a legal action is prematurely taken, though the condition precedent has been met, … if the mere passage of time will cure a defect, the action should be abated, not dismissed.")

C. THE TRIBE'S FAILURE TO COMPLY WITH ITS NOTICE OBLIGATIONS RESULTED IN A WAIVER OF THE COMPACT'S PENALTIES.

1. THE COMPACT'S LANGUAGE REQUIRES IT TO PROVIDE NOTICE TO POTENTIAL CLAIMANTS OF ALL RELEVANT DEADLINES.

We start with the language of the Compact, which requires the Tribe to alert claimants of all relevant pre-suit deadlines and the consequence of any failure to comply with them:

> 2. When the Tribe responds to an incident alleged to have caused a Patron's injury or illness, the Tribe shall provide a claim form to the Patron. The form must include the address for the Tribe's Risk Management Department and provide notice of the Tribe's administrative procedures for addressing Patron tort claims, **including notice of the relevant deadlines that may bar such claims if the Tribe's administrative procedures are not followed**.

(App.40-41) (Emphasis added).

The Compact also requires the Tribe to provide notice, on its website, of the pre-suit requirements, including the one year pre-suit period:

> 6. Notices explaining the procedures and time limitations with respect to making a tort claim shall be prominently displayed in the Facilities, posted on the Tribe's website, and provided to any Patron for whom the Tribe has notice of the injury or property damage giving rise to the tort claim. **Such notices** shall explain the method and places for making a tort claim, including where the Patron must submit the form, that the process is the exclusive method for asserting a tort claim arising under this section against the Tribe, **that the Tribe and its insurance carrier have**

> **one (1) year from the date the Patron gives notice of the claim to resolve the matter and after that time the Patron may file suit in a court of competent jurisdiction, that the exhaustion of the process is a prerequisite to filing a claim in state court**, and that claims which fail to follow this process shall be forever barred.

(App.42-43) (Emphasis added). As demonstrated below, the Tribe failed to provide notice to Pupo of the deadline it now asks this Court to enforce.

Immediately after the accident, Pupo downloaded the claims form that was available on the Tribe's website, filled it out and provided it to her attorney, who promptly submitted it to the Tribe. At the time she downloaded it, the form, the website, and the Tribe's response to Pupo's notice were wholly devoid of any mention of the one year pre-suit period despite the fact that the Compact required the Tribe to provide "notice of the relevant deadlines that may bar such claims." Nor was there any mention of any of the penalties associated with premature filing. Presumably, the Tribe is well-versed in the language of the Compact which it bargained for with the State of Florida, so the deadlines the Tribe included in its form were the ones that it considered "relevant."

2. THE TRIBE FAILED TO PROVIDE NOTICE TO PUPO OF THE ONE YEAR PRE-SUIT PERIOD.

When Pupo downloaded her claims form prior to April 19, 2021, neither the Tribe's website nor the Tribe's claims form contained any notice of the one year pre-suit period. Instead, the Tribe's website read as follows:

> It is important that you provide prompt written notice to the management of the Facility of the incident which resulted in the alleged claimed injury or damage. When the Tribe responds to an incident, you will be provided with a claim form. If you intend to seek compensation from the Tribe for your injury or damage, you must complete this claim form and return it to the Seminole Tribe's Risk Management Department. It is your responsibility to complete and timely submit the form. If the form is not returned within six (6) months from the date of the incident of the alleged claimed injury or damage, the claim shall be forever barred from recovery.
>
> . . .
>
> Once the claim form is received, the Seminole Tribe's Risk Management Department will forward the claim to its insurance carrier. The carrier will contact you in a timely manner, following the receipt of the claim. The insurance carrier will handle the claim to conclusion. Although not required, you may seek to resolve your claim through mediation with the insurance carrier.

(Supp.App.007,010)
(https://web.archive.org/web/20210103114617/https://www.theseminolecasinos.com/legal/patron-claims; https://web.archive.org/web/20210410230255/https://www.theseminolecasinos.com/legal/patron-claims)

Archived copies of the Tribe's website made on January 3, 2021, and April 10, 2021, bookending the Plaintiff's fall, demonstrate that the website provided no notice to potential claimants of the one year pre-suit period.[2]

On April 19, 2021, after Pupo accessed the site to download the claim form, the notice was amended and now contains the following notice to injured patrons:[3]

> The Tribe's sovereign immunity has been waived only as expressly stated in the Compact. If, after one (1) year from receipt of the Claim Form by the Tribe's Risk Management Department, you are unable to resolve your claim with the insurance carrier, you may file a lawsuit against the Tribe as the sole party in interest.

---

[2] Per *Manzini*, *supra,* this Court may properly "consider matters outside the four corners of the complaint." *Manzini* at *4. If this Court determines that it may not consider these web pages because they were not in the record below, we would note that the Defendant's Motion to Dismiss was scheduled for a hearing to be held on March 27, 2023. (App.86). At a February 6, 2023, case management conference, however, before Plaintiff had filed any opposition, the trial court raised the issue *sua sponte* and denied the motion. (App.88). Had we been afforded the opportunity to file a response, we would have placed the web site pages in the record and properly authenticated them. Given they are the Tribes' own statements, we don't anticipate they will contest the condition of the pages as we represent them, but if the Court feels that its decision hinges on the authenticity of these web pages, then the correct remedy would not be dismissal as requested by the Defendant, but remand to complete the record.

[3] The revision date – April 19, 2021 – is noted at the top of the page.

(Supp.App.012)

(https://web.archive.org/web/20210516161322/https://www.theseminolecasinos.com/legal/patron-claims) But this revision was too late to provide notice to Pupo, who downloaded and filled out the claims form on March 26, 2021. (App.83)

The claims form itself similarly lacked notice of the one year pre-suit period. A comparison between the form currently provided by the Tribe and the form that Pupo was provided is instructive. The current form has the following language, presumably added on April 19, 2021, the same date that the Tribe revised its website:

> If the parties are not able to resolve the claim in good faith within one (1) year after you provide written notice, you may bring a tort claim against the Tribe in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred - subject to any applicable statute of limitation. This process is the exclusive method for asserting a tort claim against the Tribe, and is a pre- requisite to filing a claim in state court. Claims that fail to follow this process shall be forever barred.

(Supp.App.014)(https://www.theseminolecasinos.com/-/media/project/shrss/hri/global/legal/sga/seminole-tribe-of-florida-patron-tort-form.pdf?rev=5b285240ccfb46ae84a130a077285738)

The only notice contained in the form Pupo filled out on March

26, 2021, was as follows:

> You must complete this form and return it to the Seminole Tribe of Florida's Risk Management Department, in a reasonable period of time, but no later than three (3) years from the date of the incident, giving rise to the claimed injury or illness or the claim will be forever barred from recovery. The Tribe will provide you with a written response within thirty (30) days and will forward the claim to the Tribe's insurance carrier for processing. The Tribe will use its best efforts to assure that the insurance carrier contacts you within a reasonable period of time, subject to the provisions in Part VI of the 2010 Gaming Compact between the Seminole Tribe of Florida and the State of Florida. There is a four year statute of limitation on the filing of a gaming patron tort claim. Receiving this form does not automatically assume eligibility of claim. By signing this form this acknowledges the receipt of the gaming patron claim form.

(App.83) There is no mention of the one year pre-suit period.

Finally, even though the Compact required the Tribe to provide a claim form when responding to an incident report, the Tribe's May 3, 2021, response to Pupo's claim contained neither a new claim form nor any notice as to the one-year pre-suit period. (Supp.App.003) The Tribe thus had three separate opportunities to provide notice to Pupo as required by the Compact, but failed each time. As we explain below, the Tribe has therefore waived the requirement that Pupo wait one year after sending the claim form before filing suit.

3. THE TRIBE'S FAILURE TO INCLUDE THE REQUIRED NOTICE LANGUAGE RESULTED IN A WAIVER OF THE ONE YEAR PRE-SUIT PERIOD.

There are no Florida cases that directly address whether a failure to provide notice of the pre-suit deadline required by the Compact results in a waiver of that deadline. Therefore, we need to consider analogous cases where the failure to provide a required notice resulted in a waiver of rights that would have otherwise been available.

Florida's Neurological Injury Compensation Act ("NICA") limits patients' remedies to those available under the Act. Similar to the Compact, NICA requires participating providers to provide notice to patients of their participation in the Plan. The Florida Supreme Court has held that failure to provide the appropriate notice results in a waiver of the limitation of remedies that participating providers were entitled to under the Act:

> [A]s previously determined by this Court, there is a condition precedent to NICA's exclusivity. Predelivery notice of the health care provider's participation in the NICA Plan must be given as required by section 766.316. *See Galen of Fla., Inc. v. Braniff*, 696 So.2d 308, 309–10 (Fla.1997) ("[T]he only logical reading of the statute is that before an obstetrical patient's remedy is limited by the NICA plan, the patient must be given pre-delivery notice of the health care provider's participation in the plan…. [T]he

> purpose of the notice is to give an obstetrical patient an opportunity to make an informed choice between using a health care provider participating in the NICA plan or using a provider who is not a participant and thereby preserving her civil remedies.").

Florida Birth-Related Neurological Injury Comp. Ass'n v. Florida Div. of Admin. Hearings, 948 So. 2d 705, 711 (Fla. 2007).

The Third District, in *Univ. of Miami v. Ruiz ex rel. Ruiz*, 164 So. 3d 758, 765 (Fla. 3d DCA 2015), further explained:

> Although NICA's Notice Provision makes no reference to NICA's Immunity Provision or discusses waiver of immunity in the statute itself, it is now well-established Florida law that a party who is required to give notice under NICA's Notice Provision and fails to do so waives its right to assert the exclusivity of remedies defense provided in NICA's Immunity Provision. *Galen of Fla., Inc. v. Braniff*, 696 So.2d 308, 309–10 (Fla.1997).

The principle that an entity that is otherwise entitled to immunity waives that right by failing to provide a required notice has also been applied to the Equine Activity Immunity Act:

> [W]e conclude that the consequence not stated by the legislature for the failure of an equine owner to comply with the posting requirements of section 773.04 is supplied by conjoining the provisions therein with the exceptions enumerated in section 773.03. Thus, the omission of the equine sponsor in not posting the sign required in section 773.04 is one "that a reasonably prudent person would not have done or omitted under the same or similar circumstances." § 773.03(2)(d), Fla. Stat (2002). In our judgment, such construction is consistent

> with the legislative intent, although not expressly stated, that the failure to post such warning disqualifies the sponsor from the protections afforded by section 773.02.

McGraw v. R And R Investments, Ltd., 877 So. 2d 886, 890 (Fla. 1st DCA 2004).

Elaborating further, *McGraw* explained the policy rationale behind its decision:

> Because an equine participant's common law right of action is affected by the enactment of chapter 773, we cannot believe that the legislature would cavalierly abrogate an injured person's substantive right to seek redress in the courts without requiring as well an owner or sponsor in some meaningful way to comply with the posting provisions of section 773.04. . . .
> Section 773.02 is a statute only limiting an equine sponsor's civil liability; therefore, the construction we have placed on the statute is, in our judgment, consistent with the legislative purpose to furnish immunity to a sponsor from liability for injuries resulting from inherent risks of equine activities in circumstances where a participant is fully aware of the sponsor's nonliability for any injury incurred by the participant in such activities.

McGraw at 892–93.

Finally, Florida has similarly required the use of a specific notice in order to invoke the statutory immunity afforded to Agritourism Operators:

> (2) The sign and contract required under subsection (1) must contain the following notice of inherent risk:
> WARNING

> Under Florida law, an agritourism operator is not liable for injury or death of, or damage or loss to, a participant in an agritourism activity conducted at this agritourism location if such injury, death, damage, or loss results from the inherent risks of the agritourism activity. Inherent risks of agritourism activities include, among others, risks of injury inherent to land, equipment, and animals, as well as the potential for you to act in a negligent manner that may contribute to your injury, death, damage, or loss. You are assuming the risk of participating in this agritourism activity.
>
> (3) Failure to comply with this section prevents an agritourism operator, his or her employer or employee, or the owner of the underlying land on which the agritourism occurs from invoking the privileges of immunity provided by this section.

Fla. Stat. § 570.89

These examples illustrate that when a defendant is required to provide a specific notice in order to claim a statutory limitation of remedies, failure to comply with those notice requirements results in a waiver of those limitations. In the examples listed above, failure to provide notice results in waiver of immunity, a much harsher outcome than the Tribe faces here, which is simply a waiver of a *full* one year pre-suit period before facing suit.

D. SUIT FILED PRIOR TO THE END OF THE ONE YEAR PRE-SUIT PERIOD SHOULD BE ABATED, NOT DISMISSED.

1. PREMATURE FILING UNDER FLA. STAT. 768.28(6).

Under Fla. Stat. 768.28, a claimant seeking to sue the state must provide notice of their claim and engage in a six month pre-suit period, the purpose of which is to allow for the pre-suit resolution of meritorious claims.[4] Because that is the sole policy reason for the six month pre-suit period, Courts have routinely held that premature filing of suit should only result in abatement, not dismissal.

The Defendants in *Fitzgerald v. McDaniel*, 833 F.2d 1516 (11th Cir. 1987), advanced the same argument made by the Tribe here. They argued that "[b]ecause the six-month period had not expired at the time Fitzgerald filed his complaint, … the state was deprived of the required notice period; consequently, Fitzgerald's complaint should have been dismissed." *Fitzgerald* at 1519. The *Fitzgerald* court rejected that argument, holding that "[a]lthough Fitzgerald failed to comply with section 768.28(6) by bringing this action before … six months had passed, by the time the district court ruled on this

[4] As a practical matter, this pre-suit period generally just delays the resolution of claims by six months, but that is a discussion for another time.

issue, six months had passed since the filing of the claim," and therefore, "the notice function of section 768.28(6) had been served, and the conditions precedent to filing a complaint had been met." *Id.*

The Court explained:

> The purpose of section 768.28(6) is to provide the state and its agencies with sufficient notice of claims filed against them. It is clear that on these facts, both Sheriff McDaniel and the Department of Insurance had ample time to respond to Fitzgerald's claim. Although Fitzgerald failed to wait six months to file this action, more than six months elapsed before the district court finally disposed of the issue. Since Sheriff McDaniel was duly notified of Fitzgerald's claims and had time to respond, the purpose underlying section 768.28(6) was adequately served.

Fitzgerald at 1519.

In *Williams v. Henderson*, 687 So. 2d 838, 839 (Fla. 2d DCA 1996), the Court quoted the above language from *Fitzgerald* as the basis for its conclusion that the "failure to wait six months to file suit after giving notice does not mandate a dismissal." *See also Hattaway v. McMillian*, 903 F.2d 1440 (11th Cir. 1990) (failure to wait six months after giving notice under Florida's notice of claims statute before bringing suit did not require directed verdict in favor of defendant.)

The Second District, in *VonDrasek v. City of St. Petersburg*, 777

So. 2d 989 (Fla. 2d DCA 2000), explained how the pre-suit notice requirement is not intended to act as a hurdle that results in dismissals of claims for technical errors in compliance:

> The notice has been described as a "temporary procedural bar to a lawsuit against the State or one of its subdivisions." *Widmer v. Caldwell*, 714 So.2d 1128, 1129 (Fla. 1st DCA 1998).
>
> Failure to comply with this condition precedent often results in the dismissal of a lawsuit without prejudice to the plaintiff's right to refile after providing notice. Nevertheless, there have been occasions when a notice provided by a plaintiff after the filing of a lawsuit has been sufficient to allow the lawsuit to proceed without dismissal. *See Lee v. South Broward Hosp. Dist.*, 473 So.2d 1322 (Fla. 4th DCA 1985). As many courts have emphasized, the notice is not intended to be a special "gotcha" that allows governmental entities to sandbag plaintiffs; it functions as a tool to allow these entities to identify and settle claims on a timely basis without the expense of extended litigation. *See Kuper v. Perry*, 718 So.2d 859, 860 (Fla. 5th DCA 1998); *Williams v. Henderson*, 687 So.2d 838 (Fla. 2d DCA 1996); *Gardner v. Broward County*, 631 So.2d 319, 321 (Fla. 4th DCA 1994).

VonDrasek at 991. The Court concluded that the only remedy that the City would be entitled to was to "defer Mrs. VonDrasek's involvement in the lawsuit for six months after it received her written answers to interrogatories while they evaluated her claim." *Id.* at 992.

Like the Defendant in *VonDrasek*, the only remedy the Tribe would have been entitled to below was an abatement of the Plaintiff's

prematurely filed initial lawsuit. But that claim was dismissed, and the instant lawsuit was filed well over a year after the service of the notice of claim, thus rendering the Tribe's request for relief moot. As in *Fitzgerald*, the notice requirement had been met, and the purpose of the Compact's pre-suit period had been adequately served.

2. FLORIDA LAW FAVORS ABATEMENT OVER DISMISSAL.

Even if the Court were to determine that the Tribe's requested remedy was not moot, abatement, rather than dismissal, would be the only remedy the Tribe would be entitled to. This is because, as the First District explained in *Thomas v. Suwannee Cnty.*, 734 So. 2d 492, 497 (Fla. 1st DCA 1999), Florida generally favors abatement:

> The general rule is that an action filed prematurely should be abated - not dismissed - until the cause of action matures. *See Interlatin Supply, Inc. v. S & M Farm Supply, Inc.*, 654 So.2d 254, 255 (Fla. 3d DCA 1995); *Angrand v. Fox*, 552 So.2d 1113, 1115-16 (Fla. 3d DCA 1989); Carmela Pellegrino, 1 Fla. Jur.2d Actions § 81 (1997) ("Another ground for abatement of an action is that it is prematurely commenced, that is, that it has been commenced before the accrual of the cause of action....").

Interlatin, cited by the *Thomas* Court, reached the same holding in a different context:

> [U]nder these circumstances, where Interlatin failed to fulfil the administrative prerequisites of section 578.26 prior to filing a legal action against the defendants, its suit

> against the defendants was premature, and the more provident remedy at the trial level would have been to grant an abatement of the action until Interlatin fulfilled those statutory prerequisites. *See Bierman v. Miller*, 639 So.2d 627 (Fla. 3d DCA 1994) (proper remedy for premature litigation is abatement or stay of the claim necessary for its maturation under the law); *see also Angrand v. Fox*, 552 So.2d 1113 (Fla. 3d DCA 1989), *review denied*, 563 So.2d 632 (Fla.1990) (same); cf. Eas*tern Air Lines, Inc. v. Mobil Oil Corp.*, 403 F.Supp. 757 (S.D.Fla.1975) (an administrative agency's determination of technical or policy matters may offer guidance to the court and conserve judicial labor). By an abatement of the legal proceedings any statute of limitations problem that might arise under circumstances such as these would be avoided.

Interlatin Supply, Inc. v. S & M Farm Supply, Inc., 654 So. 2d 254, 255 (Fla. 3d DCA 1995).

Courts are especially reluctant to dismiss claims with prejudice when the appropriate notice was provided and the only issue is that the lawsuit was filed too soon. In *Angrand v. Fox*, 552 So. 2d 1113 (Fla. 3d DCA 1989), a medical malpractice claim, the Court held that the complaint was improperly dismissed even though it was prematurely filed:

> We first hold that *Angrand I*, which was at worst filed prematurely, was not for that reason a nullity and could not properly have been dismissed. It is important to note that prior to its filing on September 8, 1987, due notice had been given to the defendants6 as required by section 768.57(3)(a); moreover, there is not even a claim that, at

> that point, the limitations period had run. Thus, the only alleged defect in the complaint was that it was brought too soon. Mere prematurity, which is by definition curable simply by the passage of time is, however, not a proper basis for the outright dismissal of an action. Such a determination has no other effect than to require a refiling which benefits only the clerk by the payment of additional fees. Instead, the proper remedy is an abatement or stay of the claim for the period necessary for its maturation under the law.

Angrand at 1115.

The Tribe has cited to no case that mandates a dismissal with prejudice for the premature filing of a complaint. Such an outcome here would be especially egregious, because Pupo still has almost a full year to file an initial notice of claim. If the Compact means what it says, and the goal behind the pre-suit period is to encourage pre-suit resolution of the claim, as described in *VonDrasek, supra,* at 991, then abatement, not dismissal, is the only remedy the Tribe would have been entitled to.

3. THE TRIBE'S CASES ARE READILY DISTINGUISHABLE.

The Tribe cites a number of cases that are inapplicable to the factual and legal issues before the Court. For example, the Tribe cites *Sampson v. City of Miami Gardens*, 2015 WL 11202372, at *2 (S.D. Fla. May 27, 2015), but this case dealt with a claimant's failure to

provide the personal information required under Fla. Stat. § 786.28(6)(c), not the premature filing of a lawsuit.

Moreover, *Sampson* has limited value given that it is a federal district court decision that directly conflicts with this Court's binding precedent. In *Aitcheson v. Florida Dep't of Highway Safety & Motor Vehicles*, 117 So. 3d 854 (Fla. 4th DCA 2013), this Court reached the opposite conclusion of *Sampson,* holding that the failure to provide all of the required personal information on the notice did not require dismissal of the claim:

> Finally, the FDHSMV argues that the notice was defective because it contained Aitcheson's incorrect date of birth. The portion of the statute requiring the claimant's date of birth, however, requires it (as well as the claimant's SSN) to be provided to the agency "prior to settlement payment, close of discovery or commencement of trial, whichever is sooner[.]" §§ 768.28(6)(c)-(d), Fla. Stat (2007). This case was dismissed prior to any settlement payment, start of discovery, or commencement of trial. Therefore, Aitcheson's failure to provide her correct date of birth on the notice is not fatal to her claim. *See also Williams v. Henderso*n, 687 So.2d 838, 839 (Fla. 2d DCA 1996) (holding that date and place of birth and social security number are not necessary to include in the notice).

Aitcheson at 857. *Sampson* also conflicts with *Williams v. Henderson*, 687 So. 2d 838 (Fla. 2d DCA 1996), which similarly held that that the failure to provide certain personal information in the notice did

not require dismissal of the claim.

The Tribe's reliance on *Williams v. Miami-Dade Cnty.,* 957 So. 2d 52 (Fla. 3d DCA 2007) is similarly misplaced. In *Williams,* the plaintiff "failed to prove compliance with the process service requirements of 768.28(7)." The Tribe makes no claim here that it was not properly served.

The Tribe's reliance on *Diaz v. Shampaner*, 2007 WL 9706467 (S.D. Fla. Apr. 10, 2007), and *Vintilla v. United States*, 767 F. Supp. 249, (M.D. Fla. 1990), *aff'd.,* 931 F.2d 1444 (11th Cir. 1991), is even more misguided. In *Diaz,* the district court dismissed the case because the United States, which was substituted in for the defendant, had not waived sovereign immunity for the claims brought by the plaintiff. Here, the Tribe has waived sovereign immunity for the Plaintiff's claim, so *Diaz* provides no authority for its dismissal.

In *Vintilla,* the plaintiff filed a tax refund suit without complying with the pre-suit requirement of filing an administrative refund claim with the IRS within two years of their overpayment. *Vintilla* at 251. *Vintilla* simply sets forth the unremarkable proposition that a claim filed after the statute of limitations is subject to dismissal. The Plaintiff here still has a little over 8 months left on the limitations

period.

E. THE TRIBE RECEIVED DUE PROCESS AND A HEARING ON ITS MOTION TO DISMISS.

The Tribe's claim that it didn't receive due process on its own motion, which was considered and rejected by the trial court, is absurd. Had the motion been granted at the CMC, Plaintiff would have had a right to complain that she hadn't been given the opportunity to file a response. However, the Tribe cannot claim it was deprived notice and opportunity to be heard because the Motion was its own.

What a trial court cannot do, as the Tribe's brief explicitly recognizes, is **grant** a motion to dismiss without prior notice to the opposing party. (IB at 22)("Prior opinions addressing this issue arise most often in appeals from an order granting a motion to dismiss") In truth, opinions addressing this issue **only** arise in appeals from orders granting motions to dismiss. *See Lake Pointe Tr. Corp. v. Coleman*, 315 So. 3d 759, 760 (Fla. 4th DCA 2021) ("[w]ithout proper notice, the ***entry of an order of dismissal*** at a status conference violates due process.") The Tribe has not cited to any opinions addressing denials of motions to dismiss because none exist.

Here, the court wasn't even required to hold a hearing on the motion to dismiss and was permitted to deny it outright because, as this Court has explained, there is no "rule or law that requires a trial court to hear oral argument on a pretrial, non-evidentiary motion." *Nudel v. Flagstar Bank, FSB*, 52 So. 3d 692, 694 (Fla. 4th DCA 2010). In letting the Tribe argue the motion, the court provided the Tribe with more due process than it was entitled to under the law.

The trial court's decision did, however, deprive Pupo of her opportunity to file a response prior to the hearing. Thus, should this Court deem the record inadequate to support Pupo's arguments, the Court must remand to allow her to complete the record.

IV. CONCLUSION

For the reasons set forth above, this Court should affirm the denial of the Tribe's motion to dismiss in all respects.

By: *s/ Douglas F. Eaton*
DOUGLAS F. EATON
FBN: 0129577
DANIEL R. SCHWARTZ
FBN: 124512
EATON & WOLK, PL
Attorneys for Appellee
2665 So. Bayshore Dr., Ste. 609
Miami, Florida 33133
Telephone: (305) 249-1640
Telecopier: (786) 221-2009

CERTIFICATE OF FONT SIZE AND PITCH

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B), counsel for Appellee hereby certifies that this brief complies with the applicable font and word count requirements because it is written in 14-point Bookman Old Style font and contains less than 13,000 words, excluding those parts omitted from the word count by Florida Rule of Appellate Procedure 9.045(e).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically served this **7th** day of **July 2023**, upon: **Mark D. Shellhase, Esq., Jordan S. Kosches, Esq., Emily L. Pineless, Esq.,** Gray Robinson, P.A., *Attorneys for Appellant,* 2255 Glades Road, Suite 301E, Boca Raton, FL 33431; mark.schellhase@gray-robinson.com; jordan.kosches@gray-robinson.com; emily.pineless@gray-robinson.com; and **Tara Rosenberg, Esq.,** Wolfson & Leon, 3399 S.W. 3rd Ave., Miami, FL 33145; eservice1@wolfsonlawfirm.com; tara@wolfsonlawfirm.com.

Respectfully submitted,

By: *s/ Douglas F. Eaton*
DOUGLAS F. EATON
FBN: 0129577
DANIEL R. SCHWARTZ
FBN: 124512