NO.: 4D23-0437

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

SEMINOLE TRIBE OF FLORIDA
Defendant / Appellant,

v.

JOSEPHINE PUPO
Plaintiff / Appellee.

Appeal from the Circuit Court of the Seventeenth Judicial Circuit
Case No.: CACE-22-013372

APPELLANT'S INITIAL BRIEF

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INTRODUCTION

Plaintiff/Appellee, Josephine Pupo, brought this suit against the Seminole Tribe of Florida (the "Seminole Tribe") regarding an incident that she alleged occurred on March 26, 2021. According to Plaintiff, she was at the Seminole Hard Rock Hotel & Casino-Hollywood (the "Casino") when she purportedly slipped and fell due to the Seminole Tribe's negligence, resulting in injuries.

As a federally recognized Indian Tribe, however, the Seminole Tribe is entitled to sovereign immunity over all claims, unless abrogated by Congress or waived by the Seminole Tribe itself. While the 2010 Gaming Compact ("Compact") entered into between the Seminole Tribe and the State of Florida provides for a limited waiver of sovereign immunity for patron tort claims, it applies when—and only when—claimants follow the specific procedures set forth therein. One of the most important of these is that, after providing the Seminole Tribe with pre-suit notice of the incident, claimants must wait one-year before filing suit in order to provide the parties an opportunity for resolution. The Compact is clear that the failure to follow these procedures results in the claim being "forever barred."

Nevertheless, Plaintiff failed to observe these procedures and filed suit within the one-year period triggering the "forever barred" provision. After the Seminole Tribe was served and its counsel appeared, Plaintiff, ostensibly recognizing that her premature filing violated the terms of the Compact, voluntarily dismissed her suit.

This appeal stems from Plaintiff's attempt to reassert her claim by refiling after the one-year period had passed. The Seminole Tribe responded to the refiled Complaint by filing a motion to dismiss on the basis of sovereign immunity, arguing that once the claim became forever barred the claim could not be resurrected (the "Motion to Dismiss"). The trial court, however, summarily rejected the Seminole Tribe's argument during a case management conference in which it brought the issue up *sua sponte,* effectively stripping the Seminole Tribe of its sovereign immunity that is well-entrenched in both Florida and federal law.

The trial court erred as a matter of law because sovereign immunity waivers are required to be strictly interpreted, with all doubts being resolved in favor of the Seminole Tribe and against waiver. As a result, this Court, on *de novo* review, should reverse and remand with directions that Plaintiff's suit be dismissed with

prejudice, or alternatively, with directions to conduct a properly noticed hearing on the Seminole Tribe's Motion to Dismiss.

STATEMENT OF THE CASE AND FACTS

The Seminole Tribe is a federally recognized Indian Tribe entitled to tribal sovereign immunity. (App. 22 at II. A.; 42 at ¶ 5). Pursuant to the Compact, the Seminole Tribe waived its sovereign immunity for patron tort claims, but only as expressly stated therein. (App. 40-43). That is to say, patrons who claim to have been injured at one of the Seminole Tribe's facilities where covered games are played may bring a tort claim, but must strictly adhere to the administrative procedures promulgated in Part VI, Section D of the Compact, which are as follows:

> 1. A Patron who claims to have been injured after the Effective Date at one of the Tribe's Facilities where Covered Games are played is required to provide written notice to the Tribe's Risk Management Department or the Facility, in a reasonable and timely manner, but in no event later than three (3) years after the date of the incident giving rise to the claimed injury occurs, or the claim shall be forever barred.
>
> 2. The Tribe shall have thirty (30) days to respond to a claim made by a Patron. If the Tribe fails to respond within thirty (30) days, the Patron may file suit against the Tribe. 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. It is the Patron's responsibility to complete the form and forward the form to the Tribe's Risk Management Department within a reasonable period of time, and in a reasonable and timely manner. Nothing herein shall interfere with any claim a Patron might have arising under the Federal Tort Claim Act.

3. Upon receiving written notification of the claim, the Tribe's Risk Management Department shall forward the notification to the Tribe's insurance carrier. The Tribe will use its best efforts to assure that the insurance carrier contacts the Patron within a reasonable period of time following receipt of the claim.

4. The insurance carrier will handle the claim to conclusion. If the Patron and the Tribe and the insurance carrier are not able to resolve the claim in good faith within one (1) year after the Patron provided written notice to the Tribe's Risk Management Department or the Facility, the Patron 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, as provided in this Compact, and subject to a four (4) year statute of limitations, which shall begin to run from the date of the incident of the alleged claimed injury. A Patron's notice of injury to the Tribe pursuant to Section D.1. of this Part and the fulfillment of the good faith attempt at resolution pursuant to Sections D.2. and 4. of this Part are conditions precedent to filing suit.

5. For tort claims of Patrons made pursuant to Section D. of this Part, the Tribe agrees to waive its tribal sovereign immunity to the same extent as the State of Florida waives its sovereign immunity, as specified in sections 768.28(1)

> and (5), Florida Statutes, as such provision may be amended from time-to-time by the Florida Legislature. In no event shall the Tribe be deemed to have waived its tribal immunity from suit beyond the limits set forth in section 768.28(5), Florida Statutes. These limitations are intended to include liability for compensatory damages, costs, pre-judgment interest, and attorney fees if otherwise allowable under Florida law arising out of any claim brought or asserted against the Tribe, its subordinate governmental and economic units, any Tribal officials, employees, servants, or agents in their official capacities and any entity which is owned, directly or indirectly by the Tribe. All Patron tort claims brought pursuant to this provision shall be brought solely against the Tribe, as the sole party in interest.
>
> 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 (I) 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 pre-requisite to filing a claim in state court, and that claims which fail to follow this process shall be forever barred.

(App. 40-43). *See also* § 285.710, Fla. Stat. (codifying the Compact into Florida law).

Plaintiff alleges that on or about March 26, 2021, the Seminole Tribe breached a "non-delegable duty to maintain its premises" resulting in a "dangerous condition (slippery wet floor)" at the Casino. (App. 4 at ¶ 4; 5 at ¶ 8). Plaintiff contends that she slipped and fell as a consequence, resulting in injuries. (App. 5 at ¶ 9). In accordance with the terms of the Compact, Plaintiff provided written notice to the Seminole Tribe on April 20, 2021. (App. 82). As also required by the Compact, the Seminole Tribe forwarded the claim to its insurance carrier, Tribal First, which began corresponding with Plaintiff regarding her claim. (App. 10-11 at ¶¶ 10-12). According to section D(5) of the Compact, Plaintiff was then prohibited from filing suit until April 19, 2022, which was one-year from the date she provided written notice in order to provide an opportunity for the parties to reach a good faith resolution lest her claim will become "forever barred." (App. 41-42 at ¶¶ D(4) and (6)).

On February 2, 2022—nine months and thirteen days into the one-year waiting period—Plaintiff filed suit against the Seminole Tribe (the "Original Lawsuit"). (App. 76). After receiving service and retaining counsel, the parties, through their counsel, discussed the

consequences of the premature filing, which led Plaintiff to voluntarily dismiss her suit on March 22, 2022. (App. 81).

Then, on September 8, 2022, after the one-year period had passed, Plaintiff attempted to resurrect her claim by refiling the identical Complaint as a new action. (App. 4). The Seminole Tribe responded with its Motion to Dismiss asserting, in relevant part, its entitlement to sovereign immunity. (App. 8). As the Seminole Tribe argued, Plaintiff failed to strictly follow the procedure set forth in the Compact that required her to wait one year after providing her written notice of the claim before filing her original suit. (App. 13-16). The Seminole Tribe argued that, as a result, Plaintiff had not followed the required procedures to trigger the limited sovereign immunity waiver for her claim, and therefore, her claim was "forever barred" as set forth in the Compact. (*Id.*).

The parties scheduled the Seminole Tribe's Motion to Dismiss 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*. (App. 88). Without any advance notice that the Seminole Tribe's Motion to Dismiss would be heard, the trial court concluded that Plaintiff had

met the conditions precedent to filing suit and denied the motion. (App. 84; 88). The trial court, having stripped the Seminole Tribe of its sovereign immunity, ordered that it must respond to the Complaint within ten days. This appeal follows. (App. 88 at ¶ 4).[1]

STANDARD OF REVIEW

"A trial court's ruling on a motion to dismiss a complaint based on whether a claim is barred under the doctrine of sovereign immunity is a question of law; thus, the appropriate standard of review is *de novo*." *Florida Office of Fin. Regulation v. Grippa*, 332 So. 3d 42, 43 (Fla. 1st DCA 2021) (quoting *DeSantis v. Geffin*, 284 So. 3d 599, 602 (Fla. 1st DCA 2019)); *see also Miccosukee Tribe of Indians v. Lewis Tein, P.L.*, 227 So. 3d 656, 660 (Fla. 3d DCA 2017) ("The issue of sovereign immunity is a legal issue subject to a *de novo* standard of review."); *Town of Gulf Stream v. Palm Beach Cnty.*, 206 So. 3d 721, 725 (Fla. 4th DCA 2016) (same); *Univ. of S. Florida Bd. of Trustees v. Moore*, 347 So. 3d 545, 547 (Fla. 2d DCA 2022), *review*

[1] The trial court has since entered an order staying this case pending this Court's review.

denied, SC22-1398 (Fla. Jan. 5, 2023) (same); *Plancher v. UCF Athletics Ass'n*, 175 So. 3d 724, 725 n.3 (Fla. 2015) (same).[2]

SUMMARY OF ARGUMENT

The trial court erred as a matter of law when it denied the Seminole Tribe's Motion to Dismiss. Both Florida and federal law are clear that sovereign immunity waivers are to be strictly construed, and any ambiguities must be resolved in favor of the Seminole Tribe

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[2] Since the order at issue was entered without prior notice at a routine case management conference, there was no court reporter present. The Seminole Tribe submits that this does not present an *Applegate* issue, however, because the pertinent facts are undisputed and whether or not the trial court erred in denying the Seminole Tribe's assertion of sovereign immunity is a pure question of law subject to *de novo* review. *See Ronbeck Const. Co., Inc. v. Savanna Club Corp.*, 592 So. 2d 344, 348 (Fla. 4th DCA 1992) ("We do not agree with appellees that the absence of a transcript for the hearing on the motion to compel arbitration requires an affirmance. The rule of *Applegate v. Barnett Bank of Tallahassee,* 377 So. 2d 1150 (Fla. 1979), applies only where the trial court's decision turns on its resolution of contested facts. Here the trial court faced a pure legal question. Both parties have furnished us with complete appendices containing the pleadings, contract documents and order under review, all of which permit us to review the same legal issue on the merits.").

If, however, the Court determines that a statement of proceedings is necessary for it to consider this appeal, then the Seminole Tribe respectfully requests the Court to enter an order providing it with the opportunity to obtain one pursuant to Florida Rule of Appellate Procedure 9.200(b)(5).

and against waiver. The terms of the Compact's limited sovereign immunity waiver are clear, as is the admonition that the failure to follow the procedure will result in the claim being "forever barred." Plaintiff failed to wait a full year before filing suit as required, and as a result, she cannot avail herself of the sovereign immunity waiver.

There is nothing within the sovereign immunity waiver that allows for a claim to be resurrected. The trial court's ruling to the contrary reads terms into the sovereign immunity waiver that simply do not exist, while at the same time ignoring what is explicitly provided—that a violation of the procedure results in the claim being "forever barred."

The trial court erred as a matter of law. This Court should reverse with directions that the trial court enter an order of dismissal with prejudice, or alternatively, with directions to conduct a properly noticed hearing on the Seminole Tribe's Motion to Dismiss.

ARGUMENT

I. THE SEMINOLE TRIBE HAS SOVEREIGN IMMUNITY FROM ALL CLAIMS EXCEPT WHERE IT HAS EXPLICITLY WAIVED SUCH IMMUNITY

The Seminole Tribe is a federally recognized Indian Tribe,[3] and "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) (citations omitted). As the Florida Supreme Court explained in *Houghtaling v. Seminole Tribe of Florida*, 611 So. 2d 1235 (Fla. 1993), this policy dates back nearly 200-years to *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832), "in which Chief Justice Marshall stated that the Indian tribes were distinct political communities, having territorial boundaries, within which their authority is exclusive. . . ." *Houghtaling*, 611 So. 2d at 1236.

"Sovereign immunity protects the sovereign from being sued without its consent." *Town of Gulf Stream v. Palm Beach Cnty.*, 206

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[3] *See MMMG, LLC v. Seminole Tribe of Florida, Inc.*, 196 So. 3d 438, 440 (Fla. 4th DCA 2016) (noting that the Seminole Tribe "is a federally recognized Native American tribe"); *Longo v. Seminole Indian Casino-Immokalee*, 813 F.3d 1348, 1349 (11th Cir. 2016) (citing the Indian Tribe List Act of 1994, 108 Stat. 4791 (1994)); 80 Fed. Reg. 1942–02 (Jan. 14, 2015) (same).

So. 3d 721, 725 (Fla. 4th DCA 2016) citing *City of Fort Lauderdale v. Israel*, 178 So. 3d 444, 446 (Fla. 4th DCA 2015). "Under Florida law, sovereign immunity is the rule, rather than the exception." *Town of Gulf Stream*, 206 So. 3d at 725 citing *Pan–Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984). Tribal sovereign immunity "involves complete immunity from suit. This is because the sovereign immunity provided to the tribe is illusory if the tribe is required to defend an action barred by the doctrine." *Seminole Tribe of Florida v. Schinneller*, 197 So. 3d 1216, 1219 (Fla. 4th DCA 2016) (citations omitted). As such, the Seminole Tribe "is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Lewis v. Edwards*, 815 So. 2d 656, 657 (Fla. 4th DCA 2002) (quoting *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998)).[4]

[4] *See also Sanderlin v. Seminole Tribe of Florida*, 243 F.3d 1282, 1285 (11th Cir. 2001) (citing *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) and recognizing that "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes and has always been at liberty to dispense with tribal immunity or to limit it, it nevertheless has consistently reiterated its approval of the immunity doctrine").

As this Court has explained, "[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Seminole Police Dept. v. Casadella*, 478 So. 2d 470, 471 (Fla. 4th DCA 1985) (quoting *Santa Clara Pueblo,* 436 U.S. at 58-59). Put another way, any waiver must be "clear, explicit, and unmistakable. . . ." *Miccosukee Tribe of Indians v. Napoleoni*, 890 So. 2d 1152, 1153 (Fla. 1st DCA 2004) (citing *Kiowa Tribe of Okla.,* 523 U.S. at 751; *Santa Clara Pueblo,* 436 U.S. at 49; and *Sanderlin,* 243 F.3d at 1282). Sovereign immunity waivers "must be strictly construed with any ambiguities being resolved **against** waiver." *Dep't of Fin. Services v. Barnett*, 262 So. 3d 750, 754 (Fla. 4th DCA 2018), *approved,* 303 So. 3d 508 (Fla. 2020) (emphasis added).

II. THE COMPACT PROVIDES FOR A LIMITED WAIVER OF SOVEREIGN IMMUNITY ONLY WHEN A CLAIMANT FOLLOWS THE SPECIFIC PROCEDURES THEREIN

The issue in this case is not a congressional waiver of sovereign immunity, but rather a voluntary one provided by the Seminole Tribe itself in the Compact with the State of Florida. Therein, the Seminole Tribe voluntarily waived its sovereign immunity for patron tort claims to a limited extent, conditioned on would-be claimants adhering to the specific administrative procedures established therein. The

relevant provisions of the Compact are cited verbatim in the Statement of Facts, *supra,* but, in sum, consist of strict adherence to the following process:

> (1) the patron must provide written notice to the Seminole Tribe of a claim for an incident;
>
> (2) the written notice must be provided within 3 years of the incident;
>
> (3) the Seminole Tribe forwards the written notice to its insurance carrier; and
>
> (4) if good faith attempts to resolve the claim in a period of 1 year are not successful, then the patron can file suit against the Seminole Tribe after the passage of the 1-year period, or immediately upon receipt of a denial of the claim.

See App. 40-43 (the "Section D Procedure").[5]

Importantly, a patron-claimant's obligation to strictly follow the Section D Procedure is not optional. To the contrary, as expressly stated in the Compact, this obligation is mandatory in order to obtain a waiver of sovereign immunity for that particular claim, and was contemplated and agreed upon by the State of Florida when it negotiated these terms with the Seminole Tribe and enacted the

[5] *See also* § 285.710(3)(a), Fla. Stat. (memorializing that the Compact was ratified and approved); 75 Fed. Reg. 38833-02 (July 6, 2010) (publishing the Compact).

Compact. *See* App. 42 at ¶5 ("For tort claims of Patrons made **pursuant to Section D. of this Part**, the Tribe agrees to waive its tribal sovereign immunity. . . ." Emphasis added). And while this procedure makes good sense because it promotes early resolution and the conservation of tribal resources otherwise spent on litigation during that initial one-year period, its efficacy is immaterial to the legal issue at hand. This is because, as a sovereign, the Seminole Tribe is entitled to establish the specific contours of any voluntary waiver and, in turn, "courts are required to strictly observe all terms and conditions that accompany a waiver of sovereign immunity." *Smith v. United States*, 14 F.4th 1228, 1231 (11th Cir. 2021);[6] *see also Barnett*, 262 So. 3d at 754 (this court holding the same).[7]

Courts considering sovereign immunity waivers routinely enforce similar procedural requirements, and have held that a

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[6] *See Miccosukee Tribe of Indians*, 227 So. 3d at 660 ("Because tribal immunity is a matter of federal law, we rely on a number of federal court decisions throughout this opinion." Citation omitted).

[7] *See also Evans Energy Partners, LLC v. Seminole Tribe of Florida, Inc.*, 561 F. Supp. 3d 1171, 1176 (M.D. Fla. 2021), *appeal dismissed in part, and aff'd*, 21-13493, 2022 WL 2784604 (11th Cir. July 15, 2022) (recognizing that "[a] 'clear' waiver of tribal sovereign immunity 'must be unequivocally expressed' and 'cannot be implied') (quoting *Santa Clara Pueblo*, 436 U.S. at 58).

claimant's failure to strictly follow them results in sovereign immunity not being waived and mandates dismissal. For instance, in *Sampson v. City of Miami Gardens*, 13-CV-24312, 2015 WL 11202372 (S.D. Fla. May 27, 2015), the court considered state and federal claims brought by a group of plaintiffs against the City of Miami Gardens and its police force, alleging unconstitutional stop-and-frisks and associated arrests. *Id.* at *1. As it pertained to the state law claims, the plaintiffs "did not strictly adhere to the notice requirements set forth in Florida's sovereign immunity waiver statute. . . . as they did not include all of their statutorily required personal information." *Id.* at *2. Although the court referred to the incomplete notice as an "oversight," it nevertheless concluded that "strict adherence is required," and granted summary judgment against the plaintiffs on all of their state law claims. *Id.*

The Third District reached the same result in *Williams v. Miami-Dade County*, 957 So. 2d 52 (Fla. 3d DCA 2007), in which it affirmed a directed verdict in favor of Miami-Dade County because the plaintiff "did not prove compliance with section 768.28, which requires plaintiffs in negligence suits against the state, its agencies, and subdivisions to follow strict procedures in order to take advantage of

the State's waiver of sovereign immunity for tort liability." *Id.* at 52. The *Williams* court held the failure to strictly comply "is fatal to his action," and countless other cases are in accord.[8]

Importantly, courts have also held that strict adherence to the terms and conditions accompanying sovereign immunity waivers is not subject to equitable considerations; if the claimant has not *absolutely* complied with the procedural steps provided for in the waiver, then the claim must be barred. *See Diaz v. Shampaner*, 06-

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[8] *See also Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 713, 719 (W.D. Mich. 2017) (in a tribal sovereign immunity case that involved a patron injury, the court recognized that procedures accompanying a waiver must be strictly adhered to and that the result—dismissal because the plaintiff submitted her claim via first class mail instead of certified mail as required by the terms of the waiver—"illustrates the potentially harsh consequences of well-established doctrines of tribal sovereign immunity"); *Vintilla v. United States*, 767 F. Supp. 249, 252–53 (M.D. Fla. 1990), *aff'd,* 931 F.2d 1444 (11th Cir. 1991) (dismissing on sovereign immunity grounds and holding that "[b]ecause jurisdiction under the statutes in question waives the United States sovereign immunity, this court must strictly observe the limitations and conditions of those statutes") (citations omitted); *Aristide v. Jackson Mem'l Hosp.*, 917 So. 2d 253, 255–56 (Fla. 3d DCA 2005) (stating "[w]e need not reach the other issues raised by appellees, that the order dismissing the complaint should be affirmed because Aristide failed to follow procedural pre-suit requirements and the suit is barred by sovereign immunity"); *Metro. Dade Cnty. v. Lopez*, 889 So. 2d 146 (Fla. 3d DCA 2004) (same); *Miami-Dade Cnty. v. Meyers*, 734 So. 2d 507 (Fla. 3d DCA 1999) (same); *Metro. Dade Cnty. v. Braude*, 593 So. 2d 563 (Fla. 3d DCA 1992) (same).

CIV-22792, 2007 WL 9706467, at *2 (S.D. Fla. Apr. 10, 2007) (dismissing on sovereign immunity grounds, noting that "[w]hile this may be viewed as an inequitable result because Plaintiff is left with no remedy for the alleged wrong, the courts have recognized that this is what the statute requires"). As another court put it, although plaintiff's failure to "strictly observe the limitations and conditions" of the sovereign immunity waiver "has probably brought them hardship, the alleviation of that hardship is a matter of policy for the Congress. It is not a matter for this court." *Vintilla v. United States*, 767 F. Supp. 249, 253 (M.D. Fla. 1990), *aff'd,* 931 F.2d 1444 (11th Cir. 1991) (citations omitted). *See also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (stating that "it is fundamentally Congress's job, not ours, to determine whether or how to limit tribal immunity. The special brand of sovereignty the tribes retain—both its nature and its extent—rests in the hands of Congress").

For these reasons, the terms and conditions of the Compact's limited sovereign immunity waiver must be strictly adhered to, and any claim that does not follow the procedure must be "forever barred." *See* App. 42-43 at ¶ D(6) ("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 pre-requisite to filing a claim in state court, and that claims which fail to follow this process shall be forever barred.").

III. PLAINTIFF FAILED TO STRICTLY FOLLOW THE PROCEDURES SET FORTH IN THE COMPACT, RESULTING IN NO WAIVER OF SOVEREIGN IMMUNITY

The pertinent facts, as set forth *supra*, are undisputed. Plaintiff submitted written notice of her claim on April 20, 2021. (App. 82). The Seminole Tribe forwarded the claim to its insurance carrier, and then pursuant to Section D(4) of the Compact, Plaintiff could not file suit against the Seminole Tribe for a one-year period expiring on April 19, 2022. (App. 41). Instead, in violation of the Compact's procedure, Plaintiff filed the Original Lawsuit on February 2, 2022. (App. 10 at ¶ 8; App. 76). This was an error that could not later be remedied.

The notice and one-year waiting period set forth at Section D of the Compact are clear and unequivocal, and Plaintiff failed to strictly adhere to these requirements. As a result, Plaintiff is unable to avail herself of the Seminole Tribe's limited waiver of sovereign immunity, which applies only to those claims that follow the specific procedures. In light of Plaintiff's failure to adhere to the specific procedures

outlined in the Compact, there has been no waiver of the Seminole Tribe's sovereign immunity for Plaintiff's claim and, therefore, dismissal with prejudice is required. *See also* App. 42-43 at ¶ D(6) ("claims which fail to follow this process shall be forever barred.").[9]

IV. IF THE COURT DOES NOT REVERSE WITH DIRECTIONS TO DISMISS THIS SUIT WITH PREJUDICE, THEN IT SHOULD AT THE VERY LEAST REVERSE SO THAT THE TRIAL COURT CAN CONSIDER THE MOTION TO DISMISS AT A PROPERLY NOTICED HEARING

On January 9, 2023, the trial court entered an order scheduling a case management conference for February 6, 2023. (App. 84). That order did not provide notice that any substantive matters would be adjudicated but, to the contrary, merely that "[a]ll counsel and any self-represented parties **MUST** appear at the hearing and have their

[9] While the Seminole Tribe maintains that the Compact's terms and conditions regarding the limited waiver of sovereign immunity are clear and unambiguous, the result would be the same even if there was any ambiguity. As this Court held in *Department of Financial Services v. Barnett*, 262 So. 3d 750 (Fla. 4th DCA 2018), *approved,* 303 So. 3d 508 (Fla. 2020), sovereign immunity waivers "must be strictly construed with any ambiguities being resolved **against** waiver." *Id.* at 754 (emphasis added). *See also Sanderlin*, 243 F.3d at 1285 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) and *Oneida County v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985)) (finding no waiver of sovereign immunity and noting that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit").

calendars to schedule future matters." *Id.* (emphasis in original). Accordingly, three days later on January 12, 2023, following the parties' agreement to the date and time, the Seminole Tribe filed its Notice of Hearing on its Motion to Dismiss which was special-set for March 27, 2023. (App. 86).

At the case management conference, however, the trial court brought up the Seminole Tribe's Motion to Dismiss *sua sponte*. *See* App. 88 ("THIS CAUSE having been brought before the Court *sua sponte* at the Case Management Conference. . . ."). Without any advance notice to the parties that this matter would be heard, the trial court summarily rejected the Seminole Tribe's Motion to Dismiss and its assertion of sovereign immunity. *Id.* But adjudicating this critical issue outside of a properly noticed hearing was improper, and did not afford the Seminole Tribe procedural due process.

As the Second District explained in *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003), "[p]rocedural due process requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 146 citing *Keys Citizens for Responsible Gov't, Inc. v. Fla. Keys Aqueduct Auth.*, 795 So. 2d 940 (Fla. 2001) and *Mathews v. Eldridge,* 424 U.S. 319 (1976).

This "serves as a vehicle to insure fair treatment through the proper administration of justice where substantive rights are at issue." *Massey*, 842 So. 2d at 146. "The specific parameters of the notice and opportunity to be heard required by procedural due process are not evaluated by fixed rules of law, but rather by the requirements of the particular proceeding." *Id.*

Prior opinions addressing this issue arise most often in appeals from an order granting a motion to dismiss, and have consistently held that "[w]ithout proper notice, the entry of an order of dismissal at a status conference violates due process." *Lake Pointe Tr. Corp. v. Coleman*, 315 So. 3d 759, 760 (Fla. 4th DCA 2021).[10] While in this case the trial court denied the Seminole Tribe's Motion to Dismiss as opposed to granting it, the core issue—adjudication of a critical

[10] *See also Alexis v. Florida Ins. Guar. Ass'n*, 61 So. 3d 487, 487–88 (Fla. 4th DCA 2011) ("We conclude that the trial court erred in dismissing the case with prejudice. The hearing at which the case was dismissed was noticed as a status conference, and without proper notice, the entry of an order of dismissal results in a denial of due process."); *Progressive Am. Ins. Co. v. Goldsmith*, 192 So. 3d 87, 88 (Fla. 4th DCA 2016) (reversing order of dismissal when the court dismissed appellant's case at a case management conference without notice because "[d]ue process requires the trial court to provide notice and an opportunity to be heard prior to dismissal").

substantive issue without notice and at a status conference—is the same. This is because sovereign immunity is not a trivial matter; rather, it is the critical substantive issue establishing whether the trial court has subject matter jurisdiction to hear this case. In this vein, denying an assertion of sovereign immunity and forcing a sovereign Indian Tribe to litigate has a similar pervasive impact on the defendant as granting a motion to dismiss would have on the plaintiff. Therefore, the same procedural safeguards should apply.[11]

For this reason, the Seminole Tribe respectfully submits that when the trial court stripped it of its sovereign immunity, *sua sponte*, at a case management conference, and without notice that this critical issue would be heard, it was deprived of its right to procedural due process. Thus, if the Court does not reverse and remand with instructions to dismiss this suit with prejudice on the basis of

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[11] As a federally recognized Indian Tribe, the Seminole Tribe's "sovereign immunity is the rule, rather than the exception." *Town of Gulf Stream*, 206 So. 3d at 725 citing *Pan–Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5 (Fla. 1984). *See also Bay Mills Indian Cmty.*, 572 U.S. at 788 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) (recognizing that tribal sovereign immunity, which provides the common-law immunity from suit traditionally enjoyed by sovereign powers, is "a necessary corollary to Indian sovereignty and self-governance")).

sovereign immunity, then at the very least it should be reversed and remanded so that the trial court can conduct a properly noticed hearing on the Seminole Tribe's Motion to Dismiss.

CONCLUSION

For the reasons articulated herein, the Court should reverse and remand with directions that the trial court dismiss Plaintiff's suit with prejudice due to the Seminole Tribe's sovereign immunity.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Initial Brief has been furnished via the Florida Court's E-Filing Portal, on this 5th day of April, 2023 upon:

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a)(2)(B), the undersigned 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 is 5,480 words, excluding those parts omitted from the word count by Florida Rule of Appellate Procedure 9.045(e).

/s/ Mark D. Schellhase