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 REPLY BRIEF

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INTRODUCTION

Plaintiff/Appellee's Answer Brief largely misses the point. This appeal does not concern a claim under the Equine Activity Immunity Act, Agritourism Operator Act, or Florida's Neurological Injury Compensation Act—all of which Plaintiff's Answer Brief directs this Court's attention to. *See* A.B. at 4. Rather, this appeal concerns the sovereign immunity of a federally recognized Indian Tribe.

As such, while Plaintiff argues that decisions arising under the former provide "guidance from analogous cases," her Answer Brief presents a false equivalence. This is because unlike the laws that Plaintiff directs this Court's attention to, an Indian Tribe's sovereign immunity is sacrosanct. It dates back nearly 200 years to *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), and it is firmly entrenched in both state and federal law that an Indian 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)). Sovereign immunity waivers "must be strictly construed with any ambiguities being resolved **against** waiver." *Dept. of Fin. Services v. Barnett*, 262 So. 3d 750, 754

(Fla. 4th DCA 2018) *approved*, 303 So. 3d 508 (Fla. 2020) (emphasis added). Further, statutes, and sovereign immunity issues in particular, must "be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985). Plaintiff's Answer Brief gives these critical principles short shrift, if any analysis at all.

Finally, Plaintiff's attempt to characterize as "absurd" the Tribe's argument that it was denied due process when its sovereign immunity was stripped away *sua sponte* at a case management conference is, ironically, itself absurd. *See* A.B. at 25. Florida law is clear that "[p]rocedural due process requires both fair notice and a real opportunity to be heard at a meaningful time and in a meaningful matter." *Massey v. Charlotte County*, 842 So. 2d 142 (Fla. 2d DCA 2003). And, without a doubt, stripping away the Tribe's federally protected 200-year-old right, entrenched throughout a wide-body of well-developed state and federal law, which requires any and all doubts and ambiguities to be construed in favor of the Tribe, *sua sponte*, and seven-weeks prior to the properly noticed hearing on the issue, is the quintessential definition of a denial of due process.

Further, it represents nothing more than Plaintiff's attempt to

have it both ways. This is because despite Plaintiff's rhetoric and claim that the trial court's treatment of the Motion to Dismiss was all but perfect and that remand for a proper hearing is unnecessary, in the next breath she *actually argues* that if this Court were inclined to rule against *her* then it should hold short and do precisely what she advocates is "absurd"—remand for an actual hearing. *See* A.B. at 26.

In sum, the trial court erred, and this Court, on *de novo* review, should reverse and remand with directions to observe the Tribe's sovereign immunity and dismiss with prejudice, or alternatively, to hold a properly noticed hearing on the Tribe's Motion to Dismiss to provide the Tribe with due process and a proper record for this Court's subsequent review.

ARGUMENT

I. THE ANSWER BRIEF ALL BUT IGNORES THAT THIS IS A CASE CONCERNING TRIBAL SOVEREIGN IMMUNITY

A significant portion of the Initial Brief is devoted to a discussion of the history and evolution of tribal sovereign immunity, and the critical importance that the doctrine holds in the resolution of this appeal. Indeed, it is discussed on nearly every page of the Initial Brief. *See* I.B. at 1, 2, 3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 21, 23.

Yet, in an attempt to ignore or evade the fundamental issue, Plaintiff provides little, if any, discussion of *tribal* sovereign immunity in her Answer Brief, with the term "sovereign" appearing just three-times throughout the entire document—once in a quote from the Tribe's claim form, and twice on page 24. This is no accident, but instead an attempt to direct this Court's focus away from that which is inviolate—that the Tribe has a federally protected right to assert sovereign immunity over Plaintiff's claims.

The importance of this doctrine to the resolution of this appeal is so critical that it is incapable of being overstated. 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. Ccasadella*, 478 So. 2d 470, 471 (Fla. 4th DCA 1985) (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)). And "[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." *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)).

An Indian Tribe's waiver of its sovereign immunity 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; *Sanderlin*, 243 F.3d at 1282). Further, as a sovereign, the 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) (emphasis added); *see also Dep't of Fin. Services v. Barnett*, 262 So. 3d 750, 754 (Fla. 4th DCA 2018), *approved*, 303 So. 3d 508 (Fla. 2020) (this Court holding the same); *Evans Energy Partners, LLC v. Seminole Tribe of Florida, Inc.,* 561 F. Supp. 3d 1171 (M.D. Fla. 2021), *appeal dismissed in part, and aff'd*, 21-13493, 2022 WL 2784604 (11th Cir. July 15, 2022).

Further, as the United States Supreme Court explained in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014), "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 in nature and its extent—rests in the hands of Congress." *Id.* at 800. For these reasons, Plaintiff's reliance on decisions in *other contexts* has absolutely no application to this case.

Put another way, it is absolutely irrelevant what other courts have done in cases involving the Equine Activity Immunity Act, Agritourism Operator Act, or Florida's Neurological Injury Compensation Act. *See* A.B. at 4. It is similarly immaterial that in *other* cases, involving *different* laws and issues *unrelated* to Indian Tribes, that courts have abated instead of dismissed defective actions. Respectfully, this Court's analysis must be constrained by the principles governing tribal sovereign immunity: the contours of the waiver *must be strictly* complied with; all matters pertaining thereto are to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit;"[1] and ultimately applied strictly "with any ambiguities being resolved **against** waiver."[2]

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[1] *Sanderlin*, 243 F.3d at 1285 (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) and *Oneida Indian Nation*, 470 U.S. at 247).

[2] *Barnett*, 262 So. 3d at 754, *approved*, 303 So. 3d 508 (Fla. 2020) (emphasis added).

II. PLAINTIFF CANNOT USE HER ANSWER BRIEF AS A VEHICLE TO INTRODUCE NEW EVIDENCE, NOT RELIED UPON BY THE TRIAL COURT BELOW

It has long been the policy in this state that "[a]n appeal is to consider errors alleged to have been committed by the. . .trial judge," and as such, "it is not the practice to receive new evidence on appeal." *Tyson v. Aikman*, 31 So. 2d 272, 273 (Fla. 1947). *See also T.H. v. Florida Dep't of Children & Families*, 308 So. 3d 678, 682 (Fla. 1st DCA 2020) ("Our role in an appeal is to correct any harmful error committed by the trial court based on the issues and evidence before it." (Citng *Hillsborough Cnty. Bd. of Cnty. Comm'rs v. Pub. Emps. Rels. Comm'n*, 424 So. 2d 132, 134 (Fla. 1st DCA 1982); *Tyson*, 31 So. 2d at 275; and *M.F.S. Land Co. v. J. Ray Arnold Cypress Co.*, 103 Fla. 732, 139 So. 200, 201 (Fla. 1931)).

Yet Plaintiff's Answer Brief ignores this fundamental pillar of appellate review and attempts to interject new evidence into these proceedings that was never presented or considered by the trial court. And even more, the new evidence contained with Plaintiff's appendix and relied upon in her Answer Brief are from extraneous and questionable sources—such as the "Internet Archive Wayback Machine"—which is, at best, plagued by authentication issues and

constitutes hearsay upon hearsay, stacked several layers high. *See* A.B. at 9; *see also, e.g.,* The Florida Bar, *Evidence in Florida*, Ch. 10, 12th ed. (2022) (citing Eltgroth, *Best Evidence and the Wayback Machine: Toward a Workable Authentication Standard for Archived Internet Evidence*, 78 Fordham L. Rev. 181 (Oct. 2009) and Holt, *Social Media Evidence: What You Can't Use Won't Help You (Practical Considerations for Using Evidence Gathered on the Internet)*, 88 Fla. Bar J. 8 (Jan. 2014).

For these reasons, the Court should disregard the new evidence submitted in Plaintiff's appendix and discussed in her Answer Brief, and instead confine its review to the record and proceedings below.

III. PLAINTIFF'S ARGUMENT THAT THIS COURT, *SUB SILENTIO*, HELD IN *MANZINI* THAT A PLAINTIFF'S FAILURE TO ADHERE TO THE TERMS OF THE COMPACT CAN BE EXCUSED OR IS INCONSEQUENTIAL IS WITHOUT MERIT

In *Seminole Tribe of Florida v. Manzini*, 361 So. 3d 883 (Fla. 4th DCA 2023), this Court granted a petition for a writ of prohibition directing a trial judge to cease the exercise of jurisdiction in an unrelated case because "the record [did] not show the Seminole Tribe waived sovereign immunity as to the respondent's common law negligence count. . . asserting negligence regarding COVID-19." *Id.*

at 888. In that proceeding, the Seminole Tribe similarly argued that the plaintiff's claim was "forever barred" due to the failure to strictly adhere to the procedures set forth in the Compact, but this Court's opinion *explicitly* noted that "[w]e *do not address in this opinion* the Seminole Tribe's argument that a negligence suit related to the respondent's claims that he was injured by contracting COVID-19 at a facility operated by the Tribe is forever barred." *Id.* (emphasis added). Notwithstanding this Court's specific disclaimer that it had not reached that issue, Plaintiff's *primary argument* in her Answer Brief is that this Court's *Manzini* opinion somehow rejected the Tribe's argument and "speaks volumes." *See* A.B. at 5-6.

With due respect to Plaintiff, her argument does not "speak volumes" but, to the contrary, conveys a deafening silence. Florida and federal law regarding the strict construction of sovereign immunity waivers, and particularly with regard to Indian Tribes, is so entrenched in this country's jurisprudence that the suggestion that this Court retreated from it *sub silentio* is nonsensical. This is especially true given that this Court did not stay silent on the "forever barred" issue in *Manzini*, but to the contrary, expressly indicated that it need not reach that issue in order to resolve the petition. Indeed, it

is commonplace for appellate courts to narrowly tailor their opinions, and Plaintiff's attempt to read any further into *Manzini* than its explicit holding is beyond reason. *See, e.g., Hayes v. Spring Lake Villas No. 1 Ass'n*, 313 So. 2d 455 (Fla. 4th DCA 1975) (in another case emblematic of this practice, this Court explained "[b]ecause of the foregoing conclusion, we need not reach another serious question in this case").

IV. THE COMPACT SETS FORTH A SPECIFIC PROCEDURE TO TRIGGER A SOVEREIGN IMMUNITY WAIVER, WHICH PLAINTIFF PLAINLY DID NOT FOLLOW, AND WHICH IS CASE DISPOSITIVE

It is undisputed that the Compact provides strict administrative procedures that must be followed in order to trigger the sovereign immunity waiver. Specifically, the procedure required Plaintiff: to wait one full year between providing the Tribe with her written notice of her claim and filing suit; that the failure to strictly follow the procedure would result in there being no waiver of the Tribe's sovereign immunity; and would, as a result, render the claim "forever barred." *See* I.B. at 3-5 (quoting the full text of the relevant procedure). Yet Plaintiff—who does not dispute that this procedure is mandatory and that she was required to strictly adhere to it—

attempts to argue that her noncompliance should be excused because she was unaware of the procedure at the time that she violated it. *See* A.B. at 9-12. With due respect, this argument fails for a multitude of reasons.

First and foremost, tribal sovereign immunity is not something that can waived by default, or put another way, by Plaintiff's claim that she was not sufficiently warned of the procedure. To the contrary, "[u]nder Florida law, sovereign immunity is the rule, rather than the exception." *Town of Gulf Stream v. Palm Beach Cnty.*, 206 So. 3d 721, 725 (Fla. 4th DCA 2016) citing *Pan-Am Tobacco Corp. v. Dep't of Corr.*, 471 So. 2d 4, 5, (Fla. 1984). Any waiver must be "clear, explicit, and unmistakable," with all doubts resolved against waiver and in favor of the Indian Tribe. *Miccosukee Tribe of Indians*, 890 So. 2d at 1153; *Barnett*, 262 So. 3d at 754, *approved*, 303 So. 3d 508 (Fla. 2020); *Oneida Indian Nation*, 470 U.S. at 247.

Thus, to the extent that Plaintiff had any misconception about the mandatory procedure, the consequences must fall on her as opposed to the Tribe. *See Vintilla v. United States*, 767 F. Supp. 249, 253 (M.D. Fla. 1990), *aff'd*, 931 F.2d 1444 (11th Cir. 1991) (noting that 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."); *Diaz v. Shampaner*, 06-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").

Second, Plaintiff's suggestion that she was unaware of the applicable procedure is unsupported by the record and strains credulity. The incident at issue occurred while Plaintiff was at the Tribe's casino. She was clearly aware that the Seminole Tribe was not an ordinary defendant and that special procedures applied, as evidenced by the fact that she knew to submit a Notice of Gaming Patron Tort Claim form, *see* App. 83, which she concedes directed her "to the provisions in Part VI of the 2010 Gaming Compact between the Seminole Tribe of Florida and the State of Florida," a document that is, and has always been publicly accessible. *Id.; see also* A.B. at 2; App. 40-43 (Part VI of the Compact). The fact that she now suggests—although does not outright assert—that she failed to

read those procedures, is of no moment.

Third, even assuming *arguendo* that Plaintiff had not realized that there were forms and procedures that she was obligated to heed, ignorance of the law has *never* been an acceptable justification for violating it. *See, e.g., Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581 (2010) (quoting *Barlow v. United States,* 7 Pet. 404, 411, 8 L.Ed. 728 (1833) ("We have long recognized the common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.")); *Gusow v. State*, 6 So. 3d 699, 705 (Fla. 4th DCA 2009) ("Ignorance of the law is no excuse. Although no one can know all the law, all persons are charged with constructive knowledge of the law.").

To be clear, the Compact at issue has been codified into both state and federal law, and accordingly, ignorance of its contents is not a defense to its application. *See* § 285.710(3)(a), Fla. Stat.; 75 Fed. Reg. 38833-02 (July 6, 2010). This is especially true when addressing a matter as sacrosanct as an Indian Tribe's sovereign immunity, and when Plaintiff concedes that she was directed ahead of time to the specific "provisions in Part VI of the 2010 Gaming Compact between the Seminole Tribe of Florida and the State of

Florida." *See* A.B. at 2; App. 83.

Fourth, even if there were a compelling reason to excuse Plaintiff's non-compliance—and there is not—sovereign immunity waivers are not subject to equitable considerations. *See, e.g., Lesperance v. Sault Ste. Marie Tribe of Chippewa Indians*, 259 F. Supp. 3d 712, 719 (W.D. Mich. 2017) (in a tribal sovereign immunity case which, like here, concerned 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").

And while Plaintiff attempts to characterize this result as punitive, that simply is not so. The Tribe did not have to agree to waive its sovereign immunity in the first place, but chose to do so voluntarily, as long as the specific procedure set forth in the Compact is followed. These terms, and the specific procedure, were negotiated between the Tribe and the State of Florida, and ultimately agreed to by both sides. Thus, if the procedure is not followed by a plaintiff patron, the individual is not penalized, but to the contrary, simply

does not gain that which she never had to begin with—the ability to sue a sovereign Indian Tribe for damages, as a failure to meet the procedure results in there being no waiver of the Tribe's sovereign immunity.

V. THIS COURT HAS ALREADY REJECTED THE ARGUMENT THAT ABATEMENT IS APPROPRIATE

As a threshold matter, this Court has already interpreted the same Compact provision that is at issue in this case, and squarely rejected the argument that a trial court can abate, rather than dismiss a claim filed before expiration of the one-year period. *See Manzini*, 361 So. 3d at 886 (granting a petition for a writ of prohibition in a case in which the trial court chose abatement over dismissal; concluding that the Compact's sovereign immunity waiver is not triggered when suit is filed within the one year period; that "Florida courts lack subject matter jurisdiction in suits against the Seminole Tribe unless sovereign immunity has been waived;" and that when subject matter jurisdiction is lacking a trial court must dismiss, not abate).

Sovereign immunity, without a doubt, is an entirely different animal. This is especially the case when it comes to Indian Tribes

given "[t]he special brand of sovereignty the tribes retain—[of which] both its nature and its extent—rests in the hands of Congress." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014) (citing *United States v. Lara*, 541 U.S. 193, 200 (2004)); *see also Haaland v. Brackeen*, 143 S. Ct. 1609, 1628 (2023) ("As we have explained, the Federal Government has charged itself with moral obligations of the highest responsibility and trust toward Indian tribes." (Quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 176, 131 S.Ct. 2313, 180 L.Ed.2d 187 (2011)); *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). And it is for this reason that, as this Court has recognized, Indian Tribes are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Lewis*, 815 So. 2d at 657 (quoting *Kiowa Tribe of Oklahoma*, 523 U.S. at 754.

At issue here is the Tribe's voluntary waiver of its sovereign immunity, under limited circumstances and subject to strict procedures. Only the United States Congress—not the courts—has the authority to modify the terms and conditions of this waiver, or to erode the immunity from suit that the Tribe otherwise enjoys. *See Bay Mills Indian Cmty.*, 572 U.S. at 800. For these reasons, the cases that Plaintiff relies upon in her brief to support the argument that

abatement—not dismissal—is appropriate are entirely inapposite. *See* A.B. at 17-22. None of them arise in the context of tribal sovereign immunity, and some do not concern any form of sovereign immunity at all. *See, e.g.,* A.B. at 21 (discussing *Angrand v. Fox*, 552 So. 2d 1113 (Fla. 3d DCA 1989), a medical malpractice case).

Stated simply, Plaintiff is attempting to compare apples to oranges, and as such, erroneously relies on a completely immaterial body of law. The Compact is what controls, and it does not provide that improperly filed lawsuits shall be abated, but rather, that they shall be "forever barred." *See* I.B. at 3-5 (quoting the Compact). Plaintiff's argument otherwise is misplaced, and should be rejected.

VI. 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

As articulated more fully in the Initial Brief, the Motion to Dismiss was scheduled to be heard at a special-set hearing on March 27, 2023, *see* App. 86, when the trial court took the issue up *sua sponte* and seven weeks early at a routine case management conference, without any prior notice. This was improper, and Plaintiff's argument that "the Tribe cannot claim it was deprived

notice and opportunity to be heard because the Motion was its own" is as nonsensical as it is erroneous. *See* A.B. at 25.

Again, tribal sovereign immunity is well-entrenched in Florida and federal law, and as this Court has explained, "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). Yet this is precisely the consequence of the trial court's *de minimis* consideration of the Tribe's Motion to Dismiss—it has rendered its sovereign immunity illusory on a whim, unnoticed, at a case management conference, and without Plaintiff having even filed any opposition.

Such treatment of a matter as critical as the Tribe's sovereign immunity does not comport with any notion of "[p]rocedural due process [which] requires both fair notice and a *real opportunity* to be heard at a *meaningful* time and in a *meaningful* matter." *Massey*, 842 So. 2d at 146 (emphasis added). While Plaintiff—perhaps understandably—wishes to benefit from the trial court's cursory treatment of the Motion to Dismiss, its arguments supporting this goal are unsupportable.

For these reasons, if the Court does not reverse with directions for the trial court to dismiss the suit with prejudice, then it should at the very least reverse and remand with directions for the trial court to conduct a full, fair, and properly noticed hearing on the Motion to Dismiss.

CONCLUSION

For the reasons articulated in the Initial Brief and 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, or at the very least, to conduct a proper hearing on the Motion to Dismiss.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished via the Florida Court's E-Filing Portal, on this 18th day of August, 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 3,918 words, excluding those parts omitted from the word count by Florida Rule of Appellate Procedure 9.045(e).

/s/ Mark D. Schellhase