No. 22-30436

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Montie Spivey,

Plaintiff - Appellant

v.

Chitimacha Tribe of Louisiana; Cypress Bayou Casino & Hotel; April Wyatt; Jacob Darden; Toby Darden; Jacqueline Junca,

Defendants - Appellees

On Appeal from
United States District Court for the Western District of Louisiana

6:22-CV-491

REPLY BRIEF ON BEHALF OF APPELLANT MONTIE SPIVEY

SUBMITTED BY:

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I. STATEMENT OF THE ISSUES

1. Whether the District Court erred in affirming the Magistrate Judge's Report and Recommendations dismissing all of plaintiff's claims with prejudice *sua sponte* without proper notice, the ability to respond, or the ability to correct any deficiencies in his pleadings.

2. Whether the District Court erred in dismissing all of plaintiff's claims with prejudice when the Court did not have subject matter jurisdiction over any of plaintiff's claims due to tribal sovereign immunity.

3. Whether the District Court erred in denying plaintiff's motion to remand when it did not have subject matter jurisdiction over the case.

II. ARGUMENT

A. Standard of Review

The parties disagree on what standard of review this Court should use to review the District Court's decision to dismiss this case with prejudice. Perhaps this is because the District Court necessarily had to rule on several different issues in reaching a decision on the case. However, plaintiff maintains that on the issues most relevant to his appeal, the standard of review is de novo.

Defendants argue that the main issue in dispute is whether the dismissal should be with or without prejudice and that this Court has held that issue should be reviewed for abuse of discretion as stated in *Bullard v. Burlington N. Santa Fe Ry. Co.*, 368 Fed. Appx. 574, 579 (5th Cir. 2010) (citing *Club Retro, LLC v. Hilton*, 568 F.3d 181, 215 n. 34 (5th Cir.2009)). It should be noted that *Bullard* is an unpublished case, and this Court did note that "We have, however, 'limited the district court's discretion in dismissing cases with prejudice.'" *Bullard*, 368 Fed. Appx. At 579. (citing *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992)). *Club Retro, LLC v. Hilton* does state that this Court reviews a district court's decision to grant a motion to dismiss with or without prejudice for abuse of discretion, but in that case the Court was speaking in the context of whether or not a plaintiff had pled

his best case, as opposed to more fundamental matters like whether federal jurisdiction exists. 568 F.3d 181, 215 n.34 (5th Cir. 2009).

A federal district court's exercise of jurisdiction is reviewed de novo. *Vasquez v. Alto Bonito Gravel Plant Corp.*, 56 F.3d 689, 692 (5th Cir.1995). By dismissing plaintiff's claims with prejudice, the District Court clearly exercised jurisdiction. Further, as this case was dismissed on the basis of sovereign immunity, it was necessarily dismissed under rule 12(b)1. *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996) ("Because sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice."). While plaintiff concedes that defendant has produced some case law that suggests abuse of discretion review, plaintiff would argue that because sovereign immunity, federal jurisdiction, and dismissal under Federal Rule of 12(b)(1) are at issue, review should be de novo. *Spec's Family Partners, Ltd. v. Nettles*, 972 F.3d 671, 674-75 (5th Cir. 2020). If the Court finds abuse of discretion review appropriate, it should be noted that this Court has "limited" the discretion of district courts in dismissing actions with prejudice. *Bullard*, 368 Fed. Appx. At 579.

B. Response to Defendants' Argument That *Sua Sponte* Dismissal With Prejudice Was Appropriate

The Magistrate Judge's decision to recommend dismissal with prejudice was inappropriate when she had previously recommended dismissal without prejudice.

To the extent *res judicata* applies in this case, it mandates the same result as the first case, which is dismissal without prejudice. Contrary to the allegations of the defendants, the Magistrate Judge and District Court did not clarify the issues. Instead, in reaching a different result in the second case by dismissing the case with prejudice as opposed to without prejudice, they reached different results.

As the defendants state "'[i]t has long been the rule that principles of *res judicata* apply to jurisdictional determinations.'" *Bank of La. v. Fed. Deposit Ins. Corp.*, 33 F.4th 836, 837 (5th Cir. 2022) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 702 n.9 (1982)). (Defendants' brief, pp. 28-29). The judgment in the first case dismissing plaintiff's claims without prejudice was a final judgment, and therefore it has preclusive effect. However, while the defendants believe *res judicata* operates in their favor, plaintiff believes it operates in his. In the first case, which is now a final judgment, the Magistrate Judge and District Court found that the case should be dismissed without prejudice because there was no jurisdiction in federal court due to tribal sovereign immunity. This judgment should preclude dismissal with prejudice in the present case, as this would be a different result than the first case.

The Magistrate Judge clearly erred in dismissing the plaintiff's complaint with prejudice without notice and the opportunity to respond. As defendants state "Pre-

dismissal notice and opportunity to respond are not needed 'if the plaintiff has [already] alleged his best case.'" *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021) 18 F.4th at 498 n.1 (quoting *Brown v. Taylor*, 829 F.3d 365, 370 (5th Cir. 2016)). "A plaintiff has alleged his best case if the plaintiff has (1) repeatedly declared the adequacy of that complaint in response to the defendant's motion to dismiss and (2) refused to file a supplemental complaint even in the face of a motion to dismiss." *Id.* (internal quotations omitted).

The reason why *sua sponte* dismissal without prejudice is appropriate is that the District Court made a different jurisdictional finding than in the first case. Because federal jurisdiction is foundational to a federal court's ability to hear a case and because dismissal with prejudice is so harsh a remedy, the plaintiff should have been given notice that the Court was considering dismissal with prejudice and given an opportunity to respond.

This Court's statement in *Carver* was that "depending on the underlying facts, perhaps *Carver* could have avoided sovereign immunity by adding a new defendant or a new claim." *Id.* at 498. This implies that a district court need not examine a case particularly deeply to determine whether *sua sponte* dismissal is or isn't appropriate. The fact remains, the reason why the plaintiff filed a second case in state court is that the Magistrate Judge's report and recommendations in the first case stated that

the case did not belong in federal court, would be dismissed without prejudice, and could be filed in a court of competent jurisdiction.

C. Defendants Have Not Overcome the Rule that Jurisdictional Dismissals are Without Prejudice

In *Carver*,18 F.4th 494, 498 (5th Cir. 2021), this Court found that "a jurisdictional dismissal must be without prejudice to refiling in a forum of competent jurisdiction." In its brief before this Court, the defendants state that the rule in Carver is "a general rule, but it is not relevant to the circumstances here, where Spivey already re-filed, unsuccessfully, in state court. In *Carver*, unlike this case, the court noted that there were plausible options for amending that complaint to establish jurisdiction and state viable claims. *Id.* at 498." (Defendants Brief, p. 26).

The Court's statement in *Carver* was in regard to whether *sua sponte* dismissals with prejudice are appropriate in the context of sovereign immunity, but there is nothing in Carver to suggest that dismissals under Federal Rule of Civil Procedure 12(b)(1) are sometimes with prejudice. This is contrary to the plain language of *Carver*. This Court has never stated that the rule in *Carver* that sovereign immunity dismissals are without prejudice is a "general rule." In fact, the rule is precedential and very clear.

Defendants refer to Louisiana state court decisions and tribal law for the proposition that plaintiff's claims are equally barred by sovereign immunity in state

court and trial court as in federal court. However, issues of state law and tribal law are best left to state court and tribal courts. A federal court should not have to look to tribal law to determine whether a federal case should be dismissed with or without prejudice, when federal courts are courts of limited jurisdiction and should always be careful to observe constitutional limits on their power of adjudication.

Defendants refer to several district court cases for the proposition that sovereign immunity dismissals can be with prejudice when claims are barred by sovereign immunity in all other courts in addition to federal court. (Defendants' Brief, pp. 34-35). These cases are not binding on this Court, and to the extent they are persuasive, there is a high bar to overcome the plain language of *Carver*. Defendants-Appellees also cite to *Frigard v. U.S.*, 862 F.2d 201, 204 (9th Cir. 1988). *Id.* That case is different from the present case because the defendant was the United States, and thus automatically removable to federal court. In the present instance, the case may be heard in tribal court, and the plaintiff does not face the same kind of statutory limitation on his claims as those state in the Federal Tort Claims Act.

D. Whether the District Court Erred in Denying Plaintiff's Motion to Remand When It Did not have Subject Matter Jurisdiction Over the Case

There are unique jurisdictional issues when a case is removal compared to when a case is filed originally in federal court. The Defendants do not significantly dispute the propriety of remanding state law claims to state court. 28 U.S.C. §

1447(c) provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Supreme Court has been clear that the plain language of § 1447(c) gives courts "no discretion to dismiss rather than remand an action removed from state court over which the court lacks subject-matter jurisdiction." *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed.2d 134 (1991) (internal quotation marks omitted).

III. CONCLUSION

For all of the reasons discussed above, the Plaintiff's claims should be dismissed without prejudice and remanded to state court. The Magistrate Judge and District Court erred in dismissing this case on the basis of sovereign immunity with prejudice, when per Circuit precedent, such dismissals should be without prejudice.

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CERTIFICATE OF SERVICE

I certify that on November 14, 2022, a copy of the Reply Brief on behalf of the Appellant was forwarded to all counsel of record via the Court's CM/ECF electronic filing system to the following parties/counsel pursuant to Fed. R. App. P. 25 and by email as follows:

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 2,279 words.

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S/Huntington B. Downer, Jr.
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