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

BRIEF OF APPELLANT MONTIE SPIVEY

SUBMITTED BY:

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant, Montie Spivey, states that oral argument is not requested in these proceedings.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291 as an appeal from a final judgment in the U.S. District Court for the Western District of Louisiana. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

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.

STATEMENT OF THE CASE

I. INTRODUCTION

In this case, plaintiff, Montie Spivey, alleges a conspiracy to deprive him of his civil rights as part of a scheme to remove him as Chief Financial Officer "CFO" of Cypress Bayou Casino and O'Neil Darden as Tribal Council Chairman of the Chitimacha Tribe of Louisiana. Plaintiff alleges that several members of the Tribal Council, April Wyatt, Jacob Darden, Toby Darden, and Jaqueline Junca, in their individual capacities (the court below found these to, in fact, be official capacity claims), conspired with federal and state law enforcement officers to arrest Montie Spivey, threaten him with prosecution, and shut him out of the casino business using the instrumentalities of the United States and the State of Louisiana. In addition to federal claims under 42 U.S.C§ 1893 and §1985, plaintiff asserts state law claims for malicious prosecution and negligence (ROA 31-36).

As alleged in the state court petition in this matter, the plaintiff followed every proper procedure in authorizing a small bonus of $3,900 to Mr. Darden in this case, and said bonus was authorized by the Tribal Council. The members of the Tribal Council who are defendants in this case knew the payment was fully authorized under the laws of the Tribe and the State of Louisiana, yet they reported the matter as a crime to both federal and state authorities. This conspiracy with the Louisiana State Police, and with an assistant district attorney in St. Mary Parish, resulted in

Mr. Spivey being arrested, depriving him of his Fourth Amendment rights, and resulted in the Louisiana Gaming Control Board stripping him of his key gaming employee permit. Both the United States Attorney for the Western District of Louisiana and the ultimately District Attorney for St. Mary Parish, presumably determining that the allegations were meritless, declined to pursue charges. However, Louisiana Gaming Control Board's decision to strip Mr. Spivey of his key gaming employee permit effectively forbid him from working in a casino, which was one of the goals of the defendants all along. *Id.*

Plaintiff originally filed suit on these facts in the U.S. District Court for the Western District of Louisiana. The Magistrate Judge recommended that case be dismissed without prejudice on the basis of tribal sovereign immunity under FRCP 12(b)(1). The Magistrate recognized that reaching the merits of the claim would be improper if the court did not have subject matter jurisdiction and that the plaintiff could later bring the case in a court of proper jurisdiction (ROA 109).

While the approval of the Magistrate Judge's Report and Recommendations, which plaintiff did not challenge, was pending, plaintiff filed suit in state court making substantially the same claims. Even though defendants had previously argued there was no federal jurisdiction, defendants removed the second case to federal court and argued all claims should be dismissed with prejudice. (ROA 147). Plaintiff filed a Motion to Remand and defendants filed a Motion for Judgment on

the Pleadings. This is the case that is now on appeal. Without justifying her change in approach, the Magistrate Judge recommended dismissing all claims with prejudice, and the District Judge accepted the Report and Recommendations (ROA 228). The court dismissed all claims with prejudice *sua sponte*, denying plaintiff's Motion to Remand, apparently not reaching defendants' motion for judgment on the pleadings. *Id.*

SUMMARY OF THE ARGUMENT

The crux of the matter is simply that District Court erred in adopting the Magistrate Judge's report and recommendations dismissing the case with prejudice. Prior to this ruling the court was faced with a factually identical complaint wherein the court ultimately decided the case should be dismissed without prejudice on the grounds that it lacked subject matter jurisdiction. Neither the Magistrate Judge's report and recommendations nor the District Judge's order adopting the report and recommendations assert which federal rule is relied upon in dismissing plaintiff's claims with prejudice.

The case law regarding dismissals for sovereign immunity under 12(b)(1) clearly indicate it must be without prejudice. If the Court was going to dismiss the claims with prejudice, it should have given notice to plaintiff and the opportunity to respond. This Court should reverse the District Court's ruling and maintain that dismissals *sua sponte* are inappropriate and reversable error. Lastly, the District Court erred in refusing to remand the case despite acknowledging it lacked subject matter jurisdiction. 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.

ARGUMENT

A. Standard of Review

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. Jurisdictional issues may be raised for the first time at any level of federal proceedings. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999). Further, "[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Id.*, 526 U.S. at 583, 119 S.Ct. 1563.

Any factual and legal conclusion made by the Magistrate Judge in her report and representations that were not objected to before the District Court are reviewed for plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996). The plaintiff objected to the Magistrate Judge's Report and Recommendations to the extent she recommended dismissing the plaintiff's case with prejudice (ROA 216-218).

To the extent the Magistrate Judge and District Court erred regarding the Court's jurisdiction, this Court has an independent obligation to review the record for the basis of federal jurisdiction. The removing party or parties, which are the defendants in this case, bears the burden of establishing that federal jurisdiction

exists. *Gaitor v. Peninsular & Occidental S.S. Co.*, 287 F.2d 252, 253-54 (5th Cir. 1961). This court reviews a district court's dismissal under Rule 12(b)(1) de novo. *Spec's Family Partners, Ltd. v. Nettles*, 972 F.3d 671, 674-75 (5th Cir. 2020). In addition, the denial of a motion to remand is reviewed de novo. *Borden v. Allstate Ins. Co.*, 589 F.3d 168, 170 (5th Cir. 2009).

B. 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.

Based on Fifth Circuit precedent, it is reversible error to dismiss claims with prejudice *sua sponte*. The Court should have dismissed the claims without prejudice. If it was going to dismiss the claims with prejudice, it should have given notice to plaintiff and the opportunity to respond.

In this circuit, "a district court may dismiss a claim on its own motion as long as the procedure employed is fair." *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014). "More specifically, 'fairness in this context requires both notice of the court's intention and an opportunity to respond' before dismissing *sua sponte* with prejudice." *Carver v. Atwood*, 18 F.4th 494, 498 (5th Cir. 2021) (quoting *Carroll v. Fort James Corp.*, 470 F.3d 1171, 1177 (5th Cir. 2006)). Failure to provide both notice and opportunity to respond before *sua sponte* dismissal with prejudice constitutes reversible error. *See Davoodi*, 755 F.3d at 310; Carroll, 470 F.3d at 1177.

"Pre-dismissal notice and opportunity to respond are not needed `if the plaintiff has [already] alleged his best case.'" *Carver*, 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).

Defendants will likely argue that plaintiff asserted his best case because the District Court found a previous similar complaint barred by sovereign immunity. However, plaintiff had no reason to know filing a similar complaint in state court would result in a dismissal with prejudice in federal court. In fact, the court had just ruled that such dismissals should be without prejudice. It is important that this Court uphold its clear procedural precedents in this case and to maintain that dismissals with prejudice *sua sponte* without proper notice are inappropriate and reversible error.

C. 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

A court's dismissal of a case resulting from a lack of subject matter jurisdiction is "not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Accordingly, such a dismissal should be made without

prejudice. *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020), as revised (Dec. 30, 2020).

In the published decision *Carver v. Atwood*, 18 F. 4th 494, 498-499 (5th Cir. 2021), this Court held:

> Our precedents also make clear that a jurisdictional dismissal must be without prejudice to refiling in a forum of competent jurisdiction. See *Mitchell v. Bailey*, 982 F.3d 937, 944 (5th Cir. 2020) (explaining, in the context of sovereign immunity, that "[a] court's dismissal of a case resulting from a lack of subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. Accordingly, such a dismissal should be made without prejudice." (quotation omitted)). This rule applies with equal force to sovereign-immunity dismissals. *See, e.g., 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.").

In *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 188 (5th Cir. 1986), this Court held that: "It is inconsistent for a district court to issue a judgment on the merits based on a finding that the court lacks subject matter jurisdiction. A decision issued by a court without jurisdiction over the subject matter is not conclusive of the merits of the claim asserted." In *Daigle v. Opelousas Health Care, Inc.*, 774 F.2d 1344, 1348 (5th Cir. 1985)), this Court held that "A dismissal for want of jurisdiction bars access to federal courts and is res judicata only of the lack of a federal court's power to act. It is otherwise without prejudice to the plaintiff's claims, and the rejected suitor may reassert his claim in any competent court."

Neither the Magistrate Judge's report and recommendations nor the District Judge's order adopting the report and recommendations assert which federal rule is relied upon in dismissing plaintiff's claims. However, this Court's ruling in *Carver* is clear that a dismissal based on sovereign immunity is under Rule 12(b)(1) and must be without prejudice. In order for this Court to affirm dismissal with prejudice in this case, the Court would have to carve out a new rule for sovereign immunity dismissals in favor of Indian tribes.

Under this Court's rule of orderliness, "one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court." *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). To affirm dismissal with prejudice in this case would run afoul of this Court's decisions in *Mitchell* and *Carver*, with are unequivocable that dismissals on the basis of sovereign immunity are without prejudice and make no distinction among the different kinds of sovereign immunity, be it the Eleventh Amendment sovereign immunity of the states in federal court, the immunity of Indian tribes, or the immunity of foreign states.

Other courts of appeal have similarly rejected dismissals on the basis of sovereign immunity with prejudice. In *Ernst v. Rising*, 427 F.3d 351, 366-67 (6th Cir. 2005) the U.S. Court of Appeals for the Sixth Circuit reversed a district court's dismissal of federal claims against a state entity with prejudice on the basis that

sovereign immunity the adjudication of plaintiff's claims and a dismissal with prejudice is a ruling on the merits. Therefore, even if federal claims may provide a basis for removal, a finding of sovereign immunity deprives a federal court of jurisdiction, and hence the ability to rule on the merits and to dismiss an action with prejudice. The Court in *Ernst* pointed to the fact that the district court did not address and justify a departure from the usual rule that dismissals on the basis of sovereign immunity are without prejudice. *Id.*

In *Freeman v. Oakland Unified Sch. Dist.,* 179 F.3d 846, 847 (9th Cir. 1999) the U.S. Court of Appeals for the Ninth Circuit held that "Dismissals for lack of jurisdiction should be without prejudice so that a plaintiff may reassert [her] claims in a competent court.")

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

Denial of the motion to remand is reviewed de novo. 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 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). None of the cases cited defendant for in opposing

plaintiff's motion to remand (ROA 145) stand for the proposition asserted. In none of them did the court find the federal courts find they had no subject matter jurisdiction and then deny remand to state court.

Defendants cite *Bodi v. Shingle Springs Band of Miwok Indians*, 832 F.3d 1011, 1022 (9th Cir. 2016) and *Contour Spa at the Hardrock Inc. v. Seminole Tribe of Florida*, 692 F.3d 1200 (11th Cir. 2012) for the proposition that federal claims are removable and sovereign tribes should be able to have the issue of sovereign immunity resolved by federal courts. However, neither of these cases supports defendants' position that all claims in this case should be dismissed with prejudice. In *Bodi*, the limited issue before the court was whether a tribe waives sovereign immunity by removing a case to federal court, and the court held that it does not. 832 F.3d at 1024. However, the court did not dismiss any claims. In *Contour Spa*, the court affirmed the district court's decision to dismiss federal claims on the basis of sovereign immunity while remanding state law claims to state court. 692 F.3d at 1212. This case is an outlier in the federal courts of appeal in that the court dismissed claims with prejudice after finding sovereign immunity barred plaintiff's claims. However, even this court did not dismiss state law claims with prejudice.

In *Nolan v. Boeing Co.*, 919 F.2d 1058, 1070 (5th Cir.1990), the defendant sought dismissal on the basis of *forum non conveniens*. The court reasoned that since the federal district court held the federal forum to be inconvenient, it made no sense

to remand part of the case to an equally if not more inconvenient state court forum. Id. That issue is not present in this case. No party argues that St. Mary Parish would be an inconvenient forum.

Defendants cited *Tellado v. IndyMac Mortg. Services*, 707 F.3d 275 (3d Cir. 2013), in which a federal court of appeals ruled that the district court lacked subject-matter jurisdiction over a removed case due to a plaintiff's failure to exhaust administrative remedies pursuant to a federal statute. That case does not address the propriety of remand and does not order that the case be dismissed with or without prejudice. It merely overturned a district court's order because it found it did not have jurisdiction over the case.

In opposition to plaintiff's motion to remand, defendants cited no case law standing for the proposition that all claims, including state law claims, should be dismissed in a case when a federal court finds that tribal sovereign immunity applies. The most prudent approach, consistent with Supreme Court and Fifth Circuit precedent, would be to simply remand all claims to state court once there is a finding a federal court lacks subject matter jurisdiction over plaintiff's claims due to sovereign immunity.

Courts have held that dismissals on the basis of sovereign immunity should be without prejudice so that plaintiffs may bring the case in a court of competent jurisdiction. Defendants have alleged that sovereign immunity applies equally to bar

plaintiff's claims in state and tribal court. However, out of respect for state and tribal courts, this Court should leave that question to those courts.

CONCLUSION

Plaintiff prays that this Court reverse and remand this case. The Court should reverse the dismissal of plaintiff's claims *sua sponte* as procedurally improper. Further, this Court should order the district court to remand the case to state court. When a case is removed from state to federal court and the Court finds there is no federal jurisdiction, the plain language of 28 U.S.C. § 1447(c) requires remand.

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CERTIFICATE OF SERVICE

I certify that on September 22, 2022, the foregoing document was forwarded to 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 4,126 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word in Font Size 14 Times New Roman.

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