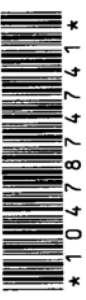


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**ORIGINAL**

2020 OK 90

**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**



COMANCHE NATION OF OKLAHOMA, )  
a Federally Recognized Indian Tribe, ex )  
*rel.* COMANCHE NATION TOURISM )  
CENTER )

FILED  
SUPREME COURT  
STATE OF OKLAHOMA

NOV 17 2020

JOHN D. HADDEN  
CLERK

Plaintiff/Appellee, )

Rec'd (date)	11-17-20
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Defendant/Appellant	<i>[Signature]</i>
Distrib	<i>[Signature]</i>
Publish	<input checked="" type="checkbox"/> yes <input type="checkbox"/> no

No. 117,267

WALLACE COFFEY,

FOR OFFICIAL  
PUBLICATION

Defendant/Appellant )

v.

**COMBS, J., dissenting.**

¶1 The majority opinion holds that Coffey was not the prevailing party within the meaning of 12 O.S. §936, and therefore, he should be denied a reasonable attorney’s fee. I believe even under a strict construction of this section, Coffey was the prevailing party. Section 936 provides, “[i]n any civil action to recover . . . on an open account . . . the prevailing party shall be allowed a reasonable attorney fee.” I would not limit the meaning of prevailing party to only those who succeed on the merits of the open account action itself. Coffey filed a motion to dismiss within a civil action to recover on an open account. He prevailed on his motion because the district court lacked subject matter jurisdiction due to tribal sovereign immunity.

The final order granting the motion to dismiss thereby dismissed *this action* with finality, subject to appeal, and therefore he was the prevailing party.

¶12 In *Amphastar Pharm. Inc. v. Aventis Pharma SA*, the Ninth Circuit noted it had previously established a two part test to determine whether attorney’s fees may be awarded when the underlying action is dismissed for lack of subject matter jurisdiction. 856 F.3d 696, 708-09 (9th Cir. 2017). The test was established in *Branson v. Nott*, 62 F.3d 287 (9<sup>th</sup> Cir. 1995). The test provides: (1) Does the fee-shifting provision contain an independent grant of subject matter jurisdiction? (2) If so, did the winning party “prevail?” In deciding the first question, the court acknowledged it had found independent grants of jurisdiction in some cases and not in others. *Amphastar*, at 710. But it also found, “[w]e have been more willing to allow a district court to award attorneys’ fees when the underlying issues concerned whether the district court had jurisdiction – since a court always has jurisdiction to determine its own jurisdiction.” *Id.* (citation omitted). The court observed that in *Latch v. United States*, 842 F.2d 1031, 1033 n.4 (9<sup>th</sup> Cir. 1988), it found a defendant could be awarded its attorney’s fees because it “prevailed on the only issue over which the district court properly had jurisdiction, i.e., the determination that it had no jurisdiction.” *Amphastar*, at 709; See also *Weiss (Herbert), Estate of Weiss (Roberta) v. Comm’r of Internal Revenue*, 88 T.C. 1036, 1040 (1987).

¶13 As to the second prong of the test, the court noted *Branson* had determined attorney’s fees were only available to a party who had prevailed on the merits. *Id.* *Branson* held when a defendant wins because the action is dismissed for lack of subject matter jurisdiction he is never the prevailing party. *Id.*, at 710. However, the *Amphastar* court concluded the United States Supreme Court had recently and effectively overruled that determination in *Branson*. *Id.* In *CRST Van Expedited Inc., v. E.E.O.C.*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1642, 1646, 194 L.Ed.2d 707 (2016), the Supreme Court explained a favorable ruling on the merits is not a necessary predicate to find that a defendant has prevailed. *Id.* at 709. The Supreme Court had reversed an Eight Circuit decision that declined to award attorneys’ fees because the defendant did not win on the merits. *Id.*; *CRST*, at 1650, 1654. The Court elaborated at length concerning why defendants who prevail for various non-meritorious reasons should still be deemed the prevailing party. *Id.*; *CRST*, at 1650-1654. The *Amphastar* court found that the Supreme Court included an example where defendants prevailed on jurisdictional reasons and it never indicated jurisdictional and non-jurisdictional victories should be treated differently. *Id.* at 709-10. The court concluded that after dismissal for lack of jurisdiction the district court retained subject matter jurisdiction over the attorney’s fee issue and the moving party was the prevailing party. *Id.* at 711.

¶4 I agree with the United States Supreme Court that a prevailing party does not necessarily mean only those who win on the merits of a case. Section 936 of Title 12 of the Oklahoma Statutes does not define prevailing party. There is no indication that the Legislature intended that defendants should be eligible to recover attorney's fees only when courts dispose of claims on the merits. See *CRST*, at 1651-1652. As the *Weiss* court found, "an order of dismissal for lack of jurisdiction is a final order, appealable as such, and surely is either a 'judgment' or a 'decision.'" *Weiss*, at 1040. I agree with the majority opinion that a court retains jurisdiction to award attorney's fees after it dismisses a case for lack of subject matter jurisdiction. However, I am perplexed *under its analysis* how anyone in that situation would be able to recover those fees pursuant to §936. The majority opinion makes it clear a defendant who obtains a dismissal for lack of subject matter jurisdiction is not entitled to prevailing party attorney's fees. It makes little sense for a defendant to have to raise an affirmative defense, prevail on that defense, the action is dismissed with finality in that court, and then have no recourse to receive his or her attorney's fees.

¶5 In *Professional Credit Collections, Inc., v. Smith*, we held the defendant's successful motion to vacate a default judgment was a quest for affirmative relief and such success placed the defendant, Smith, in the status of prevailing party which entitled her to an attorney's fee award. 1997 OK 19, ¶10,

933 P.2d 307. This was so even though the plaintiff dismissed its action without prejudice prior to Smith filing an answer after the default judgment was vacated. In an opinion authored by Justice Opala, we held the trial court's ruling in Smith's favor on her motion to vacate fully satisfied the §936 requirement that she be successful in the case. *Id.* *Professional Credit* has not been overruled and its holding is in line with the other opinions cited herein. Here, there is even clearer finality than that existing in *Professional Credit*. The trial court's granting of Coffey's motion to dismiss for lack of subject matter jurisdiction was *with prejudice*. In *Professional Credit*, the plaintiff dismissed its petition without prejudice and therefore could refile its action. That possibility did not prevent this Court from determining prevailing party status for the purpose of awarding an attorney's fee. The same is true in the present case. Here, the Appellee could refile its action in the proper jurisdiction, but that fact does not prevent this court from finding Coffey is the prevailing party when he was successful in his quest for affirmative relief, i.e., success on his motion to dismiss for lack of subject matter jurisdiction. I agree with the holding in *Professional Credit* and find the majority's attempt to diminish its value to be specious.

¶6 The majority concludes "a prevailing party is one who prevails on the merits of the action or for whom final judgment is rendered." Here, I would hold that Coffey was the prevailing party in *this* action as he is the party who has received

a final judgment by the trial court's action in granting the motion to dismiss with prejudice. As such, Coffey is entitled to his attorney's fees pursuant to §936. To hold otherwise invites frivolous lawsuits and unnecessary and costly expenses to a defendant.