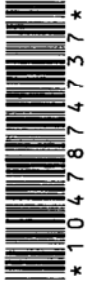


ORIGINAL

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,

Petitioner/Appellee,

v.

WALLACE COFFEY,

Defendant/Appellant.

Rec'd (date)	11-17-20
Posted	<i>[Signature]</i>
Mailed	<i>[Signature]</i>
Distrib	<i>[Signature]</i>
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FILED
SUPREME COURT
STATE OF OKLAHOMA

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JOHN D. HADDEN
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KAUGER, J., with whom GURICH, C.J., joins, dissenting:

¶1 I am baffled by how the trial court or this Court can consider, much less award, attorney fees if the trial court does not have jurisdiction over either of the parties. Because this cause involved an Indian tribe, and an Indian citizen in Indian County, the trial court dismissed it because there was no subject matter jurisdiction of the parties. After the dismissal, the appellant, Wallace Coffey, sought an award of attorney fees as a prevailing party. Because of the litigants involved, the lack of subject matter jurisdiction is apparently based on the sovereign immunity of both parties. The questions become whether the parties

waived sovereign immunity, and even if so, could the trial court award attorney fees after dismissing the cause because it lacked subject matter jurisdiction?

I.

OKLAHOMA IS NOT A PUBLIC LAW 280 STATE AND AS SUCH, OUR COURTS GENERALLY LACK SUBJECT MATTER JURISDICTION OVER DISPUTES BETWEEN INDIAN TRIBES AND TRIBAL OFFICIALS.

¶2 This Court has previously clearly explained that Oklahoma lacks subject matter jurisdiction over disputes between Indian Tribes and Tribal Officials. Two prominent cases explaining this are Ahboah v. Housing Authority of Kiowa Tribe of Indians, 1983 OK 20, 660 P.2d 625 and Housing Authority of Seminole Nation v. Harjo, 1990 OK 35, 790 P.2d 1098. Both cases involve disputes between tribal members with tribal housing authorities on tribal land.

¶3 The Courts' discussion of state subject matter jurisdiction is not only relevant, but it is dispositive.¹ In Ahboah, supra, the Kiowa Housing Authority sought possession and forcible entry and detainer against tenants occupying housing built on "Indian Country" allotment land. In determining whether an Oklahoma state court has subject matter jurisdiction, the Court said:

¹Subsequent to these cases, the Court in Lewis v. Sac & Fox Tribe of Okla. Housing Authority, 1994 OK 20, 896 P.2d 503 modified the analysis to include the preliminary inquiry into nature of rights sought to be settled and noting that only that litigation that is explicitly withdrawn by Congress or that which infringes upon tribal self-government stands outside boundaries of permissible state-court cognizance.

¶18 Although making generalizations about the allocation of subject matter jurisdiction between federal, state and tribal governments is treacherous, certain general principles are clear. Congress has plenary power over Indians and Indian activities by virtue of the Indian commerce clause and supremacy clause of the United States Constitution. Federal power over Indian activities has always been exercised broadly, subject to few limitations.

¶19 Tribal authority over tribal members and their property is derived either through the doctrine of inherent sovereignty (Indian nations) or, as more recently articulated, from the protection afforded to tribal self-government by Congress. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583, 65 L.Ed.2d 665 (1980).

¶20 As a general principle, states have full authority over Indians and Indian activity outside Indian Country. Within Indian Country, state jurisdiction may be exercised only if the field has not been preempted by federal statutes, regulations and policy, and tribal authority has not been determined. In areas traditionally within the federal ambit, states may exercise authority over Indians or Indian Country only with the explicit consent of Congress.

¶21 Public Law 280 embodies express Congressional consent to state assumption of civil and/or criminal jurisdiction over Indians and Indian activities within Indian Country, provided that certain conditions are met. Public Law 280 has appeared in two forms. As originally enacted, states were divided into two groups: mandatory states (those required to assume civil and criminal jurisdiction) and optional states (which could voluntarily assume jurisdiction by affirmative legislative action). The optional states were further divided into two groups: those whose constitutions and enabling acts disclaimed all title to and interest in Indian lands within state borders and those states having no such disclaimer. Congress perceived that disclaimer clauses presented a barrier to the assumption of jurisdiction. The barrier presented by the enabling acts was removed by Congress, but disclaimer states were required to amend their constitutions "where necessary" as well as to take affirmative legislative action to assume jurisdiction. Oklahoma is among the disclaimer states.

¶22 Public Law 280 was amended by the Civil Rights Act of 1968 in two significant ways: first, the affirmative legislative action requirement was removed; second, consent by tribal referendum was required before state jurisdiction could be assumed. The Kiowa Tribe has not assented to the assumption of jurisdiction by the State of Oklahoma. Therefore Oklahoma to assume jurisdiction under Public Law 280 must have done so under the original 280 Act before the amendment by the Civil Rights Act of 1968. (Footnotes omitted)

The Court held that Oklahoma state courts lacked subject matter jurisdiction over the cause because the State of Oklahoma had not assumed such jurisdiction under Public Law 280.²

¶4 Similarly, a few years later in Harjo, *supra*, we addressed state court subject matter jurisdiction in a similar dispute. The house involved in the dispute was part of a “Dependent Indian Community.” Harjo maintained that her house was part of a “dependent Indian community,” located in “Indian country”, and fell within federal, not state jurisdiction. The Harjo Court said:

Under the federal constitution, Congress has exclusive authority over Indian affairs. U.S. Const., Art. I, § 8. 18 U.S.C.A. § 1151 defines “Indian country” as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.

(b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof,

80.

²Act of August 15, 1953, Ch. 505, 67 Stat. 588 amended by Public Law 90-284, Act of April 11, 1968, 82 Stat.

and whether within or without the limits of a state, and

(c) all Indian allotments, the Indian titles to which have not been extinguished. . . . (emphasis added)

If indeed her house lies within Indian country then the state court was without jurisdiction to proceed in the forcible entry and detainer action. Ahboah v. Housing Authority Kiowa Tribe, 660 P.2d 625 (Okla. 1983).

We held that state courts lacked subject matter jurisdiction to decide the matter.

After Harjo alleged that the trial court also erred in awarding attorney fees to the Housing Authority when it lacked subject matter jurisdiction to decide the underlying matter, we agreed because the matter was not justiciable in state court — period. The same is true in this cause.

II.

THE ONLY WAY THE STATE OF OKLAHOMA COULD ASSERT JURISDICTION TO DECIDE THE UNDERLYING MATTER AND/OR ATTORNEY FEES IS IF THE PARTIES EXPRESSLY WAIVED SOVEREIGN IMMUNITY.

¶5 Historically, sovereign immunity must be clearly and unambiguously waived.³ Does the filing of a lawsuit in state court automatically constitute a

³Dilliner v. Seneca-Cayuga Tribe, 2011 OK 61, ¶12, 258 P.3d 516 provides:

The standard of review for questions concerning the jurisdictional power of the trial court to act is de novo. Jackson v. Jackson, 2002 OK 25, 45 P.3d 418. As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity. Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751, 754, 118 S.Ct.1700, 140 L.Ed.2d 981 (1998). Waiver of sovereign immunity cannot be implied but must be unequivocally expressed. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). Absent an effective waiver or consent, a state court may not exercise jurisdiction over a recognized Indian tribe. Pullavup Tribe, Inc. v. Department of Game of the State of Washington, 433 U.S. 165, 172, 97 S.Ct. 2616, 53 L.Ed.2d 667 (1977).

waiver of the Tribe's sovereign immunity? If not, what does constitute a waiver? The District Court has the duty to inquire into its jurisdiction.⁴ The easiest solution would have been for the District Court to ask the tribal entity whether it clearly and unequivocally waived sovereign immunity when it first filed the lawsuit against its former chairman. This Court could issue the same show cause order. Regardless, the question is important.

¶6 Additionally, the respondent argues that the Tribe is a necessary and indispensable party that must be joined in order for the Court to determine sovereign immunity of the parties, as well as to obtain any money judgment against the respondent.⁵ Regardless, the jurisdiction of the district courts of this state may have over the thirty-nine federally recognized nations of Oklahoma, and their citizens, has been the subject of litigation for the entirety of the history of this state and continues to this day.⁶ Consequently, when an entity which appears to be part of the tribal government in Indian County, brings an action in the district court of Oklahoma against a former tribal leader, rather than in tribal court or in federal court, the question of jurisdiction should be addressed immediately.

⁴It is the duty of the Court to inquire as to the propriety of the court's jurisdiction. Independent School Dist. #52 of Oklahoma City v. Hofmeister, 2020 OK 56, ¶52, ___ P.3d ___ (awaiting mandate).

⁵Title 12 O.S. 2011 §2019. The lack of necessary joinder is the reason the author of the majority opinion gave as the dissenting reason that the Court could not consider our recent case of Treat v. Stitt, 2020 OK 64, ___ P.3d ___.

⁶McGirt v. Oklahoma, 140 S.Ct. 2452, 2469, 207 L.Ed.2d 985 (2020).

¶7 Wallace Coffey, (defendant/appellant/Coffey) entered a special appearance and filed a motion to dismiss for lack of subject matter jurisdiction. He claimed that he was chair of the Comanche Nation at all times pertinent to the matter, and that he was afforded sovereign immunity. As previously noted, in Housing Authority of the Seminole Nation v. Harjo, 1990 OK 35, ¶22, 790 P.2d 1098, the Court granted certiorari to determine whether the state district court had jurisdiction over a forcible entry and detainer action involving a house built by the appellee. The Court of Appeals had held that the house was not situated in Indian country, and that the state court had jurisdiction.

¶8 However, we held that because the house was part of a "dependent Indian community" jurisdiction did not lie in the state courts. We ordered the trial court to dismiss the cause. When the appellant argued that the trial court erred by awarding attorney's fees to the Housing Authority, we agreed, stating that "**this case is not a matter properly litigable in the state courts of Oklahoma.**" Thirty years ago, we held an award of attorney fees in a matter involving an intertribal conflict was not a properly litigable in the state courts of Oklahoma. It should have been brought in the Comanche Nation court system or the federal courts.⁷

¶9 Wallace Coffey resigned as the chairman of the Comanche Nation on

⁷www.comanchenation.com.

February 5, 2016, after twenty-five years in the position.⁸ The action of money judgment against Coffey was filed in the district court on October 11, 2016. The record does not indicate that the Comanche Nation, or its agents, filed a formal waiver of sovereign immunity at the time of filing. Nor are the sufficient facts in the record on appeal to determine whether a formal waiver was intended without an evidentiary hearing.

¶10 The Comanche Nation constitution is unclear as to who exactly had the authority to waive sovereign immunity. The Comanche Nation constitution, as amended November 7, 2019, does not expressly mention who has the authority to waive sovereign immunity on behalf of the Tribe or tribal official or entity. It does, however, allow the Tribal Council to transact business and hire an attorney. It provides in pertinent part:

Article IV, Section 6. . .

(e) To select and authorize tribal delegations to transact business on behalf of the tribe. When travel is involved, the terms of the resolution shall include the purpose of the trip and the existence of the delegation's authority. . . .

Section 9. To hire an attorney to represent the tribe in legal matters.

Thus, the first questions the district court should have answered was whether the

⁸www.Indianz.com, “Wallace Coffey resigns as chair of Comanche Nation after 25 years,” February 8, 2016.

filing of the lawsuit by the Comanche Nation constituted a waiver of sovereign immunity on behalf of the tribe and a consent to jurisdiction of the district court or whether the tribe could also waive jurisdiction on behalf of the former chairman.

¶11 Because of the sovereign immunity of the parties, because the incidences giving rise to this litigation occurred on Tribal Trust Land between a sovereign nation and one of its citizens, the district court lacked subject matter jurisdiction of this cause. Even if the State of Oklahoma could entertain such causes in state court, unless the Comanche Nation waived its sovereign immunity clearly and unequivocally, no jurisdiction would exist.⁹

¶12 Evidently, the Comanche Nation Tourism Center utilized the state court system by voluntarily filing the action in the state district courts. There is no evidence that it was authorized to do so by the tribal council or that there was an express waiver of sovereign immunity. Other state and federal courts have examined this issue. In some cases, immunity may be waived by: entering into a

⁹Sheffer v. Buffalo Run Casino, PTE, Inc., 2013 OK 77, ¶22, 315 P.3d 359 states:

Only an express grant of jurisdiction by Congress or adoption of Public Law 280 will confer civil-adjudicatory jurisdiction to the State of Oklahoma. "It is undisputed that Oklahoma was not a state which was allowed to assert civil jurisdiction over Indian Tribes under Public Law 280." Cossey, 2009 OK 6, 212 P.3d 447 (Kauger, J., concurring in part/dissenting in part ¶ 26); Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114, 125 (1993) ("Oklahoma did not assume jurisdiction pursuant to Pub.L. 280."). And IGRA did not expressly grant civil-adjudicatory jurisdiction to the State of Oklahoma, but rather, included a provision "which allowed tribes and states to negotiate an allocation of jurisdiction to the states."

business contract,¹⁰ a “sue or be sued clause” in an a contract;¹¹ an arbitration agreement;¹² by a tribe’s corporate charter;¹³ if a tribal constitution allows someone other than tribal leaders to waive immunity;¹⁴ if sovereign immunity is abrogated by Congress¹⁵ or by tribal referendum.¹⁶ Explicit language in the Tribe’s complaint or counterclaim may expressly waive immunity.¹⁷

¹⁰In State ex rel. Suthers v. Cash Advance and Preferred Cash Loans, 205 P.3d 389, 400 (Colo. Ct. App. Div. II 2008) noted that a contract could waive sovereign immunity in off reservation commercial applications when certain factors are evaluated. It stated:

... In determining whether an activity was conducted off the reservation, courts generally look to where (1) the contract was entered into; (2) the contract was negotiated; (3) performance is to occur; (4) the subject matter of the contract is located; and (5) the parties reside. Emerson v. Boyd, 247 Mont. 241, 242–43, 805 P.2d 587, 588 (1991); see Wood Bros. Homes, Inc. v. Walker Adjustment Bureau, 198 Colo. 444, 447–48, 601 P.2d 1369, 1372–73 (1979) (adopting same five-part test from Restatement (Second) Conflict of Laws § 193 (1971) to resolve conflict of law issues involving contracts).

Here, the trial court was required to make factual findings to apply this test, and so we are faced with a mixed question of law and fact, which we review de novo. See Edge Telecom, Inc. v. Sterling Bank, 143 P.3d 1155, 1159 (Colo.App.2006)(enforcement of forum selection clause). . . .

¹¹Martinez v. S. Ute Tribe, 150 Colo. 504, 510, 374 P.2d 691, 694 (1962); see also Rosebud Sioux Tribe v. A & P Steel, Inc., 874 F.2d 550, 552 (8th Cir.1989); Kenai Oil & Gas, Inc. v. Dept of Interior, 522 F.Supp. 521, 528 (D.Utah 1981), *aff’d* and *remanded*, 671 F.2d 383 (10th Cir.1982); Parker Drilling Co. v. Metlakatla Indian Cmty., 451 F.Supp. 1127, 1136 (D.Alaska 1978); Dacotah Properties–Richfield, Inc. v. Prairie Island Indian Cmty., 520 N.W.2d 167, 170 (Minn.Ct.App.1994). “[A] sue or be sued clause will only accomplish a waiver when the clause clearly expresses an intent to waive immunity,” not where conditions placed on the waiver are left unmet. Sanchez v. Santa Ana Golf Club, Inc., 136 N.M. 682, 686, 104 P.3d 548, 552 (N.M.Ct.App.2004)(citing Martinez, 150 Colo. at 508–10, 374 P.2d at 693–94).

¹²C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411, 420–22, 121 S.Ct. 1589, 149 L.E.2d 623 (2001).

¹³Wright v. Colville Tribal Enterprise, 147 P.3d 1275, 1280 (Wash. 2006)..

¹⁴Rush Creek Solutions, Inc., v. Ute Mountain Ute Tribe, 107 P.3d402, 406–07 (Colo. Ct. App. Div. II 2004).

¹⁵Foxworthy v. Puvallup Tribe of Indian Ass’n, 141 Wash. App. 221, 227–28, 169 P.3d 53 (2007).

¹⁶See, Lewis v. Sac & Fox Tribe of Okla. Housing Authority, note 1, *supra*, noting that the State may assert cognizance over Indian Country only if enrolled Indians have given their consent by tribal referendum.

¹⁷Rupp v. Omaha Indian Tribe, 45 F.3d 1241 (8th Cir. 1995).

¶13 Our Court of Civil Appeals First Bank & Tr. v. Maynahonah, 2013 OK CIV APP 101, ¶1, 313 P.3d 1044 recognized that explicit language in the Tribe's constitution or by-laws may expressly waive immunity, but waiver cannot be implied by mere participation in an interpleader action. On the record presented, it is impossible to determine without further evidence or an admission by the Tribe, that it has waived its sovereign immunity.

¶14 Some courts have noted that, in some instances, the limited jurisdiction to determine attorney fees based on the court's inherent power after a lawsuit was dismissed for lack of jurisdiction.¹⁸ The rule can be very different if the action is dismissed due to sovereign immunity where the court has no inherent power. For example, in Ex Parte Alabama Dept. of Transp., 978 So.2d 17, 25-26 (Ala. 2007), a case involving the dismissal of the Alabama Department of Transportation based on sovereign immunity, the appellant argued on appeal that, if the Alabama

¹⁸For example, in Musser v. Musser, 1998 OK CIV APP 13, ¶10, 955 P.2d 744, the court noted:

We note that the trial court's inherent powers to manage its own affairs to achieve an orderly and timely disposition of cases are a necessary incident to the trial court's jurisdiction. Winters v. City of Oklahoma City, 1987 OK 63, 740 P.2d 724. Winters recognized that an attorney's personal liability for the opponent's attorney fees is an exercise of the trial court's inherent supervisory powers. Reimbursement, which was anticipated in the original order, is a logical exercise of the trial court's inherent powers. The instant situation is similar to the trial court's power to order an attorney, not a party in interest, to pay sanctions to the opposing party or counsel. In Bentley v. Hickory Coal Corp., 1992 OK CIV APP 68, 849 P.2d 417, this Court held that the trial court has jurisdiction, even after the case has been dismissed, to order an attorney to pay attorney fees as a sanction. The Oklahoma Supreme Court has held that the key to requiring an attorney to pay sanctions is notice and an opportunity to be heard. Helton v. Coleman, 1991 OK 43, 811 P.2d 100. We find this holding comports with our reading of Ford, supra, that lack of notice and opportunity to be heard were the principal factors in finding this Court without jurisdiction to enter the order in that case.

Supreme Court concluded that ALDOT was not a proper party, it should direct the trial court to allow amendment of the complaint to add the proper party. The

Supreme Court of Alabama, with regard to dismissal due to sovereign immunity,

said:

... if a trial court lacks subject-matter jurisdiction, it has no power to take any action other than to dismiss the complaint. A trial court lacks subject-matter jurisdiction if the defendant is immune under the doctrine of sovereign immunity. Larkins, 806 So.2d at 364 (“ ‘Article I, § 14, of the Alabama Constitution of 1901 thus removes subject-matter jurisdiction from the courts when an action is determined to be one against the State.’ ” (quoting Lyles, 797 So.2d at 435)). Thus, this Court cannot order the trial court to allow Good Hope to amend its complaint because the trial court lacks subject-matter jurisdiction. . .

... “Lacking subject matter jurisdiction [a court] may take no action other than to exercise its power to dismiss the action Any other action taken by a court lacking subject matter jurisdiction is null and void.” ’ ” Ex parte Blankenship, 893 So.2d at 307 (quoting State v. Property at 2018 Rainbow Drive, 740 So.2d 1025, 1029 (Ala.1999), quoting in turn Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo.Ct.App.1996)).

The same rationale applies whether the entity entitled to sovereign immunity is a State or a Native Tribe. If jurisdiction does not exist due to sovereign immunity, the court lacks jurisdiction to award attorney fees. If jurisdiction does not exist because all of the transactions occurred on Indian Trust Land between a tribe and a tribal member in which the State of Oklahoma has no jurisdiction, then any action taken such as awarding attorney fees would be null and void due to lack of

jurisdiction.

¶15 Even if sovereign immunity were not an issue, in General Motors Acceptance Corp. v. Carpenter, 1978 OK 39, ¶8, 576 P.2d 1166, the Court addressed whether a trial court could reopen a case in order to determine and award attorney fees after the plaintiff dismissed the cause. The Court held that once a party has dismissed his or her petition under §684, no jurisdiction remains in district court to go forward with the action. The Court explained that the district court's decision to reopen the case was the improper exercise of judicial discretion and the district court had no power to reassume jurisdiction over the dismissed case to award attorney fees. Federal Courts have reached similar results recognizing that fee shifting provisions themselves do not confer subject matter jurisdiction to award attorney fees.¹⁹ The same reasoning should apply here, especially when the dismissal was for lack of subject matter jurisdiction due to

¹⁹W. G. v. Senatore, 18 F.3d 60, 64 (U.S. Ct App. 2nd Cir. 1994) [Simply stated using the common law approach, when a determination is made that no jurisdiction lies, the district court has "no power to do anything but to strike the case from the docket." The Mayor v. Cooper, 73 U.S. (6 Wall.) 247, 250, 18 L.Ed. 851 (1868). In keeping with these principles, fee shifting provisions cannot themselves confer subject matter jurisdiction. Rather, such provisions must be read in conjunction with substantive statutes to establish proper jurisdiction over fee applications. For example, in the civil rights context, 42 U.S.C. § 1988 empowers a court to award reasonable attorney's fees only to the prevailing party in a proceeding brought to enforce one of the substantive sections of the civil rights laws. Where there is no subject matter jurisdiction to proceed with the substantive claim, as a matter of law "[t]hat lack of jurisdiction bars[] an award of attorneys fees under section 1988." Keene Corp. v. Cass, 908 F.2d 293, 298 (8th Cir.1990) (reversing district court's award of attorney's fees under § 1988 after affirming district court's conclusion that it lacked subject matter jurisdiction under § 1983); see also Smith v. Brady, 972 F.2d 1095, 1100 (9th Cir.1992) (addressing fee shifting in tax law context; failure to exhaust requisite administrative remedies precluded fee award); J.G. v. Board of Educ. of Rochester City Sch. Dist., 830 F.2d 444, 447 (2d Cir.1987) (recognizing questionable status of administrative exhaustion under IDEA's precursor, the Education of the Handicapped Act, appellate court avoided jurisdictional question by converting district court's decision on attorney's fees to an award under § 1988 in light of plaintiff's success on parallel claims brought pursuant to § 1983).]

sovereign immunity.

III. PREVAILING PARTY ATTORNEY FEES.

¶16 My other concern is that although the district court lacked jurisdiction in this cause, the majority's holding will control the determination of the prevailing party in all other causes. Had this not involved questions of sovereign immunity, I could agree with the dissent that, the Coffey could qualify for an award as a prevailing party within the meaning of 12 O.S. 2011 §936.²⁰ The dissent discusses Professional Credit Collections, Inc., v. Smith, 1997 OK 19, ¶10, 933 P.2d 307. There, we held Smith's successful motion to vacate a default judgment was a quest for affirmative relief and success placed Smith, in the status of prevailing party which entitled her to an attorney's fee award. This was so even though the plaintiff dismissed its action without prejudice prior to Smith filing an answer after the default judgment was vacated.

20Title 12 O.S. 2011 §936 provides:

- A. In any civil action to recover for labor or services rendered, or on an open account, a statement of account, account stated, note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, unless otherwise provided by law or the contract which is the subject of the action, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.
- B. In any civil action to recover unpaid fees, fines, costs, expenses or any other debt owed to this state or its agencies, as defined pursuant to Section 152 of Title 51 of the Oklahoma Statutes, unless otherwise provided by law, the prevailing party shall be allowed a reasonable attorney fee to be set by the court, to be taxed and collected as costs.

¶17 In Professional Credit, supra, 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. We interpreted §936 in conjunction with 12 O.S. 1991 §684.²¹ Although the majority Professional Credit disapproves, it has not been overruled. The only statutory changes that occurred after Professional Credit was a change to §684 which concerned when a plaintiff could dismiss a case.²² The

²¹Title 12 O.S. 1991 §684 provided;

A plaintiff may, on the payment of costs and without an order of court, dismiss any civil action brought by him at any time before a **petition of intervention or answer praying for affirmative relief** against him is filed in the action. A plaintiff may, at any time before the trial is commenced, on payment of the costs and without any order of court, dismiss his action after the filing of a petition of intervention or answer praying for affirmative relief, but such dismissal shall not prejudice the right of the intervenor or defendant to proceed with the action. Any defendant or intervenor may, in like manner, dismiss his action against the plaintiff, without an order of court, at any time before the trial is begun, on payment of the costs made on the claim filed by him. All parties to a civil action may at any time before trial, without an order of court, and on payment of costs, by agreement, dismiss the action. Such dismissal shall be in writing and signed by the party or his attorney, and shall be filed with the clerk of the district court, the judge or clerk of the county court, or the justice, where the action is pending, who shall note the fact on the proper record: Provided, such dismissal shall be held to be without prejudice, unless the words "with prejudice" be expressed therein. (Emphasis supplied)

²²In 2013, Title 12 O.S. Supp. 2013 §684 was amended and it now provides:

- A. An action may be dismissed by the plaintiff **without an order of court by filing a notice of dismissal at any time before pretrial**. After the pretrial hearing, an action may only be dismissed by agreement of the parties or by the court. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.
- B. Except as provided in subsection A of this section, an action shall not be dismissed at the plaintiff's request except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaims can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this subsection is without prejudice.
- C. For failure of the plaintiff to prosecute or to comply with the provisions of this section or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.
- D. The provisions of this section apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to subsection A of this section shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

If a plaintiff who has once dismissed an action in any court commences an action based upon or including the

language allowing a plaintiff to dismiss an action was changed from “affirmative relief” to “any time before pretrial.” This change does not implicate the rationale of the cause. If the majority thinks Professional Credit was wrongly decided it should overrule it, but it has not done so. Without either following it, or overruling it, the majority has thrown confusion into what a “prevailing party” is in other cases as well.

¶18 Here, 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 could refile its action. That possibility did not prevent the Court from determining prevailing party status for the purpose of awarding an attorney’s fee.

CONCLUSION

¶19 The majority’s holding that “[a]s an initial matter, we find the trial court had jurisdiction to adjudicate Coffey’s application for attorney fees despite its lack of subject matter jurisdiction over the merits of the case” is flawed. If a court of the State of Oklahoma never had jurisdiction over matters occurring in “Indian Country,” it is impossible to acquire jurisdiction later to decide attorney

same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.(Emphasis supplied).

fees. The trial court's only option was to dismiss the case for the lack of subject matter jurisdiction.