



ORIGINAL

2020 OK 90

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

FILED
SUPREME COURT
STATE OF OKLAHOMA

NOV 17 2020

JOHN D. HADDEN
CLERK

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

Plaintiff/Appellee,

No. 117,267

v.

FOR OFFICIAL PUBLICATION

WALLACE COFFEY,

Defendant/Appellant.

ON APPEAL FROM THE DISTRICT COURT OF COMANCHE COUNTY,
STATE OF OKLAHOMA
HONORABLE IRMA NEWBURN, DISTRICT JUDGE

¶10 Plaintiff/Appellant Comanche Nation of Oklahoma, a federally recognized Indian Tribe, ex rel. Comanche Nation Tourism Center, filed a lawsuit seeking a declaratory judgment that Defendant/Appellant Wallace Coffey was indebted to it for the amount of the outstanding balance on an open account. The trial court granted Coffey's motion to dismiss for lack of subject matter jurisdiction and dismissed the case with prejudice. Thereafter, Coffey filed an application for prevailing party attorney fees pursuant to 12 O.S.2011 § 936. The trial court denied Coffey's request for attorney fees, finding he was not the prevailing party because he had not prevailed on the merits of the action. Coffey appealed the order denying attorney fees, and this Court retained the appeal. We hold a defendant is not a "prevailing party" within the meaning of 12 O.S. § 936 when the court dismisses the action with prejudice for lack of subject matter jurisdiction. The trial court's order denying Coffey's motion for attorney fees is affirmed.

ORDER OF DISTRICT COURT IS AFFIRMED.

Michael Salem, Salem Law Offices, Norman, Oklahoma, for Appellant.

Rec'd (date)	11-17-20
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KANE, J.:

I. FACTS AND PROCEDURAL HISTORY

¶1 Comanche Nation filed the underlying lawsuit originally seeking a money judgment against Wallace Coffey on October 11, 2016. Comanche Nation alleged Coffey had purchased goods from it on an open account and failed to pay the balance of \$18,415.09. Comanche Nation amended its petition on November 7, 2016, alleging the same facts but seeking a declaratory judgment that Coffey was indebted to it for the amount of the outstanding balance on the open account and that Coffey was obligated to pay Comanche Nation's reasonable expenses for bringing and maintaining the action.

¶2 Coffey entered a special appearance and filed a motion to dismiss for lack of subject matter jurisdiction on February 8, 2017. Coffey argued that at all relevant times he was acting in his official capacity as Chairman of Comanche Nation and was, therefore, entitled to assert the defense of tribal sovereign immunity.¹ The trial court granted Coffey's motion to dismiss on November 16, 2017 and entered a final order dismissing the case with prejudice on February 15, 2018. In its order, the trial court found that all disputed transactions occurred on Tribal trust land. The trial court concluded that Tribal trust land is "Indian country" within the meaning of 18 U.S.C. § 1151 and, therefore, it lacked jurisdiction over a controversy involving

¹ Coffey is a former Chairman of Comanche Nation. He contends Comanche Nation filed this lawsuit to have him adjudicated a debtor and, as a result, precluded from running for office.

Indian parties relating to conduct occurring in Indian country. Comanche Nation did not appeal the final order dismissing the case with prejudice.

¶3 On March 16, 2018, Coffey filed an application for attorney fees pursuant to 12 O.S.2011 § 936. The trial court found Coffey was not entitled to attorney fees, because he “was not a ‘prevailing party’ upon the merits of the cause of action.” The Journal Entry denying Coffey’s application for attorney fees was filed on July 26, 2018.² Coffey appealed.

¶4 This Court granted Coffey’s motion to retain appeal. Comanche Nation has not entered an appearance or filed a Response to the Petition in Error. Therefore, the appeal will be decided without a response or additional record.³

II. STANDARD OF REVIEW

¶5 This appeal presents issues of statutory construction and whether a party is entitled to attorney fees under 12 O.S. § 936. Both are questions of law. See *Fanning v. Brown*, 2004 OK 7, ¶ 8, 85 P.3d 841 (statutory construction); *Finnell v. Seismic*, 2003 OK 35, ¶ 7, 67 P.3d 339 (entitled to attorney fees). Questions of law are reviewed *de novo*. See *Fanning*, 2004 OK 7, ¶ 8. Appellate courts have

² The trial court also denied Coffey’s motion to settle journal entry “as no judgment was entered upon the merits and the matter was dismissed for lack of jurisdiction of both the parties and the subject matter. A final order of dismissal was entered on the 15th day of February 2018.” The denial of Coffey’s motion to settle journal entry is not an issue on appeal.

³ Coffey filed this appeal using the accelerated procedure for appeals from summary adjudication, see Okla.Sup.Ct.R. 1.36, rather than an appeal from a final order. It has proceeded as an accelerated appeal without objection.

plenary, independent and nondeferential authority to determine whether the trial court erred in its legal rulings. *Id.*

III. DISCUSSION

A. Jurisdiction to Adjudicate Application for Attorney Fees

¶16 This Court has a duty to inquire into its own jurisdiction and the jurisdiction of the lower court. See *Hall v. GEO Group, Inc.*, 2014 OK 22, ¶ 12, 324 P.3d 399. As 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. It follows that this Court has jurisdiction to review the trial court's order denying attorney fees.

¶17 Comanche Nation did not appeal from the underlying order sustaining Coffey's dispositive motion and dismissing the case for lack of subject matter jurisdiction, and that stands as the law of the case. The trial court had the inherent authority and duty to adjudicate whether it had jurisdiction over the matter before it. See *Dutton v. City of Midwest City*, 2015 OK 51, ¶ 15, 353 P.3d 532. Because the trial court had jurisdiction to determine it lacked subject matter jurisdiction and to enter an order dismissing the case, it also had jurisdiction to rule on Coffey's request for prevailing party attorney fees. The trial court's order denying attorney fees was ancillary to the underlying dismissal. Even if the trial court lacks subject matter jurisdiction over the merits of the case, it retains jurisdiction to adjudicate an application for attorney fees and costs. See *Brown v. Desert Christian Ctr.*, 122 Cal. Rptr. 3d 590, 594-596 (Cal. Ct. App. 2011) (costs incidental to judgment of

dismissal); *New v. Dumitrache*, 604 S.W.3d 1, 20 (Tenn. 2020) (attorney fees incurred in determining the trial court lacked jurisdiction); see also *In re De-Annexation of Certain Real Property from the City of Seminole*, 2007 OK 95, ¶¶ 18-22, 177 P.3d 551 (reviewing the correctness of the trial court's order denying attorney fees after holding the trial court lacked subject matter jurisdiction over the merits of the case).

¶18 Applications for attorney fees and costs are routinely filed *after* a case has been dismissed. The parties have 30 days *after* the filing of the judgment, decree, or appealable order to file an application for attorney fees and costs. See 12 O.S.Supp.2012 § 696.4(B); *Haggard v. Haggard*, 1998 OK 124, ¶ 13, 975 P.2d 439 ("If a party files a motion for new trial following the entry of a judgment, decree, or appealable order, we interpret § 696.4 to mean that the party will have thirty days after the filing of the order disposing of her motion for new trial within which to file her attorneys' fee application."). The February 15, 2018 order dismissing the case for lack of subject matter jurisdiction was an appealable order. Coffey timely filed his application for attorney fees on March 16, 2018. The trial court's prior order dismissing the case for lack of subject matter jurisdiction did not inhibit Coffey's right to request attorney fees or the trial court's power to rule on such a request.

B. Prevailing Party

¶19 Title 12, § 936 provides, in pertinent part:

*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.***

12 O.S.2011 § 936(A) (emphasis added). The most obvious prevailing party is the single party for whom judgment is rendered after a trial on the merits. Here, the case was disposed of without a judgment for either party. The trial court dismissed the action with prejudice. The issue on appeal is whether a defendant is the “prevailing party” when the court dismisses the action with prejudice for lack of subject matter jurisdiction.

¶10 Statutes allowing an award of attorney fees are to be strictly construed. See *Beard v. Richards*, 1991 OK 117, ¶ 12, 820 P.2d 812, 816. The fundamental purpose of statutory construction is to ascertain and give effect to the intent of the Legislature. See *In re City of Durant*, 2002 OK 52, ¶ 13, 50 P.3d 218. To do this, we first look to the language of the statute. *Id.* If the statutory language is clear and unambiguous, this Court must apply the plain and ordinary meaning of the words. *Id.* Only when the legislative intent cannot be determined from the statutory language due to ambiguity or conflict should rules of statutory construction be employed. See *Keating v. Edmondson*, 2001 OK 110, ¶ 8, 37 P.3d 882.

¶11 We are guided by our prior decisions construing “prevailing party,” as used in various attorney fees statutes. *Carter v. Rebrecht*, 1940 OK 500, 108 P.2d 546,

involved the then-effective usury statute. In an action to recover the penalty for usury, the prevailing party was entitled to a reasonable attorney fee. See 15 O.S.1931 § 268. This Court found the defendant was not the prevailing party where the plaintiff dismissed the action without prejudice before trial. See *Carter*, 1940 OK 500, ¶ 13, 108 P.2d at 548. In doing so, we defined "prevailing party" as the party who prevails on the merits as determined by final judgment:

[T]he court has regarded as the prevailing party, the party who prevailed on the merits, and has regarded as the losing party, and the party subject to the additional penalty of an attorney's fee for his adversary, the party who lost upon the merits. That is, it appears to have been the policy to tax the attorney's fee only in those cases where the other party was determined by final judgment to be the losing party on the issue of the usury penalty. And while we have not before considered the question of the claim for an attorney's fee where the usury claim was dismissed without prejudice before trial, we are inclined to the view that a person so dismissing such claim should not be held to be the losing party on the issue of usury. He has not finally lost upon that issue for he might subsequently refile his action and might there prevail on the merits. While a defendant might be said to prevail on the pleadings or in the action when the plaintiff dismisses without prejudice, yet he has not finally prevailed upon the issue tendered in plaintiff's petition.

Carter, 1940 OK 500, ¶ 11, at 548.

¶12 In *Swan-Sigler, Inc. v. Black*, 1966 OK 90, 414 P.2d 300, we looked at statutory attorney fees in a lien foreclosure. Title 42, § 176 provided: "In an action brought to enforce any lien the party for whom judgment is rendered shall be entitled to recover a reasonable attorney's fee, to be fixed by the court, which shall be taxed as costs in the action." 42 O.S.1961 § 176. Although this particular fees

statute does not use the term "prevailing party," we observed the interchangeability of "the party for whom judgment is rendered" and "prevailing party":

We believe that the use of the words "prevailing party" by this court . . . meant merely the one for whom judgment is rendered, meaning, of course, a judgment upon the validity or invalidity of the lien. In the present case no judgment was entered for or against anyone adjudging that the plaintiff did or did not have a valid lien against the property of the defendants The issue of the validity of the lien was removed from this lawsuit by the filing of a voluntary dismissal by the plaintiff.

Swan-Sigler, 1966 OK 90, ¶ 7, 414 P.2d at 302. We found the defendants were not prevailing parties where the plaintiff dismissed the case. See *id.* ¶ 7, at 301-302.

¶13 In *General Motors Acceptance Corp. v. Carpenter*, 1978 OK 39, 576 P.2d 1166, we relied on our decisions in *Carter* and *Swan-Sigler*. The attorney fees statute for a replevin action provided: "The judgment rendered in favor of the prevailing party in such action may include a reasonable attorney fee to be set by the court, to be taxed and collected as costs." 12 O.Supp.1977 § 1580. We found "the right to attorney fees, taxed as costs, attaches only on behalf of a party who prevails on the merits." *General Motors*, 1978 OK 39, ¶ 4, 576 P.2d at 1167.

¶14 This Court reaffirmed our definitions of "prevailing party" in *Underwriters at Lloyd's of London v. North American Van*, 1992 OK 48, 829 P.2d 978. Title 12, § 940 provided, in pertinent part:

In any civil action to recover damages for the negligent or willful injury to property and any other incidental costs related to such action, the prevailing party shall be

allowed reasonable attorney's fees, court costs and interest to be set by the court and to be taxed and collected as other costs of the action.

12 O.S.1981 § 940(A). After reviewing this Court's "prevailing party" jurisprudence, we held: "Our interpretation is that 'prevailing party' as used in § 940 of Title 12 is the party for whom judgment is rendered." *Underwriters*, 1992 OK 48, ¶ 10, 829 P.2d at 981. The jury returned a verdict finding defendant liable for negligence. See *id.* ¶ 10, at 981. The defendant appealed the amount of damages but did not appeal the finding of negligence. *Id.* The 10th Circuit Court of Appeals reduced the amount of damages. *Id.* This Court concluded that, although the defendant was successful in limiting the plaintiff's damages, it did not prevail on the claim for negligent injury to property. *Id.* Because the successful defense did not result in a judgment for the defendant, it was not the prevailing party. *Id.* ¶ 11, at 981.

¶15 Coffey cites *Professional Credit Collections, Inc. v. Smith*, 1997 OK 19, 933 P.2d 307, as the sole legal authority supporting his argument that by securing the dismissal with prejudice he is the prevailing party. Coffey argues that he was granted affirmative relief when the case was dismissed with prejudice and, according to *Professional Credit*, is entitled to attorney fees.

¶16 In *Professional Credit*, a collection agent secured a default judgment against the formerly married defendants and sought to garnish the wife's wages. See *id.* ¶ 4, at 309. The trial court later vacated the default judgment and allowed the wife additional time to answer. *Id.* ¶ 5, at 309. Before the wife filed an answer, the collection agent dismissed her as a defendant. *Id.* The wife then sought attorney

fees pursuant to 12 O.S.1991 § 936. *Id.* ¶ 7, at 309. The trial court denied the request, and the Court of Civil Appeals affirmed. *Id.* ¶ 7, at 309-310.

¶17 On certiorari, this Court stated:

The definition of a prevailing party cannot narrowly be confined to one who obtains *judgment* after a trial on the merits. The operative factor under § 936 is *success*, not the particular stage at which success is achieved. When [the wife] prevailed in the judgment's vacation, she, as recipient of affirmative relief, clearly became the successful party.

Prof'l Credit, 1997 OK 19, ¶ 12, 933 P.2d at 311 (footnote omitted) (emphasis original). In defining prevailing party, we focused on whether "affirmative relief" had been granted to the defendant, rather than our traditional definitions.⁴ While the opinion does not explicitly address why an expanded or alternative definition was applied, from the outset, this Court recognized the interplay of 12 O.S. § 684 and 12 O.S. § 936 present in *Professional Credit*. See *id.* ¶ 8, at 310. At the time, 12 O.S.1991 § 684 provided, in pertinent part: "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." (emphasis added). In *Professional Credit*, we reasoned

⁴ We did not rely on our prior interpretations of "prevailing party" in *Carter*, *Swan-Sigler*, *General Motors*, or *Underwriters*. Rather, this Court cited a federal district court decision that a plaintiff who has entered into a settlement of her Title VII claim is a prevailing party within the meaning of how that term is used in 42 U.S.C. § 2000e-5(k). See *Prof'l Credit Collections, Inc. v. Smith*, 1997 OK 19, n.6, 933 P.2d 307, 311 (citing *Parker v. Matthews*, 411 F.Supp. 1059 (U.S.D.C. 1976)). This Court also relied on *Kelly v. Maupin*, 1936 OK 344, ¶ 14, 58 P.2d 116, 118, where we held the right of a plaintiff to dismiss an action does not destroy a previous court order awarding attorney fees. See *Prof'l Credit*, 1997 OK 19, n.7, 933 P.2d at 311.

that “[t]he test for an effective cost-escaping § 684 voluntary dismissal does not depend on whether a prevailing party has yet been determined. Instead, the key is whether, before plaintiff’s voluntary dismissal, the defendant has requested affirmative relief against the plaintiff.” 1997 OK 19, ¶ 9, 933 P.2d at 310. Harmonizing § 684 and § 936, we determined that the wife’s motion to vacate the default judgment was a request for affirmative relief and the trial court’s ruling in the wife’s favor made her a prevailing party for purposes of 12 O.S. § 936. See *id.* ¶ 10, at 310. “[T]he collection agent’s] statutory power to dismiss an action does not include the authority to wipe the slate clean of *prior orders* in the case which bear directly on its counsel-fee liability.” *Proff’l Credit*, 1997 OK 19, ¶ 12, 933 P.2d at 311 (emphasis original).

¶18 For more than half a century, we consistently interpreted “prevailing party” as one who prevails on the merits of the action or for whom final judgment is rendered. Just five years after *Underwriters*, we appeared to have reversed course in *Professional Credit*. The Court determined that the trial court’s interlocutory decision to vacate the default judgment against the defendant, coupled with the plaintiff’s voluntary dismissal, elevated the defendant to prevailing party status. The result was that, although the defendant had not prevailed on the merits or obtained a judgment in her favor, she was deemed the prevailing party for purposes of 12 O.S. § 936. This was an undeniable divergence from our prevailing party jurisprudence.

¶19 After *Professional Credit*, we quickly returned to our traditional understanding that a prevailing party is one who prevails on the merits or for whom final judgment is rendered.⁵ In fact, in the 23 years since *Professional Credit* was decided, this Court has never cited it for the definition of “prevailing party.” The Court of Civil Appeals has, likewise, been extremely hesitant to apply *Professional Credit*.⁶ So much so, the case has been found to be controlling in only one reported decision, which presented facts nearly identical to those in *Professional Credit*.⁷

⁵ See *Tulsa Adjustment Bureau, Inc. v. Calnan*, 2018 OK 60, ¶ 4, 427 P.3d 1050 (“To qualify as such, [12 O.S. § 936] requires TAB to have prevailed on those fee-bearing claims, meaning that TAB must first have obtained a judgment in its favor on those claims before it could be eligible for an attorney-fee award.”); *Sooner Builders & Invs., Inc. v. Nolan Hatcher Constr. Servs., LLC*, 2007 OK 50, ¶ 17, 164 P.3d 1063 (“Coinciding with its ordinary meaning, ‘prevailing party,’ as a legal term of art, means the successful party who has been awarded some relief on the merits of his or her claim.”) (emphasis original); *Tibbetts v. Sight ‘n Sound Appliance Ctrs., Inc.*, 2003 OK 72, ¶ 23, 77 P.3d 1042 (“[W]e hold that here without some judgment or judicial decree that has changed the relationship between the parties so that defendant is judicially required to do something, i.e., some enforceable judgment, plaintiffs cannot be said to be the successful or prevailing parties entitled to an award of attorney fees.”); *GRP of Tex., Inc. v. Eateries, Inc.*, 2001 OK 53, ¶ 7, 27 P.3d 95 (“When prevailing party status is the statutory prerequisite for awarding attorney’s fees we have defined the prevailing party as the party possessing an affirmative judgment at the conclusion of the entire case.”); *Goodwin v. Durant Bank & Trust*, 1998 OK 3, n.11, 952 P.2d 41 (“A prevailing party is one in whose favor judgment was rendered.”).

⁶ See, e.g., *Waits v. Viersen Oil & Gas Co.*, 2020 OK CIV APP 2, 456 P.3d 1149 (survey of appellate decisions citing *Professional Credit*); *Mill Creek Lumber & Supply Co. v. Bichsel*, 2015 OK CIV APP 26, 347 P.3d 295 (holding the defendant is not the prevailing party when, after four years of litigation, the plaintiff dismissed the case with prejudice before trial); *Austin Place, LLC v. Marts*, 2015 OK CIV APP 2, 341 P.3d 693 (holding the defendant is not the prevailing party when the plaintiff dismissed the forcible the entry and detainer claim after the trial court pronounced its ruling that the claim was barred by the statute of limitations and signed a minute order but before final judgment was entered for the defendant); *Hastings v. Kelley*, 2008 OK CIV APP 36, 181 P.3d 750 (holding the defendant is not the prevailing party when the trial court denied the plaintiff’s application for a temporary injunction and, thereafter, the plaintiff dismissed the suit without prejudice).

⁷ See *Capital One Bank v. Parsons*, 2009 OK CIV APP 71, ¶ 5, 217 P.3d 636; see also *Waits*, 2020 OK CIV APP 2, ¶ 10 (“[T]o date, [*Professional Credit*] had not been positively applied in a prevailing party fee question outside of one factual situation – a dismissal by the plaintiff after a default judgment was vacated.”).

Additionally, 12 O.S. § 684 has since been amended and the “affirmative relief” language relied on by this Court in *Professional Credit* has been removed from the statute.⁸

¶20 For these reasons, *Professional Credit* must be confined to its facts. The facts in this case are clearly distinguishable. Therefore, *Professional Credit* does not apply directly or by analogy. Furthermore, our decision in *Professional Credit* did not dismantle this court’s long-standing interpretation that a “prevailing party” is one who prevails on the merits of the action or for whom final judgment is rendered.

¶21 Coffey argues he prevailed in the litigation insofar as the proceeding was improperly brought in state court. He is absolutely correct that he prevailed on his motion to dismiss. When the trial court granted the dismissal, it summarily

⁸ The 2013 amendments to 12 O.S. § 684 removed the “affirmative relief” language. See 12 O.S.Supp.2013 § 684 (amended by Laws 2013, 1st Extr. Sess., SB 2, c. 13, § 6). The Court of Civil Appeals has questioned the continued viability of the “affirmative relief” rule from *Professional Credit*. See *Waits*, 2020 OK CIV APP 2, ¶¶ 10-14; *Mill Creek*, 2015 OK CIV APP 26, ¶ 20. In *Waits*, the Court of Civil Appeals aptly observed:

We find it evident that there are limits to the reach of *Professional Credit*. If the legislature intended that any form of relief granted before dismissal of a fee-bearing case, however minimal, makes the non-dismissing party a “prevailing party” entitled to full statutory attorney fees, it has had numerous opportunities to state so. Instead, the amendment of § 684 in 2013 required only that a party who dismisses after pretrial must pay costs upon refiling. If the Legislature intended the more punitive regime that an unrestricted application of *Professional Credit* would create (dismissal after any affirmative relief require the dismissing party to pay prevailing party fees) it had a perfect opportunity to do so when it amended § 684. It did not do so.

disposed of the case. However, there is a critical distinction between prevailing on a dispositive motion that terminates the case and prevailing on the merits of the action. In *Carter v. Rebrecht*, 1940 OK 500, 108 P.2d 546, we said: “[A] defendant might be said to prevail on the pleadings or in the action when the plaintiff dismisses without prejudice, yet he has not finally prevailed upon the issue tendered in plaintiff’s petition.” *Id.* ¶ 11, at 548. Coffey did not finally prevail upon the issue tendered in Comanche Nation’s amended petition. The issue tendered was whether Coffey was indebted to Comanche Nation for the amount of the outstanding balance on the open account. This issue was removed for determination when the trial court dismissed the case. The trial court never made a determination on the merits of Comanche Nation’s declaratory judgment action. Rather, the trial court dismissed the case for lack of subject matter jurisdiction. A court does not have power to decide an issue on the merits or enter judgment if it does not have jurisdiction over the subject matter. No judgment was entered for or against any party in this case.⁹

⁹ We reject Coffey’s suggestion that the dismissal with prejudice is the equivalent of a judgment on the merits. In *Mill Creek*, the Court of Civil Appeals accurately explained:

[T]he cases cited for this proposition do not hold that such a dismissal constitutes an adjudication on the merits of a plaintiff’s claims for all legal purposes, including recovery of prevailing party attorney fees—they clearly hold that the legal effect of such a dismissal with prejudice is the same as that of a judgment in prohibiting a plaintiff (or any claiming party) from reasserting the dismissed claims.

¶122 Coffey has not prevailed on the merits nor has final judgment been rendered in his favor. Therefore, we hold Coffey is not a prevailing party for purposes of an award of attorney fees under 12 O.S. § 936.¹⁰ We affirm the trial court's order denying Coffey's motion for attorney fees.

¶123 Our conclusion does not offend Coffey's right to equal access to the courts. See *Profl Credit*, 1997 OK 19, n.11, 933 P.2d 307, 311 (citing *Thayer v. Phillips Petroleum Co.*, 1980 OK 95, 613 P.2d 1041). Title 12, § 936 does not treat the defendant who obtains a dismissal for lack of subject matter jurisdiction different from the plaintiff who successfully defeats the motion to dismiss. Neither is entitled to prevailing party attorney fees. The statute applies equally to the plaintiff or the defendant who ultimately prevails on the merits of the action or for whom final judgment is rendered.

¶124 Some may view it as inequitable to deny an award of attorney fees to the defendant when the plaintiff files a lawsuit in a court without jurisdiction over the subject matter. Whether a party is entitled to an award of attorney fees pursuant to 12 O.S. § 936 is not determined based on equitable considerations. "[E]ach litigant bears the cost of his/her legal representation and our courts are without authority to assess and award attorney fees in the absence of a specific statute or a specific contract therefor between the parties." *Kay v. Venezuelan Sun Oil Co.*, 1991 OK 16, ¶ 5, 806 P.2d 648, 650. Statutes allowing the award of attorney fees

¹⁰ Today's decision is consistent with the 10th Circuit Court of Appeals' decision in *GHK Exploration Co v. Tenneco Oil Co.*, 857 F.2d 1388 (10th Cir. 1988).

are strictly construed. See *Beard v. Richards*, 1991 OK 117, ¶ 12, 820 P.2d 812, 816. Section 936 authorizes an award of attorney fees to the prevailing party and, for the reasons stated, Coffey is not the prevailing party.

IV. CONCLUSION

¶25 A prevailing party is one who prevails on the merits of the action or for whom final judgment is rendered. When the trial court dismissed the case with prejudice for lack of subject matter jurisdiction, it did not make a determination on the merits or enter final judgment. While Coffey was successful on his motion to dismiss, he has not prevailed on the merits nor has final judgment been rendered in his favor. Therefore, Coffey is not entitled to prevailing party attorney fees under 12 O.S. § 936.

ORDER OF THE DISTRICT COURT IS AFFIRMED.

CONCUR: Darby, V.C.J., Winchester, Edmondson, Colbert, and Kane, JJ.

CONCUR IN RESULT: Rowe, J.

DISSENT: Gurich, C.J., Kauger (by separate writing), and Combs (by separate writing), JJ.