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9

10 **IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE**
11 **STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

12 In Re SRBA

13 Case No. 39576
14

Subcase Numbers 55-10288B, 55-10289B, 55-
10290B, 55-10292B, 55-10293B, 55-10295,
55-10296, 55-10297B, 55-10298, 55-10299B,
55-10300, 55-10301B, 55-10303B, 55-13451,
55-13846 and 55-13844

15 **LU RANCHING CO.'S NOTICE OF**
16 **LODGING OF STATE AUTHORITY IN**
17 **SUPPORT OF REPLY TO UNITED**
18 **STATES' MEMORANDUM IN SUPPORT**
19 **OF UNITED STATES' MOTION TO**
20 **DISALLOW COSTS**

21 PLEASE TAKE NOTICE THAT LU Ranching Co., Inc, is lodging with the Court this day a true
22 and correct copy of an unpublished authority from the State of Ohio cited in its Reply Brief, namely
23 *Federal Deposit Insurance Corporation v. Chaney*, 1986 WL 1283 (Ohio App. 8 Dist., January 30,
1986).

24 Dated: June 7, 2005

Respectfully submitted:

25 McQUAID BEDFORD & VAN ZANDT LLP

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28 MICHAEL J. VAN ZANDT
ELIZABETH P. EWENS

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Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR
 REPORTING OF OPINIONS AND WEIGHT OF
 LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
 County.

**FEDERAL DEPOSIT INSURANCE
 CORPORATION**, Plaintiff-Appellant

v.

E. Bruce CHANEY, Defendant-Appellee.
No. 48798.

Jan. 30, 1986.

Civil appeal from Common Pleas Court

Case No. 947418

Robin G. Weaver, Barbara A. Rutigliano, Squire,
 Sanders & Dempsey, Cleveland, Ohio, for plaintiff-
 appellant.

John A. Hallbauer, Ebert Weidner, Parks, Eisele &
 Bates, Cleveland, Ohio, for defendant-appellee.

STILLMAN, Presiding Judge (retired of the Eighth
 Appellate District, sitting by assignment).

*1 The Federal Deposit Insurance Corporation
 (hereafter FDIC) seeks reversal of an award to
 appellee W. Bruce Chaney of attorney fees and
 expenses pursuant to Section 2412, Title 28,
 U.S.Code.

In an earlier decision, [FN1] this court reversed a
 jury verdict finding Chaney not liable on two
 negotiable notes issued by him to the non-defunct
 Northern Ohio Bank. While the matter was pending
 on appeal, appellee Chaney filed an application in the
 lower court for fees and expenses pursuant to Section
 2412, Title 28, U.S.Code.

The trial court found, among other things, that the
 defendant was the prevailing party on the merits of
 the civil contract action; that the defendant was an
 eligible "party" under Section 2412(d)(2)(B), Title
 28, U.S.Code; and that the position of plaintiff FDIC

in connection with the litigation was not substantially
 justified. Attorney fees and expenses in the amount
 of \$34,404.97, plus interest, were awarded to
 defendant Chaney.

Plaintiff FDIC appeals the award, assigning two
 errors. [FN2]

ASSIGNMENT OF ERROR NO. I:

I. THE TRIAL COURT ERRED IN GRANTING
 DEFENDANT-APPELLEE'S APPLICATION FOR
 ATTORNEY FEES AND EXPENSES PURSUANT
 TO 28 U.S.C. § 2412(d).

Appellant FDIC argues and appellee Chaney
 concedes that Chaney is not entitled to attorney fees
 and expenses since he is not the prevailing party by
 virtue of this court's reversal of the decision of the
 trial court and entry of judgment on behalf of FDIC.
 Appellant also asserts that the position of the United
 States in the underlying action was substantially
 justified.

Section 2412(d)(1)(A), Title 28, U.S.Code, provides
 in pertinent part:

Except as otherwise specifically provided by
 statute, a court shall award to a *prevailing party*
 other than the United States fees and other
 expenses * * * incurred by that party in any civil
 action * * * brought by * * * the United States in
 any court having jurisdiction of that action, *unless*
the court finds that the position of the United States
was substantially justified or that special
 circumstances make an award unjust. (Emphasis
 added)

Accordingly, since appellee Chaney was not the
 prevailing party and the position of appellant FDIC
 was substantially justified, we hold that the award of
 attorney fees was not authorized by the applicable
 statute.

However, we find that there is no merit to appellant's
 contentions that appellee waived his right to attorney
 fees during trial and that his application for attorney
 fees and expenses was not timely filed.

The application for attorney fees must be made
 within thirty days of final judgment, according to
Section 2412(d)(1)(B), Title 28, U.S.Code.

Appellant's motion for a new trial and/or judgment notwithstanding the verdict was overruled on June 21, 1983. That was the final judgment of the trial court as provided by App.R. 4(A). Since the application was filed on July 18, 1983, we hold it was timely.

The first assignment of error has merit in that it was error to award attorney fees and expenses.

ASSIGNMENT OF ERROR NO. II:

II. THE TRIAL COURT ERRED IN GRANTING THE FULL AMOUNT OF DEFENDANT-APPELLEE'S APPLICATION FOR ATTORNEY'S FEES AND EXPENSES PURSUANT TO 28 U.S.C. § 2412(d).

*2 Appellant's second assignment of error that the award itself was excessive is argued only in the alternative should we sustain the award. However, any issue as to the amount is moot because of our holding that it was error to grant the motion for attorney fees and expenses.

Judgment reversed and entered for appellant.

This cause is reversed and judgment entered for appellant.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

DAHLING [FN*], J., concurs.

BROWN [FN**], J., not participating.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

FN1. Federal Deposit Insurance Corporation v. Chaney (June 14, 1984), Cuyahoga App.

No. 47178, unreported.

FN2. The principles of judicial economy, as well as the economy of the parties, would have been better served had the appellant filed a motion with the trial court pursuant to Civ.R. 60(B)(4) which provides relief from judgment where the prior judgment upon which a challenged judgment is based has been reversed, as happened here.

FN* *Sitting by assignment:* Judge Alfred E. Dahling of the Eleventh Appellate District.

FN** Justice William B. Brown, retired of the Supreme Court of Ohio, heard oral arguments in this case but died before journalization of this entry.

1986 WL 1283 (Ohio App. 8 Dist.)

END OF DOCUMENT

1 **CERTIFICATE OF SERVICE**

2 I certify that on June 7, 2005, I served a true and correct copy of foregoing **LU RANCHING**
3 **CO.S' NOTICE OF LODGING OF STATE AUTHORITY IN SUPPORT OF REPLY TO**
4 **UNITED STATES' MEMORANDUM IN SUPPORT OF UNITED STATES' MOTION TO**
5 **DISALLOW COSTS** upon the following individuals by placing the document in the United States
6 Mail, postage paid, and addressed as follows:

7 U.S. Department of Justice
8 General Litigation Section
9 Environment and Natural Resources Division
10 550 West Fort Street, MSC 033
11 Boise, ID 83724

12 Larry Brown
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20 State of Idaho
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