

RECEIVED

NOV 23 2005

Department of Water Resources

Michael J. Van Zandt (Cal. SBN 096777)
Elizabeth P. Ewens (Cal. SBN 213046)
McQUAID BEDFORD & VAN ZANDT LLP
221 Main Street, 16th Floor
San Francisco, CA 94105
Telephone: 415/905-0200
Facsimile: 415/905-0202

ROGER D. LING (Idaho SBN 1018)
LING, ROBINSON & WALKER
P.O. Box 396
Rupert, Idaho 83350
Telephone: (208) 436-4717
Facsimile: (208) 436-6804

Attorneys for Joyce Livestock

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

In Re SRBA

Subcase Numbers 55-10135, 55-11061,
55-11385 and 55-12452

Case No. 39576

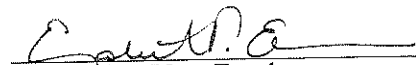
**Joyce Livestock's Notice of Lodging of
State Authority in Support of Reply Brief
in Opposition to United States' Motion to
Disallow Costs**

PLEASE TAKE NOTICE THAT Joyce Livestock is lodging with the Court this day a true and correct copy of an unpublished authority from the State of Ohio cited in its Reply Brief, namely *Federal Deposit Insurance Corporation v. Chaney*, 1986 WL 1283 (Ohio App. 8 Dist., January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

Dated this 18 day of November, 2005.

Respectfully submitted,
McQUAID BEDFORD &
VAN ZANDT, LLP

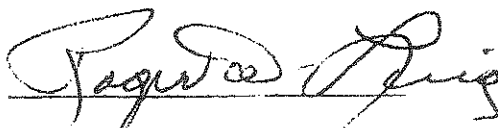
By:


Michael J. Van Zandt
Elizabeth P. Ewens

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Dated this 18th day of November, 2005.

LING, ROBINSON & WALKER

By: 
ROGER D. LING

Attorneys for Joyce Livestock

MB
VZ

Joyce Livestock's Notice of Lodging State Authority

1
2
3 **CERTIFICATE OF SERVICE**

4 I certify that on Nov. 18, 2005, I served a true and correct copy of the foregoing
5 **Joyce Livestock's Notice of Lodging State Authority** upon the following individuals by placing
the document in the United States Mail, postage paid, and addressed as follows:

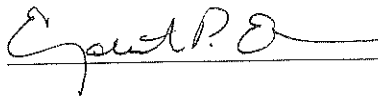
6 U.S. Department of Justice
7 General Litigation Section
8 Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, ID 83724

9 Larry Brown
10 Attorney, U.S. Dept. of Justice
General Litigation Section
11 Environment and Natural Resources Division
550 West Fort Street, MSC 033
Boise, Idaho 83724

12 Chief, Natural Resources Division
13 Office of the Attorney General
State of Idaho
14 P.O. Box 44449
Boise, ID 83720-0098

15 IDWR Document Depository
16 P.O. Box 83720
Boise, ID 83720-0098

17 Mr. Paul Nettleton
18 Joyce Livestock
14568 Joyce Ranch Road
19 Murphy, ID 83650

20 
21
22
23
24
25
26
27

H

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. 1:

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.

Not Reported in N.E.2d, 1986 WL 1283 (Ohio App. 8 Dist.)

END OF DOCUMENT