

1995

Mark Plaskon v. Darwin S. Hayes, Beth Hayes, Duane H. Jenkins, Carma Jenkins, dba Double D Storage Garages : Brief of Appellee

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

James Hanks; Rori Hendrix; Hanks & Rooker; attorneys for respondents.

John T. Caine; Richards, Caine & Allen; attorney for appellant.

Recommended Citation

Brief of Appellee, *Plaskon v. Hayes*, No. 950758 (Utah Court of Appeals, 1995).

https://digitalcommons.law.byu.edu/byu_ca1/6987

This Brief of Appellee is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

MARK PLASKON,

:

Plaintiff/Appellant,

:

vs.

:

Case No. 950758CA

DARWIN S. HAYES, BETH HAYES,
DUANE H. JENKINS, CARMA JENKINS,
dba DOUBLE D STORAGE GARAGES

:

:

:

:

:

Priority 15 UTAH SUPREME COURT
UTAH DOCUMENT BRIEF
KFD
45.9
.59
DOCKET NO. 950758CA

Defendants/Appellees.

BRIEF OF APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
THE HONORABLE JON M. MEMMOTT, JUDGE

JOHN T. CAINE [0536]
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401
Attorney for Plaintiff/Appellant

JAMES B. HANKS [4331]
RORI HENDRIX [7298] for:
HANKS & ROOKER, P.C.
The Judge Building, Suite 740
8 East Broadway
Salt Lake City, Utah 84111-2204
Attorneys for Defendants/Appellees

FILED

FEB 14 1996

IN THE UTAH COURT OF APPEALS

MARK PLASKON,	:	
Plaintiff/Appellant,	:	
vs.	:	Case No. 950758CA
DARWIN S. HAYES, BETH HAYES,	:	Priority 15
DUANE H. JENKINS, CARMA JENKINS,	:	
dba DOUBLE D STORAGE GARAGES	:	
Defendants/Appellees.	:	

BRIEF OF APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE
SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
THE HONORABLE JON M. MEMMOTT, JUDGE

JOHN T. CAINE [0536]
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401
Attorney for Plaintiff/Appellant

JAMES B. HANKS [4331]
RORI HENDRIX [7298] for:
HANKS & ROOKER, P.C.
The Judge Building, Suite 740
8 East Broadway
Salt Lake City, Utah 84111-2204
Attorneys for Defendants/Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF JURISDICTION	1
DETERMINATIVE STATUTES	1
STATEMENT OF CASE, COURSE OF PROCEEDINGS, AND DISPOSITION IN COURT	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THIS COURT SHOULD DISMISS PLASKON’S APPEAL AS UNTIMELY	7
II. THIS COURT SHOULD REFUSE TO HEAR PLASKON’S APPEAL BECAUSE HE FAILED TO PRESERVE HIS ARGUMENTS FOR APPEAL	9
III. THE TRIAL COURT’S AWARD OF DAMAGES WAS PROPER	10
IV. THE TRIAL COURT DID NOT ERR IN DENYING PLASKON COMPENSATORY DAMAGES FOR LOSS OF ALLEGED FUTURE BUSINESS INCOME	11
V. THIS COURT SHOULD AWARD DOUBLE D DAMAGES FOR DEFENDING PLASKON’S FRIVOLOUS AND UNTIMELY APPEAL	13
CONCLUSION	15
ADDENDUM	17

TABLE OF AUTHORITIES

RULES:

Utah Rules of Appellate Procedure, Rule 4(a)	1, 7
Utah Rules of Appellate Procedure, Rule 11(e)(2)	1, 9
Utah Rules of Appellate Procedure, Rule 33(a)	1, 14
Utah Rules of Appellate Procedure, Rule 33(b)	1, 14

CASES:

<u>Auburn Harpswell Ass’n. v. Day</u> , 438 A.2d 234 (Me. 1981)	14
<u>Backstrom Family Ltd. Partnership v. Hall</u> , 751 P.2d 1157 (Utah App. 1988)	14
<u>Cannon v. Keller</u> , 692 P.2d 740 (Utah 1984)	7
<u>Cook Associates, Inc. v. Warnick</u> , 664 P.2d 1161 (Utah 1983)	12
<u>Dove v. Cude</u> , 710 P.2d 170 (Utah 1985)	7
<u>First Sec. Bank of Utah, N.A. v. J.B.J. Feedyards, Inc.</u> , 653 P.2d 591 (Utah 1982)	12
<u>Henderson v. For-Shor Co.</u> , 757 P.2d 465 (Utah App. 1988)	10
<u>Horton v. Gem State Mut. of Utah</u> , 794 P.2d 847 (Utah App. 1990)	10
<u>Howard v. Ostergaard</u> , 515 P.2d 442 (Utah 1973)	12
<u>Maughan v. Maughan</u> , 770 P.2d 156 (Utah App. 1989)	15
<u>McNair v. Hayward</u> , 666 P.2d 321 (Utah 1983)	7
<u>Porco v. Porco</u> , 752 P.2d 365 (Utah App. 1988)	14
<u>Ron Shepherd, Inc. v. Sheilds</u> , 882 P.2d 650 (Utah 1994)	8
<u>Sampson v. Richins</u> , 770 P.2d 998 (Utah App. 1989)	10
<u>Sawyers v. FMA Leasing Co.</u> , 722 P.2d 773 (Utah 1986)	13

<u>Smith v. Vuicich</u> , 699 P.2d 763 (Utah 1985)	10
<u>State v. Archambeau</u> , 820 P.2d 920 (Utah App. 1991)	11
<u>State v. Brown</u> , 856 P.2d 358 (Utah App. 1993)	10
<u>State v. Nine Thousand One Hundred Ninety-Nine Dollars</u> , 791 P.2d 213 (Utah Ct. App. 1990)	10
<u>State v. Pugmire</u> , 898 P.2d 271 (Utah App. 1985)	11
<u>State v. Sepulveda</u> , 842 P.2d 913 (Utah App. 1992)	11

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this matter pursuant to Section 78-2a-3(2)(h) of the Utah Code.

DETERMINATIVE STATUTES

Appeal from final judgment and order. In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from.

Utah Rules of Appellate Procedure, Rule 4(a)

Transcript required of all evidence regarding challenged finding or conclusion. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript. Utah Rules of Appellate Procedure, Rule 11(e)(2)

Damages for delay or frivolous appeal. Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney. Utah Rules of Appellate Procedure, Rule 33(a)

Definitions. For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief or other paper. Utah Rules of Appellate Procedure, Rule 33(b)

**STATEMENT OF CASE, COURSE OF
PROCEEDINGS, AND DISPOSITION IN COURT**

The Plaintiff, Mark Plaskon (hereafter “Plaskon”), filed this action on November 21, 1989 to recover damages he claimed to have sustained as a result of the Respondents’ (hereafter “Double D”) alleged conversion of his personal property. In his Complaint, Plaskon alleged that Double D wrongfully sold certain items of his property which had been stored in the Double D Storage Garage, a self-storage facility owned by Double D. Plaskon claimed that Double D sold his property without giving him proper notice and without following proper procedures. Double D answered Plaskon’s Complaint and raised the defense of “lack of standing to sue,” among others.

On October 4, 1990, the matter was tried without a jury before the Honorable Douglas L. Cornaby. After hearing the evidence presented by both parties, Judge Cornaby found that there was no contract between the parties. As a result of finding a lack of privity of contract, Judge Cornaby ruled that Plaskon did not have standing to sue Double D and dismissed Plaskon’s claims.

On or about November 20, 1990, Plaskon filed a Notice of Appeal, complaining that the Trial Court had ignored evidence which supported the existence of a contract between himself and Double D. On November 22, 1991, the Court of Appeals reversed the Trial Court’s ruling and found that the lower court erred “in finding that no contract existed between Plaintiff and Double D.” Based on the Court’s further finding that Double D’s sale of Plaskon’s property was not conducted pursuant to Utah Code Annotated Section 38-3-1, *et. seq.* (1988), the Court of

Appeals reversed the judgment and remanded for a determination of the damages incurred by Plaskon.

On February 17, 1993, this matter came before the Honorable Jon M. Memmott for trial on the issue of Plaskon's damages. After hearing the evidence, Judge Memmott granted Plaskon judgment in the amount of \$1,392.98, plus ten percent (10%) prejudgment interest from the date of the sale of the decoys, June 10, 1988, through March 4, 1993.¹ However, the Court refused to award any damages for Plaskon's alleged loss of business income.

On or about March 10, 1994, Plaskon filed a Motion To Reconsider, wherein he asked the Court to reconsider its refusal to award him loss of business income (See Addendum). In the form of a signed Minute Entry, the Court denied Plaskon's Motion on September 12, 1994 (See Addendum). On that same date, the Court also signed a Judgment, Order and Findings of Fact and Conclusions of Law, prepared by Plaskon's attorney, which summarized Judge Memmott's February 17, 1993 ruling in the above matter (See Addendum).

Although Judge Memmott had signed a Minute Entry denying Plaskon's request for lost business income, Plaskon submitted an Order Denying Motion to Reconsider to the Judge on March 6, 1995 (See Addendum). The Order was signed on that date.

On April 5, 1995, Plaskon filed his Notice of Appeal (See Addendum).

On June 21, 1995, Double D filed a Memorandum of Points and Authorities in Support of Motion for Summary Disposition, arguing that Plaskon's appeal was not filed in a timely matter

¹The Court calculated Plaskon's damages based upon the amount for which he initially purchased the decoys.

and that, accordingly, Plaskon's appeal should be dismissed and Double D awarded attorney fees and court costs.

On October 2, 1995, Chief Justice Michael D. Zimmerman deferred ruling on Double D's Motion for Summary Disposition until further consideration.

STATEMENT OF FACTS

1. The Defendants (hereafter "Double D") are the owners of the Double D Storage Garages (a self-storage facility), which are located in Bountiful, Utah. (Tr. at 67.)

2. During the period from August 1, 1986 through July 11, 1987, Plaskon resided with his girlfriend, Paulette McFarland, in Bountiful, Utah. (Tr. at 28, 32.)

3. On July 11, 1987, Ms. McFarland contacted one of the Defendants, Carma Jenkins, concerning the rental of storage space in the Double D storage facility. Ms. McFarland indicated that she was having problems with her boyfriend, Mr. Plaskon, and wanted to move him out of her home. She contacted Double D while Plaskon was out of town. (Tr. at 67-70.)

4. Ms. McFarland agreed to rent space 108 in the storage facility and signed a rental agreement. The rental agreement provided for rent of \$40.00 per month and a \$2.00 key deposit. (Defendant's Ex. 1; Tr. at 33-35.)

5. Ms. McFarland further indicated that she was only renting the facility for one month and that Plaskon would need to make arrangements with Double D if he wanted to keep his things stored for a longer period. In accordance with her statement, Ms. McFarland signed another document bearing Mr. Plaskon's name which stated:

I, Mark J. Plaskon, agree to rent storage unit 108 for a period of one month for a total amount of \$40.00 plus \$2.00 key deposit.

The \$2.00 key deposit will be returned upon receipt of key and notification that tenant has vacated unit.

Ms. McFarland signed this document in Mr. Plaskon's name and later gave him a copy. (Tr. at 33-35, 38, 67-70; Plaintiff's Ex. 2.)

6. After Ms. McFarland had rented space 108, she proceeded to move several duck decoys, which belonged to Plaskon, into the storage unit. (Tr. at 45, 47.)

7. Mr. Plaskon's property stayed in the storage facility until August of 1988. Double D testified that during this time, Mr. Plaskon did not contact them for any reason nor did he pay any rent. During this same period of time, Double D attempted to locate Mr. Plaskon to determine what he desired to do with his property. Double D was unsuccessful in its efforts. (Tr. at 73-76, 86-87, 90, 93-94, 96.)

8. In August of 1988, and after having failed to receive any rental payments or direction from Mr. Plaskon as to what should be done with the property, Double D sold the duck decoys contained in the storage facility. The decoys were sold for the amount of \$575.00. The rent owing at that time was approximately \$610.00. (Tr. at 72-79, 96, 104.)

9. In November of 1988, Plaskon went to the storage facility and found that his decoys were gone. He confronted Double D and was told that the decoys had been sold to cover past due rent. This suit then followed. (Tr. at 93-94.)

10. On February 17, 1993, more than three years after Plaskon initiated this matter, the Honorable Jon M. Memmott awarded Plaskon damages in the amount of \$1,392.98, plus 10% prejudgement interest. (R. at 129.) However, the Court denied Plaskon any damages for his alleged loss of business income. (R. at 141-143.)

11. On March 10, 1994, more than one year after Judge Memmott's ruling, Plaskon's attorney filed a Motion to Reconsider the Court's refusal to grant Plaskon damages for loss of business income. (R. at 151.) The Court denied Plaskon's Motion on September 12, 1994, in a signed Minute Entry. (R. at 162). On the above date, the Court also signed a Judgment, Order and Findings of Fact and Conclusions of Law, which summarized the Court's holdings regarding Plaskon's damages. (R. at 153.)

12. On April 5, 1995, almost one year after Judge Memmott denied Plaskon's Motion to Reconsider and signed the Order regarding Plaskon's damages, Plaskon filed an appeal from the Trial Court to the Appellate Court. (R. at 165.)

13. Double D has incurred attorney fees in defending this untimely appeal, which has been brought in violation of Rule 4(a) of the Utah Rules of Civil Procedure.

SUMMARY OF ARGUMENT

Plaskon's appeal should be dismissed because it was not filed in a timely manner. However, if Plaskon's appeal is not dismissed, the Trial Court's judgments should be affirmed on appeal for the following reasons. First, Plaskon's arguments are not supported by the record, inasmuch as he failed to request a trial transcript pursuant to Rule 11(e)(2) of the Utah Rules of Appellate Procedure. Second, the Trial Court's award of damages to Plaskon, based upon the decoys' value at the time they were initially purchased by Plaskon, was proper, in that the Court's findings and conclusions are well supported by the record. Furthermore, Plaskon's request for punitive damages is improper on appeal inasmuch as he failed to initially raise such issue at trial. Third, the Trial Court properly denied Plaskon's request for compensatory damages, in the form of lost business income, because Plaskon failed to establish his lost profits

with reasonable certainty. Finally, this Court should award Double D damages based upon the frivolous nature of Plaskon's appeal.

ARGUMENT

I. THIS COURT SHOULD DISMISS PLASKON'S APPEAL AS UNTIMELY

Rule 4(a) of the Utah Rules of Appellate Procedure provides that:

[I]n a case in which an appeal is permitted as a matter of right from the Trial Court to the Appellate Court, the Notice of Appeal required by Rule 3 shall be filed with the clerk of the Trial Court within thirty (30) days after the date of entry of the Judgment or Order appealed.

Although the Trial Court entered judgment in this matter on September 13, 1994, Plaskon failed to file this appeal until April 5, 1995, in direct violation of Rule 4(a).

Plaskon argues that he had no obligation to file an appeal until thirty days following the Trial Court's signing of an Order denying his Motion to Reconsider, despite the fact that the Trial Court denied Plaskon's Motion in a signed Minute Entry on September 12, 1994. Plaskon reasons that the statute of limitations was tolled until the Court signed an Order formally dismissing his Motion. Plaskon's argument is contrary to established Utah case law. In fact, the Utah Supreme Court has held that "[a] signed minute entry may be a final order for purposes of appeal . . . [if] 'the ruling specifies with certainty a final determination of the rights of the parties and is susceptible of enforcement.'" Dove v. Cude, 710 P.2d 170, 171 n. 1 (Utah 1985) (quoting Cannon v. Keller, 692 P.2d 740, 740 n. 1 (Utah 1984)). See also McNair v. Hayward, 666 P.2d 321, 328 n. 6 (Utah 1983).

The signed Minute Entry in this matter was a final order for purposes of appeal because it specified with certainty that there was no good cause shown in Plaskon's Motion to Reconsider

regarding the issue of lost profits. (R. At 162.) The Minute Entry was also susceptible of enforcement because the parties were put on notice that the Court would not reconsider its failure to award Plaskon compensatory damages for his alleged loss of business income. Accordingly, Plaskon's appeal should have been filed on or before October 12, 1994, within thirty days after the Trial Court signed the Minute Entry.

Plaskon attempted to correct his failure to file a timely appeal by forwarding an Order to Judge Jon M. Memmott, for the purpose of formally denying his Motion. (R. at 163.) Significantly, Plaskon did not file this Order until March 6, 1995, approximately six months after the Judge signed the Minute Entry. Plaskon's filing of an Order with the Court at such a late date was nothing more than a thinly veiled attempt to circumvent the Utah Rules of Civil Procedure. In fact, under Plaskon's rationale, he could have waited another two or three years to file an Order with the Court and would have still preserved his ability to appeal the Court's decision. This Court should not tolerate such circumvention of the legal process nor allow Double D to be prejudiced by such an untimely appeal.

Even if this Court decides that the above Minute Entry was not a final order for purposes of appeal, Plaskon was still obligated to file his appeal on or before October 13, 1994. Utah case law provides that when a Motion to Reconsider is filed prior to the entry of a final judgment or order, the time for filing a Notice of Appeal is not extended because such a motion is "simply a reargument" of the issues raised by the parties at trial. Ron Shepherd, Inc. v. Sheilds, 882 P.2d 650, 653-655 (Utah 1994). This is exactly what occurred in this case. Plaskon filed his Motion to Reconsider before Judge Memmott signed his Findings of Fact, Conclusions of Law and Judgment and Order. Because Plaskon asked the Court to reconsider its ruling regarding loss of

business income in his Motion to Reconsider and because Plaskon brought this Motion before the Judge had entered its Findings and judgment on this case, Plaskon's Motion was nothing more than a reiteration of the arguments he presented to the Court at trial. Accordingly, Plaskon could only have properly appealed Judge Memmott's ruling within 30 days after the Trial Court entered its Findings and judgment on September 13, 1994.

**II. THIS COURT SHOULD REFUSE TO HEAR PLASKON'S APPEAL
BECAUSE HE FAILED TO PRESERVE HIS ARGUMENTS FOR
APPEAL**

The Trial Court's findings should be presumed correct by this Court because Plaskon failed to provide the Court with a trial transcript, pursuant to Rule 11(e)(2) of the Utah Rules of Appellate Procedure, and failed to provide support in the record for his arguments. Rule 11(e)(2) provides:

If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion. Neither the Court nor the appellee is obligated to correct appellant's deficiencies in providing the relevant portions of the transcript.

Although Plaskon's Brief is replete with assertions that the Trial Court improperly weighed "uncontroverted testimony" and rendered improper holdings, Plaskon never supported his assertions with the record, as Rule 11(e)(2) mandates. Hence, although Plaskon purported to marshal evidence in his Brief, Plaskon failed to disprove the Trial Court's findings because he did not support his arguments with the record.

The Utah Court of Appeals has said the following regarding the appellant's obligation under Rule 11(e)(2):

‘If the appellant intends to urge on appeal that a *finding* or *conclusion* is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.’ In essence, Rule 11 directs counsel to provide this court with *all evidence* relevant to the issues raised on appeal. ‘Where the record before us is incomplete, we are unable to review the evidence as a whole and must therefore presume that the verdict was supported by admissible and competent evidence.’

Sampson v. Richins, 770 P.2d 998, 1002 (Utah App. 1989) (quoting Smith v. Vuicich, 699 P.2d 763, 765 (Utah 1985)).

Inasmuch as Plaskon has failed to provide this Court with “an adequate record to preserve [his] arguments for review,” Horton v. Gem State Mut. of Utah, 794 P.2d 847, 849 (Utah App. 1990), and has, consequently, failed to “marshall all the evidence” to support his arguments, Id., his “claim[s] of error [are] ‘merely . . . unsupported, unilateral allegation[s]’ which this Court should refuse to resolve. Horton at 849 (quoting State v. Nine Thousand One Hundred Ninety-Nine Dollars, 791 P.2d 213, 217 (Utah Ct. App. 1990)).

III. THE TRIAL COURT’S AWARD OF DAMAGES WAS PROPER

The general law regarding a Trial Court’s award of damages is that “[i]f there is a reasonably certain basis for it in the evidence, a Trial Court’s award of damages will be affirmed on appeal.” Henderson v. For-Shor Co., 757 P.2d 465, 468 (Utah App. 1988). In the present case, the Trial Court’s award of damages to Plaskon, based upon the value of the decoys when Plaskon purchased them, was proper and should be affirmed on appeal because the Court’s findings and conclusions regarding damages are well supported by the record. The Court did not randomly award damages at its discretion, but carefully considered all of the evidence and testimony brought before it in making its decision. In fact, after receiving all of the evidence on this issue, the Court determined that it could value the decoys in one of four ways. (R. at 127.)

After considering each of these possible valuations and the testimony preferred on each, the Court chose to value the decoys based upon the price they were initially purchased by the Plaintiff. (R. at 127.) Hence, the Court's decision was deliberately made only after considering all of the evidence before it and, accordingly, should be affirmed on appeal.

Plaskon also argues that the Trial Court erred by failing to award him punitive damages. Because Plaskon has initially requested punitive damages on appeal, and not at trial, this Court should not consider Plaskon's request. "Generally, a [party] who fails to bring an issue before the trial court is barred from asserting it initially on appeal." State v. Archambeau, 820 P.2d 920, 922 (Utah App. 1991). See also State v. Pugmire, 898 P.2d 271 (Utah App. 1995), State v. Sepulveda, 842 P.2d 913 (Utah App. 1992) and State v. Brown, 856 P.2d 358 (Utah App. 1993). No exception should be made for Plaskon.

IV. THE TRIAL COURT DID NOT ERR IN DENYING PLASKON COMPENSATORY DAMAGES FOR LOSS OF ALLEGED FUTURE BUSINESS INCOME

The Court's failure to award Plaskon damages for his alleged loss of business income was proper and completely consonant with Utah case law. Contrary to Plaskon's interpretation of the Court's holding in this regard, the Court based its decision on Plaskon's utter inability to give the Court a consistent figure upon which to base Plaskon's loss of business income, not upon the Court's finding, in Plaskon's words, that an award of future income was inappropriate because Plaskon's hunting business was an "avocation" rather than a "vocation."

As the record illustrates, Plaskon failed to establish his lost profits with reasonable certainty. In fact, the Court noted that based upon the inconsistent figures provided in Plaskon's

testimony, tax return, affidavit, and interrogatories that “the Plaintiff really [didn’t] have an accurate record of what his income was and that it really [was] an estimate.” (R. at 141.) The Court continued, “I think that there’s some question as to what the true level of income was for 1986.” (R. 141.) Based upon Plaskon’s inability to provide the Court with an accurate statement of his income and his concomitant “lack of credibility,” the Court could not have awarded Plaskon lost business income because such decision would be in opposition to an established body of Utah case law on this issue.

In Utah the general rule is that “[l]ost profits must be established with reasonable certainty.” Cook Associates, Inc. v. Warnick, 664 P.2d 1161, 1165 (Utah 1983). However, because there are “so many factors of uncertainty” in establishing lost profits, “ordinarily profits to be realized in the future are too speculative to base an award of damages thereon.” First Sec. Bank of Utah, N.A. v. J.B.J. Feedyards, Inc., 653 P.2d 591, 596 (Utah 1982) (citing Howard v. Ostergaard, 515 P.2d 442, 445 (Utah 1973)). Based upon Plaskon’s inconsistent testimony regarding his business income during the 1986 hunting season, the Court could make no other conclusion than that Plaskon’s future profits were too speculative to be awarded.

Plaskon’s argument that the Court denied him an award of future profits because his hunting business was an “avocation” rather than a “vocation” is completely groundless. As the record indicates, the Court did refer to the part-time nature of Plaskon’s business. (R. at 142.) However, in so doing the Court was not stating that future profits are only awarded when the business is a full-time operation. Rather, the Court referred to Plaskon’s hunting business as more of a hobby than a profession. Plaskon’s testimony demonstrated that his hunting business

was anything but an operation which functioned on a steady basis from year to year. In this regard the Court noted:

. . . [F]or a number of reasons, including obtaining a new position in a job, marital problems, for a number of reasons the Plaintiff chose of his own accord not to continue the business. He had the opportunity to, if he desired to. But in 1987-88 decided not to continue in the hunting or guide business. In 1988 again had the opportunity, if he had wanted, to contact the people to continue the business, but for reasons of his own choice, decided not to continue the business for the first part of the 1988 season. Therefore, the Court finds that while this was maybe not a vocation, it was more of an avocation of the Plaintiff, something that I think he clearly enjoyed doing, that he had skill.

(R. at 142.)

The Court's statement that Plaskon did not produce a net positive income figure further demonstrates that the Court relied on Utah case law in denying Plaskon lost business income, not upon the avocation versus vocation distinction. (R. at 142.) The general rule in Utah is that "[a] party is entitled to recover only lost net profits." Sawyers v. FMA Leasing Co., 722 P.2d 773, 774 (Utah 1986). In the record, Plaskon only introduced evidence, although inaccurate and inconsistent, of his gross income during the 1986 hunting season. However, Utah case law requires parties seeking lost future income to introduce evidence of their business' net profits "by computing the difference between the gross profits and the expenses that would be incurred in acquiring such profits." Id at 774. Plaskon failed to do so. Accordingly, inasmuch as "proof of lost gross profits does not afford courts a proper bases for a damage award, where there is no evidentiary basis on which to calculate net profits with reasonable certainty," the Court had a further basis upon which to properly deny Plaskon's request for net lost profits. Id.

**V. THIS COURT SHOULD AWARD DOUBLE D DAMAGES FOR
DEFENDING PLASKON'S FRIVOLOUS AND UNTIMELY APPEAL**

Pursuant to Rule 33(b) of the Utah Rules of Appellate Procedure, a party is entitled to damages, in the form of single or double costs . . . and/or reasonable attorney fees, “if the court determines that a[n] . . . appeal taken . . . is either frivolous or for delay. “A frivolous appeal is one “that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reserve existing law,” while an appeal taken for delay is one which is “interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.” Utah Ct. App. R. 33(a).

Plaskon’s appeal is frivolous because it is not “well grounded in fact or law,” Backstrom Family Ltd. Partnership v. Hall, 751 P.2d 1157, 1160 (Utah App. 1988), and was taken for delay because it was ““taken with no reasonable likelihood of prevailing,”” will result ““in [the] delayed implementation of the judgment of the lower court,”” has ““increased the costs of litigation,”” and has ““dissipat[ed] . . . the time and resources of the . . . Court.”” Porco v. Porco, 752 P.2d 365, 369 (Utah App. 1988) (quoting Auburn Harpswell Ass’n. v. Day, 438 A.2d 234, 239 (Me. 1981)). Plaskon’s appeal was not only brought in an untimely manner, but it raises on appeal an issue which Plaskon never introduced at trial, it purposefully misinterprets the Trial Court’s holding regarding lost business income by creating the “avocation” versus “vocation” distinction, it ignores Utah case law regarding compensatory damages and the Trial Court’s discretion in awarding such damages, and its arguments are not supported in the record, as mandated in Rule 11(e)(2).

Based upon the above, Double D respectfully requests that this Court exercise its equitable powers by awarding Double D the attorney fees which it has incurred in defending

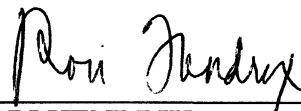
Plaskon's appeal. This appeal has done nothing to clarify the Trial Court's decision, but has served only to increase litigation costs, further harass Double D, and prolong a matter where the attorney fees involved far exceed the small amount of damages which have been awarded. Although "sanction[s]" for bringing a frivolous appeal [are] applied only in egregious cases . . . this is exactly the type of case where such sanctions are warranted. Maughan v. Maughan, 770 P.2d 156, 162 (Utah App. 1989).

CONCLUSION

The Trial Court's Findings and Judgment were proper and consonant with Utah case law, including its denial of Plaskon's request for compensatory damages based upon the decoys' replacement value, punitive damages, and lost business income. Double D respectfully requests that Plaskon's appeal be dismissed as untimely and that Double D be awarded the attorney fees and court costs it has incurred in defending this frivolous appeal.

DATED and **SIGNED** this 14th day of February, 1996.

HANKS & ROOKER, P.C.



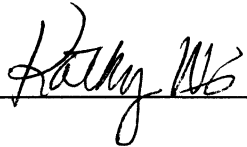
RORI HENDRIX

Attorney for Defendants/Respondents

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two true and correct copies of the foregoing Brief of Appellee were mailed, first-class, postage prepaid, on the 14 day of February, 1996, to the following:

John T. Caine
RICHARDS, CAINE & ALLEN
2568 Washington Boulevard
Ogden, Utah 84401



ADDENDUM

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: (801) 399-4191

K2C
FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

AUG 30 4 51 PM '94 SEP 13 11 01 AM '94

CLERK
BY 15 CLERK OF COURT
BY AB DEPUTY CLERK

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

MARK PLASKON,	:	
	:	MOTION TO RECONSIDER
Plaintiff,	:	
vs.	:	
DARWIN HAYES,	:	Civil No. 890746591
Defendant.	:	

COMES NOW the Plaintiff above named, by and through his counsel, John T. Caine, and hereby moves the above entitled Court to reconsider its decision following a Trial in the above matter in February of 1993, not to award Plaintiff loss of business income.

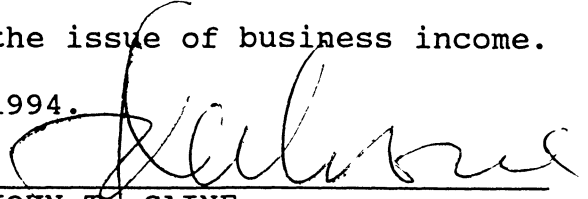
That the Court is urged to reconsider the testimony of Steve Brown who testified without opposition or contradiction from any witness presented by the defense concerning his activities with the Plaintiff, Plaintiff's value as a guide and the impact on Plaintiff's business of his television interview.

That while the Court considered the Plaintiff had presented conflicting statements about his income, there is no question from the uncontradicted testimony of Brown that Plaintiff had a rolling business and one which had he had the decoys available, would have resulted in additional income to him during the periods set forth

in the litigation.

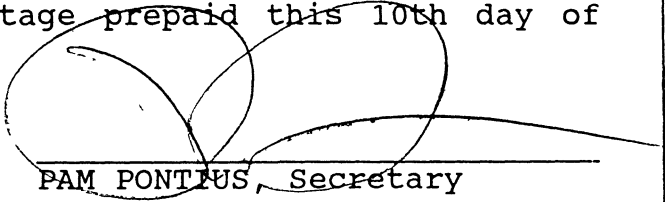
Prior to appealing this matter Plaintiff desires the Court revisit that issue to determine whether or not the Court wants to amend its Judgment with respect to the issue of business income.

DATED this 10th day of March, 1994.


JOHN T. CAINE
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Motion to Reconsider to counsel for the Defendant, Jim Hanks, Attorney at Law, 376 East 400 South #300, Salt Lake City, Utah 84111, postage prepaid this 10th day of March, 1994.


PAM PONTIUS, Secretary

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

MARK PLASKON,

Plaintiff,

v.

DARWIN HAYES,

Defendant.

MINUTE ENTRY

September 12, 1994

Case No. 890746591

Jon M. Memmott, Judge

Kathy Potts, Clerk

The Court has reviewed the Plaintiff's Motion to Reconsider and finds there is no good cause shown. The Court will deny the Motion to Reconsider and has signed the Judgment and Order and Findings of Fact and Conclusions of Law on the above date.


DISTRICT COURT JUDGE

having heard this hearing having in mind that decision and having heard the claim for damages now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

The Court finds with respect to the claim for damages as to the value of the decoys.

1. That the Plaintiff did store the decoys at the storage unit owned by the Defendant.

2. That the Defendant selling the decoys did not comply with the above referenced statute in notifying the Plaintiff or bidding or in selling as a private sale.

3. That the Court has received evidence of four (4) different values:

- a) The first value, the 1993 retail value;
- b) The 1988 resale value;
- c) The value that Plaintiff paid for the decoys initially; and
- d) The amount paid for the decoys by James Oswald.

4. In assessing damages the Court finds that the appropriate value to be assigned to the decoys is the amount Plaintiff paid Flambo for the decoys which was \$1,722.35 for all but approximately 90 of the decoys.

5. Based upon interpellation and the type of decoys the Court finds that the value of the decoys was as follows: \$62.20 for two (2) dozen super magnum mallards, \$29.65 for a dozen floater geese, \$312 for four (4) dozen mighty magnum Canada goose

shells, \$156 for hovering windsocks and \$56.10 for sumi magnum decoys issue M1, for a total together of \$2,338.30.

6. As a result of storage, forty percent (40%) of the decoys deteriorated and were not useable.

7. That the Plaintiff took the risk of storing the decoys over two (2) summers and had the opportunity at any time to pay the bill to remove those decoys.

8. That Plaintiff should have been aware that the heat in the storage unit would damage the decoys and bears the responsibility for storing them for over four (4) months without paying the bill or checking on the decoys. The Plaintiff's actions were not prudent under the circumstances, therefore, the Court assesses the forty percent (40%) loss due to deterioration as the responsibility of the Plaintiff.

The Court finds with respect to the claim for loss of income.

1. That Plaintiff's testimony was that in the hunting season 1986-87 he conducted approximately ninety (90) hunting trips for which he received \$50 a trip for a total of \$4,500.

2. That Plaintiff further testifies that the Plaintiff's income tax return for the year 1986 showed his income from that at \$600.

3. That the Defendant's Interrogatories indicated that Plaintiff made \$1,000 a week during the aforesaid period or approximately \$8,000.

4. That the Court finds that the Plaintiff's testimony lacks credibility because of the inconsistencies in the above

statements and it appears to the Court that the Plaintiff does not have an accurate record of what his income was and that his figures are an estimate.

5. The Court further finds that no matter which of the amounts was accurate, these were gross income figures and Defendant had expenses based upon that income which impacted his income.

6. Concerning the Plaintiff's income for 1987 for a number of reasons, including obtaining a new position in a job, marital problems, the Plaintiff chose, on his own accord, not to continue his business. He had the opportunity to if he desired to. That in 1987-88 the Plaintiff decided not to continue in the hunting or guide business; in 1988 again the Plaintiff had the opportunity if he wanted to contact people to continue the business, but reasons of his own choice, decided not to continue the business for the first part of the 1988 season.

7. That the Plaintiff had skill and enjoyed hunting and taking others hunting, but this was never intended to be a full time job and was more of a avocation rather than a vocation.

8. Therefore, because of the above facts, the Court does not any net positive income.

WHEREFORE, from the above and foregoing Findings of Fact, the Court concludes as follows:

CONCLUSIONS OF LAW

1. That the actual value of the decoys and other personal property items stored was \$2,338.30. That this value should be

reduced by forty percent (40%) on the basis that they were damaged due to the responsibility and actions of the Plaintiff in the case and an additional offset of \$10 which is the net difference in the rent due, thus awarding Judgment from Plaintiff against the Defendant in the sum of \$1,392.98 plus prejudgment ten percent (10%) interest from the date of the sale, June 10, 1988.

2. That further, based upon the foregoing Findings the Court awards no damages for loss of income.

3. The Court awards no attorney's fees to either party.

DATED this 12th day of Sept, 1994.

Jon M. Memmott
JON MEMMOTT

District Court Judge

NOTICE TO COUNSEL FOR THE DEFENDANT

TO: DEFENDANT AND HIS COUNSEL, JIM HANKS:

YOU WILL PLEASE TAKE NOTICE that the undersigned Attorney for Plaintiff will submit the above and foregoing Findings of Fact and Conclusions of Law to the District Court Judge for his signature upon the expiration of five (5) days from the date this Notice is mailed to you unless written objection is filed prior to that time pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this 30 day of August, 1994.

John T. Caine
JOHN T. CAINE

Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Findings of Fact and Conclusions of Law to counsel for the Defendant, Jim Hanks, Attorney at Law, 376 East 400 South #300, Salt Lake City, Utah 84111, postage prepaid this _____ day of _____, 1994.

PAM PONTIUS, Secretary

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: (801) 399-4191

FILED IN CLERK'S OFFICE
DAVIS COUNTY

SEP 13 3 16 PM '94

CLERK, 2ND DIST. COURT

BY DEPUTY CLERK

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

MARK PLASKON,	:	
	:	JUDGMENT AND ORDER
Plaintiff,	:	
	:	
VS.	:	
	:	
DARWIN HAYES,	:	Civil No. 890746591
	:	
Defendant.	:	

The above entitled matter came on for Trial before the above entitled Court on February 17, 1993, before the Honorable Jon Memmott, one of the Judges of the above entitled Court, sitting without a jury. The Plaintiff was present and represented by counsel, John T. Caine and Defendant was present in Court, and represented by counsel, James Hanks. The Court, after hearing the testimony of the parties and arguments of counsel, and the Court having received various exhibits and the Court having been fully advised in the premises and acknowledging an order of the Utah Court of Appeals entered on November 22, 1991 finding that the Trial Court erred in finding no Contract existed between the Plaintiff and Defendant and also further finding that the sale of the Plaintiff's decoys was not conducted pursuant to Utah Code Annotated 38-3-1 the case was therefore, remanded for determination of damages incurred by the Plaintiff. That Court

having heard this hearing having in mind that decision and having heard the claim for damages and heretofore made and entered its Findings of Fact and Conclusions of Law, now makes the following Judgment and Order:

JUDGMENT AND ORDER

1. That the actual value of the decoys and other personal property items stored was \$2,338.30. That this value should be reduced by forty percent (40%) on the basis that they were damaged due to the responsibility and actions of the Plaintiff in the case and an additional offset of \$10 which is the net difference in the rent due, thus awarding Judgment from Plaintiff against the Defendant in the sum of \$1,392.98 plus prejudgment ten percent (10%) interest from the date of the sale, June 10, 1988 through March 4, 1993. Post-judgment interest will then be awarded from the date of the signing of this Order.

2. That further, based upon the foregoing Findings the Court awards no damages for loss of income.

3. The Court awards no attorney's fees to either party.

DATED this 12th day of ~~August~~^{Sept.}, 1994.

Jon M. Memmott

JON MEMMOTT
District Court Judge

NOTICE TO COUNSEL FOR THE DEFENDANT

TO: DEFENDANT AND HIS COUNSEL, JIM HANKS:

YOU WILL PLEASE TAKE NOTICE that the undersigned Attorney for Plaintiff will submit the above and foregoing Judgment and Order to the District Court Judge for his signature upon the expiration

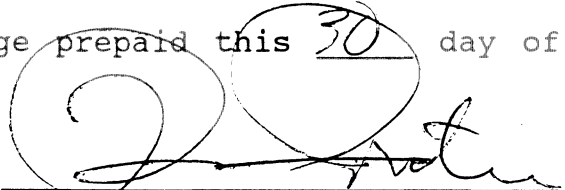
of five (5) days from the date this Notice is mailed to you unless written objection is filed prior to that time pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this 30 day of August, 1994.


JOHN T. CAINE
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Judgment and Order to counsel for the Defendant, Jim Hanks, Attorney at Law, 376 East 400 South #300, Salt Lake City, Utah 84111, postage prepaid this 30 day of August, 1994.


PAM PONTIUS, Secretary

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: (801) 399-4191

FILED IN CLERK'S OFFICE

MAR 7 8 51 PM '95

CLERK'S OFFICE

BY DEPUTY CLERK f

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

MARK PLASKON,

Plaintiff,

vs.

DARWIN HAYES,

Defendant.

:
:
:
:
:
:
:

ORDER DENYING MOTION
TO RECONSIDER

Civil No. 890746591

The above entitled matter came on for hearing on Motion of the Plaintiff to reconsider the Court's decision and to re-evaluate the evidence with respect to the issue of economic damage and the Court having reviewed its notes and the request filed, having considered the matter, now hereby makes the following Order:

That Plaintiff's Motion to Reconsider is denied.

DATED this 6th day of March ~~February~~, 1995.

Jon M. Memmott

JON MEMMOTT

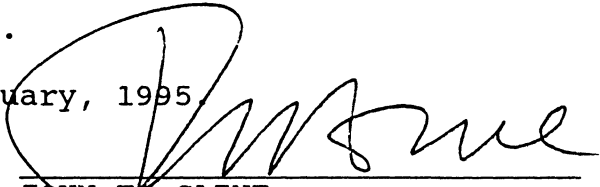
District Court Judge

NOTICE TO COUNSEL FOR THE DEFENDANT

TO: DEFENDANT AND HIS COUNSEL, JIM HANKS:

YOU WILL PLEASE TAKE NOTICE that the undersigned Attorney for Plaintiff will submit the above and foregoing Order to the District Court Judge for his signature upon the expiration of five (5) days from the date this Notice is mailed to you unless written objection is filed prior to that time pursuant to Rule 2.9 of the Rules of Practice in the District Courts of the State of Utah. Kindly govern yourself accordingly.

DATED this 28 day of February, 1995.


JOHN T. CAINE
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Order to counsel for the Defendant, Jim Hanks, Attorney at Law, 376 East 400 South #300, Salt Lake City, Utah 84111, postage prepaid this 28 day of February, 1995.


PAM PONTIUS, Secretary

JOHN T. CAINE #0536 of
RICHARDS, CAINE & ALLEN
Attorney for Plaintiff
2568 Washington Boulevard
Ogden, Utah 84401
Telephone: 399-4191

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

APR 5 10 32 AM '95

CLERK, 2ND DIST. COURT

BY AS
DEPUTY CLERK

IN THE SECOND JUDICIAL DISTRICT COURT

STATE OF UTAH, COUNTY OF DAVIS

MARK PLASKON,	:	
	:	
Plaintiff,	:	NOTICE OF APPEAL
	:	
vs.	:	
	:	
DARWIN HAYES, ET AL.,	:	Civil No. 890746591
	:	
Defendants.	:	

COMES NOW the above named Plaintiff, by and through his attorney, John T. Caine and hereby gives notice of his intent to appeal the Decision of Judge Jon Memmott, rendered hereon in the above entitled case on or about the 6th day of March, 1995, to the Utah Court of Appeals.

DATED this 5th day of April, 1995.

JOHN T. CAINE
Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Notice of Appeal to counsel for the Defendants, Jim Hanks, Attorney at Law, 376 East 400 South #300, Salt Lake City, Utah 84111, postage prepaid this 5th day of April, 1995.

SECRETARY