

1995

Mark Plaskon v. Darwin Hayes : Brief of Appellant

Utah Court of Appeals

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James Hanks; attorney for respondents.

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

Recommended Citation

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IN THE UTAH COURT OF APPEALS

MARK PLASKON, :

Plaintiff/Appellant, :

vs. :

DARWIN HAYES, ET AL., :

Case No. 950758CA

Defendants/Respondents. :

Priority No. 15

BRIEF OF APPELLANT

This is an appeal from a decision rendered by the
Honorable Jon Memmott, Judge of the Second Judicial
Court of Davis County, State of Utah, sitting without a jury

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UTAH SUPREME COURT

BRIEF

950758 CA

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COURT OF APPEALS

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IN THE UTAH COURT OF APPEALS

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Plaintiff/Appellant,	:	
vs.	:	
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JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a decision rendered by the Honorable Jon Memmott, Judge of the Second Judicial Court of Davis County, State of Utah, sitting without a jury, in which he awarded the Plaintiff a total Judgment against the Defendants in the sum of \$1,392.98, plus prejudgment 10% interest from June 10, 1988 through March 4, 1993. Jurisdiction is conferred upon this Court pursuant to Section 78-2a-3(2)(j) Utah Code Annotated, (1953).

STATEMENT OF ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Whether the Trial Court erred in not granting Plaintiff additional compensatory damages for replacement costs of the loss of his personal property.
2. Whether the Trial Court erred in failing to award the Defendant loss of business income during the years he was unable to use the decoys.
4. Whether or not punitive damages should have been awarded to the

Plaintiff against the Defendants for the deliberate violation of 38-3-1 Utah Code Annotated.

5. Whether the Trial Court, after being given an opportunity through a Motion to Reconsider to correct the above, abused its discretion in not reconsidering its decision.

Standard of Review In this case the reviewing Court must review the case in the context of whether or not the Trial Court abused its discretion and/or failed to consider the appropriate legal doctrines with respect to damages.

STATEMENT OF THE CASE

This is an appeal from a decision awarding the Plaintiff a Judgment rendered by the Honorable Jon Memmott, sitting without a jury. This case was originally filed in Case No. 890746591 by the Plaintiff against the Defendants for loss of personal property due to an improper sale of property stored in a storage unit. The case originally came on for Trial before Judge Douglas Cornaby, sitting without a jury on October 4, 1990. The Court dismissed the case at that time based upon the argument that the Plaintiff did not have standing. The case was appealed to the Utah Court of Appeals in Case No. 90587CA and the lower Court's decision was reversed. This Court found that the Plaintiff did have standing and that the Defendants had deliberately violated Section 38-3-1 Utah Code Annotated with respect to the notice provisions and therefore, the case was remanded solely for determination of the

Plaintiff's damages.

A Trial was held before the Honorable Jon Memmott on February 17, 1993 wherein the Judge ruled in favor of the Plaintiff for damages for the loss of decoys, but did not award the Plaintiff any other compensatory damages with respect to the loss of income or replacement the decoys, or punitive damages for the deliberate act.

A Motion to Reconsider was filed in June of 1994 because no Findings of Fact or Conclusions of Law had been entered. The Court denied that Motion on March 6, 1995 and this matter was then appealed on April 5, 1995.

STATEMENT OF FACTS

(All references to the Statement of Facts in this Brief will be to the transcript of the first hearing in front of the Honorable Judge Douglas Cornaby on October 4, 1990 which contained the essential facts and was not duplicated in the second hearing and will be filed with this Court.)

That in June of 1987 the Plaintiff was residing in Bountiful, Utah with an individual by the name of Paulette McFarland. (Tp. 9) At that time the Plaintiff owned a large number of duck and game bird decoys which he utilized in a guide service, guiding individuals on private hunting trips in the northern part of Utah. (Tp. 10-11) Difficulties arose between the Plaintiff and McFarland, causing McFarland to move all the Plaintiff's belongings, including the decoys, from their residence to a storage unit.

On or about July 11, 1987 McFarland went to the Double D Storage unit

owned by the Defendants in this action and moved Plaintiff's property into a unit. (Tp. 68-69) At that time a document entitled "Double D Storage Garage Rental Agreement" was signed. The Agreement, although filled out by McFarland, indicated that the Plaintiff agreed to rent the storage unit 108 for one (1) month for a total of \$40.00. The document was actually filled out by Paulette McFarland (Tp. 35) in Plaintiff's name and countersigned by Carma Jenkins, one of the owners of Double D Storage Garage. (Tp. 69) In addition, McFarland told Jenkins that while she would pay the first months rent, the Plaintiff would be responsible for any thereafter. This was acceptable to Jenkins and she knew that Plaintiff was to be the responsible party. (Tp. 69-70)

Following the initial conversation and the initiation of the storage unit, the Defendants had no further contact with Paulette McFarland, and on various occasions sent notices of delinquency to the Plaintiff. (Tp. 71)

That after a number of unsuccessful attempts to contact the Plaintiff a decision was made to sell the contents. No notice was ever sent to the Plaintiff concerning the sale of the property pursuant to Section 38-2-1 Utah Code Annotated, nor was there a Sheriff's Sale or any public notice of a sale. (Tp. 78) A private sale was made to an individual named James Kenneth Oswald in June of 1988. (Tp.54-56)

The Plaintiff was never restored to his decoys and was never compensated for them despite demand until this matter came on for Trial on

February 17, 1993. At that Trial the Court heard evidence with respect to four (4) values of the decoys. The replacement value in 1993, the 1990 resale value, the value the Plaintiff paid for the decoys initially, and the amount paid by James Oswald. (See Findings of Fact and Conclusions of Law attached hereto as Appendix "A")

The Court rejected replacement value in its interpretation and simply focused on the original amount Plaintiff paid for the decoys. The Court further rejected any loss of income from the decoys despite the unrefuted testimony of Plaintiff and Steve Brown, who indicated that the Plaintiff had a guide service and would have been able to guide trips every year from 1987 on.

The Court's only basis for rejecting that amount was that the Court found lack of credibility in the Plaintiff's testimony on in the year 1986 because of income stated on a tax return and the cost of guiding hunts. The Court never considered the continuation of the business in 1988 through 1993. (See the Court's Ruling attached hereto as Appendix "B")

Following the second hearing the Court was asked to reconsider the issues both replacement costs and the lack of award for loss of income and the Court rejected the same. It is from that rejection that this appeal is taken.

STATEMENT OF COUNSEL

I, John T. Caine, represent to the Court that I was the attorney who represented the Defendant at Trial. That I have prepared the Docketing Statement, and have prepared this Brief.

I do believe there are meritorious appellate issues and that this appeal is not frivolous.

SUMMARY OF THE ARGUMENT

The Court erred in not considering as part of total compensatory damages the replacement costs of the decoys and awarding some punitive damage for the Defendants wilful sale and violation of Section 33-3-1 Utah Code Annotated, and further abused its discretion following a Motion to Reconsider in not giving Plaintiff additional damages for the loss of business income.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN FAILING TO AWARD COMPENSATORY DAMAGES BASED UPON THE CURRENT REPLACEMENT VALUE OF THE DECOYS AND IN FAILING TO AWARD PUNITIVE DAMAGES FOR THE DELIBERATE ACTS OF THE DEFENDANTS

In this case there are certain undisputed events. The first is that Plaintiff stored expensive duck decoys and other duck hunting implements in the Defendants' storage garage and did not pay the rent that was required. It is also undisputed that the Defendants, contrary to the provisions of 38-3-1 Utah Code Annotated, as amended, deliberately disposed of those decoys without giving any notice to the Plaintiff and did so at a greatly reduced price. It is further undisputed that the Plaintiff had a hunting service in which he

guided hunters and used the decoys during the Fall of each year, and was unable to do so following the loss of the decoys through the sale. This guide service had been publized on local television and was well known throughout the Wasatch Front area.

The fact that the Court determined it was an avocation or an additional vocation is irrelevant because there was no evidence disputing that Plaintiff did indeed derive an income from these sources. The Court heard four (4) different values with respect to the property and determined that it would consider only the purchase price of the property when the Plaintiff originally purchased it. This is in direct contravention of the law in this jurisdiction.

The Court is directed initially to the case of Winters v. Charles Anthony Inc., 586 P.2d 453 (Utah 1958) In that action the Utah Supreme Court essentially adopted the Restatement of Tort position with respect to determining damages for the property taking or destruction of personal property. In that case the Court stated as follows in justifying giving replacement value to the aggrieved party:

“Replacement value is the amount it would cost to replace the property, Not the wholesale cost to manufacture a similar one. It is well settled that the fundamental principle of damages for the loss of bailed property is to restore the injured party to the position he would have been in had it not been for the wrong of the other party.” (Id at 455)

In addition, the Court also held that the rule of damages is flexible that can be modified in the interest of fairness (Id at 453) and also accepts the

Restatement of Torts position that the value of property does not entirely control the determination of compensatory damages. Damages are allowable for all the detriment proximately caused by the wrongful destruction of the property, as long as damages are provable and reasonable. (Also see Damages - 22 Am. Jur.2d 427)

This Court has more recently adopted this rationale of the Anthony case in Jenkins v. Equipment Center Inc., 869 P.2d 1000 (Utah App. 1994) wherein it recites this case at 1004.

The Court's error therefore is because of the deliberate and wilful nature of the Defendant's conduct, that it Court should have adopted the replacement cost of the decoys at the time of Trial, which was a much higher value, either under the theory that was the appropriate value or in the context of a punitive award. To simply adopt only the original purchase price would not be concert with the above referenced cases.

Because the Court did not apply the applicable law, the case should therefore be remanded for a further hearing with respect to those values and with a direction from this Court to the Court under the Anthony rationale, apply that standard to the measure of damages.

POINT II

THE COURT ERRED IN NOT ALLOWING THE PLAINTIFF JUDGMENT FOR FUTURE LOSS OF BUSINESS INCOME

In its ruling and in denying the Motion for Reconsideration the Court

completely refused to give the Defendant, as part of a measure of damages, any loss of future business income. The Court's theory was essentially that although there was uncontroverted evidence that the Plaintiff took hunting parties out for a fee in the Fall and Winter of the year, and that a necessary part of that hunting excursion was the use of the decoys, that because this was a "avocation" rather than a primary vocation and because there was a certain expense involved, the Court could not award damages.

There is no Utah case which says that the loss of business income is based upon whether or not this is a person's primary business or not. The rule is if in fact income is generated, whether it is a secondary business or avocation, if the deliberate loss, deliberate destruction, or in this case the deliberate sale without notice of the Plaintiff's property necessary to effect income from the avocation, that this is a proper compensatory damage award.

While the Court did not accept the Plaintiff's figures for the 1986-1987 years because of his income tax, the Court further compounded the error by at that point not considering lost income for future years when the uncontroverted testimony of Steve Brown and Plaintiff clearly indicated that there was a market for this type of service and that the Plaintiff had received exposure on television as providing this type of guide service. This is not an area of speculative damages which are not allowed by law, but certainly one grounded in the realistic estimates of the Plaintiff who had previously guided individuals and groups for upland game bird hunting.

The error in this case is essentially that the Court ruled as a matter of law that because this was an avocation, the Plaintiff was not entitled to any future damages. It is that specific ruling that Plaintiff takes issue with because there is simply no basis for denying recovery when the uncontroverted evidence was that this avocation did generate income.

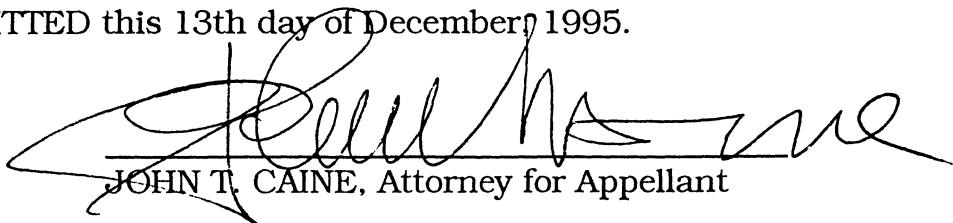
This Court should direct that the case be remanded with a direction to the Judge that even though this was not found to be full time job, the Court be required to consider realistically the type of income that could be made over the period of time and apply that as a measure of damages.

CONCLUSION

The Court erred in not considering as part of the compensatory damage award the replacement value of the decoys and the punitive nature of the Defendants' actions and further compounded the error by also not considering or allowing the Plaintiff any damage for loss of business income.

The Plaintiff respectfully requests that the case be remanded for a further evidentiary hearing with instructions from this Court to the fact finder to consider these types of damages and re-evaluate the damage award in this case.

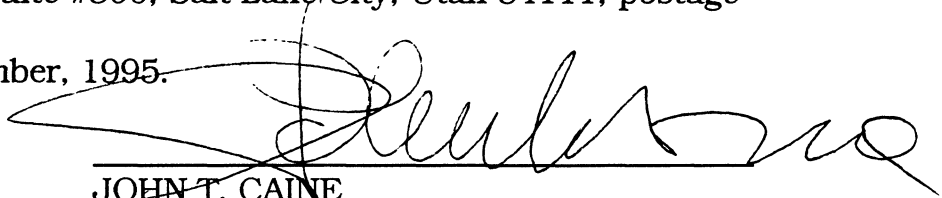
RESPECTFULLY SUBMITTED this 13th day of December, 1995.



JOHN T. CAINE, Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the above and foregoing Brief of Appellant to counsel for the Respondent, Jim Hanks, Attorney at Law, 376 East 400 South, Suite #300, Salt Lake City, Utah 84111, postage prepaid this 13th day of December, 1995.

A handwritten signature in black ink, appearing to read "John T. Caine", is written over a horizontal line.

JOHN T. CAINE
Attorney for Appellant

ADDENDUM

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FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

SEP 13 11 01 AM '94

CLERK, 2ND DIST. COURT

BY AB
DEPUTY CLERK

IN THE DISTRICT COURT OF DAVIS COUNTY

STATE OF UTAH

MARK PLASKON,	:	
	:	FINDINGS OF FACT
Plaintiff,	:	AND
	:	CONCLUSIONS OF LAW
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 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

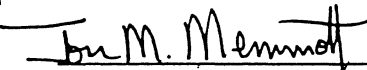
1. That the actual value of the decoys and other personal property items stored was \$2,338.30. That this value should be

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.



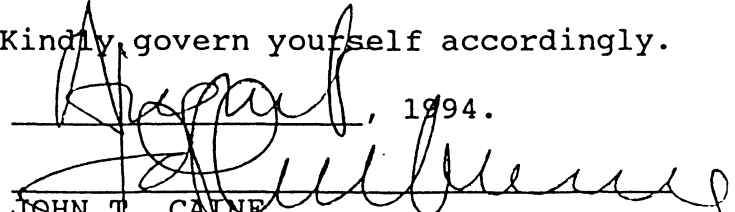
JON MEMMOTT
District Court Judge

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
Attorney for Plaintiff

1 IN THE DISTRICT COURT OF THE SECOND DISTRICT OF THE
2 STATE OF UTAH, IN AND FOR THE COUNTY OF DAVIS

3

4

5 MARK PLASKON,

6 PLAINTIFF,

7

CASE NO. 890746591

8 VS.

9 DARWIN HAYES,

10 DEFENDANT.

11

12 BE IT REMEMBERED THAT ON THE 17TH DAY OF
13 FEBRUARY, 1993, THE ABOVE-ENTITLED CAUSE CAME ON FOR
14 HEARING BEFORE THE HONORABLE JON M. MEMMOTT, DISTRICT
15 JUDGE, FARMINGTON, UTAH.

16

APPEARANCES

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19

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23

24

25

JOANNE PRATT, CSR
JUSTICE COMPLEX
800 WEST STATE STREET
FARMINGTON, UT 84025

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1 FEBRUARY 17, 1993

2 THE COURT: THANK YOU. AS TO THE CLAIM FOR
3 LOSS OF INCOME, THE COURT WOULD MAKE THE FOLLOWING
4 FACTUAL FINDING AND RULINGS. AND IN GIVING WEIGHT TO THE
5 PLAINTIFF -- THE TESTIMONY OF -- PLAINTIFF'S TESTIMONY,
6 IS THAT IN THE YEAR OF 1986- '87, APPROXIMATELY 90
7 HUNTING TRIPS IN WHICH HE RECEIVED \$50 A HUNTING TRIP.
8 THAT WOULD BE APPROXIMATELY \$4,500, BASED ON HIS
9 TESTIMONY, OF INCOME THAT YEAR. HOWEVER, THE COURT FINDS
10 THAT THERE'S SOME LACK OF CREDIBILITY IN THE PLAINTIFF'S
11 TESTIMONY AS TO THE INCOME AND HUNTS FOR THE YEAR 1986
12 WITH THE TAX RETURN INDICATING THAT THERE WAS \$600 A YEAR
13 INCOME. THE AFFIDAVIT INDICATES ANOTHER AMOUNT. THE
14 INTERROGATORIES INDICATE A THOUSAND DOLLARS A WEEK,
15 APPROXIMATELY \$8,000 INCOME. THAT IT APPEARS TO THE
16 COURT THAT THE PLAINTIFF REALLY DOESN'T HAVE AN ACCURATE
17 RECORD OF WHAT HIS INCOME WAS AND THAT IT REALLY IS AN
18 ESTIMATE. BUT EVEN GIVING THAT ESTIMATE, I THINK THAT
19 THERE'S SOME QUESTION AS TO WHAT THE TRUE LEVEL OF INCOME
20 WAS FOR 1986. HOWEVER, THAT'S GROSS INCOME AND I THINK
21 THAT THERE HAS TO BE CLEARLY EXPENSES BASED ON THAT
22 INCOME. AND BASED ON THE TAX RETURN, THOSE EXPENSES ARE
23 IN EXCESS OF \$5,000 FOR THE FIRST YEAR. BUT EVEN ABSENT
24 THE TAX RETURN INDICATED ON HIS ANSWER TO INTERROGATORIES
25 THAT THE GAS EXPENSE ALONE IS \$1,800 A YEAR, THE GUN SHOW

1 RENTAL \$125 A YEAR, THE LUNCH IS \$450, AND THAT'S NOT
2 REFLECTING ANY EXPENSES FOR DECOYS OR OTHER THINGS THAT
3 ARE PROPER AND NECESSARY EXPENSES IN THE BUSINESS. ALSO
4 AS TO THE NATURE OF THE INCOME IN 1987 THEN, FOR A NUMBER
5 OF REASONS, INCLUDING OBTAINING A NEW POSITION IN A JOB,
6 MARITAL PROBLEMS, FOR A NUMBER OF REASONS THE PLAINTIFF
7 CHOSE OF HIS OWN ACCORD NOT TO CONTINUE THE BUSINESS. HE
8 HAD THE OPPORTUNITY TO, IF HE DESIRED TO. BUT IN 1987-
9 '88 DECIDED NOT TO CONTINUE IN THE HUNTING OR GUIDE
10 BUSINESS. IN 1988 AGAIN HAD THE OPPORTUNITY, IF HE HAD
11 WANTED, TO CONTACT THE PEOPLE TO CONTINUE THE BUSINESS,
12 BUT FOR REASONS OF HIS OWN CHOICE, DECIDED NOT TO
13 CONTINUE THE BUSINESS FOR THE FIRST PART OF THE 1988
14 SEASON. THEREFORE, THE COURT FINDS THAT WHILE THIS WAS
15 MAYBE NOT A VOCATION, IT WAS MORE OF AN AVOCATION OF THE
16 PLAINTIFF, SOMETHING THAT I THINK HE CLEARLY ENJOYED
17 DOING, THAT HE HAD SKILL. BUT THE COURT DOESN'T FIND
18 EVIDENCE THAT THIS WAS EVER INTENDED TO BE A FULL-TIME
19 JOB, PROFESSION OF THE PLAINTIFF. HE DIDN'T DEMONSTRATE,
20 I THINK, THE NATURE THAT THAT WAS GOING TO BE A FULL-TIME
21 POSITION DURING THE HUNTING SEASON. AND BECAUSE ALSO
22 THAT THE COURT DOESN'T FIND ANY NET POSITIVE INCOME IN
23 ANY EVIDENCE PRESENTED, WHEN YOU TAKE THE COST, THE COURT
24 DOESN'T FIND THAT THERE WAS NET POSITIVE INCOME. BASED
25 ON THAT, THE COURT DOES NOT FIND A BASIS TO AWARD ANY

1 DAMAGES BASED ON LOSS OF INCOME AND THEREFORE WOULD GRANT
2 THE DEFENDANT'S MOTION AS TO THAT PART OF THE CASE.

3 MR. HANKS: THANK YOU VERY MUCH, JUDGE.

4 (CONCLUSION OF PARTIAL TRANSCRIPT.)

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