

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION
"IN ADMIRALTY"

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 92-10027 CIV-DAVIS

MELVIN A. FISHER, KANE FISHER,
SALVORS, INC., a Florida corporation
in personam; M/V BOOKMAKER, M/V
DAUNTLESS, M/V TROPICAL MAGIC,
their engines, apparel, tackle,
appurtenances, stores and cargo, *in rem*,

_____ Defendants.

CONSOLIDATED WITH

MOTIVATION, INC., a Delaware
Corporation,

Plaintiff,

CASE NO. 95-10051 CIV-DAVIS
MAGISTRATE JUDGE GARBER

vs.

THE UNIDENTIFIED, WRECKED
and ABANDONED VESSEL, her tackle,
armament, apparel, and cargo, located
in the Atlantic Ocean within a circle
with a radius of 1,000 yards of a point
located at 24 4113011 North Latitude
and 080 5611811 West Longitude,

_____ Defendant.

**DEFENDANTS', KANE FISHER
& SALVORS, INC.'s MOTION
FOR NEW TRIAL AND/OR
ALTERNATIVE RELIEF**

Defendants, Salvors, Inc. and Kane Fisher ("Fishers" or "Defendants"), through undersigned counsel, and pursuant to Fed. R. Civ. P. 59, hereby file their Motion for New Trial requesting that the Court grant a new trial, open the judgment, take additional testimony, evidence, and/or permit a demonstration of mailboxes, amend the findings of fact and conclusions of law and/or make new findings and conclusions against the United

States (“NOAA”, “government”, or “Plaintiffs”), and direct the entry of a new judgment in favor of the Defendants. Defendants preserve for appeal all other errors not specifically raised in this motion. The relief sought is based on each and all of the following grounds:

1. Defendants request permission to reopen the evidence for a new trial for the purposes of demonstrating that mailboxes or blowers on the DAUNTLESS are not capable of going through, or “nesting” through sea grass beds at Coffins Patch. Under this court’s findings of fact and conclusions of law it has become apparent that the critical question is whether the mailboxes on the Dauntless can penetrate directly through the sea grass bed or only effect the edge of the sea grass beds by dusting or adjoining sand or coral rubble bottoms.

2. Defendants request a demonstration be conducted involving the Dauntless and its mailboxes in Coffins Patch. The Defendants will pay for a court-appointed observer to supervise the test and demonstration and to report to the court the findings. The Defendant also offer to pay reasonable expenses of a government observer. This simple demonstration would have decisive effects upon the proper calculation and determination of any damage to sea grass. As stated, NOAA’s assumption and the adoption of the MacIntosh report is fundamentally flawed unless their unproven assumptions concerning the mailboxes and the bottom condition where the holes were dug were correct.

3. The Court erred in making inconsistent rulings by adopting the MacIntosh Marine report despite earlier ruling that the same was inadmissible for consideration at the preliminary injunction hearing in the case.

4. The Court erred in finding Kane Fisher personally liable since there was no evidence that he directed the operations of the DAUNTLESS or any other vessel on the days he was not present in Coffins Patch. The Court's finding is therefore speculative and against the manifest weight of the evidence in that it holds him personally liable when the number of holes made on days when Kane Fisher was not aboard exceed the numbers of holes NOAA claimed as damage.

5. The Court erred by entering findings, conclusions, and judgment against Kane Fisher personally for liability of the damages based on the Court's statement and NOAA's acknowledgement on May 12, 1997, at page 66 of the transcript that NOAA was not attempting to pierce the corporate veil. The Court has errantly held him liable for the acts of other corporate agents despite the ability to apportion any damage between the parties.

6. The Court erred in not incorporating a finding that of the 102 "blowholes" created by Defendants only 25 were of recent origin according to the Court's finding number 17.

7. The Court erred in refusing to continue the case and /or grant a dismissal of all defendants as requested by Defendants to allow defendants sufficient time to assimilate the evidence of the location and scope of the damage as alleged by NOAA. Such information was provided on the eve of trial and was only provided after the Magistrate issued a direct order requiring NOAA to show defendants where the damage was located. See Transcript, May 12, 1997, pp.15-33. This information lead to the discovery of the satellite image showing the pre-existing sand channel that NOAA claimed as a "damage tract".

8. The Court erred in not curing any perceived prejudice to NOAA regarding the Defendants desired use of Richard Blaes as a witness. During the break in the middle of this trial, NOAA had sufficient time to depose Blaes and develop any needed rebuttal or cross examination. Blaes' testimony was crucial to the Defendants case in that it supported the satellite imagery interpretation of Dr. Wanless that NOAA's "damage tract" was a naturally occurring sand channel and not covered with seagrass. The Court erred in excluding this witness and the other salvors requested by Defendants.

9. The Court erred by failing to incorporate and apply a finding or conclusion that salvaging was expressly recognized as an industry that should be protected by NOAA as one of the purposes of the Florida Keys National Marine Sanctuary Act. The Act did not prohibit salvage activity. No regulation had been promulgated under the Act restricting treasure salvaging or subsistence rights during the time Salvors, Inc. and Kane Fisher were salvaging. The Court erred in not concluding that the regulations which were subsequently published in the Federal Register were effective July 1, 1997, and did not apply retroactively. The regulation expressly recognized the right of subsistence use and the right of salvaging. 15 C.F.R. §922.167, Federal Regulation, June 12, 1997, vol. 62, #113, pg. 321701, et seq. The Court also erred in not concluding that no permit was required under the Archaeology Resources Protection Act. 16 U.S.C. §470bb(3).

10. The Court erred in effectively granting to the Plaintiff's a summary judgment regarding Defendant's subsistence right of salvage within Coffins Patch and the FKNMS.

11. The Court erroneously entered summary judgment in its order of April 30, 1997, that as a matter of law Defendants had no pre-existing salvage rights in the Florida Keys Sanctuary.

12. The Court erroneously entered summary judgment in its order of April 30, 1997, that as a matter of law Defendants were not engaged in an activity authorized by federal law when they salvaged in Coffins Patch in 1992.

13. The Court erroneously entered summary judgment in its order of April 30, 1997, that as a matter of law neither maritime salvage law nor the common law of finds nor MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308 (S.D. Fla 1986) is a federal law within the meanings of the NMSA.

14. The Court erroneously entered summary judgment in its order of April 30, 1997, that as a matter of law Defendants were strictly liable, thus making the trial essentially a trial of damages only, precluding any defenses of the Defendants.

15. The Court erred in its order of clarification dated May 6, 1997, by refusing to permit Defendants to argue that maritime salvage law, the common law of finds, Judge Aronovitz' order in MDM Salvage, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 631 F.Supp. 308 (S.D. Fla 1986), or the Preliminary injunction entered in this case constitute a federal law that authorized their 1992 salvage activity in Coffins Patch or created a pre-existing right of salvage within Coffins Patch.

16. The findings, conclusions, and judgment as to damages are excessive as a matter of law, are not supported by competent, substantial evidence and are against the manifest weight of the evidence.

17. The findings, conclusions, and judgment as to damages are excessive as a matter of law, are not supported by competent, substantial evidence and are against the manifest weight of the evidence based upon the lack of any evidence to support a finding or conclusion of reasonableness of the expenses claimed by NOAA.

18. The findings, conclusions, and judgment as to damages are excessive as a matter of law, are not supported by competent, substantial evidence and are against the manifest weight of the evidence based upon NOAA's knowledge before the suit that Coffins Patch was a high energy environment and that seagrass transplants could not grow in a high energy environment. Accordingly, Defendants should not be liable for costs associated with NOAA's attempt to grow seagrass in a high energy environment like Coffins Patch which NOAA knew or should have known would be unsuccessful.

19. The Court's finding of fact number 3 should add or be replaced with Defendants revised findings numbered 39 & 40.

20. The Court's finding of fact number 8 should add or be replaced with Defendants revised finding numbered 38.

21. The Court's finding of fact number 9 should add or be replaced with Defendants revised findings numbered 34, 35 & 37.

22. The Court's finding of fact number 10 should add or be replaced with Defendants revised finding numbered 30 and language that there were pre-existing blowholes in the same area as NOAA's damage tract as shown by the various newspaper articles, the Preliminary Injunction Hearing testimony of Stephen Sykora, and the satellite photograph.

23. The Court's finding of fact number 12 should add or be replaced with Defendants revised finding numbered 35.

24. The Court's finding of fact number 18 should add or be replaced with Defendants revised finding numbered 47.

25. The Court's finding of fact number 21 should add or be replaced with Defendants revised findings numbered 50, 52 & 53. Defendants continue their objections to the use of the MacIntosh Marine Report.

26. The Court's conclusion of law number 6 should add or be replaced with Defendants revised conclusion number 97.

27. The Court's findings of fact, conclusions of law, and final judgment are not supported by competent, substantial evidence, are against the manifest weight of the evidence, were induced by the consideration of improper matters extraneous to the record and not properly or lawfully in evidence, and are contrary to the applicable law.

28. Defendants reassert all objections and motions as raised at trial and in the pleadings as if set forth separately herein. Defendants maintain all objections to the United States' exhibits, witnesses, findings of fact, conclusions of law, and proposed judgment. The failure to raise all such grounds independently in this motion is not a waiver of any ground for subsequent judicial review.

29. The Court's errors, singularly and cumulatively, denied Defendants a fair trial.

WHEREFORE, Kane Fisher, and Salvors, Inc. move this Court for a new trial and/or for the Court to open the judgment, take additional testimony and evidence, permit the demonstration of mailboxes as requested, amend the findings of fact and conclusions of law and/or make new findings and conclusions, and direct the entry of a new judgment.

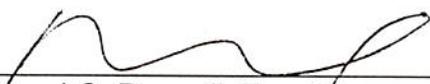
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the above and foregoing has been furnished by over night mail to: **James A. Lofton**, U.S. Department of Justice, Environmental and Natural Resources Division, Environmental Section, 1425 New York Ave., N.W., Washington, D.C. 20005; and to **Caroline M. Zander**, United States Department of Justice, Environment & Natural Resources Division, 601 Pennsylvania Avenue, N.W., Room 5614, Washington, D.C. 20004, this 16 day of September, 1997.

Respectfully Submitted,

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