

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 18-2535

[Filed July 19, 2019]

CHRISTIAN K. NARKIEWICZ-LAINE,)
<i>Plaintiff-Appellant,</i>)
)
)
)
)
KEVIN C. DOYLE, <i>et al.</i> ,)
<i>Defendants-Appellees.</i>)
)

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:11-cv-1826 — **Frederick J. Kapala**, Judge.

ARGUED APRIL 5, 2019 — DECIDED JULY 19, 2019

Before FLAUM, KANNE, and SCUDDER, *Circuit Judges*.

SCUDDER, *Circuit Judge*. This case arose from the destruction of personal property and artwork belonging to Christian Narkiewicz-Laine, an artist. Narkiewicz-Laine stored his artwork and other belongings in a space in Galena, Illinois that he rented from the defendants. Years into the lease, the defendants emptied the unit, destroying the majority of Narkiewicz-Laine’s property. He responded by suing to

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recover for the loss of his property. After a six-day trial, the jury awarded him damages on multiple claims. Unsatisfied with his damages award, Narkiewicz-Laine now appeals, challenging a number of the district court's rulings made along the way. We affirm.

I

The lease between Narkiewicz-Laine and the defendants, members of the Doyle family and affiliated entities, began in 2004. About six years later, the defendants cleared the rental space and discarded the majority of his property, including the only records he had listing the property stored in the unit. Narkiewicz-Laine then brought this suit, pursuing claims under an amendment to the Copyright Act known as the Visual Artists Rights Act of 1990, 17 U.S.C. § 106A, to recover for the destruction of his artwork. For certain types of visual art, the Act confers upon artists rights to attribution and integrity—including, for particular qualifying works, the right to prevent the work's destruction. See *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 296 (7th Cir. 2011).

Narkiewicz-Laine added common law claims for trespass, conversion, and negligence under Illinois law. He based these latter claims on a broader theory of recovery that would allow him to obtain damages for all of his lost property—the entirety of his destroyed artwork and other items of personal property.

The case proceeded to trial. Narkiewicz-Laine testified on the central issue of what property and art had been stored in the rental unit. He did so by introducing a list of all the artwork and personal

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property, explaining that he prepared the inventory after learning of the destruction by checking his personal records, contacting institutions where his work had been exhibited, and attempting to obtain photographs of his work from friends. The inventory listed 1,457 pieces of Narkiewicz-Laine's own artwork, items of personal property, and artwork created by others that he had stored in the rental unit. He asked the jury to award him \$11 million for his losses.

For their part, the defendants presented evidence that Narkiewicz-Laine had missed multiple rent payments and long since stopped paying for the utilities for the property. The defendants also underscored that, prior to emptying the space, they saw nothing resembling art or valuable personal property in the rental unit. The defendants took the position that they disposed of junk, not art.

In the course of the trial, the defendants impeached Narkiewicz-Laine with a prior conviction for lying to an FBI agent. Prior to trial, the district court had denied Narkiewicz-Laine's motion to exclude evidence of the conviction, which was over ten years old.

The jury returned a verdict in Narkiewicz-Laine's favor. It found that the defendants had destroyed four pieces of artwork protected under the Visual Artists Rights Act and awarded \$120,000 in damages. But the jury did not award him damages on the remainder of the works for which he had claimed damages under the Act—some 1,453 other pieces of artwork. As for the common law claims, the jury decided in Narkiewicz-Laine's favor and awarded \$300,000,

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reflecting the loss of all the artwork and other belongings stored at the unit.

Following the trial, the district court reduced Narkiewicz-Laine's total damages award from \$420,000 to \$300,000 to avoid what it saw as an improper double recovery. It determined that the jury's award on the common law claims needed to be reduced by the amount he recovered for the destruction of his works protected under the Visual Artists Rights Act, as some of the damages were duplicative. Even more specifically, the court reasoned that the award for Narkiewicz-Laine's common law claims—which compensated him for the loss of all property and artwork that had been destroyed—necessarily included the loss caused by the destruction of the subset of his artwork protected under the Visual Artists Rights Act.

Next, the district court concluded that Narkiewicz-Laine was not entitled to attorneys' fees under the Copyright Act. The court reasoned that, while he had won a damages award covering some of the works, he also lost the majority of the claims he brought under the Visual Artists Rights Act—his claims covered 1,457 protected works, but he prevailed only as to four of those works. In the court's view, then, there was no clear prevailing party and Narkiewicz-Laine was not entitled to attorneys' fees.

II

On appeal Narkiewicz-Laine seeks a new trial on his claims under the Visual Artists Rights Act and a reversal of the district court's post-trial rulings

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reducing his damages award from \$420,000 to \$300,000 and denying his application for attorneys' fees.

A

We begin with Narkiewicz-Laine's argument that he is entitled to a new trial because the district court never should have allowed the defense to impeach him with his 2003 conviction for making false statements to an FBI agent—a conviction well over ten years old at the time of the trial. Narkiewicz-Laine likewise takes issue with the scope of cross-examination that the district court allowed at trial regarding the conviction. On that score, he asserts that the district court improperly allowed the defendants to cross-examine him with the plea agreement from his 2003 conviction to elicit information about other charges of which he was never convicted. He further contends that the district court erred in allowing the defendants to impeach his expert witness by asking a question that improperly characterized Narkiewicz-Laine as an “art felon.”

Our review of the district court's decision to admit Narkiewicz-Laine's prior conviction as well as its other evidentiary rulings related to the use of the conviction at trial is limited. We ask only whether those rulings reflected an abuse of discretion. *See Barber v. City of Chicago*, 725 F.3d 702, 707 (7th Cir. 2013). Even then, we will not reverse if the error was harmless. *See Whitehead v. Bond*, 680 F.3d 919, 930 (7th Cir. 2012). Rather, reversal is required if the evidentiary error “had ‘a substantial and injurious effect or influence on the jury’s verdict.’” *United States v. Redditt*, 381 F.3d 597, 601 (7th Cir. 2004) (quoting *United States v.*

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Woods, 301 F.3d 556, 562 (7th Cir. 2002)). Evidentiary errors meet this standard “only when a significant chance exists that they affected the outcome of the trial.” *Whitehead*, 680 F.3d at 930.

Federal Rule of Evidence 609 supplies the controlling analytical framework. Rule 609(a)(2) allows into evidence—for purposes of impeachment—a witness’s prior conviction for a crime involving dishonesty. But the Rule sets up different presumptions for convictions more than ten years old, like Narkiewicz-Laine’s here. Evidence of such a conviction is admissible only if “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” Fed. R. Evid. 609(b)(1).

In this way, Rule 609 tilts the analysis in favor of excluding evidence of convictions over ten years old. Such convictions, we have emphasized, should be admitted “only in rare and exceptional circumstances.” *United States v. Rogers*, 542 F.3d 197, 201 (7th Cir. 2008). But so too is it true that there exists no absolute bar to admitting a conviction over ten years old, and we will uphold the district court’s decision doing so “as long as the record shows that the district court thoughtfully analyzed the facts and properly weighed the probative value of the evidence against its prejudicial effect.” *Redditt*, 381 F.3d at 601.

The district court’s decision to allow Narkiewicz-Laine’s 2003 conviction respected these principles. The court rested its ruling on a thoughtful analysis balancing the probative value of the evidence of the conviction against the prejudicial effect of

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admitting it. *See United States v. Montgomery*, 390 F.3d 1013, 1015 (7th Cir. 2004) (articulating the factors to be considered in determining whether the probative value of a conviction outweighs its prejudicial effect). Recognizing the probative value of the conviction to Narkiewicz-Laine’s credibility, the district judge took care to consider the importance of his testimony to his case and the low risk that the jury would improperly hold the conviction against him.

Recall that with the emptying of the rental unit went all documentation of what existed in the space. Narkiewicz-Laine attempted to recreate such an inventory after the fact, and testified to his compilation at trial. His testimony, then, served as the evidence establishing the existence of many of the items for which he claimed damages. As the district court saw it, this made Narkiewicz-Laine’s testimony and credibility pivotal to his case, weighing in favor of admitting the 2003 conviction. Further, the district court saw the fact that the conviction implicated Narkiewicz-Laine’s truthfulness—because it involved making false statements—as adding to its impeachment value. The district court also noted that the 2003 conviction had little similarity to Narkiewicz-Laine’s current claims, a reality that lowered the risk of the jury using the evidence for something other than impeachment.

Narkiewicz-Laine argues that the district court compounded the error of admitting his 2003 conviction by allowing the defendants too much latitude in their use of the conviction on cross-examination. To be sure, these observations are not without weight. But, in the end, we need not determine whether these evidentiary

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rulings amounted to an abuse of discretion, because even assuming that the district court erred, any impact was harmless. Viewing the trial evidence as a whole, we fail to see how the admission and use of the 2003 conviction at trial adversely skewed the jury's verdict. This is especially so because the court instructed the jury that it could consider the evidence of Narkiewicz-Laine's 2003 conviction only for the limited purpose of determining whether his testimony was truthful. See *Rogers*, 542 F.3d at 201 (explaining that "where a limiting instruction is given ... the error usually will be harmless").

And more significantly, it is far from clear that the admission of the 2003 conviction—and related testimony elicited on cross-examination—had any effect whatsoever on the jury's verdict. Remember that Narkiewicz-Laine won part of the trial: the jury awarded him damages for some of the claimed artwork and personal property. To do so, the jury had to have credited at least some of Narkiewicz-Laine's testimony and, in the process, rejected the defendants' position that the destroyed property was all scrap without any significant value. Narkiewicz-Laine presents no persuasive explanation as to why the use of his conviction at trial might have influenced the jury's decision regarding some of his claimed losses but not others. It is equally telling that he seeks a new trial only as to his claims under the Visual Artists Rights Act. In charting this course, Narkiewicz-Laine seems to accept that the use of his 2003 conviction did not affect the jury's consideration of his common law claims, even though those claims also depended heavily on his testimony and the jury's assessment of his credibility.

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None of Narkiewicz-Laine’s evidentiary challenges clears the reversible error hurdle because we cannot conclude that the admission and use of his prior conviction at trial had a substantial or injurious effect—or indeed, any discernible effect at all—on the jury’s verdict.

B

That brings us to Narkiewicz-Laine’s argument that the district court abused its discretion in reducing the jury award. Here, too, we disagree.

The jury returned a verdict for Narkiewicz-Laine on his claims under the Visual Artists Rights Act and determined two damage amounts: \$120,000 in actual damages or, in the alternative, \$120,000 in statutory damages. The jury also found in his favor on his common law claims of trespass, conversion, and negligence and awarded him \$300,000 for the loss of all of his property discarded from the rental unit. To preclude what it saw as a double recovery, the district court reduced the jury’s award for the common law claims (\$300,000) by the actual loss he sustained for the works protected under the Visual Artists Rights Act (\$120,000). Narkiewicz-Laine was instead compensated for the loss of these works by the jury’s award of statutory damages under the Act (\$120,000). This left him with a total award of \$300,000.

Narkiewicz-Laine brought his common law claims under Illinois law, so we begin there. Under Illinois law, “an injured plaintiff may receive only one full compensation for his or her injuries.” *Illinois Sch. Dist. Agency v. Pac. Ins. Co.*, 571 F.3d 611, 615 (7th Cir.

2009) (quoting *Thornton v. Garcini*, 382 Ill. App. 3d 813, 820 (2008)). To prevent a double recovery, a damage award must be reduced “to offset any amounts that the plaintiff already has collected from other sources in compensation for the same injury.” *Id.* at 615-16.

To assess whether the jury’s award would have afforded Narkiewicz-Laine a double recovery, we must turn to § 504 of the Copyright Act, the provision authorizing the recovery of damages on his Visual Artists Rights Act claims. Under § 504, a plaintiff may elect to recover either actual damages or statutory damages but not both. See 17 U.S.C. § 504(c)(1). A plaintiff electing statutory damages must make that choice “at any time before final judgment is rendered” and may recover a set range—between \$750 and \$30,000—for each work. *Id.* Here, Narkiewicz-Laine elected to receive statutory damages. That choice meant he could not recover actual damages for the same works.

What complicates our discussion here is the jury’s identical calculation of actual and statutory damages under the Visual Artists Rights Act: \$120,000 for each. That makes it tempting to view the awards as interchangeable. But statutory damages and actual damages are distinct under the Copyright Act: statutory damages compensate for harms different from actual loss. *See Bucklew v. Hawkins, Ash, Baptie & Co., LLP*, 329 F.3d 923, 931 (7th Cr. 2003) (explaining that § 504 “authorize[s] statutory damages unrelated to losses or gains”). And in the context of the Visual Artists Rights Act specifically, decoupling

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statutory damages from actual losses accords with the statute's purpose to protect the "moral rights" of artists—rights "unrelated to the artist's pecuniary interests" and instead "grounded in philosophical ideas about the intrinsic nature and cultural value of art rather than natural-property or utility justifications." *Kelley*, 635 F.3d at 296.

Relying on Congress's desire to protect the moral rights of artists, Narkiewicz-Laine argues he is entitled to both the \$120,000 in statutory damages under the Act and the \$300,000 in actual damages on his common law claims. To his mind, this does not amount to a double recovery because the \$120,000 he was awarded in statutory damages addressed his moral rights, while the \$300,000 in actual damages compensated him for his property rights.

Couched this way, Narkiewicz-Laine's position has surface appeal. A closer look shows that the analysis misses the mark, though. The biggest problem for Narkiewicz-Laine is that § 504 of the Copyright Act precludes him from recovering for both actual and statutory damages for the same works, and under his theory, that is exactly what he would be allowed to do. The jury's verdict and the related instructions bear this out.

The jury instructions made clear that both actual damages under the Visual Artists Rights Act and damages for Narkiewicz-Laine's common law claims would compensate him for the same type of loss. We have no doubt on this point because the district court instructed the jury to assess actual damages under the Act and damages on the common law claims with the

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same measuring stick: the “fair market value” of the destroyed property. The court further explained that the damages for the common law claims would compensate Narkiewicz-Laine for the value of *all* his property. This necessarily included any works the jury found to be protected under the Visual Artists Rights Act.

The instructions did not direct the jury to exclude the loss caused by the destruction of Narkiewicz-Laine’s works protected under the Act from its calculation of damages on his common law claims. This had a clear consequence: the \$300,000 awarded on the common law claims—for all property lost—necessarily included the subset of works that were specifically covered under the jury’s verdict on the Visual Artists Rights Act claims. And even though Narkiewicz-Laine elected to receive statutory damages, we cannot ignore the jury’s express finding that the fair value of his loss on the four works covered by the Visual Artists Rights Act amounted to \$120,000. Because Narkiewicz-Laine is not entitled to recover twice for the same property, the actual damages attributed to those four works must be subtracted out of the jury’s award of actual damages for all destroyed property.

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Perhaps this conclusion is easier illustrated this way:

Jury award on common law claims for all losses	\$300,000
Portion of that award covering the four works protected by the Visual Artists Rights Act	-\$120,000
Net common law award	\$180,000
Jury award of statutory damages for the four Visual Artists Rights Act works	+\$120,000
Adjusted total award	\$300,000

Skipping the subtraction step would allow Narkiewicz-Laine to recover twice for his loss of the same artwork covered by both the jury's award on his common law claims and the separate award on his claims under the Visual Artists Rights Act. On this record, the district court did not abuse its discretion in reducing the damages on the common law claims.

The trial record affords a different, alternative path to the same conclusion. During the jury instruction conference, Narkiewicz-Laine's counsel assured the defendants and the judge that his client was not seeking to recover under both the common law and the Visual Artists Rights Act for the same losses. In no uncertain terms, he explained that Narkiewicz-Laine was not taking the position that "a VARA work could

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recover both under VARA and under the common law.” The court and the defendants accepted these assurances at face value. Indeed, the defendants had originally proposed a verdict form for the common law claims that would have instructed the jury to exclude arty award for property that was included in the damage award under the Visual Artists Rights Act claims. After receiving these assurances, the defendants agreed to withdraw their form, and the resulting jury verdict form did not instruct the jury to exclude damages for the Visual Artists Rights Act artwork from its calculation of damages on Narkiewicz-Laine’s common law claims.

In a similar vein, during closing argument, Narkiewicz-Laine’s counsel asked the jury to include works protected under the Visual Artists Rights Act in its calculation of actual damages for the common law claims. He went so far as to assure the jury that, even though these works would be included in the calculation of damages for the common law claims, “nobody is trying to get paid twice.” Cementing the point, counsel then explained that, if the jury awarded actual damages for the Visual Artists Rights Act works and actual damages for the common law claims, then the actual damages for the Visual Artists Rights Act works would be subtracted from the damage award for the common law claims, stating “[t]he Judge will do this.”

On this record, Narkiewicz-Laine cannot be allowed an unjust about-face on appeal: he is urging us to reverse for the very reason he expressly disavowed at trial. *See New Hampshire v. Maine*, 532 U.S. 742, 749

(2001) (quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895)) (“[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”). Recognizing that Narkiewicz-Laine was attempting to assume a contrary position to the detriment of the defendants, the district court got it right in reducing Narkiewicz-Laine’s award from \$420,000 to \$300,000.

C

We owe a final word to the district court’s decision not to award Narkiewicz-Laine attorneys’ fees. The Copyright Act—of which the Visual Artists Rights Act is part—provides that “in its discretion,” a district court may award costs, including attorneys’ fees to the “prevailing party.” 17 U.S.C. § 505. Under this section, “[p]revailing plaintiffs and prevailing defendants are to be treated alike, but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994).

Narkiewicz-Laine contends he is presumptively entitled to attorneys’ fees as the prevailing party. See *Riviera Distributors, Inc. v. Jones*, 517 F.3d 926, 928 (7th Cir. 2008) (explaining that a prevailing party in copyright litigation is “presumptively entitled to reimbursement of its attorneys’ fees”). But his argument misaligns with what happened here by assuming that he prevailed across the board at trial. Not so.

True enough, the district court entered judgment in the amount of \$120,000 for Narkiewicz-Laine on his Visual Artists Rights Act claims. And Narkiewicz-Laine is correct to observe that a litigant is deemed to have prevailed when he obtains a “material alteration of the legal relationship of the parties”—in other words, a judgment in his favor. *Id.* (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 604 (2001)). But it is also true that—though embodied in only one count in his complaint—Narkiewicz-Laine asserted multiple claims under the Visual Artists Rights Act covering 1,457 independent pieces of artwork and seeking damages far beyond what he actually recovered. The jury found for Narkiewicz-Laine on only four of those claims. The flipside is that the jury necessarily found for the defendants on the remaining claims under the Visual Artists Rights Act—indeed, on the vast majority of those claims.

As the district court explained, that Narkiewicz-Laine “chose to plead all of his VARA claims in one count should not dictate who is determined to be the prevailing party.” And, unlike in the context of civil rights suits in which a plaintiff need not prevail on every claim to be considered the prevailing party, plaintiffs and defendants are on equal footing for the purposes of fee awards under § 505. See *Fogerty*, 510 U.S. at 524 (explaining that, in the civil rights context Congress sought to redress an imbalance between plaintiffs and defendants “by treating successful plaintiffs more favorably than successful defendants in terms of the award of attorney’s fees,” but that no such objective existed for awarding fees

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under the Copyright Act). Where, as here, the jury’s verdict points in two directions as to who prevailed, the district court was well within its discretion in declining to grant Narkiewicz-Laine fees.

The same reasoning leads us to reject the defendants’ argument that they should be awarded their costs and fees of defending this appeal. While it is true that when a party “wins a suit and is entitled by statute to a reasonable attorneys’ fee, the entitlement extends to the fee he reasonably incurs in defending the award of that fee,” *JCW Investments, Inc. v. Novelty, Inc.*, 509 F.3d 339, 342 (7th Cir. 2007) (quoting *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 438 (7th Cir. 1989)), that is not the scenario before us. The district court did not declare either side a prevailing party; nor does the defendants’ victory on appeal transform them into one. The defendants are thus not entitled to an award of attorneys’ fees for their costs in litigating this appeal.

Accordingly, we AFFIRM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

**Case No: 11 C 1826
Judge Frederick J. Kapala**

[Filed June 14, 2018]

ORDER

Plaintiff's motion for new trial, for judgment notwithstanding the verdict, and to alter judgment [286] is denied. Defendants' motion for attorney fees and expenses [283] is denied.

STATEMENT

Currently before the court are several post-trial matters. Plaintiff has filed a renewed motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(b), or in the alternative a motion

for new trial pursuant to Rule 59(a), arguing that the jury’s verdict—which resulted in a judgment in favor of plaintiff—was against the manifest weight of the evidence. Plaintiff also moves to amend the judgment pursuant to Rule 59(e) in order to add prejudgment interest. Finally, the parties have submitted briefing on the issue of attorney’s fees in which both parties claim to be the prevailing party entitled to a fee award. As explained below, each of these requests is denied and the court’s judgment will stand, with each party to bear their own costs.

I. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Rule 50(a) allows the court to grant a motion for judgment as a matter of law against a party if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party” on a particular issue. Fed. R. Civ. P. 50(a). During the trial, plaintiff filed a motion under Rule 50(a) seeking a judgment as a matter of law in his favor on his claim under the Visual Artists Rights Act of 1990 (“VARA”), 17 U.S.C. § 106A, raised in Count I of the second amended complaint.¹ The court denied the motion, noting that there was sufficient expert testimony presented by defendants for the jury to find that there were no works of recognized stature located in the storage unit at the time plaintiff’s items were discarded.

¹ Plaintiff also sought a judgment as a matter of law on defendant’s affirmative defense of abandonment, but that is no longer at issue in this case given the jury’s verdict on the state-law claims.

Pursuant to Rule 50(b), plaintiff has now filed a renewed motion for judgment as a matter of law on Count I, in which he contests the amount of damages he received on that count. The jury found that only four works of recognized stature were destroyed by defendants and awarded plaintiff a total of \$120,000 in statutory damages. In his motion, plaintiff asserts that “no reasonable jury could find that Defendants destroyed only four VARA-qualified works,” and that the evidence presented at trial established that defendants “destroyed far more than four” of plaintiff’s “VARA-qualified works.”

Under Rule 50(b), the court considers “whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in the light most favorable to the party against whom the motion is directed.” E.E.O.C. v. Mgmt. Hosp. of Racine, Inc., 666 F.3d 422, 431 (7th Cir. 2012). The court is “obliged to leave the judgment undisturbed unless the moving party can show that no rational jury could have brought in a verdict against him.” Woodward v. Corr. Med. Servs. of Ill., Inc., 368 F.3d 917, 926 (7th Cir. 2004). Moreover, the court “must accord substantial deference to a jury’s determination of compensatory damages.” Ramsey v. Am. Air Filter Co., 772 F.2d 1303, 1313 (7th Cir. 1985).

At trial, plaintiff attempted to show through the testimony of his expert witnesses that all 1,457 works of art listed in Plaintiff’s Exhibit #36 and depicted in Plaintiff’s Exhibit #52 should be considered works of recognized stature entitled to protection under VARA.

But the fact that plaintiff may have presented evidence to support his claim does not mean that the jury was required to accept that evidence in its entirety. For example, the jury could have rationally determined that it was impossible to declare a work to be of recognized stature when there was no photograph of the original work available for plaintiff's experts to view or evaluate. Nearly half of the claimed VARA works in Plaintiff's Exhibit #36 do not have a corresponding image depicted in Plaintiff's Exhibit #52.² At a minimum, the jury may have disregarded those works of art when determining which works qualified as having recognized stature. In addition, the jury could have simply disagreed with plaintiff's experts on any of the other works that were included in the list, especially considering that their testimony on this issue was general and did not address specific details about each claimed work of recognized stature. See Walker v. Sheahan, 526 F.3d 973, 979 (7th Cir. 2008) (“[A] reasonable jury could disagree with [one party’s] expert and accept [the other party’s] version of the events.”). For example, the jury may have determined that plaintiff's photographs of various buildings and structures, which comprised a large portion of the claimed works of recognized stature, did not rise to the level of recognized stature. Such a finding would have been consistent with, and supported by, the testimony of defendants' expert

² Plaintiff's Exhibit #36 lists a total of 255 works of art, but 109 of those works include only a “No Photograph Available” image in Plaintiff's Exhibit #52. When all of the duplicate prints are included, the total count becomes 1,457 works, with 640 of those works without any visual depiction.

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witnesses who opined that none of plaintiff's works of art were of recognized stature. The jury also could have rationally rejected the idea that every single work of art created by plaintiff met the standard of recognized stature considering that he had never sold any of his artwork. Finally, and perhaps most importantly, the jury was not required to simply accept plaintiff's testimony that all of the works listed in Plaintiff's Exhibit #36 were present at the time that defendants cleaned out the storage unit. A rational jury certainly could have concluded that it was unlikely plaintiff stored nearly 1,500 works of recognized stature in a storage unit with no electricity, no working climate control system, and no written inventory or insurance coverage for the works, especially given the testimony of defendants and others concerning the dirty condition of the storage unit at the time it was emptied.

Ultimately, plaintiff claims in his renewed motion for judgment as a matter of law that the jury was required to accept the blanket conclusions offered by his experts that every work of art listed in Plaintiff's Exhibit #36 qualified as a work of recognized stature, but that is simply not the case. The evidence presented, and the inferences that can be drawn therefrom, was sufficient to support the jury's verdict that only four works of recognized stature were intentionally destroyed by defendants. Under these circumstances, the court is required to leave the judgment undisturbed, and plaintiff's Rule 50(b) motion is denied.

II. MOTION FOR NEW TRIAL

Plaintiff's alternative request for a new trial fails for similar reasons. Under Rule 59(a), “[a] court may only order a new trial if the jury's verdict is against the manifest weight of the evidence, or if for other reasons the trial was not fair to the moving party.” Willis v. Lepine, 687 F.3d 826, 836 (7th Cir. 2012). A motion for new trial under Rule 59(a) claiming insufficient damages will be denied and the court “will uphold a jury's verdict as long as there is a reasonable basis in the record to support it.” Frizzell v. Szabo, 647 F.3d 698, 702 (7th Cir. 2011). The court reviews “the damages evidence in the light most favorable to the jury's verdict, and the verdict must stand unless there is no rational connection between the evidence and the jury's award.” McNabola v. Chi. Transit Auth., 10 F.3d 501, 516 (7th Cir. 1993).

As noted above, the jury was not required to accept plaintiff's evidence and could have rationally concluded that there were only four works of recognized stature that were destroyed by defendants. Indeed, a review of the testimony of Kevin and Pamela Doyle, the two primary defendants in this case, provides sufficient support for the jury's verdict. At trial, Kevin Doyle identified only two paintings that he had seen at the storage unit and that were thrown into the dumpster: “Father, Son, and Holy Ghost, 2002” and “The Universe is Burning, 2002.”³ Pamela Doyle's testimony is not as

³ The court notes that there are two works of art titled “The Universe is Burning, 2002,” which are listed in Plaintiff's Exhibit 36 as #285 and #290. Kevin Doyle appears to be discussing #290,

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precise when viewed through the trial transcript, although she did testify about one exhibit that was shown to her, but never identified by name, as a “piece of artistic material” that she had seen in the storage unit and had thrown into the dumpster. She also recalled seeing “some posters with words written on them sort of like this exhibit,” which she later identified on cross-examination as the “Refugee” poster.⁴ Given this testimony, the jury could have determined, without resorting to a compromise verdict as plaintiff suggests, that there were only four works of recognized stature in the storage unit that were intentionally destroyed by defendants. Accordingly, the court cannot say that the jury’s verdict was against the manifest weight of the evidence or order a new trial on this basis.

In his motion for new trial, plaintiff also argues that he was severely prejudiced by various evidentiary errors during the trial. As an initial matter, it is difficult to say that plaintiff suffered any prejudice as a result of this court’s evidentiary rulings given that the jury returned a verdict in his favor on all counts. Plaintiff has identified certain evidentiary rulings that he believes were adverse to his position and potentially

which was a painting on plywood, whereas plaintiff described #285 during his testimony as “one of [his] most important exhibitions” because it was the “high moment of [his] career as a landscape painter.” It is possible the jury determined that both of these paintings were destroyed.

⁴ Pamela Doyle also acknowledged that “there were some things rolled up in tubes” that were discarded, but she did not know whether those tubes contained any paintings.

prejudicial, but he has not explained how that prejudice materialized. Indeed, the only thing plaintiff could complain about is the amount of damages that were awarded to him, but there is no argument in his motion linking any of the alleged evidentiary errors to the jury's determination of damages. Accordingly, the court could deny the motion for new trial on this basis alone.

In any event, the court has reviewed the claimed evidentiary errors and finds no basis to order a new trial in this matter. Plaintiff first argues that the court erred in allowing testimony concerning plaintiff's conviction that was over ten years old. This issue was thoroughly analyzed by the court in response to plaintiff's motion in limine #1, as well as his motion to reconsider that initial ruling, and the court stands by its determination that plaintiff's 2003 conviction was admissible under Rule 609. The jury was entitled to consider this evidence for purposes of impeachment and nothing that unfolded during the trial alters this conclusion.

Next, plaintiff alleges that the cumulative effect of several other evidentiary errors was prejudicial. In order to prevail on a "cumulative effect" argument, plaintiff must show: "(1) that multiple errors occurred at trial; and (2) those errors, in the context of the entire trial, were so severe as to have rendered [the] trial fundamentally unfair." Christmas v. City of Chicago, 682 F.3d 632, 643 (7th Cir. 2012). Plaintiff is unable to meet this burden. In his motion, plaintiff asserts, without much argument or any citation to legal authority, that the court erred by (1) allowing evidence

of plaintiff's wealth, (2) allowing evidence concerning the Pulitzer Prize Committee, (3) precluding plaintiff from testifying about certain insurance valuation documents, and (4) allowing defendants to present evidence of postcards of various Chicago landmarks. After consideration, the court stands by its rulings and finds no error with regard to any of these issues. The evidence concerning plaintiff's wealth was minimal but was nevertheless relevant to the issue of whether plaintiff could have procured insurance for his works of art that were allegedly destroyed by defendants. The issue concerning the Pulitzer Prize Committee was also a minor one, but it was fair for defendants to clarify the scope of that alleged accolade as it may have been relevant to whether plaintiff's works of art should be considered to have recognized stature. As for the insurance valuations, this issue was addressed before trial within the context of defendants' motion in limine #1, and the court continues to believe that the value plaintiff placed on his own works of art that were exhibited or donated after the destruction of plaintiff's property was not relevant and would have been an improper subject for plaintiff to testify about since he was not qualified as an expert in the field of art appraisal. Finally, the court finds no error in allowing defendants to present evidence of commercially-available postcards to compare and contrast to certain photographs that plaintiff claimed should be considered works of recognized stature. Accordingly, the court finds no error in any of the issues identified by plaintiff in his motion for new trial. Moreover, even if one or more of the court's evidentiary rulings could be considered erroneous, there is nothing to credibly suggest that these errors were so severe, either

individually or cumulatively, that the trial became fundamentally unfair as a result.

Finally, without presenting any new argument on the subject, plaintiff asserts that the court erred in reducing the damages that were awarded by the jury. This undeveloped argument, in which plaintiff essentially asks the court to reconsider its ruling on the proper amount of damages, is insufficient and provides no basis for a new trial.

For all these reasons, plaintiff's motion for new trial is denied.

III. MOTION TO ALTER OR AMEND JUDGMENT

In his motion, plaintiff also asks the court to amend the judgment to include an award of prejudgment interest. “[A] motion for prejudgment interest filed after entry of a final judgment is a motion to alter or amend the judgment under Rule 59(e).” McNabola, 10 F.3d at 520. “Rule 59(e) motions may not be used to make arguments that could and should have been made before the district court rendered a judgment.” Miller v. Safeco Ins. Co. of Am., 683 F.3d 805, 815 (7th Cir. 2012). Here, because plaintiff never raised the issue of prejudgment interest in the final pretrial order, either in his statement of damages or his trial brief, the court declines to consider the issue. See First State Bank of Monticello v. Ohio Cas. Ins. Co., 555 F.3d 564, 572 (7th Cir. 2009) (“The district court was entitled to conclude that raising the issue of prejudgment interest for the first time in a Rule 59(e) motion, after summary judgment was entered, was too late.”); Thorne v.

Member Select Ins. Co., No. 2:09-CV-87-JEM, 2017 WL1089211, at *3 (N.D. Ind. Mar. 22, 2017) (declining to address the merits of the plaintiff's request for prejudgment interest in a Rule 59(e) motion, even though it was "mentioned" in his complaint).

Even if the court considers the issue, however, there is no basis for an award of prejudgment interest in this case. Turning first to plaintiff's VARA claim, it is undisputed that the statute does not provide, one way or the other, for an award of prejudgment interest for this type of claim. Plaintiff instead relies on a general rule that "prejudgment interest should be presumptively available to victims of federal law violations." Gorenstein Enters., Inc. v. Quality Care-USA, Inc., 874 F.2d 431, 436 (7th Cir. 1989). This presumption, however, does not mean that an award of prejudgment interest is required in every case.

In this case, plaintiff elected an award of statutory damages on his VARA claim. The Seventh Circuit has concluded, albeit under a different statute, that when a plaintiff has been "awarded statutory damages, prejudgment interest would be inappropriate." Matter of Marshall, 970 F.2d 383, 386 (7th Cir. 1992). Although plaintiff cites some authority from outside this circuit suggesting that a district court can, in its discretion, still award prejudgment interest under the Copyright Act for statutory damage awards, see, e.g., Barclays Capital Inc. v. Theflyonthewall.com, 700 F. Supp. 2d 310, 329 (S.D.N.Y. 2010), rev'd in part, 650 F.3d 876 (2d Cir. 2011), this court is required to follow the Seventh Circuit precedent unless and until it has been overturned.

In any event, even if the court could award prejudgment interest on the statutory damages, the court does not believe that it would be appropriate in this case. As reflected in the verdict form, the jury specifically found that defendants did not willfully violate plaintiff's rights under VARA, and there is no indication whatsoever that defendants intentionally delayed the trial or otherwise sought to increase the harm to plaintiff. Moreover, under the unique facts of this case, the destruction of plaintiff's artwork did not deprive plaintiff of any actual money, since he did not sell his artwork, and therefore an award of prejudgment interest is not necessary to fully compensate plaintiff for his loss or otherwise ensure that plaintiff is not deprived of the time-value of money. For all these reasons, even if prejudgment interest is available on the statutory damages award for plaintiff's VARA claim, the court would in its discretion decline to include this amount in the judgment, as it would result in a windfall for plaintiff.

As for plaintiff's state-law claims, there is even less basis for an award of prejudgment interest. In his motion, plaintiff relies on Section 2 of the Illinois Interest Act, 815 ILCS 205/2, but the Seventh Circuit has held that "the Illinois Interest Act does not provide for pre-judgment interest in tort cases," Westchester Fire Ins. Co. v. Gen. Star Indem. Co., 183 F.3d 578, 585 (7th Cir. 1999), and plaintiff's attempt to establish otherwise is not persuasive. In any event, even if that statute did authorize an award of prejudgment interest in this case, it would only apply if plaintiff could establish an "unreasonable and vexatious delay of payment," which he has not done. 815 ILCS 205/2; see

also Telemark Dev. Grp., Inc. v. Mengelt, 313 F.3d 972, 986 (7th Cir. 2002) (“[A]n honest dispute as to the existence of a legal obligation will not result in an unreasonable and vexatious delay which would permit recovery of interest.”). Here, plaintiff took an unfortunate landlord-tenant dispute and morphed it into a demand for more than \$11 million in damages from defendants. Under these circumstances, defendants cannot be faulted for defending themselves against plaintiff’s claims. Accordingly, the court also declines to award prejudgment interest on plaintiff’s state-law claims.

For all these reasons, plaintiff’s motion to alter or amend judgment to include prejudgment interest is denied.

IV. MOTION FOR ATTORNEY’S FEES

As a final matter, both parties have filed a position paper on the issue of attorney’s fees and costs with respect to the VARA claim advanced in Count I of plaintiff’s second amended complaint. The Copyright Act provides that “the court in its discretion may allow the recovery of full costs by or against any party” and “may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505. Given this language, the Supreme Court has explained that “[p]revailing plaintiffs and prevailing defendants are to be treated alike, but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994); see also Riviera Distrib., Inc. v. Jones, 517 F.3d 926, 928 (7th Cir. 2008) (concluding that

“§ 505 treats both sides equally and allows an award in either direction”).

In their position papers, both sides argue that they should be considered the prevailing party entitled to attorney’s fees and costs. At first blush, this appears to be a simple issue as plaintiff received a judgment in his favor and will be entitled to collect a total of \$300,000 in damages from defendants. The Supreme Court has explained that the term “prevailing party” is a “legal term of art” which requires “a court-ordered change in the legal relationship between the plaintiff and the defendant,” such as an enforceable judgment on the merits. Buckhannon Bd. & Care Home, Inc. v. Va. Dep’t of Health & Human Res., 532 U.S. 598, 604 (2001); see also Riviera, 517 F.3d at 928 (“[A] litigant prevails (for the purpose of fee-shifting statutes) when it obtains a material alteration of the legal relationship of the parties.”). The analysis in this case, however, is not so simple.

As defendants correctly point out in their filings, plaintiff’s VARA “claim” in Count I was actually numerous claims joined into one count. Plaintiff sought to recover for the destruction of 1,457 alleged works of recognized stature, and he prevailed, but only as to four of those works of art. Defendants, on the other hand, successfully defended against plaintiff’s claims with respect to the other 1,453 works. If these unique claims had each been brought in a separate count of plaintiff’s complaint, then there would have been a judgment in favor of defendants on the vast majority of plaintiff’s VARA claims. The fact that plaintiff chose to plead all of his VARA claims in one count should not

dictate who is determined to be the prevailing party for purposes of awarding costs under § 505. The court also notes that, unlike in the context of civil rights cases where the plaintiff is treated more favorably than the defendant and need not prevail on every single claim to be considered the prevailing party, the parties in a copyright action are supposed to be treated equally for purposes of § 505. See Fogerty, 510 U.S. at 534. When determining who is the prevailing party under that provision, “[t]here is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised.” Id.

The reality of this case is that both parties prevailed in some significant aspects, and both parties lost in some significant aspects, such that it is difficult to declare one clear winner.⁵ Plaintiff prevailed by receiving a judgment in his favor, whereas defendants prevailed by successfully defending against most of plaintiff’s VARA claims and the enormous amount of damages he sought. Under these circumstances, the court has determined, in its discretion, that there is no prevailing party entitled to attorney’s fees and costs under § 505.⁶ Accordingly, defendant’s motion for

⁵ Plaintiff’s apparent dissatisfaction with the judgment, as reflected above in his various requests for post-judgment relief, shows that even he does not believe he prevailed on all aspects of his case. Although this is certainly not dispositive of the issue, it is telling.

⁶ In the event that the court had to declare only one party as the prevailing party in this case, it is not clear who that would be, but that is irrelevant. No matter which party would be considered the prevailing party under those circumstances, the court still would

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attorney's fees and expenses, as well as plaintiff's request for the same, are both denied, and each party will bear their own costs.

Date: 6/14/2018 ENTER:

s/ _____
FREDERICK J. KAPALA
District Judge

exercise its discretion under § 505 and decline to award that party attorney's fees and costs. Put another way, even if the court had declared plaintiff as the prevailing party, that still would not have changed the outcome of the fee request under the circumstances of this case.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No: 11 C 1826
Judge Frederick J. Kapala

[Filed December 13, 2017]

Christian K. Narkiewicz-Laine,)
Plaintiff(s),)
v.)
Kevin C. Doyle, et al.,)
Defendant(s).)

JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

* * *

other: Judgment is entered in favor of plaintiff, Christian K. Narkiewicz-Laine, and against defendants, Kevin C. Doyle, Pamela Doyle, John T. Doyle Trust A, and John T. Doyle Trust B, in the amount of \$120,000 on plaintiff's Visual Artists Rights

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Act claim and \$180,000 on plaintiff's trespass, conversion, and negligence claims, for a total recovery of \$300,000.

This action was (*check one*):

tried by a jury with Judge Frederick J. Kapala presiding, and the jury has rendered a verdict.

* * *

Date: 12/13/2017

Thomas G. Bruton, Clerk of Court
/S/ Susan Bennehoff, Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No: 11 C 1826
Judge Frederick J. Kapala

[Filed December 12, 2017]

ORDER

Plaintiff's position on the jury verdict [273] is rejected, and defendants' position on the jury verdict [274] is accepted. Accordingly, the court directs the clerk to enter judgment in favor of plaintiff, Christian K. Narkiewicz-Laine, and against defendants, Kevin C. Doyle, Pamela Doyle, John T. Doyle Trust A, and John T. Doyle Trust B, in the amount of \$120,000 on plaintiff's Visual Artists Rights Act claim and \$180,000 on plaintiff's trespass, conversion, and negligence claims, for a total recovery of \$300,000.

STATEMENT

At the conclusion of the jury trial in this matter, the jury returned a verdict in favor of plaintiff, Christian K. Narkiewicz-Laine, and against defendants, Kevin C. Doyle, Pamela Doyle, John T. Doyle Trust A, and John T. Doyle Trust B, on all remaining counts.¹ In particular, the jury found in favor of plaintiff on his claim against defendants under the Visual Artists Rights Act of 1990 (“VARA”) raised in Count I of the second amended complaint and awarded plaintiff actual damages of \$120,000 for “VARA property destroyed by Defendants.” In the alternative, the jury also found that an award of \$120,000 in statutory damages under VARA would be appropriate based on the destruction of four works of visual art.² The jury also found in plaintiff’s favor on his common law claims of trespass, conversion, and negligence raised in

¹ In the final pretrial order, plaintiff indicated that he was voluntarily waiving the claim raised in Count II of the second amended complaint. Accordingly, that count is hereby dismissed with prejudice.

² Although plaintiff has elected statutory damages instead of actual damages, this makes no difference in the court’s analysis. Statutory damages are merely an alternative method of compensating a plaintiff for a violation of his VARA rights. See 17 U.S.C. § 504(c)(1) (providing that “the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action”); see also Martin v. City of Indianapolis, 4 F. Supp. 2d 808, 811 (S.D. Ind. 1998), aff’d, 192 F.3d 608 (7th Cir. 1999) (“Statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.”).

Counts III, IV, and V and awarded plaintiff actual damages of \$300,000 on those claims. At defendants' request, the court withheld entry of judgment on the verdict in order to allow the parties time to brief the issue of whether the jury's verdict needed to be reconciled in order to avoid a potential double recovery for plaintiff. After careful consideration of the issue and review of the parties' submissions, the court concludes that the jury's verdict should be read to reflect a total recovery of \$300,000.

"[I]t is well settled that an injured plaintiff may receive only one full compensation for his or her injuries," and that "a plaintiff is not entitled to recover twice for the same injury." Illinois Sch. Dist. Agency v. Pac. Ins. Co., 571 F.3d 611, 615 (7th Cir. 2009); see also Pasquale v. Speed Prod. Eng'g, 166 Ill. 2d 337, 368 (1995) (discussing the "long-recognized principle in Illinois that a plaintiff shall have only one satisfaction for an injury"). Indeed, the Seventh Circuit has explained that "[a] judgment that can be read to allow a plaintiff to recover twice for the same injury contains a manifest error of law." Duran v. Town of Cicero, Ill., 653 F.3d 632, 642 (7th Cir. 2011). "The determination of whether two awards compensate the same injury is a matter within the sound discretion of the trial court." Illinois Sch. Dist. Agency, 571 F.3d at 616.

In this case, the dispute over the jury's verdict is relatively straightforward. Plaintiff argues that there is no overlap between the verdicts and that it would not be a double recovery if the court awarded both \$120,000 in statutory damages on the VARA claim and \$300,000 in actual damages on the common law claims for a total

recovery of \$420,000. Defendants, on the hand, contend that there would be an impermissible double recovery under that scenario because the \$300,000 awarded on the common law claims includes \$120,000 in actual damages attributable to the four VARA-protected works that formed the basis for the jury's award on Count I. Therefore, according to defendants, the court needs to reduce the award on the common law claims by this amount, from \$300,000 down to \$180,000, in order to avoid a double recovery for the destruction of plaintiff's four VARA-protected works of art.

In order to properly interpret the jury's verdict, the court has looked closely at the jury instructions and the verdict form. “[A]bsent evidence to the contrary, we assume that juries follow a court's instructions.” 3M v. Pribyl, 259 F.3d 587, 600 (7th Cir. 2001); see also Duran, 653 F.3d at 643 (assuming that the jury followed the specific instructions that were given before concluding that “the judgment must be amended to avoid the possibility of double recovery”).

In Jury Instruction No. 42, the jury was told that plaintiff may recover under VARA for “any actual losses he suffered because of the destruction of works of visual art of recognized stature,” and in Jury Instruction No. 43, they were told that the term “actual losses” meant “the amount of money which will reasonably and fairly compensate [plaintiff] for . . . [t]he loss from the destruction of Plaintiff's works of visual art of recognized stature, determined by the fair market value of the property immediately before the occurrence.” There is no dispute that the jury

determined that \$120,000 was the fair market value of plaintiff's four VARA-protected works.

In Jury Instruction No. 45, the jury was instructed how to calculate damages if plaintiff prevailed on one or more of the common law claims. The jury was told that it should "fix the amount of money which will reasonably and fairly compensate [plaintiff] for . . . [t]he loss from the destruction of any of Plaintiff's personal property or any property which he was holding for others, determined by the fair market value of the property immediately before the occurrence." The jury determined that a total of \$300,000 was the proper amount of compensation under these counts. Nothing in the jury instructions, and nothing in the verdict form, directed the jury to exclude from its calculation of damages on the common law claims the loss caused by the destruction of plaintiff's VARA-protected works. In fact, the relevant instruction specifically tells the jury to calculate the loss from "the destruction of any of Plaintiff's personal property," (emphasis added), which would necessarily include the four VARA-protected works. Although plaintiff suggests in his position paper that "[t]he jury may have excluded the four VARA works they found from their determination of the damages under the common law counts," this is nothing more than speculation and "[t]here is nothing in the record to support this interpretation of the jury's verdict." Duran, 653 F.3d at 643. Accordingly, if the court assumes as it must that the jury carefully and accurately followed Jury Instruction No. 45, see Pribyl, 259 F.3d at 600, then it is clear that the \$300,000 award on the common law claims includes the \$120,000 loss to the four VARA-protected works plus an

additional \$180,000 for the loss to plaintiff's other property that was destroyed.

"To prevent double recovery by [plaintiff], defendants are entitled to a reduction in damages . . . to offset any amounts that the plaintiff already has collected from other sources in compensation for the same injury." Illinois Sch. Dist. Agency, 571 F.3d at 615-16. Here, because the jury determined that plaintiff's loss was \$120,000 on the VARA claim, he cannot recover that same amount a second time in connection with the common law claims. Accordingly, the court will reduce the award on Counts III, IV, and V to \$180,000 in order to avoid this double recovery, resulting in a total award of \$300,000 on all counts.

In his position paper, plaintiff cites Nintendo of America, Inc. v. Dragon Pacific International, 40 F.3d 1007 (9th Cir. 1994), in support of his argument that he can recover both statutory damages on his VARA claim and actual damages on the common law claims. In that case, the defendant was importing and selling video game cartridges that were compatible with Nintendo's system. Id. at 1009. The cartridges sold by the defendant contained numerous games per cartridge, including several Nintendo copyrighted games, and they were marketed as Nintendo products by using Nintendo's trademark. Id. Nintendo sued the defendant alleging both copyright and trademark infringement. Id. Following a bench trial, the Court awarded Nintendo both statutory damages on its copyright claim as well as actual damages on its trademark claim, which the defendant argued on appeal was an impermissible double recovery. Id. at 1009-10. The

Ninth Circuit affirmed, holding that the different damages awarded were appropriate because “Nintendo’s claims were not . . . based on the same wrongful act” since the defendant had “committed two separate violations.” *Id.* at 1010-11.

The court has reviewed Nintendo, as well as the other cases cited by plaintiff, but finds that the instant case is clearly distinguishable. In Nintendo, the defendant committed two separate and distinct wrongful acts: (1) he violated Nintendo’s copyrights by selling unauthorized copies of Nintendo’s games, and (2) he violated Nintendo’s trademark rights by using its trademark to market his unofficial game cartridges. Indeed, it would have been possible for the defendant in Nintendo to commit only one of these violations—for example, by selling the illegal cartridges without using the Nintendo trademark—which further shows that there were two distinct wrongful acts. In contrast, in the instant case, all of plaintiff’s claims are based on a single wrongful act: the destruction of plaintiff’s property. Given this distinction, the Nintendo decision does not help plaintiff, as it does not persuade the court that plaintiff is entitled to recover damages for the destruction of his VARA-protected works under both VARA and the common law claims.

In his position paper, plaintiff also argues briefly that defendants should be precluded from raising this issue of double recovery because they did not object to the final damages instruction or the verdict form.³ The

³ Plaintiff also argues that the proposed formula in defendant’s proposed verdict form did not require the reduction in damages for

court disagrees. It was clear from the filings in the final pretrial order and the discussion held during the jury instruction conference that defendants were objecting to any sort of double recovery. The parties, however, were proceeding under the belief that the issue had already been resolved. Indeed, after the issue of “double counting” was raised by defense counsel, plaintiff’s counsel explained to the court that “there are some cases that suggest you can recover under copyright and in the same case also recover under trademark,” which was obviously a reference to the Nintendo case discussed above, but then assured the court that plaintiff was “not trying to recover for VARA works . . . both under VARA and under the common law.” Counsel then restated his position that plaintiff was not asking for any sort of double counting and reiterated a final time that plaintiff was “not trying to double recover.” Given these comments, defendants cannot be faulted for not continuing their objection on the issue of a potential double recovery when both parties seemed to be in agreement on the issue. Accordingly, the court rejects plaintiff’s argument that defendants have waived their right to raise this issue.

which they now argue. While that is true, the argument is misleading because defendants’ proposed verdict form would have already accounted for the potential overlap. Indeed, defendants’ proposed verdict form specifically instructed the jury, with respect to the common law claims, “do not include any award for any damages, actual or statutory, for any property that you included in a damage award to Plaintiff under Count I for VARA.” Given this language, there would have been no need to reduce the damages award on the common law claims to avoid a double recovery.

In fact, given the statements made by plaintiff's counsel during the instruction conference, the court finds that plaintiff is precluded from raising that argument in the first place. When discussing the issue of a potential double recovery, counsel explained that plaintiff was not seeking to recover "both under VARA and under the common law," and he agreed that, if the jury "awarded actual damages and VARA damages, whichever the lesser would simply be deducted out." That is precisely the type of relief defendants are now seeking, and plaintiff is in no position to prevent defendants from seeking to reconcile the jury's verdict in this manner. As noted earlier, defendants had originally suggested a verdict form that would have helped alleviate some of the confusion that ultimately resulted from the jury's verdict, but they agreed to withdraw that form after receiving these assurances from plaintiff. Given these circumstances, the court finds that the doctrine of judicial estoppel prevents plaintiff from now asserting a position that is inconsistent with the comments made at the instruction conference. See New Hampshire v. Maine, 532 U.S. 742, 749 (2001) ("Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." (alteration omitted)).

For all these reasons, the court finds that the jury's award on the common law claims must be reduced by the amount plaintiff recovered under Count I for the destruction on his VARA-protected works in order to

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avoid an improper double recovery. Accordingly, the court will enter judgment on the jury's verdict, as modified by this order, in favor of plaintiff in the amount of \$120,000 on his VARA claim raised in Count I and \$180,000 on his trespass, conversion, and negligence claims raised in Counts III, IV, and V, for a total recovery of \$300,000.

Date: 12/12/2017 ENTER:

s/ _____
FREDERICK J. KAPALA
District Judge

APPENDIX D

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604**

No. 18-2535

[Filed August 14, 2019]

CHRISTIAN K. NARKIEWICZ-LAINE,)
Plaintiff-Appellant,)
)
v.)
)
KEVIN C. DOYLE, *et al.*,)
Defendants-Appellees.)
)

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 1:11-CV-1826
Frederick J. Kapala, *Judge*.

Before

JOEL M. FLAUM, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

O R D E R

On consideration of the petition for rehearing filed by plaintiff-appellant on August 2, 2019, all members of the original panel have voted to deny the petition for rehearing.

Accordingly, the petition for rehearing is hereby **DENIED**.