

1991

Joseph Edward McPherson, Joan Elissa McPherson v. Vaughn Belnap, Jeffrey Belnap : Brief of Appellant

Utah Supreme Court

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CKET NO.

910429CA

IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH EDWARD McPHERSON and
JOAN ELISSA McPHERSON,

Plaintiffs-Appellees,

vs.

VAUGHN BELNAP and
JEFFREY BELNAP

Defendant-Appellant.

91-0429-CA

NO. 910108

PRIORITY NO. 16

BRIEF OF APPELLANT
VAUGHN BELNAP

On Appeal from Judgment of the
Third Judicial District Court
in and for Salt Lake County,
Honorable John A. Rokich, Judge

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UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH EDWARD McPHERSON)	
and JOAN ELISSA McPHERSON,)	
)	
Plaintiffs-Appellees,)	
)	No. 910108
vs.)	
)	
VAUGHN BELNAP and)	
JEFFREY BELNAP)	
)	
Defendant-Appellant.)	

**BRIEF OF APPELLANT
VAUGHN BELNAP**

STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal from a Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah, over which the Court of Appeals does not have original appellate jurisdiction. The Supreme Court has jurisdiction in this matter pursuant to §78-2-2(3)(j), *Utah Code Ann.* (Supp. 1990).

**STATEMENT OF ISSUES
AND STANDARD OF APPELLATE REVIEW**

For purposes of clarity, and to avoid confusion, defendant-appellant Vaughn Belnap will be referred to as "Vaughn". Codefendant Jeffrey Belnap will be identified as "Jeffrey". Plaintiffs-appellees Joseph and Joan McPherson will be referred to as "McPherson".

1. Whether the trial court erred in concluding that Vaughn entered into a contract of bailment with McPherson, that Vaughn and

McPherson stood in the relationship of bailee and bailor and that McPherson's personal property was delivered to Vaughn rather than Jeffrey.

2. Assuming, for the sake of argument, that a bailment was created, whether the trial court erred in concluding that it was a bailment for mutual benefit, as opposed to a gratuitous bailment and that, consequently, a standard of simple negligence, as opposed to gross negligence, was applicable.

3. Whether the trial court erred in imposing a presumption of negligence on Vaughn.

4. Whether the trial court erred in concluding that Vaughn was negligent and that his negligence proximately caused McPherson's injuries.

5. Whether the trial court erred in concluding that Vaughn did not rebut the presumption, if any, that he was negligent and that his negligence caused the loss of McPherson's personal property.

These combined issues of law and fact each require the review of a finding of fact. The standard of appellate review requires that Vaughn marshal the evidence in support of the trial court's findings and demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be against the clear weight of the evidence, thus making them clearly erroneous. (*Matter of Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989)).

**STATUTES, RULES AND REGULATIONS
WHOSE INTERPRETATION IS DETERMINATIVE**

There are no constitutional provisions, statutes, ordinances, rules or regulations whose interpretation is determinative of the issues on appeal in this matter.

STATEMENT OF THE CASE

McPherson brought suit in the Third Judicial District Court in and for Salt Lake County against Vaughn and Jeffrey to recover damages allegedly arising from the conversion of certain items of personal property or, in the alternative, arising from a breach of a contract of bailment. (Complaint, Record on Appeal, p. 2-6).

Vaughn was served with a Summons and a copy of the Complaint. (R. 8-10). Jeffrey was not served with a Summons and the case proceeded solely against Vaughn.

Vaughn filed his Answer on June 13, 1989 (R. 11-15) and his Amended Answer on May 30, 1990. (R. 42-47).

The case was tried to the Court, without a jury, the Honorable John A. Rokich, presiding, on August 30, 1990.

After hearing testimony and the arguments and representations of counsel, the Court took the matter under advisement. (R. 84).

On September 14, 1990, the Court rendered its Memorandum Decision in which it found that McPherson entered into a contract of bailment with Vaughn, pursuant to which Vaughn stored certain items of personal property belonging to McPherson, the personal property was

stolen, a presumption arose to the effect that Vaughn was negligent, Vaughn "failed to prove that the loss of the furniture was not as a result of his negligence" and McPherson was damaged in the amount of \$6,000. (R. 99-102).

McPherson submitted Proposed Findings of Fact and Conclusions of Law. Vaughn filed his Objections to Proposed Findings of Fact and Conclusions of Law. (R. 141-144).

Vaughn then filed a Motion for New Trial and/or to Direct Entry of Judgment in Favor of Defendant. (R. 150-151).

On January 2, 1991, the Court rendered its Memorandum Decision denying the Motion for New Trial. On January 24, 1991, the Court entered its Order denying the Motion for New Trial and the Objections to Findings of Fact and Conclusions of Law. (R. 199-200).

On January 24, 1991, the Court entered its Findings of Fact and Conclusions of Law (R. 201-206). Judgment was entered on January 28, 1991. (R. 207-209).

Vaughn's Notice of Appeal was filed on February 25, 1991. (R. 210-211).

STATEMENT OF FACTS

Vaughn leased a condominium unit to McPherson during the month of September, 1988. (Trial Transcript, p. 37, lns. 4-7).

In late November, 1988, Vaughn requested that McPherson voluntarily vacate the condominium unit because Jeffrey had offered to buy the unit from Vaughn and because Jeffrey was "going through a

divorce" and it would be convenient for him to move into the condominium. (Trial Transcript, p. 38, lns. 6-17; p. 7, lns. 24-25; p. 8 lns. 1-11).

McPherson agreed to vacate the condominium unit. (Trial Transcript, p. 8, lns. 12-25; p. 9, lns.1-8; p. 38, lns. 21-25; p. 39, lns. 1-9).

McPherson found alternative lodging in a furnished apartment and informed Vaughn that he had no room to store his furniture. (Trial Transcript, p. 9, lns. 22-25; p. 10, lns. 1-4).

Vaughn told McPherson that Jeffrey had no furniture because he was in the process of obtaining a divorce (Trial Transcript, p. 10, lns. 12-16) and that he would speak with Jeffrey concerning McPherson's proposal to leave the furniture in the condominium unit. (Trial Transcript, p. 62, lns. 8-22).

Jeffrey agreed to keep the furniture in the condominium unit which he would occupy. (Trial Transcript, p. 63, lns. 5-6).

Vaughn then informed McPherson that Jeffrey had agreed to let him leave some of the furniture in the condominium unit (Trial Transcript, p. 63, lns. 9-11).

McPherson advised Vaughn of his concerns about the safety of his property while it was in the condominium unit. Vaughn stated that it would probably be fine. (Trial Transcript, p. 73, lns. 10-16).

After McPherson vacated the condominium unit, Jeffrey immediately occupied the condominium unit as a tenant, paying rent to Vaughn

in the same amount as was paid by McPherson. (Trial Transcript, p. 64, lns. 5-17).

Vaughn did not, at any time, have the possession, or use, of McPherson's furniture. (Trial Transcript, p. 64, lns. 18-23).

McPherson acknowledged that the furniture was left in the condominium for Jeffrey's use. (Trial Transcript, p. 35, lns. 12-18).

The furniture and other items of personal property owned by McPherson and left in the condominium unit rented by Jeffrey were stolen on December 15, 1988. (Trial Transcript, p. 46, lns. 2-5; p. 47, lns. 1-3; p. 49, lns. 10-17).

On December 15, 1988, a neighbor saw a pickup truck occupied by two men loaded with furniture parked in front of the condominium unit occupied by Jeffrey. Neither Vaughn nor Jeffrey were occupants of the truck. (Trial Transcript, p. 55, lns. 11-25; p. 56, lns. 1-4).

The police officer investigating the crime found no evidence of forcible entry. The theft was reported at 11:30 p.m. (Trial Transcript, p. 47, lns. 15-17).

Vaughn lived in the condominium unit prior to the time it was occupied by McPherson. At the time Vaughn lived in the unit the doors were equipped with dead bolt locks and normal security was provided. There was no difference in the security of the condominium unit at the time it was occupied by Vaughn and the time of the theft. (Trial Transcript, p. 68, lns. 21-25; p. 69, lns. 1-8).

SUMMARY OF ARGUMENT

1. An essential element of the existence of a bailment, and therefore the creation of the relationship of bailor and bailee, is that the bailee have actual possession and control of the bailed property. Although the trial court found that McPherson's property was placed in the possession and control of Vaughn, there is no evidence to support this finding. In fact, the undisputed evidence is that McPherson's furniture was stored in the condominium unit rented and occupied by Jeffrey, that Jeffrey had the use of the furniture and that McPherson intended that Jeffrey have the use of the furniture. Thus, an essential element of a bailee-bailor relationship is absent and the court erred in finding that such a relationship existed between Vaughn and McPherson.

In addition, the only evidence with respect to the existence of an agreement between Vaughn and McPherson concerning the storage of the furniture is that Vaughn acted as an intermediary between McPherson and Jeffrey, rather than as a party to the agreement. Thus, the finding of the trial court is against the clear weight of the evidence.

2. The Court erred in finding that a bailment for mutual benefit, as opposed to a gratuitous bailment, was created and consequently it erroneously applied a standard of ordinary care, rather than gross negligence. In the context of a bailment for mutual benefit, the bailee must exercise ordinary care. A gratuitous bailee is liable only for acts of gross negligence. Although McPherson argued that Vaughn used the

furniture to further the sale of the condominium, the only evidence before the Court established that Jeffrey offered to purchase the condominium prior to any negotiations concerning furniture storage. As Jeffrey, not Vaughn, had the use and benefit of the furniture, Vaughn did not receive a benefit from the alleged bailment. Therefore, the bailment, if any, was gratuitous and Vaughn may be held liable only for acts of gross negligence.

3. McPherson did not present any evidence, or even identify, any acts of specific negligence on the part of Vaughn. In essence, McPherson prevailed at the trial court because the court imposed a presumption of negligence. A presumption of negligence in the context of a bailment may be imposed only where the bailee has exclusive possession of the bailed goods and exclusive control of the premises in which the goods are stored. There is no evidence that Vaughn had either exclusive possession of the bailed goods or exclusive control of the condominium unit in which McPherson's furniture was stored. In fact, the undisputed evidence establishes that Vaughn did not have exclusive possession of McPherson's furniture or exclusive control of the condominium unit. Therefore, the Court erred in imposing a presumption of negligence. As no evidence of specific acts of negligence or causation was presented, the trial court's decision should be reversed.

4. Assuming the trial court incorrectly imposed a presumption of negligence, the record is devoid of any evidence of any specific acts of negligence, ordinary or gross, on the part of Vaughn. Thus, absent a

presumption of negligence, the decision of the trial court must be reversed.

5. Vaughn successfully rebutted the presumption of negligence. Once a presumption of negligence arises, the burden of going forward with the evidence, but not the burden of persuasion, shifts to the bailee. The only evidence which was presented concerning Vaughn's care of the bailed goods is that he exercised the same care with respect to the bailed goods as he did with respect to his own property. That is, the condominium unit was secured with deadbolt locks. In addition, Jeffrey testified that he specifically recalled securing the unit on the day of the theft. As McPherson relied solely on the presumption of negligence and that presumption was rebutted, the trial court erred in awarding Judgment to McPherson.

ARGUMENT

I.

VAUGHN DID NOT ENTER INTO A CONTRACT OF BAILMENT WITH MCPHERSON

A.

Elements of Bailment

The trial court found that Vaughn and McPherson entered into a contract of bailment, that they therefore stood in the relationship of bailee and bailor and that McPherson's personal property was delivered to Vaughn, rather than Jeffrey. (Findings of Fact and Conclusions of Law, (R. 203, ¶ 7; 204, ¶ 1) (see Addendum).

As stated at 8 Am. Jur. 2d BAILMENTS § 2,

A "bailment" in its ordinary legal signification, imports the delivery of personal property by one person to another in trust for a specific purpose, with a contract, express or implied, that the trust shall be faithfully executed and the property returned or duly accounted for when the special purpose is accomplished or kept until the bailor reclaims it. (*id.* at 738)

Inherent in this definition is the requirement that the bailee have actual possession and control of the subject of the bailment. In *Marsh vs. American Locker Co.*, 7 N.J. Super. 81, 72 A.2d 343 (1950), the Court stated this proposition as follows:

Although conflicting views have been expressed by the authorities as to whether common law bailments necessarily arise out of contract, they all recognize the need that there be possession of the property by the bailee. See 4 Williston, *Contracts* (rev. ed. 1936) pp. 2888, 2890; Brown, *Personal Property* (1936) pp. 225, 230. (72 A.2d at 344)

Similarly, in *1440 Park Road Parking, Inc. vs. Consolidated Mutual Insurance Company*, 168 A.2d 900 (D.C. Mun. App. 1961), the Court noted that: "[t]he creation of a bailment requires that **possession and control** over an object pass from the bailor to the bailee". (168 A.2d at 901) (emphasis added).

The Court, in *Broadus vs. Commercial National Bank*, 113 Okla. 10, 237 P. 538 (1925), held that to constitute a bailment there must be a delivery and full transfer of the property to the bailee, so as to exclude the possession of the owner and all other persons and give to the bailee, for the time being, the sole custody and control of the property. (237 P. at 584).

More recently the Oregon Court of Appeals, in *Dundas vs. Lincoln County*, 48 Or. App. 1025, 618 P.2d 978 (1980), stated that "[i]n order for a bailment to exist, the bailee must have both possession and physical control . . .". (618 P.2d at 982).

Thus, in order for Vaughn and McPherson to stand in the relationship of bailee and bailor, the evidence must establish (a) the delivery of personal property to Vaughn; (b) a contract, express or implied, that Vaughn would hold the personal property in trust for McPherson; (c) actual possession and physical control of the bailed property by Vaughn; and (d) an agreement that the bailed property would be safely returned to McPherson.

**B.
Evidence Supporting
Trial Court's Finding**

The evidence which supports the finding of the trial court as to the existence of a bailment is as follows:

1. McPherson testified, on direct examination, as follows:

A: . . . we had found a place but it was furnished and now we had to do something with our furniture. And he [Vaughn] indicated at that time that his - it was his son and - it would be his son moving in and he was just getting divorced and he had no furniture. And so it was - you know, he said, well, he [Jeffrey] wouldn't mind if that was left there, he would take good care of it. . . . But it was Vaughn who was the person I was dealing with because it was Vaughn who had bought our house.

Mr. Reed: Objection, your Honor. The answer at this point is not responsive.

The Court: The objection is sustained.

(Trial Transcript, p. 10, lns. 10-25).

2. McPherson also testified that his understanding of the agreement concerning the furniture was that " . . . the furniture was just to be left there long enough until we could find a permanent place to live". (Trial Transcript, p. 11, lns. 15-17).

3. As to the basis for McPherson's belief that his agreement was with Vaughn, as opposed to Jeffrey, McPherson testified as follows:

A: Well, being the basis - the basis of the understanding was that the furniture was just to be left long enough until we could find a place to live and it was done with - my whole dealings were with Vaughn. It was Vaughn who had purchased our home. It was Vaughn with which I had developed a comfort zone with, and that was basically it. I was going off assurances that his son was responsible and would take care of the property.

(Trial Transcript, p. 11, lns. 21-25; p. 12, lns. 1-4).

4. In response to questioning by the Court about statements made by the parties concerning the alleged agreement, McPherson stated:

The Witness: When we were talking we said now we're going to have to find a place for the furniture. At that time he [Vaughn] said that his son had no furniture, he was just going through a divorce and, you know, if we wanted to leave the furniture there that would be fine until we could find a permanent place for it, because - this thing was

very inconvenient thing for everyone involved.

The Court: What did you say?

The Witness: I said that was fine. The only thing we were concerned about was, you know, whether or not Jeff would take care of the - you know, be responsible for the furniture, I mean take care of it.

(Trial Transcript, p. 14, lns. 7-20).

5. As to possession and control of the bailed property, McPherson testified, on cross examination, as follows:

Q: (By Mr. Reed) . . . Just so I'm straight on this, did Jeff Belnap move into the condominium unit right after you moved out?

A: I believe so.

Q: And the furniture was left in the condominium for Jeff to use?

A: Yes.

. . .

Q: Did you have access to the furniture if you wanted it?

A: Only by contacting someone ahead of time and letting them know that we would be making arrangements.

Q: You would just call Jeff and say, hey I want to come by and get my television?

A: Jeff or Vaughn.

(Trial Transcript, p. 35, lns. 12-25; p. 36, lns. 1-4)

6. Vaughn's testimony concerning arrangements to leave the furniture in the apartment rented and occupied by Jeffrey is as follows:

Q: (By Mr. Reed) What did you say? Or, well, perhaps what did Mr. McPherson say would be more appropriate?

A: Mr. McPherson told me that they had found a furnished apartment at American Towers, that they were in the process of making an offer or a deal on another home, that it would be very inconvenient for them to have to move all the furniture to a storage unit and then take it to the house, did I think it was possible or did Jeff agree to them leaving some of their belongings in the condominium.

Q: What did you say to that request?

A: I responded, Jeff would probably be delighted since he was going through a divorce and his wife had taken everything he had and he would probably come with his toothbrush and personal belongings, but that I would call Jeff and explain the situation to him.

Q: Did you call Jeff concerning this proposal?

A: Yes I did.

. . .

Q: (By Mr. Reed) Did Jeff agree to keep the furniture?

A: Yes.

Q: Did you have any other conversations with Mr. McPherson concerning storage of the furniture?

A: No, not other than calling him and telling him Jeff had agreed to let him leave some of the items there.

(Trial Transcript, p. 62, lns. 6-24; p. 63, lns. 5-11).

7. No evidence was presented which even suggests that Jeffrey was an agent, or acted under the direction or control, of Vaughn. In fact, the only evidence presented concerning their relationship, other than familial, concerned the lease of the condominium unit by Jeffrey.

Q: (By Mr. Reed) Did Jeff move into this condominium unit?

A: (By Vaughn) Yes he did.

Q: Did he pay rent for the unit?

A: Yes he did.

Q: Did he pay rent to you?

A: Yes.

Q: What was the amount of rent?

A: I believe it was \$750.00 a month.

Q: Was that the same amount as was paid by Mr. McPherson?

A: Yes.

Q: I take it then Jeffrey was a tenant?

A: He was at the time.

(Trial Transcript, p. 64, lns. 5-17).

8. As to actual physical possession and control of the bailed property, the only evidence offered is as follows:

A: (By McPherson) . . . It was his son and - it would be his son moving and he [Jeffrey] was just getting divorced and he [Jeffrey] had no furniture. And so it

was - you know, he [Vaughn] said well he [Jeffrey] wouldn't mind if it was left there, he [Jeffrey] would take good care of it.

(Trial Transcript, p. 10, lns. 12-16).

A: (By McPherson) I was going off assurances that his son [Jeffrey] was responsible and would take care of the property.

(Trial Transcript, p. 12, lns. 2-4).

A: (By McPherson) The only thing we were concerned about was, you know, whether or not Jeff would take care of the - you know, be responsible for the furniture, I mean take care of it.

(Trial Transcript, p. 14, lns. 17-20).

Q: (By Mr. Reed) Did you ever have any of Mr. McPherson's furniture in your possession?

A: (By Vaughn) No I not. [sic]

Q: Did you ever have the use of that furniture?

A: No I did not.

(Trial Transcript, p. 64, lns. 18-23).

Q: (By Mr. Reed) Have you ever had possession of that furniture?

A: (By Vaughn) No, I never have.

Q: Ever use the furniture?

A: No sir.

(Trial Transcript, p. 68, lns. 13-17).

C.
Application of Law to Evidence

As set forth above, other than McPherson's statements that he relied on Vaughn because Vaughn had purchased his home and he had developed a "comfort zone" with Vaughn, there is no evidence that Vaughn agreed to hold the furniture for the benefit of McPherson or that Vaughn agreed to return the furniture.

The only testimony with respect to the care, or return, of the furniture is that Vaughn informed McPherson that he believed that Jeffrey would care for the furniture.

Similarly, there is no evidence which even suggests that Vaughn ever accepted delivery or had possession or control of the bailed personal property. The only evidence is that the bailed property was in the sole possession and control of Jeffrey. In fact, one of the two reasons that the furniture was left in Jeffrey's condominium unit was to allow him to have the use of the furniture.

Although Vaughn facilitated the storage of the furniture by Jeffrey, and acted as an intermediary between McPherson and Jeffrey, he did not agree to accept delivery of the furniture and did not have possession of the bailed property.

It was McPherson's clear understanding and intent that Jeffrey, rather than Vaughn, have the use, control and possession of the bailed property.

Even considering the evidence offered by McPherson in support of his claim, the trial court's finding that a bailment was created between McPherson and Vaughn and that McPherson delivered the personal property to Vaughn, and not Jeffrey, is so lacking in support as to be against the clear weight of the evidence, thus making it clearly erroneous. Because McPherson and Vaughn did not stand in the relationship of bailor and bailee, the decision of the trial court must be reversed and Judgment entered accordingly.

II.
ASSUMING, ARGUENDO, THAT A BAILMENT WAS
CREATED, THE COURT ERRED IN FINDING THAT
IT WAS A BAILMENT FOR MUTUAL BENEFIT

A.
Applicable Law

The law generally recognizes three types of bailments: (1) a bailment for the sole benefit of the bailor; (2) a bailment for the sole benefit of the bailee; and (3) a bailment for the mutual benefit of both the bailee and bailor. Those bailments falling within the first category are known as gratuitous bailments. Those included within the latter two categories are often referred to as "bailments for hire".

The duties of a gratuitous bailee differ, in degree, from those of a bailee for hire. A bailee for hire must exercise the degree of care which an ordinary prudent person under similar circumstances would exercise toward his own property. *Romney vs. Covey Garage*, 100 Utah 167, 111 P.2d 545 (1941). However, as noted by the Court in *Loomis vs. Imperial Motors, Inc.* 88 Ida. 74, 396 P.2d 467 (1964), "[t]he liability

of a gratuitous bailee . . . is generally recognized as one arising only from gross negligence". (396 P.2d at 469-70).

Although Vaughn strenuously contends that a bailment was not created, if such a relationship existed Vaughn was a gratuitous bailee and may be found liable only for acts of gross negligence.

The trial court found as follows:

The Court further believes that bailment was for the mutual benefit of both parties. The plaintiff accommodated defendant Vaughn Belnap in furthering the sale of the condominium by moving out prior to the expiration of the lease and by allowing Vaughn Belnap to use the furniture in furtherance of the sale of the condominium, to his son who had no furniture. (Findings of Fact, ¶ 8, R. 203).

**B.
Evidence Supporting
Trial Court's Finding**

1. As discussed, in detail, above, one of the factors leading to the storage of the McPhersons' property in Jeffrey's condominium unit was that he had no furniture and the use of the McPhersons' furniture would be beneficial to him. (Trial Transcript, p. 10, lns. 10-25; p. 14, lns. 7-20; p. 35, lns. 16-18; p. 62, lns. 6-24; p. 63, lns. 5-11).

2. The primary purpose of the storage arrangement was to provide storage facilities to McPherson without cost and to eliminate the necessity of moving the furniture twice. (Trial Transcript, p. 10, lns. 10-25; p. 11, lns. 21-25; p. 14, lns. 7-20; p. 62, lns. 6-15).

3. The only testimony concerning the alleged benefit to Vaughn is as follows:

Q: (By Mr. Reed) Did you receive any benefit from the storage of that furniture in the condominium unit?

A: (By Vaughn) No. Just headaches.

(Trial Transcript, p. 64, lns. 24-25; p. 65, ln. 1)

Q: (By Mr. Kunkel) Would it have benefitted you if your son purchased the condominium unit?

A: (By Vaughn) Obviously.

Q: So, the McPhersons moved out as an accommodation to you; is that correct?

A: That is correct.

(Trial Transcript, p. 38, lns. 18-23).

Q: (By Mr. Reed) In the winter of 1988 did you have any legal obligation to support Jeff Belnap?

A: (By Vaughn) No I didn't.

(Trial Transcript, p. 69, lns. 9-11).

4. During closing argument, McPhersons' counsel argued as follows:

When Mr. McPherson was asked to leave the condominium unit, he wanted to accommodate Mr. Belnap. In order to make that accommodation, Mr. McPherson had to leave his property there. So it was a benefit to Mr. McPherson and Mr. Belnap testified it was a benefit to him by having them leave so he could sell the unit. (Trial Transcript, p. 79, lns. 2-8).

C.
Application of Law to Evidence

Although the evidence clearly establishes that McPherson accommodated Vaughn by vacating the condominium unit, there is no evidence which supports McPherson's argument that Vaughn used the furniture to further the sale of the condominium to Jeffrey. In fact, the only evidence on this point is that Jeffrey agreed to purchase the condominium prior to the time McPherson was asked to vacate the unit. (Trial Transcript, p. 38, lns. 10-17; p. 61, lns. 8-15).

Jeffrey, not Vaughn, had the exclusive use and possession of the McPhersons' furniture. Jeffrey offered to purchase the condominium prior to the time the storage of furniture was ever discussed. Vaughn had no obligation to provide furniture for Jeffrey's use. Vaughn did not receive any benefit from the use of the furniture by Jeffrey or from the storage of that furniture in the condominium unit.

Again, the trial court's finding that the "bailment was for the mutual benefit" of McPherson and Vaughn is so lacking in support as to be against the clear weight of the evidence and is thus, clearly erroneous. For this reason, the trial court incorrectly applied a standard of ordinary care, rather than gross negligence and therefore, its decision must be reversed.

**III.
THE TRIAL COURT ERRED IN IMPOSING
A PRESUMPTION OF NEGLIGENCE**

**A.
A Presumption of Negligence Arises Only if
the Bailee has Exclusive Possession of
the Bailed Property**

In the context of an action to recover for damage to bailed goods, a presumption of negligence is imposed on the bailee for hire, once the bailment and the damage to the bailed goods are established. *Romney, supra* at 546.

However, this general rule is subject to an important exception which is applicable to the present case.

The leading Utah case concerning the imposition of a presumption of negligence in the context of a bailment is *Staheli vs. Farmer's Cooperative of Southern Utah*, 655 P.2d 680 (Utah 1982). There, this Court was confronted with a question of law identical to that present in this action, i.e. under what circumstances will a presumption of negligence arise.

The underlying facts in *Staheli* are as follows: Plaintiff hired the defendant, Farmer's Co-op, to store barley pursuant to an oral contract of bailment. The Co-op leased one-half of a potato cellar, owned by another entity, for purposes of storing the barley. The portion of the cellar not used by the Co-op was used by the owner of the cellar for its own purposes. There was no wall or partition between the portion of the cellar leased by the Co-op and the part retained by the owner.

Persons other than the bailee had access to the stored barley. The bailor had knowledge of this arrangement. The barley was destroyed, in part, by a fire of unknown origin.

The bailor brought suit against the Co-op to recover the value of the damaged barley and, as in the present case, at trial relied on the presumption of negligence.

The trial court entered Judgment for the Co-op finding that a presumption of negligence did not arise and that " . . . no negligence on the part of the defendant was shown by the plaintiff, and without a showing of negligence on the part of the defendant, defendant is not responsible for the fire of unknown origin which caused the loss". *Staheli, supra* at 682.

On appeal, plaintiff-appellant argued that it was entitled to a presumption that the Co-op was negligent as a matter of law and that the Co-op did not rebut that presumption. The Co-op argued that a presumption of negligence did not arise and that therefore the burden of proof did not shift because it did not have exclusive possession of the bailed goods.

In deciding whether a presumption of negligence arises under circumstances where the bailee does not have exclusive possession or control of the bailed goods, this Court, in *Staheli*, first examined the general rule applicable to contracts of bailment. The Court explained that the rationale supporting the general rule is that the party who is in possession of another's property is in a better position to control any

conditions which might cause damage to the property or, at the least, he will be able to ascertain the cause of any damage.

The Court recognized that the imposition of a presumption of negligence in the context of a bailment action is analogous to application of the doctrine of *res ipsa loquitur*. Of course, one of the prerequisites to application of the doctrine of *res ipsa loquitur* is that the defendant have exclusive control of the instrumentality causing the injury. Similarly, with respect to a bailment action, the bailee must have exclusive possession of the bailed property. After discussing these factors, this Court held as follows:

A predicate of the presumption, therefore, is that the bailee be in **exclusive possession** [of the bailed goods] and it is that proposition that gives logical force to the presumption. (655 P.2d at 680) (emphasis added).

The *Staheli* Court also noted that on the facts before it, the Coop did not have exclusive control of the premises in which the barley was stored and concluded that " . . . the trial court properly held that a presumption of negligence did not arise because of the absence of the Coop's **exclusive control** of the premises". (*Staheli, supra* at 684) (emphasis added).

The proposition that a presumption of negligence arises in bailment cases only upon a showing that the bailee had exclusive possession and control of the bailed goods, as set forth in *Staheli, supra*, is not unique to Utah. The courts of numerous other jurisdictions have recognized this requirement.

In *Burt vs. Blackfoot Motor Supply Company*, 67 Idaho 548, 186 P.2d 498 (1947) and *Nolan vs. Auto Transporters*, 225 Kan. 176, 597 P.2d 614 (1979) the courts stated that a presumption of negligence arises when the bailed goods are in the exclusive possession and control of the bailee, (186 P.2d at 501; 597 P.2d at 621).

The rationale for this prerequisite to imposition of a presumption of negligence was succinctly expressed by the Court in *Moe vs. American Ice and Cold Storage Company*, 30 Wash.2d 51, 190 P.2d 755 (1948), where the Court stated:

In other words, the common law, with its characteristic horse sense, makes a virtue out of necessity, growing out of the fact, that, where the bailee has the exclusive and undivided possession of the goods, he must also have the exclusive means of showing what became of them. Where the reason of the law ceases, the law ceases. For reasons which must be perfectly manifest to any thinking person, the rule referred to does not obtain or apply where the bailee does not have the exclusive and undivided possession of the property. (Quoting from *Lemnos Broad-silk Works, Inc. vs. Spiegelberg*, 127 Misc. 855, 217 N.Y.S. 595, 598) (190 P.2d at 761).

Thus, in order for a presumption of negligence to arise in the context of the present action, the evidence must establish that Vaughn had exclusive possession of McPherson's furniture and that he had exclusive control of the storage facility, i.e. the condominium unit rented and occupied by Jeffrey.

The trial court found " . . . the presumption is that the defendant Vaughn Belnap, was negligent for failing to return the furniture . . . ". (Findings of Fact, ¶ 9; Conclusions of Law, ¶ 3; R. 204-205).

B.

**Evidence Supporting Trial
Court's Finding**

1. As discussed in detail at pages 11 through 16, above, the bailed property, at all times, was in the actual possession of Jeffrey, rather than Vaughn. (Trial Transcript, p. 35, lns. 12-18; p. 63, lns. 5-6).

2. Vaughn did not have exclusive control of the premises in which the furniture was stored. Those premises, i.e. the condominium unit, were controlled by Jeffrey as a tenant. (Trial Transcript, p. 35, lns. 12-15; p. 64, lns. 5-17).

3. In addition to Jeffrey, on occasion his girlfriend was present in the condominium unit and had access to the bailed furniture. (Trial Transcript, p. 49, ln. 25; p. 50, lns. 1-2; p. 51, lns. 16-19).

C.

Application of Law to Evidence

In the present case, as in *Staheli*, the trial court found that McPherson and Vaughn entered into an oral contract of bailment. The bailed furniture was not stored in premises controlled by Vaughn. Rather, McPherson's property was stored, with McPherson's consent and knowledge, in the condominium unit rented and occupied by Jeffrey. Therefore, Jeffrey had possession of the bailed goods and control of the

premises in which those goods were stored. In addition, his guests had lawful access to the premises and to the bailed furniture.

Simply stated, Vaughn had neither exclusive possession of the McPhersons' furniture, nor exclusive control of the premises in which the goods were stored. Under these circumstances, a presumption of negligence does not arise.

The trial court's finding that "the presumption is that the defendant, Vaughn Belnap, was negligent" and its Conclusion of Law that " . . . the presumption is that Vaughn Belnap was negligent for failing to return the furniture" are so lacking in evidentiary support as to be against the clear weight of the evidence and are thus clearly erroneous. (Findings of Fact and Conclusions of Law, R. 204-205).

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT VAUGHN WAS NEGLIGENT

For purposes of this argument, Vaughn will assume that the trial court incorrectly imposed a presumption of negligence. In that case, the bailor must establish specific acts of negligence, by a preponderance of the evidence, and establish that those specific acts proximately caused the alleged damages. (*Staheli, supra* at 684).

A. Evidence Supporting Finding of Negligence

1. The record is devoid of any evidence of any specific acts of negligence on the part of Vaughn. Although in closing argument, McPherson's counsel questioned whether " . . . the alleged theft was an

inside job or done by a third party", there is no evidence to support this speculation. (Trial Transcript, p. 80, lns. 5-6). The only evidence which pertains to this point is a stipulation to the effect that the police investigation revealed no signs of forcible entry. (Trial Transcript, p. 47, lns. 1-3).

2. A witness to the theft, Afton Todd, testified that on the day of the theft, she saw a pickup truck parked at the condominium unit, a man get out of the pickup, walk up to the unit and return to the pickup and then later the pickup truck returned and was loaded with furniture. (Trial Transcript, p. 55, lns. 11-19). She also testified that neither Vaughn nor Jeffrey were occupants of the pickup truck. (Trial Transcript, p. 55, lns. 24-25; p. 56, lns. 1-4).

3. Jeffrey testified that he specifically recalled that the condominium unit was secured on the day of the theft. He remembered locking the doors on that day because they were locked in response to an incident involving his ex-wife and his girlfriend. (Trial Transcript, p. 49, lns. 18-25; p. 50, lns. 1-13; p. 51, lns. 3-25; p. 52, lns. 1-10).

B.

Application of Law to Evidence

Simply stated, no evidence of any negligent conduct on the part of Vaughn was introduced at trial. Therefore, absent a presumption of negligence, the trial court's finding that Vaughn was negligent and that his negligence proximately caused McPherson's injuries is so lacking in

support as to be against the clear weight of the evidence and is clearly erroneous.

**V.
THE TRIAL COURT ERRED IN CONCLUDING
THAT VAUGHN DID NOT REBUT THE
PRESUMPTION OF NEGLIGENCE**

**A.
Applicable Law**

For the purposes of this argument, Vaughn will assume that the trial court correctly imposed a presumption of negligence and found that a bailment for mutual benefit was created.

Under these circumstances, Vaughn was bound to care for McPherson's property with the same degree of care which an ordinary prudent person under similar circumstances would exercise toward his own property. (*Romney, supra*, at 546).

Of course, once a presumption of negligence arises, the burden of going forward with the evidence to rebut that presumption rests on the bailee. (*Staheli, supra*, at 682). However, the burden of persuasion remains with the bailor. (*Staheli, supra*, at 683, fn. 1).

The trial court found that " . . . Vaughn Belnap failed to prove that the loss of the furniture was not the result of his negligence". (Findings of Fact, ¶ 9; Conclusion of Law, ¶ 3; R. 204-205).

**B.
Evidence Supporting
Trial Court's Findings**

1. The only evidence presented concerning the exercise of care by Vaughn is as follows:

Q: (By Mr. Reed) You lived in that condominium unit prior to September, 1988; is that correct?

A: (By Vaughn) That's correct.

Q: Did you have locks on the doors?

A: Yes. Normal locks and deadbolt doors.

Q: I assume there were windows in place?

A: Yes.

Q: Normal security?

A: Yes.

Q: Was there any difference in the security of the unit at the time you lived in it than when Jeff lived there?

A: No.

(Trial Transcript, p. 68, lns. 21-25; p. 69, lns. 1-8).

2. In addition, Jeffrey testified that he specifically recalled locking and securing the condominium unit on the day of the theft. (Trial Transcript, p. 49, lns. 13-25; p. 50, lns. 1-13; p. 51, lns. 20-25; p. 52, lns. 1-10).

C.

Application of Law to Evidence

Although only limited evidence was presented concerning Vaughn's care of McPherson's property, that evidence rebuts the presumption of negligence.

Vaughn stated that he used the same degree of care, i.e. locks and other normal security, as he had employed in the care of his own

possessions. Jeffrey testified that he specifically recalled securing the condominium unit on the day of the theft. No evidence was presented which contradicts this testimony.

Therefore, Vaughn successfully rebutted the presumption of negligence and the trial court's Finding, to the effect that "Vaughn Belnap, failed to prove that the loss of the furniture was not the result of his negligence", and its identical Conclusion of Law, are so lacking in support as to be against the clear weight of the evidence. (Finding of Facts, ¶ 10 and Conclusion of Law, ¶ 3, R. 204-205).

CONCLUSION

The trial court's award of Judgment to McPherson may, and should be, reversed for five different reasons.

First, the court erred in finding that McPherson and Belnap stood in the relationship of bailor and bailee. The undisputed evidence establishes that McPherson did not enter into a bailment agreement with Vaughn, rather he entered into such an agreement with Jeffrey and Vaughn simply acted as an intermediary between the two. Similarly, the undisputed evidence establishes that Jeffrey, rather than Vaughn, accepted possession of the bailed goods.

Second, the bailment, if any, to which Vaughn was a party was a gratuitous bailment, rather than a bailment for mutual benefit. Thus, Vaughn may only be held liable for acts of gross negligence, as opposed to a breach of the standard of ordinary care. Thus, the trial

court applied an incorrect standard of care and its decision should be reversed.

Third, and perhaps most importantly, the trial court erred in imposing a presumption of negligence. In *Staheli, supra*, this court unequivocally held that a presumption of negligence arises in the context of a bailment only where the bailee has exclusive possession of the bailed property and exclusive control of the premises in which that property is stored. The record is devoid of any evidence which would even suggest that Vaughn had exclusive possession of McPherson's furniture or exclusive control of the condominium unit. For this reason, a presumption of negligence does not arise.

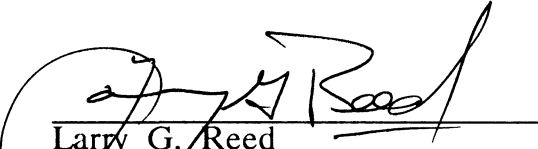
Fourth, as McPherson failed to present any evidence of specific acts of negligence on Vaughn's part and relied solely on the presumption, the trial court's decision must be reversed.

Fifth, even should this Court find that a presumption of negligence was correctly imposed, Vaughn successfully rebutted that presumption. The only evidence concerning the care which he exercised for the bailed goods is that he used the same ordinary care which he exercised for his own property.

For the foregoing reasons, Defendant-Appellant Vaughn Belnap respectfully requests that this Court reverse the Judgment of the Third Judicial District in and for Salt Lake County and instruct it to enter Judgment in favor of Defendant.

RESPECTFULLY submitted this 18th day of June, 1991.

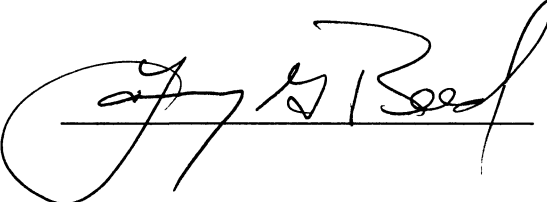
CROWTHER & REED


Larry G. Reed
Attorney for Appellant
Vaughn Belnap

CERTIFICATE OF MAILING

This is to certify that on the 18th day of June, 1991, a true and correct copy of the foregoing Brief of Appellant Vaughn Belnap was mailed, in the United States mail, postage prepaid, to:

Scott Kunkel
THOMPSON, HATCH, MORTON & SKEEN
Attorneys for Appellees
1245 Brickyard Road, #600
Salt Lake City, Utah 84106



ADDENDUM

Memorandum Decision, Dated September 14, 1990

Memorandum Decision [re: Motion for New Trial], Dated January 2, 1991

Order [Denying Motion for New Trial and Objections to Findings of Fact and Conclusions of Law], dated January 24, 1991

Findings of Fact and Conclusions of Law, dated January 24, 1991

SEP 14 1990

SALT LAKE COUNTY
By W. C. [Signature]
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH EDWARD McPHERSON and	:	MEMORANDUM DECISION
JOAN ELISSA McPHERSON,	:	
Plaintiffs,	:	CIVIL NO. 890902949 PD
	:	
vs.	:	
	:	
VAUGHN BELNAP and	:	
JEFFREY BELNAP,	:	
Defendants.	:	

This case was tried on August 30, 1990 before the Court, without a jury. Plaintiff Joseph McPherson was present and represented by Scott S. Kunkel. Plaintiff Joan Elissa McPherson was not present. The defendants, Vaughn Belnap and Jeffrey Belnap were present and represented by Larry G. Reed. The Court heard testimony of the witnesses, admitted documentary evidence, heard oral argument and took the matter under advisement. The Court now being fully advised, enters its ruling.

This case arose as a result of the defendant Vaughn Belnap leasing to the plaintiffs a condominium for a term of six months. During the term of the lease defendant, Vaughn Belnap, had an opportunity to sell the condominium. He requested that

the plaintiffs vacate the premises to accommodate the sale, which they did. However, the parties agreed that plaintiffs could leave their furniture in the premises until such time as they located a residence which could accommodate the furniture. Defendant Vaughn Belnap stated that the furniture would be a benefit to him because his son, who was in the midst of a divorce proceeding, could use the furniture.

Defendant Vaughn Belnap could not return the furniture upon plaintiffs' request, because he claimed it was stolen.

The Court has concluded that under this fact situation a bailment has been created. The plaintiffs delivered to defendant Vaughn Belnap and not Jeffrey Belnap the furniture, with the express understanding that the furniture would be returned to plaintiffs.

The bailment was for the mutual benefit of both parties. The plaintiffs accommodated defendant Vaughn Belnap in furthering the sale, plus allowing defendant Vaughn Belnap to use the furniture in furtherance of the sale of the condominium to his son who had no furniture.

The Court further concludes that since this was a case where there was a mutual benefit, the presumption is that the defendant, Vaughn Belnap, was negligent for failing to return

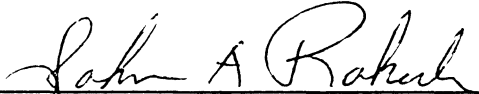
the furniture as agreed. Defendant Vaughn Belnap failed to prove that the loss of the furniture was not as a result of his negligence.

As a result of defendant Vaughn Belnap being unable to return the furniture to the plaintiffs, the plaintiffs suffered damages in the sum of \$6,000.00, together with their costs and interest.

The Court refers the parties to plaintiff's Trial Brief for additional reasons in support of its decision.

Plaintiffs' counsel shall prepare Findings of Fact and Conclusions of Law, and Judgment in accordance with this Memorandum Decision.

Dated this 14 day of September, 1990.



JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 14 day of September, 1990:

Scott S. Kunkel
Robert W. Thompson
Attorneys for Plaintiff
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106

Larry G. Reed
Attorney for Defendant
455 South 300 East, Suite 300
Salt Lake City, Utah 84111



JAN 2 1991

By SALT LAKE COUNTY
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH EDWARD McPHERSON and	:	MEMORANDUM DECISION
JOAN ELISSA McPHERSON,	:	
Plaintiffs,	:	CIVIL NO. 890902949 PD
	:	
vs.	:	
	:	
VAUGHN BELNAP and	:	
JEFFREY BELNAP,	:	
Defendants.	:	

Defendant Vaughn Belnap's Motion for New Trial or Direct Entry of Judgment in Favor of Defendant, Motion to Tax Bill of Costs, Objection to form of Judgment and proposed Findings of Fact and Conclusions of Law were heard on the 26th day of November, 1990. Plaintiffs were represented by Scott S. Kunkel. Defendant was represented by Larry G. Reed.

The Court read the Memoranda filed by the respective parties, heard oral argument, and took the matter under advisement. The Court now rules.

The first issue the Court will address is whether or not defendant Vaughn Belnap was negligent in failing to return the plaintiffs' furniture since there was a bailment for the mutual benefit of the parties.

Vaughn Belnap contends that the Court erred in concluding that the theft of the plaintiffs' furniture was caused by the negligence of Vaughn Belnap.

Vaughn Belnap relies upon Staheli v. Farmers Co-op of Southern Utah, 655 P.2d 680 (Utah 1982), as the basis for the Court erring in its decision.

The Court has reviewed the Staheli case and believes the Staheli case is distinguishable from the present case.

In this case the plaintiffs placed the furniture with Vaughn Belnap exclusively, and he in turn allowed his son to occupy the premises where the furniture was to be stored.

Plaintiffs' only access to the furniture was by permission of Vaughn Belnap.

Vaughn Belnap was the only party who could authorize the moving of the furniture from the premises.

Vaughn Belnap's son, Jeffrey Belnap, had no authority to do anything with the furniture other than as an agent or representative of his father.

Vaughn Belnap entrusted Jeffrey Belnap to protect, secure and care for the furniture so that it could be returned to plaintiffs.

The findings in the Staheli case were:

All of the parties were aware of the easy access to all parts of the potato pit at all times crucial herein and most, if not all, along with third party owner of the potato pit and others were in and out of the premises as they desired or as their business dictated. Doors were left open and little or no concern was expressed by anyone concerning the other stored equipment or materials, which plaintiffs would now have this court find constituted an unreasonable risk of the loss that actually occurred or that the defendant had responsibility under the law to control transients at or near the premises, which plaintiffs further hypothesized may have caused the fire.

The facts in this case and the Staheli case in this Court's opinion are not similar; therefore, the Court cannot come to the same conclusion as Vaughn Belnap has reached.

The Staheli case held that "one who is in possession of another's property is in a better position to control the conditions that may cause the loss and to know, or at least to be able to ascertain the cause of any actual loss or damage." A predicate of the presumption, therefore, is that the bailee be in exclusive possession, and it is that proposition that gives logical force to the presumption.

In this case, as the Court pointed out to counsel at the time of oral argument, the bailee should not be able to escape

liability by turning over the care and security of the property to an employee, representative, or an agent. Vaughn Belnap elected to name his son as caretaker of the furniture and therefore must assume the responsibility for its safety.

The Staheli case aptly states the rule: "Thus, the presumption allocates the burden of proof to a party most likely to have access to the evidence and, in the absence of evidence places liability on the party most likely to have been able to avert the loss."

In this case Vaughn Belnap contends that the furniture was stolen from the condominium, but there was no evidence of forcible entry. The only evidence presented was self-serving statements of Jeffrey Belnap that the doors and windows were locked when he left the premises.

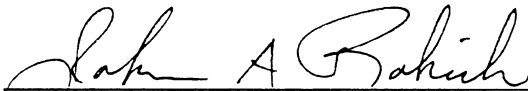
The Court denies Vaughn Belnap's Motion for a New Trial or Entry of Judgment in his favor.

Vaughn Belnap's Motion to Tax Costs is granted.

Vaughn Belnap's objection to the granting of prejudgment interest is denied.

Plaintiffs' counsel shall prepare an Order in accordance with this Memorandum Decision.

Dated this 2 day of January, 1991.



JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy
of the foregoing Memorandum Decision, to the following,
this 4 day of January, 1991:

Scott S. Kunkel
Robert W. Thompson
Attorneys for Plaintiff
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106

Larry G. Reed
Attorney for Defendants
455 South 300 East, Suite 300
Salt Lake City, Utah 84111



CLERK OF DISTRICT COURT
Third Judicial District

JAN 24 1991

By 
Deputy Clerk

JAMES E. MORTON, #3738
SCOTT S. KUNKEL, #5303
THOMPSON, HATCH, MORTON & SKEEN
Attorneys for Plaintiffs
1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106
Telephone: (801) 484-3000

IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY

STATE OF UTAH

JOSEPH EDWARD MCPHERSON and)	
JOAN ELISSA MCPHERSON,)	
)	
Plaintiffs,)	ORDER
)	
vs.)	
)	
VAUGHAN BELNAP and JEFFREY)	Civil No. 890902949 PD
BELNAP,)	
)	Judge John A. Rokich
Defendants.)	

Defendant Vaughan Belnap's Motion for New Trial or Entry of Judgment in favor of Defendant, Motion to Tax Costs and Objection to Form of Judgment came on regularly for hearing before the Honorable John A. Rokich of the above-entitled Court on November 26, 1990, Larry G. Reed appearing on behalf of Defendant Vaughan Belnap and Scott S. Kunkel appearing on behalf of Plaintiffs, Joseph Edward McPherson and Joan Elissa McPherson. Based upon the oral argument of counsel, study of the various motions and memoranda submitted on behalf of the parties, and good cause appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Defendant Vaughan Belnap's Motion for a New Trial or Entry of Judgment in his favor is denied.

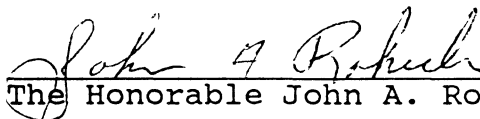
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2. Defendant Vaughan Belnap's Motion to Tax Costs is granted.

3. Defendant Vaughan Belnap's Objection to Granting of Pre-judgment interest is denied.

4. Defendant Vaughan Belnap's objections to the findings of fact and conclusions of law are denied.
DATED this 24 day of January, 1991.

BY THE COURT:


The Honorable John A. Rokich

APPROVED AS TO FORM:

Larry G. Reed

MAILING CERTIFICATE

I hereby certify that on the 15th day of January, 1991, I deposited in the U.S. Mail, a true and correct copy of the foregoing Order, postage prepaid, addressed to:

Mr. Larry Reed
Crowther & Reed
455 South 300 East
Salt Lake City, Utah 84111



JAMES E. MORTON #3738
SCOTT S. KUNKEL #5303
THOMPSON, HATCH, MORTON & SKEEN
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1245 Brickyard Road, Suite 600
Salt Lake City, Utah 84106
Telephone (801) 484-3000

FILED DISTRICT COURT
Third Judicial District

JAN 24 1991

SALT LAKE COUNTY
By *John A. Rokich*
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

JOSEPH EDWARD McPHERSON and)	
JOAN ELISSA McPHERSON,)	
)	
Plaintiffs,)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
vs.)	
)	
VAUGHAN BELNAP and)	
JEFFREY BELNAP,)	Civil No. 890902949 PD
)	
Defendants.)	Judge John A. Rokich

This case, came on regularly for a non-jury trial on August 30, 1990, before The Honorable John A. Rokich, District Court Judge. Plaintiffs Joseph Edward McPherson and Joan Elissa McPherson, were represented by Scott S. Kunkel of Hatch, Morton & Skeen and Defendant Vaughan Belnap was represented by Larry G. Reed of Crowther & Reed. The Court having heard testimony of witnesses, reviewed documentary evidence and argument of counsel and being fully advised in the premises, and for good cause appearing, now makes and enters the following:

FINDINGS OF FACT

1. In or about September, 1988, Plaintiffs entered into a lease agreement with Defendant Vaughan Belnap wherein Vaughan

Belnap agreed to lease a condominium he owned, located at 902 West Newhampton Drive, Salt Lake City, Utah, (hereinafter the "Condominium") to Plaintiffs for a period of six (6) months.

2. In or about December of 1988, during the term of the lease, Vaughan Belnap had an opportunity to sell the Condominium. Vaughan Belnap asked Plaintiffs if they would be able to vacate the Condominium as soon as possible as he had found a buyer for the property. Plaintiffs agreed to vacate the Condominium to accommodate the sale, as long as Vaughan Belnap would let them leave their furniture in the Condominium until such time as they could locate a residence which would accommodate their furniture. Vaughan Belnap agreed to this condition and stated that the furniture would be of benefit to him because his son, Jeffrey Belnap, who was in the midst of a divorce proceeding, could use the furniture.

3. Several weeks after moving out of the Condominium Plaintiff, Edward McPherson, contacted Vaughan Belnap and indicated to Vaughan Belnap that he needed to pick up his furniture and other personal items from the Condominium. Several days thereafter, Vaughan Belnap contacted Plaintiffs and indicated that he could not return the furniture as the furniture had been stolen.

4. On or about December 15, 1988, Officer Marchant of the Murray Police Department, conducted an investigation of the alleged theft of Plaintiff's property. Officer Marchant's investigation revealed that there was no evidence of any forcible

entry into the Condominium.

5. At all relevant times during the events giving rise to this action, Vaughan Belnap was the owner of the Condominium, and Plaintiff's personal property that was left at the Condominium and in the care, custody and control of Vaughan Belnap.

6. The items of personal property that Vaughan Belnap did not return to Plaintiffs are as follows:

<u>Item</u>	<u>Purchase Price</u>	<u>Date Purchased</u>
Mitsubishi 35" television	\$ 2,900.00	1985
Cannondale Mud Bike	\$ 600.00	5/87
Fat Chance Bike	\$ 1,485.00	5/87
G.E. Microwave	\$ 300.00	
Couch, Loveseat, two chairs and one ottoman made of elephant hide	\$ 6,000.00	
Persian Rug	\$ 700.00	

7. The Court believes that under the fact situation of the case, a bailment was created. Plaintiffs delivered to Defendant Vaughan Belnap, and not Jeffrey Belnap, the furniture with the express understanding that the furniture would be returned to Plaintiffs.

8. The Court further believes that bailment was for the mutual benefit of both parties. The Plaintiff accommodated Defendant Vaughen Belnap in furthering the sale of the Condominium by moving out prior to the expiration of the lease and by allowing Vaughan Belnap to use the furniture in furtherance of the sale of the Condominium, to his son who had no furniture.

9. Finally, the Court concludes that since this was a case

where there was a bailment for mutual benefit, the presumption is that the Defendant, Vaughan Belnap, was negligent for failing to return the furniture, as agreed. Defendant, Vaughan Belnap, failed to prove that the loss of the furniture was not the result of his negligence.

10. The Court believes that as a result of Defendant Vaughan Belnap being unable to return the furniture to Plaintiffs, the Plaintiffs suffered damages in the sum of \$6,000.00, together with their costs and interest.

The Court, having made its Findings of Fact, now makes the following:

CONCLUSIONS OF LAW

1. Under the fact situation of the case, a contract for bailment was created between Vaughan Belnap and Plaintiffs. The Plaintiffs delivered to Defendant Vaughan Belnap, and not Jeffrey Belnap, the furniture, with the express understanding that the furniture would be returned to Plaintiff.

2. The bailment that was created was for the mutual benefit of both Plaintiffs and Defendant, Vaughan Belnap. Plaintiffs accommodated Defendant Vaughan Belnap to further the sale, plus allowing Defendant Vaughan Belnap to use the furniture in furtherance of a sale of the Condominium to his son who had no furniture.

3. Since the bailment was for the mutual benefit of the parties, the presumption is that Vaughan Belnap was negligent for

failing to return the furniture, as agreed. Defendant Vaughan Belnap failed to prove that the loss of the furniture was not the result of his negligence.

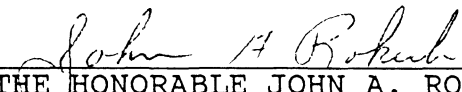
4. As a result of the Defendant Vaughan Belnap breach of the bailment agreement by failing to return the furniture to Plaintiffs, Plaintiffs suffered damages in the amount of \$6,000.00, together with their costs and interest.

5. Interest on \$6,000.00 in damages suffered by Plaintiffs shall accrue at the rate of 10% per annum prior to judgment and 12% after judgment and will begin to run from December 15, 1988 until the time the judgment is paid in full.

6. Additional reasons in support of the Court's decision is contained within the Plaintiff's trial brief.

DATED this 24 day of January, 1990.

BY THE COURT:



THE HONORABLE JOHN A. ROKICH
District Court Judge

APPROVE AS TO FORM:

LARRY REED
Attorney for Defendant Vaughn Belnap

MAILING CERTIFICATE

On the 4 day of October, 1990, I certify that I personally deposited into the U.S. Mail, postage prepaid, a copy of the foregoing Memorandum of Costs and Disbursement addressed to:

Larry Reed
Crowther & Reed
455 South Third East Street
Salt Lake City, Utah 84111

Mary W. Balling