

1991

Jospeh Edward McPherson, Joan Elissa McPherson  
v. Vaughn Belnap, Jeffrey Belnap : Brief of Appellee

Utah Supreme Court

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.A IN THE SUPREME COURT OF THE STATE OF UTAH  
DOCKET NO. \_\_\_\_\_

910429CA

JOSEPH EDWARD McPHERSON and  
JOAN ELISSA McPHERSON,

Plaintiffs-Appellees

v.

NO. 910108

VAUGHN BELNAP and  
JEFFREY BELNAP

PRIORITY NO. 16

Defendant-Appellant.

91-0429-CA

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BRIEF OF APPELLEES  
JOSEPH EDWARD McPHERSON and JOAN ELISSA McPHERSON

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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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CLERK SUPREME COURT,  
UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

---

BRIEF OF APPELLEES  
JOSEPH EDWARD McPHERSON and JOAN ELISSA McPHERSON

---

STATEMENT OF JURISDICTION OF APPELLATE COURT

This is an appeal from a Judgment in 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

For the purposes of this Brief, Plaintiffs-Appellees Joseph Edward McPherson and Joan Elissa McPherson will hereinafter be referred to collectively as "McPhersons". Defendant-Appellant Vaughn Belnap will be referred to as "Vaughn Belnap" and his son who is a co-Defendant, but who McPhersons were not able to serve will be referred to as "Jeffrey Belnap".

1. Whether the clear weight of evidence demonstrates the trial Court erred in concluding that Vaughn Belnap entered into a

contract of bailment with McPhersons, that Vaughn Belnap and the McPhersons entered into a relationship of bailee and bailor and that McPhersons' personal property was delivered to Vaughn Belnap rather than Jeffrey Belnap, his son.

2. Whether the clear weight of evidence demonstrates the trial Court erred in concluding that the bailment created between the McPhersons and Vaughn Belnap 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 applied.

3. Whether the clear weight of evidence demonstrates the trial Court erred in imposing a presumption of negligence on Vaughn Belnap.

4. Whether the clear weight of evidence demonstrates the trial Court erred in concluding that Vaughn Belnap was negligent and his negligence proximately caused the McPhersons' injuries.

5. Whether the clear weight of evidence demonstrates the trial Court erred in concluding that Vaughn Belnap failed to rebut the presumption of negligence.

#### STANDARD OF APPELLATE REVIEW

The combined issues of law and fact each require a review of the finding of fact. The standard of appellate review requires that Vaughn Belnap marshal the evidence in support of the trial court 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 evidence, thus making them clearly erroneous.



**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 FACTS**

In August, 1988, Vaughn Belnap purchased a home from the McPhersons. Thereafter, in or about September, 1988, after moving out of the home purchased from them by Vaughn Belnap, the McPhersons leased a condominium unit owned by Vaughn Belnap. (Trial Transcript p. 6, lines 8-16). The Lease Agreement was for a six month period of time from September, 1988 to February, 1989. (Trial Transcript p. 7, lines 3-8).

In late November, 1988, Vaughn Belnap contacted the McPhersons and indicated to them that he had a buyer for the condominium unit he was leasing to them. Vaughn Belnap requested that the McPhersons move out immediately as an accommodation to him. (Trial Transcript, p. 7, lines 24 - p. 8, line. 11).

Because of the short notice, the only alternative lodging the McPhersons could obtain was a furnished apartment. In the McPhersons' next meeting with Vaughn Belnap, the McPhersons indicated to Vaughn Belnap that they could vacate the condominium unit, however, the only alternative lodging that they could find was a furnished apartment, therefore they had no room to store their furniture which was currently in the condominium unit. The McPhersons further indicated that they would have to find a place to store their furniture before they could vacate the premises.

(Trial Transcript p. 12, lines 12 - p. 10, lines 25). Vaughn Belnap responded by disclosing to the McPhersons that Jeffrey Belnap, Vaughn Belnap's son, was the individual who allegedly agreed to purchase the condominium unit from him. Vaughn Belnap further stated that as Jeffrey Belnap had no furniture, it would be all right if the McPhersons left their furniture in the condominium unit until such time as they moved the furniture to their permanent lodging. (Trial Transcript, p. 10, lines 5-22; p. 32, lines 1-13).

McPhersons advised Vaughn of their concern about the safety of their property while it was in the condominium unit. Vaughn Belnap stated to the McPhersons that the furniture would be fine. (Trial Transcript, p. 73, lines 10-16).

The McPhersons dealt exclusively with Vaughn Belnap regarding storage of the furniture. (Trial Transcript, p. 10, lines 5-25; p. 11 lines 18 - p. 12, lines 7; p. 14, lines 6-14; p. 32 lines 1-13).

Approximately ten to eleven days after being informed that the condominium unit was allegedly sold, McPhersons vacated the condominium unit leaving a number of items of personal property in the unit. After the McPhersons vacated the condominium unit, Jeffrey Belnap allegedly moved into the condominium unit, not as a purchaser but allegedly as a tenant. (Trial Transcript, p. 64, ins. 5-17). After vacating the condominium, McPhersons no longer had access to the condominium unit. McPhersons did not have keys or any other way to obtain free access to their furniture to the

inside of the condominium. In order to gain access to the property in the condominium unit, they contacted Vaughn Belnap. (Trial Transcript p. 35, line 19 - p. 36, line 4).

In early December of 1988, McPhersons ran into Vaughn Belnap at an automobile dealership in Salt Lake. At that time, McPhersons indicated to Vaughn Belnap that they had found an unfurnished condominium to move into and that they wanted to pick up their furniture. (Trial Transcript p. 15, line 18 - p. 16, line 5).

The next day, a message was left at McPhersons' office by Vaughn Belnap that indicated that the property that was stored at the condominium unit had been stolen. The furniture and other items of personal property owned by McPhersons and left in the condominium unit were reported stolen on December 15, 1988. (Trial Transcript, p. 16, line 6 - p. 17, line 18).

On December 15, 1988, a neighbor saw a pickup truck occupied by two men loaded with furniture parked in front of the condominium unit. The neighbor could identify neither Vaughn Belnap nor Jeffrey Belnap as occupants of the truck. (Trial Transcript, p. 55, ins. 11-25; p. 56, ins. 104). The police officer investigating the crime found no evidence of forcible entry. He further indicated that in his opinion the circumstances looked suspicious. (Trial Transcript, p. 46, lines 1-6 and p. 47, lines 1-25).

Vaughn Belnap testified that he lived in the condominium unit prior to the time it was occupied by McPhersons. Vaughn

Belnap further testified that at the time he lived in the condominium unit, the doors were equipped with dead bolt locks. (Trial Transcript, p. 68, lines 21 - p. 69, line 8).

Jeffrey Belnap testified that even though it had been over 18 months, he remembered locking the door on the date of the robbery. (Trial Transcript, p. 51, line 20 - p. 52, line 10).

#### **SUMMARY OF THE ARGUMENT**

1. The trial Court found that McPhersons' property was placed in the possession and control of Vaughn Belnap. Vaughn Belnap, in an effort to avoid liability, claims there is no evidence to support the trial Court's findings. In fact, evidence shows that McPhersons dealt exclusively with Vaughn Belnap and not his son, Jeffrey Belnap, with respect to the storage of the property. Evidence shows that the agreement entered into between the parties was between Vaughn Belnap and the McPhersons and that Vaughn Belnap later turned control of the property over to his son Jeffrey Belnap. Finally, the facts show that Vaughn Belnap was the sole owner of the condominium unit at the time the property was stored and that in order to gain access to the property, the McPhersons contacted Vaughn Belnap. Thus, the evidence supports the trial Court's finding that a bailee-bailor relationship existed between Vaughn Belnap and the McPhersons.

2. Vaughn Belnap further claims that the trial Court erred in finding that the bailment agreement entered into between the parties was a bailment for mutual benefit. Contrary to Vaughn

Belnap's contention, the clear evidence supports the trial Court's finding that the bailment was for the mutual benefit of the parties. Both parties testified and it is undisputed that the McPhersons' agreement to move from the condominium unit prior to the expiration of the lease benefitting Vaughn Belnap by allowing him to proceed with an alleged sale. The facts demonstrate that in order to make it possible for the McPhersons to move out, Vaughn Belnap agreed to store their furniture until such time as they had accommodations that could facilitate the furniture. This bailment agreement benefited both Vaughn Belnap and the McPhersons, therefore, it was a bailment for mutual benefit.

3. A presumption of negligence may be imposed on bailee when the bailee has exclusive possession and control of the bailed goods at the time of delivery. Vaughn Belnap claims there is no evidence which supports the trial Court's conclusion that at the time the property was delivered, it was delivered to the exclusive possession of Vaughn Belnap. However, the evidence shows the McPhersons entered into an agreement with Vaughn Belnap and not Jeffrey Belnap to store the furniture in the condominium unit and the furniture was left with Vaughn Belnap. Only after the property was delivered to the exclusive possession of Vaughn Belnap did Vaughn Belnap turn over the care of the property to Jeffrey Belnap. Vaughn Belnap should not be able to escape liability for property that turned over to his possession by subsequently turning over the care and security of the property

to his son Jeffrey Belnap.

4. Vaughn Belnap finally contends that even if the presumption of negligence was correctly imposed by the trial Court, through the clear weight of evidence, he rebutted that presumption. The only evidence that Vaughn Belnap can point to to support his claim is that he locked the doors and windows on the condominium when he lived in the condominium unit prior to the time the McPhersons leased the unit from him. Further, Vaughn Belnap's son, Jeffrey Belnap, testified that even though it had been over 18 months since the date the property was allegedly stolen, he remembered locking the doors on that particular day. Thus, the only evidence that Vaughn Belnap presented was a self-serving statement of his son, Jeffrey Belnap, that the doors and windows were locked when he left the premises on that particular day. As is evident, Vaughn Belnap failed to present any evidence sufficient to rebut the presumption of negligence.

#### ARGUMENT

I. THE EVIDENCE SUPPORTS THE TRIAL COURT'S RULING THAT A CONTRACT OF BAILMENT WAS ENTERED INTO BETWEEN THE MCPHERSONS AND VAUGHN BELNAP

A. Aplicable Law

In order to establish the existence of a bailment agreement, the following facts must be shown: (1) Deliver of the property to the bailee; (2) acceptance of exclusive possession by the bailee; and (3) an agreement that the property will be returned

to the bailee at the expiration of the bailment. Wright v. Auto Haus Hortence, Inc., 472 N.E.2d 593 (1984). As stated in 8 C.J.S., §1 "A bailment is consensual relation that includes, in its broadest sense, any delivery of personal property and trust for a lawful purpose". Id. at 314. The assumption of control is a determining factor:

[A] bailee is one who receives personal property from 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.

8 C.J.S. Bailments, §1, p. 321.

Where there is a change or acceptance of possession depends on whether there is a change or acceptance of actual or potential control in fact over the subject matter. Collins v. Boeing Co., 483 P.2d 1282, 1286 (Wash. App. 1971). As stated by the Oregon Court of Appeals in Jackson v. Miller, 598 P.2d 1255 (OR. App. 1979):

Possession is defined to include the intent to exercise control over goods.... The intent to possess to assume custody or control over an object, is generally regarded as important an element of possession as actual physical control. Given exactly the same relation to an object, the person may or may not be held to be in possession thereof, according to whether or not he had the intent to exercise control over it. (Citing Brown, Personal Property, §10.3 (217)).

Id. at 1257.

The trial Court in its Findings of Fact found as follows with respect to the agreement between McPhersons and Vaughn Belnap:

2. In or about December, 1988, during the term of

the lease, Vaughn Belnap had the opportunity to sell the condominium. Vaughn 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 Vaughn Belnap would let them leave the furniture in the condominium until such time as they could locate a residence which would accommodate their furniture. Vaughn Belnap agreed to this condition and stated that the furniture would be of a benefit to him because his son, Jeffrey Belnap, who was in the midst of a divorce proceeding, could use the furniture.

(Findings of Fact and Conclusions of Law R. 202, Para. 2). Based on this finding of fact, the trial Court found that Vaughn Belnap and McPhersons entered into a contract of bailment, that they therefore stood in a relationship of bailee and bailor and the McPhersons' personal property was delivered to Vaughn Belnap and his son Jeffrey Belnap. (Findings of Fact and Conclusions of Law, R. 203, Para. 7; 204, Para. 1). As stated by the trial Court in its Memorandum Decision dated September 14, 1990:

The Court has concluded under the fact situation a bailment was created. Plaintiffs delivered to Defendant Vaughn Belnap not Jeffrey Belnap, the furniture, with the express understanding the furniture would be returned to Plaintiffs.

B. The Evidence Supports The Trial Court's Finding That Bailment Was Entered Into Between McPhersons And Vaughn Belnap.

1. Vaughn Belnap in his Brief maintains that the evidence does not support the trial Court's finding that a bailment was entered into between McPhersons and Vaughn Belnap. However, as will be shown below, the trial Court's findings are supported by the evidence of the case. The following evidence supports the trial Court's conclusion that a bailment was entered into between



Vaughn. It was Vaughn who had purchased our home. It was Vaughn with which I had developed a comfort zone with, and it was basically it. I was going off the assurances that his son was responsible and would take care of the property.

(Trial Transcript, p. 11, line 12 - p. 12, line 4).

c. After being questioned by the Court, Edward McPherson stated as follows regarding his conversation with Vaughn Belnap at the time Vaughn agreed to store McPherson's furniture:

The witness: When we were talking we said we were going to have to find a place for the furniture. At that time he said that his son had no furniture when he was just going through a divorce, and, you know, if we wanted to leave the furniture, that would be fine until we could find a permanent place for it, because -- this thing was a 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, lines 7-20).

d. In rebuttal to Defendant's testimony, Edward McPherson testified as follows regarding the agreement between the parties:

Q: And how did - - what did Mr. Belnap state to you?

A: He said that it would probably be fine. We were - - I was looking to Vaughn because I did not know his son. Vaughn had just purchased the place from me. Vaughn owned the condominium and it was Vaughn I was looking to for security, because had it not been for Vaughn I would never have left the property at the house with his son.

(Trial Transcript, p. 73, lines 14-22).

2. In addition to the evidence already recited, the following evidence support the trial Court's finding that Vaughn

McPhersons and Defendant Vaughn Belnap:

a. On direct examination, Joseph McPherson testified as follows regarding circumstances regarding his decision to leave his furniture with Vaughn Belnap:

Q: Did you, after initial contact with Mr. Belnap, did you speak with Mr. Belnap again regarding this matter?

A: We did. I believe he was - - I believe we spoke to him at the condominium, 902 West New Hampton, and told him that, you know, we had found a place but it was furnished and now we had to do something with our furniture. And he indicated at that time that his - - it was his son - - 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 wouldn't mind if that was left there, he would take good care of it. I was concerned because the furniture we had was very expensive, very nice furniture, and I was a little uncomfortable leaving that furniture there. But it was Vaughn, he was the person I was dealing with because it was Vaughn who had bought our house.

(Trial Transcript, p. 10, lines 5-22).

b. As to Mr. McPherson's understanding regarding the agreement between him and Vaughn Belnap, and basis for that understanding Edward McPherson testified as follows:

Q: Can you tell me what your understanding of the agreement was that you had with Vaughn Belnap regarding the storage of the furniture.

A: Well, we wanted to just - - the furniture was just to be left there long enough until we could find a permanent place to live.

Q: Now, you stated before that it was your understanding that the agreement was between you and Mr. Belnap. What was the basis of your understanding?

A: Well, being the basis - - the basis of the understanding was that the furniture was just to be left there long enough until we could find a place to live and it was done with - - my whole dealings were with

Belnap had actual and/or constructive possession and control of the bailed property.

a. Vaughn Belnap was the sole owner of the condominium unit at the time the property was stored; (Trial Transcript, p. 37, lines 4-15).

b. McPhersons' agreement with respect to storage of the property was with Vaughn Belnap, not Jeff Belnap and McPhersons dealt exclusively with Vaughn Belnap. (Trial Transcript, p. 10, lines 5-25; p. 11, line 18 - p. 12, line 7; p. 14, lines 6-14)

c. McPherson did not have access to the furniture in the condominium. In order to gain access to the property that was stored, McPhersons had to contact Vaughn Belnap or his son, Jeffrey Belnap. (Trial Transcript p. 35, line 19 - p. 36, line 4).

3. The evidence supports the trial Court's conclusion that Jeffrey Belnap was an agent, under the direction and control of Defendant Vaughn Belnap. (Trial Transcript, p. 10, lines 5-25; p. 11 line 18 - p. 12, line 7; p. 14, lines 6-14; p. 32 lines 1-13).

4. Edward McPherson on both direct and cross examination testified that Vaughn Belnap, not Jeffrey Belnap agreed to allow the McPhersons to store the furniture. Edward McPherson on direct examination stated as follows:

Q: Did you, after the initial contact with Mr. Belnap, did you speak with Mr. Belnap regarding this matter?

A: We did, I believe he was - - I believe we spoke to him at the condominium at 902 West New Hampton

and told him that, you know, we had found a place but it was furnished and now we had to do something with our furniture and he indicated at that time - - it was his son, and - - it would be his son moving in and that he was just getting divorced and he had no furniture and so it was - - well, he wouldn't mind if that was left there, he would take good care of it. (Emphasis added).

(Trial Transcript, p. 10, lines 5-16).

Edward McPherson on cross examination testified as follows:

A: We found a furnished place because that was our only option because of the circumstances surrounding the whole movement of displacing us out of a condominium which we had leased and which we were willing to break in order to accommodate Vaughn. Then we had indicated that now we needed a place for our furniture, he indicated his son was getting divorced and had no furniture, that it would be okay if we left the furniture there until he found a permanent place to live.

(Trial Transcript, p. 32, ines 4-13).

C. Application Of The Law Of The Evidence.

Vaughn Belnap seeks to avoid liability for the furniture by claiming that an agreement was not entered into by him and the McPhersons but his son and the McPhersons. Accordingly, Vaughn Belnap argues there is no evidence that he agreed to hold the furniture for the benefit of the McPhersons or that he agreed to return the furniture. However, the fact that a bailment agreement entered into between McPherson's is supported by the clear weight of evidence.

The facts show the condominium unit where the furniture was stored was solely owned by Vaughn Belnap. The facts show that in order to induce the McPhersons to move out of the condominium unit, Vaughn Belnap agreed to store their furniture until such

time as they had a place that could accommodate the furniture. All the negotiations regarding storage of the furniture took place between Vaughn Belnap and the McPhersons, Jeffrey Belnap was not involved. Further, the facts are undisputed that based on Vaughn Belnap's assurances, the property was left in the condominium unit with the understanding that the property would be returned. Finally, the undisputed facts evidence that McPhersons did not have access to their furniture in the condominium unit and were required to contact the Belnaps in order to gain access. These facts clearly support the trial Court's ruling that a bailment agreement was entered into between Vaughn Belnap and McPhersons.

II. THE EVIDENCE SUPPORTS THE TRIAL COURT'S FINDING THAT THE BAILMENT ENTERED INTO BETWEEN THE PARTIES WAS A BAILMENT FOR MUTUAL BENEFIT

A. Applicable Law

Bailments traditionally fall into three categories: (1) Bailment for the sole benefit of the bailor (also known as a gratuitous bailment); (2) Bailment for the sole benefit of the bailee; and (3) Bailment for the mutual benefit of the bailor and the bailee (also known as a bailment for hire or the bailment for the mutual benefit of the parties). (See e.g., Christensen v. Hoover, 643 P.2d 525 (Colo. 1982); 8 Am Jur 2d Bailments, §17. The standard of care imposed on a bailee depends on the nature of the bailment.

B. The Evidence Supports The Trial Court's Finding That Bailment Entered Into Between McPhersons And Vaughn Belnap Was A Bailment For Mutual Benefit.

With respect to the issue of the type of bailment entered into between Vaughn Belnap and the McPhersons, the trial Court found as follows:

The Court fully believes that [the] bailment was for the mutual benefit of both parties. The Plaintiffs accommodated Defendant Vaughn in furthering the sale of the condominium by moving out prior to the expiration of the lease and by allowing Vaughn Belnap to use their furniture in furtherance of the sale of the condominium to his son who had no furniture.

(Findings of Fact R. 203, Para. 8).

The following evidence supports the trial Court's finding that the bailment was for the mutual benefit of both parties:

1. As discussed above, the undisputed evidence shows that after entering a Lease Agreement with the McPhersons for a period of six months, Vaughn Belnap contacted the McPhersons and requested that they move out of the condominium unit prior to the expiration of the lease in order to allow him to sell the condominium unit to a prospective buyer. Edward McPherson in his direct examination gave the following testimony:

Q: After you moved into the condominium unit, did Mr. Belnap subsequently request that you vacate the unit?

A: He did, shortly - - shortly thereafter, he notified us and said that he had gotten a buyer for the condo and could we accommodate him by moving out. And it was moving out early because we had just been there, I believe only a couple of months.

Q: Do you know approximately what time that -- what the date was when he asked you to vacate the premises?

A: I believe it was sometime towards the end of November, beginning of December.

Q: What happened after he requested that you vacate the premises?

A: Well, we were under the impression that it was sold to an independent buyer, and at that time - - then later we found out it was actually sold to his son, that he was moving into the condo. I had no idea what the agreements were then, but that we were trying to do was be very helpful in trying to relieve Vaughn of some of his debts, because he had just purchased a home from us and he had a very large balloon payment due in a year and a half and anything we could do to accommodate him in making that easier, or making it easier for him to sell his property - - we would do anything we could do to accommodate him so that is why - - it was a terrible inconvenience for us to move out on very short notice. It was right during the holidays, it was, you know, a busy time for me and it was just - - once we found out - - I was a little bit irritated by the fact that I found it was, you know, his son and that we were inconvenienced, you know, having to move out so quickly when it could have been done in a more reasonable time.

(Trial transcript, p. 7, line 25 - p. 9, line 8).

2. Vaughn Belnap in direct examination by Plaintiffs' counsel admitted he benefited from McPhersons agreeing to move out of the condominium unit which could only be accomplished if he agreed to store their furniture. Vaughn Belnap's testimony is as follows:

Q: In or about September, 1988, did you lease a condominium unit to Ed and Lisa McPherson?

A: Yes I did.

Q: At the time you leased the condominium unit, did you enter into a Lease Agreement with McPhersons?

A: Yes.

Q: Was that Lease Agreement for a six month period of time?

A: I believe it was from September 1st to the end of February.

Q: September 1st of what year to February 1st of what year?

A: 1988 to 1989.

Q: In or about late November or early December, 1988, did you contact the McPhersons regarding the McPhersons moving from the condominium unit?

A: Yes I did.

Q: Did you ask the McPhersons to move from the condominium unit?

A: I asked them if it would be possible for them to do so yes.

Q: What was the reason that you asked them to move?

A: My son Jeff had approached me and had requested to buy the condominium from me because he was going through a divorce at the present time and it would be convenient for him to move into the condominium soon so I approached them and asked them if they would move out sooner that anticipated.

Q: Would it have benefited you if your son had purchased the condominium unit?

A: Obviously.

Q: So the McPhersons moving out was an accommodation to you; correct?

A: That is correct.

(Trial Transcript, p. 37 line 4 - p. 38, line 23).

c. Application Of Law To Evidence.

Vaughn Belnap in his Appellate Brief concedes that the evidence clearly establishes the McPhersons accommodated him by vacating the condominium unit. However, Vaughn Belnap still argues that the trial Court's finding that the bailment was for



the mutual benefit of the parties is not supported by the evidence.

Contrary to Vaughn Belnap's contention, the evidence supports the trial Court's finding that the bailment was for mutual benefit of the parties. Both parties testified and it is undisputed that McPhersons' agreement to move from the condominium unit prior to the expiration of the lease benefitted Vaughn Belnap by allowing him to proceed with an alleged sale of his condominium unit. However, prior to agreeing to move from the condominium unit, Vaughn Belnap agreed to store McPherson's furniture until such time as they had accommodations that could facilitate the furniture. Thus, Vaughn Belnap's agreement to store the subject property benefitted both parties. The bailment agreement benefitted Vaughn Belnap by making it possible for McPhersons to move out of the condominium unit which benefitted Vaughn Belnap by allowing him to consummate the alleged sale. Further, having the furniture available helped Vaughn Belnap in furthering the subsequent use of the condominium unit by his son.

### III

#### THE EVIDENCE SUPPORTS THE TRIAL COURT'S IMPOSITION OF THE PRESUMPTION OF NEGLIGENCE.

##### A. Applicable law.

It is well established that in a bailment for a mutual benefit of the parties, the bailee is required to exercise ordinary care. Anniston Lincoln Mercury v. Mayse, 341 S.2d 949 (Ala. 1977). Ordinary care is that care that a reasonable and

prudent person would exercise in dealing with his or her own property. Verenhoff Corp. v. Aetna Insurance Co., 366 S.2d 457 (Fla. App. 1976). In analyzing whether a bailee has breached the standard of care, the courts unanimously agree that in a bailment for the mutual benefit of the parties, the bailor can establish a presumption of bailee's negligence, and thus a breach of the bailment agreement, by proving that the property was delivered to the bailee in good condition and the bailee either (1) failed to return it; or (2) returned the property in damaged condition. Staheli v. Farmers Cooperative of Southern Utah, 655 P.2d 680 (Utah 1980). The leading Utah case concerning the imposition of the presumption of negligence in the contexts of a bailment is the Staheli case. The facts in Staheli are as follows:

The Defendant was engaged in the business of providing grain storage to local farmers. In the year in question, the Defendant did not have enough storage to accommodate the requirements of the area farmers, consequently, it leased a large potato cellar from a cellar and storage company to provide additional temporary storage capacity. The portion of the cellar which was not leased to the Defendant was retained and used by the owner of the cellar. The farmers who stored their grain also had unlimited access to this potato cellar where the grain was being stored. Subsequently, a fire in the cellar damaged the grain and Plaintiff, Staheli brought suit against the Farmer's Co-Op. The trial Court entered judgment in favor of the Defendant Farmer's Co-Op finding that the presumption of negligence did not imply

under the facts of the case because the facts did not show that Defendant had exclusive control over the potato cellar where the grain was stored.

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

The Court in Staheli, in determining whether the presumption of negligence should arise under the circumstances explained the rationale for the general rule regarding the presumption of negligence being imposed on the bailee. The Court stated as follows:

The policy that sustains a presumption arises from the practical considerations that one who is in the possession of another's property is in a better position to control the conditions that may cause loss or damage and to know, or at least 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....

Notwithstanding the presumption, the law does not make the bailee for hire a guarantor; it is a rule of fault with which we deal. Thus, the presumption allocates the burden of proof to the 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.

Id. at 683.

This Court in Staheli went on to conclude that as the record

did not establish the Defendant Co-op had the exclusive right and power of control over the grain in the cellar, the presumption of negligence should not apply. This Court in coming to its decision specifically noted that the trial Court found that:

Plaintiffs as well as the agents of Defendant had unlimited access to the said potato pit either through the doors on the end temporarily leased by the Defendant or through the doors on the end retained by the owner, neither which was locked.

Id. at 684.

B. The Evidence Support The Trial Court's Finding That The Property At The Time Of Delivery Was Under The Exclusive Control Of Defendant Vaughn Belnap.

In the present case, the trial Court made the following finding with respect to the application of the presumption of negligence in this case.

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

(Finding of Fact, R. 203 7)

1. As discussed above, Edward McPherson in his testimony indicates that he delivered the property to Vaughn Belnap and not Jeffrey Belnap. (Trial Transcript p. 10, lines 5-22; p. 32, lines 1-13).

2. The evidence further shows that the agreement entered into with respect to the bailed property was between the McPherson and Vaughn Belnap and not Jeffrey Belnap his son. (Trial Transcript p. 11, lines 21 - p. 12 line 7; p. 14, lines 6-14; p. 32 lines 1-13).

3. Vaughn Belnap was the sole owner of the condominium unit at the time the property was delivered. (Trial transcript p. 6, lines 17-19; p. 37 lines 13-23).

4. McPhersons did not have access to property within the condominium unit. In order to attempt to gain access to their furniture, they contacted Vaughn Belnap. (Trial Transcript p. 35, line 19 - p. 36, line 4).

B. Application Of Law To The Evidence.

In the present case, Vaughn Belnap attempts to void liability by claiming that the property stored in a condominium unit was being used by his son Jeffrey Belnap and therefore he did not have exclusive possession of the property. Vaughn Belnap claims that under the Staheli case, the trial court erred in applying the presumption of negligence.

In determining whether a party has exclusive possession, the Court should look at who had actual or constructive control over the bailed property at the time it was initially delivered, not what subsequently happened to the property when it was under the bailee's control. In the present case, the evidence shows that at the time the property was delivered by the McPhersons, it was delivered to Vaughn Belnap and not Jeffrey Belnap. As the evidence shows, Vaughn Belnap agreed to store the furniture in the condominium unit and indicated that the furniture would be safe there even though his son intended to occupy the unit. Thus, it was Vaughn Belnap who turned over the care of the property in his condominium to his son, Jeffrey. As stated by

the trial court in its Memorandum Decision, dated January 4, 1991:

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 agent. Vaughn Belnap elected his son as the caretaker of the furniture and therefore must assume responsibility for its safety.

(R. 134 and 135).

Further, the present case is distinguishable from the facts of the Staheli case. In the present case, unlike in the Staheli case, the property in question was delivered to Vaughn Belnap and stored in a condominium owned exclusive by Vaughn Belnap. The facts further show that McPhersons, unlike the farmers in the Staheli case, did not have access to the furniture which was stored in Vaughn Belnap's condominium. The facts show that when McPhersons wanted to gain access to their property they contacted Vaughn Belnap. Therefore, the facts in the present case, unlike in the Staheli case, indicate that Vaughn Belnap had exclusive control over the bailed property.

IV. THE TRIAL COURT PROPERLY RULED THAT VAUGHN BELNAP DID NOT REBUT THE PRESUMPTION OF NEGLIGENCE.

A. Applicable Law.

Once it is determined that a bailment for mutual benefit was entered into, and the bailed goods lost, damaged or destroyed, a presumption of negligence is imposed on the bailee. The bailee then must come forth with evidence that the loss or damage was not due to the bailee's negligence. Staheli v. Farmers

Cooperative of Southern Utah, 655 P.2d 680, 682 (1982).

B. Evidence Support The Trial Court's Findings.

In the present case, the trial court found that Vaughn Belnap failed to rebut the presumption that the loss of furniture was not a result of his negligence. (Findings of Fact, Para. 9; Conclusions of Law Para. 3, R. 204-205). The only evidence presented concerning the exercise of care by Vaughn Belnap is as follows:

Q: You lived in the condominium unit prior to September, 1980, is that correct?

A: That's correct.

Q: Did you have locks on the doors?

A: Yes, normal locks and dead bolt doors.

Q: I assume that the windows were in place?

A: Yes.

Q: Normal security?

A: Yes.

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

A: No.

(Trial transcript p. 68, lines 21-25; p. 69, lines 1-8).

In addition, Jeffrey Belnap claimed that even though 18 months had passed, he remembered locking the door on the day the property was stolen. (Trial transcript, p. 51, line 23 - p. 52, line 10).

C. Application Of Law To The Evidence.

Vaughn Belnap contends that even if the presumption of

negligence was correctly imposed by the trial Court, under clear weight of evidence he rebutted that presumption. The only evidence that Vaughn Belnap can point to to support his contention is his claim that he had locks on the windows and doors when he lived at the condominium prior to the McPhersons and the testimony of his son, Jeffrey Belnap, who claims that even though it has been over 18 months since the date the property was allegedly stolen, he remembers locking the doors on that particular day. As is evident, this testimony is highly questionable. Further, it is insufficient to rebut the presumption of negligence. As stated by the trial court in its January 4, 1991 Memorandum Decision:

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

(R. 135).

#### CONCLUSION

As is shown, the trial court's award of judgment to the McPhersons is supported by the evidence. The evidence shows that McPhersons left their property with Vaughn Belnap and not Jeffrey Belnap at a condominium unit owned by Vaughn Belnap. Further, the facts show that the agreement entered into between the parties was a bailment for mutual benefit. Vaughn Belnap in his testimony admitted that he benefited from the McPhersons' agreement to move from the condominium unit which could only be accomplished if Vaughn Belnap would agree to store the



McPhersons' property. Further, the facts show that at the time the property was delivered, it was delivered to Vaughn Belnap and not Jeffrey Belnap. Jeffrey Belnap was not involved in the negotiation for the storage of the property. Only after the property was delivered did Vaughn Belnap turn the care of the property over to his son, Jeffrey Belnap. Finally, evidence supports the Court's conclusion that Vaughn Belnap failed to rebut the presumption of negligence.

RESPECTFULLY submitted this 18 day of July, 1991.

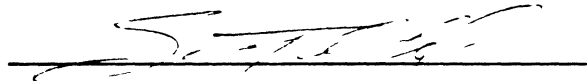
THOMPSON, HATCH, MORTON & SKEEN

  
SCOTT S. KUNKEL  
Attorney for Appellees

CERTIFICATE OF MAILING

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

Larry G. Reed  
Crowther & Reed  
455 South 300 East, #300  
Salt Lake City, UT 84111



## **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 L. M. G. H. 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

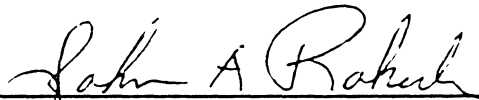
the furniture as agreed. Defendant Vaughn Belnap failed to prove that the loss of the furniture was not as a result of his negligence.

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

FILED DISTRICT COURT  
Third Judicial District

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.

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

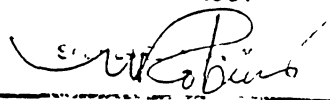
Plaintiffs' counsel shall prepare an Order in accordance with this Memorandum Decision.

Dated this 2 day of January, 1991.

  
JOHN A. ROKICH  
DISTRICT COURT JUDGE

THIRD JUDICIAL 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.



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

FILED DISTRICT COURT  
Third Judicial District

JAN 24 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	)	
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

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

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.

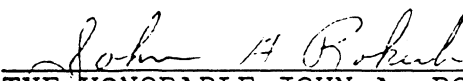
4. As a result of the Defendant Vaughan Belnap breach of the bailment agreement by failing to return the furniture to Plaintiffs, Plaintiffs suffered damages in the amount of \$6,000.00, together with their costs and interest.

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