

IN THE COURT OF APPEALS OF IOWA

No. 2-024 / 11-0690
Filed April 25, 2012

**IN THE MATTER OF THE ESTATE
OF LEWIS R. MARTIN, Deceased.**

NORMA DINNES,
Claimant-Appellant,

vs.

**ROBERT G. MARTIN, Executor of
the ESTATE of LEWIS R. MARTIN,**
Respondent-Appellee.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon
and Carl D. Baker, Judges.

Norma Dinnes appeals the probate court's denial of her bailment claim
against the estate of Lewis R. Martin. **AFFIRMED AND REMANDED WITH
DIRECTIONS.**

Harry L. Haywood III of Haywood Law Office, Eldora, for appellant.

Andrew B. Howie of Hudson, Mallaney, Shindler & Anderson, P.C., West
Des Moines, and Kirby Schmidt, Grundy Center, for appellee.

Heard by Vaitheswaran, P.J., and Doyle and Tabor, JJ.

DOYLE, J.

Norma Dinnes appeals the probate court's denial of her bailment claim against the estate of Lewis R. Martin. She contends her property stored by the decedent was damaged and lost due to the decedent's negligence. She requested return of her damaged property and monetary damages for repairs and replacement of her lost property. Upon our review, we affirm and remand with directions.

I. Background Facts and Proceedings.

Norma Dinnes's grandmother passed away in 1975. Thereafter, Norma inherited several pieces of her grandmother's furniture, as well as a china doll and a sewing machine. At the time of her grandmother's death, Norma lived out of state and did not have a place to store her inherited property.

Lewis and Virginia Martin, Norma's uncle and his wife, owned a farm in Marshall County, Iowa. Virginia enjoyed antiques, and she refinished furniture. The Martins' farm had outbuildings, including one referred to as "the cottage" and one referred to as "the milking parlor." Virginia stored her own antiques and furniture in the cottage.

The Martins had a close relationship with Norma, and they volunteered to store her inherited property in the cottage. Norma was aware Virginia stored her antiques there and that their property would be commingled. Norma accepted their offer, and Norma's father, John Dinnes, moved the property into the cottage. The Martins never charged Norma for storing her property nor did they use her property.

Norma visited the Martins over the years, and she checked on her property when she was there. Norma admitted the last time she saw her property at the Martins' farm was in approximately 2005, thirty years after the Martins volunteered to store the property. She admitted the cottage was full of furniture and she could not see all of her property, but the items she did see were in satisfactory condition. She believed her property was being cared for in the same manner as Virginia's property.

Virginia died in January 2006. Norma did not file a claim in Virginia's estate, nor did she request her property be returned to her at that time. Lewis died three years later in August 2009. After filing a petition for probate of Lewis's will in September 2009, the Martins' son, Robert Martin, was named the executor of Lewis's estate as proposed in Lewis's will.

In January 2010, Norma filed a claim against the estate for \$18,000 "based upon property held by executor of estate." The estate denied her claim stating, among other things: "The items stored by [Lewis] were placed in a small cottage . . . and much of that property has been damaged and destroyed by rainfall and by wild animals during the past thirty years." The estate then filed a motion to dismiss Norma's claim.

The parties reached an agreement to allow Norma to inspect property in the estate to determine if any of the property belonged to her, and the trial scheduled for May 2010 was cancelled. However, the parties were unable to reach an agreement thereafter. Norma resisted the estate's motion to dismiss and affirmatively stated the Martins "entered into a voluntary agreement in 1975 to allow storage of personal property belonging to [Norma] creating a legal

bailment between family . . . without monetary consideration.” Norma asserted Lewis refused financial compensation from her, “indicating his appreciation for her visits and medical advice.”

Trial began in August 2010 before district court judge Michael Moon. Robert testified his mother and his sister had kept property in the cottage and their property was intermingled with Norma’s property. He further testified that the cottage’s condition had deteriorated over the years; part of the roof had collapsed, and there were holes in the walls that allowed wildlife in. Robert testified that much of the property in the cottage was covered in raccoon feces and damaged from wildlife and water. After Lewis’s death, Robert moved the salvageable items in the cottage to the milking parlor and disposed of the rest.

Robert testified Norma spent little time with Lewis after Virginia died. He testified Lewis was concerned about Norma’s items deteriorating, but Robert himself did not contact Norma. Although he identified two cabinets and a dresser that belonged to Norma, due to the commingling of the property, he did not know what remaining property belonged to Norma or his mother. For instance, Norma asserted that four hardback chairs she inherited were placed in storage at the Martins’ farm. Robert found thirty-five different hardback chairs. Norma asserted a claim to a sewing machine; Robert found three sewing machines in the milking parlor. Robert testified he and his siblings did not trust Norma and believed she would claim property that was not hers and deprive the estate of assets.

Norma conversely testified that she kept in contact with the Martins and regularly asked about her property. She stated she was told by Virginia and Martin her property was fine, she did not need to compensate them, and she did

not need to pick the items up. She testified Lewis had told her the cottage's roof was leaking and he and his grandchildren had moved her property to the milking parlor. She testified she volunteered to pay for the roof repairs, but Lewis refused. She testified that had she known of the deteriorating and damaged condition of her property, she would have moved her items from the Martins' farm.

John, Norma's father, testified that Norma inherited property from his mother, and he and his brother Fred placed the items in the cottage. He testified he would know which items were his mother's if he saw them again. The court then requested John to go out to the Martins' farm and look over the antiques to determine what had belonged to his mother. On the record, the court stated:

If John could . . . go through those items and then these other three, the dresser and the two cabinets, we're going to get those back [W]e have to get that stuff picked up and moved out of there together with whatever John identifies that's [Norma's]."

Robert agreed that was fair, and Judge Moon entered an order for John to go out the farm and identify the items. The judge encouraged the parties to cooperate in allowing Norma to remove her property from the Martins' farm so the issues could be narrowed. The parties were to report back to the court.

John identified two more pieces of furniture as belonging to his mother, a bed frame with headboard and a dining table. Other items listed by Norma that Robert thought could possibly be in the milking parlor, such as the sewing machine and hardwood chairs, were determined by John not to belong to his mother. The remaining items claimed by Norma, such as the china doll, were not found at the Martins' farm.

The parties attempted to make arrangements for Norma to pick up her property, but ultimately could not reach an agreement. In September 2010, Norma asked for further proceedings to set a time for delivery of the property and for damages for the cost of repairs and replacement of the damaged property. Additionally, Norma filed a motion to amend the amount of her claim from \$18,000 to \$27,255.

Trial resumed in February 2011 before district court judge Carl Baker. The transcript from the first day of trial in August was admitted into evidence. The parties again testified similarly as before. Norma had new estimates on the value of her property from visiting antique shops and reviewing antique books.

The court denied Norma's claim. Noting the parties were in agreement that a bailment relationship had been created, the court found Lewis was a gratuitous bailee and the damage and loss of Norma's property "was not due to a violation of the standard of care to be met by [Lewis]." Robert was not ordered to return the five items identified as Norma's property at the Martins' farm.

Thereafter, Norma filed a motion to amend or enlarge the court's findings and conclusions. Among other things, she asserted the court applied the wrong standard of care under the Iowa Supreme Court's ruling in *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009) (adopting certain sections of the Restatement (Third) of Torts). She requested her property be returned and the estate be ordered to pay her \$27,255 for the diminished value of the five recovered items and \$17,422 for the missing items. The estate resisted, and the district court denied her motion.

Norma now appeals.¹

II. Scope and Standards of Review.

Our review of law actions is for correction of errors at law. Iowa R. App. P. 6.907. The findings of fact in an action tried to the court have the effect of a special verdict and are binding on us if supported by substantial evidence. *Id.*; *Iowa Beta Chapter of Phi Delta Theta Fraternity v. State*, 763 N.W.2d 250, 257 (Iowa 2009). “Evidence is not insubstantial merely because we may draw different conclusions from it; the ultimate question is whether it supports the finding actually made, not whether the evidence would support a different finding.” *Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 393 (Iowa 2010) (citation omitted). We view the evidence in the light most favorable to supporting the judgment and liberally construe the court’s findings to uphold, rather than defeat, the court’s decision. *State v. Dohlman*, 725 N.W.2d 428, 430 (Iowa 2006). However, the district court’s conclusions of law and its application of the legal conclusions to the facts are not binding on appeal. *Raper v. State*, 688 N.W.2d 29, 36 (Iowa 2004).

III. Discussion.

On appeal, Norma contends the district court erred in his application of law to the facts. Specifically, she asserts the adoption of the Restatement (Third) of Torts in *Thompson v. Kaczinski*, changed the degree of care required in all circumstances, and “replaced the law” relied upon by the district court. She also contends the court erred “by not finding Robert liable under Iowa Code [section]

¹ We note an all too frequently observed violation of the rules of appellate procedure: failure to place the name of each witness at the top of each appendix page where the witness’s testimony appears. See Iowa R. App. P. 6.905(7)(c).

633.158 [(2011)] or constructive bailment law.” We address her arguments in turn.

A. Duty of Care.

Norma first asserts the differing standards and degrees of care in various bailment relationships have been thrown out the window by our supreme court’s holding in *Thompson*.²

In *Thompson*, [the court] adopted the framework proposed in the Restatement (Third) of Torts for the determination of the existence of a general duty to exercise reasonable care. Under this framework, the foreseeability of physical injury to a third party is not considered in determining whether an actor owes a general duty to exercise reasonable care.

Van Fossen v. MidAmerican Energy Co., 777 N.W.2d 689, 696 (Iowa 2009) (internal citations omitted). However, the court has recognized *Thompson* does not provide the framework for analysis of duty in all circumstances, such as cases based upon agency principles and involving economic loss. See *Langwith v. Am. Nat’l Gen. Ins. Co.*, 793 N.W.2d 215, 221 n.3 (Iowa 2010), *overruled on other grounds* by Iowa Code § 522B.11(7).

Here, the parties agree that a bailment was established.

A bailment denotes delivery of personalty by one person [the bailor] to another [the bailee], for a specific purpose beneficial to bailee or bailor or both, *upon a contract, express or implied*, that the conditions shall be faithfully executed and the personalty returned to bailor, or duly accounted for when the specific purpose of the bailment shall have been accomplished, or kept by the bailee until claimed by the bailor.

² Norma’s trial brief provided to the district court did not refer to the *Thompson* case or the standard adopted there, nor was the case referred to at the hearing. She first raised the issue in her rule 1.904 motion.

Farmers Butter & Dairy Co-op. v. Farm Bureau Mut. Ins. Co., 196 N.W.2d 533, 538 (Iowa 1972) (emphasis added). A bailment “can also arise by operation of law when justice requires. Thus, when a person comes into lawful possession of personal property of another without an underlying agreement, the possessor may become a constructive bailee.” *Khan v. Heritage Prop. Mgmt.*, 584 N.W.2d 725, 729-30 (Iowa Ct. App. 1998) (internal citations omitted). Generally, “the bailment contract is governed by the same rules of law that govern other contracts.” 8A Am. Jur. 2d *Bailments* § 29, at 553 (2009) (internal footnotes omitted).

There are three types of bailments: (1) those for the sole benefit of the bailor, known as a gratuitous bailment; (2) those for the sole benefit of the bailee; and (3) those for the mutual benefit³ of both. *Khan*, 584 N.W.2d at 730 n.3 (citations omitted); see also 8A Am. Jur. 2d *Bailments* at § 2, 520-21. In a meld of contract and tort law,⁴ our case law concerning bailment relationships holds that the type of bailment established determines the degree of care the bailee is required to exercise in caring for the bailor’s property while it is in their possession. *Khan*, 584 N.W.2d at 730.

A bailment for the mutual benefit of the parties arises when an individual takes the personal property of another into his or her care or custody in exchange for some monetary payment or other

³ “A bailment for the mutual benefit of the parties may also be described as a lucrative bailment, a bailment for compensation, or a bailment for hire.” 8A Am. Jur. 2d *Bailments* § 9, at 530 (internal footnotes omitted).

⁴ See, e.g., *McPherrin v. Jennings*, 24 N.W. 242, 244 (Iowa 1885) (“Defendant had the horse in his possession as bailee. His duty to properly care for it grew out of the contract of bailment, and his liability for its loss arises out of his failure to perform his contract obligation. The immediate cause of the loss, it is true, was the negligence in failing to properly care for the animal; but this negligence constitutes a breach of contract, and the right of action is based on this breach.”).

benefit. Such a bailment occurs whenever both parties to the bailment contract receive some benefit flowing from the transaction.

8A Am. Jur. 2d *Bailments* § 9, at 529 (internal footnotes omitted). Where the bailment is for mutual benefit, the fact the property was damaged while in the bailee's possession creates a presumption the damage is due to the bailee's lack of care. *Naxera v. Wathan*, 159 N.W.2d 513, 518 (Iowa 1968). This presumption, along with proof of the amount of loss, establishes a prima facie case for the bailor. *Id.* The bailee must then rebut the presumption "by showing the damage occurred through something consistent with due care on his part" *Id.*

This is not the case for a gratuitous bailment where "the bailee receives no compensation, as when one borrows a friend's car." Black's Law Dictionary 137 (7th ed. 1999); see also 8A Am. Jur. 2d *Bailments* § 8, at 528. "There is inherent justice in the requirement that one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay" *Siesseger v. Puth*, 239 N.W. 46, 52 (Iowa 1931). To that end, our case law has established where a gratuitous bailment exists, the bailee is only liable if a reasonable degree of care is not exercised. See *Bowen v. First Nat'l Bank*, 203 N.W. 569, 570 (Iowa 1925); see also *Khan*, 584 N.W.2d at 730 n.4 ("involuntary bailee"). Some time ago it was recognized that:

The general doctrine, as stated by text writers and in judicial decisions, is that gratuitous bailees of another's property are not responsible for its loss, unless guilty of gross negligence in its keeping. But gross negligence in such cases is nothing more than a failure to bestow the care which the property in its situation demands. The omission of the reasonable care required is the negligence which creates the liability; and whether this existed is a

question of fact for the jury to determine, or by the court where a jury is waived.

Sherwood v. Home Sav. Bank, 109 N.W. 9, 12 (Iowa 1906); see also *Siesseger*, 239 N.W. at 52. A gratuitous bailee is “not responsible simply because the [bailor’s] property was lost.” *Fazio v. Brotman*, 371 N.W.2d 842, 848 (Iowa Ct. App. 1985).

Our supreme court has not had the occasion to determine whether the *Thompson* holding effects the duties of care required in the context of bailments as set out in our case law. Bailments are contractual in nature, and the duty owed is clearly determined by the consideration provided to the bailee. Moreover, the court has set forth specific reasons why there are varying degrees of care required in these relationships. We therefore decline to apply the *Thompson* framework to this bailment case.

B. Type of Bailment.

Norma next argues the district court erred in not finding the bailment relationship was constructive or one for mutual benefit of the parties.⁵ Here, the district court found:

Norma left the property on the Martin farm for over [thirty-five] years. She rarely checked on the condition of the property. Norma knew the property had been moved from the cottage to the milking parlor in order to avoid water damage. Norma did not instruct Lewis on how to care for her property. . . .

Norma never used the furniture she inherited. . . . Norma knew that the property was stored in buildings on the Martins’ farm. They were older buildings which were not in good condition. Norma’s property was stored with property owned by Virginia Martin in the same buildings.

⁵ We note that Norma, in her trial brief to the district court, admitted the bailment was gratuitous, but later claimed in the brief and at oral argument it was for mutual benefit.

Additionally, the court found:

It is clear that Lewis Martin did not receive any compensation for storing Norma's property over the [thirty-five]-year period it was on his farm in the cottage or milk parlor. Lewis never used Norma's property. The property was stored on the Martin farm because Norma did not have adequate storage space elsewhere.

We find the district court's factual findings are supported by substantial evidence. We agree with the district court's conclusion that "[t]he evidence supports the conclusion that Norma was the sole beneficiary of this bailment agreement and that Lewis Martin was therefore a gratuitous bailee." We find the court correctly stated the standard of care required in gratuitous bailments—gross negligence, and whether gross negligence existed in this case was a question of fact for the court, the trier of fact, to determine. The court determined the damage to and disappearance of Norma's property was not due to a violation of the standard of care to be met by Lewis Martin. We find no error in this determination. However, because the parties agree the relationship was a bailment, Robert should return the property determined to be Norma's to her.

C. Iowa Code Section 633.158.

Additionally, Norma states in passing the court erred by not finding Robert liable under section 633.158. Norma does not set forth how this issue was preserved. She makes no argument and cites no authority in support thereof and has therefore waived this issue on appeal. See Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities

relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue”).

IV. Conclusion.

We agree with the district court’s denial of Norma’s claim for damages for lost and damaged property, and affirm upon that issue. However, there is no dispute the estate has in its possession five items that belong to Norma. She requested the items be returned. We remand for an order providing for the return of Norma’s property to her.

AFFIRMED AND REMANDED WITH DIRECTIONS.