STATE OF IDAHO)
County of KOOTENAI)ss

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN JERECZEK, et ux, *Plaintiffs*, vs. **WATERFORD PARK HOMES, LLC, d/b/a BAYVIEW RESORT & MARINA,** *Defendants*.	Case No. **CV 2005 8729** **MEMORANDUM DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

I. INTRODUCTION.

This case involves the sinking of plaintiffs' John Jereczek and Tammy Jereczek (Jereczeks') houseboat on April 27, 2007. Jereczeks claim the sinking was caused by the negligence of the defendant Bayview Resort & Marina (Marina) in the way they moored the boat just prior to a severe storm hitting the Marina. The Marina claims the houseboat sank due to other causes such as pre-existing holes in the pontoons of the houseboat, additional weight added to the houseboat by the Jereczeks and instability caused by a loft installed by the Jereczeks.

Trial was held on this matter August 13-16, 2007. The case was at all times scheduled for a jury trial. On August 13, 2007, counsel and their clients appeared and the parties participated in and completed *voir dire* of the jury panel. This process took all morning of the first day of trial. Both parties waived the panel for cause then exercised their pre-emptory challenges in chambers. The jury was agreed upon, but before the

Court, counsel and parties entered the courtroom to seat the jury, counsel informed the Court that they had reached an agreement that the entire matter could be decided by the Court, and the jury was waived. The Court informed counsel and their clients that the Court would agree to do so, only if the parties agreed to split the costs to Kootenai County of impaneling the jury. They agreed to do so, and each party paid their share of the costs to Kootenai County of impaneling the jury.

The matter proceeded as a court trial and concluded on August 16, 2007. After closing arguments, the Court asked for additional simultaneous briefing from both parties on the issue of bailment and proposed findings of fact and conclusions of law submitted by both sides, all to occur by no later than August 24, 2007. Both parties timely submitted findings of fact and conclusions of law and briefing on the bailment issue. Accordingly, the matter is now at issue. The Court has considered the proposed findings of fact and conclusions of law, the post-trial briefing on bailment, all briefing submitted pre-trial, all exhibits admitted into evidence and the notes taken by the Court.

Prior to setting forth its findings of fact, conclusions of law and order, this Court will discuss the facts and law as it pertains to the bailment issue. That issue deserves more analysis than typically allowed in a findings of fact and conclusion of law format. Following that discussion, the Court will similarly discuss the proof on negligence and damages. Finally, the Court will set forth its findings of fact, conclusions of law and order.

II. BAILMENT ANALYSIS AND THE BURDEN OF PROOF ON NEGLIGENCE ELEMENTS OF BREACH OF DUTY AND CAUSATION.

Jereczeks owned a 47-foot pontoon houseboat and moored that boat at the Marina. Waterford Park Homes, LLC, d/b/a/ Bayview Resort and Marina (Marina), purchased Bayview Resort and Marina early in the month of April 2005, not long before the events at issue. The Jereczeks bought this houseboat March 14, 2003, and spent the next

year extensively remodeling it, and added a loft to the top of the houseboat, toward the stern. After completing the remodeling, Jereczeks launched their houseboat and moored their houseboat at the Marina beginning in June, 2004. The houseboat was continuously moored at the Marina through the time period when the Marina ownership changed and continued to be moored at the Marina until the houseboat sank on April 27, 2005. The boat substantially sank following a fairly severe storm that day or days before April 27, 2005. The starboard pontoon remained afloat, but the port pontoon came to rest on the lake bottom, and most of the living area of the houseboat was under water. Exhibits 11, 12, 13, 14, and 16 illustrate this. The cause of the boat sinking is contested. Jereczeks claim the negligent moorage by the Marina (too few moorage lines used for the size of the boat, loose lines, lines attached to rotten boards on the finger dock, and the failure of the finger dock to be chained to the adjacent piling) caused their houseboat to bang against the finger slip during the storm, which damaged the port pontoon by causing cracks in the port pontoon which allowed water from the waves into the five chambers in that port pontoon with enough water that eventually the boat turned over on its port side. The Marina claims the Jereczeks' boat was moored properly by the Marina, and that it sank because modifications performed by the Jereczeks compromised the stability of the houseboat, or it sank due to pre-existing defects. Some days before the houseboat sank, the Marina moved Jereczeks' houseboat to facilitate some repairs to the marina. John Jereczek testified he received a phone call on April 8, 2005, from Jeff Barden of the Marina discussing the need to move the houseboat for this repair work. Jereczeks were just leaving on a trip to Minnesota when the call came, and Jereczeks returned to Coeur d'Alene the evening of April 26, 2007. The storm apparently occurred April 26, 2007. John Jereczek testified he received a call from Barden the morning of April 27, 2007, informing

him that his houseboat had sunk. The Jereczeks paid the Marina for their moorage spot, although they did not have a contract for said moorage. The moorage spot was a finger slip which ran in roughly a north-south direction. The houseboat was tied up to that finger slip with the starboard side to the dock.

The bailment issue is crucial as it determines whether the Jereczeks or the Marina bears the burden of proof in this negligence case. This is a negligence case. In an ordinary negligence case, the plaintiff has the burden of proving all the elements of a negligence cause of action. If there is a bailment, the bailor (Jereczeks) need only prove delivery of the bailed property to the bailee (the Marina) in good condition, and if it is returned in a damaged state, a presumption arises that the damage or loss was due to the negligence or fault of the bailee. *Compton v. Daniels,* 98 Idaho 915, 916, 575 P.2d 1303 (1978), *citing* McCormick, Evidence § 343 (2d ed. 1972). Unless the bailee sustains the burden of showing that the damage was due to other causes consistent with due care on his part, the bailor becomes entitled to judgment as a matter of law. 98 Idaho at 917, 575 P.2d at 1304, quoting *Sky Aviation Corp. v. Colt,* 475 P.2d 301 (Wyo. 1970).

Jereczeks do not have a written contract with the Marina. As discussed in *Loomis v. Imperial Motors, Inc.,* 88 Idaho 74, 78, 396 P.2d 467, 471 (1964), below, a bailment contract can be expressed or implied. In this case, the contract was expressed, but oral. Jeff Barden told John Jereczek exactly what he was going to do with Jereczeks' houseboat as a result of the Marina's need to move it. This is a bailment solely for the bailee's (the Marina's) benefit. Moving the boat by the Marina and returning it provided Jereczeks absolutely no benefit (even prior to the sinking), and was done only for the Marina's benefit in making its improvements. As discussed below in *Low v. Park Price Co.,* 95 Idaho 91, 94, 503 P.2d 291, 294 (1974), in a bailment for the bailee's benefit, the bailee is liable

for negligence and the burden shifts to the bailee to prove something other than his negligence caused the complained-of damage.

The facts regarding bailment are as follows: John Jereczek testified that he and his wife paid rent to the Marina, and that the Marina accepted their rent checks. This occurred via a monthly rent check plus utilities and a yearly fee. He testified that on April 8, 2005, he was just about ready to pull out from his home in Coeur d'Alene for his parents' home in Minnesota when he received a call from Jeff Barden of the Marina. John Jereczek testified Barden identified himself as the manager of the Bayview Marina, and that he worked for Bob Holland and Waterford Park Homes, LLC who now owned the Marina. John Jereczek testified Barden told him they wanted Jereczeks to move their houseboat because the Marina was going to do some construction to the docks and pilings. John Jereczek told Barden he could not do it as he was on his way out of town. According to John Jereczek, Barden told him they could move the houseboat and that they had trained movers. John Jereczek testified Barden told him they would be careful and they would take full responsibility. Jereczek testified that at that point he gave Barden permission to move his houseboat.

Jeff Barden testified he was the Marina manager in April, 2005 and that Warterford Park Homes, LLC owned the Marina at that time beginning the first of April, 2005. Barden testified they needed to have Jereczeks move their houseboat in order to replace some pilings and remove some pilings, and that they were bringing in a barge with a pile driver and tugboat to do this. Barden testified that he called John Jereczek about the project. Barden recalls John Jereczek telling him he was about to go on vacation and could not move the houseboat. Barden testified it was John Jereczek who asked Barden if the Marina could move the boat for him. Barden testified he recalls John Jereczek telling him

the engine compartment takes on water if it was towed in reverse. Barden recalls John Jereczek asking Barden to be very careful of it and that Barden told John Jereczek they would.

The two versions of the same conversation are essentially identical on most points. The only material difference is John Jereczek testified it was Barden who told Jereczek the Marina could move the houseboat, where Barden testified Jereczek asked Barden if the Marina could move the houseboat. What is not in dispute is the fact that the houseboat needed to be moved solely for the purposes of the Marina. Since the move of Jereczeks' houseboat was solely to benefit the Marina, this Court finds little, if any, significance as to whether Barden told John Jereczek they could move the houseboat or whether John Jereczek asked Barden if the Marina could move the houseboat. There is no dispute that the Marina moved the houseboat so it could do its work, then moved the houseboat back to its moorage spot. There is no dispute that Barden told John Jereczek the Marina would be careful in moving his houseboat.

The Marina claims there is no bailment because the marina did not have exclusive right of possession and control of the vessel. (Defendant's) Trial Brief on Bailment, p. 3, citing *Commercial Union Insurance Company v. Bohemia River Associates, Ltd.,* 855 F.Supp 802 (E.D. Md. 1991). That case, and the cases cited therein, indicate the bailee must have exclusive right to possession, even as against the owner, in order for a bailment to exist. 855 F.Supp at 805. In the present case, the Marina had exclusive possession when it moved Jereczeks' houseboat as they were leaving town. Jereczeks were not around to possess and control the boat at that time, and remained in that status until they returned to find the boat had sunk. The exclusive right of possession distinguishes a bailment from a mere rental, which was the situation we had prior to the Marina's moving

the houseboat. The Court finds the Marina was in exclusive possession from the time it moved the Jereczeks' houseboat until it sank.

There are several elements in any negligence case: duty, and the extent of that duty (standard of care); breach of that duty; damage; the damage was caused by the defendant's acts which caused defendant to breach the standard of care; and the extent of damage. IDJI 2.10.3. The burden shifting that occurs in a bailment case applies to whether the duty was breached and causation. The burden shifting in a bailment case does not extend to the duty owed and damages to be proven. The burden remains on the plaintiff at all times to prove those elements in a bailment case.

A. The Extent of the Duty Owed.

Since Barden told John Jereczek that they would be "very careful", the case could be made that the Marina had a higher standard then "ordinary care". That is an academic point, as this Court finds the Marina failed to exercise "ordinary care" in the manner in which they tied the houseboat to the finger slip upon returning it after moving it, and in not securing the finger slip to the piling.

B. The Marina's Breach of the Duty Owed.

As set forth in *Low v. Park Price Co.,* 95 Idaho 91, 93-96, 94, 503 P.2d 291, 293-96 (1974), a bailee for hire has the burden of proving ordinary care, meaning the burden of persuasion, not merely the burden of going forward with the evidence. In that case, the Idaho Supreme Court gave its reasons why shifting both burdens (of going forward with the evidence and of persuading the fact finder) to the bailee is justified. 95 Idaho at 96, 503 P.2d at 296.

In the present case, the Marina has failed to produce any credible evidence that it did not breach the duty of ordinary care. Thus, even if this were an ordinary

negligence case, and not a bailment case, this Court finds Jereczeks met their burden of proving the Marina breached the duty of ordinary care owed by a marina. Under a bailment analysis, this Court finds the Marina has failed to meet its burden of persuading the Court that it did not breach the duty of ordinary care owed by a marina. The Court's analysis of the facts follows:

It is undisputed that the Marina used only two lines, one of which was tied to a rotten 2x4, to secure this substantial (the Marina's expert Douglas Wolff estimated the houseboat weighed about 13,000 pounds), 47-foot houseboat. Exhibit 36. This resulted in the houseboat being able to move fore and aft as tied to the finger slip, and to become detached from the finger slip and held by only one line once the rotten 2x4 cleat broke. It is undisputed that when the Marina drove a new piling for this finger slip, the Marina failed to secure the finger slip to the piling. Jereczeks used four lines to tie the boat to the finger slip, a bow and a stern line tied perpendicular to the boat, and then crossed lines from the bow toward a secure location on the dock toward the stern, and a stern line toward a secure location on the dock toward the bow. The latter two lines prevent fore and aft movement of the houseboat. The Jereczeks did not tie to the rotten wooden 2x4 cleat, but rather tied to the piling. At all times Jereczeks moored there, until the Marina moved the houseboat and put in a new piling, the finger slip was chained to the piling on the side of the finger slip opposite the boat. The ability of the houseboat to move fore and aft resulted in any fenders (air-filled cushions placed on the side of the houseboat next to the dock) to become useless or missing. The ability of the houseboat to separate from the finger slip dock and then hit the dock due to the breaking of the rotten 2x4 caused significant impact which was not cushioned due to the fenders not being placed by the Marina, or the fenders becoming useless or missing as a result of the movement of the houseboat during the

storm. It is undisputed the fenders were missing or misplaced, given the damage to the side rail of the houseboat as shown in Exhibit 29 and 30.

Common sense dictates the Marina breached its duty of ordinary care. One does not tie up a 47-foot, 6.5 ton houseboat to an unattached finger slip using only two lines, neither of which cross and one of which is tied to an old rotten 2x4 wood cleat. Substantial evidence was presented which bolsters this common sense impression. The Marina's own expert, Douglas Wolff, a naval architect and marine engineer, testified "If this was my seven-ton boat, I'd have four to five lines and tie it to well founded fittings", and that "This [Exhibit 36, the rotten 2x4 cleat] is not a well founded fitting". Captain Brad Hall is a professor of nautical science at the United States Merchant Marine Academy. Hall depo., p. 6, Ll. 11-18. Hall testified on behalf of Jereczeks. Hall testified that a minimum of four lines should be used on a boat of this size, one line off the bow, a breast line going perpendicular from the pier to the boat, and two spring lines, one leading from the bow aft, and an aft spring line leading from the aft of the boat toward the bow. *Id.,* p. 13, Ll. 1-17. Failure to do so can cause the boat to break free and cause damage to the hull of the boat. *Id.,* p. 15, Ll. 11-24. If the Marina employees are moving the boat, they are assuming responsibility to make sure that the boat is moored safely and responsibly. *Id.,* p. 39, Ll. 13-22. Had the vessel been secured properly (four lines, two crossed lines all tied to adequate attachment points) it would not have broken free. *Id.,* p. 52, Ll. 15-25. Hall testified the Marine did not exercise due diligence and prudent seamanship and proper care of the vessel in securing it. *Id.,* p. 22, Ll. 3-25. The fenders should have prevented pier to gunwale contact, and the fenders failed to do that, given the damage to the gunwale. *Id.,* p. 52, Ll. 15-25. Other witnesses referred to the gunwale as the "gunnel", "beam" or "rail" on the side of Jerczeks' boat above the pontoon. The damage to the

starboard gunwale is apparent on Exhibits 29 and 20. Brad Pearson, in charge of security and moorage for the former owners of the Marina, testified Jereczeks used a bow line, a stern line, and two crossed lines to keep the boat from moving fore and aft, that they tied off to secure fittings such as the wood piling and did not tie off to the wood 2x4 cleat. Pearson testified that with that moorage, Jereczeks' boat had weathered previous storms at the Marina in the prior 10 months. Forensic engineer William Skelton, Jr., Ph.D., testified on behalf of Jereczeks. Skelton testified he had investigated several houseboat sinkings in Pend O'Reille Lake. Skelton testified the inadequate lines, and either a failure to use bumpers (fenders), or if the bumpers were used they were used improperly as they failed to protect the starboard side of the houseboat near the stern, is what caused the cracking of the welds on the pontoons, especially the port pontoon, allowing water to enter the port pontoon, causing the houseboat to sink. Dennis Jackson, a merchant marine and a seaman with 20 years experience, testified on behalf of Jereczeks. Jacskson testified a vessel this size should have been moored with at least four lines along with fenders. Jackson testified with nearly a seven-ton boat it was not appropriate to use only two lines, and was adamant that it was not appropriate to tie to a 2x4 cleat, even if it was in good condition. Jerry McMackin, a marine surveyor, marine appraiser and marine insurance adjuster, testified on behalf of Jereczeks. McMackin testified the boat was not moored properly, and if it was moored properly it would not have sunk. Captain John Finney testified on behalf of the Marina. He admitted he was not an expert on the standard of care. Finney depo., p. 27, Ll. 3-12. Finney expressed an opinion as to causation, that the capsizing was due to an overweight structure that raised the center of gravity to an unsafe condition (Finney depo., p. 55, Ll. 14-20), and that the matter of the tie-up had nothing to do with the foundering of this vessel (*Id.,* p. 56, Ll.15-19), and that the same result would

have occurred if there was a hundred lines on the vessel. *Id.* Ll. 20-24. Finney's testimony on the number of lines essentially assumed that the houseboat this size was already tipping over, and that no matter how much one tied off to the dock, those lines would not keep it from tipping over. Eventually, Finney testified on cross-examination that tying a six or seven-ton boat to a through-bolted 2x4 in good condition would be acceptable, but not to a rotten 2x4. *Id.* p. 66, Ll. 2-17.

Aside from common sense, the experts unanimously (even Finney reluctantly) agree the way the Marina moored Jereczeks' houseboat did not meet the standard of care. The Court finds the Marina did not meet the duty of ordinary care owed by a marina.

C. Bailment Analysis and Causation.

The Idaho Supreme Court has noted that a bailment is: "A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust. *Fulcher v. State,* 32 Tex.Cr.R. 621, 25 S.W. 625." *Loomis v. Imperial Motors, Inc.,* 88 Idaho 74, 78, 396 P.2d 467, 471 (1964).

The existence of an express oral bailment between the Marina (through Barden) and Jereceks results in the burden in this negligence case being shifted from Jereceks to the Marina. There are valid reasons for this burden shifting. The Marina accepted money from Jereczeks to moor their houseboat. The Marina required Jereczeks to move their houseboat. The Marina knew Jereczeks could not move it, and the Marina told Jereczeks they would move it for them and be careful in doing so. The Jereczeks were in Minnesota when the storm occurred on Lake Pend O'Reille, but the Marina staff

was present to keep any eye on boats moored there, especially boats the Marina's employees had moored, such as Jereczeks' houseboat. *Low v. Park Price Co.,* 95 Idaho 91, 93-96, 94, 503 P.2d 291, 293-96 (1974), discusses in detail the reasons behind shifting the burden to the bailee:

> In *Cluer v. Leahy,* 44 Idaho 320, 256 P. 760 (1927), the Court stated that where chattels are delivered to a bailee and returned in a damaged state, or are lost or not returned at all, the law presumes negligence to be the cause and casts upon the bailee the burden of showing that the loss is due to other causes consistent with due care on his part. But, the Court went on to say, the burden of proving negligence remains on the bailor throughout the trial, although the presumption arising from injury to the goods or failure to redeliver is sufficient to satisfy this burden and to make out a prima facie case against the bailee. In *Cluer*, the record contained no evidence "satisfactorily explaining the loss" of the bailed property, nor did it contain any "direct proof of negligence." *Id.* at 324, 256 P. 760. Judgment in favor of the bailor was then affirmed on the ground that the bailee had failed to account for the loss of the bailor's property. In another case decided the same year as *Cluer,* the following statement of the rule appears:
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> > "Ordinarily, where property is injured, lost, or destroyed while in possession of a bailee, a presumption of negligence arises, making a *prima facie case*, and casting upon the bailee the burden of showing that the loss was due to other causes consistent with due care on his part. (*Citing Cluer v. Leahy, supra.*) But, when it appears that the loss or injury was caused by fire or other extraordinary intervention, the burden is upon the bailor to prove a lack of ordinary care or violation of some specific duty by the bailee resulting in the proximate cause of the damage. (*Citing Rosendahl v. Lemhi Valley Bank, supra,* and authorities from other jurisdictions.)' *Carscallen v. Lakeside Highway Dist.,* 44 Idaho 724, 727-728, 260 P. 162, 163 (1927).
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> Twenty years later, in *Burt v. Blackfoot Motor Supply Co.*, 67 Idaho 548, 553, 186 P.2d 498, 501 (1947), the Court said:
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> > "When a bailor sues the bailee to recover for loss or damage to bailed property and alleges and undertakes to prove negligence, the burden is upon him so to do.
> >
> > Where the property is in the sole and exclusive possession of the bailee and is lost or damages, a prima facie case is made by the plaintiff (bailor) when he shows the property was bailed to the bailee and has not been returned on demand, or has been damaged. It is then incumbent

> upon the bailee to show that such loss or damage was without negligence upon his part."

The inference left by the *Burt* case was that when a bailor does not specifically allege negligence in his complaint, the bailee then has the burden of persuading the fact finder that he had exercised ordinary care. Such a rule makes the allocation of the burden of persuasion depend on the niceties of pleading; nevertheless, this position has been taken in many jurisdictions. *See* Sweet, Burden of Proof of Bailee's Negligence in Connection with His Failure to Redeliver, 8 Hastings L.J. 89 (1956). More recently, in *Dick v. Reese,* 90 Idaho 447, 452, 412 P.2d 815 (1966) (dealing with the alleged improper performance of automobile repairs), the Court, without citing any of the aforementioned Idaho cases, stated that upon the establishment of a prima facie case of negligence, the burden of going forward-but not the burden of persuasion-shifts to the bailee.

None of the Idaho cases we have reviewed set down any reasons for their positions on the question of whether the bailee or the bailor has the burden of proof. However, in *Shockley v. Tennyson Transfer & Storage,* 76 Idaho 131, 134-135, 278 P.2d 795, 797 (1955), where the bailee's liability was governed by the provisions of the Uniform Warehouse Receipts Law, the Court stated:

> "A warehouseman, subject to the provisions of the act, who is unable to deliver the goods because of their destruction by fire of unknown origin, bears the burden of proving that he exercised due care, and that the bailed goods were not destroyed because of his negligence. * * * *The warehouseman is in a better position to know and prove the cause of the fire and to account for the injury or loss of the goods than is the bailor. The bailor, generally speaking, does not have the knowledge or information, nor equal means to acquire it.* Establishing that the origin of the fire is unknown is not sufficient in itself to free the warehouseman from liability." Emphasis added.

The emphasized language is significant; the logic employed is as applicable to a bailee who accepts a chattel for repair as it is to a warehouseman. In either case, the bailee has undertaken, for consideration, to use ordinary care in the safekeeping of a chattel. *Downey v. Martin Aircraft Service,* 96 Cal.App.2d 94, 214 P.2d 581, 584 (1950). And as the Supreme Court of Oregon has stated:

> "In the absence of some very compelling reason for taking a different course, the courts should avoid the incongruity of one rule for bailees subject to the Warehouse Receipts Act and a different rule for other bailees." *National Fire Ins. Co. v. Mogan,* 186 Or. 285, 206 P.2d 963, 967 (1949).

Until its repeal in 1967, I.C. § 69-108 in pertinent part provided that "the burden shall be upon the warehouseman to establish the existence of a lawful excuse" for his failure to deliver the bailed goods. Effective December 31, 1967, I.C. § 69-108 was superseded by the pertinent Uniform Commercial Code provision, § 7-403 (I.C. § 28-7-403). The drafters of the U.C.C. left it optional with each state adopting the code whether the burden of proving negligence should be upon the bailor or the burden of proving reasonable care upon the bailee. Thus, the official text of U.C.C. 7-403(1)(b) (as it appears in Uniform Laws Annotated) in pertinent part provides:

> "(1) The bailee must deliver the goods * * * unless and to the extent that the bailee establishes any of the following:
>
> (b) damage to or delay, loss or destruction of the goods for which the bailee is not liable (, but the burden of establishing negligence in such cases is on the person entitled under the document (i. e., on the bailor));
>
> Note: The brackets in (1)(b) indicate that State enactments may differ on this point without serious damage to the principle of uniformity."

When I.C. § 28-7-403 was enacted, the bracketed language was omitted; therefore, the Idaho Legislature has clearly indicated that, as a matter of policy, the burden of establishing negligence should not be placed upon the bailor. And, we believe, in the absence of some very compelling reason for taking a contrary course, courts should avoid the incongruity of one rule for bailees subject to the U.C.C. and a different rule for other bailees. *Cf. National Fire Ins. Co. v. Morgan, supra.* Hence, it is the conclusion of this Court that a bailee for hire should have the burden of proving ordinary care-meaning the burden of persuasion, not merely the burden of going forward with the evidence-and the allocation of this burden should not be affected by the presence of allegations of negligence in the bailor's complaint.

Although this holding is concededly a minority position, we believe that those cases placing the burden of persuasion on the bailee are the better reasoned decisions. The following comments, from various cases and legal periodicals, are exemplary:

> "Since the bailor has entrusted (and not merely 'committed') his property to the custody of the bailee and further since the bailee receives such possession in the expectation of profit, on the grounds of desirable public policy it would certainly not seem unjust to require the bailee, when he is unable to redeliver the property so entrusted to him, to establish his exercise of due care by a preponderance of the evidence. In addition to the policy considerations just mentioned, one might ask: who is in a

better position to explain the loss? Certainly not the bailor. He has delivered possession to the bailee who takes control and determines the manner of keeping. In most cases it would be almost impossible for the bailor to prove the bailee's negligence. Accessability to evidence on the issue of due care would seem to be almost exclusively the bailee's. Certainly requiring the bailee to establish by a preponderance of the evidence that he has been free from culpable fault in connection with the loss, theft or destruction of the bailed article does not have the effect of making him an insurer of the goods.

* * * It is arguable whether, in the light of human experience, it logically follows that the bailee has been negligent in such a situation but certainly it is a possibility that deserves consideration. Regardless of the question of logical deduction, in the interests of sound public policy and with the realization that access to evidence of due care is almost exclusively the bailee's, it seems just and fair that the bailee should have the burden of establishing his freedom from negligence." Sweet, Burden of Proof of Bailee's Negligence in Connection with his Failure to Redeliver, 8 Hastings L.J. 89, 95 (1965).

"This court has held that the burden of proof is upon the bailee to prove that he exercised the degree of care required of him. *Davis v. Tribune Job Printing Co.,* 70 Minn. 95, 72 N.W. 808. Considerations of fairness put upon the warehouseman the burden of proving his own freedom from negligence. The goods are intrusted to him. He has charge and control of them. He determines the manner of keeping them. He is in possession of such evidence as there is as to the circumstances attending the loss. The bailor trusts the warehouseman and has no proof. It is not unjust to the warehouseman to require him to sustain the burden of proving its freedom from negligence. Where the burden of proof should rest "is merely a question of policy and fairness, based on experience in the different situations." Wigmore on Evidence, § 2486. We hold that when the liability of the carrier has become that of a warehouseman, and the loss of the goods shipped is established, the burden of proof is upon it to show its freedom from negligence. This burden is not merely the burden of going forward with the evidence, nor a shifting burden, but a burden of establishing before the jury absence of negligence. So far as the case of *Bagley Elevator Co. v. American Express Co.,* 63 Minn. 142, 65 N.W. 264, which involves a liability of a carrier as a warehouseman, like the case at bar, states a different rule, it is disapproved. The rule now stated is entirely fair. It is a practical working rule, and the only one." *Rustad v. Great*

Northern Ry. Co., 122 Minn. 453, 142 N.W. 727, 728 (1913) (followed consistently in Minnesota; see, e. g., *Wallinga v. Johnson,* 269 Minn. 436, 131 N.W.2d 216, 219 (1964)).

"The view of the courts supporting the minority rule is that the bailee, being in exclusive possession of the chattel, is in a far better position to explain the origin of the fire and to produce evidence of the circumstances which would determine whether or not it was due to his negligence, than the bailor. We think there is a good deal of truth in this observation of the South Carolina court in *Fleischman, Morris & Co. v. Southern Ry. Co.,* 76 S.C. 237, 56 S.E. 974, 977, 9 L.R.A.,N.S., 519:

"* * * In most cases, to require the owner to assume the burden of showing that the fire or theft was due to the lack of ordinary care is to impose an impossible task and place him more than ever at the mercy of the warehouseman. "*National Fire Ins. Co. v. Mogan,* 186 Or. 285, 206 P.2d 963, 966 (1949).

"We are of the view, however, that these cases state the proper rule, that when a bailee who is under the duty of exercising ordinary care is unable to redeliver the subject of the bailment, it is not enough for him to show that the property was lost, stolen or destroyed, but that if he relies upon such fact to excuse his failure, he must go further and show that the loss occurred without negligence on his part. As heretofore stated, a contrary rule would place upon the plaintiff, in many cases, an impossible burden. It is just and fair that one who undertakes for reward to care for a chattel should have the burden of explaining its loss or destruction while in his custody and of negativing an inference of negligence on his part arising from such loss or destruction." *Downey v. Martin Aircraft Service,* 96 Cal.App.2d 94, 214 P.2d 581, 584-585 (1950).

"Although a bailor's often insurmountable burden of proving a bailee's negligence is adequate justification for (presuming negligence), will it not have other beneficial incidents? Most cases concern bailments for hire and arise either out of thefts from, or fires in, garages, parking lots, warehouses, laundry and dry cleaning establishments, and other business places. This rule tends to promote care and caution in the handling and keeping of bailed chattels with a resulting reduction in economic losses from negligent fires and other causes. In those few cases where it is impossible to determine fault, it will tend to place the loss where it can be more conveniently shifted, either by insuring or by spreading it among the bailees' customers in the form of increased rates. It may also, by giving incentive for precautions, reduce opportunities for car thieves and others

> of like inclination. * * *
>
> "Blanket coverage bailee's insurance policies are available to garages, parking lots, warehouses, et cetera, at the same or lesser rates than individual bailors would be required to pay. They are also much more convenient, especially where clothing is left at a laundry or dry cleaning plant. Most businesses of this type do have a blanket policy covering any liability for losses of or injury to goods in their hands. The expense of the policy is usually defrayed by a small addition to their service charges." Comment, 31 Texas L.Rev. 46, 51-52 (1952).

> To summarize, shifting both burdens (of going forward with the evidence and of persuading the fact finder) to the bailee is justified by the following considerations: (1) the bailee has superior access to the evidence; (2) it is probable that loss or damage will not occur if the bailee exercises ordinary care; (3) this rule will induce the bailee to take precautions to prevent damage to, or the loss of, bailed property; (4) losses will be spread out either by the bailee's procurement of insurance or by increased charges for services to bailors; and (5) it is desirable to apply a uniform rule to all bailees, including those not subject to the U.C.C. For these reasons, the Idaho bailment cases discussed above are disapproved to the extent that they place the burden of proving negligence upon the plaintiff-bailor. While courts are ordinarily reluctant to impose upon defendants the duty of proving the non-existence of negligence, an exception is justified in bailment cases, for the reasons delineated above.

95 Idaho 91, 93-96, 94, 503 P.2d 291, 293-96 (1974). The Idaho Supreme Court also discussed the effect of this presumption in *Compton v. Daniels,* 98 Idaho 915, 575 P.2d 1303 (1978):

> "When a bailor proves delivery of the property to the bailee in good condition and return in a damaged state . . . a presumption arises that the damage or loss was due to negligence or fault of the bailee." McCormick, Evidence, § 343 (2d ed. 1972), accord, 9 Wigmore, Evidence § 2508. This rule has been adopted by numerous jurisdictions in bailment cases. See, e. g., *Harris v. Deveau,* 385 P.2d 283 (Alaska 1963); *Barnes v. Western Aviation, Inc.,* 524 P.2d 642 (Colo.Ct.App.1974); *Aetna Life and Casualty Company v. Stan-Craft Corporation,* 159 Mont. 474, 499 P.2d 776 (1972); *Alamo Airways, Inc. v. Benum,* 78 Nev. 3384, 374 P.2d 684 (1962); *Liberty Mutual Fire Insurance Company v. Hubbard,* 275 Or. 567, 551 P.2d 1288 (1976); *Clack-Nomah Flying Club v. Sterling Aircraft, Inc.,* 17 Utah 2d 245, 408 P.2d 904 (1965); *Chaloupka v. Cyr,* 63 Wash.2d 463, 387 P.2d 740 (1964); *Sky Aviation Corporation v. Colt, supra*; Annot. Liability of Bailee of Airplane for Damage Thereto, 44 A.L.R.3d

862. Under the facts in this case, the district court correctly held that the bailors were entitled to the presumption of negligence on the part of the bailee. We disagree, however, with the district court as to the effect of this presumption.

The district court concluded that the bailee, Daniels, had failed to meet his burden of proof because he had failed to introduce satisfactory evidence to prove the *actual cause* of the emergency situation. The district court erred in this holding. The district court's decision placed a much heavier burden on the bailee than is contemplated by the rule upon which the district court was relying.

The presumption relied upon by the district court does not shift to the bailee the burden of persuasion or the risk of non-persuasion. The presumption only imposes upon the bailee the burden of going forward and producing evidence of facts from which the trier of facts could reasonably find that the loss was not occasioned by the bailee's negligence. *Liberty Mutual Fire Insurance Company v. Hubbard, supra.* The Wyoming Supreme Court has verbalized the effect of the presumption in the following language:

> Unless the bailee sustains the burden showing that the damage was due to other causes consistent with due care on his part the bailor becomes entitled to a judgment as a matter of law. (citations omitted) We must then consider if there was sufficient evidence to rebut the presumption; i.e., did the defendant meet the burden of showing due care?

Sky Aviation Corporation v. Colt, supra, at 304-305.

In the case at hand, the bailee was under an obligation to introduce evidence tending to establish that the damage to the aircraft was due to other causes consistent with due care on his part. The bailee satisfied this burden.

Daniels testified that the emergency situation and landing was caused by a loss of engine RPMs. Daniels testified further that he followed standard procedures in an attempt to eliminate the loss of RPMs and that when these attempts proved unsuccessful he landed the aircraft. The introduction of this evidence satisfied his burden of proof. The evidence introduced by Daniels tended to show that the cause of the damage was consistent with due care on his part. The evidence tended to show the non-existence of the presumed fact, i.e. Daniels' negligence. Once Daniels introduced this evidence “the presumption is spent and disappears.” McCormick, Evidence, s 345 (2d ed. 1972).[Footenote 2: This theory is known as the “bursting bubble” or Thayer theory.] If the evidence introduced is sufficient to support a finding contrary to the presumed fact, the bailee's burden of proof has been met.

The district court specifically found that the plaintiffs-bailors had failed to prove specific acts of negligence on the part of the defendant-bailee. The district court also found that although the bailee had not proven the actual cause of the emergency situation, he did introduce

> sufficient evidence from which the district court concluded that he had not acted negligently in operating the aircraft. The district court incorrectly held that the bailee was still presumed negligent because he failed to prove the cause of the emergency situation.

98 Idaho 915, 916-17, 575 P.2d 1303, 1304-05 (1978).

The Marina argues any bailment ended when it tied Jereczeks' houseboat up to the finger dock, returning it to its original position. This argument ignores the *fact* that any negligence in the manner in which the boat was tied to the dock, and any negligence in the manner in which the dock was tied to the pier (it wasn't), **continues** until that negligent conduct is changed. The Marina did not change any of its negligent conduct from the time it moored Jereczeks' houseboat back at its original position until the boat sank. The Marina's argument also ignores the *law*. As noted by Jereczeks in Plaintiffs' Memorandum Regarding Causation and Bailment, p. 7, the bailment continues:

> A bailment does not end until the property is returned to the bailor and the bailor recognizes completion of the work done on the property. *Nava v. Truley Nolen Exterminating of Huston, Inc.*, 140 Ariz. 497, 683 P.2d 296, 299 (Ariz. App. 1984). In *Nava*, the Court held that bailment of an aircraft for repairs did not end even though the aircraft owner had access to the aircraft and had partially inspected it. In *System Auto Parks & Garages, Inc. v. American Economy Ins. Co.*, 78 Ind. Dec. 757, 411 N.E.2d 163 (Ind. App. 1980), the Court held a bailment continued after a parking lot closed and the car owner's keys were put under the floor mat. In *Boeing Airplane Co. v. Fireman's Fund Indemnity Co.*, 44 Wn.2d 488, 268 P.2d 654 (1954) the Court held that a bailment did not end even though the owner took control of an aircraft and was conducting test flights.

Id. A bailment does not end until the bailee is given reasonable time to retake possession. *Gaskins v. Fowler Gin Co.*, 218 S.C. 201, 62 S.E.2d 119 (1950); *Brumson & Boatwright v. Atl. Coast Lime R.R. Co.*, 76 S.C. 9, 56 S.E. 538 (1907). In the present case the boat sank the evening of April 26, 2005, before Jereczeks had the opportunity, upon returning from Minnesota, to inspect the boat and take re-possession of the boat.

As stated above in *Compton:* "The presumption only imposes upon the bailee the burden of going forward and producing *evidence of* ***facts*** from which the trier of facts could reasonably find that the loss was not occasioned by the bailee's negligence." The Marina must produce evidence from facts that the sinking of the Jereczeks' houseboat was not through the Marina's negligence. The Marina has failed in this burden. The Marina has put forth "opinion" evidence through Douglas M. Wolff, P.E., and Captain John Finney. If believed, that opinion evidence could amount to a proven fact. However, the Court does not believe such opinion evidence. Even if this were not a bailment case and the burden on causation in all respects at all times remained on Jereczeks, they would have met their burden of proof as to causation.

Professional Engineer Douglas Wolff testified that he had "developed a theory that explains the sinking." That theory was that waves came over the stern of the boat and it sank. Even though Wolff recited the magical words that his opinion was rendered on a "more probable than not basis", this Court finds Wolff's opinion on this point is not rendered to a more probable than not basis because it is not supported by the **facts** of the case. First of all, Wolff never inspected the boat and was quite candid in his testimony that "I wish I had a chance to view the vessel". Second, Wolff testified he did not know the houseboat's center of gravity, did not know how much heeling over it could withstand before it tipped over. Wolff admitted he did not know how much the boat weighed before and after Jereczeks' remodeling. Third, Wolff's "theory" is that waves came over the stern of the boat and caused the boat to sink. However, Wolff admits he saw **no evidence** that waves actually came over the stern. The only thing Wolff mentioned in this regard was that Navigation Services noted that there were missing fasteners over the engine compartment, and the engine compartment is near the stern.

Yet Wolff gave no testimony of how those fasteners came to be missing. Wolff testified if those fasteners were missing, water could get in the engine compartment, but on cross-examination, Wolff did not know whether the engine compartment had a drain. The Marina's other expert Captain John Finney impeaches Wolff on this point, as Finney testified if the engine compartment were not sealed and water got in, "it will not cause the vessel to sink by the stern". Finney depo., p. 38, Ll. 12-16. Fourth, not discussed by any expert or lay witness, is the fact that the floor of this houseboat is flat…there is no basin to fill up with water. If a wave hit the stern and entered the living area through the sliding door, it would subsequently seep out through that same door. A pontoon houseboat with a flat floor is essentially self-bailing as to the living area. There is nothing in the living area to "fill up".

Wolff criticized the theory advocated by Jereczeks that the improper moorage led to severe banging of the starboard side of the houseboat which in turn caused failure of the welds of both pontoons (but especially the port pontoon) which led to cracks in the pontoons which allowed water in the port pontoon which led to the port pontoon being submersed and sinking (the port pontoon eventually ended up on the bottom of the lake with the starboard side still held afloat by the starboard pontoon). Wolff's criticism of that theory was based on his review of the photos to the damage of the starboard side of the houseboat. Wolff felt that the scratches cased by the nail on the finger pier were not indicative of enough force being transmitted by the boat repeatedly hitting the finger pier. That opinion completely ignores the **dent** in the starboard side of the houseboat caused by the impact. Exhibit 29 shows the damage to the starboard rail of the boat. Exhibit 30 demonstrates the damage, but not as accurately as Exhibit 29, due to the angle at which the photograph was taken. John Jereczek testified that photograph

shows the extent of the dent, and that the beam that was dented was thick steel. Jerry McMackin testified that he examined the boat on April 29, 2005, at Jereczeks' request. McMackin worked for seven years in the marine repair business, and worked as an appraiser, adjuster and surveyor for marine insurance companies. He has 18 years experience as a marine surveyor. He testified that he took the photograph which is Exhibit 29, which shows the starboard side gunnel (also referred to by other witnesses as a "gunwale", "beam" or "rail"), which is the outside portion of the frame which sits on top of the pontoons. McMackin testified that the gunnel showed signs of not only being scraped by the nail on the dock, but also being dented by impacts with the dock. McMackin testified that if the boat was moored properly it would not have sunk. He based that opinion on the beam being "bent quite badly over a long area, so it was hit hard, the boat took quite a beating on the starboard rail." One can clearly see the beam is badly bent in Exhibit 29. Wolff's incomplete analysis of the theory advocated by Jereczeks is crucial, because Wollf testified he developed his theory that the boat sank because water came over the stern was developed only after he dismissed Jereczeks' theory based on simply the gouges left by the nail on the dock.

Wolff also testified the weld fractures were not caused by the storm or by the Marina's moorage, but rather were caused by poor maintenance. Wolff based that opinion on the report from Navigation Services Unilimited (Captain John Finney's report, Exhibit 1 to his deposition), that the hull (the pontoons) was in poor condition, had severe pitting, heavy corrosion and epoxy patches. All of that is directly contradicted by all the rest of the evidence. We know each of the five chambers in each of the two pontoons were airtight as of its launch in July 2004. We know that from the uncontradicted testimony of John Jereczek and Doug Hanley who were both involved in

the pressure testing. We know John Jereczek tested the pontoons some months after the houseboat was launched in July 2004, and the pontoons had no water in them at that time. Captain John Finney testified he examined the boat on behalf of the Marina. He found "some" pitting that "appeared" to be coated by epoxy, but he could not tell if there was any hole that water would have leaked through. Finney depo., p. 34, L. 13 – p. 35, L. 14; p. 80, Ll. 7-11; p. 88, Ll. 2-9. Finney did not inspect the boat for nearly two years after it sank and admitted it was not possible to tell which cracks were new or old due to the amount of time that had passed since foundering. Finney depo., p. 69, Ll. 5-13; p. 81, Ll. 5-13. The prior owner of the houseboat, Richard Gittel, testified the pontoons were in good shape when he sold it and that there had never been any epoxy used to patch the pontoons. Doug Hanley helped the Jereczeks restore the boat. Hanley sanded down both pontoons and saw no moderate to severe pitting, saw no epoxy patches and saw no rust. Even if Wolffs' opinion of poor maintenance had any factual support, that is, if even if there were severe pitting, heavy corrosion and epoxy patches, no one, not Wolff, not Navigation Services Unlimited, not Captain Finney, expressed an opinion that severe pitting, heavy corrosion or epoxy patches in any way caused water to actually seep in to the port pontoon and cause the boat to sink. Finney specifically stated he wasn't saying there was any physical penetration on the hull that caused it to leak. Finney depo., p. 88, Ll. 2-9.

Captain John Finney testified by videotape deposition. He also testified to a "more probable than not basis" as well. Finney depo., p. 29, Ll. 15-23. Finney's opinion is that the boat capsized due to an overweight structure that raised the center of gravity to an unsafe stable condition. That increased weight in the loft added by Jereczeks acted as a lever arm and, with the wave action, "it's going to roll over." Finney depo., p.

55, L. 1 – p. 56, L. 14. However, this testimony is directly contradicted by the Marina's own marine engineer Wolff, who testified that the loft that was added "did not necessarily make the houseboat unstable." Finney's testimony is also weakened by the fact that Finney had no idea how much the boat weighed either before or after the Jereczeks' modifications. Finney depo., p. 63, L. 17 – 64, L. 24; p. 71, L. 12 – p. 74, L. 21. The only credible evidence is the uncontradicted testimony of John Jereczek that the total weight of the boat was actually somewhat lighter even with the loft, due to the air conditioner, fiberglass roof and iron rail that were all permanently removed in the remodeling.

In opening statement, to provide an explanation as to why the houseboat sank, counsel for the Marina tried to wrap up all the theories their experts discussed, yet ignored the contradicting testimony from their own experts Wolff and Finney (Finney said adding the loft made the houseboat unstable, Wolff said the added loft did not necessarily make the houseboat unstable). In opening statement, counsel for the Marina said the wind in conjunction with the weight Jereczeks added in remodeling the houseboat caused it to sink. Counsel for the Marina said that with a 30 mile-per-hour wind the houseboat, with the added loft, acted as a sail and the wind pushed the boat down. No witness testified about any such theory. Wolff testified there was 13 inches of freeboard on the left pontoon, and that it would take about 7,500 pounds down force on the port side only, to get that pontoon under water. That is the weight of a very large car or truck on just the port side of the boat. No amount of wind is going to do that. A wind would produce a significant pushing force to one side, but not a significant downward force. The Marina's expert Douglas Wolff testified the loft would increase "windage", but that the wind was not coming from a direction that would cause the boat

to tip over, and he made it clear he "Was not testifying that the wind force sunk this pontoon". Finney did not testify that the wind caused the houseboat to sink, but rather testified that it was the weight of the boat and the structure (the loft) that raised the center of gravity to an unsafe condition. Finney depo., p. 55, Ll. 14-20. Finally, we have no testimony as to how much additional net weight (if any) was added to the houseboat by the remodeling and addition of the loft. It is possible the houseboat was lighter, as the air-conditioner and the heavy railing was removed. John Jereczek testified after the remodeling, there was a little less weight added to the boat even with the addition of the loft, due to the removal of the air conditioner (estimated at 250 pounds), fiberglass roof (estimated at 1,000 pounds and replaced with a lighter membrane) and iron railing that was too heavy for one person to lift, and old windows (replaced by lighter new windows). There is no evidence to discredit Jereczek's testimony. He is the one who removed the old material from the boat and added the new material.

This Court finds the reason the Jereczeks' houseboat sank is due to the Marina's moorage of the houseboat with only two lines, one tied to a rotten 2x4, which caused the houseboat break loose from the finger pier, which itself was not tied to its piling. Once the houseboat broke loose, the fenders were either never placed on the houseboat by the Marina (the Marina's own expert Finney knew from talking to a Mr. Cadnum that immediately after the boat sank, it had only two lines and **no fenders**. Finney depo., p. 88, L 10 – p 89, L 16.), or they were rendered useless by the motion of the boat once it had broken loose. Without the fenders, the houseboat collided with sufficient force to bend the gunwale as shown on Exhibits 29 and 30, and that significant sideways force on the starboard side was transmitted to the port pontoon welds, sufficient to break several welds and cause water to leak into those welds, which

caused the houseboat to list to the port side and sink, eventually completely filling all five chambers of the port pontoon. This was forensic engineer William Skelton, Jr.'s opinion, and it was the opinion of Captain Brian Hall. Hall depo., p. 21, Ll. 9-19. Hall testified the insufficient lines led to the vessel slamming against the finger pier. *Id.* Hall further testified:

> And the constant slamming probably led to the cracking of those welds at the pontoon attachment point which allowed an ingress of water into that pontoon. And that pontoon then lost buoyancy. Once it lost buoyancy we had a condition known as progressive flooding. The more water that came in added weight. It caused the list. And the excessive list caused more and more water to make its way actually onto the deck above the gunwhale [sic]. And the more water, i.e., the more weight that you are putting on that vessel once it is losing buoyancy is what we call flooding. And that's where the vessel begins to founder and is actually heavily listed and sinking.

Id., p. 22, L. 19 – p. 23, L. 7. Skelton testified that once the houseboat came loose due to the poor moorage and began hitting the finger slip on the houseboat's starboard side, the vast majority of the broken welds were found on the inside of the port pontoon. Skelton testified this occurred because the when the gunwale on the starboard side impacted the finger slip, the forces in that impact and change of direction transferred straight across the houseboat boat floor to the other (port) pontoon. The gunwale surrounds the horizontal metal stringers that run between the two pontoons and make up the houseboat's floor. That assembly is very rigid. Skelton testified the welds between the stringers on top of the pontoons are very strong, but brittle, sort of like glass. Skelton testified that the weld creates this brittle material when the molten material during welding is rapidly cooled. The impact of the starboard gunwale being transferred across the deck of the boat to the port pontoon, coupled with the wave action hitting the more exposed port pontoon, causes a rotating force to that port pontoon, overwhelming the strength of the welds. According to Skelton, the wave

action pulls the port pontoon both away from the center of the boat and toward the center of the boat. The welds broke because forces of the gunwale impact being transferred to the port pontoon and the wave action exceeded the strength of the heat-affected zone of the weld. Skelton testified that obviously the bumper (fender) was not present or was not properly positioned near the stern because of the scraping caused by the nail on the finger slip (and the nail matched up to the position of the boat), and had the bumper been present and properly positioned, the impact forces upon the gunwale would have been lessened. Skelton also testified to a more probable than not basis. This Court finds Skelton's opinion credible, that to a more probable than not basis the improper use or positioning of the bumpers coupled with the movement of the unsecured finger slip and the impact of the boat upon the finger slip caused the damage to the vessel and, coupled with the waves, caused the pontoons to begin to take on water, which caused the vessel to sink. This Court finds this opinion is supported by the facts and the evidence in the case.

The evidence is uncontradicted that the pontoons were airtight when the houseboat was launched ten months before the storm and that the pontoons were watertight about seven months before the storm. The evidence is uncontradicted that the houseboat had been through a couple of storms in that 10-month period, but had sustained no damage previously as the boat was moored properly with four lines.

Jereczeks' expert William Skelton actually stuck a device into the cracks in the welds to determine that they penetrated the pontoon and could allow water in. When Finney examined the boat almost two years later, Finney could not determine if the cracks penetrated any of the chambers and thus, felt they were superficial. Finney depo., p. 41, L. 14, - p. 44, L. 2. This Court gives no credence to that opinion as Finney

did not stick any probe or any device into the cracks to substantiate that opinion. Finally, the pontoon leaked air when Albert F. Munio, Jr. tried filling it with air to stabilize and raise the boat after it had sunk.

A legitimate question is "How can a houseboat sink given the small size of the cracks in the port pontoon"? While some of the cracks may have been small, there were **many** on the port side. Skelton testified that there were thirteen to fifteen broken welds which were obvious failures on the exterior port side, and two to three more on the interior port side. All five chambers on the port side pontoon had broken welds, and all five chambers on the port side pontoon had broken weldments or cracks large enough for water to enter. Skelton testified "some cracks were quite big." Skelton testified he was able to get a probe (a thin ruler) into a crack far enough that the probe penetrated into the pontoon at several broken welds, and Exhibit 35 is an example of such.

Finney testified the boat listed to the port side prior to its sinking based on a photo he reviewed. Finney depo., p. 53, Ll. 16-25. Finney never testified as to what photo he had reviewed, and his report (Exhibit 1 to Finney depo.) shows no such photo. It could be Finney was reviewing Exhibit 18, which John Jeraczek testified was taken after the boat was brought up after it sank and was being held up with blue plastic barrels which were filled with air displacing the water to raise the houseboat. You can see the blue barrels in Exhibit 18. Any pre-sinking photos reviewed by the Court do not substantiate Finney's claim of a list. Exhibit E, pp. 9, 10. If, as Finney says, the houseboat at all times listed to the port side according to the photos he reviewed, then the Marina still "takes the victim as they find it." If the houseboat was listing slightly, it did so without water in the port pontoon. We know that because of the tests on the pontoon John Jereczek performed. If the boat listed to the port prior to the storm (again, this Court finds the evidence is to the contrary),

that would only mean smaller waves would bring water into cracks that were developing as a result of the pounding from the negligent moorage.

John Jereczek testified it did not list when launched, and he testified when he saw the boat a week before leaving on his trip it was sitting level. The few photographs taken prior to sinking indicate it floated level. If the houseboat floated level prior to the storm, the waves would need to be slightly bigger but only about an inch taller before they would bring water into the developing cracks.

The Court finds this is the only plausible explanation for the houseboat sinking. The only evidence is that the pontoons were airtight and water tight before this storm. John Jereczek pressure tested each of the five chambers before launching with a pressure gauge and left it for two weeks, and it did not leak. He used new plugs in the pontoons before he launched it. He also testified that he checked pressure at some point in time while it was in the water using a "pump out test", and that there was simply no water in any of the chambers in either pontoon. We know the boat when moored properly had handled previous storms. We know the boat was moored improperly by the Marina on the day in question, and that resulted in the boat breaking free and banging against the starboard gunwale. We know that banging was sufficient to bend the gunwale and we know the banging caused the cracks. We know the boat was not significantly heavier than the thirty years before the modification, and may have in fact been lighter, so weight did not cause the boat to sink. While the loft might have added some weight, it is equally plausible it added no weight or actually made the boat lighter in light of the equipment that was removed. The remodeling probably changed the center of gravity from what it was prior to the remodeling, but not in any significant way. The side profile of the loft is about half the height of the lower pre-existing living area, and the profile from above shows it is

significantly less than half the "footprint" of the boat. Exhibits 1, 4, 5, 15, 19, 27 demonstrate this. The loft is simply not that big of an area in comparison with the rest of the boat. As to weight, the only evidence with any foundation is from the man who made the changes, and his testimony is the additions added nothing to the overall weight given the items that were removed. Even if the remodeling added 500 pounds, it simply is not significant in light of the boat's overall weight of about 6,500 pounds. We know this because the Marina's expert Douglas Wolff testified an additional 1,300 pounds would cause both pontoons to float only one inch lower, still leaving twelve more inches of freeboard on each pontoon. The only credible evidence is John Jereczeks' testimony that the remodeling added no weight or made the boat lighter. But even if he were wrong, even an additional 1,300 pounds would not be a significant change.

This Court finds the negligence of the Marina in mooring Jereczeks' houseboat caused the stern of the houseboat to break free during the storm, causing substantial impact to the stern gunwale of the houseboat. Those forces, coupled with the wave action, caused the port pontoon to develop cracks where welded to the floor structure of the houseboat, which in turn began to fill with water. Progressive flooding of the port pontoon occurred, and the houseboat tipped over as a result. The Marina's negligence was a cause which, in natural or probable sequence, produced the complained loss and damage to the Jereczeks' houseboat, and but for that negligence, the loss and damage to Jereczeks' houseboat would not have occurred. The Marina's negligence was a substantial factor in bringing about the loss and damage to Jereczeks' houseboat. The Court finds the loss and damage to the houseboat would not have occurred absent the negligence of the Marina. The Court finds the loss and damage to the houseboat would not have occurred during this storm had the houseboat been moored properly.

The Marina has alleged by affirmative defense that the Jereczeks were the cause of the damage, or that they were contributory negligent. Answer, p. 3. The Marina claims "By not obtaining a stability report and choosing to tie up to the dock for nearly a year when it [the dock] was in visibly poor condition the plaintiffs fell below the standard of care for a reasonable person under the circumstances." (Defendant's) Proposed Findings of Fact and Conclusions of Law, p. 11. There is **no** evidence a stability report caused the boat to sink. There is no **credible** evidence the houseboat was unstable prior to sinking. While the dock was in poor condition, before Jereczeks left on their trip to Minnesota, it was chained to a piling and Jereczeks did not tie their line to a rotten 2x4 cleat. The Marina in its negligent mooring changed all that. The Court has already found the Marina has not proven its theory of the case that the Jereczeks' houseboat sank due to weight and wind issues resulting from Jereczeks' renovation and addition of a loft to the houseboat. The houseboat did not sink as a result of any action or inaction taken by Jereczeks. There has been no proof of Jereczeks' contributory negligence; thus, there is no comparative fault or negligence on the part of Jereczeks.

The Marina has alleged by affirmative defense that Jereczeks' damages were caused by a third party over whom the Marina had no control. Answer, p. 3. No proof on this issue was ever presented to the Court.

The Marina has alleged by affirmative defense that Jereczeks' damages were caused by a pre-existing condition to the vessel. Answer, p. 3. The Court has already set forth its reasons why the Marina has failed to prove such a proposition. The pontoons were airtight when launched and water tight a few months before the storm. Thus, there were no broken welds that caused water to leak until the damage occurred during the storm due to the Marina's moorage. Prior to that time, the boat rode level and did not list.

There were claims of pitting and epoxy patches on the pontoon, but there was no evidence that either of the pontoons leaked at any point where there was pitting or patches. For those same reasons, the Marina has failed to prove the Jereczeks' houseboat was unseaworthy, as alleged as another affirmative defense. Answer, p. 3.

D. Damages.

While not specifically mentioned as an item in their Complaint, Jereczeks have claimed damages for the value of the loss of use of the damaged property. Plaintiffs' Response to Defendant's Memorandum in Support of Motion for Summary Judgment, p. 3. Loss of use is a valid item of damage in a property damage case. IDJI 9.07. *Thompson v. First Security Bank,* 82 Idaho 259, 262, 352 P.2d 243, 246 (1960). There are two reasons why Jereczeks are not entitled to damages for the value of loss of use of their houseboat. First, they have put on no proof as to the value of such item of damage. Second, such item of damage is not appropriate if the property in question has been destroyed. *Id.* The Jereczeks' houseboat is a total and complete loss, according to Jerry McMackin, Jereczeks' expert on damage. This Court finds McMackin's testimony credible and supported by his expertise as a boat mechanic, owner of a boat repair business, a marine surveyor and an adjuster for Nationwide Insurance. He has spent much of his professional career evaluating the condition of vessels and setting a value on vessels.

McMackin stated the value of the Jereczeks' boat was $50,000.00. According to McMackin, that is what it would sell for in its condition prior to sinking, on the open market, given its good condition. McMackin said there is no salvage value because even though the value of the boat post sinking was about $2,500 to $5,000 (for engine and outdrive), that would be offset by the equivalent cost of hauling it away and breaking it up for disposal. The Marina put on no evidence to contradict this. The Marina did nothing in

cross-examination to discredit that opinion. If anything, cross-examination shored up that opinion. On cross-examination, McMackin was asked if he would need to do a full survey to determine the houseboat's market value, and McMackin responded "No, given the recent refurbishments." That makes sense because the improvements were new, completed less than ten months prior to sinking. McMackin's valuation of $50,000.00 comports with the Jereczeks' acquisition cost of the houseboat and the cost of materials and value of time put into the boat to restore it to its condition just prior to sinking (even though Exhibit 9 was not admitted, John Jereczek testified he put about $51,745.20 in materials and time to restore the houseboat). It is also consistent with John Jereczek's estimate of time and materials it would take to restore the boat in its present state to the condition it was in just prior to sinking, which was $41,000.00 according to his testimony at trial, and $38,927.51 according to Exhibit 44. Since John Jereczek had just restored the boat the year before and examined the boat several times since it sank, he is competent to testify what needs repaired or replaced, and how much time it would take to accomplish those repairs and replacements. The Court has reviewed all admitted evidence and finds the boat was in very good shape and the renovation was done nicely. Obviously, Jereczeks took a lot of pride in what they had done and what they had. At the time the boat sank, all the evidence shows the restoration was complete.

Regarding consequential damages, even though Exhibit 43 was not admitted, John Jereczek testified at trial that the costs actually incurred in recovery of the vessel from Lake Pend O'Reille was $14,393.90. This was for hardware purchased to raise the boat, barrels to lift the boat, drying fans to try to salvage the boat, cleaning and stretching rugs, moving the boat from the Marina to the dry dock where it was stored and storage from the time of sinking until May 2007. Any incidental or consequential damages may be awarded if they

are within the foreseeable chain of proximate cause. IDJI 9.07. This Court finds such damages are reasonable, foreseeable and a consequence of the sinking of the boat. The Jereczeks could not let the houseboat remain, its gas tank submerged, in the middle of the Marina next to a slip for which they no longer had a reason to rent. The Marina offered Jereczeks no assistance in extricating the houseboat from the lakebed at the Marina. Jereczeks made reasonable efforts to salvage what they could, drying the rugs and walls, cleaning the houseboat. Because those actions had to be taken immediately to prevent further damage from mold and rot, those efforts were reasonable even though later the boat was a total loss. Drying and cleaning were reasonable actions to mitigate their damage, even though all was lost. John Jereczek testified the reason he stored the houseboat was he did not dare send it for salvage until this litigation had ended. That is a reasonable assumption given the dispute as to causation which became apparent when the Marina filed its answer to the complaint on April 21, 2006. Preservation of evidence was a reasonable consequential item of damage up until the time of trial, and the houseboat was examined by John Finney a few months before his deposition was taken for trial purposes.

Jereczeks request interest on the amount of their damages. Jereczeks submitted a proposed findings which read:

> The $50,000 value at the time of sinking was not disputed at trial. Prejudgment interest at the statutory rate is due on the undisputed value of the boat from the date of loss, April 26, 2005, until the date of judgment, to fully compensate Jereczeks for the foreseeable damages caused by the Marina's fault.

Jereczeks seem to be requesting pre-judgment interest at the statutory rate, without stating any basis for that request. Idaho Code § 22-2-104 discusses such rate, but case law interpreting that statute as applied to pre-judgment interest shows pre-judgment interest

should only be allowed when the amount of liability or damage is "liquidated or is capable of ascertainment by mere mathematical process." *Farm Dev. Corp. v. Hernandez,* 93 Idaho 918, 478 P.2d 298 (1970); *Child v. Blaser,* 111 Idaho 702, 727 P.2d 893 (Ct.App. 1986). John Jereczek testified that the value of the houseboat was "over $50,000.00". Since he testified it was "over" $50,000.00, that makes his estimate not only an uncertain amount, but it is not the "undisputed" amount Jereczeks claimed in their proposed findings. Finally, it is not liquidated as it does not take into account the consequential damages.

III. FINDINGS OF FACT.

I.

Plaintiffs John and Tammy Jereczek are the owners of a 47-foot houseboat weighing approximately seven tons which was moored by them at Bayview Marina (Marina) on Lake Pend Oreille in Kootenai County, Idaho.

II.

Defendant Waterford Park Homes, LLC, was the owner of Bayview Marina at all times material hereto. The Marina operates a commercial moorage rental business.

III.

The Jereczeks paid the Marina for their moorage spot, including payment for moorage during April, 2005.

IV.

Peter Scardina and Jeff Barden were employees of Bayview Marina and Waterford Park Homes at all times material hereto and the acts or omissions of Barden and Scardina occurred in the course and scope of their employment.

V.

On April 8, 2005, the Jereczeks were leaving on a planned trip to Minnesota when Barden called John Jereczek by telephone and asked him to move his houseboat

for the convenience of the Marina in performing work on nearby Marina property.

VI.

In that phone conversation John Jereczek told Barden he could not move his houseboat because of his imminent departure. Barden insisted the houseboat needed to be moved and assured John Jereczek the Marina would be very careful with his houseboat and that they had trained movers to move the houseboat. John Jereczek gave the Marina permission to take control of the houseboat and move it.

VII.

Barden knew the Jereczeks would be out of town and unable to inspect or correct the manner in which the Marina and its employees moored the vessel.

VIII.

Shortly after receiving permission from John Jereczek, Barden and Scardina took possession of the vessel, untied it and moved the Jereczek boat to another moorage site as part of their employment for the Marina to facilitate the Marina's maintenance and repair work.

IX.

Scardina and Barden both testified they did not notice the method used by the Jereczeks to moor their vessel, how many lines were used, how they were located, and how many fenders or bumpers were used by Jereczeks.

X.

Barden and Scardina were unaware that the Jereczeks used four lines to moor their boat or that the Jereczeks moored the boat to a sound piling rather than the finger slip dock itself.

XI.

After completion of the Marina's project, sometime around April 23, 2005 (Barden testified it was two or three days before the houseboat sank), Barden and Scardina returned the Jereczek houseboat to the slip the Jereczeks rented.

XII.

The finger slip dock was known by Barden and Scardina to be in poor condition. Barden testified that he knew that after the piling was replaced as part of the Marina's maintencance and improvements, the finger slip was not tied up to the new piling.

XIII.

When Barden and Scardina tied the Jereczeks' houseboat back to the finger slip dock, they used only two lines and the stern line was tied to a 2x4 board on the finger slip dock rather than the piling used by the Jereczeks. Barden testified he did not tie any of the lines, and that he did not inspect any of Scardina's work. Scardina testified first that he only tied up one line the bow line, then mentioned he tied both the bow and stern line. Scardina denied tying a line to a 2x4, but claims he tied the stern line to a 2x6 board. Scardina could not recall what he tied the other line to. Neither Barden nor Scardina recall using any more than two lines. The bumpers or fenders on the Jereczek boat were either not placed by the Marina, or, when the houseboat became detached from the stern due to the Marina's faulty moorage, the bumpers were entirely ineffective in preventing significant impact to the stern gunwale of the houseboat. Brad Pearson worked for the former owner of Bayview Marina, and at the time of the storm and the sinking, worked for the floating restaurant. As a result, he walked past Jereczeks' boat twice a day. He noticed the Jereczeks tied their boat with four lines, two cross lines to keep it from moving fore and aft, and a stern line and a bow line. He noticed before the

storm the houseboat was tied with only a stern line tied to a 2x4 and the bow line to a chain. Pearson testified upon noticing this he notified the Barden that it was not tied up correctly and that the finger dock was not attached to the piling, and as far as Pearson knows, Barden did nothing. Barden denies having this conversation with Pearson. This Court finds Pearson to be more credible on this issue. Before the Marina sold he was in charge of checking the Marina for security and moorage and checked every boat two or three times a week. He was in the position to notice how Jereczeks tied up their boat. That was his job. Even after the Marina sold he was in a position to see the houseboat twice a day.

XIV.

The 2x4 was weathered, dry-rotted and in poor condition. Exhibit 36 a and b is the broken 2x4. Exhibit 37, 38 and 39 show the dock and the broken 2x4 at the time the boat was sunk. There is no 2x6 to which Scardina could have tied a line. Scardina is mistaken about a 2x6 and this Court finds he tied a line to the rotten 2x4. Scardina admitted in his testimony that it would be dangerous and unsafe to tie a line from a houseboat this big to a 2x4 (let alone a rotten 2x4).

XV.

Vessels such as Jereczeks' should ordinarily be moored with four lines and, with an approaching storm, more lines. The Marina failed to use ordinary care by using inadequate moorage lines during the storm.

XVI.

Vessels such as Jereczeks' should be moored to sound moorage ports. The Marina failed to use ordinary care by mooring Jereczeks' vessel to an undersize board in poor condition.

XVII.

The Marina agreed to use more than ordinary care in the handling and care of Jereczeks' vessel but failed to exercise even ordinary care owed by a Marina.

XVIII.

The Marina's failure to use ordinary care was a contributing factor in causing Jereczeks' vessel to sink. The houseboat would not have sunk were it not for the negligence of the Marina.

XIX.

Part of Scardina's job was to inspect vessel moorage by going on every dock, every day. Scardina did not go on the Jereczek dock to inspect the boat's moorage on the day the boat sank. Scardina's failure to inspect the Jereczek vessel moorage is a failure by the Marina to use ordinary care.

XX.

At the time the vessel was returned to its finger slip, the Jereczeks were 1,500 miles away in Minnesota and the Jereczeks could not inspect the vessel's moorings and retake possession.

XXI.

The Jereczeks did not retake possession of their vessel until April 27, 2007, after it sank.

XXII.

The Marina made no effort to assure the Jereczeks that their houseboat had in fact been moored properly prior to its sinking, and Jereczeks were in no position until after they had inspected their houseboat after they had returned from Minnesota, to retake possession of the vessel.

XXIII.

At the time the Marina took possession and control of the Jereczek vessel, it was in good condition, recently remodeled and seaworthy. The pontoons had been recently pressure checked for integrity, inspected by a painter during repainting, and checked for the presence of water in the pontoon chambers after a few months on the water.

XXIV.

There were no broken welds or leaks in the pontoons when the Marina took possession of the boat.

XXV.

The boat, when moored using the Jereczeks' technique, had weathered earlier similar storms with no damage.

XXVI.

Prior to April 26, 2005, a storm occurred in the Bayview area with strong winds from the Northeast blowing for approximately three days. Three to four foot high waves were observed in the Marina during the storm. The storm was similar to others that had occurred earlier that winter and spring.

XXVII.

On the morning of April 27, 2005, Barden observed the port side pontoon of the Jereczeks' boat sunk. Barden then called Jereczek and informed him his boat sank.

XXVIII.

The Jereczeks had been on the trip to Minnesota from April 8, 2005, until the evening of April 26, 2005, when they returned to their home in Coeur d'Alene. The Jereczeks had not been to the Marina from April 8, 2005, until April 27, 2005.

XXIX.

During the storm, the boat broke free from the unsound stern moorage and the starboard beam above the starboard pontoon pounded against the finger slip dock. The pounding broke welds on the port pontoon opening holes into the pontoon through which water entered, progressively flooding the pontoon and sinking it.

XXX.

Properly moored boats do not ordinarily sink at their moorage absent negligence.

XXXI.

The Marina has not presented facts showing a cause of sinking other than due to the Marina's negligence. The Marina has failed in its burden of proof on all of its affirmative defenses.

XXXII.

Submersion of the port side of the boat caused significant damage to the vessel rendering it a total loss.

XXXIII.

The vessel had a value of $50,000 at the time of loss. Jereczeks are entitled to such amount as damages.

XXXIV.

The Jereczeks incurred $14,393.90 in expenses to raise the sunken boat, move it to storage and store the vessel pending trial. Jereczeks are entitled to that amount as consequential damages.

XXXV.

During the course of litigation both Jereczeks and the Marina had experts inspect the stored vessel. Due to the litigation, it was reasonable for the Jereczeks to store the

damaged vessel and incur storage costs.

IV. CONCLUSIONS OF LAW.

I.

Under the doctrine of *respondeat superior,* the Marina is responsible for the acts and omissions of its employees Jeff Barden and Peter Scardina.

II.

The Marina breached its duty of ordinary care in mooring Jereczeks' houseboat to an inadequate moorage point with insufficient lines and, as a result, was negligent.

III.

The Marina's negligence caused Jereczeks' houseboat to break the inadequate moorage, pound against the finger slip dock, breaking welds and sinking the houseboat.

IV.

The Marina was acting as bailee of Jereczeks' houseboat. Under the bailment agreement, the Marina undertook to act with special care towards Jereczeks' boat and had a duty to use special care toward Jereczeks' vessel. Additionally, under a negligence analysis, the Marina had a duty to use ordinary care toward Jereczeks' vessel. Ordinary care in the case of the Marina is the care a reasonably prudent Marina would exercise under the same circumstances.

V.

The Marina, as bailee, and under a negligence analysis, breached both its duty of special care and its duty of ordinary care, causing Jereczeks' boat to sink.

VI.

Jereczeks' boat was in good, seaworthy condition when the Marina took possession for its bailment, but was returned to Jereczeks in damaged condition creating an obligation on the Marina to show with facts a cause of sinking other than the

Marina's negligence. The Marina has not produced such evidence and, as a result, has not overcome the implication of negligence causing Jereczeks' boat to sink. Under a negligence analysis, Jereczeks have proven a breach of the duty owed, and that such breach caused Jereczeks' boat to sink.

VII.

During the bailment, which continued until Jereczeks were able to inspect the boat (which occurred after sinking), the Marina had exclusive control and management of Jereczeks' boat and the method of moorage. In common knowledge and experience properly moored boats do not sink at their moorage.

VIII.

Defendant is liable to Plaintiffs for the $50,000 value of Plaintiffs' boat, as well as $14,393.90 of foreseeable consequential damages to raise, remove, transport and store the damaged boat.

IV. ORDER.

IT IS HEREBY ORDERED that as a result of the Marina's negligence and its breach of its duty of care owed under its bailment relationship, Jereczeks are awarded $64,393.90 against the Marina. Counsel for the Jereczeks are to prepare an appropriate judgment.

IT IS FURTHER ORDERED the Jereczeks are the prevailing party.

DATED this 14th day of September, 2007.

JOHN T. MITCHELL, DISTRICT JUDGE

Certificate of Service

I certify that on the _____ day of October, 2007, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #
Stephen D. Phillabaum	509-625-1909

Lawyer	Fax #
Bryce Powell	208-263-4438
William Keller	509 788-3000
Dennis Moran	509 788-3000

_____
Secretary