No. A17-1286

State of Minnesota

In Supreme Court

Central Housing Associates, LP,

Respondent,

vs.

Aaron Olson,

Appellant.

APPELLANT'S BRIEF AND ADDENDUM

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Legal Issues

1. May a residential tenant raise a retaliation defense to a breach-of-lease eviction action under Minn. Stat. § 504B.441 without first filing a civil complaint commencing a judicial proceeding?

The Court of Appeals court ruled "No", based on its conclusion that "the defense in section 504B.441 does not apply unless the tenant has also filed a tenant-remedies action" under Minn. Stat. § 504B.395. The trial court had ruled in favor of the Appellant tenant on the issue of retaliation.

Most Apposite Authority:

Minn. Stat. § 504B.441 (2017)
Minn. Stat. § 504B.275 (2017)

Dominium Management v. C. L, 2003 WL 22890386 (Minn. App. Dec. 9, 2003)
C*ity View v. Lopez*, 2000 WL 1064897 (Minn. App. Aug. 1, 2000)
City of Golden Valley v. Wiebesick, 899 N.W.2d 152,166 (Minn. 2017)
Robert Schoshinski, American Law of Landlord and Tenant, Chapter 12

2. May a residential tenant raise a retaliation defense to a breach-of-lease eviction action under common law?

The Court of Appeals court ruled "No", based on its conclusion that this court had already decided the issue. The trial court had ruled in favor of the Appellant tenant on the issue of retaliation.

Most Apposite Authority:

Edwards v. Habib, 397 F.2d 687 (D.C. App. 1968)
Botko v. Cooper (Minn. Mun. Ct. 1970)
Olson v. Bowen, 291 Minn. 546, 192 N.W.2d 188 (1971)
Robert Schoshinski, American Law of Landlord and Tenant, Chapter 12

STATEMENT OF THE CASE

Respondent Central Housing Associates ("CHA") filed an eviction against its residential tenant Appellant Aaron Olson ("Olson") alleging several breaches of his lease. Doc. #1[1].The case was tried to a jury and the jury found that while Olson breached his lease, the eviction was in retaliation for Olson's assertion of rights under the lease, state laws or federal laws. Doc. #51. The jury was not asked to identify, and did not identify, either Olson's breach of the lease or the rights Olson sought to secure or enforce. Although CHA did not object to the inclusion of the retaliation defense at trial, after trial CHA moved for judgment as a matter of law on the grounds that no retaliation defense was available to Olson. The motion was denied and the trial court entered judgment for Olson. Doc. #72.

CHA appealed to the Court of Appeals on the same basis and based on alleged incorrect jury instructions. The Court of Appeals did not reach the jury-instruction issue. Instead it held that a retaliation defense was not available to Olson under any of his three legal theories—one based on Minn. Stat. § 504B.441, and one based on common law, and one based on Minn. Stat. § 504B.285—and ordered the trial court to evict Olson.

The Court of Appeals did not address CHA's misplaced arguments that tenants who breached their lease are categorically excluded from the protections of section

[1] Document Numbers, shown as "Doc. #X" are the document numbers from the Appeals Record Documents Index.

504B.441. Instead it held *sua sponte* held that section 504B.441 does not apply in this case because CHA's retaliation was not done in response to Olson filing a civil complaint commencing a judicial proceeding. Although the Court of Appeals' opinion is somewhat ambiguous on this point, it seemingly held that a "complaint" under section 504B.441 is specifically limited to a complaint commencing a Tenant Remedies Action under Minn. Stat. § 504B.395-.471 (i.e., under section 504B.395). *Central Housing Associates v. Olson*, 910 N.W.2d 485,490 (Minn. App. 2018). The Court concluded that because Olson had not filed such an action,[2] section 504B.441 did not prohibit CHA from retaliating against him.

The Court of Appeals also held that *Olson v. Bowen*, 291 Minn. 546, 192 N.W.2d 188 (1971) had eliminated any common-law retaliation defense.

Olson petitioned for review only on the section 504B.441 and common-law rulings, and review was granted on those two issues. If this court rules that either Minn. Stat. § 504B.441 or anti-retaliation common-law protected Olson from CHA's retaliation, the district court's judgment in his favor must be reinstated. The Argument below establishes that both sources of law did protect him.

[2] While the record does not prove one way or another whether Olson filed civil complaint commencing a judicial proceeding, it is undisputed that Olson did not file a civil complaint under Minn. Stat. § 504B.395.

STATEMENT OF FACTS

CHA leases residential real property to Olson in Minneapolis. Exhibit 101. The trial court record is sparse and includes neither a trial transcript nor detailed findings by the court. However, it is clear that the parties' relationship was contentious and that Olson raised a number of complaints about various matters and asserted various rights to CHA as well as to the Minnesota Department of Human Rights[3]. For example, see Doc. #24, email correspondence between the parties re harassment; Doc. #25, Olson's complaint to CHA about discrimination; Doc. #26, Olson's complaint to the Minnesota Department of Human Rights; Doc. #27, Olson's rebuttal to CHA's prior claims about disruptive behavior; Doc. #32, Olson's emails about allegations of lease violations and about his daughter.

CHA gave Olson a lease termination notice, asserting a variety of lease breaches as a basis for this termination. However, Olson did not vacate, and CHA filed an eviction action against him based on breach of lease. Doc. #1. The eviction action alleged several breaches, including, for example, unpaid utilities and unpaid garage rent. *Id*.

After a two-day jury trial in which Olson appeared *pro se*, the jury answered Yes to the following two questions which are quoted directly from the verdict form:

[3] The parties' lease included a number of limitations on CHA, including that "The LANDLORD shall not discriminate against the TENANT in the provision of services or in any other manner on the grounds of race, color, creed, religion, sex, familial status, national origin, or disability." *Id*. at 10.

> [1] Did Central Housing Associates, LP prove by a fair preponderance of the evidence that Mr. Olson materially violated the terms of his lease.
>
> [2] Did Mr. Olson prove by a fair preponderance of the evidence that Central Housing Associates, LP retaliated against him in whole or in part as a penalty for his good faith attempt to secure or enforce rights under the lease or the laws of the State of Minnesota or the United States."

Doc. # 51. Note that while CHA had the burden of proving that Olson violated his lease, Olson had the burden of proving that CHA retaliated against him.[4]

The jury was not asked to identify, and did not identify, either Olson's breach or the specific right or rights Olson sought to secure or enforce.[5] Olson was not asked to prove that he filed a civil complaint commencing a judicial proceeding.

Both the district court and the Court of Appeals specifically reference the fact that Olson asserted anti-discrimination rights by filing a discrimination complaint with Minnesota Department of Human Rights. Doc. #72; 910 N.W.2d at 487. Because the record is sparse, it is quite possible that he asserted other tenant rights as well.

In summary, Olson violated his lease in some manner but CHA filed the eviction case to retaliate for Olson's assertion of his tenant rights in good faith.

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[4] In accord, the jury instructions, Doc. #47, created no presumption on either breach or retaliation and placed the usual burden of proof on the party trying to prove the fact.

[5] Since CHA did not obtain a transcript or appeal the jury's or the district court's findings to either the Court of Appeals or to this court, CHA cannot argue that Olson committed multiple breaches of lease or indeed any particular breach of lease.

STANDARD OF REVIEW

The standard of review for the construction of Minn. Stat. § 504B.441 is *de novo*. *Hibbing Educ. Ass'n v. Public Employment Relations Bd.*, 369 N.W.2d 527, 529 (Minn.1985). The standard of review for the common-law of retaliation by a residential landlord is also *de novo*. *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 233 (Minn. 1998) ("This court has the power to recognize and abolish common law doctrines.")

SUMMARY OF THE ARGUMENT

Minn. Stat. § 504B.441 codifies a simple common-law principle: A landlord may not punish tenants who complain about violations of their rights. Section 504B.441 protects the large number of tenants who assert their tenant rights when the landlord singles them out for eviction or otherwise attempts to penalize them by increasing obligations or decreasing services.

Minn. Stat. § 504B.441 has two parts[6]. The core of the statute, its first sentence, reads:

> A residential tenant may not be evicted, nor may the residential tenant's obligations under a lease be increased or the services decreased, if the eviction or increase of obligations or decrease of services is intended as a penalty for the residential tenant's or housing-related neighborhood organization's complaint of a violation.

[6] The second part only relates to the burden of proof. Since Olson proved to the jury that CHA was retaliating that part of the statute is irrelevant in the instant case.

Minn. Stat. § 504B.441. Beyond protecting complaining residential tenants from retaliatory eviction, which is the issue in this case, Minn. Stat. § 504B.441 also protects them from other forms of retaliation.

Olson is a residential tenant (Minn. Stat. § 504B.001, subd. 12) facing eviction (Minn. Stat. § 504B.001, subd. 4), and the jury found that the eviction was intended as penalty for his assertion of tenant rights. Therefore, Olson is protected by Minn. Stat. § 504B.441 if he made a "complaint of a violation."

Unlike the terms "residential tenant" and "violation", which are defined in Minn. Stat. § 504B.001 for the purpose of the entire Minn. Stat. Chap. 504B, the word "complaint" is not defined anywhere in the chapter. Therefore, its meaning is that in common parlance, i.e. a statement in which one expresses one's dissatisfaction with a situation. This meaning is confirmed by the context in which the word "complaint" is used in the Tenant Remedies Act, Act of May 23, 1973, ch. 611, s. 13-28.

The above definition of "complaint" is consistent with three prior decisions of the Court of Appeals, the view of the Minnesota Attorney General ("AG"), and the view of CHA's own counsel. *Dominium Management v. C. L*, File No.A03-85 (Minn. App. Dec. 9, 2003); *City View v. Lopez*, File No.C2-00-313 (Minn. App. Aug. 1, 2000); *Willemarck v. Williams*, File No.C6-94-1714 (Minn. App. Mar. 7, 1995); AG's Statement under Minn. Stat. § 504B.275.

Application of several canons of construction confirms this meaning of "complaint". If "complaint" in section 504B.441 meant only a complaint filed under Minn. Stat. § 504B.395, landlords would have a safe harbor to retaliate against tenants between the time they complain about their rights and the time weeks later when they can lawfully file a case under Minn. Stat. § 504B.395. Conversely, sophisticated tenants would be incentivized to file a case under Minn. Stat. § 504B.395 as soon as possible. Both results are unreasonable and cannot stand. Minn. Stat. § 645.17(1). Furthermore, Minn. Stat. § 504B.441 should be construed broadly to prevent retaliation against the large number of tenants who take informal steps to assert their rights, not the very small percentage of savvy and litigation-eager tenants who go so far as to file a complaint under Minn. Stat. § 504B.395. See Minn. Stat. § 645.16(3); *Harrison v. Schafer Construction*, 257 N.W.2d 336, 338 (Minn. 1977). Lastly, the legislature intends to favor the public interest as against any private interest. If landlords were encouraged to retaliate immediately after a tenant calls in the city housing inspector, the chilling effect would be dramatic and many fewer inspections would occur, the very opposite of a recent holding by this court in favor of inspections. *City of Golden Valley v. Wiebesick*, 899 N.W.2d 152,166 (Minn. 2017) (inspections protect public health, safety, and welfare); see Minn. Stat. § 645.17(5).

Even if Minn. Stat. § 504B.441 did not exist, there is a common-law defense of retaliation protecting residential tenants who assert their rights. While the passage in most

states of anti-retaliation statutes has caused tenants to rely on these statutes and not litigate the common-law issue, the majority rule in courts that have considered the issue favors a common-law defense. Robert Schoshinski, *American Law of Landlord and Tenant* § 12.1 (1980 and Supp. 2018). Indeed, before Minnesota originally enacted its two anti-retaliation statutes in 1971 and 1973[7], at least one Minnesota trial court found such a right existed. *Botko v. Cooper*, [1968-1971 Transfer Binder] CCH Pov. L. REP. 1 11,549 (Minn. Mun. Ct. 1970).

The Court of Appeals misread *Olson v. Bowen*. In *Bowen*, this Court simply held that the tenant did not prove retaliation. The *Bowen* court did not hold that the common law was pre-empted by enactment of an anti-retaliation statute.

In conclusion, Olson had two protections against this eviction action -- Minn. Stat. § 504B.441 and the common law. The district court correctly entered judgment for him based on the jury's finding that the eviction action was filed to retaliate against him for his assertion of tenant's rights.

[7] Minn. Stat. § 504B.285, subd. 2 was enacted in Act of May 10, 1971, ch. 240, 1971 Minn. Laws 445. Minn. Stat. § 504B.441 was enacted as Act of May 23, 1973, ch. 611, s. 23, 1973 Minn. Laws 1426.

ARGUMENT

I. RETALIATION IS A DEFENSE TO AN EVICTION ACTION FOR BREACH-OF-LEASE UNDER MINN. STAT. § 504B.441.

A. Minn. Stat. § 504B.441 was enacted to prevent landlords from singling out assertive, complaining tenants for eviction or other penalties.

District Court Judge Kevin Burke explained the essence of this case very well. After reviewing Minn. Stat. § 504B.441, he wrote:

> This case is, in a sense, not unique. Tenants may occasionally do something that is a material breach of a lease yet the landlord does not evict the tenant. But, for example, if the landlord decided to enforce the literal teams of the lease solely out of a desire to evict the black tenant, no one would reasonably claim that is appropriate conduct. That is essentially what happened in this case. The jury found Olson had beached the lease. But the reason Olson was evicted was not because of his breach of the lease but because of his ***complaints***. It is reasonable for the Legislature to have enacted a statutory scheme that provides a safe harbor for tenants.

Doc. #72 at 5-6 (emphasis added).[8]

B. Minn. Stat. § 504B.441 has two parts. The first part protects all residential tenants from retaliatory eviction once they complain about their rights in any manner, not just if they complain via Minn. Stat. § 504B.395. The second part merely addresses the burden of proof at trial.

Minn. Stat. § 504B.441 (2017) reads in its entirety as follows (with brackets added to highlight its two parts):

[8] For example, perhaps CHA proved unpaid utilities or garage rent but Olson proved the eviction was retaliation for asking CHA for a reasonable accommodation, asking CHA not to discriminate against him, filing an harassment petition against CHA under Minn. Stat. §609.748, or some combination of these or other assertions of rights.

> [A] A residential tenant may not be evicted, nor may the residential tenant's obligations under a lease be increased or the services decreased, if the eviction or increase of obligations or decrease of services is intended as a penalty for the residential tenant's or housing-related neighborhood organization's complaint of a violation. [B] The burden of proving otherwise is on the landlord if the eviction or increase of obligations or decrease of services occurs within 90 days after filing the complaint, unless the court finds that the complaint was not made in good faith. After 90 days the burden of proof is on the residential tenant.

As indicated by the brackets above, this statute has two parts.

Part A prohibits a residential landlord from punishing the tenant by eviction or other methods for his complaint of a violation.

Part B sets out who has the burden of proof when the tenant asserts his no-retaliation right in court. Part B can shift the burden of proof onto the landlord if the retaliation occurs within a certain 90-day window of the tenant's filing of a complaint. In the instant case, Part B is irrelevant because Olson shouldered and met the burden of proving that CHA's eviction was retaliatory. He did not seek to shift the burden of proof to CHA. Thus, the crux of this case is the meaning of the no-retaliation part of section 504B.441.

C. <u>The first part of Minn. Stat. § 504B.441 protected Olson.</u>

1. Olson is a residential tenant and CHA retaliated against him by filing an eviction action as a penalty for asserting his tenant rights.

The Court of Appeals ruling against Olson was based solely on its incorrect reasoning that he did not make a "complaint of a violation" within the meaning of section

504B.441 and did not identify any other grounds for its decision that section 504B.441 did not apply to Olson's case.[9] *Central Housing*, 910 N.W. 2d at 489-490.

2. Olson made a complaint of a violation.

Olson did make a "complaint of a violation." "When legislative intent is clear from the statute's plain and unambiguous language … [this court must] interpret the statute according to its plain meaning without resorting to other principles of statutory interpretation." *State ex. rel. Duncan v. Roy*, 887 N.W.2d 271, 276 (Minn. 2016). Therefore, first we analyze the plain meaning of "complaint of a violation".

---

[9] Indeed, assuming Olson made a "complaint of a violation", the issue discussed below, Minn. Stat. § 504B.441 does apply to the instant case.

Olson is clearly a "residential tenant" as that phrase is defined in Minn. Stat. § 504B.001, subd. 12 (2017).

The term "evict" is defined in Minn. Stat. § 504B.001, subd. 4 (2017) as "a summary court proceeding to remove a tenant or occupant from or otherwise recover possession of real property by the process of law set out in this chapter [504B]." That is exactly the sort of case this is.

Olson may not be evicted "if the eviction … is intended as a penalty for the residential tenant's [his] complaint of a violation." The jury in question 2 of its verdict answered "Yes" to the question, "Did Olson prove … that [Respondent] Central Housing Associates, LP retaliated against him in whole or in part as a penalty for his good faith attempt to secure or enforce rights under the lease or the laws of the State of Minnesota or the United States?" To "retaliate" is to "hurt someone or do something harmful to someone because that person has done or said something harmful to you". Cambridge English Dictionary Online, available at https://dictionary.cambridge.org/us/dictionary/english/retaliate. If CHA meant to "hurt" Olson it clearly "intended" to exact a penalty on him.

a. Olson complained about "violations".

The plain meaning of "violation" is provided by Minn. Stat. § 504B.001, subd. 14 (2017) which defines the word for all of Minn. Chap. 504B as:

> (1) a violation of any state, county or city health, safety, housing, building, fire prevention, or housing maintenance code applicable to the building;
>
> (2) a violation of any of the covenants set forth in section 504B.161, subdivision 1, clause (1) or (2), or in section 504B.171, subdivision 1; or
>
> (3) a violation of an oral or written agreement, lease, or contract for the rental of a dwelling in a building.

The jury found that CHA was penalizing Olson for his "attempt to enforce rights under the lease or the laws of the State of Minnesota or the United States". Thus he was dealing with one or more of the above categories of "violation". Either he attempted to enforce his rights to repair under the Minneapolis rental code and met clause (1), or his other rights to repair and met clause (2), or he attempted to enforce his rights under his lease and met clause (3), or met several of these clauses.[10]

For example, in discussing clause (3), the district court wrote: "The jury found that Olson, in good faith, made reports about his tenancy to the Minnesota Department of

[10] As noted before, CHA did not dispute the jury's finding that it intended the eviction as a means of penalizing Olson for making a complaint. Nor can CHA now point to some specific action by Olson and say this, and only this, is the action the jury intended as Olson's assertion of rights. The jury's findings stands. CHA intended the eviction as a means of penalizing Olson for making a complaint or complaints. Judge Burke said it succinctly: "the reason Olson was evicted was not because of his breach of the lease but because of his ***complaints***." Doc. #72 at 5-6 (emphasis added).

Human Rights because Olson believed [Respondent] Central Housing was discriminating against him." Doc. #51. Olson's lease included a number of limitations on CHA, including this provision on page 10 of the lease: "The LANDLORD shall not discriminate against the TENANT in the provision of services or in any other manner on the grounds of race, color, creed, religion, sex, familial status, national origin, or disability." While the jury might have had other reasons to find retaliation, this certainly illustrates one way in which Olson had asserted that CHA had committed a violation.

b. A "complaint" is an expression of dissatisfaction and is much broader than just a formal complaint filed under Minn. Stat. § 504B.395.

i. The plain meaning of "complaint" within section 504B.441 includes any expression of dissatisfaction.

The term "complaint" should be construed according to its common and approved usage because it is not defined, is not a technical word, and has not acquired a special meaning. Minn. Stat. § 645.08(1). *State v. Schouweiler,* 887 N.W.2d 22, 25 (Minn. 2016).

Unlike the word "violation", Minn. Chap. 504B provides no definition of the word "complaint". This is especially noteworthy because in Minn. Stat. § 504B.001 there are definitions of fourteen terms for the purpose of the entire chapter 504B, including four of the terms used in Minn. Stat. § 504B.441 ("residential tenant", "landlord", "lease" and "violation") but not "complaint".[11]

[11] These four particular definitions were created when this section was first enacted in 1973 when Minn. Stat. § 504B.441was first enacted and codified as Minn. Stat. § 566.28

If the legislature had intended to give the word "complaint" a technical meaning or have it mean the same thing in every section of chapter 504B or every section of the Tenant Remedies Act, the legislature would have added a definition of "complaint" to 1973 Minn. Laws ch. 611, s. 13 or at least somewhere in what is now chapter 504B. It did not.

In common parlance, a "complaint is a statement in which you express your dissatisfaction with a situation. [example] *There's been a record number of complaints about the standard of service*." Cambridge Dictionary (online), available at https://dictionary.cambridge.org/us/dictionary/english/complaint. The word "complaint" in Minn. Stat. § 504B.441 means expressing dissatisfaction, not commencing a lawsuit.

Conversely, one must strain to read "complaint of a violation" to mean the start of a lawsuit. The natural way for the legislature to make the cutoff event the commencement of a special proceeding would be to say exactly that. Indeed it used the phrase "commencement of an action to recover possession" elsewhere in this chapter in Minn.

(1974). It was enacted as section 23 as part of what is known as the Tenant Remedies Act, sections 13-28 of Act of May 23, 1973, ch. 611, 1973 Minn. Laws 1426. Sections 13-28 of this session law, the original Tenant Remedies Act (hereafter "TRA") is reprinted in the Addendum). The TRA is now codified at Minn. Stat. §§ 504B.001, 504B.185, 504B.395-471 (2017). The current statute, Minn. Stat. § 504B.441 (2017) is materially the same as TRA section 23. The definitions for the TRA were in 1973 Minn. Laws ch. 611, s. 13. At that time, what is now "residential tenant" was called "tenant" and what is now "landlord" was called "owner" but the definitions are materially identical.

Stat. § 504B.291, subd. 1(c) and in many other statutes used "commencement of an action." *See* sections 115B.444, 257.75, 469.1771, 513.41, 513.46, 609.26.

ii. The Minnesota Court of Appeals has used "complaint" accordingly in three separate cases.

The Minnesota Court of Appeals has taken the same view in three separate cases. The first case is *Dominium Management v. C. L*, File No.A03-85, 2003 WL 22890386 (Minn. App. Dec. 9, 2003), *review denied* (Minn. Feb. 25, 2004). The *Dominium* court first dealt with the landlord's contention "that the defense of retaliatory eviction under Minn. Stat. § 504B.285 does not apply because C.L.'s lease was not terminated by a 'notice to quit'." It held that while "Minn. Stat. § 504B.441 has elements parallel to those required in Minn. Stat. § 504B.285, it applies to all residential tenancies and is not predicated on receipt of a notice to quit." *Id.*, slip op. at 2. It then applied section 504B.441, based on a "residential tenant's [C.L.'s] ... complaint of a violation. A 'violation' includes not only noncompliance with an applicable governmental code, but the breach of habitability and repair covenants as well." *Id*. C.L. had not filed a Tenant Remedies Act complaint. However, she had "complained to the City of Richfield that Dominium had violated several code provisions". *Id.*, slip op. at 1. In summary, the court held that section 504B.441 protected tenant C.L. because she had complained to the city about code violations without filing Tenant Remedies Act complaint over these repair issues.

In *Willemarck v. Williams*, File No.C6-94-1714, 1995 WL 91824 (Minn. App. Mar. 7, 1995), like the instant case a breach-of-lease case, the court stated that both Minn. Stat. § 504B.441 and § 504B.285 (then codified at §566.28 and §566.03) would have protected the tenant had she proved retaliation even though no Tenant Remedies Action complaint had been filed. *Id*., slip op. at 2.

Finally, in *City View Apartments v. Silvia Lopez Sanchez*, File No.C2-00-313, 2000 WL 1064897 (Minn. App. Aug. 1, 2000) the court held that § 504B.441 protected a tenant who complained to her landlord about repairs. Ms. Lopez Sanchez had at some point filed a Tenant Remedies Action complaint, but that was not referenced in the court's reasoning. Instead, the *City View* court wrote:

> A residential tenant may not be evicted if the eviction "is intended as a penalty for the residential tenant's or housing-related neighborhood organization's complaint of a violation." Minn. Stat. § 504B.441 (Supp. 1999). "Violation" includes not only noncompliance with an applicable governmental code but the breach of habitability and repair covenants as well. Minn. Stat. § 504B.001, subd. 14 (Supp. 1999). **There is evidence in the record that Lopez complained of an alleged breach of habitability and repair covenants.**

Id., slip op. at 2 (emphasis added)

iii. The Attorney General has construed "complaint" accordingly.

Under Minn. Stat. § 504B.275, the Attorney General prepares a statement summarizing Minnesota landlord-tenant law and "annually revise[s] the statement ... to ensure that it continues accurately to describe the ... law."[12] The Attorney General annually "hold[s] a public meeting to discuss the statement and receive comments on its contents before it is issued." *Id.* With these comments in hand, the Attorney General's statement describes the purpose of § 504B.441 as follows: "A landlord may not retaliate (strike back) by filing an eviction notice, increasing rent, or decreasing services because a tenant contacts an inspector." Office of the Minnesota Attorney General, *Landlords and Tenants: Rights and Responsibilities*[13] 17 & footnote 86; accord, *id*. at 33 & footnote 185.

iv. CHA's own counsel used "complaint" accordingly.

In CHA's main brief to the Court of Appeals in this case, CHA's attorney wrote, "On February 13, 2017, **Tenant filed a complaint** with the Minnesota Department of Human Rights." Doc. #86 at 3 (emphasis added). Therefore, CHA's own experienced counsel understands "complaint" to include a non-court document and to refer to more than simply a complaint filed to initiate a tenant-remedies action under Minn. Stat. § 504B.395.

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[12] This could well be considered an administrative interpretation of the statute and thus merit deference on that basis as well. Minn. Stat. § 645.16(8).

[13] Available at https://www.ag.state.mn.us/Brochures/pubLandlordTenants.pdf

v. The legislative history of section 504B.441, specifically the use of "complaint" and "complaining" in the context of the original session law, shows that a "complaint" involves the tenant complaining outside of court.

Putting the word "complaint" in context confirms this reading. As indicated above in footnote 7, Minn. Stat. § 504B.441was first enacted in 1973 as section 23 of what is known as the Tenant Remedies Act. The Act is reprinted in the Addendum. The meaning of "complaint" today is the meaning when the word was included in the original session law.[14] The TRA established the following procedure: First, a city "inspection ... [is made] upon demand by a tenant." TRA section 14, Add. A-2. Next, "the ***complaining*** tenant shall be informed in writing by the inspector of any violations discovered and a reasonable period of time shall be allowed in which to correct such violations" *Id.* (emphasis added). Only then could the complaining tenant commence a special proceeding under TRA section 15 (now Minn. Stat. § 504B.395). **This demand by a**

[14]Along with all the other statutes in Minn. Stat. Chapters 504 and 566, this section was recodified into Chapter 504B. To be more precise, Act of May 24, 1999, ch. 199, a huge law, was a recodification of all the statutes in the existing Minn. Stat. Chapters 504 and 566 into a new Chapter 504B. The idea was to modernize the language of the statutes, improve the organization of the statutes, and gather the landlord-tenant statutes from two old chapters into one new one. The meaning of the statutes was not intended to change and the old case law was meant to still apply. This point is made in *Occhino v. Grover*, 640 N.W.2d 357,362 (Minn. App. 2002) as follows: "The main purpose ... was to consolidate, clarify, and recodify the majority of Minnesota's housing statutes under one chapter. … and it was made clear that **no substantive changes to the current housing laws were intended.** [emphasis added]".

"*complaining*" tenant is the "complaint" referenced in TRA section 23, (now Minn. Stat. § 504B.441, see Add. A-6)—a complaint to the city rental inspector—and this is the complaint filed by the tenant. It explains why the 1973 legislature used the word "complaint" in what is now Minn. Stat. § 504B.441.

Cities still use this same language. For example, see the Minneapolis internet form[15] for making or filing a "complaint" of a "violation" that the "inspector" investigates. Similarly, Saint Paul's electronic Resident Handbook has a section entitled "How to Make a Housing Complaint[16]". That webpage links to "Notes for Tenants and Landlords[17]" which says, "For Tenants: Landlord Not Making Requested Repairs. If you're a tenant and your landlord is not making repairs, call us at 651-266-8989 and ask for an inspection."

While section 504B.441 itself hasn't otherwise changed, one word within it has been given a broader meaning. The original TRA (the 1973 session law) only included what is now clause (1) of Minn. Stat. § 504B.001, subd. 14 (2017) and not clauses (2) or (3) of that subdivision. Thus, in 1973, the term "violation" was limited to a violation of a

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[15] http://www.ci.minneapolis.mn.us/inspections/report/rental-complaint

[16] https://www.stpaul.gov/departments/safety-inspections/city-information-complaints/resident-handbook/how-make-housing-3

[17] https://www.stpaul.gov/departments/safety-inspections/city-information-complaints/resident-handbook/how-make-housing-0

city inspector's order. TRA section 13, subd. 6 (see Add. A-2). In 1978, "violation" was expanded to include what are now clauses (2)-(3) of Minn. Stat. § 504B.001, subd. 14 (2017), i.e. breaches of the covenants of habitability and breaches of lease, such as breach of the anti-discrimination clause in Olson's lease. Act of March 28, 1978, ch. 598, s. 2, 1978 Minn. Laws 347.

To summarize, while in 1973 a complaint of a violation had to be made to a rental inspector, after 1978—under the broadened definition of "violation"—a complaint could be made to a much wider group of persons. For example, a breach-of-lease complaint could be made to the landlord, asking the landlord to fix a problem or obey the lease; it could also be made to the overseer of the lease, such as complaining to the Minnesota Department of Human Rights about breach of an anti-discrimination provision in the lease or to the Public Utilities Commission about a gas-meter provision in the lease.

vi. Public policy and the canons of construction support this broad reading of "complaint".

First, unreasonable or absurd results cannot stand. Minn. Stat. § 645.17(1). The Court of Appeals' construction of "complaint" creates three unreasonable, even absurd, results.

Suppose "complaint" actually meant a complaint under Minn. Stat. § 504B.395. To file such a complaint, the tenant must first have a city inspection done and wait for the inspector's deadline for repairs to pass; or the tenant must write the landlord about the problem and give the landlord 14 days to act. Minn. Stat. § 504B.395, subd. 3. Only then

may the tenant file the complaint. *Id*. That would give the landlord a safe-harbor period, usually 14 days or so, to retaliate with impunity. The landlord would have free rein to move to evict the tenant, reduce their parking privileges, deny them a pet even though other tenants are allowed pets, or otherwise retaliate and the tenant would have no protection. The legislature cannot have intended to create a safe harbor to retaliate in an anti-retaliation statute.

In a related example, suppose a complaining tenant demands an inspection of their home, the inspector orders repairs, the landlord does not do them, and the ***city*** commences a TRA under Minn. Stat. § 504B.395, subd. 1(4). Then the landlord retaliates against the tenant who started the process. This tenant is unprotected because it was the ***city's*** lawsuit, not the tenant's.

Lastly, suppose a tenant's furnace stops working in the middle of winter, the tenant asks the landlord to fix it, the landlord refuses, and the tenant sues for rent abatement for living in an unheated home. Because this is not a complaint under Minn. Stat. § 504B.395 through Minn. Stat. § 504B.471, the tenant is not protected and the landlord has free rein to retaliate. Again, the legislature cannot have intended to create such a safe harbor for retaliation in the anti-retaliation statute.

Second, statutes are construed in light of the "mischief to be remedied." Minn. Stat. § 645.16(3). The real-world problem is retaliation against a tenant who calls the inspector, contacts the Minnesota Department of Human Rights, or complains to the

landlord. It is rarely retaliation against a tenant who commences a lawsuit. Robert Schoshinski, American Law of Landlord and Tenant § 12.1 (1980 and Supp. 2018) (hereafter "SCHOSHINSKI"); Developments in Contemporary Landlord-Tenant Law, 26 VAND. L. REV. 689 (1973). Indeed, the TRA was enacted shortly after the publication of a model act providing tenants with repair remedies ***and*** retaliation protection when they took non-lawsuit steps to get repairs. A Model Tenant Remedies Act, 7 HARV. J. ON LEGIS. 357, 395-398 (1970).

Third, as remedial legislation, the 1973 Act must be interpreted broadly to better effectuate its purpose. *Harrison v. Schafer Construction,* 257 N.W.2d 336, 338 (Minn. 1977). The broad group of tenants complaining outside of court and not just the small number filing a lawsuit should be protected. In contrast, the Court of Appeals' ruling eviscerates section 504B.441 and leaves the large number of tenants who complain to the city housing inspector about repairs, to their landlord about repairs or other breaches (e.g. miscalculating rent) or who file a discrimination complaint unprotected when the landlord singles them out for eviction or for reassignment of the tenant's parking spot to a noncomplaining tenant. Only the rare tenant who complains ***and*** waits the required time for the landlord to cure the problem ***and*** then files a civil complaint ***before*** the landlord retaliates is protected.

Fourth, consider the consequence of the Court of Appeals' construction of the statute as required by Minn. Stat. § 645.16(6). While unsophisticated tenants will simply

suffer retaliation when they assert their rights, a minority of sophisticated tenants will file a Tenant Remedies Action as soon as possible instead of allowing non-litigation methods—working with the inspector, negotiating with the landlord, etc.—to resolve their problem. This is the exact opposite of the courts' view that litigation is not preferred if other methods will work. *Kohn v. La Manufacture Francaise des Pneumatriques Michelin,* 476 N.W.2d 184, 190 (Minn. App. 1991 ("enabling settlements that reduce litigation …advances a desired public policy.")

Fifth, the legislature intends to favor the public interest as against any private interest. Minn. Stat. § 645.17(5). Allowing landlords to retaliate immediately after a tenant calls in the city housing inspector and before the tenant can file a Tenant Remedies Action would dissuade many tenants from calling inspectors. This is the exact opposite of favoring the public interest. *City of Golden Valley v. Wiebesick,* 899 N.W.2d 152,166 (Minn. 2017) ("housing inspections protect public health, safety, and welfare").

In summary, public policy and the canons of construction support the plain meaning of "complaint" as it is used in common parlance.

II. RETALIATION IS A DEFENSE TO AN EVICTION ACTION UNDER THE COMMON LAW.

If Minn. Stat. § 504B.441 does not resolve this case and this court reaches the common-law issue, Olson should be protected from retaliation under common law. Although the issue has never been decided by an appellate court in Minnesota, there is a substantial body of common law that residential tenants are protected against retaliatory

evictions—evictions based in part as retaliation for the tenants' assertion of legal rights. Most of these cases involved assertion of the right to repair, but the principle of all of them was that the tenant asserted an important tenant's right, that a residential tenant is largely under the thumb of the landlord unless the law protects the tenant, and therefore retaliation for assertion of legitimate rights must be rejected by the courts.

The leading case establishing the common-law retaliation defense was *Edwards v. Habib*, 397 F.2d 687 (D.C. App. 1968). As Justice Skelly Wright wrote:

> The notion that the effectiveness of remedial legislation will be inhibited if those reporting violation of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation if it is not expressed in the statute itself.... The proper balance can only be struck by interpreting [the eviction statute] ... as inapplicable where the court's aid is invoked to effect an eviction in retaliation for reporting housing code violations.

Id. at 701-702. Two years later, at least one Minnesota trial court followed *Edwards*. *Botko v. Cooper*, [1968-1971 Transfer Binder] CCH Pov. L. REP. 1 11,549 (Minn. Mun. Ct. 1970) cited in Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography, 26 VAND. L. REV. 689, 709 (1973).

Many other jurisdictions have followed in establishing a defense of retaliation even in the absence of anti- retaliation legislation. SCHOSHINSKI § 12.1, fn. 7 (listing eleven such jurisdictions). While only about a quarter of states have established a common-law residential-tenant, anti-retaliation rule, apparently tenants have not litigated the common-law issue in most states that have an anti-retaliation statute (or at least

haven't done so in reported cases). *Id*. § 12.8. Only one case flatly rejecting the rule is reported. *Id.* at § 12.1, fn. 7.[18] In summary, the majority rule is that there is a common-law retaliation defense arising out of the residential tenant's right to habitability and related tenant's rights.

Some of the cases listed in SCHOSHINSKI involved allegations of breach. For example, in the case of *Criss v. Salvation Army Residences*, 319 S.E.2d 403 (W.Va. 1984), the landlord's eviction action was filed in the middle of a term lease and was based on allegations that the tenants had been in material noncompliance with the lease agreement.

Furthermore, and perhaps more importantly, the reasoning of *Edwards v. Habib* is that effectiveness of remedial legislation—be it housing-repair codes or civil-rights legislation—will be inhibited if those reporting violations are intimidated. Thus, a presumption against the legality of such intimidation can be inferred as inherent in the legislation. A landlord should not be able to intimidate its tenant into silence, nor should a landlord be able to use a lease breach as a pretext for retaliating against a tenant.

Finally, it is clear that the Court of Appeals' incorrectly cited *Olson v. Bowen*, 291 Minn. 546, 547, 192 N.W.2d 188,188 (1971) for the proposition that the enactment of

[18] Tenants have lost some cases when they only raised constitutional claims and there have been isolated cases denying the defense in some other circumstances. *Id.* at § 12.1, fn. 11. (citing three cases, one involving a tenant refusing to sign a lease with a waiver of notice to quit, one in which the tenant asserted no housing-code violation, and one in which the "tenant" was just a tenant at sufferance).

Minn. Stat. § 504B.285, subd. 2 and § 504B.441 pre-empted any common-law defense. That was not this court's holding in *Bowen*.

Bowen was a breach-of-lease eviction case. The tenant claimed that the eviction was retaliatory. When the case was tried in 1970 Minnesota had no anti-retaliation statute, so the tenant's claim was that he was protected by a common-law anti-retaliation rule. By the time the case reached this court in 1971, one anti-retaliation statute (what is now Minn. Stat. § 504B.285, subd. 2) had been enacted. When the *Bowen* court stated that it was not "constrained to consider ... [the tenant's] contention that the defense of retaliatory eviction must be engrafted upon the unlawful detainer statute," *id.*, it meant that it was not limited to considering only common-law retaliation. The court ***did*** consider the defense but rejected it as well as the statutory retaliation defense, not on the grounds that they didn't both exist, but on the grounds that Bowen failed to prove retaliation, ***holding***, "The disposition of the matter below is in effect a finding that plaintiff's eviction of defendants was not in fact a retaliation for any constitutionally protected activities." *Id*. Mr. Bowen lost his common-law defense because he had not been retaliated against.

Minn. Stat. § 504B.441 should be sufficient to decide this case in favor of Olson. However, if this court reaches the common-law issue, it should rule that when a tenant

proves as an affirmative defense that an eviction action was filed as retaliation for their assertion of their rights as a tenant that eviction action must be dismissed.[19]

CONCLUSION

Since the jury found that CHA's eviction action was retaliatory, both Minn. Stat. § 504B.441 and the common law protected Olson from eviction. The Court of Appeals' decision should be rejected, the trial court's original entry of judgment for Olson should be affirmed, the case dismissed, and Olson's tenancy continued.

HOME Line

Dated: July 27, 2018
Dated: July 27, 2018

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/s/ Paul Birnberg

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[19] The anti-retaliation statutes, Minn. Stat. § 504B.285, subd. 2 and § 504B.441, both include provisions shifting the burden of proof to the landlord during a 90-day window. However, under the common law, a defendant asserting an affirmative defense typically has the burden of proof. Assuming this burden of proof is on the tenant, Olson met that burden in the instant case.

CERTIFICATE OF COMPLIANCE
WITH MINNESOTA RULE OF APPELLATE PROCEDURE 132, SUBD. 3

The undersigned certify that the brief submitted herein, exclusive of the Table of Contents and Table of Authorities, contains 7,191 words and complies with the limitations of Minnesota Rule of Appellate Procedure 132, subd. 3. This Brief was prepared using a proportional spaced font size of 13 pt. The word count stated is in reliance on Microsoft Word 2013, the word-processing system used to prepare this brief.

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