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No. A17-1286

State of Minnesota

In Supreme Court

Central Housing Associates, LP,

Respondent,

vs.

Aaron Olson,

Appellant.

APPELLANT'S REPLY BRIEF

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I. CENTRAL HOUSING ASSOCIATES' EVICTION ACTION AGAINST AARON OLSON WAS RETALIATORY.

Central Housing Associates ("CHA") argues at the end of its brief that it did not retaliate against Olson. Resp. Br. at 24-26. This argument is contrary to the record and the procedural history of the case; however, it clarifies the core issue in dispute.

After a two-day trial, the jury made only two findings of fact: Olson materially breached his lease and CHA's eviction was in whole or in part retaliation against Olson. Doc. #51.[1] CHA did not challenge either finding in district court, the Court of Appeals, or by a cross petition for review, nor did CHA order a transcript of the trial. *See Duluth Herald & News Tribune v. Plymouth Optical Co*., 176 N.W.2d 552, 555 (Minn. 1970) (without a transcript, appellate review is limited to deciding whether the trial court's conclusions of law are supported by the findings). Therefore, the record is clear and unassailable that CHA retaliated against Olson 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.[2]

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

[2] While irrelevant, CHA argues that "the only evidence of any assertion of rights by Tenant [Olson] is Exhibit 12." Resp. Br. at 25. This statement is simply wrong. First, as set out in Olson's main brief at 4, Olson introduced other exhibits on this topic. More importantly, even if Olson had introduced no exhibits, he could (and almost certainly did) introduce oral evidence of retaliation. CHA cites to no case or rule that says retaliation must be proven in writing and there is no such rule of law.

CHA's argument is also contrary to the procedural history of this case. After trial CHA brought a post-trial motion seeking judgment as a matter of law that retaliation was not a defense to a breach-of-lease eviction, and CHA's notice of appeal argued the same. Doc. #54; Doc. #80. Further, CHA explicitly argues that "it makes sense" to allow retaliatory breach-of-lease evictions. Resp. Br. at 13.

CHA retaliated against Olson. CHA is asking this Court to endorse its retaliation. Indeed, the core issue before this Court may be simply put: are residential landlords allowed to retaliate against residential tenants in some instances?

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

There should be no doubt that CHA is seeking an endorsement of the right to retaliate against Olson and tenants like him by eviction. As discussed in Olson's main brief and below, Olson and tenants like him are, and should be, protected from such retaliatory eviction. This Court should not enshrine the right to retaliate against residential tenants.

A. Minn. Stat. § 504B.285, subd. 4, does not limit the use of the anti-retaliation provision in Minn. Stat. § 504B.441.

CHA's first argument for allowing retaliation reduces to the claim that Minn. Stat. § 504B.285, subd. 4, completely eliminates the retaliation defense in a breach-of-lease eviction action. Resp. Br. at 10-14.

The first half of CHA's argument is that the retaliation defense set out in subdivision 2 of Minn. Stat. § 504B.285 only protects a tenant in an eviction action based on holding over after notice to quit and that the retaliation defense set out in subdivision 3 of Minn. Stat. § 504B.285 only protects a tenant in non-payment eviction actions involving a retaliatory rent increase. Olson did not petition for review on this issue and does not contest this half of CHA's argument.

However, the second half of CHA's argument is that subdivision 4 of Minn. Stat. § 504B.285 prohibits a retaliation defense in ***any*** breach-of-lease case. That is the opposite of what the statute says. Subdivision 4 in its entirety reads as follows:

> **Nothing contained in subdivisions 2 and 3 limits the right of the landlord** pursuant to the provisions of subdivision 1 to terminate a tenancy for a violation by the tenant of a lawful, material provision of a lease or contract, whether written or oral, or to hold the tenant liable for damage to the premises caused by the tenant or a person acting under the tenant's direction or control.

(emphasis added). In other words, subdivision 4 prevents a tenant from using subdivision 2 or 3 of Minn. Stat. § 504B.285 as a defense in a breach-of-lease case. It does not stop the tenant from using other anti-retaliation statutes or other sources of anti-retaliation law.

CHA's citation of a quote from *Cloverdale Foods v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998)—"Because [landlord] Cloverdale brought this action under Minn. Stat. § 566.03, subd. 1(2) [now codified at Minn. Stat. § 504B.285], seeking to terminate the tenancy based on [tenant] Pioneer's alleged breach of lease conditions, we

conclude that the retaliatory eviction defense does not apply to this case"—does nothing to change this conclusion. *Cloverdale* was a breach-of-lease eviction case brought against a ***commercial*** tenant, Pioneer. Pioneer only raised one retaliation defense, a defense under what is now codified as Minn. Stat. § 504B.285. It did not and could not have raised a defense under Minn. Stat. § 566.28 (what is now codified as Minn. Stat. § 504B.441) because that defense only applies to ***residential*** tenants.[3] *Cloverdale* says nothing about common-law or Minn. Stat. § 504B.441 anti-retaliation defenses.[4]

[3] Minn. Stat. § 566.28 (1998) read as follows:

> A tenant may not be evicted, nor may the tenant's obligations under a rental agreement be increased nor the services decreased, if the eviction or increase of obligations or decrease of services is intended as a penalty for the tenant's or neighborhood organization's complaint of a violation. The burden of proving otherwise shall be on the owner if said eviction or increase of obligations or decrease of services occurs within 90 days after the filing of the complaint, unless it is found that the complaint was not made in good faith. After 90 days the burden of proof shall be on the tenant.

While at first glance this appears to govern all tenants, under the definitional section then in effect, Minn. Stat. § 566.18, subd. 2 (1998), "tenant" meant a residential tenant. The current statute has the same meaning as the 1998 codification. For a longer discussion of the 1999 recodification, see footnote 14 of Olson's main brief.

[4] CHA also sites several cases from other states for the proposition that a state's law could allow eviction for breach notwithstanding retaliatory motive. Resp. Br. at 13-14. As discussed later in this brief and in Olson's main brief, this is a minority view, but even if it were a majority view, it has nothing to do with the reach of Minn. Stat. § 504B.285.

In summary, no part of Minn. Stat. § 504B.285 limits or prohibits a residential tenant from asserting a Minn. Stat. § 504B.441 anti-retaliation defense.[5]

B. CHA's argument based on Minn. Stat. § 645.26 is without merit.

1. Minn. Stat. § 504B.441 is not in conflict with Minn. Stat. § 504B.285.

On pages 18-21 of its brief, CHA argues that Minn. Stat. § 645.26, subd. 1, compels the court to conclude that Minn. Stat. § 504B.285, subd. 4, prevails over Minn. Stat. § 504B.441 and prevents section 504B.441 from being used as a defense in a breach-of-lease eviction action. CHA bases this on Minn. Stat. § 645.26, subd. 1.

In analyzing CHA's argument based on Minn. Stat. § 645.26, one must read the entirety of section 645.26. The entire section reads as follows:

> **[Minn. Stat. §] 645.26 [2017] IRRECONCILABLE PROVISIONS.**
>
> **Subdivision 1. Particular controls general.**
>
> When a general provision in a law is in conflict with a special provision in the same or another law, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted at a later session and it shall be the manifest intention of the legislature that such general provision shall prevail.

[5] Nor for that matter does section 504B.285 limit Minn. Stat. § 504B.205 (preventing eviction for breach of a no-police-calls lease provision) or Minn. Stat. § 504B.315 (limiting evictions for breach of a no-other-occupants lease provision).

Subd. 2. Clauses in same law.

When, in the same law, several clauses are irreconcilable, the clause last in order of date or position shall prevail.

Subd. 3. Laws passed at same session.

When the provisions of two or more laws passed during the same session of the legislature are irreconcilable, the law latest in date of final enactment, irrespective of its effective date, shall prevail from the time it becomes effective, except as otherwise provided in section 645.30.

Subd. 4. Laws passed at different sessions.

When the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail.

Based on the first sentence in section 645.26, the initial step is to determine if it is possible to construe Minn. Stat. § 504B.285 and Minn. Stat. § 504B.441 so that effect may be given to both. Indeed it is possible to construe Minn. Stat. § 504B.285 and Minn. Stat. § 504B.441 so that effect may be given to both because, while there may be some overlap, they do not conflict.

First, as discussed in detail above, Minn. Stat. § 504B.285, subd. 4, does not limit Minn. Stat. § 504B.441. Second, since Minn. Stat. § 504B.285 covers both commercial and residential tenants while Minn. Stat. § 504B.441 only covers residential tenants, and Minn. Stat. § 504B.285 only protects tenants from traditional notices to quit and certain nonpayment cases while Minn. Stat. § 504B.441 covers residential evictions in general, they govern different situations. They can readily be construed to avoid conflict by having Minn. Stat. § 504B.441 apply to situations like the instant case—a residential

tenant facing an eviction not based on a traditional notice to quit—and having Minn. Stat. § 504B.285 apply to other situations.[6]

2. Even if Minn. Stat. § 504B.441 did conflict with Minn. Stat. § 504B.285, section 504B.441 would prevail.

Assume for the sake of argument [i] that the two statutes conflict and [ii] that Minn. Stat. § 504B.285 is the general statute and Minn. Stat. § 504B.285 the specific statute. CHA's argument still fails for two reasons.

First, under Minn. Stat. § 645.26, subd. 4, if "the provisions of two or more laws passed at different sessions of the legislature are irreconcilable, the law latest in date of final enactment shall prevail." Minn. Stat. § 504B.285, subds. 2-4, was first enacted in 1971 during the 1971-72 biennium. Minn. Stat. § 504B.441 was first enacted in 1973 by a different legislature during the 1973-74 biennium.[7] If there is a conflict, Minn. Stat. § 504B.441 prevails.

Second, for the sake of argument, ignore subdivision 4 of and only read subdivision 1 of Minn. Stat. § 645.26. A general provision still prevails over a special

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[6] Under *Ehlert v. Graue*, 293 Minn. 393,397-398, 195 N.W.2d 823,826 (1972) "where two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision." Therefore, even if Minn. Stat. § 504B.441 was labeled the "general" statute and Minn. Stat. § 504B.285 were the "specific" statute, they would be construed this way.

[7] Minn. Stat. § 504B.285, subd. 2-4 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.

provision if it was enacted at a later session and it was the manifest intention of the legislature that it prevail. *Id*. at subd. 1. As discussed above, Minn. Stat. § 504B.441 was enacted during the session after the enactment of Minn. Stat. § 504B.285. And, the last section of the 1973 session law stated, "**The purpose of this act** [now Minn. Stats. §§ 504B.395 to 504B.471] **is to provide additional remedies** and nothing herein contained shall alter the ultimate financial liability of the owner or [residential] tenant for repairs or maintenance of the building." Act of May 23, 1973, ch. 611, s. 28, 1973 Minn. Laws 1426,1439, now codified as Minn. Stat. § 504B.471 (emphasis added). The legislature manifestly intended that Minn. Stat. § 504B.441 prevail over Minn. Stat. § 504B.285, subd. 4, and thus section 504B.441 prevails.

3. *CHA's argument would render the phrase regarding evictions in Minn. Stat. § 504B.441 superfluous*.

It is a "basic maxim of statutory construction that a statute is to be construed, if possible, so that no word, phrase, or sentence is superfluous, void, or insignificant". *Duluth Firemen's Relief Ass'n v. City of Duluth*, 361 N.W.2d 381, 385 (Minn. 1985); *accord* Minn. Stat. § 645.16. Thus, when the legislature enacted Minn. Stat. § 504B.441 in 1973, it intended every phrase in it—including the phrase regarding evictions—to be effective. If CHA were correct, if Minn. Stat. § 504B.441 only protected residential tenants in holdover/notice to quit and in retaliatory non-payment cases and not in other cases, the eviction phrase in Minn. Stat. § 504B.441 would become superfluous since Minn. Stat. § 504B.285, subds. 2-3, already provided that protection to all tenants. CHA

is wrong. The eviction phrase in Minn. Stat. § 504B.441 is not superfluous, void, or insignificant; it protects residential tenants in all retaliatory eviction actions, including those based on breach of lease.

C. Conversely, Minn. Stat. § 504B.441 does not make Minn. Stat. § 504B.285's retaliation protections superfluous.

CHA argues that Appellant's reading of Minn. Stat. § 504B.441 makes the retaliation protections provided in Minn. Stat. § 504B.285 superfluous. This argument would fail even if every instance of retaliation prevented by Minn. Stat. § 504B.285, subds. 2-3, was also prevented by Minn. Stat. § 504B.441 because the protections provided by Minn. Stat. § 504B.441 only apply to ***residential*** tenants, not ***commercial*** tenants.[8] While it is true that Appellant is a residential tenant and this is a residential tenant case, these statutes must be considered as a whole. Minn. Stat. § 504B.441 does not apply to commercial tenants. Minn. Stat. § 504B.441 cannot make the retaliation provisions of Minn. Stat. § 504B.285, subds. 2-3, superfluous when it does not protect an entire group of tenants who are only protected by Minn. Stat. § 504B.285, subds. 2-3.

[8] Minn. Stat. § 504B.285 and Minn. Stat. § 504B.441 require different events to trigger protection from retaliation. However, assuming the broad definition of complaint as an "expression of dissatisfaction", Appellant agrees that the protections provided by Minn. Stat. § 504B.441 would substantially, if not completely, overlap those provided by Minn. Stat. § 504B.285, subds. 2-3.

D. CHA's argument that Minn. Stat. § 504B.285 provides sufficient protection against retaliation is unreasonable and Minn. Stat. § 504B.441 provides important residential tenant protections.

CHA's argument that Minn. Stat. § 504B.285 provides sufficient protection and that Minn. Stat. § 504B.441 provides only redundant protection against retaliation is unreasonable. The gravamen of CHA's argument is that there is at least one instance where landlords should be allowed to retaliate against their tenants—the situation in this case—and, more generally, that ***all*** forms of retaliation not covered by Minn. Stat. § 504B.285, subds. 2-3, are allowed. It follows, therefore, that Minn. Stat. § 504B.441 provides significant additional residential tenant protections not provided by Minn. Stat. § 504B.285.

Olson's brief and Amicus' brief highlighted a number of these additional protections. For example, the tenant is protected against retaliatory enforcement of no-pet clauses in leases (allowing non-complaining tenants to harbor a pet despite a no-pet-provision in the lease but not allowing complaining tenants to do the same or agreeing to modify a non-complaining tenant's lease to allow pets while not agreeing to modify a complaining tenants lease), retaliatory restriction of discretionary services (use of the party room or limited parking spaces), retaliatory withholding of informational flyers, or retaliatory enforcement of towing after improper use of the parking lot. And, specifically

relevant to this case, Amicus documented a number of retaliatory pretext breach-of-lease evictions. Amicus Br. at 3-8.[9]

Minn. Stat. § 504B.285 would not apply in any of the above situations, and even when Minn. Stat. § 504B.285, or another defense, is available, it does not follow that because a tenant has one defense against an eviction they should not have another.

However, if the Court of Appeals' ruling is confirmed and a tenant has to first file a complaint under Minn. Stat. § 504B.395, ***and*** file this complaint prior to the retaliatory actions, then a landlord could punish the tenant who calls the inspector or files a claim with the Minnesota Department of Human Rights or otherwise complains about his rights and do so with impunity so long as the landlord does so promptly before the tenant files such a complaint. Similarly, if the tenant complains about a violation and the landlord

[9] CHA is correct that in some of the real-world examples Amicus cites, the tenant would be able to use Minn. Stat. § 504B.285 or have another legal defense. For example, in the case of Edain Altamirano (Amicus Addendum A-1), who faced what she called a retaliatory non-renewal but was likely a retaliatory notice to quit, Altamirano could have litigated the issue by holding over and raising a defense under Minn. Stat. § 504B.285, subd. 2. However, under the same facts, if Altamirano had had a term lease instead of a tenancy at will and her landlord had refused to renew that lease, Minn. Stat. § 504B.285 might not protect her. See *Dominium Management v. C. L*, File No.A03-85, 2003 WL 22890386 (Minn. App. Dec. 9, 2003). And while tenants with an agreed upon payment plan might have a contractual defense to an eviction for nonpayment, for complaining tenants in arrears who want a payment plan to catch up on rent—a payment plan the landlord must usually agree to voluntarily—section 504B.285 does no good when the landlord retaliates and does not offer the same sort of payment plan to the complaining tenant that he normally offers to non-complaining tenants because no notice to quit or increase in rent is involved.

fixes the problem before the tenant files a complaint under section 504B.395, the tenant cannot file such a complaint but the landlord can retaliate indefinitely, creating a permanent safe-harbor.

Amicus also highlights how few residential tenants Minn. Stat. § 504B.441 would protect if tenants must first file a complaint under Minn. Stat. § 504B.395 by showing that only three tenant-initiated, section-504B.395 complaints were filed in Hennepin County last year. Amicus Br. at 3.

In short, arguing that Minn. Stat. § 504B.285 is a sufficient, and therefore, by implication is the exclusive anti-retaliation remedy in an eviction action ignores the important additional protections supplied by Minn. Stat. § 504B.441.

E. The legislature meant "complaint" to broadly mean "expression of dissatisfaction" and did not limit its meaning to a formal complaint under Minn. Stat. § 504B.395.

CHA makes a cursory, two-paragraph argument echoing the Court of Appeals' ruling that "complaint" in Minn. Stat. § 504B.441 means only a complaint under Minn. Stat. § 504B.395. Resp. Br. at 16-17. CHA's only argument is that Minn. Stat. § 504B.441 is part of the Tenant Remedies Act, Minn. Stats. §§ 504B.395-471. With two exceptions CHA ignores the many other, controlling indications that "complaint" in Minn. Stat. § 504B.441 means an "expression of dissatisfaction" For example, even though the legislature chose not to define "complaint" and thus intended its meaning to be that in ordinary (layman's dictionary) usage, App. Br. at 14-16, CHA did not discuss

the plain and ordinary meaning of "complaint" or how in the context of the original Tenant Remedies Act as enacted in 1973, the "complaint" was an informal complaint to an inspector. App. Br. at 19-21.[10]

While CHA does not explain why its own counsel, earlier in this same case, took a broad view of "complaint", it does briefly argue that the Attorney General's interpretation is irrelevant because the "Attorney General is not primary authority for the law in Minnesota". Resp. Br. at 21. While this statement is correct, it misses the point that the Attorney General's view should be given respect, if not deference, in illustrating

[10] Briefly summarizing these other indications, set out in detail in Olson's main brief and Amicus' brief, these include the following. When the legislature has wanted to make the cutoff event the commencement of a special proceeding it used the phrase "commencement of an action". App. Br. at 14-16. The Court of Appeals has taken the same view in three cases. App. Br. at 16-17. The Attorney General has taken the same view. App. Br. at 18. CHA's own counsel has taken the same view earlier in this case. App. Br. at 18. In the context of the original Tenant Remedies Act as enacted in 1973, the "complaint" was an informal complaint to an inspector and city inspector websites to this day confirm this use. App. Br. at 19-21. CHA's reading would create a free-harbor period of about fourteen days for landlords to retaliate. App. Br. at 21-22. CHA's reading would create a free-harbor to retaliate when the City, vindicating the tenant's rights, instead of the tenant himself files a case Minn. Stat. § 504B.395. App. Br. at 22. CHA's reading would create a free-harbor to retaliate when the tenant sues for rent abatement after a repair is eventually fixed. App. Br. at 22. As indicated by several sources—contemporary law reviews and proposed uniform laws, law treatises, and the declaration of the sponsors of the law—Minn. Stat. § 504.441 was designed to protect broadly on behalf of complaining tenants. App. Br. at 23-24 and Amicus Br. at 19. Broad reading of Minn. Stat. § 504.441 as a remedial statute requires a broad reading of "complaint". App. Br. at 23. CHA's reading would create promote litigation and limit settlements. App. Br. at 23-24. CHA's reading would reduce inspections and thus endanger tenants in general. App. Br. at 24. As the Amicus' data demonstrates, CHA's reading would not deal with the real-world types of retaliation commonly used even today – including both evictions and denials of service and other non-eviction reprisals by landlords. App. Br. at 3-8.

how "complaint" is construed by the landlord-tenant community and landlord-tenant attorneys (just as CHA's own attorney's use should be given some respect).

CHA also analyzed the three Court of Appeals cases but again missed the point. In *Dominium Management v. C. L*, File No.A0385, 2003 WL 22890386 (Minn. App. Dec. 9, 2003), *review denied* (Minn. Feb. 25, 2004) and *City View Apartments v. Silvia Lopez Sanchez*, File No. C200313, 2000 WL 1064897 (Minn. App. Aug. 1, 2000), as set out in Olson's main brief at 16-17, while the tenants in those two cases did file complaints, the courts' reasoning in both cases did not depend on that but instead depended on the tenants' other, informal complaining. That is, the *Dominium* and *City View* courts applied a broad reading to the word "complaint." And, the court in *Willemarck v. Williams*, File No. C694-1714, 1995 WL 91824 (Minn. App. Mar. 7, 1995) (like the instant case, a breach-of-lease case) 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.

In summary, for the reasons laid out in Appellants' main brief, the legislature meant "complaint" to have the broad meaning of "expression of dissatisfaction" and not the limited meaning of a complaint filed under Minn. Stat. § 504B.395, and this is the meaning that the courts, the Minnesota Attorney General, and practitioners, including CHA, have been using.

III. RETALIATION IS A DEFENSE TO AN EVICTION ACTION FOR BREACH OF LEASE UNDER COMMON LAW.

A. CHA does not dispute that common sense and sound public policy support a common law defense.

CHA argues that there is no common-law, anti-retaliation defense in Minnesota. Resp. Br.at 22-24. It does not contest the fact that, as set out in Robert Schoshinski, *American Law of Landlord and Tenant* § 12.1 (1980 and Supp. 2018) and discussed in Olson's main brief at 24-27, the majority rule is that there is a common-law defense. It does not contest the principle from the leading case, *Edwards v. Habib*, 397 F.2d 687 (D.C. App. 1968), that the effectiveness of remedial legislation—be it housing-repair codes or civil-rights legislation—will be inhibited if those reporting violations are intimidated, a principle applied in Minnesota shortly thereafter.[11] Although CHA argues that it, and landlords in general, should be allowed to retaliate, it does not even suggest that allowing retaliation is morally positive, commendable, or sound public policy.

B. A common-law defense is not precluded by statute, has been used in Minnesota, and can co-exist with similar statutory protections.

Instead, CHA's argument against a common-law, anti-retaliation defense is based on the idea that Minn. Stat. § 504B.285, subd. 4, is a clear indication by the legislature

[11] *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). See page 25 of Olson's main brief.

that the only anti-retaliation defense is the defense found in Minn. Stat. § 504B.285 and that, therefore, subdivision 4 limits the judiciary from continuing or developing a common-law, anti-retaliation defense in a breach-of-lease eviction action.

However, as discussed in detail above, Minn. Stat. § 504B.285, subd. 4, explicitly limits only subdivisions 2 and 3 of the same statute from applying in a breach-of-lease eviction action. The legislature made it clear through the language of the statute that Minn. Stat. § 504B.285, subd. 4, does not, and should not be read to, limit anything beyond Minn. Stat. § 504B.285.

While CHA correctly points out that the Vermont case, *Houle v. Quenneville*, 787 A.2d 1258 (Vt. 2001) holds that "[t]he [Vermont] Legislature's deliberate omission of a retaliatory presumption evinces its rejection of altering the burden of proof for the affirmative defense of retaliatory eviction . . . ." *Id.* at 1267, that is irrelevant here.[12] The original Vermont bill placed the burden of proof on the landlord (created a presumption of retaliation) and that provision was removed from the bill by amendment. *Id*. at 1266-1267. In contrast to Vermont, the Minnesota legislature has never said anything directly about the common law, much less amended a bill before enactment to remove a pro-common-law provision.

[12] *Houle* itself is not particularly relevant to the present case except as an example of interpreting legislative intent. The main issue in *Houle* was not a common-law, anti-retaliation defense but whether the landlord or the tenant had the burden of proof under Vermont's anti-retaliation statute, 9 V.S.A. § 4465. *Id*. at 1265-1267.

Should this Court wonder if Minn. Stat. § 504B.441 or more generally the Tenant Remedies Act bar a common-law, anti-retaliation defense, the answer is also, "No". As discussed above on page 8, Minn. Stat. § 504B.441 says nothing about the common law and is part of an Act designed to give tenants additional remedies, not take them away. See Minn. Stat. § 504B.471 ("The purpose of this act is to provide additional remedies"). Indeed, section 504B.471 implies that some remedies for residential tenants already existed and the legislature intended for those remedies to continue to exist.

At least one Minnesota trial court, *Botko v. Cooper, supra* at 15, had applied a common-law, anti-retaliation defense when the legislature enacted the two current anti-retaliation statutes—what are now Minn. Stat. § 504B.285, subds. 2-3, and Minn. Stat. § 504B.441—in 1971 and 1973 respectively. Had the legislature wished to nullify the common law, it would have done so explicitly. *Goodyear v. Dynamic Air, Inc*., 702 NW 2d 237,244 (Minn. 2005) ("if the legislature intends to enact a statute that abrogates the common law, the legislature will do so by express wording or necessary implication"). The legislature did not do so in 1971, in 1973, or at any time since.

California provides an example of anti-retaliation legislation and a common-law, anti-retaliation defense existing side by side. *Schweiger v. Superior Court*, 3 Cal.3d 507 (Cal. 1970) established a common-law, anti-retaliation defense in California. Before *Schweiger* was decided, the California legislature had enacted an anti-retaliation statute, Cal. Stats. 1970, ch. 1280, codified as Calif. Civil Code §1942.5. *Schweiger* was decided

under common law because the statute did not go into effect until after the underlying events in the case had occurred. 3 Cal.3d at 519. The court did not consider the anti-retaliation statute to have preempted a common-law, anti-retaliation defense even though the dissent argued it should have deferred to the legislature. *Id*. Several years later, in *Barela* v. *Superior Court*, 30 Cal.3d 244 (Cal. 1981) the California Supreme Court dispelled the notion that the common law retaliatory eviction defense was preempted by statute. *Id*. at 251 ("Thus California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine.").

In summary, the majority common-law rule in the United States, applied at least once in Minnesota, is that retaliation is a defense to an eviction action against a residential tenant. Protection against retaliation is a common-sense rule supported by sound public policy. It is possible, even desirable, for both a common-law, anti-retaliation defense and Minn. Stat. § 504B.441 to exist side by side; certainly, however, if Minn. Stat. § 504B.441 does not protect Olson, this Court should determine that common law does.

CONCLUSION

CHA's eviction action was retaliatory, and both Minn. Stat. § 504B.441 and common law protect Olson, a residential tenant, from a retaliatory eviction. Therefore,

the Court of Appeals' holding should be reversed, the trial court's original entry of judgment for Olson should be affirmed, the case should be dismissed, and Olson's tenancy should be continued.

HOME Line

Dated: September 7, 2018
Dated: September 7, 2018

/s/ Samuel Spaid
/s/ Paul Birnberg

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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 5,893 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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