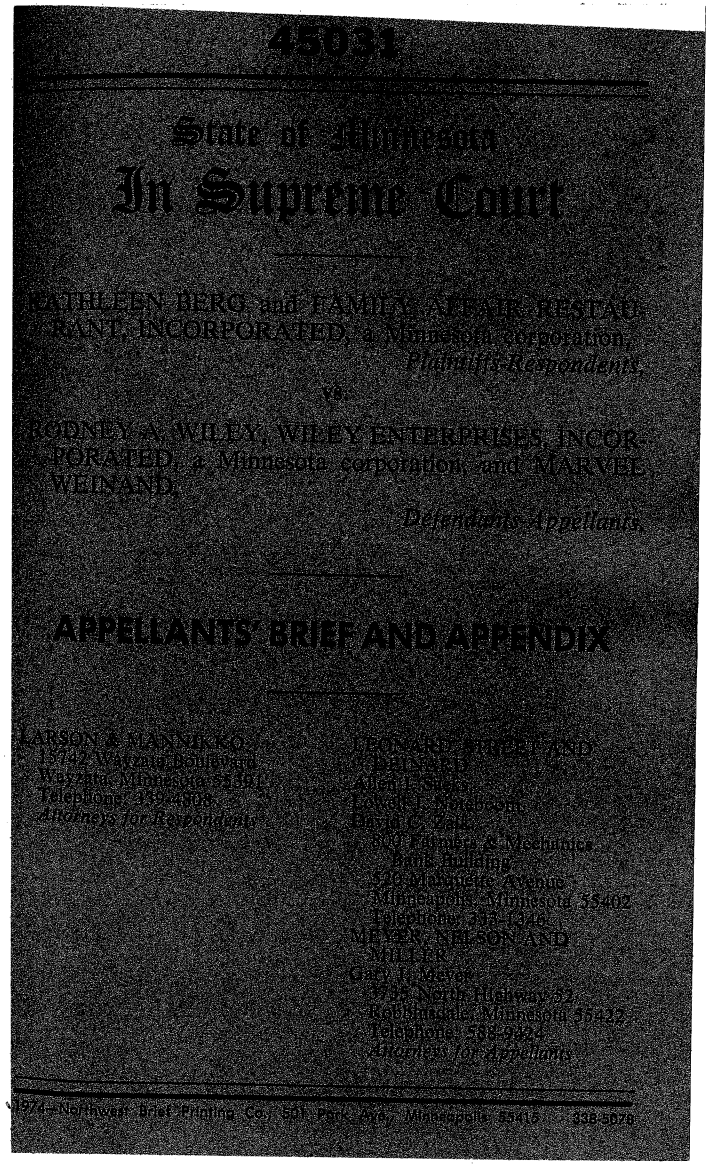
Appendix 4, Table of Contents, Briefs in *Berg vs Wiley I*

Landlord's Main Brief.....PDF pages 2-31

Tenant's Brief.....PDF pages 32-44

Landlord's Reply Brief.....PDF pages 45-51

Landlord's main brief in Berg v. Wiley I, 303 Minn. 247, 226 N.W.2d 904 (1975)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State of Minnesota

In Supreme Court

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,
Plaintiffs-Respondents,

vs.

RODNEY A. WILEY, WILEY ENTERPRISES, INCORPORATED, a Minnesota corporation, and MARVEL WEINAND,

Defendants-Appellants.

APPELLANTS' BRIEF AND APPENDIX

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Defendants-Appellants.

APPELLANTS' BRIEF

LEGAL ISSUES

I. Is the summary proceeding in unlawful detainer, provided by *Minnesota Statutes* §§566.02 and 566.03, available *to a tenant* to permit recovery of demised premises allegedly being unlawfully detained by a landlord?

The Municipal Court held: In the affirmative.

II. Does the evidence taken as a whole reasonably support the Municipal Court's finding that the tenant at no time surrendered or abandoned the leased premises and that the landlord forcibly entered said premises without the tenant's consent?

The Municipal Court held: In the affirmative.

III. Assuming arguendo that Family Affair had not abandoned the premises, Wiley's reentry was justified as a necessary action to protect his property and mitigate his damages in light of Berg's threat to vandalize the premises 23

Conclusion 25

APPENDIX INDEX

Defendants' Exhibit P A-1
Defendants' Exhibit III A-3
Defendants' Exhibit O-1 ..... A-4
Plaintiffs' Exhibit 11 ..... A-6
Summons and Complaint in Case No. U.D. 57330 ... A-8
Summons and Complaint in Case No. U.D. 57684 .. A-12
Exhibit A to the Complaint—The Lease A-15
Findings of Fact, Conclusions of Law and Order for Judgment A-18
Trial Court Memorandum A-22
Order for Additional Bond A-27
Memorandum A-28
Notice of Appeal A-31

TABLE OF AUTHORITIES

Cases:

Ahlstrand v. McPherson, 285 Minn. 398, 173 N.W. 2d 330 (1969) 14
Alworth v. Gordon, 81 Minn. 445, 84 N.W. 454 (1900) 11, 12
Anderson v. Ries, 222 Minn. 408, 24 N.W.2d 717 (1946) 11
Balafas v. Angelos, 293 Minn. 94, 198 N.W.2d 260 (1972) 13
Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 N.W. 974 (1899) 22
Burton v. Rohrbeck, 30 Minn. 393, 15 N.W. 678 (1883) 11
Chandler v. Kent, 8 Minn. 524 (Gil. 467) (1863) 10
Dayton v. Craik, 26 Minn. 133, 1 N.W. 813 (1879) . 22
Don Kral, Inc. v. Lindstrom, 286 Minn. 37, 173 N.W. 2d 921 (1970) 14
Lafferty v. Hawes, 63 Minn. 13, 65 N.W. 87 (1895) 22
Lobdell v. Keene, 85 Minn. 90, 88 N.W. 426 (1901) 23
Melco Investment Co. v. Gapp, 259 Minn. 82, 105 N.W.2d 907 (1960) 14
Mercil v. Brouillette, 66 Minn. 416, 69 N.W. 218 (1896) 24
National Farmers Union Property and Casualty Co. v. Nyborg, 295 Minn. 565, 204 N.W.2d 438 (1973) .. 13
Peterson v. Kreuger, 67 Minn. 449, 70 N.W. 567 (1897) 10
Stern v. Thayer, 56 Minn. 93, 57 N.W. 329 (1894) 22
Viking Automatic Sprinkler Co. v. Viking Fire Protection Co., 280 Minn. 250, 159 N.W.2d 250 (1968) 14
Walsh v. Mankato Oil Co., 201 Minn. 58, 275 N.W. 377 (1937) 25

Statutes:

Minn. Stat. §566.02 ..... 1, 9, 10
Text
Minn. Stat. §566.03, Subd. 1 ..... 1, 9, 10
Text

Rules:

Minnesota Rules of Civil Procedure for the Municipal Courts, Rule 52.01 13

Secondary Authorities:

25 Am. Jur. 2d, Ejectment, §35 12
17A C.J.S. Contracts §472(1) 25
82 C.J.S. Statutes §358 9

III. Where a tenant threatens to destroy or seriously damage the leased premises and demonstrates a present ability and intent to do so, may the landlord protect his property and mitigate his damages by peaceably retaking possession thereof without commencing an unlawful detainer action?

The Municipal Court held: In effect, in the negative.

STATEMENT OF THE CASE

This is an unlawful detainer action brought by Family Affair Restaurant, Inc., and Kathleen Berg,[1] tenants under a written lease, against Wiley Enterprises, Inc., and Rodney A. Wiley,[2] the landlord, and against Marvel Weinand, a subsequent tenant of Wiley. The action was tried in the Hennepin County Municipal Court before Judge Robert E. Bowen.[3] The trial court's Findings of Fact, Conclusions

[1]Family Affair Restaurant, Inc., is a Minnesota corporation of which Kathleen Berg is the President and sole stockholder (T. 12). Because of this identity between Kathleen Berg and Family Affair Restaurant, Inc., both plaintiffs will hereinafter sometimes be referred to collectively as "Family Affair."

[2]Wiley Enterprises, Inc., is a closely held Minnesota corporation of which the individual defendant Rodney A. Wiley is President. The trial court found that Mr. Wiley at all times acted in his capacity as President of Wiley Enterprises, and not in his individual capacity (App. 21). Because of the virtual identity between Rodney A. Wiley and Wiley Enterprises, Inc., both will hereinafter be referred to collectively as "Wiley."

[3]The original complaint in unlawful detainer, case No. U.D. 57330, was filed on September 4, 1973, and named only Rodney A. Wiley and Wiley Enterprises, Inc., as defendants. A second complaint, case No. U.D. 57684, with language virtually identical to that of the first complaint, was not filed until a month later, October 2, 1973. This second complaint named Marvel Weinand, the subsequent tenant, and two of her employees as defendants in addition to Rodney A. Wiley and Wiley Enterprises, Inc. The two actions were consolidated for trial. The judgment of restitution was ordered only against defendants Wiley Enterprises, Inc., and Marvel Weinand, and those two defendants are the appellants here.

of Law and Order for Judgment were filed on March 1, 1974, and judgment was thereafter entered on March 14, 1974, awarding possession of the premises to Family Affair. Wiley and Weinand filed their notice of appeal from said judgment on March 14, 1974, and on May 29, 1974, the trial court entered its order requiring Wiley and Weinand to post a $12,000 supersedeas bond to permit them to remain in possession of the premises pending this appeal.

STATEMENT OF FACTS

On November 11, 1970, Wiley, as lessor, and Phillip Berg, as lessee, entered into a written lease relating to commercial property located at 225 Central Avenue, Osseo, Minnesota, in which the lessee was to operate a restaurant. The lease was for a five-year term commencing December 1, 1970, and called for a monthly rental of three hundred dollars, with certain escalator provisions based on increases in taxes and insurance over the term of the lease (App. 16).

In the early part of 1971, Phillip Berg assigned his lessee's interest to his sister, Kathleen Berg (hereinafter "Berg"), the individual plaintiff herein, who thereafter continued to operate the restaurant business on the leased premises. Some two years later, in the early part of 1973, Berg assigned her lessee's interest to Family Affair Restaurant, Inc., the corporate plaintiff herein, a corporation of which Berg is the President and sole stockholder (T. 12).

From the time that Berg took over the lease from her brother, the relationship between herself and Wiley was

not without considerable friction. In particular, there were various disputes over the fact that the restaurant was continually in a state of disrepair, a fact which Berg attributed to her desire to "remodel" the premises. Wiley had repeatedly objected to this constant disarray as a violation of the lease terms which required Berg to operate the restaurant in a lawful and prudent manner and which prohibited structural changes without the landlord's written consent (T. 435-36; App. 17), which, as Berg freely admitted at trial, she had never received (T. 11).

In late 1972, as a result of inspections by state and municipal health authorities, Berg was advised it would be necessary to undertake substantial remodeling to bring the restaurant into compliance with applicable health codes. She was initially unwilling to embark on this expensive undertaking unless Wiley would agree to an extension of the lease which was then due to expire in less than three years. Accordingly, on December 28, 1972, Berg's attorney wrote to Wiley requesting either a renewal of the current lease or a new five-year lease. On January 4, 1973, Wiley replied that he was not interested in extending or renewing the lease because of his dissatisfaction with Berg, citing in particular the dispute over Berg's "remodeling" and her failure to obtain written permission as required by the lease (App. 1-2). Wiley further indicated that he would not consent to an assignment of the lease to the corporation which Berg was then proposing to form because he had no knowledge of the background or financial condition of the corporation (App. 2). On February 1, 1973, Berg wrote a personal reply to Wiley acknowledging that certain "remodeling" had been done in a

seemingly secretive manner ("at night") and not contesting in any manner Wiley's assertion in his letter of January 4 that this had been done without his consent (App. 3).

Despite Wiley's stated reluctance to renew or extend the lease, Berg, without written authorization, began such projects as repaneling the walls in the dining area of the restaurant and enlarging the kitchen (T. 17). The work proceeded very slowly, as Berg allowed it to be done only at night, refusing to close the restaurant temporarily so that all work might be accomplished at once (T. 126). Finally, the constant disarray at the restaurant, as well as the fact that it failed to meet health code standards, became intolerable to Wiley, and on April 27, 1973, he wrote Berg insisting that the work be completed within thirty days or he wold take legal action to enforce that provision of the lease permitting termination of Berg's tenancy (App. 4-5). This letter produced little or no response from Berg, and the "remodeling" dragged on, with progress at a virtual standstill. Two months later, on June 29, 1973, it finally became necessary for Wiley's lawyer to write Berg specifying these same items of work in progress that Wiley now insisted be finished within two weeks if he was to forgo his option under the lease to retake possession of the premises. This work which he insisted be completed included major projects which had been under way for several months, such as installing a new quarry tile floor in the kitchen, completing installation of the air conditioner, repairing the electrical system, and generally bringing the restaurant up to state and city health code standards (App. 6-8).

This letter of June 29 apparently convinced Berg that

Wiley was serious in his requests, but she did nothing to comply. Rather, she sought advice on the possibility of erecting a new building for her restaurant (T. 388), in the meantime informing her waitresses as well as a neighboring businessman that she would be moving out on July 13 (T. 261-62, 367, 376, 388-89). She was rather upset, however, by Wiley's insistence that she comply with the lease terms, and made various threats to damage the premises when she vacated (T. 265, 378). Her decision to vacate and her damage threats were eventually communicated to Wiley (T. 450-52). On the afternoon of Friday, July 13, when Wiley visited the premises, Berg did nothing to dispel his understanding that she intended to vacate as of the close of business that evening; indeed, by her sarcastic language, she strongly suggested that what he had heard was true (T. 19, 530).

Wiley returned to the restaurant that evening only to see Berg and some of her friends removing from the inside walls of the restaurant paneling which had only been installed a few weeks before. Although denied by Berg, Wiley also actually witnessed her smash a mirror with a hammer and begin to tear up carpet from the floor of the restaurant (T. 454-58). Concluding that Berg was making good on her threat and naturally concerned over the imminent destruction of his property, Wiley called the police. The police spent several hours at the scene Friday evening, mediating the dispute between the parties, as Berg maintained that she was simply "remodeling" the premises. The police finally convinced everyone to go home that evening and to seek legal advice on the following Monday. When Wiley returned to the restaurant on

Monday morning, he was met by a truck-crane crew which had been hired by Berg to remove a large air-conditioning unit that had been affixed to the roof of the restaurant. Since it was the middle of the summer and Wiley knew the air-conditioning unit was not in need of repair and that it need not be removed to complete Berg's proposed "remodeling," her actions merely confirmed to Wiley that she was vacating the premises. Accordingly, he directed the truck-crane crew to leave, and several hours later he proceeded to change the locks on the restaurant. Since neither Berg nor any of her employees were present on the premises at the time the locks were changed, the repossession was accomplished without any force or violence and caused no breach of the peace. In fact, the Osseo police were brought to the scene by Wiley himself in order to observe his changing of the locks and to assure that Wiley peaceably resumed possession of the premises (T. 462).

Wiley's primary concern in changing the locks was to prevent the possibility of further malicious damage being done to the restaurant as Berg had threatened (T. 462). Wiley was thus able to prevent the complete destruction of the premises, but he was unfortunately too late to prevent significant damage, for as he discovered, the premises had already been seriously vandalized. Damage included smashed toilet fixtures, paneling removed from the walls, holes smashed in the walls, a telephone ripped from the wall, light fixtures and fans ripped from the ceiling, ceiling tiles pulled down, and further damage rendering virtually every piece of mechanical equipment on the premises inoperable, including the air conditioner, the furnace, the range burners, and the water heater (T. 465-66).

Wiley subsequently undertook the repair of the damage, accomplished the necessary remodeling, and re-leased the premises to Weinand for the purpose of operating a restaurant. The record is barren of any evidence of Berg's thereafter attempting to reenter the premises.

In fact, it was not until September 4, 1973, *some seven weeks after vacating the premises,* that Family Affair filed this unlawful detainer action in Municipal Court in the City of Minneapolis.[4] The case came on for trial beginning November 5, 1973, and the Municipal Court entered its order directing restitution of the premises to Family Affair on March 1, 1974. Wiley's subsequent tenant, defendant Marvel Weinand, remains in possession of the restaurant property pending this appeal.

[4]This unlawful detainer action is unusual not only because it involves a tenant suing a landlord but also because of the circumstances under which suit was brought. On or about August 1, 1973, some two weeks after vacating the premises, Family Affair commenced a civil action against Wiley and Weinand in the Hennepin County District Court, alleging that it had been wrongfully evicted and *seeking recovery of damages*. [The file in that action, District Court file No. 697239, was received in evidence by the trial court (T. 53).] In late August, Family Affair's counsel sought an order in that action awarding possession of the premises to Family Affair pending the outcome of the litigation. The judge to whom the proposed order was presented refused to sign it (T. 299-300). Family Affair then filed this unlawful detainer action some seven weeks after it left the premises, but again, the relief it requested was only to be returned to possession of the premises *pending the outcome of its suit for damages* (App. 11, 14). Thus, it is apparent that this action is not a bona fide attempt to regain possession of the property in order to operate the restaurant. Rather, it is being used as a substitute means of obtaining an order which may be of aid to Family Affair in its damage action. Obviously, the instant action is merely a trial tactic in the context of Family Affair's basic concern and its one goal of seeking damages.

Under the circumstances, all the issues in dispute among the parties to this action, including Wiley's counterclaim for damages, would best be resolved in one forum rather than in piecemeal fashion. The one such forum that is appropriate is the Hennepin County District Court. It is a court competent to resolve all the issues and it is the forum the plaintiffs chose in which to pursue the remedy they elected, a suit for damages rather than a suit for possession of the premises.

ARGUMENT

I.

THE SUMMARY PROCEEDING IN UNLAWFUL DETAINER, PROVIDED BY MINNESOTA STATUTES SECTIONS 566.02 AND 566.03, IS NOT AVAILABLE TO A TENANT TO PERMIT RECOVERY OF DEMISED PREMISES ALLEGEDLY BEING UNLAWFULLY DETAINED BY A LANDLORD.

It is understandable that the trial court would note the "fairly unusual" (App. 28) posture of this case, for it is a question of first impression in this state whether a tenant may invoke the provisions of *Minnesota Statutes* Chapter 566 to bring an unlawful detainer action against his landlord. The fact that there is not one reported decision in the State of Minnesota in which a tenant has brought such an action does, in and of itself, demonstrate that this summary proceeding has never been understood by anyone to provide such a remedy. This common understanding and practice of the bench and bar, extending over such an extraordinarily long length of time, cannot be lightly ignored and further is of significant value in determining the statute's meaning. See 82 *C.J.S.* Statutes §358. Beyond that fact, however, a review of the unlawful detainer cases decided by this Court makes clear that Family Affair has here attempted to avail itself of a remedy to which it is not entitled. Had Family Affair been sincerely interested in regaining possession of the premises, it could easily have added an ejectment count to its action in Hennepin County District Court, a remedy to which a tenant has traditionally always had access in order to obtain possession of real estate.

While the statutory provisions involved[5] speak in broad terms, judicial interpretation over the years has clearly limited the remedy to situations where a landlord or the landlord's successor is attempting to regain possession from a tenant or the tenant's successor. As long ago as 1863, this Court made the following observation in the case of *Chandler v. Kent,* 8 Minn. 524 (Gil. 467, 470) (1863):

> The sole object of the statute under which this action was brought, is to provide a summary remedy by which landlords may be *restored to the possession* of leased premises, on the expiration of the lease, or the failure of the lessee to comply with provisions of the lease. [Emphasis in original]

In the 1897 case of *Peterson v. Kreuger,* 67 Minn. 449, 451, 70 N.W. 567, 568 (1897), the Court stated:

> The object of the statute is to provide an adequate and summary remedy for obtaining possession of leased premises withheld by tenants in violation of the covenants of their leases . . .

[5]*Minn. Stat. Ann.* § 566.02 (1973 Session Laws, Ch. 611, § 7) provides: "When any person has made unlawful or forcible entry into lands or tenements and detains the same, or, having peaceably entered, unlawfully detains the same, the person entitled to the premises may recover possession thereof in the manner hereinafter provided."

Minn. Stat. § 566.03 (1971) provides in relevant part: "Subdivision 1. When any person holds over lands or tenements after a sale thereof on an execution or judgment, or on foreclosure of a mortgage and expiration of the time for redemption, or after termination of contract to convey the same, or after termination of the time for which they are demised or let to him or to the persons under whom he holds possession, or contrary to the conditions or covenants of the lease or agreement under which he holds, or after any rent becomes due according to the terms of such lease or agreement, or when any tenant at will holds over after the determination of any such estate by notice to quit, in all cases the person entitled to the premises may recover possession thereof in the manner hereinafter provided."

While it is true that in these cases the Court was not emphasizing the status of the parties, nevertheless the cases are helpful for they indicate that from the outset unlawful detainer has been thought of as an action to be brought by landlords against tenants. In other words, the unlawful detainer proceeding is a very limited remedy designed to be used in specific, defined circumstance. It certainly was not meant to be expanded or, indeed, turned inside out, in such a manner as to be used in a situation that is the direct opposite of the situation for which it was specifically designed.

It is true that the action has not been restricted to proceedings by landlords directly against their tenants, but this Court has uniformly required that the plaintiff be either the landlord or someone taking from the landlord, *i.e.,* aligned in interest with the landlord, and that the defendant be either a tenant or someone taking under a tenant, *i.e.,* adverse to the landlord. See, *e.g., Alworth v. Gordon,* 81 Minn. 445, 451, 84 N.W. 454, 455, 456 (1900), where the Court emphasized that the operative factor was "the character of the defendant's possession at its inception, or that of the person under whom he claims," requiring that "the possession of the defendant commence as lessee, or that he holds under one whose possession so commenced." See also *Burton v. Rohrbeck,* 30 Minn. 393, 15 N.W. 678 (1883), and *Anderson v. Ries,* 222 Minn. 408, 24 N.W.2d 717 (1946), two cases where the Court allowed tenants whose claims were in alignment with and not adverse to the landlords to bring unlawful detainer actions against subtenants, not because a tenant is normally entitled to bring an unlawful detainer action, but

only because this Court was able to find that as between the parties to the action, the plaintiff-tenant had succeeded to the landlord's right to possession and therefore had stepped into the role of "landlord" vis-a-vis the defendant-subtenant. In the latter case, the Court reasoned:

> *Because plaintiffs and defendant occupied the relation of landlord and tenant* and because plaintiffs were entitled to possession of the subleased premises, plaintiffs were entitled to maintain an action for unlawful detainer to recover possession thereof. [Emphasis supplied.] 222 Minn. at 416, 24 N.W.2d at 722.

Thus, in the instant case, the trial court, in order to hold as it did, was compelled to be able to say that Family Affair "stands in the shoes of the landlord" (App. 25) for the purpose of being able to maintain the action against Marvel Weinand, the subsequent tenant. The flaw in that position, though, is that in this case, of course, the plaintiffs' claim was not in alignment with the landlord, but rather was adverse to it; and further, the trial court's reasoning in no way justifies or supports the action against Wiley, the landlord itself. Family Affair has failed to show, because it cannot so show, that Wiley comes within the rule of the *Alworth* case as to the character of the defendant's possession at its inception. Wiley, as the owner of the premises, is neither a lessee nor one claiming under a lessee, and it simply cannot be maintained by any theory or analogy that Family Affair is Wiley's landlord.

Family Affair's proper remedy as a tenant was an action in ejectment. See 25 *Am. Jur.* 2d Ejectment §35.

That Family Affair did not seek its available ejectment remedy in its District Court action indicates that it had no interest in regaining possession of the premises. It should not now as an afterthought be allowed to use a remedy that was conceived as, always interpreted as, and always held by the courts to be, a landlord's remedy. Accordingly, the action should have been dismissed as being one that is simply unavailable to Family Affair under Minnesota law.

II.

THE EVIDENCE TAKEN AS A WHOLE CLEARLY SUPPORTS ONLY THE FINDING THAT THE TENANT ABANDONED OR SURRENDERED THE PREMISES, AND THUS THE FINDING OF THE TRIAL COURT TO THE CONTRARY SHOULD BE SET ASIDE.

A. This Court May Reverse The Trial Court Where It Has The Definite And Firm Conviction That A Mistake Has Been Made.

By the terms of Rule 52.01 of the *Minnesota Rules of Civil Procedure for the Municipal Courts*, the findings of the trial court are to be reversed where they are "clearly erroneous." This Court has termed the "clearly erroneous" standard the broadest scope of review exercised by an appellate court, holding that the findings of a trial court may be reversed where "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." See *Balafas v. Angelos*, 293 Minn. 94, 96, 198 N.W.2d 260, 261 (1972), and *National Farmers Union Property and Casualty Co. v. Nyborg*, 295 Minn. 565, 204 N.W.2d 438 (1973). These

cases also make clear that the function of this Court on review is not to determine whether there is any evidence at all to support the trial court's findings, but rather to determine whether the trial court's findings are fairly supported by the evidence *taken as a whole*. See also *Viking Automatic Sprinkler Co. v. Viking Fire Protection Co.*, 280 Minn. 250, 159 N.W.2d 250 (1968), and *Don Kral, Inc. v. Lindstrom*, 286 Minn. 37, 173 N.W.2d 921 (1970). A review of the record in the instant case reveals that the evidence presented to the trial court fairly supports only the conclusion that Family Affair clearly intended to and did abandon the premises on or about July 13, 1973.

B. Since Abandonment Is A Matter Of Intent, And Since Such Intent May Be Shown By Conduct, The Conclusion Is Inescapable That Family Affair Had Abandoned The Premises, As Demonstrated By Berg's Statements and Actions.

Under Minnesota law, abandonment has been defined as a voluntary relinquishment of an ownership interest or of contract rights. Abandonment is a matter of intent, which intent may be shown by conduct. See *Melco Investment Co. v. Gapp*, 259 Minn. 82, 105 N.W. 907 (1960); *Ahlstrand v. McPherson*, 285 Minn. 398, 173 N.W.2d 330 (1969). In holding that Wiley was not entitled to possession of his restaurant property, the trial court found that Family Affair had never abandoned or surrendered the premises (App. 21). However, the trial court's brief reference to this point in its memorandum reveals that the sole issue considered was whether or not Family Affair had paid the July rent (App. 25-26). Even

though the trial court found that the July rent had not been paid (App. 20), it held that that did not justify Wiley's entry onto the premises as such nonpayment did not constitute an abandonment by Family Affair (App. 25-26). In view of Berg's history of always having paid the rent when due, the failure to pay the July rent is indicative of her intent regarding the premises; but in looking at only that one aspect of the situation, the trial court apparently did not consider a number of far more important factors in the record, all of which further clearly indicate an intent on the part of Family Affair to abandon its rights in the premises. These factors, when taken together, lead inescapably to the conclusion that as of Friday evening, July 13, 1973, Family Affair had, by its express intention and conduct, abandoned the premises.

The most direct evidence of abandonment is the uncontradicted testimony of several witnesses, including the waitresses at the Family Affair restaurant, regarding their conversations with Berg in which she freely admitted her intent to move out as of the close of business on Friday, July 13.

One of the waitresses, Bonnie Osterberg, testified to a conversation she had with Berg on July 5, only six days after Wiley's attorney had advised Berg that the repairs would have to be completed by July 13 or he would terminate the lease (App. 6-8):

> A. * * * So then she says, "I suppose you notice we didn't put the floor in" and I says, "yes," and she says, "well, why we didn't do that is because we plan on—I plan on moving."
>
> Q. And did she indicate to you when she would be moving from the building?

A. I thought what she had said was it was the weekend after the 13th that she was moving which would have been about two and a half weeks, and then one day she said that she decided to move out on the 13th of July instead of the week after. (T. 261-62)

Linda Langseth, another waitress at the restaurant, testified that on the same date, July 5, she had a similar conversation with Berg:

Q. And what did Kathy Berg say to you?
A. She said, "next Friday we're gonna move" and I said, "do I come to work on Saturday?" and she said, "no, we won't be open anymore."
Q. Did she say why she was going to move?
A. She said she was gonna build a new building and open up another restaurant. (T. 367)

Gerry Kosekele, a third waitress, testified that she was likewise informed of the move on July 11:

A. Two days before we closed.
Q. And then what did she say, then?
A. She just said, "we're moving out."
Q. Didn't just say that they were closing. She said that "we're moving out."
A. "We're moving out" and I asked, "would I have to come to work Saturday?" and she said, "no. Friday is the last night." (T. 376)

Stan Larson, who operated a hardware store just down the street from the restaurant, testified that as early as June 22, Berg and John Flaherty, her carpenter, contractor, and general business advisor,[6] had a conversation with him about constructing a new building for a new restaurant. Berg told Larson that she would like the new building built immediately (T. 388). Mr. Larson further tesified as follows:

Q. Did she indicate anything regarding her tenancy or her occupancy of the building that she was in at the time?
A. Well, she was gonna show me a couple letters that she had gotten from Wiley stating things that come up, and she wanted to show me the reasons she wanted to move out, and we didn't want to see these letters and we told her that, and we didn't read the letters, but she—she said that they—she would not rent from Wiley anymore and that she was sick and tired of being over there.
Q. Did she indicate to you when she approximately would be moving out?
A. Yes and no. She—she said in the very near future now and I thought she said two, three weeks, but I wasn't sure. I couldn't remember that.
Q. It wasn't a matter of a couple years—
A. No.
Q. (Continuing)—or anything of that nature?

[6]Flaherty's relationship to Berg and Family Affair Restaurant, Inc., is unclear at best. On his direct examination, he appears simply to be an independent contractor or carpenter hired by Berg to work on her various remodeling projects (T. 112). On cross-examination, however, it turns out that his involvement with the restaurant business is more extensive: He was authorized to sign checks on behalf of the corporation (T. 127); he acted as Berg's advisor (T. 147), including such tasks as the hiring and firing of employees (T. 148), and attending the meeting with Stan Larson about building a new restaurant (T. 140); he performed whatever odd jobs needed doing around the restaurant (T. 149). In short, Berg depended heavily on Mr. Flaherty (T. 150), her close personal friend (T. 151). Thus, it seems Flaherty's testimony should be evaluated accordingly and not taken as the word of an independent, neutral observer.

A. No.
Q. Did she indicate to you why they wanted to move from the building that they were in?
A. Yes. Well, she said she was sick and tired of renting from Wiley. That was—that was all.
Q. And the recollection you have was that it was two or three weeks?
A. Yes. (T. 388-89)

Finally, when Wiley confronted Berg with the reports that had circulated back to him regarding her intentions to abandon the premises, she did not deny the reports, but rather answered with a sarcastic retort to the effect that, "You shouldn't believe everything you hear," (T. 19, 530). In context, this was at best a noncommittal answer, certainly not a denial.

Additionally, it became clear to Wiley that Berg did not intend simply to move out peacefully. Rather, she indicated to at least two of the waitresses an intent to vandalize the premises when she did move. Bonnie Osterberg's testimony, though denied by Berg, is otherwise uncontradicted and is most revealing:

> A. Kathy says, "when I'm done—when I'm done with this building, when I move out and I'm done with this building," she says, "I know that Mr. Wiley will know that I've been here" and that they were going to damage the restaurant. (T. 265)

Gerry Kosekele's testimony was to the same effect, and, except for a predictable denial by Berg, is unimpeached and uncontradicted in the record:

> Q. Did she indicate anything else to you about the premises?

A. No, not that I can think of. Oh. Well, her and I, we were talking and she had said something about, "well, we should mess the place up" and I just said, "yeah."
Q. Kathy said we should mess the place up?
A. Mess the place up.
Q. Did she indicate why they should mess it up?
A. Or wreck the place, more or less, not mess up, wreck the place, and I just said, "yeah." (T. 378)

Indeed, Berg's "contractor," Flaherty, referred to himself as "the demolition crew" (T. 265). These reports were also circulated back to Wiley and made him understandably apprehensive for the safety of his premises. Unfortunately, as it turns out in retrospect, his concern was all too justified, for the restaurant was the subject of extensive, malicious vandalism (T. 269, 395-97, 408-15, 465-66).

Thus, Berg's only response to Wiley's request that she complete the necessary remodeling of the restaurant had been to make no visible progress toward that goal, but rather to announce repeatedly her intent to vacate the premises. That this intent was translated into action is made evident by Berg's conduct on the evening of Friday, July 13. Her claim that she and her friends were in fact "remodeling" at that time is incredible on its face. Why would Berg be removing paneling she had just installed a few weeks before (T. 123)? If, as is claimed, the restaurant was to be closed for a month for remodeling, why was it necessary to be at work at nine o'clock on a hot Friday evening in July when the air conditioner did not even work (T. 105)? The evidence indicates that the gathering at the restaurant was at best a social occasion for

conversation, drinks (T. 116), and polishing one's nails (T. 98), and at worst it was the beginning of the destruction which Berg had threatened.

Accordingly, when Wiley returned to the restaurant on Monday morning, he had every reason to believe Family Affair was moving out. This belief was confirmed by the presence of a truck-crane crew admittedly hired by Berg to remove a large air-conditioning unit from the roof of the building (T. 32), presumably at great expense to herself. In view of the fact that the air-conditioning unit did not need to be repaired but simply had to be connected, and did not need to be removed to permit the completion of any other of Berg's proposed projects, it was clear to Wiley, and is similarly clear on this appeal, that Berg's only reason for having the air conditioner removed was her decision to vacate the building entirely. Thus convinced of Berg's intent to abandon, and justifiably fearing for the physical safety of the premises in view of her threats to vandalize, Wiley decided to accept the abandonment and treat the lease as terminated. Under the circumstances, it was neither practical nor of interest to him to go to court to contest the abandonment or to try to hold an uncooperative tenant to the terms of the lease.

That Family Affair wanted to and did abandon the premises is also made clear by its conduct subsequent to July 13, 1973. Family Affair has never requested, either of Wiley or of any court, to be put back in possession for the remaining term of the lease. Its original civil action sought only damages for its claimed "eviction." Indeed, by filing its civil action in Hennepin County District Court,

it made clear that while Berg felt she had an alleged claim for damages, she had no actual desire to get the restaurant back. When Family Affair finally did assert a right to possession, it did not ask to be restored to possession for the remainder of the lease term, but only pending the outcome of the damage suit. This specific, qualified prayer for relief makes clear that this proceeding has been motivated from the beginning not by any bona fide desire to continue as Wiley's tenant, but simply as a litigation tactic in connection with her District Court action. See footnote 4. This proceeding in unlawful detainer, nominally brought to regain possession of the premises, was merely an afterthought to Family Affair's action for damages, filed some seven weeks or more after it was last in possession and after Wiley had taken substantial action, in the form of repairing the vandalism, doing the remodeling, and rerenting the premises to Weinand in reliance on Family Affair's having given up any desire to remain on the premises.

C. Wiley's Reentry Onto The Premises Was Justified In Light Of Family Affair's Unilateral Act Of Abandonment Or As A Completion Of The Bilateral Act Of Surrender.

The trial court found that Wiley's reentry and changing of the locks on the leased premises constituted an "eviction" of Family Affair (App. 21), and concluded in its memorandum that the "proper remedy" available to Wiley was the termination of the lease and the commencement of an unlawful detainer action (App. 26). The conclusion that Wiley should have proceeded first in an unlawful

detainer action is thus based upon the erroneous finding that Wiley "evicted" Family Affair. In fact, that is not at all what took place. As has been shown above, Family Affair had abandoned the premises and Wiley's reentry and changing of the locks merely constituted an acceptance of the vacated property, not an eviction. The changing of the locks was only a reaction to Berg's announced intention and explicit actions; it was not the initiating factor in the chain of events. It turns the true situation on its head to maintain that Wiley "evicted" Family Affair.

Analogous to the concept of abandonment is the doctrine of surrender. Surrender has been defined as "any acts which are equivalent to an agreement, express or implied, on the part of the tenant and of the landlord, that the former surrenders and the latter resumes the demised premises." See *Buckingham Apartment House Co. v. Dafoe,* 78 Minn. 268, 269, 80 N.W. 974, 975 (1899). See also *Dayton v. Craik,* 26 Minn. 133, 1 N.W. 813 (1879). Even if Berg's unilateral actions were not sufficient to constitute an abandonment, her obvious intent to move out combined with Wiley's decision to accept the premises, rather than try to hold her to the lease, constitutes just that sort of implied agreement which the law recognizes as a surrender. See *Dayton v. Craik, supra; Stern v. Thayer,* 56 Minn. 93, 57 N.W. 329 (1894); *Lafferty v. Hawes,* 63 Minn. 13, 65 N.W. 87 (1895).

Surely it cannot be said that Wiley acted too soon simply because there was evidence which tended to indicate that personal property belonging to Family Affair was still on the premises at the time that he retook possession. Given Family Affair's clear intent to abandon and the

threat of imminent physical destruction, certainly Wiley was not required to wait until every last article of Family Affair's personal property was removed from the premises. This is especially so in a situation like the instant one, where Family Affair has always been welcome at any time to recover its personal property (T. 463), and where the landlord can retake possession, as was done here, in a totally peaceful and nonviolent manner.

III.

ASSUMING ARGUENDO THAT FAMILY AFFAIR HAD NOT ABANDONED THE PREMISES, WILEY'S REENTRY WAS JUSTIFIED AS A NECESSARY ACTION TO PROTECT HIS PROPERTY AND MITIGATE HIS DAMAGES IN LIGHT OF BERG'S THREAT TO VANDALIZE THE PREMISES.

It is clear, and Wiley does not dispute, that the major purpose of providing a summary statutory proceeding for landlords to regain possession of their property is to make it unnecessary for them to "take the law in their own hands." Nevertheless, the landlord is still entitled to his "self-help" remedy where he can effect it without causing a breach of the peace. See, *e.g., Lobdell v. Keene,* 85 Minn. 90, 96, 88 N.W. 426, 428 (1901), where the Court stated:

> It is true, as a general rule, that where the terms of a written lease have expired, and the tenant wrongfully holds over in defiance of the rights of the landlord, and in any case where the owner is entitled to possession, he may make peaceable entry into the property, and retain and hold the possession thus gained, and exclude the tenant's return.

See also *Mercil v. Brouillette,* 66 Minn. 416, 418, 69 N.W. 218, 219 (1896), where the Court held:

> But if a person lawfully entitled to possession of real property can make peaceable entry, even while another is in occupation, the entry, in contemplation of law, gives or restores to him complete possession.

Thus, while under normal conditions Wiley could have proceeded in unlawful detainer, these, unfortunately, were not normal conditions. Wiley had been told of Berg's threat to damage the restaurant (T. 451), and had observed on Friday evening the beginning of that threatened damage; it was clear to him that he had to act as quickly as possible if he were to have any chance of protecting the premises from physical destruction. The situation would not permit the delay of a week or more that would be caused by pursuing the summary proceeding in unlawful detainer. Since Berg had previously closed up the restaurant, Wiley made a good faith decision to avail himself of his self-help remedy. On Monday, when he observed that Berg had not reopened the restaurant for business and indeed was nowhere to be seen, he, in the presence of the Osseo police, peacefully and without any force or violence changed the locks (T. 462). As it turns out, Wiley was, despite his efforts, too late to prevent substantial vandalism; but certainly he should not be faulted for trying to minimize the damage.

Surely it cannot be the law that where a tenant is in the process of maliciously destroying leased premises the landlord must stand by and watch his property being destroyed when it is possible for him to effect a peaceable

reentry and thus prevent further damage. Berg's actions in beginning the destruction of the leased property can be analogized to an anticipatory breach in contract law. When, prior to the time that performance is due, one party to a contract makes clear his intention not to perform, the other party is not required to stand by until the breach actually occurs, thus incurring maximum damages. Rather, he may, if he wishes, treat the contract as terminated at the time of the anticipatory breach, and proceed to take action so as to mitigate his damages resulting from the first party's breach. See 17A *C.J.S.* Contracts §472(1); *Walsh v. Mankato Oil Co.,* 201 Minn. 58, 275 N.W. 377 (1937). Likewise, Berg's activity justified Wiley in treating the lease as terminated, and thus it was entirely appropriate for him to take reasonable steps to mitigate his damages. The action that Wiley took, in light of Berg's willingness and ability to vandalize the property, was only such as was minimally necessary to protect the premises, accomplished in a totally peaceful manner and in the presence of the police in order to assure that there would be no breach of the peace.

CONCLUSION

Since a tenant may not sue a landlord or one aligned in interest with a landlord in unlawful detainer, Family Affair has improperly maintained this action against Wiley and Weinand. However, even if the action were deemed to be appropriate, the finding of the trial court that Family Affair was entitled to the premises is clearly erroneous. The evidence taken as a whole demonstrates conclusively that Family Affair had abandoned the premises at the time

that Wiley reentered and that in any event Wiley's reentry was justified in order to save his property from destruction. Moreover, all the issues involved herein are best resolved in respondents' civil action in the Hennepin County District Court where they are pursuing the remedy they first elected—*i.e.*, their alleged claim for damages. Therefore, the judgment of the trial court should be reversed, and the case should be remanded for the entry of judgment awarding possession of the restaurant to the appellants; or, in the alternative, this appeal should be stayed pending the outcome of the civil action pending before the Hennepin County District Court.

Respectfully submitted,

LEONARD, STREET AND DEINARD
By: Allen I. Saeks
Lowell J. Noteboom
David C. Zalk
800 Farmers & Mechanics
Bank Building
520 Marquette Avenue
Minneapolis, Minnesota 55402
Telephone: 333-1346
MEYER, NELSON AND MILLER
By: Gary J. Meyer
3735 North Highway 52
Robbinsdale, Minnesota 55422
Telephone: 588-9424
Attorneys for Appellants

APPENDIX

DEFENDANTS' EXHIBIT P

WILEY ENTERPRISES, INC.
101 - 5th Avenue S.E.
OSSEO, MINNESOTA 55369
January 4, 1973

Mr. Robert P. Harriman
5 Tenth Avenue South
Hopkins, Minnesota 55343

Dear Mr. Harriman

Re: Lease with Miss Kathleen Berg

This is our answer to your letter. We are going to turn down the request for renewing or writing a new lease at this time. Our experience with Miss Berg has been very poor. She does pay rent promptly, but the other conditions of our lease agreement have been ignored time and time again. It is clearly a breach of our lease agreement to remodel the structure without our written permission, yet major changes have been made. Signs have been installed, a store front was attached, holes were cut in the roof, walls were removed and moved, a furnace was changed from an oil burner to natural gas, and an old second hand furnace was installed in the rear hall. I could go on with a much longer list of infractions of a lease agreement and also the Osseo building code.

We have been asked only on two occasions for permission to make changes, and never have we given our per-

mission. The changes have taken place anyway, usually on weekends and during the night. You may ask why have we allowed this to happen repeatedly without taking legal action. The answer is quite simple. Legal action, as you know, takes time and costs money. As I told Miss Berg a couple of weeks ago, I have reached the point where, if any more violations of the lease occur, I'm through fooling around and legal action will be taken to terminate the lease and collect damages.

We care not that she is in the process of incorporating her business. We are not going to change our lease to accommodate this. We are having enough troubles endorcing a lease with Miss Berg without adding to our problems by trying to do business with a corporation which we know nothing about. We do not know who its officers and stockholders are and what the financial condition is. We can only judge by a poor relationship with the present leasee. We have agreed to not withhold our permission for unsignment [sic] unjustly, but we have been more than fair and will continue to be. Until such time as things change for the better, the lease will stand as is. We will continue to watch, wait, and hope. If at the end of this lease, things have changed we will renew or rewrite the lease.

Sincerely,

WILEY ENTERPRISES, INC.
R. A. Wiley, Pres.

DEFENDANTS' EXHIBIT III

2/1/73

Mr. Wiley,

This is my answer to your letter. Because of ill health & other personal reasons, I have been unable to answer your last letter, but in response, I would like to make the following comments & requests.

First of all, I formed a corporation Jan. 1, 1973 for my own personal reasons and hope you did not think I was trying to pull anything by requesting a new lease in the corporate name, as the corporation is just a formality. I am still the only member of the corporation and I felt that I had a good record for payment of rent, etc.

I do not feel I was responsible for the remodeling of the front of the building as my brother was your tenant at the time. I merely paid the $1000.00 escrow requirement in order to have the lease assignment. I have installed a new air conditioner, a sign and a suitable furnace for the building all of which was done by licensed contractors with permits, etc. Granted, many things were done at night for a couple of reasons. One is to avoid inconvenience to customers and most important, to avoid any further financial loss.

If I have abused my lease privileges in any other way I did so unknowingly and apoligize [sic] for the same. I am only interested in improving my business and am, in no way, trying to cause trouble.

At this time I am faced with the task of making some alterations in the kitchen area to bring certain items up to state regulations. This is an expense to me only, but I can see why the Health Dept. must have certain require-

ments. In the long run it will make the area much more useable.

These alterations include quarry tile on kitchen floors & ceramic tile on kitchen walls including bathrooms & possibly front & rear entrys [sic] with quarry tile. Other requirements include installation of booster heater for rinse water & drain around dishwasher.

I realize the ideal way to do this would be to close down & get it all done. Unfortunately, I am not that financially well off that I could do this so the work again would be done at night by contractors with permits taken out, etc.

I would appreciate your immediate consideration & response.

/s/ Kathleen Berg

DEFENDANTS' EXHIBIT O-1

WILEY ENTERPRISES, INC.
101 - 5th Avenue S.E.
OSSEO, MINNESOTA 55369
April 27, 1973

Kathleen Berg
The Family Affair
Osseo, Minnesota 55369

Dear Miss Berg:

We talked with you a couple of weeks ago about our desire to have the building back in shape. I see no progress being made. Therefore, this is legal notice. If in thirty

days all work is not complete we will take legal action to terminate the lease and collect the balance of rents due plus damages. When I say all work completed I mean finishing the remodeling in progress in the kitchen and dining area, the air conditioner in and ready to be used, the heating system in working order, all electrical work in inspectable condition, and most of all lien waivers turned in covering labor and materials. We further want it clearly understood that we claim by the terms of our lease that no property, once attached to our property, is to be removed from the premises. We also wish it to be clear that no remodeling will be started in the future until you have our written permission to do so. In the past it has been your practice to either ignore this provision of our lease or ask for permission and start work before permission is given.

Sincerely,

WILEY ENTERPRISES, INC.
/s/ R. A. Wiley, Pres.

PLAINTIFFS' EXHIBIT 11

MEYER, NELSON AND MILLER
Attorneys at Law
3735 North Highway 52
Robbinsdale, Minnesota 55422
June 29, 1973

Miss Kathleen Berg
Gas Light Cafe
225 Central Avenue
Osseo, Minnesota

Dear Miss Berg:

We are the attorneys for Wiley Enterprises, Inc., from whom you lease the premises at 225 Central Avenue, Osseo, Minnesota, under a Lease dated November 11, 1970.

Wiley Enterprises has brought to our attention that you are in default on that Lease in the following respects:

1. Item No. 5 provides: "The Lessee will make no changes to the building structure without first receiving written authorization from the Lessor." It has come to my clients' attention that you have been making substantial changes in the building structure without having first received written authorization from them.

2. Item No. 6 provides: "The Lessee agrees to operate the restaurant in a lawful and prudent manner during the lease period." It has come to my clients' attention that you are in violation of some health regulations in connection with your operation of the restaurant. You are operating the kitchen in an unhealthful and unclean manner.

My clients are doubtful that the operations would pass an inspection by the State Department of Health or the City authorities.

I have advised my clients that my clients' remedy in connection with these violations of the Lease are in accordance with Item No. 7 which provides: "Should the Lessee fail to meet the conditions of this Lease the Lessor may at their option retake possession of said premises."

In connection with the repairs that you have been making on the premises, my clients insist that the following items be completed within two weeks from the date of this letter:

1. Finish hooking up the air conditioner.

2. Finish the kitchen floor.

3. Finish the doors and paneling.

4. Repair the damage to the exterior wall where the sign is attached.

5. Repair and complete electrical installation and pass State inspection with written approval.

6. Provide lien waivers for all work and materials in connection with the improvements.

7. Furnish building permits and City Inspector approval for all work completed.

8. Furnish a State and City health inspection approval in writing.

My clients have advised me to tell you that if you do furnish these items within two weeks, you will have com-

plied with Item 5 and Item 6 and will not be in violation of the Lease. If you do not, they will have no alternative, but to exercise their option under Item 7 of the Lease and retake possession of the same.

Thank you in advance for your cooperation.

Very truly yours,

MEYER, NELSON & MILLER
By /s/ Gary J. Meyer

GJM:lwd

CERTIFIED MAIL-ADDRESSEE ONLY

STATE OF MINNESOTA — MUNICIPAL COURT
County of Hennepin — First Division, Minneapolis

THE STATE OF MINNESOTA
To the sheriff of Hennepin County
and the defendant:

SUMMONS

Case No. U.D. 57330

Whereas Kathleen Berg and Family Affair Restaurant, Incorporated, a Minnesota Corporation, plaintiff, has filed in this court a complaint against Rodney A. Wiley and Wiley Enterprises, Incorporated, Minnesota Corporation, defendants, of aforesaid county, a true and correct copy of which complaint is attached hereto. *Therefore,* you are

hereby commanded to summon the defendants, if to be found in Hennepin County, to appear before this Court at Room 445—MPLS. CITY HALL in the County of Hennepin, at 2:00 p.m. on September 21, 1973, to answer and defend against said complaint, and further to be dealt with according to law; and you will make due return to this court of this summons with your actions concerning it.

And you, the defendant, are hereby summoned to appear before this court at the time and place aforesaid, where the rights of all parties to the possession of the lands and tenements specified in the attached complaint will be determined, and where appropriate writs and orders will issue to enforce this determination. If you fail to appear, judgment will be entered against you by default.

Witness the Honorable James D. Rogers, Judge of the Municipal Court of Hennepin County, on September 4th, 1973.

/s/ J. WEUNSINGER
Court Deputy

Municipal Court Seal

STATE OF MINNESOTA — MUNICIPAL COURT
County of Hennepin — City of Minneapolis

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,
Plaintiffs,

vs.

RODNEY A. WILEY and WILEY ENTERPRISES, INCORPORATED, Minnesota corporation,
Defendants.

COMPLAINT IN UNLAWFUL DETAINER

Family Affair Restaurant, Inc., being duly sworn, on oath complains and states to the court:

I.

That on or about the fifteenth day of January, 1973, it became the lawful assignee of a valid lease to the premises lying and being in the County of Hennepin, State of Minnesota, located at 225 Central Avenue, Osseo, Minnesota for the term of five (5) years from the first day of December, 1970, and until the first day of December, 1975, for the sum of three hundred and no/100ths ($300.00) Dollars per month with possible yearly increases contingent on tax and cost increases, and that plaintiff entered into possession of said premises under said lease. Lease is attached as Exhibit A.

II.

That Wiley Enterprises, Inc., defendant in the above-entitled action, is the lessor under said lease agreement.

III.

That said lease agrement warranted to plaintiff peaceable possession and quiet enjoyment of aforesaid premises.

IV.

That on or about July 16, 1973, defendant forcibly entered and unlawfully evicted plaintiff from said premises, and has since such time unlawfully detained the possession thereof from plaintiff.

WHEREFORE, pending litigation to adjudicate damages complained of by plaintiff, plaintiff demands judgment against defendant for restitution of said premises and the costs and disbursements herein.

FAMILY AFFAIR RESTAURANT
By /s/ KATHLEEN BERG
Pres.

STATE OF MINNESOTA
SS.
COUNTY OF HENNEPIN

Kathleen Berg, being duly sworn, says that she is the President of Family Affair Restaurant, the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes it to be true.

/s/ KATHLEEN BERG

Subscribed and sworn to before me, this 27th day of August, 1973.

/s/ SUSAN M. VANCE
Notary Public
Ramsey County, Minnesota

My Commission Expires Aug. 1, 1980

(Title of Cause.)

SUMMONS

Case No. U.D. 57684

Whereas Kathleen Berg and Family Affair Restaurant, Incorporated, a Minnesota Corporation, plaintiff, has filed in this court a complaint against Rodney A. Wiley and Wiley Enterprises, Incorporated, a Minnesota Corporation, Marvel Weinand, Bonnie Osterberg and Pat Rocheford, defendants, of aforesaid county, a true and correct copy of which complaint is attached hereto, *Therefore*, you are hereby commanded to summon the defendants, if to be found in Hennepin County, to appear before this Court at Room 445—Mpls. City Hall in the County of Hennepin, at 2:00 p.m. on October 9th, 1973, to answer and defend against said complaint, and further to be dealt with according to law; and you will make due return to this court of this summons with your actions concerning it.

And you, the defendant, are hereby summoned to appear before this court at the time and place aforesaid, where the rights of all parties to the possession of the lands and

tenements specified in the attached complaint will be determined, and where appropriate writs and orders will issue to enforce this determination. If you fail to appear, judgment will be entered against you by default.

Witness the Honorable James D. Rogers, Judge of the Municipal Court of Hennepin County, on October 2nd, 1973.

By /s/ J. WEUNSINGER
Court Deputy

Municipal Court Seal

If you fail to appear at the above scheduled hearing and have not moved out of the premises, you may expect that you and your property may be removed by the sheriff.

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,
Plaintiffs,

vs.

RODNEY A. WILEY and WILEY ENTERPRISES, INCORPORATED, a Minnesota corporation, MARVEL WEINARD, BONNIE OSTERBERG and PAT ROCHEFORD,
Defendants.

COMPLAINT IN UNLAWFUL DETAINER

Kathleen Berg, president of Family Affair Restaurant, Inc., being duly sworn on oath complains and states to the Court:

1. That on or about the 15th day of January, 1973, Family Affair Restaurant, Inc. became the lawful assignee of a valid lease to the premises lying and being in the

County of Hennepin, State of Minnesota, located at 225 Central Avenue, Osseo, Minnesota, for the term of five (5) years from the first day of December, 1970, and until the first day of December, 1975, for the sum of $300.-00 per month with possible yearly increases contingent on tax and cost increases, and that plaintiffs entered into possession of said premises under said lease. Lease is attached as Exhibit A.

2. That Wiley Enterprises, Inc., one of the defendants in the above-entitled action, is the lessor under said lease agreement.

3. That said lease agreement warranted to plaintiffs peaceable possession and quiet enjoyment of aforesaid premises.

4. That on or about July 16, 1973, the defendants made entry, or forcible entry, into the lands and tenements above-described, in such circumstances that the entry was not allowed by law.

5. By the act complained of, defendants unlawfully evicted plaintiffs from said premises, took possession of said premises which they have retained to the present time, and since such time unlawfully detained possession thereof from plaintiff.

WHEREFORE, pending litigation to adjudicate damages complained of by plaintiffs, plaintiffs demand judgment against defendants for restitution of said premises and the costs and disbursements herein.

Dated: October 1, 1973.

FAMILY AFFAIR RESTAURANT, INC.
By /s/ KATHLEEN BERG
President

STATE OF MINNESOTA

SS.

COUNTY OF HENNEPIN

Kathleen Berg, being duly sworn, says that she is the President of Family Affair Restaurant, the plaintiff in the above-entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true to her own knowledge, except as to those matters therein stated on information and belief, and as to those matters she believes them to be true.

/s/ KATHLEEN BERG

Subscribed and sworn to before me this 1 day of October, 1973.

/s/ JOYCE D. AHLSTROM
Notary Public
Hennepin County, Minnesota

My Commission Expires Sept. 3, 1978.

EXHIBIT A TO COMPLAINT

WILEY ENTERPRISES, INC.
519 - 3rd Avenue N.E.
Osseo, Minnesota 55369

RENTAL LEASE

The following is a lease agreement for a period of five (5) years between Wiley Enterprises, Inc. the Lessor and Phillip Berg, proprietor of the Gas Light Cafe, Lessee. The said property located at 225 Central Avenue Osseo, Min-

nesota. The fixed cost of said lease to be three hundred dollars ($300.00) PER MONTH starting December 1, 1970 and continuing for a period of five (5) years and terminating on December 1, 1975. Each and every year and as soon as the tax statement is available the dollar increase in taxes over the previous year will be determined. Dividing this amount by one twelfth (1/12) will be the rent increase for the following 12 month period. The same procedure will be used to cover the insurance cost increase. No other items will be grounds for changing the rent fixed cost.

Item #2

A cash amount of one thousand dollars ($1,000.00) will be paid by Mr. Berg to Wiley Enterprises, Inc., on or before February 1, 1971. Said ($1,000.00) will be the charge of restoring the building front to its original condition. If however this lease remains in effect and is not terminated prior to December 1, 1975, the said ($1,000) will be returned to Mr. Berg by Wiley Enterprises, Inc.

Item #3

All costs of remodeling both before and during the period of this will be paid for promptly by the Lessee and no act of the Lessee will jeopardize the title of the Lessor.

Item #4

All repairs - utility - liability - insurance and other costs and charges, what ever be the nature, as related to this property and the operations, will be paid for promptly by the Lessee.

Item #5

The Lessee will make no changes to the building structure without first receiving written authorization from the Lessor. The Lessor will promptly reply in writing to each request and will cooperate with the Lessee on any reasonable request.

Item #6

The Lessee agrees to operate the restaurant in a lawful and prudent manner during the lease period.

Item # 7

Should the Lessee fail to meet the conditions of this Lease the Lessor may at their option retake possession of said premises. In any such event such act will not relieve Lessee from liability for payment the rental herein provided or from the conditions or obligations of this lease.

Item #8

The Lessee will not sub-lease, sub-let or assign this lease without written consent of the Lessor. The Lessor will not reasonably [sic] withhold such consent but may require the guarantee of such assignment of the Lease.

Item #9

The Lessor guarantees the full right of the Lessee to hold and enjoy possession of the demised premises upon payment of rents and performance of all convenantance [sic] agreements of this lease.

Item #10

The invalidity or unenforceability of any provisions of this lease shall not affect the validity of any other provisions.

Item #11
It is understood and agreed that provisions, covenants and conditions of this lease shall bind and insure [sic] to the benefit of the legal representatives or successors and assigns of the respective partners [sic] hereto.

Item #12
All alterations, additions and improvements made by the Lessee to the or upon the demised premises, except signs, cases, counters, tables, chairs and other removable trade fixtures, shall at once when made or installed be deemed to have been attached to the property of the Lessor; if however at the termination of this lease, the Lessor directs in written notice to Lessee, Lessee shall promptly remove the additions improvements, fixtures, trade fixtures and repair any damage by such removal.

Date: 11/11 1970
Lessor: Wiley Enterprises, Inc.
By: R. A. Wiley, Pres.
Lessee: Phillip Berg
Witness: Carl A. Jones

(Title of Cause.)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

File No. UD 57330

The above entitled matter, being regularly on the General Term Calendar of this Court, came on for trial, without a jury, before the undersigned, one of the judges of said Court, commencing November 5, 1973.

Robert P. Larson, Esq., appeared for and on behalf of the plaintiffs; Gary J. Meyer, Esq., appeared for and on behalf of defendants Rodney A. Wiley, Wiley Enterprises, Inc., and, after testimony was closed, Marvel A. Weinand. Defendants Bonnie Osterberg and Pat Rocheford appeared pro se.

At the close of plaintiffs' evidence, the Court dismissed the action as to defendants Bonnie Osterberg and Pat Rocheford.

The Court, having heard the testimony offered by the respective parties and duly considered the same, together with the briefs submitted by the parties, and from all the files and records in said case, makes the following Findings of Fact, Conclusions of Law and Order for Judgment:

FINDINGS OF FACT

1. On November 11, 1970, defendant Wiley Enterprises, Inc., as lessor, and Phillip Berg, as lessee, executed a lease covering the premises known by address as 225 Central Avenue, Osseo, Minnesota, for a period of five years commencing December 1, 1970, and providing for a monthly rental of three hundred ($300.00) dollars with certain escalator provisions based on increases in taxes and insurance over the term of the lease.

2. Said Phillip Berg entered into possession of said premises on or about December 1, 1970.

3. Thereafter, in the early part of 1971, said Phillip Berg assigned his interest as lessee to Kathleen Berg, one of the plaintiffs herein. Said assignment was consented to by defendant Wiley Enterprises, Inc. In the early part of 1973

plaintiff Kathleen Berg assigned her interest as lessee to plaintiff Family Affair Restaurant, Inc. Thereafter, plaintiff Family Affair Restaurant, Inc., made rental payments to defendant Wiley Enterprises, Inc., and the same were accepted by said defendant to and including the payment due on June 1, 1973.

4. Defendant Wiley Enterprises, Inc., by acquiescence consented to the assignment of the lessee's interest under said lease from plaintiff Kathleen Berg to Family Affair Restaurant, Inc.

5. All rentals due under said lease were paid to defendant Wiley Enterprises, Inc., through the payment due June 1, 1973. The rental payment due July 1, 1973, was not made.

6. On July 14, 1973, defendant Wiley Enterprises, Inc., forcibly entered said premises without the consent of plaintiffs, changed the locks on the doors thereof, and thereafter excluded plaintiffs from possession thereof.

7. Defendant Wiley Enterprises, Inc., thereafter purported to enter into a written lease of said premises to defendant Marvel Weinand for a period of five years under substantially the same terms and conditions as contained in the lease from defendant Wiley Enterprises, Inc., to Phillip Berg. Defendant Marvel Weinand entered into possession of said premises on or about August 1, 1973, and since that date has remained in possession thereof.

8. At all times since July 14, 1973, defendants have refused to surrender possession of said premises to plaintiff Family Affair Restaurant, Inc., and defendant Marvel Weinand still detains the same.

9. At no time did plaintiff Family Affair Restaurant, Inc., surrender possession of said premises to defendants or any of them, nor did said plaintiff ever abandon said premises.

10. Defendant Rodney A. Wiley at all times acted in his capacity as president of Wiley Enterprises and not in his individual capacity.

11. Defendant Wiley Enterprises, Inc., wrongfully and forcibly entered said premises and evicted plaintiff Family Affair Restaurant, Inc., therefrom.

12. Defendant Marvel Weinand wrongfully detains said premises from plaintiff Family Affair Restaurant, Inc., the person entitled to possession thereof; and

CONCLUSIONS OF LAW

1. Defendant Rodney A. Wiley is entitled to judgment in his favor against plaintiffs, together with his costs and disbursements.

2. Plaintiff Family Affair Restaurant is entitled to judgment of restitution of said premises against defendants Wiley Enterprises, Inc., and Marvel Weinand, together with its costs and disbursements.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: March 1, 1974.

BY THE COURT

/s/ ROBERT E. BOWEN
Judge of Municipal Court

5 Day Stay Ordered.

MEMORANDUM

The evidence presented in this case was very much in conflict on certain factual issues. Those issues of fact have been resolved as reflected in the Findings filed herein, and no useful purpose would be served by an extended discussion of the evidence in this Memorandum.

A number of legal issues have been raised by the parties, however, and the parties have submitted comprehensive briefs on those issues. The questions of law which are presented appeared to be as follows:

1. Does the unlawful detainer remedy contained in Chapter 566, Minnesota Statutes, lie in this action by a tenant against the landlord and a subsequent tenant? To what extent is relief available if the action does lie, as against the landlord and the subsequent tenant?

2. Assuming that plaintiffs did not abandon or surrender the premises, as determined by the Findings, was the landlord justified in evicting plaintiffs, or was the forcible entry by the landlord contrary to Minnesota Statutes, Section 566.01?

3. Is payment of the rent which became due on July 1, 1973, a prerequisite to the bringing of this action?

4. Are the rights of Weinand under her lease from the landlord entered into subsequent to plaintiffs' eviction, superior to those of plaintiffs'?

5. Is this action barred by limitations or laches?

The action was dismissed as to defendants Osterberg and Rocheford at the close of plaintiffs' evidence, and the

Court has found that defendant Rodney A. Wiley at all times was acting in his capacity as an officer of defendant Wiley Enterprises Inc. and that he is entitled to judgment in his favor. Furthermore, all rights under the lease from Wiley Enterprises, Inc., to Phillip Berg having been assigned, first to Kathleen Berg (to which assignment the landlord expressly consented) and then by Kathleen Berg to Family Affair Restaurant, Inc. (to which assignment the landlord assented and acquiesced by acceptance of rent from the assignee), the corporate plaintiff Family Affair Restaurant, Inc., is the real party in interest, and will hereinafter be referred to in this Memorandum as "plaintiff". Similarly, defendant Wiley Enterprises, Inc., will hereinafter be referred to as "defendant Wiley".

1. Availability of Unlawful Detainer Remedy.

This action is brought under the provisions of Minnesota Statutes, Section 566.02 which provides for the recovery of possession of premises by the person entitled to possession thereto in any case where "any person has made unlawful or forcible entry into lands or tenements, and detains the same, or, having peaceably entered, unlawfully detains the same . . ." Defendants argue that the remedy of unlawful detainer under the statute is available only to landlords in actions against tenants, and cite in support of their position *Chandler v. Kent,* 8 Minn. 524 (Gil. 46) (1863); *Steele v. Bond,* 28 Minn. 267, 9 N.W. 772 (1881); *Judd v. Arnold,* 31 Minn. 430, 18 N.W. 151 (1884); *Burton v. Rohrbeck,* 30 Minn. 393, 15 N.W. 678 (1883); *Alworth v. Gordon,* 81 Minn. 445, 84 N.W. 454 (1900); and *Anderson v. Ries,* 222 Minn. 408, 24 N.W. 2d 717 (1946).

In *Chandler* the Court stated, as pointed out by defendants, that "the sole object of the statute under which this action was brought, is to provide a summary remedy by which landlords may be *restored to the possession* of leased premises, on the expiration of the lease, or the failure of the lessee to comply with provisions of the lease, but, this object obtained, the statute goes no further. Any other right which the landlord may have, arising out of his contract, must be enforced, if at all, by another action". (Emphasis in the original.) The judgment of restitution was reversed on the ground that the plaintiff had not proved his possessory right to all of the premises involved as opposed to an undivided fractional part thereof. The quoted statement was made in that context and not in the context of deciding whether a landlord-tenant relationship between the parties was a prerequisite to bringing this action.

In *Steele* the Court remanded the case for a new trial on the ground that the defense raised the affirmative equitable issues of which the Municipal Court lacked jurisdiction. The statement by the Court that the statute applies ". . . only to the conventional relation of landlord and tenant", was made in the context that the statute was not intended as a substitute for the action of ejectment nor to afford means of enforcing agreements to surrender possession in the absence of a landlord-tenant relationship existing or having existed in the past. As the Minnesota Court stated in *Anderson v. Ries,* 22 Minn. at 416: "It is sufficient to say that for present purposes the cited case [Steele] has been adequately distinguished in the Alworth case and that it is not necessary now to go over the

grounds of distinction again". *Alworth* pointed out that in the *Steele* case the contract involved was a lease in form but was intended by the parties to secure payment of money and was in fact a mortgage. The Court made it very clear that a landlord-tenant relationship between the parties need not exist at the time of the commencement of the action.

The prerequisite for bringing an action for unlawful detainer is the right of possession in the plaintiff. See *Leader v. Joyce,* 271 Minn. 9, 12, 135 N.W.2d 34, 37 (1965). The Wiley-Berg lease not having been terminated, plaintiff in this proceeding stands in the shoes of the landlord for the purpose of maintaining this action, in that the landlord's possessory rights were transferred to plaintiff by virtue of the lease and its subsequent assignments. Plaintiff is the party entitled to possession. Defendant Weinand is wrongfully in possession and wrongfully detaining the premises, and the remedy of the summary proceeding in this unlawful detainer is clearly available to plaintiff.

2. Defendant Wiley's Entry into the Premises.

It is undisputed that the written lease between defendant Wiley and Phillip Berg, assigned first to Kathleen Berg, with Wiley's consent, and subsequently to Family Affair Restaurant, Inc., with Wiley's acquiescence, was still in force at the time Wiley undertook to change the locks on the premises and exclude plaintiffs therefrom. Defendant Wiley justifies its action in entering the premises and changing the locks upon the basis that plaintiff had abandoned whatever rights it had in the lease. There is a clear

conflict of testimony on the matter of payment of the July rent. Plaintiff claims that it paid the rent and subsequently stopped payment, after the changing of the locks, and that the action of stopping payment is evidenced by the writings on the check stub corresponding to check number 7079, which purports to represent a three hundred ($300.-00) dollar check to Wiley Enterprises. Defendant claims that it never received the check. Regardless of whether or not the rent was paid as of July 14, 1973, defendant Wiley was not justified in entering the premises in the manner in which it did. Its proper remedy was to terminate the lease and evict plaintiff under the provisions of the unlawful detainer statute, which was enacted precisely for the purpose of preventing landlords from taking the law into their own hands as Wiley did here. *Lobdell v. Kenne*, 85 Minn. 90, 88 N.W. 426 (1901).

3. Payment of July Rent as a Prerequisite.

Having been evicted, plaintiff should not be required to pay the rent as a prerequisite for bringing this action; and, having evicted plaintiff, defendant Wiley cannot be heard to complain that the rent was not paid. The covenants of possession and of payment of rent are mutual. See *Fritz v. Warthen*, — Minn. —, — N.W.2d —, filed November 30, 1973; *In Re Estate of Wishnick*, 199 Minn. 153, 155, 271 N.W. 244, 245 (1937).

4. Priority of Rights of Plaintiff and Defendant Weinand.

There is evidence that Mrs. Osterberg and Mrs. Rocheford were aware of plaintiffs' claims here and of the impending lawsuit even before August 1, 1973. The deposition of Rodney A. Wiley, which the parties agreed could be received in evidence, reflects that Mrs. Weinand had actual notice of the fact that plaintiff was claiming a right in the premises. Actual notice on Mrs. Weinand's part eliminates the need to consider whether the provisions of the Recording Act are applicable here to the respective rights to two leases, and plaintiffs' possessory right under the earlier subsisting lease is superior to that of the subsequent possessor.

5. Limitations or Laches.

The statutory limitation for bringing this proceeding is three years. Minn. Stat., Section 566.04. Even if laches were an appropriate defense to be asserted where such a statutory limitation exists, the fact that plaintiffs commenced the first unlawful detainer proceeding on August 27, 1973, would render that defense unavailable here.

R.E.B.

(Title of Cause.)

ORDER FOR ADDITIONAL BOND

File No. UD 57330

The above-entitled matter came on before the undersigned in Chambers, on May 28, 1974, on the application of plaintiff to require defendants to post an additional bond in connection with defendants' appeal from the judgment heretofore rendered herein.

ROBERT P. LARSON, ESQ., appeared on behalf of

the plaintiff; GARY J. MEYER, ESQ., appeared on behalf of the defendants.

After hearing the arguments of Counsel, the Court being fully advised in the premises,

IT IS HEREBY ORDERED

That within five days from and after the date of the filing of this Order, defendants shall submit to this Court for approval a supersedeas bond in the principal sum of $12,000.00.

DATED: May 29, 1974.

THE COURT

/s/ ROBERT E. BOWEN
Judge of Municipal Court

MEMORANDUM

In this case judgment of restitution was entered in favor of a tenant under a written lease from defendant Wiley Enterprises Inc., against both the defendant Wiley and defendant Weinand, who was in possession of the premises under a subsequent written lease from Wiley executed prior to the expiration of the Berg lease. Thus the case appears to be a fairly unusual one on its face, in that a tenant is maintaining an unlawful detainer proceeding against the landlord and another tenant. However, the Court found as a basis for its decision that the possessory rights of the landlord had passed to plaintiff under the first lease and that plaintiff stood in the shoes of the land-

lord insofar as the maintenance of the unlawful detainer portion of this action against defendant Weinand was concerned.

Accordingly it seems to the Court that Minnesota Statutes Sec. 566.12 as well as Rule 108, Rules of Civil Appellate Procedure, is applicable, and that defendant Weinand is a "party appealing" remaining "in possession of the premises," and that her bond should accordingly be "conditioned to pay all costs of such appeal and abide the order the court may make therein and pay all rent and other damages justly accruing to the party excluded from possession during the pendency of the appeal."

The motion was not brought before the Court on a formal notice, the parties agreeing to present the matter informally and in Chambers. There was no affidavit evidence presented to the court, but plaintiff's attorney made certain representations, which the count accepts for the purposes of this motion, as to the cost of certain trade fixtures installed by plaintiff in the premises and the amount of plaintiff's net profit during at least a part of the period of operation under plaintiff's lease from defendant Wiley.

The parties agreed that if an additional bond were to be ordered herein, the court might consider the factors of use and occupancy of the premises during the appeal period and use of the trade fixtures belonging to plaintiff during the appeal period, as well as some figure for waste and depreciation during said period. The parties were not agreed that the net profit which plaintiff might have earned during the appeal period was a factor to be considered.

The rental for the premises provided for under the lease

to plaintiff was $300.00 per month. The parties have indicated to me that the appeal would probably require a period of eight to ten months for dispostion, and I have accordingly considered the figure of $3,000.00 to be a fair and reasonable one representing the value of the use and occupancy of the premises by defendant Weinand during the appeal period.

I have arrived at a figure of $2,000.00 representing the reasonable value of the use of the trade fixtures during the appeal period by taking the figure submitted to me by plaintiff's attorney, $15,000.00, representing the cost of such fixtures which have a useful life of approximately seven years. For the item of waste or depreciation, which I consider to be normal wear and tear I have considered a figure of $2,000.00.

Representing the net profit from the operation of the business which plaintiff might have been expected to earn had she been in possession during the appeal period apart from the value of plaintiff's personal service as the manager of such a business, it seems to me that a figure of $5,000.00 would be reasonable. I relize that defendant feels that no consideration should be given to such possible net profits lost by plaintiff, and that plaintiff feels that the figure is too low.

Accordingly, I have arrived at $12,000.00 as the amount to be required by way of supersedeas bond pending the appeal in this matter.

R.E.B.

(Title of Cause.)

NOTICE OF APPEAL

File No. 57330

TO: Robert P. Larson, Attorney for Plaintiff;

PLEASE TAKE NOTICE that the Defendants, Wiley Enterprises, Incorporated, a Minnesota corporation, and Marvel A. Weinand, appeal to the Supreme Court of Minnesota from the judgment of restitution which was entered on March 14, 1974, and from the whole thereof.

Dated: March 14, 1974.

MEYER, NELSON & MILLER
By /s/ GARY J. MEYER
3735 N. Highway 52
Robbinsdale, Minnesota 55422

45031

State of Minnesota
In Supreme Court

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,
Plaintiffs-Respondents,

vs.

RODNEY A. WILEY, WILEY ENTERPRISES, INCORPORATED, a Minnesota corporation, and MARVEL WEINAND,
Defendants-Appellants.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

Legal Issues 1

Statement of the Case 2

Statement of Facts 2

Argument:

I. *Minnesota Statutes,* Section 566.02 is available to a tenant to recover possession of leased premises from a landlord who has forcibly evicted the tenant from actual possession before the end of the lease term 8

II. The trial court's finding that the tenant neither surrendered nor abandoned its lawful possession of the leased premises is not manifestly contrary to the evidence 13

III. A landlord may not take the law into his own hands, ignoring all legal remedies available to him, and forcibly enter leased premises when he hears rumors that his tenant has threatened to damage and abandon the premises 20

Conclusion 23

TABLE OF AUTHORITIES

Statutes:

Law of Mich., No. 314, C. XXX, §2 (1915) 13
Minn. Gen. Stat., c. 84, §6109 (1894) 10
Minn. Stat. §566.01 ..... 11, 21, 22
Minn. Stat. §566.02 ..... 1, 8, 10, 11, 13
Minn. Stat. §566.03, Subd. 1 ..... 9, 11
9 Utah Code Anno. (1953), 78-36-1 12

Tenant's brief in Berg v. Wiley I, 303 Minn. 247, 226 N.W.2d 904 (1975)

Minnesota Cases:

Chandler v. Kent, 8 Minn. 524 (Gil. 467) (1863) 11
George C. Laver Stone & Construction Co. v. Armour & Co., 149 Minn. 359, 183 N.W. 819 (1921) 19
Hildebrandt v. Newell, 199 Minn. 319, 272 N.W. 257 (1937) 19
Melco Investment Co. v. Gapp, 259 Minn. 82, 105 N.W.2d 907 (1960) 14
Nelson v. Thompson, 23 Minn. 500 (1877) 17
O'Neill v. Jones, 72 Minn. 446, 75 N.W. 701 (1898) 10
Peterson v. Krueger, 67 Minn. 449, 70 N.W. 567 (1897) 11
Strand v. Hand, 178 Minn. 460, 227 N.W. 656 (1929) 20
Viking Automatic Sprinkler Company v. Viking Fire Protection Company, 280 Minn. 250, 159 N.W.2d 250 (1968) 14

Other Cases:

Jordan v. Talbot, 12 Cal. Rptr. 488, 361 P.2d 20 (1961) 13
Pelarin v. Misner, 241 Mich. 209, 217 N.W. 36 (1938) 13, 22
Peterson v. Platt, 16 Utah2d 330, 400 P.2d 507 (1965) 11
Phelps v. Randolph, 147 Ill. 335, 35 N.E. 243 (1893) 13

State of Minnesota
In Supreme Court

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,
Plaintiffs-Respondents,

vs.

RODNEY A. WILEY, WILEY ENTERPRISES, INCORPORATED, a Minnesota corporation, and MARVEL WEINAND,
Defendants-Appellants.

RESPONDENTS' BRIEF

LEGAL ISSUES

I. Is *Minnesota Statutes,* Section 566.02 available to a tenant to recover possession of leased premises from a landlord who has forcibly evicted the tenant from actual possession before the end of the lease term?

The Municipal Court held: In the affirmative.

II. Are the trial court's findings that the tenant neither surrendered nor abandoned its lawful possession of the leased premises manifestly contrary to the evidence?

The Municipal Court held: In the negative.

III. May a landlord take the law into his own hands,

ignoring all legal remedies available to him, and forcibly enter leased premises when he hears rumors that his tenant has threatened to damage and abandon the premises?

The Municipal Court held: In the negative.

STATEMENT OF THE CASE

This is an unlawful detainer action brought by Family Affair Restaurant, Inc., tenant under a written lease, and Kathleen Berg, President and sole shareholder of Family Affair Restaurant, Inc., against Wiley Enterprises, Inc., the landlord, Rodney A. Wiley, President of Wiley Enterprises, Inc., Marvel Weinand, a subsequent tenant of Wiley Enterprises, Inc., Bonnie Osterberg and Pat Rocheford. The action was tried in the Hennepin County Municipal Court before Judge Robert E. Bowen, who dismissed the suits against Rodney A. Wiley, Bonnie Osterberg and Pat Rocheford. The trial court's Findings of Fact, Conclusions of Law and Order for Judgment were filed on March 1, 1974, awarding possession of the premises to Family Affair Restaurant, Inc. Wiley Enterprises, Inc. and Marvel Weinand filed their notice of appeal from said judgment on March 14, 1974, and on May 29, 1974, the trial court entered its order requiring Wiley Enterprises, Inc. and Marvel Weinand to post a $12,000 supersedeas bond to permit them to remain in possession of the premises pending this appeal.

STATEMENT OF FACTS

On November 11, 1970, defendant Wiley Enterprises, Inc. leased to Phillip Berg the premises at 225 Central

Avenue, Osseo, Minnesota for a term of five years commencing December 1, 1970, for a monthly rental of $300.00, with certain escalator provisions, based on increases in taxes and insurance over the term of the lease.

In the early part of 1971, Phillip Berg assigned his interest as lessee to Kathleen Berg, one of the plaintiffs in this action. Defendant Wiley Enterprises, Inc. consented to the assignment. In the early part of 1973, plaintiff Kathleen Berg assigned her interest as lessee to plaintiff Family Affair Restaurant, Inc., a corporation formed by Kathleen Berg who is its president and sole shareholder (T. 12). Thereafter, Family Affair Restaurant, Inc. made rental payments to defendant Wiley Enterprises, Inc., and the latter accepted the rental payments up to and including the payment that was made on June 1, 1973 (T. 15). Thus, defendant Wiley Enterprises, Inc. consented by acquiescence to the assignment by Kathleen Berg of her lessee's interest under the lease to Family Affair Restaurant, Inc.

Subsequent to the assignment of the leasehold interest by Kathleen Berg to Family Affair Restaurant, Inc., Kathleen Berg at no time indicated to Wiley Enterprises, Inc. a desire on the part of Family Affair Restaurant, Inc. to vacate the premises (T. 19). However, Berg feared that Wiley would evict her corporation. That fear arose in her because prior to July 13, 1973, Rodney A. Wiley, president of Wiley Enterprises, Inc., had sent her a letter in which he demanded that Berg complete a remodeling project within ten days. Berg believed that the ten-day period would end on Friday, July 13, 1973, and that she could not possibly complete the work by that time (T. 65). She

believed, further, that the implication of the demand was that if she did not complete the remodeling according to the demand, Wiley Enterprises, Inc. would evict her on July 13th, or shortly thereafter. Further, Berg feared that her landlord would not renew the lease because of the animosity that Rodney A. Wiley had repeatedly displayed toward her on various occasions. Thus, even though Berg never indicated a desire to vacate the premises, she did on one occasion speculate about moving her restaurant if it were evicted or if her landlord were to refuse to renew the lease. On another occasion, Berg had looked into the prospect of constructing a building to house her restaurant in the event of the occurrence of one or both of those contingencies (T. 31).

Prior to July 13, 1973, Berg removed a business sign from the exterior of the premises at the direction of Rodney A. Wiley (T. 29). Further, on July 16, 1974, she removed an air conditioning unit located on top of the building, unattached, to avoid the possibility of its being removed by someone else, particularly by Rodney A. Wiley who, Berg believed, desired to have the unit as his own (T. 33).

On Friday, July 13, 1973, plaintiff Berg conducted her prosperous (T. 30) restaurant business as usual. Prior to and during that day, she informed the waitresses employed at Family Affair Restaurant that she intended to close the restaurant (T. 20). The purpose of closing was to install quarry tile in the kitchen as required by health authorities and to complete other remodeling of the kitchen and other areas of the restaurant that Berg had begun during the last part of 1972 and early part of 1973, the completion of which had been delayed because of lack of funds.

By July 13, Berg had expended approximately $25,000.00 for the remodeling (T. 29). She was being pressured by defendant Wiley to quickly complete the remodeling, as was indicated above. During the afternoon of Friday, July 13, 1973, defendant Rodney A. Wiley came to the premises for the purpose of changing the locks on the doors, acting only on the basis of rumor that plaintiff Kathleen Berg intended to vacate the premises, but having received no notice of such intention from Berg (T. 18). Berg, however, directed Wiley to leave the premises, and told him expressly that she did not intend to vacate the premises.

Defendant Wiley left the premises, but returned at 7:00 P.M. to enter various rooms within the premises. At this time plaintiff Berg was absent from the premises. When Wiley left a second time, Berg, approximately at 9:00 P.M., returned to the premises, locked the doors, displayed a sign saying "Closed for Remodeling," and proceeded with the work of remodeling, along with friends and employees who were helping with the work (T. 21-22).

The remodeling work done included removing paneling from one wall and carrying it to the rear of the premises, removing ceiling tile, and moving tables, chairs, and other restaurant paraphernalia so that they would be out of the way of the work of remodeling (T. 22-23), *i.e.*, shelving was stacked on booths, and steak sauces were grouped on one table.

Shortly after her return to the premises at 9:00 P.M., plaintiff Berg observed defendant Wiley peering in through the window at the front of the restaurant and pounding, and shouting demands to be admitted into the premises. Berg, because she was fearful, and because she preferred

that Wiley leave, refused to admit the latter. Only after police, called for by Berg (T. 24), had arrived, did Berg admit Wiley onto the premises.

Upon being admitted to the premises and at the suggestion of and in the presence of police officers, defendant Wiley entered into an agreement with plaintiff Berg that Wiley would not attempt to take possession of the premises and Berg would not engage in further remodeling until each had consulted his attorney regarding his rights vis-a-vis the premises. The consultations were to occur on the following Monday, July 16, 1973 (T. 25). Pursuant to the agreement, on the following Monday morning plaintiff Berg consulted her attorney.

In the afternoon of that Monday, Berg went to the premises and discovered that the locks on the doors of the premises had been changed and that a "No Trespassing" sign had been erected, both of which had been done by defendant Wiley (T. 27). Thereupn, Berg cancelled the check for the July rental (T. 27). All of the trade fixtures and supplies used in the operation of Family Affair Restaurant remained on the premises, except for some perishables which were removed by plaintiff Berg on the morning of Saturday, July 14, 1973. The removal conformed to the agreement allowing such entered into by defendant Wiley and plaintiff Berg during the confrontation which occurred between the parties on the evening of July 13, 1973. Those trade fixtures that remained were a grill, a freezer, a walk-in cooler, an air-conditioning unit, a reach-in refrigerator, a griddle oven, a sink, a dishwasher, a wall refrigerator for displaying pies, etc., and an ice machine (T. 168). The total value of these trade fixtures was approximately $10,000.00 (T. 19).

Since their eviction on Monday, July 16, 1973, plaintiffs Kathleen Berg and Family Affair Restaurant, Inc., continuously have been refused the rightful and lawful possession of the premises.

At some undetermined time after the morning of Saturday, July 14, but before Tuesday afternoon, July 17, the interior of the restaurant had been damaged. Officer Good testified that he saw no evidence of destructive conduct when he went to the premises on the evening of July 13, 1973. He also testified that any condition of the premises at that time not in a state of complete repair was attributable to the work of remodeling that had transpired prior to his arrival (T. 77). Plaintiff Berg and her friends removed some perishables from the restaurant on Saturday morning, at which time the premises had not been damaged. However, Officer Gerald Getchell testified that he was in the premises on Tuesday morning, July 17, and that at that time the premises looked vandalized. This uncontroverted testimony sets forth the time frame within which the complained of vandalism occurred.

There is no evidence whatever that anyone was in the premises after plaintiff Berg left the premises on Saturday and before Officer Getchell arrived on Tuesday. In fact, the only evidence indicating that anyone *could* have been within the premises during the period is that which indicates that during that time defendant Wiley changed the locks.

ARGUMENT

I.

MINNESOTA STATUTES, SECTION 566.02 IS AVAILABLE TO A TENANT TO RECOVER POSSESSION OF LEASED PREMISES FROM A LANDLORD WHO HAS FORCIBLY EVICTED THE TENANT FROM ACTUAL POSSESSION BEFORE THE END OF THE LEASE TERM.

Respondents herein, Kathleen Berg and Family Affair Restaurant, Inc., clearly fall within the class of persons afforded protection by *Minnesota Statutes,* §566.02 against being dispossessed of property in which they have the right of possession. *Minnesota Statutes,* §566.02 provides that:

> [W]here any person unlawfully or forcibly enters lands or tenements and detains the same, or peaceably enters lands or tenements and unlawfully detains the same, the person entitled to possession thereof may maintain an action to recover possession of such lands or tenements as hereinafter provided.

The above statute grants to the person entitled to possession a right to maintain an action against *any person* who does the acts prohibited by the statute. The meaning and scope of the words "any person" is clear. The right to bring an action in forcible entry and detainer under *M.S.A.* §566.02 does not require that the person proceeded against be one within a particular class of persons. Appellant's argument that in order to maintain an action in *unlawful detainer* (as opposed to an action in forcible entry and detainer), there must exist between the parties the conventional relationship of landlord and tenant, and that the only class of persons who may bring an action

under the statute is the landlord, is totally immaterial. This argument is appropriate only with regard to an action brought under *M.S.A.* §566.03.

Further, appellant herein has committed acts recognized by the section as forming the basis for action. Specifically, defendant Wiley Enterprises, Inc., acting through its president, Rodney A. Wiley, made an "unlawful or forcible entry into lands . . . and detain[ed] the same." The evidence adduced at trial clearly shows that on July 16, 1974, appellant, while respondent Berg was absent from the premises, entered said premises and changed the locks on the doors, thereby unlawfully evicting respondent Berg from the premises.

Evidence introduced at the trial establishes also that appellant "*forcibly*" entered the premises involved. In fact, the trial court, in its Findings of Fact, Conclusions of Law specifically stated that appellant forcibly entered the premises and detained them, depriving respondents of their lawful possession thereof.

In addition, respondents clearly are shown by the evidence to be the "person(s) entitled to possession" of the leased premises. Respondents proved at trial that on November 11, 1970, appellant Wiley Enterprises, Inc. leased the premises to Phillip Berg, respondent Berg's brother, and that in the early part of 1971, the former assigned his leasehold interest to respondent Berg, who in turn, in the early part of 1973, assigned her leasehold interest to respondent Family Affair Restaurant, Inc. The record shows that appellant Wiley Enterprises, Inc. consented to both assignments. Thus, on July 16, 1974, since the term of the lease would not have expired for two years hence,

respondents held a leasehold interest in the premises at 225 Central Avenue, Osseo, Minnesota, and, as an incident of that leasehold interest, had a lawful right to peaceful and quiet possession.

A lessee's suit against a lessor, or against one to whom the lessor's rights have been transferred, to recover possession of property lost due to the lessor's or transferee's forcible entry and unlawful detainer, is not new to Minnesota judicial history, as appellants seem to argue (Appellants' Brief, p. 9). In *O'Neill v. Jones,* 72 Minn. 446, 75 N.W. 701 (1898), the plaintiff, a lessee, brought an action under G.S. 1894, C. 84, §6109, the predecessor to the present *M.S.A.* §566.02, in the Municipal Court of Duluth against two defendants, one of whom had been the owner-lessor of the leased premises and one of whom was the subsequent purchaser of the leased premises, to recover possession of the premises, alleging that "defendants had wrongfully and forcibly entered thereon, and thereafter unlawfully and by force detained possession from plaintiff." *O'Neill, supra,* at 477. The Municipal Court ordered judgment in favor of the plaintiffs and directed restitution of the premises to them. On appeal by the defendants, the order was reversed when the defendants showed that the plaintiff had failed to prove that, "at the time of the entry and detainer of which he complains, he or his grantor was in the actual and peaceful possession of the premises in dispute." *O'Neill, supra,* at 477. Thus, while it is true that the plaintiff-lessee was not successful in its suit under the predecessor of *M.S.A.* §566.02, nevertheless, a suit was allowed wherein a lessee proceeded against a lessor.

Appellants further argue that as a prerequisite to maintaining their suit, respondents are required to prove that the conventional relationship of landlord and tenant exists between parties therein, since "judicial interpretation over the years has clearly limited the remedy to situations where a landlord or the landlord's successor is attempting to regain possession from a tenant or the tenant's successor" (Appellants' Brief, p. 10). The "remedy" to which appellants refer, however, is that provided under *M.S.A.* §566.03, Subd. 1. The cases decided under that section indicate that the section does, indeed, provide a "landlord's remedy," and that to sue thereunder, a plaintiff must show that he is a landlord, or one who stands in the place of the landlord. Respondent herein has, however, proceeded under *M.S.A.* §566.02. Thus, the argument advanced by appellant, and the cases cited in support thereof, are immaterial. *Chandler v. Kent,* 8 Minn. 524 (Gil. 467) (1863), and *Peterson v. Krueger,* 67 Minn. 449, 70 N.W. 567 (1897), and the other cases cited by the appellant are no more helpful to one who would understand *M.S.A.* §566.02 than are the cases decided under, for example, *M.S.A.* §581.01. Both are immaterial.

While apparently there is no case reported in Minnesota wherein a tenant has successfully sued a landlord under *M.S.A.* §566.02, a brief look at cases reported in other jurisdictions and decided under statutory language similar to that set out in *M.S.A.* §566.02 quickly reveals that in other jurisdictions tenants have successfully sued landlords to recover possession of property forcibly entered and detained by the landlord. For example, the Utah case of *Peterson v. Platt,* 16 Utah2d 300, 400 P.2d 507 (1965)

was decided under 9 Utah Code Anno. (1953) 78-36-1 which provides that:

> Every person is guilty of a forcible entry who . . . by any kind of violence . . . enters upon or into any real property; . . .

In that case, plaintiff-tenant by written agreement leased from the defendant-landlord the Artic Circle Drive-In for a 10-year period in which to operate a drive-in business. After the tenant had missed payment of two monthly rentals, the landlord, one morning, and in the absence from the drive-in of the tenant and his helpers, went into the drive-in premises, changed the door locks, parked his camper near the building and took possession of the premises, and thereafter detained the same. Subsequently, the tenant sued the landlord for forcible entry and detainer and conversion of personal property and for possession of the drive-in and the lot on which it stood. The trial court awarded judgment to the tenant against the landlord. On appeal by the landlord, the Supreme Court of Utah stated, at 508:

> Our previous decisions construing our forcible entry and detainer statute places a duty on a person whether entitled to the real property in question or not, to not use force or stealth or fraud in obtaining possession of such realty. Such forcible entry and detainer statute creates a right in a person who is in actual peaceable possession of such real property to a clause of action against a person who, in his absence, and without legal process, by force, stealth, or fraud, takes the possession of such property from him. Such being the law, the judgment is affirmed.

Further, in *Pelarin v. Misner,* 241 Mich. 209, 217 N.W. 36 (1938), a tenant-defendant filed a cross-bill against his landlord-plaintiff in forcible entry and detainer. A lower court judgment rendered for the landlord was reversed on appeal under the following statutory language which appeared in *Laws of Michigan,* No. 314, Ch. XXX, 82 (1915):

> When any forcible entry shall be made, or when an entry shall be made in a peaceable manner and the possession shall be unlawfully held by force, the person entitled to the premises may be restored to the possession thereof in the manner hereinafter provided.

The quoted statute is, of course, substantially similar to that appearing in *M.S.A.* §566.02.

Clearly, therefore, the right of a tenant to sue his landlord in forcible entry and detainer is recognized in Minnesota and in other jurisdictions having statutory provisions similar to that in Minnesota. See also, *Phelps v. Randolph,* 147 Ill. 335, 35 N.E. 243 (1893); *Jordan v. Talbot,* 12 Cal. Rptr. 488, 361 P.2d 20 (1961).

II.

THE TRIAL COURT'S FINDINGS THAT THE TENANT NEITHER SURRENDERED NOR ABANDONED ITS LAWFUL POSSESSION OF THE LEASED PREMISES ARE NOT MANIFESTLY CONTRARY TO THE EVIDENCE?

Appellants urge this Court to hold that the trial court erred in finding that respondents neither abandoned nor surrendered the leased premises. When an appeal on sim-

ilar grounds was made in *Viking Automatic Sprinkler Company v. Viking Fire Protection Company,* 280 Minn. 250, 159 N.W.2d 250 (1968), this Court observed at page 254 that it was governed by the rule that:

> When an action is tried by a court without a jury its findings . . . will not be reversed on appeal unless they are manifestly contrary to the evidence.

Further, in the same case, this Court, defined, at page 254, the scope of appellate review as:

> . . . [A] careful examination of the record to ascertain whether the evidence as a whole fairly supports the findings and if these in turn support the conclusions of law and the judgment. While this court must search the record to ascertain whether any erroneous rules of law have been applied and act accordingly, it must consider the testimony in the light most favorably to the prevailing party.

An examination of the evidence will show that it reasonably could not have supported a finding by the lower court that the necessary elements of abandonment, that is, the intent to abandon and the act of abandonment, *Melco Investment Co. v. Gapp,* 259 Minn. 82, 105 N.W. 2d 907 (1960), existed in this case.

For example, respondent Berg testified that she at no time told appellant Wiley that he could take the premises and that she did not surrender a key to defendant Wiley (T. 28). She testified further that, in fact, she had told Wiley expressly that she did not intend to leave the premises (T. 28). That testimony is uncontradicted. Respondent Berg testified also that her restaurant business at 225 Central Avenue, Osseo, Minnesota, was profitable, netting her $9,000 in the first nine months of operation, and $22,000.00 during the last year of operation (T. 30). Berg's testimony to the effect that the restaurant business was profitable is corroborated by the testimony of other witnesses (T. 96). This latter testimony too is uncontradicted. Respondent Berg further testified that on the evening of July 13, 1973, she and her helpers were engaged in the work of remodeling the interior of the premises. This testimony is corroborated by the testimony of Officer Good who testified that his observations of the premises shortly after 9:30 P.M. on Friday evening, July 13, 1973, indicated to him that the appearance of the premises was attributable to remodeling (T. 77). Further, another of respondent's witnesses testified that on the evening involved, he was actually engaged in the work of remodeling. All of this testimony is substantially uncontradicted. The only contradictory testimony came from Rodney A. Wiley, who testified that on Friday evening, as he observed the interior of the premises from the outside through a window, he saw respondent Berg "kicking . . . this rug—or pulling at it" (T. 454). The record does not show where the kicking or pulling occurred. Wiley also testified that he saw "the fellow in the white sweater back there" (T. 454) carrying paneling to the back of the building (T. 454), and saw "them" (the record does not show who "them" were) tearing paneling off the kitchen wall (T. 454). However, Rodney Wiley's testimony is substantially contradicted by unimpeached testimony that it would have been physically impossible for Rodney Wiley to have seen what he alleged to have seen (T. 486-490). These facts as testified to by

Wiley neither establish vandalism nor constitute or establish any element of abandonment.

Respondent Berg further testified that on the morning of July 16, 1973, after she had been forcibly evicted, there remained approximately $10,000.00 worth of trade fixtures belonging to her (T. 19). This testimony, too, is uncontradicted.

There is some testimony that was presented for the purpose of supporting appellant's argument that respondent Berg abandoned or surrendered the premises. For example, Bonnie Osterberg testified that on July 5, 1973, respondent Berg spoke to her of moving the restaurant business (T. 261). However, this testimony is directly contradicted by Berg's later testimony that the conversation between Osterberg and her occurred on July 9, 1973, and by Berg's response when asked why she remembered the conversation to have occurred on the 9th, Berg said:

> A. Because this is when I decided that I would have to *close down* because I knew I only had till the 13th to complete this work and I could in no way do it, so at this time I sat down with Bonnie and I told her that I would be *closing down* and I told her also that I *possibly* would have another location in time if my lease agreement did not work out. Now, Mr. Wiley had promised me a five-year extension and this is what I was going on.
>
> Q. So were you—did you expect Bonnie Osterberg to tell Mr. Wiley of this conversation?
>
> A. I thought she would, yes, and I thought it might help if she did because it was the only way I could relate to the man.
>
> Q. So you had hoped by that method to try and put him into a situation of granting you a five-year extension to your lease so that you could afford to proceed with the remodeling?
>
> A. Yes.
>
> (T. 283-284) (Emphasis added.)

Berg's testimony that she spoke on July 9th in terms of "possibly" moving to another location is corroborated by Osterberg's testimony that she heard Berg say, in reference to moving, ". . . it isn't anything definite. . . ." (T. 262). Further, Berg's expectation that Osterberg would "tell Wiley" is borne out by Osterberg's later testimony that she did tell Wiley that Berg was planning to move out (T. 271).

Thus, it is clear that the evidence presented at trial manifestly supports the finding that respondent Berg did not intend to abandon the leased premises, but intended, rather, to stay in possession thereof. Further, the evidence shows that Berg did not voluntarily relinquish or disclaim her right to possession. It is clear, rather, that she involuntarily lost that possession by being locked out.

The evidence also shows that respondents did not surrender their right to possession of the premises. A surrender of a leasehold interest legally and effectively occurs pursuant to an agreement, express or implied, between tenant and landlord, or by operation of law. *Nelson v. Thompson,* 23 Minn. 500 (1877). In the present action, the only agreement existing between the respondent and appellant, other than the original lease agreement, was that agreement entered into by Kathleen Berg and Rodney A. Wiley on the evening of July 13, 1973, whereby each party agreed to take no action with regard to the premises until each had had an opportunity to consult

with their respective attorney. At no time was there an agreement or understanding between the parties that the lease would be terminated. In fact, Kathleen Berg affirmatively said to Wiley, "I'm not moving out."

Nor was there a surrender by operation of law. "Operation of law" refers to the legal effect of estoppel, whereby a tenant voluntarily removes himself and his personal property from the leased premises, manifesting to the lessor that he is vacating. In such a case, if the landlord treats the lease as terminated, and retakes possession, both parties are estopped from asserting the continuance of the lease agreement, and the lease is effectively terminated by operation of law.

Minnesota courts have been reluctant to find that there has been a surrender by operation of law. In *Hildebrandt v. Newell,* 199 Minn. 319, 272 N.W. 257 (1937), the Court held that an agreement to surrender will not be found even where the tenant vacated the premises and the landlord accepted rental payments from a third party in possession, *i.e.,* from sub-lessee, stating:

> A surrender by operation of law takes place, as between lessor and lessee, where the lessor has been a party to some act, the validity of which he is by law afterwards estopped from disputing because it is incompatible with the continued existence of the relation of landlord and tenant. . . . Permitting the lessee's occupant to remain in possession of the premises is not incompatible with the existence of the lease.

Respondents herein at no time voluntarily vacated the premises. They were in actual physical possession of said premises as of the evening of Friday, July 13, 1973. Pur-

suant to the agreement reached on that evening, respondents took no action with regard to the premises until the morning of Monday, July 16, 1973, at which time they consulted attorneys. Nor was significant property removed. The only property removed by respondents consisted of the "Family Affair Restaurant" sign hanging outside of the building, which was ordered removed by Rodney A. Wiley beause it extended onto adjacent property owned by one Stanley Larson, and certain perishable food items. Every other item of personal property owned by respondent remained on the premises, many such items being of substantial value.

Pursuant to the agreement reached between Rodney A. Wiley and Kathleen Berg on the evening of July 13, 1973, and for the purpose of completing the remodeling operations already in progress, respondents ceased business operations on July 13, 1973. Such action by respondents, especially when temporary and not in violation of lease covenants, does not constitute a surrender of lease. Thus, in *George C. Lauer Stone & Construction Co. v. Armour & Co.,* 149 Minn. 359, 183 N.W. 819 (1921), this Court held that even where lessor leased a quarry to lessee for however long it took lessee to extract a certain amount of material from the quarry, a temporary suspension of operations by the lessee did not constitute a termination of the lease agreement.

Removal of the respondents and possessions from the premises was in no way voluntary; neither did respondents' temporary suspension of business operations for purposes of remodeling constitute a termination of lease. No actions of respondents can legally be construed as a voluntary ter-

mination of the lease agreement on the part of respondents and respondents did not surrender leasehold rights and interests to said premises by operation of law.

III.

A LANDLORD MAY NOT TAKE THE LAW INTO HIS OWN HANDS, IGNORING ALL LEGAL REMEDIES AVAILABLE TO HIM, AND FORCIBLY ENTER LEASED PREMISES WHEN HE HEARS RUMORS THAT HIS TENANT HAS THREATENED TO DAMAGE AND ABANDON THE PREMISES?

Appellants in their appellate brief correctly observe that ". . . the major purpose of providing a summary statutory proceeding for landlord to regain possession of their property is to make it unnecessary for them to 'take the law into their own hands.' " (Appellants' Brief, p. 23). *Strand v. Hand,* 178 Minn. 460, 227 N.W. 656 (1929). Yet, as clearly shown by the evidence adduced at trial, appellant did "take the law into his own hands" when on Monday, July 16, 1973, in the absence of respondent from the leased premises, Rodney A. Wiley changed the locks on the doors of the premises, thus preventing respondent Berg's entrance into the premises when she arrived there upon her return from a consultation with her attorney in accordance with her agreement with Rodney A. Wiley entered into on the evening of Friday, July 13, 1973. Respondent had never communicated to her landlord a desire to vacate the premises. Further, the evidence is clear that respondent's intention as of July 13th, and continuing to July 16th, was to temporarily close down the operation of the restaurant, complete the task of remodeling as quickly as

possible, and reopen the business. However, respondent's intended course of conduct was summarily and unlawfully interrupted by appellant's act of changing the locks.

Appellant admits that it took the law into its own hands, but attempts to justify its conduct by arguing that it was entitled to act as it did under a "self-help" theory. It argues that its exercise of self-help was justified by respondent's acts of destruction to the premises. However, a careful examination of the evidence will show that appellant failed to prove a single fact tending to show that respondent was in any way destroying the premises. To be sure, there is substantial evidence in the trial transcript that shows that the premises sustained considerable damage sometime between Saturday, July 14, 1973, and Tuesday, July 17, 1973. But there is not one iota of evidence that proves that the damage occurred before Rodney A. Wiley changed the locks, that he changed the locks in response to the commission of destructive acts, or that the respondent caused the damage that occurred.

Further, even if the inference reasonably may be drawn from the evidence presented at trial that respondent Berg did engage in destructive acts toward the premises, and even if, *arguendo,* appellant therefore had a right to possession, *M.S.A.* §566.01 states:

> No person shall make entry into lands . . . except in cases where his entry is allowed by law, and in such cases he shall not enter by force, but only in a peaceable manner.

Thus, even if appellant's entry was, *arguendo,* allowed by law because of respondent Berg's alleged acts of destruc-

tion, it was unlawful, since, as the trial court found, it was effected by force, and not in a peaceable manner.

That such is the law is made clear in *Pelarin v. Misner, supra,* a Michigan case decided under a statute identical to *M.S.A.* §566.01. In that case, the landlord had leased an apartment building to tenants who misused and seriously damaged the leased premises, and permitted immoral women to live there, and failed to comply with several of the terms of the lease. Being unhappy with his tenants, the landlord locked the tenants out of the premises while one was absent and after the other had been lured outside by false representations. Subsequently, the landlord filed for a temporary and permanent injunction prohibiting the tenants from interfering with the landlord's possession. Thereupon, the tenants filed a cross-bill in forcible entry and detainer and for an accounting. Upon the hearing the court refused to consider the question of accounting, but heard evidence on the question of forcible entry. The trial court did not decide the latter question, however, but did order a decree protecting the landlord's possession. When the tenants appealed, the Supreme Court of Michigan reversed the lower court and rendered a decree for the tenants. Justice Bird dissented on the ground that the lower court had not determined the question of forcible entry. He wrote, however:

> Had [the Court] found that [the landlord] secured possession forcibly, in violation of the statute (Comp. Laws 1915, §13229, et seq., as amended), that would have been an end to the controversy, because, however clear [the landlord's] right was to possession, he had no right to acquire it by force.

The principle of law set out by Justice Bird is equally applicable here. Thus, even if appellant had a right to possession, he had no right to acquire it by force.

CONCLUSION

In Minnesota's judicial past a tenant has been allowed the right to sue his landlord in forcible entry and detainer. Further, other jurisdictions have recognized such a right. Likewise, the tenant-respondent herein has such a right. In addition, the evidence clearly supports the trial court's findings that respondents neither abandoned nor surrendered the leased premises, and that appellant took the law into its own hands contrary to the intent and purpose of the summary remedy in unlawful detainer. Thus, the judgment of the trial court should be affirmed.

Respectfully submitted,

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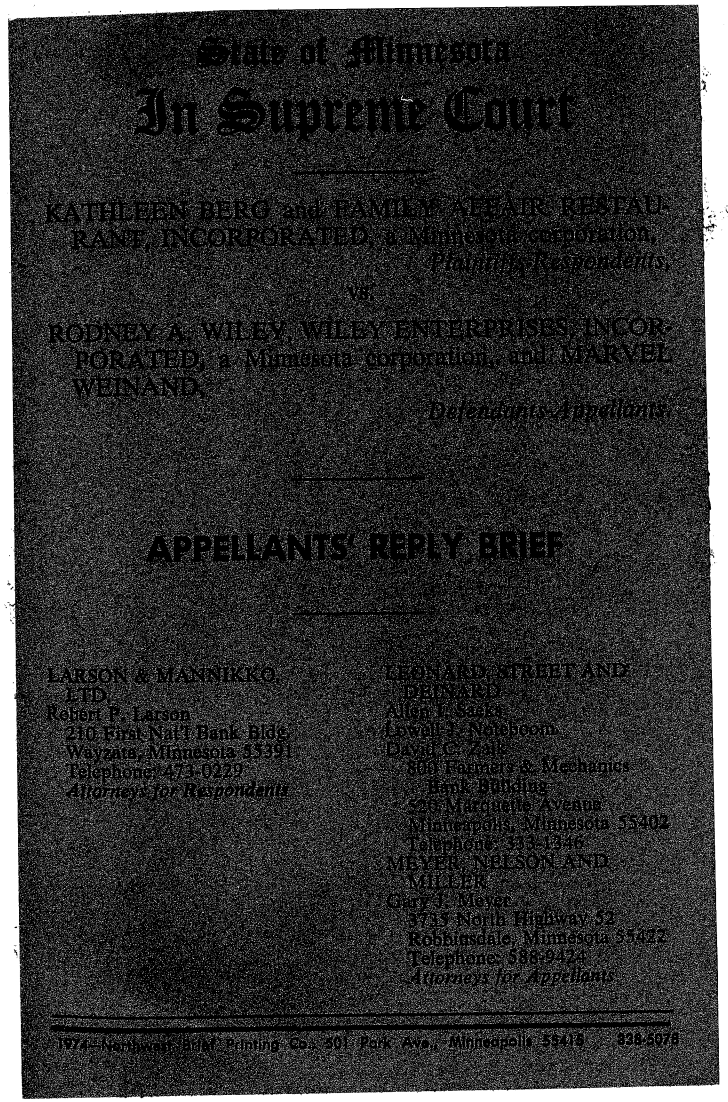

State of Minnesota

In Supreme Court

KATHLEEN BERG and FAMILY AFFAIR RESTAURANT, INCORPORATED, a Minnesota corporation,

Plaintiffs-Respondents,

vs.

RODNEY A. WILEY, WILEY ENTERPRISES, INCORPORATED, a Minnesota corporation, and MARVEL WEINAND,

Defendants-Appellants.

APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Argument:

I. Minnesota Statutes Section 566.02 when read in conjunction with Section 566.03 clearly does not permit a tenant to bring an unlawful detainer action against his landlord; Family Affair has cited no controlling or persuasive authority to the contrary 1

II. It remains clear that the trial court made a mistake in finding that Family Affair had never abandoned or surrendered the premises 7

III. Minnesota law allows a landlord to avail himself of his "self-help" remedy where he may do so peacefully 9

Conclusion 10

TABLE OF AUTHORITIES

Cases:

In Re Estate of Lea, No. 43981, decided September 20, 1974 7
Mastin v. May, 127 Minn. 93, 148 N.W. 893 (1914) 2
O'Neill v. Jones, 72 Minn. 446, 75 N.W. 701 (1898) 5, 6
Wacholz v. Greisgraber, 70 Minn. 220, 73 N.W. 7 (1897) 4

Statutes:

Gen. Stat. 1913 § 7657 2
Gen. Stat. 1913 § 7658 2
Laws 1917, Ch. 227 ..... 2, 3
Minn. Stat. § 566.02 ..... 1, 2, 3, 4, 5

Minn. Stat. § 566.03 ..... 1, 2, 3, 4, 5, 6
Minn. Stat. § 645.26, Subd. 1 4
Minn. Stat. § 645.26, Subd. 2 4
1973 Sess. Laws, Ch. 611, § 7 2

Secondary Authorities:

36A C.J.S. Forcible Entry and Detainer § 3 6
82 C.J.S. Statutes § 333 5

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APPELLANTS' REPLY BRIEF

ARGUMENT

I.

MINNESOTA STATUTES SECTION 566.02 WHEN READ IN CONJUNCTION WITH SECTION 566.03 CLEARLY DOES NOT PERMIT A TENANT TO BRING AN UNLAWFUL DETAINER ACTION AGAINST HIS LANDLORD; FAMILY AFFAIR HAS CITED NO CONTROLLING OR PERSUASIVE AUTHORITY TO THE CONTRARY.

As was shown in appellants' brief, *Minnesota Statutes* Ch. 566 has never been understood to provide a remedy for a tenant against his landlord (App. Br. 9-13). Family Affair admits that *Minnesota Statutes* § 566.03 is "a

'landlord's remedy,' and that to sue thereunder, a plaintiff must show that he is a landlord, or one who stands in the place of the landlord" (Resp. Br. 11). Unable to meet this test, Family Affair now has discarded § 566.03 and attempts to argue that the restrictions of § 566.03 can be evaded by proceeding under § 566.02.[1] However, Family Affair's novel proposition that a tenant can accomplish under § 566.02 that which is clearly unavailable to him under § 566.03 does not withstand scrutiny, as a study of the interrelationship between the two sections reveals.

As originally enacted, the predecessor of § 566.02 (see *General Statutes* 1913 § 7657) provided that the summary proceeding in unlawful detainer was available only where the initial entry or subsequent detention was forcible. See, *e.g.*, *Mastin v. May*, 127 Minn. 93, 148 N.W. 893 (1914). To this requirement of force, however, several exceptions were provided by the predecessor to § 566.03 (see *General Statutes* 1913 § 7658). Thus, where certain relationships existed (*e.g.*, landlord-tenant), the summary proceeding in unlawful detainer was available regardless of whether there was force involved in the entry or detention.

The predecessors of both sections were amended simultaneously by Chapter 227 of the *Laws of 1917* in an apparent response to this Court's decision in *Mastin v. May, supra.* In that case, two parties had entered into negotiations regarding the sale of some real estate. While the

[1]Appellants are mystified as to the source of the language which Family Affair quotes on page 8 of its brief and mistakenly attributes to Minnesota Statutes § 566.02. The correct text of § 566.02, as reported in the 1973 Session Laws, Ch. 611, § 7, is quoted on page 10 of appellants' brief.

negotiations were pending, the would-be purchaser peaceably moved into possession. When the negotiations fell through, the would-be purchaser remained in possession. The owner of the land brought an action in unlawful detainer pursuant to the predecessor of § 566.02. The Supreme Court held that the owner of the land was limited to an action in ejectment, concluding that the summary proceeding in unlawful detainer was unavailable to him since neither the entry nor the detention had been forcible, as required by statute.

Shortly thereafter, the legislature passed the simultaneous amendments referenced above: (1) the requirement of a forcible detention was eliminated from the predecessor of § 566.02; and (2) the predecessor of § 566.03 was amended to recognize an additional specific relationship which would entitle the parties to bring an unlawful detainer action, *i.e.*, a contract vendor of real estate against a contract vendee after termination of the contract. *Laws 1917*, Ch. 227.

It is apparent that by amending both sections of the law at the same time, the legislature intended both sections to have some practical meaning and effect. While such a statement would seem self-evident, it is a proposition that Family Affair apparently has ignored. Family Affair's proposed interpretation of § 566.02 (*i.e.*, that it allows any person to bring an unlawful detainer action against any other person) would make superfluous the acknowledged limitations of § 566.03. Family Affair is, in effect, asking this Court not only to ignore or repeal § 566.03, but also to cast aside the Court's prior decisions under it which have implicitly, if not explicitly, lim-

ited the action to landlords or those standing in the shoes of landlords (see App. Br. 9-13). The limitations of § 566.03 would be rendered meaningless if they could always be avoided simply by proceeding under § 566.02. Not only does such a construction of § 566.02 fly in the face of common sense, but also it is contrary to the requirement that where statutes are in potential conflict they are to be interpreted, if possible, so as to give them some practical effect. See *Minnesota Statutes* § 645.26, Subd. 1. If the conflict be irreconcilable, the specific (in this case, § 566.03) must govern the general (§ 566.02), and the clause last in order must prevail over the clause first in order. *Minnesota Statutes* § 645.26, Subds. 1 and 2.

Furthermore, the legislative history makes clear that the legislature intended both § 566.02 and § 566.03 to have effect; otherwise, had the legislature intended to create the result sought by Family Affair, § 566.03 could have simply been repealed in 1917 and there would have been no need to amend both sections at that time. The legislature must certainly have been aware in 1917 that "[o]rdinarily, where the landlord wrongfully obtains and holds unlawful possession of the demissed premises, the tenant has a remedy by an action of trespass." *Wacholz v. Griesgraber*, 70 Minn. 220, 224, 73 N.W. 7, 9 (1897). Further, the enumeration in § 566.03 of specific parties entitled to the unlawful detainer remedy indicates that the legislature gave careful consideration to the landlord-tenant relationship and the specific circumstances within that relationship in which the unlawful detainer action

would be allowed. The *expressio unius* maxim[2] thus leads to the conclusion that tenants were not intended to have the unlawful detainer remedy against their landlords. They are to rely on their common law remedy: an action in ejectment. As Family Affair concedes, § 566.03 is restricted to landlords, or those standing in their shoes. If that limitation is to have any meaning, § 566.02 likewise cannot be read to allow an unlawful detainer action by tenants.

In this light, it is clear that Family Affair's cavalier dismissal of all the cases decided under § 566.03 as "immaterial" is a most unsatisfactory answer to appellants' position that a tenant's only proper and available remedy is an action in ejectment. Such a response by Family Affair simply fails to come to grips with the fact that §§ 566.02 and 566.03 must be interpreted together.

The tenuousness of Family Affair's position is underscored by the fact that respondents have not been able to find a single Minnesota case in which a tenant has been granted standing to sue his landlord, pursuant to either § 566.02 or § 566.03. The only Minnesota case cited by Family Affair on this point, *O'Neill v. Jones*, 72 Minn. 446, 75 N.W. 701 (1898), involved a plaintiff "tenant" who had never been in possession of the disputed premises. Accordingly, this Court held that the plaintiff had no standing to bring the action. The Court did not decide, because obviously it had no need to decide, whether there were further reasons for which the plaintiff lacked stand-

[2] "[W]here a statute enumerates the subjects or things on which it is to operate, or the persons affected . . . it is to be construed as excluding from its effect all those not expressly mentioned." See generally 82 C.J.S. *Statutes* § 333.

ing. It can be but cold comfort to Family Affair that the *O'Neill* court did not "kill the plaintiff dead" by citing other or all possible grounds for his lack of standing.

Family Affair's reliance on cases from foreign jurisdictions is misplaced at best. The fact that Utah or Michigan may have unlawful detainer statutes which are in some respects broader or narrower than the Minnesota law is of little help to this Court in deciding the issues presented by the instant case. In the cases cited by Family Affair, neither the Utah or Michigan court was confronted with Minnesota's peculiar legislative history and its unique set of two interdependent statutes, where a general right to bring unlawful detainer actions, even absent the use of force, is circumscribed by a further section specifying certain limitations on the actions.

The summary proceeding in unlawful detainer is not a common law remedy; it exists only by reason of statute and only in favor of those to whom the statute gives the right to bring the action. See 36A *C.J.S. Forcible Entry and Detainer* § 3. Family Affair is not without remedies for any alleged wrongs perpetrated against it. Appellants in the instant case have never denied that a landlord must respond in damages for a wrongful eviction; nor have appellants denied that a wrongfully evicted tenant may bring an action in ejectment. However, if *Minnesota Statutes* § 566.03 is to mean anything, it must at least mean that as to the relationships specified therein the statute determines who may bring an action in unlawful detainer, and there simply is no provision there for a tenant to bring such an action against his landlord.

Appellants have repeatedly pointed out, and Family Affair has not denied, that Family Affair's sole bona fide goal in this litigation is its purported claim for damages which it is pursuing in the Hennepin County District Court. The instant action arose merely as an afterthought, filed some seven weeks after Family Affair had vacated the premises, and it never did seek repossession on a permanent basis. Had Family Affair been interested in actually regaining possession, it would have used the one remedy clearly available to it: an action in ejectment.

II.

IT REMAINS CLEAR THAT THE TRIAL COURT MADE A MISTAKE IN FINDING THAT FAMILY AFFAIR HAD NEVER ABANDONED OR SURRENDERED THE PREMISES.

Family Affair has ignored this Court's more recent statements on the scope of review pursuant to the "clearly erroneous" standard, cited in appellants' brief and reaffirmed by this Court in *In Re Estate of Lea,* No. 43981, decided September 20, 1974, allowing reversal where the Court is convinced that a mistake has been made. A review of the record leaves the definite and firm conviction that the trial court's findings on the question of abandonment and surrender were mistaken, and accordingly this Court is entitled, indeed obligated, to reverse those findings. One of the most important factors supporting appellants' position that Family Affair intended to vacate the premises as of the close of business on Friday evening, July 13, 1973, is the evidence that Berg had, prior to July 13, told a number of people that she would be moving her restaurant. This evidence is not contradicted, indeed it

is confirmed, in respondents' brief. Family Affair thus admits that Berg told one of her waitresses, knowing and expecting that the information would be communicated to Wiley, that she was "closing down" her restaurant (Resp. Br. 16-17).[3] It appears on the face of Family Affair's brief that it had simply given up the idea of trying to complete the "remodeling" by Wiley's oft-extended deadline, which "remodeling" Family Affair admits had been under way for many months (Resp. Br. 3-4, 16). A fair-minded reading of the record makes clear that Berg had decided that rather than comply with Wiley's requests, she would simply move out. The statements on pages 5 and 14 of respondents' brief that Berg told Wiley expressly that she did not intend to move out reflect a significant misreading of Berg's testimony at trial. Nowhere does it appear on the record that Berg ever told Wiley that she did not intend to move out.[4] On the contrary, she had communicated to him through a third party that she had every intention of closing down her restaurant, and by her sarcastic response on the last day of operating her business she really confirmed to him that she would be moving.

[3]Indeed, Berg's testimony at trial, as quoted in respondents' brief, makes clear that one of Berg's motives in announcing her intent to vacate was to try to force concessions from Wiley. Wiley, rather than accomodate Berg any further, decided to let her go, as long as that was what she apparently wanted to do. Respondents would have the Court believe that Berg's statements that she was "closing down" are ambiguous, and that Berg really meant "closing down temporarily," even though she did not so qualify her statement. This alleged ambiguity disappears, however, when Berg's own words are construed in light of the testimony of numerous other witnesses that Berg said she was moving out (App. Br. 15-18).

[4]What Berg actually testified to at trial is that she never told Wiley she was moving out (T. 28). This is far different from actually denying that she was moving out. Family Affair's attempt to gloss over this distinction only serves to emphasize its significance.

Another factor indicating Family Affair's decision to move out, apart from Berg's explicit statements to that effect, is her attempt to remove what she believed to be her personal property from the premises. Whether one believes the respondents' statement on page 4 of their brief that they actually removed the air conditioning unit from on top of the building (there is no evidence in the record to support such a statement) or whether one believes respondents' statement on page 19 of their brief that no "significant property" was removed from the premises (the latter statement is supported by the record), nevertheless it is clear from the record, and not denied by respondents, that they attempted to remove the air conditioning unit. When Wiley saw this attempt to remove the air conditioner on Monday morning, July 16, it merely confirmed to him Berg's intention to vacate. In short, not one of the factors cited by appellants as indicating Berg's intention to vacate, including the failure to pay the July rent, has been denied by respondents.

III.

MINNESOTA LAW ALLOWS A LANDLORD TO AVAIL HIMSELF OF HIS "SELF-HELP" REMEDY WHERE HE MAY DO SO PEACEFULLY.

Respondents do not deny that under Minnesota law a landlord may reenter premises without first proceeding in unlawful detainer when the action can be accomplished peacefully. The record is quite clear, as was pointed out in appellants' brief, that Wiley's reentry was accomplished peacefully, without any force or violence, and in the presence of the Osseo police.

Wiley's reentry was clearly justified by the threat of imminent destruction to the premises. Respondents in their brief do not deny that Berg had threatened to vandalize the premises, nor do they deny that such vandalism took place. It is clear and undisputed that the restaurant was the subject of extensive and malicious destruction. Respondents' statement on page 7 of their brief that only Wiley could have been on the premises during the period in which the destruction took place is patently incorrect and contradicted by their own testimony at trial (T. 514-15). It has never been disputed that Berg had unhindered access to the restaurant until Wiley changed the locks late on Monday morning, July 16. Berg, during her direct examination, admitted that she was in the restaurant on Saturday, on Sunday, and again early on Monday morning, before Wiley changed the locks, at the time that the truck-crane crew was at the premises at Berg's request to attempt to remove the air conditioning unit from the top of the building (T. 514-15). Respondents' implication that it was Wiley, and not Berg, who for some unfathomable reason vandalized his own property is pure nonsense.

CONCLUSION

By the foregoing, appellants have demonstrated that Minnesota law, by statutory construction and judicial interpretation, does not allow a tenant to bring an unlawful detainer action against its landlord. Rather, the tenant's remedy is ejectment. Moreover, respondents cannot deny, and have not denied, the facts indicating that Family Affair had indeed abandoned the property at the time of

Wiley's peaceable reentry, which reentry was justified in any event by respondents' threats to vandalize the premises.

Respectfully submitted,

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