REIMRINGER v. ANDERSON
AND THE MEANING OF "BAD FAITH" IN MINN. STAT. § 504B.231

Introduction

This spring the Minnesota Supreme Court issued an opinion written by Justice Paul Thissen concerning the meaning of Minn. Stat. § 504B.231, *Reimringer v. Anderson*, -- N.W.2d -- (Minn. June 16, 2021)(hereafter "*Reimringer* slip op."). While I agree with parts of the opinion I think the crux of the opinion, its construction of "in bad faith" in section 504B.231, [a] leaves both landlords and tenants in doubt as to what sorts of landlord behavior are in bad faith; [b] based on the likely purpose of the law, it is not the best construction of the phrase; and [c] does not follow the thinking of Justice Thissen in an article he published a couple of years ago.

Summary of the Case

Facts and Procedural Posture

Briefly and only as relevant to the supreme court's decision, Aaron Reimringer signed a residential lease with Bart Anderson, moved in, didn't pay rent, and after about a month the two argued. Anderson demanded that Reimringer get out, and after he and his family hurriedly left, Anderson changed the locks. Reimringer subsequently tried to reenter but Anderson prevented reentry. Reimringer sued under Minn. Stat. § 504B.375 to regain possession and under Minn. Stat. § 504B.231 for treble damages plus attorney fees. *Reimringer* slip op. at pages 2-6

The district court dismissed both claims. Reimringer did not appeal the dismissal of the Minn. Stat. § 504B.375 claim but did appeal the dismissal of the Minn. Stat. § 504B.231 claim. That dismissal was based on two holdings by the district court: [1] Reimringer was not a tenant; and [2] Anderson did not act in bad faith. Most of the district court's order discussed the first issue. Here is the entire discussion of the second issue:

> Furthermore, even if the Court could state that Defendant [sic, meant Plaintiff] met his procedural burden to receive proper money damages under Minnesota Statute 504B.231, recovery is only possible if the landlord removes, excludes, or forcibly keeps out a tenant from residential premises in *bad faith*. Here, Defendant provided for three nights at a hotel for Plaintiff and his family and placed all personal property in a loaded storage unit that was accessible to Plaintiff. There was credible testimony that Plaintiff refused to pick up his own personal property. The Court cannot find that Defendant acted in bad faith. Therefore, Plaintiff's request for monetary damages and attorney's fees is denied. [italics in original]

Reimringer v. Anderson, Findings of Fact, Conclusions of Law and Order (Wright Cty Dist. Ct., Dec. 13, 2019) at 7-8.[1]

[1] Also available at https://macsnc.courts.state.mn.us/ctrack/view/publicCaseMaintenance.do?csNameID=95311&csInstanceID=108258 as one of the first four items filed with the Court of Appeals on December 19, 2019.

The Minnesota Court of Appeals affirmed the district court on the basis of the bad-faith issue. It did not reach the issue of whether Reimringer was a tenant. The Supreme Court accepted review on the bad-faith issue. After much discussion, it stated that it had "clarified the standard for bad faith under section 504B.231", reversed and remanded to the court of appeals to answer the question left undecided in its decision -- whether Reimringer was a tenant – and ordered that if the court of appeals determined he was a tenant, then the case must be remanded to "the district court for further proceedings consistent with this opinion." *Reimringer* slip op. at 17.[2]

In short, as to the bad-faith issue, the supreme court held that the findings of the district court quoted above were not sufficient to prove lack of bad faith.

The Supreme Court's construction of "in bad faith"

Before remanding the case as set out above, the Supreme Court construed the meaning of "in bad faith" in Minn. Stat. § 504B.231. I don't find the supreme court's discussion to have fully clarified the standard for bad faith. What follows is my best summary of its statement of the rule of law, its construction of Minn. Stat. § 504B.231, and its determination of the meaning of "bad faith" within the statute.

First, the court held that for a tenant to prevail under section 504B.231 he must demonstrate that the landlord must act not just unlawfully but in bad faith. *Reimringer* slip op. at 10. Since paragraph (a) of the statute says

> If a landlord, an agent, or other person acting under the landlord's direction or control unlawfully and in bad faith removes, excludes, or forcibly keeps out a tenant from residential premises, the tenant may recover from the landlord treble damages or $500, whichever is greater, and reasonable attorney's fees. [emphasis added]

this holding is indisputable.

Second, the court held "to prove bad faith … a tenant must show that the landlord acted in a dubious or dishonest fashion—in a way that suggests the landlord was acting with some ulterior motive or purpose beyond just a desire to oust the tenant—when unlawfully removing them from a residential premises." *Reimringer* slip op. at 2.

It "clarified" the meaning of "dubious or dishonest" stating that the factfinder should consider the "totality of the circumstances ... Some circumstances the factfinder may consider include the terms of the lease agreement; the timing of the removal; the means used to remove the tenant; and statements made by the landlord before, during, or after the removal. This list is by no means exclusive or exhaustive, but we provide these examples to emphasize that a tenant cannot simply assert a lack of honest mistake." *Reimringer* slip op. at 12.

Further, it stated that ignorance of the law does the landlord no good, specifically that "A landlord who unlawfully removes a tenant based on some mistaken belief about the legal right of the tenant to reside in the premises—for instance, whether a valid lease had formed entitling the tenant to possession of the premises—cannot rely on that mistake to rebut a bad faith allegation." *Reimringer* slip op. at 14.

---

[2] On remand, the case settled at the court of appeals. The stipulation to dismiss is available on the website referenced in footnote 1.

Finally, it gave an example of something that would be unlawful but not in bad faith: A "landlord changes the locks to the premises and removes the tenant's belongings on the good faith, but mistaken, belief that the tenant had voluntarily abandoned the premises. After finding out that the tenant had not abandoned the premises, the landlord restores the tenant to possession." *Reimringer* slip op. at 16.

The Court's Reasoning

To construe "in bad faith", Justice Thissen reasoned as follows:

[1] Since the statute requires the tenant to prove the landlord acted both unlawfully and in bad faith, bad faith requires more than just an unlawful lockout. *Reimringer* slip op. at 7-10..

[2] "In bad faith" means something different than "intentionally." The strongest evidence is set out in footnote 6 of the opinion which reads:

> Notably, the initial draft of the legislation that became Minn. Stat. § 504B.231(a) required proof that the landlord acted "unlawfully and intentionally." *Compare* S.F. 1330, 73d Minn. Leg. 1984 (as introduced), *with* Act of May 2, 1984, ch. 612, § 1, 1984 Minn. Laws 1469, 1470 (codified as amended at Minn. Stat. § 504.255 (1984)). The statutory language was changed during the legislative committee process to "unlawfully and in bad faith."[3] [italics in original]

[3] Definitions of "bad faith" in other cases --

- "wrongful conduct done without legal justification or excuse"
- "willful violation of a known right"
- "having an ulterior motive for its refusal to perform a contractual duty"

-- were rejected because each "of these definitions contains an element of willful wrongfulness." *Reimringer* slip op., footnote 7.

[4] Instead, Justice Thissen used the current, 11th, edition of *Black's Law Dictionary*, which defines "bad faith" as "[d]ishonesty of belief, purpose, or motive." *Reimringer* slip op. at 11.[4] From this he concluded that "bad faith" means "that the landlord acted in a dubious or dishonest fashion—in a way that suggests the landlord was acting with some ulterior motive or purpose beyond just the ouster." *Reimringer* slip op. at 11.

[5] Justice Thissen went on to write that the factfinder should "address the totality of the circumstances surrounding the landlord's unlawful removal of a tenant." *Reimringer* slip op. at

---

[3] I have provided a full legislative history available from the written record in Appendix LH 231. As discussed below on pages 7-8, there is no available formal oral record.

[4] The entire entry reads: "Bad faith [means] **Error! Main Document Only.** "Dishonesty of beliefs purpose, or motive <the lawyer filed the pleading in bad faith>" *Black's Law Dictionary* (11th Edition 2019) page 171.

12. Footnote 8 gives an example of a court doing so but Justice Thissen does not explain how this follows from the rule in the previous paragraph.

Practical Concerns with the Court's Holding

The court did partially clarify the meaning of bad faith. However its stated rule of law still leaves the factfinder without a bright-line rule to use to decide if the landlord acted in bad faith.

One thing that is clear from the text of the statute -- which says nothing about the tenant's possible bad faith -- and the supreme court's not even mentioning the issue, is that it doesn't matter whether the tenant acted in bad faith. Unlike an equitable claim where "clean hands" matter ("your bad faith cancels my bad faith"), claims under section 504B.231 are statutory. E.g. a tenant who pays a month of rent and then tells the landlord, "The heck with you, no more rent will be coming, I need to gamble at the casino, go sue me" is probably acting in bad faith but that does not make retribution via ouster in good faith. The question the factfinder faces is whether the landlord acted in bad faith.

While deciding if the landlord was "dishonest" is a pretty straightforward task, deciding if the landlord acted in a "dubious fashion" is not. The supreme court's only guidance is [a] the actions have to be more than just ousting the tenant; and [b] the totality of the circumstances should be considered. "Dubious" is not in the statute, so what should a judge do when a jury, charged to determine if the "landlord acted dishonestly or in a dubious fashion" asks the judge to define "dubious". Does the judge tell the jury to reread the instructions, i.e. "Wing it."? Read a definition from a current dictionary?[5] Here are a couple of possibilities:

> Dubious in Merriam Webster's Online: [1] unsettled in opinion: doubtful <I was dubious about the plan.> [2] giving rise to uncertainty: such as [a] : of doubtful promise or outcome a dubious plan [b] questionable or suspect as to true nature or quality <the practice is of *dubious legality*>
>
> > Synonyms: debatable, disputable, dodgy [chiefly British], doubtable, doubtful, dubitable, equivocal, fishy, problematic (also problematical), *queer*, *questionable*, *shady*, shaky, suspect, suspicious
>
> Dubious in Dictonary.com: [1] doubtful; marked by or occasioning doubt <a dubious reply> [2] of doubtful quality or *propriety*; questionable <a dubious compliment; a dubious transaction> [3] of uncertain outcome <in dubious battle> [4] wavering or hesitating in opinion; inclined to doubt.

(emphasis added). This becomes almost circular, since this tells the jury to find against the landlord if the landlord's actions were "questionable", "shady" proper, or even "queer". Essentially, the jury is told again to consider the totality of the circumstances to decide if the landlord should be punished. Even if the case is tried to the court, the judge needs to ask herself these same questions and will end up where she started.

[5] While the statute dates from 1984, the rule of law including the word "dubious" is current. Therefore, using a current dictionary rather than one from 1984 is appropriate.

Similarly, the landlord who wants to get away with as much as he legally may, or the good-hearted landlord who wants to identify the line of treble-damages danger so he can be sure to avoid it, doesn't know where the line is. Is he being "shady" when he considers ousting a tenant in a given set of circumstances and with a given set of subsequent actions (store the tenants items? rent a hotel room for the tenant? speak to the tenant nicely, not at all, or even harshly and rudely?)

The court's statement that ignorance of the law does the landlord no good – e.g. that a landlord's "mistaken belief about the legal right of the tenant to reside in the premises … cannot [be used] to rebut a bad faith allegation" – leaves the landlord in a pickle if he thinks that the occupant, perhaps in a conniving manner, has control of a unit without being a tenant. If he is right, he is not liable under Minn. Stat. § 504B.231 because the statute only protects tenants. However, if he is wrong in his legal conclusion and a court decides that the occupant is a tenant, then he is unprotected.

I could only guess why the court decided to only half clarify the meaning of "in bad faith". Perhaps this is the result of some sort of compromise among the justices, is an indirect signal to the legislature to fix the drafting problem, is intentionally designed to give trial courts a lot of leeway, is based on thinking the legislature intended to give factfinders great discretion, or something else. Without knowing what the justices discussed, I won't guess.

My Construction of the Statute

This is largely but maybe not completely academic.

What follows is largely academic because unless the statute is amended or the Minnesota Supreme Court revisits the issue, *Reimringer* says what "in bad faith" means or at the least cabins alternative constructions. Nevertheless, below is how I would go about construing "in bad faith". The discussion may be of help to some practitioners.

Justice Thissen's Law Review Article About Statutory Construction

There is no definition and thus no plain meaning of "in bad faith" within the statute or, as Justice Thissen observed, within Minn. Chap. 504, *Reimringer* slip op. at 10. Therefore, the other canons of construction must be applied.

Interestingly, Justice Thissen recently published an excellent and fascinating article on the subject, When Rules Get in the Way of Reason: One Judge's View of Legislative Interpretation, 76 *Bench & Bar Minnesota*. 24 (November 2019) (hereafter "Thissen Article"). The article is based both on legal analysis and on his experience as a former state representative and Speaker of the Minnesota House plus a study that he and an assistant did of what legislators actually consider when reviewing and voting on legislation..

Highlights of the article (with footnotes identifying the corresponding canons of construction) are:

• Although courts very often rely on dictionaries[6], few legislators consult or consider them. Thissen Article, footnote 10.

• Legislators rely first on the text (100% do) but nearly as frequently on non-partisan summaries of the bill[7]. Thissen Article, PDF page 6.

• Next most commonly, legislators rely on the purpose of the bill[8] (87%). Thissen Article, PDF page 7.

• After that, legislators rely statements by the bill's authors in committee or on the floor and if available by experts[9] (75%). Thissen Article, PDF pages 7-8.

Based in part on the study, Thissen wrote that courts, faced with an ambiguous text, should primarily consider non-partisan summaries, authors' statements, what he calls "statutory archeology" – how the bill fits in with existing laws and the history of those laws[10] --, and what he groups into "common sense and practical experience" --- purpose of the bill and the problem to be remedied[11]. Thissen Article, PDF pages 8-9.

Analysis, Following Justice Thissen's Outline

The text is ambiguous and there are no helpful non-partisan summaries

Following Justice Thissen's advice, I start with the text and non-partisan summaries. As discussed above, the text is ambiguous.

As to the legislative history, the original version of the statute was enacted in 1984 as 1984 Minn. Laws ch. 612 s. 1. It read as follows:

> Section 1. [504.255] [UNLAWFUL OUSTER OR EXCLUSION; DAMAGES.]
>
> If a landlord, his agent, or a person acting under the landlord's direction or control, unlawfully and in bad faith removes or excludes a tenant from a residential premises, the tenant may recover from the landlord up to treble damages and reasonable attorney's fees.

---

[6] The canon instructing courts to consider dictionaries can be found at Minn. Stat. § 645.08(1).

[7] The canon instructing courts to consider legislative history, which would include such summaries, can be found at Minn. Stat. § 645.16(7).

[8] The canon instructing courts to consider the bill's purpose can be found at Minn. Stat. § 645.16(1),(3) and (4).

[9] The canon instructing courts to consider legislative history, which would include such statements, can be found at Minn. Stat. § 645.16(7).

[10] The canon instructing courts to consider former laws can be found at Minn. Stat. § 645.16(5).

[11] See footnote 8 above.

The statute was amended in 1989 and recodified in 1999 as Minn. Stat. § 504B.231 but neither change related to the meaning of "in bad faith". Thus the relevant legislative history is the history of 1984 Minn. Laws ch. 612 s. 1. I've gathered and set out its written legislative history in Appendix LH 231.[12]

The written legislative history includes no summaries that shed light on the meaning of "bad faith".[13]

The written legislative history sheds little light on the issue

The written legislative history does not provide any statement about the meaning of "in bad faith". The only clue is the one Justice Thissen noted in his opinion in footnote 9 -- that the original bill was amended to change "intentionally" to "in bad faith" -- but that does not say what the phrase meant.

The oral legislative – from tapes and interviews with the participants – is lost to time and the Gale Library's (non) retention policy

It seems likely that when the "in bad faith" amendments to SF 1330 and its companion bill, HF 1837, were presented in committee, the authors of the bill or the authors of the amendments said something significant about the meaning of the phrase "in bad faith". Unfortunately, the tapes of committee meetings and floor debates from before 1991 were stored at the Gale Library of the Minnesota History Center but only for 16 years.[14]

Next best would be what the participants remember about what was said on the floor or in committee (not what they thought -- legally irrelevant -- but what was said and which would have been on the now-discarded tapes). I tried my darndest to get such reports. I failed, primarily because the 37 years from 1984 until now is a long time.

The state-senate author of SF 1330, William Belanger, is dead, as is the sponsor of the amendment in the senate, Allan Spear. I contacted the lead lobbyists for landlords and tenants – Jack Horner, who was at the main lobbyist for the Minnesota Multihousing Association, and Steve Swanson, lobbyist for Legal Aid and for the Saint Paul Tenants Union. The committee minutes show that they were at the committee meetings[15] but neither remembers the bill or the

---

[12] As discussed below, only the written record is available and that is what I present.

[13] There is one brief summary which states in its entirety "S.F. 1330 (Belanger) (Bad Faith Eviction) The bill provides that the tenant may recover treble damages from the landlord if the landlord unlawfully and intentionally removes or excludes a tenant from a premises." Appendix LH 231 at page 9. This summary was prepared before the amendment changing "intentionally" to "in bad faith" was considered.

[14] Tapes from 1991-2003 were also discarded but not before most were converted to digital files available at https://www.house.leg.state.mn.us/audio/default.asp . Post 2003, digital files are available at https://www.lrl.mn.gov/media/ .

[15] Horner: Appendix LH 231 at PDF page 29; Swanson: Appendix LH 231 at PDF page 8.

discussions. I also spoke directly to former state representative Janet Clark, the sponsor of the amendment in the House committee, and indirectly to former state representative Sally Olsen, the chief author of HF 1837.[16] Neither remembered the bill or the discussions.

As a last hurrah, I looked for legislative records of the players donated to the Minnesota Historical Society. Of the players named above, only Senator Spear donated his or her materials. Unfortunately they shed no light on the issue.[17]

Other observations about the legislative history

It might be noteworthy that both the entire bill and the amendment sailed through the committees on voice votes that apparently were unanimous and that the floor votes on final passage were overwhelming. A proposed amendment to give landlords a treble damages claim against a holdover tenant (one who did not move out on the last day of the lease) was defeated in subcommittee[18] and an amendment to remove the treble-damage clause (leaving only the attorney fees clause) was defeated in committee.[19]

The authors of the bills were Republicans; both represented suburban districts with a fair number of tenants. The authors of the amendments were liberal Democrats, with large tenant constituencies.in their Minneapolis districts.

It seems likely that the "in bad faith" amendment was worked out behind the scenes and was acceptable to both landlords and tenants.

Purpose of the bill in light of existing law (statutory archeology)

When the 1984 legislature considered the bills that became 1984 Minn. Laws ch. 612, s.1, there were already several laws governing illegal lockouts:

---

[16] I happen to be a personal acquaintance of Janet Entzel, the current name of Janet Clark post her marriage to Arnie Entzel. She was the owner of my house before my wife and I bought it from her in 1988. After we chatted about old times, I sent her materials about the "bad faith" issue, including much of the legislative history. It turns out that Janet and Sally Olsen live in the same apartment complex so Janet and she looked at the materials together, discussed the bill, and then Janet reported that neither of them remember anything specific about the bill or the discussions in committee or on the floor.

[17] The Gale Library's finding aid for Senator Spear's papers, available at http://www2.mnhs.org/library/findaids/00686.xml, catalogs the extensive materials. I checked the two boxes whose catalog entries suggested they might contain relevant materials – Spear Box 11 with location number 143.E.19.9B and Spear Box 13 with location number 142.J.17.1B. I looked through the Consumer Protection folder in the former box and every folder in the latter box but came up empty.

[18] Appendix LH 231 at PDF page 8.

[19] Appendix LH 231 at PDF page 15.

> Minn. Stat. § 566.175 (1983) (now codified at Minn. Stat. § 504B.375) provided a residential tenant with a user-friendly procedure to rapidly regain possession after being illegally locked out. Except in unusual circumstances, the statute does not provide for attorney fees.[20]
>
> Minn. Stat. § 557.08 (1983) (still codified at Minn. Stat. § 557.08) allowed a residential or commercial tenant treble damages after being illegally and by force locked out or kept out. *Poppen v. Wadleigh*, 235 Minn. 400,407, 51 N.W.2d 75,--- (1952) construed "by force" as follows: 'The force used must be unusual and tend to bring about a breach of the peace, such as an entry with a strong hand, or a multitude of people, or in a riotous manner, or with personal violence, or with threat and menace to life or limb, or under circumstances which would naturally inspire fear and lead one to apprehend danger of personal injury if he stood up in defense of his possession."
>
> Minn. Stat. § 504.26 (1983) (now codified at Minn. Stat. § 504B.221) allowed a residential tenant treble damages plus attorney fees if the landlord illegally interrupted electrical, heat, gas or water utility service. Specifically, the claim arose if the landlord turned off the utility, the tenant gave notice (complained), and the landlord did not restore the service or take other remedial action. The landlord was not liable if the interruption was to allow repair. Therefore, in other words, if the landlord decided to force the tenant out by turning off the heat in the winter or otherwise turn off enough utilities to make living in the unit unbearable or unpleasant, the tenant had a claim for treble damages or $500 plus attorney fees.

and

> Under *Berg v. Wiley II*, 264 N.W.2d 145 (Minn. 1978) a residential or commercial tenant who was unlawfully locked out could sue for actual damages.

What sort of holes did these leave in tenant protection against lockouts? If the landlord used a utility shutoff to drive out the tenant, the tenant could regain possession quickly via section 566.175 and get powerful damages (treble damages plus attorney fees) via section 504.26. If the landlord used significant force to oust the tenant or keep him out, the tenant could regain possession quickly via section 566.175 and get treble damages via section 557.08 (but no attorney fees). Otherwise, the tenant could only get actual damages under *Berg v. Wiley II*.

Thus, if the landlord used a direct method to oust the tenant – changing the locks rather than turning off utilities – and did so without force (e.g. by rekeying locks while the tenant was at work, or, apparently as in the instant case by rudely and angrily asking the tenants to leave and then padlocking the door), the tenant could get back in via section 566.175. However, the tenant would have to spend his own money to hire an attorney, probably wiping out any gain from a judgment for actual damages. Even if force was involved, again the tenant would have to spend his own money to hire an attorney.

---

[20] Subdivision 2 provides for attorney fees only if the landlord contests the order granting the tenant possession. See a modern case confirming this meaning, Denzer v. Dolan, Minn. Ct. App. File No. A18-0645.(Nov. 26, 2018((nonprecedential).

It borders on the absurd that a residential landlord could turn off the heat in the winter and face the full punishment (treble damages plus attorney fees) but face less punishment and thus less incentive to obey the law if he just changed the locks. In the former case, at least the tenant has a home – albeit a terrible one – while in the latter case he is literally out in the cold. It would make sense for the legislature to fix the problem by making the two methods of ouster similarly unpleasant for the landlord and remunerative for the tenant.

Thus I conclude that the most likely explanation for the legislature's enacting 1984 Minn. Laws ch 612 s 1 was to deal with the landlord who evaded the law and used a non-utility method to oust a residential tenant, making non-utility and utility ousters roughly equivalent.

With this in mind, the bills' authors first tried the phrase "unlawfully and intentionally" but ran into a problem. Occasionally landlords with pure hearts and not aiming to use self-help to get rid of tenants change the locks. The example discussed in the opinion where a landlord changes the locks thinking – incorrectly -- that the tenant has abandoned the unit (*Reimringer* slip op. at 16) is a classic case.[21] These landlords certainly act intentionally but their goal is not to skirt the court system to remove a tenant and they should not be punished.

Unlike the utility situation where section 504.26 had a notice-and-response system allowing a landlord to fix a utility shutoff not designed to oust the tenant, a similar notice-and-response system would work poorly in many innocent-lockout situations. It seems that the chosen solution was that "intentionally" was amended to "in bad faith". Under the amended language, the landlord would still have to act intentionally (it is hard to negligently act in bad faith) but also have a motivation of using self help to avoid housing court. The landlord's lobby, which professes to advocate for the good landlords and for the most part does so, protected law-respecting landlords. The tenant's lobby, wanting to protect tenants literally ousted into the cold as well as those merely encouraged to leave utility-shutoffs, protected those tenants.

Therefore, I would have construed "in bad faith" to mean "with the purpose of using self help to oust the tenant unless the landlord the tenant had voluntarily abandoned or appeared to have abandoned the premises."

Dictionaries

Strangely Justice Thissen did not follow his own advice and relied heavily on *Black's Law Dictionary* in his opinion. *Reimringer* slip lip op. at 12. I do take the advice in his article and end by discussing dictionary definitions rather than starting with them.

It makes sense to look at *Black's* or other legal dictionaries rather than lay dictionaries. The phrase "in bad faith" has a legalistic sound and surely was meant to bear legal rather than common usage. However, in 1984 legislators who looked up "bad faith" in *Black's* would not have used the Eleventh Edition, which was published in 2019. They would have consulted the current *Black's Law Dictionary, Fifth Edition*, published in 1983, which gave this definition:

[21] Lindner v. Foy, Minn. Ct. App. File No. A04-2060 (June 28, 2005) (nonprecedential) is a real-life, similar case.

> **Bad faith** [means] The opposite of "good faith," generally implying or involving actual or constructive *fraud, or a design to mislead or deceive another*, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the *conscious doing of a wrong because of* dishonest purpose or *moral obliquity*, it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. [italics added]

This definition includes the dishonesty concept ("fraud ... deceive another"). However, it also includes the concept found in *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991) (bad faith is "willful violation of a known right"), the other cases cited in Thissen's opinion (*Reimringer* slip op. at 11), and what is likely the leading case, *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 837 (Minn. Ct. App. 1994) ("a party's refusal to fulfill some duty or contractual obligation based on an ulterior motive, not an honest mistake regarding one's rights or duties."). *Black's Fifth* states this concept as "conscious doing of a wrong because of … moral obliquity."

Applying these two versions of "bad faith" to real-world actions is instructive. In some lockouts the landlord is dishonest. A few landlords lock out tenants based on allegations they know are false (e.g. "you smoked marijuana in the apartment", knowing the tenant had no marijuana); and a few landlords use deceit to achieve a lockout (e.g. telling the tenant to go to place X to get something valuable and while the tenant is gone changing the locks.) However, at least in my long experience as a housing attorney, the strong majority involve landlords taking the law into their own hands but being totally honest as they do so.[22] Usually in anger, they tell the tenant to pay up their delinquent rent or get out and then when no payment arrives the landlord changes the locks. Perhaps the legislature only wanted to punish the first group of landlords but that seems unlikely; the second group is the main problem.

Justice Thissen's opinion defines "bad faith" as "dishonest" or "dubious" even though the definition in *Black's Eleventh Edition* does not include "dubious". Perhaps he meant "dubious" to cover some situations where the landlord honestly was trying to evade the law. Perhaps the word "dubious" allows tenants to pursue section 504B.231 claims when the landlord is honest but law-evading. However, it would have been better to use the Fifth Edition's definition and its "moral obliquity" concept to get at the meanings implied by statutory-archeology analysis.

Other canons of construction are not applicable

Other canons of construction, mostly gathered in Minn. Stat. §§ 645.16-17 but also in a variety of appellate cases, do not seem to apply to section 504B.231 and so are not discussed.

[22] A few appellate cases involving lockouts illustrate this point as they involve landlords who honestly thought they had the facts on their side (even if ultimately, at least in some cases, it turned out they didn't). E.g. *Stone v. Clow*, Minn. Ct. App. File No. A13-0984.(Mar. 10, 2014) (nonprecedential); *Berg v. Wiley II*, 264 N.W.2d 145 (Minn. 1978).

Conclusions

Tips for practitioners

Landlords' attorneys

Landlords considering whether to lockout a tenant usually act in haste and don't consult counsel. However, when they do their attorney needs to give good but ethical advice. Since unlawfully and intentionally locking out a tenant is a crime under both Minn. Stat. § 504B.225 and Minn. Stat. § 609.606, the attorney may not ethically advise the landlord to do so.[23] She can advise the landlord about whether the occupant is a tenant and, if the occupant is not a tenant that a lockout would not be "in bad faith" and likely not a crime. She can advise the landlord about the consequences of locking out a tenant, including the enhanced civil consequences of doing so forcefully (Minn. Stat. § 557.08) or in bad faith (Minn Stat. § 504B.231) plus the chances of being convicted of misdemeanor lockout and the likely sentence. She can advise the landlord that if the landlord's only motivation is to oust the tenant without other intentions, under *Reimringer* the action likely won't be found in bad faith and thus not make the landlord liable under section 504B.231 (with the caveat that the court will not simply take the landlord's word for his motivation but look at his statements, his actions, and surrounding circumstances).

If a case under section 504B.231 does come to trial, assuming the facts support the argument the attorney should show that the tenant appeared to have abandoned the property. If those were not the facts, then she should try to show that the landlord had no motive other than removing the tenant and/or that the landlord generally acted honestly and morally (not dubiously).

Tenants' attorneys

Tenants' attorneys do get consulted fairly frequently by tenants who fear being locked out, and less frequently but still regularly by tenants who have been locked out. One piece of advice is never to give up possession voluntarily unless threatened with physical harm. If the tenant follows this advice and is then physically thrown out or forced out by the threat of violence, the tenant will certainly have a claim under Minn. Stat. § 557.08 and probably under Minn Stat. § 504B.231 (since the landlord literally meant to harm the tenant).

If the tenant has been locked out, the tenant still has the right to possess and live in the unit, so it is lawful to enter back in (although "breaking and entering" that causes damage to the premises probably is unlawful). If the tenant is physically prevented from entering – e.g. by being tackled while he or his locksmith is picking an entrance-door lock -- that should bring into play Minn. Stat. § 557.08.

---

[23]Minn.Rule.Prof.Cond. 1.2(d) says "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

Sometimes the local police will use Minn. Stat. § 609.606 and require the landlord to let the tenant back in and maybe even arrest or tab charge the landlord. If the police are hesitant, sometimes a call to the local prosecuting attorney invoking, Minn. Stat. § 609.606 will get the police to do their job.

If the case needs to be litigated, the attorney should file a combined case under Minn. Stat. § 504B.375 (for immediate possession), for plain damages under *Berg v. Wiley II*, for treble damages under Minn. Stat. § 557.08 (if there are "forcibly" facts), for attorney fees if the lease so provides[24], and for treble damages plus attorney fees under Minn. Stat. § 504B.231 if the tenant can point to at least one dishonest, shady, or immoral act or statement by the landlord.

A subsequent motion for "ordinary" punitive damages under Minn. Stat. § 549.20 (not treble damages under sections 557.08 or 504B.231) should be made if the attorney believes he can show that the landlord acted with "deliberate disregard for the rights or safety" of the tenant or his family. Deliberately locking out a tenant should qualify. It might be difficult to do this in conciliation court, but if the lawsuit includes a section-504B.375 claim it already is in district court.

Finally, it's a close call whether it might help to show what I think the legislature really had in mind when enacting the statute. Framed in terms of how the lockout harmed the tenant, and how the landlord knew this, might help.

Suggested legislation

While enacting new legislation is never simple, the straightforward solution is to amend Minn. Stat. § 504B.231. Based on the discussion above I suggest changing "unlawfully and in bad faith" to "unlawfully and intentionally" and adding as a new sentence at the end of paragraph (a) of section 504B.231, "Provided, however, that the landlord is not liable under this section if the tenant had abandoned or it appeared that the tenant had abandoned the premises at the time of the ouster or exclusion."

[24]Keep in mind that under Minn. Stat. § 504B.172 a pro-landlord attorney-fees clause in the lease becomes bilateral.