

**UNIVERSITY OF MISSOURI – KANSAS CITY  
SCHOOL OF LAW**

**PROPERTY I, SECTION B  
PROFESSOR CARBONE**

**FALL 2007  
ASSIGNMENTS**

**Text:** Dukeminier and Krier, 6<sup>th</sup> ed. I also strongly recommend Laurence and Minzer's *Estates in Land and Future Interests*, 2<sup>nd</sup> ed.. We will not use it until the end of the semester, but to make sure you can get a copy, you should buy it soon. The assignment sheet references the student guide chapters, but the student guide assignments will not be discussed in class.

**Grades:** The grade will be based on the final exam at the end of the semester. The exam will be closed book. It will consist of a mix of multiple choice and essay questions.

**ASSIGNMENTS**

All assignments are taken from Dukeminier and Krier unless otherwise noted. All assignments are subject to change. Each assignment is generally intended for one class. Class discussion will focus on the cases identified, not the background reading. I may add additional assignments during the semester.

**Introduction to Property**

1. *Pierson v. Post*, pp. 17-23.
2. *Ghen, Keeble*, pp. 23-35.
3. *INS, Doris Silk*, pp. 51-69.
4. *Moore*, pp. 69-86 (see attached).
5. *Baseball*, pp. 110-11.

**Adverse Possession**

6. *Van Valkenburgh*, pp. 112-30.
7. *Manillo, Howard*, pp. 130-44, color of title (attached).
8. *O'Keefe*, pp. 144-57.

**Landlord-Tenant**

9. pp. 363-65, 368-76, *Crechale*.
10. *Hannan, Ernst*, pp. 384-94.
11. *Kendall*, pp. 395- 402.
12. *Berg, Sommer*, pp. 403-20.

13. Security Deposits, pp. 220-21; Hypos, KS and MO statutes and *Wurtz* (attached).
14. *Reste, Hilder*, pp. 421-39.
15. Retaliatory Eviction, pp. 439-449; *Midwest Properties, Leve* (attached).
16. LL-T Ethics Assignment, *Warren* (attached).

**Estates in Land and Future Interests**

17. Pp. 173-78, focus on problems 183, 185-86; Student Guide (SG) Chap. 1.
18. *White, Baker*, pp. 189-205.
19. SG Chap. 2; *Marenholz, Mountain Brow Lodge*, pp. 205-24.
20. Pp. 225-39; SG Ch. 3.
21. SG Chap 4; pp. 239-44.
22. Pp. 244-62, skim 62-74; Rule Against Perpetuities tutorial (website).

**THE EDITORS DECIDED TO OMIT TWO  
PASSAGES WHICH MAY HELP YOU  
UNDERSTAND THE *MOORE* CASE BETTER:**

ON PG. 75, IMMEDIATELY BEFORE THE LINE THAT BEGINS "...A fully informed patient may always withhold consent..." (it is at the end of the page) add:

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit "scientific use" contrary to the patient's expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

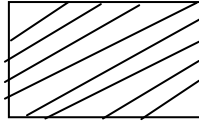
ON PG. 85, THE FIRST PARAGRAPH UNDER "**2. Should Conversion Liability Be Extended?**" is as follows:

2. Should Conversion Liability Be Extended?

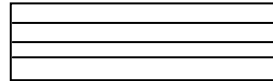
As we have discussed, Moore's novel claim to own the biological materials at issue in this case is problematic, at best. Accordingly, his attempt to apply the theory of conversion within this context must frankly be recognized as a request to extend that theory. While we do not purport to hold that excised cells can never be property for any purpose whatsoever, the novelty of Moore's claim demands express consideration of the policies to be served by extending liability [citations omitted] rather than blind deference to a complaint alleging as a legal conclusion the existence of a cause of action.

## ADVERSE POSSESSION: COLOR OF TITLE HYPOTHETICALS

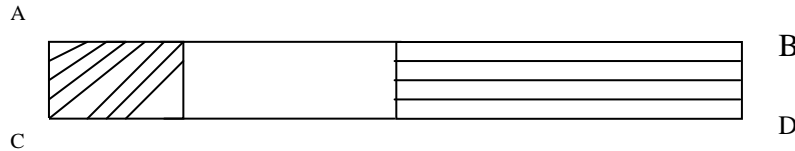
In the hypotheticals below, A, an adverse possessor, occupies the portion of property indicated by:



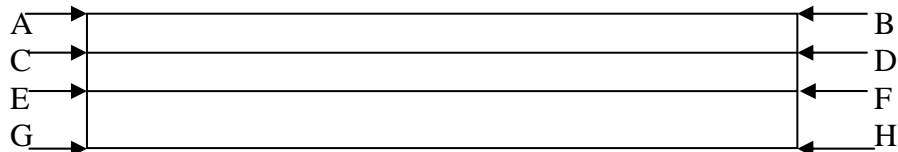
O, the true owner, occupies the portion indicated by:



Assume A can meet all the requirements of adverse possession as to the portion she occupies and that the only question is the extent of the property she can claim.



1. A has no instrument granting her title. However, she occupies the portion of ABCD indicated. O, the true owner, has a deed describing him as the owner of ABCD. O does not live on any portion of the property. Who owns what and why?
2. A has no instrument granting her title. She occupies the portion of ABCD indicated. O, the true owner, likewise has no valid instrument granting him title. O does not occupy the property. Who owns what and why?
3. A has a defective deed stating that she owns all of ABCD. O also has a deed stating O is the owner of ABCD. Each occupies the portion indicated. Who owns what and why?
4. A has a defective deed stating that she owns all of ABCD. O also has a deed stating O is the owner of ABCD. A occupies the portion indicated. O does not occupy the property. Who owns what and why?
5. A has good title to ABCD below. A lives in a house on her property. However, A's deed mistakenly describes line EF as the boundary line instead of CD which is the true boundary. A, however, has never used the CDEF area. O, the true owner, has a correct deed describing his parcel as CDGH (CDEF was inadvertently described in both deeds). O lives in a house on his property, EFGH. Neither party actually used the CDEF area. Who owns CDEF and why?



23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

## SECURITY DEPOSIT HYPOTHETICALS

1. Prior to renting an apartment, Tenant asks you what she should do to ensure that she will get her security deposit of \$1000.00 back. Advise.

2. Tenant has given Landlord a \$1000.00 security deposit. Tenant plans on moving out on October 31<sup>st</sup> (after giving the proper notice) and wants to be sure he will get his deposit back. How would you advise him?

3. Tenant in #2 above does not receive the \$1000.00. Instead one week after vacating, Tenant receives a notice from Landlord specifying that Landlord is keeping the money:

- a) to clean the carpets (which Tenant had shampooed);
- b) to dry clean the drapes (which Tenant did not do);
- c) to replace a pane of glass that was broken when the neighbor's daughter hit a softball over the fence and through the kitchen window, and
- d) to spackle the holes caused by picture hangers Tenant put up, necessitating, according to Landlord, the repainting of two rooms.

Tenant asks if there is anything he can do. Advise.

4. Assume Landlord has not returned the security deposit nor sent the tenant an itemized statement pursuant to Mo. Rev. Stat. Section 535.300.2 (2) within five weeks after the tenant has vacated.

What should Tenant do and what remedies can the Tenant claim?

5. Landlord thinks that student groups are high risk tenants and requires a security deposit of two months rent plus a \$100.00 nonrefundable fee from any group of more than two unrelated individuals under the age of twenty-five who wish to rent its apartments. This fee is entitled a "Tenant Initiation Expense Reimbursement" fee. Tenants pay the fee at the time they sign the standard lease form. Do tenants have any grounds under the statute to challenge the fee?

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

***Missouri Revised Statutes, Section 535.300*** (August 28, 2006)

535.300. 1. A landlord may not demand or receive a security deposit in excess of two months' rent.

2. Within thirty days after the date of termination of the tenancy, the landlord shall:

(1) Return the full amount of the security deposit; or

(2) Furnish to the tenant a written itemized list of the damages for which the security deposit or any portion thereof is withheld, along with the balance of the security deposit. The landlord shall have complied with this subsection by mailing such statement and any payment to the last known address of the tenant.

3. The landlord may withhold from the security deposit only such amounts as are reasonably necessary for the following reasons:

(1) To remedy a tenant's default in the payment of rent due to the landlord, pursuant to the rental agreement;

(2) To restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted; or

(3) To compensate the landlord for actual damages sustained as a result of the tenant's failure to give adequate notice to terminate the tenancy pursuant to law or the rental agreement; provided that the landlord makes reasonable efforts to mitigate damages.

4. The landlord shall give the tenant or his representative reasonable notice in writing at his last known address or in person of the date and time when the landlord will inspect the dwelling unit following the termination of the rental agreement to determine the amount of the security deposit to be withheld, and the inspection shall be held at a reasonable time. The tenant shall have the right to be present at the inspection of the dwelling unit at the time and date scheduled by the landlord.

5. If the landlord wrongfully withholds all or any portion of the security deposit in violation of this section, the tenant shall recover as damages not more than twice the amount wrongfully withheld.

6. Nothing in this section shall be construed to limit the right of the landlord to recover actual damages in excess of the security deposit, or to permit a tenant to apply or deduct any portion of the security deposit at any time in lieu of payment of rent.

7. As used in this section, the term "security deposit" means any deposit of money or property, however denominated, which is furnished by a tenant to a landlord to secure the performance of any part of the rental agreement, including damages to the dwelling unit. This term does not include any money or property denominated as a deposit for a pet on the premises.

(L. 1983 H.B. 175 § 1)

*K.S.A. § 58-2550 (2006)*

58-2550. Security deposits; amounts; retention; return; damages for noncompliance.

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

(a) A landlord may not demand or receive a security deposit for an unfurnished dwelling unit in an amount or value in excess of one month's periodic rent. If the rental agreement provides for the tenant to use furniture owned by the landlord, the landlord may demand and receive a security deposit not to exceed 1 1/2 months' rent, and if the rental agreement permits the tenant to keep or maintain pets in the dwelling unit, the landlord may demand and receive an additional security deposit not to exceed 1/2 of one month's rent. A municipal housing authority created under the provisions of *K.S.A. 17-2337* et seq., and amendments thereto, which is wholly or partially subsidized by aid from the federal government, pursuant to a rental agreement in which rent is determined solely by the personal income of the tenant, may demand and receive a security deposit in accordance with a schedule established by the housing authority, which is based on the bedroom unit size of the dwelling unit. Any such municipal housing authority which establishes such a schedule shall provide a deferred payment plan whereby the tenant may pay the deposit in reasonable increments over a period of time.

(b) Upon termination of the tenancy, any security deposit held by the landlord may be applied to the payment of accrued rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with *K.S.A. 58-2555*, and amendments thereto, and the rental agreement, all as itemized by the landlord in a written notice delivered to the tenant. If the landlord proposes to retain any portion of the security deposit for expenses, damages or other legally allowable charges under the provisions of the rental agreement, other than rent, the landlord shall return the balance of the security deposit to the tenant within 14 days after the determination of the amount of such expenses, damages or other charges, but in no event to exceed 30 days after termination of the tenancy, delivery of possession and demand by the tenant. If the tenant does not make such demand within 30 days after termination of the tenancy, the landlord shall mail that portion of the security deposit due the tenant to the tenant's last known address.

(c) If the landlord fails to comply with subsection (b) of this section, the tenant may recover that portion of the security deposit due together with damages in an amount equal to 1 1/2 the amount wrongfully withheld.

(d) Except as otherwise provided by the rental agreement, a tenant shall not apply or deduct any portion of the security deposit from the last month's rent or use or apply such tenant's security deposit at any time in lieu of payment of rent. If a tenant fails to comply with this subsection, the security deposit shall be forfeited and the landlord may recover the rent due as if the deposit had not been applied or deducted from the rent due.

(e) Nothing in this section shall preclude the landlord or tenant from recovering other damages to which such landlord or tenant may be entitled under this act.

(f) The holder of the landlord's interest in the premises at the time of the termination of the tenancy shall be bound by this section.

5. In order to effectuate the purpose of the Kansas Small Claims Procedure Act, *Kan. Stat. Ann. § 60-2006*, a tenant was awarded attorney fees in connection with an appeal filed by a landlord who unsuccessfully challenged a judgment that permitted the tenant to recover her security deposit on the basis that the landlord failed to comply with the notice provision of *Kan. Stat. Ann. § 58-*

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

2550(b). *Vogel v. Haynes*, 11 Kan. App. 2d 454, 730 P.2d 1096, 1986 Kan. App. LEXIS 1426 (1986).

18. In a dispute regarding a residential lease, although a landlord was entitled to withhold the costs of carpet shampoo from his tenant's security deposit, the tenant was entitled to mandatory statutory damages under *Kan. Stat. Ann. § 58-2550(c)* for the landlord's wrongful withholding of the tenant's security deposit. *Love v. Monarch Apartments*, 13 Kan. App. 2d 341, 771 P.2d 79, 1989 Kan. App. LEXIS 219 (1989).

22. Tenant who successfully asserted a claim against his landlord to recover his security deposit was entitled to an award of attorney fees even though the landlord received a judgment in his favor on his counterclaim to recover past due rent from the tenant because the tenant was a successful party and prevailed on the primary issue in the case. *Szoboszlay v. Glessner*, 233 Kan. 475, 664 P.2d 1327, 1983 Kan. LEXIS 332 (1983).

No. 85,305

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SARAH R. WURTZ,

*Appellee,*

v.

CEDAR RIDGE APARTMENTS,

*Appellant.*

SYLLABUS BY THE COURT

1. Under K.S.A. 1999 Supp. 58-2550(b), a landlord may retain any portion of a security deposit for actual damages sustained.
2. Under K.S.A. 1999 Supp. 58-2550(c), a tenant may recover damages in an amount equal to one and one-half times the amount of the security deposit wrongfully withheld.
3. A district court acting as a small claims appellate court may only decide those issues properly preserved for appeal by an appellant or cross-appellant.

Appeal from Shawnee District Court; TERRY L. BULLOCK, judge. Opinion filed February 16, 2001. Affirmed in part and modified in part.

*Steven R. Wiechman*, of Topeka, for appellant.

*Tracie R. England*, legal intern, *John J. Francis*, supervising attorney, of Washburn Law Clinic, of Topeka, and *Bruce Plenk*, of Lawrence, for appellee.

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

Before MARQUARDT, P.J., GREEN, J., and ROGG, S.J.

GREEN, J.: Cedar Ridge Apartments (Cedar Ridge) appeals the judgment of the trial court which awarded Sarah R. Wurtz a security deposit, rent credit, and penalty. On appeal, Cedar Ridge argues (1) that statutory and case law do not prohibit the forfeiture of a security deposit as liquidated damages and (2) that the trial court erred in failing to award it a cancellation fee as provided for in the lease. Alternatively, Cedar Ridge argues that if the trial court did not err in awarding Wurtz a security deposit, the trial court erred in assessing the penalty. We affirm in part and modify in part.

Cedar Ridge and Wurtz entered into a lease agreement for 1 year to run from March 1, 1999, to February 29, 2000. The monthly rent was \$395. Wurtz paid a \$200 security deposit to Cedar Ridge pursuant to the lease agreement. The provision referring to the security deposit provides that the deposit may be retained to reimburse Cedar Ridge for damages as a result of a breach of the covenants or for rents and damages resulting from Wurtz' early termination of the lease agreement. The lease agreement also contained a cancellation provision which required Wurtz, upon early termination of the lease, to give 30 days' written notice, forfeit the security deposit, and pay a cancellation fee in the amount of \$474.

Wurtz sent a letter dated October 1, 1999, to Cedar Ridge requesting cancellation of the lease due to unacceptable living conditions, return of the security deposit, and waiver of the cancellation fee. Cedar Ridge responded by a letter dated October 4, 1999, which stated that if Wurtz wished to terminate the lease early she would have to give 30 days' notice, forfeit the security deposit, and pay the cancellation fee of \$474. On October 29, 1999, Wurtz completed a notice to move form upon which she noted that she was moving because she had bought a house. Wurtz then vacated the apartment and paid prorated rent for the month of November in the amount of \$356.

A move-out inspection was conducted on November 9, 1999. On the inspection sheet, Cedar Ridge claimed that Wurtz forfeited the \$200 security deposit, owed the \$474 cancellation fee, and owed \$104 for cleaning and miscellaneous expenses, resulting in a total due from Wurtz of \$578. The apartment was re-let on November 20, 1999, to another tenant. The re-letting of the apartment before the end of November resulted in a rent overpayment by Wurtz of \$106. Cedar Ridge indicated that the overpayment amount would be credited to the \$578 it claimed Wurtz owed, alleging the revised total due to be \$472.

Wurtz then sent a letter to Cedar Ridge dated January 11, 2000, indicating that in light of the rent overpayment she would not pay any of the money claimed by Cedar Ridge. Cedar Ridge responded in a letter requesting that she pay the balance of \$472 within 2 weeks to maintain a good credit reference.

Wurtz then filed a small claims court petition seeking the return of the security deposit, damages, and a finding that the cancellation fee provision was null and void as a grossly unfair amount. Cedar Ridge filed a counterclaim in small claims court seeking \$472. The small claims court denied both parties' claims.

Wurtz appealed to the district court but Cedar Ridge did not file a cross-appeal. The district court found that liquidated damages are prohibited by statute and awarded Wurtz the security deposit (\$200) less damages (\$104) plus a rent credit (\$106) and assessed a penalty in the amount of \$303

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

under K.S.A. 1999 Supp. 58-2550(b) for a total of \$505. The district court refused to consider whether the small claims court correctly denied Cedar Ridge's counterclaim for the cancellation fee because Cedar Ridge failed to preserve the issue for appeal.

Cedar Ridge's first argument on appeal is that the trial court erred in awarding Wurtz the security deposit. Specifically, Cedar Ridge contends that statutory and case law do not prohibit the forfeiture of a security deposit as liquidated damages. Interpretation of a statute is a question of law subject to unlimited review. *State v. Patterson*, 25 Kan. App. 2d 245, 247, 963 P.2d 436, rev. denied 265 Kan. 888 (1998). Likewise, a de novo standard of review applies to the interpretation of case law. *NEA-Coffeyville v. U.S.D. No. 445*, 268 Kan. 384, 386, 996 P.2d 821 (2000).

The Kansas Residential Landlord and Tenant Act (RLTA), K.S.A. 58-2540 *et seq.*, addresses the forfeiture of security deposits. A security deposit is defined in the RLTA as

"any sum of money specified in a rental agreement, however denominated, to be deposited with a landlord by a tenant as a condition precedent to the occupancy of a dwelling unit, which sum of money, or any part thereof, may be forfeited under the terms of the rental agreement upon the occurrence or breach of the conditions specified therein." K.S.A. 58-2543(m).

The RLTA also specifies when a security deposit may be forfeited. K.S.A. 1999 Supp. 58-2550(b) provides:

"Upon termination of the tenancy, any security deposit held by the landlord may be applied to the payment of accrued rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with K.S.A. 58-2555, and amendments thereto, and the rental agreement, all as itemized by the landlord in a written notice delivered to the tenant."

Under K.S.A. 58-2555(f) the tenant is responsible for actual damages including "any destruction, defacement, damage, impairment or removal of any part of the premises."

The issue of whether a security deposit provision in a lease constitutes liquidated damages was addressed in *Vogel v. Haynes*, 11 Kan. App. 2d 454, 456, 730 P.2d 1096, rev. denied 240 Kan. 806 (1986). *Vogel* involved a lease which termed the security deposit as a "deposit . . . as security to the Lessor for the performance of this Agreement." The *Vogel* court found that this language did not constitute a liquidated damages provision. *Vogel* further held that "a lump sum penalty, common to liquidated damages, is proscribed by K.S.A. 58-2550(b) which provides only for actual damages sustained." 11 Kan. App. 2d at 456.

Here, the lease between Cedar Ridge and Wurtz provides for a \$200 deposit "as security for the payment of all charges which may accrue and for the full and faithful performance of all the covenants and conditions of this Lease Agreement." This provision is similar to that addressed in *Vogel*. As in *Vogel*, the \$200 security deposit is designed to cover actual damages and is not a liquidated damages clause. Although Wurtz' lease provides for a forfeiture of the entire security deposit upon early termination of the lease, such a penalty is prohibited by 58-2550(b) because, as noted in *Vogel*, the statute only provides for actual damages sustained. Furthermore, 58-2550(b) requires that these actual damages must be itemized. In contrast, a forfeiture or a liquidated damages clause, by its nature, is not itemized. As a result, we find that the district court correctly

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

refused to award Cedar Ridge the entire security deposit as liquidated damages, but correctly deducted \$104 in damages from the deposit.

It is next necessary to determine whether the district court erred in calculating the penalty Cedar Ridge was to pay Wurtz for failing to return the security deposit to her. The district court calculated the penalty at \$303 by first determining that Cedar Ridge owed Wurtz \$202 (\$200 security deposit, less \$104 damages, plus \$106 rent credit) and assessing the penalty against that amount ( $1 \frac{1}{2} \times \$202$ ) for a total judgment against Cedar Ridge in the amount of \$505.

Cedar Ridge contends that the penalty should have been assessed against the amount of the security deposit wrongfully withheld, which we have calculated at \$96. Wurtz, on the other hand, concedes that the district court erred in calculating the penalty, suggesting that the penalty should have been assessed against the \$200 security deposit.

K.S.A. 1999 Supp. 58-2550(b) governs the procedure to be followed by a landlord in returning the security deposit to a tenant upon termination of the lease agreement. The pertinent part of the statute reads:

"If the landlord proposes to retain any portion of the security deposit for expenses, damages or other legally allowable charges under the provisions of the rental agreement, other than rent, the landlord shall return the balance of the security deposit to the tenant within 14 days after the determination of the amount of such expenses, damages or other charges, but in no event to exceed 30 days after termination of the tenancy, delivery of possession and demand by tenant."

Under this statute, Cedar Ridge was entitled to retain \$104 from the security deposit for damages and expenses. Accordingly, Cedar Ridge wrongfully withheld \$96 of the security deposit and may be penalized for doing so under K.S.A. 1999 Supp. 58-2550(c). The statute provides that "the tenant may recover that portion of the security deposit due together with damages in an amount equal to  $1 \frac{1}{2}$  the amount wrongfully withheld." (Emphasis added.) Because Cedar Ridge wrongfully withheld \$96 of the security deposit, the district court should have assessed the penalty against that amount. As a result, the penalty assessed against Cedar Ridge is decreased to \$144 ( $1 \frac{1}{2} \times \$96$ ).

It is important to note that the trial court also erred in assessing a penalty against the \$106 rent credit Cedar Ridge failed to pay Wurtz. K.S.A. 1999 Supp. 58-2550 does not provide for a penalty on a wrongfully withheld rent credit, only for wrongfully withheld security deposits.

Cedar Ridge also contends that the district court erred in refusing to award it a cancellation fee in the amount of \$474. However, Cedar Ridge did not cross-appeal to the district court the issue of whether the small claims court erred in refusing to award it a cancellation fee. Cedar Ridge contended at oral argument that it was not required to file a cross-appeal in the district court because under K.S.A. 61-2709(a) all appeals from small claims judgments "shall be tried and determined *de novo* before a district judge." Cedar Ridge interprets this statute as providing for a new trial on all issues considered by the small claims court, not merely a trial on the issues appealed by Wurtz. Interestingly, this is an issue of first impression.

Statutes purporting to grant the authority to hold trials *de novo* on appeal are to be strictly construed. *Nurge v. University of Kansas Med. Center*, 234 Kan. 309, 316, 674 P.2d 459 (1983).

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

This court interpreted 61-2709(a) as expressing legislative intent that a district court reviewing a small claims action sits as an appellate court. *Armstrong v. Lowell H. Listrom & Co.*, 11 Kan. App. 2d 448, 725 P.2d 540 (1986). The *Armstrong* court rationalized:

"We construe words and phrases according to the context in which they are used and give words in common use their natural and ordinary meaning. [Citation omitted.] In natural and ordinary usage, 'appeal' does not signify an original action, but a review of a lower court's decision by a higher court. The provision for appeal 'from any judgment' and the requirement that the notice of appeal specify 'the order, ruling, decision, or judgment complained of' supports our conclusion that the legislature used 'appeal' in K.S.A. 61-2709(a) in its natural and ordinary sense.

"In the absence of express legislative directive to the contrary, we interpret 'appeal' in K.S.A. 61-2709(a) to refer to a review of the judgment of the small claims court, not to a new, original action in the district court. The provision for de novo review does not alter the appellate nature of the district court's authority, but rather specifies the procedure to be employed on appeal of a small claims judgment, directing the district court to make an independent determination of the facts." 11 Kan. App. 2d at 451-52.

*Armstrong* determined that the district court acted beyond its jurisdiction as a small claims appellate court when it awarded plaintiff a judgment exceeding the small claim.

The scope of a district court's appellate jurisdiction has been consistently construed as limited. See, e.g., *McCracken v. Wright*, 159 Kan. 615, 618, 157 P.2d 814 (1945) ("It has been the settled law of this state for many years that a district court takes a case appealed from a justice of the peace with only the limited jurisdiction of the justice and does not acquire any original jurisdiction."); *Angle v. Kansas Dept. of Revenue*, 12 Kan. App. 2d 756, 765, 758 P.2d 226, rev. denied 243 Kan. 777 (1988) ("[T]he Supreme Court has not interpreted any statute to allow true de novo review in the sense of a new trial on facts and issues as though they had never been tried. Even under the de novo review recognized in KCCR cases, the court is restricted to those issues preserved in a motion for rehearing . . .").

We conclude that a district court hearing an appeal from a small claims action may only decide those issues properly preserved for appeal by an appellant or cross-appellant. Even though K.S.A. 61-2709(a) provides for de novo review, the proceeding is still predominantly appellate in nature. If an appellee were allowed to raise an issue in the district court without filing a cross-appeal, the proceeding would not be truly appellate. Because Cedar Ridge failed to cross-appeal the denial of its counterclaim, the district court was precluded from addressing the cancellation fee issue. Moreover, because the cancellation fee issue was not raised before the district court, the issue cannot be raised in this appeal. See *Lindsey v. Miami County National Bank*, 267 Kan. 685, 690, 984 P.2d 719 (1999). As a result, we find that Cedar Ridge failed to preserve for appeal the issue of cancellation fee provisions in the lease agreement.

In summary, we find that Wurtz is entitled to the security deposit (\$200), less damages and expenses (\$104), plus a rent credit (\$106) and a penalty (\$144) for a total of \$346 plus interest. In addition, Wurtz is not required to pay the cancellation fee because that issue was not preserved for appeal.

23 Kan. App. 2d 524, \*; 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

Affirmed in part and modified in part.

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

**RETALIATORY EVICTION (KANSAS AND MISSOURI)**

**MIDWEST PROPERTIES, L.C., Appellee, v. SHERRY HARVEY, Appellant.**

**COURT OF APPEALS OF KANSAS**

*23 Kan. App. 2d 524, 934 P.2d 154 (1997)*

**OPINION:**

ROGG, J.: Sherry Harvey appeals from the district court's decision granting possession of a mobile home lot to Midwest Properties, L.C. (Midwest) in a forcible detainer action.

Sherry Harvey for a number of years rented a mobile home lot from Midwest. Harvey was renting from month to month. On January 3, 1995, Harvey received a notice to vacate on or before March 5, 1995.

Harvey and Midwest have had a long-term dispute because of Harvey's many complaints and Midwest's previous attempts to evict her. At trial, the court took judicial notice of another of its cases, *No. 93 LA 7929*. In *No. 93 LA 7929*, the court took evidence on November 30, 1993, and September 30, 1994, and issued a letter opinion on December 7, 1994. In *No. 93 LA 7929*, the court denied the petition for possession because of failure to follow the notice provisions in *K.S.A. 58-25,105*. The court also found that the action was a retaliatory eviction based on Harvey's "past action on behalf of mobile home owners" and awarded Harvey one and one-half months' rent. The district court concluded that "the retaliation covered by this letter decision has ceased."

In this case, Harvey claimed that because the eviction notice was given less than 30 days after the decision in *No. 93 LA 7929*, it amounted to a retaliatory act. Harvey testified that on November 30, 1994, she sent a letter to the Topeka city attorney complaining of the city's placement of individual water meters on the mobile home lots.

She contended this was done at the request of Midwest, violating the statutory 60-day notice provision for changes in a rental agreement. Apparently, Harvey refused to pay a \$ 25 deposit the city requested (because she paid her rent, implying that rent included any water charges), and the city turned off her water. Harvey claimed a health and safety risk was then created because she operates a licensed day care at her home.

In its memorandum decision filed July 10, 1995, the district court ruled that because in *No. 93 LA 7929* the court specifically found that retaliation had ceased, the time frame to find that Harvey did some protected act should be from September 30, 1994 (the date of the last hearing in case *No. 93 LA 7929*) until January 3, 1995 (the date Harvey received notice of Midwest's intent to terminate her possession of the lot). The only evidence of a possible protected act under *K.S.A. 58-25,125* was the November 30, 1994, letter to the city attorney. The court found Harvey did direct a complaint to a government entity; however, the complaint did not specifically complain of acts by Midwest and did not show that "health and safety" factors were involved. The decision granted Midwest possession as of August 1, 1995.

A preliminary issue is this court's jurisdiction to hear this appeal. The district court filed its memorandum decision on July 10, 1995. An appeal from an action for forcible detainer must be filed within 5 days after entry of judgment. *K.S.A. 61-2102(a)*. Harvey filed a motion for extension of time to file her notice of appeal due to excusable neglect. The district court granted

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

Harvey 30 days from July 15, 1995, within which to file her appeal. Harvey filed her notice of appeal on August 11, 1995.

*K.S.A. 60-2103(a)* provides, in relevant part, that "upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." Midwest claims Harvey had to file by August 9, 1995, contending that the 30-day extension should run from the date of the entry of judgment. Under *K.S.A. 60-2103(a)*, if the district court extends the time for an appeal, the 30 days start from the *expiration of the original time within which to file the notice of appeal*. In a forcible detainer action, this would be 5 days after entry of judgment. The district court gave 30 days from July 15, 1995. Weekends and holidays are not counted when the time for filing a notice of appeal is 10 days or less. *K.S.A. 60-206(a)*. Therefore, Harvey had 30 days from July 17, 1995, to file her appeal, or until August 16, 1995.

Even if Midwest's interpretation is correct, it failed to consider the 3-day mail rule of *K.S.A. 60-206(e)*. Notice of the filing of the judgment was given by mail. Harvey filed her notice of appeal 32 days after the entry of judgment. The 3-day mail rule would allow a filing up to 33 days. This court has jurisdiction to hear Harvey's appeal.

Harvey claims the district court misapplied the Mobile Home Parks Residential Landlord and Tenant Act, *K.S.A. 58-25,100 et seq.*, to the facts of her case. . . . Specifically, Harvey maintains she had a viable defense to Midwest's action for forcible detainer under *K.S.A. 58-25,125*. *K.S.A. 58-25,125* states in relevant part:

"(a) Except as provided in this section, a landlord shall not retaliate by increasing rent or decreasing services or by failing to renew a

rental agreement after any of the following:

(1) The tenant has complained to a governmental agency charged with responsibility for enforcement of a building or housing code of a violation applicable to the mobile home park materially affecting health and safety;

(2) the tenant has complained to the landlord of a violation under *K.S.A. 58-25,111*; or

(3) the tenant has organized or become a member of a tenant's union or similar organization."

. . . Initially, it should be recognized that Harvey had a month-to-month tenancy or a tenancy at will. *K.S.A. 58-25,105(d)* provides that a month-to-month tenancy shall be terminated by at least 60 days' written notice given by either party. The parties agree that Midwest's termination notice complied with *K.S.A. 58-25,105(d)*.

Harvey has three lines of argument to support her claim of retaliatory eviction:

(1) Under *K.S.A. 58-25,125(a)(1)*, her complaint to the city about health and safety risks because of the water shutoff was the reason for the eviction and, thus, amounted to a retaliatory eviction. Harvey's argument that the interruption of water services to her day care center materially affected the health and safety of the children is not supported by the record. The complaint to the city attorney concerning installation of individual water meters does not constitute a complaint regarding a housing code violation materially affecting health

23 Kan. App. 2d 524, \*, 934 P.2d 154, \*\*;  
1997 Kan. App. LEXIS 29, \*\*\*

and safety. There is no evidence in the record as to when her water was turned off. Appellant has the burden of establishing a record on appeal to support her allegations of error. See *McCubbin v. Walker*, 256 Kan. 276, 295, 886 P.2d 790 (1994).

(2) In the alternative, her complaint was one under *K.S.A. 58-25,125(a)(2)* and, therefore, a protected act. Harvey claims that Midwest did not give 60 days' notice as provided by *K.S.A. 58-25,109(f)* for a rent increase. The rent increase is claimed as a result of the new water meter installation. A complaint concerning *K.S.A. 58-25,109(f)* is not a protected act under *K.S.A. 58-25,125(a)(2)*.

(3) Midwest's attorney's comments that Harvey frequently complained show retaliatory motive, though not contemplated under *K.S.A. 58-25,125*. Harvey claims that Midwest's attorney's comments at trial contending that Harvey is a "nuisance" because of her numerous unfounded complaints shows in itself a retaliatory motive. We find this claim to be without merit.

Harvey further claims that the real issue before this court is how long she "remains under

the umbrella of protection" following engagement in protected conduct. Here, she appears to argue that she is still protected from eviction by the acts in case *No. 93 LA 7929*. She also argues that the notice terminating the tenancy coming less than 30 days after the judgment in *93 LA 7929* is in itself prima facie evidence of retaliatory eviction.

*K.S.A. 58-25,125* does not provide any time frame, after a finding of retaliatory eviction that a landlord must wait before giving a new notice of eviction. The Act further does not provide that after a finding of a retaliatory eviction, a landlord must then prove good cause for a subsequent eviction. Harvey asks the court to provide relief in both of these by providing what the legislature did not.

The district court in this case concluded the effect of the court's determination in *No. 93 LA 7929* was that "both the tenant and the owner began anew at the conclusion of the hearing on *93 LA 7929*." Harvey argues that the landlord must be required to show good cause for eviction to eliminate the presumed retaliatory motive, consistent with *K.S.A. 58-25,125(c)*. We decline Harvey's request to add to the statute what the legislature has not provided. If the legislature wishes to address this issue, it is the proper body to do so. This is relatively new legislation and best left to the body which adopted it to make any changes to it.

Affirmed.

**NORMAN LEVE AND MARK TURKEN, Plaintiffs-Respondents, v.  
WALTER DELPH and VIVIAN DELPH, Defendants-Appellants**

**Court of Appeals of Missouri, Eastern District, Division Two**

**710 S.W.2d 389 (1986)**

**OVERVIEW:** The parties entered into a written lease agreement for mobile home space, which created a month-to-month tenancy. The landlord was required to give 30 days' written notice to terminate the lease. The tenants subsequently founded and were actively involved in a homeowner's association for the mobile home park owned by the landlord. Within months, the tenants received two letters from the landlord terminating the tenancy. . . . The tenants did not leave the premises. On appeal, the court affirmed summary judgment for the landlord in the unlawful detainer action, reasoning that the tenants were effectively put on notice [and as] holdover tenants, they were subject to suit for unlawful detainer without written demand for delivery of possession. The equitable affirmative defense of retaliatory eviction could not be raised in the summary proceedings for unlawful detainer under Missouri law.

**JUDGES:** Robert G. Dowd, Presiding Judge. Reinhard, J. and Crist, J., concur.

**OPINION**

This is an unlawful detainer action, § 534.030 *RSMo 1978*, brought by Norman Leve and Mark Turken (hereinafter plaintiffs), a partnership doing business as Sunnydale Properties, against Mr. and Mrs. Walter Delph (hereinafter defendants).

The trial court denied defendants' motion for summary judgment, sustained plaintiffs' motion for summary judgment, ordered restitution of the mobile home space, and granted attorney's fees and court costs in favor of plaintiffs.

Plaintiffs bring this unlawful detainer action pursuant to § 534.030 *RSMo 1978*, as owners of Sunnydale Mobile Home Park, to remove defendants from said premises. Defendants have rented space in the mobile home park for a mobile home for the past seventeen years. On March 1, 1983, defendants and plaintiffs entered into a written lease agreement creating a month-to-month tenancy. The lease agreement provided that the plaintiffs were required to give a thirty-day written notice to terminate the lease.

In approximately August 1983, defendants founded the Heritage Mobile Homeowner's League and defendant, Vivian Delph, has served as president since its inception.

On August 30, 1983, defendants received two letters from plaintiffs to terminate defendants' tenancy. One letter was mailed first class and the second letter was mailed first class, return receipt requested. Both letters demanded possession of the mobile home space by October 1, 1982. Both letters were conspicuously dated August 29, 1983 across the top of the letters and were received by defendants on August 30, 1983.

On August 31, 1983, plaintiffs posted a third letter on the door of defendants' mobile home to terminate their tenancy. In this notice, plaintiffs corrected the eviction date from October 1, 1982, to October 1, 1983. Plaintiffs brought an unlawful detainer action after defendants remained in possession of the mobile home space after October 1, 1983.

. . . Defendants' second point is that the court erred in sustaining plaintiffs' motion for summary judgment because their pleading raised a material

issue of fact -- the affirmative defense of retaliatory eviction.

This Court has recently held that the unlawful detainer statute is an exclusive and special code to which the ordinary rules and proceedings of other civil actions do not apply. . . . The sole issue in an unlawful detainer action is the immediate right of possession. *Carson, supra, at 558; F.A. Sander Real Estate and Investment Company v. Warner, 205 S.W.2d 283, 288 (Mo. App. 1947)*. Issues relating to title or matters of equity, such as mistake, estoppel and waiver cannot be interposed as a defense. . . . It is generally held that counterclaims are also prohibited in unlawful detainer proceedings, regardless of the subject matter, unless permitted by statute. . . . Missouri statutes do not so

permit. . . . Defendants' argument ignores the special summary nature of unlawful detainer proceedings. . . . Action for unlawful detainer is a possessory action only, and mere equitable rights or interests which defendants think themselves entitled to cannot be set up therein. . . . To permit defendants to assert an equitable defense would defeat the purpose behind an unlawful detainer action.

The law in Missouri is clear that an equitable affirmative defense cannot be raised in an unlawful detainer action. . . . Defendants are therefore precluded from raising the equitable defense of retaliatory eviction in an unlawful detainer action.

The judgment is affirmed.

## **LANDLORD-TENANT DRAFTING PROBLEM SOME ETHICAL ISSUES**

You have been asked to draft a form residential lease for a real estate association. Landlords in the area routinely use association form leases, and landlords generally refuse to negotiate any of the terms at the request of tenants. In the course of your research, you come across the following clauses in use in the area. Consider the legality and the propriety of using each clause in your form.

In doing this exercise, consider the following. Should lawyers insert clauses in contracts if the lawyer knows that such a clause is against public policy? What if it is void as a matter of law? What are the lawyer's duties with respect to advising his or her client on these matters? If the client insists on the clause's incorporation in the contract? Should the lawyer refuse? If he or she complies with the client's request, does he or she become a party to possible deception of the other party to the contract? Is there a difference between unethical conduct and immoral conduct?

1. The tenant covenants not to sue the landlord and the landlord will not be liable to the tenant for any damage, loss or injury to property or person by reason of any existing or future defect in the premises, including acts, omissions, negligence or nuisance of other persons or tenants or of landlord or his agent, including, but not limited to, that arising from falling plaster, leaking roofs, or faulty or inadequately lighted or repaired sidewalks, stairs, halls, alleys, yards, or cellars.
2. In consideration for a rent reduction of \$\_\_\_\_\_ per month, the tenant covenants not to sue the landlord and the landlord will not be liable to the tenant for any damage, loss or injury to property or person by reason of any existing or future defect in the premises, including acts, omissions, negligence or nuisance of other persons or tenants or of the landlord or his agent, including, but not limited to, that arising from falling plaster, leaking roofs, or faulty or inadequately lighted or repaired sidewalks, stairs, halls, alleys, yards or cellars.

All tenants are required to secure tenants' insurance that covers any and all damage, loss or injury to property or person occurring on the premises.

3. Tenant acknowledges that he/she has examined the premises subject to this lease and that he/she accepts such premises as being in good, safe, clean and sanitary condition and repair. Tenant agrees to:
  - (a) Keep the premises in good order and condition;
  - (b) Assume responsibility for any repairs that cost less than a total of \$1000;

- (c) Immediately notify Landlord of any defects, dilapidation, or dangerous conditions;
- (d) Promptly reimburse Landlord for the cost of any repairs caused by Tenant's negligence, misuse or failure to repair or maintain the premises, or by the negligence or misuse of Tenant's invitees, licensees, or guests.

In consideration for a rent reduction of \$\_\_\_\_\_ per month, the tenant covenants not to sue the landlord and the landlord will not be liable to the tenant for any damage, loss or injury to property or person by reason of any existing or future defect in the premises for which (a) the tenant has assumed responsibility for repair or maintenance; (b) the landlord was unaware because of the tenant's failure to notify the Landlord; or (c ) the Tenant failed to reimburse Landlord in accordance with clause (d) above.

### **SOME GUIDANCE ON ETHICAL ISSUES**

#### **ABA Model Rules of Professional Conduct:**

##### **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**COMMENT [5]:** Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.

**The following section was submitted to the ALI membership in Tentative Draft No. 7 (dated April 7, 1994), but the membership voted to remand it to the Reporters for further work:**

##### **§ 73. *Duty to Certain Non-Clients***

For purposes of liability under §71, a lawyer owes a client the duty to exercise care within the meaning of §74:

- (1) To a prospective client, as stated in §27;
- (2) To a non-client when and to the extent that the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the non-client to rely on the lawyer's opinion or provision of other legal services, the non-client so relies, and the non-client is not, under applicable law, too remote from the lawyer to be entitled to protection;
- (3) To a non-client when and to the extent that the lawyer knows that a client intends the lawyer's services to benefit the non-client, and such a duty substantially promotes

- enforcement of the lawyer's obligations to the client and would not create inconsistent duties significantly impairing the lawyer's performance of those obligations; and
- (4) To a non-client when and to the extent that circumstances known to the lawyer make it clear that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by a client to a non-client, when the non-client is not reasonably able to protect its rights and such a duty would not significantly impair the performance of the lawyer's obligations to the client.

## **MODEL RULES OF PROFESSIONAL CONDUCT**

### **Rule 4.1 Truthfulness in Statements to Others**

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

### **In a situation involving waiver of a person's rights as part of a contract, the Association of the Bar of the City of New York stated:**

In the opinion of our Committee it is not within the proper standards of ethics for a lawyer to insert such a waiver in a contract if the lawyer knows that such a waiver is against public policy and void as a matter of law.

A lawyer must himself observe and advise his client to observe statute law\*\*\*. If a waiver in a contract has been held by a court of last resort to be void as against public policy as a matter of law, he should so advise his client. If the client should nonetheless insist on its incorporation in the contract, the lawyer should refuse to do so, for if he should comply with his client's request he would thereby become a party to a possible deception of the other party to the contract.

Do you agree? What if a client's means or goal are clearly legal but the lawyer nonetheless believes them to be immoral?

950 S.W.2d 844, \*; 1997 Mo. LEXIS 63, \*\*

**MARILYN WARREN, Respondent, vs. PARAGON  
TECHNOLOGIES GROUP, INC. and COAST FEDERAL  
MORTGAGE CORP., Appellants.**

**SUPREME COURT OF MISSOURI**

*950 S.W.2d 844; 1997 Mo. LEXIS 63*

**August 19, 1997, Filed**

**OVERVIEW:** While living in the landlords' apartment complex, the tenant slipped and fell on an icy sidewalk near her apartment. The landlords contended that the non-liability clause in the tenant's lease barred the tenant's claim. The lower court concluded that the non-liability clause was void as against public policy. On appeal, the court found that the landlords met their burden on the affirmative defense based on a copy of the lease agreement which included a non-liability clause. The court held that the tenant was presumed to notice each provision of the lease she signed which, in the absence of any other evidence, demonstrated that an agreement was reached on the release. Therefore, the landlords' were entitled to a judgment notwithstanding the verdict. However, the court concluded that the tenant should have had the opportunity to plead or introduce evidence on an avoidance of the landlords' affirmative defense.

**OUTCOME:** The court reversed the lower court's judgment and remanded the cause for a new trial.

**OPINION BY:** Duane Benton

**OPINION:** en banc

Defendants Paragon Technologies Group, Inc. and Coast Federal Mortgage Corporation appeal the trial court's refusal to enforce a non-

liability clause in a lease. The Court of Appeals transferred the case to this Court due to the general interest and importance of the question presented. *Mo. Const. art. V, sec. 10; Rule 83.02*. Reversed and remanded.

I.

Plaintiff Marilyn Warren lived in an apartment complex managed by defendant Paragon and owned by defendant Coast Federal. Twice in January 1991, Warren slipped and fell on an icy sidewalk near her apartment.

In their amended answers, defendants alleged that the non-liability clause in the lease barred plaintiff's claim. Plaintiff filed no reply. At trial, the entire evidence on this affirmative defense was the introduction of the lease, and plaintiff's testimony that she signed it.

A jury found the defendants liable, awarding Warren \$ 38,000. Following the denial of their motion for judgment notwithstanding the verdict, defendants appealed.

II.

The circuit judge concluded that the non-liability clause was void as against public policy. This ruling-entered before the *Alack v. Vic Tanny International of Missouri, Inc.* decision-is erroneous. *923 S.W.2d 330, 337* (Mo. banc 1996). Releases of future negligence are not void as against public policy, though they are disfavored and strictly construed. *Id. at 334*. To release a party from its own future negligence,

exculpatory language must be "clear, unambiguous, unmistakable, and conspicuous." *Id.* at 337. Although the validity of a non-liability clause is a question of law for the court, *id.*, the court can reach this question only after the parties comply with the applicable pleading and evidence requirements.

III. . . .

IV.

A defendant has the burden to prove all affirmative defenses. *Mochar Sales Co. v. Meyer*, 373 S.W.2d 911, 914 (Mo. 1963). The key to the affirmative defense of release is that an agreement was, in fact, reached. . . .

The evidence here established (1) a five legal-sized-page, single-spaced, form lease, and (2) plaintiff's signature. Parties are presumed to read what they sign. . . . Plaintiff Warren was presumed to notice each provision of the lease she signed, which, in the absence of other evidence, demonstrates that an agreement was reached on the release. On this record, defendants met their burden on the affirmative defense, and judgment notwithstanding the verdict should have been granted. Reversal is required.

V.

An appellate court should reverse a plaintiff's verdict without remand only if it is persuaded that the plaintiff could not make a submissible case on retrial. *Moss v. National Super Markets, Inc.*, 781 S.W.2d 784, 786 (Mo. banc 1989). "The preference is for reversal and remand." . . . .

VI.

Since this Court is permitting a remand, the defendants' alternative ground for outright reversal must be addressed. Defendants contend that judgment notwithstanding the verdict should have been granted because they assumed no duty to clear snow and ice from the sidewalk where Warren slipped. Defendants do not dispute that "where a portion of the demised premises is

reserved by the landlord for use in common by two or more tenants,... a duty is imposed ... to exercise ordinary care to keep that portion of the premises in a reasonably safe condition and is liable for damages for personal injuries to the tenant or a member of the tenant's family resulting from a failure to perform that duty." *Fitzpatrick v. Ford*, 372 S.W.2d 844, 849 (Mo. 1963); *see also Aaron v. Havens*, 758 S.W.2d 446, 447 (Mo. banc 1988). Instead, defendants argue (and Warren does not dispute) that there is an exception to this general rule for natural accumulations of ice and snow that are general to the community. . . .

Even under this exception, however, a landlord must make common premises safe from ice and snow where the landlord has, by agreement or course of conduct, obligated itself to do so. *Uptergrove v. Housing Authority of Lawson*, 935 S.W.2d 649, 655 (Mo. App. 1996); *Maschoff*, 439 S.W.2d at 236. The apartment manager testified that it was the apartment's policy and practice to have maintenance employees remove ice and snow from all sidewalks around the complex. This testimony was sufficient to establish a duty to remove the ice and snow reasonably. Whether the efforts taken were reasonable was a factual question for the jury. The trial judge properly upheld the verdict on this ground.

VII.

The judgment of the trial court is reversed and the case remanded for a new trial.

Duane Benton, Judge

Price, Limbaugh, Covington, and Holstein, JJ., concur; Robertson, J., concurs in result in separate opinion filed; White, J., dissents in separate opinion filed.

#### OPINION CONCURRING IN RESULT

The principal opinion is quite correct in its decision to reverse the judgment in this case. For

the reasons that follow, however, I would not remand for a new trial, but would remand with directions for the trial court to enter judgment for the defendants. Therefore, I concur in the result reached by the principal opinion

Plaintiff's response and memorandum of law to defendants' joint motion for judgment notwithstanding the verdict and motion for new trial indicates that plaintiff responded to the defendant's affirmative defense prior to trial and offers five grounds in support of the trial court's decision to overrule the defendant's motion for summary judgment:

#### CONTRACTUAL WAIVER

Defendants have also raised the defense issue of contractual avoidance, based on a clause contained in the lease agreement between the parties. This issue was previously submitted to the court on a Motion for Summary Judgment and Memorandum of Law. This motion of defendant's was denied (sic). Defendants again submitted the issue for consideration to the court on the date of trial, and same was denied.

[1] Plaintiff contends that the clause contained in the lease agreement is void and unenforceable as the same is against Missouri Public Policy (sic)...

[2] This language [of the exculpatory clause] purports to be a release from liability, [sic] however, there can be no release unless there exists at the time claimed a bona fide controversy concerning defendant's legal liability on some issue in dispute between the parties...

At the time the parties executed the lease agreement, there was no

controversy or dispute in existence regarding any injury or damage to plaintiff, and therefore, said clause should be deemed void. [3] Furthermore,... the clause fails due to lack of consideration.

[4] Additionally, the language [of the exculpatory clause] ... is ... "boiler plate" language intended for general application, and is thus wholly ineffective to immunize defendant from liability... The intent of the parties in executing the lease was for the purposes of obtaining a residence and paying rent for same. A non-liability clause buried in small print on page 3 of a lease agreement does not represent the intention of the parties to a residential lease agreement.

The fifth argument claims that even if exculpatory lease agreements are valid in commercial settings, they are invalid in a residential setting.

Significantly, the plaintiff did not raise any factual or legal argument that would bring her under the rule announced in *Alack v. Vic Tanny International of Missouri, Inc.*, 923 S.W.2d 330 (Mo. banc 1996): she did not claim that the language of the exculpatory clause was ambiguous or that she failed to notice the language of the clause in the contract she is presumed to have read before she signed it. Indeed, under *Alack*, the language in the exculpatory clause here is legally sufficient.

The only possible issue remaining on remand under *Alack* is the dubiously-grounded issue of conspicuous printing *Alack* mentions. I would not recognize *Alack's* conspicuous requirement, but even if one assumes that *Alack* speaks to this point with authority, on this issue the plaintiff must assert both that the type-face was not

sufficiently alerting *and* that she did not read the contract. (*Alack*, 923 S.W.2d at 340, Limbaugh, J., dissenting.)

Although the plaintiff's traverse of the defendants' affirmative defense did not appear in the form suggested by Rule 55.01, it is beyond cavil that the parties and the trial court knew the nature of both parties' claims on the issues surrounding the exculpatory clause. Plaintiff's papers make broad claims to defeat the exculpatory clause. They fail to claim, however, that plaintiff did not know of the exculpatory clause. The most her papers say on that subject is that she did not believe the parties intended to waive the defendants' liability as part of a residential lease agreement.

I comprehend no reason on the record in this case that supports permitting the plaintiff another trial. Plaintiff had a full opportunity to respond to the affirmative defense. She did so, obviously raising every legal and factual claim to which her imagination entitled her. Her papers make no claim that she failed to read the contract or that in reading it, she failed to see the bold-type reading "NON-LIABILITY" that preceded the paragraph containing the exculpatory clause. Being fully apprised of the affirmative defense and aware through summary judgment motions of the need to traverse the affirmative defense, plaintiff could and should have made this claim at the first trial. She did not. Under these circumstances, the principal opinion invites convenient prevarication as the sole basis for a new trial.

**EDWARD D. ROBERTSON, JR.**

**DISSENT BY: RONNIE L. WHITE (IN PART)**

Opinion Concurring in Part and Dissenting in Part

*In Alack v. Vic Tanny, Int'l*, we held that attempts to avoid responsibility for one's future negligent acts by use of contractual releases are disfavored on public policy grounds. n1

Although *Alack* did not hold such releases void in all cases, it required those seeking to enforce them--as with other "extraordinary methods of shifting...risk"--to meet an "exacting standard" in order to succeed. The clause at issue in this case was not conspicuous as *Alack* requires. I would affirm.

In *Alack* we held that "the best policy is to follow our previous decisions and those of other states that require clear, unambiguous, unmistakable, and conspicuous language" in releases from future negligence. These devices are disfavored because "our traditional notions of justice are so fault-based that most people might not expect such a relationship to be altered...." "There must be no doubt that a reasonable person agreeing to an exculpatory clause actually understands what future claims he or she is waiving." This Court has never before held that parties are conclusively presumed to have read and understood every term of a contract--no matter how inconspicuous or unexpected. In fact the opposite has been the case. Both this Court and the legislature have sought to protect parties from potentially abusive terms by requiring that certain contract terms be conspicuous. In their disfavored but occasionally allowed status, releases from future negligence are like waivers of implied warranties. The Uniform Commercial Code allows the implied warranty of merchantability to be disclaimed only when the disclaimer specifically mentions "merchantability" and is conspicuous. Under common law principles, this Court has established a similar standard to govern attempts to disclaim the implied warranty of habitability. While recognizing that "the right of the parties to make their own bargain as to economic risk" was a valid concern, the Court held that "the burden of demonstrating the fact of such a bargain ... remains great." "By this approach, boilerplate clauses, however worded, are rendered ineffective, thereby affording the consumer the desired protection without denying enforcement of what is in fact the intention of both parties."

"One seeking the benefit of such a disclaimer must not only show a conspicuous provision which fully discloses the consequences of its inclusion but also that such was in fact the agreement reached." "The heavy burden thus placed upon the [defendant] is completely justified, for by his assertion of the disclaimer he is seeking to show that the [plaintiff] has relinquished protection afforded him by public policy." In order to interpose this exculpatory clause as a defense, Paragon bears the burden of showing that it is conspicuous, which it has not done.

Even if the Court is to reverse its previous policy and place the burden on Ms. Warren to prove that the term at issue was inconspicuous, remand will serve no purpose since this question is entirely one of law. Conspicuousness is a well-recognized concept in commercial law. Under the Uniform Commercial Code, "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it"; whether a term is conspicuous is a legal question. Methods for making a provision conspicuous include, but are not limited to, rendering language in all capital letters, in larger type, or in other contrasting type or color. The clause at issue here cannot be said to be conspicuous. The relevant provision was the twentieth paragraph of thirty-three in Ms. Warren's lease. It was located on the bottom of the second full, legal-sized page of single-spaced

type between paragraphs entitled "Destruction or Condemnation of Leased Premises" and "Lease Subordination." While it is true that all terms of a contract are important and, obviously, not all of them can be emphasized, the holding of *Alack* is that a release from liability for negligent conduct is so far outside the customary expectations of a consumer that it must be specially highlighted in order to be enforced against him or her. When it sought to emphasize a particular point, the lease had no trouble doing so. Certain terms related to the amount of rent, the security deposit, and to pets are rendered entirely in capital letters. In fact, the issue of pets is so crucial that it is dealt with in a separate "Pet Responsibility Addendum" that, apparently, must be executed even if no pet is to reside in the apartment. The exculpatory language in this contract was not sufficiently conspicuous to alert a reasonable consumer of the extraordinary nature of the rights relinquished. Thus, the clause was inconspicuous as a matter of law and the trial court did not err in refusing to enforce it as violating public policy. The contract is before us. The only disputed question is one of law. Remanding the case for a full retrial merely to require the plaintiff to plead that the clause is inconspicuous is the height of artificial technicality.

Although I concur in part VI of the principal opinion, I respectfully dissent from the remainder. I would affirm the judgment of the trial court.

RONNIE L. WHITE, Judge