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> We cannot emphasize too strongly that should this exception be applied as a barrier against public access to public affairs, it will not be tolerated, for this court has consistently emphasized that respect for and adherence to the First Amendment is absolutely essential to the continuation of our democratic form of government.

As the court stated in *Channel 10,* because "[o]pen meeting laws and their exceptions are a developing field of law,"[58] the full application of the exception for attorney-client meetings will be left to future cases for development.

Landlord-Tenant Law—THE DUTIES OF A COMMERCIAL LANDLORD TO INFORM AND PROTECT—*Vermes v. American District Telegraph Co.*, ___ Minn. ___, 251 N.W.2d 101 (1977).

Vermes v. American District Telegraph Co.[1] has important ramifications for Minnesota landlord-tenant law. The case presented questions about a landlord's duties to protect a tenant from crime and to inform a prospective commercial tenant of potentially objectionable features of the premises. The Minnesota Supreme Court held that a landlord has both these duties.

In 1968, the plaintiff leased space for his jewelry store on the first floor of a building owned by Apache Corporation. Apache did not disclose to the plaintiff that an equipment access room was located directly above the plaintiff's store and that the thin floor of this room formed the ceiling of the store. This construction design allowed easy entry from above into the store's vault. In 1971, the store was burglarized. The illegal entry was made through the insecure ceiling of the vault.

To recover losses sustained from the burglary, the plaintiff brought suit against Apache Corporation, the original lessor; American District Telegraph Company (ADT), the installer of the burglar alarm; and the Towle Company, the subsequent lessor. Using the Minnesota comparative negligence statute,[2] the jury allocated fault as follows: Apache, forty-eight percent; ADT, twenty-five percent; Vermes, seventeen percent; Towle, ten percent. Because the defendant Towle was less negligent than the plaintiff, it was not liable.[3] ADT and Apache, however, were both liable for the losses the plaintiff sustained from the burglary because the culpability of each exceeded that of the plaintiff.[4]

58. 298 Minn. at 323, 215 N.W.2d at 826.

1. ___ Minn. ___, 251 N.W.2d 101 (1977).

2. MINN. STAT. § 604.01 (1976).

3. *See id.* § 604.01(1).

4. *See* ___ Minn. at ___, 251 N.W.2d at 103. The supreme court reversed the judgment of the trial court against ADT. The court held that it was error to submit the

Two major issues were presented to the Minnesota Supreme Court on the appeal by Apache.[5] The first issue was whether the exculpatory clause in the lease exempted Apache from liability for its own negligence, thus barring the plaintiff's claim. The second issue was whether the burglary was a superseding cause which relieved Apache of liability.

The court resolved the first issue by deciding that the exculpatory clause was inoperative. In doing so, the court relied on its previous discussion of the test for determining the enforceability of an exculpatory clause in *Rossman v. 740 River Drive.*[6] In *Vermes,* the court utilized that test,[7] which balances two competing interests: public policy favoring freedom of contract and public policy favoring the landlord's observance of certain duties.[8] The court in *Rossman* held that exculpatory

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question of ADT's liability to the jury. As a matter of law, the written agreement between the plaintiff and ADT limited the liability of ADT. ADT undertook neither to insure against loss by burglary nor to evaluate and design the store's security system. Thus, ADT fulfilled its only contractual obligations by installing a burglar alarm system in the plaintiff's store. *See id.* at ____, 251 N.W.2d at 103-04.

5. A less important issue concerned the amount of damages awarded. The actual pecuniary loss sustained by the plaintiff was $47,185.03, but the jury awarded the plaintiff only $23,000. On a post-trial motion by the plaintiff, the trial judge raised the damages to $47,185.03. The supreme court agreed that the jury award was insufficient. Therefore, the court upheld the revised award, offset by the jury's allocation of 17% fault to the plaintiff. Because the liability of the codefendants was eliminated, Apache was liable for the full 83%. *See id.* at ____, 251 N.W.2d at 106-07. Towle was not liable because the percentage of fault allocated to it was less than the negligence of the plaintiff. *See* MINN. STAT. § 604.01(1) (1976). ADT, as a matter of law, was exonerated from liability by the supreme court. *See* note 4 *supra* and accompanying text.

6. ____ Minn. ____, 241 N.W.2d 91 (1976).

7. ____ Minn. at ____, 251 N.W.2d at 105.

8. ____ Minn. ____, ____, 241 N.W.2d 91, 92 (1976). The general precept is that freedom of contract remains inviolate except when the contract violates some principle of great importance to the general public. This balancing test has long been relied on to determine the enforceability of exculpatory clauses in contract cases generally. *E.g.,* Independent School Dist. No. 877 v. Loberg Plumbing & Heating Co., 266 Minn. 426, 434, 123 N.W.2d 793, 798 (1963); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929). By applying the test in lease cases like *Rossman* and *Vermes,* the court tacitly recognizes a lease as a form of contract, at least insofar as exculpatory clauses are concerned.

At common law, however, a lease was viewed primarily as a conveyance rather than as a contract. *See, e.g.,* 1 AMERICAN LAW OF PROPERTY § 3.11 (A. Casner ed. 1952). The only covenant implied to the landlord was to deliver the land to the lessee and leave him in quiet possession of it. *See, e.g.,* Quinn & Phillips, *The Law of Landlord-Tenant: A Critical Evaluation of the Past with Guidelines for the Future,* 38 FORDHAM L. REV. 225, 227 (1969). A landlord had no duty to convey habitable premises or to keep the premises in repair. *E.g.,* Krueger v. Ferrant, 29 Minn. 385, 387, 13 N.W. 158, 159 (1882). Gradually, exceptions eroded the rule of "caveat lessee." The "public use" exception required landlords to deliver the premises free from dangerous defects if the premises were open to the public. *See, e.g.,* Spain v. Kelland, 93 Ariz. 172, 379 P.2d 149 (1963). For a discussion of the "common use" exception, see note 12 *infra.*

Eventually, by both legislative enactment and judicial decision, the law implied affirmative duties on the landlord. *See, e.g.,* Delamater v. Foreman, 184 Minn. 428, 239 N.W.

clauses are enforceable except "in cases when the particular contract violates some principle which is of even greater importance to the general public,"[9] than freedom of contract. Thus, if a duty is deemed "basic" to the relationship between the landlord and tenant, an exculpatory clause relating to that duty will not be enforced.[10] Conversely, if the duty is not deemed "basic" an exculpatory clause agreement will be enforced.[11]

The *Rossman* court offered examples to flesh out the meaning of "basic duty." The duty of a landlord to maintain the common stairways and hallways to avoid personal injury to tenants was deemed basic.[12] By contrast, a duty to maintain the temperature of the premises at such levels as will not injure a tenant's tropical houseplants was not seen as basic.[13] The *Rossman* rule, then, makes the enforceability of exculpatory agreements depend on the "nature of the particular duty breached."[14]

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148 (1931) (implied covenant of habitability); MINN. STAT. § 504.18 (1976) (duty to provide and maintain residential premises in a habitable condition).

Even today, however, leases are not entirely within the rubric of contract law. Contract law provides that if one party fails to carry out his obligations, the other party is excused from performance. RESTATEMENT OF CONTRACTS § 397 (1932). Covenants in a lease, on the other hand, have generally been regarded as independent of one another. *E.g.*, Fritz v. Warthen, 298 Minn. 54, 57, 213 N.W.2d 339, 341 (1973). Thus, if a landlord breached his express covenants, the tenant was still obliged to pay rent. The United States Supreme Court has held that it is constitutional for states to treat covenants in a lease as independent. Lindsey v. Normet, 405 U.S. 56, 68 (1972). However, the Minnesota court has gone beyond this constitutional minimum and held that the statutory covenants and the duty to pay rent are mutually dependent. *See* Fritz v. Warthen, 298 Minn. 54, 57-58, 213 N.W.2d 339, 341 (1973). *But see* University Community Prop., Inc. v. Norton, ___ Minn. ___, ___, 246 N.W.2d 858, 861-62 (1976) (breach of a collective bargaining agreement not a defense in an unlawful detainer action).

9. ___ Minn. ___, ___, 241 N.W.2d 91, 92 (1976).

10. *Id.*

11. *Id.*

12. *Id.* This duty was a common law exception to the general rule of landlord nonliability for injuries to tenants. This "common use" exception required that a landlord maintain in a safe condition those areas retained in his control for the common use of tenants. *See, e.g.*, Coenen v. Buckman Bldg. Corp., 278 Minn. 193, 199, 153 N.W.2d 329, 334 (1967); Strong v. Shefveland, 249 Minn. 59, 63, 81 N.W.2d 247, 250 (1957); Nubbe v. Hardy Continental Hotel Sys., Inc., 225 Minn. 496, 499, 31 N.W.2d 332, 334 (1948).

13. ___ Minn. ___, ___, 241 N.W.2d 91, 92 (1976). Perhaps the court is not being very helpful. The duty to maintain room temperatures at levels conducive to the growth and care of exotic plants may be nonexistent, not merely capable of being exculpated.

14. *Id.* The position of the court is that the landlord is free to exculpate his liability unless the agreement would relieve him from liability for the consequences of a breach of duty imposed by statute or dictated by public interest. *See* note 8 *supra* and accompanying text. It is difficult to overcome the general precept that freedom of contract should remain inviolate because few duties have been judicially defined as affecting the public interest. *See, e.g.*, Santa Fe, P. & P. Ry. v. Grant Bros. Constr. Co., 228 U.S. 177, 188 (1913) ("the highest public policy is found in the enforcement of the contract which was actually made"); Wade v. Six Park View, Inc., 25 N.J. Super. 433, 439, 96 A.2d 450, 453 (Cty. Ct.) (fact that 3,500 people live in an apartment complex does not establish a public

The court in *Vermes* held that Apache was under a basic duty to inform the prospective tenant of the conditions of the premises which might affect their suitability as a jewelry store.[15] Apache breached this basic duty when it failed to inform the plaintiff of the latent unsubstantial ceiling condition. The court reasoned that the particular business needs of commercial tenants often require the leased premises to have specific attributes. Therefore, the duty of disclosing any condition which might reasonably be undesirable from the tenant's point of view is basic.[16]

The court's articulation of a general duty of disclosure for a commercial landlord makes *Vermes* a significant case in commercial landlord-tenant law. Before *Vermes*, what might be called a "doctrine of caveat lessee" appeared to be the prevailing rule in Minnesota insofar as a tenant's commercial use was concerned.[17] The statute establishing a landlord's covenant of habitability applies only to the leasing of residential premises.[18] But *Vermes* extends the duty of landlords by making it a landlord's duty to inform the prospective commercial tenant of conditions which might render the premises unsuitable for the tenant's particular commercial use.

The second major issue on appeal was whether the burglary constituted a superseding cause, thus relieving Apache of liability. The court

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interest), *aff'd*, 27 N.J. Super. 469, 99 A.2d 589 (App. Div. 1953); Maglin v. Weinberg, 21 Pa. D. & C.2d 630, 633 (1959) (public interest is established if violation of a statute is involved in the negligent conduct).

Thus, lease agreements between private parties shifting the risk of loss to one party, whether or not caused by negligence of the other party, have been enforced. *See, e.g.*, Govero v. Standard Oil Co., 192 F.2d 962, 964-65 (8th Cir. 1951); Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929); Midland Carpet Corp. v. Franklin Associated Prop., 90 N.J. Super. 42, 47, 216 A.2d 231, 234 (App. Div. 1966). The position of the courts in these cases is that leases are private matters between the lessor and lessee and do not involve the general public. Arm's length agreements between contracting parties must, therefore, be enforced. *See, e.g.*, Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175 (1929) (arm's length bargain between lessor and lessee). *But see* Kuzmiak v. Brookchester, Inc., 33 N.J. Super. 575, 586-87, 111 A.2d 425, 432 (App. Div. 1955) (exculpatory clause in residential lease unenforceable because scarcity of housing resulted in unequal bargaining power of landlord and tenant).

15. ___ Minn. at ___, 251 N.W.2d at 105.

16. *Id.*

17. This was not a strict caveat lessee doctrine, however. Courts did impose duties on commercial landlords in certain circumstances. The landlord was under a duty to maintain the common areas of the leased premises or any area over which the landlord maintained control. *See* note 12 *supra* and accompanying text. Also, the landlord was under a duty to disclose defects on the premises which posed a threat of physical harm to either the tenant or the tenant's guests, customers, patients, or clients. *See* note 8 *supra* and accompanying text. But there was no general duty of disclosure nor implied covenant of suitability imputed to the commercial landlord. *See* Wilkinson v. Clauson, 29 Minn. 91, 93, 12 N.W. 147, 148 (1882) (no implied covenant in lease that leased stores were to be suitable for the tenant's use).

18. *See* MINN. STAT. § 504.18 (1976).

held it was not. The bare fact that a criminal act is a link in the chain of causation does not automatically relieve a negligent party from liability.[19] To be a superseding cause, the criminal act itself must not be reasonably foreseeable.[20] If criminal acts are reasonably foreseeable by the landlord, the landlord is then under an obligation to guard against them.[21]

This rule was applied by the Minnesota Supreme Court recently in *Hilligos v. Cross Co.*[22] In *Hilligos*, a tenant brought a negligence suit against his landlord following a burglary of his apartment. The tenant had been hospitalized and during his week-long absence the landlord placed a notice on the tenant's door notifying him that the lock had been changed and that the new key could be picked up at the rental office. This notice remained on the door for several days. The apartment was burglarized during this period, entry apparently being made without force. The court affirmed the trial court's granting of the defendant's

19. The rules for when an intervening cause will act as a superseding cause and thus immunize the original actor from liability were collected in Kroeger v. Lee, 270 Minn. 75, 132 N.W.2d 727 (1965), where the court said:

> For a cause to be superseding, the following elements must be present: (1) Its harmful effects must have occurred after the original negligence; (2) it must not have been brought about by the original negligence; (3) it must actively work to bring about a result which would not otherwise have followed from the original negligence; and (4) it must not have been reasonably foreseeable by the original wrongdoer.

Id. at 78, 132 N.W.2d at 729-30.

The general rule is that a criminal act is a superseding cause if the act is foreseeable. *See* Wallinga v. Johnson, 269 Minn. 436, 439-40, 131 N.W.2d 216, 219 (1964) (foreseeable by hotel that its office containing valuables entrusted to it by guests for safe-keeping would be burglarized). The original actor cannot claim immunity from liability when the possibility that the criminal act will occur is one of the hazards he should guard against. *See, e.g.*, d'Hedouville v. Pioneer Hotel Co., 552 F.2d 886, 894 (9th Cir. 1977) (effect of fire on its product and possibility of arson resulting in death were reasonably foreseeable by defendant carpet manufacturer); Spar v. Obwoya, 369 A.2d 173, 178-79 (D.C. Ct. App. 1977) (landlord liable for losses sustained by tenant from gunpoint robbery in the common hallway of the apartment building; defendant had failed to take security precautions even though another tenant had previously been robbed at knifepoint, the presence of strangers in the building had been reported by other tenants, the building was situated in one of the worst crime areas of the city, and neighboring apartment complexes had instituted certain security measures); Concord Fla., Inc. v. Lewin, 341 So. 2d 242, 245 (Fla. 1976) (cafeteria owner liable for failure to guard against the foreseeable risk that arsonist would set fire to the building); Johnson v. Sculley Constr. Co., 255 Minn. 41, 52, 95 N.W.2d 409, 417 (1959) (foreseeable by possessor of land that persons would try to steal gasoline from premises; possessor therefore liable for injury caused to child when thief tripped and spilled stolen gasoline on fire and on plaintiff); Atamian v. Supermarkets Gen. Corp., 146 N.J. Super. 149, 157-58, 369 A.2d 38, 42 (Law Div. 1976) (store liable for the rape of female customer in unlighted, unguarded parking lot).

20. *See* note 19 *supra*.

21. *See* notes 24-25 *infra* and accompanying text.

22. 304 Minn. 546, 228 N.W.2d 585 (1975) (per curiam).

motion for summary judgment.[23]

For his argument that the burglary was reasonably foreseeable, the plaintiff in *Hilligos* had relied on a New York case involving a landlord's liability for a wrongful death in a high violent-crime area.[24] The court distinguished that case on its facts, noting that evidence of prior crimes in the area had been determinative of the landlord's liability.[25] This was the sole discussion of the court's reasons for affirmance in *Hilligos.* Three justices dissented, reasoning that the foreseeability issue should have gone to the jury.

Vermes, like *Hilligos,* involved economic loss, not personal injury. In addition, no evidence was introduced in either case that similar incidents of crime had occurred in the area. In both cases, the court apparently relied on the foreseeability issue to reach its decision. But in *Hilligos* the burglary was deemed unforeseeable, and in *Vermes* it was deemed foreseeable.

There are several possible explanations for the disparate outcomes. The court may be liberalizing the standards for when a crime will be deemed foreseeable. Thus, landlords would more frequently have a legal duty to use reasonable measures to minimize the foreseeable risk of criminal actions against tenants. A second explanation is that the court is approving jury resolution of the foreseeability issue in such cases, pursuant to the dissenting opinion in *Hilligos.* Finally, the court may have found the landlord's conduct in *Vermes* more egregious than his counterpart's conduct in *Hilligos.* Thus, the totality of circumstances in *Vermes*—the unsubstantial ceiling condition, the free use of pass keys by employees in the building, and the questionable security measures regarding the door to the access room above the jewelry store—may have been compelling indicia of the likelihood of burglary, whereas a similar risk in *Hilligos* was not apparent.

It is not clear which of these explanations, if any, is correct. The

23. *See id.* at 548, 228 N.W.2d at 586.

24. *See id.* The case relied on by the plaintiff was Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969), *rev'd on other grounds,* 38 App. Div. 407, 330 N.Y.S.2d 569 (1972).

25. In Bass v. City of New York, 61 Misc. 2d 465, 305 N.Y.S.2d 801 (Sup. Ct. 1969), *rev'd on other grounds,* 38 App. Div. 407, 330 N.Y.S.2d 569 (1972), the evidence indicated that the apartment complex consisting of ten 14-story buildings was ridden with crime. Courts in other jurisdictions have similarly relied on the frequency of proximate criminal activity in determining whether a landlord should have anticipated, and thus guarded against, a criminal act. *See, e.g.,* Kline v. 1500 Mass. Ave. Apt. Corp., 439 F.2d 477 (D.C. Cir. 1970) (trial court did not err in admitting evidence of prior similar crime at trial of tenant's suit against landlord for negligence in allowing security system to deteriorate despite a concurrent increase of crime in the area); Samson v. Saginaw Prof. Bldg., Inc., 393 Mich. 393, 224 N.W.2d 843 (1975) (foreseeable by landlord leasing space to state mental health clinic that injury might be caused by patients in the common areas of the building).

disparity between the cases leaves in doubt when criminal conduct will be deemed foreseeable. It is clear that past instances of crime are relevant to, but not determinative of, the issue of foreseeability.[26] Beyond that factor, however, the court has not clarified when landlords are duty-bound to afford their tenants protection from crime.

In conclusion, *Vermes* raised the significant issues of when a landlord has a duty to inform a commercial tenant of undesirable conditions of a premises and when a criminal act against a tenant supersedes a landlord's liability for negligence. The court's disposition of these issues provides some guidance in determining a landlord's duties to inform and protect. Both issues, however, need further clarification through case law before the extent of those duties can be fully understood.

Municipal Corporations—SPECIAL ASSESSMENT DETERMINATION—*In re Village of Burnsville*, ___ Minn. ___, 245 N.W.2d 445 (1976).

Special assessments levied by municipalities for local improvements add to the tax burden imposed on Minnesota citizens which now ranks among the highest in the nation.[1] The advantage of a general tax is that necessary public services are provided by government and the burden is apportioned among all citizens. The purpose of a special assessment, however, is to fund local services that do not justify payment from general revenues. Originally, special assessments were held to violate the state's constitutional requirement of equal taxation.[2] However, an amendment to the Minnesota Constitution in 1869 specifically validated the use of special assessments for local improvements.[3]

In the recent case of *In re Village of Burnsville*,[4] the Minnesota Supreme Court reaffirmed settled interpretations[5] of the 1869 constitutional amendment. In 1963, Burnsville began to assess property at $300 per acre for sewer service. In subsequent years, nearly all the property in Burnsville was serviced, except for property owned by respondent, located on the floodplain of the Minnesota River.[6] When an interceptor

26. *See* ___ Minn. at ___, 251 N.W.2d at 106.

1. *See* MINNESOTA TAXPAYERS ASSOCIATION, HOW DOES MINNESOTA COMPARE? 2 (1976).

2. Bidwell v. Coleman, 11 Minn. 78, 91 (Gil. 45, 56) (1865); Stinson v. Smith, 8 Minn. 366 (Gil. 326) (1862).

3. MINN. CONST. art. 10, § 1, *construed in* Rogers v. City of St. Paul, 22 Minn. 494, 507 (1876).

4. ___ Minn. ___, 245 N.W.2d 445 (1976).

5. *See* Carlson-Lang Realty Co. v. City of Windom, ___ Minn. ___, ___, 240 N.W.2d 517, 519 (1976); Village of Edina v. Joseph, 264 Minn. 84, 95-99, 119 N.W.2d 809, 817-18 (1962); State v. District Court, 33 Minn. 295, 306-10, 23 N.W. 222, 227-29 (1885); Rogers v. City of St. Paul, 22 Minn. 494, 507 (1876).

6. *In re* Village of Burnsville, ___ Minn. ___, ___, 245 N.W.2d 445, 447 (1976). Some service was provided to adjoining land in 1967. *Id.* Burnsville contended that trunk service