Alison Key: I always think the law is kind of, like, where we struggle the most because we have no authority to teach people law.

Mark Thomson: No kidding. Welcome back to The ComMN Law, the best and only podcast about the Minnesota Supreme Court. My name is Mark Thomson. I work at Nichols Kaster and I'm an ex clerk for Justices David Lillehaug and Anne McKeig.

Alison Key: My name is Alison Key and I was a clerk for Justices Stras and Hudson.

Mark Thomson: We've got a statutory interpretation case today about the rights of tenants when facing retaliation and also eviction. But before that we've got a fair bit of legal news in some cases to catch you up on.

Alison Key: First in legal news would be the results of the judicial election. So as many of our listeners likely already know, Justice Chutich did win reelection to another full term on the court on this November 6th. She won 55.88% of the vote to her challenger, Michelle MacDonald's 43.74% of the vote. So for comparison, Justice Chutich's margin was wider than Justice Lillehaug's margin in the 2014 midterms, but Chutich's margin was smaller than Justice Hudson's 18-ish point margin over Michelle MacDonald in the 2016 presidential election.

Mark Thomson: I haven't seen anyone really speculate very much about how this happened, but I guess I find this result especially disturbing in that I think back in 2014 there was some confusion about whether the GOP was endorsing Michelle MacDonald or she at least was not as clear a figure in the public mind. Here we are in 2018, she's run these campaigns over and over again. I think it's fairly clear that she doesn't have the qualifications that we would hope for from someone running for this office and yet continues getting, you know, a significantly substantial minority of votes. Why that's occurring is kind of beyond me.

Alison Key: And what's interesting, I think, about how this kind of panned out in comparison to Justice Lillehaug and Justice Hudson's races is, we didn't publish that portion of the audio, but she predicted that she would do better than she did in 2016 simply because she believes a lower turnout election actually favors her. So it turns out she was right on with that prediction.

Mark Thomson: I'm just not sure who the people are that go to vote for Michelle MacDonald. I guess you're voting against the incumbent. That's the only thing I can think of. Which Justice Chutich certainly personally has done nothing to initiate a campaign against her personally. And I don't think that the supreme court, as an institution has done anything to suggest that there should be an anti incumbency wave. So I just find it really concerning that we have these relatively small margins in races that should not be seriously contested.

Alison Key: So Judge Jesson also won against her challenger, AL Brown, in the only contested court of appeals race. Her margin was actually higher than the margin

of victory at the supreme court with Judge Jesson prevailing by about 25 points, netting 63% of the vote. All of the other uncontested justices on the ballot all obviously won. But was interesting to me about the results here is that the write-in, the write-in percentages for judicial campaigns are just wildly high, which I think just goes to show that there's a true lack of information in the seriousness of these races and the candidates that are running uncontested. And people might think the stakes are low enough to write people in. I mean, who are the 15,000 people who wrote in someone instead of voting for Chief Justice Gildea? Like, who do they think that was to benefit?

Mark Thomson: This is a segment called, "The ComMN Law gets lecture-y about the Minnesota electorate." But honestly, these are important offices and to a large degree, I think courts in general, and we could say for the Minnesota Supreme Court, there are rules in place, but the day-to-day functioning of the place is largely dependent on good faith, highly competent, intelligent, and collegial people coming together with a goal of producing good work product and clarifying the law for the state of Minnesota. And if we had someone who was not qualified to do that come on to the court, I'm not sure how well the institution would hold up.

Alison Key: So Michelle MacDonald has been defeated now for a third time, but she hasn't ruled out another 2020 run, which she did mention to us in our discussion with her last month. We didn't end up publishing that specific portion of our interview with her in our previous episode, but we did post the audio of that specific answer of hers on our Twitter feed. So you can take a listen to that and see what she has to say about 2020 and running for the court in perpetuity.

Mark Thomson: And I think you'd have to think that she'll keep running. I mean, 43% is just a huge margin for someone with no real formal campaign. You know, I don't really even know how much time and effort it's costing her to run in these races every two years.

Alison Key: So I know we're all kind of wary of any discussion of 2020 for the foreseeable future, but we can just say from a judicial election standpoint that Justices Lillehaug and Thissen, who are both up in 2020, may have to watch out for Michelle MacDonald coming for them in 2020. Both of them are Democrat appointed, which she told us was her main criteria in trying to decide who to run against. And in our discussion with her we did kind of tip her off that she should probably run against the most junior justice. So, sorry Justice Thissen for putting that target on your back. But I think he has enough experience running for election that he'll probably manage just fine.

Mark Thomson: That transition's perhaps, briefly, to an article by David Schultz that was in the Pioneer Press, an op-ed suggesting that we appoint rather than elect judges in Minnesota. So he provides some useful background here, which is that, when the state constitution was passed in 1848, it provided for judicial elections with appointment by the governor in case of vacancy. That's how we ended up at the state of play that we have right now. And he has a law review article coming out

and it sounds like he's kind of dissecting two different ways that we could handle this. So one is letting judges run like political candidates, and that would be getting a party endorsement, publicizing positions as to policy issues, et cetera. And he notes that one, there's a fair bit of US Supreme Court jurisprudence and other jurisprudence that would make that difficult for judicial candidates; that they are hamstrung as far as how they can do fundraising, et cetera. And also on that score, that the kind of recent Judge Kavanaugh proceedings should be a warning note about the dangers of politicizing the judiciary. And then the other alternative that he's more favorably disposed to is the straight appointment of judges. So right now when there's a vacancy, the governor appoints the judge, but as we were just discussing with judge, rather Justice Thissen, he was appointed by Governor Dayton, but he will have to run in 2020 and he'll be a regular elected judge from there on out. And so David Schultz is proposing getting rid of that; getting rid of elections full stop. And I suppose based on are fairly brief discussion just now, I would not stand in the way of that proposal.

Alison Key: So I'm assuming in his upcoming article that he is going to publish, he'll kind of go through how other states do it. But I think Minnesota is actually in the norm in terms of how it handles state judicial elections, which is, there is kind of an intermediate appointment process for midterm retirements that are kind of funneled through a judicial selection committee. So it's not a true appointment by the governor in the sense that there is kind of an independent commission that recommends to the governor who will be appointed and then the governor makes a decision based on that. But then I think Minnesota is in the norm with most states who do then require that judges run for reelection, which is kind of the mechanism that most states have used to make sure that there aren't any one without proper qualifications or who have suddenly been swayed in some direction or the other to make sure that they are not continuing to influence the judicial stakes in that state.

Mark Thomson: Yeah. A couple of other interesting things from his article, which we can put in the show notes. One, 90% of judges in Minnesota are initially appointed by the governor through the process that Alison just described, rather than being elected in the first instance. So in effect, given how few people run against incumbent judges, and secondly, how rarely incumbent judges lose when challenged, we already have appointments. And the other thing he notes is that in Minnesota we've been fortunate to avoid some of the hijinks that have occurred in other states. So he notes the West Virginia Supreme Court where a ton of money poured into judicial elections after judges were casting controversial votes as to liability for high dollar amounts of coal companies that were native to West Virginia. The kind of things that, you know, the tough votes that judges have to make and adhere to the law and how when you have elections, you should be prepared for judges to face unpleasant consequences from those tough votes. And I think he thinks that's no way to ensure an independent judiciary.

Alison Key: Another fascinating thing that has come about relating to the Minnesota Supreme Court this past month, is was something that I'm sure everyone in the universe has heard by now that Justice Page was awarded a Presidential Medal of Freedom. So for our listeners who may be less familiar, Justice Page was the first black member of the Minnesota Supreme Court and he was also the last person who was ever elected to an open seat rather than the appointment process we just described. And he was elected in 1992 after two incredibly successful careers, both in the NFL and then also as an attorney at the Minneapolis from of Lindquist and Vennum. So what I love most about this story and what has happened in the media as a result of him being honored with this award, is that there has been a genuine outpouring of acknowledgement of how great of a person that Justice Page is, regardless of what you think of the current president and whether Justice Page should or should not have accepted this award, it was really heartening to see that the focus of this entire thing was really Justice Page and all of his accomplishments, both in the NFL and on the supreme court and his work at the Page Foundation. That said, a lot of attention has been focused on a particular quote of his from a CBS news story that came out this past January, in which he said, of the current president, "Given the license the current administration has given to people to feel comfortable in their bigotry, it seems to me on some level we are moving backwards." So was a lot of talk about whether he would accept this award. Whether it was appropriate for him to accept this award given his stances, his public stances on the current administration. And Justice Page did address some of those concerns and that controversy with an op-ed that he wrote in the Star Tribune on November 15th. The op-ed carries the headline, "Alan Page on receiving the Presidential Medal of Freedom: It is an honor, but it's really not about me." And I'll just read a little bit from his op-ed where he explains his decision to accept this award.

> "It is an honor to have been awarded the Presidential Medal of Freedom, but as I have said on a number of occasions in the past, I'm never quite sure that I'm worthy of such recognition. When I look at the list of the metals previous recipients, I ask myself, how did my name come to be included with icons of the civil rights movement like Rosa Parks, or people like Dr. Robert Coles, who spent his life documenting the effects of poverty on children? I conclude the honor is not really about me." Then he goes on to discuss the group of people whom he believes this honor is about including his family, civil rights leaders and victims of the Birmingham Baptist Church bombing, Page scholars supported by his foundation, his athletic role models, and then his late wife Diane Sims Page. He then ends, "Mere words are inadequate to express the debt of gratitude I owe this group of people. When I think about these people in the context of the Presidential Medal of Freedom, I'm reminded of the first three words of the preamble to the Constitution. Those words are, We the People. I'm also reminded that the White House is the people's house. We live in a time when our passions cause us to spread more heat than light. I believe the voices of all the people who have contributed to who I am deserve to be brought

into the light and represented, heard, and seen in the people's house it has on their behalf and in their honor that I accept the Presidential Medal of Freedom."

So he's apparently now among a very limited list of Minnesotans who have won this award, joining former Vice President Hubert Humphrey, former SCOTUS Chief Justice Warren Burger, and Bob Dylan. So another example of what a swell guy Justice Page is.

Mark Thomson: Last bit of legal news is an interview with Justice G. Barry Anderson in Bench and Bar magazine. Fun note, this interview was conducted by Jon Schmidt, who was the attorney for the state in The ComMN Law's first episode, which covered the *State v. Edstrom* case concerning curtilage in an apartment building. Just a couple notes from this interview. One, Justice Anderson was asked how his prior jobs contributed to his decision-making ability. And, if you ever get the chance to hear Justice Anderson speak, I recommended it, he is endlessly charming and has anecdotes for days. So immediately he jumped to his first job as a handyman at the Cliff Keyes Hotel in Mankato where he apparently was insufficiently handy. The other thing I wanted to note from the interview is he predicts a Minnesota Vikings championship at some point, but is smart enough not to even give a ballpark of when that might be. I recommend checking out the whole interview. It's a delight and we will put a link to it in the show notes.

Alison Key: So now moving onto resulted cases that have since been published since our last episode. We first have what was our— one of our featured cases, our last featured case remaining from season one of The ComMN Law. The case was *In re Marriage of Gill* and this was the case about how we divide a gelato empire after a marriage has dissolved. The ultimate question in this case, if you remember, was a lot simpler than the facts that you had to slog through to get there. Um, so just bear with me as I recap the case facts before we get to the holding. So Husband Gill and Wife Gill, during their marriage at issue here, helped run Talenti gelato. In 2008, Husband purchased a majority ownership in the interest in the Talenti company. And then in 2014, he filed for divorce from Wife. In the time between 2008, when he purchased a majority interest in Talenti, and 2014, when he filed for divorce, the value of Talenti grew significantly. So after filing for divorce, but while the dissolution proceeding was pending, Husband in 2014 helped negotiate a sale of Talenti for $180 million to Unilever, plus two earnout payments that were contingent on future company performance up to $170 million. So this is where Dean Phillips, the now-congressmen-elect from the third district, was credited with nearly sinking the entire deal while trying to get a better price out of Unilever at his lake home. At the dissolution proceeding the following year in 2015, Husband and Wife agreed to equally divide the $180 million payment that the purchaser made when the sale of the company closed. But they disagreed about whether those additional earnout payments were in fact marital property that could be divided equally or whether they belonged strictly to Husband. So at the Minnesota Supreme Court, the issue was whether the future contingent earnout payments were marital property that could be divided or nonmarital property that belonged to

Husband. So the Minnesota Supreme Court in a 4-2 decision with Thissen not participating, authored by Justice Chutich, ruled that the right to receive these earnout payments that were memorialized in a purchase agreement for the sale of the marital property [was] itself marital property." So Gretchen Gill will get her share of those earnout payments. Just briefly Justice Chutich started her analysis explaining the rationale of marital property and she says,

> "The idea of marital property is grounded in the principle that marriage is a partnership and that each partner should get out of the marriage of fair share of what was put into it. In *Nardini v. Nardini*, we explained marriage is a joint enterprise whose vitality, success, and endurance is dependent upon the conjunction of multiple components, only one of which is financial. The extent to which each of the parties contributes to the marriage is not measurable only by the amount of money contributed to it during the period of its endurance, but rather by the whole complex of financial and nonfinancial components contributed. When a marriage ends, each spouse, based on the totality of the contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured." She says, "We have therefore interpreted marital property expansively so as not to ignore the presumption that each spouse contributed to the acquisition of property while they live together as husband and wife."

So Justice Chutich ended up reasoning for the court that because the marital asset itself was sold in exchange for the possibility of an earnout payment, the possibility of the earnout payment was also marital property.

Mark Thomson: I think this is the right result. And it sounds well-reasoned. I guess one thing I found interesting about it, and it's probably inevitable for the court, is that there's just a lot of moralizing that has to happen when you're determining the boundaries of marital property. And moralizing that inevitably is kind of along traditionalistic lines. You know, the facts of this case present a man who was involved in a big business deal and a woman who was the wife. So I don't know from a fairly kind of forward thinking, progressive court, it's strange to me to hear a sentences like this, but I think they did a good job with it.

Alison Key: So Justice Anderson did write a dissent that was joined by the Chief, a common pairing these days. So make sure to go back and listen to our episode on *In re Marriage of Gill* and we'll post the link to the opinion and the Minnesota Lawyer article summarizing it in our show notes. So another case that has resulted that we think would be worth bringing to your attention is a case that brought us Justice Thissen's first authored decision. This was a dissent that he wrote in the case *Depositor's Insurance Company v. Dollansky* that was heard on June 5th of this year. So this was his second day of oral argument this case was heard. And we noted when we covered the Johnson case the day before, that he was pretty active on the bench. And then the next day he dissents in this case. So he's definitely hitting the ground running here.

Mark Thomson: And not just the dissent, a solo dissent, which are somewhat unusual on the court. And a lengthy one and well written. So he's off to the races.

Alison Key: Yes. So the majority in *Depositors v. Dollansky* was authored by Justice Hudson. Justice Lillehaug then wrote a concurrence joined by Chief Justice Gildea, not your typical pairing. Then Justice Thissen wrote a dissent, as Mark said, on his own. This dissent is s e v e n t e e n pages. It is longer than the majority. So if you remember, he joined the court in its last month of the 2017-2018 sitting. Then the court took two months off. So it's both surprising and not surprising that he decided to use his time from the first month of argument on the court to actually write something in the first three months when he had probably a lighter load. So here's the skinny behind the case. Craig Dollansky rented an RV from a company called Karavan trailers. The rental agreement provided that Dollansky would be responsible for all damage or loss to the vehicle while he rented it and that same agreement required him to carry insurance covering the vehicle. While Dollansky was renting the vehicle, it caught fire while he was driving it in Nebraska, apparently from unknown causes, leading to pretty significant damage totaling over $200,000. I am not sure how you spontaneously combust an RV, but Justice Hudson's opinion does note that "nothing in the record suggests that intentional acts by Dollansky caused the fire or the subsequent damage to the RV," which I believe is supposed to be a legal clarification, but as a practical matter leaves me with more questions than answers. Karavan then submitted a claim to Dollansky's insurer which did not pay the claim in full. Karavan then submitted a claim to its own insurer, Depositor's Insurance Company, and Depositor's did pay the remainder of Karavan's claim. Then, Karavan's insurance company sued Dollansky to recover the cost of what his own insurer would not pay for the damage to the RV. So the issue with the Minnesota Supreme Court concerns the scope of a specific Minnesota statute that states "an insurance company providing insurance coverage may not proceed against its insured in a subrogation action where the loss was caused by the nonintentional acts of the insured." So Dollansky reads that statute and says, under your policy at Karavan where I rented the RV, I'm "[your] insured," so you cannot sue me to recover the leftover damages here. Depositors, which is Karavan's insurer reads that statute and says, Dollansky was not "its insured" because he did not purchase a policy from Depositor's Insurance Company. So Justice Hudson's majority sides with Dollansky, that Dollansky was "it's insured" and therefore the prohibition on going after him in the statute prevents Depositor's Insurance Company from going after Dollansky for the money to fix this RV.

J. Hudson: And why is that? Isn't insured by Depositer's, since section 2(a), under "who is an insured," says that an insured is "anyone else while using with your permission a covered auto that you own." And the, "your" of course there is referring to Karavan. I don't think there's any question that I knew the rental agreement had had with Mr. Dollansky gave him permission to use the RV. So yes, he has an insurance policy with American Family, but the district court and the court of appeals basically said, under that provision he also is an insured here. Why isn't that the case?

Mark Thomson: I think this opinion is a fun one, even though it's about insurance subrogation, because it's such a thorough tour through the tools of statutory interpretation that the court uses. And sometimes the court is more explicit about the decisions it's making and the sequence of statutory interpretation tools that it's using. And sometimes it kind of glides through one or two of them without acknowledging really what's happening. And this is the former, which I find satisfying. So they first go straight to Black's Law dictionary to try to find the definition of "insured." They determine that there are two possible reasonable definitions of insured, which would lead to different outcomes here. And they dispose of a few arguments about using other statutes and such to try and glean a meeting.

Alison Key: I do have to point out as a former Stras clerk that, though it's frequently mistaken as a common and ordinary meaning source, Black's Law dictionary is actually rooted in technical definitions for the law. But Justice Hudson did also use common and ordinary dictionaries like The American Heritage Dictionary and Webster's Third New International Dictionary, which are more common and ordinary meaning definitions.

Mark Thomson: Justice Stras is a lovely man. Justice Stras's clerks are at times insufferable. After they get through the dictionary, they conclude that the statute is ambiguous and that they have to determine which of the two reasonable definitions applies. So first, they note, when the statute is ambiguous, you can look to the legislative history. However, here, the parties don't provide, nor could the court locate, any helpful legislative history.

J. Hudson: You know, if we say it's ambiguous—either because you know, that's how, it became ambiguous as you said because of how the court of appeals interpreted—but then that takes you to legislative history and we've searched and there really is none. And neither party has cited us to anything.

Mark Thomson: Then they look to policy considerations. They explicitly say this. And they note that in interpreting insurance policies and determination of coverage, the disparity between the insurance companies and those seeking insurance with regard to bargaining power is significant. And leads to a background rule of interpreting ambiguous statutes in favor of insurance holders. Subsequently, they look to past jurisprudence. They do a full survey of Minnesota Supreme Court cases from decades ago that are possibly relevant to this decision. And finally they wrap things up.

Alison Key: So like Mark says, Justice Hudson does wind through various aids of interpretation and construction to come to this conclusion, "We remain firm in our conclusion that the word 'insured' in Minn. Stat § 60A.41(a), encompasses any party covered by 'some part' of the insurance policy at issue." She then interprets the policy to determine that Dollansky is covered by "some part" of that insurance policy, largely because Dollansky was given permission by Karavan to use the vehicle.

Mark Thomson: I think Alison and I, as clerks, were often looking for an even more explicit delineation of the sequence of statutory interpretation. What tools are inbounds and outbounds at what point of the process, pre or post finding of ambiguity. And this doesn't get all the way there, but it's the best such discussion that I've seen in a little while from the court.

Alison Key: Then we get to Thissen's dissent, so before we talk about it, we should say that the gist of Justice Thissen's dissent is that he actually agrees with Justice Hudson, that the language is ambiguous, but he ultimately concludes, "that a person is an insured under § 60A.41(a), only when the person seeking immunity under the antisubrogation rule is in fact covered for the lawsuit issue."

Mark Thomson: One part of this dissent that I found interesting, aside from the rather bold nature of a single-person, 17-page dissent on your second day as a justice—and that sounds like I'm being critical; I actually think it's pretty cool that Justice Thissen is on the court and he is going to just take to the job straight away. So part of that that I found interesting in the dissent is I think he's bringing his experience as a state legislator to the bench immediately. And it might go too far to call this a personal tone in the dissent, but it's a pretty impassioned tone I think from someone who has been at the legislature probably in the drafting room trying to work out the language of these bills and on the floor listening to testimony. And I think you can hear someone who's frustrated at what he feels is a miscomprehension of the legislature's attempt to solve a problem in a way that's a little more direct than you usually get. So a fun perspective and one I think we'll probably get in the future.

Alison Key: Definitely a fun perspective and I think that's what we were hoping we would see from Justice Thissen when he came straight from the legislature over to the court. Particularly in these cases of statutory interpretation which do rest on, what was the legislature trying to do? What was their intent? And having someone who was so intimately involved in that process for so long, certainly has the potential to shape how a lot of the justices and the court think about those issues. So reading Justice Hudson's majority opinion, so she repeatedly cites Justice Stras's highly textual opinion, *Thonesavanh*, for her analysis, which based on Thissen's public statements through his tweets, is an opinion that Justice Thissen is not particularly impressed by. So I just want to take a quick detour and do a brief reprise of Top Thissen Tweets and talk about these tweets because I do think they give a clue to Justice Thissen's judicial philosophy, like Mark said, informed in great part by his prior experience as legislator. And I think it's important in combination with the dissent in considering how things will move for him in the court going forward. On September 6, he tweeted one of his On This Day tweets about the case *Thonesavanh v. State*. And after explaining the facts and the result, he says "The case is a good example of what is known as a textualist analysis. A sometimes complicated superstructure of various rules that courts overlay on a text to discern legislative intent. Which canons a court chooses, can be decisive of the outcome. In particular, courts turn to (sometimes usefully) dictionary definitions. Setting aside that dictionary definitions often defer, it was a rare occasion when I witnessed a legislator pull

out a dictionary in the course of lawmaking." So that's a really interesting perspective on Justice Thissen stating that he doesn't believe a textual analysis really gets to the heart of legislative intent as he saw legislators legislating. And I agree, he did seem somewhat incredulous at times about how the court chose to go about interpreting a statute that was not what he considered consistent with his personal experience. But by all indications, it sounds like he is not interested in a textual analysis. He is more interested in the intent of the legislature as they're passing the law. So it will be interesting to see what arguments do sway Justice Thissen because we're not familiar yet with his jurisprudence.

Mark Thomson: It'll be really interesting because even as, I think probably, in the popular conception of the Minnesota Supreme Court, to the extent it exists, I think people understand it to be a court largely appointed by democratic governors, full of liberal leaning people, probably, as I imagine is what the public thinks. Nonetheless, it is a pretty strictly textualist court, heavy on dictionaries, heavy on a plain meaning of words. Even when you could argue that a more purposive approach that is placing more weight on what the legislature might've been trying to accomplish would be appropriate. So whether Justice Thissen will be out on an island with interpretations like this, if indeed they continue, or whether he can assemble perhaps a caucus to use this approach more regularly will be something to keep an eye on. So he talks a lot about the importance of what the purpose of the law was. Once we have found it ambiguous as both the majority and him in dissent found. And he refers repeatedly to what the legislature was trying to accomplish here. It's his take that the legislature was not intending a blanket immunity for insurance in cases like this, that you need to look for nexus between the type of coverage sought and the incident giving rise to the claim.

Alison Key: He says his conclusion about the purpose of the law is supported by common law doctrine on the area from before the statute was enacted, which he also spent a lot of time discussing an oral argument.

J. Thissen: Well and doesn't it make sense in light of Minnesota's longstanding common law? I mean, we have this statute here and we just ruled last week that statutes have to be interpreted consistent with common law and we have— like, we have the *Dairyland* case from the seventies, which is essentially this case, but it decided that you have to look at which section of the— which section of the contract you're covered by. So, I mean, frankly, I mean, in my experience, I don't think the legislature probably spent a whole lot of time thinking through what the word insured meant. But I do think we have this background of common law which actually informs a lot of what this is.

Alison Key: Justice Thissen ends up deciding that the record is not clear on whether Dollansky was actually covered by this policy and he would instead of remand back to the district court to find that fact and then allow the parties to argue in, brief it on the way back up. One other cute fact about this case is that I went to go and listen to argument to see what Justice Thissen was doing in oral

argument. But what I found hilarious about this case is that the webcast posting said this, "*Depositor's v. Dollansky* due to technical difficulties, the first few minutes of these arguments are unavailable," which I'm sorry if it's was not funny to literally anyone else, but this most likely means that the clerks who marshaled oral argument and are responsible for hitting the start button, forgot to hit the start button, which I obviously know from not personal experience.

Mark Thomson: Yeah, definitely not something Alison did. Now finally time for our feature case *Central Housing Authority [Associates] v. Olson*, a landlord tenant case, and we can do facts with Alison.

Alison Key: So this case started back in 2016 when a tenant named Olson entered into a year-long apartment lease with a landlord, Central Housing Associates. Approximately half way through his lease, Central Housing Associates gave Olson a written notice that it was terminating his lease due to Olson's breach of multiple lease terms, which they said included: submitting false information on his application, failing to pay rent, sharing his unit with a personal care attendant with a criminal record disqualifying her from residing there, and tolerating disruptive behavior. So after receiving this notice, Olson then filed a report with the Minnesota Department of Human Rights. Olson claimed in that report to the Minnesota Department of Human Rights that the landlord, Central Housing Associates, only began taking note of these lease violations after he had complained to the landlord in an email that a maintenance worker had verbally harassed his daughter for wearing a hijab. So Olson alleged in this Minnesota Human Rights Department report that the landlord, Central Housing Associates, discriminated against him on the basis that— both that he has a disability and that his daughter is a Muslim. So to quick recap, the timeline is that: Olson signed the lease. Olson complaints via email to the landlord, Central Housing Associates, about his daughter being verbally harassed. Olson starts hearing about lease violations from landlord Central Housing Associates. Landlord Central Housing Associates gives notice to evict Olson on the basis of these violations. Finally, Olson files a complaint with the Minnesota Department of Human Rights alleging retaliation for his complaints. So Olson refused to vacate the property. And so after his lease period ended, Central Housing Associates filed a holdover eviction action. A jury trial then followed. So the jury ended up finding two facts that are relevant to our story. First, it found that Olson did materially violate the terms of his lease. Second, it found that the landlord, Central Housing Associates, "retaliated against Olson in whole or in part as a penalty for his good faith attempt to secure or enforce rights under the lease or the laws of the State of Minnesota or the United States."

Olson Atty: Mr. Olson defended the residential eviction action by alleging retaliation. The jury found two facts. First, that Mr. Olson breached his lease. Second, that the eviction was intended to retaliate against Mr. Olson for asserting his rights.

Mark Thomson: So the main statute that's at issue here is Minn. Stat. § 504B.441. So I'll read you a slightly abbreviated version of this statute that gets to the heart of the issue here. The statute says "a residential tenant may not be evicted if the eviction is

intended as a penalty for the residential tenants complaint of a violation." "Complaint of a violation" is the phrase that were going to be dealing with in this case. The word "complaint" is not defined anywhere in the chapter. That's why the court has so much work to do here. So that's the main statute that said issue that the tenant is seeking to assert a retaliation defense under.

Alison Key: So the more relevant part of the court of appeals opinion for our purposes at the supreme court, is that the court of appeals held that the retaliation defense isn't available to Olson here because it is only triggered on the basis of a "complaint." And the court of appeals reason that a "complaint" in that sense meant a formal complaint to initiate a lawsuit, not a mere expression of dissatisfaction like the email Olson sent to its landlord about his daughter being harassed, or even a complaint to the Minnesota Department of Human Rights. So in this way, the court of appeal says, it doesn't matter that the jury found that Central Housing Associates retaliated against Olson for that "complaint" because it's not the type of complaint addressed in .441, which protects against retaliation by the landlord. So Olson then petitioned to the Minnesota Supreme Court for review on the .441 retaliation argument only. Saying that this informal "complaint" to the landlord should trigger the retaliation protections in .441 absent even this formal complaint to initiate a lawsuit.

Mark Thomson: The other statute that's in play here is Minn. Stat. § 504B.285, which also deals with landlord-tenant conflicts. And there are a few subdivisions that play a small role. Subdivision 2 creates a right for tenants to plead a retaliation defense in cases where there's been a notice to quit, subdivision 3 creates a right for tenants to plead a retaliation defense in a nonpayment case, but subdivision 4, which the landlord leans on quite heavily, says that nothing contained in those prior two subdivisions limits the right of a landlord to terminate a tenancy for a violation by the tenant of a lawful material provision of the lease. So at least with regard to that statutory scheme, subdivision 4 is saying, in some instances, a retaliation defense does not exist. The scope of that is something that's debated throughout the case.

Alison Key: So moving to, then, the oral argument and the arguments that the attorneys and parties put forth, the first attorney to argue was Olson's attorney. This was Samuel Spaid of the organization HOME Line. And his basic argument was, first, obviously based on provision .441 in which he says that "complaint," as it's used in .441, means any expression of dissatisfaction to anyone, including a landlord.

Olson's Atty: Mr. Olson should be protected under .441 for the simple reason that landlords should not be allowed to punish their tenants for complaining about a problem. Certainly in the ordinary sense of the word, he complained about problems. And courts generally deviate from the ordinary meaning of the word only if a word is used in a technical sense or acquired a special meaning. And here, "complaint" has not been used in a technical sense or acquired a special meaning.

Alison Key: So immediately after Olson's attorney makes this plain-meaning argument, the attorney faces some pushback pretty clearly and decisively, specifically from Justice Hudson.

J. Hudson: Because when you look at the current TRA statute, the use of the word "complaint" clearly seems to— well not clearly it does. It refers to a formal complaint that one files with the district court. So if that's true, and we're to look at the entire statute to help determine the meaning of complaint in for .441, where does that leave us?

Mark Thomson: Another thing that I thought was interesting here is like the earlier insurance case with the Justice Thissen dissent that we discussed. There's a bit of a library of statutory interpretation techniques discussed by the parties and by the court. So, we talked about the plain language we talked about the common definition of complaint. The landlord also makes an argument that "complaint" must refer to a legal filed complaint, because the title of this statute is "Tenant Remedies Action," which makes it sound like more of a legally inflected complaint and less of a, you know, email-to-your-landlord type thing. And the landlord also argues separately that the canon that courts must give effect to all statutes pertaining to a topic applies here because giving the statute abroad reading would impinge on some of what's accomplished by the other statute we discussed earlier § 504B.285, which appears to allow landlords to evict tenants without qualification in these circumstances. So more interesting than the actual arguments that play to me is that the court is just giving a tour of all the tools available to it and I think you could see the Chief Justice taking that route.

Chief Justice: In making a decision about whether a statute is ambiguous, we read the words in context, in context of the overall statute. What is your position about which statutory provisions we can look to in determining the context of .441?

Mark Thomson: One other note I thought was interesting in the statutory interpretation discussion is that, you know, the court was spending its time in the weeds of these statutes, but one thing that is often absent and that I really appreciate about Justice McKeig is she's just willing to bring to a discussion like this the common-sense analysis that is often left out. Lawyers in their fancy suits don't like to talk about what is sometimes the most obvious thing in the room. And she does. And so she did that here.

J. McKeig: But counsel, isn't the majority of complaints that are made by landlord— or excuse me, by tenants in the less formal realm? I mean how many tenants actually file—who are self-represented, who are living in low income housing, who are disabled, who have all of these additional problems or barriers—how many of them actually file a civil complaint and serve it on the landlord? Does that make sense to you that that would be the normal course?

Alison Key: So then I think seeing Justice McKeig's opening there, the attorney for Olson on rebuttal did seize on that, highlighting arguments made by the amicus brief filed by Renters United, suggesting that Justice McKeig is right. It is not in the normal

course to file a formal complaint, which is why the court should maybe read a less formal interpretation of .441 in their decision here.

Olson Atty: Most tenants do not file court cases as the amicus clearly pointed out. In Hennepin County, about three TRAs are filed a year. If you do the math, that would come to maybe around 10 or 12 TRAs in the whole state per year. This obviously is dwarfed by the number of actual complaints, informal complaints, that tenants would make to their landlords about repairs and so on.

Mark Thomson: A brief detour, there was a common law portion of this argument. So the tenant noted that the majority rule in courts that have considered this issue across the country, favors the existence of a common law defense in retaliation such situations like this in addition to any statutory cause of action that might exist. And notes that indeed before Minnesota enacted these anti-retaliation statutes, at least one Minnesota trial court found that a common law right existed.

Olson Atty: It is possible to have both the common law and Minnesota statute § 504B.441 running parallel to each other. But second, this court obviously has the power to establish common law. And I think that to some extent It's already present in Minnesota.

Mark Thomson: The landlord pretty strenuously opposes the existence of a common law defense, noting that the legislature has legislated pretty specifically in this area and that it's a truism that when the legislature's words expressly or necessarily preclude application of the common law, then they overrule the common law.

Alison Key: And certainly that argument from the landlord was pretty compelling to, specifically, Justice Hudson and then also the Chief who were also questioning the wisdom of the court adopting a common law retaliation doctrine when statutes seem to address the issue sufficiently.

J. Hudson: As I understand your position, even if we disagree with you on the statutory piece. Your position is that this court should create a new common law action. And I guess I just want to express a concern about that and get your response. Many courts have established a defense of retaliation in the absence of anti-retaliation legislation, but here, we've got a statute that quite explicitly provides for that, both in .285 but also here in Tenant's Remedies Action. And so I'm just wondering, given this court's historical reluctance to create new common law causes of action when the legislature has spoken, and here it seems to me they've done that, what would be the basis or the reason for us doing that?

Chief Justice: So the remedy that you're seeking here seems to me to be already available in state statute, even apart from the landlord tenant statutes, which I think further informs whether there's really a vacuum that this court needs to step into.

Alison Key: So on the converse side of the common law argument, Justice Chutich in particular seemed open at least to the possibility of considering a common law

retaliation doctrine, specifically because the Tenant Remedies Act is intended to provide "additional remedies," which could be read, and Olson does read, as permitting a common law retaliation doctrine even though the statute is also on point.

J. Chutich: Can you tell me, referring to that section where the legislature specifically gives the reason why it's enacted these sections and it says to provide "additional remedies." How to interpret that? I know in some other states they've viewed that as indicating that there is some common law remedy available.

Mark Thomson: A few odds and ends we wanted to cover. One, Justice Anderson has a habit. He likes to— he has one question in mind and he wants both attorneys to answer it. We've seen him do that a few times. I'm not sure I've seen him do what he did here though, which is asked the question at what he knows is the very conclusion of the first attorneys time such that the attorney will not be permitted time to answer the question and instead will have to do so on rebuttal.

J. Anderson: Counsel, I have a question that—maybe it's more appropriate for you to ponder and maybe come back up on rebuttal here—but the amicus here makes a really powerful argument, I think, about the importance of dealing with landlords who take actions relative to tenants that are in the form of retaliation. Do we also have to be concerned about the public policy running the other way? What, you know, what I would call the—it's probably overkill—but the "Pacific Heights" problem, you know, the old movie about tenants who are impossible to remove, don't pay rent for long periods of time. Retaliation becomes a haven. Seems to me that there's also public policy that runs that way. And I, I'd like to have you maybe take a little time on rebuttal and just talk about the balance that you think the legislature has struck here in dealing with those two problems. I'm going to ask opposing counsel that question as well.

Mark Thomson: Even when you're out of time at the end of your argument, usually the Chief will just kind of provide you dispensation to answer whatever the question was. But here, Justice Anderson seems to be almost like a teacher instructing the attorney to go think about it for half an hour while the other attorney is talking, which is a strange state of affairs.

Alison Key: Yeah. I don't think I had seen that before. It would have made a little more sense for Justice Anderson to just save this question for rebuttal when he was ready for an answer for that question.

Mark Thomson: Another notable thing about this case is it was a pretty complicated deal, right? You have a statute that's not clear. Another statue with multiple subdivisions that maybe impact on the first statute. And so everybody was struggling at points to a straighten it all out. The landlord's attorney probably had the hardest time of all. And to be fair, Justice Lillehaug was asking him some very direct and difficult questions. But I don't know that I've ever seen the lengths of silence

that we observed in this oral argument. And maybe we'll play just one of those pauses for you just so you can get a sense of the atmosphere.

J. Lillehaug: Do you have a defense of retaliation, even if you've got a potted plant there? And if so, under what statute?

~ 25 seconds of silence ~

Chief Justice: Counsel, sometimes lawyers say they don't know and we move on.

Alison Key: So the oral argument video isn't actually on him during that long pause because I think you actually have to speak into the mic for the camera to know that it flips back to the speaker. And I'm not sure he was even breathing during that period, so I can't see if he's fumbling or chugging his water or trying to buy time or what he's doing. And then the Chief comes in and tries to save him with an out. But I'm not really sure if it's a save or kind of just, like, twisting the knife.

Mark Thomson: Ugh I'm in physical pain right now, mostly because I just strongly identify with what that attorney went through. I thought for the most part he was fine. It was a really complicated case and sometimes you're in a tough spot and you get anxious and you can't remember what you're talking about. Just rough. So.

Alison Key: We feel for ya, CHA attorney. So Mark, who is going to win this case?

Mark Thomson: I think it's tough to tell. I think the court was sincerely struggling through the thicket of subdivisions that they're left to deal with here. However, based on the tone of some of the questioning, I suppose I will go with the tenant winning. I thought Justice Lillehaug, Justice Thissen, and Justice McKeig all seemed pretty convinced on both the statutory interpretation and equities that the tenants should have a defense here and one more vote to pick up and seem like a big task.

Alison Key: Yeah. I think the easier question here would be that I don't think we're getting common law retaliation. I think nobody wanted to talk about that in oral argument. None of the attorneys did. But because I got so much less play during oral argument than the statutory .441 claim, if I had to guess, that doesn't bode well for Olson's argument on that ground. You'd think if the justices were actually considering it, they'd be wrestling more with the parameters of what the common law should be, what it already is. And they just, they just weren't. As to the .441 statutory argument. I think I do agree. Justice Lillehaug, McKeig, and Thissen seemed to be working pretty hard to pave the way to an interpretation of "complaint" that was more expansive than a lawsuit. I think some unequivocal statements against that idea were from Justice Hudson. Justice Chutich didn't weigh in specifically on the .441 question that I can remember. She just noted her willingness to consider common law or reject the reasons not to consider it. So if Lillehaug, McKeig, and Thissen can convince

Chutich on the .441 claim, I think they will go with, like Mark said, Olson's broad interpretation of the word "complaint" in .441.

Mark Thomson: What did we learn from the case today, Alison?

Alison Key: Today we learned from the case that, when in doubt, sue your landlord in the most formal sense all the time.

Mark Thomson: That wraps up this episode of The ComMN Law. Check us out on Twitter @TheComMNLaw, on the website, thecommnlaw.com. Thanks to our co-directors of communication, Joy and Chloe. Thanks to the brilliant state law librarians at the Minnesota State [Law] Library who hook us up with the briefs and . . .

Alison Key: . . . save our life on a regular basis . . .

Mark Thomson: . . . in every way. And we'll be back next month.

Alison Key: Have a nice one, ComMNers.

Mark Thomson: Turns out I wasn't listening. I was probably drinking.