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Summers v. Crestview: Protecting Tenants at the Expense of the Law

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SUMMERS V. CRESTVIEW: PROTECTING TENANTS AT THE EXPENSE OF THE LAW

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I. INTRODUCTION

Over the past 50 years, perhaps no area of property law has been more dramatically transformed than landlord-tenant law.[1] Beginning in the 1960s, rapid urbanization caused many courts to reexamine landlord-tenant law and its property law principles that traditionally favored landlords.[2] Like any transformation in the law, the modern shift in landlord-tenant law has produced complexity, inconsistency, and confusion.[3] However, it is clear that the recent movement in landlord-tenant law has been directed at one common goal: expanding and protecting the rights of tenants.[4]

The Montana Supreme Court's decision in *Summers v. Crestview*[5] is emblematic of the modern trend toward enhanced protection for residential tenants. The Court determined that Montana law: (1) prohibits landlords from recovering damages in the form of accelerated rent and (2) prohibits lease provisions which provide for the deduction of future unpaid rent from security deposits.[6]

This note discusses the Montana Supreme Court's decision to adopt a bright-line rule prohibiting accelerated rent provisions in lease agreements. The note begins with a brief overview of how accelerated rent provisions are conceptualized in various jurisdictions, including Montana's approach prior to *Summers*. Next, the note discusses the *Summers* opinion. In the opinion, the majority concluded that, as a matter of law, an accelerated rent provision is unenforceable because it "conflicts with [a] landlord's duty to mitigate damages."[7] This enabled the majority to further conclude that landlords may not deduct future unpaid rent from a tenant's security de-

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1. Gerald Korngold, *Whatever Happened to Landlord-Tenant Law?*, 77 Neb. L. Rev. 703, 703 (1998).
2. John G. Sprankling, *Understanding Property Law* 216 (2d ed., Lexis 2007).
3. *Id.*
4. *Id.*
5. *Summers v. Crestview Apts.*, 236 P.3d 586 (Mont. 2010).
6. *Id.* at 590.
7. *Id.* at 591.

posit.[8] Finally, the note concludes with an analysis and critique of the *Summers* opinion, concluding that the majority's reasoning and analysis are inconsistent with prior Montana law.

II. An Overview of Lease Agreements and Accelerated Rent Provisions

An accelerated rent provision allows a landlord to demand immediate payment of all future rent in the event the tenant breaches the lease agreement.[9] While some acceleration clauses are triggered by *any* breach of the agreement, others are limited to a default in rental payments.[10] Regardless of the language used in a particular clause, a landlord's right to collect future rent is usually dependent upon the lease containing some sort of acceleration clause.[11]

Jurisdictions throughout the United States have taken varying positions on the validity of accelerated rent provisions. For example, some jurisdictions enforce acceleration clauses based on freedom of contract principles.[12] Jurisdictions adopting this approach reason that because parties have the freedom to agree on a total rental balance at the beginning of a lease term, they may also agree to accelerate that balance in the event of a tenant breach.[13] A pure "freedom of contract" approach allows landlords to accelerate rental payments for *any* tenant breach, minor or major.[14] Some jurisdictions justify this approach by analogizing acceleration clauses to the contract remedy of anticipatory repudiation.[15] Under this theory, a "landlord has the right to recover the balance of the rents owed because, by its present breach, the tenant has indicated that [he] also intends to breach the future lease obligations as well."[16]

Some courts hold that acceleration clauses are unenforceable because they constitute penalties.[17] These courts often reason that enforcement of an acceleration clause would make a landlord's recovery disproportionate to the actual loss suffered.[18] Not surprisingly, in most of these cases, the lease

8. *Id.* at 590.

9. William B. Stoebuck & Dale A. Whitman, *The Law of Property* 360 (3d ed., West 2000).

10. *Id.*

11. Alvin L. Arnold & Jeanne O'Neill, 1 *Real Estate Leasing Practice Manual* § 38:7.50 (WL current through Oct. 2010).

12. Stoebuck & Whitman, *supra* n. 9, at 361.

13. *Id.*

14. *Id.*

15. Milton R. Friedman & Patrick A. Randolph, Jr., *Friedman on Leases* § 5:3 (WL current through Nov. 2010).

16. *Id.*

17. *Ricker v. Rombough*, 261 P.2d 328, 331 (Cal. Super. App. Dep. 1953); *see also* Stoebuck & Whitman, *supra* n. 9, at 361.

18. Friedman & Randolph, *supra* n. 15.

agreements permitted a landlord to "accelerate for *any* tenant breach, trivial as well as serious."[19] These courts are disinclined to enforce an acceleration clause that "allows acceleration of a large amount of rent for minor breaches."[20]

Many courts have not adopted a per se rule permitting or prohibiting the use of acceleration clauses. In these jurisdictions, an acceleration clause is presumed valid and enforceable as long as it does not constitute a penalty.[21] Courts often use the same analysis when testing the validity of a liquidated damages provision.[22] Indeed, accelerated rent is often viewed as a "form of liquidated damages."[23]

A leading case illustrating the "liquidated damages" approach is *Aurora Business Park Associates, L.P. v. Michael Albert, Inc.*[24] There, the Iowa Supreme Court held that an accelerated rent provision is "a valid and enforceable liquidated damages provision" when: (1) the amount of actual damages resulting from the breach is uncertain and (2) the amount of liquidated damages is reasonable "to the extent that it approximates the loss anticipated" at the time of contracting.[25] The Court reasoned that when a tenant stops paying rent and abandons the premises, a landlord's damages are uncertain because the amount is dependent upon his ability to re-let the premises and there is "no guarantee . . . that [he] will be able to re-let the premises at any time during the remainder of the lease."[26] As for the second factor, the Court concluded that the acceleration clause at issue "reasonably approximate[d]" the anticipated loss because it "[took] into account the landlord's duty to mitigate damages by offsetting any claim [against] amounts received in re-letting the property."[27] Since the acceleration clause accounted for mitigation, it placed the landlord in the exact position he would have occupied had the tenant performed the entire lease.[28]

Prior to *Summers v. Crestview*, Montana law allowed landlords to impose "special liabilities" on tenants who stopped paying rent and abandoned the rental property.[29] Specifically, landlords could hold breaching tenants liable for "subsequently accruing rents."[30] A landlord's right to collect future rent was usually dependent upon the existence of a "savings" clause in

19. *Id.* (emphasis added).
20. Stoebuck & Whitman, *supra* n. 9, at 361.
21. *Aurora Bus. Park Assocs. v. Michael Albert, Inc.*, 548 N.W.2d 153, 156 (Iowa 1996).
22. Stoebuck & Whitman, *supra* n. 9, at 361.
23. *Id.*
24. *Aurora*, 548 N.W.2d 153.
25. *Id.* at 157 (citations omitted).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Knight v. OMI Corp.*, 568 P.2d 552, 553–555 (Mont. 1977).
30. *Id.* at 554.

the lease agreement.[31] Like an acceleration clause, a savings clause allows a landlord to retake possession of the premises and still recover damages for lost rent, less any amounts recovered in mitigation thereof.[32] However, in the absence of an acceleration or savings clause, landlords typically have no right to collect damages in the form of lost rent once they repossess the rental property.[33] In *Summers*, the specific issue before the Court was whether a landlord could retake possession of abandoned rental property and simultaneously recover the entire rental balance due under the lease.

III. *SUMMERS V. CRESTVIEW*

A. Facts

On June 29, 2006, Matthew Summers entered into a one-year lease agreement with Crestview Apartments in Missoula, Montana (the "Lease").[34] The Lease required a security deposit of $2,170 and obligated Summers to make monthly rental payments of $935.[35] In the event Summers failed to make a monthly payment, the Lease provided Crestview with the option to accelerate the remaining rental balance due under the Lease.[36] The Lease also allowed Crestview to deduct damages from the security deposit in the form of accelerated rent.[37] Lastly, the Lease obligated Summers to pay Crestview's attorney fees in the event of a breach by Summers.[38]

Shortly after executing the Lease, Summers obtained financing to purchase a home, and in late August 2006, he notified Crestview of his intent to terminate the Lease.[39] Crestview acknowledged the notice and suggested that Summers advertise the apartment and offer incentives for someone to take over the Lease.[40] Accordingly, Summers placed an ad in the newspaper, offering the apartment at $935 per month with the first month rent-free.[41] Approximately 25 people responded to the ad, which ran for two weeks, and several prospective tenants visited the Crestview rental

31. *Id.*; *TSI, Inc. v. Am. Gem Corp.*, 82 P.3d 34 (table), 2003 WL 22469832 at **2–3 (Mont. 2003).
32. *Knight*, 568 P.2d at 553–554.
33. *Id.* at 553–555.
34. *Summers*, 236 P.3d at 588.
35. *Id.*
36. *Id.* at 588–589.
37. *Id.*
38. *Id.* at 592.
39. *Id.* at 588.
40. *Summers*, 236 P.3d at 588.
41. *Id.*

office and toured the apartment.[42] Despite these efforts, Summers was unable to re-rent the apartment.[43]

In October 2006, Summers vacated the apartment with rent paid through the end of the month.[44] On November 15, 2006, Crestview notified Summers that he owed approximately $6,500 in accelerated rent, including a credit of $2,170 for the security deposit.[45] The next day, Crestview's collection agency informed Summers that he actually owed $9,758.63, the balance from the accelerated rental payments plus a 50% collection fee.[46]

Crestview re-rented Summers's apartment on June 1, 2007, just one month before the Lease expired.[47] Prior to that day, Crestview "did nothing specific nor took any extra effort" to re-rent the apartment; however, it did advertise the apartment along with its other vacant units.[48] Although Crestview's policy was to offer a breached-lease apartment at the rate set in the lease, that information was not included in Crestview's advertisements, which showed similar apartments for $980 per month.[49] When Summers vacated his apartment, Crestview had 26 similar apartments available for rent, 12 of which were rented while Summers's apartment remained vacant.[50]

Summers filed suit against Crestview, alleging violations of the Residential Tenants' Security Deposits Act ("Security Deposits Act") and the Montana Residential Landlord and Tenant Act of 1977 ("Landlord-Tenant Act").[51] Specifically, Summers claimed that Crestview: (1) illegally deducted future unpaid rent from the security deposit; (2) wrongfully imposed accelerated rent upon breach of the Lease; (3) failed to properly mitigate damages; and (4) impermissibly obligated breaching tenants to pay attorney fees.[52]

Following a bench trial, the Fourth Judicial District Court of Missoula County rejected all of Summers's claims and awarded Crestview recovery of $9,442.36.[53] Summers appealed the district court's decision to the Montana Supreme Court.

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42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Summers*, 236 P.3d at 588.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Summers*, 236 P.3d at 587.
53. *Id.* at 588–589.

B. Majority Holding

In a divided opinion delivered by Chief Justice McGrath, the Montana Supreme Court reversed the district court's order.[54] In addition, the Court went a step further and held that the entire Lease was unenforceable.[55] The Court also found that Crestview purposely and knowingly used a rental agreement containing illegal provisions.[56] As a result, the Court remanded the matter to district court for a determination of Summers's damages.[57] Justice Cotter dissented from the majority opinion to the extent it nullified the entire Lease.[58] Justice Rice concurred in part and dissented in part. Although he agreed that the attorney fees provision violated Montana law, he believed the remainder of the Lease was valid and enforceable.[59]

The majority held that Crestview violated the Security Deposits Act when it deducted "accelerated future rent from the security deposit."[60] According to the majority, "Crestview could not deduct future rent from the security deposit" because the Act only allows a landlord to make deductions for money owed "at the time of deduction."[61] The majority began its analysis with an examination of the relevant statutory language. Pursuant to Montana Code Annotated § 70–25–201, landlords may deduct from the security deposit "[any] money owing to the landlord *at the time of deduction*."[62] The statute further provides that "[a] person may not deduct or withhold from the security deposit any amount for purposes other than those set forth in this section."[63]

After examining the relevant statute, the majority applied it to the facts in *Summers*. Because the accelerated rent represented "future rent" for the remaining eight months of the Lease, the majority reasoned that the rent was not owed to Crestview *at the time of deduction* in November 2006.[64] Thus, the majority concluded that Crestview violated the Security Deposits Act because it deducted rent that was not yet due at the time of deduction.[65]

Next, the majority addressed Crestview's accelerated rent provision and concluded that it violated the Landlord-Tenant Act.[66] Because Sum-

54. *Id.* at 593.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Summers*, 236 P.3d at 593–597 (Cotter, J., concurring in part and dissenting in part).
59. *Id.* at 594–597 (Rice, J., concurring in part and dissenting in part).
60. *Id.* at 589 (majority).
61. *Id.* at 589–590.
62. Mont. Code Ann. § 70–25–201(1) (2009) (emphasis added).
63. *Id.* at § 70–25–201(4).
64. *Summers*, 236 P.3d at 589 (emphasis added).
65. *Id.* at 589–590.
66. *Id.* at 590–591.

mers argued that the accelerated rent provision was in fact a liquidated damages provision, the majority focused its analysis on: (1) whether the actual damages sustained by Crestview were impracticable or extremely difficult to fix and (2) whether the accelerated rent provision was unconscionable.[67]

First, the majority examined Montana Code Annotated § 28–2–721, the relevant statute pertaining to liquidated damages. That statute allows for liquidated damages "when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."[68] According to the majority, "'[u]pon re-renting [Summers's] apartment on June 1, 2007, Crestview knew exactly how much Summers owed as a result of breaching the [Lease] and could have sent a final statement at that time."[69] Without further analysis, the majority promptly concluded that "[t]he actual damages sustained by [Summers's] breach were known and were not impracticable or extremely difficult to fix."[70]

Second, the majority addressed Crestview's contention that "liquidated damages are presumed enforceable unless the opposing party establishes that they are unconscionable."[71] The majority noted that "unconscionability requires a two-fold analysis: [1] that the contractual terms are unreasonably favorable to the drafter and [2] that there is no meaningful choice on the part of the other party regarding acceptance of the provisions."[72] Applying the second prong of the test, the majority quickly concluded that Summers had no meaningful choice regarding the accelerated rent provision because "[he] could either accept or reject Crestview's standardized lease agreement without an opportunity to negotiate its terms."[73]

As for the first prong of the test, the majority concluded that Crestview was unreasonably favored by the provision for accelerated rent because it undermined Crestview's duty to mitigate damages.[74] Under Montana law, nondefaulting parties "must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by default."[75] Although the majority agreed with the district court's determination that "Crestview acted reasonably to mitigate damages," it nonetheless concluded that the acceler-

67. *Id.*

68. Mont. Code Ann. § 27–2–721(2).

69. *Summers*, 236 P.3d at 590.

70. *Id.*

71. *Id.*

72. *Id.* (citing *Iwen v. U.S. W. Direct*, 977 P.2d 989, 995 (Mont. 1999); *Arrowhead Sch. Dist. No. 75 v. Klyap*, 79 P.3d 250, 263 (Mont. 2003)).

73. *Id.*

74. *Id.* at 591.

75. *Summers*, 236 P.3d at 591 (quoting *Gierke v. Walker*, 927 P.2d 524, 527 (Mont. 1996)); *see also* Mont. Code Ann. § 70–24–401(1).

ated rent provision unreasonably favored Crestview.[76] According to the majority, "Crestview unreasonably benefited from Summers's breach of the [Lease] by collecting rent not yet due, while simultaneously offering the apartment for rent."[77] In other words, the majority believed the accelerated rent provision reduced Crestview's incentive to re-rent the apartment.[78] Because the accelerated rent provision unreasonably favored Crestview and because Summers had no meaningful choice regarding its acceptance, the majority held that it was unconscionable and therefore unenforceable.[79]

Next, the majority analyzed the attorney fees provision and concluded that it also violated the Landlord-Tenant Act.[80] The Act provides that "reasonable attorney fees . . . may be awarded to the prevailing party *notwithstanding an agreement to the contrary*."[81] According to the majority, the attorney fees provision "directly violate[d] this statutory provision by binding the tenant to an absolute attorney fee obligation."[82] Moreover, the Act "specifically prohibits a rental agreement from providing that a party agrees 'to waive or forego rights or remedies under [the Act].'"[83] The majority concluded that the attorney fees provision also violated the Act because it required tenants to waive or forego their right to a discretionary award of attorney fees.[84]

Having determined that both the accelerated rent and attorney fees provisions violated the Landlord-Tenant Act, the majority addressed the effect such provisions had on the remainder of the Lease.[85] Pursuant to the Act, if a court concludes that "a rental agreement or any provision thereof is unconscionable," it may refuse to enforce the agreement or "enforce the remainder of the agreement without the unconscionable provision."[86] The majority quickly concluded that the entire Lease was unenforceable.[87] The majority reasoned that merely severing the offending terms would not address "the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights if the only consequence to a landlord for using such provisions is that they are found unenforceable by a court."[88]

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76. *Summers*, 236 P.3d at 591.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 592.
81. Mont. Code Ann. § 70–24–442(1) (emphasis added).
82. *Summers*, 236 P.3d at 592.
83. Mont. Code Ann. § 70–24–202(1).
84. *Summers*, 236 P.3d at 592.
85. *Id.*
86. Mont. Code Ann. § 70–24–404(1)(a).
87. *Summers*, 236 P.3d at 593.
88. *Id.*

To "further counter the chilling effect" of the illegal provisions, the majority awarded damages to Summers under § 70–24–403(2).[89] Pursuant to that statute, tenants may recover damages if a landlord "purposely uses a rental agreement containing provisions known by [the landlord] to be prohibited."[90] According to the majority, the attorney fees provision, the accelerated rent provision, and the deduction of future rent from the security deposit were all "clearly prohibited" under the Landlord-Tenant Act and "Crestview should have known that from simply reading the Act."[91] Thus, the majority remanded the case back to the district court to determine the amount of Summers's damages under § 70–24–403(2).[92]

C. Justice Cotter's Concurring and Dissenting Opinion

Justice Cotter agreed with the majority's analysis of the disputed Lease provisions but disagreed with the majority's decision to nullify the entire Lease.[93] Specifically, Justice Cotter believed that it was "premature and unconscionable" to declare the entire Lease unenforceable because the Court "[had] just declared for the first time" that the disputed provisions were unlawful.[94]

Although Justice Cotter agreed that future unpaid rent may not be deducted from a security deposit, she acknowledged that the "[statutory] provision on this point [was] not as clear as it could be."[95] Justice Cotter noted that the Security Deposits Act permits landlords to deduct money owing "at the time of deduction."[96] According to Justice Cotter, because Crestview knew at the time of deduction that Summers was not going to make the remaining rental payments, it "may well have believed . . . that the unpaid rent was owing to it *at the time of deduction* [in November 2006]."[97] Given what she saw as a lack of clarity in the law, Justice Cotter believed that Crestview was "arguably entitled to its interpretation of the statutory language."[98]

Justice Cotter similarly argued that Crestview's accelerated rent provision was excusable because the Landlord-Tenant Act does not clearly and

89. *Id.*

90. Mont. Code Ann. § 70–24–403(2).

91. *Summers*, 236 P.3d at 593.

92. *Id.*

93. *Id.* at 593–597 (Cotter, J., concurring in part and dissenting in part).

94. *Id.* at 593–594.

95. *Id.* at 594.

96. *Id.* (quoting Mont. Code Ann. § 70–25–201(1)).

97. *Summers*, 236 P.3d at 594 (Cotter, J., concurring in part and dissenting in part) (emphasis in original).

98. *Id.*

unambiguously prohibit such provisions.[99] According to Justice Cotter, the majority opinion itself demonstrated this lack of clarity, as it took the Court "[five] pages of step-by-step analysis" to conclude that accelerated rent provisions are unenforceable.[100] Thus, because Montana law does not *clearly* prohibit accelerated rent provisions, Justice Cotter believed that Crestview's use of the provision was not "so draconian" that it warranted nullifying the entire Lease.[101]

Lastly, Justice Cotter expressed concern that the Court's decision to nullify the entire Lease might create dramatic consequences for Montana landlords.[102] Justice Cotter believed that "Crestview and other Montana landlords ought to have notice of [the Court's] decision and time to correct their leases to comply with [the Court's] statements of the law before being placed at risk of having their existing leases nullified in their entirety."[103] Because of the potential hardship imposed on Montana landlords, Justice Cotter dissented from the majority's decision to nullify the entire Lease.[104]

D. Justice Rice's Concurring and Dissenting Opinion

Justice Rice concurred with the majority's analysis of the attorney fees provision but dissented from its analysis of the remaining issues.[105] Justice Rice took particular issue with the majority's conclusion "that a residential rental agreement, under no circumstances, may contain a mutually agreed upon acceleration clause."[106]

Justice Rice strongly criticized the majority's conclusion that acceleration clauses undermine a landlord's duty to mitigate damages.[107] According to Justice Rice, the conclusion was contrary to prevailing legal authority and contrary to the facts of the case.[108] In support, he cited the *Restatement (Second) of Property*, which authorizes acceleration clauses as long as landlords remain obligated to account to breaching tenants for any rent received from a new tenant.[109] Justice Rice highlighted the fact that the acceleration clause in Crestview's Lease "precisely required landlord mitigation."[110] He

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Summers*, 236 P.3d at 594 (Cotter, J., concurring in part and dissenting in part).
104. *Id.*
105. *Id.* (Rice, J., concurring in part and dissenting in part).
106. *Id.* at 594–595.
107. *Id.* at 595–596.
108. *Id.* at 596.
109. *Summers*, 236 P.3d at 595–596 (Rice, J., concurring in part and dissenting in part) (citing *Restatement (Second) of Property: Landlord and Tenant* § 12.1 cmt. k (1977)).
110. *Id.* at 596 (quoting language from the Lease, which provided: "The foregoing [accelerated rent] provision shall not relieve the Landlord of its obligation to mitigate damages").

also pointed out that the majority agreed with the district court's conclusion that Crestview "acted reasonably to mitigate damages."[111] Justice Rice questioned how the Court could agree with the district court's conclusion, yet still hold that the acceleration clause undermined Crestview's duty to mitigate damages.[112] Because Crestview acted reasonably to mitigate damages, the acceleration clause should have been enforced.[113]

Justice Rice also criticized the majority's conclusion that Summers had no meaningful choice regarding acceptance of the accelerated rent provision.[114] He highlighted the fact that "Summers . . . admitted during oral argument that the rental agreement at issue [was] unique to Crestview and that other rental options were readily available."[115] Therefore, Justice Rice believed that Summers had a meaningful choice: he had a "clear opportunity to seek residency elsewhere under a different agreement."[116]

Lastly, Justice Rice disagreed with the Court's conclusion that the Security Deposits Act prohibits deductions for accelerated rent.[117] Justice Rice noted that pursuant to the Act, landlords "may deduct from the security deposit . . . *money owing to the landlord at the time of deduction*."[118] He then highlighted the specific language used in Crestview's acceleration clause that provided "the entire principal rent amount owed for the full lease term *shall at once become due and payable*."[119] Based on this language, Justice Rice reasoned that the moment Summers defaulted on his rent, he "*at once* owed previous unpaid rent as well as the future accelerated rent, subject only to [Crestview's] future obligation to mitigate."[120] Thus, Justice Rice argued that Crestview could lawfully deduct accelerated rent from the security deposit because it qualified as money owing "at the time of deduction."[121]

IV. ANALYSIS

The Montana Supreme Court made two mistakes in *Summers* that produced a holding inconsistent with prior Montana law. First, the majority misstated and misapplied the law governing liquidated damages in Montana. Second, the majority incorrectly concluded that "accelerated rent

111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Summers*, 236 P.3d at 596 (Rice, J., concurring in part and dissenting in part).
116. *Id.*
117. *Id.* at 597.
118. *Id.* (quoting Mont. Code Ann. § 70–25–201(1)) (emphasis in original).
119. *Id.* (emphasis in original).
120. *Id.* (emphasis in original).
121. *Summers*, 236 P.3d at 597 (quoting Mont. Code Ann. § 70–25–201(1)).

reduces the landlord's incentive to re-rent the apartment."[122] This conclusion allowed the Court to ignore well-established case law that authorizes landlords to retake possession of a rental property and still collect damages in the form of lost rent. Consequently, the *Summers* opinion is detrimental for Montana landlords because it demonstrates the Court's willingness to manipulate the law to protect and expand the rights of tenants.

A. Liquidated Damages under Montana Law

Pursuant to Montana Code Annotated § 28–2–721, liquidated damages are void unless "it would be impracticable or extremely difficult to fix the actual damage."[123] Under this statute, liquidated damages are presumptively unenforceable; however, non-breaching parties may rebut the presumption by proving that damages would be impracticable or difficult to fix.[124] Despite ambiguities in the language of the statute, it is generally interpreted to mean that the validity of a liquidated damages clause is determined *at the time of contracting*.[125] In other words, a liquidated damages clause is only enforceable if "damages were difficult to estimate or determine at the time the contract was formed."[126]

In 2003, the Montana Supreme Court adopted a new test for analyzing the validity of liquidated damages.[127] In *Klyap*, the Court held that a liquidated damages clause is presumptively enforceable unless the party seeking to avoid the clause can prove that it is unconscionable.[128] According to the Court, unconscionability involves a two-prong determination: (1) whether the opposing party had a meaningful choice regarding acceptance of the provision, and (2) whether the clause is unreasonably favorable to the drafter.[129] In other words, a liquidated damages clause is presumptively enforceable unless the breaching party establishes that he had no meaningful choice regarding acceptance of the provision and the clause is unreasonably favorable to the drafter.[130]

In *Summers*, the majority committed a crucial error when it analyzed the validity of the accelerated rent provision under both the statutory test

122. *Id.* at 591.

123. Mont. Code Ann. § 28–2–721 (2009).

124. *Id.*; *Story v. City of Bozeman*, 856 P.2d 202, 228 (Mont. 1993), *overruled*, *Klyap*, 79 P.3d at 264.

125. Daniel Browder, Student Author, *Liquidated Damages in Montana*, 67 Mont. L. Rev. 361, 383 (2006); *see also* Lisa A. Fortin, *Why There Should Be a Duty to Mitigate Liquidated Damages Clauses*, 38 Hofstra L. Rev. 285, 305–306 (2009).

126. Browder, 67 Mont. L. Rev. at 383.

127. *Klyap*, 79 P.3d 250.

128. *Id.* at 264.

129. *Id.* at 263.

130. *Id.* at 263–264.

and *Klyap*.[131] A cursory review of § 28–2–721 and the *Klyap* decision reveals that the statute and case law conflict with one another. While the statute provides that liquidated damages are presumptively *unenforceable* unless actual damages are difficult to fix, the *Klyap* decision provides that liquidated damages are presumptively *enforceable* unless they are unconscionable.[132] Despite the clear contradiction between the two tests, the majority analyzed the validity of Crestview's acceleration clause under both tests.[133] The majority made no attempt to explain or reconcile the inconsistency in the law. Consequently, the majority opinion suggests that a liquidated damages clause can be presumptively unenforceable and presumptively enforceable at the same time.

Assuming arguendo that § 28–2–721 is still applicable after *Klyap*, the majority's analysis was still flawed because it misapplied the statutory test. Specifically, the majority analyzed whether Crestview's damages were difficult to fix *at the time of re-renting Summers's apartment in June 2007.*[134] As discussed above, it is well established that, under § 28–2–721, the validity of a liquidated damages clause is determined at the time of contracting.[135] Thus, the majority should have analyzed whether Crestview's damages were difficult to fix at the time of contracting in June 2006, not at the time of re-renting in June 2007.

At the time of contracting in June 2006, Crestview's damages would have been extremely difficult to fix; the amount was entirely dependent upon (1) the date of breach and (2) Crestview's ability to re-rent the apartment. If Crestview were able to re-rent the apartment shortly after the breach, the resulting damages would be reduced. However, there was no guarantee that Crestview would be able to re-rent the apartment at any time during the remainder of the lease term. If Crestview were unable to re-rent before the Lease's expiration, damages would be increased. Therefore, a proper statutory analysis would demonstrate that there was considerable difficulty and uncertainty in fixing Crestview's damages at the time of contracting in June 2006.

B. The Duty to Mitigate

The Landlord-Tenant Act explicitly states that non-breaching parties have a duty to mitigate damages.[136] In addition, the Montana Supreme Court has long adhered to the common law rule that "a nondefaulting party

131. *Summers*, 236 P.3d at 590–591.
132. Mont. Code Ann. § 28–2–721; *Klyap*, 79 P.3d at 264.
133. *Summers*, 236 P.3d at 590–591.
134. *Id.* at 590.
135. Browder, *supra* n. 125, at 383; *see also* Fortin, *supra* n. 125, at 305–306.
136. Mont. Code Ann. § 70–24–401(1).

in a contractual arrangement must act reasonably under the circumstances so as not to unnecessarily enlarge damages caused by default."[137] However, a nondefaulting party is only expected to do what is "reasonable under the circumstances and need not embark upon a course of action which may cause further detriment to him."[138]

In *Summers*, the majority concluded that the accelerated rent provision unreasonably favored Crestview because it undermined Crestview's duty to mitigate damages.[139] Specifically, the majority reasoned that "Crestview had no incentive to rent the vacant apartment [because] it had already charged rent through the end of the lease term."[140] Based on this reasoning, the majority concluded that, as a matter of law, all accelerated rent provisions unreasonably favor landlords because they conflict with the duty to mitigate damages.[141]

This conclusion, however, is inconsistent with Montana law. In *Klyap*, the Court specifically stated that when determining whether a liquidated damages clause unreasonably favors the drafter, courts should consider "whether [the] clause attempts to waive the general duty to mitigate."[142] This statement demonstrates that prior to *Summers*, Montana law did not view liquidated damages as contrary to mitigation, but rather deemed liquidated damages to be reasonable if the non-defaulting party sought to mitigate damages.[143] In his dissent, Justice Rice correctly noted that the acceleration clause in Crestview's Lease "precisely required landlord mitigation."[144] Specifically, the Lease provided: "The foregoing [accelerated rent] provision shall *not* relieve the Landlord of its obligation to mitigate damages."[145] Therefore, because the acceleration clause did not attempt to waive the general duty to mitigate damages, it did not unreasonably favor Crestview.

By concluding that acceleration clauses undermine the duty to mitigate, the majority was able to ignore well-established case law authorizing landlords to retake possession of a rental property and still collect damages in the form of lost rent. Under Montana law, the general rule is that "cancellation of a lease and reentry by the landlord terminates the lease and with

137. *Gierke*, 927 P.2d at 527 (citations omitted).

138. *Id.*

139. *Summers*, 236 P.3d at 591.

140. *Id.*

141. *Id.*

142. *Klyap*, 79 P.3d at 264.

143. *See Summers*, 236 P.3d at 596 (Rice, J., concurring in part and dissenting in part) (noting that prevailing legal authority "does not view acceleration to be contrary to mitigation, but rather deems acceleration clauses to be reasonable if mitigation is employed to limit the damages").

144. *Id.*

145. *Id.* at 595 (emphasis added).

it all obligations, covenants, and stipulations dependent upon continuation of the term."[146] Stated differently, when a landlord repossesses rental property prior to the expiration of the lease term, the tenant no longer has an obligation to make rental payments.[147] However, the Court has long held that "a lease may provide for the performance of certain obligations or impose certain liabilities after [a landlord repossesses the property]."[148] Specifically, landlords may be entitled to collect "damages for being deprived of future rent throughout the entire term of the lease, less any sums recoverable in mitigation thereof."[149] The right to collect "future rent" is entirely dependent upon the lease containing "clear language expressly preserving such right."[150] Thus, in the absence of "clear language" preserving such right, landlords cannot hold tenants liable for future rent following repossession.[151]

In *Summers*, the majority failed to recognize that acceleration clauses serve an important function: they preserve a landlord's right to collect future rent following repossession. By failing to recognize the importance of acceleration clauses, the majority may have eliminated a landlord's right to repossess a rental property and still recover damages in the form of future rent.

VI. Conclusion

The Montana Supreme Court's decision in *Summers* dramatically transformed landlord-tenant law in Montana, and it demonstrates the Court's willingness to manipulate the law to protect and expand the rights of tenants. Specifically, the Court misstated and misapplied the law of liquidated damages in Montana. Accelerated rent provisions are now *ipso facto* unconscionable and will likely render an entire lease agreement unenforceable if incorporated. In reaching its conclusion, the Court overlooked established case law that authorized landlords to retake possession of a rental property and still collect damages in the form of lost rent. In the wake of *Summers*, Montana landlords find themselves in a precarious position. The opinion establishes a precedent for nullifying entire lease agreements and awarding damages to breaching tenants based on lease provisions that seemingly favor landlords. Ultimately, the *Summers* opinion improperly reshapes landlord-tenant law in Montana by placing tenants' rights above the law.

146. *Knight*, 568 P.2d at 553.

147. *Id.*

148. *Id.*; *see also LIC, Inc. v. Baltrusch*, 692 P.2d 1264, 1266–1267 (Mont. 1985); *Grenfell v. Anderson*, 989 P.2d 818, 828 (Mont. 1999); *TSI, Inc.*, 2003 WL 22469832 at **2–3.

149. *Knight*, 568 P.2d at 553–554.

150. *Id.* at 554.

151. *Id.*