



Housing  
**Justice**  
Center

MN's Unconstitutional  
"Pay to Defend" Barrier  
to *Fritz* Defenses

# Bench & Bar

OF MINNESOTA

## Fixing a Hole: The Fritz defense revisited



## Eliminating the unconstitutional “pay-to-defend” barrier in Minnesota eviction actions

By James Poradek and Luke Grundman

# The Good News

## *Fritz v. Warthen* = Powerful Habitability Defense

“The legislative objective in enacting the implied covenants of habitability is clearly to assure adequate and tenantable housing within the state. That objective is promoted by **permitting breach of the statutory covenants to be asserted as a defense in unlawful detainer actions.**”

*Fritz v. Warthen*, 213 N.W.2d 339, 342-43

# Current MN Supreme Court Has Repeatedly Reinforced *Fritz*

“A lease is not a one-way street that entitles only the landlord to the aid of the law. The tenant, too, is entitled to rely on the lease, residential covenants, city codes, and state laws.”

*Central Housing Associates v. Olson*, 929 N.W.2d 398, 409 (Minn. 2019).

# The Bad News



MINNESOTA  
HOUSING  
COURT  
BENCHBOOK

SECOND EDITION



**MINNESOTA  
HOUSING  
COURT  
BENCHBOOK**  
SECOND EDITION

7.  If Tenant alleges FRITZ defense, then you need to have Tenant deposit rent owed into Court and schedule hearing.

*be cancelled and a Writ issued. If Tenant cannot pay the undisputed amount of rent owed there is no reason to have a hearing on the disputed amount. Sometimes, the real problem is that Tenant simply does not have the money to pay the rent owed, and the deposit requirement will resolve the issue. Often, when Tenants understand that this will happen, they are more willing to simply settle the case and work out either a payment agreement or they will agree to move out at some agreed date.*

District Court  
Fourth Judicial District

Court File Number: 27-CV-HC-19-4357

Case Type: Housing

**EVICTIION SUMMONS**  
**Minn. Stat. § 504B.321**

**YOU HAVE THE RIGHT** to come to court and tell your side of the case. For example,

- If you believe that all or some of the things that your landlord says in the attached papers are wrong, you can tell those things to the judge.
- If you believe that your landlord is trying to evict you because of something you did to protect your rights as a tenant, you can explain that to the judge.
- **If the attached papers say that you have not paid rent, and you believe that your apartment is in bad condition and needs repairs, you can tell that to the judge. Bring total rent owed to court hearing.**

# The Due Process News

# “Pay to Defend” Is Anathema to Due Process

“Due process requires that there be an opportunity to present every available defense.” *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citations omitted).

“Surely no one would contend that either a State or the Federal Government could constitutionally provide that defendants unable to pay court costs in advance should be denied the right to . . . defend themselves in court. . . . Notice, the right to be heard, and the right to counsel would under such circumstances be **meaningless promises to the poor.**” *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

# *Mathews* Procedural Due Process Test

“First, the private interest that will be affected by the official action”

“Second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”

“Finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”

*Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)

*Olson v. One 1999 Lexus MN License Plate*, 924 N.W.2d 594, 601 (Minn. 2019)

# 1. Private Property Interest

Eviction “deprive[s] [defendants] of a significant interest in property: indeed, of **the right to continued residence in their homes.**” *Greene v. Lindsey*, 456 U.S. 444, 450-51 (1982).

## 2. Risk of Erroneous Deprivation

*Mathews*: “The “right to be heard **before** being condemned to suffer grievous loss of any kind . . . is a principle basic to our society.” 424 U.S. at 333 (quoting *Joint Anti-Fascist Comm. V. McGrath*, 341 U.S. 123, 168 (Frankfurter, J., concurring)).

### 3. Government's Interest

“There is a compelling reason to recognize this defense: the protection of the health, safety, and welfare of tenants and their families.” *Central Housing*, 929 N.W.2d at 409 (citations omitted).

## Potential Source of Confusion

Concern in *Fritz* that “the landlord may prevail and may not then be able to collect the rents due and yet would have been unable to dispossess the tenant during the delays occasioned by court proceedings.” 213 N.W.2d at 343.

# What Fritz Actually Says

Refers to escrowing “future rent” and “**rent to be withheld**”

“In the majority of cases, the final determination of the action will be made quickly and this procedure will not have to be used.”

“[w]e also expect that, as experience dictates, additional rules may be adopted to meet any problems encountered.” *Id.* at 343 n.5.

# Misreads MN General Rule of Practice Rule 608

Rule 608: “In any eviction action case where a tenant withholds rent in reliance on a defense, the defendant shall deposit forthwith into court an amount in cash, money order or certified check payable to the District Court equal to the rent due **as the same accrues** or such other amount as determined by the court to be appropriate as security for the plaintiff, given the circumstances of the case.”

Back to Good News

*Bell v. Tsintolas Realty Co.* 430 F.2d 474, 483-84 (D.C. Cir. 1970).

**Pre-deprivation hearing required:** Such a rent prepayment order would happen “only upon motion of the landlord and after notice and opportunity for oral argument by both parties.”

**Ongoing rent payments deposited:** Prepayment orders would “require[e] only future payments falling due after the date the order is issued to be paid into the court registry.”

**Back rent payments not deposited:** “Any inclusion of back rent alleged to be due would depart from this protective purpose, since the landlord cannot recover back rent in a suit for possession, and would be in the nature of a penalty on the tenant.”

**Burden on landlord to demonstrate need for prepayment.** “[I]t may issue only when the landlord has demonstrated an obvious need for such protection.”