IN THE IOWA SUPREME COURT

No. 12-1031

BROOKE STALEY, ET AL,

Appellants-Plaintiffs,

vs.

TRACY BARKALOW, ET AL,

Appellees-Defendants.

APPEAL FROM THE JOHNSON COUNTY DISTRICT COURT
THE HONORABLE PAUL MILLER JUDGE

APPELLANT'S PROOF REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. ERROR PRESERVATION

Appellees ("Landlord") repeatedly misstate the doctrine of error preservation by arguing that the trial court must rule upon a particular issue and in addition must specifically address the exact points raised by the parties in its ruling before these issues can be raised on appeal,

> Error preservation is based on principles of fairness: "[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue *it was never given the opportunity to consider*. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable." 5 Am. Jur. 2d Appellate Review § 690, at 360-61 (1995).

Emphasis supplied, *Devoss v. State*, 648 N.W.2d 56 at ¶35-7 (Iowa 2002).

As the *Devoss* Court ruled,

> We have in a number of cases upheld a district court ruling on a ground *other than the one upon which the district court relied provided the ground was urged in that court*. See, e.g., *Interstate Power Co. v. Ins. Co. of N. Am.*, 603 N.W.2d 751, 756-58 (Iowa 1999) [additional citations omitted] We have likewise applied the rule in reversing a district court ruling. See *Fencl v. City of Harpers Ferry*, 620 N.W.2d 808, 811-12, 818-19 (Iowa 2000)

Emphasis supplied, *Devoss v. State*, 648 N.W.2d 56 at ¶43-4.

As the *Devoss* Court makes clear, the question of error preservation hinges on whether issues have been raised in the trial court, not whether the trial court actually ruled on the specific grounds urged by a party,

> Ordinarily, we attempt to protect the district court from being ambushed by parties raising issues on appeal that were not raised in the district court. We see no reason why we should not apply the same rationale to the parties themselves. That is, one party should not ambush another by raising issues on appeal, *which that party did not raise in the district court*.

Devoss v. State, 648 N.W.2d 56 at ¶50.

Landlord is not being ambushed as all of the issues raised by Tenants on appeal were raised to the trial court. In fact these issues were heavily briefed below, Tenants filing extensive motions both for class certification and summary & declaratory judgement, Landlord filing lengthy briefs resisting these motions, Tenants responding with an extensive reply to Landlord's resistances, Landlord responding with a further reply brief and Tenants' finally responding to Landlord's reply until mutual exhaustion finally put an end to the briefing of these issues below.

The trial court clearly had an opportunity to address the issues and even the specific grounds raised by Tenants both here and below. The fact that it may have refused to address some of the specific arguments raised by Tenants is not basis for refusing to consider the broader issues properly raised both below and on appeal.

II. WHEN A DEPOSIT IS NOT A DEPOSIT AND DIRT IS NOT WEAR & TEAR

The only other areas in which additional briefing would bring further clarity were raised by Landlord on page 46 of its brief. There Landlord cites some rather anomalous landlord friendly cases, in particular, *Stutelberg v. Practical Mgmt. Co*, 245 N.W. 2d 737 (Mich. App. 1976) and *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994).

In *Stutelberg* the landlord charged both a security deposit and a non-refundable cleaning fee at the outset of the lease. *Stutelberg,* 245 N.W. 2d 737 at ¶45. The *Stutelberg* Court held that because the cleaning fee was charged in advance separately from the security deposit that the rules regulating security deposits did not apply to it. ""The tenant could have no expectation that this sum or a part thereof should be returned. It is not a 'security deposit.'". *Stutelberg,* 245 N.W. 2d 737 at ¶127.

Landlord's leases, however, provide with regard to carpet cleaning that, "Tenants agree to a charge…*being deducted from the deposit*" Emphasis supplied, in Lease §37(3). Since the carpet cleaning charge is deducted from the security deposit, on the facts of the instant case, the holding in *Stutelberg* does not apply.

Secondly, on broad policy grounds *Stutelberg* should be rejected as persuasive precedent. Following *Stutelberg* would allow landlords to entirely circumvent the restrictions placed on landlords with regard to the use of

security deposits and thereby relieve them of their statutory responsibility for repair and maintenance. *Stutelberg* interprets the Michigan landlord tenant statute very narrowly, insisting that the restrictions on the use of security deposits by landlords were only put in place so that landlords would not deceive tenants as to the use of pre-paid funds. "The Act is primarily aimed to protect the tenant from the landlord surreptitiously usurping substantial sums held to secure the performance of conditions under the lease." *Stutelberg,* 245 N.W. 2d 737 at ¶122. Their function in requiring maintenance and repair by landlords was ignored in *Stutelberg*.

This is not true of §562A.12, which governs security deposits, and is not the only section of the Iowa Uniform Residential Landlord Tenant Act ("URTLA") that enumerates the repair & cleaning obligations of landlords and tenants. For example, tenants must, "Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit." Iowa Code §562A.17(2). Again, like the ordinary wear and tear requirement of §562A.12(3)(b), tenants' cleaning responsibility is limited by statute, not by landlord's contract of adhesion. Tenants would argue that the "clean and safe as the conditions of the premises permit" standard is a restatement of the ordinary wear and tear requirement since deterioration due to ordinary wear and tear is deterioration in the condition of the premises.

In addition, following *Stutelberg* would ignore the comprehensive reform of the landlord tenant relationship undertaken through the adoption of the common law warranty of habitability in cases like *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) and in the Iowa legislature's adoption of the URLTA. As §562A.2 states the, "Underlying purposes and policies of this chapter are… To insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Iowa Code §562A.2(c). Following *Stutelberg* would allow the landlord to entirely evade its responsibility for repair and maintenance because there would be no legal restrictions whatsoever on what they could charge as non-refundable fees.

If *Stutelberg* were adopted, for example, landlords could charge "non-refundable" fees and force tenants to pay for roof maintenance, remodeling, for third party vandalism, for cleaning due to normal wear and tear or even charge when cleaning was unnecessary. The reasoning in *Stutelberg* is flawed and its use as precedent would seriously undermine the legal and statutory scheme carefully adopted by the Iowa Supreme Court in *Mease v. Fox* and by the legislature in chapter 562A.

Landlord further attempts to justify his automatic carpet cleaning provisions by relying on Indiana's aberrant ordinary wear and precedent. In *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994). the Indiana Court of Appeals held,

> [W]e conclude that ordinary wear and tear refers to the gradual deterioration of the condition of an object which results from its appropriate use over time. We do not agree with the tenants' contention that the accumulation of dirt constitutes ordinary wear and tear. Objects which have accumulated dirt and which require cleaning have not gradually deteriorated due to wear and tear. Rather, such objects have been damaged by dirt, although they are usually capable of being returned to a clean condition. *In short, the accumulation of dirt in itself is not ordinary wear and tear.*

Emphasis supplied*, Miller v. Geels*, 643 N.E.2d 922 at ¶50-1.

Outside of Indiana, counsel has been unable to find a single authority that accepts the *Miller v. Geels* "dirt is not ordinary wear and tear" holding. The states that have considered this question uniformly hold that dirt and required cleaning are indeed measured by the ordinary wear and tear standard. See eg, *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) (statute does not require tenants to clean carpets that are made dirty by normal and ordinary use.); *Chan v. Allen House Apartments Management*, 578 N.W.2d 210 at P30 (Wis.App. 1998) (landlord did not meet his burden of proof that those items needed cleaning beyond the normal wear and tear); *Rock v. Klepper*, 23 Misc.3d 1103(A) at ¶54 (N.Y.City Ct. 2009) (tenant is not responsible for "normal wear and tear," and the landlord cannot retain the security deposit for cleaning or repainting that are due to "normal wear and tear."); *Stoltz Management v. Consumer Affairs Bd*, 616 A.2d 1205 at ¶29 (Delaware 1992) (landlord may recover…for detriment to the rental unit in excess of "ordinary wear and tear which can be corrected by painting and ordinary

cleaning"); *Southmark Management Corp. v. Vick*, 692 S.W.2d 157 (Tex App 1985) (landlord could not retain any portion of the security deposit to cover normal wear and tear…Appellee could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security.)

More importantly, however, the logic of the holding in *Miller v. Geels* is highly flawed and it is therefore not persuasive precedent. *Miller v. Geels* stands for the proposition that cleaning requirements in the lease are not controlled by a standard of ordinary wear and tear, allowing the landlord to require whatever cleaning and cleaning charges it wishes. The *Miller v. Geels* Court's holding that dirt is not wear and tear is illogical. Why dirt is not included in the "gradual deterioration of the condition of an object which results from its appropriate use over time" is not at all obvious. *Miller v. Geels*, 643 N.E.2d 922 at ¶50. But the incoherence of the *Miller* Court's reasoning is clear when it states that that objects that need to be cleaned have not been subject to wear and tear, but "[r]ather, such objects have been damaged by dirt, although they are usually capable of being returned to a clean condition." *Miller v. Geels*, 643 N.E.2d 922 at ¶50-1.

If the logic of *Miller v. Geels* is accepted, landlords are free to argue that if an item, say refrigerator or window, is damaged, but can be repaired that it did not suffer ordinary wear and tear. Only items that do not need cleaning and cannot be repaired are covered by this aberrant definition of ordinary wear and

tear. Thus another huge area has been removed from the responsibility of the landlord to maintain and repair. Neither *Stutelberg* nor *Miller v. Geels* should be followed by this court.

III. CONCLUSION

Landlord has put forth tremendous effort, both in the trial court and on appeal, to avoid the real issue in this case, the legality of its lease. Its extreme reluctance to face this issue is understandable because, on the rare occasions it turns from procedural quibbles to substance, it supports its own lease by gutting the legal protections of tenants put in place by the Iowa Supreme Court and the Iowa Legislature.

If the trial court's order is affirmed, it is difficult to see how any class action could ever be maintained by tenants, or how any party to a contract can obtain declaratory judgment previous to a breach.

This case will have immediate, practical effect for thousands of tenants, both in Iowa City and across Iowa. Sustain the trial court and landlords can freely include illegal provisions in their leases and when challenged, as here, simply claim no enforcement. Overturn the trial court, insist that leases contain no illegal clauses and Iowa tenants are free from the damage caused by the inclusion, as well as the enforcement of illegal clauses.

WHEREFORE, Tenants ask that this Court reverse the district court, certify the instant action as a class action and remand this case for the trial court to issue summary and declaratory judgment with regard to the challenged lease clauses.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I served via e-mail a copy of this Appellant's Proof Reply Brief on October 2012, on

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I hereby certify that I paid _____ to prepare the original and copies of this page proof reply brief.

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CERTIFICATE OF Rule 6.1401 COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)g(1) because this brief contains 8,529 words, excluding the parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) because this brief has been prepared in a proportionally spaced typeface using Word 97 and Garamond 14 point font.

_____ October , 2012
Christopher Warnock