IN THE SUPREME COURT OF IOWA
Supreme Court No. 14-1783
Johnson County No. SCSC081696

LENORA CARUSO,

Plaintiff-Appellee

vs.

APTS. DOWNTOWN, INC.

Defendant-Appellant

Appeal from the Iowa District Court in and for Johnson County
The Honorable Douglas S. Russell, Judge

Defendant-Appellant's Initial Brief In Final Form

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STATEMENT OF THE CASE

This case is a landlord-tenant case, one of a series of cases filed by counsel for Plaintiff-Appellee, Lenora Caruso, against landlords in Johnson County. The landlord in this case is Defendant-Appellant, Apts. Downtown, Inc. Caruso filed an action in small claims on March 27, 2012, against multiple defendants not including Apts. Downtown. (Original Notice, 3/27/12, App. 9). Caruso alleged:

> YOU ARE HEREBY NOTIFIED that the plaintiff demands from you the sum of $5,000 individually and/or as a manager participating in tortious conduct and/or under the doctrine of respondeat superior, for overcharging for repairs, for violating Iowa Code Chapter 562A, for abuse of process and for violations of the Iowa consumer credit and debt collection statutes, Iowa Code §§537.5201(1)(y) &537.7103(4)(e) [sic], willfully using a rental agreement with known prohibited provisions, plus punitive damages and attorney fees.

(Id.). On April 16, 2012, Defendant, Joseph Clark, answered and denied liability, as did Defendants, James Clark, N-1 LLC, and Gilbert Manor, LLC. On June 15, 2012, Caruso filed a "Consent Motion to Substitute Defendants," replacing James Clark with Apts. Downtown. On August 29, 2012, Caruso filed an amended petition adding an allegation of "wrongful withholding of a security deposit." (First Amended Petition, App. 11).

Trial was held on October 12, 2012, and November 9, 2012. (Transcript, 10/12/12; Transcript Volume II, 11/9/12). In closing argument,

counsel for Caruso argued, "So cause or not, it is almost like I am here on a cause. I am not getting paid anything. It is completely pro bono because I believe in this. And so the bottom line is this, that the law needs to be obeyed, and that I'm really happy we have had this opportunity to take a look at this." (Tr. 225, App. 113). The magistrate told the parties to submit all information by December 15, 2012. (Tr. 227, App. 114).

On June 25 and 27, 2013, respectively, counsel for Caruso filed attorney's fee affidavits. (Warnock Attorney Fee Affidavit, App. 13-15; Boyer Attorney Fee Affidavit, App. 16-17). On July 3, 2013, Apts. Downtown moved to strike the attorney fee affidavits because Caruso did not present any evidence to support an award of attorney's fees and because the fees, "when combined with the other damages sought by Plaintiff, would result in damages which would exceed the monetary jurisdiction limits of the Small Claims court." (Motion to Strike, 7/3/13, App. 18).

The magistrate, Karen D. Egerton, issued Findings of Fact, Conclusions of Law, and Judgment on December 8, 2013. (Magistrate Ruling, App. 21-31). The magistrate ruled that the carpet cleaning provision in the lease was unenforceable and that the evidence was "insufficient" to show the carpet was "damaged . . . beyond the level of ordinary wear and tear." (Magistrate Ruling, at 9, App. 29). The magistrate further ruled that

repair provisions in the lease were "unconscionable and not enforceable" and that the evidence was "insufficient to prove that the problems with the door, if any, were caused by the Plaintiff, another tenant, or a guest or visitor of the Plaintiff or other tenants." (Magistrate Ruling, at 10, App. 30). The magistrate also credited the testimony of Caruso's witnesses on other cleaning issues. (Id.). Accordingly, the magistrate awarded Caruso the unreturned portion of the deposit, $904.33, from Apts. Downtown. (Magistrate Ruling at 11, App. 31). The magistrate further awarded $200 for bad faith retention of the security deposit, plus $2,770 based on a finding that "Defendant willfully used this rental agreement containing at least two provisions known by the landlord to be prohibited under 562A.11 (paragraphs 37(e) and 33(a))." (Id.). The damage award thus totaled $3,874.33. (Id.). The magistrate rejected Caruso's other claims for personal liability, debt collection, and abuse of process, but awarded "as costs" attorney's fees of $1,200 for Boyer and $2,400 for Warnock. (Id.).

Apts. Downtown appealed to the district court. In its ruling, filed September 26, 2014, the district court, the Honorable Douglas S. Russell, presiding, quoted extensively from the magistrate and upheld the magistrate's "credibility" determinations. (District Court Ruling, 9/26/14, App. 32-44). The district court held that the carpet cleaning provision "may

not be included in the landlord's standard lease because inclusion of paragraph 37(e) permits the landlord to avoid his obligations as defined by the Iowa Legislature in § 562A.12(3)." (Id. at 11, App. 42). The district court also held "that the clause in the lease requiring the tenants in this case to pay for the allegedly damaged door is illegal." (Id. at 12, App. 43). The district court then upheld the magistrate's finding of willful use of a provision known to be prohibited as follows:

> Magistrate Egerton was in the best position to determine the credibility of Joseph Clark's testimony regarding whether Defendant willfully used a rental agreement containing provisions known by the landlord to be prohibited. There was testimony that Joseph Clark was familiar with the IURLTA and what a landlord can and cannot do thereunder, and that he was familiar with Iowa Code § 562A.11. Thus, the Court concludes that Magistrate Egerton's judgment awarding two months' rent due to willful use in the rental agreement of prohibited provisions should be upheld on appeal.

(Id.). Finally, the district court reduced the award of attorney's fees from $3,600 to $1,125.67 in order to keep the overall award below the maximum jurisdictional amount for small claims court. (Id. at 13, App. 44).

Apts. Downtown applied for discretionary review of the district court's ruling. (Application, 10/22/14). This court granted discretionary review in an order filed November 5, 2014.

STATEMENT OF FACTS

Caruso leased an apartment from Apts. Downtown for two years, from August 2010 through July 2012, with two roommates, her sister, Claire Caruso, and Victoria Isenhour. (Tr. 10, 13, 23 (Caruso), App. 49, 50, 59; Exh. A, App. 117-119; Exh. B, App. 120-123). Caruso admitted the roommates never objected to any terms of the lease. (Tr. 23 (Caruso), App. 59). Caruso admitted the leases expressly set forth the costs of various repairs and carpet cleaning charges. (Tr. 31-33 (Caruso), App. 62-64). Caruso admitted the leases expressly added repair costs to rent and charged $40 monthly for late rent. (Id.).

Caruso admitted that her co-tenant, Claire Caruso, received a statement from Apts. Downtown explaining the deductions from the security deposit. (Tr. 14 (Caruso), App. 51; Exh. K, App. 128). The statement showed that Apts. Downtown withheld $625.33 from the deposit for past due rent and fees on account; $134 for carpet cleaning; $105 for general cleaning; and $40 for replacement of drip pans for the stove, for a total of $904.33. (Exh. K, App. 128). The past due rent and fees included $199.33 for an interior door replacement in July, 2011, ten months' late charges of $40 each month less a $20 payment; and a $46 charge for replacement of patio lights and refrigerator clips. (Exh. J, App. 127). At the hearing,

Caruso did not dispute the $46 charge for maintenance to replace patio lights and the refrigerator clip, (Tr. 35-36 (Caruso), App. 66-67), but neither the magistrate nor the district court gave Apts. Downtown credit for that charge.

Caruso disputed the charges and late fees for the interior door replacement by Apts. Downtown on July 7, 2011. (Tr. 18-21 (Caruso), App. 55-58). As stated above, Caruso and her roommates were charged $199.33 for the door replacement. (Tr. 23 (Caruso), App. 59). Caruso admitted they did not pay the bill. (Id.). Caruso admitted she knew they were charged late fees each month for not paying the bill. (Tr. 24, 34-35 (Caruso), App. 60, 65-66). In February, 2012, Caruso and her roommates paid $20 toward the door replacement and late fees, explaining they were only paying $20 because of "financial constraints." (Tr. 35 (Caruso), App. 66; Tr. 125 (Isenhour), App. 88).

Caruso testified that part of her claim was that Apts. Downtown over-charged them for the door. (Tr. 27 (Caruso), App. 61). A retired attorney, George Perry, who viewed the apartment on Caruso's behalf, testified that he visited Menard's where he found that a replacement door could be bought for $45. (Tr. 86 (Perry), App. 85). Perry admitted, however, that he has personally never replaced a door in an apartment, that he has personally never ordered a door from Menard's, and that it would take additional time

to order, pick up, and install a door. (Tr. 102, 104 (Perry). App. 86, 87). Caruso admitted the door was in good condition when they moved into the apartment, and admitted that the door in the photograph (Exhibit R) appeared "pulled away," but she denied its condition was that bad before it was removed. (Tr. 19-20 (Caruso), App. 56-57; Exh. R, App. 129).

Joe Clark testified that the damage to the door was not "normal wear and tear." (Tr. 53 (Joe Clark), App. 72). The door was "coming apart almost halfway up the door," which would not show the door was defective or "not square." (Tr. 59 (Joe Clark), App. 78). Bryan Clark testified that the damage "looks like the door was kicked." (Tr. 153 (Bryan Clark), App. 94). Tyler Burkett, who works in maintenance for Apts. Downtown and actually replaced the door, testified that the damage was below the latch, about "midway up," and it was split. (Tr. 171-172 (Burkett), App. 100-101). He testified it appeared as if "a force from the outside came into it." (Tr. 171-172 (Burkett), App. 100-101). He testified "normal tear wouldn't do this to a door. . . . I have never seen a door just come apart on its own." (Tr. 179 (Burkett), App. 104). Burkett testified if not replaced, "You'll never stop it from being damaged more. . . . [Repair] would never work. It would just keep getting worse. You can't repair it." (Tr. 181 (Burkett), App. 105).

The damage was discovered during Apts. Downtown's annual maintenance tour of the property designed to identify problems before turnover at the apartment. (Tr. 58-60 (Joe Clark), App. 77-79; Exh. B ¶ 33(d), App. 119). When Apts. Downtown conducts a maintenance tour, or repairs or replaces a door, it posts the apartment so tenants know they are coming. (Tr. 60 (Joe Clark), App. 79; Tr. 164-166 (Bryan Clark), App. 96-98; Tr. 170 (Burkett), App. 99). Apts. Downtown determined "[i]n this particular situation the tenant was responsible for the damage." (Tr. 54 (Joe Clark), App. 73). The door was "not anywhere that anyone else would have had access to." (Id.).

The bill for the door replacement included materials for $59.33 and two hours of labor at $70 per hour for a total of $199.33. (Tr. 55-56 (Joe Clark), App. 74-75). A door replacement typically takes two to four hours. (Tr. 159 (Bryan Clark), App. 95). Tyler Burkett testified that this replacement took about two hours for him and another worker. (Tr. 174 (Burkett), App. 102). Joe Clark testified that replacement costs for the door compared favorably to the cost of hiring an independent contractor to do it, which would have cost "upwards of $500." (Tr. 66 (Joe Clark), App. 81).

At the hearing, Caruso also disputed the $134 carpet cleaning charge. (Tr. 14-17 (Caruso), App. 51-54). Joe Clark explained that the carpet

cleaning charge was based in part on a $55 bill from Cody's Carpets plus indirect costs. (Tr. 45-47 (Joe Clark), App. 69-71). Joe Clark further explained that hiring an independent contractor to clean the carpets would have cost $250 to $350. (Tr. 66 (Joe Clark), App. 81). According to the employee who performed the final inspection, Melissa Goatley, Apts. Downtown has the carpets "professionally cleaned" before new tenants move in and guarantees the cleaning. (Tr. 206 (Goatley), App. 110). Apts. Downtown expects the same state of cleanliness for the carpet as when the tenants moved into the apartment. (Tr. 74 (Joe Clark), App. 84).

Caruso claimed that she and her roommates and other family members cleaned the carpet, but co-tenant Victoria Isenhour admitted there were "stains that would not come out" in the carpet when they left the apartment. (Tr. 128 (Isenhour), App. 89). Goatley testified that "[t]he carpet had not been vacuumed. There were stains and . . . dirt particles and stuff. . . . [T]here was crumbs and dirt on the carpet." (Tr. 188-189 (Goatley), App. 107-108). Goatley testified she took photos of the "stains" and "dirt." (Tr. 204 (Goatley), App. 109). The carpets had "little specks of dirt and stuff." (Tr. 207 (Goatley), App. 111). The carpet in one closet was stained by "a bleach or some kind of chemical stain." (Tr. 214 (Goatley), App. 112). Joe

Clark testified he relied on Goatley's assessment of the carpet's cleanliness. (Tr. 64 (Joe Clark), App. 80).

ROUTING STATEMENT

This case should be retained by the Supreme Court because it presents issues of first impression that are important to the residential rental property industry across the state. Iowa R. App. P. 6.1101(2)(c)-(d).

ARGUMENT

I. THE DISTRICT COURT SHOULD BE REVERSED AND THE AWARD VACATED BECAUSE THE SMALL CLAIMS COURT LOST JURISDICTION WHEN IT AWARDED ATTORNEY'S FEES AND DAMAGES THAT EXCEEDED THE SMALL CLAIMS COURT'S MONETARY JURISDICTIONAL LIMITS.

A. Preservation Of Error. Because this issue is jurisdictional, Apts. Downtown did not need to preserve error on this issue. Klinge v. Bentien, 725 N.W.2d 13, 16 (Iowa 2006). Nonetheless, Apts. Downtown raised this issue in its motion to strike Caruso's attorney fee affidavits, (Motion to Strike, 7/5/13, App. 18-20), and in its brief in support of its district court appeal, (District Court Appeal Br. at 7-11).

B. Standard Of Review. Subject matter jurisdiction is reviewed for corrections of error at law. Tigges v. City of Ames, 356 N.W.2d 503, 512 (Iowa 1984). It is the duty of the court to determine whether the courts

have jurisdiction, and such a determination should be made "before the court looks at other matters involved in the case." Id. at 511.

C. Argument. The small claims court lost jurisdiction when it purported to award $3,600 in attorney's fees along with $3,874.33 in damages for a total of $7,474.33. (Magistrate Ruling, at 11, App. 31). The maximum "amount in controversy" in small claims court is $5,000 "exclusive of interest and costs." Iowa Code § 631.1(1). Case law holds that when an item of recovery is not excluded from the maximum amount, it is included. Garza v. Chavarria, 155 S.W.3d 252, 256 (Tex. Ct. App. 2004). Under Iowa law, it is settled that the word "costs" does not include "attorney's fees." Turner v. Zip Motors, 245 Iowa 1091, 65 N.W.2d 427, 432 (1954). In Roeder v. Nolan, 321 N.W.2d 1, 4 (Iowa 1982), the court held that "costs" awarded as a condition of a continuance in small claims court under the IURLTA could not include "attorney fees" or "travel expenses." Claims for attorney's fees in small claims are not included within the statutory term "costs" and thus are limited by the maximum jurisdictional amount.

The Iowa Supreme Court has held that even a liberal construction of the statutory word "costs" does not include "attorney's fees." Weaver

Constr. Co. v. Heitland, 348 N.W.2d 230, 233 (Iowa 1984) (construing Iowa Code § 677.10). As the court explained in Weaver Construction:

> We do not agree, however, that the word "costs" should be so liberally stretched as to include attorney fees. As the trial court correctly noted, our legislature has explicitly provided in some statutes that a prevailing party may recover attorney fees as well as costs. We believe the legislative intent of chapter 677 is clear; attorney fees are not included in the cost-shifting which the statute allows because attorney fees are not mentioned in the statute.

Id. If the Legislature intended to exclude attorney's fees from the maximum jurisdictional limit of small claims court, as it did for "interest and costs," the Legislature would have said so.

The Iowa Legislature has repeatedly treated "attorney's fees" and "costs" as separate and distinct statutory concepts. See, e.g., Iowa Code § 6A.24 (in condemnation proceedings, expressly including "reasonable attorney's fees" within definition of "costs" that may be recovered); Iowa Code § 6B.33 (same); Iowa Code § 9A.116 (for violations of uniform athlete agent act, expressly allowing "costs and reasonable attorney's fees"); Iowa Code § 12C.23(3)(d) (for credit union violation, expressly allowing "costs" and "attorney's fees"); Iowa Code § 22.10 (for open records enforcement, expressly providing for award of "all costs and reasonable attorney fees"); Iowa Code § 504.703 (for court ordered meetings of nonprofit boards, expressly providing for recovery of "costs, including reasonable attorney

fees"); Iowa Code § 523H.13 (for violations of insurance franchise, expressly allowing recovery of "costs and reasonable attorneys' and experts' fees"); Iowa Code § 537A.10(13) (for violations of franchise agreements, expressly allowing recovery of "costs and reasonable attorneys' and experts' fees"); Iowa Code § 552A.5 (for buyer's club member violations, expressly allowing "costs, including reasonable attorney's fees"); Iowa Code § 553.12(4) (in antitrust proceeding, expressly providing that plaintiff may recover "necessary costs of bringing suit, including a reasonable attorney fee"); Iowa Code § 573.21 (in mechanic's lien action, expressly providing that court may tax "costs" including "reasonable attorney fee"); Iowa Code § 598.24 (in contempt proceedings, expressly providing that court may award "costs of the proceeding, including reasonable attorney's fees"); Iowa Code § 625.22 (in written contract actions, expressly providing that award may include "court costs incurred, including a reasonable attorney fee"); Iowa Code § 633.3 (in probate proceedings, costs of administration expressly includes "court costs" and "attorney fees"); Iowa Code § 633A.4507 (in trust proceedings, expressly providing that court may award "costs and expenses, including reasonable attorney fees"); Iowa Code § 729.6(8) (civil remedy for genetic testing violation expressly includes both "court costs" and "attorney's fees"); Iowa Code § 730.4(5) (civil remedy for polygraph

violation expressly includes both "court costs" and "attorney's fees"); Iowa Code § 730.5(15) (civil remedy for drug testing violation expressly includes both "court costs" and "attorney's fees"). There is no indication the Legislature intend to exclude attorney's fees from the maximum jurisdictional amount by using only the word "costs" under § 631.1(1).

When the magistrate purported to award $3,600 in attorney's fees along with $3,874.33 in damages, the magistrate exceeded the small claims court jurisdiction, and jurisdiction was lost. See Iowa Code § 631.1(1). Before making such an award, the magistrate was obligated to transfer the case to district court "to be tried by regular procedure." Iowa Code § 631.8(2)(b); Wilson v. Iowa District Court, 297 N.W.2d 223, 224-25 (Iowa 1980). The magistrate could not avoid that result by labelling the attorney's fees as "costs." (Magistrate Ruling, at 11, App. 31).

Nor could the district court restore jurisdiction by reducing the award for attorney's fees below the $5,000 limit. (District Court Ruling, at 13, App. 44). As one authority has clearly stated, "No jurisdiction can be conferred by abandoning a part of the claim in the appellate court by a remittitur or an amendment reducing the amount claimed." 51 C.J.S., Justices of the Peace, §306 (2013). Small claims jurisdiction was already lost when the magistrate purported to award more than $5,000. (Magistrate

Ruling, at 11, App. 31). Caruso's counsel could have limited their claim for attorney's fees to an amount below the $5,000 limit, but did not. (Warnock Attorney Fee Affidavit, App. 13-15; Boyer Attorney Fee Affidavit, App. 16-17). Reversing the district court's ruling and vacating the magistrate's ruling is necessary to protect the rights of Apts. Downtown, which was entitled to the procedural protections of a case tried by regular procedure in district court under the rules of civil procedure once the claim for damages and attorney's fees exceeded $5,000.

Counsel for Caruso has argued in other cases that the $5,000 limit does not apply to attorney's fees under Maday v. Elview-Stewart Sys., Co., 324 N.W.2d 467 (Iowa 1982). Although Maday stated that courts, not juries, have the power to award attorney's fees when they are in "the nature of costs," id. at 469, it did not hold that attorney's fees are themselves "costs" that fall within the statutory exclusion from the small claims court maximum jurisdictional amount. In Maday, the court interpreted a statute which treated "costs" and "attorney's fees" as separate items of recovery. Id. at 470. Because the Legislature treated them separately in Maday, it does not make sense that the Legislature would have included "attorney's fees" within the word "costs" in Iowa Code § 631.1.

II. THE DISTRICT COURT ERRED BECAUSE THERE WAS NO EVIDENCE THAT APTS. DOWNTOWN HAD ACTUAL KNOWLEDGE THAT ANY PROVISION IN THE LEASE ON WHICH IT RELIED WAS "PROHIBITED" BY THE IURLTA.

A. Preservation Of Error. Apts. Downtown preserved error on this argument by raising it in its trial memorandum for the magistrate, (Defendants' Trial Memorandum, 12/7/12, § VI), and by raising it in its appeal brief to the district court, (District Court Appeal Br. at 11-12).

B. Standard Of Review. This small claims action is reviewed for correction of errors at law. Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396, 399 (Iowa 2007); Meier v. Sac & Fox Indian Tribe, 476 N.W.2d 61, 62 (Iowa 1991). Statutory construction is reviewed for errors of law. State v. Hellstern, 856 N.W.2d 355, 360 (Iowa 2014); Anderson Financial Servs., LLC v. Miller, 769 N.W.2d 575, 578 (Iowa 2009). The district court's factual findings are binding if supported by substantial evidence. GE Money Bank v. Morales, 773 N.W.2d 533, 536 (Iowa 2009).

C. Argument. The district court erred by finding that Apts. Downtown willfully used lease provisions known to be prohibited. (District Court Ruling at 12, App. 43). This finding was based on insufficient evidence and an incorrect understanding of the statutory requirements.

The statutory language requires actual, subjective knowledge that a provision is prohibited. The willful use of lease provisions can lead to two months' rent damages only when they are "known by the landlord to be prohibited." Iowa Code § 562A.11(2). The knowledge required is the subjective knowledge of the landlord, not objective knowledge of what a landlord should have known. See State v. Leckington, 713 N.W.2d 208, 214 (Iowa 2006); Hobbiebrunken v. G&S Enterprises, Inc., 470 N.W.2d 19, 22 (Iowa 1991). The Legislature knows how to use an objective standard when it wants to do so, see State v. Hopkins, 465 N.W.2d 894, 896-97 (Iowa 1991), but it did not do so for Iowa Code § 562A.11(2). Section 562A.11(2) creates a subjective standard of actual knowledge, not an objective standard that the landlord knew or should have known the provision was prohibited.

There is no evidence that Apts. Downtown actually knew the two provisions at issue – paragraphs 37(e) and 33(a) – were prohibited by the IURLTA. Paragraph 33(a) provides in relevant part: "Unless the landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, screens, doors, carpet, and walls, regardless of whether such damage is caused by residents, guests, or others." (Exh. B, ¶ 33(a), App. 119). Paragraph 37(e) provides: "The carpets throughout the building are professionally cleaned each time apartments turn over occupancy. Tenants

agree to a charge starting at $95 (efficiency) not to exceed $225 (6+ bedrooms) being deducted from the deposit for professional cleaning at the expiration of the lease." (Exh. B, ¶ 37(e), App. 119). For neither provision did the evidence show actual knowledge by Apts. Downtown.

The only evidence related to knowledge was Joe Clark's testimony that he was familiar "for the most part" with the IURLTA and otherwise relied on Apts. Downtown's attorney, Joe Holland. (Tr. 56-57, 66-67 (Joe Clark), App. 75-76, 81-82). This evidence is insufficient to meet the requirement of actual, subjective knowledge that a provision was prohibited. The district court's reasoning – that the magistrate was allowed to assess Joe Clark's credibility and that his familiarity with the IURLTA was enough, (District Court Ruling, at 12, App. 43) – effectively eliminates the "actual knowledge" requirement from the statute. There was no evidence of any prior court decision ruling these provisions prohibited. There was no evidence that Apts. Downtown received a legal opinion that they were prohibited. To the contrary, its attorney drafted the lease and advised it that the provisions were proper. The evidence presented was thus insufficient for the court to infer that Apts. Downtown actually knew the provisions were prohibited and used them willfully notwithstanding that fact. Even if the district court found on the facts that Apts. Downtown did not provide

sufficient evidence that the repairs and cleaning were necessary, that does not mean Apts. Downtown actually knew that the lease provisions themselves were prohibited at the time of the 2010-11 or 2011-12 leases.

Because the evidence was insufficient to meet the standard for actual, subjective knowledge under Iowa Code § 562A.11(2), the district court erred by upholding the damage award of $2,770 for willful use of lease provisions known to be prohibited. This court should reverse that award.

III. THE DISTRICT COURT ERRED BY HOLDING THE DOOR REPAIR PROVISION WAS PROHIBITED WHERE THE PROVISION WAS AGREED UPON BY THE PARTIES TO THE LEASE AND ADDRESSES ONLY PAYMENT FOR REPAIRS, NOT THE OBLIGATION TO MAKE REPAIRS.

A. Preservation Of Error. Apts. Downtown preserved error by raising this argument in its trial memorandum, (Defendants' Trial Memorandum, 12/7/12, § III(D)), and by raising it in its appeal brief to the district court, (District Court Appeal Br. at 12-13).

B. Standard Of Review. This small claims action is reviewed for correction of errors at law. Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396, 399 (Iowa 2007); Meier v. Sac & Fox Indian Tribe, 476 N.W.2d 61, 62 (Iowa 1991). Statutory construction is reviewed for errors of law. State v. Hellstern, 856 N.W.2d 355, 360 (Iowa 2014); Anderson Financial Servs., LLC v. Miller, 769 N.W.2d 575, 578 (Iowa 2009). The

district court's factual findings are binding if supported by substantial evidence. GE Money Bank v. Morales, 773 N.W.2d 533, 536 (Iowa 2009).

C. Argument. The district court erred by holding that the repair provision of the lease was prohibited or, as it said, "in this case . . . illegal." (Dist. Ct. Ruling, at 12, App. 43). The district court further erred by affirming the magistrate's ruling, (id. at 13, App. 44), in which the magistrate ruled that the provision conflicted with the landlord's obligations to maintain fit premises under Iowa Code § 562A.15. (Id. at 8, App. 39).

The IURLTA expressly provides that a "landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law including rent, terms of the agreement, and other provisions governing the rights and obligations of the parties." Iowa Code § 562A.9(1). "Prohibited" provisions include only agreements "to waive or to forego rights and remedies under this chapter" (with an exception for single family residential property on agricultural land in unincorporated areas that is not involved in this case), "to confess judgment on a claim arising out of the rental agreement," "to pay the other party's attorney fees," and "to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith." Iowa Code § 562A.11(1)(a)-(d).

In this case, it is undisputed the parties agreed to the lease provision assigning financial responsibility for the door repair to Caruso and her co-tenants. (Exh. B at ¶ 33(a), App. 119). As quoted above, Paragraph 33(a) provides in relevant part: "Unless the landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, screens, doors, carpet, and walls, regardless of whether such damage is caused by residents, guests, or others." (Id.). This provision is not "prohibited" within the meaning of Iowa Code § 562A.11(1)(a)-(d). It does not involve "liability of the other party arising under law." It does not involve an agreement to "pay the other party's attorney's fees." It does not involve a "confession of judgment." It does not involve the waiver of any rights or remedies under the statute. Nothing in the IURLTA prohibits the parties from agreeing to allocate the costs of various repairs or prohibits a landlord from charging tenants for repairs made by the landlord. Because an agreement to assign financial responsibility for repairs to a tenant is not prohibited by the IURLTA, the district court erred by holding that this provision was illegal.

Nor does the provision conflict with Iowa Code § 562A.15, as the magistrate found. Section 562A.15 makes the landlord responsible for making all repairs and doing "whatever is necessary to put and keep the premises in a fit and habitable condition." Iowa Code § 562A.15(1)(b).

Section 562A.15 says nothing that prohibits an agreement between a landlord and tenant for the tenant to pay for repairs after they have been made. Id. In this case, Apts. Downtown fulfilled its statutory obligations by conducting its annual inspection tour and repairing the damaged door. As the parties agreed, however, Apts. Downtown then asked Caruso and her co-tenants to pay for that repair – $199.33 – the cost of the materials plus two hours labor. The agreed-upon provision is consistent with the purpose of the IURLTA, which expressly encourages both "landlord and tenant to maintain and improve the quality of housing." Iowa Code § 562A.2(2)(b). In light of the statutory language and purpose, it is clear that Apts. Downtown fulfilled its responsibility to make repairs, but properly allocated the cost of that repair to the tenants, as the parties had agreed in their lease.

It appears the district court tried to limit the magistrate's decision by stating "in this case" the provision was "illegal" because there was "not sufficient evidence in the record to show that actual damage was sustained by Defendant based on the claimed damage to the door." (Dist. Ct. Ruling at 12, App. 43). Nonetheless, the district court upheld the magistrate's decision and still found that the repair provision was "prohibited" in this case. (Id. at 12-13, App. 43-44). The provision was not illegal or prohibited for the reasons given above. This finding was also wrong because the

evidence was overwhelming that the door had been damaged by someone in Caruso's apartment and needed to be repaired. Even if the district court could have rejected that evidence, however, it erred by holding that the provision was "illegal" or prohibited, as opposed to inapplicable or unconscionable under the facts of the case. Whether a lease provision is "prohibited" cannot depend on the facts of the case. Iowa Code § 562A.11(2). Because it is not prohibited by the IURLTA, the parties were free to agree to it. Iowa Code § 562A.9(1). The agreed-upon repair provisions are proper under the IURLTA.

IV. THE DISTRICT COURT ERRED BY HOLDING THE CARPET CLEANING PROVISION WAS PROHIBITED UNDER IOWA CODE § 562A.12(3) WHERE IT WAS AGREED UPON BY THE PARTIES IN THE LEASE AND IT BENEFITS TENANTS BY ENSURING THAT CARPETS ARE CLEANED TO THEIR CONDITION AT THE START OF THE TENANCY.

A. Preservation Of Error. Apts. Downtown preserved error by raising this argument in its trial memorandum, (Defendants' Trial Memorandum, 12/7/12, § II(B)), and by raising it in its appeal brief to the district court, (District Court Appeal Br. at 13-14).

B. Standard Of Review. This small claims action is reviewed for correction of errors at law. Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396, 399 (Iowa 2007); Meier v. Sac & Fox Indian Tribe, 476 N.W.2d 61, 62 (Iowa 1991). Statutory construction is reviewed for errors of

law. State v. Hellstern, 856 N.W.2d 355, 360 (Iowa 2014); Anderson Financial Servs., LLC v. Miller, 769 N.W.2d 575, 578 (Iowa 2009). The district court's factual findings are binding if supported by substantial evidence. GE Money Bank v. Morales, 773 N.W.2d 533, 536 (Iowa 2009).

C. Argument. The district court erred by holding that the carpet cleaning provision, Paragraph 37(e), was illegal or prohibited. (District Court Ruling, at 11-12, App. 42-43). As state above, the only "prohibited" provisions are (1) a waiver of rights or remedies under the statute, (2) a confession of judgment, (3) agreement to "pay the other party's attorney's fees," or (4) agreement to "exculpation or limitation on any liability of the other party arising under law." Iowa Code § 562A.11(1)(a)-(d). Paragraph 37(e) is not "prohibited" within the meaning of Iowa Code § 562A.11(1)(a)-(d). It does not involve "liability of the other party arising under law." It does not involve an agreement to "pay the other party's attorney's fees." It does not involve a "confession of judgment." It does not involve the waiver of any rights or remedies under the statute.

The district court held that Paragraph 37(e) allows Apts. Downtown to avoid its obligations under Iowa Code § 562A.12(3). (Dist. Ct. Ruling, at 11-12, App. 42-43). Under Iowa Code § 562A.12, a landlord has a duty to return the deposit to the tenant or to "furnish to the tenant a written

statement showing the specific reason for withholding of the rental deposit or any portion thereof." Iowa Code § 562A.12(3). Further, the statute expressly provides that a landlord "may withhold from the rental deposit . . . such amounts as are reasonably necessary . . . [t]o restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted." Iowa Code § 562A.12(3)(b).

In this case, Paragraph 37(e) does not contradict Iowa Code § 562A.12 in any way. Apts. Downtown ensures professional cleaning of all carpets to restore them to their condition at the start of the tenancy, ordinary wear and tear excepted. Apts. Downtown further provided the required written notice to the tenants, which indicated that $134 was being withheld because the carpet was "dirty, stained, unvacuumed." (Exh. K, App. 128). Caruso's co-tenant, Isenhour, admitted there were carpet "stains that would not come out." (Tr. 128 (Isenhour), App. 89). There is no question that Apts. Downtown actually hired a company to professionally clean the carpets, (Tr. 45-47 (Joe Clark), App. 69-71), to restore the carpets to their condition at the start of Caruso's tenancy for the benefit of the incoming tenants. (Tr. 206 (Goatley), App. 110). As Joe Clark explained, Apts. Downtown expects the same state of cleanliness for the carpet as when the tenants moved into the apartment. (Tr. 74 (Joe Clark), App. 84). By hiring

a company to clean the carpets, Apts. Downtown avoids the expense of hiring an independent contractor to clean the carpets at a higher cost. (Tr. 66 (Joe Clark), App. 81). In short, Paragraph 37(e) complies with Iowa Code § 562A.12; it does not require any tenant to waive any right the tenant has under § 562A.12.

The dirt that Apts. Downtown cleaned was not "ordinary wear and tear." The phrase "wear and tear" suggests permanent physical damage, not "accumulation of dirt." Miller v. Geels, 643 N.E.2d 922, 927-28 (Ind. Ct. App. 1994). Dirt does not physically damage "the nap or the fibers within a carpet." Castillo-Cullather v. Pollack, 685 N.E.2d 478, 483 n. 4 (Ind. Ct. App. 1997), abrogated on other grounds, Mitchell v. Mitchell, 695 N.E.2d 920 (Ind. 1998). The plain language of "wear" and "tear" includes "to cause to deteriorate, diminish, or waste by some constant or repetitive action" and "to pull apart and in pieces, by force." Webster's Collegiate Dictionary 1342, 1479 (Random House ed. 2000). Dirt that can be cleaned does not cause any "wear and tear." Thus, Apts. Downtown was free to withhold from the security deposit the amount Caruso and her co-tenants had agreed to pay to clean the carpets professionally to restore their condition from the start of her tenancy. Iowa Code § 562A.12(3)(b).

V. THE DISTRICT COURT ERRED BY UPHOLDING THE $200 AWARD FOR "BAD FAITH" RETENTION OF THE DEPOSIT.

A. Preservation Of Error. Apts. Downtown preserved error by raising this argument in its appeal brief to the district court, (District Court Appeal Br. at 16-17).

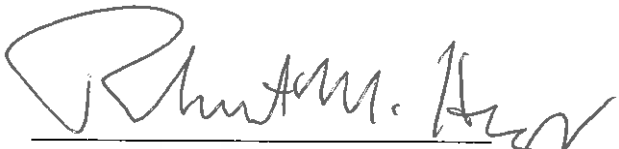
B. Standard Of Review. This small claims action is reviewed for correction of errors at law. Midwest Check Cashing, Inc. v. Richey, 728 N.W.2d 396, 399 (Iowa 2007); Meier v. Sac & Fox Indian Tribe, 476 N.W.2d 61, 62 (Iowa 1991). The district court's factual findings are binding if supported by substantial evidence. GE Money Bank v. Morales, 773 N.W.2d 533, 536 (Iowa 2009).

C. Argument. Upon reversing the district court on issues III and/or IV, this court should also reverse the penalty for "bad faith" retention of the security deposit because the amounts were properly retained.

CONCLUSION

For these reasons, this court should reverse the district court and vacate the award by the small claims court for lack of jurisdiction in small claims court. In the alternative, this court should reverse the district court's holding that Apts. Downtown willfully used provisions known to be prohibited, reverse the district court's holding that the door repair provision was illegal or prohibited, and reverse the district court's holding that the

carpet cleaning provision was illegal or prohibited. If this court reverses on the alternative grounds, the judgment should be reduced by $2,770 (willful use of a known prohibited provision), $625.33 (past due rent arising out of door replacement and other undisputed charges), $134 (carpet cleaning), and $200 (bad faith retention).



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