IN THE SUPREME COURT OF IOWA

No. 14-1783

LENORA CARUSO,
Plaintiff-Appellee/Cross Appellant,

vs.

APTS. DOWNTOWN, INC,
Defendant-Appellant/Cross Appellee,

and

JOSEPH CLARK, JAMES CLARK
GILBERT MANOR, LLC, AND R-1, LLC,
Defendants.

APPEAL FROM THE JOHNSON COUNTY DISTRICT COURT
THE HONORABLE DOUGLAS RUSSELL JUDGE

APPELLEE/CROSS APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Are automatic carpet cleaning clauses illegal under the IURLTA?

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II. Is a lease clause that charges tenants for all repairs and all damage, whatever the source, illegal under the IURLTA?

Javins v. First National Realty Co, 428 F.2d 1071 (D.C. App. 1970).
Mastland v. Evans Furniture, 498 N.W. 2d. 682 (Iowa 1993)
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III. Was a prohibited lease provision used knowingly and willfully?

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Iowa Supreme Court Attorney Disciplinary Bd. v. Barry, 762 N.W.2d 129 (Iowa 2009)
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IV. Was there a bad faith withholding of the security deposit?

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H-L Apartments v. Al-Qawwiyy, 440 N.W.2d 371 (1989)
Ikari v. Mason Properties, 731 N.E.2d 975 (Ill App. 2000)
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Reed v. Ford, 760 S.W.2d 26 (Tex. App. 1988)
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Seifert v. Dosland, 328 N.W.2d 531 (Iowa 1983)
Sieg Co. v. Kelly, 568 N.W.2d 794 (Iowa 1997)
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31A C.J.S. Evidence §§ 174, 175 (1964).

V. Are IURLTA attorney fees taxed and treated as costs?

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Turner v. Zip Motors, Inc., 65 N.W.2d 427 (Iowa 1954)
Weaver Constrution Co. v. Heitland, 348 N.W.2d 230 (Iowa 1984)

Iowa Code §631
Iowa Code §562A.12

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

On March 26, 2012, Plaintiff/Appellee Lenora Caruso ("Tenant") filed a motion to proceed *in forma pauperis*[1] and her small claims petition. Petition, Docket, Apx. 7-9. The original petition was filed during the tenancy and when the tenancy terminated Tenant amended her petition on August 30, 2012 to add wrongfully withholding her security deposit. Amended Petition, Apx. 11; Docket, Apx.5.

Trial was held before the Honorable Karen Egerton, Magistrate of the Johnson County District Court sitting in small claims on October 12 and November 9, 2012. Docket, Apx. 4. Tenant's counsel filed affidavits seeking attorney fees as costs on June 25 and 27, 2013. Docket, Apx. 3. Defendant Apts. Downtown ("Landlord") moved to strike the attorney fee affidavits on July 3, 2013. Defendant's Motion to Strike, Apx. 18-20, 3.

The trial court found in favor of Tenant on December 9, 2013 and issued a lengthy and detailed Findings of Fact, Conclusions of Law and Judgment. ("Trial Ct. Judg."). Apx. 21-31. The trial court awarded to Tenant actual damages, as well as punitive damages for bad faith retention of a security

[1] Leave to proceed *in forma pauperis* was granted March 26, 2012. Docket, Apx. 8

deposit and knowingly and willfully included prohibited lease provisions, in particular automatic carpet cleaning and repair shifting provisions, as well as awarding attorney fees as costs. Trial Ct. Judg. Apx. 31.

On December 30, 2013 Landlord appealed to the district court. Docket, Apx. 2. On September 26, 2014 the Honorable Douglas Russell affirmed the trial court's judgment and award of actual and punitive damages in a written ruling, but reduced the amount of attorney fees awarded. District Court Appeal Ruling ("Dist. Ct. App. Ruling") Apx. 40-4.

Landlord appealed, seeking discretionary review supported by Tenant and on November 7, 2014 the Supreme Court granted discretionary review and permitted a cross appeal by Tenant.

FACTS

Plaintiff/Appellee/Cross Appellant Lenora Caruso ("Tenant") was a 20 year old undergraduate student, who with her sister and a friend rented an apartment from Defendant/Appellant/Cross Appellee Apts. Downtown, Inc. ("Landlord"). October 12, 2012 Trial Transcript ("10/12/12 Tr.") at 8, 9, 13, 24; Leases, Defendant's Exhibits A & B, Apx. 115, 118. Apts. Downtown, Inc. is the largest landlord in Iowa City. Plaintiff's District Court Appeal Brief at 2. Tenant was a tenant of Landlord at 427 S Johnson Street, Unit 3 from August 5, 2010 to July 30, 2012. 10/12/12 Tr. at 10; Leases, Defendant's

Exhibits A & B, Apx. 115, 118.

On or about July 7, 2011, Landlord's maintenance crew entered Tenant's unit and without a request from or notice to Tenant, replaced her bathroom door at a cost of $199.33. 10/12/12 Tr. 18-20; Trial Ct. Judg., Apx. 24; Repair receipt, Defendant's Exhibit G1. Apx. 124-5. When Tenant insisted that the door was not damaged by her or her roommates and refused to pay for the door replacement, Landlord charged a late fee each month. 10/12/12 Tr. 24, Trial Ct. Judg., Apx. 24; Landlord Letter, Defendant's Exhibit G2, Apx. 126; Transaction Listing, Defendant's Exhibit J, Apx. 127.

At the termination of the tenancy Landlord charged Tenant $134 for carpet cleaning, $105 for general cleaning and $40 for drip pans, in addition to the $199.33 charge for the door. Security Deposit Statement, Defendants' Exhibit K, Apx. 128. The trial court found that the evidence of damage to the door presented by Landlord 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." Trial Ct. Judg., Apx. 30. The trial court found that the charges for cleaning and for the drip pans to be "unreasonable and unnecessary" and expressed its concern at the discrepancies between the evidence presented by Tenant and Landlord. Trial Ct. Judg., Apx.30. The trial court found that Landlord had withheld Tenant's security

deposit in bad faith and that Landlord had knowingly and willfully included illegal provisions in its lease, in particular automatic carpet cleaning and shifting repair provisions. Trial Ct. Judg., Apx.31.

ROUTING STATEMENT

Appellant believes that this case presents substantial issues of first impression with regard to the standards for knowing and willful inclusion of a prohibited lease provision under Iowa Code §562A.11(2) and bad faith withholding under §562A.12(7) as well as the legality under Iowa Code §§562A.12 & 562A.15 of automatic carpet cleaning and shifting the costs of all damages and repairs to tenants. Thus this case could be retained in the Supreme Court under Iowa R. App. Proc. 6.1101(2). However, Appellant also believes that the application of the governing statute to the facts of the instant case are fairly straightforward and that under Iowa R. App. Proc. 6.1101(3)(a) that this case could also be appropriately transferred to the Court of Appeals.

I. Introduction to Appeal & Cross Appeal Issues

This case involves multiple issues of first impression under the Iowa Uniform Residential Landlord Tenant Act ("IURLTA"), codified at Iowa Code Chapter 562A, affecting tens of thousands of Iowa landlords and tenants.[2] The most important issue presented in this case is the correct standard for knowing and willful use of a prohibited lease provision under Iowa Code §562A.11. Also significant are the legality under the IURLTA of automatic carpet cleaning provisions, which charge tenants for cleaning even if their carpets are clean, and provisions making tenants pay for all repairs and for damage they did not cause or condone. With regard to the award of punitive damages for the use of these provisions, Tenant agrees with Landlord that knowing and willful use of a prohibited lease provision under §562A.11 requires actual knowledge, but asserts that knowledge can be inferred from the surrounding circumstances.

The standard for bad faith withholding of a security deposit is important and of first impression, but Landlord has essentially conceded that if its

[2] Tenant would note that with the exception of the standard for knowing use of a prohibited lease provisions, because of the way Landlord has presented the issues in this case they have significant overlap with the issues in a companion case, *DeStefano v. Apts. Downtown*, 14-0820, currently pending before this Court. Landlord's motion to consolidate these cases was denied.

challenged lease provisions are prohibited, then withholding under them is in bad faith.

The attorney fee issues are not particularly significant and Landlord appears to have raised them primarily as a means to urge outright dismissal of the entire case.

ARGUMENT ON APPEAL

II. The Trial & District Courts Correctly Found the Automatic Carpet Cleaning Provision to be Illegal

In section II, Tenant as Appellee responds to the arguments raised by Landlord as Appellant with regard to automatic carpet cleaning on pages 26-8 of its brief. Tenant agrees that Landlord has preserved error on this issue. Small claims actions that are tried at law are reviewed for correction of errors at law. A review of statutory construction is at law. The appellate court is bound by the lower courts' findings of fact if supported by substantial evidence. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009).

This is a key issue of first impression, affecting tens of thousands of Iowa tenants and landlords because automatic carpet cleaning clauses are endemic in Iowa leases. Automatic carpet cleaning clauses are so prevalent because landlords want outgoing tenants to pay the costs of preparing units for incoming tenants. Landlords shift the cost of professional carpet cleaning onto

tenants either by direct deductions from their security deposit or by requiring tenants to pay an authorized carpet cleaning company.

The trial and district courts in this case ruled that automatic carpet cleaning is illegal because it requires tenants to pay even if the carpets are clean. In response, Landlord argues dirt is not wear and tear and attempts to overturn the magistrate's finding that Tenant's carpets were clean.

A. Landlord's Lease & the Trial & District Court Rulings

Landlord deducted $134 from Tenant's security deposit for carpet cleaning.[3] Trial Ct. Judg., Apx. 23. Landlord's lease states,

> 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. Hardwoods and decorative concrete floors are polished or cleaned upon turn over of occupancy each year. Tenants agree to a charge not to exceed $195 being deducted from the deposit for polishing or cleaning the floors.

§37(e) Leases, Defendant's Exhibits A&B, Apx. 116, 119.

The trial court held that Landlord's lease §37(e), the automatic carpet cleaning provision, was illegal,

> …the terms of this lease requiring tenant to agree that the amount of cleaning shall be deducted from the deposit is in violation of §562A.12 and is unconscionable. Amounts to be deducted from a

[3] Tenant would note that despite the $134 charge to Tenant the professional carpet cleaner only charged Landlord $55 to clean Tenant's unit. Landlord was unable to give a breakdown of the additional $79 charged to Tenant on top of the professional cleaning charge. 10/12/12 Tr. 45-7.

> tenant's security deposit can only be retained by the landlord if §562A.12 is adhered to by the landlord. The tenant is then provided with the opportunity to challenge those amounts and hold the landlord to his/her burden of showing that the amounts withheld were reasonable to restore the property to its condition prior to the commencement of the tenancy. The requirement that costs for carpet cleaning shall be withheld from the tenant's deposit requires the tenant to forgo their claim or right as defined in §562A7(2) and therefore the Court FINDS this provision in the lease unenforceable.

Trial Ct. Judg., Apx. 29.

In addition to ruling that the automatic carpet cleaning provision was illegal, the trial court also found that,

> …the evidence presented by the Defendants in this case regarding the condition of the carpeting at the termination of the tenancy was insufficient to show that the carpet was damaged by the Plaintiff or other tenants such that it was beyond the level of ordinary wear and tear and therefore the charges assessed by Defendant Apartments Downtown, Inc. should not have been withheld from Plaintiff's security deposit.

Trial Ct. Judg., Apx. 29.

On appeal the district court affirmed the magistrate's ruling that automatic carpet cleaning clauses are illegal,

> Plaintiffs have specifically challenged section 37(e) of the standard lease, which the Court incorporates by reference as if set forth in full herein. This clause automatically imposes on tenants certain fees for carpet cleaning regardless of whether the carpet is clean or not. Iowa Code § 562A.12(3) requires a landlord to provide the tenant with a specific reason for withholding any of the rental deposit, and also requires the landlord to prove, by a preponderance of the evidence, the reason for withholding any of the rental deposit,

> with ordinary wear and tear excepted. Section 37(e) of the standard lease may not be included in the landlord's standard lease because inclusion of section 37(e) permits the landlord to avoid his obligations as defined by the Iowa Legislature in § 562A.12(3). The Iowa Supreme Court has held that a landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained. *D.R. Mobile Home Rentals v. Frost*, 545 N.W.2d 302, 306 (Iowa 1996). Thus, the automatic carpet cleaning clause utilized by Defendant in the subject lease is illegal.

Dist. Ct. App. Ruling, Apx. 42-3.

B. Automatic Carpet Cleaning Provisions are Illegal

The trial court and the district court both correctly found that the inclusion in Landlord's leases and enforcement of an automatic cleaning fee provision violates Iowa Code §562A.12 which states that the landlord shall provide,

> …the tenant a written statement showing the *specific reason* for withholding of the rental deposit or any portion thereof. If the rental deposit or any portion of the rental deposit is withheld for the restoration of the dwelling unit, the statement shall *specify the nature of the damages*.

Iowa Code §562A.12(3). Instead of giving the required specific damage itemization at the conclusion of the tenancy, Landlord's standard lease provides that a professional carpet cleaning fee is automatically deducted from tenants' security deposit. As noted by the district court, Landlord's lease charges tenants for carpet cleaning, even if, as in this case, their carpets are clean. District Ct. App. Ruling, Apx. 11.

In *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) the Ohio Court of Appeals, in construing Ohio's security deposit statute[4], substantially similar to Iowa's, held that landlords could not automatically deduct carpet cleaning fees from a security deposit, either using a lease or checkout provisions,

> It is well settled that a provision in a lease agreement as to payment for carpet cleaning that is inconsistent with R.C. 5321.16(B) is unenforceable. *Albreqt v. Chen* (1983), 477 N.E.2d 1150, 1152-1153. Accordingly, a landlord may not unilaterally deduct the cost of carpet cleaning from a tenant's security deposit without an itemization setting forth the specific need for the deduction. Id. at 477 N.E.2d at 1153-1155.

Chaney v. Breton Builder Co., Ltd., 130 Ohio App.3d 602 at ¶18.

In addition, by requiring automatic carpet cleaning fees Landlord's standard lease violates Iowa Code §562A.12,

> The landlord may withhold from the rental deposit only such amounts as are reasonably necessary for the following reasons…b. To restore the dwelling unit to its condition at the commencement of the tenancy, *ordinary wear and tear excepted.*

Iowa Code §562A.12(3)(b).

Thus §562A.12(3)(b) forbids a landlord from charging a tenant for

[4]Ohio Revised Code §5321.16 (B) Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession.

cleaning dirt resulting from ordinary wear and tear. See e.g., *Southmark Management Corp. v. Vick*, 692 S.W.2d 157 (Tex App 1985) ([Tenant] could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security.)

Under §562A.12, at the conclusion of the tenancy the landlord must inspect the carpet, determine if it is clean or unclean and only if uncleanliness exceeds normal wear and tear may it charge the tenant. Since automatically charging for carpet cleaning short circuits this legally required process and allows for landlords to make cleaning charge for carpets that are clean, in violation of the Supreme Court's holding in *D.R. Mobile Home Rentals v. Frost*, 545 N.W.2d 302, 306 (Iowa 1996), both the trial and district court correctly held that automatic carpet cleaning provisions are illegal under the IURLTA.

C. Landlord Defends Its Lease Arguing Tenant's Carpets Were Dirty

Landlord asserts that it provided written notice, that the carpets were not clean, that the carpets were professionally cleaned, and that a tenant, Victoria Eisenhour, had "admitted" that there were stains in the carpet,[5] but in doing so does not address the real question: the legality of its automatic carpet cleaning provision. Instead, Landlord is rearguing the magistrate's finding that Tenant's

[5] Brief of Appellant at 27.

carpets were clean.

First and foremost, the trial court correctly found that the carpets were clean, crediting the testimony of Tenant's investigator George Perry and Tenant's roommate Victoria Isenhour with regard to the strenuous efforts made to clean the unit and its immaculate condition at the end of the tenancy. Trial Ct. Judg., Apx. 24-5, 29; 10/12/12 Tr. 80-1, 110-115. In fact, as the district court held, "The testimony of Plaintiff and her witnesses at trial provides a basis for the Court to conclude that the apartment was, in fact, clean (even pristine) when vacated." Dist. Ct. Judg. Apx. 43. Since the carpets were clean, whether or not Landlord gave notice or arranged for additional professional carpet cleaning is irrelevant, since it had no basis to charge Tenant.[6]

The actual state of Tenant's carpet is irrelevant to the legality of Landlord's automatic carpet cleaning provision; under this provision Landlord had already made the decision to charge for carpet cleaning long before the end of the tenancy or inspection of the carpet. That Tenant's carpet was clean and yet still incurred a cleaning charge merely exposes the inherent illegality of

[6] Landlord asserts Ms. Isenhour admitted the carpet was stained. In fact, Ms. Isenhour testified, and the trial court held, that these stains had been present when she and her roommates moved in and had been noted on their checklist. Move-in Checklist, Defendant's Exhibit F, Apx. 123; Trial Ct. Judg. Apx. 25.

automatic cleaning clauses. If the carpet was dirty beyond ordinary wear and tear, Landlord can charge Tenant under §562A.12 and need not rely on this lease provision. If, as in this case, the carpet was clean, Landlord cannot charge for additional cleaning on any basis, including this provision.

D. Dirt is Ordinary Wear and Tear

In fact, the only substantive argument that Landlord makes in support the legality of its automatic carpet cleaning clause is that dirt is not ordinary wear and tear, citing *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994). Brief of Appellant at 28. In *Miller*, 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.*

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

Only two jurisdictions, Indiana, under *Miller* and New Mexico, statutorily,[7] hold that dirt is not ordinary wear and tear. All other courts that

[7] New Mexico Statutes Annotated §47-8-3(I)"…uncleanliness does not constitute normal wear and tear."

have considered this question uniformly hold that dirt and required cleaning are measured by the ordinary wear and tear standard.[8]

While the weight of precedent is decidedly against it, more importantly the logic of the holding in *Miller* is highly flawed and not persuasive. Under *Miller* only items that cannot be repaired are subject to wear and tear. If an item is repairable, then under *Miller*, it has not been subject to wear and tear. If the logic of *Miller* 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.

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[8] 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 items needed cleaning beyond normal wear and tear); *Rock v. Klepper*, 23 Misc.3d 1103(A) at ¶54 (N.Y.City Ct. 2009) (tenant not responsible for "normal wear and tear," and landlord cannot retain the security deposit for cleaning or repainting due to "normal wear and tear."); *Burley v. Mateo*, (Broward County 2010) 18 Fla. L. Weekly Supp.__ 624a. (Carpet cleaning, general cleaning of the house and driveway/patio, or painting, held to be ordinary 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.)

A more logical and broadly accepted definition of ordinary wear and tear is the deterioration which results from normal use. For example, the District of Columbia Court of Appeals held,

> …we comment briefly on the trial court's general finding that all of the damage…was due to 'ordinary wear and tear.' The expression is a usual one and has been defined as the wear which property undergoes when the tenant does nothing more than to come and to and perform the acts usually incident to an ordinary way of life. Stated otherwise ordinary wear and tear is the depreciation which occurs when the tenant does nothing inconsistent with the usual use and omits no acts which it is usual for a tenant to perform.

Tirrell v. Osborn 55 A.2d 727 at ¶ 17 (D.C. App 1947) citing *Taylor v. Campbell*, 123 App.Div. 698, 108 N.Y.S. 399, 401; see also Haw. Rev. Stat. Ann. §521-8 (2010) ("'Normal wear and tear' means deterioration or depreciation in value by ordinary and reasonable use …"); Colo. Rev. Stat . Ann. § 38-12-102(1) & ME. Rev. Stat. Ann. tit. 14, § 6031(1) ("'Normal wear and tear' means that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse…").

Since normal use of a rental unit will inevitably result in some grime, dirt or soiling, so long as the tenant takes reasonable precautions against dirt and does normal cleaning, they can, in the words of the Texas Court of Appeals, "…[vacate] the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security." *Southmark Management Corp. v. Vick*, 692

S.W.2d 157 (Tex App 1985). Dirt is clearly ordinary wear and tear.

This Court should affirm the ruling of the trial and district court that automatic carpet cleaning provisions are illegal under the IURLTA.

III. The Trial & District Courts Correctly Found that Charging Tenants for All Repairs & Damage is Illegal under the IURLTA

In section III, Tenant as Appellee responds to the arguments raised by Landlord as Appellant on pages 22-5 of its brief with regard to the legality of lease provisions that shift the costs of all damage and repairs onto its tenants. Tenant agrees that Landlord has preserved error on this issue. Small claims actions that are tried at law are reviewed for correction of errors at law. A review of statutory construction is at law. The appellate court is bound by the lower courts' findings of fact if supported by substantial evidence. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009).

A. Landlord's Lease, Trial & District Court Rulings

Tenant was charged $199.33 for repair of her bathroom door.[9] Trial Ct. Judg., Apx.24. Tenant testified her bathroom door was not damaged, that she

[9] Tenant notes that to replace the door Landlord charged $70 per hour for two hours ($140) while paying their worker $10.50 an hour. §33(c), Leases, Defendant's Exhibit A&B, Apx, 116, 119; 10/12/12 Tr 176, 182. Thus the charge for the door itself was around $60. Tenant's investigator testified that a comparable door at a local hardware store cost $45 and that it would take approximately 25 minutes to install. 10/12/12 Tr. 86-7.

did not request nor was she given any notice that it would be repaired. 10/12/12 Tr. 18-20. The magistrate found that, "[t]he evidence presented by Defendant Apartments Downtown, Inc., regarding the damage to the bedroom door 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." Trial Ct. Judg., Apx. 30.

Nevertheless, as the trial court noted, Landlord's lease provides that,

> Unless Landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, doors, carpet, and walls regardless of whether such damage is cause by residents, guests or others.

§ 33(a) Lease, Defendants' Exhibits A & B, Apx. 116,119[10] In fact, as the trial court notes, Landlord's Exhibit M identifies seven separate lease provisions making tenants responsible for repairs. Trial Ct. Judg., Apx 29.

The trial court properly held,

> The specific provisions within this lease requiring the tenants to be responsible for all repairs to doors, removes the landlord's obligations under Chapter 562A and places them with the tenant, including the requirement that the cost of repair be paid immediately or it will be withheld from the tenant's security deposit. Section 562A.15 requires that the landlord, not the tenant to maintain fit premises, including making all repairs and doing whatever is necessary to put and keep the premises in fit and habitable condition. The written provision that the tenant is liable for

[10] In addition, §30 of the Lease states, "Tenants agree to pay for all damages to the apartment windows, screens and doors including exterior unit doors (including random acts of vandalism.) Defendants' Exhibits A & B, Apx 116-9.

> "repairs" removes the obligation of the landlord to maintain fit premises and assesses the cost of upkeep of the premises on the tenant.

Trial Ct. Judg., Apx. 30.

The district court affirmed the magistrate,

> This includes Defendants' claim that there was damage to the bathroom door, and the Court concludes that the clause in the lease requiring the tenants in this case to pay for the allegedly damaged door is illegal. Under the terms of the lease, Defendant is not required to show actual damage before seeking payment from the tenant for repair of items such as doors. There is not sufficient evidence in the record to show that actual damage was sustained by Defendant based on the claimed damage to the door.

District Court App. Ruling, Apx. 43.

B. Landlord's Lease Provision Charging Tenants for All Damage and Repairs is Illegal

Landlord attempts to simultaneously justify its lease provision charging Tenant for damage she did not cause and assert, in the face of the magistrate's ruling, that there actually was damage and Tenant caused it. Brief of Appellant at 23-5. Landlord argues that the evidence the door was damaged and by Tenant was "overwhelming" but then fails to cite to the record or relevant authority that would justify overturning the magistrate's fact finding. Brief of Appellant at 25. In fact, Tenant's testimony and the photograph entered into evidence fully support the magistrate who could best determine facts and witness credibility. 10/12/12 Tr. 18-20, Defendant's Exhibit R., Apx. 129. See

e.g., *State v. Carter*, 696 N.W.2d 31, 36 (Iowa 2005) (trial court's finding given weight by appellate courts as it is in better position to assess the credibility of witnesses).

Both the magistrate and district court[11] correctly ruled that Landlord's lease provisions making tenants responsible for the costs of all damage and repairs to windows, doors, carpet, and walls, regardless of who caused the damage, are prohibited under the IURLTA. The landlord's responsibility for repair and maintenance is an essential part of the IURLTA, which was created explicitly, "[t]o ensure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Iowa Code §562A.2(2)(c).

Iowa Code §562A.15 makes landlords responsible for repair and maintenance, providing that,

> 1. The landlord shall:
> a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
> b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.
> c. Keep all common areas of the premises in a clean and safe condition.

[11] The district court held that lease provision requiring the tenants to pay for all damages was illegal because it did not require proof of actual damage. District Court App. Ruling, Apx. 43. While Landlord did not show actual damage, the district court's ruling is clearer if we consider it as requiring a landlord to show actual damage *by the tenant* before charging for repairs.

Iowa Code §562A.15(1)(a)-(c) (2014).

On the other hand, §562A.17 lays out the tenant's responsibility, which is to keep their unit clean and not cause or condone damage,

> The tenant shall:
> 1. Comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety.
> 2. Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit.
> 3. Dispose from the tenant's dwelling unit all ashes, rubbish, garbage, and other waste in a clean and safe manner.
> 4. Keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits.
> 5. Use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning and other facilities and appliances including elevators in the premises.
> 6. Not deliberately or negligently destroy, deface, damage, impair or remove a part of the premises or knowingly permit a person to do so…

Iowa Code §562A.17 (2014). In *Mastland v. Evans Furniture*, 498 N.W. 2d. 682 (Iowa 1993) the Supreme Court held, "…the landlord may keep the rental deposit only if the damages beyond normal wear and tear result from the *deliberate or negligent acts of the tenant, or the tenant knowingly permits such acts*." *Mastland*, 498 N.W. 2d at 686.

The IURLTA is a comprehensive regulatory framework for landlords and tenants, with a mandate that landlords, not tenants, be responsible for repair and maintenance. The only exception, set forth in §562A.17(6) and

Mastland, is that tenants must pay for damage beyond wear and tear that they cause or condone. Landlord's lease provisions making tenants responsible for the costs of all damage and all repairs, no matter what the cause, strike at the very heart of the IURLTA's requirement of landlord repair.

Landlord agrees that it has a statutory duty to repair under the IURLTA in general and §562A.15 in particular, but argues that it is free to push the costs of repairs, even those statutorily required of landlords, onto its tenants. Brief of Appellant at 24. Landlord asserts there is a difference between being responsible for repair and being responsible for payment for repair. This argument, though cunning, cannot be sustained. The Supreme Court made clear in *Mastland* that, "the *landlord may keep the rental deposit* only if the damages beyond normal wear and tear result from the deliberate or negligent acts of the tenant, or the tenant knowingly permits such acts." *Mastland*, 498 N.W. 2d at 686. The costs of required repairs and maintenance must be borne by the landlord, unless the limited exception of damage caused by the tenant applies.

A landlord is not discharging its statutory obligation to repair if it merely picks up the phone and calls a contractor, but then sends the bill to the tenant. As noted by the Supreme Court in the landmark landlord tenant case, *Mease v. Fox*, one of the reasons to require landlords to be responsible for repairs and maintenance is that, "Low and middle income tenants, even if they were

interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property." *Mease v. Fox*, 200 N.W.2d 791 at ¶ 32 (Iowa 1972) citing *Javins v. First National Realty Co*, 428 F.2d 1071, 1078-9 (D.C. App. 1970).

Overturning the trial and district court would be extremely costly for tenants and an incredible windfall for landlords, allowing them to push the cost of all their statutorily required repairs and maintenance on to tenants. The rulings of the trial and district courts finding Landlord's repair cost shifting lease provisions to be illegal under the IURLTA should be affirmed by this Court.

IV. The Trial & District Courts Correctly Found that Landlord Knowingly & Willfully Used Prohibited Lease Provisions

In section IV, Tenant as Appellee responds to the arguments raised by Landlord as Appellant on pages 18-21 of its brief with regard to knowing and willful use of prohibited lease provisions under Iowa Code §562A.11. Tenant agrees that Landlord has preserved error on this issue. Small claims actions that are tried at law are reviewed for correction of errors at law. A review of statutory construction is at law. The appellate court is bound by the lower courts' findings of fact if supported by substantial evidence. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009).

The standard for knowing and willful use of a prohibited lease provision under §562A.11 is perhaps the most important issue presented in this case and is the one issue that does not at least partially overlap with in *DeStefano v. Apts. Downtown*, 14-0820, currently pending before this Court. With the exception of a very brief discussion in *Staley v. Barkalow*, there is no precedent directly on point with regard to the correct standard for knowing and willful use of a prohibited lease provision which permits punitive damages. This issue not only affects tens of thousands of individual landlords and tenants throughout Iowa, but also at least five class action landlord tenant cases currently pending.

Tenants are particularly keen to find a standard that is fair for both tenants and landlords. Tenants feel it is very important to shield small, inexperienced landlords with one or two units who are honestly unaware of violating the IURLTA from being subject to large punitive damages for a few minor or technical violations from which they reaped no significant revenue, while ensuring that large, experienced professional landlords who are blatantly and profitably violating the IURLTA on a massive scale are not permitted to shield themselves by feigning ignorance of their statutory obligations.

Tenant agrees with Landlord that the proper standard for knowing use of an illegal lease provision is actual knowledge, but asserts that actual knowledge can be inferred from the surrounding circumstances. Tenant

believes that the magistrate and district court were correct in finding actual knowledge of illegality and thus knowing and willful use of prohibited lease provisions.

A. Knowing & Willful Use of Prohibited Provisions under §562A.11

Iowa Code §562A.11 "Prohibited provisions in rental agreements", provides,

> 1. A rental agreement shall not provide that the tenant or landlord:
> a. Agrees to waive or to forego rights or remedies under this chapter…
> b. Authorizes a person to confess judgment on a claim arising out of the rental agreement;
> c. Agrees to pay the other party's attorney fees; or
> d. Agrees 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.
> 2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney fees.

Iowa Code §562A.11 (2014).

Inclusion as well as enforcement of a lease provision are uses under §562A.11. In *Staley v. Barkalow*, 834 N.W.2d 873 (2013) (Table) the Court of Appeals held,

> Accordingly, we hold a landlord's inclusion of a provision prohibited in Iowa Code section 562A.11(1) ("shall not provide"), even without enforcement, can be a "use" under Iowa Code section 562A.11(2):

> "If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited . . . . " See Unif. Residential Landlord & Tenant Act § 1.403 cmt. When read together, these subsections make a landlord liable for the inclusion of prohibited provisions in a rental agreement, even without enforcement, if the landlord's inclusion was willful and knowing. See Iowa Code § 562A.11. In order to recover damages, the tenant has the burden of proving the landlord willfully used, i.e., willfully included, "provisions known by the landlord to be prohibited." Id. § 562A.11(2).

Staley v. Barkalow, 834 N.W.2d 873 at pages 15-16.

Under *Staley*, to sustain the magistrate and district court Tenant must first show that the challenged lease provisions are prohibited and then must show that the use of one or more lease provisions was knowing and willful on the part of Landlord.

First, as we have seen in sections II & III, Landlord's automatic carpet cleaning and repair cost shifting provision are illegal under the IURLTA. Thus tenants have a right under the IURLTA not to be automatically charged for carpet cleaning and not to be charged for repairs and damage that they did not cause or condone. Under §562A.11, a prohibited provision is one that agrees to, "…waive or to forego rights or remedies under this chapter." Iowa Code §562A.11(1)(a). Therefore, both the automatic carpet cleaning provision, lease §37(e) and the repair shifting provision, lease § 33(a) are prohibited provisions under §562A.11 since they waive Tenant's rights under the IURLTA.

B. Landlord Knowingly & Willfully Used the Automatic Carpet Cleaning & Repair Shifting Clauses in its Lease

As we have seen, in addition to showing that the challenged provisions are prohibited, Tenant must show that Landlord used them willfully and knowingly. Tenant would argue that willfulness is basically subsumed in knowledge under §562A.11.

Sometimes willfulness has been defined as merely an intentional act, a less exacting standard than knowing. See, e.g. *Board of Dental Examiners v. Hufford*, 461 N.W.2d 194, 201 (Iowa 1990). See also *Committee of Professional Ethics & Conduct v. Crawford*, 351 N.W.2d 530, 532 (Iowa 1984) (attorney discipline case where failure to file tax return was held intentional and therefore willful). However, willful has also been defined as being synonymous with knowing. The Supreme Court in *State v. Tippett*, 624 N.W.2d 176 (Iowa 2001) held,

> In *Osborn* we described the words "willfully failing" as denoting a voluntary and intentional violation of a known legal duty. Id. We stated that this interpretation gave that term "its ordinary meaning." We believe that characterization is accurate. A dictionary definition of "willful" fixes the meaning of that word as "said or done deliberately or intentionally." Webster's Twentieth Century Dictionary 2093 (unabr. ed.1979).

State v. Tippett, 624 N.W.2d at 178.

Since in addition to being willful, the use of a prohibited lease provision

must be knowing, under §562A.11 willfulness is essentially synonymous with knowing since it is impossible to have a knowing violation without that violation also being intentional.

1. Actual Knowledge is the Correct Standard But Knowledge Can be Inferred from the Surrounding Circumstances

Thus the key issue is the correct standard for knowingly using a prohibited lease provision under Iowa Code §562A.11. Tenant agrees with Landlord that actual knowledge of illegality is required under §562A.11,[12] but asserts that actual knowledge can be inferred from the surrounding circumstances.

We have useful precedential guidance from *Staley v. Barkalow*, 834 N.W.2d 873 (2013) where the Court of Appeals held,

> ….the district court should consider whether the challenged lease provisions are provisions that "shall not be included, " and whether the inclusion was made willfully and knowingly. See id. § 562A.11; see also *Summers*, 236 P.3d at 593 (stating landlord's "provision requiring tenants to pay its attorney fees in any legal dispute is clearly prohibited by the Landlord and Tenant Act, and [landlord] should have known that from simply reading the Act").

Staley at 24.

The *Staley* Court cites *Summers v. v. Crestview Apartments*, 236 P.3d 586 (Mont. 2010) which involved Montana's version of the Uniform Residential

[12] Brief of Appellant at 19.

Landlord Tenant Act.[13] The prohibited lease provisions section in the Montana statute states,

> A rental agreement may not provide that a party:
> (1) agrees to waive or forego rights or remedies under this chapter;
> (2) authorizes any person to confess judgment on a claim arising out of the rental agreement; or
> (3) agrees to the exculpation or limitation of liability resulting from the other party's purposeful misconduct or negligence or to indemnify the other party for that liability or the costs or attorney's fees connected therewith.

Montana Code §70-24-202. In addition, Montana Code §70-24-403 provides,

> (1) A provision prohibited by 70-24-202 that is included in a rental agreement is unenforceable.
> (2) If a party purposefully uses a rental agreement containing provisions known by the party to be prohibited, the other party may recover, in addition to the other party's actual damages, an amount up to 3 months' periodic rent.

Montana Code §70-24-403.

In *Summers*, the Montana Supreme Court, as cited in *Staley*, held that, "[the landlord's] provision requiring tenants to pay its attorney fees in any legal dispute is clearly prohibited by the Landlord and Tenant Act, and [the landlord] should have known that from simply reading the Act." *Summers*, 236 P.3d at 593. While the *Summers* Court held that the attorney fee provisions were clearly prohibited by the Montana landlord tenant act, we note that this is not one of

[13] Montana Code Annotated, Chapter 24, the Landlord Tenant Act of 1997.

the provisions specifically prohibited, but rather comes under the general prohibition of any waiver of tenant rights and remedies,

> The attorney fee terms in the lease agreement here directly violate this statutory provision by binding the tenant to an absolute attorney fee obligation and attempting to avoid a discretionary award of attorney fees to the prevailing party as provided in the Act. The plain terms of § 70-24-442(1), MCA, prohibit this practice. *The lease agreement violates § 70-24-202(1), MCA, by requiring tenants to waive or forego their rights or remedies* to a discretionary award of attorney fees to the prevailing party under the Landlord and Tenant Act.

Summers, 236 P.3d at ¶32-3.

Because the attorney fee provision clearly violated the Montana landlord tenant act, even though it was not specifically enumerated in the prohibited provisions clause, the *Summers* Court held that the landlord knew it was prohibited. While *Staley* & *Summers* could be read as presuming knowledge, Tenant believes that *Summers* and *Staley* in fact stand for the proposition that actual knowledge of illegality is required, but can be inferred.

As a general rule a statutory or common law requirement of knowing means actual knowledge. See e.g. *Iowa Supreme Court Attorney Disciplinary Bd. v. Barry*, 762 N.W.2d 129, 139 (Iowa 2009) (knowingly denotes actual knowledge of the fact in question); *State v. Leckington*, 713 N.W.2d 208, 215 (Iowa 2006) (conscious awareness, or actual knowledge is required under statute prohibiting "knowingly act[ing]").

Nevertheless, a direct confession by Landlord is not necessary. Instead a landlord's knowledge of the illegality of lease provisions can be inferred from the surrounding circumstances. "Knowledge is a state of mind seldom capable of direct proof, and may be inferred from the circumstances." *State v. Gordon*, 531 N.W.2d 134, 137 (Iowa App. 1995) citing *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994); see also *Ackerman v. James*, 200 N.W.2d 818, 827 (Iowa 1972) (when actual knowledge is required, this knowledge may be inferred from circumstantial evidence, in spite of a denial by defendant.)

Rather than a presumption of knowledge *Staley* and *Summers* hold that a court need not simply accept a defendant's self-serving denial of knowledge, but may also consider the surrounding circumstances, including what information was available to the defendant and what they did to seek or avoid knowledge of illegality. "Sometimes there can be such opportunity to know that a person should be required to take notice." *Tewes v. Pine Lane Farms, Inc.*, 522 N.W.2d 801, 807 (Iowa 1994) citing *US v. Wilcox*, 258 F.Supp. 944, 946 (N.D.Iowa 1966); see also *In re Marriage of Halvorsen*, 521 N.W.2d 725, 728 (Iowa 1994); ("Willful ignorance is not a good substitute for 'lack of knowledge of true facts on part of actor.'").

Under *Summers* and *Staley* if a landlord had an obvious opportunity to see the illegality of its lease because the provisions clearly violated the landlord

tenant act, a court can infer actual knowledge of illegality. As we shall see in Section III.B.2, Tenant believes that the magistrate and district court properly applied this standard of inferring actual knowledge.[14]

2. The Evidence Establishes That Landlord Knowingly & Willfully Used Prohibited Lease Provisions

The magistrate found,

> …that the 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)), and the Plaintiff is therefore awarded two month's rent in the amount of $2,770.00.

Trial Ct. Judg., Apx.31.

The district court affirmed the magistrate, finding,

> Further, 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

[14] Tenant believes the following are some relevant factors in determining knowing use of a prohibited lease provision:
1. Is landlord is a part time "amateur" or a full time professional landlord, and for how long;
2. How many units landlord owns or manages, is landlord is an individual or corporate entity, whether landlord has staff and how extensive that staffing is;
3. What training landlord and their staff have, what access to legal assistance, what familiarity the landlord has with the IURLTA and applicable precedent;
4. How obvious is the violation of the IURLTA, is the violation unfair, inequitable or unconscionable or merely a technical violation, how profitable has the violation been for the landlord and how costly for the tenants;
5. Has landlord made an effort to educate themselves with regard to the IURLTA or has the landlord made no attempt or actively sought to be ignorant of their legal responsibilities.

> Joseph Clark was familiar with the IURLTA and what a landlord can and cannot due 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.

District Court App. Ruling, Apx. 43.

Landlord argues that there was no evidence that Landlord knew that these provisions were prohibited because there were no prior court decisions ruling Landlord's provisions illegal and Landlord's own attorney had drafted the lease. Brief of Appellant at 20. Landlord thus accepts that circumstantial as well as direct evidence is probative of actual knowledge. Landlord further signals its acceptance of circumstantial evidence and of the district court's reliance on familiarity with the statute by arguing that Joseph Clark, business manager for Landlord, only testified that he was familiar 'for the most part'" with the IURLTA. Brief of Appellant at 20.

On the other hand, Landlord simultaneously argues that no matter how knowledgeable Mr. Clark was about the IURLTA, this is not evidence Landlord knowingly used a prohibited clause. The district court's reliance on Mr. Clark's familiarity with the statute, "effectively eliminates the 'actual knowledge' requirement…" asserts Landlord. Brief of Appellant at 20. Here Landlord appears to be making an argument that actual knowledge can only be proven by direct evidence. However, it is well established that, "direct and circumstantial

evidence are equally probative." Iowa R.App. P. 6.904(3)(p); *State v. Knox*, 536 N.W.2d 735, 741 (Iowa 1995). "It is not required that intent be proved by direct evidence; intent is seldom so proved." *State v. Salkil*, 441 N.W.2d 386, 388 (Iowa 1989). "Usually proof of intent will depend upon circumstantial evidence and inferences drawn from such evidence." *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994).

Mr. Clark's familiarity with the IURLTA is highly probative, since if Landlord had no knowledge whatsoever of the requirements of the statute, it could not knowingly violate it. Landlord recognizes the strong probative value of this evidence by arguing Mr. Clark's lack of familiarity.

In fact, as business manager for Landlord, Joseph Clark,[15] not only testified that he was familiar with the IURLTA and specifically with the prohibition on the inclusion of prohibited lease clauses, but even discussed the how §562A.11 applied to specific security deposit deductions,

> Q. [by Plaintiff's Counsel] Do you feel that you're familiar with the Landlord Tenant Law on what you can do and what you can't do?
> A. [Joseph Clark] Yes.
> Q. [by Plaintiff's Counsel] You're familiar with the Iowa Code in terms of what you're allowed to do and what you're not allowed to do.
> A. [Joseph Clark] For the most part, yes, I am.

[15] Mr. Clark testified that he oversaw operations for Defendant/Appellant Apts Downtown. 10/12/12 Tr 42.

Q. [by Plaintiff's Counsel] I'm going to have you just look at 562A.11. That's prohibited clauses in leases. Are you familiar with that? Have you seen it before?
A. [Joseph Clark] I have.
Q. [by Plaintiff's Counsel] Could you just read that off, the first, let's see, it would be 1, let's see what we've got here, sorry, yeah. Read 1(a) through (d).
A. [Joseph Clark] "Agrees to waive or to forego rights or remedies under this chapter provided that this restriction shall not apply to rental agreements covering single family residents on land assessed as agricultural land and located in an unincorporated area;
(b). Authorizes a person to confess judgment on a claim arising out of the rental agreement;
(c). Agrees to pay the other party's attorney's fees; or
(d). Agrees to exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or loss -- or the costs connected therewith."
Q. [by Plaintiff's Counsel] These are all things that you can't do in a lease. You can't, right?
A. [Joseph Clark] Correct.
Q. [by Plaintiff's Counsel] You're familiar with these already?
A. [Joseph Clark] That's correct.
Q. [by Plaintiff's Counsel] You just testified that your indirect cost for both the $40 an hour rate and the $70 an hour rate include legal fees. So it seems to me that you're violating the Landlord Tenant Act knowingly and willfully. What do you think about that?
11 MR. AFFELDT: I'm going to object.
12 THE COURT: I'll allow it.
13 [Joseph Clark] A. I disagree.

10/12/12 Tr. at 56-58.

Defendant's own counsel even asked Mr. Clark to testify as to his familiarity with the IURLTA,

[Defendant's Counsel] Q. Mr. Warnock was asking you your familiarity with Iowa law and especially Section 562A. Do you remember that?

> [Joseph Clark] A. Uh-huh. Yes, I do.
> [Defendant's Counsel] Q. Do you feel -- what portions of your lease do you contend comply with the provisions defining rent?

10/12/12 Tr. 67-8.

In fact, Mr. Clark not only testified that he was familiar with the IURLTA in general, but demonstrated his familiarity with §562A.11. Mr. Clark was able to express his opinion as to the legality of Landlord's policies under §562A.11. Even Landlord's own counsel sought Mr. Clark's opinion as to the legality of lease provisions under the IURLTA.

We can discern in what Landlord choses to accept as circumstantial evidence its implicit underlying argument: that the IURLTA standing alone is never sufficient to put anyone on notice as to the legality of a lease's provisions. For example, Landlord argues, "There is no evidence of any prior court decision ruling *these provisions* prohibited." Brief of Appellant at 20. In other words, even if a lease provision blatantly and obviously violates the IURLTA a landlord cannot be found to have knowingly used it until a court rules that the specific provisions of its own lease are prohibited. By itself, Landlord implicitly argues, knowledge of the IURLTA is not sufficient to show knowledge of illegality.

The results of this argument are even more sweeping than they first appear. Since under Landlord's standard a court must rule that the specific

provisions of a lease are illegal before knowledge can be found, if this Court finds that automatic carpet cleaning clauses are illegal in general, landlords are still free to use these clauses since the specific language of their own leases has not been found to be illegal. Even if Landlord's lease is found to be illegal in this case it can simply change the wording of the challenged provisions and escape a finding of knowledge. The absurd results of Landlord's argument make it obvious that familiarity with the IURLTA is the touchstone of an actual knowledge inquiry. The statute itself, standing alone, is clearly sufficient guidance as to the legality of an obvious violation.

Beyond Mr. Clark's testimony, additional evidence of Landlord's knowledge of the IURLTA, briefed to the district court,[16] is Landlord's standard lease which states that, "Tenant shall, in addition to any other obligations in this Lease, comply with all applicable building, housing and zoning codes and *with Chapter 562A of the Code of Iowa (Residential Landlord Tenant Act)*…." §9, Lease, Defendant's Exhibits A&B, Apx. 115, 118. Thus, Landlord requires tenants to know and comply with the IURTLA while simultaneously denying its own knowledge of the statute.

[16] District Court Brief of Appellee at 18.

Further consideration of the surrounding circumstances adds considerable weight to the trial court's finding of knowledge. This is not a situation with an inexperienced "mom & pop" landlord renting out their upstairs bedroom. Defendant Apts. Downtown is owned by James Clark, Tr. 167, who, "[d]eveloped and owns more Iowa City real estate than anyone else (301 parcels assessed at $93.6 million), providing housing to more than 1,000 university students, as well as businesses, mostly in the downtown area."[17] Apts. Downtown is organized as a corporation[18] and has its own specially created standardized lease drafted by its attorney. Defendant's Exhibits A & B, Apx 115-20; 10/12/12 Tr. 67. It has both a business manager and field operations manager, who both testified at trial, with the field operations manager noting that he had 20 years of experience overall and had worked for Landlord for 14 years. 10/12/12 Tr. 141. Landlord is a very large, very experienced landlord and it strains credulity to believe that it was not fully aware of the requirements of the IURLTA. We should also consider how profitable for Landlord it would be to feign lack of knowledge of the illegality of its automatic carpet cleaning and repair shifting clauses. As we have seen from its lease Landlord

[17] Iowa Press Citizen, Fabulous 150, www.press-citizen-media.com/150/clarkja.html

[18] Apts. Downtown is Iowa corporation #2846, Iowa Secretary of State http://sos.iowa.gov/search/business/

charges between $95 and $225 for each unit for carpet cleaning. With several thousand tenants, Landlord conservatively cleared $100,000 a year from this cleaning charge alone, a strong incentive to turn a blind eye to any illegality.

In essence, the trial court found that Landlord was in the same position as someone puffing on a cigarette in front of a no smoking sign. The violations of the IURLTA are so blatant and the Landlord's familiarity with the statue so clear, that it is obvious from the circumstances that Landlord actually knew the challenged clauses were illegal. This Court should affirm the ruling of the magistrate and district court that Landlord knowingly and willfully used prohibited provisions under §562A.11.

C. Landlord Cannot Rely on the Advice of Counsel to Negate Knowing Use of Illegal Lease Provisions

Landlord argues in its brief that it could not have known that the provisions in its lease were illegal because, "…its attorney drafted the lease and advised it the provisions were proper." Brief of Appellant at 20. No precedent is cited by Landlord and no further details with regard to what specific legal advice was given or Landlord's relationship with its attorney were entered into evidence.

There is considerable doubt as to whether the defense of advice of counsel is even available for violations of Iowa Code §562A.11. Landlord cites

no authority in support its use of the advice of counsel defense and in fact, the only specific area in which Iowa precedent permits the defense of advice of counsel is malicious prosecution. As the Supreme Court held in *Liberty Loan Corp. of Des Moines v. Williams*, 201 N.W.2d 462, 465 (Iowa 1972), "the advice of counsel obtained in good faith upon a full and fair disclosure of all of the facts in possession of a party is a complete defense to an action for malicious prosecution." However, advice of counsel is not a defense even for the closely related claim of abuse of process. *Ahrens v. Ahrens*, 386 N.W.2d 536 (Iowa App. 1986).

The Supreme Court in *Palmer College of Chiropractic v. Iowa Dist. Court for Scott County*, 412 N.W.2d 617, 621 (Iowa 1987) held,

> As to advice of counsel, the record before us does not indicate in detail what specific advice Palmer's attorney provided. Nevertheless, advice of counsel is no defense to a contempt action although it may be considered in mitigating the penalty to be imposed. *Carr v. District Court*, 147 Iowa 663, 674, 126 N.W. 791, 795 (Iowa 1910); *Lindsay v. Hatch*, 85 Iowa 332, 334, 52 N.W. 226, 227 (1892).

Palmer College of Chiropractic, 412 N.W.2d at 621.

The Supreme Court in *Blessum v. Howard County Bd. of Sup'rs*, 295 N.W.2d 836, 848-9 (Iowa 1980) held,

> Neither at trial, nor on appeal, do defendants assert any basis for the proposition that reliance on advice of counsel will exonerate them from liability for their breach of the contract with plaintiff. Our independent research was also unable to produce such a theory.

> Therefore, the trial court did not err in refusing to give the requested instruction to the extent it attempted to set forth the rule that reliance on advice of an attorney would exonerate defendants from liability for breach of contract.

Blessum v. Howard County Bd. of Sup'rs, 295 N.W.2d at 848-9.

Tenant would assert that the knowing inclusion of prohibited lease clauses involves a contract and is closer to breach of contract than it is to the lone claim where Iowa courts have permitted a defense of advice of counsel, malicious prosecution.

Even in a malicious prosecution case simply consulting counsel, "…is not an absolute or conclusive defense," *Schnathorst v. Williams*, 36 N.W.2d 739, 748-9 (Iowa 1949). Furthermore,

> It may or may not rebut malice and want of good cause. To be a good defense the advice of counsel must have been sought in good faith, from honest motives, and for good purposes, after a full and fair disclosure of all matters having a bearing on the case, and the case, and the advice received must have been followed in good faith with honest belief in the probable guilt of the one suspected.

Schnathorst v. Williams, 36 N.W.2d at 748. In malicious prosecution the Iowa Civil Jury Instructions for the advice of counsel defense state,

> The defendant must prove all of the following propositions:
> 1. The attorney giving the advice was admitted to practice law in this state.
> 2. The defendant had no reason to believe that the attorney had a personal interest in obtaining a conviction of the plaintiff.
> 3. The attorney's advice was sought in good faith from honest motives and for good purposes.

4. Defendant had made a full disclosure to the attorney of all facts concerning the case.

5. The defendant received the attorney's advice in good faith with the honest belief in the probable guilt of the person suspected.[19]

In addition, out of state courts have considered additional factors to determine whether reliance on the advice of counsel was reasonable. For example, in *Daly v. Smith*, 220 Cal. App. 2d 592, 601 (Cal. App. 1963) the California Court of Appeals held that a trial court should consider the interest of the attorney in outcome of the matter, as well as the attorney's expertise regarding the subject matter of the litigation.

Even if the defense of advice of counsel was available, Landlord has not carried its burden simply by making the conclusory statement that it consulted counsel. Landlord failed to enter into evidence exactly what it was advised by counsel. Landlord admits that it simply relied on the drafter of the lease and it did not consult new, independent counsel. We do not know whether the drafter of the lease was a salaried, in-house or employee attorney or outside counsel who were not subordinate to Landlord and had no incentive to preserve a profitable, long term relationship. No evidence was presented with

[19]Iowa Civil Jury Instructions, 2200.8 Malicious Prosecution - Malice And Probable Cause - Advice Of An Attorney (2004).

regard to good faith. No evidence was presented that Landlord made a full and fair disclosure of all relevant matters to counsel.

In essence Landlord is asking this Court to give it a "get out of jail free" card. If Landlord is permitted to assert this defense, in future if any landlord is ever accused of violating the IURLTA it can simply say, "my lawyer said it was legal." It need not give any information about its attorney; the trial court and the opposing parties are not permitted to know any of the surrounding circumstances. It need not even specify what the legal advice was, but can simply walk scot free on its own say so.

Tenant would urge this Court not to permit a specific affirmative defense of advice of counsel for knowing use of a prohibited provision under §562A.11. Certainly the advice specifically given by counsel is a factor that courts should take into consideration when determining actual knowledge of illegality, but allowing it as a blanket defense makes it too tempting to pay or pressure attorneys, particularly in-house counsel, into signing off on very questionable provisions.

Landlord has failed to show that the defense of advice of counsel is even available for knowing use of a prohibited lease provision under §562A.11, let alone sustained the burden necessary to establish the defense. Finally, even if advice of counsel is not an affirmative defense, without further evidence

regarding the actual advice given and the surrounding circumstances, a mere allegation of the advice of counsel should not be considered in determining knowledge under §562A.11.

IV. Bad Faith Withholding of the Security Deposit

In section IV, Tenant as Appellee responds to the arguments of Landlord as Appellant raised on page 29 of its brief. Small claims actions that are tried at law are reviewed for correction of errors at law. A review of statutory construction is at law. The appellate court is bound by the lower courts' findings of fact if supported by substantial evidence. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009). Tenant agrees that Landlord has preserved error on this issue.

The question of the proper standard for bad faith withholding of a security deposit under §562A.12(7) is a significant question of first impression. Landlord essentially has conceded that the district court was correct in holding that security deposit deductions based on its prohibited lease provisions constitute bad faith withholding. Tenant agrees and additionally urges this Court to explicitly affirm the district court's holding that withholding a security deposit when no cleaning is necessary also constitutes bad faith withholding.

A. The Standard for Bad Faith Withholding of a Security Deposit

The trial court awarded and the district court upheld the maximum punitive damages for bad faith withholding of a security deposit pursuant to §562A.12(7) by Landlord. Under the IURLTA, as it was in force at the time of the retention of the security deposit, "The bad faith retention of a deposit by a landlord, or any portion of the rental deposit, in violation of this section shall subject the landlord to punitive damages not to exceed two hundred dollars in addition to actual damages." Iowa Code §562A.12(7).[20]

However, the question of the proper standard for bad faith under §562A.12(7) is a matter of first impression. In *Roeder v. Nolan*, 321 N.W.2d 1 (Iowa 1982) the Supreme Court did hold that the burden of proving bad faith withholding of a security deposit under §562A.12(7) was on the tenant, and that, "[b]ad faith or good faith, of course, being a state of mind, may be established by substantial circumstantial evidence as well as by substantial direct evidence." *Roeder v. Nolan*, 321 N.W.2d at 5 citing 29 Am.Jur.2d Evidence §§ 358, 365 (1967); 31A C.J.S. Evidence §§ 174, 175 (1964). *Roeder* did not go further and define what constituted bad faith withholding.

[20]Amended, effective July 1, 2013, to provide for up to two months punitive damages. Iowa Code §562A.12(7); 2013 Acts, ch 97, §4.

Some guidance is provided by *H-L Apartments v. Al-Qawwiyy*, 440 N.W.2d 371 (1989) where the tenants were asked to vacate due to complaints by their neighbors and there was confusion over the date of the termination of tenancy. The magistrate determined that the security deposit withholding notice was four days late. Without setting forth a general standard the Supreme Court held that under these facts that there was not bad faith under §562A.12(7) on the part of the landlord. *H-L Apartments,* 440 N.W.2d at 373.

The Supreme Court has recognized the importance of careful enforcement of the security deposit rules contained in §562A.12. For example, in *Seifert v. Dosland*, 328 N.W.2d 531 (Iowa 1983), it held that, "We are convinced the legislature intended this statute to be strictly enforced against landlords…" *Seifert*, 328 N.W.2d at 532.

The strict enforcement ruling in *Seifert* is quite logical because by permitting landlords to require security deposits, the Legislature granted them a significant advantage over tenants that could be easily abused. See e.g., *Evans v. International Village Apartments* 520 N.E.2d 919, 921 (Ill. App. 1988) (purpose of bad faith withholding statute is to correct abuses by landlords who keep security deposits of former tenants without any basis.) If a tenant feels that a landlord has caused them financial loss, they must file suit for relief; if a landlord feels aggrieved, they can simply retain the tenant's security deposit.

Recognizing this imbalance, the drafters of the Uniform Act and the Iowa Legislature, in passing the IURLTA, added a variety of protections for tenants into §562A.12. For example, Landlords must return the deposit or give an accounting of amounts retained within 30 days or forfeit the deposit, specific damages must be itemized and damages must be above ordinary wear and tear. Iowa Code §§562A.12(3), (3)(a), (3)(c) & (4). Recognizing the potential for abuse the Legislature provided that bad faith withholding of a security deposit would subject a landlord to punitive damages, and as recently as 2013 emphasized the importance of this protection for tenants by increasing significantly the potential punitive damages from a maximum of $200 to up to two months rent.

In *Ikari v. Mason Properties*, 731 N.E.2d 975 (Ill App. 2000), the Illinois Court of Appeals, when construing their landlord tenant statute which provides for double damages if a security deposit is withheld in bad faith, affirmed a trial court finding that the landlord had acted in bad faith by withholding their deposit for repair and cleaning when tenants had left their unit, "in the same or better condition as they found it, ordinary wear and tear excepted…" *Ikari v. Mason Properties*, 731 N.E.2d 975 at ¶29-30.

In *Wilson v. O'Connor*, 555 S.W.2d 776 (Tex. Civ. App. 1977) the Texas Court of Appeals, in construing its bad faith withholding statute, held that, "A

landlord acts in bad faith when she acts in disregard of the tenant's rights and with the intention of depriving the tenant of a refund lawfully due." *Wilson v. O'Connor*, 555 S.W.2d at 780. Similarly in *Reed v. Ford*, 760 S.W.2d 26 (Tex. App. 1988), the Texas Court of Appeals held, that, "a landlord acts in bad faith when he retains the security deposit in dishonest disregard of the tenant's rights." *Reed v. Ford*, 760 S.W.2d at 30.

This accords with the general definition of bad faith as defined by Iowa courts. The Supreme Court in *In re Lorimor's Estate*, 216 N.W.2d 349 (Iowa 1974) held,

> In regard to bad faith, *Black's Law Dictionary*, p. 176, defines it as follows: 'The opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or a refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'

In re Lorimor's Estate, 216 N.W.2d at 353.

On the other hand good faith was defined by the Supreme Court as,

> …that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Black's Law Dictionary 693; accord Webster's Third New International Dictionary 978 (defining "good faith" as "a state of mind indicating honesty and lawfulness of purpose ...: belief that one's conduct is not unconscionable or that known circumstances do not require further investigation: absence of fraud, deceit, collusion, or gross negligence").

Sieg Co. v. Kelly, 568 N.W.2d 794, 805 (Iowa 1997).

Clearly in order to find bad faith withholding the landlord must make a security deposit deduction that it had no right to do. However, the key question is whether or not that unlawful withholding was in bad faith. Tenant feels that the correct standard for bad faith withholding is whether the finder of fact, after examining the totality of the circumstances, determines that landlord made an honest mistake in the security deposit deduction or was acting dishonestly and thus in bad faith. A knowing violation of the law, as well as willful ignorance or gross negligence are also dishonest and in bad faith.

B. The Trial & District Courts Properly Found Bad Faith Withholding of Tenant's Security Deposit

The trial court awarded the maximum amount of punitive damages for bad faith withholding of a security deposit under §562A.12(7),

> The Plaintiff requests that the Court award her damages for the bad faith retention of the security deposit and for damages due to Defendant Apartment Downtown's willful use of unconscionable provisions in the rental agreement (carpet and repairs to doors) the Court finds these request to be appropriate based on the evidence presented in this matter and awards the Plaintiff $200.00 in punitive damages for the bad faith withholding of the security deposit.

Trial Ct. Judg., Apx. 31

The district court upheld the award of punitive damages,

> Finally, the Court considers whether Magistrate Egerton erred in finding that Defendant made a bad faith retention of the security deposit. Iowa Code § 562A.17(7) provides: "The bad faith retention of a deposit by a landlord, or any portion of the rental deposit, in

> violation of this section shall subject the landlord to punitive damages not to exceed twice the monthly rental payment in addition to actual damages." Iowa Code § 562A.17(7) (2013). The Court concludes there was bad faith retention of the security deposit based on, at a minimum, Defendant's inclusion of the automatic cleaning fee provisions in the lease. The Court also concludes there was a bad faith retention of the security deposit based on Defendant's assertion that the apartment was not sufficiently cleaned when it was vacated. The testimony of Plaintiff and her witnesses at trial provides a basis for the Court to conclude that the apartment was, in fact, clean (even pristine) when vacated, and Defendant did not have an adequate basis for reducing the security deposit based on the tenants' alleged failure to meet Defendant's standards for refunding the security deposit.

Dist. Ct. App. Ruling, Apx. 43-4.

The trial and district courts gave several different reasons to support bad faith withholding. The magistrate noted that the automatic carpet cleaning and repair shifting provisions were unconscionable. Trial Ct. Judg., Apx. 29, 30. The district court stated that withholding based on the automatic carpet cleaning clause was in bad faith having earlier found that this clause was illegal under the IURLTA. Dist. Ct. App. Ruling, Apx. 43. Finally the district court held that because the evidence showed that the unit was cleaned, that Landlord had withheld the security deposit in bad faith when it deducted for cleaning. Dist. Ct. App. Ruling, Apx. 43. Landlord briefly argues that it properly withheld for carpet cleaning and door repair thus it did not do so in bad faith. Brief of Appellant at 29.

First, Tenant believes that the trial court is correct that withholding under an unconscionable provision constitutes bad faith. In Iowa an unconscionable contract is one that, "…no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Casey v. Lupkes*, 286 N.W.2d 204, 207 (Iowa 1979). Acting dishonestly and unfairly is clearly in bad faith. Similarly, deducting for cleaning Tenant's carpet or unit in general, when the evidence shows that no cleaning was required, also indicates dishonesty and bad faith.

The more difficult question is what standard is required for bad faith withholding under a prohibited lease provision: does actual knowledge of illegality have to be shown or a lesser standard? Applicable Iowa precedent indicates that actual knowledge is not required, rather that bad faith is shown where known circumstances require further investigation or where there is gross negligence. *Sieg Co. v. Kelly*, 568 N.W.2d at 805.

In the instant case the provisions at issue, automatic carpet cleaning and repair shifting clearly violate the IURLTA. As noted Landlord is a very large landlord with a full time professional and experienced staff, whose business manager testified as to his familiarity with the IURLTA and who clearly derived a great deal of profit from charging for carpet cleaning and repair. Beyond this circumstantial evidence, all we have to do is look at the lease provisions

themselves to see that they are clearly dishonest. What honest man could justify the use of a lease provision that charged tenants a cleaning fee for carpet that was already clean or a lease provision that charged tenants for damage they did not cause or condone?

This Court should sustain the trial court and district court's award of punitive damages for the bad faith withholding of Tenant's security deposit.

ARGUMENT ON APPEAL & CROSS APPEAL

V. The Trial Court Properly Awarded Attorney Fees under the IURLTA

Both Tenant and Landlord raised closely intertwined issues with regard to the award of attorney fees. In section V, Tenant, as Cross Appellant, challenges the district court's refusal to classify IURLTA attorney fees as costs and reduction of the magistrate's attorney fee award and as Appellee responds to Landlord's attorney fee arguments presented on pages 13-17 of its brief.

Substantively speaking the issue of attorney fees pales in comparison to the other issues presented in this case. However, it is very attractive to Landlord and features as its leading argument because Landlord thinks it presents an opportunity for a clever "knock out" blow, dismissing the entire case.

With regard to the actual issue award of statutory attorney fees under the

IURLTA and their interaction with the jurisdictional limit of small claims cases, while Tenant's counsel would certainly like to be paid for their work, this is not their primary impetus. Tenant's counsel are fully prepared to sacrifice their own fees if necessary to advance the substantive issues presented, but are concerned about the attorney fee precedent that would be established for all Iowa tenants and their lawyers.

This is yet another area where the imbalance between the available resources of landlords and tenants causes injustice for tenants. Landlord is the largest landlord in Iowa City, with tremendous financial resources. Tenant, on the other hand, is a twenty year old proceeding *in forma pauperis*. Landlord was willing and able to spend an enormous amount of money on trial, district court appeal and discretionary appeal, enough to overwhelm any residential tenant. Even in a run of the mill case, attorneys need to be able to make a living and charge for their services, but tenants typically lack the money to hire them.

If this Court vindicates the substantive rights of tenants under the IURLTA, but restricts the ability of the trial court to award statutory attorney fees, it would be a somewhat hollow victory. As we can see from Landlord's lease and the facts of this case, the existence of the IURLTA and favorable precedent is not enough. Tenants need counsel to assert their rights and counsel deserves to be remunerated for their services.

Small claims actions that are tried at law are reviewed for correction of errors at law. A review of statutory construction is at law. The appellate court is bound by the lower courts' findings of fact if supported by substantial evidence. *GE Money Bank v. Morales*, 773 N.W.2d 533, 536 (Iowa 2009). Tenant agrees that Landlord has preserved error on this issue. Tenant also raised this issue to the district court which ruled on it. District Court Brief of Appellee at 22-4, Dist. Ct. App. Ruling, pp._9-10.

A. Attorney Fee Award Below

Trial in the instant case took place on October 12 and November 9, 2012. Trial Ct. Judg, Apx. 12. Tenant's counsel did not file affidavits seeking attorney fees as cost until June 25 and 27, 2013. Docket, Apx. 3. Landlord moved to strike the attorney fee affidavits on July 3, 2013. Defendant's Motion to Strike, Apx. 18-20.

The trial court's judgment was issued December 9, 2013. Trial Ct. Judg., Apx. 12. After finding in favor of Tenant, the trial court, "…further awards *attorney fees as costs* in this matter in the amount of $1,200.00 to Attorney Boyer and reduced fees in the amount $2,400.00 to Attorney Warnock." Trial Ct. Judg., Apx. 31. Landlord appealed, arguing that the affidavits were untimely since they were filed after the close of evidence in the case and that the combination of actual and punitive damages and the attorney fee award

exceeded the jurisdictional limit of the small claims division.

Defendant/Appellant's District Court Appeal Brief at 10.

On district court appeal Judge Russell partially reversed the fee award,

> Iowa Code § 631.1(1) provides: 1. The following actions or claims are small claims and shall be commenced, heard and determined as provided in this chapter…b. A civil action for a money judgment where the amount in controversy is five thousand dollars or less for actions commenced on or after July 1, 2002, exclusive of interest and costs. Iowa Code § 631.1(1) (2013). Iowa Code § 562A.12(8) provides that the Court may, "in any action on a rental agreement, award reasonable attorney fees to the prevailing party." Iowa Code § 562A.12(8) (2013). The Court notes that the "legislature intended small claims suits to be simpler, easier, and less expensive than a district court action." *GE Money Bank v. Morales*, 773 N.W.2d 533, 537 (Iowa 2009). As Plaintiff points out, Iowa Code § 562A.12(8) provides an independent statutory basis for an award of attorney fees in an action on a rental agreement. This action in the small claims division, not in the district court. Thus, keeping in mind that small claims suits are to be simpler, easier and less expensive than district court actions, the Court concludes that, when a lawsuit proceeds in the small claims division and an attorney fee request is based on Iowa Code §562A.12(8), a request for an award of attorney fees must fall within the jurisdictional limits for the filing of small claims actions. Therefore, the attorney fee award must be reduced by an amount that brings the judgment within the jurisdiction of the small claims court.

Dist. Ct. App. Ruling, Apx. 40-1.

B. IURLTA Attorney Fees are Costs, not Damages

As noted by the district court, Iowa Code § 631.1(1) sets a $5,000 jurisdictional limit for small claims that is, "…exclusive of interest and costs." The trial court specifically awarded attorney fees as costs of action, accepting

Tenant's argument that costs were not included in the jurisdictional limit of small claims. Plaintiff's Resistance to Motion to Strike Attorney Fee Affidavit, at 1. On appeal, the district court's ruling did not turn on the distinction between costs and damages, but instead found that attorney fees were included in the jurisdictional limit of small claims because the legislature intended that these cases be "simpler, easier, and less expensive" Dist. Ct. App. Ruling, Apx.41.

The district court's ruling, in essence, is that the legislature did not intend that the total judgment against a defendant in small claims exceed $5000. However, this is contradicted by the statute itself which allows for a judgment of $5000 *plus* interests and costs, clearly allowing judgments in small claims for more than $5000 so long as the excess consists only of interest and costs.

The Supreme Court has, "…sided with those authorities treating statutory allowance of attorney fees as a court cost logically assessable by the court." *Ayala v. Center Line,* 415 N.W.2d 603 (Iowa 1987). In *Maday v. Elview-Stewart Sys., Co.*,324 N.W.2d 467 (Iowa 1982) the Supreme Court held,

> Attorney fees are not ordinarily allowable in favor of a successful party unless authorized by statute or agreement. *Addy v. Addy*, 240 Iowa 255, 266, 36 N.W.2d 352, 359 (1949). They are not considered an element of damages nor are they taxable as costs at common law, unless specifically authorized by statute. *Turner v. Zip Motors, Inc.*, 245 Iowa 1091, 1100, 65 N.W.2d 427, 431 (1954).
>
> Section 91A.8 provides liability for attorney fees, but does not state

> explicitly whether they are to be determined as an element of damages by the fact-finder or taxed as costs by the trial court. Nonetheless, we interpret section 91A.8 to place the responsibility for determining the appropriate attorney fees upon the trial court. This rule is the better one and is in accord with the intent of the legislature…
>
> When a statute provides for attorney fees but is silent as to their ascertainment, *we find the better rule to be that "[w]here attorneys' fees are allowed to the successful party, they are in the nature of costs and are taxable and treated as such*." 20 Am.Jur.2d Cost § 72 (1965). When faced with a request for the allowance of attorney fees in a modification of a divorce decree, we recognized this rule and stated "attorney fees when authorized by statute, with few exceptions, are taxed as costs in the action in this state. This is too well settled to require reference to the numerous sections of the code relating thereto." *Hensen v. Hensen*, 212 Iowa 1226, 1227, 238 N.W. 83, 84 (1931).

Maday, 324 N.W.2d at 469. The decisions of the Supreme Court in *Ayala* and *Maday* are directly on point and binding precedent: statutory attorney fees are treated and taxed as costs.

Landlord provides extensive precedent for the proposition that costs do not include attorney fees citing e.g. *Weaver Constrution Co. v. Heitland*, 348 N.W.2nd 230, 233 (Iowa 1984), "…the word 'costs' should not be so liberally stretched as to include attorney fees…attorney fees are not included…because attorney fees are not mentioned in the statute." Brief of Appellant at 14-6. This precedent is inapposite because Tenant is not attempting to recover attorney fees when only costs are specifically authorized by the statute since §562A.12(8) specifically provides for attorney fees. Similarly, while many

statutes do explicitly mention costs together with attorney fees, as noted by Landlord, the IURLTA is silent as whether they are costs or damages, and thus the rule articulated in *Ayala* and *Maday* applies: statutory attorney fees are treated as costs and do not count towards the $5000 jurisdictional limit of small claims.

If this Court was to find that IURLTA attorney fees are damages, then the proper remedy is not dismissal of the entire action, as advocated by Landlord, but rather either vacation of the attorney fee award or the reduction ordered by the district court on appeal.

Landlord argues that the trial court lost jurisdiction when it awarded $3600 in attorney fees in addition to $3874.33 in damages, but then shifts responsibility to Tenant's counsel arguing that they, "…could have limited their claim for attorney fees below the $5000 limit, but did not." Brief of Appellant at 16-7. In fact, at no time did Tenant make a specific claim for more than $5000. Tenant requested $5000 in its petition, including attorney fees, and Tenant's counsel only requested $3600 in attorney fees. Amended Petition, Apx. 11, Attorney Fee Affidavits, Apx. 13-17.

In addition, what Landlord fails to mention on appeal are the other grounds it urged to the trial court in resisting an award of attorney fees. "The Affidavit is untimely. The record was closed at the conclusion of the trial and

Plaintiff rested. Plaintiff produced no evidence at trial relating to attorney fees." Defendant's July 3, 2013 Motion to Strike, Apx. 18. If Landlord's arguments are correct and the award was in error, then it should never have been made in the first place and the $5000 jurisdictional limit of small claims court was not breached. Despite raising this argument below Landlord has declined to present it on discretionary appeal in hopes of snatching victory from the jaws of defeat with a complete dismissal.

This Court should rule that IURLTA attorney fees are costs, not included in the jurisdictional limit of small claims and that Tenant's counsel be awarded the full attorney fees granted by the magistrate. Alternatively, if IURLTA attorney fees are damages, the district court's fee reduction or a vacation of the fee award should be ordered rather than the draconian remedy of total dismissal. If Tenant prevails, Tenant requests this Court remand the instant action for the ascertainment of appropriate district court and discretionary appellate attorney fees. See *Bankers Trust Co. v. Woltz*, 326 N.W.2d 274, 278 (Iowa 1982); (unless statute otherwise provides, attorney fees includes appellate attorney fees).

VI. Conclusion

This case provides a window into the everyday business practices of the largest landlord in Iowa City, Apts. Downtown, and a rather squalid scene is revealed: Landlord charges its tenants to clean their already clean carpets, and to fix their unbroken doors and then, adding insult to injury, significantly overcharges them. Seemingly endless ingenuity and the finest legal talent money can buy has produced Landlord's standard lease, whose every line strains to the utmost to shift as many costs and as much responsibility off Landlord and onto its tenants.

The mismatch between Landlord's tenants, typified by this case's 20 year old undergraduate Plaintiff/Appellee proceeding *in forma pauperis*, and the multi-millionaire owner of Defendant/Appellant, Apts. Downtown makes clear how little things have changed since this Court's landmark decision in *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972). It was just this wide difference in bargaining power between landlords and residential tenants that helped bring about the creation of the implied warranty of habitability in *Mease* as well as the Uniform Residential Landlord Tenant Act which sought to,

> Equalize the bargaining positions of landlords and tenants…. Whether they live in luxury apartments or hovels, renters in most states are powerless in negotiations with their landlords… The Uniform Residential Landlord and Tenant Act is designed to improve the bargaining position of tenants.

Uniform Law Commission, Residential Landlord Tenant Act Summary.

The IURLTA represents a fair and equitable division of the rights and responsibilities of landlords and tenants. Tenant seeks only that it be fully enforced and fully obeyed by both landlords and tenants.

WHEREFORE, Plaintiff/Appellee, that the district court's ruling be affirmed with the exception of the district court's ruling with regard to reduction of attorney fees and the case be remanded for the determination of Appellee/Cross Appellant's counsel's trial and appellate attorney fees.

REQUEST FOR ORAL SUBMISSION

Appellee requests oral argument.

Respectfully submitted,

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CERTIFICATE OF RULE 6.1401 COMPLIANCE

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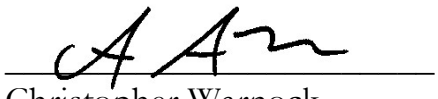

Christopher Warnock

March 31, 2015