IN THE IOWA SUPREME COURT

No. 14-0820

ELYSE DE STEFANO,

Plaintiff/Appellant/Cross Appellee,

vs.

APTS. DOWNTOWN, INC,

Defendant/Appellee/Cross Appellant.

APPEAL FROM THE JOHNSON COUNTY DISTRICT COURT
THE HONORABLE NANCY BAUMGARTNER JUDGE

APPELLANT'S FINAL REPLY BRIEF & CROSS APPELLEE'S FINAL BRIEF

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STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

Plaintiff/Appellant/Cross Appellee Elyse DeStefano, ("Tenant") filed a petition against Defendant/Appellee/Cross Appellant Apts. Downtown ("Landlord") in the small claims division of Johnson County District Court on October 10, 2011 and was permitted to proceed *in forma pauperis*. Docket, Apx. 1-2. Tenant claimed that Landlord had violated the Iowa Uniform Residential Landlord Tenant Act, ("IURTLA") codified at Iowa Code Chapter 562A. Petition.

The case proceeded to trial on July 18, 2012 and on June 10, 2013 in a 17 page memorandum opinion, Magistrate Egerton found in favor of Tenant. Docket, Apx. 6; Trial Court Judgment, Apx. 97.

Landlord appealed and on district court appeal Judge Baumgartner, in an 11 page ruling entered May 5, 2014, partially reversed the magistrate's ruling District Court App. Ruling, Apx. 104-8.

Tenant appealed and sought discretionary review while Landlord sought to cross appeal, both requests were granted October 1, 2014.

FACTS

Tenant, an undergraduate student, along with her roommates rented a house from Landlord. Lease, Apx. 13. The house's side door was kicked in by an unknown burglar. Trial Court Judgment, Apx. 83; District Court App.

Ruling, Apx. 100. Tenant was subsequently charged $598.46 by Landlord for the repair of the door. Trial Court Judgment, Apx. 83; District Court App. Ruling, Apx. 100. Landlord charged $70 an hour for repairing the door and included its overhead and ordinary business expenses in the repair charges. July 18, 2011 Trial Transcript ("Tr.") 43-4; Def. Exhibit OO, Apx. 17; Trial Court Judgment, Apx. 88; District Court App. Ruling, Apx. 104.

Tenant refused to pay for the door and as a result Landlord charged $40 late fees per month and refused to allow a sublease by Tenant. Trial Court Judgment, Apx. 83; District Court App. Ruling, Apx.100-1. Tenant was charged $191 for carpet cleaning at the conclusion of the tenancy. Trial Court Judgment, Apx. 87. The trial court found that there was insufficient evidence to charge Tenant for carpet cleaning. Trial Court Judgment, Apx. 93.

ROUTING STATEMENT

Appellant/Cross Appellee believes that this case presents a substantial issue of first impression with regard to the repair responsibilities of landlords and tenants and thus could be retained in the Supreme Court under Iowa R. App. Proc. 6.1101(2). However, Appellant/Cross Appellee 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 be appropriately transferred to the Court of Appeals.

I. INTRODUCTION

This case presents a host of important landlord tenant issues: Can tenants be required to pay for the criminal acts of third parties? Can all repair costs be shifted to tenants? Can landlords automatically charge for carpet cleaning, even for clean carpets? Can landlords include their overhead and ordinary business expenses when charging repair costs to their tenants? Can a landlord in good faith make a deduction from a tenant's security deposit under a prohibited lease provision?

Landlord answers every question in the affirmative, arguing either that the IURLTA doesn't apply or can be waived using its boilerplate lease. Individually, Landlord's arguments are unpersuasive. Collectively, they represent a concerted effort to eviscerate the IURLTA's carefully crafted balance of landlord and tenant rights and responsibilities.

ARGUMENT ON APPEAL

II. LANDLORD'S REPAIR COST SHIFTING IS ILLEGAL

In section II, Tenant as appellant replies to the substantive repair cost shifting arguments made by Landlord as appellee. The most important issue presented in section II is whether or not landlords can charge tenants for the criminal acts of unknown third parties. This is highly significant because the only way Landlord could justify charging Tenant for unknown vandalism was to make the much broader argument that it can shift the costs of *all* repair and

maintenance onto its tenants. This argument was accepted by the district court and unless overturned has far reaching consequences for all Iowa tenants.

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 Cannot Charge Tenant for the Criminal Acts of Unknown Third Parties

To understand what is at stake here for tenants across Iowa, all we have to do is look at the facts of this case: Landlord charged Tenant for the damage inflicted by an unknown burglar. Trial Court Judgment, Apx. 83; District Court App. Ruling, Apx. 100. In order to support this iniquitous charge, Landlord has asserted an even more extreme position: that the district court's ruling allows it to charge its tenants, not only for all damage caused, whatever the source, but also for any and all repairs, whatever the cause, even those that are its statutory responsibility under the IURLTA. Brief of Appellee/Cross Appellant at 17-18. As Tenant lays out in detail in her appellate brief, sustaining the district court would mean that from now on all Iowa landlords can charge all tenants for all repairs and maintenance, even those the law requires the landlord to do to maintain safety and habitability. Brief of Appellant at 10-12.

The foundation of Landlord's argument is §562A.15(2), authorizing limited tenant repairs, an exception to the general rule of landlord repair. Brief of Appellee/Cross Appellant at 15-19. Clearly the purpose of this section was to allow tenant repairs, which are nevertheless specifically forbidden under Landlord's lease.[1] Instead, Landlord's crews do all repairs and maintenance at a grossly inflated cost,[2] which it insists it can then charge to its tenants. Landlord undermines the general rule of landlord repair by using a limited tenant repair exception, while simultaneously forbidding tenants to make repairs themselves or arrange for more affordable maintenance than that offered by Landlord.

This cannot be what the Legislature intended in enacting the IURLTA. We know this because of the faulty logic and outrageous practical results of Landlord's argument and because the Legislature itself established that one of the primary purposes of the IURLTA was, "To insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." §562A.2(c). The district court's ruling, reversing the trial court, and allowing Landlord to charge Tenant for the criminal acts of an unknown third party, should be reversed.

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[1] "Iowa City Maintenance will do all repairs for an apartment unless written authorization is secured from Landlord." §33(c) Lease, Defendant Exhibit A, Apx. 14. Iowa City Maintenance is a fictitious name of Defendant Apts. Downtown Inc. Iowa Secretary of State business entity search sos.iowa.gov/search/business/search.aspx

[2] See Brief of Appellant at 15-19 and Section II.D below.

B. Landlord Cannot Refuse to Sublease for an Illegal Reason

Because Tenant refused to pay for the damage done by the burglar, Landlord refused to allow a summer sublease, costing Tenant and her roommates two months rent as they were unable to live in the house themselves. Appellant's Brief at 13; Tr.21; Plaintiff's Exhibit 11, Apx. 16. The trial court's restitution of the two months rent paid was overturned by the district court. Trial Court Judgment Apx. 96; District Court App. Ruling Apx. 105.

If the repair charge was legal, then the refusal to sublease was also legal. However, Landlord argues that even if the repair charge was illegal, under the district court's ruling Landlord could still unreasonably refuse to sublease. District Court App. Ruling, Apx. 105; Brief of Appellee/Cross Appellant at 24. However, the lease refusal in this case was more than simply unreasonable, it was for a reason that is illegal under the IURLTA, which clearly violates public policy and should not be enforced. See e.g, *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331, 335 (Iowa 1980) ("Contracts that contravene public policy will not be enforced."); *Beneficial Finance Co. v. Lamos,* 179 N.W.2d 573, 580 (Iowa 1970) (where the illegality, "is of such nature that the public interest and welfare of those persons for whose protection the particular element has been declared to be illegal will be best subserved by denying plaintiff a remedy it would be [the court's] province to do so").

Furthermore, if a lease provision charging a tenant for the criminal acts of an unknown third party is prohibited under the IURLTA, Landlord cannot seek to enforce that provision by refusing to sublease as §562A.11(2) makes prohibited clauses unenforceable. By refusing to sublease unless Tenant paid for the burglary damage, Landlord was clearly seeking to enforce an illegal lease provision. The district court should be overruled and the trial court's award of two months rent as damages for refusing a sublease should be restored.

C. Landlord Should Not Be Permitted to Profit from Illegal Lease Provisions

To support its argument with regard to refusal to sublease, Landlord asserts that damages under the IURLTA can only be assessed through §562A.11(2), which provides for actual and punitive damages and attorney fees for knowing and willful inclusion of a prohibited provision. Brief of Appellee/Cross Appellant at 25. Thus Landlord argues that it can keep any money taken from tenants taken through enforcement of prohibited provisions so long as it lacked knowledge of their illegality.

It is true that the second sentence of §562A.11(2) states,

> 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's fees.

Iowa Code §562A.11(2). However, this section merely enumerates the damages that are available if knowing and willful inclusion of a prohibited lease

provision takes place, but it does not, on its face, limit the damages otherwise recoverable under other provisions of the IURLTA. While much attention has been focused on the issue of damages due to knowing inclusion under §562A.11(2), this is just one of many damage provisions in the IURLTA.[3] For example, under §562A.21(2) damages are recoverable by a tenant for breach of §562A.15. Door repair clearly falls under §562A.15, which requires that a landlord, "Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Iowa Code §562A.15(1)(b).

Even more importantly, however, §562A.4(1) states, "The remedies provided by this chapter shall be administered so that the aggrieved party may recover appropriate damages," making actual damages available for *any* violation of the IURLTA.

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[3] §562A.12(7) punitive damages for bad faith retention of security deposit in addition to actual damages; §562A.21(1)(a) breach remediable by payment of damages; §562A.21(2) damages recoverable by tenant for breach of lease, §562A.15; §562A.22(1)(b) damages recoverable by tenant for failure to deliver possession; §562A.22(2) bad faith failure to deliver possession, damages plus attorney fees; §562A.23(1)(b) damages for diminution in rental value; §562A.23(1)(c) recover rent paid; §562A.26 actual damages plus attorney fees for unlawful ouster, exclusion or diminution of services; §562A.27(1) landlord's damages for tenant breach of lease or §562A.17; §562A.27(3) landlord damages for damages for tenant breach of lease or §562A.17; §562A.29(1) landlord's actual damages for tenant extended absence; §562A.32 landlord's damages for breach of lease; §562A.34(4) landlord's actual damages for holding over; §562A.35(1) landlord actual damages and reasonable attorney fees for refusal of access; §562A.35(2) tenant's actual damages, not less than one month's rent, and reasonable attorney fees for access harassment; §562A.36(2) tenant's actual damages and reasonable attorney fees for retaliatory conduct;

Finally, the first sentence of §562A.11(2) states that, "A provision prohibited by subsection 1 included in a rental agreement is *unenforceable*." Thus, if a landlord receives payment under an unenforceable lease provision, then they must make restitution and pay back the money that they have illegally received. See *Cambron v. Moyer*, 519 N.W.2d 381, 385 (Iowa 1994) (restitution appropriate where money paid under unenforceable contract); see also *United States v. Stute Company, Inc.*, 402 F.3d 820 at ¶ 27 (8th Cir. 2005) (restitution available remedy where payment made pursuant to unenforceable contract.).

With regard to the refusal to sublease, the damages assessed by the trial court were the two months rent paid to Landlord that otherwise would have been paid by the subleasees. Trial Court Judgment, Apx. 84. If a provision is prohibited, the IURLTA and existing law provide for restitution or other actual damages merely upon a showing of its enforcement. Tenant is entitled to restitution for the rent paid due to enforcement of an illegal lease provision as Landlords should not be permitted to profit from illegal provisions. The district court should be overruled and the trial court's award of two months rent as damages for refusing a sublease should be restored.

D. Landlord Fails to Justify Charging its Overhead & Ordinary Business Expenses to Tenant

Landlord freely admits that based solely on its lease it charges tenants $70 per hour for repairs and that this charge includes its ordinary business expenses and overhead. Brief of Appellee/Cross Appellant at 25-6. However, Landlord makes no effort to establish that the legal requirement of actual damages, established by the Supreme Court and the IURLTA, can include overhead and ordinary business expenses or that a $70 an hour repair charge reflects its actual damages. Instead, to rebut the trial court's finding that these charges were excessive, Landlord simply states that these are costs, "…that must be paid somehow…" Brief of Appellee/Cross Appellant at 26-7. And who better to pay for its 401(k) plan, health & liability insurance, legal fees, equipment rental, business licenses, utilities & phone, vehicle & mileage expense, accounting, postage, supplies and other overhead than its hapless tenants under the guise of repair costs? Defendant's Exhibit OO, Apx. 17.

As detailed in section III. below, the trial court found that Landlord's repair charges were excessive, and while the district court noted Tenant's argument, it still awarded the full cost of the door repair to Landlord. This court should reverse the district court and affirm the trial court's finding that including overhead and ordinary business expenses in the cost of repairs and maintenance is illegal.

III. ERROR PRESERVATION

In section III, Tenant as appellant responds to the error preservation arguments made by Landlord as appellee. Landlord repeatedly argues that error has not been preserved. Tenant strongly disagrees.

First, Landlord states, "[Tenant] did not raise her argument that Iowa Code §562A.15(2) is limited to trash collection, water supply, and non-essential repairs…in the district court," and thus did not preserve error. Brief of Appellee/Cross Appellant at 12. However, the district court expressly ruled that under Iowa Code §562A.15(2) that a landlord and tenant may agree that the tenant, "…perform the landlord's duties and specified repairs, maintenance tasks, alterations, and remodeling …" District Court Ruling App. 105. Tenant directly challenges that specific ruling, arguing that the district court incorrectly quoted §562A.15(2) and that its reasoning in that specific ruling was therefore flawed as well. Brief of Appellant at 5-7.

When a ruling is made, error is preserved with regard to that ruling. *State of Iowa vs. Ricky Lee Hull Jr*, 843 N.W.2d 478 (Iowa App 2014) citing *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (If the court's ruling indicates that the court considered the issue and ruled on it the issue has been preserved.).

Landlord next states with regard to the issue of the charge for the vandalized door and Tenant's argument with regard to inclusion of ordinary business expenses and overhead in that repair charge that,

> [Landlord] agrees [Tenant] preserved error on this issue to the extent she is challenging the charge of $70 per hour for four hours of work to repair the exterior door…To the extent [Tenant] is raising a larger challenge, however, she did not preserve error because either she did not brief it to the district court or the district court did not rule against her.

Brief of Appellee/Cross Appellant at 25.

The trial court ruled that Landlord's cleaning and repair charges were excessive and specifically disapproved Landlord charging its ordinary business costs and overhead to its tenants. Trial Judgment at 93. Tenant and Landlord extensively briefed to the district court the issue of Landlord charging its ordinary business expenses and overhead to tenants. Plaintiff's District Court Appeal Brief pages 17-20; Defendant's District Court Brief, pages 5-6.

In §I(C)(1) of Appellant's Brief Tenant laid out the basis for error preservation on this issue stating that district court noted in its ruling that, "Plaintiff's next argument is that the landlord may not charge tenants its ordinary business expenses by passing along high hourly rates to the client in order to pay for the costs of operating the landlord's business." District Court App. Ruling, Apx. 104. After noting Tenant's argument, but without further explanation of its rationale, the district court awarded Landlord the full amount of the charges it sought for the entry door repair. District Court App. Ruling, Apx. 108.

In *Lamasters v. State*, 821 NW 2d 856 (Iowa 2012) the Iowa Supreme

Court held that,

> Where the trial court's ruling, as here, expressly acknowledges that an issue is before the court and then the ruling necessarily decides that issue, that is sufficient to preserve error. See *Meier*, 641 N.W.2d at 540 ("The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it."). This is not one of those cases where the court failed to mention the issue. Cf. *Addison Ins. Co. v. Knight, Hoppe, Kurnik & Knight, L.L.C.,* 734 N.W.2d 473, 480 (Iowa 2007)

Lamasters, 821 NW 2d at 864. The Supreme Court went on to "…conclude that [appellant] has preserved error on his claim…This claim is correctly summarized on both the first and the second pages of the district court's ruling, before the court denied the application in its entirety." *Lamasters*, 821 NW 2d at 865-6.

Since the district court, (1) was aware of Tenant's argument with regard to the excessiveness of door repair charges due to the inclusion of ordinary business expenses & overhead, having correctly noted that the argument was raised; and (2) necessarily denied Tenant's argument by granting the full amount of the door charge to Landlord, error has been preserved on this issue.

Finally, Appellant in her brief at 14-5 noted the issue had been presented to the district court, which standing alone preserves error, *Devoss v. State*, 648 N.W.2d 56 at ¶35-7 (Iowa 2002) and because this is an appeal of a small claims case, a motion to enlarge under Iowa R. Civ. P. 1.904(2) was not available. See *Midwest Recovery Services v. Cooper*, 465 N.W.2d 855, 857 (Iowa 1991).

ARGUMENT ON CROSS APPEAL

IV. AUTOMATIC CARPET CLEANING IS ILLEGAL

In section IV, Tenant as cross appellee responds to the arguments raised by Landlord as cross appellant with regard to automatic carpet cleaning provisions. 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, in common with other Iowa landlords, has attempted to maintain its policy of automatically charging all tenants for carpet cleaning by arguing that (1) dirt is not wear and tear; (2) that tenants can be required to restore their unit to the professionally cleaned state in which they received it, regardless of wear and tear; and (3) that landlords can contractually alter or reset the legal standard for ordinary wear and tear.

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 preserved error on this issue.

A. Carpet Cleaning Facts & Proceedings Below

Landlord deducted $191 from Tenant's security deposit for carpet cleaning. Trial Court Judgment, Apx. 87. 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) Lease, Defendant's Exhibit A, Apx. 14.

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 tenant's security deposit can only be retained by the landlord is §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 and the charges assessed by the Defendant cannot be withheld from the security deposit.

Trial Court Judgment Apx. 93. In addition to ruling that the automatic carpet

cleaning provision was illegal, the trial court also found that,

> …the evidence presented 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.

Trial Court Judgment, Apx. 93.

On appeal, the district court held,

> *The carpet-cleaning clause at issue in this matter 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 specific reasons for withholding any of the security 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. When the Court gives weight to the credibility determinations made by Magistrate Egerton as to the testimony presented at trial regarding the carpet cleaning, the Court concludes that this charge goes beyond the type of agreement the parties may make pursuant to Iowa Code §562A.15(2) and is an illegal provision because it does not require the landlord to prove any specific damage to the carpet as a result of the tenants' use of the rental unit. *The landlord is simply permitted to collect fees for carpet-cleaning regardless of actual damage.* 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).

District Court App. Ruling, Apx. 106.

B. Automatic Carpet Cleaning Clauses are Illegal

Once again the facts of this case show us what awaits Iowa tenants if Landlord prevails: Tenant's carpets were found by the trial court to be clean and yet Tenant was still charged for professional carpet cleaning. Trial Court Judgment, Apx. 93.

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.[4] 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 Court App. Ruling, Apx. 106; Trial Court Judgment, Apx. 93.

[4] Landlord insists that it did give Tenant notice of damages. Brief of Appellee/ Cross Appellant at 37. However, the security deposit withholding statement cited by Landlord as notice justifies the carpet cleaning charge by referring to lease §37, the automatic carpet cleaning clause. Def. Exhibit P, Apx 79.

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[5], 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), 17 Ohio App.3d 79, 80, 17 OBR 140, 140-141, 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 81, 17 OBR at 142, 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).

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[5]Ohio Revised Code §5321.16 (B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. 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.

What §562A.12(3)(b) makes clear is that a landlord may not charge a tenant for 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, both the trial and district court correctly held that automatic carpet cleaning provisions are illegal under the IURLTA.

C. Non-Refundable Cleaning Charges are Illegal

Landlord argues that the automatic carpet cleaning fee is acceptable as a non-refundable cleaning charge citing *Stutelberg v. Practical Mgmt. Co*, 245 N.W. 2d 737 (Mich. App. 1976). Brief of Appellee/Cross Appellant at 38. In *Stutelberg* the landlord charged both a security deposit and a non-refundable cleaning fee at the outset of the lease. *Stutelberg,* 245 N.W. 2d 737 at ¶45. The Michigan Court of Appeals held that because the cleaning fee was charged in advance separately from the security deposit that the rules regulating security deposits did not apply to it. "The tenant could have no expectation that this

sum or a part thereof should be returned. It is not a 'security deposit.'"*Stutelberg,* 245 N.W. 2d 737 at ¶127. Landlord's leases, however, provide with regard to carpet cleaning that, "Tenants agree to a charge…*being deducted from the deposit*" §37(e), Lease, Defendant's Exhibit A, Apx. 14. In addition, since the carpet cleaning charge was actually deducted from the security deposit, on the facts of the instant case, the holding in *Stutelberg* does not apply. Trial Court Judgment, Apx. 87.

Secondly, on policy grounds *Stutelberg* should be rejected as persuasive precedent. Following *Stutelberg* would allow landlords to entirely circumvent the restrictions placed on landlords with regard to the use of security deposits and thereby relieve them of their statutory responsibility for repair and maintenance. *Stutelberg* interprets the Michigan landlord tenant statute very narrowly, insisting that the restrictions on the use of security deposits by landlords were only put in place so that landlords would not deceive tenants as to the use of pre-paid funds. "The Act is primarily aimed to protect the tenant from the landlord surreptitiously usurping substantial sums held to secure the performance of conditions under the lease." *Stutelberg,* 245 N.W. 2d 737 at ¶122. This reasoning does not apply to the IURLTA whose rules governing security deposits, found at §562A.12, are just one piece of a larger statutory scheme intended to, "…insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Iowa Code §562A.2(2)(c).

Even if a non-refundable cleaning fee was not deducted from the security deposit it would still run afoul of §§562A.15 and §562A.17 which set forth the respective repair, maintenance and cleaning responsibilities of landlords and tenants. Following *Stutelberg* would allow landlords to evade their statutory responsibility for repair and maintenance because there would be no restrictions on what could be charged as non-refundable fees.

D. Dirt is Ordinary Wear and Tear

In its continuing quest to keep charging automatic carpet cleaning fees, Landlord argues that dirt is not ordinary wear and tear citing *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994). Brief of Appellee/Cross Appellant at 38. 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 its progeny and New Mexico, statutorily,[6] hold that dirt is not ordinary wear and tear. The other

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

courts that have considered this question uniformly hold that dirt and required cleaning are indeed measured by the ordinary wear and tear standard.[7]

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. *Miller v. Geels*, 643 N.E.2d 922 at ¶50-1. 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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[7] See eg, *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) (statute does not require tenants to clean carpets that are made dirty by normal and ordinary use.); *Chan v. Allen House Apartments Management*, 578 N.W.2d 210 at P30 (Wis.App. 1998) (landlord did not meet his burden of proof that those items needed cleaning beyond the normal wear and tear); *Rock v. Klepper*, 23 Misc.3d 1103(A) at ¶54 (N.Y.City Ct. 2009) (tenant is not responsible for "normal wear and tear," and the landlord cannot retain the security deposit for cleaning or repainting that are due to "normal wear and tear."); *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.

E. "But You Started with a Professionally Cleaned Carpet!"

Having digested district court rulings striking down automatic carpet cleaning fees, the fallback and new rallying cry for landlords is, "you started the tenancy with a professionally cleaning carpet, you have to leave it professionally cleaned." And indeed Landlord argues that §562A.12(3)(b), "…does not make it unlawful for a landlord and tenant to agree that [the tenant] will leave the apartment in the same state of cleanliness as when the tenancy began." Brief of Appellee/Cross Appellant at 39.

The downfall of this argument is the plain language of §562A.12 which allows a landlord to make deductions from a tenant's security deposit, "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). Therefore even if a tenant received a professionally cleaned carpet, they need not restore it to a professionally cleaned level, so long as they only subject it to ordinary wear and tear. As noted in section IV.D. above, ordinary wear and tear means ordinary use and a tenant may, "…[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).

Landlord wishes to continue to automatically charge for carpet cleaning and by setting the required level of cleanliness at the end of the tenancy at the professionally cleaned level, Landlord intentionally sets a level that no tenant

can ever reach. Walking on the carpet, even with the greatest care, will inevitably introduce some dirt and dust. Even if the tenant locked the doors of the unit and never entered it, by the end of the tenancy airborne dust and dirt would have reduced the level of carpet cleanliness below a professional level.[8] A landlord may not require that the carpet be left in a professionally cleaned state because this precludes the ordinary use which tenants are permitted under the IURLTA.

F. Landlord Cannot Contractually Alter the IURLTA

Landlord continues its defense of automatic carpet cleaning by arguing that it can contractually set the legal definition of ordinary wear and tear, citing *Castillo-Cullather v. Pollack*, 685 N.E.2d 478 (Ind. App. 1997). Brief of Appellee/Cross Appellant at 38-39. Progeny of *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994) in the aberrant Indiana "dirt is not wear and tear" line of precedent, in *Castillo-Cullather*, the Indiana Court of Appeals held,

> In particular, the lease requires the tenant to steam-clean the carpets and states that the tenant will be responsible for the cost of painting all walls in the apartment which have scuffs or markings that cannot be removed…In essence, therefore, *the cleaning and painting provisions in the lease define what constitutes ordinary wear and tear*, which is the responsibility of the landlord under section 13, and what constitutes

[8]"Filtration soiling is a term used to describe dark, grayish lines that may appear on carpet. This is not a carpet defect, but a situation in which dust, smog, and other airborne pollutants can accumulate on the carpet face fibers in areas with a concentrated flow of air over the carpet or through tiny cracks or other open areas under the carpet." Carpet and Rug Institute www.carpet-rug.org/Documents/Technical_Bulletins/2008_Filtration_Soiling.pdf

> damages exceeding ordinary wear and tear, which is the responsibility of the tenant under section 14.

Castillo-Cullather v. Pollack, 685 N.E.2d 478 at ¶ 40-1.

The Indiana Court of Appeals makes it very clear that under Indiana law lease provisions trump the statute, with freedom of contract as the key value to uphold in landlord tenant relations,

> Our determination that the parties may contractually define "ordinary wear and tear" is consistent with the long-standing policy in this State allowing parties the freedom to contract. See, e.g., *Franklin Fire Ins. Co. v. Noll*, 115 Ind. App. 289, 58 N.E.2d 947 (1945 ("[U]niform trend of the decisions in Indiana clearly upholds the right of freedom of contract, guaranteed by both the Federal and State Constitutions . . ..").

Castillo-Cullather v. Pollack, 685 N.E.2d 478 at ¶ 42.

The *Castillo* Court also makes it clear that any definition and indeed any obligation imposed by a landlord tenant statute can be contractually redefined or altered under Indiana law,

> Indeed, our courts presume that contracts represent the freely bargained agreement between the parties and that it is in the public's best interest not to unnecessarily restrict peoples' freedom of contract. *Fresh Cut, Inc. v. Fazli*, 650 N.E.2d 1126, 1129 (Ind. 1995). As a result, we have upheld lease agreements which have delegated cleaning and repair duties to tenants or defined what constitutes damages. See, e.g., *Miller*, 643 N.E.2d at 927 (Security Deposit statute not intended to limit landlord's and tenant's right to contractually define what constitutes "other damages" under statute).

Castillo-Cullather v. Pollack, 685 N.E.2d 478 at ¶ 43.

Castillo makes explicit Landlord's main argument throughout its brief, freedom of contract, and makes crystal clear the consequences of sustaining Landlord's assertions: the IURLTA would become entirely optional for landlords while any legal requirement could be altered or waived simply by inserting it in a standard lease. This Court should reject *Castillo* as precedent as only the Legislature and courts can determine the legal definition of ordinary wear and tear.

The decisions of the trial and district courts finding automatic carpet cleaning to be illegal should be affirmed.

V. BAD FAITH WITHHOLDING OF THE SECURITY DEPOSIT

In section IV, Tenant as cross appellee responds to the arguments raised by Landlord as cross appellant with regard to bad faith withholding of Tenant's security deposit.[9]

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. The trial court held,

> …based on Defendant's assessment of charges and damages withheld from the security deposit for unreasonable costs for repair, the unconscionable and unenforceable provisions in the lease and

[9] Tenant agrees that Landlord 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).

> violations in the lease of the statutory requirements under IURLTA, a punitive damages for the bad faith retention of the security deposit is appropriate…

Trial Court Judgment, Apx. 96.

The district court upheld the award of punitive damages for bad faith withholding,

> The Court concludes that there was bad faith retention of the security deposit based on, at a minimum, Defendant's inclusion of the carpet cleaning fee in the lease. The Court also concludes there was a bad faith retention of the security deposit based on late fee assessed for non-payment of the cost to repair the vandalized door.

District Court App. Ruling, Apx. 107.

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).[10]

By permitting landlords to require security deposits, the Legislature granted them a significant advantage over tenants. 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

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

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. Recognizing the potential for abuse, the Legislature specifically 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.

The courts have also 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), the Supreme Court held that, "We are convinced the legislature intended this statute to be strictly enforced against landlords…" *Seifert*, 328 N.W.2d at 532.

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.

Both the trial court and district court found that retention of a security deposit based on a prohibited provision supported an award of punitive damages. Landlord argues that automatic carpet cleaning charges are not prohibited and if prohibited that there was a good faith dispute with regard to the legality of the carpet cleaning citing *H-L Apartments v. Al-Qawwiyy*, 440 N.W.2d 371 (1989). Brief of Appellee at 40. In *H-L Apartments*, 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. The Supreme Court held that under these facts that there was not bad faith sufficient to support punitive damages under §562A.12(7) on the part of the landlord. *H-L Apartments,* 440 N.W.2d at 373.[11]

The instant case does not involve a simple error in computation or confusion over dates. Having actually enforced a provisions prohibited under the IURLTA, Landlord once again argues that it should escape any consequences. This is particularly egregious when we consider that this is not simply an isolated instance, but Landlord's set policy, enshrined in its standard lease for thousands of tenants.

[11] Landlord also argues that by using a lease provision it can transform illegal charges into legal rent. Brief of Appellee at 40. If Landlord is correct, then no landlord need ever be concerned about charging for prohibited provisions, a simple tweak to their lease and a prohibited charge turns into rent.

Finally, Tenant would note that the trial court found Landlord's automatic carpet cleaning and repair provisions as well as the charges made under them to be unconscionable and specifically mentioned unconscionability in awarding punitive damages for bad faith retention. Trial Court Judgment, Apx. 93, 96. 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). Since the provisions and charges were found to be ones that no honest and fair man would make, this clearly constitutes bad faith.

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

VI. ATTORNEY FEES

Both Tenant and Landlord raised closely intertwined issues with regard to the award of attorney fees. In section V. Tenant, both as appellant and cross appellee, responds to Landlord's attorney fee arguments.[12]

With regard to the award of statutory attorney fees under the IURLTA

[12] Tenant agrees that Landlord preserved error on attorney fee issues. 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).

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 young undergraduate 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 normal 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.

A. Are IURLTA Attorney Fees Treated as Costs or Damages?

Iowa Code § 562A.12 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). Pursuant to this authority, the district court awarded $1,160 in attorney fees to Tenant's co-counsel, Ms. Boyer, but no attorney fees to Tenant's counsel, Mr. Warnock. District Court App. Ruling, Apx. 108. Tenant challenged the failure to award attorney fees to Mr. Warnock on direct appeal. Brief of Appellant at 19-20.

In its brief Landlord makes several arguments with regard to attorney fees. First, it argues that attorney fees awarded under §562A.12(8) or other IURLTA provisions are damages, rather than costs. Brief of Appellee/Cross Appellant at 29-34. Second, it argues that if attorney fees are damages, and the total damages exceed the $5000 jurisdictional limit of small claims that the case must be dismissed. Brief of Appellee/Cross Appellant at 41.

Tenant asserts that attorney fees under the IURLTA are costs and that even if they were treated as damages and cross the jurisdictional limit, dismissal is not appropriate, instead the case must be transferred to the district court, as required by statute.

Iowa Code § 631.1(1) sets a $5,000 jurisdictional limit for small claims that is, "…exclusive of interest and costs." Thus no jurisdictional problem is presented if IURLTA attorney fees are treated as 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). Similarly,

> 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..." *Hensen v. Hensen*, 212 Iowa 1226, 1227, 238 N.W. 83, 84 (1931).

Maday v. Elview-Stewart Sys., Co.,324 N.W.2d 467, 469 (Iowa 1982).

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." This precedent is inapposite because Tenant is not attempting to recover attorney fees when only costs are specifically authorized by the statute. Instead §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 or not attorney fees are classified as 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.

B. What If During a Small Claims Case, Damages Exceed $5000?

If this Court was to find that attorney fees are indeed damages, then the question arises of what to do if the amount of attorney fee damages when added to the existing damages exceeds the $5000 small claims jurisdictional limit. Landlord argues for the draconian remedy of complete dismissal. Brief of Appellee/Cross Appellant at 33. However, Iowa 631.8, which regulates small claims actions provides,

> In small claims actions, if a party joins a small claim with one which is not a small claim, the court shall:
> a. Order the small claim to be heard under this chapter and dismiss the other claim without prejudice, or
> b. *As to parties who have appeared or are existing parties*, either (1) order the small claim to be heard under this chapter and the other claim to be tried by regular procedure or (2) order both claims to be tried by regular procedure.

Iowa Code § 631.8(2).

In other words, if at the outset of the case, the amount of damages claimed exceeds $5000 then it is inappropriately filed in small claims, in which case the court can dismiss the non-small claims claim without prejudice and it can be refiled as a district court case. If, on the other hand, during the pendency of a small claims case, a party adds a new non-small claims claim, for example, a demand for more than $5000 damages, then this new claim must be transferred to the district court to be tried under regular procedure.

This appears to allow for bifurcation of multiple claims in one case.

However, in *Wilson v. Iowa Dist. Court*, 297 N.W.2d 223 (Iowa 1980) the plaintiff filed a small claim, but the defendant filed a counterclaim exceeding the jurisdictional limit of small claims, then $1000. The Supreme Court held,

> The judicial officer before whom the case originally came *properly transferred the entire case from the small claims docket*, since the claim and counterclaim both arose out of the same transaction and the counterclaim exceeded $1000. This meant that the case was no longer a small claim for disposition under chapter 631; it was to be tried by "regular procedure." 631.8(4).

Wilson v. Iowa Dist. Court, 297 N.W.2d 223 at ¶25. Since the attorney fees arise from the same transaction, i.e. the violation of the IURLTA, as the underlying claims, the entire case should be transferred.

Therefore, (1) if attorney fees are not costs, but damages, and (2) they are demanded during the pendency of the case, and (3) together with the existing damages, they exceed the jurisdictional limit of small claims, then the case must be transferred from small claims to the district court, rather than dismissed as argued by Landlord.[13]

In counsel's experience judges are somewhat reluctant to award attorney fees in landlord tenant small claims actions and, as in the instant case, refuse or reduce the fees sought. In most cases, attorney fees either will not be awarded

[13] The district court on small claims appeal in *Caruso v. Apts. Downtown*, No. 14-1783, a companion case currently pending before the Supreme Court, reduced the IURLTA attorney fee award so that the damages plus attorney fees did not exceed $5000. While Tenant does not believe attorney fees are damages, if they are, fee reduction is preferable and more supportable than outright dismissal.

or, when combined with other damages, will not exceed $5000. The only situation where the combination of damages and attorney fees will exceed $5000 is where, as here, the landlord egregiously violates the IURLTA. In such a case, the liability of a landlord should not be reduced by treating attorney fees as damages.

In fact, rather than seeking to reduce the potential liability of landlords the Legislature has moved in the direction of increasing possible damages, in 2013 significantly increasing the punitive damages for wrongful withholding of a security deposit from $200 to two months rent and by making unlawful ouster, exclusion or diminution of services liable to two months rent as punitive damages. §§ 562A.12(7); 562A.26; 2013 Acts, ch 97, §§4,6.

In addition, treating attorney fees as damages and thus requiring transfer puts an unnecessary burden on the district court. Already busy with its own cases, it must now decide the appropriate attorney fees in a case tried in small claims. Certainly Landlord's suggestion of automatic dismissal is untenable and self-serving. That a case where a tenant manages, against all odds, to prevail and be awarded otherwise appropriate attorney fees and damages should then simply be dismissed due to a procedural error would be harsh and oppressive.

This Court should rule that attorney fees under the IURLTA are costs and not included in the jurisdictional limit of small claims and that Tenant's counsel should be awarded attorney fees. If Tenant prevails on appeal and on

attorney fees issues, Tenant requests this Court remand the instant action for the ascertainment of appropriate trial and 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).

VII. CONCLUSION

While there are many important issues presented, what this case truly reveals are two competing views of the IURLTA. Landlord's overarching vision is best encapsulated by its citation of *Castillo-Cullather v. Pollack*, 685 N.E.2d 478, (Ind. App. 1997) where the Indiana Court of Appeals relied on the 19th century doctrine of the primacy of freedom of contract to permit landlords to contractually alter or even waive the statutory requirements of the landlord tenant act. Landlord uses this argument repeatedly, asserting agreement by the parties, when in fact this "agreement" is nothing more than landlord's fiat embodied in its cunningly contrived standard lease.

A key impetus towards reform of landlord tenant relations in the late 60s and early 70s was the recognition that parties could not be said to freely agree when their relative socio-economic positions were heavily imbalanced. The wide difference in bargaining power between landlords and residential tenants was one of the key factors that brought about the creation of the implied warranty of habitability, see *Mease v. Fox*, 200 N.W.2d 791, 795 (Iowa 1972), 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

This case, where a young undergraduate, typical of Landlord's tenants, faces the largest landlord in Iowa City, graphically illustrates, but is not atypical of the ongoing imbalance between Iowa landlords and tenants and the continuing need for the protections of the IURLTA.

In distinction to Landlord, Tenant sees the IURLTA as a fair and reasonable allocation of the rights and responsibilities of landlord and tenants. It was put in place explicitly as an abrogation of freedom of contract because it became obvious that landlords were exploiting the weakness of tenants. It is not a set of optional guidelines. Its provisions were not intended to be changed, waived or altered, certainly not by a fine print, boiler plate contract of adhesion. The IURLTA is the law and must be obeyed as written by the Legislature and as interpreted by the courts.

WHEREFORE, Plaintiff/Appellant/Cross Appellee Elyse DeStefano requests that the district court's ruling on small claims appeal be reversed insofar as it reverses the trial court's judgment and be affirmed insofar as it affirms the trial court's judgment and that the case be remanded for the determination of Plaintiff/Appellant/Cross Appellee's counsel's trial and appellate attorney fees.

REQUEST FOR ORAL SUBMISSION

Appellant/Cross Appellee requests oral argument.

Respectfully submitted,

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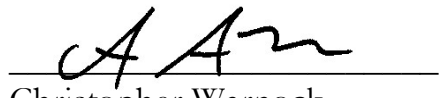
CERTIFICATE OF RULE 6.1401 COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)g(1) because this brief contains 9,156 words, excluding the parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) because this brief has been prepared in a proportionally spaced typeface using Word 2013 and Garamond 14 point font.



Christopher Warnock

January 21, 2015