IN THE SUPREME COURT OF IOWA

NO. 15-1350

DANIEL KLINE, FRANK SORIES and AMARIS MCCANN, et al.,
Plaintiffs-Appellees,

vs.

SOUTHGATE PROPERTY MANAGEMENT, LLC,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County
The Honorable Patrick R. Grady
No. CVCV076694

APPELLANT'S FINAL BRIEF

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ROUTING STATEMENT

This appeal raises both fundamental and urgent issues of broad public importance requiring prompt and ultimate determination by the Supreme Court. As a threshold matter, the Supreme Court in this appeal will be asked to address an issue of wide-spread application, i.e., whether Plaintiffs/Appellees have standing to even pursue this matter when the relief sought is nothing more than an award of statutory penalties - without a showing of actual damages, and an advisory opinion on the merits of a hypothetical dispute. This appeal further presents substantial issues of first impression, i.e., the Supreme Court in this appeal will be called upon to issue much needed guidance governing the statutory interpretation of Iowa Code Chapter 562A, the Iowa Uniform Residential Landlord Tenant Act ("IURLTA"), which will impact multitudes of Iowa residents (both tenants and landlords). The only decision arguably applicable is Staley v. Barkalow, 834 N.W.2d 873 (Iowa Ct. App. 2013) (table), which Defendant/Appellant respectfully submits was erroneously decided and should be overruled. Accordingly, this appeal is appropriately retained by the Supreme Court. IOWA R. APP. P. 6.1101(2)(c)(d)(f).

STATEMENT OF THE CASE

A. Nature of the Case

Defendant-Appellant SouthGate Property Management, LLC ("SouthGate") is an Iowa limited liability company which owns and/or manages various rental dwellings in the Iowa City/Johnson County area. (App. p. 1, 11, 20, 61). Plaintiffs-Appellees were tenants who signed leases with SouthGate in the 2012/2013 timeframe. (Id.). Specifically, the three named Plaintiffs/Appellees in this matter are Daniel Kline, Frank Sories, and Amaris McCann[1] (referred to collectively as "Tenants").

B. Procedural History

On August 29, 2014 Tenants filed this action, along with an application for class certification pursuant to Iowa R. Civ. P. 1.262, and a motion for partial summary and declaratory judgment. (App. pp. 1-60). Tenants sought a judgment declaring the mere inclusion of the challenged provisions in SouthGate's lease was prohibited under Iowa law, absent any proof of enforcement or actual damages, and moved for partial summary judgment on the declaratory judgment count. (Id.). SouthGate resisted Tenants' motion on October 20, 2014 and Tenants filed their reply on

[1] McCann was married after suit was filed and now goes by Amaris Hanson. (App. p. 141) (McCann Dep. p. 3:10-14). For ease of reference and to be consistent with the underling pleadings and documents, she will be individually referred to in this brief as "McCann."

November 20, 2014. (App. pp. 67-92). SouthGate filed a supplemental brief in support of its resistance on February 27, 2015 and Tenants filed their reply to SouthGate's supplemental resistance on March 9, 2015. (App. pp. 93-185).

On July 12, 2015, the district court granted Tenants' motion for partial summary judgment and entered declaratory judgment in Tenants' favor.[2] (App. pp. 188-200). The district court expressly adopted the reasoning of a district court ruling in Staley v. Barkalow, LACV07382 (which included a summary of the Iowa Court of Appeals' unpublished table decision in Staley v. Barkalow, 834 N.W.2d 873 (Iowa Ct. App. 2013) (table)). (Id.). The district court ruled that the mere inclusion of the challenged lease provisions, without any evidence of actual enforcement, was prohibited. (App. pp. 194-198). Consequently, the district court granted partial summary judgment in Tenants' favor, which resulted in the entry of a declaratory judgment in Tenants' favor. (App. p. 199). The district court also granted Tenants' motion for class certification via adoption and incorporation by reference to

[2] The ruling also denied SouthGate's March 31, 2015 motion for summary judgment, notwithstanding the fact that the Tenants submitted no evidence generating a dispute of material fact that SouthGate willfully included any allegedly prohibited provisions in its leases so as to trigger the damages and attorney fee provisions found at Iowa Code § 562A.11(2). (App. p. 199).

the Iowa Court of Appeals' decision in Staley, but without any independent analysis or required findings. (Id.).

STATEMENT OF FACTS

Kline and Sories were married co-tenants on a lease with SouthGate entered into on July 27, 2012 for a dwelling unit located at 425 Penn Court, #5 in North Liberty, Iowa. (App. p. 25). McCann was a tenant of South Gate from August 1, 2012 through July 28, 2014, subject to a lease for a dwelling unit located at 2103 Keokuk Street #7 in Iowa City, Iowa. (App. p. 33).

At the time the lawsuit was filed on August 29, 2014, Tenants were no longer under lease with SouthGate or living in a SouthGate dwelling unit.[3] (App. p. 119) (Kline Dep. p. 5:8-9); (App. p. 141) (McCann Dep. p. 5:16-18); (App. p. 161). When McCann vacated her SouthGate unit on July 28, 2014 she was not assessed a carpet cleaning charge upon her departure and it was not subsequently deducted from her deposit. (App. p. 145) (McCann Dep. p. 20:3-7); (App. p. 161). Kline and Sories were not assessed a carpet cleaning fee and SouthGate made no deductions from their security deposit. (App. p. 122) (Kline Dep. pp. 16:24-17:1); (App. p. 134) (Sories Dep. pp.

[3] SouthGate was the property manager for Kline and Sories' dwelling unit. As of November 30, 2013 the property owner, Prime Ventures, L.C., assumed management of the property. (App. p. 120) (Kline Dep. p. 7:9-15).

15:7-9; 12-18). No Tenant was assessed a nonsufficient funds (NSF) check fee. (App. p. 146) (McCann Dep. pp. 23:23-24:1). No Tenant had delivery of possession of their rental dwelling delayed. (App. p. 122) (Kline Dep. p. 15:16-19); (App. p. 133) (Sories Dep. p. 13:22-24); (App. p. 143) (McCann Dep. p. 12:22-24). Though maintenance calls were made on Tenants' rental dwellings, no Tenant was ever charged for any maintenance by SouthGate and nothing in the lease discouraged them from making such requests. (App. pp. 121-122) (Kline Dep. pp. 11:21-12:7, 14:10-15:6); (App. p. 133) (Sories Dep. p. 13:13-21); (App. pp. 143-144) (McCann Dep. pp. 12:25 – 15:17).

No Tenant identifies a single provision of their SouthGate lease that has been used against them in any way. (App. p. 122) (Kline Dep. p. 16:18-20); (App. p. 134) (Sories Dep. p. 15:1-3). No Tenant identifies a provision in their respective leases that violates Iowa law, although Kline believes there may be a "possibility of unfairness" to the agreement. (App. pp. 123, 125) (Kline Dep. pp. 19:14-19; 26:1-5); (App. pp. 132, 134) (Sories Dep. pp. 7:10-16; 14:14-21); (App. p. 147) (McCann Dep. p. 6:19-24). All Tenants personally disavow that they are seeking monetary relief from SouthGate, and aside from "justice for all" no Tenant can identify the relief they seek. (App. p. 123) (Kline Dep. pp. 18:21-19:1); (App. p. 146) (McCann Dep. pp.

24:19-25:4). At the time of their depositions, neither McCann nor Sories had even read the lawsuit filed on their behalf.[4] (App. p. 134) (Sories Dep. pp. 14:3-15:3); (App. p. 147) (McCann Dep. p. 6:5-10). The only relief sought specifically by Sories is that someone review the lease and make sure it is in accordance with the law. (App. pp. 134-135) (Sories Dep. pp. 16:7-10; 21-25; 18:13-19).

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO DISMISS THIS MATTER AS NO JUSTICIABLE CONTROVERSY EXISTS AND TENANTS LACK STANDING.

A. Standard of Review/Preservation of Error

District court decisions on standing are reviewed for errors at law. Godfrey v. State, 752 N.W.2d 413, 417 (Iowa 2008). SouthGate preserved error on this issue by raising it both in its supplemental resistance to Tenants' motion for partial summary and declaratory judgment and in its affirmative motion for summary judgment. (App. pp. 67-85, 93-176).

B. No Justiciable and Ripe Controversy Exists Rendering the Tenants Without Standing.

No Tenant suffered any actual injury in fact of a concrete nature by any of the challenged provisions in their leases with SouthGate. No

[4] In fact, Sories met his attorney for the first time at his deposition. (App. pp. 134-135) (Sories Dep. pp. 17:16-18:1).

imminent threat of future injury exists as to Tenants since their challenged leases with SouthGate ended before suit was even filed. Tenants are not current lessees with SouthGate, making injunctive relief unavailable, and no Tenant personally claims entitlement to actual damages. Tenants' lawsuit seeks nothing more than an advisory opinion that various clauses from SouthGate's 2012/2013 lease – had they *hypothetically* been enforced – would have resulted in a violation of IURLTA. The district court failed to even address this fundamental threshold issue and erred in granting summary and declaratory judgment in Tenants' favor where no justiciable controversy exists. Dismissal is the appropriate remedy.[5]

1. Tenants Have Suffered No Actual Injury and Seek only to have Adjudicated Hypothetical Violations of IURLTA.

Standing to sue requires that a party have "sufficient stake in an otherwise justiciable controversy to obtain judicial review of that controversy. Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004). This means "that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be

[5] Where a party is not properly situated to prosecute an action, the doctrine of standing prohibits the determination of the merits of a legal controversy irrespective of its correctness. Alons v. Iowa Dist. Ct. for Woodbury County, 698 N.W.2d 858, 864 (Iowa 2005) (citing 59 Am. Jur.2d Parties § 36, at 442 (2002)). "Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing." Id.

injuriously affected." Sanchez v. State, 692 N.W.2d 812, 821 (Iowa 2005) (noting that both requirements must be satisfied to confer standing); Baker v. City of Iowa City, 750 N.W.2d 93, 98-99 (Iowa 2008); Berent v. City of Iowa City, 738 N.W.2d 193, 202 (Iowa 2007).

In Lujan v. Defenders of Wildlife, the United States Supreme Court identified three elements required to establish standing:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not "conjectural" or "hypothetical." Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. 555, 560-61 (1993). See also Clapper v. Amnesty Intern. USA, 113 S.Ct. 1138, 1147 (2013) (reiterating the Lujan factors and noting that to be "imminent" the injury must be "certainly impending" and cannot rest on allegations of "possible future injury."). This Court cited the Lujan test with approval in Sanchez, 692 N.W.2d at 821. See also Alons, 698 N.W.2d at 869 (noting that the federal test for standing is "not dissimilar from our own test" and "therefore consider the federal authority persuasive on the standing issue.").

Standing focuses on the party and whether the dispute sought to be adjudicated will be presented in an adversary context capable of judicial resolution, i.e., does the party have a personal stake in the outcome of the controversy? Alons, 698 N.W.2d at 868. To have standing, a party must be injured in a personal and individual way – abstract injury is not enough. Id. Claimed violations of the law, without more, affect only the generalized interests of all citizens and represent an abstract injury insufficient to confer standing. Id. at 869 (citations omitted).

Tenants allege in their pleadings (as opposed to their depositions) that SouthGate's lease contains a myriad of impermissible fees, penalties, and liquidated damages and that the mere presence of these clauses in a lease may entitle Tenants to recover statutorily provided punitive damages and attorney fees. Notwithstanding the legal fallacy of the argument, no Tenant has been assessed any of the fees of which they complain. No Tenant has been assessed a NSF charge, a maintenance fee, a sublet fee, or a holdover fee. No Tenant was assessed a carpet cleaning fee. No Tenant's possession of delivery of their dwelling unit was delayed, and they have not exculpated or limited SouthGate's legal duties in any way. All of the Tenants admit under oath that they have suffered no concrete injury.

As Kline testified:

Q. What provisions of the lease [. . .] do you claim are prohibited?

A. I'm not aware.

Q. What provisions of the lease do you claim have been used you in some way?

A. I don't know.

Q. Have you been charged in any way by SouthGate above the normal rental fees for the unit?

A. No.

. . .

Q. What exactly then are you seeking from SouthGate in this case?

A. I'm seeking justice for all.

Q. Are you seeking monetary damages in this case?

A. No.

. . .

Q. So you want someone, for example the Court, to take a look at the rental agreement and say it is fair or it isn't fair?

A. Yes.

(App. pp. 122-123) (Kline Dep. pp. 16:9-23; 18:21-19:4; 20:3-6).

Frank Sories likewise concedes that he has suffered no injury.

Q. Do you claim that any of the provisions in the lease have been used against you in any way?

A. No.

. . .

Q. What relief are you seeking?

A. To ensure that all provisions of the lease are in accordance with existing law.

. . .

Q. You're not seeking any specific relief from SouthGate, you just want to have someone review the lease and make sure it's in accordance with the law; is that correct?

A. It's as close to correct as you could probably express.

(App. pp. 134-135) (Sories Dep. pp. 15:1-3; 16:7-10; 18:13-19).

Amaris McCann could identify no injury.

Q. Regarding your status as a plaintiff in this lawsuit, what would you want as relief from SouthGate?

A. I don't know. Define relief.

Q. Do you want money from SouthGate, or do you want something that SouthGate has done to be addressed by the Court? What would you like?

A. I'm not sure. Well, I guess I don't want money. I don't expect money.

Q. Is there something else that you're expecting?

A. I'm not sure.

(App. p. 146) (McCann Dep. pp. 24:19-25:4).

Whatever theoretical violations of IURLTA Tenants allege, no legally cognizable injury has been suffered by any Tenant so as to confer standing.

See Lee v. American Express Travel Related Servs., 2007 WL 4287557 (N.D. Cal. 2007) (rejecting plaintiffs' argument that they demonstrated injury in fact by the mere facial existence of allegedly unconscionable terms in their credit card agreements where the terms were not implicated or invoked against plaintiffs, and have not prohibited plaintiffs from asserting their rights), aff'd 348 Fed. Appx. 205 (9th Cir. 2009).[6] Absent an injury in fact, there can logically be no causal connection or likelihood of redress by a favorable decision. The district court erred in considering the merits of Tenants' claims and in granting Tenants' motion for partial summary and declaratory judgment. Dismissal is warranted.

2. Prudential Considerations of Ripeness and Mootness also Support Dismissal of Tenants' Declaratory Judgment Action as No Justiciable Controversy Exists.

"The first requirement for the bringing of a declaratory judgment action is that a justiciable controversy actually exists." Green v. Shama, 217

[6] See also Bowen v. First Family Fin. Servs., Inc., 233 F.3d 1331, 1341 (11th Cir. 2000). In Bowen, the plaintiff, in a class action, alleged that the mere inclusion of a provision in a loan agreement requiring arbitration violated the Truth-in-Lending Act and was unenforceable. However, since there was no evidence that the defendant invoked, or threated to invoke, the arbitration provision, the court held that the plaintiff lacked standing to challenge the enforceability of the provision. The court noted that in seeking declaratory or injunctive relief a "perhaps" or "maybe chance" that the arbitration provision will be enforced in the future is not enough to confer standing. The court concluded that such a result " . . . maintains a manageable caseload for the courts and prevents courts from becoming merely legal counselors and adjudications merely advice."

N.W.2d 547, 551 (Iowa 1974). There must be a "substantial controversy between the parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment." Id. Mere abstract questions do not create a justiciable controversy and will not support an action for declaratory judgment. Id. "There must be a live case or controversy that is actually being litigated in order for a court to declare the rights of the parties." Stew-Mc Development, Inc. v. Fischer, 770 N.W.2d 839, 848 (Iowa 2009). See also Citizens for Responsible Choices, 686 N.W.2d at 474; Sierra Club Iowa Chapter v. Iowa Dep't of Transp., 832 N.W.2d 636, 649 (Iowa 2013).

The requirement that an actual case or controversy exist is clear from the declaratory judgment rule itself. Iowa R. Civ. P. 1.1102 provides, in pertinent part (emphasis added):

> Any person . . . *whose rights, status or other legal relations are affected* by any statute . . . may have any question of the . . . validity thereof or arising thereunder determined, and obtain a declaration of rights, status or legal relations thereunder.[7]

[7] Tenants' reliance on Iowa R. Civ. P. 1.1103 ("A contract may be construed either before or after a breach") is misplaced as no Tenant was a party to the lease at the time declaratory judgment was sought so there can be no allegation of threatened breach and there is no allegation of an actual, contemporaneous breach of the terms of the lease. "The purpose of a declaratory judgment is to determine rights in advance." Bormann v. Bd. of Supervisors, 584 N.W.2d 309, 312 (Iowa 1998). In a declaratory judgment action, "there must be no uncertainty that the loss will occur or that the right asserted will be invaded." Id. No such showing is possible in this case.

In the absence of a justiciable controversy, the court must decline from issuing advisory opinions. Kucera v. Baldazo, 745 N.W.2d 481, 487 (Iowa 2008); Stream v. Gordy, 716 N.W.2d 187, 192 (Iowa 2006); Hartford-Carlisle Sav. Bank v. Shivers, 566 N.W.2d 877, 884 (Iowa 1997); Betchel v. City of Des Moines, 225 N.W.2d 326, 332 (1975) (confirming that courts are without jurisdiction to decide hypothetical and speculative questions and may not render declaratory judgments where the parties merely fear or apprehend that a controversy may arise in the future).

"If a claim is not ripe for adjudication, a court is without jurisdiction to hear the claim and must dismiss it." Iowa Coal Min. Co. v. Monroe Cnty, 555 N.W.2d 418, 432 (Iowa 1996). To be ripe for adjudication a case must present an "actual, present controversy, as opposed to one that is merely hypothetical or speculative." State v. Wade, 757 N.W.2d 618, 627 (Iowa 2008). A two-factor test applies in determining ripeness: "(1) are the relevant issues sufficiently focused to permit judicial resolution without further factual development, and (2) would the parties suffer hardship by postponing judicial action?" Sierra Club Iowa Chapter, 832 N.W.2d at 649 (citing Iowa Coal Mining Co., 555 N.W.2d at 432). "A case is moot if it no longer presents a justiciable controversy because the issues involved are academic or nonexistent." Homan v. Branstad, 864 N.W.2d 321, 328 (Iowa

2015) (citing Iowa Bankers Ass'n v. Iowa Credit Union Dep't, 335 N.W.2d 439, 442 (Iowa 1983)). "Our test is whether an opinion would be of force and effect with regard to the underlying controversy." Id. (citing Women Aware v. Reagen, 331 N.W.2d 88, 92 (Iowa 1983)).

McCann's lease with SouthGate ended and she vacated her SouthGate dwelling unit over a month before this lawsuit was even filed. (App. p. 146) (McCann Dep. p. 24:2-6). Kline and Sories' tenancy with SouthGate ended nine months before suit was filed. There is no immediacy or reality among the parties to this lawsuit as to the issues raised (which now present solely as an academic exercise), and there is no hardship the parties would suffer by postponing judicial action. Seeking "justice for all" and judicial review of the "fairness" of unapplied statutory provisions which were moot prior to filing does not present a ripe, justiciable controversy. Dismissal is the only remedy.

II. THE TRIAL COURT ERRED IN GRANTING TENANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR DECLARATORY JUDGMENT.

A. Standard of Review/Preservation of Error.

Generally, this Court's standard of review for declaratory judgment actions "is determined by the manner in which the action was tried to the district court." Shelby County Cookers, L.L.C. v. Utility Consultants

Intern., Inc., 857 N.W.2d 186 (Iowa 2014) (citing SDG Macerich Props., L.P. v. Stanek Inc., 648 N.W.2d 581, 584 (Iowa 2002)). When review entails a trial court's summary judgment ruling, this Court's review is based on the propriety of the summary judgment ruling, not the declaratory judgment. Id. (citing Boelman v. Grinnell Mut. Reins. Co., 826 N.W.2d 494, 500 n.1 (2013) and Ferguson v. Allied Mut. Ins. Co., 512 N.W.2d 296, 297 (Iowa 1994)). Summary judgment rulings based on questions of statutory interpretation are reviewed for correction of errors at law. Id.; Rolfe State Bank v. Gunderson, 794 N.W.2d 561, 564 (Iowa 2011); Miller v. Marshall County, 641 N.W.2d 742, 746 (Iowa 2002).

SouthGate preserved error by resisting Tenants' motion for partial summary judgment and declaratory judgment.

B. The Challenged Lease Provisions Do Not Violate Iowa Code Chapter 562A.

Under the plain language of IURLTA, there are only four prohibited provisions in a (non-single family) residential lease agreement. See Iowa Code § 562A.11:

> 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.

Aside from these specifically delineated prohibitions, and unless otherwise prohibited by rule of law, a landlord and tenant may include in their rental agreement any term or condition such as rent, term of the agreement, and other provisions governing the rights and obligations of the parties. Iowa Code § 562A.9. Notwithstanding this finite list of proscriptions, Tenants assert in sweeping and unsupported fashion (both legally and factually) that their leases were replete with a various assortment "illegal" provisions, the mere inclusion of which entitles them to statutory damages. The district court agreed and erroneously declared the mere inclusion of these non-prohibited lease provisions to be "illegal."

1. As Staley is Wrongly Decided, the District Court's Reliance on Staley Cannot be Affirmed.

Iowa Code § 562A.11(2) provides (emphasis added):

> 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*.

In Staley v. Barkalow, 834 N.W.2d 873 (Iowa Ct. App. 2013)(Table), the Court of Appeals erroneously decided that "willfully uses," as set forth in Iowa Code section 562A.11(2) does not require "willful enforcement," but encompasses the mere "willful inclusion" of prohibited provisions in a lease. The court then concluded the willful inclusion alone of a prohibited provision entitled every tenant to statutory damages and, if such provision was enforced, to actual damages as well.

This non-binding decision misinterprets the plain language of the statute and was wrongly decided on several bases. First, the statute expressly provides the remedy for the "inclusion" of a prohibited provision – it is unenforceable. If the legislature had intended to equate "use" with mere "inclusion," the statute would not have provided varying remedies for "inclusion" versus "use." Therefore, under the plain language of the statute, more than "inclusion" is required to trigger the damages provision.

Second, "use" must be construed to require enforcement as enforcement is required in order to cause actual damages – without which Tenants lack standing, as argued above. Any alleged "chilling effect" that a prohibited lease term may hypothetically have on a tenant's assertion of rights is not sufficient injury-in-fact to confer standing as such does not represent "specific present objective harm or threat of specific future harm."

See Laird v. Tatum, 408 U.S 1, 13-14 (1972); Amnesty Int'l U.S.A. v. McConnell, 646 F. Supp.2d 633, 654 (S.D.N.Y. 2009) (finding no standing where "chilling effect" of authorized surveillance is not a "threat of direct harm"); Morrison v. Bd. of Educ. of Boyd County, 521 F.3d 602, 609 (6th Cir. 2008) ("In order to have standing . . . a litigant alleging chill must still establish that a concrete harm – i.e., enforcement of a challenged statute – occurred or is imminent.").

Further, given the conjunctive correlation between actual and punitive damages, both per the terms of the statute ("a tenant may recover actual damages sustained by the tenant *and* not more than three month's periodic rent and reasonable attorney fees), and as long recognized in Iowa jurisprudence, the "willful use" of a prohibited provision necessarily requires enforcement.[8] Without enforcement, no tenant can incur actual damages, and without actual damages there can be no punitive damages.[9]

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[8] Compare, e.g., 15 U.S.C. § 1681n(a)(1)(A) (under FCRA's liability provision, a person who willfully fails to comply is liable for "any actual damages sustained by the consumer as a result of the failure ***or*** damages of not less than $100 and not more than $1,000); Bakker v. McKinnon, 152 F.3d 1007, 1013 (8th Cir. 1998) (noting that actual damages for willful noncompliance are not a statutory prerequisite to an award of punitive damages under the Fair Credit Reporting Act); Hammer v. Sam's East, Inc., 754 F.3d 492, 499-500 (8th Cir. 2014) ("Notably, Congress described these permissible damages in the *disjunctive*, which indicates that a consumer can bring a claim to recover statutory damages "of not less than $100 and more

Closely related to the standing requirement, is the common law rule in Iowa that plaintiffs are entitled to recover exemplary damages only if there is a showing of actual damages. Syester v. Banta, 133 N.W.2d 666, 675 (Iowa 1965) ("It is a well settled and almost universally accepted rule in the law of damages that a finding of exemplary damages must be predicated upon a finding of actual damages . . . [I]f no actual damages have been sustained, the defendant merits no harsh treatment, and [. . .] there is no foundation on which exemplary damages may be based."); Hockenberg Equipment Co. v. Hockenberg's Equipment & Supply Co. of Des Moines, Inc., 510 N.W.2d 153, 156 (Iowa 1993) (noting that a plaintiff must show defendant actually caused some injury to support a claim for punitive damages); Sundholm v. City of Bettendorf, 389 N.W.2d 849, 853 (Iowa 1986) ("some actual damages are necessary to support a claim for punitive damages"); Pringle Tax Service, Inc. v. Knoblauch, 282 N.W.2d 151, 154 (Iowa 1979). The term "use" in section 562A.11(2) must be construed in

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more than $1,000" as an alternative to a claim for actual damages.") (emphasis added).

[9] See State v. Kaster, 469 N.W.2d 671, 674 (Iowa 1991) ("The purposes of a fine, which is stated [in the statute] . . . is purely punitive."); Stevenson v. Stoufer, 21 N.W.2d 287, 288 (Iowa 1946) (statutory treble damages are a penalty); Tull v. United States, 481 U.S. 412, 422, n. 7 (1987) ("[T]he remedy of civil penalties is similar to the remedy of punitive damages.").

light of this Iowa common law to require enforcement resulting in actual damages.

In an analogous circumstance, in KGB Investments v. Greenspoint Prop. Owners Assoc., Inc., 2015 WL 5770828 (Tex. Ct. App. Oct. 1, 2015), the court held a plaintiff was not entitled to a statutory penalty without a showing of actual damages. In KGB Investments, a property owners' association sued to enforce a restrictive covenant, seeking an award of statutory damages of $200 a day for the violation. Id. at *3. The Texas statute, like Iowa's common law, provides that exemplary damages can be awarded only if damages other than nominal actual damages were awarded. The court noted that the statutory recovery constituted punitive or exemplary damages and, therefore, are not available if the plaintiff had sustained no other damages. Id. at *4.

In this case, without "use," vis a vis, enforcement, there can be no showing of actual damages and without such a showing statutory treble rent may not be awarded. Therefore, Tenants were not entitled to partial summary judgment because there is no evidence they have sustained any damages – a required showing both to establish standing and to prevail on the merits of their claim. An interpretation to the contrary also would implicate serious constitutional and due process concerns occurring when

exemplary damages are excessive as compared to actual damages. See Wilson v. IBP, Inc., 558 N.W.2d 132, 145-48 (Iowa 1996) (holding punitive damage award violated due process where ratio of compensatory to punitive damages was 1:3750); Home Pride Foods of Iowa v. Martin, 2003 WL 23005185 (Iowa Ct. App. 2003) (holding award of $82,000 in punitive damages violated defendant's due process rights where plaintiff was awarded $0 in actual damages).

2. The Court of Appeals Erred in Staley by Finding Injury in Fact Premised on a Hypothetical Chilling Effect.

While, as discussed above, the court in Staley misinterpreted "use" to mean mere inclusion as opposed to enforcement of a prohibited provision, assuming, arguendo, that inclusion is all that is required from a statutory interpretative analysis, the rules change when the tenants seek court intervention. At that time, the tenants assume the burden of showing that they have the requisite standing to utilize limited judicial resources. This requires an injury in fact of a concrete and particularized nature which, under the facts of this case, necessarily means actual damages. And actual damages can only result from the enforcement of a prohibited provision.

The court in Staley erred by finding an injury in fact presumed on a so-called and unsubstantiated "chilling effect" or "intimidation" that the

mere inclusion of a prohibited provision has on a hypothetical tenant.[10] Certainly such vagueness and speculation cannot form the basis of the type of particularized injury uniformly required for standing.

Moreover, the Staley court's "presumed injury in fact" is not supported by the evidence in this case. None of the Tenants have any real dispute with SouthGate concerning their lease terms and certainly did not testify that they were in any manner "intimidated" from challenging any lease provision they felt was unfair.

If this Court affirms the Staley decision, the floodgates to further litigation will open to redress non-existent harms, contrary to the very principles and purposes standing is designed to protect against. Tenants who never incurred actual damages and never were "intimidated," "chilled," or otherwise tangibly injured in any way (because no actual or threatened enforcement took place) will use the courts to recover statutory damages (either individually or as a member of a class) simply because a prohibited provision is found in their lease. This is not using the courts to resolve a genuine dispute involving individuals and putative class members who face

[10] ". . .[T]he trial court erred in interpreting Chapter 562A to require the landlord's enforcement of a prohibited provision as a prerequisite to a tenant suffering injury or harm in all situations." Staley at *7.

". . .immediate, tangible harm absent the grant of declaratory or injunctive relief." Bowen, supra, at 1340.

3. The Various Fees Theoretically Assessable Under the Lease do Not Implicate the Provisions of IURLTA Limiting a Landlord's Recovery to Actual Damages.

Tenants argue that SouthGate's lease contains various fines, penalties, liquidated damages and charges which violate the purported limitation under IURLTA that a landlord can only recover its actual damages for a tenant's breach of any lease provision or violation of IURLTA. Tenants read IURLTA far too expansively, and the governing case law underscores the speciousness of Tenants' position.

Tenants challenge the following provisions of SouthGate's lease:

¶ 3 – **RENT** . . . A Twenty-Five Dollar ($25) charge will be assessed for any checks returned "NSF" or returned for any other reason.

¶ 4 – **OCCUPANTS** . . . In addition to the monthly rental amount, there will be a Fifty Dollar ($50) charge per month for any additional tenant added after the date of this Rental Agreement over the number described above.

¶ 9 – **UTILITIES, UTILITY RATES AND CHARGES** . . . A Fifty Dollar ($50) handling fee will be charged for each billing received/paid by Landlord that has not been transferred into Tenant's name.

¶ 12 – **MAINTENANCE BY LANDLORD** . . . Maintenance is charged at current rate per hour as determined by Landlord, plus parts. A separate trip charge may also be charged by Landlord.

¶ 15 – **PETS** . . . In the event that Tenant breaches the terms of this Paragraph 15, Landlord shall have the right to assess liquidated

damages in the amount of Five Hundred Dollars ($500) plus action damages and/or terminate this Rental Agreement, in Landlord's sole discretion.

¶ 19 – **ASSIGNMENT AND SUBLETTING** . . . [Requiring sublet fee] of Three Hundred Dollars ($300).

¶ 22 – **HOLDING OVER AFTER THE TERM OF THE LEASE.** If Tenant remains in possession after the termination of this Rental Agreement, whether the termination is at the option of the Landlord or not, Tenant Agrees to pay the sum of Three Hundred Dollars ($300) per day and any damages incurred to Landlord, until possession is surrendered to Landlord.

¶ 27 - **TERMINATION FOR BREACH OF CONTRACT . . .** Should Landlord at any time terminate this Rental Agreement for any breach by Tenant, in addition to any other remedies it may have, it may recover from Tenant all damages that Landlord may incur by reason of such breach, including the cost of recovering the Dwelling Unit and including the value at the time of such termination of the excess, if any, of this amount of rent and charges equivalent to rent reserved in this Rental Agreement for the remainder of the stated term, all of which amounts shall be immediately due and payable from Tenant to Landlord. Leasing of the Dwelling Unit to a subsequent tenant within the period of this Rental Agreement shall reduce any amount owing.

(App. pp. 1-8).

Tenants challenge the following provisions of SouthGate's Building and Property Rules:

¶ 10 – A Forty-Five ($45) fee will be charged to Tenant for lockout service calls from 8:00 a.m. to 5:00 p.m. Monday through Friday (except holidays) and an Eighty-Five ($85) fee will be charged at all other times.

¶ 11 – Copies of keys may be made by Landlord for Fifteen Dollars ($15) per key.

¶ 12 – The violation of any Rental Agreement provision or HOA or Apartment Community Rule will result in a minimum Twenty-five Dollar ($25) charge per violation.

(App. pp. 1-3, 9).

The above clauses are not "prohibited" provisions under Iowa Code §562A.11, and are not otherwise barred by IURLTA. Nothing in IURLTA bars the imposition of a bad check charge, an additional occupancy fee, an administrative subletting fee, a pet surcharge or a holdover fee.

IURLTA does provide, in the event of a tenant's *failure to maintain* the premises, a landlord is permitted to "enter a dwelling unit and cause the work to be done in a competent manner and submit an itemized bill for the *actual and reasonable cost or the fair and reasonable value . . .*" Iowa Code § 562.28A (emphasis added). IURLTA entitles a landlord to recover *actual damages* from a tenant "[i]f the rental agreement requires the tenants to give notice to the landlord of an *anticipated absence* as provided in section § 562A.20, and the tenant *willfully* fails to do so. Iowa Code § 562A.29(1). *If a lease is terminated*, a landlord has a claim for possession and for rent and a separate claim for *actual damages* for breach of the rental agreement. Iowa Code § 562A.32 (emphasis added). If a tenant *refuses to allow lawful access*, the landlord may recover *actual damages* and reasonable attorney fees. Iowa Code § 562A.35 (emphasis added).

This Court did not hold in D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302 (Iowa 1996) that a landlord's recovery is limited to its actual damages whenever any lease provision is breached or IURLTA is violated in any way. Rather, at issue in D.R. was a landlord's attempt to recover unpaid rent after a tenant's abandonment of the premises and termination of the lease, where the landlord failed to present any evidence that attempts were made to re-rent the unit. Id. at 305. "We conclude the landlord failed to establish an essential element of its claim – what attempts were made to rerent the abandoned unit – and therefore failed to establish it was entitled to recover any portion of April rent from Frost." Id. The Court further rejected the landlord's attempt to recover under Iowa Code §562A.32 (Remedy After Termination) its actual damages for debris removal where it provided no evidence to substantiate that it had, in fact, sustained actual damages. Id.

> Here, the landlord did not present any testimony or other evidence to support the value of its demand for debris removal. In fact, the landlord did not present evidence that Frost's debris was removed. Absent evidence that actual damages were sustained, it was error to award any sum for debris removal. We reverse the award made for debris removal.

Id.

None of the provisions of IURLTA limiting recovery to actual damages apply to the fees and other charges found in SouthGate's lease. None of the complained of fees fall under the auspices of a tenant's failure

to maintain the premises, anticipated absence, termination of lease or refusal to allow access. And as set forth above, none of these fees were ever assessed against the Tenants, rendering hypothetical consideration of these provisions the epitome of an academic exercise resulting in an advisory opinion. See Gordon v. Pfab, 246 N.W.2d 283 (Iowa 1976) ("A party who contends that a liquidation clause is in reality a penalty has the burden to plead that fact and prove the actual damages in the trial court.").

Nor do these provisions constitute a penalty clause. In Rohlin Constr. v. City of Hinton, 476 N.W.2d 78 (1991) this Court, relying on Restatement (Second) of Contracts § 356(1) (1981), discussed the parameters of a permissible liquidated damages contract provision versus an impermissibly large penalty clause.

> The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation.
> . . .
>
> Two factors combine in determining whether an amount of money fixed as damages is so unreasonably large as to be a penalty. The first factor is the anticipated or actual loss caused by the breach. The amount fixed is reasonable to the extent that it approximates the actual loss that has resulted from the particular breach, even though it may not approximate the loss that might have been anticipated under other possible breaches. . . . The second factor is the difficulty of proof of loss. The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty, the easier

> it is to show that the amount fixed is reasonable . . .A determination whether the amount fixed is a penalty turns on a combination of these two factors. If the difficulty of proof of loss is great, considerable latitude is allowed in the approximation of anticipated or actual harm. If, on the other hand, the difficulty of proof of loss is slight, less latitude is allowed in that approximation.

See also City of Davenport v. Shewry Corp., 674 N.W.2d 79 (Iowa 2004) (noting the observation in Rohlin that liquidated damage clauses are favored as long as not unreasonably large so as to constitute a penalty).

Tenants have the burden to prove that the charges are, in reality, a penalty and to prove the actual damages. No such evidence exists in this record (let alone materially undisputed evidence) to support such a finding. Rather, the record evidence demonstrates unequivocally that Tenants have incurred no actual damages and that the amounts hypothetically chargeable to tenants under the lease are *below* market rates. (App. pp. 113-115). Thus, the district court erred in granting partial summary judgment and declaratory judgment on Tenants' claim that above cited lease provisions were "illegal and should not have been included in the standard lease utilized by Defendant." (App. p. 199).

4. The "Automatic" Carpet Cleaning Charge is not Automatic and Does Not Violate IURLTA.

The district court found that a provision in SouthGate's building rules providing for carpet cleaning following a tenant's vacancy of a dwelling unit violated Iowa Code § 562A.12(3). The district court erred.

Iowa Code § 562A.12(3) governs a landlord's handling of rental deposits upon the termination of a tenancy and provides:

> a. A landlord shall, within thirty days from the date of termination of the tenancy and receipt of the tenant's mailing address or delivery instruction, return the rental deposit to the tenant or furnish to 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. The landlord may withhold from the rental deposit only such amounts as are reasonably necessary for the following reasons:
>
> (1) To remedy a tenant's default in the payment of rent or of other funds due to the landlord pursuant to the rental agreement.
>
> (2) To restore the dwelling unit to its condition at the commencement of the tenancy, ordinary wear and tear excepted.
>
> (3) To recover expenses incurred in acquiring possession of the premises from a tenant who does not act in good faith in failing to surrender and vacate the premises upon noncompliance with the rental agreement and notification of such noncompliance pursuant to this chapter.

The challenged provision is found in SouthGate's Building and Property Rules:

> **¶ 9 of Building and Property Rules:** All carpets are professionally cleaned at the end of each tenancy. The departing tenant had professionally cleaned carpet at move-in, and the tenant will be charged for the professionally cleaned carpet at departure. Any extra paining or carpet cleaning needing to be done will be deducted from Tenant's Rental Deposit.

(App. pp. 1-3, 9).

Iowa Code § 562A.12 addresses only the return of a tenant's rental deposit upon termination of the tenancy, and does not prohibit a landlord from affirmatively charging a tenant for carpet cleaning. Rather, § 562A.12 requires that a landlord, within thirty days after termination of the tenancy, return the rental deposit in full *or* furnish a written statement showing the reason for the withholding, including a specification of the nature of the damage for any sums withheld for the restoration of the dwelling unit. The amount withheld from the rental deposit must be limited to the amount reasonably necessary to restore the dwelling unit to its condition at the commencement of the tenancy and cannot be withheld to cover ordinary wear and tear.

SouthGate's building rules do not absolve SouthGate from its statutory obligation to provide an itemized statement of rental deposit deductions and the record evidence demonstrates that SouthGate does just that. (App. p. 161). Aside from counsel's contention, there is no evidence

in this record that a Tenant failed to receive the requisite written statement itemizing the withholdings from their rental deposit or that any carpet cleaning charge was automatically deducted without an inspection of the premises. To the contrary, the undisputed record evidence demonstrates that SouthGate does perform an individualized inspection and charges for carpet cleaning on a case-by-case basis. (App. p. 71). McCann did, in fact, receive an itemized statement and Kline and Sories were still living in the dwelling unit with their rental deposit intact at the time the lawsuit was filed. McCann's carpet was professionally cleaned following her tenancy, but no deduction was made from her rental deposit for that carpet cleaning, rendering hollow Tenants' argument that such charges are "automatic." Further, SouthGate's building rules limit the rental deposit deduction to ***extra*** carpet cleaning, i.e., that above and beyond ordinary wear and tear, so it does not run afoul of IURLTA.

The trial court erred in granting Tenants' motion for partial summary judgment and declaring this provision of SouthGate's building rules to be "illegal."

5. The Purported Waiver of Liability Clauses Do Not Limit SouthGate's Liability or Exculpate SouthGate in any Prohibited Manner.

Under Iowa Code § 562A.11(a) and (b), lease provisions requiring a party to "waive or to forego rights or remedies under this chapter" or under which a party "[a]grees to the exculpation or limitation of the other party arising under law" are "unenforceable." Iowa Code § 562A.11(2). The district court erroneously declared the following lease provisions to be prohibited under Iowa Code § 562A.11 and further erred in ruling that the mere inclusion of such clauses in a lease – absent any evidence of enforcement or actual damages sustained by the tenants – is "illegal."

> ¶ 11 - **Delay of Possession.** ***Subject to other remedies at law***, if Landlord, after making a good faith effort, is unable to give Tenant possession at the beginning of the term, the rent shall be rebated on a pro rata basis until possession can be given. The rebated rent shall be accepted by Tenant as full settlement of all damages occasioned by the delay, and, if possession cannot be delivered within ten (10) days of the beginning of the term, this Rental Agreement may be terminated by either party giving five (5) days written notice.

(App. p. 5).

This clause expressly reserves a tenant's remedies under Iowa Code § 562A.22 and waives no available rights or remedies, i.e., "***subject to other remedies at law***." This clause provides that in the event SouthGate is unable to timely deliver possession, rent will be abated until it can. This is wholly

consistent with Iowa Code § 562A.22. Nothing in this clause forecloses a tenant's right to refuse the rent abatement as a make-whole remedy and instead file an action against either SouthGate or the wrongful possessor to recover their actual damages. Likewise, nothing in this clause precludes a tenant from arguing that the failure to deliver possession was willful and in bad faith and seek recovery of actual damages and reasonably attorney fees. Again, this is a merely hypothetical argument seeking an advisory opinion, as no Tenant had delivery of possession of their rental dwelling delayed.

Tenants further argue that the following clause in SouthGate's lease violates Iowa Code §562A.11(1):

> ¶ 30 - Within three (3) days of the commencement of occupancy, Tenant shall complete and return to Landlord the Apartment Inspection Checklist, Smoke Alarm and Fire Extinguisher checklists (if applicable). If Tenant does not within three (3) days complete and return those checklists, Tenant shall be presumed as acknowledging that there are no defects or damages in the Dwelling Unit. Landlord agrees to review the checklists and notify Tenant of any objections within seven (7) days of receipt of completed checklists. If Landlord does not notify Tenant of landlord's objections within seven (7) days of receipt of completed checklists, Tenant's evaluation shall be deemed accepted by Landlord. These checklists and objections (if any) shall be retained by Landlord.

(App. p. 7).

It is incongruous to read this provision as violating § 562A.11. Nothing in ¶ 30 relieves SouthGate of its duty to provide and maintain fit

premises throughout a tenant's occupancy. Nothing in ¶ 30 exculpates or limits the landlord's liability arising under law in any fashion. Rather, such a checklist provides a ready means for a tenant to evaluate the dwelling unit and note any existing damage or defects at the commencement of the occupancy term so that the landlord can address those issues while presumptively absolving the tenant from future liability for same. The lease must be read in its entirety and within the real world context, e.g., if tenant assumes occupancy and fails to disclose a preexisting tear in the carpet and such damage exists at the expiration of the tenancy period, such damage will be presumed to have been caused by the tenant. This checklist provides a means for tenants to insulate themselves from liability for preexisting damages and in that sense is indistinguishable from the checklist completed every time a consumer rents a car.

Such a reading also neglects the other provisions of the lease where SouthGate expressly recognizes and embraces its statutory duty to maintain the dwelling unit in a safe and habitable manner – as well as the tenant's ongoing duty to notify Southgate of any defective conditions of the dwelling unit. See e.g.,:

> ¶ 12 - MAINTENANCE BY LANDLORD. Landlord shall maintain the Dwelling Unit in accordance with applicable building and housing codes and in accordance with the Iowa Uniform Residential Landlord and Tenant Law.

¶ 13.I - Any defective condition of the Dwelling Unit, which comes to Tenant's attention, shall be reported to the Landlord as soon as practical.

(App. p. 5).

"Because leases are contracts as well as conveyances of property, ordinary contract principles apply." Walsh v. Nelson, 622 N.W.2d 499, 503 (citing Dickson v. Hubbell Realty Co., 567 N.W.2d 427, 430 (Iowa 1997)). A contract must be interpreted as a whole and courts must strive to give effect to all of the language of a contract. Fashion Fabrics of Iowa, Inc. v. Retail Investors Corp., 266 N.W.2d 22, 26 (Iowa 1978); Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991) ("[A]n interpretation which gives a reasonable, lawful and effective meaning to all terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or to no effect.");

Nothing in either of these challenged clauses is prohibited under Iowa Code § 562A.11, rendering erroneous the district court's ruling to the contrary - especially when considering the lease as a whole and giving effect to all of its terms. Further, material fact disputes were demonstrated as to all challenged lease provisions which renders summary and judgment declaratory inappropriate.

III. THE TRIAL COURT ABUSED ITS DISCRETION IN CERTIFYING THIS MATTER AS A CLASS ACTION.

A. Standard of Review/Preservation of Error

District court rulings on class certification are reviewed for abuse of discretion. Comes v. Microsoft Corp., 696 N.W.2d 318, 320 (Iowa 2005). Such an abuse of discretion lies where the district court's grounds were clearly unreasonable. Vos v. Farm Bureau Life Ins. Co., 667 N.W.2d 36, 44 (Iowa 2003). SouthGate preserved error by resisting Tenants' motion for class certification.

B. Neither the Procedural nor Substantive Requirements for Class Certification Were Satisfied.

Assuming, for purposes of argument, that this matter is not dismissed on standing grounds or upon a reversal of Staley, the district court's certification of a class was an abuse of discretion, both procedurally and substantively. Whether to certify a class is a significant responsibility, not appropriately discharged by reference and incorporation of another judge's decision in a different case. Such shorthand certifications should not be sanctioned by this Court.[11]

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[11] Class certification is proper only if "the trial court is satisfied, after rigorous analysis that the prerequisites of the [class action rule] have been satisfied." Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541, 2551 (2011) (quoting General Tele. Co. of Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364 (1982)).

The most glaring abuse of discretion lies in the district court's failure to appropriately describe the class being certified. Apparently, the district court accepted the class description set forth in the relief requested provision of Tenants' Motion to Certify, which provided in pertinent part:

> Plaintiffs request declaratory judgment and ask that the instant action be certified as a class action with the class consisting of all of the Defendants' tenants with the same or substantially similar standard leases and lease rules.

(App. p. 23).

There is no time limitation included. What is a "substantially similar" lease? Must the lease be identical to the lease signed by Tenants during 2012-2013? Does the pertinent statute of limitations play a role and, if so, where does the district court address what lease years will be included in the class? Leaving unanswered these questions renders a class certification ruling an abuse of discretion.

Iowa R. Civ. P. 1.261 permits the certification of a class action if there is a question of law or fact common to a class of persons so numerous that joinder of all persons is impracticable. A court may certify an action as a class action if it *finds all of the following:*

(a) The requirements of rule 1.261 [numerosity and commonality] have been satisfied;

(b) A class action should be permitted for the fair and efficient adjudication of the controversy; and

(c) The representative parties fairly and adequately will protect the interests of the class.

Iowa R. Civ. P. 1.262(2). Tenants have the burden of establishing that a purported class meets the prerequisites. The failure of proof on any one of the prerequisites is fatal to the class certification. Vos, 667 N.W.2d at 45 (citing City of Dubuque v. Iowa Trust, 519 N.W.2d 786, 791 (Iowa 1994)).

Per Iowa R. Civ. P. 1.264(2), an order certifying a class action "shall state the reason for the court's ruling and its findings on the facts listed in rule 1.263(1)." The district court's decision must "weigh and consider the factors and come to a reasoned conclusion as to whether a class action should be permitted for a fair adjudication of the controversy." Luttenegger v. Conseco Fin. Serv. Corp., 671 N.W.2d 425, 437 (Iowa 2003). See also Martin v. Amana Refrigeration, Inc., 435 N.W.2d 364, 369 (Iowa 1989) (affirming the district court's class certification order where the ruling indicated that the court carefully considered all of the factors and then made a finding that a class action provided the best means for a fair and efficient adjudication of the controversy).

In determining whether the representative parties will fairly and adequately represent the interests of the class, the trial court must find all of the following:

(a) The attorney for the representative parties will adequately represent the interests of the class;

(b) The representative parties do not have a conflict of interest in the maintenance of the class action; and

(c) The representative parties have or can acquire adequate financial resources, considering rule 1.276, to ensure that the interests of the class will not be harmed.

Iowa R. Civ. P. 1.263(2). This showing is required because, in a class action, the interests of those not present before the court are conclusively determined on the strength of the case made by the representative parties. Vignaroli v. Blue Cross of Iowa, 360 N.W.2d 741, 746 (Iowa 1985). Thus, it is imperative that the named parties demonstrate the ability to protect the interests of the class. Id. Along this vein, the requirement that a class representative actually be a member of the class is implicitly required. Id.

C. The District Court Abused its Discretion in Certifying this Matter as a Class Action.

Rather than hold the contemplated hearing, undertake any of the required analyses or make the requisite findings, outlined above, the district court merely ruled:

> The Court turns to Plaintiffs' First Motion for Class Certification. In Staley, under nearly identical class certification facts, the Iowa Court of Appeals determined that certification of a class is appropriate. Therefore, this matter should be and is certified as a class action. Plaintiffs' counsel shall take all appropriate steps to effectuate this certification pursuant to the Iowa Rules of Civil Procedure.

(App. p. 199).[12]

1. The District Court Failed to Make the Required Rule 1.263 Findings.

In addition to failing to define the class, the district court made no findings on the Rule 1.263(1) factors, the majority of which weigh against class certification. Rule 1.263(1)(a),(c) and (h) are not satisfied where the named Tenants have suffered no injury and have personally disavowed any claim to monetary relief. Compared to Tenants' pursuit of justice and judicial review of an expired lease, putative class members who may have, in fact, suffered an actual injury-in-fact compensable by money damages, will have a substantial and incompatible interest in controlling the prosecution of their own actions. Rule 1.263(1)(d) and (e) are not met as SouthGate's actions regarding the challenged provisions vary according to each particular situation, so common questions of fact do not predominate. Rule 1.263(1)(f) is not satisfied because much more practical and efficient

[12] A careful reading of Staley reveals that the operative facts are not "nearly identical." In Staley, the representative plaintiffs (unlike Tenants in this matter) included current tenants and former tenants who actually had carpet cleaning charges automatically deducted from their rental deposits. Further, the challenged lease(s) in Staley (unlike the lease at issue in this suit) made tenants responsible for indoor and outdoor maintenance and repair and contained actual indemnity and exculpatory provisions.

means exist to adjudicate those claims where tenants have a specific, identifiable injury, i.e., small claims court.

2. The Trial Court Made No Findings as Required by Rule 1.262(2) that the Class will be Fairly and Adequately Represented.

a. As Tenants Lack Standing, they Cannot Fairly and Adequate Represent the Class.

"On the issue of adequate representation, each case must be judged on its own facts. Resolution of the issue depends on all the circumstances presented." Stone v. Pirelli Armstrong Tire Corp., 497 N.W.2d 843, 847 (Iowa 1993). The status of the purported class representative presents a legitimate area of inquiry. Id. When a significant portion of the relief requested is declaratory in nature, the representative party's direct interest in obtaining such relief must be considered, i.e., does the representative party have standing?

This Court has recognized a standing requirement for class representatives, i.e., "a class representative must be a member of the class sought to be represented." Hammer v. Branstad, 463 N.W.2d 86, 89 (Iowa 1990) (citing Vignaroli, 360 N.W.2d at 746). It is necessary that the named plaintiffs demonstrate that they have suffered the same type of injury for which they seek relief on behalf of the class. Id. ("If it is ultimately determined in the present litigation that plaintiffs Hammer and Drury have

not sustained the type of injury for which they are seeking relief on behalf of the class, they may no longer continue as class representatives.").

In Stone, the trial court's denial of class action certification on the basis of inadequate representation was affirmed, in part because the representative party had no direct interest in obtaining or standing as to the injunctive relief requested (a preliminary and permanent injunction against Pirelli forbidding it to maintain a sexually discriminatory work environment) because she was no longer employed at Pirelli. Stone, 497 N.W.2d at 848. Thus, Stone's only interest was in recovering individual monetary damages for the discrimination she allegedly suffered. Id.

A recent decision from the Supreme Court of Ohio applies these principles in the class action context. In Felix v. Ganley Chevrolet, Inc., -- N.E.3d --, 2015 WL 5039233 (Ohio August 27, 2015), the trial court certified a class of all consumers who purchased vehicles within a two-year period from a car dealership through a purchase agreement which included an unconscionable arbitration provision in violation of the Ohio Consumer Sales Protection Act. The trial court held that each class member was entitled to the minimum $200.00 award statutorily provided for any such violation. The Ohio Supreme Court reversed the class certification, concluding that the plaintiffs failed to demonstrate that common questions

"predominate" because there was no showing that all members of the class had a dispute with the dealership and therefore suffered an injury in fact. More specifically, the court stated:

> "Perhaps the most basic requirement to bringing a lawsuit is that the plaintiff suffer some injury. Apart from showing of wrongful conduct and causation, proof of actual harm to the plaintiff has been an indispensable part of civil actions." Schwartz & Silverman, *Common Sense Construction of Consumer Protection Acts,* 54 U.Kan.L.Rev. 1, 50 (2005). We agree, and we hold that all members of a class in a class action litigation alleging violations of the OCSPA must have suffered injury as a result of the conduct challenged in the suit.
>
> Here, the class, as certified, fails because there is no showing that all class members suffered an injury in fact. The broadly defined class encompassed consumers who purchased a vehicle at Ganley through a purchase contract that contained the unconscionable arbitration provision. But there is absolutely no showing that all of the consumers who purchased vehicles through a contract with the offensive arbitration provision were injured by it or suffered any damages.

Based on the only evidence in this record, namely the undisputed affidavits of SouthGate, there is no showing that all of the tenants who would be in the vague and broadly defined class have actual disputes with the challenged leases and no imminent threat exists that such disputes will arise in the future based on the manner in which SouthGate actually administers and enforces its lease terms. If Tenants fail to establish that all

of the class members were injured in fact, there can be no showing of predominance.

b. No Showing has been made Regarding Tenants' Financial Resources to Protect the Class.

Adequate representation also requires that the trial court consider whether the representative party has or can acquire the financial resources to protect the interests of the class. Stone, 497 N.W.2d at 848. The record is devoid of any evidence of the representative parties' resources as the documents required to be considered by the district court under Iowa R. civ. P. 1.276 were never filed.[13] Without such evidence and findings, the likelihood exists that Tenants' counsel will, as a practical matter, end up acquiring a financial interest in the litigation, which is tantamount to the prohibited situation of the attorney being a member of the class of litigants while also serving as class counsel. Stone, 497 N.W.2d at 849.

None of the documentation required by Rule 1.276 has been filed or considered. No findings or record has been made on the adequacy of class counsel. No showing has been made as to the adequacy of the Tenants' financial resources to prosecute this matter and protect the interests of the

[13] Compare Comes, 696 N.W.2d at 326-27 (concluding that plaintiffs sufficiently established their ability to provide financial resources where plaintiffs' attorneys requested that the court issue an order under rule 1.276 approving their fee arrangement and their willingness to advance all costs).

entire class. And as demonstrated above, Tenants lack standing, having suffered no injury-in-fact. Without membership in the class itself, Tenants cannot provide adequate class representation.

The district court abused its discretion in certifying this matter as a class action.

CONCLUSION

Having suffered no actual injury, Tenants lack standing to bring this matter, and it must be dismissed. Alternatively, the district court erred in granting Tenants' motion for partial summary judgment and declaratory judgment, warranting reversal. If not dismissed, the district court abused its discretion in certifying this matter as a class action.

REQUEST FOR ORAL ARGUMENT

SouthGate requests oral argument.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on February 15, 2016, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per IOWA RULE 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in IOWA R. APP. P. 6.903(1)(g)(1). It contains 10,607 words, excluding parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).*

This brief complies with the type-face requirements of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Stephen J. Holtman — February 15, 2016
Date