IN THE SUPREME COURT OF IOWA

No. 15-1350

DANIEL KLINE, FRANK SORIES,
and AMARIS MCCANN,
Plaintiffs-Appellees,

vs.

SOUTHGATE PROPERTY
MANAGEMENT, LLC.
Defendant-Appellant.

APPEAL FROM THE JOHNSON COUNTY DISTRICT COURT
THE HONORABLE PATRICK GRADY CHIEF DISTRICT JUDGE

APPELLEES' FINAL BRIEF

CHRISTOPHER WARNOCK
IOWA BAR 9679
Iowa Tenants' Project
532 Center Street
Iowa City, IA 52245
(319) 358-9213
chriswarnock@gmail.com

CHRISTINE BOYER
IOWA BAR 1153
Iowa Tenants' Project
Post Office Box 1985
132 ½ East Washington Street
Iowa City, IA 52244-1985
(319) 321-4778
christine.boyer@mchsi.com

COUNSEL FOR APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Should the decision of the Court of Appeals in *Staley v. Barkalow* be affirmed?

Amor v. Houser, 864 N.W.2d 553 (Iowa Ct. App. 2015)
Baierl v. McTaggart, 629 N.W.2d 277 (Wis. 2001)
Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470 (Iowa 2004)
Crawford v. Yotty, 828 N.W.2d 295 (Iowa 2013)
Staley v. Barkalow, 834 N.W.2d 873 (Iowa Ct. App. 2013)
Summers v. Crestview Apartments, 236 P.3d 586 (Mont. 2010)
VG Marina Management Corp. v. Wiener, 882 N.E.2d 196 (Ill. Ct. App. 2008)

25 Delaware Code §5301(3)(b)
Iowa Code §533.508
Iowa Code 562A.9
Iowa Code §562A.11
Iowa Code §718.6

II. Do lease provisions trump the IURLTA?

Castillo-Cullather v. Pollack, 685 N.E.2d 478 (Ind. App. 1997)
Mease v. Fox 200 N.W.2d 791, 795 (Iowa 1972)

Iowa Code §562A.3
Iowa Code §562A.11

III. Did the district court properly grant summary & declaratory judgment?

Dubuque Policemen's Protective Ass'n v. City of Dubuque, 553 N.W.2d 603 (Iowa 1996)
Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines, 588 N.W.2d 450 (Iowa 1999)
Green v. Shama, 217 N.W.2d 547 (Iowa 1974)
IMT Ins. Co. v. Roberts, 401 N.W.2d 228 (Iowa App. 1986)
Kolarik v. Cory Intern. Corp., 721 N.W.2d 159 (Iowa 2006)
McCarl v. Fernberg, 126 N.W.2d 427 (Iowa 1964)
Mealy v. Nash Finch 845 N.W.2d 719 (Iowa App. 2014)
Smutz v. Cent. Iowa Mut. Ins. Ass'n, 742 N.W.2d 605 (Iowa App., 2007),
Staley v. Barkalow, 834 N.W.2d 873 (Iowa Ct. App. 2013)
Wesselink v. State Dep't of Health, 80 N.W.2d 484 (Iowa 1957)

Iowa R. Civ. P. §1.1102
Iowa R. Civ. P. §1.1103

IV. Does the IURLTA require actual damages and prohibit liquidated damages?

D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302 (Iowa 1996)
Gordon v. Pfab, 246 N.W.2d 283, 288 (Iowa 1976)
Grunwald v. Quad City Quality Service, Inc., 662 N.W.2d 370 (Iowa App. 2003)
Hamilton v. City of Urbandale, 291 N.W.2d 15, 17 (Iowa 1980)
In re Estate of Anderson, No. 9-991 / 09-1066 (Iowa App. 2010) (Mansfield J. dissent)
Lefemine v. Baron, 573 So. 2d 326 (Fl. 1991)
Riding Club Apts. v. Sargent, 2 Ohio App.3d 146 (Ohio App. 1981)
Rohlin Construction v. City of Hinton, 476 N.W.2d 78 (Iowa 1991)
State Ex Rel Switzer v. Overturff, 33 N.W.2d 405 (Iowa 1948)

United Fire & Cas. Co. v. Acker, 541 N.W.2d 517, 519 (Iowa 1995)
Watson v United Real Estate, 330 A.2d 650 (N.J. Sup. Ct 1974)
Wurtz v. Cedar Ridge Apts. 28 Kan. App. 2d 609 (Kan. Ct. App. 2001)

Iowa Code §562A.4
Iowa Code §562A.11
Iowa Code §562A.12
Iowa Code §562A.14
Iowa Code §562A.22
Iowa Code §562A.23
Iowa Code §562A.26
Iowa Code §562A.27
Iowa Code §562A.28
Iowa Code §562A.32
Iowa Code §562A.34
Iowa Code §562A.34
KS Code § 58-2550
Ohio R.C. 5321.16

V. Does landlord's lease contain illegal provisions?

Castillo-Cullather v. Pollack, 685 N.E.2d 478 (Ind. Ct. App. 1997)
Southmark Management Corp. v. Vick, 692 S.W.2d 157 (Tex App 1985)
Staley v. Barkalow, 834 N.W.2d 873 (Iowa App. 2013)
Tirrell v. Osborn 55 A.2d 727 at ¶ 17 (D.C. App 1947)
Tradewinds Ford Sales, Inc. v. Paiz, 662 S.W.2d 164 (Tex.App. 1983)

Colo. Rev. Stat . Ann. § 38-12-102(1)
Haw. Rev. Stat. Ann. §521-8 (2010)
Iowa Code §562A.11
Iowa Code §562A.12
Iowa Code §562A.14
Iowa Code §562A.15

ME. Rev. Stat. Ann. tit. 14, § 6031

VI. Did the district court properly certify a class?

Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002)
Staley v. Barkalow, 834 N.W.2d 873 (Iowa App. 2013)
State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003)

Iowa R. Civ. P. 1.261
Iowa R. Civ. P. 1.262
Iowa R. Civ. P. 1.265

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

On August 29, 2014 Plaintiffs/Appellees Daniel Kline, Frank Sories and Amaris McCann ("Tenants") filed their petition and motions for partial summary & declaratory judgment and class certification. Combined General Docket ("Docket") page 1. Defendant Southgate Property Management, LLC ("Landlord") resisted the motions. Docket, page 3. Both Tenants and Landlord filed additional supplemental pleadings with regard to partial summary & declaratory judgment and class certification. Docket, pages 3-5. Landlord moved for summary judgment which was resisted by Plaintiffs. Docket, page 5. On July 12, 2015, the district court granted Tenants' motions for partial summary & declaratory judgment and class certification and denied Landlord's motion for summary judgment. District Court July 12, 2015 Ruling ("Dist. Ct. Ruling") Apx, page 188-200.

FACTS

Tenants were tenants of Landlord and signed its standard lease. Lease, Apx, pages 25-39. The lease contained provisions providing for automatic

carpet cleaning, as well as penalties and charges other than actual damages, limitation of liability and waiver of landlord's maintenance responsibilities. Dist. Ct. Ruling, pages 193-8. Landlord admitted that over 50 of its tenants used its standard lease containing these provisions. Response to Request for Admissions, Apx, page 65.

ROUTING STATEMENT

Appellees believes this case presents substantial issues of first impression under App. R. 6.1101(2)(c). In addition this case presents the issue of enforcement versus inclusion of prohibited lease clauses under Iowa Code §562A.11(2) decided by the Court of Appeals in *Staley v. Barkalow*, 834 N.W.2d 873 (Iowa Ct. App. 2013) and affirmed without opinion in *Amor v. Houser*, 864 N.W.2d 553 (Iowa Ct. App. 2015) citing *Staley*. Because the opinion in *Staley* was unpublished, Appellant, in common with other landlords, has argued that it lacks precedential value. Appellees would urge this Court to retain the instant case and affirm the ruling in *Staley v. Barkalow* in a published opinion.

ARGUMENT

I. INTRODUCTION

This case and its companion, *Walton v. Gaffey*, no. 15-1348, concern the legality of a variety of lease provisions under the Iowa Uniform Residential Landlord Tenant Act ("IURLTA") codified at Iowa Code Chapter 562A and propriety of certifying a class of tenants whose leases contained these provisions. But before we can resolve the validity of the leases or certification of the class, Defendant/Appellant Southgate Property Management ("Landlord") and Amici Curiae, Landlords of Iowa, Inc, and the Greater Iowa Apartment Association ("Amici") have asked this Court to overturn the ruling of the Court of Appeals in *Staley v. Barkalow*, 834 N.W.2d 873, (Iowa App. 2013) that tenants have a right to a legal lease, free from illegal provisions, under the IURLTA.

This right to a legal lease, held the *Staley* Court, means that the inclusion, even without enforcement, of an illegal clause in a lease violates Iowa Code 562A.11 and the knowing and willful inclusion of an illegal lease provision, again even without enforcement, can subject a landlord to attorney fees, actual damages and up to three months' rent as punitive damages. *Staley*

at 15-16.

Staley seems to have generated a great deal of fear and even panic among some Iowa landlords who are under the erroneous impression that they are now liable for punitive damages even if they mistakenly or unknowingly include illegal provisions in their leases. This could not be further from the truth. Under *Staley*, innocent landlords are safe; only landlords who knowingly and willfully include prohibited provisions are subject to punitive damages. These unreasonable fears, however, have led Landlord and landlords in general in Iowa, speaking through Amici, to attempt to overrule *Staley* and to assert extreme positions: that Iowa tenants have no right to a legal lease, are not injured except by the enforcement of illegal provisions and that landlords have the right to include in their leases provisions they know to be illegal so long as these provisions are not enforced.

Reliant on overturning *Staley*, the crux of Landlord's appeal, endlessly repeated in various guises, is that Plaintiffs/Appellees ("Tenants") have not sustained any "actual damages" which prevents not only class certification but even declaratory judgment as to the legality of the challenged provisions.

Tenants freely admit that they personally have not had any illegal provision enforced against them. However, in common with all of Landlord's tenants they were indeed injured because their right under the IURLTA to a lease free of illegal provisions was violated when these provisions were included in their lease. Whether or not these provisions were knowingly and willfully included and what actual and/or punitive damages Tenants and the class of Landlord's tenants sustained due to the inclusion of illegal provisions remain to be determined at trial.

If this Court affirms *Staley*, then almost all of Landlord's arguments evaporate. The most important remaining question is whether or not the IURLTA requires actual damages or whether landlords may insert liquidated damage provisions in their leases. The legality of automatic carpet cleaning provisions, while significant, has already been briefed and argued in *DeStefano v. Apts. Downtown*, 14-820, currently pending before this Court.

II. *STALEY* WAS CORRECTLY DECIDED

Given that almost their entire argument on appeal depends on overruling *Staley v. Barkalow*, 834 N.W.2d 873, 3-255/12-1031 (Iowa Ct. App. 2013) neither Landlord nor Amici make more than a token effort to directly refute the Court of Appeals' ruling. Landlord devotes just 6 of 54 pages of its brief and Amici a single page to discussing *Staley*; neither Landlord nor Amici actually come to grips with the Court of Appeals' reasoning or cited precedent.[1]

Enforcement versus inclusion remains the touchstone of *Staley* and of Landlord's and Amici's arguments. In *Staley* the defendant landlord argued that without enforcement of illegal provisions, tenants suffered no injury. *Staley* at 14. Here, Landlord says that Tenants had no actual damages. Same argument, different wording: no enforcement = no actual damages. The *Staley* Court decisively rejected the necessity of enforcement, finding that tenants had the right to a legal lease and the inclusion, even without enforcement, of an

[1]Tenants agree that Landlord has preserved error on this issue. Since Landlord is seeking to overturn the Court of Appeals, it appears that a standard of correction of legal errors is applied. See e.g. Iowa R. App. P. 6.1103(1)(b)(1).

illegal provision, was itself illegal because it infringed this right. *Staley* at 15-16. The question is, who is correct, the Court of Appeals, or landlords?

A. IURLTA & Prohibited Provisions

Let us begin with the statute itself. Iowa Code §562A.11, "Prohibited provisions in rental agreements" states that,

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

Iowa Code §562A.11.

Section 562A.11(1) does not say that illegal provisions may be included in a lease but then are unenforceable, it says that illegal provisions may not be part of a lease. Some states have explicitly made enforcement of illegal

provision subject to penalty, but did so by changing the original Uniform Act language in their statutes. Delaware, for example, in adopting this section changed it to say, "If a landlord attempts to enforce provisions of a rental agreement known by the landlord to be prohibited…" 25 Delaware Code §5301(3)(b). One of the key cases discussed in *Staley* was *VG Marina Management Corp. v. Wiener*, 882 N.E.2d 196, 203-04 (Ill. Ct. App. 2008) where the Illinois Court of Appeals interpreted the following similar Chicago landlord tenant provision,

> A provision prohibited by this section included in a rental agreement is *unenforceable*. The tenant may recover actual damages sustained by the tenant because of *enforcement* of a prohibited provision. If the landlord *attempts to enforce* a provision in a rental agreement prohibited by this section, the tenant may recover two month's rent.

VG Marina at 203, cited in *Staley* at 9-10. The Illinois Court of Appeals held that because of the language of the statute that enforcement was required before a tenant suffered an injury from a prohibited provision.

Significantly Iowa Code §562A.11(2) does not say that landlords are subject to penalty if they enforce illegal lease provisions, but only if they willfully use a rental agreement that they know contains illegal clauses.

Buttressing the Court of Appeals' ruling that the goal of the IURLTA is legal leases, free from prohibited provisions, is §562A.9 which provides, "The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law…." Iowa Code 562A.9(1). Conversely, §562A.9 clearly prohibits the inclusion of any provision in a rental agreement that is illegal, either under the IURLTA or other law.

B. Prohibited Provisions & Their Purpose

As noted by the *Staley* Court, the language of §562A.11(1) is quite similar to the Uniform Residential Landlord Tenant Act, "In 1978, the general assembly enacted the IURLTA. The act was substantially adopted from the [Uniform Residential Landlord Tenant Act]" ("URLTA") *Staley* at 5, citing *Crawford v. Yotty*, 828 N.W.2d 295, 299 (Iowa 2013). Uniform Residential Landlord Tenant Act §1.403, also entitled "Prohibited Provisions in Rental Agreements" states:

> (a) A rental agreement may not provide [Iowa—"shall not provide"] that the tenant [(1) waives or forgoes rights, (2) confesses judgment, (3) agrees to pay landlord attorney fees, (4) agrees to limit landlord's liability or agrees to indemnify landlord]."

URLTA § 1.403(a) (1972), cited in *Staley* at 5.

The official comments to the URLTA explain the purpose of this section,

> Rental agreements are often executed on forms provided by landlords, and some contain adhesion clauses, the use of which is prohibited by this section . . . . The official comment to [section 2.415 of the Uniform Consumer Credit Code] states "This section reflects the view of the great majority of states in prohibiting authorization to confess judgment." Similarly, clauses attempting to exculpate the landlord from tort liability for his own wrong have been declared illegal by statutes in some states . . . . *Such provisions, even though unenforceable at law, may nevertheless prejudice and injure the rights and interests of the uninformed tenant who may, for example, surrender or waive rights in settlement of an enforceable claim against the landlord for damages arising from the landlord's negligence*. . . . The right to recover attorney's fees against the tenant . . . must arise under the statute, not by contract of the parties.

URLTA, § 1.403 (1972) comment, cited in *Staley* at 6.

In support of its interpretation of §562A.11 the Staley Court cited *Baierl v. McTaggart*, 629 N.W.2d 277 (Wis. 2001) where the Wisconsin Supreme Court, explicating their administratively adopted version of the URTLA, examined the section entitled, "Prohibited rental agreement provisions" corresponding to Iowa Code §562A.11. The *Baierl* Court held the words, "no rental agreement may require" meant that that the prohibited act is the *inclusion* of an illegal clause in the lease, not the enforcement of the lease clause.

Baierl, 629 N.W.2d at 277 at ¶41. The *Baierl* Court went on to hold that,

> "…many lease provisions have been found to be void because they are either unconscionable or unconstitutional; but their existence in a lease continues to have an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests of the landlords or fail to pursue their own lawful rights.
>
> …some landlords explained that these objectionable provisions were not enforced, and therefore caused the tenant no serious problems… this fact, if true, merely aggravated the unfairness of these objectionable provisions: If these provisions are not actually enforced, however, there can be no explanation for the inclusion of the provisions in the rental agreement, unless they are intended solely for the purpose of intimidation. This purpose, far from legitimizing the provisions, merely compounds the alleged unfairness.

Baierl, 629 N.W.2d 277, ¶50-52 (Wis. 2001) cited in *Staley* at 6-7, 15.

Similarly, the *Staley* Court cites *Summers v. Crestview Apartments*, 236 P.3d 586 (Mont. 2010) where the Montana Supreme Court followed the reasoning in *Baierl* in applying Montana's version of the URLTA. In *Summers* the landlord had not enforced an illegal provision requiring the tenant to pay the landlord's attorney fees, yet the inclusion of this provision was sufficient to trigger statutory penalties. *Summers* at 236 P.2nd 586 at ¶38.

C. Enforcement versus Inclusion

The *Staley* Court clearly and unequivocally rejected arguments that enforcement is required,

> …[we] conclude the 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. Specifically, we decide "willfully uses," in Iowa Code section 562A.11(2), does not require "willful enforcement," but encompasses a landlord's "willful inclusion" of prohibited provisions.

The *Staley* Court rests its decision on sound policy and solid precedential grounds,

> The Iowa language, "willfully uses," as compared to Chicago's language, "damages sustained by the tenant because of enforcement of a prohibited provision," shows the Iowa legislature recognized the unequal bargaining positions of the parties and followed the URLTA and prevented tenants from being intimidated into giving up their legal rights as a result of landlords' willful inclusion of provisions known by landlords to be prohibited. See Unif. Residential Landlord & Tenant Act § 1.403 cmt….By using the phrase, "a landlord willfully uses," the legislature recognized a landlord's willful inclusion of prohibited clauses can have "an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests . . . or fail to pursue their own lawful rights." See *Baierl*, 629 N.W.2d at 284; see also *Summers v. Crestview Apartments*, 236 P.3d 586, 593 (Mont. 2010) (stating damages for a tenant under Montana's Landlord and Tenant Act ("if a party purposefully uses a rental agreement containing provisions known by him to be prohibited") "would further counter the chilling

> effect" of prohibited lease provisions and "merely severing the prohibited rental provisions does not address the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights").

Staley at 14-16.

To see the wisdom of the *Staley* decision we need look no further than *Walton v. Gaffey*, no. 15-1348, companion to the instant case, to see what use Iowa landlords make of included, but unenforced illegal provisions. In a written ruling Magistrate Karen Egerton summarized illegal provisions in landlord Martin Gaffey's lease and noted,

> Plaintiff [Gaffey] has included an addendum that sets forth a clear violation of the law regarding late fees, assessing fees in the amount of $110 if rent is not paid by the 11th of the month. When asked why the Plaintiff would set forth these fee amounts in clear violation of the landlord/tenant laws, the Plaintiff replied, "It gets their attention."

Gaffey v. Sigg, SCSC 81780 (Small Claims, May 28 2012, 6th District) at 3.[2]

Landlord asserts that *Staley* was "erroneously decided" but chooses not to address the precedent relied on and rationale presented by the Court of Appeals, in fact Landlord does not cite a single landlord tenant case. Instead,

[2] http://www.ictenantsclassaction.com/GaffeyDecision.pdf

making another enforcement argument, Landlord asserts that because illegal provisions are unenforceable under §562A.11(2) this is the sole remedy for the inclusion of illegal lease provisions. Brief of Appellant, page 26.

Landlord then cites a number of federal cases to assert that a chilling effect is not sufficient to provide standing. Brief of Appellant, page 26-7. This precedent is irrelevant because the question before this Court is whether the legislature, in enacting 562A.11, intended that tenants have a right to a legal lease or only the right not to have illegal provisions enforced against them. If the legislature gave tenants the right to a legal lease, as held by the *Staley* Court, then the inclusion of illegal lease provisions gives rise to an injury and standing is established. See, e.g. *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004).

Similarly, Landlord's argument with regard to punitive damages also fails on the same grounds. Brief of Appellant, page 26-9. If the inclusion of illegal lease provisions injures tenants, then by statute, actual as well as punitive damages may be awarded. It is correct that Tenants have not had illegal provisions enforced against them. Relying on *Staley*, the district court found

that Tenants' right to a legal lease had been infringed, but that the factual issue of knowing and willful use of prohibited provisions, which could give rise to both actual and punitive damages, should be determined at trial. Dist. Ct. Ruling, page 12. At this point, we do not know whether or not actual damages for inclusion of illegal lease provisions will be awarded, therefore, it is premature to argue that punitive damages are inappropriate based on the lack of actual damages.

D. Knowing & Willful Inclusion

Landlord characterizes the Court of Appeals' decision in *Staley* as erroneous because it was based on, "…a so-called and unsubstantiated 'chilling effect' or 'intimidation,'" as well as "…vagueness and speculation," and notes no evidence was presented in the instant case that Tenants were intimidated. Brief of Appellant, page 30. Landlord raises the specter that based on *Staley*, tenants "…will use the courts to recover statutory damages (either individually or as a member of a class) *simply because a prohibited clause is found in their lease*." Brief of Appellant at 31.

Landlord either misunderstands or misstates the holding in *Staley* and

the statutory framework established in §562A.11. A tenant *may not* recover damages simply because a lease contains a prohibited provision,

> Accordingly, we hold a landlord's inclusion of a provision prohibited in Iowa Code section 562A.11(1) ("shall not provide"), even without enforcement, can be a "use" under Iowa Code section 562A.11(2): "If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited . . . . " See Unif. Residential Landlord & Tenant Act § 1.403 cmt. When read together, these subsections make a landlord liable for the inclusion of prohibited provisions in a rental agreement, even without enforcement, if the landlord's inclusion was willful and knowing. See Iowa Code § 562A.11. *In order to recover damages, the tenant has the burden of proving the landlord willfully used, i.e., willfully included, "provisions known by the landlord to be prohibited*." Id. § 562A.11(2).

Staley at 15-16.

The involuntary inclusion of a prohibited provision or the inclusion of a prohibited provision without knowledge of its illegality cannot give rise to punitive damages under *Staley* and §562A.11. Furthermore, as Tenants' Counsel, the Iowa Tenants' Project, has argued in *Caruso v. Apts. Downtown*, no. 14-1783, currently pending before this Court, knowledge of illegality should not be presumed and actual knowledge should be required under §562A.11.

What the legislature, following the URLTA, has decided to punish in

§562A.11(2) is the act by the landlord of willful inclusion of a provision known to be illegal, not the act of intimidation of tenants, even if the protection of tenants was the ultimate goal. This is hardly an unusual statutory stance. For example, Iowa Code §718.6 provides,

> A person who reports or causes to be reported false information to a fire department, a law enforcement authority, or other public safety entity, knowing that the information is false, or who reports the alleged occurrence of a criminal act knowing the act did not occur, commits a simple misdemeanor…

Iowa Code §718.6. In a civil context, for example, the legislature has made it punishable as fraudulent practice that,

> [a] director, officer, or employee of a state credit union shall not intentionally publish, disseminate, or distribute any advertising or notice containing any false, misleading, or deceptive statements…

Iowa Code §533.508(1). The framework of §562A.11 tracks this type of statute; a willful and knowing act and a false or misleading statement by the actor, in this case the use of provisions known to be illegal, yet without a requirement of reliance or effect on the part of the recipient, even though detrimental reliance or negative effect clearly is the underlying evil that all these statutes seek to prevent.

E. The Right to a Legal Lease

The purpose of §562A.11 is clear. As the *Staley* Court held, in passing this statute the legislature sought to assure that tenants have a legal lease, a lease free from illegal provisions. The legislature felt that landlords, realizing the potential penalties for knowing inclusion of prohibited provisions, would carefully vet their leases to insure that they do not contain illegal provisions.[3] Since innocent landlords are not subject to punitive damages, what is the harm of requiring them to remove illegal lease provisions once they become aware of them? [4] On the other hand, why should landlords be permitted to knowingly

[3] This is exactly what has happened in the wake of *Staley*. For example, an attorney at a prominent Des Moines law firm summarizes *Staley* and advises, "The clear implication to all residential Iowa landlords is that they should carefully review their leases and Rules and Regulations to ensure they contain no unlawful provisions." http://www.martindale.com/litigation-law/article_Davis-Brown-Koehn-Shors-Roberts-PC_2057830.htm

[4] If landlords discover illegal provisions in a current lease they can use a procedure suggested by an Iowa City landlord. Within a reasonable time, e.g. 30 days, after the initial discovery of the illegality the landlord sends a letter to affected tenants. The landlord need not admit liability but can state that questions have been raised about the legality of identified provisions and the landlord believes they should no longer be part of the lease. The landlord should then neither enforce these provisions nor include them in future leases. If the landlord follows this procedure, the Tenants' Project believes that they should not be found to have knowingly used prohibited lease provisions.

keep illegal provisions in their leases? If this Court accepts the arguments of Landlord and Amici and overturns *Staley*, reading §562A.11(2) to require enforcement before a tenant can be injured by illegal lease provisions, it will explicitly allow landlords to knowingly and willfully include illegal provisions so long as enforcement cannot be proven.

Illegal leases *do* hurt tenants. Tenants look at their leases and believe they mean what they say. Tenants think that their leases have to be legal; the legislature and *Staley* Court agree. Landlord and Amici disagree and out of fear of punitive damages, they assert the right to knowingly include illegal lease provisions. This Court should reject the arguments of Landlord and Amici and affirm *Staley*.[5]

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[5] Considerations of respect for appellate decisions and finality in the judicial process are also implicated if *Staley* is overruled. This Court denied further review in *Staley* and in *Amor v. Houser*, 14-0866, reliant on *Staley*. Landlords have repeatedly argued that because *Staley* is unpublished that a district court is free to disregard it. If this Court believes *Staley* was illegal or unjust, it should be overturned. But Tenants would ask this Court to be cognizant of the message that overturning *Staley* would send. Reversal would vindicate the strategy of hard line landlords in refusing to accept *Staley*, their insistence that an unpublished decision by the Court of Appeals can be ignored and encourage future resistance to unpublished decisions even after the denial of further review.

III. THE IURLTA: LAW OR GUIDELINES?

Amici, representing Iowa landlords, makes a number of preliminary arguments with regard to how courts should interpret the IURLTA with particular application to summary & declaratory judgment. In essence Amici's argument is that this Court should let what Amici call "common law", i.e. pre-1974 precedent, govern the IURLTA, and that the IURLTA itself should be trumped by freedom of contract and thus allowed to be contractually defined, altered or waived.

Amici first quotes §562A.3, "Unless displaced by the provisions of this chapter, the principles of law and equity in this state, shall supplement its provisions," and argues that this provision proves the legislature did not intend the IURLTA to pre-empt existing landlord tenant law. Brief of Amici, page 2. In fact, says Amici, in passing the IURLTA the legislature made freedom of contract the preeminent principle of Iowa landlord tenant law. In support of this proposition, Amici cites a 1926 Iowa landlord tenant case and *Castillo-Cullather v. Pollack*, 685 N.E.2d 478 (Ind. App. 1997).

In *Castillo-Cullather v. Pollack* the Indiana Court of Appeals makes it

crystal clear that under Indiana law lease provisions trump its statutes,[6] 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 emphasizes that any legal definition and indeed any obligation imposed by Indiana landlord tenant law can be contractually redefined, altered or waived,

> 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).

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[6]Indiana has not adopted the URLTA. Indiana Code Title 32 Article 7; http://www.uniformlaws.org/Act.aspx?title=Residential%20Landlord%20and%20Tenant%20Act%201972

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

What was gradually recognized in the 1920s and especially in the 1930s and 1940s, after the Great Depression and New Deal, was that "freedom of contract" only meant true liberty when both parties were of approximately equal bargaining power,

> Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

F Kessler, 'Contracts of Adhesion--Some thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 631-2.

Both Iowa courts and the Iowa legislature have decided that due to the disparities in bargaining power that freedom of contract cannot be the guiding principle of landlord tenant law. In a landmark 1972 landlord tenant case, *Mease v. Fox*, the Supreme Court made clear the shortcomings of freedom of contract for landlords and tenants,

> The need and social desirability of adequate housing for people in

> this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, caveat emptor. Permitting landlords to rent `tumbledown' houses is at least a contributing cause of such problems as urban blight, juvenile delinquency and high property taxes for conscientious landowners…subsequent cases recognized landlord's superior position to know of housing law violations and to discover deficiencies in the premises to be leased. The frequent inequality in bargaining power was acknowledged: where housing is in short supply the potential lessee is in no position to dicker about even the most basic necessities.

Mease v. Fox 200 N.W.2d 791, 795 (Iowa 1972) citing *Pines v. Perssion*, 111 N.W.2d 409, 412-413 (Wis. 1961).

One of the key goals of the Uniform Residential Landlord and Tenant Act,[7] was to,

> [e]qualize 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.

URLTA (1972) Act Summary[8]

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[7]In 1978, the general assembly enacted the IURLTA. The act was substantially adopted from the…" [Uniform Residential Landlord Tenant Act ("URLTA")] *Staley* at 5, citing *Crawford v. Yotty*, 828 N.W.2d 295, 299 (Iowa 2013).
[8]Uniform Law Commission, http://uniformlaws.org/ActSummary.aspx?title=Residential%20Landlord%20and%20Tenant%20Act

Amici should be commended for their honesty; they have very frankly stated that their goal is to turn the clock back to 1926 and to emasculate the IURLTA. If this Court adopts "freedom of contract" as the key principle of landlord tenant law, as Amici urges, from now on it will be the province of landlords, not the courts, to say what the law of landlord tenant is. The IURLTA will be reduced to mere guidelines, which a landlord can change, waive or overrule simply by including a clause in their standard leases.

Amici is simply wrong. Section 562A.3 makes it clear the IURLTA is indeed meant to "displace" previously existing law, whose function is now to "supplement" the provisions of the IURLTA. Nowhere does the IURLTA state that it is meant to be voluntary or that its strictures may be waived. In fact, §562A.11(1)(a) specifically prohibits any lease provision that, "[a]grees to waive or to forego rights or remedies under this chapter…" The IURLTA is law and must be obeyed by both landlords and tenants. Only the legislature may change it and only the courts may interpret it. No private party can contractually alter, waive or ignore it.

IV. THE DISTRICT COURT PROPERLY FOUND THAT LANDLORD'S LEASE CONTAINS ILLEGAL PROVISIONS

Tenant sought partial summary & declaratory judgment with regard to the legality of a number of lease provisions in Landlord's standard lease under the IURLTA. All of the challenged provisions, including automatic carpet cleaning, liquidated damages and charges other than actual damages, provisions that limited Landlord's liability and waived Landlord's responsibilities for maintenance and repair were properly found by the district court to be prohibited under the IURLTA. Dist. Ct. Ruling, pages 6-11. The district court found persuasive the Court of Appeal's opinion in *Staley v. Barkalow*, 834 N.W.2d 873, 3-255/12-1031 (Iowa Ct. App. 2013) ordering summary & declaratory judgment and District Court Judge Russell's partial summary & declaratory ruling on remand in *Staley v. Barkalow*, LACV 073821 (6th District, March 19, 2013) ("*Staley Remand*") Dist. Ct. Ruling, pages 3-4.

Landlord's primary argument remains "no actual damages" i.e., no enforcement of lease provisions. Without enforcement, argues Landlords, tenants are not injured, cannot not recover any damages, and cannot even get a ruling on the validity of their lease, either through summary or declaratory

judgment.

The standard of review on appeal for summary judgment on the damage portion of the action is for correction of errors at law. *Wallace v. Des Moines Indep. Cmty. Sch. Dist. Bd. of Dirs.*, 754 N.W.2d 854, 857 (Iowa 2008). When declaratory judgment is granted on summary judgment the propriety of the summary judgment is also reviewed on a standard of correction of errors at law. *Shelby County Cookers, L.L.C. v. Utility Consultants Intern., Inc.*, 857 N.W.2d 186 (Iowa 2014). Tenants agree that Landlord has preserved error with regard to its arguments on partial summary & declaratory judgment.

A. Partial Summary & Declaratory Judgment was Appropriate

The district court, relying on *Staley v. Barkalow*, granted partial summary & declaratory judgment with regard to the challenged lease provisions. Dist. Ct. Ruling, pages 3-4. On almost identical operative facts, the *Staley* Court held,

> "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. The question "is whether there is a substantial controversy between parties having antagonistic legal interests of

> sufficient immediacy and reality to warrant declaratory judgment." *Farm & City Ins. Co. v. Coover*, 225 N.W.2d 335, 336 (Iowa 1975). Summary judgment is appropriate if the record shows there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Walker*, 801 N.W.2d at 554.

Staley, page 23-4. The *Staley* Court then ordered the district court on remand to determine the legality of the challenged provisions. Judge Russell did so and his opinion in the *Staley* Remand was relied on and partially incorporated by the district court in the instant case. Dist. Ct. Ruling, page 3.

Partial summary judgment was clearly appropriate. Landlord agreed that Plaintiffs' lease was their standard lease. Response to Request for Admission, Apx, page 65. "Summary judgment is appropriate if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Kolarik v. Cory Intern. Corp*., 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa Rule of Civil Procedure 1.981(3)) cited in Dist. Ct. R. page 4. Landlord makes no assertion that there were disputed material facts, thus it was proper for the district court to proceed to the purely legal issue of whether the challenged lease provisions were legal under the IURLTA. The district court's ruling on the legality of the lease provisions can be seen as establishing liability

for a damage claim or as part of a declaratory judgment, both were sought in Tenants' petition. Petition, Apx, page 3.

With regard to declaratory judgment, Iowa R. Civ. P. §1.1102 states,

> Any person interested in an oral or written contract, or a will, or whose rights, status or other legal relations are affected by any statute, municipal ordinance, rule, regulation, contract or franchise, may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status or legal relations thereunder.

A declaratory judgment action, like an action for damages, can be determined on summary judgment, if no material facts are in dispute, or can be decided after facts are determined at trial. See, e.g. *Financial Marketing Services, Inc. v. Hawkeye Bank & Trust of Des Moines*, 588 N.W.2d 450 (Iowa 1999) (summary judgment properly granted in declaratory judgment action); see also, *IMT Ins. Co. v. Roberts*, 401 N.W.2d 228 (Iowa App. 1986) (trial of declaratory judgment action). The declaratory judgment rules "are to be liberally construed in order to carry out their purpose." *Green v. Shama*, 217 N.W.2d 547, 551 (Iowa 1974). As the Iowa Supreme Court has held,

> The basic and fundamental requirement under [the declaratory judgment rule] is that the facts alleged in the petition seeking such relief must show there is a substantial controversy between the

> parties having adverse legal interests of sufficient immediacy and reality to warrant a declaratory judgment. There must be a justiciable controversy as distinguished from a mere abstract question.

McCarl v. Fernberg, 126 N.W.2d 427 (Iowa 1964).

In *Staley v. Barkalow*, the defendant landlord argued that without enforcement of the challenged lease provisions that no declaratory judgment could be granted. Similarly in the instant case Landlord argues that the case is not ripe or is moot and does not present a justiciable controversy for purposes of declaratory judgment because Tenants' leases have terminated. Appellant's Brief, page 23. Landlord appears to be once again arguing that the lack of enforcement = lack of injury = lack of damages, since the challenged lease provisions were not and cannot now be enforced against Tenants.

A justiciable controversy is clearly presented in the instant case. In *Wesselink v. State Dep't of Health*, 80 N.W.2d 484, 486 (Iowa 1957) cited in *Mealy v. Nash Finch* 845 N.W.2d 719 (Iowa App. 2014) the Supreme Court stated,

> Our declaratory judgment rules necessarily deal with present rights, and we must examine carefully each petition to determine whether such legal right is in issue between the parties litigant…Were the controversy not genuine or ripe for judicial

> decision, with a plaintiff and defendant having actually or potentially opposing interests, with a res or other legal interest definitely affected by the judgment rendered and the judgment a final determination of the issue, it would fail to present a justiciable dispute…We search, then, for an "antagonistic assertion and denial of right"

Wesselink, 80 N.W.2d at 486-87.

If, following *Staley*, Tenants have a right to a legal lease, they were injured when that right was invaded by the inclusion, even without enforcement of a prohibited provision.[9] As a threshold matter, the district court had to determine whether or not the challenged provisions even were prohibited. In addition, as parties to a contract Tenants sought a declaratory judgment under Iowa R. Civ. P. §1.1102 as to the validity of provisions of

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[9] Making enforcement of a lease a prerequisite obviates the purpose of declaratory judgment. As the Court of Appeals held *in Smutz v. Cent. Iowa Mut. Ins. Ass'n*, 742 N.W.2d 605 (Iowa App., 2007), "[T]he purpose of a declaratory judgment is to resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed," citing *Dubuque Policemen's Protective Ass'n v. City of Dubuque*, 553 N.W.2d 603, 607 (Iowa 1996). If a party must wait until the lease is enforced, then they have a claim for damages and no need for declaratory judgment. Tenants (and landlords!) are permitted to seek declaratory judgment with regard to the legality of lease provisions before enforcement, rather than having these provisions hanging over their heads or being forced to breach the lease or IURLTA in order to test the legality of the provisions.

their lease. The legality of the challenged provisions is fiercely contested by the parties in the instant case. Since the rights of the Tenants and the tenant class to a legal lease are at issue and actual and punitive damages could be awarded if prohibited provisions were found in the lease, the question of illegality was ripe, is not moot and presents a justiciable controversy. Indeed as Iowa R. Civ. P. §1.1103 states for purposes of declaratory judgment, "A contract may be construed either before or after a breach." Tenants can seek a declaratory judgment before, after or without enforcement of their lease and the district court properly granted summary & declaratory judgment in this case.

B. Actual or Liquidated Damages?

The IURLTA specifically requires actual damages in multiple provisions; liquidated damages are not mentioned. At issue is the definition of the term "damages" in the IURLTA. Landlord and Amici argue that "damages" include liquidated damages, while Tenant argues and the district court ruled that only actual damages can be recovered under the IURLTA, citing *D.R. Mobile Home Rentals v. Frost*, 545 N.W.2d 302, 306 (Iowa 1996)("landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained.")

1. Landlord's Lease & the District Court Ruling

Landlord's standard lease provides for a wide variety of fines, penalties, fees and set charges. Tenant challenged the following charges,

Lease

a. $25 NSF or returned check charges
b. $50 per month additional occupant charge
c. $50 handling fee, $50 reconnection fee
d. Maintenance call bills, "current rate per hour as determined by Landlord" plus trip charge
e. $500 liquidated damages for unauthorized pet
f. $300 sublease administrative fee
g. $300 per day for holding over "and any damages"
h. Acceleration clause making all rent for entire lease due immediately if lease terminated

Building and Property Rules

a. $45 lockout service calls during business hours, $85 lockout fee at other times, $15 per duplicate key
b. Minimum $25 charge for violations of lease or lease rules

Dist. Ct. Ruling, page 6.

The district court ruled,

> Plaintiffs generally argue that Defendant cannot recover anything other than actual damages for a tenant's breach of a lease of violation of chapter 562A. Further, Plaintiff contends that a residential lease cannot include liquidated damages provisions. 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).

> Considering the language utilized by the Iowa Legislature in chapter 562A in conjunction with the Iowa Supreme Court's holding that actual damage must be sustained in order for a landlord to recover, the Court concludes that a landlord may only recover actual damages that are proven to be owed to the landlord under the standards set forth in chapter 562A. The fees described by Plaintiffs in this section of their Motion have been set without any consideration of what the landlord's actual damages and fees would be in each situation.

Dist. Ct. Ruling, page 6.

2. Precedent Supports Actual Damages

The district court correctly held that only actual damages and not liquidated damages are permitted under the IURLTA. As noted by the district court, the Supreme Court has held that under the IURLTA when a lease or the IURLTA is breached a landlord may only recover their actual damages,

> …we agree with [the tenant] that the *landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained*. Section 562A.32 provides the landlord "may have a claim . . . for actual damages for breach of the rental agreement."…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.

D.R Mobile Home Rentals v. Frost, 545 N.W.2d 302, 306 (Iowa 1996).

In *Riding Club Apts. v. Sargent*, 2 Ohio App.3d 146 (Ohio App. 1981)

the Ohio Court of Appeals, ruling under the Ohio landlord tenant act held,

> A liquidated damages clause permitting the landlord to retain a security deposit without itemization of actual damages caused by reason of the tenant's noncompliance with R.C. 5321.05 or the rental agreement is inconsistent with R.C. 5321.16(B),[10] which requires itemization of damages after breach by the tenant of the rental agreement. Since the provision is inconsistent with R.C. 5321.16(B), it may not be included in a rental agreement and is not enforceable. R.C. 5321.06. *It is immaterial that the liquidated damages clause might otherwise be enforceable as such rather than being found to be a penalty*.

Riding Club Apts., 2 Ohio App.3d 146 at ¶17.

In *Wurtz v. Cedar Ridge Apts*. 28 Kan. App. 2d 609 (Kan. Ct. App. 2001) the Kansas Court of Appeals held invalid a residential lease provision imposing liquidated damages because, "58-2550(b) [11] requires that these actual damages must be itemized. In contrast, a forfeiture or *a liquidated damages*

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

[11]KS Code § 58-2550(b), "Upon termination of the tenancy, any security deposit held by the landlord may be applied to the payment of accrued rent and the amount of damages which the landlord has suffered by reason of the tenant's noncompliance with K.S.A. 58-2555, and amendments thereto, and the rental agreement, all as *itemized* by the landlord in a written notice delivered to the tenant."

clause, by its nature, is not itemized. *Wurtz,* 28 Kan. App. 2d at 612

Iowa Code §562A.12 similarly requires damages to be itemized before a security deposit deduction can be made,

> A landlord shall, within thirty days from the date of termination of the tenancy and receipt of the tenant's mailing address or delivery instructions, 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*.

Iowa Code §562A.12(3).

Courts have also invalidated liquidated damages provisions in residential leases on grounds other than the lack of itemization. In *Watson v United Real Estate*, 330 A.2d 650 (N.J. Sup. Ct 1974) the New Jersey Superior Court held,

> …under the terms of N.J.S.A. 46:8-21.1 the lessor is not entitled to retain the damage deposit absent a showing by the lessor of "*charges expended* in accordance with the terms of a contract, lease, or agreement."…defendant's contractual *rights under a liquidated damages provision in the lease are subject to and limited by the plaintiff's statutory rights under N.J.S.A. 46:8-21.1. That being the case, the statutory mandate is clear. Defendant may only retain so much of the damage deposit as he can demonstrate was expended in accordance with the terms of the lease. Put another way, to retain any part of the damage deposit, a *lessor must demonstrate actual damages caused by the lessee, and any retention by the lessor is limited to such damages*. The liquidated damage clause is void because it is

contrary to the statute.

Watson, 330 A.2d 650.

The holding in *Watson* allows a landlord to recover only "charges expended", i.e. actual damages. Again similarly under Iowa Code §562A.12,

> The landlord may withhold from the rental deposit only such *amounts as are reasonably necessary* for the following reasons:
> a. To remedy a tenant's *default in the payment of rent* or of other funds due to the landlord pursuant to the rental agreement.
> b. To *restore the dwelling unit* to its condition at the commencement of the tenancy, ordinary wear and tear excepted.
> c. 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.

Iowa Code §562A.12(3)(a)-(c). We can see another example of this principle in §562A.23 where, if the landlord deliberately or negligently fails to provide hot water, heat or essential services the tenant may, "[r]ecover damages based on the diminution in value of the dwelling unit;" Iowa Code §562A.23(1)(b). Clearly the tenant's damages are to be measured by the actual diminution in value.

3. Further Requirements of the IURLTA Preclude Liquidated Damages

Section 562A.4 sets the general rules under the IURLTA for the administration of remedies states that parties have the right to appropriate damages and, "[t]he aggrieved party has a *duty to mitigate damages*." Iowa Code §562A.4(1). While IURLTA damages must be mitigated, liquidated damage clauses preclude mitigation,

> In any event, once a liquidated damages clause is determined to be valid, the damages thereunder may not be reduced based on failure to mitigate. *Fed. Realty Ltd. P'ship v. Choices Women's Med. Ctr., Inc.*, 735 N.Y.S.2d 159, 161-62 (2001); 22 Am.Jur.2d Damages § 538 at 473--74 (2003). It follows naturally that once a court has determined that a liquidated damages clause is valid, it need not make further inquiries as to actual damages. This includes a determination of whether the parties attempted to mitigate damages resulting from the breach.... [*T]here exists no duty to mitigate damages where a valid liquidated damages clause exists. Barrie Sch. v. Patch*, 933 A.2d 382, 392 (Md. 2007); see also *Lake River Corp. v. Carborundum Co.*, 769 F.2d 1284, 1291 (7th Cir. 1985). Mitigation arguments may be considered in determining whether the clause is a penalty, but not to reduce the damages once the clause is found to be enforceable.

In re Estate of Anderson, No. 9-991 / 09-1066 (Iowa App. 2010) (Mansfield J. dissent).

In addition, liquidated damages provisions illegally shift the burden of

proof of liquidated damage penalties and actual damages onto tenants. The Supreme Court held in *Gordon v. Pfab*, 246 N.W.2d 283, 288 (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.

Gordon v. Pfab, 246 N.W.2d at 288; cited in Brief of Appellant, page 36. This requirement of proof of actual damages by a party seeking to show that a liquidated damage clause is a penalty conflicts with §562A.12(3), "In an action concerning the rental deposit, the *burden of proving*, by a preponderance of the evidence, the reason for withholding all or any portion of the rental deposit *shall be on the landlord*." Iowa Code §562A.12(3)(c). This burden is even more difficult for tenants because it is the landlord, not the tenant, that will have done the repairs, maintenance or other work and will have evidence of the actual costs. By placing a liquidated damages provision in a lease a landlord is able to shift the burden of proof concerning actual damages and whether or not a liquidated damage provision constitutes a penalty onto the tenant in violation of the IURLTA and *D.R Mobile Home Rentals v. Frost*, 545 N.W.2d 302 at ¶34-5 .

4. Landlord's and Amici's Arguments are not Persuasive

Landlord argues that they are prevented from charging liquidated damages only when the IURLTA specifies actual damages and that the requirement of actual damages does not apply to any of the challenged lease provisions. Brief of Appellant, page 35. Amici, Landlord and Tenants appear to agree that when the IURLTA says punitive damages, the IURLTA means punitive damages and when the IURLTA says actual damages it means actual damages. The argument is over the IURLTA's use of the term "damages". Tenants assert that the term "damages" is simply synonymous with actual damages, while Amici explicitly and Landlord implicitly insist that "damages" includes liquidated damages. Brief of Amici, pages 13-16; Brief of Appellant, pages 34-5.

Under §562A.4(1), "The remedies provided by this chapter shall be administered so that the aggrieved party may recover appropriate damages." Nowhere does the IURLTA specifically permit liquidated damages and the requirement of actual damages is pervasive throughout the IURLTA which repeatedly limits both landlords and tenants to actual damages. Five separate

sections of the IURLTA specifically limit tenants to actual damages,[12] three sections limit landlords to actual damages,[13] while §562A.35 limits both landlords and tenants to actual damages.

In fact, the IURLTA uses the term "damages" synonymously with actual damages. For example, §562A.14 provides, "The landlord may bring an action for possession against a person wrongfully in possession and may recover the *damages* provided in section 562A.34, subsection 4." The cited section, 562A.34(4) provides,

> If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession and if the tenant's holdover is willful and not in good faith the landlord, in addition, may recover the *actual damages* sustained by the landlord and reasonable attorney fees.

Iowa Code §562A.34(4). The reverse example is provided by §562A.32 cited in *D.R. Mobile Homes*, which provides,

> If the rental agreement is terminated, the landlord may have a claim for possession and for rent and a separate claim for *actual damages* for breach of the rental agreement and reasonable attorney fees as provided in section 562A.27.

[12]§§562A.11, 562A.12, 562A.22, 562A.26 & 562A.36
[13]§§562A.29, 562A.32, 562A.34.

Iowa Code §562A.32. Iowa Code §562A.27(1) provides, "If the breach is remediable by repairs or the payment of *damages* or otherwise and the tenant adequately remedies the breach prior to the date specified in the notice, the rental agreement shall not terminate."

Iowa Code §562A.27(3) provides,

> Except as provided in this chapter, the landlord may recover *damages* and obtain injunctive relief for noncompliance by the tenant with the rental agreement or section 562A.17 unless the tenant demonstrates affirmatively that the tenant has exercised due diligence and effort to remedy any noncompliance, and that the tenant's failure to remedy any noncompliance was due to circumstances beyond the tenant's control. If the tenant's noncompliance is willful, the landlord may recover reasonable attorney fees.

Iowa Code §562A.27(3).

Whether moving from the term "damages" in §562A.14 to actual damages in §562A.34 or from actual damages in §562A.32 to "damages" in §562A.27, these examples clearly show that these terms are synonymous in the IURLTA.

According to Amici the legislature in passing the IURLTA decided that under certain circumstances landlords and tenants could recover only actual

damages while in other circumstances, liquidated damages would be permitted. For example, Amici argues that when the legislature says "damages" in §562A.27 that it intended that landlords be able to recover liquidated damages for breaches of the lease during the tenancy, but only actual damages under §562A.32 for the exact same claim of breach of a lease when made after lease termination. Brief of Amici, page 15.

It is impossible to see any logic behind this purported scheme. It is much more reasonable to see "damages" as synonymous with actual damages and in fact, we can even see this in operation. Section 562A.22 regulates the landlord's failure to deliver possession. Under §562A.22(1)(b) if the landlord fails to deliver possession a tenant may maintain an action against the landlord and, "…recover the *damages* sustained by the tenant." The very next subsection of §562A.22 states, "If a landlord's failure to deliver possession is willful and not in good faith, a tenant may recover from the landlord the *actual damages* sustained by the tenant and reasonable attorney's fees." §562A.22(2). Why would liquidated damages be permitted for a non-willful failure to deliver, while only actual damages permitted for a willful failure? Note also that the

language of both subsections speaks in terms of the damage sustained by the tenant which points to actual damages as the proper measure, see e.g., *Watson v United Real Estate*, 330 A.2d 650 (statutory requirement of "charges expended" means actual damages).

Finally, Amici argues that the IURLTA specifically permits liquidated damages citing §562A.28 which provides if a tenant fails to maintain the premises a landlord may cause the work to be done and "…submit an itemized bill for the actual and reasonable cost or the fair and reasonable value of it." Brief of Amici, page 20. Amici asserts the term "fair and reasonable value" means liquidated damages since it is juxtaposed with actual damages. First, this provision requires an itemized bill and as we have seen, "…a liquidated damages clause, by its nature, is not itemized." *Wurtz,* 28 Kan. App. 2d at 612. Second, Tenants believe that this provision is intended to allow landlords who do their own repairs rather than using employees or outside contractors to bill for their time. Since there is no actual out of pocket cost, these landlords are permitted to charge the fair and reasonable value of their time based on the work done. Section 562A.28 specifically measures both the actual cost or fair

and reasonable value by the actual work done and cannot be read as some sort of general approval for liquidated damage provisions which are preset and independent of actual circumstances.

5. Damages Means Actual Damages

Reading the term "damages" as synonymous with actual damages provides a clear and simple explanation of legislative purpose and makes it simple to reconcile the use of the terms "actual damage" and "damage" not only throughout the IURLTA. Insisting that the term "damages" permits liquidated damages creates bizarre and baroquely complex problems of statutory interpretation. This violates basic rules of statutory construction, requiring that courts read a statute as a whole and give it "…a sensible and logical construction." *Hamilton v. City of Urbandale*, 291 N.W.2d 15, 17 (Iowa 1980); *United Fire & Cas. Co. v. Acker*, 541 N.W.2d 517, 519 (Iowa 1995) (Statutes are not construed in such a way that would produce impractical or absurd results).

We can be sure that the legislature explicitly approved the use of actual damages and neither Amici nor Landlord has argued that when "damages" are

called for in the IURLTA that imposing actual damages would be illegal or inappropriate. We can always be sure that properly computed actual damages are appropriate under the IURLTA. On the other hand, we must always be concerned that liquidated damages are inappropriate simply because they do not reflect actual damages and even in a lease or contract not covered by the IURLTA may be excessive and therefore void as a penalty. As the Supreme Court has held,

> 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….*parties to a contract are not free to provide a penalty for its breach*. The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on grounds of public policy.

Rohlin Construction v. City of Hinton, 476 N.W.2d 78 (Iowa 1991).

Requiring actual damages also eliminates the ability of landlords to fine or financially penalize their tenants. Fines and penalties have never been permitted in a lease or contract for reasons of public policy and are reserved to the government for law enforcement purposes, not for the pecuniary benefit of

private parties. Amici argues none of the challenged leases provisions are fines or penalties simply because they are not labelled as such. Brief of Amici, page 5. Nevertheless, whatever Landlord choses to call them its lease contains penalty provisions. For example, Landlord's lease has a "no pets" provision that provides for "…liquidated damages in the amount of Five Hundred Dollars ($500) *plus actual damages*…" Lease, §15, Apx, pages 26-7. Similarly, if a tenant holds over Landlord's lease provides for, "…Three Hundred Dollars ($300) per day *and any damages incurred to Landlord*…" Lease §22, Apx, page 27. Since the tenant is already liable for actual damages, the additional "liquidated damages" are a penalty. See *Lefemine v. Baron*, 573 So. 2d 326 at ¶39 (Fl. 1991) (provision that allows party to choose between liquidated damages or actual damages or to sue for additional actual damages, "…constituted a penalty as a matter of law because the existence of the option negated the intent to liquidate damages.") If liquidated damages are permitted in residential leases the courts will be faced with repeatedly having to determine, on a case by case basis, whether or not a provision is acceptable as liquidated damages or is an illegal fine or penalty, with the burden of proof on

tenants.

In evaluating liquidated damages we must also be mindful of the fact that while a tenant must go to court to receive damages from their landlord, landlords have two highly effective extra-judicial mechanisms for collecting damages from tenants. First, a landlord may take whatever damages it sees fit simply by deducting them from tenants' security deposits. Unless tenants chose to go to court, landlord can keep any deductions made. Secondly, landlords can collect damages from tenants during the term of the tenancy by threatening to evict them if the charges are not paid. This is a highly effective means of debt collection by landlords because the threat of eviction is extremely intimidating to tenants.

Iowa courts have long had a suspicion of liquidated damages and only fairly recently sanctioned their use even for commercial contracts with the requirement that they not constitute penalties. See *State Ex Rel Switzer v. Overturff*, 33 N.W.2d 405 (Iowa 1948) (liquidated damages not permitted); *Grunwald v. Quad City Quality Service, Inc.*, 662 N.W.2d 370 (Iowa App. 2003) (liquidated damages permitted if not penalty). This suspicion is well

founded because whenever a lease or contract departs from actual damages and imposes liquidated damages, inevitably one party is unfairly overpaid or underpaid. In a commercial setting with a freely negotiated contract between parties of equal experience and power, the inherent inequity of liquidated damages can be tolerated. In a residential landlord tenant setting, however, leases are not negotiated; as in the instant case, landlords uniformly insist that tenants use their standard lease which is carefully drafted to the landlords' advantage. Allowing liquidated damages will be a continual temptation to landlords to fine or penalize tenants for violations of the lease or IURLTA. Having the power to unilaterally set fixed fees, it is difficult to believe that landlords will not repeatedly overcharge tenants for damages. The IURLTA requires appropriate damages and specifically approves actual damages. Only actual, not liquidated, damages are permitted under the IURLTA.

C. Automatic Carpet Cleaning

The issue of the legality of automatic carpet cleaning clauses is presented in a number of appeals currently pending before this Court, including *DeStefano v. Apts Downtown*, 14-820 and *Caruso v. Apts. Downtown*, 14-1783.

Every Iowa judge and magistrate who has considered this issue has concluded that automatic carpet cleaning is illegal, generally on the same grounds as the district court in the instant case: that automatic carpet cleaning provisions charge tenants for cleaning even if their carpet is clean.

Like many landlord throughout Iowa, Landlord's standard lease includes an automatic carpet cleaning clause,

> 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 professionally cleaned carpet at departure. Any extra painting or carpet cleaning needed to be done will be deducted from Tenant's Rental Deposit.

Lease, "Building and Property Rules," §9, Apx, page 30.

The district court found this provision illegal under the IURLTA,

> *This clause automatically imposes on tenants certain fees for carpet cleaning regardless of whether the carpet is clean or not*. Iowa Code § 562A.12(3) requires a landlord to provide the tenant with a specific reason for withholding any of the rental deposit, and also requires the landlord to prove, by a preponderance of the evidence, the reason for withholding any of the rental deposit, with ordinary wear and tear excepted. This section of the lease may not be included in Defendant's standard lease because inclusion of this section permits the landlord to avoid its obligations as defined by the Iowa Legislature in § 562A.12(3).

Dist. Ct. Ruling, pages 7-8.

Iowa Code §562A.12 provides,

> A landlord shall, within thirty days from the date of termination of the tenancy and receipt of the tenant's mailing address or delivery instructions, 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:…To restore the dwelling unit to its condition at the commencement of the tenancy, *ordinary wear and tear* excepted.

Iowa Code §562A.12(3)

Iowa Code §562A.12(3), as noted by the district court, requires that damages be specified before security deposit deductions are made while automatic carpet cleaning charges are made regardless of the state of the carpet at the end of the tenancy. Finally, §562A.12(3)(b) allows for security deposit deductions only for damages that exceed normal wear and tear, which automatic carpet cleaning provisions make no provision for.

Landlord's argument on appeal follows its standard rationale and argues enforcement, ignoring the terms of the lease. Brief of Appellant, pages 39-40. Landlord's argument succeeds only if *Staley* is overruled, tenants have no right

to a legal lease and thus the actual terms of the lease are irrelevant.

Landlord's stated rationale in its lease, also adopted by Amici, for this particular automatic carpet cleaning provision is that, "The departing tenant had professionally cleaned carpet at move-in, and the tenant will be charged for professionally cleaned carpet at departure"[14] Lease, "Building and Property Rules," §9, Apx, page 30; Brief of Amici, page 23-4. 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.

Ordinary wear and tear is the deterioration which results from normal and appropriate use of the premises. 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

[14]See appellant's reply brief in *DeStefano v. Apts. Downtown*, §IV.E, pages 24-5.

> 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…").

Amici argues that the landlord can contractually set the legal definition of ordinary wear and tear citing the "freedom of contract" precedent embodied in *Castillo-Cullather v. Pollack*, 685 N.E.2d 478, 482-83 (Ind. Ct. App. 1997). Brief of Amici, page 23. As discussed more fully in §III., above, this would reduce the IURLTA to a set of voluntary guidelines, and give landlords the right to redefine, alter or waive entirely the provisions of the IURLTA.

Amici also argues that since the accumulation of dirt is natural and inevitable that it is only "common sense" to permit landlords to automatically charge for carpet cleaning, no inspection of the unit is required. Brief of Amici, page 23. As we have seen, natural and inevitable deterioration and damage is the essence of ordinary wear and tear and thus is not chargeable to tenants. Furthermore, the natural and inevitable accumulation of dirt described by Amici is not due to tenants' negligence or deliberate misuse of the premises. In fact, it is impossible to avoid breaching the standard set in the Landlord's lease since as Amici acknowledges, there is no way to avoid carpets falling below a professionally cleaned standard during the tenancy. Thus Amici insists that landlords can require compensation by tenants for damage the tenants did not negligently or deliberately cause and that was impossible for tenants to prevent. In fact, says Amici, landlords are permitted to assume that this damage took place and need not make any inspection to verify the actual state of the premises.

None of these assertions can be squared with the requirement of the IURLTA. 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). 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 nor may a lease waive the inspection and itemization of damages required by §562A.12.

D. Using a Checklist to Waive Landlord's Maintenance Responsibilities

Landlord's lease provides,

> Within three (3) days of the commencement of the occupancy, Tenant shall complete and return to the 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.

Lease, ¶11, Apx, page 26.

Iowa Code §562A.11 provides, " A rental agreement shall not provide that the tenant or landlord: Agrees to waive or to forego rights or remedies

under this chapter…" Iowa Code §562A.11(1)(a). Iowa Code §562A.14 provides, " At the commencement of the term, the landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and section 562A.15." Iowa Code §562A.15 provides,

> 1. The landlord shall:
> a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
> b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition…
> d. Maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by the landlord.

Iowa Code §562A.15(1)(a),(b)&(d).

The district court ruled that, "…pursuant to Iowa Code §§ 562A.14 and 15, the landlord may not waive its repair, maintenance and cleaning obligations simply because a tenant fails to use Defendant's checklist, fails to complete a checklist, or fails to return a checklist within three days." Dist. Ct. Ruling, page 11.

Landlord argues "within a real world context" it is perfectly reasonable to contractually establish that "such damage will be presumed to have been caused

by the tenant." Brief of Appellant, page 43. Amici characterizes this provision as an "admission" that the tenant is "presumed as acknowledging that there are no defects or damages in the dwelling unit." Brief of Amicus, page 30.[15]

Under §562A.14 not only must possession be given by the Landlord, but possession in accordance with §562A.15, which sets forth landlord's statutory maintenance obligations. A landlord can't just give tenants the keys, the unit must be clean, sanitary and habitable with everything in working order at the beginning of the tenancy as required by §562A.15. However, under this lease provision if a tenant complains of a defect, but fails to use Landlord's checklist, or fails to put an item on the checklist or fails to get the checklist to Landlord within three days, then under its lease Landlord presumes the tenant is responsible, and the tenant's right to a clean, safe and habitable unit, is waived. The district court properly found this violated the prohibition on waivers of

[15] Amici notes that the Iowa Bar lease contains a similar waiver provision and argues that landlords are, "threatened with penalties for every tenant… without any showing of actual damages because they 'used' this allegedly prohibited term in their leases." Brief of Amici, pages 31-2. Nothing could be further from the truth. Punitive damages can only be awarded for the willful use of a known prohibited provision. Innocent or mistaken inclusion is not punishable and once they discover it is illegal Landlords need only remove this provision from their leases or disavow it to insulate themselves from punitive damages.

§562A.11(1)(a) and landlord's maintenance obligations under §562A.15.

E. Liability Limitation Provision

Landlord's lease provides,

> 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 given five (5) days written notice.

Lease ¶ 11, Apx, page 26.

The district court ruled,

> The Iowa Legislature has stated that a rental agreement shall not provide that the tenant or landlord agrees to the exculpation or limitation of any liability of the other party arising under law. The Iowa Supreme Court has held that a landlord owes a duty of care to protect tenants from reasonably foreseeable harm…The Court concludes that paragraphs 11 and 30 of Defendant's lease allow exculpation or limitation of any liability arising under the law, and allow Defendant to waive its obligations under §§ 562A.14 and 15.

Dist. Ct. Ruling, page 11.

Section 562A.11(1)(d) specifically prohibits leases from providing that a party, "[a]grees to the exculpation or limitation of any liability of the other

party arising under law…" Section 562A.22 provides,

> 1. If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in section 562A.14, rent abates until possession is delivered and the tenant shall:
> *a.* Upon at least five days' written notice to the landlord, terminate the rental agreement and upon termination the landlord shall return all prepaid rent and security; or
> *b.* Demand performance of the rental agreement by the landlord and, if the tenant elects, maintain an action for possession of the dwelling unit against the landlord or a person wrongfully in possession and recover the damages sustained by the tenant.
> 2. If a landlord's failure to deliver possession is willful and not in good faith, a tenant may recover from the landlord the actual damages sustained by the tenant and reasonable attorney's fees.

Iowa Code §562A.22.

Landlord's lease requires that if Landlord cannot give possession that tenants are required to accept rebated rent, "…as full settlement of all damages occasioned by the delay." Lease §11, Apx, page 26. This clearly limits the liability of Landlord in violation of §562A.11(1)(d) and also cuts off tenants' rights to damages under §§562A.22(1)(b)&(2).

Landlord argues that because the lease provision is prefaced with a general disclaimer, "subject to other remedies at law," that this disclaimer saves the provision. Landlord cannot mislead tenants or escape the specific statutory

prohibition on illegal provisions by using a general disclaimer. See *Tradewinds Ford Sales, Inc. v. Paiz*, 662 S.W.2d 164 (Tex.App. 1983) (general disclaimer cannot save illegal specific provision in a contract). Amici argues that the disclaimer is effective because tenants are presumed to know the law and thus presumed to know that illegal provision is illegal. Brief of Amici, page 29-30.

In *Staley v. Barkalow*, the Court of Appeals analyzed the language and purpose of Iowa Code §562A.11 which specifically prohibits liability shifting and indemnification lease clauses. The *Staley* Court pointed out the negative effect that the presence of illegal lease provision had on tenants holding that,

> …the legislature recognized a landlord's willful inclusion of prohibited clauses can have "an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests . . . or fail to pursue their own lawful rights." See *Baierl*, 629 N.W.2d at 284;

Staley v. Barkalow, 834 N.W.2d 873 at 15 (Table), 2013 WL 2368825 (Iowa App. 2013).

Similarly here, the fact that the exculpatory provision is unenforceable, rather than unenforced, does not render it any less objectionable. A tenant reading these provisions would naturally assume their validity and act

accordingly. This disclaimer is highly misleading. It says, "… subject to other remedies at law" when NO exculpation or liability shifting is allowed. It is hard to imagine that a tenant would read this section and understand that it is entirely void. Amici urges this Court to presume that tenants are aware of illegal provisions, will they argue that this Court should presume that landlords are similarly aware of illegal lease provisions?

The key question in *Staley* was, "…whether tenants have a right to a legal lease, a lease free from prohibited provisions…" *Staley* at 2. This use of disclaimers should not be permitted because it would allow landlords to include illegal provisions in their leases so long as they were prefaced with phrases like, "subject to other remedies at law" or "as allowed by law" It would be highly ironic if making these misleading statements then permitted a landlord to include otherwise illegal provisions.

IV. CLASS CERTIFICATION WAS APPROPRIATE

Landlord's class certification arguments fail into two categories: (1) arguments that it raises for the first time on appeal; or (2) arguments requiring *Staley v. Barkalow* to be overruled. If *Staley* was correctly decided and enforcement of prohibited provisions is not required for an injury to tenants, then Landlord's arguments with regard to class certification fail.

A district court's decision on class certification is reviewed for abuse of discretion. *Vos v. Farm Bureau Life Ins. Co*., 667 N.W.2d 36, 44 (Iowa 2003). Class action rules, "…should be liberally construed to favor the maintenance of class actions." *Comes v. Microsoft Corp*., 696 N.W.2d 318, 320 (Iowa 2005).

Tenants agree that Landlord preserved error on the class certification issues regarding enforcement and inclusion of prohibited lease provisions under *Staley*, but Landlord failed to preserve error with regard to the form of the class certification order, Brief of Appellant, pages 45-6; with regard to the financial resources of the class representatives or the adequacy of class counsel, Brief of Appellant, pages 53-4.

A. Landlord Failed to Preserve Error

Landlord argues for the first time on appeal the district court abused its discretion through its "…failure to appropriately describe the class being certified." Brief of Appellant, page 45-6. Landlord also argues for the first time on appeal that the district court failed to make any finding with regard to whether the class representatives had sufficient financial resources or whether class counsel was adequate. Brief of Appellant, page 53-4. None of these issues were raised in Landlord's pleadings below and Landlord did not file a motion to reconsider, a motion pursuant to Iowa R. Civ. P. 1.904(2) or in any way attempt to seek a modification of the district court's order. See Docket. Landlord states that it preserved error by "…resisting Tenants' motion for class certification." Appellant's Brief, page 45.

The mere filing of a resistance does not give Landlord carte blanche to raise issues on appeal that were not raised below. Error preservation is generally considered present when the *issues* to be reviewed have been raised and ruled on by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002);

State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003) (error preservation rules exist to ensure that district courts have the opportunity to correct or avoid errors and to provide appellate courts with a record to review.) Instead Landlord appears to be proceeding on a "plain error" rule. See, e.g. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). ("We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.")

It is particularly inappropriate to raise these issues for the first time in an interlocutory appeal made early in the case. It is hardly surprising that the district court has not resolved all possible issues that might arise, and it was deprived of the opportunity to resolve them expeditiously below by Landlord's failure to raise them. Tenants would note that Iowa R. Civ. P. 1.265(1) permits the district court wide discretion to amend the class certification order.

B. Enforcement vs. Inclusion

Landlord did preserve error for its key argument with regard to class certification, that Tenants suffered no injury. Brief of Appellant, page 52. According to Landlord since the challenged provisions were not enforced

against Tenants, they have suffered no injury and therefore are not proper class representatives. Brief of Appellant, pages 50-2. This is simply a reiteration of Landlord's earlier arguments that *Staley v. Barkalow* should be overruled which are discussed and refuted at §II., above. If the Court of Appeals in *Staley* correctly ruled that under the IURLTA that tenants have a right to a legal lease and are injured by the inclusion, even without enforcement of prohibited provisions injures tenants, then Landlord's arguments with regard to class certification fails. Only if *Staley* is overruled can Landlord's attack on the lack of injury to Tenants and their inadequacy as class representatives succeed.

C. The District Court Properly Followed *Staley* for Class Certification

Under Iowa R. Civ. P. 1.262(2) a class may be certified if:

> a. The requirements of rule 1.261 have been satisfied.
> b. A class action should be permitted for the fair and efficient adjudication of the controversy.
> c. The representative parties fairly and adequately will protect the interests of the class.

Iowa R. Civ. P. 1.262(2). Rule 1.261 requires:

> 1.261(1) The class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.

1.261(2) There is a question of law or fact common to the class.

Iowa R. Civ. P. 1.261.

The district court certified a class action in the instant case stating that,

> 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.

Dist. Ct. Ruling, page 12.

The *Staley* Court noted that the defendant landlord had stipulated that more than 80 tenants had the same or substantially similar leases. *Staley* at 17. In the instant case Landlord admitted that Tenants' lease, building and property rules and security deposit agreement was "essentially the same or substantially similar" to rental agreements used for at least 50 of its tenants.[16] Response to Request for Admissions. Apx, page 65.

As in the instant case, in *Staley* the defendant landlord challenged the

[16] More than 40 class members is sufficient to satisfy the numerosity requirement of Iowa R. Civ. P. 1.261(1), *Martin v. Amana Refrigeration, Inc.*, 435 N.W.2d 364, 368 (Iowa 1989). see also *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786 (Iowa 1994).

existence of a common question of law or fact based on lack of enforcement of the illegal lease provisions. The *Staley* Court held,

> Accordingly, when we consider the "substantially similar leases" and the "use/inclusion" factors, we conclude the district court abused its discretion because a common issue of liability under Iowa Code section 562A.11 predominates: whether TSB "willfully uses a rental agreement" with eighty tenants containing provisions known by TSB to be prohibited. See *Vignaroli v. Blue Cross*, 360 N.W.2d 741, 744-45 (Iowa 1985) (holding plaintiffs' reliance on employment manual's written provisions constituted the "gist of their claim"). Common issues of fact and law support the use of a class action procedure on the issue of TSB's liability under the commonality requirement of rule 1.261(2).

Staley at 18. Almost exactly the same issue is presented in the instant case: did Landlord willfully use a rental agreement with 50 or more tenants containing provisions known by Landlord to be prohibited? Following *Staley* the district court correctly found that common issues of law and fact exist in the instant case.

With regard to damages, the *Staley* Court held,

> …tenants seek damages common to all class members—actual damages, three months' rent, and reasonable attorney fees. See id. Damages for three months' rent are based on the actual rent amounts and damages for attorney fees would be identical for the tenant class. We recognize the actual damages incurred could be individualized, but the fact a "potential class action involves

> individual damage claims does not preclude certification when liability issues are common to the class." *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 792 (Iowa 1994).

Staley at 18. Once again the same damages, common to all class members are sought in the instant case as in *Staley*: actual damages, punitive damages and attorney fees. Petition, Apx, page 3.

The *Staley* Court then held,

> We reiterate Iowa Code section 562A.11(2) encompasses inclusion of prohibited lease terms and enforcement of prohibited provisions is not a prerequisite. Accordingly, any difference in enforcement is not dispositive of this class-certification element….Class certification can efficiently dispose of numerous tenant claims with an identical basis for TSB liability (use/inclusion of prohibited lease terms) and an identical basis for the tenants' recovery of three months' rent and reasonable attorney fees. The key evidence, applicable to all class members, is the identical TSB standard lease and the leases' alleged identical violations of Iowa landlord tenant law entitling the class to damages if they prove TSB willfully uses a standard lease "containing provisions known by [TSB] to be prohibited."

Staley at 19-20. Again, in the instant case, Tenants and the class of tenants all have the same identical basis for Landlord's liability and identical basis for punitive damages and attorney fees. The key evidence, as in *Staley*, is the identical standard lease and identical violation: the knowing and willful use of illegal lease provisions.

Finally, the *Staley* Court held,

> If additional individualized damage determinations are necessary, for example, the landlord enforcing an automatic carpet cleaning deduction, those determinations "will arise, if at all, during the claims administration process after a trial of the liability and class-wide injury issues." *Anderson Contracting*, 776 N.W.2d at 851. While some variations in the individual damage claims is likely to occur, sufficient common questions of law or fact regarding TSB's liability predominates over questions affecting only individual class members such that the class should be permitted for the fair and efficient adjudication of this controversy.

Staley at 20. This disposes of Landlord's main argument and objection to class certification. Since tenants are injured by the inclusion of illegal lease provisions, which violates their right to a legal lease, if in addition to including the lease provisions, Landlord actually enforced them, this simply adds to the damages for the tenants against whom they were enforced. All tenants with Landlord's illegal leases were injured, Tenants are appropriate class representatives and all tenants with Landlord's illegal lease provisions were appropriately made class members.

V. CONCLUSION

For the first time since the passage of the IURLTA a significant number of widely used lease provisions, including automatic carpet cleaning and liquidated damages, have received legal scrutiny. What was a "faint whiff of panic" of a few landlords with *Staley* has become a full blown stampede. A significant number of landlords appear convinced that they will soon be put out of business with punitive damages for unknowingly using prohibited lease provisions. Again, as Tenants have emphasized throughout their brief, the innocent or mistaken use of illegal provisions will not subject a landlord to punitive damages. The primary purpose of §562A.11 is "truth in labeling" for leases, a point lost in the furor over punitive damages. *Staley's* holding that tenants are entitled to a legal lease poses no threat to innocent landlords, while permitting the knowing inclusion of illegal lease provisions harms tenants.

Both landlords and tenants will benefit greatly from the guidance provided by this Court's rulings on the many issues of first impression presented in this and other pending landlord tenant cases. Landlords in

particular need to be reassured that only the willful inclusion of provisions known to be prohibited gives rises to punitive damages. Ultimately, it must not be the fiat of landlords through their cunningly crafted leases, but the IURLTA and the courts which govern landlord tenant relations.

WHEREFORE, district court's grant of partial summary & declaratory judgment and class certification should be affirmed.

REQUEST FOR ORAL SUBMISSION

Appellees request oral argument.

Respectfully submitted,

CHRISTOPHER WARNOCK
IOWA BAR 9679
The Iowa Tenants' Project
532 Center Street
Iowa City, IA 52245
(319) 358-9213
chriswarnock@gmail.com

CHRISTINE BOYER
IOWA BAR 1153
The Iowa Tenants' Project
Post Office Box 1985
132 ½ East Washington Street
Iowa City, IA 52244-1985
(319) 321-4778
christine.boyer@mchsi.com

COUNSEL FOR APPELLEES

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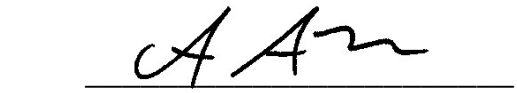

Christopher Warnock

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