IN THE SUPREME COURT OF IOWA
NO. 15-1350

Johnson County No. CVCV076694

DANIEL KLINE, FRANK SORIES AND AMARIS MCCANN,

PLAINTIFFS-APPELLEES,

vs.

SOUTHGATE PROPERTY MANAGEMENT, LLC,

DEFENDANT-APPELLANT.

CORRECTED BRIEF OF LANDLORDS OF IOWA, INC. AND GREATER IOWA APARTMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF DEFENDANT-APPELLANT

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STATEMENT OF IDENTITY AND INTEREST IN CASE

Landlords of Iowa, Inc. ("Landlords") is a non-profit Iowa corporation and has approximately 800 members in the State of Iowa. Membership is open to owners or managers of at least one residential or commercial rental property in Iowa.

Greater Iowa Apartment Association ("GIAA") is an Iowa non-profit organization and has approximately 109 members, including approximately 47 management companies with 162 properties under management. The total number of rental units under management by members is approximately 21,000.

The resolution of the issues involved in this appeal will have a wide-ranging impact on the terms and conditions of residential leases throughout the State of Iowa and on the manner in which members of Landlords and GIAA conduct business with their tenants.

ARGUMENT

I. CHAPTER 562A IS NOT THE LAST WORD ON LEASE TERMS AND SHOULD BE SUPPLEMENTED BY COMMON LAW PRINCIPLES.

Iowa adopted the Uniform Residential Landlord and Tenant Act ("Chapter 562A") in 1978, but with some modifications. Chapter 562A is not intended to be the last and only word on the law governing the relationship between landlords and tenants in Iowa. First, Iowa Code Section 562A.3 recognizes, "[u]nless displaced by the provisions of this chapter, the principles of law and equity in this state . . . shall supplement its provisions." There is no reason for this savings clause if the legislature intended Chapter 562A to preempt the field of landlord-tenant relationships. Second, Iowa Code Section 562A.9(1) provides the landlord and tenant may include in a rental agreement, terms and conditions not prohibited by Chapter 562A.

This is a legislative recognition there could exist other provisions of a lease between landlords and tenants that would not violate Chapter 562A. Where Chapter 562A is silent, the Court should look to the principles of common law to supplement its provisions and otherwise allow the parties the freedom of contract.

Several applicable common law principles should guide the Court's decision. These include the freedom of contract, the enforceability of liquidated damage provisions, the favor granted settlement of disputed claims, and the encouragement of personal responsibility.

A. Freedom of Contract Has Deep Roots in Iowa.

This Court has long recognized the importance of freedom of contract with respect to leases. In Snyder v. Bernstein Bros., 208 N.W. 503 (Iowa 1926), the issue was whether an anti-assignability provision was valid and enforceable. Id. at 504. The Court started its analysis:

> The right of an owner of real estate to create a leasehold interest therein must be recognized as a right in property. Who shall occupy, have care of, and control of his real estate is a necessary incident of a right in private property, and this right is enforced and protected, unless some positive law is violated or public policy is contravened. The freedom of contract and the right of property are the two most fundamental things in our individualistic scheme of society.

Id. (emphasis added). See Castillo-Cullather v. Pollack, 685 N.E.2d 478, 482-83 (Ind. Ct. App. 1997) (landlord and tenant defined "ordinary wear and tear" as not including dirty carpet, and parties may contractually define "ordinary wear and tear" because "consistent with the long standing policy . . . allowing parties their freedom of contract").

The societal interest in preserving the freedom of parties to contract has been described as "weighty" by the Court. Rogers v. Webb, 558 N.W.2d 155, 157 (Iowa 1997). "The freedom of contract is a fundamental principle in our social and industrial life, and, subject to certain limitations, receives the same legal protection as the right of property." Miles v. Lynch, 182 N.W. 220, 224 (Iowa 1921).

This Court has also recognized the fundamental right of freedom of contract as a limiting principle. In Robinson v. Allied Property and Casualty Insurance Co., 816 N.W.2d 398 (Iowa 2012), the Court upheld a two-year limitation in an insurance policy on actions to recover uninsured motorist benefits. In a separate division of its opinion entitled "Freedom of Contract," the Court concluded it was "reluctant to interfere with the freedom of contract." Id. at 408. The Court characterized the invalidation of provisions in private contracts as a "very unruly horse," which the Court may not be able to control. Id. Therefore, in light of the weighty principle of freedom of contract, this Court should proceed very cautiously in declaring illegal terms and conditions of residential leases that are not clearly prohibited by Chapter 562A.

B. Liquidated Damage Terms are Enforceable and Beneficial.

Parties to a contract are free to agree to liquidated damages. The only limitation on this right is if the agreed-to sum is so excessive as to constitute a penalty.[1] Aurora Business Park Assocs. v. Michael Albert, Inc., 548 N.W.2d 153, 155 (Iowa 1996).

Aurora Business Park was an action for breach of a lease. The Court considered the enforceability of a provision providing for the acceleration of rent payments in the event of default. The Court stated: "A landlord and tenant may agree to the landlord's remedies if the tenant abandons the property and fails to pay rent, as long as the provision does not constitute a penalty." Id. at 156. In fact, the Court "recognized the trend of favoring liquidated damages clauses." Id. The Court upheld the acceleration clause. Id. Many benefits arise from the use of liquidated damage. Such clauses preclude the need for litigation, encourage parties to settle, and provide an

[1]Variously in the record below there have been references by Plaintiff to "penalties" or "fines". For the sake of clarity, nowhere in the SouthGate lease is a monetary sum referred to as a "penalty" or "fine". When referenced, they are called "fees", "charges" or "liquidated damages". There was no evidence presented in the record below that any of the monetary sums set forth in the SouthGate lease were excessive. Therefore, those monetary funds may only be properly referred to in this matter as fees, charges or liquidated damages.

inducement for performance, all of which reduce the transaction costs to the parties.

These same benefits were relied upon by the Court in Rohlin Construction Co., Inc. v. City of Hinton, 476 N.W.2d 78, 79-80 (Iowa 1991), in which the Court cited favorably the approach of the American Law Institute toward liquidated damages as set forth in the Restatement (Second) of Contracts, Section 356(1) (1981), quoting with favor from comment a:

> 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 principles of compensation. The enforcement of such provisions for liquidated damages saves the time of courts, juries, parties and witnesses and reduces the expense of litigation. This is especially important if the amount in controversy is small.

Id. at 80 (emphasis added). Here, the fees and charges agreed to between SouthGate and its tenants are actually liquidated damages ranging from $25 to $500 (unauthorized pet fee) which should be favored and enforced by the Court.

C. Iowa Law Favors Settlement of Disputes.

Related to the benefits flowing from liquidated damages, particularly in cases where the amount at issue may be relatively small, as here, is the Iowa common law that favors settlement of disputes. Each agreed-to fee or

charge in the lease operates as a pre-dispute settlement of a potential breach of contract. Each liquidated damages provision is a mini-settlement agreement, and "[t]he law favors settlement of controversies." Wright v. Scott, 410 N.W.2d 247, 249 (Iowa 1987). As this Court has further observed: "We have long held that voluntary settlements of legal disputes should be encouraged, with the terms of settlements not inordinately scrutinized." Id. This policy applies to "stipulations." In re Clark's Estates, 181 N.W.2d 138, 142 (Iowa 1970). This common law principle supports a landlord and tenant agreeing in advance as to monetary sums that may be assessed for a tenant's noncompliance with a lease or a tenant's need for special services or attention, as here.

D. Personal Responsibility Supports Lease Terms That Impose Costs on the Tenant.

The legal principle that overarches all of those discussed above is the principle of personal responsibility. "A basic principle underlies much of not only law, but of life: A person will be held to the consequences of his decisions; if not by himself, then by society. We can call this concept the guiding principle or ideal, the lodestar if you will, of personal

responsibility." Michael B. Brennan[2], The Lodestar of Personal Responsibility, 88 Marq. L. Rev. 365 (Fall 2004).

This principle runs throughout Iowa common law. In the criminal context, penalties are imposed upon individuals for their conduct to hold them personally responsible for that conduct and to deter future similar conduct. In civil law, damages are imposed upon parties for their wrongdoing for the same reasons, and individuals are held responsible for their own safety. In contract law, courts enforce contracts as written because competent individuals should keep the promises they make. In fact, this personal responsibility principle is one of the first lessons we all learn.[3] This idea of personal responsibility is also reflected in Iowa Code Section 562A.17, which sets forth a list of the tenant's obligations relating to the maintenance of the rental unit.

[2]Judge Brennan sits on the Wisconsin Circuit Court of Appeals.

[3]Among the lessons in All I Really Need to Know I Learned in Kindergarten (1989) by Rob Fulghum are "put things back where you found them" and "clean up your own mess".

E. The Common Law Guides the Construction of Chapter 562A.

Chapter 562A should be construed consistent with Iowa case law and the common law. See Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 685 (Iowa 2001). For example, "[w]ords that have a well-defined meaning in the common law have the same meaning in statutes dealing with similar subject matter." Id.; Welch v. Iowa Dept. of Transp., 801 N.W.2d 590, 600 (Iowa 2011) ("'The legislature is presumed to know the state of the law, including the case law, at the time it enacts a statute'") (citation omitted). Iowa common law includes within the definition of "damages" the concepts of liquidated or stipulated damages. See Am. Soil Processing, 586 N.W.2d at 325 (liquidated damages "ordinarily means the parties intended a remedy for damages in the event of non-performance"). Liquidated damages are a species or type of "damage". Therefore, where Chapter 562A uses the term "damages" (discussed below), that term includes fees, charges or liquidated damages in the SouthGate lease.

II. THE DISTRICT COURT ERRED IN CONCLUDING AGREED-TO FEES, CHARGES AND LIQUIDATED DAMAGES ARE PROHIBITED BY CHAPTER 562A.

The SouthGate lease includes certain provisions whereby tenants and SouthGate agree the tenant will be liable for certain monetary amounts for various things. It provides for various fees, charges and liquidated damages.

With respect to these fees and charges, the district court cited D.R. Mobile Homes Rentals v. Frost, 545 N.W.2d 302, 306 (Iowa 1996), and the "'language utilized'" in Chapter 562A to conclude that a landlord may only agree with the tenant that the tenant will pay actual damages in the event of a breach. (Ruling at 7). The court further noted the "fees . . . have been set without any consideration of what that landlord's actual damages and fees would be in each situation." Id. at 7.

As to this last statement, there was no evidence in the summary judgment record that the fees and charges do not reasonably approximate "actual damages". Therefore, there was no evidence any of the fees or charges in the lease were excessive, or deviation from the landlord's actual costs.

The district court also erred because nothing in Chapter 562A may be reasonably construed as prohibiting landlords and tenants from agreeing to

liquidated damages (whatever they may call them). In construing statutes, the court's aim is to ascertain the intention of the legislature. Iowa R. App. P. 14(f)(13). Further, the usual and ordinary meaning is to be given the language used by the legislature unless the manifest intent of the legislature is otherwise. Am. Home Prod. Corp. v. Iowa State Bd. of Tax Review, 302 N.W.2d 140, 143 (Iowa 1981). These principles support reversal.

First, Iowa Code Section 562A.11 (Prohibited Provisions in Rental Agreements) does not specifically prohibit liquidated damages. While that section does address one type of fee (attorney fees), it does otherwise specifically prohibit any other fees in a lease agreement. The legislature knew how to specifically prohibit fees when it wanted to, but it did not prohibit the kind of fees at issue here. With respect to the anti-waiver provision of Iowa Code Section 562A.11(1)(a), it is not clear what particular "right or remedy" of a tenant may be reasonably viewed as waived by a fee term. The only relevant "right or remedy" involved is that of a landlord to deduct amounts from a security deposit or to recover damages.

Actually, the statute also recognizes amounts other than unpaid rent may be deducted from the security deposit. Section 562A.12(3)(1) provides the landlord may withhold from the rental deposits "other funds due to the

landlord pursuant to the rental agreement." (emphasis added). This language recognizes there may be funds due to the landlord pursuant to the lease other than rent. Such "other funds due" contemplates the types of fees or charges here.

Second, the decision in D.R. Mobile does not warrant the heavy reliance placed on it by Plaintiffs and the district court. The lease involved there did not include any fee or liquidated damage provisions. The court never decided whether such provisions were prohibited by Chapter 562A. D.R. Mobile simply stands for the unsurprising concept that, if a landlord is only entitled to recover actual damages under a lease (because it does not provide for liquidated damages), then the landlord must present evidence of those damages.

However, D.R. Mobile does not answer the question of whether the liquidated damage provisions are prohibited by Chapter 562A. They are not. First, for the reasons discussed above, the statute expressly contemplates a landlord may deduct from the security deposit "other funds due" pursuant to a lease besides rent like agreed-to fees or liquidated damages. Further, even if the statute may be properly construed to limit a landlord's recovery in a lawsuit to actual damages (which it does not), that does not answer the

question of whether the landlord may collect during the tenancy or deduct from the security deposit fees, charges or liquidated damages. The right to collect fees or charges during the term of a lease or to deduct amounts from the security deposit provided by Section 562A.12(3)(a)(1) are rights separate and apart from the issue of what damages a landlord may be entitled to recover in a lawsuit.

In addition, D.R. Mobile relied upon Section 562A.32 ("Remedy After Termination") 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." (emphasis added). The Court did not consider, however, the more germane Section 562A.27(3), which 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 ('Tenant to Maintain Dwelling Unit'). . . ." (emphasis added).

Significantly, the legislature used the term "damages" in Section 562A.27(c), not "actual damages" as it did in Section 562A.32, to identify what a landlord is entitled to recover in the event of noncompliance by the

tenant with the rental agreement or failure of the tenant to meet his or her obligations under Section 562A.17 to keep the property "as clean and safe as the condition of the premises permit."

Compare Section 562A.27(3) to its counterpart in the Model Act Section 4.201(c). The Model Act section provides: "Except as provided in this act, the landlord may recover actual damages and obtain injunctive relief for noncompliance by the tenant with the rental agreement or section 3.101." (emphasis added). The Iowa legislature intentionally deleted the reference to "actual" damages when it enacted Section 562A.27(3). The Court must presume it did so for a reason.[4] The only conceivable reason is that the

[4]When the legislature intended to restrict recovery to "actual damages", it said so. See Iowa Code §§ 562A.11(2); 562A.12(7); 562A.22(2); 562A.26; 562A.34(4); 562A.35(1), (12), and 562A.36(2). Therefore, when the legislature deliberately used the term "damages" instead of "actual damages", it must have intended a broader scope of recovery. "When a legislature uses similar but different terms in an ordinance, the reviewing court presumes the legislature intended the particular word choice." Town of Jackson v. O'Hearn, No. 98-0237, 1998 WL 467069, at *2 (Wis. Ct. App. Aug. 12, 1998); SEC v. Tambone, 597 F.3d 436, 443 (1st Cir. 2010) ("Word choices have consequences, and this word choice virtually leaps off the page. There is no principled way that we can treat it as meaningless."). Kansas City Power & Light Co. v. Strong, 356 P.3d 1064, 1074 (Kan. 2015) ("We will not presume that this word choice was accidental. In fact, we presume the legislature deliberately chose the words used and intended those choices to convey a real meaning").

legislature intended the scope of "damages" recoverable under Section 562A.27 to be broader than "actual damages", and to include other species of damages, such as stipulated or liquidated damages like the agreed-to fees or charges here.

In addition, Section 562A.32 (Remedy After Termination) applies under different circumstances—when a rental agreement has been terminated and repossession is sought. Pursuant to the terms of the SouthGate lease, the various fees or charges may be due and payable by the tenant while the lease remains in force and effect. Section 562A.32 does not address that circumstance. It is reasonable to conclude the broader scope of "damages" recoverable under Section 562A.27(3) is meant to allow collection of the "other funds due to the landlord pursuant to the rental agreement", as provided in Section 562A.12(3)(a)(1), which may include fees, charges or liquidated damages set forth in the lease.

The legislature's decision to broaden the scope of damages that could be recovered by a landlord to include fees, charges or liquidated damages as well as actual damages finds further support in Section 562A.12(3)(a). That section provides: "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." (emphasis added). Again, the legislature intentionally used the broader term "damages" rather than "actual damages."

This is a recognition that the landlord and tenant may have stipulated, for example, that in the event of certain items of uncleanliness (unclean refrigerator, stove, toilet, etc.), fees for such items. Or, as in the SouthGate lease, agree to fees, charges, or liquidated damages related to common acts of noncompliance by tenants, or special services or attention required because of a tenant's irresponsibility or special requests. Such stipulated fees reasonably fall within the terms "damages", which the landlord may collect during the lease term, deduct from a security deposit under Section 562A.12(3)(a), and recover in a lawsuit based upon noncompliance by the tenant with the lease, including a tenant's failure to maintain a clean unit under Section 562A.27(3).

While the statute is not controlling here, this construction of the statute is consistent with its purpose to encourage landlords and tenants to maintain and improve the quality of housing, and is supported by many practical policy reasons. The fees or charges agreed to by the parties in the SouthGate lease lower transaction costs for both the landlord and tenant, freeing up sums otherwise spent on a dispute for upkeep and maintenance of

the housing. This tends to support the goal of affordable and habitable rental housing in Iowa. Further, allowing the parties to agree to fees for various services gives landlords' flexibility to provide new services as needed or available because of emerging technologies, such as Wi-Fi or electric car charging stations. Allowing a landlord to charge tenants fees for goods or services encourages landlords to make them available when technologically feasible.

In addition, the imposition of agreed-to fees or charges imposes a personal responsibility on the tenant for repairs or services that are required because of a particular tenant's conduct. In the case of the SouthGate lease, for example, such fees or charges include those for returned checks, utility disconnects, the keeping of unauthorized pets, maintenance or repair needed because of a tenant's negligence and the fees for lockout and key replacements. These fees arise out of a tenant's failure in a particular case to be responsible. The fees work to impose the costs of that irresponsibility on the culpable party. The alternative of spreading the costs of such conduct to all tenants through higher rents is not only unfair[5] but removes any incentive

[5]The Act covers all types of rental housing, not just student housing, including low income individuals and the elderly. Making such tenants pay

for an individual tenant to act responsibly, contrary to statutory policy to require tenants to do their part in the upkeep of rental units. The use of stipulated fees or liquidated damages is also consistent with Chapter 562A's policy of promoting full disclosure by the landlord to the tenant. See Iowa Code § 562A.13.

In some instances, the stipulated fees may be user fees, which impose the costs associated with provision of a particular facility or service on those tenants who take advantage of it. In the SouthGate lease, such fees may include the fee charged for handling a utility bill received or paid by the landlord, lockout fees and the fees for new keys. Those tenants who use or need a particular service or facility should be the ones to pay for it, and stipulated fees is a good way to do that. Another common example may be fees for parking. Not all tenants need or use parking. A parking fee may be properly included in a lease because they are not prohibited by Chapter 562A, and they make common sense—those tenants that use a particular facility should pay for it, rather than having the costs of the

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higher rents because of the irresponsible conduct of other tenants is not the answer.

facility spread to all tenants, some of whom may not use it, such as a senior citizen who no longer drives or a disabled person who is unable to drive.

One of the provisions held to be improper by the district court did not impose a specific agreed-to fee or charge. Paragraph 12 of the SouthGate lease deals with the payment for repair to a unit caused by a tenant's negligence. It includes an agreed-to method for calculating the cost of repair ("charged at a current rate per hour. . . ."). The evidence below indicated SouthGate provides these maintenance services through use of its own in-house staff, rather than a third party. Apparently, Plaintiffs' position (which the district court apparently accepted) is that SouthGate has not sustained "actual damages" when it has not hired a third party to perform the maintenance. That is wrong.

First, as discussed above, landlords are not limited to recovering "actual damages" for a tenant's noncompliance with a lease, and in particular, noncompliance relating to the tenant's obligation to maintain the unit. Iowa Code §§562A.12(3)(a); 562A.27(3). Second, nothing in Chapter 562A precludes a landlord from calculating its damages for its repair and maintenance service based upon the rate it charges third parties for that service. SouthGate and its tenants agreed that would be the basis for

any charges for maintenance or repair. Like liquidated damages, parties to a contract are free to agree in advance as to the method of calculation of a particular item of damage. In addition, damages may be calculated at common law based upon the hourly rates of in-house employees. See, e.g., Hartford Elec. Light Co. v. Beard, 213 A.2d 536, 537 (Conn. Cir. Ct. 1965) (damages caused by plaintiff striking of light pole may properly be measured by indirect costs of repair calculated as a percentage of the direct costs of labor and materials when a repair is performed by defendant's own employee). Finally, and probably conclusively, Chapter 562A, itself, sanctions this method of calculating damages. See Iowa Code § 562A.28 (landlord may enter unit for repairs and bill the tenant for "the fair and reasonable value" of the repair). Therefore, the district court erred in ruling the fees, charges and liquidated damages in the SouthGate lease are prohibited by Chapter 562A.

III. THE DISTRICT COURT ERRED IN FINDING THE CARPET CLEANING PROVISION IS PROHIBITED BY CHAPTER 562A.

The "Building and Property Rules" of the SouthGate lease provides:

> All carpets are professional cleaned at the end of each tenancy. The parting tenant had a professionally cleaned carpet at move-in, and the tenant will be charged for professionally cleaned carpet at departure.

(Pl.'s Ex. 1, ¶ 9).[6] Without regard to how SouthGate actually administered this provision (which was to not require carpet cleaning in all cases without inspection), the district court concluded SouthGate "automatically imposes on tenants certain fees for carpet cleaning regardless of whether the carpet is clean or not." Id. Given this provision, the district court concluded in error that it "permits the landlord to avoid its obligation" to provide "a specific reason for withholding any of the rental deposit" and its obligation to prove "the reason for withholding any of the rental deposit, with ordinary wear and tear excepted."

To the contrary, however, this provision is not prohibited by Chapter 562A and is consistent with the purposes of the statute and applicable common law principles. First, such a provision is not expressly prohibited by Section 562A.11(1). Plaintiff must rely upon the general anti-waiver provision of Section 562A.11(1)(a) to argue the carpet cleaning provision is somehow prohibited. Based upon the district court's logic, it appears the

[6]It should be noted the carpet cleaning provision only imposes on tenants actual charges incurred by SouthGate to professionally clean the carpet. Therefore, any arguments Plaintiffs have made regarding the recovery of "actual damages" only are irrelevant with respect to this provision of the lease.

Court accepted the argument that the carpet cleaning provision somehow waives the tenant's right to a "written statement showing the specific reason for withholding of the rental deposit", which "statement shall specify the nature of the damages." Iowa Code § 562A.12(3)(a).

However, no evidence was submitted that SouthGate ever deducted charges for carpet cleaning from a tenant's security deposit while not providing the tenant a specific reason for withholding the deposit with a specification of the nature of the damages. Further, there is nothing about the carpet cleaning provision that would make it impossible for SouthGate to comply with these requirements or excuse it from doing so. For example, a compliant statement could read as follows: "The charge of $100.00 was withheld from your rental deposit to professionally clean the carpet because the carpet had accumulated filth during the course of your occupancy." Such a statement would comply with Section 562A.12(3)(a) and nothing about the carpet cleaning provision would preclude such an explanation.

The court's error is based upon three wrong assumptions. First, is the assumption that a landlord may not properly insist on professionally cleaned carpets. Nothing in Chapter 562A so provides. Furthermore, the tenant is obligated to restore the unit "to its condition at the commencement of the

tenancy. . . ." Iowa Code § 562A.12(3)(a)(2). If the carpet has been professionally cleaned at commencement of the tenancy, then the applicable objective standard for the "condition at commencement of the tenancy" is a professionally-cleaned carpet. See Castillo-Cullather v. Pollack, 685 N.E.2d 478, 482-83 (Ind. Ct. App. 1997) (lease requirement that tenants steam clean carpet "establishes an objective standard to determine the condition of the apartment upon termination of the lease"). Therefore, to restore the carpet to that prior condition, they must be professionally cleaned.

The second incorrect assumption is that an actual inspection of the carpet is required before a tenant may be properly obligated to professionally clean it. Again, the statute requires the tenant to restore the unit "to its condition at the commencement of the tenancy." If the carpet was professionally cleaned at commencement of the tenancy, unless and until it is professionally cleaned, the unit has not been restored to its "condition at commencement," regardless of how clean the carpet may or may not be. No inspection is needed to know that.

In this regard, Plaintiff's insistence that the carpet must actually be inspected to determine the need for professional carpet cleaning defies common sense. Unless the tenant lives in a bubble, it is a foregone

conclusion that the carpet will accumulate dust and dirt as certain as the sun rises in the east. The Court may take judicial notice of known natural phenomenon. See Staples v. City of Spencer, 271 N.W. 200, 202 (Iowa 1937) (judicial notice taken as "common knowledge" and experience that "[w]here the snow is melting and freezing, irregular surfaces are likely to form unexpectedly"); see also, Williams by Williams v. Stewart, 703 P.2d 546, 547 (Ariz. Ct. App. 1985) (court took judicial notice "that pools can become dirty without negligence"). Here, the Court may take judicial notice that dust and dirt accumulates on carpet over time.[7] SouthGate's lease term requiring professional cleaning of carpet at the end of a tenancy is premised upon simple common sense. It is "automatic" only because the accumulation of dust and dirt on the carpet of a rental unit is, itself, "automatic."

[7]What experience teaches is also supported by science. Most of the dust and dirt in a residence is dead skin cells. Scientists estimate that of the billions of skin cells that make up human skin, between 30,000 and 40,000 of them are shed from the body every hour. Over a 24-hour period, one person loses almost one million skin cells. An average person sheds more than 8 pounds of dead skin in a year. These dead skin cells attract trillions of microscopic life forms called dust mites that eat the old dead skin. http://health.howstuffworks.com\skin-care\information\anatomy\shed-skin-cells.htm.

Not only does this term of the SouthGate lease comport with common sense, it is supported by the policy of Chapter 562A, which is to encourage landlords and tenants to maintain and improve the quality of housing. It is only fair and consistent with the principle of personal responsibility that the tenants who have enjoyed the use and occupancy of a unit for the term of the lease are responsible to restore the carpet in that unit to the same standard of cleanliness they enjoyed at the commencement of their lease term. They should return the unit to the condition they found it in.

The third and final erroneous assumption underlying the district court's opinion is that the natural accumulation of dirt on carpet is "ordinary wear and tear" for which a tenant is not responsible under Section 562A.12(3)(a)(2). The anti-waiver provision of Chapter 562A applies only if based upon the carpet cleaning requirement tenants are waiving their right not to pay for "ordinary wear and tear". Therefore, this Court will need to decide whether the natural accumulation of dirt on carpet is or is not "ordinary wear and tear" under Section 562A.12(3)(a)(2).

It is not. The natural accumulation of dirt on carpet is not "ordinary wear and tear" for which a tenant is not responsible under the statute. Other courts have concluded that such accumulation of dirt on the carpets does not

constitute ordinary wear and tear under their version of the Model Act. For example, in Miller v. Geels, 643 N.E.2d 922, 927 (Ind. Ct. App. 1995), the court stated:

> [W]e conclude that ordinary wear and tear refers to the gradual deterioration of the condition of an object which results from its appropriate use over time. We do not agree with the tenants' contention that the accumulation of dirt constitutes ordinary wear and tear. Objects which have accumulated dirt and which require cleaning have not gradually deteriorated due to wear and tear. Rather, such objects have been damaged by dirt, although they are usually capable of being returned to a clean condition.

Id. at 927.

Of course, the phrase "ordinary wear and tear" has an ordinary meaning. "Ordinary" means "occurring or encountered in the usual course of events." Webster's Third New International Dictionary (1971). "Wear" means "to cause to deteriorate by use." Id. "Tear" means to "divide (as a piece of fabric or paper) forcefully or violently into parts." Id. All connote the physical deterioration of things like carpet, windows, paint, hardware and appliances over time due to expected use. Id.; see also Black's Law Dictionary (10th Ed. 2014) ("wear and tear" is "[d]eterioration caused by ordinary use"). The phrase does not connote the mere accumulation of dust

and dirt on surfaces that may be thoroughly removed by a good professional carpet cleaning.[8]

A simple analogy will make the distinction clear between accumulated dirt and "ordinary wear and tear." When a gentleman's shirt is flaked with dandruff, that is an accumulation or deposit of dirt. When that shirt frays at the cuffs, that is "ordinary wear and tear." SouthGate's carpet cleaning requirement does not obligate the tenant to replace worn out carpet that is threadbare or matted down from traffic, which are good examples of "ordinary wear and tear." It only obligates the tenant to remove accumulated dirt to the extent of a professionally cleaned carpet. Therefore, SouthGate's requirement that a tenant professionally clean the carpet does not waive tenants' right not to be held responsible for ordinary wear and tear. The district court erred on finding the provision violated the statute.

[8]The draft of the Revised Uniform Residential Landlord and Tenant Act (2015) in section 501(a) defines "normal wear and tear" in a similar way as "deterioration that results from the intended use of the dwelling unit, including breakage or malfunction due to age or deteriorated condition."

IV. THE DISTRICT COURT ERRED IN FINDING THAT THE "DELAY OF POSSESSION" PROVISION OF THE SOUTHGATE LEASE CONSTITUTED A WAIVER OR RELEASE.

The District Court Order considered together the provisions of paragraph 11 and 30 of the SouthGate lease. A more focused analysis is achieved if each provision is considered separately, as will be done here.

Plaintiff challenges paragraph 11 of SouthGate's lease as an improper exculpation clause prohibited by Section 562A.11(1)(d). To qualify as an improper exculpation or limitation of liability clause under this provision, however, it must be a legally effective agreement releasing the landlord or limiting the liability of the landlord for a legal liability. For a waiver, release or indemnification provision in a lease to violate Chapter 562A, it must be legally effective. See Norfolk and Dettum Mut. Fire Ins. Co. v. Morrison, 924 N.E.2d 260, 263-66 (Mass. 2010) (indemnification provision in lease did not violate statute because it was not legally effective to relieve the landlord from liability for injuries caused by its own negligence). Section 562A.11(1)(d) requires that a prohibited term actually be (1) an agreement, (2) that releases or limits of liability of the landlord arising under law. Significantly, this section does not prohibit terms that "seem to be" or "may be believed" or "could be interpreted" as a legally effective waiver or

release. Therefore, to violate Section 562A.1(a) [waiver] or (d) [exculpation or limitation], the agreement must, as a matter of law, constitute a legally effective waiver, release or limitation of liability. If the provision does not, it is not prohibited by the Act.

Paragraph 11 of SouthGate's lease regarding "Delay of Possession" does qualify as a prohibited term because it is legally ineffective. Plaintiff's assertion that paragraph 11 does not allow the tenant all the rights provided under sections 562A.22(1)(a)(b) and 562A.22(2) is wrong. Paragraph 11 does give tenants all the rights and remedies under the statute because it is "[s]ubject to other remedies at law."

Paragraph 11 of the SouthGate lease is not legally effective in waiving tenants' rights under Chapter 562A. The reason it is not is because it provides that it is "[s]ubject to other remedies at law. . . ." That is, what it appears to take away with one hand, it gives back with the other. A proviso such as that in Paragraph 11 ("Subject to. . .") saves a term that without it may violate the Act. See VG Marina Mgmt. Corp. v. Wiener, 882 N.E.2d 196, 201 (2008) (attorney fee provision in lease did not violate Act where it included proviso "as provided by applicable laws and court rules'"). The law also presumes tenants know all their rights under Iowa law, despite the

language of paragraph 11. Garlick v. The Mississippi Valley Ins. Co., 44 Iowa 553, 555 (1876) ("[E]very person is presumed to know the law, no statement about it can operate as a waiver."). Therefore, paragraph 11 does not constitute a legally effective agreement to waive or forego rights or remedy of the tenant under Chapter 562A or as a legally effective release or limitation of liability. Therefore, the district court erred.

V. THE DISTRICT COURT ERRED IN CONCLUDING THAT SOUTHGATE'S TENANT CHECK-IN "ACKNOWLEDGMENT" IS PROHIBITED BY CHAPTER 562A.

The district court also erred in finding that paragraph 30 of the SouthGate lease constituted a prohibited waiver of rights or remedies or release of liability under Chapter 562A. That provision generally provides that if a tenant does not identify on a checklist a condition of the property, then the tenant will be "presumed as acknowledging that there are no defects or damages in the dwelling unit."

By no stretch of the legal imagination, however, does such a provision constitute a legally effective waiver or release of rights or remedies under Chapter 562A or a limitation of liability. At most, it is only an admission by the tenant that the rental unit has been delivered in a condition that complies with the landlord's obligations to maintain a premises. An

"acknowledgement" qualifies as neither a legally effective waiver nor a release or limitation of liability. Like any other admission recognized by common law, it may be rebutted by a subsequent denial or later-discovered facts. Sheffer v. Rardin, 704 S.E.2d 32, 37 (N.C. Ct. App. 2010) ("'[A]n evidential or extrajudicial admission consists of words or other conduct of a party . . . which is admissible into evidence against such party, but which may be rebutted, denied or explained away and is in no sense conclusive'") (citation omitted) (emphasis added). Therefore, in the event there is a condition of the rental unit at the start of occupancy that constitutes a violation of the landlord's obligations to maintain a safe and habitable premise, the tenant has lost none of the rights or remedies available to the tenant under Chapter 562A or the lease. This acknowledgement does not even come close to a release or waiver of a landlord's obligation to use reasonable care to prevent foreseeable harm to tenants, as it was characterized by the district court.[9]

[9]The Iowa State Bar Association form entitled "Dwelling Unit Rental Agreement" also provides in paragraph 16 for the tenant's inspection of the property and "acknowledgement" of its condition at the commencement of the tenancy. At least in the opinion of the Iowa Bar Association, such an acknowledgement is not prohibited by Chapter 562A. The Bar is right. Incredibly, all landlords who have used the Bar form, according to Plaintiffs

Not only is this provision not prohibited by Chapter 562A, it is actually beneficial and consistent with the statutory policy to maintain and improve the quality of housing. The inspection by the tenant provides a second set of eyes to help the landlord identify conditions of the property that need to be corrected. This inspection establishes a base line with respect to the condition of the unit at the commencement of occupancy that should avoid subsequent disputes. The inspection process also protects the tenant from being held responsible for a pre-existing condition. Finally, the provision is consistent with the policy of encouraging disclosure between the landlord and tenant. Paragraph 30 of the lease does not violate Chapter 562A.

VI. PLAINTIFF OR CLASS MEMBERS HAVE NOT BEEN INJURED-IN-FACT.

Amici Curiae join the Brief of SouthGate on all issues, including its request this Court reverse the decision in Staley v. Barkalow, 2013 WL 2368825 (Iowa Ct. App. 2013). Staley was wrongly decided. Its error

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and Staley v. Barkalow, 2013 WL 2368825 (Iowa Ct. App. 2013), are threatened with penalties for every tenant they have rented to up to three times the monthly rent without any showing of actual damages because they "used" this allegedly prohibited term in their leases.

threatens to impose a wave of substantial judgments on landlords in Iowa (or at least substantial attorney fees incurred in defense), even where tenants have sustained not one cent in actual damages and the lease contains just one prohibited provision. The Staley Court decided what "uses" in Section 562A.11(2) means in a vacuum, apparently without any briefing on the crucial issues of standing, the prerequisite in Iowa of a showing of actual damages before exemplary damages may be awarded, and the serious due process issues arising from a statute that allows a penalty award without any showing of real harm. Such a result cannot be consistent with the public policy of promoting safe, habitable and affordable rental housing in Iowa.

VII. CONCLUSION.

Amici Curiae Landlords of Iowa, Inc. and Greater Iowa Apartment Association request that the Court dismiss this action for the reasons provided by Defendant SouthGate Property Management, LLC, or alternatively, reverse the district court's grant of partial summary judgment and class certification, and remand for further proceedings consistent with its ruling.

CERTIFICATE OF FILING

I hereby certify that on February 9, 2016, I electronically filed the foregoing with the Clerk of Supreme Court using the ECF system, which will send notification of such filing to the following ECF system participants:

Stephen Holtman
Lisa Stephenson
Christine Boyer
Christopher S. Warnock
Charles Joseph Holland

/s/ Thomas H. Walton

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