IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

ELYSE DE STEFANO,	)	
PLAINTIFF/APPELLEE,	)	CASE NO. SC 080575
	)	*ON DISTRICT COURT APPEAL*
vs.	)	
	)	BRIEF OF
APTS DOWNTOWN, INC.	)	PLAINTIFF/APPELLEE
DEFENDANT/APPELLANT.	)	

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COMES NOW Elyse De Stefano, Plaintiff/Appellee, by and through her attorney Christopher Warnock, and files her Brief, stating as follows:

I. Statement of the Case

On October 3, 2011, Plaintiff/Appellee Elyse DeStefano ("Tenant") filed a motion to proceed *in forma pauperis*[1] and her small claims petition. Docket.[2] The case was first consolidated with *Conroy v. Apts Downtown*,[3] LACV072840 and then transferred back to the small claims division. Docket. Trial was held before the Honorable Karen Egerton, Magistrate/Judge in the Johnson County District Court sitting in small claims on July 18, 2012.[4] Docket; Judgment at 1. The trial court found in favor of Tenant and issued an lengthy and detailed Findings of Fact, Conclusions of Law and Judgment ("Judgment") on June 10, 2013.

[1] Leave to proceed *in forma pauperis* was granted on October 4, 2011. Docket.

[2] All citations to Docket reference the online docket at Iowa Courts Online https://www.iowacourts.state.ia.us/ESAWebApp

[3] In *Conroy* plaintiffs' counsel sought class action certification, which was denied on almost identical grounds to that overturned by the Court of Appeals in *Staley v. Barkalow*, No. 3-255 / 12-1031 (Iowa App. 2013). After class certification was denied the instant case was returned to the small claims division for trial.

[4] As noted by the trial court, this is one of three connected landlord tenant cases, all with the same plaintiffs' and defendants' counsel. Trial in all three cases was unusually elaborate for small claims matters. Plaintiff and Defendants each had two counsel, a court reporter was used, the trial court sat on a Friday when small claims matters are not normally heard, with each case having an extended hearing as the only case on the calendar. Finally, the legal issues presented in the case were extensively briefed.

II. Statement of Facts

For the majority of her lease Tenant was an undergraduate student at the University of Iowa. Tr. 66. Defendant Apts. Downtown ("Landlord") is owned by the Clark Family, the largest landlords in Iowa City.[5] Tenant was a tenant of Landlord from July 31, 2010 to July 26, 2011. Lease, Defendant's Exhibit A; Judgment at 2. On or about October 2010, a burglary occurred at the premises, which Tenant reported to the police. Police Property Report, Plaintiff's Exhibit 13; Judgment at 3-4. The burglar damaged a door, for which Landlord billed $598.46 to Tenant. Invoice, Defendant Exhibit E; Judgment at 3.

After Tenant vacated the premises, Landlord withheld the entire security deposit of $1,635 and billed Tenant for an additional $503.45. Security Deposit Withholding Statement, Defendant's Exhibit P. Landlord charged Tenant $191 for carpet cleaning and $280 for general cleaning. Security Deposit Withholding Statement, Defendant's Exhibit P. Landlord also deducted from the security deposit $1308.45 for "past due rent and fees on account" which included $598.46 for the door broken by the burglar, $210 for lawn care, $190 in late fees as well as other charges. Breakdown of Past Due Fees, Defendant's Exhibit NN. Landlord included in its repair charges the cost of its taxes, Workers' Compensation, equipment, utilities, mileage, legal fees, liability insurance, vehicle expense, accounting, computer hardware & software and postage. Breakdown of Cleaning, Repair & Carpet Cleaning Charges, Defendant's Exhibit OO;[6] Tr. at 44, 60-1.

[5] James Clark is President of Apts Downtown, Iowa Secretary of State business entities database https://sos.iowa.gov/search/business/%28S%28vp4zpu45vrsakhnloa5levyd%29%29/officers.aspx and Joe Clark is the business manager. James Clark "Developed and owns more Iowa City real estate than anyone else (301 parcels assessed at $93.6 million), providing housing to more than 1,000 university students, as well as businesses, mostly in the downtown area." Iowa Press Citizen, http://www.press-citizen-media.com/150/clarkja.html.

[6] Exhibit OO is also attached to this brief.

III. Standard of Review

Appeal of a small claims case is to the district court and is governed by Iowa Code §631.13,

> The judge shall decide the appeal without regard to technicalities or defects which have not prejudiced the substantial rights of the parties, and may affirm, reverse, or modify the judgment, or render judgment as the judge or magistrate should have rendered.

Iowa Code §631.13(4).

In *Sunset Mobile Home Park v. Parsons*, 324 N.W.2d 452 (Iowa 1982), an appeal of a small claims landlord tenant case to district court, the Supreme Court held,

> The district court conducts a de novo review on the record before the magistrate unless it finds the record inadequate for the purpose of rendering a judgment, in which case it may order additional evidence to be presented. *Ravreby v. United Airlines*, Inc., 293 N.W.2d 260, 262 (Iowa 1980)… [on de novo review the court] will "review the facts as well as the law and determine from the credible evidence rights anew on those propositions properly presented, provided issue has been raised and error, if any, preserved in the trial proceedings." *In re Marriage of Full*, 255 N.W.2d 153, 156 (Iowa 1977).

Sunset Mobile Home Park v. Parsons, 324 N.W.2d at 454.

On de novo review, the reviewing court will, "….give considerable deference to the [trial court's] credibility determinations because the court has a firsthand opportunity to hear the evidence and view the witnesses." *In re Marriage of Berning*, 743 N.W.2d 872 at ¶30 (Iowa App. 2007) citing *In re Marriage of Brown*, 487 N.W.2d 331, 332 (Iowa 1992); see also *Payton Apartments, Ltd. v. Board of Review of City of Des Moines*, 358 N.W.2d 325, 329 (Iowa App. 1984) (trial court in a much better position to weigh the credibility of witnesses and weight given to the trial court's decision even in a de novo review.)

IV. Questions Presented

The questions presented in this appeal are:

1. Can a landlord charge a tenant for the criminal acts of third parties?

2. Can a lease contain an automatic carpet cleaning provision?

3. Is dirt ordinary wear and tear?

4. Can a landlord include its ordinary business expenses when it charges tenants for cleaning and repair?

5. Can a landlord charge for cleaning and repairs without producing evidence of its actual out of pocket costs?

6. Did the trial court properly assess actual and punitive damages?

V. Argument

A. Landlord Cannot Charge Tenants for the Criminal Acts of Third Parties

The trial court found that a burglar broke into Tenant's rental house and damaged the door. Judgment at 3; Police Property Report, Plaintiff's Exhibit 13. The trial court found that neither the tenants nor their guests had known, caused nor permitted the damage. Judgment at 14. Landlord agrees that this was, "a criminal act against the exterior door of the residence by an unknown perpetrator…"[7] but, nevertheless argues that a landlord can make tenants contractually responsible for any and all damages, including the criminal acts of unknown third parties.

The trial court correctly ruled that Landlord's lease illegally shifts the responsibility of repair from landlords to tenants. Judgment at 14-15. The trial court cited the lease provision used by the Landlord to charge Tenant for the door broken by the burglar,

[7] Appellant's Brief at 7.

> Tenants agree to pay for all damages to the apartment windows, screens, and doors, including exterior unit doors (including random acts of vandalism). Tenants further agree to be responsible for a 15 foot area around the apartment entry door, and for the cost to repair damage in the common areas of the building as follows:
> a. Tenants agree to be responsible for damage in the common areas, as the tenants are the only lawful occupants of the building. The lease includes reasonable use of the common areas and Tenants share responsibility for its care. If Landlord and tenants are unable to determine who caused damage in common areas within 7 days after the damage comes to the attention of Landlord, then each apartment in the building shall pay an equal pro-rata share of costs to repair the damage. Damages can include but are not limited to doors, windows, drywall, carpet, lights, smoke detectors, etc. Such charges are due immediately.

§30, Lease, Defendant's Exhibit A, cited in Judgment at 15.

Landlord attempts to sidestep the issue of the facial legality of these lease provisions by arguing unconscionability. Brief of Appellant at 7-9. While Tenant certainly agrees with the trial court that these provisions are unconscionable, more importantly, as the trial court correctly held, these lease provisions violate Iowa Code Chapter 562A, the Iowa Uniform Residential Landlord Tenant Act ("IURLTA") specifically §562A.15. Judgment at 15. Section 562A.15 requires that the landlord, "Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition…Keep all common areas of the premises in a clean and safe condition." Iowa Code 562A.15(1)(a)&(b).

The trial court held, "In essence, the Defendant has now required the tenant to be the insurer of his own property for damages caused by others, through no fault of the tenant. See *Mastland v. Evans Furniture*, 498 N.W. 2d. 682, 686 (Iowa 1993)." Judgment at 15.

In *Mastland*, the Supreme Court held that while §562A.12(3)(b) states that the premises are to be returned to the landlord in the same condition as at the commencement

of the lease, ordinary wear and tear excepted, this requirement must be read in conjunction with the legal obligations of tenants, specifically §562A.17(6), thus "…the landlord may keep the rental deposit only if the damages beyond normal wear and tear result *from the deliberate or negligent acts of the tenant, or the tenant knowingly permits such acts*." *Mastland*, 498 N.W. 2d at 686. The trial court is entirely correct that these provisions in Landlord's lease are illegal because they shift the cost and responsibility for maintenance and repairs from the landlord to the tenant.[8] Judgement at 15.

Landlord attempts to argue, at page 9 of its brief, that the repair shifting provisions of §562A.15(2) apply to the instant action,

> The landlord and tenant of a single family residence may agree in writing that *the tenant perform the landlord's duties* specified in paragraphs "e" and "f" of subsection 1 and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith.

Iowa Code §562A.15(2).

However, in the instant case the repairs were not performed by Tenant, but by Landlord, thus §562A.15(2) is inapplicable on its face. Landlord further argues that §562A.15(2) permits a landlord to perform repairs and charge them to a tenant. Brief of Appellant at 9. It is clear that under the IURLTA that the general rule is landlords, not tenants, are responsible for repairs and maintenance. Iowa Code §§562A.15 & 562A.17. In fact, the express purpose of the IURLTA is, "[t]o insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Iowa Code §562A.2(2)(c). Section 562A.15(2), allowing the tenant to perform repairs, is therefore an exception to the general statutory rule of landlord repair. This section is "…a statutory exception

[8] This is not the only illegal repair clause in the lease. Paragraph 33 states, "Unless Landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, doors, carpet, and walls regardless of whether such damage is cause by residents, guests or others." §33(a) Lease, Defendant's Exhibit A.

which should be strictly construed so as not to encroach unduly upon the general statutory provision to which it is an exception." *Peoples' Gas & Elec. Co. v. State Tax Commission*, 28 N.W.2d 799, 803 (Iowa 1947); see also *Polk County Juvenile Home v. Iowa Civil Rights Com'n*, 322 N.W.2d 913, 916 (Iowa App. 1982).

Since its express statutory language requires the tenant to perform the repairs and as an exception to the general requirement of landlord repairs, §562A.15(2) must be strictly construed, a landlord may not rely on it to justify doing its own repairs and then charging the tenant for them.

Even if §562A.15(2) could be applied to landlord repairs, the statute also requires that the agreement be, "in good faith." In the instant case, as we will see in more detail below, Landlord blatantly overcharges tenants for maintenance and repairs: charging excessive hours at excessive rates: an exorbitant $40 an hour for cleaning and even more ridiculous $70 an hour for repairs, as well as charging tenants its ordinary costs of business, including the costs of its 401(k) plan, legal fees, accounting, insurance and postage. Indeed, the trial court specifically found that Landlord had acted in bad faith. Judgment at 16-17. Once again, the repair shifting provisions of §562A.15(2) do not apply.

B. <u>The Automatic Carpet Cleaning Provision is Illegal</u>

Landlord charged Tenant $191 for carpet cleaning. Security Deposit Withholding Statement, Defendant's Exhibit P. The security deposit withholding statement references, as the basis for this charge, §37(e) of the lease which states,

> Tenants agree to a charge starting at $95 (efficiency) not to exceed $225 (6+ bedrooms) being deducted from the deposit for professional cleaning at the

> expiration of the Lease. Hardwoods and decorative concrete floors are polished or cleaned upon turn over of occupancy each year. Tenants agree to a charge not to exceed $195 being deducted from the deposit for polishing or cleaning the floors.
>
> §37(e) Lease, Defendant's Exhibit A.

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

> …the terms of this lease requiring tenant to agree that the amount of cleaning shall be deducted from the deposit is in violation of §562A.12 and is unconscionable. Amounts to be deducted from a tenant's security deposit can only be retained by the landlord is §562A.12 is adhered to by the landlord. The tenant is then provided with the opportunity to challenge those amounts and hold the landlord to his/her burden of showing that the amounts withheld were reasonable to restore the property to its condition prior to the commencement of the tenancy. The requirement that costs for carpet cleaning shall be withheld from the tenant's deposit requires the tenant to forgo their claim or right as defined in §562A7(2) and therefore the Court FINDS this provision in the lease unenforceable and the charges assessed by the Defendant cannot be withheld from the security deposit.

Emphasis in original, Judgment at 13.

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

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

Iowa Code §562A.12(3). Instead of giving the required specific damage itemization Landlord's leases provide that this cleaning fee is automatically imposed on tenants and deducted from their security deposit upon termination of their tenancy. As the lease language reads, tenants are automatically charged for carpet cleaning even if their carpet is clean.

In *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) the Ohio Court of Appeals, in construing Ohio's security deposit statute[9], substantially similar to Iowa's, held that landlords could not automatically deduct carpet cleaning fees from a security deposit, either using a lease or checkout provisions,

> It is well settled that a provision in a lease agreement as to payment for carpet cleaning that is inconsistent with R.C. 5321.16(B) is unenforceable. *Albreqt v. Chen* (1983), 17 Ohio App.3d 79, 80, 17 OBR 140, 140-141, 477 N.E.2d 1150, 1152-1153. Accordingly, a landlord may not unilaterally deduct the cost of carpet cleaning from a tenant's security deposit without an itemization setting forth the specific need for the deduction. Id. at 81, 17 OBR at 142, 477 N.E.2d at 1153-1155.

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

In addition, by requiring automatic cleaning fees Landlord's standard leases violate Iowa Code §562A.12(3)(b) which states,

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

Iowa Code §562A.12(3)(b).

By including these automatic cleaning fee provisions in its leases Landlord evades the statutory requirement that it determine specifically: (1) if cleaning is even necessary, because if no cleaning is necessary charging a cleaning fee is clearly unwarranted or (2) whether there is cleaning that is required due to ordinary wear and tear, which is the landlord's statutory responsibility or (3) the cleaning that is required is due to the extraordinary acts of the tenant, for which the tenant may be charged.

[9]Ohio Revised Code §5321.16 (B) Upon termination of the rental agreement any property or money held by the landlord as a security deposit may be applied to the payment of past due rent and to the payment of the amount of damages that the landlord has suffered by reason of the tenant's noncompliance with section 5321.05 of the Revised Code or the rental agreement. Any deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the rental agreement and delivery of possession.

In *Uhlenhake v. Professional Property Management Inc.*, No. CL-82571 (D. Iowa 5th District, entered April 19, 2000)[10] District Judge Michael Huppert invalidated a Polk County Iowa landlord's attempt to charge automatic carpet cleaning fees in its lease. Judge Huppert held that carpet cleaning charges could not be made for dirt or soiling due to ordinary wear and tear, citing *Southmark Management Corp v. Vick*, 692 S.W.2nd 157, 160 (Tex App. 1985) "[The tenant] could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security." *Uhlenhake* at 5. Judge Huppert further held that Iowa landlords could not charge automatic cleaning fees, "Otherwise, the lease would be used to circumvent [Iowa Code §562A.12(3)] in cases such as this one where there has been no showing of extraordinary wear and tear." *Uhlenhake* at 6.

Landlord attempted to argue at trial that it did not enforce its automatic carpet cleaning clause. First, in *Staley v. Barkalow* 3-255 / 12-1031 (Iowa App. 2013) the Court of Appeals held,

> 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.

Staley at 14. "…[T]he district court should consider whether these are provisions 'that shall not be included' and whether the inclusion was made willfully and knowingly. *See id* §562A.11." *Staley* at 24. Therefore a tenant need not prove enforcement in order for a court to find that a provision is illegal.

Secondly, the trial court properly found that Landlord had enforced the automatic carpet cleaning provision, "the Court FINDS this provision

[10] Attached as Exhibit 2.

unenforceable and the charges assessed by Defendant cannot be withheld from the security deposit." Judgment at 13.

Landlord argues that its actual policy is not to enforce its own lease provision which automatically charges tenants for carpet cleaning, but instead to individually inspects each tenant's carpet and then charge only for extraordinary wear and tear. Brief of Appellant at 12-13.

This is a highly questionable assertion. When Tenant, before commencing litigation, complained to Landlord about the automatic carpet cleaning charge, Landlord did not state that it had inspected the carpets and that they were soiled beyond ordinary wear and tear. Instead Landlord cited the automatic carpet cleaning provision of its lease and stated that, "Concerning the carpet cleaning this is an agreed-upon deduction set forth in the rental agreement…" September 8, 2011 Letter, Defendant's Exhibit L.

However, once Landlord found itself in court, it changed its tune. At trial its business manager Joseph Clark testified that Landlord did not follow §37(e) of its lease and automatically charge for carpet cleaning, but instead individually inspected each unit and only charged for carpet cleaning if there was more than normal wear and tear. Tr. 35-6, 78.

At trial, Tenant's Counsel confronted Mr. Clark with a cleaning checklist that he admitted was distributed to tenants by Apartments Downtown. Cleaning Checklist, Plaintiff's Exhibit 5; Tr. 81-3. The checklist states, "Carpet cleaning, as agreed in your lease, landlord will *automatically* subtract $85 to $195 out of deposit for professional carpet cleaning." Checklist, Plaintiff's Exhibit 5; Tr. 81.

Q. [Tenant's Counsel] What I'm trying to get at is whether or not they have an automatic carpet cleaning clause. So you're saying that you don't automatically deduct?
A. [Joseph Clark] That is correct. We do not automatically deduct.
Q. Why did you send out this notice at all? Why does it exist?
A. We did not send this notice to Elyse De Stefano
….
Q. But at some point it was put out by Apartments Downtown?
A. It may have been 5, 10 years ago. I don't know. But at some point it looks as though that is a document we had.
Q. Have you changed your policy? Were you deducting in the past automatically and now you're not automatically deducting?
A. No. We haven't changed our policy. We've never automatically deducted.
Q. Then why does this say automatic deduction?
A. I don't know why. I don't know why it says automatic.

Tr. at 82-3.

The pattern is clear. When Landlord is communicating with its tenants, it relies on and enforces its automatic carpet cleaning provision, but when it comes under the scrutiny of the court, it claims that it individually inspects tenants' carpets and only charges for extraordinary wear and tear. Nevertheless, regardless of whether the lease provision is simply included in Landlord's lease or actually enforced, an automatic carpet cleaning charge violates the IURLTA and the trial court properly found it was illegal.

C. Dirt is Not Ordinary Wear & Tear?

Landlord claims that can require tenants to be responsible for cleaning ordinary wear and tear and can set any cleaning standards it wishes without running afoul of the IURLTA. In particular it argues that dirt is not ordinary wear and tear. Appellant's Brief at 13-15. In support Landlord cites *Stutelberg v. Practical Mgmt. Co*, 245 N.W. 2d 737

(Mich. App. 1976) and *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994) and its progeny, *Castillo-Cullather v. Pollack*, 685 N.E. 2d 478 (Ind. App. 1997).

In *Stutelberg* the landlord charged both a security deposit and a non-refundable cleaning fee at the outset of the lease. *Stutelberg,* 245 N.W. 2d 737 at ¶45. The *Stutelberg* Court held that because the cleaning fee was charged in advance separately from the security deposit that the rules regulating security deposits did not apply to it. "'"The tenant could have no expectation that this sum or a part thereof should be returned. It is not a 'security deposit.'". *Stutelberg,* 245 N.W. 2d 737 at ¶127.

Landlord's leases, however, provide with regard to carpet cleaning that, "Tenants agree to a charge…*being deducted from the deposit*" §37(3), Lease, Defendant's Exhibit A. Since the carpet cleaning charge was deducted from the security deposit, on the facts of the instant case, the holding in *Stutelberg* does not apply.

Secondly, on broad policy grounds *Stutelberg* should be rejected as persuasive precedent. Following *Stutelberg* would allow landlords to entirely circumvent the restrictions placed on landlords with regard to the use of security deposits and thereby relieve them of their statutory responsibility for repair and maintenance.[11] *Stutelberg* interprets the Michigan landlord tenant statute very narrowly, insisting that the restrictions on the use of security deposits by landlords were only put in place so that landlords would not deceive tenants as to the use of pre-paid funds. "The Act is primarily aimed to protect the tenant from the landlord surreptitiously usurping substantial sums held to secure the performance of conditions under the lease."

[11] Landlord has, in fact, begun to implement a prepayment policy based on *Stutelberg*. The carpet cleaning clause in its 2013-14 lease states, "The floor coverings are scheduled to be professionally cleaned every time apartments turn over occupancy or at commencement of your tenancy. *..That charge can be added to the monthly rent, prepaid by Tenants at lease signing, or deducted from the deposit at the expiration of the lease, at Tenants' option*. Tenants agree to pay a professional carpet cleaning charge starting at $95 (efficiency) not to exceed $295 (6+ bedrooms) at the expiration of the Lease." www.aptsdowntown.com

Stutelberg, 245 N.W. 2d 737 at ¶122. Their function in requiring maintenance and repair by landlords was ignored in *Stutelberg*.

This is not true of §562A.12, which governs security deposits, and is not the only section of the IURTLA that enumerates the repair & cleaning obligations of landlords and tenants. For example, tenants must, "Keep that part of the premises that the tenant occupies and uses as clean and safe as the condition of the premises permit." Iowa Code §562A.17(2). Again, like the ordinary wear and tear requirement of §562A.12(3)(b), tenants' cleaning responsibility is limited by statute, not by landlord's contract of adhesion. Tenants would argue that the "clean and safe as the conditions of the premises permit" standard is a restatement of the ordinary wear and tear requirement since deterioration due to ordinary wear and tear is deterioration in the condition of the premises.

In addition, following *Stutelberg* would ignore the comprehensive reform of the landlord tenant relationship undertaken through the adoption of the common law warranty of habitability in cases like *Mease v. Fox*, 200 N.W.2d 791 (Iowa 1972) and in the Iowa legislature's adoption of the IURLTA. As noted §562A.2 states that a primary purpose of the IURLTA is, "To insure that the right to the receipt of rent is inseparable from the duty to maintain the premises." Iowa Code §562A.2(c). Following *Stutelberg* would allow the landlord to entirely evade its responsibility for repair and maintenance because there would be no legal restrictions whatsoever on what they could charge as non-refundable fees.

If *Stutelberg* were adopted, for example, landlords could charge "non-refundable" fees and force tenants to pay for roof maintenance, remodeling, for third party vandalism,

for cleaning due to normal wear and tear or even charge when cleaning was unnecessary. The reasoning in *Stutelberg* is flawed and its use as precedent would seriously undermine the legal and statutory scheme carefully adopted by the Iowa Supreme Court in *Mease v. Fox* and by the legislature in chapter 562A.

Landlord further attempts to justify its automatic carpet cleaning provisions by relying on Indiana's aberrant ordinary wear and precedent. In *Miller v. Geels*, 643 N.E.2d 922 (Ind App. 1994). the Indiana Court of Appeals held,

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

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

Outside of Indiana, counsel has been unable to find a single authority that accepts the *Miller v. Geels* "dirt is not ordinary wear and tear" holding. The states that have considered this question uniformly hold that dirt and required cleaning are indeed measured by the ordinary wear and tear standard. See eg, *Chaney v. Breton Builder Co., Ltd.*, 130 Ohio App.3d 602, (Ohio App. 1998) (statute does not require tenants to clean carpets that are made dirty by normal and ordinary use.); *Chan v. Allen House Apartments Management*, 578 N.W.2d 210 at P30 (Wis.App. 1998) (landlord did not meet his burden of proof that those items needed cleaning beyond the normal wear and tear); *Rock v. Klepper*, 23 Misc.3d 1103(A) at ¶54 (N.Y.City Ct. 2009) (tenant is not responsible for "normal wear and tear," and the landlord cannot retain the security deposit for cleaning or repainting that are due to "normal wear and tear."); *Stoltz Management v.*

Consumer Affairs Bd, 616 A.2d 1205 at ¶29 (Delaware 1992) (landlord may recover…for detriment to the rental unit in excess of "ordinary wear and tear which can be corrected by painting and ordinary cleaning"); *Southmark Management Corp. v. Vick*, 692 S.W.2d 157 (Tex App 1985) (landlord could not retain any portion of the security deposit to cover normal wear and tear…Appellee could have vacated the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security.) On the other hand, *Castillo-Cullather v. Pollack*, 685 N.E.2d 478, (Ind. App. 1997) as we can see from the section cited in Appellant's Brief at 14, simply continues this aberrant Indiana "dirt is not wear and tear" precedent.

Despite the fact that the weight of precedent is decidedly against it, more importantly the logic of the holdings in *Miller v. Geels* and *Castillo-Cullather* are highly flawed and not persuasive precedent. Why dirt is not included in the "gradual deterioration of the condition of an object which results from its appropriate use over time" is not at all obvious. *Miller v. Geels*, 643 N.E.2d 922 at ¶50. But the incoherence of the *Miller* Court's reasoning is clear when it states that that objects that need to be cleaned have not been subject to wear and tear, but "[r]ather, such objects have been damaged by dirt, although they are usually capable of being returned to a clean condition." *Miller v. Geels*, 643 N.E.2d 922 at ¶50-1.

If the logic of *Miller v. Geels* is accepted, landlords are free to argue that if an item, say refrigerator or window, is damaged, but can be repaired that it did not suffer ordinary wear and tear. Only items that do not need cleaning and cannot be repaired are covered by this aberrant definition of ordinary wear and tear. *Castillo-Cullather* makes the implications of this holding clear, explicitly allowing landlords

to set whatever definition they wish for ordinary wear and tear. Thus another huge area has been removed from the responsibility of the landlord to maintain and repair. Neither *Stutelberg* nor *Miller v. Geels* and its progeny should be followed by this court. Dirt is clearly ordinary wear and tear.

D. Landlord May Not Charge Tenants Its Ordinary Business Expenses

Landlord argues that it properly deducted $280 for cleaning Tenant's unit at the conclusion of the tenancy. Appellant's Brief at 15. The trial court ruled that these charges were excessive,

> While the Defendant has taken exceptional steps to consolidate the business of renting and maintaining properties for rent to tenants in the Iowa City area, it appears quite apparent that the costs of operating a such a large business, including liability insurance and employee retirement benefits, have been passed on to the tenant.

Judgment at 13.

Landlord's lease states that at the end of the lease that, "Tenants will be charged $40/hour per person (6-8 people on each cleaning crew) plus $40 service charge for general cleaning…" §37(c) Lease, Defendant's Exhibit A. Landlord deducted $280 from Tenant's security deposit for cleaning charges and the charge references lease provision §37(c). Security Deposit Withholding Statement, Defendant's Exhibit P.

However, at trial Joseph Clark, business manager for Landlord, testified that Landlord actually charges $35 per worker per hour for cleaning plus a $35 service charge. Tr 29-30; Judgment at 6. Mr. Clark testified and provided Exhibit OO showing the basis for its cleaning charges which do not consist of just cleaning materials and the actual cost of paying workers to clean, but also include, "vehicle expense, mileage

expense, overtime, equipment, Social Security taxes, Medicare taxes, Workmans [sic] comp, Federal taxes, State taxes, Gen Liability insurance…" Tr. at 43-4, 60-1; Hourly Cost Breakdown, Defendant's Exhibit OO; Judgment at 6.

Similarly, Landlord's lease provides that Iowa City Maintenance, which is a fictitious name of Defendant, Apts Downtown itself[12] does all repairs and charges $70 per hour. §33(c) Lease, Defendant's Exhibit A.[13] As noted above, Landlord charged Tenant for the repair of a door damaged by a burglar. This included a labor charge of four hours at $70 an hour. Iowa City Maintenance Bill, Defendant's Exhibit E, Judgment at 9.

Landlord also provided a breakdown of the costs in its $70 an hour repair charge including,

> Salaries/hourly pay, overtime expense, Social Security taxes, Medicare taxes, Workmans [sic] comp, Federal taxes, State taxes, bonus/longevity pay, depreciation, advertising, 401k plan, health insurance, legal fees, equipment rental, business license, gen. liability insurance, utilities/phone, vehicle expense, mileage expense, accounting, postage and supplies, IT expense/hardware/software, Misc.other.

Hourly Cost Breakdown, Defendant's Exhibit OO.

These charges are clearly inappropriate. The Supreme Court has held that under the URLTA when a lease 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 at ¶34-5 (Iowa 1996).

[12] See Iowa Secretary of State website http://sos.iowa.gov/search/business/%28S%28wqp4pgvdx1gdxj2oyw1ybs45%29%29/names.aspx

[13] Landlord also charges $70 per hour for maintenance calls, §33(f) and for painting §37(g), Lease, Defendant's Exhibit A.

A more detailed examination of the IURLTA gives us even more clarity on the issue of actual damages. The provision cited in *D.R Mobile,* §562A.32, states, "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's fees as provided in section 562A.27." Section 562A.27 regulates a landlord's remedies if a tenant fails to comply with the rental agreement or the tenant's obligations under §562A.17 which include cleaning and not damaging the premises. What §562.32 makes clear is that a landlord is limited to recovering actual damages for the tenant's breach of the lease or other statutory obligations. The IURLTA repeatedly limits both landlords and tenants to actual damages. Five separate sections limit tenants to actual damages[14], three sections limit landlords to actual damages[15] while §562A.35 limits both landlords and tenants to actual damages.

With regard to what can appropriately be charged as actual damages as the trial court held,

> A reasonable cost of repair to restore the dwelling to its condition at the commencement of the tenancy, if the property can be repaired or restored, is the reasonable cost of repair or restoration, not exceeding the fair market or actual value of the improvement immediately prior to the damage. See generally *Schlitz v. Cullen-Schlitz & Assoc. Inc*., 228 N.W.2d 10, 18-19 (Iowa 1975); *State v. Urbanek*, 177 N.W.2d 14, 16-18 (Iowa 1970). See *Ducket v. Whorton*, 312 N.W.2d 561, 562 (Iowa 1981).

Judgment at 11.

Furthermore, as a general contractual rule, the cost of repairs properly charged as damages includes only the reasonable costs of labor and materials. See e.g., *City Wide Associates v. Supreme Judicial Court of Mass.*, 564 N.E.2d 1003 at ¶14 (Mass 1991) ("…

[14] §§562A.11, 562A.12, 562A.22, 562A.26 & 562A.36
[15] §§562A.29, 562A.32, 562A.34.

cost of *materials and labor* to repair the damage done by the tenant"); *Matus v. State*, No. A-9998 at ¶55 (Alaska App.2009) ("In the case of a repair estimate, it is a prediction of how much money would be needed {e., the cost of materials and labor}to restore the property.") .

Charging tenants for their ordinary business expenses is clearly a problem in Iowa City. In *Ahmed v. Barkalow* SCSC 82744 (Johnson County District Court Small Claims entered May 16, 2013)[16] Magistrate Judge Rose found that the landlord had acted in bad faith in charging its ordinary business expenses as part of damages, "Defendants are sophisticated landlords in the Iowa City community, running a high-volume rental business. Stop payment fees and staff time are regular costs of doing business for the Defendants." *Ahmed* at 4.

The trial court properly found that Landlord may not charge its ordinary business expenses to tenants and that its cleaning and repair charges were excessive.

E. <u>There is Insufficient Evidence to Charge Tenant for Cleaning & Repairs</u>

In addition to challenging the trial court's ruling on carpet and general cleaning Landlord also claims the trial court erred by not allowing Landlord's charges for blinds and gasket replacement. Appellant's Brief at 15 The trial court held, "…no evidence was presented at trial regarding…the actual costs of the blinds by Defendant" and that evidence regarding the gasket was, "insufficient" Judgment at 13-14. In fact, no eyewitness testimony by the cleaning or repair crews as to damage and no receipts or other third party documentation of Landlord's actual out of pocket costs for repair were provided other than a single lawn care invoice. Other than the lawn care invoice

[16] Attached as Exhibit 3.

Landlord relied entirely on the testimony of the brothers Clark and Apartments Downtown's own internal documents to document the extent of damage and necessary cleaning. It relied on the $40 and $70 an hour charges were set forth in its lease to determine the amount charged for repair and cleaning.[17] As Landlord's business manager Joseph Clark testified at trial, "So how do we come up with the $70 an hour, that is agreed by the tenants when they sign [the lease]." Tr. 61

As a general rule, landlords provide proof of their actual costs for labor and materials for repairs by using receipts of their arm's length transactions with third parties, though these costs must still be reasonable. See, e.g. *Calderwood v. Bender*, 189 Conn. 580, 584--85, 457 A.2d 313 (1983) (actual cost of repairing faulty septic system, as reflected in repair bill, was proper measure of damages…").

The Illinois Court of Appeals in *Hoffman v. Altamore* cites the Illinois Security Deposit Act which requires,

> an itemized statement of the damage allegedly caused to the premises and the estimated or actual cost for repairing or replacing each item on that statement, *attaching the paid receipts*, or copies thereof, for the repair or replacement. If the lessor utilizes his or her own labor to repair any damage caused by the lessee, the lessor may include the reasonable cost of his or her labor to repair such damage.

Hoffman v. Altamore, 815 N.E.2d 984 at ¶42 (Ill.App. Dist.2 2004); See also Iowa Code §562A.28 (landlord must provide "itemized bill for the actual and reasonable cost" of repairs).

[17] Landlord certainly had every opportunity to provide this documentation as Tenant served a subpoena on Defendant Apts Downtown on July 7, 2012, see Docket, requesting, "in particular any records regarding charges for any repair or maintenance, including invoices, pay records, etc., evidencing the actual out of pocket costs for carpet cleaning, door replacement and grounds work and repair/maintenance." Rather than filing a motion to quash, Landlord simply ignored the subpoena and Landlord's counsel stated at trial, "I advised my client not to respond to the subpoena. It's not a valid subpoena." Tr. 105.

Landlord chose not to provide any documentation of its actual out of pocket costs for labor and materials, but instead relies on the cleaning and repair charges set forth in the lease. The trial court therefore properly found that Landlord failed to provide credible evidence of damage and its actual costs for cleaning and repairs.

F. Actual & Punitive Damages were Properly Assessed by the Trial Court

Landlord contests the trial court's award of $3,270 for actual damages for its lease provisions that require tenants to pay for vandalism by unknown third parties, arguing that the damage award was inappropriate because these provision are not illegal. Appellant's Brief at 11.

Tenant sought to sublease the unit, but Landlord refused unless Tenant agreed to pay for the door damaged by the burglary. Tr 20-1; May 11, 2012 Sublease Letter, Plaintiff's Exhibit 11.[18] The trial court held that,

> The Plaintiff obtained the appropriate form approved by Defendant, located tenants to sublease, but was refused by the Defendant due to the remaining balance assessed for the damage caused by the burglary and contested by Plaintiff and other tenants. While subleasing under the lease is not an absolute right afforded to the tenants, the inability to exercise that option under the lease because of Defendant's refusal based on improper charges on Plaintiff's account caused damages to the Plaintiff and other tenants in the amount of two month's rent…

Judgment at 16.

The trial court correctly assessed two months rent ($3270) as damages for Landlord's wrongful refusal to sublease. Under Iowa law a wrongful failure to permit a tenant to sublease is a breach of the lease. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d

[18] The tenants refused to sign the letter.

174 (2010). As the Iowa Supreme Court held in determining damages for breach of a lease,

> when a contract has been breached the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed….see also Restatement (Second) of Contracts § 344(a) (1979); 22 Am.Jur.2d Damages § 43 (1988). This type of damages is sometimes referred to as the injured party's "expectation interest" or "benefit of the bargain" damages…citing 22 Am.Jur.2d Damages § 45).

Midland Mutal Life Ins. v. Mercy Clinics, 579 N.W.2d 823 at ¶55 (Iowa 1998).

Landlord also contests the trial court's imposition of $200 damages for wrongful retention of a security deposit, arguing that Landlord had not acted in bad faith. Tr. 16-17.

The Supreme Court has held that,

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

In re Lorimor's Estate, 216 N.W.2d 349, 353 (Iowa 1974); see also *Sieg Co. v. Kelly*, 568 N.W.2d 794, 805 (Iowa 1997) (defining "good faith" as "a state of mind indicating honesty and lawfulness of purpose.").

Landlord not only charged Tenant for the criminal acts of third parties, in blatant violation of the IURTA, but has made this its general policy, enshrined in its standard lease. Landlord brazenly overcharges its tenants for cleaning and repairs, charging tenants the cost of its 401(k) plan, liability insurance, utilities, legal fees, postage and other ordinary business expenses and again making these overcharges not on an individual basis to Tenant alone, but as part of its standard lease for over 1,000 tenants.

Finally, it is difficult to see Landlord's argument and trial testimony that it does not follow its own lease with regard to carpet cleaning as anything other than duplicitous subterfuge. Clearly the trial court was correct in finding that these security deposit deductions were made in bad faith.

VI. Conclusion

What this case reveals is the methodical implementation by the Clarks of a simple business plan: charge tenants for every conceivable expense, on every conceivable occasion. The Clarks charge their tenants for the criminal acts of third parties, inflate their damages beyond their actual costs and make their tenants pay for the Clarks' own 401(k) plan, their utilities and phones, vehicles, advertising, legal fees, accounting, postage and supplies. Because their tenants are predominately young, transient undergraduate students of the University of Iowa until now the business methods of the Clarks have escaped scrutiny by the courts.

Finally, the Clarks have been called to account and a far-reaching system of illegal rental practices has been both revealed and condemned in the trial court's thorough and well reasoned Judgment.

WHEREFORE, Plaintiff/Appellee requests that the judgment of the trial court be affirmed and that the instant case be remanded to the trial court for the determination of attorney fees.[19]

[19] The trial court did not award attorney fees as no affidavit was filed. Judgment at 17. Attorney fee affidavits were then filed by Plaintiff's attorneys and resisted by Defendant/Appellant. The trial court ordered consideration of attorney fees stayed until directed by this court at the conclusion of the instant appeal. Trial Court July 8, 2013 Order.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that I served via e-mail a copy of this document on August 19, 2013 on

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