IN THE SUPREME COURT OF IOWA

No. 15-1348

JOAN WALTON,
Plaintiff-Appellee,

vs.

MARTIN GAFFEY,
Defendant-Appellant.

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

APPELLEE'S FINAL BRIEF

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STATEMENT OF THE CASE

COURSE OF PROCEEDINGS

On December 1, 2014 Plaintiff Joan Walton ("Ms. Walton") filed her petition and motions for partial summary & declaratory judgment and class certification. Docket, Apx, page iii. Defendant Martin Gaffey ("Landlord") resisted the motions. Docket, Apx, page iii. On July 12, 2015, the district court granted Ms. Walton's motions for partial summary & declaratory judgment and class certification. District Court July 12, 2015 Ruling ("Dist. Ct. Ruling") Apx, pages 127-136.

FACTS

Ms. Walton was a tenant of Landlord and signed his standard lease. Lease, Apx, page 27. The lease contained provisions providing for limitation and exculpation of landlord's liability, as well as fees, fines penalties and charges other than actual damages, and an automatic carpet cleaning provision. Apx, pages 19-27. Landlord stipulated that over 50 of his tenants used his standard lease containing these provisions. Plaintiff's Request for Admissions; Defendant's Response to Request for Admissions, Apx, pages 59-61.

ROUTING STATEMENT

Appellee believes that this case presents substantial issues of first impression under Iowa R. App. P. 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). This issue was 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 Because the opinion in *Staley* was unpublished, the appellant in this case, in common with other landlords, has argued that they lack precedential value. Appellee would urge this Court to retain the instant case and affirm the ruling in *Staley v. Barkalow* in a published opinion.

ARGUMENT

I. INTRODUCTION

While a variety of issues, including the propriety of summary & declaratory judgment, the illegality of various lease provisions and class certification are presented in this case, like its companion, *Kline v. Southgate*, no. 15-1350, Appellant/Defendant landlord Martin Gaffey's ("Mr. Gaffey") hopes of success on appeal depend almost entirely on this Court overturning the ruling of the Court of Appeals in *Staley v. Barkalow*, 834 N.W.2d 873, (Iowa App. 2013). *Staley* held that tenants have a right to a legal lease, free from illegal provisions, under the Iowa Uniform Residential Landlord Tenant Act ("IURLTA") codified at Iowa Code Chapter 562A.

A significant number of landlords and their counsel seem to believe that the Court of Appeals took leave of its senses in *Staley* and they have relentlessly attacked the precedential value of this decision, repeatedly urging, as in this case, that district courts simply ignore it. Their bête noire is the key holding in *Staley:* because the IURLTA gives tenants the right to a legal lease, the inclusion, even without enforcement, of an illegal clause in a lease violates

§562A.11. Furthermore, the *Staley* Court held that under §562A.11 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.

The possibility of punitive damages coupled with class actions has created considerable trepidation among some landlords. In particular they fear they will be liable for massive damages even if they mistakenly or unknowingly include illegal provisions in their leases. This panic is needless. Under the IURLTA as interpreted in *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 Mr. Gaffey and other landlords to strenuously resist *Staley* and to assert an extreme position: 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. In addition, Mr. Gaffey and other landlords argue that tenants must

be entirely passive in the face of illegal provisions. Unless these provisions are enforced, say landlords and Mr. Gaffey, tenants are barred from seeking a declaratory judgment as to the legality of their leases.

The facts of the instant case make it crystal clear what tenants will face if *Staley* is overturned and Mr. Gaffey's appeal succeeds. His lease contains multiple penalties and even a fine, explicitly labeled as such. In open court, upon questioning by a magistrate Mr. Gaffey freely admitted knowingly including illegal provisions in his leases because, "it gets their attention." The same magistrate issued a written ruling explicitly informing Mr. Gaffey that his lease contained illegal provisions. Mr Gaffey ignored the ruling, continued to include the prohibited provisions in his lease and when challenged, attacked the authority of the magistrate to issue the ruling.

Under the arguments advanced by Mr. Gaffey, all of this behavior is perfectly acceptable under the IURLTA. If this Court accepts the invitation of Mr. Gaffey, as well as the landlord appellant and amici curiae in *Kline v. Southgate*, to overrule *Staley*, there can be no question exactly what tens of thousands of tenants throughout Iowa are in for. Tenants will be stuck with

illegal leases, not even able to get a ruling on their legality absent enforcement and this Court will have put its seal of approval on Mr. Gaffey's oppressive tactics.

On the other hand if this Court affirms *Staley*, then almost all of Mr. Gaffey's arguments evaporate. If enforcement is not necessary for injury, Mr. Gaffey's argument of lack of damages because of lack of enforcement fails, repeated as it is in a variety of guises: standing, ripeness, justiciability and class certification. While a few substantive arguments remain, this case basically rises or falls on the affirmance or reversal of *Staley* and the key to *Staley* is enforcement versus inclusion of prohibited lease provisions.

II. *STALEY* WAS CORRECTLY DECIDED & DISPOSES OF THE MAJORITY OF MR. GAFFEY'S ARGUMENTS

Mr. Gaffey asks this Court to overrule the decision of the Court of Appeals in *Staley v. Barkalow*, 834 N.W.2d 873, 3-255/12-1031 (Iowa Ct. App. 2013, but in support merely incorporates by reference the arguments made by the appellant in *Kline v. Southgate*, no. 15-1350. Brief of Appellant, page 15.[1] The key issue is whether or not under the IURLTA tenants have a right to a legal lease, free of illegal provisions, as *Staley* holds or rather, that landlords are free to use leases they know are illegal so long as they are not caught enforcing them.

Since Mr. Gaffey 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). Plaintiff/Appellee tenant Joan Walton ("Ms. Walton") agrees that Mr. Gaffey has preserved error on this issue.

[1]Mr. Gaffey also attacks *Staley* on the grounds it lacks precedential value because it is an unpublished decision. Brief of Appellant, page 9.

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) states that a rental agreement "shall not provide." Provide is defined as "to have as a condition : stipulate <the contract provides that certain deadlines will be met>"[2] The focus here is clearly on the lease itself. Section 562A.11(1) requires that the lease itself not contain prohibited

[2]http://www.merriam-webster.com/dictionary/provide

provisions. Similarly §562A.9 states, "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, under §562A.9(1) a lease may not include terms and conditions prohibited by Chapter 562A. This section again focuses on the lease itself and specifically speaks in terms of inclusion of lease provisions.

Section 562A.11(1) explains what may not be done: the specified provisions are prohibited in residential leases. Section 562A.11(2) explains what happens if prohibited provisions are included in leases. First, a prohibited provision may not be enforced. Iowa Code §562A.11(2). Secondly, if a landlord willfully uses a lease containing provisions they know to be prohibited they are subject to actual and punitive damages and attorney fees. Iowa Code §562A.11(2).

Some states have explicitly made only the enforcement of illegal provision subject to penalty, but did so by changing the original Uniform Act language in their statutes. Delaware's version of this section of the URLTA reads,

> (a) A rental agreement shall not provide that a tenant:
> (1) Agrees to waive or forego rights or remedies under this Code;
> (2) Authorizes any person to confess judgment on a claim arising out of the rental agreement;
> (3) Agrees to the exculpation or limitation of any liability of the landlord arising under law or to indemnify the landlord for that liability or the costs connected therewith.
> (b) A provision prohibited by subsection (a) of this section which is included in the rental agreement is unenforceable. *If a landlord attempts to enforce* provisions of a rental agreement known by the landlord to be prohibited by subsection (a) of this section the tenant may bring an action to recover an amount equal to 3 months rent, together with costs of suit but excluding attorneys' fees.

25 Delaware Code §5301. Delaware changed the URLTA language to make only enforcement of a prohibited provision subject to punitive damages.

Similarly, in one of the key cases discussed in *Staley*, *VG Marina Management Corp. v. Wiener*, 882 N.E.2d 196, 203-04 (Ill. Ct. App. 2008) 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. Again this statute provides

specifically damages only in case of enforcement. 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.

B. Prohibited Provisions & Their Purpose

Landlords, including Mr. Gaffey, have strenuously argued that only enforcement of illegal provisions harms tenants. What harm is caused by the inclusion, without enforcement of illegal provisions?

As noted by the *Staley* Court, the language of §562A.11(1) comes from and is substantially similar to the Uniform Residential Landlord Tenant Act.[3] 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

[3]"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).

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, comment, cited in *Staley* at 6.

In further support of the proposition that the mere existence of illegal provisions harms tenants, 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. The *Summers* Court explained,

> We similarly conclude that 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 if the only consequence to a landlord for using such provisions is that they are found unenforceable by a court.

Summers at 236 P.2nd 586 at ¶38, cited in *Staley* at 15, 24.

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.

Staley at 14.

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)

Staley at 14-16.

Landlords have argued that based on *Staley*, tenants will use the courts to recover punitive damages simply because a prohibited clause is found in their lease. This position either misunderstands or consciously 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 Ms. Walton's 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.

Both the purpose and methodology of §562A.11 are 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 clearly felt that landlords, realizing the potential penalties for knowing and willful inclusion of prohibited provisions, would carefully vet their leases and insure that they do not contain illegal provisions.[4] Since innocent landlords are not

[4] 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

subject to punitive damages, what is the harm of requiring them to remove illegal lease provisions once they become aware of them?[5] On the other hand, why should landlords be permitted to knowingly keep illegal provisions in their leases?

D. *Staley* Disposes of Mr. Gaffey's Arguments

If this Court affirms *Staley*, then the majority of Mr. Gaffey's arguments fail, because they depend on enforcement of illegal provisions being required under the IURLTA. Mr. Gaffey first argues that declaratory judgment should not have been granted and Ms. Walton's claim is not ripe because she cannot, "show actual use of these provisions and the effects thereof…" Brief of

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no unlawful provisions." Martindale.com legal library, http://www.martindale.com/litigation-law/article_Davis-Brown-Koehn-Shors-Roberts-PC_2057830.htm

[5] If landlords discover illegal provisions in their current lease they can protect themselves using a procedure suggested by an Iowa City landlord and adopted by the Iowa Tenants' Project. Within a reasonable time, for example 30 days, after the initial discovery of the illegality the landlord should send a letter to affected tenants. The landlord need not make any admission of liability but rather can state that questions have been raised about the legality of particular provisions which are identified and that 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 Iowa Tenants' Project believes that they should not be found to have knowingly used prohibited lease provisions under §562A.11.

Appellant, page 9. Ms. Walton, says Mr. Gaffey, has not "suffered any actual injury relating to her claims". Brief of Appellant, page 12. Finally, Ms. Walton does not have standing, argues Mr. Gaffey, because she "cannot show she has suffered any concrete, particularized invasion of her rights…" Brief of Appellant, page 12-13. With regard to the illegality of lease provisions and the propriety of class certification Mr. Gaffey also argues lack of enforcement. Brief of Appellant, pages 16, 18, 24-5.

Almost all of Mr. Gaffey's arguments rest on the necessity of enforcement. Without enforcement, he argues, no rights are invaded, no injury suffered and no damages are sustained. If *Staley* is affirmed, these arguments fail. As noted above, *Staley* holds that the IURLTA gives tenants the right to a legal lease. Enforcement is clearly not required under *Staley*. Under the IURLTA no lease may contain illegal provisions and a lease that contains illegal provisions invades the rights of tenants and causes them damage.[6]

[6]Under §562A.11(2) if landlord willfully uses a provision known to be prohibited they can be subject to actual and punitive damages. While the district court found the challenged provisions to be illegal it found that the issue of knowing and willful use was a fact question and reserved it for trial. Dist. Ct. Ruling, page 10. The issue of damages is thus also reserved for trial.

E. The Facts of this Case Show the Necessity of Legal Leases

Mr. Gaffey and other landlords have strenuously argued that tenants suffer no harm if illegal lease provisions are not enforced. The facts of this case show otherwise. If *Staley* is overturned landlords will have the right to include illegal provisions in their leases and will use them to intimidate their tenants.

Mr. Gaffey's 2014-15 lease was found by the district court to contain illegal automatic carpet cleaning clauses. Dist. Ct. Ruling, Apx, page 135. This is not the first time a court has found illegal carpet cleaning clauses in Mr. Gaffey's leases. In *Gaffey v. Sigg*, SCSC81780, (6th District Small Claims, May 29, 2012) Magistrate Karen Egerton examined one of Mr. Gaffey's earlier leases and held, "Of great concern to the Court, however, is [Mr. Gaffey's] use of clauses within his rental agreement addendum which are clearly in violation of the law or unconscionable." *Gaffey v. Sigg*, Apx, page 143. The magistrate noted a variety of illegal clauses including, "a provision that failure to have carpeting professionally cleaned will result in automatic deduction from the security deposit." *Gaffey v. Sigg*, Apx, page 143. The magistrate then held that in future damages could be recovered by tenants pursuant to section 562A.11,

"in the event Plaintiff willfully uses these rental agreement provisions *known by Plaintiff to have been found to be prohibited*…" *Gaffey v. Sigg*, Apx, page 143. Nevertheless, despite the ruling of the magistrate with regard to the illegality of automatic carpet cleaning, Mr. Gaffey left these provisions in his later leases which the district court subsequently also found to be prohibited.

What was Mr. Gaffey's justification for leaving these provisions in his lease? Had he failed to understand the magistrate's ruling? Was his mental capacity impaired? No, according to Mr. Gaffey, the problem instead lay with the magistrate's ruling, which was ineffective to show his knowledge because it was "dicta." Defendant's Resistance to Summary & Declaratory Judgment and Class Certification, ("Def. Resistance"), Apx, page 74. On appeal Mr. Gaffey continues to dig himself in deeper, further attacking the legitimacy of the magistrate's ruling by arguing that "No *court of record* has ever found a provision of Gaffey's lease to be prohibited…"[7] Brief of Appellant, page 5.

Ms. Walton is not citing the magistrate's ruling as legal precedent nor

[7]This argument is not only irrelevant, but mistaken "small claims court" is legally the district court sitting in small claims, and the district court is a court of record. Iowa Code §631.2(1); §602.6101.

asserting that it is binding authority.[8] Ms. Walton proffered the magistrate's ruling as evidence to the district court that Mr. Gaffey knew his lease contained illegal provisions. Ms. Walton proffers it to this court as confirmation of the wisdom of *Staley* and the IURLTA. Even a written ruling from a judicial officer was not enough to convince Mr. Gaffey his lease contained illegal provisions that should be removed.

But Mr. Gaffey went even further. The magistrate in *Gaffey v. Sigg* asked Mr. Gaffey in open court why he had included illegally high late fees in his lease, "[w]hen asked why the Plaintiff would set forth these fee amounts in clear violation of the landlord/tenant law, the Plaintiff replied, '*It gets their attention.*'" *Gaffey v. Sigg*, Apx, page 143. Mr. Gaffey not only admitted that this provision was illegal, he acknowledged he knew it was illegal when he used it in his lease and frankly admitted that this illegal provision was included in order to intimidate his tenants.

Under Mr. Gaffey's and other landlords' reading of the IURLTA, none

[8] Dicta or more properly obiter dictum is a concept that is used in assessing the authority of legal precedent as controlling. See e.g. *Boyles v. Cora*, 6 N.W.2d 401, 413 (Iowa 1942).

of Mr. Gaffey's behavior is illegal so long as no evidence of enforcement surfaces. If this Court overturns *Staley*, this case will then provide a clear roadmap and this Court's explicit sanction for landlords to copy Mr. Gaffey and knowingly include illegal lease provisions that mislead and intimidate their tenants. This Court should reject these arguments and affirm *Staley*.[9]

[9] Considerations of respect for judicial 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, relying on *Staley*. Mr. Gaffey has shown scant respect for judicial rulings, refusing to accept the magistrate's ruling as noted, attacking district court rulings because, "they do not have precedential value" Def. Resist. Sum Judg., page 6. Mr. Gaffey also attacked *Staley* as unpublished and argued it has no precedential value for lower courts. Def. Resist. Sum Judg., page 6. If this Court believes *Staley* was illegal or unjust, it should be overturned. But Appellee 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*, and their insistence that any judicial decision, other than a published opinion of the Supreme Court, can be ignored.

III. MR. GAFFEY'S LEASE CONTAINS ILLEGAL PROVISIONS

Aside from the question of whether to reverse or affirm *Staley*, the most important substantive issue presented are whether the district court was correct in granting partial summary & declaratory judgment that found specific lease provisions illegal under the IURLTA. The most important lease issue, presented both in this case and in *Kline v. Southgate*, no. 15-1350, is the prohibition on fines and penalties and the illegality of liquidated damage provisions. Also significant is the legality of exculpatory and liability shifting clauses, specifically prohibited under §562A.11. The issue of automatic carpet cleaning, while important, has been briefed and argued in *DeStefano v. Apts Downtown*, 14-820, currently pending.[10]

A. Declaratory Judgment is a Key Tool For Tenants

The district court, relying on *Staley v. Barkalow*, granted partial summary & declaratory judgment with regard to the challenged lease

[10] Declaratory judgment on summary judgment is 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). Ms. Walton agrees that Mr. Gaffey has preserved error with regard to his arguments on partial summary & declaratory judgment.

provisions. Dist. Ct. Ruling, Apx, pages 130-1. 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 of the 6th District 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, Apx, page 129.

Mr. Gaffey does not argue that there are any material facts in dispute but asserts that the district court should not have granted summary declaratory judgment because no justiciable controversy exists in this case and Ms. Walton

lacks standing because the lease provisions were not enforced.[11] Brief of Appellant, pages 8-14. For Mr. Gaffey, this is simply another variation on his "no enforcement = no injury = no damages" argument. If this argument is successful, however, the result will be to bar tenants from obtaining declaratory judgment unless the challenged lease provisions are enforced against them. It is ironic that declaratory judgment, which merely determines legality and legal rights, might fall victim to landlord hysteria over punitive damages. But if *Staley* is overturned and enforcement becomes an iron clad necessity for all tenant lease litigation, a key tool, declaratory judgment, will be lost.

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.

Iowa R. Civ. P. §1.1102. The declaratory judgment rules "are to be liberally construed in order to carry out their purpose." *Green v. Shama*, 217 N.W.2d

[11] Since no material facts are in dispute, it was appropriate for the district court to grant summary judgment. *Kolarik v. Cory Intern. Corp.*, 721 N.W.2d 159, 162 (Iowa 2006) (citing Iowa R. Civ. P. 1.981(3).

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).

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.

The legality of the challenged provisions is fiercely contested by the parties in the instant case. Since the rights of Ms. Walton 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.

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) should be 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.

B. Actual Versus Liquidated Damages

Landlords, including Mr. Gaffey would like to be able to use fines and penalties as a way to force tenants to comply with their leases. By using set fees they can disguise penalties as liquidated damages. Even when considered as compensation because landlords can demand as liquidated damages whatever charges or fees they desire in their leases, they can ensure that they always profit from a tenant's breach by obtaining more than their actual damages. In provision after provision the IURLTA specifically requires actual damages. The district court correctly found that only actual damages are permitted under the IURLTA.

1. District Court Ruling

Ms. Walton argued to the district court that the IURLTA only allows actual damages and challenged the following fines, penalties, fees and charges other than actual damages in Mr. Gaffey's lease,

a. $35 returned check fee (section 7)
b. $35 processing administrative fee for 3 day notice (section 8)
c. $40 administrative fee for failure to transfer utilities (section 12)
d. $40 administrative fee for not keeping utilities in tenant's name

(section 13)
e. $500 fine for smoking (section 22)
f. $50 minimum trip charge (section 24)
f. $50 minimum service charge for lock outs (section 25)
g. $100 per occurrence for not informing landlord of additional occupants, $40 administrative fee for approved occupancy change (section 26)
h. $200 sublease fee (section 27)
i. $40 administrative fee for not keeping utilities in tenant's name (section 27(f))
j. $500 unauthorized animal fee (section 28)
k. $100 fee for additional move-out inspection due to tenant failure to vacate
(section 37)
l. Various service charges on page 11 of the lease, including a $50 minimum trip charge for noise complaints, trash, parking or pet violations and posting notices

Dist. Ct. Ruling, Apx, page 134.

The district court held,

Plaintiff generally argues that Defendants 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 Plaintiff in this section of her Motion have been set without any consideration of what the landlord's actual damages and fees would be in each situation. Therefore, Plaintiff's Motion for Summary and Declaratory Judgment should be granted on this issue.

Dist. Ct. Ruling, Apx, page 134.

2. Penalty Provisions Are Not Permitted in Leases

Mr. Gaffey argues that liquidated damage provisions are not prohibited by the IURLTA and that the holding in *D.R. Mobile Homes* merely requires evidence of loss, but permits liquidated damages. Brief of Appellant, pages 16-17. While Mr. Gaffey attempts to justify the challenged lease provisions as liquidated damages, in fact many are thinly or even undisguised penalties or fines used to coerce tenants into compliance. For example, tenants are required to transfer utilities into their name, "Failure to do so may result in disconnection of utility services and TENANT will be charged a $40 administrative fee." §12, Lease, Apx, page 20. Failure to keep utilities in the tenant's name also "…will result in a $40 administrative fee." §13, Lease, Apx, page 21.

> Tenant agrees to a $50 minimum trip charge to LANDLORD regarding noise complaints, improper removal of trash from

> premises, illegal/improper parking, pet violations, and/or posting of legal notices to TENANT or any other notification to TENANT regarding violation of the Lease or Rules and Regulations.

§24, Lease, Apx, page 24. This section specifically levies this minimum "trip charge" only for lease violations and it clearly intended to penalize tenants.

No pets are permitted under the lease and which states in bold, "Any unauthorized animal not approved by LANDLORD found in TENANT'S unit will results in a fee of $500 payable within (5) days of notification being assessed to TENANT." §28, Lease, Apx, page 25. Again, the $500 fee is clearly a penalty.

Finally the clearest example of a penalty is the no smoking clause, which states, "Smoking is NOT ALLOWED in the dwelling unit or interior common areas. If caught smoking in dwelling unit or interior common area a $500 fine will be enforced." Lease §22, Apx, page 23. Here Mr. Gaffey calls a spade, a spade and explicitly labels the charge as a fine.

Fines or penalty clauses are simply not permitted in leases. 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).

In future landlords will no doubt do a better job of concealing the punitive nature of their fees and charges, but there can be no question given Mr. Gaffey's lease that one of the primary purposes of these set fees and charges is to punish tenants for non-compliance.

3. The IURLTA & Precedent Require 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),[12] 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

[12]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."

imposing liquidated damages because, "58-2550(b) [13] requires that these actual damages must be itemized. In contrast, a forfeiture or *a liquidated damages 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

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[13]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."

> 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.

4. "Damages" Means Actual Damages

While Mr. Gaffey argues that the IURLTA does not specifically prohibit liquidated damages, if the IURLTA requires actual damages, then it precludes liquidated damages because liquidated damages are always set and never actual.[14] 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 does not apply just to security deposits. In fact, it is pervasive throughout the IURLTA which repeatedly specifically limits both landlords and tenants to actual damages. Five separate sections of the IURLTA

[14] *American Soil Processing, Inc. v. Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd.*, 586 N.W.2d 325 (Iowa 1998) ("Parties include a liquidated damages provision in their contracts to provide a ready and relatively easy calculation of damages if there is a breach of contract." citing Restatement (Second) of Contracts § 356 cmt. a, at 157.

specifically limit tenants to actual damages,[15] three sections limit landlords to actual damages,[16] while §562A.35 limits both landlords and tenants to actual damages.

Furthermore 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). Here damages refers to actual damages. 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.

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[15]§§562A.11, 562A.12, 562A.22, 562A.26 & 562A.36
[16]§§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.

Arguing that the term "damages" in the IURLTA allows for liquidated damages would cause bizarre and baroquely complex problems of

interpretation. For example, §562A.22 regulates the failure to deliver possession by a landlord. Under §562A.22(1)(b) if possession is not delivered a tenant may,

> 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.

Iowa Code §562A.22(1)(b). The very next section 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 fees.

Iowa Code §562A.22(2). If damages and actual damages are synonymous then these sections meld easily and harmoniously. But, if the term "damages" permits liquidated damages then tenants are limited to actual damages if the failure to deliver possession was willful, but if the failure was not willful then liquidated damage are appropriate?

Paired sections 562A.32 & 562A.27 previously discussed provide another useful example. As noted §562A.32 provides that, '[i]f the rental agreement is terminated" the landlord may have a claim for actual damages as provided in §562A.27, while §562A.27 which deals with the landlord's

remedies for all breaches of the lease uses the term "damages" rather than actual damages. If "damages" equals actual damages, again the two sections interact logically and seamlessly. It has been argued, however, that "damages" in §562A.27 includes liquidated damages and that a landlord is limited to actual damages for breach of the lease only for claims after the termination of the lease by the tenant. Following this argument a tenant who does not terminate the lease can be charged liquidated damages, but once terminated only actual damage can be charged? What if the breach took place before termination, but the landlord only filed suit after termination? If the landlord filed suit before termination does the liquidated damage claim survive termination? The logic behind this distinction between damages and actual damages is tenuous and complex problems of statutory interpretation that would inevitably arise if this false distinction is maintained.

5. Liquidated Damages Cannot be Squared with the Requirements of the IURLTA

Other insuperable problems make liquidated damages untenable under the IURLTA. Section 562A.4 which sets the general rules under the IURLTA for the administration of remedies states, "The remedies provided by this

chapter shall be administered so that the aggrieved party may recover appropriate damages. The 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.

Section 562A.4 sets forth the overall goals of administration for the IURLTA and states, "The remedies provided by this chapter shall be

administered so that the aggrieved party may recover appropriate damages." Iowa Code §562A.4(1). We can be sure that the legislature explicitly approved the use of actual damages and no argument has been made that when "damages" are called for in the IURLTA that imposing actual damages would be illegal or inappropriate. Thus we can always be sure that if properly computed actual damages are imposed that they are always 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.

Requiring actual damages eliminates the ability of landlords to unilaterally 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. 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 tenants must go to court to receive damages from landlords, 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 the tenant's security deposit. Unless the tenant choses to go to court, the landlord can keep any deductions. 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 highly effective and widely used 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 for commercial contracts restricted by a 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 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.

Beyond these important policy arguments is the fact that the IURLTA requires actual damages because the term "damages" is clearly synonymous with actual damages. This reading provides a clear and simple explanation of legislative purpose and makes it simple to reconcile the use of the terms "damages" and actual damages throughout the IURLTA. Insisting that the term "damages" permits liquidated damages creates bizarre and baroquely

complex problems of statutory interpretation throughout the statute. 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). Liquidated damage provisions should not be permitted in leases because IURLTA clearly requires actual damages. The district court's ruling should be affirmed.

C. Exculpatory Provisions

Ms. Walton challenged two exculpatory provisions in Mr. Gaffey's lease,

> **LANDLORD shall not be liable for damage or loss of any of the TENANT'S personal property for any cause whatsoever.**

Emphasis in original, §23 Lease, Page 6, Apx, page 24. Landlord's lease also provides,

> In the event of a failure of an appliance that is furnished by LANDLORD under this rental agreement, LANDLORD'S sole responsibility shall be the repair or replacement of the appliance at the LANDLORD'S sole discretion. In no event or circumstance will LANDLORD be responsible for any loss of use or consequential damages caused by said appliance failure.

§20(e) Lease, Page 4, Apx, page 22.

Iowa Code §562A.11 provides,

> 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 or to indemnify the other party for that liability or the costs connected therewith.

Iowa Code §562A.11(1(d).

The district court held,

> 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 sections 20(e) and 23 of Defendant's lease allow exculpation or limitation of any liability arising under the law. Therefore, the Court concludes that the challenged clauses of the lease agreement providing for exculpation are provisions that shall not be included in the landlord's standard lease. Plaintiff's Motion for Summary and Declaratory Judgment should be granted on this issue.

Dist. Ct. Ruling, Apx, page 133.

On appeal, Landlord fails to present any argument with regard to the legality of the challenged exculpatory provisions. The district court properly found that as landlord has a duty of care to its tenants, the challenged lease

provisions that provide the landlord shall not be liable for any loss or damage, loss of use or consequential damage clearly limit the landlord's liability and are prohibited under §562A.11(1)(d). The district court's ruling should be affirmed.

D. Automatic Carpet Cleaning

The issue of the legality of automatic carpet cleaning has been presented in several other pending cases and has been argued in *DeStefano v. Apts Downtown*, 14-820. 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.

Mr. Gaffey's lease actually has two separate automatic carpet cleaning clauses. The first provides, "**LANDLORD shall have all carpeting professionally shampooed, paid out of tenants security deposit**." Emphasis in original, §29 Lease, Apx, page 25.

In addition Mr. Gaffey's lease rules provide,

> Carpet has been cleaned prior to move-in and is required to be cleaned at move out and at TENANT'S expense only by approved or

> authorized firms. At the time of move-out a copy of the receipt for cleaning is to be provided to LANDLORD.

Lease & Lease Rules, ¶ 5, Apx, page 32. Mr. Gaffey's lease therefore provides for a direct payment by tenants to Landlord for carpet cleaning, while the lease rules require that they pay an authorized carpet cleaner. In either case, tenants are being illegally required to automatically pay for professional carpet cleaning.

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).

The district court found the automatic carpet cleaning provisions to be 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. These sections of the lease may not be included in Defendant's standard lease because inclusion of these sections permits the landlord to avoid its obligations as defined by the Iowa Legislature in § 562A.12(3).

Dist. Ct. Ruling, Apx, page 135.

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 deduction only for damages that exceed normal wear and tear, which automatic carpet cleaning provisions make no provision for.

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[17], substantially similar to Iowa's, held that landlords could not

[17]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

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. The *Chaney* Court further found,

> …a reasonable tenant would believe that if he did not shampoo the carpet himself to [landlord's] satisfaction, [landlord] would automatically shampoo the carpet and deduct the charge from his security deposit. As stated above, such an automatic deduction is inconsistent with R.C. 5321.16 and is therefore unenforceable.

Chaney v. Breton Builder Co., Ltd., 130 Ohio App.3d 602 at ¶28.

Mr. Gaffey appears to argue that the purpose of §562A.12(3) is merely to require a written statement which can include unlimited deductions by the

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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.

landlord. Brief of Appellant, page 19. In fact, §562A.12 requires that before a security deposit deduction can be made there must actually be damage to the unit and that damage must exceed normal wear and tear. As the Supreme Court held, "…the 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). Since the carpet cleaning clause is automatic, made without an inspection to determine whether or not the carpet is even dirty, it short circuits the process required by the IURLTA.

Mr. Gaffey also argues that he is entitled to contractually redefine the legal standard of ordinary wear and tear citing *Castillo-Cullather v. Pollack*, 685 N.E.2d 478, 482-83 (Ind. Ct. App. 1997). Mr. Gaffey then argues that he has reset the legal standard in his lease and that because his tenants began the tenancy with professionally cleaned carpet, he can require them to automatically pay for professional cleaning at the end of the tenancy. Brief of Appellant, page 19-20.

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

crystal clear that under Indiana law lease provisions trump its statutes,[18] 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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[18]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.

Mr. Gaffey's argument would reduce the IURLTA to a set of optional guidelines that could be redefined, altered or waived by inserting a clause in his standard lease. Section 562A.11 specifically prohibits exactly what Mr. Gaffey proposes, "A rental agreement shall not provide that the tenant or landlord: [a]grees to waive or to forego rights or remedies under this chapter…" Iowa Code §562A.11(1)(a). Other courts have rejected attempts by landlords to contractually trump the requirements of landlord tenant statutes,

> N.J.S.A. 46:8-21.1 is part of a statutory scheme calculated to protect lessees from overreaching landlords. *Watson v. Jaffe*, 121 N.J. Super. 213, 214 (App. Div. 1972). This legislation imbued lessees with statutory rights the enforcement of which was not made subject to contractual limitations and avoidances. *Watson v. Jaffe*, supra. To hold any other way would be to undermine the very purpose of the legislation, i.e., protecting lessees from contractual overreaching by lessors. Therefore, 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.

Watson v. United Real Estate, 131 N.J. Super. 579, 581-2 (N.J. Super. 1974); see also *Rand v. Washington*, no. 7822, 1983 WL 2448 (Oh. App. 1983) (lease may not contain provisions contrary to landlord tenant statute).

Mr. Gaffey argues that all his automatic carpet cleaning clauses do

require is tenants to return the unit in the same state in which they received it. Brief of Appellant, page 20. This argument deprives tenants of what they are paying for with their rent: normal use of the premises. Section 562A.12 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.

This is because 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 usual one and has been defined as the wear which property undergoes when the tenant does nothing more than to come and to and perform the acts usually incident to an ordinary way of life. Stated otherwise ordinary wear and tear is the depreciation which occurs when the tenant does nothing inconsistent with the usual use and omits no acts which it is usual for a tenant to perform.

Tirrell v. Osborn 55 A.2d 727 at ¶ 17 (D.C. App 1947) citing *Taylor v.*

Campbell, 123 App.Div. 698, 108 N.Y.S. 399, 401; see also Haw. Rev. Stat. Ann. §521-8 (2010) ("'Normal wear and tear' means deterioration or depreciation in value by ordinary and reasonable use …"); Colo. Rev. Stat . Ann. § 38-12-102(1) & ME. Rev. Stat. Ann. tit. 14, § 6031(1) ("'Normal wear and tear' means that deterioration which occurs, based upon the use for which the rental unit is intended, without negligence, carelessness, accident, or abuse…").

Since normal use of a rental unit will inevitably result in some grime, dirt or soiling, so long as the tenant takes reasonable precautions against dirt and does normal cleaning, they can, in the words of the Texas Court of Appeals, "…[vacate] the apartment, leaving the normal amount of wear and soil, without forfeiting any portion of his security." *Southmark Management Corp. v. Vick*, 692 S.W.2d 157 (Tex. App. 1985). 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. The district court's ruling should be affirmed.

IV. CLASS CERTIFICATION WAS APPROPRIATE

Mr. Gaffey'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 Mr. Gaffey'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 Mr. Gaffey preserved error on the class certification issues regarding enforcement and inclusion of prohibited lease provisions under *Staley*, but Mr. Gaffey failed to preserve error with regard to the form of the class certification order, Brief of Appellant, pages 21-4.

A. Landlord Failed to Preserve Error

Mr. Gaffey argues for the first time on appeal the district court abused its discretion because it, "…failed to adequately consider the requirements of certification, adequately explain its decision or adequately describe the class or subclasses it certified." Brief of Appellant, page 21-4. None of these issues were raised in Mr. Gaffey's pleadings below and Mr. Gaffey 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. Docket, Apx, page iii. Mr. Gaffey states that he preserved error by "…resisting Tenants' motion for class certification." Appellant's Brief, page 21.

The mere filing of a resistance does not give Mr. Gaffey 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 Mr.

Gaffey 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 Mr. Gaffey's failure to raise them.[19]

B. Enforcement vs. Inclusion

Mr. Gaffey did preserve error for its key argument with regard to class certification: Ms. Walton suffered no "actual damages" thus there is no common issue of law or fact, Ms. Walton cannot represent the class of tenants and in any case the issue of actual damages is best dealt with individually in small claims court. Brief of Appellant, page 24-5. These are simply

[19] If this appeal does not end the case, all of the issues with regard to the form of the class certification order and composition of the class can be dealt with on remand. If modification is necessary Iowa R. Civ. P. 1.265(1) gives the district court wide discretion to amend the class certification order.

reiterations of Mr. Gaffey's earlier arguments that *Staley* should be overruled and enforcement of illegal provisions required which are discussed and refuted at §II., above. If the Court of Appeals in *Staley* correctly ruled under the IURLTA that tenants have a right to a legal lease and are injured by the inclusion, even without enforcement of prohibited provisions, then Mr. Gaffey's arguments with regard to class certification fail. Only if *Staley* is overruled can Mr. Gaffey's attack on the lack of injury to Ms. Walton and her adequacy 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, Apx, page 136.

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 Mr. Gaffey admitted that the standard lease and lease rules used by Ms. Walton was part of its rental agreement for more than 50 tenants.[20] First Request for Admissions & Response to Request for Admissions. Apx, pages 59-61.

As in the instant case, in *Staley* the defendant landlord challenged the existence of a common question of law or fact based on lack of enforcement of

[20] More than 40 class member 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).

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. Once again this is almost exactly the same issue that 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? Under *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 were appropriately made class members. The district court's order should be affirmed.

V. CONCLUSION

When the Iowa Tenants' Project, counsel for Ms. Walton, first began our litigation campaign we naively believed that getting a legal ruling under the IURLTA with regard to the validity of lease provisions widely used by Iowa landlords would be a relatively short and simple process. Fear and confusion over the possibility of punitive damages has caused such fervent opposition from some landlords that over 5 years later the legality of many provisions is still awaits a definitive appellate ruling.

The focus of the Tenants' Project, in this and other cases, is fulfilling the mandate of the IURLTA and *Staley v. Barkalow*: that tenants have legal leases, free from illegal provisions. The key to cleaning up leases is *Staley*'s holding that no enforcement of lease provisions is required and the availability of class actions and declaratory judgment. The Tenants' Project would be happy if punitive damages are never necessary, because that would mean that landlords will have taken seriously the rulings of the Supreme Court, the Court of Appeals and the district courts and removed any prohibited provisions.

The facts of this case make it clear how important the right to a legal

lease is for tenants and how vital it is that the promise of the IURLTA, as a legally binding, fair and reasonable framework for landlord tenant relations, be made a reality for tens of thousands of Iowa tenants and landlords.

WHEREFORE, the Court of Appeals' ruling in *Staley v. Barkalow* and the district court's grant of partial summary & declaratory judgment and class certification should be affirmed.

REQUEST FOR ORAL SUBMISSION

Appellee requests oral argument.

Respectfully submitted,

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CERTIFICATE OF RULE 6.1401 COMPLIANCE

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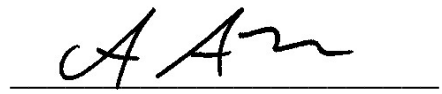

Christopher Warnock

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