IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

CHRISTOPHER JANSON,	)	
PLAINTIFF,	)	CASE NO. SC 84082
	)	SMALL CLAIMS
vs.	)	
	)	POST TRIAL
JOSEPH CLARK, ET AL,	)	MEMORANDUM
DEFENDANTS.	)	

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COME NOW Plaintiff Christopher Janson & Third Party Defendants/Plaintiffs Cody Elbert and Brett Zeller, by and through their attorney, Christopher Warnock, and submit their Post Trial Memorandum to reply to Defendants' Post-Trial Brief, stating as follows:

I. Introduction

This case is part of a coordinated effort on the part of the Iowa Tenants' Project to improve landlord tenant relations in Iowa City and throughout Iowa. While both sides have filed extensive briefs, the key to this case is Defendant Apartments Downtown's ("Landlord") excessive $35 an hour labor charge, authorized by its lease. As we will see, Landlord admits that this charge includes its overhead and ordinary business expenses, and could not provide an actual breakdown of the charges included in the $35 an hour rate. Since, as we will see, a landlord can only charge its actual damages under the Iowa Uniform Residential Landlord Tenant Act ("IURLTA") Iowa Code Chapter 562A, when landlord enforced this lease provision at the termination of the tenancy it violated the IURLTA. Since this enforcement was a clear violation of the IURLTA and in addition came after the decision in *DeStefano v. Apts. Downtown*, where Judge Egerton found this

same $35 an hour charge to violate the IURLTA, the use of the prohibited provision was knowing and willful.

While many other issues are potentially presented in this case, the $35 an hour charge provides the clearest example of Landlord's violation of the IURLTA. In addition, the question of the timing of Landlord's knowledge of illegality is also an important issue of first impression. On the other hand, while Plaintiffs have briefed the issues of attorney fees and Mr. Clark's individual liability, these are clearly less significant issues.

II. Repairs & Cleaning Were Improperly Made & Charged by Landlord

In their Post-Trial Brief Landlord states that "Repairs were proper under the Rental Agreement and the IURLTA," and disputes Plaintiff's & Third Party Defendants' ("Tenant") arguments with regard to cleaning, asserting that the photographic evidence and testimony showed that all charges made by Landlord were appropriate. In fact, "None of Plaintiff's legal arguments are valid."[1]

A. Landlord Made Excessive Hourly Charges for Repair & Cleaning

First, the evidence at trial confirms Tenant's arguments in its pre-trial hearing memorandum and at trial that Landlord charges an excessive hourly labor charge.[2] As the evidence at trial indicated and we will see below, Landlord charged $35 an hour for all repairs, including the countertop, sink base, wall repairs and blinds as well as for cleaning. At trial Mr. Clark testified that he had no idea what Landlord's repair and

[1] Defendants' Post-Trial Brief at 1.
[2] Plaintiff's pre-trial Hearing Memorandum at 6-9.

cleaning workers were actually paid per hour. Mr. Clark testified that in addition to the direct cost of workers' actual wages that Landlord charged its indirect costs, including the overhead for its business, in its $35 per hour repair and cleaning charges. Mr. Clark testified that he didn't know how much of the $35 an hour charge was for overhead or what specific overhead items were charged. That even more expensive repairs might be available elsewhere, as argued in Defendants' Post-Trial Brief, does not make Landlord's own excessive repairs reasonable.[3]

In its Post-Trial Brief Landlord does not dispute that it charges its tenants its overhead and ordinary costs of business, instead it argues that all business include charges for their overhead when billing their customers for products and services.[4] This is correct, but Landlord's product or service in this case is the tenancy and its charge for that product or service is rent. It is, of course, perfectly appropriate for a landlord to charge its overhead as part of rent. However, in this case, a different standard applies as Landlord is seeking damages for breach of the lease and violation of the tenant's obligations under the IURLTA.

Even under the more lenient common law standards applicable to general contract principles it is well settled that,

> A party seeking to recover for breach of contract is entitled only to be placed in as good a position as the party would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics*, 579 N.W.2d 823, 831 (Iowa 1998). A party is not entitled to use the breach to better its position by recovering damages not actually suffered.

Grunwald v. Quad City Quality Service, Inc., 662 N.W.2d 370 at ¶31 (Iowa App. 2003).

[3] Defendant's Post-Trial Brief at 5.
[4] Defendant's Post-Trial Brief at 5.

Landlord has not suffered any additional costs directly attributable to its overhead or ordinary business expenses if Tenant breaches the lease, as these are costs that it must pay regardless of whether the lease is breached. Alternatively, while Tenant would dispute that this is appropriate, Landlord has refused to breakdown its hourly charge and thus has failed to show what amount if any caused by the tenant's breach is attributable to overhead.[5] Tenants argue that by charging its overhead and ordinary business expenses to its tenants Landlord reaps a windfall. Furthermore, Landlord is a very large landlord with thousands of tenants so its overhead and ordinary business expenses are very large as well. Allowing landlords to charge their overhead creates a very wide differential in charges for exactly the same repairs depending on the size of the landlord. Under Landlord's rationale if a multi-billion dollar company like Google or Exxon was a landlord it would be justified in charging thousands of dollars per hour for repairs due to its immense overhead and ordinary business expenses, none of which are directly attributable to the tenant's breach.

Furthermore, as this is a residential lease, the stricter standards of the IURLTA also apply. Tenant argued in his pre-trial hearing memorandum that Landlord was limited under the IURLTA to charging its actual damages and that actual damages for repair were limited to the reasonable cost of labor and materials. As noted there, Judge Egerton and Judge Rose both ruled that landlords could not charge their business overhead or ordinary costs of doing business to their tenants.[6]

[5] Tenants would assert that landlords may never charge their overhead or ordinary business expenses as a result of a breach of the lease or IURLTA.
[6] Plaintiff's pre-trial Hearing Memorandum, §III, pages 6-9.

B. Landlord Improperly Charged Repairs

While Landlord makes the sweeping claim that all repair and cleaning charges were appropriate, when we look at the specific items charged we can see multiple violations of the IURLTA. For example, Tenants were charged $570.80 for countertop repair with $280.00 for labor at $35 an hour.[7] At trial the Landlord introduced photographs of the countertop and as the Court can see from the photo of the countertop, Defendant's Exhibit Z, there were only a very few, very small cuts or ridges in the countertop. We can see how small these cuts are when we can see the true size of the wet board used in both photos compared to the worker's hand in Defendant's Exhibit X.

As noted at trial by Tenant's counsel, Ms. Boyer, no evidence was introduced that the Tenants were responsible for the damage, nor are the small countertop cuts self evidently damage caused by negligence or deliberate misuse of the countertop. In fact, tiny cuts on a countertop or a split in the sink base appear to be normal wear and tear. In response at trial Landlord argued that since Tenants had not noted the damage to the countertop on a check in form, that any subsequent need for repair or maintenance in the apartment could be charged to the Tenants. In its Post-Trial Brief Landlord makes a similar argument stating that, "…repairs were necessary because of damage in that portion of the unit under the exclusive control of Plaintiff and his fellow tenants."[8] In essence Landlord, at trial and in its brief, is making a strict liability argument: any necessary repair inside the unit can be charged to the tenants without any need to determine the actual source of the damage.

[7] Countertop repair receipts, Defendant's Exhibit BBB.
[8] Defendant's Post-Trial Brief at 7.

This strict liability standard is illegal under the IURLTA. As a general rule the landlord is required to, "Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Iowa Code §562A.15(b). There is only one, limited exception to the landlord's obligation to repair. As the Supreme Court held in *Mastland v. Evans Furniture*, 498 N.W. 2d. 682 (Iowa 1993) [9] "…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. In this case Landlord sees no need to determine ordinary wear and tear or prove deliberate or negligent damage by the tenant, as it automatically presumes the tenant is responsible for all damage in the unit. The general legal obligation of the landlord to repair and maintain cannot be squared with a policy that charges all damage and every repair inside a unit to the tenant.

In addition, while the testimony at trial was that the original, damaged countertop was installed in 2010 and was therefore two years old, Landlord charged its full cost of installation for a new countertop. Landlord charged Tenants, not the cost of what was damaged, a used countertop, but the full cost of a new countertop, thus receiving a windfall. It is apparent from Landlord's other repair receipts that tenants are always charged the full cost of a new replacement item and never the actual depreciated, market or current value of the item repaired or replaced. It is illegal for Landlord to charge the full replacement cost of a used item to tenants, even if repair is appropriate.

As the Supreme Court has held,

[9]Cited in the *DeStefano* ruling at 15

> 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).[10]

Further illegal and improper charges were established by the evidence presented at trial. For example, Tenants were charged $100 for a lock change.[11] While the Landlord's internally produced receipt says the $100 charge is for "labor and materials" no breakdown is provided and in fact, a $100 flat fee charge for lock changes at the end of the lease is provided in Landlord's lease.[12] Landlord failed to provide proof of the actual cost of damages for the lock change.

Tenants were charged $102.50 for wall repairs with $87.50 of labor at the excessive $35 per hour rate.[13] Damage was described as "sticky tabs above kit[chen] sink, hole behind entry door,"[14] and is found in photos JJ and KK.[15] Despite the very minor damage which was repairable with spray texture, as noted in the Landlord's internally produced receipt, Tenants were billed for 2.5 hours of labor which is clearly excessive.

Despite Landlord's arguments in its Post-Trial Brief,[16] no evidence was presented that the repairs were necessary for health or safety reasons. In fact, when Bryan Clark, maintenance manager, was asked if there was a safety or health problem, the recollection

[10]Cited in the *DeStefano* ruling at 11.
[11] Lock change receipt, Defendant's Exhibit WW.
[12] Lease §14(a), Defendant's Exhibit A.
[13] Wall repair receipt, Defendant's Exhibit EEE.
[14] Sink base repair receipts, Defendant's Exhibit EEE, page 2.
[15] Photos of sticky tabs and hole, Defendant's Exhibits JJ and KK.
[16] Defendant's Post-Trial Brief at 3.

of Tenant's counsel is that he answered "no". As noted in Plaintiff's pre-trial Hearing Memorandum,[17] §562A.28 only allows landlords to enter the unit during the tenancy and make repairs if repairs are necessary because of a condition "materially affecting health and safety…"

An additional illegal item improperly repaired and charged to Tenants was the sink base at a cost of $348.70 with $210 in labor at the excessive $35 an hour charge.[18] Tenants were charged the full cost of repair with no depreciation for the age or previous condition of the sink. The damage was described as a "split" which is shown in Defendant's Exhibit X, a photo taken April 15, 2013 which corresponds to the date of the repair receipts. This photo does indeed show a crack or a split in the panel of the countertop, but does not appear in any way to be the result of deliberate or negligent damage by Tenant. Instead this appears to be the sort of normal maintenance and repair which the Landlord is legally obligated to make.

This repair epitomizes the approach of Landlord which is to charge its tenants for: (1) any and all maintenance and repair in their units regardless of the cause; (2) at the full cost of a new replacement item without depreciation with; (3) excessive hourly charges that include its overhead and ordinary business expenses. Landlord is clearly violating its legal responsibility to, "Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." Iowa Code §562A.15(b).

[17] Plaintiff's pre-trial Hearing Memorandum, §II, page 3-4.
[18] Sink base repair receipts, Defendant's Exhibit ZZ.

C. Landlord Failed to Give Proper Notice for Repairs

In its Post-Trial Brief Landlord argues that the notice provided in its lease was sufficient legal notice under the IURLTA.[19] The Tenants testified that no separate notice was provided for entry to repair the countertop and sink base; they were only notified earlier of a maintenance check. While Joe Clark testified that Landlord's policy was to post notices for repairs, no evidence was provided of notice for entry for the repair of the countertop or sink base. In addition, the Tenants were not given notice or an opportunity to cure the repair problems, which as noted in Plaintiff's pre-trial Hearing Memorandum,[20] is required under §562A.28.

D. Landlord Improperly Charged for Cleaning

Despite Landlord's arguments in its Post-Trial Brief to the contrary, the evidence including photographs introduced at trial shows that the Tenants were improperly charged for cleaning. At trial Defendant's own internally produced receipt for carpet cleaning showed a charge of $83 for carpet cleaning.[21] However, the actual receipt for the carpet cleaning company, Cody's, was for $55.[22] Joe Clark, Business Manager of Defendant Apartments Downtown admitted that Landlord added approximately $20 of indirect costs onto the carpet cleaning charge from Cody's.[23] Again, as noted in Plaintiff's pre-trial Hearing Memorandum,[24] Landlord cannot charge its overhead or ordinary costs of business to its tenants.

[19] Defendant's Post-Trial Brief at 3.
[20] Plaintiff's pre-trial Hearing Memorandum, §II, pages 3-5.
[21] Cleaning Receipt, Defendant's Exhibit TT.
[22] Cleaning Receipt, Defendant's Exhibit TT, page 2.
[23] At trial Clark asserted that approximately $5 in tax needed to be added to the $55 Cody's carpet charge.
[24] Plaintiff's pre-trial Hearing Memorandum, §III, pages 6-9.

Contrary to the blanket assertions in Defendants' Post-Trial Brief, further illegal cleaning charges were made. Tenant was charged $367.50 for cleaning at the termination of the tenancy, with 10.5 hours of cleaning charged at the excessive $35 an hour rate.[25] As we can see from the Defendant's own exhibits, no trash removal or removal of Tenants' possessions from the unit was necessary. Landlord did offer a large number of photographs at trial in support of its assertion that cleaning was necessary.[26] The photos at worst indicated that some additional cleaning of surface dirt or grime was necessary. For example Defendant's Exhibit G showing a dirty sink, Defendant's Exhibit K showing grime on toilet base or Defendant's Exhibit P showing grime on a freezer or refrigerator.

While Tenant Cody Elbert testified as to the amount of cleaning that he and Tenant Brett Zeller did of the apartment and Landlord did provide evidence that some cleaning was necessary through photographs and the testimony of its "inspector" Ms. Goatley, there was no eyewitness testimony from Landlord's witnesses to support the number of hours charged for cleaning. Landlord claimed that 10.5 hours of cleaning was necessary to clean the apartment which based on the photographic evidence is clearly excessive.

E. Landlord Incorrectly Asserts that Dirt is Not Wear & Tear

Again, contrary to Landlord's blanket assertion that its repair and cleaning charges were appropriate, Tenant contends that Landlord improperly refused to recognize that dirt is, in fact wear and tear.

[25] Cleaning Receipt, Defendant's Exhibit VV.
[26] Defendant's Exhibits A-Z.

Tenant first became aware that this was Landlord's policy when at trial, Ms. Goatley, Landlord's inspector, testified that according to Landlord's cleaning standards "dirt was not wear and tear." Rather than allowing a normal amount of dirt as part of wear and tear, Landlord charges for the removal of all dirt. Landlord appears to be 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.[27] [28]

[27] 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.)

[28] Landlord in its Post-Trial Brief at 7 notes that *Chaney v. Breton Builder Co* was abrogated "on other grounds" in *Parker v. I&F Insulation*, 730 N..E.2d 972 (Ohio 2000). *Parker* does abrogate *Chaney Builder*, but not with regard to carpet cleaning, the grounds cited by Tenant, but because the Ohio Supreme Court felt that the decision incorrectly stated Ohio law with regard to interest owing on post judgment appellate attorney fees. *Parker* at ¶10-1.

Despite the fact that the weight of precedent is decidedly against it, more importantly the logic of the holdings in *Miller v. Geels* is flawed and not persuasive precedent. 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. *Miller v. Geels* should be not be followed by this court. Dirt is clearly ordinary wear and tear.

III. Tenant's Lease Contains Illegal Provisions

In its Post-Trial Brief,[29] Landlord attempts to write enforcement back into *Staley v. Barkalow*, 3-255/12-1031 (Iowa App. 2013)[30] by arguing that Tenants must be "affected" by illegal lease provisions in order to challenge them. For example, Landlord argues Tenant cannot complain that his lease contained an illegal carpet cleaning fee because, "that fee was not charged to Plaintiff in this case, nor did Plaintiff testify that he was affected in any way by the alleged 'illegal' provision."[31] In other words, by re-labeling it as "affected" Landlord is attempting to resurrect the requirement of enforcement so clearly and forcefully rejected by the *Staley* Court,

[29] Defendants' Post-Trial Brief at 6-7.
[30] Landlord urges this Court to "disregard" *Staley v. Barkalow* on the grounds that it is "unpublished" and "is not controlling here" Defendants' Post-Trial Brief at 5. Even if *Staley* is unpublished or not controlling precedent, it is certainly highly persuasive. Tenants believe that it would be highly unwise for any Iowa trial court to simply disregard an opinion of the Court of Appeals, published or unpublished, particularly when it is directly on point. Landlord also argues that this Court should disregard the memoranda opinions in *DeStefano* and *Borer* as they were unpublished and on appeal and *Uhlenake*, as it was unpublished. Landlord cites no rule or authority that prohibits a trial court from consulting unpublished opinions or opinions on appeal and its citation of the Iowa Appellate Rules merely confirms that in an appellate setting courts are willing to consider unpublished opinions as persuasive precedent. As noted in Tenant's pre-trial Hearing Memorandum, these opinions are intended merely as persuasive precedent, useful to the Court in reaching its own decision.
[31] Defendants' Post-Trial Brief at 7.

> 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*…

Staley at 15.

Section 562A.11(2) states, "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's fees."

The statute does not state that the tenant must be affected by the inclusion of illegal lease provisions, nor must the tenant even be aware of the illegality of the provision. The entire focus of §562A.11(2) is on the landlord and their actions and knowledge. The *Staley* Court explains out how lower courts are to deal with allegations of illegal lease provisions, "the district court should consider whether the challenged lease provisions are provisions that "shall not be included," and whether the use/inclusion was made willfully and knowingly." *Staley* at 25. Again there is no requirement that the tenant be affected by or even aware of the illegality of the provisions. While Landlord is clearly unhappy with *Staley*, it is precedent that should not simply be disregarded by this Court.

IV. Landlord Cannot Rely on the Advice of Counsel to Negate Knowing Use of Illegal Lease Provisions.

Landlord argued at trial and in its Post-Trial Brief that it could not have known that the provisions in its lease were illegal because, "the evidence showed that Defendant's lease was approved by its legal counsel"[32] No precedent is cited by Landlord and no further details with regard to the lease, its approval or Landlord's counsel were provided by Landlord.

There is considerable doubt as to whether the defense of advice of counsel is available with regard to violations of Iowa Code §562A.11. The only specific area in which Iowa precedent permits the defense of advice of counsel is malicious prosecution. As the Supreme Court held in *Liberty Loan Corp. of Des Moines v. Williams*, 201 N.W.2d 462, 465 (Iowa 1972), "the advice of counsel obtained in good faith upon a full and fair disclosure of all of the facts in possession of a party is a complete defense to an action for malicious prosecution." However, advice of counsel is not a defense even for the closely related claim of abuse of process. *Ahrens v. Ahrens*, 386 N.W.2d 536 (Iowa App. 1986).

The Supreme Court in *Palmer College of Chiropractic v. Iowa Dist. Court for Scott County*, 412 N.W.2d 617, 621 (Iowa 1987) held,

> As to advice of counsel, the record before us does not indicate in detail what specific advice Palmer's attorney provided. Nevertheless, advice of counsel is no defense to a contempt action although it may be considered in mitigating the penalty to be imposed. *Carr v. District Court*, 147 Iowa 663, 674, 126 N.W. 791, 795 (Iowa 1910); *Lindsay v. Hatch*, 85 Iowa 332, 334, 52 N.W. 226, 227 (1892).

Palmer College of Chiropractic, 412 N.W.2d at 621.

[32] Defendants' Post-Trial Brief at 8.

The Supreme Court in *Blessum v. Howard County Bd. of Sup'rs*, 295 N.W.2d 836, 848-9 (Iowa 1980) held,

> Neither at trial, nor on appeal, do defendants assert any basis for the proposition that reliance on advice of counsel will exonerate them from liability for their breach of the contract with plaintiff. Our independent research was also unable to produce such a theory. Therefore, the trial court did not err in refusing to give the requested instruction to the extent it attempted to set forth the rule that reliance on advice of an attorney would exonerate defendants from liability for breach of contract.

Blessum v. Howard County Bd. of Sup'rs, 295 N.W.2d at 848-9.

Tenants would assert that the knowing inclusion of prohibited lease clauses involves a contract and is closer to breach of contract than it is to the lone claim where Iowa courts have permitted a defense of advice of counsel, malicious prosecution.

Even in a malicious prosecution case simply consulting counsel, "…is not an absolute or conclusive defense," *Schnathorst v. Williams*, 36 N.W.2d 739, 748-9 (Iowa 1949). Furthermore,

> The fact that defendant took such counsel before acting is not an absolute or conclusive defense. It may or may not rebut malice and want of good cause. To be a good defense the advice of counsel must have been sought in good faith, from honest motives, and for good purposes, after a full and fair disclosure of all matters having a bearing on the case, and the case, and the advice received must have been followed in good faith with honest belief in the probable guilt of the one suspected.

Schnathorst v. Williams, 36 N.W.2d 739, 748 (Iowa 1949). In malicious prosecution the Iowa Civil Jury Instructions for the advice of counsel defense state,

> The defendant must prove all of the following propositions:
> 1. The attorney giving the advice was admitted to practice law in this state.
> 2. The defendant had no reason to believe that the attorney had a personal interest in obtaining a conviction of the plaintiff.

3. The attorney's advice was sought in good faith from honest motives and for good purposes.
4. Defendant had made a full disclosure to the attorney of all facts concerning the case.
5. The defendant received the attorney's advice in good faith with the honest belief in the probable guilt of the person suspected.[33]

Even if the defense of advice of counsel was available Landlord has not carried his burden simply by making the conclusory statement that it consulted counsel. No evidence was presented that counsel's attorney was admitted in Iowa or that Landlord made a full and fair disclosure of all relevant matters was made to counsel.

In addition, out of state courts have considered additional factors to determine whether reliance on the advice of counsel was reasonable. For example, in *Daly v. Smith*, 220 Cal. App. 2d 592, 601 (Cal. App. 1963) the California Court of Appeals held that a trial court should consider the interest of the attorney in outcome of the matter, as well as the attorney's expertise regarding the subject matter of the litigation. Landlord has not even disclosed who is counsel was, let alone give any evidence with regard to the expertise or independence of its counsel. Landlord has not disclosed whether it sought additional legal opinions other than that of the drafter of the lease and what those opinions were. Landlord has failed to show that the defense of advice of counsel is even available, let alone sustained the burden necessary to establish the defense.

V. Landlord Knowingly Enforced and/or Included Illegal Lease Provisions After the *DeStefano* Decision Was Issued

Landlord argued at trial and in its Post-Trial Brief that it could not have known that the provisions in its lease were illegal because,

[33] Iowa Civil Jury Instructions, 2200.8 Malicious Prosecution - Malice And Probable Cause - Advice Of An Attorney (2004)

> …no court had ruled any provision was illegal at the time of the rental agreement. Plaintiff argues that the lease provisions were specifically found "illegal" in DeStefano, yet Defendant "left" the provisions in the lease - but ignores the fact that DeStefano was not decided until June 10, 2013, well after the rental agreement was entered into by Plaintiff and Defendant and *after most of the conduct relevant to this case*.

Defendants' Post-Trial Brief at 8.

In its pre-trial Hearing Memorandum, Tenants asserted that a number of different provisions of Landlord's lease were illegal. Some provisions, for example, the repair shifting clauses[34] were included in the lease, but no evidence of enforcement was provided. Other clauses, like Landlord's excessive cleaning and repair charges which included Landlord's overhead and ordinary business expenses,[35] were both included in the lease and, as the evidence at trial showed, actually enforced.

At trial Tenants sought to introduce the June 10, 2013 decision of Judge Egerton in *DeStefano v. Apts Downtown* SCSC80575 (Johnson County District Court-Small Claims) for the purpose of showing that Landlord willfully used a rental agreement with known prohibited provisions.[36] Tenants provided a certified copy of the *DeStefano* decision pursuant to Iowa Code §622.53, but Landlord objected on the grounds of relevance, arguing that since the *DeStefano* decision had been issued after the lease in the instant case had been signed, that it was irrelevant to Landlord's knowledge. The Court

[34] Lease §§30 & 33(a), Plaintiff's pre-trial Hearing Memorandum at 13-15.
[35] Lease §37(c) Plaintiff's pre-trial Hearing Memorandum at 6-9.
[36] At trial Landlord argued that the *DeStefano* decision did not find any of Landlord's lease provisions to be illegal, which is an incorrect reading of *DeStefano*. In addition, Landlord argued that the *DeStefano* decision was erroneous in finding illegal lease provisions. Certainly if this Court disagrees with Judge Egerton and finds all of the challenged lease provision to be legal then Landlord could not have knowledge of their illegality.

sustained the objection and Tenant made an offer of proof.[37] In that offer, Joseph Clark, business/general manager for Landlord, admitted that he had read the *DeStefano* decision.

After the objection to the relevance of the *DeStefano* decision was sustained, Landlord asked Mr. Clark if Landlord's lease "*had ever* been found to be illegal" Mr. Clark answered "no".

A. Landlord Either is Presumed to Know or Actually Knew Its Lease Contained Prohibited Provisions

Under §562A.11(2) "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's fees."

With regard to knowledge in *Staley v. Barkalow* the Court of Appeals held,

> On remand, the district court should consider whether the challenged lease provisions are provisions that "shall not be included, " and whether the inclusion was made willfully and knowingly. See id. § 562A.11; see also *Summers*, 236 P.3d at 593 (stating landlord's "provision requiring tenants to pay its attorney fees in any legal dispute is *clearly prohibited by the Landlord and Tenant Act, and [landlord] should have known that from simply reading the Act*").

Staley at 24.

Therefore as the *Staley* Court held, if a lease provision clearly violates the IURLTA, then actual knowledge is not necessary, knowledge is presumed. Tenants would argue that the challenged provisions of Landlord's lease are clear violations of the IURLTA and thus it is not necessary to show actual knowledge. Since knowledge is

[37] Trial Court's Order of December 13, 2013 at 2.

presumed in this instance, the entry of the *DeStefano* case into evidence would not be necessary and Landlord's knowledge of illegality preceded its entering into the lease.

If this Court were to find that the challenged lease provisions in this case were not clear violations of the IURLTA, but were illegal, it still would not be necessary to show actual knowledge of their illegality. Since the Landlord was also a defendant in the *DeStefano* case it is presumed to be aware of the rulings and judgment in that case,

> "A person has no right to shut his eyes or his ears to avoid information and then say that he had no notice * * *." 58 Am.Jur.2d Notice § 8, at 491-492 (1971); see National Labor Relations Board v. Local 3, Bloomingdale, Etc., 216 F.2d 285, 288 (2d Cir. 1954). Ordinarily, *all parties properly brought into court are chargeable with all subsequent steps taken in the proceeding down to and including the judgment*. See, e. g., *Irving Trust Co. v. Spruce Apartments*, 44 F.2d 218, 222 (E.D.Pa.1930); *Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 613 (Mo.1964); 66 C.J.S. Notice § 12, at 648 (1950).

Committee on Professional Ethics, Etc. v. Toomey, 253 N.W.2d 573 (Iowa 1977).

In fact, even if these two presumptions did not apply, actual knowledge was established as Joseph Clark admitted during Tenant's offer of proof that he had, in fact, read the *DeStefano* decision.[38]

B. Knowledge of Illegality Is Not Irrelevant After the Lease is Signed

Thus, unless this Court completely disagrees with the *DeStefano* ruling that the challenged provisions were illegal, Landlord's knowledge of their illegality after June of 2013 has been established. However, Landlord argued and this Court accepted at trial that if Landlord discovered its lease was illegal after signing it, that its knowledge of

[38] Tenant would note a final indicia of knowledge on the part of Landlord. In *Conroy v. Apts Downtown*, LACV072840, a district court case pending against Landlord, Plaintiff Conroy attached a copy of *Uhlenhake v. Professional Property Management Inc.*, No. CL-82571 (D. Iowa 5th District, entered April 19, 2000) as Exhibit 14 to its Amended & Substituted Motion for Partial Summary Judgment filed May 12, 2011. Tenant's lease was signed January 20, 2012. In *Uhlenhake* District Judge Huppert found that an automatic carpet cleaning provision violated the IURLTA.

illegality was irrelevant. Tenant asks this Court, upon reflection, to reverse that ruling or alternatively notes this issue for appeal.

While Landlord did not cite any precedent or articulate the reasoning behind its assertion that knowledge of illegality is irrelevant after a lease is signed, there are two possible ways to read 562A.11(1) to support Landlord's argument. First that, "using a rental agreement" only means the initial act of signing or executing a lease. Second, that "including a lease provision," previously found by the *Staley* Court to be "using a rental agreement," also only means the initial act of signing or executing a lease.

Ultimately, what Landlord is arguing is that if it learns that a lease provision is illegal after a lease is signed, that without fear of punitive damages under §562A.11(2) it is free to leave the illegal provisions in its lease or enforce the provisions. In opposition, Tenants again argue, as they did in *Staley*, that all Iowa tenants have, "a right to a legal lease, a lease free from prohibited provisions,"[39] and that knowingly and willful enforcement of illegal provisions can result in punitive damages under §562A.11(2).

C. Landlord Knowingly Used Illegal Provisions Since it Enforced Illegal Provisions after the *DeStefano* Ruling

First, with regard to the argument that using a rental agreement only means signing or executing the agreement, Tenants would agree that signing or executing a lease is one possible way that a rental agreement can be used under §562A.11(2). However, Tenants assert that there are multiple possible ways of using a rental agreement under the IURLTA. In *Staley v. Barkalow* the Court of Appeals stated, "we hold a landlord's inclusion of a provision prohibited in Iowa Code section 562A.11(1) ("shall not

[39] *Staley* at 1.

provide"), *even without enforcement*, can be a "use" under Iowa Code section 562A.11(2)" *Staley* at 15.

The *Staley* Court did not find that inclusion of a lease clause was the *only* possible "use" of a rental agreement, in fact, it is clear that enforcement of an illegal lease clause is also a "use" under §562A.11(2). Tenant has never argued that enforcement is not a "use" only that inclusion is also a "use" of a rental agreement. Landlord, in its Post-Trial Brief argues that Tenant could not complain that clauses were illegal because he had not been "affected" by them, "Whatever the alleged 'automatic carpet cleaning fee,' *that fee was not charged* to Plaintiff in this case…"[40] Clearly, then if Tenant was actually charged under an illegal provision, as here for the excessive hourly labor rates, then under Landlord's own argument, Tenant could challenge the illegal lease provision since they had been "affected" by them.

The *DeStefano* ruling was entered June 10, 2013, while the illegal cleaning and cleaning charges were made in late July of 2013, thus the enforcement of the illegal cleaning clause and thus their "use" for purposes of §562A.12(2) took place after Landlord had knowledge of their illegality. Landlord admits this in its Post-Trial Brief stating that, "DeStefano was not decided until June 10, 2013, well after the rental agreement was entered into by Plaintiff and Defendant and after *most of the conduct relevant to this case*."[41]

It would be a bizarre result if a landlord could knowingly enforce illegal provisions but escape punitive damages under §562A.11(2) because the landlord had no

[40]Defendants' Post-Trial Brief at 6-7.
[41] Defendants' Post-Trial Brief at 8.

knowledge of illegality before the lease was signed, but then be subject to punitive damages for mere inclusion when landlord knew of the illegality when the lease was signed.

D. Landlord Knowingly Used a Rental Agreement with Prohibited Provisions Because it Left Illegal Provisions in its Lease

However, in addition, as Tenants argued unsuccessfully at trial, "using" a rental agreement also means that the lease provided the legal framework for the tenancy. So long as the lease term ran, and the lease governed the tenancy, then Tenants would argue that the landlord was using the lease under §562A.11(2).

It is possible to argue in favor of Landlord that including a lease provision, which the *Staley* Court found to be using a rental agreement under §562A.11(2), only means the initial signing or execution of the lease. Tenants would assert that to include a provision in a lease, again means that the provision was part of the lease during the tenancy.

The word include is defined as,

> 1. to contain, as a whole does parts or any part or element: The package includes the computer, program, disks, and a manual.
> 2. to place in an aggregate, class, category, or the like.
> 3. to contain as a subordinate element; involve as a factor.[42]

Therefore, definition 2 supports the Landlord's argument, since it focuses on the initial placement of the provision in the lease. However, Tenant's position is supported by definitions 1 and 3, because the lease contained the illegal provisions during the tenancy.

Landlord is akin to a automaker who discovers a serious defect in its cars, but argues that it should not have to recall the cars or correct the problem because it only

[42]Dictionary.com http://dictionary.reference.com/browse/include

learned of the defect after the cars left the factory. Tenant's position, that tenants have a right to a legal lease, lease free of illegal provisions throughout their tenancy is necessary in order to effectuate the purpose of §562A.11 and to avoid grandfathering in illegal lease provisions. As the *Staley* Court held,

> 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.; see also *Crawford*, 828 N.W.2d at 303 (stating the IURLTA "was heavily based" on the URLTA). By using the phrase, "a landlord willfully uses," the legislature recognized a landlord's willful inclusion of prohibited clauses can have "an unjust effect because tenants believe them to be valid. As a result, tenants either concede to unreasonable requests…or fail to pursue their own lawful rights." See *Baierl*, 629 N.W.2d at 284; see also *Summers v. Crestview Apartments*, 236 P.3d 586, 593 (Mont. 2010) (stating damages for a tenant under Montana's Landlord and Tenant Act…"severing rental provisions does not address the chilling effect that such provisions could continue to have on the exercise of tenants' statutory rights").

Staley at 14-15.

Landlord's argument means that if it becomes aware of illegal lease clauses after the lease was signed that it is free to leave those lease clauses in its lease without penalty. This grandfathers in any illegal clause for as long as a lease is used. It is not unusual for residential tenants to renew their leases for multiple years, and thus a landlord is free to leave illegal leases clause in its leases for as long as the lease is renewed. Other landlords, like Landlord, do sign a new lease every year, but insist on tenants signing leases for the next year up to six months before the end of the current lease.[43] Thus not only would Landlord be permitted to include illegal lease provisions in its leases for

[43] Note, for example, that Tenant's lease term began July 25, 2012, but Tenants signed the lease January 20, 2012. Lease, Defendant's Exhibit A.

2012-13 tenants, like the Plaintiff, but since many 2013-14 leases were already signed by the time the *DeStefano* decision was entered, Landlord could continue to include illegal lease provisions until the end of the 2013-14 lease term.

The purpose of 562A.11 is to provide tenants with a legal lease, a lease free of illegal provisions. Landlords are protected by the requirement that the inclusion of illegal provisions be willful and knowing. Once a landlord knows that a provision is illegal it should not be permitted to leave that illegal lease provision in its leases due to the intimidating effect that these provisions have on tenants. Accepting Landlord's argument that the only "use" of a rental agreement is its initial execution thwarts the very purpose of the statute and allows landlords to grandfather in illegal provision and knowingly include prohibited provisions in their leases for years.

Tenants feel compelled to point out a factor is not readily apparent: the synergistic effect of combining Landlord's arguments on knowledge and precedent. Landlord has argued in its Post-Trial Brief that unpublished opinions, including both trial and appellate decisions, should be disregarded.[44] Thus Landlord will only take notice of published opinions of the Iowa Court of Appeals and Supreme Court. Additionally, even if a published opinion is handed down after a lease is signed, following Landlord's argument the decision is irrelevant to its knowledge of the illegality of that lease. At the earliest the Tenants Project does not expect any appellate decision on the illegality of lease provisions until late 2014 or 2015. Given Landlord's current lease re-signing policy, Landlord itself would be protected until 2017, but so long as a landlord kept renewing its leases, the illegal provisions are permanently grandfathered in. Finally, even if there is

[44] Defendant's Post-Trial Brief at 4-5.

an appellate decision, if the appellate court as in *Staley* does not issue a published opinion, then according to Landlord, it would never have knowledge of the illegality of any lease provision, regardless of how many trial or appellate decisions are entered against it, and could keep using the provisions forever.

VI. Attorney Fees Are Appropriate

Section 562A.11(8) provides, "The court may, in any action on a rental agreement, award reasonable attorney fees to the prevailing party." Reasonable attorney fees, "means fees determined by the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the tenant or landlord." Iowa Code §562A.6(8).[45]

A. Attorney Fees are Taxed as Costs and Not Included in the Jurisdictional Limit of the Small Claims Division

The Supreme Court has held that attorneys fees are taxed as costs. See *Ayala v. Center Line, Inc.,* 415 N.W.2d 603 (Iowa 1987) citing *Maday v. Elview-Stewart Sys., Co.*,324 N.W.2d 467 (Iowa 1982) . As such attorney fees are not included in the $5000 jurisdictional limit of a small claims case. "A civil action for a money judgment where the amount in controversy is five thousand dollars or less for actions commenced on or after July 1, 2002, *exclusive of interest and costs*. Iowa Code §631.1(1).

The defendant in *Ayala* made an almost identical argument to that of Landlord, asserting that the attorney fees could not be assessed as the plaintiff had failed to present attorney fee evidence to the jury at trial. The Supreme Court rejected this argument

[45]Tenant's counsel have filed Attorney Fee Affidavits; note Tenant requested permission in its pre-trial Hearing Memorandum for its counsel to file their Attorney Fee Affidavits contemporaneously with its post-trial Hearing Memorandum.

citing *Maday* and holding that, "we sided with those authorities treating statutory allowance of attorney fees as a court cost logically assessable by the court." *Ayala,* 415 N.W.2d 603.

> When a statute provides for attorney fees but is silent as to their ascertainment, *we find the better rule to be that "[w]here attorneys' fees are allowed to the successful party, they are in the nature of costs and are taxable and treated as such*." 20 Am.Jur.2d Cost § 72 (1965). When faced with a request for the allowance of attorney fees in a modification of a divorce decree, we recognized this rule and stated "attorney fees when authorized by statute, with few exceptions, are taxed as costs in the action in this state. This is too well settled to require reference to the numerous sections of the code relating thereto." *Hensen v. Hensen*, 212 Iowa 1226, 1227, 238 N.W. 83, 84 (1931). In the absence of a statute indicating other intent, we stand by our pronouncement in *Hensen* **.**

Maday v. Elview-Stewart Sys., Co.,324 N.W.2d 467, 469 (Iowa 1982). Finally, rather than being determined at trial, "The assessment of attorney fees, like the assessment of court costs, cannot be done until liability has been established." *Maday*, 324 N.W.2d at 470.

While Landlord attempts to distinguish *Maday*, Tenant would urge this Court simply to read the decision and judge for itself. Landlord says that,

> Maday cited favorably but distinguished another case, Dyche Real Estate Fund v. Graves, 380 N.E. 2nd 767, 769, (Ohio Ct. App. 1978) which held that, 'the award of attorney fees under a landlord-tenant act is in effect a part of the damage awarded to the tenant for proving the landlord's prescribed act and is to be submitted to the jury'[46]

In fact, the *Maday* Court first notes that, "Not all authorities agree that attorney fees allowed by statute are to be assessed by the court as costs. Indeed, some authorities recognize such fees as an element of damages." *Maday* at 324 N.W.2d at 469. *Maday*

[46] Defendants' Post-Trial Brief at 10.

then does indeed cite *Dyche* as one of these authorities finding attorney fees to be damages. However, in the very next paragraph the *Maday* Court goes on to hold that,

> When a statute provides for attorney fees but is silent as to their ascertainment, *we find the better rule to be* that "[w]here attorneys' fees are allowed to the successful party, they are in the nature of costs and are taxable and treated as such." 20 Am.Jur.2d Cost § 72 (1965).

Maday at 324 N.W.2d at 469.

Far from citing *Dyche* "favorably" as asserted by Landlord, *Maday* makes it crystal clear that Iowa does not follow the precedent articulated in *Dyche*.

B. Attorney Fees Can be Awarded Even Though Tenant was In Forma Pauperis and had Pro Bono Representation

Landlord argues that since Tenants were *in forma pauperis* and had counsel who provided legal services *pro bono* that no attorney fees can be assessed by this court.[47] Tenants would assert that under Iowa law statutory attorney fees can be paid to pro bono counsel. Under the Iowa Rules of Professional Conduct governing pro bono legal services that,

> Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section

Iowa Rules of Professional Conduct 32:6.1 comment 4; see also *In re Legislative Districting of General Assembly*, 193 N.W.2d 784, 791-2 (Iowa 1972) (request for attorney fees by pro bono litigants denied due to lack of statutory authorization for payment of attorney fees).

[47] Defendant's Post-Trial Brief at 9.

In *Cariaso v. Coleman*, No. 4-080 / 03-1174 at ¶37 (Iowa App. 2004) the Iowa Court of Appeals, even after noting that the petitioner spouse was represented by the Iowa Legal Aid Society, found that an award of appellate attorney fees to the petitioner were appropriate. Tenant would note that the Legal Aid Society does not charge any fees to the clients it represents.[48]

Other courts have denied attorney fees to parties with pro bono counsel on the grounds that the relevant statute required attorney fees to be "incurred" See, e.g., *Wilkins v. Sha'ste Incorporated*, 99167 at ¶¶10-13 (Ohio App. Dist.8 08/15/2013). However Section 562A.11(8) provides, "The court may, in any action on a rental agreement, award reasonable attorney fees to the prevailing party." Reasonable attorney fees, "means fees determined by the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the tenant or landlord." Iowa Code §562A.6(8).

Read together these sections require that for an award of attorney fees that a party must prevail and that the fee set by the court must be reasonable, there is no statutory requirement that the fees actually be incurred. See e.g. *Brown v. Commission for Lawyer Discipline*, 980 S.W.2d 675 (Tex.App. Dist.4 1998) (attorney fees awarded to pro bono attorney as statute does not require fees be contracted-for or incurred; the rules merely require that an award of attorney fees be reasonable).

In fact, §562A.6(8) appears to contemplate that in a situation where the attorney agreed to a contingent fee arrangement, that the court could not give attorney fees based on the fees as actually agreed or paid, but must instead award fees based on a different

[48] "Free legal help with civil law problems for eligible low-income Iowans." Legal Aid Society website http://www.iowalegalaid.org/

measure, that of the time reasonably expended by the attorney. In upholding an attorney fee award to a party with pro bono representation, the 8th Circuit Court of Appeals in *Cornella v Schweiker*, 728 F.2d 978 (8th Circuit 1984) held,

> Once the actual fee arrangements between the attorney and client are excluded from computation of the award, there is no logical distinction which can be drawn between cases in which fees have been incurred and those in which they have not.

Cornella v Schweiker, 728 F.2d 978 at ¶43.

Courts have also pointed out that a party opposed by an indigent defendant with pro bono representation would itself receive a windfall if otherwise appropriate attorney fees are not awarded. See, e.g. *Matter Entertainment Partners v. Gail Davis*, 590 N.Y.S.2d 979 at ¶49 (NY Supreme Ct. NY County 1992). Accepting Landlord's argument would give landlords an incentive to discriminate against poorer tenants, secure in the knowledge that even if the tenant prevails, no attorney fees could be awarded.

While some courts have refused to allow attorney fee awards unless the fees were actually paid, see e.g., *Patronelli v. Patronelli*, 623 S.E.2d 322, (N.C.App. 2006), the greater weight of precedent allows the award of attorney fees even when a client has received pro bono representation.[49] Courts have found numerous basis to support the award of attorney fees even when representation has been pro bono observing that this approach is,

> "an incentive to lawyers and organizations to accept and pursue actions and proceedings otherwise avoided by private practitioners" (*Nassau Trust Co. v Belfield*, 89 Misc. 2d 282, 284 [Civ Ct, Kings County 1977, Goldstein, J.]).

[49]See, e.g. *Martin v. Tate*, 492 A.2d 270, 274 (D.C. 1985); *In re Marriage of Brockett*, 474 N.E.2d 754, 756 (Ill. App. Ct. 1984); *Butler v. Butler*, 376 So. 2d 287, 287 (Fla. Dist. Ct. App. 1979); *In re Marriage of Gaddis*, 632 S.W.2d 326, 329 (Mo. Ct. App. 1982); *Ferrigno v. Ferrigno*, 279 A.2d 141, 142 (N.J. Super. Ct. Ch. Div. 1971); *Sellers v. Wollman*, 510 F.2d 119, 123 (5th Cir. 1975); *Folsom v. Butte County Ass'n of Governments*, 652 P.2d 437, 447 n.26 (Cal. 1982).

> Absent a tie of blood or affection, it is a rare attorney who will offer free or low-cost assistance to defend an individual from a specious claim, especially given the rising cost of legal services, the view that pro bono work lowers income, and the increasing depersonalization of the practice of law (see generally, Adams, The Legal Profession: A Critical Evaluation, 74 Judicature 77 [1990]). If the individual is poor, chances for legal assistance are even less, for it is widely reported that "only fifteen to twenty percent of the civil legal service needs of the poor are met" (Watkins, In Support of a Mandatory Pro Bono Rule for New York State, 57 Brook L Rev 177 [1991]).

Matter Entertainment Partners v. Gail Davis, 590 N.Y.S.2d 979 at ¶50 (NY Supreme Ct. NY County 1992); see also *In re Marriage of Swink*, 807 P.2d 1245 (Colo. App. 1991); *Miller v. Wilfong*, 119 P.3d 727, 730-31 (Nev. 2005) (award of attorneys' fees to pro bono counsel was proper, "[t]o impose the burden of the cost of litigation on those who volunteer their services, when the other party has the means to pay attorney fees, would be unjust".) Finally, the award of attorney fees even when representation is pro bono is generally accepted in Federal courts as well.[50]

VII. Joseph Clark Can be Found Personally Liable

Finally, contrary to Defendants' Post-Trial Brief,[51] Joseph Clark can be found personally liable as an agent of Landlord. Knowing and willful violation of Iowa Code §562A.11 can result in the imposition of punitive damages, which in Iowa are only imposed for tort liability, not for the mere contractual violations. *Pogge v. Fullerton Lumber Co*., 277 N.W.2d 916 (Iowa 1979). Iowa law recognizes statutory torts, see

[50]See, under 42 USC § 1988, *Martin v Heckler*, 773 F2d 1145, 1152 [11th Cir 1985]; and *Oldham v Ehrlich*, 617 F2d 163, 168 [8th Cir 1980]; see, under Equal Access to Justice Act, *Ceglia v Schweiker*, 566 F Supp 118, 123 [ED NY 1983]; see, as to 42 USC § 2000e-5 [k], *New York Gaslight Club v Carey*, 447 US 54, 70, n 9 [1980]; see, under Freedom of Information Act, *Crooker v U.S. Dept. of Treasury*, 634 F2d 48, 49, n 1 [2d Cir 1980]; and see, under Age Discrimination in Employment Act of 1967, *Rodriguez v Taylor*, 569 F2d 1231, 1244-1246 [3d Cir 1977], cert denied 436 US 913 [1978]).

[51] Defendants' Post-Trial Brief at 10-11.

Bulova Watch Co. v. Robinson Wholesale, Co., 108 N.W.2d 365 (Iowa 1961) and thus by making knowing and willfully including prohibited lease clauses punishable by punitive damages, the Legislature created a statutory tort.

As violation of Iowa Code §562A.11 gives rises to tort liability, even if Joseph Clark was acting as an agent or manager of the owner of the property he can still be found individually & personally liable. As the Iowa Supreme Court held in *Estate of Countryman v. Farmers Coop Assoc*, 679 N.W. 2d 598 at ¶47-50 (Iowa 2004),

> …the longstanding approach to liability in corporate settings, where, under general agency principles, [is that] corporate officers and directors can be liable for their torts even when committed in their capacity as an officer. *Haupt v. Miller*, 514 N.W.2d 905, 907 (Iowa 1994); 3A Jennifer L. Berger et al., Fletcher Cyclopedia of the Law of Private Corporations § 1135, at 200-01 (perm. ed. rev. vol. 2002). This approach has been explained as follows:
>
> Agency law generally, and Iowa law in particular, has long recognized that if a person commits a tort while acting for another person, *the tortfeasor is personally liable for the tort, even if the person for whom he is acting is also vicariously liable for the same wrong*. In other words, a person's status as an agent confers no immunity with respect to the person's own tort liability. Thus, if a member of a limited liability company injures another person while working in the course of the firm's business, the member is personally liable for that harm along with the company, just as the member would be if he worked for a firm organized as a corporation, a partnership, or any other business form.

Estate of Countryman v. Farmers Coop Assoc, 679 N.W. 2d 598 at ¶47-50 (Iowa 2004).

VIII. Conclusion

The clearest path to a decision in this case rests on Landlord's illegal $35 an hour labor charges and Landlord's knowing and willful enforcement of them. Tenant's Counsel would certainly not wish to have much of the Court's energy diverted from the real issues in this case, the legality of lease clauses under the IURLTA, into a tussle over attorney fees. While Tenant's Counsel would certainly appreciate being paid for their hard work, their primary purpose is to determine the legality of widely used lease provisions under the IURLTA in a quest for fair play for both landlords and tenants. Counsel are perfectly willing to continue their representation on a pro bono basis as it is both an honor and a privilege to be able to speak for those whose voices, due to their transience, inexperience and poverty, would otherwise not be heard.

WHEREFORE, Plaintiff and Third Party Defendants/Plaintiffs respectfully request that this Court find in their favor on all counts, deny Defendants' counterclaim and request for attorney fees, reverse its ruling with regard to the admissibility of *DeStefano v. Apts Downtown*, and award costs and attorney fees against Defendants.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document was served on December 26, 2013, via e-mail upon all attorneys of record who have not waived their right to service and/or pro se parties at their respective addresses as shown herein:

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