IN THE SUPREME COURT OF IOWA

NO. 15-1350

DANIEL KLINE, FRANK SORIES and AMARIS MCCANN, et al.,
Plaintiffs-Appellees,

vs.

SOUTHGATE PROPERTY MANAGEMENT, LLC,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County
The Honorable Patrick R. Grady
No. CVCV076694

APPELLANT'S FINAL REPLY BRIEF

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SUMMARY OF THE REPLY

This appeal calls upon the Court to decide first whether Tenants have standing even to pursue this lawsuit. Assuming, arguendo, that this appeal presents a live, justiciable case or controversy, this Court must interpret the precise language of the applicable sections of Iowa Code Chapter 562A, the Iowa Uniform Residential Tenant Landlord Act ("IURTLA"), apply that interpretation to the actual SouthGate lease provisions, and decide whether the lease provisions at issue actually violate IURLTA. This appeal further calls upon the Court to decide whether it will sanction the district court's "cut and paste" certification of this matter as a class action – where no analysis was conducted and no discretion exercised.

This appeal is *not* about the testimony or intent of other landlords in separate and wholly unrelated lawsuits, i.e., there are no "companion" cases to the instant appeal. This appeal is *not* about panic or extreme positions. This appeal is *not* about law firm blogs or theoretical landlord self-help procedures which, as described, appear to represent an impermissible attempt by a party to a contract to unilaterally alter its terms. And this appeal is *not* about uninformed tenants who have surrendered or waived their rights or had those rights chilled in any fashion.

Tenants cannot demonstrate they personally have suffered an injury in fact, which is the core requirement to establish standing. Tenants concede they have sustained no actual damages. Tenants' lawsuit presents as nothing more than an academic exercise, postulating that their lease contained assorted clauses which, *had* they been enforced (they were not), *may* have run afoul of IURTLA (they did not), and *may* have caused an injury, *depending* on the actual, underlying circumstances (again, they did not). This is the definition of an advisory opinion. Tenants have suffered no injury and as a result, lack standing to pursue this theoretical controversy, either individually or, most certainly, as a class action.

ARGUMENT

I. ADOPTING THE RATIONALE OF STALEY AND APPLYING IT TO THIS CASE WOULD RENDER MEANINGLESS THE CORE REQUIREMEMENT THAT PLAINTIFFS PRESENT A JUSTICIABLE CASE OR CONTROVERSY AND DEMONSTRATE AN ACTUAL INJUJRY IN FACT.

A. Without An Actual Injury, Tenants Lack Standing to Pursue this Matter.

Tenants' sole argument that they have standing to bring this lawsuit is that "...the legislature gave tenants the right to a legal lease, as held by Staley v. Barkalow, 834 N.W.2d 873, (Iowa Ct. App. 2013), then the inclusion of illegal lease provisions gives rise to an injury and standing is established."[1] See Appellee's Brief, p. 24. Stated simply, Tenants' position is that Iowa Code Chapter 562A, itself, provides standing regardless of actual injury or damages. The United States Supreme Court and other courts have repeatedly rejected this argument. The Supreme Court has held that Congress may not override Article III's requirement of injury in fact. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." Summers v. Earth Island Inst., 555 U.S. 488, 497 (2009). See also O'Shea v. Littleton, 414 U.S. 488, 514 N.2d (1974):

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[1] Curiously, the only case Tenants cite in support of this proposition is Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d, 470, 475 (Iowa 2004), which held that plaintiffs did not have standing to challenge conduct in violation of an Iowa statute.

> We have previously noted that Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statue. . . . But such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory right has occurred or is likely to occur. Title 42 U.S.C. § 1983, in particular, provides for liability to the 'party injured' in an action at law, suit in equity, or other proper proceeding for redress. Perforce, the constitutional requirement of an actual case or controversy remains. Respondents still must show actual or threatened injury of some kind to establish standing in the constitutional sense. [Cases omitted.][2]

Accord, John Doe v. National Board of Medical Examiners, 199 F.3d 146, 153 (3d Cir. 1999) ("[T]he proper analysis of standing focuses on whether the plaintiff suffered an actual injury, not on whether a statute was violated.") Although Congress can expand standing by enacting a law enabling someone to sue on what was already a de facto injury to that person, it cannot confer standing by statute alone. See, Lujan v. Defenders of Wildlife, 504 U.S. 555 at 578 (1992), 112 S. Ct. 2130 (noting that Congress can "elevat[e]" to the status of a legally cognizable injur[y] concrete, de facto injuries that were previously inadequate in law."). As a result, because Tenants assert only a violation of Iowa Code Chapter 562A, they do not have standing on that basis. See also, Lee v. American Express Travel

[2] This Court has specifically adopted federal authority as being persuasive on the standing issue both from a constitutional and prudential standpoint. Alons v. Iowa Dist. Ct. for Woodbury County, 698 N.W.2d 858, 869 (Iowa 2005).

Related Servs., Inc., 2007 WL 4287557 (N.D. Cal. 2007), aff'd 348 Fed. Appx. 205 (9th Cir. 2009). In Lee, the plaintiffs alleged that certain terms in their credit card agreement were unconscionable and hence illegal under several California consumer protection statutes. In finding that the statutory violation alone did not provide standing to bring such a claim, the district court cogently observed:

> At bottom, plaintiffs' argument is that they were damaged by the mere existence [inclusion] of the alleged unconscionable terms in their card agreements. But those terms have not been implicated in any actual dispute between the parties. The challenged terms have not, for instance, been invoked against plaintiffs and they have not prohibited plaintiffs from asserting their rights. No court, state or federal, has held that a plaintiff has standing in such circumstances and plaintiffs have not convinced this Court that it should be the first. Accordingly, defendants' motion to dismiss for lack of standing is GRANTED.

Lee, 2007 WL 4287557 (emphasis in original). The United States Court of Appeals for the Ninth Circuit affirmed, similarly noting that "[p]laintiffs cannot satisfy the requirements of Article III because they have not yet been injured by the *mere inclusion* of these provisions in their agreement. . . ." 348 Fed. Appx. at 207 (emphasis added).

In Bowen v. First Family Fin. Servs. Inc., 233 F.3d 1331 (11th Cir. 2000), the court found that the class action plaintiffs lacked standing to

question whether their arbitration agreements were generally unenforceable as being in violation of the Truth-in-Lending Act. In so ruling, the court observed "there [was] no allegation that First Family has invoked, or threatened to invoke, the arbitration agreement to compel to the plaintiffs to submit any claim to arbitration." Id. at 1339. In other words, there was no "real dispute" whereby plaintiffs were facing immediate, tangible harm calling for declaratory or injunctive relief. Id. at 1340.

In the instant case, there is no more compelling evidence that Tenants lack standing than their own deposition testimony. Beyond their admission that they have never had any alleged illegal provision enforced against them, it is apparent that they do not even know what it is they want to accomplish by this lawsuit other than to have a court tell them if a now expired lease was at one time a "legal lease." To say that this cannot represent injury in fact comprising immediate, tangible harm sufficient to confer standing is to state the obvious.

Standing focuses on the *party*, not the claim, i.e., if the alleged wrong produces a legally cognizable injury, are Tenants among those who have sustained it? Alons, 698 N.W.2d 858 (Iowa 2005) (citing Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004)). To have standing, Tenants must (1) have a specific personal or legal

interest in the litigation and (2) be injuriously affected. Sanchez v. State, 692 N.W.2d 812, 821 (Iowa 2005). These requirements are separate and both must be satisfied. Id.

To be "injuriously affected" Tenants must demonstrate "injury in fact." Godfrey v. State, 752 N.W.2d 413, 419 (Iowa 2008). "Injury in fact" is a harm suffered that is "concrete and actual or imminent, not conjectural or hypothetical." Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103, 118 S.Ct. 1003, 1016 (1998). To constitute an "injury in fact," Tenants must have "suffer[ed] a palpable and distinct harm" which must "affect [them] in a personal and individual way." Toll Bros., Inc. v. Township of Readington, 555 F.3d 131, 138 (3d Cir. 2009) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, n.1, 112 S.Ct. 2130 (1992)). The mere filling of a declaratory judgment action does not, in and of itself, create standing. Greenbriar Group, L.L.C. v. Haines, 854 N.W.2d 46, 50-51 (Iowa 2014); Katz Inv. Co. v. Lynch, 47 N.W.2d 800, 805 (Iowa 1951) ("[D]eclaratory relief will not ordinarily be granted where there is no actual or justiciable controversy between the parties and a mere advisory opinion is sought."); McCarl v. Fernberg, 126 N.W.2d 427 (Iowa 1964) (declaratory judgments are intended to address the parties' *present* rights and requires the Tenants show that there *is* a substantial controversy between the parties);

Alons, 698 N.W.2d at 864 (noting that standing relates to the doctrine that prohibits advisory opinions as standing requires the court dispose of only those issues that affect the rights of the parties present). As no present rights are affected or any substantial controversy currently exists between Tenants and SouthGate, declaratory judgment in Tenants' favor was not appropriate and Tenants are left to pursue an action for money damages – none of which have been sustained, which mandates dismissal.

To establish standing Tenants must also demonstrate the requisite causal link, i.e., "a fairly traceable connection between the [Tenants'] injury and the complained-of conduct of [SouthGate]." Steel Co., 118 S.C. at 1017 (citing Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1925-26 (1976)). Finally, redressability must be shown – a likelihood that the requested relief will redress the alleged injury. Id. (noting further that a plaintiff's desire to make sure laws are faithfully enforced and/or an attempt to recover attorney fees pursuant to statute do not redress a cognizable injury in fact); American Civil Liberties Union v. National Sec. Agency, 493 F.3d 644, 660 (6th Cir. 2007) (noting that subjective "chill" is not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm).

Tenants admit that no actual damages were sustained, but then also state it is currently unknown "whether or not actual damages for the inclusion of illegal lease provisions will be awarded." See Appellee's Brief, pp. 24-25. The question for this Court is what actual damages could Tenants establish they have suffered? There are none. Tenants were *former* tenants of SouthGate at the time this lawsuit was filed. What injury will this suit redress? There is none.

Unlike Staley, where at least two named plaintiffs argued impermissible deductions from their security deposits, no Tenant in this suit is out a dime. And no Tenant in this suit has waived any legal right which resulted in harm. Huisman v. Miedema, 644 N.W.2d 321, 324 (Iowa 2002) (defining a "waiver" as "an intentional relinquishment of a known right"); Scheetz v. IMT Ins. Co., 324 N.W.2d 302, 304 (Iowa 1982) (listing the essential elements of waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right). Particularly with respect to class actions, the "courts must be more careful to insist on formal rules of standing, not less so." Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1449 (2011) Insisting on a constitutional minimum of concrete, palpable injury-in-fact will ensure that class actions remain the

"exception to the usual rule" that cases are litigated individually. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2550 (2011).

B. Tenants' Lack of Standing Aside, Staley was Wrongly Decided.[3]

Tenants criticize SouthGate for making a "token effort" to refute the Iowa Court of Appeals' ruling in Staley, noting that only six pages of SouthGate's 54-page brief discuss Staley and, in so doing, never comes to grips with the Iowa Court of Appeals reasoning or cited precedent. Tenants' Brief, p. 16.

Obviously, the number of pages used to discuss an issue on appeal does not dictate the quality of the argument and SouthGate stands behind the content expressed in its opening brief. On the contrary, it is the reasoning, or lack of reasoning, in Staley (as adopted by Tenants and the district court) which falls short.

Determining whether the term "uses" in Iowa Code § 562A.11(2) means mere inclusion and does not require enforcement is a matter of statutory interpretation. While SouthGate asserts for the reasons discussed in

[3] On the issue of standing, Court of Appeals' decision in Staley v. Barkalow, even if published, is not controlling authority because at least some of the named plaintiffs in Staley alleged that they had suffered an injury-in-fact, i.e, had impermissible deductions made from their security deposits. Automatically adopting the Staley decision, without first addressing standing, would be error.

its opening brief that "uses" requires "enforcement" according to its plain meaning, the same result is reached if it is assumed that the meaning of "uses" is sufficiently ambiguous to require construction and interpretation.

This Court has repeatedly explained that ". . . we construe statutory phrases not by assessing solely words and phrases in isolation, but instead by incorporating considerations of the structure and purpose of the statute in its entirety." Den Hartog v. City of Waterloo, 847 N.W.2d 459, 462 (Iowa 2014). Examining Iowa Code § 562A.11 in its entirety, it is apparent that unenforceability is the remedy for *including* a prohibited provision in a lease. Following immediately is a further admonition that if a landlord, knowing it has a unenforceable provision in its lease, nevertheless "uses" that unenforceable provision against the tenant, then the tenant can recover actual damages *sustained* by the tenant and punitive damages equivalent to three months' rent. The interpretation of this statutory scheme given in Staley violates the statutory interpretation principle that "[w]e presume statutes or rules do not contain superfluous words." State v. McKinley, 860 N.W.2d 874, 882 (Iowa 2015). When the court in Staley found that a landlord is liable for the willful inclusion of a known prohibited provision in a rental agreement, *even without enforcement*, it rendered the words "actual

damages sustained by the tenant" superfluous together with the word "and."[4] In other words, accepting Staley, the statute would provide that willful inclusion of a known prohibited transaction, without enforcement resulting in no actual damages, nonetheless entitles the tenant to punitive damages of not more than three months' rent. This interpretation is unsound as it totally ignores the conjunctive word "and" as found in the statute. See Beaudry v. Telecheck Svcs., Inc., 579 F.3d 702, 706 (6th Cir. 2009) ("because 'actual damages' represent an alternative form of relief", the statute "implies that a claimant need not suffer (or allege) consequential damages to file a claim") (collecting cases). Tenants admit as much in their brief when they re-write the statute to include the disjunctive word "or" – "whether or not these provisions were knowingly and willfully included and what actual and/"*or* punitive damages . . . tenants sustained due to the inclusion of illegal provisions remain to be determined at trial. See Tenants Brief at p. 15 (emphasis added).

Iowa Code § 562A.11(2) does not provide the statutory right to treble rent as an alternative to the recovery of actual damages. This indicates a legislative intent not to dispose of the standing requirement of injury-in-fact.

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[4] "Class certification can efficiently dispose of numerous tenant claim with an identical basis for . . . liability (use/inclusion of prohibited lease terms) and an identical basis for the tenants' recovery of three months' rent . . .." Staley, 2013 WL 2368825 *10.

Rather, the statute is written to require the recovery of statutory damages *in addition to actual damages*.

Furthermore, such an interpretation would be counter to the well-established legal principal that punitive damages are not recoverable in the absence of actual damages. Hockenberg Equipment Co. v. Hockenerg's Equipment & Supply Co. of Des Moines, Inc., 510 N.W.2d 153 (Iowa 1993) (holding that a nominal damage award, which showed that defendant actually caused plaintiff some injury, constituted showing of actual damages which was required to support punitive damage award); Pulla v. Amoco Oil Co., 72 F.3d 648, 660-61 (8th Cir. 1995) (noting that the amount of punitive damages awarded must bear "some proportion" and a "reasonable relationship" to plaintiff's actual damages).

In effect, the Staley reading of Iowa Code § 562A.11(2) would be the only section in Iowa Code Chapter 562A (IULTRA) which permits statutory damages without the necessity of actual damages. The legislative history of IULTRA does not support such a result.

As the Court has observed, IULTRA was substantially adopted by the general assembly in 1978 from the Uniform Residential Landlord and Tenant Act (URLTA). Crawford v. Yotty, 828 N.W.2d 295, 299 (Iowa 2013). Under URLTA, there are sections which provide for statutory

damages without the need to also prove actual damages. These sections read as follows:

> [The tenant] may recover an amount not more than [3] months' periodic rent *or* [threefold] the actual damages sustained by him, *whichever is greater*, and reasonable attorney fees.

URLTA § 4.107 (emphasis added).[5]

In each instance when the Iowa legislature enacted Chapter 562A, it declined to adopt URLTA's language permitting statutory damages of three months' rent *or* three times' the actual damages, whichever is greater. For example, the Iowa equivalent to URLTA's § 4.107 is Iowa Code § 562A.26, which reads: "[The tenant] may recover . . . the actual damages sustained by the tenant *and* reasonable attorney fees." (emphasis added).

The upshot from a statutory interpretation standpoint is that the Iowa legislature had and rejected the opportunity to adopt damage provisions which described allowable damages in the disjunctive (three months' rent *or* three times' actual damages, whichever is greater). Accordingly, when Iowa Code § 562A.11(2) speaks in terms of actual damages *and* up to three months' rent, it means what it says – no statutory damages without actual

[5] The other sections are 4.102, 4.301 and 5.101.

damages.[6] And, contrary to Staley, to have caused actual damages, a landlord must have *enforced* a prohibited provision against a tenant.

The Staley court and Tenants rely heavily on the Wisconsin case of Baierl v. McTaggart, 629 N.W.2d 277 (Wis. 2009) in support of their statutory interpretation that the meaning of the word "use" in § 562A.11(2) is satisfied by mere inclusion of a prohibited term in a tenant's lease. Such reliance is misplaced.[7]

Finally, when engaging in statutory interpretation, this Court has adhered to the presumption expressed in Iowa Code § 4.4(3) that "[i]n enacting a statute . . . [a] just and reasonable result is intended" and that in

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[6] Although URLTA allows statutory damages only in the noted sections, it does not do so with respect to Iowa Code § 562A.11's equivalent – § 1.403. Section 1.403 states that the tenant may recover " . . .*in addition to his actual damages* an amount up to [3] months' rent *and* reasonable attorney fees." (emphasis added).

[7] First, Wisconsin has not adopted URLTA. See Crawford, 828 N.W.2d at 299, n.1. Deriving legislative intent from the adoption of a uniform act by looking to a state whose legislature has not adopted the same uniform act is problematic at best. Secondly, whatever administrative investigation was conducted by Wisconsin concerning the "chilling effect" of including a prohibited term in a residential lease is not part of the legislative history in Iowa – and the record evidence in this case demonstrates unequivocally that there was no "chilling effect" on Tenants. Lastly, and stating the obvious, this Court is not bound by the decision of a sister state. See VG Marina Mgmt. Corp. v. Wiener, 882 N.E.2d 196, 205 (Ill. Ct. App. 2008) ("In urging a contrary result, defendant directs us to the Wisconsin Supreme Court's decision in Baierl v. McTaggart . . . To the extent defendant's citation to foreign authority would direct us to a different result, we find it unpersuasive . . .").

construing a statute "[t]he consequences of a particular construction" should be considered. Iowa Code § 4.6(5). See e.g., Iowa Ins. Inst. v. Core Group of Iowa Ass'n for Justice, 867 N.W.2d 58, 75 (Iowa 2015).

The instant case presents a stark example of the untoward consequence created by the Staley court's interpretation of Iowa Code § 562A.11(2) requiring only inclusion without enforcement, especially in the class action context. It invites plaintiffs (in reality, plaintiffs' lawyers) to bring class action lawsuits based on bare statutory violations in the hope of receiving a statutory windfall when none of them have been harmed and all they are allegedly are seeking is a general interest in having a "legal lease."[8] Vermont Agency of Natural Res. v. United States, 529 U.S. 765, 772 (2000) (noting whatever "private interest" may arise in the outcome of a suit driven by statutory windfall is "insufficient to give a plaintiff standing").

Tenants freely admit that there have been no allegedly prohibited provisions enforced against them which would result in any actual damages. Nevertheless, if SouthGate is found to have willfully included a prohibited provision in its lease, under Staley, Tenants and the (undefined) class they

[8] Iowa does not have a private Attorney General-type statute that would apply in this case.

represent will be entitled to three months' rent.[9] This could easily amount to thousands, if not millions of dollars, depending on the size of the class. Most likely, few landlords in Iowa can withstand that magnitude of exposure which then results in forced settlements once a class has been certified.[10]

SouthGate submits that the Iowa legislature did not intend such a result and that is why, when it enacted Iowa Code § 562A.11(2), a fair and reasonable interpretation of the word "use" is one requiring enforcement of the prohibited provision and not mere inclusion without enforcement, as held in Staley.

II. NO PROHIBITED PROVISIONS ARE FOUND IN SOUTHGATE'S LEASE, RENDERING STALEY INAPPLICABLE REGARDLESS OF ITS INTERPRETATION.

A. Under IURLTA there are Only Four "Prohibited" Provisions and None are Found in SouthGate's Lease.

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[9] Tenants' suggestion in footnote 4 of their brief as to how landlords could cure "illegal" lease provisions by, in effect, re-writing the parties' lease has no support in the underlying record and would be at odds with well-established contract law principle that one party to a contract cannot unilaterally re-write its terms. Davenport Osteopathic Hospital Ass'n of Davenport, Iowa v. Hospital Serv., Inc., of Iowa, 154 N.W.2d 153 (Iowa 1967).

[10] See e.g., AT & T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011) (explaining the risk of 'in terrorem' settlements that class actions entail"); Shady Grove Orthopedic Assocs. v. Allstate Ins. Co., 559 U.S. 393, 445, n.3 (2010) ("When representative plaintiffs seek statutory damages" - [as Tenants do here] – "pressure to settle may be heightened because a class action imposes the risk of massive liability unmoored to actual injury.") (Ginsburg, J., dissenting).

At issue in Staley were a myriad of lease provisions which are not found in SouthGate's lease. See Staley v. Barkalow, 834 N.W.2d 873 *3, n.6 (Iowa Ct. App. 2013)[11]. For example, the lease in Staley required tenants agree to an automatic deduction from their security deposit for carpet cleaning even if their floors were clean and undamaged. Id. The tenants in Staley provided record evidence that automatic carpet cleaning deductions had been made from two named plaintiffs' security deposits. Id. No such provision appears in SouthGate's lease and there is no evidence in this record that SouthGate has automatically deducted a carpet cleaning charge from Tenants' security deposits. It did not with Tenants and does not happen with any SouthGate tenant.

Also challenged in Staley were lease provisions requiring tenants to "hold harmless and indemnify the Landlord for all loss of property, damages to vehicle, or personal injury sustained through theft, vandalism, or otherwise" and to "hold harmless/indemnify Landlord for all losses sustained due to such laundry equipment." Id. No such provisions are found

[11] While SouthGate respectfully disagrees with the Court of Appeal's decision in Staley, Tenants' hyperbole that such disagreement represents some "hard line" strategy or belief that Court of Appeals decisions can be ignored is baseless. See Appellee's Brief, p. 29, n.5. Staley is an unpublished table decision and Iowa R. App. P. 6.904 states that "[u]npublished opinions or decisions shall not constitute controlling legal authority."

in SouthGate's lease. The challenged lease in Staley required tenants pay for common area damage by unknown vandals, making tenants responsible for unit repairs and also provided: "Tenants shall hold harmless and indemnify the Landlord/Partners for all loss of property or injuries the Tenant sustains through theft, fire, rain, wind or otherwise." Id. Nothing of this sort is found in SouthGate's lease.

Thus, even if Staley is adopted by this Court, the result is no different as this matter still fails to present a justiciable case or controversy. The statutory language of IURLTA makes clear that there are only four prohibited provisions and no such provisions appear in SouthGate's lease. Tenants do not identify any lease provision wherein they agreed to "waive or forego rights or remedies" under IURLTA and there are no provisions in Southgate's lease either: authorizing a confession of judgment on a claim arising out of the lease; providing that one party agrees to pay the other party's attorney fees; or providing that one party "[a]grees 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)(a)-(d).

In Staley, the Court of Appeals held that, under § 562A.11, "a landlord [is] liable for the inclusion of prohibited provisions in a rental agreement,

even without enforcement, *if* the landlord's inclusion was willful and knowing." Id. at *8. Here there is *no* inclusion.

B. Lease Provisions Calling for Various Fees and Charges Do Not Violate IURLTA.

No violence is done to IURLTA and no clocks turned back by reading IURLTA according to its actual terms and interpreting those terms not defined by the statute itself in accordance with common law. IURLTA itself provides that "[u]nless displaced by the provisions of this chapter, the principles of law and equity in this state . . . shall supplement its provisions." Iowa Code § 562A.3. The continued strength of the principle of freedom of contract was recently affirmed in Robinson v. Allied Property & Cas. Ins. Co., 816 N.W.2d 398 (Iowa 2012). Under Iowa law, parties are free to include liquidated damage provisions in their contracts as long as those provisions do not constitute a penalty.

IURLTA does not limit a landlord's recovery to actual damages for *any* violation of a lease provision or building rule. IULTRA defines "rent" as "a payment to be made to the landlord under the rental agreement." Iowa Code § 562A.6(7). IULTRA does not prohibit liquidated damage provisions in residential leases and liquidated damage provisions, in and of themselves, do not obviate a landlord's duty to mitigate – where possible. See Aurora Business Park Assoc., L.P. v. Michael Albert, Inc., 548 N.W.2d 153 (Iowa

1996) (holding that an acceleration clause in a commercial lease was a valid and enforceable liquidated damages provision which took into account the landlord's duty to mitigate). Tenants read IURLTA far too expansively.

Iowa Code § 562A.1(1) provides expressly that "[t]he landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement, and *other provisions governing the rights and obligations of the parties*" (emphasis added). Despite Tenants representation to the contrary, D.R. Mobile Home Rentals v. Frost, 545 N.W.2d 302 (Iowa 1996) did *not* hold that "only actual damages can be recovered under IURLTA." Tenants' Brief, pp. 41-43. Instead, D.R. Mobile Home Rentals addressed directly a landlord's duty to make reasonable efforts to re-rent the property post-abandonment, i.e., mitigate their damages, under Iowa Code § 562A.29 ("Remedies for absence, nonuse and abandonment"). D.R. Mobile Home Rentals further confirmed that landlords have a claim for actual damages *following a termination of a rental agreement* under Iowa Code § 562A.32, but found no damages were recoverable in that case as the landlord offered no proof that actual damages were, in fact, incurred.[12] D.R. Mobile Home

[12] Iowa Code § 562A.32 ("Remedy after termination") states: "If the rental agreement is terminated, the landlord may have a claim for possession and

Rentals did not hold that landlords cannot include reasonable administrative, maintenance or other charges in their leases – to be assessed during the pendency of the lease term. The types of damages recoverable after termination of a lease are wholly distinct from the charges a landlord may assess during the term of the lease. Further support for this proposition is found throughout IURLTA itself. See e.g., Iowa Code § 562A.27(3) (providing that a landlord may recover "damages," not "actual damages" for noncompliance with the rental agreement); Iowa Code § 562A.28 (providing that if a tenant fails to satisfy its obligations to maintain the dwelling unit during the tenancy under § 562A.17, the landlord can remedy the issue and "submit an itemized bill for the actual and reasonable cost or the fair and reasonable value of" the work done).[13] The use of the term "damages" for in-lease infractions verses "actual damages" recoverable after termination

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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."

[13] Tenants hypothesize that the "fair and reasonable value" provision applies to landlords who actually do their own repairs themselves, i.e., "[s]ince there are no actual out of pocket cost, these landlords are permitted to charge the fair and reasonable value of their time based on the work done." Tenants' distinction has no statutory basis and inexplicably discriminates between "individual" landlords who do repairs themselves and "corporate" landlords who use staff members or outside contractors to do repairs and maintenance. Such delineations are not grounded in the law and would only interject more confusion as IURLTA and this Court's interpretation of same applies equally to all residential landlords in Iowa; not only "corporate" landlords, but also "mom and "pop" landlords, and not only those in Iowa City, but in every corner of the State.

recognizes that a lease may include provisions for fees, charges or liquidated damages for such acts of non-compliance which can only occur during the duration of the lease (returned check fees, disconnected utilities, unauthorized pets, subleasing, lock-outs, lost keys, etc.).

The remaining cases cited by Tenants, i.e., Riding Club Apts. v. Sargent, 440 N.E.2d 1368 (Ohio Ct. App. 1981), Wurtz v. Cedar Ridge Apts., 18 P.3d 299 (Kansas Ct. App. 2001), and Watson v. United Real Estate, Inc., 330 A.2d 650 (Dist. Ct., Cumberland County, New Jersey 1974) are inapplicable as they address impermissible liquidated damages in terms of automatic deductions from tenants' security deposits in violation of the applicable statutory requirements that such deductions be specifically itemized, based on actual damages sustained, and timely provided. No such charges/fees appearing in SouthGate's lease are expressly disallowed by IURLTA: See Iowa Code § 562A.9(1) ("The landlord and tenant may include in a rental agreement, terms and conditions not prohibited by this chapter or other rule of law including rent, term of the agreement, and other provisions governing the rights and obligations of the parties."). In Kopp v. Associated Estates Realty Corp., 2010 WL 1510196 (Ohio Ct. App. 2010) the court held that a redecorating fee and pet fee were allowed, finding that such fees were not an impermissible liquidated damage provision and were

not deducted from the security deposit. See also Cactus Wren Partners v. Arizona Dept. of Bldg. & Fire Safety 869 P.2d 1212, 1218 (Ariz. Ct. App. 1993) (finding nothing in the Landlord and Tenant Act prohibits Cactus Wren from assessing an administrative fee upon notice to its tenants).

It is specious to cite wholly inapplicable provisions of IURLTA which limit either party to actual damages under the applicable circumstances and argue that such provisions prohibit SouthGate from charging its tenants the fees about which Tenants specifically complain or limit SouthGate's recovery to its "actual damages."

III. THE TRIAL COURT ABUSED ITS DISCRETION IN CERTIFYING THIS MATTER AS A CLASS ACTION.

The issue on appeal is whether the district court in this case abused its discretion in certifying a class without making all of the findings expressly required by the rules, e.g., adequacy of representative parties and class counsel, taking into account the record evidence presented in this lawsuit. SouthGate vigorously and repeatedly resisted Tenants' class certification efforts, only to face resistance from Tenants in even taking their depositions or doing any discovery. SouthGate's request to be heard in oral argument on the pending motions was resisted by Tenants and denied by the district court. (App. 91, 188). Instead of undertaking the rigorous analysis called for in certifying class actions, the district court cut and pasted a ruling from a

factually distinguishable case without giving any independent analysis whether the class action factors were satisfied on this record. The district court did not even define the class. How could a class be found to satisfy the commonality and typicality requirements when it is not defined?

Class actions are not a "one size fits all" proposition and treating them as such, which essentially equates to exercising *no* discretion, is an abuse of that discretion. Reversal is warranted.

The rules are clear that prior to certifying a class, the district court must make a specific finding that the "representative parties fairly and adequately will protect the interests of the class." Iowa R. Civ. P. 1.262(2)(c). In a class action, this is critical as the interests of those not present before the court are conclusively determined on the strength of the case made by the representative parties. Vignaroli v. Blue Cross of Iowa, 360 N.W.2d 741, 746 (Iowa 1985); Stone v. Pirelli Armstrong Tire Corp., 497 N.W.2d 843, 846-47 (Iowa 1993) ("[A]dequacy of representation is perhaps the most significant of the prerequisites to a determination of class certification."). In making this determination, the district court must find all of the following:

a. The attorney for the representative parties will adequately represent the interests of the class.

b. The representative parties do not have a conflict of interest in the maintenance of the class action.

c. The representative parties have or can acquire adequate financial resources, considering rule 1.276[14], to ensure that the interests of the class will not be harmed.

Iowa R. Civ. P. 1.263(2)(a)-(c).

The district court made none of these required findings and there was no record created by Tenants which would have provided a reasonable basis to support a finding that that the representative parties or class counsel would fairly and adequately represent the class's interests. Instead of discharging its obligation to protect the interests of the (undefined) class it certified, the district court copied and incorporated by reference a decision from an entirely separate and factually distinguishable case.

In Staley, the named plaintiffs included current tenants and the class was comprised of both current and former tenants. The lease at issue in Staley is wholly different than SouthGate's lease. In Staley there were allegations of actual enforcement of the purportedly prohibited lease provisions against named plaintiffs. Staley, 2013 WL 2368825 at *11. No

[14] Iowa R. Civ. P. 1.276 governs arrangements for attorney's fees and expenses in class actions and, generally speaking, requires that representative parties and their attorney file with the court their fee agreements/financial arrangements and obtain court approval of any arrangement where the costs and litigation expenses cannot reasonably be defrayed by the representative parties.

such evidence exists in this case. Thus, the district court abused its discretion in finding (in a four sentence paragraph) that Staley presented "nearly identical class certification facts" and certifying this lawsuit as a class action solely on that basis.

CONCLUSION

The district court erred in granting Tenants motion for partial summary judgment and declaratory judgment as Tenants' lack standing to pursue this matter individually, let alone as representatives of an undefined class. The error was compounded by finding as a matter of law that SouthGate's lease violated IURLTA based on another landlord's lease provisions, which were challenged in a wholly separate lawsuit. Furthermore, the district court exercised no discretion and undertook no analysis before certifying this matter as a class action. That was an abuse of discretion, impacting every landlord of every size throughout the state. This matter must be dismissed based on Tenants' lack of standing. Alternately, this matter must be reversed and remanded so that the district court can undertake and appropriately discharge its obligation to consider this matter on its own facts and merit.

Respectfully submitted,

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on February 15, 2016, I electronically filed the foregoing with the Clerk of Court of the Supreme Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per IOWA RULE 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in IOWA R. APP. P. 6.903(1)(g)(1). It contains 6,230 words, excluding parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1).*

This brief complies with the type-face requirements of IOWA R. APP. P. 6.903(1)(e) and the type-style requirements of IOWA R. APP. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Stephen J. Holtman February 15, 2016
Date