IN THE IOWA DISTRICT COURT IN AND FOR JOHNSON COUNTY

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

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COMES NOW Plaintiff Christopher Janson, by and through his attorney, Christopher Warnock, and submits his Hearing Memorandum, in order to inform Defendants with regard to some of the legal and factual arguments Plaintiff intends to raise at trial, to assist the presiding judicial officer at trial and to preserve legal and factual issues for appeal.

I. Introduction

The instant case is part of a coordinated effort on the part of the Tenants' Project and its affiliated attorneys to provide fair play for both landlords and tenants in Iowa City. Plaintiff in the instant action is Christopher ("Chase") Janson, and as the evidecne at trial will show, Mr. Janson along with Cody Elbert and Brett Zeller,[1] was a tenant ("Tenant") at 618 Burlington Street, #3 in Iowa City from August 1, 2012 to July 25, 2013. 618 Burlington Street is managed by Defendant Apts Downtown, Inc., ("Apartments Downtown") whose business manager is Defendant Joseph Clark. In this memorandum Tenant will collectively refer to Apartments Downtown and Joseph Clark as "Landlord". Landlord does its own maintenance under the fictitious name of Iowa Maintenance.

[1] Plaintiff has moved to add Cody Elbert, the security deposit holder named in the lease and Brett Zeller, as plaintiffs in the instant action.

As the evidence at trial will show on or about April of 2013, Landlord sent maintenance crews through its units. Landlord decided to replace the countertops in Tenants' unit even though Tenants had not requested them to be repaired and even though, as Tenants will testify, no repair was necessary. Landlord overcharges by billing $70 an hour for repairs. Similarly, at the end of the lease, Landlord charged for unnecessary repairs and cleaning and overcharged Tenants by billing $35 an hour for cleaning. This Court will have to decide for itself whether or not these charges, which include Landlord's overhead and ordinary business expenses are legal. Tenants would assert that Judge Egerton's ruling in *DeStefano v. Apts Downtown*,[2] that Landlord could not charge its overhead to its tenants and could not bill these excessive hourly repair and cleaning charges, is highly persuasive on this issue.

If this Court decides that the lease provisions cited by Tenants in this memorandum are illegal under the Iowa Uniform Residential Landlord Tenant Act ("IURLTA") Iowa Code Chapter 562A, then Tenants would argue that since these provisions are clearly illegal and were earlier found to be illegal in *DeStefano* and Landlord continued to use these provisions, that Landlord knowingly and willfully used prohibited lease clauses in violation of Iowa Code §562A.11(2). Since the continued use of these provisions after Judge Egerton found then to be illegal is so egregious, the maximum punitive damages are appropriate.

[2] *DeStefano v. Apts Downtown* , SCSC80575 (Johnson County District Court -Small Claims June 10, 2013) Attached. Note Plaintiffs have attached *DeStefano* and two other unreported small claims rulings and a district court opinion to this memorandum, not as evidence in the case, or binding precedent, but as persuasive precedent to assist this court in its decision. Plaintiffs additionally will seek to have a certified copy of the opinion in *DeStefano* admitted at trial as evidence for the purpose of showing Defendants' knowledge of the illegality of their lease provisions and to show that the maximum punitive damages are appropriate.

II. Landlord's "Preventative Maintenance" Policy is Illegal

Landlord's lease states as follows,

> Tenants agree to allow a preventative maintenance crew to enter their apartment during the summer months to repair any damages caused by tenants throughout the leasing year. *All charges associated with these damages must be paid immediately or they will be added to the rent due balance*.[3]

As the evidence will show at trial, Landlord sends crews through its units to do maintenance and, as in the instant case, does repairs without a request from tenants. Landlord's lease provides that, "Iowa City Maintenance will do all repairs unless prior written authorization is obtained from landlord."[4] Iowa Maintenance is a fictitious name of Defendant Apts Downtown thus Landlord does all repairs and does not permit tenants to repair or arrange for repairs.

In doing preventative maintenance and charging these repairs to tenants as rent Landlord appears to be relying on §562A.28, which states,

> If there is noncompliance by the tenant with section 562A.17, materially affecting health and safety, that can be remedied by repair or replacement of a damaged item or cleaning, and the tenant fails to comply as promptly as conditions require in case of emergency or within seven days after written notice by the landlord specifying the breach and requesting that the tenant remedy it within that period of time, the landlord may enter the dwelling unit and cause the work to be done in a competent manner and submit an itemized bill for the actual and reasonable cost or the fair and reasonable value of it as rent on the next date when periodic rent is due, or if the rental agreement has terminated, for immediate payment.

As the evidence will show at trial, on or about April 2013 Landlord replaced Tenants' countertop and then charged them $570.80. Tenants were not given any notice

[3] §33(d) Lease.
[4] §33(c) Lease.

of the need for repair or opportunity to cure. Tenants refused to pay for the countertop, and on information and belief, charges for the countertop repair and late fees for not paying these charges were deducted from Tenants' security deposit. No charge for countertop repair appears on the Security Deposit Withholding Statement, but a charge for "Past Due Rent and Fees on Account" does appear in the amount of $1256.10. In the previous three trials with Landlord when charges were made during the tenancy and unpaid, Landlord deducted them from the security deposit as past due rent and fees due on account as indicated in Landlord's lease §33(d).

Landlord's preventative maintenance policy violates the IURLTA. First, §562A.28 only applies to repairs that "materially affecting health and safety" and the damaged countertop in the instant action posed neither a health or safety problem. Secondly, §562A.28 requires that the landlord send a written seven day notice to the tenant, which was not done in this case and is clearly not contemplated by the lease which simply provides that repairs will be done and charged to the tenant. Section 562A.28, in common with other IURLTA provisions provides that upon notice the tenant has an opportunity to cure by doing or arranging for repairs themselves. Section 562A.28 is violated by Landlord's lease section §33(d) which makes it a breach of the lease for the tenant to repair or arrange for repair without Landlord's authorization. Under §562A.28 and other provisions of the IURLTA, the tenant has a right to cure a breach of the lease or IURLTA which the Landlord's lease repair restriction violates.

Next, under §562A.28, the work must, "be done in a competent manner and [the landlord may then] submit an itemized bill for the actual and reasonable cost or the fair

and reasonable value of it…" As we shall see below, Landlord bills tenants far in excess of the actual and reasonable cost or fair and reasonable value, charging tenants for its overhead and ordinary business expenses.

Section 562A.28 is not the only IURLTA provision violated by Landlord's preventative maintenance policy. Under §562A.12(3) "If the rental deposit or any portion of the rental deposit is withheld for the restoration of the dwelling unit, the statement shall specify the nature of the damages." However, Landlord, as in this case, routinely fails to specify the nature of damages when the repairs are done during the tenancy. Instead Landlord lists them as past rent due and fees due on account.

In its testimony and case presentation in previous trials Landlord has made a further argument regarding the nature of repair and cleaning bills charged as rent. Landlord's argument is that while the original charge may have been for repairs that once the repairs are charged as rent that they lose their character as repairs charges and become transformed into rent. Following the logic of Landlord's argument, even if the charge was originally for repairs or even originally illegal, that once converted to rent, it is no longer a rent charge and any illegality is washed away.

This argument is specious as it would allow for Landlord to make any charge it wished, in any amount, no matter what its legality, and if the tenant did not sue and win their case before their rent next came do, would be permanently foreclosed from challenging or objecting to the charge. Clearly, a repair bill is a repair bill even if charged as rent.

In fact, what Landlord is doing is entering tenants' units without proper notice, repairing items that do not materially affect health and safety, failing to give tenants a right to cure and then improperly failing to specify damages when deducting these charges from tenants' security deposits. It is abundantly clear that almost the entirety of Landlord's preventative maintenance program is illegal.

III. A Landlord May Only Charge Actual Damages and May Not Charge its Overhead or Ordinary Costs of Business to its Tenants

Tenants' lease provides that Landlord charges $40 an hour for cleaning and $70 for repairs.[5] In fact, Landlord actually charges "only" $35 per hour for cleaning. Landlord typically pays its workers $10 an hour and justifies the $25 or $60 an hour difference between its actual costs and its charges by claiming it is entitled to charge its overhead and or ordinary costs of business to its tenants. Tenants will introduce at trial an hourly charge breakdown exhibit originally prepared and provided by Landlord that indicates its $35 an hour cleaning charges include its, "vehicle expense, mileage expense, overtime, equipment, Social Security taxes, Medicare taxes, Workmans [sic] comp, Federal taxes, State taxes, Gen Liability insurance…" Similarly this exhibit also indicates that its $70 an hour repair and maintenance charges include,

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

[5]"Tenants will be charged $40/hour per person (6-8 people on each cleaning crew) plus $40 service charge for general cleaning…" §37(c) Lease; repairs, "Iowa City Maintenance will do all repairs…[and] charges $70/hour during regular business hours and $90/hour on nights and weekends for services performed." §33(c) Lease.

In *DeStefano* Judge Egerton examined these exact lease provisions, hourly charges and hourly charge breakdown exhibit and rejected Landlord's argument that it was entitled to charge these specific overhead expenses, ruling that its repair and cleaning charges were excessive and illegal,

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

DeStefano at 13.

Similarly in *Ahmed v. Barkalow*,[6] Magistrate Judge Rose found that a different landlord, who used an almost identical lease to the lease in the instant case, had acted in bad faith in charging its ordinary business expenses as part of damages, "Defendants are sophisticated landlords in the Iowa City community, running a high-volume rental business. Stop payment fees and staff time are regular costs of doing business for the Defendants." *Ahmed* at 4.

These charges are clearly illegal. The Supreme Court has held that under the URLTA when a lease is breached a landlord may only recover their actual damages,

> …we agree with [the tenant] that the *landlord is not entitled to recover if no evidence substantiates that actual damage has been sustained*. Section 562A.32 provides the landlord "may have a claim . . . for actual damages for breach of the rental agreement."…Here, the landlord did not present any testimony or other evidence to support the value of its demand for debris removal. In fact, the landlord did not present evidence that Frost's debris was removed. *Absent evidence that actual damages were sustained*, it was error to award any sum for debris removal.

D.R Mobile Home Rentals v. Frost, 545 N.W.2d 302 at ¶34-5 (Iowa 1996).

[6] *Ahmed v. Barkalow*, SCSC 082744 (Johnson County District Court - Small Claims May 15, 2013) Attached.

A more detailed examination of the IURLTA gives us even more clarity on the issue of actual damages. The provision cited in *D.R Mobile,* §562A.32, states, "If the rental agreement is terminated, the landlord may have a claim for possession and for rent and *a separate claim for actual damages for breach of the rental agreement* and reasonable attorney's fees as provided in section 562A.27." Section 562A.27 regulates a landlord's remedies if a tenant fails to comply with the rental agreement or the tenant's obligations under §562A.17 which include cleaning and not damaging the premises. What §562.32 makes clear is that a landlord is limited to recovering actual damages for the tenant's breach of the lease or other statutory obligations. The IURLTA repeatedly limits both landlords and tenants to actual damages. Five separate sections limit tenants to actual damages[7], three sections limit landlords to actual damages[8] while §562A.35 limits both landlords and tenants to actual damages.

In addition, as we have seen, landlords proceeding under §562A.28 are limited to "the actual and reasonable cost or the fair and reasonable value" of repairs and Tenants would argue that this restriction applies to all landlord repairs since it is simply a specification of actual damages.

With regard to what can appropriately be charged as actual damages as Judge Egerton in *DeStefano* cited the Iowa Supreme Court,

> 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

[7] §§562A.11, 562A.12, 562A.22, 562A.26 & 562A.36
[8] §§562A.29, 562A.32, 562A.34.

(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).

DeStefano ruling at 11.

Furthermore, as a general contractual rule, the cost of repairs properly charged as damages includes only the reasonable costs of labor and materials. See e.g., *City Wide Associates v. Supreme Judicial Court of Mass.*, 564 N.E.2d 1003 at ¶14 (Mass 1991) ("… cost of *materials and labor* to repair the damage done by the tenant"); *Matus v. State*, No. A-9998 at ¶55 (Alaska App.2009) ("In the case of a repair estimate, it is a prediction of how much money would be needed {e., the cost of materials and labor}to restore the property.") .

Landlord is clearly charging far more than its actual out of pocket costs of labor and material and is blatantly disregarding Judge Egerton's and Judge's Rose's rulings as well as the IURLTA.

IV. Landlord's Lease Includes Illegal Provisions

As noted above Landlord's lease includes and Landlord enforced illegal excessive hourly repair and cleaning charges that far exceeds its actual damages. Landlord's lease contains numerous additional illegal clauses. The inclusion of illegal clauses, even without enforcement is illegal under the IURLTA.

Iowa Code §562A.11 states,

1. A rental agreement shall not provide that the tenant or landlord:…a. Agrees to waive or to forego rights or remedies under this chapter…
2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental

> agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney's fees.

In *Staley v. Barkalow*, 3-255 / 12-1031 (Iowa App. 2013) the Court of Appeals held,

> the trial court erred in interpreting chapter 562A to require the landlord's enforcement of a prohibited provision as a prerequisite to a tenant suffering injury or harm in all situations. Specifically, we decide "willfully uses, " in Iowa Code section 562A.11(2), does not require "willful enforcement, " but encompasses a landlord's "willful inclusion" of prohibited provisions.

Staley at 14.

Thus the inclusion of illegal provisions, even without enforcement, subjects Landlord to up to three months punitive damages, if the inclusion is willful and knowing.

1. Landlord's Lease includes Illegal Automatic Carpet Cleaning Provisions

Tenant's lease § 37(e) requires an automatic cleaning fee be paid at the termination of the tenancy.

> Tenants agree to a professional carpet cleaning charge (cleaning cost + administrative charges + utility charges) starting at $95 (efficiency) not to exceed $250 (6+ bedrooms) Hardwoods and decorative concrete floors are polished or cleaned each time apartments turn over occupancy. Tenants agree to a charge for professional polishing or cleaning not to exceed $250.

The inclusion in Tenant's of an automatic cleaning fee provision violates Iowa Code §562A.12 which states that the landlord shall provide,

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

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

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

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

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

In fact, the statutory requirements in Iowa are even higher as the Iowa Code requires that, "In an action concerning the rental deposit, the burden of proving, by a preponderance of the evidence, the reason for withholding all or any portion of the rental deposit shall be on the landlord." Iowa Code §§562A.12(3).

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

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

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

Emphasis added, Iowa Code §562A.12(3)(b).

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

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

[10] *Uhlenhake v. Professional Property Management Inc.*, No. CL-82571 (D. Iowa 5th District, entered April 19, 2000), Attached.

In *DeStefano* in ruling on an almost identical lease provision in an earlier version of Landlord's lease, Judge Egerton held that,

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

Emphasis in original, *De Stefano* at 13.

2. Landlord's Lease Includes Illegal Repair & Maintenance Shifting Provisions

Landlord's standard leases require tenants to pay for common area damages. These are not damages caused by the tenants themselves or damages for which tenants are responsible due to their own action or negligence or the actions of their guests, but vandalism by unknown parties and damages of unknown origin.

Charges for common area damage are imposed through a variety of different lease clauses. Tenant's lease §30 states,

> Tenants agree to pay for all damages to the apartment windows, screens, and doors, including exterior unit doors (including random acts of vandalism). Tenants further agree to be responsible for a 15 foot area around the apartment entry door, *including cleaning on a daily basis if necessary*.[11]

Tenant's lease §33(a) provides,

[11] Italicized portion is new in Tenant's lease and was not part of earlier version found in *DeStefano*.

> Unless Landlord is negligent, Tenants are responsible for the cost of all damages/repairs to windows, doors, carpet, and walls regardless of whether such damage is cause by residents, guests or others.

Landlord requires tenants to pay for vandalism or damage by unknown parties in common areas and thus directly contravene Iowa law which states, "The *landlord* shall… Keep all common areas of the premises in a clean and safe condition." Iowa Code §562A.15(1)(c).

In addition, Iowa Code §562A.15, entitled, "Landlord to maintain fit premises" states,

> 1. The landlord shall:
> a. Comply with the requirements of applicable building and housing codes materially affecting health and safety.
> b. Make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition.

Iowa Code §562A.15(1).

In *De Stefano* Judge Egerton held that the almost identical lease provision, requiring tenants to be responsible for damages by unknown third parties, was illegal under §562A.15. *DeStefano* at 15. In *DeStefano* Judge Egerton held, "In essence, [Landlord] has now required the tenant to be the insurer of his own property for damages caused by others, through no fault of the tenant. See *Mastland v. Evans Furniture*, 498 N.W. 2d. 682, 686 (Iowa 1993)." *DeStefano* at 15.

In *Mastland*, the Supreme Court held that while §562A.12(3)(b) states that the premises are to be returned to the landlord in the same condition as at the commencement of the lease, ordinary wear and tear excepted, this requirement must be read in conjunction with the legal obligations of tenants, specifically §562A.17(6), thus "…the landlord may keep the rental deposit only if the damages beyond normal wear and tear

result *from the deliberate or negligent acts of the tenant, or the tenant knowingly permits such acts*." *Mastland*, 498 N.W. 2d at 686.

Under §562A.17 tenants' legal obligations regarding repair and maintenance are limited to responsible use of the rental premises and cleaning just the interior of the unit that they actually occupy. Absent some showing that tenants caused or condoned damage to the premises such damage must be repaired and paid for by Landlord. Landlord's lease therefore illegally shifts repair and maintenance responsibilities on to tenants.

V. The Inclusion of these Prohibited Clauses was Knowing and Willful and Landlord's Retention of the Security Deposit was in Bad Faith

Iowa Code §562A.11 provides,

> 1. A rental agreement shall not provide that the tenant or landlord:
> a. Agrees to waive or to forego rights or remedies under this chapter….
> b. Authorizes a person to confess judgment on a claim arising out of the rental agreement;
> c. Agrees to pay the other party's attorney fees; or
> d. Agrees to the exculpation or limitation of any liability of the other party arising under law or to indemnify the other party for that liability or the costs connected therewith.
> 2. A provision prohibited by subsection 1 included in a rental agreement is unenforceable. If a landlord willfully uses a rental agreement containing provisions known by the landlord to be prohibited, a tenant may recover actual damages sustained by the tenant and not more than three months' periodic rent and reasonable attorney's fees.

Section 562A.11(1)(a) is a general prohibitory provision, requiring broadly that landlords not include any provision in their leases that waives the rights or remedies of

tenants. Sections 562A.11(1)(b)-(d), on the other hand, are specific, setting forth three types of provisions that are explicitly prohibited: attorney fees, indemnity/liability shifting and confession of judgment.

In *Staley v. Barkalow* the Court of Appeals held that,

> 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.

In defining willful and knowing, the Supreme Court has held,

> We have defined "willful" in a dental license suspension proceeding as meaning an intentional act. *Board of Dental Examiners v. Hufford*, 461 N.W.2d 194, 201 (Iowa 1990). See also *Committee of Professional Ethics & Conduct v. Crawford*, 351 N.W.2d 530, 532 (Iowa 1984) (attorney discipline case where failure to file tax return was held intentional and therefore willful).
>
> To act "knowingly" has been defined to mean that a person acted voluntarily and intentionally, and not because of mistake or accident or other innocent reason. *United States v. Enochs*, 857 F.2d 491, 493 (8th Cir.1988). Knowledge is defined in Iowa's uniform instructions to mean the defendant "had a conscious awareness" of the element requiring knowledge.

Sahu v. Iowa Bd. of Medical Examiners, 537 N.W.2d 674, 678 (Iowa 1995).

We begin with the standard set forth by the Court of Appeals in *Staley v. Barkalow* which is if a provision is clearly prohibited by the statute then a landlord is presumed to have know it was illegal simply from reading the IURLTA. Tenants would certainly argue that all of the lease provisions identified in this memorandum as illegal are clearly illegal and that Landlord must be presumed to have known that.

Tenants note that, as Judge Egerton found, that Defendants are very large, sophisticated landlords,

> …the Defendant [Apts Downtown] has taken exceptional steps to consolidate the business of renting and maintaining properties for rent to tenants in the Iowa City area, it appears quite apparent that the costs of operating a such a large business...

DeStefano ruling at 13. Furthermore, Landlord's lease §9 states that, "Tenant shall, in addition to any other obligations in this Lease, comply with all applicable building, housing and zoning codes and *with Chapter 562A of the Code of Iowa (Residential Landlord Tenant Act)*…."[12] Thus Landlord imposes a requirement on its tenants that they be familiar with the IURLTA.

In *Borer v. Clark*,[13] another case against Defendants Joseph Clark and Apts. Downtown, Inc., with a substantially identical lease, Judge Egerton noted the testimony of Mr. Clark that, "…he had been an employee of Apartments Downtown for 17 years and general manager for 15 years." Judge Egerton also noted Mr. Clark's testimony that, "…he had help from legal counsel to look over his lease each year and make changes…he believed the lease [the tenant] signed was used commonly. *He never had any provisions of his lease found to be invalid*."[14]

However, in this case, three specific areas of lease provisions have been specifically found to be illegal by Judge Egerton in *DeStefano*. Nevertheless, Landlord left the $40 and $70 an hour cleaning and repair charges in its lease and

[12] §9, Lease.
[13] *Borer v. Clark*, SCSC SC 081695 (Johnson County District Court -September 3, 2013), attached as Exhibit 4.
[14] *Borer* at 10.

enforced a $35 an hour cleaning charge and $70 an hour repair charge. Landlord also left the automatic carpet cleaning and repair and maintenance provisions in its lease.

Clearly, under the facts of this case Landlord has knowingly and willfully used prohibited lease provisions. Given that Judge Egerton specifically ruled that these lease provisions of Landlord were illegal, this Court should impose the maximum punitive damages of three months rent per tenant.

In HF 495(2013) effective July 1, 2013, §562A.12(7) was amended by the Iowa Legislature as follows: "The bad faith retention of a deposit by a landlord or any portion of a deposit, in violation of this section shall subject the landlord to punitive damages, not to exceed twice the monthly rental in addition to actual damages."

This very significant increase in punitive damages, from an earlier maximum of $200, shows a legislative determination [abuse of trust, landlord's given privilege of security deposit] Given Judge Egerton's ruling, Landlord's retention of the security deposit was clearly in bad faith and the maximum two months rent for bad faith retention of security deposit should also be imposed.

VI. Attorney Fees

In the instant case both sides have requested attorney fees. Under §562A.12(8) "The court may, in any action on a rental agreement, award reasonable attorney fees to the prevailing party." However, §562A.27 states that,

> Except as provided in this chapter, the landlord may recover damages and obtain injunctive relief for noncompliance by the tenant with the rental agreement or section 562A.17 unless the tenant demonstrates affirmatively that the tenant has exercised due diligence and effort to remedy any noncompliance, and that the tenant's failure to remedy any noncompliance was due to circumstances beyond the tenant's control. If the tenant's noncompliance is willful, the landlord may recover reasonable attorney's fees.

In *Seldin Co. v. Calabro*, the Iowa Court of Appeals held,

> By the statute's plain language, not every tenant breach will justify a fee award. If every tenant breach formed the basis of an attorney fee award, the legislature would never have used the word "willful." See Iowa Code § 4.4(2) (stating "entire statute" is presumed effective). Nothing in the record supports a finding of willfulness. There is no evidence of stubborn disobedience or ill will on [the tenant's] part. Cf. *Brandenburg v. Feterl Mfg. Co*., 603 N.W.2d 580, 585 (Iowa 1999) (in an action to set aside a default judgment, stating "willfully" and "defying" "indicate conduct . . .showing a deliberate intention to ignore, and resist any adherence to, the rules of procedure") (emphasis added); *Kuta v. Newberg*, 600 N.W.2d 280, 288-89 (Iowa 1999) (under punitive damages statute, "willful and wanton disregard" means "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow") (emphasis added) (citation omitted). In a challenge to a contempt charge, our supreme court stated "willfully" means intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemnor had the right or not. *Henley v. Iowa District Ct*., 533 N.W.2d 199, 202 (Iowa 1995). Consistent with these authorities, we conclude "willful" as it is used in section 562A.27(3) connotes a similar state of mind, which we find [tenant] lacked.

Seldin Co. v. Calabro, No. 5-063 / 03-1252 at ¶32-3. (Iowa App. 2005).

Landlord requested attorney fees in its answer and counterclaim. Tenants assert as to the attorney fee request that was part of its counterclaim since its counterclaim is based on breach of the lease and the duties of the tenant under §562A.17 then Landlord needs to show willful non-compliance.

In any case, Tenants believe what's good for the goose is good for the gander and do not seek a high standard for attorney fees for landlords and a more lenient standard for tenants. Tenants feel that it would not be appropriate for either side to obtain attorney fees without aggravating circumstances beyond simply a good faith contractual disagreement. Tenants should not be liable for Landlord's attorney fees unless Tenants are proven not to comply with the lease or their legal obligations and that non-compliance was willful as defined in *Seldin*. On the other hand, it would not be equitable for Landlord to be liable for Tenants' attorney fees unless they are shown to have acted in bad faith or willfully and knowingly violated the IURLTA.

Tenants would also note that the Iowa 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).

Tenants would also request permission to file their attorney fee affidavits and fee amounts with their final pleading in the case, their reply to Defendants' trial/hearing memorandum which Defendants usually file post trial.

As the Court of Appeals held *In re Marriage of Potts,* No. 0-202 / 09-0312 at ¶25 (Iowa App. 2010),

> …our courts have repeatedly held that attorney fees are separate and distinct from the underlying controversy.") citing *Iowa State Bank & Trust Co*., 683

> N.W.2d at 110; *Landals v. George A. Rolfes Co*., 454 N.W.2d 891, 897 (Iowa 1990) .” [citations omitted] …Attorney fees are frequently litigated in post-trial motions.” [citations omitted] From an efficiency standpoint, this makes sense. Until the merits are decided, the parties do not know who has been the prevailing party, the issues on which that party has prevailed, or the fees that have been incurred.

In re Marriage of Potts, No. 0-202 / 09-0312 at ¶24 (Iowa App. 2010).

VII. Appearing for Trial

While both Landlord and Tenant have sought to add tenants Cody Elbert and Brett Zeller to the case, Tenant is unsure if both Mr. Elbert and Mr. Zeller will be able to appear for scheduled trial on December 9, 2013. Nevertheless, tenants still wish to go forward with trial.

In *Jack v. P and A Farms*, Ltd, 11–0877 (Iowa 2012) the Iowa Supreme Court held it was not appropriate to enter a, “…default judgment against a party who fails to appear personally for trial when the party's attorney is present and able to proceed in the party's absence. Unless subject to a subpoena or court order, a plaintiff in a civil trial is not obligated to take the stand.” *Jack v. P and A Farms* at 14. As the *Jack* Court noted, the party can proceed by using evidence other than the testimony of the party and if the other side wished to procure the non-appearing party’s testimony they need to use a subpoena to secure their attendance. *Jack v. P and A Farms* at 15-18.

However, at worst, a default would only be entered as to the non-appearing tenant, there is no reason that the claims of the tenants that actually appear for trial should not be tried.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of this document was served on December 6, 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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