IN THE INDIANA COURT OF APPEALS

APPELLATE CASE NO. [redacted]

[redacted].,	)	Marion County Superior Court
	)	Civil Division – 04
Appellant(s),	)	
	)	
vs.	)	Cause No. [redacted]
	)	
[redacted],	)	
	)	The Honorable Burnett Caudill, Magistrate Judge
Appellee.	)	to The Honorable Cynthia Ayers, Judge

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

STATEMENT OF ISSUES

Whether the trial court erroneously interpreted the Indiana Landlord Tenant Relations Act ("LTRA"), Ind. Code 32-31-3 *(*2009), *et seq*. and erred in granting the Appellee-Defendant, [redacted] ("[redacted]"), Summary Judgment on Counts I and II of the Appellant-Plaintiff's [redacted] Amended Class Action Complaint; specifically:

1. Whether I.C. § 32-31-3-9 permits a security deposit (or a portion thereof) be deemed "non-refundable";
2. Whether I.C. § 32-31-3-17 is an additional statutory protection against non-refundable security deposits;
3. Whether "re-keying a lock" constitutes a permissible damage under I.C. § 32-31-3-13 absent an agreement of the parties; and
4. Whether an Indiana tenant has the requisite intent to make donative gifts to landlords?

STATEMENT OF THE CASE

On October [redacted] filed a class action complaint relating to a landlord-tenant dispute against the Defendant. Appellant's App. p.1. On April [redacted], [redacted] moved the trial court for partial summary judgment on counts I and II of her amended complaint. Appellant's

App. p.2. On September [redacted], [redacted] cross-motioned for summary judgment to all five of [redacted]'s counts. Appellant's App. p.3. Upon hearing and argument, the trial court granted complete summary judgment in favor of [redacted] on November [redacted]. Appellant's App. p.4.

On December [redacted], [redacted] filed a Notice of Appeal with the trial court. Appellant's App. p.3. The court reporter filed her notice of completion of the clerk's record on January [redacted]. Appellant's App. p.5.

STATEMENT OF THE FACTS

On February [redacted], [redacted] and [redacted]. entered into a Lease Agreement ("Lease") by which [redacted] rented an apartment from [redacted] located at [redacted] North Meridian Street, Indianapolis, IN. Appellant's App. p.4, Ct. Order Findings ¶ 1. On May [redacted] and May [redacted], [redacted] and [redacted] renewed their obligations with two additional Leases containing substantially the same terms. Appellant's App. p.6, Ct. Order Findings ¶ 3. Paragraph 26 of these Leases, numbered the same for each of the Leases (200[redacted], 200[redacted], and 200[redacted]), contained the following language: "Tenant has given Landlord a security deposit in the amount of $99.00. *$50.00 of said security deposit is non-refundable.*" Appellant's App. p.6, Ct. Order Findings ¶ 2. Through a cover letter and Move Out-Checklist dated September [redacted], [redacted] detailed to [redacted] the disposition of her security deposit. Appellant's App. p.7, Ct. Order Findings ¶ 4. Pursuant to this letter, [redacted]'s security deposit was used to "re-key [a] lock per lease agreement" for an amount equal to fifty dollars ($50.00). Appellant's App. p.7, Ct. Order Findings ¶ 5.

Upon hearing and arguments, the trial court concluded because [redacted]agreed to an amount labeled as part of the security deposit that was followed with language designating it as "non-refundable," she could not meet the statutory definition of "security deposit" and the LTRA did not apply to this portion of her security deposit. Appellant's App. p. 8-9 , Ct. Order Conclusions ¶ 5-6. On this basis, [redacted] was granted summary judgment.

SUMMARY OF THE ARGUMENT

By granting summary judgment for [redacted], the trial court issued a judgment contrary to several express provisions of the LTRA, as well as the spirit/purpose of the Act itself. In accepting money as part of a "security deposit," deeming it non-refundable, then later claiming it was used for an obligation both parties had agreed to (re-keying a lock),[1] [redacted] attempted to have [redacted] waive her statutory right to return of the full amount. In addition, the trial court's summary judgment order created, in essence, the perfect loophole for landlords in Indiana: accept a security deposit, deem it non-refundable, and in the event damage is found sue departing tenants with the statutory authority given them by the LTRA (in excess of what's already been retained). This disrupts the very playing field the LTRA was meant to level.

Further, I.C. § 32-31-3-17 of the LTRA specifically forbids a tenant or landlord from waiving their statutory protections as codified in I.C. § 32-31-3, the Security Deposit statute. Therefore, even if [redacted] freely bargained that a portion of her security deposit was, in fact, non-refundable, I.C. 32-31-3-17 still permits [redacted] to recover from [redacted] under I.C. §§ 32-31-3-13, 14, and 16.

Lastly, and in the event the trial court was correct in its interpretation of the LTRA, an Indiana tenant cannot maintain the donative intent required to simply hand over any amount of money – not used for rent or other obligations found within a respective lease arrangement (i.e. utilities) – to their respective landlords. Thus, [redacted] is entitled to the return of this unlawful gift as are any previous tenants that made a similar gift in a comparable amount.

STANDARD OF REVIEW

This is an appeal from the trial court's summary judgment order interpreting the LTRA and its application to the parties' lease agreement. Upon the appeal of a summary judgment decision, this Court's standard of review is the same as the trial court. Sims v. The Town of New

[1] This itself was subject to dispute. A review of the lease will show no agreement to "re-key a lock" was expressly made. *See* Appellant's App. p.18-23, Designation of Evidence Lease Exhibits A, B, and C

Chicago, 843 N.E.2d 830, 832-833 (Ind. Ct. App. 2006). To wit, summary judgment is only appropriate where the designated evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Id. at 833; Ind. Trial Rule 56(c). All facts and reasonable inferences are construed in favor of the non-moving party, and appellate review is limited to the materials designated to the trial court. Progressive Insurance Company v. Bullock, 841 N.E.2d 238, 240 (Ind. Ct. App. 2006).

ARGUMENT

I. By Drafting the Lease, and Accepting a Specific Amount of Money Referenced as a "Security Deposit" from [redacted], the Amount [redacted] Held – Regardless of Deeming it "Non Refundable" – is Subject to the Security Deposit Statute of I.C. § 32-31-3.

A. Paragraph 26 of the Lease listed the amount as the Security Deposit

The heart of [redacted]'s argument the trial court relied on was that the amount of money held as "non-refundable" was an amount [redacted] could not have reasonably expected to be returned to her. Therefore, the amount could not fit the statutory definition as found at I.C. § 32-31-3-9 as it fails to meet any of the definitions contained within this statutory provision.[2] This is incorrect for several reasons.

On at least five (5) different occasions, [redacted] referred to the fifty dollar amount-in-question as part of the security deposit.[3] That is, at the initial lease signing [redacted] was given the impression she was paying a security deposit to [redacted].[4] While it's true parties are presumed to understand documents on which they sign, "and cannot be released from the terms of a contract due to his or her failure to read the documents" (Robert's Hair Designers, Inc. v. Pearson, 780 N.E.2d 858, 869 (Ind. Ct. App. 2002)), this is far from the situation presently before this court. In fact, in some contract cases, contract terms are interpreted against the drafter of the contract. *See,*

[2] I.C. 32-31-3-9(a) defines a "security deposit" as being "a deposit paid by a tenant to the landlord or the landlord's agent to be held for all or part of the term of the rental agreement to secure performance of any obligation of the tenant under the rental agreement."

[3] *See* Appellant's App. p.18-23, Lease(s) A,B,C ¶ 26; Appellant's App. p.24. 26

[4] The exact language of the initial Lease states: "Tenant has given Landlord a security deposit in the amount of $99.00."

e.g., Eli Lilly and Co. v. Home Ins. Co,, 482 N.E.2d 467 (Ind. 1985) (addressing insurance contracts). If [redacted] did not intend for the fifty dollars to be part of the security deposit, it could have used demarcating language to clarify its wishes. Or it could have created a separate paragraph stating "Tenant agrees to give fifty dollars ($50.00) to Landlord for no express purpose or reason." Essentially, this is the equivalency of what the trial court has permitted, and one senses very few tenants would agree to such a term standing alone.

B. The Move-Out Checklist Cites the Specific Amount held as Non-Refundable as Being used to "Re-key Lock Per Lease Agreement."

Contrary to the conclusions of the trial court at Appellant's App. p.8, Ct. Order Conclusions ¶ 6, the fifty-dollar ($50.00) payment does in fact fulfill the statutory definition at I.C. § 32-31-3-9. Since [redacted] claims to have used the fifty dollars to "re-key lock per lease agreement," it has effectively held a portion of the security deposit for an obligation it claims [redacted] owed at the end of the lease term. [redacted] maintains present doubts her former dwelling was re-keyed, nor has [redacted] offered any evidence it actually did so; however, [redacted] represents to have used the money for an obligation arising from the Lease Agreement. It would be an absurd result if [redacted] could deduct money from a security deposit, use that money for an obligation it represents as being from a mutually-agreed upon Lease (even if their tenants, including [redacted], are unaware of it), then take refuge from its conduct and claim the LTRA doesn't apply when questioned on the statutory propriety of such actions.

Consider the following hypothetical if the trial court's ruling should stand: a landlord may accept a specific amount of money from a tenant and label it a security deposit. The tenant, perhaps unwittingly, may not see that all of which is labeled "non-refundable." At the end of the lease term, a landlord has a windfall profit - particularly if that landlord rents to multiple tenants.

Now consider if that same landlord finds damage to the dwelling. Not only would the landlord still have the sum originally collected as part of the security deposit, but it could also turn around and sue their tenant for the costs of the damages found by the authority that landlords also have under I.C. § 32-31-3, *et seq*. This is simply impermissible with the language

and intent behind the Act, and would render the LTRA a codification in name only for certain tenants.

For these reasons, the trial court erred when it concluded the primary purposes of the security deposit provision of the LTRA is to prevent landlords from "arbitrarily withholding from their tenants [sic] security deposits that the tenants reasonably expected to have returned at the end of their lease terms." Appellant's App. p.7. Ct. Order Findings ¶ 3. To the contrary, the Indiana Supreme Court stated the primary purpose of the LTRA's security deposit statute was "for the protection and benefit of tenants" against "*wrongful* withholding of the deposit by the landlord." Lae v. Housholder, 789 N.E.2d 481 (Ind. 2003) (emphasis added). [redacted] wrongfully withheld a portion of [redacted]'s deposit regardless of what she expected to be returned to her.

II. I.C. § 32-31-3-17 Expressly Forbids This Exact Conduct Regardless of the Parties' Agreement

The Indiana General Assembly addressed the situation created by [redacted], and expressly provided any waiver or attempts to get around the Security Deposit statute should and would be void.[5] Very little case law has, unfortunately, interpreted the application of I.C. § 32-31-3-17 to a specific lease – perhaps because no landlord or tenant have attempted to waive a designated statutory protection. It is worth noting "[t]he primary goal in statutory construction is to determine, give effect to, and implement the intent of the legislature. The best evidence of legislative intent is the language of the statute itself, and all words must be given their plain and ordinary meaning unless otherwise indicated by statute. It is just as important to recognize what the statute does not say as it is to recognize what it does say." Bailey v. Holliday, 806 N.E.2d 6 (Ind. Ct. App. 2004). Given the language of the statute itself, it appears the Indiana General Assembly was intent on protecting the disposition of a tenant's security deposit – particularly

[5] The precise language provides:

IC 32-31-3-17
Waiver of Chapter
Sec. 17. A waiver of this chapter by a landlord or tenant is void

against any attempts by a landlord to waive a tenant's statutory rights even with a tenant's willingness to do so.

In addition, this statutory codification harmonizes with the overriding purpose of the Security Deposit statute: namely that I.C. § 32-31-3-17 exists for the protection and benefit of the tenant. To wit, "the primary purpose of the security deposit statute is to equalize the bargaining position between the landlord and tenant that the legislature deemed unbalanced." *See* Lae, at 481. (See also Robinson v. Gazvoda, 783 N.E.2d 1245 (Ind. Ct. App. 2003)[, *trans. denied*] ("The overarching purpose of the statute is for the protection and benefit of tenants.")

Thus, by having [redacted] sign a Lease that specifically mandated a portion of her security deposit be partitioned as "non-refundable," [redacted] has effectively had [redacted] waive the Security Deposit statute contrary to I.C. § 32-31-3-17.

III. Re-Keying a Lock, Absent an Agreement, is not Actual Damage Under I.C. § 32-31-3-13

Since a tenant cannot contract around their statutory right, the trial court also erred by not finding [redacted]'s alleged use of the amount in question contrary to I.C. § 32-31-3-13.[6] By using a portion of [redacted]'s security deposit to re-key a lock, [redacted] did not use [redacted]'s deposit to correct "actual damages." Thus, by representing to [redacted] this deduction was used for a certain damage agreed-to in the original Lease,[7] [redacted] itemized a damage that the security deposit may not statutorily be used in violation of I.C. § 32-31-3-14[8] which, as a consequence, civilly implicates

[6] IC 32-31-3-13
Use of deposits
Sec. 13. A security deposit may be used only for the following purposes:
(1) To reimburse the landlord for actual damages to the rental unit or any ancillary facility that are not the result of ordinary wear and tear.
(2) To pay the landlord for:
(A) all rent in arrearage under the rental agreement; and
(B) rent due for premature termination of the rental agreement by the tenant.
(3) To pay for the last payment period of a residential rental agreement if a written agreement between the landlord and the tenant stipulates that the security deposit will serve as the last payment of rent due.
(4) To reimburse the landlord for utility or sewer charges paid by the landlord that are:
(A) the obligation of the tenant under the rental agreement; and
(B) unpaid by the tenant

[7] *See* Appellant's App. p.24 Move-out Checklist (last line), *cf.* Appellant's App. p.18-23 (Exhibits A, B, C)

[8] IC 32-31-3-14
Notice of damages; refund of remaining deposits
Sec. 14. Not more than forty-five (45) days after the termination of occupancy, a landlord shall mail to a tenant an itemized list of damages claimed for which the security deposit may be used under section 13 of this chapter. The

[redacted] under I.C. § 32-31-3-16.[9]

In Castillo-Cullather v. Pollack, 685 N.E.2d 478 (Ind. Ct. App. 1997), this very Court addressed certain items being itemized as "damage" that the tenant would later dispute as being merely "ordinary wear and tear" deducted contrary to I.C. § 32-31-3-13.[10] The tenant, Castillo-Cullather, sued her landlord, Pollack, after Pollack sent her an itemized list of damages that included things like "painting," "carpet cleaning," and "general cleaning." Id. at 482.

This Court ruled against the tenant, finding because she had signed a lease that created an "objective standard to determine the condition of the apartment upon termination of the lease" and contractually allocated which "party should bear responsibility for the varius costs associated with cleaning and repairing the premises," the Landlord did not violate the LTRA. Id. at 483. In other words, the parties were freely entitled to bargain what constituted "ordinary wear and tear." Id. The Court noted the ruling "was consistent with the long standing policy in the State allowing parties the freedom to contract." Id. And concluded its decision by finding their holding ultimately benefited the tenants: "by requiring compliance with the Security Deposit statute while allowing the parties the flexibility to define "ordinary wear and tear," the tenant is not only informed of the landlord's reasons for making deductions from the rental agreement, but also provided with an objective standard to determine if the landlord's deductions are justified." Id. at 484.

In the present, [redacted]'s circumstances are highly distinguishable from the facts of Castillo-Cullather. First, and most importantly, there was no mutual understanding that [redacted] and [redacted] agreed "re-keying a lock" would be considered "ordinary wear and tear" in the initial Lease. It

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list must set forth:

(1) the estimated cost of repair for each damaged item; and

(2) the amounts and lease on which the landlord intends to assess the tenant.

The landlord shall include with the list a check or money order for the difference between the damages claimed and the amount of the security deposit held by the landlord

[9] IC 32-31-3-16

Liability for withheld deposits

Sec. 16. A landlord who fails to comply with sections 14 and 15 of this chapter is liable to the tenant in an amount equal to the part of the deposit withheld by the landlord plus reasonable attorney's fees and court costs

[10] At the time of Castillo-Cullather v. Pollack, the codification of the LTRA was at Ind. Code § 32-7-*et seq*. (no substantive changes have been made in the LTRA's recodification)

simply says "non-refundable." This is hardly creating an "objective standard" for which [redacted]'s deduction was justified. Even if there were a mutual understanding, however, the dispute would still exist on whether a functioning lock re-keyed – unlike painting and cleaning – could constitute "ordinary wear and tear." And if it were, the burden is on [redacted] to prove it actually re-keyed the lock like its checklist states.

Secondly, [redacted] created the impression [redacted] did agree to the deduction by sending an itemized list that stated fifty dollars ($50.00) was deducted "per the Lease Agreement." The very realm of contract law would implode if one party could unilaterally inject a term at the end of a contract period that the other party is required to submit to after the matter. Whereas the tenant in Castillo-Cullather agreed to the terms beforehand (that she would later dispute in court), [redacted] was never given that consideration.

Lastly, a tenant and landlord may contract within the Security Deposit statute to create an "objective standard" both parties may use, but certainly this must be distinguished from parties contracting outside of the Security Deposit statute - which is, simply put, what [redacted] and [redacted] did. For this reason, [redacted] deducted money from [redacted]'s security deposit for a use disallowed by I.C. § 32-31-3-13.

IV. A Tenant Lacks the Requisite Intent to Gift Money to a Landlord

Assuming the arguments above are unpersuasive, that a landlord and tenant in Indiana may not only contract per the LTRA and the provisions therein, but may also contract around or outside of it as well, an interesting legal environment is therefore created between landlord and tenant.

With respect to [redacted] and [redacted], and theoretically all of [redacted]'s tenants subject to such security deposit-language, this kind of transfer of money would then effectively be an *inter vivos* gift made to the sole benefit of [redacted].

If that be the case, the question turns to whether a tenant has the donative intent required to make such gifts to one's landlord.

In Indiana, "a valid inter vivos gift - i.e., an absolute gift - occurs when: (1) the donor intends to make a gift; (2) the gift is completed with nothing left undone; (3) the property is delivered by the donor and accepted by the donee; and (4) the gift is immediate and absolute." Fowler v. Perry, 830 N.E.2d 97 (Ind. Ct. App. 2005).

[redacted] did not intend to simply give [redacted] money, nor did she do so with immediacy and absolution. For this reason, her gift should be returned to her as should any other tenants and the gifts they gave to [redacted] under comparable circumstances. In addition, the Lease by which [redacted] may claim rights to the gift must be construed as a donative instrument. If so, terms must be unambiguous so as to give effect to the donor's full intention. *See* University of Southern Indiana Foundation v. Baker, 843 N.E.2d 528 (Ind. 2006). If terms are ambiguous or unclear – that is, "reasonable people could come to different conclusions as to its meaning" – they may be deemed patent or latent and extrinsic evidence may be admitted to give clarity to the donor's intention. Id. at 534. No such extrinsic evidence is required beyond what's been designated by the trial court as evidence, as it's clear from the four corners of all Exhibits that [redacted] and [redacted] had neither the donative intent to give, nor the requisite capacity to accept, the fifty dollars as a gift.

Reasonable minds may differ on the interpretation of "non-refundable" as intending/meaning a gift of the amount listed as much. Absent a showing of the fifty dollars actually being used to re-key [redacted]'s lock – and a showing such may be used as "actual damage" – the amount is an invalid gift returnable to [redacted].

CONCLUSION

For the foregoing reasons, [redacted] respectfully requests that this Court reverse the trial court's judgment and grant summary judgment on counts I and II of the [redacted]'s initial class action complaint for the appellant-plaintiff.

Respectfully submitted,

_____

Adam D. Dolce

Counsel for Appellant

WORD COUNT CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellant[s]' complies with Indiana Appellate Rule 44 word limitation in that it contains no more than 14,000 words.

Respectfully Submitted,

_____

Adam D. Dolce

Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant Brief was duly served, by first class mail, postage prepaid, on this _____ of _____, 20[redacted] to the following:

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