STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
Appeal No. 2013AP002207

Milwaukee City Housing Authority,

Plaintiff-Respondent,

v.

Felton Cobb,

Defendant-Appellant,

APPEAL FROM A DECISION AND ORDER BY THE
MILWAUKEE COUNTY CIRCUIT COURT
THE HON. PEDRO COLON
CIRCUIT COURT CASE NO: 2013SC020628

BRIEF OF DEFENDANT-APPELLANT FELTON COBB

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STATEMENT OF ISSUES PRESENTED

Does the right-to-remedy termination notice requirement in Wis. Stat. § 704.17(2)(b) apply when a public housing authority alleges that a tenant engaged in drug related criminal activity?

The Circuit Court answered no.

Does the clear, satisfactory and convincing burden of proof apply in eviction cases when the plaintiff alleges criminal activity as its grounds for terminating tenancy?

The Circuit Court answered no.

Is testimony that the smell of marijuana was stronger at the defendant's apartment door sufficient evidence to prove that the defendant "engaged in drug related criminal activity," as that phrase is defined by federal law?

The Circuit Court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary in this case, as the issues are straightforward and the facts are uncomplicated. Publication of the Court's decision, however, will clarify existing Wisconsin law regarding the interplay of federal housing regulations and state landlord/tenant law. *See* § 809.23(1)(a)1, 5. Evictions from public housing for alleged criminal activity are common, and the correct termination notice and standard of proof are issues fundamental to the proper administration of justice.

STATEMENT OF THE CASE

This is an eviction action. The tenant, Felton Cobb, appeals the circuit court's entry of a Judgment of Eviction and issuance of a Writ of Restitution, entered on September 17, 2013. He further appeals the circuit court's denial of his Motion to Reconsider, which was also entered on September 17, 2013.

Felton Cobb is a sixty-two-year old disabled public housing tenant at Merrill Park, one of the Housing Authority of the City of Milwaukee's (HACM's) mid-rise complexes for the elderly and single disabled adults. **(**R. at 18-9 & 10,

App. at A-64&65) He occupies his apartment pursuant to a lease for one year. (R. at 6-8, App. at A-75) HACM filed this eviction action against Mr. Cobb on July 18, 2013, alleging that Mr. Cobb breached his lease by engaging in drug related criminal activity. (R. at 2-1 & 2-3) The allegations stem from an incident on June 5, 2013, when HACM Public Safety Officer James Darrow smelled marijuana while on routine patrol at Merrill Park. (R. at 6-3&4, App. at A-70-72) Officer Darrow believed the smell was coming from Mr. Cobb's apartment, so he knocked on Mr. Cobb's door. *Id.* Mr. Cobb opened the door slightly and answered Officer Darrow's questions. *Id.* Officer Darrow did not believe Mr. Cobb's explanations for the smell. *Id.* Mr. Cobb refused to allow Officer Darrow to search his apartment. *Id.* Officer Darrow did not observe Mr. Cobb using or possessing marijuana. (R. at 17-39, L. 10-16, App. at A-39)

Officer Darrow did not contact the police or engage in any further investigation. (R. at 17-42, L. 20-25, App. at A-42) On June 9, 2013, he issued a Lease Violation Notice against Mr. Cobb for "illegal drug use" and "not cooperating with Public Safety." (R at.6-7, App. at A-74) On June 26,

2013, HACM's attorney issued a 14-Day Notice to Tenant Terminating Tenancy which alleged that Mr. Cobb had engaged in drug related criminal activity. (R. at 6-3&4, App. at A-70-71) This eviction action followed.

Mr. Cobb's attorney filed a Motion to Dismiss on the Pleadings, arguing first, that the evidence of the factual allegations would be insufficient as a matter of law to prove that Mr. Cobb engaged in drug related criminal activity. (R. at 5-1). Second, the motion to dismiss argued that HACM had failed to terminate Mr. Cobb's tenancy because HACM had failed to serve Mr. Cobb with a right-to-remedy termination notice, as required by Wis. Stat. § 704.17(2)(b). *Id.*

The Motion to Dismiss was heard by the Honorable Pedro Colon on August 20, 2013. Mr. Cobb's attorney argued that even if all of the facts alleged in HACM's pleadings were true, HACM lacked sufficient evidence to prove by a preponderance of the evidence that Mr. Cobb engaged in drug related criminal activity as defined by federal law. (R. at 17-25, L. 13-18, App. at A-25) The parties also argued over whether HACM had to serve a right-to-remedy

notice pursuant to Wis. Stat. § 704.17(2)(b). (R. 17-8 - 17-15, App. at A-8-15) The circuit court denied that portion of the motion regarding the sufficiency of the evidence but held open the termination notice issue for further consideration. (R. at 17-23, L. 23-25, App. at A-23)

The circuit court held a trial. HACM offered as evidence only Officer Darrow's testimony and his written report of the incident. (R. 17-29 – 17-43, App. at A-29-43) Mr. Cobb renewed his motion to dismiss based on the insufficiency of the evidence, which Judge Colon again denied. (R. 17-43 – 17-45, App. at A-43-45)

Judge Colon stated that he needed testimony controverting Officer Darrow's testimony in order to dismiss the case. (R. 17-44&45, App. at A-44-45) The defendant took the stand and testified that he had not engaged in drug related criminal activity on the day alleged. (R. 17-46, L. 6-10, App. at A-46)

Following the defendant's testimony, Judge Colon determined that the evidence was sufficient to find that Mr. Cobb engaged in drug related criminal activity. (R. 17-51 – 17-53, App. at A-51-53) The court did not enter judgment and

issue a writ, however, because it had not made a determination regarding the validity of the termination notice. (R. at 17-54, App. at A-54)

Before the hearing on the issue of whether HACM had terminated Mr. Cobb's tenancy, Mr. Cobb moved for reconsideration of the sufficiency of the evidence, arguing explicitly that the proper burden of proof in civil cases alleging criminal activity is the clear, satisfactory and convincing standard. (R. at 9-1 – 9 -18) HACM responded that its evidence met both standards. (R. at 10-1 – 10-39)

At the post-trial hearing held on September 17, 2013, the court denied Mr. Cobb's motion to reconsider. (R. at 18-7, L. 13-23, App. at A-62). The court specifically stated that it was not applying the clear and convincing burden of proof, but affirmed its earlier finding that the evidence was sufficient to find that Mr. Cobb had engaged in drug related criminal activity. *Id.* Additionally, the circuit court held that because HACM alleged that Mr. Cobb engaged in criminal activity, a right-to-remedy notice as provided in Wis. Stat. § 704.17(2)(b) was not required. (R. at 18-2 – 18-4, App. at A-

57-59) The circuit court explained its reasoning on this issue as follows:

> And the one issue I did not rule on and the reason we are back is to determine whether he has a right to cure under state law. After examining *Rucker* and *Scarborough*, both cases find that there doesn't have to be a cure once criminal activity is found. There is - - the notice is moot. I believe it was *Scarborough* out of the Washington circuit in which essentially the same - - there was essentially the same fact pattern in that there was some criminal activity. Admittedly that was a homicide, and admittedly that was for a big shotgun that she had in her apartment. That is the tenant in that case.
>
> However, in that case the tenant argued that they had a claim to - - to the statutory cure requirement based on DC code, District of Columbia code. Similarly I think it was *Rucker* that was out of Oakland where a group of essentially tenants in public housing - - I believe it was a different kind of public housing, but it was public housing, engaged in drug activity of various kinds, some out in the parking lot, others in their apartments and drug was found in one of the apartments.
>
> The tenant indicated that - - that she should have been given a right to cure based on that fact that she did not know that the drugs were there. The Court also rejected that.
>
> So, to that extent I think in this case there is a case in Wisconsin by the Supreme Court which indicates that the odor of marijuana is - - can lead to reasonable suspicion of criminal activity. I believe it's Justice Crooks. I have read it in the past, but it's consistent with the finding of this Court that marijuana smell is - - could be an inference of illegal criminal activity.

(R. at 18-3&4, App. at A-58-59) The circuit court entered a Judgment of Eviction and issued a Writ of Restitution, which

it then stayed for thirty days pursuant to Wis. Stat. § 799.44(3). (R. at 18-7 – 18-11, App. at A-62-66). On October 1, 2013, Mr. Cobb timely filed the Notice of Appeal. (R. at 15-1)

STANDARD OF REVIEW

Whether federal law preempts state law is a question of federal law that the appellate court reviews independently. *Int'l Ass'n of Machinists & Aerospace Workers v. U.S. Can Co.*, 150 Wis. 2d 479, 487, 441 N.W.2d 710 (1989).

A trial court's denial of a motion for reconsideration is reviewed using the erroneous exercise of discretion standard. *Koepsell's Olde Popcorn Wagons, Inc. v. Kopesell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 6, 275 Wis. 2d 397, ¶ 6, 685 N.W.2d 853, ¶ 6. However, determining the appropriate evidentiary burden is a question of law reviewed independently on appeal. *Town of Schoepke v. Rustick*, 2006 WI App 222, ¶ 5, 296 Wis. 2d 471, ¶ 5, 723 N.W.2d 770, ¶ 5.

A circuit court's findings of fact will be set aside only if the findings are clearly erroneous, but whether the facts fulfill a particular legal standard and whether a party has met

the required burden of proof are matters of law reviewed de novo. *Nottelson v. DILHR*, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (Wis. 1980), *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988).

ARGUMENT

I. Wis. Stat. § 704.17(2)(b) required HACM to serve Mr. Cobb with a right-to-remedy termination notice, and that requirement is not preempted by federal law.

A. Wisconsin law required HACM to serve Mr. Cobb a termination notice providing a right to remedy.

Under Wisconsin law, the proper (and only) way for a landlord to terminate a tenancy under a lease for one year for a breach of the lease is explained in Wis. Stat. § 704.17(2)(b), which states:

> [t]he tenant's tenancy is terminated if the landlord gives the tenant a notice requiring the tenant **to remedy the default** or vacate the premises on or before a date at least 5 days after the giving of the notice, **and if the tenant fails to comply with such notice**. A tenant is deemed to be complying with the notice if promptly upon receipt of such notice the tenant takes **reasonable steps to remedy the default and proceeds with reasonable diligence,** . . . If within one year from the giving of the notice, the tenant again commits waste or breaches the same or any covenant or condition of the tenant's lease, other than for payment of rent, the tenant's tenancy is terminated if the landlord, prior to the tenant's remedying the waste or breach, gives the tenant notice to vacate on or before a date at least 14 days after the giving of the notice.

Wis. Stat. § 704.17(2)(b). (Emphasis added).

Thus, a landlord's first tenancy termination notice to a tenant with a one-year lease must be a right-to-remedy notice, allowing the tenant to stay if he remedies the default alleged in the notice. Wisconsin law also prohibits any provision in a one-year lease that is contrary to Wis. Stat. § 704.17. *See* Wis. Stat. § 704.17(5).

Further, Wisconsin courts have long required landlords to strictly adhere to statutory termination notice requirements before filing an eviction. In *Hartnip v. Fields*, for example, the Supreme Court found that the trial court had no jurisdiction over an unlawful detainer action in which the complaint failed to adequately allege that "there was in fact and in law an effective termination of tenancy." 247 Wis. 473, 19 N.W.2d 878, 879 (Wis. 1945). Specially, the Court found the complaint defective because it did not allege that the notice terminated the tenancy at the end of the rental period. *Id.*

In *Tower Building Company v. Andrew*, the Supreme Court dismissed an unlawful detainer action where the

landlord had used the wrong type of termination notice for non-payment of rent. 191 Wis. 269, 210 N.W. 842 (1926). Affirming the trial court's dismissal of the action, the court held that a landlord must strictly comply with statutory notice requirements, stating "[w]hen one... seeks to invoke the summary remedy provided by the unlawful detainer action, he must bring himself within its terms." *Id.* at N.W. 844. The court rejected the landlord's argument that he should be permitted to proceed under the defective notice because the lease, by its own terms, "expired" when the tenant failed to pay rent, and thus the tenant was holding over after expiration of the lease. The court refused to permit the landlord to circumvent the strict notice requirements by redefining one type of breach as another. *Id.* at N.W. 844. More recently, Wisconsin's Supreme Court has again confirmed that landlords must serve "proper" termination notices to avail themselves of summary eviction proceedings. *Scalzo v. Anderson*, 87 Wis. 2d 834, 848, 275 N.W.2d 894, 899 (Wis. 1979). Therefore, an eviction action may not be commenced against a tenant whose tenancy was not properly terminated. Wis. Stat. § 799.40(1).

There is no dispute in this case that HACM, however, did not serve Mr. Cobb with a § 704.17(2)(b) notice. The first and only termination notice HACM served on Mr. Cobb require him to "quit, remove from and deliver up" his apartment on or before July 14, 2013, notifying Mr. Cobb that his tenancy was "hereby terminated." (R. at 6-3&4, App. at 70-71) HACM's termination notice did not give Mr. Cobb an opportunity to remedy the alleged breach of the lease. Therefore, HACM did not comply with Wis. Stat. § 704.17(2)(b).

Having failed to properly terminate Mr. Cobb's tenancy pursuant to Wisconsin law, HACM lacked the right to repossess Mr. Cobb's apartment by filing an eviction action. Wis. Stat. § 799.40(1)(2011-12). Under Wisconsin law, the circuit court lacked the capacity to proceed. *Id.*, *see also Tower Building Co. v. Andrew,* 191 Wis. 269, 274, 210 N.W. 842, 844 (1926).

B. Federal law does not preempt Wis. Stat. § 704.17(2)(b).

B.1. Introduction

Evictions from federally funded public housing involve the application of both federal and state law.

Pursuant to the Supremacy Clause of the Constitution of the United States, federal law preempts conflicting state law. (U.S. Const. art. VI). In this case, the circuit court found that a federal public housing statute, 42 U.S.C. § 1437d(*l*), preempts Wis. Stat. § 704.17. Specifically, the circuit court found that when a public housing authority alleges criminal activity, it need not serve a right-to-remedy notice. (R. at 18-2 – 18-4, App. at A57-59) Contrary to the circuit court's holding, however, there is no indication of Congressional intent to preempt state termination notice requirements.

There are three ways federal law might preempt state law. Express preemption results when Congress explicitly states its intent to preempt state law. Field preemption results if Congress implicitly indicates its intent to preempt by occupying an entire field of law. The third kind of preemption is conflict preemption. *Miller Brewing Co. v. Dept. of Industry and Labor*, 210 Wis.2d 26, 34, 563 N.W.2d 460 (1997). Conflict preemption arises when "compliance with both the federal and state laws is a physical impossibility or when a state law is a barrier to the accomplishment and execution of Congress' objectives and purposes." *M & I*

Marshall & Ilsley Bank v. Guaranty Financial, MHC, 2011 WI App 82, ¶ 25, 334 Wis. 2d 173, ¶ 25, 800 N.W.2d 476, ¶ 25. The party claiming preemption bears the burden of establishing it. *Miller Brewing Co.*, 210 Wis. 2d at 35.

B.2. Federal law does not explicitly preempt Wis. Stat. § 704.17(2)(b).

The statute at issue, 42 U.S.C. § 1437d(*l*), does not explicitly preempt the notice requirements in Wis. Stat. § 704.17. It provides in relevant part that public housing authorities:

> [s]hall utilize leases which . . . provide that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

42 U.S.C. § 1437d(*l*)(6).

Referring to termination notice requirements, it provides only that the public housing agency is required to give "adequate written notice of termination of the lease which shall not be less than a reasonable period of time, but not to exceed 30 days in the event of any drug-related or violent criminal activity or any felony conviction." 42 U.S.C.

§ 1437d(l)(4)(A)(ii). Thus, the statute requires public housing leases to put tenants on notice that they are in breach if they or their guests engage in drug related criminal activity. It also ensures that tenants receive an adequate, written termination notice. Neither the statute nor its implementing regulations explicitly preempt state law requiring a right-to-remedy termination notice. *Id.*, see also 24 C.F.R. § 966.4(*l*)(3)(iii).

The most telling evidence that Congress did not expressly preempt state law notice procedures for terminating tenancies is that throughout 42 U.S.C. § 1437d(*l*), when Congress intended to preempt state law, it stated its intention. Congress expressly preempted state law with the language "notwithstanding any State law." The sub-paragraph (7) language reads:

> (*l)* Leases; terms and conditions; maintenance; termination: Each public housing agency shall utilize leases which
>
> ***
>
> (7) specify that with respect to any notice of eviction or termination, notwithstanding any State law, a public housing tenant shall be informed of the opportunity, prior to any hearing or trial, to examine any relevant documents, records, or regulations directly related to the eviction or termination.

42 U.S.C. § 1437d(*l*)(7). Thus, even if a state law would permit summary eviction without requiring public housing authorities to grant access to relevant documents, federal law requires such access and expressly preempts any contrary state law.

And, sub-paragraph (6), the same sub-paragraph at issue in this case, provides:

> (B) notwithstanding subparagraph (6)(A) or any Federal, State, or local law to the contrary, a public housing agency may bifurcate a lease under this section, or remove a household member from a lease under this section, without regard to whether a household member is a signatory to a lease, in order to evict, remove, terminate occupancy rights, or terminate assistance to, any individual who is a tenant or lawful occupant and who engages in criminal acts of physical violence against family members or others, without evicting, removing, terminating assistance to, or otherwise penalizing the victim . . .

42 U.S.C. § 1437d(*l*)(6)(B). Thus, even if a state law would prohibit bifurcating the lease of a domestic violence perpetrator and victim, federal law preempts that prohibition.

In contrast, Congress did not use the "notwithstanding state law" language when it referred to drug related criminal activity or termination notice requirements. *See* 42 U.S.C. § 1437(d)(*l*)(6) & 42 U.S.C. § 1437d(*l*)(4)(A). Instead,

Congress simply stated that engaging in drug related criminal activity, on or off the public housing premises, is grounds for termination of tenancy. 42 U.S.C. § 1437d(*l*)(6). Non-payment of rent and other serious or repeated violations of the lease are also listed as potential grounds for termination of tenancy, and adequate notice requirements for those potential allegations are also provided. 42 U.S.C. § 1437d(*l*)(4)(B)&(C) & 42 U.S.C. § 1437d(*l*)(5). Further, the implementing regulations list criminal activity as one of at least eight "grounds for termination of tenancy." *See* 24 C.F.R. § 966.4(*l)*(2). Therefore, that language cannot form the basis for a finding that Congress expressly preempted state termination notice requirements only when the alleged ground for termination is criminal activity.

B.3. Congress did not intend to occupy the entire field of tenancy termination notice requirements and public housing eviction procedures.

As this Court has previously stated, "[f]ederal and local governments often share the regulation of areas and activities, unless there is a clear and manifest congressional indication of an intent to preempt the field." *State v. St. Croix County*, 2003 WI App 173, ¶10, 266 Wis. 2d 498, 668

N.W.2d 743. The federal government intended to share the field of regulating public housing evictions with state governments. In fact, 42 U.S.C. § 1437d's implementing regulations specifically provide that a notice to vacate which is required by State or local law may be combined with, or run concurrently with the federally required termination notice. 24 C.F.R. § 966.4(*l*)(3)(iii); *see also* 24 C.F.R. § 966.4(*l)*(4) (providing that a tenant may be evicted by bringing an administrative action if *the law of the jurisdiction* permits eviction by administrative action (emphasis added)). Congress did not intend to replace Wisconsin's eviction procedural requirements with its own, and field preemption does not apply in this case.

B.4. Federal law does not conflict with Wis. Stat. § 704.17(2)(b).

Contrary to the circuit court's holding, Wisconsin's right-to-remedy termination notice does not conflict with 42 U.S.C. § 1437d(*l*).

Conflict preemption arises when "compliance with both the federal and state laws is a physical impossibility or when a state law is a barrier to the accomplishment and execution of Congress' objectives and purposes." *M & I*

Marshall & Ilsley Bank v. Guaranty Financial, MHC, 2011 WI App 82, ¶ 25, 334 Wis. 2d 173, ¶ 25, 800 N.W.2d 476, ¶ 25. As described above, it is not physically impossible to comply with both federal and state termination notice requirements, and, in fact, the federal law specifically contemplates compliance with both. 24 C.F.R. § 966.4(*l*)(3)(iii).

Further, there is a strong presumption against preemption. *See Miller Brewing Co. v. Dep't of Indus., Labor, & Human Relations*, 210 Wis. 2d 26, ¶ 12, 563 N.W.2d 460, ¶ 12 (Wis. 1997); *State v. St. Croix County*, 2003 WI App 173 ¶ 10, 266 Wis. 2d 498, ¶10, 668 N.W.2d 743, ¶10. The presumption against preemption is particularly strong when applied to a field which the States have traditionally occupied. *Miller*, 201 Wis. 2d at 35. It is indisputable that States have traditionally occupied the field of tenancy termination notice requirements.

The Kentucky Court of Appeals applied this strong presumption against preemption by enforcing a public housing lease provision that required a right-to-remedy notice for drug-related criminal activity, noting that a right-to-

remedy provision was not in conflict with federal law. *Housing Authority of Covington v. Turner* , 295 S.W.3d 123, 127 (Ky. Ct. App. 2009). In *Turner*, the state appellate court began its inquiry with a reminder that there is a presumption against preemption in dealing with invasions into the traditional powers of the states, such as landlord/tenant law. 295 S.W.3d 123, 127 (Ky. Ct. App. 2009). Importantly, the Kentucky court disagreed that the right to remedy a drug-related violation of a lease defeats the purpose of the same federal statute at issue in this case, stating:

> In its well-reasoned opinion, the circuit court applied judicial common sense and concluded the right to remedy may further the objective of discouraging illegal drug use on public housing premises. We quote: '[R]ather than the provision of an opportunity to remedy being an obstacle to the purposes and objectives of the Anti-Drug Activity law, a tenant who has been served with notice of the intent to evict has clear knowledge of the provision, and having been given the opportunity to remedy may be among the most likely of tenants to prevent the situation from recurring, thereby furthering the purpose of and objectives of the law.

Id. at 127. The *Turner* court found the right to remedy consistent with the Department of Housing and Development's (HUD) polices and prior holdings of the United States Supreme Court. *Id.* at 127.

The circuit court in this case, however, chose to disregard the Kentucky Court of Appeal's decision. The circuit court instead relied on a Court of Appeals of the District of Columbia case which held that D.C.'s unlimited 30-day right-to-cure notice provision could not be imposed consistently with the purpose and language of 42 U.S.C. § 1437d(*l*)(6). *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments*, 890 A. 2d 249 (D.C. 2006). In *Scarborough*, the D.C. court affirmed a subsidized housing eviction, finding Ms. Scarborough responsible for the presence in her apartment of a loaded, unregistered, 12-gauge shotgun that had been used in a fatal shooting, in her apartment, the previous day. 890 A. 2d 249, 251.

Scarborough is not precedent for this Court, but based on the difference in facts and law, it is also distinguishable. The facts of Mr. Cobb's case are very different from the facts in *Scarborough.* The *Scarborough* court was, understandably, preoccupied with the threat the unregistered firearm posed to other tenants after it had been used in a fatal shooting in the apartment. *See*, 890 A.2d 257, n. 9, *see also* at 251, 253, 256 (noting the danger posed to other tenants).

In Mr. Cobb's case, however, the only facts alleged are that a public safety officer believed he smelled marijuana. This case does not involve guns, violence, death, or a threat to the health and safety of other Merrill Park tenants.

More importantly, the D.C. Code at issue in *Scarborough* required a 30-day notice to correct an alleged breach, with no apparent limit in how often a tenant must be given the opportunity to correct an alleged breach before the landlord might initiate an eviction action. *Scarborough*, 890 A.2d at 253. Unlike the District of Columbia, Wisconsin places a strict limit on the right to remedy, providing only a short, five-day cure period and allowing a tenant only one chance to cure within a year. Wis. Stat. § 704.17(2)(b). If a tenant does not take reasonable steps to remedy the alleged behavior within five days, an eviction can be filed. *Id.* If a tenant cures the behavior, but breaches the lease again within twelve months of the 5-day-right-to-cure notice, a fourteen-day notice with no right to cure will validly terminate the tenancy. *Id.* Thus, Wisconsin's right to remedy does not pose the same potential for repeat offending that the D.C. law posed.

In addition to *Scarborough* , the circuit court referred to the Supreme Court of the United States' decision in *Department of Housing and Urban Development v. Rucker*. 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258. In *Rucker*, the Supreme Court of the United States held that tenants may be evicted from their federally subsidized apartments for the criminal actions of their guests or household members, even if the tenants were unaware that their guests or household members were committing crimes. *Id.* at 129. Unlike *Scarborough*, *Rucker* is controlling law. Contrary to the circuit court's reasoning, however, *Rucker* is inapplicable to this case. *Rucker* was not a preemption case; the Court was interpreting the plain language of 42 U.S.C. § 1437d(*l*)(6) in the context of federal claims brought by public housing tenants. 535 U.S. at 129. *Rucker* does not stand for the proposition that 42 U.S.C. § 1437d(*l)*(6) preempted state termination notice requirements.

Based on *Scarborough* and *Rucker*, however, the circuit court in this case found that a housing authority need not serve a right-to-remedy notice once "criminal activity is found." (R. at 18-3, L. 1-5, A-58) In support of this

proposition, much is made by HACM of the fact that HUD referred to 42 U.S.C. § 1437d(*l*)(6) as creating a "one-strike and you're out policy**."** (R. at 10-9, App. at A-93) There can be no doubt that Congress intended to send a message and put drug dealers and violent gang members on notice that drug crime and violent crime would not be tolerated in public housing.

The "one strike" policy guide that HUD issued after passage of 42 U.S.C. § 1437d(*l*)(6), however, unambiguously states that tenants can rely on additional procedural rights provided by their respective states. The policy provides:

> State or local law governing eviction procedures may give tenants procedural rights in addition to those provided by federal law. Tenants may rely on those state or local laws so long as they have not been preempted by federal law.

(R. at 10-19, App. at A-103) Further, years after the policy was issued, and in direct response to the Court's decision in *Rucker*, then HUD Secretary Mel Martinez sent a letter to housing authorities, advising, "[e]viction should be the last option explored, after all others have been exhausted." (R. at 6-18, App. at A-85) Given HUD's policy statement regarding the application of state eviction procedural protections and

HUD's stated intent to minimize evictions, Wis. Stat. § 704.17(2)(b) cannot be said to obstruct Congress' intentions and purpose.

As early as 1972, Wisconsin's Supreme Court stated, "[e]viction is hardly consistent with public interest in providing housing for low income persons." *Hous. Authority of the City of Milwaukee v. Mosby*, 53 Wis. 2d 275, 284, 192 N.W.2d 913, 917 (Wis. 1972). Wisconsin's right to remedy does not require housing authorities to tolerate gangs or drug houses. Wisconsin permits landlords to evict tenants without a right-to-remedy notice when the police have determined that the tenancy results in a gang or drug nuisance. Wis. Stat. § 704.17(2)(c). Otherwise, a tenant gets one warning to remedy a breach within five days, and a future violation results in eviction. *See* Wis. Stat. § 704.17(2)(b). Meanwhile, the tenant must take reasonable steps to eliminate the problem. Reasonable steps would seemingly include ceasing the activity, removing offending people or things, or seeking treatment, if necessary.

The purpose of the public housing program is to remedy the unsafe and unsanitary housing conditions and the

acute shortage of decent, safe and sanitary dwellings for families of lower income. 42 U.S.C. § 1437. Surely, Wisconsin's 5-day right to remedy cannot be said to undermine the purposes and objectives of public housing. Instead, the right to remedy promotes housing stability for families and individuals who cannot afford private market housing, helping to fulfill public housing's promise.

Wisconsin courts are warned not to seek out conflicts between federal and state law unless conflict clearly exists. *State v. St. Croix County*, 2003 WI App 173, ¶ 10, 266 Wis. 2d 498, 668 N.W.2d 743. Further, Wisconsin law absolutely requires a landlord to serve statutory compliant notices terminating tenancy if that landlord wishes to commence summary eviction proceedings. E.g., *Hartnip v. Fields*, 247 Wis. 473, 19 N.W.2d 878 (1945), Wis. Stat. § 704.17(2)(b), Wis. Stat. § 799.40(1). Therefore, Mr. Cobb respectfully requests reversal and dismissal of the eviction action.

II. The clear, satisfactory and convincing burden of proof applies in eviction cases when the complaint alleges criminal activity, and it was reversible error not to apply it in this case.

As a general rule, the clear, satisfactory and convincing burden of proof is applied in civil cases involving allegations

of fraud or criminal behavior. *Kuehn v. Kuehn*, 11 Wis. 2d 15, 26-27, 104 N.W.2d 138, 145 (Wis. 1960), *Trzebietowski v. Jeresk*i, 159 Wis. 190, 193, 149 N.W. 743, 744 (Wis. 1914) (applying the higher evidentiary burden when plaintiff was suing for damages following the rape and battery of his daughter), *Klipstein v. Raschein*, 117 Wis. 248, 252, 94 N.W. 63, 65 (Wis. 1903), *Town of Schoepke* at ¶ 12-14, *see also* Wis. JI-CIVIL 205 p. 2. The Supreme Court of Wisconsin has held for more than one hundred years that "a greater degree of certainty as to the existence of facts required to make out the plaintiff's case is necessary . . . especially where the charge is such as, if true, would indicate that he committed a criminal offense of some character . . ." *Klipstein v. Raschein,* 117 Wis. 248, 252, 94 N.W. 63, 65 (Wis. 1903). Also known as the middle burden, the clear, satisfactory, and convincing burden applies in these cases because public policy requires a higher burden of proof than the preponderance of the evidence standard. *Town of Schoepke v. Rustick*, 2006 WI App 222, ¶ 11, 296 Wis. 2d 471, ¶ 11, 723 N.W.2d 770, ¶ 11. Cases involving allegations of criminal activity involve "moral turpitude" and "one ought not to be found guilty of moral turpitude except upon a

greater quantum of proof than is necessary in ordinary civil actions." *Lang v. Oudenhoven*, 213 Wis. 666, 668, 252 N.W. 167, 167-68 (Wis. 1934).

The clear, satisfactory and convincing burden of proof should have applied in this case because HACM alleged Mr. Cobb engaged in criminal activity. (R.at 2-4). HACM did not allege that Mr. Cobb was somehow, vaguely involved with drugs, or that Mr. Cobb smelled like drugs, or that he was around drugs. Instead, HACM specifically alleged in its termination notice that Mr. Cobb had engaged in "drug-related criminal activity." (R. at 6-3, App. at A-70-72) Federal law defines the phrase "drug-related criminal activity" as "the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 C.F.R. § 5.100.

Eviction cases alleging criminal acts involve allegations of moral turpitude, and the stakes are extremely high for eviction defendants. Being evicted means a double loss for public housing tenants like Mr. Cobb; he is losing both his long-term home and the subsidy that allows him to

remain sheltered despite his low, fixed income. If Mr. Cobb is evicted from public housing for "criminal" activity he will very likely be unable to obtain new, subsidized housing. *See* 24 C.F.R. §§ 960.204(a) & 982.553. Mr. Cobb will be stigmatized as an individual who was evicted for engaging in allegedly criminal behavior. It is unlikely that many reputable landlords offering unsubsidized housing will choose to rent to him either.

Thus, a higher standard of proof must be applied in eviction cases alleging criminal activity. And, the clear, satisfactory, and convincing burden of proof is substantially higher than the preponderance of the evidence standard. In a civil case alleging fraud, the Supreme Court of Wisconsin explained that the two standards are significantly different:

> The rule of clear and satisfactory evidence in fraud cases, as distinguished from mere preponderance of the evidence, is substantial and may, very properly, be the turning point, especially, when the matter rests in mere inference. As has been frequently said, while in ordinary civil matters the person on whom the burden of proof rests may rely upon evidence establishing the facts to a reasonable certainty, though the evidence be not, in all respects, clear and satisfactory, not so where fraud is the gist of the matter, then he must go further, -- not to the extent of establishing the charge with the highest degree of certainty, but to that one which rests, not only in reasonable certainty, but on evidence which is clear and satisfactory.

Will of Ball, 153 Wis. 27, 35, 141 N.W. 8 (Wis. 1913).

In this case, Mr. Cobb's attorney incorrectly argued the preponderance of the evidence standard at Mr. Cobb's trial, but timely brought the error to the circuit court's attention, before the court had even entered a judgment of eviction against Mr. Cobb. (R. at 9-1). In its response to Mr. Cobb's Motion for Reconsideration, HACM did not cite any eviction exception to the general rule that civil allegations of crime must be proven by clear, satisfactory, and convincing evidence. (R. at 10-1 – 10-7). HACM essentially argued that the evidence met both standards and the standards were not substantially different. (R. at 18-6&7, App. at A61-62) The court acknowledged that the middle burden is a higher burden than preponderance of the evidence, but the court declined to apply the clear and convincing burden of proof to Mr. Cobb's case, specifically stating, "I did not decide it by clear and convincing evidence. That was not what was - - what was decided." (R. at 18-7, L. 8-23, App. at A-62)

Declining to apply the correct burden of proof in this case, however, is reversible error. HACM's allegations of criminal activity were directly disputed by Mr. Cobb's testimony. (R. at 17-46, L. 6-10, App. at A-46) The court's

finding of criminal activity was based on a mere inference that the smell of marijuana more probably than not meant that Mr. Cobb used marijuana. (R. at 17-52, L. 13-19, App. at A-52) The evidentiary standard applied in this case could well have been the turning point for the court's decision. Therefore, Mr. Cobb respectfully requests reversal of the circuit court's denial of his Motion to Reconsider.

III. As a matter of law, HACM's evidence that Mr. Cobb engaged in drug related criminal activity was not clear, satisfactory, and convincing.

At trial, HACM had the burden to prove that Mr. Cobb had engaged in "drug related criminal activity" on June 5, 2013. It bears repeating that "drug related criminal activity" is a federally defined phrase meaning "the illegal manufacture, sale, distribution, or use of a drug, or the possession of a drug with intent to manufacture, sell, distribute or use the drug." 24 C.F.R. § 5.100. Thus, HACM had to prove that Mr. Cobb actually manufactured drugs, or sold drugs, or used drugs, or possessed drugs on June 5, 2013, and it had to prove that his actions were illegal.

Officer Darrow's testimony is the only evidence HACM presented to prove that Mr. Cobb manufactured, sold, used, or possessed drugs on June 5, 2013. Officer Darrow

testified that the smell of marijuana in the apartment complex hallway was stronger when he sniffed at Mr. Cobb's closed apartment door and that Mr. Cobb stated he was both spraying for bugs and cooking when questioned. (R. at 17-32-36, App. at A-32-36) Officer Darrow further testified that Mr. Cobb refused to let Officer Darrow search his apartment, and in Officer Darrow's opinion that in itself was a lease violation. (R. at 17-35, App. at A-35)

Upon cross-examination, the circuit court heard Officer Darrow's unlikely assessment that the exchange with Mr. Cobb, taking place at Mr. Cobb's partially opened apartment door, lasted a full five to seven minutes. (R. at 17-39, L. 3-5, App. at A-39) Officer Darrow admitted he did not knock on any other doors in Mr. Cobb's hallway to inquire about the marijuana smell. (R. at 17-39, L. 2, App. at A-39) He also did not call the police to report a crime being committed or to investigate Mr. Cobb further, even though he stated that he has contact with the police department in the day-to-day operations of his job. (R. at 17-38, L. 15-18 & R. at 17-42, L. 19-25, App. at A-38 & A-42) On re-direct, he testified that he did not call the police because calling the police without being in Mr. Cobb's unit would have given

Mr. Cobb a chance to destroy the evidence that there would have been. (R. at17-43, L. 6-9, App. at A-43) Officer Darrow offered no testimony that Mr. Cobb appeared intoxicated or high. He said Mr. Cobb seemed "[f]riendly but maybe a little bit nervous." (R. 17-35, L. 2-4, App. at A-35) When asked to elaborate on how Mr. Cobb exhibited nervousness, however, Officer Darrow offered only that Mr. Cobb refused to let him come into his apartment. (R. 17-35, L. 5-10, App. A-35) Finally, Officer Darrow did not testify that any actual smoke emanated from the apartment when Mr. Cobb opened his door.

Mr. Cobb also testified. He stated he was not using marijuana when Officer Darrow knocked on his door or at any time that day. (R. at 17-46, L. 6-12, App. A-46) Instead, he was cooking in his underclothes, which is why he did not allow Officer Darrow to enter his apartment. (R. at 17-46, L. 13-15, R. at 17-47, L. 19-22, App. at A-46 & A-47) Mr. Cobb testified that when Officer Darrow knocked on his door, he answered immediately, without pause, although he only opened the door about half an inch. (R. at 17-46, L. 20-24, App. at A-46) Mr. Cobb realistically estimated that his entire

exchange with Officer Darrow lasted less than a minute. (R. at 17-48, L. 2-5, App. at A-48)

Based solely on the testimony of Officer Darrow and Mr. Cobb, the circuit court found that Mr. Cobb engaged in drug related criminal activity. (R. at 17-52, L. 13-19, App. at A-52) When the court reaffirmed its finding at Mr. Cobb's second hearing, the circuit court appeared to be conflating the standard for reasonable suspicion or probable cause with the burden of proof in a civil case, stating:

> . . . [t]here is a case in Wisconsin by the Supreme Court which indicates that the odor of marijuana is - - can lead to reasonable suspicion of criminal activity . . . it's consistent with the finding of this Court that marijuana smell is - - could be an inference of illegal criminal activity.

(R. at 18-4, L. 2-9, App. at A-59).

It is true that Wisconsin law provides that the smell of marijuana, in some circumstances, creates probable cause sufficient for a search, or even an arrest, if the odor is unmistakable and if the odor may be linked to a specific person because of circumstances in which the odor is discovered or because other evidence links the odor to the person or persons. *State v. Secrist*, 224 Wis. 2d 201, 203, 589 N.W.2d 387, 388 (Wis. 1999). As the *Secrist* opinion notes,

however, the probable cause standard does not require evidence that guilt is more likely than not. *Id.* at 212. Probable cause certainly does not require evidence that is clear, satisfactory and convincing.

The alleged intensification of the odor of marijuana is insufficient to prove clearly, satisfactorily and convincingly that the person who opened the door engaged in drug related criminal activity. At most, Officer Darrow reasonably suspected that Mr. Cobb had engaged in drug related criminal activity. In its one-strike policy guide, HUD explained that tenants cannot be evicted on the basis of a suspicion, and no eviction alleging criminal activity should be brought without "strong evidence." (R. at 10-17, App. at A-101) Officer Darrow could have contacted the police department and reported his suspicions, either before or after talking with Mr. Cobb, asking them to follow up and search Mr. Cobb's apartment for evidence of drug use or possession, but he did not. HACM lacked clear, satisfactory, and convincing proof that Mr. Cobb engaged in any criminal act. Therefore, Mr. Cobb respectfully requests reversal of the circuit court's finding that he engaged in drug related criminal activity.

IV. As a matter of law, HACM failed to prove by a preponderance of the evidence that Mr. Cobb engaged in drug related criminal activity.

Without repeating his arguments set forth in section III of this brief, Mr. Cobb asks this Court to find that the evidence was not sufficient to find by a preponderance of the evidence that he engaged in drug related criminal activity. As explained above, the circuit court did not require HACM to prove, specifically, that it was Mr. Cobb who engaged in a specific illegal act on June 5, 2013. Instead, the court generally found that it could infer criminal activity, or "use," had occurred by relying solely on lay opinion testimony of the smell of marijuana. (R. at 17-51&52, App. at A-51-52)

Even under the preponderance of the evidence standard, HACM had to prove its allegations to a reasonable certainty. (*See* Wis. JI-CIVIL 200 at 3, App. at A-88) "To a reasonable certainty" means that the Court is persuaded based on a rational consideration of the evidence. (Wis. JI-CIVIL 200 at 1, App. at A-86) Absolute certainty is not required, but a guess is not enough. *Id.* In this case, the circuit court's finding was really a guess based on what the court believed probably happened and not a rational examination of the

evidence that HACM presented. Further, it was an error of law for the circuit court to determine it was making a permissible inference of criminal activity by relying on case law, like *Secrist*, that only explains what is required to find probable cause. (R. at 18-4, L. 2-9, App. at A-59)

Public policy also supports reversal of the circuit court's decision in this case. Permitting such an inferential leap essentially places the burden on the defendant to prove that a crime was not committed. In Mr. Cobb's case, the circuit court seemingly determined that Mr. Cobb's testimony was not convincing enough to disprove HACM's allegations of criminal activity. (R. at 17-45, L. 12-15, App. at A-45, noting "[t]here's no other evidence [other than the smell] that there was drug use came from his apartment. There was an alternative explanation sought, but it was never confirmed; and that's all we have," also R. at 17-51, L. 21, App. at A-51 noting Mr. Cobb did not testify as to what he was cooking). It is an understatement to say that eviction defendants face an uphill battle to convince courts that they are innocent, as their testimony will likely be found self-serving. In order to ensure that landlords continue to bear the burden of proof and persuasion in eviction actions, landlords alleging criminal

activity must be required to present more than a mere scintilla of evidence that a crime may have occurred. Therefore, Mr. Cobb respectfully requests reversal of the circuit court's decision.

CONCLUSION

For the reasons stated above, Mr. Cobb respectfully requests the Court reverse the circuit court's Judgment of Eviction and denial of his Motion for Reconsideration.

Dated this ___day of January, 2014 at Milwaukee, Wisconsin

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif fond. The length of this brief is 7,624 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

CERTIFICATION OF SERVICE

I hereby certify that:

Ten (10) copies of Defendant-Appellant's Brief were deposited at FedEx for delivery to the Clerk of the Court of Appeals by first class mail or other class of mail that is as expeditious, and three (3) copies of this brief and certifications were similarly deposited in the mail for delivery to the Respondent by first class mail or other class of mail that is as expeditious on January 13, 2014. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 13th day of January, 2014 at Milwaukee, Wisconsin.

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