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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CASE NO. 2013AP002207

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent,

v.

FELTON COBB,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE CIRCUIT COURT OF
MILWAUKEE COUNTY, THE HONORABLE PEDRO COLON,
CIRCUIT JUDGE PRESIDING,
CIRCUIT COURT CASE NO: 2013SC020628

BRIEF OF PLAINTIFF-RESPONDENT,
MILWAUKEE CITY HOUSING AUTHORITY

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Pursuant to Wis. Stat. § 809.22(2), oral argument is unnecessary because the legal issues are fully presented in the briefs or address findings of fact clearly supported by sufficient evidence.

Publication is requested by both parties as it would clarify existing rules of law concerning federal preemption and proper burden of proof in eviction actions.

INTRODUCTION

This is an eviction action brought by the plaintiff landlord, Housing Authority of the City of Milwaukee (HACM). HACM is a public body, organized and chartered pursuant to Wis. Stat. § 66.1201, for the purpose of operating a low-income housing program under the United States Housing Act of 1937, codified at 42 U.S.C. Sec. 1437, *et seq.* It is funded by the United States Department of Housing and Urban Development (HUD) and regulated by Title 24 of the Code of Federal Regulations. Mr. Cobb leases a public housing unit at HACM's Merrill Park housing development under a one-year lease. This is an action to terminate that lease for breach of a material term.

REGULATORY BACKGROUND

HACM's funding is dependant on its compliance with federal regulations that govern public and Indian housing, located at 24 C.F.R. Ch. IX, Parts 900-971. Pursuant to those federal regulations, HACM enters into written contracts, called Annual Contributions Contracts, under which HUD agrees to provide funding for its programs and HACM agrees to comply with HUD regulations for the programs. 24 C.F.R. § 5.403, Definitions. These funding requirements imposed on HACM by HUD significantly effect HACM's role as a landlord in the community and,

in large part, dictate its relationship to its tenants, like the Defendant under eviction here.

Of particular relevance to the case at bar, is 24 C.F.R. § 966.4(f) *Tenant Obligations*, which reads:

> The lease shall provide that the tenant shall be obligated:
>
> * * *
>
> (12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:
>
> * * *
>
> (B) Any drug-related criminal activity on or off the premises.

Defendant's lease complied in all respects with 24 C.F.R. § 966.4(f). (*See* Lease, Sec. 5(Q) at A-79).

With respect to the type of lease termination notice required to evict tenants from federally-funded housing, 24 C.F.R. § 966.4(f)(*l*)(3) provides:

> (3) *Lease termination notice.* (i) The PHA must give written notice of lease termination of:
>
> (A) 14 days in the case of failure to pay rent;
>
> (B) A reasonable period of time considering the seriousness of the situation (but not to exceed 30 days):
>
> (1) If the health or safety of other residents, PHA employees, or persons residing in the immediate vicinity of the premises is threatened; or
>
> (2) If any member of the household has engaged in any drug-related criminal activity or violent criminal activity;
>
> * * *
>
> (iii) A notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination under paragraph (*l*)(3)(i) of this section.

HUD has determined what it deems to be appropriate notice when public housing landlords terminate leases for drug-related criminal activity. There is no right to cure, or remedy, set forth in the applicable regulations. Indeed, subsection (iii) provides, in those states where an initial "notice to vacate" must precede a notice of lease termination, no such preliminary notice is necessary where the termination is for drug-related criminal activity.

In addition, federal regulations do not require the drug-related activity to meet a burden of proof, but vest the public housing authority (PHA) with discretion in deciding what types of drug-related activity to prohibit. Subsection (*l*)(5) states:

> (iii) *Eviction for criminal activity.* (A) *Evidence*. The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

24 C.F.R. § 966.4(*l*)(5)(iii)(A).

HUD provided regulatory guidance to a PHA's exercise of discretion at 24 C.F.R. § 966.4(*l*)(5)(vii)(B) as follows:

> (B) *Consideration of circumstances.* In a manner consistent with such policies, procedures and practices, the PHA may consider all circumstances relevant to a particular case such as the seriousness of the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action. (emphasis added)

ARGUMENT

I. Wis. Stat. § 704.17(2) is Preempted by 42 U.S.C. § 1437d(*l*)(6) and Federal Regulation.

As Cobb notes in the Introduction to Section I(B) of his brief, evictions from federally funded public housing involve the application of both federal and state law. [Brief of Appellant, p.12.] Respondent also agrees that, pursuant to the Supremacy Clause of the Constitution, federal law preempts conflicting state law. [Brief of Appellant, p. 13]. Cobb contends, with respect to Wis. Stat., 704.17(2)(b) and its provision requiring tenancy termination notices that afford tenants an opportunity to "remedy the default" (or cure), that there is no conflict with federal law. Here our agreement ends.

Respondent respectfully submits there is a clear and irrefutable conflict between a state statute that allows all manner of lease violations to be given a second chance, or right to cure, and a federal policy dubbed

"One Strike and You're Out."[1] The 'One Strike' policy derives from a federal statute, 42 U.S.C. § 1437d(*l*)(6), which allows for evictions from federally subsidized housing of entire households, regardless of knowledge of the leaseholder, for any illegal violent or drug related activity engaged in by the tenant, any member of the tenant's household, or any guest or other person under the tenant's control.

Chapter 42 U.S.C. § 1437d(*l*)(6), provides:

> (*l*) Leases; terms and conditions; maintenance; termination. Each public housing agency shall utilize leases which –
>
> * * *
>
> (6) 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:
>
> * * *
>
> For purposes of paragraph (5) [(6)], the term "drug-related criminal activity" means the illegal manufacture, sale, distribution, use, or possession with intent to manufacture, sell, distribute, or use, of a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802).

The U.S. Supreme Court had no problem with HUD's intent or implementation of its "no-fault" eviction policy, in the seminal case of *HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002):

[1] See 64 Fed. Reg. 40262 and HUD Directive No. 96-16, Notice PIH 96-16 (HA)(April 12, 1996).

> Such "no-fault" eviction is a common "incident of tenant responsibility under normal landlord-tenant law and practice." 56 Fed. Reg., at 51567. Strict liability maximizes deterrence and eases enforcement difficulties. See *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 14, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991).
>
> And, of course, there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." 56 Fed. Reg., at 51567. With drugs leading to "murders, muggings, and other forms of violence against tenants," and to the "deterioration of the physical environment that requires substantial governmental expenditures," 42 U.S.C. § 11901(4) (1994 ed., Supp. V), it was reasonable for Congress to permit no-fault evictions in order to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," § 11901(1) (1994 ed.). (emphasis added)

Rucker, id. 122 S. Ct. at 1235.

The defendants in *Rucker*, though challenging the strict liability aspect of 42 U.S.C. § 1437d(*l*)(6) rather than the prohibition of illegal drug usage, raised similar due process concerns. They, like the defendant-appellant here, were being subjected to eviction for illegal drug activity. The high court made short work of their arguments by noting a significant factor in both that case and the case at bar – the fact that the defendants reside in federally-owned property.

> The situation in the present cases is entirely different. The government is not attempting to criminally punish or civilly regulate respondents as members of the general populace. It is instead acting as a landlord of property that it owns, invoking a clause in a lease to which respondents have agreed and which Congress has expressly required.

* * *

> Section 1437d(l)(6) requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity.

Rucker, id. at 1236.

Four years after *Rucker*, the District of Columbia Court of Appeals ruled on the same arguments made by this defendant and flatly rejected them. In *Scarborough v. Winn Residential LLP/Atl. Terrace Apartments*, 890 A.2d 249 (D.C. 2006), the court held:

> (3) landlord was not required to provide tenant with a cure notice before it instituted eviction proceedings, even if cure provision in Rental Housing Act applied, as Act's cure provision was pre-empted by federal statute and regulations; and
>
> (4) exercise by landlord of its discretion to evict tenant from unit was not subject to a review for abuse of discretion.

Id. at 249.

Cobb cites to *M&I Marshall & Ilsley Bank v. Guaranty Financial, MHC*, 2011 WI App. 82, 334 Wis. 2d 173, 800 N.W.2d 476, for the proposition that 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. Indeed, the relevant paragraph 25 discusses implied conflict preemption and states:

> This form of preemption will be found when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'

Id. at ¶ 25 (citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-154, 102 S. Ct. 3014, 73 L. Ed.2d 664 (1982)). This is precisely the language used by the D.C. Court in *Scarborough*:

> Applying the cure provision of *D.C. Code § 42-3505.01(b)* **would stand as a pronounced obstacle** to the exercise of this authority. Not for nothing are lease provisions of the kind involved here described as manifesting a federal "One-Strike Policy." The only way to make sense of the idea of "correct[ing]" criminal activity would be to require the tenant not to engage in such activity again. But, as HUD points out in the government's brief *amicus curiae*, "this interpretation quickly renders the eviction provision a virtual nullity, because the grounds for eviction-the criminal act-would be washed away by a simple promise not to commit another crime." The very ease of thwarting the landlord's right to evict for commission of such a crime would frustrate the purpose of an anticrime provision that permits eviction for "any" criminal activity threatening in the sense defined.
>
> It is true, as the *Rucker* Court pointed out, that termination of a tenancy after criminal activity is not automatic under federal law; housing providers have discretion whether to exercise the right of eviction. *See Rucker*, 535 U.S. at 133-34, 122 S. Ct. 1230. But the cure opportunity provided by § 42-3505.01(b), if applicable to violations of "an obligation of tenancy" dangerously criminal in nature, would substitute for the landlord's discretion a mandatory second-strike opportunity for a tenant to stay eviction by discontinuing, or not repeating, the criminal act during the thirty days following notice. We do not believe Congress meant to permit that obligatory re-setting of the notice clock.

Scarborough v. Winn, *ibid*. at 257 (footnotes omitted) (emphasis added).

II. *Scarborough* Decision the Best Applicable Case Law.

The decision in *Scarborough* is on point and dispositive of the issues before this court. The holding and its reasoning have been examined, discussed, cited or reviewed by courts in Connecticut, Tennessee, Delaware, Massachusetts, and Iowa, as well as by District of Columbia Superior Courts. No published decision has deviated from, or even criticized, the *Scarborough* decision. While HACM understands that case law from foreign jurisdictions is not to be considered mandatory authority by Wisconsin courts, the *Scarborough* decision squarely addresses the exact issues put before this court by Cobb and persuasively explains why the federal 'One Strike And You're Out' Policy, as understood and applied in *Rucker,* permits an eviction from public housing for criminal activity without a right to cure.

In the case of *Housing Authority of Norwalk v. Brown*, 129 Conn. App. 313 (2011), the court examined Connecticut's statutes and found that, where the breach of the lease is illegal drug activity, Connecticut's statutory right-to-cure did not apply. It wrote:

> Additionally, we believe that the decision of the District of Columbia Court of Appeals in *Scarborough v. Winn Residential, LLP*, 890 A.2d 249 (D.C. 2006), is directly on point and thus further supports our conclusion. In *Scarborough*, the Court of Appeals considered the question of whether, as a matter of law, a breach of lease is curable pursuant to D.C. Code § 42-3505.01 (b) (2001), when the conduct constituting the breach is "discrete criminal acts or ongoing criminal activity." (Internal quotation marks omitted.) Id., 254. The court held that, as a matter of law, such breaches cannot be cured because

> otherwise it would "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (Internal quotation marks omitted.) Id., 255. Congress declared that those purposes and objectives are "to provide public and other federally assisted low-income housing that is decent, *safe, and free from illegal drugs*." (Emphasis added; internal quotation marks omitted.) Id., 256.

Housing Authority of Norwalk v. Brown, 129 Conn. App. at 323.

Another recent case, from Iowa, examines both *Rucker* and *Scarborough* and goes on to share the reasoning of Iowa's Supreme Court. In that case, a similar challenge is mounted under the regulations applicable to HUD's Section 202 Program, Supportive Housing for the Elderly.

> Smith contends the ten-day notice reflects the purpose and intent behind the good cause requirements for terminating HUD housing. However, criminal activity is treated differently as we have already discussed with respect to Iowa Code section 562A.27A and federal law recognizes a duty to provide safe housing to all residents in HUD housing assistance programs.
>
>> Among the many conditions imposed by HUD's housing assistance programs, are that specific provisions must appear in the written lease agreements with individual tenants. As relevant here, 42 U.S.C. § 1437f(d)(1)(B) states:
>>
>>> Contracts to make assistance payments entered into by a public housing agency with an owner of existing housing units shall provide (with respect to any unit) that-
>>>
>>> * * *
>>>
>>> (iii) during the term of the lease, *any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants* . . . engaged in by a tenant of any unit . . . or any guest or other person under the tenant's control, "*shall be cause for termination of tenancy*."

> In enacting this provision, as in enacting a parallel provision for public housing, *see* 42 U.S.C. § 1437d(*l*)(6), Congress declared that "the Federal Government has a duty to provide public and other federally assisted low-income housing that is decent, *safe*, and free from illegal drugs." 42 U.S.C. § 11901(1).

Scarborough v. Winn Residential L.L.P./Atl. Terrace Apartments, 890 A.2d 249, 255-56 (D.C. 2006).

In *Department of Housing & Urban Development v. Rucker*, 535 U.S. 125, 135, 122 S. Ct. 1230, 1236, 152 L. Ed. 2d 258, 269 (2002), the Supreme Court affirmed the federal government's authority "as a landlord of property that it owns," to "invok[e] a clause in a lease to which respondents have agreed and which Congress has expressly required"[8] to prevent crime in federally-assisted housing by permitting the eviction of tenants when they or persons they have allowed access to their premises commit crimes threatening the health or safety of other residents.

In *Horizon Homes*, our supreme court has stated the HUD Handbook "is entitled to notice as the agency's interpretation of its own regulations and should be accepted by us unless there is a showing that the handbook is unreasonable or inconsistent with statutory authority." 684 N.W.2d at 226. Where a lease is terminated for criminal activity such as here, Smith conceded before the district court that there is no "right to cure," and thus there is no need to meet and confer. *See Scarborough*, 890 A.2d at 255 (rejecting tenant's argument that a D.C. law requiring notice and opportunity to correct a violation of lease as applied to criminal activity that endangers other tenants' safety or right to peaceful enjoyment would frustrate the objectives of the federal program); *see also Ross v. Broadway Towers, Inc*., 228 S.W.3d 113, 121 (Tenn. Ct. App. 2006) (finding Tenn. Code Ann. § 66-28-508 ["If the landlord accepts rent without reservation and with knowledge of a tenant default, the landlord by such acceptance condones the default and thereby waives such landlord's right and is estopped from terminating the rental agreement as to that breach."] has no application as it would be contrary to "the intent of the regulations to protect all the occupants of the subsidized housing project").

AHEPA 192-1 Apts. v. Smith, *2011 Iowa App. Lexis 147,* 810 N.W.2d 25.

In addition, the case of *Howell v. Justice of the Peace Court No. 16,* 2007 Del. Super LEXIS 424, provides another example of a state that acknowledged pre-emption of state landlord-tenant law when federally-subsidized housing is involved.

> Our law recognizes that, in cases where a tenant occupies a federally-subsidized housing unit, if a conflict arises between the terms of the Landlord-Tenant Code and "the terms of any federal law, regulations or guidelines, the terms of the federal law, regulations or guidelines shall control." The Court finds that this language controls in the case *sub judice.* An alleged violation of the specific lease provision at issue in this case, because it is based on, and required to be in, the lease pursuant to federal law, serves to preempt our requirement of irreparable harm. Although it has not done so explicitly, the Congress has spoken regarding the need to preempt Delaware law in this respect for tenants that occupy a federally-subsidized housing unit, and this Court recognizes that preemption.
>
> * * *
>
> Based on the foregoing, there is no need for the Respondent to have proceeded under § 5513(a). Even if there were, this Court would note that there can be no opportunity to cure a violation of this specific lease provision;[47] again, this is another decision by Congress to preempt our law, which this Court recognizes.

*Id. at 26-27 (*Footnote 47 provides*:* "*See Scarborough v. Winn Residential LLP/Atlantic Terrace Apartments*, 890 A.2d 249, 256-258 (D.C. 2006) (The Court discusses why D.C.'s cure provision is inapplicable in cases similar to the one at bar.).)

Finally, in *Boston Housing Authority v. Garcia*, 449 Mass. 727, 871 N.E.2d 1073 (2007), the court ruled that Massachusetts' state law permitting a judge to override the housing authority's discretion based on the judge's evaluation of the evidence presented on the issue of a tenant's

knowledge or control, would substantially interfere with the congressional objective (expressed by 42 U.S.C. § 1437d(*l*)(6) and HUD through its implementing regulations) and was, therefore, preempted. *Id.* at 734.

The clear weight of authority nationally is to the effect that, in federally subsidized housing, a statutory right-to-cure criminal and drug-related activity is inconsistent with and an obstacle to the federal government's duty to provide housing that is decent, safe, and free from illegal drugs.

III. Lowest Civil Burden of Proof Appropriate to Breach of Lease Actions.

Mr. Cobb next argues that the trial court erred when it weighed the evidence at trial using the lower, ordinary burden of proof for civil cases: satisfaction to a reasonable certainty by the greater weight of the credible evidence. A thorough analysis of the appropriate burdens of proof in civil cases is provided by our Wisconsin Supreme Court in the case of *Carlson & Erickson Builders v. Lampert Yards*, 190 Wis. 2d 650, 529 N.W.2d 905 (Wis. 1995), concerning a civil antitrust action.

> Wisconsin law recognizes three degrees of burden of proof. In criminal cases the jury is told that the state has the burden to convince the jury beyond a reasonable doubt. In certain civil cases, a higher civil standard is used; the jury is told that a party has the burden to convince the jury to a reasonable certainty by evidence that is clear, satisfactory and convincing. In most civil cases the lower, ordinary burden of proof applies; the jury is told that a party has the burden to satisfy the jury to a reasonable certainty by the greater weight of the credible evidence.

> Determination of the appropriate burden of proof in this case presents a question of statutory interpretation, a question of law which this court determines independently of other courts, benefitting from their analyses. The principle objective of statutory interpretation is to ascertain and give effect to the intent of the legislature.

Id. at 907-908.

Chapter 799, Stats. is silent about the burden of proof in eviction actions. A review of Wisconsin caselaw did not produce any case on point. It is worth noting, however, that Justice Ann Walsh Bradley, in her dissenting opinion in the case of *State v. West*, 2011 WI 83, 336 Wis. 2d 578, 800 N.W. 2d 929 (Opin. By Justice David Prosser) writes: "Normally, when the level of the burden of persuasion is unspecified, it is the preponderance of evidence."

The closest legislative act to the question put before this court comes from a federal regulation which undermines the foundation for Mr. Cobb's argument for a higher burden of proof when criminal acts are alleged in a lease termination notice. 24 C.F.R. § 966.4(*l*)(5)(iii)(A), provides:

> (iii) *Eviction for criminal activity.* (A) *Evidence*. The PHA may evict the tenant by judicial action for criminal activity in accordance with this section if the PHA determines that the covered person has engaged in the criminal activity, regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction.

A parallel provision, applicable to a PHA's Section 8 or rent-assisted housing program, states:

> (c) *Evidence of criminal activity*. The PHA may terminate assistance for criminal activity by a household member as authorized in this section if the PHA determines, based on a preponderance of the evidence, that the household member has engaged in the activity, regardless of whether the household member has been arrested or convicted for such activity.

24 C.F.R. § 982.553(c).

As the two provisions make apparent, HUD regulations evince a legislative intent to facilitate eviction for criminal activity in housing it owns, or subsidizes the rent at. While the middle burden might be appropriate where the regulatory guidance mandates a high level of proof to establish the basis for eviction, such is not the case as it pertains to criminal conduct in public housing. We return to the pronouncement of the U.S. Supreme Court, in *Rucker*, for emphasis:

> And, of course, there is an obvious reason why Congress would have permitted local public housing authorities to conduct no-fault evictions: Regardless of knowledge, a tenant who "cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project." 56 Fed. Reg., at 51567. With drugs leading to "murders, muggings, and other forms of violence against tenants," and to the "deterioration of the physical environment that requires substantial governmental expenditures," 42 U.S.C. § 11901(4) (1994 ed., Supp. V), it was reasonable for Congress to permit no-fault evictions in order to "provide public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs," § 11901(1) (1994 ed.).

HUD v. Rucker, *ibid.*, 535 U.S. at 134. It would be grossly inconsistent with the legislative intent of Congress to raise the bar, in terms of burden of proof, when Congress is enacting regulations that impose strict liability and

allow eviction for criminal activity based solely on the PHA's discretion, without need of corroborating evidence of criminal arrest or conviction.

IV. Trial Court's Findings Entitled to Presumption of Correctness.

Cobb asks this court to reverse a decision of a circuit court when it was the circuit court that heard the evidence and is presumed correct. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Wis. Stat. § 805.17(2).

In *Noll v. Dimiceli's, Inc.*, 115 Wis. 2d 641, 643-644, 340 N.W. 575 (Wis. Ct. App. 1983), the court wrote:

> On review of a factual determination made by a trial court without a jury, an appellate court will not reverse unless the finding is clearly erroneous. *See* sec. 805.17(2), Stats. While we now apply the "clearly erroneous" test as our standard of review for findings of fact made by a trial court without a jury, cases which apply the "great weight and clear preponderance" test to the same situation may be referred to for an explanation of this standard of review because the two tests in this state are essentially the same. *Robertson-Ryan & Associates v. Pohlhammer*, 112 Wis. 2d 583, 591 n. *, 334 N.W.2d 246, 251 n. *(1983) (Abrahamson, J., dissenting). In applying the "great weight and clear preponderance" test our supreme court has stated: The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from

> the credible evidence, the reviewing court must accept the inference drawn by the trier of fact. *Cogswell v. Robertshaw Controls Co.,* 87 Wis. 2d 243, 249-50, 274 N.W.2d 647, 650 (1979). [Citations omitted.]

Cobb construes the trial court's decision as one premised upon inferences and "a mere scintilla of evidence that a crime may have occurred." As with his second argument, Cobb overlooks the pivotal distinction between what HACM was seeking to prove and what Cobb contends needed to be proved. No crime need be charged or committed by the leaseholder for HACM to conclude that illegal drug-related activity occurred in Mr. Cobb's unit.

The evidence adduced at trial pitted the testimony of a HACM Public Safety Officer trained in the detection of marijuana (A:34-36) who was confident the odor coming from Mr. Cobb's unit was smoked marijuana (A:37), not "bug spray" or cooking smells (A:35-36), the inconsistent answers offered by Mr. Cobb. Later, in response to questioning by his own attorney, Cobb suggested that he didn't understand Officer Darrow because he mumbled. Cobb said "I thought I heard what he was saying, but I really didn't answer him." (A:47).

Finally, under cross-examination, Cobb offered yet a fourth defense by testifying that the smell of marijuana was always present in the hallway outside his apartment door, not caused by his own drug use (A:50). This

despite the Officer's testimony that, after two attempts to determine its source (A:32), the drug smell was strongest at Mr. Cobb's door.

Upon the conclusion of the testimony, the trial court immediately found that there had been drug activity at Cobb's unit. He also found: "Officer Darrow's testimony is more consistent and more credible." This finding alone rebuts Cobb's argument weighing the evidence. If the court believed HACM's witness and disbelieved the defendant-appellant, there was ample basis upon which to rule in HACM's favor. A lessee who offers four different and inconsistent explanations for the smell of marijuana emanating from his apartment and is found not credible by the finder of fact has no business arguing that the court's findings should be reversed.

The trial court took judicial notice that the evidence convinced him that marijuana use was engaged in (A:52). The court correctly found that it was not being asked whether a crime had been committed, a finding that could only be effectively made beyond a reasonable doubt. Rather, after hearing the evidence and considering written and verbal arguments of the parties, the court found there was criminal action or activity, "as defined," which is sufficient to warrant an eviction from public housing (A:57).

CONCLUSION

For all of the reasons set forth above, HACM respectfully asks this court to affirm the trial court's conclusions that the lease termination notice issued in this case was valid; that the evidence proved illegal drug-related activity; and that the appropriate burden of proof was utilized by the court.

Dated and signed at Milwaukee, Wisconsin this 12th day of February, 2014.

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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), Wis. Stats., for a brief and appendix produced with a proportional serif font. The length of this brief is 20 pages/4,939 words.

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ELECTRONIC BRIEF CERTIFICATION

I hereby certify that:

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

I further certify that:

The electronic brief is identical in text, 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.

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CERTIFICATE OF THIRD-PARTY COMMERCIAL DELIVERY AND MAILING

Linda K. Dirnbauer herein certify that I am employed by the Housing Authority of the City of Milwaukee, as a Legal Assistant, assigned to duty in the office of the City Attorney of the City of Milwaukee, located at City Hall Room 800, 200 East Wells Street, Milwaukee, Wisconsin 53202; that on the 12th day of February, 2014 I filed ten copies of the Brief of Plaintiff-Respondent, Housing Authority of the City of Milwaukee, in the above-entitled case, via third-party commercial courier, addressed to: Diane Fremgen, Clerk of the Wisconsin Court of Appeals, P.O. Box 1688, 110 East Main Street, Suite 205, Madison, Wisconsin 53701-1688; and three copies of the Brief of Plaintiff-Respondent, Housing Authority of the City of Milwaukee, were served upon counsel for the Defendant-Appellant, Attorney April A.G. Hartman of Legal Action of Wisconsin, Inc., 230 West Wells Street, Suite 800 Milwaukee, Wisconsin 53203, via U.S. Postal Service first-class mail.

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