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

REPLY BRIEF OF DEFENDANT-APPELLANT FELTON COBB

LEGAL ACTION OF WISCONSIN, INC.

April A.G. Hartman
Attorneys for Defendant-Appellant

P.O. Address
Legal Action of Wisconsin, Inc.
230 West Wells Street, Room 800
Milwaukee, Wisconsin 53203
(414) 278-7722 x. 3030
agh@legalaction.org

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ARGUMENT

I. Wis. Stat. § 704.17 is not preempted by federal law.

In its response brief, HACM concedes that express and field preemption do not apply but argues that conflict preemption applies. (Resp't's Br. at 8-9). To support its conflict preemption argument, HACM cites only non-precedential case law from other jurisdictions. HACM's reliance on these cases is misplaced for two reasons. First, each state must independently interpret whether its own specific state law conflicts with federal law. Second, other than *Scarborough*, not one of the cases cited by HACM analyzed whether a state termination notice requirement conflicted with federal law. On that precise point, HACM fails to address the relevant statutory, regulatory, and policy language discussed in Cobb's initial brief, showing neither Congress nor HUD intend to preempt state tenancy termination notice laws.

A. HACM correctly conceded that express preemption does not apply.

HACM is unable to pinpoint any language in 42 U.S.C. § 1437d(*l*) that explicitly conflicts with Wis. Stat. § 704.17. In

contrast, Cobb's principal brief identified instances where, within 42 U.S.C. § 1437d(*l*), Congress expressly preempted state law by inserting the phrase "notwithstanding any State law." (Appellant's Br. at 15-16). *See*, 42 U.S.C. § 1437d(*l*)(7); 42 U.S.C. § 1437d(*l*)(6)(B) (2012).[1] When interpreting a statute, Wisconsin courts assume that Congress's intent is expressed in the statutory language. *State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 662, 681 N.W.2d 110, 112. Congress' explicit, but sparing, use of express preemption is very significant to judicial inferences of implied preemption through either the field or conflict preemptions doctrines. Had Congress intended the rhetorical metaphor "One Strike and You're Out" to be compulsory on the States, it knew how to say so.

B. Field preemption does not apply.

If HACM is arguing field preemption by observing that the applicable regulation does not set forth a right to remedy when the termination notice alleges drug-

[1] Public housing provisions relating to victims of domestic violence were changed, reorganized, and codified at 42 U.S.C. § 14043e-11 when Congress reauthorized the Violence Against Women Act in 2013. *See* Pub. Law 113-4 § 602.

related criminal activity, it does not develop its argument further. 24 C.F.R. § 966.4(*l*)(3), (Resp't's Br. at 3-4). More importantly, the regulation does not set forth a right to remedy for any alleged breach. Even though it expressly sets forth federal notice time limits, it expressly allows different notice provisions set by state law. Rather than "occupying the field," the regulation acknowledges state law termination provisions can separately exist. Thus, HUD did not take a regulatory position on a state's right-to-remedy. To argue otherwise, HACM must argue that it is not required to give a right-to-remedy termination notice under any circumstances. HACM has not made that argument directly, and the federal regulation does not imply it.

C. Wis. Stat. § 704.17 does not conflict with federal law.

i. The cases cited by HACM are unpersuasive, distinguishable, and they are not precedent.

HACM's reliance, (Resp. Br at 10-14), on non-precedential cases from other states is misplaced

because landlord/tenant laws are indisputably state-specific, and preemption analysis requires a careful analysis of the specific state law potentially preempted. Each state's court must determine whether its own landlord/tenant laws stand as barriers to the objectives of Congress. In this regard, Cobb's principal brief argued, (Br. at 21-22), that Wis. Stat § 704.17 does not pose the conflict found in the District of Columbia's 30-day, repeatable right-to-remedy, which *Scarborough* analyzed. The *Scarborough* court reasoned that such a law may have been a barrier to protecting other tenants from the gun violence involved in that case. However, that does not mean Wisconsin's five-day, non-repeating right to remedy stands as an impenetrable barrier to providing for the safety of Wisconsin's public housing tenants, and it does not mean that all state right-to-remedy provisions conflict with federal law.

Wisconsin law allows the easy eviction of drug and gang nuisances. Wis. Stat. § 704.17(2)(c) permits all Wisconsin landlords to evict by serving a five-day Notice to Vacate *without a right to remedy* if the police department determines the tenant has caused a drug or

gang nuisance, or if a drug or gang nuisance exists in the unit. Thus, Wisconsin's termination notice scheme strikes a balance permitted by federal law, ensuring housing stability and tenants' safety.

None of the cases HACM cites, other than *Scarborough*, even used a preemption analysis to find a conflict between the federally required lease provision and a state's termination notice requirement. The cases may have cited *Scarborough*, but they simply were not determining the preemption issue.

HUD v. Rucker, is not a preemption case at all. The Court interpreted the plain language of 42 U.S.C. § 1437d(*l*) to permit innocent tenant evictions. *Dep't of Hous. and Urban Development v. Rucker*. 535 U.S. 125, 129, 122 S. Ct. 1230, 152 L. Ed. 2d 258 (2002). The Court then held that the provision did not violate due process.

The Supreme Judicial Court of Massachusetts held that *Rucker* (which, unlike *Scarborough*, is precedent) preempted the state's "innocent tenant defense." *Boston Hous. Auth. v. Garcia*, 449 Mass. 727, 729, 871 N.E.2d 1073, 1075 (2007). In *Garcia*,

state law limited the housing authority's discretion to evict an innocent tenant. 871 N.W.2d at 1075. Massachusetts' innocent tenant defense and the *Rucker* holding directly conflicted. The court was not considering termination notices and eviction procedures, which the federal government left up to the states.

In HACM's Connecticut case, the court interpreted a Connecticut statute; it did not do a preemption analysis. Unlike Cobb, that tenant did not challenge the housing authority's compliance with federal or state termination notice requirements. *Hous. Auth. of City of Norwalk v. Brown*, 129 Conn. App. 313, 317, 19 A.3d 252, 255 (2011). Instead, the tenant was arguing that she remedied her son's alleged drug activity under a state statute that provided:

> [If the breach] can be remedied by repair by the tenant or payment of damages by the tenant to the landlord and such breach is not so remedied within such fifteen-day period, the rental agreement shall terminate.

19 A.3d. at 256. The state statute only permitted tenants to remedy by repair or payment. Thus, under

state law the breach could not be cured. *Id.* at 259. Wis. Stat. § 704.17(2)(b) provides tenants with the right to remedy any alleged breach, unless the police department finds that the tenant caused a drug or gang nuisance. *See* Wis. Stat. § 704.17(2)(c).

The Iowa case cited by HACM is an unpublished decision, and it is also not a preemption case. In *AHEPA 1921-1 Apartments v. Smith*, the tenant argued that because the landlord gave him thirty days' notice to vacate instead of only three as required by Iowa's clear and present danger statute, the termination was defective. 810 N.W.2d 25 *3 (Iowa Ct. App. 2011). The court reached the conclusion that three-days' notice was the minimum, and the landlord was free to give a longer notice. *Id.* at *7. Although not doing a preemption analysis, the court noted,

> [the district court's decision that the landlord had to use a 3-day notice] is inconsistent with the HUD Handbook, 6-4(1)(E), which provides: "If any provision of a model lease conflicts with state or local law, the *owner must follow the rule that is of most benefit to the tenant.*"

810 N.W.2d 25, *7 (emphasis in original). This case supports Cobb's position that federal law does not limit

the procedural rights of tenants in evictions. The HUD handbook itself notes that owners must follow a state law rule when it is more beneficial to tenants.

Iowa's discussion of *Scarborough*, which HACM cites at length, is from a section of the case analyzing HUD policy, not preemption of state law. *AHEPA 1921-1 Apartments,* 810 N.W.2d 25, *9. The court specifically noted that, unlike Cobb, the Iowa defendant conceded the right-to-remedy issue. *Id.* at *10. Thus, preemption was not an issue before the Iowa court.

HACM cites a second unpublished decision at length in its brief, *Howell v. Justice of the Peace Court No. 16*. 2007 WL 2319147. The *Howell* court found that Delaware's irreparable harm requirement was preempted because it directly conflicted with federal law. *Id.* at *1. The court mentioned *Scarborough* in dicta but summarily accepted *Scarborough's* holding without doing its own analysis. *Id.* at 9.

Thus, HACM's argument is actually based on only one published preemption decision decided by the

District of Columbia in 2006. HACM does not address the 2009, published Kentucky Court of Appeals case discussed by Cobb in his initial brief, although it is directly on point. The Kentucky court stated the question presented as a question of conflict preemption:

> The issue presented is whether the tenant has the right to remedy the breach of the lease pursuant to KRS 383.660(1), contained within the Uniform Residential Landlord and Tenant Act (URLTA), or whether KRS 383.660(1) is preempted by federal law.

Hous. Auth. of Covington v. Turner, 295 S.W.3d 123 (Ky. Ct. App. 2009). Acknowledging *Rucker* and the federal one-strike policy language, the court engaged in a preemption analysis to determine "whether the state and federal law can coexist and be applied without conflict." *Id.* at 127. The court firmly determined,

> [W]e conclude there is no prohibition in the federal law against affording a public housing tenant the right to remedy the breach, no irreconcilable conflict between the statutes, and that the application of the state statute does not defeat the objectives of the federal statute.

Id.

Kentucky rejected *Scarborough's* reasoning. HACM's assertion that no published decision has deviated from *Scarborough* is simply not true.

ii. HACM did not address relevant statutory, regulatory, and policy language raised in Cobb's brief.

In its brief, HACM did not address the relevant and explicit statutory, regulatory, and policy language cited by Cobb in his initial brief. HACM did not address the fact that in 42 U.S.C. § 1437d(*l*), Congress expressly stated its intent when it preempted state landlord/tenant law. Moreover, the statute and regulations are silent regarding a right to remedy for every type of breach, not just drug-related criminal activity. Most tellingly, HACM ignored HUD's unambiguous statement in its "One Strike" policy guidance, which 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, Appellant's Br.App. at A-103). Finally, HACM did not address HUD's post-*Rucker* policy letter advising "[e]viction should be the last option explored, after all others have been exhausted" (R. at 6-18, Appellant's Br. App. at A-85). HUD's policy

statement is consistent with the Wisconsin Supreme Court's statement that "[e]viction is hardly consistent with public interest in providing housing for low income persons." *Hous. Auth. of the City of Milwaukee v. Mosby*, 53 Wis. 2d 275, 284, 192 N.W.2d 913, 917 (1972).

II. The Circuit Court must apply the clear, satisfactory and convincing evidence standard in this case.

Cobb's principal brief cited several cases and Wisconsin Jury Instruction CIVIL 205 to the effect that Wisconsin law requires courts to apply the clear, satisfactory and convincing evidence standard to civil allegations of criminal behavior. *Kuehn v. Kuehn*, 11 Wis. 2d 15, 26-27, 104 N.W.2d 138, 145 (Wis. 1960), *Trzebietowski v. Jereski*, 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. HACM concedes that the circuit court did not apply that evidentiary standard in this case, but

HACM seems to argue that the legislature must specifically adopt the higher standard of proof for it to apply. (Resp't's Br., Section III at 14). HACM cites no authority for this proposition other than noting that the usual civil burden of proof is preponderance of the evidence. Contrary to HACM's argument, the lack of explicit legislative direction to apply the higher standard in eviction cases does not mean that eviction courts may apply a lower standard than that applied in all other civil cases alleging criminal activity.

HACM does not even try to distinguish the many Wisconsin cases that apply the clear and convincing standard in civil litigation involving allegations of criminal behavior. Nor does the federal regulation HACM cites, 24 C.F.R. § 966.4(*l*)(5)(iii)(A), support its argument. The federal regulation requires judicial eviction, a civil proceeding, but does not require "the standard of proof used for a criminal conviction." 24 C.F.R. § 966.4(*l*)(5)(iii)(A). Cobb does not argue that HACM must prove its allegations using the criminal standard, beyond a reasonable doubt. Cobb simply

argues that the court must use the appropriate civil standard.

The fact that Congress and HUD chose not to specify the burden of proof to be applied in judicial eviction actions shows that they did not intend to preempt state law. The obvious omission markedly distinguishes this public housing eviction regulation from the regulation governing the administrative process used to terminate a rent assistance program participant's benefits, which HACM also cites in its brief. 24 C.F.R. § 982.553(c); (Resp't's Br. at 16). The rent assistance regulation establishes the burden of proof for hearings in the broader context of providing administrative procedures. *See generally* 24 C.F.R. § 982.551-555. HUD's omission of a burden of proof requirement in the public housing eviction regulation is illustrative of HUD's acquiescence to state judicial eviction procedures. It bears repeating that HUD stated in its "one-strike" policy guidance,

> 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, Appellant's Br. App. at A-103). In this case, the circuit court applied the incorrect legal standard to its finding that Mr. Cobb engaged in criminal activity. (R. at 18-7, L. 8-23, Appellant Br. App. at A-62). Therefore, Mr. Cobb respectfully requests that this Court reverse the circuit court's finding.

III. Public Safety Officer Darrow's testimony, even if credible, was not sufficient evidence to prove that Mr. Cobb engaged in drug-related criminal activity.

Cobb is asking this Court to determine, upon independent review, whether a trial court can infer that a tenant possessed, used, or distributed marijuana based solely on another individual's testimony that he smelled smoked marijuana at the tenant's door. At trial, the circuit court incorrectly relied on case law which establishes that the smell of marijuana, in some circumstances, rises to the level of reasonable suspicion or probable cause. The trial court found that the smell of smoked marijuana alone was sufficient to prove that

Cobb, or perhaps an unidentified guest of Cobb's, had engaged in drug related criminal activity.

"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. HACM argues that it only had to prove that there "was" criminal action or activity, but in fact, the regulation requires that HACM prove a specific person (either Cobb or his guest) engaged in a specific criminal act (manufacturing, selling, distributing, using or possessing an illegal drug). 24 C.F.R. § 966.4(f)(12)(i)(B).

Contrary to HACM's argument in its brief, Cobb is not asking this Court to overturn the circuit court's credibility determinations. The questions before this Court are whether HACM has met its burden of proof and whether the facts found by the trial court (that Officer Darrow perceived the smell of smoked marijuana at Cobb's door) fulfill the relevant legal standard to prove that Cobb or his guest engaged in

drug-related criminal activity on June 5, 2013. Both of those issues are matters of law reviewed de novo. *Nottelson v. DILHR*, 94 Wis. 2d 106, 116, 287 N.W.2d 763 (1980), *Brandt v. Brandt*, 145 Wis. 2d 394, 409, 427 N.W.2d 126 (Ct. App. 1988).

CONCLUSION

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

Dated this 28th day of February, 2014 at Milwaukee, Wisconsin.

LEGAL ACTION OF WISCONSIN
SeniorLAW

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April A.G. Hartman
SBN 1054346

P.O. Address:
230 W Wells Street, Room 800
Milwaukee WI 53203
Phone: (414) 278-7722 x. 3030
Fax: (414) 278-5853
E-mail: agh@legalaction.org.

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 produced with a proportional serif fond. The length of this brief is 2,727 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 Reply 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 February 28, 2014. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 28th day of February, 2014 at Milwaukee, Wisconsin.

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April A.G. Hartman, SBN 1054346