STATE OF WISCONSIN
SUPREME COURT

District 1 Appeal No. 2013AP002207
Circuit Court Case No. 2013SC020628

MILWAUKEE CITY HOUSING AUTHORITY,

Plaintiff-Respondent-Petitioner

v.

FELTON COBB,

Defendant-Appellant.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT 1
REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR
MILWAUKEE COUNTY, PEDRO A. COLON, JUDGE

AMICUS CURIAE BRIEF AND APPENDIX OF APARTMENT ASSOCIATION OF SOUTHEASTERN WISCONSIN, INC. and WISCONSIN ASSOCIATION OF HOUSING AUTHORITIES

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INTEREST OF THESE *AMICI*

The Apartment Association of Southeastern Wisconsin, Inc. (AASEW) is a nonprofit trade association with headquarters in Milwaukee, Wisconsin. The AASEW represents individuals and businesses engaged in the rental housing industry. The association has approximately 600 members who are owners and operators of residential rental property and over 50 business members who service the housing industry, ranging from appliance repair to windows and door suppliers. Many members own only a duplex or a few rental units while other members own and/or manage several hundred units.

The Wisconsin Association of Housing Authorities (WAHA) is an umbrella organization for public housing authorities or community/development redevelopment authorities in the state of Wisconsin. WAHA has 125 active members consisting of such public authorities and 49 associate members who are individuals, organizations, agencies or boards whose professional interests are allied with those of the public housing authorities. WAHA defines its mission statement as *"To foster and promote low-rent public housing and other housing programs for low and moderate income families, including elderly and handicapped, which provide a physical and social environment for the benefit of both the family and the community."*

The interests of WAHA are clearly aligned with those of Plaintiff-Respondent-Petitioner Milwaukee City Housing Authority because WAHA members face the same legal issues concerning federal versus Wisconsin housing statutes and regulations as are presented by this appeal.

Those members of AASEW who participate in the federal Section 8 housing program as private landlords are also affected by this issue of whether federal statutes and regulations preempt Wisconsin landlord/tenant law.

ARGUMENT

I. The Court of Appeals Decision Mistakenly Elevates the Rights of an Individual Tenant Over Federal Statutes and Regulations Intended to Create Safe, Crime-free Subsidized Housing

A. Hard Cases Make Bad Law

We start with a disabled 62 year old public housing tenant in the City of Milwaukee. He was perhaps smoking a bit of weed in his own apartment, doing it quietly, and when the security officer knocked on his door to ask, "What's that smell?" he understandably didn't let the officer in. And for this small, albeit *criminal* transgression (we are in Wisconsin, not Colorado!) his Housing Authority landlord serves him with an eviction notice. When his case gets to the Wisconsin Court of Appeals the court reverses the eviction because the notice did not give the tenant the required 5 days per Wis. Stat. § 704.17(2)(b) to cure himself of his addiction.

So he is elderly, he is disabled, he never admitted to the act and the landlord didn't have that much solid proof of a lease violation – all sympathetic, mitigating facts – but facts which should not play a role in the appellate decision.

As said, we start with these facts but this eviction case could have started with other facts and one wonders if the rationale of the decision below would have changed. Other facts might be like those in *Scarborough v. Winn Residential L.L.P./Atl. Terrace Apts.*, 890 A.2d 249 (D.C. 2006) where the tenant was evicted for having a loaded shotgun in her apartment which had been used in a fatal shooting. Or what if Mr. Cobb had been like the tenant in *Housing Authority of Covington v. Turner*, 295 S.W. 3rd 123 (Ky, Ct. App. 2009) who allowed her nephew to store crack cocaine and drug paraphernalia in her apartment?

Or we can posit a fact situation where a tenant goes to the rental office in the lobby of his building, slugs the manager and steals rental payments from the manager's desk. That is an obvious crime but, as we will discuss later, eviction would not be automatic, the tenant would get a 5-day notice to cure and if he behaved himself he could remain a tenant from year to year because public housing leases renew automatically.

B. The Court of Appeals decision implicitly says that Wisconsin statutes give a tenant the right to cure a criminal act as long as it is a minor one.

The Court of Appeals opinion implicitly finds fault with a landlord who rigorously enforces the federal mandate that one criminal act, however minor, can be grounds for termination of a lease. This is apparent at several points in the opinion:

(1) At ¶7 where the Court cites federal housing regulations which say the housing provider "may consider all circumstances" regarding the seriousness of the tenant's breach including whether the tenant has mitigated his offending action.

(2) At ¶11 where the opinion erroneously states that the federal "One Strike and You're Out" Policy does not have the force of law or regulation and is trumped by the Wis. Stat. § 704.17(2)(b) provision because a one strike clause is not included in the lease.

(3) At ¶12 where the opinion brushes off the rationale of *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002) by saying it "is not a preemption case and is of little help here." *Rucker* has been sufficiently analyzed in the briefs of the parties. The U.S Supreme Court's holding that a totally innocent public housing tenant, who did not commit a crime and could not have prevented commission of a crime by others, was nevertheless properly evicted when a crime occurred on the

premises emphasizes the importance of the federal mandate that public housing be made as crime-free as possible.

(4) At ¶14 the Court of Appeals is flatly wrong about the workings of the "cure" statute, § 704.17(2)(b). The opinion says tenants do not get "a free pass for whatever 'criminal activity' the Housing Authority contends" they committed. But yes, there **is** a free pass for the first crime and it could be as serious as homicide or sexual assault. The only exceptions giving no right to cure are under Wis. Stat. § 704.17(2)(c) [operation of a drug or criminal gang house] or under Wis. Stat. § 704.16(3)(b) [crime must be committed against another tenant **and** an injunction or criminal complaint must have been issued]. So the hypothetical crime we posited above of a tenant beating and robbing an employee of the landlord will require the landlord to give the tenant a 5-day notice to not repeat his crime. If the tenant commits a sexual assault on a *guest* of another tenant the co-tenants in his building would be justifiably concerned about his continued presence but, again, all the landlord can do is serve a 5-day notice telling the tenant to "remedy the default" (Don't do it again!) and the tenant can stay unless there is a future breach of some kind.

II. Private Landlords Face the Threat of Municipal Nuisance Ordinances if They Can't Promptly Evict Tenants Who Commit a Crime

Several municipalities in Wisconsin have enacted so-called "chronic nuisance premises" ordinances. See Milwaukee, Wis., Code of Ordinances § 80-10 (2014) (copy provided in our appendix) and Madison, Wis. Gen. Ordinances § 25.09 *available at*

https://www.municode.com/library/wi/madison/codes/code_of_ordinances?nodeId=Chapter%2025%20-%20Offenses%20Against%20Public%20Safety.

The City of Milwaukee ordinance defines a huge range of 39 undesirable activities, including most any kind of crime, as "nuisance activity" (§ 80-10-2-c). Violations of various Wisconsin criminal code chapters such as chapter 961 (possession or delivery of controlled substances) and Wis. Stat. §§ 940.01 to 940.32 (crimes against life and bodily security) are incorporated by reference. See § 80-10-2-c-1-i and c-1-k. Scanning through the list of the types of nuisance activities quickly reveals that they are almost all activities which would be engaged in by tenants, not landlords. However, the ordinance makes the owner of the property liable for the cost of police enforcement (§ 80-10-2-c). The owner can also be fined between $1,000 and $5,000 if the owner has not persuaded the troublesome tenant to abate the nuisance activity and the property is

declared to be a "chronic nuisance" premises by the chief of police. § 80-10-6-a-3. The Madison ordinance is similar in scope.

The City of Milwaukee most recently enacted another type of nuisance ordinance (published November 21, 2014) to control after-hours types of activities where premises are used for the unlicensed sale of alcohol or likely distribution of drugs, known as "after set" activities. Milwaukee Code of Ordinances § 80-11 (copy furnished in our appendix). A property owner can be charged for police enforcement after only the *second* instance of after set activity. § 80-11-3-c. If the owner receives police notification that a tenant has operated an illegal after set, the owner could promptly give the tenant a 5-day notice to cease the activity. If the tenant then runs an after-hours party again the owner can definitely file an eviction. But the owner would still be liable for police enforcement costs of closing down the second after hours party. If the owner could rely on federal law preempting the tenant's Wisconsin's right to cure the owner could serve a 14 day notice upon occurrence of the first after set and neighborhood peace would be more quickly restored.

Such after set activity may be unlikely to occur at supervised multi-unit public housing but it is of concern to public housing authorities who operate scattered site properties and certainly to private owners who operate Section 8 subsidized housing.

III. All Subsidized Housing Tenants and their Neighbors Benefit from the Prompt Removal of Criminals in their Midst

Plaintiff-Respondent HACM makes this public policy argument at pages 24-27 of its initial brief. We *amici curiae*, as both public agency and private operators of federally subsidized housing, strongly second that argument. Unless they rent to someone living upstairs, private landlords and most employees of public housing agencies leave their "place of work" and go home at night. True, there are the night time calls from tenants or the police complaining about bad actor tenants with the resulting stress and expense to the owner of dealing with dysfunctional members of society. But crimes such as drug dealing, drug usage, violence, theft, or providing alcoholic beverages to minor guests most directly affects the fellow tenants at the premises and neighboring property owners and residents. Their welfare is an additional reason why federal preemption should be given effect.

IV. A Tenant Cannot "Cure" the Commission of a Crime

The "right to cure" provided by Wis. Stats. §704.17(2)(b) is not wiped out through federal preemption for most tenant breaches which can effectively be cured, such as loud music, harboring an illegal pet, leaving garbage in the hall or failing to properly dispose of recyclables. How does

one cure a criminal act? Especially if it is a serious crime, what societal purpose is served by giving the perpetrator only a cease and desist notice?

The Court of Appeals was too concerned with protecting Cobb's rights as a tenant when he was faced with losing his abode due to a relatively minor criminal act. That judgment call – is there enough evidence of illegal activity – rested with the landlord in the first instance. And then it rested with the trial judge who supported the landlord. And then it could have rested with the Court of Appeals reviewing the trial judge's findings on the sufficiency of the evidence except that that evidentiary issue was not decided by the Court of Appeals. Instead, the Court of Appeals has ruled that public housing **tenants will always have a right to commit a first criminal act** and cannot be evicted under a one year lease until they commit the second criminal act or some other breach.

That ruling and precedent should be reversed.

Dated this 5th day of December, 2014.

Respectfully submitted,

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CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19 (8)(c)(2), Wis. Stats., for a brief produced with a proportional serif font. The length of this brief is 2049 words.

CERTIFICATION OF ELECTRONIC FILING

I hereby certify that I have submitted an electronic copy of this *Amicus Curiae* brief and a separate electronic copy of the appendix bound with the brief which complies with the requirements of § 809.19(12).
I further certify that the electronic brief and appendix are identical in text, content and format to the printed form of the brief and appendix filed as of this date.

Dated at Milwaukee, Wisconsin this 5th day of December, 2014

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