THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2018-002155

The Housing Authority of the
City of Charleston,

Respondent,

v.

Katrina Brown,

Appellant.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. CHA MIS-CONSTRUES BROWN'S ARGUMENTS REGARDING THE APPLICABILITY OF U.S. DEP'T OF HOUS. AND URBAN DEV. V. RUCKER, 535 U.S. 125 (2002), TO THE INSTANT CASE.

In its brief, CHA addresses two arguments regarding the applicability of U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002), to the instant case which Brown has not made. Thus, at the outset it may be useful to clarify what Brown is arguing in this case and what she is not.

First, CHA appears to contend that the question of whether the Circuit Court mis-applied Rucker is not properly before this Court because Brown has never before argued that Rucker is inapplicable to this matter. Initial Br. of Resp., p. 7. CHA is correct insofar as it contends that Brown has never argued that Rucker is entirely inapplicable here. Indeed, Rucker is important here for two reasons. First, it emphasizes the need for housing authorities, like CHA, to carefully exercise their discretion. As the Rucker Court noted, housing authorities are "in the best position to take account of, among other things, the degree to which the housing project suffers from rampant drug-related or violent crime, the seriousness of the offending action, and the extent to which the leaseholder has . . . taken all reasonable steps to prevent or mitigate the offending action." 535 U.S. at 134 (internal citations and quotations omitted). Second, Rucker provides an example of a housing authority judiciously exercising its discretion under circumstances very similar to those presented in the instant case. There, the housing authority dismissed its eviction claim against the named respondent, Pearlie Rucker, after the offending household member, Ms.

Rucker's daughter, was incarcerated and no longer posed a threat to other tenants. 535 U.S. at 128 fn 1.

However, while Rucker is relevant in those limited respects, Brown has consistently argued that Rucker is not controlling in this case. (*See e.g.* R. pp. 30, 37, 66-69). Brown has taken the same position here. Initial Br. App., p. 9. Thus, the question of whether Rucker is controlling in this case and the question of whether the Circuit Court erred in its application of Rucker in this case are both properly before this Court.

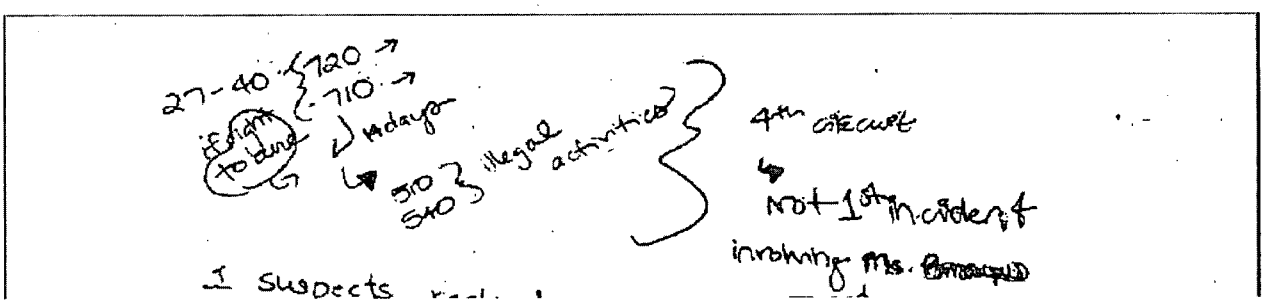
Second, CHA argues that Brown is relying on the innocent tenant defense that Rucker rejected because she "is not arguing that her son Cobb, who engaged in the criminal activity, should not be evicted, she is arguing that she and her other child should be allowed to remain in public housing." Initial Br. Resp., p. 8-9. CHA's argument misconstrues Rucker's core holding "that 42 U.S.C. § 1437d(l)(6) unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests **whether or not the tenant knew, or should have known, about the activity**." 535 U.S. at 130 (emphasis added). The "innocent tenant" defense which Rucker rejected was based on the argument that a housing authority was not authorized to evict a tenant based on the drug-related activity of other household members unless the tenant had actual or constructive knowledge of that activity. 535 U.S. at 129. Brown has not argued that her lack of knowledge about her son's activity means that CHA has failed to satisfy the threshold requirements for eviction, though she does argue that CHA has failed to satisfy those requirements for other reasons. As a result, Brown does not rely on the innocent tenant defense rejected in Rucker and that case is not controlling here.

II. CHA ALLEGES FACTS WHICH ARE UNSUPPORTED BY THE RECORD

In its brief, CHA makes several statements of fact which are unsupported either by the findings of the courts below or by evidence in the record. First, CHA accuses Brown's son, Anthony Cobb, of unlawfully possessing a firearm. CHA states that "Cobb committed two separate crimes" and goes on to assert that "Cobb's possession of a firearm is clearly a threat to the health, safety, or right to quite [sic] enjoyment of other residents or of those living in the immediate vicinity of the home." Initial Br. Resp., pp. 15 – 16. Both assertions presume that Cobb is guilty of unlawfully possessing a firearm, yet the record only contains evidence of his arrest on that allegation. (R. p. 106, 108).

Second, CHA asserts that Cobb was the subject of "two arrests for separate incidents". Initial Br. Resp., p. 10. However, nothing in the record supports the assertion that Cobb was arrested twice. Instead, Cobb was arrested once on suspicion of unlawfully carrying a firearm and then gave a post-Miranda confession to an attempted armed robbery. (R. p. 106, 108).

Third, CHA makes reference to the Magistrate's hand-written notes, (R. p. 103), and attempts to extract from them a finding that "this is not the first incident involving Brown" and that CHA had faced un-specified "issues" with Brown in the past. Initial Br. Resp., pp. 1, 12. CHA appears to be referring to the following excerpt from the Magistrate's notes:



(R. p. 103). Neither the Magistrate nor the Circuit Court made findings with respect to any other incidents or issues regarding Brown and the record does not contain sufficient evidence to even speculate as to what incidents or issues CHA is alleging, much less to prove that those incidents occurred. While CHA attempts to use these alleged and un-specified "issues" to bolster its argument that it did not abuse its discretion in deciding to seek the eviction of Brown and her then thirteen-year-old daughter, Initial Br. Resp., pp. 10, 22, the record is devoid of evidence that would either clarify or support what CHA is alleging.

Fourth, CHA makes several references to a February 2016 lease between Brown and CHA which lists Cobb as a household member. Initial Br. Resp., pp. 1, 11, 22, 23. CHA asserts that this lease was executed on February 1, 2016 and makes much of the fact that this lease was executed after Cobb's arrest. Initial Br. Resp., pp. 1, 11, 22, 23. In essence, CHA argues that the fact that Cobb's name appears on the February 2016 lease somehow undermines Brown's uncontradicted testimony that Cobb was, as of the March 16, 2016 hearing, being held in the Charleston County Jail and that her plan was for him to stay at his grandmother's house and no longer reside with her and her other young child on CHA property if he was allowed out on bond. (*See e.g.* R. p. 4). In doing so, CHA both misreads the 2016 lease and assigns to it a meaning which is both implausible and unsupported by the record.

Contrary to CHA's assertions, the lease in question was *dated* February 1, 2016, but not *executed* until April 18, 2016. (R. p. 98). The timing of these events is important in context. CHA alleged that Brown was in violation of her lease by letter dated January 29, 2016, a Friday. (R. p. 102). The date on the lease at issue is February 1, 2016, the following Monday, and it is not executed until April 18, 2016. (Lease dated February 1, 2016, R. p. 98). CHA filed for eviction

on March 1, 2016. (R. p. 29). The Magistrate issued her initial order finding against CHA on March 31, 2016. (R. p. 3). CHA did not appeal that order until April 29, 2016. (R. p. 30). Thus, the lease in question was executed after CHA initially lost its eviction case, but before it appealed that decision.

Upon these facts, CHA attempts to build an argument that Brown's true intention was evidenced not by her sworn testimony that Cobb would not return to her household, but by the fact that Cobb's pre-printed name was not removed from her lease. This argument strains credulity, particularly in light of two facts. First, there is no evidence in the record that Cobb ever returned to Brown's household. Second, the lease was executed by both Brown and CHA after the Magistrate had authorized CHA to remove Cobb from Brown's household. The more plausible scenario is simply that CHA executed a new lease with Brown after the Magistrate declined to evict her, but before CHA appealed that ruling and that the presence of Cobb's pre-printed name on the lease was either not noticed, or not believed to be significant. The fact that the Magistrate's Order authorized CHA to remove Cobb from Brown's household, and that CHA is authorized by regulation to require exclusion of an offending household member in order for non-offending members to remain in the unit, also support the latter scenario. (R. p. 4); 24 C.F.R. § 966.4(l)(5)(vii)(C).

Fifth, in discussing the language contained in its public housing lease which purports to authorize eviction for violent criminal activity regardless of where it occurred, CHA asserts that "[t]he language that is included in CHA's lease is included in the statutes and regulations as grounds for termination of public housing tenancy . . . ." Initial Br. Resp., p. 15. Yet, the applicable statutes and regulations do not contain this language. Instead, as Brown has argued, the language

in CHA's lease which purports to authorize such evictions plainly contradicts the regulatory limitations on CHA's authority. Initial Br. App., p. 15 – 17. The applicable regulation provides that CHA may terminate a public housing tenancy only for specified criminal activity which includes 1) drug-related criminal activity on or off the public housing premises, and 2) other criminal activity which poses a threat to the community as discussed above. 24 C.F.R. § 966.4(1)(2)(iii)(A) (2018). CHA's lease attempts to authorize evictions for a category of criminal activity which the applicable regulation does not recognize, that is, violent criminal activity regardless of where it occurred and regardless of whether it created a threshold threat. It does so by including language which, contrary to CHA"s assertion, is not contained in the applicable statutes or regulations.

Finally, CHA states that "Brown goes on to argue that the CHA abused its discretion in seeking to terminate Brown's tenancy, which both circuit court judges also ruled on and found in CHA's favor." Initial Br. Resp., p. 8. During Brown's appeal of the Magistrate's decision reversing her earlier finding against CHA, the Circuit Court did rule against Brown on her argument that CHA abused its discretion. (R. p. 26). Brown has presented that question to this Court for consideration. Initial Br. App., p. 25 – 31. However, this issue was neither presented to nor ruled upon by the Circuit Court during CHA's initial appeal of the Magistrate's decision in favor of Brown. Instead, the only issue which CHA raised on appeal was whether the Magistrate properly applied Rucker. (Housing Authority of the City of Charleston's Notice of Civil Appeal, April 29, 2016). As a result, it is inaccurate to say that both circuit court judges ruled on this issue and found in CHA's favor.

III. CHA'S ARGUMENTS HIGHLIGHT THE LACK OF EVIDENCE TO SUPPORT A FINDING THAT COBB'S CONDUCT CREATED THE REQUISITE THREAT.

CHA's authority to terminate a public housing lease and seek eviction for non-drug-related criminal activity is limited to situations where the activity in question creates a threat to the health, safety, or right to peaceful enjoyment of the premises by other residents or of those living in the immediate vicinity. 42 U.S.C. § 1437d(l)(6) (2018); 24 C.F.R. § 966.4(l)(5)(ii)(A). The Circuit Court held, without reference to any particular evidence, that Cobb's conduct "involved acts, from which it can be inferred, created a threat to the health safety and right to peaceful enjoyment by residents in the vicinity of CHA's property." (R. p. 23). Similarly, CHA argues here that Cobb's conduct created such a threat, but points to no evidence which would support such a finding. Instead, CHA relies upon conclusory statements like "Cobb's crimes and confession to those crimes are in and of themselves evidence of a threat" and "[t]he fact that he engages in violent criminal activity involving a firearm is sufficient evidence that a threat existed." Initial Br. Resp., p. 16. Additionally, CHA relies upon conjecture in an effort to establish a hypothetical threat arguing that "[a]dditionally, there is clearly the risk that at any time, someone could have engaged in an act of retaliation, or attempted to take the gun from Cobb, while he was residing on housing authority property." Initial Br. Resp., p. 16. This is precisely the sort of "chain of conjecture about hypothetical facts" that the Appeals Court of Massachusetts held was insufficient to demonstrate the requisite threat in Boston Hous. Auth. v. Bryant, 693 N.E.2d 1060 (Ma. App. 1998).

CHA's conjecture and conclusory statements do no more to establish the requisite threat that did the Circuit Court's inference that such a threat existed. Instead, they serve to highlight the lack of evidentiary foundation for such a finding.

IV. CHA ERRONEOUSLY RELIES UPON THE PENNSYLVANIA SUPREME COURT'S HOLDING IN POWELL V. HOUS. AUTH., 812 A.2D 1201 (PA. 2002) TO SUPPORT ITS ARGUMENT THAT IT IS NOT REQUIRED TO SHOW THE REQUISITE THREAT.

In her brief, Brown cited the Pennsylvania intermediate appellate court's opinion in Powell which interpreted the term "immediate vicinity" to mean "on the premises or next door". Powell v. Hous. Auth, 760 A.2d 473, 482 (Pa. Commw. Ct. 2000) *rev'd on other grounds,* 812 A.2d 1201 (Pa. 2002). Brown's reference to Powell was in support of her argument that Cobb's conduct, which occurred approximately one mile from her home, did not affect residents in the immediate vicinity of the public housing complex and, as a result, did not constitute grounds for lease termination. *See e.g.* Initial Br. App., pp. 22 – 24. Notably, the intermediate appellate court in Powell affirmed the lower court's finding that distances of 0.8 miles and 0.2 to 0.3 miles or several blocks were not located in the immediate vicinity of the premises. 760 A.2d at 479. The Pennsylvania Supreme Court did not address the meaning of "immediate vicinity" on appeal.

CHA begins its critique of Brown's reliance on Powell by noting that it dealt with Section 8 housing assistance, not the public housing program at issue here. Initial Br. Resp., p. 18. "Section 8", in this context, refers to housing assistance authorized by Section 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f, which includes the Housing Choice Voucher

(HCV) program at issue in Powell. While CHA is correct that Powell dealt with Section 8 benefits as opposed to public housing, that distinction is not relevant in this context. In Powell, the intermediate appellate court was interpreting the meaning of "immediate vicinity" in a statute that authorized termination of a Section 8 assisted tenancy for, among other things,

> any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the **immediate vicinity** of the premises . . . .

42 U.S.C. § 1437f(d)(1)(B)(iii) (emphasis added). That statutory language is nearly identical to the regulation at issue in the instant case which authorizes a housing authority to terminate a public housing tenancy based on

> any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents (including PHA management staff residing on the premises) or threatens the health, safety, or right to peaceful enjoyment of their residences by persons residing in the **immediate vicinity** of the premises . . . .

24 C.F.R. § 966.4(l)(5)(ii)(A) (emphasis added). Thus, Powell is relevant in this case insofar as it analyzed statutory language nearly identical to the regulatory language at issue here in the context of off-premises violent criminal activity by a member of a household receiving federal housing assistance.

After dismissing Powell as irrelevant, CHA then goes on to cite the Pennsylvania Supreme Court's opinion on appeal which states

> Accordingly, we hold that a PHA may terminate Section 8 benefits for the violent criminal activity of a family member without having to prove that the violent criminal activity threatens the health, safety, or right to peaceful enjoyment of the premises by other residents or threatens the health, safety, or right to peaceful

> enjoyment of their residences of persons residing in the immediate vicinity of the Section 8 premises.

Initial Br. Resp., p. 19 (*citing* Powell v. Hous. Auth., 812 A.2d 1201, 1216 (Pa. 2002)). To the extent that CHA relies on this statement to support its argument that it need not prove the requisite threat, its reliance is misplaced because, in this context, the distinction between public housing and Section 8 matters a great deal.

In Powell, the Plaintiff, a recipient of Section 8 housing assistance, argued that HUD lacked the authority to promulgate a regulation which permitted the housing authority to terminate her Section 8 assistance for "violent criminal activity" without imposing a requirement that the activity threaten the health, safety, or quiet enjoyment of other tenants or of persons residing in the immediate vicinity. 760 A.2d at 476. The intermediate appellate court agreed with the Plaintiff holding that the statute which authorized termination of Section 8 benefits did not specifically authorize termination for violent criminal activity without proof of the requisite threat and that HUD's regulation, which purported to do so, exceeded the scope of the statute. 760 A.2d at 481. The housing authority appealed, and the Pennsylvania Supreme Court reversed holding that the court below failed to afford HUD appropriate Chevron deference and that the regulation at issue was a permissible construction of the applicable statute. 812 A.2d at 1216.

The Section 8 regulation at issue in Powell, promulgated by HUD, permitted termination of housing benefits for violent criminal activity without proof of a threat to other residents or others living in the immediate vicinity. 24 C.F.R. § 982.551(l). The public housing regulation at issue here, also promulgated by HUD, does not. 24 C.F.R. § 966.4(l)(5)(ii)(A). Thus, to the extent that CHA relies on Powell to argue that it need not prove the requisite threat, that reliance is misplaced.

V. CHA'S ARGUMENTS FAIL TO DEMONSTRATE THAT IT PROPERLY EXERCISED ITS DISCRETION.

CHA argues that it properly exercised its discretion in deciding to seek the eviction of Brown and her then thirteen-year-old daughter. However, in doing so, it relies not on any evidence in the record, but on a series of conclusory statements such as "CHA exercised its authorized discretion in choosing to end the tenancy of all of the occupants" and "[i]n this case, CHA exercised its discretion and made the decision to proceed with the eviction." Initial Br. Resp., p. 20 – 21. Similarly, the Circuit Court found, without citing any particular evidence, that CHA did exercise its discretion because it "was aware of the applicable regulations" and that "[e]viction here did not occur automatically . . . ." (R. p. 27). If the proper exercise of discretion may be proven merely with evidence of the fact that a particular decision was made, then judicial review of that exercise becomes both meaningless and impossible. Tenants subjected to arbitrary action by a housing authority, a violation of their right to due process, *See e.g.* Thorpe v. Hous. Auth. of Durham, 386 U.S. 670 (1967), would be left without meaningful review or remedy if CHA's position is adopted.

Further, in arguing that it properly exercised its discretion, CHA points to several factors that it claims, without evidence, it considered in reaching the decision to seek Brown's eviction. Assuming that CHA did consider these factors, a review of those listed reveals several which are not supported by any evidence or are plainly irrelevant.

First, CHA asserts that it considered the fact that Brown "testified that [Cobb] would no longer reside with her after signing a subsequent lease AFTER the arrest had taken place, where

she listed Cobb as a resident." Initial Br. Resp., p. 23. CHA's mis-interpretation of the lease in question and the implausibility of CHA's apparent conclusion have been discussed already. *See infra* pp. 6 – 8. CHA's reliance on this factor does not support its assertion that it properly exercised its discretion, rather, it supports the opposite conclusion.

Second, CHA asserts that it "also advised that they have had issues with Brown prior to these incidents." Initial Br. Resp., p. 23. As has already been discussed, the record does not contain evidence sufficient even to explain what these "issues" may have been, much less prove that they occurred. *See supra* pp. 5 – 6. Again, far from demonstrating the appropriate exercise of discretion, CHA's purported consideration of this factor supports the opposite conclusion.

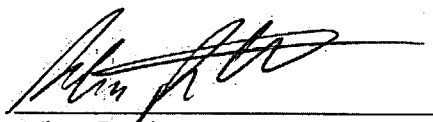
Finally, CHA asserts that it exercised its discretion "in looking at the circumstances surrounding the multiple crimes committed by Cobb over the course of several days . . . ." Initial Br. Resp., 22. As discussed above, CHA again relies upon the assertion that Cobb was guilty of multiple crimes when the record only discloses his admission to one criminal act. *See supra*, p. 5. CHA's reliance upon assertions for which there is no evidence again supports the conclusion that it failed to properly exercise its discretion.

CONCLUSION

For the reasons stated herein and those stated in Appellant's Brief, this Court should reverse the judgment of the Circuit Court.

(signature to follow)

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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