

IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION, PABLO MONTANA

SALISH AND KOOTENAI HOUSING)	
AUUTHORITY,)	Cause No. AP-002-204-CV
)	
Plaintiff-Appellant,)	
)	OPINION
)	
v.)	
)	
DEBRA CAYE,)	
)	
Defendant-Appellee.)	

BEFORE: Wm. Joseph Moran, Chief Justice, Clayton Matt and Wilmer E. Windham, Associate Justices

APPEARANCES:

For Appellant: DECKER & DESJARLAIS
Daniel F. Decker (argued)
David H. House (argued)
P. O. Box 310
St. Ignatius, Montana 59865

For Appellee: TRIBAL DEFENDER'S OFFICE
Laurence J. Ginnings (argued)
P. O. Box 278
Pablo, Montana 59855

Opinion by Associate Justice Windham.

Summary

On September 17, 2001, law enforcement officers raided defendant's Tribal Housing residence and seized three glass or porcelain objects, which appeared to be pipes used for ingesting illegal drugs. There was also testimony to the effect that other objects observed were commonly associated with drug use and sales. A criminal prosecution was instituted but was dismissed. An arrest report was sent to SKHA, which in turn sent Ms.

Caye a letter and posted an eviction notice on her door on November 29, 2001. By a telephone call to Ms. Vanderburg of SKHA on December 4, 2001, Ms. Caye disputed the drug charges and the eviction. No further action was taken until June 6, 2002, when this action was filed seeking eviction and damages. This was, coincidentally, the date the criminal complaint was dismissed. The money claims were denied, except for \$43.99 to replace a window shade; and the eviction was denied for failure of proof, no tests having been performed on the pipes, and because of the dismissal of the criminal charges.

The Trial Court's Findings of fact included the following:

7. The Dwelling Lease provides that the Authority may terminate the lease:

If Tenant, any member of Tenant's household, guest or other person under Tenant's control engages in criminal activity, that threatens the health, safety, or right to peaceful enjoyment of other tenants, including drug-related criminal activity, on or near the leased premises, while Tenant resides in the Authority's property.

For purposes of subsection (6), the term "drug-related criminal activity:(sic) means the illegal manufacture, sale, distribution, or use of a controlled substance as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802). The standard of proof used to determine "drug-related criminal activity" has occurred is a preponderance of the evidence that the activity has occurred. A specific criminal conviction is not required. (Plaintiff's Exhibit #1, p.6-7, Dwelling Lease, Section 11(B) (6))

The Trial Court's Conclusions of Law included the following:

2. The Plaintiff has not established that the Defendant was engaged in criminal activity within the meaning of the provisions of the Dwelling Lease. Though a criminal conviction is not required as proof of criminal activity, the dismissal of Cause No.01-1083-CR and the absence of test results establishing the presence of illegal drug residue in the "pipes" seized at the housing unit on September 17, 2001, do not allow the Court to conclude by a preponderance of the evidence that the Defendant was engaged in criminal activity. The Plaintiff has failed to establish the basis for eviction.

As of this date, Ms. Caye has voluntarily vacated the premises, and the financial issues have been disposed of one way or another. SKHA had judgment for \$43.99 and costs, but appeals from that part of the judgment denying the Order of Eviction.

DISCUSSION

This Court takes judicial notice of the pervasive problem of drug abuse in this Country generally and on this Reservation in particular. We also recognize the difficult task faced by the officials of the Tribal Housing Authority in maintaining a safe and healthful environment for their tenants.

This Court also recognizes the controlling authority represented by the United States Supreme Court Case of *Department of Housing and Urban Development v. Rucker* 535 U.S. 125, 122 S.Ct. 1230 (2002). At the same time we are bound to give great deference to the factual determinations of our trial courts. Appellant nonetheless urges us to hold that the Trial Court's factual determination should be disregarded as clearly erroneous. However, in this case we need not reach this question.

Generally speaking, Appellate Courts do not and should not decide hypothetical cases. This appears to be such a case. The mootness rule is not necessarily binding on this Court, but it is a rule founded in long experience and sound reasoning. No matter how we decide this case, no one will be evicted and no money will change hands. We are urged to rule on the merits because of the important question of public policy presented and because of the likelihood that the legal situation will recur. The controlling law has been announced by the United States Supreme Court in the *Rucker* case.

In *Rucker*, the Court set out the guidelines for eviction of tenants from federally assisted housing units as follows:

1. With drug dealers "increasingly imposing a reign of terror on public and other federally assisted low-income housing tenants," Congress passed the Anti-Drug abuse act of 1988. (42 USC section 11901, et seq.)
2. The Act, as later amended, provides that each "public housing agency shall utilize leases which . . . provide that any criminal activity which threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug related activity on or off the 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 the tenancy.
3. The statute requires lease terms that allow a local public housing authority to evict a tenant when a member of the tenant's household or a guest engages in drug-related criminal activity, regardless of whether the tenant knew, or had reason to know, of that activity.
4. There is no Constitutional prohibition involved since the government in these cases is not attempting to criminally punish or civilly regulate

members of the general populace, but is, instead, acting as a landlord of property which it owns, invoking a clause to which the tenant has agreed.

5. The statute does not *require* the eviction of a tenant who violates the lease provision, but entrusts that decision to the local housing authorities who 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"
6. The tenant is entitled to a hearing to determine whether the lease provision was actually violated.

We can add little to this decision except to point out that due process can be afforded to a tenant facing eviction either in an administrative hearing subject to the judicial review applicable to such proceedings or by a complaint for eviction initiated in the court system; as was done here. If the situation presented in this case recurs, we are confident that if due process is afforded and proper proof is made the rule of law will be upheld. In this case, however, we are not persuaded that anything will be accomplished by giving an advisory opinion.

In the event we do hold that the case is moot, Appellant urges us to follow the rule of *Deakins v. Monaghan* 484 U.S. 193, 108 S. Ct. 523 (1988) and vacate the judgment below with directions to dismiss the relevant portion of the complaint. This we are prepared to do.

DISPOSITION

This appeal is dismissed as moot. The judgment of the Trial Court is vacated and the Trial Court is directed to dismiss the complaint of the Salish and Kootenai Housing Authority with prejudice.

DATED this 13th day of April, 2004

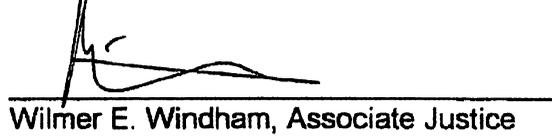




Wilmer E. Windham, Associate Justice



Clayton Matt, Associate Justice



Wilmer E. Windham, Associate Justice

CERTIFICATE OF MAILING

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed true and correct copies of the OPINION to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 13th day of April, 2004.

**David House
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A handwritten signature in black ink that reads "Abigail Dupuis". The signature is written in a cursive style and is positioned above a horizontal line.

**Abigail Dupuis
Appellate Court Administrator**