No. 32PA15 DISTRICT EIGHT-B

SUPREME COURT OF NORTH CAROLINA

**********

| | | |
|---|---|---|
| EASTERN CAROLINA REGIONAL HOUSING AUTHORITY – BROOKSIDE MANOR, | ) | |
| Plaintiff-Appellant, | ) | From Wayne County |
| | ) | No. 13-CVD-1197 |
| v. | ) | No. COA14-212 |
| SHERBREDA J. LOFTON, | ) | |
| Defendant-Appellee. | ) | |

**********

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

**********

NOW COMES Disability Rights North Carolina ("DRNC"), North Carolina's Protection & Advocacy system, through undersigned counsel and pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure, and moves this Court for leave to file an *Amicus Curiae* Brief in support of Appellee Sherbreda Lofton.

In support of this motion, Movant shows to the Court the following:

## NATURE OF APPLICANT'S INTEREST

DRNC requests to participate in this matter as *amicus curiae* to discuss the impact this Court's ruling may have on our State's system of care for persons with disabilities. DRNC is North Carolina's designated Protection and Advocacy System ("P&A"); DRNC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. §10801 et seq.; 42 U.S.C. § 15041 et seq. (2006). The federal Developmental Disability Act additionally mandates that DRNC as the P&A must "protect the legal and human rights of individuals with developmental disabilities" and

> pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation.

42 U.S.C. §§ 15041, 15043 (2006).

DRNC's interest in the present case is to advocate for the legal rights of people with disabilities who rely on federally subsidized housing for their residential needs.

Over fifty percent of households living in public housing are composed of people who are elderly or who have at least one member of

the household who has a disability. National Low Income Housing Coalition, *Who Lives in Federally Assisted Housing?* HOUSING SPOTLIGHT, Nov. 2012, *available at* nlihc.org/sites/default/files/HousingSpotlight2-2.pdf. People with disabilities and the elderly often have caregivers who, either through a formal or an informal arrangement, are permitted entry into their homes to assist them with activities of daily living. Others may rely on family, friends or neighbors for assistance with transportation, grocery shopping, housekeeping or meal preparation.

## REASONS WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

Movant believes DRNC's expertise in representing and advocating for people with disabilities will be of benefit to the Court in this case. DRNC routinely represents individuals receiving public benefits in administrative hearings and judicial appeals. Moreover, as a member of the national network of P&As, DRNC possesses a uniquely broad view of the importance of subsidized housing to the health and well-being of people with disabilities, and the dire consequences that may result if the Court should sanction the 'one-size-fits-all' approach advanced by the Plaintiff-Appellant.

Should this Court grant DRNC's request to file an *amicus curiae* brief, said brief will provide the Court with a broader perspective concerning the impact of this case on people with disabilities and will highlight for the Court the importance of meaningful court oversight of eviction proceedings so that the individual circumstances of a tenant with a disability will be taken into account before such a tenant faces the loss of their home.

## ISSUES OF LAW TO BE ADDRESSED

The brief will address the following topics:

- The trial court's consideration of unconscionability acts as a necessary and important safeguard against abusive or unjust evictions, particularly for tenants who are elderly or disabled are at an enhanced risk of eviction because of their reliance on outsiders to assist them in their activities of daily living.
- The trial court's consideration of unconscionability is entirely consistent with the law and regulations governing federally subsidized housing.

For the above reasons, Movant requests that the Court grant Leave to file an *amicus curiae* brief, submitted conditionally herewith.

Respectfully submitted this 10th day of August, 2015.

DISABILITY RIGHTS NORTH CAROLINA

By: _____

John R. Rittelmeyer, Esq.
john.rittelmeyer@disabilityrightsnc.org
NC Bar No. 17204

By: _____

Yasmin Farahi, Esq.
yasmin.farahi@disabilityrightsnc.org
NC Bar No. 41228
Disability Rights North Carolina
3724 National Drive
Suite 100
Raleigh, NC 27612
(919) 856-2195
(919) 856-2244 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF upon the Plaintiff-Appellant and Defendant-Appellee by placing a copy of same in the United States Mail, first class postage prepaid, addressed to their Attorneys of Record as follows:

Michael J. Parrish
E. Bradley Evans
Ward and Smith, P.A.
Post Office Box 8088
Greenville, NC 27835
(252) 215-4000
Attorneys for Plaintiff-Appellant

John Keller
Legal Aid of North Carolina
P.O. Box 2684
Wilson, NC 27894

Attorneys for Defendant-Appellee

This the 10th day of August, 2015.

DISABILITY RIGHTS NORTH CAROLINA

By: J. Rittelmeyer

John R. Rittelmeyer, Esq.
john.rittelmeyer@disabilityrightsnc.org
NC Bar No. 17204
3724 National Drive
Suite 100
Raleigh, NC 27612
(919) 856-2195
(919) 856-2244 (fax)

No. 32PA15 DISTRICT EIGHT-B

SUPREME COURT OF NORTH CAROLINA

**********

| | | |
|---|---|---|
| EASTERN CAROLINA REGIONAL HOUSING AUTHORITY – BROOKSIDE MANOR, | ) | |
| Plaintiff-Appellant, | ) | From Wayne County<br>No. 13-CVD-1197<br>No. COA14-212 |
| v. | ) | |
| SHERBREDA J. LOFTON, | ) | |
| Defendant-Appellee. | ) | |

**********

*AMICUS CURIAE* BRIEF OF DISABILITY RIGHTS NORTH CAROLINA IN SUPPORT OF DEFENDANT-APPELLEE SHERBREDA J. LOFTON

**********

# INDEX

## TABLE OF CASES AND AUTHORITIES

## ISSUES PRESENTED

I. CONSIDERATIONS OF UNCONSCIONABILITY ACT AS A NECESSARY AND IMPORTANT SAFEGUARD AGAINST ABUSIVE OR UNJUST EVICTIONS.

II. THE TRIAL COURT'S CONSIDERATION OF UNCONSCIONABILITY IS ENTIRELY CONSISTENT WITH THE LAW AND REGULATIONS GOVERNING FEDERALLY SUBSIDIZED HOUSING.

## THE NATURE OF DRNC'S INTEREST AS AMICUS CURIAE

Disability Rights North Carolina ("DRNC") is North Carolina's designated Protection and Advocacy System ("P&A"). As the state's designated P&A, DRNC is authorized by federal law to protect and advocate for the rights of individuals with disabilities. *See* 42 U.S.C. § 10801 et seq. (2006); 42 U.S.C. § 15041 et seq. (2006). The federal Developmental Disability Act additionally mandates that, as the P&A, DRNC must "protect the legal and human rights of individuals with developmental disabilities" and

> pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation.

42 U.S.C. §§ 15041, 15043 (2006). DRNC's interest in the present case is to advocate for the legal rights of people with disabilities who rely on federally subsidized housing for their residential needs and who would be affected by the Court's ruling in this matter.

Over fifty percent of households in public housing are composed of people who are elderly or who have at least one member of the household who has a disability. National Low Income Housing Coalition, *Who Lives in Federally Assisted Housing?*, HOUSING SPOTLIGHT, Nov. 2012, at 2, *available at* nlihc.org/sites/default/files/HousingSpotlight2-2.pdf. People with disabilities and the elderly often have caregivers who, either through a formal or informal arrangement, are permitted entry into their homes to assist them with activities of daily living. Daily activities such as bathing and getting in and out of bed, which many of us take for granted, can be a challenge for many people with disabilities. Others may rely on family, friends or neighbors for assistance with transportation, grocery shopping, housekeeping or meal preparation.

Even for those individuals who are receiving paid help through a formal arrangement, ensuring adequate care is often a shared

responsibility among many family members and others in the community. A report on the prevalence of caregiving in the United States estimates that in 2009 there were at least 54.1 million caregivers age 18 and over providing unpaid care to an adult family member or friend. Nat'l Alliance for Caregiving, *Caregiving in the U.S.: A Focused Look at Those Caring for Someone Age 50 or Older*, Nov. 2009, at 8, *available at*

www.caregiving.org/pdf/research/FINALRegularExSum50plus.pdf.

Given that the majority of households in subsidized housing include a person with a disability or the elderly, there are countless caregivers entering the homes of tenants in public housing on a daily basis. People with disabilities allow caregivers into their homes to provide them with needed assistance that allows them to maintain some degree of independence and to live in the community.

Policies such as the one espoused by ECRHA that compel the eviction of a tenant who is elderly or one with a disability—particularly when based on the criminal activities of one who acts as a caregiver—will have an extraordinary impact on the lives of people with disabilities living in this state.

## ARGUMENT

### I. CONSIDERATIONS OF UNCONSCIONABILITY ACT AS A NECESSARY AND IMPORTANT SAFEGUARD AGAINST ABUSIVE OR UNJUST EVICTIONS.

A trial court's consideration of matters of unconscionability acts as an important safeguard for the protection of the elderly and people with disabilities. As previously noted, the elderly and people with disabilities comprise the majority of public housing residents. They often rely on outside caregivers, both formal and informal, to assist them with activities of daily living that others take for granted. For example, it is commonplace for those with disabilities to open their homes to friends, family and neighbors who deliver groceries, medications and other necessary items. In addition, more than 25,000 disabled and elderly individuals receive Medicaid Personal Care Services in their own homes. Rose Hoban, *DHHS Deadline for Personal Care Services Looms*, NC HEALTH NEWS (Mar. 14, 2012), http://www.northcarolinahealthnews.org/2012/03/14/dhhs-deadline-for-personal-care-services-looms/. Many of these Medicaid-eligible persons

rely on public housing for their residential needs.[1] For this vulnerable population, principles of unconscionability may stand as the only protection against wrongful eviction and homelessness.

Eviction is a state law process. Due process protections provided by state law and required by the U.S. Department of Housing and Urban Development (HUD) are an important safeguard for tenants in public housing. The court's consideration of equity is the only point in the eviction process where special consideration of vulnerable populations, such as people with disabilities and the elderly, may be taken into account. Equitable principles such as unconscionability are a necessary limit on what would otherwise be unlimited powers of housing authorities to impose harsh policies that may have a disproportionate effect on our most vulnerable citizens.

a. Public Housing Authorities, like all Landlords, Must Follow the State Eviction Laws.

There is no separate federal law process for eviction of a tenant in federally-subsidized housing. Although many terms contained in the

---

[1] As one court notes: "Many tenants in public housing are the fragile elderly, or disabled mentally or physically, and public housing is, indeed, the housing of last resort for them. These are often the very same tenants whose grandchildren, children, care giver or other third person engages in illegal activity over which the tenant has no control or knows nothing about." *New York City Hous. Auth. v. Lipscomb-Arroyo*, 866 N.Y.S.2d 93 (N.Y. Civ. Ct. 2008).

lease agreement are dictated by federal law and regulation, federal regulations direct that state law controls the eviction process. 24 C.F.R. § 966.4(l)(4)(i). Public housing authorities, like all landlords in the state of North Carolina, must adhere to state law eviction procedures.

To evict a tenant in North Carolina, a court must undertake a four-part analysis, one step of which is "that the result of enforcing the forfeiture is not unconscionable." *Charlotte Housing Authority v. Fleming*, 123 N.C. App. 511, 513, 473 S.E.2d. 373, 375 (1996) (citing *Morris v. Austraw*, 269 N.C. 218, 223, 152 S.E.2d 155, 159 (1967) (internal citations omitted)). For nearly fifty years, North Carolina courts have required all landlords to satisfy these four criteria to obtain an eviction. This test has also been applied by state courts in considering evictions by public housing authorities.[2] *See Fleming*, 123 N.C. App. at 513, 473 S.E.2d at 375. The protections provided by state court proceedings serve as the only safeguard to tenants facing eviction from their homes in cases involving criminal acts by third parties.

---

[2] Although there is no separate federal eviction procedure, public housing regulations require that in some cases, landlords take additional steps before proceeding with an eviction in state court. However, evictions brought under the public housing authority's policy relating to alleged drug-related activity of tenants or their guests do not require the formal grievance procedure typically utilized by housing authorities before engaging in state eviction proceedings. 42 U.S.C. § 1437d(k).

Housing authorities themselves expect that state law eviction proceedings provide the necessary due process protections required by HUD. The HUD Secretary may waive the administrative grievance procedure after review, on a state-by-state basis, of whether state court procedures fulfill the basic elements of due process, as defined by HUD. *Simmons v. Kemp*, 751 F. Supp. 815, 817 (D. Minn. 1990). In granting his approval for housing authorities in North Carolina to forgo administrative proceedings, HUD Secretary Andrew Cuomo described the court hearings as "safeguard[ing] the rights of tenants to due process of law." Press Release, U.S. Dept. of Housing & Urban Dev., HUD Clears Way for Faster Eviction of Criminals from Public Housing in North Carolina (June 30, 1997), HUD No. 97-111, *available at* http://archives.hud.gov/news/1997/pr97-111.cfm.

Courts have also determined that *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002), suggests, in essence, that "state eviction proceedings sufficiently guarded against any potential abuses." *Newark Housing Authority v. Melvin*, 2013 WL 149666 (N.J. Super. Ct. 2013) (unpublished) (citing *Rucker*, 535 U.S. 125).

According to Eastern Carolina Regional Housing Authority's (ECRHA) own policies, "HUD has issued a due process determination that the law of the State of North Carolina requires a Tenant be given an opportunity for a hearing in the court which provides the basic elements of due process before eviction from the dwelling unit." ECRHA Admission and Continued Occupancy Policy 13-8; *Record* at 104. The policies further state that "In matters of Eviction, all Evictions pursued by ECRHA are subject to civil law including evictions for drug-related or criminal activity." ECRHA Admission and Continued Occupancy Policy 19-6; *Record* at 113. Taken together, these policies demonstrate an expectation by ECRHA that the full scope of established state law eviction procedures would apply to all evictions, including drug-related evictions from public housing.

By eschewing administrative hearings and relying on the North Carolina courts to ensure adequate due process protections in eviction proceedings as required by HUD, public housing authorities have signaled their intent to follow state law and abide by local eviction practices. In its consideration of matters of unconscionability, state law is not blind to the special considerations of persons with disabilities and

the elderly. Public housing authorities should not be allowed to employ the state courts to obtain evictions while exempting themselves from the state's established protections for its most vulnerable citizens.

b. Courts' Consideration of Unconscionability in Eviction Proceedings is an Essential Component of the Due Process Protections Afforded to All Public Housing Tenants.

Courts in North Carolina and elsewhere have long permitted tenants to raise matters of unconscionability in eviction proceedings. Under North Carolina's long-established four-part analytical framework, the court is required to determine whether the result of enforcing the forfeiture of a tenant's leasehold is unconscionable. *Fleming*, 123 N.C. App. at 513, 473 S.E.2d at 375 (citing *Morris*, 269 N.C. at 223, 152 S.E.2d at 159). North Carolina courts have also allowed additional equitable defenses, such as waiver and estoppel, to be pleaded by the defendants in an eviction. *Wachovia Bank & Trust Co., N.A. v Rubish* 306 N.C. 417, 293 S.E.2d 749 (1982) (allowing consideration of a tenant's equitable defenses of waiver and estoppel in an eviction proceeding); *Cmty. Hous. Alternatives, Inc. v. Latta*, 87 N.C. App. 616, 618, 362 S.E.2d 1, 2 (1987) (allowing consideration of a tenant's equitable defense of waiver). Other jurisdictions likewise

permit consideration of "equitable circumstances" and unconscionability in their evictions proceedings. *See e.g., Portage Metro. Housing Auth. v. Brumley*, 2008 WL 4693200, at *24 (Ohio Ct. App.) ("[A] trial court may consider equitable circumstances in eviction matters."); *Millenium Hills Hous. Dev. Fund. Corp. v. Davis*, 936 N.Y.S.2d 59, 59 (N.Y. Dist. Ct. 2011) (considering whether the penalty of termination is so disproportionate as to " 'shock' the conscience").

HUD requires that tenants that are evicted be given a court hearing that contains basic elements of due process. 24 C.F.R. § 966.51(a)(i). Required elements of due process in such a hearing include an "[o]pportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or *equitable defense* which the tenant may have." 24 C.F.R. § 966.53(c)(3) (emphasis added). Thus, HUD's own regulations contemplate that state courts[3] would consider equitable principles, including matters of unconscionability, as a basic element of due process. See e.g. *Minneapolis Pub. Hous. Auth. v. Lor*, 491 N.W.2d

[3] As discussed above, the HUD Secretary's approval of waiver of the administrative grievance process, allowing housing authorities to go directly to state court for eviction proceedings, is based upon a review of state court procedures and whether those procedures "fulfill[ ] the basic elements of due process." *Simmons*, 751 F. Supp. at 817.

700, 703 (Minn. 1999) (referring to unconscionability as an equitable defense). ECRHA's compulsory eviction policy regarding the drug-related activities of tenants and their guests would violate due process rights if it were held to bar public housing tenants from raising, and courts from considering, the unconscionability standard available to all other tenants in state court.

Court oversight of state eviction proceedings provides a necessary degree of protection for vulnerable populations, such as persons with mental illness or cognitive impairments,[4] from unjust, inequitable, or unconscionable results. People with disabilities and the elderly often have caregivers in their homes on whom they rely for their health and safety. These caregivers provide basic needs and allow persons with disabilities and the elderly to remain in the community. Often, the individuals needing such caregivers must contend with limitations on both their resources and their personal freedom when attempting to choose among the limited pool of people willing to provide assistance. These groups may include family members, neighbors, or rotating

[4] People with disabilities are more than twice as likely as the general population to be living in poverty, and are thus highly represented among persons eligible for and receiving housing assistance. National Council on Disability, *The State of Housing in America in the 21st Century: A Disability Perspective*, Jan. 19, 2010, at 329.

personal care workers assigned by the State. While people with disabilities and the elderly remain responsible for their choices and have an obligation not to permit drug-related activities, many face barriers to exercising control over their caregivers while balancing their need for in-home care. Removing consideration of equities and unconscionability in imposing strict liability for third-parties' drug related activities would have a disparate impact on these vulnerable populations who are often so dependent on these outside caregivers.

*Rucker* holds that 42 U.S.C. § 1437d(*l*)(6) requires public housing authorities to utilize lease terms that give local public housing authorities discretion to evict tenants for the drug-related activity of "any member of the tenant's household, or any guest or other person under the tenant's control" whether or not the tenant knew about the activity.[5] *Rucker*, 535 U.S. at 132 (citing 42 U.S.C. § 1437d(*l*)(6). The Appellant in this case is arguing for a mandatory eviction rule—one that would both foreclose the exercise of discretion by ECHRA and circumvent the ordinary protections of state law—in every eviction

[5] It is important to note that Congress did not require and the Court did not find that the public housing authorities must evict tenants for the drug-related activity of any household guest. Instead, the intention of Congress, clarified by the Court in *Rucker*, was to give discretion to the public housing authorities.

allegedly based on drug-related activities. Eviction would be required in every case, including those in which the tenant had no knowledge of the alleged activities or the activities did not occur on the property. Left unchecked, this compulsory eviction policy could produce results that undermine the policy justification—concern for the health and safety of tenants in public housing, many of whom are people with disabilities and the elderly—underlying Congressional action and the Court's decision in *Rucker*.

The Housing Authority of the City of Raleigh (RHA), as *amici*, suggests that tenants owe a responsibility to guard against persons in their units engaging in drug activity and that "a policy that holds tenants strictly liable for those within their control engaging in drug activity is an appropriate discretionary decision by a public housing authority, which encourages tenants to be vigilant in policing those who are allowed to be on their premises and in monitoring their conduct." Brief of RHA at 7. Persons with disabilities and the elderly, however, face hurdles in precisely this type of monitoring.[6] A person who is

[6] As one court noted "it may be unduly burdensome to expect a physically infirm individual" to restrain an able-bodied individual from entering Housing Authority premises. *Lowery v. Hous. Auth.*, 826 N.E.2d 685 (Ind. Ct. App. 2005).

bedridden or who is suffering from a psychiatric illness cannot be expected to effectively police all of the activities of those on whom they rely for their care. Compulsory eviction policies which (it is contended) encourage such vigilance will not be effective when enforced against those who lack the full physical or mental capacity to exercise the oversight expected by housing authorities.

This is not to say that all individuals with disabilities cannot be subject to the drug-related eviction policies of housing authorities. It is important to recognize the dignity of people with disabilities who take responsibility for their actions and those of their guests to the extent that it is possible. There will certainly be situations in which people with disabilities and the elderly are at fault, just as any others, and in such cases an eviction may be an appropriate resolution. Meaningful judicial consideration of unconscionability, however, allows courts to take disability or infirmity into consideration in order to avoid inherent injustice. There is simply no other point in the process of evictions for drug-related activities of a tenant's guest where these considerations are allowed.

The policy goals underlying a compulsory eviction policy are not furthered by enforcing such policies on tenants who, by nature of their disability and reliance on the care of others, cannot reasonably be expected to monitor the activities of all of their guests at all times. Considerations of unconscionability by the courts serve as a natural backstop to compulsory eviction policies when their implementation would not further the interests of Congress, HUD, or the local housing authority in providing for the health and safety of tenants receiving housing assistance.

c. The Fair Housing and the Americans with Disabilities Acts Do Not Offer Adequate Protection to a Disabled Tenant in an Eviction Proceeding.

The Fair Housing Act (FHA) prohibits discrimination in housing on the basis of disability. 42 U.S.C. §§ 3601–3619. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability by governmental entities.[7] 42 U.S.C. §§ 12131–12134. Entities subject to the FHA and ADA, including all public housing authorities, must make reasonable accommodations in rules or policies when such accommodations may be necessary to afford a person with a disability

[7] Title II of the ADA applies to all programs, services, and activities provided or made available by a public entity. A housing authority is a public entity under Title II of the ADA.

equal opportunity to use and enjoy a dwelling. Under the FHA and ADA, the burden is on the tenant to request a reasonable accommodation.

The compulsory eviction policy at issue in this appeal does not allow any meaningful opportunity for people with disabilities to exercise their rights under the FHA and ADA prior to an eviction proceeding.[8] Though some might argue that individuals with disabilities could assert the protections of the FHA and ADA to avoid eviction based on application of a public housing authority's compulsory eviction policy, reasonable accommodation requests under the FHA and ADA are typically raised affirmatively in contemplation of a necessary change in policy, not as a defense to an eviction.

As contemplated by HUD, a request for reasonable accommodations by a tenant to her landlord initiates an interactive process to discuss the requester's disability-related need for an accommodation. Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *Reasonable Accommodations Under the Fair Housing Act* (May 17, 2004) (advising

[8] As previously discussed, unlike in other grievance proceedings in public housing, evictions based on drug-related activity do not require an administrative hearing or provide for other pre-hearing protections.

housing providers to engage in the interactive process with tenants requesting reasonable accommodations), *available at* http://www.hud.gov/offices/fheo/library/huddojstatement.pdf. This interactive process requires time and allows both parties an opportunity to ask questions and provide sufficient information to determine whether a request is reasonable, necessary, and sufficiently relates to the tenant's disability.

In practice, an eviction proceeding does not provide a meaningful opportunity for a person with a disability to raise FHA or ADA defenses or engage in the interactive process. Meghan P. Carter, *How Evictions from Subsidized Housing Routinely Violate the Rights of Persons with Mental Illness*, 5 Nw. J. L. & Soc. Pol'y. 118 (2010), *available at* http://scholarlycommons.law.northwestern.edu/njlsp/vol5/iss1/5. Many individuals, such as those with cognitive disabilities or mental illness, would be unable to raise an effective reasonable accommodation request when faced with eviction. Indeed, many individuals would be unlikely to have the benefit of counsel in an eviction proceeding. When faced with a poorly formulated request by a *pro se* defendant, it is all too easy for housing authorities attempting to evict a tenant to deny such requests

for a reasonable accommodation. Anne Fleming, Note, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing after* HUD v. Rucker, 40 HARV. C.R.-C.L. L. REV. 197 (2005). For example, housing authorities may suggest that providing such an accommodation would pose a direct threat to the health or safety of other individuals or that the nexus between the disability and the accommodation request is insufficient to modify a policy related to the drug-related activity of tenant's guests. *Id.* at 216, 219.

Thus, while the FHA and the ADA may provide protections to people with disabilities in limited circumstances, equitable principles such as unconscionability, that are necessarily considered by North Carolina courts in eviction proceedings, remain a tenant's best protection against an unjust and potentially discriminatory eviction.

## II. THE TRIAL COURT'S CONSIDERATION OF UNCONSCIONABILITY IS ENTIRELY CONSISTENT WITH THE LAW AND REGULATIONS GOVERNING FEDERALLY SUBSIDIZED HOUSING.

The factors articulated by the Court of Appeals are entirely consonant with HUD regulations governing federally-subsidized housing. *Eastern Carolina Reg'l Hous. Auth. v. Lofton*, ___ N.C. App.

___, ___, 767 S.E.2d 63, 68 (2014). ECRHA and RHA lament that their consideration of any factors relevant to notions of unconscionability is "untenable," "unworkable," and would lead to "absurd and discriminatory results." *See* Appellant's New Brief at 34; Brief of RHA at 8. Presumably, any consideration of the disability of the tenant would likewise be regarded as irrelevant when applying the harsh, unyielding policy that Appellant endorses. Notwithstanding this protest, however, federal regulations have long urged Public Housing Authorities to exercise their discretion in eviction decisions. The criteria identified by the federal authorities bear a close resemblance to the factors identified by the Court of Appeals as germane to a court's consideration of unconscionability.

The factors identified by the Court of Appeals as bearing on this issue included (1) the fact that Ms. Lofton was unaware of the drug-related activity; (2) that she cooperated with the investigating officers; (3) that she was not accused of any crime; (4) that she had not previously violated any provision of her lease agreement; (5) that no complaints had ever been made concerning her tenancy; (6) that she had no contact with Mr. Smith after the incident; and (7) that she and

her three small children faced homelessness if evicted. *Lofton*, ___ N.C. App. at ___, 767 S.E.2d at 68. The Court of Appeals concluded that it would be "shockingly unfair or unjust" for the eviction to proceed after consideration of these circumstances. *Id.*

Such a result is entirely consistent with HUD regulations and other forms of federal guidance. The relevant federal regulation states:

> *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 extent of participation by the leaseholder in 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.

24 C.F.R. § 966.4(l)(5)(vii)(B).

Still further, guidance issued by the federal authorities in the wake of the *Rucker* decision also counseled Public Housing Authorities to exercise an informed judgment when choosing to evict a tenant who was not personally culpable in a drug offence. *See e.g.*, Letter from HUD Secretary Mel Martinez to Public Housing Directors (Apr. 16, 2002) ("I would like to urge you, as public housing administrators, to be guided by compassion and common sense in responding to cases involving the

use of illegal drugs."), *available at* http://www.nhlp.org/files/Martinez%204-16-02%20ltr.pdf.

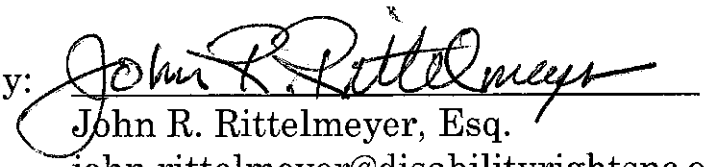
Appellant argues that it may disregard these regulations and advisory statements because they are not mandatory, and it is therefore permissible for it to take no notice of the innocence of the tenant or other mitigating circumstances when making specific eviction decisions. Appellant's New Brief at 15–19. This Court should nonetheless reaffirm an important limitation on ECRHA's 'discretion:' North Carolina courts will not enforce a rule if application of such a mechanistic policy would yield an unconscionable result.

## CONCLUSION

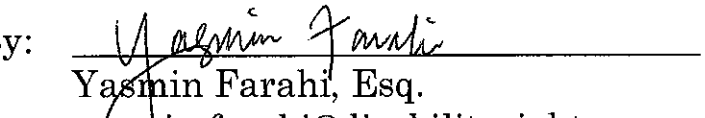
Elimination of any consideration of matters of unconscionability would disadvantage thousands of persons with disabilities and place them at risk of homelessness, needless institutionalization or worse. Our courts' consideration of principles of unconscionability in eviction proceedings is a necessary element of due process and may stand as the only protection against wrongful eviction and homelessness for our most vulnerable citizens. We therefore request that this Court affirm the holding of the Court of Appeals.

Respectfully submitted this 10th day of August, 2015.

DISABILITY RIGHTS NORTH CAROLINA

By: 

John R. Rittelmeyer, Esq.
john.rittelmeyer@disabilityrightsnc.org
NC Bar No. 17204

By: 

Yasmin Farahi, Esq.
yasmin.farahi@disabilityrightsnc.org
NC Bar No. 41228
3724 National Drive
Suite 100
Raleigh, NC 27612
(919) 856-2195
(919) 856-2244 (fax)

## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing *AMICUS CURIAE* BRIEF OF DISABILITY RIGHTS NORTH CAROLINA IN SUPPORT OF DEFENDANT-APPELLEE SHERBREDA J. LOFTON upon the Plaintiff-Appellant and Defendant-Appellee by placing a copy of same in the United States Mail, first class postage prepaid, addressed to their Attorneys of Record as follows:

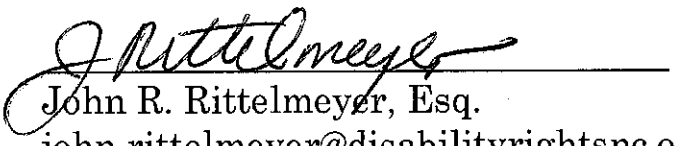
Michael J. Parrish
E. Bradley Evans
Ward and Smith, P.A.
Post Office Box 8088
Greenville, NC 27835
(252) 215-4000
Attorneys for Plaintiff-Appellant

John Keller
Legal Aid of North Carolina
P.O. Box 2684
Wilson, NC 27894

Attorneys for Defendant-Appellee

This the 10th day of August, 2015.

DISABILITY RIGHTS NORTH CAROLINA

By: 

John R. Rittelmeyer, Esq.
john.rittelmeyer@disabilityrightsnc.org
NC Bar No. 17204
3724 National Drive
Suite 100
Raleigh, NC 27612
(919) 856-2195
(919) 856-2244 (fax)