

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 7, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 04-1283
STATE OF WISCONSIN**

Cir. Ct. No. 04SC002045

**IN COURT OF APPEALS
DISTRICT I**

**HOUSING AUTHORITY OF THE
CITY OF MILWAUKEE,**

PLAINTIFF-RESPONDENT,

v.

JACQUALIN KING,

DEFENDANT-APPELLANT.

APPEAL from an order, a judgment, and an order of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Order and judgment reversed; order vacated and cause remanded.*

¶1 FINE, J. Jacqualin King appeals from an order and a judgment of eviction, entered on a jury verdict, and from a writ of assistance, evicting her from her apartment, which is owned by the Housing Authority of the City of Milwaukee. The Housing Authority brought this eviction action, claiming that

King violated section 5(Q) of her lease. King asserts that the trial court gave the jury the wrong issue to decide. We agree, reverse, and remand.

I.

¶2 The facts pertinent to this appeal are not disputed. King and her children were living under a one-year lease in apartment 440 in 715 West Galena Street in Milwaukee, a multi-unit building owned by the Housing Authority. She had a brief relationship with David Brown, who, although he spent the night with her in the apartment several times, never lived there and did not have keys to that apartment. At his request, she agreed to allow him to have delivered to her apartment what he told her was furniture. The shipment, which originated in California, also had some fifty-nine pounds of marijuana. The Housing Authority does not dispute King's assertion that she did not know there would be marijuana in the shipment.

¶3 Law enforcement discovered that the shipment had marijuana in it. The box, with furniture and the marijuana, was heavy, and it took two law-enforcement officers disguised as Federal Express employees to deliver it. Although the package was addressed to King's unit in the building, it had a fictitious addressee. Brown met the agents at the apartment-complex's common area, and signed for the shipment, telling the agents that the person listed as the addressee had given him permission to do so. The agents then moved the box to outside of King's apartment on the second floor, and, although they offered to put it inside, Brown refused to let them do so. The agents left the box leaning against the doorway outside of King's apartment. King was not in her apartment or the building. Ten minutes later, law-enforcement agents searched King's apartment, but found nothing implicating King in either the use or sale of any controlled

substances. She was also not home during the search. Law-enforcement agents arrested Brown. They did not arrest King.

¶4 Approximately one week after delivery of the marijuana/furniture shipment to the fictitious addressee at the apartment complex in which King and her children lived, the City of Milwaukee Police Department sent a drug-abatement letter to the Housing Authority. The notice had the following subject line: “RE: Drug House/Public Nuisance at 715 W. Galena St. #440,” and represented that the “building or structure is being used to facilitate the delivery, distribution or manufacture of controlled substances,” and was, therefore, a “public nuisance” under WIS. STAT. § 823.113. (Underlining in original.) The notice also declared that unless the Housing Authority, within five days of receipt of the notice, was able “to stop the nuisance and the conduct taking place in this building,” the building could ultimately be closed or ordered sold.

¶5 A day or so later, the Housing Authority sent a “NOTICE TO TENANT TERMINATING TENANCY” to King, telling her that it “has received written notice from the Milwaukee Police Department that a member of your household or person under your control has caused a drug nuisance, under sec 823.113 (1), Wis. Stats., to exist on the [Housing Authority]’s property.” (Capitalization in original; italics omitted.) This sentence was not entirely accurate: the notice from the Police Department did not assert that either “a member of [King’s] household or person under [King’s] control has caused a drug nuisance, under sec 823.113 (1), Wis. Stats., to exist on the [Housing Authority]’s property.” In any event, the notice from the Housing Authority told King that her “tenancy with the City of Milwaukee is hereby terminated” because she violated section 5(Q) of her lease in connection with the California shipment.

¶6 Section 5(Q) of King’s lease with the Housing Authority made King vicariously responsible for the acts of others by providing that she “agrees ... [t]o assure that [she], any member of the household, guest or another person under [King]’s control shall not engage in ... [a]ny drug-related ... criminal activity,” which the lease defined, as material here, as “the illegal manufacture, sale, distribution, use or possession with intent to manufacture, sell, distribute or use of a controlled substance.”

¶7 The Housing Authority’s attempted termination of King’s tenancy is governed by WIS. STAT. § 704.17(2), which applies to, as applicable here, “tenancies under a lease for one year or less.” (Small capitals omitted.) There are three subsections to § 704.17(2).

¶8 WISCONSIN STAT. § 704.17(2)(a) concerns the non-payment of rent, and is not implicated in this case. WISCONSIN STAT. § 704.17(2)(b) provides, as material here, that if a tenant “breaches any covenant or condition of the tenant’s lease ... the tenant’s tenancy is terminated if the landlord gives the tenant a notice requiring the tenant to remedy the default or vacate the premises on or before a date at least 5 days after the giving of the notice, and if the tenant fails to comply with such notice.” The notice given to King by the Housing Authority purporting to terminate King’s tenancy, did not give her the option of “remedy[ing] the default.” Thus, § 704.17(2)(b) does not apply here.

¶9 WISCONSIN STAT. § 704.17(2)(c) provides, again as material here:

A property owner may terminate the tenancy of a tenant who is under a lease for a term of one year ... if the property owner receives written notice from a law enforcement agency of a city ... that a nuisance under s. 823.113 (1) or (1m) (b) *exists in that tenant’s rental unit or was caused by that tenant on the property owner’s property* and if the property owner gives the tenant written

notice requiring the tenant to vacate on or before a date at least 5 days after the giving of the notice.

(Emphasis added.) WISCONSIN STAT. § 823.113(1) provides:

Any building or structure that is used to facilitate the delivery, distribution or manufacture, as defined in s. 961.01 (6), (9) and (13) respectively, of a controlled substance, as defined in s. 961.01 (4), or a controlled substance analog, as defined in s. 961.01 (4m), and any building or structure where those acts take place, is a public nuisance and may be proceeded against under this section.¹

(Footnote added.)

¶10 As noted, this case was tried to a jury. Over King's objection, the trial court submitted two questions to the jury. The first asked if "David Brown engage[d] in drug-related criminal activity on or near the apartment of Jacqualin King's apartment [*sic*]." The trial court answered this question "yes," taking it from the jury. The second question, which was given to the jury, asked: "On the day in question, was David Brown a guest or a person under the control of the tenant, Jacqualin King?" The jury answered this question "yes." King submits that this was the wrong question because it focused on King's alleged breach of her lease, which, pursuant to WIS. STAT. § 704.17(2)(b) she had a right to "remedy," rather than on WIS. STAT. § 704.17(2)(c), which permits termination of tenancies for the drug-related activity encompassed by WIS. STAT. § 823.113(1) and does not give tenants a right-to-remedy second chance. We agree.

¹ WISCONSIN STAT. § 823.113(1m)(b) refers to the use of buildings for gang-related activity and does not apply here.

II.

¶11 Trial courts have wide latitude in formulating special-verdict questions. *Guzman v. St. Francis Hosp., Inc.*, 2001 WI App 21, ¶15, 240 Wis. 2d 559, 580–581, 623 N.W.2d 776, 786. Nevertheless, whether the verdict framed by the trial court encompasses the correct dispute being tried is a matter of law subject to our *de novo* review. *Zintek v. Perchik*, 163 Wis. 2d 439, 454, 471 N.W.2d 522, 527–528 (Ct. App. 1991), *overruled on other grounds*, *Steinberg v. Jensen*, 194 Wis. 2d 439, 458–464, 534 N.W.2d 361, 368–370 (1995). Additionally, whether the trial court correctly framed the special-verdict questions turns on what the governing statutes require. This also presents an issue of law that we review *de novo*. See *State v. Swiams*, 2004 WI App 217, ¶5, No. 04-0299. We apply statutes as they are written, giving unambiguous language its clear meaning. *Ibid.*

¶12 As we have seen, in order to terminate a tenancy under WIS. STAT. § 704.17(2)(c) the landlord must prove that the nuisance defined by WIS. STAT. § 823.113 either “exists in that tenant’s rental unit or was caused by that tenant on the property owner’s property.” The jury was not asked that. Rather, as we have also seen, it was asked whether “David Brown [was] a guest or a person under the control of” King when the drug shipment was delivered. Neither § 704.17(2)(c) nor § 823.113(1), either separately or in tandem, references that kind of vicarious responsibility. Although whether Brown was “a person under the control of” King would be material if the Housing Authority’s case against King fell under WIS. STAT. § 704.17(2)(b)’s breach-of-lease provisions, the Housing Authority’s eviction action was not brought under that subsection because it, unlike § 704.17(2)(c), requires that the tenant be given a chance to “remedy” the breach, and she was not given that chance. Additionally, although King’s control or lack

of control over Brown might also be material to an alleged violation of § 704.17(2)(c) *if* there was evidence of King's knowledge of or participation in Brown's marijuana caper, there is, as we have seen, no evidence of that in the record.²

¶13 The order and judgment of eviction is reversed, the writ of assistance is vacated, and the matter is remanded for further proceedings, including a retrial if the Housing Authority determines that King's eviction from her rental unit is consistent with its mandate to provide safe, affordable housing to low income tenants.³

By the Court.—Order and judgment reversed; order vacated and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

² We also reject as wholly without merit the Housing Authority's assertion that King waived her right to object to the trial court's formulation of the special verdict questions by not anticipating that formulation in her answer to the Housing Authority's eviction complaint.

³ Outright dismissal, as King's appellate briefs request, is not appropriate because it may very well be that the Housing Authority can prove the requisite elements under WIS. STAT. § 704.17(2)(c) if it seeks to do so on remand.

