Michael K. Jeanes, Clerk of Court
*** Filed ***
05/05/2014 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000018-001 DT 04/28/2014

COMMISSIONER MYRA HARRIS

CLERK OF THE COURT
J. Eaton
Deputy

W R P V , X I , D H , SCOTTSDALE L L C KEVIN W HOLLIDAY

v.

MARIA MILTON (001)
ETHAN MILTON (001)

WILLIAM JAMES FISHER

MCDOWELL MOUNTAIN JUSTICE COURT
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Lower Court Case No. CC2013100080.

Plaintiff-Appellant WRPV XI Scottsdale LLC dba Desert Horizon Apartments (Plaintiff) appeals the McDowell Mountain Justice Court's determination that the tenants (Defendants Maria and Ethan Milton) had a right to continued possession of the premises despite their possession of marijuana when (1) Ethan Milton had a valid medical marijuana card; but (2) marijuana is a controlled substance under federal law. Plaintiff contends the trial court erred. For the reasons stated below, this Court reverses the trial court's judgment.

I. FACTUAL BACKGROUND.

On June 10, 2013, Plaintiff filed a Complaint to evict Defendants from their residence and claimed Defendants committed a material and irreparable breach in violation of A.R.S. § 33–1368(A) by possessing marijuana and drug paraphernalia at the premises. Plaintiff included a copy of the Immediate Termination Notice dated June 4, 2013. That Notice indicated a vendor and staff member saw marijuana and "Drug pararfanalia" [sic.] in the apartment and this was a violation of the lease agreement. Defendant Maria Milton was told she must move immediately or an eviction action would be commenced. The lease contained a provision prohibiting certain conduct on the part of the lessee, and the lessee's occupants and guests, including: "manufacturing, delivering, possessing with intent to deliver, or otherwise possessing a controlled substance or drug paraphernalia".[1] Both Defendants signed this lease.

[1] Lease, provision # 20.

Defendant Ethan Milton has a medical marijuana physician certification indicating that according to the Arizona Medical Marijuana Act (AMMA) Defendant is a qualifying patient and is entitled to use marijuana. Defendant Ethan Milton's physician provided Mr. Milton with a statement that included a warning that the physician's recommendation was not a prescription as defined under Federal law and, instead, was a recommendation that adopted the legal provision of AMMA and its encompassing regulations. The warning included advice that under Federal law cannabis is a schedule 1 drug and under Federal law, the sale, possession, and cultivation of cannabis is illegal.

The trial court held a default hearing on June 18, 2013 at 1:30 p.m. At the conclusion of the hearing, Plaintiff was awarded judgment and given immediate possession of the premises as well as court costs and attorneys' fees. That same day, at 1:18 p.m., Defendants filed an Answer denying Plaintiff's claims and asserting all affirmative defenses applicable according to Rule 8(c), A.R.C.P.[2] The trial court set trial for June 20, 2013.

At the trial,[3] Beth Latte—the assistant community manager—testified she was familiar with the lease agreement and with the Defendants.[4] She identified the lease agreement and paragraph 20 re prohibited conduct, which included possessing drugs and drug paraphernalia.[5] The trial court asked if the lease modified A.R.S. § 33–1368 and, after hearing it did not, announced the trial court would follow the state law.[6] Ms. Latte announced she prepared the Immediate Termination Notice after Plaintiff's representative found drug paraphernalia at the apartment.[7] She (1) added the problem was brought to her attention by a maintenance employee and a pest control person; and (2) identified the allegations in the Immediate Termination Notice. The trial court admitted the document for purposes of maintaining the record but ruled it would not consider any hearsay portions within this document.[8]

On cross-examination, Ms. Latter admitted she did not see any marijuana in the apartment.[9] She added she told Defendants she would give them until the "15th" to move out and not proceed through the court process but denied making any comment about Defendants' credit.[10] Defense counsel asked Ms. Latte for a definition of a controlled substance, and she replied: "Drugs."[11] When asked for a definition of a drug, the witness replied it was something illegal or a prescription.[12] When defense counsel asked if marijuana was illegal in Arizona if there was a

[2] Defendants erred by referring to the A.R.C.P. Eviction actions are governed by the RPEA and not the A.R.C.P.
[3] Audio transcript, June 20, 2013.
[4] *Id*. at 1:59:45–2:00:07.
[5] *Id*. at 2:00:49–2:02:05.
[6] *Id*. at 2:02:05–23.
[7] *Id*. at 2:02:29–59.
[8] *Id*. at 2:03:00–2:04:06.
[9] *Id*. at 2:04:15–40.
[10] *Id*. at 2:04:41–2:05:07.
[11] *Id*. at 2:05:07–13.
[12] *Id*. at 2:05:13–29.

prescription, Plaintiff's counsel objected on the grounds the question called for a legal conclusion and the trial court sustained the objection.[13] Defense counsel re-asked if the witness knew what a controlled substance was and the witness responded:" I guess not."[14]

Todd Kaplan testified (1) he was a lead tech; (2) part of his duties included inspecting apartments; (3) he—and the Service Manager—went to Defendants' apartment to inspect the air conditioning; and (4) they saw baggies and a Mason Jar filled with marijuana.[15] He explained he identified the marijuana as a result of D.A.R.E. and other classes he received as a child.[16] He added he notified his Service Manager—who was standing there with him—and then proceeded to take photographs as a record.[17] He identified Plaintiff's Exhibit 3 as photographs he took of the paraphernalia, baggies and drugs, and stated he took the pictures inside the Defendants' unit.[18] On cross-examination, Mr. Kaplan indicated he never met Ethan Milton.[19] He responded he did not have a medical marijuana card but he recognized marijuana based on his training in high school and some college because he—at one time—wanted to be a police officer.[20] He added he also attended a crime-free class after he was employed and, based on these classes, concluded the substance in the jar was marijuana.[21]

Robert Hallahan—the maintenance supervisor—testified. He said he was present with Mr. Kaplan at Defendants' unit, saw the items in the apartment and was present when Mr. Kaplan took the photos.[22] He added he went through crime-free training many times; as a Service Manager he was required to attend crime-free training every 12 months; and he recognized the substance.[23] On cross-examination defense counsel asked Mr. Hallahan if he called the police. Mr. Hallahan replied he was instructed to inform the manager and he was not aware of any police investigation.[24]

Defense counsel moved for a directed verdict and proffered Defendant had a medical marijuana card.[25] The trial court asked if the property was re-entered without a complaint and Plaintiff objected to the question because Defendants had not raised the defense.[26] The trial court denied the directed verdict.

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[13] *Id.* at 2:05:29–41.
[14] *Id.* at 2:05:41–53.
[15] *Id*. at 2:06:46–2:08:18.
[16] *Id*. at 2:08:18–40.
[17] *Id*. at 2:08:40–2:09:01.
[18] *Id*. at 2:09:17–34.
[19] *Id*. at 2:10:32–48.
[20] *Id*. at 2:10:49–2:11:17.
[21] *Id*. at 2:11:17–35.
[22] *Id*. at 2:12:27–41.
[23] *Id*. at 2:12:46–2:13:10.
[24] *Id*. at 2:13:17–54.
[25] *Id*. at 2:14:23–47.
[26] *Id*. at 2:14:47–2:15:43.

Defendant called Ms. Maria Milton who testified about a discussion she had with Ms. Latte re the marijuana in Ethan's room and reported Ms. Latte told her that if she moved, Ms. Latte would not wreck Defendant's credit.[27] She added Ms. Latte questioned her about Ethan's use of marijuana and she told Ms. Latte she did not commit crimes.[28] She added she had leased property there for approximately three years and signed the current lease in October 2012.[29] She also stated she explained the reasons why Ethan had marijuana. She said she told Ms. Latte that (1) Ethan had a prescription; (2) had Crohn's disease since he was three and a half years old; (3) other treatments have not been successful in treating the chronic vomiting and diarrhea Ethan suffered as part of his Crohn's disease; (4) he began to gain weight after he began the marijuana regime; (5) her son only weighed 128 pounds and was almost six feet tall; (6) her son only used the marijuana at night; (7) her son suffers pain when he does not smoke marijuana; and (8) she was initially opposed to the use of marijuana but finally agreed when his wasting away exacerbated.[30] She added that in her opinion, the marijuana stabilized her son's stomach but she is not a doctor and cannot say how it works.[31]

Ethan Milton testified Exhibit 1 was his marijuana "prescription" and his medical records.[32] Plaintiff's counsel stipulated that Ethan had a medical marijuana card and a debilitating condition but said he would not stipulate that it was legal.[33] Mr. Milton said he met Mr. Kaplan when the management company was switched—approximately in August, 2012—and Mr. Kaplan came to work on the AC in the unit Defendants occupied at that time.[34] He described a conversation he had with Mr. Kaplan about marijuana and said he remembered Mr. Kaplan stating either Mr. Kaplan or someone in maintenance also had a medical marijuana card.[35]

In closing, Plaintiff argued (1) a medical marijuana card did not give Defendants the right to use marijuana on the property; (2) marijuana is a controlled substance under federal law; and (3) the Arizona Attorney General issued an opinion that a landlord cannot be required to allow marijuana use on the property.[36] Plaintiff's counsel re-iterated that federal law prohibited the use of marijuana and the trial court responded: "Federal law. Federal law doesn't control the State of Arizona."[37] The trial court added that federal law "does not trump a State law that is not affected by the federal law."[38] After Plaintiff's counsel argued Plaintiff was affected by federal law, the

[27] *Id*. at 2:16:06–46.
[28] *Id*. at 2:16:46–2:17:04.
[29] *Id*. at 2:17:04–18.
[30] *Id*. at 2:17:18–2:20:22.
[31] *Id*. at 2:20:47–2:21:01.
[32] *Id*. at 2:21:49–2:22:15.
[33] *Id*. at 2:22:15–46.
[34] *Id*. at 2:23:00–38.
[35] *Id*. at 2:23:48–2:24:24.
[36] *Id*. at 2:25:08–59.
[37] *Id*. at 2:26:00–26.
[38] *Id*. at 2:26:27–31.

trial court (1) determined there was "an outside chance" the federal law would affect the use of marijuana in Arizona; but (2) asserted this would not occur if the marijuana was produced and used in Arizona and none of it was taken outside of the State.[39] Defense counsel interjected to say there was no evidence that marijuana was a controlled substance under federal law: and the trial court took judicial notice that marijuana was a controlled substance under federal law.[40] The trial court then announced that if there is a bona fide state law, (1) a political opinion by an Attorney General who was opposed to the AMMA would not be persuasive; and (2) the matter might be governed by the ADA if the person has Crohn's Disease and cannot function without the marijuana.[41] Plaintiff's counsel interrupted to state there was also a HUD opinion on the same matter.[42]

Plaintiff's counsel argued the issue was not whether Defendant's disease was terrible. The trial court interrupted to ask Plaintiff's counsel if he wanted the trial court to ignore law passed by the voters of the State of Arizona and Plaintiff's counsel responded by asking the trial court to not force the landlord to violate federal law.[43] The trial court announced it had reviewed the lease and there was no provision stating you could not have marijuana on the premises if you have a marijuana card.[44] The trial court added (1) the lease said you shall not violate a law; but (2) in Arizona it was not illegal for Defendant to ingest marijuana if he had a marijuana card.[45]

The trial court engaged in further colloquy with Plaintiff's counsel and the trial court argued (1) it could be illegal in Britain but British law would not be controlling; (2) there were cases about the separation of church and state; and (3) this was similar to a 1939 case in Schenectady about grain going across state lines and federal law controlling.[46] The trial court added Plaintiff should show there was a violation of federal law and that the marijuana plants came across state lines.[47] The trial court ruled that if the marijuana was home-grown and did not go anywhere else, the trial court did not see how federal law could possibly apply.[48] The trial court added it thought the landlord could put a specific provision in a lease addressing the use of marijuana by medical marijuana cardholders and maintained the trial court was not forcing a landlord to violate any law because in the state of Arizona, medical marijuana was legal.[49] Plaintiff's counsel disagreed

[39] *Id*. at 2:26:31–49.
[40] *Id*. at 2:26:49–2:27:21.
[41] *Id*. at 2:27:31–2:28:41. This Court notes there was no evidence presented about the ADA or if this landlord was governed by the ADA. Similarly, there was no evidence about whether this complex was federally subsidized.
[42] *Id*. at 2:28:02–06.
[43] *Id*. at 2:28:42–2:29:12.
[44] *Id*. at 2:29:12–26.
[45] *Id*. at 2:29:26–55.
[46] *Id*. at 2:29:55–2:30:25.
[47] *Id*. at 2:29:25–31.
[48] *Id*. at 2:30:31–39.
[49] *Id*. at 2:30:30–2:31:01.

and stated the medical marijuana was illegal under federal law.[50] The trial court then said Plaintiff's counsel should show him one case where a person with a medical marijuana card was cited for smoking in his own home and added there was a memorandum from the Department of Justice that it was not the intent of the Department of Justice to enforce any federal laws as to the use of medical marijuana.[51] Plaintiff's counsel argued the memorandum did not repeal the law. The trial court responded it could not wave a wand and say the use was illegal.[52]

Plaintiff's counsel argued the property rights of the property owner must prevail and, if the property owner did not want to have marijuana used on his property, he had that right. At this point the trial court again interrupted and stated the landlord needed to put that provision in his lease.[53] The trial court again interrupted and raised a hypothetical about a landlord not wanting kissing on the property.[54] The trial court then ruled it was dismissing the eviction action.[55] After that, the trial court apologized to defense counsel for not giving him the chance to argue.[56] The trial court added if the conduct was specifically addressed in the lease, the conduct could be prohibited.[57]

The trial court granted Defendant's Application for Attorneys' fees on July 18, 2013.

Plaintiff filed a timely appeal. Defendant failed to file a responsive memorandum. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. Did The Trial Court Abuse Its Discretion In Finding Tenant Had A Right To Possess The Premises Despite the Provisions of ARLTA, A.R.S. § 33–1368— and the CSA When The Tenant—A Medical Marijuana Card Holder— Possessed Marijuana.

Detainer Actions

Detainer (eviction) actions are brought to obtain possession of premises when the tenant no longer has a right to possess the property. They are limited actions. The only right to be decided in a forcible detainer action is the right of actual possession. *United Effort Plan Trust v. Holm*, 209 Ariz. 347, 350–51, ¶ 21, 101 P.3d 641, 644–45, ¶ 21 (Ct. App. 2004). The remedy was originally conceived as a way for landlords to obtain quick possession of premises when the tenant withheld possession. *Olds Bros. Lumber Co. v. Rushing*, 64 Ariz. 199, 204, 167 P.2d 394, 397

[50] *Id*. at 2:31:01–05.
[51] *Id*. at 2:31:05–31.
[52] *Id*. at 2:31:31–38.
[53] *Id*. at 2:31:38–2:32:29.
[54] *Id*. at 2:32:29–37.
[55] *Id*. at 2:32:52–2:33:05.
[56] *Id*. at 2:33:05–13.
[57] *Id*. at 2:33:13–22.

(1946). The purpose of a forcible detainer is to award possession of property and not to determine if the parties have a landlord-tenant relationship or if the parties had a lease agreement. *RREEF Mgmt. Co v. Camex Prods., Inc.*, 190 Ariz. 75, 79, 945 P.2d 386, 390 (Ct. App. 1997). Because the action is a limited one, the only appropriate judgment is either the dismissal of the complaint or the grant of possession to the plaintiff. *Olds Bros. Lumber, Co. v. Rushing, id.*, 64 Ariz. at 205, 167 P.2d at 400.

Detainer actions are governed by the Rules of Procedure for Eviction Actions (RPEA).

ARLTA 33–1368

Plaintiff sought to evict Defendants because Plaintiff's agents found marijuana on the premises. Although Defendant Ethan Milton's use of the marijuana was in accordance with Arizona state law, Plaintiff relied on (1) its crime-free provision in the lease; and (2) its belief that federal law made possession of marijuana a crime; as the basis for the eviction action. Plaintiff claimed the Arizona Residential Landlord-Tenant Act (ARLTA) also supported its eviction action. A.R.S. § 33–1368 contains a specific prohibition against criminal activity at rented premises and allows the residential landlord to institute eviction actions. In relevant part, the statute states:

> **A.** Except as provided in this chapter, if there is a material noncompliance by the tenant with the rental agreement, including material falsification of the information provided on the rental application, the landlord may deliver a written notice to the tenant specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than ten days after receipt of the notice if the breach is not remedied in ten days. For the purposes of this section, material falsification shall include the following untrue or misleading information about the:
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> . . . .
>
> 2. Tenant's criminal records, prior eviction record and current criminal activity. Material falsification of information in this paragraph is not curable under this section.
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> . . . .
>
> If there is a breach that is both material and irreparable and that occurs on the premises, including but not limited to an illegal discharge of a weapon, homicide as defined in §§ 13-1102 through 13-1105, prostitution as defined in § 13-3211, criminal street gang activity as prescribed in § 13-105, activity as prohibited in § 13-2308, the unlawful manufacturing, selling, transferring, possessing, using or storing of a controlled substance as defined in § 13-3451, threatening or intimidating as prohibited in § 13-1202, assault as prohibited in § 13-1203, acts that have been found to constitute a nuisance pursuant to § 12-991 or a breach of

> the lease agreement that otherwise jeopardizes the health, safety and welfare of the landlord, the landlord's agent or another tenant or involving imminent or actual serious property damage, the landlord may deliver a written notice for immediate termination of the rental agreement and shall proceed under § 33-1377.

Ariz. Rev. Stat. Ann. § 33-1368. Despite Defendant Ethan Milton having a valid medical marijuana card, Plaintiff maintained there was a violation of A.R.S. § 33–1368 because Defendants kept, possessed, used or stored a controlled substance as defined in § 13-3451—marijuana. A.R.S. § 13–3451 defines controlled substances as drugs or substances listed in A.R.S. § 13–3401. A.R.S. § 13–3401 specifically lists marijuana.[58] Marijuana is also specifically included as a controlled substance under federal law.

The CSA Takes Precedence Over The AMMA

As a federal law, the Controlled Substances Act (CSA) overrides the Arizona Medical Marijuana Act (AMMA) because it preempts the field under the Supremacy clause of the U.S. Constitution. The supremacy of federal law where it conflicts with state law has been part of our jurisprudence since Chief Justice Marshall commented on this in *M'Culloch v. State of Maryland*. In this opinion, Chief Justice Marshall wrote the Supreme Court may invalidate state laws which conflict with federal law or policy.

> The people of the United States have seen fit to divide sovereignty, and to establish a complex system. They have conferred certain powers on the state governments, and certain other powers on the national government. As it was easy to foresee that question must arise between these governments thus constituted, it became of great moment to determine, upon what principle these questions should be decided, and who should decide them. The constitution, therefore, declares, that the constitution itself, and the laws passed in pursuance of its provisions, shall be the supreme law of the land, and shall control all state legislation and state constitutions, which may be incompatible therewith; and it confides to this court the ultimate power of deciding all questions arising under the constitution and laws of the United States. The laws of the United States, then, made in pursuance of the constitution, are to be the supreme law of the land, anything in the laws of any state to the contrary notwithstanding. The only inquiry, therefore, in this case is, whether the law of the state of Maryland imposing this tax be consistent with the free operation of the law establishing the bank, and the full enjoyment of the privileges conferred by it? If it be not, then it is void; if it be, then it may be valid.

[58] See *infra*.

M'Culloch v. State of Maryland, 17 U.S. 316, 326-27, 4 L. Ed. 579 (1819). In *Gibbons v. Ogden*, 22 U.S. (Wheat) 1, 2, 6 L. Ed. 23 (1824) the Supreme Court commented on the power of a State to override a federal statute and held:

> [that as] to such acts of the State Legislatures as do not transcend their powers, but . . . interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Federal law is supreme and preempts state laws in the same field. The U.S. Supreme Court commented on the conflict between a federal law and state law and stated:

> The Supreme Court of Texas' interpretation of the Supremacy Clause is not in accord with controlling doctrine. The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. Thus our inquiry is directed toward whether there is a valid federal law, and if so, whether there is a conflict with state law.

Free v. Bland, 369 U.S. 663, 666, 82 S. Ct. 1089, 1092, 8 L. Ed. 2d 180 (1962) (citations omitted). The U.S. Supreme Court also held:

> Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be " 'clear and manifest.' "
>
> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. Gen. Elec. Co., 496 U.S. 72, 79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (U.S.N.C. 1990) (citations omitted).

The federal government indicated its intention to preempt the field of marijuana regulation and decided medical marijuana was not an allowed medical option according to federal law. To that end, Congress passed the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, PL 105–277, October 21, 1998, 112 Stat 2681. Division F of that Act specifically addressed medical marijuana and stated:

> DIVISION F—NOT LEGALIZING MARIJUANA FOR MEDICINAL USE
>
> It is the sense of the Congress that—
>
> (1) certain drugs are listed on Schedule I of the Controlled Substances Act if they have a high potential for abuse, lack any currently accepted medical use in treatment, and are unsafe, even under medical supervision;
>
> (2) the consequences of illegal use of Schedule I drugs are well documented, particularly with regard to physical health, highway safety, and criminal activity;
>
> (3) pursuant to section 401 of the Controlled Substances Act, it is illegal to manufacture, distribute, or dispense marijuana, heroin, LSD, and more than 100 other Schedule I drugs;
>
> (4) pursuant to section 505 of the Federal Food, Drug and Cosmetic Act, before any drug can be approved as a medication in the United States, it must meet extensive scientific and medical standards established by the Food and Drug Administration to ensure it is safe and effective;
>
> (5) marijuana and other Schedule I drugs have not been approved by the Food and Drug Administration to treat any disease or condition;
>
> (6) the Federal Food, Drug and Cosmetic Act already prohibits the sale of any unapproved drug, including marijuana, that has not been proven safe and effective for medical purposes and grants the Food and Drug Administration the authority to enforce this prohibition through seizure and other civil action, as well as through criminal penalties;
>
> (7) marijuana use by children in grades 8 through 12 declined steadily from 1980 to 1992, but, from 1992 to 1996, has dramatically increased by 253 percent among 8th graders, 151 percent among 10th graders, and 84 percent among 12th graders, and the average age of firsttime use of marijuana is now younger than it has ever been;
>
> (8) according to the 1997 survey by the Center on Addiction and Substance Abuse at Columbia University, 500,000 8th graders began using marijuana in the 6th and 7th grades;

> (9) according to that same 1997 survey, youths between the ages of 12 and 17 who use marijuana are 85 times more likely to use cocaine than those who abstain from marijuana, and 60 percent of adolescents who use marijuana before the age of 15 will later use cocaine;
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> (10) the rate of illegal drug use among youth is linked to their perceptions of the health and safety risks of those drugs, and the ambiguous cultural messages about marijuana use are contributing to a growing acceptance of marijuana use among children and teenagers;
>
> (11) Congress continues to support the existing Federal legal process for determining the safety and efficacy of drugs and opposes efforts to circumvent this process by legalizing marijuana, and other Schedule I drugs, for medicinal use without valid scientific evidence and the approval of the Food and Drug Administration; and
>
> (12) not later than 90 days after the date of the enactment of this Act—
>
> (A) the Attorney General shall submit to the Committees on the Judiciary of the House of Representatives and the Senate a report on—
>
> (i) the total quantity of marijuana eradicated in the United States during the period from 1992 through 1997; and
>
> (ii) the annual number of arrests and prosecutions for Federal marijuana offenses during the period described in clause (i); and
>
> (B) the Commissioner of Foods and Drugs shall submit to the Committee on Commerce of the House of Representatives and the Committee on Labor and Human Resources of the Senate a report on the specific efforts underway to enforce sections 304 and 505 of the Federal Food, Drug and Cosmetic Act with respect to marijuana and other Schedule I drugs.

This clearly indicated Congress' intent to control medical marijuana despite attempts on the part of individual states to legalize the use of marijuana for specified medical conditions.

Medical Marijuana and the State-Federal Dichotomy

In the case before this Court, the trial court ruled federal law did not pre-empt the AMMA because the marijuana was ostensibly grown and used solely within Arizona. First, there was no evidence on which to base this claim as neither party provided testimony about the source of the marijuana Defendant used. Therefore the trial court's premise was not supported by the presented facts in this case.

The trial court's position was also legally incorrect. Our Federal courts have discounted arguments that wholly intrastate marijuana do not affect interstate commerce and said:

> Title 21 U.S.C. § 801 contains the introductory provisions to the Drug Act, including Congressional findings and declarations. In § 801, Congress specifically found that a nexus exists between marijuana and interstate commerce. Congress concluded that controlled substances have a "detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress also found that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. § 801(4). Congress also found that "[f]ederal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6).
>
> The Supreme Court has instructed that Congress may regulate those wholly intrastate activities which have an effect upon interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S. Ct. 82, 89, 87 L. Ed. 122 (1942); *United States v. Darby*, 312 U.S. 100, 120-21, 61 S. Ct. 451, 460-61, 85 L. Ed. 609 (1941).

United States v. Visman, 919 F.2d 1390, 1392 (9th Cir. 1990). The U.S. Supreme Court addressed a related issue where it held the federal government could criminalize the manufacture, distribution, or possession of marijuana of intrastate growers and users of marijuana for medical purposes; and determined that imposing criminal penalties against a marijuana grower or user whose activity was solely within a single state came under the penumbra of the Commerce Clause and subjected the grower to federal jurisdiction. *Gonzales v. Raich*, 545 U.S. 1, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005). In *Raich*, the U.S. Supreme Court confronted the preemption problem faced when a state law expressly allows the cultivation and possession of medical marijuana in opposition to the provisions of the CSA. The U.S. Supreme Court stated:

> The question presented in this case is whether the power vested in Congress by Article I, § 8, of the Constitution "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States" includes the power to prohibit the local cultivation and use of marijuana in compliance with California law.

Gonzales v. Raich, 545 U.S. 1, 5, 125 S. Ct. 2195, 2198-99, 162 L. Ed. 2d 1 (2005). In *Raich*, as in the case before this Court, the patient suffered from debilitating illness that was being treated with medical marijuana. The U.S. Supreme Court noted:

> The question before us, however, is not whether it is wise to enforce the statute in these circumstances; rather, it is whether Congress' power to regulate interstate markets for medicinal substances encompasses the portions of those markets that are supplied with drugs produced and consumed locally. Well-settled law controls our answer. The CSA is a valid exercise of federal power, even as applied to the troubling facts of this case.

Gonzales v. Raich, 545 U.S. at 9, 125 S. Ct. at, 2201. The U.S. Supreme Court reviewed the history of marijuana as a drug and commented:

> In enacting the CSA, Congress classified marijuana as a Schedule I drug. 21 U.S.C. § 812(c). This preliminary classification was based, in part, on the recommendation of the Assistant Secretary of HEW "that marihuana be retained within schedule I at least until the completion of certain studies now underway."[22] Schedule I drugs are categorized as such because of their high potential for abuse, lack of any accepted medical use, and absence of any accepted safety for use in medically supervised treatment. § 812(b)(1). These three factors, in varying gradations, are also used to categorize drugs in the other four schedules. For example, Schedule II substances also have a high potential for abuse which may lead to severe psychological or physical dependence, but unlike Schedule I drugs, they have a currently accepted medical use. § 812(b)(2). By classifying marijuana as a Schedule I drug, as opposed to listing it on a lesser schedule, the manufacture, distribution, or possession of marijuana became a criminal offense, with the sole exception being use of the drug as part of a Food and Drug Administration preapproved research study. §§ 823(f), 841(a)(1), 844(a); see also *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490, 121 S. Ct. 1711, 149 L. Ed.2d 722 (2001).
>
> The CSA provides for the periodic updating of schedules and delegates authority to the Attorney General, after consultation with the Secretary of Health and Human Services, to add, remove, or transfer substances to, from, or between schedules. § 811. Despite considerable efforts to reschedule marijuana, it remains a Schedule I drug.

Gonzales v. Raich, 545 U.S. at 14-15, 125 S. Ct. at 2204. The U.S. Supreme Court addressed the applicability of the CSA to marijuana that was ostensibly grown intrastate and said:

> Findings in the introductory sections of the CSA explain why Congress deemed it appropriate to encompass local activities within the scope of the CSA. See n. 20, *supra.* The submissions of the parties and the numerous *amici* all seem to agree that the national, and international, market for marijuana has dimensions that are fully comparable to those defining the class of activities regulated by the Secretary pursuant to the 1938 statute. Respondents nonetheless insist that the CSA cannot be constitutionally applied to their activities because Congress did not make a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. Be that as it may, we have never required Congress to make particularized findings in order to legislate, absent a special concern such as the protection of free speech. While congression-

> al findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate.

Gonzales v. Raich, 545 U.S. at 20-21, 125 S. Ct. at 2208 (citations omitted). This is of particular importance in the case before this Court because the trial court specifically flouted the holding of *Raich* and determined federal law had no applicability where intrastate marijuana was used. Notably, as stated above, there was no evidence that Defendant's marijuana was intrastate. However, even if this Court were to assume—as did the trial court—that the marijuana was grown solely within the State of Arizona, the trial court erred by finding federal law inapplicable. *Raich* forecloses that option.

> Thus the case for the exemption comes down to the claim that a locally cultivated product that is used domestically rather than sold on the open market is not subject to federal regulation. Given the findings in the CSA and the undisputed magnitude of the commercial market for marijuana, our decisions in *Wickard v. Filburn* and the later cases endorsing its reasoning foreclose that claim.

Gonzales v. Raich, 545 U.S. at 32-33, 125 S. Ct. at 2215.

The "Ogden Memo"[59]

The trial court relied on the "Ogden Memo" as further support for its position that Plaintiff ran no risk of prosecution for a violation of federal law. This reliance is misplaced. While the Ogden Memo said it was a better use of federal resources to ignore medical marijuana patients for purposes of prosecution in states where medical marijuana is legal, the memo also stated:

> Indeed, this memorandum does not alter in any way the Department's authority to enforce federal law. . .
>
> . . . .

[59] The "Ogden Memo" from Deputy General Ogden detailed the enforcement of the CSA in states where medical marijuana is allowed. The memo stated—in relevant part:

> As a general matter, pursuit of these priorities should not focus federal resources in your States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana. For example, prosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana, is unlikely to be an efficient use of limited federal resources.

This was followed by a June 29, 2011, memo for U.S. Attorneys written by James Cole. This memo clarifies the position of the Department of Justice and states—in relevant part:

> The Department of Justice is committed to the enforcement of the Controlled Substances Act in all States.

> This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter.

The memo cautioned federal prosecutors they should review each case on a case-by-case basis. While it is likely Defendant would not be prosecuted for his use of medical marijuana to treat his Crohn's disease, the Ogden Memo does not provide a defense to the possibility of prosecution.

Federal courts have interpreted the Ogden Memo in the context of state law where medical marijuana is a treatment option. The Federal Court for the Eastern District of California commented on the "Ogden Memo" and said:

> But the Department also made clear that it did not intend to "legalize" marijuana (nor could it). The Ogden Memo states, for instance:
>
> > The Department of Justice is committed to the enforcement of the Controlled Substances Act in all states. This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law ... create a legal defense to a violation of the Controlled Substances Act.
>
> A reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.

Sacramento Nonprofit Collective v. Holder, 855 F. Supp. 2d 1100, 1111 (E.D. Cal. 2012) aff'd, 12-16710, 2014 WL 128998 (9th Cir. Jan. 15, 2014).

Montana growers and caregivers were in a similar situation in Montana when federal officials prosecuted them for violations of the CSA despite a Montana state law exempting the growers and caregivers of medical marijuana patients from prosecution. *In Montana Caregivers Ass'n, LLC v. United States*, 841 F. Supp. 2d 1147, 1148 (D. Mont. 2012) aff'd, 526 F. App'x 756 (9th Cir. 2013) the marijuana growers filed a complaint after federal authorities raided their facilities in March, 2011. The growers alleged the raids were not lawful because (1) Montana law allowed them to grow and produce marijuana for medical consumption; and (2) the United States Department of Justice represented that they would not actively prosecute medical marijuana caregivers. The District Court of Montana (1) noted the Department of Justice was committed to enforcing the CSA, and (2) commented:

Even if the plaintiffs' alleged conduct was legal under Montana law, it was still illegal under the federal Controlled Substances Act, Pub. L. No. 91–513, 84 Stat. 1242 (1970). So the plaintiffs were still subject to prosecution under the United States Constitution's Supremacy Clause. U.S. Const. art. VI, cl. 2; *Gonzales v. Raich,* 545 U.S. 1, 28, 125 S. Ct. 2195, 162 L. Ed.2d 1 (2005) ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

Moreover, the federal government has never given a free pass to produce and consume marijuana, even for medical purposes. In the so-called "Ogden Memo," the Department of Justice communicated to its attorneys that certain marijuana users and providers would be a lower priority for prosecution than others. *See* David W. Ogden, Dep. Atty. Gen., U.S. Dept. of Just., *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* ("Ogden Memo") (October 19, 2009) (available at www.justice.gov/opa/documents/medical-marijuana.pdf) (accessed on Jan. 13, 2012). For example, "[I]ndividuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law, or those caregivers in clear and unambiguous compliance with existing state law who provide such individuals with marijuana," would be a lower priority than "large-scale criminal enterprises, gangs, and cartels." *Id.* at 1–2. But the Department also made clear that it did not intend to "legalize" marijuana (nor could it). The Ogden Memo states, for instance:

The Department of Justice is committed to the enforcement of the Controlled Substances Act in all states.

> This guidance regarding resource allocation does not "legalize" marijuana or provide a legal defense to a violation of federal law, nor is it intended to create any privileges, benefits, or rights, substantive or procedural, enforceable by any individual, party or witness in any administrative, civil, or criminal matter. Nor does clear and unambiguous compliance with state law ... create a legal defense to a violation of the Controlled Substances Act.

Id. A reasonable person, having read the entirety of the Ogden Memo, could not conclude that the federal government was somehow authorizing the production and consumption of marijuana for medical purposes. Any suggestion to the contrary defies the plain language of the Memo.

Montana Caregivers Ass'n, LLC, 841 F. Supp. 2d at 1148-49. The District Court concluded: "We are all bound by federal law, like it or not." *Montana Caregivers Ass'n, LLC*. 841 F. Supp. 2d at 1151. Based on these rulings, the trial court erred by finding the CSA did not preempt the AMMA.

Medical Marijuana and the ADA

The trial court also relied on the ADA as additional authority for denying Plaintiff's claim. This reliance is inapposite. The Ninth Circuit considered the use of medical marijuana under the provisions of the Americans with Disabilities Act (ADA) and held the ADA did not apply to marijuana because marijuana is a controlled substance according to the CSA. The Ninth Circuit held:

> It did not affirmatively authorize medical marijuana use for purposes of *federal* law, which continues unambiguously to prohibit such use.[12] *See* Webster's Third New International Dictionary 147 (2002) ("*Authorize* indicates endowing formally with a power or right to act."). Moreover, even if Congress' actions somehow implicitly authorized medical marijuana use *in the District of Columbia,* Congress in no way authorized the plaintiffs' medical marijuana use in *California.* Congress' actions therefore did not bring the plaintiffs' marijuana use within the § 12210(d)(1) exception.
>
> . . . .
>
> Local decriminalization notwithstanding, the unambiguous *federal* prohibitions on medical marijuana use set forth in the CSA continue to apply equally in both jurisdictions, as does the ADA's illegal drug exclusion.

James v. City of Costa Mesa, 700 F.3d 394, 404-05 (9th Cir. 2012) cert. denied, 133 S. Ct. 2396, 185 L. Ed. 2d 1105 (U.S. 2013). The Ninth Circuit concluded by holding:

> We hold that doctor-recommended marijuana use permitted by state law, but prohibited by federal law, is an illegal use of drugs for purposes of the ADA, and that the plaintiffs' federally proscribed medical marijuana use therefore brings them within the ADA's illegal drug exclusion. This conclusion is not altered by recent congressional actions allowing the implementation of the District of Columbia's local medical marijuana initiative.

James v. City of Costa Mesa, 700 F.3d at 405. Because the current interpretation is that neither the ADA, nor state law prevails when confronted with the opposing principles of preemption and supremacy where medical marijuana is concerned, the trial court erred by relying on its own beliefs about the ADA and States' rights in finding there was no potential criminal violation for smoking marijuana at the premises.

Civil Asset Forfeiture

Plaintiff claimed it might be subject to civil asset forfeiture under federal law[60] and argued this provided an additional reason why it needed to enforce its crime free lease provision. This law states—in relevant part—:

[60] Plaintiff's-Appellant's Memorandum of Law at p. 7, ll. 4–6.

> The following shall be subject to forfeiture to the United States and no property right shall exist in them:
>
> . . . .
>
> **(7)** All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.

21 U.S.C.A. § 881. While the seizure of Plaintiff's property did not appear likely in this case at this time, Plaintiff could not ignore the possibility that such could occur. Plaintiff argued it should be the arbiter of whether it wished to run any risk of this possibility. Indeed, the Federal District Court for the Northern District of California in commenting on whether the federal government would be estopped from enforcing the CSA as a result of the Ogden Memo noted:

> The Government "promised" no such thing. To the contrary, in the *Santa Cruz* stipulation, the parties explicitly agreed that the government reserved the right to "withdraw, modify, or cease to follow the [Ogden Memo]," and, on that occasion, the *Santa Cruz* action could be reinstituted.

Marin Alliance For Med. Marijuana v. Holder, 866 F. Supp. 2d 1142, 1154 (N.D. Cal. 2011). The *Marin Alliance* opinion continued and noted:

> The memorandum was not directed to landlords or the medical marijuana community in general; rather, it was directed to various U.S. Attorneys, not as a statement of official policy, but "solely as a guide to the exercise of investigative and prosecutorial discretion." As such, Plaintiffs are hard pressed to claim that it was reasonable to rely on a memorandum that was not even addressed to them—and which unequivocally did not state that marijuana for medical reasons was "legal."

Marin Alliance For Med. Marijuana v. Holder, 866 F. Supp. 2d at 1155-56 (citation omitted).

Arizona Rulings

There is little in the way of binding Arizona law. Although our Court of Appeals was asked to address the issue of federal preemption of AMMA by the CSA, our Court of Appeals determined the issue was not ripe for resolution. See *State v. Okun*, 231 Ariz. 462, 466, 296 P.3d 998, 1002 ¶ 16 (Ct. App. 2013) cert. denied, 13-436, 2014 WL 1271322 (U.S. Mar. 31, 2014) where the Arizona Court of Appeals held:

> On the facts presented here, we decline to address the State's suggestion that the Controlled Substances Act preempts and thereby invalidates the AMMA. We do not question the general proposition that when federal law actually conflicts with state law, federal law controls. *See, e.g., E. Vanguard Forex, Ltd. v. Ariz.*

> *Corp. Comm'n,* 206 Ariz. 399, 405, ¶ 18, 79 P.3d 86, 92 (App.2003). But several principles restrain us from deciding in this case whether federal law preempts the AMMA.

Okun, at ¶ 16. As with *Okun*, there was no evidence Plaintiff might suffer any injury because of Defendants' possession of marijuana at the premises. As the Court of Appeals stated:

> Here, in the language of *Karbal,* the Sheriff has no "personal stake" in whether the federal Controlled Substances Act might invalidate Okun's right under the AMMA to possess an allowable amount of marijuana. *See id.* The requirement of standing "is consistent with notions of judicial restraint and ensures that courts refrain from issuing advisory opinions, that cases be ripe for decision and not moot, and that issues be fully developed between true adversaries." *Bennett v. Brownlow*, 211 Ariz. 193, 196, ¶ 16, 119 P.3d 460, 463 (2005); *see also County of San Diego v. San Diego NORML,* 165 Cal.App.4th 798, 81 Cal.Rptr.3d 461, 472–73 (2008) (county has no standing to raise hypothetical constitutional infirmities of a statute when statute did not cause it injury).
>
> Whether Okun's possession of marijuana may subject her to federal prosecution despite her state-law right to possess it is not a controversy before this court because the federal government has not charged Okun with any crime. Nor does public policy require us to decide the abstract issue the State presents. *Cf. City of Garden Grove,* 68 Cal.Rptr.3d. at 664–65 (deciding for reasons of public policy to address preemption question, and holding federal Controlled Substances Act did not preempt California medical marijuana law).

Okun, at ¶¶ 17–18. This, then, is an unsettled area of law in Arizona. Because there is no binding precedent, the trial court could not be assured that Defendant's state-allowed use of medical marijuana would not be considered a crime under federal law. Federal officials have seized property where marijuana was cultivated—even if the cultivation was, in part, in response to a clinically diagnosed disease.

> To comprehend that Beth Marder cannot make either showing with respect to the Defendant Property at 5 Reynolds Lane, one need look no farther than her responses to the Government's Local Rule 56(a) 1 Statement [Doc. 39]. ¶ 3 of Claimants' response recites: "Beth Marder admits that prior to March 18, 2009 [the date of the search], she helped Seth Marder in the growing of marijuana for her personal use related to her chronic Lyme Disease." See also ¶¶ 10, 11, and 17: "Beth Marder knew that growing marijuana was illegal." "Seth and Beth Marder packaged marijuana at the Defendant property for their personal use." "Beth Marder knew that there was marijuana growing at the Defendant property."

United States v. One Parcel of Prop. Located at 5 Reynolds Lane, Waterford, Conn., 895 F. Supp. 2d 305, 320 (D. Conn. 2012).

Plaintiff, as a landlord, only has a limited opportunity to raise the "innocent owner" defense to a federal civil asset forfeiture claim. In order to avail itself of the innocent owner defense to the possibility of forfeiture, the owner of the property must demonstrate it took necessary steps to distance itself from any alleged criminal conduct.

> A claimant may raise an "innocent owner" defense by proving (1) no knowledge of the conduct giving rise to the forfeiture; or (2) that upon learning of the conduct giving rise to the forfeiture, the claimant did all that reasonably could be expected under the circumstances to terminate such use of the property. *See* 18 U.S.C. § 983(d)(1). This defense, however, must be proven by a preponderance of the evidence.

United States v. 30 Acre Tract of Land, More or less, Located at 524 Cheek Rd., Ramseur, Columbia Twp., Randolph Cnty., N.C., 425 F. Supp. 2d 704, 709 (M.D.N.C. 2006). Here, that is exactly what Plaintiff did. Upon learning of the marijuana use at the property, the landlord did what was needed to terminate the use of the property for what is still considered to be a federal crime. While Defendant's conduct is not criminal according to Arizona state law, and while more states are joining in finding the use of medical marijuana to be beneficial, current federal law is marijuana is still a controlled substance and illegal. Because marijuana falls within the category of a controlled substance, Plaintiff has the right to distance itself from any possible allegation of criminal conduct and avoid any possible seizure of its real property.

B. Did The Trial Court Abuse Its Discretion In Finding Tenant Had A Right To Possess The Premises When The Landlord Included A Crime Free Provision In The Lease But Tenant—A Medical Marijuana Card Holder—Possessed Marijuana On The Premises.

Defendants' lease contained a crime-free provision—Provision 20 re Prohibited Conduct. The provision—in relevant part—precluded tenants, occupants, and guests from "manufacturing, delivering possessing with intent to deliver, or otherwise possessing a controlled substance or drug paraphernalia." There was no dispute that Defendant possessed marijuana.

The trial court determined this provision was vague when applied to Defendant because Defendant's marijuana use was an approved use within the State of Arizona. The trial court ruled that had Plaintiff wished to preclude the use of medical marijuana it could have specifically done so. The trial court concluded that because the lease provision did not specifically address the use of medical marijuana, and because the State of Arizona allows medical marijuana, Plaintiff's crime-free provision could not be extended to cover the use of medical marijuana.

Contract Interpretation

The lease is a contract. As such, the standard for contract interpretation is that a contract is construed against the drafter when there is an ambiguity in the terms of the agreement.

> It is a fundamental principle of law that a contract will be construed most strongly against the drafter which in this instance was the Company.

Harford v. Nat'l Life & Cas. Ins. Co., 81 Ariz. 43, 45, 299 P.2d 635, 637 (1956). This rule of construction, however, only applies where there is an ambiguity in the contract.

> Only when the meaning of the contract remains uncertain after application of the primary standards of interpretation cited above may the court apply the rule of construction that ambiguity of language is to be construed against the drafter of the contract.

United California Bank v. Prudential Ins. Co. of Am., 140 Ariz. 238, 258, 681 P.2d 390, 410 (Ct. App. 1983) (citations omitted). Here, the trial court inferred an ambiguity in the contract because Defendant's possession of marijuana was allowed under state law. However, the terms of the contract are clear and preclude criminal activity or criminal acts. While this Court understands the confusion Defendants may experience when there are contradictory standards between state and federal law about the use of medical marijuana, and while the AMMA prohibits discrimination against medical marijuana patients, the current standard of the law favors the Plaintiff's position.

A.R.S. § 36–2813 (A) states:

> No school or landlord may refuse to enroll or lease to and may not otherwise penalize a person solely for his status as a cardholder, unless failing to do so would cause the school or landlord to lose a monetary or licensing related benefit under federal law or regulations.

Plaintiff did not refuse to lease to Defendants because of his status as a marijuana card holder. Instead, Plaintiff sought to evict Defendants because Defendant possessed and used the marijuana on the premises. Defendants should have been aware of this possibility. The medical certification Defendant Ethan Milton provided to the trial court included a warning that (1) the physician's recommendation was not a prescription; and (2) under federal law cannabis is a schedule 1 drug and is illegal.

This Court understands Defendant found relief for his medical condition by using marijuana. However, his right to seek medical treatment using medical marijuana is balanced by Plaintiff's right to avoid any potential of civil asset forfeiture or other penalty. Under the current state of the law this Court finds that in a balance between the Plaintiff's right to control its property and Defendant's right to secure his medical treatment, Defendant's right to use his medical marijuana where and how he chooses gives way to the Plaintiff's lease provision.

> For now, federal law is blind to the wisdom of a future day when the right to use medical marijuana to alleviate excruciating pain may be deemed fundamental. Although that day has not yet dawned, considering that during the last ten years eleven states have legalized the use of medical marijuana, that day may be upon us sooner than expected. Until that day arrives, federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering.

Raich v. Gonzales, 500 F.3d 850, 866 (9th Cir. 2007).

While the trial court was correct that the crime-free provision in the lease would be more clear-cut if it specifically referred to federally determined controlled drugs instead of the more generic term of "controlled drugs," Defendants produced no evidence suggesting the lease prohibition did not cover marijuana. As stated above, A.R.S. § 36-2813 specifies a landlord cannot discriminate against a medical marijuana card holder: it does not state that a landlord must allow the cardholder to use the controlled substance at the landlord's premises or where and how the tenant chooses.

Our Arizona statutes define controlled substances as:

> In this chapter, unless the context otherwise requires:
>
> 1. "Controlled substance" means a drug, substance or immediate precursor in schedules I through V of title 36, chapter 27, or a dangerous drug or a narcotic drug listed in § 13-3401.

A.R.S. § 13-3451, A. R. S. § 13–3401(4) specifically includes marijuana,

> 4. "Cannabis" means the following substances under whatever names they may be designated:
>
> (a) The resin extracted from any part of a plant of the genus cannabis, and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seeds or its resin. Cannabis does not include oil or cake made from the seeds of such plant, any fiber, compound, manufacture, salt, derivative, mixture or preparation of the mature stalks of such plant except the resin extracted from the stalks or any fiber, oil or cake or the sterilized seed of such plant which is incapable of germination.
>
> (b) Every compound, manufacture, salt, derivative, mixture or preparation of such resin or tetrahydrocannabinol.

Ariz. Rev. Stat. Ann. § 13-3401. Because the lease referred to controlled substances and marijuana is specifically included as a controlled substance in our statutory scheme, the lease provision was clear and prohibited Defendant from using and storing marijuana at the premises.

C. Did The Trial Court Abuse Its Discretion By Engaging In Argument And Interfering With Plaintiff's Counsel's Opportunity To Present Its Closing Argument.

Plaintiff also complained about the trial court's conduct and alleged the trial court became an advocate for Defendants during trial. This Court agrees. Trial courts are supposed to be dispassionate and not participate in formulating arguments for the litigants appearing before them. In addition, closing argument is the opportunity for adverse litigants to address the trial

court and argue the relevant merits of each side's position. That did not occur in this case. Here, the trial court erred by crossing the line and engaging in colloquy with Plaintiff's counsel during the time set aside for closing argument. By raising—and knocking down—arguments, the trial court abandoned its judicial role and became, instead, an advocate for Defendants. Plaintiff's counsel had difficulty in presenting its closing because the trial court argued its own view of the matter and consistently interrupted Plaintiff's counsel. The trial court's participation was so great that the trial court omitted providing defense counsel its opportunity to close until the trial court had effectively decided the case. When the trial court finally recognized defense counsel had not been given this opportunity, defense counsel elected to forego any closing.

On appeal, Plaintiff's counsel raised the trial court's active participation in Defendants' viewpoint as error. Plaintiff is correct. As stated, the function of closing argument is to enable each party to review the evidence and interpret the evidence in the light that most favors that party's legal position. As our Court of Appeals stated:

> The function of closing arguments is to enable each party to review the evidence and tie it to the applicable law in a light that favors its legal position at the trial. Demonstrations before the jury should not be used to divert the jury from the evidence but to help the jury understand it. During summation counsel may state matters not in evidence, but only those which are common knowledge or are illustrations drawn from common experience, history, or literature.

Standard Chartered PLC v. Price Waterhouse, 190 Ariz. 6, 48, 945 P.2d 317, 359 (Ct. App. 1996) (citations omitted). Persuasively, scholars have commented on the role of closing argument.

> Closing argument is the aspect of trial that the public, including juries, holds in the greatest awe. For the lawyer, it is often the culmination of weeks or months of hard work requiring every skill of a successful advocate. The entire process of trial preparation and trial itself has built toward this single event. The lawyer must deliver an interesting, persuasive argument, summarizing the points of the case and rebutting the opponent's argument. Passion and emotions can be volatile, and invoking them properly may convince the jury to return or to prevent a favorable verdict.
>
> The ability to persuade is one of the strongest tools that a lawyer may possess. In Arizona, courts have recognized that "excessive and emotional language is the bread and butter weapon of counsel's forensic arsenal." Therefore, it has been stated repeatedly that "attorneys must be given wide latitude in their arguments to the jury." In fact, as suggested by the large volume of case law on improper closing arguments, this maxim has become so commonplace in Arizona that many attorneys seem to have forgotten that the closing arguments are limited in many ways by rules of evidence—and by ethics. Closing arguments "must be

> based on facts which the jury is entitled to find from the evidence and not on extraneous matter that were not or could not be received in evidence." When improper comments are made so as "to inflame the minds of jurors with passion or prejudice or influence the verdict in any degree," attorneys have exceeded their discretion.

David C. Tierney, Limitations on Closing Arguments Ethical and Evidentiary Do's and Don't's, Ariz. Att'y, November 2003, at 22, 24. In the current case, the trial court took the unusual step of raising facts and issues Defendants never presented. The trial court then ruled on these issues and facts. In this case, the trial court overstepped its bounds during Plaintiff's closing argument and debated the facts and the law with Plaintiff's counsel. The trial court's participation in this context was so great that defense counsel did not find any need to present any closing argument. The trial court erred by actively participating during closing.

D. Is Plaintiff Entitled To Attorneys' Fees For The Appeal.

Plaintiff's counsel requested attorneys' fees for the appeal. This case has a basis in contract and attorneys' fees may be awarded to the successful party. A.R.S. 12–341.01 subsection B provides attorneys' fees:

> . . . should be made to mitigate the burden of the expense of litigation to establish a just claim or a just defense. It need not equal or relate to the attorney's fees actually paid or contracted. . . .

Assoc. Indem. Corp. v. Warner, 143 Ariz. 567, 694 P.2d 1181, (1985); *Moedt v. General Motors Corp*., 204 Ariz. 100, 60 P.3d 240 (Ct. App. 2003). An award of attorney fees under A.R.S. 12–341.01 is subject to an analysis about the reasons for the shifting of responsibility for fees. Our Arizona Supreme Court has discussed the factors a court should consider prior to making an award. These include:

1. whether the unsuccessful party's position or defense had merit;
2. whether the litigation could have been avoided, or settled and how the successful party's efforts influenced the result;
3. whether assessing fees against the unsuccessful party would cause extreme hardship;
4. whether the successful party prevailed with respect to all of the relief sought;
5. whether the legal question was novel;
6. whether a similar claim had been previously adjudicated in this jurisdiction;
7. whether the particular award would discourage other parties with tenable claims or defenses from litigating or defending for fear of incurring liability for substantial amounts of attorney fees.

Assoc. Indem. Corp. v. Warner, 143 Ariz. at 570, 694 P.2d at 1184; *Moedt v. General Motors Corp*., ¶ 19. This Court notes Defendants did not submit any legal memorandum on appeal and have not challenged Plaintiff's position. Because Plaintiff is the successful party, Plaintiff is

entitled to a reasonable fee for the appeal. Should Plaintiff desire any award of attorneys' fees Plaintiff shall submit a written request together with a China Doll affidavit and itemization for the work done on the appeal on or before **May 20, 2014**. Plaintiff shall provide a courtesy copy of any request to this Court and shall provide a copy to Defendants and their counsel. Defendants may submit any written objection to the request for attorneys' fees to this Court on or before **June 10, 2014**. Defendants shall provide a courtesy copy of any objection to this Court.

III. CONCLUSION.

Case law indicates federal authorities have the ability to prosecute for violations of the CSA even where state law allows the use of medical marijuana. The Ogden Memo fails to provide the protection from prosecution the trial court believed it guaranteed. Similarly, the ADA does not provide the necessary authority to support the trial court's conclusion. Because (1) federal law preempts this field and allows for the potential for prosecution; and (2) the lease agreement included a provision precluding controlled substances at the premises; the trial court erred in dismissing Plaintiff's case based on the trial court's belief that (1) there was protection from federal prosecution by virtue of the AMMA; and (2) the ADA supported Defendants' position.

Based on the foregoing, this Court concludes the McDowell Mountain Justice Court erred.

IT IS THEREFORE ORDERED reversing the judgment of the McDowell Mountain Justice Court.

IT IS FURTHER ORDERED awarding Plaintiff its reasonable attorneys' fee contingent on Plaintiff providing this Court and Defendants with a written China Doll affidavit on or before **May 20, 2014**, in accordance with this written opinion. Plaintiff must provide this Court with a courtesy copy of its written request.

IT IS FURTHER ORDERED Defendants may file an objection to Plaintiff's requested fees on or before **June 10, 2014**, but Defendants must provide this Court with a courtesy copy of any objection.

IT IS FURTHER ORDERED remanding this matter to the McDowell Mountain Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Myra Harris
THE HON. MYRA HARRIS
Judicial Officer of the Superior Court 042920140800

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.