

No. 91880

In The Missouri Supreme Court

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**Fannie Mae,**

*Plaintiff/Respondent,*

VS

**My Truong,**

*Defendant/Appellant.*

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Appeal from the 23<sup>rd</sup> Judicial Circuit Court - Jefferson County, Missouri  
Division No. 11 - The Honorable Ray Dickhaner

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## Appellant's Brief

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### **Jurisdictional Statement**

An unlawful detainer was filed against Appellant in associate circuit court in Jefferson County, Missouri. Appellant/Defendant sought a jury trial in his answer. Plaintiff sought summary judgment. Defendant opposed summary judgment, and the trial court held a hearing on the record regarding Defendant's opposition. A transcript of this hearing and all briefing filed with the trial court are available in this record on appeal.

In his briefing and arguments to the trial court, Defendant asserted that he should be able to raise various defenses and counterclaims because the foreclosure leading to this unlawful detainer action was illegal. Defendant argued to the trial court that Missouri's unlawful detainer statutes § 534.010 *et seq.*, including Mo. Rev. Stat. § 534.210, is unconstitutional because it violates equal protection principles and it violates substantive and procedural due process. Appellant also asserts that the trial court improperly prohibited him from challenging whether Respondent had standing and was the real party in interest. Further, Missouri's unlawful detainer statute is inconsistent with Missouri Rules of Civil Procedure, as set forth herein.

The trial court held that it could not consider challenges to title and that the fair rental value was not contested. The trial court entered an order stating that all issues were preserved for appeal. This Court has exclusive original jurisdiction over challenges to the constitutionality of a statute so long as the challenges are "real and substantial; not merely colorable." *Wright v. Mo. Dep't of Soc. Servs.*, 25 S.W.3d 525, 528 (Mo. Ct. App. 2000). Further, appellate jurisdiction is appropriate pursuant to Mo. Rev. Stat. § 512.180

both because Defendant/Appellant sought a jury trial and because the case was heard on the record, providing this Court a full record on appeal.

## Statement of Facts

### Synopsis of Statement of Facts

Respondent sued Appellant for unlawful detainer shortly after Appellant's house was foreclosed upon. Appellant contends that the foreclosure was unlawful and unjustified. In the unlawful detainer action, Appellant demanded a jury trial and filed an answer raising constitutional questions about Mo. Rev. Stat. 534.010 *et seq.* He also argued that the Respondent lacked standing and was not the real party in interest.

Respondent moved for summary judgment. Appellant's response included an affidavit indicating that he was not in default, that the foreclosure was wrongful, and that Respondent had no right to institute the unlawful detainer action against him. Before the trial court, Appellant argued (in his memo in opposition and on the record) that preventing him from fully defending his home was unconstitutional because it violated equal protection principles and because it ran afoul of requirements for substantive and procedural due process. Appellant also argued he should be able to file counterclaims and affirmative defenses consistent with the Missouri Rules of Civil Procedure. Despite these efforts to raise numerous issues, Constitutional and otherwise, summary judgment was granted on behalf of Respondent and the trial court entered a judgment of \$6,000.00 against Appellant.

Appellant is now appealing the trial court's summary judgment decision on constitutional grounds, including violations of the Equal Protection and Due Process Clauses of the United States and Missouri Constitutions.

Appellant<sup>1</sup> purchased his home in 2006. (LF 87.) In early 2010, Appellant contacted CitiMortgage, seeking to modify his payment arrangements. (LF 87.) CitiMortgage agreed to put Appellant into a modification plan, requesting that he make three trial period payments. (LF 87.) Appellant made the three required mortgage payments. Appellant ultimately arranged for his mortgage payments to be deducted automatically from his bank account by CitiMortgage. (LF 87-88.)

On August 3, 2010, CitiMortgage deducted Appellant's mortgage payment from his account. (LF 88.) Despite this compliance with the modified payment plan, on August 4, 2010, CitiMortgage mailed Appellant two separate notices: (1) a permanent modification plan dated August 4, 2010 and (2) a notice of default from Millsap and Singer dated August 4, 2010. (LF 88.) On August 9, 2010, Millsap and Singer mailed Appellant a notice of foreclosure. On August 17, 2010, Appellant was mailed a Notice of Trustee's Sale which indicated that Appellant's home would be sold on September 10, 2010. (LF 88-89.)

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<sup>1</sup> Appellant was the Defendant in the previous action and Respondent was the Plaintiff. For purposes of this brief, Defendant/Appellant will refer to the parties solely as Appellant and Respondent.

Appellant was out of the country during the month of August 2010. (LF 88.) When he returned home on September 9, 2010, he found the above-described notices. (LF 88.) He was confused by these letters; he did not understand how he could be in default when his bank had automatically deducted his mortgage payment in early August 2010. (LF 89.) Appellant, who was not yet represented by counsel (LF 1-2), was not able to stop the foreclosure sale (LF 88-89). His house was purportedly sold at an auction on September 10, 2010, to Federal National Mortgage Association (“Fannie Mae”). (LF 88-89.)

Respondent Fannie Mae then sued Appellant for unlawful detainer on September 22, 2010. (LF 89.) Appellant then hired counsel to represent him, and counsel entered in this matter on November 2, 2010, at which time he was given until December 7, 2010, to file his Answer to Respondent’s Petition. (LF 1-2.) On November 24, 2010, Respondent filed its Motion for Summary Judgment. (LF 2 & 16-47.)

Appellant filed his Answer on December 7, 2010. In his Answer, Appellant raised constitutional arguments and affirmative defenses, including challenges to standing, as well as counterclaims. He sought a jury trial. He set forth the following defenses:

- Missouri Revised Statutes § 534.010 *et seq.*, and specifically Mo. Rev. Stat. § 534.210, Mo. Rev. Stat. § 534.330, and Missouri cases that prohibit affirmative defenses and counterclaims related to the underlying action, are unconstitutional because they violate both the Missouri Constitution and the United States Constitution by, among other things, denying him due process, equal protection under the law, the right to be heard, free and equal access to courts, and the

efficient and fair resolution of claims, and by imposing penalties and undue burdens on litigants.

- Respondent was not the real party in interest.
- The action was barred by the doctrines of waiver, estoppel, failure to mitigate hypothetical damages, contributory negligence, and comparative fault.
- Respondent had failed to state a claim for which relief can be granted.
- Any penalty imposed by Mo. Rev. Stat. § 534.010 *et seq.* would be an improper penalty that would be violative of due process.
- Respondent's claims for penalties and removal from the home could not be sustained because of its willful or wanton conduct.
- Respondent was not a bona fide purchaser for value and would be subject to the claims and defenses of the previous owner.

Appellant also filed counterclaims for negligence and unjust enrichment and requested the Court enter a declaratory judgment holding that the Respondent did not hold valid title to Appellant's property. (LF 165-171.)

On December 7, 2010, Appellant requested additional time to respond to Respondent's Motion for Summary Judgment so that discovery could be undertaken, and Appellant's request was granted by the Court. (LF 2 & 63-65.) On December 30, 2010, Respondent filed a Motion to Strike Appellant's counterclaims and affirmative defenses. (LF 2 & 66-67.) On January 18, 2010, Appellant filed the following:

- Response to Respondent's Statement of Uncontroverted Facts,

- Response to Respondent's Motion to Strike Appellant's Affirmative Defenses and Counterclaims,
- Motion to Compel Discovery Answers of Respondent,
- Memorandum in Opposition to Respondent's Motion for Summary Judgment, and
- Statement of Uncontroverted Facts (Respondent never responded to Appellant's Statement of Uncontroverted Facts.<sup>2</sup>).

On January 18, 2010, Respondent's Motion for Summary Judgment was called and heard. (LF 2; Motion Tr. 2-10.) The hearing was on the record. (See Tr. generally.) The Court, after arguments, expressed concern about the propriety of the unlawful

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<sup>2</sup> Respondent filed only a Motion to Strike Appellant's Statement of Uncontroverted Facts, arguing that they were not served electronically; Respondent did not respond to Appellant's Statement of Uncontroverted Facts. Under the Missouri Rules of Civil Procedure governing summary judgments, the Respondent was required to respond substantively to Appellant's Statement of Uncontroverted Facts, providing proof for any denials, but it did not do so. The associate circuit court found that facts, other than that the foreclosure sale occurred and a Trustee's Deed was delivered, were outside the scope of the unlawful detainer action. The associate circuit court did not grant Respondent's Motion to Strike Appellant's Statement of Facts; instead, it held only that all motions were ruled upon consistent with the final order refusing to consider the merits of title and other issues raised by Appellant. Therefore, for the purposes of this appeal, then, Appellant's facts should be taken as true.

detainer statute, as well as concern that it was not able to consider whether the foreclosure was wrongful. It noted:

Cause called for Summary Judgment Motion. Defendant raises constitutional issues, denies the Plaintiff's statement of uncontroverted facts. Plaintiff asserts Defendant is trying to try title to the property in contravention of the statutes. Without commenting on the merits, which this Court does not yet explore, this Court has issues with the statute, which would seemingly allow usurpers of title to evict lawful owners.

The Motion for Summary Judgment is continued. (LF 2.)

The cause was then continued to February 22, 2010.

On February 2, 2011, Respondent filed a Motion to Strike Appellant's Statement of Uncontroverted Facts and Suggestions in Opposition to Appellant's Motion to Compel. (LF 3 & 139-146.) On February 22, 2010, Appellant filed a motion to amend his answer to Respondent's Petition. (LF 3 & 163-174.) On March 1, 2010, the Court granted Respondent's Motion for Summary Judgment and entered a judgment for possession of the property to the Respondent as well as \$6,000.00 in damages. (LF 186.)

On April 4, 2011, Appellant's attorney learned that Respondent had executed its judgment on March 31, 2011, prior to the expiration of the right to appeal the constitutional issues. (LF 194.) On April 5, 2011, Appellant filed his Motion to Require Respondent Fannie Mae to Refrain from Execution of Judgment, to Relinquish Possession of Property to Mr. Truong and for the Court to Set Bond. (LF 194-196.)

Appellant also filed a Motion to Shorten Time so that this issue could be addressed quickly by the court. (LF 198.) Respondent filed its Suggestions in Opposition on April 5, 2011, and the cause was heard on April 5, 2011. (LF 202-203.) The court set a bond hearing for April 8, 2011, but denied Appellant's Motion to return the property to the Appellant. (LF 203.)

On April 5, 2011, Appellant filed a Notice of Appeal for Transfer to the Supreme Court because of the constitutional issues raised regarding the unlawful detainer statute. (LF 214-218.) This cause follows from that appeal.

**Points Relied On**

***Point I***

***[Constitutional Argument - Equal Protection]***

**The trial court erred in granting Respondent's Motion for Summary Judgment in reliance on Mo. Rev. Stat. § 534.010 *et seq.*, because Mo. Rev. Stat. § 534.010 *et seq.* violate the Equal Protection Clauses of the United States and Missouri Constitutions in that:**

**A. They create two special classes of litigants:**

- a. A class of Plaintiffs who receive an expedited hearing and double damages, who need not prove title because title cannot be challenged, and who need not prove that they have standing or that they are the real party in interest, and**
- b. A class of Defendants who, upon being sued, are prevented from fully defending the suit, prevented from introducing evidence to contest fundamental elements of Plaintiff's case, and prevented from raising affirmative defenses or alleging counterclaims; and**

**B. The creation of these two classes of litigants, as compared to similarly situated plaintiffs and defendants in other civil cases, is not rationally related to any legitimate government interest.**

*Authority on Which Appellant Principally Relies:*

- *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991).
- *Jamison v. State, Dept. of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399 (Mo. banc 2007).
- *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006).

***Point II***

[Constitutional Argument – Substantive Due Process]

**The trial court erred in granting Respondent’s Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.*, because Mo. Rev. Stat. § 534.010 *et seq.* violate Substantive Due Process provisions of the Missouri and United States Constitutions in that:**

- A. The Open Courts Provisions of the Missouri Constitution and of federal law constitute a fundamental right safeguarded by substantive due process, and**
- B. Mo. Rev. Stat. § 534.010 *et seq.* are not narrowly tailored to serve any compelling state interest.**

*Authority on Which Appellant Principally Relies*

- *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991).
- *Jamison v. State, Dep’t of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399 (Mo. banc 2007).
- *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006).

***Point III***

[Constitutional Argument – Procedural Due Process]

**The trial court erred in granting Respondent’s Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.*, because Mo. Rev. Stat. § 534.010 *et seq.* violate the Due Process Clauses of the United States and Missouri Constitutions in that:**

- A. Appellant has been deprived of a liberty interest protected under the due process clause, and**
- B. The unlawful detainer hearing did not qualify as a “meaningful hearing” as required by procedural due process.**

*Authority on Which Appellant Principally Relies*

- *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. 1991).
- *Jamison v. State, Dep’t of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399 (Mo. 2007).
- *State ex rel. Donelon v. Div. of Employment Sec.*, 971 S.W.2d 869 (Mo. Ct. App. 1998).

**Point IV**

[Challenges to standing and real party in interest]

**The trial court erred in granting Respondent's Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.*, because the provisions of Mo. Rev. Stat. § 534.010 *et seq.* and case law interpreting these statutes do not prohibit inquiry into whether the foreclosure that proceeded the unlawful detainer was wrongful and whether the plaintiff in the unlawful detainer has standing or is the real party in interest.**

Authority on Which Appellant Principally Relies:

*Citizens Bank of Edina v. West Quincy Auto Auction, Inc.*, 742 S.W.2d 161 (Mo. banc 1987).

*Hill v. Morrison*, 436 S.W.2d 255, 257 (Mo. Ct. App. 1969)

## Point V

[Missouri Rule of Civil Procedure v. Inconsistent Statute]

**The trial court erred in granting Respondent's Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.*, because the provisions of Mo. Rev. Stat. § 534.010 *et seq.* stand in direct contravention to the Missouri Rules of Civil Procedure in that:**

- A. Rules that are found to be procedural in nature always prevail over conflicting statutes, and**
- B. Missouri Rules of Civil Procedure 55.32(a) and 55.08, allowing for counterclaims and affirmative defenses, are procedural in nature, and therefore prevail over any contradictory statutes, rendering § 534.010 RSMo *et seq.* unenforceable.**

### *Authority on Which Appellant Principally Relies:*

- *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804 (Mo. banc 1995).
- *State v. Reese*, 920 S.W.2d 94 (Mo. banc 1996).

**Argument - Point I**

*[Constitutional Argument - Equal Protection]*

**The trial court erred in granting Respondent's Motion for Summary Judgment in reliance on Mo. Rev. Stat. § 534.010 *et seq.* because Mo. Rev. Stat. § 534.010 *et seq.* violate the Equal Protection Clauses of the United States and Missouri Constitutions in that:**

**C. They create two special classes of litigants:**

- a. A class of Plaintiffs who receive an expedited hearing and double damages, who need not prove title because title cannot be challenged, and who need not prove that they have standing or that they are the real party in interest, and**
- b. A class of Defendants who, upon being sued, are prevented from fully defending the suit, prevented from introducing evidence to contest fundamental elements of Plaintiff's case, and prevented from raising affirmative defenses or alleging counterclaims; and**

**D. The creation of these two classes of litigants, as compared to similarly situated plaintiffs and defendants in other civil cases, is not rationally related to any legitimate government interest.**

*Synopsis of the Argument of Point I*

In this case, the unlawful detainer proceeding against Appellant occurred as follows:

- 1) Fannie Mae filed an unlawful detainer action against Appellant, a property owner;

- 2) Appellant answered the complaint and although he attempted to raise counterclaims and affirmative defenses, the trial court barred their consideration, basing its decision on existing law;
- 3) Appellant provided proof that he was the lawful owner of the property, including proof that he was making timely payments up to and including the date of the foreclosure and that he even received a notice praising him for his timely payments on the same day he received a notice of default;
- 4) Fannie Mae vehemently argued that standing, the requirement that the plaintiff be the real party in interest, the validity of plaintiff's title, and whether the foreclosure was unlawful cannot be questioned or refuted by the defendant in an unlawful detainer action. Fannie Mae argued that although legal title is an element of its claim, Defendant should not be able to challenge that element in any way.
- 5) The trial court ruled for Fannie Mae after expressing serious concerns about the propriety of the unlawful detainer statute.
- 6) Appellant was evicted from his home, suffering irreparable harm and public humiliation, and he has also been subjected to an award of damages against him for the act of living in his own home.
- 7) Appellant's wages can be garnished for the damages awarded in this case.
- 8) Appellant's only recourse under existing law is to file an affirmative action, take on the burden of proof, and if he is successful, recover money instead of his home.
- 9) Under current law, none of the above could possibly be lawful unless it served the public interest.

The above scenario demonstrates the flaws of Mo. Rev. Stat. § 534.010 *et seq.*, including Section 534.210. This statute has created a special class of plaintiffs (most often banks and corporations), who are able to summarily kick Missouri homeowners out their houses with little or no proof. This statute has created a special class of defendants who are systematically being deprived of their property rights without fair hearings. Missouri's unlawful detainer law does not allow unlawful detainer defendants to (1) put the plaintiff to its proof, (2) raise affirmative defenses, or (3) raise counterclaims. Missouri's unlawful detainer laws gag defendants during legal proceedings and offer them no recourse against the plaintiff except to file a separate action, which requires them to take on the burden of proof. In the meantime, the defendant is caused irreparable harm by being forced out of his or her home and forced to deal with garnishments for the doubled damages awarded pursuant to Chapter 534.

Plaintiffs and defendants in Missouri unlawful detainer cases stand in stark contrast to all other plaintiffs and defendants. Most plaintiffs are required to prove their cases. When most defendants are sued, they are able to defend themselves, contesting any and all elements of the plaintiffs' cases, and making use of all available defenses. It is only in the unlawful detainer context that plaintiffs are given a free pass and defendants are stripped of all ability to defend themselves.

The creation of a separate class of plaintiffs and defendants, pursuant to Chapter 534, violates the Equal Protection Clause of the United States and Missouri Constitutions because there is no rational basis for disparate treatment between (1) all other plaintiffs

and unlawful detainer plaintiffs and (2) all other defendants and unlawful detainer defendants. For these reasons, the offending statutory provisions of Chapter 534, including Mo. Rev. Stat. § 534.210, must be struck down as unconstitutional.

### ***Standard of Review***

The standard of review for constitutional challenges to a statute is *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007). When the constitutionality of a statute is attacked, the statute at issue should be presumed to be constitutional unless it is clearly and undoubtedly in contravention of the Missouri constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *Winston v. Reorganized Sch. Dist. R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982). In questioning the constitutionality of a statute, the burden is upon the party claiming the statute is unconstitutional. *Blaske*, 821 S.W.2d at 828-29; *Schnorbus v. Dir. of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990). “Nonetheless, if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid.” *Jamison v. State, Dep’t of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (citing *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)).

**A. Sections 534.010 *et seq.* Inappropriately Create and Classify Two Groups of Plaintiffs and Defendants in Missouri Courts.**

The Equal Protection Clauses of the United States and Missouri Constitutions provide that all persons are created equal and they are all entitled to equal rights and opportunities under the law. Thus, equal protection scrutiny focuses on the classifications of persons or groups. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (citing *Romer v. Evans*, 517 U.S. 620, 631 (1996)). Not all differences in treatment of individuals or groups are invalid for it is inherent that a law may properly treat groups differently. Nonetheless, “a law may not treat similarly situated persons differently unless such differentiation is adequately justified.” *Phillips*, 194 S.W.3d at 845 (citing *Creason v. City of Washington*, 435 F.3d 820, 823 (8th Cir. 2006)).

In this case, two groups of similarly situated individuals are being treated in a sharply different manner. Namely, the plaintiffs and defendants in unlawful detainer actions are treated differently than plaintiffs and defendants in all other judicial actions. Sections 534.010 *et seq.* impermissibly create a special class of plaintiffs and defendants that violates Equal Protection.

**1. The unlawful detainer plaintiff versus the “regular” plaintiff**

A plaintiff in an unlawful detainer action enjoys the following special privileges:

- A forum where the proof it proffers cannot be contested or refuted,
- An expedited proceeding,
- A free pass from having to introduce any evidence to prove that it has standing or that it is the real party in interest, and

- A mandatory award of double damages.

This differs dramatically from the cases tried by “regular” plaintiffs.<sup>3</sup> For example, a plaintiff asserting she was injured due to the negligence of another does not enjoy an expedited proceeding or an award of double damages. This is true no matter how horribly injured she is. Similarly, a regular plaintiff who has suffered blatant discrimination at work does not enjoy any presumption that by filing suit, the discrimination is presumed to have occurred.

It seems incomprehensible, then, that § 534.010 *et seq.* allows an unlawful detainer plaintiff, typically a bank, to have the upper hand, when the end result of these actions is homelessness and economic hardship for Missouri citizens.

It seems more appropriate that a specialized unlawful detainer plaintiff classification would be applied to the “regular” plaintiffs. For example, imagine a disabled single mother who, after she is wrongfully terminated from her job, files suit against her former employer. She struggles to find new work, and while searching for a new position, she has immense difficulty paying for her housing, health insurance, and children’s needs. Wouldn’t she benefit from an expedited hearing, liability that is presumed and cannot be challenged, as well as double damages? One could certainly make a rational argument that providing her with such special privileges would make some sense, yet justice is blind to her terrible predicament and the law puts her to her

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<sup>3</sup> From this point forward, “regular” refers to the parties in cases other than unlawful detainer cases.

proof, even though her case could take several years and she could suffer grave harm before she obtains her day in court.

If the law does not offer special protections to such a desperate individual plaintiff, what is the justification for handing a commercial business such an advantage in an unlawful detainer case? The state has no legitimate interest in facilitating a bank's immediate seizure of a house while it forces desperate individual plaintiffs to wait for their legal recoveries. The state has no interest in specially protecting the finances of unlawful detainer plaintiffs, while refusing to offer such special privileges for injured plaintiffs, cheated plaintiffs, or any other type of plaintiff. Nor does the state presume that the plaintiff may dispense with the need to present proof on basic elements of the case in any other type of trial, including cases where a corporation has been horribly damaged by a competitor corporation. In all other types of trials, the plaintiff is held to his/her/its proof. In no other type of case is the defendant prohibited from introducing evidence that disputes a core element of the plaintiff's case. In short, the application of Mo. Rev. Stat. § 534.010 *et seq.* turns logic on its head.

## **2. The unlawful detainer defendant vs. the "regular" defendant**

The defendants in unlawful detainer actions are treated substantially differently from other defendants in civil litigation. Specifically, an unlawful detainer defendant:

- Cannot refute or contest the evidence provided by the Plaintiff,
- Cannot raise affirmative defenses,
- Cannot raise counterclaims,

- Cannot recoup any double damages collected in a separate action, and
- Loses the right to his property with no real prospect of ever getting it back, even if it is later proved that the property was legally his.

The “regular” defendant in Missouri can present a full defense. Regular defendants can put regular plaintiffs to their proof; they can raise affirmative defenses and counterclaims. This is true for every type of defendant, including parties on both sides of cases involving breaches a contract where damages are measured in billions of dollars. Every regular defendant has the absolute right to contest the elements of the case, even where it has been alleged that the defendant cheated a consumer or harmed a child. In contrast, in unlawful detainer cases, the defendant (the party who has suffered a foreclosure) is forced to stand mute in court, bound and gagged by a lopsided statute that keeps a defendant from challenging standing with publicly available evidence. In what other types of cases are defendants prohibited from raising affirmative defenses or filing counterclaims? Because there is no right to present basic evidence or legal defenses in unlawful detainer proceedings, they have the feel of a big rubber stamp in action. It is distressing to write these words, but for anyone who has sat through a crowded unlawful detainer docket, the eyes and ears do not lie.

Because of these skewed rules, unlawful detainer plaintiffs *own* the courtrooms of Missouri, and Missouri trial court judges feel the same frustration expressed by Judge Dickhaner in this case. Because of the way that Missouri’s unlawful detainer statutes have tilted these proceedings, the summary judgments filed by plaintiffs are legally impenetrable, the defenses are futile, and homeowners inevitably suffer irreparable harm.

This imbalance in Missouri's unlawful detainer statutes causes the public's confidence in the rule of law to be fundamentally undermined. Because the unlawful detainer plaintiff is afforded starkly unfair advantages, the defendant becomes victimized by these proceedings rather than a meaningful party to the process. In one ultra-quick proceeding, an unlawful detainer defendant, who enters the courtroom with one hand tied behind the back, goes from being a property owner to a homeless, indebted, humiliated person who feels utterly disenfranchised by the legal system.

Based on the above analysis, Mo. Rev. Stat. § 534.010 *et seq.* create impermissible classifications amongst similarly situated groups.

**B. There is no rational basis for the separate classification of unlawful detainer plaintiffs and “real” plaintiffs and unlawful detainer defendants and “real” defendants.**

A party who challenges a statute under the equal protection clause may present facts or arguments to show that the classification as applied is not rationally related to a legitimate interest. *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 513 (Mo. banc 1991) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938)). In the equal protection analysis, once it is determined that classifications have been created under a statutory scheme, the next question is: Are there possible rational reasons for those classifications? *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

There are no rational reasons for the classifications of plaintiffs and defendants that exist under Sections 534.010 *et seq.* In fact, Missouri's unlawful detainer statutes and their application against Missouri homeowners are completely irrational. Consider this hypothetical:

A person from another country visits the United States. He has never heard of what has happened in the United States with regards to the mortgage crisis. He is informed of skyrocketing foreclosures, investigations of banks in almost every state in the country, reports of negligent and fraudulent foreclosures, reports of lost titles to homes, and negligent and fraudulent record keeping of mortgage payments. He reads of the now infamous story of Bank of America foreclosing on a home that was never the subject of a loan. He studies how securitization encouraged new problems over the past decade, including over-loaning, phony appraisals, hidden fees, bribes posing as "yield spread premiums," and exploding ARMs. He reads of robo-signing and lawsuits all over the country by governmental bodies against lenders. He then learns that in Missouri, despite all this, a foreclosure can occur within a month with no judicial oversight.

After he learns all of this, he is asked one simple question: "If a law is passed regarding what must be done before a purchaser at a foreclosure sale can remove a person from a home they owned, should it offer any special protections to either party of an unlawful detainer action and if so, who?" If this hypothetical question were asked over and over and over again to millions of open-minded people, would anyone ever suggest that the proper answer would be that society should give banks special legal advantages to help them take homes faster by requiring less proof, by expediting the proceeding and

by precluding the homeowners from defending themselves? No one can honestly suggest that there is any rational basis for offering special rights to unlawful detainer plaintiffs while stripping would-be homeowners of the rights that are currently afforded to all other defendants.

The question of whether or not there is a rational basis for the unlawful detainer statute may also be considered by breaking this basic question down into smaller questions.

- Is it rational, in a proceeding to take a defendant's home, to limit defendants' rights to defend themselves by prohibiting counterclaims, affirmative defenses, and the use of discovery to review plaintiff's evidence?
- Is it rational to force defendants to file separate actions to bring their claims while taking on the burden of proof, after irreparable harm has already occurred and the unlawful detainer judgment is final?
- Is it rational to expedite one party's right to deprive another of his or her home?
- Is it rational to provide an unlawful detainer plaintiff, who is often a commercial entity, more advantages than a "regular" plaintiff?
- Is it rational to provide a "regular" defendant more protections, even if his claim is small, than an unlawful detainer defendant, who is at risk of losing his property?
- Is it rational to require the splitting of a cause of action, resulting in uncertainty regarding legal title to property and fractured, multiplicative litigation?

- Is it rational to provide additional protection for unlawful detainer plaintiffs, who are often large commercial banks, when those entities are implicated in the most pervasive systematic fraud in American history?

The answer to each of these questions is “no.”

For all of these reasons, § 534.010 RSMo *et seq.* stands as a danger to Missouri citizens and it is an embarrassment to our system of law and order. It violates the Equal Protection Clause of the United States and Missouri Constitutions, and it should therefore be held invalid as it applies to parties who have suffered foreclosures.

**Argument - Point II**

[Constitutional Argument – Substantive Due Process]

**The trial court erred in granting Respondent’s Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.* because Sections 534.010 *et seq.* violate Substantive Due Process provisions of the Missouri and United States Constitution in that:**

- C. The Open Courts Provisions of the Missouri Constitution and of federal law constitute a fundamental right safeguarded by substantive due process, and**
- D. Sections 534.010 *et seq.* are not narrowly tailored to serve any compelling state interest.**

*Synopsis of the Argument of Point II*

The Missouri Constitution provides free access to courts and a remedy for every recognized wrong. Despite this, the unlawful detainer statute prohibits defendants from defending their homes in unlawful detainer actions. As a result, defendants in unlawful detainer actions are often irreparably harmed. This is true because, even if the homeowner later brings an affirmative claim and proves that the foreclosure was wrongful, that homeowner cannot realistically be restored to his or her home once it is sold. The result is that the unlawful detainer defendant suffers an injury for which there is no legally sufficient remedy. This results exclusively from application of Missouri’s unlawful detainer statutes, for which there is no reasonable justification or excuse. Further, far from advancing a government interest, Missouri unlawful detainer statutes

harm Missouri citizens, encourage duplicative litigation, cloud title, and compound injuries that can occur from wrongful foreclosures.

### ***Standard of Review***

The standard of review for constitutional challenges to a statute is *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007). When the constitutionality of a statute is attacked, the statute at issue should be presumed to be constitutional unless it is clearly and undoubtedly in contravention of the Missouri constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *Winston v. Reorganized Sch. Dist. R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982). In questioning the constitutionality of a statute, the burden is upon the party claiming the statute is unconstitutional. *Blaske*, 821 S.W.2d at 828-29; *Schnorbus v. Dir. of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990). “Nonetheless, if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid.” *Jamison v. State, Dep’t of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (citing *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)).

#### **A. The Open Courts Provision of the Missouri Constitution Is a Fundamental Right Safeguarded by Substantive Due Process.**

“[S]ubstantive due process rights are created only by the Constitution.” *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc 2006) (quoting *Regents of Univ. of Mich. v.*

*Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring)). In order to be considered a “fundamental” right safeguarded by substantive due process, that right or liberty must be one that is “objectively, deeply rooted in the nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Phillips*, 194 S.W.3d at 842 (quoting *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005)).

The “Open Courts” provision of the Missouri Constitution is found in the Bill of Rights. It provides:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property, or character, and that right and justice shall be administered without sale, denial, or delay. Mo. Const. art. I, § 14.

That the courts be open to all is a constitutional right that is “objectively, deeply rooted” in our nation’s and in Missouri’s history. The Honorable Michael Wolff provided a detailed and historical perspective on the open courts provision in *Kilmer v. Mun*, which stated:

An “open courts” provision has been in our state constitution since the first Missouri Constitution of 1820. Its origins are in *Magna Carta*, a document that evolved as the basic charter of English liberty after its

original version was signed and sealed by King John of England in 1215. . . . It may be argued that the original *Magna Carta* language was directed only to courts. However, in the 19th century, when our first constitution was adopted, “the evil was renegade legislatures that had, for example, deprived injured creditors of their judicial remedies against debtors by passing legislation impairing existing contractual obligations.” In Missouri, barriers to a “certain remedy” for an “injury” can be erected by the courts themselves, or by the legislature. An examination both of the history and the language of our constitution supports the conclusion that article I, section 14, “applies against all impediments to fair judicial process, be they legislative or judicial in origin.”

Missouri's version of the “open courts” provision has been strengthened twice since its adoption in our state's first constitution of 1820. Missouri's first constitution put the “open courts” provision in our Bill of Rights, which provided: “That courts of justice *ought to be* open to every person, and certain remedy afforded for every injury to person, property, or character; and that right and justice *ought to be* administered without sale, denial, or delay....” Mo. Const. art. XIII, sec. 7 (1820) (emphasis added.) In the constitution of 1875, the provision reads: “That courts of justice *shall be* open to every person, and certain remedy afforded for every injury to person, property or

character; and that right and justice *should be* administered without sale, or delay.” Mo. Const. art. II, sec. 10 (1875) (emphasis added). This version was added by amendment in the Constitutional Convention, but without elaboration as to any change in meaning. *See* debates, Missouri Constitutional Convention 1875, vol. II, 226–27. In the constitution of 1945, the word “should” was changed to “shall.” *See* O. Const. art. I, sec. 14 (1945) quoted above. One might question whether these changes reflect a change in meaning or merely reflect contemporary linguistic conventions. But when the words “ought” and “should” are replaced with the word “shall” it is difficult to escape the conclusion that our drafters changed a passage that could originally have been taken to be mere exhortation to a constitutional provision that is mandatory in tone and substance.

*Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. banc 2000) (some citations omitted).<sup>4</sup> This extensive and thorough history of the open courts provision demonstrates that free and open access to the courts is an engrained and essential tradition, integral to liberty and justice. And as Justice Wolff opines, it is also a constitutional right, thus protected by

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<sup>4</sup> Appellant is aware that in *Kilmer v. Mun*, this Court analyzed the open courts provision and established an “arbitrary and unreasonable” test. However, that case was not predicated on a substantial due process claim and therefore the analysis for the provision in this instance is necessarily different.

substantive due process. In short, the Open Courts provision ensures that for all recognized wrongs, there will be a remedy.

Although Missouri recognizes a claim for wrongful foreclosure, the unlawful detainer statute guarantees that there is often no *adequate* remedy at law for a wrongful foreclosure. If an unlawful detainer is brought, and the defendant is not allowed to contest the underlying foreclosure, including standing and whether or not the real party in interest is who brought the unlawful detainer, the result can be disastrous. Defective unlawful detainer actions are invited to move forward, resulting in judgments against people seeking to protect their homes with highly relevant evidence and well-recognized legal arguments. In fact, certain Missouri precedent interprets Sections 534.010 *et seq.* (specifically Sections 534.140 and 534.200) to deny the unlawful detainer judge control of his own docket by prohibiting him even from staying the action while the wrongful foreclosure action proceeds. *See Am. Vision Ctr. Of St. Louis Ctr., Inc. v. Carr Optical, Inc.*, 810 S.W.2d 121, 122 (Mo. Ct. App. 1991). Despite the existence of bona fide defense, the home is then often put on the market and sold. Then, even if the party can bring an affirmative action for wrongful foreclosure and for a wrongful unlawful detainer, he cannot recover back his home. Given that property is unique at law, *Eime v. Bradford*, 185 S.W.3d 233, 236 (Mo. Ct. App. 2006), this constitutes irreparable harm and lack of a remedy, in violation of the Open Courts provision, which in turn means this is a violation of substantive due process. This is discussed more fully below.

**B. Sections 534.010 *et seq.* Are Not Narrowly Tailored to Serve a Compelling State Interest.**

Substantive due process principles require abrogation of a substantive rule of law if it intrudes on liberty interests that “are so fundamental that a State may not interfere with them, even with adequate procedural due process, unless the infringement is ‘narrowly tailored to serve a compelling state interest.’ ” *Doe v. Phillips*, 194 S.W.3d 833, 842 (Mo. banc. 2006) (citing *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005) and quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); U.S. Const. amend. XIV). In such cases, the laws are invalid “regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

Under the standard, § 534.010 *et seq.* must be narrowly tailored to serve a compelling state interest in order to survive judicial scrutiny. There is nothing narrow, however, about the limitations and ramifications of Missouri’s unlawful detainer statutes. Despite the specific and concrete language of the open courts provision, Missouri’s unlawful detainer statutes have effectively (1) turned legal proceedings into foregone conclusions for unlawful detainer defendants by barring inquiry into plaintiff’s evidence, given plaintiffs a free pass on the issue of standing, and prevented defendants from defending themselves, (2) limited remedies for unlawful detainer defendants by prohibiting the filing of affirmative defenses and counterclaims, (3) delayed an unlawful detainer defendant’s day in court and right to justice by forcing the defendant to file a separate action to address their rights and claims and take on the burden of proof, and (4)

guaranteed that even when an affirmative claim is filed and won by the former unlawful detainer defendant, an adequate remedy at law will typically not exist. Such results are not indicative of a narrow rule; in fact, such results are indicative broad sweeping statutes that negatively and seriously affect thousands of property owners in Missouri.

As discussed at length in Point I, there is not a rational basis for the law, much less a compelling state interest. The word state is critical in this analysis. The unlawful detainer plaintiff would argue that it certainly benefits from the unlawful detainer statute, and it is unarguably true that it advances that plaintiff's *private* interest. However, how does privileging a private plaintiff, usually a commercial entity, advance the *public* good? After all, the state is not trying to protect the public from sexual offenders, violent criminals, or abusive day care workers (as it has in other laws that do not violate due process). Instead, the state's unlawful detainer law, as it stands today, helps banks take homes from homeowners, and it helps them do it in the absence of a full hearing based on complete evidence. There is no state interest in rushing cases to judgment, to the detriment of the state's own citizens.

The state is actually *harmed* by Missouri's unlawful detainer laws. Thousands of Missouri homeowners are being thrown out of their homes without the ability to defend themselves, leaving neighborhoods of empty houses, declines in property values, and loss of tax revenue. In addition, the sanctity of the court system and the belief that laws are just are being undermined every time the law prevents another defendant from asserting

relevant proof and legal arguments that are valid in all civil cases other than unlawful  
detainer cases.

***Argument of Point III***

[Constitutional Argument – Procedural Due Process]

**The trial court erred in granting Respondent’s Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.* because Sections 534.010 *et seq.* violate the Due Process Clause of the United States and Missouri Constitutions in that:**

- C. Appellant has been deprived of a liberty interest protected under the due process clause, and**
- D. The unlawful detainer hearing did not qualify as a “meaningful hearing” as required by procedural due process.**

***Synopsis of the Argument of Point III***

An unlawful detainer defendant is essentially accused, in a public document, of being a squatter in what many defendants could prove, if given the chance, is their *own* legal property. In addition to the stigma attached to such a claim, the unlawful detainer defendant faces additional harm, including double damages, the loss of his or her home, and a permanent impairment of credit. All of this occurs in an expedited process in which the plaintiff is not even required to prove all the elements of its claim, and the defendant is forced to stand by helplessly, unable to defend himself in any meaningful way. In short, the liberty interest at issue is significant, and the due process provided prior to the deprivation is tragically lacking. For these reasons, Missouri’s unlawful detainer statutes are unconstitutional.

### ***Standard of Review***

The standard of review for constitutional challenges to a statute is *de novo*. *Hodges v. City of St. Louis*, 217 S.W.3d 278, 279 (Mo. banc 2007). When the constitutionality of a statute is attacked, the statute at issue should be presumed to be constitutional unless it is clearly and undoubtedly in contravention of the Missouri constitution. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 828 (Mo. banc 1991); *Winston v. Reorganized Sch. Dist. R-2, Lawrence County*, 636 S.W.2d 324, 327 (Mo. banc 1982). In questioning the constitutionality of a statute, the burden is upon the party claiming the statute is unconstitutional. *Blaske*, 821 S.W.2d at 828-29; *Schnorbus v. Dir. of Revenue*, 790 S.W.2d 241, 243 (Mo. banc 1990). “Nonetheless, if a statute conflicts with a constitutional provision or provisions, this Court must hold the statute invalid.” *Jamison v. State, Dep’t of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (citing *State v. Kinder*, 89 S.W.3d 454, 459 (Mo. banc 2002)).

#### **A. Appellant Has Been Deprived of a Liberty Interest as Recognized Under the Due Process Clause.**

The due process clauses of the United States and Missouri Constitutions prohibit the taking of life, liberty or property without due process of law. U.S. Const. amend. XIV, sec. 1; Mo. Const. art. I, sec. 10. The United States Supreme Court has consistently acknowledged that this prohibition “imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests.” *Jamison v. State, Dep’t of*

*Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 (Mo. banc 2007) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)).

In determining what process is due in a particular case, the Court must conduct a two-part inquiry. “The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in ‘property’ or ‘liberty.’ Only after finding the deprivation of a protected interest do we look to see if the State’s procedures comport with due process.” *America Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) (citations omitted).

Procedural due process protects a liberty interest “where a person’s good name, reputation, honor or integrity is at stake because of governmental action.” *Barnes v. City of Lawson*, 820 S.W.2d 598, 601 (Mo. Ct. App. 1991) (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). “For state action resulting in stigmatization to rise to the level of a constitutionally protected interest, a person must also show that the state action affects some other tangible liberty or property interest.” *Jamison*, 218 S.W.3d at 406. This standard for such state action is the “stigma plus” test. *Id.*

The unlawful detainer statute affects a liberty interest. Specifically, § 534.010 *et seq.*, affect the reputation, honor, and integrity of every defendant sued under its provisions. As a matter of public record, it casts the defendant in a negative light, suggesting that the defendant is squatter who refuses to leave property he or she does not own. The statute then attaches a double monetary damage judgment to defendants’ good name, putting a black mark on the defendant’s credit records.

In addition to this stigmatization, the defendant also has a monetary and real property interest detrimentally affected. As previously discussed in this brief, the unlawful detainer statute prohibits the defendant from adequately representing his interests in the suit; as a result, the defendant is stripped of his property and a monetary judgment is entered against him. Since these actions are implemented by the judiciary, *res judicata* attaches, foreclosing defendant's ability to overturn these judgments later. These actions create a permanent and public blight on defendants' records. Given that the defendants in unlawful detainer actions first suffer stigmatization and then suffer the loss of money and property, the stigma plus test has been met.

**B. Since Appellant Has Been Deprived of a Liberty Interest, Appellant is Entitled to a Meaningful Hearing, Which Does Not Occur under the Unlawful Detainer Statute.**

Under both the federal and state constitutions, the central requirement of due process is the "opportunity to be heard at a meaningful time and in a meaningful manner." *Moore v. Bd. of Educ. of Fulton Pub. Sch. No. 58*, 836 S.W.2d 943, 947 (Mo. banc 1992). The United States Supreme Court has consistently held that a basic principle of our society is the right to be heard at some form of hearing before an individual is stripped of a protectable interest. *Jamison*, 218 S.W.3d at 405-06 (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). What type of procedural protections afforded at this hearing as well as when the hearing takes place, vary based on the level of the interest at stake. *Id.*

In order to effectively meet the due process standard, three factors must be considered in determining what procedures are constitutionally appropriate:

[F]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

*Belton v. Bd. of Police Com'rs of Kansas City*, 708 S.W.2d 131, 137 (Mo. banc 1986) (quoting *Mathews*, 424 U.S. at 335).

The unlawful detainer statute does not provide for an “opportunity to be heard at a meaningful time and in a meaningful manner.” In fact, the unlawful detainer does not allow a defendant to be heard at all. Despite serious deprivation that a defendant must suffer—being stigmatized by the statute, as well as losing property and monetary interests—there are no procedures in an unlawful detainer action that afford a defendant a fair hearing. Since there are no safeguards, it makes the risk of deprivation very high for defendants, and no governmental interest is served by this statute. In fact, the statute places additional burdens on the government because rather than resolving all issues during the unlawful detainer proceeding, an additional and unnecessary suit must be filed in order for the defendant to have any chance to vindicate his rights and obtain

his remedies under the law. As such, the statute splits the cause of action and multiplies litigation, stretching the courts' resources.

*Argument - Point IV*

[Challenges to standing and real party in interest]

**The trial court erred in granting Respondent's Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.* because the provisions of Mo. Rev. Stat. § 534.010 *et seq.* and case law interpreting these statutes do not prohibit inquiry into whether the foreclosure that proceeded the unlawful detainer was wrongful and whether the plaintiff in the unlawful detainer has standing or is the real party in interest.**

*Synopsis of Point IV*

In the trial court, Respondent in this matter asserted that because the statute suggests that title cannot be inquired into, it is also inappropriate to consider whether the plaintiff obtained the title via a wrongful foreclosure, whether plaintiff has standing to bring the action or whether the plaintiff is the real party in interest. This position is unsupported by long-standing Missouri case law. This Court has previously considered whether a foreclosure was properly carried out in an unlawful detainer action; after concluding an improper trustee was used, this Court voided the foreclosure.

**A. This Court's Precedent Establishes that the Validity of the Underlying Foreclosure Can Be Considered by the Court in an Unlawful Detainer.**

Despite repeated assertions by Respondent (and numerous other unlawful detainer plaintiffs throughout Missouri) that the validity of an underlying foreclosure is irrelevant

to an unlawful detainer, it is clear that the validity of a foreclosure sale can be inquired into in an unlawful detainer.<sup>5</sup> In *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.*, 742 S.W.2d 161 (Mo. banc 1987), this Court reversed an unlawful detainer judgment because this Court determined that the underlying foreclosure sale was void. In that case, West Quincy Auto executed a deed of trust on real estate in order to secure a note to Citizen's Bank. Default occurred on the note and the Trustee Tom B. Brown initiated foreclosure proceedings. Tom B. Brown, trustee, was not present at the sale of the property and David Brown, Tom's son and law partner, conducted the sale. Relying on years of precedent, this Court held that the sale conducted by David Brown was void because he had no power to sell the property and therefore, no title was passed to Citizens Bank. This analysis occurred under the same provisions of the unlawful detainer statute that exist today, including § 534.210, which states:

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<sup>5</sup> In briefing in this case and in other similar matters, Respondent's attorneys have offered no rebuttal to this case other than to suggest that since the case does not say it was an unlawful detainer, it must have been an ejectment. However, Appellant has investigated this matter and is in the process of obtaining a certified copy of the petition filed in *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.* Conversations with the trial court clerk who retrieved the pleading from the basement indicates that this action was an unlawful detainer. As such, this Court would have to overrule longstanding precedent in order to affirm this trial court's refusal to consider the validity of the foreclosure.

The merits of the title shall in nowise be inquired into, on any complaint which shall be exhibited by virtue of the provisions of this chapter.

As discussed below, many other cases support the position that before a court will allow a plaintiff to force a defendant out of a property, it will first determine whether that plaintiff has any right to do so.

Despite the fact that an unlawful detainer is a “special code,” actions in unlawful detainer are not exempt from basic justiciability doctrines, including standing. *See Hill v. Morrison*, 436 S.W.2d 255, 257 (Mo. Ct. App. 1969) (holding that plaintiff in an unlawful detainer action brought under Chapter 534 of the Missouri Revised Statutes “had no standing to maintain this possessory action”). “[S]tanding is a threshold issue” that must be determined as a matter of law. *Executive Bd. of Mo. Baptist Convention v. Carnahan*, 170 S.W.3d 437, 445 (Mo. Ct. App. 2005); *see also In re Estate of Scott*, 913 S.W.2d 104, 105 (Mo. Ct. App. 1995) (“Without [standing], a court has no power to grant the relief requested.”). Lack of standing cannot be waived. *Kinder v. Holden*, 92 S.W.3d 793, 803 (Mo. Ct. App. 2002). “Where, as here, a question is raised about a party’s standing, courts have a duty to determine the question of their jurisdiction before reaching substantive issues, for if a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.” *Farmer v. Kinder*, 89 S.W.3d 447, 451 (Mo. banc 2002). “[T]o have standing a plaintiff must show she has some actual and justiciable interest susceptible of protection by her suit.” *Dodson*

v. *City of Wentzville*, 133 S.W.3d 528, 533 (Mo. Ct. App. 2004) (emphasis added); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565–66 (1992).

In addition, Mo. Rev. Stat. § 507.010 and Missouri Supreme Court Rule 52.01 require that every action be prosecuted in the name of the real party at interest. While the “real party in interest” rule is a “prudential limitation” and standing is a “jurisdictional limit,” the two doctrines are related. *Mecklenburg Farm v. Anheuser-Busch, Inc.*, 250 F.R.D. 414, 417 (E.D. Mo. 2008). The requirements that a plaintiff have standing to maintain an action and be the real party at interest apply to every action, including unlawful detainer actions pursuant to the plain terms of Rule 52.01 and Mo. Rev. Stat. § 507.010.

In *Mecklenburg Farm*, the District Court for the Eastern District of Missouri denied, without prejudice, defendants’ motion to dismiss for lack of standing, but ordered the plaintiff to produce evidence that it had standing to maintain an action and that it was the real party at interest. The court stated:

The defendants correctly observe that the complaint does not contain any reference to the [plaintiff] as an assignee of the [third party’s] rights in the [contracts at issue] or in this cause of action. The [plaintiff] responds that it is the assignee of the [third party’s] interest in the contracts . . . . This assertion, however, is not supported by affidavits or other evidentiary proof. The identity of the real party may not always be apparent from the face of pleadings; it may be necessary to look beyond the pleadings to the

facts of the dispute. The Court finds it appropriate under the circumstances of this case to order the Farm to submit evidence to establish (1) what was assigned to it, so it can be determined whether the Farm is the real party in interest with regard to the claims raised in this action, and (2) that a valid assignment was made.

*Id.* at 418 (quotations and citations omitted) (emphasis added).

In this matter, Appellant hotly contested that Respondent had standing to bring this unlawful detainer, given that the foreclosure which allegedly transferred title was invalid. Respondent responded by asserting that the trial court was required to put on blinders and move forward without any scrutiny of the foreclosure. The trial court, after expressing grave concerns about the risks this type of reasoning created, ruled in favor of Respondent.

#### **B. Mo. Rev. Stat. Section 534.220 Explicitly Admits Evidence Regarding Title.**

Respondent pointed to Mo. Rev. Stat. Section 534.210, stating that “[t]he merits of the title shall in nowise be inquired into” on a complaint of unlawful detainer, as evidence that it need not present any evidence that it has standing to bring a claim. Courts have long distinguished, however, between *questioning* title and using the title as evidence to show the nature of possession. In *Lehnen v. Dickson*, 148 U.S. 71 (1893), applying Missouri law, the United States Supreme Court held that proof of the transfer of title was proper in an unlawful detainer action. The Court wrote, “[I]t has been held in Missouri

that the tenant may defeat an action for unlawful detainer, brought by the landlord after the expiration of the lease, by proof that the title, since the execution of the lease, has passed away from the landlord to some other party . . . .” *Id.* at 75. The Court goes on to point out that derivative titles may be admitted into evidence in an unlawful detainer, whether offered by the plaintiff, the defendant, or the party now with title. *Id.* at 76. “None of this testimony impeaches the lease, or challenges any rights created by or under it. It is simply evidence for proof of rights under a derivative title, evidence which, in terms, is authorized by [statute].” *Id.* at 76-77.

The statute to which the Supreme Court refers is now denominated as Mo. Rev. Stat. § 534.220, and is currently part of the chapter on Forcible Entry and Unlawful Detainer, as it was at the time the *Lehnen* Court handed down its decision. The statute states, in its entirety:

Evidence for proof of rights under derivative titles, provided for by this chapter, shall be admissible in actions instituted under this chapter.

“Derivative title” is a general term not employed by a Missouri court since 1918. Black’s Law Dictionary defines “derivative” as:

Coming from another; taken from something preceding; secondary. That which has not its origin in itself, but owes its existence to something foregoing. Anything obtained or deduced from another.

The term “derivative title” would appear to apply to a title that is assigned or transferred.

Some of the confusion by courts, and the incorrect assertion by Respondent that no proof that title has been properly passed is admissible, probably comes from the fact that unlawful detainers, until less than fifteen years ago, applied solely to renters. In such settings, title was often an issue that would not be contested. It seems the law only allowed introduction of title when it may have been passed, perhaps invalidating a landlord's right to seek to oust the tenant.

However, in the context of applying unlawful detainer law to a foreclosure setting, it is clear that title will always be passed, and that it is always derivative. The plain reading of the statute makes evidence of the title admissible. There is no reason to read this to mean that evidence is somehow inadmissible when it suggests that the title was transferred appropriately, or obtained improperly, or through a sale that is void.

As in *Lehnen*, in which this Court held that evidence of the invalidity of the lease at issue did not involve an inquiry into the merits of the title but was, rather, properly admitted as proof of right under a derivative title, evidence of the invalidity of the foreclosure sale and the lack of the proper assignment of the deed of trust should be admitted under Section 534.220 RSMo.

*Hafner Mfg. Co. v. City of St. Louis*, 172 S.W.28 (Mo. 1914) (still good law and cited by *Davis v. Stewart Title Guar. Co.*, 726 S.W.2d 839, 849 (Mo. Ct. App. 1987)) is also instructive on the construction of Mo. Rev. Stat. Sections 534.210 and 534.220. In *Hafner*, the plaintiff brought an action in unlawful detainer, asserting "color of title" and right of possession to a strip of land on a wharf on which he stacked lumber. The defendant, the city of St. Louis, argued that it owned the land at issue. The city provided

evidence that it had established the public wharf and continued to control it, by ordinance, and the court found for the city. *Id.* at 30. The plaintiff appealed, claiming that the evidence provided by the city was inadmissible under the same statute that Plaintiff relies on in this case, that the merits of his title cannot be inquired into. *Id.* at 33; Mo. Rev. Stat. Section 534.210 (as now denominated). The court dismissed the plaintiff's argument out of hand, holding:

It is argued for appellant that the case was tried throughout on an erroneous theory, to wit, on the theory of trying title as if it were a case in ejectment; this in the teeth of the statute forbidding an inquiry into the merits of the title. But [the statutes] permit[] evidence for proof of rights under derivative titles, provided for by this article, the forcible entry and unlawful detainer statute.

*Id.* at 33.

In sum, this Court's precedent regarding challenging the validity of the underlying foreclosure and considering the transfer of title, makes clear that the trial court erred in excluding evidence of derivative title, including whether defects in the foreclosure sale resulted in no valid title being transferred.

## Argument - Point V

[Missouri Rule of Civil Procedure v. Inconsistent Statute]

**The trial court erred in granting Respondent's Summary Judgment Motion in reliance on Mo. Rev. Stat. § 534.010 *et seq.* because the provisions of Mo. Rev. Stat. § 534.010 *et seq.* stand in direct contravention to the Missouri Rules of Civil Procedure in that:**

- C. Rules that are found to be procedural in nature always prevail over conflicting statutes, and**
- D. Missouri Rules of Civil Procedure 55.32(a) and 55.08, allowing for counterclaims and affirmative defenses, are procedural in nature, and therefore prevail over any contradictory statutes, rendering § 534.010 RSMo *et seq.* unenforceable.**

### *Synopsis of the Argument of Point V*

Missouri Rules of Civil Procedure set out the process by which a party may submit affirmative defenses and counterclaims. The unlawful detainer statute and subsequent court precedent would alter when and how affirmative defenses and counterclaims can be asserted, relegating all such inquiries, claims and issues to a separate lawsuit. This alteration of the procedure for asserting rights is inconsistent with the Missouri Rules of Civil Procedure, and the Rules (*see* Rule 41.02) and the Missouri Constitution indicate that the Rules to trump inconsistent statutes in that situation.

### *Standard of Review*

Where an appeal is based upon interpretation of a statute, the appellate court reviews the statute's meaning *de novo*. *Pitts v. Williams*, 315 S.W.3d 755, 759 (Mo. Ct. App. 2010). Further, the standard of review of appeals from summary judgment is essentially *de novo*. *St. Charles County v. Laclede Gas Co.*, --- S.W.3d ----, 2011 WL 3837157, 1 (Mo. banc Aug. 30, 2011) (citing *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 846 (Mo. banc 2009)).

The Missouri Constitution authorizes the Missouri Supreme Court to set out rules of practice and procedure for all courts and those rules have the full force and effect of law. Mo. Const. art. V, § 5. As a result, rules promulgated pursuant to article V, § 5, supplant all statutes and existing court rules that are inconsistent. *See also* Missouri Rule of Civil Procedure 41.02.<sup>6</sup> “[I]f there is a conflict between this Court's rules and a statute, the rule always prevails if it addresses practice, procedure or pleadings.” *State ex rel. Union Elec. Co. v. Barnes*, 893 S.W.2d 804, 805 (Mo. banc 1995). In fact, the Court's rules can only be invalidated or changed in whole or in part by a law that was enacted solely for that purpose. Mo. Const. art. V, § 5. Procedural laws set up a system for enforcing rights or procuring redress. *Barnes*, 893 S.W.2d at 805. “Substantive laws, on

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<sup>6</sup> Rule 41.02 states specifically: “Rules 41 to 101, inclusive, are promulgated pursuant to authority granted this Court by Section 5 of article V of the Constitution of Missouri and supersede all statutes and existing court rules inconsistent therewith.”

the other hand, define and regulate those rights. In a sense, substantive laws create rights; procedural laws provide remedies.” *Id.* (citing *Shepherd v. Consumers Cooperative Assoc.*, 384 S.W.2d 635, 640 (Mo. banc 1964)). Put simply, “substantive law relates to the rights and duties giving rise to the cause of action, while the procedural law is the machinery used for carrying on the suit.” *State v. Reese*, 920 S.W.2d 94, 95 (Mo. banc. 1996).

**A. Rules 55.32(a) and 55.08 of Civil Procedure are Procedural in Nature and Thus Prevail Over Any Contradictory Law Pursuant to Mo. Rev. Stat. § 534.010 et seq.**

Missouri Rule 55.32 delineates when a counterclaim must be filed in an action or it is waived. Specifically, 55.32(a) states:

**(a) Compulsory Counterclaims.** A pleading shall state as a counterclaim any claim that at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Similarly, Missouri Rule 55.08 outlines when affirmative defenses must be filed in an action and indicates that “[i]n pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances . . .” Clearly, Rules 55.32(a) and 55.08

describe the procedure used to answer a suit and compels a defendant to raise all potential counterclaims at the first instance so that the litigation can proceed with all issues out in the open.

However, by Respondent's analysis under the unlawful detainer statute, such counterclaims and affirmative defenses are not allowed to be filed by the Defendant.<sup>7</sup> This directly contradicts Rules 55.32(a) and 55.08 and it prevents the efficient resolution of claims. It forces the defendant to file his claims separately in another action, thereby splits the cause of action, which is disfavored under Missouri law. Given that Rule 55.32(a) and 55.08 govern the "machinery" of litigation, compulsory counterclaims should be allowed in unlawful detainer actions. For this reason, the judgment of the trial court was in error, and this case should have been tried with both Respondent's claims and Appellant's counterclaims.

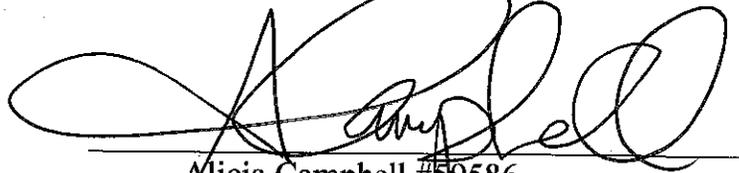
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<sup>7</sup> Respondent relies on *Central Bank of Kansas City v. Mika*, 36 S.W.3d 772 (Mo. Ct. App. 2001), for this proposition.

## CONCLUSION

For all these reasons, Missouri unlawful detainer statutes 534.010 *et seq.*, including Mo. Rev. Stat. § 534.210, to the extent they prohibit parties who have undergone a foreclosure from raising affirmative defenses and counterclaims, are unconstitutional. Further, any and all cases that hold that an unlawful detainer defendant cannot challenge the underlying foreclosure or challenge whether the plaintiff has standing and/or is the real party in interest are inappropriate, unconstitutional and not supported by this Court's precedent.

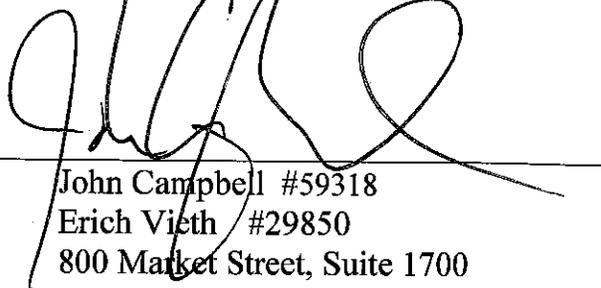
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**Certificates of Service, Brief Form and Virus Scanning**

1. Two copies of the foregoing were mailed, postage paid this 11th day of October, 2011, to attorneys for the Respondent and have been delivered electronically *via* the electronic filing system:

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2. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 31,000 words. This brief contains 12,773 words, as determined by the word count feature of MS Word.
3. This brief has been filed electronically, as required by this Court.



Alicia Campbell #59586