No. 92649

In the Missouri Supreme Court

Wells Fargo Bank, N.A.,

Plaintiff/Respondent,

vs.

William and Susan Smith,

Defendants/Appellants.

Appeal from Cause #10JE-AC01817-01,

From the 23rd Judicial Circuit Court - Jefferson County, Missouri
Division No. 12 - The Honorable Stephen Bouchard

Appellants' Reply Brief

Alicia Campbell #59586
Campbell Law, LLC
640 Cepi Drive, Suite A
St. Louis, MO 63005
(314) 588-8101; (314)588-9188 fax

and

John Campbell #59318
Erich Vieth #29850
The Simon Law Firm
800 Market Street, Suite 1700
St. Louis, MO 63101
(314) 241-2929; (314) 241-2029 fax

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Other Authorities

ARGUMENT

APPELLANTS' REPLY TO RESPONDENT'S POINT I

Respondent asserts that Appellant was obliged to give notice to the Attorney General in order for this case to proceed. This argument is baffling. No case has ever held that such notice is required where a party is defending a claim. Instead, both the statute and the rule cited to by Respondent (§ 527.110 and Rule 87.04) explicitly and only apply to cases where the court is ruling on a claim for declaratory judgment.

In this case, the trial court did not rule on any claim for declaratory judgment. Appellants included such a claim in their counterclaim, but they were not allowed to proceed with their action for declaratory judgment. Instead, the trial court granted a summary judgment on Wells Fargo's Petition for Unlawful Detainer, barring inquiry into the validity of the Smiths' foreclosure and refusing to rule on any of Plaintiffs counterclaims and affirmative defenses.

No Missouri case suggests that a defendant to an unlawful detainer action must provide notice of the legal proceedings to the Attorney General, regardless of the types of defenses they raise or attempt to raise. The rule and statute cited by Respondent apply only where party is allowed to proceed with an affirmative declaratory judgment action that attacks the validity of a Missouri statute. Unless a declaratory judgment action has been pursued, ruled upon by the trial court and appealed, no notice is required to the Missouri Attorney General. As one example of many, s*ee Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503, 506-7 (Mo. 1991), where the court ruled that no notice

was required because plaintiff had not filed a declaratory judgment action pursuant to Rule 87 or Chapter 527. No notice was required, even though the Plaintiffs were vigorously attacking the validity of § 538.225 on the ground that it denied them access to the courts.

Many other appellate cases examining the constitutionality of Missouri statutes are not declaratory judgment actions. No Attorney General notice was required because these cases don't fall within Rule 87. For instance, in the recent case of *Watts v. Lester E. Cox Med. Centers*, 376 S.W.3d 633, 635 (Mo. 2012) the plaintiff brought only a medical malpractice action, not an action for declaratory judgment. Nonetheless, she vigorously and successfully attacked Section 538.210 RSMo., arguing that the cap on non-economic damages violated her right to trial by jury and several other provisions of the Missouri Constitution.

Every case on which Respondent relies (except for *Doerhoff*) involved a declaratory judgment. In the present case, there was no trial court declaratory judgment ruling. This case comes to this Court based solely on the trial court's granting of summary judgment regarding Respondent's Petition for Unlawful Detainer.

In spite of the above, out of an abundance of caution, one of the Attorneys for the Appellants did provide notice of this proceeding, including all counterclaims, to the Missouri Attorney General's Office. This notice was provided to the Missouri Attorney General on April 1, 2011, well prior to the May 17, 2012 trial court ruling in this case. See the Affidavit of Erich Vieth in the Appendix to this Reply Brief.

APPELLANTS' REPLY TO RESPONDENT'S POINT II

Respondent's argument that no state action implicated in this case does not stand the test of scrutiny. Respondent appears to be arguing that a state law drafted by a state legislature and enforced by a state court isn't state action. Under Respondent's argument, if Missouri enacted a law tomorrow that said that women, and only women, are not allowed to present defenses in civil cases, this would not constitute state action.[1] Respondent is offering an absurd reading of state actions cases that would produce absurd results. There are very few ways a state "acts "more overtly than state action. In this case, the state statute is the "but for" cause of Appellants' injuries.

Respondent's position 1) defies common sense, 2) is refuted by the very cases Respondent cites; and 3) is out of step with a long line of United States Supreme Court decisions regarding "state action," including a case that is highly similar to this one, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982).

[1] One might argue that a law directed at women is even more offensive than one directed only at people who have undergone foreclosure. It is of no import. Whether a law targets a protected class or a general class determines the standard of review (strict scrutiny, etc.). However, for any review to be required, there must be state action. That is why it would be dangerous precedent indeed to hold that a state law that specifically limits the rights of a specific group of people is not state action.

1. A State Statute that Directly Causes Injury to a Party is State Action.

The harm Appellants suffered was caused by Missouri's unlawful detainer statute and its irrebuttable presumption that all buyers at foreclosures have good title. In this case, this reality is stark. In its motion for summary judgment Respondent asserted that it had title to the property. Indeed, this is the only claim Respondent could possibly have to support a right to possession. It was this element – title – that Appellants vigorously contested in response to summary judgment. They provided evidence to suggest that there was no default (a condition precedent for a valid foreclosure), that notice was muddled and improper (another condition that can void a foreclosure) and that the trustee was improper (yet another condition that voids a foreclosure). This evidence gave rise to a genuine issue of material fact that should have required this case to proceed to trial. Instead, due to the unlawful detainer statute's prohibition of inquiry into title, all of the evidence presented by Appellants was ignored and the trial court entered summary judgment. Except for the offending statute, Appellants might still be in their home today.

2. Respondent's Own Cited Cases Undercut Its Position and Instead Prove State Action Is Present.

In support of the position that there is no state action, Respondent cites to *Fed. Nat. Mortg. Ass'n v. Howlett*, 521 S.W.2d 428 (Mo. 1975). Respondent asserts in the text of Point II that *Howlett* "squarely" holds that there is no state action in this matter. (Resp.'s Brief, 7.) Respondent attempts to frame this case as a challenge to a foreclosure. However, this framing ignores the fact that *Howlett* is about the constitutionality of a

specific provision, § 534.210 of the unlawful detainer statute. By contrast, the issue in *Howlett,* as articulated by this Court was, "whether various statutory provisions relating to the foreclosure of mortgages and deeds of trust under power of sale (§§ 443.290, 443.310, 443.320, 443.380, and 443.410) [were] unconstitutional . . . ." *Id.* at 429. The *Howlett* Court refined the issue even further, holding that "the threshold question we must determine is whether the foreclosure of the deed of trust on appellant's property involved significant state action." *Id.* at 431. The Court never considered whether the unlawful detainer statute's provision prohibiting all defenses regarding title was unconstitutional.

Instead of supporting Respondent's assertion that there is no state action, *Howlett,* suggests that this case does involve state action. When considering whether a non-judicial foreclosure involves state action, the *Howlett* Court noted that:

1. non-judicial foreclosure actually arose at common law, and therefore could not be said to be created by statute (*Id.* at 431-32.);
2. non-judicial foreclosure is by definition outside of court; involving no state agent (*Id.* at 436-37.); and
3. non-judicial foreclosure arises as a creature of contract, in that it can only occur if the deed of trust between the two private parties allows for it (*Id.*).

This case is markedly different than *Howlett.* Unlawful detainer actions are different than non-judicial foreclosures other than the fact that unlawful detainers sometimes follow foreclosures. Whereas a non-judicial foreclosure is rooted in common

law, is never in court and is always a creature of contract, an unlawful detainer and the severe limitations it involves are created by statute, always occur in court, and are never a creature of contract. As such, the very factors which led this Court to conclude that non-judicial foreclosures do not involve state action should lead this Court to conclude that unlawful detainer statutes do involve state action.

In *Howlett*, the parties could only assert that Missouri law allowed the enforcement of a private contract – the agreement to non-judicial foreclosure found in the deed of trust.[2] This Court properly noted that this reading would turn every contract dispute into a matter of constitutional importance. *Id.* at 437. Here, Appellants assert that it is the state unlawful detainer statute itself that is acting to cause their harm. They never agreed with Respondent that they could not present defenses. In fact, they have no contract with Respondent at all. Nor did they agree that they could be removed from

[2] Respondent might assert that *Howlett* is an unlawful detainer case. This is true, but it is unimportant. That case was simply the means in which the party chose to bring a declaratory judgment regarding non-judicial foreclosures. Appellants in this case do not challenge the validity of the process of non-judicial foreclosures. Instead, they challenge the unlawful detainer statute which prohibits a homeowner from challenging a buyer's claim to title. The result of this case, if Appellants are successful, would be that a court would determine who has title to a property before it evicts the homeowner. Although Respondent rails against such a result, it is hard to imagine why a state would ever remove a person from a property before any court determines who owns the property.

their home even if they retained superior title (because the foreclosure was void). They never agreed that courts would be unable to consider evidence; they never agreed that facts would be presumed true in the absence of proof, or in this case, even in the face of proof to the contrary. Their injury is the inability to defend their home, and this occurs exclusively because of Missouri law. This is prototypical state action.

This type of direct action by the state is exactly what has always been considered state action. When states passed laws that discriminated on the basis of race, or when states passed laws that harmed protected classes by treating them differently from other classes, the laws were scrutinized for constitutionality because they were actions taken by the state. How can Respondent seriously argue that a state law that interferes with the rights of homeowners is any less "state action" than a law that interferes with the rights of minorities? If a state law which directly acts to strip rights from an individual and results in the homeowner losing their house is not state action, what is?

Respondent's argument is beguiled by its own brief in yet another way. In Point II Respondent suggests there is no state action, then in Point III Respondent cites to *Lindsey v. Normet,* 405 U.S. 56 (1972). Although the parties disagree on whether *Lindsey's* facts (which relate to a rental situation) are apposite here, it is undisputable that the United States Supreme Court believed that unlawful (wrongful) detainer statutes constitute state action. In *Lindsey* the Court considered whether a wrongful detainer statute that related to a rental situation was unconstitutional. In doing so, the Court struck a portion of the statute, upheld another part, and held that due process requires an ability to present every available defense. In reaching its conclusion, the majority clearly believed the law

constituted state action or else it could not have analyzed it under due process and equal protection law. In addition, the dissent agreed in part, noting that it violated the "guarantee[] against state action under the Fourteenth Amendment." *Id.* at 80 (emphasis added). In sum, Respondent's own cited case makes it clear that when a state enacts an unlawful detainer statute that could limit a litigant's rights, state action is involved.

3. United States Supreme Court Precedent, including a Highly Similar Case, Support the Conclusion that State Action is Present.

A review of United States Supreme Court cases supports the conclusion that state action is present. The Fourteenth Amendment of the Constitution provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Because the Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as "state action." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 923-24, (1982). Although the Supreme Court has applied a number of tests to determine what constitutes state action, the "goal in every case is to determine whether an action can fairly be attributed to the State." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 306 (2001). Consistent with this common sense test, the Court has long recognized that both specific state statutes and actions taken by a state agent constitute state action. For example, in *Shelley v. Kraemer*, the Court

held actions can be "repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute." *Shelley v. Kraemer*, 334 U.S. 1, 16 (1948) (emphasis added). Similarly, the Supreme Court has held that "while private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action. This is subject to constitutional restraints . . . ." *Lugar*, 457 U.S. at 941.

Consistent with these holdings, the position that state statutes which directly impacts citizens constitute state action has been uncontroversial. In fact, in some cases that directly challenge a statute or state constitution that acts upon a group of individuals, the Court often skips a state action analysis entirely and simply analyzes the Constitutional issue (presumably because it is obvious state action exists). For example, see *Taylor v. Louisiana*, 419 U.S. 522, 535 (1975), in which the Court held that a law that prohibited women from serving as jurors was unconstitutional. The Court did not even discuss whether this law that acted directly to impact the rights of women was state action. It was assumed. See also *Loving v. Virginia*, 388 U.S. 1, 11 (1967), in which the Court struck a state law that prohibited interracial marriage because it violated the equal protection law.[3] Again, the Court devoted no energy to considering whether a statute that stripped individuals of rights was state action; it seems to have assumed this was true.

[3] Stripping rights from a group of people is not even near the boundary for what constitutes state action. The Court has gone much further, holding that laws that merely encourage a private party to strip another individual of their rights is state action. See *e.g.*

Perhaps the most similar case is *Lugar*. In *Lugar*, a state law allowed for the attachment of a person's property in an *ex parte* proceeding related to an alleged but unproved debt. A creditor sought such an order, obtained it, and an attachment order was executed by the sheriff. Subsequently, the alleged debtor challenged the order and it was removed. The debtor brought a 1983 action, alleging that the private party acted with the state to deprive the debtor of his property. The Supreme Court agreed that the state statute was state action and that the court's involvement in allowing the private party to attach the property was also state action. Specifically, the Court held that the debtor "was deprived of his property through state action; [the creditors] were, therefore, acting under color of state law in participating in that deprivation." 457 U.S. at 942.

The same is true here. The state statute provides the procedure to deprive a person of his property without a fair hearing. Respondent's invoked that procedure. State action is present. Common sense, a careful reading of Missouri cases, Respondent's own case and United States Supreme Court precedent all make clear that a state statute is always state action when it directly works to impact the rights of a group of people in a way that is alleged to cause harm.

Adickes v. S. H. Kress & Co., 398 U.S. 144, 202 (1970) (holding that "prior decisions leave no doubt that the mere existence of efforts by the State, through legislation or otherwise, to authorize, encourage, or otherwise support racial discrimination in a particular facet of life constitutes illegal state involvement . . . ").

APPELLANTS' REPLY TO RESPONDENT'S POINT III

Appellants argue that allowing a party to take possession of a person's home without proving ownership violates due process. A state's decision to tie the hands of homeowners also presents equal protection problems. Respondent provides a number of responses, but never explains why it is permissible to remove people from their home before figuring out who actually has title. It never addresses the fact that the United States Supreme Court, in Respondent's favorite case, held that that "due process requires there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 67 (1972). Respondent never explains how one can contest the right to possession, as Respondent suggests is allowed in an unlawful detainer, if they cannot contest title.

Instead, Respondent argues that Appellants must lose for three reasons, exhorting that the inquiry must "begin and end with *Lindsey*." Finally, Respondent suggests that Appellants were wrong to spend a "good deal of ink" asserting that the creation of an irrebuttable presumption that title is valid violates due process. Each of Respondent's points is considered below.

A. The Reasons that Respondent Provides in Support of its Position Are Not Legally Coherent.

Respondent enumerates three reasons that Appellants must lose. They are:

1. Missouri's unlawful detainer statutes are part of an exclusive and special code allowing for summary proceedings;
2. The sole issue in an unlawful detainer is the right to possession; and

3. Appellants are not deprived of any right because they can file a lawsuit to try to get their home back. (See Respondent's Brief, 14-15.)

These points do not stand up to reason.

It is true enough that the unlawful detainer statute calls for a summary proceeding. The question in this case is whether the summary proceeding can prohibit inquiry into title. Respondent's Point I begs the question.

Respondent's second point is that the sole issue in an unlawful detainer is the right to possession. How does one determine right to possession without considering the title? If the Smiths have superior title, they have the right to possession. If Respondent has superior title, it has the right to possession. Respondent refuses to explain why it is better to presume title then litigate it later, rather than to resolving this issue before displacing home owners.

Respondent then argues that Appellants haven't lost any rights because they can file their own case or seek to enjoin the foreclosure. This argument is flawed in several ways. First, in many cases in which the right to challenge title arises, there was no notice of foreclosure. It is hard to imagine how a party can challenge a foreclosure she did not know about. In this case, for example, after the foreclosure, the Smith's continued to receive communications about a loan modification. These were confusing communications to say the least. To suggest that homeowners will simply know to enjoin an illegal foreclosure is to ignore the realities of the foreclosure crisis. Similarly, to suggest that homeowners, in the 20 day notice period, can find an attorney who will

file for a temporary restraining order is naïve. In most cases, this would also require the homeowners to post a hefty bond to stop the illegal foreclosure.

Respondents suggest that since the Smiths have now filed an affirmative case regarding the foreclosure, there is no need to allow them to defend their home in the unlawful detainer. This betrays logic devoid of any consideration for reality. The Smiths have lost their family home. They were forced to move their children and their things. Their credit is destroyed. Their lives were turned upside down. Since they could not prove they still had title to their home, in order to prevent this they would have had to post double rent through the first trial, and then more double rent during the trial de novo, and then through any appeal. They would need to do all of this with almost no chance of winning since they were barred from presenting critical evidence.

Alternatively, they might attempt to file an affirmative action and seek to have the unlawful detainer stayed. That is precisely what they eventually did in this case, and the request to stay the unlawful detainer was denied. To suggest that this is no big deal because the Smith's can now pursue a case ignores the human cost of moving people out of their homes before ownership is ever considered.

Similarly, the very process Respondent supports – multiple cases about the same property – is nonsensical. In this case, if the Smith family ultimately proves that the foreclosure was illegal and void in an affirmative case, what will happen? Will an order issue that requires a new, innocent family living in the Smith's house to evacuate it? Will that family need to sue Respondent, who will in turn sue the seller? Why does Respondent support such uncertainty and such duplicative litigation? Nothing good

comes of moving the Smiths from their home, only to later determine it was their home all along. It makes far more sense for all involved to litigate the matter once, instead of in two or three separate cases. This reduces the number of cases and limits the number of parties by avoiding the risk of innocent subsequent buyers being involved.

Respondent has provided this court with doomsday predictions. They suggest that if a party can challenge title in an unlawful detainer, it would be the end of non-judicial foreclosure. They suggest that Appellants are "iconoclasts" who want to destroy all unlawful detainers. They suggest that the economy will come grinding to a halt. They suggest all this will happen by consolidating issues of title in once case that happens before anyone is removed from their home. All of this is nonsense. Right now, a buyer at a foreclosure sale could be sued years later for buying a house that was subject to an illegal foreclosure. By then, the house may have been sold several times. This uncertainty does not grow economies. Allowing the unlawful detainer proceeding to conclusively decide title is the best way to promote certainty.

Similarly, non-judicial foreclosures will be unaffected by this case. They will continue to happen outside court, between private parties. If one is illegal, and the property is sold, and the new buyer stubbornly proceeds (like the Respondent), the most that can happen in an unlawful detainer is a determination regarding title. It seems uncontroversial to determine title when the only meaningful element of the action is proving title.

The idea that involving the court in some small percentage of unlawful detainers will destroy the Missouri economy is silly. Most unlawful detainers will remain

uneventful. It is only the ones with serious problems that could, should and will be contested.

B. The Cases Respondent Relies Upon, with Specific Reference to *Lindsey*, Support Appellants' Position.

Respondent suggests that "any discussion of the constitutional issues raised by appellants must begin – and end- with an analysis of *Lindsey*." Resp.'s Brief, 18. The Respondent then proceeds to avoid analyzing *Lindsey*, and it fails to even mention *Lindsey's* most lasting line: **Due process requires that there be an opportunity to present every available defense.** *Lindsey*, 405 U.S. at 66 (emphasis added). In short, Respondent puts all its eggs in one basket with *Lindsey*, asserting that the issue has been laid to rest. However, a careful reading of *Lindsey* reveals that the facts of *Lindsey*, a landlord-tenant case, are vastly different from this case. To the extent *Lindsey* provides any guidance at all, it supports Appellant's contentions that when a court attempts to apply the challenged statutes from Chapter 534 in an unlawful detainer case, they are unconstitutional.

In *Lindsey*, a group of month-to-month tenants sought a declaratory judgment that Oregon's Forcible Entry and Wrongful Detainer Statute was unconstitutional on its face because it limited triable issues and required double damages to be posted on appeal. The United States Supreme Court stated the issue in the case was "whether Oregon's judicial procedure for eviction of tenants after nonpayment of rent violates either the Equal Protection Clause or the Due Process Clause of the Fourteenth Amendment. 405 U.S. at

58 (emphasis added). The Court upheld the portion of the law that limited triable issues. The Court carefully limited its decision to the Oregon statute and noted that the "rational" bases for the Oregon law could be found in the "unique" nature of the landlord-tenant setting. *Id.* at 73.

Regarding the restriction of issues that could be tried, the Court held it did not deny due process to restrict the issues to "whether the tenant has paid rent and honored the covenants he has assumed." *Id.* The Court noted that just as the tenant could not raise issues about habitability, the landlord could not seek back rent. The Court specifically held that the two covenants, to pay and to provide land, were independent, allowing them to be adjudicated separately since they do not relate to one another.

Respondent points out that *Lindsey* also cited to *Bianchi v. Morales*, 262 U.S. 170 (1923). Respondent asserts that *Bianchi* "involved the same factual scenario as is present here – the holding over of a borrower following a foreclosure." Resp.'s Brief, 19. This statement is not true. *Bianchi* is a two-page opinion from 1923 addressing a "bill in equity filed in the District Court to restrain proceedings under the mortgage law of Porto Rico (sic) to foreclose a mortgage." *Id.* at 171. In that sense, *Bianchi* is almost identical to *Lindsey*. Both cases allow a party to contest whether or not they have paid, but leave other issues for another trial. As such, in both cases, Plaintiffs must prove non-payment, as it is a condition of eviction or foreclosure, and the Defendant can present any defense related to the issue.

Even under the broadest interpretation, these cases cannot support Respondent's position in this matter. *Lindsey* explicitly requires that parties have the ability to present

any available defense to the matters at issue. Although both cases allow for issues to be carved out for later trial, this is bilateral with regards to those issues. Neither of these cases suggests that the Respondent can win, even in the face of evidence that refutes the Respondent's position, by virtue of a statute. Quite the opposite, both cases suggest constitutional problems in this case.

In this matter, Respondent had the duty to "prove" title, yet Appellants cannot challenge this proof. Not only are Appellants prevented from presenting all available defenses, they are prevented from putting on any defense at all. The result is that the unlawful detainer "hearing" has become a ritual, a rubber stamp, a rouse, but never a trial. The result is foregone and disputes are not allowed. If this Court wants to affirm this procedure, it should do it with its eyes wide-open. Approving of the Missouri unlawful detainer statute that prevents inquiry into title is the equivalent of entering summary judgment in every single unlawful detainer in Missouri – title cannot be disputed and is irrevocably proven even in the absence of proof. This holding would be devastating at any time, but it would be especially troubling coming on the heels of the mortgage crisis.

C. The Irrebuttable Presumption of Valid Title Created by the Legislator Divests Defendants of a Defense and Makes Courts Rubber Stamps.

Respondent suggests that "the only question in an unlawful detainer case is whether the purchaser is entitled to possession. The statute allows defendants to contest that issue." Resp.'s Brief, 23 (emphasis in original). This is a perplexing statement. How

does one challenge the right to possession without challenging title? The only way the Smith's could contest Respondent's right to possession was by showing that Respondent's had no legal title because it came from a void foreclosure. It is this challenge that is expressly prohibited.

The result is an irrebuttable presumption that all plaintiffs in all unlawful detainers have valid title. This presumption cannot be disproved. It cannot be challenged. Not even the Court can inquire into it. Filing an unlawful detainer proves title, even in the absence of evidence, or in this case, even in the face of contrary evidence. Respondent suggests that recent United States Supreme Court cases have held that such presumptions can be acceptable, citing to *Weinberger v. Salfi,* 422 U.S. 749 (1975), and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

Weinberger was a Social Security case that laid out basic requirements for who could seek benefits as a widow or child. As such, it did not deal with taking away rights, but rather the government's decision to create rights for some people. The Court noted that this creation of rights created "a noncontractual claim to receive funds from the public treasury [which] enjoys no constitutionally protected status." *Id.* at 772. It went on to hold that the objective criterion were reasonably connected to the policy objective. *Id.* Far from backing away from previous decisions that were critical of conclusive presumptions, it simply refused to extend the reasoning to social security rules for eligibility.

Michael H. v. Gerald D., 491 U.S. 110 (1989) is a convoluted mess in which a majority opinion can only be cobbled together by considering Justice Scalia's opinion, a

concurrence by the Chief Justice, two partial concurrences and another concurrence in the affirmance on other grounds. It involves California's presumption that a child born to a married couple is not illegitimate and that the husband is the legal father. The Court upheld a law limiting who may challenge paternity in such situations, arguing that it met the rational basis test because limiting challenges to paternity preserved family unity. *Id.* at 131-32.

Neither of these cases alters *Vlandis v Kline* 93 S.Ct 2230 (1973), *Stanley v. Illinois*, 405 U. S. 645 (1972) or *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Instead, they cite to them. Those three cases all stand for the same premise: if a state creates a conclusive presumption, it will almost always be invalid and will always trigger strict scrutiny. The same should be true here. The State of Missouri has taken the unusual step of conclusively presuming that all title in all unlawful detainers is valid, or seen from the homeowner's view, that every homeowner has no title to their home, even if the title is falsified or the foreclosure is void. Unless this presumption is a perfect fit with reality it must fail as unconstitutional.

D. Conclusion Regarding Due Process and Equal Protection

Despite all this briefing, this case is simple. After this Court issues an order, parties will either have to prove title before they kick someone out of house, or title will be presumed in every case. There is no doubt that presuming title in every case will cause harm to innocent people in some cases. There is no doubt that presuming title will force courts to ignore evidence. There is no doubt that presuming title will create duplicative litigation as homeowners are forced to file affirmative actions after they are out of their

homes. As such, the answer is clear under the law and justice: before someone must move from their home, the party seeking to evict them must prove that they have the right to do so. This requires proving title with evidence, not presumption. Because § 534.210 prohibits this very inquiry, it is unconstitutional both because it violates due process and because it falls unfairly on homeowners with no basis for doing so.

APPELLANTS' REPLY TO RESPONDENT'S POINT IV

(Collateral Estoppel/Judicial Estoppel)

Despite the fact that Appellants were not allowed to proceed with their counterclaims and affirmative defenses, Respondents argue that they would have prevailed on such claims due to "collateral estoppel" and "judicial estoppel." Respondents are unfairly arguing that they would have prevailed regarding issues that the trial court barred the Smiths from pursuing.

As Respondent accurately mentions, Appellants raised their concerns about the 2007 foreclosure and recission in a separate reformation action they filed before Judge Kramer (*Smith v Wells Fargo Bank*, N.A., No. 11-JE-CC00749). In that action, Appellants presented Judge Kramer to reform a "recission" judgment he entered back in 2007 after being asked to do so by Respondent's attorneys, Millsap & Singer, while the Smiths were not represented by counsel. Although the pleadings from that action are not part of this court record, the problem is clear from filings that are part of this appellate

record. The following appears in *Defendants' Consolidated Response to Plaintiff's Motions to Strike. And All Other Pending Motions* (LF 383-4):

> 10. Plaintiff has produce[d] no evidence to show that it has either standing or a right to possession. Instead, Plaintiff erroneously relies on the previous recission action it brought against Defendants, Case No. 07JE-CC00800. Plaintiff fraudulently used this previous action to attempt to alter title and should be estopped from asserting that it has a right of possession based on the "Judgment" in Case No. 07JE-CC00800 . . . The language on page 2 of that "Judgment," that the Plaintiff (which is also the plaintiff in this case) had a "first lien interest in the subject property" directly conflicts with the "Memorandum" signed by William Smith, which had been attached to the *Plaintiff's Motion for Judgment on the Pleadings.* At no time did Defendants discuss this attempted title "fix" or agree to include such a declaration in any Judgment. This language fraudulently attempting to cure title defects in favor of Wells Fargo, Trustee (also the Plaintiff in this suit), was inserted by the Plaintiff, a sophisticated bank represented by sophisticated lawyers, taking advantage of non-lawyers, who were under duress, in that they were desperately trying to retain possession of their house. As this Court can see, this Judgment (as well as the Apri1 28, 2008 "Consent Judgment" attached by Plaintiff) conflicts with the only thing that Defendants agreed to do back in 2008: Roll back the clock to make the situation the same as it was prior to the May 7, 2007 foreclosure.

> 11. Plaintiff also relies on a purported "Release of Claims" to attempt to prove that Defendants are barred from raising claims related to Millsap & Singer, P.C.'s appointment as successor trustee. This "Release of Claims" is an invalid exculpatory clause and does not relate disputes over standing or who has the right of possession of the property at issue in this case.

These events are also summarized in Defendant's Statement of Facts, at LF 481-2. Appellants contend they were wrongfully foreclosed back in 2007, and they were desperate to get their house back. They agreed only that Millsap would roll back events to the way they were prior to the foreclosure. This is exactly what Mr. Smith indicated in his February 20, 2008 filing regarding Millsap's "Petition for Recission" (LF 396):

> I, William Smith, and wife, agree that this property mentioned in the suit was foreclosed on and sold as the result of a mistake. This property and all of its interests should be reinstated to the way it was prior to the foreclosure date of May 7, 2007.
>
> The original mortgage holder should be the mortgage holder now, as it was before May 7, 2007.
>
> Again the sale on May 7, 2007 of the property located at: 6 Crabtree Lane in Pacific, Missouri in Jefferson County should be null and void.

Appellants filed their Petition for Reformation, asking Judge Kramer to invoke a somewhat obscure rule (74.06(b)(5)) to strike the "first lien language" in the April 29, 2008 Final Judgment in Cause Number 07JE-CC00800 because the Smiths only agreed to

a recission; The Smiths did not agree to alter the title history such that Wells Fargo would be inserted into the title as a lien holder. Without comment, Judge Kramer denied the Smith's request to set aside his 2008 order.

Appellants contend that they signed the release while under duress--they were financially strapped and fighting to keep their house in light of the improper foreclosure. Appellants contend that Judge Kramer's 2007 judgment (LF 595) conflicts with the chain of title (see LF 481 – 487) and actual title records (LF 519 – 588). No court has yet considered evidence of the real-life the chain of title to determine whether the 2007 foreclosure was valid or whether Respondent has standing. No court has yet ruled on whether the purported release Millsap foisted upon the desperate homeowners in 2007 (LF 592) was enforceable. Further, by its terms, this purported release does not pertain to future events, such as the 2010 foreclosure that is the subject of this case. Under these circumstances, the estoppel theories raised by Respondent do not apply. The above facts don't give rise to any form of estoppel because the Smiths are not asserting any position inconsistent with any "contrary" position they ever took from which they "benefitted."

Equally important, the issues discussed above illustrate the important practical and equitable reasons for allowing homeowners to bring all of their counterclaims and affirmative defenses as part of unlawful detainer actions. All of the above issues should be part of a complex interrelated whole. Deciding these cases piecemeal, as Respondent proposes, leads to inconsistent and inequitable results where none of the courts involved is in a position to consider the entire picture.

APPELLANTS' REPLY TO RESPONDENT'S POINT V

Respondent indicates that Robert Sweere based his Missouri Bar Journal article on a big mistake, but it is Respondent who has made the mistake. The issue for Sweere and for this case is whether there is a "no-counterclaims" rule in the wrongful detainer actions, not whether JPs had equitable powers. Like many Missouri appellate courts, Respondent has confused the issue of a JP's jurisdictional reach with the issue of the existence (or lack thereof) of a no-counterclaims rule.[4] There is no no-counterclaims rule in Missouri.

Unlike JPs of old, associate circuit judges may "hear and determine all cases and matters within the jurisdiction of their circuit courts."[5] This "revolutionary change in the time-honored concept that associate circuit judges have limited statutory authority only" eliminated any rationale for precluding equitable remedies in unlawful detainer cases.[6]

Respondent cites to *Ridgley v. Stillwell*, 28 Mo. 400, 404 (1859) and *Finney v. Cist*, 34 Mo. 303, 304 (1863) arguing that unlawful detainer actions do not permit counterclaims. This is incorrect. *Ridgley* merely held that a JP had "no power to inquire and decide whether the contract ought to be enforced and to give the equitable relief the

---

[4] See generally, Robert Sweere, *The No Counterclaim Rule in Unlawful Detainer Proceedings*, 68 J. MO. B. 162 (2012).

[5] *Id.* at 163.

[6] *Id.*

defendant sought." *Ridgley*, 28 Mo. at 400. *Finney* merely held that a justice of the peace could not inquire into an equitable right. *Finney v Cist*, 34 Mo. 303, 309 (Mo). Neither of these cases mentions counterclaims. Respondent's reliance on *Morris v. Davis*, 66 S.W.2d 883, 889 (Mo. 1933) is wrong for these same reasons. In a sheepish footnote, Respondent concedes that justices of the peace lacked equitable jurisdiction.[7]

Respondent nevertheless claims that *Finney* held that counterclaims are barred in unlawful detainer actions, basing this incorrect statement on the following language from Finney: "The form of the complaint and evidence to be heard are prescribed by the statute. No authority exists to permit other questions or issues to be tried."[8] It should be noted that Respondent's quoted language is not part of the *Finney* opinion. Rather, it is part of that court's summary of the position of the respondent in that case. *Finney*, 34 Mo. at 304. Therefore, Respondent is not correctly reading the law when it advises this Court that its position is "completely consistent with more than 150 years of case law."[9]

Further, Robert Sweere is absolutely correct when he labels *Lake in the Woods Apartment v. Carson*, 651 S.W.2d 556, 557 (Mo. App. E.D. 1983) as "the seminal no counterclaim case." *Carson* is the case where this crucial mistake was made: misconstruing a limitation on justice of the peace jurisdiction as a *per se* prohibition on

[7] Resp. Br. at 45.

[8] Resp. Br. at 44.

[9] Resp. Br. at 45.

counterclaims. *Carson* relies primarily on *Wilson v. Teale*, 88 S. W.2d 422, 423 (Mo. App. 1935). However, *Wilson*

> stands only for the oft-stated proposition that equitable matters were not cognizable in unlawful detainer proceedings because the JP had no equitable jurisdiction.[10]

State ex rel. Deutsche Bank Nat. Trust Co. v. Chamberlain, 372 S.W.3d 24, 31 (Mo. App. W.D. 2012) and *US Bank NA v. Watson*, 2012 WL 5395278 (Mo. App. E.D. Nov. 6, 2012) belong to this same lineage of cases that Sweere traces back to the court's mistake in *Carson*.

Respondent contends that the no-counterclaim rule has an alternate source in statutes. Acknowledging that § 517.021 provides that rules of civil procedure apply in associate circuit court, Respondent nonetheless argues that Chapter 534 falls under the exception to this provision because it specifically "provides otherwise" by law.[11] But nowhere in Chapter 534 are counterclaims prohibited. Respondent points to §§ 534.070 and 534.090, which provide for a compressed timeframe, but a limitation on counterclaims cannot be found there. In fact, §§ 534.110, 534.160, and 534.180 provide for the power to issue subpoenas, demand trial by jury and take depositions, respectively. The existence of these provisions shows that the compressed timeframe cannot by itself indicate a prohibition on any particular civil procedure mechanism. In fact, Chapter 534

[10] Sweere, 68 J. Mo. B. at 165.

[11] Resp. Br. at 45.

specifically provides for the importation from Chapter 517 of any procedures not specifically mentioned in 534: "to the extent practice and procedure are not provided in this chapter the practice and procedure provided in chapter 517 shall apply." § 534.060. Likewise, § 534.210 does not specifically address or forbid counterclaims.

Respondent argues that if Supreme Court rules trump the procedures found in Chapter 534, this would "run[] afoul of Article V, 5 of the Missouri Constitution, which states that the Supreme Court rules "shall not change substantive rights." This position bolsters Appellants' substantive due process argument. Where there is a conflict between a Missouri Supreme Court Rule and a statute, the rule always prevails if it addresses practice, procedure or pleadings. *Reichert v. Lynch*, 651 S.W.2d 141, 143 (Mo. 1983), citing Mo. Sup. Ct. R. 41.02.

Missouri Rules 55.32 (a) and 55.08 disfavor claim-splitting. Respondent's position conflicts with this well settled law. Given that these rules govern the "machinery" of litigation, and are thus procedural, counterclaims should be allowed in unlawful detainer actions.

CONCLUSION

For each of these reasons set forth in this brief, Missouri unlawful detainer statute § 534.210 is unconstitutional and unenforceable in that it prohibits parties who have undergone a foreclosure from raising affirmative defenses and counterclaims. Further, any and all prior cases must be overturned to the extent that they hold that an unlawful detainer defendant cannot challenge the validity of the underlying foreclosure or challenge whether the plaintiff has standing and/or is the real party in interest.

Campbell Law, LLC

/s/ Alicia Campbell
Alicia Campbell #59586
640 Cepi Drive, Suite A
St. Louis, MO 63005
(314) 588-8101; (314)588-9188 fax
Attorney for Appellant

and

The Simon Law Firm

/s/ Erich Vieth
Erich Vieth #29850
John Campbell #59318
800 Market Street, Suite 1700
St. Louis, MO 63101
(314) 241-2929; (314) 241-2029 fax
Attorneys for Appellant

Certificates of Service, Brief Form, and Virus Scanning

1. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 7,750 words. This brief contains 7,485 words, as determined by the word count feature of MS Word.

2. This brief has been filed electronically, as required by this Court, after scanning for viruses.

3. An electronic copy of the foregoing was delivered this 28th day of December, 2012, to attorneys for the Respondent *via* the Court's electronic filing system:

BRYAN CAVE LLP
John J. Schoemehl, #63373
(John.Schoemehl@bryancave.com)
One Metropolitan Square
Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)
ATTORNEYS FOR RESPONDENT

_____/s/ Alicia Campbell____