IN THE
SUPREME COURT OF MISSOURI

No. 92649

WELLS FARGO BANK, N.A.,
Plaintiff-Respondent,

v.

WILLIAM and SUSAN SMITH,
Defendants-Appellants.

Appeal from the Circuit Court of
Jefferson County, Missouri,
Hon. Stephen Bouchard

BRIEF FOR RESPONDENT

Thomas C. Walsh #18605
Louis F. Bonacorsi #28331
John J. Schoemehl #63373
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)

Attorneys for Respondent

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STATEMENT OF FACTS

When Appellants William and Susan Smith bought residential property in Jefferson County, Missouri, in April 2005, they borrowed $100,000 from Argent Mortgage Company and executed a promissory note and deed of trust imposing a mortgage lien on that property to secure repayment of the note (L.F. 52-69). The deed of trust contained a power of sale authorizing the trustee to sell the mortgaged property, after notice to the borrowers, in the event of an uncured default (L.F. 64).

In 2007, the successor trustee conducted a foreclosure sale for appellants' property, and respondent purchased the property at that sale (L.F. 141-43). Later, upon protest by appellants, respondent filed a petition to rescind that foreclosure because of what both parties agreed was a "mutual mistake" (L.F. 482). Appellants executed a release in favor of respondent and a consent judgment to be signed by the circuit court to rescind the previous foreclosure (L.F. 345, 350). Respondent moved for judgment on the pleadings (L.F. 394), and the court entered a Final Judgment containing the precise terms to which appellants had agreed (L.F. 397). Among the consent holdings of the court were these:

(1) The 2007 foreclosure was set aside and held void.

(2) The successor trustee's deed was declared void.

(3) The April 2005 deed of trust was reinstated and "declared to be a first lien interest in said real property held by plaintiff WELLS FARGO BANK."

(4) The power of sale in the deed of trust was not exhausted.

(5) The parties were reinstated to their respective positions as existed immediately prior to the rescinded sale, with Appellants "SMITH possessing fee simple title to the subject property and plaintiff WELLS FARGO BANK holding a first lien interest in the subject property by virtue of its Deed of Trust" (L.F. 398).

That judgment, as consented to by appellants, was entered by Circuit Judge Gary Kramer on April 29, 2008 (id.).

In August 2011, appellants filed in Jefferson County Circuit Court a "Petition for Reformation of Judgment, Nunc Pro Tunc, Declaratory Judgment, Injunctive and Related Relief." Smith v. Wells Fargo Bank, N.A., No. 11-JE-CC00749. The petition asked the court to reform and revise the Final Judgment of April 29, 2008 by deleting provisions regarding the status of respondent and its first lien under the deed of trust – to which appellants had agreed. After an evidentiary hearing, the court granted summary judgment dismissing that suit and confirming the 2008 judgment. No appeal was taken from the final judgment in that 2011 case.

Meanwhile, in 2010 appellants again had fallen behind in their mortgage payments. Upon their failure to cure, the successor trustee (L.F. 139) gave published notice and certified-mail notice that the property would be sold at public

auction by the successor trustee on February 23, 2010 (L.F. 445-48). Appellants took no action to enjoin the foreclosure, which proceeded as scheduled. Respondent was the successful bidder at the sale and received and recorded the trustee's deed evidencing conveyance of the property (L.F. 442-44).

The successor trustee gave appellants notice to vacate the premises (L.F. 452-56), and, upon their failure to vacate, respondent instituted a suit for unlawful detainer in the associate circuit court of Jefferson County on March 29, 2010 (L.F. 10). Although there was no doubt that appellants had defaulted on their indebtedness, they responded with a laundry list of alleged affirmative defenses and counterclaims seeking to void the foreclosure (L.F. 13-24). As is relevant here, the counterclaims sought a declaratory judgment that Chapter 534 of the Missouri Statutes, relating to unlawful detainer, is unconstitutional under the United States and Missouri constitutions as a violation of due process and equal protection because it purportedly deprives defendants of the right to access to the courts and treats unlawful detainer parties differently from parties to other civil litigation (L.F. 6-7, 10-11).

Appellants also ultimately contended that respondent lacked standing to maintain the unlawful detainer action, that the successor trustee was not properly appointed, and that the preclusion of counterclaims in unlawful detainer cases was a misapplication of the law. Respondent moved to strike the defenses and

counterclaims (L.F. 25) and moved for summary judgment (L.F. 33, 164). The associate circuit judge noted that appellants could have sought a writ for their constitutional challenges and entered summary judgment granting respondent possession of the property, assessing double rent as authorized by statute (L.F. 407, 409).

Appellants appealed by way of trial de novo to the circuit court (L.F. 410). After more of the same type of skirmishing, the circuit court likewise rejected appellant's position and reached the same result, granting summary judgment to respondent but reducing appellants' rent assessment by 93% (L.F. 659). Appellants have appealed to this Court on the grounds that the constitutionality of state statutes is at issue.

In the meantime, appellants have filed yet another lawsuit in Jefferson County alleging wrongful foreclosure and numerous other causes of action against Wells Fargo, Bank of America, and the trustee. Susan and William Smith v. Wells Fargo, N.A., No. 12-JE-CC00397. That action remains pending.

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED BECAUSE APPELLANTS DID NOT SERVE THEIR COUNTERCLAIM OR THEIR BRIEF ON THE ATTORNEY GENERAL, AS REQUIRED BY § 527.110 RSMO AND SUPREME COURT RULE 87.04.

In attempting to derail the unlawful detainer proceedings in the courts below, appellants filed a "Counterclaim" asserting that the unlawful detainer statutes, §§ 534.010 et seq., are unconstitutional and seeking, in Count III, a declaratory judgment that respondent was therefore precluded from ousting them from the property in question (L.F. 22-23). At no time did appellants ever notify the state Attorney General of their attempt to invalidate these Missouri statutes, nor was the Attorney General served with appellants' brief in this Court. Their appeal should therefore be dismissed for lack of jurisdiction.[1/]

Both § 527.110 R.S.Mo. "Parties" and Supreme Court Rule 87.04 "Joinder of Parties – Municipalities – Attorney General" require that "if the statute,

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[1/] This omission was not an oversight. The same jurisdictional defect was pointed out in Fannie Mae v. Truong, 361 S.W.3d 400 (Mo. banc 2012), where the appellant was represented by the same counsel as appear here. See Resp. Br. in Truong, No. 91880, at 11-13. Appellants have purposefully excluded the Attorney General from participation in this case.

ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard." This Court has held that this requirement is "mandatory." Land Clearance Redev. Auth. v. City of St. Louis, 270 S.W.2d 58, 63 (Mo. banc 1954); Mahoney v. Doerhoff Surgical Servs., Inc., 807 S.W.2d 503, 507 (Mo. banc 1991); Bauer v. Bd. of Elec. Comm'rs, 198 S.W.3d 161, 164 n.6 (Mo.App. 2006) (dicta); Yellow Freight Sys., Inc. v. Mayor's Comm'n on Human Rights, 737 S.W.2d 250, 254 (Mo.App. 1987) (dicta). The LCRA Court noted that § 527.110 is a verbatim iteration of § 11 of the Uniform Declaratory Judgments Act (12A U.L.A. 557) and that the "weight of authority" under identical statutes in other states had refused to consider constitutional claims asserted in the absence of the Attorney General. 270 S.W.2d at 63.

That "weight" has added substantial heft during the last half century. In each of the following cases, the court applied the exact same requirement to dismiss the case where the state attorney general was not properly notified of an attempt to have a statute declared unconstitutional:

Medina Twp. Trustees v. Armstrong Utilities, Inc., 457 N.E.2d 933 (Ohio App. 1983) (no jurisdiction).

Sendak v. Debro, 343 N.E.2d 779 (Ind. 1976) (no jurisdiction).

Bollhoffer v. Wolke, 223 N.W.2d 902 (Wis. 1974) (dismissal of appeal).

Lazo v. Bd. of Cnty. Comm'rs, 690 P.2d 1029 (N.M. 1984) (no relief available).

Lakewood Pawnbrokers, Inc. v. City of Lakewood, 512 P.2d 1241 (Colo. 1973) (declaration of invalidity vacated).

Roehl v. Pub. Util. Dist. No. 1, 261 P.2d 92 (Wash. 1953) (no jurisdiction).

Plantation Pipe Line Co. v. City of Bremen, 170 S.E.2d 398 (Ga. 1969) (no jurisdiction).

Cummings v. Shipp, 3 S.W.2d 1062 (Tenn. 1928) (no jurisdiction).

City of Gadsden v. Cartee, 184 So. 2d 360 (Ala. 1966) (no jurisdiction).

Thus, apart from the other deficiencies plaguing appellants' case, their claims are a non-starter from the outset because of their failure to comply with § 527.110 and Rule 87.04.

II. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE FORECLOSURE CHALLENGED BY APPELLANTS WAS CONDUCTED PRIVATELY PURSUANT TO THE POWER OF SALE IN THE DEED OF TRUST SIGNED BY APPELLANTS, AND WAS NOT STATE ACTION AND THEREFORE NOT SUBJECT TO CONSTITUTIONAL LIMITATIONS, AS THIS COURT SQUARELY HELD IN FEDERAL NATIONAL MORTGAGE ASS'N V. HOWLETT, 521 S.W.2d 428 (MO. BANC 1975).

When appellants bought the property at issue in this case, they obtained a loan of $100,000 and executed a deed of trust granting the trustee a security interest in the property, with a power of sale in the event of default (L.F. 52-66). Paragraph 22 of the deed of trust provided that after notice of a default and appellants' failure to cure, the remaining balance of the loan can be accelerated and the lender is entitled to invoke the power of sale. After notice of sale to the borrowers and publication thereof, "Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder for cash at the time and place and under the terms designated in the notice of sale . . . ." (L.F. 64). Following the sale, the deed of trust requires the trustee to deliver to the purchaser a trustee's deed conveying the property, and the recitals in the trustee's deed are prima facie evidence of the truth of such statements. Id.

The undisputed evidence showed that appellants received notice of default and notice of the foreclosure sale (L.F. 445-48). They do not deny that they were in default under the note and deed of trust. Rather, appellants claim that the foreclosure process denied them their constitutional rights to due process and equal protection. Their constitutional arguments, however, are squarely foreclosed at the outset by this Court's unanimous en banc decision in Federal National Mortgage Ass'n v. Howlett, 521 S.W.2d 428 (Mo. banc 1975).

Howlett involved almost exactly the same facts and contentions as are present here. A borrower/mortgagor whose property had been sold at a foreclosure sale was sued in unlawful detainer. She filed a counterclaim alleging that the foreclosure sale was conducted, and the trustee's deed was issued, pursuant to Missouri statutes that did not give her adequate notice or a meaningful opportunity for a hearing prior to foreclosure, thereby violating the due process clauses of the federal and state constitutions. Id. at 431.

The Court rejected Howlett's constitutional challenges because the foreclosure process was conducted pursuant to the parties' contract and did not involve significant state action necessary to implicate the constitution, which of course does not regulate private conduct. The Court noted that the statutory provision dealing with the procedures for foreclosure proceedings "neither compels the inclusion of a power of sale in a mortgage or deed of trust nor has the effect of inserting such a clause when not put therein by the parties." Id. at 432. None of the statutory provisions (which remain essentially unchanged, though re-numbered, today) supply the legal basis for the foreclosure, for the power of sale "is not derived from [the statute] but from the deed of trust." Id., citing, inter alia,

Davidow v. Corp. of Am., 60 P.2d 132, 135 (Cal.App. 1936). And the right of the trustee to foreclose would be the same even without the statutes. Id. at 433.[2/]

Howlett pointed out that a "symbiotic relationship" was necessary between the state and the creditor in order to satisfy the requirement of significant state involvement. Id. at 434-35, citing Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961), and Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). The Court surveyed numerous other Supreme Court opinions dealing with related issues and rejected the argument that "state action" existed merely because state statutes encouraged or facilitated the deprivation of property rights. The Court concluded that such a statute "which authorizes and thereby encourages private conduct does not automatically render that conduct state action under the fourteenth amendment." Id. at 436.[3/]

[2/] The only relevant statutory change since Howlett was the 1997 amendment to §534.030, which formally defined unlawful detainer to include the holding-over by a dispossessed mortgagor. That clarification does not affect the Howlett analysis or holding.

[3/] In American Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 57-58 (1999), the Court referred to Burton as "one of our early cases dealing with 'state action'" and noted that later decisions had refined the "joint participation" test of Burton so that

The Howlett Court's ruling on this point was summarized thusly:

> "We hold that the foreclosure of the deed of trust on appellant's property was pursuant to the contractual provisions in the deed of trust and not by authority of state law. It follows that appellant's contention that state action was present on the theory that the power of sale exercised by the trustee was conferred by state statute is overruled." Id. at 433.

Howlett also rejected the notion that the involvement of the Missouri courts in enforcement of the rights secured in nonjudicial foreclosures rendered such foreclosures subject to the Fourteenth Amendment. Id. at 437. The acquisition of such rights "is complete without any court action of any kind." Id. And in a suit to require a foreclosed mortgagor to vacate the property, "the owner seeks only to enforce the contractual rights he previously acquired by virtue of the foreclosure sale conducted by the trustee." Id.

Howlett remains the law of this State and has never been questioned or qualified. Indeed, just two years later, its rationale was unanimously reaffirmed in Federal National Mortgage Ass'n v. Scott, 548 S.W.2d 545, 548 (Mo. banc 1977), which applied the same analysis to rebuff the identical claim of an unlawful-detainer defendant based on the Due Process Clauses of the Fifth and Fourteenth

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even "extensively regulated" private activities are not subject to Fourteenth Amendment strictures.

Amendments and Article I §10 of the Missouri Constitution. Remarkably, appellants' brief does not address or even acknowledge these four-square authorities that thwart their constitutional contentions.

Because there is no valid way to distinguish Howlett or, for that matter, the controlling U.S. Supreme Court decisions discussed below, appellants will no doubt implore the Court to overrule, or at least to ignore, those rulings that are adverse to the extraordinary propositions they are advancing before this Court. But stare decisis should not be treated so cavalierly.[4/]

The U.S. Supreme Court has instructed that stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Payne v. Tennessee, 501 U.S. 808, 827 (1991). While stare decisis is not an inexorable command, it is at its acme in cases involving contract and property rights. Id. at 828.

[4/] Of course this Court has no discretion to refuse to follow a controlling U.S. Supreme Court ruling, even if it believes that intervening decisions have called into question whether that Court would rule the same way today. Only that Court may overturn its own precedent. Rodriguez v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

This Court, too, has very recently re-emphasized the principle that "a decision of this court should not be lightly overruled, particularly where . . . the opinion has remained unchanged for many years." First Bank v. Fischer & Frichtel, Inc., 364 S.W.3d 216, 224 (Mo. banc 2012), quoting Novak v. Kansas City Transit, Inc., 365 S.W.2d 539, 546 (Mo. banc 1963). Stare decisis promotes security in the law by encouraging adherence to previously decided cases. Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 223 S.W.3d 131, 137 (Mo. banc 2007).

The statutes involved in this case have been on the books of this State, and of virtually every other state in the nation, for more than a century, and the procedures embodied therein were recognized and utilized at common law decades before that. Many thousands of unlawful detainer actions have been processed pursuant to those provisions. Howlett and the controlling federal cases date from the 1970s and have never been questioned.

If the law is to have any predictably for the guidance of citizens, lawyers, and lower courts, its longstanding precepts cannot be blithely cast aside merely on the basis of a philosophical disagreement with one's judicial forebears. When that happens, we become a government of men, not of laws, and take on the aspects of an autocracy, where contracts are meaningless and the absence of the rule of law makes commerce so unpredictable as to stifle, if not eradicate, free enterprise.

Appellants' flowery prose and melodramatic depiction of the plight of hypothetical borrowers resembles a plea for jury nullification of established principles based on sympathy. Appellants are unabashedly asking this Court to excuse them from the law that has consistently been applied forever to others in the same circumstances. But they have fallen far short of demonstrating that this Court should scuttle settled expectations by abandoning rules that have "remained unchanged for many years." First Bank, 364 S.W.3d at 224. Howlett and Scott require affirmance of the judgment below.[5/]

III. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE THE PROVISIONS OF CHAPTER 534 RSMO DO NOT VIOLATE DUE PROCESS OR EQUAL PROTECTION.

If, despite the arguments in Points I and II, the Court should determine that it can reach the merits of appellants' constitutional arguments, those arguments are unavailing. None of the aspects of Chapter 534 about which they complain violate due process or equal protection under either the state or federal constitution.

Appellants' constitutional arguments are plagued by their failure to acknowledge (or to admit) three undeniable considerations that have been recognized for more than 130 years in Missouri: (1) The unlawful detainer statutes

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[5/] Notably, every Point Relied On in appellants' brief, if sustained, would result in the overruling of numerous well-ingrained precedents.

are an exclusive and special code that provide for summary relief and are therefore not subject to the rules of practice and procedure that apply to other civil actions. Fannie Mae v. Truong, 361 S.W.3d 400, 404-05 (Mo. banc 2012); Phelps v. Phelps, 299 S.W.3d 707, 709 (Mo.App. 2009); Broken Heart Venture, L.P. v. A & F Rest. Corp., 859 S.W.2d 282, 286 (Mo.App. 1993); Leve v. Delph, 710 S.W.2d 389, 391-92 (Mo.App. 1986); Lake in the Woods Apartment v. Carson, 651 S.W.2d 556, 558 (Mo.App. 1983).[6/]

(2) The sole issue in unlawful detainer is the immediate right to possession, and equitable defenses and counterclaims are not permitted because they would defeat the purpose of such an action, which is to promptly restore possession of the premises to the party rightfully entitled thereto. US Bank, NA v. Watson, ___ S.W.3d ___, 2012 WL 5395278, at *2 (Mo.App. Nov. 6, 2012); Broken Heart, 859 S.W.2d at 286; Leve, 710 S.W.2d at 391-92; Lake in the Woods, 651 S.W.2d at 558; Central Bank v. Mika, 36 S.W.3d 772, 774 (Mo.App. 2001).

(3) Appellants' repeated mantra that they have been deprived of their right to contest respondent's right to foreclose or to assert other claims against respondent is simply wrong. Whatever rights they have remain intact, but they must assert

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[6/] This well-established principle disposes of the argument made in appellants' Point IIIB (Br. 72-74), based on an alleged inconsistency between Chapter 534 and the Supreme Court rules.

them in a separate proceeding. Broken Heart, 859 S.W.2d at 286; Meier v. Thorpe, 822 S.W.2d 556, 558-59 (Mo.App. 1992). As stated in Lake in the Woods, 651 S.W.2d at 558: "Tenant-defendants still have the right to litigate their claim . . . using the appropriate statute in the proper forum. . . . Defendants thus were not without remedy." In the recent case of US Bank v. Watson, at *2, the court observed that "[w]hat the homeowner may not do is wait until after foreclosure, and then challenge the validity of the deed of trust as a defense in a subsequent unlawful detainer action."[7/]

In the present case, appellants could have – and should have – sought to enjoin the complained-of foreclosure in a pre-foreclosure proceeding in which all of their present contentions could have been aired and resolved, as the associate circuit judge noted in his order granting summary judgment (L.F. 407). Their complaint that they must take on the burden of proof "in such a case" (Br. 27) is a

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[7/] Appellants' assertion that they were powerless to contest the foreclosure is belied by the fact that when they protested that the previous 2007 foreclosure was the result of a "mistake," the trustee sought and obtained a judicial rescission of the foreclosure and restoration of appellants' pre-foreclosure status (L.F. 397). Furthermore, even after the 2010 foreclosure, the loan servicer offered appellants a loan modification agreement that would rescind the foreclosure and enable them to keep their house. They rejected it (L.F. 516).

red herring because obviously they would also have the burden of proof with regard to any defenses or counterclaims that might be allowed in the unlawful detainer action. The Court should take judicial notice that appellants have since filed another suit for wrongful foreclosure in Jefferson County Circuit Court asserting multiple causes of action against Wells Fargo, Bank of America, and the trustee. Susan and William Smith v. Wells Fargo Bank, N.A., et al., Jefferson County Circuit Court, No. 12-JE-CC00397.

Appellants' constitutional arguments are devoid of merit, as evidenced by their failure to cite any authority even remotely on point, coupled with the fact that unlawful detainer has been a recognized cause of action for the better part of two centuries. Appellants' inability to find any helpful authority is no doubt attributable to the fact that the issues they present here were definitively laid to rest 40 years ago by the United States Supreme Court and have never been decided otherwise in any case we have discovered.

In Lindsey v. Normet, 405 U.S. 56 (1972), the Court addressed the constitutionality of the Oregon Forcible Entry and Wrongful Detainer statute containing features and procedures very similar to those in Chapter 534 of our statutes. There, as here, proceedings for possession of property were expedited and summary in nature. The issues triable were limited to the tenant's default, and defenses based on the landlord's conduct were precluded. The Supreme Court

ruled that the Oregon statutory scheme did not run afoul of either the Due Process Clause of the Fourteenth Amendment or the Equal Protection Clause (except with regard to a bonding requirement for appeal which is irrelevant to this case). Id. at 67-70. This Court has repeatedly acknowledged that the Missouri due process and equal protection provisions are coextensive with their federal counterparts and are to be construed consistent therewith. Beard v. Mo. State Employees' Ret. Sys., 379 S.W.3d 167 (Mo. banc 2012) (equal protection); State ex rel. Houska v. Dickhaner, 323 S.W.3d 29, 33 n.4 (Mo. banc 2010) (due process); Turner v. Mo. Dep't of Conservation, 349 S.W.3d 434, 447 (Mo.App. 2011) (both). Therefore, any discussion of the constitutional issues raised by appellants must begin – and end – with an analysis of Lindsey.

A. Due Process (Appellants' Point I)

1. Procedural Due Process

The core of appellants' procedural due process argument (Br. 35-54) is that they are being deprived of their right to a hearing and to assert claims against respondent. But the Supreme Court in Lindsey held that there is no such deprivation because "[t]he tenant is not foreclosed from instituting his own action against the landlord and litigating his right to damages or other relief in that action." 405 U.S. at 66. As noted above, the same right to conduct separate

proceedings has been recognized by Missouri courts and was expressly suggested to appellants by the associate circuit judge.

The Lindsey Court cited two previous Supreme Court cases recognizing that it is constitutionally permissible to segregate an action for possession of property from other claims that might be asserted by defenses or counterclaims. In both Grant Timber & Mfg. Co. v. Gray, 236 U.S. 133 (1915), and Bianchi v. Morales, 262 U.S. 170 (1923), Justice Holmes, for the Court, upheld state statutes that confined summary possessory suits to the issue of the right to possession and ruled that it was "permissible under the Due Process Clause to 'exclude all claims of ultimate right from possessory actions.'" Lindsey, 405 U.S. at 68, quoting Bianchi, 262 U.S. at 171.

It is noteworthy that, while Lindsey arose in the context of a holdover tenant, Bianchi involved the same factual scenario as is present here – the holding over of a borrower following a foreclosure. The statute in question there precluded any defense by the borrower except payment. Bianchi, 262 U.S. at 171. Justice Holmes, and the rest of the Court, declared the due process issue so clear-cut that the dismissal of the borrower's case was affirmed "without putting the parties to the expense of printing the full record." Id. The Bianchi Court noted the universal acceptance of the separation between possessory and other causes of action and held, "The United States, the States, and equally Porto Rico, may exclude all

claims of ultimate right from possessory actions, consistently with due process of law." Id.

Lindsey applied the reasoning of Bianchi to dismiss the assertion that fast-track summary procedures or "the limitation on litigable issues" transgresses the Due Process Clause. Lindsey, 405 U.S. at 64. In response to the contention that the tenant was denied a hearing at which he could present his defenses, the Court noted that he was not prevented from instituting his own action against the landlord and that there were available procedures to litigate any such defenses and claims. Id. at 66.

Cognizant that Lindsey squarely bars their due process claim based on a property interest, appellants have also propounded the rather bizarre argument that §534.210 deprives them of a "liberty interest" (Br. 38-39). They say that the statute "impugns the reputation, honor, and integrity of every defendant sued under its provisions" (Br. 39). But their own case of Board of Regents v. Roth, 408 U.S. 564, 573 (1972), requires stigma plus some other intangible property or liberty interest. The "plus" that they assert is the speculative, intangible effect on their reputation, which is a mere reiteration of their so-called liberty interest. They are thus left with alleged stigma alone, which is insufficient to invoke due process protection. Jamison v. Dep't of Soc. Servs., 218 S.W.3d 399, 406 (Mo. banc 2007), citing Paul v. Davis, 424 U.S. 693, 701 (1976).

Acceptance of appellants' notion of "liberty" would constitutionalize the tort of defamation and afford a constitutional cause of action to anyone who is the subject of public criticism. Virtually any defendant in a civil case could contend that the allegations of the petition exposed him or her to public embarrassment and ridicule, and all litigants would be subject to liability for the contents of their pleadings even, apparently, if they were true.

Respondent did not accuse appellants of dishonesty or immorality, as the Roth court indicated was necessary to implicate the reputational liberty interest. Nor was there any gratuitous widespread dissemination of appellants' default to the community or any realistic contention that they were subjected to "public opprobrium." See Valmonte v. Bane, 18 F.3d 992, 999 (2d Cir. 1994). Additionally, there was nothing untrue in the unlawful detainer petition, for appellants admittedly were in default on their mortgage. Thus, appellants have no standing to complain about being named in a lawsuit unless they are suggesting that even truthful averments are actionable under their strained concept of "liberty." Suffice it to say that being named a defendant in a real estate possessory action is not a stigma and does not deprive anyone of "liberty" in the constitutional sense. Appellants' argument to the contrary is spurious.

Even assuming, arguendo, that freedom from unlawful detainer suits is a protectable liberty interest, due process merely requires "the opportunity to be

heard 'at a meaningful time and in a meaningful manner.'" Jamison, 218 S.W.3d at 405, quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Appellants were unquestionably entitled to contest the regularity of the foreclosure proceedings by seeking a pre-foreclosure injunction. All the claims they are now making could have been asserted there. And their currently pending wrongful-foreclosure action betrays their present advocacy as disingenuous, as Missouri courts have repeatedly held in cases such as Lake in the Woods, 651 S.W.2d at 558; Broken Heart, 859 S.W.3d at 286; and Mika, 36 S.W.3d at 774.

Appellant's reliance on Connecticut v. Doehr, 501 U.S. 1 (1991) (Br. 45-47), is also wide of the mark. Doehr, like Lindsey was written by Justice Byron White, who in no way indicated that Lindsey was undercut or qualified by his Doehr opinion. And this for good reason because the cases were substantially different in significant respects. In particular, the statute in Doehr authorized an ex parte prejudgment attachment of a prospective defendant's property without any prior notice to him. The party seeking the attachment there had no lien or interest in the subject property but sought the attachment as security for the collection of any judgment he might obtain against the property owner on an unrelated claim for assault and battery. Id. at 5-7.

Here, by contrast, the trustee had legal title to appellants' property by reason of the deed of trust they signed, which specifically granted the trustee the power of

sale in the event of default. City of Gallatin v. Feurt, 50 S.W.2d 1027, 1030 (Mo. 1932); Glenstone Block Co. v. Pebworth, 330 S.W.3d 98, 101 (Mo.App. 2010). And, unlike Doehr, appellants received a notice of default and a notice of foreclosure sale before any dispossession or transfer of title occurred. They contractually consented to the procedure that was employed.

Nothing in Doehr represents a retreat from Lindsey, which is precisely on point and dispositive here.

Appellants also spend a good deal of ink complaining about what they call an "irrebuttable presumption" (Br. 47-53). They claim that the provision of §534.210 that prohibits an inquiry into title is an "irrebuttable presumption" that per se constitutes a violation of due process. Their argument is baseless.

First, as appellants repeatedly ignore, they have multiple opportunities to challenge the title of the foreclosure purchaser, including a pre-foreclosure injunction suit, which they eschewed. Second, the inability to contest the purchaser's title in an unlawful detainer action deprives appellants of nothing, for legal title was held by the trustee, who has given his deed – and therefore title – to the purchaser. Howlett, 521 S.W.2d at 437. And the only question in the unlawful detainer case is whether the purchaser is entitled to possession. The statutes allow defendants to contest that issue.

Moreover, even if we assume, arguendo, that the statute creates an irrebuttable presumption, appellants' argument fails. Appellants' reading of older Supreme Court cases disregards later decisions that have held that irrebuttable presumptions must be analyzed in context to determine whether they violate due process. In Weinberger v. Salfi, 422 U.S. 749, 770-73 (1975), the Court backed away from cases such as Vlandis, Stanley, and LaFleur (relied on here by appellants) and invoked Richardson v. Belcher, 404 U.S. 78, 81 (1971), and Dandridge v. Williams, 397 U.S. 471, 487 (1970), to hold that a conclusive presumption passes constitutional muster under the Due Process Clause if it meets the requirements of the Equal Protection Clause that it be rationally related to a legitimate goal and free from invidious discrimination.

So too in Michael H. v. Gerald D., 491 U.S. 110, 120 (1989), the Court again distanced itself from Stanley, Vlandis, and LaFleur and said "our 'irrebuttable presumption' cases must ultimately be analyzed as calling into question not the adequacy of procedures but – like our cases involving classifications framed in other terms – the adequacy of the 'fit' between the classification and the policy that the classification serves." Id. at 121 (plurality opinion, citations omitted).

See also Daugherty v. Thompson, 322 F.3d 1249, 1255 (10th Cir. 2003) ("statutes creating conclusive presumptions are judged under the same due process

standards as other statutes"), quoting Delong v. Dep't of Health & Human Services, 264 F.3d 1334, 1341 (Fed. Cir. 2001); B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233, 254 (3d Cir. 2011) (plaintiff challenging irrebuttable presumption must establish that inference is not rationally related to a legitimate legislative classification).[8/]

Hence, an accurate analysis of current law on irrebuttable presumptions requires the same test to be applied as is utilized for equal protection claims. As will be discussed momentarily, the Supreme Court in Lindsey also rejected the equal protection argument made in that case. So even if the Missouri statutory scheme could be described as creating an irrebuttable presumption, the Supreme Court has authoritatively ruled that the challenged unlawful detainer provisions are rationally related to a legitimate legislative purpose and do not discriminate between similarly situated persons.

At bottom, appellants' argument proves too much. Their rationale would, for example, require a holding that the statute of limitations is invalid because it irrebuttably forecloses a prospective plaintiff's right to his day in court. Likewise,

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[8/] The only Missouri case cited by appellants, State v. Shelby, 64 S.W.2d 269 (Mo. banc 1933), did not involve a statutory provision but a jury instruction in a criminal case that effectively deprived the defendant of the presumption of innocence.

the statute of frauds and the parol evidence rule bar litigants from obtaining what they contend are their property rights. It is equally inappropriate to interject such concepts into the unlawful detainer context, for, as the Court said in Lindsey, "The Constitution has not federalized the substantive law of landlord-tenant relations," 405 U.S. at 68, and "the Constitution does not provide judicial remedies for every social and economic ill." Id. at 74.

2. Substantive Due Process

Appellants' "substantive due process" argument, based on the Missouri "open courts" provision (Br. 28-35), is likewise flawed on several grounds. First, for the reasons stated in Watson, Lindsey, Broken Heart, Meier v. Thorpe, and Lake in the Woods, the courts are simply not closed to their claims. It is especially audacious for these appellants to complain of being shut out of the legal system, as this is the fourth lawsuit arising from the foreclosure of their property. Appellants' problem is not lack of access, but lack of merit.

Second, a substantive due process claim requires conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty. United States v. Salerno, 481 U.S. 739, 746 (1987). The Eighth Circuit has framed it this way:

> "Substantive due process 'is concerned with violations of personal rights . . . so severe . . . so disproportionate to the need presented, and . . . so

inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to brutal and inhumane abuse of official power literally shocking to the conscience.'" Golden ex rel. Balch v. Anders, 324 F.3d 650, 652-53 (8th Cir. 2003), quoting Moran v. Clarke, 296 F.3d 638, 647 (8th Cir. en banc 2002).

Apart from the fact that appellants are asserting property rights, rather than personal rights, the rights at issue here don't come close to meeting this stringent standard. Indeed, the Lindsey Court's application of the rational basis test for equal protection purposes constitutes rejection of appellants' "fundamental right" characterization both for purposes of substantive due process (Br. 29-32) and under the Equal Protection Clause (Br. 62-65). Unlawful detainer statutes have been on the books in Missouri since at least 1855, and no one in this State or anywhere else has yet registered a shocked conscience. And whatever rights appellants claim were denied them in unlawful detainer were, as observed above, asserted by them in other actions.

Finally, the open courts provision, Art. I, § 14 of the constitution, prohibits "any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury." Mo. Alliance for Retired Americans v. Dep't of Labor & Indus. Relations, 277 S.W.3d 670, 675 (Mo. banc 2009) (plurality opinion). The analysis

is the same as that used for procedural due process claims. Id. Hence, appellants' open courts theory is untenable because (a) they are not plaintiffs in a personal injury case, (b) they have not been denied access to any court, and (c) the procedural due process analysis discussed above precludes their open courts argument.

Contrary to appellants' expansive notion of substantive due process, this Court has cautioned that the "doctrine of judicial self-restraint" dictates a "reluctan[ce] to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Doe v. Phillips, 194 S.W.3d 833, 842 (Mo. banc 2006), quoting Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). The Court further observed:

> "To be considered a 'fundamental' right protected by substantive due process, a 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.'" Doe at 842, quoting State ex rel. Nixon v. Powell, 167 S.W.3d 702, 705 (Mo. banc 2005).

Being subjected to summary court proceedings to determine the right to possess property hardly involves the type of personal right or liberty described by

this Court in Doe or the Eighth Circuit in Golden. Quite the contrary, for such procedures in unlawful detainer have themselves been part of our legal fabric for generations and, from all that appears, have never been held constitutionally infirm by any court, state or federal. Appellants' attempt to shoehorn the open-court requirement into the highly restrictive category of rights deemed so fundamental as to implicate substantive due process finds no support in logic or precedent.

To sprinkle some umbrage into their substantive due process theory, appellants vilify the mortgage-lending business as undermining the "American Dream" and wreaking "devastation across Missouri" (Br. 34). Implicit in this indictment is the assumption that the vast majority of homeowners who are dispossessed by unlawful detainers are not in default on their loans and are wrongfully ousted from their domiciles. The Commission on Uniform State Laws has put the lie to that assumption.

In rejecting judicial foreclosure, while recommending modifications to existing statutes, the Uniform Nonjudicial Foreclosure Act recognizes the benefits of sparing the judiciary the task of refereeing countless foreclosures, and lucidly details some of the numerous state interests served by nonjudicial foreclosure:

> "The fundamental premise of this Act is that, in the great majority of foreclosures, judicial involvement is unnecessary because there is no dispute between the debtor and creditor. The validity of the note and security

instrument are not in question, the payments are indeed in default, and the debtor typically has no defense to foreclosure. Of course there are cases in which a defense exists and deserves to be heard, but it makes little sense to force all disclosures into court because a small fraction of them involve disputes of law or fact. Using the time of judges and the machinery of the courts to conduct routine foreclosures is often misallocation of public funds as well as a waste of the secured creditor's resources.

"The delays and inefficiency associated with foreclosure by judicial action are costly. They increase the risks of vandalism, fire loss, depreciation, damage, and waste. The resulting costs raise the prices of private mortgages and erode the economic value of government subsidy programs involving mortgages." Prefatory Comment, 14 U.L.A. 124.[9/]

Appellants may counter that they are not advocating judicial foreclosure as such, but the practical effect of their position in this case would for sure enmesh the judiciary in countless cases where the debtor has no legitimate defense but merely seeks to delay the day of reckoning. This truism was articulated in Nelson

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[9/] The Executive Director for this project was Professor William H. Henning of the University of Missouri – Columbia School of Law, and the Reporter was Professor Dale A. Whitman of the same faculty. The Uniform Act, first promulgated in 2002, has yet to be adopted by any state legislature.

& Whitman, Reforming Foreclosure: Uniform Nonjudicial Foreclosure Act, 53 DUKE L.J. 1399, 1508-09 (2004):

> "Any attacks on the validity of the foreclosure, either substantive or procedural, can and should be raised in a suit to enjoin the foreclosure or in a separate suit for damages or to set aside the sale. To permit challenges to validity in a summary proceeding would encourage persons facing foreclosure to refuse to relinquish possession voluntarily and to raise all of their claims and defenses in the summary possession proceeding. Every [nonjudicial] foreclosure might then become a judicial proceeding, and its purpose of providing a fair and efficient nonjudicial foreclosure mechanism would be thwarted."

The authors also observed that the purpose of summary proceedings is to avoid potential violence. Id. at 1508. They noted that about 60% of the states utilize "power of sale" foreclosures like Missouri, and that judicial foreclosures take from 148 to 300 days longer than nonjudicial foreclosures. Id. at 1403 & n. 20.

The current housing crisis has exacerbated that discrepancy. A recent study has revealed that current rates of existing foreclosures are higher in judicial states than in states that allow power-of-sale foreclosures. Among the 12 states with ongoing foreclosure rates that exceed the national average, eleven of them require

judicial approval of the foreclosure process; in September 2012, foreclosure rates stood at 6.6% in judicial states, while they have dropped to 2.4% in nonjudicial states. See The Wall Street Journal, "Safer Homeowners, Slower Rebounds, Foreclosure Rates Remain High in States Where Judges Oversee the Process, Possibly Stunting Recovery," November 16, 2012, p. A4.

The upshot is that the recovery from the housing crisis is substantially slower in judicial foreclosure states. In Florida, a judicial state, for example, the average loan that completed foreclosure in June 2012 had been delinquent for 1034 days, while in the nonjudicial states of California and Arizona, which were right in the "epicenter of the housing bust," the corresponding delinquencies were 646 days (California) and 486 (Arizona). Id.

Evidence does not show that borrowers in judicial foreclosure states are more likely to obtain loan modifications; instead "long time lines only increase the potential that homes fall into disrepair, harming property values." Id.

Appellants' underlying theme that nonjudicial "power of sale" foreclosures constitute bad public policy should, of course, be presented to the General Assembly. But their view of the unwisdom of the policy is inconsistent with considerable precedent. Numerous cases have noted that enforcing power of sale provisions and other summary and prompt remedies is actually beneficial to consumers because it "lowers the interest rate at which the bank is willing to loan

money," whereas elimination of such procedures "will cause widespread hardship to the general home-buying public." Dunham v. Ware Sav. Bank, 423 N.E.2d 998, 1001-02, 1004 (Mass. 1981). In Occidental Sav. & Loan Ass'n v. Venco P'ship, 293 N.W.2d 843, 847, 849 (Neb. 1980), the court observed that if such clauses are not enforced, "ultimately, no one will be able to secure satisfactory financing," and such clauses are "not repugnant to public policy but, to the contrary . . . [the clauses] may favor the public interest."

To the same effect are United Sav. Bank Mut. v. Barnette, 695 P.2d 73, 76 (Ore. App. 1985); Income Realty & Mortg., Inc. v. Columbia Sav. & Loan Ass'n, 661 P.2d 257, 261-63 (Colo. 1983); Martin v. Peoples Mut. Sav. & Loan Ass'n, 319 N.W. 2d, 220, 226-28 (Iowa 1982); and Weiman v. McHaffie, 470 So. 2d 682, 684 (Fla. 1985).

So, contrary to appellants' protestations, requiring mortgagees to jump through a succession of legal hoops to collect a just debt will necessarily increase the cost of home financing for those Missouri borrowers who can still qualify for a home loan. In any event, it is ridiculous to suggest that these time-tested and universally-accepted procedures "shock the conscience."

B. Equal Protection (Appellants' Point II)

Lindsey likewise requires rejection of appellants' equal protection argument (Br. 55-67). In response to the contention that unlawful detainer defendants were invidiously discriminated against vis-à-vis defendants in other cases (i.e., the same contention advanced here by appellants), the Court ruled that the statute applied to all tenants, rich and poor, commercial and residential, and that "[t]here are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants." 405 U.S. at 70, 72. Classifying tenants of real property differently for purposes of possessory actions will offend equal protection "only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." Id. at 70, quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961); accord Riche v. Dir. of Revenue, 987 S.W.2d 331, 337 (Mo. banc 1999).

The Lindsey Court held that the need for rapid and peaceful restoration of the landlord's possession without undue expense was a reasonable legislative goal, and that the statutory provisions for summary proceedings and the simplification of issues were closely related to that purpose. 405 U.S. at 70. The Court further noted that at common law self-help was recognized as a legitimate method of regaining one's property, and frequently such actions were "fraught with 'violence

and quarrels and bloodshed.'" Id. at 71; accord Redman v. Perkins, 98 S.W. 1097, 1098 (Mo.App. 1906).

Thus, the challenged Oregon statutes, enacted in 1866, averted resort to self-help and violence, and "[t]he statute, intended to protect tenants as well as landlords, provided a speedy, judicially supervised proceeding to settle the possessory issue in a peaceful manner." 405 U.S. at 71-72. Accordingly, applying the rational basis test, the Court held that "Oregon was well within its constitutional powers in providing for rapid and peaceful settlement of these disputes." Id. at 73.[10/]

Lindsey's equal protection analysis was followed by this Court in Dixon v. Davis, 521 S.W.2d 442, 444 (Mo. 1975), and in Rice v. Lucas, 560 S.W.2d 850, 858 (Mo. banc 1978). In Rice, the Court held that a provision of §535.040 that denied a jury trial to a defendant in a landlord-tenant case was not unconstitutional because such cases at common law were not triable to juries in justice-of-the-peace courts. Id. at 856-57.

[10/] The prefatory note to the Uniform Nonjudicial Foreclosure Act, quoted above at pages 29-30, further evidences the reasonableness of the Missouri legislature's chosen method of dealing with foreclosures.

The Lindsey reasoning is sound and is consistent with this Court's equal protection jurisprudence. It applies with full force to Chapter 534, and appellants' equal protection argument is therefore groundless.[11/]

IV. APPELLANTS' CHALLENGE TO RESPONDENT'S RIGHT TO MAINTAIN THIS ACTION IS BARRED BY COLLATERAL ESTOPPEL AND JUDICIAL ESTOPPEL RESULTING FROM A FINAL JUDGMENT TO WHICH APPELLANTS CONSENTED, AND IN ANY EVENT THERE IS NO ARGUABLE ISSUE OF "STANDING" OR "REAL PARTY IN INTEREST" IN THIS CASE.

In May 2007, the trustee under the deed of trust securing respondent's lien on appellants' property conducted a foreclosure that the parties later agreed was in error. In order to rectify the mistake, the parties consented to a judgment by the

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11/ In addition to the undesirable economic consequences (unavailability of financing and/or higher interest rates), one might ponder the sheer legal chaos that would flow from acceptance of appellants' iconoclastic position urging the abolition of unlawful detainers. Not only would the lower courts be overwhelmed with spurious "defenses" and "counterclaims" designed to forestall perfectly legitimate foreclosures, but arguments about retroactivity, and the consequences thereof, as well as challenges to thousands of property titles, would reverberate for years.

circuit court setting aside the foreclosure sale, voiding the trustee's deed, and reinstating the deed of trust (L.F. 397-98).[12/]

As part of the consideration for the rescission of the foreclosure, appellants agreed (a) that the reinstated deed of trust should be "declared to be a first lien interest in said real property held by Plaintiff Wells Fargo Bank," (b) that the deed of trust continued to contain a power of sale, and (c) that the parties be reinstated to their prior status, "with Defendants SMITH possessing fee simple title to the subject property and Plaintiff WELLS FARGO BANK holding a first lien interest in the subject property by virtue of its Deed of Trust" (L.F. 398). These terms were incorporated verbatim into the court's final judgment of rescission, and appellants executed a full release in favor of respondent "pursuant to the terms stipulated in the Consent Judgment" (L.F. 350).

In the present appeal, appellants contend that respondent is not the real party in interest and has no standing to maintain the unlawful detainer action (Br. 74-86). Appellants' lengthy pronouncements are mistaken because the only "standing" required to file an unlawful detainer case is the right to possession, which is established by the trustee's deed. But the Court need not concern itself with this

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12/ Judge Kramer did not sign the same document on which appellants' consenting signatures appear, but they expressly agreed to the exact terms contained in the court's judgment. See L.F. 373-76.

issue because appellants are barred from flip-flopping on this question by the doctrines of collateral estoppel and judicial estoppel.

A. Collateral Estoppel

Collateral estoppel, or "issue preclusion," prohibits a party from relitigating an issue that was unambiguously decided in an earlier case. Oberle v. Monia, 690 S.W.2d 840, 843 (Mo.App. 1985); Consumers Oil Co. v. Spiking, 717 S.W.2d 245, 248 n.6 (Mo.App. 1986). Here, the 2007 proceeding arose because of some imperfection in the foreclosure action taken against appellants' property. As part of the relief granted to appellants, the court clarified that whatever the defect in the previous foreclosure, respondent's deed of trust was deemed valid, creating a first lien on the property for respondent and an enforceable power of sale in the trustee. Appellants' present appeal seeks to relitigate that finding – to which they consented – but collateral estoppel will not permit them to seek a finding inconsistent with facts already judicially determined.

Moreover, appellants filed a separate action in Jefferson County Circuit Court in 2011 seeking reformation of the Final Judgment of rescission signed in 2008 by Judge Kramer. Smith v. Wells Fargo Bank, N.A., No. 11-JE-CC00749. The court granted summary judgment dismissing their claims and refusing to revise or vacate that judgment. That ruling is now final. Appellants are thus

barred from further attacks on the 2008 Final Judgment and are doubly barred from challenging respondent's "standing."

B. Judicial Estoppel

The related doctrine of judicial estoppel prohibits a party from assuming a certain position in a legal proceeding, thereby obtaining benefits from that position in that instance, and later taking a contrary position in order to obtain benefits from that subsequent inconsistent position. Loth v. Union Pac. R.R. Co., 354 S.W.3d 635 (Mo.App. 2011); In re Contest of Primary Election Candidacy of Fletcher, 337 S.W.3d 137 (Mo.App. 2011). The doctrine is designed to preserve the dignity of the court, to ensure order in judicial proceedings, and to prevent a party from playing fast and loose with the courts. Loth, 354 S.W.3d at 637-38 n.4; Candidacy of Fletcher, 337 S.W.3d at 145.

In order to obtain the judgment reinstating their title, appellants consented to terms that included their express acknowledgement of respondent's first-lien interest in the reinstated deed of trust and the trustee's power of sale. They also released respondent from further litigation over the matters specified in the Consent Judgment. Appellants were successful in having the earlier foreclosure nullified, at least partially because of these stipulations. Judicial estoppel precludes them from now saying "never mind" and reversing their position to the

prejudice of respondent. The Court should not entertain their inconsistent attack on respondent's rights or status under the deed of trust.

C. "Standing" Is a Non-Issue

Even if appellants were not estopped from challenging respondent's status as a plaintiff in unlawful detainer, their "standing" and "real party in interest" arguments betray a fundamental misconception about those concepts and the nature of unlawful detainer.

Unlawful detainer, of course, is a possessory action, and for more than a century Missouri courts have recognized that a complaint in unlawful detainer is "quite sufficient" if it alleges that the plaintiff is entitled to possession of the subject premises. Tucker v. McClenny, 77 S.W. 151, 152 (Mo.App. 1903). Title is not a requirement for pursuing this cause of action, but even a defective showing of entitlement to possession does not create a "standing" problem – in the sense used here by appellants – in that it does not constitute a jurisdictional defect. Jones v. Gleason, 209 S.W.2d 536, 538 (Mo.App. 1948). Thus, a fortiori, appellants' inability to challenge respondent's title is irrelevant and does not implicate the lower courts' jurisdiction.

Earlier this year, the Western District of the Court of Appeals firmly rebuffed these same arguments that have gained favor recently in a corner of the Bar. In an erudite and comprehensive opinion in State ex rel. Deutsche Bank Nat'l

Trust Co. v. Chamberlain, 372 S.W.3d 24, 29 (Mo.App. 2012), the court properly characterized "standing" as asking whether the person seeking relief has the right to do so. The court then made the following holdings that flow from legions of previous decisions:

(1) The grantee under a trustee's deed has standing conferred by §534.030.1 to assert the remedy of unlawful detainer as a matter of law. Id.

(2) The "creatively framed 'standing' argument" – the same one advanced here – is indistinguishable from a forbidden inquiry into the merits of the plaintiff's title. Id. at 30.

(3) A challenge to the "mode" of obtaining possession is in essence a challenge to title and therefore is not cognizable in an unlawful detainer action. Id. at 30, citing Walker v. Anderson, 182 S.W.3d 266, 269 (Mo.App. 2006).

(4) Defendants retain the right to litigate their claim of wrongful foreclosure in an independent action. Chamberlain, 372 S.W.3d at 31.

(5) The changes sought in a foreclosing lender's ability to utilize a statutory unlawful detainer action as a summary remedy to obtain possession of property it has purchased at a trustee's sale must be originated in the Missouri General Assembly and not in the Missouri courts. Id. at 32.

This Court denied an application for transfer in Chamberlain on August 14, 2012.

Appellants try to skirt the proscription regarding the merits of title in §534.210 by suggesting that they are really inquiring into a "derivative title," within the meaning of §534.220, which allows "evidence for proof of rights under derivative titles" (Br. 86). They seem to maintain that they can challenge the title of respondent because it is "derivative" either from the trustee or from appellants. But of course such an interpretation would vitiate the prohibition against attacks on title contained in the immediately preceding statute, §534.210.

Appellants' concept of "derivative titles" is inconsistent with the interpretation of that term by the United States Supreme Court, applying this very statute in Lehnen v. Dickson, 148 U.S. 71 (1893). The Court there held that those persons who can show that their own title is derivative are "heirs, devisees, grantees, assigns, executors and administrators," id. at 76, or in other words persons whose title devolved upon them as a matter of inheritance or grant from the original owner or lessor. In appellants' cited case of Hafner Mfg. Co. v. City of St. Louis, 172 S.W. 28, 32 (Mo. 1914), the Court admitted evidence of deeds, ordinances, and leases to permit the defendant City to "characterize the City's possession as that of a public wharf" and not "to try the question of title between plaintiff and defendant." The present case has nothing to do with derivative titles.

Thus, whether by reason of preclusion or flawed reasoning, appellants' Point IV is baseless.

V. APPELLANTS' ATTACK ON THE LONGSTANDING RULE PROHIBITING COUNTERCLAIMS IN UNLAWFUL DETAINER ACTIONS IS WITHOUT MERIT.

In their Point III (Br. 68-74), appellants contend that the so-called "no counterclaim" rule applied historically by Missouri courts is invalid because it "conflicts with Missouri case law and is otherwise inequitable." Appellants rely extensively on an attached article from the Missouri Bar Journal but, quite properly, do not attempt to incorporate by reference the arguments in that article.

There are two threshold problems with appellants' Point III. First, as we have demonstrated above, the counterclaim that appellants attempted to file below did not state a viable cause of action for constitutional violations, and the non-constitutional claims were barred by estoppel. Thus, because their counterclaim was legally defective, they were not injured by the lower court's rejection of it, and they have no standing to complain about the "no counterclaim" rule. See Monsanto v. Geertson Seed Farms, ___ U.S. ___, 130 S. Ct. 2743, 2752 (2010) (plaintiffs have no standing if their alleged injury would not be redressed by a favorable ruling); Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (same). Here, appellants' argument is abstract in the absence of a real injury, and granting them relief would be a futile act because it would not redress any

wrongdoing they have suffered. In other words, they are requesting an advisory opinion, which is beyond the ken of this Court.

Second, appellants' assertion that the lower court's preclusion of counterclaims "conflicts with Missouri case law" is demonstrably wrong. Beginning as early as 1859, this Court held that an unlawful detainer action did not permit inquiry into whether the contract ought to be enforced or give the defendant equitable relief. Ridgley v. Stillwell, 28 Mo. 400, 404 (1859). Four years later, the Court said in Finney v. Cist, 34 Mo. 303, 304 (1863): "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."[13/]

Ridgley and Finney were reaffirmed by this Court in Morris v. Davis, 66 S.W.2d 883, 889 (Mo. 1933), and their holdings have been applied unwaveringly ever since. See Chamberlain, 372 S.W.3d at 30-31; Watson, 2012 WL 5395278, at

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[13/] The author of the cited Missouri Bar Journal article was therefore a victim of defective legal research because he traced the origin of the "no counterclaim" rule to a 1980s decision of the Southern District of the Court of Appeals, which he erroneously characterized as "the seminal no-counterclaim case." 68 J. Mo. Bar. at 165.

*2. Appellants' Point IIIA therefore should be denied because the present counterclaim rule is completely consistent with more than 150 years of case law.[14/]

Although appellants' Point Relied On does not argue that the "no counterclaim" rule violates any statute (and thus the issue is not before the Court), the article they attach suggests that the rule is at odds with §517.021, which provides that the rules of civil procedure apply to cases in associate circuit court "except where otherwise provided by law." The problem with this analysis, though, is that Chapter 534, relating specifically to unlawful detainers, "provides otherwise."

The Supreme Court rules generally governing affirmative defenses and counterclaims contemplate that counterclaims are to be contained in the responsive pleading "if one is required," Rule 55.27(a), and recognize that there are certain actions in which counterclaims "cannot be properly interposed," Rule 55.27(a)(11).

[14/] It is true that part of the historical impetus for prohibiting counterclaims was attributable to the fact that justices of the peace had no jurisdiction over equitable matters. But it was also noted early on, as indicated in Finney, that the structure and the purpose of this special statutory enactment does not accommodate counterclaims. And the prohibition has endured intact long after the abolition of justice-of-the-peace courts.

No answer is required of the unlawful detainer defendant, and counterclaims have never been allowed in such actions.

Furthermore, under Rule 55.25, counterclaims are to be filed within 30 days after the service of summons. Chapter 534, however, contains a highly compressed time frame for final resolution of an unlawful detainer action within 21 days from issuance of the summons, which may be served up to four days before the hearing. §§534.070, 534.090. Under §534.200, a plaintiff is required only to show its entitlement to possession and the unlawful detention by the defendant, and §534.210 precludes any inquiry into the "merits of title."

Hence, the statutory scheme mandates a hearing on the merits of the plaintiff's petition before the time for pleading in a conventional circuit court case would even have expired. As observed by this Court 150 years ago, the statutes prescribe the issues to be tried and the evidence to be heard and preclude the trial of other issues. Finney, 34 Mo. at 304. Just last month, the Eastern District reconfirmed that the procedures followed in unlawful detainer over the years are dictated by "the governing statutes." Watson at *2. So both the case law and statutory law prohibit counterclaims.

Appellants' insistence that the Supreme Court rules trump the requirements of Chapter 534 also runs afoul of Article V, §5 of the Missouri Constitution, which states that the Supreme Court rules "shall not change substantive rights." The

substantive rights of landlord and tenant, and mortgagor and mortgagee, were cemented in Missouri law many decades before the rules of procedure came into being. Appellants' reliance on those procedural rules to alter the rights and obligations of parties to unlawful detainer litigation cannot be squared with the Constitution. See State ex rel. McCulley v. Reese, 920 S.W.2d 94, 95 (Mo. banc 1996) ("This Court's rules may not 'change substantive rights' . . .").

For this and other reasons, appellants' Point IIIB, urging that unlawful detainer actions must be subject to the rules of procedure that govern other civil actions, is answered by this Court's own recent holding in a case involving the very same issues: "Unlawful detainer proceedings are summary in nature and the ordinary rules and proceedings of other civil actions do not apply." Fannie Mae v. Truong, 361 S.W.3d at 404, citing S&P Props., Inc. v. Bannister, 292 S.W.3d 404, 408 (Mo.App. 2009); and Lake in the Woods, 651 S.W.2d at 558.

* * * *

Appellants' thoroughgoing disenchantment with the Missouri unlawful detainer statutes, heartfelt though it may be, is a quarrel over policy, not legality. Their complaints are properly addressed to the General Assembly, not the judiciary. Indeed, in light of the consistent reaffirmation of unlawful detainers by the courts, the only abrogations of nonjudicial foreclosure we have discovered in recent history were accomplished legislatively. See CAL. CIV. CODE §1367.4(c)

(2005); HAW. REV. STAT. ANN. §657-5 (2007); 735 ILL. COMP. STAT. ANN. 5/15 at 405 (2007). Like their counterparts in those states, appellants should take their grievances across the street.

CONCLUSION

For the reasons stated, this appeal should be dismissed, or the judgment of the Circuit Court of Jefferson County should be affirmed.

Respectfully submitted,

/s/ *Thomas C. Walsh*
Thomas C. Walsh #18605
Louis F. Bonacorsi #28331
John J. Schoemehl #63373
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)

Attorneys for Respondent

CERTIFICATE OF COMPLIANCE WITH

MISSOURI SUPREME COURT RULE 84.06(b) and (c)

The undersigned certifies that the foregoing brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and, according to the word count function on Microsoft Word 2003, by which it was prepared, contains 10,533 words.

BRYAN CAVE LLP

/s/ *Thomas C. Walsh*

Thomas C. Walsh #18605
Louis F. Bonacorsi #28331
John J. Schoemehl #63373
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2012, I submitted electronic versions of this Brief for Respondent to the Clerk of the Supreme Court of Missouri for filing by using the Court's electronic filing system. I understand that doing so will accomplish service on all attorneys of record.

BRYAN CAVE LLP

/s/ *Thomas C. Walsh*

Thomas C. Walsh #18605
Louis F. Bonacorsi #28331
John J. Schoemehl #63373
BRYAN CAVE LLP
One Metropolitan Square
211 N. Broadway, Suite 3600
St. Louis, MO 63102
(314) 259-2000
(314) 259-2020 (fax)

Attorneys for Respondent