No. 91880

In The Missouri Supreme Court

Fannie Mae,

Respondent,

vs

My Truong,

Appellant.

Appeal from the 23rd Judicial Circuit Court - Jefferson County, Missouri

Division No. 11 - The Honorable Ray Dickhaner

Appellant's Reply Brief

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Table of Contents

Table of Authorities

CASES

CONSTITUTIONAL

STATUTES

RULES

OTHER AUTHORITIES

REPLY POINT I

(JURISDICTION)

This Court has exclusive jurisdiction over this appeal because this is a constitutional challenge to a state statute.

I. ARGUMENT REGARDING REPLY POINT I

Respondent argues that because Missouri Revised Statute section 512.180 provides for unlawful detainers to be appealed to a circuit court for a trial *de novo,* this Court lacks jurisdiction in this matter. However, Respondent offers no authority that supports this position. In reality, the issue of jurisdiction is resolved by a few fundamental rules, none of which have been disputed by Respondent.

1. Mr. Truong is appealing a judgment.

2. Mr. Truong's appeal is a constitutional challenge to the validity of a statute.

3. Pursuant to the Missouri Constitution, this Court has original, exclusive appellate jurisdiction over the constitutional challenge of the validity of a statute.

Each of these principles is briefly addressed below.

A. Jurisdiction Is Appropriate Only in this Court

1. Mr. Truong is appealing a judgment.

Respondent concedes that asking the circuit court to review the decision would be an "appeal." In fact, Respondent refers to the need to "appeal" to the trial court several times. *See e.g.* Resp. Br., 2. Similarly, Respondent suggests Section 512.180 R.S.Mo. requires a trial de novo, and that statute is titled, "Appeals from cases tried before associate circuit judges." Finally, the plain meaning of the word "appeal" supports the conclusion that asking the trial court to review the decision of the associate circuit court would constitute an appeal of the decision. Appeal is defined as "[a] proceeding undertaken to have a decision reconsidered by a higher authority; esp., the submission of a lower court's or agency's decision to a higher court for review and possible reversal." *Black's Law Dictionary* (9th ed. 2009).

Given that what Mr. Truong seeks is an appeal in every sense of the word, the only question that remains is what court must hear it. This turns on both the nature of Mr. Truong's challenge and on the fact that this Court has exclusive jurisdiction for certain matters.

2. Mr. Truong's appeal is a constitutional challenge to the validity of a statute.

This point has been conceded by Respondent: "[Appellant] opposed the motion for summary judgment, again challenging the constitutionality of the unlawful detainer statute." (Resp. Br., 2.)

3. Pursuant to the Missouri Constitution, this Court has original, exclusive appellate jurisdiction over the constitutional challenge of the validity of a statute.

Mr. Truong's appeal must be heard by this Court and this Court only. No other court, including a circuit court, has authority to hear this appeal.

> **The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity** of a treaty or statute of the United States, or **of a statute or provision of the constitution of this state**, the construction of the revenue laws of this state, the title to any state office and in all cases where the punishment imposed is death. The court of appeals shall have general appellate jurisdiction in all cases except those within the exclusive jurisdiction of the supreme court.

Mo. Const. art. V, § 3 (emphasis added).

This provision has consistently been held to mean that this Court "has exclusive original appellate jurisdiction in all cases involving the validity of a statute of this state." *State v. Sullivan,* 935 S.W.2d 747, 754 (Mo. App. S.D. 1996).

Respondent has cited no case that calls these undisputed principles into question. Instead, Respondent references *Greenbriar Hills Country Club v. Director of Revenue*, 2 S.W.3d 798 (Mo. banc 1999), for the premise that "[m]erely labeling his challenge constitutional does not entitle [Appellant] to skip the lower-court exhaustion requirements and come directly to this Court." (Resp. Br., 9.) Citation to this case is

puzzling, as *Greenbriar* is not analogous with this case in any way. In *Greenbriar,* a party argued this Court had appellate jurisdiction because the party asserted that its claim was related to construction of a revenue law. This Court held that the claim did not relate to the construction of a revenue law. Therefore, this Court did not have jurisdiction. The Court also noted that a statute that purported to give this Court jurisdiction, where such jurisdiction was outside the Constitution's grant of jurisdiction, was unconstitutional. *Greenbriar* does not involve a constitutional challenge to a statute, nor does *Greenbriar* suggest that a constitutional challenge to a Missouri statute can be appealed to any court other than the Missouri Supreme Court.

Respondent also cites to *VFW Post 722 v. Summersville,* 788 S.W.2d 796 (Mo. App. S.D. 1990), suggesting that it controls because it concerns whether a party must assert affirmative defenses regarding an unlawful detainer action in a trial *de novo.* Nothing in *Summersville* suggests that any constitutional challenge was being made nor is there any statute that prohibits the assertion of affirmative defenses. In truth, the prohibition of affirmative defenses in unlawful detainers arises from case law. In this case, Appellant clearly and unambiguously challenges the validity of the unlawful detainer statue, including its alleged prohibition against inquiry into title because it deprives homeowners from contesting even the basic elements of the plaintiff's claim. Because this case is a challenge to the validity of a state statute, this Court is the only Court that can hear this appeal.

B. Additional Considerations Show that this Court Must Have Jurisdiction to Hear this Matter.

In addition to the reasons discussed *supra,* this Court has jurisdiction of this case pursuant to Section 512.180, a statute cited by Respondent. Section 512.180 states that if a civil case is tried with a jury, a trial *de novo* is not required. Instead, the right to a trial *de novo* arises only when a person is "aggrieved by a judgment in a civil case tried without a jury before an associate circuit judge. . . ." Here, a jury trial was requested. The only reason this case was not actually determined by a jury is because the associate circuit judge granted summary judgment after reluctantly concluding that his hands were tied by the statute. Can Section 512.180 really be interpreted to mean that if a party demands a jury trial and the case is resolved by a jury, the appeal is to the appellate court, but if that same party demands a jury trial but loses on summary judgment, the appeal must be a trial *de novo?* This seems illogical, given that even if there were a trial *de novo*, the same rules regarding summary judgment would apply.

Similarly, Section 512.180 specifies that if a case is assigned to a judge "to hear it on the record under procedures applicable before circuit judges" it will be appealable to the appellate court. This case was heard before an associate circuit judge who, by the laws of Missouri, sat under procedures applicable in circuit courts. Missouri Revised Statute, Section 517.011 enumerates the types of cases that are often heard in associate circuit court. The list includes cases heard under chapter 534, the unlawful detainer chapter. Section 517.021 provides that "the rules of civil procedure shall apply to cases

or classes of cases to which this Chapter is applicable, except as otherwise provided by law." As such, unlawful detainer statutes are subject to the rules of civil procedure. For this reason, it should be considered that this case was "heard on the record under procedures applicable before circuit judges" and that it can thus be appealed without a trial *de novo*.

Appellant asks this Court to take judicial notice of the docket proceedings of an almost identical unlawful detainer case now before this Court, *WELLS FARGO BANK, N.A., AS TRUSTEE FOR THE BENEFIT OF THE CERTIFICATE HOLDERS, PARK PLACE SECURITIES, INC., ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2005-WCW2 v. William Smith and Susan Smith.* [1] In that matter, after summary judgment was granted against the Smiths in an unlawful detainer, Counsel for the Smiths sought a trial *de novo* but also filed a notice of appeal to ensure that if this Court were to conclude that a trial *de novo* were required, the case could still be heard. The more important reason for mentioning the *Smiths'* request for a trial *de novo* is to illustrate the profound waste of time associated with a trial de novo, especially where, as with this case and in *Smith,* constitutional challenges are being made regarding Missouri statutes. The

[1] *Smith* was filed in Jefferson County as Cause No. 10JE-AC-1817. In this Court, *Smith* is Cause No. SC92141. Counsel for Appellant represents the William and Susan Smith. The original unlawful detainer action was heard by Associate Circuit Judge Ray Dickhaner, Division 11. After request for trial *de novo*, this same case was assigned to be heard a second time by Associate Circuit Court Judge Stephen Bouchard, Division 12.

Smith case was reassigned for a trial *de novo* by sending it to yet another associate circuit judge. Civil Rule 41.04 prohibits such a waste of judicial resources to the extent that it provides that the civil rules "shall be construed to secure the just, speedy and inexpensive determination of every action."

C. Conclusion for Reply Point I

For each of these reasons, this Court has jurisdiction to hear and decide this matter.

REPLY POINT II

(NOTICE)

No notice to the Attorney General was required in this case because the trial court did not consider or rule on a declaratory judgment; instead, the issue on appeal is the trial court's granting of summary judgment.

II. ARGUMENT REGARDING REPLY POINT II

Respondent asserts that notice must have been given to the Attorney General in order for this case to proceed. This argument is baffling. No case has ever held that notice must be given the attorney general in a claim like this one. Instead, both the statute and the rule cited to by Respondent (Section 527.110 and Rule 87.04) explicitly apply only to declaratory judgments. In this case, the trial court did not decide a declaratory judgment nor was Appellant ever allowed to take up or proceed with a declaratory judgment. Instead, the trial court granted a summary judgment, holding that any questions into the validity of the foreclosure and whether or not Respondent had title were barred by statute. Appellant's claims, including his claim for declaratory judgment were stricken. There is no case that holds, or even suggests, that notice must be given to the Attorney General when the case is disposed of on summary judgment and where no ruling has been made on a declaratory judgment.

REPLY POINT III

(CONSTITUTIONAL ISSUES)

Respondent relies almost exclusively on one starkly inapposite case when it suggests that the unlawful detainer statute is constitutional; a review of the cited case and applicable law further supports Appellant's argument that Missouri Statutes (Chapter 534) violate both due process and equal protection.

III. ARGUMENT REGARDING REPLY POINT III

As explained in Appellant's initial brief, Missouri's unlawful detainer statute runs afoul of the "Open Courts" provision of the Missouri Constitution. Mo. Const. art. I, § 14. Because this right is rooted in the Missouri Constitution, a statute infringing on this right will only be enforced if it is "narrowly tailored to serve a compelling state interest." *Doe v. Miller,* 405 F.3d 700, 709 (8th Cir. 2005). With regards to procedural due process, an "opportunity to be heard at a meaningful time and in a meaningful manner" is required. *Moore v. Bd. of Educ. Of Fulton Pub. Sch. No. 58,* 836 S.W.2d. 943, 947 (Mo. banc. 1992). The level of due process required will be based upon what is at stake. *Belton v. Bd. of Police Com'rs of Kansas City,* 708 S.W.2d 131, 137 (Mo. banc 1986). Finally, with regard to equal protection, "a law may not treat similarly situated persons differently unless such differentiation is adequately justified." *Doe v. Phillips,* 194 S.W. 3rd 833, 845 (Mo. 2006).

As discussed in more detail below, Missouri's unlawful detainer statutes fail these three tests. First, they create irreparable harm by depriving parties of a right to present

defenses to the very elements of the claim. This violates the fundamental test for due process, which is that "Due process requires there be an opportunity to present every available defense." *Lindsey v. Normet,* 405 U.S. 56, 67 (1972). Second, because a party can lose property and suffer humiliation, all without a fair hearing, procedural due process is also implicated. Finally, there is no conceivable justification for fast-tracking people out of their homes, only to relegate them to filing affirmative actions to attempt to prove they have been wrongfully displaced, all of this occurring, if at all, after the home is likely sold and gone forever.

A. The Sole Case Cited by Respondent Is Largely Inapposite and to the Extent it Applies, it Supports Appellant's Position.

Respondent spends very little time addressing the principles of due process or equal protection and the proper level of scrutiny; instead, Respondent cites to *Lindsey v. Normet,* 405 U.S. 56 (1972) as its sole authority for the proposition that Missouri's unlawful detainer statute is constitutional. Respondent puts all its eggs in one basket with *Lindsey*, asserting that "the issue [regarding constitutionality] was definitively laid to rest 40 years ago by the United States Supreme Court." (Resp. Br., 15.) Respondent seems to be claiming that *Lindsey* is so factually similar that is controlling, and that no further inquiry or analysis is required. 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. The tenants argued that the following aspects of Oregon law were unconstitutional: A) the requirement of an extremely quick trial, B) the limitation of triable issues on tenant's default, and C) the requirement to post double bond 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 held that only in the landlord tenant setting the requirement of a double bond was unconstitutional. 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.

With regard to the expedited nature of the proceedings, the Court reasoned that in "recurring cases where the tenant fails to pay rent or holds over after expiration of his tenancy and the issue is simply whether he has paid . . ." the "[tenants] would appear to have as much access to relevant facts as their landlord . . . ." *Id.* at 64-65. Based upon these facts, decidedly unique to the landlord-tenant relationship, the Court held that requiring a speedy trial was not unconstitutional "on its face." *Id.* at 64.

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.

Even under the broadest interpretation, the Court's holding cannot be read to allow the prohibition of all defenses in any case, and the Court's decision did not consider a situation like this one, in which the alleged right to possession arises from a foreclosure. In reality, the Court's holding can only be read to support Appellant's position. The Court held that "Due process requires there be an opportunity to present every available defense." *Id.* at 67 (emphasis added). In light of this principle, the Court reached its holding that the warranty of habitability could be excluded from the Oregon proceeding because Oregon had the right to view the undertakings of the tenant and the landlord as independent covenants, rather than as mutually dependent ones. As a result, whether the property was habitable was unrelated to the separate obligation to pay.

The Court further clarified its holding by asserting that the Oregon law was valid because there was no showing that "Oregon excludes any defenses it recognizes as available on the three questions" that were at issue in the case. *Id.* at 69. The Court recognized that those three questions were 1) physical possession, 2) forcible withholding and 3) legal right to possession. *Id.* This holding indicates that if Oregon had limited defenses that related directly to the issues of possession (e.g., forcible withholding or

legal right to possession), the Supreme Court would have stricken the Oregon law as unconstitutional.

Turning to Equal Protection, the Court framed the issue as "whether the State may validly single out possessory disputes between landlords and tenants for especially prompt judicial settlement." *Id.* at 70 (emphasis added). The Court held that allowing plaintiffs in the landlord-tenant setting an expedited process and limiting defenses was permissible because the law applied to all tenants and because tenants could pursue their remedies in a separate action. The Court made clear that its decision was based on the fact that the case involved landlords and tenants, noting that "there are unique factual and legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants." *Id.* at 72 (emphasis added). The Court noted some of these "unique" facts, such as 1) a tenant is by definition in possession of the land of another (the landlord); and 2) holding over of tenants has been a problem in history.

Finally, with regard to the enforceability of the provision requiring a double bond in order for a party to appeal, the Court held the provision unconstitutional. Since this provision was not related to "actual rent accrued" it did not further the purpose of ensuring adequate security for an appeal. *Id.* at 77. As such, the Court struck the requirement for posting double rental amounts as bond, holding it "heavily burdens the statutory rights of [tenants]." *Id.*

The differences between *Lindsey* and this matter are stark. Since 1997, Missouri's unlawful detainer statute has been applied to individuals remaining in their

home after a foreclosure. *See* Section 534.030; *P.M. Const. Services, Inc. v. Lewis,* 26 S.W.3d 284, 288 (Mo. Ct. App. 2000). This is precisely the context in which this case arises and upon which Appellant bases his challenge. Appellant is not challenging the application of Missouri's unlawful detainer statute to the landlord-tenant setting. Therefore, the first serious difference between *Lindsey* and this case is that the entire reasoning in *Lindsey* rests upon considering the "unique" facts of a landlord-tenant relationship. That relationship is vastly different from that of a family living in the family home subsequent to foreclosure.

Ignoring the fundamental differences between landlord-tenant relationships and a foreclosure leads Respondent astray. Respondent reasons that since Oregon could prevent renters from challenging issues such as habitability, this means it is constitutional to prevent homeowners from challenging title, but this is flawed reasoning. In the landlord-tenant setting, the obligation to pay arises from a contract. In *Lindsey,* the Supreme Court held that since the obligation to pay was a separate covenant from the obligations of the landlord to provide the property, they could be litigated separately. Put another way, even if parties in Oregon had been allowed to prove that the rental unit was not habitable, this would not have relieved them of their duty to pay. As such, it was not a "defense" at all. It is clear that had the Supreme Court viewed the obligation to pay and the obligation to provide the property as mutual covenants, the result would have been different. In fact, despite Respondent's assertion at page 15 of its brief (that no cases have turned out differently from *Lindsey*) subsequent holdings have rejected the idea that a party cannot raise the defense of habitability where the covenant to pay is mutual with

the covenant to provide the property under state law. *See e.g. Teller v. McCoy,* 253 S.E.2d 114, 125 (W. Va. 1978); *See also Green v. Superior Court,* 517 P.2d 1168, 1181 (Cal. 1974).

It was only because the Supreme Court concluded that (under Oregon law) the obligation to pay had nothing to do with the obligation to keep the property in good condition that the Court held that preventing a "defense" regarding the warrant of habitability was appropriate. The Court makes this clear, stating that no available defenses were actually precluded. In fact, defenses were allowed to the actual elements of a forcible detainer action in Oregon, namely 1) physical possession, 2) forcible withholding and 3) legal right to possession. *Id.* The Court would not have allowed Oregon to prevent tenants from contesting an element of the claim itself, e.g., contesting that the landlord had a legal right possession.

Now consider the situation in the present matter. The right to possession arises only if the party initiating the unlawful detainer is the legal owner of the land. Appellant Truong had no contract with Fannie Mae. Fannie Mae's only possible right to possession would exist if it is the legal title holder to the house in which Mr. Truong was living. Just as it is clear that even in Oregon a tenant could challenge whether the landlord had a legal right to possess the property under the contract, Mr. Truong must be allowed to challenge whether Fannie Mae has legal title – the only ground upon which Fannie Mae would have any right to evict him.

Yet, unlike the Oregon law (which allowed all available defenses recognized at law) Missouri's unlawful detainer statute prevents Mr. Truong from defending the

essential element of the Plaintiff's claim: whether or not the Plaintiff actually owns the home from which he seeks to evict the homeowner. How can it be said that Plaintiff must "prove" title while it is simultaneously held that Mr. Truong is prohibited from challenging title? To the extent that Section 534.210 is applied for the purpose of gagging families that have undergone non-judicial foreclosure, it leads to absurd and unjust results. *Lindsey* requires that defendants must be able to contest each of the elements of the causes of action alleged by plaintiffs. *Lindsey* condemns the application of Section 534.210 in unlawful detainer cases. Respondent is attempting to turn *Lindsey* on its head; but reason will not stretch that far.

The facts of this case make it even clearer that *Lindsey* has no bearing on this case. Although it may be true that on the issue of whether rent has been paid, a landlord and a tenant have comparable access to information, this is not true in the foreclosure setting. Similarly, although it may be true that in the landlord-tenant setting the tenant is always in possession of the landlord's land, that is not true in this case. Quite the opposite, Mr. Truong has presented evidence that any foreclosure that occurred was void because it was improper, illegal and fraudulent. Mr. Truong presented this information in response to summary judgment and none of this information was denied by Respondent. As such, it is admitted; the admitted facts before this Court are that Mr. Truong's foreclosure is void because it was improper, illegal and fraudulent. As a result, Fannie Mae's argument is stunning: Even when the person who is about to be evicted from his home is the rightful owner, that person may not introduce such evidence in an unlawful detainer case. This is especially absurd given that most Missouri foreclosures, including this one, are non-

judicial foreclosures. This unlawful detainer case was the first court proceeding considering Mr. Truong's right to remain in his house, and Respondent blithely asserts that it does not matter that the (non-judicial) foreclosure was illegal or that the party who instigated the foreclosure had no legal right to do so.

Consider a hypothetical illustrating the absurdity of barring inquiry into title. What if a person files an unlawful detainer against the St. Louis Cardinals, seeking to evict them from Busch Stadium? As proof, the person shows the judge a "Deed of Trust" for the stadium. On its face, this document indicates that the person is now the owner of the stadium. At the unlawful detainer case, the person testifies that the Cardinals were occupying his property. Under the law as Respondent describes it, the Cardinals could not inquire into the validity of title. Even if they came forward with a deed of trust of their own, and even if they proved that the title that the plaintiff relies upon was not recorded and has flaws demonstrating that it's a fake, the Court could not consider the evidence because title cannot be inquired into. Further, if the Cardinals asked the Court to stay the proceeding so they could file a claim of their own, they would face the same challenge homeowners do. Missouri law does not require unlawful detainer courts to stay their own proceedings.[2] Instead, a party must file an affirmative action and beg for a stay

[2] Respondent suggests that the trial judge offered to stay his proceedings if an affirmative action was filed; however, this argument fails to recognize that Millsap & Singer, counsel for Fannie Mae at the trial court, routinely points out to judges that they do not have the authority to stay the proceeding. In fact, in this case, counsel for Millsap told the trial

in that court. However, since the Cardinals would find themselves in the City of St. Louis, if they received no special treatment, they would find that the City of St. Louis has a general policy not to stay unlawful detainer proceedings.[3] If the new owner of the Cardinal's property wanted to sell the usurped property, he could try to do so, and if he did, the Cardinals' would have a serious fight to get the land back, especially if the new purchaser were a bona fide purchaser for value.

Although the hypothetical regarding the Cardinals might seem comical, it invokes the legal positions urged by Respondent. When the real life consequences of Missouri law play out in the residential setting, they are not funny at all; they are tragic. When homeowners suffer wrongful foreclosures (which take about 20 days) and they cannot stop the forced sale of their home, they next find themselves facing unlawful detainer actions, brought by the new alleged "owner" of the property, an abstrusely named real estate trust that struts into court knowing that the judges of these crowded dockets won't

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court that "this Court does not have the ability to stay an unlawful detainer. . ." (Transcript, 8.) It also flies in the face of experiences by counsel for Appellant, who have sought stays in both Jefferson County and the City of St. Louis, only to have them denied.

[3] This is not uncommon. In the case of *Wells Fargo v. Smith,* previously mentioned in this brief and pending before this Court, an affirmative claim was filed and a stay was sought before a circuit court judge. It was denied, and Ms. Smith and her family lost their home.

put them to the basic proof. These trusts, even those with robo-signed credentials, think that they will never need to answer the following question: "Prove that you have the legal right to kick this family out of its home." That is precisely what happened in the case against Mr. Truong.

Even if home-owners want to prove that the foreclosure was wrongful, that the trustee carried out a fraudulent sale, that the improper party served as trustee, that the purchaser colluded to purchase the home at the sale or any number of other problems that render the foreclosure sale void, these issues may not be raised. If the trial court then denies a stay to the homeowner, the unlawful detainer proceeds, summary judgment is entered (because title cannot be contested) and the homeowner is swiftly evicted.

This leads to yet another problem ignored by Respondent. Respondent repeatedly argues that Mr. Truong and those like him are not losing any rights because they can supposedly pursue them in another case. Respondent even suggests that Mr. Truong is not harmed in this matter because he has now filed an affirmative action. These statements are as naïve as they are insensitive.

Mr. Truong's home is currently up for sale; if it sells, there is no realistic way he will ever get his home back. The new purchasers will either be, or argue that they are, bona fide purchasers. They will likely be a family, not a bank. Displacing them is simply not going to happen. As a result, Mr. Truong will have permanently lost his home. At a very human level, no amount of money can provide a remedy for this and, at a legal level, since all property is deemed unique, there is no adequate remedy at law. *See e.g. McCullough v. Newton,* 348 S.W.2d 138, 144 (Mo. 1961). As a result, kicking Mr.

Truong out of his house before he can even contest whether the foreclosure was illegal creates irreparable harm. No later affirmative case can fix that. Depriving Mr. Truong of property he owns is far different from displacing a renter.

If homeowners were allowed to challenge title and the validity of the foreclosure in the unlawful detainer case, the party asserting title would have the burden of proof. The plaintiff would need to show that the deed of trust was breached, that an appropriate trustee was appointed[4], that the party that foreclosed was the appropriate party to do so, that a commercially reasonable sale occurred, and that they in fact were the purchaser.

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[4] This is a critical issue in many cases, yet it cannot be raised in an unlawful detainer action. For example, in this case, Millsap & Singer was appointed the successor trustee. Although the Deed of Trust required appointment by the lender, appointment was carried out by a subsequent purported note holder, yet nothing was recorded to prove assignment of the note. Similarly, Millsap & Singer served as the attorney for the note holder while owing a duty of neutrality to Mr. Truong. At the foreclosure sale, Millsap & Singer sold the property from one client to another of its clients, while still owing a duty of neutrality to Mr. Truong. After serving as Mr. Truong's "trustee," Millsap & Singer served as the attorneys for Fannie Mae and initiated an unlawful detainer against Mr. Truong. These types of questions (whether or not the trustee was properly appointed, whether the apparent conflicts of interest disqualified the trustee, and whether or not the trustee acted properly at the sale of the property) are all questions that could invalidate a foreclosure but cannot be considered by the unlawful detainer court.

In Mr. Truong's affirmative claim, he bears the burden of proof on all matters. This is a heavy load when compared to the right to defend by putting the plaintiff to its proof. This requires him into engage in extensive discovery regarding the transfer of the note (as this will affect who can appoint the trustee); it will require him to dig into the trustee's actions and past relationships with the foreclosing entity, and maybe the new purchase. It will also likely involve large legal bills and untold stress while he is being evicted from his home, fighting to get it back before it is too late. It is a legal fiction to suggest then, that simply because Mr. Truong could bring own action, that he is not harmed by being censored in the unlawful detainer hearing.

Yet another way to measure the havoc wreaked by the way the unlawful detainer statute was applied in the trial court is to look at the real world effect of prohibiting challenges to title. The only element that is truly important in an unlawful detainer action is the determination of legal title. If the plaintiff really owns the property, plaintiff should be granted possession. However, if the plaintiff is not the legal title holder, whether it is because the foreclosure is wrongful or the title is falsified or the trustee sale was invalid or any other host of reasons, plaintiff should not be granted possession.

The unlawful detainer statute turns equity on its head when it prevents inquiry into title. Every trial court grants summary judgment as to title in every case because there is no opportunity to put the plaintiff to its proof as to a basic element of its case. As such, there is no work for the judge to do. The judges in these cases are reduced to clerks with rubber stamps; they must hold the plaintiff has legal title, even when the title is riddled with holes. The result is that aside from the many cases resolved by default judgments,

summary judgments are the usual way to resolve unlawful detainers. This is true because proving that that defendant is in possession is never at issue (or there would not be an unlawful detainer action) and whatever value the defendant suggests for rent is generally agreed to swiftly remove families from homes.

The result is that the unlawful detainer "hearing" has become a more of a ritual than a trial. The result is foregone and disputes are not allowed. This is far from the adversarial system that students are taught to treasure in their civics classes.

Although every other type of plaintiff is required to prove its case, even if it takes time, it is only the unlawful detainer plaintiff who is allowed to proceed unfettered by pesky issues like proof and evidence. Similarly, while every other defendant is allowed to challenge claims, it is only the homeowner who is prevented from defending his own property and is, instead, relegated to seeking what at best can be a partial remedy in a separate case.[5]

[5] It should also be noted that although Respondent half-heartedly argues that there is a pressing need to expedite the process of removing people from homes, the unlawful detainer statute actually creates more uncertainty regarding property rights and arguably more delay. For example, Mr. Truong has had to file a separate affirmative action. If he prevails, it will establish that the home is rightfully his. However, if he seeks to recover it, it would involve yet another claim against the new purchasers. This action might fail if they are bona fide purchasers. This could all be avoided.

Associate circuit court judges wrestle with what to do when homeowners, through counsel, but more often *pro se*, come to court to assert that they were not behind on their mortgage or that they were in a modification or that they never received notice of the foreclosure. The judges do not like the fact that they are required to put homeowners out of their homes without a meaningful hearing. This frustration is evident in this case. While considering this summary judgment, the trial court commented:

> I certainly emphasize and understand the dilemma that somebody has that says what do you do in an unlawful detainer where you're not entitled to try title to land if you're the record owner of the title and some usurper is out there who's trying to evict you from property you really own. I . . . that's a real dilemma under the statute.
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> . . .
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> I'm still struggling with the fact that I don't like the statute very much either. It doesn't seem fair to me fair that somebody can't come into court and say, especially in the economic climate that we have with loan proceedings – not suggesting Fannie Mae did anything wrong, but Lord knows there's been a slug of them
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> . . .

> [A]nd if [Fannie Mae's] right to proceed is based on a default which [Mr. Truong] claims didn't occur, then I don't know if you have a right to proceed.

(Transcript, 6-8.) The Court also noted its concern in its first order, in which it decided to hold-off ruling on the motion for summary judgment for 30 days. It wrote:

> Without commenting on the merits, which this Court does not yet explore, this Court has issues with the statue, which would seemingly allow usurpers of title to evict lawful owners.

(L.F. 138.)

B. Conclusion Regarding Reply Point III

For all the reasons discussed above, the unlawful detainer statute as it applies to the foreclosure setting as articulated in Section 534.030 is unconstitutional. It unlawfully deprives parties of their right to assert defenses and it creates a special class of plaintiffs and defendants despite no rational basis for doing so.

REPLY REGARDING APPELLANT'S POINT IV

Since Respondent concedes that 1) challenges to the Plaintiff's right to possession in an unlawful detainer are proper and 2) case law allows for inquiry into the underlying foreclosure, the trial court's prohibition of inquiry or investigation into these issues, and the resulting summary judgment, was erroneous.

IV. Argument Regarding Reply Point IV

In Point IV of his brief, Appellant argues that this Court may not need to reach the constitutional issues to decide this case. Although the trial court held it could not inquire into title (including the validity of the foreclosure), this Court issued an opinion that invites trial courts to consider the validity of foreclosure proceedings in unlawful detainer cases. *Citizens Bank of Edina v. West Quincy Auto Auction, Inc.,* 742 S.W.2d 161 (Mo. banc 1987).[6] In *West Quincy,* this Court concluded that because the sale was not held by the appointed trustee, the foreclosure was void. Thus, Appellant argued to this Court that Missouri's unlawful detainer statute does not prohibit investigation into the foreclosure or standing.

Respondent's response to this argument was surprising. Although Respondent suggests that Appellant misunderstands the difference between standing and Article III jurisdiction, Respondent then concedes that Appellant should have the right to "show that

[6] In the first brief, it was mentioned that Appellant had discovered that *West Quincy* was in fact, an unlawful detainer case. Appellant has attached a certified copy of that Petition from the Court.

plaintiff is not entitled to possession of the premises and therefore cannot evict the defendant." (Resp. Br., 22.) This is an outright admission that Appellant should have been allowed to assert that Respondent was not the legal owner of the land because the underlying foreclosure was void. Similarly, Respondent does not dispute that *West Quincy* allows for considering the validity of the underlying foreclosure. Instead, Respondent asserts that this is immaterial because in this case there was allegedly nothing wrong with the foreclosure. This is a perplexing claim, given that Appellant provided the trial court with undisputed proof that the foreclosure was wrongful, in that he was making timely payments and, on the same day as he received a notice of foreclosure, he also received a letter commending him for his timely payments. Similarly, although Respondent asserts that Fannie Mae was a bona fide purchaser, this is a bizarre claim to make before this Court, given that Respondent argued long and hard in the trial court to keep Appellant from conducting any discovery on this issue.

In fact, at the trial court, while represented by different attorneys, Respondent strenuously and repeatedly argued that nothing about the foreclosure or title could be considered. For example, in response to an interrogatory that asked Respondent to identify any investigation it engaged into before purchasing the subject property, Respondent objected. It stated: "interrogatory Number 5 seeks undiscoverable material as said request asks for material outside the scope of the present Unlawful Detainer Action. Unlawful Detainers are limited actions, where the sole issue is immediate right to

possession." (L.F. 70-71.) In fact, Respondent objected to all interrogatories except one.[7] Similarly, in response to a motion to compel answers to the above reference discovery, Respondent again wrote that: "Defendant has in his possession all of the material that would be discoverable in this action. Specifically, Defendant has copies of the Trustee's Deed, the Deed of Trust, and the Demand of Possession. All other discovery requests by Defendant is [sic] outside the scope of this limited action . . . ." (Emphasis added). (L.F. 139.) Again, in Plaintiff's Reply Memorandum regarding summary judgment, Respondent stated that "challenges on title cannot be used to defend an action in Unlawful Detainer." (L.F. 141.) Respondent went on to say that Defendant alleged "the foreclosure sale should not have occurred . . ." and this is "nothing more than a direct challenge on title." Respondent argued "Defendant is prohibited from bringing those claims before this Court." (L.F. 142.) Similarly, arguments were made on the record at the summary judgment hearing. (See Transcript, 5-6.)

The about-face of Respondent highlights how wrong Respondent was on the law at the lower court. Given the candid admissions in Point IV, this Court may well decide that it can rely on *West Quincy* alone to reiterate that in an unlawful detainer case, a party may inquire into A) the validity of the underlying foreclosure and B) whether a plaintiff

[7] The only interrogatory not objected to asked for the identity of trial witnesses. Respondent identified only one witness: Kip J. Bilderback, an attorney at Millsap & Singer, counsel for Respondent.

is truly entitled to possession. Such a ruling would be a separate and independent ground (in addition to the constitutional issues) for reversal.

V. CONCLUSION

For each of these reasons, Appellant asks that this Court hold that Missouri Revised Statutes 534.010 *et seq.* are unconstitutional as they apply to the foreclosure setting to the extent that they prohibit inquiry into title, including the underlying foreclosure. Specifically, Section 534.210, which prohibits inquiry into title, is unconstitutional. In the alternative, Appellant asks this Court to rule that existing law allows for a party to inquire into the right to possession of the plaintiff, including inquiry into the validity of the underlying foreclosure and the standing of the unlawful detainer plaintiff. Appellant asks this Court to reverse the trial court's grant of summary judgment and to remand this case for further proceedings consistent with this brief.

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CERTIFICATES OF SERVICE, BRIEF FORM AND VIRUS SCANNING

1. A copy of the foregoing was served upon attorneys for Respondent through the electronic filing system of this Court on this 5th day of December, 2011:

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2. This brief complies with Rule 55.03, the limitations contained in Rule 84.06(b), limiting Appellant's brief to 7,750 words. This brief contains 7,311 words, as determined by the word count feature of MS Word.

3. This brief has been filed electronically, as required by this Court.

/s/ Alicia Campbell