SC96376

IN THE MISSOURI SUPREME COURT

BRAINCHILD HOLDINGS LLC,
Plaintiff/Respondent,

v.

STEPHANIE CAMERON,
Defendant/Appellant.

Appeal from the Circuit Court of St. Louis City
Associate Circuit Court
Case No. 1522-AC11511
The Honorable Michael Noble

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED104122

SUBSTITUTE REPLY BRIEF OF APPELLANT

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REFERENCE NOTE

All statutory references, unless otherwise noted, are to the Revised Statutes of Missouri 2016. References to Appellant's Substitute Brief are referred to as "App. Br." References to *Amicus Curiae* Brief of the Missouri Apartment Association are referred to as " Resp. *Amicus* Br."

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I. BURDENS ON JUDICIAL EFFICIENCY DO NOT JUSTIFY THE COMPLETE ELIMINATION OF AN INVIOLATE CONSTITUTIONAL RIGHT; IN ANY EVENT, RESPONDENT AMICUS'S BRIEF OVERSTATES THE IMPACT OF PERMITTING JURY TRIALS IN ACTIONS BROUGHT UNDER CHAPTER 535.

In its Brief in Support of the Respondent, the Respondent *Amicus* relies heavily on the assumption that allowing jury trials in Chapter 535 cases would create an "exceedingly unfair burden on landlords" (Resp. *Amicus* Br. 15) and a "public policy nightmare" (Resp. *Amicus* Br. 19). These concerns are overstated, but, even if such a burden were present, Respondent *Amicus*'s argument inappropriately attempts to justify the abrogation of an inviolate constitutional right by alleging that the burdens of abiding by the Missouri Constitution are too much to bear. This argument is an anathema to the founding principles of a constitutional republic. Constitutional protections that only exist as long as they are convenient provide no protection at all. Fortunately for this Court, the question presented by this case does not require the creation of a "public policy nightmare," and Respondent *Amicus*'s brief exaggerates the potential burden. Furthermore, even if protection of the constitutional right to trial by jury does create some modest burdens, the legislature is well equipped to reduce these burdens.

The Missouri Constitution provides that the right to a jury trial shall remain inviolate. Mo. Const. art. I, § 22(a). This constitutional protection cannot be legislated around, as "the right to a jury trial is 'beyond the reach of hostile legislation and [is] preserved' as it existed at common law before the state constitution's first adoption in

1820." *Dodson v. Ferrara*, 491 S.W.3d 542, 553 (Mo. banc 2016) (citing *State ex rel. St. Louis, Keokuk & Nw. Ry. Co. v. Withrow*, 36 S.W. 43, 48 (Mo. banc 1896)).

Respondent *Amicus* contends that affirming the right to a jury trial in Chapter 535 actions will greatly increase costs to both tenant and landlord. Although the costs for both tenant and landlord may increase as part of jury trial preparation, Respondent *Amicus* greatly overstates the possible increase. Our judicial system already provides tools for parties to resolve cases without a jury trial, including motions for dismissal or summary judgment, alternative dispute resolution, and settlement. These factors make jury trials rare overall. In 2016 in Missouri, just 1.0% of civil cases were disposed via jury trial. Missouri Office of State Courts Administrator, Table 23: Circuit Court FY16 Cases Disposed by Manner of Disposition, Statewide Totals, https://www.courts.mo.gov/file.jsp?id=109556 (last visited Aug. 16, 2017).

The analysis by the Washington University Civil Rights & Community Justice Clinic (CRCJC) and the Metropolitan St. Louis Equal Housing & Opportunity Council (EHOC) cited in the Appellant's Substitute Brief in this case supports the conclusion that jury trial requests would be similarly rare in Chapter 535 cases. (App. Br. at 35-37.) That analysis of cases from St. Louis County, St. Louis City, and Jackson County found that only one out of 2,317 unlawful detainer cases (0.04%) was resolved by jury trial. *Id.* In 99.1% of unlawful detainer cases, there was not even a request for jury trial. *Id.* Respondent *Amicus*'s contention that the possibility of jury trial could add "months . . . or even years" (Resp. *Amicus* Br. 17) is similarly without merit. In the only case identified in the EHOC/CRCJC study where an eviction case went to trial by jury –

Chouteau/Lasalle Properties, LLC v. Griffin, No. 16SL-AC17831 (Mo. 21st Jud. Cir. 2016) – the total time from filing to jury verdict was a mere 57 days.

While there is little evidence that the prospect of jury trials in Chapter 535 cases would pose an unmanageable burden to Missouri courts, the legislature has tools to address issues of judicial economy in the event that some burden is created. One obvious solution would be to return to the procedure in place before the 2014 amendments. Allowing jury trial in a *de novo* hearing is a compromise that preserves the parties' constitutional right to trial by jury while allowing landlords to move quickly to judgment. This process was upheld as constitutional by this Court in *Rice v. Lucas*, 560 S.W.2d 850, 857 (Mo. banc 1978).

II. AN ACTION'S SUMMARY NATURE DOES NOT PRECLUDE JURY TRIAL; EVEN IF IT DID, JUDICIAL GUIDANCE ABOUT THE PROCEDURE IN SUMMARY ACTIONS CANNOT TRUMP A CONSTITUTIONAL GUARANTEE.

Respondent *Amicus* argues that the constitutional right to trial by jury does not attach to summary proceedings. This claim is belied by the existence of unlawful detainer (Chapter 534) claims. Unlawful detainer claims have routinely been described as "summary" in nature. *See, e.g.*, *Wells Fargo Bank, N.A. v Smith*, 392 S.W.3d 446, 462 (Mo. 2013) (referencing "the summary remedy of unlawful detainer") (internal citations omitted); *Fannie Mae v. Truong*, 361 S.W.3d 400, 404-05 (Mo. 2012) ("Unlawful detainer proceedings are summary in nature."); *Lake in the Woods Apartment v. Carson*, 651 S.W.2d 556, 558 (Mo. App. W.D. 1983) (highlighting "the special summary nature

of unlawful detainer proceedings"). Despite their summary nature, though, Chapter 534 contains an explicit statutory guarantee of the right to trial by jury. § 534.160, RSMo ("Either party shall have the right to a jury trial if a timely request therefor is made as in other civil cases.").

Many of the cases cited by Respondent *Amicus* that characterize rent and possession actions (or their alleged historical equivalent) as summary proceedings do not address the issue of a tenant's right to a jury trial. The Respondent *Amicus* cites *Carter v. Tindall*, 28 Mo. App. 316 (1887) and *Pesant v. Heartt*, 22 La. Ann. 292 (1870) as supporting its contention that a tenant's right to a jury trial is somehow limited or eliminated in summary proceedings. (Resp. *Amicus* Br, at 35-37.) In fact, the Court in *Carter* does not even mention jury trials, but instead addresses an issue concerning notice of appeal. *Carter at* 317-18. *Pesant*, on the other hand, directly addresses the issue of jury trials in summary proceedings. *Pesant*, 22 La. Ann. At 292. However, as an 1870 case from Louisiana that addresses a statute in that state's civil code, *Pesant*'s reasoning has little relevance on the current case before this Court. Neither case speaks to Respondent *Amicus'*s contention that summary proceedings affect a Missouri tenant's right to a jury trial.

The Respondent *Amicus* also cites language in several cases emphasizing the "speedy" and "expeditious" nature of summary proceedings. However, none of the cases cited addresses the relationship between a summary proceeding and a tenant's right to a jury trial. The Court in *Ellsworth Breihan Bldg. Co. v. Teha Inc.*, 48 S.W.3d 80, 82-83 (Mo. Ct. App. E.D. 2001), proffers a definition of summary proceedings – including the

fact that their "remedy is speedy" – as part of the Court's determination that a landlord is not barred from filing unlawful detainer and rent and possession actions at the same time by the doctrine of election of remedies.

In *Duchek v. Carlisle*, 735 S.W.2d 791 (Mo. App. E.D.1987),, the court similarly mentions the "simple and expeditious method" of a rent and possession action while examining whether a tenant has the ability to tender all cost due and have the rent and possession action dismissed after losing at the associate court and requesting a trial *de novo*. Characterizing the simple and expeditious method as "fair to both the landlord and the tenant," the appellate court concluded that the tenant could tender all cost due prior to the trial *de novo* and defeat the landlord's action for rent and possession. *Id.* at 793. Nowhere does the court in *Duchek* address the tenant's right to a jury trial. *Id*.

Finally, in *Stough v. Bregg,* 506 S.W.3d 400, 403-04 (Mo. Ct. App. E.D. 2016), cited the summary proceeding's "expeditious resolution of disputes" as an important factor in considering the adequacy of the notice given to the appellant commercial tenants. Rejecting the appellant commercial tenants' due process claims, among several others, the *Stough* court ultimately concluded that, in part because of the action's expeditious summary nature, the summons served eleven days before the first court date provided adequate due process notice. *Id.* at 407. Again, nowhere does the court in *Stough* address the tenant's right to a jury trial. *Id*.

III. THIS COURT HAS CONSISTENTLY HELD THAT, WHILE JURY TRIAL IS NOT GENERALLY PERMITTED IN CASES BROUGHT BEFORE COURTS THAT DO NOT OPERATE UNDER COMMON LAW RULES, JURY TRIAL IS AVAILBLE IN EVICTION CLAIMS BROUGHT BEFORE CIRCUIT COURTS.

Respondent Amicus's brief mischaracterizes *State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551 (Mo. 1891), and *Rice v. Lucas*, 560 S.W.2d 850 (Mo. banc 1978), by asserting that those cases hold that claims heard under Chapter 535 do not provide a right to jury trial. Neither case makes such a holding. Instead, in both cases, the Court held that jury trial was not available in certain inferior courts where the first appeal was a trial *de novo*. In both cases, the Court based its analysis on the type of court hearing the claim rather than the type of claim being raised. In fact, the Court in both cases explicitly noted that while the eviction statute did not provide for jury trial in the inferior court, it did "provide, without unreasonable restriction, for an appeal to a court where a jury trial may be had." *Rice*, 560 S.W.2d at 856 (citing *Kansas City Auditorium*, 45 Mo. App. at 565).

In *Kansas City Auditorium*, the Court reviewed a case where a tenant requested a jury trial in eviction proceedings[1] before a justice of the peace. *Kansas City Auditorium*,

[1] The Court in *Kansas City Auditorium* reviewed a claim brought under §§ 6391-6400 RSMo (1889), a statutory precursor to Chapter 535. *Kansas City Auditorium*, 45 Mo. App. at 551.

45 Mo. App. at 556. The Court found that there was no such right while the case was before a justice of the peace. *Id.* at 564. It ruled that "[i]n courts of the class to which justices of the peace belong, and which do not exercise jurisdiction according to the course of the common law, it is safe to say that a jury will not be authorized for the trial of causes, unless it is required by legislative enactment." *Id.* While declining to determine whether the eviction claim qualified to belong to "the class of civil cases in courts not of the record," the Court nevertheless emphasized that even if it did belong, the constitutional jury requirement would be satisfied by the availability of "an appeal to a court where a jury trial may be had." *Id.* at 566-67. "When such is the case, the constitution is not only not violated, but the mode and manner of securing the constitutional right is pointed out." *Id.* at 567.

In *Rice*, the Court examined a case brought under § 535.040, RSMo (1969), which provided that a magistrate judge was to hear the cause without a jury. *Rice*, 560 S.W.2d at 851. The Court found that magistrate courts, as successors the justices of peace courts, were not common law courts. *Id.* at 856. It also found that "the civil-jury-trial provision of the constitutions of Missouri . . . [do not apply] to special courts, such as justice of the peace, magistrate, or probate courts, which do not proceed according to the common law regardless of the type of civil case which may be involved." *Id.* at 857. Again, the ruling denying jury trial was based on the type of court hearing the claim, rather than the type of claim raised. Nevertheless, the Court emphasized that jury trial was "available in cases filed in magistrate court whenever, and by whatever means, the case reaches the circuit court." *Id.* Furthermore, the Court distinguished its holding from that of *Pernell v.*

Southall Realty Co., 416 U.S. 363 (1974) by noting that, unlike a tenant in *Rice*, "the tenant in *Pernell* could not obtain a jury trial at all if he did not obtain it in the Superior Court of the District of Columbia . . . [,] a court of general jurisdiction similar to our circuit court, and . . . [appealable] on the record." *Id.* at 857.

When Missouri courts have addressed cases where a Chapter 535 action reached the circuit court, they have permitted trial by jury. In *State ex rel. Burlison v. Conklin*, 741 S.W.2d 825 (Mo. Ct. App. S.D. 1987), the court reviewed a related set of cases brought under Chapter 535. The law at that time provided that Chapter 535 cases were to be first heard, off the record, by an Associate Circuit Judge. In *Burlison*, however, the defendant filed counterclaims in each case that exceed the jurisdictional limit of what an Associate Circuit Judge could hear without special assignment, and the cases were certified to the Presiding Judge. *Id.* at 826. Accordingly, the cases were heard on the record, and the first appeal available was to the Court of Appeals rather than a trial *de novo. Id.* a 827. The court ruled that "[w]ithin the meaning of *Rice*, the cases have reached the Circuit Court and the relators are entitled to trial by a jury." *Id.*

Respondent *Amicus* emphasizes that the *Burlison* court held that the general rule that jury trial is available to cases filed in magistrate court "whenever, and by whatever means they reach the circuit court," *Rice*, 560 S.W.2d at 857, "would not be applicable if the action was such that it did not carry the right to a jury trial at common law," *Burlison* at 827. (Resp. *Amicus* Br. 31.) This comment ignores the ultimate holding in *Burlison,* which permitted the tenants to request a trial by jury. If the court had not concluded that

Chapter 535 actions were of the type that that carried a right to jury trial at common law, it would not have held that the tenants in that case were entitled to jury trial.

Since the 2014 amendments to Chapter 535, the statute no longer provides for hearing of cases before any sort of inferior or non-common-law court. Instead, cases are heard directly by a court of general jurisdiction, with appeals "conducted in the manner provided as in other civil cases." § 535.110, RSMo. As there is no longer a right to trial *de novo*, Missouri tenants – like the tenants in *Pernell* and *Burlison* – only have one opportunity to have their cases heard by a jury. Accordingly, like the tenants in *Pernell* and *Burlison,* they should have the right to trial by jury in their one and only trial on the record.

IV. MODERN RENT AND POSSESSION ACTIONS MOST CLOSELY RELATE TO COMMON LAW EJECTMENT ACTIONS AND TRIGGER A RIGHT TO JURY TRIAL, AS RECOGNIZED BY A MAJORITY OF STATE COURTS.

Contrary to Respondent *Amicus*' assertion, the modern rent and possession action is analogous to a common law ejectment action for the purpose of determining whether a right to jury trial attaches under *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003). The Court in *Diehl* held that the key inquiry to determine the existence of a right to jury trial is whether the cause of action "is the kind of case that carried a right of trial by jury in 1820." *Id.* at 85. Respondent *Amicus* concedes that "[a]t common law, the cause of action for an individual dispossessed of real property was forfeiture, and

ejectment was the remedy." (Resp. *Amicus* Br. 33.) This assertion is in line with Appellant's own prior argument detailing early nineteenth century cases where ejectment claims received jury trials. (App. Br. 17.) This predecessor relationship, according to the analysis in *Diehl*, conveys the same right to jury trial to the modern-day rent and possession action at issue in this case.

Respondent *Amicus* incorrectly argues that the Court should not consider common law ejectment equivalent because more contemporary statutes governing ejectment and rent and possession actions differ. (Resp. *Amicus* Br. 33-34). Respondent *Amicus* cites *Tarlotting v. Bokern*, 95 Mo. 541 (Mo. 1888). for the proposition that ejectment is a distinct action from rent and possession actions. However, the *Tarlotting* Court did not go so far as to conclude that ejectment and rent and possession actions were in some way essentially different. Rather, the *Tarlotting* Court equated the "possession" in a rent and possession action with ejectment. *Id*. at 544. This is similar to the way that the Court in *Diehl* analogized discrimination claims to actions for trespass that were triable by juries in 1820. *Diehl*, 95 S.W.3d at 87.

In *Tarlotting*, the Court affirmed the lower court's ruling denying the plaintiff landlord a judgment for possession because the landlord failed to properly end the landlord-tenant relationship prior to filing an ejectment action. *Tarlotting*, 95 Mo. at 544. In its opinion, the Court elucidated at least two ways by which the landlord could have properly ended the landlord-tenant relationship prior to the ejectment action: by filing a claim for rent or by providing "one month's notice in writing requiring her to remove from the property." *Id*. By providing these options, the Court demonstrated that the

ejectment action was contingent on the landlord proving that either the tenant breached the contract (the claim for rent) or that the contract no longer existed (proper notice of the end of the contract). *Id*. Either way, the landlord needed to bring what would be in effect a contract claim prior to the ejectment claim in order to sever the landlord-tenant relationship prior to taking possession. *Id*. As extrapolated from the *Tarlotting* Court's reasoning, rent and possession actions most closely mirror a combination of breach of contract and ejectment claims at common law, both of which the Missouri court system has consistently treated as claims at law and, thus, as including the right to a jury trial.

The United States Supreme Court followed similar reasoning in *Pernell v. Southall Realty Co.*, 416 U.S. 363, 376 (1974), when it determined that the right to a jury trial attaches to statutory unlawful detainer evictions in the District of Columbia. *Id*. Although *Pernell* is not necessarily binding on Missouri courts, *Pernell*'s reasoning is particularly compelling considering that this Court has consistently held that the Missouri Constitution's right to jury trial is more expansive than the Seventh Amendment of the United States Constitution. *Diehl*, 95 S.W.3d at 84.

Furthermore, the vast majority of state courts follow *Pernell* in their guarantee of the right to jury trial in eviction actions equivalent to Missouri's rent and possession statute. Of fifty comparable state-level jurisdictions in the United States, thirty-seven jurisdictions provide for a right to jury trial at either the initial level or upon appeal. Twenty-nine states and the District of Columbia explicitly provide the right to jury trial by statute or case law. *See, e.g.,* Ohio Rev. Code § 1923.10 (2017) (granting the right to a jury trial in forcible entry and detainer action); Tex. R. Civ. P. 150.7(b) (2017) (granting

the right to a jury trial in eviction cases); and Wyo. R. Civ. P. 38 (2017) (granting the right to a jury trial in "actions for the recovery of money only, or specific real or personal property"). Seven additional states provide for a right to jury trial upon appeal. *See, e.g. Ex parte Moore*, 880 So. 2d 1131, 1140 (Ala. 2003) (finding "a clear legal right to a jury trial" on appeal in an Alabama eviction action) and *Hill v. Levenson*, 383 S.E.2d 110 (Ga. 1989) (clarifying that the Georgia statutory right to jury trial on appeal satisfies the right to a trial by jury in dispossessory actions). Only thirteen states do not provide any right to a jury trial for eviction cases similar to Missouri's rent and possession statute. Consequently, Missouri's traditional guarantee of the right to jury trial in rent and possession cases is consistent with both prevailing federal law and the vast majority of states.

CONCLUSION

Section 22(a) of the Missouri Constitution preserves the right to a jury trial in legal actions, including actions for rent and possession and the analogous common law action of ejectment. Burdens on judicial economy or efficiency cannot justify abrogation of this inviolate constitutional right.

Missouri courts have consistently held that the right to a jury trial in eviction actions brought under Chapter 535 applies whenever and by whatever means a case reaches the circuit court. This right to jury trial does not conflict with the summary nature of these eviction actions, and even if it did, the legislature's intent to create a summary action cannot supersede the Missouri Constitution's protection of the right to jury. Accordingly, as the 2014 made actions brought under Chapter 535 triable in circuit court and directly appealable to the Court of Appeals, parties must be entitled to trial by jury at the first trial before an associate circuit or circuit court judge.

For the reasons discussed in Appellant's Substitute Brief and this Reply, this Court should reverse the trial court's denial of Appellant's request for trial by jury and remand this case to the trial court with instructions to grant Appellant's request for trial by jury.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Comes now counsels for Appellant and certifies that:

1. This brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidentiary support.
2. The brief complies with Rule 84.06(b).
3. The number of words contained in the brief is approximately 4015 as listed by the word processor the document was prepared on, Microsoft Word 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the foregoing were sent on this 18th Day of August, 2017, via the Case.net e-filing system to:

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