SC 95944

IN THE MISSOURI SUPREME COURT

KOHNER PROPERTIES, INC.

Respondent,

vs.

LATASHA JOHNSON

Appellant.

Appeal from the Twenty-First Judicial Circuit Court
Associate Circuit Court, Case No. 15SL-AC07852
The Honorable Judy Draper

On Transfer from the Missouri Court of Appeals, Eastern District
Case No. ED103133

SUBSTITUTE BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

Respondent adopts and incorporates by reference the Jurisdictional Statement set forth in Appellant's Substitute Brief.

REFERENCE NOTE

References to the Trial Transcript are denoted "Tr." References to the trial court's Judgment are denoted "J." References to exhibits from the trial court are denoted as "Exh." References to the Appendix for Respondent's Substitute Brief are denoted as "App." References to the Substitute Brief of the Appellant are denoted as "Sub. App. Br." References to the Missouri Court of Appeals, Eastern District, Opinion in this case are denoted as "CoA Op."

STATEMENT OF FACTS

Respondent Kohner Properties, Inc. ("Kohner") is the property management entity for Hickory Trace Apartments in St. Louis County, State of Missouri. Tr. 10: 4-5. Appellant Latasha Johnson ("Johnson") signed an Apartment Lease ("Lease") with Kohner to rent 3543 #1 Dehart Place, St. Ann, Missouri 63074 ("the Premises"). App. 1-9. The Lease indicates Johnson's security deposit was $200.00. App. 1. The Lease required Johnson to pay $585.00 per month in rent on or before the first day of each month and an additional $58.50 late fee if rent was not paid on or before the 5th day of each month. App. 1. The Lease also required Johnson to pay an additional $5.00 late fee for each day her account was delinquent. App. 1. Paragraph 17 of the Lease requires Johnson to pay all Kohner's attorney's fees, expenses, and court costs associated with enforcing any of its provisions. App. 5.

Johnson moved into the Premises on October 31, 2014. Tr. 31: 4-5. At the end of February 2015, Johnson had a delinquent balance of $54.32 and Kohner's manager, Becky Smith, posted a notice on Johnson's door on March 6, 2015 asking Johnson to pay what was owed as of that date of $709.92. Tr. 11: 17-25; 12:1-4.

Throughout her tenancy, Johnson made oral maintenance requests regarding the bathroom located in the Premises. *See* Tr. 12: 15-25; Tr. 14: 1-3; Tr. 15; 10-25. Johnson notified Kohner that maintenance was not to enter the Premises unless she was home. Tr. 17: 24-25; 18: 1-2. On November 26, 2014, Johnson made her first maintenance request regarding the bathroom after two tiles fell from the shower wall. Tr. 12: 15-25. The tiles

were placed back onto the bathroom wall by Kohner's maintenance technician. Tr. 13: 1-6. On February 10, 2015, Johnson made her second maintenance request regarding the bathroom alleging that mold was present on the ceiling. The alleged mold area was cleaned by Kohner's maintenance technician the very next day. Tr. 14: 22-25; Tr. 15: 1. After the alleged mold area was cleaned, Johnson made no further complaints about the mold in the bathroom. Tr. 15: 2-11.

In March 1, 2015, Johnson failed to pay her rent for that month. Tr. 11: 11-25; Tr. 37: 22-23. On March 17, 2015, Johnson made her third maintenance request regarding the bathroom after a portion of the bathroom ceiling collapsed. Tr. 15: 10-18. The partial ceiling collapse was caused by a leaking tub spout in the apartment immediately above the Premises. Tr. 15: 21-25. On that same date, Kohner's maintenance technician repaired the leaking tub spout. *Id*. Upon repairing the leaking tub spout, Kohner's technician and painter attempted to make the cosmetic repair to the bathroom ceiling in the Premises. Tr. 17: 2-12; Tr. 18: 8-9. Johnson, however, refused to allow Kohner's maintenance technician and painter repair her bathroom ceiling. Tr. 17: 2-12. Because Johnson refused the necessary cosmetic repair, the maintenance technician placed plastic wrap over the hole in the ceiling. Tr. 17: 2-6.

On the day Johnson reported the partial ceiling collapse, Kohner sent Johnson correspondence regarding the necessity to enter the Premises to repair the ceiling. App. 11; Tr. 24: 11-25; Tr. 25: 1-9. Kohner, on at least nine separate occasions after March 17, 2015, attempted to gain access to the Premises to make the necessary cosmetic repairs to

the bathroom ceiling. *See* Tr. 17: 2-25; 18: 1-25; 19:1-25; 20:1-23. On March 18, 2015, despite a two day written notice, Johnson refused to allow the maintenance technician to make the necessary repairs because she was taking a shower in the very bathroom that was allegedly uninhabitable. App. 10; Tr. 49: 1-21. Johnson failed to answer the door on the other attempts. Tr. 27: 22-25. On March 25, 2015, Kohner sent Johnson an additional correspondence regarding its multiple attempts to repair the ceiling. App. 12; Tr. 23: 16-25; Tr. 24: 1-10. Johnson testified that she received and understood the letters from Kohner. Tr. 49; 22-23; 51: 5. After the partial ceiling collapse that occurred on March 17, 2015, Johnson never contacted Kohner to set up a time for maintenance to enter the Premises and make the necessary repairs. Tr. 23: 2-8.

On March 20, 2015, Kohner filed a rent and possession lawsuit against Johnson pursuant to Mo. Rev. Stat. § 535.020. LF 8. Kohner's affidavit and statement alleged that Johnson owed $1,118.76 in unpaid rent and requested Kohner's reasonable attorney's fees and court costs be assessed against Johnson. *Id*. On April 14, 2015, Johnson filed an affirmative defense and counterclaim alleging that Kohner breached the implied warranty of habitability and violated the Missouri Merchandising Practices Act. LF 9-19. Johnson failed to tender rent charges due *in custodia legis* or vacate the Premises. Tr. 2: 12-23. Despite the alleged problems, Johnson remained in possession of the Premises and failed to pay all charges through April 2015. Tr. 11: 11-16; Tr. 42: 9-12.

At trial on April 21, 2015, Johnson testified she had March and April rent but was withholding payment because the Premises were uninhabitable. Tr. 41: 5-15. Johnson,

however, also testified that her and her daughter remained in possession of the Premises and that they continued to use the shower and bathroom facility. Tr. 42: 9-16. Though Johnson testified that there was mold present in the Premises, Johnson failed to establish that she is qualified to identify mold and failed to introduce any mold testing conducted by an expert. Tr. 33: 7-19. Johnson contended that the mold caused her daughter to experience discomfort with her eyes but failed to produce any medical records establishing that mold was the causation. Tr. 43: 2-8. Johnson testified that she spent a total of three nights in a hotel due to the conditions of the Premises. Tr. 53: 22-25. She, however, failed to introduce any receipts into evidence or testify as to the amounts she allegedly expended to stay in the hotel. *Id.*

After the close of Johnson's evidence, the trial court took the case under submission. Tr. 58: 2-4. On May 13, 2015, the trial court entered Judgment in favor of Kohner and against Johnson for $2,104.36 (which included a $300.00 credit for "hotel expenses") plus costs and possession of the Premises. LF 46-49. The trial court found that Johnson was barred from asserting her affirmative defense and counterclaim for breach of implied warranty of habitability because she failed to vacate the Premises or tender March and April rent *in custodia legis*. *Id.* Additionally, the trial court found that Johnson failed to establish the elements necessary to establish a violation of the Missouri Merchandising Practices Act. *Id.*

Johnson filed her notice of appeal on June 22, 2015. LF 50. On August 17, 2016, the Missouri Court of Appeals, Eastern District, heard oral arguments. On September 13,

2016, the Missouri Court of Appeals, Eastern District, in case number ED103133, issued its opinion and transferred the case to the Missouri Supreme Court. CoA Op. 19.

POINTS RELIED ON

I. THE TRIAL COURT DID NOT ERR IN BARRING JOHNSON FROM ASSERTING AN AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY BECAUSE JOHNSON FAILED TO VACATE THE PREMISES OR TENDER HER RENT *IN CUSTODIA LEGIS* PRIOR TO ASSERTING THE AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF IMPLIED WARRANTY OF HABITABILITY.

Detling v. Edelbrock, 671 S.W.2d 265 (Mo. 1984).

King v. Moorehead, 495 S.W.2d 65 (Mo. App. W.D. 1973).

Lindsey v. Normet, 405 U.S. 56, (1972).

Proffer v. Randall, 755 S.W.2d 655, 657 (Mo. App. E.D. 1988).

II. THE TRIAL COURT DID NOT ERR IN BARRING JOHNSON FROM ASSERTING A COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY DUE TO HER FAILURE TO TENDER RENT *IN CUSTODIA LEGIS* WHILE SHE WAS IN POSSESSION OF THE PREMISES IN THAT SUCH A REQUIREMENT DOES NOT VIOLATE THE OPEN COURTS PROVISION, ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION BY RESTRICTING HER ABILITY TO BRING A CAUSE OF ACTION FOR BREACH OF AN IMPLIED WARRANTY OF HABITABILITY.

Lang v. Pataki, 176 Misc.2d 676 (N.Y. Sup. Ct. 1998).

Lindsey v. Normet, 405 U.S. 56, (1972).

Weigand v. Edwards, 296 S.W.3d 453, 461 (Mo. 2009).

III. THE COURT OF APPEALS ERRED HOLDING THAT A TENANT MAY ASSERT AN AFFIRMATIVE DEFENSE AND WITHHOLD RENTS DUE THE LANDLORD WHILE REMAINING IN POSSESSION OF THE PREMISES, IN THAT SUCH ACTION VIOLATES RESPONDENT'S RIGHT TO DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE MISSOURI CONSTITUTION.

U.S. Const. amend. XIV, §1.

Chernin v. Welchans, 844 F.2d 322 (6th Cir. 1988).

Lindsey v. Normet, 405 U.S. 56, (1972).

Mahdi v. Poetsky Management, Inc., 433 A.2d 1085, 1088 (D.C.App. 1981).

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN BARRING JOHNSON FROM ASSERTING AN AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY BECAUSE JOHNSON FAILED TO VACATE THE PREMISES OR TENDER HER RENT *IN CUSTODIA LEGIS* PRIOR TO ASSERTING THE AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF IMPLIED WARRANTY OF HABITABILITY.

In her first point, Johnson asserts that the trial court erred in barring her affirmative defense and counterclaim. (Sub. App. Br. 10). Johnson asserts that she was not vacating the premises or paying rent in custodial egis are not legal elements to her affirmative defense or counterclaim for breach of the implied warranty of habitability. (Sub. App. Br. 10). Johnson asserts that she proved all elements of the affirmative defense and counterclaim. (Supp. App. Br. 10).

STANDARD OF REVIEW

On appellate review, the trial court's judgment is presumed to be correct. *McAllister v. McAllister*, 101 S.W.3d 287, 290 (Mo. App. E.D. 2003). An appellate court shall review both the law and evidence when reviewing a case tried without a jury. Sup. Ct. R. 84.13(d). This Court must affirm the trial's court judgment unless it is not supported by substantial evidence, it is against the weight of evidence or it erroneously declares or applies the law. *Murphy v. Carron*, 535 S.W.2d 30, 32 (Mo. banc 1976). An

appellant has the burden to prove that the trial court erroneously applied the law. *McAllister*, 101 S.W.3d at 290. Conversely, a respondent has no burden to show the trial court's ruling was proper. *Endsley v. Director of Revenue, State of Mo.*, 6 S.W.3d 153, 166 (Mo. App. W.D. 1999).

DISCUSSION

A landlord impliedly warrants that a residential property is habitable and safe for human existence. *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. 1984) (citing *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. App. W.D. 1973)). The implied warranty of habitability was first recognized by a Missouri court in *King* and later acknowledged by this Court in *Detling*. *Id*. A tenant may use the implied warranty of habitability as both an affirmative defense to a rent and possession action and an affirmative suit for damages. *Detling*, 495 S.W.2d at 270. "To constitute a breach of the warranty, a tenant must allege and prove conditions of such a nature as to render the premises unsafe or unsanitary." *Id*.

In *Detling*, this Court abandoned the traditional common law rule of *coveat emptor* in the area landlord-tenant law, for the more widely accepted view that a landlord impliedly warrants habitability of leased residential property. 671 S.W.2d at 269. In so holding, this Court stated that a breach of warranty of habitability invokes traditional contract remedies and the tenant may assert a claim of breach of warranty of habitability as an affirmative defense to a Rent and Possession action or as the basis for a separate cause of action. *Id.* at 270. A tenant seeking to establish a cause of action for breach of the implied warranty of habitability must establish:

> (1) entry into a lease for residential property; (2) the subsequent development of dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant; (3) reasonable notice of the defects to the landlord; and (4) subsequent failure to restore the premises to habitability.

Id. In such cases, tenants "may seek to recover damages for impaired enjoyment of the premises and consequential damages." *Id.* citing *King* 495 S.W.2d at 76; *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972). In *Detling*, the tenants paid their rent to a court appointed receiver during the litigation. No one challenged the appointment of a receiver and therefore it was unnecessary for this Court to address the issue of whether a tenant was legally entitled to withhold payment of rent if it remained in possession of the property while alleging the landlord breached the warranty of habitability and, if so, whether the tenant was required to deposit the rent, *in custodia legis*, pending litigation. Consequently, these issues are a matter of first impression for this Court.

In *Lindsey v. Normet*, the Unites States Supreme Court rejected the tenants' claim that, as matter of due process, rental payments automatically suspended while the alleged wrongdoings of the landlord are litigated. 405 U.S. 56, 66-67 (1972). Because a tenant does not have a constitutional right to withhold rent, whether a tenant can withhold rent if it alleges a breach of warranty of habitability, is determined on a state by state basis. Most states have enacted legislation outlining the rights and procedure of a landlord and tenant in these situations. Others have addressed certain issues through the courts. Since there is no legislation directly on point in Missouri, this Court must determine whether

the law and underlining principles outlined in *King v. Moorehead*, will prevail as the Missouri's law in this area into the future.

Some states do not allow a tenant to withhold rent during the pendency of the litigation.[1] Several states have enacted legislation that does allow a tenant to withhold rent.[2] Other states have enacted legislation that gives tenants the right to withhold rent, but also gives courts that ability to order tenants to escrow withheld rent.[3] A few states

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[1] Alabama, ALA. CODE §35-9A-164 ("The tenant may not withhold payment of rent to the landlord, while in possession, to enforce any of the tenant's rights under this chapter."); Illinois, 765 ILL. COMP. STAT. 742/20 (A tenant may not assert as a defense to an action for rent or eviction that rent was withheld under this Act unless the tenant meets all the requirements provided for in this Act."); New Mexico, N.M. STAT. ANN. §§ 47-8-27.1 & 47-8-27.2 (abatement of rent in the amount of one-third of the pro-rata daily rent for each day condition exists after notice to landlord); Wisconsin, WIS. STAT. §704.07(4) (rent abates but cannot be totally withheld).

[2] Louisiana, LA. CIV. CODE ANN. art. 2694; Massachusetts, MASS. ANN. LAWS. ch. 239, §8A; Mississippi, MISS. CODE. ANN. §89-8-15; New York; N.Y. REAL PROP. LAW §235-b; Oklahoma, OKLA. STAT. tit. 41, §121; Texas, TEX. PROP. CODE §92.0561; Utah, UTAH CODE ANN. §57-22-6; Vermont, VT. STAT. ANN. tit. 9, §4458.

[3] Alaska, ALASKA STAT. §34.03.180; Arizona, see ARIZ. REV. STAT. §33-1365; Iowa, IOWA CODE §562A.24; Kansas, KAN. STAT. ANN. § 58-2561; Kentucky, KY. REV. STAT. §383.645; Maryland, MD. CODE. ANN. REAL PROP. §8-211; Montana, MONT. CODE ANN.

have enacted legislation that allows a tenant to withhold rent, but requires the tenant to escrow the rent.[4] Several states have enacted legislation that allows the tenant to withhold rent, requires the tenant to escrow the rent, and provides a penalty for failing to escrow the rent.[5]

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§70-24-421; Nebraska, NEB. REV. STAT. ANN §76-1428; New Jersey, N.J. STAT. §2A:42-87; Rhode Island, 34 R.I. GEN. LAWS §18-32

[4] Colorado, COLO. REV. STAT. §38-12-507 (court shall order tenant to pay rent accrued into court registry); Michigan, MICH. COMP. LAWS SERV. §125.530 (tenant shall pay rent into an escrow account); Minnesota, MINN. STAT. ANN §504B.385 (tenant shall pay rent into the court); New Hampshire, N.H. REV. STAT. ANN. §540:13-d (court shall require the person to pay rent into the court); Ohio, OHIO REV. CODE ANN. §5321.07 (tenant shall deposit rent with the municipal or county clerk); Pennsylvania, 35 PA. STAT. ANN. §1700-1 (tenant shall pay into escrow); South Dakota, S.D. CODIFIED LAWS §43-32-9 (tenant shall deposit rent into an account); Tennessee, TENN. CODE ANN. §68-111-104 (tenant shall pay rent into county clerk); Washington, WASH. REV. CODE ANN. §§ 59.18.119, 58.18.115 (tenant shall deposit rent into an escrow account).

[5] Connecticut, CONN. GEN. STAT. §47a-14h (tenant shall deposit rent with the court clerk and if tenant fails make such payment, the court may dismiss the complaint); Florida, FLA. STAT. ANN. §83.60 (failure to pay rent into the court registry constitutes an absolute waiver of the tenant's defenses and the landlord is entitled to an immediate default judgment and removal of the tenant); Hawaii, HAW. REV. STAT. ANN. §521-78 (if the

It is Respondent's position that this Court should follow the Court of Appeals position in *King v. Moorehead*, in that it attempts to balance the rights of the landlord and tenant. *King* allows a tenant to remain in possession of the premises during litigation and withhold rent until habitability is restored. 495 S.W.2d at 77. *King* also attempts to protect the landlord's property interest in requiring the rents to be deposited *in custodia legis.* "A tenant who retains possession, however, ***shall*** be required to deposit the rent as it becomes due, *in custodia legis* pending the litigation.[6] *Id.* (emphasis added); *See Wulff*

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tenant is unable to comply with court's order to escrow rent, the landlord shall have judgment for possession and execution); Nevada, NEV. REV. STAT. ANN. §118A.490 (if tenant fails to deposit rent with the court, the tenant relinquishes the right to a hearing and the court shall grant a judgment for eviction without further hearing). Oregon, OR. REV. STAT. §90.370 (if tenant does not pay rent into the court, then the tenant shall not be permitted to assert a counterclaim); South Carolina, S.C. CODE ANN. §27-40-790(c) (if tenant fails to pay rent into court, then the court shall issue a warrant of ejectment);

[6] Johnson contends that the *in custodia legis* requirement established by *King* and followed by *Wulff* is non-binding dicta. In light of the fact that *King* and *Wulff* are both Court of Appeals cases and the matter is now before this Court, who is the final authority on Missouri law, Respondent believes that any conversation of whether the statements are dicta by the courts of appeal is immaterial to this Court's determination. Nevertheless, in *Henry*, the appellate court approved the *in custodia legis* requirement which was clearly not dicta as the decision was construed with reference to the specific

v. Washington, 631 S.W.2d 109, 110 (Mo. App. W.D. 1982); *See Tower Management, Inc. v. Henry*, 687 S.W.2d 564, 565 (Mo. App. W.D. 1984).

A. THE REQUIREMENT THAT A TENANT WHO RETAINS POSSESSION OF THE PREMISES MUST DEPOSIT HIS OR HER RENT *IN CUSTODIA LEGIS* AS A CONDITION PRECEDENT TO ASSERTING AN AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY DOES NOT CREATE AN ADDITIONAL ELEMENT TO THE DEFENSE OF IMPLIED WARRANTY OF HABITABILITY.

Appellant asserts that requiring a tenant to deposit rents *in custodia legis* is essentially adding another element to a claim for breach of warranty of habitability. *See*, Sub. App. Br., I.A. Requiring that money is available to secure damage to a party deprived of its protected interest, has never been considered adding another element to the prima facie case. By way of example, the posting of a bond on appeal does not somehow change the matter on appeal or add something new to the issues underlying the appeal. *See, Rice v. Lucas*, 560 S.W.2d 850, 858 (Mo. banc 1978) ("State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession …" *quoting, Lindsey*, 405 U.S. at

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facts and issues before the court. *See, Wulff* 631 S.W.2d at 110; *Henry*, 687 S.W.2d at 565.

77). Like an appeal bond, depositing rents *in custodia legis* is merely securing those rents that are accruing and the property interest of the landlord until such time as the court determines that they are not.[7]

B. JOHNSON FAILED TO ESTABLISH THE LEGAL ELEMENTS NECESSARY TO PROVE A BREACH OF THE IMPLIED WARRANTY OF HABITABILITY AND FAILED TO OFFER ANY EVIDENCE REGARDING THE DIMINISHED VALUE OF THE LEASED PREMISES.

Assuming *arguendo*, that a tenant who retains possession is not required to deposit his or her rent *in custodia legis*, Johnson still failed to establish a breach of the implied warranty of habitability. As previously discussed, a tenant must prove the following elements to establish a breach of the implied warranty of habitability:

> (1) entry into a lease for residential property[8]; (2) the subsequent development of dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant; (3) reasonable notice of the defects to the landlord; and (4) subsequent failure to restore the premises to habitability.

[7] It should be noted that the elements of breach of warranty of habitability are the same in each state yet so many states have required that a tenant deposit the rents pending litigation without adding an "additional element" to the cause of action.

[8] Kohner does not dispute that Johnson entered into a lease for residential property.

Detling, 671 S.W.2d at 270. "To constitute a breach of the warranty, a tenant must allege and prove conditions of such a nature as to render the premises unsafe or unsanitary." *Id.* "A tenant must allow a landlord reasonable time to alleviate the defects. *Moser v. Cline*, 214 S.W.3d 390, 395 (Mo. App. W.D. 2007) (citing *Chiodini v. Fox*, 207 S.W.3d 174, 177 (Mo. App. E.D. 2006)). Damages stemming from a breach of implied warranty of habitability are measured by calculating the difference between the contractual rent and the fair rental value of the premises in the unsafe condition. *Proffer v. Randall*, 755 S.W.2d 655, 657 (Mo. App. E.D. 1988).

Johnson failed to establish that the Premises were dangerous or unsanitary. Johnson testified that she and her daughter were able to use the bathroom and shower in the Premises throughout her tenancy. Tr. 42: 9-16. Johnson and her daughter were able to use bathroom and shower because the necessary repairs were only cosmetic in nature. She also testified that her and her daughter continued to reside in the Premises on the date of trial. Id. Johnson claimed that mold in the Premises was causing her daughter to experience discomfort with her eyes. Tr. 43: 3-8. She, however, failed to produce any testing or medical records that confirmed that mold was present in the Premises and caused the discomfort her daughter was experiencing.[9]

[9] Assuming *arguendo* that Johnson could show that her daughter suffered discomfort, she cannot establish that the discomfort was caused by the conditions of the apartment. The daughter's alleged cerebral palsy could be the likely cause of the daughter's discomfort. Many children with cerebral palsy have strabismus ("cross eyes") which can lead

If the conditions of the apartment were truly a hazard to her daughter, Johnson would have vacated the Premises immediately or arranged a time for Kohner to enter the Premises to make the cosmetic repairs. Additionally, Johnson failed to establish herself as either a mold or medical expert. Because Johnson failed to prove that the Premises were unsafe or unsanitary, she failed establish an affirmative defense and counterclaim for breach of the implied warranty of habitability.

Additionally, Johnson did not prove that Kohner failed to restore the Premises to habitability. Rebecca Smith, the property manager for Kohner, testified that Kohner located and fixed the leak in the apartment immediately above the Premises. Tr. 15: 21-3. The repair was made the same date that Johnson complained about the leak. Tr. 16: 1-2. When the maintenance technician appeared at the Premises to fix the ceiling and walls, Johnson refused to allow the maintenance technician to make the cosmetic repairs. Tr. 17: 2-6. As a result, the maintenance technician placed a plastic bag over the hole in the ceiling. Id. Because the necessary repair was only cosmetic in nature, Johnson and her

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impairment in one or both eyes. National Institute of Health, National Institute of Neurological Disorders and Stroke, *Cerebral Palsy: Hope Through Research*, NIH Publication No. 13-159 (July 2013), available at http://www[.]ninds.nih.gov/disorders/cerebral_palsy/detail_cerebral_palsy.htm, last visited December 19, 2016. Cerebral palsy clearly affects an individual's eyes and without further evidence it is impossible to determine if the daughter's discomfort was caused by something other than her alleged cerebral palsy.

daughter continued to use the bathroom and shower. Tr. 18: 8-9; Tr. 42: 9-16. Though Johnson had previously complained about alleged mold, she made no further complaints after the maintenance technician cleaned the alleged mold area on February 11, 2015. Tr. 15: 2-4. Therefore, if mold was truly a continuing problem, Johnson failed to provide reasonable notice to Kohner. Because Kohner repaired the leak in the apartment immediately above the Premises and cleaned the alleged mold area, Johnson did not prove that Kohner failed to restore the Premises to habitability.

Furthermore, Johnson did not submit any evidence regarding the diminished use of the leased Premises. The facts in this case are similar to the facts in *Proffer*. There, the tenant initiated an action against the landlord after a flood occurred in the premises and damaged tenant's personal property. *Proffer*, 755 S.W.2d at 655. The trial court granted the landlord's directed verdict after the tenant failed to offer any evidence regarding the diminished value of the leased premises. *Id.* This Court affirmed the trial court's decision finding that a tenant asserting a cause of action for breach of the implied warranty of habitability must offer evidence regarding the diminished value of the leased premises. *Id*. at 657.

Here, like in *Proffer*, Johnson offered no evidence regarding the diminished value of the Premises. When Johnson was asked about her monetary damages at trial, she could not state what monetary damages she actually suffered. Tr. 44: 9-24. Though Johnson alleges that she and her daughter spent three nights in a hotel, she did not provide any receipts or testify as to the amount she spent for those nights.

Because Johnson failed to prove the elements necessary for establishing a cause of action for breach of implied warranty of habitability and did not offer any evidence regarding the diminished value of the leased premises, it cannot be said that the trial court erred in barring Johnson's affirmative and counterclaim for breach of the implied warranty of habitability.

II. THE TRIAL COURT DID NOT ERR IN BARRING JOHNSON FROM ASSERTING A COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY DUE TO HER FAILURE TO TENDER RENT *IN CUSTODIA LEGIS* WHILE SHE WAS IN POSSESSION OF THE PREMISES IN THAT SUCH A REQUIREMENT DOES NOT VIOLATE THE OPEN COURTS PROVISION, ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION BY RESTRICTING HER ABILITY TO BRING A CAUSE OF ACTION FOR BREACH OF AN IMPLIED WARRANTY OF HABITABILITY.

In her second point, Johnson asserts that the trial court erred in barring her counterclaim for breach of the implied warranty of habitability on the grounds that she had not vacated the premises or tendered her rent to the court in custodia legis. (Sub. App. Br. 33). Johnson claims such a requirement violates the open courts provision, Article I, Section 14 of the Missouri Constitution (Sub. App. Br. 33).

STANDARD OF REVIEW

On appellate review, the trial court's judgment is presumed to be correct. *McAllister*, 101 S.W.3d at 290. An appellate court shall review both the law and evidence when reviewing a case tried without a jury. Sup. Ct. R. 84.13(d). This Court must affirm the trial's court judgment unless it is not supported by substantial evidence, it is against the weight of evidence or it erroneously declares or applies the law. *Murphy*, 535 S.W.2d at 32. An appellant has the burden to prove that the trial court erroneously applied the law. *McAllister*, 101 S.W.3d at 290. Conversely, a respondent has no burden to show the trial court's ruling was proper. *Endsley*, 6 S.W.3d at166.

A. IT IS WELL ESTABLISHED THAT THE REQUIREMENT THAT A TENANT, WHO RETAINS POSSESSION OF THE PREMISES, MUST PAY RENT *IN CUSTODIA LEGIS* IN ORDER TO ASSERT A BREACH OF IMPLIED WARRANTY OF HABITABILITY CLAIM DOES NOT RESULT IN AN UNREASONABLE RESTRICTION ON HER CAUSE OF ACTION.

Article I, Section 14 of the Missouri Constitution provides that, "the court of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that rights and justice shall be administered without sale, denial or delay." Mo. Const. Art. I, § 14. The constitutional right to open courts does not entitle an individual access to the courts for all grievances or concerns. *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. 2009). Missouri's Open Courts Doctrine is violated when: (1) a party has a recognized cause of action; (2) the cause of action is being

restricted; and (3) the restriction is arbitrary or unreasonable. *Id*. Kohner does not dispute that the breach of implied warranty of habitability is a recognized cause of action. *See King*, 495 S.W.2d at 75.

The requirement that a tenant who retains possession of the premises must deposit his or her rent *in custodia legis*, does not restrict the tenant's access to the courts. A claim for breach of warranty of habitability affords the tenant all of the remedies available under traditional contract law. *Detling*, 671 S.W.2d at 270. In doing so, a tenant may assert a breach of the warranty as both an affirmative defense to a landlord's rent and possession action and as an affirmative action for damages resulting from their impaired enjoyment of the premises. *Id.* This Court has held that a counterclaim in a rent and possession lawsuit under Chapter 535 is permissive, not compulsory. *Rahman v. Matador Villa Associates*, 821 S.W.2d 102, 103 (Mo. banc 1991). Therefore, a tenant who fails to vacate the premises or deposit his or her rent *in custodia legis*, can institute a separate cause of action against the landlord after vacating the premises and, as a result, is not denied access to the courts. [10] Consequently, requiring a tenant to deposit accruing

[10] As discussed in Section III, of this Brief, a court's sanctioning of the withholding of rents by a tenant in possession of the property, triggers due process protections concerning the denial of a property interest and requires the protection of that interest from wrongful deprivation. It is Respondent's position that the "limiting" of a tenant's right to assert an affirmative defense is outweighed by the necessity to protect that

rent during litigation in order to assert the defense of breach of warranty of habitability is constitutional. *Lang v. Pataki*, 176 Misc.2d 676 (N.Y. Sup. Ct. 1998).

In *Lindsey v. Normet*, the Court rejected the tenants' claim that they "are denied due process of law because the rental payments were not suspended while the alleged wrongdoings of the landlord are litigated" stating that there was no constitutional bar to the state's "insistence that the tenant provide for accruing rent pending judicial settlement of his disputes with the lessor." 405 U.S. at 66. In so holding, the Court recognized that tenants had the availability of other procedures to litigate their claims against the landlord. *Id.* The Court held as constitutional a restriction on a tenant's ability to obtain a continuance longer than two days unless the tenant posted security for all rents that may accrue. *Id.* at 63. Therefore, requiring a tenant to deposit rents *in custodia legis* in order to assert an affirmative defense is constitutional in light of the tenant's ability to bring a separate action for damages claimed as a result of the landlord's alleged breach of warranty.

Furthermore, the requirement that a tenant who retains possession of the premises deposit his or her rent *in custodia legis* is not arbitrary or unreasonable. A tenant is contractually and equitably obligated to pay rent to his or her landlord. *See Cooper v. Ratley*, 916 S.W.2d 868, 868 (Mo. App. S.D. 1996) (The court found that the covenant to pay rent runs with the land.) The warranty does not modify that obligation and, therefore,

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property interest. Likewise, any additional burden that a separate action would impose on the courts does not excuse the due process protections due a landlord.

depositing those rents *in custodia legis*, does not subject the tenant to an additional burden. A tenant simply has to deposit his or her rent *in custodia legis* instead of submitting payment directly to the landlord. If the tenant is successful in asserting its affirmative and/or counterclaim for breach of the implied warranty of habitability, the funds or a portion of the funds will be returned to the tenant. A tenant who does not want to deposit his or her funds *in custodia legis* has the alternative of vacating the premises. *King*, 495 S.W.2d at 77.

Depositing accrued rents *in custodia legis*, is no different than requiring a bond to secure possible damages which may be suffered by an individual when the state is denying them of their property interest. As a result, requiring a tenant to deposit rents is constitutional and does not deprive a litigant access to the courts. *See*, *Lindsey*, 405 U.S. at 77 ("state may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession…"); eg. *Rice*, 560 S.W.2d at 858; *Browne v. Peters*, 33 Conn.Supp. 531, 534, 360 A.2d 131, 132 (Conn. Super. Ct. 1976)("the requirement that the tenant guarantee payment of the rent from the commencement of the action until the conclusion of the appeal falls within those legitimate objectives"). Likewise, courts have held that it is constitutional to deny a litigant the right to assert affirmative defenses in certain proceedings. *Wells Fargo Bank v. Smith*, 392 S.W.3d 446 (Mo banc 2013).

In *King*, the court found that the *in custodia legis* requirement ensures that the landlord will have funds available to him or her to correct the defects in habitability and encourages the landlord to make timely repairs. 495 S.W.2d at 77. Though the large property management companies may have adequate funds to meet its mortgage, bills and other expenses such as for the necessary repairs, small "mom and pop" landlords may not have extra funds readily available. In this scenario, the *in custodia legis* requirement would protect a small landlord from what could be irreparable harm by having funds available where the court saw fit.

Because the *in custodia legis* requirement does not restrict the implied warranty of habitability and is not arbitrary or unreasonable, it cannot be said it violates Missouri's Open Court Doctrine.

B. THE TRIAL COURT DID NOT ERR IN BARRING JOHNSON FROM ASSERTING AN AFFIRMATIVE DEFENSE AND COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY BECAUSE JOHNSON FIRST BREACHED THE LEASE AND WAS NOT ENTITLED TO TRADITIONAL CONTRACT REMEDIES.

Assuming *arguendo*, that Johnson was not required to deposit her rent *in custodia legis* and proved the elements necessary to establish a breach of the implied warranty of habitability, Johnson is not entitled to traditional contract remedies. A lease is both a conveyance and a contract. *King*, 495 S.W.2d at 70. "Proof of a breach of the warranty of

habitability entitles the tenant to pursue traditional contract remedies." *Detling*, 671 S.W.2d at 270. The contracting party who first materially breaches the contract cannot claim its benefit. *Guengerich v. Barker*, 423 S.W.3d 331, 339 (Mo. App. S.D. 2014).

Here, there is no dispute that Kohner and Johnson entered into a valid Lease. Johnson, however, was the first contracting party to breach the Lease. There were two alleged issues with the Premises that could be classified as dangerous or unsanitary. The first occurred on February 10, 2015 when Johnson alleged that mold was growing in the Premises. Tr. 14: 22-3. Kohner sent a maintenance technician to clean the alleged mold area on February 11, 2015. Tr. 14: 22-5. Johnson did not submit an additional maintenance request regarding mold after the area was cleaned. Tr. 15: 5-11. Because Kohner immediately cleaned the alleged mold area, it did not breach the Lease.

On March 1, 2015, Johnson failed to pay her rent for that month. Tr. 11:11-3; Tr. 37: 22-3. The second issue that could be classified as dangerous or unsanitary occurred when a portion of the bathroom ceiling collapsed in the Premises. The partial collapse of the bathroom ceiling did not occur until March 17, 2015. Tr. 15: 12-8. On that date, Johnson's March rent was over a half month late. *See* App. 1. Because Johnson failed to pay her March rent before the partial collapse of the bathroom ceiling, she was the first contracting party to breach the Lease.

Because Johnson was the first contracting party to breach the Lease, she is not entitled to traditional contract remedies.

III. THE COURT OF APPEALS ERRED HOLDING THAT A TENANT MAY ASSERT AN AFFIRMATIVE DEFENSE AND WITHHOLD RENTS DUE THE LANDLORD WHILE REMAINING IN POSSESSION OF THE PREMISES, IN THAT SUCH ACTION VIOLATES RESPONDENT'S RIGHT TO DUE PROCESS PURSUANT TO THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE MISSOURI CONSTITUTION.

STANDARD OF REVIEW

Questions of law, including constitutional challenges to a statute, are reviewed de novo. *Rentschler v. Nixon,* 311 S.W.3d 783, 786 (Mo. banc 2010). Likewise, this Court reviews the lower court's interpretation of the Missouri constitution *de novo. City of Arnold v. Tourkakis,* 249 S.W.3d 202 (Mo. 2008). Therefore, the appropriate standard of review in challenging a decision as unconstitutional is *de novo.*

DISCUSSION

The Fourteenth Amendment of the United States Constitution states:

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

U.S. Const. amend. XIV, §1. Likewise, Missouri's Constitution guarantees "That no person shall be deprived of life, liberty or property without due process of law." Mo.

Const. Art. I, §10. This Court treats "'the state and federal Due Process Clauses as equivalent.'" *State ex rel. Houska v. Dickhaner*, 323 S.W.3d 29, 33 n. 4 (Mo. banc 2010) (*quoting Jamison v. State Division of Family Services*, 218 S.W.3d 399, 405 (Mo. banc 2007)).

Actions by the judicial branch of a state are considered state action governed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 14-20 (1948). "'The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government.'" *Id.* at 15; *quoting*, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930). The Supreme Court, observed:

> … from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the actions that of the judicial branch of the state government."

Id. at 18.

In *Detling*, this Court first recognized a tenant's right to assert a breach of warranty of habitability defense to an action for rent and possession, but did not address whether a tenant, still in possession of the premises, was legally entitle to withhold rent while the litigation was pending.[11] S.W.2d at 270. *King*, on the other hand, advanced the position that a landlord's breach of the duty to provide a habitable premises, justified withholding of rental payments while remaining in possession of the premises. 495 S.W.2d at 75. In doing so, it appears that the *King* court of appeals was mindful of the due process implications when indicating that the tenant would be required to deposit, *in custodia legis*, rents as they came due. The court stated, "[t]he procedure assures the landlord that those rents adjudicated for distribution to him will be available" and allows for the trial court to "make partial distribution to the landlord before final adjudication when to deny it would result in irreparable loss to him." *Id.* at 77. The court of appeals accurately assessed the situation, albeit without specific reference to due process.

In determining whether the state provided the appropriate due process, courts should consider: (i) the private interest affected by the stated action; (ii) the risk of erroneous deprivation; (iii) the government interest, eg. the burden on the government in the event of additional safeguards. *Matthews v. Eldridge*, 424 U.S. 319, 334-35 (1976). The ultimate goal of due process is to safeguard against the improper deprivation of property which is generally achieved through a hearing at a meaningful time and manner.

[11] It was not at issue in that case because the tenants, without objection, deposited the rents, *in custodia legis*, as they accrued.

Chernin v. Welchans, 844 F.2d 322, 325-326 (6th Cir. 1988)*; Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)("[T]he right to a prior hearing … is the only truly effective safeguard against arbitrary deprivation of property."); *Brock v. Roadway Express, Inc.* 481 U.S. 252, 465-65 (1982)("a meaningful opportunity to respond before a temporary deprivation may take effect entails, at a minimum, the right to be informed not only of the nature of the charges but also of the substance of the relevant supporting evidence. If the [affected party] is not provided this information, the procedures … contain an unacceptable risk of erroneous decision"). As such, due process requires that a landlord have the right to notice and opportunity to respond to the deprivation of its property interest, to wit: accrued rents. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 17-20 (1978)*; Fuentes*, 407 U.S. at 82; *see also, Chernin*, 844 F.2d at 325-26. (*quoting Mullane v. Cent Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). "While the length and consequent severity of a deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right to a prior hearing of some kind." *Fuentes*, 407 U.S. at 86.

The United States Supreme Court has consistently held that a landlord's expectation in receiving rents pursuant to a rental agreement is a "property interest" invoking all of the protections of due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Memphis Light, Gas & Water Div.*, 436 U.S. at 17-21; *Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972); see also, *Chernin*, 844 F.2d at 325. In *Chernin*, a landlord challenged Ohio's rent deposit procedure which

allows a tenant to withhold funds during the pendency of litigation where the tenant claims the affirmative defense of breach of warranty of habitability and is not entitled to a hearing prior to the funds being deposited. In its analysis, the Sixth Circuit recognized that a tenant's withholding of rent pursuant to the rent deposit procedure is a deprivation of the landlord's property interest during the pendency of the case. 844 F.2d at 325, *citing, Fuentes,* 407 U.S. at 82; *Sniadach v. Family Finance Corp.,* 395 U.S. 337, 343 (1969). The length of time an owner is deprived of his property, even if temporary, is irrelevant to the requirements of due process. *Id.*; see also, *Connnecticut v. Doehr,* 501 U.S. 1, 15 (1991) ("'The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause.'" *quoting, Fuentes,* 407 U.S. 67 at 86.) The *Chernin* court reached the conclusion that the statute complied with due process because it provided the landlord with: (i) full adjudication of the issue within 60 days; (ii) an immediate hearing to release part or all of the withheld rent during the litigation to avoid irreparable harm; and, (iii) an award of additional damages to the landlord if the rent is wrongfully withheld. 844 F.2d 322 at 327.

In the case at bar, the Court of Appeals held that a tenant should be allowed to withhold rent while still in possession of the premises and should not be obligated to pay the rents, *in custodia legis.* Legally granting a tenant the right to withhold accrued rent while still in possession of the property, without affording a landlord any further protections, violates the landlord's right to due process in failing to safeguard against the

improper deprivation of the landlord's property which is generally achieved through notice and hearing. The judicial sanctioning of a tenant's right to unilaterally withhold rent, empowers the tenant and makes the tenant the sole decision making authority prior to divesting the landlord of his property interest. [12] Under this legal approach a landlord is denied both notice of the withholding and the right to a hearing or to otherwise challenge the withholding, within a reasonable time. In essence, a tenant can claim that it

[12] The illogicalness of allowing a tenant to withhold rents without guarding against the improper denial of the landlord's property interest, is highlighted in the statements made by the Court of Appeals in reaching its decision. The court recognized that "The implied warranty of habitability applies only in extreme situations where living conditions pose risks to the *life, health, or safety* of the tenant, through no fault of their own. Minor housing code violations are insufficient to sustain a claim." CoA Op. 16. Clearly, a tenant, with no legal training would be unable to determine whether, prior to denying a landlord of its property interest, the tenant's complaints rise to the level of a breach of warranty defense or counterclaim. In this action, like so many others, the issues with the apartment did not even rise to the level of a minor housing code violation. However, Johnson allegedly withheld her rent on those grounds. Without a requirement that the tenant deposit accrued rents *in custodia legis*, any tenant could claim it withheld rent because of un-inhabitability with no recourse for the landlord or safeguard the landlord's moneys.

has withheld rents due to a breach of warranty of habitability at any time and in any manner as it deems fit and deny a landlord its property interest without due process.[13]

This shortcoming is highlighted by the facts in the instant case. Prior to withholding her rent on March 1, 2015, Johnson had no outstanding complaints about her apartment. Both of the issues raised by her in the previous months had been immediately addressed. Therefore, at the time Johnson withheld rent on March 1st, Johnson did not have a breach of warranty of habitability defense and made no statements to Kohner that the rent was being withheld on that ground. On March 17th, more than two weeks after failing to pay her rent, a portion of Johnson's bathroom ceiling collapsed. After maintenance fixed the leak causing the collapse, Johnson refused to allow maintenance to enter to fix the drywall. Johnson failed to make her April 1st rent payment and again never claimed that she was withholding her rent due to Kohner's breach of it warranty of habitability. Johnson first asserted her claim of the breach of warranty of habitability as justification for withholding her rent, when she filed her affirmative defense on April ,

[13] The Court of Appeals also misses the mark when it states: "Furthermore, the landlord's interests are protected, in part, because a claim under the implied warranty can be sustained only if the landlord received notice of the condition and has been given a reasonable time to repair said condition." CoA Op. 17. The landlord's interests are only protected if it receives notice and opportunity to be heard prior to being deprived accrued rents. The elements of notice and opportunity to correct the uninhabitable condition in a breach of warranty claim are irrelevant to the requirements of the Due Process Clause.

2015, **more than six weeks after** allegedly withholding her rent on those grounds. Without notice or right of hearing, Kohner was unable to timely challenge the propriety of the rent withholdings on either the lack of an uninhabitable condition on March 1st or failure to allow repairs on April 1st, until trial of the case. The only due process protection against unlawful deprivation afforded Kohner, was the requirement that Johnson deposit her rents *in custodia legis*, prior to maintaining the affirmative defense.[14]

[14] If Kohner ultimately succeeds on its claims it is unlikely it will recover any of those accrued rents. Assume, for the sake of argument that Johnson is still in possession of the property at this time. By the time the appeal is resolved, she would owe roughly one year of back rent. The likelihood of obtaining that amount of money from Johnson who, admittedly a low income tenant (Sub. App. Br. 46), would seem minimal. On the other hand, if Johnson left some time ago, she has no incentive to pay Kohner its accrued rent from almost a year ago. Similarly, in those situations in which the landlord has been granted rent and possession by the trial court, the soon-to-be-evicted-tenant would have little to no incentive to pay back rent. A study sponsored by Yale University analyzing landlord-tenant proceedings in the City of New Haven, Connecticut, found that in approximately 87.7% of all cases brought by landlords for eviction cited non-payment of rent as grounds for eviction. *Eviction Defenses for Poor Tenants: Costly Compassion or Justice Served*, Yale Law & Policy Review, p. 397, Table 7 (1995). In analyzing eviction related losses, the study found that in those cases, approximately 66% of the rent which

Where, as here, there are no due process safeguards in effect to protect the landlord against a wrongful deprivation, such as: advance notice of the conditions which exist; procedures to minimize the length of time the property is withheld and the amount of property withheld through expeditious proceedings; or, special recourse if the rent is improperly withheld[15], the Court must require the tenant to place that rent *in custodia legis*, in order to afford the landlord some minimal due process protection.[16] Therefore, the Lower Court's striking of Johnson's affirmative defenses was lawful in that it was necessary to protect Kohner's due process rights.

Although requiring a tenant to deposit accrued rents, *in custodia legis*, may be unique to the landlord-tenant scenario, such situations have been contemplated the United States Supreme Court and upheld in other jurisdictions to protect the improper

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accrued before and during the litigation until the tenant finally vacated the property, was lost and unrecoverable by the landlord. *Id.* p. 417, Table 21.

[15] Every day that a tenant is in possession of the property and not paying rent, the tenant is not only accruing rents but is denying the landlord of his ability to rent that property to someone else.

[16] Respondent is not conceding that the mere escrowing of funds satisfies Due Process. Respondent is merely arguing that the escrowing of rents as they accrue in order to assert the affirmative defense of breach of warranty of habitability is, at a minimum, required under the Due Process Clause and therefore, the trial court's action of dismissing Appellant's affirmative defenses was no error.

deprivation of a landlord's property. In *Lindsey*, the Supreme Court recognized that the "unique factual and legal characteristics of the landlord-tenant relationship" may justify special treatment from other litigants." 405 U.S. at 72. The Supreme Court opined:

> The tenant is, by definition, in possession of the property of the landlord; unless a judicially supervised mechanism is provided for what would otherwise be swift repossession by the landlord himself, the tenant would be able to deny the landlord the rights of income incident to ownership by refusing to pay rent and by preventing sale or rental to someone else. Many expenses of the landlord continue to accrue whether a tenant pays his rent or not. Speedy adjudication is desirable to prevent subjecting the landlord to underserved economic loss and the tenant to unmerited harassment and dispossession when his lease or rental agreement gives him the right to peaceful and undisturbed possession of the property. Holding over by the tenant beyond the term of his agreement or holding without payment of rent has proved a virulent source of friction and dispute.

Id. at 73. In essence, a tenant who stays in possession of the property while withholding rent is depriving the landlord of two property interests, namely: the interest in the premises as well as the rents associated with that property.

For this reason, many jurisdictions have realized the importance of escrowing accrued rents when a tenant asserts a breach of warranty claim. *See, Javins v. First Nat.'l Realty Corp.*, 428 F.2d 1071, 1082-83 (D.C. Cir. 1970) (requiring a tenant, who is in

possession during the litigation, to pay rent as it comes due into the court registry is an "excellent protective procedure."

Absent a requirement that a tenant escrow the withheld rent while retaining possession of the property, there is no protection that a landlord will recoup those rents, let alone be compensated for any damages he suffers if the tenant wrongfully withheld rent. Moreover, Missouri's statutory scheme does not minimalize the length of time a landlord could be deprived of its property interest.[17] In addition, there are no procedural remedies available to a landlord if it he needs part of the withheld rent in order to avoid irreparable harm. It should not be forgotten that, a tenant, who retains possession of the property, still owes the fair market value of the premises even if there is a breach of the warranty of habitability. The law does not allow that the tenant to live completely rent free and logic would dictate that the premises has value if the tenant is still residing in it.[18] Absent a requirement that the tenant pay withheld rent, *in custodia legis*, there is no protection that the landlord's property interests will recoup the fair market value to which

[17] Missouri Revised Statute § 535.040 simply provides that a rent and possession action must be set on the first available date. There are also no limitations on such matters as to the issuance of continuances or the timing for resolution of the action.

[18] Common law required that a tenant abandon the premises under the theory of constructive discharge because a tenant could not retain the premises rent free. *See, King*, 495 S.W.2d at 77.

it is entitled. *See, Mahdi v. Poetsky Management, Inc.*, 433 A.2d 1085, 1088 (D.C.App. 1981).

> 'An elementary and fundamental requirement of due process …is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'

Id. at 328 (*quoting, Mullane,* 339 U.S. at 314).

Allowing a tenant the right to unilaterally withhold rent and retain that rent for its own purpose magnifies the risk for an improper deprivation of landlord's property interest. *See, Fuentes,* 407 U.S. at 81, 92-93 (the Court emphasized the danger of improper deprivation of property "is especially great when the State seizes goods simply upon application of and for the benefit of a private party."); eg. *Connecticut*, 501 U.S. at 15 (Supreme Court struck down a statute which allowed, in a civil tort action, the prejudgment attachment of real estate without notice or hearing or the posting of a bond to ensure that any damages suffered by the attachment, to violate due process.)

The *IN CUSTODIA LEGIS* Requirement

Does Not Frustrate the Purpose of the Implied Warranty

of Habitability nor Place an Unfair Burden on Low Income Tenants.

Throughout her Brief, Johnson claims that requiring a tenant to deposit accrued rents, *in custodia legis,* frustrates the purpose of the breach of warranty of habitability and creates an undue burden for low-income tenants. *See,* Sub. App. Br., I.C; II.A.i. The

in custodia legis procedure assures that an adequate supply of habitable dwellings will be available. *Id*. If the landlord knows it can recover accrued rents, the procedure encourages the landlord to make the necessary repairs as quickly as possible thereby minimizing the tenant's damages. *Id*.

Johnson contends that requiring a tenant to vacate the premises or deposit rent, *in custodia legis,* creates an undue hardship on low income tenants. Sub. App. Br. 24. The U.S. Supreme Court has specifically rejected this argument stating that: "A requirement that the tenant pay or provide for the payment of rent during the continuance of an action is hardly irrational or oppressive…" *Lindsey*, 405 U.S. at 65; *accord, Lang*, 176 Misc.2d at 685.

In *Mahdi,* the District of Columbia Court of Appeals considered whether poverty could be a defense to a tenant being required to escrow rents while the case is pending. The court rejected the argument stating that it is indisputable that a tenant's right to remain in possession of the landlords property is conditioned on her payment of rent. 433 A.2d at 1088. The court admitted that

> …the amount of rent due may be abated, but no tenant can remain in possession unless he pays the abated rent, inability to pay rent due to poverty or lack of funds has never been, and is not now, a defense to possession action based on nonpayment… To put it in the vernacular, if you cannot pay the rent, you cannot stay on in the landlord's apartment. It is just about as simply as that." *Id.*

The *Mahdi* court went on to say:

> [the escrowing of rent in these cases was necessary]
>
> to preserve some reasonable balance between the rights of landlords and tenants. If no such payments were required, the landlord would be compelled to permit a tenant who does not pay rent to remain on his premises for a substantial period with little or no assurance that any delinquency would be corrected even if he were to prevail on the merits. The payment of funds into the registry restores some measure of balance, for it assures the availability to the landlord whose position is meritorious, at the conclusion of the litigation, of at least some of the rent that was due him.

Id. at 1088. The court recognized that where litigation is allowed to continue without requiring a tenant to deposit the rent as it comes due, the landlord cannot rent the premises to a paying tenant thereby depriving him of the funds that may be necessary to make a mortgage payment, maintain other apartments or meet other expenses. *Id.* at 1089. In concluding, the court acknowledged the substantial affect that this issue has on public interest:

> Any substantial impairment of the landlord's right to a protective order threatens to tilt the balance to such a degree that the already shrinking supply of rental housing in this jurisdiction will contract even further, to the

> detriment of the community at large and to relatively impecunious in particular.

Id. at 1090; eg. *Browne*, 33 Conn.Supp. at 536 (low income status is not a suspect class for due process and does not excuse the posting of a bond even though it imposes a burden).

Appellant and the Court of Appeals claim that by requiring a tenant to escrow rent if it remains in the property, "the trial court effectively creates a special protection for landlords not afforded to litigants involved in other types of contract disputes." Sub. App. Br. 26; CoA. Op. 15. To the contrary, indefinitely allowing a tenant to retain rent while remaining in possession of the leased premises, without any guarantee of payment to the landlord, would afford the tenant all rights while stripping the landlord of its rights. Where else is a party given the legal authority to deprive another of its property without any recourse. Furthermore, in what other scenario is a party required by the court, to continue to provide a benefit to another party, when that other party has stopped performing its part of the bargain.[19] To allow a tenant to, not only remain in the premises

[19] For example, the court would not require one party to an installment contract to continue to provide goods or services when the other party has stopped making payments, until such time in the future that the parties' respective rights can be determined. All benefits are being bestowed on a single party, while all of the losses are suffered by the other.

but retain all rents, confers all of the benefits of the agreement to the tenant while failing to preserve the rights of the landlord.

While the plight of low income tenants may be sympathetic, the Supreme Court stated:

> "We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement… Nor should we forget that the Constitution expressly protects against confiscation of private property or income therefrom."

Lindsey, 405 U.S. at 74.

Briefly, Respondent would like to address this argument in light of Johnson's testimony at trial. Johnson testified that she had her March and April rent readily available for use. Tr. 41: 11-15. Johnson's rent was $585.00 per month. App. 1. According to Johnson's testimony she had $1,170.00 readily available to move to a new apartment or unit. *See* App. 1; Tr. 41: 11-15. Johnson contends that the average two

bedroom apartment rents for $840.00[20] in the St. Louis area; however, her rent with Kohner was only $585.00. Sub. App. Br. 43; App. 1. Johnson also argues that by statute, landlords can charge up to two times the rent as a deposit, yet Johnson's deposit was only $200.00.[21] App. 1. The funds Johnson had readily available were more than enough to cover the alleged average first month's rent in the St. Louis area and a security deposit of

[20] The fair market rent for the St. Louis area is irrelevant. Johnson refused to look for housing throughout the St. Louis area; instead Johnson restricted herself to the Ritenour School District. Tr. 41:16-17. Ritenour School District is only a tiny portion of the St. Louis area. The fair market rent for the entire St. Louis area is irrelevant, because Johnson restricted her housing search to a single school district.

[21] A tenant does not have to provide $2,520.00 to move into a two-bedroom apartment in the St. Louis area. In the present case, Johnson provided $785.00 and moved into a two-bedroom apartment in the St. Louis area. Tr. 11:5; CoA Op. 1. Appellant contends that a tenant cannot move unless she provides $2,520.00. Sub. App. Br. 43-45. Appellant's calculations are based on a monthly rent of $896.00, which Appellant contends is the fair market rent for St. Louis. Sub. App. Br. 44. Appellant also contends that a tenant would have to provide a $1,792.00 deposit. Id. In the present case, Johnson's rent was $585.00 and her security deposit was $200.00. Tr. 11:5; CoA Op. 1. Appellant's contention that it costs $2,520.00 to move into a two-bedroom apartment is false. The facts of the present case show that a tenant can provide $785.00 and move into a two-bedroom St. Louis apartment.

over $300.00. Common sense dictates that if any tenant, including low income tenants[22], is not paying his or her rent, that tenant will have funds readily available to find a new apartment with comparable rent and security requirements. On the other hand, if Johnson wanted to remain in an allegedly "uninhabitable" unit, she could have easily deposited the funds *in custodia legis*.

Because low income tenants can either use unpaid rent money to find a different apartment or easily deposit their rent money *in custodia legis*, it cannot be said that the *in custodia legis* requirement creates an unfair burden on low income tenants.

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[22] Appellant's Brief states that Johnson is poor. Sub. App. Br., p. 46. Missouri Revised Statute §514.040, does not authorize Legal Services of Eastern Missouri ("LSEM") to make a finding of fact for the court. The statute does allow LSEM to make a determination for the purposes of waiving court costs, but not for the purposes of establishing facts pertaining to the case. Pursuant to MO. REV. STAT. §514.040, court costs may be waived without a motion, provided that an organization, like LSEM, makes a determination that the party is unable to pay the costs and a certification is filed with the court. MO. REV. STAT. §514.040. The statute does not authorize an organization, like LSEM, to declare an individual poor and submit it as a fact of the case. Appellant contends that Johnson is poor. Sub. App. Br. 46 fn. 22.

CONCLUSION

Finally, Johnson was the first contracting party to breach the Lease when she failed to pay March 2015 rent. In an attempt to avoid her contractual obligations, Johnson used the partial ceiling collapse as an excuse for not paying rent. The partial ceiling collapse, however, occurred more than a half month after her March 2015 rent was due. Because Johnson's material breach occurred significantly before the partial ceiling collapse, she is not entitled to any traditional contract remedies.

Basically, the tenant, in a rent and possession case, could assert it withheld rents due to uninhabitabilty without any recourse available to the landlord to collect those rents that had accrued during the pendency of the case. At a minimum, courts must require that the tenant escrow rents in order to comply with due process. Without requiring a tenant to place *in custodia legis*, those rents as they accrue, Missouri courts would be ignoring the principle purpose of due process: to safeguard against the improper deprivation of property.

The trial court did not err in barring Johnson from asserting an affirmative defense and counterclaim for breach of the implied warranty of habitability because Johnson failed to vacate the premises or tender her rent in custodia legis prior to asserting the affirmative defense and counterclaim for breach of implied warranty of habitability. Requiring money that money is available to secure damage to a party deprived of its protected interest, has never been considered adding another element to the prima facie case. Therefore, the requirement that a tenant who retains possession of the premises

must deposit her rent in custodia legis as a condition precedent to asserting an affirmative defense and counterclaim for breach of the implied warranty does not create an additional element to the defense of implied warranty of habitability.

Johnson failed to establish a breach of implied warranty of habitability. She failed to establish that the Premises were dangerous or unsanitary. She did not prove that Kohner failed to restore the Premises to habitability. Johnson failed to establish any diminished use of the Premises. Finally, Johnson could not state what monetary damages she actually suffered. Johnson failed to prove the elements necessary for establishing a cause of action for breach of implied warranty of habitability. Therefore, the trial court did not err in barring Johnson's affirmative defense and counterclaim for breach of the implied warranty of habitability.

The trial court did not err in barring Johnson from asserting a counterclaim for breach of implied warranty of habitability due to her failure to tender rent in custodia legis while she was possession of the premises in that such requirement does not violate the open courts provision, Article I, Section 14 of the Missouri Constitution by restricting her ability to bring a cause of action for breach of an implied warranty of habitability. It is well established that the requirement that a tenant, who retains possession of the premises must pay rent in custodia legis in order to assert a breach of implied warranty of habitability claim does not restrict the tenant's access to the courts and it is not arbitrary. The tenant can choose to use the unpaid rent money to find a different apartment or deposit the rent money in custodia legis. This requirement does not frustrate the purpose

of the implied warranty of habitability nor place an unfair burden on low income tenants. Johnson did not vacate the premises and she did not deposit the rent money in custoida legis. Therefore, the trial court did not err in barring her from asserting a counterclaim for breach of implied warranty of habitability.

The court of appeals erred holding that a tenant may assert an affirmative defense and withhold rents due the landlord while remaining in possession of the premises, in that such action violates Respondent's right to due process pursuant to the Fourteenth Amendment of the United States Constitution and Article 1, Section 10 of the Missouri Constitution. The landlord has a property interest that is protected by the United States Constitution and that interest must also be protected by the courts and due process. Legally granting a tenant the right to withhold rent while still in possession of the property, without affording a landlord any further protections, violates the landlord's right to due process. The court of appeals sanctioned Johnson's unilateral deprivation of Kohner's property interest. The court of appeals erred in its reasoning and in its decision. The court of appeals holding should be overruled, because allowing a tenant to assert an affirmative defense and withhold rents due while remaining in possession of the premises is a violation of Respondent's right to due process pursuant to the Fourteenth Amendment.

For the foregoing reasons, Kohner respectfully requests this Court affirm the trial court's judgment and award Kohner its reasonable attorney's fees pursuant to Paragraph 17 of the Lease.

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Missouri Supreme Court Rule 84.06(c), that the foregoing Brief for Respondent contains the information required by Missouri Supreme Court Rule 55.03. This Brief was prepared in Times New Roman 14-point proportional spaced font using Microsoft Word 2007 software, which indicated that the Brief contains 11,178 words, *including* the cover, Certificate of Service, this Certificate of Compliance, signature block, Table of Contents, and Table of Authorities, which are permitted to be excluded from the Count under Missouri Supreme Court Rule 84.06(b). This Brief complies with the limitation requirements contained Missouri Supreme Court Rule 84.06(d).

Respectfully Submitted,
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Substitute Brief of Respondent was filed electronically through the Missouri Courts eFiling System and was served on Lee R. Camp, Attorney for Appellant, via the Court's electronic filing system on December 19, 2016 and by U.S. Mail:

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