SC 95944

IN THE MISSOURI SUPREME COURT

KOHNER PROPERTIES, INC.,
Plaintiff/Respondent,

v.

LATASHA JOHNSON,
Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County
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 APPELLANT

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Oral Argument Requested

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REFERENCE NOTE

All statutory references are to the Revised Statutes of Missouri 2014. References to the Legal File are denoted "L.F." and 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 Appellant's Appendix are denoted as "App." References to the Missouri Court of Appeals, Eastern District, Opinion in this case are referred to as "CoA Op."

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JURISDICTIONAL STATEMENT

This appeal is taken from the trial court's Judgment, entered on May 13, 2015, in favor of Plaintiff, Kohner Properties, Inc. ("Kohner Properties" or "Kohner"), in a rent and possession lawsuit for alleged unpaid rent. J. 1-3.

Under Mo. R. Civ. P. 81.05(a)(1), the trial court's Judgment became final on June 13, 2015, thirty days after its entry. Defendant's notice of appeal and required supporting documents were timely filed not later than ten days after the Judgment became final, under Mo. R. Civ. P. 81.04(a), on June 22, 2015. L.F.50.

On September 13, 2016, the Missouri Court of Appeals, Eastern District, in an opinion which all three of the participating judges concurred, reversed the trial court's judgment, and remanded the case to the trial court. However, the appellate court, on its own Motion pursuant to Mo. R. Civ. P. 83.02, transferred this case to the Missouri Supreme Court based on the case's general interest.

Therefore, this Court has jurisdiction pursuant to Mo. R. Civ. P. 83.02 and Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Latasha Johnson rented the premises at 3543 De Hart Place, Apartment 1, St. Louis County, Missouri from Kohner Properties for $585 per month pursuant to a one-year written lease. Tr. 9:22-23; Tr. 10:10-11. Ms. Johnson lived in the home with her young daughter who has cerebral palsy. Tr. 42:21-22.

Ms. Johnson began to notice problems with the home's only bathroom immediately upon moving into her home in October 2014. Tr. 31:4-5. She wrote on her move-in sheet that it had missing shower tiles and there were cracks on the bathroom floor. Tr. 32:1-3. Ms. Johnson asked a property manager about the floor and was told there was "nothing [they] could do". Tr. 32:1-13. According to this property manager, "[t]he property was built in the 50's" and "[t]iles are going to start popping." Tr. 26:20-21.

A few weeks after Ms. Johnson and her daughter moved into the home, a leak appeared above the shower. Tr. 33:1-4. The leak started as a drip but developed into a stream, and mold began to grow on the ceiling. Tr. 33: 5-17. Ms. Johnson made the first of many service requests to the property manager on November 26. Tr. 12:15-21. Kohner's request form said maintenance replaced the two missing tiles on the shower wall. Tr. 13:1-2.

On December 26, only one month later, Ms. Johnson contacted the property manager because the stove would not light. Tr. 13:10. Kohner's request form of the same

date said maintenance turned on the gas to the stove and, again, put tiles back on the bathroom wall. Tr. 13:13-14.

Ms. Johnson made another request regarding electrical problems in a bedroom. Tr. 13:19. Kohner's request form said that maintenance replaced the light switch and installed blinds two days after Ms. Johnson submitted her request. Tr. 13:21-23.

On February 10, 2015, Ms. Johnson contacted Kohner again about the mold on the ceiling and the unstable bathroom floor containing cracks. Tr. 14:22-23. Kohner's request form indicated that maintenance employees cleaned the mold and called a supervisor to look at the floor. Tr. 14:25; Tr. 15:1-3.

On March 17, 2015, five months after Ms. Johnson first noted concerns about the bathroom's conditions, the ceiling above the shower collapsed. Tr. 37:19-20; App. Exh. B. Ms. Johnson placed an emergency service request for the collapsed ceiling at 2:00 a.m. on March 17. Tr. 34:1-2. A Kohner maintenance employee arrived hours later and determined that the bathtub in the apartment above Ms. Johnson's bathroom was leaking. Tr. 15:22-23. After allegedly repairing the tub spout in the bathroom upstairs, Kohner taped a large black plastic bag over the hole in Ms. Johnson's bathroom ceiling to catch the water. Tr. 17:3-6; Tr. 37:9-10; App. Exh. D. Ms. Johnson repeatedly asked Kohner to repair the leak and remove the bag from the ceiling, but Kohner failed to do so. Tr. 20:17-20; Tr. 38:1-2; Tr. 53:2-5. Eventually, the bag filled with water and the tape began to pull away from the ceiling. Tr. 45:9-10; App. Exh. D. Water began leaking from the plastic

bag into Ms. Johnson's bathtub below. Tr. 45:8-10. Ms. Johnson reported this problem to Kohner. Tr. 32:24-25. However, Kohner never fixed the water leak or hole in the ceiling. Tr. 53:2-3. As a result of the leaking water, Ms. Johnson's daughter was not able to use the bathtub to take a bath. Tr. 43:7-8.

Kohner used a "standard lease" with Ms. Johnson, which they use with all tenants. Tr. 27:2-13; Tr. 30:7-8. App. Resp. Exh. 1. The lease contained an access clause giving Kohner the right to enter the property to make repairs without Ms. Johnson's permission. Tr. 27:2-13. App. Resp. Exh. 1 ¶ 9. Kohner's property manager maintained at trial that Ms. Johnson was not available or would not let maintenance technicians into her home when they arrived to fix the ceiling collapse. Tr. 16:8-9. The property manager said there was no answer at the door. Tr. 27:22-25. Ms. Johnson, on the other hand, testified that she did allow the maintenance workers into her home. Tr. 38:12-16. Charlie, Kohner's maintenance technician, came to address the ceiling and told Ms. Johnson he would come back to fix the remaining problems. Tr. 38:17-19. He "left his ladder and some of his other equipment in there at [her] apartment." Tr. 38:19-20. Charlie came back to pick up his equipment, but Kohner employees did not return to the bathroom to repair the hole beyond the initial step of taping the bag to the ceiling. Tr. 38:20-23. The plastic bag remained over the hole on the trial date, approximately one month after the ceiling collapsed. Tr. 38:9-11.

From October 2014 through the duration of Ms. Johnson's tenancy, the conditions

in the home's only bathroom worsened and left her daughter sicker. Tr. 42:21-22. She was not able to take a bath like "normal kids." Tr. 43:35. It caused her daughter's eyes to droop and to hurt. Tr. 43:3-8. Both Ms. Johnson and her daughter inhaled the mold which formed on the bathroom ceiling. Tr. 43:3-8.

Because of the bad conditions, Ms. Johnson and her daughter had to stay elsewhere, including at a hotel at her own expense. Tr. 38:5-8. She even attempted to find a new home. Tr. 41:16-25. Ms. Johnson was unable to move because she could not afford it, especially to another home in her daughter's school district. Tr. 41:23-25; Tr. 42:1-2. Consequently, she remained in possession of the home in spite of the bathroom's dangerous and unsanitary conditions. Tr. 42:3-8. Frustrated by the situation, Ms. Johnson withheld her March 2015 rent. Tr. 37:22-25; Tr. 38:1-2.

On March 20, 2015, Kohner filed a lawsuit against Ms. Johnson seeking unpaid rent and possession of the premises. L.F. 8. On April 14, the summons date, Kohner set the case for trial on April 21, 2015. L.F. 2. Ms. Johnson filed an answer, affirmative defenses, including a breach of the implied warrant of habitability, and a two-count counterclaim for violation of the Missouri Merchandising Practices Act (MMPA) and a common law breach of lease. L.F. 11-13; L.F. 9; L.F. 13-19. The parties tried the case on April 21, 2015 before Judge Judy Draper in Division 41 of St. Louis County Circuit Court (21st Judicial Circuit). Tr. 2:1-4; L.F. 2.

Prior to opening arguments, Kohner moved to bar Ms. Johnson's affirmative

defense of a breach of the implied warranty of habitability and her breach of lease counterclaim. Tr. 2:12-23. Kohner argued Ms. Johnson could not raise an affirmative defense and counterclaim because she failed to escrow money. Tr. 2:18-22.

The court overruled Kohner's motion and the case proceeded to trial. Tr. 7:18-21; L.F. 46. Kohner's property manager, Rebecca Smith, and Ms. Johnson each testified during the trial. Tr. 9:6-7; Tr. 30:18-19. Ms. Johnson also offered pictures of the conditions of her home into evidence. Tr. 33:22; Tr. 64:1-18. App. Exh. A-D. The court took the case under submission and, on May 13, 2015, entered its Order and Judgment against Ms. Johnson for $2,104.36 plus court costs and possession of the premises. L.F. 46; Order and Judgment (hereafter "J.") 1-3. The Court found that there was a hole in the bathroom ceiling that Kohner had not repaired and water continued to leak into the bath tub below. The court found that, because of this damage, Ms. Johnson rented a hotel room at her own expense. J. 2; L.F. 47. But, the court also held that "[Ms. Johnson] is barred from asserting the affirmative defense or counterclaim of implied warranty of habitability as [Ms. Johnson] failed to either vacate the premises or tender her rent to the court *in custodia legis* as required by *King v. Moorehead*[.]" J. 2; L.F. 47. Ms. Johnson filed her notice of appeal on June 22, 2015. L.F. 50.

A three-judge panel of the Missouri Court of Appeals, Eastern District, heard oral arguments on August 17, 2016, and, on September 13, issued its opinion in cause number ED103133. In its opinion, the Missouri Court of Appeals, Eastern District rejected the

trial court's imposition of an *in custodia legis* escrow requirement as a bar to asserting a counterclaim and defense for the implied warranty of habitability. CoA Op. 15. The Court of Appeals remanded "the cause to the trial court for consideration of Appellant's affirmative defense and counterclaims based on the implied warranty of habitability." CoA Op. 19. However, based on the general interest and importance of the issue, the court transferred the case to the Missouri Supreme Court pursuant to Rule 83.02. CoA Op. 19. This appeal follows.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN BARRING MS. JOHNSON FROM ASSERTING HER AFFIRMATIVE DEFENSE AND COUNTERCLAIM THAT KOHNER PROPERTIES, INC. ("KOHNER") BREACHED ITS IMPLIED WARRANTY OF HABITABILITY ON THE GROUNDS THAT MS. JOHNSON HAD NOT VACATED THE PREMISES OR TENDERED HER RENT TO THE COURT *IN CUSTODIA LEGIS* BECAUSE MS. JOHNSON WAS NOT REQUIRED TO PROVE THAT SHE HAD VACATED THE PREMISES OR PAID THE RENT TO THE COURT *IN CUSTODIA LEGIS* IN THAT THESE ARE NOT LEGAL ELEMENTS TO HER AFFIRMATIVE DEFENSE OR COUNTERCLAIM THAT KOHNER BREACHED ITS IMPLIED WARRANTY OF HABITABILITY AND MS. JOHNSON PROVED ALL ELEMENTS OF THE AFFIRMATIVE DEFENSE AND COUNTERCLAIM.

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

State ex rel. Baker v. Goodman, 274 S.W.2d 293 (Mo. banc 1954)

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

Moser v. Cline, 214 S.W.3d 390 (Mo App. W.D. 2007)

II. THE TRIAL COURT ERRED IN BARRING MS. JOHNSON FROM ASSERTING A COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY ON THE GROUNDS THAT MS. JOHNSON HAD NOT VACATED THE PREMISES OR TENDERED HER RENT TO THE COURT *IN CUSTODIA LEGIS* BECAUSE SUCH A REQUIREMENT AND CONDITION PRECEDENT TO BRINGING HER COUNTERCLAIM VIOLATES THE OPEN COURTS PROVISION, ARTICLE I, SECTION 14 OF THE MISOURI CONSTITUTION, IN THAT IT IS AN ARBITRARY AND/OR UNREASONABLE RESTRICTION ON HER RECOGNIZED CAUSE OF ACTION FOR BREACH OF IMPLIED WARRANTY OF HABITABILITY.

Mo. Const. art. I, sec. 14.

Dieser v. St. Anthony's Med. Ctr., No. SC95022, 2016 Mo. LEXIS 327 (Mo. Oct. 4, 2016)

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

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

ARGUMENT

I. THE TRIAL COURT ERRED IN BARRING MS. JOHNSON FROM ASSERTING HER AFFIRMATIVE DEFENSE AND COUNTERCLAIM THAT KOHNER PROPERTIES, INC. ("KOHNER") BREACHED ITS IMPLIED WARRANTY OF HABITABILITY ON THE GROUNDS THAT MS. JOHNSON HAD NOT VACATED THE PREMISES OR TENDERED HER RENT TO THE COURT *IN CUSTODIA LEGIS* BECAUSE MS. JOHNSON WAS NOT REQUIRED TO PROVE THAT SHE HAD VACATED THE PREMISES OR PAID THE RENT TO THE COURT *IN CUSTODIA LEGIS* IN THAT THESE ARE NOT LEGAL ELEMENTS TO HER AFFIRMATIVE DEFENSE OR COUNTERCLAIM THAT KOHNER BREACHED ITS IMPLIED WARRANTY OF HABITABILITY AND MS. JOHNSON PROVED ALL ELEMENTS OF THE AFFIRMATIVE DEFENSE AND COUNTERCLAIM.

STANDARD OF REVIEW

This is an appeal from a bench-tried case in St. Louis County Circuit Court. *Kavanaugh v. Ealy*, 364 S.W.3d 759, 761 (Mo. App. E.D. 2012), provides the standard of review on appeal for this action. "In a court-tried case, appellate review is governed by Rule 84.13(d) and the principles articulated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)." *Id.* at 759 (citing *Wedgewood Square Center Ltd. P'ship. v. Stewart Title Guar. Co.*, 347 S.W.3d 582, 585 (Mo. App. S.D. 2011)). A reviewing court will

affirm the trial court's decision unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

A. THERE ARE ONLY FOUR LEGAL ELEMENTS TO MS. JOHNSON'S AFFIRMATIVE DEFENSE AND COUNTERCLAIM THAT KOHNER BREACHED ITS IMPLIED WARRANTY OF HABITABILITY; AND THESE ELEMENTS DO NOT INCLUDE VACATING THE PREMISES OR PAYMENT OF RENT TO THE COURT *IN CUSTODIA LEGIS*.

In *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. W.D. 1973), the appellate court recognized a landlord's duty to deliver a leased home to a tenant and to maintain the home in a fit and habitable condition. The court held that an implied warranty of habitability existed in residential rental leases and that a landlord has a duty to "…provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code." *King*, 495 S.W.2d at 75. "Breach of this duty justifies retention of possession by the tenant and withholding of rent until habitability has been restored." *Id.* at 77. The court held that this warranty applies throughout the length of a tenancy and protects

tenants living in uninhabitable conditions a landlord fails to repair.[1] *Id.*

[1] Under traditional property law, a lessee's covenant to pay rent had been viewed as independent of any covenants on the part of the landlord. *King v. Moorehead*, 495 S.W.2d 65, 69 (Mo. App. W.D. 1973). Courts initially viewed a lease as a conveyance of an estate in the land and equated it to a sale of the premises for an agreed upon period of time. *Id.* at 68. The tenant was then subject to the harsh rule of "*caveat emptor* – let the buyer beware." *Id*.

In *Dolph v. Barry*, 165 Mo. App. 659, 668 (Mo. App. E.D. 1912), the court held that a physical deprivation is not necessary to determine that a landlord intruded into a tenant's possession. Constructive eviction allowed a tenant to abandon a lease and the obligations of rent because the landlord's conduct "operated to impair the consideration for the lease." *Dolph*, 165 Mo. App. at 668. The *King* court established that modern rental leases between a landlord and a tenant are more than a conveyance of property, but also a contract subject to an implied warranty that the residence be habitable. *King*, 495 S.W.2d at 68. In doing so, the *King* court recognized that constructive eviction was too harsh a remedy on individuals who lacked the financial means to immediately move from a home, and instead created the implied warranty of habitability as a remedy that allowed a tenant to remain in possession. *Id*. at 76. The Missouri Supreme Court recognized and endorsed this evolution of the law in *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. banc 1984).

In *King*, the appellate court set out the following factors to determine the materiality of the landlord's breach of this implied warranty: "the nature of the deficiency or defect, its effect on the life, health, or safety of the tenant, length of time it has persisted and the age of the structure." *King*, 495 S.W.2d at 76. The court further held that "[m]inor housing code violations which do not affect habitability will be considered *de minimis*. Also, the violation must affect the tenant's dwelling unit or the common areas which he uses." *Id*.

In *Detling v. Edelbrock*, 671 S.W.2d 265, 268-270 (Mo. banc 1984), this Court issued a controlling opinion on the breach of implied warranty of habitability and analyzed the development of a residential rental lease from what was once considered a mere conveyance of property under the doctrine of caveat emptor to a contract with attendant rights. The Court also recognized the enactment of local housing codes and examined the existing remedy for a tenant living in a dwelling that violated the Housing Code Enforcement Act, §§ 441.500 et seq., RSMo 2014. At the time of the Court's decision, the Housing Code Enforcement Act allowed tenants to petition for the appointment of a receiver to collect rent and pay for the abatement of housing code violations.[2] Significantly, the *Detling* court specifically found that the Act was not an

[2] In 1998, the Missouri General Assembly abrogated the Chapter 441, RSMo private right of action for a tenant occupying a non-compliant dwelling to enforce the Act against her landlord.

exclusive remedy for a tenant living in uninhabitable housing. 671 S.W.2d at 272.[3] Instead, the Court held that a tenant could use a breach of the warranty of habitability as a defense and affirmative suit for damages. *Id*. at 270. The Court then outlined the following specific elements necessary to plead either an affirmative defense or a counterclaim[4] that the landlord breached the implied warranty of habitability:

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[3] Courts and commentators have found that the legislative policy of promoting safe and habitable housing has been an ineffective means of advancing policy. *DeStefano v. Apts. Downtown, Inc.*, 879 N.W.2d 155 (Iowa 2016); Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. Ark. Little Rock L. Rev. 793 (2013). Code enforcement has often been lax, if not inconsistent, and the sanctions for violations characterized as comparatively mild. *DeStefano*, 879 N.W.2d at 175 n.11. "Common law courts adopted the implied warrant[y] of habitability to advance the policies behind housing codes by offering a potentially more effective remedy." *Id.*

[4] In Missouri, a counterclaim "has the nature and effect of an independent action by the defendant against the plaintiff." *ITT Commercial Fin. Corp. v. Mid-am. Marine Supply Corp.*, 854 S.W.2d 371, 389 (Mo. 1993) (quoting *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 129 (Mo. banc 1985)). In associate circuit court, an affirmative defense, counterclaim, and/or cross claim must be filed in writing no later than the date and time listed on the summons unless granted leave by the court. § 517.031, RSMo 2014.

> (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. at 270.

Upon proving these elements and pleading the materiality of the breach, a tenant is then entitled to breach of contract remedies. *Id*. At no time since *Detling* has the Missouri Supreme Court, or any other Missouri Court of Appeals, adopted or discussed any additional requirements to plead the implied warranty of habitability.

In the present case, the trial court's reliance on *King* for the requirement that Ms. Johnson must either escrow her rent or vacate the premises in order to assert a defense or counterclaim of breach of the implied warranty of habitability was misplaced for two reasons: (1) *Detling* is the controlling law in Missouri and (2) any suggestion in *King* that tenants must either vacate the premises or place their rental payments into escrow was

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Counterclaims are permissive, meaning the defendant has an option whether to assert a counterclaim in the present suit or to wait to raise the issue in a later lawsuit. *Becker Glove Int'l, Inc. v. Dubinsky*, 41 S.W.3d 885, 888 (Mo. 2001). If a defendant wishes to raise a counterclaim, she must do so in writing. *Id*. No other requirement exists where a party seeks to raise such a claim in a pending cause of action.

dicta.

First, *Detling* superseded *King*. While *King* was the seminal Missouri case adopting the implied warranty of habitability, it is no longer the controlling Missouri law. The *Detling* Court thoroughly analyzed the implied warranty and created the four specific elements of such a cause of action. Nowhere in the *Detling* opinion is there any requirement that a tenant must vacate the premises or escrow their rent *in custodia legis* to assert a claim or affirmative defense that the landlord has breach the implied warranty of habitability. As the Missouri Court of Appeals correctly stated in the present case:

> While *Detling* adopted the implied warranty of habitability established by *King* and quoted extensively from the case, *Detling* did not adopt the *King* *in custodia legis* requirement via citation, quotation or rationale. Instead, the *King* requirement is conspicuously absent from the opinion, including the Court's holding as to the claim's essential elements.

CoA Op. 12.

Second, as the Missouri Court of Appeals stated in its opinion below, "[a] careful review of *King* demonstrates its pronouncement that a tenant asserting a claim of breach of the implied warranty of habitability, who retains possession of the premises, is required to deposit his rent with the court pending litigation is nonbinding dicta" CoA Op. 11.

In *King*, the landlord sued the tenant for rent and possession. 495 S.W. 2d at 67.

After losing in the magistrate court, the tenant appealed to the circuit court. *Id*. By then, possession was not at issue because the tenant had found other housing and vacated the premises. *Id*. However, before moving, the tenant withheld two month's rent because the landlord failed to abate the housing code violations. *Id*. On appeal, the tenant raised a defense and counterclaim that the landlord breached the implied warranty of habitability. *Id*. at 68. She claimed a set-off against the rent for her damages. *Id*. at 76. She also raised an affirmative defense that the lease was illegal and void because it violated the Kansas City, Missouri Housing Code. *Id*. at 67.

In *King*, the circuit court ruled that neither defense stated a legal defense to the landlord's rent claim and struck both affirmative defenses. *Id*. at 68. The appellate court then reversed and remanded the case, holding that a residential lease "gives rise to a contractual relationship between the landlord and tenant from which the law implies a warranty of habitability and fitness by the landlord." *Id*. at 75. The court found the tenant sufficiently pled "a residential lease, the warranty of habitability implied from that contractual relationship, substantial violations of the municipal housing code materially affecting her life, health, and safety in breach of the implied warranty, reasonable notice of the defects to the landlord, and [the] refusal of the landlord to restore the premises to habitability." *Id*. at 76. These are the same elements pled and proven by Ms. Johnson. *See supra* pp. 21-25, Answer and Counterclaim, L.F. 9-19.

The *King* court went on to discuss the rights of a tenant remaining in possession

to bring a claim for breach of the implied warranty of habitability. The court explained that a "modern lease is a bilateral contract so that the tenant's obligation for rent is dependent upon the landlord's performance of his responsibilities, among them his implied warranty of habitability. Breach of this duty justifies retention of possession by the tenant **and withholding of rent** until habitability has been restored." *Id*. at 77. (emphasis added). The court also said that a tenant who retains possession "shall be required to deposit rent as it becomes due *in custodia legis* pending the litigation." *Id*. The tenant in *King* was not in possession and was not seeking to have habitability restored because she had already vacated the premises. *Id*. at 67-8. As a result, this statement by the court was not necessary to the court's holding and was dicta.

This Court discussed the importance of distinguishing dicta from a court's holding in *State ex rel. Baker v. Goodman*, 274 S.W.2d 293, 297 (Mo. banc 1954) (emphasis added):

> There is no doctrine better settled than that **the language of judicial decisions must be construed with reference to the facts and issues of the particular case**, and that the authority of the decisions as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision.

In the present case, because it relied on dicta instead of the holding of the case, the trial court misplaced its reliance on *King* as precedent for the proposition that Ms.

Johnson must escrow her rent with the court in order to raise the breach of the implied warranty as an affirmative defense or counterclaim. *See* CoA Op. 18-19.

Only two other Missouri cases discuss a requirement that tenants asserting an implied warranty of habitability defense or a counterclaim deposit money or escrow it into the court: *Wulff v. Washington*, 631 S.W.2d 109 (Mo. App. W.D. 1982) and *Tower Management, Inc. v. Henry*, 687 S.W.2d 564 (Mo. App. W.D. 1984). Neither case establishes a requirement that a tenant who remains in possession of a home is obligated to escrow her rent in order to assert the defense or claim. Additionally, neither case stands for the proposition that the requirement applies throughout Missouri.

The tenant in *Wulff* vacated the home prior to the landlord filing the rent and possession lawsuit and then asserted a defense of a breach of the implied warranty of habitability. 631 S.W.2d at 109. The *Wulff* court said it did not "need to deal with the mechanics" of asserting a defense for a tenant remaining in possession and expressly acknowledged that its consideration would be dicta because it was not before the court. *Id*. at 110.

In *Tower*, the tenants never questioned the trial court's ruling that they were required to deposit rent *in custodia legis* as it became due. Instead, the tenants argued that their cash appeal bond satisfied the requirement to appeal to circuit court in a trial *de novo*. *Tower*, 687 S.W.2d at 566. Neither the tenants nor the court addressed the propriety of the *in custodia legis* requirement, so the case does not have any precedential value

with regard to that proposition.

Other Missouri courts have followed *Detling*'s pronouncement on the elements of a breach of implied warranty of habitability claim or defense. In *Moser* v. *Cline*, 214 S.W.3d 390, 392 (Mo. App. W.D. 2007), the tenants raised the landlord's breach of implied warranty as a defense and counterclaim to the landlord's two-count petition for rent and possession and unlawful detainer. Although the tenants remained in possession and had not escrowed rent with the trial court, the *Moser* court, citing *Detling*, held that the tenant's breach of the implied warranty of habitability claim "was properly brought as a defense to the landlord's rent and possession action and as the basis for an affirmative suit for damages" and that "[t]he trial court had not erred in allowing the claim." *Moser*, 214 S.W.3d at 394.[5]

In *Kolb v. DeVille I Props., LLC*, 326 S.W.3d 896 (Mo. App. W.D. 2010), the appellate court reviewed a breach claim for a bedbug-infested home. The court found that "[t]o **succeed on a claim** for the breach of the implied warranty of habitability, the tenant must prove that the condition of the premises was of such a nature as to render the

[5] The court ultimately reversed the trial court's award of damages to the tenant for breach of the implied warranty of habitability after finding that the tenant had not proven the fourth element of the breach of implied warranty of habitability claim – namely that the landlord failed to restore the premises to habitability. *Moser v. Cline*, 214 S.W.3d 390, 395 (Mo. App. W.D. 2007).

premises 'unsafe or unsanitary.'" *Kolb*, 326 S.W.3d at 901 (emphasis added). The court later stated, "[t]o **prevail on a claim** for breach of the implied warranty of habitability" the tenants must prove the same four factors noted by the court in *Detling*. *Id*. (emphasis added).

Similar to the court in *Kolb*, the appellate court here correctly held that "**to successfully maintain a cause of action** for breach of the implied warranty of habitability" a tenant must prove only the four *Detling* elements. CoA Op. 18-19. (emphasis added). The court explicitly struck the trial court's bar of the claim for breach of the warranty stating, "we hold a tenant's submission of the entire contracted-for rent to the court *in custodia legis* is not an automatic prerequisite to a tenant raising the landlord's breach of the warranty as a defense or counterclaim in a rent and possession suit against her." CoA Op. 19.

B. MS. JOHNSON PROVED ALL THE ELEMENTS OF HER AFFIRMATIVE DEFENSE AND COUNTERCLAIM THAT KOHNER BREACHED ITS IMPLIED WARRANTY OF HABITABILITY.

In the present case, Ms. Johnson met her burden of proving the four elements set forth in *Detling* to assert her affirmative defense and counterclaim that Kohner breached its implied warranty of habitability.

First, there is no factual dispute over whether Kohner entered into a residential lease with Ms. Johnson. Tr. 9:22-23; Tr.29: 3-8; Tr. 31:2-3.

Second, the evidence demonstrates that a dangerous and unsanitary condition developed on the premises affecting the life, health, and safety of Ms. Johnson and her young daughter. J. 1-2.

The trial court found "credible evidence" that the bathroom ceiling in Ms. Johnson's home "collapsed as result of a water leak in the above rental unit." J. 1; L.F. 46. This left a hole in the ceiling and a leak which Kohner attempted to repair by covering the hole with a plastic trash bag taped to the ceiling. J. 2; L.F. 47; Tr. 38:9-10; Tr. 17:6; App. Exh. D. However, the leak was not repaired, and the trash bag began to bulge as "water continued to drip from the hole/plastic covering into the bath tub below." J. 2; L.F. 47. The drip then developed into a stream and mold began to grow on the ceiling. Tr. 33:5-17.

During the trial, Ms. Johnson testified that, as the bag taped to the ceiling over the bathtub began to fill with water, the tape started to peel away, putting both her and her daughter at risk of it falling on them at any time. Tr. 45:8-10. The dangerous and unsanitary conditions forced Ms. Johnson and her daughter to make the unenviable choice between risking their health and safety to use the bathroom and not using the only bathroom in their home at all. Tr. 38:3-8. Ms. Johnson's young daughter has cerebral palsy[6] and was not able to take baths in the home. Tr. 43:2-8. Both Ms. Johnson and her

[6] "Cerebral palsy refers to a group of neurological disorders that appear in infancy or

daughter had to inhale mold. Tr. 43:3-8. The evidence showed, and the trial court found, Ms. Johnson and her daughter had to leave and they stayed elsewhere on multiple occasions. Tr. 38:5-8; Tr.42:5-6. "As a result of the damage… [Ms. Johnson] rented a hotel room at her own expense to use the shower." J. 2.; L.F. 46.

As to the third element, Ms. Johnson indisputably provided reasonable notice of the leak to Kohner. She first reported the leak on November 26, 2014 – almost immediately upon moving in and approximately four months before Kohner filed its rent and possession action. Tr. 12:15-21; L.F. 8. Ms. Johnson contacted Kohner again about the mold on the ceiling and the bathroom floor, which was unstable because of cracks in

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early childhood and permanently affect body movement and muscle coordination. Cerebral palsy (CP) is caused by damage to or abnormalities inside the developing brain that disrupt the brain's ability to control movement and maintain posture and balance. The term *cerebral* refers to the brain; *palsy* refers to the loss or impairment of motor function." 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 October 23, 2016.

the floor tiles. Tr. 14:22-23. When the bathroom ceiling collapsed on March 17, Ms. Johnson placed an emergency service request to Kohner at 2:00 a.m. Tr. 34:1-2. Kohner responded by covering the hole in the ceiling with a plastic bag, which proves it had notice of the problem no matter how inadequate its response may have been. Tr. 17:3-6; Tr. 37:9-10; Tr. 38:9-11. App. Exh. D. When this bag filled with water and began leaking again, Ms. Johnson again reported this problem to Kohner. Tr. 38:9-11.

Ms. Johnson also proved the fourth element of her claim and defense that Kohner never repaired the leak or the hole in the ceiling and never restored the premises to habitability.

After Ms. Johnson made the emergency call to Kohner about the ceiling collapse on March 17, 2015, and Kohner responded by taping a plastic bag over the ceiling hole, Kohner took no further action even after the bag began leaking water. Tr. 34:1-2; Tr. 17: 3-6; Tr. 45:8-10; Tr. 53:2-3. Indeed, the trial court's order acknowledged the leaky bag remained over the ceiling hole on the date the case went to trial. Tr. 38:9-11; J. 2.

While the parties offered conflicting testimony at trial as to whether Ms. Johnson allowed Kohner access to the premises to repair the ceiling and broken floor tiles, it is undisputed that under the terms of the lease, Kohner had the right to enter the premises, without her permission, to make those repairs.[7] Tr. 27:2-13. It is also undisputed that Kohner had sufficient access to put the plastic bag over the hole – a failed Band-Aid

[7] Plaintiff's Exh. 1, Rental Lease, ¶ 9, Tr. 30: 7-8.

approach that was temporary at best. It strains credulity to believe Ms. Johnson did not allow Kohner's maintenance employees access to her home when this bag began to leak water, but this fact is irrelevant in any case, given Kohner's contractual right to enter the unit at any time.

Since Ms. Johnson met her burden of proof on each element of her affirmative defense and counterclaim against Kohner for breach of implied warranty of habitability, the trial court erred in barring her claim for failure to vacate the premises or pay rent *in custodia legis*.

C. REQUIRING A TENANT WHO REMAINS IN POSSESSION TO ESCROW RENTAL PAYMENTS BEFORE ASSERTING A DEFENSE OR RAISING A CLAIM OF BREACH BY HER LANDLORD FRUSTRATES THE PURPOSE OF THE IMPLIED WARRANTY OF HABITABILITY.

Detling does not require tenants in possession to escrow or deposit their rent *in custodia legis* in order to raise the landlord's breach of implied warranty of habitability as an affirmative defense or counterclaim and such a requirement should not be adopted by this Court. As the appellate court correctly stated below, "[t]o automatically require every tenant to escrow her entire withheld rent payments dilutes the very remedy the implied warranty establishes." CoA Op. 15.

In *King*, *Detling*, and the appellate court's opinion in the present case, the courts all recognized that the implied warranty of habitability was established in response to

inequitable bargaining power between landlords and tenants, and to ensure housing was fit for habitability rather than dangerous and unsanitary. *King*, 495 S.W.2d at 71; *Detling*, 671 S.W.2d at 269; CoA Op. 14. In the present case, the Court of Appeals noted, "the warranty was intended to provide a remedy to low-income households faced with limited housing options by allowing the tenant to retain possession and withhold rent until habitability was restored." CoA Op. 14. (citing *King*, 495 S.W.2d at 77.)

By requiring a tenant to place her money into escrow, the trial court effectively creates a special protection for landlords not afforded to litigants involved in other types of contract disputes. Appellant is aware of no such court-imposed requirement or a condition precedent for a party involved in any other contractual dispute.[8] The courts do not require specific performance in any other contract prior to a party filing a breach of contract cause of action. The appellate court recognized this position favored the landlord, stating:

[8] Due process requires that states provide individuals the opportunity to be heard in a meaningful time and a meaningful manner and the ability to present "every available defense." *Lindsey v. Normet*, 405 U.S. 56, 67 (1972). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007). The court-imposed escrow requirement denies low-income tenants due process by removing their ability to assert a legitimate defense in a contract dispute over their housing.

> It is unclear … why a landlord is entitled to the special protection of being assured of recovery on a monetary judgment before the tenant can even raise an otherwise permissible defense or counterclaim.
>
> Furthermore, it is unclear how barring a tenant's viable defense or counterclaim for failing to escrow her withheld rent "encourage[s] the landlord to minimize the tenant's damages by making tenantable repairs at the earliest time" or helps maintain an adequate supply of habitable dwellings.
>
> Instead, armed with the knowledge that a low-income tenant faces a potentially insurmountable financial barrier to raising a legal defense in a rent and possession action, landlords lose incentive to quickly repair the condition because they may be able to avoid making necessary repairs while still collecting full rent.

CoA Op. 15-16.

The trial court's bar on Ms. Johnson's defense and counterclaim denies tenants a remedy to challenge landlords who do not deliver or maintain a habitable dwelling while remaining in their homes – the very purpose of the implied warranty of habitability. Instead, the trial court's ruling affords special protections to landlords. By barring Ms.

Johnson from asserting her defense and counterclaim regarding the dangerous and unsanitary housing conditions that she and her daughter endured, the trial court essentially stripped Ms. Johnson of her remedies to defend against Kohner's lawsuit. She was left in an inequitable position that began when Ms. Johnson signed the lease with Kohner – a large property management company – and culminated when she was denied her equal access to the courts.

Creating additional protections for a class of litigants is contrary to both Missouri contract law and recent efforts to ensure equal access to Missouri courts among low-income and vulnerable Missourians by eliminating judicial barriers.[9] *See* Supreme Court of Missouri, *In re: Commission on Racial and Ethnic Fairness* (Oct. 6, 2015) (creating a commission charged with identifying barriers to access and fairness in Missouri's court system with a goal to "examine access and full participation for racial and ethnic minorities in the judicial process and in the practice of law."); Supreme Court of Missouri, *In re: Rule 37.04 Supervision of Courts Hearing Ordinance Violations and*

[9] Recently there have been coordinated efforts by the Governor, the Missouri Supreme Court, and the Missouri General Assembly to reform municipal courts throughout Missouri because of their impact on low-income individuals and racial minorities. Allyssa D. Dudley *Municipal court reform called for on three fronts*, Missouri Lawyers Weekly, Jan. 22, 2015, http://www[.]molawyersmedia.com/2015/01/22/live-tweets-the-state-of-the-judiciary/.

Minimum Operating Standards for Missouri Courts: Municipal Division (September 20, 2016) (creating minimum standards for Missouri municipal courts including a requirement that municipal divisions shall not condition an indigent defendant's access to a judicial hearing on payment of fines or fees).

One such judicial barrier is the requirement that tenants in possession must escrow or deposit their rent *in custodia legis* before the tenant can assert a claim or defense that the landlord has breach the implied warranty of habitability. Such a judicial barrier impedes equal access to justice for low-income tenants like Ms. Johnson, who are often racial minorities, by restricting access to the courts.[10] "Such a severe limitation on a tenant's ability to raise a breach of the warranty as a defense or counterclaim places unnecessarily burdensome restrictions on the remedy." CoA Op. 16. Commentators noted that "[m]any of those who face the most severe and inadequate housing are low income tenants. It is unrealistic to expect a tenant living in poverty, who withholds his rent, not to

[10] More than 50 percent of people with "worst case housing needs" are Black, Hispanic, or members of other racial minority groups. Worst case housing needs are defined as households where the tenant spends more than 50 percent of their income on rent. National Law Center on Homelessness & Poverty, *Racial Discrimination in Housing and Homelessness in the United States*, available at https://www[.]nlchp.org/documents/CERD_Housing_Report_2014, last visited October 23, 2016.

spend that money on other necessities of life." Jeffrey Hiles, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L. Rev. 237, 253 (1980).

As the Court of Appeals noted, the escrow requirement forces low-income tenants to either:

> (1) use their rent money to seek new housing or to remediate the condition or its deleterious effect and be prevented from countersuing or defending against the landlord, or (2) continue to pay or escrow their rent and live in unsafe and unsanitary conditions in order to pursue the claim in court.

CoA Op. 15.

Because neither option is acceptable for the low-income tenant, the escrow requirement undermines the implied warranty of habitability defense and improperly diminishes the contract rights of low-income tenants, thereby denying them due process and equal access to the judicial system.

Tenants living in uninhabitable housing **already** face an overwhelming challenge in navigating the system. Most tenants go largely unrepresented in courts.[11] The process

[11] "90 percent of landlords are represented by attorneys, and 90 percent of tenants are not." Matthew Desmond, *Evicted: Poverty and Profit in the American City* 303 (Crown Publishers 2016) (citing Russel Engler, *Pursuing Access to Justice and Civil Right to Counsel in a Time of Economic Crisis*, 15 Roger Williams U. L. Rev. 472 (2010); Russel

assumes tenants can navigate the courts, the participants, and court rules as cases move at an expedited pace and tenants often find themselves with limited tools to defend against the lawsuit.[12]

Rent and possession lawsuits are summary proceedings that, by the very nature of the statute, move quickly. Per § 535.040, RSMo 2014, "[u]pon the return of the summons executed, the judge shall set the case on the first available court date and shall proceed to hear the cause." While this does not necessarily prevent a tenant from preparing and mounting a defense to a landlord's suit, tenants proceeding *pro se* often have difficulty navigating the procedural rules, much less articulating the specific elements of a certain cause of action. The expedited process only compounds those issues.

For all of the reasons above, the trial court's decision in the present case should be

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Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveals About When Counsel Is Most Needed*, 37 Fordham L. Rev. 37 (2010)).

[12] In St. Louis in 2012, of the approximately 6,000 landlord-tenant cases filed, 4,934 ended in a judgment and **only two judgments were for the defendant/tenant**. Walker Moskop and Nancy Cambria, *As the Economy Improves, Evictions in St. Louis Remain Stubbornly High*, St. Louis Post-Dispatch, Oct. 17, 2016, http://www[.]stltoday.com/news/local/metro/as-the-economy-improves-evictions-in-st-louis-remain-stubbornly/article_55deb337-b65c-5c3a-a671-de513b6e205d.html. (emphasis added)

reversed. It is contrary to the existing law under *Detling* and will impose a burdensome legal barrier that negatively affects racial and ethnic minorities, who are often low-income tenants like Ms. Johnson.

II. THE TRIAL COURT ERRED IN BARRING MS. JOHNSON FROM ASSERTING A COUNTERCLAIM FOR BREACH OF THE IMPLIED WARRANTY OF HABITABILITY ON THE GROUNDS THAT MS. JOHNSON HAD NOT VACATED THE PREMISES OR TENDERED HER RENT TO THE COURT *IN CUSTODIA LEGIS* BECAUSE SUCH A REQUIREMENT AND CONDITION PRECEDENT TO BRINGING HER COUNTERCLAIM VIOLATES THE OPEN COURTS PROVISION, ARTICLE I, SECTION 14 OF THE MISOURI CONSTITUTION, IN THAT IT IS AN ARBITRARY AND/OR UNREASONABLE RESTRICTION ON HER RECOGNIZED CAUSE OF ACTION FOR BREACH OF IMPLIED WARRANTY OF HABITABILITY.

STANDARD OF REVIEW

This is an appeal from a bench-tried case in St. Louis County Circuit Court. *Kavanaugh v. Ealy*, 364 S.W.3d 759 (Mo. App. E.D. 2012), provides the standard of review on appeal for this action. "In a court-tried case, appellate review is governed by Rule 84.13(d) and the principles articulated in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)." *Id*. at 759 (citing *Wedgewood Square Center Ltd. Partnership v. Stewart Title Guar. Co.*, 347 S.W.3d 582, 585 (Mo. App. S.D. 2011)). A reviewing court will affirm the trial court's decision unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

A. THE REQUIREMENT THAT MS. JOHNSON EITHER VACATE THE PREMISES OR PAY HER RENT *IN CUSTODIA LEGIS* IN ORDER TO ASSERT HER BREACH OF IMPLIED WARRANTY CLAIM VIOLATES THE OPEN COURTS PROVISION OF THE MISSOURI CONSTITUTION BECAUSE IT IS AN ARBITRARY AND/OR UNREASONABLE RESTRICTION ON HER RECOGNIZED CAUSE OF ACTION.

"[T]he courts of justice shall be open to every person and certain remedy for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay." Mo. Const. art. I, sec. 14.

Interpreting this provision, Missouri courts have held that "any law that arbitrarily or unreasonably bars individuals or classes of individuals from accessing Missouri courts in order to enforce recognized causes of action for personal injury violates [this] open courts provision." *Dieser v. St. Anthony's Med. Ctr.*, No. SC95022, 2016 Mo. LEXIS 327 (Mo. Oct. 4, 2016) (citing *Weigand* v. *Edwards*, 296 S.W.3d. 453, 461 (Mo. banc 2009)). "To establish an open courts violation it must be shown that (1) the 'party has a recognized cause of action' (2) 'the cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable.'"[13] *Dieser*, No. SC95022, 2016 Mo. LEXIS 327

[13] The "touchstone of due process is protection of the individual against arbitrary action of government." *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). Due process requires that states provide

(citing *Ambers-Philips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 909 (Mo. 2015)).

The uncontroverted facts show that the first two requirements of an open courts violation are satisfied here. The rights conferred upon a tenant when she enters into a residential lease include a recognized right of action, satisfying the first requirement of an open courts violation. *King v. Moorehead*, 495 S.W.2d 65 (Mo. App. W.D. 1973), and *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. banc 1984), clearly establish that an implied warranty of habitability exists in residential rental leases and that a landlord has a duty to "…provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes. It is an obligation which the landlord fulfills by substantial compliance with the relevant provisions of an applicable housing code." *King*, 495 S.W.2d at 75. The *Detling* court made clear that a tenant could use a breach of the warranty of habitability as a defense and affirmative suit for damages. *Detling*, 671 S.W.2d at 270. Tenants could bring actions to recover damages for impaired

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individuals the opportunity to be heard in a meaningful time and a meaningful manner and the ability to present "every available defense." *Lindsey v. Normet*, 405 U.S. 56, 67 (1972). *See also Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Jamison v. State, Dept. of Soc. Services, Div. of Family Services*, 218 S.W.3d 399, 405 (Mo. 2007). The arbitrary restriction on the ability to bring a valid cause of action denies due process to low-income tenants.

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)).

The requirement that a tenant either vacate the premises or deposit rent *in custodia legis* is a procedural bar[14] which restricts the tenant's right to bring a claim against the landlord for breach of the implied warranty of habitability. This procedural bar and restriction satisfies the second requirement for an open courts violation. *See State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 109-110 (Mo. banc 1979) (requirement that one appear before a medical review board prior to filing suit violated the open courts provision because it barred the plaintiff from bringing a valid recognized claim); *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. banc. 1979) (a two-year statute of limitations on medical malpractice lawsuits by minors violated the open courts provision by precluding the claim before the minor was able to bring suit on his or her own behalf); and *Blaske v. Smith & Entezeroth, Inc.*, 821 S.W.2d 833 (Mo. banc 1991) ("a condition precedent to the use of the courts to enforce a valid cause of action" violates the open courts provision).

[14] In barring Ms. Johnson's counterclaim, the trial court is eliminating Ms. Johnson's ability to pursue remedies for the contractual breach. Ms. Johnson cannot file and pursue a new, separate cause of action. In the trial court's reasoning, Ms. Johnson would face the same escrow requirement that ostensibly prevents her from asserting any of her rights under the contract simply because she is a tenant.

The third requirement for an open courts violation – namely that the restriction is arbitrary or unreasonable – is also satisfied. The *in custodia legis* requirement is arbitrary or unreasonable for four reasons. First, the restriction frustrates the very purpose and policy goals of the implied warranty of habitability. Second, the restriction imposes a severe and undue burden on low-income tenants like Ms. Johnson. Third, the restriction is contrary to the well-established rule that a material breach of a contract by one party to a contract excuses performance by the other party. Finally, there is no justification for providing such a special legal protection to landlords when a tenant brings claims for a breach of implied warranty of habitability.[15]

i. This Restriction on Ms. Johnson's Cause of Action Frustrates the Policy

[15]As noted in the previous section, such a restriction flies in the face of recent efforts to improve access to the justice system for low-income persons and racial minorities. *See, e.g.*, Supreme Court of Missouri, *In re: Commission on Racial and Ethnic Fairness* (Oct. 6, 2015); Supreme Court of Missouri, *In re: Rule 37.04 Supervision of Courts Hearing Ordinance Violations and Minimum Operating Standards for Missouri Courts: Municipal Division* (September 20, 2016) and discussion accompanying note 9, *supra*. Allowing a court-imposed barrier to legitimate claims and defenses is not only arbitrary but would be a step backward for Missouri's efforts to improve access and achieve fairness in its judicial system.

Behind the Implied Warranty of Habitability

Both the appellate court in *King* and the Missouri Court of Appeals in the present case addressed the importance of low-income tenants using the implied warranty of habitability as a means of maintaining an adequate supply of habitable housing. *See King*, 495 S.W.2d at 77; CoA Op. 15. "The implied warranty of habitability was intended to provide a remedy to low-income households faced with limited housing options by allowing the tenant to retain possession and withhold rent until habitability was restored, a remedy not then available to the tenant." CoA Op. 15. (citing *King*, 495 S.W.2d at 77). A tenant suing for breach of the implied warranty of habitability is entitled to pursue traditional contract remedies including damages and consequential damages. *King*, 495 S.W.2d at 75-76; *Detling*, 671 S.W.2d at 270; CoA Op. 14-15.

"The *King* court…fashioned the *in custodia legis* procedure to assure 'the landlord that those rents adjudicated for distribution to him will be available to correct the defects in habitability, and will also encourage the landlord to minimize the tenant's damages by making tenantable repairs at the earliest time." CoA Op. 15. (citing *King*, 495 S.W.2d at 77). However, barring a tenant's viable defense or counterclaim for failure to escrow her rent does not encourage remedial actions by the landlord. "[A]rmed with the knowledge that a low-income tenant faces a potentially insurmountable financial barrier to raising a legal defense [or asserting a counterclaim] in a rent and possession action, landlords lose incentive to quickly repair the condition because they may be able to avoid

making necessary repairs while still collecting full rent." CoA Op. 16. Conversely, eliminating the *in custodia legis* procedure incentivizes the landlord to promptly repair the tenant's uninhabitable property because the landlord knows he is at risk of not receiving any money from the tenant or being held liable to the tenant for her ongoing damages caused by his breach of the implied warranty of habitability.

Here, the trial court's preclusion of Ms. Johnson's affirmative defense and counterclaim certainly will not incentivize Kohner to repair the hazardous conditions in Ms. Johnson's home.

ii. Requiring Tenants to Vacate the Premises or Pay Rent *in custodia legis* Imposes a Severe and Undue Burden on Low-Income Tenants like Ms. Johnson

Requiring tenants to vacate the premises or to escrow rent as a condition precedent for raising an affirmative defense or bringing a counterclaim for a breach of the implied warranty of habitability imposes a severe and unfair burden on low-income tenants. In *King*, the court recognized the profound dilemma that arises for low-income tenants if they "must continue to pay rent and endure the conditions of untenantability or abandon the premises and hope to find another dwelling which, in these times of severe housing shortage, is likely to be as uninhabitable as the last." *King*, 495 S.W.2d at 76. The *King* court described the shortage of safe, sanitary, and affordable dwelling accommodations at the time that the case was decided and recounted actions taken to combat this shortage

by the Missouri Legislature as early as 1939. *Id*. at 73. "The implied warranty of habitability remedy developed, in measure, as response to a chronic and prolonged housing shortage, particularly for those of low-income." [16] *Id*. at 76. The *King* court found that, by 1973, constructive eviction "proved an insufficient remedy" for the poor.

[16] A 2015 nationwide study showed that "extremely low-income households…have increasingly few housing choices" and that, after excluding structurally inadequate units or those occupied by higher-income households, "there were only 34 affordable units for every 100 extremely low-income renters. Despite a slight improvement in recent years, the gap between the number of extremely low-income renters and the supply of units they can afford nearly doubled from 2003 to 2013." Joint Center for Housing Studies of Harvard University, *The State of the Nation's Housing* 2015, available at http://www[.]jchs.harvard.edu/sites/jchs.harvard.edu/files/jchs-sonhr-2015-full.pdf. An extremely low-income household is one in which the household members earn up to 30 percent of area median income. *Id.* The numbers are even worse in St. Louis County, where a 2013 study found that there were **only 20.8 available units for every 100 extremely-low income renter households.** The Urban Institute, *Housing Affordability Gap for Extremely Low-Income Renters*, available at http://www[.]urban.org/sites/default/files/alfresco/publication-pdfs/2000260-The-Housing-Affordability-Gap-for-Extremely-Low-Income-Renters-2013.pdf, last visited October 21, 2016. (emphasis added)

Id.

The law evolved over time to create an implied warranty of habitability intended to provide a remedy for low-income tenants who face limited, alternative housing options. *Id.* at 77. As explained by the Court of Appeals below:

> The underlying rationale [behind the recognition of the implied warranty of habitability] is that people living in poverty may lack the ability or option of relocating even when presented with what is commonly considered to be an untenable condition. Courts have recognized that tenants faced with serious[ly] unsafe or unhealthy conditions which a landlord fails to address in a reasonable amount of time are sometimes forced to remediate the situation at their own costs by making the necessary repairs or seeking alternative accommodations or housing.

CoA Op. 14.

To automatically require every low-income tenant to escrow all of her withheld payment leaves the tenant in an impossible situation. The tenant can remain in possession and "can continue to pay or escrow the rent and live in unsafe and unsanitary conditions in order to pursue …[her] claim in court." [17] CoA Op. 15. Alternatively, to

[17] A tenant in Missouri must be cautious when repairing issues with a home. The repair and deduct statute in Missouri caps the amount of repairs a tenant can deduct from her monthly rent. § 441.234, RSMo 2014. Under the trial court's logic, if the tenant uses her

preserve her remedy for breach of the implied warranty of habitability, the tenant can vacate the premises and risk becoming homeless if she cannot find another dwelling unit – a result that neither the court in *King* nor any other court would consider an acceptable outcome for the tenant.

It is nearly impossible for a low-income tenant to pay a security deposit to a new landlord, pay to move or store her belongings, **and** pay money into escrow for an uninhabitable home while she is making every attempt to move. A 2016 study found that a person living in the St. Louis Metropolitan Area would have to work at least two full-time jobs at minimum wage[18] to be able to cover the monthly rental obligation for a two-

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money to remediate the conditions instead of escrowing it, she will have no remedy available to recover her consequential damages (out-of-pocket expenses) for restoring the home to habitability that exceed the statutory cap. Further, the landlord has the added protection that the court will likely require a tenant escrow rental payments in order to assert her action in court – almost guaranteeing the landlord's ability to limit the tenant's recovery and/or ensure the money is available to him at a later date.

[18] The federal minimum wage for covered nonexempt employees is $7.25 per hour effective July 24, 2009. United States Department of Labor, available at http://www[.]dol.gov/whd/minimumwage.htm, last visited October 23, 2016. The Missouri minimum wage is currently $7.65 per hour. Missouri Department of Labor and

bedroom apartment.[19] Under Missouri law, landlords can charge up to two times the

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Industrial Relations, available at http://labor[.]mo.gov/DLS/MinimumWage, last visited October 23, 2016.

[19] The Fiscal Year 2015 Fair Market Rent (FMR) for a two-bedroom apartment in St. Louis was $816.00. National Low Income Housing Coalition, *Out of Reach 2015*, available at http://nlihc[.]org/sites/default/files/oor/OOR_2015_FULL.pdf. The 2016 FMR was $840.00. U.S. Department of Housing and Urban Development, *Final FY 2016 Fair Market Rent Documentation System*, available at https://www[.]huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr16, last visited October 23, 2016. The 2017 FMR, effective October 1, 2016, is now $896.00. U.S. Department of Housing and Urban Development, *Final FY 2017 Fair Market Rent Documentation System*, available at https://www[.]huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr17, last visited October 23, 2016. The U.S. Department of Housing and Urban Development (HUD) sets fair market rents (FMR) for geographic areas across the country. "FMRs are used to determine payment standards for the Housing Choice Voucher (HCV) program and initial renewal rents for some project-based Section 8 contracts. FMRs also serve as rent ceilings for the HOME Investments Partnership program. FMRs are set at the 40th percentile of gross rent in most metropolitan areas, the top end of the price range that new movers could expect to pay for the lowest priced 40% of apartments." National Low

monthly rent as a security deposit prior to renting an apartment. § 535.300, RSMo 2014. The current fair market rent for a two-bedroom apartment in the St. Louis area is $896.00.[20] A tenant, therefore, would have to provide as much as $2688.00 upfront to cover the security deposit ($1,792.00) and first month's rent ($896.00), just to move into

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Income Housing Coalition, *HUD Releases Proposed FY16 FMRs* (09/14/2015), available at http://nlihc[.]org/article/hud-releases-proposed-fy16-fmrs, last visited October 23, 2016. The St. Louis, MO-IL HUD Metro FMR Area consists of the following counties- In Missouri: Sullivan city part of Crawford County; Franklin County; Jefferson County; Lincoln County; St. Charles County; St. Louis County; Warren County; and St. Louis City. In Illinois: Calhoun County; Clinton County; Jersey County; Madison County; Monroe County; St. Clair County; U.S. Department of Housing and Urban Development, available at https://www[.]huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr16, last visited October 23, 2016.

[20] U.S. Department of Housing and Urban Development, *Final FY 2017 Fair Market Rent Documentation System*, available at https://www[.]huduser.gov/portal/datasets/fmr/fmrs/docsys.html?data=fmr17, last visited October 23, 2016.

a different two-bedroom apartment.[21]

Under Missouri law, a landlord has up to thirty days after a tenant vacates the premises to return a security deposit, § 535.300, RSMo 2014, but a landlord who has failed to maintain the premises in habitable condition and whose tenant has abruptly vacated the unit, cannot reasonably be expected to return the tenant's security deposit timely, if at all. The likely forfeiture of her security deposit, compounded with the costs of moving, make it virtually impossible for a low-income tenant to pay a security deposit, move or store her belongings, and pay money into an escrow for an uninhabitable home while she is making every attempt to move. As a result, low-income tenants are often faced with the impossible choice of remaining in an uninhabitable home or becoming homeless.

[21] "Families who pay more than 30 percent of their income for housing are considered cost burdened and may have difficulty affording necessities such as food, clothing, transportation, and medical care. An estimated 12 million renter and homeowner households now pay more than 50 percent of their annual incomes for housing. A family with one full-time worker earning the minimum wage cannot afford the local fair-market rent for a two-bedroom apartment anywhere in the United States." U.S. Department of Housing and Urban Development, *Affordable Housing*, available at http://portal[.]hud.gov/hudportal/HUD?src=/program_offices/comm_planning/affordablehousing/, last visited October 23, 2016.

Here, Ms. Johnson, who is poor,[22] testified at trial to the efforts she made to move and the impossibility of actually moving. Tr. 39:12-20. Ms. Johnson applied to other apartment complexes within her daughter's school district to locate a new home for the two of them. Tr. 41:16-25. She knew it would take time to find a home in her price range, but she continued to complete applications. Tr. 41:25. Many property managers denied Ms. Johnson's application because of her low income. Tr. 42:1-2. Putting it succinctly, at trial, Ms. Johnson stated, "we don't have the money to just up and leave as quickly as someone who was staying in a well-to-do neighborhood." Tr. 39:18-20. She used her limited income to take care of her disabled daughter, including renting hotel rooms so that her daughter could bathe, and to pay the application fees to other apartment complexes. Tr. 38:9-11; 41:16-23. Ms. Johnson's issues are a reflection of the greater problems facing low-income tenants contemplated in *King*, the very case the trial court relied on in barring Ms. Johnson from asserting her affirmative defense and counterclaim.

iii. The Restriction is Contrary to the Rule that a Material Breach by One Party to a Contract Excuses Performance by the Other Party

The *King* court established that modern rental leases between a landlord and a

[22] Ms. Johnson retained Legal Services of Eastern Missouri, Inc. (LSEM) as counsel in this action. LSEM's primary purpose is to furnish legal services to indigent persons. LSEM certified to the court that Ms. Johnson is too poor to pay the costs, fees, and expenses necessary to proceed in this action pursuant to § 514.040, RSMo 2014.

tenant are more than a conveyance of property, but also a contract subject to an implied warranty that the residence be habitable. *King*, 495 S.W.2d at 68. The Missouri Supreme Court recognized and endorsed this evolution in the law in *Detling*, 671 S.W.2d at 270. In doing so, this Court explicitly recognized that "[p]roof of a breach of the warranty of habitability entitles the tenant to pursue traditional contract remedies." *Id*. (citing *King*, 495 S.W.2d at 76; *Mease v. Fox*, 200 N.W.2d 791, 797 (Iowa 1972)).

"A party to a contract cannot claim its benefit where he is the first to materially breach it." *Guengerich v. Barker*, 423 S.W.3d 331, 339 (Mo. App. S.D. 2014). To operate as an excuse from performance, the first contract breach must have been material, or "[go] to the substance or root of the agreement." *Id*. The materiality of a breach is a question of fact. *Id*. *See also Daugherty v. Bruce Realty & Dev., Inc.*, 892 S.W.2d 332, 336 (Mo. App. E.D. 1995); *Forms Mfg., Inc. v. Edwards*, 705 S.W.2d 67 (Mo. App. E.D. 1985); *S.G. Adams Printing & Stationery Co. v. Central Hardware Co.*, 572 S.W.2d 625 (Mo. App. 1978).

A requirement that a tenant in possession must pay her contracted rent *in custodia legis* to the court even though the landlord may have breached the implied warranty of habitability stands the "first to breach rule" on its head. It forces a tenant living in a substandard unit that poses a risk to the life, health, and safety of the tenant and her family due to no fault of her own, to continue to pay the contracted rent before the pending litigation continues with her affirmative defense and counterclaim for a

landlord's breach of the implied warranty of habitability. This bar on a tenant's options is contrary to well-established contract law and *Detling*'s holding that a tenant could use this law as a remedy against her landlord, and demonstrates an open courts violation because it's an arbitrary and unreasonable restriction.

Here, the trial court barred Ms. Johnson's viable contractual claim against Kohner despite finding that Kohner had been the first party to breach the lease. The trial court held that "credible evidence" presented by Ms. Johnson demonstrated dangerous and unsanitary conditions. J. 1-2. These conditions violated the implied warranty of habitability and occurred long before Ms. Johnson withheld rent. By barring Ms. Johnson from raising her contractual remedy, the trial court imposed an unreasonable bar to her cause of action.

iv. There is No Justification for Providing Special Legal Protection to Landlords When Tenants Bring Claims for Breach of the Implied Warranty of Habitability

Ms. Johnson anticipates that Kohner will argue that the requirement that tenants either vacate the premises or deposit their rent with the court *in custodia legis* functions much like a bond in that the requirement protects landlords from frivolous breach of implied warranty of habitability claims and defenses. But, as the Court of Appeals pointed out, "[i]t is unclear … why a landlord is entitled to the special protection of being assured recovery on a monetary judgment before the tenant can even raise an otherwise

permissible defense or counterclaim" CoA Op. 15. The appellate court noted that Missouri Rules of Civil Procedure 55.08 and 55.32, governing affirmative defenses and counterclaims respectively, "do not contain …[a] general requirement that a party escrow funds as a precondition to raising an affirmative defense or bringing a counterclaim[.]" CoA Op. 15.

In *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974), the United States Supreme Court held that a landlord is not entitled to special protection. "Our courts were never intended to serve as rubber stamps for landlords seeking to evict their tenants, but rather to see that justice is done before a man is evicted from his home." *Pernell*, 416 U.S. at 285.

Tenants face a high bar to a successful claim based on a violation of the implied warranty of habitability. Very importantly, the implied warranty of habitability applies only in situations where living conditions pose risks to the life, health, and safety of the tenant through no fault of her own. "Minor housing code violations are insufficient to sustain a claim." CoA Op. 16. *See Detling*, 671 S.W.2d at 270 (material and substantial violations of municipal codes including roach and rodent infestations, missing screens, exposed wiring, boiler malfunctions, water leakage, rubbish, and unstable steps can constitute violation of warranty); *King*, 995 S.W.2d at 68 (rodent and vermin infestation, defective and dangerous electrical wiring, leaking roof, inoperative toilet, unsound and unsafe ceilings); *Kolb v. DeVille I Props., LLC*, 326 S.W.3d 896, 903 (Mo. App. W.D.

2010) (bedbug infestation constitutes violation of implied warranty).[23]

Landlords do not need and should not be afforded the protection of common law that would require tenants to pay their rent *in custodia legis* or vacate the premises as a condition precedent to bringing a breach of implied warranty of habitability claim. Landlords are adequately protected by the requirement that tenants must notify them of the condition and give them reasonable time to repair the condition before bringing an action based on the implied warranty of habitability. *Detling*, 671 S.W.2d at 270. And, as the appellate court pointed out below:

[T]enants who withhold rent without sufficient justification, i.e. for *de*

[23] Several other jurisdictions and secondary sources have defined dangerous and unsanitary conditions that violate the implied warranty of habitability. *See Acad. Spires, Inc. v. Brown*, 268 A.2d 556, 559 (Dist. Ct. 1970) (failure to provide heat, hot water, and garbage removal are violations of implied warranty of habitability but malfunction of blinds, minor water leaks, wall cracks, and lack of painting go to amenities and, while unpleasant or aesthetically unsatisfying, do not come within the category of uninhabitability); *Lemle v. Breeden*, 462 P.2d 470, 472 (1969) (rodent infestation violation of implied warranty; and 43 Am. Jur. *Proof of Facts* 3d 329 §§ 10-13.5 (1997) (2016 update) (common conditions that render a premises unfit for human habitation include insect and rodent infestation; water leakage through roofs, ceilings, and walls; mold; and faulty plumbing and electricity).

> *minimi*s conditions as opposed to those that pose risks to their life, health or safety, or otherwise fail to establish their right to abate or withhold rent, are in default of the lease and the landlord may pursue the remedies available to him, including damages provided by the contract such as per diem penalties, late fees, or attorney's fees.

CoA Op. at 17.

As the Court of Appeals noted below, it is unclear how barring a tenant's implied warranty claim encourages swift repairs or maintains an adequate supply of habitable housing. CoA Op. 15. Instead, "armed with the knowledge that a low-income tenant faces a potentially insurmountable financial barrier to raising a legal defense in a rent and possession action, landlords lose incentive to quickly repair the condition because they may be able to avoid making necessary repairs while still collecting full rent." CoA Op. 16.

Under the rule the trial court applied in the present case, landlords are given a special protection at the expense of tenants' legal rights. Requiring a low-income tenant to undertake the risk, expense, and effort required to place rental payments into escrow eliminates a tenant's incentive to assert the warranty. Requiring a tenant to escrow her rent after a court order only protects the landlord from harm due to an unenforceable judgment and ensures it has the ability to repair the premises after he has evicted the tenant. The tenant is afforded no similar guarantee that her landlord will actually repair

the dangerous or unsanitary conditions while she still occupies the premises. Nor is the tenant entitled to an assurance she will collect on her counterclaim or assured she will recover financial assistance to move from her uninhabitable home.

Finally, landlords have the benefit of the summary nature of the rent and possession action, further protecting their interest in removing a non-paying tenant and recovering past due rent. Per § 535.040, RSMo 2014, "[u]pon the return of the summons executed, the judge shall set the case on the first available court date and shall proceed to hear the cause." In the present case, less than six weeks passed between the date that Ms. Johnson withheld her rent and the case went to trial. L.F. 1-3. This summary proceeding protects the landlord from any undue hardship caused by long-term rent withholding.

B. GRANTING THE TRIAL COURT DISCRETIONARY POWER TO ORDER THE TENANT TO DEPOSIT HER RENT WITH THE COURT IS NOT A LEGITIMATE REMEDY SINCE AN ORDER TO DEPOSIT THE RENT MONEY INTO THE COURT IS AN INVALID CONDITION PRECEDENT TO THE TENANT'S CAUSE OF ACTION THAT VIOLATES THE OPEN COURTS PROVISION. IT IS ALSO NOT A PRACTICAL REMEDY DUE TO THE EXPEDITED NATURE OF RENT AND POSSESSION PROCEEDINGS AND THE NEED FOR TWO EVIDENTIARY HEARINGS TO IMPLEMENT THE REMEDY.

The Court of Appeals in the present case held that "a tenant's submission of the

entire contracted for rent to the court *in custodia legis* is not an automatic prerequisite to a tenant raising the landlord's breach of the warranty as a defense or counterclaim in a rent and possession" action. CoA Op. 19. But, it ruled that the "trial court may order a tenant in possession to submit all, part or none of her withheld rent to the court *in custodia legis* pending litigation." *Id*.

The Court of Appeals stated that its ruling was in line with the majority of jurisdictions that "permit rent withholding as a remedy under the warranty" and "allow the tenant to retain his rent, subject to the court's discretionary power to order the tenant to deposit his rent with the court." CoA Op. 17. (citing Restatement of the Law (Second), *Property*, § 11.3 n.2 (1977) (2016 update); *Pugh v. Holmes*, 253 Pa. Super. 76 (1978), aff'd 486 Pa. 272, 292 (1979); *Teller v. McCoy*, 162 W.Va. 367, 393-394, 253 S.E.2d 114, 129-130 (W. Va. 1978)); *Hinson v. Delis*, 26 Cal. App. 3d 62, 71, 102, Cal. Rptr. 661 (Ct. App. 1972); *Javins v. First National Realty Corp.*, 428 F.2d 1071, 1083 n.67 (D.C. Cir. 1970); *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 484 (D.C. Cir. 1970)).

The Court of Appeals appropriately rejected an automatic requirement that tenants in possession must deposit the contracted rent *in custodia legis* in order to assert a counterclaim (or affirmative defense) for a landlord's breach of implied warranty of habitability. However, the court's proposed remedy – giving trial courts discretion to enter a suitable protective order upon either party's request after notice and opportunity to be heard – also runs afoul of the open courts provision.

A trial court's order that a tenant in possession must deposit the rent *in custodia legis* in order to be heard on the tenant's breach of warranty claim is an illegal condition precedent to a valid cause of action. See *State ex rel. Cardinal Glennon Mem'l Hosp. for Children*, 583 S.W.2d at 109-10; *Strahler*, 706 S.W.2d at 7; *Blaske*, 821 S.W.2d at 833. As explained above, there is no justification for such a special protection for landlords. Any such restriction on the tenant's breach of warranty claim is unreasonable and violates the Open Courts Doctrine.

Even if such a restriction can be justified (and it cannot under the Missouri open courts provision), there must be clear and precise guidelines specifying when a court can require a tenant escrow rent in order to raise an affirmative defense or bring counterclaims. Without specific guidelines, there is a danger of arbitrary rulings by the trial court which will deny tenants their rights.

The Court of Appeals, in its decision below, omitted any such guidelines from its opinion. This is also true for many of the cases the court cited for the majority rule. One notable exception is *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970). In *Bell*, the court began by expressing its concern that "a requirement that an indigent tenant meet current rental payments in order to maintain his defense…has the effect of restricting access to and participation in the judicial system….[W]hen a meritorious defense cannot be litigated because a monetary barrier has been erected…not only does the individual defendant lose but the purposes of the adversary system as a whole are

frustrated." 430 F.2d at 480.

Nevertheless, in recognition of the "emerging non-summary nature of the suit for possession" and the potential for dilatory tactics which judicial innovation had bred the court concluded that prepayment of rent as a method of protecting the landlord could be employed in "limited" fashion. *Id*. at 482. The court held[24] that such a protective order would issue only "when the landlord demonstrated an obvious need for such protection." *Id*. The *Bell* court stated:

> In making a determination of need, the trial court may properly consider the amount of rent alleged to be due, the number of months the landlord has not received even a partial rent payment, the reasonableness of the rent for the premises, the amount of the landlord's monthly obligations for the premises, whether the tenant has been allowed to proceed in forma pauperis, and whether the landlord faces a substantial threat of foreclosure.

[24] There is no mention in *Bell v. Tsintolas Realty Co.*, 430 F.2d 474 (D.C. Cir. 1970), of any constitutional provision similar to the open courts provision found in Article I, Section 14 of the Missouri Constitution. If such a constitutional provision existed, it is unlikely the court would have found a landlord protective order lawful given the court's expressed concern that such an order could restrict indigent tenants' "access to and participation in the judicial system." *Bell*, 430 F.2d at 480.

> Even if the landlord has adequately demonstrated his need for a protective order, the trial court must compare that need with the apparent merits of the defense based on housing code violations. Relevant considerations would be whether the housing code violations alleged are *de minimis* or substantial, whether the landlord has been notified of the existence of the defects and, if so, his response to that notice, and the date, if known, of the last repair or renovation to the alleged defect.

Id.

While these guidelines are helpful, they require a pretrial hearing which will involve much of the evidence to be heard again at trial. Unlike the District of Columbia, where the court noted the "emerging non summary nature" of rent and possession suits, in Missouri, rent and possession actions continue to rocket through the courts. *Id*. at 482, c*ompare with B-W Acceptance Corp. v. Benack*, 423 S.W.2d 215, 216 (Mo. App. E.D. 1967) (rent and possession actions are "a simple and expeditious procedure for regaining possession of property for nonpayment of rent"). Ms. Johnson's case went to trial one week after the first court date, also known as the summons date. *See* CoA Op. 4. Two evidentiary hearings make no sense under these circumstances and are a waste of judicial resources. Further, holding the pretrial hearing on the eve of trial prejudices the tenant because an adverse ruling will leave the tenant little time to comply with the court's

order.

In short, even if the protective order envisioned by the Court of Appeals below is constitutional and does not violate the open courts provision, allowing for the trial to court to impose a protective order is not a practical solution and could unduly prejudice tenants like Ms. Johnson and her daughter and still restrict their access to the courts.

CONCLUSION

Missouri courts recognize a lease between a landlord and a tenant as a contractual agreement providing both parties contractual rights and remedies. Over time, Missouri courts recognized a warranty implied in that contract wherein a landlord had a duty to deliver and maintain the home in fit and habitable condition throughout the duration of a tenancy. This implied warranty of habitability gives tenants additional contractual remedies to assert an affirmative defense or permissive counterclaim when they find themselves responding to a landlord's lawsuit while living in dangerous and unsanitary conditions that affect their life, health, and safety.

Ms. Johnson and her daughter needed repairs to their home almost immediately upon moving in in late 2014. Ms. Johnson reported the conditions to Kohner and the property's maintenance employees responded to those reports. However, the employees did not remediate the conditions because they continued and worsened. Ultimately, the ceiling above Ms. Johnson's bathtub in her home's only bathroom collapsed in March 2015. In response, Kohner's employees taped a plastic bag over the hole in the ceiling and the bag remained precariously taped to the ceiling, bulging, and dripping water below on the trial date over a month later.

Kohner filed a rent and possession lawsuit, a summary breach of contract proceeding, against Ms. Johnson. As a contract, either party can suspend a lease's performance upon a material breach. Missouri courts further recognize the right to bring

affirmative defenses and counterclaims in breach of contract cases. Kohner failed to make repairs to the bathroom and, in doing so, breached the implied warranty of habitability and materially breached its lease with Ms. Johnson. Thus, Kohner's breach suspended Ms. Johnson's rental obligation.

Because Ms. Johnson did not escrow her rent, the trial court precluded Ms. Johnson from asserting an affirmative defense or a permissive counterclaim to Kohner's cause of action. In barring Ms. Johnson's defense and counterclaim, the trial court created a condition precedent found nowhere else in Missouri contract law.

Ms. Johnson properly stated and proved the four elements to establish that Kohner breached its implied warranty of habitability. The trial court's bar on Ms. Johnson's defense and counterclaim created additional elements to such a claim and effectively created a special protected class for landlords. Further, the bar on Ms. Johnson's claims removes the very protections intended by the courts in creating the warranty of habitability, supports inequitable bargaining power, and limits access to justice and the courts for low-income, and racial and ethnic minority, Missouri tenants.

The trial court's bar on Ms. Johnson's affirmative defense and counterclaim for the dangerous and unsanitary conditions of her home with the deposit of rent *in custodia legis* violates the Open Courts Doctrine of the Missouri Constitution. A pay or vacate rule violates this doctrine because it is an arbitrary and unreasonable restriction on her recognized cause of action. This rule is arbitrary and unreasonable because it frustrates

the very purpose of the law's evolution the law and the creation of the implied warranty of habitability, it creates a severe and undue burden on low-income tenants, it is contrary to the rule that a material breach by one party of a contract excuses the performance by the other, and there is no justification for creating a special, protected class for landlords.

Giving a trial court discretionary power to determine whether a tenant must deposit rent *in custodia legis* will still unreasonably restrict access to courts in violation of the open courts provision of the Missouri Constitution. This remedy will also require a pretrial evidentiary hearing which will largely involve the same evidence later heard at trial. This is impractical given the summary nature of Missouri's landlord-tenant proceedings. Also, an adverse ruling on the eve of trial will leave a tenant with little time to comply with the trial court's order. This discretionary power is also not a remedy because it too violates the Open Courts Doctrine.

For the reasons stated above, Ms. Johnson respectfully requests that this Court reverse the trial court's judgment and remand for a new trial.

CERTIFICATION OF COMPLIANCE

Comes now counsel 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 13,760, excluding the cover, certificate of service, this certification, the signature block, and the appendix, as listed by the word processor the document was prepared on, Microsoft Word 2010.

/s/ Lee R. Camp

Lee R. Camp, Mo. Bar No. 67072

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellant's Brief was filed electronically through the Missouri Courts eFiling System and was served on Randall Reinker, Attorney for Respondent, via the Court's electronic filing system on October 24, 2016 and by U.S. Mail to:

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