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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

APPELLANT'S REPLY TO RESPONDENT'S SUBSTITUTE BRIEF

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ARGUMENT

I. THE APPELLATE COURT'S DECISION BELOW DOES NOT VIOLATE KOHNER PROPERTIES'S DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION OR ARTICLE I, SECTION 10 OF THE MISSOURI CONSITUTION. HOWEVER, THE TRIAL COURT'S DECISION DOES VIOLATE MS. JOHNSON'S DUE PROCESS RIGHTS.

In the instant case, Ms. Johnson and Kohner assert conflicting due process claims. The appellate court reversed the trial court's judgment and permitted Ms. Johnson to assert the breach of implied warranty of habitability as both an affirmative defense and counterclaim without paying accrued rent *in custodia legis*. Kohner claims this reversal violated its due process rights. *See* Res. S. Br. 26-43. Ms. Johnson contends that the trial court's judgment barring her affirmative defense and counterclaim violated her due process rights. *See* App. S. Br. 26 n.8, 34 n.13.

Due process guarantees a fair procedure before depriving an individual of a constitutionally-protected interest. *See Zimmerman v. Burch*, 494 U.S. 113, 125 (1990). The key to due process is whether the movant was afforded the measure of process to which she was constitutionally entitled prior to losing a protected interest. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 533 (1985).

"The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected property interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins.*

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Co. v. Sullivan, 526 U.S. 40, 55 (1999) (citations omitted). The next inquiry is "whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dep't. of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

KOHNER'S DUE PROCESS CLAIM

A. The state has not deprived Kohner of a protected property interest.

"Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) *quoting Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). In *Roth*, the Court noted that an individual's "property interest" in continued employment at a state university "was created and defined by the terms of his appointment." 408 U.S. 564 at 578.

Here too, Kohner's right to rent is created and defined by the terms of its one-year lease with Ms. Johnson. Pursuant to *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. banc 1984) this lease includes an implied warranty of habitability. *Detling* and *King v. Moorehead*, 495 S.W.2d 65 (Mo. W.D. 1973), both hold that a lease is not only a conveyance but a contract under which "a tenant's obligation to pay rent is dependent upon the landlord's performance of his obligation to provide a habitable dwelling during the tenancy…." *King*, 495 S.W.2d at 75-76. "Tenants may use a breach of the warranty both as a defense to a landlord's action for possession and rent … and as the basis for an affirmative suit for damages." *Detling*, 671 S.W.2d at 270. As a result, Kohner does not have an independent right to collect rent from Ms. Johnson. Instead, the right to rent

depends on Kohner's performance of its obligation to provide Ms. Johnson with a habitable dwelling – an obligation Kohner breached.

The Court of Appeals decision does not deprive Kohner of any protected right. Instead the court recognizes the lease as a bilateral contract with reciprocal obligations on the part of the landlord and the tenant, but holds that Kohner can recover rent only after the trial court considers Ms. Johnson's habitability "affirmative defense and counterclaim based on the implied warranty of habitability." CoA Op. 19. The Court of Appeals found that *Detling* did not adopt the *in custodia legis* requirement mentioned in *King*, and refused to adopt it for multiple reasons: (a) the requirement diluted the implied warranty of habitability remedy, (b) there was no need to grant landlords the special protection of "being assured of recovery on a monetary judgment before the tenant can even raise an otherwise permissible defense or counterclaim," (c) it was "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 possible time' or helps to maintain an adequate supply of habitable dwellings," and (d) the *in custodia legis* requirement "places unnecessarily burdensome restrictions on the [breach of implied warranty] remedy … "which 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." CoA Op. 15-16.

B. Kohner's right to an expedited hearing on its rent and possession claim provides sufficient due process.

Even if this Court finds that the appellate court's decision below interfered with

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Kohner's right to receive rent, its due process claim fails because Kohner still has a right to a hearing on its claim. This hearing is all the process Kohner Properties is due.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the U.S. Supreme Court outlined the following factors used to determine what procedures are necessary to protect property interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

"Depending on the circumstances of the particular case, the hearing called for by the 14th amendment may be a pre-deprivation hearing, … or a pre-deprivation abbreviated 'opportunity to respond' with a prompt post-deprivation hearing, … or solely a prompt post-deprivation hearing." *Chernin v. Welchans*, 844 F.2d. 322, 326 (6th Cir. 1988).

The Private Interest Affected by the Official Action

The hardship to Kohner in waiting for a hearing on Ms. Johnson's affirmative defense and counterclaim before it receives its rent is minimal compared to the suffering endured by plaintiffs for whom courts have required a pre-deprivation hearing. *See Goldberg v. Kelly*, 397 U.S. 254 (1970) (welfare benefits termination); *Memphis, Light,*

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Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (utility cut off); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (household belongings seizure); and *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (wage garnishment). There is no extraordinary hardship here. *See Cherin,* 844 F.2d at 326-27 (the suggestion that the temporary deprivation of landowners' rent money rises to the level of the deprivation described in *Goldberg*, *Craft, Fuentes*, and *Snidach* is difficult to accept.)

Further, the length of the possible deprivation is short since Kohner sued for rent and possession. *See Fusari v. Steinberg*, 419 U.S. 379, 389 (1975) (possible length of wrongful deprivation of unemployment benefits was an important factor in assessing the impact of official action on private interests). "[R]ent and possession is a summary proceeding intended for expeditious resolution of disputes within its scope." *Stough v. Bregg*, 2016 Mo. App. LEXIS 1348, at *5 (Mo. App. E.D. Dec. 27, 2016), *citing Ellsworth Breihan Bldg. Co. v Teha Inc*., 48 S.W.3d 80, 83 (Mo. App. E.D. 2001). § 535.030.1 RSMo 2014 requires only four days between service of summons and the first court date which must be no more than 21 days from the date the summons is issued unless the plaintiff or plaintiff's attorney consents in writing to a later date. § 535.040.1 RSMo 2014 requires the trial court, upon return of the summons, "to set the case on the first available court date and … proceed to hear the cause."

Although nothing in the statute prevents a tenant from requesting a continuance, a landlord is free to oppose the request if the landlord contends it will present an undue hardship for the landlord. *Stough*, 2016 Mo. App. Lexis 1348 at 7.

The availability of an expeditious hearing on the landlord's rent and possession

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claim and the tenant's affirmative defense and/or counterclaim for habitability means any deprivation resulting from the tenant's rent withholding will be short lived and minimal.

Even without a breach of warranty defense or counterclaim, landlords still face the problem of tenants not paying rent during the course of the rent and possession action. Therefore, whether the tenant withholds rent because of a breach of warranty claim or simply fails to pay rent pending the trial, the landlord's loss of income will be the same. The only difference is that if this court affirms the trial court's ruling it will mean that landlord skates free from any breach of the warranty of habitability claim. There is no reason why a tenant who withholds rent because of the landlord's breach should be penalized in this fashion.

C. The risk of erroneous deprivation is small and there is little value to additional or substitute safeguards.

There is a small risk of erroneous deprivation. As explained by the Court of Appeals, "tenants who withhold rent without sufficient justification, i.e. for *de minimis* 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 remedies available to him, including damages provided by the contract such as per diem penalties, late fees or attorney's fees." CoA Op. 17. Therefore, there is little incentive for tenants to wrongfully withhold their rent.

There is also no need for additional safeguards because landlords have the right to an expedited hearing on the merits of their rent and possession claim, the tenant's breach of warranty claim, and the right to appeal. See *Metro. Hous. Dev. Corp. v. Vill. of*

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Arlington Heights, 469 F. Supp. 836, 861 (N.D. Ill. 1979). Requiring tenants to pay their rent *in custodia legis* will not affect "the accuracy of the truth-finding process". *Id.* It will only prejudice low-income tenants with breach of warranty claims who lack the financial means to pay the rent. App. S. Br. 39-46. Often such tenants used the money to remediate the situation at their own cost by making necessary repairs or must save the money to afford the first and last month's rent and security deposit for a new apartment. *Id.* ; *See* CoA Op. 14 and cases cited therein.

D. The government interest in providing an adequate supply of habitable dwellings is not served by barring breach of implied warranty of habitability claims because tenants have not paid their rent *in custodia legis*.

The governmental interest in providing an adequate supply of habitable dwellings is frustrated when courts bar tenants with legitimate breach of habitability claims from asserting those claims because they did not pay rent *in custodia legis*.

Kohner argues on the basis of *Lindsey v. Normet*, 405 U.S. 56 (1972), that a requirement that tenants deposit rent *in custodia legis* as a condition precedent to asserting a breach of warranty claim is justified by the "unique factual and legal characteristics of the landlord-tenant relationship" and that such a requirement is hardly "irrational or oppressive". Res. S. Br. 35, 58 *quoting Lindsey*, 405 U.S. at 65 and 72. Kohner's reliance on *Lindsey* is misplaced for the reasons articulated in the Amicus Brief filed by the American Civil Liberties Union of Missouri Foundation, *et al. See* ACLU Amicus Br. 22-28. Among those reasons is that *Lindsey* dealt with the Oregon Forcible Entry and Wrongful Detainer Statute and Oregon treats "the undertakings of the tenant and those of the landlord as independent, rather than dependent, covenants." *Lindsey,*

405 U.S. at 68. Therefore, under the Oregon statutory scheme, the tenant is expressly barred from raising breach of warranty claims in a Forcible Entry and Detainer Action. *Id*. at 65-66. Whereas Missouri law treats a lease as a bilateral contract in which the tenant's obligation for rent is dependent upon the landlord's performance of its responsibilities, including the warranty of habitability. *King*, 495 S.W.2d at 77.

Kohner also cites *Mahdi v. Poretsky Mgmt., Inc.,* 433 A.2d 1088 (D.C. App. 1981), for the proposition that a tenant's poverty should not be considered a defense to a requirement that a tenant escrow rents *in custodia legis*. Res. S. Br. at 38. *Mahdi* should not be read so broadly. The case concerned an appeal from an order granting the landlord possession because of the tenant's failure to comply with an order for protective payments. The District of Columbia where *Mahdi* was decided has a statutory scheme much like the one recommended by the Court of Appeals in this case. CoA Op. 17-19. The deposit of rent to the court is not an automatic prerequisite to a tenant raising the landlord's breach of the warranty of habitability as a defense or counterclaim in a rent and possession action. Instead, upon motion of the landlord, the court, "in the exercise of its equitable jurisdiction, order that future rent be paid into the registry of the court as it becomes due during the pendency of the litigation." *Bell v. Tsintolas Realty Co.*, 430 F.2d 474, 479 (DC. Cir. 1970). Such prepayment is not favored and may only be ordered in limited circumstances after notice and opportunity for hearing on the landlord's motion. *Id.* "At the hearing on the motion for protective order, allegations of housing code violations would be relevant to the trial court's determination of the amount which should be paid monthly into the registry of the court." *McNeal v. Habib*, 346 A.2d 508,

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514 (D.C. App. 1975). *See also Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 (D.C. Cir. 1970) ("In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.")

In *Mahdi*, the tenant defaulted on the rent payment required under the terms of the protective order. Presumably, the tenant had previously been given notice and opportunity to be heard on any alleged housing code violations and the requirement that he pay the rent into the court registry. *Mahdi* differs from the present situation where the trial court required Ms. Johnson pay her full rent which she had withheld into the court registry as a condition of asserting her breach of warranty claim without any opportunity to be heard on the merits or for rent abatement. J. 1-2.

While the tenant's financial condition may not have been relevant in *Mahdi*, it is significant when a court adopts a blanket rule that "a defense may only be maintained upon payment of a given sum of money – whether the sum is characterized as a rental prepayment or an appeal bond…" *Bell*, 430 F.2d 474 at 479. Then it becomes an issue with respect to access to the courts. *See Id.* at 479-81 and *McKelton v. Bruno*, 428 F.2d 718, 720 (D.C. Cir. 1970) ("All courts must be careful lest the financial burdens of litigation preclude the poor from litigating meritorious issues.").

MS. JOHNSON'S DUE PROCESS CLAIMS

The trial court violated Ms. Johnson's due process rights because its judgment stripped her of any opportunity to litigate Kohner's breach of warranty of habitability in the rent and possession action even though this claim and defense was critical to a

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determination of her liability for rent and Kohner's right to possession. Therefore, the trial court denied Ms. Johnson a meaningful opportunity to be heard.

A. The trial court's judgment deprived Ms. Johnson of a protected property interest.

Ms. Johnson has a protected property interest under the 14th Amendment because she signed a one-year lease of the premises with a term that commenced October 31, 2014 and ended October 31, 2015. App. A1. *See Gentry v. Lee's Summit*, 10 F.3d 1340, 1343 (8th Cir. 1993) (leasehold was "undoubtedly" a "property right"). Like Kohner, the scope of Ms. Johnson's property interest is defined by the lease which includes an implied warranty of habitability.

Ms. Johnson also has a property interest in her cause of action against Kohner for breach of the implied warranty of habitability. *See Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982) (cause of action is a species of property protected by the 14th Amendment). Under *Detling v. Edelbrock*, Ms. Johnson had the right to assert this breach of warranty claim "both as a defense to a landlord's action for possession and rent … and as the basis for an affirmative suit for damages." 671 S.W.2d at 270.

The trial court effectively terminated both property interests – her leasehold interest and her ability to assert Kohner's breach as an affirmative defense – when it ruled Ms. Johnson could not assert the claim in Kohner's rent and possession action because she had not paid rent *in custodia legis*. J. 2. By denying Ms. Johnson the right to raise Kohner's breach as an affirmative defense in Kohner's rent and possession action, the trial court deprived her of a full and fair opportunity to litigate her rent

liability to Kohner, Kohner's right to possession, and Ms. Johnson's right to continued occupancy.

B. The private interest affected by the official action – there is no substitute for the loss of Ms. Johnson's home.

Although Ms. Johnson may be able bring a separate action against Kohner for breach of warranty and seek to recover damages, this is no substitute for the loss of her home. *See U.S. v. James Daniel Good Real Prop.*, 510 U.S. 43, 53-54 (1993) (home is a private interest of "historic and continuing importance"); *Greene v. Lindsey*, 456 U.S. 444, 451 (1982) (noting that tenants in eviction actions face "depriv[ation] of a significant interest in property; indeed, of the right to continued residence in their homes); and *Grayden v. Rhodes*, 345 F.3d 1225, 1233 (11th Cir. 2003) ("[o]ne's home certainly ranks among the most cherished property interests that due process protects, and the uninterrupted enjoyment of its comforts and security is undoubtedly a significant private interest.").

C. There is an enormous risk of erroneous deprivation.

By stripping Ms. Johnson of her affirmative defense in the rent and possession action, the trial court denied her a full and fair opportunity to litigate her rent liability. If Ms. Johnson owes no rent, Kohner has no right to possession. Allowing Ms. Johnson to bring a separate action does not suffice because once she is evicted, Kohner can rent the premises to another party.

The U.S. Supreme Court "stressed that, when a 'statutory scheme makes liability an important factor in the State's determination…the State may not consistent with due

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process, eliminate consideration of that factor in its prior hearing.' *Bell v. Burson,* 402 U.S. at 541. To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. See *Id*. at 542." *Logan,* 455 U.S. at 434.

In *Bell v Burson*, 402 U.S. 535 (1971), the Court addressed the constitutionality of Georgia's Motor Vehicle Safety Act. The Act allowed the state to suspend a motorist's license if the motorist was in a vehicle accident, did not have liability insurance, and failed to post bond for the damage amount after suit was brought against her. The Court said this statutory scheme violated the motorist's procedural due process rights under the 14th Amendment because the administrative hearing excluded consideration of the motorist's fault or liability for the accident. "[L]iability, in the sense of an ultimate judicial determination of responsibility, play[ed] a crucial role" because an adjudication of non-liability would lift a suspension. *Id.* at 541. As a result, the motorist was denied a meaningful hearing in violation of the 14th Amendment.

Similarly, in *Logan*, the U.S. Supreme Court held that a decision by the Illinois Supreme Court barring an employee's discrimination claim because the Commission hearing the claim had not acted within the 120-day period prescribed by statute violated the employee's due process rights. *Logan*, 455 U.S. at 437. The Court, citing *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), reaffirmed that a "cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause". *Logan*, 455 U.S. at 428. The failure to act within the 120-day period was the Commission's fault, not the claimant's, and the claimant was entitled to have the

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Commission consider the merits of his charge before terminating his claim. A post-deprivation hearing was insufficient because the claimant was not challenging the state's error but the "established state procedure" that destroyed his entitlement without according him proper procedural safeguards. *Logan*, 102 S.Ct. at 1158.

In *Bodie v. Conn.*, 401 U.S. 371 (1971), the Court held that Connecticut's refusal to permit the petitioners from filing for divorce without first paying the filing fee and cost for service of process violated the petitioners' 14th Amendment due process rights where they lacked the ability to pay. The Court noted that the state court was the only forum for seeking a divorce as the State required the petitioners resort to judicial process. The state's requirement that petitioners pay fees and costs they could not afford in order to access the court violated the 14th Amendment and denied petitioners their opportunity to be heard upon their right to dissolve their marriage. *Id*. at 380-81.

Like *Bell*, Kohner's liability to Ms. Johnson for breach of the warranty of habitability is a crucial factor in determining whether Ms. Johnson owes any rent. Yet, the trial court barred her from asserting Kohner's breach as an affirmative defense.

Like the petitioner in *Logan*, no post-termination tort action can ever make Ms. Johnson whole. Once evicted, Ms. Johnson's tenancy cannot be restored if she prevails on her breach of warranty claim in a separate action because her apartment will have been re-let. She is challenging a "state procedure that destroys [her] entitlement without according [her] proper procedural safeguards." *Logan*, 455 U.S. at 436.

Like the petitioners in *Bodie*, who could not access the courts because they could not afford the filing fee and court costs, the trial court here has shut the courthouse door

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on the only venue for Ms. Johnson to challenge Kohner's right to rent and her right to possession because she did not (and cannot) pay the accrued rent *in custodia legis*.

The common thread among the petitioners in each of these cases, and Ms. Johnson, is that each have been denied protected property interest without any opportunity for a meaningful hearing. *See also Philip Morris USA, Inc. v. Scott*, 561 U.S. 1301, 1303 (2010) (due process requires that there be an opportunity to present every available defense). What the 14th Amendment requires "is 'an opportunity … granted at a meaningful time and in a meaningful manner' … 'for a hearing appropriate to the nature of the case.'" *Logan*, 455 U.S. at 437 (internal citations omitted). The trial court denied Ms. Johnson such an opportunity.

D. No governmental interest justifies the blanket requirement that a tenant must deposit all rent claimed to be due *in custodia legis* in order to assert a breach of implied warranty defense in a rent and possession action.

"The implied warranty of habitability was developed, in part as a response to a chronic and prolonged housing shortage – particularly for low income households." CoA Op. 7. Imposing on low-income tenants like Ms. Johnson the requirement that a breach of warranty defense may be maintained only upon payment of the accrued rent is "incongruous". *See Bell*, 430 F.2d at 479. This is particularly so when considered in the light of court decisions enhancing the opportunity for indigent litigants to meaningfully participate in the judicial process. *See State ex rel Taylor v. Clymer*, 503 S.W.2d 53, 56 (Mo. App. W.D. 1973) ("The Bill of Rights to our first constitution, the language of which today remains unchanged in Article 1, Section 14 of the Missouri Constitution is a recognition by our organic law of the principle that access to the courts must not depend

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on the ability to pay fees and costs); and *Harrison v. Monroe County*, 716 S.W.2d 263, 267 (Mo. 1986) ("Article I § 14 embodies the principle found in Chapter 40 of the Magna Carta that 'To no one will we sell, to none will We deny or delay, right or justice.' The obvious focus of Chapter 40 is the sale of justice, through bribery, by the magistrates of King John's time. In its modern manifestations, however, the constitutional proscription against the sale of justice extends to guarantee access to the courts without a requirement of payment of unreasonable charges.")

It is unreasonable to require a tenant to pay the full amount of the rent claimed due by the landlord before there has been any consideration of the tenant's right to rent abatement because of the landlord's breach of the warranty of habitability, and in the case of indigent tenants like Ms. Johnson, a violation of both their rights under Article I, Section 14 of the Missouri Constitution and their due process rights under Article I, Section 10 of the Missouri Constitution and the 14th Amendment.

II. THE TRIAL COURT'S JUDGMENT VIOLATES THE MISSOURI OPEN COURTS DOCTRINE BECAUSE IT CREATES AN UNREASONABLE AND ARBITRARY RESTRICTION THAT PREVENTED MS. JOHNSON FROM ASSERTING AN IMPLIED WARRANTY OF HABITABILITY CLAIM AGAINST HER LANDLORD.

An Open Courts Doctrine violation occurs where (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. *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc. 2009).

Kohner agrees that the breach of implied warranty of habitability is a recognized

cause of action. Res. S. Br. 21. But, Kohner argues that the *in custodia legis* requirement is not an arbitrary or unreasonable restriction. At the outset, it must be noted that Kohner itself characterizes the requirement as a "condition precedent" to the breach of warranty claim. Res. S. Br. 14 and 25. In *Blaske v. Smith & Entezeroth, Inc.*, 821 S.W.2d 822, 833 (Mo. banc 1991) this Court found just such a condition precedent to be a violation of the Open Courts Doctrine. The *Blaske* Court distinguished between a statute creating a condition precedent to using the courts to enforce a valid cause of action and a statute that simply changes the common law by eliminating the cause of action. *Id.* The former would violate the Open Courts Doctrine because it restricts a litigant's access to the courts. *Id.* at 832.

As explained more fully in Ms. Johnson's opening brief, there are four reasons why the *in custodia legis* requirement for asserting a breach of warranty claim as an affirmative defense or counterclaim is arbitrary and unreasonable. Sub. App. Br. 37-52. 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 first to breach rule of contract law. Finally, there is no legal justification for providing such a special legal protection to landlords when a tenant brings claims for a breach of implied warranty of habitability.

Kohner relies heavily upon *Lindsey v. Normet* for the proposition that the *in custodia legis* requirement is a reasonable restriction. Res. S. Br. 23. *Lindsey* upheld the constitutionality of Oregon's Forcible Entry and Wrongful Detainer ("FED") Statute. As

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explained in Reply Argument I and in the Amicus Brief filed by the American Civil Liberties Union of Missouri Foundation, *et al*., the present case is distinguishable from *Lindsey* for several important reasons. *See* ACLU Amicus Br. 22-28. Oregon treats the "undertakings of the tenant and those of the landlord as independent rather than dependent covenants." *Lindsey* 505 U.S. at 68. The FED Statute expressly limits the triable issues to possession only. The only recognized defenses are those that go to three questions: "physical possession, forcible withholding, and legal right to possession." *Id.* at 69. A landlord cannot sue for back rent or other claims against the tenant and the tenant is expressly barred from raising claims that the landlord failed to maintain the premises. *Id.*[1]

By contrast, in Missouri, the landlord's and the tenant's obligations are considered dependent covenants. Under the rent and possession statute, this court explicitly recognized the landlord's breach of the implied warranty of habitability as a defense and counterclaim. *Detling*, 671 S.W.2d at 270. Further, § 535 *et seq*. RSMo 2014 is not

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[1]Oregon's FED statute is similar to Missouri's Unlawful Detainer Statute § 534 *et seq*. RSMo 2014 which prohibits equitable defenses or counterclaims and the sole issue is the right of possession. In *Wells Fargo Bank N.A. v. Smith*, 392 S.W.3d 446 (Mo. 2013), this Court held a tenant could not raise equitable affirmative defenses or assert counterclaims in an unlawful detainer action. The instant case involves the Missouri's Rent and Possession Statute (§ 535. et seq. RSMo 2014) which allows such claims and defenses. Therefore, *Lindsey* and *Wells Fargo* are inapposite.

merely a possessory action. A landlord can also sue for monetary damages for past-due rent, late fees, and attorney's fees owed under the lease. § 535 et seq. RSMo 2014. Thus, there is little in common between the Oregon FED statute the U.S. Supreme Court found constitutional in *Lindsey* and the *in custodia legis* requirement at issue here.

Kohner asserts that a tenant must "simply" deposit rent instead of submitting it to the landlord and equates this pre-litigation rent deposit to that of a post-judgment bond. Res. S. Br. 23. *Id.* But a post-judgment bond is only required after a hearing on the merits and a judgment has been entered. No such hearing on the merits occurs prior to the *in custodia legis* requirement. Under the trial court's ruling, the tenant must deposit monthly rent which the landlord claims is due even when there exists a breach of the warranty of habitability and the law entitled the tenant to rent abatement. This rule cannot be squared with the law given that under *Detling* the obligations of the landlord and tenant are dependent covenants.

Moreover, the rule discourages rather than encourages landlords to make necessary repairs. As the appellate court explained in its decision below: "[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.

Finally, Kohner argues that the *in custodia legis* requirement is reasonable because tenants have the right to assert their breach of warranty claim as a separate action against the landlord. Res. S. Br. 21. While this may be true, the rent and possession action will

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have concluded long before the tenant's independent action against the landlord goes to trial due to the summary nature of rent and possession actions. In the meantime, the tenant will have been evicted from their home because they have been stripped of a defense to the landlord's rent and possession claim. The tenant may also face a money judgment for back rent, late fees, and attorney's fees and will have to post bond if they wish to appeal. For the low-income tenant, such an appeal bond may not be possible. Even if the tenant should win the breach of warranty claim against the landlord in the independent action, money damages are no substitute for the loss of one's home. *See* Reply Argument I, *supra,* 18-20.

III. MS. JOHNSON PROVED ALL THE ELEMENTS OF HER BREACH OF IMPLIED WARRANTY OF HABITABILTY CLAIM.

Kohner argues that even if Ms. Johnson was not required to deposit her rent *in custodia legis*, this Court should affirm the trial court's judgment because she failed to prove the conditions were dangerous or unsanitary – the second element[4] of the breach of implied warranty of habitability claim. Instead, Kohner characterizes the significant

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[4] In order to successfully state a cause of action for breach of the implied warranty of habitability a tenant must prove the following elements: (1) entry into a lease for residential property; (2) the development of a dangerous or unsanitary condition materially affecting the life, health, and safety of the tenant; (3) reasonable notice of the defect to the landlord; and (4) the landlord's failure to restore the premises to habitability. *Detling*, 671 S.W.2d at 270.

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problems with the home as "only cosmetic in nature." Res. S. Br. 16.

But the trial court found and the appellate court agreed that dangerous and unsanitary conditions developed in Ms. Johnson's home. A bathroom with cracked floor tiles, leaking water, and mold forming on the ceiling renders a home uninhabitable when it is a family's only option. The dangerous and unsanitary conditions forced Ms. Johnson and her daughter to make the unenviable decision of choosing between using the bathroom and not using it at all. Tr. 38: 3-8.

The bathroom photographs marked as Exhibits A - D prove the necessary repairs were not merely "cosmetic." Ms. Johnson testified that mold formed on the ceiling. Tr. 33: 5-17. While Kohner argues Ms. Johnson was not qualified as a mold expert, Kohner's own request form said its employees cleaned the mold in February 2015 after a call from Ms. Johnson. Tr. 14: 25; 15:1-4.

Kohner again mischaracterizes the evidence when it asserts that "prior to withholding her rent on March 1, 2015, Johnson had no outstanding complaints about her apartment". Res. S. Br. 32. Kohner's own records showed that Ms. Johnson placed at least five service calls regarding conditions at the property. *See* App. S. Br. 2-5. These calls gave Kohner adequate notice of the dangerous and unsanitary conditions and sufficient time to address them and established the third element of a claim of for the breach of the implied warranty of habitability.

Despite this notice, Kohner failed to restore the premises to habitability. The trial court found that at the time of the trial the bulging trash bag Kohner taped to the bathroom ceiling by Kohner (Exhibit D) was leaking water into the bathtub below. J. at 2.

L.F 47; Tr. 37: 9-10. The tape began to peel away from the ceiling, putting both Ms. Johnson and her daughter at risk of it falling on them at any time. Tr. 45: 8-10. Exhibit B shows the cracked floor tiles. Tr. 36: 18-19. Any contention that this condition was not unsanitary and dangerous to the life, health and safety of Ms. Johnson and her child is simply not true. In fact, the trial court found that based on the conditions Ms. Johnson "rented a hotel room at her own expense to use the shower" for which she was entitled to a set-off in the amount of $300 in hotel costs. J. 2; L.F. 47.[6]

These are the very conditions described by the Court of Appeals in examining existing case law in both Missouri and other jurisdictions. *See* CoA Op. 16-17. (outlining specific instances of uninhabitable conditions including leaking roof, mold, and flooring issues).

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[6] Kohner, relying on *Proffer v. Randall*, 755 S.W.2d 655 (Mo. App. E.D. 1988), argues Ms. Johnson "offered no evidence regarding the diminished value of the premises" or of monetary damages. Resp. S. B. 16. In *Proffer,* the appellate court affirmed a directed verdict in favor of the landlord when the tenant sought to recover damage to her personal property on the basis of the landlord's breach of the implied warranty of habitability. The court held that even if the tenant had prevailed on her breach of the warranty claim, consequential damages do not include loss of personal property as a result of the condition of the premises. 755 S.W.2d at 657. Here, Ms. Johnson is not seeking damages to her personal property. Therefore, *Proffer* is inapposite.

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Ms. Johnson proved her home was full of dangerous and unsanitary conditions that materially affected her and her daughter's life, health, and safety. She also proved she gave Kohner notice of the unsafe and unsanitary conditions and not only were they present when she began withholding rent but they still existed on the trial date 52 days later. By doing so, Ms. Johnson has met all of the elements of a breach of the implied warranty of habitability claim.

IV. MISSOURI LAW DOES NOT REQUIRE MS. JOHNSON TO ESCROW OR DEPOSIT HER RENT INTO THE COURT REGISTRY IN ORDER TO ASSERT AN AFFIRMATIVE DEFENSE OR BRING A BREACH OF THE IMPLIED WARRANTY OF HABITABILITY CLAIM.

Kohner argues the law requires Ms. Johnson to escrow rent into the trial court's registry *in custodia legis* in order to sustain her claim that Kohner breached its implied warranty of habitability. The appellate court rightfully rejected this argument and Ms. Johnson addressed it in her opening brief. See CoA Op. 11 and App. S. Br. 11-20.

Kohner likens the escrow "requirement" discussed in *King* to the type of post-judgment bond discussed in *Rice v. Lucas*, 560 S.W.2d 850 (Mo. banc 1978). Res. S. Br. 14. *Rice* involved a facial challenge to the constitutionality of § 535.110 RSMo 2014 which required a tenant to post a bond to stay execution of a judgment for possession while the case was on appeal in circuit court. The tenant in *Rice* was indigent and claimed the bond provision was an unreasonable condition upon the exercise of her right to a jury trial as guaranteed by the Missouri Constitution and her right to due process and

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equal protection under the 14th Amendment. *Rice* upheld the constitutionality of § 535.110 based on *Lindsey* where the U.S. Supreme Court said that "a 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 the rent if the tenant remains in possession." 525 U.S. at 77.

But there is a significant difference between the *in custodia legis* requirement and a post-judgment bond. There is no opportunity for a hearing on the merits of the tenant's breach of warranty claim with the *in cusotdia legis* requirement. The tenant must pay the full amount of the withheld rent into the court registry even though the landlord may have breached the warranty of habitability and the tenants owes no rent as a matter of law. This differs from a post-judgment bond where there has been a hearing on the merits and a finding of liability.

Notably, *Lindsey* struck down the requirement in the Oregon FED Statute that a tenant post a bond double the rental value whenever the tenant desired to remain in possession while the case was on appeal. Such a requirement violated the Equal Protection Clause of the 14th Amendment because it did not effectuate the purpose of a bond since it was "unrelated to the actual rent accrued or to specific damage to the landlord." *Id.*

The *in custodia legis* requirement may have the same effect as the double bond requirement which *Lindsey* found unconstitutional. In situations where the landlord has breached the warranty, and the tenant is entitled to rent abatement, the amount of rent paid *in custodia legis* will be unrelated to the actual rent owed or the landlord's specific

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damages. The *in custodia legis* requirement forces the tenant to escrow the rent claimed to be owed by the landlord with no opportunity to argue a right to rent abatement because of the landlord's breach of warranty of habitability. In situations where the landlord breached the warranty, the tenant may owe zero or significantly less rent than the amount claimed by the landlord. Hence, the escrowed rent may have no relation to the actual rent owed or the landlord's specific damages. Contrast this with the posting of a bond where there has been a full hearing on the merits and a judgment for a party before the tenant is required to post security.

Lindsey does not grant states the boundless power to constitutionally require rent deposits or bonds in rent and possession actions. In explaining the *Lindsey* holding, the U.S. Supreme Court in *Fuentes v. Shervin*, 407 U.S. 67, 85 n.15 (1972), pointed out that it upheld the Oregon rent deposit requirement in *Lindsey* because "the tenant was not deprived of his possessory interest even for one day without opportunity for a hearing." The tenant was only required to post rent as security when the tenant sough a continuance and only for the period of the continuance. *Id. Lindsey* cautioned against "depriving a tenant of a proper hearing" on the merits of an eviction proceeding "in other situations." 405 U.S. at 65.

The *in custodia legis* requirement imposed by the trial court and urged by Kohner applies regardless of whether the tenant seeks a continuance of the trial date. Further, it is a recovery provision because it bars the tenant from asserting the landlord's breach of warranty as a defense in the rent and possession action – a defense that may be critical to defeating the landlord's right to possession. And contrary to the holding in *Lindsey*, it

bars the defense without an opportunity for a hearing on the tenant's breach of warranty claim.

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CONCLUSION

Ms. Johnson properly stated and proved Kohner breached its implied warranty of habitability. Kohner's breach suspended Ms. Johnson's obligations pursuant to the rental lease between the parties. Accordingly, the Court should not require a condition precedent contrary to Missouri law and due process in order for Ms. Johnson to raise an affirmative defense or counterclaim regarding her landlord's breach of the warranty of habitability.

For the reasons discussed in Appellant's Substitute Brief and this Reply, this Court should vacate the trial court's decision and remand the case 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 7,456, 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.

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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 January 9, 2017 and by U.S. Mail to:

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