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IN THE SUPREME COURT OF MISSOURI

No. SC95944

LATASHA JOHNSON,
Appellant,

v.

KOHNER PROPERTIES,
Respondent.

On Appeal from the Circuit Court of St. Louis County
Associate Circuit Court
The Honorable Judy Draper

BRIEF OF THE METROPOLITAN ST. LOUIS EQUAL HOUSING & OPPORTUNITY COUNCIL, WASHINGTON UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS & COMMUNITY JUSTICE CLINIC, CATHOLIC LEGAL ASSISTANCE MINISTRY, AND ST. LOUIS UNIVERSITY CIVIL LITIGATION CLINIC AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

Zachary Schmook #59555
Kalila Jackson, #61964
Samuel Hoff Stragand, #69370
METROPOLITAN ST. LOUIS EQUAL
HOUSING & OPPORTUNITY COUNCIL
1027 South Vandeventer Avenue, 6th Floor
St. Louis, Missouri 63110

Karen Tokarz #27516
WASHINGTON UNIVERSITY SCHOOL OF LAW
CIVIL RIGHTS & COMMUNITY JUSTICE CLINIC
One Brookings Drive
St. Louis, Missouri 63130

Amy Diemer, #38249
Donanld Beimdiek, #15873
Stephen Novak, #26816
Stephanie Lummus, #64999
CATHOLIC LEGAL ASSISTANCE MINISTRIES
100 N. Tucker Blvd., Suite 726
St. Louis, MO 63101-1915

John J. Ammann, #34308
Brendan D. Roediger, #60585
SAINT LOUIS UNIVERSITY LEGAL CLINIC
100 North Tucker, Suite 704
St. Louis, Mo. 63101

ATTORNEYS FOR AMICI CURIAE

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STATEMENT OF INTEREST OF AMICI CURIAE

The Metropolitan St. Louis Equal Housing & Opportunity Council ("EHOC"), Washington University School of Law Civil Rights & Community Justice Clinic, Catholic Legal Assistance Ministry, and St. Louis University Civil Litigation Clinic, as *amici*, are interested in this case because the Court's decision has the potential to drastically restrict the ability of St. Louis residents to assert affirmative defenses based on derelict housing conditions. Amici represent non-profit organizations and educational institutions that regularly collaborate to provide legal assistance indigent tenants facing eviction in the Metropolitan St. Louis area. Missouri tenants already have few defenses to discriminatory and treatment in housing, and this case puts the practical application of a key affirmative defense – the implied warranty of habitability – at risk. By affirming the trial court's decision, this Court would significantly curtail the ability of tenants to raise defenses based on inadequate housing conditions. By affirming, the Court would severely undercut a key tool for preserving and maintaining adequate housing and impede EHOC's mission to ensure equal housing opportunity.

The trial court's decision in this case threatens to further impair the already low success rate of tenants in defending eviction actions, many of whom are predisposed to experience discriminatory practices. EHOC and the Washington University School of Law Civil Rights & Community Justice Clinic recently analyzed St. Louis City eviction proceedings using 2012 data from Missouri's automated case management system, Case.net, and found that tenants face extraordinary hurdles in raising successful defenses

to eviction. In fact, out of 6,369 eviction cases identified in a recent empirical review, just **two** cases (0.03%) resulted in judgments in favor of a tenant.

We write in support of Appellant Latasha Johnson ("Johnson") and urge this Court to reverse the trial court's determination that Johnson is unable to assert the defense of implied warranty of habitability in the absence of funds held in escrow. We respectfully request that the Court consider the ensuing public policy concerns in light of the disproportionate eviction trends *amici* have observed in St. Louis.

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JURISDICTIONAL STATEMENT

We adopt and incorporate by reference the Jurisdictional Statement set forth in Appellant's brief.

STATEMENT OF FACTS

We adopt and incorporate by reference the Statement of Facts set forth in Appellant's brief.

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POINT RELIED ON

The trial court erred in awarding judgment to Respondent because it inappropriately barred Appellant from asserting her affirmative defense or counterclaim based on the implied warranty of habitability in that the law permits defendants in eviction actions to raise the defense without vacating the property or escrowing rent money into the court.

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

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

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ARGUMENT

The implied warranty of habitability is a judicially created tool for preserving and maintaining quality housing in Missouri. Residential tenants may use the implied warranty as an affirmative defense to an eviction action where a landlord has failed to ensure a livable dwelling. Missouri law does not require a tenant to escrow of money into the court in order to raise the implied warranty of habitability as a defense, even where a tenant remains in possession of the property when she raises the defense. Nevertheless, an empirical study by EHOC and the Washington University School of Law Civil Rights & Community Justice Clinic of eviction cases filed in St. Louis City reveals that tenants are virtually precluded from effectively raising any defenses to eviction actions. The trial court's decision barring the Appellant from raising her defense on the grounds that she failed to vacate the property or escrow her rent money into the court must be reversed in order to maintain the availability of the implied warranty of habitability as a defense to eviction and allow the implied warranty to effectively ensure an adequate supply of safe and livable housing.

I. The implied warranty of habitability defense is an essential tool for ensuring quality housing throughout Missouri.

The implied warranty of habitability holds that landlords in residential lease contracts impliedly represent to their tenants that "the dwelling is habitable and fit for living at the inception of the term and that it will remain so during the entire term." *Detling v. Edelbrock*, 671 S.W.2d 265, 270 (Mo. banc. 1984) (internal quotations and

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citations omitted). Missouri first recognized the existence of an implied warranty of habitability in *King v. Moorehead*, 495 S.W.2d 65, 75 (Mo. App. W.D. 1973). The court in *King* recognized that "the modern lease is both a conveyance and a contract." *Id.* at 70. As such, the court recognized that other courts around the country had rejected the common law idea of *caveat emptor* and had instead "implied a warranty of habitability and fitness for use of the premises on principles of contract law."

The Supreme Court subsequently endorsed a tenant's ability to use the implied warranty of habitability to defend against eviction actions in *Detling* at 270. The Supreme Court, though, made no mention of *King*'s escrow requirement and instead held that:

> [A] tenant seeking to state a cause of action for breach of the warranty of habitability must allege facts satisfying the following elements:
>
> (a) entry into a lease for residential property;
> (b) the subsequent development of dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant;
> (c) reasonable notice of the defects to the landlord; and
> (d) subsequent failure to restore the premises to habitability.

Id. at 270.

Both *Detling* and *King* justify the implied warranty, in part, on the recognition that public policy considerations at the state and local level encourage landlords to comply with local housing codes and building regulations. *Detling* at 269; *King* at 79 (stating that "public policy . . . recognizes the implied warranty of habitability as a means of preserving housing for the rental market."). These housing standards were imposed in response to the tenant's inherent reliance on the honesty of the landlord who holds "superior knowledge" of the premises and its potential defects. *King*. at 71. Additionally,

courts have further justified the implied warranty by recognizing that the rental housing market creates an "inequality in the bargaining power between the landlord and tenant" and that "a residential tenant is entitled to the benefit of consumer protection law." *Id.* at 71-72.

The implied warranty of habitability specifically ensures only the most basic protections for tenants in exchange for the payment of rent. This includes "walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation and proper maintenance." *Detling* at 273 n.7; *King* at 70. "Minor housing code violations which do not affect habitability will be considered *de minimis.*" *King* at 76. Everyday conveniences such as functioning refrigerators and air conditioning are not typically considered severe enough grounds to invoke the implied warranty. The warranty is necessary as a bottom line defense, as it is only available in extreme circumstances where "dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant." *Detling* at 270.

II. Missouri law does not require tenants raising the implied warranty of habitability to escrow rent money into the court or vacate possession of the property.

In addition to recognizing the availability of the implied warranty of habitability as a defense, the *King* court also proposed, in *dicta*, that a tenant should be required to deposit the rent, *in custodia legis*, if the tenant attempts to raise the implied warranty as a defense while she remains in possession of the property. *King* at 77. This proposal,

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however, is *dicta* rather than binding case law because it reflects an opinion on facts that were not before the *King* court. The *King* court was addressing a claim brought by an tenant who raised the defense after relinquishing possession and asserted in her answer to the petition that she had vacated the property. *King* at 67. Accordingly, any statement by the *King* court regarding a counter-factual case where a tenant remains in possession lacks the weight of legal precedent.

Furthermore, the Supreme Court, in establishing the elements of the implied warranty of habitability defense, makes no mention of any escrow requirement. *Detling* at 270. If this court were to create an escrow requirement, such a requirement would not only run counter to general principles of contract law (as explained more fully in Appellant's Brief), but would also prevent the implied warranty of habitability from meeting its objective of preserving and maintaining quality housing throughout Missouri.

While the *King* court endorses an escrow requirement on the ostensible grounds that it would further the objective of ensuring adequate housing, such a requirement has the opposite effect in practice. In *King*, the court reasoned that an escrow requirement would help ensure "that those rents adjudicated for distribution to [the landlord] will be available to correct the defects in habitability." *Id.* at 77. In practice, though, tenants in uninhabitable properties are unable to wait indefinitely for absentee landlords to respond. Uninhabitable conditions force tenants to take prompt steps, at their own expense, to address and ameliorate the problems (e.g. buying space heaters, paying for exterminations or repairs at their own expense, arranging alternative accommodations, etc.).

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Forcing tenants, often with limited means, to escrow the full rental amount limits the sum available to apply directly to restoring the property to habitability. While the *King* court speculates that the presence of money held in escrow will "encourage the landlord to minimize the tenant's damages by making tenantable repairs at the earliest time," *id.*, such an incentive pales in comparison to the tenant's own incentive to restore the property – her home – to a livable condition. If the goal of the implied warranty is, as the *King* court states, to ensure adequate supply of housing, that goal is served best by encouraging money to be spent on making housing inhabitable in the most direct and expeditious means possible.

III. The implied warranty of habitability fails to meet its goal of preserving and maintaining an adequate supply of habitable dwellings when tenants are unable to effectively raise defenses in eviction actions.

The imposition of an escrow requirement is, at its core, a judicially created attempt to balance a landlord's interest in securing adequate payment for his property and a tenant's interest in living in a habitable property. The study of current eviction cases conducted by EHOC and the Washington University School of Law Civil Rights & Community Justice Clinic, though, shows that this balance is already significantly stacked in favor of the landlord. The implied warranty of habitability cannot serve its purpose of preserving and maintaining an adequate supply of habitable dwellings unless tenants are able to effectively assert it as a defense to eviction. Based on the study of eviction cases, however, it is virtually impossible for tenants to obtain a judgment in their

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favor in eviction actions in *any* case. By further stifling a tenant's ability to raise the implied warranty as a defense through imposing an escrow requirement, this Court would only increase the already insurmountable burden on tenants in eviction actions.

A. *An empirical study of eviction cases conducted by EHOC and the Washington University School of Law Civil Rights & Community Justice Clinic shows that tenants are currently extremely unlikely to successfully defend against an eviction action*

EHOC and the Washington University School of Law Civil Rights & Community Justice Clinic conducted a statistical study of eviction actions in St. Louis City, which revealed that of the 6,369 cases based on Chapters 534 and 535, RSMo, filed in 2012, only **two** cases (0.03%) resulted in a judgment in favor of the tenant, while **4,934** cases (77.5%) resulted in judgments in favor of the landlord (with the remaining cases being dismissed without a judgment (the "Study").[1] In cases where landlords obtained a money judgment, the average award was $2,414. At least 2,282 cases (or 35.9% of the total) were forwarded to the sheriff for execution of the eviction (i.e. forcible removal of the tenant from the property).

[1] The reasons why these cases were dismissed was not clear from the online case files. It is likely that the tenants in many of these cases either paid their rent in full to settle the matter or voluntarily vacated the property. Chapter 535 provides a means for tenants to cure nonpayment by requiring that "further actions shall cease and be stayed" if tenant makes payment of all the rent in arrears and court costs. § 535.160, RSMo.

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EHOC and law students from the Washington University School of Law Civil Rights & Community Justice Clinic compiled the eviction data by searching online court records through Missouri's automated case management system, Case.net, which allows searches by filing date within a Circuit. The search results display basic information about the case (including case number, style, and type) and provide links to access more detailed information about the cases (including the judgment amount, party addresses, and a list of docket entries. For cases filed in St. Louis City in 2012, a pdf copy of each judgment is also available. If a user has an attorney login account for Case.net, pdf copies of additional case documents (including the petition) can be downloaded.

Using the search by filing date option, the Study examined every civil case filed in the 22nd Judicial Circuit (St. Louis City) between January 1, 2012 and December 31, 2012. Looking at these cases, the Study identified and analyzed cases in the search results with a claim type of "AC [Associate Circuit] Rent and Possession," "AC Unlawful Detainer," or "AC Landlord Complaint." For these identified cases, the reviewers recorded the following variables:

- The case number and plaintiff name;
- The address of the property at issue;
- The manner of service;
- The disposition of the case;
- The presence and identity of counsel, if any, for plaintiff (landlord) and defendant (tenant);

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- The party to whom possession was awarded
- The existence and amount of any monetary judgment; and
- Whether judgment was enforced through execution for possession of the property.

The Study identified 6,369 eviction cases filed in St. Louis City in 2012.[2] Of these cases, 5,416 were brought under Chapter 535, RSMo, which provides an expedited procedure for recovering rent and possession from a tenant after nonpayment, and 953 were filed under Chapter 534, RSMo, which creates the general cause of action for unlawful detainer.

B. Tenants face significant hurdles in effectively raising their defenses.

In addition to finding that landlords were more than 2,000 times more likely than tenants to succeed in obtaining a judgment in their favor, the Study found other disparities between landlords and tenants. While 68% of landlords were represented by attorneys, just 2.7% of tenants were represented (173 out of 6,369 cases). Based on the limited data, attorneys did not increase the odds of success for tenants at trial (as both defendants who successfully obtained a judgment from the court were *pro se*). But, attorneys did significantly increase the likelihood of dismissal. Over 48% of cases where

[2] This number excludes four cases that were transferred to St. Louis County via a Change of Venue and one case that was certified to go before a Circuit Court Judge instead of an Associate Circuit Court Judge.

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a tenant was represented ended in dismissal, while just 21.6% of unrepresented tenants were able to obtain a dismissal.

Not only were landlords more likely to be represented by attorneys, corporate landlords had a substantial likelihood of success even without representation. A corporate landlord cannot legally bring an eviction suit in Missouri without being represented by a licensed attorney. *See Reed v. Labor and Indus. Relations Com'n*, 789 S.W.2d 19, 21 (Mo. banc 1990) ("[A] corporation may not represent itself in legal matters, but must act solely through licensed attorneys."). The Study, however, revealed that 188 cases were filed by corporations without a listed attorney of record. Of these 188 cases, only 44 were dismissed, showing an underlying presumption in favor of landlords filing for eviction and a failure to establish that cases meet even minimum legal standards.

Additionally, landlords – but not tenants – are provided with form pleadings for eviction actions. *See Form 101 – Affidavit and Complaint in Unlawful Detainer*, 22nd Circuit Court, http://www[.]stlcitycircuitcourt.com/CourtForms/form101.pdf (last visited October 23, 2016); *Form 1102 – Affidavit and Statement in Landlord Case*, 22nd Circuit Court, St. Louis, Missouri, http://www.stlcitycircuitcourt.com/CourtForms/form1102.pdf (last visited October 23, 2016). The lack of information to tenants creates additional barriers, as tenants remain uninformed of their rights and potential defenses.

The impact of this lack of information to tenants is especially pronounced with regard to affirmative defenses, including the implied warranty of habitability. Eviction actions under Chapters 534 and 535 are brought pursuant to the rules of practice before Associate Circuit Court Judges. § 517.011, RSMo. While these rules do not require a

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tenant defending an eviction to file an answer denying the landlord's petition, an answer is required when a tenant wishes to raise an affirmative defense such as the implied warranty of habitability. § 517.031m, RSMo. Nevertheless, tenants are not provided any form pleadings, and many tenants first learn of this requirement at trial when their defenses are summarily rejected by a judge because of their failure to file an answer.

C. *Comparing the St. Louis results to other studies shows that Missouri tenants are more disadvantaged than tenants in other areas of the country.*

Throughout the country, tenants face significant disadvantages in eviction actions, but the results of the Study reflect a particularly pronounced disadvantage for tenants in the state of Missouri. A recent law review article summarizes the common findings of more than a dozen studies of eviction actions across the nation as follows:

> While the details of eviction procedures vary, the common outcome measurements include possession, rent abatement, and repairs. Regardless of whether tenants appear or default, settle or go to trial, raise defenses or do not, the result invariably is a judgment for the landlord. Typically, the results are unaffected by whether the landlord is represented by counsel. The unrepresented tenant faces swift eviction, and with minimal judicial involvement.[3]

While not all eviction studies state the precise success rates of tenants at trial, they all reflect that tenants throughout the country face extremely long odds of

[3] Russel Engler, *Connecting Self-Representation to Civil Gideon: What Existing Data Reveal About When Counsel is Most Needed*, 37 Fordham Urb. L.J 37, 48 (2010) (internal citations omitted).

succeeding at trial. Most of these studies find tenants are successful less than 10% of the time, including:

- Oklahoma City, OK – Reviewing 2,706 eviction actions and finding that 0.5% (or 15 cases) ended in judgments for a tenant, while 61.9% ended in judgment for the landlord, and 37.4% were dismissed.[4]
- Chicago, IL – Reviewing 763 eviction cases and finding that 4% resulted in judgment for a tenant, while approximately 68% resulted in some form of judgment or agreed order in favor of landlords.[5]
- New Haven, CT – Finding that 7% of unrepresented tenants and 21% of represented tenants were able to avoid eviction.[6]

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[4] Lucia Walinchus, "Tenants on trial: Investigation shows landlords win 95 percent of eviction cases." *The Journal Record* (December 31, 2015), *available at* http://journalrecord[.]com/2015/12/ 31/tenants-on-trial-investigation-shows-landlords-win-95-percent-of-cases-law/.

[5] Chicago-Kent College Class of 2004 Honors Scholar, *No Time for Justice: A Study of Chicago's Eviction Court*, Lawyers' Committee for Better Housing (Dec. 2003), *available* at http://lcbh[.]org/images/2008/10/chicago-eviction-court-study.pdf.

[6] Steven Gunn, Note, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 Yale L. & Pol'y Rev. 385, 411, 414 tbl. 18 (1995).

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- Boston, MA – Finding that two-thirds of represented tenants retained possession and one-third of unrepresented tenant retained possession.[7]

While these percentages are low nationwide, the numbers for St. Louis are staggering. Even Oklahoma City's miniscule success rate of 0.5% was an entire order of magnitude greater than the 0.03% chance of success for tenants observed in the Study.

Overall, the results of the Study demonstrate that tenants already face nearly insurmountable hurdles in raising defenses to eviction actions. These barriers prevent the implied warranty of habitability from effectively serving its purpose of preserving and maintaining adequate housing in Missouri by preventing the defenses from ever seeing success at trial. Imposing an escrow requirement on tenants seeking to raise the implied warranty as defense to eviction would only further limit the availability of this important tool. Instead of endorsing the trial court's escrow requirement, this Court should categorically disclaim the *dicta* in *King* and reaffirm the Supreme Court's holding in *Detling*, which contained no escrow requirement.

[7] Boston Bar Association Task Force on Expanding the Civil Right to Counsel, *The Importance of Representation in Eviction Cases and Homelessness Prevention* (March 2012), a*vailable at* http://www[.]bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf.

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CONCLUSION

Amici urge this Court to reverse the trial court's decision barring Appellant from raising her implied warranty of habitability defense and to remand this case to the trial court with instructions to permit the Appellant's implied warranty of habitability defense.

Respectfully submitted,

/s/ Zachary Schmook
ZACHARY M. SCHMOOK, #59555
KALILA JACKSON, #61964
SAMUEL HOFF STRAGAND, #69370
METROPOLITAN ST. LOUIS EQUAL HOUSING & OPPORTUNITY COUNCIL
1027 South Vandeventer Avenue, 6th Floor
St. Louis, Missouri 63110
(314) 246-9381 (telephone)
(888) 636-4412 (facsimile)
zschmook@ehoc-stl.org

/s/ Karen Tokarz
KAREN L. TOKARZ, #27516
WASHINGTON UNIVERSITY SCHOOL OF LAW CIVIL RIGHTS & COMMUNITY JUSTICE CLINIC
One Brookings Drive
St. Louis, Missouri 63130
(314) 935-6414 (telephone)
(314-935-5356 (facsimile)
tokarz@wustl.edu

/s/Amy Diemer
AMY DIEMER, #38249
DONALD BEIMDIEK, #15873
STEPHEN NOVAK, #26816
STEPHANIE LUMMUS, #64999
Catholic Legal Assistance Ministries
100 N. Tucker Blvd., Suite 726
St. Louis, MO 63101-1915
P: 314-977-3958
F: 314-977-3444
Adiemer1@slu.edu

/s/ Brendan Roediger
JOHN J. AMMANN, #34308
BRENDAN D. ROEDIGER, #60585
Saint Louis University Legal Clinic
100 North Tucker, Suite 704
St. Louis, Mo. 63101
314-977-2778; 314-977-1180 fax
ammannjj@slu.edu

ATTORNEYS FOR AMICI CURIAE

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 24, 2016, a true and correct copy of the foregoing document was served upon the Clerk of the Court and upon all counsel of record via the Missouri e-filing system.

/s/ Zachary Schmook

/s/ Karen Tokarz

/s/ Amy Diemer

/s/ Brendan D. Roediger

CERTIFICATE OF COMPLIANCE

The undersigned certify that this brief contains the information required by Supreme Court Rule 55.03 and complies with the requirements contained in Supreme Court Rule 84.06(b). Relying on the word count of Microsoft Word, the undersigned certify that this brief contains 3,893 words, excluding the cover, certificate of service, certificate of compliance, and signature block.

/s/ Zachary Schmook

/s/ Karen Tokarz

/s/ Amy Diemer

/s/ Brendan D. Roediger

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