Summary of SC95944, *Kohner Properties Inc. v. Latasha Johnson*
Appeal from the St. Louis County circuit court, Judge Judy P. Draper
Argued and submitted February 8, 2017; opinion issued July 3, 2018

Attorneys: Johnson was represented by Lee R. Camp and Jacki L. Langum of Arch City Defenders Inc. in St. Louis, (314) 361-8834; and Cheryl Rafert and Daniel E. Claggett of Legal Services of Eastern Missouri in St. Louis, (314) 256-8708. Kohner was represented by Randall J. Reinker, William Edward Waits and Mary J. Ligocki of Reinker, Hamilton & Piper LLC in St. Louis, (314) 333-4140.

Several organizations filed briefs as friends of the Court. The ACLU of Missouri Foundation, et al., were represented by Anthony E. Rothert of the ACLU of Missouri Foundation in St. Louis, (314) 652-3114 and Emily J. Coffey of the Sargent Shriver National Center on Poverty Law in Chicago, Illinois, (312) 724-8411. The Metropolitan St. Louis Equal Housing & Opportunity Council, et al., were represented by Zachary Schmook, Kalila Jackson and Samuel Hoff Stragand of the council in St. Louis, (314) 246-9381; Karen Tokarz of the Civil Rights & Community Justice Clinic at Washington University School of Law in St. Louis, (314) 935-6414; Amy Diemer, Donald Beimdiek, Stephen Novak and Stephanie Lummus of Catholic Legal Assistance Ministries in St. Louis, (314) 977-3958; and John J. Ammann and Brendan Roediger of the Saint Louis University Legal Clinic in St. Louis, (314) 977-2778. Legal Aid of Western Missouri, et al., were represented by Michael T. Carney of the University of Idaho College of Law in Boise, Idaho, (208) 577-4495; Jane E. Worley of Legal Aid of Western Missouri in Kansas City, (816) 474-6750; Daniel R. Wichmer of Legal Aid of Southern Missouri in Springfield, (417) 881-1397; and Mary M. Beck of the University of Missouri School of Law in Columbia, (573) 882-7872.

This summary is not part of the opinion of the Court. It has been prepared by communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A woman barred from asserting her landlord breached the implied warranty of habitability because she did not pay rent into escrow with the circuit court appeals the judgment against her. In a 3-2 per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri affirms the judgment. Although the circuit court cannot be faulted for relying on a decades-old appellate decision in barring the woman's affirmative defense and counterclaim – and, therefore, did not erroneously declare or apply the law at the time it entered its judgment – in the future, circuit courts may exercise discretion on a case-by-case basis to determine whether a tenant should be required to pay rent into escrow with the court pending litigation over whether a landlord breached an implied warranty of habitability.

Judge Breckenridge dissents. She would reverse the judgment. The appellate decision on which the circuit court relied was not binding. Regardless of whether a circuit court should have discretion to determine whether to require a tenant to pay rent into escrow before alleging a breach of the implied warranty of habitability, the circuit court here thought it was mandatory.

Facts: Latasha Johnson rented an apartment from Kohner Properties Inc. During her tenancy, a water leak caused the bathroom ceiling in her apartment to collapse. Despite repair attempts, the leak persisted, and Johnson stayed at a hotel at her own expense to use the shower. She also withheld two months of rent. Kohner sued Johnson, seeking unpaid rent and possession of the apartment. In her answer, Johnson raised an affirmative defense and counterclaim alleging Kohner had breached the implied warranty of habitability. At trial, the parties introduced conflicting evidence about whether Johnson allowed Kohner access to the apartment to make repairs and whether Kohner breached the implied warranty. The circuit court entered its judgment in Kohner's favor, finding the hole in the bathroom ceiling remained unrepaired but, because Johnson had not vacated the premises or paid her rent to the circuit court, she was barred from asserting her affirmative defense and counterclaim. The circuit court awarded Kohner possession of the apartment along with rent, late fees, attorney fees and court costs, offset by the amount Johnson paid in hotel expenses. Johnson appeals.

AFFIRMED.

Court en banc holds: The circuit court did not erroneously declare or apply the law at the time it entered its judgment. In barring Johnson from asserting a breach of the implied warranty of habitability, the circuit court relied on the 1973 appellate decision in *King v. Moorehead*, which concluded a tenant who retains possession is required to deposit the rent as it becomes due "*in custodia legis*" (into escrow under the court's custody) pending litigation as to whether the landlord breached the implied warranty of habitability. This decision, however, was unnecessary to resolve the case, because the tenant in *King* already had vacated the premises. As such, this discussion is *dicta* (not controlling). Although only one Missouri appellate case appears to sanction it, circuit courts have been following *King*'s *in custodia legis* procedure for nearly five decades. The majority of courts in other jurisdictions that permit rent withholding leave whether to impose an *in custodia legis* procedure to the trial court's discretion. Consistent with that prevailing view, this Court holds circuit courts may exercise discretion on a case-by-case basis to determine whether an *in custodia legis* procedure is appropriate in a particular case. Given, however, that *King*'s pronouncement long has constituted the status quo in Missouri, and absent contrary authority from this Court or the legislature, the circuit court cannot be faulted for relying on *King* when it barred Johnson's affirmative defense and counterclaim.

Dissenting opinion by Judge Breckenridge: The author would reverse the circuit court's judgment. The *in custodia legis* procedure discussed in *King* is *dicta*. Requiring tenants to deposit rent as it comes due prior to adjudicating a landlord's claim for rent is a financial prerequisite to a tenant's access to the courts to allege a breach of the implied warranty of habitability and ignores the disparity between landlords and tenants. In practice, the *in custodia legis* procedure revives the constructive eviction doctrine the implied warranty of habitability was designed to replace. Even if the author agreed the discretionary *in custodia legis* procedure the principal opinion adopts were appropriate, the record makes clear the circuit court perceived the procedure to be mandatory. As such, the author believes Johnson should be afforded the opportunity for the circuit court to exercise such discretion.