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Law School Clinic and Community Legal Services
Providers Collaborate to Advance the Remedy of
Implied Warranty of Habitability in Missouri

Karen Tokarz*
Zachary Schmook**

Missouri tenants have few defenses to uninhabitable housing conditions. In a statistical study conducted by the Washington University Civil Rights & Community Justice Clinic and the Metropolitan Saint Louis Equal Housing & Opportunity Council, which encompassed 6,369 landlord-tenant cases from the 2012 calendar year, 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. These findings suggest that unrepresented low-income tenants seeking to raise defenses in rent and possession and eviction cases in the Missouri state courts face significant difficulties.

The trial court's decision in Kohner Properties, Inc. v. Johnson,¹ currently before the Missouri Supreme Court, puts the practical application of a key affirmative defense—the implied warranty of habitability—at risk. The remedy of implied warranty of habitability developed, in part, as a response to a chronic and prolonged housing shortage, particularly for low-income households. This remedy is necessary because common law constructive eviction, which requires the tenant to abandon the premises, is an insufficient remedy for low-

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1. Kohner Props., Inc. v. Johnson, __ S.W.3d __, No. ED 103133, 2016 WL 4760904 (Mo. Ct. App. E.D. 2016).

income tenants. The remedy of implied warranty of habitability is crucial to balancing the interests of landlords and tenants, and maintaining an adequate supply of safe, livable, quality housing in Missouri.

Collaborating with community legal services organizations to provide needed legal services is a central tenet of the Washington University Civil Rights & Community Justice Clinic.² The Clinic's earliest partner was Legal Services of Eastern Missouri (LSEM), where the Law School clinical program offices were physically located in the beginning years. Over the years, the Civil Rights & Community Lawyering Clinic has collaborated with LSEM's public benefits, immigration, housing, consumer, and children's rights programs. More recently, the Clinic has partnered with other local legal services providers, including the Metropolitan Saint Louis Equal Housing & Opportunity Council (EHOC), Land of Lincoln Legal Assistance Foundation (LLAF), and Migrant & Immigration Community Action Project (MICA).³

The Civil Rights & Community Justice Clinic provides assistance in the collective representation of the client communities served by these legal services partners through investigative research and reporting, impact litigation and amicus briefs, legislative and regulatory advocacy, media advocacy, community education, and community dispute resolution services.⁴ Today, in all of these offices, Clinic alums now serve as supervising clinic attorneys, including one of the co-authors of this Essay.

2. See generally Tokarz et al., *Conversations on Community Lawyering: The Newest (Oldest) Wave in Clinical Legal Education*, 28 WASH. U. J.L. & POL'Y 359 (2008) (with Nancy Cook, Susan Brooks, and Brenda Blom).

3. In addition, the Civil Rights & Community Justice Clinic also collaborates with non-legal community service agencies, such as the Better Business Bureau, Beyond Housing, and U.S. Arbitration & Mediation Services.

4. Examples include investigative research and reports on landlord-tenant rights; litigation and legislative challenges to anti-immigration legislation; litigation and legislative advocacy for home foreclosure mediation and the development of a regional home foreclosure mediation project; community education on consumer, housing, and immigration rights via brochures, video, and web resources; media advocacy on municipal court reform with local and national news media, including multiple clinic student op-eds; and municipal court reform reports and initiatives in conjunction with the Ferguson Commission and the Missouri Supreme Court.

From 2013 to 2015, the Civil Rights & Community Justice Clinic partnered with EHOC to investigate widespread difficulties faced by indigent tenants seeking to raise defenses, especially the implied warranty of habitability, in landlord-tenant cases in Missouri state courts. In collaboration with EHOC, Clinic students conducted an empirical analysis of over 6,000 landlord-tenant cases in St. Louis City Associate Circuit Court from the calendar year 2012. EHOC and the Clinic submitted the data collected from this study in an amicus curiae brief to the Missouri Court of Appeals in *Kohner Properties, Inc. v. Johnson*,⁵ the appeal of a rent and possession case decided in May 2015 in St. Louis County Associate Circuit Court, in which LSEM represented the tenant, Latasha Johnson. While the trial court found credible evidence of lack of habitability, the trial court ruled Ms. Johnson was barred from raising her breach of implied warranty affirmative defense and counterclaim because she failed to vacate the premises or escrow her rent to the court.⁶ The Missouri Court of Appeals ruled on the appeal in this case in record time in September 2015, less than one month after oral arguments. While affirmatively recognizing the merits of Ms. Johnson's arguments, the court certified the case to the Missouri Supreme Court pursuant to Missouri Supreme Court Rule 83.02.⁷

EHOC and the Clinic submitted the data collected from this study again in an amicus curiae brief in the appeal of *Kohner Properties, Inc. v. Johnson* to the Missouri Supreme Court,⁸ which heard arguments

5. *Kohner*, 2016 WL 4760904.

6. *Id.* at *2.

7. *Id.* at *1.

8. The original amici were joined in the appeal to the Missouri Supreme Court by the Catholic Legal Assistance Ministry and the St. Louis University Civil Litigation Clinic. Brief of the Metropolitan St. Louis Equal Housing & Opportunity Council, Washington University School of Law Civil Rights & Community Justice Clinic et al. as Amici Curiae in Support of Appellant, *Kohner Props., Inc. v. Johnson*, No. SC 95944 (Mo. 2017). In addition, a separate amicus brief was filed, jointly, by the Housing Umbrella Group Of Florida Legal Services, the National Alliance of HUD Tenants, the American Civil Liberties Union Of Missouri Foundation, the Lawyers' Committee For Civil Rights Under Law, the National Housing Law Project, Legal Services NYC, the National Law Center On Homelessness And Poverty, the National Legal Aid And Defenders Association, and the Sargent Shriver National Center On Poverty Law. Brief of American Civil Liberties Union of Missouri Foundation, Housing Umbrella Group of Florida Legal Services et al. as Amici Curiae, *Kohner Props., Inc. v. Johnson*, No. SC 95944 (Mo. 2017). A third amicus brief was filed by Legal Aid of Western Missouri, Legal Services of Southern Missouri and Mid-Missouri Legal Services. Brief of

on February 8, 2017. As is evident from the material below drawn from the amicus briefs and the Missouri Court of Appeals decision, this case raises significant economic and public policy concerns about the implied warranty of habitability law and practice in Missouri when tenants are unable to raise effective defenses to rent and possession/eviction actions. A decision is expected from the Missouri Supreme Court by summer 2017.

I. FACTUAL AND PROCEDURAL BACKGROUND IN *KOHNER PROPERTIES, INC. V. JOHNSON*

Ms. Latasha Johnson (Appellant) entered into a lease with Kohner Properties, Inc. (Respondent) to rent the premises at 3543 DeHart Place, Apartment 1, in St. Louis County on October 31, 2014. The lease provided for \$585.00 per month in rent and a \$200.00 security deposit. Ms. Johnson and her young daughter, who has cerebral palsy, moved into the apartment that day, and Ms. Johnson immediately noticed problems with the only bathroom. She wrote on her move-in sheet that the shower was missing tiles and there were cracks in the bathroom floor. While moving, Ms. Johnson asked the property manager about the bathroom floor and was told there was “nothing [they] could do.”⁹

Almost immediately, a water leak appeared in the ceiling above the shower. The leak began as a drip, but developed into a stream. Shortly thereafter, mold began growing on the ceiling. Ms. Johnson reported the leak and mold via Respondent’s telephone service line and by speaking personally with the maintenance technician. On November 29, 2014, Ms. Johnson also made a service request regarding two tiles that had fallen off the shower wall. The tiles were placed back on the wall by Respondent’s maintenance technician. According to the property manager, the property was built in the 1950s and “[t]iles are going to start popping.”¹⁰

Legal Aid of Western Missouri, Legal Services of Southern Missouri et al. as Amici Curiae, *Kohner Props., Inc. v. Johnson*, No. SC 95944 (Mo. 2017).

9. *Kohner*, 2016 WL 4760904, at *1–2.

10. *Id.* at *1.

From December 2014 to January 2015, Ms. Johnson also reported several problems with a board under the kitchen sink, the range that would not light, the oven that was not functioning properly, the tiles that had fallen off the bathroom wall again, and an electrical problem in a bedroom. On February 10, 2015, Ms. Johnson contacted Respondent again about the mold on the bathroom ceiling and the cracked, unstable bathroom floor. Respondent's maintenance technician responded the following day. But, according to Ms. Johnson, the condition of the floor and ceiling continued to deteriorate during her tenancy. On March 1, 2015, Ms. Johnson withheld her rent payment because her maintenance requests regarding the leak in the bathroom ceiling, the mold, and the floor were not resolved.¹¹

On March 17, 2015, at 2:00 a.m., the bathroom ceiling above the shower collapsed and Ms. Johnson placed an emergency service request. Respondent's maintenance technician responded later in the morning and determined the bathtub above Ms. Johnson's apartment was leaking. After "repairing" the tub spout in the bathroom upstairs, Respondent taped a black plastic bag over the hole in Ms. Johnson's ceiling. The leak persisted, however, and water collected in the plastic and pulled at the tape on the ceiling, causing a hole in the ceiling. Ms. Johnson repeatedly asked Respondent to repair the leak and the hole in her ceiling, but Respondent failed to do so.¹²

As a result of the leaking water, Ms. Johnson was only getting "minimum" use of the bathroom. Although she continued to use the shower to bathe, her young daughter with cerebral palsy was unable to use the bathtub for bathing and was only able to be in the bathroom for short periods of time. According to Ms. Johnson, the mold and air conditions in the bathroom aggravated her daughter's allergies and irritated her daughter's eyes to the extent her eyes were beginning to droop. Following the ceiling collapse, Ms. Johnson and her daughter stayed at a hotel three or four nights at her own expense.¹³

On March 20, 2015, Respondent filed a lawsuit against Ms. Johnson seeking unpaid rent and possession of the premises. Ms.

11. *Id.*

12. *Id.*

13. *Id.* at *2.

Johnson, who was represented by LSEM, filed an answer, affirmative defenses including a breach of the implied warranty of habitability, and a two-count counterclaim for violation of the Missouri Merchandising Practices Act and a common law breach of lease alleging violation of the implied warranty of habitability.¹⁴

Prior to opening statements in the trial in St. Louis County Associate Circuit Court on April 15, 2015, Respondent moved to bar Ms. Johnson's affirmative defense and counterclaim for breach of the lease based on the implied warranty of habitability asserting such could not be raised because Ms. Johnson failed to pay her rent to the court *in custodia legis*.¹⁵ The court overruled Respondent's motion and the case proceeded to trial, during which Ms. Johnson presented evidence of a breach of implied warranty of habitability.

At the time of trial, Ms. Johnson was still living in the apartment because she was unable to secure other housing due, in part, to a lack of resources.¹⁶ She testified at trial that she withheld her March and April rent to expend money for hotel rooms and save money for alternative housing. She repeatedly applied for other housing in her daughter's school district, but was repeatedly rejected because she did not meet the minimum income requirements. At the time of trial, both the leak and the ceiling remained unrepaired.¹⁷

The trial court took the case under submission and entered its Order and Judgment on May 13, 2015 against Ms. Johnson for \$2,104.36 in rent, late fees, attorney's fees, and court costs, and awarded possession of the premises to Respondent. The trial court found that credible evidence demonstrated lack of habitability of the apartment at the time of trial, specifically, the hole in the ceiling remained covered by plastic, the hole had not been repaired, and water continued to drip from the hole and plastic covering the ceiling. However, the trial court ruled Ms. Johnson was barred from asserting the affirmative defense and counterclaim based on implied warranty of habitability because she failed to either vacate the premises or

14. *Id.*

15. *Id.*; *In custodia legis* is defined as "[i]n the custody of the law" and is used in reference to property placed in the court's charge pending litigation over the property. *In custodia legis*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16. Ms. Johnson and her daughter have since relocated to temporary housing.

17. *Kohner*, 2016 WL 4760904, at *2.

tender her rent to the court *in custodia legis*, per the trial judge's interpretation of *King v. Moorehead*,¹⁸ a 1973 appellate decision from the Missouri Court of Appeals for the Western District. The trial court also found Respondent breached the maintenance clause of the lease agreement and awarded Ms. Johnson a \$300 set-off for hotel costs. This decision led to Ms. Johnson's appeal in the Missouri Court of Appeals for the Eastern District and her subsequent appeal to the Missouri Supreme Court.

II. THE STATEMENT OF INTEREST OF AMICI CURIAE ON BEHALF OF THE TENANT IN *KOHNER PROPERTIES, INC. V. JOHNSON*

EHOC and the Civil Rights & Community Justice Clinic submitted an amici curiae brief on behalf of Ms. Johnson in the now-decided Missouri Court of Appeals case and in the subsequent Missouri Supreme Court case, which was argued on February 8, 2017, because of the significant public policy issues involved in the implied warranty of habitability law and practice in Missouri. The ultimate decision of the Missouri Supreme Court has the potential to restrict drastically the ability of residents to assert affirmative defenses based on derelict housing conditions. Missouri tenants already have few defenses to uninhabitable housing conditions, and the trial court's decision puts the practical application of a key affirmative defense—the implied warranty of habitability—at risk. Affirming the trial court's decision would significantly curtail the ability of tenants to challenge uninhabitable housing conditions, undercut a potential key tool for defending eviction actions, exacerbate the disparities in case outcomes between landlords and tenants, and negatively impact the preservation and maintenance of an adequate supply of safe and livable housing in Missouri.

A. Tenants in Missouri Face Significant Hurdles in Eviction Actions

Amici concur with the appellant that the implied warranty of habitability is a judicially created tool for preserving and maintaining quality housing in Missouri. For economic and public policy reasons,

18. *Id.*

tenants should be able to use the implied warranty as an affirmative defense to an eviction action where a landlord has failed to ensure a livable dwelling. However, the empirical study conducted by EHOc and the Civil Rights & Community Justice Clinic of eviction cases filed in St. Louis City in 2012 reveals that tenants face significant hurdles in raising defenses to eviction actions.¹⁹ 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).

EHOc and law students from the 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 judicial 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.

In the statistical study conducted by EHOc and the Civil Rights & Community Justice Clinic, which encompassed 6,369 landlord-tenant cases during the 2012 calendar year, based on Chapters 534 and 535, RSMo, only 2 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.

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. The study identified and analyzed cases in the search results with a claim type of "[Associate Circuit] Rent and Possession," "AC Unlawful Detainer," or "AC Landlord Complaint," and obtained a PDF copy of each. For these

19. The reason 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. MO. ANN. STAT. § 535.160 (West 2016). If a user has an attorney login account for Case.net, PDF copies of additional case documents (including the petition) can be downloaded.

identified cases, the reviewers recorded the following variables: case number and plaintiff name; address of the property at issue; manner of service; disposition of the case; presence and identity of counsel, if any, for plaintiff (landlord) and defendant (tenant); party to whom possession was awarded; 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 2012.²⁰ 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.

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 obtaining a trial verdict in favor of a tenant, 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 a tenant was represented ended in dismissal, while just 21.6% of unrepresented tenants were able to obtain a dismissal.²¹

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

20. This number excludes four cases that were transferred to St. Louis County via a Change of Venue and one case that was certified through local procedural rules to go before a Circuit Court Judge instead of an Associate Circuit Court Judge. *See* Brief of the Metropolitan St. Louis Equal Housing & Opportunity Council, Washington University School of Law Civil Rights & Community Justice Clinic et al. as Amici Curiae in Support of Appellant, Kohner Props., Inc. v. Johnson, No. SC 95944 (Mo. 2017).

21. *See* Brief of the Metropolitan St. Louis Equal Housing & Opportunity Council, Washington University School of Law Civil Rights & Community Justice Clinic et al. as Amici Curiae in Support of Appellant, Kohner Props., Inc. v. Johnson, No. SC 95944 (Mo. 2017).

licensed attorney.²² 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 form pleadings for eviction and rent and possession actions on the St. Louis Circuit Court website.²³ The lack of information and procedural assistance provided 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.²⁴ While these rules do not require a tenant defending an eviction action 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.²⁵ Nevertheless, tenants are not provided any form pleadings on the circuit court website, nor advised as to the procedures for filing same. Rather, many (if not most) 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.

22. See *Reed v. Labor & Indus. Relations Comm'n*, 789 S.W.2d 19, 21 (Mo. 1990) (en banc) (“[A] corporation may not represent itself in legal matters, but must act solely through licensed attorneys.”).

23. See *Form 101: Affidavit and Complaint in Unlawful Detainer*, 22ND CIRCUIT COURT, ST. LOUIS, MISSOURI, <http://www.stlcitycircuitcourt.com/CourtForms/form101.pdf> (last visited Dec. 29, 2016); *Form 1102: Affidavit and Statement in Landlord Case*, 22ND CIRCUIT COURT, ST. LOUIS, MISSOURI, <http://www.stlcitycircuitcourt.com/CourtForms/form1102.pdf> (last visited Dec. 29, 2016).

24. MO. ANN. STAT. § 517.011 (West 2016).

25. MO. ANN. STAT. § 517.031 (West 2016).

B. Tenants in Missouri are More Disadvantaged Than Tenants in Other Areas of the Country

Tenants face significant disadvantages in eviction actions across the nation; however, the results of the St. Louis study reflect a particularly pronounced disadvantage for tenants in the state of Missouri. The Missouri Court of Appeals noted that many jurisdictions do not automatically require tenants in possession to escrow rent with the court in order to raise a breach of the implied warranty. According to the court, “[i]n fact, the majority of courts which permit rent withholding as a remedy under the warranty 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.”²⁶

A review of eviction studies reveals that tenants throughout the country face extremely long odds of succeeding at trial, but Missouri tenants appear to have the longest odds. In a recent law review article, Professor Russell Engler summarized the common findings of more than a dozen studies of eviction actions across the nation and concluded:

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.²⁷

26. *Kohner Props., Inc. v. Johnson*, __ S.W.3d __, No. ED 103133, 2016 WL 4760904, at *9 (Mo. Ct. App. E.D. 2016) (citing RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 11.3 n.2 (AM. LAW INST. 1977) (amended 2016)).

27. Russell 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).

According to Engler and others, 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.²⁸
- 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.²⁹
- New Haven, CT—Finding that 7% of unrepresented tenants and 23% of represented tenants were able to avoid eviction.³⁰
- Boston, MA—Finding that two-thirds of represented tenants retained possession and one-third of unrepresented tenant retained possession.³¹

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

Overall, the results of the St. Louis study demonstrate that tenants in Missouri face nearly insurmountable hurdles in raising defenses to eviction actions. These barriers prevent the implied warranty of habitability from effectively serving its purposes of preserving and maintaining adequate housing in Missouri and balancing the rights of

28. Lucia Walinchus, *Tenants on Trial: Investigation Shows Landlords Win 95 Percent of Eviction Cases*, J. RECORD (Dec. 31, 2015), <http://journalrecord.com/2015/12/31/tenants-on-trial-investigation-shows-landlords-win-95-percent-of-cases-law/>.

29. KAREN DORAN ET AL., NO TIME FOR JUSTICE: A STUDY OF CHICAGO'S EVICTION COURT (2003), <https://lcbh.org/sites/default/files/resources/2003-lcbh-chicago-eviction-court-study.pdf>.

30. Steven Gunn, *Eviction Defense for Poor Tenants: Costly Compassion or Justice Served?*, 13 YALE L. & POL'Y REV. 385, 413–14 (1995).

31. BOSTON BAR ASSOCIATION TASK FORCE ON EXPANDING THE CIVIL RIGHT TO COUNSEL, THE IMPORTANCE OF REPRESENTATION IN EVICTION CASES AND HOMELESSNESS PREVENTION (Mar. 2012), <http://www.bostonbar.org/docs/default-document-library/bba-crtc-final-3-1-12.pdf>.

the parties by preventing the defenses from ever seeing success at trial. Imposing an escrow requirement on tenants who seek to raise the implied warranty as a defense to eviction only further limits the availability of this crucial tool for tenants and the public.

III. SHOULD THERE BE AN *IN CUSTODIA LEGIS* REQUIREMENT IN MISSOURI?

As indicated above, prior to trial on Respondent's rent and possession lawsuit in St. Louis County Associate Circuit Court, Respondent moved to bar Ms. Johnson's affirmative defense and counterclaim based on breach of the implied warranty of habitability. Respondent argued that Ms. Johnson waived her opportunity to raise habitability issues because she had remained in possession of the premises, but had not deposited her rent to the court, relying upon the *King* court's assertion that "[a] tenant who retains possession . . . shall be required to deposit the rent as it becomes due, *in custodia legis* pending the litigation."³² Ms. Johnson objected, arguing this language was nonbinding dicta. While the trial court initially allowed her evidence to be admitted, the court subsequently barred her defense and counterclaim in its Order and Judgment based on *King*. The parties maintained their respective positions on appeal in the Missouri Court of Appeals and in the Missouri Supreme Court.

The ultimate issue before the Missouri Court of Appeals, and now the Missouri Supreme Court, is whether the court should adopt an *in custodia legis* requirement as a prerequisite for raising the breach of implied warranty of habitability. In concluding in the negative, the Missouri Court of Appeals highlighted the underlying dilemma for tenants:

To automatically require every tenant to escrow her entire withheld rent payment dilutes the very remedy the implied warranty establishes. Such an inflexible requirement potentially creates a new dilemma for impoverished tenants to (1) use their rent money to seek new housing or to remediate

32. Kohner Props., Inc. v. Johnson, __ S.W.3d __, No. ED 103133, 2016 WL 4760904, at *6 (Mo. Ct. App. E.D. 2016).

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.³³

The Missouri Court of Appeals concurred with Ms. Johnson's position that "the tenant's obligation for rent is dependent upon the landlord's performance of his responsibilities, among them, his implied warranty of habitability" and "[b]reach of [the landlord's duty to maintain habitable property] justifies retention of possession by the tenant and withholding of rent until habitability has been restored."³⁴ According to the court, "The underlying rationale 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."³⁵

The Missouri Court of Appeals discussed at great length *King v. Moorehead*,³⁶ the seminal case in Missouri on the implied warranty of habitability on which the trial court had relied. The court agreed with the *King* court's recognition that constructive eviction creates a dilemma for tenants, forcing them to either "continue to pay rent and endure the conditions of untenability or abandon the premises and hope to find another dwelling which, in times of severe housing shortage, is likely to be as uninhabitable as the last."³⁷

The Missouri Court of Appeals concurred with the *King* court that modern housing leases are not purely conveyances of property interests with independent covenants to perform, but are also bilateral contracts.³⁸ The Missouri Court of Appeals also agreed with the *King* court's recognition of the need for an implied warranty of habitability in residential leases due to: (1) the landlord's superior bargaining power as a result of contemporary housing shortages; (2) housing codes requiring the landlord to repair and maintain the property in

33. *Id.* at *8.

34. *Id.* at *4 (quoting *King*, 495 S.W.2d at 77).

35. *Id.* at *7.

36. 495 S.W.2d 65 (Mo. App. 1973).

37. *Kohner*, 2016 WL 4760904, at *4 (citing *King*, 495 S.W.2d at 76–77) (internal quotation marks omitted).

38. *Id.* at *3 (citing *King*, 495 S.W.2d at 71).

compliance with housing codes, including Enforcement of Missouri's Minimum Housing Code Standards Act (Housing Code Enforcement Act);³⁹ (3) the landlord's superior knowledge of the condition of the premises including latent defects and of housing requirements and violations; and (4) the residential lessee's position who relies on the lessor to provide habitable housing.⁴⁰

While the Missouri Court of Appeals restated the *King* framework as to what constitutes a material breach, the court explicitly disagreed with *King's* conclusion that a tenant who retains possession shall be required to deposit the rent as it becomes due, *in custodia legis*, pending the litigation to assure the landlord that those rents adjudicated for distribution to him will be available to correct the defects in habitability.⁴¹ According to the court, “[b]y establishing the right to the implied warranty of habitability, *King* expanded the common law and set forth a new judicially created remedy in landlord-tenant disputes. In doing so, the court attempted to balance the rights and interests of the parties before it and to establish guiding principles for future litigation.”⁴²

The Missouri Court of Appeals questioned “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[,]”⁴³ and suggested “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

39. MO. REV. STAT. § 441.500 (2014). The statute in effect in 1973 provided that a civil action could be maintained under the Housing Code Enforcement Act on the ground that a nuisance existed with respect to a dwelling by the municipality or one-third of the tenants. The statute was amended in 1993 to allow certain not-for-profits and owners or tenants within 1,200 feet of the nuisance property to bring suit. In 1998, the statute was amended to allow only the county or municipality to bring an action. In 2001, the statute was amended again and now allows only the county, municipality, local housing corporation, or neighborhood association to bring an action under the Act. Thus, tenants occupying a noncompliant dwelling have no personal right of action under the statute. *Kohner*, 2016 WL 4760904, at *3 n.4 (referring to MO. REV. STAT. § 441.500 (1993); MO. REV. STAT. § 441.500 (1998); MO. REV. STAT. § 441.500 (2001) (current version at MO. REV. STAT. § 441.500 (2014))).

40. *Kohner*, 2016 WL 4760904, at *3 (citing *King*, 495 S.W.2d at 71–72).

41. *Id.* at *8 (citing *King*, 495 S.W.2d at 77).

42. *Id.* at *7.

43. *Id.* at *8.

helps maintain an adequate supply of habitable dwellings.”⁴⁴ The court noted:

Landlords have alternative incentives to maintain their rental properties in habitable condition, including the financial incentive to rent the premises for the maximum profit and a legal incentive to lawfully maintain the property in compliance with local housing codes. 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. 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.⁴⁵

Furthermore, the Missouri Court of Appeals noted that the landlord’s interests are protected because: (1) a claim under the implied warranty can be sustained only if the landlord received notice of the condition and had been given a reasonable time to repair said condition, and (2) tenants who withhold rent without sufficient justification, i.e., for *de minimis* conditions, are in default of the lease and the landlord may pursue available remedies, including damages provided by the contract such as *per diem* penalties, late fees, or attorney’s fees.⁴⁶ The court bolstered its holding with reference to the Restatement of Property⁴⁷ and to multiple other jurisdictions across the country that do not automatically require tenants in possession to escrow rent with the court in order to raise a breach of the implied warranty.⁴⁸ According to the court, “Requiring a tenant to place the

44. *Id.* (quoting *King*, 495 S.W.2d at 77).

45. *Id.*

46. *Id.* at *9.

47. RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 11.3 n.4 (AM. LAW INST. 1977) (amended 2016).

48. *Kohner*, 2016 WL 4760904, at *9.

full amount of rent into escrow penalizes the tenant by requiring him to pay for more than received from the landlord.”⁴⁹

The Missouri Court of Appeals outlined the predicates for a tenant to successfully maintain a cause of action for breach of the implied warranty of habitability: “[T]he tenant must prove: (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.”⁵⁰ As to the parameters of the implied warranty of habitability, the court concluded that it is “only in extreme situations where living conditions pose risks to the *life, health, or safety* of the tenant, through no fault of their own. Minor housing code violations are insufficient to sustain a claim.”⁵¹ The court then pointed out examples of breach of implied warranty of habitability, such as failure to provide heat, hot water, and garbage removal, but not malfunction of blinds, minor water leaks, wall cracks, and lack of painting, which go to amenities; missing screens, exposed wiring, boiler malfunctions, water leakage, rubbish, and unstable steps; defective and dangerous electrical wiring, leaking roof, inoperative toilet, unsound and unsafe ceilings; water leakage through roofs, ceilings, and walls; mold; faulty plumbing and electrical wiring; and common conditions that render premises unfit for human habitation, such as insect and rodent infestation.⁵²

The Missouri Court of Appeals determined that the *in custodia legis* requirement articulated in *King* is dicta, stating that “[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.”⁵³ “Because the tenant [in *King*] had already vacated the premises, any alleged recondition to bringing the defense or counterclaim when the tenant

49. *Id.* at *9 (citing RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 11.3 n.4 (AM. LAW INST. 1977) (amended 2016)).

50. *Id.* at *9.

51. *Id.* at *8.

52. *Id.*

53. *Kohner*, 2016 WL 4760904, at *6.

remained in possession was not before the court and was unnecessary to the decision.”⁵⁴ According to the Missouri Court of Appeals:

[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. We join the majority of other jurisdictions that have examined and adopted the implied warranty of habitability over the last four decades and hold 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. Because the trial court is in the best position to assess the merits of the case and the parties’ respective positions and competing interests, the trial court shall have the discretion to enter a suitable protective order upon either party’s request and after notice and an opportunity to be heard by the opposing party.⁵⁵

In conclusion, the Missouri Court of Appeals stated:

Based on the foregoing, we would grant Appellant’s Points I and II, reverse the trial court’s judgment, and remand the cause to the trial court for the court’s consideration of Appellant’s affirmative defense and counterclaim based on the implied warranty of habitability. However, due to the general interest and importance of the issue on appeal, we transfer to the Missouri Supreme Court pursuant to Rule 83.02.⁵⁶

IV. CONCLUSION

Missouri tenants have few defenses to landlord-tenant cases and are rarely successful, as demonstrated by the statistical study conducted by the Washington University Civil Rights & Community Justice Clinic and the Metropolitan Saint Louis Equal Housing & Opportunity Council. In the study, which encompassed 6,369 landlord-

54. *Id.* at *6.

55. *Id.* at *9.

56. *Id.* at *10.

tenant cases from the 2012 calendar year, only 2 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. These findings demonstrate that unpresented low-income tenants seeking to raise defenses in rent and possession/eviction cases in the Missouri state courts face widespread difficulties, far greater than reported difficulties of tenants in other states in the country.

The trial court's decision in *Kohner Properties, Inc. v. Johnson*, currently before the Missouri Supreme Court, puts the practical application of a key affirmative defense—the implied warranty of habitability—at risk. The remedy of implied warranty of habitability developed, in part, as a response to a chronic and prolonged housing shortage, particularly for low-income households. The remedy of implied warranty of habitability is crucial to balancing the interests of landlords and tenants, and maintaining a supply of safe, livable, quality housing in Missouri.