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NOTE

In Custodia Legis: Implied Warranty of Habitability Procedure in Missouri

Kohner Properties, Inc. v. Johnson, 553 S.W.3d 280 (Mo. 2018) (en banc)

Connor M. Sosnoff[*]

I. Introduction

The common law has changed drastically in its treatment of tenants who rent their living spaces from landlords. Over the course of the twentieth century, property doctrine has evolved in response to an ever changing society.[1] Although early common law failed to recognize the relationship between landlord and tenant as a contractual relationship, modern common law has developed to treat the relationship as such.[2] The implication of contractual principles upon the relationship has increased the scope of duties landlords owe tenants in exchange for the tenants' agreed upon rent.[3]

The evolution of the law has most notably encouraged landlords to become more responsible for maintaining safe and habitable living spaces for their tenants. The contractual nature imputed into the relationship between modern landlords and tenants allows tenants to abandon their leases when the living spaces are uninhabitable through a doctrine known as constructive eviction.[4] However, abandoning leased premises carries serious risks for tenants, particularly tenants of lower income classes.[5] With this in mind, our legal system has developed the implied warranty of habitability, which protects vulnerable tenants by allowing them to remain in possession of unsafe living spaces while withholding their monthly rent payments.

Kohner Properties, Inc. v. Johnson applies an evolving modern habitability doctrine to a landlord-tenant dispute over unpaid rent.[6] The situation in *Kohner* is one in which a tenant refused to pay her rent because she asserted

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1. *See* King v. Moorehead, 495 S.W.2d 65, 70–75 (Mo. Ct. App. 1973).
2. *Id.* at 70.
3. *Id.* at 69 (discussing the evolution from caveat emptor to the modern doctrine of the implied warranty of habitability).
4. *Id.* at 70.
5. *Id.* at 70–77.
6. 553 S.W.3d 280, 281 (Mo. 2018) (en banc) (per curiam).

that her landlord failed to provide her with a habitable living space.[7] The ultimate issue assessed by the Missouri Supreme Court involved the propriety of allowing Missouri circuit courts to compel tenants to pay withheld rent to the courts, in lieu of payment to the landlord, during the course of litigation.[8]

This Note addresses whether the judiciary should have the power to compel tenants to pay their rent to the court ("*in custodia legis*") as a prerequisite to asserting a breach of the implied warranty of habitability at trial. Section II of this Note will describe the relevant facts and the holding of *Kohner*. Section III explores the legal background surrounding the implied warranty of habitability and *in custodia legis* procedures. Section IV describes the Missouri Supreme Court's holding and rationale. Finally, the Comment Section of this Note argues in favor of the dissenting opinion, that the use of discretionary *in custodia legis* procedures is harmful to the interests of tenants in Missouri.

II. FACTS AND HOLDING

On October 31, 2014, Latasha Johnson entered into a lease with Kohner Properties, Inc. to rent an apartment in St. Ann, Missouri.[9] Johnson paid a $200 security deposit to secure her lease at a rate of $585 per month.[10] Upon moving into the apartment, Johnson immediately discovered various problems with the only bathroom, including missing tiles and cracks on the floor.[11] Kohner's property manager informed Johnson that nothing could be done about the bathroom.[12] In November of that year, Johnson noticed a water leak had developed in the ceiling of the bathroom above the shower and bathtub.[13] Mold began growing on the ceiling, and Johnson called Kohner to report the leak and mold.[14] Over the next few months, Johnson noticed and reported various other problems with the bathroom and other rooms in her apartment.[15] Other issues that Johnson faced involved her kitchen sink, stove, and range.[16] She contacted the property manager again in February and was told "there was nothing they could do."[17]

7. *Id.*
8. *Id.* at 286.
9. Kohner Props., Inc. v. Johnson, No. ED 103133, 2016 WL 10998837, at *1 (Mo. Ct. App. Sept. 13, 2016) *transferred to* Kohner Props., Inc. v. Johnson, 553 S.W.3d 280 (Mo. 2018) (en banc) (per curiam).
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*

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Beginning in March of 2015, Johnson withheld her rent because property management would not resolve the maintenance requests for the apartment.[18] At 2:00 A.M. on March 17, 2015, the bathroom ceiling in Johnson's apartment collapsed.[19] Although Johnson placed an emergency service request to fix the ceiling, Kohner's technician tried to remedy the situation by taping a "black plastic bag over the hole in the ceiling."[20] Because water eventually collected in the plastic bag, the bag did not fix the leak and Johnson found herself unable to get minimal use out of her bathroom.[21] Johnson could not safely bathe her daughter in the bathtub below the collapsed ceiling and was forced to stay at a hotel for a few nights to bathe.[22] Johnson withheld her March and April rent, and Kohner Properties sued Johnson for the unpaid rent as well as possession of the apartment.[23]

Before opening statements were given, Kohner moved to bar Johnson from asserting either an affirmative defense or a counterclaim based upon breach of the implied warranty of habitability.[24] Kohner argued that Johnson's failure to pay her rent *in custodia legis*[25] prevented her from asserting any such claims.[26] This motion was granted, and on May 13, 2015, the Circuit Court for St. Louis County entered a judgment against Johnson for the unpaid rent, late fees, attorney's fees, court costs, and possession of the apartment.[27] Although the circuit court did find as a matter of fact that the hole above Johnson's bathtub had been inadequately repaired, the court found as a matter of law Johnson could not assert either an affirmative defense or counterclaim relying on the implied warranty of habitability because she had not paid her rent *in custodia legis*.[28] Johnson appealed to the Missouri Court of Appeals for the Eastern District.[29]

On appeal, Johnson argued that the trial court erred in barring her from asserting the implied warranty of habitability as either an affirmative defense or counterclaim and that her failure to pay rent to the court *in custodia legis*

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at *2. Johnson's young daughter with cerebral palsy could not make use of the bathtub, as 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." *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. "*In custodial 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." *Id.* at *2, fn. 3 (citing BLACK'S LAW DICTIONARY (9th ed. 2009)).
26. *Id.* at *2.
27. *Id.*
28. *Id.*
29. *Id.*

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was not "a legal prerequisite to asserting a breach of implied warranty of habitability."[30] Although the Eastern District concluded that it would grant Johnson's points on appeal and remand her case back to the trial court, the case was instead transferred to the Missouri Supreme Court pursuant to Missouri Rule of Civil Procedure 83.02.[31]

The Missouri Supreme Court, in a three to two per curiam decision, ruled in favor of Kohner.[32] The Missouri Supreme Court held that circuit courts in Missouri have the power to require tenants asserting a breach of the implied warranty of habitability to pay their rent to the court during the course of litigation.[33]

III. Legal Background

Society's evolution from an agricultural-based, agrarian society to a modern industrial society has prompted concomitant changes in the common law principles governing property law.[34] This Section tracks changes in the law that have precipitated the discussion of *in custodia legis* procedures as they apply to claims for breach of implied warranty of habitability. First, this Section details how the implied warranty of habitability developed and the doctrines preceding it, such as caveat emptor, the covenant of quiet enjoyment, and constructive eviction. Second, this Section explains how courts in some jurisdictions have developed an *in custodia legis* procedure, along with some of their stated policy rationales for doing so.

A. The Common Law and the Implied Warranty of Habitability

At early common law, tenants were subject to the doctrine of *caveat emptor* – buyer beware.[35] Under this doctrine, leases were primarily understood as a rental of the land upon which a residence was built, as the land itself was the "most important feature of the conveyance."[36] Early common law leases were considered a "conveyance of an estate in land and w[ere] equivalent to a sale of the premises for the term of the demise."[37] As such, rent was due "without

30. *Id.*

31. *Id.* at *10. Mo. R. Civ. P. 83.02 (Per this rule, cases resolved by "opinion, memorandum decision, written order, or order of dismissal in the court of appeals" may be transferred to the Missouri Supreme Court).

32. Kohner Props., Inc. v. Johnson, 553 S.W.3d 280 (Mo. 2018) (en banc) (per curiam).

33. *Id.* at 285. In making its decision, the Supreme Court of Missouri relied on *King*. *Id.* at 282 (referencing King v. Moorehead, 495 S.W.2d 65, 70 (Mo. Ct. App. 1973)).

34. King v. Moorehead, 495 S.W.2d 65, 69 (Mo. Ct. App. 1973).

35. *Id.*

36. *Id.*

37. *Id.* at 68.

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reference to the condition of the buildings or structures on [the land]."[38] Although tenants could negotiate with their prospective landlords, such covenants were considered "only incidental to the land and independent of the tenant's obligation to pay rent."[39] *Caveat emptor* imposed a duty on the potential tenant to inspect any property before entering into a lease, as there was no warranty implied by the landlord.[40] At common law, courts traditionally assumed the tenant and landlord were of equal bargaining power in the transaction, and tenants wishing to have covenants or warranties in their leases could expressly bargain for them.[41] However, even if tenants did enter into covenants with their landlords for necessary repairs, those covenants were understood as an obligation by the landlord to the land, and thus "independent of the tenant's covenant to pay rent."[42]

The early common law of real estate leasing carried "harsh results" for tenants.[43] Because of this, courts started to carve out exceptions to these rules by treating the relationship between landlord and tenant "as if governed by contract law."[44] One such exception to *caveat emptor* was the covenant of quiet enjoyment, a doctrine under the early common law that suspended the tenants' obligation to tender their rent where the landlord had physically deprived them of possession of the land.[45] Originally, the implied covenant of quiet enjoyment protected only against physical extrusion,[46] but the courts soon began to consider whether a tenant's possession could be "molested by something less."[47]

Thus, the doctrine of quiet enjoyment was expanded with the creation of constructive eviction:

> A constructive eviction arises when the lessor, by wrongful conduct or by the omission of a duty placed upon him in the lease, substantially interferes with the lessee's beneficial enjoyment of the demised premises. Under this doctrine the tenant is allowed to abandon the lease and excuse himself from the obligations of rent because the landlord's conduct, or omission, not only substantially breaches the implied covenant

38. *Id.* at 69 (internal citation omitted).
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at n. 6 (citing O'Neil v. Flanagan, 64 Mo. App. 87 (Mo. Ct. App. 1895) ("the tenant was not discharged from his obligation to pay rent although the building was destroyed by fire").
44. *Id.*
45. *Id.*; *see also* Dolph v. Barry, 148 S.W. 196, 198 (Mo. Ct. App. 1912).
46. *King*, 495 S.W.2d at 70.
47. *Id.*

of quiet enjoyment but also 'operates to impair the consideration for the lease.'[48]

The doctrine of constructive eviction was the first rule created by courts that required landlords to ensure habitability and was designed specifically as "a substantial breach of a material covenant in a bilateral contract."[49] While the covenant of quiet enjoyment protected tenants against intrusions from their landlords, the doctrine of constructive eviction evolved to permit tenants to abandon their leases upon the mere breach of a duty or substantial interference with the land, which is now understood as a breach of the implied warranty of habitability.[50]

The implied warranty of habitability is a doctrine that has only somewhat recently received recognition in Missouri.[51] The doctrine provides that the landlord-tenant relationship is contractual, and a landlord's failure to provide a habitable living space constitutes a breach of contract.[52] The use of this doctrine was thus emblematic of a transition whereupon courts began to recognize landlord-tenant relationships as contractual relationships, where the duty to maintain the premises was contractually implied for the landlord.[53] In effect, rent was due to landlords only where the tenant was provided with a habitable living space.[54] Modern courts justify the doctrine by pointing to the difference in bargaining power between landlords and tenants, the regulatory enactment of minimum standards of habitability, and tenants' reasonable expectations of habitable dwellings.[55]

In 1973, the Missouri Court of Appeals, Kansas City District, through its holding in *King v. Moorehead*, abandoned caveat emptor and applied the implied warranty of habitability to every residential lease.[56] The *King* court summarized and evaluated the progression of the early common law doctrines of landlord-tenant leases and concluded the implied warranty of habitability should be read into Missouri real estate leases.[57] *King* involved a suit by a landlord against a tenant for possession and unpaid rent of a single-family dwelling in Kansas City.[58] The tenant in *King* refused to pay rent until the

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48. *Id.* (quoting *Dolph*, 148 S.W. at 198).
49. *Id.* (quoting *Dolph*, 148 S.W. at 198).
50. *Id.*
51. *Id.* at 75.
52. *Id.* at 75–76. The implied warranty of habitability developed in response to societal changes, such as the transition from an agrarian society to an urban society.
53. *See* Detling v. Edelbrock, 671 S.W.2d 265, 268–69 (Mo. 1984) (en banc).
54. *See King*, 495 S.W.2d at 75.
55. *Detling*, 671 S.W.3d at 269.
56. *King*, 495 S.W.2d at 75.
57. *Id.* at 69–70, 75.
58. *Id.* at 67.

landlord "corrected and abated certain substantial housing code violations."[59] Finding that the tenant sufficiently pleaded a breach of the implied warranty of habitability, the court declared that such pleading was an effective counterclaim and reversed the trial court's holding in favor of the landlord.[60] *King* held that tenants asserting a breach of the implied warranty of habitability are justified in withholding rent until the premises have been restored to a habitable degree.[61]

The *King* court reasoned that "modern housing leases are not purely conveyances of property interests with independent covenants to perform but are also bilateral contracts."[62] To justify their departure from existing case law, the court cited policy rationales regarding the ineffectiveness of constructive eviction in the face of a prolonged housing shortage.[63] Per the *King* court, the implied warranty of habitability developed in response to this housing shortage, specifically given the shortage's effects on low income tenants.[64] The low income tenants that were "most likely to resort to [constructive eviction]" often faced a difficult dilemma: "either continue paying rent for an untenable living space or abandon the premises."[65] Low income tenants either had to continue paying rent for subpar property or "abandon the premises and hope to find another dwelling which, in these times of severe housing shortage [was] likely to be as uninhabitable as the last."[66]

The implied warranty of habitability defined in *King* recognized the duties of the landlord and tenant as contractual obligations.[67] Specifically, the *King* court declared that 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."[68]

The court also outlined factors to consider for the determination of a breach of the implied warranty of habitability.[69] Whether or not a breach was material per the *King* court depended on factors such as "the nature of the deficiency or defect, its effect on the life, health or safety of the tenant, length of

59. *Id.* The defendant alleged fourteen specific housing code violations such as "rodent and vermin infestation, defective and dangerous electrical wiring, leaking roof, inoperative toilet stool, [and] unsound and unsafe ceilings." *Id.* at 68.

60. *Id.* at 79–80.

61. *Id.* at 77.

62. Kohner Props., Inc. v. Johnson, No. ED 103133, 2016 WL 10998837, at *3 (Mo. Ct. App. Sept. 13, 2016) (referencing *King*, 495 S.W.2d at 71).

63. *King*, 495 S.W.2d at 76.

64. *Id.*

65. *Id.*

66. *Id.* at 76–77.

67. *Id.* at 75.

68. *Id.*

69. *Id.* at 76.

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time it has persisted and the age of the structure."[70] The court detailed that damages should be "reasonably measured by the difference between the agreed rent and the fair rental value of the premises as they were during occupancy by the tenant in the unhealthful or unsafe condition.[71] Notably, the court in *King* also outlined the procedure for withholding rent by a tenant asserting the breach.[72] In dicta, the court cited *Javins v. First National Realty* for the proposition that tenants withholding rent "shall be required to deposit the rent as it becomes due, *in custodia legis* pending the litigation."[73]

Explaining its decision, the court noted that modern landlords are likely to have both a stronger interest in, and a better economic position with respect to, the property.[74] Other policy rationales cited by the *King* court included housing shortages, the disparity in bargaining power between landlords and tenants, changing housing codes, which placed responsibilities upon landlords, the likelihood that landlords have superior knowledge of the state of the premises, and the benefit of consumer protection laws to the tenant.[75] From this reasoning, the court in *King* abandoned the doctrine of *caveat emptor* and applied the implied warranty of habitability to all residential leases in Missouri.[76]

In 1984, the Missouri Supreme Court fully incorporated the holding and reasoning of *King* by formally adopting the implied warranty of habitability in *Detling v. Edelbrock*.[77] In *Detling*, the Missouri Supreme Court recognized "the evolution of the common law, the modern acceptance of a lease as both a conveyance and a contract and the rejection of *caveat emptor*."[78] The *Detling* court articulated that a breach of the implied warranty of habitability may be shown where there is (1) a lease; (2) development of "dangerous or unsanitary conditions on the premises materially affecting the life, health and safety of the tenant; (3) reasonable notice of the defects to the landlord; and (4) subsequent failure to restore the premises to habitability."[79] Citing *King*, the court stated habitability was "measured by community standards, reflected in most cases in

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70. *Id.* The court also explained that minor housing violations should be considered de minimis in regard to the materiality of a breach of the implied warranty of habitability. *Id.*

71. *Id.* (citing Kline v. Burns, 276 A.2d 248, 252 (N.H. 1971)).

72. King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973).

73. *Id.* (citing Javins v. First National Realty Corp., 428 F.2d 1071, n.67 (D.C. Cir. 1970)).

74. *Id.* at 71.

75. *Id.* at 71–72.

76. *Id.* at 75.

77. 671 S.W.2d 265, 269–70 (Mo. 1984) (en banc), *abrogated on other grounds by* Kohner Props., Inc. v. Johnson, 553 S.W.3d 280 (Mo. 2018) (en banc) (per curiam).

78. Kohner Props., Inc. v. Johnson, No. ED 103133, 2016 WL 10998837, at *5 (Mo. Ct. App. Sept. 13, 2016) (citing Detling v. Edelbrock, 671 S.W.2d 265, 268–69 (Mo. 1984) (en banc)).

79. Detling v. Edelbrock 671 S.W.2d 265, 270 (Mo. 1984) (en banc).

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local housing and property maintenance codes."[80] The court also noted that tenants are required to give notice to the landlord and allow a reasonable time for the landlord to correct the situation.[81] At the time of *Detling*, seventeen other jurisdictions had also recognized an implied warranty of habitability in residential leases.[82]

Although *Detling* marked the formal recognition of the implied warranty of habitability by the Missouri Supreme Court in 1984, some questions remained about its proper application.[83] In its adoption of the implied warranty of habitability, the court in *King* also echoed support for the *in custodia legis* procedure, which originated with *Javins*.[84] However, the *in custodia legis* requirement in *Javins* was not necessary for the resolution of *King*, and thus the procedure was, at the time of *Detling*, considered dicta.[85]

B. In Custodia Legis Procedure

The *in custodia legis* procedure requires tenants-in-possession who seek to raise the implied warranty of habitability, as either an affirmative defense or counterclaim, to pay their rent during litigation either directly to the trial court or to an escrow account.[86] Although *King* described this process, Missouri courts dismissed the comment on *in custodia legis* procedures as dicta because it was unnecessary to the resolution of the case.[87]

Other state and federal courts across the country have also considered *in custodia legis* as a prerequisite to assert the implied warranty of habitability.[88] In a footnote in *Javins*,[89] the United States Court of Appeals for the District of Columbia Circuit detailed how it believed the *in custodia legis* requirement should function, referring to it as an "excellent protective procedure."[90] The *Javins* court opined, "if the tenant defends against an action for possession on

80. *Id.*

81. *Id.* (citing King v. Moorehead, 495 S.W.2d 65, 76 (Mo. Ct. App. 1973)).

82. *Id.* at 268–69 n. 4.

83. *See* Kohner Props., Inc. v. Johnson, 553 S.W.3d 280 (Mo. 2018) (en banc) (per curiam).

84. King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973) (citing Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1083 n. 67 (D.C. Cir. 1970)).

85. *See Kohner Props, Inc.*, 553 S.W.3d at 283.

86. *See* Javins v. First National Realty Corp., 428 F.2d 1071, 1083 n. 67 (D.C. Cir. 1970).

87. Kohner Props., Inc. v. Johnson, No. ED 103133, 2016 WL 10998837 (Mo. Ct. App. Sept. 13, 2016) (citing State ex rel. Baker v. Goodman, 274 S.W.2d 293, 297 (Mo. 1954) (en banc)).

88. *See e.g.*, *Javins*, 428 F.2d 1071 at 1083 n. 67; Hinson v. Delis, 26 Cal. App. 3d 62, 71 (Cal. Ct. App. 1972); Pugh v. Holmes, 405 A.2d 897, 907 (Pa. 1979); Fritz v. Warthen, 213 N.W.2d 339, 343 (Minn. 1973).

89. *Javins*, 428 F.2d at 1083 n. 67.

90. *Id.*

the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due."[91] The *Javins* court explained the use and function of the procedure, one which it noted "would only be appropriate while the tenant remains in possession."[92] The outlined procedure requires the fact finder to make a "separate finding as to the condition of the apartment" when a party asks for imposition of the procedure.[93]

Javins' recommendation that trial courts be allowed to require an *in custodia legis* procedure proved influential to courts in other jurisdictions. For example, in *Hinson v. Delis,*[94] the California Court of Appeals relied upon *Javins* in support of the proposition that trial courts have the discretion to enforce an *in custodia legis* requirement.[95] *Hinson* described the procedure the same way as *Javins*: a mechanism for trial courts to require that rental payments be apportioned among the parties based upon the findings at trial.[96]

In *Fritz v. Warthen*,[97] the Supreme Court of Minnesota instructed Minnesota trial courts to exercise this power to order tenants to pay their rent to the court, after evaluating factors such as "the seriousness and duration of the alleged defects, and the likelihood that the tenant will be able to successfully demonstrate the breach of warranty."[98] Directing trial courts to follow this procedure, the Supreme Court of Minnesota expanded upon *Javins*' *in custodia legis* procedure, requiring trial courts to take rent payments from litigants if such a procedure would be suitable.[99] The *Fritz* court's application of the *in custodia legis* procedure was more extreme than its predecessors, instructing that trial courts *will* order the procedure when a question of fact exists regarding a breach of the implied warranty of habitability, rather than granting discretionary power.[100]

Missouri appellate courts have not often dealt with the issue of the propriety of the *in custodia legis* procedure.[101] In one instance, the Missouri Court of Appeals for the Western District cited *King* in its application of the procedure and found the tenants in question had not paid their rent *in custodia legis*.[102] There are no other examples of appellate Missouri case law where a

91. *Id.*
92. *Id.*
93. *Id.*
94. 26 Cal.App.3d 62 (Cal. Ct. App. 1972).
95. *Id.* at 70–71.
96. *Id.* at 71.
97. 213 N.W.2d 339 (Minn. 1973).
98. *Id.* at 343.
99. *Id.* (instructing lower courts that they will take "adequate security therefor if such a procedure is more suitable).
100. *Id.*
101. Kohner Props., Inc. v. Johnson, 553 S.W.3d 280, 283 n. 2; *see also*, Tower Mgmt., Inc. v. Henry, 687 S.W.2d 564, 565–66 (Mo. Ct. App. 1984).
102. *Tower Mgmt., Inc.*, 687 S.W.2d at 565–66.

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tenant remaining in possession was subjected to the *in custodia legis* procedure.[103]

IV. INSTANT DECISION

This Section discusses the Missouri Supreme Court's decision in *Kohner Properties, Inc. v. Johnson*. The court applied relevant precedent to the dispute between Latasha Johnson and Kohner Properties and held that circuit courts may use discretion to impose an *in custodia legis* procedure in disputes over the implied warranty of habitability. This Section first examines the majority opinion and rationale, then turns to the dissenting opinion, which argued the imposition of this procedure was not founded in doctrinal property or contract law.

A. Majority Opinion

Authored per curiam, the two-part holding by the majority of the Missouri Supreme Court, as a matter of first impression, ruled that "circuit courts may exercise discretion on a case-by-case basis to determine whether an *in custodia legis* procedure is appropriate."[104] The court found in favor of the landlord, Kohner Properties, and barred the tenant, Johnson, from asserting an affirmative defense or counterclaim of the implied warranty of habitability because she failed to pay rent to the circuit court *in custodia legis*.[105] The court affirmed the circuit court's judgment, finding the circuit court's reliance on *King* proper, even though the relevant language from *King* was dicta.[106]

The court declared that although the *in custodia legis* requirements as they pertained to tenants remaining in possession were dicta, *King* was the prevailing law in Missouri and had been "dutifully followed by our circuit courts for almost five decades."[107] However, until *Kohner*, the specific issue of whether the *in custodia legis* requirements from *King* applied to all actions for rent and possession when the tenant *remained in possession* of the property had not been examined by the Missouri Supreme Court.[108] Reasoning that "the 'majority of the courts which permit rent withholding' leave the imposition of an *in custodia legis* procedure to the sound discretion of the trial court,"[109] the majority found

103. *Kohner*, 553 S.W.3d at 283 n. 2. The Supreme Court of Missouri also noted that other circuit courts in Missouri have applied the *in custodia legis* procedure, however no examples were provided. *Id.*

104. *Id.* at 285.

105. *Id.* at 286.

106. *Id.* at 286–87.

107. *Id.* at 283.

108. *Id.* (emphasis added).

109. *Id.* (quoting RESTATEMENT (SECOND) OF PROP.: LANDLORD & TENANT § 11.3 (AM. LAW INST. 1977)).

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that the circuit court did not err in barring Johnson from asserting the implied warranty of habitability as an affirmative defense or counterclaim.[110]

The majority opinion expanded its rationale by providing three policy arguments in support of its decision.[111] First, citing the dicta in *King*, the court stated the process assures money is there for the landlord to remedy the uninhabitable situation.[112] The opinion further stated the procedure would effectively minimize the damage to the tenant by encouraging the landlord to make necessary repairs as soon as possible.[113] Second, the majority opinion argued the status quo was preserved through the *in custodia legis* procedure.[114] The court described the use of discretionary power as deriving "from a trial court's general equitable powers to protect a landlord from the potential loss of income from his property during a prolonged period of litigation."[115] Third, the court noted the *in custodia legis* procedure minimizes the risk to the landlord following litigation, should a case arise where a tenant who is found to owe the landlord outstanding rent payments is "unwilling or unable" to pay them following litigation.[116]

B. Dissenting Opinion

The dissenting opinion, authored by Judge Patricia Breckenridge, focused on the lack of "basis in present property law or contract principles" upon which the *in custodia legis* procedure was founded.[117] Explaining the evolution of the common law from *caveat emptor* to the implied warranty of habitability, the dissenting opinion acknowledged the nature of the bilateral contract, where "the tenant's obligation to pay rent is dependent on the landlord's performance of the obligation to provide a habitable dwelling."[118] The dissent also evaluated the majority's use of dicta in its holding, pointing out that although the majority claimed the dicta had been "dutifully followed by our circuit courts for almost five decades," only one prior case required the *in custodia legis* procedure for its resolution.[119]

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110. *Id.* at 286–87.

111. *Id.* at 286.

112. *Id.* at 282 (quoting King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973)).

113. *Id.* (quoting King v. Moorehead, 495 S.W.2d 65, 77 (Mo. Ct. App. 1973)).

114. *Id.* at 285 (quoting MMB Assocs. v. Dayan, 564 N.Y.S.2d 146, 147 (N.Y. App. Div. 1991)).

115. *Id.* (internal citations omitted). The majority opinion also noted that a trial court is in the best position to assess the merits of the case compared to other courts. *Id.*

116. *Id.* (internal citations omitted).

117. *Id.* at 288 (Breckenridge, J., dissenting).

118. *Id.* (Breckenridge, J., dissenting).

119. *Id.* at 287 (citing King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973)) (Breckenridge, J., dissenting).

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Judge Breckenridge's evaluation of the policy implications for allowing trial courts to require the payment of rents to the court or an escrow account during ongoing litigation responded to the majority's argument that the procedure effectively preserved the "status quo" of the contractual relationship between landlord and tenant during the course of litigation.[120] She argued the procedure was unnecessary to safeguard the interests of the landlord because the landlord was not entitled to the rent at issue until after a "favorable adjudication."[121] Furthermore, Judge Breckenridge argued such a requirement ultimately placed landlords "in a better position than they would be if tenants did not assert an implied warranty of habitability defense."[122] She additionally pointed out the inability of the majority to articulate any other types of disputes in either contract or property law that require any disputed amount to be paid to the court as a requirement for establishing a legal claim.[123] As such, the dissenting opinion described the procedure as a "financial prerequisite to a tenant's access to the courts."[124] Lastly, the dissent pointed out a problem inherent in the circuit court's perception that the *in custodia legis* procedure was mandatory in the present case.[125] Recommending reversal of the circuit court judgment, Judge Breckenridge wrote that Johnson should be afforded an opportunity "for the circuit court to exercise its discretion in this case," as it appeared to the dissenting opinion that the circuit court applied the law as if the procedure was required, rather than discretionary.[126]

V. COMMENT

This Section discusses why the per curiam majority of the Missouri Supreme Court should have adopted the dissent's decision and allowed Johnson's affirmative defense of breach of the implied warranty of habitability. First, by allowing courts to discretionarily impose an *in custodia legis* requirement upon tenants, the court overlooked and discounted the negative effects suffered by tenants who have asserted their landlords breached the implied warranty of habitability, many of whom are low income tenants. Second, the negative effects of this doctrine impose a "financial prerequisite" to our judicial system and act as a deterrent to claiming a breach of the implied warranty of habitability. Finally, the doctrine fails to maximize landlord investment in habitable properties by minimizing the potential risks of being taken to court.

120. *Id.* at 288. (Breckenridge, J., dissenting).
121. *Id.* (Breckenridge, J., dissenting).
122. *Id.* (Breckenridge, J., dissenting).
123. *Id.* (Breckenridge, J., dissenting).
124. *Id.* (Breckenridge, J., dissenting).
125. *Id.* (Breckenridge, J., dissenting). The procedure was mandatory in this case as Johnson would not be given an opportunity to argue against the application of the procedure in her case.
126. *Id.* (Breckenridge, J., dissenting).

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In its holding, the majority emphasized the usage of the *in custodia legis* procedure as a means of maintaining the "status quo" between the parties in the landlord-tenant relationship.[127] Effectively, the status quo is maintained by the payment of rent to the court in exchange for the continued tenancy of the property in question.[128] But as the dissent notes, the imposition of an *in custodia legis* requirement in this circumstance would be unique: the majority could not "cite to any other action – based in either property or contract – requiring the disputed amount to be paid into the court as a precondition to asserting a defense or raising a claim."[129]

Although this circumstance is unique in the way it relates to a tenant's use of a residence, the law should treat this distinction as a necessary protection for low income tenants. Further, the dissent pointedly stated: "requiring a tenant to deposit rent as it becomes due prior to adjudication of a landlord's claim for rent and possession is a financial prerequisite to a tenant's access to the courts to present a claim or defense of a breach of the implied warranty of habitability."[130] This consequence for tenants involved in housing disputes seems particularly shocking and problematic.

A main purpose of implying a warranty of habitability into modern residential leases is to protect low income tenants who have few options. Imposing even more barriers for low-income tenants to reach the court system to redress their grievance shocks the conscience. While the circumstances at issue here are unique, reference to mortgage law principles provides a helpful analogy in understanding the disparity between the landlord and tenant in terms of bargaining power. Courts sometimes place a financial requirement on borrowers seeking injunctive relief from their lenders upon a foreclosure of mortgaged property.[131] While some courts require a full tender of the debt amount on the mortgage[132] and others require the borrower to tender the amount the borrower concedes to be due,[133] some "dispense with the tender requirement when the plaintiff alleges that defect renders the sale void."[134]

Foreclosed-upon borrowers are likely experiencing serious financial difficulty. In the case of a borrower seeking injunctive relief against a foreclosure sale, a tender requirement serves as a financial prerequisite that limits the borrower's equitable relief and is "objectionable when the [borrower] is requesting injunctive relief in good faith."[135] While a borrower who has been foreclosed

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127. *Id.* at 285.
128. *Id.*
129. *Id.* at 288. (Breckenridge, J., dissenting).
130. *Id.* (Breckenridge, J., dissenting).
131. Grant S. Nelson et. al., REAL ESTATE FINANCE LAW § 7.23 (6th ed. 2014).
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

upon would prefer to simply pay their mortgage and avoid the foreclosure process, a tenant living in uninhabitable conditions may likewise prefer to simply renovate their living space on their own accord.

Although the economically disadvantaged party faces a difficult dilemma in each scenario, the discrepancy in bargaining power between landlords and tenants presents an arguably more unfair dilemma to the disadvantaged tenant, who has not promised to repay over time a large sum of money but has merely contracted for a tenantable living space. This analogy is particularly helpful because it highlights that foreclosed-upon borrowers are not always required to tender outstanding mortgage debt, yet low-income tenants seeking relief from the implied warranty of habitability may be compelled by the court to escrow their rent akin to a tender requirement.

One potential reason the procedure may serve as a barrier for low income tenants is its effect as a deterrent from bringing a lawsuit for breach of implied warranty of habitability in the first place. Making particular note of the power disparity inherent in this type of conflict, Judge Breckenridge stated, "such findings ignore the disparity between tenants and landlords that often exists in situations in which the implied warranty of habitability is being asserted and overlook the likelihood that requiring payment of rent as it becomes due acts as a deterrent to tenants wishing to assert the defense."[136] If a low-income tenant wishes to assert a breach against their landlord, they could likely make significant use of the money instead of paying the rent *in custodia legis* under this holding. At its conception, the implication of a warranty of habitability into modern leases served to minimize the instances of constructive eviction, where tenants simply abandoned the property and were forced to seek other housing.[137] By requiring tenants to make full rent payments to the court in lieu of the landlord while they assert their housing is unsatisfactory, the benefits of the doctrine are weakened, and constructive eviction becomes more appealing. Although the majority argues the procedure preserves the status quo, this holding may in fact make tenants more likely to find themselves constructively evicted – which would be disastrous for the "status quo."

The options for tenants living in uninhabitable spaces are limited: tenants may either find themselves constructively evicted or choose to withhold rent.[138] If tenants in Missouri may – at the courts' discretion – be required escrow their rent to the court during the pendency of litigation, then they may wish to pursue other options, such as using that rent money in an effort to find a new living situation. The *in custodia legis* doctrine neuters the bargaining power that tenants gain by withholding rent. By withholding their payments, tenants are able to put pressure on their landlords to make their inhabited space livable. The law should allow disadvantaged tenants who are forced to live in squalor to pressure landlords by withholding rent. Granting greater bargaining power to

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136. Kohner Props., Inc. v. Johnson, 553 S.W.3d 280, 288 (Mo. 2018) (en banc) (per curiam).

137. *See generally* King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973).

138. *Id.*

tenants serves the public policy aim of minimizing instances of abusive and neglectful landlord practices that lead to such situations in the first place. Instead, by allowing circuit courts to discretionarily rent payments to the court as a means of minimizing potential risk to the landlord, the law will be less favorable to the neglectful actions that lead to the uninhabitable living situations at issue.

The *Kohner* opinion does not specify what factors trial courts should use to determine whether to exercise discretion in any given case. While the majority opinion is correct that trial courts are "in the best position to assess the merits of each case,"[139] it is unclear what, if any, factors the majority wants trial courts to consider when determining whether to require rent be paid to the court. Even though the power to impose these payments may be equitable to the competing interests of the parties in some hypothetical instances, the granting of such a broad and undefined power to the trial courts poses a threat to the interests of at-risk and low-income tenants. Without the provision of clear standards for use in determining which tenants must pay their rent *in custodia legis*, *Kohner* runs the risk of allowing a variety of standards applied in Missouri's trial courts, which is problematic in its own right. Given the potential impact of an *in custodia legis* procedure on at-risk or low-income tenants, careful guidelines should be provided for direction to the trial courts. If courts are to implement this procedure, such guidelines could instruct courts to consider various relevant factors, such as the tenants rent amount as compared to their monthly income.

The legal system should recognize that landlords and tenants are rarely in equal bargaining positions and the risk of nonpayment of rent is one that should be borne by the landlord when there is a question of whether tenanted spaces meet a modern understanding of habitability. When courts force tenants to pay their rent during litigation, regardless of the habitability of their living space, this minimizes the risk to the landlord that the tenant will not have the funds available to pay outstanding rent should the landlord win at trial. Landlords who must defend against a breach of the implied warranty of habitability should not receive and do not deserve this protection. As a policy, we should encourage landlords to invest in their properties and make them habitable. Shifting the risk of litigation to landlords encourages them to properly invest in the spaces they offer tenants. The policy advanced by the holding of the Missouri Supreme Court does not maximize landlord investment into habitable living spaces and disadvantages low-income tenants.

In effect, tenants who are already suffering unfavorable living conditions bear the risk of litigation because they are deprived of the time value of their money when the court holds the money in escrow. The majority is correct in its discussion of this risk allocation – the procedure minimizes the potential risk to the landlord. However, the point of the doctrine is to bring tenants – particularly vulnerable and low-income tenants – to parity in the bargaining

139. *Kohner*, 553 S.W.3d at 285.

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process with their landlords by requiring habitable living spaces as a prerequisite to "earning" their monthly rent payment.

The dissenting opinion is stronger in *Kohner* because it illuminates the point that landlords being sued or countersued for a breach has not "earned" their rent payment and therefore, has not earned that it be set aside for him in the meantime.[140] Although the landlord could certainly prevail at trial, foregoing an *in custodia legis* procedure would incentivize landlords to keep their living spaces unquestionably habitable. Having landlords assume the risk of nonpayment following litigation could encourage landlords to invest more in their properties, especially the properties and living spaces of a lower tier or quality, which may be more likely to be found inhabitable. In short, allocation of the risk that the tenant will not have money following litigation would serve as a reason for landlords to ensure they are never brought to court by providing unquestionably habitable living spaces.

By placing a "financial prerequisite"[141] upon tenants asserting a breach of the implied warranty of habitability, we are not preserving the status quo but instead granting a windfall to neglectful landlords by minimizing their potential risk. In doing so, we place some of society's most vulnerable – low income tenants – at an increased risk of constructive eviction, effectively negating the general benefit of the implied warranty of habitability.

VI. CONCLUSION

Kohner Properties, Inc. v. Johnson imposes upon the state of Missouri a procedure intended to benefit landlords by mitigating their potential risk when brought to court on a theory of breach of the implied warranty of habitability. Although the intentions of the majority opinion are understandable in seeking to preserve the status quo of the relationship between landlord and tenant, the status quo should be irrelevant when landlords fail to provide habitable living spaces to their tenants. Landlords are in a superior bargaining position relative to tenants, and the law has evolved specifically in response to this imbalance. Placing the burden of paying rent during litigation on a tenant when the landlord is failing to provide a habitable living environment is harmful to low income tenants who have few options. Although the *in custodia legis* procedure serves as an effective measure for protecting the interests of the landlord, the judiciary should seek to instead protect the more vulnerable party during litigation. The procedure not only obstructs the tenant by imposing a financial prerequisite due to the courts not found in other contract disputes but also reallocates a financial burden onto a party with less economic bargaining power.

The change in the law from *caveat emptor* through constructive eviction and the implied warranty of habitability came as a result of our judiciary recognizing and addressing the reality that a power imbalance is inherent in the landlord-tenant relationship. Rent withholding via the implied warranty of

140. *Id.* at 288.
141. *Id.*

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habitability is a valuable bargaining tactic for the disadvantaged tenant. By giving circuit courts in Missouri the discretionary power to require the payment of rent to the court, the bargaining power of modern tenants to stand up for themselves against neglectful landlords is minimized.