IN THE
SUPREME COURT OF MISSOURI

Appeal No. SC96376

BRAINCHILD HOLDINGS, LLC

Plaintiff/Respondent

vs.

STEPHANIE CAMERON

Defendant/Appellant

Appeal from the Associate Circuit Court of St. Louis City, Missouri
On Transfer from the Missouri Court of Appeals, Eastern District
Case No. 1522-AC11511
The Honorable Michael Noble, Judge

BRIEF OF THE MISSOURI APARTMENT ASSOCIATION ON BEHALF OF BRAINCHILD HOLDINGS, LLC AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Missouri Apartment Association is a non-profit state wide association dedicated to unifying rental housing professionals through education, legislative advocacy and member services. The Missouri Apartment Association is affiliated with the National Apartment Association and other local associations in Missouri, and does have chapters and local affiliates throughout the state, including in Kansas City, Columbia, Jefferson City, St. Louis, Joplin, and Springfield. The Missouri Apartment Association, as *amicus*, is interested and deeply invested in the outcome of this matter, as the Court's decision has the potential to affect the ability of tens of thousands of landlords and/or property owners to protect their real estate interests.

Moreover, a decision in favor of the Appellant in this matter has the potential to clog the legal system with unnecessary and burdensome litigation, substantially drive up the cost of the eviction process in Missouri to untenable levels, and considerably impede and impair a landlord's ability to re-take possession of their property in a timely and expeditious manner. Most of these landlords across the state rely upon payment of rent as a means to satisfy their mortgage payments, or other lending obligations as owners of the property at issue. Should the Court find in favor of Appellant, this holding would directly impact their ability to protect those interests.

The Missouri Apartment Association writes in support of Respondent, and urges this Court to affirm the trial court's judgment and denial of Appellant's request for a jury trial under Chapter 535, RSMo. *Amicus* further prays the Court to affirm the guiding principal that has gone unquestioned for more than a century in Missouri—that rent and

possession cases are summary proceedings, intended for the expeditious resolution of disputes, where rent is unpaid and tenants refuse to vacate the property. Finally, the Missouri Apartment Association respectfully requests the Court to take into consideration the public policy concerns that may arise should this Court hold in favor of Appellant.

REFERENCE NOTE

All statutory references are to the Revised Statutes of Missouri 2016, unless otherwise noted in this brief. References to the Missouri Court of Appeals Eastern District Opinion in this case are referred to as "C of A Op." References to Appellant's Substitute Brief are referred to as "App. Sub. Br." References to *Amicus Curiae* Brief of the ArchCity Defenders are referred to as "*Amicus* Br."

JURISDICTIONAL STATEMENT

The Missouri Apartment Association adopts and incorporates by reference the entirety of Appellant's jurisdictional statement as if set forth more fully herein.

STATEMENT OF FACTS

The Missouri Apartment Association adopts and incorporates by reference each of Appellant's statement of facts necessary for the resolution of the underlying question on transfer to the Supreme Court, namely whether Appellant was entitled to a right to trial by jury. *Amicus* objects to the remaining facts contained within Appellant's statement of facts, including those numerous facts relating to the habitability of the property, as both argumentative and irrelevant to the question presented on appeal. MO. SUP. CT. R. 84.04(c).

ARGUMENT

RESPONSE TO POINT RELIED ON NO. 1—THE JUDGMENT OF THE TRIAL COURT SHOULD BE AFFIRMED AS APPELLANT'S REQUEST FOR TRIAL BY JURY WAS PROPERLY DENIED

Chapter 535 cases are summary proceedings, of which are required by statute to be set on "the first available court date" for trial. MO. REV. STAT. § 535.040. Dating back to 1891, Missouri courts have consistently held that Defendants in actions for rent and possession of property are not entitled to a trial by jury. *See State ex rel. Kansas City Auditorium Co. v. Allen*, 45 Mo. App. 551 (1891). In *Rice v. Lucas*, the Missouri Supreme Court re-affirmed the guiding principles that 1) cases heard under Chapter 535 do not provide the right to a trial by jury, and 2) this denial of a right to trial by jury was not unconstitutional. 560 S.W.2d 850, 857 (Mo. banc 1978).

For more than a century, Missouri's legislature and its courts have been consistent that landlord-tenant actions, including those brought under Chapter 535, are intended for "expeditious resolution of disputes within its scope." *Stough v. Bregg*, 506 S.W.3d 400, 404 (Mo. Ct. App. E.D. 2016). Where possession is at issue, "Chapter 535 gives the landlord the ability to reclaim property in a prompt manner when the tenant has stopped paying rent." *Id.* To conclude otherwise, and to grant Appellant a jury trial on a rent and possession claim, would fly in the face of more than a century of case law and would create a public policy nightmare for the state of Missouri, in which its courts are clogged with hundreds, if not thousands, of cases set for trial by jury each year.

I. STANDARD OF REVIEW

The Missouri Apartment Association, as *Amicus*, adopts and incorporates by reference herein the entirety of Appellant's standard of review as if set forth more fully herein. *Amicus* also notes that the specific question presented before the Court is whether the provisions of Chapter 535 provide for a jury trial in a rent and possession case. The procedural mechanism by which this question has reached the Court is unusual, as courts have held that a writ of prohibition is typically the appropriate remedy if the trial court improperly denies the right to a trial by jury. *See State ex rel. Estill v. Iannone*, 687 S.W.2d 172, 175 (Mo. banc 1985). Nonetheless, *Amicus* intends this brief to address the questions of 1) whether Chapter 535 provides for the right to a trial by jury, and 2) whether the denial of a right to a trial by jury in a rent and possession case is constitutional and comports with due process of law. The Missouri Apartment Association does not offer an opinion as to the scope of the challenge presented, nor whether the questions presented are properly before the Court, but as a guide to aid the Court's decision-making process.

II. THE ADVENT OF JURY TRIALS IN CHAPTER 535 RENT AND POSSESSION CASES WOULD CREATE A PUBLIC POLICY NIGHTMARE FOR COURTS AND PROPERTY OWNERS ALIKE

For many individuals, home ownership was once considered the cornerstone of the American dream. Owning your own home was a symbol of status, a token of pride, and a practical necessity of life as an adult. Increasingly, however, Americans are turning to

renting, rather than buying, as their primary means of obtaining housing. The retirement of the "baby boomer" generation, the collapse of the housing market in 2008, and the delayed entry into adulthood by the millennial generation[1] all likely played a part in reversing the housing trend. Regardless of the cause of this phenomenon, it is clear that renting property is rapidly becoming in the new norm. According to a recent study conducted by Trulia, a real estate and housing website, using data obtained from the American Community Survey for 50 of the largest United States metropolitan areas, the share of American households that rent increased from 36.1 percent in 2006 to 41.1 percent in 2014.[2] That trend is highly unlikely to reverse anytime soon.

The National Multifamily Housing Council and the National Apartment Association estimate that approximately 429,200 Missouri residents live in apartments.[3]

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[1] *See Generational Differences During Young Adulthood: Families and Households of Baby Boomers*, Lydia R. Anderson. National Center for Marriage and Family Research. http://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/anderson-families-households-boomers-millennials-fp-17-07.pdf

[2] *From Rent to Own: Who Lost the American Dream*. Mark Uh. https://www.trulia.com/blog/trends/own-to-rent/

[3] These statistics are based upon a study conducted by the National Multifamily Housing Council, in conjunction with the National Apartment Association, and pulls data from the

A substantial number of other Missouri residents live in rental housing that are not apartments. That same study indicates that Missouri will need to add an additional estimated 41,000 new apartments by 2030 to keep up with demand for the same.[4] In *King v. Moorehead*, the Missouri Court of Appeals first recognized and articulated the public policy of the state of Missouri to ensure "an adequate supply of habitable dwellings" for its citizens. 495 S.W.2d 65, 77 (Mo. Ct. App. 1973). The *King* court also recognized that in order to ensure a supply of dwellings remains available, it is paramount that a tenant fulfills their end of the bargain by paying rent. *Id.* (requiring a tenant to pay rent *in custodia legis* even in cases where a defense of habitability is raised). Accordingly, landlords must necessarily have a mechanism to enforce and ensure the payment of rent.

Chapter 535, including its statutory predecessor, was a legislative response to the inadequacy of the common law to deal with the issues presented above. The *primary* purpose of the statute, as delineated by a simple reading of its text, is to provide a landlord an expeditious mechanism by which to "dispossess the tenant and all subtenants and recover possession of the premises rented or leased" in cases where rent is unpaid. MO. REV. STAT. § 535.010.

Interpreting Chapter 535 to allow for a jury trial for every tenant who requests it would place an exceedingly unfair burden on landlords who could be forced to wait

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United States Census Bureau. http://missouriapartmentassociation.com/wp-content/uploads/2016/12/MO-WRA-State-Data.pdf

[4] *Id.* https://www.weareapartments.org/data/state/missouri

several months or years, all without rent being paid, to have their cases heard in order to obtain possession of a property they acquired a right to long before. Oftentimes, tenants without legitimate claims or defenses to an eviction proceeding will utilize the right to trial as a stalling mechanism in order to remain in possession of a property. The legislature specifically contemplated this behavior, which is why it mandated that trial courts set Chapter 535 cases "on the first available court date" for trial in the event of a dispute. MO. REV. STAT. § 535.040.1.

The Metropolitan St. Louis Equal Housing and Opportunity Council (hereinafter "EHOC") frequently cites a study it conducted in connection with the Washington University School of Law Civil Rights & Community Justice Clinic regarding a statistical analysis of eviction actions in St. Louis City. *See generally Kohner Properties v. Johnson*, SC95944, Brief of Amicus Curiae, at P. 10. The study revealed that in 2012, landlords in St. Louis City filed 6,369 eviction cases. *Id.* Of those cases, 5,416 were filed as "rent and possession" cases under Chapter 535, RSMo. *Id.* The EHOC concludes that 4,934 of those eviction cases (77.5%) resulted in judgments in favor of the landlord. *Id.* These results do *not* evidence nefarious outcomes or a corrupt system. Instead, the results confirm that in the vast, *overwhelming* majority of these cases, the tenant owed rent, refused to return possession of the property to the landlord, and could not or otherwise did not want to pay the rent to the landlord or the court to remedy their default. Unlike nearly every other type of action in our legal system, Defendants in Chapter 535 cases have little incentive to resolve cases without the need for trial.

In Missouri, it can take many months, or even years, from filing a Petition to obtaining a jury trial setting. Should the Court interpret Chapter 535 as providing for a jury trial in all cases in which it is requested, the statutory language requiring an expedited trial setting would be rendered meaningless. This outcome could not have been what the legislature intended when passing such a statute into law and it does not adequately protect our landlords.

Moreover, the Missouri Apartment Association agrees wholeheartedly with Judge Dowd's concerns in his concurring opinion that "our existing court systems and jury pools may not be able to absorb the influx of cases that could result from jury trials in these frequent matters." C of A Op. at P. 9. In Greene County, Missouri, for fiscal year 2016, a total of 8,189 cases were filed in associate civil and small claims court.[5] Of those cases, 2,674 were filed as rent and possession or eviction cases. By comparison, only 1,635 *total* cases were filed in circuit court. Of all the civil cases filed in Greene County in 2016, only 24 of those cases ever reached a jury. In total, judges in Greene County spent 87 days in civil jury trials throughout the year. According to the most recent Weighted Workload Study, judges in Greene County are already some of the busiest judges in the state.

[5] Data is obtained through the website of the Office of State Courts Administrator at the following link: https://www.courts.mo.gov/file.jsp?id=109523

In Jackson County, the numbers are similar. In fiscal year 2016, there were 27,201 cases filed in associate civil or small claims court.[6] Of those cases, 6,213 were filed as rent and possession cases or evictions. Of all the civil cases filed in Jackson County in 2016, only 76 civil cases ever reached a jury. Judges in Jackson County spent a total of 381 days in civil jury trials in 2016. As stated above, tenants who have failed to pay their rent, and wish to remain in possession of a property without paying anything, have every incentive to request a jury trial, even when there is no genuine dispute that rent is unpaid. Even if only a fraction of those Defendants actually request a jury trial, the results could be disastrous for our judicial system.

Appellant claims this concern is both overstated and unfounded based upon a study that was conducted of filings for unlawful detainer cases from January 1 to December 31, 2016. *See generally* App. Sub. Br. at P. 36. Appellant concludes that in 2016, a total of 2,317 cases were filed as unlawful detainers in Jackson County, St. Louis County, and St. Louis City. *Id*. Of those cases, a total of 21 cases requested a trial by jury. *Id*. However, comparing unlawful detainer cases to rent and possession cases is akin to comparing apples and oranges.

Typically, unlawful detainer cases in Missouri under Chapter 534 are reserved for three specific scenarios—tenants who holdover after breach or termination of their lease, former owners who holdover after being foreclosed upon, or trespassers and squatters.

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[6] Data is obtained through the website of the Office of State Courts Administrator at the following link: https://www.courts.mo.gov/file.jsp?id=109508

Though possession is often at issue in an unlawful detainer case, the policy concerns for Chapter 534 are different than the policy concerns for Chapter 535. Put simply, the legislature intended Chapter 535 to provide a cost-effective, expedient mechanism to allow a landlord to re-take possession of property when rent is unpaid, while simultaneously balancing the rights of the tenant. The legislature did not intend for Chapter 534 to provide for such relief, as evidenced by the fact that there is an explicit provision allowing for the request of a jury trial in an unlawful detainer case. MO. REV. STAT. § 534.160.

Moreover, even assuming the veracity of Appellant's data, that would still add *hundreds* of jury trials to this state's jury trial calendar each year. If these numbers are understated, as *Amicus* anticipates, that number could reach the thousands. This scenario would create both a logistical and a public policy nightmare for landlords and the courts alike. Such a scenario would waste judicial resources and taxpayer dollars.

Finally, the cost of taking a simple rent and possession case to trial would skyrocket. The Missouri Apartment Association similarly shares Judge Dowd's concerns that "if rent and possession cases go from being handled in summary fashion before a judge to being tried before juries, the attorney fees could drastically increase and become a source of significant damages owed by tenants, potentially exceeding the value of these oftentimes minor cases." C of A Op. at P. 9. According to the Court Statistics Project[7],

[7] The Court Statistics Project is a joint project of the National Center for State Courts (NCSC) and the Conference of State Court Administrators (COSCA). According to its

the median cost to take a real property case from Petition to jury trial is $66,000.00. Simple rent and possession cases would obviously be less, but would still cost thousands of dollars. Typically, the bill for costs and attorney's fees would exceed the total amount of rent that landlords claim is owed in these types of cases, by ten to one hundred-fold.

This is especially concerning for the vast majority of landlords in this state who are not commercial and own a single property or a handful of properties. In Missouri, we encourage our landlords to place their properties, including the management operations of the same, in limited liability companies, closely held corporations, or similar business organizations. *See i.e.*, MO. REV. STAT. § 347.057, *et. seq*. However, unlike small claims actions, those entities cannot bring an action before a court in Missouri, including a rent and possession action, unless they are represented by an attorney. *See generally Strong v. Gilster Mary Lee Corp.*, 23 S.W.3d 234, 239 (Mo. Ct. App. E.D. 2000).

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website, the Court Statistics Project publishes caseload data from the courts of the fifty states, the District of Columbia, and Puerto Rico. These data are provided by the offices of the state court administrator in those jurisdictions. The data reported here conform to the definitions and case counting rules in the State Court Guide to Statistical Reporting (Guide). States publish their own data that may be more extensive, although not directly comparable to other states for a variety of reasons, including differences in court structure, case definitions and counting practices, court rules, statutes, or terminology. http://www.courtstatistics.org/~/media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx

Presently, a residential landlord in Missouri can hire an attorney to prosecute an eviction, from start to finish, for a fairly modest sum. That could drastically change if this Court is to find that a party to a rent and possession case has a right to a trial by jury. In such a scenario, a landlord would be faced with a nearly impossible dilemma—pay an attorney many times more than the entire claim for rent is worth to evict a tenant in default, or allow a tenant to reside in the property rent-free because it is too costly to file an eviction. A landlord can, of course, request attorney's fees be assessed in a judgment if such a provision is contained within their lease. Practically speaking, however, this provides little relief to a landlord because the vast majority of these cases are uncollectible due to the insolvency of the tenant. Such a scenario is untenable and patently unfair to landlords from a public policy standpoint.

In conclusion, the advent of jury trials in rent and possession cases under Chapter 535 would create a public policy disaster on multiple fronts. Such a holding would unfairly prejudice property owners and landlords, would create a significant new burden on our overworked judicial system, and would skyrocket the cost of litigation in cases involving simple disputes. The legislature did not intend such consequences in rent and possession cases, as evidenced by the fact that it did not explicitly provide for jury trials as it did in cases under Chapter 534. Based upon the policy considerations above, the Missouri Apartment Association urges this Court to affirm the trial court's judgment in the above-styled matter.

III. RENT AND POSSESSION ACTIONS ARE SUMMARY PROCEEDINGS WHERE THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY DOES NOT ATTACH

In 1891, the Missouri Court of Appeals first held that tenants in an action for possession of property under the terms of a lease were *not* entitled to a trial by jury under the Missouri Constitution. In *State ex. rel. Kansas City Auditorium Co. v. Allen*, a commercial landlord brought an action for possession of its premises under Sections 6391- 6400 of the Revised Statutes of 1889 (one of the statutory predecessors to Chapter 535, RSMo.) on the basis that rent in the amount of $4,088.33 was unpaid. 45 Mo. App. 551, 556 (1891). The question presented was whether the "method of recovering possession of demised premises for failure to pay rent" under the statute was a "summary proceeding… special and contrary to the course of the common law." *Id.* at 554. The court adopted the rule that "in summary proceedings, in such courts, there is no doubt in our minds that, unless the intention to provide a jury for the trial of such causes is gleaned from the statutes, none can be had." *Id.* at 564. *See also Carter v. Tindall,* 28 Mo. App. 316 (1887); *Pesant v. Heartt,* 22 La. Ann. 292 (1870).

This pronouncement is consistent with the definition of "summary proceeding" provided for in Black's Law Dictionary and adopted by Missouri courts, which states "summary proceedings are those that are conducted without the usual formalities and *without a jury*." *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d 339, 351 (Mo. banc 2006) (emphasis added) (quoting BLACK'S LAW DICTIONARY 1476 (8th ed. 1999)). The Missouri legislature has consistently drafted its landlord-tenant laws with that

understanding in mind. Though the current version of the statute neither provides for, nor precludes a jury trial, the legislature's silence on the matter in Chapter 535 should be read as an intent that these cases be tried summarily, without a jury.

This analysis is bolstered by more than a century of Missouri case law on the issue. Courts in Missouri have consistently held that "summary proceedings are entirely statutory, sui generis, summary in character or nature, and the remedy is speedy." *Ellsworth Breihan Bldg. Co. v. Teha Inc.*, 48 S.W.3d 80, 83 (Mo. Ct. App. E.D. 2001). Similarly, rent and possession cases under Chapter 535 "provide a very simple and expeditious method of forfeiture for nonpayment of rent, fair to both the landlord and tenant." *Duchek v. Carlisle*, 735 S.W2d 791, 793 (Mo. Ct. App. E.D. 1987). "Compared with its stricter common law counterpart of forfeiture the statutes under [Chapter] 535 provide a summary, speedy and inexpensive disposition of otherwise minor cases." *Id.* As recently as 2016, the Eastern District reiterated that "[r]ent and possession is a summary proceeding, intended for expeditious resolution of disputes within its scope." *Stough v. Bregg*, 506 S.W.3d 400, 404 (Mo. Ct. App. E.D. 2016)

In 1875, the Missouri Constitution was amended and the phrase "as heretofore enjoyed" was added to the middle of the sentence "the right of trial by jury… shall remain inviolate." MO. CONST. art. I, § 22(a). As such, the Missouri Apartment Association agrees that the proper inquiry to determine whether a jury trial attaches is whether that cause of action "is the kind of case that carried a right of trial by jury in 1820." *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). *Kansas City Auditorium* is particularly instructive on this question, in that we know Chapter 535 cases

were not the "kind of case" that carried a right of trial by jury as early as 1891. There exists no good reason for the Court to abandon well-established precedent that has been in place, and relied upon, for more than a century in Missouri.

IV. RENT AND POSSESSION CASES ARE DEEPLY ROOTED IN EQUITY AND EQUITABLE CLAIMS ARE NOT ENTITLED TO A RIGHT TO TRIAL BY JURY

In the 1800s, a summary proceeding, such as a claim for rent and possession, would have been brought before the Justice of the Peace. At that time, courts were divided into common law courts and courts of special jurisdiction, including the Justice of the Peace. In *Kansas City Auditorium*, the court reasoned that summary proceedings before the Justice of the Peace were not entitled to a jury because they were not courts of common law, and as a result, juries were never intended as part of their "machinery." *Kansas City Auditorium*, 45 Mo. App. at 564. As far back as *Kansas City Auditorium*, these kinds of cases were treated as cases in equity.

In the 1800s, the determination of whether a case was founded in "equity" or "at law," was jurisdictional and would determine which court would hear your case. In 1979, Article V, Section 17 of the Missouri Constitution took effect, which abolished magistrate courts and merged all courts into a singular circuit court, with associate division judges to be given the duties of magistrates. *See* MO. CONST. art. V, § 17; *see also Farinella v. Croft*, 922 S.W.2d 755, 757 (Mo. 1996).

Functionally speaking, this change eliminated the hard line distinction between claims at law and equity. In *State ex rel. Leonardi v. Sherry*, this Court recognized the

guiding principal that the significance between law and equity is no longer "jurisdictional, but practical." 137 S.W.3d 462, 472 (Mo. banc 2004). In other words, the Court is not required to check its common sense at the door when making such a determination. Dating back to at least 1820, "Missouri's constitutional guarantee to a jury trial has never been applied to claims seeking equitable relief." *Id*. *See also State ex rel. Diehl v. O'Malley,* 95 S.W.3d 82, 85 (Mo. banc 2003).

The question is whether, from a practical standpoint, a Chapter 535 action for rent and possession more closely resembles an action at law or in equity, as that distinction would have existed in 1820. With the exception of ejectment actions (which will be discussed below), the majority of actions for possession of real property are considered to be actions in equity. This principal is recognized by both Judge Van Amburg's opinion and Judge Dowd's concurrence in this case before the Eastern District. C of A Op. at P.9.

The Missouri Apartment Association ultimately agrees with Judge Dowd's conclusion that "both monetary damages and possession of the property [are at issue] in this case, and both are explicitly sought pursuant to the lease, making this action akin to an action for specific performance, an equitable remedy." *Id*. (referencing *Nitro Distributing, Inc. v. Dunn*, 194 S.W.3d at 351 (finding a motion to compel arbitration to be "an equitable remedy designed to compel specific performance of a term in a contract")). This conclusion follows from more than a century of case law in Missouri and takes into consideration the practical realities of a rent and possession action.

Citing *Lee v. Armour Building Co.*, 18 S.W.2d 102, 105 (Mo. Ct. App. 1929), the majority opinion jumps to the conclusion that "[a] rent and possession action under

Chapter 535 is *essentially a breach of contract claim seeking monetary damages*." C of A Op. at P. 5 (emphasis added). This argument necessarily fails for several reasons. First, if Chapter 535 was a simple codification of the common law regarding breach of contract, there would be no need for its existence. At least as early as 1879, the Missouri legislature recognized that the remedies for landlords that existed at common law for breach of contract were insufficient in cases involving unpaid rent, and therefore it created and promulgated statutes that *modified* and *changed* the common law. *See generally* The 1879 Revised Statutes of the State of Missouri, Section 3084, *et. seq*. These statutes now exist as Chapter 535 of the Missouri Revised Statutes.

Second, a common law action for breach of contract would never provide for restitution of possession of the premises at hand. At common law, landlords would have only been entitled to damages as a result thereof. Finally, this conclusion is misplaced because it fundamentally misunderstands the *primary* purpose of an action for rent and possession. The *primary* purpose of bringing an action for rent and possession is not to obtain "monetary damages," it is to re-take possession of the property.

This can be gleaned by a thorough reading of the statutes at hand. MO. REV. STAT. § 535.010 states that Chapter 535 is the mechanism by which a landlord can "dispossess the tenant and all subtenants and recover possession of the premises rented or leased" in cases where rent is unpaid. *Id*. MO. REV. STAT. § 535.040 states that upon hearing the cause, "[T]he judge shall render judgment that the landlord recover the possession of the premises so rented or leased, *and also* the debt for the amount of the rent then due, with all court costs and shall issue an execution upon such judgment, commanding the officer

to put the landlord into *immediate possession of the property leased or rented*." (emphasis added).

MO. REV. STAT. § 535.120 states, "Whenever one month's rent or more is in arrear from a tenant, the landlord, if he has a subsisting right by law to reenter for the nonpayment of such rent, may bring an action *to recover the possession* of the demised premises." (emphasis added). In addition to a request for possession, a landlord may, under MO. REV. STAT. § 535.020, "*join a claim* for any other unpaid sums, other than property damages, regardless of how denominated or defined in the lease, to be paid by or on behalf of a tenant to a landlord for any purpose set forth in the lease." (emphasis added).

It is clear from reading these statutes that the *primary* concern is to provide a mechanism by which to transfer immediate possession of the property at issue. Landlords may request possession of the property "and also" monetary damages. Other monetary damages may be "joined" to the action, provided they are contained within the lease. An award of monetary damages for unpaid rent, or other costs, is *secondary* and *incidental* to the issue of obtaining possession.[8] Possession is the primary purpose of the statutes.

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[8] This interpretation is entirely consistent with how other states treat these types of cases. In Alaska, the functional equivalent to Missouri's rent and possession action under Chapter 535 is a statutory action for forcible entry and detainer. In *McDowell v. Leonarduzzi*, 546 P.2d 1315 (Alaska 1976), the Supreme Court of Alaska stated, "[a] suit for forcible (entry and) detainer . . . substitutes the authority of the courts for private force

A landlord cannot bring an action for rent and possession under Chapter 535 without asking for possession of the property. Otherwise, that landlord has brought a common law action for breach of contract. A landlord can bring an action for rent and possession under Chapter 535 without asking for monetary damages. *See* MO. REV. STAT. § 535.040 ("If the plaintiff so elects, the plaintiff may sue for possession alone, without asking for recovery of the rent due").

The majority's comparison of a Chapter 535 claim to a common law claim for breach of contract is misplaced and oversimplified. Even if this Court does not accept that a Chapter 535 action sounds in specific performance, a wholly equitable cause of action, at the very least it presents a cause of action for both legal and equitable relief. In *State ex rel. Leonardi v. Sherry*, this Court addressed such a scenario. 137 S.W.3d 462.

Appellant is correct that Missouri trial courts have the authority to try cases seeking equitable relief and monetary damages in one proceeding. In *Leonardi*, the Court noted that while Missouri has a "historical preference" for trial by jury, the "trial court has discretion to try such cases in the most practical and efficient manner possible." *Id.* at 473. Moreover, the Court recognized that "[i]n some situations, the practical and efficient trial of a case may require limited *incidental claims* at law to be tried *to the court* in connection with equitable matters." *Id.* at 474. (emphasis added).

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to compel a citizen wrongfully in possession of real property to surrender it to another with a superior claim. The essence of the action is a dispute over possession. A claim for rent is *secondary* and *incidental* to a determination of the right to possession." *Id.*

The Court also noted this procedure "preserves the trial court's flexibility to try cases in the most practical and efficient manner possible. It also preserves and maintains the distinction between equitable relief and damages while respecting the historical preference for trial by jury. Furthermore, it escapes the inconsistent application of *outdated historical theories inherent in our existing case law*. It does not, however, enlarge or expand the right to a jury trial in this state. Equitable issues that traditionally have been tried to the court shall still be tried to the court." *Id*. (emphasis added).

To the extent preceding case law contained outdated historical distinctions between law and equity (or Justices of the Peace and those at law), the *Leonardi* Court presented a reasonable and practical solution for ascertaining which cases can be tried by jury and which cannot. Given the reality that rent and possession cases are traditionally summary proceedings, deeply rooted in equity, with the primary function of awarding possession of a rental property, it makes sense to try the limited incidental claim for monetary damages in conjunction therewith. To the extent the question of monetary damages presents a remedy of law, not equity, *Amicus* can think of no type of case more suited for the scenario described in *Leonardi* than a rent and possession case under Chapter 535. As such, the Missouri Apartment Association urges this Court to affirm the decision of the trial court and deny Appellant's request for trial by jury.

V. THE ELIMINATION OF TRIAL DE NOVO MAKES NO DIFFERENCE TO THE ANALYSIS IN *DIEHL* AND *LEONARDI*

In 2014, the Missouri legislature amended Chapter 535 to remove the right to a trial *de novo* in a rent and possession action. Previously, MO. REV. STAT. § 535.110 provided that "[a]pplications for trials *de novo* and appeals shall be allowed and conducted in the manner provided in chapter 512 [RSMo.]." Chapter 512 provided the mechanism through which an aggrieved party could file for trial *de novo* before the Circuit Court. Today, MO. REV. STAT. § 535.110 provides that "[a]pplication for appeals shall be allowed and conducted in the manner provided as in other civil cases." *Id.*

In *Rice v. Lucas*, Supreme Court addressed the constitutionality of denying a right to jury trial in a rent and possession case. 560 S.W.2d 850 (1978). *Rice* closely tracked the language and holding of *Kansas City Auditorium*, and re-affirmed that "the provision of [Chapter 535], which requires the action to be tried in magistrate court (which followed the Justices of the Peace) without a jury is not unconstitutional." *Id.* at 851. Appellant is correct that both *Kansas City Auditorium* and *Rice* contain language that these types of cases may be heard on by jury on application to the circuit court.[9] Importantly, however, that language was not outcome determinative in either case. To the

[9] In *Kansas City Auditorium*, cases before the Justices of the Peace could be directly appealed to the Circuit Court, whereas in *Rice*, the same mechanism applied for cases in front of magistrate judges.

extent that language creates a distinction in law, this distinction would consist of non-binding dicta. The Court should not follow this distinction for two main reasons.

First, the cases of *Kansas City Auditorium* and *Rice* were decided long before the Court clarified the law in *Diehl* and *Leonardi* in 2003 and 2004 respectively. As stated above, the proper inquiry under *Diehl* is whether this type of case would have been entitled to a jury trial in 1820. Since rent and possession cases sound in equity, and cases in equity have never been entitled to a trial by jury, it follows that the right to a trial by jury would not have attached to those cases, even as far back as 1820. To the extent the dicta in *Kansas City Auditorium* and *Rice* are inconsistent with the holdings in *Diehl* and *Leonardi*, that dicta should not be followed by the Court.

Second, in *State ex rel. Burlison v. Conklin*, the Southern District recited the following general rule: "[T]he civil-jury-trial provision of the constitutions of Missouri have repeatedly been held to apply to courts proceeding according to the course of the common law and not to special courts, such as justice of the peace, magistrate, or probate courts, which do not proceed according to the common law regardless of the type of civil case which may be involved. Under our system, the jury trial was and is available in cases filed in magistrate court whenever, and by whatever means, the case reaches the circuit court." 741 S.W.2d 825,827 (Mo. Ct. App. S.D. 1987).

However, *Burlison* importantly noted the general rule "would not be applicable *if the action was such that it did not carry the right to a jury trial at common law.*" *Id.* (emphasis added) (citing *In Re Moynihan*, 332 Mo. 1022, 62 S.W.2d 410 (1933); *City of St. Louis v. Smith*, 325 Mo. 471, 30 S.W.2d 729 (1930)).

Burlison foreshadowed the Court's holding in *Diehl* regarding the distinction between courts of general jurisdiction and courts of special jurisdiction. Since rent and possession actions under Chapter 535 do not carry the right to a jury trial at common law, and would not have in 1820, the rule regarding appeals to courts of record or circuit court would not apply. Since *Diehl* clarified and simplified the law regarding which cases are and are not entitled to trial by jury, the elimination of trial *de novo* is no longer relevant to the analysis. Under *Diehl*, rent and possession cases would not have been entitled to a jury trial in 1820. Therefore, the Court should affirm the trial court's judgment and denial of a trial by jury.

VI. EJECTMENT ACTIONS ARE NOT ANALOGOUS TO RENT AND POSSESSION ACTIONS UNDER CHAPTER 535

Citing to *Mexico Refractories Co. v. Pignet's Estate*, 161 S.W.2d 417, 419 (Mo. 1942), Appellant argues that "[i]n Missouri, actions seeking the remedy of possession are tried as legal claims." *See* Appellant's Substitute Brief at P. 15. This argument mischaracterizes the law. In Missouri, numerous cases seeking the remedy of possession of real property, such as quiet title actions[10], are deeply-rooted in equity and not entitled to a jury trial. Actions seeking *ejectment* are tried as legal claims. The remedy of possession is not confined merely to ejectment actions. In fact, today the vast majority of cases regarding possession of property are *not* ejectment actions.

[10] *See generally Pipes v. Sevier,* 694 S.W.2d 918 (Mo. Ct. App. 1985).

Chapter 524 specifically governs ejectment actions in Missouri. At common law, the cause of action for an individual dispossessed of real property was forfeiture, and ejectment was the remedy. MO. REV. STAT. § 524.010 provides for ejectment in cases where "the plaintiff is legally entitled to the possession thereof [a premises]." Though Appellant tries desperately to claim ejectment actions are directly analogous to rent and possession actions, the Missouri Supreme Court has consistently recognized the distinction between those two claims dating all the way back to 1888.

In *Tarlotting v. Bokern*, Michael Tarlotting sought possession of certain real property he owned in St. Louis. 95 Mo. 541 (1888). The Defendant, Adelia Bokern, was the owner of a life-estate in the premises pursuant to the terms of a residential lease agreement. *Id.* at 547. Tarlotting brought an action for ejectment based on the theory that Bokern owed him rent in the amount of $300.00. *Id.* The trial court entered judgment in favor of the Defendant, which was affirmed on appeal. *Id.* at 548. In doing so, the Missouri Supreme Court stated, "In ejectment, plaintiff cannot recover without showing that, at the time his suit was commenced, he was entitled to the possession of the premises sued for. The fact that rent is due, has been demanded, and is unpaid, does not extinguish the relation of landlord and tenant, determine the tenant's term, or give the landlord a right of entry. The only right these facts confer upon the landlord is to institute *a summary proceeding* before the justice of the peace against the tenant, requiring him to show cause why possession of the property should not be restored to the plaintiff." *Id.* (emphasis added).

The Court in *Tarlotting* specifically instructed that the remedy for unpaid rent was to file the modern-day equivalent of a rent and possession action under Chapter 535, not an action for ejectment. In doing so, the Court recognized the important distinction between these two cases. Moreover, *Amicus* on behalf of the Appellant even recognizes the distinction between those two causes of action. Citing Mary B. Spector's research on tenant's rights[11], *Amicus* for the Appellant notes that "[s]ummary proceedings in rent and possession actions evolved because landlords viewed common law ejectment actions 'as cumbersome, expensive, and time consuming.' The summary rent and possession action was created as an 'efficient' alternative to return property to the landlord quickly." *Amicus* Br. at P. 17. Put simply, the legislature created an entirely new cause of action for rent and possession because the traditional cause of action for ejectment was insufficient.

Appellant cites this Court to the United States Supreme Court's decision in *Pernell v. Southall Realty*, whereby the United States Supreme Court recognized a constitutional right to a jury trial in a rent and possession case by comparing the same to an action for ejectment. 416 U.S. 363 (1974). *Pernell* is inapposite and should not be followed for two main reasons. First, *Pernell*'s holding was based on the United States Supreme Court's interpretation of the Seventh Amendment to the United States Constitution. Unlike the District of Columbia, Missouri courts are not bound to the holding in *Pernell* because the

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[11] Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 Wayne L. Rev. 135, 154 (2000).

Seventh Amendment of the United States Constitution does not apply to state court proceedings. *See generally Minneapolis & St. Louis R.R. v. Bombolis,* 241 U.S. 211, 217, 36 S.Ct. 595, 60 L.Ed. 961 (1916)*; Bringe v. Collins,* 274 Md. 338, 335 A.2d 670, 673 (1975)*, application for stay denied,* 421 U.S. 983, 95 S.Ct. 1986, 44 L.Ed.2d 475 (1975). States are free to impose whatever requirements within their Constitution regarding trial by jury that they see fit, and are not bound by the Seventh Amendment of the United States Constitution.

Second, the Supreme Court's analogy to ejectment actions is inaccurate. In *Vinson v. Hamilton*, the Supreme Court of Alaska criticized the rationale in *Pernell* as follows:

> *Pernell* holds that despite being a creature of statute, an FED [Forcible Entry and Detainer, the equivalent to a rent and possession] action is still one at law, similar to a common-law ejectment action. On the other hand, many actions for possession of real property, such as an action to quiet title or one seeking a prescriptive easement, are equitable in nature and thus demand no jury trial…
>
> Furthermore, FED statutes *do not call for an imitation of common law ejectment proceedings*. At common law, if a tenant violated the terms of his lease, or if he retained possession after the lease terminated, an action for ejectment was the landlord's only judicial remedy. This action was one at law, and traditionally parties had a right to a civil jury trial. However, ejectment was also a rather slow and complex procedure, and many landlords were reluctant to rely on it. Instead, they would often evict their

> tenants by means of self-help, a method that was allowed under the common law but frequently led to violence. *To avoid bloodshed, state legislatures of the nineteenth century forbade self-help as a remedy, but also created summary proceedings in order to speed resolution of possessory issues.*
>
> When interpreting Alaska's FED statute, we must take care to preserve the swift proceedings that the legislature intended. Alaska's FED provisions forbid the use of forcible self-help to regain possession of property. At the same time, they require a summary hearing on the question of possession alone. This bifurcation of possessory issues from claims for damages indicates that *an award of possession is distinct from a remedy at law*. Therefore, we hold that in an FED hearing, *an award of possession constitutes equitable relief.* Consequently, the parties in an FED hearing do not have a right to a jury trial.

854 P.2d 733, 737 (Alaska 1993) (internal citations omitted) (emphasis added).

Vinson represents a reasonable interpretation and comparison of ejectment and rent and possession actions. *Pernell* is not binding on this Court, and to the extent it attempts to equate ejectment actions to rent and possession actions because of the fact both involve possession of property, it should not be followed. As the Alaska Supreme Court aptly noted in *Vinson*, this comparison ignores the historical developments of the law and the practical realities of the differences between these two types of cases. The Missouri Apartment Association urges this Court to adopt the framework in *Vinson* when

deciding whether a rent and possession action is similar to an action for ejectment, and prays this Court affirm the judgment of the trial court on the basis of the same.

CONCLUSION

Chapter 535 cases are summary proceedings, deeply rooted in equity, of which the right to a trial by jury does not attach under the Missouri Constitution. Moreover, it has been unquestioned for more than a century that tenants in Missouri did not have right to trial by jury. Though they both involve the remedy of possession, rent and possession cases under Chapter 535 are not analogous to ejectment cases for the reasons stated above. Rent and possession cases more closely resemble actions in specific performance, which are not, and have never been entitled to a jury trial since at least 1820.

Finally, granting jury trials to tenants in rent and possession cases under Chapter 535 could create a public policy disaster for Missouri. A decision in favor of the Appellant in this matter has the potential to clog the legal system with unnecessary and burdensome litigation, skyrocket the cost of the eviction process in Missouri to untenable levels, and considerably impede and impair a landlord's ability to re-take possession of their property in a timely and expeditious manner. Accordingly, the Missouri Apartment Association urges this Court to affirm the trial court's grant of judgment in favor of the Respondent and to affirm the trial court's denial of Appellant's request for a trial by jury of the underlying matter.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

COMES NOW N. Austin Fax of Lowther Johnson Attorneys at Law, LLC, of lawful age and having been duly sworn, states that this Brief complies with the limitations contained in Missouri Supreme Court Rule 84.06.

I further state that the number of words contained in this Brief are 8,263, that the number of lines contained in this Brief are 759, and that this Brief was prepared with and formatted in Microsoft Word 2013.

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

I, N. Austin Fax, being of lawful age and being first duly sworn upon his oath, states that he is the attorney and agent above named, and the facts and matters as stated above are true according to his best information, knowledge and belief.

/s/ N. Austin Fax

MBN 68060

Subscribed to before me this 17th day of July, 2017.

/s/ Linda S. Matney

My Commission Expires:

Linda S. Matney Comm#1250351
Greene County State of Missouri
My Commission Expires May 3, 2020

CERTIFICATE OF SERVICE

COMES NOW N. Austin Fax, of lawful age and having been duly sworn, states that the BRIEF OF THE MISSOURI APARTMENT ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, in the within cause, was by him electronically filed with the Clerk of the Court via Electronic Filing System pursuant to Court Operating Rule 27.01 and Supreme Court Rule 103.08, and mailed postage prepaid, by United States Mail, to the following named persons at the addresses shown, all of the 17th day of July, 2017.

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/s/ Linda S. Matney

My Commission Expires:

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