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STATEMENT OF FACTS

In the Court of Appeals this case was consolidated with the appeal in William T. Brown, D.O. and Judith Brown, Appellants v. Harrah's North Kansas City, L.L.C., Respondent, SC88298. When transfer was accepted by this Court, the appeals were again separated. In the introduction below, Respondent makes reference to the record in SC88298 as a means of providing some background to this appeal.

I. INTRODUCTION

In March of 2001, while playing three card poker at Harrah's casino, Respondent Dr. William Brown was accused of cheating. Unbeknownst to Dr. Brown, charges were filed and an arrest warrant was applied for and issued. (SC88298 L.F. 29). About 10 months later, Dr. Brown spoke to the general manager at Harrah's about what had happened. Harrah's then conducted an investigation and concluded that it had made a mistake. It sent Dr. Brown a letter of apology. (SC88298 L.F. 7-8). But, Harrah's did not inform the prosecuting authorities about the mistake it had made. (SC88298 L.F. 8)

More than a year after receiving the letter of apology, Dr. Brown was in Miami, Florida when he was arrested based on the arrest warrant issued in Clay County. He was incarcerated in the Miami, Dade County Jail. (SC88298 L.F. 9-10). After three and half days of incarceration, Dr. Brown was released and allowed to return to Missouri where he surrendered to Clay County authorities. After the Clay County prosecutor reviewed the letter of apology from Harrah's, he

dismissed the charges against Dr. Brown. Dr. Brown then filed a civil action against Harrah's on January 2, 2003. (SC88298 L.F. 4 and 10).

II. PROCEDURAL HISTORY

About a year after filing suit against Harrah's, Dr. Brown filed an unverified Petition for Expungement of his arrest records. (L.F. 4-5). Dr. Brown included in his petition those elements required by §610.123 RSMo. (L.F. 4-5). At the time he filed the petition, Dr. Brown's counsel was unaware that §610.122 RSMo extended authority to expunge arrest records only if there was no civil action pending at the time the petition for expungement was filed. (L.F. 10)

In his Petition for Expungement of Arrest Records, Dr. Brown did not name any law enforcement agencies, courts, prosecuting attorneys, central state depositories of criminal records or others as defendants. (L.F. 4). Rather, he captioned his action, "In Re: Expungement of Arrest Records of William T. Brown, Jr." (L.F. 4). In paragraph 13 of his Petition, Dr. Brown stated:

> Petitioner believes the following agencies possess records regarding this case:
>
> (a) Missouri State Highway Patrol
>
> (b) Federal Bureau of Investigation
>
> (c) Clay County, Missouri Circuit Court
>
> (d) Clay County, Missouri Sheriff's Department
>
> (e) Clay County, Missouri Prosecutor's Office.

Appellants state at page 7 of their Statement of Facts that "[i]n a separate notice form, Mr. Brown listed the criminal records repository and the Missouri State Highway Patrol as defendants in the expungement action. (L.F. 6)." The form referenced by Appellants was not filled out or signed by Dr. Brown or his counsel; rather, it was signed by M. Kelso, D.C. and had a stamp of "Rita Fuller, Circuit Clerk" on it. (L.F. 6).

The State, "sub nom. the Criminal Records Repository", filed a motion to dismiss even though it was not named as a party nor listed in the petition as an agency that may possess records. (L.F. 7). The State, however, did not serve Dr. Brown or his attorney with a copy of the motion to dismiss. (L.F. 7)

On February 20, 2004, the Trial Court took up Dr. Brown's petition for expungement. Dr. Brown's counsel, a Clay County counselor and an assistant Clay County prosecutor all appeared. (L.F. 1). No one appeared for the Highway Patrol or the State "sub nom. the Criminal Records Repository." (L.F. 1). At the conclusion of the hearing Judge Janet Sutton entered her Order of Expungement of Arrest Records. (L.F. 8). In her Order, Judge Sutton found:

> That the arrest of Petitioner…was based on false information, that there is no probable cause at the time of the action to expunge to believe that the individual committed the offense, that no charges will be pursued as a result of the arrest, that the Petitioner/Subject of the arrest has no prior felony conviction, and that an action to expunge the records of the arrest was commenced within three years from the date of the arrest or if criminal

charges were filed, within three years from the date of any dismissal or reversal. (L.F. 8).

Judge Sutton's Order does not state that there was no civil action pending relating to the arrest. (L.F. 8).

More than a year after Judge Sutton entered her order of expungement, Harrah's filed a Motion for Summary Judgment in the civil action brought by Dr. Brown. Harrah's claimed that §610.126 prohibited Dr. Brown from maintaining his civil action. (SC88298 L.F. 27). After learning of the basis of Harrah's Motion for Summary Judgment, Dr. Brown's counsel in this action reviewed the expungement statutes and discovered that under §610.122 RSMo a court has no authority to expunge arrest records unless there is no civil action pending relating to the arrest. (L.F. 11).

Upon learning this fact, Dr. Brown, through his lawyer, filed a disclosure with Judge Sutton informing her that at the time he petitioned for expungement of his records, there was in fact a civil action pending. (L.F. 10-18). Dr. Brown was concerned that the Court's Order of Expungement was without legal authority or jurisdiction, and asked the Court to vacate and set aside its Order. (L.F. 10-12).

Appellants claim at pages 7-8 of their Statement of Facts that Dr. Brown filed his disclosure and motion "because the defendant in Mr. Brown's civil action filed a motion for summary judgment based on §610.126 RSMo which does not allow a civil action for false arrest after an expungement has been granted. (L.F. 11)." Appellant's statement is not factually accurate. Because there was in fact a

civil action pending at the time that Respondent filed his petition for expungement, he felt obligated to notify the Court of this fact and ask that the expungement be set aside or vacated because the Court lacked legal authority to grant the expungement. (L.F. 11-12). Furthermore, Appellants statement is legally inaccurate. At page 11 of the Legal File, Dr. Brown explains in his motion to set aside or vacate that the defendant in the civil action had filed a motion for summary judgment citing §610.126 of the Revised Statutes of Missouri which statute includes a provision that a petitioner shall not bring any action subsequent to the expungement against any person or agency relating to the arrest described in the expunged records. The civil action was not filed subsequent to the expungement. It was filed before the expungement. (SC88298 L.F. 4 and L.F. 4).

In response to Dr. Brown's disclosure and motion, Judge Sutton found that because there was a civil action pending, she was without jurisdiction to enter the Order of Expungement, and therefore, the order was set aside. (L.F. 19-20). The Court's Order stated in part:

> The Court finds that there was a civil action pending at the time the order of expungement was sought and entered. The Petitioner [Dr. Brown] has disclosed these facts to the attorney for the State of Missouri and for Clay County, Missouri, both of whom have agreed that this matter needed to be brought to the attention of the Court. (L.F. 19).

Appellants claim that Dr. Brown moved "ex parte" to set aside the order of expungement. (Appellants' Brief at 24). This statement is incorrect and the part of

the record cited by Appellants in support of their claim demonstrates that it is incorrect. Dr. Brown notified the Clay County Counselor's Office as well as Dan White, the Clay County Prosecuting Attorney. (L.F. 13). What's more, the Trial Court specifically recited in its Order setting aside the expungement, "the petitioner has disclosed these facts to the attorney for the State of Missouri and for Clay County, Missouri, both of whom have agreed that this matter needed to be brought to the attention of the Court." (L.F. 19) (emphasis added). Thus, Dr. Brown's motion was not "ex parte."

While it is true that Mr. O'Connor did not send a copy of the motion to the Missouri State Highway Patrol, he did provide a copy of the motion to the State by sending a copy of the motion to the Clay County Prosecuting Attorney who represents the State of Missouri in criminal matters. (L.F. 13). To the extent Appellants are asserting that the State "sub nom. the Criminal Records Repository" did not receive a copy of Dr. Brown's motion, the statement is true. However, the State omits the fact that the criminal records repository was not a party to the expungement action; it was not named as a defendant in the petition nor was it listed in the petition as an agency that possessed records regarding this case. (L.F. 4-5). The Court's order of expungement ordered only those agencies "identified in the Petition" to expunge their arrest records. (L.F. 8). Because the criminal records repository was not identified in the petition, it was not bound by the Order. (L.F. 8). Consequently, it was unnecessary to send the criminal

records repository a copy of the motion to set aside an expungement order which it was not bound by.

In addition, neither the State "sub nom. the Criminal Records Repository" nor the Missouri Highway patrol appeared at the hearing on Dr. Brown's expungement petition. (L.F. 1). Nor did the State "sub nom. the Criminal Records Repository" serve Dr. Brown or his attorney with its motion to dismiss. (L.F. 7). Dr. Brown sent a copy of his motion to set aside to the two agencies who appeared at the expungement hearing.

On April 22nd, 2005, the State of Missouri and the Missouri State Highway Patrol together filed a motion to set aside the Court's Order of April 7th, 2005 wherein the Court vacated its prior order of expungement. (L.F. 21). The motion was not verified, and no affidavits were submitted in support of the motion. (L.F. 21-28). Furthermore, the motion did not contain any legal authority in support of its arguments. (L.F. 21-28). Nowhere in the motion did the State or the Missouri State Highway Patrol affirmatively state that they had in fact expunged whatever records they may have had regarding Dr. Brown. (L.F. 21-28). Finally, the motion did not assert that laches or estoppel precluded Dr. Brown from moving to set aside the prior order of expungement, nor did the motion assert any constitutional argument. (L.F. 21-28).

On May 5th, 2005, the Court held a hearing on the State and the Missouri State Highway Patrol's Motion. Appellants put on no evidence at the hearing. (Tr. 3-19). In addition, the Assistant Attorney General, appearing on behalf of the

State and the Highway Patrol, never affirmatively stated to the Court that any records in the possession of the State or the Highway Patrol had been destroyed. (Tr. 3-19). Rather, the Attorney General stated only that when they receive an order to expunge records, "by law they are required to destroy them, obliterate them." (Tr. 4). The Attorney General added, however, that they need to ensure that there is finality to the judgment. (Tr. 4). Later in the hearing, the assistant Attorney General again acknowledged that "typically when there is an expungement we wait for that, for the finality of the judgment. We wait that appeal time." (Tr. 12).

At no time during the hearing did the Attorney General assert that the doctrines of laches or estoppel or waiver precluded Dr. Brown from moving to set aside the order of expungement. (Tr. 3-19). Nor did the Attorney General assert any constitutional arguments. (Tr. 3-19).

Kevin Graham, the Clay County Counselor, appeared at the hearing on behalf of both Clay County and the Clay County Prosecutor's Office. (Tr. 7). He acknowledged that the order expunging Dr. Brown's records was void, and therefore, the Court correctly set aside the order. (Tr. 8-9). Neither the County Counselor nor the Clay County Prosecutor moved to set aside the Court's order vacating its prior order of expungement. Nor did the Clay County Prosecutor or the Clay County Counselor appeal the Trial Court's decision.

On page 13-14 of its Brief, Appellants state, "the Trial Court verbally ordered that the State 'recreate' its now expunged file by receiving from the

Respondent whatever he chose to submit." This statement is not supported by the record. Nowhere in the Trial Court's order nor in the transcript does the Court make such an order. As Appellants later acknowledge, the Court ordered only that Dr. Brown produce any and all criminal records pertaining to his arrest to the State. The Court did not order the State to recreate its file because there was no evidence from the State that it had in fact destroyed its file.

Following the hearing and the Court's order denying Appellants' motion, the State and Highway Patrol filed a "Motion to Stay Portion of Court's Order of May 5, 2005." (L.F. 41). The Attorney General never noticed up this motion for hearing. (L.F. 2). On the same day, the State and Highway Patrol filed a motion to amend the order. In that motion, the Attorney General stated, "the State does not request that the Court alter the content of the April 7, 2005 order other than its heading." (L.F. 44)(emphasis added). The Attorney General sought only to have the order denominated a judgment noting that in order to appeal, the order must be designated a judgment. (L.F. 44).

Appellants state in their brief that they were not aggrieved by the Trial Court's order of expungement. (Appellants' brief at 24). And although they have failed to show that they were aggrieved by the Court's Judgment setting aside that order, the State and Highway Patrol have appealed.

POINT RELIED ON WITH PRIMARY AUTHORITIES

The Trial Court Did Not Err In Vacating And Setting Aside Its Order Of Expungement Because The Court Lacked Legal Authority To Enter Its Order Of Expungement In That The Only Authority The Court Has To Enter An Order Of Expungement Is The Statutory Authority Granted In §§610.122 Through 610.126 RSMo And §610.122(5) States That An Order Of Expungement "May Be" Entered Only If "No Civil Action Is Pending Relating To The Arrest For The Record Sought To Be Expunged." Here, At The Time The Court Entered Its Order Expunging The Arrest Records, There Was In Fact A Civil Action Pending Relating To The Arrest.

Jones v. St. Louis County Police Department, 133 S.W.3d 524 (Mo.App. 2004)

Kubley v. Brooks, 141 S.W.3d 21 (Mo.banc 2004)

State of Ohio v. Thomas, 411 N.E.2d 845 (Ohio App. 1979)

Taylor v. Taylor, 47 S.W.3d 377 (Mo.App. W.D. 2001)

§610.122 RSMo

§610.123 RSMo

§610.126 RSMo

Missouri Supreme Court Rule 74.01

Missouri Supreme Court Rule 74.06

ARGUMENT

The Trial Court Did Not Err In Vacating And Setting Aside Its Order Of Expungement Because The Court Lacked Legal Authority To Enter Its Order Of Expungement In That The Only Authority The Court Has To Enter An Order Of Expungement Is The Statutory Authority Granted In §§610.122 Through 610.126 RSMo And §610.122(5) States That An Order Of Expungement "May Be" Entered Only If "No Civil Action Is Pending Relating To The Arrest For The Record Sought To Be Expunged." Here, At The Time The Court Entered Its Order Expunging The Arrest Records, There Was In Fact A Civil Action Pending Relating To The Arrest.

A. Standard Of Review

"The trial court is vested with broad discretion when acting on motions to vacate judgments and this Court will not interfere with that action unless the record convincingly demonstrates an abuse of discretion." Clark v. Clark, 926 S.W.2d 123, 126 (Mo.App. 1996). The record, and all reasonable inferences, must be viewed in the light most favorable to the Trial Court's judgment, and all contrary evidence and inferences must be disregarded. See Thiel v. Miller, 164 S.W.3d 76, 81 (Mo.App. 2005). Finally, the Trial Court's judgment should be affirmed if it is "sustainable for any reason supported by the record." See Reagan v. County of St. Louis, 211 S.W.3d 104, 107 (Mo.App. 2006) (citation omitted)(emphasis added).

B. The Court Properly Vacated Its Order Of Expungement Because It Lacked Authority To Have Entered The Order.

1. The Court's Order of Expungement Was Void

"A court obtains jurisdiction of the subject matter by operation of law." Missouri Soybean Ass'n v. Missouri Clean Water Comm'n, 102 S.W.3d 10, 22 (Mo. banc 2003) (citation omitted). And, although a court may be a court of general jurisdiction, when it engages in the exercise of a special statutory power, the court is confined strictly to the authority given by the statute. Id. (citations omitted). In this case, the Trial Court acted beyond the statutory authority to grant an expungement, and therefore, it correctly set aside its order of expungement for a lack of subject matter jurisdiction.

The only authority to grant an expungement comes through the expungement statutes. See Jones v. St. Louis County Police Department, 133 S.W.3d 524 (Mo.App. 2004). A Court has no equitable authority to grant an expungement. Id. at 526. Section 610.126.2 RSMo states, "except as provided by §610.122 to 610.126, the Courts of this state shall have no legal or equitable authority to close or expunge any arrest records." The Jones Court pointed out that by enacting §§610.122 through 610.126, the Missouri Legislature eliminated the equitable power of the courts to expunge records, but at the same time, vested courts with the statutory authority to do so if the specific and stringent criteria of the statute are met. Id. and see also In Re Dyer, 163 S.W.3d 915, 917-918 (Mo.banc 2005)

Section 610.122 RSMo sets forth six conditions which a Court must determine to exist before it has authority to enter an order of expungement. In Re Dyer, 163 S.W.3d at 917-918 (Mo.banc 2005). One such condition is that, "no civil action is pending relating to the arrest or records sought to be expunged." §610.122(5) RSMo. At the time Judge Sutton entered her expungement order, there was in fact a civil action pending relating to the arrest. Thus, Judge Sutton had no authority to enter her order expunging the arrest records. Id. Accordingly, Judge Sutton found that she was without statutory authority to grant the order of expungement, and set aside her order. (L.F. 20).

Judge Sutton was without jurisdiction to enter the order of expungement not only because the requirement set forth in §610.122(5) was not met, but also because the petition for expungement was not verified. Section 610.123 RSMo provides that a person who wishes to have an arrest record expunged "may file a verified petition …." (emphasis added). The statute makes no provision for the filing of an unverified petition. Because the expungement statutes were not strictly complied with, the expungement court was without jurisdiction to enter its order of expungement. Green v. St. Louis County, 327 S.W.2d 291 (Mo. 1959).

In Green the Court dealt with whether or not a judgment entered by a county court was void because the jurisdictional facts did not appear on the record. Citing previous authority, the Court pointed out that in a statutory proceeding, the utmost strictness is required for an order to be given validity. Id. at 296-297. And unless on the face of the proceeding it affirmatively appears that every essential

prerequisite of the statute conferring authority has been fully complied with, the judgment is void. Id. at 297.

Here, one of the prerequisites necessary for the Court to have statutory authority to order the expungement of records did not exist: a civil action was pending. And nowhere in the record, proceedings, or Order of Expungement does it affirmatively appear that every essential prerequisite of the statute conferring authority was satisfied. In addition, the petition for expungement was not verified as required by §610.123. Thus, Judge Sutton's Order of Expungement was not valid, and it was properly vacated. Green, 327 S.W.2d at 296-297.

In addition to looking at the plain language of the Missouri statutes, and the cases discussed above, see State of Ohio v. Thomas, 411 N.E.2d 845 (Ohio App. 1979). In that case, a previously entered expungement order was vacated and the defendant appealed. The Ohio Court of Appeals pointed out that the statutes required that an individual be a "first offender" before he or she is entitled to an expungement order. The Court found that at the time the expungement order was entered, the defendant was not a "first offender", and thus, the original expungement order was void in that the Trial Court lacked jurisdiction to grant the expungement in the first place. Id. at 848.

Missouri law is in accord. An expungement is a statutory proceeding. There is no longer any equitable right to an expungement. See, Dyer, 163 S.W.3d at 917-918 and Jones, 133 S.W.3d at 526. Because an expungement is a statutory

proceeding, a judgment made without jurisdictional facts appearing on the record is null and void. See Green, 327 S.W.2d at 296-297, discussed above.

Appellants rely on Taylor v. Taylor, 47 S.W.3d 377 (Mo.App. 2001) in support of its argument that the Court's order of expungement was not void. Taylor defeats, rather than supports, Appellant's argument. In Taylor, a father appealed the judgment of the Clay County Probate Court which had found that because his parental rights had been terminated, he lacked standing to make objections to the final settlement filed in the Conservatorship Estate for his child. Id. at 379. The father argued that the judgment which purportedly terminated his parental rights was void because the statutory requirements regarding termination of parental rights were not complied with. Id. at 381. The Court of Appeals agreed and reversed the Trial Court. Id. at 388 and 390.

In reversing the Trial Court, the Court of Appeals first recognized that the father's attack on the judgment terminating his parental rights was a collateral attack on that judgment. Id. at 384. However, the Court recognized that "a void judgment 'is entitled to no respect, and may be impeached at any time in any proceeding in which it is sought to be enforced….'" Id. at 384. The Court found that a court's power to terminate parental rights is not derived from common law, but from statutory authority. Id. at 385. Consequently, "'strict and literal compliance with the statutory authority' was required in exercising that authority." Id. at 385. The Court of Appeals concluded that because the statutes had not been

strictly and literally complied with, the trial court lacked subject matter jurisdiction to terminate the father's right, and the judgment was void. Id. at 388.

In reaching this conclusion, the Court of Appeals stated:

> [A] court's authority to terminate parental rights flows exclusively from statute, and *strict compliance* with the statutory requirements is mandatory. Here a termination of parental rights proceeding was not properly initiated, and therefore, the court's jurisdiction to terminate [father's] parental rights was not properly invoked.

Id. In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006), also relied upon by Appellants is in accord with Taylor. The Hendrix Court explained:

> "If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard."

Id. at 588 quoting State ex rel. Lambert v. Flynn, 154 S.W.2d 52, 57 (Mo. banc 1941). The Hendrix Court then quoted the Flynn Court's conclusion, "[the] court had no power to try the case *until* statutory conditions had been complied with . . . and also unless these facts were shown by the petition upon which the [court's] jurisdiction was invoked." Id. (italics original).

The court's authority to expunge arrest records, like the Court's authority in Taylor to terminate parental rights, flows exclusively from statute. See, Dyer, 163

S.W.3d at 917-918 and Jones, 133 S.W.3d at 526. Therefore, strict compliance with the statutory requirements is mandatory. Here, it is undisputed that the statutory conditions for expungement did not exist and were not shown in the petition for expungement. Furthermore, the expungement proceedings were not properly initiated with a verified pleading as is required by §610.123 RSMo. Consequently, the Trial Court did not have jurisdiction to enter its order of expungement and did not err in setting aside that order. Id. and see, Green, 327 S.W.2d at 296-297 and Taylor, 47 S.W.3d at 388.

2. Judge Sutton's Expungement Order Was Not A Final Judgment; Consequently, She Retained Jurisdiction Over the Matter and Could Modify or Set Aside Her Order

Even if this Court concludes that the failure to comply with the statutory requisites did not deprive Judge Sutton of jurisdiction, the failure, at a minimum, provided a sound legal basis for her judgment setting aside the order of expungement. See, Dyer, 163 S.W.3d at 917-918 and Jones, 133 S.W.3d at 526.

Judge Sutton's "order" of expungement was not a final "judgment." See Rule 74.01 and City of St. Louis v. Hughes, 950 S.W.2d 850, 853 (Mo. banc 1997). This Court stated in Hughes:

> The requirement that a Trial Court must "denominate" its final ruling as a "judgment" is not a mere formality. It establishes a "bright line" test as to when a writing is a judgment. The rule is an attempt to assist the litigants and the appellate courts by clearly distinguishing between when

orders and rulings of the trial court are intended to be final and appealable and when the trial court seeks to retain jurisdiction over the issue.

(emphasis added). Thus, by denominating its ruling an "order", the Trial Court indicated that the ruling was not final and that it intended to retain jurisdiction over the issue. Consequently, the Trial Court had the power to alter, set aside or abrogate her order. See Williams v. Williams, 41 S.W.3d 877, 878 (Mo. banc 2001) and Harris v. Munoz, 6 S.W.3d 398, 402 (Mo.App. 1999) where Judge Stith held that an "order" dismissing a case was not a final judgment, but rather an interlocutory order, and as such, it could be set aside or modified at any time.

Because the statutory requisites for expungement had not been met, Judge Sutton properly exercised her discretion in setting aside her order of expungement. See, Jones, 133 S.W.3d 524, where the Court reversed an order of expungement because a Trial Court had failed to find that the arrest was based on false information which is one of the criteria of §610.122 RSMo. See also Dyer, 163 S.W.3d 915 where this Court noted that under §610.122 RSMo, six requirements had to be met for a Court to have authority to expunge an arrest record, and because all of those requirements were not met, the Court reversed the Trial Court's order of expungement. Id. at 919.

Additionally, see Glover v. St. Louis County Circuit Court, 157 S.W.3d 329 (Mo.App. 2005). In Glover, the Court of Appeals reversed a trial court's order of expungement because there was no hearing held preceding the entering of the judgment. The Court pointed out that a judgment could not stand where there

is no evidence to support it. Accordingly, the judgment of the Circuit Court was reversed and the cause was remanded for further proceedings. Likewise, here, because the petition for expungement was not verified, and there was no other evidence presented to support the order of expungement; consequently, it was proper for Judge Sutton to set aside the order.

The cases discussed above provide sufficient basis for the Trial Court to set aside the order of expungement. Thus, the Trial Court did not abuse its discretion in setting aside the order of expungement, and Respondent respectfully requests that the Trial Court be affirmed.

Relying on River Salvage, Inc. v. King, 11 S.W.3d 877 (Mo.App. W.D. 2000), Appellants argue that the order of expungement was final even though it was not denominated a judgment. In King, the trial court's order was entered on December 29th, 1995. Id. at 878. The defendant attempted to appeal the order but it was dismissed as untimely. Id. The order and dismissal of the appeal both occurred before this Court's decision in City of St. Louis v. Hughes which was decided on August 19th, 1997. After the decision in Hughes was handed down, the defendant in King returned to the trial court and asked it to denominate its order a judgment. Id. at 879. The trial court complied and an appeal followed. The Court of Appeals dismissed the appeal as untimely.

In reaching its decision that the time from which the defendant had to appeal ran from the Court's "order" rather than the subsequently entered "judgment", the Court of Appeals stated, "after the revision of 74.01(a) and the

decision in Hughes", a document entered by a Trial Court did not constitute a judgment unless it was denominated a judgment. Id. at 880. The Court then noted that the defendant's appeal of the original order was dismissed "as being untimely long before any case law existed holding that an 'order' did not constitute a 'judgment' under revised 74.01(a)." Id. at (emphasis added). The Court emphasized that it dismissed the appeal on June 3rd, 1996, and that the first case holding that documents not denominated a "judgment" were not appealable was not handed down until October 17, 1996. Id. at 880. Finally, the King Court found that the record showed that King accepted the burdens and benefits of the original order for nearly two years. Id. at 882.

Here, the Trial Court's order was entered well after this Court's decision in Hughes. This fact alone demonstrates that the holding in King is not applicable to this case. In addition, here, Appellants produced no evidence at all on its motion to set aside the Court's judgment. Consequently, it provided no evidence as to whether it accepted the burdens of the order of expungement; nor did it produce any evidence as to whether Dr. Brown accepted the benefits of that order. By seeking and obtaining the Trial Court's judgment setting aside the order of expungement, it is clear that Dr. Brown certainly has not retained the benefits of the original order.

The reasoning in King would eliminate this Court's bright line rule expressed in Hughes. In support of its conclusion that the order became final and appealable before it was denominated a judgment, the King Court cited the fact

that King had filed a motion for leave to appeal the order out of time in both the Court of Appeals and the trial court. Id. at 880. Under this reasoning, every time a party attempts to appeal an "order", the order becomes a final judgment because the parties effectively treated it as such. Thus, despite the bright line test set forth in Hughes, an order, even though not denominated a judgment, would be final and appealable as long as the parties treated the order as final and appealable.

Likewise, under Appellants' reasoning, the parties would have the power to deprive a trial court of jurisdiction and confer jurisdiction upon the Court of Appeals by simply treating an "order" as a "judgment." As long as the litigants treat an "order" as a "final judgment", then, under the Appellants' reasoning, the order is a judgment. The question then becomes at what point did the order become a judgment so as to start the running of the 30 days during which the trial court would retain jurisdiction: 30 days after it is entered or thirty days after the parties first treated the order as a final judgment? And if it is the conduct of the opposing party that causes an otherwise unappealable order to become a judgment, how is the other party to know when his time to appeal begins to run? How does a trial court know that an order it entered and intended to retain jurisdiction over is now a final judgment over which it no longer has jurisdiction? These questions demonstrate the soundness of the bright line test established in Hughes, and the unworkable nature of the rule asserted by Appellants.

Pursuant to this Court's holding in Hughes, the Trial Court's "order" of expungement was not a final, appealable judgment, and therefore, the Court

retained jurisdiction over the matter and could set it aside or vacate it at any time. See Harris, 6 S.W.3d at 402. The statutory conditions necessary for the court to have authority to expunge Dr. Brown's records did not exist, and therefore, the Trial Court was well within its discretion to set aside its order.

C. Appellants Have Waived Their Constitutional, Estoppel and Laches Arguments.

Appellants did not present their constitutional, estoppel or laches arguments to the Trial Court; nor did they raise these issues in their point relied on. For these reasons, Appellants have waived their constitutional, estoppel and laches arguments. See, Smith v. Shaw, 159 S.W.3d 830, 835 (Mo. banc 2005) where this Court stated, "An issue that was never presented to or decided by the trial court is not preserved for appellate review." And see, Schriner v. Edwards, 69 S.W.3d 89, 96 (Mo.App. W.D. 2002) where the Court stated, "Issues raised only in the argument portion of a brief are not preserved for review." Finally, see, Berger v. Huser, 498 S.W.2d 536, 539 (Mo. 1973) where the Court stated, "We do not pass upon this question, for the reason that it was not raised in plaintiffs' points relied upon, and is advanced for the first time in the argument portion of their brief."

Additionally, Appellants are precluded from raising their estoppel and constitutional arguments in this Court because they failed to raise those arguments in their brief before the Court of Appeals. See Rule 83.03 and Linzenni v. Hoffman, 937 S.W.2d 723, 727 (Mo. banc 1997).

Finally, Appellants' constitutional argument is not preserved for the reasons set forth above, and, in addition, it was waived because it was not raised at the earliest opportunity. See, State Dept. of Social Services v. Houston, 989 S.W.2d 950, 952 (Mo.banc 1999). To overcome this well-established rule of waiver, Appellants seem to assert that the Court of Appeals opinion, not the Trial Court's opinion, violated the constitution, and therefore, the appeal to this Court was the first opportunity to raise a constitutional challenge. (Appellant's Brief at 28). But the Court of Appeals opinion is not what is on appeal to this Court; the Trial Court's judgment is. If Appellants constitutional argument is directed at the Trial Court's decision, the argument has been waived because it was not raised at the earliest possible opportunity. Id. If the argument is directed at the Court of Appeals' opinion, it need not be addressed because that opinion is not what is on appeal. Either way, the argument need not be addressed.

D. Even If Appellants' Laches and Estoppel Arguments are Considered, They Should Be Denied

Estoppel is an affirmative defense and Appellants had the burden of proving by "clear and satisfactory evidence" every fact essential to create estoppel. See, Ronollo v. Jacobs, 775 S.W.2d 121, 124 (Mo.banc 1989)(citations omitted). Likewise, the defense of laches is an affirmative defense which Appellants had the burden of proving. See, State v. Scott, 933 S.W.2d 884, 885 (Mo.App. 1996) (citation omitted). To sustain their burden of proving laches, Appellants had to produce evidence showing that a party possessing knowledge of the facts

unreasonably delayed asserting his rights and that the other party suffered legal detriment as a result. Id. Mere delay, without more, is not enough. Appellants had to prove that they were prejudiced by the delay. Id. (citation omitted). Finally, neither estoppel nor laches is favored by the law. See, Bolz v. Hatfield, 41 S.W.3d 566, 572 (Mo.App. 2001) and Moore v. Weaks, 85 S.W.3d 709, 721 (Mo.App. 2002).

Here, Appellants never raised the defense of estoppel or laches in the Trial Court. Consequently, Appellants offered no evidence, much less "clear and satisfactory evidence", of every fact essential to prove these defenses.

1. Appellants Did Not Produce Any Evidence That They Have Suffered Any Prejudice Or Unfair Detriment

Both the doctrine of estoppel and the doctrine of laches require proof that the party asserting the defenses suffered some prejudice or unfair detriment. Appellants claim, "the prejudice to the State in this case is obvious and substantial." (Appellant's Brief at 31). Appellants cite no part of the record but argue that once records are destroyed, they cannot accurately be recreated. Id. Thus, to prove prejudice, Appellants had to prove that they had records relating to Dr. Brown's arrest, that they destroyed those records in reliance on the order, and that they cannot recreate the records. Appellants failed to produce evidence sufficient to support a finding of prejudice.

Appellants have provided no facts at all that they have destroyed any records relating to Dr. Brown's arrest; nor did they produce any evidence that if

the records were destroyed, they could not be recreated. Their motion to set aside the Court's judgment was not supported by affidavit, nor did they offer any oral testimony at the hearing on their motion. (L.F. 21-28 and Tr. 3-16). The oral and written statements of Appellants' counsel to the trial court, and in their brief are not evidence. See, Bowers v. Hiland Dairy Co., 132 S.W.3d 260, 265 n.5 (Mo.App. 2004) where the Court stated, "Statements of fact in a brief which are unsupported by the record are not evidence, hence they supply no basis for appellate review of alleged trial court error." (citation omitted). See also, Flora v. Flora, 834 S.W.2d 822, 823 (Mo.App. 1992) where the Court noted that recitals in a motion that are unsupported by the record are not evidence.

Even if the allegations of the Appellants in their Motion and their oral remarks to the Trial Court were considered, they would demonstrate that Appellants never affirmatively stated that they destroyed any records relating to Dr. Brown's arrest. (L.F. 21-28 and Tr. 3-16). The first time Appellants claimed that they destroyed records was in their brief to this Court. (Appellants brief at 22 and 31). Appellants provided no cite to the record in support of this claim as is required by Rule 84.04(h). Nor did Appellants assert this alleged fact in their statement of facts. Rule 84.04(h) requires that all statements of fact in a brief have specific page references to the legal file or the transcript. Because Appellants cite no part of the legal file or transcript in support of this alleged fact, the allegation should be rejected. Id. and see generally, Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc., 874 S.W.2d 526, 533 (Mo.App. 1994).

Despite claiming that they destroyed their records, Appellants acknowledge that the Missouri Highway patrol sent Dr. Brown some records. (Appellant's brief at 22). Appellants reference is to records that Dr. Brown's attorney, John O'Connor, received from the Highway Patrol. Around April 6, 2005, Mr. O'Connor wrote the Highway Patrol requesting the records in its possession regarding Dr. Brown. About a month later, the Highway Patrol sent Mr. O'Connor a letter, affidavit and records. (SC88298 L.F. 206). The letter, affidavit, and records that the Highway Patrol sent to Mr. O'Connor are at pages 210-215 of the Legal File in SC88298. Thus, it is clear that the Highway Patrol's arrest records have not been expunged. Appellants argue that the Highway Patrol would have had more records than what Dr. Brown received. However, Appellants again offer no cite to the record in support of this allegation.

Appellants offered no evidence to the Trial Court in support of its laches and estoppel arguments, and therefore, the Trial Court cannot be convicted of an error with respect to these arguments. See, Brown v. Brown, 878 S.W.2d 94 (Mo.App. 1994).

In Brown, a putative husband filed a motion to set aside a dissolution decree entered approximately two and a half years earlier. Id. at 95. In his motion, the husband claimed that the parties had never legally been married, and therefore, the Trial Court lacked subject matter jurisdiction. Id. The Court of Appeals noted that if the parties were never legally married, then it would be

impossible for a trial court to acquire subject matter jurisdiction to order a dissolution. Id. at 96.

In response to the husband's motion, the wife alleged that the motion was untimely and was barred by the doctrine of laches. The Court of Appeals noted that the wife offered no evidence to support either ground. The Court found that the allegation as to untimeliness was a conclusion and that the real issue was "whether the time was unreasonable." Because there was no evidence to support a finding that the delay was unreasonable, the Court of Appeals rejected the wife's argument.

With respect to the wife's laches argument, the Court of Appeals noted that the doctrine of laches was an affirmative defense and required evidence of both an unreasonable delay and prejudice to the opposing party. Id. at 96. The Court rejected the wife's laches argument again finding that she had offered no evidence to support a finding of prejudice. Id. The Court explained that if the parties to the litigation never were married, then the setting aside of the prior dissolution decree could not be prejudicial.

Likewise, here, Appellants produced no evidence to support a finding that they were prejudiced by Dr. Brown's delay in seeking to set aside the order of expungement. Nor did they offer evidence that the delay was unreasonable. Furthermore, if neither Appellant destroyed any arrest records of Dr. Brown's, then they could not have been prejudiced by the Trial Court's judgment setting aside the order of expungement.

The State intimates, without cite to the record, that it was required to destroy its records and that its failure to do so would have been a crime. (See Appellant's Brief at 19). The statute does not require that the State expunge Dr. Brown's records; §610.124.2 RSMo states:

> The petition shall name as defendants all law enforcement agencies, courts, prosecuting attorneys, central state depositories of criminal records or others who the petitioner has reason to believe may possess the records subject to expungement. The court's order **shall not affect any person or entity not named as a defendant in the action**. (emphasis added).

Here, neither the State nor the criminal record repository nor the Missouri State Highway Patrol was named as a defendant in this action. (L.F. 5). Thus, the court's order had no affect on them. Perhaps that is why Appellants admit at page 24 of their brief that they were not aggrieved by the Court's expungement order.

Appellants may argue that the order applied to Missouri Highway Patrol because Dr. Brown did list the Highway Patrol as an agency that potentially had records relating to his arrest. However, the Missouri Highway Patrol introduced no evidence that it destroyed its records. Furthermore, its counsel stated to the trial court that it waited for "finality of judgment" before acting on the Court's order. (Tr. 4 and 12). Similarly, in their brief, Appellants state, "Once the time for an appeal of an expungement order has run, the State must be able to rely on that Order and act accordingly-by destroying the records." (Appellants' Brief at 19). The expungement order was never denominated a judgment, and therefore, it

never became a final judgment. See Rule 74.01 and Hughes, 950 S.W.2d at 853 discussed above. Based on its counsel's admissions that Appellants wait for a final judgment before expunging records, it can be inferred that Appellants did not rely on the order and never expunged their records because the order was never a final judgment.

Finally, Appellants state that they were not aggrieved by the Court's order of expungement. See Appellant's brief at 24. An aggrieved party is defined as "one who suffers from an infringement or denial of legal rights." See Parker v. Swope, 157 S.W.3d 350, 352 (Mo.App. 2005). By Appellants' own admission, they did not suffer from an infringement or denial of legal rights as a result of the order of expungement. In other words, Appellants suffered no detriment as a result of the order of expungement, and therefore, they have failed to prove that laches or estoppel should be applied in this case.

The courts do not look favorably on the use of laches or estoppel. See, Moore, 85 S.W.3d at 721 and Bolz, 41 S.W.3d at 572. And the State has provided no evidence supporting the application of those unfavored doctrines in this case.

2. Dr. Brown Did Not Intentionally Mislead the Court, And Therefore, Judicial Estoppel Does Not Apply.

To be entitled to the defense of judicial estoppel, Appellants had to prove not only that they suffered some unfair prejudice, but also that Dr. Brown intentionally misled the Court to gain an unfair advantage. See, New Hampshire

v. Maine, 532 U.S. 742, 753 (2001) citing John S. Clark Co. v. Faggert and Frieden, P.C., 65 F.3d 26 (4th Cir. 1995).

In John S. Clark Co., the Fourth Circuit reversed a trial court for dismissing a case on grounds of judicial estoppel. In reversing the Trial Court, the Clark Court found that "the '**determinative factor**' in the application of judicial estoppel is whether the party who is alleged to be estopped 'intentionally mislead the court to gain unfair advantage.'" Id. at 29 (emphasis added)(citation omitted). The Court concluded, "It is inappropriate, therefore, to apply the doctrine when a party's prior position was based on inadvertence or mistake." Applying this determinative factor to the facts before it, the Court found that there was a fact issue as to whether the plaintiff had the intent to mislead, and therefore, the trial court erred in finding that judicial estoppel applied as a matter of law. Id.

Here, Appellants presented no evidence that Dr. Brown or his counsel intentionally mislead the court. Dr. Brown pointed out to the Trial Court that his counsel who petitioned the Court for the expungement of his arrest records, John O'Connor, did not mislead the expungement Court with respect to his petition. (L.F. 31-32). Section 610.123 RSMo, a copy of which is in the Appendix to this Brief, sets forth the factors which must be in the petition. There is no requirement that the petitioner set forth that there is "no civil action pending relating to the arrest or records sought to be expunged." Mr. O'Connor further stated that, at the time he petitioned the Court for the expungement of Dr. Brown's records, he was unaware that §610.122 RSMo required that there be no civil action pending. (L.F.

10). When Harrah's filed its motion for summary judgment in the civil case, it caused Mr. O'Connor to reexamine the expungement statutes; it was then that he became aware that there was a requirement that no civil action be pending. (L.F. 11). Upon learning this fact, Dr. Brown, through his lawyer, filed a disclosure with Judge Sutton informing her that at the time he petitioned for expungement of his records, there was in fact a civil action pending. (L.F. 10-18).

Appellants not only failed to present evidence that Dr. Brown intentionally misled the Court, but they graciously acknowledged that they would "assume that the failure of Mr. Brown to disclose his pending civil case was not willful." (Appellants' Brief at 32). Because Dr. Brown did not intentionally mislead the Court, judicial estoppel does not apply. See, New Hampshire, 532 U.S. at 753 and John S. Clark Co., 65 F.3d at 29.

E. Missouri Law Does Not Require An Order of Expungement Be Denominated An Order; Rather, The Order Must Be Denominated A Judgment To Be Final And Appealable.

On page 22 of their Brief, Appellants argue that "the legislature and this Court have specified that a trial decision by a trial court regarding an expungement order will be designated an 'Order.'" Appellants then cite §§610.123.4, 610.124 and Rule 155.04. Contrary to Appellants' argument, neither the statutes nor the Rule require that the Court's order of expungement be in a document denominated an order. For example, §610.123.4 RSMo provides that the Court "shall enter an order directing expungement." Likewise, Rule 155.04 provides that the Court

"shall enter an order directing expungement." Nothing about the statute or rule requires that the order directing expungement be included within a document denominated an order. Trial Courts often order parties to take certain actions within a judgment, and there is no bar in the statutes or the rule to a trial court ordering the expungement of arrest records in a document designated a judgment. Reading Rule 74.01 in conjunction with the expungement statutes and rules, it is clear that to be final and appealable, the order of expungement must be set forth in a document denominated a judgment. See, Brooks v. Brooks, 98 S.W.3d 530, 532 (Mo. banc 2003).

In Brooks, this Court held that a qualified domestic relations "order" (QDRO), which is an appealable "order" under §512.020 RSMo. must be denominated a "judgment" to be final and appealable. Thus, although the statute at issue in that case referred to "orders", this Court still recognized the necessity that those orders be denominated "judgments" to be final. Likewise, here, the statutes' and rule's references to an "order" did not obviate the requirement that the order be denominated a "judgment" to be final.

F. The Cases Relied on By Appellants Are Not Applicable Here

Appellants rely primarily on State ex rel. York v. Daugherty, 969 S.W.2d 223 (Mo.banc 1998) and State Department of Social Services v. Houston, 989 S.W.2d 950 (Mo.banc 1999). The Houston Court framed the issue before it and the York Court as follows:

> For the second time in fewer than twelve months, this Court is called upon to address the validity of a purported judgment entered pursuant to a statute under authority of which *thousands* of purported judgments were entered *before* the statute was declared unconstitutional by this Court.

Id. at 951 (emphasis added). Under the statute at issue in Houston and York, family court commissioners entered thousands of judgments in divorce actions which would have included orders regarding such issues as child custody, child support, and visitation. In addition, commissioners entered judgments in child abuse and neglect cases, termination of parental rights cases, and adoption cases.

The Houston and York Courts were addressing the validity of judgments entered by a Commissioner under authority of a statute which was determined to be unconstitutional about two years after the judgments were entered. Both the York Court and the Houston Court acknowledged the well established rule that constitutional violations are waived if not raised at the earliest opportunity. Because the parties in York and Houston did not raise their constitutional challenges in a petition for judicial review, they were waived. Id. at 952.

The Houston Court found that in the case before it, as in York, the parties were acting under a presumptively constitutional but flawed statute. The Houston Court concluded that under the limited circumstances presented by the case before it and under the "extraordinary circumstances" presented to the York Court, parties may be estopped from attacking a purported judgment. Id.

The limited and extraordinary circumstances at issue in York and Houston do not exist in this case, and therefore, the holdings in those cases are not applicable here. Also, as the Eastern District pointed out in State v. Wilson, 5 S.W.3d 527, 529 (Mo.App. 1999), "jurisdiction was never an issue in [*York*]." And on that basis, the Wilson court found York to be distinguishable from the case before it. Likewise, here, subject matter jurisdiction is an issue, and therefore, York and Houston are distinguishable from the facts at issue here.

An additional distinguishing fact is that here, unlike the parties in York and Houston, Appellants can not demonstrate reasonable reliance on the Court's "order" as a final judgment. In York, this Court specifically stated:

> By granting limited *past* efficacy to the purported judgments of commissioners, we are not compelled to sanction *future* unconstitutional practices by commissioners. …After this Court concludes that a statute is unconstitutional, parties can no longer reasonably rely on the statute as a basis for continued entry of void judgments.

969 S.W.2d. at 225 (emphasis original). In other words, the parties reasonably relied on the finality and validity of the judgments because the statute upon which the commissioners had relied had not yet been declared unconstitutional. Here, however, the Trial Court's "order" was entered after this Court's decision in Hughes where it was made clear that an "order" is not final and the trial court retains jurisdiction until the order is denominated a judgment. 950 S.W.2d at 853.

Consequently, Appellants could not reasonably rely on the finality of the Trial Court's decision which was denominated an "order" as opposed to a judgment.

Furthermore, Appellants failed to produce any evidence that they relied, reasonably or otherwise, on the Court's order of expungement. Neither the State nor the Missouri Highway Patrol produced any evidence that they destroyed records in reliance on the Court's order. (See discussion in section B.1 above).

Appellants, citing York, argue that "one accepting and retaining benefits of a void judgment is estopped to deny the validity of any part thereof…." Here, Appellants presented no evidence that Dr. Brown accepted and retained the benefits of the Trial Court's order. What's more, the record conclusively demonstrates that Dr. Brown did not retain any benefits of the Trial Court's order of expungement. In fact, Dr. Brown immediately sought to have the expungement set aside when he discovered that the Court was without authority to enter the expungement. (L.F. 10-13). And, although the State and the Missouri Highway Patrol have appealed the Trial Court's judgment setting aside the order of expungement, no other entity has. The Clay County Missouri Circuit Court, Clay County Missouri Sheriff's Department and Clay County Missouri Prosecutor's Office have all accepted the judgment of the Trial Court setting aside the expungement. (L.F. 5). Therefore, any alleged benefit Dr. Brown obtained under the order of expungement as to those entities has been conclusively rejected.

Appellants reliance on Linzenni v. Hoffman, 937 S.W.2d 723 (Mo.banc 1997) is also misplaced. The issue in Linzenni was whether the death of a

husband in a divorce action abated the action after an order dissolving the marriage had been entered by the Trial Court. That issue is not present in this case. In addition, the Linzenni case was decided before this Court's decision in Hughes. And while the Linzenni decision seems to treat the rule requiring the decision of a trial court to be denominated a judgment as a mere formality, this Court in Hughes made it clear that the rule was not just a mere formality. 950 S.W.2d at 853.

Where, like here, the limited and extraordinary circumstances that existed in York and Houston are not present, Missouri Courts repeatedly acknowledge that subject matter jurisdiction cannot be conferred by estoppel. See, Kubley v. Brooks, 141 S.W.3d 21, 28 (Mo.banc 2004).

In Kubley v. Brooks, 141 S.W.3d 21, 28 (Mo.banc 2004), this Court found that a party was not estopped from challenging a void order of the DCSE even though she had not appealed the DCSE's order, and she voluntarily acquiesced to and complied with the order for three and a half years. Id. at 34. In reaching its decision, this Court noted that subject matter jurisdiction cannot be conferred by estoppel except in unusual circumstances. Id. citing York, 969 S.W.2d at 224-225. This Court then distinguished York from the case before it stating:

> Here, unlike in *York*, the decree to which estoppel effect is sought to be given by DCSE is not a prior judicial decree, but a void administrative action that DCSE is statutorily prohibited from taking, if, as here, a prior court order of support has been entered.

Id. Likewise, here, the order to which estoppel effect is sought to be given by Appellants is a void, non-final order that the Court was statutorily prohibited from making because the statutory conditions necessary for a Court to have authority to expunge arrest records did not exist at the time the expungement was sought.

See also State v. Wilson, 5 S.W.3d 527, 529 (Mo.App. 1999). In that case, a Juvenile Court Commissioner entered a "Judgment and Order" certifying the defendant to stand trial as an adult. Defendant did not challenge or appeal that judgment, nor did he raise any objections or defects once he was in the circuit court. Approximately eight months after the juvenile court's order, Defendant was tried as an adult in the circuit court and found guilty. On appeal, defendant argued that the juvenile court never lost jurisdiction, and therefore, the circuit court never acquired jurisdiction because the judgment of the juvenile court was never signed by an article V judge. The Court of Appeals agreed. Id. at 528.

In support of its decision, the Wilson Court reasoned that a final judgment consists of a writing signed by an Article V judge, and because the order of the commissioner was never signed by an Article V Judge until after the defendant was tried, at the time of the trial, no judgment existed in the Juvenile Court, and therefore, jurisdiction remained in the Juvenile Court. Id. With jurisdiction remaining in the juvenile court, the circuit court could not have jurisdiction. Relying on York, the state argued that because defendant did not challenge the commissioner's order at any time prior to trial, and because it reasonably relied on

the juvenile court's order, defendant waived his argument. The Court rejected the argument noting that jurisdiction was not at issue in York. Id. at 529.

Thus, despite the fact that the parties accepted the burdens and benefits of the Juvenile Court's order certifying the defendant as an adult, and treated it as a valid judgment, the Wilson Court refused to treat the order as a final and valid judgment. Likewise, here, even if Appellants had offered evidence that they accepted and suffered some burden from the original order, which they did not, it would not have been enough to transform the trial court's non-final, void order into a valid, final judgment.

The Court of Appeals reached a similar result in Bock v. Broadway Ford Truck Sales, Inc., 169 S.W.3d 143 (Mo.App. 2005). In Bock, both parties appealed a non-final decision of the Labor and Industrial Relations Commission. The lack of finality was not raised on appeal, and the Court of Appeals rendered an opinion in Bock v. Broadway Ford Truck Sales, Inc., 55 S.W.3d 427 (Mo.App. 2001). The Court of Appeals remanded the case to the Labor and Industrial Relations Commission. After additional proceedings before the Commission and entry of a final award, the parties again appealed. Id. at 144. The Eastern District vacated and set aside its earlier opinion finding that it did not have jurisdiction to render that opinion because the award from which the appeal was taken was not final and appealable. Id. at 145.

In vacating its prior opinion, the Court of Appeals explained that "subject matter jurisdiction may be considered at any time during the proceedings, and may

not be conferred by consent or agreement of the parties, by appearance or answer, or by estoppel." Id. at 147 (citations omitted). Consequently, the Court concluded that despite the fact that the parties, the Commission, and the Court of Appeals itself treated the Commission's prior award as final and appealable, the Court of Appeals did not have jurisdiction to consider the merits of the appeal. Because it was without jurisdiction, its prior opinion had to be "set aside, vacated or reversed." Id. at 148 (citations omitted). In addition, the proceedings that occurred after its prior opinion also had to be vacated. Id.

The parties, the Commission, and the Court of Appeals all treated the non-final decision of the commission as final and appealable. This did not, however, cause the decision to become final and appealable. Furthermore, the parties and the Commission relied upon Court of Appeals earlier opinion and acted in accordance with the opinion by conducting and participating in additional proceedings. Nonetheless, these actions did not make the Court of Appeals opinion valid. Here, there is no evidence that Appellants or Respondent treated the Trial Court's order as final, nor is there evidence that either party acted in reliance on the Trial Court's order, but even if there was, the Bock case demonstrates that such conduct would not change the Trial Court's non-final, void order into a valid, final judgment.

See also Williams v. Williams, 932 S.W.2d 904 (Mo.App. 1996) where the Court of Appeals affirmed a trial court's judgment setting aside a judgment that had been entered 9 years earlier. The Court stated, "a judgment which is void

from its inception is a nullity and is not subject to the 'reasonable time' requirement of Rule 74.06(c)." Id. at 906 (citation omitted).

In State ex rel. Houston v. Malen, 864 S.W.2d 427 (Mo.App. 1993), the Court of Appeals reversed the trial court's denial of motion to set aside a decree of dissolution. The decree of dissolution entered in 1988 declared appellant to be the father of the children, and ordered him to pay child support in the amount of $150.00 per month per child. Id. at 428. Four years after the decree was entered, the husband filed a motion to set it aside on the ground that he was never served with process, and therefore, the court lacked personal jurisdiction. Id. at 429.

On appeal, the wife argued that because the husband had not sought relief for four years and three months after entry of the judgment, he failed to request the relief within a reasonable time. Id. at 430. The Court of Appeals rejected the wife's argument noting that a judgment entered against a party by a Court lacking personal jurisdiction was void. Id. The Court noted that the reasonable time requirement of Rule 74.06 does not apply to void judgments. Id. Consequently, father's motion was not untimely. Id. The Court concluded stating, "a void judgment cannot be brought back to life." Id.

Finally, see Brown v. Brown, 878 S.W.2d 94 (Mo.App. 1994), discussed in section D.1 above, where the Court of Appeals stated, "'If the court had no jurisdiction of the cause, its decree was a nullity and should be set aside. Neither the lapse of time, nor evil results following could prevent this.'" Id. at 97 quoting Nave v. Nave, 28 Mo.App. 505, 510, (1888).

The cases above demonstrate that where, like here, the limited and extraordinary circumstances that existed in York and Houston are not present, a void judgment is subject to attack even after two, four, or nine years. And the fact that the parties accepted the burdens of trial, child support payments, an appeal and additional proceedings after remand, did not prevent the judgment from subsequently being vacated or set aside.

Here, Respondent moved to set aside the Court's order a little over a year after it had been entered. Appellants presented no evidence that they accepted the alleged burdens of the order. In fact, Appellants state that they were not even aggrieved by the order. Thus, based on the authority cited above, Dr. Brown was not precluded from moving to set aside the Court's order, and the Trial Court did not err in granting the motion.

CONCLUSION

The court's authority to expunge arrest records flows exclusively from statute. Therefore, strict compliance with the statutory requirements is mandatory. Here, it is undisputed that the statutory conditions for expungement did not exist and the expungement proceedings were not properly initiated with a verified petition. Consequently, the Trial Court did not have jurisdiction to enter its order of expungement and did not err in setting aside that order. Even if this Court concludes that the failure to comply with the statutory requisites did not deprive the Trial Court of jurisdiction, the failure, at a minimum, provided a sound legal

basis for setting aside the order of expungement. And because the "order" was not a "judgment" the Trial Court could set it aside at any time.

For the foregoing reasons, Respondent respectfully requests that this Court affirm the Trial Court's Judgment.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing together with a labeled disk containing a copy of the foregoing were duly delivered via FedEx, this ____ day of March, 2007, to:

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CERTIFICATION PURSUANT TO RULE 84.06

1. Respondents' Attorneys: John E. Turner, Bar No. 26218 and Christopher P. Sweeny, Bar No. 44838, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131 and John P. O'Connor, Wagstaff & Cartmell, 4740 Grand Avenue, Suite 300, Kansas City, MO, 64112, Missouri Bar No. 32352

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Christopher P. Sweeny