SC88172

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI
AND
MISSOURI STATE HIGHWAY PATROL,

Appellants,

v.

IN RE: EXPUNGEMENT OF ARREST RECORDS
RELATED TO WILLIAM T. BROWN, JR.,

Respondent.

Appeal from the Circuit Court of Clay County, Missouri
Seventh Judicial Circuit
The Honorable Janet Sutton, Judge

APPELLANTS' SUBSTITUTE BRIEF, STATEMENT AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from an order entered on April 7, 2005, subsequently denominated a judgment on May 16, 2005, vacating an expungement order in the Circuit Court of Clay County, Missouri. This cause was appealed to the Missouri Court of Appeals, Western District, which rendered a decision on October 10, 2006. On January 30, 2007, the Missouri Supreme Court ordered this case transferred pursuant to Rule 83.04.

STATEMENT OF THE FACTS

On December 30, 2003, the Respondent, William Brown, filed a petition to expunge a record of an arrest in the Circuit Court of Clay County, Missouri (L.F. 4). The arrest was for cheating[1] and occurred on March 30, 2000 (L.F. 5). Mr. Brown listed, among other entities, the Missouri State Highway Patrol as an agency possessing records subject to expungement (L.F. 5). In 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 State, through the Criminal Records Repository, filed a Motion to Dismiss on February 5, 2004, because Mr. Brown had not supplied a fingerprint card as required by §610.123.1, RSMo (2003). It appears that Mr. Brown corrected that defect by filing a fingerprint card (L.F. 9). On February 20, 2004, the trial court ordered the expungement of Mr. Brown's arrest record (L.F. 28).

Apparently, prior to filing the expungement action, Mr. Brown filed a separate civil action against Harrah's Casino for false arrest arising from that same arrest (L.F. 10).

On April 7, 2005, Mr. Brown filed a Motion to Vacate or Set Aside the Order of Expungement (L.F. 10-13). According to the motion, Mr. Brown filed the Motion to Set

[1] Because Mr. Brown has apparently filed a civil lawsuit against Harrah's Casino over this arrest (L.F. 10), it is assumed that the charge arose from an allegation of cheating on a gaming casino.

Aside 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).[2]

Mr. Brown did not send a copy of the motion to the State or the Missouri State Highway Patrol, and did not send any notice that he was going to ask that his motion be heard (L.F. 22, Tr. 15-16). On April 7, 2005, the same day that the motion to vacate was filed, a hearing was held on the motion (L.F. 1, 19; Tr. 15).

Also on April 7, 2005, the trial court granted the motion to vacate and issued an order on that date vacating its expungement order of February 20, 2004 (L.F. 45-46).

When the State and the Missouri State Highway Patrol learned of this order, the State filed a Motion to Set Aside the Court's Order of April 7, 2005, on April 22, 2005 (L.F. 21-24). The State then gave notice that a hearing on its motion was set for May 5, 2005 (L.F. 29-30).[3]

On May 5, 2005, a hearing was held on the State's motion (Tr. 3). During argument, Mr. Brown's counsel indicated that Mr. Brown does want an expungement, but argued the original February 20, 2004, order was void because the trial court did not make a specific finding that no civil action was pending (Tr. 5-6). The State argued that attempts to "rescind" an expungement order placed the Criminal Records Repository in a

[2] There was no transcript of the hearing.

[3] The State recognized the decision of April 7, 2005, became final in 30 days and wanted its motion heard while the trial court retained jurisdiction.

difficult position (Tr. 9-11), and that there must be some finality to such orders (Tr. 4-5).

While the trial court agreed "with the State that it puts them and the court system in a very difficult position of trying to recreate the file" (Tr. 17), the court denied the State's motion (Tr. 17-18; L.F. 2). The court expressly stated that Mr. Brown was "free to petition the Court" for expungement again (L.F. 20), and ordered that Mr. Brown was to submit his copy of his records to the State for it to recreate its file (Tr. 18-19). The State filed a Motion to Stay the Court's Order because of its concern that a defendant was being allowed to determine the content of his official criminal record (L.F. 41-42), but that motion was not ruled upon.

The State and the Missouri State Highway Patrol then filed their timely Notice of Appeal (L.F. 47-51). After issuing an opinion, the Missouri Court of Appeals, Western District, granted rehearing on September 26, 2006. On October 10, 2006, the Court issued an opinion denying the State's appeal. On January 30, 2007, this Court granted transfer of this case.

POINT RELIED ON

THE TRIAL COURT ERRED IN SETTING ASIDE THE ORDER OF EXPUNGEMENT WHICH HAD BEEN ENTERED OVER THIRTEEN MONTHS EARLIER BECAUSE THE EXPUNGEMENT ORDER WAS FINAL AND THE TRIAL COURT DID NOT RETAIN JURISDICTION TO SET ASIDE THE ORDER IN THAT THERE IS NO AUTHORITY FOR A COURT TO SET ASIDE A JUDGMENT THAT WAS WITHIN THE TRIAL COURT'S JURISDICTION TO ENTER AFTER THE JUDGMENT BECAME FINAL AND CONCLUSIVE AS TO THE PARTIES' RIGHTS. EVEN IF THE ORIGINAL ORDER WAS BASED ON A MISREPRESENTATION BY THE PLAINTIFF, THAT ORDER WAS NOT VOID, BUT MERELY VOIDABLE, AND THE PLAINTIFF WHO MADE THE MISREPRESENTATION CANNOT USE HIS OWN MISREPRESENTATION AS THE BASIS TO SET ASIDE THE COURT'S ORDER.

In Re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006);

Nelson v. Marsh, 119 S.W.3d 197 (Mo.App., W.D. 2003);

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

ARGUMENT

THE TRIAL COURT ERRED IN SETTING ASIDE THE ORDER OF EXPUNGEMENT WHICH HAD BEEN ENTERED OVER THIRTEEN MONTHS EARLIER BECAUSE THE EXPUNGEMENT ORDER WAS FINAL AND THE TRIAL COURT DID NOT RETAIN JURISDICTION TO SET ASIDE THE ORDER IN THAT THERE IS NO AUTHORITY FOR A COURT TO SET ASIDE A JUDGMENT THAT WAS WITHIN THE TRIAL COURT'S JURISDICTION TO ENTER AFTER THE JUDGMENT BECAME FINAL AND CONCLUSIVE AS TO THE PARTIES' RIGHTS. EVEN IF THE ORIGINAL ORDER WAS BASED ON A MISREPRESENTATION BY THE PLAINTIFF, THAT ORDER WAS NOT VOID, BUT MERELY VOIDABLE, AND THE PLAINTIFF WHO MADE THE MISREPRESENTATION CANNOT USE HIS OWN MISREPRESENTATION AS THE BASIS TO SET ASIDE THE COURT'S ORDER.

The Respondent in this case sought, and obtained, an expungement of an arrest record on February 20, 2004. Nearly 14 months later, he realized that one of the consequences of obtaining that expungement was that he could not proceed with a civil lawsuit relating to that arrest by virtue of §610.126, RSMo. On April 7, 2005, the Respondent filed a "Motion to Vacate or Set Aside the Order of Expungement" (L.F. 10-13), without proper notice to the State. The trial court granted this motion and set aside the expungement order on April 7, 2005, the same date the motion was filed (L.F. 19-20).

The trial court did not retain continuing jurisdiction over the expungement and was without jurisdiction or authority to "set aside" an expungement over one year later. This case is not simply about the propriety of vacating a previous expungement order, but deals with the more significant issue of when a circuit court's judgment in a case becomes final and when parties to litigation can rely on the finality of that judgment. In this case, the State received an Order to destroy certain records, and did so based on the reasonable assumption that the trial court meant exactly what it said in its order and that the State was to comply. Fourteen months later, the State is then ordered to do what is impossible to do—to "undestroy" the records that were ordered to be destroyed. A secondary issue is whether a party has a legal or equitable right to vacate the very order he sought simply because he subsequently decides there are legal disadvantages that he failed to recognize at the time he sought the order.

Standard of Review

Because the issue in this case is purely a matter of law, with no facts at issue, the review of this Court is *de novo*. *Cody v. Missouri Board of Probation and Parole*, 111 S.W.3d 547, 549 (Mo.App., W.D. 2003); *Burnside v. Gilliam Cemetery Association*, 96 S.W.3d 155, 156 (Mo.App., W.D. 2003). Issues of statutory interpretation are matters of law subject to *de novo review*. *State ex rel. Hunter v. Lippold*, 142 S.W.3d 241, 242-43 (Mo.App., W.D. 2004).

Summary of the Facts

On April 7, 2005, the trial court issued an order setting aside an earlier judgment granting the Respondent an expungement of an arrest (L.F. 19-20). The original judgment had been entered on February 20, 2004 (L.F. 1, 8).

Though a party to the original expungement,[4] neither the Missouri State Highway Patrol nor any other state agency received any notice of this April 7, 2005, hearing (L.F. 1). In fact, the motion to vacate was filed on the same day the motion was granted-April 7, 2005 (L.F. 10), and the Respondent's certificate of service indicated he did not send a copy to the State (L.F. 13). No record of this April 7, 2005, hearing was made.

On April 22, 2005, the State and the Missouri State Highway Patrol filed a motion asking the trial court to set aside its order of April 7, 2005 (L.F. 21-24). A hearing on that motion was held on May 5, 2005 (L.F. 29-30). That hearing was on the record, and is apparently the only hearing in this cause that was recorded.

Following the hearing, the trial court issued an order concluding that the initial expungement order was "void" because the Respondent did not disclose to the court that he had a "civil action pending relating to the arrest." (L.F. 45-46). The trial court verbally ordered that the State "recreate" its now expunged file by receiving from the

[4] The docket sheet reflects that notice of the original petition was sent to the Missouri State Highway Patrol on January 8, 2004 (L.F. 1). The State filed a Motion to Dismiss on February 5, 2004 (L.F. 1, 7).

Respondent whatever he chose to submit.[5] The State sought to stay that portion of the trial court's ruling pending appeal (L.F. 41-42), but the trial court did not rule upon that request.

No Authority Exists For Trial Court To Vacate An Earlier Judgment.

The trial court's order of April 7 and judgment of May 16, 2005, both fail to cite any authority suggesting that a trial court can simply vacate an earlier judgment. No such authority exists, particularly when more than one year has passed since the first judgment was entered. This is because trial courts do not have any common law, regulatory, or statutory authority to retain jurisdiction over cases indefinitely.

a. Rules of Civil Procedure

Rule 78.06 provides that a trial court can entertain a "motion for new trial, motion to amend the judgment or opinion, or motion for judgment notwithstanding the verdict," but those motions are deemed denied if not ruled upon within 90 days of any such motion being filed. As a general rule, this delineates the period of time in which a court retains jurisdiction to alter a judgment.

[5] This statement is, admittedly, somewhat argumentative, but accurately reflects the result. The court stated: "I'll show the Defendant is ordered to produce any and all criminal records pertaining to this arrest to the State and all parties to the action." (Tr. 19).

Likewise, Rule 81.05 provides that a judgment is final for purposes of appeal 90 days after post-trial motions are filed. Otherwise, a "judgment becomes final at the expiration of thirty days after its entry if no timely authorized after-trial motion is filed."

There is one other rule of court that extends the jurisdiction of a trial court to alter a judgment beyond the general 30-day period.

Rule 74.06(b) states:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is irregular; (4) the judgment is void; or (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment remain in force. (Emphasis added.)

Subsection (c) of Rule 74.06 states that the "motion shall be made within a reasonable time and for reasons (1) and (2) and (3) of subdivision (b) not more than one year after the judgment or order is entered."[6]

[6] Rule 74.06(c) also requires that notice and any motion will be served on the parties, which the Respondent failed to do in this case.

This provision did not authorize the trial court to set aside its expungement order. First, the motion was not filed within one year. Second, and significant for purposes of this appeal, is that any mistake, fraud, or misrepresentation was not due to any "misconduct of an adverse party." Rule 74.06 (c).

It was Mr. Brown who obtained the original expungement by failing to disclose that he did have a civil suit pending over the arrest (L.F. 10). No adverse party misrepresented any fact. Only Mr. Brown knew he had filed a civil lawsuit against Harrah's Casino over this arrest and he did not provide that information to the court. After obtaining the expungement, Mr. Brown then learned that he could not proceed with his civil suit because Section 610.126.3, RSMo, explicitly states:

> The Petitioner shall not bring any action subsequent to the expungement against any person or agency relating to the arrest described in the expunged records.

Apparently, nearly 14 months after obtaining his expungement, Mr. Brown decided he would rather proceed with his civil suit and, as a result, filed his motion to set aside on April 7, 2005.

Under these circumstances, Mr. Brown cannot file a motion under Rule 74.06.

b. The original expungement order of February 20, 2004, is not void.

Rule 74.06(b) also permits a trial court to vacate a "void" judgment. There is no time limit for setting aside a void judgment under Rule 74.06(c). The expungement order in this case was not void, however.

The need for finality and certainty in judicial decisions is obvious. *Taylor v. Taylor*, 47 S.W.3d 377, 384 (Mo.App., W.D. 2001); *American Economy Ins. Co. v. Powell*, 134 S.W.3d 743, 748 (Mo.App., S.D. 2004). A "judgment is void if the 'court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process.'" *Taylor*, 47 S.W.3d at 385.

The trial court was simply incorrect in concluding that its February 20, 2004, expungement order was "void." "The failure to distinguish between the 'erroneous exercise of jurisdiction' and the 'want of jurisdiction' is a fruitful source of confusion and errancy of decision." *Taylor*, 47 S.W.3d at 387. "The label 'jurisdictional defect' is seldom appropriate outside the context of lack of jurisdiction of the subject matter or of the person." *In re Marriage of Hendrix*, 183 S.W.3d 582, 590 (Mo. banc 2006).

In this case, the trial court (1) had jurisdiction to grant an expungement, (2) had jurisdiction over the parties, and (3) is not alleged to have violated due process. At most, the February 20th expungement was "voidable," but not "void." A "voidable judgment is one rendered by a court having jurisdiction, but which is irregularly and erroneously rendered." *American Economy Ins. Co. v. Powell*, 134 S.W.3d at 748. And most important, a voidable judgment "becomes valid by failure within the proper time to have it annulled or by subsequent ratification or confirmation." *Id*. Voidable judgments must be set aside by motions filed within one year. *Id*.

Mr. Brown argued that the expungement order was "void" because he failed to disclose that he had a civil action pending arising from the arrest (L.F. 10). Mr. Brown admits that he was unaware of that requirement until the defendant in the civil case filed a

summary judgment motion pointing out that the expungement foreclosed his civil action (L.F. 11).[7]

And the State readily agrees that Mr. Brown should not have been entitled to an expungement because of that pending civil action. But that is not a jurisdictional issue, and this fact does not mean that the expungement order is void.

> The judgment of a court of general jurisdiction, with the parties before it, and with the power to grant or refuse relief in the case presented, though the judgment is contrary to law as expressed in the decisions of the Supreme Court or the terms of the statute, is at most only an erroneous exercise of jurisdiction . . . .

Taylor, 47 S.W.3d at 387-88. (Emphasis added.)

It is true that had Mr. Brown and his counsel disclosed to the trial court that he had a pending lawsuit over the arrest giving rise to his expungement, Mr. Brown would not have been entitled to an expungement. But it is untrue that the expungement is thereafter void when Mr. Brown belatedly decides it was strategically advantageous for him to reveal this fact. As this Court stated:

> If a court then errs in substance or procedure in failing to make necessary findings, in making findings not supported

[7] "The filing of this motion for summary judgment caused the Petitioner (Mr. Brown) to review the expungement statutes." (L.F. 11, ¶ 6).

> by the evidence, in excluding necessary evidence or in mistaking hearing requirements, it has not lost jurisdiction. It simply has erred. Such errors should be raised on appeal and, if prejudicial, may lead to reversal and remand. But, they do not affect the court's jurisdiction to render the particular judgment in the particular case, and "[a] judgment is not void simply because it is erroneous, or based on precedent later determined to be incorrect or unconstitutional." *In re Marriage of Hendrix*, 183 S.W.3d at 590.

The State, the Criminal Records Repository, and the other defendants are entitled to some assurance of finality in judgments rendered by Missouri's courts. This is particularly true with expungements. "All records ordered to be expunged . . . shall be destroyed." §610.124, RSMo. 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. Failure to do so is a crime. §610.125, RSMo.

If, however, trial courts retained unlimited and timeless jurisdiction to set aside an expungement order, the integrity and accuracy of criminal records are substantially compromised. This case amply demonstrates this danger. Upon vacating its expungement order, the trial court ordered that the Respondent provide to the state and county law enforcement agencies his records for these agencies to recreate their expunged records (Tr. 18-19). The State has a very legitimate concern that the decision

as to what is contained in his criminal history should not be left to the discretion of the criminal defendant.[8]

For example, upon being ordered to destroy and expunge a criminal history, the Highway Patrol destroys the fingerprint card that accompanied the original charge. Sections 43.503 and 43.506, RSMo. Once that fingerprint card—providing definitive proof as to the identity of the person arrested—has been destroyed, no amount of "re-creation" can ever conclusively link the arrestee to that crime. The Patrol is often confronted with claims that "I was not the person arrested" or "my sister/brother used my identity when arrested." Those kinds of claims cannot be refuted once the fingerprint card from the arrest is destroyed.

c. <u>Section 511.250 is not applicable.</u>

One final statutory provision is relevant to the discussion as to whether the trial court retained jurisdiction to vacate its original expungement order.

Section 511.250, RSMo, states that a motion to set aside an "irregular" judgment must "be made within three years after the term at which such judgment was rendered."

[8] And how can the State verify, or contest, the accuracy of anything the defendant/Respondent submits as part of his criminal history? Contrary to the decision of the Western District (October 10, 2006 Opinion, p. 15), the State did protest this requirement (L.F. 41-42).

That statute, however, does not authorize the trial court retaining jurisdiction to set aside its original expungement order because §511.250 has been superceded by Rule 74.06, discussed above:

> Section 511.250, RSMo [has] been superceded by Rules 74.03 and 74.06. We held that the statute now applies only to those proceedings in which Rule 74 is not applicable. In the present matter, Rule 74 is clearly applicable to the proceeding. As Rule 74 supercedes §511.250, Rule 74 provides the exclusive remedy available to [Mr. Brown]."

Manning v. Fedotin, 64 S.W.3d 841, 848 (Mo.App., W.D. 2002) (citations omitted).

Rule 74.06 is clearly a rule applicable to a petition to expunge. The Rules explicitly provide that Rule 74 is among the Rules applicable to civil actions. Rule 41.01.

In addition, it has also clearly established that an "irregularity" as used in §511.250, RSMo, "is a timing or procedural issue" and the statute "cannot be used to test the sufficiency of the evidence or to review trial errors." *Nelson v. Marsh*, 119 S.W.3d 197, 202 (Mo.App., W.D. 2003); *Edson v. Fahy*, 330 S.W.2d 854, 858 (Mo. 1960).

The Conclusiveness of the Trial Court's Original Expungement Order

Though not argued or briefed before the trial court or the Western District, the Western District determined that Judge Sutton's original expungement order of February 20, 2004, was not a final order because it was not denominated a "judgment" and, therefore, not appealable.

While the State recognizes that appellate courts have a responsibility to examine whether they have jurisdiction over an appeal, *McElroy v. Eagle Star Group, Inc.*, 156 S.W.3d 392, 398 (Mo. App. WD 2005); *Chromalloy American Corp v. Elyria Foundry Co.*, 955 S.W.2d 1, 3 (Mo. banc 1997), in this case the result was that the issue was decided without the benefit of briefs on the merits of that issue.

It is absolutely true that for a decision to be subject to appeal, it should be denominated a "judgment." This is not, however, the equivalent to finality or enforceability. In this case, both the legislature and this Court have specified that a trial decision by a trial court regarding an expungement order will be designated an "Order." §§610.123.4, 610.124, RSMo; Rule 155.04.

Thus, when the Missouri State Highway Patrol received Judge Sutton's Order of Expungement dated February 20, 2004, the Patrol complied with that order.[9] Had the Patrol desired to appeal that order, the Patrol would have needed to have that order

[9] Mr. Brown suggests that there is "some evidence" that the Patrol did not expunge the records. To support this claim, he points to a copy of the investigative report he received from the Highway Patrol. This is simply one concrete example why criminal defendants should not be given the authority to "recreate" their own criminal history; the assertion by Mr. Brown shows his lack of understanding of the criminal records process. The investigative report is not the criminal history which the criminal history repository keeps; the investigative report is an entirely separate police report which, by law, was an open record. §610.100.2, RSMo.

designated as a "judgment." The designation of the decision as an order did not, however, affect its finality. No one doubts that the trial court and Mr. Brown expected the Highway Patrol to comply with that order. And as a named party to the suit, the Patrol could not do anything other than comply. The fact is, one cannot recreate what has been destroyed and Judge Sutton recognized the "very difficult position" her order placed the State in (Tr. 17).

The Order of Expungement was in the form prescribed by this Court and the legislature. Rule 155.04 states that a court "shall enter an order directing expungement."[10] (Emphasis added). The form this Court provides accompanying Rule 155 is entitled "Order of Expungement of Arrest Records." The legislative denomination of the expungement decision as an order is likewise unequivocal. Section 610.10, 123.4, RSMo, states that a court "shall enter an order directing expungement." (Emphasis added). It then dictates that a "copy of the order" (emphasis added) shall be provided to each agency. Section 610.124, RSMo, also refers to "orders." Finally, Section 610.125, provides penalties for failing to comply with an expungement "order."

An *order* of expungement is precisely what the statute requires, and it triggered a variety of legal consequences affecting substantive rights and obligations. *See generally* Mo. Rev. Stat §§610.122-.126. Only after Harrah's moved for summary judgment and Brown's counsel realized that the expungement carried both benefits and burdens did

[10] The use of the word "shall" denotes a mandatory duty. *Bauer v. Transitional School District of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003).

Brown make an abrupt about-face and move ex parte to undo the very same uncontested and unappealed expungement he had sought, obtained and accepted some fourteen months earlier (L.F. 10-13).

Under these circumstances, the decisive issue is not whether the expungement was entered in a form that would have permitted an appeal that no one wanted to take because no one was aggrieved; instead, the issue is whether the expungement—regardless of its form—was conclusive of the rights of the parties.

In two decisions this Court held unequivocally that those who accept a judicial decision are bound by it—even if the decision is somehow flawed or a party later has a change of heart (or strategy).

In *State ex rel York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998), this Court held that the rights of two former spouses "were *concluded* by the June 10, 1996, 'judgment' of the commissioner" dissolving their marriage. *Id*. at 224 (emphasis added). The court reached this decision even though in an earlier case it had "held that documents signed solely by a commissioner *are not final appealable judgments*"and therefore had dismissed an appeal taken directly from such a defective decision. *Id*. (emphasis added; citing *Slay v. Slay*, 965 S.W.2d 845 (Mo. banc 1998)). "[E]ven an absence of jurisdiction is not necessarily an obstacle to a judgment having a conclusive effect on the rights of the parties" because "one accepting and retaining benefits of a void judgment is estopped to deny the validity of any part thereof, or any burdensome consequences, even where

invalidity arises from want of subject matter jurisdiction." *Id*. at 225 (collecting cases).[11] Consequently, the Court found the commissioner's decision "*as conclusive as if entered as the judgment* of an article V judge." *Id*. (emphasis added). This estoppel "extends not only to the parties but also to third parties who acquired rights or obligations by or through a party to the purported judgment." *Id*.

The Court reiterated the importance of finality and repose in *State Department of Social Services v. Houston*, 989 S.W.2d 950 (Mo. banc 1999), a case involving a change in position by a party attempting to challenge a child support decision in which he had earlier acquiesced. In late 1995, the Division of Child Support had entered an uncontested administrative order increasing the father's child support obligations. He received notice of the decision but did nothing for fifteen months, when he moved to set it aside for a procedural defect. *Id*. at 951. A year later, the trial court set aside the modification order based on intervening authority holding the child support modification statute was unconstitutional. *Id*. Citing *State ex rel York*, this Court reversed, holding that the "rights of the parties were concluded" by the unchallenged but defective administrative order, which was "deemed *effective as a judgment*." *Id*. at 953 (emphasis added). Under *State ex rel. York*, "there is no question that a party who accepts the burden of a child support modification *order* is estopped from challenging its validity." *Id*. at 952 (emphasis added). Even if the record does not clearly reveal the acceptance of

[11] The conclusive effect of the expungement order is even more compelling here, where it was entered with subject matter jurisdiction and was not void.

a burden, the decision becomes conclusive where a party with notice does nothing to challenge it for fifteen months. *Id*. Moreover, "[a]pplication of the doctrine of estoppel is especially appropriate given [the mother's] reasonable reliance on the legitimacy of the administrative order." *Id*. at 952-53.

Additionally, in *River Salvage, Inc. v. King*, 11 S.W.3d 877 (Mo. App. WD 2000), the appellant had originally attempted – unsuccessfully – to appeal an "order" that did not comply with Rule 74.01(a). More than two years later, the appellant convinced the trial court to relabel the same order as a "judgment" and then attempted to appeal again. In rejecting the belated appeal, the Western District held the appellant had "failed to question the validity of the original 'order' in a timely manner" (*id*. at 881) and then "accepted the burdens and benefits of the original order for nearly two years." *Id*. at 882. Consequently, the Court held that "[t]he *rights of the parties were concluded* by entry of the trial court's 'Findings of Facts, Conclusion of Law, and *Order*' on December 29, 1995, and that *order is deemed effective as a judgment* as of that date." *Id*. (emphasis added).

The *River Salvage* case, and the Missouri Supreme Court decisions upon which it relied, demonstrate that courts will act to assure finality and repose by treating as conclusive any judicial decision which the parties themselves have treated as conclusive for more than a year. All of these cases were decided after the 1995 amendment to Rule 74.01(a) and thus refute the notion that a party may invoke that rule of procedure to upend a long-settled determination of substantive rights. Furthermore, it would be unconstitutional to do so.

In *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997), this Court made three points about Rule 74.01(a) in the context of its constitutional rule-making power. First, the rule is based on the court's authority under article V, section 5 to adopt "rules of civil procedure." *Id*. Second, the 1995 amendment to rule 74.01(a) came about because "it was unclear when a pronouncement or judgment was a final judgment *for purposes of appeal*." *Id*. (emphasis added). Finally, "Rule 74.01(a) does not expand or shrink jurisdiction, the right to appeal, or *any other substantive right.*" *Id*. (emphasis added.)

On its face, Rule 74.01(a) does not purport to supplant substantive law or define a "judgment" for every conceivable purpose. Rule 74.01(a) defines a "judgment" only "as used in these rules," which are the "Rules of Civil *Procedure*" rather than a definition of substantive rights under statutory or common law.

The non-exclusive and limited purpose of Rule 74.01(a) is also evident in its phrasing that a judgment "*includes* a decree and any order from which an appeal lies." Rule 74.01(a) (emphasis added). As here pertinent, the word "include" means "to place, list or rate as a part or component of a whole or of a larger group, class or aggregate." *Webster's Third New International Dictionary* at 1143 (1993). Thus, Rule 74.01(a) does not purport to define all judgments for all purposes.

With reference to this phrasing of Rule 74.01(a), the Court has observed that "[o]ur procedural rules are not specific as to what is excluded from the definition of a judgment." *Linzenni v. Hoffman*, 937 S.W.2d 723, 726 (Mo. banc 1997). In *Linzenni*, the husband had died one day after the trial court had signed and filed a worksheet stating

that his marriage was "ORDERED DISSOLVED," and the issue was whether his death had abated the action. The Court found this was "unquestionably a valid order" and looked to "the policy of our dissolution of marriage act" to reach the conclusion that "the doctrine of abatement is inapplicable where a dissolution of marriage has been ordered prior to the death of a party, *even though the order may be partial, interlocutory or not a final judgment resolving all issues in the case*." *Id*. at 726 (emphasis added).

Consequently, this Court held there was "no procedural question regarding finality of a judgment for purposes of appeal. The issue in this case is one of abatement or survival of an action, a question of *substantive law* that was not modified by an amendment to our *procedural rules*." *Id*. (emphasis added.) Likewise, the question here is whether the order of expungement triggered the State's statutory obligations, which *Linzenni* teaches is plainly a question of substantive law rather than procedural rule: "*The procedural rules and cases construing those rules are not dispositive of questions of substantive law.*" *Id*. (emphasis added.)

For this reason, the Western District's opinion upholding the decision of Judge Sutton results in a violation of article V, section 5 of the Constitution, as well as *City of St. Louis v. Hughes* and *Linzenni*, by construing Rule 74.01(a) in a manner that destroys substantive rights and duties created under the expungement statute, all of which flow from an *order* of expungement. Given the clear-cut legislative intent to define the substantive law of expungement, preclude common law or equitable expungement, and authorize only procedural rules by the Supreme Court, it is especially important that courts respect and enforce the substantive rights and duties that flow from an order of

expungement, all as defined by statute. *Linzenni*, 937 S.W.2d at 726 (basing decision on substantive policy of dissolution of marriage act rather than procedural rule.)

Whether Judge Sutton's order of expungement was in a form sufficient to perfect an appeal under the rules of procedure in no way diminishes its substantive effect as established by statute.

Finally, the State believes that the facts of this case make it inherently unjust for Mr. Brown to seek the untimely reversal of a decision that he initially sought and obtained. It was Mr. Brown who sought, and obtained, the expungement order on February 20, 2004. He did so fully aware that he was involved in litigation against Harrah's Casino over that very arrest (L.F. 10). Whether reviewed under the notion of judicial estoppel, equitable estoppel, or laches, what Mr. Brown seeks to do is inherently unfair and unjust.

According to his motion to vacate the judgment, Mr. Brown failed to review all of the statutes applicable to expungements until Harrah's filed a motion for summary judgment in the separate civil case (L.F. 11, ¶ 6). It is a well-established legal principle that "persons are conclusively presumed to know the law." *Grace v. Missouri Gaming Commission*, 51 S.W.3d 891, 903 (Mo.App., W.D. 2003). That Mr. Brown and his counsel did not know the law does not justify him seeking to vacate an order he sought once he belatedly discovered that it was not to his advantage.[12]

[12]While Mr. Brown's motion suggests that he was simply trying to "correct" a mistake he created, a reasonable inference is that he was motivated by fear that his civil

The day after learning that his civil case against Harrah's was in jeopardy, Mr. Brown filed his motion to vacate (L.F. 11). The State was not notified of the motion to vacate, or even the order to "un-expunge" the records.[13] Mr. Brown failed to notify the State in spite of the fact that the State is a necessary party by statute, §610.123.2, RSMo, had been named in the original petition (L.F. 5, 6), and had entered its appearance in the original action by filing a motion to dismiss (L.F. 1, 26).[14]

In *Shockley v. Director*, 980 S.W.2d 173 (Mo. App. E.D. 1998), the Division of Child Support Enforcement was judicially estopped from arguing a previous judgment the Division had enforced was not a "court order." *Id*. at 175. Judicial estoppel prohibits a litigant from taking a position in one judicial proceeding, thereby obtaining benefits "from that position in that instance and later, in a second proceeding, taking a contrary position in order to obtain benefits from such a contrary position at that time." *Id*.

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suit against Harrah's was in real jeopardy based on his having obtained the earlier expungement.

[13] The motion to vacate states that only the Clay County Prosecutor and Clay County Counselor's offices were notified (L.F. 11-12, ¶ 8).

[14] The Motion to Dismiss was based on the fact that Mr. Brown did not provide a fingerprint card when he filed the petition-another requirement of the statute. §610.123.1, RSMo (2003). In response, Mr. Brown apparently filed a fingerprint card (L.F. 27), and the State had no further basis for challenging the expungement.

On February 20, 2004, Mr. Brown argued he was entitled to expungement, and received the benefit he desired, i.e., the records were destroyed. On April 7, 2005, Mr. Brown simply changed his mind and took a completely contrary position—that he was not entitled to an expungement.

Likewise, the judicial doctrine of laches bars Mr. Brown's unjust attempt to undo the court relief he sought. "'Laches' is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Elton v. Davis*, 123 S.W.3d 205, 211 (Mo.App., W.D. 2004). Mere delay is not sufficient, however; "the delay involved must work to the disadvantage and prejudice of the defendant." *Id.*; *Moore v. Weeks*, 85 S.W.3d 709, 721 (Mo.App., W.D. 2002).

The prejudice to the State in this case is obvious and substantial. As the State pointed out in its Motion to Set Aside the Court's Order of April 7, 2005, "[o]nce records have been destroyed and obliterated pursuant to a court order, those records cannot be 'undestroyed'" (L.F. 22). Section 610.124, RSMo, expressly states that all "records ordered to be expunged will be destroyed." Once the records have been destroyed, there is no way to undo that act and the accuracy of any "recreated" record cannot be relied upon.[15]

[15] The State filed a request to stay that portion of the trial court's decision ordering Mr. Brown to provide his copies of expunged records to the State to recreate those records (L.F. 41).

The State is aware that courts do not look favorably on the use of laches as a defense. *Moore v. Weeks*, 85 S.W.3d 709, 721 (Mo.App., W.D. 2002). Nevertheless, it is a viable doctrine to prevent injustice, *id*., and invoking laches is entirely appropriate in this case.

The State will assume that the failure of Mr. Brown to disclose his pending civil case was not willful. But it was at the very least negligent and inexcusable given the fact that all Mr. Brown and his counsel had to do was read the statute. Now that the "damage" has been done, it is Mr. Brown who should accept and deal with the consequences of his neglect. The State, as is any other party to litigation, is entitled to expect some finality to judgments entered by the courts of Missouri and should not have to allow a criminal defendant to dictate what his criminal history will look like because he wishes to "undo" his expungement. The State believes that enforcing an expungement order that Mr. Brown, on hindsight, might not have been entitled to is far superior to trying to "recreate" a criminal history with no reasonable means of assuring its accuracy.

CONCLUSION

It is not unreasonable for the State to seek some finality to a judgment, particularly when the State is ordered to take the extraordinary step of destroying records. Once an expungement order is issued, and the time for an appeal has passed, the expungement order should be final. There is no authority for a trial court to "vacate" an expungement order, particularly when it is the person who sought the expungement order requesting that the court set aside its order over one year later.

It is not unreasonable to expect Mr. Brown to accept the decision he sought and to deal with the consequences of his request. It is, however, unreasonable and inequitable for the State to be subject to the whims of a plaintiff who changes his trial strategy because he did not thoroughly consider the consequences of his own voluntary actions.

The Court's Order of April 7, 2005, and Judgment of May 16, 2005, were entered without authority or jurisdiction and must be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby certifies:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and (c) of this Court and contains 6671 words, excluding the cover, and this certification, as determined by Microsoft Word software; and

That the labeled disk, simultaneously filed with the hard copies of this brief, has been scanned for viruses and is virus-free; and

That two true and correct copies of the attached brief, and a labeled disk containing a copy of this brief, were mailed, postage prepaid, this 28th day of February, 2007, to:

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APPENDIX

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