IN THE MISSOURI SUPREME COURT

SC 88298

WILLIAM T. BROWN, D.O. and
JUDITH BROWN *husband and wife*

Appellants,

v.

HARRAH'S NORTH KANSAS CITY L.L.C.,

Respondent.

APPELLANTS' SUBSTITUTE BRIEF

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Green v. St. Louis County, 327 S.W.2d 291 (Mo. 1959)

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Honorable Larry D. Harman entered in the Circuit Court of Clay County, Missouri on May 27th, 2005. The Court's judgment granted Defendant's Motion for Summary Judgment on Plaintiffs' claims of negligence, malicious prosecution, false arrest, and intentional infliction of emotional distress.

The Trial Court based its judgment on §610.126 RSMo which precludes any person who has had his arrest records expunged from bringing "any action subsequent to the expungement…." The first issue on appeal is whether the Court properly granted summary judgment based on that statute when Appellants, Dr. Brown and his wife, brought this action prior to the expungement of his arrest records. The second issue involves whether the Court erred in granting summary judgment by failing to follow Missouri Supreme Court Rule 74.04. The final issue involves whether the Trial Court erred in granting summary judgment because there was a genuine issue of material fact.

Because none of these issues fell within the exclusive jurisdiction of this Court, the appeal was within the general appellate jurisdiction of the Missouri Court of Appeals for the Western District pursuant to Article V, Section 3 of the Missouri Constitution, and §477.070 RSMo. After the Court of Appeal's opinion reversing the Trial Court, this Court granted transfer. This Court, therefore, has jurisdiction to hear this appeal. See Article V, Section 10 of the Missouri Constitution and Supreme Court Rule 83.04.

STATEMENT OF FACTS

I. INTRODUCTION

While playing Three Card Poker at Harrah's casino, Appellant, Dr. William Brown, was accused of cheating. Unbeknownst to Dr. Brown, charges were filed and an arrest warrant was applied for and issued. (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, but, Harrah's did not inform the prosecuting authorities about its findings. (L.F. 7-8).

More than a year after receiving the letter of apology, Dr. Brown was in Miami, Florida when he was arrested based upon the Clay County arrest warrant. Dr. Brown was incarcerated in the Miami, Dade County Jail where he was beaten by another inmate. (L.F. 9-10). After three and half days of incarceration, Dr. Brown was released and allowed to return to Missouri. (L.F. 10). After the Clay County prosecutor reviewed the letter of apology from Harrah's, he dismissed the charges against Dr. Brown. This lawsuit was then filed. (L.F. 10).

The Trial Court sustained Harrah's Motion for Summary Judgment and the Browns appealed. The Court of Appeals reversed the Trial Court. This Court then accepted transfer.

II. HARRAH'S ACCUSES DR. BROWN OF CHEATING AND BANS HIM FROM ITS PROPERTY

Dr. Brown was playing Three Card Poker at Harrah's when a Harrah's employee accused him of cheating. Dr. Brown was then searched, fingerprinted and held against his will. (L.F. 6). Harrah's told Dr. Brown that he was barred from the casino and all of Harrah's properties. (L.F. 6-7). Harrah's prepared and completed an incident report containing false information which was ultimately provided to the Missouri Gaming Commission and the Clay County prosecutor. (L.F. 6). Four days later, the Missouri Gaming Commission, unbeknownst to Dr. Brown, applied for an arrest warrant based on the report made by Harrah's.

III. AFTER HARRAH'S INVESTIGATES THE MATTER, IT DETERMINES THAT IT MADE A MISTAKE, AND SENDS DR. BROWN A LETTER OF APOLOGY

About ten months after being accused of cheating, Dr. Brown had an opportunity to go to the Convention Center (not the casino) of Harrah's complex. (L.F. 7). Dr. Brown, on his own initiative, spoke with the general manager of Harrah's casino about what had happened in March of 2000. (L.F. 7). Based on this conversation, Harrah's conducted an investigation into the March, 2000 incident. Following that investigation, Harrah's sent a letter to Dr. Brown stating:

> Thank you for taking the time to speak to Mr. Noble [general manager] about the unfortunate incident that occurred during your visit in March of last year. I have personally reviewed and investigated the

incident which you addressed. It seems clear that this situation could have been handled in a better manner. Sometimes in our effort to comply with the Missouri Gaming Requirements we fall short of providing out best guest service. I have addressed your case to my staff and assure you that this is not an acceptable standard here at Harrah's.

Harrah's North Kansas City Casino and Hotel takes great pride in delivering excellent guest service in all areas every time you visit. In your case, it is obvious that we have not lived up to our commitment and I wish to extend my personal apology. I hope you will give us another opportunity to provide you with the level of service you deserve and expect from Harrah's.

In our business, as any, mistakes will happen. However, we will never make the mistake of not caring…. I look forward to hearing from you soon. (L.F. 7-8 and 229)(attached in Appendix).

Although Harrah's sent the letter of apology to Dr. Brown, it made no attempt to communicate the results of its investigation indicating that it made a mistake to the Clay County Prosecutor or Missouri Gaming Commission. Nor did Harrah's attempt to determine what, if anything, was being done by those authorities with respect to the charges and arrest warrant pending against Dr. Brown. (L.F. 8).

IV. DR. BROWN IS ARRESTED IN MIAMI, DADE COUNTY, FLORIDA AND INCARCERATED

After receiving the February 3rd, 2001 letter in which Harrah's apologized, Dr. Brown did not hear anything further regarding the incident until March of 2002. At that time, Dr. Brown and his wife were on a Caribbean cruise which was docked in Miami, Florida. (L.F. 8). While there, two United States Customs Officers came aboard the ship and arrested Dr. Brown based upon the Clay County arrest warrant. Dr. Brown told the Customs Officers that he had received a letter of apology from Harrah's, but the Customs Officers called the Miami Police who, in turn, put Dr. Brown into the Miami, Dade County Jail. (L.F. 9).

Dr. Brown was stripped searched outside of the holding cells while the other inmates watched. He was put into a cellblock designed to hold 24 persons which was in fact filled with 40 to 45 other inmates. He was beaten by another inmate who hit him in the face, chin, chest, shoulder and back. He experienced emotional distress to such a degree that he had back pain, upset stomach, loss of sleep, loss of appetite, and diarrhea; he lost seven pounds in the three and a half days he was incarcerated. (L.F. 10). Due to the assistance of legal counsel in Florida and Missouri, Dr. Brown was finally released from jail. (L.F. 10).

V. CHARGES AGAINST DR. BROWN ARE DISMISSED

When he returned to Missouri, Dr. Brown surrendered himself to the Clay County Authorities. His defense attorney then sent a letter to Clay County Prosecuting Attorney, Don Norris. Dr. Brown's attorney included with his letter a

copy of the February 3, 2001 letter of apology from Harrah's. Eight days later, the criminal charges against Dr. Brown were dismissed. (L.F. 10).

VI. PROCEDURAL HISTORY

On January 2, 2003, Dr. Brown and his wife filed this suit against Harrah's. (L.F. 4). Harrah's filed its Answer on February 14th, 2003. (L.F. 1, 20-26). About a year later, Dr. Brown, by and through his criminal defense attorney John P. O'Connor, filed a Petition for Expungement of his arrest records. (L.F. 95). A little over a year after Harrah's had filed its Answer in this case, Judge Janet Sutton entered her Order to expunge the arrest records of Dr. Brown. (L.F. 97). In her Order, Judge Sutton found as follows:

> That the arrest of the 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. 97).

More than a year after Judge Sutton entered her order of expungement, Harrah's filed its Motion for Summary Judgment claiming that §610.126 RSMo prohibited Dr. Brown from maintaining this action. (L.F. 27).

At the time that Dr. Brown, by and through his attorney John P. O'Connor, filed his Petition to Expunge his arrest records, he and his counsel were not aware that §610.122 RSMo required that a determination be made by the Court that there was no civil action pending. (L.F. 91 and 98). Mr. O'Connor followed the form which is part of Supreme Court Rule 155. That form, attached hereto in the appendix, does not include any question or information regarding pending civil actions. Furthermore, §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."

When Harrah's filed its motion for summary judgment, 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 at the time the order of expungement is sought. (L.F. 92). Upon discovery of the requirement, Dr. Brown, by and through Mr. O'Connor, filed a disclosure with Judge Janet Sutton informing her that at the time he petitioned for expungement of his records, there was in fact a civil action pending. (L.F. 98-99). 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. 98-100). Dr. Brown indicated that when all of the requirements for expungement could be satisfied, he would then seek a new order. (L.F. 100).

In response to Dr. Brown's disclosure and motion, the Honorable Janet Sutton found that because there was a civil action pending at the time she entered her Order of Expungement, she was without jurisdiction to enter the order, and therefore, the order was without authority and void. (L.F. 107). The Court's Order stated as follows:

> 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. 107).

In responding to Harrah's Motion for Summary Judgment, Dr. Brown's civil attorney, John Turner, argued that summary judgment was inappropriate because Dr. Brown did not bring this action subsequent to the expungement of his arrest records; rather, he brought this action almost a full year prior to the expungement of his arrest records. (L.F. 86). In addition, he argued that the Court in the expungement case had no authority to enter an order expunging the records, and therefore, there was genuine issue of material fact as to whether there was in fact an expungement. (L.F. 83-88).

On May 23, 2005, Harrah's filed its reply in which Harrah's set forth additional statements of fact. (L.F. 131, 137-140). In its reply, Harrah's argued that the arrest records had been destroyed and could not be recreated by Judge Sutton vacating the Order of Expungement. (L.F. 141). In fact, the arrest records

do exist and are included in the legal file. (L.F. 210-215 and 217-246). On May 27th, 2005, before Dr. Brown filed his sur-reply and before the time for filing his sur-reply had expired, the Trial Court entered its judgment sustaining Harrah's Motion for Summary Judgment. (L.F. 192).

On June 6, 2005, Dr. Brown filed his Motion to Set Aside Order Granting Summary Judgment. (L.F. 193). In that motion, Dr. Brown pointed out to the Trial Court that he had a right pursuant to Missouri Supreme Court Rule 74.04(c)(4) to file a sur-reply and to include exhibits and affidavits for the record. Dr. Brown further pointed out to the Trial Court that Rule 74.04(c)(6) mandates that the Court decide the motion after the response, reply and any sur-reply have been filed or the deadlines therefore have expired. (L.F. 193).

Contemporaneous with his Motion to Set Aside, Dr. Brown timely filed his Surreply to Defendant's Motion for Summary Judgment. (L.F. 196). In his sur-reply, Dr. Brown informed the Court that on or about April 6th, 2005, attorney John O'Connor wrote to the Highway Patrol requesting its records concerning Dr. Brown, and about a month later, the Highway Patrol mailed Dr. Brown's arrest records to Mr. O'Connor. (L.F. 199 and 206). The Highway Patrol's letter, affidavit, and records were attached to Dr. Brown's sur-reply and can be found at pages 210-215 of the Legal File. Dr. Brown also informed the Trial Court that Mr. O'Connor had spoken with the Clay County Prosecutor's Office and was informed that although the paper file had been destroyed, the file was capable of being retrieved and had in fact been retrieved. (L.F. 200 and 206-207). The

Prosecutor's Office provided a copy of its file to Mr. O'Connor. (L.F. 200 and 206-207). Those records were attached to Dr. Brown's sur-reply and can be found at pages 217-246 of the Legal File.

The Trial Court took no action with respect to Appellants' Motion to Set Aside its judgment, and Dr. Brown and his wife timely filed his Notice of Appeal on June 28th, 2005. (L.F. 259).

After the Court of Appeals issued its opinion which affirmed Judge Sutton's judgment vacating her order of expungement and reversed the Trial Court's grant of summary judgment, this Court accepted transfer.

ARGUMENT

POINT I

The Trial Court Erred In Sustaining Defendant's Motion For Summary Judgment Because The Court Misinterpreted Or Misapplied §610.126 RSMo In That The Statute Precludes Any Person Who Has Obtained Expungement Of An Arrest Record From "Bring[Ing] Any Action Subsequent To The Expungement" And Here, Dr. Brown Did Not Bring His Action Subsequent To The Expungement; Rather, He Brought His Action Prior To The Expungement.

A. STANDARD OF REVIEW

Review of a grant of summary judgment is de novo. See ITT Commercial Finance Corp., v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record must be viewed in the light most favorable to the party against whom judgment was entered. Id. And, the non-movant is entitled to all reasonable inferences from the record. Id.

A grant of a summary judgment should be sustained only if the moving party proved by uncontroverted facts the indisputable right to judgment as a matter of law. Id. Here, Harrah's failed to demonstrate the indisputable right to judgment as a matter of law, and therefore, the Trial Court erred in sustaining Harrah's motion.

B. THE STATUTE UPON WHICH HARRAH'S RELIED AND THE TRIAL COURT BASED ITS JUDGMENT, §610.126 RSMO, DOES NOT STATUTORILY BAR PLAINTIFF'S ACTION.

Harrah's argued in its Motion, and the Trial Court found, that §610.126.3 RSMo statutorily barred Plaintiffs from bringing this cause of action. (L.F. 27 and 192). Harrah's and the Trial Court misinterpreted §610.126.3 RSMo, and therefore, Plaintiffs respectfully request that this Court reverse and remand the Trial Court's decision.

1. Section 610.126.3 RSMo

Section 610.126.3 RSMo, the statute upon which Harrah's and the Trial Court relied, states as follows:

> 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. (emphasis added).

2. Rules of Statutory Construction.

Our Courts have consistently held that, unless constitutionally infirm, the Court is obligated to follow and apply the law as written by the legislature. See e.g., State v. Williams, 24 S.W.3d 101, 115 (Mo.App. 2000). In addition, Courts cannot read into a statute legislative intent contrary to the intent made evident by the statute's plain language, even if the Court may prefer a policy different from that enunciated by the legislature. See e.g., Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622, 624 (Mo.banc 1995). In other words, this Court

must be guided by what the legislature said, not by what the Court thinks the legislature meant to say. And the Court may not engraft upon a statute provisions which do not appear in the explicit words or by implication from other words in the statute. See Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397, 401 (Mo.banc 1986). Even if the legislature inadvertently, or through lack of foresight, omitted language from the statute, the Court is not entitled to supply the omitted provision or language. See State, ex rel., Mercantile National Bank v. Rooney, 402 S.W.2d 354, 362 (Mo.banc 1966).

Finally, in Estate of Williams v. Williams, 12 S.W.3d 302, 307 (Mo.banc 2000), this Court found that "no statute should be construed to alter the common law further than the words import." And when "doubt exists about the meaning or intent of words in a statute, the words should be given the meaning which makes the least, rather than the most, change in the common law." Id. The statute at issue here alters the common law in that it forbids people from bringing common law causes of action after the expungement of arrest records. Because the statute alters the common law, it must be construed in a manner which has the least impact on common law.

3. Application of the Rules of Statutory Construction to §610.126.3 Demonstrates That It Does Not Bar Plaintiffs' Action.

The plain and ordinary language of the statute indicates that a person is barred from "**bring[ing]** any action **subsequent to** the expungement" of his records. In the Eighth Edition of Black's Law Dictionary, the author defines what

it means to "bring an action" as follows: "To sue; institute legal proceedings." Here, the undisputed facts demonstrate that Plaintiffs instituted legal proceedings against Harrah's on January 2, 2003. (L.F. 4). It is also undisputed that on February 20, 2004, Judge Janet Sutton entered an order of expungement of Dr. Brown's records.[1] Thus, it is undisputed that Plaintiffs brought this action against Harrah's more than a year prior to the expungement of his arrest records. The Trial Court erred in finding that §610.126.3 RSMo, which bars a person from bringing an action subsequent to the expungement of his records, barred Dr. Brown from bringing his action more than a year before the expungement.

Citing State, ex rel., Linthicum v. Calvin, 57 S.W.3d 855 (Mo.banc. 2001) Harrah's may argue, as it did in the Court of Appeals, that the word "bring" and the phrase "bring any action" mean not only to initiate or commence an action but to continue or maintain the action. Respondent's reliance on Calvin was misplaced. On the very page cited by respondent, the Calvin court stated:

> Although a suit is "brought" against the original defendants **when the petition is initially filed**, in like manner, it is also "brought" against subsequent defendants when they are added to the lawsuit by amendment.

[1] Judge Sutton subsequently entered a judgment setting aside her order of expungement. Harrah's contests the validity of Judge Sutton's judgment setting aside the expungement; however, the issues involved in that dispute are not pertinent to this point.

(emphasis added). Thus, this Court's decision in Calvin, consistent with Black's Law Dictionary, demonstrates that the phrase "bring any action" means the filing of a petition. Id. at 858.

The Calvin Court did recognize that when subsequent defendants are added to the lawsuit, then the lawsuit is "brought" against them when they are added. Here, the Browns never filed an amended petition adding Harrah's as a defendant. Rather, Harrah's was the original defendant. Pursuant to Calvin, this action was "brought" against Harrah's "when the petition [was] initially filed." Id. And the Browns' petition was initially filed before, not subsequent to, Judge Sutton's order of expungement. Thus, § 610.126.3 RSMo does not preclude this action.

Harrah's may also argue, as it did in the Court of Appeals, that it is "note worthy that the legislature employed an expansive term like 'bring' rather than a more restrictive word such as 'commence' or 'initiate'." Respondent overlooked the fact that the Calvin Court specifically noted that the terms "commence" and "brought" are commonly deemed to be synonymous. Id. Calvin, 57 S.W.3d at 858, n. 2 citing BLACKS LAW DICTIONARY 192 (6th Ed. 1990). And our legislature uses the terms interchangeably in the statutes of limitations. Compare §516.105 RSMo where the legislature uses such phrases as "shall be brought" and "to bring such action" with §516.103 RSMo. where the legislature uses the phrase "commencement of any suit." See also §516.110 RSMo. where the title of the statute is "**What action shall be commenced with ten years**" and the body of the statute uses the phrase "shall be brought." (bold original).

Respondent's and the Trial Court's attempt to read the word "maintain" into §610.126.3 is contrary to well established rules of statutory construction. See Fidelity Security Life Ins. Co. v. Director of Revenue, 32 S.W.3d 527, 531 (Mo.banc 2000) where the Missouri Supreme Court stated, "the Court will not read into the statute words or provisions that do not appear there." If the legislature intended to preclude Appellant from bringing or maintaining an action, it could have said so as it did in §516.350 RSMo. That statute deals with the presumption that a judgment has been paid at the expiration of ten years. The pertinent part of the statute states:

> after the expiration of ten years from the date of the original rendition…no execution, order or process shall issue thereon, nor shall any suit be **brought, had or maintained** thereon for any purpose whatsoever.

(emphasis added). This statute demonstrates that the Legislature recognizes the difference between bringing and maintaining a suit. And when it wants to preclude both bringing and maintaining a suit, it says so.

Plugging the Calvin Court's definition of what it means to bring an action into the statute upon which the Trial Court and Harrah's relied, the statute would read, "the petitioner shall not [file a petition with the court] subsequent to the expungement…." Here, it is undisputed that Plaintiffs did not file their petition with the court subsequent to Dr. Brown's. Rather, they filed their petition with the court more than a year before Dr. Brown's expungement. Thus, the Trial Court erred in finding that §610.126 RSMo barred Dr. Brown's action against Harrah's.

Construing the statute as precluding only the bringing of an action after the expungement is not only consistent with the plain language of the statute, but it is also consistent with the mandate that statutes be interpreted in a manner which makes the least change in the common law. See, Estate of Williams v. Williams, 12 S.W.3d 302, 307 (Mo.banc 2000). At common law there was no bar to bringing or maintaining an action after an expungement had been obtained. See 20A Mo.Prac., Administrative Practice & Procedure §15:10 (4th ed). Thus, §610.126 changes the common law by precluding a person from bringing an action after expungement. Reading the statute to preclude both bringing and maintaining any action would make the greatest, rather than the least, change in the common law.

Although Dr. Brown is unaware of any case construing §610.126 RSMo, there is at least one case applying the plain and ordinary language of §610.122 RSMo which is one of the expungement statutes. See Martinez v. State, 24 S.W.3d 10 (Mo.App. 2000). In Martinez, an arrestee filed a petition for the expungement of his arrest records after a jury had acquitted him of the charges for which he was arrested. Section 610.122 RSMo requires a finding that no charges "will be pursued" as a result of the arrest. Id. at 15. Based on this language, the Trial Court denied the arrestee's petition for expungement holding that once criminal charges were pursued following the arrest, expungement was no longer an available remedy. Id. at 15. The Court of Appeals reversed. Id. at 21.

In reversing the Trial Court, the Court of Appeals noted that the plain and ordinary meaning of the words "will be pursued" refers to the future tense only. Id. at 16. Thus, the Court of Appeals found that the statute requires only that the arrestee prove that, at the time the petition to expunge is filed, no charges will be pursued. Id. at 17.

Likewise, here, §610.126.3 RSMo has a plain and ordinary meaning. And pursuant to that plain and ordinary meaning, an arrestee is precluded from filing a civil action after his records have been expunged. As stated by Professor Alford Neely, IV, the statute bars future actions. See 20A Mo.Prac., Administrative Practice & Procedure §15:10 (4th ed). Because Dr. Brown filed this civil action more than a year before his arrest records were expunged, §610.126.3 RSMo is inapplicable and the Trial Court erred in finding otherwise.

POINT II

The Trial Court Erred In Sustaining Defendant's Motion For Summary Judgment Because The Court Failed To Follow Missouri Supreme Court Rule 74.04(c)(6) In That The Rule Provides That The Court Shall Decide The Motion "After The Response, Reply And Sur-Reply Have Been Filed" And Here, The Trial Court Decided The Motion Before Plaintiffs Had An Opportunity To File Their Sur-Reply And Before The Time For The Sur-Reply Expired.

A. STANDARD OF REVIEW

Review of a grant of summary judgment is de novo. See ITT Commercial Finance Corp., v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record must be viewed in the light most favorable to the party against whom judgment was entered. Id. Finally, the non-movant is entitled to all reasonable inferences from the record. Id.

A grant of a summary judgment should be sustained only if the moving party proved by uncontroverted facts the indisputable right to judgment as a matter of law. Id. Here, Harrah's failed to demonstrate the indisputable right to judgment as a matter of law, and therefore, the Trial Court erred in sustaining Harrah's motion.

B. THE TRIAL COURT FAILED TO FOLLOW THE MANDATE OF MISSOURI SUPREME COURT RULE 74.04(c)(6).

Missouri Supreme Court Rule 74.04 sets forth the procedure for summary judgments. That rule allows for a motion, response, reply, and sur-reply. See Rule 74.04(c). The rule requires that a sur-reply be filed within fifteen days of service of the movant's reply if the movant filed a statement of additional material facts. (See Rule 74.04(c)(4)). Here, it is undisputed that Harrah's, the movant, filed a statement of additional material facts in its reply. (L.F. 137-140). Thus, pursuant to Rule 74.04(c)(4), the non-movants, Dr. Brown and his wife, were required to file a sur-reply within fifteen days.

On May 27, 2005, four days after Harrah's filed its reply which contained an additional statement of facts, and before Dr. Brown filed his sur-reply and before the time within which Dr. Brown had to file his sur-reply, the Trial Court entered its judgment granting Harrah's motion. (L.F. 192). After receiving a copy of the Court's judgment, Appellant filed his motion to set aside the judgment. (L.F. 193). In that motion, Appellants advised the Court that it had violated Rule 74.04(c)(6). Contemporaneously with that motion, Appellants filed their sur-reply to Harrah's motion for summary judgment. (L.F. 196). The Trial Court failed to take any action on Appellants' motion to set aside the judgment.

Missouri Supreme Court Rule 74.04(c)(6) states: "After the response, reply and any sur-reply have been filed or the deadlines therefore have expired, the court shall decide the motion." (emphasis added). Here, the Trial Court decided the

motion before Dr. Brown's sur-reply had been filed or the deadline therefore had expired. The Trial Court violated the rule, and therefore, Appellants respectfully request this Court reverse the Trial Court and remand this case for trial by jury.

The language in Missouri Supreme Court Rule 74.04 providing for a reply and sur-reply was recently added to the Rule. Appellants are unaware of any cases interpreting the new provisions regarding replies and sur-replies. However, prior to the change in the rule, cases interpreting the rule found rule violations sufficient to reverse the granting of summary judgment. See, e.g., Cross v. Drury Inns, Inc., 32 S.W.3d 632 (Mo.App. 2000).

At the time Cross was decided, Rule 74.04 provided only for a motion and a response. In Cross, the movant filed supplemental pleadings and materials that were not authorized by the Rule. Id. at 634-635. The Trial Court then granted the motion for summary judgment. Id. at 635. The Court of Appeals reversed.

In reversing the Trial Court, the Court of Appeals noted that Rule 74.04 contemplates that the Trial Court should only consider the motion and response in deciding whether the motion should be granted. Id. at 636. Because the Rule did not authorize the filing of materials raising new facts, and because the Court of Appeals could not determine whether the Trial Court relied on the unauthorized pleadings filed by the movant, the Court of Appeals reversed. Id. at 637.

Likewise, here, the Trial Court failed to follow the mandate of Rule 74.04(c)(6). That rule authorizes a trial court to rule on a motion for summary judgment only after a sur-reply has been filed or the time therefore has expired.

Here, the Trial Court ruled before Appellant's sur-reply was filed or the time therefore had expired. Thus, the trial court was without authority to enter its judgment, and Plaintiffs respectfully request that the Trial Court be reversed.

POINT III

The Trial Court Erred In Granting Harrah's Motion For Summary Judgment Because There Was A Disputed Issue Of Material Fact In That Harrah's Motion Was Premised On The Alleged Fact That Dr. Brown's Arrest Records Had Been Expunged But The Court Entering The Order Expunging Dr. Brown's Records Subsequently Vacated Its Order Finding That It Was Void, And The Arrest Records Were Not In Fact Expunged.

A. STANDARD OF REVIEW

Review of a grant of summary judgment is de novo. See ITT Commercial Finance Corp., v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The record must be viewed in the light most favorable to the party against whom judgment was entered. Id. Finally, the non-movant is entitled to all reasonable inferences from the record. Id.

A grant of a summary judgment should be sustained only if the moving party demonstrates that there is no genuine issue of material fact. Id. Here, Harrah's motion is based on the allegation that Dr. Brown's arrest records have been expunged. As discussed below, the order of expungement has been vacated and set aside, and the arrest records are available for Harrah's review. Thus, Harrah's allegation of expungement is, at a minimum, controverted, and therefore, the Trial Court erred in sustaining Harrah's motion.

B. HARRAH'S FAILED TO DEMONSTRATE THROUGH UNCONTROVERTED FACTS THAT THERE WAS IN FACT AN EXPUNGEMENT.

Harrah's argued, and the Trial Court agreed, that §610.126.3 RSMo barred Plaintiffs from maintaining this action. Section 610.123.3 RSMo states as follows:

> 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.

(emphasis added). As discussed in Point I, the statute has no application here because Dr. Brown did not bring this action subsequent to the alleged expungement; rather, he brought this action before the alleged expungement. Even if this Court denies Appellant's Point I, the Trial Court should be reversed because Respondent failed to demonstrate through uncontroverted facts that there was in fact an expungement.

1. The Order of Expungement Was Vacated and Set Aside.

In support of its Motion for Summary Judgment, Harrah's relied on an Order of expungement entered by Judge Sutton. Judge Sutton subsequently entered a judgment setting aside the order of expungement because the statutory requisites for expungement had not been met. Thus, the expungement upon which Harrah's relied no longer exists.

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. See also §610.126.2 RSMo which 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 equitable power of the Court 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. Jones, 133 S.W.3d at 526.

Section 610.122 RSMo sets forth five conditions which a Court must determine to exist before it has authority to enter an order of expungement. 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. Accordingly, Judge Sutton found that she was without statutory authority to grant the order of expungement, and found that her order was void. (L.F. 107). Consequently, Judge Sutton vacated and set aside her order. (L.F. 107-108).[2]

The expungement court was without jurisdiction to enter the order of expungement not only because the fifth requirement of §610.122 was not met, but

[2] Judge Sutton's judgment vacating and setting aside her previous expungement order has been appealed by the State of Missouri.

also because the petition for expungement was not verified. See §610.123 which 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, the fifth condition set forth in §610.122 RSMo which must exist before a court has authority to expunge an arrest record requires that no civil action be pending. It is undisputed that this action was pending at the time Dr. Brown filed his petition for expungement. In addition, the petition for expungement was not verified as required by §610.123. Nowhere in the record, proceedings, or Order of Expungement does it affirmatively appear that every essential prerequisite of the statute conferring authority was fully complied with. Thus, Judge Sutton's Order of Expungement was not valid, and it was properly vacated. Green, 327 S.W.2d at 296-297.

See also the out of state case of State 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.

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 her order of expungement. See, Jones, 133 S.W.3d 524. Judge Sutton's order of expungement was not a final judgment. Consequently, she retained jurisdiction over the matter, and had the power to alter, set aside or abrogate her order. See Williams v. Williams, 41 S.W.3d 877, 878 (Mo. banc 2001). 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.

The Jones Court reversed an order of expungement because a Trial Court had failed to comply with §610.122 RSMo. In Jones, the Trial Court had failed to

find that the arrest was based on false information which is one of the criteria of §610.122 RSMo. Likewise, here, the Trial Court failed to find all of the criteria of §610.122 RSMo had been met, and therefore, the order of expungement was properly vacated and set aside.

Additionally, see the case of Glover v. St. Louis County Circuit Court, 157 S.W.3d 329 (Mo.App. 2005). In Glover, a Circuit Court entered a judgment ordering an expungement. The State appealed. On appeal, the Court pointed out that 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 proceeding. Likewise, here, there was no evidence presented nor hearing held; consequently, it was proper for Judge Sutton to set aside her order of expungement. Finally, see Martinez v. State, 24 S.W.3d 10, 21 (Mo.App. 2000) where the Court held that only after an evidentiary hearing where evidence is presented is the Court able to enter a proper judgment of expungement.

Dr. Brown would like to point out to the 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. Mr. O'Connor followed the form which is part of Supreme Court Rule 155. That form, attached hereto in the appendix, does not include any question or information regarding pending civil actions. Furthermore, §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."

In addition, Mr. O'Connor filed an affidavit stating that he was unaware that §610.122 RSMo required that there be no civil action pending relating to the arrest or records sought to be expunged. (L.F. 91). When Harrah's filed its motion for summary judgment, 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 at the time the order of expungement is sought. (L.F. 92). Upon discovery of the requirement, Mr. O'Connor immediately notified the expungement Court that there was in fact a civil action pending at the time he sought the order of expungement and asked that the Court vacate and set aside the expungement. (L.F. 92). Based on the authority discussed above, the Court vacated its order of expungement. (L.F. 107-108). Thus, the fact upon which Harrah's based its summary judgment no longer exists.

3. The Arrest Records Exist And Are Available to Harrah's.

Harrah's argued below that regardless of Judge Sutton's judgment setting aside her prior order of expungement, summary judgment is still appropriate because Dr. Brown's arrest records do not exist and are not available for them to review. (L.F. 141). In fact, the arrest records do exist and are included in the legal file. This fact and the records were included in the sur-reply filed by appellants. (L.F. 196-246).

On or about April 6th, 2005, attorney John O'Connor wrote to the Highway Patrol requesting the records in its possession concerning Dr. Brown. On or about May 4th, 2005, the Highway Patrol mailed Dr. Brown's arrest records to attorney John O'Connor. (L.F. 199 and 206). The letter, affidavit, and records that the Highway Patrol sent to Mr. O'Connor are at pages 210 through 215 of the Legal File. Thus, the Highway Patrol's arrest records have not been expunged.

Mr. O'Connor also spoke with Clay County Prosecutor's Office and was informed that although the paper file had been destroyed, the file was capable of being retrieved and had in fact been retrieved. The Prosecutor's Office then provided a copy of its file to Mr. O'Connor. (L.F. 200 and 206-207). The records from the Clay County Prosecutor's Office are at pages 217-246 of the Legal File.

At a minimum, these facts create a genuine issue of material fact regarding Harrah's allegation of expungement, and therefore, summary judgment was improper.

C. CONCLUSION

Harrah's motion for summary judgment was based upon the alleged fact of expungement. Although Judge Sutton originally entered an order of expungement, she subsequently entered a judgment vacating her order because the statutory pre-requisites for an expungement had not been met. Thus, the alleged fact upon which Harrah's based its motion no longer exists. In addition, the arrest records are not expunged but currently exist for Harrah's review. At a minimum, there is

a question of fact regarding Harrah's allegation of expungement, and therefore, summary judgment was improper.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Trial Court and remand this matter for trial.

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CERTIFICATION PURSUANT TO RULE 84.06

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2. According to the word count function of Microsoft Word, this brief contains 7,990 words in compliance with Rule 84.06(b).

3. According to the line count function of Microsoft Word, this brief contains 1,018 lines.

4. The disc has been scanned by Symantec Anti-Virus Software and was found to be virus-free.

Christopher P. Sweeny

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a disc and one copy of the foregoing Appellants' Substitute Brief were duly mailed, postage prepaid, this 27th day of February, 2007, to:

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