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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. UNDER MISSOURI LAW, "BRING ANY ACTION" MEANS FILE A PETITION IN COURT

The case upon which Respondent relies for arguing the manner in which the statute should be interpreted provides that a term in a statute must be considered in context. Dept. of Social Services v. Brookside Nursing Center, Inc., 50 S.W.3d 273, 277 (Mo. banc 2001) (citation omitted). Here, "bring" is used in the phrase "bring any action." In the Sixth Edition of Black's Law Dictionary, relied upon by Respondent at page 18 of its Brief, the author states, "to 'bring' an action or suit has a settled customary meaning at law, and refers to the initiation of legal proceedings in a suit. (citation omitted). A suit is 'brought' at the time it is commenced." (citation omitted). Thus, "bring" within the context it is used in the statute, means to initiate or commence.

As recognized by the Sixth Edition of Black's Law Dictionary, the phrase "bring an action" has a settled and customary meaning at law, and therefore, our legislature requires that the phrase be interpreted and understood pursuant to that customary meaning. See Section 1.090 RSMo which states in part, "phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import." Consistent with this statutory directive, Missouri Courts recognize that a plaintiff brings an action "against the original defendants when the petition is initially filed…." See, State ex rel. Linthicum v. Calvin, 57 S.W.3d 855, 858 (Mo. banc 2001).

On page 20 of its Brief, Respondent cites State v. Owen, 2007 WL 654359 (Mo.App. March 6, 2007). As best Appellant can tell, Respondent cites this case for the proposition that concern about statutory manipulation should be taken into consideration when interpreting a statute. But the Court declined to entertain any statutory construction arguments noting that the statutory language was plain and unambiguous. The Owen Court was interpreting the phase "has been issued" in §577.054.2 which provides for expungement of alcohol related offenses. Petitioner argued that although he had been issued a commercial driver's license, he should be entitled to an expungement because he no longer held a commercial driver's license. The Court of Appeals disagreed noting that a person of "plain and ordinary intelligence" would understand the phrase "has been issued" applied to anyone once the issuing has occurred. Id. The Court concluded that if the legislature had intended the phrase to apply only to those currently holding a

commercial driver's license, "it could have used the phrase 'any individual who holds a commercial driver's license' or similar phrasing." Id. at *3.

Likewise, here, a person of ordinary intelligence reading the phrase, "the petitioner shall not bring any action subsequent to the expungement" would understand the phrase to mean that a petitioner cannot file a lawsuit after the expungement. If the legislature intended a different meaning, it could have used different phrasing. For example, the legislature could have stated that "petitioner shall not bring, maintain or pursue any action subsequent to the expungement" or some similar phrasing. The legislature used such phrasing in §516.350 RSMo, but chose not to use such language in §610.126.3 RSMo, and therefore, the statute should not be read as if that language was included. See Fidelity Security Life Ins. Co. v. Director of Revenue, 32 S.W.3d 527, 531 (Mo. banc 2000) where this Court stated, "The Court will not read into the statute words … that do not appear there."

Respondent also argues that the legislative and judicial meaning attached to the term "bring" as used in other statutes should be disregarded. Respondent's argument is contrary to one of the rules of construction expressed in Citizens Electric Corp. v. Dept. of Revenue, 766 S.W.2d 450, 452 (Mo. banc 1989) where this Court stated, "when the legislature enacts a statute referring to terms which have had other judicial or legislative meaning attached to them, the legislature is presumed to have acted with knowledge of that judicial or legislative action." (citation omitted). Likewise in Brookside Nursing Center, Inc., 50 S.W.3d 273, this Court noted, "a Court also may consider the other legislative or judicial

meanings of a term." Id. at 277. Respondent does not dispute that in other statutes the term "bring" when referring to an action means commence.

Finally, Harrah's argues that "Appellants' interpretation of the statute would allow Appellants to transform the expungement statute into a vehicle for state sponsored spoliation of evidence – by simply filing suit before requesting expungement." When, as here, suit is brought before requesting an expungement and is pending at the time expungement is sought, the Trial Court is without jurisdiction to expunge the records. See §610.122(5) which provides that a Court has no authority to expunge a record if a "civil action is pending relating to the arrest for the record sought to be expunged." Thus, simply bringing suit before requesting expungement does not transform the expungement statute into a vehicle for state sponsored spoliation of evidence. Rather, it deprives the Court of any authority to grant the requested expungement.

B. RES JUDICATA AND COLLATERAL ESTOPPEL DO NOT APPLY

Respondent argues that res judicata and collateral estoppel preclude Appellants from arguing that his civil action was brought a year prior to the expungement. (Respondent's Brief at 24). These arguments have been waived because Harrah's failed to raise them in its answer or in its motion for summary judgment. See Householder v. Oliver, 741 S.W.2d 116, 117 (Mo.App. 1987).

Even if these arguments are considered, they should be denied because res judicata and collateral estoppel can be applied only if there is a valid final judgment that has been rendered involving the same issue sought to be precluded.

See Robin Farms, Inc. v. Beeler, 991 S.W.2d 182, 185 (Mo.App. 1999). Here, there is no valid final judgment which has found that there was no existing civil suit at the time Dr. Brown sought expungement. The only valid judgment entered by Judge Sutton found that an action was pending, and therefore, she had no jurisdiction. (L.F. 251-252). The order of expungement upon which Respondent relies has been vacated and set aside. (L.F. 251-252). Consequently, there exists no final judgment upon which Respondent can base its new arguments. Even if the order had not been vacated and set aside, it was not a final judgment, and therefore, res judicata and collateral estoppel do not apply. Id.

Judge Sutton's "order" was not a final judgment because it was not denominated a "judgment" or "decree." (L.F. 97) and See Missouri Supreme Court Rule 74.01(a) which provides, "a judgment is entered when a writing signed by the judge and denominated a 'judgment' or 'decree' is filed." In City of St. Louis v. Hughes, 950 S.W.2d 850, 853 (Mo. banc 1997), this Court explained that a decision of the Court which is not denominated a "judgment" is not final, and the trial court retains jurisdiction. Thus, Judge Sutton's order was not a final judgment upon which Harrah's can base a defense of res judicata or collateral estoppel. Beeler, 991 S.W.2d at 185

Harrah's argues that if Dr. Brown disputed that there was in fact litigation pending at the time he requested his expungement, he should have appealed Judge Sutton's Order. (Respondent's Brief at 24). Harrah's cites no support for its claim that Dr. Brown could have appealed Judge Sutton's non-final order. As discussed

above, Judge Sutton's order of expungement was not denominated a "judgment", and therefore, it could not be appealed. Hughes, 950 S.W.2d at 853. The only avenue open to Dr. Brown to challenge Judge Sutton's order was to file a motion with her which is exactly what he did once he learned of the requirement that no civil action could be pending at the time expungement is sought. (L.F. 98-101).

In support of its res judicata and estoppel arguments, Harrah's cites Noakes v. Noakes, 168 S.W.3d 589 (Mo.App. 2005). The Noakes Court recognized that void judgments do not support res judicata or collateral estoppel. Id. at 597. Here, as discussed in Point III of this Brief and in Appellants' Brief, Judge Sutton's expungement order was void because the Court lacked authority to enter the order. In fact, Judge Sutton has entered a judgment setting aside the order. (L.F. 251-252). Thus, even if Judge Sutton's expungement order was a final judgment, it cannot support res judicata or collateral estoppel because the order was void.

C. JUDICIAL ESTOPPEL DOES NOT APPLY

Finally, Harrah's asserts that Appellants should be judicially estopped from arguing that this civil action was brought more than a year before his expungement was obtained. (Respondent's Brief at 26). Courts generally use four factors in determining if judicial estoppel should apply. Respondent has failed to prove the existence of any of those four factors by uncontroverted evidence, and therefore, judicial estoppel does not apply.

The first factor considered by Courts is whether a party's later position is "clearly inconsistent" with its earlier position. New Hampshire v. Maine, 532 U.S.

742, 750 (2001). Dr. Brown never took the position in his expungement action that there was no civil action pending. (L.F. 95-96). He did not know that the non-existence of a pending civil action was a requirement for his expungement when he petitioned for expungement. (L.F. 91). But once he became aware of the requirement, he immediately told the expungement court that there was in fact a civil action pending. (L.F. 98-99) Thus, the only position that Dr. Brown took in the expungement action is the same position he is asserting in this action: there was a civil action pending prior to the expungement.

The second consideration is whether there is a risk of inconsistent court determinations. Id. at 751. Here, there is no risk of inconsistent court determinations because the only final judgment entered by the expungement Court found that there was a civil action pending at the time Dr. Brown sought his expungement. (L.F. 251-252). Dr. Brown asserts the same position in this litigation; a position that is not controverted.

The third consideration is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped…." Id. at 751. As stated above, Dr. Brown is not asserting inconsistent positions. In addition, there is no evidence in the record that Dr. Brown would derive an unfair advantage or impose an unfair detriment on Harrah's if he is not judicially estopped.

Harrah's, as the party moving for summary judgment, had the burden of demonstrating that it was entitled to judgment as a matter of law. See ITT

Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). 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. Thus, Harrah's bore the burden of proving by uncontroverted facts that Dr. Brown has gained unfair advantage or imposed unfair detriment on Harrah's. Harrah's alleges that records relating to the arrest have been destroyed and are no longer available, and therefore, it would suffer an unfair detriment. Harrah's failed to prove this allegation by uncontroverted fact.

The one and only uncontroverted fact alleged by Harrah's regarding the records of any governmental authority provides that Harrah's contacted the Clay County Sheriff's Office and was informed that the criminal file "was expunged on February 20th, 2004." (L.F. 31). Harrah's did not even attempt to obtain the records until March 11, 2005: more than two years after filing its Answer. (L.F. 55). In any event, Harrah's did not allege that the Clay County Sheriff's Office refused to produce its records after the expungement was set aside. Thus, there was no showing that Harrah's cannot now obtain those records.

Harrah's did not set forth any other uncontroverted facts indicating that it has even contacted any governmental authority other than the Clay County Sheriff's Office. (L.F. 31-32). If Harrah's has not contacted any other authorities, then it cannot claim that the records those other entities have are vital to its defense. If Harrah's has contacted other entities and was told that the records were expunged, Harrah's would have set forth those facts in its motion. The fact

that the Clay County Sheriff's Office is the only entity which Harrah's claims to have requested records from and been denied leads to one of two inferences favorable to Appellants. Harrah's either received records from each of the other entities, or it never requested records from any other entity. If Harrah's has received the records, then it cannot claim an unfair detriment. If Harrah's never requested the records, then it cannot claim that the records are vital to its defense. Either inference defeats Harrah's claim that it has suffered some unfair detriment. What's more, Dr. Brown was actually arrested and imprisoned in Miami, Dade County, Florida, and those records have not been expunged.

Harrah's argues that "the linchpin of Brown's action against Harrah's is his assertion that neither the Missouri Gaming Commission nor Clay County had probable cause to arrest or charge him with a crime after he was accused of cheating while on Harrah's premises." (Respondent's Brief at 29). There is nothing in the record to suggest that the Missouri Gaming Commission has expunged any of its records. The Missouri Gaming Commission was not a party to the expungement action. (L.F. 95-96). Thus, the order of expungement did not apply to the Commission. See §610.123.2 RSMo which states, "The court's order shall not affect any person or entity not named as a defendant in the action." In addition, the expungement order was set aside. (L.F. 251-252). And none of the Clay County agencies involved in the expungement action appealed the Court's judgment setting aside the expungement. Thus, both the Missouri Gaming Commission's and Clay County's records are available to Harrah's. The Clay

County Prosecutor's records are even a part of the record. (L.F. 217-246). There is no evidence, much less uncontroverted evidence, proving that Harrah's would suffer unfair detriment if Appellants' action is permitted to go forward. See also the discussion in Point III.B. regarding Harrah's lack of evidence.

Finally, the Courts recognize that where a party's prior position was based on inadvertence or mistake, judicial estoppel should not be applied. See New Hampshire, 532 U.S. at 753 citing John S. Clark Co. v. Faggert and Frieden, P.C., 65 F.3d 26 (4th Cir. 1995). In the John S. Clark Co. case, the Fourth Circuit reversed a Trial Court for dismissing a case on grounds of judicial estoppel stating, "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). Here, Dr. Brown did not intentionally mislead the Court to gain unfair advantage, and for this reason alone, judicial estoppel does not apply.

Harrah's cites Jeffries v. Jeffries, 840 S.W.2d 291, 292–294 (Mo.App. 1992) in support of its judicial estoppel argument. The facts in Jeffries are decidedly different than the facts here. There, a husband specifically represented to the Court that he was the father of a child when he knew that the representation was false. Id. at 293. Here, it is uncontroverted that Dr. Brown and his counsel did not know of the requirement that there be no pending civil action at the time he sought his expungement. (L.F. 91-92). And neither Dr. Brown nor his counsel

ever represented to Judge Sutton or any other Court that there was not a civil action pending at the time of his expungement. (L.F. 95-96).

Dr. Brown has not sought to gain unfair advantage or impose unfair detriment upon Harrah's. As soon as he learned that the non-existence of a pending civil action was a requirement for expungement, Dr. Brown notified the Court and moved the Court to set aside its order of expungement. (L.F. 91-92 and 98-100). Ironically, it is Harrah's that urges that the expungement order not be set aside and that the arrest records be destroyed. (Respondent's Brief at 50).

D. CONCLUSION

Section 610.126.3 RSMo precludes only the bringing of an action subsequent to the expungement. Missouri recognizes that an action is brought when the petition is initially filed. Here, it is undisputed that Appellants' Petition was filed prior to the expungement; therefore, the Trial Court erred in finding that §610.126.3 RSMo precludes this action. Although not raised by Respondent in its motion for summary judgment, it now argues that summary judgment was appropriate based on the principles of res judicata and collateral estoppel. These defenses must be based on a prior valid, final judgment. Here, the order that Harrah's relies upon was neither valid nor a final judgment, and has been set aside. Consequently, Harrah's argument fails. Harrah's judicial estoppel argument also fails because Harrah's did not prove by uncontroverted fact any of the four factors used to determine if judicial estoppel should apply. For these reasons, Appellants respectfully request that the Trial Court be reversed.

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. APPELLANTS WERE PREJUDICED BY THE TRIAL COURT'S FAILURE TO FOLLOW RULE 74.04.

Harrah's does not dispute that the Trial Court failed to follow Rule 74.04. Rather, Harrah's claims that Appellants were not prejudiced by the Trial Court's failure. Although Harrah's Summary Judgment Motion raised only the issue involving §610.126, its reply raised the additional argument of judicial estoppel and asserted additional facts. Because Appellants were denied the right to provide a sur-reply in response to Harrah's new argument and additional statement of facts, Appellants were prejudiced.

In Point III of its Brief, Respondent assails Appellants' counsel for submitting 1) records which were not authenticated and 2) an affidavit which was based in part on hearsay. (Respondent's Brief at 50-51). Harrah's also asserts that Appellants' arguments regarding the non-destruction of documents rest on

insufficient and inadmissible evidence. (Respondent's Brief at 50). If Appellants had been allowed the time mandated by the rule to file their sur-reply, they could have provided authenticated records and additional affidavits. Thus, the Trial Court's failure to follow Rule 74.04 prejudiced Appellants.

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; 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. THE EXPUNGEMENT COURT HAD THE POWER TO SET ASIDE ITS ODRER OF EXPUNGEMENT.

1. The Order Was Not A Final Judgment; Therefore, Judge Sutton Could Set It Aside At Anytime

Harrah's argues that "Judge Sutton had no jurisdiction to alter or abrogate an expungement entered a year earlier." (Respondent's Brief at 35). In support of this argument, Harrah's cites State ex rel. Nixon v. Hoester, 930 S.W.2d 52, 54 (Mo. App. 1996) and S.D. Investments, Inc. v. Michael-Paul, LLC, 157 S.W.3d 782 (Mo.App. 2005). Neither of those cases is applicable to the facts here. Both cases cited by Respondent set forth the proposition that a trial court loses jurisdiction over a matter thirty days after final judgment is entered. As discussed in Point I, 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 which she chose to do.

In City of St. Louis v. Hughes, 950 S.W.2d 850, 853 (Mo. banc 1997), this Court examined the requirements of Rule 74.01 and stated:

> 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 her ruling an "order", Judge Sutton indicated that the ruling was not final and that she intended to retain jurisdiction over the matter. 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); 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; and Davis v. Dept. of Social Services, 15 S.W.3d 42, 44-45 (Mo.App. 2000), where the Court of Appeals held that an order of dismissal was not final because it was not denominated a 'judgment'. Because the order of dismissal was not final, Rule 75.01's thirty day limit upon the Trial Court's continued jurisdiction was inapplicable. Id. at 46.

Likewise, here, Judge Sutton's order was not denominated a judgment, and therefore, it was not a final judgment. Consequently, Rule 75.01's thirty day limit

upon continued jurisdiction was inapplicable. Judge Sutton never lost jurisdiction over the matter, and could set aside her order at any time. Id. and Williams, 41 S.W.3d at 878 and Harris, 6 S.W.3d at 402.

Relying on River Salvage, Inc. v. King, 11 S.W.3d 877 (Mo.App. 2000), Respondent argues that the order of expungement was final even though it was not denominated a judgment. In reaching its decision, the King Court explained 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. (emphasis added). The Court emphasized that it dismissed the appeal on June 3, 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. Here, Judge Sutton's order was entered well after this Court's decision in Hughes, and therefore, the holding in King is not applicable to this case.

Respondent also seems to argue that because the expungement statutes and Rule 155.04 refer to an "order", the Court is required to enter a document denominated an "order" instead of a judgment. However, nothing about the statutes or rule require that the order directing expungement be included within a document denominated an order. 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. Without such a designation, as this Court explained in Hughes, the trial court indicates the intention to retain jurisdiction over the matter.

Respondent's 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. The effect of an order after the death of one of the parties is not an issue 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.

Respondent also argues that agencies expunge their records when the Court enters an expungement "order" even though it is not a "final judgment." The Missouri State Highway Patrol and the State, sub nom. the Criminal Records Repository, are the only entities that appealed Judge Sutton's judgment setting

aside the expungement order. Counsel for those two entities acknowledged that those entities wait for a final judgment before expunging any records. (L.F. 168). Counsel stated, "We wait that appeal time." Here the appeal time never ran because the "order" was not denominated a judgment. Thus, contrary to Harrah's argument, the agencies do not destroy their records when an "order" is entered; rather, they wait for a "final judgment."

2. The Order Was Void; Therefore, Judge Sutton Had The Authority To Set It Aside

Judge Sutton had the authority to set aside her order not only because it was not final, but also because it was void. Harrah's acknowledges that the petition for expungement was not verified as required by statute, but claims, without any cite to authority, that the failure to verify the petition was a "non-jurisdictional defect." Respondent's argument is contrary to Missouri law. See American Industrial Resources, Inc. v. P.S.E. Supply Co., 708 S.W.2d 806 (Mo.App. 1986).

In P.S.E. Supply Co, the plaintiff filed a petition to register a foreign judgment in Missouri; however, the petition was not verified. At that time, §511.760 RSMo and former Supreme Court Rule 74.79 required a verified petition. The Court of Appeals held that the failure to comply with the verification requirement deprived the Trial Court of subject matter jurisdiction. The Court explained that "where a trial court's subject matter jurisdiction arises solely by statutory creation, absent conformity with the statute, no such jurisdiction exists in the Trial Court." Id. at 808. See also Dunn v. Dunn, 650 S.W.2d 638, 639

(Mo.App. 1983) where the Court of Appeals found that a trial court lacked jurisdiction to hear a dissolution case because the petition was not verified as was required by state statute at the time the case was filed.

Harrah's further argues that the point has not been preserved because it was raised in the Court of Appeals for the first time during oral argument. Harrah's overlooks the well established rule that lack of jurisdiction can be raised at any time and is never waived.

In addition to requiring verification, the expungement statutes set forth several conditions which must exist before an expungement can be granted. See §610.122 RSMo. One such condition is that, "no civil action is pending relating to the arrest or records sought to be expunged." §610.122(5) RSMo. It is undisputed that there was a civil action pending relating to the arrest, and Dr. Brown did not state in his petition that there was no civil action pending. Thus, Judge Sutton had no authority to enter her order expunging the arrest records, and she properly set aside that order. See Taylor v. Taylor, 47 S.W.3d 377 (Mo.App. 2001).

In Taylor, a father appealed a judgment which had found that he lacked standing to objection to the settlement filed in his child's estate because his parental rights had been terminated. Id. at 379. The father argued that the judgment purportedly terminating his parental rights, which was entered three years earlier, was void because the statutory requirements for that action were not complied with. Id. at 381. The Court of Appeals agreed and reversed the trial court stating, "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 explained, "[A] court's authority to terminate parental rights flows exclusively from statute, and *strict compliance* with the statutory requirements is mandatory." Id. at 388. Because the proceeding was not properly initiated, the court was without jurisdiction to terminate the father's parental rights. Id.

In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006) and Noakes v. Noakes, 168 S.W.3d 589 (Mo.App. 2005), relied upon by Respondent, are 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 (citation omitted). The Hendrix Court, quoting an earlier Supreme Court opinion, stated, "[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 Noakes Court also recognized that "if statutory conditions have not been complied with" then the Court has no jurisdiction to render a particular judgment. 168 S.W.3d at 597, n.7.

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

§610.126.2. Therefore, strict compliance with the statutory requirements was mandatory. Here, it is undisputed that the statutory conditions for expungement did not exist and were not shown in the petition for expungement; nor were the proceedings properly initiated with a verified petition. Consequently, Judge Sutton did not have jurisdiction to enter her order of expungement. Taylor, 47 S.W.3d at 388 and American Industrial Resources, Inc., 708 S.W.2d at 808.

By failing to set forth in his petition the conditions required to state a claim upon which expungement relief could be granted, Dr. Brown's petition for expungement failed to invoke the jurisdiction of the Court. See Wright v. Mullen, 659 S.W.2d 261, 263 (Mo.App. 1983) where the Court explained, "a pleading which states no cause of action confers no subject matter jurisdiction a court can adjudicate, and is subject to dismissal. (citation omitted). Such a defect is jurisdictional." (citation omitted). To be entitled to expungement, the conditions set forth in §610.122 must exist; thus, to state a claim upon which relief could be granted, Dr. Brown had to assert in his petition that those conditions existed. By failing to state that there was no civil action pending, Dr. Brown failed to state a claim upon which expungement relief could be granted, and therefore, the expungement court had no jurisdiction to enter an order. Id.

As discussed in their original Brief, Dr. Brown relied upon the form petition for expungement of arrest records found in the Supreme Court Rules. Harrah's argues, "the fact that the approved form calls for no express statement regarding pending litigation simply confirms that its existence or non-existence is

immaterial to establishing the subject matter jurisdiction of the expungement court." (Respondent's Brief at 37). The form petition sets forth the jurisdictional elements that were found in §610.122 RSMo prior to a 1995 amendment to the statute. See, In Re Dyer, 163 S.W.3d 915, 918 (Mo.banc 2005) and the form petition at A9 of Appellants' original Brief.

Prior to the 1995 amendment, §610.122 RSMo required that 1) the petitioner had no prior felony convictions; 2) the arrest was based on false information; 3) there was no probable cause at the time of the action to expunge to believe that petitioner committed the offense; 4) no charges will be pursued as a result of the arrest; and 5) an action to expunge the records of 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. Dyer, 163 S.W.3d at 918. All of these elements are set forth in the form petition which indicates that the elements of §610.122 must be set forth in the petition to invoke the jurisdiction of the Court. See form petition at A9 of Appellants' original Brief. After the 1995 amendment, the statute no longer required that the action to expunge be commenced within three years; however, a new requirement was added that there be "no civil action pending…." Dyer, 163 S.W.3d at 918 and §610.122 RSMo. The form petition was not changed to conform to the amended statute. Thus, the form petition Dr. Brown used failed to set forth the conditions upon which expungement could be granted under the amended statute, and did not properly invoke the jurisdiction of the court.

Once Dr. Brown learned that the statute required that no civil action be pending, he notified Judge Sutton immediately of his mistake. Throughout its Brief, Harrah's disparages Dr. Brown and his counsel for reporting the mistake to Judge Sutton. Perhaps Harrah's thinks Dr. Brown and/or his counsel should have waited a week, a month, or a year to report the mistake. Maybe Harrah's thinks Dr. Brown and/or his counsel should never have notified the expungement Court of the mistake. Dr. Brown and his counsel certainly should not be penalized, punished or chastised because they believed the ethical thing to do was to notify the Court as soon as they found out about the mistake.

In an attempt to overcome the well established rule that subject-matter jurisdiction cannot be conferred by estoppel, Respondent relies primarily on State ex rel. York v. Daugherty, 969 S.W.2d 223 (Mo. banc 1998) and Dept. 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 statutes 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 statutes which were determined to be unconstitutional 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.

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, this Court found that a party was not estopped from challenging a void order of the DCSE even though she had not challenged 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 Respondent is a void, non-final order that the Court was statutorily prohibited from making because the statutory conditions necessary for it to have authority to expunge arrest records did not exist when the expungement was sought.

Because of the length restrictions of a reply brief, Appellants cite, without discussion, the following cases which are consistent with this Court's holding in Kubley: State v. Wilson, 5 S.W.3d 527, 529 (Mo.App. 1999); Bock v. Broadway Ford Truck Sales, Inc., 169 S.W.3d 143 (Mo.App. 2005); Taylor v. Taylor, 47 S.W.3d 377 (Mo.App. 2001); Williams v. Williams, 932 S.W.2d 904 (Mo.App. 1996); Brown v. Brown, 878 S.W.2d 94 (Mo.App. 1994), and State ex rel. Houston v. Malen, 864 S.W.2d 427 (Mo.App. 1993). All of these cases 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.

B. WHETHER THE RECORDS HAVE BEEN DESTROYED IS A GENUINE ISSUE OF FACT

In response to Appellants' argument that there is an issue of fact regarding the destruction of records, Respondent asserts that the statutory preclusion from bringing any action subsequent to an expungement "flows from the judicial act of 'expungement.'" (Respondent's Brief at 50). If Respondent's argument is correct, then Appellant is not statutorily precluded from maintaining this action because the judicial act of expungement was void ab intitio and has been vacated. The Court entering the order lacked jurisdiction to enter the expungement. Therefore, the order was a nullity and of no legal effect. See In re Estate of Pittsenbarger, 136 S.W.3d 558, 560-561 (Mo. App. 2004). Thus, pursuant to Respondent's argument, because there has been no valid judicial act of expungement, Dr. Brown is not precluded from pursuing this action.

The judgment entered by Judge Sutton setting aside her order of expungement has not been appealed by the Clay County Missouri Circuit Court, the Clay County Missouri Sheriff's Department and the Clay County Missouri Prosecutor's Office; consequently, Judge Sutton's final judgment setting aside her order of expungement and denying expungement to Dr. Brown is conclusive as to those agencies. Furthermore, as discussed in Point I.C, the Missouri Gaming Commission was not a party to the expungement action, and therefore, the order of

expungement did not apply to the Commission. See §610.123.2 RSMo. It is the records of these Clay County agencies and the Commission that Harrah's describes as the "linchpin of Browns' action." There is no judicial act of expungement with respect to the records of these agencies that Harrah's deems vital to this action.

Respondent chastises Appellants for not producing any "admissible evidence negating document destruction." Harrah's misses the point. It is not Appellants who had the obligation to come forward with evidence of non-destruction. Rather, it was Harrah's obligation to come forward with uncontroverted facts that proved as a matter of law that the records were destroyed. The lack of uncontroverted facts provided by Harrah's and the fact that both the Highway Patrol and the Clay County Prosecutor's Office have produced records relating to Dr. Brown's arrest creates a question of fact regarding document destruction, and therefore, summary judgment was inappropriate. See also the discussion in Point I.C. regarding Harrah's lack of evidence.

Harrah's admits that "the record is silent about the status of arrest records maintained by … entities…" other than the Highway Patrol and Clay County Prosecutor's office. (Respondent's Brief at 51). Rather than recognizing that such lack of evidence demonstrates that it has failed to sustain its burden, Harrah's argues, "so this Court can only presume that the statutory mandate to destroy any such files has been fulfilled." (Respondent's Brief at 50). The record is not to be viewed in the light most favorable to the movant, but it is to be viewed in the light

most favorable to the non-movant, the Browns. See ITT Commercial Finance Corp., 854 S.W.2d at 376. Thus, the Court cannot reach an inference or entertain a presumption that is favorable to Harrah's. Id.

Finally, Harrah's alleges that Dr. Brown's counsel "palm[ed] off his own records as official files 'retrieved' from the Clay County Prosecutor." This allegation is false and not supported by the record.

C. CONCLUSION

Harrah's motion for summary judgment was based upon an order of expungement that was not valid or final, and was subsequently set aside. The Court had the authority to set aside its non-final, void order at any time. Because the expungement order upon which Harrah's based its motion does not exist, summary judgment should have been denied. In addition, the arrest records currently exist for Harrah's to 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 further proceedings.

TURNER & SWEENY

John E. Turner - MO - 26218
Christopher P. Sweeny - MO - 44838
10401 Holmes Road, Suite 450
Kansas City, MO 64131
(816) 942-5100
FAX: (816) 942-5104
ATTORNEYS FOR APPELLANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a disc and one copy of the foregoing Appellants' Substitute Reply Brief were duly mailed, postage prepaid, this 6th day of April, 2007, to:

Mr. Richard D. Rhyne
Mr. Matthew Hubbard
2345 Grand Boulevard, Suite 2800
Kansas City, MO 64108
ATTORNEYS FOR RESPONDENT

RULE 84.06 CERTIFICATION

1. Appellants' Attorneys: Christopher P. Sweeny, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No. 44838 and John E. Turner, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No. 26218.

2. Not counting the cover, certificate of service, this certification and the signature block, this brief contains 7,604 words in compliance with Rule 84.06(b).

3. This brief contains 922 lines.

4. The disc has been scanned and is virus-free.

Christopher P. Sweeny