**SC88298**

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**IN THE SUPREME COURT OF MISSOURI**

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**WILLIAM T. BROWN and JUDITH BROWN,**

**Plaintiffs-Appellants,**

**vs.**

**HARRAH'S NORTH KANSAS CITY, LLC,**

**Defendant-Respondent.**

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**Appeal from the Circuit Court of Clay County, Missouri**
**The Honorable Larry D. Harman**

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# SUBSTITUTE BRIEF OF RESPONDENT HARRAH'S NORTH KANSAS CITY, LLC

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**Richard D. Rhyne MO # 23692**
**R. Kent Sellers MO # 29005**
**Matthew R. Hubbard MO # 45096**
**2345 Grand Boulevard, Suite 2800**
**Kansas City, MO 64108**
**(816) 292-2000**
**(816) 292-2001 - Facsimile**

**ATTORNEYS FOR RESPONDENT**
**HARRAH'S NORTH KANSAS CITY, LLC**

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## STATEMENT OF FACTS[1]

Plaintiff-appellant William T. Brown[2] devotes several pages to the allegations underlying his tort claims against Harrah's North Kansas City, LLC. Suffice it to say that Harrah's filed an answer denying all allegations of tortious conduct arising out of Brown's arrest on Harrah's premises. I LF 20-26. As set forth below, the facts pertinent to this appeal largely involve the procedural history of this case, Brown's separate action to expunge his arrest records, and his efforts fourteen months later to invalidate the expungement that he obtained.

### A. Background

Brown filed this action for damages against Harrah's on January 2, 2003. I LF 4. Almost one year later, Brown filed a separate action for expungement of arrest records on December 30, 2003; the expungement action was assigned to Clay County Associate Circuit Judge Janet Sutton. I LF 95 (Appendix A4). One of the reasons Brown sought expungement was to obviate the need to report the arrest to the healing arts board in connection with renewal of his medical license.

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[1] The legal file ("LF") will be cited by volume and page (*e.g.*, I LF 192), and items in the appendix to this brief will be cited "Appendix ___."

[2] Although Judith Brown joined as plaintiff to assert a consortium claim and is nominally a party to this appeal (I LF 4, 18-19; II LF 259), she asserts no claim of error in regard to summary judgment on her claim.

I LF 64-65. On February 20, 2004, Judge Sutton entered an order of expungement of arrest records. I LF 97 (Appendix A6).

In March 2005, the Clay County Sheriff's Office responded to Harrah's request for records regarding the arrest and charge of Brown with the explanation that Brown's criminal file was expunged. I LF 52-58. In a deposition later that month, Brown confirmed that he had sought and obtained expungement of his criminal records in Missouri. I LF 64.

**B. Harrah's Motion for Summary Judgment**

On April 6, 2005, shortly after Harrah's was informed of the expungement, Harrah's filed a motion for summary judgment based on Missouri law regarding expungement of criminal records and served Brown's counsel by facsimile and regular mail. I LF 27-75. The next day (April 7, 2005), Brown filed in Judge Sutton's closed case a motion to vacate or set aside the expungement. I LF 98-101. Also on April 7, 2005, Judge Sutton signed an order granting Brown's motion and ordered "that the previous expungement order is vacated and set aside because it was entered without appropriate legal and statutory authority." I LF 108 (Brown's Appendix A-8).

On May 4, 2005, Brown responded in opposition to Harrah's motion for summary judgment, asserting that the expungement had been set aside on April 7, 2005 and therefore could no longer support the motion for summary judgment. I LF 76-130. The response included an affidavit from John P. O'Connor, one of Brown's attorneys, stating he was unaware of pertinent provisions of the

expungement statute until after Harrah's filed its motion for summary judgment. I LF 91-92.

### C. Hearing Before Judge Sutton

The next day, on May 5, 2005, Judge Sutton held a hearing on a motion by the State of Missouri to set aside the order of April 7, 2005 purportedly vacating the expungement. I LF 157-76. Attending the hearing were Brown's attorney, an Assistant Attorney General, and the Clay County counselor. I LF 157. Judge Sutton denied the State's motion and refused to set aside the order vacating the expungement. I LF 173-74. At the conclusion of the hearing, the Clay County counselor asked Judge Sutton to order Brown's attorney "to copy his entire criminal file to—and forward it to myself and whomever else might want it in the A.G.'s Office in our effort as best we can to recreate that file." I LF 174. Judge Sutton granted the request. I LF 175.[3]

### D. Further Summary Judgment Proceedings and Appeal

On May 23, 2005, Harrah's filed its reply brief in support of its motion for summary judgment. I LF 131-91. Harrah's reply summarized proceedings on the State's motion to set aside Judge Sutton's April 7 order vacating the expungement and included as exhibits copies of the May 5 hearing transcript and related pleadings. I LF 157-91.

[3] The State's appeal of Judge Sutton's ruling is SC88172.

On May 27, 2005, the trial court granted Harrah's motion for summary judgment and explained its rationale as follows:

> this court finds that plaintiff herein had obtained an expungement of the record of his arrest giving rise to the instant action. This court finds that Sec. 610.126, et seq. applies, and that the plaintiff it [*sic*: is] statutory barred from bringing this action.

I LF 192 (Brown's Appendix A-1).

On June 6, 2005, Brown moved to set aside the entry of summary judgment and filed his sur-reply to Harrah's motion for summary judgment. I LF 193-95; II LF 196-252. In response to Harrah's additional statement of facts, Brown admitted that the State had moved to set aside the order vacating the expungement and that Judge Sutton had held a hearing on May 5, 2005. I LF 138; II LF 198. Brown otherwise objected to Harrah's additional statement of facts in its entirety, asserting that the pleading and hearing transcript were not authenticated and included hearsay statements by attorneys. II LF 197-99. Brown then submitted an additional statement of facts in sur-reply based on a second affidavit from one of his attorneys, John P. O'Connor. II LF 199-200, 206-08.[4] As part of that affidavit, O'Connor attached correspondence he had received from the Missouri State Highway Patrol and recited a conversation wherein the Clay County

[4] Mo. Sup. Ct. R. 74.04(c)(4) does not provide for the inclusion of an additional statement of facts in a sur-reply.

Prosecutor's Office had informed him "that although the paper copy of William Brown's criminal file had been destroyed, the file had been maintained in some format which would allow it to be retrieved." II LF 206-07. Attached to O'Connor's affidavit were copies of documents O'Connor claimed had been provided to him by the Clay County Prosecutor's Office sometime after the April 7, 2005 order vacating the expungement. II LF 207, 216-46. The items were submitted without any affidavit of authentication from the custodian of records for the Clay County Prosecutor's Office. *Id.*

On June 13, 2005, Harrah's filed a response in opposition to Brown's motion to set aside the order granting summary judgment. II LF 253-58. Brown filed no reply and never requested a hearing on his motion; the trial court took no further action. I LF 3. Brown filed a notice of appeal on June 28, 2005. II LF 259-60.

The Missouri Court of Appeals for the Western District reversed in an opinion filed August 1, 2006. Upon motion for rehearing, the court of appeals vacated its decision on September 26, 2006, and issued a revised opinion on October 10, 2006, again reversing the summary judgment. Its rationale was that Judge Sutton's original order of expungement had never been denominated a judgment under Rule 74.01(a), so it never became final in the ensuing fourteen months and was therefore subject to modification by Judge Sutton at any time. Slip op. at 7-14.

This Court granted transfer on January 30, 2007.

## POINTS RELIED ON

**I. The Trial Court Did Not Err In Granting Summary Judgment Barring Brown's Tort Action Against Harrah's Based On The Prohibition In Section 610.126.3 That One Who Obtains An Expungement "Shall Not Bring Any Action Subsequent To The Expungement . . . Relating To The Arrest Described In The Expunged Records" Because (A) The Statute Forbids The Continuation Of Litigation In That The Plain And Ordinary Meaning Of "Bring" Includes Advance, Convey, Carry Or Cause To Come Along, (B) Interpreting Section 610.126.3 To Preclude The Continuation Of Litigation Is Consistent With The Statutory Intent That Expungement Of Arrest Records And Litigation About The Arrest Are Mutually Exclusive, And (C) Principles Of Finality And Judicial Estoppel Now Preclude Brown From Asserting That His Action Against Harrah's Predates Expungement In That Brown's Petition For Expungement And The Court's Order Of Expungement Were To The Contrary. (Response To Brown's Point I)**

*State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855 (Mo. banc 2001)

*State v. Owen*, 2007 WL 654359 (Mo. App. March 6, 2007)

*Noakes v. Noakes*, 168 S.W.3d 589 (Mo. App. 2005)

*State ex rel. Kelcor, Inc. v. Nooney Realty Trust, Inc.*,

966 S.W.2d 399 (Mo. App. 1998)

Mo. Rev. Stat. § 610.126.3

**II. The Trial Court Did Not Commit Reversible Error In Granting Summary Judgment Before Brown Filed His Sur-Reply Because It Did Not Materially Affect The Merits Of The Action In That Brown's Evidence Of "Unexpungement" Was Already In The Record And Was Rendered Immaterial By The Court's Summary Judgment Based On Expungement, Which Also Rendered Immaterial Any Further Evidence Or Argument Regarding "Unexpungement." (Response to Brown's Point II)**

*Heintz v. Woodson*, 758 S.W.2d 452 (Mo. banc 1988)

*Crawford v. Crawford*, 986 S.W.2d 525 (Mo. App. 1999)

*McMickle v. McMickle*, 862 S.W.2d 477 (Mo. App. 1993)

Mo. Sup. Ct. R. 84.13(b)

**III. The Trial Court Did Not Err In Granting Summary Judgment Barring Brown's Tort Action Against Harrah's Based On Brown's Expungement Of Arrest Records Because There Was No Genuine Issue Of Material Fact Regarding Record Destruction In That The Statutory Prohibition On Litigation Arises From The Judicial Act Of Expungement Rather Than Physical Destruction Of Records And In That Brown's Purported Evidence Of Nondestruction Was Inadmissible And Insufficient. (Response to Brown's Point III)**

*Hendrix v. Hendrix*, 183 S.W.3d 582 (Mo. banc 2006)

*State ex rel. York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998)

*State Department of Social Services v. Houston*,
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*SD Investments, Inc. v. Michael-Paul L.L.C.*,
157 S.W.3d 782 (Mo. App. 2005)

Mo. Rev. Stat. § 610.124

## ARGUMENT

### Standard of Review for All Points

Review in this case is de novo for at least two reasons. First, summary judgment is reviewed de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Second, "the trial court's judgment is based upon statutory interpretation. Construction of a statute is purely a question of law." *Martinez v. State*, 24 S.W.3d 10, 15 (Mo. App. 2000).

### I. The Trial Court Did Not Err In Granting Summary Judgment Barring Brown's Tort Action Against Harrah's Based On The Prohibition In Section 610.126.3 That One Who Obtains An Expungement "Shall Not Bring Any Action Subsequent To The Expungement . . . Relating To The Arrest Described In The Expunged Records" Because (A) The Statute Forbids The Continuation Of Litigation In That The Plain And Ordinary Meaning Of "Bring" Includes Advance, Convey, Carry Or Cause To Come Along, (B) Interpreting Section 610.126.3 To Preclude The Continuation Of Litigation Is Consistent With The Statutory Intent That Expungement Of Arrest Records And Litigation About The Arrest Are Mutually Exclusive, And (C) Principles Of Finality And Judicial Estoppel Now Preclude Brown From Asserting That His Action Against Harrah's Predates Expungement In That Brown's

**Petition For Expungement And The Court's Order Of Expungement Were To The Contrary. (Response To Brown's Point I)**

Brown first argues that the trial court erred in granting summary judgment because it misinterpreted or misapplied section 610.126.3, which provides 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." *See* Brown's Appendix A-3. Brown dissects this sentence to reach the conclusion that it does not bar his tort suit against Harrah's because he filed it before he obtained his expungement and merely continued prosecuting it thereafter. This argument is only possible because Brown procured an expungement contrary to the terms of the statute, which permits expungement if the court determines that "[n]o civil action is pending relating to the arrest or the records sought to be expunged." Mo. Rev. Stat. § 610.122 (5) (Brown's Appendix A-2). Therefore, Brown presents the unusual question of what does the statute mean in a situation that could never happen if Brown had obeyed the statute. Brown advocates holding the legislature to exacting standards of draftsmanship but makes excuses for those who failed to read what the legislature actually drafted.

Viewed in this context, Brown's myopic interpretation of the expungement statute fails for at least three reasons. First, it ignores the plain meaning of the word "bring" used in section 610.126.3. Second, it ignores the overall legislative intent evident in the expungement statute as a whole, fails to construe its

provisions in harmony, and represents an absurd and illogical interpretation. Finally, and in any event, by operation of principles of finality and judicial estoppel, Brown is now precluded from asserting that his tort action against Harrah's predated the expungement.

### A. Plain and Ordinary Meaning of "Bring"

"When construing statutes, this Court ascertains the intent of the legislature from the language used and gives effect to that intent." *State Department of Social Services v. Brookside Nursing Center, Inc.*, 50 S.W.3d 273, 276 (Mo. banc 2001). "The provisions of a legislative act are not read in isolation but construed together and read in harmony with the entire act." *Id*. "Absent express definition, statutory language is given its plain and ordinary meaning, as typically found in the dictionary." *Id.* at 276-77 (citing Webster's Third New International Dictionary as authoritative).

Section 610.126.3 provides that a petitioner who has obtained an expungement "shall not *bring* any action subsequent to the expungement." The definitions of "bring" include the following: "to convey, lead, carry, or cause to come along from one place to another"; bring also means to "advance." Webster's Third New International Dictionary Unabridged at 278 (1993). Similarly, this Court has recognized that "[t]he word 'brought' in the legal context means 'to advance or set forth in a court.'" *State ex rel. Linthicum v. Calvin*, 57 S.W.3d 855, 858 (Mo. banc 2001) (quoting American Heritage Dictionary). Thus, the Court held that actions during the continued prosecution of a single case can cause that

case to be "brought" repeatedly. *Id.* (holding that, for venue purposes, "a suit instituted by summons is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition"). These various definitions of "bring" are easily broad enough to encompass a variety of activities that move a suit forward and are not limited to the creation of a lawsuit. Moreover, the prohibition of section 610.126.3 applies to "*any* action," which further confirms its expansive scope.

Thus, Brown's attempt to equate "bring" with the "initiation" or "commencement" of a suit is too narrow, and he relies on a legal dictionary rather than a general dictionary. Brown's Brief at 21-22. Indeed, the eighth edition of Black's Law Dictionary does not even contain a definition for "bring" although an earlier edition contains an entry for "bring" that is consistent with the definitions found in dictionaries of general usage, including "to convey, carry or conduct, move." Black's Law Dictionary at 192 (6th ed.).

Equally misguided is Brown's contention that the expungement statute should be narrowly construed to have the least impact on the common law. As Brown concedes elsewhere in his brief (Brown's Brief at 32-33), the legislature expressed the clear intent to make expungement purely a creature of statute, providing that otherwise "the courts of this state shall have no legal or equitable authority to close or expunge any arrest record." Mo. Rev. Stat. § 610.126.2 (Brown's Appendix A-3). Brown's argument that a statute that expressly displaces the common law should nevertheless be interpreted to minimize its

impact on the common law (Brown's Brief at 21) is nonsensical, particularly in light of the clear legislative intent (discussed in the next subsection) to preclude further litigation regarding the expunged arrest and records.

### B. Legislative Intent for Expungement Act

Section 610.126 is "part of a comprehensive expungement act relating to arrest records, consisting of five statutory sections, that was enacted by our legislature in 1993 and subsequently amended in 1995." *Martinez v. State*, 24 S.W.3d 10, 13 n.2 (Mo. App. 2000). Accordingly, section 610.126 must not be read in isolation but should be "construed together and read in harmony with the entire act." *State Department of Social Services*, 50 S.W.3d at 276; *accord Martinez*, 24 S.W.3d at 18. It is evident from the expungement statute read as a whole that the legislature intended to limit the availability of expungement and allow it only in exchange for tradeoffs by a petitioner for expungement.

Most notably, and in recognition of the important role that official records may play in litigation regarding an arrest, the legislature made expungement available only as a mutually exclusive alternative to litigation about the arrest. An expungement should not be entered if a "civil action is pending relating to the arrest or the records sought to be expunged." Mo. Rev. Stat. § 610.122(5) (Brown's Appendix A-2). Likewise, section 610.126.3 precludes litigation "subsequent to the expungement." Thus, the statutory message is that a person who is litigating, or wishes to litigate, about an arrest should not seek expungement.

Brown's narrow interpretation of section 610.126.3 fails because it ignores this clear legislative intent and leads to an absurd interpretation that would make a mockery of that intent. Under well settled law, no Missouri statute should be interpreted as having an absurd and illogical meaning. *In re Beyersdorfer*, 59 S.W.3d 523, 526 (Mo. banc 2001). As well illustrated by this case, Brown advances an interpretation whereby a litigant could evade section 610.126.3—and transform the expungement statute into a vehicle for State-sponsored spoliation of evidence—by simply filing suit and then requesting expungement in violation of section 610.122(5). The legislature should not be expected to redundantly prohibit in one provision a scenario already foreclosed by compliance with another provision.

In a recent case arising on appeal from denial of a petition for expungement of an alcohol-related driving offense, the Western District construed the meaning of a statutory exception precluding expungement for any individual "'who has been issued a commercial driver's license.'" *State v. Owen*, 2007 WL 654359 at *1 (Mo. App. March 6, 2007) (quoting Mo. Rev. Stat. § 577.054.2). The plaintiff had surrendered his commercial license before seeking expungement, and argued he thereby regained eligibility for expungement. The court of appeals rejected this contention because it was contrary to the statutory text and because "it would defeat the purposes of the statutory exceptions if a driver having a commercial license could surrender the license in order to obtain an expungement and then, immediately thereafter, apply for and obtain another commercial license." *Id*. at

*3. Although *Owen* involved a different provision and different posture (unlike Brown, the applicant made disclosure, was denied expungement and then pursued a direct appeal), the concern about statutory manipulation remains the same.[5]

Faced with a comparably problematic situation, this Court rejected an interpretation of "brought" in the venue statute that left it vulnerable to manipulation because that interpretation "assumed a temporal distinction that conferred different venue rights on Missouri defendants depending on whether the plaintiff initially named or subsequently added them to the lawsuit." *Linthicum*, 57 S.W.3d at 858. "This construction is contrary to both the plain language of the statute and to the legislature's purpose . . . ." *Id.* Likewise, no party should have to defend litigation regarding an arrest for which records have been expunged, regardless of the exact sequence or timing of that suit in relation to the expungement.

[5] There was no concern about statutory manipulation in *Martinez v. State*, 24 S.W.3d 10 (Mo. App. 2000), the case upon which Brown relies. Unlike Brown, the arrestee in *Martinez* disclosed the facts, was denied an expungement, and then appealed. The plaintiff in *Martinez* had been acquitted and then sought an expungement, rather than seeking the expungement of evidence directly relevant to a pending matter.

Brown attempts to claim *Linthicum* supports his argument based on its discussion of various meanings or synonyms for the word "brought," but once again Brown is ignoring the big picture in at least two respects.

First, *Linthicum* demonstrates the need for statutory interpretation that is mindful of statutory context. Just as the *Linthicum* analysis was conducted with respect to the purpose and policy of venue (57 S.W.3d at 857-58), the analysis here should focus on the purpose and policy evident in the expungement statute. Brown's attempt to take words from unrelated statutes (such as statutes of limitation) should be disregarded for lack of context and comparable purpose.

Second, *Linthicum* was decided against a backdrop of perceived abuse and manipulation of the venue statute by forum shopping. Although some members of the Court would have deferred to the legislature on whether to alter a status quo known to the legislature, those circumstances are not present here. The overall legislative intent to offer expungement to an arrestee as a mutually exclusive alternative to further litigation is apparent in the statute. There is no settled practice or precedent permitting what Brown attempts to accomplish here, so the legislature has not acquiesced in such tactics. Instead, Brown asks this Court to remodel the legislative framework for expungement to the detriment of law enforcement officers or private persons who might thereafter find themselves engaged in litigation with the arrestee.

In sum, it would be absurd and illogical to adopt an interpretation permitting preexisting litigation to survive expungement. Accordingly, this Court

should give the expungement statute an "interpretation [that] protects all party defendants equally and gives effect to the intent of the legislature." *Linthicum*, 57 S.W.3d at 858.

### C. Finality and Preclusive Effect of Prior Actions

In any event, Brown's course of conduct in the judicial process and the expungement that he obtained now preclude him from asserting the arguments he makes in Point I.

In his petition for expungement of arrest records, Brown expressly stated that his request was "[p]ursuant to Section 610.122, RSMo." (I LF 95 (Appendix A4)); this statute establishes that expungement should be granted only when "[n]o civil action is pending relating to the arrest or the records sought to be expunged." In granting expungement, Judge Sutton found Brown was entitled to expungement of the arrest records pursuant to section 610.123. I LF 97 (Appendix A6). Although Judge Sutton made no express finding about the nonexistence of pending litigation, Rule 73.01(c) provides that in a court-tried matter "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." Appendix A1; s*ee also McLain v. Johnson*, 885 S.W.2d 345, 347 (Mo. App. 1994).

This sequence of events now forecloses Brown's arguments under Point I for several interrelated reasons.

### 1. Principles of Finality: Res Judicata and Collateral Estoppel

The unappealed expungement of February 20, 2004 precludes Brown from taking a position contrary to the express or implicit findings on which it was based. *Cf. Noakes v. Noakes*, 168 S.W.3d 589 (Mo. App. 2005) (mother who did not appeal earlier award of visitation rights to stepgrandparent was barred by res judicata from later asserting that the stepgrandparent had no statutory right to any visitation). Judge Sutton's decision necessarily rested on a finding under the statute (implied by operation of Mo. Sup. Ct. R. 73.01(c)) that no litigation was pending regarding the arrest. Had Brown disputed that result, he should have appealed it, but he never did.

Principles of finality cannot be avoided merely by claiming some matter or circumstance was overlooked. For example, in *Noakes* the mother claimed that only after the stepgrandparent had been granted visitation rights did a subsequent court decision construe the statute as not extending such rights to stepgrandparents. The court nevertheless applied res judicata, finding that the argument was apparent on the face of the statute and could have been raised when the visitation rights were originally granted.[6] 168 S.W.3d at 595-96. Likewise,

[6] The *Noakes* court applied res judicata based on a contention first raised at oral argument (168 S.W.3d at 595), thereby indicating the doctrine was being applied in the manner of judicial estoppel and as alternative grounds for affirmance rather than as an affirmative defense. *See* section I.C.2., *infra*. *Accord*

the requirement of no pending litigation and the fact that such litigation was pending were obviously matters of which Brown and his attorneys had actual or constructive knowledge, so Brown is now precluded from taking a contrary position.

Even though res judicata may not technically apply here because Harrah's was never a party to Brown's expungement action, the expungement also has a preclusive effect by operation of collateral estoppel. *See Oates v. Safeco Ins. Co.*, 583 S.W.2d 713, 719 (Mo. banc 1979) (discussing elements of collateral estoppel). Collateral estoppel can operate to preclude new litigation on an issue without the necessity of specific findings: "A finding which is implicit in a judgment can also have this effect." *Dehner v. City of St. Louis*, 688 S.W.2d 15, 17 (Mo. App. 1985). Judge Sutton reached the merits by granting an expungement and implicitly found no litigation regarding the arrest was pending; Brown was a party to the expungement proceeding and had a full and fair opportunity to litigate issues supporting the relief he sought and ultimately obtained. The elements of collateral estoppel are therefore satisfied, and Brown is precluded from again litigating

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*ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 387-88 (Mo. banc 1993) (because grant of summary judgment is reviewed *de novo,* court may affirm on an alternative theory "entirely different . . . than that posited at trial").

whether a suit regarding his arrest was pending prior to expungement.[7] *Cf. Dehner,* 688 S.W.2d at 16-18 (earlier decision granting city a lien for demolition costs necessarily included finding that demolition followed proper procedures, so collateral estoppel precluded later claim of wrongful demolition).

**2. Judicial Estoppel**

Brown procured an expungement premised upon the nonexistence of litigation regarding his arrest, so judicial estoppel now precludes him from changing position and seeking relief based on the contradictory assertion that his action against Harrah's was pending at and prior to the expungement.

"Missouri has long recognized the doctrine of judicial estoppel." *State ex rel. Kelcor, Inc. v. Nooney Realty Trust, Inc.*, 966 S.W.2d 399, 403 (Mo. App. 1998) (internal quotation omitted). Courts generally invoke judicial estoppel to "'prohibit parties from deliberately changing positions according to the exigencies of the moment" (*Dick v. Children's Mercy Hosp.*, 140 S.W.3d 131, 141 n.5 (Mo. App. 2004) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)) or to prevent individuals "from playing fast and loose with the courts." *Kelcor*, 966 S.W.2d at 403 (internal quotation omitted). The purpose of the doctrine is to "protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at 749.

[7] To whatever extent Brown may attempt to avoid this result by asserting that the expungement was somehow void or nonfinal, his arguments are erroneous for the reasons stated in section III, *infra*.

> [W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

*Id.* (internal quotation omitted). The *New Hampshire* Court also noted that "absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Id*. (internal quotation omitted). For example, a husband who filed a petition for dissolution reciting there were two children born of the marriage and who was granted relief on that basis was judicially estopped from later seeking to be relieved from a portion of his child support obligations by asserting that he was neither the biological nor adoptive father of one of the two children. *Jeffries v. Jeffries*, 840 S.W.2d 291, 292-94 (Mo. App. 1992) (immaterial that husband may not have read all the documents he signed).

Although the doctrine of judicial estoppel is not limited to any specific formula, the following factors "typically inform the decision whether to apply the doctrine in a particular case:"

> First, a party's later position must be "clearly inconsistent" with its earlier position. . . . Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent

> position in a later proceeding would create "the perception that either the first or the second court was misled." . . . Absent success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations," . . . and thus poses little threat to judicial integrity. . . . A 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. . . . (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage").

*New Hampshire*, 532 U.S. at 750-51 (citations omitted). These three factors plainly support the application of judicial estoppel to Brown.

First, Brown signed a petition claiming entitlement to expungement of his arrest records "[p]ursuant to Section 610.122, RSMo." I LF 95. Under the provision he cited, expungement may be granted if certain conditions exist, including that "[n]o civil action is pending relating to the arrest or the records sought to be expunged." In an about-face, Brown repeatedly told the trial court and again tells this Court that he "Brought His Action Prior To The Expungement" and was not entitled to expungement. *E.g.*, Brown's Brief at 6. Brown's positions are "clearly inconsistent."

Second, Brown succeeded in convincing Judge Sutton to find, pursuant to section 610.123, that "the petition in the above titled cause is entitled to

expungement of the arrest records specified in the petition." I LF 97 (Appendix A6). Thus, Judge Sutton accepted Brown's position that he had met the requirements for expungement, including the nonexistence of pending litigation regarding his arrest. In sharp contrast, Brown now urges this Court to rule in his favor and find trial court error precisely because his suit against Harrah's was pending when he convinced Judge Sutton otherwise.

Finally, the unfair advantage to Brown—and the unfair detriment to Harrah's—is apparent. 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. Government records that went to the heart of that issue have been expunged. Documents have been destroyed and the integrity of files has been lost. There is no longer a reliable record of all that occurred to be used as evidence in its own right or to refresh the recollections of witnesses about events that happened seven years ago. There is simply no way to know how much critical evidence has been lost as a result of the expungement process that Brown initiated.

Choices have consequences, and Brown made the choice to have his arrest records expunged. Brown and his counsel well knew they were pursuing a civil action against Harrah's based on allegations that there was no probable cause for his arrest even as they simultaneously sought the destruction of records that would go to the heart of establishing or refuting that claim. Brown may protest that he

and his counsel did not intentionally mislead the Court, but as discussed above, there is no formula mandating intentional misconduct as a basis for judicial estoppel. At a minimum, Brown's conduct was reckless and warrants application of judicial estoppel to protect judicial integrity.

Brown and his counsel played fast and loose with the courts in seeking expungement and engaged in hurried machinations in reaction to Harrah's motion for summary judgment. The doctrine of judicial estoppel operates to rectify this abuse of the judicial process by placing the consequences for such abuse on the abuser by precluding Brown from controverting summary judgment facts in a manner inconsistent with the position he took in seeking expungement.[8] Affirming summary judgment will terminate this action and conform reality to Brown's position when he obtained expungement. To do anything else is to reward abuse of the judicial process and impose the prejudice on Harrah's, contrary to fundamental notions of justice.

## II. The Trial Court Did Not Commit Reversible Error In Granting Summary Judgment Before Brown Filed His Sur-Reply Because It Did Not Materially Affect The Merits Of The Action In That Brown's

[8] Harrah's raised judicial estoppel in its summary judgment reply and at the earliest appropriate opportunity—immediately after it became apparent that Brown was attempting to deny what he had previously advocated and obtained. I LF 132-34, 137, 148-53.

**Evidence Of "Unexpungement" Was Already In The Record And Was Rendered Immaterial By The Court's Summary Judgment Based On Expungement, Which Also Rendered Immaterial Any Further Evidence Or Argument Regarding "Unexpungement." (Response to Brown's Point II)**

One day after Harrah's moved for summary judgment based on the expungement, Brown sought and obtained from Judge Sutton an order purportedly setting aside the expungement. This "unexpungement" was the centerpiece of Brown's response to Harrah's motion, which Brown filed early and one day before the hearing Judge Sutton had scheduled on the State's motion to set aside the "unexpungement." I LF 76-130.

Because of the possibility that the trial court might consider the "unexpungement" as somehow material to a decision on summary judgment, Harrah's submitted a reply memorandum on May 23 containing an additional statement of facts updating the record to include the State's motion to set aside and the hearing before Judge Sutton on May 5. I LF 131, 137-40.

A few days after Harrah's filed its reply brief and before the date for Brown to file a sur-reply had passed, the trial court proceeded to enter summary judgment, based on the expungement plaintiff had obtained on February 20, 2004. I LF 192. Brown now claims the trial court erred in issuing its decision before he filed his sur-reply containing a response to Harrah's statement of additional facts. II LF 196, 197-99. Indeed, Rule 74.04(c)(6) states that "[a]fter the response, reply

and any sur-reply have been filed or the deadlines therefor have expired, the court shall decide the motion." However, the issue before this Court is not the occurrence of some technical or procedural error; instead, the question on appeal must be framed in terms of whether *reversible* error occurred.

Rule 84.13(b) requires that any trial court error must be material to warrant appellate relief: "No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action." Appendix A2. As this Court has explained,

> Procedural rules are but the means through which we seek to ensure the fair and orderly resolution of disputes and to obtain just results. They are not ends in themselves. For this reason, we do not generally consider noncompliance with rules or statutory procedures to warrant reversal in the absence of prejudice.

*Heintz v. Woodson*, 758 S.W.2d 452, 454 (Mo. banc 1988). "Without a showing of prejudice from the technical non-compliance . . . , the complaining party may not expect a reversal." *Crawford v. Crawford*, 986 S.W.2d 525, 528 (Mo. App. 1999). Even rules framed in mandatory terms "must be interpreted in view of the admonitory language of Rule 84.13(b)." *McMickle v. McMickle*, 862 S.W.2d 477, 483 (Mo. App. 1993). And the one case Brown cites under his Point II recognizes that, in appropriate cases, a reviewing court "may waive noncompliance and decide the appeal on the merits." *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 637 (Mo. App. 2000).

In granting summary judgment against Brown, the trial court did nothing more than give legal effect to a final, unappealed expungement entered some fifteen months earlier. Brown had already put before the court his evidence that an "unexpungement" had been entered, but this obviously had no impact on the decisive question of law. Accordingly, further discussion and debate about the "unexpungement," the State's motion to set aside, the hearing before Judge Sutton, judicial estoppel, and related matters are entirely immaterial to the trial court's dispositive rationale.[9] Plaintiff is not entitled to a reversal by claiming that he was prejudiced by a missed opportunity to present additional evidence and argument in support of a position that fails as a matter of law (as discussed above in section I and below in section III).

## III. The Trial Court Did Not Err In Granting Summary Judgment Barring Brown's Tort Action Against Harrah's Based On Brown's Expungement Of Arrest Records Because There Was No Genuine Issue Of Material Fact Regarding Record Destruction In That The

[9] Moreover, Brown made no serious effort to prompt any further debate. Brown submitted his sur-reply in connection with his motion to set aside the summary judgment, but he never noticed his motion for hearing in order to bring his motion and sur-reply to the trial court's attention; instead, Brown filed his notice of appeal early. *Cf.* Mo. Sup. Ct. R. 81.05(a)(2)(A) (after-trial motions deemed overruled after 90 days).

**Statutory Prohibition On Litigation Arises From The Judicial Act Of Expungement Rather Than Physical Destruction Of Records And In That Brown's Purported Evidence Of Nondestruction Was Inadmissible And Insufficient. (Response to Brown's Point III)**

For his final point, Brown argues summary judgment was entered in erroneous disregard of what he claims were two disputed issues of material fact. First, Brown argues that the existence of an expungement was disputed because he engineered an "unexpungement" one day after Harrah's filed its motion for summary judgment. To the contrary, the effect of Brown's unappealed expungement is a legal question correctly resolved against Brown, notwithstanding the attempted wizardry of "unexpungement." As demonstrated below, the "unexpungement" is void, the original expungement suffers from no invalidating defect, and it is conclusive as to the rights of the parties. Second, any purported dispute regarding actual destruction of Brown's arrest records is neither material nor genuine because the statutory bar against litigation arises from the judicial act of expungement rather than the physical act of record destruction, and in any event, Brown's arguments regarding the alleged nondestruction of some documents rest on insufficient and inadmissible evidence.

**A. Legally Effective Expungement**

**1. "Unexpungement" is Void**

According to Brown's own evidence, his petition for expungement was granted on February 20, 2004 and was never appealed. I LF 97. Brown's only

basis for claiming a dispute about the existence of an expungement arises from the "quick fix" Brown engineered within 24 hours after Harrah's filed its motion for summary judgment, but these actions by Brown were legally ineffective and cannot raise any impediment to summary judgment.

As Brown concedes, Missouri courts have no authority regarding expungement except as granted by statute. Brown's Brief at 32-33 (citing Mo. Rev. Stat. § 610.126.2). The statute grants no authority to "unexpunge" arrest records, so Judge Sutton was powerless to provide Brown the relief purportedly granted on April 7, 2005.

Even more fundamentally and apart from the lack of statutory authorization for "unexpungement," Judge Sutton had no jurisdiction to alter or abrogate an expungement entered more than a year earlier. *See, e.g.*, *State ex rel. Nixon v. Hoester*, 930 S.W.2d 52, 54 (Mo. App. 1996) ("Once a trial court disposes of post-trial motions it loses jurisdiction over the judgment."). For example, in *SD Investments, Inc. v. Michael-Paul L.L.C.*, 157 S.W.3d 782 (Mo. App. 2005), the trial court's judgment had previously been affirmed on appeal without remand. *Id.* at 785. The following year, on cross motions by the parties arising out of enforcement proceedings, the court granted some additional relief, which was then challenged in a second appeal. *Id.* at 784-85. The court found the purported modification of the judgment to be void because, although a court has inherent power to enforce a judgment as originally rendered, "the trial court's power to modify a judgment ceases when the judgment becomes final." *Id.* at 786 (internal

quotation omitted). Thus, "the trial court lacked jurisdiction to take any action other than to enforce its original judgment." *Id.* at 788.

**2. No Invalidating Defect in Expungement**

Brown erroneously contends the expungement was jurisdictionally defective and therefore void. Brown points to supposed errors in his uncontested and unappealed expungement based on cases involving immediate direct appeals of expungements in contested cases. Brown's Brief at 35-36. For example, Brown cites *Martinez v. State,* 24 S.W.3d 10 (Mo. App. 2000), for the proposition that "only after an evidentiary hearing where evidence is presented is the Court able to enter a proper judgment of expungement." Brown's Brief at 36.[10] In reality, the *Martinez* requirement of an evidentiary hearing applies only "if the matter is disputed by any of the named defendants." *Martinez*, 24 S.W.3d at 20.

Error that might serve as the basis for reversal on direct appeal does not invalidate a judgment. In Missouri, "[a] judgment is void in *only* three circumstances: (1) if the trial court did not have subject matter jurisdiction; (2) if the trial court did not have personal jurisdiction over the parties; or (3) if the trial court acted in a manner inconsistent with due process of law." *American Economy*

[10] Brown does not, however, contend that his "unexpungement"—obtained on an expedited, ex parte basis without a hearing and without notice to the State—is defective for lack of an evidentiary hearing.

*Ins. Co. v. Powell*, 134 S.W.3d 743, 747-48 (Mo. App. 2004) (emphasis added).[11] The February 20, 2004 expungement of Brown's arrest record did not suffer from any of these three fatal defects.

First, the statute vests subject matter jurisdiction in the court in the county where the arrest occurred (Mo. Rev. Stat. § 610.123.1 (Brown's Appendix A-4)), and that is where Brown sought expungement. I LF 95-96. Brown concedes that he invoked the court's jurisdiction by providing information as specified in the approved form of petition. Brown's Brief at 36-37. The fact that the approved form calls for no express statement regarding pending litigation simply confirms that its existence or nonexistence is immaterial to establishing the subject matter jurisdiction of the expungement court. Likewise, section 610.123.1 lists the information that the petition "shall include" and provides that the petition "shall be

[11] Brown relies on an Ohio case invalidating an expungement (*State v. Thomas*, 64 Ohio App. 2d 141, 411 N.E.2d 845 (1979)), but it did not employ this Missouri test for a void judgment. The Ohio statutory scheme was also distinguishable (closure of conviction records rather than destruction of arrest records), and the party moving to set aside the expungement was the State rather than the convicted criminal. *Cf. Jeffries v. Jeffries*, 840 S.W.2d 291, 293 (Mo. App. 1992) (fraud sufficient to set aside a judgment under Rule 74.06 must be fraud of the party against whom relief is sought; "unconscionable to permit a party to set aside a judgment because of his own fraud").

dismissed if the information is not given." Notably, the statutory list includes nothing about the existence of litigation, so that information cannot be considered jurisdictional. Likewise, Brown's failure to verify the petition is at best a nonjurisdictional defect in form and is not listed among the absent "information" that will result in dismissal.[12]

Second, there was no issue of personal jurisdiction over any of the parties to the expungement. Certainly Brown cannot complain because it was Brown as *plaintiff* who submitted to jurisdiction by seeking the expungement, so he plainly had notice. Thus, Brown's reliance on *Greene v. St. Louis County*, 327 S.W.2d 291 (Mo. 1959), where a judgment was invalidated for lack of proper notice or personal jurisdiction as to a defendant, is misplaced.

Third, there was no issue of due process in regard to the expungement, and Brown identifies none. Consequently, Brown has no support for the contention that the expungement was void and unenforceable. Indeed, even though it ruled for Brown on other grounds, the court of appeals found that Judge Sutton had jurisdiction to grant an expungement. Slip op. at 8.

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[12] Brown's argument attempting to capitalize on his own failure to verify the petition was not briefed in the court of appeals and was first asserted there in oral argument, so it has not been preserved. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002).

This Court last year rejected the contention that a court may "retroactively be deprived of jurisdiction, and any judgment entered by it thereby rendered void, if in entering the judgment the court failed to follow all procedures set out in the relevant statutes, such as by failing to make findings of fact or to hold a hearing the statutes require." *Hendrix v. Hendrix*, 183 S.W.3d 582, 590 (Mo. banc 2006). As this Court explained, "such errors would not deprive the court of subject matter or personal jurisdiction, nor would they affect the power of the court to render a particular judgment in the particular case." *Id*. Brown's argument is therefore misguided:

> The tendency to call matters "jurisdictional" that are really only assertions of legal error greatly confuses the notion of jurisdiction in civil cases. It can also create the potential for great mischief because calling legal errors "jurisdictional" could be used years later to void settled judgments.

*Id*. "Nothing is better settled than the principle that an erroneous judgment has the same *res judicata* effect as a correct one" *Noakes v. Noakes*, 168 S.W.3d 589, 598 (Mo. App. 2005) (also observing that a court with jurisdiction "may decide the issues erroneously without losing that jurisdiction"). "If the court made a mistake, it was a mistake of law, and any mistake of law should have been addressed on direct appeal." *Id*.

In short, Brown's expungement was not void for lack of jurisdiction.

### 3. Expungement is Final and Conclusive

Brown asserts the 2004 order of expungement "was not a final judgment," so Judge Sutton "retained jurisdiction" and "the power to alter, set aside or abrogate her order." Brown's Brief at 35. For support, Brown offers only a "see" citation to *Williams v. Williams*, 41 S.W.3d 877 (Mo. banc 2001), which merely stands for the proposition that a judgment which fails to dispose of all issues between the parties is not a final judgment. *Id*. at 878. Brown fails to identify any matter left unresolved by the 2004 expungement, and the court of appeals observed "that it purports to fully adjudicate the matter at controversy and to judicially resolve all the issues presented in the petition as to the parties in question." Slip op. at 10. Nevertheless, the court of appeals then proceeded to conclude that because the order of expungement was not in the form prescribed by Rule 74.01(a) (Appendix A7) for purposes of taking an appeal, it was not a judgment and remained subject to further proceedings for more than a year. Slip op. at 14.

Brown has not embraced or briefed the rationale developed by the court of appeals as the basis for reversing summary judgment, just as Brown never invoked any rationale based on Rule 74.01(a) in his opening brief to the court of appeals. Consequently, the matter has never been sufficiently preserved as a basis for relief on appeal. *Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. banc 2002) ("an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and

the point is considered abandoned in this Court"). Nevertheless, Brown did begin discussing Rule 74.01(a) in his reply brief to the court of appeals, which then expanded the argument into the basis for its decision.

In light of the court of appeals' rationale and the possibility that Brown may again raise Rule 74.01(a) for the first time in reply, Harrah's feels compelled to address these issues in its only briefing opportunity before this Court. As discussed below in subsection a., even assuming Brown could establish that the expungement was somehow defective or "void," it is nevertheless a conclusive determination of his rights and obligations. Moreover, as demonstrated in subsection b., in the case of an uncontested and unappealed expungement decision such as this one, Rule 74.01(a) does not, and cannot for constitutional reasons, alter the statutory directive for the determination of expungement by "order."

**a. Case law on conclusive judicial determinations**

In December 2003, Brown petitioned for an expungement, and in February 2004, he got what he wanted from Judge Sutton, who entered an order directing each agency named in the petition to expunge Brown's arrest records as required by statute. The matter was uncontested; no one was aggrieved; there was no appeal. Everyone accepted the decision for some fourteen months. This Court in two decisions has held unequivocally that those who accept a judicial decision are bound by it—even if it is somehow flawed.

In *State ex rel. York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998), the Court held that the rights of two former spouses "were *concluded* by the June 10,

1996, 'judgment' of the commissioner" dissolving their marriage, even though an earlier case had "held that documents signed solely by a commissioner *are not final appealable judgments*." *Id*. (emphasis added). "[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). Consequently, this 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*. This means the order of expungement binds Brown with respect to the State, which was a party to the expungement proceeding and has rights and duties by statute, and with respect to Harrah's, which acquired the statutory right to be free from litigation by Brown arising out of the arrest. Mo. Rev. Stat. § 610.126.3. Thus, Harrah's right to summary judgment based on a conclusive judicial determination of expungement is independent of any outcome in the State's appeal.

This Court reiterated the importance of finality and repose in *State Department of Social Services v. Houston*, 989 S.W.2d 950 (Mo. banc 1999), where a father attempted to challenge a child-support decision in which he had earlier acquiesced. The father received notice of the decision but did nothing for

fifteen months, when he moved to set it aside for a procedural defect; the trial court set aside the modification order a year later. *Id*. at 951. 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 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. Brown plainly had notice of the expungement he sought and obtained, and the State and other authorities ordered to expunge arrest records were entitled to rely on an order triggering various rights and responsibilities under the statute.

The court of appeals followed both *State ex rel. York* and *State Department of Social Services* in *River Salvage, Inc. v. King*, 11 S.W.3d 877 (Mo. App. 2000). The appellant there had 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 attempted to appeal. In rejecting the belated appeal, the court 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, "[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 decisions by this Court upon which it relied, were all issued after the 1995 amendment to Rule 74.01(a) and demonstrate that courts will assure finality and repose by treating as conclusive any judicial decision which the parties themselves have treated as conclusive for more than a year. Moreover, these controlling decisions do not turn on the precise contention of the party advocating for repose or finality. *See River Salvage*, 11 S.W.3d at 879 (applying estoppel "[a]lthough not articulated well" by party opposing effort to disregard prior judicial decision).

Without discussing any of these cases regarding the conclusiveness of judicial decisions, the court of appeals instead treated as controlling several decisions by this Court construing procedural Rule 74.01(a) in regard to appealability. None of the cases cited by the court of appeals presents a comparable situation involving the conclusive effect of a long-standing, unchallenged judicial decision. If anything, the cited decisions confirm their narrow focus on a procedural issue of appealability. *See, e.g.*, *Brooks v. Brooks*, 98 S.W.3d 530, 531-32 (Mo. banc 2003) (only addressing "appealability" of QDRO; no suggestion that unappealed QDRO is unenforceable); *In re Interest of R.B.*, 186 S.W.3d 255 (Mo. banc 2006) (appeal dismissed because juvenile officer

lacked right to appeal); *Spiece v. Garland*, 197 S.W.3d 594, 596 (Mo. banc 2006) (determining which of two decisions by trial court was the one supplying jurisdictional basis for appeal; indicating that Rule 74.01(a) addresses "the *procedural* requirements for the *appeal*"; emphasis added); *Williams v. Williams*, 41 S.W.3d 877 (Mo. banc 2001) (determining jurisdictional basis for appeal); *In re Marriage of Coonts*, 190 S.W.3d 590 (Mo. App. 2006) (dismissing appeal for want of final judgment). None of these cases addresses the dispositive point here, namely that an uncontested judicial decision is conclusive of substantive rights after standing unchallenged for more than a year.

**b. Statutory directive for expungement by "order"**

Mo. Rev. Stat. §§ 610.122 *et seq*. is "a comprehensive expungement act relating to arrest records, consisting of five statutory sections." *Martinez v. State*, 24 S.W.3d 10, 13 n.2 (Mo. App. 2000). As part of this act, the legislature expressed its intention to make expungement purely a creature of statute, providing that otherwise "the courts of this state shall have no legal or equitable authority to close or expunge any arrest record." Mo. Rev. Stat. § 610.126.2 (Brown's Appendix A-3). Consistent with constitutional restrictions, the legislature authorized this Court to "promulgate rules," but only those "establishing *procedures*." *Id*. § 610.123.5 (emphasis added) (Brown's Appendix A-5). The act, as well as the procedural rules and forms for expungement, all

provide for judicial determination of substantive rights by order, as was done here.[13]

A court that finds "the petitioner is entitled to expungement . . . *shall* enter an *order* directing expungement." Mo. Rev. Stat. § 610.123.4 (emphasis added). "A copy of the *order* shall be provided to each agency identified in the petition . . . ." *Id.* (emphasis added). "All records *ordered* to be expunged pursuant to section 610.123 *shall* be destroyed" or "blacked out" (*id.* § 610.124 (emphasis added)), and "[e]ntries of a record *ordered* expunged pursuant to section 610.123 *shall* be removed from all electronic files maintained with the state of Missouri." *Id*. (emphasis added). Section 610.125 imposes criminal consequences for persons "subject to an order" of expungement who knowingly fail to comply with their statutory obligations or use arrest information for financial gain. Finally, section 610.126.3 provides "[t]he petitioner shall not bring any action subsequent to the expungement against any person or agency relating to the arrest described in the expunged records."

Like the expungement statute granting this Court authority to adopt procedural rules, article V, section 5 of the Missouri Constitution (Appendix A8) grants this Court authority to "establish rules relating to practice, procedure and

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[13] The order of expungement was in the form prescribed by the Supreme Court. *Compare* I LF 97 (Appendix A6) *with* Mo. Misc. Rule 155 and accompanying form for "Order of Expungement of Arrest Records."

pleading," but the "rules shall not change substantive rights." "A rule that would affect substantive matters would be beyond the rule-making authority of the Supreme Court." *In re Marriage of Ulmanis*, 23 S.W.3d 814, 818 (Mo. App. 2000) (Rule 74.06(b)(5) conferred no authority to terminate maintenance obligation contrary to statute).

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). The words this Court employed in Rule 74.01 (a) confirm its limited scope and purpose.

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. Appendix A7.

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), this 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 2004 order of expungement triggered the State's statutory obligations and extinguished Brown's right to bring a civil action against Harrah's regarding the arrest, 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).

To apply Rule 74.01(a) as did the court of appeals would be contrary to article V, section 5 of the Constitution, as well as *City of St. Louis v. Hughes* and *Linzenni*, because it would construe Rule 74.01(a) to destroy 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 this Court, it is especially important to 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).

In short, whether Judge Sutton's order of expungement was in a form sufficient to perfect an appeal under the rules of procedure—an appeal no one wanted to take—in no way diminishes its substantive effect as established by statute.

**B. No Material or Genuine Dispute About Document Destruction**

Brown's attempt to create a genuine issue of material fact about whether his arrest records have all been destroyed or can be recreated fails both on the law and on Brown's purported evidence.

First, the statute provides that legal consequences flow from the judicial act of "expungement." *See, e.g.*, Mo. Rev. Stat. § 610.123.4 (court to enter "expungement"); *id*. § 610.126.3 ("petitioner shall not bring any action subsequent to the *expungement*") (emphasis added). The statute treats the physical act of record destruction separately in section 610.124, which mandates that expunged records "shall be destroyed." Appendix A3. Even assuming Brown has some evidence of incomplete destruction of records, it is immaterial to the existence of the expungement that triggered the statutory prohibition on litigation by Brown. Should there be any question about incomplete destruction of documents, the appropriate remedy is to enforce the mandatory statutory duty of destruction or obliteration rather than to somehow "unexpunge."

Second, even assuming that alleged incomplete destruction of records is somehow material, there is no genuine dispute because Brown has no admissible evidence negating document destruction. Affidavits submitted in connection with a summary judgment motion must be based on personal knowledge and set forth facts which would be admissible in evidence; affidavits which merely recite hearsay statements by others must be disregarded. *State ex rel. Conway v. Villa*, 847 S.W.2d 881, 886-87 (Mo. App. 1993). The affidavit from the record custodian for the Highway Patrol merely states that three pages of records are attached; it does not state that they are all the records the Highway Patrol ever had or that none of its records regarding the arrest has ever been destroyed. II LF 210-15. Even more egregious is the hearsay found in the second affidavit by

attorney O'Connor, which recites what he was allegedly "informed by the Clay County Prosecutor's Office." II LF 206-07. These and similar assertions are blatant hearsay, and there is no authentication by a government custodian of records that these documents—which Brown's counsel says he received from the Clay County Prosecutor's Office after the destroyed file was cryptically and mysteriously "retrieved" (II LF 207)—are true, accurate and complete. In light of previous statements by the Clay County Counselor in open court and Judge Sutton's order that Brown's attorney provide his file on the arrest to Clay County authorities (I LF 174-75), it appears the pages attached to the second O'Connor affidavit were "retrieved" from him and then turned back over to him as newly manufactured government documents. This Court should not countenance this apparent effort by Brown's counsel to palm off his own records as official files "retrieved" from the Clay County Prosecutor. Such conduct simply reinforces the case for judicial estoppel. *See* section I.C., *supra*.

Finally, the record reflects that plaintiff requested and obtained an expungement of records in the possession of several governmental agencies in addition to the Highway Patrol and Clay County Prosecutor. *See* I LF 96 ¶ 13. The record is silent about the status of arrest records maintained by these other entities, so this Court can only presume that the statutory mandate to destroy any such files has been fulfilled. Mo. Rev. Stat. § 610.124 (Appendix A3). Moreover, it would contravene the statutory scheme for expungement to require Harrah's to defend litigation when the integrity of pertinent public records and files has been

impaired at the behest of the plaintiff—regardless of whether every last record in every last file has been destroyed. No one can ever know the exact nature or content of what has been destroyed or the impact that an incomplete record would have on Harrah's defense. Nor is there any reason or statutory basis to devote public and private resources to litigating the nature and extent of record destruction that is solely attributable to the party who sought and obtained expungement.

## CONCLUSION

Accordingly, respondent Harrah's North Kansas City, LLC requests that the judgment be affirmed.

Respectfully submitted,


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Richard D. Rhyne #23692
rrhyne@lathropgage.com
R. Kent Sellers #29005
ksellers@lathropgage.com
Matthew R. Hubbard #45096
mhubbard@lathropgage.com
LATHROP & GAGE L.C.
2345 Grand Boulevard, Suite 2500
Kansas City, Missouri 64108
(816) 292-2000
(816) 292-2001 Facsimile

**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF COMPLIANCE

I certify that:

1. The brief includes the information required by Rule 55.03;

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3. According to the word count function of counsel's word processing software (Microsoft® Word 2002), the brief contains 10,868 words; and

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R. Kent Sellers

## CERTIFICATE OF SERVICE

On this 20th day of March, 2007, I hereby certify that two copies of the above and foregoing together with a copy of this brief on disk were served by hand delivery, addressed to:

John E. Turner
Christopher P. Sweeny
10401 Holmes Road, Suite 450
Kansas City, MO 64131-0000
Attorneys for Appellants

_____
ATTORNEYS FOR RESPONDENT

# APPENDIX

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