

SUPREME COURT OF NEW JERSEY
DOCKET NO. 65,366

<p>G.D., Plaintiff/Cross- Appellant/Respondent, v. BERNARD KENNY and THE HUDSON COUNTY DEMOCRATIC ORGANIZATION, INC., Defendants/Appellants/ Cross-Respondents.</p>	<p>ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Docket No. A-3005-08T3 Sat Below: Hon. Dorothea Wefing, P.J.A.D. Hon. Jane J. Grall, J.A.D. Hon. Laura M. Lewinn, J.A.D.</p>
<p>G.D., Plaintiff/Cross- Appellant/Respondent, v. CRAIG GUY, HAROLD E. DEMELLIER, JR., a/k/a BUD DEMELLIER, RAUL GARCIA a/k/a RUDY GARCIA, NICOLE HARRISON- GARCIA, Defendants/Appellants/ Cross-Respondents, & NEIGHBORHOOD RESEARCH CORP., d/b/a MOUNTAINTOP MEDIA; RICHARD K. SHAFTAN, a/k/a RICK SHAFTAN; CAREYANN SHAFTAN; JOHN DOE; and ABC CORP., Defendants/Respondents.</p>	

**BRIEF OF AMICI CURIAE, NEW JERSEY PRESS ASSOCIATION, ADVANCE
PUBLICATIONS, INC. THE ASSOCIATED PRESS, THE AMERICAN CIVIL
LIBERTIES UNION OF NEW JERSEY, THE AMERICAN SOCIETY OF NEWSPAPER
EDITORS, AND THE ASSOCIATION OF CAPITOL REPORTERS AND EDITORS**

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PRELIMINARY STATEMENT

There are two ways to be fooled: One is to believe what isn't so; the other is to refuse to believe what is so.

Soren Kierkegaard

The assertion that an expungement changes what is to what is not cannot survive scrutiny. Truth is not merely a defense to a claim for defamation; it is a constitutionally protected value. Indeed, so fundamental is this proposition that the state constitution explicitly embraces it. New Jersey Constitution (1947), Article I, Par. 6.

Yet Appellant would have this Court declare that the effect of an expungement is either to preclude the defense of truth or to alter reality - transforming victims of a crime to non-victims, judicially eradicating their injuries. Neither alternative is tenable.

Orders of expungement require that records of arrest or conviction specified in the Order pursuant to N.J.S.A. 2C:52-15 be removed from the files of specified agencies, but they do not and constitutionally cannot erase the occurrence of the events underlying those records. Indeed, the expungement statute cannot be read to sanction the effect proposed by Appellant. By asserting the unavailability of the records of his arrest and conviction, Appellant seeks to use the expungement statute as a sword to deprive a defendant in a defamation or a false light invasion of privacy case of the defense of truth. Amici

acknowledge that the expungement statute embodies a socially valuable principle that individuals should, under prescribed conditions, be relieved of certain legal disabilities that attach to an arrest or conviction. However, the expungement statute does not unwind history or undo what has been done and cannot undermine constitutional protections.

If the expungement statute were deemed to preclude the defense of the truth of the occurrence of an expunged arrest or conviction, it would punish the publication of truthful information. Florida Star v. B.J.F., 491 U.S. 524(1989) makes clear that a state may not constitutionally punish lawfully obtained truthful information about a matter of public significance absent a state interest of the highest order. Consequently, the expungement statute must be constitutionally read to limit its effect to the categories of records specified in the statute and to the entities, also specified in the statute, that maintains them.

Further, because the effect of an expungement does not to privatize criminal activity, it cannot transform an arrest or conviction into a private fact that would support an invasion of privacy claim. Likewise, the publication of an individual's expunged criminal history cannot give rise to a cause of action for false light. A statute cannot alter reality.

I. THE USE OF AN EXPUNGED CRIMINAL HISTORY TO PROVE THE "TRUTH" OF AN OTHERWISE DEFAMATORY COMMUNICATION DOES NOT VIOLATE THE EXPUNGEMENT STATUTE

Essential to establishing a successful claim for defamation is proof that the complained of communication consist of a false and defamatory statement concerning the plaintiff. DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004).¹ Truth is an absolute defense to a defamation claim because the utterance of truth is in all circumstances an interest paramount to reputation. Ward v. Zelikovsky, 136 N.J. 516, 530 (1994), citing 2 Fowler v. Harper et al., The Law of Torts § 5.1, at 42 (2nd Ed. 1986).

New Jersey's expungement statute creates the legal fiction that when an order of expungement is granted, "the arrest, conviction and any proceedings related thereto" are "deemed not to have occurred." N.J.S.A. 2C:52-27. Although the expungement statute limits access to certain records, prohibits disclosure of a criminal record by certain people and authorizes an eligible person to deny an expunged criminal record, they do not, and constitutionally cannot, erase or alter a person's past so as to render untrue, facts and events that did, in fact, occur. More important, the expungement statute cannot be used by

¹ The other elements of a defamation claim are: (1) an unprivileged publication of that statement to a third party; (2) fault amounting at least to negligence on the part of the

a willing defamation plaintiff, who alleges that a statement made about him or her is false, to deny the defendant the opportunity to prove, as an absolute defense, that the statement is, in fact, true. If the expungement statute were read so as to allow such results, it would render the act unconstitutional.

A. The Events Underlying An Expunged Record Remain Reality

N.J.S.A. 2C:52-15 provides:

If an order of expungement of records of arrest or conviction under this chapter is granted by the court, all the records specified in said order shall be removed from the files of the agencies which have been noticed of the pendency of petitioner's motion and which are, by the provisions of this chapter, entitled to notice, and shall be placed in the control of a person who has been designated by the head of each such agency which, at the time of the hearing, possesses said records. That designated person shall, except as otherwise provided in this chapter, insure that such records or the information contained therein are not released for any reason and are not utilized or referred to for any purpose. In response to requests for information or records of the person who was arrested or convicted, all noticed officers, departments and agencies shall reply, with respect to the arrest, conviction or related proceedings which are the subject of the order, that there is no record information.

N.J.S.A. 2C:52-27 describes, in relevant part, the effect of expungement:

...if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may

publisher; and (3) damages. DeAngelis v. Hill, 180 N.J. 1, 12-13 (2004).

answer any questions relating to their occurrence accordingly...

Taken literally, records that are extracted or isolated pursuant to New Jersey's expungement statute, "although in existence, are in contemplation of law nonexistent." Ulinsky v. Avignone, 148 N.J. Super. 250, 255 (App. Div. 1977). However, the statutory fiction that certain records do not exist does not change history so as to erase the occurrence of the events underlying those records.

The plaintiff in Ulinsky was acquitted of a charge of indecent exposure and was later granted an order expunging those charges from his record. Id. at 252. Thereafter, plaintiff filed a malicious prosecution lawsuit seeking substantial money damages. Id. at 252-53. The plaintiff asserted that the defense was precluded from accessing the records pertaining to his expunged charges, relying upon "the statutory fiction that his arrest and the related proceedings 'shall be deemed not to have occurred.'" Id. at 255, citing N.J.S.A. 2A:85-21 (now N.J.S.A. 2C:52-27). The court found that a literal reading of the expungement statute is unworkable, as the facts and events underlying an expunged record did, in fact, occur and remain in existence despite the entry of an expungement order. Id. at 255. Indeed, even the actual records never cease to exist, as they are never destroyed or modified. Rather they are "removed from

the files of the agencies...and shall be placed in the control of a person who has been designated by the head of each such agency...." N.J.S.A. 2C:52-15. Those records remain in existence and can be disclosed upon consent of Plaintiff or pursuant to certain statutory provisions.²

In Ulinsky, the Appellate Division addressed the impossibility of a literal reading of the expungement statute.

The statutory sense of this enactment is clear. Its purpose is to provide the means of insulating one acquitted of a charge of criminal conduct from the disabilities or adverse effects which could be foreseen as resulting from dissemination of the fact of his mere involvement with law enforcement. The protection made available is, according to its literal terms, quite complete; the expunged records can be exhibited to no one for any reason, not even to the person who sought and obtained expungement. Theoretically, even were plaintiff to attempt to view them for his own purposes, he would be denied access; unable to obtain them for himself, he is in no position to consent to others viewing them. Taken literally, the records, although in existence, are in contemplation of law nonexistent.

The events which they concern and evidence do, nonetheless, have existence; indeed, in this case, they have been specifically drawn in issue by plaintiff himself. Hence, plaintiff eschews the statutory fiction that his arrest and the related proceedings "shall be deemed not to have occurred." N.J.S.A. 2A:85-21. He asserts, understandably and correctly, that his arrest and trial did occur, seeks to visit on defendants' liability for their

² "N.J.S.A. 2C:52-17 through -23, inclusive, outline the variety of situations when expunged records may be released. Those situations include release for setting bail, sentencing, classification of inmates, use in connection with diversity programs, etc." In Re T.P.D., 314 N.J. Super. 643, 647 (Law Div. 1997) fn. 2.

occurrence, but, at the same time, seeks the protection of the statute in denying defendants access to the records which evidence this occurrence. This he cannot do. The remedy of expungement was never intended as a device by which a plaintiff in a malicious prosecution suit could control the availability of evidence relevant thereto.

Id. at 254-55. (Emphasis added.)

Although an expungement order prevents access to records of a prior criminal act, it does not delete the occurrence of that criminal act. Something that was true before an expungement does not become false after an expungement. The victim of the crime still remains a victim; the injuries caused by the crime still remain injuries; the memories of those involved still remain memories; and the reality about what occurred, still remains reality.

Furthermore, an expungement does not allow a plaintiff whose record is expunged to control the availability of evidence by insisting upon the record's continued unavailability while, at the same time, depriving defendants of materials possibly relevant to their defense. Id. at 258. The court in Ulinsky, supra, noted that although not presented in precisely this form, the issue of a plaintiff converting the shield of a privilege, such as expungement, into a sword upon which to impale defendants, is not entirely novel.

In Brogan v. Passaic Daily News, 22 N.J. 139, 151-152 (1956), the court held that in a libel case assertion by the newspaper of the defense of fair comment and

good faith constituted a waiver of a newspaper's privilege against disclosure of sources. See also, Beecroft v. Point Pleasant Print. & Publ. Co., 82 N.J. Super. 269, 275-277 (Law Div. 1964). A governmental privilege against disclosure of official information has been denied in proceedings instituted by the government to which the privileged matter is relevant. See United States v. Cotton Valley Operators Comm., 9 F.R.D. 719, 721 (W.D. La. 1949), aff'd 339 U.S. 940, 70 S. Ct. 793, 94 L. Ed. 1356 (1950); United States ex rel. Schlueter v. Watkins, 67 F. Supp. 556, 561 (S.D.N.Y.), aff'd 158 F. 2d 853 (2 Cir. 1946). See also, McCormick, The Law of Evidence (2 ed. 1972), § 110. The confidentiality accorded to a juvenile's records has been breached to the extent necessary to insure the right of cross-examination of the juvenile who filed the complaint. State v. Parnes, 134 N.J. Super. 61, 63 (App. Div. 1975); see also In re A.S., 130 N.J. Super. 388, 392-393 (Cty. Ct. 1974). **In short, plaintiff must choose: either he leaves the events evidenced in the expunged records in the obscurity from which a trial, with its attendant discovery, may draw them, or he must expose them in full for trial purposes. He cannot do both.**

Id. at 257. (Emphasis added.)

An expungement confers a privilege that grants an eligible person protection from certain legal disabilities that may result from his or her actions. The expungement granted to Plaintiff in the present case may provide him with the ability to deny his prior drug offense when inquired about same. It may prevent certain persons from disclosing that offense or providing access to the records of that offense. It absolutely cannot rewind time and undo that which has been done. It cannot render false that which is true.

B. The Statutory Prohibition Against Disclosure Of An Expunged Record Is Unconstitutional To The Extent It Reaches Beyond Those Persons Performing A Law Enforcement Function Within One Of The Four Categories Listed In N.J.S.A. 2C:52-1

"[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." Florida Star v. B. J. F., 491 U.S. 524, 533 (1989) (Internal citations omitted.) See Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 496 (1975) (involving a civil invasion of privacy suit and holding that courts may not punish the publication of truthful information contained in court records); Oklahoma Pub. Co. v. District Court, 430 U.S. 308 (1977) (courts may not restrain the publication of the identities of juvenile murder suspects obtained in open court proceedings); Smith v. Daily Mail Pub. Co., 443 U.S. 97 (1979) (courts may not restrain the publication of the identities of juvenile murder suspects). A statute criminalizing the publication of truthful information, regardless of the manner in which that information was obtained or discovered, is unconstitutionally overbroad. See, Florida v. Globe Communications Corp., 648 So.2d 110 (1994). Thus, punishment for the publication of truthful information, whether

meted out for violating a statute or by way of a verdict in a civil suit, is constitutionally proscribed.

In Florida Star,³ the Sheriff's Department prepared a report which identified a rape victim by her full name. Id. at 527. The Department then placed the report in its pressroom, to which access was not restricted. Id. A Florida Star reporter who was sent to the pressroom copied the report verbatim and the newspaper ran an article about the crime which included the rape victim's full name. Id. The victim sued The Florida Star for invasion of privacy. Id. at 528.

The court held that it is a violation of the First Amendment⁴ to restrict the media from reporting lawfully obtained information made public by the government and pertaining to a matter of public significance. Id. at 541. Such a restriction would result in the media self-censoring government released information, erring on the side of non-disclosure so as to avoid liability. Id. at 538. The court also stated that where the

³ Although The Florida Star v. B.J.F., 491 U.S. 524 (1989) involved a claim for invasion of privacy, "the constitutional immunity granted to publication within its purview extends to all civil and criminal sanction, including defamation." See 1985 U. Ill. L. Rev. 1059 (1985), citing Time, Inc. v. Firestone, 424 U.S. 448, 455 (1976); Medico v. Time, Inc., 643 F.2d 134, 143 (3d Cir. 1981).

⁴ New Jersey's State Constitution affords even broader speech protections than does the Federal Constitution. See Sisler v. Gannett Co., Inc., 104 N.J. 256, 271 (1986); State v. Schmid, 84 N.J. 535 (1980); New Jersey Coalition Against War in the Middle East v. J.M.B Realty Corp., 138 N.J. 326 (1994).

government has failed to police itself in disseminating information, it is clear that the "imposition of damages against the press for its subsequent publication can hardly be said to be a narrowly tailored means of safeguarding anonymity." Id. at 538. The fact that the government can impose internal regulations so as to only make certain information public, demonstrates that there are less restrictive and more effective means to protect privacy than limiting free speech. Id. at 534.

In Bowley v. City of Uniontown Police Dept., 404 F.3d 783 (3rd Cir. 2005), the defendant newspaper published the fact of an arrest of a minor for raping another minor. Id. at 785. A police officer, in violation of a Pennsylvania law prohibiting disclosure of juvenile law enforcement records, gave the newspaper information about the arrest. Id. at 787. The Third Circuit held that as the newspaper was not involved in any wrongdoing in merely receiving the information about the arrest, the First Amendment shields it from liability for publishing truthful information on a matter of public concern, even though the police officer that divulged the information may have violated the State law. Id. at 787-89.

The truthful publication of lawfully obtained information about a person's expunged criminal record cannot constitutionally be punished at least when the publication is by other than the government custodian of the record. As set forth

in Point I.A., an expungement does not erase the fact that a crime occurred. If an event happened, whether or not the person involved obtained an expungement order, the event is still in existence and still remains reality. Therefore, despite an order of expungement, if the newspaper obtains accurate information about a criminal act, it must be free to disseminate same to the public.

It follows then that N.J.S.A. 2C:52-30, which states in relevant part that "any person who reveals to another the existence of an arrest, conviction or related legal proceeding with knowledge that the records and information pertaining thereto have been expunged or sealed is a disorderly person," cannot be read literally and constitutionally to mean that anyone who knowingly reveals an expunged record is in violation of the statute. Such an interpretation would render the statute unconstitutional, as it punishes the dissemination of truthful information. A constitutional reading of N.J.S.A. 2C:52-30 is as a counterpart to N.J.S.A. 2C:52-1. As discussed in Point III.A. herein, N.J.S.A. 2C:52-1, which provides in relevant part, for "the extraction and isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency," applies only to records that are maintained as part of the law enforcement process by those four entities. (Emphasis added.) The purpose of N.J.S.A. 2C:52-30 is

to regulate the person working in one of the four enumerated entities who is charged with control over the record, by making it a disorderly persons offense to knowingly disclose an expunged record. Such a restriction upon disclosure is much more narrowly tailored to the State's interest in keeping expunged records confidential.

If the person designated pursuant to N.J.S.A. 2C:52-1 knowingly discloses an expunged record, that person can be punished. However, the recipient of that record, provided he or she did not engage in any illegal activity in order to obtain the records, cannot constitutionally be punished for later disseminating true facts contained in that record. If the Legislature's intent in enacting the expungement statute was to prevent the publication of the facts surrounding a crime once an expungement order is granted, it has the ability to implement that intent by less restrictive means. For example, the Legislature can impose stricter internal regulations upon the person designated pursuant to N.J.S.A. 2C:52-15 to prevent access to the expunged records. However, once a member of the public obtains an expunged record, provided that person did not violate any laws in order to obtain the record, he or she has a constitutional right to publish the information contained in that record. As the Court held in Florida Star,

...where the government has made certain information publicly available, it is highly anomalous to sanction persons other than the source of its release...As *Daily Mail* observed in its summary of *Oklahoma Publishing*, "once the truthful information was 'publicly revealed' or 'in the public domain' the court could not constitutionally restrain its dissemination." 443 U.S., at 103.

Florida Star, *supra* at 535. (Emphasis added.)

II. AN EXPUNGED CRIMINAL RECORD IS A "MATTER OF PUBLIC RECORD" THAT PRECLUDES CAUSES OF ACTION FOR PRIVACY TORTS

A. The Expungement of Criminal Records Does Not Change The Public Nature Of The Records

In *Doe v. Poritz*, 142 N.J. 1, 81 (1995), while discussing the privacy concerns raised by the community notification requirement under Megan's Law, this Court cited to *Nilson v. Layton City*, 45 F.3d 369, 372 (10th Cir. 1995) for the proposition that:

...matters of public record, such as criminal background, may be disclosed without impinging on privacy interests. As stated in *Nilson*, *supra*, 45 F.3d at 372, government disclosures of arrest records, judicial proceedings, and information contained in police reports, do not implicate the right to privacy.

In that case, the court concluded that a sergeant's post-expungement disclosure, in an interview with a television news reporter, of the plaintiff's sexual abuse charges and conviction did not violate the right of privacy.

(Internal citations omitted.) The Court in *Nilson* held that "a validly enacted law places citizens on notice that violations thereof do not fall within the realm of privacy. *Nilson*, *supra*,

at 372. Criminal activity is thus not protected by the right to privacy. Id. An expungement order does not change this conclusion. Id.

An expungement order does not privatize criminal activity. While it removes a particular arrest and/or conviction from an individual's criminal record, the underlying object of expungement remains public. Court records and police blotters permanently document the expunged incident, and those officials integrally involved retain knowledge of the event. An expunged arrest and/or conviction is never truly removed from the public record and thus is not entitled to privacy protection. Mr. Brimhall, as an officer in the Layton police department in 1981, had first-hand knowledge of Mr. Nilson's arrest and conviction. The expungement order did not erase this knowledge. We hold that Mr. Nilson did not have a legitimate expectation of privacy in his expunged criminal records.

Id. (Emphasis added.) In response to the Plaintiff Nilson's argument that the expungement statute created the legitimate expectation of privacy, the court stated that

substantive due process rights are founded not upon state law but upon "deeply rooted notions of fundamental personal interests derived from the Constitution." While state statutes and regulations may inform our judgment regarding the scope of constitutional rights, they "fall far short of the kind of proof necessary" to establish a reasonable expectation of privacy. Mere allegations that an official failed to abide by state law will not suffice to state a constitutional claim. The disclosed information itself must warrant constitutional protection. We have already concluded that Mr. Nilson's criminal history, despite the expungement order, is not protected by the constitutional right to privacy. It is therefore irrelevant to our inquiry whether Sergeant Brimhall violated the Utah expungement statute.

Id.

Additionally, the Third Circuit has held that there is no right to privacy in an expunged criminal record under the Federal Constitution. Nunez v. Pachman, 578 F.3d 228 3rd Cir. 2009). The court recognized that before a person is eligible for an expungement, his or her a criminal record is publicly available for a minimum period of ten years under New Jersey law. N.J.S.A. 2C:52-2(a).

News accounts of a defendant's criminal acts, moreover, may persist after obliteration of formal records. **Accordingly, this information is never truly private.**

Id. at 231.

Indeed, in the present case, we are dealing with private entities. While a state statute may create confidentiality expectations vis-à-vis the government that must be respected,⁵ it

⁵ The Appellate Division, Nunez v. Pachman, 2009 N.J. Super. LEXIS 3160 (App. Div., Nov. 29, 2009), on an appeal from the State trial court's grant of a Motion to Dismiss for Failure to State a Claim, raised, although did not resolve, the issue of whether there is a constitutional right of privacy in an expunged criminal record under the New Jersey Constitution. The Appellate Division stated:

For these reasons, we are not inclined to assume that our state constitution takes as limited a view of what an individual may reasonably expect to remain private when that individual lawfully obtains an expungement order as does the federal constitution. Indeed, considering the validity of plaintiff's complaint was questioned by way of a Rule 4:6-2(e) motion, and considering also the novelty of the questions posed by this suit, plaintiff was entitled to the inference that he did possess a reasonable expectation of privacy in the expunged criminal records.

cannot transform the public information obtained by one private individual into another individual's private domain.

B. Because It Remains Public Information, An Expunged Criminal Conviction Cannot Serve As The Basis For A False Light Invasion Of Privacy Claim

The elements of a false light claim consist of, (1) giving publicity to a matter concerning another that places the other before the public in a false light if (2) the false light in which the other was placed would be highly offensive to a reasonable person, and (3) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. Leang v. Jersey City Bd. of Educ., 198 N.J. 557, 588-89 citing Restatement (2nd) of Torts, § 652E.⁶

The Appellate Division remanded the case, making no determination whether there is, in fact, a State Constitutional right of privacy in an expunged criminal record. Indeed, the Appellate Division was of the view that because the case was before it by way of a Rule 4:6-2(e) motion for Failure to State a Claim, the court was constrained to assume, in the context of that motion and solely for the purpose of that motion, that there was a right of privacy in an expunged criminal record under the New Jersey Constitution.

⁶ The invasion of privacy by the unreasonable publication of private facts occurs when it is shown that the matter revealed was actually private, that dissemination of that matter would be offensive to a reasonable person and that there is no legitimate interest of the public in being apprised of the facts publicized. Romaine v. Kallinger, 109 N.J. 282, 297 (1988). Because a prior criminal record is never private, as set forth in Point II.A. herein, there can be no cause of action for private facts invasion of privacy.

The interest protected by the duty not to place another in a false light is that of the individual's peace of mind, i.e., his or her interest "in not being made to appear before the public in an objectionable false light or false position, or in other words, otherwise than as he is.

Romaine v. Kallinger, supra, at 294 (1988) citing Restatement (2nd) of Torts, § 652E, comment b. A fundamental requirement of the false light tort is that the disputed publicity be, in fact, false, or else have the capacity to give rise to a false public impression as to the plaintiff. Id.

The publicized material in a false-light claim must constitute a "major misrepresentation of [plaintiff's] character, history, activities or beliefs." Thus, there can be no recovery for false-light invasion of privacy unless it is shown that the publicity at issue was of a character "highly offensive to a reasonable person." This protection of privacy does not extend to the "hypersensitive person;" the material publicized "must be something that would be objectionable to the ordinary person under the circumstances."

Id. at 295. (Internal citations omitted.)

First, there can be no cause of action for false light unless the publisher knew or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the person would be placed. For example, if a newspaper published a story concerning a person's prior criminal conviction where there had been an expungement of that conviction but did not mention the expungement, and did so

without knowledge that the record had been expunged, there can be no cause of action against the newspaper for false light.⁷

Even when a newspaper reports on a conviction and the subsequent expungement of that conviction, the newspaper cannot be charged with knowledge of the expungement, for the purposes of a false light claim, simply because it has previously reported on same. In New York Times Co. v. Sullivan, 376 U.S. 254, 287 (U.S. 1964), the Supreme Court held that despite news stories in the Times' own files that contradicted the advertisement that it published, the Times did not have knowledge of the falsity of the advertisement. The Court stated,

the mere presence of the stories in the files does not, of course, establish that the Times "knew" the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement.

New York Times Co., supra, at 287. Therefore, it is possible that a claim for false light against the newspaper for publishing an expunged crime without mentioning the expungement would fail, even though the newspaper has previous reports regarding the crime and the expungement in its own files.

Second, even if a reporter for a newspaper knew of an expungement but published an article about the underlying crime

⁷ We do not suggest whether Defendants in the present case knew that Plaintiff's record had been expunged and express no opinion

without mentioning the expungement, a claim for false light would still fail as the true reporting upon the criminal act is not highly offensive to a reasonable person. The truth of the matter is that the person did, in fact, commit the crime regardless of the subsequent expungement. Therefore, publication of that crime cannot constitute a "major misrepresentation" of that person's "character, history, activities or beliefs." Romaine, supra, at 295.⁸ Although the crime may no longer appear on his or her criminal record, the acts that he or she performed while committing the crime still remain in that person's history and are still a reflection of his or her character and beliefs.

III. THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN EXPUNGED CRIMINAL RECORDS AS THE SCOPE OF THE EXPUNGEMENT STATUTE IS LIMITED TO RECORDS RELATING TO AND PERSONS ENGAGED IN THE LAW ENFORCEMENT PROCESS

The Legislature's intent to limit the reach of the expungement statute is evident by the definition of "Expungement" in N.J.S.A. 2C:52-1(a), which restricts the "extraction and isolation" of records on file

within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention,

thereon.

⁸ Consequently, because there is no basis then, for a false light invasion of privacy claim, any liability imposed on a newspaper in this circumstance arises solely as a result of its editorial choice to include or not include material in a publication. Imposing liability in these circumstances is constitutionally proscribed. See Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974).

trial or disposition of an offense within the criminal justice system.

b. Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets" and judicial docket records.

(Emphasis added.) Neither N.J.S.A. 2C:52-1(a) nor N.J.S.A. 2C:52-15 authorize the removal of all records anywhere concerning a person's criminal history. The Legislature specifically limited the application of N.J.S.A. 2C:52-1(a) to four particular categories of entities, each of which performs a role in the law enforcement process. Additionally, the list of expunged records set forth in N.J.S.A. 2C:52-1(b) consists of records that are made and maintained as part of the law enforcement process. Clearly, the only records to which the expungement statute apply are those that exist by virtue of the law enforcement process and that are on file with a (1) court, (2) detention or correctional facility, (3) law enforcement or (4) criminal justice agency.

In E.A. v. New Jersey Real Estate Commission, 208 N.J. Super. 65 (App. Div. 1986), the Appellate Division acknowledged the limited reach of the expungement statute. In that case, the plaintiff's real estate and insurance licenses were suspended or revoked upon his indictment and conviction. Id. at 66. His real estate license was later restored and he subsequently obtained an expungement order. Id. at 66-67. He forwarded copies of the

order to the defendants and asked that they "correct" their records so as to remove the criminal conviction. Id. at 67. Shortly thereafter, the plaintiff filed a lawsuit alleging that the New Jersey Real Estate Commission and the Department of Insurance refused to obey the expungement order and have made public the records concerning the plaintiff. Id. The court held that the defendants were not subject to the expungement order, stating,

Although plaintiff argues that "all persons and all entities must comply" with the expungement order, both the order and the enabling legislation clearly have a more limited reach. The expungement order here is directed solely to the Clerk of the Superior Court and "any law enforcement agency" which possesses relevant records. That focus of the order is consistent with the statutory definition of expungement, *i.e.*, the extraction and isolation of records on file within "any court, detention or correctional facility, law enforcement or criminal justice agency." **Plaintiff does not contend, nor do we find any reason to conclude, that either of the defendants is a law enforcement or criminal justice agency.** Cf. Maietta v. N.J. Racing Com'n., 93 N.J. 1, 8-10 (1983); In re Schmidt, 79 N.J. 344, 354-55 (1979). Plaintiff argues, rather, that there is an inequity in permitting a State licensing agency to maintain and use records of an occurrence which is elsewhere "deemed not to have occurred" (N.J.S.A. 2C:52-27). If that result is inequitable, the remedy must be a legislative one.

Id. at 68. (Emphasis added.)

Similarly, newspapers, libraries, the Internet, and other private, non-law enforcement entities are simply beyond the reach of an expungement order. For example, an expungement order does not mandate that a library go through its archive of

newspapers it has on file and cut out articles that report on the person's prior criminal act, now expunged anymore than a law library would be required to eliminate from case reports a published opinion relating to a conviction later expunged. Likewise, such an order cannot compel a newspaper to sift through its archives and eliminate any reference to the prior criminal act. The intent of the Legislature, as articulated through judicial decisions, makes it evident that the appropriate interpretation of the reach of the New Jersey expungement statute is that its scope is limited to the four entities enumerated in N.J.S.A. 2C:52-1. Indeed, no other interpretation renders the statute constitutional. See generally Point I.B., herein.

Even records maintained by one of the four entities enumerated in N.J.S.A. 2C:52-1 are exempt from an expungement order if they are maintained for a purpose other than law enforcement. New Jersey v. Zemak, 304 N.J. Super. 381 (Law Div. 1997). In Zemak, a Secaucus police officer was charged under a Municipal Summons with Theft and Possession of Stolen Property. Id. at 382. The charges were ultimately dismissed and the police officer petitioned the court for an expungement of the charges. Id. The Secaucus Police Department did not object to the expungement, but did object to the eradication of the police officer's personnel file, which contained a letter from the

Deputy Chief of Police to the Director of Public Safety and a letter from the Director of Public Safety notifying the officer that he was suspended without pay. Id. at 383.

In holding that personnel records are beyond the reach of the expungement statute and, thus, not subject to expungement, the court recognized the Appellate Division's "reluctance to 'expand the coverage'" of the expungement statute promulgated by the Legislature. Id. at 384, citing Matter of M.D.Z., 286 N.J.Super. 82, 86 (App. Div. 1995). The court held that the expungement statute does not

call for the removal of personnel records from any employment files. The Appellate Division has held that state agencies other than law enforcement are beyond the expungement statute and cannot be compelled to remove referenced from their records. **This limitation implies that records maintained outside the realm of the law enforcement function are exempt from the expungement statute.**


Id. (Internal citations omitted.) (Emphasis added.) The court concluded that "the statute governing the expungement of records does not subject the Police Department as employer to the same restrictions as it does the Police Department as law enforcement entity. Id.

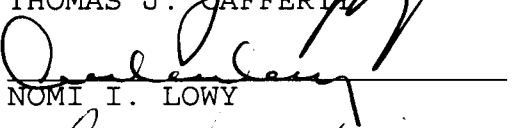
Therefore, an expungement order does not mandate the removal of records (or limit dissemination of received records) in the possession of persons or entities other than those enumerated in N.J.S.A. 2C:52-1.


CONCLUSION

For the forgoing reasons, Amici respectfully urge this Court to hold that the use of an expunged record to prove the truth of an otherwise defamatory statement does not violate the expungement statute and that an expunged record is a matter of public record in which there exists no reasonable expectation of privacy.

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