

Case No. SC83802

IN THE MISSOURI SUPREME COURT

DIRECTOR OF REVENUE, STATE OF MISSOURI,

Appellant,

v.

BRENT L. KINZENBAW,

Respondent.

Appeal from the Circuit Court of
Morgan County, Missouri, Associate Division
The Honorable Patricia F. Scott, Judge

APPELLANT'S SUBSTITUTE BRIEF

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
State Solicitor

ALANA M. BARRAGÁN-SCOTT
Deputy Solicitor

JAMES A. CHENAULT, III
Special Assistant Attorney General
Supreme Court Building

P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

ATTORNEYS FOR APPELLANT

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Jurisdictional Statement

This is an appeal from a final judgment of the Circuit Court of Morgan County, Missouri, the Honorable Patricia F. Scott, Judge. After the Missouri Court of Appeals, Western District, issued its opinion affirming the trial court's judgment, this Court ordered transfer pursuant to Rule 83.03 . Therefore, this Court has jurisdiction of this appeal pursuant to Mo. Const. Art. V, ' 10, as amended effective November 2, 1982.

Statement of Facts

On November 19, 1999, the Director of Revenue notified respondent Brent Kinzenbaw that his application for a Missouri driver's license had been denied pursuant to ' 302.060(9), RSMo. 2000, due to two DWI convictions in the state of Missouri and a DWI conviction in the state of Iowa (LF 13). On December 20, 1999, he filed a petition seeking review of the denial (LF 1-2). The Director filed an Answer on January 13, 2000 (LF 8-20). Attached to the Answer were the administrative record relating to the Director's decision. *Id.*

The cause was called on January 28, 2000. The local prosecutor, appearing for the Director, said he would present no evidence (TR 2). The trial court found that the Director had failed to meet her burden of going forward with the evidence (TR 3), and entered judgment setting aside the license denial (LF 22, 23).

The Director appealed to the Missouri Court of Appeals, Western District (LF 24-26). On May 15, 2001, the court of appeals entered an opinion affirming the judgment below, pursuant to this Court's opinion in *Wampler v. Director of Revenue*, 48 S.W.3d 32 (Mo.banc 2001).

This Court granted the Director's application for transfer on August 21, 2001.

Standard of Review

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976).

Points Relied On

I.

The circuit court erred in setting aside the license denial. Setting aside the denial was erroneous because, if the administrative record was not in evidence in circuit court, there was no basis in the record on which to base any finding that the decision of the Director of Revenue was deficient. There was no evidence on which to base a finding in that the challenger introduced no evidence whatsoever.

Wampler v. Director of Revenue, 48 S.W.3d 32 (Mo.banc 2001)

' 302.311, RSMo 2000

' 302.535, RSMo 2000

' 536.140, RSMo 2000

' 536.150, RSMo 2000

Mo.Const. Art. V, ' 18

Mo. Sup. Ct. Rule 84.04

Mo. Sup. Ct. Rule 100.02

2 Am.Jur. 2d ' ' 614-615

73 C.J.S. ' 222

II.

The circuit court erred in setting aside the license denial. Setting aside the denial was erroneous because the evidence before the trial court supported only a finding that the denial was required by law. The evidence supported only such a finding in that it consisted solely of the Director of Revenue's administrative record filed with the circuit court without the formalities of admission, and in that the administrative record showed that the driver had been convicted more than twice of crimes related to driving while intoxicated, and in that the driver presented no evidence whatsoever to contradict or cast doubt upon the truthfulness of the administrative record.

Wampler v. Director of Revenue, 48 S.W.3d 32 (Mo.banc 2001)

Legal Communications Corp. v. St. Louis County Printing & Publishing Co., Inc., 24 S.W.3d 744 (Mo. App. 2000)

Johnston v. Director of Revenue, 762 S.W.2d 444 (Mo. App. 1988)

Lane v. Director of Revenue, 996 S.W.2d 117 (Mo. App. 1999)

' 303.290, RSMo 2000

' 303.311, RSMo 2000

'' 303.024 - 303.044, RSMo 2000

'' 536.100 - .140, RSMo 2000

Chapter 45, ' 8463, RSMo 1939

L.1945, p. 1054

L.1951, pp. 689-690

L.1953, p. 678

Argument

I.

The circuit court erred in setting aside the license denial. Setting aside the denial was erroneous because, if the administrative record was not in evidence in circuit court, there was no basis in the record on which to base any finding that the decision of the Director of Revenue was deficient. There was no evidence on which to base a finding in that the challenger introduced no evidence whatsoever.

A. As a general principal of administrative law, a circuit court can reverse an agency decision in a *noncontested* case only when the court has before it evidence, *properly adduced*, on which to find that the decision was *unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion.*

License denials are administrative actions, handled by the Director of Revenue pursuant to general and specific principles of administrative law, and reviewed by the courts by a similar set of general and specific principles. In Missouri, the applicable principles differ, as a general matter, according to whether the action being challenged in court is a *contested* or a *noncontested* case. Review of *noncontested* cases is governed by ' 536.150, RSMo. 2000. That statute permits a circuit court to reverse an agency decision only when, *in light of the facts as they appear to the court, [that*

decision] is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion.@ *Id.*

Implicit within that statute is a principle that is critical to the analysis here: We trust agencies and officials to make correct decisions in the first instance. Those decisions can be reversed by a court, but only when the court holds that the decision is wrong on one of the enumerated grounds. Put another way, a trial court need not find that an agency decision is constitutional, lawful, nor reasonable in order to uphold it. Each word used in defining the standard of review ' 536.150 carries with it the mandate that the trial court affirmatively hold that the agency action violates one of the enumerated criteria **B** and that it do so based on findings of fact sufficient to support that holding.

The plain language and a common sense reading of the statute suggest that the initial burden of making such a showing is on the person challenging the agency decision, rather than on the agency. It makes no sense to suggest that when the legislature said that a court could act only when it found an agency decision was *unconstitutional* or *unlawful*, was imposing on the agency to initial burden to prove the negative, *i.e.*, that its decision was *not* unconstitutional, *not* unlawful, etc.

This Court has never directly explained what the legislature intended, or the nature of the burdens imposed on the parties when someone is challenging an agency decision, whether under ' 536.150 or otherwise. It has left hints. For example, in Rule 100.02(a), the court designates **A**[t]he party filing the petition for review . . . as the appellant and the

adverse party [i.e., the agency or official] as the respondent. Those are terms that carry with them longstanding meaning: It is the task of the appellant to show that the decision being challenged was wrong, not of the respondent to show that it was right. Thus, for example, when an appellant fails to comply with Rule 84.04, his appeal fails regardless of whether the respondent commits some comparable error.

Placing the burden on the petitioner or appellant in the first instance is consistent with the restriction of relief under ' 536.150 to instances in which the administrative decision is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion. It is also consistent with that section's specification of available remedies. It provides that the administrative decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action. Remedies such as injunctions and writs are never available merely for the asking. They always require a showing of entitlement B a showing that is made by the petitioner. In the absence of some basis for the remedy, the remedy is denied. Thus, this and other courts often rule on writ petitions even before hearing from an opponent, ruling that the showing by the petitioner was insufficient to reach the applicable threshold. In judicial review of a noncontested case, again, the threshold is a prima facie showing that the administrative decision A is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion. Again, there is no basis in Chapter 536 for imposing on the agency an initial burden of showing constitutionality, lawfulness, reasonableness, etc.

B. Judicial review of a driver's license denial proceeds as review of a noncontested case.

That a challenge to a decision of the Director of Revenue to deny a driver's license is to be reviewed as a noncontested case is evident from § 302.311. That statute authorizes judicial review in the manner provided by chapter 536, RSMo, for the review of administrative decisions. If the statute ended there, a court attempting to ascertain whether the review under Chapter 536 proceeds as a contested or a noncontested case would have to consider what occurred at the Department of Revenue. But § 302.311 bypasses that step; it provides directly that upon such appeal the cause shall be heard de novo.¹

Chapter 536 deals with de novo appeals only in § 536.150. Under that section, the circuit court may determine the facts relevant to the question ... and may hear such evidence as may properly be adduced. The court then evaluates the validity of the decision in view of the facts as they appear to the court. By contrast, the contested case provision requires that a matter be heard on the petition and record. § 536.140.1.

¹ The statute's reference to judicial review as an appeal is consistent with this court's use of the titles, appellant and respondent, in Rule 100.02(a), discussed above.

By invoking Chapter 536 but providing that an appeal be heard de novo,² § 302.311 requires the circuit court to implement the process for de novo review of administrative agency decisions contained in Chapter 536 B which now means the process provided by § 536.150.² In other words, license denials are heard by the circuit courts

² As discussed below, Chapter 536 did not include a noncontested case or de novo review provision when § 302.311 was enacted. But by referencing Chapter 536 generally rather than a particular section, the legislature effectively adopted the general

as **Noncontested** cases regardless of what process the Director may have used in making her decision.³

scheme for administrative review, instead of requiring that Chapter 302 be updated over time as Chapter 536 evolved.

³ Section 302.311 makes one change to the general authority of circuit courts under ' 536.150: It limits the permissible remedies. The court only has the power to **Order** the Director to grant such a license, sustain the suspension or revocation by the director, set aside or modify the same, or revoke such license. That limitation does not affect the conclusion that such reviews proceed as **Noncontested** cases; the case is still heard de novo and thus must proceed as a noncontested case under ' 536.150.

C. The general requirement of evidence, Aproperly adduced,@ to support the rejection of an agency decision applies in a challenge to the denial of a driver=s license.

By incorporating Chapter 536, ' 302.311 ties this case to the more general principles of Missouri administrative law B with two effects: drivers=license cases should not be treated as a unique group of cases, to be decided without regard to the legislative mandate in ' 536.150; and any holding in this case B unless specifically limited by the Court B may apply beyond the relatively narrow confines of drivers= license denials. Because of the tie between Chapter 536 and ' 302.311, the two questions presented in this appeal may affect the entire range of Anoncontested@ cases in all areas of administrative law.

The first question relates specifically to the administrative record, filed with the court but never moved to be admitted into evidence. It asks whether such evidence has been Aproperly adduced,@ and is thus part of the record on which the circuit court may rely in determining whether the decision it reflects Ais unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion.@ ' 536.150. In *Wampler v. Director of Revenue*, 48 S.W.2d 32 (Mo. banc 2001), this Court held that submission of the record was not enough. But nothing in that decision expressly limits it to the drivers=license context. Presumably every Aappellant@ in a Anoncontested@ case will also demand that the agency formally admit the administrative record into evidence.

The reasons for modifying that holding are addressed in part II below.

The problem presented by that answer to the first question can, of course, be solved. Prosecutors can appear in each case and formally move the admission of the administrative record. Circuit courts can hear such motions and formally rule on them. Neither in this case nor in *Wampler* did any party identify a purpose for requiring such formality. But again, that method, though cumbersome and not without expense to all parties and the courts, may be feasible.

The same is not true with respect to another problem, *i.e.*, the question of what happens when there is no evidence before a trial court that is required to consider *Ade novo* a challenge to an agency decision. That question was not addressed in *Wampler*, though an answer is implicit in the *Wampler* result. It is implicit because once this Court excluded from consideration the administrative record in *Wampler*, there was no evidence whatsoever. This Court did not expressly address what happens in that circumstance, *i.e.*, when there is a petition for judicial review and no party has *A*properly adduced[@] any evidence whatsoever on which the circuit court could decide the case. In *Wampler* and here, the circuit court granted relief despite the entire absence of a record. In *Wampler*, this Court upheld that decision without comment. The court of appeals did the same here.

That result **B** granting relief when there was no record on which the circuit court could find that the administrative decision was wrong **B** turns the entire concept of

administrative review on its head. It imposes the burden on the agency in the first instance, before the **A**ppellant@challenging administrative decision even makes a prima facie case that the decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or an abuse of discretion. Assigning the burden in that fashion would be a troubling direction for Missouri administrative law **B** a direction that has never been explained by any court. Rather than explaining or confirming that direction, this Court should divert the continued development of Missouri administrative law to a more reasonable course.

As noted above, in *Wampler* this Court followed without explanation the court of appeals=course of granting relief where there is no record on which to do so. This court came closest to explaining why it would go that direction be reiterating a sentence from the court of appeals= opinion: **A**The director is required, as are proponents in other de novo civil cases, to put into evidence that which the fact finder is asked to consider.@ 48 S.W.2d at 35. The problem with that statement is that it leaves **A**proponent@undefined. And defining it as the agency, without explanation or limitation, goes too far.

In the usual civil case, the **A**proponent@ is the party seeking judicial action. Certainly that is true when the plaintiff, petitioner, or **A**ppellant@ wants the court to enter an injunction or grant a writ **B** again, the kind of relief provided for **A**noncontested@ cases under ' 536.150. When an **A**ppellant@ challenges an administrative decision in a circuit court, the **A**ppellant@ **B** not the state **B** is the proponent of judicial action. That the

Appellant is entitled to de novo review does not, standing alone, reverse the roles of the parties. The person challenging the agency action must still bear some burden. To hold otherwise is to say that a person challenging an agency order makes a prima facie case merely by filing a complaint in a position that is contrary to the usual order of civil proceedings, not consistent with them, as the language this Court quoted from the court of appeals seems to suggest.

Certainly it is contrary to longstanding principles of administrative law. Even prior to the adoption of Chapter 536, the courts generally held that in an administrative action, the burden of proof was on the petitioning party to show error. *State ex rel. Rice v. Public Service Commission*, 220 S.W.2d 61 (Mo. 1949); *State ex rel. Shepherd v. Public Service Commission*, 142 S.W.2d 346 (Mo. App. 1940).⁴ Indeed, the general rule across

⁴ No case squarely addresses the burden in the context of § 302.311 license denials. The only decision to touch on the issue is *McInerney v. Director of Revenue*, 12 S.W.3d 403 (Mo. App. 2000), in which the court of appeals held that the petitioner (the

the country is that the burden of proof is on the party challenging the validity of an administrative action, unless a specific statutory provision places that burden on the agency. *See generally* 2 AmJur 2d ' ' 614 - 615, 618; 73A C.J.S. ' 222.

Citing to Black's Law Dictionary, *see* 48 S.W.2d at 35 n. 4 (again, as this Court did only by repeating the court of appeals' language), to define *de novo* does not change that fact. Black's definition is necessarily a general one, not one specific to administrative nor even to Missouri law. But the legislature eschewed the general and common, in favor of the specific and unique: When the legislature combined the reference to Chapter 536 with its reference to a trial *de novo*, it was merely ensuring that the circuit court was not bound by the Director's findings. It was not making the Director the plaintiff. That distinction is evident, again, in the contrast between judicial review of contested and *noncontested* cases. The *appellant* in a noncontested case under ' 536.150 may litigate *de novo* the facts on which the agency decision is based; hearing a challenge under ' 536.140, a court may not be entitled to *weigh* the evidence and determine facts for itself. But the right to litigate facts *de novo* does not mean that the challenger in a driver) bears the burden of proving the jurisdictional prerequisite that he timely filed his petition.

An uncontested case can prevail without litigating any facts at all, *i.e.*, without putting on the record any facts that support his claim.

Yet that, in essence, is the result of *Wampler*. Without explanation, it permits a driver to make a *prima facie* case merely by filing his petition. That result turns administrative review on its head: making a mere allegation, unsupported by any evidence in the record, is enough to force agencies to present, and courts to hear, lengthy proofs as to whether their decisions were unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involved an abuse of discretion.

In the narrower context of driver's license denials, requiring a driver to bear the burden of proof is the statutorily faithful interpretation.

First, nothing in either ' 302.311 nor ' 536.150 explicitly places the burden of proof on the Director; nor does the Missouri Constitution do so. *See* Article V, ' 18 (requiring judicial review to determine whether an administrative action is authorized by law, but silent with respect to burden of proof).

Second, such a reading of the statute is fortified by examination of an analogous statute, ' 302.535.1, which permits a driver to file a petition for trial *de novo* concerning certain actions against his driver's license, and specifically mandates that the burden of proof shall be on the *state* to adduce the evidence. (Emphasis added.) The legislature can place the burden of proof upon the Director if that is its intent. Here, the legislature did not.

D. Because, if the administrative record is determined not to be evidence properly adduced,^e there was no evidence before the circuit court, the circuit court was required to deny the petition.

In the circuit court, the proper course in the absence of any evidence properly adduced^e by either side in a noncontested^e case under Chapter 536 is to refuse relief.

Here, the driver did not introduce any evidence whatsoever. Assuming that the administrative record cannot be considered evidence properly adduced,^e ' 536.150, then the circuit court was acting in an evidentiary vacuum. Unable to make the findings required by ' 536.150 in order to grant relief, the only course for the circuit court was to deny it.

On appeal, the proper course is to remand to the circuit court with instructions to either deny relief, or to reopen the record to adduce sufficient facts to reach a decision.

To the extent that following that course requires revision of this Court's holding in *Wampler*, it should take that step.

II.

The circuit court erred in setting aside the license denial. Setting aside the denial was erroneous because the evidence before the trial court supported only a finding that the denial was required by law. The evidence supported only such a finding in that it consisted solely of the Director of Revenue=s administrative record filed with the circuit court without the formalities of admission, and in that the administrative record showed that the driver had been convicted more than twice of crimes related to driving while intoxicated, and in that the driver presented no evidence whatsoever to contradict or cast doubt upon the truthfulness of the administrative record.

Instead of reaching the question of what happens in a judicial review proceeding where there is no evidence *A*properly adduced,@ the Court could revisit its decision in *Wampler* and recognize that in *A*noncontested@ as in *A*contested@ cases, the agencies and the circuit courts need not proceed through the formalities of admitting administrative records into evidence in order to include them in the record on which the circuit court can rule.

In fact, there is a dearth of published appellate opinions in which the courts have even considered the necessity of such a formality in the uncontested case context. Appellate courts confronted with cases arising out of petitions for review in *A*noncontested@ matters typically parrot boilerplate language with respect to the standard

of review, describing the trial court's duty as one of conducting *Aa de novo* review in which it hears evidence on the record, makes a record, determines the facts and decides whether the agency's action is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion. @ *Legal Communications Corp. v. St. Louis County Printing & Publishing Co., Inc.*, 24 S.W.2d 744, 750 (Mo. App. 2000) (discussing standard of review in case heard under ' 536.150). *See also Smith v. Housing Authority of St. Louis County*, 21 S.W. 3d 854, 856 (Mo. App. 2000)(same); *Redpath v. Missouri Highway and Transportation Comm-n*, 14 S.W.3d 34, 37 (Mo. App. 1999)(same); and *State ex rel. Straatmann Enterprises, Inc. v. County of Franklin*, 4 S.W.3d 641, 645 (Mo. App. 1999)(same). These same opinions do not explicitly discuss whether either party, if any, bears the burden of offering evidence to the trial court. But the directive that the trial court both make the record and determine the facts strongly suggests that these cases are like other circuit court trials in that the petitioner must put on sufficient evidence to support his claim. But even if the Director is required to provide the initial record in order to place that burden on the petitioner, the Director's practice of filing the administrative record with trial court more than discharges any such responsibility in denials reviewed under ' 302.311.

Moreover, development of ' 302.311 also supports the Director's construction of its review provisions as permitting her to discharge her responsibility by introducing a certified copy of the administrative record. Section 302.311 traces its roots back to

Chapter 45, ' 8463, RSMo 1939, which provided in pertinent part:

Any person denied a license or whose license has been canceled, suspended, or revoked ... shall have the right to file a petition within thirty (30) days thereafter for a hearing in the matter in the circuit court in which such person shall reside and such court is thereby vested with jurisdiction and it shall be its duty to set the matter for hearing upon reasonable notice, in writing, to the commissioner, and thereupon to take its testimony and examine into the facts of the case and to determine whether the petitioner is entitled to a license or is subject to suspension, cancellation, or revocation of license [.]

The statute at that time contemplated some sort of de novo proceeding, and was enacted without thought to Chapter 536, which did not come into existence until 1945.

See L.1945, p. 1054, ' 10. The general assembly subsequently enacted ' 302.311 in its present form, including reference to Chapter 536, in 1951. *See* L. 1951, pp. 689-690.

At that time, Chapter 536 contained contested review provisions, *see* RSMo 1949; the noncontested case provisions of ' 536.150 were not added until 1953.⁵ *See* L. 1953,

⁵ Pursuant to ' ' 536.100 - .140, administrative records are merely filed with, and then reviewed by, the circuit court.

p. 678. That the legislature enacted ' 302.311 with reference to contested review provisions, where the circuit court must give deference to an administrator's findings and rely on them, suggests that the legislature was aware of and comfortable with the prospect that the record merely needed to be filed in the circuit court.

The Director acknowledges that she has come to be cast in the role of the party bearing the burden of proof by various appellate decisions in the driver's license arena over the years, albeit by decisions that were short on explanations for rule. For example, in *Askins v. James*, 642 S.W.2d 383 (Mo.App. 1982), the court stated that "the applicable statutes do not directly prescribe who bears the burden of proving these matters," but nonetheless decreed, "We think the state should be required to carry the burden of proof[.]" *Id.* at 385.

More on point is *Boyd v. Director of Revenue*, 703 S.W.2d 19 (Mo.App. 1985). *Boyd* arose under the review provisions of ' 303.290.2 pertaining to the "Safety Responsibility" law; therein, the court merely decreed that "[t]hroughout such proceedings, the Director shall bear the burden of proof[.]" *Id.* at 22. *Boyd* is relevant from a historical perspective because it involved a construction of ' 303.290.2, and that section "contains language identical to that of RSMo ' 302.311." *Pointer v. Director of Revenue*, 891 S.W.2d 876, 878 n.5 (Mo.App. 1995). *Boyd* represents the germination of the theory that subsequently sprouted into the issue confronted by this Court in *Wampler*.

Shortly after *Boyd*, Chapter 303 was amended to include the mandatory insurance provisions now found in §§ 303.024-303.044, and it can readily be imagined how the new law produced a burgeoning case load for the Director in the circuit courts. This presented a conundrum for the Director: She was clearly saddled with the burden of proof in a proceeding before the circuit court per *Boyd*, but since these matters constituted contested cases, see *Randle v. Spradling*, 556 S.W.2d 10, 11 (Mo. banc 1977), it would seem that the burden was upon a petitioner, the driver, to file the administrative record with the circuit court, per § 536.130.

However, the Director noted some reluctance on the part of drivers to file records with the circuit court that would establish that their driving privileges were properly suspended. This situation was exacerbated by the absence from § 536.130 of any specific sanction for the failure of a petitioner to produce the administrative record, and by the fact that mandatory insurance proceedings produced a higher percentage of *pro se* litigants than other actions that are reviewed in circuit courts.

As a result, the Director began, *sua sponte*, to file the administrative record with the reviewing court. The Western District ratified this procedure in *Johnston v. Director of Revenue*, 762 S.W.2d 444, 448 (Mo.App. 1988), a case in which the Director filed the record with the circuit court, but the record was not formally admitted into evidence. The Western District, seeking to clarify the matter so that litigants will have no question, held that the burden was on the state to secure and present the entire record to the circuit

court, and that the circuit court shall not make final disposition of the Petition for Review until the entire record of the administrative hearing has been presented to and reviewed by said court. @ *Id.*

With respect to the second matter before it, the court in *Johnston* went on to hold

that the duty of evidentiary introduction would fall to the petitioning party. In contrast, since the Director bears the responsibility of establishing the reasonableness of the decision by a preponderance of the evidence, one might presume that evidentiary introduction would fall to the Director. The conclusion reached is that *neither* party has such a responsibility. *Stated another way, there is no requirement for the formal evidentiary introduction of the administrative record.*

This court further rules that once the administrative record is properly and timely placed with the circuit court, that is fully sufficient (to place the administrative record before the circuit court) and no formal evidentiary introduction of such record by either party is necessary or required.

Id. (emphasis added.) *See also, Connaughton v. Director of Revenue* 760 S.W.2d 604,

606 (Mo.App. 1988)(same). The Eastern District subsequently adopted this rationale in *Kinder v. Director of Revenue*, 895 S.W.2d 627, 629 (Mo.App. 1995). Given the similarity between the two statutes, it appeared logical to apply the *Johnston* rationale from ' 303.290.2 to proceedings under ' 302.311. See, e.g., *Lane v. Director of Revenue*, 996 S.W.2d 117, 119-120 (Mo. App. 1999).

Being cast in the role of the party with the burden of production was not particularly worrisome to the Director since she was deemed to have met this burden by merely filing the administrative record with the court, per *Johnston* and *Lane*. It was certainly no more onerous for her to simply file the administrative record with the reviewing court than it was for her to forward it to the petitioner and have the petitioner file it, or to file it directly with the court at the petitioner's request, pursuant to ' 536.130.

However, having the burden of production is one thing when the law is that **A**there is no requirement for the formal evidentiary introduction of the administrative record[@]and that **A**the circuit court shall not make final disposition of the Petition for Review until it has reviewed the entire administrative record.[@] *Johnston, supra*, 762 S.W.2d at 448. It is another matter altogether when the law is that **A**[t]he judge is not required to leaf through a file to determine what should be used as evidence,[@] *Wampler*, 48 S.W.3d at 35, and when **B** if a trial court has been required to do so **B** the penalty for the imposition of such a chore is placed on the Director pursuant to *Wampler*.

Obviously, it is particularly worrisome for the Director to no longer be able to rely

upon the *Johnston B Lane* rationale in matters, such as this case, in which she has denied a driver's license to a person who has been convicted more than twice of offenses related to driving while intoxicated. The decision in *Wampler* also appears to be at odds with appellate opinions construing the standard of review in ' 536.150 cases in general, and the development of ' 302.311. It is clearly at odds with the *Johnston B Lane* rationale, that the Court cast aside by reference to a case not reviewable under Chapter 536. *Wampler*, 48 S.W.3d at 35 (citing *Hopkins v. Hopkins*, 664 S.W.2d 273, 274 (Mo. App. 1984)).

The Director's practice of filing the administrative record with the circuit court at the outset of judicial review proceedings is sound. The court should reconsider its decision in *Wampler* requiring courts and parties to engage in the ultimately fruitless process of formally moving and admitting the administrative record into evidence **B** and by so doing, eliminate the need, at least for now, to reach the question of whether a person challenging an administrative action in a **Noncontested@** case can obtain relief without presenting any evidence whatsoever.

Conclusion

The Director respectfully requests that the judgment of the court below be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JAMES R. LAYTON
Missouri Bar No. 45631
State Solicitor

ALANA M. BARRAGÁN-SCOTT
Deputy Solicitor
Missouri Bar No. 38104

JAMES A. CHENAULT, III
Special Assistant Attorney General
Missouri Bar No. 33167

Supreme Court Building
P.O. Box 899
Jefferson City, MO 65102
(573) 751-3321

ATTORNEYS FOR APPELLANT
DIRECTOR OF REVENUE

Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 17th day of September, 2001, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

Timothy R. Cisar
2140 Bagnell Dam Blvd., #41
Lake Ozark, MO 65049

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 5,735 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

James R. Layton