

No. SC94840

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**In the  
Supreme Court of Missouri**

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**KRISTIN N. STIERS,**

**Respondent,**

**v.**

**DIRECTOR OF REVENUE,**

**Appellant.**

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**Appeal from St. Charles County Circuit Court  
Eleventh Judicial Circuit  
The Honorable Matthew E.P. Thornhill, Judge**

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**APPELLANT'S SUBSTITUTE BRIEF**

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**CHRIS KOSTER  
Attorney General**

**DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182**

**P.O. Box 899  
Jefferson City, MO 65102  
Phone: (573) 751-3321  
Fax: (573) 751-5391  
Dan.McPherson@ago.mo.gov**

**ATTORNEYS FOR APPELLANT  
DIRECTOR OF REVENUE**

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## **JURISDICTIONAL STATEMENT**

This appeal is from a judgment entered in the Circuit Court of St. Charles County that reinstated the driving privileges of Kristin N. Stiers after they had been administratively suspended by the Director of Revenue under the provisions of sections 302.505, RSMo Cum. Supp. 2001 and 302.525, RSMo Cum. Supp. 2013. This case was transferred to this Court, after opinion, by order of the Missouri Court of Appeals, Eastern District. Therefore, jurisdiction lies in this Court pursuant to Article V, § 10, Missouri Constitution.

## STATEMENT OF FACTS

On July 12, 2013, Lake St. Louis Police Officer Gerald Crowley saw a GMC Envoy traveling westbound on Interstate-70 that repeatedly drifted out of the center lane into the left lane, and then back again into the center lane. (L.F. 23-24). Officer Crowley stopped the vehicle and identified the driver as Respondent Kristin Stiers. (L.F. 24). Officer Crowley detected a strong odor of alcohol on Stiers's breath. (L.F. 24). He also noticed that her eyes were bloodshot and glassy, her eyelids were droopy, and her speech was slurred. (L.F. 24). Stiers agreed to Officer Crowley's request that she undergo field sobriety tests. (L.F. 24). Stiers's performance on the horizontal gaze nystagmus test, the walk-and-turn test, and one-leg stand test indicated impairment. (L.F. 25). Stiers agreed to take a portable breath test that was positive for the presence of alcohol. (L.F. 25).

Stiers was placed under arrest and taken to the Lake St. Louis Police Department. (L.F. 25). Stiers agreed to take a breath test. (L.F. 25). That test showed a blood-alcohol content of .172-percent. (L.F. 25).

The Director of Revenue revoked Stiers's driver's license following an administrative hearing on November 30, 2013. (L.F. 4-5, 8). Stiers filed a petition for trial de novo in St. Charles County Circuit Court on December 2, 2013. (L.F. 1, 4-7). A hearing on the petition was held on April 10, 2014, before the Honorable Matthew Thornhill. (L.F. 2; Tr. 2). The court, over

Stiers's objection, admitted into evidence most of Director's Exhibit A, which contained certified records relating to Stiers's arrest and the administration of the breath test. (Tr. 13; L.F. 12-36). In admitting the exhibit, the court noted that its action did not automatically mean that the breath test result would become part of the evidence. (Tr. 13). The court also admitted Director's Exhibits B, C, and D, which contained documents, including Department of Health and Senior Services regulations, relating to the verification and calibration of breath analyzers generally and of the specific breath analyzer used to obtain Stiers's breath sample. (Tr. 14-22).

Both parties filed post-trial briefs that addressed the admissibility of the breath test results. Stiers argued that the test results were inadmissible because the breath analyzer used to take her breath sample was not verified and calibrated in the manner required by the version of 19 CSR 25-30.051(2) that was in effect at the time the maintenance report on that instrument was completed. (L.F. 108-12). Stiers argued that the regulation required that breath analyzers be calibrated using three standard simulator solutions: ten-percent, eight-percent, **and** four-percent. (L.F. 108, 110) (emphasis added). The instrument used to obtain Stiers's sample had been calibrated with only one solution standard – the ten-percent standard. (L.F. 20). Stiers argued that the Director's non-compliance with the regulation mandated exclusion of the breath test results. (L.F. 111-12).

The Director argued that the entire regulatory scheme concerning maintenance checks of breath analyzers showed that 19 CSR 25-30.051 merely defined the types of solutions and mixtures available for use in performing maintenance checks and did not define how the maintenance checks, including the verification and calibration functions, were to be performed. (L.F. 97-104). The Director also argued that the regulation had been changed effective February 28, 2014, to list the available solutions as ten-percent, eight-percent **or** four-percent. (L.F. 99) (emphasis added). The Director argued that the current regulation applied to Stiers's case because it was procedural in nature and in effect at the time of Stiers's trial. (L.F. 93-96). The parties disagreed on whether 19 CSR 25-30.051(8) reflected an intent that the rule be given prospective operation only. (L.F. 93-96, 107-08).

The trial court issued its Findings of Fact, Conclusions of Law, and Judgment on April 23, 2014. (L.F. 117). (Appx. A1). The court first concluded that 19 CSR 25-30.051(8) required that the court apply the regulation that was in effect at the time the maintenance check on the breath analyzer was completed. (L.F. 118). (Appx. A2). The last maintenance check on the breath analyzer used to obtain Stiers's breath sample was conducted on June 20, 2013. (L.F. 118). The court found that the version of 19 CSR 25-30.051 that was in effect on that date required the use of three standard simulator solutions when verifying and calibrating a breath analyzer, and that the

Director's evidence only showed the use of a single standard. (L.F. 119). (Appx. A3). The court found that the Director failed to present sufficient credible evidence of compliance with the regulation, and it sustained Stiers's objection to admission of the breath test result.<sup>1</sup> (L.F. 119). (Appx. A3).

The court further found that the Director failed to meet her burden of providing sufficient credible evidence that Stiers drove with a blood-alcohol concentration at or above .08-percent. (L.F. 120). (Appx. A4). The court declined to make a finding on whether the officer had probable cause to arrest Stiers. (L.F. 120). (Appx. A4). The court ordered the Director to remove the administrative revocation<sup>2</sup> from Stiers's driving record and to reinstate Stiers's driving privileges to the extent otherwise allowable by law. (L.F. 120). (Appx. A4).

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<sup>1</sup> While the judgment used the term "credible evidence," the issue in this appeal is whether a proper foundation was laid for admission of the breath test results under section 577.037, RSMo, which is a legal issue that does not require the trial court to make any credibility determinations.

<sup>2</sup> The judgment used the term "suspension" when it should have used the term "revocation."

## POINTS RELIED ON

**I. The trial court erred in excluding the results of the breath test and in reinstating Stiers’s driving privilege because the breath analyzer used to administer Stiers’s breath test had been properly verified and calibrated according to applicable regulations of the Department of Health and Senior Services, in that the regulation that became effective on December 30, 2012, added a third concentration level of the standard simulator solution that could be used in performing a calibration check of a breath analyzer but did not change the requirement that a single concentration level be used when performing a calibration check.**

*EBG Health Care III, Inc. v. Missouri Health Facilities Review Comm’n*,  
12 S.W.3d 354 (Mo. App. W.D. 2000)

*Missouri Hosp. Ass’n v. Air Conservation Comm’n*, 874 S.W.2d 380  
(Mo. App. W.D. 1994)

*Mullins v. Dir. of Revenue*, 946 S.W.2d 770 (Mo. App. E.D. 1997)

*State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788 (Mo. 1975)

Section 536.021, RSMo Cum. Supp. 2004

Section 577.020, RSMo Cum. Supp. 2006

Section 577.037, RSMo Cum. Supp. 2001

19 CSR 25-30.031 (Nov. 30, 2012)  
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19 CSR 25-30.051 (Jan. 29, 2014)  
19 CSR 25-30.051 (Nov. 30, 2012)  
19 CSR 25-30.051 (June 30, 2004)  
19 CSR 25-30.060 (Nov. 30, 2012)  
38 Mo. Register 1625 (Oct. 15, 2013)  
37 Mo. Register 1027-28 (July 2, 2012)

**II. The trial court erred in excluding the results of the breath test and in reinstating Stiers’s driving privilege because the court applied the wrong version of the Department of Health and Senior Services regulation governing the verification and calibration of breath test devices, in that the regulation is procedural and is to be given retroactive application and the version of the regulation that was in effect at the time of Stiers’s trial clearly stated that only a single concentration level of the standard simulator solution needed to be used when performing a calibration check of the breath analyzer.**

*DeClue v. Dir. of Revenue*, 945 S.W.2d 684 (Mo. App. E.D. 1997)

*Eckhoff v. Dir. of Revenue*, 745 S.W.2d 815 (Mo. App. W.D. 1988)

*Trumble v. Dir. of Revenue*, 985 S.W.3d 815 (Mo. App. E.D. 1998)

*Roberson v. Vincent*, 290 S.W.3d 110 (Mo. App. W.D. 2009)

19 CSR 25-30.051 (Jan. 29, 2014)

## ARGUMENT

### I.

**The trial court erred in excluding the results of the breath test and in reinstating Stiers's driving privilege because the breath analyzer used to administer Stiers's breath test had been properly verified and calibrated according to applicable regulations of the Department of Health and Senior Services, in that the regulation that became effective on December 30, 2012, added a third concentration level of the standard simulator solution that could be used in performing a calibration check of a breath analyzer but did not change the requirement that a single concentration level be used when performing a calibration check.**

In order for a chemical breath analysis to be used to support the suspension or revocation of a person's driving privileges, that analysis must have complied with the methods and standards approved by the Missouri Department of Health and Senior Services (hereafter "DHSS"). §§ 577.020, RSMo Cum. Supp. 2006; 577.037.4, RSMo Cum. Supp. 2001. The trial court excluded the results of the breath test administered to Stiers, and therefore reinstated her driving privilege, on the grounds that the breath test instrument used to conduct the test had not been verified and calibrated in the manner required by the DHSS regulations that were in effect at the time

of Stier's arrest. (L.F. 26). That conclusion was based on an erroneous reading of those regulations.

**A. Standard of Review.**

The nature of this Court's review is directed by whether the particular issue is a question of fact or law. *Cortner v. Dir. of Revenue*, 408 S.W.3d 789, 792 (Mo. App. E.D. 2013). Administrative rules are interpreted under the same rules of construction used in interpreting statutes. *Trumble v. Dir. of Revenue*, 985 S.W.3d 815, 819 (Mo. App. E.D. 1998). Statutory interpretation is a matter of law. *Bender v. Dir. of Revenue*, 320 S.W.3d 167, 169 (Mo. App. E.D. 2010). So too is interpretation of a state regulation. This Court applies de novo review to questions of law decided in court-tried cases. *Cortner*, 408 S.W.3d at 792. With respect to such questions, the appellate court reviews the trial court's determination independently, without deference to that court's conclusions. *Id.*

**B. Analysis.**

The DHSS regulations in place at the time of Stiers's arrest required that breath analyzers undergo maintenance checks at least every thirty-five days. 19 CSR 25-30.031(3) (Nov. 30, 2012) (effective date of rule was Dec. 30, 2012). (Appx. A14). The instruments were to be verified and calibrated using either a standard simulator solution or compressed ethanol-gas standard mixtures. 19 CSR 25-30.051(1) (Nov. 30, 2012) (effective date of rule was Dec.

30, 2012). (Appx. A24). Stiers's breath test was administered on an Alco-Sensor IV breath analyzer that was verified using a standard simulator solution. (L.F. 20).

The required characteristics of the standard simulator solutions were also set forth in the regulation:

Standard simulator solutions, used to verify and calibrate evidential breath analyzers, shall be solutions from approved suppliers. The standard simulator solution used shall have a vapor concentration within five percent (5%) of the following values:

(A) 0.10%;

(B) 0.08%; and

(C) 0.04%.

19 CSR 25-30.051(2) (Nov. 30, 2012). (Appx. A24).

Stiers's argument to the trial court was that the inclusion of the word "and" in the above subsection meant that all three solution standards had to be used to perform calibration checks during maintenance of the breath test instrument used to take his breath sample. (Tr. 2-3). The instrument used to obtain Stiers's sample had been verified with only one solution standard – the ten-percent standard. (L.F. 20). Stiers therefore argued, and the trial court agreed, that the instrument had not been verified in accordance with the

DHSS regulation. Both Stiers and the trial court misinterpreted the scope of the regulation.

When interpreting administrative rules, this Court relies upon the same principles of construction that are used in interpreting statutes.

*Woolridge v. Woolridge*, 915 S.W.2d 372, 378 (Mo. App. W.D. 1996). The primary rule of construction is to ascertain the agency's intent from the language used and give effect to that intent, while considering the words used in their plain and ordinary meaning. *Tuft v. City of St. Louis*, 936 S.W.2d 113, 119 (Mo. App. E.D. 1996).

**i. Regulations do not require the use of three simulator solutions when conducting a maintenance check.**

A fundamental flaw in the argument that 19 CSR 25-30.051 required the use of three different simulator solutions when conducting a maintenance check on a breath test instrument is that it misinterprets what the rule does and does not do. That misinterpretation is based on a failure to give effect to the entire rule and to related rules. A subsection of a rule must be viewed in light of the entire regulation and, if possible, harmonized with that regulation. *Mullins v. Dir. of Revenue*, 946 S.W.2d 770, 771 (Mo. App. E.D. 1997). Additionally, regulatory provisions relating to the same subject matter are considered *in pari materia* and are to be construed together. *EBG Health Care III, Inc. v. Missouri Health Facilities Review Comm.*, 12 S.W.3d 354, 360

(Mo. App. W.D. 2000). This Court presumes that regulations *in pari materia* are intended to be read consistently and harmoniously. *Id.*

19 CSR 25-30.051 begins with the following statement of purpose:

This rule defines the standard simulator solutions or compressed ethanol-gas mixtures to be used in verifying and calibrating breath analyzers, as well as the annual checks required on simulators used in conjunction with the standard simulator solution.

19 CSR 25-30.051 (Nov. 30, 2012). (Appx. A24). The rule also lists the approved suppliers of standard simulator solutions. 19 CSR 25-30.051(3) (Nov. 30, 2012). (Appx. A25). And it outlines a requirement that any breath alcohol simulator used to verify or calibrate a breath test instrument with a standard simulator solution be certified against a National Institute of Standards and Technology traceable reference thermometer or thermocouple. 19 CSR 25-30.051(4) (Nov. 30, 2012). (Appx. A25).

The rule, when read in its entirety, defines the solutions that can be used to calibrate or verify breath test instruments. It does not establish procedures for conducting maintenance checks. Those procedures are instead addressed in a different rule. 19 CSR 25-30.031 authorizes a Type II permit holder to perform maintenance checks on breath test instruments as authorized by DHSS. 19 CSR 25-30.031(1) (Nov. 30, 2012). (Appx. A14). The

rule defines when maintenance checks must be performed and requires that records of those maintenance checks be kept. 19 CSR 25-30.031(3) (Nov. 30, 2012). (Appx. A14). The rule also requires that maintenance checks be recorded on “the appropriate maintenance report form for the specific instrument being checked[.]” 19 CSR 25-30.031(7) (Nov. 30, 2012). (Appx. A14). Those approved forms were included with the rule in the Code of State Regulations. (Appx. A15-A20). A separate rule requires breath analyzer operators to follow the procedures on the approved form and to complete the form. 19 CSR 25-30.060 (Nov. 30, 2012). (Appx. A25). The rule’s statement of purpose indicates that the rule establishes an operational checklist for the approved breath analyzers that can be introduced in court to show that the operators have adhered strictly to the operating procedures approved by the Department of Health and Human Services. *Id.* Accordingly, the Court can look to the requirements of those forms in determining whether the requirements of a particular regulation apply to an actual test of an individual’s breath. *Vernon v. Dir. of Revenue*, 142 S.W.3d 905, 910 (Mo. App. S.D. 2004), *cf.*, *Poage v. Dir. of Revenue*, 948 S.W.2d 194, 196 (Mo. App. E.D. 1997) (stating without further analysis that “[a]ccording to the form, only one standard is to be used per maintenance report.”).

The approved form for the Alco-Sensor IV used to administer the breath test to Stiers contained a section for recording the calibration check.

(L.F. 20). (Appx. A20). That section contained the admonition, “Only one standard is to be used per maintenance report.” (L.F. 20). It also provided the following directions: “Run three tests using a standard solution. All three tests must be within  $\pm 5\%$  of the standard value and must have a spread of .005 or less. Mark the box corresponding to the standard solution being used.” (L.F. 20). Below those instructions were three boxes: one for a ten-percent standard solution, one for an eight-percent standard solution, and one for a four-percent standard solution. (L.F. 20).

If the regulations required three calibration checks to be performed using three different standard solutions, DHSS would have included space on the maintenance reports for the results of calibration checks at all three vapor concentration percentages. Instead, DHSS included one box for one standard, and emphatically stated that only one standard value is to be used when performing a maintenance check.

Nor can the rule be reasonably construed to require that three separate maintenance reports – one each for the four-percent, eight-percent, and ten-percent solutions – be filled out by the Type II permit holder. To the contrary, 19 CSR 25-30.031 mandates that a permittee “shall retain the *original report* of the maintenance check and submit a copy of *the report*” to the Department of Revenue. 19 CSR 25-30.031(3) (Nov. 30, 2012) (emphasis added). (Appx. A14). The use of the singular “report” rather than the plural “reports” shows

that the permit holder is only required to fill out one maintenance report reflecting the performance of one calibration check using one of the listed vapor concentration levels.

- ii. The history of the regulations show that only one simulator solution is to be used when conducting a maintenance check.**

In determining the meaning of a particular administrative regulation, resort may be had to the established policy of the entity promulgating the rule as disclosed by a general course of rule-making. *State ex rel. Jackson County v. Spradling*, 522 S.W.2d 788, 791 (Mo. 1975). With this purpose in view, it is proper to consider both prior and subsequent versions of the same rule. *Id.*

The regulation at issue in this case took effect on December 30, 2012. 19 CSR 25-30.051 (Nov. 30, 2012). (Appx. A25). Prior to that date, 19 CSR 25-30.051 defined two standard simulator solutions:

- (1) Standard simulator solutions, used to verify and calibrate evidential breath analyzers at the 0.10% or 0.100% level, shall be solutions from approved suppliers.

- (2) Standard simulator solutions, used to verify and calibrate evidential breath analyzers at the 0.40% or 0.040% level, shall be solutions from approved suppliers.

19 CSR 25-30.051 (June 30, 2004). (Appx. A13). In addition, 19 CSR 25-30.031 specified that standard maintenance report forms were to be used for the specific authorized instruments. 19 CSR 25-30.031(7) (Sept. 30, 2001). (Appx. A5). Those forms were incorporated into the regulation and, like the forms incorporated into the 2012 regulation, directed that only one standard solution was to be used for each maintenance report. (Appx. A6-A11).

The 2012 amendment to the rule added the language that Stiers contends required calibration checks using three different standard solutions. But when the proposed amendment was published it was accompanied by a statement of purpose that said, in pertinent part, that the amendment “adds 0.08% as another concentration level available for performing accuracy checks and instrument recalibrations.”<sup>3</sup> 37 Mo. Register 1028 (July 2, 2012). (Appx. A22). That language makes clear that DHSS’s intent was to provide permit holders with a third option for conducting calibration checks, not to mandate that calibration checks be performed at every available solution level.

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<sup>3</sup> Under Missouri law, a notice of proposed rulemaking must include “[a]n explanation of any proposed rule or any change in an existing rule, and the reasons therefore.” § 536.021.2, RSMo Cum. Supp. 2004.

The rule was amended yet again in 2014. The version of the rule that took effect on February 28, 2014 and remains in place today states that:

Standard simulator solutions, used to verify and calibrate evidential breath analyzers, shall be solutions from approved suppliers. The standard simulator solutions used shall have a vapor concentration within five percent (5%) of the following values:

- (a) 0.10%;
- (b) 0.08%; or
- (c) 0.04%.

19 CSR 25-30.051(2) (Jan. 29, 2014). (Appx. A35). The proposed amendment was accompanied by a statement of purpose that said:

This amendment clarifies which standard simulator solutions of the listed concentrations may be used in verifying and calibrating breath analyzers, as well as the annual checks required on simulators used in conjunction with the standard simulator solution.

38 Mo. Register 1625 (Oct. 15, 2013). (Appx. A34).

Subsequent regulations can be used to clarify or restate the intent of the entity promulgating the rule. *Missouri Hosp. Ass'n v. Air Conservation Comm'n*, 874 S.W.2d 380, 398 (Mo. App. W.D. 1994). Subsequent regulations

can be considered in construing previously enacted regulations. *Id.* The current regulation was enacted in the wake of arguments that the 2012 regulation required calibration checks at all three simulator solution levels, which is another indication that DHSS never intended for that to be the effect of the 2012 regulation.

The statements of public cost that accompanied the regulations when they were first proposed also demonstrate that DHSS never intended to require verification using all three simulator solution levels. The proposed amendment to 19 CSR 25-30.050 that was published on July 2, 2012, stated that the proposed amendment would not cost state agencies or political subdivisions more than 500-dollars in the aggregate. 37 Mo. Register 1027 (Jul. 2, 2012). (Appx. A22). The same public cost statement appeared when the current regulation was first published as a proposed amendment. 38 Mo. Register 1625 (Oct. 15, 2013). (Appx. A34). If the 2012 amendments had changed the regulations to require that calibration checks be performed for each solution level, that requirement would have imposed significant additional costs for law enforcement agencies to purchase simulator solutions in sufficient quantities to perform monthly checks using all three solution levels. The statement of public cost accompanying the proposed regulation would have reflected that increase. Likewise, if the 2013 amendments changed the regulations to go back to a single check at a single solution level,

there would have been a significant decrease in cost to local law enforcement agencies, and the statement of public cost accompanying the proposed regulation would have reflected that decrease.

In summary, the DHSS regulations in effect at the time of Stiers's arrest and trial required that the breath test instrument undergo a single monthly maintenance check during which a single calibration check would be performed using a single standard simulator solution. The instrument used to obtain Stiers's breath sample was verified according to that requirement and the trial court erred in excluding the breath test result.

## II.

The trial court erred in excluding the results of the breath test and in reinstating Stiers's driving privilege because the court applied the wrong version of the Department of Health and Senior Services regulation governing the verification and calibration of breath test devices, in that the regulation is procedural and is to be given retroactive application and the version of the regulation that was in effect at the time of Stiers's trial clearly stated that only a single concentration level of the standard simulator solution needed to be used when performing a calibration check of the breath analyzer.

Even if this Court believes the prior version 19 CSR 25-30.051(2) required that three calibration checks be performed, the trial court still erred in excluding the breath test results. The trial court should have applied the current version of 19 CSR 25-30.051(2), which was in effect at the time of the trial de novo and that changed the word "and" in subsection B to "or."

### **A. Standard of Review.**

The nature of this Court's review is directed by whether the particular issue is a question of fact or law. *Cortner*, 408 S.W.3d at 792. Administrative rules are interpreted under the same rules of construction used in interpreting statutes. *Trumble*, 985 S.W.3d at 819. Statutory interpretation

is a matter of law. *Bender*, 320 S.W.3d at 169. So too is interpretation of a state regulation. This Court applies de novo review to questions of law decided in court-tried cases. *Cortner*, 408 S.W.3d at 792. With respect to such questions, the appellate court reviews the trial court’s determination independently, without deference to that court’s conclusions. *Id.*

## **B. Analysis.**

Statutes and administrative rules generally operate prospectively. *DeClue v. Dir. of Revenue*, 945 S.W.2d 684, 686 (Mo. App. E.D. 1997); *Eckhoff v. Dir. of Revenue*, 745 S.W.2d 815, 817 (Mo. App. W.D. 1988). But procedural rules operate retroactively<sup>4</sup> unless the enactment reveals a contrary intent.

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<sup>4</sup> The cases cited herein use the term “retrospective” and that same term was used in the lower court. While the terms “retrospective” and “retroactive” are frequently interchanged, they are not synonymous. *Missouri Real Estate Comm’n v. Rayford*, 307 S.W.3d 686, 690 (Mo. App. W.D. 2010). A law is retroactive in operation when it looks or acts backward from its effective date and is retrospective if it has the same effect to past transactions or considerations as to future ones. *Id.* A law that makes only a procedural change is not retrospective and can be applied retroactively. *Id.* The Director respectfully suggests that retroactive is the more accurate characterization in this case and will use that term.

*Id.* In particular, several cases have characterized the rules regarding the admissibility of breath test results as procedural rules that are to be applied retroactively.

One of those cases specifically addressed 19 CSR 25-30.051. At issue in that case was whether the trial court erred in refusing to admit a certificate of analysis reflecting the maintenance check performed on a breath test instrument. *Trumble*, 985 S.W.2d at 817. In determining whether the certificate of analysis comported with Department of Health regulations, the court looked to the version of 19 CSR 25-30.051 that became effective after the driver's arrest but prior to his trial. *Id.*

The driver in *DeClue* claimed that the breath test results should have been excluded because the Director did not prove that an approved standard simulator solution was used to verify and calibrate the machine as required by 19 CSR 20-30.050. *DeClue*, 945 S.W.2d at 685. That regulation was amended after the breath test was administered to the driver, and the court gave retroactive application to the amended regulation to rule in the driver's favor. *Id.* at 686.

*Eckhoff* also raised the issue of which version of 19 CSR 20-30.050, should be applied in determining the admissibility of a breath test. *Eckhoff*, 745 S.W.2d at 816. The precise issue was whether the chemical reagent test vials used in performing the breath test met the regulatory requirement of

being obtained from a source approved by what was then known as the Missouri Division of Health. *Id.* The court noted that the company that provided the vials was not an approved source under the version of the regulation that was in effect when the breath test was performed. *Id.* But the court then noted that the regulations had been changed to add that company to the list of approved sources and that because the rule was procedural in nature, the version in effect on the day of trial was the version to be used in determining the admissibility of the breath test results. *Id.* at 817-18.

The trial court in *Roberson v. Vincent* excluded the result of a blood-alcohol test on the grounds that the Director had not established that a non-alcoholic antiseptic was used during the blood draw. *Roberson v. Vincent*, 290 S.W.3d 110, 112 (Mo. App. W.D. 2009). The requirement for using a non-alcoholic antiseptic was contained in the version of section 577.029, RSMo that was in effect at the time of the driver's arrest. *Id.* at 113-14. But the Court of Appeals noted that the statute had been amended between the time of the driver's arrest and his trial, and that the version of the statute in effect at the time of trial did not require the use of a non-alcoholic antiseptic. *Id.* at 114. The Court of Appeals concluded that the trial court had erroneously applied the version of the statute in effect at the time of the driver's arrest because section 577.029, RSMo was a procedural statute that should have been given retroactive application. *Id.* Accordingly, the trial court should

have applied the version of the statute that was in effect at the time of trial and should not have excluded evidence of the blood alcohol test results. *Id.*

Stiers might argue that the present version of 19 CSR 25-30.051 contains language indicating an intent that it be given prospective application only. *See DeClue*, 945 S.W.2d at 686 n.2 (noting that future amendments to the Code of State Regulations could declare intent for prospective application only). The language that Stiers might rely on states:

Maintenance reports completed prior to the effective date of this rule shall be considered valid under this rule if the maintenance report was completed in compliance with the rules in effect at the time the maintenance was conducted.

19 CSR 25-30.051(8) (Jan. 29, 2014). (Appx. A36). But that language does not, in any way, declare intent to prospective application only.

Subsection 8, by its own terms, only comes into play when the maintenance check at issue was valid at the time it was performed.<sup>5</sup> Stiers's

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<sup>5</sup> Stiers has never contended that the maintenance check performed in her case is invalid under the 2014 version of the regulation. Therefore, if the provisions of subsection 8 were triggered because the maintenance check was valid when it was performed in 2013, the maintenance check would remain valid under the 2014 regulation and the question of retroactive versus

theory is that the maintenance check in her case was invalid at the time it was performed. If that were the case, subsection 8 would have no application here. A maintenance check that was invalid when performed but which became valid under a subsequently adopted regulation in effect at the time of trial would be governed by the rule of retroactive application that is outlined in *DeClue* and *Eckhoff*, and discussed above.

The plain language of subsection eight demonstrates an intent to save maintenance reports that complied with the applicable regulations when performed, but which would not be in compliance with an amended version of the regulation that was enacted after the date of the maintenance test and before the date of trial. The Court of Appeals has given that construction to similar regulatory language.

The regulation at issue in that case was 19 CSR 25-30.051 and the question raised was whether the certificate of analysis, which was attached to the maintenance report, complied with the requirements of that regulation. *Trumble*, 985 S.W.2d at 818-19. The court found that the certificate would not comply with the regulation that was in effect at the time

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prospective application would be moot. The upshot would be that the breath test result would be admissible under either version of the regulation.

of trial unless some other exception applied. *Id.* at 817, 819. The court found such an exception from a subsection providing that maintenance reports completed before the effective date of the new regulation would be valid if a certificate of analysis was supplied with the simulator solution. *Id.* at 819. The court stated that the clear intent of lawmakers was to exempt reports prepared during that earlier time frame from having to comply with the technicalities outlined in the amended regulation. *Id.* Likewise, 19 CSR 25-30.051(8) reflects a legislative intent to exempt maintenance reports prepared before the effective date of the regulation from having to comply with any requirements contained in that regulation that were not in existence at the time the report was prepared. The language does not reflect an intent to give the regulation prospective application only.

*Stiers* might argue that the Court of Appeals opinion in *Hunt v. Dir. of Revenue*, 10 S.W.3d 144 (Mo. App. E.D. 1999), demonstrates that subsection 8 does prevent retroactive application of the rule. A closer look at *Hunt* does not support that argument.

*Hunt* also dealt with the certificate of analysis requirements for breath analyzers. *Id.* at 148. The rule in effect at the time of trial required that maintenance reports on breath analyzers be accompanied by certificates of analysis. *Id.* The maintenance report that was offered into evidence in *Hunt* had been completed before the effective date of that rule and thus was not

accompanied by a manufacturer's certification. *Id.* at 145, 147. The driver contended that the new regulation should be applied retroactively to require the presence of a certificate of analysis before a breath test result could be admitted. *Id.* at 148-49. In rejecting that argument, the court looked at language in the regulation that is substantially the same as that contained in subsection 8, stating that maintenance reports completed prior to the effective date of the regulation would be considered valid if done in accordance with the rules in effect at the time the report was completed. *Id.* at 149-50. The court applied that language to find that the maintenance report was admissible because it was done in compliance with the regulations then in effect. *Id.* at 150.

In reaching that conclusion, the court did state that the savings clause "was clearly and unambiguously intended to supersede the retrospective application of [the prior rule], limiting that rule's application to its effective date . . . and subsequent." *Id.* Stiers might use that language to argue that subsection 8 prohibits retroactive application of the rule in all instances. But the court's broad statement has to be considered both in the context of the factual background in *Hunt* and in light of the specific language of the rule.

*Hunt* involved the exact scenario discussed above, a maintenance check that was valid under the regulation in effect at the time that it was performed but that was invalid under the regulation that was in effect at the

time of trial. The language of subsection 8 is expressly limited to that scenario. The holding of *Hunt* was correct, and consistent with the Director's argument that subsection 8 operates as a savings clause. To read the decision any more broadly than that would be contrary to the intent of the subsection that is clearly reflected in its plain language.

The current version of 19 CSR 25-30.051(2), in effect at the time of Stiers's trial, permits the use of any one of the three listed solutions. The maintenance check was performed in compliance with that regulation and therefore met the requirements for admissibility. The trial court thus erred in excluding the breath test results and entering judgment against the Director.

## CONCLUSION

In view of the foregoing, Appellant submits that the judgment of the circuit court should be reversed and remanded.

Respectfully submitted,

CHRIS KOSTER  
Attorney General

/s/ Daniel N. McPherson  
DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182

P. O. Box 899  
Jefferson City, MO 65102  
Phone: (573) 751-3321  
Fax: (573) 751-5391

ATTORNEYS FOR APPELLANT  
DIRECTOR OF REVENUE

**CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 6,303 words as calculated pursuant to the requirements of Supreme Court Rule 84.06, as determined by Microsoft Word 2010 software; and
2. That a copy of this notification was sent through the eFiling system on this 25th day of March, 2015, to:

Robert S. Adler  
Attorney at Law  
130 S. Bemiston Ave., Ste. 608  
Clayton, MO 63105

/s/ Daniel N. McPherson  
DANIEL N. McPHERSON  
Assistant Attorney General  
Missouri Bar No. 47182

P.O. Box 899  
Jefferson City, Missouri 65102  
Phone: (573) 751-3321  
Fax (573) 751-5391

ATTORNEYS FOR APPELLANT  
DIRECTOR OF REVENUE