IN THE
SUPREME COURT OF MISSOURI

SC90403

MICHAEL R. STRUP

Respondent,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI

Appellant.

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

1. Mr. Strup responds to the Director's Point I with a very curious argument. He implicitly concedes that his underlying driving privilege was suspended, and that he would be disqualified from holding a commercial driving license (CDL) upon such suspension. But in Mr. Strup's view, because on February 11, 2007, the circuit court had not finally decided the question of the suspension of his underlying driving privilege, that court had an adequate basis for reversing his CDL disqualification. Respondent's Substitute Brief ("Resp. Sub. Br.") at 13-14. In other words, Mr. Strup reads the statutory scheme to permit a driver to evade a CDL disqualification by manipulating the timing of consideration of his challenge to the underlying driving privilege in relation to the timing of resolution of his challenge to the CDL disqualification. There is not, of course, even a hint in the circuit court's decision that the circuit court would countenance, much less rely on, such a reading of the statute.

Mr. Strup's approach makes no sense. The question as to the underlying driving privilege is a necessary prerequisite to the CDL disqualification issue. The legislative intent could not possibly be to make CDL disqualification contingent on the timing of related matters in a circuit court. Whatever the timing of circuit court's CDL decision in relation to its decision on the

underlying license, the fact remains that the CDL disqualification was required no later than when the action on the underlying privilege became final.

But we need not rely on logic to discern legislative intent, for Mr. Strup's argument is contrary to the statutory language. Mr. Strup's argument is based on the premise that a CDL disqualification requires a final judgment on the underlying license suspension. It does not. Rather, it requires merely an "unvacated" determination in an "authorized administrative proceeding." As of the date of the circuit court's CDL decision, there was an "authorized administrative proceeding," dated September 27, 2006, which resulted in an unvacated determination that he drove under the influence of alcohol. § 302.700.2(8). *See also* Appellant's Substitute Brief ("App. Sub. Br.") at 17-18. Because there was still an unvacated determination, regardless of whether it was still being challenged and not yet final, the circuit court could not reverse the CDL disqualification.

2. Strup complains that the Director "never made any argument that the constitutional right to due process had been afforded [Mr. Strup]." (Resp. Sub. Br. at 17). But it was not the Director's burden to prove that Mr. Strup received due process. The burden to prove a constitutional claim rests upon the party making the claim. *See Reproductive Health Services of Planned Parenthood of St. Louis Region v. Nixon*, 185 S.W.3d 685, 687 (Mo. banc 2006)

(burden to prove a statute unconstitutional rests on party making challenge). Here, that party would have been Mr. Strup, had he properly plead a constitutional claim in the first place. *See* App. Sub. Br. at 21-22.

3. As to the merits of Mr. Strup's due process claim, he still never tackles the key question: what additional process was due on his CDL disqualification, given that he had a hearing and the opportunity for a trial de novo on the suspension of his underlying driving privilege, and that the CDL disqualification is automatic once there is such a suspension.

CONCLUSION

This Court should reverse the trial court's judgment and reinstate the one-year disqualification of Mr. Strup's commercial driving privilege.

Respectfully submitted,

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

The undersigned hereby certifies that on this 27th day of January, 2010, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 623 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.

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Solicitor General