**No. SC84192**

**_____**

**IN THE SUPREME COURT OF MISSOURI**

**_____**

**MARK J. HINNAH**

**Respondent,**

**V.**

**DIRECTOR OF REVENUE,**

**Appellant.**

**_____**

**Appeal from the Circuit Court of St. Louis County**
**The Honorable Judge Robert S. Cohen**

**_____**

# RESPONDENT'S SUBSTITUTE BRIEF

**_____**

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## JURISDICTIONAL STATEMENT

This case involves an appeal by the Director of Revenue from an adverse ruling and judgment by the Trial Court. Respondent Hinnah prevailed in his Petition for Review filed under §577.041, RSMo, cum. supp 1998, for refusing to submit to a chemical test following an arrest for driving while intoxicated. This case does not involve the categories reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court. Jurisdiction, therefore, lies in this Court. Missouri Constitution Article IV, §3; §512.02 RSMo.

After an opinion by the Court of Appeals, Eastern District, this Court took transfer of this case. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const.Art. V, Section 10 (as amended 1976).

## STATEMENT OF FACTS

The Appellant Director of Revenue revoked the driving privilege of Respondent Hinnah pursuant to §577.041, RSMo. cum supp 1998, for a period of one year for failing to submit to a chemical test following an arrest for driving while intoxicated. (L.F. 23). Respondent Hinnah filed a Petition for Review in St. Louis County Circuit Court. (L.F. 3). Respondent Hinnah stood trial on July 6, 2000 before Commissioner Margaret McCartney in St. Louis County Circuit Court. (T 1) After trial, Commissioner McCartney ruled in favor of Respondent Hinnah and the commissioner's findings were confirmed and adopted by Judge Cohen on October 31, 2000 (L.F. 31).

At trial the Commissioner sustained Respondent's objection to the driving record. (T 3) Appellant Director called Officer Borawski of the Chesterfield Police Department to the stand. (T 4) The officer testified that on January 1, 1999, at approximately 9:00 a.m., he observed a pick-up truck on the shoulder of highway 40. (T 5) He pulled up behind the vehicle and observed that the engine was running and that the occupant appeared to be sleeping inside the cab. (T 5) The officer approached the passenger side of the vehicle and he awoke the occupant. (T 6) Respondent Hinnah, the occupant, responded to the officer that he was looking for the Chesterfield Police Station. Respondent Hinnah identified himself by passport. (T 6) The officer noted a strong odor of an alcoholic beverage from Hinnah. (T 8) The officer testified that he could not tell the number, recency, quantity, or quality of the alcoholic beverage from the odor. (T 22) He stated he could not tell from the odor whether Hinnah was intoxicated. (T 23)

The officer testified after refreshment of recollection that Hinnah's eyes were watery, glassy, and bloodshot. (T 9) The officer testified that any association between bloodshot and glassy eyes to an individual who had one beer would "depend on the person". (T 23)

The officer testified that as Hinnah exited the vehicle he used the passenger side door to keep his balance but the officer took Hinnah to the station to do the performance tests due to the inclement weather. (T 9, 23) The officer testified that he did not tell Hinnah not to use the door when he stepped out nor did he tell Hinnah that he needed to take some time after he was awakened to gain his balance before exiting the vehicle. (T 24) The officer testified that whether Hinnah's balance would be less than perfect after being awakened and ordered to step out of the vehicle immediately would "depend on the person". (T 24) The officer agreed that an intoxicated person would exhibit common symptoms of intoxication, including lack of balance, swaying, staggering and slurred speech. (T 24) The officer then testified after refreshment of recollection from his police report that Hinnah's balance was fair. (T 25) The officer then testified that Hinnah exhibited fair balance, fair walking, and coherent speech. (T 26) He further testified that Hinnah's speech was not slurred but was coherent. (T 25)

The officer testified that Hinnah stated to him that Hinnah had pulled over to the side of the road to take a nap while looking for the Chesterfield Police Department. (T 9) The officer observed that the front tire of the truck was flat and there was some damage to the rim of the vehicle. (T 10) The officer testified that Hinnah stated that he had fallen asleep

and struck a concrete barrier. (T 10)

The officer testified that he then placed Hinnah under arrest for driving while intoxicated. (T 10)

The officer then conveyed Hinnah to the police station and performed the field sobriety testing at the station given the inclement weather. (T 11) The officer indicated he advised Hinnah of his Miranda rights and the Missouri Implied Consent law. (T 11, L.F. 26). The officer stated he advised Hinnah that to determine the alcoholic content of his blood he was requesting Hinnah to take a chemical test of Hinnah's breath. (T 13) He further advised Hinnah that if he refused to take the test, Hinnah's driver's license would be revoked immediately for one year. The officer testified that Hinnah understood those warnings. (T 14 Respondent Hinnah sought voir dire of the witness. The attorney for Hinnah questioned the officer concerning statements made by Hinnah at the station. In response to the officer's question whether Hinnah was operating a motor vehicle, the officer testified Hinnah responded "No". (T 16, L.F. 25)

Respondent Hinnah objected to the submissibility of appellant's case given that inconsistent nature of the testimony concerning driving. (T 17) The commissioner overruled Respondent's objection. (T 18)

The officer then testified that Hinnah refused to take the breath test. (T 18)

On cross-examination, the officer testified that Hinnah was seated on the passenger side in the cab of the truck. (T 19) Hinnah was not in the driver's seat. (T 19) Hinnah initially stated he was driving and then later stated he wasn't driving. (T 19) The officer

testified that he did not have an independent recollection of Hinnah's response when questioned why he would not take the test. (T 20) The officer further could not recall whether Hinnah told him at the scene that someone had gone for help and he was waiting for that help to arrive. The officer testified that he arrested Hinnah before any performance tests. (T 22) The officer testified that he could not tell the number, recency, quantity or quality of any alcohol imbibed from the odor. He agreed that he could not tell from the odor whether a suspect was intoxicated. (T 23) Further he could not tell whether an individual was intoxicated "just from the eyes". (T 23) The officer testified the classic symptom of intoxication can be slurred speech but then characterized Hinnah's speech as coherent and not slurred (T 26) Hinnah also exhibited fair balance and fair walking at the scene. (T 26) He said his assessment "depends on the person". (T 26) He agreed that coherent speech is not an indicator of intoxication. (T 27) The officer testified he could not give the gaze nystagmus test because he is not trained in that test. (T 28)

The officer testified on cross that the tests he gave later to Hinnah after arrest were to determine whether Hinnah was in fact intoxicated. (T 29) The officer agreed that in the walk-and-turn test Hinnah correctly walked heel to toe and stayed on the line during the test taking the correct number of steps. (T 30) In the actual walking aspect of the test Hinnah did "fine". (T 31) The officer testified that in the one leg stand test, an individual who is intoxicated puts his leg down three or more times. (T 31) He then indicated that Hinnah during the one leg stand test did not put his foot down at all during the test. (T 31) The officer agreed that Hinnah's performance on the one leg stand test was consistent with his

coherent speech and fair walking and balance. (T 32) The officer agreed that Hinnah's balance was good. (T 32)

On redirect examination, after again refreshing his recollection with the police report, the officer testified that Hinnah began the walk-and-turn test before the instructions were completed. (T 33) The officer then testified that he viewed the indicators on the front of the alcohol influence report "in isolation of each other". (T 33) He again stated that he does not look at the totality of the circumstances in the testing. (T 34) He indicated that he based his decision to arrest Hinnah on the field sobriety testing at the station. (T 34)

On recross he indicated that he did not take in to account the field performance testing at the station because he had already placed Hinnah under arrest. (T 35) The officer indicated Hinnah did not start the one leg stand test before the instructions were completed. (T 35) The officer could not recall how soon Hinnah began the walk-and-turn test before the instructions were completed. (T 36) The officer testified Hinnah followed the specific instructions given to him during that test. (T 36) The appellant director then rested. (T 37)

Respondent Hinnah called Keith Tomnitz to the stand. (T 37) Tomnitz testified that he and Respondent Hinnah had received a call at Hinnah's house from Hinnah's brother from the Chesterfield Police Station and that he and Hinnah headed to the Chesterfield Police Station to pick up Hinnah's brother. Tomnitz stated he drove the vehicle, (T 38), and he ended up missing the turnoff and proceeding into St. Charles on highway 40. (T 38) Tomnitz testified he hit a pothole and then had a flat tire and sought to change the tire but could not get the spare tire loose. (T 38) Tomnitz testified Hinnah never drove the truck. (T 39)

Tomnitz then proceeded down the road to make a phone call at the Clarkson Road exit from highway 40. (T 39) He called his brother Brian Tomnitz from the pay phone and asked him to bring a spare tire. Tomnitz waited there for his brother. (T 40) His brother eventually appeared and they went back to where Hinnah was. When he arrived at that location the truck was gone. (T 40) Tomnitz indicated that Hinnah's speech that morning was coherent and his balance and walking were fair. (T 41) His opinion was Hinnah was not intoxicated. (T 41).

On cross-examination Tomnitz indicated Hinnah did not have a strong odor of alcohol on his breath. (T 43)

Petitioner next called Brian Tomnitz. (T 43) Brian testified he received a call from his brother Keith on the date in question and he went out to Clarkson Road to pick his brother up. (T 44) He stated his brother Keith told him that Keith was driving the vehicle and they hit a chuckhole. (T 45) He drove Keith down highway 40 but did not see the truck. (T 45)

Respondent Hinnah rested. (T 47)

At the close of all the evidence Respondent Hinnah argued his case. (T 47)

The trial court after argument took all of the evidence under submission. (T 51)

Commissioner McCartney ruled in favor of Respondent Hinnah and the commissioner's findings were confirmed and adopted by Judge Cohen on October 31, 2000 (L.F. 31). The courts ordered the revocation removed from respondent Hinnah's driving record.

Director now appeals. (L.F. 34)

## POINT RELIED ON

THE TRIAL COURT DID NOT ERR IN RULING IN FAVOR OF RESPONDENT HINNAH AND AGAINST APPELLANT DIRECTOR IN THAT THE TRIAL COURT FOUND AFTER REVIEWING ALL THE EVIDENCE THAT THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE OR REASONABLE GROUNDS TO BELIEVE HINNAH WAS DRIVING WHILE INTOXICATED. APPELLANT WAS UNABLE TO PROVE THE STATUTORY REQUIREMENTS UNDER §577.041. THE TRIAL COURT DID NOT FIND THAT APPELLANT FAILED TO MAKE A PRIMA FACIE CASE. THE JUDGMENT OF THE TRIAL COURT, MADE AFTER TAKING ALL THE EVIDENCE UNDER SUBMISSION, IS SUPPORTED BY SUBSTANTIAL EVIDENCE. APPELLANT PRESENTED NO CREDIBLE, COMPETENT, RELIABLE EVIDENCE OF PROBABLE CAUSE OR REASONABLE GROUNDS. THE EVIDENCE PRESENTED BY APPELLANT DIRECTOR WAS CHALLENGED, CONTRADICTED, AND CONFLICTED BY RESPONDENT HINNAH'S WITNESSES AND BY RESPONDENT'S CROSS EXAMINATION OF THE POLICE OFFICER. THE TRIAL COURT RESOLVED THE WITNESS CREDIBILITY ISSUE IN FAVOR OF RESPONDENT. IN RESPONSE TO APPELLANT'S NARROWLY DEFINED POINT, THE DIRECTOR FAILED TO ESTABLISH A PRIMA FACIE CASE FOR REVOCATION OF RESPONDENT HINNAH'S DRIVING PRIVILEGE BY CREDIBLE, COMPETENT EVIDENCE. IN THE ALTERNATIVE, THE RESPONDENT REBUTTED APPELLANT'S CASE BY A PREPONDERANCE OF THE EVIDENCE BY THE CROSS EXAMINATION OF THE

POLICE OFFICER AND THE TESTIMONY OF RESPONDENT'S WITNESSES CHALLENGING AND CONTRADICTING APPELLANT'S CASE. THE TRIAL COURT AND THE EASTERN DISTRICT DID NOT FIND THAT THE DIRECTOR MUST PROVE ACTUAL DRIVING IN HER PRIMA FACIE CASE. THE DIRECTOR HAS THE BURDEN OF GOING FORWARD WITH THE EVIDENCE. HINNAH THEN HAS A SUBSTANTIVE RIGHT TO PRESENT EVIDENCE ON ALL ISSUES TO REBUT THE DIRECTOR'S CASE.

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976);

Endsley v. Director of Revenue, 4 S.W.3d 153 (Mo.App.WD 1999);

Kearney v. Director of Revenue, 999 S.W.2d 310 (Mo.App.ED 1999);

Scott v. Director of Revenue, 755 S.W.2d 751 (Mo.App.ED 1988);

Kinsman v. Director of Revenue, 58 S.W.3d 27 (Mo.App.WD 2001);

Dabin v. Director of Revenue, 9 S.W.3d 610 (Mo.banc 2000);

Askins v. James, 642 S.W.2d 383 (Mo.App.WD 1982);

§577.041, RSMo, cum supp 1998

ARGUMENT

THE TRIAL COURT DID NOT ERR IN RULING IN FAVOR OF RESPONDENT HINNAH AND AGAINST APPELLANT DIRECTOR IN THAT THE TRIAL COURT FOUND AFTER REVIEWING ALL THE EVIDENCE THAT THE ARRESTING OFFICER DID NOT HAVE PROBABLE CAUSE OR REASONABLE GROUNDS TO BELIEVE

HINNAH WAS DRIVING WHILE INTOXICATED. APPELLANT WAS UNABLE TO PROVE THE STATUTORY REQUIREMENTS UNDER SECTION 577.041. THE TRIAL COURT DID NOT FIND THAT APPELLANT FAILED TO MAKE A PRIMA FACIE CASE. THE JUDGMENT OF THE TRIAL COURT, MADE AFTER TAKING ALL THE EVIDENCE UNDER SUBMISSION, IS SUPPORTED BY SUBSTANTIAL EVIDENCE. APPELLANT PRESENTED NO CREDIBLE, COMPETENT, RELIABLE EVIDENCE OF PROBABLE CAUSE OR REASONABLE GROUNDS. THE EVIDENCE PRESENTED BY APPELLANT DIRECTOR WAS CHALLENGED, CONTRADICTED, AND CONFLICTED BY RESPONDENT HINNAH'S WITNESSES AND BY RESPONDENT'S CROSS EXAMINATION OF THE POLICE OFFICER. THE TRIAL COURT RESOLVED THE WITNESS CREDIBILITY ISSUE IN FAVOR OF RESPONDENT. IN RESPONSE TO APPELLANT'S NARROWLY DEFINED POINT, THE DIRECTOR FAILED TO ESTABLISH A PRIMA FACIE CASE FOR REVOCATION OF RESPONDENT HINNAH'S DRIVING PRIVILEGE BY CREDIBLE, COMPETENT EVIDENCE. IN THE ALTERNATIVE, THE RESPONDENT REBUTTED APPELLANT'S CASE BY A PREPONDERANCE OF THE EVIDENCE BY THE CROSS EXAMINATION OF THE POLICE OFFICER AND THE TESTIMONY OF RESPONDENT'S WITNESSES CHALLENGING AND CONTRADICTING APPELLANT'S CASE. THE TRIAL COURT AND THE EASTERN DISTRICT DID NOT FIND THAT THE DIRECTOR MUST PROVE ACTUAL DRIVING IN HER PRIMA FACIE CASE. THE DIRECTOR HAS THE BURDEN OF GOING FORWARD WITH THE EVIDENCE. HINNAH THEN HAS A SUBSTANTIVE

RIGHT TO PRESENT EVIDENCE ON ALL ISSUES TO REBUT THE DIRECTOR'S CASE.

A. PROBABLE CAUSE

In a court-tried case, the trial court's decision will be affirmed unless it is against the weight of the evidence, there is no substantial evidence to support it, or it misstates or misapplies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo.banc 1976).

In determining if there is substantial evidence, the appellate court will defer to the ability of the trial court to ascertain the facts and to judge the credibility of the witnesses. Thurmond v. Director of Revenue, 759 S.W.2d 898, 899 (Mo.App.ED 1988).

In the administrative context under §577.041, RSMo. 1998, the trial court must determine only the following: (1) whether the person was arrested; (2) whether the arresting officer had reasonable grounds to believe that the person was driving while intoxicated; and (3) whether the person refused to submit to the breath test. If the court determines any issue not to be in the affirmative, the court shall order the director to reinstate the license. §577.041.5 RSMo

A bench-tried judgment that reaches a correct result will not be set aside, even if the trial court gives a wrong or insufficient reason for its judgment. Fix v. Fix, 847 S.W.2d 762,766 (Mo.banc 1993).

This Court generally reviews the evidence supporting the lower court's judgment, as well as all reasonable inferences drawn from such evidence, as true. Diehl v. Director of Revenue, 836 S.W.2d 94 (Mo.App.ED 1992). The appellate court views the evidence and reasonable inferences drawn from that evidence in a light most favorable to the lower

court's judgment. Id. The appellate court deems all facts to have been found in accordance with the result reached by the trial court. Hawk v. Director of Revenue, 943 S.W.2d 18 (Mo.App.SD 1997).

Deference is given to the trial court's decision and the trial court is provided wide discretion in making its determination, even if there is evidence that would produce a contrary decision or if part of the testimony can reasonably be viewed as inaccurate or inconsistent. Thurmond, supra at 899. Such deference is not limited to the issue of credibility of witnesses, but also to the conclusion of the trial court. Hawk, supra at 20.

The trial court is free, as in any other case, to believe or disbelieve the evidence it chooses in admitting or excluding; and the Court of Appeals must defer to the trial court's determination. Endsley v. Director of Revenue, 6 S.W.3d 153 (Mo.App.WD 1999).

Review on appeal is limited to the same theories heard by the trial judge. Lazzari v. Director of Revenue, 816 S.W.2d 21 (Mo.App.ED 1991). Appellant failed to preserve at the trial level the arguments presented now for the first time on appeal. Appellant did not object to the introduction of Respondent's inconsistent statements of driving nor did Appellant request a restricted, limited review of the evidence at trial to only the evidence before arrest. Appellant did not object to the cross examination of the officer by Respondent Hinnah concerning events after the arrest of Hinnah and Appellant did not object to the presentation of Respondent's case through his witnesses. Appellant argued all the evidence at the conclusion of the trial and did not object when the court took "all the evidence under submission". (T 51).

Respondent Hinnah posits that the Appellant fails in her brief to recognize the standard of review on appeal. Appellant in her arguments points out evidence that would have supported a finding in her favor. The accepted standard of review is of course that the appellate court views the evidence and all reasonable inferences in the light most favorable to the trial court's judgment. Kidd v. Director of Revenue, Slip Opinion (WD 58308, May 29, 2001).

Appellant Director, in her brief, makes no mention of Respondent Hinnah's evidence brought out through Hinnah's cross examination of the police officer and by Hinnah's witnesses in his case in chief. The appellant seemingly asks this higher court to rule the case based on appellant's direct examination of the police officer. Appellant asks the court to ignore the cross examination of the police officer by Respondent Hinnah and the Respondent's witnesses presented in Respondent's case. That restricted review is not the standard of review.

Appellant Director, in her brief, argues that Appellant made a prima facie case against Respondent. Respondent rebutted that prima facie case by the cross examination of the arresting officer and by Respondent's witnesses presented in his case. The trial court found in the clear language of the trial court's order that Respondent prevailed. The trial court, after review and assessment of the credibility of the witnesses presented, found against Appellant.

When Appellant Director sought to present evidence as to probable cause or reasonable grounds, statutory requirements under §577.041 RSMo.1998, the issues were

challenged and contradicted by Respondent's cross examination of the arresting officer and by Respondent's witnesses. The trial court resolved the issues in favor of Respondent. Because Respondent's witnesses contradicted the Director's evidence that was already challenged by Respondent's cross examination of the officer, it is clearly within the discretion of the trial court to determine that one of the statutory requirements under §577.041 was not met by credible competent evidence. The appellate court therefore must affirm the trial court. Endsley, supra at 153. This deference to the trial court's findings is only required when the evidence is contested, contradicted, or challenged. Hedrick v. Director of Revenue, 839 S.W.3d 300 (Mo.App.WD 1992.)

Probable cause or reasonable grounds exist when a police officer observes a traffic violation or unusual operation of a motor vehicle and, upon stopping the motorist notes indications of alcohol intoxication. Halmich v. Director Of Revenue, 967 S.W.2d 693, 695 (Mo.App.ED 1998). Mere suspicion is insufficient to establish probable cause. Wilcox v. Director of Revenue, 842 S.W.2d 240 (Mo.App.WD 1992). In the present case, the officer's testimony as to probable cause and reasonable grounds was clearly challenged and contradicted by Respondent's cross examination of that officer and by Respondent's witnesses.

"'Intoxication' is a 'physical condition' usually evidenced by unsteadiness on the feet, slurring of speech, lack of body coordination and impairment or motor reflexes." State v. Teaster, 962 S.W.2d 429 (Mo.App.SD 1998). Seen in the context of this standard Respondent Hinnah exhibited no such indicators of intoxication.

Respondent avers that contrary to the Appellant's position the officer in the case at bar was ill trained in DWI detection. The officer testified that he was not trained in the gaze nystagmus test. (T 28) The alcohol influence report used by all police departments in the State of Missouri (L.F. 24) calls for the use of three standardized performance tests in a driving while intoxicated investigation. The officer in the instant case did not have the eight hours of training in the gaze nystagmus test to qualify to administer that test. One can only assume that the preparers of the state-wide alcohol influence report assumed that the officer who utilized the report would be trained in all aspects of field performance testing. The trial court could certainly take this lack of training into account when assessing the credibility of the officer.

Further, the officer testified that he did not give the two standardized field performance tests until after he had arrested Respondent Hinnah. He testified (T 29) that those tests he gave after arrest were to determine whether Hinnah was intoxicated. (T 29) He then testified that in those performance tests Respondent Hinnah was able to walk heel to toe while staying on the line and taking the correct number of steps. (T 30) The officer testified Respondent did "fine on the actual walking part of the standardized test." (T 31) The officer then testified in the one leg stand test that an intoxicated person puts his leg down three or more times during the thirty count balancing test. He then testified that Hinnah did not put his foot down at all during the thirty-count balancing test. (T 31) These performance tests given by the officer after arrest indicated that Hinnah passed those performance tests even though the officer gave those tests out of the approved enforcement

sequence.

Further, the officer testified that he looked at each aspect "individually". (T 34) He indicated that he did not review the actions of the Respondent in the totality of the circumstances as most officers do. (T 33) Those individual aspects, of course, were challenged and contradicted in the officer's cross examination. The trial court surely can weigh the officer's failure to apply the "totality of circumstances" test that all other officers apply in the driving while intoxicated enforcement area. Appellant, in her brief, applies the "totality" test even though her witness denied in the record that he used that test.

Appellant, in her brief, argues that the evidence was uncontroverted that Hinnah was driving the vehicle. That evidence of course was challenged by Respondent Hinnah. The officer without objection by Appellant testified that Hinnah told him at the station that he was not driving the vehicle. (T 17) Respondent Hinnah called two witnesses in his case in chief who testified that Hinnah was not driving the vehicle. The inferences drawn from the officer's cross examination and Respondent's evidence supported the fact that Hinnah was not driving. Hinnah was in the passenger seat of the vehicle parked on the side of the road at 9:00 a.m. in inclement weather on the way to the Chesterfield Police Department. Respondent's evidence was that the driver of the vehicle, Keith Tomnitz, had gone for help. There was no front quarter panel damage, only rim and tire damage consistent with hitting a pothole not a concrete wall. Respondent's witnesses so testified. In Scott v. Director of Revenue,755 S.W.2d 751 (Mo.App.ED 1988) an analogous situation arose. In that case the officer stated that Scott had made an admission of driving but then stated later that he was

not the driver of the vehicle. The court noted the contradictory nature of the evidence and found that it was clearly within the discretion of the trial court to determine that there was no probable cause to believe that Scott was driving the motor vehicle. This contradictory evidence coupled with the testimony of Keith Tomnitz that he was driving the vehicle support the trial court's judgment.

Appellant, in her brief, cites a number of cases in which she claims probable cause has been found by this Court under similar facts. However, Appellant fails to mention that in all of these cases, the driver in question offered no direct testimony to refute the officer's allegations. In those cases the driver did not present direct testimony that rebutted the officer's testimony. When the director's evidence is challenged and contradicted, it is clearly within the discretion of the trial court to determine that there were no reasonable grounds to believe the Respondent was driving while intoxicated. Kinzel v. Director of Revenue, 944 S.W.2d 326 (Mo.App.SD 1997).

In this issue Appellant seeks to convict the trial court of error and argues that the trial court must only consider the direct examination of the officer. In her brief, Appellant does not speak to Respondent's cross examination of the officer or the testimony of Respondent's witnesses on the issue. That limited standard has never been accepted.

Appellant further argues that Respondent's intoxicated condition was uncontroverted at the trial. Again, Respondent Hinnah challenged and contradicted the officer's observations on cross examination and by the testimony by Respondent's witnesses. Of

course Respondent may rebut director's prima facie case solely through cross examination. Kearney v. Director of Revenue, 999 S.W.2d 310 (Mo.App.ED 1999). That cross examination rebutted a material element of the director's case. Further, Respondent introduced evidence in his case in chief. The trial court therefore may properly decide to discredit the Appellant's evidence and find in favor of the Respondent. Appellant argues that the officer observed that Respondent had a strong odor of alcohol on his breath, watery, glassy and bloodshot eyes, and that Hinnah had difficulty in maintaining his balance. (T 7-9) On cross examination for the first time the officer testified that Respondent Hinnah exhibited "coherent speech": and not slurred speech that is usually associated with an intoxicated person. (T 25) The officer testified that coherent speech is not an indicator of intoxication. The officer continually needed to refresh his recollection by the use of the police report. The officer testified on cross that he could not tell from the odor the number, recency, quantity or quality of any alcohol imbibed. (T 22) He then admitted that he could not tell from the odor whether or not the suspect was intoxicated. Therefore the odor told the officer nothing. (T 23) The trial court weighed this testimony in the context of the officer's later testimony that he did not assess the totality of the circumstances in determining whether this driver was intoxicated. Rather, he relied on individual assessment of each characteristic. (T 33, 34) Without the totality of circumstances test this officer cannot compound the odor and the bloodshot eyes given the fact that his position on both was eroded and undermined on cross examination. A reviewing trial court can weigh that state of the officer's testimony. The officer stated that he observed Hinnah "use the

passenger side door to--help him keep his balance". (T 9) The officer testified that he did not tell Hinnah not to use the door when he stepped out. (T 23) He further did not tell Hinnah that Hinnah could take some time after he was awakened to gain his balance. (T 24) The officer stated that it "depends on the person" when asked whether balance would be something less than perfect in that context. The officer indicated that the area had received a heavy snow and that the weather was inclement. (L.F. 29) Given the inclement nature of the weather and the questionable footing, it would not be unusual that an individual exiting the vehicle would use the car door to gain his balance. This use of the car door must be seen in the context of the officer's further assessment that Hinnah's walking and balance were fair. (L.F. 24) (T 25) The officer indicated that an intoxicated person would exhibit swaying, or staggering. (T 24) Hinnah did not exhibit those common indicators. The officer's contradictory testimony supports Respondent's position that Respondent was not intoxicated.

The officer was unable to equate the condition of Hinnah's eyes with intoxication. (T 23) He again answered that "it depends on the person". (T 23) The trial court can weigh the officer's testimony in the context of these equivocal answers. The fact that Hinnah's pupils were normal and not affected by intoxication further contradicts the officer's use of bloodshot eyes as an indicator of intoxication. (L.F. 24)

Later at the station in response to questions by the officer Respondent stated that he had not been drinking "today" and that he was not operating a motor vehicle. He further stated that he has just had back surgery recently. (L.F. 25) It is Respondent's position that

coherent speech, fair balance and walking, and normal pupils are indicators of one who is in an normal and unimpaired, non-intoxicated condition. Clearly the officer chose not to give the performance test at the side of the road given the uncertain footing at the scene. Hinnah did not exhibit slurred speech, swaying or staggering balance or walking or dilated pupils: all indicators of one who is intoxicated. Appellant's evidence is contradicted. Respondent avers that the officer lacked any articulable basis for reasonable grounds to believe Hinnah was driving while intoxicated.

Hinnah through the officer's testimony exhibited many more symptoms of one who is not intoxicated. Any seeming indicators of intoxication were neutralized by cross-examination. The police officer did not have even a mere suspicion. The Court so ruled.

Further, in the post arrest context, the officer gave Hinnah a series of physical performance tests. It is clear that field performance tests are used to build probable cause before arrest. This officer however chose to give him those field performance tests after arrest. He therefore departed from the norm in DWI enforcement: field performance testing before arrest. Respondent held up his leg for the officer during the one leg stand test and did not put his foot down nor did he use his arms to balance. He of course did not put his foot down three or more times which is an automatic fail. (T 31) The result of the one leg stand test is inconsistent with the officer's testimony that Hinnah at the scene used the door to balance when later Hinnah was able to pass the one leg stand test-a balancing test. The officer testified on cross examination that Hinnah's performance on those performance tests at the station "bore out his good balance and walking". (T 32) The officer

then gave the Respondent the walk-and-turn test. The Respondent was able to take the correct number out and return the correct number of steps passing the divided attention nature of the test. Hinnah walked heel to toe and stayed on the line. The results of this test if consistent with the one leg stand test exhibiting good balance and is inconsistent with the assumptions in the physical tests that intoxication affects balance and causes the suspect to step off the line three or more times, or put his foot down. Hinnah scored as a normal, unimpaired, non-intoxicated person. Respondent's performance in the post arrest context indicated that he was not intoxicated before or after arrest. His performance must be tested against the common standard of an intoxicated individual set out in Teaster, supra. Hinnah's performance belied any opinion of intoxication by the arresting officer. Had these tests been done before arrest in the usual sequence, the officer would have not had probable cause to arrest.

Further, Respondent Hinnah presented evidence. Keith Tomnitz testified that he was driving the truck that morning. (T 38) He was to drive to the Chesterfield Police Station with Respondent to pick up Respondent's brother. Tomnitz struck a pot hole and had a flat tire. (T 38) When he was unable to get the spare from under the truck, Tomnitz set out to get help by going back to Clarkson Road in an effort to make a phone call. He testified he contacted his brother and his brother picked him up but they were unable to find the truck. (T 40) Tomnitz further offered his opinion that Hinnah's speech was coherent and his balance and walking were fair to him. He did not think Hinnah was intoxicated. (T 41) He further denied that Hinnah had a strong odor of alcohol on his breath. (T 43)

Brian Tomnitz testified. (T 43) He stated he went to a gas station on Clarkson Road to pick up his brother. (T 44) His brother told him that Keith Tomnitz had been driving the vehicle and had hit a chuckhole and the tire had blown out. (T 45)

Respondent therefore contradicted and conflicted Appellant's case.

Appellant argues that the trial court erred in finding that the director failed to prove a prima facie case. The Respondent objected to the prima facia submissibility of Appellant's case. (T 18) The court overruled Respondent's objection to that case.

Appellant cites cases to support her position but those cases are distinguishable in that those cases show no evidence presented by the driver or that the evidence presented by the director was unchallenged and not contradicted. Herein the director's evidence was challenged and conflicted.

The Court at the close of all of the evidence took all the evidence under submission. (T 51) The Court at that time and after weighing all the evidence found that Appellant was unable to prove the statutory requirements under §577.041. The trial court did not find that Appellant failed to make a prima facie case. The Court weighed the contradictory and challenged nature of Appellant's evidence with the evidence presented by Respondent and the inferences drawn from that evidence and found in favor of Respondent Hinnah. The Court did not err given the contradicted and controverted nature of Appellant's evidence and the evidence presented by Respondent. The trial court may properly decide to discredit Appellant's evidence and find in favor of the Respondent. The trial court herein found that Appellant did not prove the statutory requirements under §577.041.

Therefore, the trial court's findings are clearly in accordance with the substantial evidence presented at trial that was in favor of Respondent.

B. DRIVING

The Director argues that she made a prima facie case under Section 577.041, RSMo 2000, and that Hinnah had no right to present evidence that Hinnah was not intoxicated and that Hinnah was not driving. The Director objects to Hinnah's witnesses on the grounds that their testimony is irrelevant and immaterial once the Director has proved that prima facie case. The Director failed to preserve at the trial and appellate level the argument presented now for the first time before this Court. Director did not object to the testimony by Hinnah's witnesses as to intoxication and driving at trial nor did the Director move to strike that testimony on the basis that it was immaterial or irrelevant. Review on appeal is limited to the same theories heard by the trial judge. Lazzari v. Director of Revenue, 816 S.W. 2nd 21 (Mo.App.ED 1991). Director further did not argue to the trial court that Hinnah had no right to present evidence that he was not intoxicated or that he was not driving. The trial court cannot now be convicted of error when the Director did not apprise the trial court of her position at trial.

Director argues that she made a prima facie case under Section 577.041 (Appellant's Brief 8,12) to revoke Hinnah's driving privilege. By time-tested definition, a prima facie case is one that will prevail until contradicted or overcome by other evidence. A prima

facie case consists of sufficient evidence to get a plaintiff past a motion for directed verdict in a jury case or a motion to dismiss in a non-jury case. It is the evidence necessary to require any Defendant to proceed with his case. The Director by arguing she made a prima facie case has acknowledged her burden and the shifting of the burden of going forward with the evidence or the burden or persuasion to her opponent once that prima facie case is made. Hinnah in the instant case contradicted and overcame Director's prima facie case. Once the Director made her case, Hinnah was required to proceed with his case in order to rebut that case. Had Hinnah not proceeded with his case and presented evidence, he would have been subject to attack by the Director on the grounds that in not presenting evidence in his case in chief Hinnah failed to contradict, challenge and conflict the Director's evidence. Hinnah therefore loses if the evidence is uncontradicted. Herein the Court of Appeals for the Eastern District, Judge Ahrens writing, (hereinafter Eastern District) found that the case must be remanded to the trial court for a factual finding whether based on the conflicting evidence presented by Hinnah whether Hinnah was the driver at the time in question. If Hinnah did not present evidence contradicting the Director's case, the Director would argue that any judgment in favor of Hinnah is against the weight of the evidence in that Hinnah did not present any contrary evidence. Hinnah in presenting no evidence in his civil case would be confronted with the inference in civil cases that failure or waiver in presenting evidence is interpreted as meaning that that party had nothing to offer to contradict or challenge the prima facie case. Herein Hinnah presented evidence. Hinnah has the right to rebut Director's case on the issues presented by

Director. The 577.041 legislative scheme does not foreclose Hinnah's right to rebut the Director's case. Instead the statute creates a right to file a petition for review to contest the license revocation and provides for a hearing before an associate or circuit court.

Director argues that the testimony Hinnah presented at trial to show that he was not, in fact, driving while intoxicated had no bearing on any of the limited or restricted issues that the trial court was allowed to consider under Section 577.041. Therefore that testimony was irrelevant. Director further argues that nothing in the implied consent law in 577.020 modifies Section 577.041.4 to make testimony about "actual" driving relevant. A review of the statutory scheme undermines Director's position.

Section 577.020.1. RSMo, states that any person who operates a motor vehicle upon the public highways of this State shall be deemed to have given consent to a chemical test pursuant to certain circumstances. The implied consent law goes on to state under (1) that "if the person is arrested for any offense arising out of acts which the arresting officer had reasonable grounds to believe were committed while the person was driving a motor vehicle while in a intoxicated or drugged condition." (emphasis added) Therefore the person who operated a motor vehicle must be shown to be the person who was arrested for acts that the arresting officer perceived to have been committed while that person was driving a motor vehicle in a intoxicated condition. Section 577.041.2. is similarly descriptive. The refusal statute indicates that the officer shall make a sworn report in which he must present "reasonable grounds to believe that the arrested person was driving a motor vehicle while in a intoxicated condition." At later hearing the reviewing court must determine whether or

not the person was arrested or stopped and whether the officer has reasonable grounds to believe that that person was driving a motor vehicle while in a intoxicated condition. These statutes given the same subject matter must be read in pari materia. The Director must prove that the person who was arrested was the person who was driving the motor vehicle while in a intoxicated condition. Once shown, the burden shifts to the opponent of that evidence who must present evidence that he was not the person who was driving the motor vehicle while in a intoxicated condition. Hinnah at trial controverted Director's evidence. Same was relevant under the statutory scheme.

The Eastern District addressed this issue in its opinion:

"But our inquiry does not end there. In this case, Hinnah presented evidence at trial, which if believed, would support a finding that he was not driving the vehicle. If a person whose license is revoked under section 577.041 produces evidence that he was not driving after the Director proves a prima facie case, then the inquiry shifts to the issue of whether the person was in fact driving. Kinsman v. Director of Revenue, 58 S.W. 3d 27 (Mo.App.WD 2001) The 'revoked person is necessarily permitted to overcome the effect of the Director's initial evidence of reasonable grounds by coming forward with evidence showing that he or she was not in fact driving.' Id. 'It is not enough for the person who allegedly refused the breath test to simply argue that the Director did not prove he was driving.' Id. The revoked person 'cannot simply criticize the Director's evidence on the basis that it is not conclusive; he has a duty to present evidence that he was not driving if he wishes to shift the

inquiry from the probable cause issue.' Id." (Slip Opinion at 6) and;

"Section 577.041 cites to and must be read in conjunction with Section 577.020, the implied consent law. Section 577.020 states that '[a]ny person who operates a motor vehicle upon the public highways of this state shall be deemed to have given consent to, subject to the provisions of Section 577.020 to 577.041, a chemical test or tests of his breath, blood, saliva or urine...' Section 577.020. Thus a person must have operated a motor vehicle to trigger the implied consent law, Section 577.020 and the revocation for refusal law, Section 577.041. A revoked person who wishes to challenge the applicability of the implied consent law based on his or her not driving the vehicle has an affirmative duty to plead and prove that proposition." (Slip Opinion at 7)

The Legislature further in 1996 enacted a statutory change in Section 577.001 in chapter definitions. The Legislature deleted from the definition of driving and operating "being in actual physical control" of a vehicle. Therefore, being in actual physical control of the vehicle no longer constitutes "driving" or "operating". This restrictive definition with its deletion indicated this issue was before the Legislature for review. The Legislature in that amendment declined to add that the person arrested could not present evidence that he was not driving or operating or in actual physical control. This restrictive change affected the Director's prima facie case and the arrested person's ability to present evidence to contradict the case. This legislative action affirms the issue as one that can be proved or disproved by either party.

The Director further argues that the Eastern District by citing Kinsman held that the Director must prove "actual" driving in her prima facie case. Kinsman v. Director of Revenue, 58 S.W. 3d 27 (Mo.App.WD 2001) was decided without benefit of a brief by respondent and apparently did not come before this Court. The Kinsman case is well reasoned and the Eastern District's following of Kinsman is proper and supported by precedent and the record below. Kinsman did not testify at trial. The Kinsman court found that the 577.041 "only" language meant that the "Director need not show that the officer had more than reasonable grounds (probable cause) to believe the person was driving while intoxicated." (l.c. 31) The Director did not need to prove as part of making a prima facie case that the individual in question was driving. "At the same time, in order to interpret the statute in a way that does not produce an absurd or unconstitutional result, we may assume that the word 'only' refers specifically to the Director's burden." (l.c. 31) The court sought to construe the reasonable meaning of the word in accordance with the legislative objective.

> "Accordingly the revoked person is necessarily permitted to overcome the effect of the Director's initial evidence of reasonable grounds by coming forward with evidence by showing that he or she was not in fact driving. If the revoked person does produce such evidence, the inquiry necessarily shifts from the issue of whether the officer had probable cause to the issue of whether the person was in fact driving. Otherwise, we would be faced with the anomalous and unjust result that someone who is not actually driving might have a revocation affirmed even after

proving that he or she was not in fact driving at the time in question." (l.c. 32)

The Court went on to state that the Court does not favor a construction that produces an absurd or unconstitutional result. The Court did not increase the Director's initial burden and simply assumed that there was always an implied right of any arrested person to show that he or she was not driving. Kinsman further shows a willingness on the part of the court "where there is evidence of probable cause, to reverse the contrary conclusion of the trial court when there is no evidence showing that the person in question was not driving." (l.c.33)

> "If Kinsman had been the unfortunate victim of unusual circumstances, he certainly could have presented evidence to show that things were not as they appeared. As already noted, the statute must be interpreted to allow Kinsman the opportunity to come forward with exculpatory evidence once the Director has shown that the officer had reasonable grounds."

and;

> "But the failure of Kinsman to present evidence in his own behalf in this case left the trial court with nothing but the Director's evidence. Because this was a civil case, the normal inference from Kinsman's decision to waive the presentation of evidence is that Kinsman had nothing to offer which would tend to show that he was not driving on the night in question." (Kinsman supra. 34.)

Kinsman was soundly reasoned and right decided. Hinnah presented evidence that he was not driving and rebutted the Director's case. It is then up to the trial court to give weight and credibility to the evidence and witnesses before it.

The Director's contention that Hinnah has no right to present evidence that he was

not driving cannot overcome constitutional challenge. In Dabin v. Director of Revenue, 9 S.W. 3d 610 (Mo.banc 2000), a refusal case, this Court held that due process applies to the suspension or revocation of a driver's license by the state. This court cited Dixon v. Love, 431 U.S. 105, 112, 97 S.Ct. 1723, 52 L.Ed 2d 172 (1977) for the proposition that "[L]icenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." The Court further cited Jarvis v. Director of Revenue, 804 S.W.2d 22, 25 (Mo.banc 1991), for the proposition that "the due process clause requires a 'meaningful' hearing in which consideration of all elements essential to the decision as to whether a license to operate a vehicle may be suspended are considered." The Court further held that due process requires the opportunity to be heard "at a meaningful time in a meaningful manner". (l.c. 615) The Court in Dabin held that the meaningful opportunity for a hearing to consider all elements in the decision to revoke or suspend includes a reasonable time in which to challenge the findings of the trial commissioner. A same-day signing by the presiding judge entering judgment based on the traffic commissioner's findings was found not to meet that due process standard.

Certainly based on this constitutional due process standard, Hinnah had the right to present evidence to contradict the Director's prima facie case. The Director's position that Hinnah is barred from presenting evidence that he was not driving or that he was not intoxicated or that he did not refuse does not pass constitutional muster. The Director cites no case authority for that proposition. The Director instead relies on the word "only" in

577.041, in effect for many years, to deny Hinnah that right to present evidence. The Legislature did not draft 577.041 to include specific language that an arrested person is barred from introducing any evidence that he or she was not driving. Such a bar would not meet constitutional due process and is inconsistent with the differing burdens of going forward with the evidence and persuasion in any civil case.

The Director further argues that the administrative suspension statute, §302.505 RSMo, requires proof of "actual" driving. (Appellant's Brief 19) The Director argues that "actual" driving is required because §302.530.4 requires it. Subsection 4 of §302.530 indicates that "[T]he sole issue at the hearing shall be whether by a preponderance of the evidence the person was driving a vehicle pursuant to the circumstance set out in §302.505." The Legislature herein chose not to use the word "actual" in the section just as the Legislature chose not to use the word "actual" in 577.041. Turning to §302.505, subsection 1 indicates that the Director "shall suspend or revoke the license of any person upon its determination that the person was arrested upon probable cause to believe such person was driving a motor vehicle..." This is seemingly the same standard used in 577.041. The Director's attempt to differentiate the two as one statute being more lenient then the other is without rational basis.

Further, the Director in the past has taken the same position in the administrative suspension area that she takes now in the refusal area. The Director argued in House v. Director of Revenue, 997 S.W.2d 135 (Mo.App.SD 1999) that the issue was not whether the Director proved that House was actually driving his truck, but whether the trooper had

probable cause to believe that he was.

The Court found:

"Director, in order to sustain the suspension or revocation of a license, must prove; (1) the driver- not someone believed to be the driver was arrested on probable cause that he or she was committing an alcohol-related driving offense, and (2) the driver- not someone believed to be the driver was driving with a blood alcohol concentration with at least .10 by weight. (l.c. 139). To hold otherwise would mean an individual who is not in fact driving a motor vehicle could have his or her driver's license suspended or revoked if arrested on probable cause to believe he or she was driving while his or her blood alcohol concentration was .10 percent or more be weight." (l.c. 139)

In Hampton v. Director of Revenue, 22 S.W.3d 217 (Mo.App.WD 2000) the Court, in an administrative suspension case, determined adversely to the Director her position that it was not necessary to show the person arrested was driving the vehicle in order to suspend his driving privileges.

> "The Director's contrary argument, that a person's license may be revoked under Section 302.505 even if the Director cannot prove at a hearing that the person was in fact the driver is thus not only contrary to common sense, but is in conflict with Section 302.530.4 and Collins v. Director of Revenue, 691 S.W.2d 246, 252 (Mo.banc 1985), which requires the Director to prove at the hearing that the person was driving while intoxicated." (l.c. 221)

The Hampton Court cited Collins, supra, for the proposition

that

> "[w]here a literal reading of a predecessor to that section would have led

to 'unreasonable results and inequities' such a literal interpretation should give way to a reasonable interpretation that comports with the intendment of the statute. Id. Moreover, the statute must be read in pari materia with other statutes on the same subject, and such a reading makes it clear that where the question of who was driving is put at issue in a hearing, the Director must offer proof that the person whose license is to be suspended was, in fact, the driver." (l.c. 221)

In both the administrative suspension and refusal areas, the person arrested has a right and a duty to present evidence that he was not driving if he wishes to shift the inquiry from the probable cause issue. Once the arrested person produces that evidence, the inquiry necessarily shifts from the issue of whether the officer had probable cause to the issue of whether the person was in fact driving. Kinsman,supra at 32.

The Director in his reply brief before the Eastern District did not argue this difference between the 577 refusal and the 302 administrative suspension. The Director cited Phelps v. Director of Revenue, 47 S.W.3d 395 (Mo.App.ED 2001) as controlling the present case. (Appellant's Reply Brief at 7) Phelps does not hold that the arrested person has no right to present evidence to rebut the Director's case. Phelps does not hold further that the inquiry ends when the Director shows probable cause. Phelps rather affirms that the arrested person has the right to rebut the Director's prima facie case by presenting evidence. This right is not a newly discovered right and has always existed and is triggered by the moving party's making a prima facie case.

Director cites Bertram v. Director of Revenue, 930 S.W.2d 7 (Mo.App.WD 1996) and Peeler v. Director of Revenue, 934 S.W.2d 329 (Mo.App.ED 1996) in support of her position. Those cases dealt with individuals who challenged the implied consent law on the grounds that they had not been driving on a public highway but rather had been stopped on a private parking lot. Neither party presented any evidence. The Court ruled the case on that public-private distinction. The Court did not hold that the arrested person had no right to present evidence to rebut the Director's prima facie case.

As an aside, Hinnah moves to strike from the legal file the Missouri Driver Record (L.F. 30) in that the trial court barred the admission of that driver record at trial after objection by Respondent. The Director's trial attorney withdrew that record. The trial court then barred the introduction of the driving record. Director did not appeal the trial court's ruling.

The Director has the burden of proof in 577.041 cases and must go first in presenting evidence. Askins v. James, 642 S.W.2d 383 (Mo.App.WD 1982) Both parties presented evidence in Askins. The Court remanded the case for ruling on the sufficiency of the evidence to be determined by the fact finder. Herein Hinnah has the right to rebut Director's prima facie case by presenting evidence that he was not driving and that he was not intoxicated.

## CONCLUSION

In Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1996), the court indicated that the trial court's decision will be affirmed unless it is unsupported by substantial evidence, is against the weight of the evidence, or misstates or misapplies the law. It is Respondent Hinnah's contention that the trial court's decision herein must be affirmed.

Respectfully Submitted,

_____

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CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing were served by U.S. Mail, postage prepaid, on this____ day of _____, 2002, addressed to: David J. Hansen, Assistant Attorney General, Missouri Bar No. 40990, PO Box 899, Jefferson City, Missouri 65102.

_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document was prepared with WordPerfect 6.0 Software and according to that software contained 11,187 words excluding the cover of this certification. I certify that the computer disk submitted with this brief was scanned for viruses and that the disk is virus-free. I certify that a copy of the disk was sent to the attorney for Appellant. I certify that the foregoing brief complies with the limitations contained in Supreme Court rule 84.06 (b). Respondent files this disk.

_____

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