

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 Thornhill, Judge**

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**APPELLANT'S SUBSTITUTE REPLY BRIEF**

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## STATEMENT OF FACTS

The Statement of Facts portion of Stiers's brief contains a number of assertions concerning what exhibits were admitted at the trial de novo and the accuracy of those exhibits. None of that has any relevance to the issues before this Court, which are legal issues that are subject to this Court's independent review. Specifically, the claim that the arresting officer altered the Notice of Suspension would only be relevant to the issue of whether the officer had probable cause to arrest Stiers for driving while intoxicated. But the trial court made no ruling on the probable cause issue. (L.F. 120).

Accordingly, if this Court rules in the Director's favor on the issues presented in its brief, the case will be remanded to the trial court which can then make a ruling on the probable cause issue. *Weiser v. Dir. of Revenue*, 987 S.W.2d 496, 497 (Mo. App. E.D. 1999).

Exhibits C and D filed by the Director contain copies of relevant legal authorities that were filed with the trial court as a matter of convenience. This Court can consider those authorities regardless of whether they were admitted into evidence before the trial court. Any discrepancies between what was electronically filed with the trial court and what appears in the legal file has already been explained in the Director's response filed in the Court of Appeals to Stiers's motion to correct the record that was also filed in

that court.<sup>1</sup> Simply put, Exhibit D had to be electronically filed in the circuit court in two parts due to its size. When assembling the legal file, undersigned counsel mistakenly identified the second group of documents that comprised Exhibit D as being a part of Exhibit B. The Director requested, and was granted by the Court of Appeals, leave to file a corrected Legal File Index that would accurately reflect which pages of the Legal File corresponded to which exhibit. The Director also filed a Supplemental Legal File in the Court of Appeals containing exhibits that Stiers filed at the trial de novo. Stiers did not file any objections in the Court of Appeals to the corrected Legal File Index or to the Supplemental Legal File that the Director filed in that court, nor has she demonstrated any prejudice from the state of the record.

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<sup>1</sup> The Director asks the Court to take judicial notice of the files in ED101407 that have been transferred to this Court.

## 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.**

Stiers argues the word “and” as it appears in the 2012 version of 19 CSR 25-30.051(2) must be given its plain and ordinary meaning. The Director's argument has never been based on the meaning of the word “and.” It instead concerns the scope of the regulation. As the Director argued in her opening brief, the regulation defines the standard simulator solutions that are to be used in verifying and calibrating breath analyzers. It does not establish procedures for conducting maintenance checks. Stiers's argument asks this Court to expand the scope of 19 CSR 25-30.051 beyond its stated purpose.

Stiers supports her argument by quoting liberally from the Court of Appeals's opinion issued in this case. In doing so, she overlooks the fact that once a case is transferred to this Court it is determined as if on original appeal. *Wims v. Bi-State Dev. Agency*, 484 S.W.2d 323, 324 (Mo. banc 1972) (citing Mo. Const. art. V, § 10). Once a case is transferred, the decision of the Court of Appeals is necessarily vacated and set aside and may be referred to as *functus officio*, meaning without further authority or legal competence. *State v. Norman*, 380 S.W.2d 406, 407 (Mo. banc 1964); *Bolden v. State*, 423 S.W.3d 803, 808 n.6 (Mo. App. E.D. 2013). It further bears noting that the Director sought transfer of this case because the Southern District issued an opinion on the same day as the Eastern District that adopted the Director's argument and held that the regulations at issue here did not require the use of all three simulator solution levels. *Riggins v. Dir. of Revenue*, 2015 WL 452440 (Mo. App. S.D., Jan. 27, 2015). An application for transfer was filed in this Court on March 2, 2015, and remains pending.<sup>2</sup>

Stiers next argues that the Director does not believe her own argument because she dismissed five cases involving the same issue. The Director would not be pursuing this appeal if she did not believe her position was

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<sup>2</sup> The Director asks the Court to take judicial notice of its files in *Riggins v. Dir. of Revenue*, No. SC94829.

valid. Nor would she be pursuing the approximately 200 cases pending in the Court of Appeals and in the circuit courts if she did not believe that her position was valid. The cases that Stiers lists in her brief were dismissed for reasons totally unrelated to the Director's view of the merits of the case.

Stiers goes on to make arguments concerning maintenance reports totally unrelated to this case that she claims demonstrate that all machines have to be verified at all three solution levels. Aside from relying on facts outside the record, all that those maintenance reports demonstrate is that a single officer decided, for unknown reasons, to perform maintenance checks at two, not three, different solution levels on two different occasions. Again, the meaning of the regulations is a legal issue and are determined from the contents of the regulations, not from the actions of a single officer.

Stiers goes on to argue that Missouri's rules should be construed to require verification at all three solution levels because other states require verification at multiple solution levels. What other states do is irrelevant because each state has the authority to make its own determination of what verification standards are appropriate and to draft its own laws and regulations accordingly. The issue before this Court is what the Missouri regulations require, and again, that determination is based on the language of those regulations.

## 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.**

The Director’s opening brief argued that language contained in the 2014 version of 19 CSR 25-30.051(8) which 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[,]” does not prevent retroactive application of the 2014 regulation.<sup>3</sup> Stiers contends that

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<sup>3</sup> Stiers claims the Director has changed the argument that she presented to the trial court and in the Court of Appeals and is now claiming that the maintenance check was invalid. The Director is not claiming that the

the Eastern District's decision in *Hunt v. Dir. of Revenue*, 10 S.W.3d 144 (Mo. App. E.D. 1999), demonstrates that the above-quoted language does prevent retroactive application. The Director discussed in her opening brief why *Hunt* does not support Stiers's argument, but instead supports the Director's argument that subsection 8 operates as a savings clause. The Director refers the Court to that discussion.

Stiers goes on to make a lengthy argument under this point concerning the admissibility at trial of Director's Exhibits C and D. Again, those exhibits contain copies of relevant legal authorities that were filed with the trial court as a matter of convenience. This Court can consider those authorities regardless of whether they were admitted into evidence before the trial court. Stiers argument thus has no relevance to the legal issue that this Court has to decide. And it is hard to see how she was prejudiced by the admission of the exhibits since the trial court ruled in her favor on the issues to which those exhibits were addressed.

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maintenance check was invalid but is instead presenting this argument, as she has throughout these proceedings, as an alternative basis for relief should the Court adopt Stiers argument that the maintenance check was invalid because the regulations in effect when that maintenance check was performed did require the use of all three simulator solution levels.

## CONCLUSION

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

Respectfully submitted,

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## **CERTIFICATE OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06, and contains 1,738 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 17th day of August, 2015, to:

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