

IN THE MISSOURI SUPREME COURT

SC94840

KRISTIN N. STIERS

Respondent,

v.

DIRECTOR OF REVENUE,

Appellant.

On Appeal from the Circuit Court of St. Charles County, Missouri
The Honorable Judge Matthew E.P. Thornhill

SUBSTITUTE BRIEF OF RESPONDENT

LAW OFFICES OF ROBERT S. ADLER, P.C.

ROBERT S. ADLER, #24229
Attorney for Respondent
130 S. Bemiston, Suite 608
St. Louis, MO 63105
(314) 725-2400
(314) 725-2405 (facsimile)

TABLE OF CONTENTS

TABLE OF CONTENTS	i.
TABLE OF AUTHORITIES.....	ii.
JURISDICTIONAL STATEMENT.....	1
STATEMENT OF FACTS.....	2
POINTS RELIED ON	11
ARGUMENT	13
CONCLUSION	37
CERTIFICATE OF SERVICE.....	38
CERTIFICATE OF COMPLIANCE	39
APPENDIX INDEX.....	40

TABLE OF AUTHORITIES

CASES

<u>Adkins v. Director of Revenue</u> , 985 S.W.2d 407 (Mo.App. E.D. 1999)	30
<u>DeClue v. Director of Revenue</u> , 945 S.W.2d 684, 686 (Mo.App. E.D. 1997)	29, 30
<u>Doughty v. Director of Revenue</u> , 387 S.W.3d 383 (Mo.banc 2013).....	34
<u>EBG Health Care III, Inc. v. Missouri Health Facilities Review Committee</u> , 12 S.W.3d 354, 358 (Mo.App. W.D. 2000)	17
<u>Hunt v. Director of Revenue</u> , 10 S.W.3d 144 (Mo.App. E.D. 1999)	30-31
<u>Murphy v. Carron</u> , 536 S.W.2d 30 (Mo. banc 1976)	13
<u>Nesbitt v Director of Revenue</u> , 982 S.W.2d 783, 785 (Mo.App. E.D. 1998) .	14, 33
<u>O'Rourke v. Director of Revenue</u> , 409 S.W.3d 443, 447 (Mo.App. E.D. 2013)	14
<u>Renner v. Director of Revenue</u> , 288 S.W.3d 763, 766 (Mo.App. E.D. 2009) . .	14, 26
<u>Salamone v. Director of Revenue</u> , 991 S.W.2d 749 (Mo.App. E.D. 1999)	30
<u>Sermchief v. Gonzales</u> , 660 S.W.2d 683, 689 (Mo. 1983)	19
<u>Soval v. Director of Revenue</u> , 2 S.W.3d 854 (Mo.App. W.D. 1999)	30
<u>St. Louis Police Officers' Association v. Sayad</u> , 685 S.W.2d 913, 917 (Mo.App. E.D. 1984).....	29
<u>Teague v. Missouri Gaming Com'n</u> , 127 S.W.3d 679, 685-686 (Mo.App. W.D. 2003)	13, 17
<u>Trumble v. Director of Revenue</u> , 985 S.W.2d 815 (Mo.App. E.D. 1998)	30
<u>White v. Director of Revenue</u> , 321 S.W.3d 298 (Mo.banc 2010).....	13

<u>Wolff Shoe Co. v. Director of Revenue</u> , 762 S.W.2d 29, 31 (Mo. banc 1988)	26
----------------------------------------------------------------------------------------	----

STATUTES

Section 302.312 RSMo.....	5, 6, 7, 8, 33,
.....	34, 35
Section 302.505 RSMo.....	13, 14
Section 302.535 RSMo.....	13
Section 577.029 RSMo.....	33

CODE OF STATE REGULATIONS AND DHSS RULES

19 CSR 25-30.051 (12/30/12 to 2/28/14).....	16-17, 19, 22-23
.....	25, 28, 31
19 CSR 25-30.051 (effective 2/28/14)	9, 10, 19, 27, 28
19 CSR 25-30.051(8)	11, 30

OTHER AUTHORITY

Merriam-Webster Online Dictionary, at <u>www.merriam-webster.com/and</u>	26
Merriam-Webster Online Dictionary, at <u>www.merriam-webster.com/or</u>	26

JURISDICTIONAL STATEMENT

Respondent adopts Appellant's Jurisdictional Statement.

STATEMENT OF FACTS

On July 12, 2013, Respondent (hereinafter referred to as "Driver") was stopped and arrested for Driving While Intoxicated. Driver was subsequently taken to the Lake St. Louis Police Department. (LF 15-19)

Driver agreed to take a breath test on an Alco-Sensor IV with Printer (Alco-Sensor IV). The Alco-Sensor IV was last maintained on June 20, 2013. (LF 20) Driver received a Notice of Suspension and timely requested an administrative hearing. (LF 114-116) Petitioner's Exhibit 1A. The Record on Appeal filed by the Director at the time of this brief contains an altered Notice of Suspension filed by the arresting officer which is different from the one Driver received from the arresting officer the night of her arrest. (LF 13-14)

An administrative hearing was held on November 13, 2013 and the Final Order was issued on November 15, 2013. (LF 4-5)

The Petition for Trial de Novo was timely filed on December 2, 2013 and summons to the Director issued on the same date. (LF 1-4)

Respondent/Appellant's (hereinafter referred to as "Director") Answer was filed on January 17, 2014 and the case was at issue. Any delay in trying the case before February 28, 2014 was occasioned by Director. (LF 8-9)

At the setting of this case Director's attorney requested a continuance and said "no detriment would arise to Petitioner" and she needed time to call witnesses. (TR p. 3, l. 4-7; TR p. 3, l. 12-13.)

The trial was continued at the request of Director to April 10, 2014 at 2:00 p.m. (LF 11) The Trial Court found in favor of Driver and against Director, finding the results of the breath test were inadmissible for failure to comply with the DHSS regulation in effect at the time of the maintenance report. (LF 118)

The Trial Court never reached the question of probable cause to arrest or whether the Simulator Calibration Report prepared after the date of arrest satisfies the requirements of 19 CSR 25-35-051(4). “The Court does not consider whether the Simulator Calibration Report prepared after the date of arrest would be sufficient under the regulation.” “This Court need not address Respondent’s burden on the issue of probable cause.” (LF 119-120)

Driver notes that Director’s Statement of Facts relating to the facts of the instant case does not grant this Court authority to order the revocation of Driver’s license because that is a factual determination which must be left to the trial court and a legal decision the trial court did not reach. (LF 119, 120)

At the Trial de Novo, Director’s only evidence was the admission of Director’s Exhibits A, B, C and D and/or D1 or D2. (Transcript pages i, 13, 17, 22).

The Legal File originally submitted by the Director was inaccurate as to what Exhibit B and D, and/or D1 or D2 were and Director requested an opportunity to correct said Legal File. See Appellant’s Response and Supplemental Response to Respondent’s Motion to Correct Record on Appeal and Motion to File Corrected Legal File Index. Unfortunately, the inaccuracies still exist because Appellant failed to comply with the

Eastern District Order granting leave to file a supplemental legal file with the scanned versions of Appellant's exhibit¹. The transcript reflects exhibits A, B, C, D-1, and D-2. (Transcript pages i, 13, 17, 22). The Legal File and Legal File Index reflects exhibits A, B, C, and D (LF Index, 12-90) with the first two pages of Exhibit B showing they were filed in person (LF 37-38) while the remaining pages of that document were electronically filed (LF 39-58). Once granted the Motion to Correct the Record on Appeal, Appellant, rather than submit a new Legal File, simply submitted a new Legal File Index, hereinafter Legal File Index Two. Legal File Index Two references exhibits A, B, D-2, D-1, and C with different page numbers and no new clerk certification².

When these documents were transmitted to this Court Appellant had still not corrected the Legal File: The issue of what was admitted in Exhibits B and C is still at issue; the issue of whether D and/or D1 or D2 was admitted and what it contained is still at issue. The inaccuracies still exist because the Director has not complied with the Eastern District Order granting leave to file the supplemental legal file. Director has transmitted these same documents to this Court rather than complying with the Eastern District's Order granting leave to file a supplemental legal file with Appellant's scanned exhibits.

¹ Appellant did file a supplemental legal file, but it included Driver's exhibits 1 and 1-A.

² The original Legal File indicates Exhibit A is pages 12-36, Exhibit B is 37-58, Exhibit C is 76-90 and D is 59-75. Legal File Two indicates Exhibit A is 12-36, Exhibit B is 37-38, Exhibit C is 76-90, Exhibit D-1 is 59-75 and Exhibit D-2 is 39-58.

The portion of Director's Exhibit A relevant to the determination before this Court consisted of the Alco-Sensor IV with Printer Maintenance Report conducted on June 20, 2013 (LF 12-36) and the breath test result on July 12, 2013. (LF 22) Director's Exhibit A, admitted at trial pursuant to Section 302.312 RSMo. as a document lawfully deposited or filed in the offices of the Missouri Department of Revenue, was filed in advance of trial on January 17, 2014 with Director's Answer. (LF 8-33)

Director's Exhibit B (LF 37-58; LF2 37-38), admitted at trial pursuant to Section 302.312 RSMo., as a document lawfully deposited or filed in the offices of the Missouri Department of Revenue, contained a Simulator Calibration Report dated November 21, 2013 with an expiration date of November 21, 2014 (after the June 20, 2013 maintenance and the July 12, 2013 breath test in this case). The difference between what was admitted at trial and the Legal File and Legal File Two is at issue. This exhibit, in fact, contains an additional 20 pages of unexplained documents. (LF 39-58) The first two pages of Exhibit B were hand filed on April 10, 2014 (LF 37-38), the date of trial, and the rest of the pages indicate they were electronically filed on April 10, 2014, the date of trial, and have no Section 302.312 RSMo. certification and therefore are properly excluded. This Court can take judicial notice of the Code of State Regulations but it can not take judicial notice of the Missouri Register.

Director's Exhibit C (LF 76-90) (admitted over the objection of Driver) pursuant to Section 302.312 RSMo. as a document lawfully deposited or filed in the offices of the Missouri Department of Revenue, purports to contain a certified copy from the Secretary

of State of:

“19 CSR 25-30.051 Breath Analyzer Calibration and Accuracy Verification Standards Proposed Amendment published in the July 2, 2012 issue of the *Missouri Register* (37 MoReg 1027-1029) Order of Rulemaking published in the Nov. 1, 2012 issue of the *Missouri Register* (37 MoReg 1613) *Amended; Filed May 31, 2012, effective Dec. 30, 2012 through Feb. 27, 2014* Proposed Amendment published in the Oct. 15, 2013 issue of the *Missouri Register* (38 MoReg 1625-1626) Order of Rulemaking published in the Jan. 15, 2014 issue of the *Missouri Register* (39 MoReg 399) *Amended; Filed Sep. 4, 2013, effective Feb. 28, 2014”*

and

“19 CSR 25-30.060 Operating Procedures for Breath Analyzers Fiscal note published in the July 2, 2012 issue of the *Missouri Register* (37 MoReg 1038-1039)”

However, Exhibit C does not contain what it suggests in its title. (LF 78-90) The pages are not in any logical order. Exhibit C actually contains pages 1027 to 1029 of the Missouri Register from July 2, 2012 (LF 78-80), skips to page 1613 of the Missouri Register from November 1, 2012 (LF 81), proceeds to Pages 19 and 20 of the Code of State Regulations from November 30, 2012, goes back to pages 1625 to 1626 of the

Missouri Register from October 15, 2013 (LF 84-85), then to page 399 of the Missouri Register from January 15, 2014 (LF 86), then back to pages 19 and 20 of CSR from January 29, 2014, then back to pages 1038 and 1039 of the Missouri Register from July 2, 2012 (LF 89-90). Exhibit C was electronically filed on April 10, 2014, the date of trial. Driver objected to Exhibit C. (Tr. p. 17, l. 21-25 and p. 18, l. 6-19)

Director's Exhibit D and/or D1 or D2 (LF 59-75) (admitted over the objection of Driver) pursuant to Section 302.312 RSMo. as a document lawfully deposited or filed in the offices of the Missouri Department of Revenue, purports to contain a certified copy from the Secretary of State of:

"19 CSR 25-30-031 Type II Permit Proposed Amendment
published in the July 2, 2012 issue of the *Missouri Register*
(37 MoReg 1015-1024) Order of Rulemaking published in
the Nov. 1, 2012 issue of the *Missouri Register* (37 MoReg
1612) *Amended; Filed May 31, 2012, effective Dec. 30, 2012*
through Feb. 27, 2014 Proposed Amendment published in the
Oct. 15, 2013 issue of the *Missouri Register* (38 MoReg
1623-1625) Order of Rulemaking published in the Jan. 15,
2014 issue of the *Missouri Register* (39 MoReg 399)
Amended; Filed Sept. 4, 2013, effective Feb. 28, 2014."

However, Exhibit D and/or D1 or D2 does not contain what it purports to contain. (LF 61-75) Exhibit D was electronically filed on April 10, 2014, the date of trial.

Specifically, it does not contain the proposed amendment published October 15, 2013, pages 1623-1629. Driver objected to Exhibit D and/or D1 or D2. (Tr. p. 19, l. 2-25, p. 20, l. 1-25, p. 22, l. 25 and p. 23, l. 1-9). The Court of Appeals, Eastern District, granted Appellant leave to file a supplemental legal file of the scanned versions of the Appellant's exhibits, but Appellant filed a scanned version of the driver's exhibits instead.

Director did not call any witnesses to testify. Instead, significantly, Director relied on documents certified by the Director's Custodian of Records in the St. Louis office pursuant to Section 302.312 RSMo., without any number of pages or description of what is being certified, when and how it was lawfully deposited or filed in the Office of the Missouri Department of Revenue, particularly as it relates to certified documents from the Secretary of State.

The Trial Court found in favor of the Petitioner stating that the requirements of 19 CSR 25-30.051 from December 30, 2012 to February 28, 2014 provide:

“According to Subparagraph (1) of this Rule
*‘Standards used for the purpose of verifying and calibrating
 breath analysis shall consist of standard simulator solutions
 or compressed ethanol - gas standard mixtures.’* (Emphasis
 added.)

Subparagraph (2) of the same rule (in effect on the date of
 Petitioner's arrest) adds the following requirement for

admissibility of a breath-test results: ‘*The standard simulator solutions used shall have a vapor concentration within five percent (5%) of the following values: (A) 0.10%; (B) 0.08%; and (c) 0.04%.*’ (Emphasis added.)” (LF 119)

The Trial Court also found that

“Respondent failed to present sufficient credible evidence of compliance with 19 CSR 25-30.051(2), and thus also with RSMo. § 577.020.3, and Petitioner’s timely objection to the admission of the breath-test result in this case is sustained.

Because Respondent failed to lay a proper foundation for the admission of the breath test under the regulations in effect at the time of the arrest, the Court does not consider whether the Simulator Calibration Report prepared after the date of arrest would be sufficient under the regulation.

Having found in favor of Petitioner on the issue of Petitioner’s blood-alcohol concentration, this Court need not address Respondent’s burden on the issue of probable cause.” (LF 119-120).

Director argued that the February 28, 2014 amendment of 19 CSR 25-30.051(2) should be applied retrospectively. (LF 117) The Court disagreed that the amendment should be given retrospective application, relying on 19 CSR 25-30.051(8) which appears in both the regulations

in effect at the time of Driver's arrest and the regulations in effect at the time of the trial. (LF 118)

19 CSR 25-30.051(8) in the February 28, 2014 amendment states:

“(8) 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.*”

This language was included in the December 30, 2012 amendment and was not changed in 2014.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY EXCLUDED THE RESULTS OF THE BREATH TEST AND IN REINSTATING DRIVER'S DRIVING PRIVILEGE BASED ON 19 CSR 25-30.051(2) EFFECTIVE 12/30/12.

White v. Director of Revenue, 321 S.W.3d 298 (Mo.banc 2010)

Teague v. Missouri Gaming Com'n, 127 S.W.3d 679, 685-686 (Mo.App. W.D. 2003)

O'Rourke v. Director of Revenue, 409 S.W.3d 443, 447 (Mo.App. E.D. 2013)

Nesbitt v Director of Revenue, 982 S.W.2d 783 (Mo.App. E.D. 1998)

19 CSR 25-30.051(2)

Section 302.505.1 RSMo.

Section 302.535 RSMo.

Mirriam-Webster Online Dictionary, at www.merriam-webster.com/and

Mirriam-Webster Online Dictionary, at www.merriam-webster.com/or

II. THE TRIAL COURT PROPERLY APPLIED THE VERSION OF 19 CSR 25-30.051(2) EFFECTIVE 12/30/12 RATHER THAN 19 CSR 25-30.051(2) EFFECTIVE 2/28/14 AND RESPONDENT'S EXHIBITS C AND D AND/OR D1 OR D2 ARE INADMISSIBLE.

Hunt v. Director of Revenue, 10 S.W.3d 144 (Mo.App. E.D. 1999)

Blechle v. Director of Revenue, 11 S.W.3d 655 (Mo.App. E.D. 1999)

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

Doughty v. Director of Revenue, 387 S.W.3d 383 (Mo.banc 2013)

19 CSR 25-30.051(2)(8)

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED THE RESULTS OF THE BREATH TEST AND IN REINSTATING DRIVER'S DRIVING PRIVILEGE BASED ON 19 CSR 25-30.051(2) EFFECTIVE 12/30/12.

Standard of Review

In an appeal from a court tried civil case the judgment of the trial court is affirmed unless there is “no substantive evidence to support it, it is against the weight of the evidence or it erroneously declares or applies the law.” Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976). A trial court's judgment in a driver's license revocation case is reviewed in the same manner. White v. Director of Revenue, 321 S.W.3d 298 (Mo.banc 2010).

Here, the Judgment of the Trial Court should be affirmed.

In such trial de novos the State Statute, §§302.505.1 RSMo. and 302.535 RSMo. expressly provided that the trial be conducted according to the Missouri Rules of Civil Procedure. White at 304. The general law and procedures governing court tried civil cases apply. White at 312.

Review by this Court of the law if properly preserved by the Director is de novo.

The same principles of construction are used to interpret a regulation as used to interpret a statute. Teague v. Missouri Gaming Com'n, 127 S.W.3d 679, 685-686 (Mo.App. W.D. 2003).

The intent of the amendment is not in question when the language is clear. Renner v. Director of Revenue, 288 S.W.3d 763, 766 (Mo.App. E.D. 2009).

Burden of Proof

To establish a prima facie case for suspension of a driver's license, Director must present evidence that at the time of the arrest the driver's BAC exceeded the legal limit of .08 percent. Section 302.505.1; O'Rourke v. Director of Revenue, 409 S.W.3d 443, 447 (Mo.App. E.D. 2013). Director has the burden of establishing grounds for the revocation by a preponderance of the evidence. Id.

Director may introduce evidence of a breath test result to establish that the driver's BAC exceeded the legal limit. O'Rourke, 409 S.W.3d at 3. To establish a prima facie foundation for admission of breath test results, Director must demonstrate the breath test was performed: (1) by following the approved techniques and methods of Department of Health and Senior Services ("DHSS" or "DOH"); (2) by an operator holding a valid permit; (3) on equipment and devices approved by DHSS. Id. (Emphasis added). The regulations that must be followed to satisfy the foundational requirements are set forth in 19 CSR 25-30. Id. The standard of compliance must be "absolute and literal." Nesbitt v Director of Revenue, 982 S.W.2d 783, 785 (Mo.App. E.D. 1998).

In the instant case, evidence of Petitioner's breath test results is inadmissible at trial as the calibration of the breath test did not comply with the approved techniques and methods as described DHSS rules, specifically 19 CSR 25-30.051(2) and (4) effective December 30, 2012.

Discussion

The DHSS regulation in effect at the time of the June 20, 2013 Maintenance Report was 19 CSR 25-30.051 (effective 12/30/12) and required the use of three simulator solutions when conducting a required, periodic maintenance check.

The DHSS regulation in effect at the time of the July 12, 2013 breath test was 19 CSR 25-30.051 (effective 12/30/12) and required the use of three simulator solutions when conducting a maintenance check.

The DHSS regulation in effect at the time of the November 13, 2013 administrative hearing was 19 CSR 25-30.051 (effective 12/30/12) and required the use of three simulator solutions when conducting a maintenance check.

The DHSS regulation in effect at the time this cause of action was filed in Circuit Court, December 3, 2013, was 19 CSR 25-30.051 (effective 12/30/12) and required the use of three simulator solutions when conducting a maintenance check.

The DHSS regulation in effect at the time this case was at issue, January 17, 2014, was 19 CSR 25-30.051 (effective 12/30/12) and required the use of three simulator solutions when conducting a maintenance check.

Foundational Requirements of 19 CSR 25-30.051(2) Not Met for the

July 12, 2013 Breath Test

Driver was asked to provide a breath sample on July 12, 2013. The machined used was an Alco-Sensor IV with Printer (Alco-Sensor IV). The Alco-Sensor IV was last maintained on June 20, 2013 using a 0.100% solution. That maintenance violated CSR

25-30.051(2) (effective 12/30/12) in that only a 0.100% standard simulator solution (“standard”) was used for said maintenance rather than a 0.10%, 0.08% and 0.04%, as was required by regulation. See 19 CSR 25-30.051(2) (effective 12/30/12).

19 CSR 25-30.051 effective December 30, 2012 stated for the first time in its title **“Breath Analyzer Calibration & Accuracy Verification Standards”**. Previous versions were entitled only **“Standard Simulator Solutions”**.

Not only its title but its *“PURPOSE”* for the first time included language relating to the accuracy of the simulators used in the maintenance reports, it states: *This rule defines the standard simulator solutions of compressed ethanol gas mixtures to be used in verifying and calibrating breath analysis, as well as the annual checks required on simulators used in conjunction with the standard simulator solution.*

The pertinent approved techniques and methods of the DHSS at the time Driver’s breath test instrument was maintained, in regards to the verification of the breath test machine, stated:

(2) Standard simulator solutions, used to verify and calibrate evidential breath analyzers, shall be solutions from the 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%; and

(C) 0.04%.

19 CSR 25-30.051(2) (12/31/12) (Emphasis added).

The inclusion of the conjunction “and” is crucial, indicating that all three standards should be used when calibrating the breath test. The same principles of construction are used to interpret a regulation as are used to interpret a statute, and in the absence of an alternative definition, words will be given their plain and ordinary meaning. Teague v. Missouri Gaming Com’n, 127 S.W.3d 679, 685-686 (Mo.App. W.D. 2003). The Court of Appeals, Eastern District, in its opinion prior to transfer stated:

In the absence of a definition in the regulation, the words will be given their plain and ordinary meaning as derived from a dictionary. Teague, 127 S.W.3d at 686. “The plain and ordinary sense of a word is generally found in the dictionary.” EBG Health Care III, Inc. v. Missouri Health Facilities Review Committee, 12 S.W.3d 354, 358 (Mo.App. W.D. 2000). The word “and” is a conjunction used to join words or groups of words and means “added to” or “plus”. Merriam-Webster Online Dictionary, at www.merriam-webster.com/and (last visited January 12, 2015). The word “or” also is a conjunction; however, “or” is used to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty. Merriam-Webster Online

Dictionary, at www.merriam-webster.com/or (last visited January 12, 2015). (ED Opinion, 6-7)

Nothing indicates that the word “and” should be given anything other than its plain meaning as a conjunction that is meant to indicate that all three standards are to be utilized when verifying the breath test.

On August 29, 2014 the Director dismissed at least five (5) cases tried before February 28, 2014 where the issue in the case was “whether the court erred as a matter of law in holding the Petitioner’s BAC was inadmissible for failure to follow 19 CSR 25-30.051(2) effective December 30, 2012. Those cases are:

- a. Yahl v. Director of Revenue, ED101412, decided by the Trial Court in favor of Driver on 2/21/14, St. Louis County Circuit Court, 21st Judicial Circuit, Division 43, Judge Joseph S. Dueker;
- b. Boese v. Director of Revenue, ED101300, decided by the Trial Court in favor of Driver on 2/24/14, Jefferson County Circuit Court, 23rd Judicial Circuit, Division 11, Judge Stephen Bouchard;
- c. Stein v. Director of Revenue, ED101286, decided by the Trial Court in favor of Driver on 2/18/14, St. Louis City Circuit Court, 22nd Judicial Circuit, Division 28, Judge Calea Stovall-Reid;
- d. Hoeffner v. Director of Revenue, ED101287, decided by the Trial Court in favor of Driver on 2/18/14, St. Louis City Circuit Court, 22nd Judicial Circuit, Division 28, Judge Calea Stovall-Reid; and

e. Hughes v. Director of Revenue, ED101289, decided by the Trial Court in favor of Driver on 2/18/14, St. Louis City Circuit Court, 22nd Judicial Circuit, Division 28, Judge Calea Stovall-Reid; demonstrating the Director's belief there is no ambiguity in the language of 19 CSR 25-30.051(2) effective 12/30/12.

Just like a statute, when a regulation is amended, it should be construed on the theory that the amendment was intended to enact a substantive change in the law, and every word, clause, sentence, and section of a statute must be given some meaning. See Sermchief v. Gonzales, 660 S.W.2d 683, 689 (Mo. 1983). Once amended effective December 30, 2012, the DHSS regulation unambiguously stated "and".

The language is so clear and so basic that the unambiguous requirement of the regulation is that as of December 30, 2012, 19 CSR 25-30.051(2) required all approved breath tests to be verified at three levels, 0.10%, 0.08% and 0.04% in maintenance reports. On February 28, 2014, the DHSS regulation removed the word "and" replacing it with the word "or". If the word "and" meant "or" from December 30, 2012 to February 28, 2014, then the February 28, 2014 amendment was unnecessary and the Director would have not dismissed the appeal of the cases tried before February 28, 2014.

As the Court of Appeals, Eastern District said:

We find it difficult to understand how the two versions of the regulation are not in conflict or, as the Director urges this Court, how they can be viewed to require the same thing. To

view the two versions of this regulation as the Director argues and conclude that “and” and “or” have the same meaning would require us to ignore the plain difference between the words. (ED Opinion, 7).

The Director argues on appeal, “if the regulation required three calibration checks to be performed using three different standard solutions the DHSS would have included space on the maintenance reports.” Appellant’s Substitute Brief p. 18.

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.” Appellant’s Substitute Brief p. 18.

“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). 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. Appellant's Substitute Brief p. 19.

As the Court of Appeals, Eastern District noted in response to this argument, in its opinion prior to transfer:

On appeal, the Director's brief also included an argument referencing Form 7 to encourage this Court to reach the opposite conclusions. Form 7 is a report form required for the recording of calibration checks performed on the breath analyzer. See 19 CSR 25-30-031(7)(F). However, because we find the language of 19 CSR 25-30.051(2) so plain, we are not addressing Form 7 as suggested by the Director. Furthermore, it is our view that the language of 19 CSR 25-30.051(2), on its face, overrides the use of Form 7 to resolve the issues presented in this case. (ED Opinion, 7-8).

First, a check with every solution requires an entire maintenance report - not just the solution. The top of the report to the bottom would need to be filled out with each

report. That is why only one box. Each solution requires an entire report. Each solution we have lists its own “report” so the use of the singular “is” is appropriate. The Type 2 would not simply check solution mid-maintenance but would do all appropriate pre and post checks required for a full and complete maintenance check. Not one full check and two partials.

Second, a contrary inference is indicated by documents found on the DHSS Breath Alcohol Program for Maintenance Reports lawfully required to be deposited with the Missouri Department of Health and Senior Services performed on a Datamaster #940244 at 2920 North Shamrock Rd., Jefferson City, by Type II Missouri State Highway Patrol Officer Dwayne Carver. Those documents show on January 7, 2013 at 4:22 and 4:34 a maintenance report (#6) was performed using a .04 solution and a .10 solution respectively, using two separate maintenance reports. Appendix 1.

Likewise, a Maintenance Report lawfully required to be deposited with the Missouri Department of Health and Senior Services was performed on a Datamaster #204183 at 2920 North Shamrock Rd., Jefferson City, by Type II Missouri State Highway Patrol Officer Dwayne Carver shows on January 11, 2013 at 7:10 and 7:21 a maintenance report was performed using a .04 solution and a .10 solution respectively. Appendix 2. These are just two of many other examples of maintenance reports testing breath alcohol machines with multiple solutions at the same time and place on the same machine.

The unambiguous interpretation is that between December 30, 2012 and February

28, 2014, 19 CSR 25-30.051(2) required all approved breath alcohol machines to be maintained and verified to three levels, 0.10%, 0.08% and 0.04%. This is also reasonable in light of other States' verification policies. Driver has not been able to examine every State; however, New Jersey, Washington, Pennsylvania, Virginia, Montana and Texas all require some form of multi level testing of breath alcohol machines. New Jersey mandates that approved breath alcohol machines be verified at .04%, .08%, .10% and .16%¹

¹New Jersey is not an administrative regulations State. The .04%, .08%, .10%, and .16% specifications are set by the New Jersey Attorney General's Office and sent to Draeger for implementation in the Alcotest 7110. See State v. Shun, 943 A.2d 114, 135 (N.J. 2008); Alcotest 7119 Calibration Record.

. Washington dictates that approved breath alcohol machines be verified at .04%, .08%, .10%, and .15%.² Pennsylvania requires that approved breath alcohol machines be verified at .05%, .010% and .015%.³ Virginia mandates that approved breath alcohol machines be verified at .02%, .08%, .15%, and .25%.⁴ Montana specifies that approved breath alcohol machines be verified at .02%, .04%, .08%, .20%, and .40%.⁵ Texas requires that approved breath alcohol machines be verified at .00%, .040%, .080%,

²The .04%, .08%, .10%, and .15% specifications are located in the Washington State Patrol, Breath Test Program, Calibration - Technical Manual, Chapter 3, Pg. 13 (March 15, 2013).

³67 Pa. CODE § 77.26(a) (2012); 67 Pa. CODE § 77.26(d).

⁴Virginia State procedures require the EC/IR-II breath test machine to be calibrated at least every six months at .02%, .08%, .15%, and .25%. Virginia Department of Forensic Science, Breath Alcohol Procedure Manual, Pg. 21-22 (December 31, 2013).

⁵Montana administrative rules require a laboratory certification annually that shall at a minimum consist of a series of controlled ethyl alcohol water/gas standards that shall be analyzed with an accuracy requirement of +/- 5% or .005%, whichever is greater, on all target values. The rules are not specific about which standards to use, however, Montana is currently using .020%, .040%, .080%, .200%, and .400%. Rule 23.4.241; Forensic Science Division, Department of Justice, State of Montana, Laboratory Certification.

.150%, and .40%.⁶ Finally, the Federal National Highway Traffic Safety Administration maintains a list of conforming “Evidential Breath Alcohol Measuring Devices.” For a device to earn a place on that list, the factory calibration must be done at 0%, .02%, .04%, .08%, and .16%.⁷ It is reasonable for Missouri to follow the scientific trend.

Therefore, in light of the unambiguous language of 19 CSR 25-30.051(2) (effective 12/30/12) and other States’ maintenance and verification policies, the foundational requirements of 30.051(2) were not satisfied on the June 20, 2013 Alco-Sensor IV maintenance report and the breath test administered to Driver on July 12, 2013 was inadmissible because the Alco-Sensor IV was improperly maintained and not in compliance with approved methods and techniques of the DHSS.

No Ambiguity Equals No Room for Statutory Construction

As described above, the language of 19 CSR 25-30.051(2) required the use of three standards, 0.10%, 0.08% and 0.04% when calibrating the breath test. Director argues that the intent of the amendment was not to require calibration with three standards, but rather only one. However, the intent of the amendment is not in question

⁶Texas Breath Alcohol Testing Program. Standard Operating Guidelines: Evidential Breath Alcohol Instrument Calibration, Pg. 1, 5, and 7 (September 27, 2013).

⁷77 FR 35747 (June 14, 2012). Thus, a machine is not properly calibrated at the factor unless multiple standards are used. Which begs the question, how can a machine in the field remain properly calibrated if a deficient procedure is followed?

because the language is clear. As a result, evidence to that effect is inadmissible.

Courts should approach the task of statutory interpretation mindful that it is the function of the courts to “construe and apply the law and not to make it.” (emphasis added) Renner v. Director of Revenue, 288 S.W.3d 763, 766 (Mo.App. E.D. 2009). In interpreting statutes the primary goal is to determine and further the intent of the legislature. This interpretation should come from the “plain and ordinary language of the statute.” Courts should not “construe clear and unambiguous language”. Id. Renner, 288 S.W.3d at 766. When determining whether statutory language is clear and unambiguous, the courts “determine whether the terms of the statute are ‘plain and clear to one of ordinary intelligence.’” Id. (quoting Wolff Shoe Co. v. Director of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988)). “Moreover, the plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute’s clear and unambiguous language.” Wolff Shoe Co., 762 S.W.2d at 31.

“And” is not a term that requires an in depth explanation by etymologists. It is a simple conjunction that is “used as a function word to indicate connection or addition especially of items within the same class or type; used to join sentence elements of the same grammatical rank or function.” Mirriam-Webster.com Mirriam-Webster, n.d. Web. 6 Apr. 2014. In contrast, “or” is “used as function word to indicate an alternative.” Mirriam-Webster.com Mirriam-Webster, n.d. Web. 6 Apr. 2014.

“And” and “or” are diametrically opposed and mutually exclusive. The DHSS confirmed this in the most recent amendment to 19 CSR 25-30.051(2). This amendment, which took effect February 28, 2014, changed the “and” at issue here to “or.” Currently 30.051(2) states that the breath test should be calibrated using a 0.10%, 0.08% or 0.04% standard. If “and,” not “or”, were ambiguous, then why did DHSS amend 19 CSR 25-30.051(2) to replace the “and” with an “or”? If the “and” merely meant that three different solutions could be used to calibrate the breath test, then why not leave the “and”?

The answer, of course, is that “and” does not mean “or” and no amount of *post hoc* rationalization can make it. Because “and” is unambiguous, then there is no need for recourse to the canons of statutory interpretation.

Again, Director dismissed appeals in at least five (5) cases tried on or before February 28, 2014 where the issue in the case was “whether the court erred as a matter of law in holding the Petitioner’s BAC was inadmissible for failure to follow 19 CSR 25-30.051(2) (effective 12/30/12) demonstrating the Director’s knowledge that her argument is without merit.

II. THE TRIAL COURT PROPERLY APPLIED THE VERSION OF 19 CSR 25-30.051(2) EFFECTIVE 12/30/12 RATHER THAN 19 CSR 25-30.051(2) EFFECTIVE 2/28/14 AND RESPONDENT'S EXHIBITS C AND D AND/OR D1 OR D2 ARE INADMISSIBLE.

Director argues that 19 CSR 25-30.051(2) (effective February 28, 2014) should govern the maintenance check performed on June 20, 2013, rather than 19 CSR 25-30.051(2) (effective December 30, 2012), despite the fact that the maintenance report, the breath test, the administrative hearing, the filing of the petition, and this case was at issue January 17, 2014, all occurring before the February 28, 2014 rules came into effect. In other words, the Director argues you can change the rule as to maintenance report requirements to fit what the officer did in performing the maintenance days, months or years prior.

Director argues that even if this Court believes that from December 30, 2012 to February 28, 2014, 19 CSR 25-30.051(2) required breath tests to be calibrated with three standards, .10%, .08%, and .04%, this Court should ignore that version and apply the version of 19 CSR 25-30.051(2) (effective February 28, 2014) retrospectively. Unfortunately, for the Director, 19 CSR 25-30.051(8) dictates that 19 CSR 25-30.051(2) should not be applied retrospectively.

As a general rule, statutes and administrative rules operate prospectively. It is a well settled principle that changes to the DHSS regulations as to the admissibility of

chemical tests are procedural and, thus, are generally retrospective. DeClue v. Director of Revenue, 945 S.W.2d 684, 686 (Mo.App. E.D. 1997). Unless the change indicates a contrary intent, the change will apply only prospectively. St. Louis Police Officers' Association v. Sayad, 685 S.W.2d 913, 917 (Mo.App. E.D. 1984).

In DeClue, one of the rules regarding maintenance reports had been amended between the time the report was completed and the time of driver's trial. While the report was completed according to the prior rule, it was not in compliance with the rule in effect at the time of the trial. The trial court ruled in favor of Driver. On appeal, the Director discarded as inconvenient the proposition that amendments to the rule were procedural and retrospective, and attempted to argue that the changes were substantive and prospective. The Court of Appeals noted the change in the Director's line of argument and dismissed it, holding that the retrospective procedural change invalidated a test that would have been in compliance, but for the amendment. DeClue, 945 S.W.2d at 686. The Court of Appeals did include, as dicta, that if the Director wished to avoid "the problem of retrospective application, future amendments [...] could declare an intent for prospective application only." DeClue, 945 S.W.2d at 686. fn. 1.

Similarly here, the Director has changed the argument it made at the Trial Court and in the Eastern District. Their theory is now since the maintenance check performed was invalid under the rule in effect at the time of the maintenance, the time of the test, the time of the administrative hearing, and the time the case was at issue, the new rule should be given retrospective application and save an otherwise invalid test.

After DeClue future amendments declared an intent. 19 CSR 25-30.051(8) (effective February 28, 2014) and similar language in other rules were included in future amendments. Section (8) of 19 CSR 25-30.051 states that “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.*” (emphasis added) Section (8) explicitly limits the retrospective application of a procedural amendment. Where DeClue would mean that report, while proper under the rules in effect at the time completed, is invalidated by a subsequent amendment, Section (8) prevents that retrospective application. The Director has argued precisely that point repeatedly, consistently, and successfully: the language in Section (8) prevents the retroactive application of a procedural amendment. See Adkins v. Director of Revenue, 985 S.W.2d 407 (Mo.App. E.D. 1999) (overruled on other independent grounds), Trumble v. Director of Revenue, 985 S.W.2d 815 (Mo.App. E.D. 1998), Salamone v. Director of Revenue, 991 S.W.2d 749 (Mo.App. E.D. 1999), and Soval v. Director of Revenue, 2 S.W.3d 854 (Mo.App. W.D. 1999).

The question of retrospective or prospective application is a binary one. The two are mutually exclusive, and every case that expresses the distinction does it in terms of either “retrospective” or “prospective”.

In Hunt v. Director of Revenue, 10 S.W.3d 144 (Mo.App. E.D. 1999), the maintenance report at issue had been completed in 1995. It was completed in compliance with the rule in effect at that time. An amendment in 1997 occurred prior to the *trial de*

novo, and that amendment stated “maintenance reports completed prior to March 26, 1996, shall be considered valid under this rule if done in compliance with the rules in effect at the time the maintenance report was conducted.” Hunt, 10 S.W.3d at 148. The Court of Appeals held language meant that the regulation at the time of the maintenance report was to be followed and “was clearly and unambiguously intended to supersede the retrospective application of [the 1996 rule], limiting that rule’s application[.]” Id. at 150.

The same principle applies here. Through the inclusion of Section (8), the application of 19 CSR 25-30.051 has been limited to prospective situations only. Section (8) explicitly states that 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[.]” and implicitly makes reports that fail that test invalid.

The “rules in effect at the time” the maintenance report at issue here was completed were the rules in effect as of June 20, 2013, in essence, 19 CSR 25-30.051(2) (effective December 30, 2012). As described supra, that rule required the use of all three standards, 0.04%, 0.08%, and 0.10%. The Alco-Sensor IV maintenance report should have been verified to all three standards. If all three standards were used, the report would comply with the rule in effect at the time. Because all three standards were not in use, the maintenance report did not comply with the rules in effect at the time. Therefore, the report is invalid. Any other result conflicts with the clear, prospective, intent of Section (8).

As the Court of Appeals, Eastern District resolved the question of retroactive application in its opinion prior to transfer by finding:

In this case, the trial court correctly applied the version of 19 CSR 25-30.051(2) that was in effect at the time of Driver's arrest because the amended version of 19 CSR 25-30.051 that was in effect at the time of her trial *de novo* contained the following language:

(8) 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.*

(Emphasis added.)

Therefore, even if the trial court had applied the version of 19 CSR 25-30.051(2) that became effective February 28, 2014, retroactively to Driver's case, the result of the breath test still would have been excluded since the language of 19 CSR 25-30.051(8) indicates 'a contrary intent.' DeClue 945 S.W.2 at 686. Here, the maintenance report at issue was completed prior to the effective date of the regulation but was not

completed in compliance with the regulation in effect at the time the maintenance was conducted, which required utilizing all three standard simulator solutions. (ED Opinion, 9)

Similarly, in Nesbitt v. Director of Revenue, 982 S.W.2d 783 (Mo.App. ED 1998) Driver argued on appeal that the trial court erred in admitting the results of a blood test because the Director failed to lay a proper foundation for its admission.

The State, as the proponent of the test, has the initial burden to establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to insure reliability.

The Court in construing language of Section 577.029 RSMo. requiring blood be drawn “by a licensed physician, registered nurse, or trained medical technician” found the business records without testimony did not establish the qualifications of the phlebotomist who drew the blood.

Respondent’s Exhibits C and D and/or D1 or D2 are Inadmissible as Those Documents Were Not Lawfully Deposited

Respondent offered Exhibits C and D at trial using Section 302.312 RSMo. Those exhibits are documents from the office of the Missouri Secretary of State, Jason Kander’s, office consisting of information from the Missouri Register of proposed rules and comments. Section 302.312 RSMo. provides “copies of all papers, documents, and records *lawfully* deposited or filed in the offices of the department of revenue or the bureau of vital records of the department of health and senior services and copies of any

records, properly certified by the appropriate custodian or the director, shall be admissible in evidence in all courts of this state and in all administrative proceedings.”

Exhibits C and D are inadmissible.

The legislature’s intention in passing Section 302.312 RSMo. was to eliminate the need for testimony as to the identity and authentication of the records and provide foundation as well as to eliminate best evidence and hearsay challenges. Doughty v. Director of Revenue, 387 S.W.3d 383 (Mo.banc 2013).

First of all, the Director’s custodian in this case could not properly and lawfully identify and authenticate Exhibits C and D and/or D1 or D2, Jason Kander’s records and, unlike in Doughty the Driver had no opportunity to subpoena the Custodian of the Director of Revenue or the Secretary of State.

Doughty stated “The existence of this unbridled subpoena right undercuts any argument that the administrative hearing procedure was unfair.

The Director e-filed these documents the day of trial under a Section 302.312 RSMo. certification dated April 3, 2014. Exhibits C and D and/or D1 or D2.

Secondly, Section 302.312 RSMo. is not applicable to documents such as Exhibits C and D and/or D1 or D2. It would be illogical for the legislature to use the word “lawfully” unless it had meaning. The word lawfully is ambiguous; it can mean “not illegally/unlawfully” or it can mean “required by law”. It would be hard to envision a scenario whereby the depositing of papers, documents, and records to the department of revenue or the department of health and senior services would be illegal or unlawful,

thereby making the inclusion of “lawfully” in the statute meaningless. However, many papers, documents, and records are required by law to be deposited in the department of revenue and the department of health and senior services, those documents often are required in court and administrative proceedings, and to have a custodian testify every time such a document, paper or record was needed would be a tremendous burden. It is only logical that the legislature would want documents “required by law” to be deposited or filed in those agencies to be admissible without live testimony. Therefore Section 302.312 RSMo. can be interpreted as follows: Copies of all papers, documents, and records *required by law to be* deposited or *required by law to be* filed in the offices of the department of revenue or the bureau of vital records of the department of health and senior services . . . shall be admissible as evidence in all courts of this state and in all administrative proceedings.

Documents from the Secretary of State, such as those in Exhibits C and D and/or D1 or D2 are not required by law to be deposited or filed in the department of revenue or the bureau of vital records of the department of health and senior services and therefore are not admissible under that statute.

The time may have come to examine the efficiency of the Missouri Department of Revenue certification pursuant to Section 302.312 RSMo. It cannot be used as a method of getting inadmissible evidence into court. It does not identify the number of pages being certified, and it allows the filing on the date of trial with no prior notice to Driver. Under its current operation, even the President’s birth certificate would be admissible

without any further foundation.

CONCLUSION

Based on the analysis provided herein, the Court should affirm the decision of the Trial Court ordering the Director of Revenue to reinstate Kristin Stiers' driving privileges in that the Trial Court correctly applied the law relating to breath analyzer maintenance reports.

LAW OFFICES OF ROBERT S. ADLER, P.C.

By: /s/ Robert S. Adler
ROBERT S. ADLER, #24229
Attorney for Appellant
130 S. Bemiston, Suite 608
St. Louis, MO 63105
(314) 725-2400
(314) 725-2405 (facsimile)

CERTIFICATE OF SERVICE

This is to certify that a copy of this Respondent's Substitute Brief was served upon the parties of record via the Court's electronic filing system, this 6th day of August, 2015, addressed to:

Daniel N. McPherson
Assistant Attorney General
P.O. Box 899
Jefferson City, MO 65102

/s/ Robert S. Adler

RULE 84.06 CERTIFICATE

I certify that this brief is typed in Times New Roman, 13 point type, WordPerfect 15. This brief complies with the limitations contained in Rule 84.06(b). This brief contains 7,666 words (excluding the cover, certificate of service, certificate required by Rule 84.06(c) and signature block) according to the word counting feature of WordPerfect 15.

LAW OFFICES OF ROBERT S. ADLER, P.C.

By: /s/ Robert S. Adler
ROBERT S. ADLER, #24229
Attorney for Appellant
130 S. Bemiston, Suite 608
St. Louis, MO 63105
(314) 725-2400
(314) 725-2405 (facsimile)
robertsadlerpc@aol.com

APPENDIX INDEX

Section 302.312 RSMo.....	A1
Section 302.535 RSMo.....	A2
Section 577.026	A3
BAC Datamaster #940244 Maintenance Report	
1/7/13 @ 4:22: .04 solution	A4
1/7/13 @ 4:34: .10 solution	A8
BAC Datamaster #204183 Maintenance Report	
1/11/13 @ 7:10: .04 solution	A12
1/11/13 @ 7:21: .10 solution	A16
Petitioner (Driver's) Exhibit 1 and 1A	A20
Certification Exhibit A	A28
Certification Exhibit B	A29
Certification Exhibit C	A30
Certification Exhibit D	A32