S.C. No. 87082

IN THE
MISSOURI SUPREME COURT

NICHOLAS B. REED,

Respondent,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI,

Appellant.

Appeal from the Circuit Court
of Phelps County, Missouri,
The Honorable Ralph Haslag, Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of the Circuit Court of Phelps County, Missouri, the Honorable Ralph J. Haslag, Judge. Transfer of this appeal was ordered by this Court pursuant to Rule 83.03 after an opinion by the Missouri Court of Appeals, Southern District. Therefore, this Court has jurisdiction of this appeal pursuant to Mo. Const. Art. V, ' 10, as amended effective November 2, 1982.

STATEMENT OF FACTS

Respondent=s driving privilege was suspended pursuant to ' 302.500, *et seq*. RSMo Supp. 2003, and he filed a petition for trial de novo in the court below March 19, 2004 (LF 8-9). Respondent filed a AMotion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment@ on June 16, 2004, asserting that he was not lawfully arrested pursuant to ' 577.039, RSMo, in that he was not arrested within one and one-half hours of when the offense was committed, and therefore the results of his breath test were not admissible under ' 577.037, RSMo (LF 28-39, App. A37-48). Appellant filed Suggestions in opposition to this motion on August 16, 2004, asserting that the time constraints of ' 577.039 did not apply since Respondent had left the scene of an accident, and further that the lawfulness of the arrest was not relevant in this civil proceeding (LF 41-45, App. A49-53).

The Aundisputed facts@ set forth in the parties= memoranda to the court and the Alcohol Influence Report (AIR) were as follows: At approximately 6:14 a.m. on December 20, 2003, Sgt. Reynolds of the Missouri State Highway Patrol located a

vehicle partially off the roadway in Rolla, Missouri (LF 21, App. A30).[1] The vehicle was Abacked off@ into a ditch, with its emergency flashers activated, and it was partially blocking a lane (LF 21, App. A30). The vehicle appeared to have been there for some time, since the engine area was cold and frost had accumulated on the vehicle (LF 21, App. A30).

The sergeant requested a wrecker to remove the vehicle from the roadway, and was subsequently advised that the vehicle owner had just called the wrecker service to request that the vehicle be towed (LF 21, App. A30). Thereafter, an officer from the Rolla police department brought the vehicle owner to the scene at 6:30 a.m. (LF 21, App. A30). This subject was identified as Respondent (LF 21, App. A30).

When Respondent was asked by the sergeant what had happened, he stated: AI meant to turn at Lanning Lane and go across, but I missed it. I was turning around and backed off here@ (LF 21, App. A30). As Respondent spoke, the sergeant noted a distinct odor of intoxicants about his person, that Respondent=s eyes were bloodshot and glassy,

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[1]The various facts alluded to in the parties= memoranda below and in the argument before the court below all appear to be drawn from the AIR. For simplicity=s sake, only the AIR will be cited herein.

and that his speech was somewhat slurred (LF 21, App. A30). Respondent indicated that he had not had anything to drink since backing his vehicle into the ditch, but he admitted to drinking Aa few@ during the night (LF 21, App. A30).

The sergeant then administered a series of field sobriety tests, after which he arrested Respondent for driving while intoxicated (DWI) and careless and imprudent driving (C&I) at 6:46 a.m. (LF 21, App. A30). A breath test administered at 7:04 a.m. reflected Respondent=s BAC was .136% (LF 21, 25; App. A30, 34). The DWI and C&I citations issued to Respondent reflect the time of the offenses as being 3:00 a.m. (LF 15, 27; App. A24, 36).

The cause was called on August 16, 2004, and the parties argued their memoranda before the court below (TR 1-9). The court inquired as to whether to constitute Aleaving the scene of an accident@ there had to be some type of damage to another vehicle or injury to another person before it became a crime (TR 9). Appellant maintained that Respondent had not intentionally backed his vehicle into a ditch, and therefore it was an accident (TR 9-10).

The court subsequently took the matter under advisement (TR 15). On September 1, 2004, the Honorable Ralph J. Haslag, Judge, ruled that Respondent=s arrest was not valid under Missouri statutes and ordered that his driver=s license be reinstated (LF 47, App. A1). This appeal ensued.

POINTS RELIED ON

I.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT HE HAD BEEN LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo.

Metro Auto Auction v. Director of Revenue, 707 S.W.2d 397 (Mo.banc 1986);

Jones v. Director of Revenue, 832 S.W.2d 516 (Mo.banc 1992);

Strode v. Director of Revenue, 724 S.W.2d 245 (Mo.banc 1987);

Greenbriar Hills Country Club v. Director of Revenue,

47 S.W.3d 346 (Mo.banc 2001);

' ***302.302, RSMo Supp. 2004***;

' ***302.505, RSMo Supp. 2003***;

' ***303.040, RSMo 2000***;

' ***577.020, RSMo Supp. 2003***;

' ***577.023, RSMo Supp. 2004***;

' ***577.037, RSMo Supp. 2003***;

' ***577.039, RSMo 2000***;

' 577.060, RSMo 2000;

The American Heritage Dictionary, 2d College Edition.

II.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT THE BREATH TEST RESULT WAS LAWFULLY OBTAINED, REGARDLESS OF WHETHER RESPONDENT HAD BEEN LAWFULLY ARRESTED FOR DWI.

State v. Setter, 721 S.W.2d 11 (Mo.App.W.D. 1986);

Strode v. Director of Revenue, 724 S.W.2d 245 (Mo.banc 1987);

Verdoorn v. Director of Revenue, 119 S.W.3d 543 (Mo.banc 2003);

Turcotte v. Director of Revenue, 829 S.W.2d 494 (Mo.App.E.D. 1992);

' ***302.505, RSMo Supp. 2003***;

' ***304.012, RSMo 2000***;

' ***544.216, RSMo 2000***;

' ***577.020, RSMo Supp. 2003***;

' ***577.021, RSMo Supp. 2003***;

' ***577.026, RSMo 2000***;

' ***577.029, RSMo 2000***;

' ***577.031, RSMo 2000***;

' ***577.033, RSMo 2000;***

' ***577.041, RSMo Supp. 2003***.

' ***577.039, RSMo 2000***.

III.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT WHETHER HE WAS LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo, WAS OTHERWISE IRRELEVANT IN THIS CIVIL PROCEEDING.

Riche v. Director of Revenue, 987 S.W.2d 331 (Mo.banc 1999);

State ex rel. Peach v. Boykins, 779 S.W.2d 236 (Mo.banc 1989);

Murphy v. Director of Revenue, WD 64266 (June 21, 2005);

In re Littleton, 719 S.W.2d 772 (Mo.banc 1987);

' 577.037, RSMo Supp. 2003;

' 577.039, RSMo 2000.

ARGUMENT

I.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT HE HAD BEEN LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo, AND THE BREATH TEST RESULT WAS OTHERWISE LAWFULLY OBTAINED.

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evi dence to support it, it is against the weight of the evidence, it erroneously declares the law, and/or it erroneously applies the law. ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo.banc 1976). Here, the court below erroneously applied the law.

Pursuant to ' 302.505, RSMo Supp. 2003 (App. A4), Appellant was required to establish:

> (1) the driver was arrested on probable cause that he or she was committing an alcohol-related driving offense, and (2) the driver had been driving at a time when his or her blood alcohol concentration was at least .10 percent by weight.

House v. Director of Revenue, 997 S.W.2d 135, 138 (Mo.App.S.D. 1999).[2] Here, it is undisputed that there was probable cause to believe Respondent was driving while intoxicated; he admitted he had driven the vehicle and that he had not consumed any intoxicants after driving, and he displayed obvious indicia of intoxication (LF 16, 21; App. A25, 30). Nor is there any dispute but that his BAC tested at .136% (LF 21, 25; App. A30, 34).

Rather, Respondent=s challenge to the suspension of his license was that the results of his breath test were not admissible pursuant to ' 577.037.4, RSMo Supp. 2003 (App. A17), since he was not lawfully arrested pursuant to ' 577.039, RSMo 2000 (App. A18), and the court below found that the arrest was not valid under the Missouri statutes (LF 47, App. A1). Appellant submits that the court=s interpretation of the statutes, particularly the reliance upon ' 577.060, RSMo 2000 (App. A22), to determine whether Respondent had been in an Aaccident,@ was erroneous.

Section 577.039 provides:

Arrest without warrant, lawful, when. --

An arrest without warrant by a law enforcement

[2] Subsequent to the holding in ***House***, the general assembly lowered the threshold BAC level to .08%. The issues otherwise remain unchanged under the current statute.

> officer, including a uniformed member of the state highway patrol, for a violation of section 577.010 or 577.012 is lawful whenever the arresting officer has reasonable grounds to believe that the person to be arrested has violated the section, whether or not the violation occurred in the presence of the arresting officer and when such arrest without warrant is made within one and one-half hours after such claimed violation occurred, unless the person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment, in which case such arrest without warrant may be made more than one and one-half hours after such violation occurred.

The statute was amended in 1996 to explicitly authorize warrantless arrests more than 90 minutes after the offense where: Athe person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment.@ See generally, ***Knipp v. Director of Revenue,*** 984 S.W.2d 147, 151 (Mo.App.W.D. 1998) (arrest at a hospital more than 90 minutes later was valid under the amended statute where the officer was not able to effectuate the arrest at accident scene due to the medical treatment the subject was receiving).

Respondent=s primary contention below was that the exception in ' 577.039

pertaining to subjects who have left the scene of an accident does not apply to him, asserting that he was not in an Aaccident.@ This position rests upon the propositions that his conduct at issue herein did not constitute Aleaving the scene of an accident@ as proscribed by ' 577.060, and that Sgt. Reynolds did not charge him with being in an accident on the tickets that were issued (LF 27, App. A36). Appellant submits that neither rationale is tenable under the relevant statutes and case law.

It is clear that the legislative intent behind this provision was not to restrict its application to situations where the subject could otherwise be charged with leaving the scene of an accident pursuant to ' 577.060. If the legislature so intended, they could have simply provided Aunless the person to be arrested has violated ' 577.060.@

Rather, it is clear that the legislature was simply circumventing their own arbitrary time constraint where law enforcement=s ability to meet it was exacerbated by the subject no longer being at the scene of the crime. See generally, ***Collette v. Director of Revenue,*** 717 S.W.2d 551, 557-558 (Mo.App.W.D. 1986) (urging the general assembly to amend the statute because of the difficulties it posed for law enforcement when investigating suspects who are transported for medical treatment).

This Court has previously been recognized that the language of ' 577.039 is clear and unambiguous. ***Strode v. Director of Revenue,*** 724 S.W.2d 245, 247 (Mo.banc 1987). Granted, ***Strode*** was decided before the amendment at issue here, but there is nothing unclear or ambiguous about the new language, either, and it clearly does not require that there be property damage, personal injury and/or a violation of ' 577.060.

This Court has also held: "Where the language of a statute is clear and unambiguous, there is no room for construction." ***Jones v. Director of Revenue***, 832 S.W.2d 516, 517 (Mo.banc 1992). As such, what we are left with here is simply a statute which does not apply its own time constraint where a subject has left the scene of an accident, and it is ***not*** subject to any construction requiring a particular showing of injuries or damages such as required by ' 577.060.

Moreover, these two statutes are disparate in their purposes, and therefore not otherwise subject to being construed together. Section 577.060 criminalizes leaving the scene of an accident Aknowing that an injury has been caused to a person or damage has been caused to property,@ without first providing proper identification. The legislative intent behind this statute is clear -- to punish those who seek to avoid potential civil liability (if not criminal prosecution) stemming from their involvement in an accident, replete with enhanced penalties where there are more serious consequences stemming from the accident or repeated offenses by the subject who left the scene.

On the other hand, ' 577.039 authorizes an officer to make a warrantless arrest for a ADWI@ or ABAC@ violation. The legislative intent behind this statute is self-evident -- to authorize officers to make warrantless arrests for DWI or BAC violations. Moreover, as noted above, the legislative intent behind the specific provisions at issue here is also self-evident -- to broaden the officer=s authority by circumventing its arbitrary time constraint where the officer=s ability to meet it was exacerbated by the

subject no longer being at the scene of the crime. Whether the subject was driving while intoxicated is not an element of ' 577.060; whether the subject actually caused damages and/or injuries is not an element of the exceptions set forth in ' 577.039.

Although both statutes involve motor vehicle accidents, it can hardly be said that they are enacted on the same subject. The crime in the former is leaving the scene of the accident; the underlying crime at issue in the latter is driving to the scene of the accident while intoxicated.

Furthermore, this Court has previously declined to read *related* statutes together in ***Metro Auto Auction v. Director of Revenue,*** 707 S.W.2d 397 (Mo.banc 1986), where it was urged that the court should determine the intent of the legislature by reading the statute together with related statutes. ***Id.*** at 402. This Court first noted that it would consider words used in the statute Ain their plain and ordinary meaning@ and concluded: AThis Court may not engraft upon the statute provisions which do not appear in explicit words or by implication from other words in the statute.@ ***Id.*** at 401, 402. There is nothing in the statute at issue here, express or implied, that the legislature intended for the term Aaccident@ to be limited to the types of circumstances set forth in other statutes dealing with accident.

The statutory language at issue here is crystal clear, and "A court may not add words by implication to a statute that is clear and unambiguous." ***Dean Machinery Co. v. Director of Revenue***, 918 S.W.2d 244, 246 (Mo.banc 1996). Moreover, "We have a

duty to read statutes in their plain, ordinary, and usual sense... Where there is no ambiguity, we cannot look to any other rule of construction.@ ***Bosworth v. Sewell***, 918 S.W.2d 773, 777 (Mo.banc 1996).

Since there is no ambiguity in the wording of the statute, Appellant submits that this is a simple matter of applying the maxim *expressio unius est exclusio alterius*: the express mention of various criteria for what constitutes an accident in the various other statutes enumerated above implies the exclusion of such criteria here. See generally, ***Greenbriar Hills Country Club v. Director of Revenue,*** 47 S.W.3d 346, 352 (Mo.banc 2001) (since the legislature was deemed to be aware of the related statute, the omission at issue from the statute at issue was deemed intentional).

Indeed, this Court has recently held the absence of a term in one ***subsection*** of a statute meant that the term did not apply in said subsection, even though it was used in other subsections of the same statute. ***Murphy Co. Mechanical Contractors and Engineers v. Director of Revenue,*** 156 S.W.3d 339, 341 (Mo.banc 2005). The legislature has repeatedly demonstrated the ability to attach explicit conditions to the term Aaccident@ if they intend the accident to bear various legal consequences, but they attached no such provisions here.

An analogous scenario was addressed by the Missouri Court of Appeals in ***State v. Laplante,*** 148 S.W.3d 347 (Mo.App.S.D. 2004). There, the subject was arrested for DWI while riding a minibike that did not meet the definition of a Amotor vehicle@ set

forth in Chapter 302, and the subject argued that he was not driving a motor vehicle as required by the DWI statute. ***Id.*** at 348. It was noted that the criminal DWI statute was required to be construed strictly against the state and that it did not define the term Amotor vehicle,@ but the court nonetheless rejected the contention that it should look to Chapter 302 to define Amotor vehicle.@ ***Id.*** at 349.

It was found that there was no provision in the DWI statute indicating the legislature intended to exempt minibike operators from being charged with DWI. ***Id.*** at 350. The court concluded that the legislature intended to protect the public from drunken minibike drivers as well as the drivers of standard motor vehicles, and noted: AThis construction is consistent not only with the broad purpose of section 577.010 but with common sense as well.@ ***Id.*** at 351.

Appellant submits that the same rationale applies here: there is simply no evidence of any legislative intent to place any special limitations or conditions on the term Aaccident@ in ' 577.039. Therefore, the term as used in ' 577.039 should be read in its Aplain, ordinary, and usual sense@ (***Bosworth, supra***, 918 S.W.2d at 777), and AAbsent a definition in the statute, the plain and ordinary meaning is derived from the dictionary.@ ***Cox v. Director of Revenue,*** 98 S.W.3d 548, 550 (Mo.banc 2003).

The plain and ordinary meaning of the term Aaccident@ derived from the dictionary is: A**1.** An unexpected an undesirable event. **2.** Something that occurs unexpectedly or unintentionally.@ ***The American Heritage Dictionary, 2d College***

Edition, p. 71 (App. A23). Moreover, it should also be noted that this Court most recently had no qualms about denominating an incident substantially similar to the one at issue here as an Aaccident.@ ***State v. Madorie,*** 156 S.W.3d 351, 353, 356 (Mo banc 2005) (subject backed vehicle into a ditch when attempting to turn around).

Of course, it should be noted that the record reflects Sgt. Reynolds did not check the box on the ticket pertaining to an accident and did not recite the charge code pertaining to an accident. However, review of the statutory scheme reflects that these factors still fail to support the proposition that this was not an accident.

Whether or not a person was involved in an accident which resulted in the issuance of a ticket is solely relevant pursuant to ' 302.302.3, RSMo Supp. 2004, which provides that an additional two points can be assessed against a subject=s driving record when personal injury or property damage result from a violation enumerated in ' 302.302.1 (App. A3). Since there does not appear to have been any personal injuries or property damage resulting from Respondent=s accident, there would be no basis for the sergeant to check the Aaccident@ box on the ticket charging the AC & I@ violation enumerated in ' 302.302.1(4).

However, whether the accident in question was one for which additional points could be assessed against Respondent=s license pursuant to ' 302.302.3, or which required that it be reported to Appellant pursuant to ' 303.040, RSMo 2000 (App. A5),[3]

[3]Accidents involving uninsured motorist with personal injuries or at least $500 in

or which required that Respondent submit to testing for alcohol and/or drugs in his blood pursuant to ' 577.020.1(5)-(6), RSMo Supp. 2004(App. A8),[4] or which Respondent could be charged for leaving the scene thereof pursuant to ' 577.060 is simply ***not*** relevant under ' 577.039. As noted above, the gravamen of ' 577.039 is not the nature of the accident, it is the fact that the subject is no longer at the scene of the accident, thereby exacerbating law enforcement=s ability to effectuate an arrest within an hour and half.

Whether Respondent was insured or uninsured, drunk or sober, at fault or not at fault, mangled a few blades of grass or an entire school bus full of children is irrelevant to whether law enforcement could find him within an hour and a half. If the legislature wanted to define the term Aaccident@ in ' 577.039, they clearly could have done so, but they clearly did not.

As such, Appellant submits that Respondent=s operation of his vehicle here resulted in an accident for the purposes of ' 577.039, since it was both Aunintentional@ and Aundesirable@ (***The American Heritage Dictionary, supra***) -- by Respondent=s own

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property damage.

[4]Accidents involving serious physical injury and/or death.

admission, he was intending to turn his vehicle around, not just park it in a ditch with its nose sticking out into the road (LF 21, App. A30). His own statements reflect that this was an Aaccident@ rather than an Aon purpose.@ Therefore, he was subject to a warrantless arrest more than an hour and a half later since he had left the scene.

By removing himself from the scene of the accident, Respondent removed the 90-minute constraint from the arresting officer. Therefore, his arrest was valid under the provisions of ' 577.039. The court below erroneously declared the law in finding otherwise, and therefore its judgment should be reversed. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32.

II.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT THE BREATH TEST RESULT WAS LAWFULLY OBTAINED, REGARDLESS OF WHETHER RESPONDENT HAD BEEN LAWFULLY ARRESTED FOR DWI.

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, and/or it erroneously applies the law. ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo.banc 1976). Here, the court below erroneously applied the law.

Even assuming *arguendo* that the DWI arrest was unlawful, this does not render the ensuing breath test inadmissible pursuant to ' 577.037, RSMo Supp. 2003. Respondent=s theory below was that since ' 577.037.4 requires the test be performed pursuant to '' 577.020 - 577.041, a test obtained in violation of ' 577.039 would not be admissible. However, Respondent=s theory was based upon the faulty premise that a subject has to be under arrest ***for DWI*** before being tested.

It should first be noted that ' 577.039 explicitly applies only to arrests made pursuant to ' 577.010 or ' 577.012, and it has previously been held that it applies only

to the arrests enumerated therein. ***State v. Setter,*** 721 S.W.2d 11 (Mo.App.W.D. 1986) (90-minute rule does not apply to an arrest for involuntary manslaughter); ***Strode, supra,*** 724 S.W.2d at 247 (90-minute rule does not apply to DWI arrests made pursuant to municipal ordinance). Nor does ' 577.039 set forth any time frame in which a test must be performed.

However, ' 577.020.1(1), RSMo Supp. 2003 (App. A8) specifically provides that a person can be required to submit to testing:

> 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 an intoxicated or drugged condition....

(Emphasis added.) The statute does ***not*** require that the person be arrested ***for DWI*** before being required to submit to the test; it merely requires that the officer have reasonable grounds to believe the person was driving while intoxicated.

As noted in Point I, there does not appear to be any dispute here as to whether there was probable cause to believe Respondent was driving while intoxicated; he admitted he had driven the vehicle, that he had not consumed any intoxicants after driving, and he displayed obvious indicia of intoxication (LF 16, 21; App. A25, 30). See, ***Swanberg v. Director of Revenue,*** 122 S.W.3d 87 (Mo.App.S.D. 2003) (subject

found several hours after an accident; admitted driving and appeared intoxicated, and merely made no claim prior to arrest that he had been drinking after he was driving).

It is also undisputed that Respondent was also arrested for C&I driving (LF 21, 27; App. A30, 36). It is also clear that C&I is not a charge enumerated in ' 577.039, and that the sergeant otherwise had the authority to make such an arrest.

Section 544.216, RSMo 2000 (App. A7), provides:

> **Powers of arrest -- arrest without warrant....**
>
> ...[A]ny member of the Missouri state highway patrol ... may arrest on view, and without a warrant, any person the officer sees violating or who such officer has reasonable grounds to believe has violated any law of this state, including a misdemeanor.... The power of arrest authorized by this section is in addition to all other powers conferred upon law enforcement officers....

Appellant submits that, in addition to there being reasonable grounds to believe Respondent was driving while intoxicated, it cannot be disputed that there were reasonable grounds to believe he had driven carelessly and imprudently, either.

Nothing in ' 304.012, RSMo 2000 (App. A6), requires that a subject actually injure another or damage another=s property to be subject to a conviction for C&I. Regardless, the serendipitous circumstance that there apparently was nobody and/or nothing in Respondent=s path when he backed into the ditch notwithstanding, nothing in

' 577.020.1(1) requires that a subject actually be guilty of the offense, only that the arresting officer have reasonable grounds. Appellant submits that the danger to the life, limb and/or property of another posed by driving a vehicle backwards off the roadway is patent.

It is noted that ' 302.510, RSMo Supp. 2004, requires an arrest for an intoxication-related offense. However, there is no dispute here but that Respondent was, in fact, arrested for DWI; it was uncontroverted that he was arrested for DWI and taken to the police station where the breath test was administered (LF 21). In lieu of any theory as to how he could end up at the station and take the breath test without (at the very least) submitting to the sergeant=s show of authority (see e.g., ***Smither v. Director of Revenue,*** 136 S.W.3d 797, 799 [Mo.banc 2004]), it cannot be gainfully argued that Respondent was not arrested for DWI.

Whether Respondent was ***validly*** arrested for DWI is the subject of Point I, *supra*, and the relevance of the validity of said arrest is the subject of Point III, *infra*. However, it cannot be subject to debate but that Respondent was arrested.

As such, whether or not Respondent=s arrest for DWI was valid, it is clear that his arrest for C&I was, and that this offense arose Aout of acts which the arresting officer had reasonable grounds to believe were committed while (Respondent) was driving a motor vehicle while in an intoxicated or drugged@ Since Respondent=s test was obtained in compliance with ' 577.020, and not in violation of ' 577.039, it was still properly admissible pursuant to ' 577.037.

Assuming again *arguendo* that the arresting officer here lacked the authority to make an arrest for ' 577.010 under the provisions of ' 577.039, Respondent still had to submit to the breath test pursuant to ' 577.020 by virtue of his Acareless and imprudent@ arrest. Indeed, the test result obtained thereby would certainly bolster the probable cause statement submitted for obtaining a warrant for the DWI charge, and given the ephemeral nature of alcohol in the body (***State v. LeRette,*** 858 S.W.2d 816, 819 [Mo.App.W.D. 1993]), a test result obtained at that time would be of greater worth than one not obtained until after a warrant was obtained.

The gist of Respondent=s theory is that the breath test result was not admissible because it was not obtained in accordance with the applicable statutes and regulations. However, the only violation he relied upon below was the putative unlawfulness of the arrest without a warrant pursuant to ' 577.039.

It is clear that the purpose of the statutes and regulations pertaining to the administration of breath analysis tests is to ensure the accuracy of the tests. See generally, ***Turcotte v. Director of Revenue,*** 829 S.W.2d 494, 496 (Mo.App.E.D. 1992). It is also clear that whether or not an officer obtains an warrant before making an arrest does not have ***any conceivable effect*** on the accuracy of a breath test any more than whether an officer timely mails a report has any conceivable effect on the accuracy of the test. ***Id.***

Nothing in ' 577.039 addresses the administration of a breath test, and nothing in any of the statutes or regulations pertaining to breath tests raise any issue concerning

the accuracy of a test administered without an warrant, regardless of elapsed time. While ' 577.037.5(1), RSMo Supp. 2004, does address the reliability of a test as evidence of intoxication at the time of driving when there is a lapse of time between the driving and the test, no such issue is confronted here: Respondent=s BAC was .136% approximately four hours after he was driving (LF 21, 25) and he admitted he had not been drinking since he had been driving. See, ***State v. Lynch,*** 131 S.W.3d 422, 424-425 (Mo.App.W.D. 2004) (subject=s breath tested at .165% approximately seven hours after accident; he admitted he had not been drinking since the accident).

While it is also noted that ' 577.037.4 requires a breath analysis be performed in accordance with '' 577.020-577.041, Appellant submits that this does not render Respondent=s test result inadmissible due to the putative violation of ' 577.039. The range of statutes at issue here includes ten different sections, seven of which ('' 577.021, 577.023, 577.029, 577.031, 577.033, 577.039 and 577.041 [App. A10-19]) have nothing to do with evidential breath testing.577.041[5] Construing ' 577.037.4 in such a fashion would mean Respondent=s breath test would not be admissible here if the sergeant had administered a preliminary breath test improperly (' 577.021), if he was improperly charged as a prior or persistent offender (' 577.023), if he had also submitted to blood test that was performed improperly ('' 577.029, .031 and .033) or

[5]It is noted that ' 577.041.1 does pertain to when a test may ***not*** be administered. ***Murphy v. Director of Revenue,*** WD64266 (June 21, 2005) (App. A54).

if he was improperly subjected to a revocation for refusing a test (' 577.041), in addition to if he was improperly arrested pursuant to ' 577.039.

Courts are to construe statutes in a manner which subserve, not subvert, the legislative intent, and Awill not construe the statute so as to work unreasonable, oppressive or absurd results.@ ***Elrod v. Treasurer of Missouri,*** 138 S.W.3d 714, 716 (Mo.banc 2004). Appellant submits that construing ' 577.037.4 in such a fashion would produce such absurd results. It is clear that ' 577.026 and ' 577.037 are the only provisions of '' 577.020-577.041 which actually pertain to breath testing, and they are intended to ensure the accuracy of breath test results. It would be absurd to maintain that a test result should be deemed inadmissible on the basis of statutes which have no bearing on the administration or accuracy of said test, particularly where it is undisputed that the test was performed "in accordance with the methods and standards" approved by the Department of Health.

Appellant=s burden was to produce evidence that Respondent=s BAC tested .08% or higher, and Appellant met this burden. The burden then shifted to Respondent to produce evidence that Araises a genuine issue of fact regarding the validity of the blood alcohol test results.@ ***Verdoorn v. Director of Revenue,*** 119 S.W.3d 543, 546 (Mo.banc 2003). Merely arguing that a warrant had not been obtained for the underlying arrest raises no issue of fact regarding whether the test was accurate and/or whether his BAC was at least .08% when he had the accident.

Respondent was lawfully arrested here, if not for the DWI, then for the C&I, and

the results of his breath test should have been admitted. The court below erroneously applied the law in finding that the suspension should be set aside on the grounds that he was not properly arrested, and therefore, its judgment should be reversed. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32.

III.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OF RESPONDENT=S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT WHETHER HE WAS LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo, WAS OTHERWISE IRRELEVANT IN THIS CIVIL PROCEEDING.

In reviewing this court-tried case, this Court is to sustain the judgment of the court below unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, and/or it erroneously applies the law. ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo.banc 1976). Here, Appellant submits the court below erroneously applied the law by setting aside the suspension of Respondent's driving privilege.

The court below entered judgment for Respondent on the grounds that the arrest was not valid under Missouri statutes (LF 47, App. A1). Appellant submits that even if it could be found that Respondent=s arrest was unlawful and that the breath test was illegally obtained, he his still subject to a suspension of his license.

Regardless of how Respondent=s contentions below are analyzed, they simply come down to an argument that his test results should be excluded, based upon the theory that his arrest was unlawful pursuant to ' 577.039, and therefore his test results

were not admissible pursuant to ' 577.037.

However, this Court held in ***Riche v. Director of Revenue,*** 987 S.W.2d 331 (Mo.banc 1999), that the Aexclusionary rule@ does not apply in proceedings under ' 302.505 since they are civil in nature. ***Id***. at 334. It has otherwise been recognized that "evidence obtained in an illegal or unethical manner is not subject to an exclusionary rule except in criminal cases." ***In re Littleton***, 719 S.W.2d 772, 775 (Mo.banc 1987) (exclusionary rule does not apply in a proceeding for the suspension of a law license). See also, ***State ex rel. Peach v. Boykins,*** 779 S.W.2d 236, 237 (Mo.banc 1989) (exclusionary rule inapplicable in ouster proceeding); ***INS v. Lopez-Mendoza***, 468 U.S. 1032, 1050, 104 S.Ct. 3479, 3489 (1984) (exclusionary rule inapplicable in a deportation proceeding).

It is noted that the Missouri Court of Appeals, Western District, has recently held that blood test results were inadmissible pursuant to ' 577.037.4 where the sample was drawn in violation of ' 577.041.1. ***Murphy v. Director of Revenue, supra*** (App. A54). However, Appellant submits that said holding is not dispositive of the case at bar.

The specific issue in ***Murphy*** entailed drawing blood from a subject who had already refused a test. The court held that since ' 577.041.1 expressly provides that if a subject Arefuses upon the request of the officer to submit to any test allowed pursuant to section 577.020, then ***none shall be given***...@ (emphasis added), the test was not Aperformed as provided in sections 577.020 - 577.041.@ ***Id***. Of course, the general

assembly is free to create a Astatutory exclusionary rule@ that is applicable in civil cases. See, e.g., ***Graham v. Director of Revenue***, 793 S.W.2d 577, 579 (Mo.App.S.D. 1991); ***Downs v. Director of Revenue***, 791 S.W.2d 851, 853 (Mo.App. S.D. 1990) (' 303.024.5 specifies that a police officer must lawfully stop a motorist before require proof of insurance be shown).

However, nothing in ' 577.039 provides that no test shall be given to a subject who is not arrested for DWI or BAC within 90 minutes of the offense. Moreover, as noted in Point II, nothing in ' 577.020 requires that a subject be arrested for DWI or BAC before being subjected to the testing requirements. Indeed, in addition to the Aarrested for any offense@ language discussed in Point II, there are circumstances under which a subject can be subjected to testing without an arrest at all. See, e.g., ' 577.020.1(2)-(4)(subjects under the age of 21 required to submit to testing to see if they have been driving with a BAC of .02% or greater); ' 577.020.1(6) (subjects involved in fatality accidents).

As such, the best-case scenario for Respondent would be a determination that his arrest was unlawful under ' 577.039. However, he would still be seeking to exclude evidence of his test as being obtained pursuant to an unlawful arrest, ***not*** that it was obtained in violation of some express statutory provision pertaining to when such a test could be administered. Cf. ***Murphy v. Director of Revenue, supra***. Appellant submits that this argument still boils down to seeking to exclude evidence because it was illegally obtained, and that the evidence still is not subject to exclusion on this basis

here since this is a civil case. ***St. Pierre v. Director of Revenue,*** 39 S.W.3d 576 (Mo.App.S.D. 2001).

The holding in ***St. Pierre*** certainly seems applicable here, in that said case also involved a contention that the officer lacked the authority to make the arrest (albeit for a lack of evidence establishing that the officer had Afresh pursuit@ authority pursuant to ' 544.157.4, RSMo, rather than for a lack of a showing that the arrest was made in compliance with ' 577.039). ***Id.*** at 578-579. It was found that applying the criminal procedure statute would require rewriting the civil driver=s license statute, and held that all the evidence collected pursuant to the putatively illegal arrest still was not excludable. ***Id.*** at 580. The crux of the arguments raised by Respondent herein are indistinguishable from the arguments raised by Respondent (and rejected) in ***St. Pierre***.

The foundation for admitting a breath test consists of the test being administered by a certified operator, using an approved device which has been timely maintained, following the methods and techniques approved by the Department of Health. ***Tidwell v. Director of Revenue***, 931 S.W.2d 488, 490 (Mo.App.S.D. 1996). Whether or not a subject is timely and/or lawfully arrested for DWI or BAC is not a method or technique approved by the Department of Health, nor is it relevant to the accuracy of the breath test.

Even if it could be found that the evidence which comprised Appellant=s *prima facie* case was illegally obtained pursuant to ' 577.039, it was still admissible in this

proceeding. See, ***In re Littleton, supra***, 719 S.W.2d at 775 ("evidence obtained in an illegal or unethical manner is not subject to an exclusionary rule except in criminal cases.") This is not to say that a test result would be admissible if it were obtained in violation of a statute that actually pertained ***to the administration of the test***, or whether the test could be administered. In such a case, however, the result would be excludable for lack of foundation, not an application of the exclusionary rule *per se*. Such is not the case here, though, since there was no showing that the actual test was actually administered improperly.

As such, Respondent=s test results were properly admissible here, regardless of the legality of his arrest. The court below erroneously applied the law by setting aside the suspension on the grounds that Respondent=s arrest was not proper under the Missouri statutes, and therefore its judgment should be reversed. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32.

CONCLUSION

WHEREFORE, based upon the foregoing, Appellant respectfully requests that the judgment of the court below be reversed.

Respectfully submitted,

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CERTIFICATION OF APPELLANT'S BRIEF

COMES NOW Appellant by the undersigned counsel and certifies that this brief complies with the limitations contained in Rule 84.06(b), in that the Word Count for Appellant's Brief is 7053 words, as calculated by the word count of the word-processing system used to prepare this brief.

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CERTIFICATION OF SCANNED DISK

COMES NOW Appellant by the undersigned counsel and certifies that this disk containing Appellant's Brief has been scanned for viruses and it is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing was mailed, postage prepaid, this 11th of October, 2005, to:

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