S.C. No. 87082

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IN THE
MISSOURI SUPREME COURT

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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 REPLY BRIEF

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TABLE OF AUTHORITIES

INTRODUCTORY STATEMENT

In light of the contentions raised in Respondent's Substitute Brief, Appellant believes this Substitute Reply Brief is necessary.

JURISDICTIONAL STATEMENT

Appellant adopts the Jurisdictional Statement found at page 5 of Appellant's Substitute Brief.

STATEMENT OF FACTS

Appellant adopts the Statement of Facts found at pages 5-7 of Appellant's Substitute Brief, with the addition of noting that when Respondent filed his "Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment" (LF 28-39, App. A22-33), he included as an exhibit a copy of his "careless and imprudent" ticket which was not previously included in the pleadings (LF 27, App. A36). This exhibit was deemed admitted by the court below (LF 47, App. A1). Moreover, Respondent stipulated below that his BAC tested .136% (TR 4).

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 RESPONDENT HAD BEEN LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo.

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

Romans v. Director of Revenue, 783 S.W.2d 894 (Mo.banc 1990);

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);

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

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

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

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

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

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

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

' ***577.060, RSMo 2000***.

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. Grady, 548 S.W.2d 601 (Mo.App.E.D. 1977);

St. Pierre v. Director of Revenue, 39 S.W.3d 576 (Mo.App.S.D. 2001);

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

Gregory v. Director of Revenue, SD26757 (October 5, 2005);

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

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

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

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

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

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.

Sellenriek v. Director of Revenue, 826 S.W.2d 338 (Mo.banc 1992);

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

Murphy v. Director of Revenue, 170 S.W.3d 507 (Mo.App.W.D. 2005);

Woodall v. Director of Revenue, 795 S.W.2d 419 (Mo.App.E.D. 1990);

' 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 RESPONDENT HAD BEEN LAWFULLY ARRESTED PURSUANT TO ' 577.039, RSMo.

Respondent asserts at the outset of his Brief that Appellant has incorrectly set forth the standard of review by relying upon ***Murphy v. Carron,*** 536 S.W.2d 30 (Mo.banc 1976), in that the judgment was granted on his Motion for Judgment on the Pleadings. However, his motion was actually styled AMotion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment@ (LF 28, App. A22). Moreover, the court below took additional evidence beyond the pleadings, to wit: the ACareless and imprudent@ ticket attached to Respondent=s motion (LF 27, App. A36). This exhibit was deemed admitted by the court below (LF 47, App. A1).

As such, Rule 55.27(b) (App. B2) dictates that this matter be treated as a motion for summary judgment pursuant to Rule 74.04. Since the material facts were not otherwise disputed by the parties, this Court should review the matter *de novo* to determine whether the court below correctly determined the law. ***City of Springfield v. Gee,*** 149 S.W.3d 609, 612 (Mo.App.S.D. 2004). As such, this Court=s task is the

same as is otherwise set forth in ***Murphy v. Carron*** (see generally, ***ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.,*** 854 S.W.2d 371, 376, 380 [Mo.banc 1993]), and Appellant otherwise persists in her premise that the court below erroneously applied the law.

To the extent that it is responsive to Appellant=s first point,[1] Respondent argues in his Argument on Point I that he was not in an Aaccident,@ urging that the criteria set forth in ' 577.060, RSMo 2000 (App. A22) be applied to determine what constitutes an accident. Respondent=s position rests largely on the proposition that the Aleft the scene of an accident@ language used in ' 577.039, RSMo 2000 (App. A18), is merely the past tense of Aleaving the scene of an accident.@ Appellant submits that none of the authorities cited by Respondent, or otherwise found on the books, supports such a theory of statutory construction.

As otherwise noted in Appellant=s Substitute Brief, if the legislature intended that a subject be involved in an accident as the term is contemplated by ' 577.060 (or as

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[1]The multifarious claims raised by Respondent in his Argument on Point I will be addressed in separate points pursuant to Rule 84.04(d) (App. B3). See generally, ***Martin v. Reed,*** 147 S.W.3d 860, 863 (Mo.App.S.D. 2004).

contemplated by ' 302.302.3, RSMo Supp. 2004 [App. A3], ' 303.040, RSMo 2000 [App. A5] and/or ' 577.020.1[5]-[6], RSMo Supp. 2004 [App. A8]), it could have simply provided Aunless the person to be arrested has violated ' 577.060,@ etc. However, they did not qualify or otherwise restrict the type of Aaccident@ of which the subject left the scene, and there is nothing in ' 577.039, 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 accidents. ***Metro Auto Auction v. Director of Revenue,*** 707 S.W.2d 397, 401 (Mo.banc 1986).

Respondent further asserts in his Argument on Point I that there is no repugnancy between ' 577.039 and ' 577.060, and therefore they should be read A*in pari material*@ (sic), relying upon ***Romans v. Director of Revenue,*** 783 S.W.2d 894 (Mo.banc 1990). However, ***Romans*** is clearly inapposite to the case at bar.

In ***Romans***, this Court construed the specific judicial review provisions found in ' 577.041 (App. A19) with the general judicial review provisions of ' 302.311 (App. B5). ***Id.*** at 895. Here, however, we are ***not*** dealing with two statutes Aupon the same

matter or subject.@ ***Id.*** at 895-896.[2]

Applying Respondent=s reasoning in reverse, a subject would have to be intoxicated and arrested within 90 minutes in order to be charged with leaving the scene pursuant to ' 577.060 to the same extent that there would have to be property damage and/or personal injuries before a subject could be deemed to have been in an accident pursuant to ' 577.039. However, whether the subject was intoxicated is not an element of the offense set forth in ' 577.060 any more than whether there was property damage and/or personal injuries involved in the accident is relevant under the language of ' 577.039.

Moreover, a subject who first provided identification before leaving the scene of

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[2]While Respondent complains at pp. 16-18 of his Substitute Brief that Appellant focuses on the word Aaccident@ apart from the phrase Aleft the scene of,@ he then proceeds to quote Appellant=s Substitute Brief, p. 18, as stating that both A' 577.039 and ' 577.060 involve motor vehicle accidents@ without noticing the subsequent phrase Ait can hardly be said that they are enacted on the same subject.@

an accident involving property damage and/or personal injuries would not be subject to prosecution under ' 577.060, but should still be deemed to have Aleft the scene@ for purposes of ' 577.039. Further, a subject who is transported from the scene by medical personnel would clearly lack the necessary volition or *mens rea* for prosecution under ' 577.060, but explicitly falls within the scope ' 577.039.

Quite simply, none of the specifications for an accident in ' 577.060, *et al*., have any bearing on the issue addressed in ' 577.039 -- whether an officer is able to effectuate an arrest for DWI or BAC within 90 minutes. As such, Appellant submits that these two statutes are not subject to being construed *in pari materia*.

Respondent further posits in his Argument on Point I that the amendment dealing with accidents in ' 577.039 was in response to ***Collette v. Director of Revenue,*** 717 S.W.2d 551 (Mo.App.W.D. 1986), and asserts that said case held Aa lawful arrest under ' 577.039 is a prerequisite to the application of ' 577.041.@ However, the while finding that the subject=s ultimate arrest was untimely, the application of ' 577.041 hinged upon the fact that there had been no arrest, period, and the time the subject refused the test. ***Id.*** at 558.

Moreover, if the legislature was seeking solely to redress ***Collette***, they certainly did not act with undue haste: the statute was amended approximately ten years after ***Collette*** was decided. Having pondered the matter for ten years, Appellant submits that the legislature surely would have expressly included any restrictions on the term Aaccident@ ***if*** they intended any restrictions or conditions to apply.

Furthermore, the specific problem confronted by the officer in ***Collette*** was that the subject had been transported for medical treatment, not that there had been property damage and/or personal injuries. If the legislature was merely seeking to rectify ***Collette***, they would not have also included the provision dealing with subjects who leave the scene of the crime of their own volition. Regardless, it cannot otherwise be gainfully argued that when the legislature seeks to redress a decision by the courts of this state, they cannot enact a statute broader than the specific circumstances in the underlying case.

Respondent next contends in his Argument on Point I that AThe reference in ' 577.039 to left the scene of an accident uses common words understood by most to have the meaning set out in ' 577.060.@ Beyond the trial judge and Respondent=s trial counsel, the record does not support the proposition at *anyone else* understands the phrase Aleft the scene of an accident@ in such a fashion. Indeed, as noted in Appellant=s Substitute Brief, this Court has otherwise categorized a similar occurrence as an Aaccident@ (***State v. Madorie,*** 156 S.W.3d 351, 353, 356 [Mo.banc 2005]), so Appellant submits that the tally is currently seven to two in favor of the incident at issue here being understood as an accident. Granted, the issue in ***Madorie*** was the *corpus delicti* rule, not the validity of an arrest under ' 577.039, but Appellant lacks the temerity to suggest that this Court is otherwise cavalier with its choice of words in its opinions.

Regardless, statutes are not interpreted on the basis of bald assertions as to what

most people might understand a term to mean; rather, "Absent 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). As otherwise noted in Appellant's Substitute Brief, the plain and ordinary meaning of the term "accident" is: "**1.** An unexpected an undesirable event. **2.** Something that occurs unexpectedly or unintentionally." ***The American Heritage Dictionary, 2d College Edition,*** p. 71 (App. A23).

Respondent also contends in his Argument on Point I that an accident did not occur here under the interpretations of either the Highway Patrol or Appellant herself. However, as otherwise noted in Appellant's Substitute Brief, whether or not the accident is of a nature for which it could be charged on a ticket and additional points could thereby be assessed against the subject's license, or which was required to be reported to Appellant pursuant to ' 303.040, RSMo 2000 (App. A5), or which the subject could be charged for leaving the scene thereof pursuant to ' 577.060, etc., is simply ***not*** relevant under ' 577.039. Section 577.039 is ***not*** about punishing the subject criminally for leaving the scene of an accident, or subjecting the subject to various administrative sanctions for being at fault in an accident and/or not having insurance; it is simply about when an officer can arrest a subject who has left the scene. The nature of the accident is wholly irrelevant under ' 577.039; it is simply the fact that the subject is no longer at the scene of the accident which is relevant. As the Missouri Court of Appeals, Western District, has noted: "This court has no way to know *why* the

Missouri General Assembly prescribed such a specified time limit of one and one-half hours.@ ***Collette, supra,*** 717 S.W.2d at 557. Indeed, the reasoning is no more clear now than when ***Collette*** was penned nearly 20 years ago, particularly in light of ' 544.216, RSMo 2000 (App. A7), which authorizes arrests without a warrant or time constraint, so long as the officer has reasonable grounds to believe a subject has violated any law of this state.

Regardless, this Court has noted, "Where the statutory language is clear, the matter of reasonableness is for the legislature." ***Messer v. King***, 698 S.W.2d 324, 325 (Mo.banc 1995). 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). This Court has further held that the language of ' 577.039 is clear and unambiguous. ***Strode v. Director of Revenue,*** 724 S.W.2d 245, 247 (Mo.banc 1987).

While Appellant is neither required nor otherwise inclined to champion the reasonableness of ' 577.039 in general, it is both reasonable and logical for the legislature to not have restricted the nature of an accident under ' 577.039; the nature of the accident is not relevant under the issues in ' 577.039, but rather only the fact that the subject has left the scene thereof.

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, pursuant to ***Messer***, ***Strode*** and ***Jones***, to require that there

be injuries and/or damages ensuing from the accident. Therefore, Respondent=s 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; ***Gee, supra,*** 149 S.W.3d at 612.

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 the case at bar, this Court is to determine whether the court below erroneously declared the law. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32; ***Gee, supra,*** 149 S.W.3d at 612. Appellant submits that it did.

In his Argument on Point I, Respondent disputes Appellant=s assertions that it was undisputed that there was probable cause to arrest him. Granted, maybe Auncontroverted@ would be a better word, but Appellant otherwise persists in the proposition that there was probable cause to arrest Respondent: 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). Respondent certainly offered no evidence to dispute (or controvert) that there was probable cause to believe he had been driving while intoxicated.

However, Respondent concludes his Argument on Point I with the theory that there was not probable cause for the arrest since the arrest was made outside the time

constraints of ' 577.039 and no warrant was obtained. While the logic of this argument is not entirely clear, it is clear that whether an officer has reasonable grounds to believe that an offense has been committed, and that the subject to be arrest committed it, are independent issues from the question of whether the officer has authority to make the arrest.

It has been noted:

> AProbable cause@ for an arrest without warrant exists where the facts and circumstances within the arresting officers= knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable prudence and caution to form a belief that an offense has been or is being committed.

State v. Grady, 548 S.W.2d 601, 608 (Mo.App.E.D. 1977). Here, the facts and circumstances within the trooper=s knowledge was that Respondent admitted he had been driving, admitted he had not been drinking since he had been driving, and he appeared intoxicated. Appellant submits that this information -- particularly the admissions against interest -- was reasonably trustworthy and sufficient to warrant the trooper forming a belief that Respondent had been driving while intoxicated.

To the same extent that an officer can have probable cause to make an arrest, even without adequate grounds to make the initial stop (***Riche v. Director of Revenue,***

987 S.W.2d 331, 336-337 [Mo.banc 1999]), or without authority to make the arrest for being outside of his jurisdiction without Afresh pursuit@ authority (***St. Pierre v. Director of Revenue,*** 39 S.W.3d 576, 580 [Mo.App.S.D. 2001]), Appellant submits that the trooper here had probable cause to arrest Respondent for DWI, regardless of whether he had the authority to do so without a warrant.

There is certainly no support to be found in the case law that an officer does not have probable cause because (s)he does not a warrant; the officer may not have the authority to make the arrest without a warrant, but that certainly does not affect the issue of whether there was probable cause to believe the subject was driving while intoxicated. Respondent=s contention seems to be that after an hour and a half, the requirement that there be reasonable grounds to make an arrest is supplanted by the requirement that the officer have a warrant.

Of course, the officer still has to have probable cause to get a warrant in the first place. Regardless, Respondent simply seems confused by the distinction between the ***grounds*** for an arrest (probable cause) and the ***authority*** to make an arrest (such as a warrant). There is simply no support in either the statutes or case law to intermingle these two concepts.

As such, Appellant reiterates that it was uncontroverted that the trooper had probable cause to believe Respondent was driving while intoxicated, which is the issue under ' 302.505, RSMo Supp. 2003 (App. A4). Whether the trooper had the ***authority*** to make the arrest is addressed in Point I, *supra*, and whether this is relevant will be

addressed *infra*, but whether he had probable cause to believe Respondent was driving while intoxicated cannot be reasonably debated.

Respondent further asserts in his Argument on Point I that the court below was looking at the "grounds" of the arrest, in particular "looking at the event -- a vehicle without damage parked[3] in a ditch -- and the trooper's act of having the Rolla Police bring Respondent back to the scene 3 1/4 hours later." However, the trooper's act of having Respondent brought back would appear to be wholly irrelevant to the issues in the case; there is no evidence that Respondent returned to the scene completely voluntarily, as opposed to any coercion or show of force. Nor is there any support for the proposition that the trooper was not entitled, if not required, to conduct an investigation to ensure that there had been no property damage or injuries; the fact that Respondent's vehicle did not display any damage did not foreclose the possibility that a pedestrian or some item of personal property might have been struck when Respondent *accidentally* backed off into the ditch.

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[3]Regardless of how this Court views the issue of whether this was an "accident" under Point I, Appellant really must take exception to Respondent's characterization that the vehicle was "parked."

Respondent next questions in his Argument on Point II how the arrest for C&I can be the basis of a Arevocation@ (sic) of his license. However, review of Appellant=s Point II reflects that she did ***not*** maintain that the arrest for C&I could be the basis for the suspension under ' 302.505, but rather that the test results would still be admissible under '' 577.020 - 577.041, regardless of any putative impropriety of the DWI arrest under ' 577.039.

As noted in Appellant=s Substitute Brief, ' 577.020.1(1), RSMo Supp. 2003 (App. A8) specifically provides that a person can be required to submit to testing if 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 condition. See ***Gregory v. Director of Revenue,*** SD26757 (October 5, 2005)(App. B6-8) (subject=s license suspended where subject was tested pursuant to an arrest for leaving the scene of an accident). 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.

Respondent further asserts in his Argument on Point II that the evidence before the court below did not reflect that he was arrested for C&I, but rather only for the DWI charge. However, in addition to the ticket for said charge that Respondent adduced (see Point I, *supra*), the trooper=s narrative reflects that Respondent was charged both with DWI and C&I (LF 21, App. A30). While issuance of a traffic citation without actual

restraint or taking the subject into custody does not generally constitute an arrest (see ***State v. Grady, supra,*** 548 S.W.2d at 606), here Respondent was taken into custody and held in lieu of bond (LF 21, App. A30).

Of course, as otherwise acknowledged in Appellant=s Substitute Brief, and reiterated by Respondent, the subject must be arrested for an alcohol-related traffic offense before facing the administrative loss of driving privileges. Again, whether the trooper had the ***authority*** to make the arrest is addressed in Point I, *supra*, and whether this is relevant will be addressed *infra*, but whether he did, in fact, arrest Respondent for DWI cannot be reasonably debated.

The ultimate point of this Point is, though, that it simply cannot be maintained that an arrest has to be made in compliance with ' 577.039 before a test result can be deemed admissible pursuant to ' 577.037. Arrests for a plethora of charges not enumerated in ' 577.039 can result in a subject being tested pursuant to ' 577.020, and ' 577.039 does not otherwise address when (or how) a subject can be tested, only when an arrest can be made without warrant.

As such, the court below erroneously declared the law in setting aside the suspension on the grounds that Respondent was not arrested in accordance with Missouri statutes. Therefore, its judgment should be reversed. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32; ***Gee, supra,*** 149 S.W.3d at 612.

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 the case at bar, this Court is to determine whether the court below erroneously declared the law. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32; ***Gee, supra,*** 149 S.W.3d at 612. Appellant submits that it did.

In his Argument on Point I, Respondent contends that his position is not based upon an application of the exclusionary rule to an unlawful arrest, but rather that the test was inadmissible pursuant to ' 577.037.4 (App. A4) since he was not arrested in compliance with ' 577.039. In his Arguments on Points II and III, he specifically relies upon ***Murphy v. Director of Revenue,*** 170 S.W.3d 507 (Mo.App.W.D. 2005), for the proposition that the test result should be statutorily excluded.

However, as noted in Appellant=s Substitute Brief, the specific issue in ***Murphy*** was 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***. at 510-511. Here, ' 577.039 does not include any express

Astatutory exclusionary rule@ providing that no test shall be given if the subject is not arrested in accordance with its provisions. In lieu of any such statutory exclusionary rule, we are left with the constitutional exclusionary rule, which this Court has held does not apply in proceedings under ' 302.505 since they are civil in nature. ***Riche v. Director of Revenue,*** 987 S.W.2d 331, 334 (Mo.banc 1999).

For his Argument under Point III, Respondent cites ***Woodall v. Director of Revenue,*** 795 S.W.2d 419 (Mo.App.E.D. 1990), and ***Sellenriek v. Director of Revenue***, 829 S.W.2d 338 (Mo.banc 1992) for the proposition that Appellant needs to meet the foundational requirements set forth in the statutes and regulations in order to admit a breath test result.

However, Respondent utterly overlooks this Court=s holding in ***Sellenriek*** that it is not necessary to prove up such foundational requirements in lieu of a proper and timely objection to the introduction of the breath test result. ***Id.*** at 339. In particular, this Court noted that the Apuzzling part@ about the record was that it was stipulated that the subject=s BAC exceeded the legal limit, and this Court held: A[W]here the results of a breathalyzer test are stipulated, a party may not complain that the breathalyzer test was improperly admitted in evidence.@ ***Id.*** Further, this Court concluded that since the results were admitted by stipulation, ***Woodall*** was inapposite. ***Id.***

Here, Respondent expressly announced in the proceeding below:

> We will stipulate at this point that there was a test--
>
> - for purposes of this hearing anyway -- there was a test,

and that Mr. Reed tested .013 -- I=m sorry, yeah -- 0.136 percent on the DataMaster.

(TR 4). The court below further found in its judgment: ANo objections were made on any matter concerning this proceeding including the facts and exhibits presented by the parties@ (LF 47, App. A1).

While Appellant otherwise submits that she did establish a proper foundation for admission of Respondent=s breath test result under the ***relevant*** statutes and regulations, she simply did not have to establish any such foundation at all under ***Sellenriek*** since Respondent stipulated to said results. As such, the court below erroneously declared the law in setting aside the suspension of Respondent=s driving privilege, and therefore its judgment should be reversed. ***Murphy v. Carron, supra,*** 536 S.W.2d at 32; ***Gee, supra,*** 149 S.W.3d at 612.

CONCLUSION

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

Respectfully submitted,

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_____

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CERTIFICATION OF APPELLANT'S REPLY 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 4826 words, as calculated by the word count of the word-processing system used to prepare this brief.

JEREMIAH W. (JAY) NIXON
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CERTIFICATION OF SCANNED DISK

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

JEREMIAH W. (JAY) NIXON
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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing was mailed, postage prepaid, this 9th of November, 2005, to:

Larry Alan Reed
11 Moselle Court
Florissant, MO 63031-8621

_____
James A. Chenault, III