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STATEMENT OF FACTS

On December 20, 2003, at 6:14 a.m., Highway Patrol Sergeant Reynolds ("trooper") observed a vehicle with its emergency flashers activated, backed into a ditch, and partially blocking a lane. The vehicle was unoccupied and appeared to have been there for some time, since the engine area was cold and frost had accumulated on the vehicle [LF 21].

The trooper radioed to secure a wrecker and was advised that the owner had just called the same company for assistance to tow the vehicle to his residence. The trooper contacted the Rolla police to respond to said address and bring the owner to the scene. A Rolla Police officer arrived with Respondent at 6:30 a.m. [LF 21]. Respondent, a resident of Phelps County, was the holder of a valid driver's license [LF 8 and 10] with no prior alcohol related convictions [LF 21]. When questioned, Respondent said, "I meant to turn at Lanning Lane and go across, but I missed it. I was turning around and backed off here" [LF 21]. This occurred at 3:00 a.m. [LF 15]. Then for the next two hours, Respondent walked home [LF 17].

The trooper noted the odor of intoxicants, that Respondent's eyes were bloodshot and glassy, and his speech was somewhat slurred. Respondent said that he had not had anything to drink since the incident, but he had a few during the night. The trooper administered field sobriety tests [LF 21]. At 6:46 a.m., based on his performance, Respondent was arrested for driving while intoxicated in violation of §577.010 [LF 15; 21; 42]. The arrest took place three hours and forty-six minutes after the offense [LF 15; 21]. A breath test was administered. The Evidence Ticket indicates that the BAC

was .136% [LF 21; 25]. The trooper served Respondent with a Notice of Suspension [LF 20]. The trooper also issued a Uniform Citation for violation of §304.012 charging Respondent with 'operated a motor vehicle in a careless and imprudent manner – did not result in an accident' [LF 21; 27; 29].

On February 26, 2004, an administrative hearing was held and, on March 15, 2004, Respondent received notice that the suspension was sustained [LF 8; 10]. Respondent filed a petition for Trial De Novo on March 19, 2004 [LF 8-9]. On April 15, 2004, Appellant ("Director") filed her Answer attaching the records from the Drivers License Bureau ("AIR") [LF 10-26]. On June 16, 2004, Respondent filed a Motion for Judgment on the Pleadings or, in the Alternative, for Summary Judgment [LF 27-39]. On August 16, 2004, Director filed Suggestions in Opposition [LF 41-45].

The legal issue presented to the trial court on the pleadings was if the trooper did not comply with §577.020 to §577.041, the "Implied Consent Law," can the test results be admitted into evidence under §577.037.4 [LF 33-34] (references to RSMo 2005). Respondent argued that he was arrested without a warrant more than one and one half hours after the claimed violation making the arrest invalid under §577.039 [LF 31-33], so that the test results are inadmissible under §577.037.4 [LF 33-34] and because the test did not comply with the regulations of the Missouri Department of Health [LF 36-37]. The Director argued that §577.039 did not apply because Respondent left the scene of an accident and in any event the exclusionary rule does not apply in a civil action [LF 43-44].

The Motion hearing took place on August 16, 2004 [LF 47]. At the hearing, the

parties agreed, solely for the purposes of the hearing on the Motion, that the facts were accepted as undisputed. Relevant excerpts from the hearing transcript follow:

Respondent's attorney: "And again, Judge, we're here for a motion for judgment on the pleadings, and that's what the Court has before it." [TR 14, 24-25; TR 15, 1].

Respondent's attorney: "Judge, I think that the facts, as they pertain to the pertinent issues that we want to argue and show for this motion, are agreed to." [TR 3, 17–19].

The Court: "Would you agree, Mr. Cox, that the statement of undisputed facts that are set forth in Plaintiff's motion? The Court can look at those facts as undisputed for purposes of making a ruling in this case?" Director's attorney: "Yes, Judge, and I'd ask that you look at our facts. I think they're pretty much the same, and my suggestions." [TR 4, 5–11].

Respondent's attorney: "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, 22–25].

The trial court found "The parties agree the facts were not in dispute for the purposes of this Motion. The Court finds that the Motion for Judgment on the Pleadings should be granted because there exists no material issue of fact and Plaintiff is entitled to a judgment as a matter of law based on the face of the pleadings." [LF 47 Judgment].

At the hearing, Director's first position was that a warrantless arrest could take place if the person left the scene of an accident and Respondent left the scene of an accident after he backed his truck into a ditch, walked home for two hours and called a

tow truck [TR 7, 24-25; 8, 1-2]. Director admitted there was no damage to Respondent's vehicle [TR 8, 4-9]. The Court inquired whether a material element of leaving the scene of an accident is that there has to be some type of damage or injury. "I mean, if someone just parks their – they're just parked in the ditch or the side of the road, that necessarily isn't leaving the scene, is it?" [TR 9, 21-23]. Director's attorney responded that Respondent did not intend to back into the ditch [TR 9, 24-25; 10, 1]. Director's attorney's position was that "…an accident is defined as an unintentional act, which I don't think he intentionally put his vehicle in the ditch" [TR 10, 5-7]. The Court asked: You're saying that act gave – gave – was grounds for the law enforcement to go out and pick him up?" [10, 8-10]. Director's attorney answered in the affirmative [TR 10, 11]. Director admitted that the ticket was not written for an accident [TR 14, 19-20].

Director's second position was that the exclusionary rule does not apply in civil cases citing Riche and St. Pierre [TR 8, 19-12; 9; 10, 1-23]. Respondent did not argue the exclusionary rule or a constitutional ground for the exclusion of the evidence. Respondent argued the test results were inadmissible on statutory grounds. Relevant excerpts from the transcript of statements by Respondent's attorney follow:

"I don't disagree with Mr. Cox whatsoever that the case law is very strong, the exclusionary rule does not apply in civil cases, particularly in these type of administrative cases and for de novo, when you get there. The important thing to remember here is that we're not dealing with the exclusionary rule, we're not dealing with a violation of a constitutional right, we're dealing with what - - whether the officer

has complied and whether the Director has complied with the statutory requirements that are placed upon it by the legislature." [TR 11, 6 – 16].

"The legislature says that these BAC results are admissible in administrative cases and in civil cases only if you comply with the provisions of 020 through 041, which includes that the arrest occur within an hour and a half." [TR 11, 18–22].

"We're not asking for you to apply any constitutional protection to my client, we're only asking you to hold the Director of Revenue to the standard that the legislature has established for it. The Director of Revenue has no power to act whatsoever, except within the realm of the powers that are given to it. This is not a constitutional issue; it is not a request that you apply the exclusionary rule." [TR 11, 23 -25; 12, 1-5]

On September 1, 2004, Judgment was entered finding all issues in Respondent's favor [LF 47]. The trial court held:

> The Court finds for Plaintiff on all issues. In particular, but not exclusively, the Court finds that the arrest of Plaintiff was not valid under Missouri statutes. The Defendant did not present any fact or legal authority that would avoid this conclusion. [Judgment LF 47].

DIRECTOR'S POINT 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.

Standard of Review Is Not Murphy v. Carron

A trial de novo has not taken place in this case. Throughout Director's brief, Director sets forth the wrong standard of review citing ***Murphy v. Carron***, 536 S.W.2d 30 (Mo. banc 1976) [App Br 13, 24, 32 and 36]. This appeal concerns the Judgment on Respondent's Motion for Judgment on the Pleadings.

After the pleadings are closed, any party may move for judgment on the pleadings. Rule 55.27(b) (references are to Rules, 2004). The motion for judgment on the pleadings shall be heard and determined before trial on application of any party. Rule 55.27(c). The pleadings were the Respondent's Petition for Trial De Novo [LF 8-9 and 27] and Director's Entry of Appearance and Answer and attached Exhibit A [LF10-27]. An exhibit is a part of the pleadings for all purposes. Rule 55.12.

A party moving for judgment on the pleadings admits the truth of all well-pleaded facts in the opposing party's pleadings for purposes of the motion. ***Stephens v. Brekke***, 977 S.W.2d 87, 92 (Mo. App. 1998). The position of a party moving for judgment on the pleadings is similar to that of a movant on a motion to dismiss, i.e., assuming the facts pleaded by the opposite party to be true, these facts are nevertheless insufficient as a matter of law. ***Id.*** A motion for judgment on the pleadings should be granted if there exists no material issue of fact and the moving party is entitled to judgment as a matter of law based on the face of the pleadings. ***Id.***

Suspension of Driver's License is Statutory Creation

An aggrieved driver can seek a trial *de novo* at which the circuit court must determine whether the suspension is supported by evidence that: (1) the driver was

arrested upon probable cause for violating an alcohol-related offense; and (2) the driver's blood alcohol concentration exceeded the legal limit of .08%. ***Singleton v. State of Missouri***, 120 S.W.3d 218, 221 (Mo. App. 2003). The burden of proof is on the Director to establish grounds for the suspension by a preponderance of the evidence. ***Id***.; § 302.535.1. The failure of Director to satisfy its burden will result in the reinstatement of the driver's license. ***Litzsinger v. Director of Revenue,*** 115 S.W.3d 866, 868 (Mo. App. 2003).

> Section § 302.505 cases do not implicate constitutional protections against unreasonable governmental searches and seizures. *Riche v. Director of Revenue*, 987 S.W.2d 331, 334-35 (Mo. banc 1999). These actions are creatures of statute. The General Assembly is free to set the boundaries and procedures for any cause of action which it creates, and we will interfere only in cases in which those procedures violate due process and other constitutional guarantees. See *Lunsford v. Director of Revenue, State of Missouri*, 969 S.W.2d 833, 835 (Mo. App. 1998); *Wates v. Carnes*, 521 S.W.2d 389, 390 (Mo. 1975).

Sternecker v. Director of Revenue, 3 S.W.3d 808, 809 (Mo. App. 1999).

Even though the issuance of a drivers license amounts to no more than a personal privilege, once granted it may not be revoked arbitrarily, "but only in the manner and on the grounds provided by law[.]" ***Knierim v Director of Revenue,*** 677 S.W.2d 322, 324

(Mo. banc 1984) citing ***City of St. Louis v. Mosier***, 223 S.W.2d 117, 119 (Mo. App. 1949).

Respondent Argued the Evidence was Inadmissible under Missouri Statutes Contrary to Director's Use of the Exclusionary Rule

Respondent agrees that the exclusionary rule for criminal matters does not apply to this civil case. Notwithstanding Director's attempts to direct the Court otherwise, the legal issue on the agreed facts is whether §577.037.4 allows BAC evidence to be admitted into evidence if an officer, in the arrest and testing of a driver, does not comply with his statutory duties under §577.039 of Missouri's Implied Consent Law? This is covered in detail under Point III. Respondent suggests that Point III be read first.

Did the officer comply with §577.039 so as to make the test admissible under §577.037? Respondent argued to the trial court the same statutory provision for the inadmissibility of the evidence under §577.037 as did the driver in ***Murphy v. Director of Revenue***, 170 S.W.3d 507; 2005 Mo. App. Lexis 895* (Mo. App. 2005). [LF 33-34, 36-38]. The arrest took place more than one and one half hours after the alleged violation without the warrant that is statutorily required by §577.039. This was the issue before the trial court. The trial court's statements and Judgment demonstrate that it was following the Missouri statutes that required compliance with §577.039, not applying the exclusionary rule. "Mr. Cox, I – it appears to me, once again, I had a recent case on this involving someone who was at the hospital who wasn't under arrest, and I looked at the – if the person is not under arrest – and I know at that point the

person has to be under arrest and refuse. It appears the same situation here. If there wasn't a valid arrest, then some of the – what I'm looking at at this point is the Plaintiff seems to have a valid point, but I will look at your cases." [Tr. 15, 3-13]. Compare to ***Murphy,*** supra.

Section 577.039 is an integral part of the Implied Consent Statutes of §577.020 through §577.041. Section 577.039 states:

> An arrest without a warrant by a law enforcement 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.

Section 577.039 applies to the offense prescribed by §577.010. ***State v. Cox,*** 836 S.W.2d 43, 47 (Mo. App. 1992). The one and one half hour time limitation is clear and precise and grants no allowance to construe that portion of the statute. ***Collette v. Director of Revenue,*** 717 S.W.2d 551 (Mo. App. 1986). A lawful arrest is required by §577.039. ***Id.*** at 558. However, under §577.039, an officer is not entitled to make a warrantless arrest in a DWI case if more than one and one-half hours have elapsed from

the time the claimed violation occurred. ***Rodriguez v. Suzuki Motor Corp.,*** 996 S.W.2d 47, 62 (Mo. 1999) (fn 9). When an officer does not place the person under arrest within one and one half hours, the facts fail to establish a lawful arrest. ***Collette***, supra.

Under the facts and the plain language of the statute, the arrest without a warrant was not lawful under a statute §577.039. The trial court reached the same result finding the arrest was not valid under "Missouri statutes" and, "The Defendant did not present any fact or legal authority that would avoid this conclusion" [LF 47].

Director argues through out her brief that the exclusionary rule is the issue on review. It is not. Director introduces this invalid defense so as to direct the Court away from the issue to be reviewed. The constitutional argument asserted by Director, that it is irrelevant that Respondent was arrested in violation of §577.039 because the exclusionary rule does not apply, is contrary to Missouri law. In order for the test results to be admissible in evidence, the analysis must have been performed in accordance with §§ 577.020 to 577.041, and in accordance with methods and standards approved by the State Division of Health. §577.037(4); ***Woodall v. Director of Revenue,*** 795 S.W.2d 419 (Mo. App. 1990); ***Sellenriek v. Director of Revenue,*** 826 S.W.2d 338, 340 (Mo. banc 1992); ***Buckley v. Director of Revenue***, 864 S.W.2d 394, 396 (Mo. App. 1993); ***Collette v. Director of Revenue***, supra, 552 (because the evidence failed to establish a lawful arrest pursuant to § 577.039, Director could not meet her burden of proof, there being an unlawful arrest, there was not sufficient evidence to support a revocation pursuant to §577.041); and ***Murphy v. Director of Revenue***, supra, *1 ("As set forth below, we hold that under the plain language of section 577.037, the

results of the blood test taken by the arresting officer in violation of section 577.041, were inadmissible in the license revocation proceeding under section 302.505"). Thus, it is very relevant whether Respondent was lawfully arrested in compliance with §577.039.

Exception to Warrantless Arrest under 577.039 is

Left the Scene of an Accident

One of the exceptions to the one and one half hour requirement in §577.039 is that a warrant is not required if Respondent left the scene of an accident. Director argues the trial court erred because it relied on §577.060 to determine if an accident occurred [App Br 16-22]. Director's position is that the word accident is not defined so this Court should interpret it very broadly to include any unintended result [App Br 23]. Director's analysis is wrong. Accident is in the statute to define the occurrence of an event not the intent of the individual. Most importantly, Director's suggested definition conflicts with Missouri law, and the definitions used by the Missouri Highway Patrol and the published position of Director's own agency, the Missouri Department of Revenue.

In construing legislative intent, a court presumes that the legislature was aware of existing declarations of law and the construction of existing statutes when a law is enacted on the same subject. ***State v. Cox,*** supra 46. If the statute is unclear, it should be construed strictly against the State. ***State v. Johnson,*** 148 S.W.3d 338, 344 (Mo. App. 2004).

Sections 577.039 and 577.060 can easily be harmonized since the phrases used

are the same except one is in the past tense – left the scene vs. leaving the scene. There is no repugnancy between the statutes as they both relate to accidents. ***Romans v. Director of Revenue***, 783 S.W.2d 894, 896 (Mo banc 1990). Director focuses on the word accident separate and apart from the phrase. Possibly, this is done to increase the ambiguity or show there is no ambiguity depending on the requirements of Director's brief [App Br 18-19 vs. 20-21].

> Appellate courts must be guided by what the legislature said, not by what the courts think it might have meant to say. *White v. American Republic Ins. Co.*, 799 S.W.2d 183, 189 (Mo. App. 1990). We have no business foraging among the rules of judicial construction to try to create an ambiguity where none exists. *Wells v. Bryant*, 782 S.W.2d 721, 723 (Mo.App.1989).

State v. Cox, supra, 48.

Director's citation to ***State v. Madorie***, 156 S.W.3d 351 (Mo banc 2005) is inapposite [App Br 21], because the issue before that court was whether the vehicle was "operated", not if there was an accident nor the interpretation of the word accident.

Director focuses her attention on the word "accident" separate and apart from the exception section of §577.039 "left the scene of an accident". This takes the word accident out of context.

> Sometimes, when we isolate one phrase from its statutory context, we get a

meaning different from that which would appear if we considered the entire statute in context. See *Phillips v. Am. Motorist Ins. Co*., 996 S.W.2d 584, 587 (Mo. App. 1999). As explained in *Ferrell Mobile Homes, Inc. v. Holloway*:

> A statute is passed as a whole and not in part or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed. 954 S.W.2d 712, 715 (Mo. App. 1997) (quoting NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05 (5th ed. 1991)).

State v. Johnson, supra, 343-344.

Respondent submits that the legislative amendment to include the exception of left the scene of an accident was in response to ***Collette v. Director of Revenue,*** 717 S.W.2d 551 (Mo. App. 1986) where the court believed the time limitation in §577.039 ignores the reality of officers at the scene of an accident. ***Id.*** at 557. In ***Collette***, an accident occurred with vehicle damage and personal injuries. The officer was unable to arrest the driver within 1 ½ hours. The Court found a lawful arrest under §577.039 is a

prerequisite to the application of §577.041. ***Id.*** at 558. The ***Collette*** court urged the legislature to consider this problem. ***Id.*** The statute subsequently was amended to include left the scene of an accident and removed from the scene to receive medical treatment.

As stated by the Director, both "§577.039 and §577.060 involve motor vehicle accidents" [App Br 18]. The doctrine of *in pari material* is a cardinal tenet of statutory construction. ***Romans***, supra. "Statutes must be read in pari materia and, if possible, given effect [sic] to each clause and provision. Where one statute deals with a subject in general terms and another deals with the same subject in a more minute way, the two should be harmonized if possible, but to the extent of any repugnancy between them the definite prevails over the general." ***Id.*** at 896. The doctrine requires statutes relating to the same subject matter to be construed together even if the statutes are found in different chapters. ***Id.*** In ***Romans***, the statutes reviewed were §577.041 and §302.311. This Court determined that the 30 day time limit within §302.311 applies to §577.041. ***Id.***

The 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. The legislature did not need to define the term "left the scene of an accident" since it is a phase with a plain and ordinary meaning. The words are in common use outside of the law and refer to the fact that an accident has occurred – damaged vehicles and/or injured persons. It is totally out of context to argue that "left the scene of an accident" means any unintended mishap

that could occur. Does this include spilling coffee in your lap on the way to work, tripping on the curb while entering your vehicle, parking on top of the marking lines in a parking lot, or bent grass [as suggested by Director App Br 22] or the many other inconsequential events that would (under the Director's definition of accident) now come within the exception to §577.039?

Notwithstanding the foregoing, the interpretation of the Missouri Highway Patrol was that an accident did not occur. This is evident from the ticket issued by the trooper for alleged violation of §304.012. [LF 27]. The ticket indicates that the Charge Code is "4737605.0." The Missouri Charge Code Manual is a standard manual of codes for all offenses. §43.512. The Missouri Charge Code Manual 2004 at pages 74 and 118 provides that 4737605.0 is "Operated Motor Vehicle In A Careless And Imprudent Manner – Did Not Result In An Accident."

The charge code is consistent with the Missouri Uniform Accident Report Preparation Manual used by law enforcement. The authority for this Manual is §§43.250 and 43.251 RSMo. Manual at page 2. At page 6, the Manual defines "Accident" – An unintended event resulting in property damage, injury, or death." Thereafter, at page 7 the definition of a "Motor Vehicle Traffic Accident" is set out. The required criteria for an accident are "Cause property damage, injury or death" and "Be unintentional." The trooper did not prepare an accident report nor cite Respondent for an accident because none had occurred under Missouri law.

Last but certainly not least, Director's argument is also inconsistent with her own published position. The Missouri Department of Revenue publishes The Missouri

Driver's Guide to inform Missouri drivers about the laws concerning operation of motor vehicles. The court in ***State v. Johnson***, supra 342, used the Driver's Guide as a reference to interpret a statute. The court found it to be the Department of Revenue's interpretation on the subject matter at issue (use of turn signals). At page 72 of the Guide, the Department of Revenue states "An accident is when you injure yourself or someone else, or cause damage to property, while driving your vehicle." Missouri Driver's Guide, revised September 2004. It is the Department of Revenue's published position that the word "accident" means that there must be injury and/or damage. Based on the interpretation of the Missouri Department of Revenue, the agency attempting to suspend Respondent's license, – an accident did not occur in this case. This makes it unnecessary to apply or interpret §577.060 with §577.039.

Without the Warrant There Was No Ground for the Arrest

Director simply states that it is undisputed there was probable cause to arrest Respondent. [App Br 14 and 25]. This is not true. Respondent argued in his Motion and at the hearing that there was no probable cause or reasonable grounds for the trooper to believe Respondent operated a motor vehicle in an intoxicated condition. Although this takes the focus off the main issue for review, Respondent does not want this Court to believe that he agrees with Director's position.

The reasonable grounds argument was made to the trial court [LF 34; TR 6, 12-25; 7, 1-15]. The Director's attorney responded [TR 7-9]. Then, the trial court sought clarification on leaving the scene of an accident [TR 9, 16-17]. The trial court believed that there must be some type of damage or injury before it actually becomes a crime

[TR 9, 18-23]. In her brief, Director sees this statement as an indication the trial court applied §577.060 decide if an accident had occurred [App Br 16-22]. However, the trial court sought information on the "grounds" for the arrest. The trial court was looking at the event – a vehicle without damage parked in ditch – and the trooper's act of having the Rolla Police bring Respondent back to the scene 3 ¼ hours later. Director argued because of Respondent's "unintentional act" that he was involved in an accident [TR 10, 1-7]. The trial court then asked Director's attorney "You're saying that act gave – gave – was grounds for law enforcement to go out and pick him up?" [TR 10, 8-10] (emphasis added). Director's attorney said yes [TR 10, 11]. What grounds did the trooper have?

Section 577.039 requires an officer to have reasonable grounds to make an arrest for violation of §577.010. Reasonable grounds and probable cause are virtually synonymous. ***Hinnah v. Director of Revenue***, 77 S.W.3d 616, 619-620 (Mo. 2002). Whether reasonable grounds exist, is evaluated from the vantage point of a cautious, trained and prudent police officer. ***Calicotte v. Director of Revenue,*** 20 S.W.3d 588, 592 (Mo. App. 2000). Mere suspicion is not sufficient. ***Edmisten v. Director of Revenue,*** 92 S.W.3d 270, 274 (Mo. App. 2002). However, when a warrant is required, a warrantless seizures is generally deemed per se unreasonable. ***State v. England,*** 92 S.W.3d 335, 339 (Mo. App. 2002). The mere fact that an arrest is made by a police officer does not in any way tend to prove that the arrest was lawful. ***Nelson v. Macy,*** 434 S.W.2d 767, 773 (Mo. App. 1968). As a general rule, a search conducted outside the judicial process without prior approval by a judge is per se unreasonable. ***State v.***

Adams, 51 S.W.3d 94, 98 (Mo. App. 2001).

However, because in this case the "arrest" took place 3 hours and 46 minutes after the claimed violation, the reasonable grounds requirement of §577.039 no longer applied. After 1 ½ hours, the legislature removed from the trooper the power to make an arrest on reasonable grounds. The trooper's sole ground for the arrest had to be a warrant. This is the statutory ground for the arrest to have taken place imposed by the legislature.

Section 302.505 focuses is on the ground for the arrest for driving while intoxicated, not the stop. ***Koons v. Director of Revenue***, 931 S.W.2d 210, 212 (Mo. App. 1996). Section 544.180 defines arrest. ***Smither v. Director of Revenue,*** 136 S.W.3d 797, 799 (Mo. 2004). An arrest is made by restraint or submission under the authority of a warrant; and the warrant must be shown by the officer. §544.180. Therefore, either the trooper did not have the required ground for the arrest – the warrant – or the trooper did not have a reasonable ground to arrest because he did not possess the statutorily required warrant.

What grounds did the trooper have to arrest Respondent? None. He did not have the only ground required by §577.039 to make the arrest – a warrant. The trooper was not entitled to make the arrest. ***Rodriguez v. Suzuki Motor Corp.***, supra, 62. Without a warrant, there was not an arrest and/or a reasonable ground required to suspend a license. ***Singleton,*** supra. In either case, Director could not meet her burden of showing that Respondent was arrested on a reasonable ground for violating an alcohol related offense. ***Id.***; ***Koons***, supra.

DIRECTOR'S POINT 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.

Director again sets forth the wrong standard of review [App Br 24] and misstates the facts by stating there is no dispute that probable cause existed for the arrest [App Br 25].

Under this point, Director argues that any arrest under §577.020 is sufficient, including an alleged arrest for C&I [App Br 22]. Accordingly, the test results were lawfully obtained. What does not follow from this argument is how can the trooper's testing of BAC for C&I can be the basis of a revocation of Respondent's license? Director must prove that the arrest was based on probable cause for violating an alcohol related offense. ***Singleton,*** supra.; ***Koons***, supra 212 ("The statute [§302.505] requires reasonable grounds to believe that the subject is violating the drunk driving laws"). Director can not meet her burden with evidence of an alleged arrest for a violation of §304.012.

§577.020 applies to persons "arrested." ***State v. Ikerman,*** 698 S.W.2d 902, 905-6 (Mo. App. 1985). Although an officer has the authority under §577.020 to order a BAC test to be taken, that authority arises only when the person has been placed under

arrest. An officer is not entitled to make a warrantless arrest in a DWI case if more than 1 ½ hours have elapsed from the time the claimed violation occurred. ***Rodriguez v. Suzuki Motor Corp***., supra 62 (fn 9).

Arrest upon probable cause is a prerequisite to the consent being deemed. ***State v. Copeland,*** 680 S.W.2d 327, 331 (Mo. App. S.D. 1984). As to what constitutes an arrest, the courts look to §544.180. ***Smither***, supra. §544.180 defines an arrest:

> An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of the officer, under authority of a warrant or otherwise. The officer must inform the defendant by what authority he acts, and must also show the warrant if required. (emphasis added).

Director's reliance on §544.216 is misplaced [App Br 26]. §544.180 states how an arrest is made. §544.216 names the persons who may use the power of arrest. ***Forste v. Director of Revenue,*** 792 SW2d 910, 915 (Mo. App. 1990). §544.180 defines the term arrest that is contained in §544.216. To make an arrest under §544.180, the trooper was required to have the authority of a warrant and to show the required warrant. The trooper did not make an "arrest" according to §544.180.

Respondent Was Not Arrested for the C&I Violation

Inconsistent with the facts before the trial court, the Director now argues that Respondent had to submit to the breath test by virtue of his "C&I arrest." [App Br 26]. Director did not make this argument in her response to the Motion or at the hearing on

the Motion. In fact, it was Director's position at the hearing that "the officer did cite Mr. Reed for careless and imprudent driving" [TR 8, 8-9]. "He didn't write him a ticket for that [accident] he wrote him a ticket for careless and imprudent" [TR 14, 22-24].

Respondent was arrested for 'driving while intoxicated' [LF 21]. There was no fact before the trial court on the Motion for Judgment on the Pleadings that indicated that Respondent was arrested for violation of §304.012, careless and imprudent driving. Nothing in the AIR states that Respondent was arrested for anything other than the driving while intoxicated. The facts are the Respondent was issued a Uniform Citation for the alleged violation of §304.012 [LF27]. The citation does not state that the subject was taken into custody nor was the section completed 'For issuance of a Warrant' on the reverse side of the ticket [LF 27]. Therefore, Director's statement that "It is also undisputed that Respondent was also arrested for C&I driving" [App Br 26] is simply not true. Thereafter, Director's argument is based on this unsupported statement. This is as far as the Court need consider this argument – Respondent was not arrested for this violation.

Notwithstanding Respondent was not arrested for C&I, the facts do not support the issuance of a summons let alone an arrest for C&I. §304.012.1 states:

> Every person operating a motor vehicle on the roads and highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

The Director admits there was no danger to anyone's property or life and limb; then Director argues that regardless of the 'serendipitous' circumstances that no one or anything was in Respondent's path [App Br 26], the trooper only needs reasonable grounds for the arrest [App Br 27]. How can the trooper have reasonable grounds to arrest when nothing was done that falls within the statute in question?

Under §304.012, there must be conduct that shows that the property of another or the life or limb of a person is endangered. It is the endangerment to life or limb that causes an act of careless driving to violate the statute. ***State v. Bacon***, 841 S.W.2d 735, 740 (Mo. App. S.D. 1992). Compare ***State v. Todd,*** 477 S.W.2d 725 (Mo. App. 1972) where the defendant with wild abandon spun his tires doing several circles while throwing rocks within a city limits. Since at the time of the incident the property of another or the life or limb of any person was not endangered, the defendant did not violate §304.012 RSMo. The ticket indicates Respondent was not moving. There is a dash at driving ----- mph and Posted Speed Limit ---- mph. Also missing is "Subject taken into custody. (Complete "For issuance of a Warrant" section on reverse side.)" [LF 27].

> In this case, there was no direct evidence that at that time of the morning, any person was in danger; there was evidence that there was no traffic at or near the scene of the defendant's acts; there was no direct evidence of the speed of the vehicle and there was no showing that the conduct of the defendant endangered the life, limb or property of others.

State v. Todd, supra 729.

When the trooper came into contact with the vehicle, he found an undamaged parked vehicle with a wheel in the ditch with its safety flashers activated that had not been operated for hours. The trooper called dispatch and was told that the owner was seeking help. Dispatch also told the trooper that the towing service "advised" the owner said he "wrecked his truck" [LF 21]. The trooper knew the vehicle had not been "wrecked" or damaged based on his personal observation of the vehicle [LF 21]. Director admitted there was no damage [TR 8, 4-6]. In addition, the trooper did not see Respondent operate the vehicle or have any witnesses concerning the operation of the vehicle. Based on the facts, reasonable grounds did not exist for the trooper to have Respondent picked up at his residence by a Rolla Police officer and handed over to the trooper at the scene or "arrest" the Respondent for C&I. None of the requirements of §304.012 are present. Therefore, there are no grounds for this alleged arrest. ***State v. Johnson,*** supra, 343-345. Under §304.12, there was no facts to support a violation of this statute, no arrest, and no reasonable grounds for an arrest.

Arrest Must be for Committing an Alcohol Related Offense

Director's argument that any arrest suffices for §577.020 [App Br 27] does not follow the law. To suspend a license, Director must prove an arrest for an alcohol related offense. ***Singleton***, supra. C&I is not an alcohol related offense. C&I is a separate and distinct offense distinguishable from other offenses regulating the operation of motor vehicles. It covers operating a vehicle not detailed in specific statutes.

> The offense of careless and imprudent driving is a separate and distinct offense distinguishable from other offense created by statutes regulating the operation of automobiles. Section 304.010.1 creates a blanket type offense and is a salutary statute to cover the multitude of situations which may arise from the operation of a motor vehicle which cannot not be detailed in specific statutes. To constitute the offense, there must be conduct which shows under the circumstances and under the conditions existing at the time, the property of another or the life or limb of a person is endangered. When such conditions and circumstances are shown, the offense is complete.

State v. Bacon, supra, 739 (prior §304.010.1 is identical to §304.012.1) (emphasis added).

A C&I offense covers situations which are not detailed in the alcohol related offenses, such as §577.010. Thus, if the arrest was under §304.012, the suspension was improper because it was not based upon an arrest for violating an alcohol related offense. ***Singleton,*** supra 221. Nevertheless, as set forth above, there are no facts indicating an arrest, no facts to support an arrest or the citation given to Respondent by the trooper.

Accuracy of Test

The Director's argument that the purpose of the Implied Consent Statutes, §577.020 through §577.041, is to ensure the accuracy of the tests [App Br 28-31] is not supported by the statutes, regulations or the case law. This Court has found that the

Implied Consent Law was adopted "to establish a fixed standard for procuring admissible evidence of blood alcohol for use against persons operating automobiles while intoxicated." ***Hinnah,*** supra 619 (emphasis added). Respondent could find no cases that support Director's accuracy of the test interpretation.

Murphy v. Director of Revenue, supra, answers all the questions that Director posits. In ***Murphy***, the driver was tested even though he had refused under §577.041. As in this case, a warrant was required for the test. Then, without the required warrant, the driver was tested. The Court found that the test results were not admissible under §577.037.4 because the officer did not comply with the Implied Consent Statutes, §577.020 to §577.041. Failure to comply with §577.041 had nothing to due with the accuracy of the test. The Court of Appeals did not find it absurd [App Br 30] that the test results were inadmissible. The legislature required this result. The Murphy Court followed the statutory procedure set down by the legislature. It gave affect to the language as written. ***Hinnah***, supra 620. Director may have many issues with the Implied Consent Statutes (including the limited protection of rights provided to the citizens of this state) but her attention for any changes should be directed to the legislature not this Court. ***State v. Cox***, supra 48.

DIRECTOR'S POINT III.

THE COURT BELOW ERRED IN SETTING ASIDE THE SUSPENSION OR RESPONDENT'S DRIVING PRIVILEGE BECAUSE THE SUSPENSION ACTION WAS PROPER, IN THAT WHETHER HE WAS LAWFULLY ARRESTED PURSUANT TO

§577.039, WAS OTHERWISE IRRELEVANT IN THIS CIVIL PROCEEDING.

Director again sets forth the wrong standard of review [App Br 32]. Thereafter, Director again argues constitutional issues for the application of the exclusionary rule [App Br 33, 34, 35, 36]. At one point Director determines that Respondent's argument is the same as in *St. Pierre* [App Br 35] another case involving the exclusionary rule. The arguments and statements made by Director based on the "defense" of the exclusionary rule has made it difficult to write this brief so as to allow the Court to understand the issues decided by the trial court. However, we have finally reached the main and most crucial legal issue decided by the trial court.

Legislative Enactments Replaced Common Law Foundations for Introduction of Evidence

"The statutes and corresponding regulations establish the foundation which justifies the admission of a chemical analysis for blood alcohol independent of common law rules of evidence." ***Sellenriek,*** supra 340. The legislative enactments replaced the common law foundations for introduction of evidence, so that failure to comply with these statutes makes the test results inadmissible. ***State v. Peters,*** 729 S.W.2d 243, 245 (Mo. App. 1987). The Implied Consent Law was adopted "to establish a fixed standard for procuring admissible evidence of blood alcohol for use against persons operating automobiles while intoxicated." ***Hinnah,*** supra 619 (emphasis added).

As explained below, our legislature has promulgated statutes - sections

> 577.020 to 577.041 - limiting the authority of law enforcement to request the taking of a blood sample to determine an arrested driver's BAC. Additionally, in section 577.037, our legislature specifically provided for the admissibility of test results obtained pursuant to exercise of that authority in a proceeding to suspend or revoke a driver's license under Chapter 302.

Murphy, supra 895*7.

Section 577.037, as a part of Missouri's Implied Consent Law (§577.020 through §577.041), governs the admissibility of chemical test results to establish a driver's BAC in license suspension proceeding under Chapter 302. Section 577.037.1 provides in relevant part:

> In any license suspension or revocation proceeding pursuant to the provisions of Chapter 302, RSMo, arising out of acts alleged to have been committed by any person while driving a motor vehicle while in an intoxicated condition, the amount of alcohol in the person's blood at the time of the act alleged as shown by any chemical analysis of the person's blood, breath, saliva or urine is admissible in evidence. . . . If there was eight-hundredths of one percent or more by weight of alcohol in the person's blood, this shall be prima facie evidence that the person was intoxicated at the time the specimen was taken. (emphasis added.)

However, §577.037.4, narrows this broad declaration of admissibility by providing:

> A chemical analysis of a person's breath, blood, saliva or urine, in order to give rise to the presumption or to have the effect provided for in subsection 1 of this section, shall have been performed as provided in sections 577.020 to 577.041 and in accordance with methods and standards approved by the state department of health and senior services. (emphasis added.)

The arrest of Respondent took place 3 hours and 46 minutes after the claimed violation. The trooper did have the warrant to arrest Respondent required by §577.039. The test results were not performed as provided in sections 577.020 to 577.041, as required by section 577.037.4, so that they were not admissible in evidence under §577.037.1. And, BAC evidence can not be admitted since the test was not performed in accordance with the methods and standards approved by the Department of Health. Under the plain language of §577.037, the BAC results obtained by the trooper in violation of §577.039 could not be admitted.

Lack of Foundation

To establish a proper foundation for the admission of the results, the Director must show that a person possessing a valid permit followed the techniques and methods approved by the Department of Health. §577.020; ***Sellenriek,*** supra 339; ***Buckley***, supra 396. "[T]o be admissible in evidence, the analysis must have been performed in accordance with §577.020 to §577.041 RSMo." ***Woodall,*** supra 420. BAC evidence can not be admitted if the test is not performed in accordance with the methods and

standards approved by the Department of Health. ***Sellenriek*** and ***Buckley***, supra. Section 577.026.1 states:

> Chemical tests … to be considered valid under the provisions of sections 577.020 to 577.041, shall be performed according to the methods and devices approved by the state department of health…

The Missouri Department of Health required the test to be performed following §577.039.

> 19 CSR 25.30.011(1): "…at the direction of a law enforcement officer acting under the provisions of sections 577.020 – 577.039…".
>
> 19 CSR 25.30.011(3): "The chemical analysis … conducted under the provisions of 577.020 – 577.039 … shall be performed by personnel possessing a valid permit issued by the department."

The rules of this administrative agency have the force and effect of law. ***Woodall***, 795 S.W.2d 419 (Mo. App. 1990) (citing §577.037.4). Adherence to the administrative rules by Director was mandatory. ***Buckley***, supra. Since the Department of Health required compliance with §577.039, the trooper must follow this requirement in order to test Respondent. The trooper did not comply with §577.039 when he arrested Respondent without the required warrant. Thus, Director could not show that the trooper followed the methods and standards approved by the Department of Health. Without this proper foundation for the admission of the results, the BAC evidence can not be admitted. ***Selleriek***, supra.

The trooper's authority to test breath is granted by his permit which states it is

"Issued under the provisions of sections 577.020 through 577.041, RSMo 1986" [LF 23]; Missouri Code of State Regulations 19 CSR 25-30.041. Consequently, his permit did not authorize him to operate the equipment in violation of §577.039. Therefore, the test was performed by an unauthorized person and/or in excess of the authority granted in violation of §577.026.

Director could not establish a proper foundation for the admission of the results to satisfy §302.505. Director could not show that a person possessing a valid permit followed the techniques and methods approved by the Department of Health. §577.020; ***Sellenriek,*** supra 339; ***Buckley***, supra 396. The test in violation of §577.020 to 577.041 means a proper foundation cannot be laid to introduce the evidence of BAC.

Murphy v. Director of Revenue

In addition to following the methods of the department of health, "For the results of a breathalyzer analysis to be admissible into evidence, the analysis must have been performed in accordance with §§ 577.020 to 577.041 . . ." ***Buckley***, supra. Because the trooper did not comply with Missouri's Implied Consent Law, under §577.037.4, the chemical analysis was not admissible. ***Sellenriek*** and ***Buckley,*** supra.

This is also the conclusion reached by the Western District in ***Murphy v. Director of Revenue***, supra. Respondent argued to the trial court the same issues and legal arguments concerning the admissibility of the evidence as in ***Murphy***. Murphy also involved an officer's testing for BAC without a warrant. The question presented was whether the results of a prohibited warrantless test are admissible in a suspension proceeding. ***Murphy,*** supra*13. The Western District determined that the officer's

violation of the Implied Consent Statutes (§577.020 to §577.041) is critical and must be reviewed because the statutes control the admissibility of evidence. **Id.** *15. Because Murphy argued that he was tested in violation of §577.041, the court found the rationale in ***Riche v. Director of Revenue***, 987 S.W.2d 331 (Mo. banc 1999) did not apply since the driver in ***Riche*** urged the exclusion of evidence on constitutional grounds. ***Id.*** *13-14. Compare, Director's argument based on ***Riche*** to Respondent's argument that he was tested in violation of §577.039. Sections 577.020 to 577.041 grant to law enforcement the authority to request the taking of a test. ***Id.*** *19. Under these statutes, the issue is not reviewed in the ordinary search and seizure context. ***Id.*** *8. In §577.037, the legislature specifically provided for the admissibility of test results obtained pursuant to a valid exercise of that authority. ***Id.*** *7. By the officer ordering a test in violation of §577.041, the chemical analysis was not performed as provided in §577.020 to §577.041. ***Id.*** *18-19. When you apply the plain language of the statutes to the facts of the case, under §577.037.4, the evidence is not admissible. ***Id.*** *19. (Because it was not an issue, the Western District did not review if the standards of the Department of Health were followed. ***Id.*** *18.)

In this case, the legal issue is the same. The trooper's warrantless testing of Respondent in violation of §577.039 means that the analysis was not performed as provided in §§577.020 to 577.041. Under the plain language of §577.037.4, the test results were not admissible in the license revocation proceeding under §302.505. ***Murphy***, supra *1-2.

So, notwithstanding the issues argued by Director, including the irrelevance of

the arrest and the exclusionary rule, the test was not performed following §577.039 or the techniques and methods of the Department of Health. The test results are not admissible because a statute - §577.037.4, does not allow such evidence to be admitted. Director failed on her burden of proof under §302.505. There is no evidence of driving a vehicle with BAC of .08% or more. ***Endsley v. Director of Revenue***, 6 S.W.3d 153, 166 (Mo. App. 1999). Director's failure to satisfy its burden of proof results in the reinstatement of Respondent's driver's license. ***Litzsinger***, supra 868.

CONCLUSION

As a matter of law, trial court correctly ruled that the evidence was not admissible. When the trial court found the arrest was invalid under Missouri statutes, it determined under the statutory directives of §577.037.4 that the test results were not admissible to prove Respondent's BAC was in excess of .08%. Therefore, Director could not meet her burden under Chapter §302 to suspend the license.

Wherefore, Respondent Nicholas B. Reed respectfully requests that the Judgment of the Circuit Court of Phelps County, Missouri be affirmed.

Respectfully submitted,

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CERTIFICATION OF RESPONDENT'S BRIEF

Comes Now Respondent by and through his counsel and certifies that this brief complies with the limitations contained in Rule 84.06(b) of the Missouri Rules of Civil Procedure, in that the number of words in Respondent's brief is 9166 words as calculated by the word count of Microsoft Word used to prepare this Brief.

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CERTIFICATION OF SCANNED DISK

Comes Now Respondent by and through his counsel and certifies that the disk containing Respondent's Brief was scanned for viruses and it is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing and Appendix were mailed, postage prepaid by U. S. Mail, on October 27, 2005, to:

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