

**Summary of SC94840, *Kristin Nicole Stiers v. Director of Revenue***

Appeal from the St. Louis Charles County circuit court, Judge Matthew E.P. Thornhill  
Argued and submitted September 1, 2015; opinion issued January 12, 2016

**Attorneys:** The director was represented by Danial McPherson of the attorney general’s office in Jefferson City, (573) 751-3321; and Stiers was represented by Robert S. Adler of the Law Offices of Robert S. Adler PC in St. Louis, (314) 725-2400.

*This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.*

**Overview:** In a DWI case, the director of revenue appeals the trial court’s exclusion of the results of a breath test because the breath analyzer was not shown to be calibrated properly under the calibration regulations in effect at the time of the offense. In a 4-3 decision written by Judge Laura Denvir Stith, the Supreme Court of Missouri affirms the trial court’s decision. The regulation setting the standards for proper calibration of a breath analyzer uses the conjunctive “and” and requires the use of three solutions to calibrate a breath analyzer properly. As the breath test in this case was calibrated using only one solution, the trial court did not err in excluding the results. Moreover, the trial court properly applied the regulation in place at the time of the driver’s breath test rather than the amended regulation in place at the time of her trial. The regulation sets out the standard for testing for purposes of revoking driving privileges, and the relevant standard cannot be changed in mid-process if the driver appeals the revocation.

Judge Paul C. Wilson dissents. He agrees the trial court applied the correct version of the regulation, but he believes the only reasonable reading of that regulation is that it approves the use of any one of three solution strengths in calibrating the breath analyzer and identifies the approved suppliers for those solutions, but it does not require operators to use all three solutions in conducting any particular test. Because he would find the trial court should not have excluded the results from evidence, he would vacate the judgment and send the case back.

**Facts:** Kristin Nicole Stiers was arrested and charged with driving while intoxicated. The revocation of her driving privilege was stayed while she sought administrative review. After the director of revenue upheld the revocation, Stiers sought review in the circuit court. Between the time of her arrest and the time of her trial, the department of health and social services amended the regulation regarding the standards for breath analyzer calibration, replacing the word “and” – used to separate the three solutions required to calibrate a breath analyzer – with “or.” The court excluded Stiers’ breath test results because the breath analyzer used to test her breath was improperly calibrated with one solution rather than the three required by the regulation in effect at the time of her test. The director appeals.

**AFFIRMED.**

**Court en banc holds:** (1) The version of the regulation in place at the time that Stiers’ breath test was given used the conjunction “and” rather than the disjunctive “or” in listing the three solutions to use in calibration the breath analyzer mechanism. The plain language of the

regulation thereby required the use of all three solutions listed. No other language in this or related regulations supports interpretation of the word “and” other than in its ordinary, conjunctive meaning. Because the breath analyzer used to take Stiers’ breath test was calibrated using only one solution, the trial court did not err in excluding the test results.

(2) The trial court also did not err in applying the version of the calibration regulation that was in effect at the time of Stiers’ breath test rather than the one adopted shortly before her trial in the circuit court. The results of a breath test have an immediate impact on the individual being tested by forming the basis for suspending or revoking a driver’s license. Here, those results were used to order revocation of Stiers’ license, and the propriety of that revocation was determined throughout the administrative process based on the regulation in effect at the time of the test. It would have been improper to allow the director to revise the regulation by replacing the conjunctive “and” with the disjunctive “or” and then apply the revised regulation to the remainder of the revocation review process.

**Dissenting opinion by Judge Wilson:** The author agrees the trial court applied the correct version of the regulation, but he writes separately because he believes the regulation does not require that breath analyzers be calibrated with three different solutions. Instead, the only reasonable reading of the regulation is that it approves the use of any one of three solution strengths in calibrating the particular breath analyzer at issue in this case, and it identifies the approved suppliers from which those solutions must be obtained, but it does not require operators to use all the solutions in conducting any particular test. This construction gives effect to the language of the regulation as a whole and the surrounding regulations, is in keeping with prior and subsequent versions of the regulation, and is reflected in the plain language of the form promulgated as part of the regulation. Because the director laid a proper foundation to admit the breath analyzer results, the trial court should not have excluded those results from evidence. Accordingly, the author would vacate the judgment and send the case back.