

**IN THE SUPREME COURT
IN THE STATE OF NORTH DAKOTA**

Brian Michael Masset

Appellant,

v.

North Dakota Department of Transportation

Appellee.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Donald L. Jorgensen**

**SUPREME COURT NO. 20100098
BURLEIGH COUNTY NO. 08-09-C-2263**

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	PAR. NO.
TABLE OF AUTHORITIES	1
LAW AND ARGUMENT	2
ISSUE : The Department has violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists.	2
CONCLUSION AND PRAYER FOR RELIEF	7
CERTIFICATE OF SERVICE	10

1. TABLE OF AUTHORITIES

ND SUPREME COURT CASES

PAR. NO.

<i>Aamodt v. North Dakota Dept. Of Transp.</i> , 2004 ND 134, 682 N.W.2d 308.	4
<i>Greenwood v. Moore</i> , 545 N.W.2d 790 (N.D.1996)	4
<i>Jorgensen v. North Dakota Department of Transportation</i> , 2005 ND 80, 695 N.W.2d 212	4
<i>Madison v. North Dakota Dept. of Transp.</i> , 503 N.W.2d 243 (N.D.,1993)	4, 5
<i>Raboin v. North Dakota Dept. of Human Services</i> , 552 N.W.2d 329 (N.D.,1996)	5
<i>State v. Hilgers</i> , 2004 ND 160, 685 N.W.2d 109	5
<i>State v. Simpfenderfer</i> , 120 N.W.2d 595 (N.D.1963)	3, 4, 6

N.D.C.C.

N.D.C.C. § 28-32-36	2, 6, 8
N.D.C.C. § 28-32-44	2, 6, 8

2. LAW AND ARGUMENT

ISSUE : The Department has violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists.

3. It is undisputed that the Department failed to provide a complete transcript and was obligated by statute to do so. Although *State v. Simpfenderfer*, 120 N.W.2d 595 (N.D.1963), should control this case, the Department argues that to follow *Simpfenderfer* would lead to an absurd result.
4. Masset maintains that no prejudice should be required to remand this matter. See *Simpfenderfer, supra* (not requiring a showing of prejudice); *Madison v. North Dakota Dept. of Transp.*, 503 N.W.2d 243, 246 (N.D.,1993)(“[E]xcept for Madison's fear of testifying, it is clear that the Department's waiver of the Rules of Evidence did not otherwise prejudice him.”); *Greenwood v. Moore*, 545 N.W.2d 790 (N.D.1996)(concluding, without a showing of prejudice, that the Department did not hold a timely hearing); *Jorgensen v. North Dakota Department of Transportation*, 2005 ND 80, 695 N.W.2d 212 and *Aamodt v. North Dakota Dep’t of Transp.*, 2004 ND 134, 682 N.W.2d 308 (not requiring a showing of prejudice for “a basic and mandatory” provision).
5. However, even if this Court were to consider any prejudice, at the very least, Masset was deprived of any meaningful opportunity to search the record for any appealable issues which could be raised sua sponte. See *Madison, supra* at 246 (finding systemic disregard of law sua sponte); *Raboin v. North Dakota Dept. of Human Services*, 552 N.W.2d 329, 331 (N.D.,1996)(“The right of appeal in this state is statutory and is a jurisdictional matter which we will consider sua sponte.”) In other

contexts, this Court has, “reiterate[d] that our rules require an appellant to file a trial transcript and the consequences of failing to do so fall on the appellant.” *State v. Hilgers*, ¶ 35, 2004 ND 160, 685 N.W.2d 109. Significantly, this Court “will decline to review an issue if the record on appeal does not allow a meaningful and intelligent review...” *Id. See Hilgers* at ¶ 41 (“Without a transcript, we are unable to provide a meaningful review of this issue.”)

6. Here, without a full transcript, Masset is unable to conduct a meaningful review of any issues to raise sua sponte. To that end, he has indeed been prejudiced. While the legislature did not make N.D.C.C. §§ 28-32-36 and 28-32-44 jurisdictional, it clearly intended the recording of all testimony to be imperative. As this Court held in *Simpfenderfer, supra*, “If the Attorney General was unable to furnish such transcript as is required by law, a rehearing should have been ordered by such agency so that a record which would satisfy the requirements of the law might be made.” *Id.*

7. CONCLUSION AND PRAYER FOR RELIEF

8. In this case, the Department violated N.D.C.C. §§ 28-32-36 and 28-32-44, in that a significant portion of the recording of the administrative hearing held before the Department was inadvertently deleted and no longer exists. The Department is unable to furnish a complete transcript of the proceedings as is required by law.
9. WHEREFORE, the Appellant, Brian Michael Masset, by and through his attorney, Chad R. McCabe, respectfully prays that this Court will reverse the judgment affirming the administrative suspension of his driving privileges and remand for a new hearing.

Dated this 14th day of June, 2010.

/Chad R. McCabe
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10. CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by electronic transmission on this 14th day of June, 2010, to the following:

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/s/ Chad R. McCabe
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