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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

AUG 25 2015

Christopher L. Williamson,	)	STATE OF NORTH DAKOTA
	)	
Appellant,	)	Supreme Ct. No. 20150179
	)	
v.	)	
	)	District Ct. No. 53-2015-CV-00046
Director, North Dakota Department	)	
of Transportation,	)	
	)	
Appellee.	)	
	)	

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APPEAL FROM THE APRIL 17, 2015  
JUDGMENT OF THE DISTRICT COURT  
WILLIAMS COUNTY, NORTH DAKOTA  
NORTHWEST JUDICIAL DISTRICT

HONORABLE DAVID W. NELSON

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**BRIEF OF APPELLEE**

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## TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities .....	iii
	<u>Paragraph</u>
Statement of Issue .....	1
Whether the evidence in the record established that Williamson's Intoxilyzer test was performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. ....	1
Statement of Case .....	2
Statement of Facts.....	3
Proceedings on Appeal to District Court.....	7
Standard of Review .....	12
Law and Argument.....	16
The evidence in the record established that Williamson's Intoxilyzer test was performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee .....	16
A.    General.....	16
B.    Kashur's certification of the Lists, combined with her signing of each page of the Lists, signified Kashur's certification of the chemical test operators and her approval of the chemical testing devices .....	25
C.    The evidence in the record established that Eder had the authority to certify the chemical test operators and approve	

the chemical testing devices and the methods used to conduct breath tests .....	33
D. The undisputed testimony of the law enforcement officer who administered Williamson's Intoxilyzer test established that Williamson's test was performed by a certified chemical test operator.....	39
Conclusion .....	41

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<u>Alerus Financial, N.A. v. Lamb,</u> 2003 ND 158, 670 N.W.2d 351 .....	30
<u>Bjerklie v. Workforce Safety and Ins.,</u> 2005 ND 178, 704 N.W.2d 818 .....	30
<u>Doll v. N.D. Dep't of Transp.,</u> 2005 ND 62, 693 N.W.2d 627. ....	16
<u>Frank v. N.D. Dep't of Transp.,</u> 2014 ND 158, 849 N.W.2d 248. ....	17, 18, 33, 34, 35, 36
<u>Grzadzielewski v. Walsh County Mut. Ins. Co.,</u> 297 N.W.2d 780 (N.D. 1980). ....	30
<u>Harter v. N.D. Dep't of Transp.,</u> 2005 ND 70, 694 N.W.2d 677. ....	14
<u>Haynes v. Dir., Dep't of Transp.,</u> 2014 ND 161, 851 N.W.2d 172. ....	12, 13
<u>Knudson v. Dir., N.D. Dep't of Transp.,</u> 530 N.W.2d 313 (N.D. 1995). ....	15
<u>Phipps v. N.D. Dep't of Transp.,</u> 2002 ND 112, 646 N.W.2d 704. ....	14
<u>Potratz v. N.D. Dep't of Transp.,</u> 2014 ND 48, 843 N.W.2d 305. ....	15
<u>Schlosser v. N.D. Dept. of Transp.,</u> 2009 ND 173, 775 N.W.2d 695. ....	39
<u>State v. Fasteen,</u> 2007 ND 162, 740 N.W.2d 60. ....	14
<u>Unser v. N.D. Workers Comp. Bureau,</u> 1999 ND 129, 598 N.W.2d 89 .....	30
 <u>Statutes and Other Authorities</u>	
N.D.C.C. ch. 28-32.....	12

N.D.C.C. § 28-32-46. ....	12
N.D.C.C. ch. 39-20.....	9, 26, 27
N.D.C.C. § 39-20-06. ....	10
N.D.C.C. § 39-20-07 .....	16, 33, 36, 37
N.D.C.C. § 39-20-07(5) .....	10, 16, 17, 34
N.D.C.C. § 54-12-24 .....	22

### **STATEMENT OF ISSUE**

[¶1] Whether the evidence in the record established that Williamson's Intoxilyzer test was performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee.

### **STATEMENT OF CASE**

[¶2] Williston Police Officer Travis Martinson ("Officer Martinson") placed Christopher L. Williamson ("Williamson") under arrest on December 9, 2014, for the offense of driving a vehicle while under the influence of intoxicating liquor. (App. of Appellant ("App.") 19, ll. 5-7; 83) At the conclusion of the January 8, 2015, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Williamson's driving privileges for a period of two years. (Id.) Williamson requested judicial review of the hearing officer's decision. (Id. at 85-86.)

### **STATEMENT OF FACTS**

[¶3] On December 9, 2014, Officer Martinson stopped a vehicle that was being driven by Williamson after Williamson drove over a fire hose at the scene of a fire to which Officer Martinson had responded. (Id. at 8, ll. 15-18; 10, l. 7 – 11, l. 7.) After observing the odor of alcohol coming from Williamson's vehicle and that Williamson had bloodshot and watery eyes, and slurred speech, Officer Martinson removed Williamson from his vehicle. (Id. at 12, l. 9 -- 14, l. 5; 14, l. 24 – 15, l. 13.)

[¶4] Officer Martinson requested Williamson submit to a series of field sobriety tests, however, Williamson refused Officer Martinson's request. (Id. at 14, ll. 5-7; 15, l. 14 – 16, l. 11.) Williamson, however, consented to perform the onsite screening test on which he produced a result of .236. (Id. at 16, l. 12 – 18, l. 9.)

[¶5] Officer Martinson placed Williamson under arrest for driving a vehicle while under the influence of alcohol and requested he submit to an Intoxilyzer test. (Id. at 18, l. 10 – 19, l. 10.) Sergeant Randy Haugenoe ("Sgt. Haugenoe") of the Williston Police Department, who administered Williamson's Intoxilyzer test, testified that he is certified chemical test operator for the Intoxilyzer 8000. (Id. at 29, ll. 10-15.)

[¶6] Sgt. Haugenoe testified he administered Williamson's Intoxilyzer test in accordance with the Approved Method. (Id. at 30, l. 24 – 31, l. 2.) Sgt. Haugenoe also certified Williamson's Intoxilyzer Test Record and Checklist ("Test Record") stating that "[he] followed the Approved Method." (Id. at 54.) The Test Record showed Williamson's breath test was administered with an Intoxilyzer bearing the identification number of "SN 80-004950." (Id.) The results of the Intoxilyzer test established Williamson had a blood alcohol concentration of 0.231% by weight. (Id.)

#### **PROCEEDINGS ON APPEAL TO DISTRICT COURT**

[¶7] At the administrative hearing, the hearing officer admitted without objection by Williamson the following documents: "Exhibit 5, the List of Certified Chemical Test Operators July 1, 2014. Exhibit 6, the List of Approved Chemical Testing Devices July 1, 2014. Exhibit 8, the Approved Method to Conduct Breath

Tests with the Intoxilyzer 8000, BrS, revision number 0.0, April 19, 2012. Exhibit 9, the Ethanol Breath Standard Analytical Report, Lot No. 13314080A1. Exhibit 13, Appointment of Charles E. Eder as a State Toxicologist. Exhibit 15, three Memos Regarding Designees of the State Crime Laboratory Director, dated August 1, 2005; January 25<sup>th</sup>, 2013; and April 5<sup>th</sup>, 2013." (Id. at 6, ll. 4-20.)

[¶8] Williamson, however, objected to the admission of the Test Record (Exhibit 1c) based on the qualifications of Charles Eder ("Eder"). Citing the Memos Regarding Designees of the State Crime Laboratory Director ("Memos"), Williamson argued:

Exhibit 15, the third document, there's three documents that are Exhibit 15. I'm referring to the third document. Deb Kashur is the designee for purposes of breath testing. This is a breath test case. Charles Eder is not the designee for purposes of breath testing. So the operators, devices and the approved method ... there's no foundation here to show that Mr. Eder is the designee for purposes of breath testing. And I object on foundation on that basis.

(Id. at 22, ll. 7-14.) Williamson did *not* object to the admission of the Test Record based on Deb Kashur's ("Kashur's") certification and/or signing of any of the Test Record's foundational documents.

[¶9] The hearing officer overruled Williamson's objection regarding Eder's qualifications stating:

. . . Exhibit 15 includes the memo regarding designees of the state crime lab that was done in August 1<sup>st</sup>, 200,5 [sic] when we changed the language from the Attorney General or the state toxicologist to the designee of the director of the state crime lab of the office of the attorney general. Charles Eder is specifically named.

The memo specifically says that the persons are authorized to act as designee until revoked or terminated. There's no language that Charles Eder's role as a designee has been terminated. And the purposes covered by that legislation include what's been covered

under 39-20 for purposes of approving methods, devices, operators. There's nothing in the designee of Deb Kashur that makes her exclusive. So it's overruled.

(Id. at 22, l. 19 – 23, l. 7.) The hearing officer concluded “[t]he test was fairly administered.” (Id. at 83.)

[¶10] Williamson requested judicial review of the administrative decision by the Williams County District Court pursuant to N.D.C.C. § 39-20-06. (Id. at 85-86.) Williamson alleged “Exhibit 1c was inadmissible in that there was a failure to meet the foundational requirements of N.D.C.C. § 39-20-07(5), the Director's designee.” (Id. at 85.)

[¶11] The district court issued the Court's Order on March 30, 2015, in which it affirmed the Hearing Officer's Decision. (Id. at 87-88.) Judgment was entered on April 17, 2015. (Id. at 89.) Williamson appealed the Judgment to the North Dakota Supreme Court. (Id. at 91-92.) On appeal, the Department respectfully requests this Court affirm the judgment of the Williams County District Court and the Hearing Officer's Decision suspending Williamson's driving privileges for a period of two years.

### **STANDARD OF REVIEW**

[¶12] “The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to revoke driving privileges.” Haynes v. Dir., Dep't of Transp., 2014 ND 161, ¶ 6, 851 N.W.2d 172. The Court must affirm an administrative agency's order unless one of the following is present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

N.D.C.C. § 28-32-46.

[¶13] "In an appeal from a district court's review of an administrative agency's decision, [the Court] reviews the agency's decision." Haynes, at ¶ 6. The Court "do[es] not make independent findings of fact or substitute [its] judgment for that of the agency; instead, [it] determine[s] whether a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence from the entire record." Id.

[¶14] "When an 'appeal involves the interpretation of a statute, a legal question, this Court will affirm the agency's order unless it finds the agency's order is not in accordance with the law.'" Harter v. N.D. Dep't of Transp., 2005 ND 70, ¶ 7, 694 N.W.2d 677 (quoting Phipps v. N.D. Dep't of Transp., 2002 ND 112, ¶ 7, 646

N.W.2d 704). The “[i]nterpretation of a statute is a question of law fully reviewable on appeal.” State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60.

[¶15] “This Court reviews an administrative hearing officer’s evidentiary rulings under the abuse of discretion standard.” Potratz v. N.D. Dep’t of Transp., 2014 ND 48, ¶ 7, 843 N.W.2d 305 (citing Knudson v. Dir., N.D. Dep’t of Transp., 530 N.W.2d 313, 317 (N.D. 1995)).

### **LAW AND ARGUMENT**

**The evidence in the record established that Williamson’s Intoxilyzer test was performed according to methods and with devices approved by the director of the state crime laboratory or the director’s designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director’s designee.**

#### **A. General.**

[¶16] “Admissibility of chemical test results of a driver’s blood alcohol content is governed by N.D.C.C. § 39-20-07.” Doll v. N.D. Dep’t of Transp., 2005 ND 62, ¶ 9, 693 N.W.2d 627. “Under N.D.C.C. § 39-20-07(5), the results of a chemical analysis must be received in evidence if the sample was properly obtained, the test was fairly administered, and the test is shown to have been performed according to methods and with devices approved” by the director of the state crime laboratory. Id.

[¶17] Section 39-20-07(5) provides:

The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director’s designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime

*laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.*

N.D.C.C. § 39-20-07(5) (emphasis added). See Frank v. N.D. Dep't of Transp., 2014 ND 158, ¶ 11, 849 N.W.2d 248 ("Because the record does not contain prima facie evidence Eder was a designee of the director, we conclude proper foundation for the Intoxilyzer test results was not laid, and the administrative hearing officer erred in admitting the Intoxilyzer test results.").

[¶18] In this case -- as opposed to the circumstances in Frank -- the record contains evidence that the appropriate designees of the director approved the device and the method of chemical analysis used in performing Williamson's Intoxilyzer test, and certified the chemical test operator who administered that test.

[¶19] The foundational documents for the admission of Williamson's Test Record consisted of: (1) the List of Certified Chemical Test Operators (Exhibit 5); (2) the List of Approved Chemical Testing Devices (Exhibit 6); (3) the Approved Method to Conduct Breath Test with Intoxilyzer 8000 (Exhibit 8); (4) the Ethanol Breath Standard Analytical Report (Exhibit 9); (5) the Appointment of Charles E. Eder as a State Toxicologist (Exhibit 13) ("Appointment"); and (6) the Memos Regarding Designees of the State Crime Laboratory Director (Exhibit 15) ("Memo(s)"). (App. at 55-82).

[¶20] On appeal, Williamson challenges the sufficiency of the List of Certified Chemical Test Operators and the List of Approved Chemical Testing Devices (collectively referred to as the “Lists” except where otherwise note). (Br. of Appellant ¶¶ 16-20.) On the other hand, Williamson does not challenge the sufficiency of the Approved Method to Conduct Breath Test or the Ethanol Breath Standard Analytical Report. Instead, Williamson concedes “[t]he record in this case does show that Deb Kashur approved the method for the breath test in this case (A. 63-71), and the ethanol stated in this case (A. 72-74.)” (Id. at ¶ 21.)

[¶21] The Appointment (Exhibit 13) and the Memos (Exhibit 15) provide the necessary evidence to substantiate the required approval of the devices and the certification of the operators identified in the Lists. The August 1, 2005, Memo identified “Charles E. Eder, Toxicology Supervisor/Deputy State Toxicologist,” and stated:

Pursuant to the statutory changes adopted by the 2005 North Dakota Legislative Assembly in House Bill 1088, codified in Chapter 195 of the 2005 North Dakota Sessions Laws the following persons are authorized to act as a designee of the director of the Crime Laboratory Division of the Office of the North Dakota Attorney General until the authorization is revoked or terminated.

(Id. at 78.)

[¶22] The Attorney General’s April 29, 2011, Appointment provided that “pursuant to North Dakota Century Code § 54-12-24, I appoint **Charles E. Eder** as State Toxicologist, effective today, Friday April 29, 2011.” (Id. at 76 (original emphasis).)

[¶23] In the January 25, 2013, Memo, the Director authorized Eder, in his capacity as the State Toxicologist, "to sign and certify records as a designee of the Director of the State Crime Laboratory." (Id. at 80.)

[¶24] The April 5, 2013, Memo provided for the appointment by the Director of "Deb Kashur, a Forensic Scientist, as a designee of the Director of the State Crime Laboratory." (Id. at 82.) The Director authorized "Kashur to approve breath alcohol methods and devices; train, certify and supervise chemical test operators; and appoint, train, certify and supervise field inspectors for the breath testing equipment and its operation for the breath alcohol testing program, and sign and certify records of the State Crime Laboratory." (Id.)

**B. Kashur's certification of the Lists, combined with her signing of each page of the Lists, signified Kashur's certification of the chemical test operators and her approval of the chemical testing devices.**

[¶25] In this case, Kashur executed a certification page for each List stating "I, Deb Kashur, do hereby certify that I am a duly-appointed Forensic Scientist for the State of North Dakota and an official custodian of the records and files of the office." (Id. at 55, 59.) Kashur certified that each List attached to the respective certification page was a true and correct copy of the original record as "appears of record on file in the Office of Attorney General, Crime Laboratory Division." (Id.)

[¶26] The List of Certified Chemical Test Operators was prefaced with the statement that "[t]he following individuals have been trained and certified to conduct the analysis of breath to determine alcohol concentration, pursuant to sections . . . 39-20 . . . of the North Dakota Century Code." (Id. at 56.) That List

included Sgt. Haugenoe who administered Williamson's Intoxilyzer test. (Id. at 57.)

[¶27] The List of Approved Chemical Testing Devices was prefaced with the statement that "[e]ach of the following Intoxilyzers® has been inspected . . . and has been found to be in good working order . . . and is therefore approved by the State Toxicologist as a device for the analysis of breath to determine alcohol concentration, in accordance with Section . . . 39-20 . . . of the North Dakota Century Code." (Id. at 60.) That List included the Intoxilyzer bearing the identification number of "SN 80-004950" that was used to administer Williamson's Intoxilyzer test. (Id. at 61.)

[¶28] Each page of the Lists bore the signature of "Deb Kashur" with the date of 01 July 2014." (Id. at 56-58; 60-61.)

[¶29] Williamson argues that Kashur's signature on each page of the Lists represents no more than the exercise of her authority as a designee to sign and certify records. Williamson, however, raised no such argument at hearing in opposing the Test Record, and instead, focused his challenge on Eder's qualifications. Williamson raised the matter for the first time in his brief on appeal to the district court. (Record at Doc ID# 18.)

[¶30] A proper objection is required "to assure that the court is given a meaningful opportunity to rule on the objection." Grzadzielewski v. Walsh County Mut. Ins. Co., 297 N.W.2d 780, 781 (N.D. 1980). "This Court has repeatedly said it will not review an issue that was not properly raised by a party at the administrative level." Bjerklie v. Workforce Safety and Ins., 2005 ND 178, ¶ 6,

704 N.W.2d 818 (citing Unser v. N.D. Workers Comp. Bureau, 1999 ND 129, ¶ 8, 598 N.W.2d 89; Alerus Financial, N.A. v. Lamb, 2003 ND 158, ¶ 17, 670 N.W.2d 351 (“We have repeatedly held that issues not raised in the trial court cannot be raised for the first time on appeal.”) (quotation omitted).

[¶31] Unlike the language on the certification page of the Lists, Kashur's signature on each page of the Lists is not accompanied by any language that would limit the scope of the authority in which she signed the page. Williamson raised no objection at the hearing regarding this matter which would have allowed the hearing officer to rule, and accordingly, Williamson waived his objection regarding this issue.

[¶32] In the absence of contrary evidence in the record and the lack of a proper objection at the hearing, a reasonable inference may be drawn that Kashur's certification of the Lists, combined with her signing of each page of the Lists, signified Kashur's certification of the chemical test operators and her approval of the chemical testing devices.

**C. The evidence in the record established that Eder had the authority to certify the chemical test operators and approve the chemical testing devices and the methods used to conduct breath tests.**

[¶33] “Under the prior version of [N.D.C.C. § 39-20-07], the methods, devices, and individual administering the analytical test must have been approved by ‘the state toxicologist.’” Frank, at ¶ 8. “The statute was amended in 2005, replacing all references to ‘the state toxicologist’ with ‘the director of the state crime laboratory or the director’s designee.’” Id. The Court stated “[w]e recognize the

state toxicologist no longer holds statutory authority to approve the methods, devices, and individual administering analytical tests." Id. at ¶ 9.

[¶34] In Frank, the driver argue[d] the requirements of N.D.C.C. § 39-20-07(5) were not met and the hearing officer erred in admitting the Intoxilyzer test results over his objection, because it was not shown that the director of the state crime laboratory or the director's designee approved the device used or the individual who administered Frank's breath test." Id. at ¶ 5. "The list of chemical test operators and the list of approved chemical testing devices were certified by Charles E. Eder, the state toxicologist." Id. at ¶ 6. "However, there [was] no evidence on the record that Eder is a designee of the director of the state crime laboratory." Id.

[¶35] The Court rejected the Department's argument that "[it] should infer Eder was a designee of the director, because . . . a crime laboratory director's memo showing Eder is a designee of the director is available on the state crime laboratory website." Id. at ¶ 10. The Court noted, "[h]owever, this document was not offered into evidence at the administrative hearing." Id.

[¶36] The Court determined "[w]ithout evidentiary proof that Eder was a designee of the director, two of the foundational elements of N.D.C.C. § 39-20-07 were not met." Id. at ¶ 43. The Court found that "no other evidence was offered which identified Eder as a designee of the director" and "[t]he testimony offered at the administrative hearing did not establish this fact." Id. The Court determined that "[b]ecause the record does not contain prima facie evidence Eder was a designee of the director, we conclude proper foundation for the

Intoxilyzer test results was not laid, and the administrative hearing officer erred in admitting the Intoxilyzer test results." Id.

[¶37] In this case, the evidence in the record demonstrated that Eder was a designee of the director. (App. 78, 80.) Furthermore, the August 1, 2005, Memo conveyed the intention of the Director that, despite the 2005 statutory amendments to N.D.C.C. § 39-20-07, the position of State Toxicologist, although not having the *statutory authority*, would still retain the authority to certify the chemical test operators and approve the chemical testing devices and the methods used in breath analysis *in the capacity as a designee of the Director*. (Id. at 78.)

[¶38] The evidence in the record established that Eder had the authority to certify the chemical test operators and approve the chemical testing devices and the methods used to conduct breath tests.

**D. The undisputed testimony of the law enforcement officer who administered Williamson's Intoxilyzer test established that Williamson's test was performed by a certified chemical test operator.**

[¶39] This Court has allowed the testimony of a law enforcement officer to establish fair administration of a chemical test. See, e.g., Schlosser v. N.D. Dept. of Transp., 2009 ND 173, ¶ 11, 775 N.W.2d 695 ("While introducing Form 104 is a shortcut to show fair administration, chain of custody, and compliance with the approved method, this Court has previously allowed an officer's testimony to overcome the failure to introduce a complete Form 104.").

[¶40] In this case, Sgt. Haugenoe testified that he is certified chemical test operator for the Intoxilyzer 8000. (App. 29, ll. 10-15.) Williamson did not

challenge the law enforcement officer's testimony. Sgt. Haugenoe's undisputed testimony established that Williamson's test was performed by an individual possessing a certificate of qualification to administer the test.

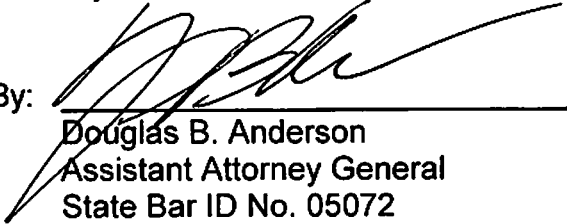
**CONCLUSION**

[¶41] The Department respectfully requests this Court affirm the judgment of the Williams County District Court and the Hearing Officer's Decision suspending Williamson's driving privileges for a period of two years.

Dated this 25<sup>th</sup> day of August, 2015.

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Christopher L. Williamson,	)	
	)	
Appellant,	)	<b>Supreme Ct. No. 20150179</b>
	)	
v.	)	<b>District Ct. No. 53-2015-CV-00046</b>
	)	
Director, North Dakota Department	)	<b>AFFIDAVIT OF SERVICE BY MAIL</b>
of Transportation,	)	
	)	
Appellee.	)	
	)	

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STATE OF NORTH DAKOTA     )  
  ) ss.  
COUNTY OF BURLEIGH     )

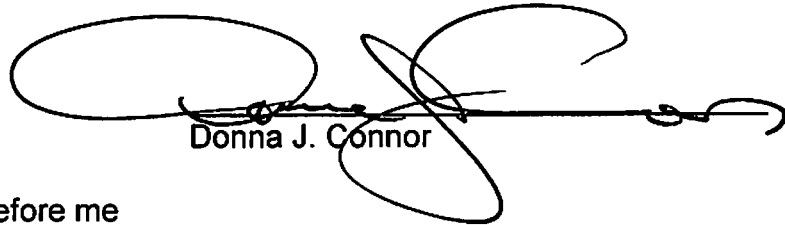
[¶1] Donna J. Connor states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 25<sup>th</sup> day of August, 2015, I served the attached **BRIEF OF APPELLEE** upon the appellant by placing true and correct copies thereof in an envelope addressed as follows:

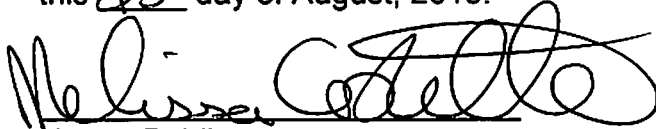
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and depositing the same, with postage prepaid, in the United States mail at Bismarck,  
North Dakota.



Donna J. Connor

Subscribed and sworn to before me  
this 25<sup>th</sup> day of August, 2015.



Notary Public

