

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Kendra M. Christiansen,	)	
	)	
Appellant,	)	
	)	
v.	)	Supreme Court No. 20210218
	)	
William T. Panos, Director,	)	
Department of Transportation,	)	
	)	Cass County No. 09-2021-CV-01432
Appellee.	)	

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PETITION FOR REHEARING

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On appeal from Judgment  
affirming administrative hearing officer's decision  
from the District Court, Cass County, North Dakota  
East Central Judicial District  
The Honorable Wade L. Webb, Presiding

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## [¶2] PRIOR PROCEEDINGS

[¶3] On April 26, 2021, the Department of Transportation (“Department”) held an administrative hearing regarding the proposed suspension of the driving privileges of the Appellant, Kendra Christiansen (“Ms. Christiansen”). *See* Hearing Decision, Appendix (“App.”) 52-53; Notice of Hearing, App. 6. At the hearing, testimony and evidence showed the arresting officer did not promptly forward a certified written report as required by statute. *See* App. at 34-35 (report mailed nine days after issuance); App. 52 (“The Report and Notice was not forwarded to the NDDOT within five days.”). At the conclusion of the hearing, counsel moved to dismiss based on non-compliance with statute requiring forwarding of a certified written report within five days. The Department later issued a decision, suspending Ms. Christiansen’s driving privileges, based upon an issue never specified by the Department and **neither raised nor argued** at the hearing.

[¶4] Christiansen timely appealed to the district court. The district court affirmed on issues never specified by the Department and **neither raised nor argued** at the hearing.

[¶5] Christiansen then timely appealed to this Court. Following briefing and oral argument, this Court rendered a decision based upon an issue and section of law that was **neither raised nor argued below**. In doing so, this Court inexplicably and inaccurately cabined Christiansen's argument as: "the basic and mandatory analysis has been used to a degree higher than justified by the traditional rules of statutory interpretation and should be abandoned." (slip opinion, at ¶14). However, Christianson made no such argument. The legal route taken by this Court was unique and not related

to issues explored in the agency tribunal or in the district court. Ms. Christiansen now petitions for rehearing.

[¶6] LAW AND ARGUMENT

[¶7] Remarkably, this Court whipsawed to N.D.C.C. § 39-20-04.1(1), a section not argued by either party, and proclaimed that the non-existence of the 5-day forwarding requirement within that section evidences no need to timely forward the administrative complaint (Report and Notice form). This Court, in ignoring the "jurisdiction section" of the implied consent statute, N.D.C.C. § 39-20-03.1(4), mangled its own basic and mandatory test (and blamed it on Christiansen) and, for the first time ever, required a driver to establish prejudice when the Department of Transportation did not establish jurisdiction.

[¶8] Section 39-20-03.1(4), N.D.C.C., is the "jurisdiction section;" not N.D.C.C. § 39-20-04.1(1). Indeed, every other portion of N.D.C.C. § 39-20-03.1(4) has been declared jurisdictional by this Court. *See Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, ¶1, 682 N.W.2d 308 ("the provision ... requiring an officer to issue a certified written report showing reasonable grounds ... is a basic and mandatory provision."); *see also Jorgensen v. North Dakota Dept. of Transp.*, 2005 ND 80, ¶13, 695 N.W.2d 212 ("inclusion of the test result in the officer's certified report to the Department is a basic and mandatory provision of the statute."); *Bosch v. Moore*, 517 N.W.2d 412, 413 (N.D. 1994) ("The statute's command that all tests be forwarded to DOT is basic and mandatory."). This jurisdiction section, N.D.C.C. § 39-20-03.1(4), "establishes the prerequisite for the exercise of DOT's jurisdiction." *See Bosch*, at 413 (formerly N.D.C.C. § 39-20-03.1(3)).

[¶9] There is a difference between "authority to sanction a driver" (slip opinion, at ¶14) and jurisdiction, i.e., "authority to act" administratively; just like there is a difference between jurisdiction to criminally prosecute and authority to sanction or punish criminally. Like N.D.C.C. § 12.1-32-01, which spells out criminal sanction or punishment and not jurisdiction to prosecute, N.D.C.C. § 39-20-04.1(1) spells out administrative sanction/punishment and not jurisdiction. Section 39-20-03.1(4), N.D.C.C., spells out the Department's jurisdiction, not N.D.C.C. § 39-20-04.1(1).

[¶10] Furthermore, neither party relied on N.D.C.C. § 39-20-04.1(1), here or below. "Courts should be cautious" to render "judgment on propositions of law that were not advanced by the parties" and a "court should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants." *See Jaste v. Gailfus*, 679 N.W.2d 257, ¶12, 2004 ND 94. This rule of law should not apply only at the district court level.

[¶11] At the same time this court reads out of existence the specific 5-day forwarding requirement the Legislature chose, rendering it an idle legislative act, it ignores the jurisdiction section of the implied consent law in favor of the consequence section, which was neither briefed nor argued. At every level of these proceedings, Ms. Christiansen has been on the wrong end of a decision or opinion based upon a proposition of law never noticed, and neither argued nor briefed. Due process, fairness, and legitimacy of the rule of law, militates toward additional briefing and argument on this matter, and particularly the applicability of N.D.C.C. § 39-20-04.1(1) on jurisdiction, if any.

[¶12] CONCLUSION AND RELIEF SOUGHT

[¶13] For the foregoing reasons, Ms. Christiansen asks that this Court place the matter on the Court's calendar for oral argument and resubmission, pursuant to Rule 40 of the North Dakota Rules of Appellate Procedure, including submission of additional briefs. *See* N.D.R.App.P. 40.

[¶14] CERTIFICATE OF COMPLIANCE

[¶15] Pursuant to Rule 32(e) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 7 pages.

Dated this 7th day of February, 2022.

/s/ *Dan Herbel*

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[¶16] CERTIFICATE OF SERVICE

[¶17] The undersigned hereby certifies that, on February 7, 2022, the PETITION FOR REHEARING (with corrected page numbers) was electronically filed with the Clerk of the North Dakota Supreme Court and was also electronically transmitted to Michael Pitcher, Assistant Attorney General, at the following:

Electronic filing to: "Michael Pitcher" < [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov) >

/s/ *Dan Herbel*

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