

IN THE SUPREME COURT

FEB 07 2018

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Drew Park Sutton, )  
 )  
 Plaintiff/Appellant, )  
 )  
 v. )  
 )  
 North Dakota Department )  
 of Transportation, )  
 )  
 Defendant/Appellee. )

20180427

Supreme Ct. No. 20180427

District Ct. No. 53-2018-CV-00902

---

APPEAL FROM THE DISTRICT COURT  
JUDGMENT DATED OCTOBER 1, 2018  
WILLIAMS COUNTY, NORTH DAKOTA  
NORTHWEST JUDICIAL DISTRICT

HONORABLE PAUL JACOBSON

---

BRIEF OF APPELLEE

---

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: Michael Pitcher  
Assistant Attorney General  
State Bar ID No. 06369  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov)

Attorneys for Appellee.

**TABLE OF CONTENTS**

	<u>Page</u>
Table of Authorities .....	ii
	<u>Paragraph</u>
Statement of Issues .....	1
The Department had jurisdiction to revoke Sutton's driving privileges under N.D.C.C. § 39-20-04 for Sutton's refusal of an onsite screening test based on the sufficiency of the information on the Report and Notice .....	1
The hearing officer did not err in finding that Sutton refused to submit to an onsite screening test under N.D.C.C. § 39-20-14.....	2
Statement of Case .....	3
Statement of Facts .....	7
Standard of Review .....	13
Law and Argument .....	15
I.    The Department had jurisdiction to revoke Sutton's driving privileges for refusing to submit to an onsite screening test under N.D.C.C. § 39-20-14 .....	15
II.   The hearing officer's findings that Sutton refused to submit to a request for an onsite screening test under N.D.C.C. § 39-20-14 is not against the greater weight of the evidence .....	28
Conclusion .....	33

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Paragraphs(s)</u></b>
<u>Aamodt v. N.D. Dep't of Transp.</u> , 2004 ND 134, 682 N.W.2d 308 .....	15, 16, 19, 20, 24
<u>Berger v. State Highway Comm'r</u> , 394 N.W.2d 678 (N.D. 1986) .....	29
<u>Bosch v. Moore</u> , 517 N.W.2d 412 (N.D. 1994) .....	15
<u>Crawford v. Dir., N.D. Dep't of Transp.</u> , 2017 ND 103, 893 N.W.2d 770 .....	14
<u>Dawson v. N.D. Dep't of Transp.</u> , 2013 ND 62, 830 N.W.2d 221 .....	28
<u>Ding v. Dir., N.D. Dep't of Transp.</u> , 484 N.W.2d 496 (N.D. 1992) .....	17
<u>Gardner v. N.D. Dep't of Transp.</u> , 2012 ND 223, 822 N.W.2d 55 .....	28
<u>Gillmore v. Levi</u> , 2016 ND 77, 877 N.W.2d 801 .....	30
<u>Greenwood v. Moore</u> , 545 N.W.2d 790 (N.D. 1996) .....	17
<u>Ike v. Dir., N.D. Dep't of Transp.</u> , 2008 ND 85, 748 N.W.2d 692 .....	16
<u>Knoll v. N.D. Dep't of Transp.</u> , 2002 ND 84, 644 N.W.2d 191 .....	13
<u>Mayo v. Moore</u> , 527 N.W.2d 257 (N.D. 1995) .....	28
<u>Morrow v. Ziegler</u> , 2013 ND 28, 826 N.W.2d 912 .....	16, 25, 26
<u>Roberts v. N.D. Dep't of Transp.</u> , 2015 ND 137, 863 N.W.2d 529 .....	21

Schock v. N.D. Dep't of Transp.,  
2012 ND 77, 815 N.W.2d 255 .....28

Thorsrud v. Dir., Dep't of Transp.,  
2012 ND 136, 819 N.W.2d 483 .....30

**Statutes**

N.D.C.C. ch. 28-32..... 13

N.D.C.C. ch. 39-20..... 13

N.D.C.C. § 28-32-46 ..... 13

N.D.C.C. § 39-06.2-10.2 .....28

N.D.C.C. § 39-20-01 .....21

N.D.C.C. § 39-20-03.1(3) ..... 19

N.D.C.C. § 39-20-04 ..... 1, 18, 21

N.D.C.C. § 39-20-04(1) ..... 18, 22

N.D.C.C. § 39-20-05(3) ..... 4

N.D.C.C. § 39-20-05(4) .....28

N.D.C.C. § 39-20-14 ..... 2, 15, 21, 22, 28, 31, 32

Black's Law Dictionary 1071 (5<sup>th</sup> ed. 1979) .....29

## STATEMENT OF ISSUES

[¶1] The Department had jurisdiction to revoke Sutton's driving privileges under N.D.C.C. § 39-20-04 for Sutton's refusal of an onsite screening test based on the sufficiency of the information on the Report and Notice.

[¶2] The hearing officer did not err in finding that Sutton refused to submit to an onsite screening test under N.D.C.C. § 39-20-14.

## STATEMENT OF CASE

[¶3] Officer Craig Ware (Officer Ware) of the Williston Police Department arrested Drew Park Sutton (Sutton) on May 7, 2018, for the offense of driving a vehicle while under the influence of intoxicating liquor. Transcript (Tr.) Exhibit (Ex.) 1b. A Report and Notice, including a temporary operator's permit, was issued to Sutton after he refused to submit to chemical Intoxilyzer breath test. Id. The Report and Notice notified Sutton of the Department's intent to suspend his driving privileges. Id.

[¶4] The administrative hearing was held on June 6, 2018, at which time the hearing officer considered two sets of issues. Tr. Ex. 2. In accordance with N.D.C.C. 39-20-05(3) the hearing officer considered the following issues regarding Sutton's refusal of the on-site screening test:

- (1) Whether a law enforcement officer had reason to believe the person committed a moving traffic violation or was involved in a traffic accident as a driver;
- (2) Whether in conjunction with the accident or violation, the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol; and
- (3) Whether the person refused to submit to the onsite screening test.

Id. The hearing officer also considered the following issues in regards to Sutton's refusal of the alcohol concentration test:

- (1) Whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle while under the influence of intoxicating liquor or any drug or substance in violation of N.D.C.C. section 39-08-01, or equivalent ordinance;
- (2) Whether the person was placed under arrest; and
- (3) Whether the person refused to submit to the test or tests.

Id.

[¶5] Following the hearing, the hearing officer issued her findings of fact, conclusions of law, and decision revoking Sutton's driving privileges for a period of 180 days based solely on Sutton's refusal of the onsite screening test, without reaching the second set of issues. Tr. 22, line (l.) 11 – Tr. 23, l. 19. Sutton requested judicial review of the Hearing Officer's Decision.

[¶6] Judge Paul W. Jacobson issued an order affirming the hearing officer's decision on September 18, 2018. App. 23-24. Judgment was entered on October 1, 2018. App. 26. Sutton appealed from the Judgment to this Court. App. 28. The Department asks this Court to affirm the judgment of the Williams County District Court and the administrative revocation of Sutton' driving privileges for 180 days.

#### **STATEMENT OF FACTS**

[¶7] On May 7, 2018 at 12:42 a.m., Officer Ware conducted a traffic stop of a Harley Davidson motorcycle for speeding after clocking it on his radar device traveling above the posted speed limit. Tr. 4, l. 23 – Tr. 5, l. 7. Upon making contact with the driver, who he later identified as Sutton, Officer Ware detected the

odor of an alcoholic beverage coming from Sutton, saw that Sutton's eyes were bloodshot and watery eyes, and that he had slow facial movements. Tr. 6, ll. 15-19. Officer Ware asked Sutton how much he had to drink and Sutton stated, "not very much." Tr. 6, ll. 21-22.

[¶8] Sutton was brought back to Officer Ware's patrol car where the strong odor of alcohol persisted. Tr. 7, ll. 3-4. Sutton indicated he had two short beers earlier but felt okay to be driving. Tr. 7, ll. 4-8. During this conversation Officer Ware noticed that Sutton's speech was slurred. Tr. 7, ll. 8-10. Officer Ware asked Sutton if he would perform some field sobriety tests but Sutton declined. Tr. 7, ll. 15-22.

[¶9] Officer Ware read Sutton the implied consent advisory and requested he submit to an onsite screening test. Tr. 7, l. 24 – Tr. 8, l. 5. Sutton refused to submit to the screening test. Tr. 8, ll. 12-15; Tr. Ex. 1b. At the time of the hearing, Officer Ware could not recall if Sutton's refusal was verbal or not. Tr. 8, l. 18 – Tr. 9, l. 11. Following Sutton's refusal of the onsite screening test, Officer Ware placed Sutton under arrest for driving under the influence. Tr. 9, l. 16.

[¶10] Officer Ware read the implied consent advisory from the Report and Notice form and requested Sutton submit to a chemical breath test. Tr. 9, l. 24 – Tr. 10, l. 8. Officer Ware read the advisory to Sutton multiple times because Sutton would not provide a straight answer regarding testing. Tr. 10, ll. 10-11; Tr. 18, l. 24 – Tr. 19, l. 2. Officer Ware transported Sutton to the Williams County Correctional Center and after they arrived he again read the implied consent advisory to Sutton and requested chemical breath testing but again Sutton would not give an answer. Tr. 10, ll. 11-17. Sutton told Officer Ware that he was scared. Tr. 19, ll. 6-11.

[¶11] Sutton then mentioned the word attorney, so Officer Ware asked him if he wished to speak to an attorney, and Sutton said yes. Tr. 10, ll. 17-19; Tr. 19, ll. 18-22. Officer Ware ensured that Sutton had access to a phone and phone book and gave him time to make calls to an attorney. Tr. 11, ll. 5-10. After approximately 15 minutes of making calls Sutton quit using the telephone. Tr. 11, ll. 10-11. Officer Ware asked Sutton if he was done seeking counsel and Sutton responded in the affirmative. Tr. 11, ll. 11-12.

[¶12] Officer Ware again read the implied consent advisory and asked Sutton to submit to a chemical breath test. Tr. 11, ll. 12-14. Sutton said "I don't know." Tr. 11, ll. 14-15. Officer Ware deemed Sutton's failure to provide a straight answer as a refusal by action, and informed Sutton that there was going to be an additional charge of refusal of chemical test. Tr. 11, ll. 15-17.

### **STANDARD OF REVIEW**

[¶13] The Administrative Agencies Practices Act governs an appeal from an administrative hearing officer's decision suspending a license. N.D.C.C. ch. 28-32; N.D.C.C. ch. 39-20. The appeal is civil in nature. Knoll v. N.D. Dep't of Transp., 2002 ND 84, ¶ 16, 644 N.W.2d 191. And it is separate and distinct from any criminal matter that may ensue. Id. The North Dakota Century Code provides, in relevant part, that a court must affirm an agency's order except in the event of any of the following:

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.

[¶14] In reviewing an agency's findings of fact, this Court does not make independent findings of fact or substitute its judgment for that of the agency; rather, the court determines only whether a reasoning mind reasonably could have concluded the agency's findings were supported by the weight of the evidence from the entire record. Crawford v. Dir., N.D. Dep't of Transp., 2017 ND 103, ¶ 4, 893 N.W.2d 770.

## LAW AND ARGUMENT

- I. **The Department had jurisdiction to revoke Sutton's driving privileges for refusing to submit to an onsite screening test under N.D.C.C. § 39-20-14.**

[¶15] The prerequisites for the exercise of Department's jurisdiction to suspend or revoke a person's driving privileges are established by statute. See Bosch v. Moore, 517 N.W.2d 412, 413 (N.D. 1994). "The Department's authority to suspend a person's license is given by statute and is dependent upon the terms of the statute." Aamodt v. N.D. Dep't of Transp., 2004 ND 134, ¶ 15, 682 N.W.2d 308.

“The Department must meet the basic and mandatory provisions of the statute to have authority to suspend a person’s driving privileges.” Id.

[¶16] “Whether the provision is basic and mandatory rests primarily on whether the Department’s authority is affected by failure to apply the provision.” Morrow v. Ziegler, 2013 ND 28, ¶ 9, 826 N.W.2d 912 (citing Aamodt, at ¶ 23). The Court must articulate “what in [the statute] is a basic and mandatory requirement such that the Department would be without authority to adjudicate revocation of [a person’s] driving privileges.” Ike v. Dir., N.D. Dep’t of Transp., 2008 ND 85, ¶ 7, 748 N.W.2d 692.

[¶17] Usually, when no statutory remedy is specified for an agency’s failure to satisfy a statutory provision, the Court will not reverse without a showing of prejudice. Greenwood v. Moore, 545 N.W.2d 790, 795-96 (N.D. 1996). The Court also “construe[s] statutes to avoid ludicrous and absurd results when possible.” Ding v. Dir., N.D. Dep’t of Transp., 484 N.W.2d 496, 501 (N.D. 1992).

[¶18] Section 39-20-04(1), N.D.C.C. – the statute at issue in this case – requires an officer to forward to the director a certified written report - Report and Notice – containing certain information to include

. . . for purposes of section 39-20-14, [the officer] had reason to believe that the person committed a moving traffic violation . . . and in conjunction with the violation or accident the officer has, through the officer’s observations, formulated an opinion that the person’s body contains alcohol, that the person was lawfully arrested if applicable, and that the person had refused to submit to the test or tests under section 39-20-01 or 39-20-14.

N.D.C.C. § 39-20-04.

[¶19] In Aamodt, the Court referred to N.D.C.C. § 39-20-03.1(3), which requires

the arresting officer to “forward to the director a certified written report . . . show[ing] that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while [under the influence of alcohol].” Aamodt, 2004 ND 134 at ¶ 14, 682 N.W.2d 308. At issue in Aamodt was whether this statutory provision was a “basic and mandatory provision.” Id. at ¶ 15. The Court determined the provision was mandatory, and because the officer failed to fill out the reasonable grounds portion of the Report and Notice, the Department was deprived of jurisdiction to suspend Aamodt’s license. Id. at ¶ 26. [¶20] Sutton argues the department lacked jurisdiction to revoke his license because, like Aamodt, the Report and Notice filled out by Officer Ware did not show sufficient grounds on its face that the officer had probable cause to arrest him for driving under the influence of alcohol. Appellant’s Br. ¶ 20. For the reasons below Sutton’s arguments are meritless.

[¶21] The North Dakota Supreme Court has stated, “The North Dakota Century Code authorizes two separate tests, each for a specific purpose under N.D.C.C. §§ 39-20-01 and 39-20-14. Section 39-20-04, N.D.C.C., authorizes revocation for refusal of the preliminary onsite screening test under section 39-20-14 and for refusal of the subsequent chemical test to determine alcohol concentration under section 39-20-01.” Roberts v. N.D. Dep’t of Transp., 2015 ND 137, ¶ 11, 863 N.W.2d 529. Here, because the Department is only revoking Sutton’s driving privileges for refusing the onsite screening test, the statutory provisions at issue are those in N.D.C.C. § 39-20-04, and N.D.C.C. § 39-20-14. In other words, the provisions of N.D.C.C. § 39-20-01 do not directly apply. N.D.C.C. § 39-20-14 does

not require probable cause to arrest for driving under the influence of alcohol before taking action to revoke a person's driving privileges.

[¶22] The Report and Notice shows sufficient grounds on its face for revocation of Sutton's driving privileges for refusing an onsite screening test. When a person fails to submit to a screening test under N.D.C.C. § 39-20-14, the Report and Notice need only show that the officer 1) had reason to believe that the person committed a moving traffic violation or was involved in a traffic accident as a driver, 2) in conjunction with the violation or accident the officer has, through the officer's observations, formulated an opinion that the person's body contains alcohol and 3) that the person had refused to submit to the [screening] test. See N.D.C.C. § 39-20-04(1).

[¶23] Sutton's Report and Notice on its face shows all three of the requirements. It is undisputed that Sutton's Report and Notice shows that he committed a moving traffic violation and that he refused the onsite screening test. Tr. Ex. 1b. What Sutton is challenging is whether the Report and Notice shows step two – that the trooper formulated an opinion that Sutton's body contained alcohol. Appellant's Br. ¶ 20. Under the probable cause section of the Report and Notice, Officer Ware marked the "odor of alcoholic beverage" box. Tr. Ex. 1b. The odor of alcoholic beverage alone under the "Probable Cause to arrest/lawfully detain" section of the Report and Notice is satisfactory evidence to show that an officer has formed an opinion that a person's body contains alcohol.

[¶24] Sutton relies on Aamodt, to argue that checking the odor of alcoholic beverage box alone, and the "traffic violation" box is insufficient to give the

Department jurisdiction to revoke. Appellant's Br. ¶ 21. However, Aamodt is distinguishable from this case because the standard being decided in Aamodt was not whether the Report and Notice showed the officer believed Aamodt's body contained alcohol, but rather whether the report showed sufficient grounds to arrest Aamodt for being in Actual Physical Control of a vehicle while under the influence of alcohol. Aamodt, 2004 ND 134, ¶10. 682 N.W.2d 308. Because the odor of alcohol alone was insufficient to establish probable cause, the Aamodt court determined that the Report and Notice, on its face, did not show a reasonable basis for Aamodt's arrest, and thus the Department was without authority to revoke Aamodt's license. Id. at ¶ 26.

[¶25] Sutton next relies on Morrow to argue the Report and Notice fails to provide any indication that the officer believed his body contained alcohol. Appellant's Br. ¶ 22. However, Morrow is distinguishable from this case. In Morrow the officer in completing the Report and Notice checked the box noting the driver refused the onsite screening test, indicated a traffic violation as the reason for the stop, but wrote "N/A" in the probable cause to arrest section. 2013 ND 28, ¶ 4, 826 N.W.2d 912. This Court found that under these facts the report was "devoid of any indication that the driver's body contained alcohol" which made the report and notice deficient. Id. at ¶ 12.

[¶26] Here, like Morrow, Officer Ware checked the box indicating Sutton refused the onsite screening test and indicated a traffic violation was the reason for the stop. However, in contrast to Morrow, Officer Ware filled out the probable cause portion of the form, checking "odor of alcoholic beverage" and also explaining that

Sutton declined field sobriety testing. This information was sufficient for the Department to reasonably infer that Officer Ware had determined Sutton's body contained alcohol.

[¶27] Yet, Sutton asserts the "odor of alcoholic beverage" box being checked is insufficient to show Officer Ware believed Sutton's body contained alcohol because the box does not delineate where the odor was coming from. Appellant's Br. ¶ 23. Sutton claims it is just as likely that the odor of alcoholic beverage was coming from a passenger or compartment of the vehicle. *Id.* Sutton's claim is incorrect as the box is not as vague as he suggests. The box is specifically located on the Report and Notice under the section "Probable cause to arrest/lawfully detain." In order for the odor of an alcoholic beverage to have any rational basis for probable cause to arrest an individual, the odor must be an odor emanating from the person being arrested. An odor of alcoholic beverage from a passenger or even from a vehicle compartment does not provide any valid basis in a probable cause inquiry. Therefore, the fact that Officer Ware marked the "odor of alcoholic beverage" box under the probable cause section of Sutton's Report and Notice is sufficient evidence to show the officer believe Sutton's body contained alcohol. Therefore, the Department had authority to revoke Sutton's driving privileges.

**II. The hearing officer's findings that Sutton refused to submit to a request for an onsite screening test under N.D.C.C. § 39-20-14 is not against the greater weight of the evidence.**

[¶28] "Whether a driver has refused to submit to a chemical test is a question of fact." Gardner v. N.D. Dep't of Transp., 2012 ND 223, ¶ 15, 822 N.W.2d 55.

"[F]ailure to submit to a test, whether by stubborn silence or by a negative answer,

can be a refusal.” Id. (citing Mayo v. Moore, 527, N.W.2d 257, 260 (N.D. 1995). The Report and Notice Officer Ware issued to Sutton serves as prima facie evidence that Sutton refused testing under N.D.C.C. § 39-20-14. N.D.C.C. § 39-20-05(4) provides that the regularly kept records of the director may be introduced at a hearing and that those records are prima facie evidence of their contents without further foundation. The Department’s Report and Notice form is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department. Dawson v. N.D. Dep’t of Transp., 2013 ND 62, ¶ 23, 830 N.W.2d 221. See also Schock v. N.D. Dep’t of Transp., 2012 ND 77, ¶ 15, 815 N.W.2d 255. The Report and Notice form unequivocally indicates that Sutton “Refused onsite screening test (NDCC Section 39-20-14 or 39-06.2-10.2).” Tr. Ex. 1b. When Sutton’s Report and Notice was admitted into evidence, the information indicating he refused the requested testing under N.D.C.C. § 39-20-14 became “prima facie evidence”. See Dawson, at ¶ 23.

[¶29] The term “prima facie evidence” is defined as meaning “[e]vidence good and sufficient on its face . . . and which if not rebutted or contradicted, will remain sufficient.” Black’s Law Dictionary 1071 (5<sup>th</sup> ed. 1979). “If a driver want[s] to discredit the prima facie fairness and accuracy of a test, it [is] the driver’s responsibility to produce evidence that the test was not fairly or adequately administered. . . . A driver must do more than raise the mere possibility of error.” Berger v. State Highway Comm’r, 394 N.W.2d 678, 688 (N.D. 1986). Prima facie evidence is not rebutted simply by asserting the officer could not recall how exactly Sutton refused the onsite screening test.

[¶30] Rather, Sutton was required to present actual evidence contradicting the prima facie evidence that he did not refuse the onsite screening test. See Gillmore v. Levi, 2016 ND 77, ¶ 12, 877 N.W.2d 801 (stating, "... Gillmore had the burden to rebut the prima facie evidence contained in the report and notice); Thorsrud v. Dir., N.D. Dep't of Transp., 2012 ND 136, ¶ 10, 819 N.W.2d 483 (stating, "once the record and checklist was received into evidence, Thorsrud had the burden to present sufficient evidence to rebut the prima facie evidence of fair administration by proving Officer Nielsen had not followed the approved method")

[¶31] Sutton did not rebut the prima facie showing that he refused the onsite screening test. Sutton did not present any testimony contradicting the prima facie showing. The cross examination of Officer Ware also did not call into question the accuracy of Officer Ware's reference to the refusal of the onsite screening test under N.D.C.C. § 39-20-14 on the Report and Notice. Further, in addition to the Report and Notice, Officer Ware testified that Sutton refused the onsite screening test. See Tr. 8, ll. 3-15. Simply because Officer Ware could not recall at the time of the hearing the "exact way that [Sutton] declined" onsite screening testing, whether verbal or otherwise, does not rebut the prima facie showing. Tr. 9, ll. 5-7.

[¶32] Officer Ware's testimony that Sutton refused testing was not contested at the hearing and either alone or in conjunction with the Report and Notice is sufficient evidence to determine that Sutton refused the onsite screening test requested under N.D.C.C. § 39-20-14. Based on this evidence, the hearing officer determined "Mr. Sutton refused the onsite screening test." Tr. 22, l. 21. This finding is supported by the greater weight of the evidence in the record. The



Department had grounds to revoke Sutton's driving privileges.

**CONCLUSION**

[¶33] The Department respectfully requests that this Court affirm the judgment of the Williams County District Court and the Department's decision suspending Sutton's driving privileges for a period of 180 days.

Dated this 7<sup>th</sup> day of February, 2019.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: 

Michael Pitcher  
Assistant Attorney General  
State Bar ID No. 06369  
Office of Attorney General  
500 North 9<sup>th</sup> Street  
Bismarck, ND 58501-4509  
Telephone (701) 328-3640  
Facsimile (701) 328-4300  
Email [mtpitcher@nd.gov](mailto:mtpitcher@nd.gov)

Attorneys for Appellee.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Drew Park Sutton, )  
)  
Plaintiff/Appellant, )  
)  
v. )  
)  
North Dakota Department )  
of Transportation, )  
)  
Defendant/Appellee. )

**Supreme Ct. No. 20180427**  
**District Ct. No. 53-2018-CV-00902**

**AFFIDAVIT OF SERVICE  
BY ELECTRONIC MAIL**

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

¶1 Melissa Castillo 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 7<sup>th</sup> day of February, 2019, I served the attached **BRIEF OF APPELLEE** upon Drew Park Sutton, by and through his attorney Dan Herbel, by electronic mail as follows:

Dan Herbel  
Attorney at Law  
herbellawfirm@yahoo.com

  
Melissa Castillo

Subscribed and sworn to before me  
this 7<sup>th</sup> day of February, 2019.

  
Notary Public

**DONNA J CONNOR**  
Notary Public  
State of North Dakota  
My Commission Expires Aug. 6, 2021