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SUPREME COURT

20090106

JUN 2 2009

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

NO. 20090106

Larry Sample, d/b/a Sample Auto Sales,  
Appellant/Appellee,

vs.

North Dakota Department of Transportation,  
Appellee/Appellant.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 02 2009

STATE OF NORTH DAKOTA

Appeal from District Court, Burleigh County, North Dakota  
South Central Judicial District  
Honorable Gail Hagerty

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REPLY BRIEF OF APPELLEE

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Submitted by,

Michael J. Geiermann  
SCHULZ GEIERMANN & BERGESON  
LAW OFFICES, P.C.  
Attorney for Appellee  
P.O. Box 2196  
Bismarck, ND 58502-2196  
Telephone: (701) 223-1986

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1. **The Department of Transportation (DOT) does not have the authority to suspend Sample's motor vehicle dealer's license for a violation of N.D.C.C. § 39-04-17.**

The main argument Sample has made to this Court relates to the punishment or penalty he received from the DOT for violation of N.D.C.C. § 39-04-17. He received a suspension of his motor vehicle dealer's license. Sample argued the DOT does not have the authority to suspend his motor vehicle dealer's license and can only apply or assess a penalty in the form of a fine. In addressing these arguments, DOT has ignored several basic rules of statutory construction and has made an argument which calls into question the validity of the action taken by DOT.

The first error DOT makes in its argument is to lump together the provisions of N.D.C.C. § 39-04-17 and 39-22-04. DOT claims the issue is "whether Sample violated a duty relating to the sale of a motor vehicle under § 39-22-04, N.D.C.C.." (DOT Brief, p. 10). This is an interesting position for DOT to take in light of the fact the notices which were given to Sample indicated he had violated N.D.C.C. § 39-04-17. (App. p. 3, 5, 15, 24). It was not until the administrative hearing that N.D.C.C. § 39-22-04 comes into play as the ALJ disregards the plain language of N.D.C.C. § 39-04-17 and applies the suspension under N.D.C.C. § 39-22-04. Therefore, the initial premise DOT has argued is misplaced.

DOT would have a much better argument in trying to combine N.D.C.C. § 39-04-17 and 39-22-04 if the former did not contain its own penalty provision. For example, if N.D.C.C. § 39-04-17 did not contain a penalty provision, DOT would most likely have an excellent argument that provisions of N.D.C.C. § 39-22-04 apply

and suspension would be proper. However, in light of the fact the legislature has provided for a specific penalty for a violation of N.D.C.C. § 39-04-17, the DOT erred the specific statutory provision in attempting to suspend Sample's license. Furthermore, such an argument by the State ignores several basic rules of statutory construction.

"Generally, the law is what the legislature says, not what is unsaid. There exists a principle of statutory interpretation that the mention of one thing implies the exclusion of another. It is presumed the legislature intended all that it said, and that it said all it intended to say. The legislature must be presumed to have meant what it has plainly expressed. It must be presumed, also, it made no mistake in expressing its purpose and intent. Where the language of a statute is plain and unambiguous, the Court cannot indulge in speculation as to the probable or possible qualifications which might have been in the mind of the legislature, but the statute must be given effect according to its plain and obvious meaning, and cannot be extended beyond it." Little vs. Tracy, 497 N.W. 2d 700, 705 (N.D. 1993).

This language is directly applicable to the arguments by DOT that it has the right to suspend, notwithstanding the specific language of N.D.C.C. § 39-04-17. Sample's argument above also applies to the argument made by DOT that "N.D.C.C. § 39-04-17 does not explicitly prevent DOT from suspending dealers who fail to remit fees." (DOT Brief, p. 10). In essence, DOT wants this Court to ignore the specific language of the statute and to somehow become the legislature and expand DOT's authority which was given to them specifically by the legislature. This Court's function is to interpret the statute. The justice, wisdom, necessity, utility, and expediency of legislation are questions for legislative, not for judicial determination. Rodenburg vs. Fargo-Moorhead YMCA, 2001 ND 139 ¶ 29, 632 N.W. 2d 407.

This Court is charged with interpreting statutes. It is a fundamental rule of statutory construction that this Court will interpret statutes to give meaning and effect to every word, phrase, and sentence in a statute. First State Bank vs. Moen Enterprises, 529 N.W. 2d 887, 891 (N.D. 1995). To accept the arguments made by DOT would require this Court to ignore the plain language of the statute and to ignore the last sentence of N.D.C.C. § 39-04-17. While there may be valid policy concerns of DOT which would lead to the expansion of their authority, those arguments are for the legislature, not for this Court. This Court has stated:

"Our function is not to reevaluate those policy arguments, but to ascertain the legislature's intent from the language of the statute. We are not free to disregard the letter of the statute under the pretext of pursuing its spirit. The legislature, not this Court, should waive a competing policy concerns and decide whether to change the clear statutory language." See Treiber vs. Citizens State Bank, 1999 ND 130 ¶ 16 and 17, 598 N.W. 2d 96, 100 (N.D. 1999) (citations omitted).

In his brief, Sample took the position N.D.C.C. § 39-04-17 is a specific statute and N.D.C.C. § 39-22-04 is a general statute. DOT takes just the opposite position. However, a review of the case law will reveal the error in the position taken by DOT. N.D.C.C. § 39-04-17 is a specific statute which is designed to address specific conduct. In contrast, N.D.C.C. § 39-22-04 is far more general and is more of a "catch-all" statute. It must also be remembered the alleged violation made by Sample dealt with N.D.C.C. § 39-04-17 and not § 39-22-04. Specific provisions always control general provisions and in this scenario the DOT only had the authority to assess a fine, not suspension.

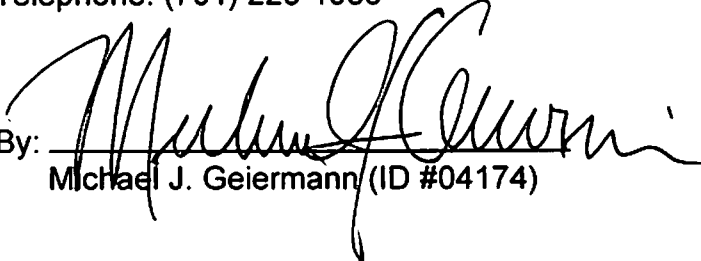
The last argument of DOT which must be addressed is the interesting argument it makes on Page 10 of their Brief. In arguing about the authority to

suspend or to fine, DOT takes the position "the minimum \$50 fine mentioned in N.D.C.C. § 39-04-17 applies to those in possession of the notary certificate". If that is in fact a proper interpretation of that statute, the entire process that has been taken against Sample is unlawful and has no legal basis. If DOT's argument is followed to its logical conclusion, the only person who could have violated N.D.C.C. § 39-04-17 was Ms. Hall and she should have been prosecuted and fined, if found guilty. Such an argument on behalf of DOT simply underscores the position of Sample that DOT does not have the authority to suspend his license but only to assess a fine for the infraction.

For all other reasons stated herein, Sample requests this Court to overturn the order of DOT.

Dated this 2<sup>nd</sup> day of June, 2009.

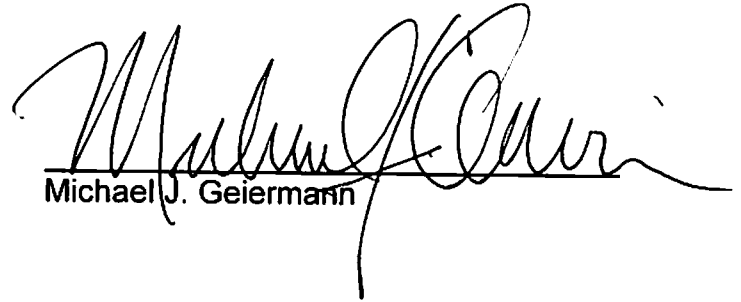
SCHULZ GEIERMANN & BERGESON  
LAW OFFICES, P.C.  
Attorneys for Appellee  
P.O. Box 2196  
Bismarck ND 58501-2196  
Telephone: (701) 223-1986

By:   
Michael J. Geiermann (ID #04174)

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing document was mailed to the following this 2<sup>nd</sup> day of June, 2009:

Michael T. Pitcher  
Assistant Attorney General  
Office of Attorney General  
500 N 9<sup>th</sup> Street  
Bismarck, ND 58501-4509



Michael J. Geiermann