

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

Alexis Kae Glaser

Appellee,

v.

North Dakota Department of Transportation

Appellant.

**Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable James S. Hill**

**SUPREME COURT NO. 20170129
BURLEIGH COUNTY NO. 08-2016-CV-02433**

BRIEF OF APPELLEE

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TABLE OF AUTHORITIES

No.

NORTH DAKOTA SUPREME COURT CASES

Dawson v. North Dakota Dep't of Transp., 2013 ND 62, 830 N.W.2d 221 2-7

Pavek v. Moore, 1997 ND 77, 562 N.W.2d 574 6

STATEMENT OF ISSUE

ISSUE: The Department failed to establish that chemical testing was conducted within two hours of driving.

STATEMENT OF CASE/ STATEMENT OF FACTS

[¶ 1] Ms. Glaser agrees with the statement of case and statement of facts presented by the Department.

LAW AND ARGUMENT

ISSUE: The Department failed to establish that chemical testing was conducted within two hours of driving.

[¶ 2] The Department failed to establish that the time of driving was within two hours. In *Dawson v North Dakota Dep't of Tramp.*, 2013 ND 62, 830 N.W.2d 2215 this Court addressed the time of driving issue with facts similar to the case at hand.

[¶ 3] In *Dawson*, the Report and Notice stated the appellant had been driving at 3:12 p.m. *Id.* at ¶ 2. The officer received a dispatch report at 3:15 p.m. that a boat had fallen off a trailer being pulled by a vehicle and the driver had not stopped. *Id.* at ¶ 3. The officer arrived at the scene of the accident and the driver was not present. *Id.*

[¶ 4] Several minutes later, the officer received another call from dispatch that the driver had returned to the scene. *Id.* at 4. The officer also returned to the scene and spoke with the appellant who was not in his vehicle but admitted to driving the vehicle and consuming

alcohol. *Id.* The officer interviewed several witnesses that stated the accident occurred within fifteen minutes prior to the call from dispatch. *Id.* The hearing officer found the appellant had been driving at 3:15 p.m., which was within two hours of the chemical test.

[¶ 5] This Court excluded the witnesses's statements as inadmissible hearsay. *Id.* at ¶ 18. This Court then reasoned, "The Department's argument is based only on assumptions without evidentiary support." *Id.* at ¶ 22. "[T]he record only indicates dispatch reported the accident to [the officer] at 3:12 p.m..." *Id.* "It does not establish when [the Appellant] was driving, when [the Appellant] parked his vehicle to the east of the accident, or when the accident occurred." *Id.*

[¶ 6] This Court further reasoned the Report and Notice form "is admissible as prima facie evidence of its contents once it is forwarded to the director of the Department." *Id.* ¶ 23. "We have held the Report and Notice form, coupled with an officer's testimony, may be sufficient to establish the time of driving in order to determine whether the chemical test was performed within two hours of that time." *Id.* (quoting *Pavek v Moore*, 1997 ND 77, ¶ 83 562 N.W.2d 574). "However, the time of driving may be placed into question at the administrative hearing." *Id.*

[¶ 7] Finally, this Court further reasoned the officer had not seen the Appellant driving. *Id.* at ¶ 26. The Appellant had not told the officer when he was driving and the officer based the time of driving and the accident on the time of the initial dispatch report and witnesses' statements. *Id.* "Although the Report and Notice is prima facie evidence of the time of driving, the evidence at the administrative hearing established that 3:12 p.m. was not the time of driving, but was the time [the officer] received the initial dispatch report that an accident had occurred." *Id.* The time of driving on the Report and Notice had no support in the

record and the court determined “a reasoning mind could not have reasonably concluded the time of driving under the facts of [the] case.” *Id.* Thus, this Court reversed the district court’s judgment and hearing officer’s decision because the Department had failed to establish the chemical test had been administered within two hours of the Appellant’s driving. *Id.* at ¶ 26-27.

[¶ 8] In the present case, the District Court found that, from the record a reasoning mind could not reasonably determine the time of driving. According to the *Dawson* reasoning, although the Crash Report and Report and Notice forms are prima facie evidence of their contents, the time of driving may be called into question. At the hearing, Officer Gallagher testified, in pertinent part, as follows:

Ms. Huber: And when you arrived what did you observe?

Officer Gallagher: There were two...two people standing outside of the vehicle, a female and a male. I spoke with Officer Rasmussen. He explained to me what was going on.

...

Officer Gallagher: [Officer Rasmussen] told me the female was the driver of the vehicle that stuck the parked car.

...

Ms. Huber: Did he explain to you how he knew the female was the driver?

Officer Gallagher: I'm not sure. I don't know if the female was sitting in the car when he arrived or if she was outside. I don't know.

...

Officer Gallagher: I did not ask [Glaser] about the motor vehicle accident or driving.

...

Mr. McCabe: So the time of driving on the Report and Notice, you would...you would not know the time of driving because you weren't there? You...you don't have any direct knowledge of the time of driving?

Officer Gallagher: That...that's going to be the time of...the time of the call...when the call came in.

Mr. McCabe: Okay. The time of driving we don't know, that the?

Officer Gallagher: Not the exact no.

Mr. McCabe: Okay.

Officer Gallagher: Because I wasn't there.

...

Mr. McCabe: [W]ould it be fair to say you did not have anything to do with preparing the crash report?

Officer Gallagher: That's fair to say.

Mr. McCabe: Okay. So anything it says on there you have no knowledge of directly? You didn't write it?

Officer Gallagher: Correct.

[¶ 9] Similar to the facts in *Dawson*, it is clear from Officer Gallagher's testimony that the ascertained time of driving listed on the Report and Notice form was founded on the call from dispatch. Officer Gallagher specifically testified that he observed Glaser standing outside her vehicle when he arrived at the scene. The only knowledge imputed from Officer Rasmussen to Officer Gallagher was that Glaser was indeed the driver and that she appeared to be intoxicated. Officer Gallagher provided no testimony indicating how he determined the time of driving to be 2:37 a.m. other than that's when the call from dispatch came in. Thus, Officer Gallagher's estimated time of driving is based on assumptions rather than observations. The District Court found that there was no evidence in the record to support the Report and Notice time of driving as 2:37 a.m.

[¶ 10] Additionally, the District Court found that the time of the accident on the Crash Report was also unsupported by the record. The time of driving was not imputed to Officer

Gallagher. Although the District Court found the Crash Report was admissible, the time of driving was called into question at the hearing and raised on appeal. Officer Rasmussen did not testify. Officer Gallagher specifically testified that he did not know the “exacts” of the time of driving.

[¶ 11] Because the time of driving was not established at the hearing, the District Court found that a reasoning mind could not reasonably conclude the time of driving was 2:37 a.m. Therefore, the District Court found that, because the time of driving has not been established, the Department failed to show that the chemical test was administered within two hours of driving.

CONCLUSION AND PRAYER FOR RELIEF

[¶ 12] WHEREFORE, the Appellee, Alexis Kae Glaser, by and through her attorney, Chad R. McCabe, respectfully prays that this Court will affirm the decision of the District Court reversing the hearing officer’s decision.

Dated this 21st day of July, 2017.

/s/ Chad R. McCabe _____
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CERTIFICATE OF SERVICE

[¶ 13] A true and correct copy of the foregoing document was sent by electronic transmission on this 21st day of July, 2017, to the following:

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/s/ Chad R. McCabe
CHAD R. MCCABE