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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kyle Steven Ouradnik,	)	
	)	
Appellee,	)	**Supreme Ct. No. 20190293**
	)	
v.	)	
	)	**District Ct. No. 09-2019-CV-01615**
Ronald Henke, Interim Director,	)	
Department of Transportation,	)	**ORAL ARGUMENT REQUESTED**
	)	
Appellant.	)	

APPEAL FROM THE AUGUST 5, 2019,
JUDGMENT OF THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE THOMAS R. OLSON

BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellant.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph(s)

Cases

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES

[¶1] Whether the District Court erred in granting Ouradnik's appeal and reversing the Hearing Officer's Decision when it determined that Ouradnik did not waive his argument regarding the omission of the word "urine" from the implied consent advisory by failing to raise a proper objection at the administrative hearing and by failing to include the issue in his specifications of error on appeal based upon the District Court's reasoning that the Hearing Officer's Decision had not become final at the time of the Supreme Court's decision in State v. Vigen, 2019 ND 134, 927 N.W.2d 430.

[¶2] Whether the District Court erred in granting Ouradnik's appeal and reversing the Hearing Officer's Decision when it determined that, regardless of whether a specific objection was made to omission of the word "urine" from the implied consent advisory, "it is clear, post-Vigen, that the finding of fact are not supported by the evidence."

STATEMENT OF CASE

[¶3] North Dakota Highway Patrol Trooper Paul Sova ("Trooper Sova") arrested Kyle Steven Ouradnik ("Ouradnik") on April 5, 2019, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellant ("Dep't App.") at 8. After the conclusion of the May 6, 2019, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Ouradnik's driving privileges for a period of 91 days. Id. at 12-13.

[¶4] Ouradnik requested judicial review of the Hearing Officer's Decision by the District Court. Id. at 14-19. The District Court reversed the Hearing Officer's

Decision. Id. at 20-24. The Department has appealed the District Court's Judgment. Id. at 28-29.

REQUEST FOR ORAL ARGUMENT

[¶5] The Department requests the Court schedule oral argument in this case under N.D. R. App. P. 28(h). This matter involves the question of whether the Supreme Court's decision in State v. Vigen, 2019 ND 134, 927 N.W.2d 430, regarding the issue of the omission of the word "urine" from the implied consent advisory -- which was issued after the conclusion of Ouradnik's administrative hearing, but while his appeal to the District Court was pending -- should be given retroactive effect when (1) Ouradnik failed to raise a proper objection at the administrative hearing, (2) Ouradnik failed to include the issue in his specifications of error on appeal to the District Court, and (3) the issue was not tried by the express or implied consent of the parties before the District Court. See Forster v. N.D. Workers Comp. Bureau, 447 N.W.2d 501 (N.D. 1989). Oral argument would be helpful in the Court's de novo review of the District Court's decision and the Hearing Officer's decision.

STATEMENT OF FACTS

[¶6] On April 5, 2019, North Dakota Highway Patrol Trooper Ben Hixson ("Trooper Hixson") was assigned to flood duty at a "road closure checkpoint" when he observed a vehicle that was being operated by Ouradnik nearly strike a railroad bridge. Transcript ("Tr.") at 4, l. 23 – 5, l. 20. Trooper Hixson testified that "the close proximity of the vehicle to the bridge and then a sharp movement back" led him "to believe the driver was either impaired or distracted." Id. at 6, ll. 1-8.

[¶7] After making contact with the driver, Trooper Hixson observed Ouradnik had bloodshot and watery eyes further leading the law enforcement officer to believe Ouradnik was "very intoxicated." Id. at 6, ll. 18-19. When asked about his alcohol consumption, Ouradnik admitted "he had two to three beers." Id. at 6, ll. 14-16. Trooper Hixson also observed that Ouradnik mumbled, had slurred speech and appeared confused. Id. at 6, ll. 22-23. Due to his concerns that Ouradnik was over the legal limit, Trooper Hixson requested that Ouradnik park his vehicle on the side of the road and then advised him that another "officer would be there shortly." Id. at 9, ll. 5-12.

[¶8] When Trooper Sova arrived at the scene, Trooper Hixson advised him of his observations and his belief that Ouradnik was under the influence and "asked him to make sure that [Ouradnik] was okay to drive." Id. at 9, l. 21 – 10, l. 1. Trooper Sova testified that when he made contact with Ouradnik, he observed the odor of an alcoholic beverage coming from Ouradnik's window and that Ouradnik had a flushed face and watery eyes leading the law enforcement officer to believe "Ouradnik had possibly been consuming alcohol." Id. at 22, l. 24 – 23, l. 5.

[¶9] Trooper Sova requested Ouradnik submit to field sobriety tests. Id. at 23, l. 25 – 24, l. 1. The results of the horizontal gaze nystagmus test, the walk-and-turn test, and the one-legged stand test indicated Ouradnik was under the influence. Id. at 24, l. 2 – 26, l. 10. Ouradnik did not properly perform the partial-alphabet test and the backwards-counting test. Id. at 26, l. 11 – 27, l. 8. Ouradnik produced a result of .13 on the onsite screening test. Id. at 27, ll. 10-22.

[¶10] Trooper Sova placed Ouradnik under arrest for driving while under the

influence. Id. at 28, ll. 3-4. Trooper Sova transported Ouradnik to the Cass County Correctional Center where he "informed him of the implied consent for a breath chemical test" and requested he submit to an Intoxilyzer 8000 test. Id. at 28, ll. 11-24. Trooper Sova testified he advised Ouradnik:

> I must inform you that North Dakota law requires you to take a chemical breath test to determine … (INAUDIBLE) … under the influence of alcohol or drugs. A refusal to submit to a test directed by a law enforcement officer may result in a revocation of your driving privileges for a minimum of 180 days and up to three years. I must inform you that refusal … refusal to take a breath test is a crime punishable in the same manner as driving under the influence. Do you consent to taking a breath test?

Id. at 34, l. 20 – 35, l. 4. The results of the Intoxilyzer test established Ouradnik had a blood alcohol concentration of 0.113% by weight. Dep't App. at 9.

STATEMENT OF ADMINISTRATIVE PROCEEDING

[¶11] At the hearing, Ouradnik objected to the admission into evidence of Exhibit 1, which included his Intoxilyzer Checklist and Record, on the basis of authentication. Tr. at 32, ll. 13-16. Ouradnik's objection was based on the grounds that Exhibit 1 bore the April 16, 2019, certification of Glenn Jackson who had been placed on administrative leave prior to the date of the certification and who had since resigned as the Division Director of the Department's Drivers License Division. Dep't App. at 7.

[¶12] Ouradnik explained:

> I would ask the Hearing Officer go through this is a widely noted news accounts of the former division director, now disgraced director resigned as chief of the Driver's License Division as pulled up on my cell phone here, KFYR TV two days ago reported Glenn Jackson's resignation after a stinging workplace investigation. So did the Grand Forks Herald. So did kfgo.com. Rob Port's Say Anything Blog today has an … a detailed article about the resignation. The public

> records all show that Glenn Jackson, the person whose signature that purports to be on Exhibit 1 has been on unpaid leave and incapable of performing any functions as the Driver's License Division Director since February 12th of this year. The Department of Transportation email sent to all news media accounts says they accepted the Driver's License Division Director, Glenn Jackson's, resignation as of May 3rd. The Department has made an interim director until the position can be filled. The documents purported to be certified and offered under Exhibit 1 are not made by a person with authority or authorization to make them and are not admissible under Rule 803 and 901.

Tr. at 32, l. 17 – 33, l. 13. The hearing officer overruled Ouradnik's objection and admitted Exhibit 1 into evidence. Id. at 33, ll. 14-18.

[¶13] After Exhibit 1 was admitted into evidence, Ouradnik questioned Trooper Sova as to the implied consent advisory that had been provided:

> Mr. Friese: I understand. What advisory did you give him?
>
> Trooper Sova: I gave him, I can read it directly to you.
>
> Mr. Friese: Did you read it from something at the time?
>
> Trooper Sova: Yes, I had it saved on my computer at the time.
>
> Mr. Friese: And you read it from your computer?
>
> Trooper Sova: Yeah and since then the advisory has changed but I do have the advisory that I read to him.
>
> Mr. Friese: Okay. What was that?
>
> Trooper Sova: You want the screening test one or implied for breath?
>
> Mr. Friese: The post-arrest advisory … (INAUDIBLE) …
>
> Trooper Sova: The post-arrest. The implied consent that I read was, I must inform you that North Dakota law requires you to take a chemical breath test to determine … (INAUDIBLE) … under the influence of alcohol or drugs. A refusal to submit to a test directed by a law enforcement officer may result in

a revocation of your driving privileges for a minimum of 180 days and up to three years. I must inform you that refusal … refusal to take a breath test is a crime punishable in the same manner as driving under the influence. Do you consent to taking a breath test?

Mr. Friese: And you testified that you've received information to provide a different advisory now?

Trooper Sova: Yes, since that date, the implied consent that we had been directed to give has changed.

Mr. Friese: And who's giving you the direction?

Trooper Sova: My Captain gave it to me, I'm not sure where he received it from, I'm not sure if it was a legislative change.

Mr. Friese: And what direction do you have now?

Trooper Sova: Now … I can pull that up as well. Now for the breath, I have, I must inform you that North Dakota law requires you to take the chemical breath or urine test to determine whether you're under the influence of alcohol or drugs. That refusal to submit to a test directed by a law enforcement officer may result in a revocation of your driving privileges for a minimum of 180 days and up to three years. I must inform you, a refusal to take a breath test is a crime punishable in the same manner as driving under the influence. Do you consent to taking a breath test?

Mr. Friese: And how long have you been giving that new admonition?

Trooper Sova: That new one, that's been since, I believe that was April 27th that I received that one.

Id. at 34, l. 9 – 36, l. 1.

[¶14] Ouradnik made no claim during closing argument regarding the substance of the implied consent advisory that had been provided to him. Instead, Ouradnik relied on his authentication objection and argued:

> The primary issue, and really, the dispositive issue in this case is that in order for the … the documents that are comprised within Exhibit 1 to be admitted into evidence, the Department, who is the proponent of hearsay evidence and that Exhibit 1 is clearly hearsay, may bear the burden of establishing that the statement qualifies under one of the exceptions, the hearsay rules under 803 and 804 and the Hearing Officer maybe should take a look at Peterson versus North Dakota Department of Transportation, 518 N.W.2d 690 (1994), a North Dakota Supreme Court decision. The … the Department is the one who bears the burden of establishing that a statement qualifies under the hearsay rule. In this case, if there is admission of maybe Exhibit 1, it has to be authenticated. It must be authenticated consistent with Rule 901 and Rule 902 which collectively are the authentication and self-authentication rules. Specific evidence of authenticity is a condition precedent to admissibility but it's not required, if it is a domestic, public document under seal, which Exhibit 1 is not; or a domestic, public document not under seal, which you'll see that it has to be signed by a public officer who is and has official capacity to sign that document. In this case, as the Hearing Officer has taken judicial notice of and is widely known in the community, the proponent of this exhibit, Glenn Jackson, has been without official capacity since February 12th and resigned effective May 3rd. The evidence being offered today is offered when the person who is purportedly providing authentication clearly does not have statutory or rule authority to be making the authentication consistent with Peterson versus Director. *Exhibit 1 should not be admitted because it is neither a regularly kept record nor is it hearsay subject to an exception nor is it properly authenticated*. With Exhibit 1 not being admitted into the record, there is no basis for the administrative suspension and we would ask that the Hearing Officer issue a decision accordingly.

Id. at 43, l. 16 – 44, l. 24 (emphasis added).

[¶15] The hearing officer addressed Ouradnik's authentication argument stating "[t]he hearing officer took judicial notice that DLD Director Glenn Jackson (Jackson) was on administrative leave on April 16, 2019 when the Exhibit 1 was certified. Mr. Ouradnik did not appear for the administrative hearing or offer any evidence regarding the authenticity of documents certified in Exhibit 1." Dep't App. at 12. The hearing officer concluded "Ouradnik did not offer any evidence to

challenge the authenticity of the documents certified by Exhibit 1, page 1." Id. at 13.

[¶16] The hearing officer also determined "[Ouradnik] was provided the statutory implied consent advisory and consented to a chemical breath test." Id. at 12. The hearing officer concluded "Ouradnik was arrested for DUI, was provided the statutory implied consent advisory, consented to a chemical breath test, and was tested in accordance with NDCC Chapter 39-20 and the approved method." Id. The hearing officer issued his decision suspending Ouradnik's driving privileges for a period of 91 days. Id. at 13.

[¶17] Ouradnik requested judicial review of the Hearing Officer's Decision. Dep't App. at 14-19. Ouradnik's specifications of error included the claim that "[t]he hearing officer erred by admitting evidence and records without foundation, without authentication, and purported certification by a DOT Division Director who was on leave and without authority to certify the records." Id. at 15. Ouradnik's specifications of error did not include any claim regarding the substance of the implied consent advisory that he was provided.

[¶18] Three days following Ouradnik's May 13, 2019, appeal of the Hearing Officer's Decision to the District Court, the Supreme Court issued its decision in Vigen, 2019 ND 134, 927 N.W.2d 430. In Vigen, at ¶ 14, the Court determined that because the implied consent advisory that was provided to the driver omitted the word "urine," "Vigen was not fully informed on the contents of N.D.C.C. § 39-20-01(3)(a), and any evidence obtained as a result of the breath test is therefore inadmissible under N.D.C.C. § 39-20-01(3)(b)."

[¶19] In his brief on appeal to the District Court, Ouradnik relied on Vigen in support of his position that *the hearing officer erred in overruling his objection to the admission of Exhibit 1* "because the record unequivocally demonstrates Sova did not read Mr. Ouradnik the required implied consent advisory as required by statute to allow admission of the chemical test results." Register of Actions at Index # 23; ¶ 6. Ouradnik requested the District Court reverse the administrative decision because the hearing officer's finding of fact that "Sova provided Mr. Ouradnik 'the statutory implied consent advisory,'" was not supported by a preponderance of the evidence. Id.

[¶20] The Department responded by arguing that (1) Ouradnik waived any argument he might have had regarding the substance of the implied consent advisory by failing to raise a proper objection at the administrative hearing; and (2) Ouradnik waived any argument he might have had regarding the substance of the implied consent advisory by failing to include the issue in his specifications of error on appeal. Id. at Index # 25; ¶¶ 15-26.

[¶21] The District Court issued its Order on Administrative Appeal in which the Court reversed the Hearing Officer's Decision. Dep't App. at 20-24. The District Court determined:

> [¶7] The hearing officer entered a finding of fact which stated "[Ouradnik] was provided the statutory implied consent advisory and consented to a chemical breath test." The hearing officer suspended Ouradnik's driving privileges for 91 days.
>
> [¶8] Between the hearing officer's decision and this appeal, the North Dakota Supreme Court entered a decision in State v. Vigen, in which the Court determined that a failure to read the "or urine" portion of Section 39-20-01(3)(a) failed to convey all necessary substantive information required by the Legislature. 2019 ND 134, 927 N.W.2d

430.

Id. at 21-22.

[¶22] The District Court ruled:

> [¶13] In State v. Vigen, 2019 ND 134, the North Dakota Supreme Court held that a failure to read the "or urine" portion of Section 39-20-01(3)(a) fails to meet this statutory requirement. This failure renders a test result inadmissible.
>
> [¶14] Trooper Sova also failed to give the "or urine" portion of the implied consent advisory. Because Trooper Sova failed to give the "or urine" portion of the implied consent advisory, under the Court's decision in Vigen, the hearing officer's finding that Trooper Sova provided the statutory implied consent advisory is not a finding of fact supported by the evidence. Accordingly, the Court is required to reverse the decision.
>
> [¶15] The Department argues that this Court should not review the specific error with the advisory because it was not specifically objected [to] during the administrative hearing. However, it would be unfair to this Court to deny the opportunity for argument on the point, because Vigen had yet to be decided at the time of the hearing. Vigen is controlling authority for this matter, because this matter had not become final by the time of the Vigen decision. Further, it is clear, post-Vigen, that the findings of fact are not supported by the evidence, regardless of whether a specific objection was made to the officer admitting evidence.

Id. at 23.

[¶23] Judgment was entered on August 5, 2019. Id. at 26. The Department appealed the Judgment to the North Dakota Supreme Court. Id. at 28-29. The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer's Decision suspending Ouradnik's driving privileges for a period of 91 days.

STANDARD OF REVIEW

[¶24] "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.

[¶25] "In an appeal from a district court's review of an administrative agency's decision, [the Court] review[s] the agency's decision." Haynes, 2014 ND 161, ¶ 6, 851 N.W.2d 172. 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.

LAW AND ARGUMENT

I. The District Court erred in granting Ouradnik's appeal and reversing the Hearing Officer's Decision when it determined that Ouradnik did not waive his argument regarding the omission of the word "urine" from the implied consent advisory by failing to raise a proper objection at the administrative hearing and by failing to include the issue in his specifications of error on appeal based upon the District Court's reasoning that the Hearing Officer's Decision had not become final at the time of the Supreme Court's decision in State v. Vigen, 2019 ND 134, 927 N.W.2d 430.

A. The retroactive application of the Court's decision in Vigen regarding the omission of the word "urine" from the implied consent advisory should be limited to pending cases in which the issue has been properly raised and preserved before the administrative tribunal and the District Court.

[¶26] "As a general rule, judicial decisions are retroactive in the sense that they apply both to the parties in the case before the court and to all other parties in pending cases." Crowe v. Bolduc, 365 F.3d 86, 93 (1st Cir. 2004) (citing James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 535 (1991); Amann v. Town of Stow, 991 F.2d 929, 934 (1st Cir. 1993) (per curiam)). See also Gonzalez v. U.S. Dep't of Homeland Sec., No. C06-1411-MJP, 2009 WL 302283, at *4 (W.D. Wash. Feb. 6, 2009) ("In general, judicial decisions that are to be given binding precedential effect are retroactive in the sense that they apply as precedent to all future cases, including cases pending at the time the precedent was created.") (quoting 18 Moore's Federal Practice § 134.06[2]).

[¶27] *The caveat to this general rule requires that the issue has been properly raised and preserved before the lower tribunal*. See, e.g., Com. v. Smith, 17 A.3d 873, 893-94 (Pa. 2011) ("[I]t is well-settled that in order for a new law to apply retroactively to a case pending on direct appeal, the issue had to be preserved in

the trial court and at all subsequent stages of the adjudication up to and including the direct appeal."); Clifton v. Mass. Bay Transp. Auth., 839 N.E.2d 314, 321 (Mass. 2005) (judicial decision "providing new standard by which a jury may bar as untimely employee's discrimination claim . . . would apply retroactively to case pending appeal when [judicial] decision was issued, where issue of applicable standard was preserved by employer's timely objection at trial."); State v. Natale, 878 A.2d 724, 744 (N.J. 2005) (judicial decisions creating "a new rule of law" applied retroactively to cases pending on direct appeal and to those defendants who raised claims at trial or on direct appeal); Paul v. Wayne Co. Dep't of Pub. Serv., 722 N.W.2d 922, 924 (Mich. Ct. App. 2006) ("Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved.").

[¶28] In Forster v. North Dakota Workers Compensation Bureau, this Court considered whether due-process requirements announced in a previous case should be applied retrospectively. 447 N.W.2d 501 (N.D. 1989). The Bureau accepted an application from Forster for workers compensation benefits and paid him disability benefits from December 20, 1986, through July 26, 1987. Id. at 502. "On July 21, 1987, the Bureau notified Forster by letter of its decision to terminate his disability benefits on July 26, 1987." Id.

[¶29] "On December 15, 1987, the Bureau issued an order denying any further disability benefits to Forster" and "Forster timely submitted a petition for rehearing with the Bureau." Forster, 477 N.W.2d at 502. Prior to the date of Forster's April 14, 1988, formal hearing, the Court issued its decision in Beckler v. North Dakota

Workers Compensation Bureau, 418 N.W.2d 770 (N.D. 1988), on February 1, 1988, in which it determined that letters concerning the Bureau's decisions to terminate disability benefits – such as the letter that had been sent to Forster – did not conform to certain due-process requirements. Id. "Neither Forster's petition nor his argument at the formal hearing asserted any violation by the Bureau of his due-process rights under Beckler, even though Beckler had been decided by that time." Id.

[¶30] "[T]he Bureau issued a decision affirming its earlier order denying Forster further disability benefits," which Forster appealed to the district court. Forster, 477 N.W.2d at 502. "Forster's specifications of error did not contain any allegation that he had been denied due process." Id. "Nevertheless, Forster did raise a due-process issue in his brief to the district court, contending that the Bureau violated his constitutional rights under the Beckler decision." Id. "The Bureau not only failed to object to the fact that the due-process issue was not raised by Forster in his specifications of error, but in its responsive brief to the district court the Bureau argued the due-process issue." Id.

[¶31] "[T]he sole issue raised by the parties on [the] appeal [was] whether the due-process requirements announced in Beckler should have been applied retrospectively." Forster, 477 N.W.2d at 502. "Initially the Bureau argue[d] that the Beckler due-process issue was not properly raised at the district court level because Forster did not allege the due-process violation in the specifications of error he submitted . . ." Id. at 503.

[¶32] The Court stated, "[h]owever, the record indicates, and the Bureau's counsel admits, that the Bureau failed to make any objection at the district court to Forster's raising of the due-process issue, and that it briefed and argued the issue at that level." Forster, 477 N.W.2d at 503. The Court determined that "[b]ecause the Bureau failed to object that the due-process issue was not contained in Forster's specifications of error, and because it voluntarily proceeded to brief and argue the constitutional issue before the district court, we think it was proper, under the circumstances of this case, for the district court to entertain the Beckler due-process issue." Id. (footnote omitted) (citing by comparison N.D.R.Civ.P. 15(b)(2) ("when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings").

[¶33] After applying the relevant considerations set forth in Olson v. Dillerud, 226 N.W.2d 363 (N.D. 1975), the Court restricted the retroactive application of Beckler "***only to those claims that were pending in the appeal process as of the date of that decision, and in which the issue was raised before the Bureau and on appeal either by the specifications of error or trial by agreement of the parties***." Id. at 505 (emphasis added).

B. Ouradnik waived his argument regarding the omission of the word "urine" from the implied consent advisory by failing to raise a proper objection at the administrative hearing.

[¶34] "Appellate review of alleged errors in the admission of evidence is governed by N.D.R.Ev. 103." Gonzalez v. Tounjian, 2003 ND 121, ¶ 30, 665 N.W.2d 705. Rule 103(a)(1) provides in part:

> **(a) Preserving a Claim of Error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
>
> (1) if the ruling admits evidence, a party, on the record:
>
> (A) timely objects or moves to strike; and
>
> (B) states the specific ground, unless it was apparent from the context;

N.D. R. Ev. 103(a)(1).

[¶35] "Under Rule 103, one of the requirements for an effective appeal based upon erroneous admission of evidence is that the matter has been properly raised in the trial court so the court can intelligently rule on it." Gonzalez, 2003 ND 121, ¶ 31, 665 N.W.2d 705 (citing In re P.A., 1997 ND 146, ¶ 13, 566 N.W.2d 422). "As [the Court] explained in Piatz v. Austin Mut. Ins. Co., 2002 ND 115, ¶ 7, 646 N.W.2d 681 (citations omitted):

> A touchstone for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so the trial court could effectively rule on it. To take advantage of irregularities during trial, a party must object at the time they occur, so that the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. A party's failure to object to an irregularity at trial acts as a waiver."

Id. The Court has "noted that it is 'fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.'" Gonzalez, 2003 ND 121, ¶ 31, 665 N.W.2d 705 (quoting Messer v. Bender, 1997 ND 103, ¶ 10, 564 N.W.2d 291 (quoting 5 Am. Jur. 2d Appellate Review § 690 (1995)); citing Roise v. Kurtz, 1998 ND 228, ¶ 9, 587 N.W.2d 573). "The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new strategies or theories." Id. (quoting

Roise, at ¶ 9; Mahoney v. Mahoney, 1997 ND 149, ¶ 13, 567 N.W.2d 206).

[¶36] "Rule 103 requires an objection on a specific ground unless the reason for the objection is apparent from the context." Gonzalez, 2003 ND 121, ¶ 32, 665 N.W.2d 705 (citing Scientific Application, Inc. v. Delkamp, 303 N.W.2d 71, 77 (N.D. 1981)). "Again, the reason for requiring a specific objection is to give the trial court an opportunity to rule upon the objection:

> If the administration of the exclusionary rules of evidence is to be fair and workable the judge must be informed promptly of contentions that evidence should be rejected, and the reasons therefor. The initiative is placed on the party, not on the judge. The general approach, accordingly, is that a failure to object to an offer of evidence at the time the offer is made, assigning the grounds, is a waiver upon appeal of any ground of complaint against its admission."

Id. (quoting City of Fargo v. Erickson, 1999 ND 145, ¶ 22, 598 N.W.2d 787 (Sandstrom, J., concurring specially) (quoting Charles McCormick, McCormick on Evidence § 52, at 200-01 (4th ed. 1992)) (emphasis omitted in original)).

[¶37] This Court's "standard for preserving evidentiary issues on appeal is well established:

> We have long held that an effective appeal of any issue must be appropriately raised in the trial court in order for us to intelligently rule on it. In general, a party must object at the time the alleged irregularity occurs; failure to object acts as a waiver of the claim of error. The party must object at the time the error occurs during trial so the trial court may take appropriate action if possible to remedy any prejudice that may have resulted. . . .

Haider v. Moen, 2018 ND 174, ¶ 14, 914 N.W.2d 520 (quoting Linstrom v. Normile, 2017 ND 194, ¶ 10, 899 N.W.2d 287) (citations and quotation marks omitted in original). "On appeal a party cannot complain about error that is of their own making." Lorenz v. Lorenz, 2007 ND 49, ¶ 21, 729 N.W.2d 692.

[¶38] Furthermore, "[t]his Court has repeatedly declined to decide issues raised for the first time on appeal:

> A party may not raise an issue or contention that was not previously raised or considered in the lower court for the first time on appeal. 'If a party fails to properly raise an issue or argument before the trial court, the party is precluded from raising that issue or argument on appeal.'"

In Interest of F.M.G., 2017 ND 123, ¶ 14, 894 N.W.2d 850 (quoting Schiele v. Schiele, 2015 ND 169, ¶ 16, 865 N.W.2d 433 (quoting S.H.B. v. T.A.H., 2010 ND 149, ¶ 12, 786 N.W.2d 706) (citations omitted in original)). "'Issues or contentions not adequately developed and presented at trial are not properly before this Court. The purpose of an appeal is to review the actions of the trial court, not to grant the appellant the opportunity to develop new theories of the case.'" Id. (quoting Niles v. Eldridge, 2013 ND 52, ¶ 7, 828 N.W.2d 521 (quoting In Interest of A.G., 506 N.W.2d 402, 403 (N.D. 1993))).

[¶39] In addition, "'[a] change in the law amounts to sufficient cause for failing to object only if the change is so novel that its legal basis was not reasonably available or foreseeable at the time of trial,' United States v. Shaid, 937 F.2d 228, 231 n. 5 (5th Cir. 1991), and the 'mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default,' Murray v. Carrier, 477 U.S. 478, 486-87 (1986)." Belle v. United States, 142 F.3d 431, at *5 (6th Cir. 1998).

[¶40] Any potential issue regarding compliance with the implied consent advisory language was ***not*** so novel that its legal basis was not reasonably available or foreseeable at the time of Ouradnik's administrative hearing. In City of Bismarck

v. Vagts, this Court noted the line of cases in which it has "considered issues involving compliance with the implied consent advisory language in N.D.C.C. § 39-20-01(3)." 2019 ND 224, ¶ 14, 932 N.W.2d 523 (citing Vigen, 2019 ND 134, 927 N.W.2d 430; State v. Dowdy, 2019 ND 50, 923 N.W.2d 109; City of Grand Forks v. Barendt, 2018 ND 272, 920 N.W.2d 735; LeClair v. Sorel, 2018 ND 255, 920 N.W.2d 306; Korb v. N.D. Dep't of Transp., 2018 ND 226, 918 N.W.2d 49; State v. Bohe, 2018 ND 216, 917 N.W.2d 497; Schoon v. N.D. Dep't of Transp., 2018 ND 210, 917 N.W.2d 199; State v. O'Connor, 2016 ND 72, 877 N.W.2d 312).

[¶41] With respect to its consideration of the language of the advisory that had been provided to an individual, this Court has stated "[w]e have never held that § 39-20-01(3)(a) must be read word-for-word--only that the substance must be conveyed in a way 'reasonably calculated to be comprehensible to the driver.'" LeClair, 2018 ND 255, ¶ 11, 920 N.W.2d 306 (citing State v. Ayala, 2017 ND 126, ¶¶ 8-9, 894 N.W.2d 865). "Although the preferred approach is to use the language of subdivision 3(a), it is only for substantive omissions that [the Court has] concluded an advisory was deficient." Id.

[¶42] In other words, although Vigen and the issue of whether the omission of the word "urine" from the advisory was a "substantive omission" rendering the advisory deficient had not been decided at the time of Ouradnik's hearing or when Ouradnik appealed the Hearing Officer's Decision to the District Court, a potential issue with the omission was not so novel that its legal basis was not reasonably available or foreseeable. Ouradnik chose to object to admission of Exhibit 1 – inclusive of his Intoxilyzer Test Record and Checklist – on the basis of its alleged lack of proper

authentication, rather than on the basis of the language of the implied consent advisory under N.D.C.C. § 39-20-01(3)(b). Ouradnik waived his argument regarding the omission of the word "urine" from the implied consent advisory by failing to raise a proper objection at the administrative hearing.

C. Ouradnik waived his argument regarding the omission of the word "urine" from the implied consent advisory by failing to include the issue in his specifications of error on appeal.

[¶43] "Judicial review of a hearing officer's decision to suspend, revoke, or deny a driver's license is governed by N.D.C.C. § 39-20-06, and provides:

> Any person whose operator's license or privilege has been suspended, revoked, or denied by the decision of the hearing officer under section 39-20-05 may appeal within seven days after the date of the hearing under section 39-20-05 as shown by the date of the hearing officer's decision, section 28-32-42 notwithstanding, by serving on the director and filing a notice of appeal and specifications of error in the district court in the county where the events occurred for which the demand for a test was made, or in the county in which the administrative hearing was held."

Rounkles v. Levi, 2015 ND 128, ¶ 10, 863 N.W.2d 910 (quoting N.D.C.C. § 39-20-06). "[A] person appealing to the district court from the Department's decision to suspend driving privileges must comply with the specification-of-error requirement of N.D.C.C. § 28-32-42(4)." Id. (quoting Hamre v. N.D. Dep't of Transp., 2014 ND 23, ¶ 8, 842 N.W.2d 865 (quoting Daniels v. Ziegler, 2013 ND 157, ¶ 7, 835 N.W.2d 852)).

[¶44] "In Hamre, this Court discussed the interplay between N.D.C.C. §§ 28-32-42(4) and 39-20-06:

> 'Both statutes require the filing of specifications of error. To comply with the requirements of N.D.C.C. § 28-32-42(4), the specifications of error must 'identify what matters are truly at issue with sufficient

> specificity to fairly apprise the agency, other parties, and the court of the particular errors claimed.' Vetter v. N.D. Workers Comp. Bureau, 554 N.W.2d 451, 454 (N.D. 1996). This Court stated that after its decision in Vetter, it would no longer tolerate imprecise or boilerplate specifications of error. See generally id. Boilerplate specifications of error are those that are general enough to apply to any administrative agency appeal. Sonsthagen v. Sprynczynatyk, 2003 ND 90, ¶ 14, 663 N.W.2d 161. This rationale has also been applied in driver's license suspension cases. Id. Furthermore, the same purpose for filing the specifications of error applies under both statutes--to prevent meaningless specifications of error. We recognize that compliance with the specifications-of-error requirement, because of the different time limitations for filing, may be more difficult under N.D.C.C. § 39-20-06, but this is for the legislature to address.'"

Rounkles, 2015 ND 128, ¶ 10, 863 N.W.2d 910 (quoting Hamre, at ¶ 8 (quoting Dettler v. Sprynczynatyk, 2004 ND 54, ¶ 15, 676 N.W.2d 799). "In Hamre, this Court determined that issues not included in the specifications of error are not preserved for judicial review." Id. (citing Hamre, at ¶ 10).

[¶45] For example, the Court has rejected as being boilerplate the sole specification of error:

> "This appeal is taken upon the grounds that the decision by the Bureau is not in accordance with the law; that certain Findings of Fact made by the Bureau are not supported by a preponderance of the evidence; and that the Conclusions of Law made by the Bureau are not supported by its Findings of Fact."

Vetter v. N.D. Workers Comp. Bureau, 554 N.W.2d 451, 453 (N.D. 1996). The Court also has rejected as being "pure boilerplate" Dettler's claim that he was seized without reasonable and articulable suspicion based on the "specification of error, which state[d], 'The Hearing Officer's Decision is not in accordance with the law and is in violation of the Appellant's constitutional and statutory rights.'" Dettler, 2004 ND 54, ¶ 16, 676 N.W.2d 799.

[¶46] In this case, Ouradnik's specifications of error did not include any claim regarding the substance of the implied consent advisory that he was provided. Dep't App. at 14-19. As with his objection at the administrative hearing, Ouradnik chose to limit his specification of error concerning the admission of Exhibit 1 – inclusive of his Intoxilyzer Test Record and Checklist – to the claim that "[t]he hearing officer erred by admitting evidence and records without foundation, without authentication, and purported certification by a DOT Division Director who was on leave and without authority to certify the records." Dep't App. at 15.

[¶47] In his brief on appeal to the District Court, however, Ouradnik requested the District Court reverse the administrative decision because *the hearing officer's finding of fact that "Sova provided Mr. Ouradnik 'the statutory implied consent advisory'", was not supported by a preponderance of the evidence*. Register of Actions at Index # 23; ¶ 6 (emphasis added). Consequently, to the extent Ouradnik relies on such a specification of error, including that "[t]he hearing officer erred in rendering factual findings which were contrary to the record and evidence" (Dep't App. at 15), the claim is a boilerplate specifications of error that is general enough to apply to any administrative agency appeal.

[¶48] Ouradnik waived his argument regarding the omission of the word "urine" from the implied consent advisory by failing to include the issue in his specifications of error on appeal.

D. The issue of whether the omission of the word "urine" from the implied consent advisory was a "substantive omission" rendering the advisory deficient was not tried by the express or implied consent of the parties before the District Court.

[¶49] The Department responded to Ouradnik's argument before the District

Court by arguing that (1) Ouradnik waived any argument he might have had regarding the substance of the implied consent advisory by failing to raise a proper objection at the administrative hearing; and (2) Ouradnik waived any argument he might have had regarding the substance of the implied consent advisory by failing to include the issue in his specifications of error on appeal. Register of Actions at Index # 25; ¶¶ 15-26. The District Court recognized the Department's position regarding the issue stating "[t]he Department argues that this Court should not review the specific error with the advisory because it was not specifically objected to during the administrative hearing." Dep't App. at 23.

[¶50] The issue of whether the omission of the word "urine" from the implied consent advisory was a "substantive omission" rendering the advisory deficient was not tried by the express or implied consent of the parties before the District Court

II. The District Court erred in granting Ouradnik's appeal and reversing the Hearing Officer's Decision when it determined that, regardless of whether a specific objection was made to omission of the word "urine" from the implied consent advisory, "it is clear, post-Vigen, that the findings of fact are not supported by the evidence."

[¶51] In this case, the District Court excused Ouradnik's procedural failings by intervening and independently determining that regardless of whether a specific objection was made to omission of the word "urine" from the implied consent advisory, "it is clear, post-Vigen, that the findings of fact are not supported by the evidence." Dep't App. at 23. The Court's reasoning fails to take into consideration that, under the reasoning of Forster, supra, the Vigen decision is not to be given retroactive effect in this proceeding because (1) Ouradnik failed to raise a proper

objection at the administrative hearing, (2) Ouradnik failed to include the issue in his specifications of error on appeal to the District Court, and (3) the issue was not tried by the express or implied consent of the parties before the District Court.

[¶52] At the time the hearing officer issued his decision, there was no Supreme Court precedent that controlled whether the omission of the word "urine" from the implied consent advisory was a "substantive omission" rendering the advisory deficient. Rather, at that time, the district court in Vigen had "found the modified advisory satisfied N.D.C.C. § 39-20-01(3)(a)." Vigen, 2019 ND 134, ¶ 3, 927 N.W.2d 430. Although Rule 103(e), N.D. R. Ev., provides that "[a] court may take notice of an error affecting a substantial right, even if the claim of error was not properly preserved," that rule *presupposes* the existence of error at the time.

[¶53] Under the law in effect at the time, it cannot be said that when the Hearing Officer's Decision was issued the finding of fact that "Sova provided Mr. Ouradnik 'the statutory implied consent advisory,'" was not supported by a preponderance of the evidence and that the finding constituted error. The District Court erred in granting Ouradnik's appeal and reversing the Hearing Officer's Decision when it determined that, regardless of whether a specific objection was made to the omission of the word "urine" from the implied consent advisory, "it is clear, post-Vigen, that the findings of fact are not supported by the evidence."

CONCLUSION

[¶54] The Supreme Court's decision in Vigen, regarding the issue of the omission of the word "urine" from the implied consent advisory – which was issued after the conclusion of Ouradnik's administrative hearing, but while his appeal to the District

Court was pending – should ***not*** be given retroactive effect because (1) Ouradnik failed to raise a proper objection at the administrative hearing, (2) Ouradnik failed to include the issue in his specifications of error on appeal to the District Court, and (3) the issue was not tried by the express or implied consent of the parties before the District Court.

[¶55] The Department requests this Court reverse the Judgment of the Cass County District Court and affirm the Hearing Officer's Decision suspending Ouradnik's driving privileges for a period of 91 days.

Dated this 4th day of November, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Douglas B. Anderson
Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellant.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kyle Steven Ouradnik, Appellee, v. Ronald Henke, Interim Director, Department of Transportation, Appellant.	)	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20190293** **District Ct. No. 09-2019-CV-01615**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Brief of Appellee contains 32 pages.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2017 word processing software in Arial 12 point font.

Dated this 4th day of November, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Douglas B. Anderson
Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellant.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kyle Steven Ouradnik, Appellee, v. Ronald Henke, Interim Director, Department of Transportation, Appellant.	)	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20190293** **District Ct. No. 09-2019-CV-01615**

[¶1] I hereby certify that on November 4, 2019, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** were filed electronically with the Clerk of Supreme Court. Service is being accomplished upon Kyle Steven Ouradnik, by and through his attorneys, to Drew J. Hushka at dhushka@vogellaw.com and Mark A. Friese at mfriese@vogellaw.com.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Douglas B. Anderson
Douglas B. Anderson
Assistant Attorney General
State Bar ID No. 05072
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email dbanders@nd.gov

Attorneys for Appellant.