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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Jeremy Nathan Grove, Appellee, v. Department of Transportation, Appellant.	**Supreme Ct. No. 20200016** **District Ct. No. 49-2019-CV-00120** **ORAL ARGUMENT REQUESTED**

APPEAL FROM THE NOVEMBER 19, 2019,
JUDGMENT OF THE DISTRICT COURT
TRAILL COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT

HONORABLE SUSAN L. BAILEY

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.

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[¶1] Whether the District Court erred in granting Grove's appeal and reversing the Hearing Officer's Decision when it determined that Grove's "failure to specially assert an objection to the admissibility of the test results based on the omission of the phrase 'directed by the law enforcement officer' did not constitute a waiver of the objection based on law emerging subsequent to the administrative hearing."

[¶2] Whether in the event the Supreme Court reverses the District Court's Judgment based upon the foregoing issue, a remand to the District Court is required to address any other issues raised by Grove but not addressed by the District Court "because the issue addressed is dispositive."

[¶3] Whether the hearing officer erred in admitting the Report and Notice into evidence over Grove's objection that the document contained the results of his onsite screening test.

STATEMENT OF CASE

[¶4] North Dakota Highway Patrol Trooper Cody Blake Harstad ("Trooper Harstad") arrested Grove on July 13, 2019, for the offense of driving while under the influence of intoxicating liquor. Appendix to Brief of Appellee ("App.") at 8. After the conclusion of the August 5, 2019, administrative hearing, the hearing officer issued his findings of fact, conclusions of law, and decision suspending Grove's driving privileges for a period of 180 days. Id. at 13-14.

[¶5] Grove requested judicial review of the Hearing Officer's Decision by the District Court. Id. at 15-16. The District Court reversed the Hearing Officer's Decision. Id. at 17-20. The Department has appealed the District Court's

Judgment. Id. at 23-24.

STATEMENT OF FACTS

[¶6] On July 13, 2019, Trooper Harstad stopped a vehicle that was being operated by Grove, after he observed it travelling at a rate of 70 miles per hour in a 55 mile-per-hour speed limit zone. Transcript ("Tr.") at 4, l. 11 – 6, l. 1. After observing indicia of Grove's intoxication and administering field sobriety tests, which indicated Grove was impaired, Trooper Harstad administered an onsite screening test, which also indicated "Grove was under the influence of alcohol and/or drugs." Id. at 6, l. 24 – 13, l. 17.

[¶7] After placing Grove under arrest for driving while "under the influence of alcohol and/or drugs," Trooper Harstad transported Grove to the Traill County jail where he asked Grove to submit to an Intoxilyzer 8000 test." Id. at 13, l. 18 – 15, l. 14. Trooper Harstad informed Grove of the implied consent advisory as contained on the Report and Notice that:

> I must inform you that North Dakota law requires you to take a chemical breath or urine test to determine whether you are under the influence of alcohol or drugs. Refusal to take a chemical breath or urine test may result in revocation of your driving privileges for a minimum of 180 days and up to three years. I must also inform you that refusal to take a chemical breath or urine test is a crime punishable in the same manner as driving under the influence. Do you consent to take the chemical breath test that I'm requesting?

Id. at 28, l. 16 – 29, l. 13; App. at 8. The results of the Intoxilyzer test established Grove had a breath alcohol concentration of 0.232% by weight. Id. at 9. Trooper Harstad issued a Report and Notice with the numeric result of Grove's onsite screening test reported on the document. Tr. at 16, l. 18 – 17, l. 2; App. at 8.

STATEMENT OF PROCEEDINGS BEFORE THE ADMINISTRATIVE HEARING OFFICER

[¶8] At the hearing, Trooper Harstad testified that the Report and Notice included in the proposed Exhibit 1 was a true and correct copy of the document he issued to Grove. Tr. at 17, l. 7 – 18, l. 4. Grove's counsel questioned Trooper Harstad as to his inclusion of the numeric result of the onsite screening test on the Report and Notice:

> Mr. Williams: What's your understanding of the … the use of preliminary breath test results in a proceeding?
>
> Trooper Harstad: In this proceeding?
>
> Mr. Williams: In any proceeding.
>
> Trooper Harstad: It's kind of a guidance tool, if you will. So based on my observations throughout the traffic stop, including the violation that I stopped for, the stopping sequence, my contact with the drive, the arrest, and then the follow up testing, the overall circumstances of that investigation should lead me to either choose to arrest or not arrest that driver. And my understanding of the PBT is that it is a guidance tool for me to use to verify my results that I observed throughout that sequence.
>
> Mr. Williams: As your understanding that those results are not admissible, say in court?
>
> Trooper Harstad: For the most part, yes, they're not admissible in the criminal court room.
>
> Mr. Williams: Do you know of any … do you know of any situations where that result is admissible?
>
> Trooper Harstad: If my understanding is correct, I believe it is on a refusal.
>
> Mr. Williams: And Mr. Grove didn't refuse this. That's correct?
>
> Trooper Harstad: Correct.

Id. at 19, l. 8 – 20, l. 9.

[¶9] When the hearing officer offered Exhibit 1 into evidence. Grove objected as follows:

> . . . I object to page two of the Exhibit 1, the Report of Notice under chapter 39-20 because the PBT results are on there. PBT results … case law is very clear, the statute is very clear that the PBT results aren't admissible in any proceeding unless probable cause is being challenged. There is no challenge to probable cause here. With the PBT results being on the actual report notice form, I would object to page two being admitted into evidence.

Id. at 22, l. 18 – 23, l. 1. The hearing officer overruled Grove's objection and admitted Exhibit 1 into evidence. Id. at 24, ll. 24-25.

[¶10] Grove's counsel limited his questioning of Trooper Harstad as to his reading of the implied consent advisory:

Mr. Williams:	The implied consent advisory that you read to Mr. Grove, that was after he was placed under arrest, correct?
Trooper Harstad:	There was one prior …
Mr. Williams:	For the chemical test … I'll clarify … for the chemical test.
Trooper Harstad:	Yes.
Mr. Williams:	And is the language on the Report of Notice form that was on Exhibit 2 … or Exhibit 1, I apologize, page two … the same implied consent that you read?
Trooper Harstad:	Yes.
Mr. Williams:	Can I have you grab that, please? I'll just have you take a look at that implied consent advisory that you read to Mr. Grove and let me know if that's the exact same language that you used.
Trooper Harstad:	Yeah, I read it right off of the computer screen.

Mr. Williams: So you advised him that North Dakota law requires him to take a chemical breath or a urine test to determine whether he is under the influence of alcohol or drugs?

Trooper Harstad: Yes.

Mr. Williams: And, just for clarification of the record, I know I probably asked this, but this language under the chemical test is exactly what you read, correct?

Trooper Harstad: Yes.

Id. at 28, l. 16 – 29, l. 14.

[¶11] During closing argument, Grove claimed:

> . . . I believe that page two of Exhibit 1 was incorrectly admitted into evidence because the PBT results are actually written on there. The PBT results shouldn't be admissible in any proceeding when probable cause is not an issue. Probable cause in this instance is not an issue.

Id. at 31, ll. 2-8. Grove further argued:

> Additionally, with the law that was in place at the time, the implied consent advisory recited to Mr. Grove was incorrect because the law in place at the time of his arrest states that North Dakota law requires him to take chemical test to determine, not just a chemical breath or urine test. North Dakota law required an individual to take a chemical breath, urine, or blood test to determine whether he was under the influence of alcohol. The only time [] that we can into chemical breath or urine test is the crime punishable in the same manner as driving under the influence. Because refusal to take a chemical breath, urine, or blood test could have resulted in the revocation of his driving privileges. The Supreme Court has taken a pretty literal approach in interpreting the statute. Substantial compliance is necessary and the fact Mr. Grove wasn't informed that refusal to take any chemical test may result in a revocation of his driving privileges does not substantially comply with the statute. . . .

Id. at 31, ll. 8-24.

[¶12] The hearing officer issued his findings of fact, conclusions of law, and decision suspending Grove's driving privileges for a period of 180 days. App. at

13-14. Among other matters, the hearing officer found:

> Petitioner's Counsel asserted that the 180-day civil administrative suspension of Mr. Grove's driver's license must be dismissed because the words "urine" and "breath" were included in the first phrase of the implied consent advisory. It appears Counsel is seeking to extend the holding in State v. Vigen, 2019 ND 134 beyond what is required by the statute. In Vigen, only the omission of the word "urine" was noted as being deficient. There was no criticism by the Court of that portion of the Vigen advisory that added the word "breath" to the first phrase: "I must inform you that North Dakota law requires you to take a chemical breath test to determine whether you are under the influence of alcohol or drugs." Id. at ¶10. The Court has already addressed this argument in Korb v. N.D. Dep't of Transportation, 2018 ND 226 where it held that inclusion of additional language does not violate the requirement of the statute as long as the information does not mislead or coerce. Id. ("Neither the plain language of N.D.C.C. § 39-20-01 (3) nor its legislative history indicate an intent by the legislature to restrict an officer's speech to only the specific words written in the statute."). Telling the driver, "chemical breath or urine test" three times instead of once as provided in the statute has no effect on the meaning of the advisory as written by the Legislature and interpreted by the Court. Likewise, language that is synonymous with the statutory language is acceptable as long as it is "substantively complete and reasonably calculated to convey the entire substance of the advisory." LeClair v. Sorel, 2018 ND 255, ¶¶ 13 and 14. In DeForest v. N.D. Dep't of Transportation, 2018 ND 224, the Court determined that since the statute was amended in 2017, blood tests are treated differently than breath or urine tests in regard to the statutory implied consent advisory. Grove did not appear at the hearing or offer any evidence that he was misled or coerced by the post-arrest language provided to him.

Id.

STATEMENT OF PROCEEDINGS ON APPEAL BEFORE THE DISTRICT COURT

[¶13] Grove requested judicial review of the Hearing Officer's Decision alleging:

> . . .
>
> 2. That the hearing officer erred in admitting page 2 of Exhibit 1 into evidence because breath test results from a preliminary screening test were displayed on the form.

3. The hearing officer erred in admitting the chemical test results into evidence because the law enforcement officer failed to inform Mr. Grove of the proper implied consent advisory.

App. at 15.

[¶14] In his brief on appeal before the District Court, Grove argued "[t]he Hearing Officer erred in admitting the chemical breath test into evidence when an improper and coercive implied consent advisory was recited to Mr. Grove prior to administration of the chemical breath test." Register of Actions at Index # 25 – Brief in Support of Appeal from Administrative Hearing at ¶¶ 12-14. Grove, however, ***did not argue*** – as he had for his objection to the implied consent advisory at the administrative hearing – that Trooper Harstad's reading that "I must inform you that North Dakota law requires you to take a ***chemical breath or urine test*** to determine whether you are under the influence of alcohol or drugs" did not substantially comply with the statutory language that "[t]he law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take a ***chemical test*** to determine whether the individual is under the influence of alcohol or drugs . . ." Tr. at 28, l. 16 – 29, l. 13; N.D.C.C. § 39-20-01(3)(a) (emphasis added).

[¶15] Instead, Grove raised an entirely new objection based upon the Supreme Court's then-recent decision in City of Bismarck v. Vagts, 2019 ND 224, 932 N.W.2d 523, which had been issued following the conclusion of Grove's administrative hearing that:

> In this case, the implied consent advisory read by Trooper Harstad omitted the phrase "as directed by a law enforcement officer". Hr'g Tr. at p. 28-29. Trooper Harstad testified he read the implied consent

> advisory verbatim from the Report and Notice from admitted as Exhibit #1, pg. 2. The implied consent advisory on the admitted exhibit did not include the phrase "as directed by a law enforcement officer." Therefore, the Intoxilyzer test record is inadmissible and the Department is without authority to suspend Mr. Grove's driving privileges.

Register of Actions at Index # 25 – Brief in Support of Appeal from Administrative Hearing at ¶ 14.

[¶16] The Department responded that "Grove waived any argument he might have had regarding the absence of the wording 'directed by a law enforcement officer' from the implied consent advisory by failing to raise a proper objection at the administrative hearing." Register of Actions at Index # 26 – Appellee's Brief at ¶¶ 14-24.

[¶17] The District Court issued its Order Reversing Decision of Hearing Officer Issued August 8, 2019. App. at 17-20. The Court determined that

> [¶6] . . . [T]he North Dakota Supreme Court has held that omission of the phrase "directed by the law enforcement officer" is a substantive omission and not in compliance with the statutory requirements for the implied consent advisory. City of Bismarck v. Vagts, 2019 ND 224, ¶ 17, 932 N.W.2d 523, 528. There is no dispute that Trooper Harstad did not include the phrase "directed by the law enforcement officer" in the advisory given to Mr. Grove. The DOT asserts that Mr. Grove waived any argument he might have had regarding the absence of the phrase "directed by the law enforcement officer" in the advisory provided by failing to raise a proper objection at the administrative hearing. The administrative hearing here was held August 5, 2019, prior to the issuance of Vagts on August 22, 2019. Multiple rulings have been recently issued by the North Dakota Supreme Court related to the nuances of what constitutes a sufficient implied consent advisory. Neither counsel for Mr. Grove, nor the hearing officer, could necessarily have predicted that omission of the phrase "directed by the law enforcement officer" would constitute a substantive omission thus rendering the advisory insufficient and the test results inadmissible. Mr. Grove's counsel's failure to specifically assert an objection to the admissibility of the test results based on the omission of the phrase "directed by the law

> enforcement officer" did not constitute a waiver of the objection based on law emerging subsequent to the administrative hearing. The Court need not address the other issues raised by Mr. Grove, because the issue addressed is dispositive.
>
> [¶7] Because Trooper Harstad did not include the phrase "directed by the law enforcement officer" in the advisory given to Mr. Grove, the advisory did not substantively comply with N.D.C.C. § 39-20-01(3)(a), thus the test results were inadmissible as evidence of the administrative proceeding under N.D.C.C. § 39-20-01(3)(b). Because the DOT's order is not in accordance with the law, this Court need not affirm its order under N.D.C.C. § 28-32-46. . . .

Id. at 19-20.

[¶18] Judgment was entered on November 19, 2019. Id. at 21. The Department appealed the Judgment to the North Dakota Supreme Court. Id. at 23-24. The Department requests this Court reverse the Judgment of the Cass County District Court and reinstate the Hearing Officer's Decision suspending Grove's driving privileges for a period of 180 days.

REQUEST FOR ORAL ARGUMENT

[¶19] 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 Vagts, regarding the issue of the omission of the phrase "directed by law enforcement" -- which was issued after the conclusion of Grove's administrative hearing, but while his appeal to the District Court was pending -- should be given retroactive effect when (1) Grove failed to raise a proper objection at the administrative hearing and (2) the issue was not tried by the express or implied consent of the parties before the District Court. See Ouradnik v. Henke, 2020 ND 39; Forster v. N.D. Workers Comp. Bureau, 447 N.W.2d 501 (N.D. 1989). Oral argument would be helpful in the Court's review of the Hearing

Officer's Decision.

STANDARD OF REVIEW

[¶20] "The Administrative Agencies Practice Act, N.D.C.C. ch. 28-32, governs the review of a decision to [suspend] 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.

[¶21] "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

The District Court erred in granting Grove's appeal and reversing the Hearing Officer's Decision when it determined that Grove's "failure to specially assert an objection to the admissibility of the test results based on the omission of the phrase 'directed by the law enforcement officer' did not constitute a waiver of the objection based on law emerging subsequent to the administrative hearing."

A. The retroactive application of the Court's decision in Vagts regarding the omission of the phrase "directed by the law enforcement officer" 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.

[¶22] "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]).

[¶23] *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 in pipeline, i.e., to defendants with 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.").

[¶24] 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.

[¶25] "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." Id. 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.

[¶26] "[T]he Bureau issued a decision affirming its earlier order denying Forster further disability benefits," which Forster appealed to the district court. Id. "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.

[¶27] "[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." Id. "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.

[¶28] 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." Id. 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").

[¶29] 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. Grove waived his argument regarding the omission of the phrase "directed by the law enforcement officer" from the implied consent advisory by failing to raise a proper objection at the administrative hearing.

[¶30] "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).

[¶31] "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, ¶ 32, 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).

[¶32] "Rule 103 requires an objection on a *specific ground* unless the reason for the objection is apparent from the context." Id. at ¶ 32 (citing Scientific Application, Inc. v. Delkamp, 303 N.W.2d 71, 77 (N.D. 1981)) (emphasis added). "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 added). See also Ouradnik, 2020 ND 39, ¶ 12 ("To preserve a claim of error under Rule 103, a party must timely object and state the specific ground unless it was apparent from the context.") (citing N.D.R.Ev. 103(a)(1)).

[¶33] "*When a specific objection is made at trial to the admission of evidence, no different objection will be considered on appeal*." Marks v. State, 654 P.2d 652, 655 (Okla. Crim. App. 1982) (emphasis added). See also United States v. Mutte, 424 F. App'x 765, 768 (10th Cir. 2011) ("In the district court, Mutte raised a different objection to the prosecutor's closing argument. That was not sufficient, however, to preserve the specific issue he raises now on appeal."); State v. Bryant, 38 P.3d 661, 665 (Kan. 2002) ("[A] defendant may not object to the introduction of evidence

on one ground at trial, and then assert a different objection on appeal."); State v. Lord, No. 40822-4-1, 1998 WL 846830, at *3 (Wash. Ct. App. Dec. 7, 1998) ("The appellate court will not review specific objection on appeal where a different objection was argued at the trial court."); Josel v. Rossi, 288 N.E.2d 677, 679 (Ill. Ct. App. 1972) ("It is also well settled that a party will not be permitted to raise new or different objections on appeal which were not urged in the trial below.").

[¶34] 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.

[¶35] 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))).

[¶36] 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).

[¶37] 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 Grove's administrative hearing. In City of Bismarck v. Vagts – which was decided after the conclusion of Grove's administrative hearing– 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).

[¶38] 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.

[¶39] In other words, although Vagts -- and the issue of whether the omission of the phrase "directed by the law enforcement officer" from the advisory was a "substantive omission" rendering the advisory deficient -- had not been decided at the time of Grove's hearing, a potential issue with the omission was not so novel that its legal basis was not reasonably available or foreseeable.

[¶40] In this case, Grove choose to object to the admission of Exhibit 1 – inclusive of his Intoxilyzer Test Record and Checklist – on the basis that:

> Additionally, with the law that was in place at the time, the implied consent advisory recited to Mr. Grove was incorrect because the law in place at the time of his arrest states that North Dakota law requires him to take chemical test to determine, not just a chemical breath or urine test. North Dakota law required an individual to take a chemical breath, urine, or blood test to determine whether he was under the influence of alcohol. The only time [] that we can into chemical breath or urine test is the crime punishable in the same manner as driving under the influence. Because refusal to take a chemical breath, urine, or blood test could have resulted in the revocation of his driving privileges. The Supreme Court has taken a pretty literal approach in interpreting the statute. Substantial compliance is necessary and the

> fact Mr. Grove wasn't informed that refusal to take any chemical test may result in a revocation of his driving privileges does not substantially comply with the statute. . . .

Tr. at 31, ll. 8-24. Grove did ***not*** object on the basis that Trooper Harstad did not include the phrase "directed by the law enforcement officer" in the advisory given to Grove.

[¶41] On appeal, Grove abandoned the objection he raised at the administrative hearing. Instead, Grove raised an entirely new objection based upon the Supreme Court's then-recent decision in City of Bismarck v. Vagts, 2019 ND 224, 932 N.W.2d 523, which had been issued following the conclusion of Grove's administrative hearing that:

> In this case, the implied consent advisory read by Trooper Harstad omitted the phrase "as directed by a law enforcement officer". Hr'g Tr. at p. 28-29. Trooper Harstad testified he read the implied consent advisory verbatim from the Report and Notice from admitted as Exhibit #1, pg. 2. The implied consent advisory on the admitted exhibit did not include the phrase "as directed by a law enforcement officer." Therefore, the Intoxilyzer test record is inadmissible and the Department is without authority to suspend Mr. Grove's driving privileges.

Register of Actions at Index # 25 – Brief in Support of Appeal from Administrative Hearing at ¶ 14.

[¶42] The Court should not review specific objection on appeal where a different objection was argued before the administrative hearing. Grove waived his argument regarding the omission of the phrase "directed by the law enforcement officer" from the implied consent advisory by failing to raise a proper objection at the administrative hearing.

C. The issue of whether the omission of the phrase "directed by the law enforcement officer" 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.

[¶43] The Department responded that "Grove waived any argument he might have had regarding the absence of the wording 'directed by a law enforcement officer' from the implied consent advisory by failing to raise a proper objection at the administrative hearing." Register of Actions at Index # 26 – Appellee's Brief at ¶¶ 14-24. The issue of whether the omission of the phrase "directed by the law enforcement officer" 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. In the event the Supreme Court reverses the District Court's Judgment based upon the foregoing issue, a remand to the District Court is not required to address any other issues raised by Grove but not addressed by the District Court "because the issue addressed is dispositive."

[¶44] "When a district court has failed to reach a question below that becomes critical when reviewed on appeal, an appellate court may sometimes resolve the issue on appeal rather than remand to the district court." Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151, 159 (3d Cir. 1998) (citing Chase Manhattan Bank, N.A. v. Am. Nat'l Bank and Trust Co., 93 F.3d 1064, 1072 (2d Cir. 1996)). "This procedure is generally appropriate when the factual record is developed and the issues provide purely legal questions, upon which an appellate court exercises plenary review." Id. "In such a case, an appellate tribunal can act just as a trial court would, so nothing is lost by having the reviewing court address the disputed

issue in the first instance." Id. See also Am. Inst. of Certified Pub. Accountants v. Internal Revenue Serv., 746 F. App'x 1, 8 (D.C. Cir. 2018) ("Although our 'general practice' is to remand the case when we reverse the district court's denial of standing, it may be appropriate to address the merits when the parties have 'fully briefed the issue before this court,' the merits 'involve purely legal questions,' which we would review de novo in a subsequent appeal, '[t]he district court has no comparative advantage in reviewing the agency action' for compliance with applicable law, and therefore '[a] remand to the district court would be a waste of judicial resources.'") (citations omitted)).

[¶45] The remaining issue – which was not decided by the District Court – involved whether the hearing officer erred in admitting the Report and Notice into evidence over Grove's objection that the document contained the results of his onsite screening test is primarily a legal question. In the event the Supreme Court reverses the District Court's Judgment based upon the foregoing issue, a remand to the District Court is not required to address any other issues raised by Grove but not addressed by the District Court "because the issue addressed is dispositive."

III. The hearing officer did not err in admitting the Report and Notice into evidence over Grove's objection that the document contained the results of his onsite screening test.

[¶46] "The sole purpose of an onsite screening test is to assist a law enforcement officer in deciding whether there are reasonable grounds to arrest an individual." Brewer v. Ziegler, 2007 ND 207, ¶ 25, 743 N.W.2d 391 (quoting Nichols v. Backes, 461 N.W.2d 113, 114 (N.D. 1990). "[I]t [is] appropriate for [law enforcement] to

utilize the results of [an] onsite screening breath test as a basis for determining probable cause to arrest [an individual] for violating N.D.C.C. § 39-08-01." Id. "[The Supreme] Court has recognized that pursuant to N.D.C.C. § 39-20-14(3), the results of preliminary breath tests are to be excluded from evidence unless probable cause for the arrest is being challenged." State v. Rende, 2018 ND 33, ¶ 6, 905 N.W.2d 909 (citing Barrios-Flores v. Levi, 2017 ND 117, ¶ 12, 894 N.W.2d 888; City of Fargo v. Erickson, 1999 ND 145, ¶ 10, 598 N.W.2d 787; State v. Schimmel, 409 N.W.2d 335, 339 (N.D. 1987)).

[¶47] Under N.D.C.C. § 39-20-05(3), the scope of an administrative hearing for refusing to submit to a test under section 39-20-01 requires the hearing officer determine "whether a law enforcement officer had *reasonable grounds* to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance." N.D.C.C. § 39-20-05(3) (emphasis added). "'*Reasonable grounds*' to believe an offense has been committed is synonymous with '*probable cause*.'" Moser v. N.D. Highway Comm'r, 369 N.W.2d 650, 652-53 (N.D. 1985). In other words, the existence of probable cause by statute is *always* to be an issue in administrative license revocation proceedings, *regardless of whether or not an individual chooses to challenge that determination*. Cf. Rende, 2018 ND 33, ¶ 6, 905 N.W.2d 909 ("The trial did not include a challenge to probable cause, and the preliminary test result should have been excluded.").

[¶48] The hearing officer did not err in admitting the Report and Notice into evidence over Grove's objection that the document contained the results of his

onsite screening test.

CONCLUSION

[¶49] The Department requests this Court reverse the Judgment of the Traill County District Court and affirm the Hearing Officer's Decision suspending Grove's driving privileges for a period of 180 days.

Dated this 26th day of February, 2020.

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

Jeremy Nathan Grove, Appellee, v. Department of Transportation, Appellant.	**CERTIFICATE OF COMPLIANCE** **Supreme Ct. No. 20200016** **District Ct. No. 49-2019-CV-00120**

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

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016 word processing software in Arial 12 point font.

Dated this 26th day of February, 2020.

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

Jeremy Nathan Grove, Appellee, v. Department of Transportation, Appellant.	**CERTIFICATE OF SERVICE BY ELECTRONIC MAIL** **Supreme Ct. No. 20200016** **District Ct. No. 49-2019-CV-00120**

[¶1] I hereby certify that on February 26, 2020, the following documents: **BRIEF OF APPELLANT, CERTIFICATE OF COMPLIANCE, and APPENDIX TO BRIEF OF APPELLANT** were filed electronically with the Clerk of Supreme Court through the E-Filing Portal and served on Alexander F. Reichert and Challis Williams at supportstaff@reichertlaw.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.