

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Brandon Potts, Plaintiff and Appellant, vs. City of Devils Lake and Devils Lake Police Department, Defendants and Appellees.	Supreme Court No. 20200144 District Court No. 36-2019-CV-00293
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APPELLANT’S REPLY BRIEF

**APPEAL FROM THE RAMSEY COUNTY DISTRICT COURT’S
APRIL 20, 2020 JUDGMENT BY WHICH PLAINTIFF’S
CLAIMS WERE DISMISSED PURSUANT TO A
MEMORANDUM OPINION AND ORDER GRANTING
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT**

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[¶ 3] ARGUMENT

[¶4] **A. The Exception to Employment At-Will in a Case Involving Termination For Obeying a Subpoena Applies With Equal Force to a Case Involving Termination for Compliance with Statutory Duty**

[¶5] The City of Devils Lake and the Devils Lake Police Department (hereafter “Devils Lake”) cite the North Dakota Supreme Court’s holding in *Ressler v. Humane Society of Grand Forks*, 480 N.W.2d 429, 431 (N.D. 1992) that there is a public policy exception to the employment at will doctrine when an employee is discharged for honoring a subpoena and testifying truthfully. (Appellees’ Brief, p. 12) Indeed, Devils Lake, notes this Court’s language in that case as to “our criminal statutes prohibiting the failure to obey a subpoena, the refusal to testify and the making of a false statement.” *Id.*

[¶6] But Devils Lake avoids confronting the fact that North Dakota’s criminal statutes prohibit a law enforcement officer from taking, or failing to take, certain actions. Thus, N.D.C.C. § 12.1-10-05 prohibits anyone from disobeying a court order (other than to pay money) on pain of being charged with a Class A misdemeanor. And N.D.C.C. § 12.1-11-06 prescribes the same penalty for a public servant who knowingly refuses to perform a duty imposed by law.

[¶7] As pointed out in the Amicus Curiae Brief of the North Dakota Fraternal Order of Police, law enforcement officers are mandated to arrest persons who have committed, or attempted to commit, a public offense. N.D.C.C. § 11-15-03. Law enforcement officers are mandated to execute bench warrants issued by a court. N.D.C.C. § 29-26-10. The peace officer is not told that on locating the suspect, or the subject of the bench warrant, he is limited to politely asking the individual to accompany him to the police station. No, the peace officer is directed to effect the arrest either “by the defendant’s submission to the

custody of the person making the arrest” or “by an actual restraint of the person.” N.D.C.C. § 29-26-09. The statutes further direct that restraint in the process of making an arrest is limited, and that “[a] person who is arrested may not be subjected to unnecessary or unreasonable force....” N.D.C.C. § 29-06-10. As noted by both parties to this appeal, two independent investigations determined that Potts’ use of his service weapon to strike Fuller’s head in an attempt to subdue him was reasonable and justified.

[¶8] Devils’ Lake offers patently incorrect and self-serving arguments against these principles. For example, it states that “Police officers do not have a right to act with force....” (Appellees’ Brief, ¶39) To the contrary, the statutes cited in the preceding paragraph do authorize the use of reasonable force in making an arrest

[¶9] Devils Lake also dismisses the significance of N.D.R.Crim.P.4 – and by implication N.D.C.C. § 29-26-10 – when it states as follows:

Further, a warrant was not at issue in this situation.
At most, these provisions provide justification for
a public policy exception for a peace officer who
acts in self-defense, **while executing a warrant.**
These are not the facts before this court.

(Appellees’ Brief, ¶42, emphasis in original)

[¶10] This statement is so far off the mark as to be absurd. First, Potts is asking this Court to recognize a public policy exception to the employment at will doctrine for law enforcement officers acting in self-defense, regardless of what duties they are carrying out – making a traffic stop, intervening in a domestic dispute, being summoned to a bank robbery, etc. It makes no difference. But it is telling that Devils Lake concedes the possibility that a public policy exception exists for a law enforcement officer executing a warrant. Secondly, it is hard to believe that Devils Lake is seriously suggesting that a peace

officer attempting to apprehend a felon, following multiple reports that the offender had just committed theft and burglary of a residence, is entitled to less protection than an officer executing a warrant.

[¶11] B. **“Create” vs. “Recognize” is a False Distinction**

[¶12] Devils Lake repeatedly – and no doubt deliberately - misstates what Potts is asking of this Court.

“Potts requests this court create rather than recognize a public policy exception.”

(Appellees’ Brief, ¶19)

“The creation of public policy is a duty best left to the Legislature, and not the role expected of this Court.”

(Id.)

“Potts is requesting this Court create a public policy exception, and this Court should affirm the District Court by declining to create such an exemption.”

(Appellees’ Brief, ¶20)

“Potts is requesting this Court create, rather than recognize, a public policy exemption.”

(Appellees’ Brief, ¶35)

“This Court has established a clear standard for public policy exceptions. It is cautious, and will recognize those exceptions evidenced by clear and compelling constitutional or statutory provisions, but it will not create a public policy exception.

(Appellees’ Brief, ¶54)

[¶13] Potts asks nothing more than what Devils Lake itself admits (Appellees’

Brief, ¶13) is the correct standard for recognizing a public policy exception, as stated

in *Jose v. Norwest Bank N.D., N.A.*, 1999 ND 175, ¶17, 599 N.W.2d 293: “...public policy must be evidenced by a constitutional or statutory provision.”

[¶14] In Appellant’s Brief and the Amicus Curiae Brief of the North Dakota Fraternal Order of Police, both constitutional and statutory provisions have been cited which provide the “clear and compelling” rationale for the public policy exception requested by Potts:

Article I, Section 1 of the North Dakota Constitution:

“All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty...”

12.1-10-05. Disobedience of judicial order.

“1. A person is guilty of a class A misdemeanor if the person disobeys or resists a lawful temporary restraining order or preliminary or final injunction or other final order, other than for the payment of money, of a court of this state.”

12.1-11-06. Public servant refusing to perform duty.

“Any public servant who knowingly refuses to perform any duty imposed upon him by law is guilty of a class A misdemeanor.”

11-15-03. Duties of sheriff.

“The sheriff shall:

1. Preserve the peace.
2. Arrest and take before the nearest magistrate, or before the magistrate who issued the warrant, all persons who attempt to commit or who have committed a public offense.”

12.1-05-03. Self-defense.

“A person is justified in using force upon another person to defend himself against danger of imminent unlawful bodily injury, sexual assault, or detention by such other person....”

12.1-05-02. Execution of public duty.

1. “Conduct engaged in by a public servant in the course of the person's official duties is justified when it is required or authorized by law.”

12.1-05-07. Limits on the use of force - Excessive force - Deadly force.

2. “Deadly force is justified in the following instances:
 - a. When it is expressly authorized by law or occurs in the lawful conduct of war.
 - b. When used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence.....”

29-26-10. Disposition of defendant on arrest.

“Whether a bench warrant issued as provided in section 29-26-06 is served in the county in which it was issued or in another county, the officer shall arrest the defendant and bring the defendant before the court, or commit the defendant to the officer mentioned in the warrant, according to the command thereof.”

[¶15] In *Ressler*, supra, this Court relied on three criminal statutes which obligate an individual to obey a lawful subpoena and testify truthfully – N.D.C.C. §§ 12.1-10-02(1), 12.1-10-03(1)(b) and 12.1-11-01(1) – in order to recognize a public policy exception to employment at will when that individual is terminated. Potts relies on multiple criminal statutes in this case – in addition to the North Dakota Constitution -- in asking for the same result if a law enforcement officer is terminated as a result of engaging in self-defense.

[¶16] **C. There is No Distinction Between a Public Employee and a Private Employee When Considering a Public Policy Exception to the Employment at Will Doctrine**

[¶17] Without any persuasive authority, Devils Lake contends that “[a] public employer has a stronger interest in managing their employees” than a private employer. (Appellees’

Brief, ¶17) It cites an Eighth Circuit case to the effect that a sheriff “has an interest in maintaining the efficient operation of his office.” Do not private employers have an equal interest in the efficient operation of their offices?

[¶18] Indeed, it is more logical to assert that a public employer such as Devils Lake should have less latitude, and be held to a stricter standard, when termination pursuant to the employment at will doctrine is at issue. Public servants serve the public and should be protected and supported in doing so. This is especially true of law enforcement officers, who risk their lives to protect their communities.

[¶19] An April 2020 decision of the United States Supreme Court affirms Potts’ position on this issue. In *Babb v. Wilkie*, 140 S.Ct. 1168, 206 L.Ed.2d 432, a pharmacist sued the Secretary of Veterans Affairs, alleging age discrimination in various adverse personnel actions. The Supreme Court noted that when Congress expanded the ADEA’s scope beyond private employers to include state and local governments, it prescribed a distinct statutory scheme applicable only to the federal sector. It commented as follows: “It is not anomalous to hold the Federal Government to a stricter standard than private employers or state and local governments.”

[¶20] **D. The Utah and West Virginia Cases Provide this Court With Ample Precedent for Recognizing the Requested Public Policy Exception**

[¶21] Devils Lake argues that *Ray v. Walmart Stores*, 359 P.3d 614 (Utah 2015) and *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713 (W. Va. 2001), the two cases relied on by Potts in Appellant’s Brief, are distinguishable. But its rationale is flawed.

[¶22] Devils Lake contends that *Feliciano* can be distinguished because while it recognizes several sources for a public policy exception – “constitutional authority, statutory and regulatory provisions, and principles of common law” – North Dakota recognizes only

constitutional and statutory provisions. Apparently, it doesn't register with Devils Lake that Potts is relying on precisely the type of constitutional and statutory provisions endorsed by this Court in *Jose v. Norwest Bank, supra*.

[¶23] As for *Ray, supra*, Devils Lake again relies on the false argument that there is a distinction to be made between public employees and private employees. (Appellees' Brief, ¶50) And the three-factor process for determining a public policy exception relied on in *Ray* strongly supports this Court's adoption of the exception being urged by Potts. Those three factors are as follows:

(1) whether the policy at issue is reflected in authoritative sources of state public policy, (2) whether the policy affects the public generally as opposed to the private interests of the employee and the employer, and (3) whether countervailing policies outweigh the policy at issue.

359 P.3d at 620.

[¶24] Potts has shown that the right of self-defense, and the consequences for law enforcement officers who do not fulfill mandates duties, are enshrined in the North Dakota Constitution and multiple criminal statutes. The public policy exception advocated by Potts affects the public generally because the public has the right to expect its peace officers to be able to enforce the law and apprehend criminals without fear of being terminated. And the "countervailing policies" apparently urged by Devils Lake – that a police department should have virtually unfettered discretion to terminate police officers, regardless of circumstances – are unpersuasive.

[¶25] E. **All Dissenting Cases from Foreign Jurisdictions Can be Distinguished on their Facts**

[¶26] Devils Lake mostly cites Federal court cases in California, Florida and Maryland which declined to find a public policy exception for an employee terminated after acting

in self-defense. Apart from the natural reluctance of a Federal court to recognize exceptions to a state doctrine on employee-at-will, none of those cases involved a law enforcement officer terminated after defending himself in the line of duty. Their very names indicate that most of them involved clerks or managers in convenience stores (i.e., CVS). The same is true of the three state court cases cited from Maryland, North Carolina and Pennsylvania. *Bagwell v. Peninsula Regional Medical Center*, 665 A.2d 297 (Md. Ct. of Special App., 1995) involved a police officer, but he was working as a security guard at a hospital and he was fired by the hospital after being involved in an altercation with a patient.

[¶27] All of these cases are a far cry from the very narrow and limited public policy exception sought by Potts – an exception that protects peace officers acting in self-defense while serving in the line of duty. If this Court declines to recognize such an exception it will serve to encourage criminals, or suspected criminals, to flee the police or resist arrest. They would do so secure in the knowledge that the police officer risks his employment by defending himself or herself against violent assault. That is a “public policy” which this Court should be very reluctant to embrace.

[¶28] **CONCLUSION**

[¶29] For all the reasons discussed herein, Potts renews his request that the judgment of the District Court be reversed and this Court hold that the termination of a law enforcement officer's employment on the sole or primary grounds that the officer was defending himself against danger of imminent bodily injury or death is against the public policy of North Dakota and is a valid exception to the employment at will doctrine.

[¶30] Dated this 27th day of July, 2020.

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[¶31] **CERTIFICATE OF COMPLIANCE**

[¶32] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Times New Roman, size 12-point font, proportional typeface and that the total number of pages does not exceed 12 pages.

[¶33] Dated: July 27, 2020.

/s/ Leo F.J. Wilking
Leo F.J. Wilking (ND # 03629)

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Brandon Potts, Plaintiff and Appellant, v. City of Devils Lake and Devils Lake Police Department, Defendants and Appellees.	Supreme Court No. 20200144 Case No. 36-2019-CV-00293 AFFIDAVIT OF SERVICE
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[¶1] I, Marlene Schumacher, hereby states that she is of legal age and that on July 27, 2020, she served the following:

1. **APPELLANT’S REPLY BRIEF**

[¶2] by sending a true and correct copy thereof pursuant to N.D.R.Ct. 3.5 by electronic means through the North Dakota e-filing portal to the parties listed below:

Scott K. Porsborg - sporsborg@smithporsborg.com

[¶3] To the best of affiant’s knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[¶4] I declare under penalty of perjury that everything I have stated in this document is true and correct.

/s/ Marlene Schumacher
Marlene Schumacher

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Brandon Potts, Plaintiff and Appellant, v. City of Devils Lake and Devils Lake Police Department, Defendants and Appellees.	Supreme Court No. 20200144 Case No. 36-2019-CV-00293 AFFIDAVIT OF SERVICE
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[¶1] I, Marlene Schumacher, hereby states that she is of legal age and that on July 28, 2020, she served the following:

1. **APPELLANT’S REPLY BRIEF**

[¶2] by sending a true and correct copy thereof pursuant to N.D.R.Ct. 3.5 by electronic means through the North Dakota e-filing portal to the parties listed below:

Mark A. Frieze - mfrieze@vogellaw.com

[¶3] To the best of affiant’s knowledge, information and belief, such address as given above was the actual address of the party intended to be so served.

[¶4] I declare under penalty of perjury that everything I have stated in this document is true and correct.

/s/ Marlene Schumacher
Marlene Schumacher