

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20210138
Burleigh County Civil No. 08-2019-CV-00667

Robyn Krile,)
)
Plaintiff-Appellant,)
)
v.)
)
Julie Lawyer, in her official and individual,)
Capacity as Assistant Burleigh County)
State's Attorney,)
)
Defendant-Appellee.)

APPELLANT'S BRIEF

On Appeal from Order Granting Renewed Motion to Dismiss dated March 4, 2021, Docket No. 189, and subsequently entered Judgment, dated March 8, 2021, Docket No. 194, in which notice of entry of Judgment was filed on March 10, 2021, Doc. No. 195, The Honorable Troy J. Lefevre Presiding, Burleigh County District Court, South Central Judicial District

ORAL ARGUMENT REQUESTED

In compliance with N.D.APP. Rule 28(h), counsel advises the Court that oral arguments are requested because this case involves numerous factual elements which we allege are in dispute, as well as an issue of first impression of law in regards to libel and defamation, allegedly privileged communications of a prosecutor, absolute and qualified immunity of a prosecutor, and, and whether the actions taken by the prosecutor constituted her role as a prosecutor or instead as an investigator.

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Statement of the Issues

1. Whether the lower court misapplied the law as articulated by this Court in its previous decision.
2. Whether the lower court erred in concluding as a matter of law that it was impossible for the plaintiff to prove a claim upon which relief could be granted.
3. Whether the lower court erred in not finding a material genuine issue of fact in dispute, therefore improperly granting the motion to dismiss.
4. Whether the lower court erred in failing to review all the materials submitted by the parties and improperly limited itself to the complaint and materials embraced by the pleadings.
5. Whether the lower court erred by failing to consider the materials submitted by the parties in the light most favorable to the plaintiff.
6. Whether the lower court erred in failing to convert the motion to dismiss to a summary judgment motion once the parties provided evidence and material beyond the scope of the complaint and materials embraced by the pleadings.

Statement of the Case

¶1 This case involves a prosecutor who decided, unilaterally and on her own, to investigate numerous criminal cases of one particular police officer, Robyn Krile, for the purpose of questioning her honesty as a witness. This investigation was not part of responding to a specific Brady-Giglio discovery request, and was not connected to any one particular case. Moreover, instead of simply issuing discovery responses to a specific case, which is within the clear traditional prosecutorial conduct, the prosecutor instead took it upon herself to conduct the investigation, reach her own conclusions, and then send those conclusions to the police officer's employer, the Bismarck Police Department, as well as a potential employer, the City of Lincoln. Because these actions were not part of any litigation or part of the traditional role of prosecutors, we assert that the prosecutor was unilaterally acting as an investigator and not as a prosecutor and that any protections provided to prosecutors for privilege communications or absolute immunity do not apply. To the extent the privileges or immunities to apply in accordance with this Court's previous decision, we assert that the facts alleged create the basis for a claim upon which relief can be granted.

¶2 Unsurprisingly, the police officer was fired from her position due to the prosecutor's report being sent to the third party, her employer; she also was denied employment with the City of Lincoln and suffered damages as a result of the City of Lincoln not hiring her. Lastly, we assert that dismissal of the matter by the lower court was error due to the existence of material genuine facts that are in dispute.

¶3 Moreover, and significantly, when the plaintiff was finally allowed a hearing before the committee that licenses police officers, the POST Board, for determination whether sanctions should be imposed on the plaintiff for code of conduct violations. Following the plaintiff's only hearing in regards to the issues at hand, the Board found that the allegations made by the prosecutor were wholly unsupported and incorrect. The board reviewed the prosecutor's investigative memorandum, and Chief Donlon testified relating to all the erroneous information contained in the prosecutor's memorandum. The board unanimously found no violation of the peace officer code of conduct that prohibits the police officer to willfully lie, provide false information, or falsify written or verbal communications relied upon by the courts, states attorneys, or other law enforcement officials.

¶4 Of course, due to the manner in which the prosecutor decided to conduct her own investigation and submit her own report to her employer, the plaintiff had no opportunity for hearing or in any way contest the matter. In addition, it should be noted that the prosecutor, despite all these negative conclusions relating to specific cases, did not at any time bring charges against the police officer, which would of course have resulted in a hearing to determine if indeed any of the prosecutor's assertions were true.

¶5 On remand the defendant filed a renewed motion to dismiss plaintiff's complaint. **Docket No. 98.** The defendant filed 10 exhibits in conjunction with the motion to dismiss. **Docket Nos. 100-110.** [Appendix 37-96]. The plaintiff responded to the defendant's motion, **Docket No. 124** and filed 15 exhibits, **Docket Nos. 114-22, 125-130.** [Appendix 97-464]. The defendant filed a reply brief, **Docket No. 131.** In order to provide coherence to all the exhibits filed by both parties, Attorney Boughey, a week before the ZOOM motion hearing, reorganized the exhibits in chronological order and re-filed all the exhibits in a manner that made more sense. **Doc. Nos. 133-176 and 179** [Appendix 465-1143].

¶6 A motion hearing was held via ZOOM December 9, 2020, before the Hon. Troy LeFevre. On March 4, 2021, the lower court issued its order granting the renewed motion for dismissal. **Docket No. 189.** [Appendix 1147] The lower court issued its Order for Judgment **Docket Nos. 193** [Appendix 1158] and the clerk entered the Judgment on March 8, 2021. **Docket Nos. 194.** [Appendix 1159] Notice of entry of judgment was filed in March 10, 2021. **Docket No. 195.** [Appendix 1160] The notice of appeal was submitted to the North Dakota Supreme Court on May 7, 2021. **Docket No. 197.** [Appendix 1161]

¶7 Statement of the facts

¶8 Because this matter involves a dismissal under Rule 12, the facts asserted in the complaint are relevant to the motion and serve as the statement of facts in this case. The complaint asserts the following facts, which for purposes of the motion to dismiss and this appellate review are taken as true:

COMPLAINT PARA 3 Defendant served, at all times material, as an Assistant Burleigh County State’s Attorney and currently serves at the Burleigh County State’s Attorney;

COMPLAINT PARA 5 Plaintiff served the public as a Sergeant with the Bismarck Police Department (hereinafter, “BPD”), and was employed by the City for fourteen years before she was terminated in March 2017 after issuance of a memorandum by Defendant. The

memorandum falsely stated that Plaintiff could no longer be used as a witness in Burleigh County cases because, among other things, Plaintiff made false reports, lacked credibility, was a liar, and is *Giglio*-impaired.

COMPLAINT PARA 6 Plaintiff was employed by BPD from approximately April 1, 2004, through March 27, 2017. Her positions included, but were not limited to, Patrol Officer, Field Training Officer, Sergeant, and Acting Lieutenant.

COMPLAINT PARA 7 From April 1, 2004, through March 27, 2017, BPD consistently employed over 100 employees

COMPLAINT PARA 8 On or about March 22, 2017, Defendant published a memorandum to BPD opining that Plaintiff was a liar and the Burleigh County State's Attorney's Office "will no longer be able to use Sgt. Krile [Plaintiff] to testify in our cases." This memorandum was issued upon the Defendant's *spontaneous* review of Plaintiff's personnel file and Defendant's own misguided investigation into Plaintiff's activities. Immediately thereafter, Plaintiff was placed on administrative leave by BPD and subsequently terminated from her position.

COMPLAINT PARA 9 The memorandum published by Defendant is colloquially referred to as a *Giglio* or *Brady* letter and is the proverbial *scarlet letter* in any law enforcement officer's personnel file.¹ Despite the *Giglio* letter being issued by the Defendant upon patently false evidence and in clear ignorance to prevailing jurisprudence, the consequences are severe and catastrophic—tersely, being issued a *Giglio* letter, despite the underlying factual deficiency, is terminal to any law enforcement officer's career.

COMPLAINT PARA 10 On March 28, 2017, Defendant's letter was published to the Peace Officer Standards and Training (hereinafter, "POST") Board for recommended sanction on Plaintiff's professional licensure for willfully providing false testimony, providing misleading information, or falsified written or verbal communications. After a contested hearing on May 17, 2017, the POST Board unanimously determined Plaintiff did not willfully provide false testimony, misleading information, or falsify written or verbal communication and there was no POST Board violation.

COMPLAINT PARA 11 On or about May 2, 2018, Defendant re-published the same or substantially similar false material and conclusions to the North Dakota Department of Labor in a sworn affidavit. Defendant specifically states, “there is no doubt in my mind that [Plaintiff] . . . has a propensity to misrepresent the truth, making her an unreliable witness that would need to be disclosed in every criminal case where she would be a witness.”

COMPLAINT PARA 12 A copy of the *Giglio* letter currently resides in Plaintiff’s BPD personnel file and at the Burleigh County State’s Attorney’s Office which continuously publishes the false narrative she lied and is untrustworthy. Furthermore, it has been affirmatively published a number of additional times to Plaintiff’s prospective employers which have thereafter not hired Plaintiff despite her superior experience, training, and education. Particularly, she has since been denied full-time employment by the North Dakota Highway Patrol, Mandan Police Department, Morton County Sheriff’s Department, and City of Lincoln Police Department.

COMPLAINT PARA 17 Individually, and in her capacity as Assistant Burleigh County State’s Attorney, Defendant has made various defamatory statements about Plaintiff’s reputation, competence, and disqualification from her profession which were patently false and erroneously concluded.

COMPLAINT PARA 18 The statements by Defendant described herein constitute civil libel and civil slander under N.D.C.C. §§ 14-02-02 through 14-02-04. Such statements were false, unprivileged, and tend to injure Plaintiff in her occupation, business, trade, and profession along with naturally causing actual damage.

COMPLAINT PARA 19 Defendant’s statements were made without reasonable basis for believing them to be true, and for no common good or public purpose. Defendant’s *Giglio* conclusion was patently afoul of established guidance in the Burleigh County State’s Attorney’s Office and inconsistent with other “non-*Giglio*” determinations for much more severe conduct by other BPD officers. Defendant’s statements are malicious and false and/or made with a reckless or intentional disregard for the truth.

COMPLAINT PARA 20 Notwithstanding Defendant’s defamatory statements that Plaintiff could no longer be used as a prosecutorial witness, since Plaintiff’s termination, prosecutors in multiple jurisdictions continue to subpoena Plaintiff to testify against defendants in Plaintiff’s current capacity as loss prevention manager. Furthermore, not only have prosecutors continued to subpoena Plaintiff from other jurisdictions, but Plaintiff has continued to receive subpoenas to testify from other prosecutors at the Burleigh County State’s Attorney’s Office—an exemplar that the Defendant’s statements are knowingly false.

COMPLAINT PARA 21 Defendant forfeited absolute and/or prosecutorial immunity when she acted as an investigator and engaged in fact-finding activities to personally seek to disqualify Plaintiff from her profession. Defendant furthermore knew that termination was a foregone conclusion upon issuance of a *Giglio* letter, despite its material deficiency, and thereafter engaged in personnel activities of the County not covered by absolute and/or prosecutorial immunity. Defendant continued to publish the erroneously issued *Giglio* letter and/or related information directly or indirectly to the POST Board, North Dakota Department of Labor, and Plaintiff’s prospective employer(s) which is conduct not covered by absolute and/or prosecutorial immunity.

COMPLAINT PARA 22 Defendant forfeited any arguable qualified immunity when she acted in complete defiance to prevailing facts and maliciously, falsely stated evidence supported her position when in fact it ran against. Specifically, Defendant asserted several reports supported Defendant’s theory that Plaintiff was lying regarding arrests without backup, when in fact dispatch logs indicate otherwise, and one report was for a time when the Plaintiff was not even working patrol. Additionally, Defendant engaged in systemic confirmation bias throughout her investigation and wholly misapplied prevailing jurisprudence when issuing the *Giglio* letter to an officer who did not even serve in her governmental unit. The United States Supreme Court stated in 1985, “qualified immunity . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 US 335, 341 (1986). In this case, the Defendant was plainly incompetent and violated established standards for actually determining *Giglio*-status.

COMPLAINT PARA 25 Defendant has seriously damaged Plaintiff's standing and associations in her community by imposing upon her a stigma that forecloses the freedom to take advantage of other employment opportunities, as the basis for Plaintiff's termination is entirely false.

¶9 ARGUMENT

¶10 The facts surrounding Julie Lawyer sending the letter to Chief Gibbs along with Krile's more recently filed affidavit create genuine issues of fact in dispute, and for that reason alone the renewed motion to dismiss should not have been granted. The statute at issue requires malice (and not actual malice), and taking the facts in the light most favorable to Krile there is a genuine issue of fact in dispute. We note that the requirement of "actual malice" as a determinative factor in regards to analyzing misconduct itself sanctions the misconduct and often itself creates an injustice. By selecting a standard or burden that can rarely be met, those who have been wronged can rarely right that wrong. This Court should reject the actual malice standard as applied to government action, or at the very least adopt a standard that allows any actual malice to be more easily implied.

¶11 The issue of whether Julie Lawyer acted with malice should have been left to the jury. The decision of the lower court granting Julie Lawyer's motion to dismiss should be reversed and this matter should be remanded for trial. In the alternative, we respectfully request that the Court reverse the decision of the lower court granting Julie Lawyer's motion to

dismiss and remand this matter with instructions that the defendant present a proper Rule 56 motion for summary judgment, where all materials present by the parties are reviewed in conjunction with that motion and briefs.

¶12 As to sending the letter to Chief Donlin, nothing in Julie Lawyer's brief supports the sending of the letter as being entitled to a qualified privilege. The brief only repeats what was already presented to the trial court and to the Supreme Court, which is merely a repeated recitation of paragraphs 19-21 of the Affidavit of Julie Lawyer. The Supreme Court already decided that the information presented below did not entitle Julie Lawyer to a qualified privilege. Nothing in the renewed motion or renewed brief supports that some other exception applies. Julie Lawyer voluntarily sent Giglio letter to Chief Donlin, and as such qualified privilege does not apply. Nor was sending this letter to Chief Donlin as part of a legal proceeding that would subject it to any privilege.

¶13 As to the disclosure of the letter to Lincoln Police Chief Gibbs, the record is clear that the letter was sent to Chief Gibbs voluntarily and none of the absolute qualified communities would apply. Indeed, we assert that the sending of the letter to Lincoln Police Chief Gibbs demonstrates malice on the part of Julie Lawyer. The only reason for providing that letter to Lincoln Police Chief Gibbs was to ensure that Robyn Krile would not be

hired by the Lincoln Police Department, and that she would be unable to be hired as a police officer there, or anywhere else.

¶14 The North Dakota Supreme Court in its decision reversing and remanding this action back to the district court provided the following description of the law applicable to this case:

[¶18] Under N.D.C.C. § 14-02-05, certain communications are privileged:

A privileged communication is one made:

1. In the proper discharge of an official duty;
2. In any legislative or judicial proceeding or in any other proceeding authorized by law;
3. In a communication, without malice, to a person interested therein by one who also is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; and
4. By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

In the cases provided for in subsections 3 and 4, malice is not inferred from the communication or publication.

“Privilege is based upon the sound public policy that some communications are so socially important that the full and unrestricted exchange of information requires some latitude for mistake.”

Richmond v. Nodland, 552 N.W.2d 586, 588 (N.D. 1996) (quoting *Rykowsky v. Dickinson Pub. Sch. Dist. 1*, 508 N.W.2d 348, 351 (N.D. 1993)). “There is no liability for defamatory statements that are privileged.” *Id.* (citing *Rykowsky*, 508 N.W.2d 348; *Soentgen v. Quain & Ramstad Clinic, P.C.*, 467 N.W.2d 73 (N.D. 1991)).

[¶19] Privileged communications may be either absolute or qualified. *Id.* “A privilege is absolute when the free exchange of information is so important that even evidence of actual malice does not destroy the

privilege.” *Id.* (citing N.D.C.C. §§ 14-02-05(1)-(2); *Soentgen*, 467 N.W.2d at 78; *Emo v. Milbank Mut. Ins. Co.*, 183 N.W.2d 508 (N.D. 1971); *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 89 N.W.2d 102 (N.D. 1958)). “A qualified privilege, on the other hand, ‘may be abused and does not provide absolute immunity from liability for defamation.’” *Id.* (quoting *Soentgen*, at 78; and then citing N.D.C.C. § 14-02-05(3), (4)). “Whether privilege applies is a question of law for the courts.” *Id.* (citing *Soentgen*, at 78).

¶15 The malice exhibited by Julie Lawyer is demonstrated by the affidavit filed by Robyn Krile in conjunction with the motion below:

1. Julie Lawyer’s failure to properly look into the facts relating to me, resulting in reaching conclusions of fact and general conclusions not supported by the actual facts.
2. Julie Lawyer conducted an inept, incomplete, and inherently flawed review of my prior cases and actions, resulting in conclusions of fact and other conclusions shown to be unsupported by the hearing by the post board. Our expert provides this assessment as well.
3. Julie Lawyer knew or should’ve known that providing the *Giglio* letter to the Bismarck Police Chief Donlin would more than likely result in my being fired, and this was done knowing that and for the purpose of getting me fired, and with malice.
4. Julie Lawyer knew or should’ve known that providing the *Giglio* letter to the Lincoln Police Chief would more than likely result in her not being hired, and providing that letter was not in any way protected as part of a judicial proceeding or other lawful proceeding and was voluntarily provided to the chief of police of Lincoln when requested, without any obligation to provide it.
5. Julie Lawyer “had it in” for me and did everything in her power to ruin my professional career as a police officer.
6. Each of these actions and activities were performed by Julie Lawyer with malice directed at me.

7. The fact that I was successful in obtaining a job with the Lincoln Police Department does not change the fact that Julie Lawyer's action was done voluntarily and separate from any legal process and as such no qualified immunity applies; voluntarily providing the *Giglio* letter to the chief of police of the Lincoln Police Department was unwarranted and constitutes defamation and malice toward me.

8. The fact that I was successful in obtaining employment with the Lincoln Police Department does not prevent or defamation action, and only potentially limits damages, but does not get rid of damages for defamation; at the very least, nominal damages would apply.

Each of the items listed above constitute material fact issues that are in dispute and as such it was inappropriate to dismiss this matter. Where there is a dispute in fact the matter must be determined through an evidentiary hearing, and not by dispositive motion to dismiss.

¶16 In furtherance of our position that qualified immunity does not apply, we provided to the lower court our expert's report concluding that "there is no basis in law or fact for the complete exclusion of Robyn Krile as a witness." **Randy Seiler Expert Report June 2020, Doc. No. 128**

[**Appendix 421**]. At salient part, the report provides the following:

Then, on March 22, 2017, Julie Lawyer, while undertaking a review of the files from the Bismarck Police Department, concluded that these statements "[i]nclude misconstruing the facts to such an extent that it misleads the fact finder and outright lies" She then concluded that the Burleigh County State's Attorney's Office would "no longer be able to use Sergeant Krile to testify in our cases."

The documents I reviewed are devoid of any evidence that Ms. Lawyer consulted with any lawyers in her office or did any legal research to support her unsubstantiated conclusion. In her letter, Ms. Lawyer did not cite any cases or legal precedent to support her

conclusion. This is a prime example of how one lawyer's unsubstantiated opinion can vilify a police officer with far-reaching professional and performed consequences.

Randy Seiler Expert Report June 2020 page 6, Doc. No. 128 [Appendix 427]. As noted above, the lower court refused to look at any documents submitted, limiting its review to the complaint and the materials embraced by the pleadings.

¶17 Robyn Krile was terminated from the Bismarck Police Department after the State's Attorney's Office issued a letter indicating she was *Giglio* impaired. The occurred due to the actions of Julie Lawyer.

¶18 In the March 22, 2017, letter from Julie Lawyer which indicates Robyn Krile is Giglio impaired, she indicates that she detailed report number 15-16414 showing Robyn Krile lied about officers arresting without backup.

Exhibit 61 at pg. 2, Doc. No. 114 [Appendix 97]. She then indicates, "[t]here are more reports which show other officers arresting a suspect without backup and under no exigent circumstances. I am only enclosing report 15-16414 as one example." *Id.* These "reports" were the sole basis for Robyn Krile's alleged Giglio status.

¶19 Robyn Krile's counsel requested all information from the State's Attorney's office which was reviewed prior to issuing the March 22, 2017 letter. Julie Lawyer only reviewed eight (8) police reports. **Exhibit Q,**

Doc. No. 115 [Appendix 110]. Out of the eight (8) police reports, only report number 15-016414, which Julie disclosed in her letter, facially appears to be an arrest without backup. **Exhibit R, Doc. No. 125**

[Appendix 265]. Every other report reviewed expressly showed that officers did in fact have backup present before the arrest was made.

Furthermore, that one report which indicates backup arrived after the arrest by several minutes can be explained by the “arrest call” to dispatch being delayed because of a busy radio, on-scene issues, or a host of other issues; furthermore, there is nothing to indicate Robyn Krile knew of this arrest because she wasn’t even working the street that night. The only conclusion

is that Assistant State’s Attorney Lawyer was lying in her letter when she indicated there were other reports she reviewed which showed arrests without backup. Also, the incident for report number 15-016414 occurred the evening of September 20, 2015, and Chief Donlin knew Robyn Krile was not on shift that evening. He was aware she was in Minot at a funeral with Chief Donlin, Deputy Chief Ziegler, Draovitch, and McMerty.

Subsequently, the POST Board found that Robyn Krile did not violate any rules and was not untruthful. **Exhibit S, Doc. No. 126 [Appendix 266].**

There was not sufficient evidence for Julie Lawyer to issue the Giglio letter, indicating the qualified immunity does not apply to the facts of this case and

that there exists malice. These factual contentions are questions of fact.

Where there is a genuine issue of facts, dismissal is not allowed.

¶20 Furthermore, that one report (#15-016414 on September 20, 2015) which indicated backup arrived after the arrest by several minutes can be explained by the “backup check-in” to dispatch being delayed because of busy radio traffic, on-scene problems, or a host of other issues.

¶21 The evidence supports a systemic effort to get rid of Robyn Krile—artificially low rankings, denial of training necessary for promotion, selective and erroneous discipline, and finally a fabricated letter from an aspiring politician to an established politician indicating Robyn Krile can no longer be a credible cop, which every law enforcement officer knows leads to termination.

¶22 Robyn Krile was terminated under the auspices of being *Giglio*-impaired by then Assistant State Attorney Julie Lawyer. For context, Julie Lawyer conducted a review of Departmental personnel files in March of 2017 after she received an anonymous complaint that another female officer was engaged in misconduct. Robyn Krile’s personnel file was reviewed by Julie Lawyer in Lieutenant Dwight Offerman’s office. **Julie Lawyer depo 118:10, Doc. No. 127 [Appendix 267]**. After discovering the two disciplinary letters regarding the Vargas incidents and indicating there was a

problem, Lieutenant Dwight Offerman asked her, “what more do [you] want to look at.” **Julie Lawyer depo 121:8, Doc. No. 127 [Appendix 267].**

¶23 Julie Lawyer pulled a number of police reports and documents and ultimately concluded a week later there were three reasons Robyn Krile was *Giglio*-impaired to such an extreme degree that she could not be used as a witness. First, she found that because Robyn Krile used the term “advanced” when describing Vargas’ movement towards her that would “cause great concern about her ability to accurately report facts and testify without misleading the factfinder.” **Exhibit 61 at pg. 2, Doc. No. 114 [Appendix 97].** Second, she found that Robyn Krile told her shift mates that “racial discrimination ... was the reason she was being moved to a different shift [when] this is wholly untrue...” *Id.* (i.e. this is the race card incident). Third, she took a large issue with Robyn Krile’s hyperbolic statement that she is unaware that officers were making solo, non-exigent circumstance arrests when backup was actually available. *Id.* This comment about solo arrests without exigent circumstances when backup is available has taken on a life of its own during this proceeding. It was a statement that Lieutenant Fetzer heavily documented in his Vargas investigation which ultimately turned into the death knell for Robyn Krile: a completely exaggerative, off-the-cuff comment given the weight of perjury. **Ex. U, Doc. No. 117**

[**Appendix 179**]. The whole thing appears ridiculous from the outside—it is the epitome of the mountain of a molehill analogy.

¶24 In addition to the police reports and evaluations that Julie Lawyer reviewed to come to her *Giglio* conclusion, there was one outlying document entitled: 2013 Lieutenant Stugelmeyer notes.pdf. **Exhibit W, Doc. No. 118 [Appendix 180]**. The document is actually a ‘note to self’ saved by Lieutenant Dwight Offerman that was from Lieutenant Stugelmeyer back in 2013. *Id.* It is a laundry list of issues Lieutenant Stugelmeyer had with Robyn Krile back in 2013 (when Robyn Krile first made sergeant) that apparently was saved by Lieutenant Offerman. It ended up in the hands of Julie Lawyer during the coincidental Department-wide *Giglio* review. It was the only non-police report, non-evaluation Julie Lawyer admits to reviewing regarding the matter. *Id.*

¶25 The Department loaded Robyn Krile’s personnel file with inane disciplinary actions that not only prevented her from being promoted, the actions directly and adversely brought into question her credibility. Ultimately, Julie Lawyer picked up on what she believed was a *Giglio* issue and it appears a little extra push by Lieutenant Offerman giving the laundry list of gripes helped push Robyn Krile out the door.

¶26 While Julie Lawyer indicated from a “paper review” that Robyn

Krile was *Giglio*-impaired, the Department has a *Giglio/Brady* Policy and a procedure in place to protect officers from wrongful *Giglio* determinations. That process was ignored when it came to Robyn Krile. Specifically, the policy states: “the department must ensure that final disposition of potential allegations are actual integrity failures and not innocent mistakes or oversights by the employee.” **Exhibit MM at 79, Doc. No. 119 [Appendix 181]**. No follow-up interview was done with Robyn Krile to vet out the circumstances of her statements now that they were determined to be *Giglio* implicating, and certainly no investigation was completed to support the decision within the Department. Furthermore, there is the option of retaining an employee who is *Giglio*-impaired in a non-“enforcement capacity” after a *Giglio* determination, and that was never offered or explored with Robyn Krile. *Id.* She was merely shown the door.

¶27 Defendants released Robyn Krile of her duties with the Department allegedly based off Julie Lawyer’s *Giglio* letter indicating she would not be able to testify in cases due to her lack of credibility. Following her termination, however, Robyn Krile was contacted approximately eight times between March 9, 2018 and August 12, 2019 by the Burleigh County State’s Attorney’s Office and Defendants about testifying. **Exhibit HH, Doc. No. 120 [Appendix 183]**.

¶28 We now will review the decision of the district court. **Doc. No. 189 [Appendix 1147]**

¶29 Although the district court cited the correct standards – that a complaint should not be dismissed unless it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted, and that the complaint must be construed in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint – the district court went on to basically ignore the standard. Instead of looking to whether or not the information provided in conjunction with the motion to dismiss made it impossible for the plaintiff to prove the claim, the lower court refused to look at the additional materials provided and instead narrowed the scope merely to the complaint itself in the materials embraced by the pleadings or part of the public record. In addition, the district court did not take as true the well-pleaded allegations in the complaint, and instead insisted that those allegations be supported by facts, while at the same time ignoring the much of the materials provided by both parties which indeed provided facts that supported the allegations in the complaint.

¶30 In situations where the defendant in a motion to dismiss include substantial factual material, then the rules envision that the district court will convert the motion to dismiss to a motion for summary judgment and allow

a fair review of the facts submitted in the light most favorable to the plaintiff the material submitted by both sides. This did not happen here. The lower court, instead of reviewing all the material submitted in the light most favorable to the plaintiff, instead intentionally narrowed the scope only to the complaint and materials embraced by the pleadings and materials that are part of the public record.

¶31 In conjunction with ignoring the additional materials, the district court ignored the affidavit of the plaintiff submitted in response to the motion to dismiss, and failed to take into account any of the allegations or facts submitted by the plaintiff in her affidavit and other materials submitted.

¶32 The district court (at paragraph 11 of the decision, **Doc. No. 189, [Appendix 1147]**) went so far as to assert that none of the arguments constitute factual matters that the court must accept as true for the purposes of this motion, thereby rejecting both the arguments and indeed the allegations and the facts presented to the court by the plaintiff. Instead of determining whether or not the facts taken in the light most favorable to the plaintiff showed malice or abuse of the privilege, the lower court focused almost entirely on whether or not Julie Lawyer's conduct was supported by the "attending circumstances" and then found in favor of Julie Lawyer as a

matter of law based merely on the prosecutor’s self-serving statements and rationale for actions, all the while ignoring the facts presented by the plaintiff that should have been taken in the light most favorable to the plaintiff. The lower court goes on at paragraph 13 to assert that the “attending circumstances” are not in any way contradicted by the plaintiff’s complaint, even though the plaintiff’s complaint repeatedly asserts that this conduct was based on malice, improper motives, and not in conjunction with any official proceeding. The real issue is whether there are facts which support the plaintiff’s claims, not what the attending circumstances were.

¶33 At paragraph 14 of the decision, **Doc. No. 189, [Appendix 1153-1154]**, the district court – which already limited its review of the materials to the complaint and materials embraced by the pleadings – goes on to state that the plaintiff does not set forth any factual matters that would tend to support a showing of malice. We refer this court once again to the materials in the record. Thus, by ignoring the material submitted by the plaintiff, including her affidavit, the district court asserted no facts had been presented even though they had been presented and ignored by the district court.

¶34 Also paragraph 14 of the decision, **Doc. No. 189, [Appendix 1153-1154]**, the district court cites the requirement of proof that the

statement was made with malice in fact, ill-will, or wrongful motive, citing the *Richmond* case, but then reaches a conclusion relating only to malice and ignoring the other two prongs that would allow liability, that is, ill-will or wrongful motive. It seems exceedingly unfair for the district court to ignore the factual information presented and then assert that the factual information fails to support the plaintiff's claim.

¶35 In addition, the district court at paragraph 15 of the decision, **Doc. No. 189, [Appendix 1153-1154]** totally failed to understand the plaintiff's argument relating to the voluntary nature of submitting the letters to Chief Dolin and Chief Gibbs. The reference to Julie Lawyer sending the documents to these two chiefs voluntarily goes to the issue of whether or not there was an official proceeding which would allow the privilege. Because there was no official proceeding in reference to the letter sent to the two chiefs, the privilege does not apply. The point that they were sent voluntarily goes to the fact that malice, ill will, or wrongful motive occurred as shown by the sending of these two letters, voluntarily.

¶36 In regards to sending the letter to Lincoln Police Chief Gibbs, the district court erred in applying the same analysis to the entity where the plaintiff was employed as opposed to a different entity. Although it could be argued that there is a basis for sending the letter to her present employer, no

such argument would be applicable as to sending the letter to third party looking to hire the plaintiff. Indeed, sending the letter to third party is an additional fact which, taken in the light most favorable to the plaintiff, indicates the presence of malice, ill will, or wrongful motive.

¶37 The lower court also erred in regards to concluding that the plaintiff has no claim because she eventually got hired by the city of Lincoln. The fact that she eventually got hired by the City of Lincoln does not change the fact that sending a letter to the City of Lincoln is not privileged under the statute; nor does it change the fact that it is undisputed that the plaintiff was indeed harmed by the sending of that letter to the City of Lincoln because not only was her reputation harmed, but also initially she was not hired, and therefore had a loss of income, as well as retirement and medical benefits.

¶38 The simple fact of the matter is that the plaintiff was indeed damaged by Julie Lawyer sending the letter to the chief of police of city of Lincoln. This fact is undisputed. Nonetheless, the district court at paragraph 20 concluded that because she was eventually hired by the City of Lincoln she is failed to state a claim. The fact that she eventually – much later – was hired by the City of Lincoln does not change the fact that due to the letter sent by Julie Lawyer she initially was not hired, and suffered damages

thereby.

¶39 It should be noted that the attorney for Julie Lawyer failed to disclose in oral arguments the fact that the plaintiff was indeed not hired by the City of Lincoln due to the letter being sent by Julie Lawyer, even though that information was submitted in the materials provided by that attorney. Immediately following oral arguments, plaintiff's counsel reviewed the relevant materials and indicated by letter to the lower court that the information supplied in oral arguments by Julie Lawyer's attorney was not correct, and provided the lower court specific reference to the record of the deposition of the plaintiff taken by defense counsel in which these facts were clearly made part of the record and are undisputed. **Docket No. 178**

[Appendix 1140] The lower court nonetheless ignored these undisputed facts that damages were incurred by the plaintiff as a result of the letter sent to the City of Lincoln, while at the same time asserting that the logic that applied to the City of Bismarck chief of police – where the plaintiff was employed – equally applied to a different entity where she was not employed. Sending the letter to an entity to where she is not employed is not supported by the same logic, and indeed is a fact that should be read in light most favorable to the plaintiff as indicative of malice, ill will, or wrongful motive.

¶40 Conclusion

¶41 For the reasons listed above, and based on all the documents filed in this matter, we respectfully request that this Court reverse the decision of the lower court granting Julie Lawyer's motion to dismiss and remand this matter for trial. In the alternative, we respectfully request that the Court reverse the decision of the lower court granting Julie Lawyer's motion to dismiss and remand this matter with instructions that the defendant present a proper Rule 56 motion for summary judgment, where all materials presented by the parties are reviewed in conjunction with that motion and briefs.

¶42 Dated this 12th day of July, 2021.

_____/s/_____
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¶43 CERTIFICATE OF COMPLIANCE

¶44 The undersigned, as attorney for the Appellant in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a) of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional type face in 14-point font and equals 29 pages, exclusive of this Certificate of Compliance

¶45 Dated this 12th day of July, 2021.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20210138
Burleigh County Civil No. 08-2019-CV-00667

Robyn Krile,)	
)	CERTIFICATE OF
Plaintiff-Appellant,)	SERVICE
)	
v.)	
)	
Julie Lawyer, in her official and individual,)	
Capacity as Assistant Burleigh County)	
State's Attorney,)	
)	
Defendant-Appellee.)	

¶1 I hereby certify that the following document (s):

1. Appellant's Brief;
2. Appellant's Appendix (Table of Contents and 14 parts); and
3. Certificate of Service

were served upon the above-named Defendant-Appellee by filing and serving true and correct copies of the above-listed documents on the 12th day of July, 2021, y to:

Randall J. Bakke
Bradley N. Wiederholt

rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

¶2 Dated this 12th day of July, 2021.

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Robyn Krile,)	
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Capacity as Assistant Burleigh County)	
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¶1 I hereby certify that the following document (s):

1. Appellant's Brief (corrected); and
2. Appellant's Appendix (Corrected).

were served upon the above-named Defendant-Appellee by filing and serving true and correct copies of the above-listed documents on the 15th day of July, 2021, to:

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¶2 Dated this 19th day of July, 2021.

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