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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20190367
Burleigh County No. 08-2019-CV-00667

Robyn Krile, Plaintiff - Appellant, vs. 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 Defendant's Motion To Dismiss dated September 20, 2019, Docket No. 74, and subsequently entered Judgment, dated September 24, 2019, Docket No. 79, in which notice of entry of Judgment was filed on September 24, 2019, Doc. No. 80, 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 ledger 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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¶1 Statement of the Issues

¶2 Within the context of this brief the following issues have been raised:

> **¶3** ISSUE 1. Whether a prosecutor's investigation relating to one particular police officer's honesty, and not as a *Brady - Giglio* discovery response sent to defense counsel and not in conjunction with a pending criminal case, falls within the confines of "privilege communications" under Section 14-02-05, subdivision 1 or 2, or "absolute immunity" provided to traditional prosecutorial conduct.
>
> **¶4** ISSUE 2. Whether the distribution of any report or conclusions made by prosecutor to a third party (i.e., the police officer's employer or job service) in regards to the honesty of the police officer, that is separate from any specific pending criminal case or discovery response, is a privilege communication under Section 14-02-05, subdivision 1 or 2.
>
> **¶5** ISSUE 3. Whether taking the factual information in the complaint as true , the lower court erred in granting the motion to dismiss.
>
> **¶6** ISSUE 4. Whether there were sufficient material facts in dispute which precluded the lower court from granting the motion to dismiss.
>
> **¶7** ISSUE 5. Whether the lower court erred in failing to convert the motion to dismiss into a motion for summary judgment and allow the plaintiff to submit further affidavits and information.

¶8 Because these issues are so interrelated, counsel has determined his move cook more coherently sound not to parse the argument stringently into each of these narrow issues, but instead provide a more general argument in which

those issues are addressed in conjunction with the normal flow of the argument presented below.

¶9 Statement of the Case

¶10 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. 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.

¶11 Unsurprisingly, the police officer was fired from her position due to the prosecutor's report being sent to the third party, her employer. The

prosecutor continued her vendetta against the police officer by submitting to job service of North Dakota the same information in order to prevent the police officer from receiving unemployment benefits.

¶12 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. 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 live, provide false information, or falsify written or verbal communications relied upon by the courts, states attorneys, or other law enforcement officials. The board found that the allegations made by the prosecutor were wholly unsupported and incorrect.

¶13 Of course, due to the manner in which the prosecutor decided to conduct your own investigation and submit her own report to her employer, the plaintiff had no opportunity for hearing or two. 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've of course resulted in a hearing to determine if indeed any of the prosecutor's assertions were true.

¶14 The plaintiff Robyn Krile filed this action against (then) Assistant States Attorney Julie Lawyer on March 7, 2019. **Docket No. 2. [Appendix 4]** The defendant filed a motion to dismiss plaintiff's complaint on April 5, 2019. **Docket No. 27. [Appendix 12]** The defendant filed 16 exhibits in conjunction with the motion to dismiss. **Docket Nos. 30-45. [Appendix 30-227]** On May 2, 2019, the plaintiff responded to the defendant's motion, **Docket No. 61**, **[Appendix 232]** and filed five exhibits, **Docket Nos. 62-66. [Appendix 244-335]**The defendant filed a reply brief, **Docket No. 69**, **[Appendix 337]** and with it filed to exhibits. **Docket No. 71-72**. **[Appendix 353-367]**

¶15 A motion hearing was held on July 11, 2019, before the Hon. Troy LeFevre. On September 20, 2019, the lower court issued its order granting dismissal. **Docket No. 74. [Appendix 368]** Counsel for defendant submitted proposed order for judgment and proposed judgment, which were signed and entered on September 24, 2019. **Docket Nos. 75-76, 78-79. [Appendix 373-374]** Notice of entry of judgment was filed in September, 24, 2019. **Docket No. 80. [Appendix 375]** The notice of appeal was submitted to the North Dakota Supreme Court on November 22, 2019.

¶16 Plaintiff's counsel below was attorney Christopher Redmann, a private lawyer who also serves as the Sioux County state's attorney. Plaintiff's counsel on appeal is attorney Lynn Boughey, who focuses on appellate work.

¶17 A statement of the facts relevant to the issues submitted for review

¶18 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:

> **¶19 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;
>
> **¶20 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.
>
> **¶21 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.
>
> **¶22 COMPLAINT PARA 7** From April 1, 2004, through March 27, 2017, BPD consistently employed over 100 employees
>
> **¶23 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.

¶24 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.

¶25 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.

¶26 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."

¶27 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.

¶28 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.

¶29 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.

¶30 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.

¶31 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.

¶32 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.

¶33 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.

¶34 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.

¶35 ARGUMENT

¶36 This action is an action brought by police officer Robyn Krile against assistant states attorney Julie Lawyer. The action was dismissed by the lower court in conjunction with a Rule 12 motion to dismiss. As a result, it is proper to review the factual allegations made in the complaint, which for purposes of the motion to dismiss are taken as being true:

¶37 Lawyer has indicated all her actions, as stated in the Complaint and documents incorporated by reference, are privileged communications, and

Lawyer is absolutely immune from suit under N.D.C.C. § 14-02-05 (1) and (2). Privileged communication under subsection one (1) grants absolute immunity for communications occurring in the *proper* discharge of an official duty. Subsection two (2) expands absolute immunity to legislative, judicial, or other proceedings authorized by law. Privileged communications, thus immunity for Lawyer, bestowed under subsection (1) is best guided under case law for prosecutorial immunity as this matter involves an assistant state's attorney who is contending that she operated within the *proper* scope and capacity of her employment.

Section 14-02-05 provides as follows:

> **Section 14-02-05. Privileged communications.**
> The privilege 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;
> . . .
> 4. By a fair and true report, without malice, the judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

¶38 Application of Section 14-02-05 – Privileged Communications

¶39 Privilege and immunity are indeed different legal concepts that must be analyzed separately. If the communication is privileged, then we do not get to the issue of the application of immunity. However, if the communication is not privileged, then it may be necessary to proceed to immunity issues.

Because the lower court concluded that the communication was privileged, the action was dismissed under Rule 12 is a matter of law, and the issue of community – absolute or qualified – was not necessary to the decision.

¶40 A privilege can only be extended as far as its underlying purpose. Section 14-02-05, subdivision 1, allows a privilege only if it is for a proper purpose. In the context of this case, the stated purpose of the review of the officers reports was to determine first, if there is any exculpatory evidence that must be provided to a criminal defendant, and second, if there is any evidence that can be used for impeachment purposes that must also be provided to the criminal defendant. Thus, a proper communication under Section 14-02-05, subdivision 1, is limited to the communication "in the proper discharge of an official duty." Emphasis added. The "official duty" imposed upon a prosecutor in this context is to advise the defendant of exculpatory evidence or impeachment evidence. Such disclosure would have to be in conjunction with the official duty at issue, which would necessarily be the Rule 15 discovery disclosure to the defendant. All privileged communications are limited to communications directed to the protected person, and cannot be extended beyond that person or that purpose.

¶41 Perhaps an analogy will assist in the proper understanding of privileged communications. If a priest provides advice to a parishioner regarding how to

end his relationship with a person not his spouse, that communication is privileged, as long as it is between those two individuals, and for the underline purpose of that privilege, and what is said by the priest is protected because in that context it is "in the proper discharge of an official duty." Giving specific advice to that single parishioner would be proper and protected; however, calling the parishioner up to the front of the church during a Sunday service and communicating that advice to that parishioner before the entire congregation would destroy any protection or privilege that the priest might have had.

¶42 Sending a letter to the Bismarck Police Department – or job service, or even to the POST board[1] – is not a privileged communication that falls within the proper discharge of an official duty of a prosecutor. The duty at issue – the duty of proper disclosure to the defense in a criminal case – does not extend to the actions taken by this prosecutor. By misusing this privilege, and by the attempted use of this privilege to justify the actions of the prosecutor, the police officer is denied all due process rights; all options to have a hearing to

[1] When an officer is terminated the employer informs the POST board that the officer is no longer employed with the department, reasons for termination (if terminated), and indicates whether the POST Board should initiate an investigation. The Bismarck Police Department sent in the form to the POST Board stating that Krill was fired due to the prosecutor's memorandum, provided the memorandum to the POST Board, and indicated that the POST Board should initiate a hearing to see if Krill had violated any of the rules that apply to police officers. The prosecutor would have known that the result of sending her memorandum to the Bismarck Police Department was that the department would fire her and forward her allegations to the POST Board.

determine the truth immediately forsaken by the prosecutor's unilateral and unjustified actions.

¶43 And it is not as if the prosecutor has no other options to deal with an officer who she thinks has provided false evidence, submitted false reports, or lied on the stand. A prosecutor has many, many tools at his or her disposal to deal with such wayward officers. But this prosecutor did not avail herself of any of these prosecutorial tools – tools which would provide the police officer a proper hearing to determine the truth – and instead chose a path that is entirely destructive to that officer's livelihood while at the same time forgoing any possibility of her conclusion being put to the test—to any test. And, of course, upon receipt of an actual *Brady-Giglio* letter in an actual criminal case, the Bismarck Police Department would have had the option of initiating an internal affairs investigation to determine if the conclusions of the prosecutor had any basis in fact.

¶44 Simply put, the prosecutor's attempt to find shelter under the privilege communication provision of Section 14-02-05, subdivision 1, is misplaced and should be rejected by this Court.

¶45 If the decision is made by the prosecutor to focus on one particular officer, instead of one particular case, then the prosecutor by definition becomes

an investigator and is no longer acting as a prosecutor in regards to one particular case. The following that investigation charges are brought against the officer, then she in conjunction with bringing that actual prosecution adorns the mantle of a prosecutor. But until that happens, she is acting as an investigator when she is investigating one particular officer – or for that matter, 20 officers.

¶46 The attempt by the prosecutor to employ the second subsection of Section 14-02-05 to protect her from her defamatory, libelous conduct is also misplaced, and more obviously so. As before, if the prosecutor had been presenting her views or conclusions as to the police officer in conjunction with an actual discovery disclosure required under *Brady* and its progeny, there could be the possibility of a proper application of Section 14-02-05, subdivision 2, for her actions. But for this second subdivision to apply, such privilege communication must be either 1) in a "legislative or judicial proceeding," or 2) "in any other proceeding authorized by law." Section 14-02-05(2). Because the prosecutor's communication was not part of the discovery disclosure in a specific judicial proceeding, the first half of this subsection does not apply. Thus, it is left to the prosecutor to demonstrate that her communications were part of some "other proceeding authorized by law." But there was no "other proceeding" – and certainly not one "authorized by law." Indeed, the letter to

the Bismarck Police Department is specifically a violation of the law, in that it constitutes, in this case, civil libel under Chapter 14-02.

¶47 There is no "official duty" to besmirch a police officer or – outside the bounds of a particular criminal case – generically impugn the honesty of a police officer and sending a communication in the form of a letter to that officer's employer stating the same. There is an official duty to prosecute those who file false reports or are guilty of some other criminal conduct that may apply to wayward police officers. But the actions of the prosecutor in this case do not fall within "the proper discharge of an official duty." Nor do they fall within the context of an actual judicial proceeding.

¶48 Distinction between prosecution and investigation

¶49 The prosecutor in this case, attempts to assert that investigation of the police officer is within the scope of her acting as a prosecutor and therefore protected, even though the prosecutor freely admits – and Exhibit A **docket #62,** page 2, paragraph 5 and page 3, paragraph 9 **[Appendix 245-246]** – that she conducted her own independent investigation.

¶50 It is important for this Court to understand what information and argument was supplied by Attorney Redmann in the case below:

> **¶51** [3]Privileged communications, thus immunity for Lawyer, bestowed under subsection (1) is best guided under case law for

prosecutorial immunity as this matter involves an assistant state's attorney who is contending that she operated within the *proper* scope and capacity of her employment. "Immunity and privilege serve the same purpose." *Boice v. Unisys Corp*., 50 F.3d 1145, 1148 (2d Cir. 1995).[2] The United States Supreme Court has further indicated that it's "the relation of the act complained of to matters committed by law to his control or supervision which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity from civil defamation suits." *Barr v. Matteo*, 360 U.S. 564, 576 (1959) (internal citations omitted). Although privilege under N.D.C.C. § 14-02-05 is a function of state law, the defense itself is found in all layers of government.

¶52 [4]"Absolute immunity covers prosecutorial functions such as the initiation and pursuit of a criminal prosecution, the presentation of the State's case at trial, and other conduct intimately associated with the judicial process. *Witzke v. City of Bismarck*, 2006 ND 160, ¶ 17, 718 N.W.2d 586). It is those duties that are *proper* for a prosecutor. Distinctly different, however, "prosecutors have only the protection of qualified immunity when functioning in the role of an administrator or investigative officer rather than in the role of an advocate." *Id.* (emphasis added). The categorization of Lawyer's activities and function at this stage of the proceedings is critical as it determines if she *properly* exercised her duties and ultimately the applicability or inapplicability of absolute immunity and/or absolute privilege. A ruling by the Court that Lawyer was acting in a quasi-judicial capacity, thus covered by absolute privilege/immunity, would be fatal to the Plaintiff's case. Alternatively, if this Court believes Lawyer's activities are more akin to an administrator or investigative officer this matter must proceed as she was not properly discharging her *official* duties. It is solely and exclusively Lawyer's burden to show absolute privilege and/or immunity. *See Burns v. Reed*, 500 U.S. 478, 486 (1991) ("[T]he official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question."). "The presumption is that qualified rather than absolute immunity is sufficient to protect government officials in the

[2] The absolute privilege from liability for defamation based on judicial and quasi-judicial communications is closely related to the absolute immunity of judges, legislatures, prosecutors, and witnesses; in fact it overlaps all those immunities. *Briscoe v. LaHue*, 460 U.S. 325, 330-36 (1983).

exercise of their duties" and the application of absolute immunity is intentionally limited. *Id.* at 486-87. Similarly, "the doctrine of absolute privilege should [also] be 'confined within narrow limits.'" *Bol v. Cole*, 561 N.W.2d 143, 146 (Minn. 1997).

¶53 [5]As a primer, "absolute immunity does not apply to or include any publication of defamatory matter before the commencement, or after the termination of the judicial proceeding . . . nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings." Veeder, *Absolute Immunity in Defamation: Judicial Proceedings*, 9 Colum. L. Rev. 463, 489 (1909).

¶54 Analysis: All of Lawyer's Activities are Outside the Scope of Absolute Privilege or Immunity.

¶55 [6]The gravamen of this case revolves around an investigation that Lawyer solely initiated and conducted as an Assistant State's Attorney. What is entirely unique about this matter is Lawyer's investigation of an internal affairs matter—an allegedly incredible officer. Other members of the Bismarck Police Department who have been allegedly incredible have been handled via the Internal Affairs Division, which is the proper channel. When Lawyer began acting as an investigator, she exceeded the proper discharge of prosecutorial duties and her communications are not granted absolute immunity or privilege.

¶56 [7]"In no sense can any investigative activity undertaken by [a prosecutor] or any legal advice given by them to the police . . . be deemed to be part of the judicial function of the State's Attorney's Office. *Simms v. Constantine*, 688 A.2d 1, 15 (Md. App. 1997). Lawyer contends she is innocently forwarding her broader mission to vet out potential witnesses' credibility; however, this is patently incongruent with legal standards which clearly bifurcate true prosecutorial duties protected by absolute privilege or immunity and auxiliary duties not part of the quasi-judicial scheme. If this Court adopts Lawyer's illogical position, "almost any action by a prosecutor [including his or her direct participation in purely investigative activity] could be said to be in some way related to the ultimate decision whether to prosecute." *Burns v.*

Reed, 500 U.S. 478 (1991). However, the Courts, have never indicated that immunity is that expansive. *See Milstein v. Cooley*, 208 F. Supp. 2d 1116 (C.D. Cal. 2002) (The argument that immunity applies to any role a prosecutor may undertake "proves too much. Almost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive.").

¶57 Test for Applicability of Absolute Immunity

¶58 [8]The 9th Circuit has generally articulated the applicable test to determine if a prosecutor's activity in question is in fact quasi-judicial and protected by absolute immunity or instead investigative and not subject to absolute immunity. "[W]e inquire whether the prosecutor's actions are closely associated with the judicial process." *Milstein v. Cooley*, 257 F.3d 1004, 1009 (9th Cir. 2001). Furthermore, the 3rd Circuit has provided slightly more guidance as to the test: "In determining prosecutorial immunity questions, the court conducts a two part analysis: (1) what conduct forms the basis for the plaintiff's cause of action; and (2) what "function (prosecutorial, administrative, investigative, or something else entirely) that act served." *Schneyder v. Smith*, 653 F.3d 313, 332 (3d Cir. 2011).

¶59 [9]Before analysis in this rubric is conducted, some general examples will illustrate the types of conduct not covered by absolute immunity.

¶60 Absolute Immunity Not Applicable, Highlights

¶61 [10] In *Mitchell v. Forsyth*, the United States Supreme Court held that the Attorney General was not absolutely immune from liability for authorizing a warrantless wiretap. 472 U.S. 511 (1985). "Even though the wiretap was arguably related to a potential prosecution, we [find] that the Attorney General 'was not acting in a prosecutorial capacity' and thus was not entitled to the immunity recognized in *Imbler*. *Cooley* citing *Forsyth* at 521.

¶62 [11] In *Buckley v. Fitzsimmons*, the United States Supreme Court denied absolute immunity to prosecutors who were sued for fabricating

evidence "during the early stages of the investigation" where "police officers and assistant prosecutors were performing essentially the same investigatory functions." 509 U.S. 259, 262-76 (1993). The Court went on to comment that "statements to the media are not entitled to absolute immunity." *Id*. at 277. Those statements "have no functional tie to the judicial process just because they are made by a prosecutor." *Id*. at 278.

¶63 [12] In *al-Kidd v. Ashcroft*, the 9th Circuit ruled that a prosecutor seeking a material witness warrant to investigate or detain a suspect, he is not entitled to absolute immunity. 580 F.3d 949, 963 (9th Cir. 2009), rev'd on other grounds, 131 U.S. 2074 (2011).

¶64 The Two Prong Test: Lawyer's Conduct

¶65 [13] Lawyer admits in a sworn statement to the Department of Labor that she conducted "my own independent investigation" of Krile. Exhibit A at ¶¶ 5, 9. Tersely, Lawyer solely and personally initiated an investigation into Krile for lying during an official investigation.[3] Exhibit A, B. To further her investigation, Lawyer apparently reviewed years' worth of Krile's reports looking for the proverbial "exhibit A" of Krile lying and spoke to members of the Bismarck Police Department. Only speculation can illuminate the laborious investigation that was undertaken to review the hundreds of reports Krile authored or approved to settle on eight (8) reports dating from 2014, 2015, and 2016 for Lawyer's case against Krile. In what can be explained most innocently as "ignorant confirmation bias" or most maliciously as "discrimination," absolutely none of Lawyer's exemplars prove what she proffered—that Krile knew of solo, non-exigent circumstances, arrests were being made. Seven (7) of the calls show backup was available and present when the arrest was made, and the eighth (8th) report was for a time she was not even working—Krile was actually with the Chief Dan Donlin at a funeral. Lawyer's assertion there was evidence of Krile lying was entirely bogus. This was not a *proper* discharge of *official* duties of a prosecutor as would otherwise invoke privilege under N.D.C.C. § 14-02-05.

[3] The actual Bismarck Police Department internal investigation involved an incident wherein Krile was counseling an insubordinate officer who was cavalierly disregarding officer safety protocols by, among other things, making non-exigent circumstances arrests without backup when backup was readily available. She innocuously stated that was not how things are done and that's not how she was trained.

¶66 [14] In Lawyer's further investigation of Krile, she interviewed members of the Bismarck Police Department and continued the review of reports to target Krile. Particularly, Lawyer indicated Krile lied when Krile commented to others that an insubordinate officer she counseled played the "race card." In fact, Krile's comments that the insubordinate officer brought race into the situation as a trump card was factually accurate per Lieutenant Chad Fetzer's report of the insubordinate officer: "Officer Vargas stated he is aware that he is in a protected class, and is aware that you cannot discriminate against him, which he believes is happening." Exhibit C at p. 11. That is the "race card," and that's not the only time he played it.

¶67 [15] Lawyer's investigative memorandum and conclusions were sent to Chief of Police, Dan Donlin, on March 22, 2017. Exhibit B. That investigative memorandum, colloquially referred to as a *Giglio* letter, expressly states Krile was an "outright" liar, "misconstrued facts to such an extent that [she would] mislead the factfinder," and has a "lack of credibility." Exhibit B at p. 3. These are incredibly damning statements from a prosecutor to a cop.

¶68 [16] Lawyer thereafter falsely stated that Krile would no longer be used by the Burleigh County State's Attorney's Office (hereinafter, BCSAO) as a witness—Krile has since been subpoenaed to testify a number of times by the BCSAO and other prosecution offices. However, such statements were terminal to her law enforcement career with the Bismarck Police Department, and she was subsequently terminated.

¶69 [17] On May 17, 2017, Lawyer's investigation memorandum, results, and evidence were provided to the North Dakota Peace Officer's Standards & Training Board for review of sanctions relating to code of conduct violations. They were published to the Board without the Board's inquiry and prior to the commencement of any agency proceedings. The Board reviewed Lawyer's investigative memorandum, and Chief Donlin testified to much of what Lawyer erroneously proffered in her memorandum. The Board unanimously found no violation of the Peace Officer Code of Conduct N.D.Admin § 109-02-05-01 (4)(e): To willfully lie … provide false information, or falsify written or verbal communication … relied upon by the courts, states attorneys, or other law enforcement officials. (emphasis added).

¶70 [18] On May 2, 2018, Lawyer proffered much of the same defamatory material to the North Dakota Department of Labor, not under subpoena, but under request by the City of Bismarck's attorney.

¶71 [19] On August 20, 2018, Lawyer directly (not through the Burleigh County Human Resources Department) proffered the same investigative memorandum and conclusions to the City of Lincoln Chief of Police, Joe Gibbs, as Krile was applying for a law enforcement job there. Exhibit D.

¶72 [20] To current date, Lawyer's investigative memorandum and conclusions are on public display at the BCSAO and Bismarck Police Department which continually publishes the unprivileged, defamatory material.

¶73 The Two Prong Test: Lawyer's Function

¶74 [21] **Investigatory**: The Defendant cited no case or prosecution which was pending regarding Krile as a witness which would give rise to concerns about *Giglio*, *Brady*, or their progeny; there were no specific concerns that her allegations gave rise to material concerns of a defendant's guilt, innocence, or punishment therefore invoking disclosure requirements. *See generally Brady v. Maryland*, 373 U.S. 83 (1963). It is well known that the State's Attorney's Office does not conduct investigations, perhaps because it is not a *proper* discharge of the State's Attorney. However, Lawyer readily admits she received a letter—suspiciously anonymous—regarding a police officer's lack of credibility. Exhibit A at ¶¶ 9, 11; Exhibit B at p. 1. Instead of requesting the Bismarck Police Department investigate the incident through their internal affairs processes, Lawyer readily admits she solely and exclusively launched an investigation into police officer credibility, particularly Krile's. *Id*.

¶75 [22] Lawyer's *Giglio* conclusions were wholly ignorant to prevailing guidelines established in *Brady*, *Giglio*, and their progeny as issues only exist if a witness' credibility is *material* to the guilt, innocence, or sentencing of an individual; this, by its very nature is a case-by-case analysis. Furthermore, disclosure is the *proper* remedy when an abundance of caution is desired. There is no jurisprudential mandate to wholly exclude a witness—particularly over the incredibly

innocuous nature of the allegations.

¶76 [23] Lawyer's refusal to use Krile as a witness given the innocuous nature of the allegations is contrary to direction by her own office which indicated only "Intentional and Malicious Deceptive Conduct … would destroy an officer's credibility. Exhibit E. At worst, even if Lawyer's allegations of Krile were correct, it would be deemed by Lawyer's own office as "Excusable" given it was at worst an inaccurate or false statement based on misinformation. *Id*. at p. 1. Lawyer's office policy states that this information "will not usually be considered impeachment material nor will it disqualify an officer from service, even if it results in disciplinary action. *Id*. at p. 2. Lawyer excluded Krile as a witness without jurisprudential support and in contradiction of her own office's policy; accordingly, this was not a proper discharge of her official duties—it was wholly improper. This is strikingly evident given the POST Board ruling which dismissed Lawyer's allegations that Krile lied.

¶77 [24] **Advisory**: Prosecutors who render advice or opinions to law enforcement agencies are not protected by absolute immunity. *Simms* at 15. Lawyer's investigatory memorandum to the police department served to not only advise them of the results of her investigation but also served to advise the Department as to legal implications relating to continued employment of Krile after her erroneous *Giglio* conclusion.

¶78 [25] **Personnel**: Lawyer was keenly aware that Krile's termination would be a foregone conclusion after admonishing Krile as a liar and an officer which misstates facts in her investigative memorandum. Lawyer even commented, "I am well aware of the serious ramifications it can have for an officer when their credibility is called into question . . . ." Exhibit B at p. 2. Accordingly, Lawyer's investigation memorandum essentially served as constructive termination of Krile and placed Lawyer within the personnel practices of the City of Bismarck, well outside the scope of prosecutor. Involvement in City of Bismarck personnel practices is outside the quasi-judicial role of a prosecutor and not a proper discharge of a prosecutor's duties, particularly as it relates to a county prosecutor involved in personnel affairs of a city employee.

¶79 [26] Furthermore, even after Lawyer had Krile terminated from the Bismarck Police Department, Lawyer acted as a liaison for human resources materials in a direct effort to block Krile's employment with

other law enforcement agencies, particularly the Lincoln Police Department. This occurred on August 20, 2018, when Lawyer electronically transmitted her investigative memorandum to Lincoln Police Chief Joe Gibbs pursuant to Krile applying for an officer position with the Lincoln Police Department. Exhibit D. In no way does this communication serve the quasi-judicial functions protected through absolute immunity or fall within the proper discharge of Lawyer's duties as a prosecutor which would otherwise be privileged.

¶80 [27] **Non-compelled Witness**: On May 2, 2018, and again on May 21, 2018, Lawyer proffered much of the same defamatory material to the North Dakota Department of Labor, not under subpoena or court order, but likely under request by the City of Bismarck's attorney, who was not hers at the time. The City of Bismarck's attempt to shield her liability through a meaningless disclaimer is wholly ineffectual. It's the legal equivalent of posting a sign on the back of a poorly loaded dump truck, not responsible for broken windshields. While it is true the City was compelled to respond, Lawyer was not compelled via official proceeding, subpoena, or court order. Her injection via sworn affidavits are outside the scope of protections and published to the City of Bismarck's attorney, not hers, before making it to the Department of Labor. "The absolute privilege [in this case] assures a citizen cannot be sued for defamation on the basis of his response to the subpoena." *Boice v. Unisys Corp*., 50 F.3d 1145, 1148 (2d Cir. 1995) (emphasis added).

¶81 As can be seen from the quoted material,Attorney Redmann clearly articulated the difference between prosecutorial conduct and investigation. Once the assistant states attorney took it upon herself to do her own separate independent investigation, she became an investigator, and not a prosecutor. Had she taken that information and used it to bring charges against the police officer, the actual act of charging the police officer with the crime would be prosecutorial; but anything prior to that, would be investigatory.

¶82 Improper Dismissal under Rule 12

¶83 As can be seen from the material in the previous section, counsel below – attorney Christopher Redmann, the states attorney for Sioux County – presented to the lower court the listing of many facts in dispute. Attorney Redmann specifically brought to the attention of the District Court these many factual disputes through Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Complaint, **Docket No. 61**. **[Appendix 232]** Moreover, it is important for this Court to be aware of the materials submitted by both sides as exhibits, which also clearly indicate the dispute in regards to material facts, which may be summarized as follows:

Defendant, Julie Lawyer's Exhibits

1. Affidavit of Randall J. Bakke [Doc. No. 29];
2. Exhibit 1 – Plaintiff's Charge of Discrimination to the North Dakota Department of Labor and Human Rights dated January 18, 2017, partially redacted [Doc. No. 30];
3. Exhibit 2 – Determination from the North Dakota Department of Labor and Human Rights dated June 7, 2018, partially redacted [Doc. No. 31];
4. Exhibit 3 – North Dakota Department of Labor Notice of Charge letter to the Bismarck Police Department dated January 18, 2017 [Doc. No. 32];
5. Exhibit 4 – email from Brenda Halvorson at the North Dakota Department of Labor and Human Rights to the undersigned dated March 1, 2018 [Doc. No. 33];

6. Exhibit 5 – email from Brenda Halvorson at the North Dakota Department of Labor and Human Rights to the undersigned dated April 11, 2018 [Doc. No. 34];

7. Exhibit 6 – Exhibit 6 -email from Brenda Halvorson at the North Dakota Department of Labor and Human Rights to the undersigned dated May 9, 2018 [Doc. No. 35];

8. Exhibit 7 – response letter to the North Dakota Department of Labor and Human Rights from the undersigned dated April 19, 2017, partially redacted [Doc. No. 36];

9. Exhibit 8- response letter to the North Dakota Department of Labor and Human Rights from the undersigned dated March 15, 2018, partially redacted [Doc. No. 37];

10. Exhibit 9 – response letter to the North Dakota Department of Labor and Human Rights from the undersigned dated May 3 2018, partially redacted [Doc. No. 38];

11. Exhibit 10 – response letter to the North Dakota Department of Labor and Human Rights from the undersigned dated May 23, 2018, redacted [Doc. No. 39];

12. Exhibit 11 - Affidavit of Julie Lawyer dated May 2, 2018, partially redacted [Doc. No. 40];

13. Exhibit 12 – Second Affidavit of Julie Lawyer dated May 21, partially redacted [Doc. No. 41];

14. Exhibit 13 - Letter dated March 22, 2017 to Dan Donlin from Julie Lawyer, partially redacted [Doc. No. 42];

15. Exhibit 14 - Plaintiff s Amended Charge of Discrimination to the North Dakota Department of Labor and Human Rights dated March 28, 2017, partially redacted [Doc. No. 43];

16. Exhibit 15 – Petitioner s Supplemental Rebuttal To Respondent's Position Statement dated February 6, 2018,

partially redacted [Doc. No. 44];

17. Exhibit 16 – Petitioner s Second Supplemental Rebuttal To Respondent s Position Statement dated April 9, 2018, partially redacted [Doc. No. 45];

18. Second Affidavit of Randall J. Bakke [Doc. No. 70];

19. Exhibit A - AP News Story from the Bismarck Tribune dated March 11, 2019 [Doc. No. 71];

20. Exhibit B - Affidavit of Lieutenant Dwight Offerman dated April 18, 2017 and Exhibits 24 and 29 [Doc. No. 72];

Plaintiff, Robyn Krile's Exhibits

21. Exhibit A- Affidavit of Julie Lawyer 5/2/18 [Doc. No. 62];

22. Exhibit B- Letter from Julie Lawyer 3/22/17 [Doc. No. 63];

23. Exhibit C- IA Investigation [Doc. No. 64];

24. Exhibit D- Lincoln PD Records [Doc. No. 65];

25. Exhibit E- Email 12/8/11 [Doc. No. 66];

¶84 Under Rule 12 of the North Dakota Rules of Civil Procedure, the facts alleged in the complaint are taken as true, and unless the matter can be properly dismissed as a matter of law, any factual dispute of a material fact precludes the granting of a dismissal under Rule 12. The existence of such a dispute in material facts was demonstrated most palpably by Mr. Redmann's paragraph 13 in his response:

> To further her investigation, Lawyer apparently reviewed years' worth of Krile's reports looking for the proverbial "exhibit A" of Krile lying and spoke to members of the Bismarck Police Department. Only speculation can illuminate the laborious investigation that was undertaken to review the hundreds of reports Krile authored or approved to settle on eight (8) reports dating from 2014, 2015, and 2016 for Lawyer's case against Krile. In what can be explained most innocently as "ignorant confirmation bias" or most maliciously as "discrimination," absolutely none of Lawyer's exemplars prove what she proffered—that Krile knew of solo, non-exigent circumstances, arrests were being made. Seven (7) of the calls show backup was available and present when the arrest was made, and the eighth (8th) report was for a time she was not even working—Krile was actually with the Chief Dan Donlin at a funeral. Lawyer's assertion there was evidence of Krile lying was entirely bogus. This was not a *proper* discharge of *official* duties of a prosecutor as would otherwise invoke privilege under N.D.C.C. § 14-02-05.

¶85 As discussed above, the lower court misapplied the law and should not have granted the motion to dismiss. By the same token, under the terms of both Rule 12[4] and Rule 56,[5] the District Court should have denied the Rule 12

[4] RULE 12. DEFENSES AND OBJECTIONS; WHEN AND HOW; MOTION FOR JUDGMENT ON PLEADINGS; CONSOLIDATION AND WAIVING DEFENSES; PRETRIAL HEARING
(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay the trial—a party may move for judgment on the pleadings.
(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

[5] RULE 56. SUMMARY JUDGMENT

motion out of hand, or in the alternative, converted the Rule 12 motion to a Rule 56 motion and allowed further submissions by the plaintiff. Had the lower court followed the dictates of Rule 12 and Rule 56, is as applied to this situation, the plaintiff would've had an opportunity to demonstrate by further submission of affidavits that material facts were in dispute.

¶86 CONCLUSION

¶87 For the reasons stated above this Court should declare the statements made by the Defendant are not protected as a privileged communication or any absolute immunity, that it was err to dismiss the case as a matter of law, and that because there are material facts in dispute the order dismissing the complaint should be reversed and the matter set for trial

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(e) Affidavits; Further Testimony.
(1) In General. A supporting or opposing affidavit must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a document or part of a document is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.
(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment shall, if appropriate, be entered against that party.
(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
(1) deny the motion;
(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
(3) issue any other just order.

following the opportunity for both sides to conduct discovery. In the alternative, the order dismissing the complaint should be reversed and the matter should be remanded to be determined under Rule 56, with both sides having an opportunity to re-brief the matter in regards to facts alleged and the material facts which are in dispute.

¶88 Dated this 17th day of March, 2020.

_____/s/_____

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court No. 20190367
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.	)

CERTIFICATE OF SERVICE

¶1 The Plaintiff Robyn Krile by and through her attorney Lynn M. Boughey hereby provides the following certificate of service upon the Defendant Julie Lawyer by and through her attorney of record Randall Joseph Bakke and Bradley Neuman Wiederholt by email

rbakke@bgwattorneys.com
bwiederholt@bgwattorneys.com

of the following documents:

1. Appellant's Brief

2. Appellant's Appendix (Parts 1-8)

3. Certificate of Service

¶2 this 17th day of March, 2020.

_____/s/_____
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