

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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

Robyn Krile,	)
	)
Plaintiff - Appellant,	)
	)
vs.	) <b>APPELLANT’S</b>
	) <b>REPLY BRIEF</b>
Julie Lawyer, in her official and individual	)
capacity as Assistant Burleigh County State’s	)
Attorney,	)
	)
Defendant - Appellee.	)

**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**

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## ¶1 Argument

¶2 The only way that this particular action could be properly dismissed the lower court is if – as a matter of law – the privilege contained subdivision 1 or 2 of Section 14-02-05 clearly and unquestionably applies.

¶3 The burden is on the person proposing application of the privilege or the immunity. The facts alleged in the complaint are taken as true. As such, the only way this matter could have been properly dismissed as if the facts as alleged have no bearing on the application of the privilege, and that under any of these facts the privilege applies.

¶4 It is clear from reading the lower court’s opinion that the court concluded as a matter of law and under Rule 12 (motion to dismiss) that the alleged defamatory communication is a privileged communication under section 14-02-05, subdivision 1 or 2. Although the lower court mentions and finds “absolute immunity” it does so exclusively in regards to application of Section 14-02-05, which is more accurately referred to as a privilege, not an immunity.

¶5 In its nine-paragraph opinion, the lower court provides its legal analysis (applying the facts of this case to the law) in only one paragraph, paragraph 8, in which the District Court states as follows:

8. The letter drafted by Lawyer was done to comply with Brady and Giglio. It was done so as part of her official duties as a prosecutor and in the pursuit of criminal prosecutions. (See Witzke). Krile was not singled out. Her file was one of numerous files that were reviewed by Lawyer. Under the circumstances, Lawyer has absolute immunity. Lawyer also has absolute immunity in regards to the POST Board and the Department of Labor as she was acting in her capacity as a prosecutor.

**A. 372.**

¶6 The lower court’s decision is incorrect as a matter of law. It is undisputed that the prosecutor was not issuing a Brady-Giglio letter relating to any particular criminal prosecution. The Brady-Giglio letter was issued not to a defense counsel in conjunction with discovery under Rule 15, but to the police officer’s employer, the Bismarck Police Department. There was no pending Rule 15 discovery request that in any way related to the prosecutor’s investigation and issuance of the Brady-Giglio letter. Moreover, as is clear under Witzke, the prosecutor was acting not in her role as a prosecutor – issuing a complaint, presenting evidence at trial or at sentencing – but was admittedly acting as an investigator. Her actions were not closely associated with the judicial process, but instead were investigative in nature. The lower court in its analysis concluded that the prosecutor was acting “in the pursuit of criminal prosecutions,” even though there was no pending prosecution relevant to her inquiry.

¶7 Although the District Court sites Witzke as a basis for its decision, the reality is clear that Witzke demonstrates that when the prosecutor is acting as an investigator, absolute immunity does not apply:

[¶17] We recognized that 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, but that 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.* The procedural difference between the two immunities is significant. *Id.* Absolute immunity defeats a suit at the outset, while an official with qualified immunity must establish his or her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. . . .

*Witzke v. City of Bismarck*, 2006 ND 160, ¶17, 718 N.W.2d 586, 592.

¶8 In this case, the prosecutor's conduct was not "intimately associated with the judicial process" – and it was not in conjunction with "the initiation and pursuit of a criminal prosecution, the presentation of the State's case at trial, or other conduct intimately associated with the judicial process." Id. The prosecutor was "functioning in the role of an administrator or investigative officer rather than in the role of an advocate." Id. As such, the lower court erred in concluding absolute immunity based on the privilege enunciated in subdivision 1 and subdivision 2 of section 14-02-05. As demonstrated by the quoted language from the Witzke immediately above, it is also clear that the lower court erred as a matter of law in regards to the

misapplication of the Witzke case. Moreover, the burden of proving the proper application of the privilege communication statute is on the prosecutor.

¶9 As to the application of Section 14-02-05, subdivision 1, dismissal would not be appropriate unless it was absolutely clear that the prosecutor was discharging an official duty and the prosecutor was “properly” discharging that official duty. The prosecutor’s role by her own admission was investigatory, and not prosecutorial. **Exhibit A Doc. No. 62**, page 2, paragraph 5 & Page 3, paragraph 9 at **A. 245-246** (admitting that she conducted her own independent investigation). The actions of the prosecutor were not closely associated with the judicial process, but were instead investigative activities. As such, the prosecutor was not, in regards to her investigation of the police officer, discharging an official duty as a prosecutor, but as an investigator. Moreover, she was not “properly” discharging any official duty, if there was indeed an official duty being discharged, because the prosecutor’s factual assertions and conclusions were not supported by the facts, as demonstrated by the decision of the POST Board.

¶10 As to subdivision 2 of Section 14-02-05, it is clear that the prosecutor investigated the police officer separate from any judicial proceeding. The prosecutor did not issue a Brady-Giglio letter that provided exculpatory

information or evidence that could be used as impeachment in a particular case. Nor can it be said that sending her report to the Chief of the Bismarck City Police relates to any proceeding authorized by law. The prosecutor unilaterally decided to distribute her report not in conjunction with the judicial proceeding, but specifically for the purpose of informing the police chief that the Burleigh County States Attorney's Office intended to no longer use the police officer as a witness in any of its cases. Section 14-02-05 clearly does not protect the prosecutor from this unilateral, non-prosecutorial activity. The prosecutor was acting as an investigator and as such the privilege does not apply to this communication.

¶11 It is also appropriate to review subdivision 4 of section 14-02-05, in part because the entire statute should be read as a whole and it is proper to apply the requirements of subdivision 4 in regards to what is meant in subdivision 1 in regards to what is a "proper" discharge of an official duty. We assert that a "proper" discharge of an official duty would require that the prosecutor issue a "fair and true report, without malice."

¶12 Simply put, the District Court erred in concluding that sending her report to the police officer's employer is a privileged communication under Section 14-02-05, and as such the lower court's decision should be reversed and

the matter proceed to trial (unless a proper summary judgment motion is presented, and properly ruled upon).

¶13 Specific Reply Brief as to Prosecutor’s Issue 1 The prosecutor alleges in her responsive brief that the issue of the lower court misapplying the rules relating to receipt of additional information outside the pleadings should have been raised below. Although the lower court had before it only a motion to dismiss, the lower court nonetheless allowed outside materials to be considered in its decision. Once it decided to receive outside materials, the lower court erred as a matter of law by not following the requirements of Rule 56. If the lower court misapplies the rules and in actuality converted the pending Rule 12 motion into a Rule 56 motion, it was obligated to follow the rules and allow additional submission of evidence by the police officer. This is especially true when the prosecutor – in her reply brief – submitted numerous additional materials attached to a third-person’s affidavit. See, e.g., Doc. No. 72 A. 356-367.

¶14 Although the lower court recognized that the motion to dismiss should be based on the pleadings and that the matters outside the pleadings should not be considered, it nonetheless considered not only the Giglio letter written by the prosecutor but also “the affidavits that were submitted to the

Department.” Order Granting Defendant’s Motion to Dismiss at ¶3 A. 369. The Giglio letter written by the prosecutor is certainly a material that is “embraced by the pleadings” and could be properly reviewed by the lower court. However, the additional materials, which includes unidentified affidavits submitted “to the Department” should not have been considered, or at the very least should have been specifically identified. The reason this is so essential is that the affidavits submitted not only included the two affidavits of the prosecutor to the Department of Labor, but also the affidavit of Lieut. Dwight Offerman who attached to his affidavit 29 separate exhibits, including the police officer’s complete personnel file. The materials submitted by Offerman is indeed one of the affidavits that were submitted “to the Department” and do not constitute materials embraced by the pleadings. By admitting hundreds of pages of documents that went well beyond those embraced by the pleadings, the District Court converted the Rule 12 motion into a Rule 56 motion, but did not follow the requirements of Rule 56.

¶15 Specific Reply Brief as to Prosecutor’s Issue 2 The prosecutor next attempts to justify the Giglio letter sent to the police officer’s employer as “the proper discharge of an official duty,” referring to a case involving a school board member who made a statement during the school board meeting, as well as another case involving a child support enforcement unit providing a report to

a consumer reporting agency. Appellee’s Brief at ¶25. The prosecutor then goes on to cite three North Dakota cases involving the obligation under Brady and Giglio, but all three cases are actual state criminal prosecutions involving a specific criminal matter and discovery in those three criminal matters. None of these cases support the view that sending a letter to a police officer’s employer is the proper discharge of an official duty.

¶16 The prosecutor goes on to assert that the materials the prosecutor supplied to the Department of Labor and to the POST board are absolutely privileged because they are part of “a proceeding authorized by law.” But that would not justify – or allow absolute immunity – to the original Brady-Giglio letter sent to the Bismarck Police Department. The letter to the Bismarck Police Department was not in reference to any particular pending criminal case or in conjunction with the issuance of any particular Brady-Giglio letter relating to a particular pending case, but was instead a specifically directed malicious attempt to get the police officer fired. Subdivision 1 and subdivision 2 of Section 14-02-05 certainly cannot be used to justify the sending of this letter to the police officer’s employer as either a proper discharge of an official duty or in conjunction with a judicial proceeding, or any other proceeding authorized by law.

¶17 Dated this 30<sup>th</sup> day of April, 2020.

\_\_\_\_\_/s/\_\_\_\_\_  
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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 provides the following certificate of service upon the Defendant Julie Lawyer by and through her attorney of record Randall Bakke and Bradley Wiederholt by email

rbakke@bgwattorneys.com  
bwiederholt@bgwattorneys.com

of the following documents:

1. Appellant’s Reply Brief
2. Certificate of Service

this 30<sup>th</sup> day of April, 2020.

\_\_\_\_\_/s/\_\_\_\_\_  
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