

SUPREME COURT OF NORTH CAROLINA

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JON-PAUL CRAIG, by his mother)
and next friend, KIMBERLEY)
CRAIG,)

Plaintiff,)

v.)

NEW HANOVER COUNTY BOARD OF)
EDCUATION,)

Defendant.)

From New Hanover County

* * * * *

PLAINTIFF-APPELLANT'S NEW BRIEF

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SUPREME COURT OF NORTH CAROLINA

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JON-PAUL CRAIG, by his mother)
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 NEW HANOVER COUNTY BOARD OF)
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 Defendant.)

From New Hanover County

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PLAINTIFF-APPELLANT'S NEW BRIEF

* * * * *

QUESTION PRESENTED

IS A CAUSE OF ACTION BARRED BY SOVEREIGN IMMUNITY AN ADEQUATE
STATE REMEDY UNDER CORUM V. UNIVERSITY OF NORTH CAROLINA?

STATEMENT OF THE CASE

Kimberly Craig, on behalf of her minor son, plaintiff Jon-Paul Craig, filed suit against New Hanover County Board of Education (the "Board") and Annette Register, principal of the Roland Grise Middle School, in her official and individual capacities. (R p. 8) Plaintiff alleged a claim for common law negligence based on defendants' failure to provide adequate protection for Jon-Paul, which led to him being sexually assaulted by another student. (R p. 12) Plaintiff also alleged that defendants violated Jon-Paul's right to an education free from physical abuse and psychological harm, in violation of Article I, Sections 15 and 19, and Article IX, Section 1, of the North Carolina Constitution. (R p. 13)

Defendant Register filed a motion to dismiss. (R p. 56) Defendant Board filed a motion for summary judgment on the grounds that governmental immunity bars plaintiff's negligence claim and that plaintiff has an adequate state remedy for his constitutional claims. (R p. 16) The Honorable Paul L. Jones entered an order granting Register's motion to dismiss, and denying the Board's motion for summary judgment. (R p. 56) Plaintiff did not appeal the dismissal of the claims against defendant Register. The Board appealed Judge Jones' order denying its motion for summary judgment. (R p. 58)

The Court of Appeals reversed, holding that (1) the Board had not waived sovereign immunity for plaintiff's negligence claim; and (2) plaintiff could not bring his constitutional

claims because the negligence claim was an adequate state remedy. Craig v. New Hanover County Bd. of Educ., 648 S.E.2d 923, 925-27 (2007). Judge Bryant concurred in part and dissented in part. Judge Bryant agreed with the majority that the Board had not waived sovereign immunity for plaintiff's negligence claim. Id. at 927. Judge Bryant disagreed, however, with regard to the constitutional claims. She concluded that because the courts are barred by sovereign immunity from considering the merits of plaintiff's negligence claim, plaintiff does not have an "adequate state remedy" and may assert his constitutional claims. Id.

On October 2, 2007, plaintiff filed a "Petition for Discretionary Review," stating that Judge Bryant's dissent was the basis of the petition. On November 15, 2007, plaintiff filed a Petition for Writ of Certiorari to Review the Decision of the Court of Appeals, or, in the alternative, a Motion to Convert Plaintiff's Petition for Discretionary Review to a Notice of Appeal of Right. On March 6, 2008, the Court denied plaintiff's motion to convert, but allowed plaintiff's petition for writ of certiorari. The petition for writ of certiorari is limited to the issue raised in Judge Bryant's dissent.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Plaintiff seeks appellate review of the decision of the Court of Appeals pursuant to N.C. Gen. Stat. §§ 7A-30(2) and 7A-31(a), and N.C. R. App. P. 21.

STATEMENT OF FACTS

Plaintiff Jon-Paul Craig is a mentally disabled boy who was 14 years old at the time of the events in question. (R p. 8-9) Plaintiff had attended the Roland Grise Middle School since the sixth grade. (R p. 9) On January 6, 2004, plaintiff's mother, Kimberly Craig, was called by an assistant principal from Roland Grise and told there had been some "sexual experimentation" between plaintiff and another boy in his class. (R p. 10) The following day, the same assistant principal informed Ms. Craig that plaintiff was being suspended for ten days; eventually, the school decided to deny him placement at Roland Grise for the remainder of the school year. (R p. 10) Plaintiff alleges that defendants knew or should have known of prior sexual assaults by the other boy, and that they failed to adequately supervise and protect Jon-Paul. (R p. 11).

STANDARD OF REVIEW

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.'" Forbis v. Neal, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citing N.C. R. Civ. P. 56(c)). This Court reviews a trial court's order for summary judgment *de novo* to determine whether there is a "genuine issue of material fact" and whether either party is "entitled to

judgment as a matter of law.” Robins v. Town of Hillsborough, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007) (citing Summey v. Barker, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003)).

ARGUMENT

I. THE SUPREME COURT IN CORUM RECOGNIZED DIRECT CONSTITUTIONAL CLAIMS AGAINST THE GOVERNMENT AND HELD THAT SUCH CLAIMS CANNOT BE BARRED BY SOVEREIGN IMMUNITY.

In Corum v. University of North Carolina, 330 N.C. 761, 413 S.E.2d 276 (1992), this Court established that constitutional rights can be vindicated through direct causes of action against the State, even in the face of sovereign immunity. In Corum, the plaintiff had brought claims under the North Carolina Constitution, Article I, Sections 14, 19, and 35, and 42 U.S.C. § 1983. Id. at 766, 413 S.E.2d at 280. Defendants moved for summary judgment, in part based on the defense of sovereign immunity. Id. The trial court denied the motion. Id. Relying on the doctrine of sovereign immunity, the Court of Appeals reversed with regard to defendants Appalachian State University, University of North Carolina, and the individual defendants in their official capacity. Id. at 781, 413 S.E.2d at 289.

This Court granted review to address the question of whether a plaintiff has a direct cause of action under the State Constitution against state defendants for alleged violations of the plaintiff's rights. Id. The Court held that, “in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim

against the State under our Constitution." Id. at 782, 413 S.E.2d at 289. Moreover, the Court concluded that sovereign immunity is no defense to such claims. "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." Id. at 785-86, 413 S.E.2d at 291.

In recognizing direct claims under the Constitution, the Court emphasized the importance of the rights at issue. "The civil rights guaranteed by the Declaration of Rights in Article I of our Constitution are individual and personal rights entitled to protection against state action[.]" Id. at 782, 413 S.E.2d at 289. "The very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." Id. at 783, 413 S.E.2d at 290 (citing State v. Manuel, 20 N.C. 144 (1838)). This Court gives "our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to both person and property." Id. (citing State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1939)).

The Court emphasized the importance of the judiciary's role of safeguarding citizens' constitutional rights, especially where individuals have no other means of protection. "This Court is the ultimate interpreter of our State Constitution." Id. (citing Bayard v. Singleton, 1 N.C. (Mart.) 5 (1787)). "It is the state judiciary that has the responsibility to protect the state

constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State." Id. As the plaintiff had no other effective remedy for the constitutional wrongs he suffered, the Court held that "our common law guarantees plaintiff a direct action under the State Constitution for alleged violations of his constitutional freedom of speech rights." Id. (citing Sale v. Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955)).

The Court noted two limitations in crafting common law remedies for constitutional violations. First, courts need not create new remedies where there are "established claims and remedies" that provide an effective alternative to the judiciary's inherent power to right constitutional wrongs. Id. at 784, 413 S.E. 2d at 291. Thus, direct constitutional claims are only allowed "in the absence of an adequate state remedy." Id. at 782, 413 S.E.2d at 289. Second, courts must respect the separation of powers by "seeking the least intrusive remedy available and necessary to right the wrong." Id.

The Corum Court considered the State's argument that sovereign immunity barred constitutional claims. The Court acknowledged that sovereign immunity is firmly established in the State's law, and has been recognized by the General Assembly. Id. at 785, 413 S.E.2d at 291. The Court noted that the doctrine is judge-made in North Carolina and was derived from the "feudal concept that the king could do no wrong." Id.; cf. Steelman v. City of New Bern, 279 N.C. 589, 593, 184 S.E.2d 239, 242 (1971)

(discussing how other states have found this concept to be contrary to the principles of democratic government and our system of justice, and have overruled or greatly modified the immunity).

Despite the doctrine's well-established place in the law, the Court rejected the application of sovereign immunity to direct constitutional claims. "[I]t is the judiciary's responsibility to guard and protect" the constitutional rights of citizens under the Declaration of Rights. Corum, 330 N.C. at 785, 413 S.E.2d at 291. The judiciary would fail to live up to this duty, however, were it "to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity." Id. at 786, 413 S.E.2d at 291.

The Court recognized that the interests protected by sovereign immunity are subordinate to the constitutional interests of citizens. Rights protected by the Declaration of Rights are constitutional, and thus part of the supreme law of the State. Id. at 786, 413 S.E.2d at 291-92. "On the other hand, the doctrine of sovereign immunity is not a constitutional right; it is a common law theory or defense established by this Court[.]" Id. at 786, 413 S.E.2d at 292. "Thus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." Id. Accordingly, the

Court held that plaintiff had a direct cause of action under the State Constitution for which sovereign immunity was not a defense. Id.¹

II. POTENTIAL REMEDIES BARRED BY SOVEREIGN IMMUNITY ARE NOT ADEQUATE UNDER CORUM BECAUSE THEY DO NOT ALLOW COURTS TO REDRESS CONSTITUTIONAL WRONGS.

A state cause of action that is barred by sovereign immunity is not an "adequate state remedy" under Corum, id. at 781, 413 S.E.2d at 289, because it does not provide a means for courts to redress constitutional violations. Otherwise, immunity would shield the government against both the state law cause of action and a direct constitutional action under Corum, leaving citizens with no means of protecting their constitutional rights in the courts.

The Court in Corum made clear that an "adequate state remedy" is more than an empty cause of action subject to summary dismissal on the grounds of sovereign immunity. Instead, an adequate remedy is an "appropriate action for the adequate redress of a violation of [a constitutional] right." Corum, 330 N.C. at 782, 413 S.E.2d at 289 (emphasis added). If a citizen cannot obtain a hearing on the merits of her claim, then she has

¹ Sovereign immunity bars claims against the State and its bodies, while governmental immunity bars claims against a county and its bodies. See Meyer v. Walls, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997). For Corum purposes, the distinction is immaterial: "It is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution." Peverall v. County of Alamance, 154 N.C. App. 426, 430, 573 S.E.2d 517, 519 (2002)(citing Corum).

no means to redress her constitutional injury.

When the Court defined the scope of direct constitutional causes of action, it held that the judiciary should use "the least intrusive remedy available and necessary to right the wrong." Id. at 784, 413 S.E. 2d at 291 (emphasis added). To be "adequate," a remedy must necessarily be capable of righting the constitutional wrong. Thus, the Court held that direct constitutional actions should only give way to "established claims and remedies." Id. (emphasis added). If a cause of action is barred by sovereign immunity, a court will never reach the merits of the claim, and be unable to remedy the constitutional injury. Therefore, a state cause of action barred by sovereign immunity is not an adequate state remedy under Corum.

The Court of Appeals has generally followed this Court's guidance in Corum. In Alt v. Parker, 112 N.C. App. 307, 435 S.E.2d 773 (1993), the plaintiff brought a direct constitutional action against doctors and officials at a state mental hospital under the "law of the land" clause, alleging that he had been unlawfully restrained in violation of his due process rights, and also asserted common law tort claims for false imprisonment and malicious prosecution. Id. at 312-13, 317, 435 S.E.2d at 776, 779. The Court of Appeals held that no state constitutional action was available because the claim of false imprisonment was an adequate state remedy. Id. at 317-18, 435 S.E.2d at 779. The court addressed and rejected the false imprisonment claim on the

merits, finding that defendants had exercised professional judgment in restraining the plaintiff. Id. at 313-17, 435 S.E.2d at 776-79. The Court of Appeals' finding that the plaintiff had an adequate state remedy was premised on his ability to have his state law claim heard on the merits.

In City-Wide Asphalt Paving v. Alamance County, 132 N.C. App. 533, 513 S.E.2d 335 (1999), the plaintiff paving company brought a direct constitutional action against a county that had awarded a landfill contract to another bidder for the project, alleging that the county had violated its rights to substantive due process and equal protection. Id. at 539-40, 513 S.E.2d at 339-40. The defendant argued that no state constitutional claims were available because an action to have the competitor's contract declared void or to enjoin performance would have been an adequate state remedy. Id. at 538, 513 S.E.2d at 339. The Court of Appeals rejected defendant's argument, holding that these proposed remedies were not adequate because they "are equitable in nature and do not provide plaintiff with an avenue to pursue money damages." Id. A state law claim barred by sovereign immunity is similarly inadequate because it forecloses a plaintiff's opportunity to pursue money damages.

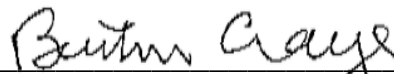
"It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the

doctrine of sovereign immunity." Corum, 330 N.C. at 786, 413 S.E.2d at 291. It would be an equally fanciful gesture to say on the one hand that citizens have an adequate state remedy to protect their constitutional rights from encroachment by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot use this "adequate" state remedy because of the doctrine of sovereign immunity. This Court cannot allow the civil rights guaranteed by the Declaration of Rights to be discarded so easily. Because state causes of action barred by sovereign immunity are not "adequate state remedies," plaintiff is entitled to proceed with his constitutional claims.

CONCLUSION

For the foregoing reasons and for the reasons stated in Judge Bryant's dissent, the decision below should be reversed with regard to plaintiff's constitutional claims.

This the 7th day of April, 2008.



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CERTIFICATE OF SERVICE

The undersigned counsel for the plaintiff-appellant hereby certifies that a copy of Plaintiff-Appellant's New Brief was sent via first class mail, postage prepaid, addressed as follows:

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