NO. 12-12 TWENTY-EIGHTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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MARY ANN WILCOX, Plaintiff, v. CITY OF ASHEVILLE; WILLIAM HOGAN, individually and in his official capacity as the Chief of the City of Asheville Police Department; STONY GONCE, individually and in his official capacity as a police officer for the City of Asheville; BRIAN HOGAN, individually and in his official capacity as a police officer for the City of Asheville; and CHERI INTVELD, individually and in her official capacity as a police officer for the City of Asheville, Defendants.	)	From Buncombe County No. 10-CVS-2809

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BRIEF OF *AMICUS CURIAE*
NORTH CAROLINA ADVOCATES FOR JUSTICE

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I. THIS CROSS-APPEAL PRESENTS UNANSWERED QUESTIONS ABOUT THE APPLICABLE STANDARD FOR USE OF FORCE CLAIMS UNDER THE STATE CONSTITUTION AGAINST LOCAL GOVERNMENTS AND WHETHER CLAIMS AGAINST INDIVIDUAL OFFICERS CAN PROVIDE AN ADEQUATE REMEDY FOR SUCH CONSTITUTIONAL VIOLATIONS

The use of unreasonable or excessive force by law enforcement implicates basic rights guaranteed by the North Carolina Constitution's Declaration of Rights. This cross-appeal presents two intertwined, unanswered questions that have the potential to arise in any excessive force claim against a local government. First, does a claim under Article I, § 20 for excessive force apply the Fourth Amendment's standard of "objective reasonableness"? If so, then a defendant officer's subjective state of mind is an impermissible consideration in resolving that state constitutional claim. Second, if subjective intent is not to be considered, is the alternative state law claim against use of force – a claim for assault against the officers individually that must also hurdle the defense of public officer immunity – an inadequate remedy, since it requires proof of the officer's subjective intent?

The cross-appeal also raises a broader question: in light of *Craig v. New Hanover County Bd. of Ed.*, 363 N.C. 334, 678 S.E.2d 351 (2009), can an *individual* capacity claim against an officer ever be an adequate remedy for a constitutional claim against the government?

A. Defendants Used Unreasonable Deadly Force Against Plaintiff.

This Cross-Appeal turns on the following essential facts. Plaintiff was a passenger in a car that drove away from a police stop for a minor driving violation that turned into an 18-minute police pursuit. Defendants knew there were two persons in the vehicle. When the three Defendant officers separately shot multiple rounds into the vehicle, gravely wounding Plaintiff, the car was moving at less than 25 miles per hour and posed no imminent threat to anyone's safety. In the light most favorable to Plaintiff, the circumstances did not warrant the use of deadly force and the amount of force applied was unreasonable and excessive, violated state law and department policies, and caused Plaintiff serious injury.

B. Unreasonable Force Is a Statutory Violation Actionable as Negligence.

The legal authority to use deadly force is codified at G.S. § 15A-401(d)(2). By statute, police are allowed to use deadly force only in certain circumstances – if an officer or third-party's life is threatened, if someone is using a deadly weapon to elude lawful arrest or capture, or, inapplicable here, to capture an escaped convicted felon. *Id.* The facts are disputed as to whether the statutory circumstances applied to authorize this shooting.

But even when authorized, there are two separate limitations on use of force. One is *subjective* – the officer's use of force cannot be "willful, malicious or

criminally negligent." *Id.* The other is *objective* – the amount of force cannot be "unreasonable or excessive." *Id.*

Under the case law, a violation of this objective "unreasonable or excessive" limitation on the use of force is actionable as negligence. See, *Williams v. City of Jacksonville Police Department*, 165 N.C.App. 587, 595, 599 S.E.2d 422, 429 (2004)(citing to the limitation on "unreasonable" force in G.S. 15A-401(d)(2)). *Prior v. Pruett,* 143 N.C.App. 612, 620, 550 S.E.2d 166, 172 (2001)(same). *Jackson v. N.C. Dept of Crime Control and Public Safety*, 97 N.C.App. 425, 432, 388 S.E.2d 770, 774 (1990) (same, affirming Industrial Commission award for unintentional use of excessive force).

C. The Common Law Claim for Unreasonable or Excessive Force Is Against the Municipality.

A negligence claim for use of objectively unreasonable or excessive force must be brought against the municipality and the offending police officers in their official capacities. See *Thompson v. Dallas*, 142 N.C.App. 651, 654, 543 S.E.2d 901, 904 (2001) (finding Town of Dallas subject to suit for negligence of officer where it had insurance coverage). *Thompson* restated the maxim that a police officer is a public official who cannot be liable individually for negligence; that there must be a showing of aggravated conduct for individual liability. *Id.* To bring a negligence claim for unreasonable use of force against officers, then, one must sue the municipality and the officers officially, as Plaintiff did here.

D. Defendants Asserted Immunity from the Common Law Claim for Negligent Use of Unreasonable or Excessive Force.

Defendants asserted governmental immunity in its Answer. They produced an insurance policy with an express exclusion of any claims in which the City could assert sovereign or governmental immunity.[1] This type of exclusion is widely used in this state by local governments, especially after this Court affirmed its effectiveness in preserving governmental immunity in *Patrick v. Wake County Dept. of Human Services*, 188 N.C. App. 592, 655 S.E.2d 920 (2008). Another panel later acknowledged the "circular nature of the logic" of *Patrick,* under which local agencies purchase coverage for claims but the insurance policy excludes those very claims. *Estate of Earley ex rel. Earley v. Haywood County Dept. of Soc. Services*, 204 N.C. App. 338, 343, 694 S.E.2d 405, 409 (2010).

E. Plaintiff Filed her Unreasonable Force Claim Under the State Constitution.

In response to Defendants' assertion of immunity from her tort claim, Plaintiff relied on *Craig, supra,* to amend her Complaint to add an unreasonable force claim under the state constitution, including Article I, § 20. In *Craig*, a unanimous Supreme Court reaffirmed its decision in *Corum v. University of North Carolina,* 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 113 S.Ct. 493,

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[1] The immunity that applies to a local government "is more precisely identified as a governmental immunity, while sovereign immunity applies to the State and its agencies." *Craig,* 363 N.C. at 336, 678 S.E.2d at 353, n.3. In application, however, "the distinction is immaterial."

121 L.ed.2d 431 (1992), and declared that local government immunity from tort claims could not "'stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights.' " 363 N.C. at 338, 678 S.E.2d at 354 (quoting *Corum,* 330 N.C. at 785-86, 413 S.E.2d at 291-92). The New Hanover County school board had asserted governmental immunity from an official-capacity negligent supervision claim by the parent of a student who was touched sexually by another student. The school district did not have insurance coverage and claimed immunity, but the plaintiff also brought claims under the Declaration of Rights. The trial court granted summary judgment on the negligence claim on immunity grounds, but denied it on the constitutional claims.

This Court reversed the trial court, holding 2-1 that the existence of the negligence claim was an "adequate remedy" at law, even though barred by immunity, foreclosing the constitutional claims. *Craig,* 185 N.C.App. 651, 656, 648 S.E.2d 923, 926-27 (2007). The dissent argued that the negligence claim could not be an "adequate remedy" if precluded by immunity. *Id.* at 659, 648 S.E. 2d at 928. The Supreme Court agreed.

The high court held unanimously that Craig could sue directly under the state constitution where governmental immunity barred the negligence claim. *Craig,* 363 N.C. at 338, 678 S.E.2d at 354. It held that *Corum* "could hardly have been clearer" in declaring that citizens have direct claims under the state

constitution absent an adequate common law or statutory remedy. *Id.* The Supreme Court wrote that the "practical effect" of the court of appeals' holding,

> would be to allow the doctrine of sovereign immunity to 'stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights,' exactly contrary to our holding in *Corum*. . . . . Allowing sovereign immunity to defeat plaintiff's colorable constitutional claim here would defeat the purpose of the holding of *Corum*.

Id. The Supreme Court concluded that Craig could bring his "colorable claims directly under our State constitution **based on the same facts that formed the basis of his common law negligence claim.**" *Id.* at 340, 678 S.E.2d 355 (emphasis added). That is what Plaintiff did here.

F. The Trial Court Dismissed the State Constitutional Claim, Finding the Assault Claim Provided an Adequate Remedy.

Ignoring the wording of *Craig,* the trial court dismissed Plaintiff's state constitutional claim for unreasonable force, finding an adequate remedy in her assault claims against the officers individually – even though that claim involves proof of additional facts including the subjective, malevolent intent of the officers.

The trial court denied Defendants' motion for summary judgment on the assault claim based on public officer immunity. The officers appealed from the denial of public officer immunity. It is well settled that the Court has jurisdiction over that interlocutory appeal. See, *Fraley v. Griffin*, ___ N.C.App. ___, 720 S.E.2d 694, 696 (2011). The trial court certified Plaintiff's cross-appeal under

Rule 54. That certification was appropriate in light of the importance of the state constitutional issue presented here, which is inextricably linked to the issues raised in Defendants' appeal, and the risk of two trials about the same facts reaching inconsistent results.

G. The Fourth Amendment's "Objective Reasonableness" Standard Applies to Excessive Force Claims.

The assault claim cannot provide an adequate remedy for Plaintiff's Article I, § 20 claim of unreasonable force because the claims involve different issues of fact and law. The state's appellate courts have never directly addressed whether the Fourth Amendment standard of "objective reasonableness" applies to excessive force claims brought under Article I, § 20. Some settled principles make clear that standard must apply.

1. The State Constitution Provides at Least as Much Protection as the Federal Constitution.

In general terms, the North Carolina Constitution affords this state's citizens at least as much protection as the federal constitution.

> [B]ecause the United States Constitution is binding on the states, the rights *it* guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be "accorded lesser rights" no matter how we construe the state Constitution. . . . In this respect, the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States(.)

State v. Jackson, 348 N.C. 644, 648, 503 S.E.2d 101, 103 (1998); *Virmani v. Presbyterian Health Services Corp.,* 350 N.C. 449, 475, 515 S.E.2d 675, 692 (1999).

2. Article I, § 20 Parallels the Fourth Amendment.

The case law next shows that Article 1, § 20 is the parallel provision to the Fourth Amendment. While the text "differs markedly from the language of the Fourth Amendment," *State v. McClendon,* 350 N.C. 630, 635, 517 S.E.2d 128, 132 (1999), "[n]evertheless, Article I, Section 20 of the Constitution of North Carolina prohibits unreasonable searches and seizures." *State v. Arrington,* 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984) (citing *State v. Ellington,* 284 N.C. 198, 200 S.E.2d 177 (1973)). See, also, *State v. Carter*, 322 N.C. 709, 712-13, 370 S.E.2d 553, 555 (1988) Given the Fourth Amendment provides the "floor," this Court will "first determine whether [a seizure] violates the Fourth Amendment; if so, [it] also violates Article I, Section 20." *Jones v. Graham County Bd. of Educ.*, 197 N.C. App. 279, 289, 677 S.E.2d 171, 178 (2009).

3. *Graham v. Conner* Applied the "Objective Reasonableness" Standard to Use of Force Claims.

Under the Fourth Amendment, excessive force claim turn on the "objective reasonableness" of the officers' conduct. In *Graham v. Conner*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), the Supreme Court rejected the Fourth Circuit's consideration of the officer's motive in using force.

> [T]he "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. . . . . An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

490 U.S. at 397, 109 S. Ct. at 1872. This "objective" standard remains the law of the land. See, *Scott v. Harris,* 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007); *Henry v. Purnell,* 652 F.3d 524, 531 (4th Cir., July 14, 2011) *cert. denied,* 132 S. Ct. 781 (Nov. 28, 2011)

The *Graham* opinion was rooted in Fourth Amendment precedent. In *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694,1701, 85 L. Ed. 2d 1, 9-10 (1985), the Court had declared that the "use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." Here, deadly force was used to apprehend persons fleeing a traffic citation.

H. The Trial Court Ruling Interjected Subjective Standards into Plaintiff's Constitutional Claim.

Clearly, *Graham's* objective reasonableness standard applies Plaintiff's claim under Article I, § 20. The negligence claim raised the same reasonableness issue, but was barred by governmental immunity. The issue raised on cross-appeal is the trial court's error in concluding, on this claim based on the reasonableness of

the shooting, that the individual capacity assault claims provide Plaintiff an adequate remedy at law.

The difference between an injury claim based on negligence and one based on assault is sharp.

> [A]n intentional act of violence is not a negligent act. Such conduct is beyond and outside the realm of negligence. Indeed, negligence cease[s] to play a part in the analysis where the injury is intentional, and such intent to injure may be actual or constructive. . . . Constructive intent to injure, which may provide the mental state necessary for an intentional tort, exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.

Lynn v. Burnette, 138 N.C. App. 435, 441, 531 S.E.2d 275, 279-80 (2000)(internal citations and quotations omitted.)

That stark difference is reflected in G.S. § 15A-401(d)(2). The negligent use of force is the "unreasonable or excessive" is an objective standard, while the other limitation on using force in a manner that is "willful, malicious or criminally negligent" is a subjective standard.

And the officers have asserted and additional layer of subjectivity -- that they are entitled to public officer immunity from the assault claim.

> As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. A defendant acts with malice when he wantonly does that which a man of reasonable intelligence would know to be contrary to his duty and which he intends to be prejudicial or injurious to another. An act is

> wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.

Grad v. Kaasa, 312 N.C. 310, 313, 321 S.E.2d 888, 890-91 (1984)(internal citations and quotations omitted).

Given these various "subjective motive" elements to the individual capacity assault claim, the trial court erred in finding that claim was an adequate remedy for a state constitutional claim based on "objective reasonableness." Doing so imposes upon an objective constitutional analysis the burden of showing that Defendant acted with a "wicked purpose" in order to recover. Malice and wickedness cannot be considered in a challenge to the reasonableness of the use of force.

> [t]he "malicious and sadistic" factor puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is "unreasonable" under the Fourth Amendment. . . . subjective concepts like "malice". . . have no proper place in that inquiry.

Graham 490 U.S. at 399, 109 S. Ct. at 1873. The assault claim cannot be an adequate remedy for the state constitutional violation because it requires proof of subjective motives in order to establish liability.

I. *Rousselo* Does Not Support Dismissal of the Constitutional Claim.

The trial court relied on *Rousselo v. Starling*, 128 N.C. App. 439, 495 S.E.2d 725 (1998), to find the individual capacity assault claim against the three officers an adequate remedy. It does not support that holding.

Rousselo involved the road-side detention of the plaintiff and the search of his rental car. It did not involve the use of force, only the lawfulness of the detention and search. The court first analyzed the federal constitutional claims and found that Trooper Starling had acted reasonably under the circumstances, was entitled to qualified immunity and that Rousselo's federal constitutional rights were not violated. *Id.* at 446, 495 S.E.2d at 730 (1998).

A. Common Law and Constitutional Claims for False Arrest Involve the Same Standard and Protect the Same Interests

The court then turned to Rousselo's challenged of his arrest and the search under Article I, §§ 19 and 20. *Rousselo* held that a constitutional claim was unnecessary because "'an attempt to vindicate [a plaintiff's] right to be free from restraint ... is the same interest protected by his common law claim for false imprisonment.'" *Id.*, at 447, 495 S.E.2d 725, 731 (1998), quoting *Alt v. Parker,* 112 N.C.App. 307, 317–18, 435 S.E.2d 773, 779 (1993), *cert. denied,* 335 N.C. 766, 442 S.E.2d 507 (1994). (Also citing *Davis v. Town of Southern Pines,* 116 N.C.App. 663, 449 S.E.2d 240 (1994), *disc. review denied,* 339 N.C. 737, 454 S.E.2d 648 (1995)). *Rousselo* also held that a state law claim for trespass to

chattels provided an adequate remedy at law to challenge the search. 128 N.C. App. at 448, 495 S.E.2d at 731 (1998). The court pointed to precedent holding that the constitutional and common law claims involved the same interests.

In marked contrast, a constitutional claim for unreasonable force and a claim for assault involve different interests and legal standards. The two claims that involve the same interests, in the sense described in *Rousselo,* are the negligent use of force claim and the constitutional claim. Both turn on the reasonableness of the officers' actions. If the negligence claim were not barred by immunity, Plaintiff would not need to bring a constitutional claim. But because it is barred, and because the assault claim is so different, she needs her constitutional claim to protect her rights guaranteed under the Declaration of Rights.

B. *Craig* Implicitly Overruled *Rousselo* on the Effect of Public Officer Immunity on the Adequacy of a Common Law Remedy

The plaintiff in *Rousselo* also challenged the adequacy of the individual capacity claims as an adequate remedy because he had to prove malice, corruption or conduct outside the scope of authority. 128 N.C.App. at 448-49, 495 S.E.2d at 732. Judge Wynn dismissed that concern. "[W]e decline to hold that Rousselo has no adequate remedy merely because the existing common law claim might require more of him." *Id.*, at 449, 495 S.E.2d at 732. This holding of *Rousselo* appears to have been overruled by *Craig*.

Judge Wynn was the author of both *Rousselo* and the Court of Appeals opinion in *Craig*. In both cases, he dismissed the idea that a remedy had to be "possible" to be adequate. In *Craig,* after noting that the negligence claim was completely barred by immunity and, thus, "fruitless," he wrote,

> the term "adequate" in *Corum* is not used to mean "potentially successful." . . . . Clearly, the Court is using "adequate remedy" to mean "available, existing, applicable remedy." Such a remedy is available here in the form of a common-law negligence claim.

Craig, 185 N.C. App. at 656, 648 S.E.2d at 927. A unanimous Supreme Court resoundingly rejected Judge Wynn's view as "exactly contrary to our holding in *Corum*." 363 N.C. at 338, 678 S.E.2d at 354. This strong restatement of *Corum's* holding that sovereign immunity cannot "stand as a barrier" to the redress of rights guaranteed in the Declaration of Rights, implicitly rejected Judge Wynn's holding in *Rousselo* that the additional burdens of overcoming public officer immunity is not to be considered in assessing the adequacy of an individual capacity remedy. Public officer immunity can be no more of a "barrier" to the vindication of fundamental rights than can sovereign immunity. .

It was "exactly contrary" to *Craig* for *Rousselo* to hold, and for this trial court to rule, that an individual capacity claim is an "adequate remedy" when it requires more of Plaintiff – proving the officers' subjective intent -- than needed to prove her constitutional claim. Plaintiff has gone from having to prove simply that the force was objectively unreasonable under the circumstances to being

compelled to show the officers both intended to injure her and did so with malice or corruption -- that they acted with a "wicked" purpose. That heightened requirement erects a "barrier" to the protection of her fundamental rights as much as does sovereign immunity, so it does not survive the unanimous opinion in *Craig*.

C. An Individual Capacity Claim Can Never Be an Adequate Remedy for a Constitutional Violation.

Finally, under *Corum* and *Craig*, an adequate remedy for *constitutional* violations must be one that allows for the possibility of recovery against the *government*. *Corum* held that direct constitutional actions could not be brought against persons in their individual capacity, but only officially. *Corum*, 330 N.C. at 787, 413 S.E.2d at 292. "The Constitution is intended to protect our rights as individuals from our actions as the government . . . [and] is not intended to protect our rights vis-à-vis other individuals." *Id.* at 788, 413 S.E.2d at 293. The Declaration of Rights, in particular, "was intended to protect individual rights from infringement *by the State*." *Id.* at 787, 413 S.E.2d at 292 (emphasis added). For that reason, citizens cannot rely on the Constitution "to support a claim for money damages against individuals, acting in their personal capacities[.]" *Id.* at 788, 413 S.E.2d at 293. Instead, as the government acts through its officials, plaintiffs may bring constitutional actions against government units or officials in their official capacity. *Id.*

Labeling a tort claim against an individual an adequate remedy for a constitutional violation by the government is contrary to the holding in *Corum* and *Craig*. It shifts the remedy for unconstitutional governmental action onto private individuals. Because the purpose of constitutional claims is to protect citizens from governmental abuse, an adequate remedy for constitutional violations must be one that creates the opportunity for recovery against the government.

CONCLUSION

Amicus respectfully requests that the Court hold that the "objective reasonableness" standard of the Fourth Amendment applies to use of force claims brought under Article I, § 20; that an assault claim against the Defendant officers individually requiring prove of subjective motive is not an adequate remedy for a constitutional claim based on objective reasonableness; and, more broadly, that an individual capacity claim can never be an "adequate remedy" for a constitutional violation by the government.

Respectfully submitted, this the 5th day of March, 2012.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document entitled, **Motion by North Carolina Advocates for Justice to File an Amicus Curiae Brief**, was electronically filed with the Clerk for the North Carolina Court of Appeals and duly served upon all other parties to this cause by U.S. Mail, postage paid, addressed to the parties as follows:

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this document, prepared in 14 point Time New Roman typeface, consists of 3,739 words.

This 5th day of March 2012

/s/ S. Luke Largess