

NO. COA12-1520-2

NORTH CAROLINA COURT OF APPEALS

Filed: 16 December 2014

BRYAN DEBAUN,
Plaintiff

v.

Durham County
No. 11 CVS 3999

DANIEL J. KUSZAJ, also known as
D.J. KUSZAJ, a Durham police
officer in his individual and
official capacity; CITY OF DURHAM,
NORTH CAROLINA,
Defendants

Appeal by plaintiff from order entered 5 September 2012 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 10 April 2013. Unpublished opinion filed 6 August 2013. Petition for discretionary review allowed by the North Carolina Supreme Court for remand to this Court for reconsideration 23 December 2013.

M. Alexander Charns, for plaintiff-appellant.

Office of the City Attorney, by Kimberly M. Rehberg, for defendant-appellee City of Durham.

Kennon Craver, PLLC, by Joel M. Craig, for defendant-appellee Daniel J. Kuszaj.

CALABRIA, Judge.

Bryan DeBaun ("plaintiff") appeals from the trial court's

order granting summary judgment in favor of Daniel J. Kuszaj ("Officer Kuszaj") and the City of Durham (collectively "defendants") with respect to plaintiff's claims for assault and battery, use of excessive force, malicious prosecution, and violation of plaintiff's rights under the North Carolina Constitution. Initially, this Court filed an unpublished opinion which affirmed the trial court's order. *Debaun v. Kuszaj*, ___ N.C. App. ___, 749 S.E.2d ___, 2013 N.C. App. LEXIS 795, 2013 WL 4007747 (2013) (unpublished). Plaintiff then filed a petition for discretionary review ("PDR") with the North Carolina Supreme Court, which entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)." Upon reconsideration, we affirm.

On the evening of 23 July 2009 and in the early morning hours of 24 July 2009, Officer Kuszaj of the Durham Police Department ("DPD") was on patrol and observed plaintiff standing or walking in a turning lane, carrying a twelve-pack of beer. Officer Kuszaj approached plaintiff and asked him for identification, which plaintiff provided. Since plaintiff appeared to Officer Kuszaj to be intoxicated, Officer Kuszaj

decided to take plaintiff into custody for his own safety. When Officer Kuszaj began to restrain plaintiff with handcuffs, plaintiff asked whether he was under arrest, and Officer Kuszaj said no. Officer Kuszaj then continued trying to restrain plaintiff, but plaintiff attempted to run away. Officer Kuszaj then directed his electronic impulse device ("taser") into plaintiff's back. As a result, plaintiff immediately fell down, hitting his face on the concrete and breaking his nose and jaw. Plaintiff incurred medical and dental expenses in excess of \$30,000.00 for permanent injuries he sustained in the fall.

Plaintiff was transported to Duke Hospital, where Officer Kuszaj issued plaintiff a citation for impeding the flow of traffic, drunk and disorderly conduct, and resisting, delaying or obstructing an officer ("resisting an officer"). After a trial in Durham County District Court, plaintiff was found not guilty of drunk and disorderly conduct and resisting an officer, but found guilty of impeding traffic.

On 14 July 2011, plaintiff filed a complaint seeking damages and permanent injunctive relief. Plaintiff asserted claims of assault and battery, use of excessive force, and malicious prosecution against the City of Durham and against Officer Kuszaj in both his official and individual capacities.

In the alternative, plaintiff claimed defendants violated his rights under Article I, Sections 19, 20, 21, and 35 of the North Carolina Constitution. Defendants filed an answer denying the material allegations of the complaint and asserting the affirmative defenses of governmental immunity and public officer immunity.

On 25 July 2012, defendants filed a motion for summary judgment. After a hearing, the trial court granted defendants' motion with respect to all of plaintiff's claims. The court based its ruling on the "insufficiency of the forecast of evidence as to the elements of each such claim" and made no ruling with respect to Officer Kuszaj's affirmative defense of public official immunity. Plaintiff appealed the trial court's ruling to this Court, which on 6 August 2013 filed an opinion affirming the trial court's order. Plaintiff then filed a PDR with the North Carolina Supreme Court on 6 September 2013. On 23 December 2013, our Supreme Court entered an order granting the PDR "for the limited purpose of remanding to the Court of Appeals for reconsideration in light of *Craig ex rel. Craig v. New Hanover County Board of Education*, 363 N.C. 334, 678 S.E.2d 351 (2009)."

The *Craig* decision is relevant to only one of plaintiff's arguments from his initial appeal to this Court. Specifically, *Craig* would apply to plaintiff's contention that the trial court erred by granting summary judgment in favor of defendants with respect to plaintiff's direct claim for relief under the North Carolina Constitution. Accordingly, we limit our analysis in this opinion to that issue.

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows 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.'" *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation omitted).

"[A] direct cause of action under the State Constitution is permitted only 'in the absence of an adequate state remedy.'" *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 675, 449 S.E.2d 240, 247 (1994) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992)). In *Craig*, our Supreme Court considered whether a separate constitutional claim was available when the plaintiff's common law negligence claim was barred by the absolute defense of sovereign immunity. 363 N.C. at 338, 678 S.E.2d at 354. The

Court held that "plaintiff's common law negligence claim is not an 'adequate remedy at state law' because it is entirely precluded by the application of the doctrine of sovereign immunity. To hold otherwise would be contrary to our opinion in *Corum* and inconsistent with the spirit of our long-standing emphasis on ensuring redress for every constitutional injury." *Id.* at 342, 678 S.E.2d at 356-57.

In *Wilcox v. City of Asheville*, ___ N.C. App. ___, 730 S.E.2d 226 (2012), *disc. rev. denied and appeal dismissed*, 366 N.C. 574, 738 S.E.2d 363 (2013), this Court applied *Craig* in the context of excessive force claims against law enforcement officers who asserted the defense of public official immunity. The decedent in *Wilcox* was shot and killed while traveling as a passenger in an automobile that was involved in a high speed chase with law enforcement officers, and the appeal involved the plaintiff's claims against the law enforcement officers in their individual capacities. *Id.* at ___, 730 S.E.2d at 229. The trial court had denied the defendant-law enforcement officers' motion for summary judgment with respect to these claims based upon the existence of a genuine issue of material fact regarding whether the officers acted with malice, but granted their motion for summary judgment with respect to the plaintiff's

constitutional claim pursuant to *Corum* and *Craig*. *Id.* at ___, 730 S.E.2d at 229-30.

On appeal, this Court reversed the trial court's ruling as to the individual capacity claim against one officer, and affirmed the denial of summary judgment with respect to the remaining officers. *Id.* at ___, 730 S.E.2d at 236. The Court then considered the plaintiff's appeal regarding her constitutional claim. Specifically, the Court addressed "whether a state common law claim that *may*, at trial, ultimately fail based on a defense of public official immunity is an adequate remedy." *Id.* at ___, 730 S.E.2d at 237. The *Wilcox* Court concluded that the common law claims were adequate, even if public official immunity was available as a defense to the claims:

Our Supreme Court stated in *Craig* that an adequate remedy must give the plaintiff "at least the *opportunity* to enter the courthouse doors and present his claim" and must "provide the *possibility* of relief under the circumstances." *Id.* at 339-40, 678 S.E.2d at 355 (emphasis added). Thus, adequacy is found not in success, but in chance. Further, when discussing the *inadequacy* of the remedy in that case, the Supreme Court used the language of impossibility, noting that governmental immunity stood as "an absolute bar" to the plaintiff's claim, "entirely" and "automatically" precluded recovery, and made relief "impossible." *Id.* at 340-41, 678

S.E.2d at 355-56. As we have concluded that there is a genuine issue of material fact as to the applicability of public official immunity, it follows that Wilcox still has a chance to obtain relief and that her claims against the Individual Defendants in their individual capacities are not absolutely, entirely, or automatically precluded. Therefore, because the Supreme Court's decision in *Craig* indicates that such a possibility warrants a finding of adequacy, we conclude that Wilcox's claims against the Individual Defendants in their individual capacities serve as an adequate remedy.

Id. (footnote omitted). The Court further explained that

while the Individual Defendants have not lost their ability to assert the immunity defense at trial, the normal effect of the immunity - to deny a plaintiff the opportunity to present her claim - is lost. As this "effectively lost" immunity defense is not operating to prevent Wilcox from presenting her claim, but only as a usual affirmative defense, it cannot be said that the Individual Defendants' assertion of the public official immunity defense entirely precludes suit and renders Wilcox's common law claims inadequate.

Id. Finally, this Court held that the additional requirement of demonstrating malice that is necessary to overcome public official immunity did not render common law tort claims inadequate: "this Court has already rejected a similar argument in a similar case, holding that a remedy is still an adequate alternative to state constitutional claims where the plaintiff must show that the defendant acted with malice, despite the fact

that 'such a showing would require more evidence.'" *Id.* at ___, 730 S.E.2d at 238 (quoting *Rousselo v. Starling*, 128 N.C. App. 439, 448-49, 495 S.E.2d 725, 731-32, *disc. rev. denied*, 348 N.C. 74, 505 S.E.2d 876 (1998)).

In *Rousselo*, which the *Wilcox* Court specifically relied upon to reach its holding regarding malice, this Court upheld the trial court's grant of summary judgment in favor of the defendant-law enforcement officer with respect to the plaintiff's state constitutional claim, despite the plaintiff's inability to overcome the defense of public official immunity. 128 N.C. App. at 448-49, 495 S.E.2d at 730-31. The *Rousselo* Court concluded:

In the present case, however, there is not an absence of a remedy -- the common law action of trespass to chattel provides a remedy to the wrong of an unlawful search. We decline to hold that *Rousselo* has no adequate remedy merely because the existing common law claim might require more of him. As the common law remedy of trespass to chattel provides an adequate vindication of the right to freedom from unreasonable searches, we hold that the trial court did not err in granting summary judgment to [defendant] on this claim.

Id. at 449, 495 S.E.2d at 732 (internal citation omitted). Thus, pursuant to *Rousselo*, a common law claim that also requires the plaintiff to demonstrate that the defendant acted

with malice is still considered an adequate remedy which precludes a state constitutional claim.

While we recognize that *Rousselo* predated our Supreme Court's opinion in *Craig*, the *Wilcox* Court specifically held that "we are bound by this previous decision[.]" *Wilcox*, ___ N.C. App. at ___, 730 S.E.2d at 238. Based upon this holding, we are compelled to also conclude that the *Rousselo* Court's holding that the affirmative defense of public official immunity does not render common law tort claims inadequate remains good law after *Craig*. See *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

Ultimately, since plaintiff could seek a remedy for his alleged injuries through his claims of assault and battery, use of excessive force, and malicious prosecution, he cannot bring a cause of action under the State Constitution against either the City of Durham or Officer Kuszaj. Pursuant to *Rousselo* and *Wilcox*, the fact that plaintiff must overcome the affirmative defense of public officer immunity to succeed on his tort claims

does not negate their adequacy as a remedy. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants as to plaintiff's claim under the State Constitution.

Affirmed.

Judges ERVIN and DILLON concur.