IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

CIVIL ACTION NUMBER 1:07-CV-00953

RYAN McFADYEN, et al.,

Plaintiffs,

v.

DUKE UNIVERSITY, et al.,

Defendants.

REPLY IN SUPPORT OF DUKE UNIVERSITY DEFENDANTS', DUKE SANE DEFENDANTS', AND DUKE POLICE DEFENDANTS' MOTION TO DISMISS COUNT 41 OF PLAINTIFFS' SECOND AMENDED COMPLAINT

Count 41 of the Second Amended Complaint ("SAC"), which attempts to state claims based directly on the North Carolina Constitution, should be dismissed because (1) Plaintiffs have adequate common law remedies; (2) the Count fails basic pleading requirements; and (3) Plaintiffs fail to allege any violation of the North Carolina Constitution.

I. PLAINTIFFS HAVE ADEQUATE COMMON LAW REMEDIES

Plaintiffs cannot bring their claims under the North Carolina Constitution because they have adequate common law remedies for their alleged injuries. Plaintiffs argue that *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 339-342, 678 S.E.2d 351, 355-357 (2009), allows them to bring direct claims under the state constitution if Duke prevails on *any* of the defenses that it has raised in response to Plaintiffs' common law claims. Pl. Supp. Br. 2-4 (Dkt. 181). But the North Carolina

Supreme Court made clear in *Craig*, and subsequently in *Copper v. Denlinger*, 363 N.C. 784, 688 S.E.2d 426 (2010), that a plaintiff's failure to allege, or inability to prove, the elements necessary to prevail on a common law claim does not make the remedy for that claim "inadequate" so as to allow the plaintiff to proceed under the state constitution. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355-356; *Copper*, 363 N.C. at 788, 688 S.E.2d at 428-429; Duke Supp. Br. 6-7 (Dkt. 178). Plaintiffs' inability to prevail on the merits of their common law claims does not, therefore, render their state law remedies "inadequate" under *Craig*.

Rather, a plaintiff's remedy is "inadequate" if there is no remedy available at all under state law, or if that remedy is barred by governmental immunity. *See Craig*, 363 N.C. at 340, 678 S.E.2d at 355. The cases cited in *Craig—Midgett v. Highway Comm'n*, 260 N.C. 241, 132 S.E.2d 599 (1963), *Sale v. Highway & Public Works Comm'n*, 242 N.C. 612, 89 S.E.2d 290 (1955), and *Corum v. University of N.C.*, 330 N.C. 761, 413 S.E.2d 276 (1992)—do not support Plaintiffs' argument that state law remedies are "inadequate" whenever the plaintiff is unable to prevail on his common law claims. Instead, in these cases the North Carolina Supreme Court made clear that the plaintiff could proceed directly under the state constitution because either (1) state law did not provide the plaintiff with *any* remedy, *see Corum*, 330 N.C. at 783; 413 S.E.2d at 290; *Midgett*, 260 N.C. at 250-251; 132 S.E.2d at 608-609, or (2) the plaintiff's common law

claim was barred by sovereign immunity, *see Sale*, 242 N.C. at 616, 89 S.E.2d at 295.[1] None of those circumstances is present here: common law claims are available to redress Plaintiffs' alleged injuries, and Duke has not raised any governmental immunity defenses.

II. COUNT 41 IS INADEQUATELY PLEADED

Plaintiffs argue that Duke has "ignor[ed] over 1,300 paragraphs of allegations in the SAC." Pl. Supp. Br. 5 (Dkt. 181). But Count 41 fails to satisfy basic pleading standards precisely because Plaintiffs have not identified which particular allegations, out of those "over 1,300 paragraphs," they believe are relevant to their various state constitutional claims.[2] The allegation that unspecified "acts and omissions" of the Duke Police—mentioned somewhere in more than 1,300 paragraphs—violated various state constitutional rights (in unspecified ways) forces the Court and Defendants to "ferret out the relevant material from a mass of verbiage," 5 Wright & Miller, Fed. Prac. & Proc. § 1281 (3d ed.), and therefore "does not permit [Duke University] a meaningful

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[1] In *Corum*, "state law did not provide for the type of remedy sought." *See Craig*, 678 S.E.2d at 356 (discussing *Corum*, 330 N.C. at 785-786, 413 S.E.2d at 291-292). Similarly, in *Midgett*, under the state statute designed to provide a remedy for the plaintiff's injuries, the plaintiff's cause of action would be barred *before it accrued*, rendering the statutory remedy effectively unavailable. 260 N.C. at 251; 132 S.E.2d at 608-609. In *Sale*, there was no state statutory remedy, and the common law claim was barred by governmental immunity. *Sale*, 242 N.C. at 616, 621, 89 S.E.2d at 295, 298.

[2] *Craig* makes clear that Plaintiffs cannot rely on every allegation in their entire complaint to support their constitutional claims. *See* Duke Supp. Br. 9 n.4 (Dkt. 178).

opportunity to respond."[3]

Similarly, the argument that *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), "require Duke to identify … the non-conclusory, well-pled factual allegations in the complaint" (Pl. Supp. Br. 6 (Dkt. 181)) gets the law exactly backwards. It is Plaintiffs who must allege sufficient facts to "plausibly suggest" that they are entitled to relief against Duke University; conclusory allegations that unspecified acts or omissions of the Duke Police Department harmed Plaintiffs in unspecified ways is insufficient. *See* Duke Supp. Br. 9-10 (Dkt. 178).

III. PLAINTIFFS FAIL TO ALLEGE VIOLATIONS OF THE NORTH CAROLINA CONSTITUTION

A. Art. IX, § 1 and Art. I, § 15 (Education).

Plaintiffs acknowledge that the North Carolina courts have addressed Art. IX, § 1 and Art. I, § 15 of the North Carolina Constitution only in the context of the rights of schoolchildren to a public education, and have never extended those provisions to cover private university education. Pl. Supp. Br. 15-17 (Dkt. 181); *see also* Duke Supp. Br. 10-11 (Dkt. 178). Nor have Plaintiffs cited any authority suggesting that the state constitution guarantees the right to a college education at a private university.[4] Plaintiffs' only argument is that the language of Art. IX, § 1 and Art. I, § 15 does not foreclose that

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[3] *Lawson v. Virginia*, No. 01-180, 2002 WL 771901, at *2 (M.D.N.C. Mar. 22, 2002), *aff'd*, 36 F. App'x 537 (4th Cir. 2002); *see also Ajuluchuku v. Stacey*, No. 1:07CV0069, 2008 WL 345616, at *1 (M.D.N.C. Feb. 5, 2008).

[4] The Fourth Circuit in *Webster v. Perry*, 512 F.2d 612 (4th Cir. 1975), cited by Plaintiffs, addressed the expulsion of *minor children* from the *public school* system and did not so much as hint at a constitutional right to a private university education.

possibility. But that language certainly does not compel extending the state constitution to cover private university education, and given the wide-ranging implications that could flow from such a ruling—potentially implicating university admissions, qualifications for graduation, student conduct, and a host of other matters—this Court should rule that the North Carolina Constitution does not guarantee the right to a college education at a private university.

B. Article I, §§ 1, 14, and 19 (Free Speech, Due Process, Equal Protection).

Plaintiffs do not dispute that their free speech, due process, and equal protection claims under the North Carolina Constitution are governed by the same standards as those applicable under the First, Fourth, and Fourteenth Amendment counterparts. *See* Duke Supp. Br. 11-12 (Dkt. 178). Plaintiffs have failed to state a claim under the First, Fourth, or Fourteenth Amendments, and so their state constitutional claims fail as well. *See id*. at 12-13. A few points raised in Plaintiffs' opposition brief warrant specific mention:

Free Speech. Duke has shown that Plaintiffs had no free speech right not to speak to the police.[5] *See* Duke Supp. Br. 14-15 (Dkt. 178). Plaintiffs cite no state or federal authority recognizing such a free speech right.[6] Plaintiffs suggest, however, that

[5] Plaintiffs have not disputed that Count 41 fails to state a free speech claim in connection with the lacrosse team's voter registration efforts. *See* Duke Supp. Br. 13-14 (Dkt. 178); *see also* Duke Br. 21-22 (Dkt. 46); Duke Reply 4-5 (Dkt. 97).

[6] Plaintiffs' retaliation claim also fails for failure to allege any of the remaining elements of that claim. Duke Supp. Br. 13 n.7 (Dkt. 178); Duke Br. 22-24 (Dkt. 46); Duke Reply Br. 5-6 (Dkt. 97).

their right not to speak to the police "passes over" to a substantive due process claim. Pl. Duke Opp'n 18 n. 18 (Dkt. 75). That argument fails for the reasons discussed *infra* at 6-8.

Due Process; Search and Seizure. Duke has shown that Plaintiffs cannot state a claim for an allegedly illegal search or seizure based on Art. I, § 19. North Carolina courts have consistently held that § 20 is the state counterpart to the Fourth Amendment.[7] Irrespective of which clause Plaintiffs rely on, they cannot state a claim for an illegal search and seizure under the state constitution for the same reasons that they cannot state a Fourth Amendment claim. *See* Duke Supp. Br. 16 (Dkt. 178). Moreover, Plaintiffs are barred from pursuing any such claim under the state constitution because they have adequate remedies (trespass to chattels and false imprisonment) that they chose not to pursue. *Rousselo v. Starling*, 128 N.C. App. 439, 447-449, 495 S.E.2d 725, 730-732 (1998); *see also Copper*, 363 N.C. at 788; 688 S.E.2d at 428-429.

Substantive Due Process. Plaintiffs assert that Duke engaged in a massive conspiracy to subject them to a criminal investigation even though Duke allegedly "knew" that no crime had occurred. Pl. Supp. Br. 13-15 (Dkt. 181); *e.g.*, SAC ¶¶ 445-455. Plaintiffs argue that that investigation—untethered to any deprivation of liberty—gives rise to a substantive due process claim. This claim fails for several reasons.

First, the United States Supreme Court has already rejected any such argument. In

[7] *See, e.g.*, *State v. Washington*, 193 N.C. App. 670, 676, 668 S.E.2d 622, 626 (N.C. App. 2008); *State v. McLamb*, 186 N.C. App. 124, 125-126, 649 S.E.2d 902, 903 (N.C. App. 2007); *State v. Downing*, 169 N.C. App. 790, 794, 613 S.E.2d 35, 38 (N.C. App. 2005).

Albright v. Oliver, 510 U.S. 266, 274 (1994), the Supreme Court concluded that there is no "substantive right under the Due Process Clause of the Fourteenth Amendment to be free from criminal prosecution except upon probable cause." *Id*. at 268. The Supreme Court explained that "it is the Fourth Amendment, and not substantive due process," that governs "pretrial" deprivations of liberty. *Id.* at 271; *see* Duke Br. 12-13 (Dkt. 46). Because Plaintiffs were never indicted or tried, their only possible constitutional claim is for unlawful search and seizure, for which they cannot state a claim. *See supra* at 6; Duke Supp. Br. 16 (Dkt. 178).[8]

Second, courts have consistently rejected the notion of a substantive due process right not to be investigated.[9] "[T]here is no constitutional right to be free of

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[8] Contrary to Plaintiffs' suggestion, Duke has not abandoned its arguments under *Albright*. *See* Duke Br. 12-15 (Dkt. 46).

[9] *See, e.g.*, *Becker v. Kroll*, 494 F.3d 904, 922, 923 (10th Cir. 2007) (rejecting a substantive due process claim for a "groundless investigation" and stating that "[w]hile the enforcement tactics and absence of professionalism in this case—if true as alleged—fail the most obvious standards of proper conduct, they do not meet the affronts to personal autonomy suggested by our case law.… To rest her claims on the undefined contours of substantive due process would only introduce uncertainty and analytical confusion to an already unwieldy body of law"); *Shields v. Twiss*, 389 F.3d 142, 150-151 (5th Cir. 2004) ("Regarding Shields's 'unreasonable investigation' claim, Shields has pointed to no legal basis for a § 1983 action of this sort, and the court knows of none."); *Burrell v. Adkins*, No. 01-2679, 2007 WL 4699166, at *9 (W.D. La. Oct. 22, 2007) ("[T]here is no constitutional basis for a Section 1983 action based on an 'unreasonable investigation.'"); *Biasella v. City of Naples, Fla.*, No. 2:04-CV-320, 2005 WL 1925705, at *4 (M.D. Fla. Aug. 11, 2005) (rejecting a substantive due process right "to be free from maliciously instigated and baseless investigations," especially where "all investigations ended favorably towards plaintiff and he was never arrested or charged with anything").

investigation." *United States v. Trayer*, 898 F.2d 805, 808 (D.C. Cir. 1990); *see United States v. Crump*, 934 F.2d 947, 957 (8th Cir. 1991).[10]

Finally, Plaintiffs have failed to allege any facts that would plausibly suggest that the Duke defendants entered into a massive conspiracy to instigate and prolong a malicious criminal investigation against Plaintiffs (Pl. Supp. Br. 14-15 (Dkt. 181)). Nor do Plaintiffs allege any facts that would plausibly suggest why Duke University and its officials would agree that it would be "best for Duke" if its own students were convicted on false charges of rape. SAC ¶¶ 85, 332, 452-453, 638, 862; *Twombly*, 550 U.S. at 544; *see also* Duke Br. 9-12 (Dkt. 46); Duke Supp. *Iqbal* Br. 5-11 (Dkt. 120).

Equal Protection. Duke does not contend that "out-of-staters" are not protected by the federal or state constitutions. (*See* Pl. Supp. Br. 9 (Dkt. 181) (arguing to the contrary).) Rather, Duke argues that Plaintiffs have not stated a claim for discrimination based on that theory. *See* Duke Supp. Br. 17 (Dkt. 178); *see also* Duke Br. 24-26 (Dkt. 46); Duke Reply Br. 6-9 (Dkt. 97) (explaining that the Durham police's alleged policy of

[10] Plaintiffs cite several federal substantive due process cases, but all of those involved plaintiffs who had been *prosecuted*. Pl. Supp. Br. 13-14 (Dkt. 181) (citing *Limone v. Condon*, 372 F.3d 39, 42 (1st Cir. 2004); *Moran v. Clarke*, 296 F.3d 638, 645 (8th Cir. 2002); *Jean v. Collins*, 221 F.3d 656 (4th Cir. 2000); *White v. Wright*, 150 F. App'x 193, 194, 198-199 (4th Cir. 2005)). *Toomer v. Garrett*, 155 N.C. App. 462, 574 S.E.2d 76 (2002), is inapposite as *Toomer* did not involve a criminal investigation at all; rather, it involved a claim that a state agency violated an individual's constitutional rights by disclosing confidential personal information about him. Finally, Plaintiffs mischaracterize the decision in *Chavez v. Martinez*, 538 U.S. 760 (2003); that case did not hold that "because Plaintiff was not charged or tried he could proceed with a substantive due process claim" (Pl. Supp. Br. 12-13 (Dkt. 181)). The Court in *Chavez* declined to resolve the petitioner's substantive due process claim, and instead remanded the question whether he had any such claim to the lower courts. 538 U.S. at 779-780.

"zero tolerance" towards underage drinking did not violate the Privileges and Immunities Clause). Plaintiffs make no substantive argument on this point in their opposition.[11]

Plaintiffs also fail to state an equal protection claim for alleged discrimination against them as white males, for they have failed to allege that Durham improperly investigated them for the alleged rape *because of* their race. *See Monroe v. City of Charlottesville*, 579 F.3d 380, 388 (4th Cir. 2009), *cert. denied*, 2010 WL 757718 (Mar. 8, 2010) (No. 09-795); Duke Supp. Br. 17-18 (Dkt. 178). Here, as in *Monroe*, it was the alleged victim, not the investigators, who classified her attackers on the basis of their race. *See id.* at 17-18.

To the extent that Plaintiffs are arguing that *Monroe* is distinguishable because here Duke allegedly engaged in a massive conspiracy to frame its own students for a crime Duke "knew" had not occurred (Pl. Supp. Br. 12 (Dkt. 181)), Plaintiffs' allegations are implausible and therefore cannot survive dismissal under *Iqbal* and *Twombly*. Plaintiffs adduce no plausible basis to infer that Duke's actions were motivated by racial animus against white men. *See Iqbal*, 129 S. Ct. at 1951-1952 (directing dismissal of discrimination claim where the defendants' decision to detain plaintiff, a Muslim, as part of an investigation into the September 11 attacks "should come as no surprise" given the

[11] In their brief, Plaintiffs frame the issue of discrimination against "out-of-staters" as one of privileges and immunities rather than equal protection. Pl. Supp. Br. 9-10 (Dkt. 181). Plaintiffs point to no authority, however, interpreting the North Carolina Constitution to include a protection analogous to that of the Privileges and Immunities Clause of Art. IV, § 2, of the federal Constitution. In any event, Plaintiffs acknowledge that the federal and state standards would be the same. *See id.* Because Plaintiffs' federal privileges and immunities claim fails, so does their analogous state-law claim.

demographics of the attackers); *see also Monroe*, 579 F.3d at 387-389; Duke Supp. *Iqbal* Br. 13-15 (Dkt. 120).

State Action. Plaintiffs' conclusory assertions that individual Duke University defendants acted under "color of law" or conspired with Durham are insufficient to plead state action. *See* Duke Supp. Br. 10 n.5 (Dkt. 178). Nor is Duke University converted into a state actor merely because it "operates" a police department. Pl. Supp. Br. 19 (Dkt. 181). Plaintiffs allege that the Duke Police (and therefore Duke University) were state actors during the rape investigation because they improperly "ceded" the investigation to Durham. *Id.* at 19; Duke Supp. Br. 9 n.4 (Dkt. 178). But, as a matter of law, the rape investigation was not Duke's to "cede." Duke Br. 28-32 (Dkt. 46); Duke Reply Br. 10-12 (Dkt. 97). Nor is it contradictory for Duke to rely on the public duty doctrine. Plaintiffs allege that Duke was "obligated" to conduct the rape investigation and was negligent in allowing the Durham Police to do so instead. *See, e.g.*, SAC ¶¶ 1293-1294. But as Duke has shown, that contention is self-defeating, for if in fact the Duke Police Department had a legal "obligation" to conduct the rape investigation (which it did not), then it could not be liable in negligence, for under the public duty doctrine, any "duty" would be owed to the public, not to Plaintiffs.

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Accordingly, Count 41 of the Second Amended Complaint should be dismissed.

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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2010, I electronically filed the foregoing Reply in Support of Duke University Defendants', Duke SANE Defendants', and Duke Police Defendants' Motion to Dismiss Count 41 of Plaintiffs' Second Amended Complaint with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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