UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

RYAN McFADYEN, *et al.*, *Plaintiffs,* v. DUKE UNIVERSITY, *et al.*, *Defendants.*	1:07-CV-953-JAB-JEP

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE CITY OF DURHAM'S MOTION FOR JUDGMENT ON THE PLEADINGS (COUNT 41)

This matter is before the Court on the City of Durham's Motion for Judgment on the Pleadings [Doc. #385] on Plaintiffs' state constitutional claim under Fed. R. Civ. P. 12(c). The Court should deny the City's Motion for Judgment on the Pleadings for all the same reasons that the Court granted Plaintiffs' motion to amend their complaint to assert Count 41, a new cause of action against Defendant City of Durham ("the City") under Article I and Article IX of the North Carolina Constitution, pursuant to the North Carolina Supreme Court's decision in *Craig v. New Hanover County Board of Education,* 363 N.C. 334, 678 S.E.2d 351 (N.C. 2009) in its Order [Doc. #135], and for all the same reasons the Court denied the City's Motion to Dismiss Count 41 in its Memorandum and Opinion [Doc. #186 at 211-15].

THE RELEVANT FACTS

The Second Amended Complaint ("SAC") alleges that the City of Durham, through its police officers and officials, caused Plaintiffs to be subjected to multiple deprivations of rights guaranteed by the North Carolina Constitution. For example, Plaintiffs allege that the City, though its employees, subjected Plaintiffs to station-house detentions during which Plaintiffs were compelled to disrobe and submit to invasive bodily searches *without probable cause*[1]. That the City's employees knew no probable cause existed is beyond serious dispute, given that the City's lead investigator has already testified that his response to the command to indict three lacrosse players was, "With what?" (Doc. #136 at 273 ¶ 816). And for his part, Nifong told the City's lead investigator and his supervisor, "You know we're f*****d" in response to the City's investigators' report of the absence of evidence supporting Mangum's false allegations shortly after they misled a superior court judge into issuing the NTO subjecting Plaintiffs to the station-house detentions and invasive bodily searches in violation of the North Carolina

[1] Specifically, Plaintiffs allege that the City violated their Fourth Amendment rights by subjecting them to searches and seizures for investigative purposes without "probable cause or reasonable grounds, reasonable suspicion, or any lesser quantum of proof." Brief of Appellees' at 53, *McFadyen v. Baker,* No. 11-1458 (4th Cir. Sept. 21, 2011) (ECF 69).

Constitution alleged in the complaint. (Doc. #136 at 202-03 ¶ 593). Plaintiffs also allege that the City, through its employees and officials, manufactured false evidence to mislead a judicial official into issuing orders authorizing those unlawful detentions and searches and that the City, through its employees and officials, "prevented, obstructed, impeded, or hindered" public justice in North Carolina by, among other things, conspiring with Defendants Wilson, Nifong, Steel, Dzau, Manly, Arico, Levicy, DUHS, and Duke University, to fabricate forensic medical reports and records of Crystal Mangum's SAE conducted at DUHS. (Doc. #136 at 391 ¶ 1193 and 257-66 ¶¶ 779-799 (Section XXXIV, "The SANE Conspiracy")). While there is more, see, e.g., Doc. #136 at 145-54 ¶¶ 414-44 and 390-94 ¶¶ 1189-1202, any one of the foregoing is sufficient to state a violation of rights guaranteed by the North Carolina Constitution.[2]

Furthermore, Answers filed by the City's co-defendants admit many of the material allegations that form the basis of Plaintiffs' state constitutional claim. For example, Defendant Linwood Wilson admits Plaintiffs' allegations con-

[2] Plaintiffs have summarized the detailed allegations documenting the misconduct attributable to the City several times, (*e.g.*, Doc. #129 at 4-38 (Plaintiffs' *Iqbal* Briefing §§ 2 & 3)), which Plaintiffs incorporate by reference here.

cerning his participation as a latecomer to the conspiracy to obstruct justice and to violate Plaintiffs' right to be free from unreasonable searches and seizures under the Fourth Amendment and the North Carolina Constitution. For example, Wilson admits Plaintiffs' allegations regarding the medical evidence that the City's employees falsely swore existed in order to obtain the NTO. Wilson admits Plaintiffs' allegation that he "was part of an interview conducted in the DA's office . . . of Nurse Levicy." (Doc. #377 at 143 (Answer ¶ 788)). Further, Wilson admits that he "met Nurse Levicy and Investigator Himan on the evening of January 10, 2007." (*Id.* at 145 (Answer ¶ 798)). Wilson also admits Plaintiffs' allegation that, during that January 10 meeting, he, Levicy, and Himan discussed how Levicy would respond to the absence of DNA belonging to any member of the Duke men's lacrosse team, and that "Nurse Levicy responded to multiple questions about condoms during her interview on January 10, 2007." (*Id.* at 144 (Answer ¶ 795).) And, among other things, Wilson admits Plaintiffs' allegation that, during the January 10, 2007, meeting, "Levicy stated that she 'wasn't surprised when [she] heard no DNA was found because rape is not about passion or ejaculation but about power.'" (*Id.* at 145 (Answer ¶ 796).)

THE STANDARD OF REVIEW

A motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) is analyzed under the same standard as a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Burbach Broad. Co. of Del. v. Elkins Radio Corp.,* 278 F.3d 401, 405-06 (4th Cir. 2002). Thus, the factual allegations in Plaintiffs' Second Amended Complaint (Doc. #136) and all reasonable factual inferences that may be drawn from them are taken to be true and in the light most favorable to Plaintiffs. *See id.* at 406.

On a Rule 12(c) motion the Court may consider the Answer as well, but factual allegations in the Answer may be considered "only where and to the extent they have not been denied or do not conflict with the complaint." *Alexander v. City of Greensboro,* 801 F. Supp. 2d 429, 433 (M.D.N.C. 2011) (quoting *Jadoff v. Gleason,* 140 F.R.D. 330, 331 (M.D.N.C. 1991)). "For the purposes of this motion [the defendant] cannot rely on allegations of fact contained only in the answer, including affirmative defenses, which contradict [the] complaint," because "Plaintiffs were not required to reply to [the] answer, and all allegations in the answer are deemed denied." *Id.; see* Fed. R. Civ. P. 8(b)(6)

("If a responsive pleading is not required, an allegation is considered denied or avoided.").

In short, the question presented by a motion for judgment on the pleadings "is whether or not, when viewed in the light most favorable to the party against whom the motion is made, genuine issues of material fact remain or the case can be decided as a matter of law." *Alexander,* 801 F. Supp. 2d 429, 433 (quoting *Smith v. McDonald,* 562 F. Supp. 829, 842 (M.D.N.C. 1983), aff'd, 737 F.2d 427 (4th Cir. 1984), *aff'd*, 472 U.S. 479 (1985)); *see id.* (collecting authorities).

ARGUMENT

I. THIS COURT REJECTED THE CITY'S ARGUMENTS FOR JUDGMENT ON THE PLEADINGS IN ITS ORDER GRANTING PLAINTIFFS' MOTION TO AMEND THE PLEADINGS [ECF 135] AND IN ITS ORDER DENYING THE CITY'S MOTION TO DISMISS [ECF 186].

This Court consistently refuses to reconsider issues raised in a Rule 12(c) motion that it fully addressed at the Rule 12(b)(6) stage. *See, e.g., Alexander,* 801 F. Supp. 2d 429, 434. The Court should follow that practice here. As explained below, the City raises nothing new in its Rule 12(c) motion. All of the City's arguments for dismissal under Rule 12(c) were available to the City in the proceedings on

its motion for dismissal under Rule 12(b)(6), and all of them were waived by the City's failure to assert them in those proceedings or rejected by the Court.

II. PLAINTIFFS' STATE CONSTITUTIONAL CLAIM AGAINST THE CITY SHOULD NOT BE DISMISSED

A. PLAINTIFFS' SECOND AMENDED COMPLIANT AFFORDS ADEQUATE NOTICE OF PLAINTIFFS' STATE CONSTITUTIONAL CLAIM, AND THIS COURT HAS ALREADY REJECTED THE CITY'S CLAIM TO THE CONTRARY.

The City's contention (Br. 4-5) that the SAC fails to give adequate notice of Plaintiffs' state constitutional claim under Rule 8 is meritless and this Court has already rejected it. (Doc. #135). Rule 8 provides that all that is required to state a claim for relief is "a short and plain statement of the claim showing that the pleader is entitled to relief' and "a demand for the relief sought." Fed. R. Civ. P. 8(a). The Supreme Court has held that this requirement means that the pleader must allege facts that, taken as true, show "more than a sheer possibility" of entitlement to relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). The City's contends that of the allegations in the Second Amended Complaint "less than 0.3% measured in pages and barely 0.2% measured by numbered paragraphs is devoted to Count 41." (Doc. #386 at 5). This is plainly false. Count 41, like the

other claims for relief, begins by stating the following as its first paragraph: "Plaintiffs incorporate here all of the preceding allegations (¶¶ 1–1381)." (Doc. #136 at 440 ¶ 1382).

Moreover, the City has already raised and this Court has rejected the same contention in the proceedings on the City's Rule 12 motion and Plaintiffs' motion to amend the pleadings. As such, the City's argument is meritless and because this Court has already held as much, it need not do so again. *Alexander*, 801 F. Supp. 2d 429, 434.

B. PLAINTIFFS' SECOND AMENDED COMPLAINT STATES A CLAIM FOR VIOLATION OF PLAINTIFFS' STATE CONSTITUTIONAL RIGHTS.

All of the City's arguments for judgment on the pleadings as to Plaintiffs' state constitutional claim lack merit, and they were advanced by the City—and rejected by the Court—in the proceedings on Plaintiffs' motion to amend the pleadings and the City's first Rule 12 motion to dismiss. The City's contentions (Br. 4-11) that Plaintiffs' SAC fails to state a claim for violation of Article I, § 1, § 14, § 15, § 19, § 20, § 21, and Article IX, § 1 are recycled arguments that the City made and this Court rejected in the proceedings on Plaintiffs' motion to amend the pleadings and the City's first Rule 12 motion dismiss. (*See* Doc. #135 and Doc. #186). Therefore, the City's arguments were "fully addressed at the Rule 12(b)(6) stage," and the Court should apply its

practice and decline to re-consider those same arguments here. *See, e.g.,* Alexander, 801 F. Supp. 2d 429, 434. The City offers no reason for the Court to abandon that practice here.

Furthermore, North Carolina's constitution guarantees the right to be free from station-house detentions and invasive searches without probable cause, a right that overrides an NTO issued upon the lesser statutory grounds.

> The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." . . . Similarly, the Constitution of the State of North Carolina provides that "general warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."

State v. Grooms, 353 N.C. 50, 73-74, 540 S.E.2d 713, 727-728 (N.C. 2000).[3]

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[3] The City recycles its contention Plaintiffs' reference to Article I of the North Carolina Constitution is not specific enough, noting that the rights its employees violated by misleading a judicial official into issuing the NTO directed to Plaintiffs are located in

Regardless of whether or not the right is located in § 20 or § 19 (or more likely, both), it is beyond cavil that the North Carolina Constitution prohibits station-house detentions and searches that involve the invasion of a person's body to collect saliva in the absence of full probable cause. For example, the North Carolina Supreme Court held that "[t]he invasion of a person's body to seize blood, saliva, and hair samples is the most intrusive type of search," and, as such, regardless of the availability of NTO procedures under that state statutes, "the seizure of such evidence *must be based upon probable cause* to believe the blood, hair, and saliva samples constitute evidence of an offense or the identity of a person who participated in the crime. . . ." *State v. Grooms*, 353 N.C. 50, 73-74, 540 S.E.2d 713, 727-728 (N.C. 2000) (emphasis supplied) (holding seizure and search of suspect for collection of saliva and blood samples met state constitutional standard because supporting affidavit established full probable cause).[4]

Article 1, § 20. To the extent it is necessary, Plaintiffs will move for leave to amend the complaint to specify that their state constitutional claim includes violations of N.C. Const. art. I, § 20

[4] Indeed, not only has this Court considered and rejected the same arguments the City presents in its belated motion for judgment on the pleadings, but also, at the recent status conference, the Court rejected the City's suggestion that it should seek

In that regard, the City's contention (Br. at 10) that Plaintiffs' state constitutional claims fail on the pleadings because the Article I rights that are analogous to those protected by the Fourth Amendment provide no greater protection than the Fourth Amendment to the United States Constitution comes to nothing. First, the contention based on the incorrect premise that the Fourth Circuit held that the NTOs that Plaintiffs were subjected to could be justi-

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adjudication of the state constitutional claims on the pleadings in the *Evans* litigation:

> **MR. GILLESPIE:** Well, Your Honor, speaking for the City, we understand that, yes, Count Twenty-three is the only remaining claim in the *Evans* case pending against the City. We are not really clear exactly what is the basis for the constitutional claim. We do intend to continue to challenge that. We do think there are adequate remedies in state law which would preclude the assertion of a constitutional claim, and, of course, the Fourth Circuit has ruled that the City does have immunity, but immunity does not extend to state constitutional claims. That claim is currently exigent in this case. The City opposes it, and the City contends that there is a viable state remedy for that; and, ultimately, we would expect to address that by way of a dispositive motion as well, if it comes to that point in this case.
>
> **THE COURT:** Obviously, no discovery has taken place at this point, so you really can't flesh out what the underlying basis of that claim is.

Transcript of the Status Conference Hearing Before the Honorable James A. Beaty, Jr., March 14, 2014, at 16-17.

fied by anything less than "full blown" probable cause. To the contrary, the Fourth Circuit did not address whether or not the Fourth Amendment could be satisfied by "reasonable grounds" which, the circuit court explained, is "significantly lower standard than probable cause." *Evans v. Chalmers*, 703 F.3d 636 at 652 (internal citations and quotations omitted). Instead, the Fourth Circuit merely held that, in light of the "uncertainty" created by the NTO statute's "significantly lower standard," the police officers were entitled to qualified immunity,[5] even though the North Carolina Supreme Court had clearly established that station-house detentions for invasive bodily searches like those Plaintiffs allege do require "full blown" probable cause and cannot be justified by the NTO statute's "significantly lower standard." *See*, *e.g.*, *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000) ("[t]he invasion of a person's body to seize blood, saliva, and hair samples is the

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[5] The Fourth Circuit panel explained its finding of qualified immunity by noting that "the district court correctly noted the uncertainty as to whether North Carolina courts would interpret the state NTO statute "as authorizing a search and seizure . . . on less than a full showing of probable cause." *Evans v. Chalmers*, 703 F.3d 636 at 649 n.6. And "[g]iven this uncertainty, we cannot conclude that clearly established law mandated 'a full showing of probable cause' . . . Accordingly, we must reverse on qualified immunity grounds." *Id*.

most intrusive type of search; and a warrant authorizing the seizure of such evidence must be based upon probable cause"); *State v. Welch*, 316 N.C. 578, 585, 342 S.E.2d 789, 793 (1986) (holding that collection of a blood sample requires "a search warrant . . . before a suspect may be required to submit to such a procedure unless probable cause and exigent circumstances exist that would justify a warrantless search").

Finally, the City's most over worn line of this litigation – that Plaintiffs were not indicted as a result of its employees' attempt to frame them – was impugned by Justice Scalia's observation that such a status is hardly a barrier to their right to relief; to the contrary, it places Plaintiffs within "the sole group for whom the Fourth Amendment's protections ought to be most jealously guarded: people who are innocent of the State's accusations." *Maryland v. King*, 133 S. Ct. 1958, 1989, 186 L. Ed. 2d 1, 42 (U.S. 2013).

C. THIS COURT REJECTED THE CITY'S CONTENTION THAT ADEQUATE STATE REMEDIES EXIST EVEN BEFORE THE FOURTH CIRCUIT RULED THAT PLAINTIFFS' STATE REMEDIES ARE BARRED BY GOVERNMENTAL IMMUNITY.

The City's contention (Br. 11-14) that Plaintiffs have adequate state law remedies for City employees' violations of Plaintiffs' state constitutional rights was rejected by this

Court in the proceedings on the City's Rule 12 motion. (Doc. #186 at 211-215). Because this Court has already considered and rejected the City's contention, it need not do so again. *See Alexander*, 801 F. Supp. 2d 429, 434.

And should the Court decide to re-consider the City's claim again at the pleadings stage, the City's contention has less merit now than it had in the first instance because, since then, the Fourth Circuit ruled that the doctrine of governmental immunity bars all of Plaintiffs' state law claims (except their state constitutional claim) against the City. As such, Plaintiffs' state law remedies are inadequate to remedy the violations of Plaintiffs as a matter of law.

Plaintiffs' SAC notes that they "plead this direct cause of action under the North Carolina Constitution in the alternative to Plaintiffs' state-law claims should those causes of action be barred in whole or part or otherwise fail to provide a complete and adequate state law remedy for the wrongs committed by the Defendants and their agents and employees." (Doc. #136 at 441 ¶ 1385). In the prior proceedings on the City's motion to dismiss and motion for summary judgment based on the City's governmental immunity defense, this Court rejected the City's bid to dismiss Plaintiffs' state constitutional claim even while deciding that Plaintiffs should be permitted to go forward against the

City on several state law claims, including state law claims for obstruction of justice, negligence, and negligent supervision with respect to Counts 18, 25, and 26. (Doc. #186 at 211.) And in those proceedings, this Court rejected the City's bid for dismissal of Plaintiffs' state constitutional claim because:

> unresolved questions remain with respect to whether there are other adequate remedies under state law, particularly in light of the City's assertion of governmental immunity. Therefore, to the extent that Defendants contend that Count 41 should be dismissed because there are alternative remedies, the Court will deny the Motion to Dismiss as to Count 41, and allow it to go forward as a potential alternative claim should the City ultimately prevail on its governmental immunity defense.

(*Id.*) Shortly thereafter, the City, in fact, "prevail[ed] on its governmental immunity defense" when the Fourth Circuit held that all of Plaintiffs' state law claims against the City are barred by governmental immunity. *Evans v. Chalmers*, 703 F. 3d 636, 658-59 (4th Cir. 2012). Thus, the possibility that this Court pointed to – "should the City ultimately prevail on its governmental immunity defense" – has come to pass, and, as such, Plaintiffs should be permitted to continue to discovery on their state constitutional claim against the City for all the same reasons this Court has explained in rejecting the City's first iteration of the same ar-

gument. (Doc. #186 at 210-214). The Court also declined the City's identical invitation to follow North Carolina Court of Appeals' decisions that were overruled or repudiated by the North Carolina Supreme Court in *Craig* v. *New Hanover Bd. of Educ.*, which explained that it had previously clarified the defect in the City's interpretation of "adequate remedy" in *Corum v. Univ. of N.C.* 330 N.C. 761; 413 S.E.2d 276 (1992). 363 N.C. 334, 338; 678 S.E.2d 351, 354 (2009) ("Allowing sovereign immunity to defeat plaintiff's colorable constitutional claim here would defeat the purpose of the holding of *Corum*.") The City's contention that adequate state remedies exist has already been considered and rejected by this Court under less favorable circumstances; that is, before the City prevailed on its sovereign immunity defense to all of Plaintiffs' state law claims. Thus, state law remedies offer no basis for judgment on the pleadings.

D. THE CITY OWED PLAINTIFFS A DUTY TO REFRAIN FROM VIOLATING PLAINTIFFS STATE CONSTITUTIONAL RIGHTS.

The City's contention (Br. 14-16) that Plaintiffs have not alleged "any duty owed to them was not fulfilled or any right they held that was breached" is meritless and this Court rejected it in the prior Rule 12 proceedings. The contention is meritless because, of course, Plaintiffs have al-

leged facts showing that the City's employees violated rights guaranteed by the North Carolina constitution. *See* discussion, *supra,* at 2-4; *see also* Doc. #129 at 4-38 (Plaintiffs' *Iqbal* Briefing §§ 2 & 3)). It is true, as the City notes (Br. 16) that, in *Craig*, the Plaintiffs alleged a duty of ordinary care as the basis for a negligence claim against the local government. But that observation comes to nothing because nothing in *Craig* suggests that a state constitutional claim cannot exist in the absence of a companion negligence claim, and, regardless, Plaintiffs asserted negligence claims, like those asserted in *Craig*, are inadequate as a matter of law as a result of the Fourth Circuit's ruling that governmental immunity bars Plaintiffs' recovery on those claims. *Evans v. Chalmers*, 703 F. 3d 636, 658-59 (4th Cir. 2012). That is precisely what this Court has already decided in addressing the same claim; only this time, the possibility that the City would ultimately prevail on its governmental immunity defense to Plaintiffs' state law claims is now a reality. If anything, the City's recycled argument has far less merit than it had in its first iteration. Plaintiffs are entitled to proceed against the City on their state constitutional claims precisely because the City prevailed on its governmental immunity defense to all other state law

claims that were otherwise available to Plaintiffs based on the same conduct.

III. THE COURT SHOULD NOT CONSIDER THE CITY'S MOTION BECAUSE THE CITY FAILED TO FILE ITS MOTION "EARLY ENOUGH NOT TO DELAY TRIAL."

Rule 12(c) permits a party to move for judgment on the pleadings, but only so long as the motion is filed "early enough not to delay trial." Fed. R. Civ. P. 12(c). Given that this case is now in its seventh year and Plaintiffs have been barred from discovery of any kind from the City as a result of its prior Rule 12 motion asserting the same arguments raised here, Plaintiffs respectfully submit that the City has delayed the trial of this action long enough, and that the City has failed to file its motion "early enough" as Rule 12(c) requires.

CONCLUSION

The City's Motion for Judgment on the Pleadings should be denied. Plaintiffs should be permitted to proceed to discovery on their state constitutional claim against the City without further delay.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that on the date stamped below, the foregoing Memorandum in Opposition to the City of Durham's Motion for Judgment on the Pleadings was electronically filed with the Court's CM/ECF System, which will issue a Notice of Electronic Filing (NEF) to counsel of record for every party registered to receive NEFs through the Court's CM/ECF System. I further certify that every party to this action has at least one counsel of record registered to receive NEFs in this action, and that they only unrepresented party, Linwood Wilson, has been permitted to register to receive the NEFs issued by the Court's CM/ECF System in this action.

/s/ Robert C. Ekstrand
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