

**THE GOOD, THE BAD, AND THE UGLY:
RECENT DEVELOPMENTS
IN LAW ENFORCEMENT LITIGATION**

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INTRODUCTION

Civil lawsuits against law enforcement officers continue to be extremely difficult and time-consuming. However, in spite of the obstacles involved in pursuing these claims, some positive developments have occurred during the past eighteen months. For example, the North Carolina appellate courts have clarified that a sheriff's department may be sued for money damages under §1983 and the federal courts have allowed prisoners greater latitude in seeking relief under §1983. The bad news is that the courts have continued to remove lawsuits involving the police from the province of the jury by resolving disputed issues of fact in favor of the police and by applying absolute legal defenses to insulate tortious behavior.

This article will summarize the good, the bad, and the ugly developments in law enforcement litigation since January 1, 2004. This article will review §1983 cases as well as state tort actions which impact the federal and state courts of North Carolina. Employment cases will not be addressed, although the reader is encouraged to review recent North Carolina cases concerning retaliatory discharge claims in violation of the First Amendment and/or public policy.

THE GOOD ...

1. Fourth Amendment Litigation

- *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284 (2004).

In *Groh*, ranch owners sued an agent from the Bureau of Alcohol, Tobacco, and Firearms for violating their Fourth Amendment right to be free from an unreasonable search of their property.

In this case, the agent had obtained a warrant from a local magistrate judge upon an application which stated that plaintiffs' home would be searched for "any automatic firearms or parts, two automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." The warrant was less specific than the application and failed to identify any of the items that the agent intended to seize. The warrant also did not incorporate by reference the itemized list contained in the application.

A team of law enforcement officers then searched the plaintiffs' home pursuant to this warrant. The officers' search uncovered no illegal weapons or explosives and no charges were filed against the plaintiffs.

In a 5-4 decision, the U.S. Supreme Court determined that the warrant was plainly invalid and that it was so obviously deficient that the search was characterized as "warrantless."

The Supreme Court also held that the agent was not entitled to qualified immunity because no reasonable officer could believe that this warrant complied with the text of the Fourth Amendment. In rendering its decision on qualified immunity, the Court conducted a fact-specific analysis which relied in part upon ATF internal guidelines concerning liability for executing a manifestly invalid warrant. In particular, the policy stated that "special agents are liable if they exceed their authority while executing a search warrant and must be sure that a search warrant is sufficient on its face even when issued by a magistrate."

- *Turmon v. Jordan*, 405 F.3d 202 (4th Cir. 2005).

In *Turmon*, the plaintiff, a retired state trooper, filed a claim under §1983 against a deputy sheriff for violating his Fourth Amendment rights by seizing him without reasonable suspicion and by using excessive force.

In this case, plaintiff and his girlfriend had rented a room at the Red Roof Inn in the Columbia, South Carolina area. They attended a concert and then returned to their hotel room where they discovered that the heater was not properly functioning. During the early morning hours, plaintiff turned on the hot water in the shower in an effort to heat the room with steam. After a while, the steam became stifling and he opened the door at approximately 5:00 a.m. to allow it to escape.

At the same time, the defendant deputy sheriff noticed what appeared to be white smoke billowing from the plaintiff's room. He thought that a fire had been started, and he began to run towards the building. While the defendant was running up the stairs towards the room, he was concerned that the fire had engulfed the room and that someone might be overwhelmed by the smoke.

Plaintiff heard someone approaching, and he decided to close the door and return to bed. When the deputy heard the door close, his whole mind-set changed, and he believed that the occupant was engaged in wrongdoing. The defendant then banged on the door, informed the plaintiff that he was a deputy, and ordered the plaintiff out of the room. When the plaintiff opened the door, the deputy sheriff pointed his gun at his face. The deputy then jerked the plaintiff outside, spun him around, and proceeded to handcuff him. In the course of spinning him around, the defendant injured plaintiff's back.

On these facts, the Fourth Circuit determined that the defendant did not have a reasonable belief that the room was on fire and the plaintiff's actions did not support a reasonable suspicion of criminal activity. As a result, the detention was unreasonable and a violation of the Plaintiff's

Fourth Amendment rights. After determining that a violation had occurred, the Fourth Circuit concluded that the officer was not entitled to qualified immunity because a reasonable police officer would have realized that there was no basis for reasonable suspicion of criminal activity and that seizing the plaintiff would be unlawful.

With regard to plaintiff's excessive use of force claim, the Fourth Circuit concluded that excessive force had been used. The Court reasoned that (1) there was insufficient evidence to support a reasonable suspicion on the officer's behalf that criminal activity was afoot; (2) there was no evidence that the plaintiff posed an immediate threat to the safety of the deputy or others; and, (3) the plaintiff did not actively resist arrest or attempt to evade detention by flight.

The Court also found that qualified immunity did not apply, stating that "the contours of the Fourth Amendment right to be free from excessive force during a seizure were set forth sixteen years ago by the Supreme Court in *Graham v. Connor*. In addition, over the years this Court has addressed the propriety of the use of force comparable to that used by Deputy Jordan and we have consistently found such force to be proper only in situations in which there was at least reasonable suspicion to believe criminal activity was afoot."

- *Pruitt v. Pernell*, 360 F.Supp. 2d 738 (E.D.N.C. 2005)

Pruitt is a remarkable case in light of the fact that the plaintiff appeared *pro se* before Judge Terrence Boyle on claims that several police officers violated his Fourth Amendment rights to be free from an unreasonable search and seizure of property.

Plaintiff was the owner of a pizzeria in Sharpsburg, NC. The daily operations of the restaurant were overseen by two managers, who included his son. Plaintiff became concerned that his managers were planning to steal property from the restaurant and he confided in the defendant-chief of police about his concerns.

The two managers also sought the counsel of the police chief. They both told him that various items within the pizzeria were their own personal property and did not belong to the plaintiff. They informed the chief that they planned to remove their property from the restaurant.

On the evening of April 23, 1999, the managers arrived at the restaurant after closing along with six police officers. Most of the officers were dressed in police uniform. Following their arrival, the defendant-officers found the plaintiff at an adjoining store and told him to open the pizzeria. One of the officers told the plaintiff that if he didn't comply with the order, he would be arrested. The door was opened and the officers supervised the managers while they removed property from the business. While the property was being removed, the defendant-officers told the plaintiff on several occasions that if he obstructed these men, he would be arrested. At one point, the plaintiff asked one of the officers to stop the managers from taking his property. The defendant responded by stating that the chief of police had already determined that the managers were the rightful owners of the property. Judge Boyle determined that the defendant officers facilitated the two managers with conducting an unreasonable search and seizure of the plaintiff's property in violation of the Fourth Amendment.

Judge Boyle also determined that there was sufficient evidence to show that the chief of police was deliberately indifferent in his supervision of the defendant officers and that he could be held vicariously liable for their illegal conduct.

Finally, the Court held that qualified immunity did not apply since it was well settled that state actors must not affirmatively facilitate or encourage an unreasonable search or seizure by a private person.

- *Rogerson v. Fitzpatrick*, 612 S.E.2d 390 (N.C. Court of Appeals, 2005)

Rogerson is a case in which a motorist sued several police officers for violating his Fourth Amendment rights during a traffic stop. The lawsuit arose from the following facts:

Plaintiff and a female passenger were driving to a party around midnight. The defendant officer observed the plaintiff traveling slowly and then saw him complete a U-turn before turning into an apartment complex. The officer also noted that the vehicle had expired out-of-state tags. The officer stopped the plaintiff as a result of the expired tags and under suspicion that the driver was impaired.

Following the stop, the plaintiff was removed from his car and placed into the patrol car. The defendant-officers then searched the car, looked under the hood, looked through the glove compartment, and searched through papers and documents in the trunk. Plaintiff was not arrested for driving while impaired. Rather, he was issued traffic citations for displaying an expired license plate and failing to have current registration and insurance. The officers claimed that the car was searched incident to arrest; however, there was a dispute between the parties as to whether the officers ever placed the plaintiff under arrest.

The N.C. Court of Appeals denied defendants' motion for summary judgment on the basis of qualified immunity holding that summary judgment was inappropriate since there were disputed issues of fact concerning the officers' conduct. The Court declined to address the defendants' other assignments of error on issues which were not subject to immediate appeal.

2. Prisoner Litigation

A. Use of §1983 instead of habeas corpus.

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), the Supreme Court held that when a prisoner's §1983 action would implicitly question the validity of a conviction or the duration of a sentence, the litigant must first obtain a favorable result in state or federal habeas proceedings before filing suit under §1983. The Supreme Court declined to expand the principles of *Heck* in the following cases:

- *Muhammad v. Close*, 540 U.S. 749, 124 S.Ct. 1303 (2004).

An inmate sued a correctional officer under §1983 for charging him with threatening behavior and placing him under pre-hearing lock-up in retaliation for the inmate's prior lawsuits and grievance proceedings against the officer.

The Court, in a *per curiam* opinion, held that the habeas exhaustion requirement in *Heck* did not bar the plaintiff's §1983 lawsuit for monetary damages.

- *Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117 (2004).

An inmate sued the Alabama Department of Corrections under §1983 for attempting to violate his Eighth Amendment rights by proposing to execute him by a "cut-down" procedure. The plaintiff sought a temporary stay of execution and a permanent injunction.

The Court, in a unanimous decision, held that §1983 was an appropriate mechanism for challenging an execution procedure which would be cruel and unusual. The court rejected Alabama's contention that plaintiff's civil action implicitly challenged the validity of his death sentence and was therefore inappropriate under *Heck*.

- *Wilkinson v. Dotson*, ___, U.S. ___, 125 S.Ct. 1242 (2005).

Two prisoners sued the Ohio Department of Rehabilitation and Correction under §1983 claiming that state parole procedures were unconstitutional. The prisoners sought declaratory and injunctive relief.

In an 8-1 decision, the Court held that the prisoners could challenge the constitutionality of the state parole procedures under §1983 and were not required to seek relief exclusively under the federal habeas corpus procedures.

- *Young v. Nickols*, 413 F.3d 416 (4th Cir. 2005).

Heck does not prevent a prisoner from filing an action against correctional officers under §1983 seeking monetary damages for an illegal extradition.

B. Fabrication of Evidence Claims.

- *Washington v. Wilmore*, 407 F.3d 274 (4th Cir. 2005).

Plaintiff was convicted by a jury of rape and murder, and sentenced to death. All appeals and collateral review proceedings in state and federal court were denied. However, in late 1993, DNA testing revealed that semen recovered from the victim contained a genetic marker which was not possessed by her, her husband, or the plaintiff. Additional DNA testing in 2000 conclusively excluded plaintiff as a contributor of semen at the crime scene. Based on this evidence, the governor granted plaintiff an absolute pardon for rape and murder.

Plaintiff thereafter sued the defendant-officer under §1983 for falsifying evidence which led to his conviction. In particular, plaintiff's evidence established that the defendant prepared a false report stating that plaintiff had volunteered non-public information about the crimes during his interrogation. At trial, the officer testified that specifically, the plaintiff told him that he left a shirt in the apartment following the attack. That information had not been revealed to the public at the time of the interrogation.

The defendant subsequently acknowledged that either he or another officer had elicited this statement from the plaintiff via leading questions.

The Fourth Circuit held that the officer was not entitled to qualified immunity. The facts stated by the plaintiff showed that the defendant violated his constitutional right under the Fourteenth Amendment to not be deprived of liberty as a result of the fabrication of evidence by an investigating officer. Moreover, this right was clearly established by the U.S. Supreme Court in *Miller v. Pate*, 386 U.S.1, 87 S.Ct. 785 (1967)(“[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.”).

C. Deliberate Indifference Claims.

- *Boyd v. Robeson County*, 2005 WL 1993925 (N.C. Court of Appeals, April 5, 2005), *disc. review denied*, June 30, 2005.

An inmate sued the defendant-sheriff and his deputies for violating her Eighth Amendment rights by denying her adequate medical treatment for a ruptured appendix. The defendants were denied summary judgment and immediately filed an interlocutory appeal arguing that the sheriff was not a “person” subject to suit under §1983 and that the defendants were entitled to qualified immunity.

The defendants' first argument was based upon the Court of Appeals' decisions in *Slade v. Vernon*, 110 N.C. App. 422, 429 S.E.2d 744 (1993), *Messick v. Catawba County*, 110 N.C. App. 707, 431 S.E.2d 489, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993), and *Buchanan v. Hight*, 133 N.C. App. 299, 515 S.E.2d 225, *disc. review denied*, 351 N.C. 351, 539 S.E.2d 280 (1999) which all held that a sheriff, in his official capacity, could not be held liable for money damages under §1983.

The North Carolina Court of Appeals in a 3-0 decision held that the office of sheriff is a local governmental unit which may be sued under §1983. The Court rejected the defendants' arguments that the sheriff is the “State” and closely scrutinized the cases which the defendants relied upon.

In reaching its decision, the Court noted that *Southern Ry. Co v. Mecklenburg County*, 231 N.C. 148, 56 S.E.2d 438 (1949), *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002), and *Hull v. Oldham*, 104 N.C. App. 29, 407 S.E.2d 611, *disc. review denied*, 330 N.C. 441, 412 S.E.2d 72 (1991) all characterized the sheriff as a local county official. The Court of

Appeals also analyzed U.S. Supreme Court jurisprudence on Eleventh Amendment immunity and concluded that (1) the State Constitution and the General Assembly refer to the sheriff as a local governmental officer; (2) the State has no potential liability for a monetary award against a sheriff under §1983; and (3) the State does not exercise over the sheriff the minimum degree of control required by *Hess v. Port-Auth. Trans-Hudson Corp.*, 513 U.S. 30, 115 S.Ct. 394 (1994).

With respect to the defendants' second argument, the Court concluded that the defendants were not entitled to qualified immunity. In particular, the Court of Appeals held that "a reasonable officer in 1998 would have had fair warning that ignoring an inmate's requests for medical care to address severe pain, vomiting, and nausea - - over two full days - - would, under these circumstances, violate clearly established constitutional law.

3. State Tort Claims

- *Smith v. Jackson County Bd. Of Educ.*, 168 N.C. App. 452, 608 S.E.2d 399 (2005).

A high school teacher encouraged a senior high school student to engage in a sexual relationship with the minor plaintiff (age 14). He then facilitated their sexual relationship by allowing them to use his office and home for that purpose both during and after school hours. The defendant-school resource officer was aware that the teacher was promoting and facilitating this relationship, but did not report the teacher's actions to the students' parents, school officials, the sheriff's department, or social services.

On May 25, 2001, the teacher arranged for the students to drive to his home during school hours for the purpose of having sex. When the students arrived at the home, they discovered the teacher hiding in the closet of his bedroom. The teacher subsequently offered the students \$500 to have sex in his presence.

The students refused and returned to school where they encountered the defendant. The defendant chastised them for leaving school, but didn't investigate their absence or take further actions. Later that day, the defendant escorted the minor plaintiff to the teacher's office, where the teacher sought to obtain her silence about the incident.

The minor plaintiff filed suit against various parties including the defendant-school resource officer and the county sheriff. She sued the officer for negligence, breach of fiduciary duty, negligent infliction of emotional distress, intentional infliction of emotional distress, and civil conspiracy to deprive her of her civil rights as a female under N.C. Gen. Stat. §99D-1. Plaintiff sued the sheriff for negligent supervision and negligent retention of the officer.

The Court of Appeals held that the public duty doctrine did not bar plaintiff's negligence claims against the officer because (1) under N.C. Gen. Stat §7B-301, the defendant had no discretion in determining whether or not to report known child abuse; and (2) a special relationship existed between the officer and the school since he provided protective services for an identifiable group of students and not the public at large.

The Court also held that plaintiff's claims against the sheriff for negligent supervision and retention were not barred by the public duty doctrine. The Court reached this decision by relying upon *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991) and *Leftwich v. Gaines*, 134 N.C. App. 502, 521 S.E.2d 717, *disc. review denied*, 351 N.C. 357, 541 S.E.2d 713-14 (1999). In both cases, the Court declined to apply the public duty doctrine to negligent supervision and retention claims even though it had been asserted as a defense. No further rationale was given.

- *Burt v. North Carolina Dep't of Corrections*, 167 N.C. App. 653, 605 S.E.2d 740 (2004)(*Unpublished Opinion*, COA04-60).

Plaintiff was a 22-year old inmate with severe mental health issues. She was housed in the acute mental health unit at a NC women's prison. While in a state of agitation, she was restrained by several female nurses and a correctional officer. The officer punched her twice in the face with a closed fist after she spit at him. The plaintiff suffered a nasal fracture and a medial orbital blowout fracture of the right eye. A negligence suit was filed and the Industrial Commission awarded the plaintiff \$50,000.

The Court of Appeals upheld the award holding that the officer "intended to restrain the plaintiff, but did not intend to use excessive force when doing so, thereby performing the intended act negligently."

THE BAD ...

1. Fourth Amendment Litigation.

- *Brosseau v. Haugen*, 543 U.S. 394, 125 S.Ct. 596 (2004).

In *Brousseau*, plaintiff sued the defendant-officer under §1983 alleging that the officer used excessive force when she shot him in the back as he was attempting to elude arrest. The facts are summarized as follows:

On the day before the shooting, the defendant learned that plaintiff had recently stolen tools from a former crime partner. She also discovered that there was a felony no-bail warrant for plaintiff's arrest on drug and other offenses.

The following day, plaintiff was involved in a fight at his mother's home which caused a neighbor to call 911. The defendant-officer responded to the scene. When she arrived, the plaintiff ran away and hid in the neighborhood. The defendant requested assistance and two officers with a K-9 searched for the plaintiff for 30-45 minutes.

After a neighbor spotted the plaintiff in her backyard, he ran back to his mother's house and jumped into the driver's side of his jeep, locking all the doors. The defendant saw the plaintiff running and she believed that he was going to retrieve a weapon from the jeep. When

the defendant arrived at the jeep, she pointed her gun at the plaintiff and ordered him to get out of the vehicle. Plaintiff ignored her commands and searched his car for the ignition key.

Defendant responded by hitting the driver's side window several times with her handgun. On the third or fourth try, the window shattered. Defendant unsuccessfully grabbed for the car keys and struck the defendant on the head with the barrel and butt of her gun.

Plaintiff started the ignition and began driving away. At this point, the defendant-officer fired one shot through the rear driver's side window hitting the plaintiff in the back. Defendant shot the plaintiff because she was concerned for the safety of the other officers in the area, the vehicles in his path, and other citizens in the area.

The U.S. Supreme Court, in an 8-1 decision, held that the defendant was entitled to qualified immunity because her "actions fell in the 'hazy border between excessive and acceptable force.'"

In reaching its holding, the Court reiterated that the qualified immunity inquiry "must be undertaken in light of the specific context of the case [and] not as a broad general proposition." As a result, the general legal principles on excessive force as enunciated in *Tennessee v. Garner* and *Graham v. Connor* were deemed irrelevant. Instead, the Court focused on cases which were analogous to defendant's situation, i.e., those in which an officer had to decide whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight. The Court concluded that the few analogous cases were fact-specific and failed to clearly establish that defendant's conduct violated the Fourth Amendment.

- *Owens v. Lott*, 372 F.3d 267 (4th Cir. 2004).

Four adults and two minor occupants of a residence brought §1983 actions against the county sheriff and various deputies alleging that their Fourth Amendment rights were violated when the defendants strip-searched or patted them down while executing a search warrant. The warrant authorized the defendants to search the residence and all persons located therein for drugs. No narcotics were found during the search.

The Fourth Circuit, as a matter of first impression, determined that an "all persons" warrant can pass constitutional muster if the affidavit and information provided to the magistrate supply enough detailed information to establish probable cause to believe that all persons on the premises at the time of the search are involved in criminal activity. The Court then concluded that the warrant in this case was unconstitutional because there was insufficient evidence to establish probable cause that all persons at the residence were likely involved in illegal drug transactions.

Despite the unconstitutionality of the search, the defendants were entitled to qualified immunity because the U.S. Supreme Court and the Fourth Circuit had not previously addressed the circumstances under which an "all persons" warrant could be constitutional. Furthermore, decisions from other jurisdictions, primarily state courts, failed to provide consensus for determining when probable cause exists for an "all persons" warrant.

- *Waterman v. Batton*, 393 F.3d 471 (4th Cir. 2005)

A motorist was seen by an officer traveling 51 miles per hour in a 25 mile per hour zone in the Baltimore-Washington Int'l Airport terminal. The officer activated his lights, but the motorist failed to stop and a ten minute pursuit ensued. At the end of the pursuit, the motorist approached a toll plaza at a normal speed, keeping a safe distance from vehicles in front of him. At that point, the three defendant-officers were positioned in front of the approaching car, a few feet to the passenger side of the vehicle's projected path.

The officers then saw the vehicle lurch forward and accelerate to 15 miles per hour. The officers perceived that the motorist was attempting to run them over, and they immediately began to shoot at the car. The vehicle then passed by, avoiding them by several feet before it stopped behind another car. The officers continued to fire at the car from the passenger side of the vehicle and from behind. The vehicle went through the toll gate where it ran over stop sticks and came to a complete rest. The motorist was shot five times by the officers and died.

The motorist's estate sued the officers for using deadly force in violation of the Fourth Amendment. The U.S. District Court for Maryland denied the defendants' motion for summary judgment, and the officers appealed.

On appeal, the Fourth Circuit, in a 2-1 decision, reversed the lower court. In analyzing the facts, the Court held that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated." As a result, the Court divided its legal analysis into two settings: (1) the defendants' use of deadly force in response to the motorist's car lurching and then accelerating towards them, and (2) the defendants' use of deadly force after the car passed by.

With respect to the first setting, the Fourth Circuit held that the defendants were entitled to qualified immunity because "a reasonable officer could have believed at the instant of acceleration that [plaintiff's decedent] presented a threat of serious physical harm." With respect to the second set of shots, the Court found that "a reasonable factfinder could determine that any belief that the officers continued at that point to face an imminent threat of serious physical harm would be unreasonable." However, the officers were still entitled to qualified immunity because at the time of the shootings, the law was not clearly established that an officer would be unjustified in using deadly force seconds after a threat of serious physical harm was eliminated.

2. Deliberate Indifference Claims.

- *Parrish v. Cleveland*, 372 F.3d 294 (4th Cir. 2004).

In *Parrish*, a pre-trial detainee died in police custody following his arrest for being drunk in public.

The defendant-officers initially transported the deceased to a police substation in the back of a police cruiser. Along the way, he vomited numerous times, was drooling heavily and obviously impaired. At the substation, he had a large quantity of fluid in his mouth and refused

to spit it out. Eventually, the deceased spit the fluid into a large garbage can. At that point, the officers noted some red specks in the substance he spat out.

The defendant-officers were concerned that the decedent might spread bloodborne pathogens and as a result of their concern, they decided to place a “TranZport Hood” spit mask over his face. The officers had never used the mask and were unaware that the manufacturer instructions stated, “DO NOT USE on anyone that is vomiting”

The detainee remained at the substation for 45 minutes to an hour with the mask over his head. During this period, he was conscious, able to communicate, and did not vomit or indicate a need to vomit. He did spit into the mask several times.

An EMT at the substation examined the deceased and observed that he was intoxicated, alternating between being sleepy and agitated. She questioned the officers about the spit mask and specifically asked what might happen if the deceased vomited with it over his head. One of the defendants commented that the vomit would flow out the bottom of the mask.

The defendants then determined that the deceased was too drunk to be held at the station and that he should be transported to the adult detention center. The plaintiff’s decedent was placed into the rear of a police van with the mask over his head and his hands hand-cuffed. He was laid onto his left side and no one sat with him during transport. In addition, the intercom in the police van was broken and the driver was unable to hear the deceased during transport. When the police van arrived at the detention center 30 minutes later, the deceased was dead. He was found lying on his stomach with vomit in the mask. The autopsy revealed that his BAC was .35 and that he died as a result of aspiration and positional asphyxia.

The detainee’s estate filed suit under §1983 alleging that the officers violated the deceased’s Fourteenth Amendment rights. The U.S. District Court for the Eastern District of Virginia denied the defendants’ motion for summary judgment. On appeal, the Fourth Circuit in a 2-1 vote held that the defendants were entitled to qualified immunity because the officers’ actions did not meet the deliberate indifference standard. Judge Williams wrote the opinion for the Court and Judge King wrote a separate concurrence in which he underscored that “the officers have skirted the precipice of deliberate indifference.”

Judge Luttig wrote a heated dissent in which he characterized the decision as turning the doctrines of deliberate indifference and qualified immunity on their heads, “so confounding these two important doctrines that it is literally impossible in the first instance to make principled predictions as to what conduct will and will not be considered to constitute ‘deliberate indifference,’ and, upon a finding of such, to make like predictions as to the availability of qualified immunity.”

The dissent derided Judge Williams’ analysis as being directly contrary to *Odom v. South Carolina Dep’t of Corrections*, 349 F.3d 765 (4th Cir. 2003), indicative of unpredictable jurisprudence in the Circuit (*See, Robles v. Prince George’s County*, 302 F.3d 262 (4th Cir. 2002) and *Bailey v. Kennedy*, 349 F.3d 731 (4th Cir. 2003)), and results-oriented. Judge Luttig stated on several occasions that Judge Williams set forth the facts “in the light most favorable to the defendant officers” and drew all reasonable inferences in the defendants’ favor.

Since Judge King did not join in Judge Williams' opinion, her review of the facts and law does not constitute precedent.

3. State Tort Claims.

- *Williams v. City of Jacksonville*, 165 N.C. App. 587, 599 S.E.2d 422 (2004).

The plaintiff-motorist was stopped for speeding by defendant-officers. Plaintiff was removed from the car at gun point and patted down by the officers. The opinion is bereft of additional facts, other than noting that the defendants allegedly destroyed the dispatch tapes and unnecessarily called plaintiff's supervisor to the scene.

Plaintiff sued the defendants under §1983 for violating his Fourth Amendment rights and also asserted state tort claims for negligence and false arrest. The U.S. District Court for the Eastern District of North Carolina granted summary judgment to defendants on plaintiff's Fourth Amendment claims holding that the defendants had probable cause to stop the plaintiff; that the defendants did not exceed the permissible scope of the stop; and that the threat of force and pat-down search were not unreasonable. The Federal Court declined to review plaintiff's state law claims. Thereafter, plaintiff filed suit in state court alleging claims for negligence, false arrest, and assault.

The North Carolina Court of Appeals held that the doctrine of *res judicata* did not bar the plaintiff's claims. However, the Court found that the doctrine of collateral estoppel applied to essential elements of each claim and that summary judgment should have been entered in the defendants' favor.

The Court first examined plaintiff's negligence claim in light of N.C. Gen. Stat. §15A-1401(d)(2) noting that an officer may be held liable in negligence for the use of unreasonable or excessive force upon another person. The Federal Court (Judge James C. Fox) had concluded that the defendants' conduct in pointing a weapon at the plaintiff was reasonable under Fourth Amendment law. Judge Fox had also concluded that the defendants' conduct did not amount to an unreasonable search or seizure of the plaintiff. Based upon these conclusions, the Court of Appeals held that collateral estoppel precluded plaintiff's negligence claims.

With regard to the false arrest claim, the Court observed that Judge Fox determined that probable cause existed for the traffic stop. The lack of probable cause is an essential element of a claim for false arrest/false imprisonment. Due to Judge Fox's ruling, the Court of Appeals held that plaintiff was collaterally estopped from pursuing his false arrest claim.

Finally, the Court held that Judge Fox's rulings on plaintiff's excessive force and unreasonable search claims barred plaintiff's assault claim under the doctrine of collateral estoppel.

- *Mays v. Clanton*, ___ N.C. App. ___, 609 S.E.2d 453 (2005).

Plaintiff sued the defendant officer for battery and false imprisonment. The evidence suggested that plaintiff made a confusing gesture to the defendant after the defendant asked him

to move his vehicle off the street during a Christmas Parade. The parties engaged in a physical altercation. Following the altercation, the defendant moved the vehicle and arrested the plaintiff for assaulting a public officer with a deadly weapon and simple assault.

Plaintiff was subsequently convicted by a jury of these offenses.

The Court of Appeals held that due to the convictions, the doctrine of collateral estoppel precluded the plaintiff from re-litigating his claims for battery and false imprisonment. Therefore, defendant was entitled to summary judgment.

- *Eckard v. Smith, 106 N.C. App. 312, 603 S.E.2d 134 (2004), appealed to the Supreme Court on the basis of a dissent.*

Motorist was killed in a collision with an uninsured motorist who was being pursued by the defendant officers. The motorist's estate sued the defendant officers for gross negligence.

The North Carolina Court of Appeals, in a 2-1 decision, held that the defendants were entitled to summary judgment since plaintiff failed to proffer any evidence of gross negligence.

The dissenting opinion concluded otherwise. In dissent, Judge Geer found that the officers' conduct in attempting a moving roadblock constituted gross negligence. The dissent relied on the following evidence: (1) defendants were attempting to force the motorist from the road by positioning their vehicles less than a car's length apart in front and behind the fleeing motorist; (2) defendants knew that a moving roadblock created a substantial hazard – 90% chance of collision; (3) they conducted the moving roadblock, with a 90% chance of collision, at

a time when the traffic was heavy and moving at significant speeds; and (4) the officers knew that there was a strong possibility that the motorist would change lanes or otherwise move sideways and that the motorist did not fear a collision.

Note: *Eckard* was argued before the Supreme Court on September 14, 2005.

- *Jones v. City of Durham, 168 N.C. App. 433, 608 S.E.2d 387 (2005), appealed to the Supreme Court on the basis of a dissent.*

Plaintiff-pedestrian was injured when the defendant police officer's vehicle struck her while responding to a call for assistance. The plaintiff sued the officer for negligence and gross negligence.

The North Carolina Court of Appeals unanimously held that since the defendant was responding to another officer's call for assistance, his conduct was governed by G.S. §20-145 and he could only be held liable for gross negligence. The Court in a 2-1 decision held that the defendant-officer was entitled to summary judgment on plaintiff's claim for gross negligence.

In dissent, Judge Levinson found that genuine issues of material fact existed as to the defendant's gross negligence. The dissent pointed to the following facts as showing gross negligence: (1) the defendant was not pursuing an escaping felon, but was responding to a call for assistance with a situation he knew nothing about; (2) defendant knew that other officers had also responded to the call for backup and the officer was not solely dependent on his aid; (3) defendant was familiar with the street where the accident occurred and knew it was a densely populated urban area; (4) defendant was driving between 50-74 miles per hour in a 35 mph zone as he approached the accident site, and did not have his blue light or siren activated; (5) defendant knew that the intersection had been the site of several previous accidents and that there were people hanging out there; (6) he knew from experience that the safest maximum speed on the road was 45 miles per hour; (7) he failed to apply his brakes after seeing the plaintiff in the road; (8) defendant lost control of his vehicle and struck the plaintiff with such force that she suffered serious injuries; and (9) defendant's conduct violated basic law enforcement training.

After concluding that summary judgment was inappropriate on plaintiff's gross negligence claim (and her obstruction of justice claim), Judge Levinson addressed plaintiff's *Dobrowolska* claims. He concluded that plaintiff failed to show that the defendants violated her Fourteenth Amendment rights by asserting governmental immunity in defense to her claims. The dissent's views on the merits of *Dobrowolska* claims became law a few months later in *Clayton v. Branson*, *infra* at pp. 21-23.

Note: *Jones* was argued before the Supreme Court on September 14, 2005.

- *Cunningham v. Riley*, ___, *N.C. App.* ___, 611 *S.E.2d* 423 (2005).

Inmate in the Mecklenburg county jail was assaulted by the defendant deputy-sheriff. Plaintiff sued the defendant in his official capacity for assault. The jury rendered a verdict for plaintiff in the amount of \$49,500. Following the verdict, plaintiff moved to amend his pleadings to add a claim under §1983. The trial court denied plaintiff's motion and entered judgment holding that plaintiff's claims were barred by sovereign immunity.

The North Carolina Court of Appeals affirmed the trial court's order. The Court found that the sheriff's department had a self-insured retention in the amount of \$250,000 and that the SIR was not extinguished by the verdict and costs of defense, which only totaled \$180,296.13. Since the defendant did not have liability insurance coverage, he was entitled in his official capacity to sovereign immunity. The Court also held that the motion to amend was properly denied since plaintiff had failed to present any evidence that the sheriff's office had a policy or custom which caused the assault.

The UGLY ...

1. §1983 Claims.

- *Town of Castle Rock v. Gonzales*, ___ U.S. ___, 125 S.Ct. 2796 (2005).

In *Gonzales*, plaintiff obtained a temporary restraining order directing her husband to not molest or disturb the peace of her and her children and to remain at least 100 yards from the family home at all times. The TRO was subsequently modified and made permanent. The modified order allowed plaintiff's husband to spend time with his three daughters on alternate weekends, for two weeks during the summer, and upon reasonable notice for a mid-week dinner visit arranged by the parties. He was also allowed to visit the home in order to collect the children for parenting time.

At 5:00 p.m. on June 22, 1999, plaintiff's husband took the three children while they were playing outside the home. The parties had not arranged for him to see his daughters that evening. When plaintiff noticed that her children were missing, she contacted the police. At 7:30, the police came to her home and she showed them a copy of the TRO. The police informed her that there was nothing they could do about the TRO and suggested that she call the police department again if the children weren't home by 10:00 p.m. At 8:30, plaintiff talked with her husband by telephone who told her that he took the kids to an amusement park. She then called the police and asked them to check on her husband at the amusement park and issue an all-points-bulletin for him. The police refused and told her to wait until 10:00 p.m. to see if her husband returned the children.

At 10:10, plaintiff called the police to report that her children were still missing. She was told to wait until 12:00. At midnight, she again called the police and then went to her husband's apartment. No one was at her husband's residence and she therefore called the police again. Plaintiff was told to wait for an officer to arrive, but no one came within the hour.

At 12:50, she went to the police station and submitted an incident report. The officer who took the report ignored her and instead, went to dinner. At 3:20 a.m., plaintiff's husband arrived at the police station and opened fire with a semi-automatic handgun. The police shot back, killing him. Shortly thereafter, the police discovered that he had murdered his three daughters and that he had their bodies in his pick-up truck.

Plaintiff sued the defendant-police department under §1983 alleging that the department violated the due process clause of the Fourteenth Amendment when its officers failed to properly respond to her repeated reports that her husband was violating the terms of the restraining order.

The U.S. Supreme Court in a 7-2 opinion held that the lawsuit must be dismissed because the plaintiff did not have a property interest in police enforcement of the restraining order against her husband. In reaching its decision, the Court noted that Colorado law did not make police enforcement of restraining orders mandatory. Rather, the majority reasoned that a Colorado officer had "some discretion to determine that - - despite probable cause to believe a restraining

order has been violated - - the circumstances of the violation or the competing duties of that officer or his agency counsel decisively against enforcement in a particular instance.” The Court then observed (contrary to the record) that “[t]he practical necessity for discretion is particularly apparent in a case such as this one, where the suspected violator is not actually present and his whereabouts are unknown.”

Furthermore, even if Colorado law made enforcement of restraining orders mandatory, that would not necessarily mean that state law gave plaintiff an “entitlement” to enforcement of the mandate. The Supreme Court then reviewed the applicable Colorado laws and determined that since the order was issued in a civil action, plaintiff only had the power to initiate civil contempt proceedings against her husband. Even if the order was issued in the criminal context, she only had the power to request that the district attorney initiate criminal contempt proceedings.

In sum, the Supreme Court held that “the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the due process clause, neither in its procedural nor in its “substantive” manifestations.” Justice Scalia did note however, that while “the framers of the Fourteenth Amendment and the Civil Rights Act of 1871, 17 Stat. 13 (the original source of §1983), did not create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.”

- *Muehler v. Mena*, ___U.S.____, 125 S.Ct. 1465 (2005).

Plaintiff sued the defendant officers under §1983 for violating her Fourth Amendment rights while executing a search warrant. In particular, the police obtained a search warrant in connection with their investigation of a gang-related driveby shooting. The warrant authorized a broad search of the home and premises for deadly weapons and evidence of gang membership. Plaintiff (a petite young woman) along with three other individuals occupied the home.

When the police (18 officers altogether) executed the warrant, they placed plaintiff and the other occupants in handcuffs and took them to a converted garage where two officers detained them for two to three hours. The police also brought INS agents with them who questioned the occupants about their immigration status. Plaintiff was a lawful resident; however, one of the occupants was removed from the scene by the INS.

Once the search was completed, plaintiff was released from custody without being charged with a crime. The search yielded weapons, ammunition, baseball bats with gang writing, additional gang paraphernalia, and a bag of marijuana.

Plaintiff sued the officers in the U.S. District Court for the Central District of California for detaining her for an unreasonable length of time and in an unreasonable manner. At trial, the jury rendered a verdict in favor of the plaintiff and awarded \$20,000 in compensatory damages and \$40,000 in punitive damages. The Ninth Circuit affirmed, holding that the use of handcuffs

to detain plaintiff during the search violated the Fourth Amendment and that the officers' questioning about her immigration status during the detention constituted an independent Fourth Amendment violation.

The U.S. Supreme Court vacated the judgment in plaintiff's favor. While all nine justices voted for this result, four justices joined Chief Justice Rehnquist's majority opinion and three justices joined Justice Stevens' concurring opinion.

The majority, relying upon *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587 (1981), concluded that the officers were authorized to detain all of the occupants of the home while the search was being conducted. Inherent in the authorization to detain was the authority of the officers to use reasonable force to effectuate the detention. The use of handcuffs was an appropriate use of force since the defendants were searching for weapons, a wanted gang member resided on the property, and only two officers were available to supervise the detention of the four occupants. On this evidence, the Court held that "the officers' detention of [plaintiff] in handcuffs during the execution of the search warrant was reasonable and did not violate the Fourth Amendment."

The Court also held that the INS' questioning of plaintiff was not a seizure under the Fourth Amendment and did not constitute an independent constitutional violation.

Although the concurring opinion voted to vacate the judgment, the justices felt that the Ninth Circuit had to re-examine the evidence on the following issues: whether the evidence supported a jury verdict that it was unreasonable to handcuff plaintiff throughout the search and whether plaintiff was detained after the search was completed.

The concurrence pointed to the following facts as suggesting that the prolonged handcuffing was unreasonable: (1) plaintiff was a poor five foot, two inch woman who rented bedrooms at her home to others; (2) each bedroom could be locked with a pad-lock and all of the contraband was found in the wanted gang member's room; (3) the wanted gang-member was concurrently arrested at his mother's home, not at plaintiff's residence; (4) the other occupants included a 55-year-old Latina, a 40-year-old Latino, and a white male in his 30's who was cited for possession of a small amount of marijuana; (5) the cuffs pinned the plaintiff's arms behind her back for two to three hours; (6) the cuffs were very uncomfortable and she asked the officers to remove them, but they refused; (7) she was continuously guarded by two officers who made flight virtually impossible; (8) 18 officers in total were at the scene; (9) no contraband was found in her room or on her person; (10) there were no indications that she was or ever had been a gang member; (11) police had previously visited her home and observed no gang members present there; (12) she fully cooperated with the officers and the INS agents and answered all of their questions; (13) she was unarmed and no match for the two armed officers who guarded her.

Justice Stevens, relying upon *Graham v. Connor*, stated that "a jury could have reasonably found from the evidence that there was no apparent need to handcuff [plaintiff] for the entire duration of the search and that she was detained for an unreasonably prolonged period. She posed no threat whatsoever to the officers at the scene. She was not suspected of any crime

and was not a person targeted by the search warrant. She had no reason to flee the scene and gave no indication that she desired to do so. Viewing the facts in the light most favorable to the jury's verdict, as we are required to do, there is certainly no obvious factual basis for rejecting the jury's verdict that the officers acted unreasonably, and no obvious basis for rejecting the conclusion that, on these facts, the quantum of force used was unreasonable as a matter of law."

- *Willingham v. Crooke*, 412 F.3d 553 (4th Cir. 2005).

In a false arrest case, defendants were denied summary judgment on the defense of qualified immunity. At trial, the court submitted the issue of qualified immunity to the jury for determination. The jury then rendered a verdict in favor of the defendants.

On appeal, the Fourth Circuit held that the issue of qualified immunity remained viable at trial despite the order denying summary judgment to the defendants on that issue. The Court further held that the lower court committed reversible error by submitting the issue to the jury. The Court noted in *dictum* that "to the extent that a dispute of material fact precludes a conclusive ruling on qualified immunity at the summary judgment stage, the district court should submit the factual questions to the jury and reserve for itself the legal question of whether the defendant is entitled to qualified immunity on the facts found by the jury."

- *Young v. Great American Ins. Co. of New York*, 359 N.C. 58, 602 S.E.2d 673 (2004), *reh'g denied by* ___ N.C. ___, ___ S.E.2d ___ (2005)

Three women were sexually assaulted on different occasions by the defendant-officer while in his custody. In each case, the officer came into contact with the women while performing his law enforcement duties. The women filed §1983 actions against the officer alleging that he violated their Fourth Amendment rights by assaulting them under color of law.

The officer subsequently filed a declaratory action seeking a determination as to whether a law enforcement liability policy provided liability coverage for his actions. The insurance policy provided liability coverage for

... those sums that the Insured becomes legally obligated to pay as damages because of "wrongful act(s)" which result in

1. personal injury,
2. bodily injury,
3. property damage,

caused by an "occurrence" and arising out of the Insured's duties to provide law enforcement activities.

The term "wrongful act(s)" was defined as "any of the following a. actual or alleged errors, b. misstatement or misleading statement, c. act or omission, or d. negligent act of breach of duty, by an Insured while performing law enforcement duties."

The term “personal injury” included injuries arising from eleven different intentional torts, including claims for assault and battery and civil rights violations.

The North Carolina Supreme Court in a *per curiam* opinion adopted the dissenting opinion of the Court of Appeals which held that insurance coverage did not exist for the officer’s misconduct. The Court determined that the insurance policy was unambiguous and the case was not controlled by *City of Greenville v. Haywood*, 130 N.C. App. 271, 502 S.E.2d 430 (1998)(holding that an on-duty officer’s sexual assault was insured under policy language which covered misconduct “arising out of the insured’s law enforcement duties). As a result, the Court narrowly focused upon the phrase “while performing law enforcement duties” and concluded that “[e]ven though each case of assault began with a traffic stop or accident investigation, [defendant] at some point in each case stopped carrying out his duties in order to commit the assaults by performing acts so completely remote from law enforcement to constitute a cessation of his job duties These assaults were not committed while [defendant] was carrying out the public duties of a law enforcement officer, but rather they were committed while he was serving his own personal and reprehensible purposes for which he may be charged criminally and sued in his individual capacity.”

The Court did not address the portions of the policy which allowed coverage for civil rights violations which typically would be asserted against the officer in his individual capacity. However, the Court indicated by footnote that “[e]xamples of acts that would be covered under the insurance policy would include using excessive force during an arrest or assaulting a suspect during an interrogation.” The opinion effectively creates a judicial exclusion under law enforcement insurance policies for sexual assaults.

2. State Tort Claims.

- *Lassiter v. Cohn*, 168 N.C. App. 310, 607 S.E.2d 688, *disc. review denied* (2005).

The defendant-officer investigated a three car collision which occurred as traffic was leaving a high school football game. The plaintiff’s car was the middle vehicle and it was the most severely damaged. When the officer arrived at the scene, she parked her vehicle across the street from the accident with her emergency lights in operation facing oncoming traffic. The officer did not direct the vehicles to move off the road or up the street, did not direct the motorists to turn on their car lights, and did not set out flares or other warnings for oncoming traffic. The accident occurred in a poorly lit area and the game traffic quickly dissipated (not noted in the opinion).

45 minutes later, the defendant allowed the third vehicle to leave and she called the plaintiff to the rear of his car to answer questions. Plaintiff was talking with the officer with his back turned to oncoming traffic when another vehicle crashed into him from behind. The driver of this vehicle had been distracted by the flashing police lights on the other side of the street and had seen no warnings in her lane of travel.

Plaintiff sued the defendant for negligence. After the trial court denied defendant's motion for summary judgment on the public duty doctrine, the case was immediately appealed.

The North Carolina Court of Appeals held that the case was barred by the public duty doctrine and that the special relationship exception did not apply. In rendering its decision, the Court rejected plaintiff's arguments that the public duty doctrine was specifically limited to the facts in *Braswell* and the issue of whether the police failed to provide protection from criminal acts. See, *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000). The Court distinguished the Supreme Court's holdings in *Braswell* and *Lovelace* and instead found that *dicta* in *Moses v. Young*, 149 N.C. App. 613, 561 S.E.2d 332, *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002) was controlling. Based upon its reading of these cases, the Court of Appeals found that the public duty doctrine barred claims against the police for discretionary governmental actions which fail to prevent acts of negligence resulting in injury.

The Court then concluded that the defendant-officer's actions were discretionary in nature, that she actively weighed the safety interests of the public when applying her discretion, and that there was nothing accidental about her conduct. The Court further concluded that a special relationship did not exist between plaintiff and defendant because plaintiff was not relying upon the officer and did not surrender his freedom of movement or judgment.

Although not addressed in the opinion, the record contained testimony from an expert in law enforcement that the defendant did not have the discretion to conduct her accident investigation as noted in this case. In addition, the record reflected that the plaintiff was 18 years old at the time of the wreck and that he, in fact, did rely upon the officer's status and perceived expertise in answering her questions while standing behind his vehicle.

- *Clayton v. Branson*, ___, N.C. App. ___, 613 S.E.2d 259 (2005)

In *Clayton*, plaintiff was injured while being transported by the defendant-officer in the rear of his patrol car. Plaintiff's injuries occurred when the officer abruptly braked and swerved to avoid a collision with another car. Before braking the officer was traveling 30-35 miles per hour over the 35 mile-per-hour speed limit although he knew that plaintiff was not wearing a seat belt due to the presence of a metal safety shield which limited space in the back of the patrol car.

Plaintiff sued the defendant-officer in his individual capacity for gross negligence. In *Clayton v. Branson*, 153 N.C. App. 488, 570 S.E.2d 253 (2002), the Court of Appeals held that defendant was not entitled to public officer immunity because plaintiff's evidence raised genuine issues of material fact as to the officer's gross negligence.

The case was tried before a jury on the gross negligence claim and a *Dobrowska* claim against the municipality for violating plaintiff's Fourteenth Amendment rights. The jury returned a verdict finding that the officer was grossly negligent and that the municipality violated plaintiff's rights. Plaintiff was awarded damages against the officer in the amount of \$100 and

against the municipality in the amount of \$1,500,000. Following the verdict, the trial judge awarded the defendants a new trial finding that the verdict was irreconcilable, inconsistent, and inexplicable.

On appeal, the Court of Appeals held that the defendants were entitled to the entry of judgment, as a matter of law, in their favor on plaintiff's claims. With regard to the gross negligence claim, the Court found that its review of the issue was not foreclosed by *Clayton I* because the prior decision only determined whether or not defendant was entitled to governmental immunity. The Court then concluded that plaintiff's evidence fell "far short of the threshold for gross negligence" because the officer never lost control of his vehicle, never struck another object or person, and was neither intoxicated nor racing.

The Court then examined plaintiff's constitutional claims first noting that their evidentiary analysis was not governed by *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000). The opinion held that:

1. The execution of settlement contracts between a municipality and a tort claimant does not waive governmental immunity.
2. Plaintiff's procedural due process claim was barred because he had no constitutionally protected property right to recover tort damages from the city by means of a lawsuit or settlement.
3. Plaintiff's substantive due process claim was barred because the municipality had eight factors for deciding whether to offer a monetary settlement which bore a rational relationship to a legitimate governmental goal and did not "shock the conscience."
4. Finally, plaintiff did not present evidence of any similarly situated claimants who were treated differently from him and did not produce any evidence that the city acted arbitrarily or irrationally. Therefore, his equal protection claim also failed as a matter of law.

The Court noted in passing that "as a practical matter, it would be extremely difficult for a plaintiff to show disparate treatment of 'similarly situated' claimants absent evidence of reliance on an 'inherently suspect criteria.'"

In a nutshell, the Court of Appeals expressed significant doubts regarding the viability of *Dobrowolska* claims. The underlying concern raised by the opinion is that these claims are just another way of asking the appellate courts to abolish governmental immunity or to change the way it is applied. "Any change in this doctrine should come from the General Assembly."

CONCLUSION

Litigating law enforcement cases in North Carolina presents serious challenges. In addition to the legal challenges, the courts will bend over backwards to prevent a litigant from having his or her day in court and from collecting money damages. The keys to success are to have an appealing client, a compelling fact pattern, and a defendant whose conduct borders on (but does not cross into – *see Young*) criminality.