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

MARY SMITH and GEORGE SMITH, Individually, and MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased,	)	
Plaintiffs,	)	
v.	)	Case No. 1:19CV386
CITY OF GREENSBORO, et al.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANT GREENSBORO POLICE OFFICERS' MOTION TO DISMISS

INTRODUCTION

On September 8, 2018, the Defendant Greensboro Police Officers killed Marcus Deon Smith by hogtying him while he was prone on the ground. The crux of Plaintiffs' claims against the Officer Defendants is that the brutal *manner* in which they hogtied Marcus constituted excessive force in violation of the Fourth Amendment. Specifically, Plaintiffs' Complaint alleges that as the Officer Defendants applied a restraint device to hogtie Marcus, they used extreme and unreasonable force to push Marcus's feet toward the small of his back while he was lying prone on the ground, bending Marcus's knees well beyond a 90 degree angle to the point that his feet were touching his handcuffed hands at the small of his back, and they maintained this level of extreme force and pressure as they secured the strap on the restraint device so tightly that Marcus's shoulders and his knees were suspended above the ground. The manner in which the Officer Defendants restrained Marcus and applied the restraint device placed extreme stress on Marcus's chest and severely compromised his ability to breathe, causing his death. Moreover, Plaintiffs' Complaint alleges that the force was unnecessary, unreasonable and excessive because Marcus was not engaged in any criminal conduct, was unarmed, made no threats to the police or others, presented no immediate danger to the officers, himself or to others, was not actively resisting arrest, and was particularly vulnerable to the excessive force because of his delusional and agitated mental state.

The Officer Defendants have moved to dismiss the Complaint in its entirety, arguing, in essence, that when the facts and inferences are viewed in the light most favorable to *them,* the amount of force they used to restrain and hogtie Marcus was reasonable and did not violate the Constitution. But their revisionist account of Plaintiffs' allegations turns the motion to dismiss standard on its head. Instead of accepting as true all of the factual allegations in the Complaint

and drawing all reasonable inferences in favor of the Plaintiffs, as they are required to do at the motion to dismiss stage, the Officer Defendants create their own version of the facts, based on their mischaracterization of the body camera video of the incident, in which they draw all reasonable inferences in their favor, and completely omit the key factual allegations in Plaintiffs' Complaint concerning the brutal and excessive manner in which Marcus was hogtied.

Because Plaintiffs' Complaint alleges more than sufficient facts to set forth plausible claims for relief against the Officer Defendants and because the conduct of the Officer Defendants constitutes a violation of Plaintiffs' clearly established constitutional rights, Defendants' motion to dismiss should be denied.

STANDARD OF REVIEW

To survive a motion to dismiss, a complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While the complaint must "state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), "it nevertheless need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Wright v. North Carolina*, 787 F.3d 256, 263 (4th Cir. 2015). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. A claim satisfies this pleading standard when its factual allegations "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

"When ruling on a Rule 12(b)(6) motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint" and "draw all reasonable inferences in favor of the plaintiff."[1] *E. I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 440 (4th Cir.

[1] Defendants omit this bedrock principle from their standard of review section.

2011). "A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 441 (4th Cir. 2015). The Court should grant a Rule 12(b)(6) motion only if, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *McCaffrey v. Chapman*, 921 F.3d 159, 163-64 (4th Cir. 2019).

In civil rights cases, the Fourth Circuit has emphasized that "[i]n testing the sufficiency of a civil rights complaint, 'we must be especially solicitous of the wrongs alleged,' and we 'must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Stevenson v. Martin Cty. Bd. of Educ.*, 3 F. App'x 25, 29 (4th Cir. 2001) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)); *see also McCollum v. Snead*, 2016 U.S. Dist. LEXIS 69884, at *5 (E.D.N.C. May 27, 2016).

STATEMENT OF FACTS CONCERNING THE OFFICER DEFENDANTS

The facts, viewed according to the motion-to-dismiss standard, are as follows: Marcus Deon Smith was a 38 year-old African American man, who had been diagnosed with bipolar disorder and schizophrenia, that manifested in episodes of psychosis, with symptoms including delusions, paranoia, hallucinations and altered mental status, and substantially limited major life activities including concentrating, thinking and communicating. Compl. ¶ 22.

On September 8, 2018, shortly after midnight, Defendant Greensboro Police Officers Payne, Duncan, Montalvo, Lewis, Bradshaw, Andrews, Strader, and Bailey encountered Marcus

on North Church Street in Greensboro near the North Carolina Folk Festival that was happening downtown. *Id.* ¶ 23. Marcus was pacing back and forth in the street and running around in circles. *Id.* ¶ 24. He appeared exasperated and frantic and was waving his arms in the air. *Id.* ¶ 24. He begged the officers for help, repeatedly stating, "Please help me, sir," and asked to be taken to the hospital. *Id.* ¶ 24. Marcus had not committed a crime, he was not engaged in any criminal conduct, he was not trying to flee, he was unarmed, he was not violent, he made no threats to the Defendants or others, and he presented no immediate danger to the Defendants or others. *Id.* ¶¶ 27, 53. Defendants believed that Marcus was under the influence of drugs and could see that he was extremely agitated, afraid, and in the throes of a mental health crisis. *Id.* ¶¶ 25-26.

Defendants called an ambulance to take Marcus to a hospital, and while waiting for the ambulance to arrive, they asked Marcus to get in the back of one of the police cars and told him they would take him to the hospital. *Id.* ¶ 28. Marcus voluntarily entered the back of a police car, but after a short period of time of being alone in the car with no one driving him to the hospital as Defendants told him they would do, he began to panic and thrash around because he wanted to get out. *Id.* ¶ 29. Marcus was not under arrest. *Id.* ¶ 30. He tried to open the door of the car, but it was locked, so he banged his hand against the window to get the Defendants' attention. *Id.* ¶ 30.

Defendant Duncan then stated, "we probably ought to RIPP Hobble him." *Id.* ¶ 31. A RIPP Hobble is a restraint device used by police that is manufactured by a company called RIPP Restraints International. *Id.* ¶ 32. It consists of a belt-like strap made of polypropylene that is placed around an arrestee's ankles to restrain his feet. *Id.* ¶ 32. The other end of the strap contains a hook and can be attached to the arrestee's handcuffs. *Id.* ¶ 32.

The Defendants then opened the door of the car and Marcus quickly got out. *Id.* ¶ 35. Marcus did not kick or hit or threaten any of the Defendants or others as he got out of the car. *Id.* ¶ 36. Defendant Duncan grabbed Marcus, and he and the other Defendants forced Marcus down to the ground and then rolled Marcus onto his stomach in the prone position. *Id.* ¶ 37. Marcus cried out in pain and said, "please don't do that!" and "I'm not resisting!" Marcus was grunting and groaning and moving his body, but he was not actively resisting the Defendants. *Id.* ¶ 38. While the Defendants held Marcus down, Defendant Duncan handcuffed Marcus's hands behind his back. *Id.* ¶ 39.

Defendants then hogtied Marcus while he was prone on the ground. *Id.* ¶ 40. Defendant Payne grabbed Marcus's ankles and pushed Marcus's feet toward his hands with extreme and unnecessary force, bending Marcus's knees well beyond a 90 degree angle. *Id.* ¶ 40. Defendant Payne pushed Marcus's feet all the way to the point that they were touching his handcuffed hands at the small of his back. *Id.* ¶ 40. Defendants Duncan, Andrews and Montalvo used the RIPP Hobble device to bind Marcus's hands to his feet behind his back while Defendant Payne continued to violently push Marcus's feet toward his back, causing Marcus's knees to continue to be bent well beyond a 90 degree angle. *Id.* ¶ 41. Defendants Andrews and Montalvo then tightened the strap on the RIPP Hobble device so tight that Marcus's shoulders and his knees were suspended above the ground.[2] *Id.* ¶ 42. The manner and extreme force with which Defendants Payne, Duncan, Andrews and Montalvo restrained Marcus and applied the RIPP

[2] Relying on their self-serving interpretation of the body camera video, Defendants describe Marcus's position as "hobbled" rather than "hogtied." Def. Br. at 5. However, accepting Plaintiffs' facts as true and drawing all reasonable inferences in their favor, the force used to restrain Marcus clearly qualifies as "hogtying" since his "feet . . . were touching his handcuffed hands at the small of his back." Compl. ¶ 40.

Hobble device placed extreme stress on Marcus's chest and severely compromised his ability to breathe. *Id.* ¶ 43.[3]

While he was being restrained and hogtied, Marcus was wheezing, moaning, groaning, gasping for air, and in obvious respiratory and physical distress. *Id.* ¶ 44. Marcus's breathing quickly became strained and less than half a minute later he became unable to breathe and was unresponsive. *Id.* ¶ 45. During and after the hogtying, Defendants allowed Marcus to remain prone on his stomach, with his knees bent well beyond 90 degrees, and they failed to continuously monitor Marcus's condition and breathing. *Id.* ¶ 46. Defendant Sergeants Bradshaw and Strader and Defendant Officers Lewis and Bailey were either holding Marcus down or standing right next to him during the prone restraint and hogtying. *Id.* ¶ 47. They each had the opportunity, duty and ability to intervene on behalf of Marcus, but failed to do so. *Id.* A few moments after Marcus stopped breathing, one of the police Defendants looked down and saw that Marcus's eyes were closed and ascertained that Marcus was unresponsive. *Id.* ¶ 49. Defendants then placed Marcus on a gurney to move him inside of an ambulance. *Id.* ¶ 50. When the paramedic Defendants finally placed Marcus in the ambulance and attempted to resuscitate him, their efforts were unsuccessful. *Id.* ¶ 51.

The North Carolina Office of the Chief Medical Examiner determined that the manner of death was "homicide" and the cause of death was "sudden cardiopulmonary arrest due to prone restraint; n-ethylpentalone, cocaine, and alcohol use; and hypertensive and atherosclerotic cardiovascular disease." *Id.* ¶ 52.

Throughout this incident, Marcus presented a purely medical and mental health emergency, not a law enforcement problem, he had not committed a crime, he was not engaged

[3] Defendants' "Statement of Pertinent Facts" omits entirely all of the facts contained in this paragraph, which involve the key issue in this case—the brutal manner in which the Officer Defendants hogtied Marcus.

in any criminal conduct, he was unarmed, he made no threats to the Defendants or others, he presented no immediate danger to the Defendants or others, and he was not actively resisting arrest. *Id.* ¶ 53. Marcus was particularly vulnerable to the potential lethal consequences of hogtying and prone restraint because of his delusional and agitated mental state and Defendants were aware of Marcus's mental state and vulnerability from the moment they encountered him. *Id.* ¶ 54.

At the time of the incident, the GPD had a written policy in its Directives Manual concerning the use of a RIPP Hobble. GPD Directive 11.1.4, *Handling and Transporting of Persons in Custody – Restraint*, stated:

> At no time shall the wrists and ankles of an arrestee be linked together using the RIPP HOBBLE restraining device, unless the arrestee can be seated in an upright position, or on their side. If this is done, the knees of the arrestee will not be bent more than 90 degrees (unless extenuating circumstances exist) to prevent stress being placed on the arrestee's chest muscles or diaphragm which might contribute to a positional asphyxia situation. . . . It is the responsibility of the arresting officer to ensure the arrestee is under direct observation from the time he is restrained in this manner until the restraints are removed or the custody of the arrestee is turned over to another agency.

Id. ¶ 58.[4] The manufacturer of the RIPP Hobble provides a bold faced warning with the product that reads: "NEVER Hog-Tie a Prisoner."[5] *Id.* ¶ 60.

[4] A portion of Defendants' "Pertinent Facts" contains several statements about how and in what circumstances the hobble can be used (Def. Br. at 4). Defendants cite to the Directive, which they attach as an exhibit to their motion, in support of these statements, but the Directive does not say what the Defendants claim it says. Moreover, Defendants' statement that "The hobble can prevent a restrained individual from kicking or causing harm to themselves or others while being transported" is not supported by any citation in violation of Local Rule 7.2(a)(2). Def. Br. at 4.

[5] Another example of Defendants' complete disregard for the motion to dismiss standard is the statement in their "Pertinent Facts" that the device used to hogtie Marcus was manufactured by a different company. Def. Br. at 4. Not only does this statement improperly contradict the factual allegations in Plaintiffs' Complaint, it too is not supported by a citation, in violation of Local Rule 7.2(a)(2).

QUESTIONS PRESENTED

I. Whether the Court should construe the facts and inferences in the light most favorable to the Defendants based on their mischaracterization of the extrinsic materials attached to their motion to dismiss or instead focus its inquiry on the factual allegations contained in Plaintiffs' Complaint?

II. Whether Defendants are entitled to qualified immunity on Plaintiffs' Fourth Amendment claim?

III. Whether Plaintiffs have stated a viable survival claim?

IV. Whether Plaintiffs have stated a claim for deprivation of the right to familial relationships with the decedent?

V. Whether the doctrine of public official immunity bars Plaintiffs' state law claims?

VI. Whether the doctrine of contributory negligence bars Plaintiffs' state law claims?

VII. Whether Plaintiffs have stated a claim for battery?

ARGUMENT

I. The Court Should Not Consider the Extrinsic Materials that Defendants Attach to Their Motion to Dismiss

Instead of accepting as true all of the facts alleged in Plaintiffs' Complaint as they are required to do at the motion to dismiss stage, the Officer Defendants rely on body camera video of the incident to create their own highly misleading version of the facts, which omits the key allegations of the Complaint and draws all of the inferences in their favor rather than in favor of the Plaintiffs.[6] They ask the Court to consider the body camera video to purportedly show that they did not use excessive force. According to Defendants, this is proper because "the body-worn camera footage is integral to the Complaint" and the Court "may take judicial notice of matters of public record under Fed. R. Evid. 201." Def. Br. at 15. Although Plaintiffs intend to rely on

[6] Of the 31 "Pertinent Facts" contained in Defendants' "Statement of Pertinent Facts," only six cite Plaintiffs' Complaint. The rest cite an amalgam of the Complaint and body camera video, the body camera video only, the autopsy report, or the GPD directive, and several of their "Pertinent Facts"—those related to the hobble device—contain no citation whatsoever. (*See* Def. Br. at 2-5).

the body camera video at summary judgment and trial because it supports their claims, it is improper for the Court to consider this evidence in the context of Defendants' Rule 12 motion because the video presents issues of factual interpretation which cannot be determined in favor of the Defendants at this stage given the requirement that the facts and inferences be construed in the light most favorable to the Plaintiffs.

"Generally, when a defendant moves to dismiss a complaint under Rule 12(b)(6), courts are limited to considering the sufficiency of allegations set forth in the complaint and the documents attached or incorporated into the complaint." *Zak v. Chelsea Therapeutics Int'l, Ltd.*, 780 F.3d 597, 606 (4th Cir. 2015). "Consideration of extrinsic documents by a court during the pleading stage of litigation improperly converts the motion to dismiss into a motion for summary judgment." *Id.* "This conversion is not appropriate when the parties have not had an opportunity to conduct reasonable discovery." *Id.* (citing Fed. R. Civ. P. 12(b), 12(d), and 56). "Courts therefore should focus their inquiry on the sufficiency of the facts relied upon by the plaintiffs in the complaint." *Id.*

Consideration of a document attached to a motion to dismiss is only permitted when the document is "integral to and explicitly relied on in the complaint, and when the plaintiffs do not challenge [the document's] authenticity." *Id.* at 606-607 (internal citations and quotation marks omitted). One other "narrow exception to this standard" is material of which a court may take judicial notice. *Id.* Under Federal Rule of Evidence 201, a court may "judicially notice a fact that is not subject to reasonable dispute," provided that the fact is "generally known within the court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. "Under this exception, courts may consider relevant facts obtained from the public record, so long as these facts are construed

in the light most favorable to the plaintiff along with the well-pleaded allegations of the complaint." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556-58 (4th Cir. 2013); *see also Zak*, 780 F.3d at 607 ("[W]hen a court considers relevant facts from the public record at the pleading stage, the court must construe such facts in the light most favorable to the plaintiffs.")

Contrary to Defendants' argument, the body camera video is not integral to the Complaint. Indeed, the Complaint does not cite to, refer to, or attach the video footage of the incident. As one district court has held, "[s]imply because a video that captured the events complained of in the complaint exists does not transform that video into a 'document' upon which the complaint is based." *Slippi-Mensah v. Mills*, 2016 U.S. Dist. LEXIS 124719, at *6 (D.N.J. Sep. 14, 2016); *see also Estate of Valverde v. Dodge*, 2017 U.S. Dist. LEXIS 70653, at *6-9 (D. Colo. May 9, 2017) (declining defendant police officers' request that it consider video evidence of the underlying incident, rejecting defendants' argument that the video is integral to the complaint simply because the alleged conduct is depicted on the video, and explaining that "the limited exceptions to what the court can consider at this stage require that the plaintiff specifically reference or incorporate the evidence"); *Liebler v. City of Hoboken*, 2016 U.S. Dist. LEXIS 95641, at *7 (D.N.J. July 21, 2016) (declining to consider video of the underlying incident at the motion to dismiss stage, explaining that "[t]he context of the statements, the identities and tone of voice of the speakers, the decisions that may have preceded or surrounded a meeting, and so on, all present issues of factual interpretation . . . the video is not the sort of uncontroversial document that may itself settle the claims one way or the other.")

Taking judicial notice of the video footage is also inappropriate here. Defendants are not asking the Court to merely take judicial notice of the fact that these videos exist; they are asking the Court to take judicial notice of the contents of the videos to purportedly show that the Officer

Defendants did not employ excessive force. One highly significant example is Defendants' assertion that one video shows that Marcus's hands were more than a foot from his feet during the hogtying, a fact that the video in no way supports, even if it is construed in the light most favorable to the hogtyers. *See* Def. Br. at 11 n.4. Moreover, this assertion is directly contradicted by the Complaint, which is consistent with the video, and which alleges that "Defendant Payne pushed Marcus's feet all the way to the point that they were touching his handcuffed hands at the small of his back."[7] Compl. ¶ 40. Thus, Defendants' characterization of the video is disputed by the Plaintiffs, and "is far beyond the usual purposes of judicial notice." *Knickerbocker v. United States*, 2018 U.S. Dist. LEXIS 23603, at *15-16 (E.D. Cal. Feb. 12, 2018) (rejecting defendant police officers' request that the court take judicial notice of body camera video to show that the defendants did not employ excessive force). Accordingly, the Court should decline to consider the body camera video at this stage.

II. Defendants are Not Entitled to Qualified Immunity on Plaintiffs' Fourth Amendment Claim

"While the defense of qualified immunity may be presented in a motion to dismiss, the defense faces a 'formidable hurdle' 'when asserted at this early stage in the proceedings . . . and 'is usually not successful.'" *Blackburn v. Town of Kernersville*, 2014 U.S. Dist. LEXIS 170386, at *6 (M.D.N.C. Dec. 9, 2014) (quoting *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014)). The Officer Defendants' qualified immunity argument must be rejected because it is based on a mischaracterization of the facts and a misrepresentation of the constitutional right in question. To determine whether an officer is entitled to qualified

[7] Other examples include: (1) Defendants' assertion that Marcus attempted to kick out the window of the police car; (2) Defendants' assertion that they decided to use the hobble because they thought Marcus was going to break the window of the police car; (3) Defendants' assertion that Marcus forcefully ran into an officer after he get out of the police car; and (4) Defendants' assertion that Marcus was kicking and struggling and not being compliant while the officers hogtied him. Def. Br. at 18. These assertions mischaracterize the video and are directly contradicted by the Complaint.

immunity, courts engage in a two-step inquiry. "The first step is to determine whether the facts, taken in the light most favorable to the non-movant, establish that the officer violated a constitutional right." *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). "At the second step, courts determine whether that right was clearly established." *Id.* Both prongs are satisfied here.

A. The Officer Defendants Violated Marcus's Fourth Amendment Right to be Free From Excessive Force

Viewing the facts and inferences in the light most favorable to the Plaintiffs, there is no question that the Officer Defendants violated Marcus's right to be free from excessive force. The Fourth Amendment bars police officers from using excessive force to effectuate a seizure. *Yates v. Terry*, 817 F.3d 877, 884 (4th Cir. 2016); *see Graham v. Connor*, 490 U.S. 386, 395 (1989). Courts evaluate a claim of excessive force based on an "objective reasonableness" standard. *Graham*, 490 U.S. at 399. The subjective intent or motivation of an officer is irrelevant at this step. *Id.* at 397. Courts are to carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Jones v. Buchanan*, 325 F.3d 520, 527 (4th Cir. 2003) (quoting *Graham*, 490 U.S. at 396). "To properly consider the reasonableness of the force employed [a court] must view it in full context, with an eye toward the proportionality of the force in light of all the circumstances. Artificial divisions in the sequence of events do not aid a court's evaluation of objective reasonableness." *Smith v. Ray*, 781 F.3d 95, 101 (4th Cir. 2015) (internal citation and quotation omitted).

The Court "also must give 'careful attention to the facts and circumstances of each particular case, including' three factors in particular: 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is

actively resisting arrest or attempting to evade arrest by flight.'" *Id.* (quoting *Graham*, 490 U.S. at 396). "The extent of the plaintiff's injury is also a relevant consideration." *Jones*, 325 F.3d at 527 (citing *Rowland v. Perry*, 41 F.3d 167, 174 (4th Cir. 1994). "Ultimately, the question to be decided is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure.'" *Smith*, 781 F.3d at 101 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)).

Accepting as true all of the factual allegations contained in the complaint and drawing all reasonable inferences in favor of the Plaintiffs, the factors enunciated in *Graham* weigh overwhelmingly in the Plaintiffs' favor. The first *Graham* factor—the severity of the crime at issue—undoubtedly points in Plaintiffs' favor because there was *no* crime at issue. Marcus was experiencing a mental health crisis and needed to be taken to a hospital. He had not committed a crime. In cases where the plaintiff who was subjected to police use of force had committed no crime, the Fourth Circuit has repeatedly held that the plaintiff had stated a claim for violation of his constitutional right to be free from excessive force. *See Jones*, 325 F.3d at 528-31 (upholding denial of summary judgment to officer in excessive force case where the plaintiff voluntarily went to the station for assistance in recovering from excessive alcohol consumption and was subjected to police use of force despite committing no crime); *Turmon v. Jordan*, 405 F.3d 202, 207 (4th Cir. 2005) ("[T]he severity of the crime cannot be taken into account because there was no crime."); *Clem v. Corbeau*, 284 F.3d 543, 545-47 (4th Cir. 2002); *Park v. Shiflett*, 250 F.3d 843, 848, 853 (4th Cir. 2001). Even in cases where the plaintiff had committed a crime, "when the offense committed is a minor one," the Fourth Circuit has found that the first *Graham* factor weighed in the plaintiff's favor and denied judgment as a matter of law to the defendant police officer. *See Yates*, 817 F.3d at 885; *Rowland*, 41 F.3d at 174. Accordingly, in this case, in which Marcus committed *no* crime, this first factor clearly weighs in Plaintiffs' favor.

The second and third *Graham* factors—whether Marcus posed an immediate threat to the safety of the police or others and whether Marcus was actively resisting arrest—also heavily favor the Plaintiffs. The Complaint alleges that throughout the incident, including the point at which the Officer Defendants' employed force, Marcus was unarmed, not violent, made no threats and presented no danger to the Defendants or others, was not actively resisting arrest, and that the Defendants knew that he was in the throes of a mental health crisis. Compl. ¶¶ 25-30, 35-44, 53. Nevertheless, relying on their self-serving interpretation of the body camera video, Defendants assert that Marcus "was not compliant and was actively kicking and moving his body and legs" and "continued to struggle and move his legs while officers attempted to restrain his feet." Def. Br. at 18. These statements improperly contradict the factual allegations in Plaintiffs' complaint, misconstrue the video, and cannot be accepted by the Court, particularly at the motion to dismiss stage. Viewing the facts in the light most favorable to the Plaintiffs, Marcus posed no danger to the police or others at any time during their encounter, and he was not actively resisting arrest.

Finally, "the extent of the plaintiff's injury" obviously could not be any more serious than what occurred here, the ultimate injury—death. This is another consideration in determining whether the force employed was excessive. *See Jones*, 325 F.3d at 530 (upholding denial of summary judgment to officer in excessive force case in which the officer "caused severe injuries" including a broken nose, lacerations and bruised ribs); *Rowland*, 41 F.3d at 174 (same when officer inflicted "serious leg injury" on a misdemeanant); *Kane v. Hargis*, 987 F.2d 1005, 1008 (4th Cir. 1993) (*per curiam*) (same when officer cracked three teeth, cut plaintiff's nose, and inflicted facial bruises). Again this factor clearly weighs in the Plaintiffs' favor.

In sum, the Complaint alleges that the Officer Defendants knew that Marcus was having a mental health crisis and was vulnerable to the potential lethal consequences of hogtying and prone restraint. Marcus had committed no crime, was unarmed, not violent, made no threats and presented no danger to the Defendants or others, and was not actively resisting arrest at any point during the incident. Yet the Officer Defendants grabbed him, forced him to the ground, rolled him onto his stomach in the prone position, and used unnecessary, gratuitous and disproportionate force to hogtie him after he was already handcuffed and secured, bending his knees well beyond a 90 degree angle to the point that his feet were touching his handcuffed hands at the small of his back and simultaneously tightening the strap on the hobble restraint so tight that his shoulders and knees were suspended above the ground, causing him to asphyxiate and die. This specific manner of applying the hogtying technique was so dangerous and life threatening that both the GPD and the manufacturer banned its use in this manner, and, particularly given the resultant homicide, it can be considered to be the use of deadly force.

The "totality of [these] circumstances," *Garner*, 471 U.S. at 8-9, does not justify "a reasonable officer on the scene" using the brutal and deadly force applied by the Officer Defendants in this case. *Graham*, 490 U.S. at 396. *See Drummond v. City of Anaheim*, 343 F.3d 1052, 1059 (9th Cir. 2003) (When "a mentally disturbed individual not wanted for any crime . . . [i]s being taken into custody to prevent injury to himself[,] [d]irectly causing [that individual] grievous injury does not serve th[e officers'] objective in any respect."); *Martin v. City of Broadview Heights*, 712 F.3d 951, 962 (6th Cir. 2013) (denying qualified immunity to officers on excessive force claim and finding that officers who encounter an unarmed and minimally threatening individual who is "exhibit[ing] conspicuous signs that he [i]s mentally unstable" must "de-escalate the situation and adjust the application of force downward."). Plaintiffs have

thus established that the Officer Defendants' actions constituted excessive force in violation of the Fourth Amendment.

Although Defendants pay lip service to the *Graham* factors, their argument ignores them and instead relies on a different standard for assessing the reasonableness of force used in a medical emergency that was adopted by the Sixth Circuit in *Estate of Hill v. Miracle*, 853 F.3d 306 (6th Cir. 2017). In *Miracle*, the Court offered the following questions to serve as a guidepost when considering the objective reasonableness of force used during a medical emergency: (1) Was the person experiencing a medical emergency that rendered him incapable of making a rational decision under circumstances that posed an immediate threat of serious harm to himself or others? (2) Was some degree of force reasonably necessary to ameliorate the immediate threat? (3) Was the force used more than reasonably necessary under the circumstances (i.e., was it excessive)? *Miracle*, 853, F.3d at 314. Neither the Fourth Circuit nor any other Circuit has adopted this alternative standard and neither should this Court.[8] Regardless, even under the *Miracle* standard Plaintiffs have established that the Defendants actions were objectively unreasonable because, according to Plaintiffs' facts, which must be accepted as true, Marcus did not pose an immediate threat of serious harm to himself or others, there was no threat that needed to be ameliorated by force, and the force used was both unnecessary and excessive under the circumstances.

B. The Constitutional Right Was Clearly Established

Plaintiffs have also satisfied the second step of the qualified immunity analysis—whether the Officer Defendants' objectively unreasonable conduct violated a constitutional right that was clearly established at the time the conduct occurred. *Saucier*, 533 U.S. at 201. While the

[8] Defendants' assertion that the Middle District of North Carolina has cited *Miracle* with approval in *France-Bey v. Holbrook*, 2019 WL 653147, at *10 (M.D.N.C. Feb. 15, 2019) is misleading because in *France-Bey* the Court applied the *Graham* factors, not the *Miracle* factors.

Supreme Court has warned that courts must not define "clearly established law at a high level of generality," it has also instructed that there need not be a case directly on point. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). To be clearly established, the "contours of the right must be sufficiently clear that a reasonable official would understand what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). As the Supreme Court explained in *Hope v. Pelzer*:

> Officials can still be on notice that their conduct violates established law even in novel factual circumstances . . . . The salient question that the Court of Appeals ought to have asked is whether the state of the law [at the time of the alleged wrong] gave respondents fair warning that their alleged treatment of [the petitioner] was unconstitutional.

536 U.S. 730, 741 (2002). In this analysis, the Fourth Circuit reviews "cases of controlling authority in this jurisdiction, as well as the consensus of cases of persuasive authority from other jurisdictions." *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018) (quoting *Amaechi v. West*, 237 F.3d 356, 363 (4th Cir. 2001)). The Fourth Circuit has repeatedly held that "a right need not be 'recognized by a court in a specific context before such right may be held 'clearly established' for purposes of qualified immunity.'" *Yates*, 817 F.3d at 887 (quoting *Meyers v. Baltimore Cty.*, 713 F.3d 723, 734 (4th Cir. 2013)); *see also Sims*, 885 F.3d at 262 ("We observe that the exact conduct at issue need not previously have been deemed unlawful for the law governing an officer's actions to be clearly established."). As the Fourth Circuit recently explained,

> Instead, we must determine whether pre-existing law makes "apparent" the unlawfulness of the officer's conduct. Accordingly, a constitutional right is clearly established for qualified immunity purposes not only when it has been specifically adjudicated but also when it is manifestly included within more general applications of the core constitutional principle invoked.

Sims, 885 F.3d at 263 (internal quotations and citations omitted). The Fourth Circuit has instructed that while the "contours" of the right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, [t]his is not to say that an

official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . .” *Jones*, 325 F.3d at 531. The Court continued:

> The standard is again one of objective reasonableness: the “salient question” is whether “the state of the law” at the time of the events at issue gave the officer “fair warning” that his alleged treatment of the plaintiff was unconstitutional. Officials can still be on notice that their conduct violates established law even in novel factual circumstances. Although earlier cases involving “fundamentally similar” or “materially similar” facts “can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.” Even though the facts of a prior case may not be “identical,” the reasoning of that case may establish a “premise” regarding an unreasonable use of force that can give an officer fair notice that his conduct is objectively unreasonable.

Id. at 531-32 (internal citations omitted).

Defendants urge the Court to define the constitutional right in question as “a purported right to not be restrained with a hobble . . . when the restraint was for the purpose of transport for medical treatment.” Def. Br. at 9. But this inaccurately construes the right in question. Plaintiffs claim that the *manner* in which the Officer Defendants restrained Marcus—using extreme and unnecessary force to push his feet and legs against the small of his back while simultaneously fastening his ankles to his handcuffs far too tightly with the hobble so that he was hogtied, all while he was prone on the ground, unarmed, handcuffed, and not actively resisting, and all with the knowledge that such hogtying was forbidden by police regulation and manufacturer’s directive—violated his Fourth Amendment right to be free from excessive force.

Defendants contend that there is no Supreme Court or Fourth Circuit precedent nor any weight of authority from other courts that “restraint with a hobble” violates a clearly established constitutional right. Def. Br. at 9-10. Essentially, they are asking the Court to conclude that because there is no case with the exact same fact pattern, qualified immunity applies. That is not what the qualified immunity analysis requires. The fact that the force used in the present case involved a hobble, rather than a more traditional device, is not dispositive. There is no question

here that, as of September 2018, the case law gave the Officer Defendants fair warning that the force they used was constitutionally excessive. In *Meyers v. Baltimore Cty., Md.*, 713 F.3d 723, 734-35 (4th Cir. 2013), the Court explained:

> We . . . have stated in forthright terms that "officers using unnecessary, gratuitous, and disproportionate force to seize a secured, unarmed citizen, do not act in an objectively reasonable manner and, thus, are not entitled to qualified immunity." *Bailey v. Kennedy*, 349 F.3d 731, 744-45 (4th Cir.2003) (quoting *Jones v. Buchanan*, 325 F.3d 520, 531-32 (4th Cir. 2003)). The fact that the force used in the present case emanated from a taser, rather than from a more traditional device, is not dispositive. The use of any "unnecessary, gratuitous, and disproportionate force," whether arising from a gun, a baton, a taser, or other weapon, precludes an officer from receiving qualified immunity if the subject is unarmed and secured.

Id. at 734-35. *See also Chew v. Gates*, 27 F.3d 1432, 1499 (9th Cir. 1994) ("If new weapons or tactics are sufficiently similar in design, purpose, effect, or otherwise to weapons or procedures that have been held unconstitutional, so that a reasonable officer would have known that a court's holding of unconstitutionality would be extended to the new weapon or tactic, then qualified immunity will not apply.").

It was clearly established well before 2018 that police officers were not entitled to use unnecessary, gratuitous, or disproportionate force to restrain a nonviolent person who committed no crime, presented no threat to the safety of the officers or others, was not actively resisting arrest, and who the officers knew was particularly vulnerable to such force due to the person's diminished mental state. *See Bailey*, 349 F.3d at 745 (denying qualified immunity to officers who used excessive force against the plaintiffs who had not committed any crimes, were secured in handcuffs, and posed no threat to the officers or others); *Jones*, 325 F.3d at 532-34 (denying qualified immunity to officer who severely injured the plaintiff by knocking him to the floor and jumping on him, even though Jones, although drunk and using foul language, was unarmed and handcuffed); *Yates*, 817 F3d at 886-87 (denying qualified immunity to officer who tased the

plaintiff three times during a traffic stop where the plaintiff was nonviolent, not actively resisting arrest, and did not pose a threat to the officer or anyone else); *Rowland*, 41 F.3d at 172, 174 (where an individual committed a minor crime, and there was some evidence of resistance, the Court denied qualified immunity to an officer who "used a wrestling maneuver, throwing his weight against [the suspect's] right leg and wrenching the knee until it cracked", explaining that the suspect was neither armed nor a danger to the officer or others); *Kane v. Hargis*, 987 F.2d 1005, 1006-07 (4th Cir. 1993) (denying qualified immunity on excessive force claim where taking the facts in the light most favorable to plaintiff, she resisted arrest for driving under the influence and the police officer, after he had secured her, "repeatedly pushed her face into the pavement, cracking three of her teeth, cutting her nose, and bruising her face").

Furthermore, pre-existing law regarding the manner in which police officers may restrain individuals who are prone on the ground also gave the Officer Defendants fair warning that their conduct violated the Fourth Amendment. *See McCue v. City of Bangor, Maine*, 838 F.3d 55, 64 (1st Cir. 2016) ("it was clearly established in September 2012 that exerting significant, continued force on a person's back while that person is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force."); *Weigel v. Broad*, 544 F.3d 1143, 1152, 1155 (10th Cir. 2008) (denying qualified immunity at summary judgment stage where officer applied pressure to detainee's back after hands and feet had been restrained and noting "the law was clearly established that applying pressure to [a person's] upper back, once he was handcuffed and his legs restrained, was constitutionally unreasonable due to the significant risk of positional asphyxiation associated with such actions"); *Abdullahi v. City of Madison*, 423 F.3d 763, 765 (7th Cir. 2005) (denying qualified immunity at the summary judgment stage where an officer, for 30 to 45 seconds, "placed his right knee and shin on the back of [a person's] shoulder area and

applied his weight to keep [the person] from squirming or flailing" despite the fact that the detainee had "arch[ed] his back upwards as if he were trying to escape" because it may have instead been "a futile attempt to breathe"); *Drummond v. City of Anaheim*, 343 F.3d 1052, 1057 (9th Cir. 2003) (holding officers violated the plaintiff's Fourth Amendment right to be free from excessive force by pressing their weight against the torso and neck "after he was 'knock[ed] . . . to the ground where the officers cuffed his arms behind his back as [he] lay on his stomach'" (alterations in original)); *Champion v. Outlook Nashville Inc.*, 380 F.3d 893, 903 (6th Cir. 2004), (denying qualified immunity to officers who, in 1999, placed their weight upon the arrestee's body by lying across his back and simultaneously pepper sprayed him, holding "it is . . . clearly established that putting substantial or significant pressure on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force."); *Martin v. City of Broadview Heights*, 712 F.3d 951 (6th Cir. 2013) ("A reasonable officer should have known that subduing an unarmed, minimally dangerous, and mentally unstable individual with compressive body weight, head and body strikes, neck or chin restraints, and torso locks would violate that person's clearly established right to be free from excessive force."). Therefore, "as the abundant case law demonstrates, a jury could find that a reasonable officer would know or should have known about the dangers of exerting significant pressure on the back of a prone person, regardless of any lack of formal training." *McCue*, 838 F.3d at 65. Accordingly, this Court should find that it was clearly established that Marcus had a constitutional right to be free from officers exerting extreme and unnecessary pressure on his torso while he was prone on the ground and handcuffed.

Even if the Court were to determine that the right in question must specifically relate to the use of the hobble, the weight of authority from other Circuits clearly establishes the right to

be free from being hogtied with a hobble while prone on the ground when it is applied with the type of unnecessary force alleged in the Complaint. In *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001), Wyoming police officers responded to a complaint of a naked man running on the exterior landing of an apartment building. *Id*. at 1186. When the officers arrived, Cruz, the man on the landing, was jumping up and down and kicking his legs in the air. When he descended from the landing, the officers wrestled him to the ground and handcuffed him. They applied a nylon restraint to his ankles to abate his continued struggle. Then a metal clip was used to fasten the wrist and ankle restraints together in the hogtie position, which caused Cruz's death from positional asphyxiation. Although the Court held there was no clearly established law prohibiting the officers' actions at the time they encountered Cruz, it also made clear that similar future conduct was prohibited. Specifically, the Court stated, "officers may not apply th[e hog-tie] technique when an individual's diminished capacity is apparent." *Id*. at 1188. To reach this conclusion, the Court highlighted the "breathing problems created by pressure on the back and placement in a prone position, especially when an individual is in a state of 'excited delirium.' These breathing problems lead to asphyxiation." *Id*.; *see also Gutierrez v. City of San Antonio*, 139 F.3d 441, 443 (5th Cir. 1998) (denying qualified immunity where police hogtied a man who died in the back seat of a patrol car while officers transported him to the hospital); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903-04 (6th Cir. 2004) (denying qualified immunity where officers "applied asphyxiating pressure" and pepper sprayed the plaintiff while he was handcuffed and restrained with a hobble); *Blankenhorn v. City of Orange*, 485 F.3d 463, 478-481 (9th Cir. 2007) (denying qualified immunity where police tackled, punched and used hobble restraints that made it difficult for the plaintiff to move and breathe).[9]

[9] The clearly established inquiry in a case such as this—where the issue concerns the *manner* in which Marcus was hogtied—is fact-specific and does not lend itself to a determination at the motion to dismiss

Furthermore, the GPD explicitly warned its police officers of the dangers of using unnecessary force in applying the RIPP Hobble prior to the date of the incident, explaining specifically that:

> At no time shall the wrists and ankles of an arrestee be linked together using the RIPP HOBBLE restraining device, unless the arrestee can be seated in an upright position, or on their side. If this is done, the knees of the arrestee will not be bent more than 90 degrees (unless extenuating circumstances exist) to prevent stress being placed on the arrestee's chest muscles or diaphragm which might contribute to a positional asphyxia situation.

Compl. ¶ 58. This also put the Officer Defendants on notice that the force they used to restrain Marcus was excessive. *See Drummond*, 343 F.3d at 1062 ("Anaheim's training materials are relevant not only to whether the force employed in this case was objectively unreasonable . . . but also to whether reasonable officers would have been on *notice* that the force employed was objectively unreasonable" (emphasis original)); *Champion*, 380 F.3d at 903 ("In addition to prior precedent, the Officers' training demonstrates that they were aware of Champion's clearly established right to be free from this type of excessive force. The Officers were taught that pepper spraying a suspect after the individual was incapacitated constitutes excessive force."); *Gutierrez*, 139 F.3d at 447-48 (denying qualified immunity where, *inter alia*, the San Antonio Police Department warned its officers of the possible dangers of hogtying prior to the date of the incident); *Padilla v. City of Alhambra*, 2007 U.S. Dist. LEXIS 104051, *58-59 (C.D. Cal. May

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stage. This is demonstrated by the fact that all of the cases cited by the Defendants (as well as most of the cases cited by the Plaintiffs) were decided on summary judgment. *See, e.g., Pratt v. Harris Cty., Tex. (In re Estate of Pratt)*, 822 F.3d 174, 184 (5th Cir. 2016) ("the record evidence shows that Pratt ignored multiple requests and warnings from all three officers; and, he aggressively evaded their attempts to apprehend him, even after promising compliance. Construing the facts in the light most favorable to him, it is clear from the record that Pratt did not follow through on his offers to comply with the officers' requests. Instead, Pratt renewed resistance, broke free from the officers' grips, and kicked at officers attempting to restrain him (eventually kicking one officer in the groin twice). Furthermore, unlike the arrestee in *Gutierrez*, the officers who hog-tied Pratt were unaware of his use of drugs or alcohol when they hog-tied him.")

30, 2007) (denying qualified immunity in hogtying case where, *inter alia*, training bulletin "buttresses plaintiffs' contention that Officers . . . were on notice that the force used might have been objectively unreasonable").[10]

Additionally, the outrageousness, in 2018, of brutally hogtying a defenseless Black man, who was neither resisting nor otherwise under lawful arrest, in contravention of GPD regulations and the manufacturer's prohibition, further establishes that the Defendants had notice that their conduct was clearly unconstitutional as was previously established in similar circumstances by the Supreme Court in *Hope v Pelzer*. As the Court stated in *Hope* when finding that another form of antebellum brutality was clearly unconstitutional:

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity when he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

Hope, 536 U.S. at 745.[11] *See also United States v. Lanier*, 520 U. S. 259 (1997) (sexual assault by a judge); *McDonald v. Haskins*, 966 F.2d 292 (7th Cir. 1992) (putting a gun to the head of a nine year old); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir.1994) ("no particularized case law is necessary for a deputy to know that excessive force has been used when a deputy sics a canine on a handcuffed arrestee who has fully surrendered and is completely under control.")

For all of the foregoing reasons, Plaintiffs have shown that the constitutional right in question was clearly established.

[10] This notice was also conveyed by the explicit warning that the manufacturer provided with the RIPP Hobble device itself—"NEVER Hog-Tie a Prisoner." Compl. ¶ 60.

[11] The *Hope* Court also noted the significance of a Department of Justice Report that condemned the use of hitching posts in Alabama's prisons in its determination that there was reasonable notice for purposes of resolving the question of qualified immunity. 536 U.S. at 744.

III. Plaintiffs Have Stated a Viable Survival Action

Plaintiffs have pleaded a Survival Action under 42 U.S.C. § 1983 (Second Cause of Action) as an alternative basis for recovery in addition to the Wrongful Death Action under 42 U.S.C. § 1983 (First Cause of Action) for two reasons. *First*, contrary to Defendants' assertion, the Complaint does allege pre-death injuries related to the prone restraint and hogtying. *See* Compl. ¶ 66 ("Marcus sustained damages, including pre-death pain and suffering"). It also alleges injuries for post-death loss of enjoyment of life. *See* Compl. ¶ 66. Therefore, to the extent that Marcus's pre-death injuries as well as his post-death loss of enjoyment of life injuries are not recoverable pursuant to the Wrongful Death Action, the Survival Action is necessary. *See Banks v. Yokemick*, 177 F. Supp. 2d 239, 246-252 (S.D.N.Y. 2001). *Second*, if any of the Officer Defendants are found liable for injuring Marcus but not for causing his death, the Survival Claim may become necessary. This scenario, while unlikely, is not outside the realm of possibility, especially given the separate claims against the Paramedic Defendants. In any event, since this issue is solely about damages and involves a number of factual questions regarding the specific injuries Marcus suffered, the timing of the injuries, and which defendants were responsible for the injuries, it is more appropriately resolved after discovery. Accordingly, Defendants' motion to dismiss this cause of action should be denied.

IV. Claim for Deprivation of the Right to Familial Relationships With the Decedent

Plaintiffs recognize that the Fourth Circuit Court of Appeals has held that there is no cause of action for deprivation of the right to familial relationship with the decedent under 42 U.S.C. § 1983. Because other Circuits recognize such a cause of action, *see, e.g., Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010), and the issue has not yet been determined by the United States Supreme Court, Plaintiffs have plead this claim solely to preserve the issue for

potential review by the United States Supreme Court or for potential reconsideration by the Fourth Circuit Court of Appeals of its prior holdings.

V. The Doctrine of Public Official Immunity Does Not Bar Plaintiffs' State Law Claims Because the Complaint Alleges Intentional Torts and Malice

Defendants' argument for official immunity badly misses the mark. *First*, the Complaint alleges intentional torts against the Officer Defendants (i.e., battery and willful and wanton conduct), and it is well-established that public officials and employees sued in their individual capacities are not immune from claims of intentional torts. *See Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 320 (2002). *Second*, to the extent the Complaint alleges willful and wanton negligence against the Officer Defendants, they are still not entitled to public official immunity because they acted with malice. In North Carolina, a public official is not immune from suit if the challenged action was done with malice. *See Wilcox v. City of Asheville*, 222 N.C. App. 285, 288 (2012). "[A] malicious act is an act (1) done wantonly, (2) contrary to the actor's duty, and (3) intended to be injurious to another." *Id.* at 289. Intent to injure may be shown where "the officer's actions were so reckless or so manifestly indifferent to the consequences . . . as to justify a finding of willfulness and wantonness equivalent in spirit to an actual intent." *Id.* at 292 (internal quotations and citations omitted). Accepting as true all of the factual allegations contained in the complaint and drawing all reasonable inferences in favor of the Plaintiffs, there is no question that the malice exception to public official immunity is satisfied here. As alleged, the Officer Defendants used extreme and unnecessary force to push Marcus's feet and legs against the small of his back while simultaneously fastening his ankles to his handcuffs far too tightly with a hobble device so that he was hogtied, all while he was prone on the ground, unarmed, handcuffed, not actively resisting, and vulnerable to the potential lethal consequences of hogtying and prone restraint, with the knowledge that such hogtying was forbidden by police

regulation and manufacturer's directive. *See* Compl. ¶¶ 39-47, 53, 58, 60. Plaintiffs are entitled to the inference that this type of conduct, which the Complaint accurately characterizes as "brutal," "violent," "malicious," and "willful and wanton," is so reckless and manifestly indifferent to the consequences as to be equivalent in spirit to an actual intent to injure. *See Id.* ¶¶ 1, 41, 44, 67, 96. Thus, Defendants' assertion of public official immunity should be rejected.

VI. The Doctrine of Contributory Negligence Does Not Bar Plaintiffs' State Law Claims

Defendants' argument that contributory negligence bars Plaintiffs' state law claims fails for at least four reasons. *First*, since the Complaint alleges intentional torts and willful and wanton negligence, the Officer Defendants are not entitled to the defense of contributory negligence. *See Jenkins v. N.C. Dep't of Motor Vehicles*, 244 N.C. 560, 564, 94 S.E.2d 577, 581 (1956) ("Contributory negligence is no defense to an intentional tort."); *Braswell v. N. C. A & T State Univ.*, 5 N.C. App. 1, 8-9 (1969) (discussing the degree of negligence sufficient to constitute an intentional tort depriving the defendant of the defense of contributory negligence).

Second, even if the Court were to find that the doctrine of contributory negligence could apply here, Defendants' argument still fails because the Complaint does not allege any conduct on behalf of Marcus that constitutes contributory negligence as a matter of law. Defendants' contention that Marcus "failed to act with due care by using alcohol and drugs" is based, not on the allegations in the Complaint, but on the autopsy report which they have attached as an exhibit to their motion.[12] *See* Def. Br. at 23-24. As explained in Section I above in relation to the body camera video, the Court cannot draw inferences in favor of the Defendants based on extrinsic evidence on a motion to dismiss.

[12] Defendants contend, based on the autopsy report, that alcohol and drugs were "co-equal" factors that caused Marcus's death even though the autopsy report says no such thing. In fact, given that the manner of death was homicide and that prone restraint is listed as the first cause of death factor, it can be reasonably inferred in the light most favorable to the Plaintiffs, that prone restraint was the predominant or controlling factor, a conclusion that an independent expert might reach during discovery.

Third, even if the Court were to consider the autopsy report for the truth of the matters asserted, without allowing Plaintiffs to conduct discovery and consult an expert concerning the toxicology results, it would still be improper for the Court to find that the medical examiner's statement that alcohol and drugs factored into Marcus's death proves contributory negligence as a matter of law because the Court would have to draw an inference in favor of the Defendants, which is improper at this stage of the proceedings. *See E. I. du Pont de Nemours & Co.*, 637 F.3d at 440.

Fourth, even if the Court were to construe the complaint in the light most favorable to the Defendants, contributory negligence should still be rejected because there is, at the very least, a question of fact as to whether the "last clear chance" exception applies. *See Vernon v. Crist*, 291 N.C. 646, 654-55 (1977) ("If defendant had the last clear chance to avoid injury to the plaintiff and failed to exercise it, then his negligence, and not the contributory negligence of the plaintiff, is the proximate cause of the injury."). For all of these reasons, Defendants' argument for contributory negligence should be denied.

VII. Plaintiffs' Claim for Battery

Defendants' argument regarding the battery claim elevates form over substance, but given that they concede that the battery claim is "encompassed by the wrongful death claim," Plaintiffs agree to voluntarily dismiss this claim.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny the Officer Defendants' motion to dismiss.

Dated: July 26, 2019

Respectfully submitted,

/s/ Graham Holt
Graham Holt
THE LAW OFFICE OF GRAHAM HOLT
Post Office Box 41023
Greensboro, North Carolina 27404
Phone: (336) 501-2001
gholtpllc@gmail.com

Ben H. Elson
G. Flint Taylor
Christian E. Snow
PEOPLE'S LAW OFFICE
1180 N. Milwaukee Avenue
Chicago, Illinois 60642
Phone: (773) 235-0070
Fax: (773) 235-6699
ben.elson79@gmail.com
flint.taylor10@gmail.com
christianesnow@gmail.com

Attorneys for Plaintiffs

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The foregoing document is 9,863 words (excluding captions, signature lines, certificate of service and any cover page or index) as counted by word processing software, which exceeds Local Rule 7.3(d)'s limitation. Plaintiffs have filed a motion for leave to file *instanter* an oversized brief.

Dated: July 26, 2019

/s/ Graham Holt
Graham Holt

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Graham Holt
Graham Holt