UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES GRAY, IV	:	CASE NO. 2:09-cv-00868
Plaintiff	:	JUDGE ALGENON L. MARBLEY
-vs-	:	
VILLAGE OF MIDDLEPORT, et al.	:	**DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
Defendants	:	

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Defendant, Steven Koebel, by and through counsel, submits his Motion for Summary Judgment. This Motion is supported by the pleadings filed herein, the depositions of Steven Koebel and James Gray IV, which have been filed separately, the expert reports of John J. Ryan and Michael D. Lyman, copies of which are attached hereto; and the attached Memorandum of Law.

MEMORANDUM OF LAW

I. PROCEDURAL HISTORY

Plaintiff, James Gray IV ("Gray"), filed his Complaint (doc. 1) in the Meigs County, Ohio Court of Common Pleas on September 2, 2009. Gray named three Defendants in the lawsuit: the Village of Middleport, the Middleport Police Department (collectively referred to as "Middleport") and Patrolman Steven Koebel ("Koebel"). The essential allegations made by Gray in his Complaint are that Koebel used excessive force when he shot Gray, and that the Village of Middleport failed to properly supervise and train Koebel after he was hired by the Middleport Police Department.

On October 2, 2009, this case was removed from the Meigs County Court of Common Pleas to the United States District Court, Southern District of Ohio, Eastern Division. Koebel filed his Answer to Gray's Complaint on October 2, 2009, denying each and every allegation contained therein.

II. STATEMENT OF FACTS

On April 15, 2009, Gray departed from his grandmother's house wearing pants, a t-shirt, and tennis shoes (Deposition of James Gray, IV, page 83; hereinafter referred to as "Gray depo, pg. ___"). The pants that he wore belonged to his uncle and the waist was too big for Gray (Gray depo, pg. 83-84). Because Gray was not wearing a belt he was forced to consistently pull the pants up (Gray depo, pg. 83-84).

At approximately 4:00 or 5:00 PM, Gray began drinking alcohol at his ex-wife's house (Gray depo, pg. 20-21). Gray then departed to go to a "biker bar" off of Route 124, where he drank whiskey and beer (Gray depo, pg. 21-22). When Gray left the bar at approximately 5:00 or 6:00 PM he was driven back to his ex-wife's house by a Meigs County sheriff (Gray depo, pg. 22-23). Gray spent the next three hours at his ex-wife's house consuming a bottle of whiskey (Gray depo, pg. 23-24).

At approximately 8:30 or 9:30 PM, Gray walked to a bar known as Beth's Place, where he drank two pitchers of beer (Gray depo, pg. 25). At 11:30 PM or 12:00 AM that night Gray left the bar and walked back to his ex-wife's house (Gray depo, pg. 26). While walking back, Gray came into contact with Koebel (Gray depo, pg. 28). Gray told Koebel, who was a Middleport police officer at the time, that he had been drinking and was walking home (Gray depo, pg. 29-30). Koebel observed that Gray was staggering and reeked of alcohol (Deposition of Steven Koebel, page 63; hereinafter referred to as "Koebel depo, pg. ___"). Koebel then

radioed headquarters to have a computer check performed on Gray driver's license, which found no warrents (Koebel depo, pg. 63, 65). Because Gray said that he was walking home to go to sleep, Koebel allowed him to leave and the parties departed (Koebel depo, pg. 63).

Upon reaching the house, Gray became agitated upon discovering that his daughter was alone in her bedroom with her boyfriend (Gray depo, pg. 32-33). He then became involved in a verbal confrontation with his ex-wife about the situation, attempted to exit the house, tripped and fell off of the front porch, got into his ex-wife's car and began driving to his mother's house, despite the fact that his driver's license was suspended (Gray depo, pg. 33-36).

Gray began driving "pretty fast" and went through several stop signs without stopping, but did not know exactly how fast he was going (Gray depo, pg. 42-44, 47). Koebel observed him failing to stop at the stop signs, and as he began to follow in his police cruiser he observed Gray's vehicle sliding sideways and travelling all over the road (Koebel depo, pg. 76). Koebel turned on his lights and siren, but when he got behind Gray he observed Gray accelerating the vehicle to nearly 100 M.P.H., failing to stop at another stop sign and driving on the wrong side of the road (Koebel depo, pg. 76-77, 83).

While driving on Route 7 Gray first noticed flashing police lights behind him (Gray depo, pg. 48). He did not know if the police siren was activated because his stereo volume was very loud, and he attempted to turn right onto County Road 124 "to get out of the way" because he did not know that the police cruiser was following him (Gray depo, pg. 48-49). Gray testified that he "could have cared less" about getting pulled over for driving with a suspended license (Gray depo, pg. 115).

Gray missed the turn and lost control of his vehicle, which travelled off of the road, went airborne, and crashed into a fence (Gray depo, pg. 45-46, 50). Upon impact, the airbag deployed

in the vehicle, smacking Gray in the head and leaving him "punch-drunk" and "stunned" (Gray depo, pg. 36-37).

Following the crash Gray exited the vehicle, stumbled into the fence (Gray depo, pg. 52-53), and began trying to climb over the fence (Koebel depo, pg. 77). Koebel, who had pulled up to the scene of the crash, ran to approximately 30-40 feet from Gray and told Gray to stop climbing the fence, put his hands up, and get down on his knees (Koebel depo, pg. 77). Gray refused to comply despite Koebel's repeated issuance of the commands (Koebel depo, pg. 77). Gray, whose back was turned towards Koebel, then made a movement to turn from his left side over his right shoulder, while his hands were near his waistband (Koebel depo, pg.77, 93). Koebel, who believed that Gray might have possessed a weapon in his waistband, interpreted the movement as a threat and fired two shots at Gray, hitting him in the left side of his face (Koebel depo, pg. 77, 93-96).

Gray does not remember hearing any commands from Koebel prior to the shots being fired (Gray depo, pg. 60). He also does not remember whether or not he put his hands above his head, got down on his knees, ran toward the fence, or reached down in front of his pants (Gray depo, pg. 114).

All officers are trained that they may use deadly force in any case where there is a reasonable belief that that the subject poses a danger of serious bodily harm or death to the officer or others (Expert report of John J. Ryan, page 12; hereinafter referred to as "Ryan expert report, pg. __").[1] (A true and accurate copy of the report is attached hereto as Exhibit "A") The law enforcement expert retained by Middleport and Koebel determined that Koebel's actions

[1] The parties have agreed to rely on the reports of any experts for summary judgment purposes.

were reasonable under this standard and consistent with law enforcement training, policies, practices, and legal mandates governing the use of force by law enforcement (Ryan expert report, pg. 11-12). The law enforcement expert retained by Gray opined that Koebel's actions were not objectively reasonable because the commands Koebel gave to Gray were contradictory in nature and could not be followed in the order they were given (Expert report of Michael D. Lyman, page 8; hereinafter referred to as "Lyman expert report, pg. __"). (A true and accurate copy of the report is attached hereto as Exhibit "B")

III. ARGUMENT

A. Introduction

Koebel has not violated any of Plaintiff's Constitutional rights, nor has he committed any other torts. Koebel is entitled to all of the immunities and protections of Ohio Revised Code §2744 and is entitled to qualified immunity. Plaintiff has not produced sufficient evidence to substantiate an excessive use of force claim.

B. Summary Judgment Standard

Federal Rule of Civil Procedure 56 allows summary judgment to secure a just and efficient determination of an action such as this. The Court may grant summary judgment as a matter of law when a moving party has identified, as the basis for its Motion, an absence of any genuine issue of material fact. ***Celotex Corp. v. Catrett***, 477 U.S. 317, 327 (1986).

C. Qualified Immunity Applies Because Defendants Had Probable Cause

Plaintiff alleges that Koebel violated his due process rights. When Plaintiff was shot by Koebel, Plaintiff had already failed to stop for several stop signs, driven at speeds nearing 100 M.P.H., and failed to respond to an order of a police officer. Plaintiff has absolutely no memory of the events that took place immediately prior to the shooting. Koebel was acting in his

capacity as a police officer for the Village of Middleport. Koebel is entitled to qualified immunity because he did not violate any of Plaintiff's Constitutional rights.

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, (1982), 457 U.S. 800, 818. Even if reasonable minds can disagree about whether a police officer used excessive force, such officers are entitled to qualified immunity, "shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." ***Hale v. Vance***, 267 F. Supp. 2d 725, 734 (S.D. Ohio 2003). In the qualified immunity context, the question of reasonableness "ordinarily should be decided by the court long before trial." ***Id***., citing ***Hunter v. Bryant***, 502 U.S. 224, 228 (U.S. 1991).

Concerning the use of deadly force, the question of reasonableness is to be determined by whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." ***Tenn. v. Garner***, 471 U.S. 1, 11 (U.S. 1985). "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight", and "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." ***Graham v. Connor***, 490 U.S. 386, 396-397 (U.S. 1989).

In order to determine whether a Section 1983 claim against the individual Defendant should be dismissed for qualified immunity, a two-part inquiry must take place. To overcome an

officer's entitlement to qualified immunity a plaintiff must establish: 1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth; 2) that the allegedly false or omitted information was material to the finding of probable cause. ***Saucier v. Katz***, 533 U.S. 194, 200.

Ohio Revised Code §2744.01(B) provides that Koebel, while in his capacity as a police Officer for the Village of Middleport, is an "employee" thereof. Pursuant to Ohio Revised Code §2744.02(A), tort immunity for a political subdivision is the rule, and tort liability for a political subdivision is the exception to that rule. Ohio Revised Code §2744.03(A)(6)(a) and (b) states:

> (6) In addition to any immunity or defense referred to in division (A)(7) of this section and in circumstances not covered by that division or sections 3314.07 and 3746.24 of the Revised Code, the employee is immune from liability unless one of the following applies:
>
> (a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
>
> (b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner.

In ***Fahnbulleh v. Strahan***, (1995), 73 Ohio St.3d 666, the Ohio Supreme Court addressed the constitutionality of the Ohio Revised Code §2744 immunity provisions. The Court found the immunity to be a constitutional exercise of legislative authority. Noting the presumption of constitutionality, the Court further stated Ohio Revised Code §2744.02 is constitutional "if it is reasonably calculated to advance a legitimate governmental interest," and would uphold it "unless it is wholly irrelevant to the achievement of the purpose." ***Id***.

The Village of Middleport is a "political subdivision" pursuant to Ohio Revised Code §2744.01(F). Pursuant to Ohio Revised Code §2744.02(A), tort immunity for a political

subdivision is the rule, and tort liability for a political subdivision is the exception to that rule.

Ohio Revised Code §2744.02(A)(1) states:

> For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

According to Ohio Revised Code §2744.01(C)(2) "governmental function" includes the provision of police services. It cannot be disputed that Koebel was acting in the course and scope of his employment as a police officer.

Additionally, Ohio Revised Code 2744.01(C)(1) provides, in part, "governmental function" includes " . . . a function . . . that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons . . .."

Criminal investigation is an activity that is "not engaged in or customarily engaged in by nongovernmental persons." Therefore, subject to Ohio Revised Code §§2744.03 and 2744.05, providing police services is a governmental function carrying immunity unless one of the exceptions found in Ohio Revised Code§2744.02(B) applies.

Ohio Revised Code §2744.01(B) defines police officers as "employees." A police offer's duties are "governmental functions" pursuant to Ohio Revised Code §2744.01(C)(2)(a). Therefore, Koebel qualifies for immunity for performing governmental functions unless an exception applies. Plaintiff does not allege that either officer's acts or omissions were manifestly outside the scope of their employment or official responsibilities nor do they allege that liability is expressly imposed by a section of the Revised Code.

Plaintiff alleges that Koebel negligently, recklessly, or with willful and wanton disregard for his rights and safety. "Wanton" misconduct is the failure to exercise any care whatsoever towards those whom a duty is owed if the failure to exercise care occurs when there is a great probability of harm. ***Herweh v. Bailey***, (1996), 1996 Ohio App. LEXIS 4621 at *8 (1st. Dist. Ct of Apps). "Willful" misconduct involves intent, purpose or design not to perform the duty of care that is owed. ***Id***. at *8. "Reckless" misconduct is the equivalent of "willful" misconduct. ***Brockman v. Bell***, (1992), 78 Ohio App. 3d. 508, 516.

Wanton, willful, and reckless misconduct require conduct more severe than mere negligence. Negligence is the failure to use ordinary care and "is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of the tortfeasor. Such perversity must be under such conditions that the actor must be conscious that his conduct will in all probability result in injury." ***Roszman v. Sammett***, (1971), 26 Ohio St.2d 94, 96-97.

There is no evidence in the record of any ill will between the parties. To the contrary, their first interaction went well. The only evidence in the record is that Koebel was trying to defend himself from someone who fled and failed to comply with lawful orders.

D. Plaintiff's Claim Is Barred By The Public Duty Doctrine

The public duty doctrine has been defined by the First Appellate District as follows:

> If the duty which the law imposes upon a public official is a duty to the public, then a failure to perform it, or an inadequate or erroneous performance, must be a public, not an individual injury, and must be redressed, if at all, in some form of public prosecution. On the other hand, if the duty is a duty to the individual, then a neglect to perform it, or to perform it properly, is an individual wrong, and may support the individual action for damages. [citations omitted] ***Brown v. City of Cincinnati***, (1989) 59 Ohio App.3d 49, 50

It is an officer's duty, upon observing a motor vehicle being recklessly operated, to apprehend the motorist who is endangering others. ***Leach v. City of Toledo***, 1999 Ohio App. LEXIS 94 (Ohio Ct. App., Lucas County January 22, 1999). On the other hand, law enforcement officers have no duty to refrain from chasing a person who violates the traffic laws. ***Id***.

Koebel, acting in his authority as a police officer for the Village of Middleport, had a duty to pursue Plaintiff, who had broken numerous traffic laws and continued to flee from Koebel even after he wrecked his car. Koebel's duty was to apprehend Plaintiff. Plaintiff may disagree with the public policy decision, supported by case law, but the alternative is to reward those who choose to violate the law. Ohio courts have not seen fit to change this public policy decision, so Plaintiff's claim should be dismissed.

E. The Reasoning Behind the Report Submitted by Plaintiff's Expert is Flawed

The expert retained by Plaintiff to analyze this case determined that Koebel's use of force was unreasonable because the commands Koebel gave to Plaintiff were phrased in such a way that Plaintiff could have been attempting to follow them when he was shot (Lyman expert report, pg. 8). However, Plaintiff admitted that he does not remember hearing any commands from Koebel (Gray depo, pg. 60), and also does not remember whether he attempted to follow any such commands (Gray depo, pg. 114).

Plaintiff has failed to put forth any evidence that he was attempting to follow the commands at the time Koebel fired the shots. As a result, the opinion of Plaintiff's expert regarding whether Koebel's use of force was unreasonable is not supported by the facts in the record.

F. This Is Not A Case That Warrants An Award Of Punitive Damages

Plaintiff claims that he is entitled to punitive damages. However, Plaintiff is unable to demonstrate by clear and convincing evidence that the Defendant acted with malice. ***Zoppo v. Homestead, Inc. Co.***, 71 Ohio St.3d 552, 557 (1994).

In ***Preston v. Murty***, 32 Ohio St.3d 334 (1987), the Ohio Supreme Court set forth the elements constituting malice as follows:

> Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.

Further and in accordance with Ohio Revised Code §2744.05(A), "in an action against a political subdivision to recover damages for injury, death, or loss to person or property caused by an act or omission in connection with a governmental or proprietary function, punitive or exemplary damages shall not be awarded."

IV. CONCLUSION

The Plaintiff's Complaint makes a number of allegations against Koebel. However, there are several independent reasons why none of these claims can move forward. Koebel is entitled to the qualified immunity afforded to them under Ohio Revised Code §2744. Since Koebel was serving a governmental function, none of the exceptions to the immunity apply.

For all of the foregoing reasons, Defendant, Steven Koebel, hereby requests that this Court grant his Motion for Summary Judgment because no genuine issue of material fact exists, and he is entitled to judgment as a matter of law.

Respectfully Submitted,

/s/ Joseph T. Mordino
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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing document was served upon James Quinn Dorgan, III, Esq., 88 E. Broad Street, Ste. 1750, Columbus, Ohio 43215 and Alphonse A. Gerhardstein, Esq., 432 Walnut Street, Ste. 400, Cincinnati, Ohio 45202, via the CM/ECF filing system this 31st day of January, 2011.

/s/ Joseph T. Mordino
JOSEPH T. MORDINO