

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

James Gray, IV	:	
	:	
Plaintiff,	:	Case No. 2:09-cv-868
	:	
vs.	:	District Judge Marbley
	:	
Village of Middleport, Ohio, et al.,	:	Magistrate Judge King
	:	
Defendants.	:	

**MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS THE VILLAGE OF
MIDDLEPORT AND THE MIDDLEPORT POLICE DEPARTMENT**

Pursuant to Fed.R. Civ.P. 56(b), Defendants Village of Middleport and the Middleport Police Department respectfully move for summary judgment on each of the claims filed by Plaintiff, James Gray. There are no genuine issues of material fact, and the Defendants are entitled to judgment as a matter of law. This motion is based on the allegations of the Complaint, the depositions of Gray and Defendant Steven Koebel, the expert reports of Michael Lyman and John Ryan, the motion for summary judgment filed by Koebel (Doc. 39), and the following memorandum of law.

Respectfully submitted,

/s/ W.Charles Curley
W. Charles Curley (0007447)
/s/ J.Quinn Dorgan
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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a civil rights action brought by James Gray, IV, against the Village of Middleport, the Middleport Police Department, and Steven Koebel, formerly a patrolman for Middleport. The central allegations are that Koebel unlawfully shot and wounded Gray and that Middleport is responsible for Koebel's actions.¹ The Complaint appears to state claims under Ohio law and under 42 U.S.C. § 1983, for alleged violations of Gray's federal constitutional rights. *See* Compl. (attached to the Notice of Removal, Doc. 1). For the following reasons, all of these claims, including Gray's claims for punitive damages, should be dismissed.

II. FACTS AND BACKGROUND

Middleport adopts and incorporates the statement of facts set forth in the motion for summary judgment that Steven Koebel filed. Doc. 39 at 2.

III. DISCUSSION

1. Middleport is not liable unless Koebel is liable.

Middleport cannot be liable in this case unless it is first determined that Defendant Koebel is liable; thus if this Court grants Koebel's motion for summary judgment, the claims against Middleport must also be dismissed as a matter of law. *See Scott v Clay County*, 205 F.3d 867, 879 (6th Cir. 2000). For these reasons, Middleport adopts the arguments made by Koebel in his separate motion and urges the Court to find them well-taken. Doc. 39.

¹ Gray's Complaint names the Village of Middleport and its police department as separate defendants. *See* Compl. (attached to the Notice of Removal, Doc. 1). But as the Supreme Court has noted, a municipal department is not a separate entity from the municipality itself and cannot be independently liable for damages. *See Brandon v. Holt*, 469 U.S. 464, 472 (1985); *see also Stump v. Gates*, 777 F. Supp. 808, 816 (D. Colo. 1991) ("naming a municipal department as a defendant is not an appropriate means of pleading a § 1983 action against a municipality"), *aff'd*, 986 F.2d 1429 (10th Cir. 1993)). As a result, Gray's claims against the Middleport Police Department are really just claims against Middleport, and both of these Defendants will be referred to as "Middleport."

2. Gray's state-law claims against Middleport must be dismissed.

Middleport also emphasizes that Gray's state-law claims are barred by R.C. Chapter 2744, which grants broad immunity to political subdivisions. *See Cater v. Cleveland*, 83 Ohio St.3d 24, 28, 697 N.E.2d 610 (1998); R.C. 2744.02(A), (B). There are only five exceptions to this immunity:

(1) ... [P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by their employees; ...

(2) ... [P]olitical subdivisions are liable for injury, death, or loss to person or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

(3) ... [P]olitical subdivisions are liable for injury, death, or loss to person, or property caused by their negligent failure to keep public roads in repair and other negligent failure to remove obstructions from public roads,

(4) ... [P]olitical subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function... .

(5) ... [A] political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by a section of the Revised Code.... Civil liability shall not be construed to exist under another section of the Revised Code merely because that section imposes a responsibility or mandatory duty upon a political subdivision, because that section provides for a criminal penalty, because of a general authorization in that section that a political subdivision may sue and be sued, or because that section uses the term 'shall' in a provision pertaining to a political subdivision.

R.C. 2744.02(B)(1-5).

None apply here. This case does not concern a motor vehicle, a public road, or any grounds or buildings, and thus R.C. 2744.02(B)(1), (3), and (4) are inapposite. R.C. 2744.02(B)(2) does not apply because the provision of police service is a governmental, rather

than proprietary, function. *See* R.C. 2744.01(C)(2). And lastly, there is no provision in the Ohio Revised Code that imposes liability on Middleport under these circumstances. *See* R.C. 2744.02(B)(5). Whatever state-law claims that Gray brings against Middleport must be dismissed as a matter of law.

3. Gray's claims for punitive damages against Middleport must be dismissed.

Finally, Gray has no claim for punitive damages against Middleport under either Ohio law or § 1983. *See* R.C. 2744.05(A); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 260, (1981).

III. CONCLUSION

Based on the foregoing, Middleport is entitled to summary judgment on all of Gray's claims. Moreover, even if this Court denies Koebel's separate motion for summary judgment, Middleport is still entitled to judgment as a matter of law on all of Gray's state-law claims and with respect to his claims for punitive damages.

Respectfully submitted,

/s/ W.Charles Curley
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/s/ J.Quinn Dorgan
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CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically this 31st day of January 2011. Notice of this filing will be sent to all counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ J.Quinn Dorgan
J.Quinn Dorgan (0076780)