

**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 STEVEN KOEBEL'S**
Defendants : **REPLY MEMORANDUM IN**
SUPPORT OF HIS MOTION FOR
SUMMARY JUDGMENT (DOC. 39)

Now comes Defendant, Steven Koebel, by and through counsel, and hereby submits his Reply Memorandum in Support of his Motion for Summary Judgment (Doc. 39).

MEMORANDUM OF LAW

I. INTRODUCTION

Much of Plaintiff's Memorandum in Response to Motions for Summary Judgment by Defendants Koebel (Doc. 39) and Village of Middleport (Doc. 43) is not relevant to the liability analysis that applies to this case and this Defendant. In the introduction to Plaintiff's Memo, it is argued that Gray complied with a command given to him by Koebel. Nothing could be further from the truth. By the time the shooting occurred, Gray had led Koebel on a high-speed dangerous chase and then attempted to flee the scene after crashing his car. While Plaintiff apparently wants this Court to conclude that he was following some of Koebel's supposed confusing or contradictory orders, James Gray's own deposition testimony demonstrates that he was not complying with any orders because he says he did not hear any orders. 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).

Further muddying the waters is the fact that Gray and Koebel had encountered each other before this high-speed chase. Koebel determined during the first encounter that Gray was unarmed. This ignores the fact that Gray was on foot during the first encounter and that time had elapsed between the two encounters. There is nothing about the first encounter that should have led Koebel to conclude that Gray was unarmed under the circumstances.

Plaintiff's Memo spends a great deal of effort attacking the testimony given by Koebel regarding commands he gave at the scene. If Gray claimed he had actually heard those orders and if Gray claimed that he was trying to comply with those orders, this might mean something. But given Plaintiff's own deposition testimony, this analysis and criticism of Koebel's orders is not a basis for denying summary judgment.

Finally, it is clear that Plaintiff was shot in the face. But the information provided regarding damages is not relevant to the analysis here. And, as to dismissal of Koebel, an analysis of the training provided by Middleport, while enlightening, does not necessarily impact whether this Court can grant summary judgment in Koebel's favor.

II. ARGUMENT

Koebel agrees with Plaintiff's assertion that the core issue in this case is whether he acted reasonably in shooting Mr. Gray. The disagreement lies in whether this is something that can and should be decided on summary judgment.

While it is easy to second guess motives and mindsets months or years later, in this case, even when applying summary judgment standards, the facts and law favor summary judgment. Gray led Koebel on a high-speed chase. He crashed his car and got out of it. He then tried to

scale a fence. He stopped trying to scale the fence. Gray had his hands down around his waistline when he made a sudden turn toward Koebel. It was then that Koebel fired his weapon.

III. 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 2nd day of March 2011.

/s/ Joseph T. Mordino
JOSEPH T. MORDINO