

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

TERRY FROST,	:	APPEAL NO. C-080942
	:	TRIAL NO. A-0702765
Plaintiff-Appellant,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
POLICE OFFICER CHRIS NIEHAUS,	:	
	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Plaintiff-appellant, Terry Frost, filed a complaint against defendant-appellee, Chris Niehaus, alleging that Niehaus had detained him in violation of his Fourth Amendment rights. The complaint also set forth state-law causes of action for false imprisonment, assault and battery, intentional infliction of emotional distress, and conversion. The trial court granted summary judgment in favor of Niehaus on all of Frost's claims. Frost has filed a timely appeal. We find no merit in his two assignments of error, and we affirm the trial court's judgment.

The record shows that Niehaus, who worked for the Springfield Township Police Department, was assisting the Drug Abuse Reduction Task Force (DART) in executing a search warrant at the residence of Dejuan Wilkins. The DART officers saw Frost leave Wilkins's residence, and they told Niehaus to stop and detain him.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Frost claimed that he had been at Wilkins's residence to meet a loan officer to return paperwork concerning a real estate deal involving Frost and his mother. He was talking on his cellular phone with his mother when Niehaus stopped his car.

According to Frost, Niehaus told him to get off the phone, grabbed it out of his hand, and threw it. When Frost asked why he was stopping and grabbing him, Niehaus replied that he could do what he wanted.

Frost said that Niehaus aggressively ordered him to get out of the car. When Frost got out, Niehaus swore at him and grabbed him by the neck and belt buckle. He then slammed Frost against the car and told him to put his hands behind his back. Frost complied and was immediately handcuffed. Niehaus put the handcuffs on extremely tightly and refused to loosen them at Frost's request.

Niehaus then put Frost in the back of his patrol car. Frost stated that Niehaus was excited about the traffic stop and taunted him. Niehaus told him that he was stupid and that he could not wait to see him in court. He also stated that Frost was a "stupid black" and that nobody cared about him.

Niehaus denied any improper behavior. He testified that as he approached Frost's car, Frost was talking on his cellular phone, and he was concerned that Frost might have been alerting the other occupants of Wilkins's residence about police activity. He asked Frost to discontinue the call, but Frost refused. Consequently, Niehaus took the phone out of Frost's hand, turned it off, and placed it on the roof of the car. He explained to Frost that he was not under arrest and that the DART agents wanted to talk to him.

Niehaus asked Frost to step out of the car, which he did voluntarily. Frost demanded that Niehaus search him and his car to prove that he had no contraband.

Niehaus put Frost in the back of his cruiser and searched his car. While sitting in the cruiser, Frost became agitated and called to people who were walking past.

Niehaus drove Frost to the police station while another unidentified officer drove Frost's car. Niehaus placed Frost in an interview room and stayed with him a few minutes until DART agents arrived. He left Frost with those agents, returned to his patrol, and had no further contact with Frost. His total contact with Frost lasted approximately 30 minutes. The DART agents released Frost without filing any charges against him.

In his first assignment of error, Frost contends that the trial court erred in granting summary judgment in favor of Niehaus on Frost's constitutional claim. He argues that genuine issues of fact existed as to whether Niehaus had violated his Fourth Amendment rights and whether Niehaus had justification to detain him. This assignment of error is not well taken.

In *Michigan v. Summers*,² the United States Supreme Court approved the seizure and detention of a person descending the steps to leave a residence that the police were about to search under a warrant. The court held that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."³ It noted that the "connection of an occupant to that home gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant."⁴

² (1981), 452 U.S. 692, 101 S.Ct. 2587.

³ Id. at 705.

⁴ Id. at 703-704.

An officer's authority to detain the occupants of a residence incident to a search is "categorical." It does not depend on the "quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure."⁵

The rule in *Summers* applies to all persons on the premises at the time of the search, not just to residents of the property.⁶ Further, inherent in the "authorization to detain an occupant of the place to be searched is the authority to use reasonable force to effectuate the detention."⁷

Frost argues that *Summers* does not apply because he was not physically present in the house when the police executed the warrant. "*Summers* does not impose upon police a duty based on geographic proximity[.]"⁸ The focus is on whether the police detained the person as soon as practicable after departing from the residence to be searched.⁹

In this case, Niehaus was assigned to assist the DART agents in executing the search warrant at the home of Frost's friend Wilkins. While they were preparing to enter the house, they observed Frost leave Wilkins's house, get into his car, and drive down the street. A DART agent ordered Niehaus to stop Frost's car and detain him. Niehaus pulled him over a block away from and within eyesight of Wilkins's residence. The detention lasted 30 minutes or less and ended when the DART agents told Niehaus to take Frost to the police station. Thus, under the reasoning of *Summers* and its progeny, the stop and detention did not violate Frost's rights under the Fourth Amendment.

⁵ *Muehler v. Mena* (2005), 544 U.S. 93, 98, 125 S.Ct. 1465, quoting *Summers*, supra, at 705, fn. 19.

⁶ *United States v. Fountain* (C.A.6, 1993), 2 F.3d 656, 663.

⁷ *Muehler*, supra, at 98-99.

⁸ *United States v. Cochran* (C.A.6, 1991), 939 F.2d 337, 339.

⁹ Id.; Accord *State v. Torres*, 3rd Dist. No. 13-04-41, 2005-Ohio-674, ¶15-17.

We find no issues of material fact. Construing the evidence most strongly in Frost’s favor, we hold that reasonable minds could come to but one conclusion—that Niehaus did not violate Frost’s constitutional rights. Niehaus was entitled to judgment as a matter of law, and the trial court did not err in granting his motion for summary judgment on Frost’s constitutional claim.¹⁰ Consequently, we overrule Frost’s first assignment of error.

In his second assignment of error, Frost contends that the trial court erred in granting summary judgment in favor of Niehaus on Frost’s state-law claims. He argues that Niehaus was not entitled to qualified immunity. This assignment of error is not well taken.

R.C. 2744.03(A)(6) creates a presumption of immunity for employees of a political subdivision in connection with their performance of governmental or proprietary functions.¹¹ An employee is immune from liability unless “the employee’s acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner[.]”¹²

This court has defined malice as “the willful and intentional design to do injury.”¹³ Bad faith means more than bad judgment or negligence. It implies “a dishonest purpose, moral obliquity, conscious wrong doing, breach of a known duty through some ulterior motive or ill will partaking in the nature of fraud. It also embraces actual intent to mislead or deceive another.”¹⁴

¹⁰ See *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46; *Stinespring v. Natorp Garden Stores, Inc.* (1998), 127 Ohio App.3d 213, 215-216, 711 N.E.2d 1104.

¹¹ *Scott v. Longworth*, 180 Ohio App.3d 73, 2008-Ohio-6508, 904 N.E.2d 557, ¶10; *Lambert v. Hartmann*, 178 Ohio App.3d 403, 2008-Ohio-4905, 898 N.E.2d 67, ¶12, discretionary appeal allowed sub nom. *Lambert v. Clancy*, 120 Ohio St.3d 1524, 2009-Ohio-614, 901 N.E.2d 244.

¹² R.C. 2744.03(A)(6)(b).

¹³ *Wooten v. Vogele*, 147 Ohio App.3d 216, 2001-Ohio-7096, 769 N.E.2d 889, ¶19.

¹⁴ *Id.*, quoting *Garrison v. Bobbitt* (1999), 134 Ohio App.3d 373, 384, 731 N.E.2d 216.

Wanton misconduct is the failure to exercise any care whatsoever. “Mere negligence is not converted into wanton misconduct unless the evidence establishes a disposition to perversity on the part of a tortfeasor.”¹⁵ That perversity requires the actor to be conscious that his conduct will, in all likelihood, cause an injury.¹⁶ Recklessness is a perverse disregard of a known risk. It requires something more than mere negligence. The actor must be conscious that his conduct will in all probability result in an injury.¹⁷

The question whether an employee acted wantonly or recklessly is generally a question of fact for the jury. But where the record does not contain evidence that the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner, a trial court may properly grant summary judgment in favor of the employee.¹⁸

The record in this case does not show that Niehaus’s conduct rose to the level of perversity necessary to overcome his presumption of immunity. Frost’s claims, even if true, do not show that Niehaus acted maliciously, wantonly or recklessly. Niehaus did not violate Frost’s Fourth Amendment rights in stopping and detaining him. He detained Frost for less than 30 minutes at the request of the DART agents and took him to the police station. Frost’s allegations that Niehaus put the handcuffs on too tightly, taunted him and made racist comments did not rise to the level necessary to strip him of immunity.

¹⁵ *Fabrey v. McDonald Police Dept.*, 70 Ohio St.3d 351, 356, 1994-Ohio-368, 639 N.E.2d 31; *Wooten*, supra, at ¶19.

¹⁶ *Fabrey*, supra, at 356; *Wooten*, supra, at ¶19.

¹⁷ *O’Toole v. Denihan*, 118 Ohio St.3d 374, 2008-Ohio-2574, 889 N.E.2d 505, paragraph three of the syllabus; *Scott*, supra, at ¶12.

¹⁸ *Fabrey*, supra, at 356; *Scott*, supra, at ¶13; *Wooten*, supra, at ¶18.

We find no issues of material fact. Construing the evidence most strongly in Frost’s favor, we hold that reasonable minds could come to but one conclusion—that Niehaus was immune from liability as an employee of a political subdivision. Niehaus was entitled to judgment as a matter of law, and the trial court did not err in entering summary judgment in his favor on Frost’s state-law claims.¹⁹ We overrule Frost’s second assignment of error and affirm the trial court’s judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

PAINTER, P.J., SUNDERMANN and DINKELACKER, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 29, 2009

per order of the Court _____
Presiding Judge

¹⁹ See *Harless*, supra, at 66; *Stinespring*, supra, at 215-216.