

[Cite as *Sparks v. Dept. of Rehab. & Corr.*, 2017-Ohio-9439.]

BRYAN SPARKS

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2016-00905-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Bryan Sparks, an inmate, filed a complaint against defendant, Ohio Department of Rehabilitation and Correction (“ODRC”). Plaintiff related on August 19, 2016, a contraband ticket was written due to plaintiff’s possession of wire. As a result, plaintiff was removed from the mushfake program, and his property was confiscated.

{¶2} Plaintiff contended on September 21, 2016, he was informed by the Institutional Inspector that his property would be held until the Grievance process was completed. On October 14, 2016, defendant wrote a contraband ticket and confiscated his supplies. Plaintiff asserted he contacted the Warden’s Administrative Assistant, Pam Shaw, who informed him the contraband ticket had been dropped but his property had already been destroyed.

{¶3} On November 18, 2016, plaintiff sent an Informal Complaint to Deputy Warden Faine, who asserted that plaintiff must be compensated for his property loss. (Plaintiff submitted a copy of an Informal Complaint dated November 8, 2016, wherein he addresses the destruction of his mushfake property. In response defendant stated: “You are correct. You will have to prove purchase of these items to be reimbursed”).

{¶4} Plaintiff contended the destroyed materials resulted in his inability to construct and sell model motorcycles for \$125.00. Plaintiff also contended he was

stock-piling materials to build music boxes, clocks, and jewelry boxes. Plaintiff stated he could not complete these projects since he was unjustly removed from the mushfake program.

{¶5} Plaintiff seeks damages for the loss of the following property items and their values: wooden motorcycle, \$125.00; a lumber order dated September 22, 2015, in the amount of \$115.46; a lumber order dated January 14, 2016, in the amount of \$151.30; a lumber order dated January 28, 2016, in the amount of \$467.54; a lumber order dated April 15, 2016, in the amount of \$96.01; an order dated April 9, 2015, for a variety of paints (It should be noted no value is listed on this sheet and plaintiff handwrote the values for each paint) \$38.55; and orders dated December 12, 2015, and August 7, 2015, for music box parts in the amount of \$99.33; and \$82.37, respectively; plus \$224.09 for what plaintiff characterizes as compensatory damages. Accordingly, plaintiff seeks damages in the amount of \$1,500.00. Plaintiff was not required to submit the \$25.00 filing fee.

{¶6} Defendant submitted an investigation report denying liability in this matter. Defendant's investigation revealed that on or about August 19, 2016, plaintiff received a conduct report for the possession of contraband. Plaintiff possessed two unauthorized wires plus multiple pieces of wood. Sgt. Birdsong found plaintiff guilty of a rule 51 violation, possession of contraband and plaintiff was allowed to mail out the contraband property at his own expense, however, he refused. Accordingly, the property was destroyed pursuant to AR5120-9-55.

{¶7} While defendant acknowledges that the contraband ticket was reversed due to a procedural error (failure to list the contraband property) nevertheless defendant still contends the property in question was contraband and plaintiff should not be granted judgment for the loss of contraband property. In support of this position, defendant submitted a copy of the Disposition of Grievance dated September 2, 2016.

{¶8} On March 3, 2017, this court issued an entry requiring defendant to submit the investigation report within 14 days. On March 28, 2017, defendant filed the investigation report. On March 30, 2017, plaintiff filed a motion for default judgment based on defendant's failure to timely submit the investigation report. On April 14, 2017, plaintiff filed a motion to strike pursuant to Civ.R. 12(F), and urges this court to strike defendant's investigation report.

{¶9} Plaintiff submitted a response to defendant's investigation report. Plaintiff against reasserted his contention that defendant's investigation report should not be considered since it is time barred. Therefore, default judgment should be granted in his favor.

{¶10} Plaintiff contended that his property was destroyed contrary to AR5120-9-55, since ODRC violated the 30 days waiting period when his property was destroyed. Plaintiff contended his property was deemed contraband on October 30, 2016, and destroyed on or before November 7, 2016. Plaintiff denies that ODRC's agents requested that he send his property home. Accordingly, plaintiff's requests judgment be granted in his favor for the full amount requested.

CONCLUSIONS OF LAW

{¶11} Plaintiff's motion to strike is tantamount to a motion for default judgment, since plaintiff asserted the investigation report should not be considered. Civ.R. 12(F) states: "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter." Initially, plaintiff filed his motion to strike the same day he filed his response. Furthermore, to grant plaintiff's motion to strike sufficient evidence must be contained in plaintiff's pleadings to render a decision in this case. This is simply not the case.

Therefore, the investigation report must be considered to render a decision in this case. See R.C. 2743.10(A),(B),&(C) and *Chasteen v. Dept. of Rehab. and Corr.*, 2010-13059-AD (8-31-2011). Accordingly, plaintiff's motion to strike is DENIED.

{¶12} In order to prevail, in a claim of negligence, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that defendant's breach proximately caused his injuries. *Armstrong v. Best Buy Company, Inc.*, 99 Ohio St.3d 79, 2003-Ohio-2573, 788 N.E.2d 1088, ¶ 8 citing *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St.3d 75, 77, 472 N.E.2d 707 (1984).

{¶13} "Whether a duty is breached and whether the breach proximately caused an injury are normally questions of fact, to be decided . . . by the court . . ." *Pacher v. Invisible Fence of Dayton*, 154 Ohio App.3d 744, 2003-Ohio-5333, 798 N.E.2d 1121, ¶ 41 (2nd Dist.), citing *Miller v. Paulson*, 97 Ohio App.3d 217, 221, 646 N.E.2d 521 (10th Dist. 1994); *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

{¶14} This court in *Mullett v. Department of Correction*, 76-0292-AD (1976), held that defendant does not have the liability of an insurer (i.e., is not liable without fault) with respect to inmate property, but that it does have the duty to make "reasonable attempts to protect, or recover" such property.

{¶15} Plaintiff has the burden of proving, by a preponderance of the evidence, that he suffered a loss and that this loss was proximately caused by defendant's negligence. *Barnum v. Ohio State University*, 76-0368-AD (1977).

{¶16} Plaintiff must produce evidence which affords a reasonable basis for the conclusion that defendant's conduct is more likely a substantial factor in bringing about the harm. *Parks v. Department of Rehabilitation and Correction*, 85-01546-AD (1985).

{¶17} AR5120-9-55(C)(1)(a)(b)(c)&(d) states:

"(C) Disposition of contraband: any item considered contraband under this rule may be confiscated.

"(1) Minor contraband.

“(a) When appropriate, such items should be returned to their proper locations or to their original owners. However, if the item came into the inmate's possession through a violation of the rules by the original owner, such item may not be returned to the owner, if the original owner is an inmate.

“(b) Minor contraband received in the mail may be returned to the sender if the inmate agrees to pay postage costs.

“(c) Minor contraband, valued at one hundred dollars or less, may, thirty days after confiscation, be destroyed, donated, utilized by the institution for training or other official purposes, or utilized in non-monetary offers to compromise in accordance with rule 5120-9-32 of the Administrative Code, by the order of the warden when the institution has attempted to contact or identify the owner of the personal property and those attempts have been unsuccessful or the inmate who owns the personal property agrees in writing to the disposal of the property in question.

“(d) Minor contraband, valued at over one hundred dollars, which cannot be returned to the original owner if either an inmate or unknown and cannot be returned to sender, may, upon the issuance of an order of forfeiture by the court of common pleas in the county in which the institution is located, be destroyed or utilized by the institution for training or other official purposes, sold at public auction, or utilized in non-monetary offers to compromise in accordance with rule 5120-9-32 of the Administrative Code. The warden may file a petition for forfeiture with the court, asking the order be issued. The petition shall attach a list of the property involved and shall state briefly why the property cannot be returned. Each institution shall record the manner in which the contraband was disposed. In the event a court of common pleas issues an order that

forfeited contraband be sold at public auction, the institution shall deposit any money received in the inmates' industrial and entertainment fund and record the date of disposition, the amount the forfeited contraband was sold for, and the name of any person who purchased the forfeited contraband at public auction."

{¶18} The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony *State v. Antill*, 176 Ohio St. 61, 197 N.E.2d 548 (1964). In the instant claim the court finds the assertions of plaintiff to be persuasive in regard to plaintiff possessing a significant quantity of art supplies that were confiscated and destroyed. However, insufficient documentation has been submitted to prove the cost of all the items in question. For example, plaintiff submitted an order from TRIARO dated April 9, 2015, with no value for the paints listed, however, plaintiff handwrote values, but provided this court with no basis for these values. In addition, the court does not find plaintiff's assertions credible as to the lost sale value of the motorcycle.

{¶19} When destroying declared contraband, defendant is required to follow the provisions of the Ohio Administrative Code. Defendant did not offer sufficient documentation to establish plaintiff agreed to or authorized the destruction of the declared contraband articles.

{¶20} It has been previously held an inmate plaintiff may recover the value of confiscated property destroyed by agents of defendant when those agents acted without authority or right to carry out the property destruction. *Bert v. Belmont Correctional Institution*, 97-09261-AD (1998); *Wooden v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2004-01958-AD, 2004-Ohio-4820; *Hemsley v. N. Cent. Correctional Inst.*, Ct. of Cl. No. 2005-03946-AD, 2005-Ohio-4613; *Mayfield v. Richland Correctional Inst.*, Ct. of Cl. No.

2005-07976-AD, 2006-Ohio-358, *Brunner v. N. Central Corr. Inst.*, Ct. of Cl. No. 2006-08020-AD, 2007-Ohio-6386.

{¶21} Evidence has shown defendant did not obtain proper authority to destroy the confiscated property. *Brunner*.

{¶22} Negligence of the part of the defendant has been shown in respect to the loss of the property. *Baisden v. Southern Ohio Correctional Facility*, 76-0617-AD (1977); *Stewart v. Ohio National Guard*, 78-0342-AD (1979).

{¶23} As trier of fact, this court has the power to award reasonable damages based on evidence presented. *Sims v. Southern Ohio Correctional Facility*, 61 Ohio Misc.2d 239, 577 N.E.2d 160 (Ct. of Cl. 1988). Evidence has established that some unknown portion of the destroyed art supplies had been used by plaintiff during his participation in the recreation program.

{¶24} Damage assessment is a matter within the function of the trier of fact. *Litchfield v. Morris*, 25 Ohio App.3d 42, 495 N.E.2d 462 (10th Dist. 1985). Reasonable certainty as to the amount of damages is required, which is that degree of certainty of which the nature of the case admits. *Bemmes v. Pub. Emp. Retirement Sys. of Ohio*, 102 Ohio App.3d 782, 658 N.E.2d 31 (12th Dist. 1995).

{¶25} The standard measure of damages for personal property loss is market value. *McDonald v. Ohio State Univ. Veterinary Hosp.*, 67 Ohio Misc.2d 40, 644 N.E.2d 750 (Ct. of Cl. 1994).

{¶26} In a situation where damage assessment for personal property destruction or loss based on market value is essentially indeterminable, a damage determination may be based on the standard value of the property to the owner. This determination considers such factors as value to the owner, original cost, replacement cost, salvage value, and fair market value at the time of the loss. *Cooper v. Feeney*, 34 Ohio App.3d 282, 518 N.E.2d 46 (12th Dist. 1986).

{¶27} It appears from a review of the Invoices submitted by plaintiff that he purchased the same materials on different occasions. Accordingly, this court will consider the art supplies purchased on April 15, 2016, in the amount of \$96.01 and January 18, 2016, in the amount of \$467.54. However, only the Hard Maple purchased on January 14, 2016, in the amount of \$13.84, will be considered since it appears the remaining purchases were replaced by subsequent purchases of the same material. Finally, the supplies purchased on September 22, 2015, will not be considered since plaintiff failed to prove, by a preponderance of the evidence, he was still in possession of this property.

{¶28} Furthermore, the purchase order dated April 9, 2015, will not be considered since the order lists no price for the property in question, and the amounts handwritten by plaintiff cannot be verified. The two orders from Cherry Tree will be considered consequently, plaintiff will be granted an award in the amount of \$181.70, for the loss of property listed on these order forms.

{¶29} This court does not recognize entitlement to damages for mental distress and extraordinary damages for simple negligence involving property loss. *Galloway v. Department of Rehabilitation and Correction*, 78-0731-AD (1979). *Berke v. Ohio Dept. of Pub. Welfare*, 52 Ohio App.2d 271, 369 N.E.2d 1056 (1976). Consequently, the court shall address plaintiff's claim based on the standard measure of damages for property loss. In addition, plaintiff's time spent performing legal research, as well as postage and copying expenses are not compensable in a claim of this type. See *Lamb v. Chillicothe Corr. Inst.*, Ct. of Cl. No. 2004-01788-AD, 2004-Ohio-1841, citing *Hamman v. Witherstrine*, 20 Ohio Misc. 77, 252 N.E.2d 196 (C.P. 1969). See also, *Perdue v. Lebanon Corr. Inst.*, Ct. of Cl. No. 2007-02971-AD, 2007-Ohio-7188.

{¶30} Therefore, judgment is rendered in favor of plaintiff in the amount of \$759.09.

BRYAN SPARKS

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2016-00905-AD

Deputy Clerk Daniel R. Borchert

ENTRY OF ADMINISTRATIVE
DETERMINATION

Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of plaintiff in the amount of \$759.09. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk