

one bag of chips, one fish, eight batteries, one bottle of ketchup, one bottle of hot sauce, one pepper, one cheese, five cans of soda pop, one cracker, one can of tobacco, four bars of soap, four "chew," one detergent, two dental picks, two emery boards, two towels, one cord, one soap dish, one "acne," one "grease," two containers or Orajel, one aftershave, one Palmolive, two toothbrushes, one mouth guard, one eraser, one color pencil, pens, three pouches of tobacco, nineteen packs of cigarettes, legal work, a photo album, a winter hat, a pair of winter gloves, and a remote control.

{¶ 4} 4) Plaintiff filed this complaint seeking to recover \$311.64, the estimated replacement cost of his alleged lost or destroyed property. The filing fee was paid.

{¶ 5} 5) Defendant admitted liability for the loss of plaintiff's commissary items and remote control. Defendant acknowledged plaintiff suffered damages for the loss of this property in the amount of \$76.60.

{¶ 6} 6) Defendant specifically denied any liability for the loss of nineteen packs of cigarettes, a can of Bugler tobacco, a pair of Sony headphones, legal work, two bowls, a photo album, a color pencil, pens, a winter hat, a pair of gloves, two towels, a cord, and stationery.

{¶ 7} 7) Defendant explained nineteen packs of cigarettes and a can of Bugler tobacco were confiscated from plaintiff on December 7, 2004, and declared contraband because plaintiff could not establish ownership of the confiscated tobacco products. Plaintiff purchased items at the ToCI commissary on August 16, 23, 30, 2004; October 5, 13, 19, 26, 2004; November

1, 8, 15, 22, 30, 2004; and December 6, 2004. Plaintiff did not purchase any packs of cigarettes or a can of Bugler tobacco at the ToCI commissary on the listed dates, although plaintiff did make multiple purchases of Bugler tobacco pouches from August 16, to December 6, 2004. Plaintiff purchased five packs of Marlboro cigarettes on August 9, 2004. Defendant confiscated four packs of Marlboro cigarettes and fifteen packs of Newport cigarettes from plaintiff on December 7, 2004. Additionally, defendant asserted plaintiff never rightfully owned a set of Sony headphones. Evidence has shown plaintiff was issued a title for a set of Sentry brand headphones on October 24, 2004. Defendant related a pair of headphones were confiscated from plaintiff on December 7, 2004, but were subsequently returned to his possession. Defendant suggested the confiscated and returned headphones were the Sentry brand headphones. There is some evidence plaintiff possessed a pair of Sony brand headphones. A September 1, 2004, property inventory lists a set of headphones for plaintiff. The brand name of the headphones is written on the inventory. However, the trier of fact is unable to determine the actual brand name written on this inventory. Plaintiff was never issued a title for a set of Sony headphones. Consequently, evidence tends to establish plaintiff never rightfully owned a set of Sony headphones.

{¶ 8} 8) Defendant maintained plaintiff never possessed any legal work and no legal work was packed by ToCI personnel on December 7, 2004. Property inventories dated September 1, 2004, and February 8, 2005, do not list any legal work owned by plaintiff was packed.

{¶ 9} 9) Defendant related plaintiff's winter hat, a pair of gloves, towels, cord, pencil, pens, and art supplies were packed by ToCI staff and ultimately returned to plaintiff. Plaintiff's property inventory dated September 1, 2004, lists a ball cap, a pair of gloves, five towels, two cable cords, pencils and pens.

{¶ 10} 10) Plaintiff's property inventory dated December 7, 2004, lists a pair of gloves, five towels, pens, and pencils. A winter hat and a cord are not listed on this inventory. Plaintiff's property inventory dated January 5, 2005, lists a stocking hat, a pair of gloves, three towels, pens, and pencils. Plaintiff's inventory dated February 8, 2005, lists a ball cap, a pair of gloves, three towels, an electrical extension, pens, pencils, and art supplies. Plaintiff signed the February 8, 2005, inventory acknowledging the listed property as a complete and accurate accounting of his property.

{¶ 11} 11) Defendant also denied plaintiff's photo album and two bowls were lost while under the control of ToCI staff. The December 7, 2004, inventory lists three photo albums and two bowls. Bowls are listed under the heading "contraband." The January 15, 2005, inventory lists photo albums - "RA" ("reasonable amount"). Bowls are not listed on this inventory. Photo albums and bowls are not recorded on plaintiff's February 8, 2005, property inventory.

{¶ 12} 12) In his response to defendant's investigation report, plaintiff insisted he was the rightful owner of all property claimed. Plaintiff explained he purchased Sony headphones while incarcerated at the North Central Correctional Institution and that institution has failed to forward a title

for the headphones to ToCI. Plaintiff did not produce a title for the Sony headphones. Plaintiff also insisted he purchased and therefore, owned the nineteen packs of cigarettes and a can of Bugler tobacco. Plaintiff pointed out he accumulated these tobacco products over a period of time and since he denies being a smoker he did not consume the products. Plaintiff did not offer sufficient evidence to establish he actually purchased the tobacco products confiscated by defendant. Plaintiff contended all other property items in dispute were lost while under the control of ToCI staff.

CONCLUSIONS OF LAW

{¶ 13} 1) Although not strictly responsible for a prisoner's property, defendant had at least the duty of using the same degree of care as it would use with its own property. *Henderson v. Southern Ohio Correctional Facility* (1979), 76-0356-AD.

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

{¶ 15} 3) Plaintiff must produce evidence which affords a reasonable basis for the conclusion defendant's conduct is more likely than not a substantial factor in bringing about the harm. *Parks v. Department of Rehabilitation and Correction* (1985), 85-01546-AD.

{¶ 16} 4) Plaintiff's failure to prove delivery of a set of legal papers and winter hat on December 7, 2004, to defendant constitutes a failure to show imposition of a legal bailment

duty on the part of defendant with respect to stolen or lost property. *Prunty v. Department of Rehabilitation and Correction* (1987), 86-02821-AD. Consequently, plaintiff's claims for these items are denied.

{¶ 17} 5) Plaintiff has no right to pursue a claim for property in which he cannot prove any rightful ownership. *DeLong v. Department of Rehabilitation and Correction* (1988), 88-06000-AD. Defendant cannot be held liable for the loss of contraband property that plaintiff has no right to possess. *Radford v. Department of Rehabilitation and Correction* (1984), 84-09071.

{¶ 18} 6) The issue of ownership of property is determined by the trier of fact based on evidence presented. *Petition for Forfeiture of 1978 Kenworth Tractor v. Mayle* (Sept. 24, 1993), Carroll App. No. 605, 1993 Ohio App. LEXIS 4552. The trier of fact, in the instant action, finds the confiscated property was not owned by plaintiff. Therefore, plaintiff may not recover damages associated with the loss of property he did not own. See *Mumm v. Ohio Dept. of Rehab. and Corr., et al.*, 2004-04574-AD, 2004-Ohio-5134.

{¶ 19} 7) This court has previously held that property in an inmate's possession which cannot be validated by proper indicia of ownership is contraband and consequently, no recovery is permitted when such property is confiscated. *Wheaton v. Department of Rehabilitation and Correction* (1988), 88-04899-AD. Consequently, plaintiff's claims for the tobacco products and headphones are denied since he has failed to offer sufficient proof to show he owned these articles.

{¶ 20} 8) Furthermore, plaintiff has failed to prove, by a preponderance of the evidence, any pens, pencils, gloves, and cord were lost as a proximate result of any negligent conduct attributable to defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.

{¶ 21} 9) However, negligence on the part of defendant has been shown in respect to the loss of a remote control, commissary items, two bowls, two towels, and a photo album. *Baisden v. Southern Ohio Correctional Facility* (1977), 76-0617-AD.

{¶ 22} 10) The assessment of damages is a matter within the province of the trier of fact. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42.

{¶ 23} 11) Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148. Only 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* (1995), 102 Ohio App. 3d 782.

{¶ 24} 12) The court finds defendant liable to plaintiff in the amount of \$125.00, plus the \$25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

IN THE COURT OF CLAIMS OF OHIO

MICHAEL A. NELSON :

Plaintiff :

v. :

CASE NO. 2005-10373-AD

TOLEDO CORRECTIONAL :
INSTITUTION :

ENTRY OF ADMINISTRATIVE
DETERMINATION

Defendant :

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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 \$150.00, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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