

Court of Claims of Ohio

The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

RICHARD FERNBACH

Plaintiff

v.

WARREN CORRECTIONAL INSTITUTION

Defendant

Case No. 2008-08311-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) On October 6, 2007, at approximately 5:05 p.m., Richard Fernbach, an inmate formerly incarcerated at defendant, Warren Correctional Institution (“WCI”), was transferred from the WCI general population to a segregation unit for an institutional rule violation. Incident to this transfer, plaintiff’s property was inventoried, packed, and delivered into the custody of WCI staff. According to plaintiff’s property inventory record, which he submitted with his complaint, WCI staff packed the property at approximately 9:58 p.m. on October 6, 2007.

{¶ 2} 2) Plaintiff asserted defendant’s personnel failed to pack all his personal property including the following items: one pair of Nike sandals, two belts, two bath towels, one set of Koss headphones, one combination lock, and a “handcrafted historical ship.” Additionally, plaintiff asserted that when he regained possession of his property on October 16, 2007, he discovered his television set was damaged. Plaintiff has asserted his property items were lost, stolen, or damaged as a proximate cause of negligence on the part of WCI employees in packing and handling the property. Plaintiff

has filed this complaint seeking to recover \$396.52 for property loss plus \$16.50 for shipping expenses. The \$25.00 filing fee was paid and plaintiff requested reimbursement of that cost along with his damage claim.

{¶ 3} 3) On October 17, 2007, plaintiff filed a theft/loss report (copy submitted) in reference to the loss of his sandals, towels, belts, headphones, lock, and ship model. Defendant acted on the theft/loss report by searching plaintiff's previous cellmate who did not have any of the listed items in his possession. Also, the WCI property vault was contacted and none of plaintiff's property was located there. No other investigation was conducted.

{¶ 4} 4) Plaintiff submitted a handwritten statement from fellow inmate, Nathaniel Grega, who was housed in the same housing unit with plaintiff on October 6, 2007. Grega related he observed plaintiff's television set "on numerous (occasions) and can say that Fernbach's television was in perfect working condition prior to his pack-up conducted on October 6, 2007." Grega also related he witnessed plaintiff build an historical ship and the "ship was in his cell #266 prior to his pack-up being conducted on October 6, 2007." Grega stated, "I observed on 10-7-07 inmates carrying some of Fernbach's items out that were left in cell #266, after the pack-up was conducted."

{¶ 5} 5) Plaintiff submitted a receipt indicating he purchased a television set for \$109.97, a set of Koss headphones for \$14.69, and two bath towels for \$11.94 on March 28, 2006. In his complaint, plaintiff claimed damages of \$18.81 for a set of headphones, \$16.12 for two bath towels, and \$177.36 for a television set. Plaintiff's October 6, 2007 property inventory does not list any bath towels, belts, headphones, sandals, or model ship. The inventory does include a television set and "1 box misc. towels."

{¶ 6} 6) Defendant denied liability in his matter asserting that the alleged missing property items never came under the custody and control of WCI staff. Defendant also asserted plaintiff failed to offer sufficient evidence to prove his television set was damaged while being stored in the WCI property vault. Defendant maintained the packing of plaintiff's property was handled appropriately. Defendant suggested plaintiff "could have very well damaged the TV himself" considering that at the time he was transferred to a segregation unit he was highly intoxicated.

{¶ 7} 7) Plaintiff filed a response reporting all his property was secured inside

his locked cell at the time he was transferred. Plaintiff related all property remained secured in the locked cell until the items were packed. Plaintiff explained his cellmate “was out of WCI on a round trip” and therefore the only persons with access to the cell were WCI personnel. Plaintiff reasserted defendant failed to conduct a proper investigation once he reported his property missing. Furthermore, plaintiff insisted his television set was rendered totally inoperative while under defendant’s control.

CONCLUSIONS OF LAW

{¶ 8} 1) For plaintiff to prevail on a claim of negligence, he must prove, by a preponderance of the evidence, that defendant owed him a duty, that it breached that duty, and that the 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.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707.

{¶ 9} 2) “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, citing *Miller v. Paulson* (1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521; *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 318, 544 N.E. 2d 265.

{¶ 10} 3) “If an injury is the natural and probable consequence of a negligent act and it is such as should have been foreseen in the light of all the attending circumstances, the injury is then the proximate result of the negligence. It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone.” *Cascone v. Herb Kay Co.* (1983), 6 Ohio St. 3d 155, 160, 6 OBR 209, 451 N.E. 2d 815, quoting *Neff Lumber Co. v. First National Bank of St. Clairsville, Admr.* (1930), 122 Ohio St. 302, 309, 171 N.E. 327.

{¶ 11} 4) 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.

{¶ 12} 5) This court in *Mullett v. Department of Correction* (1976), 76-0292-AD, 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.

{¶ 13} 6) 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* (1977), 76-0368-AD.

{¶ 14} 7) 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.

{¶ 15} 8) In order to recover against a defendant in a tort action, plaintiff must produce evidence which furnishes a reasonable basis for sustaining his claim. If his evidence furnishes a basis for only a guess, among different possibilities, to any essential issue in the case, he fails to sustain the burden as to such issue. *Landon v. Lee Motors, Inc.* (1954), 161 Ohio St. 82, 53 O.O. 25, 118 N.E. 2d 147.

{¶ 16} 9) The credibility of witnesses and the weight attributable to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St. 2d 230, 39 O.O. 2d 366, 227 N.E. 2d 212, 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* (1964), 176 Ohio St. 61, 26 O.O. 2d 366, 197 N.E. 2d 548. The court does not find plaintiff's assertions or the assertions of inmate Grega to be particularly persuasive regarding the cause of damage to property or the allegations that other property was deliberately not packed.

{¶ 17} 10) Plaintiff's failure to prove delivery of the claimed missing property to defendant constitutes a failure to show imposition of a legal bailment duty on the part of defendant in respect to lost property. *Prunty v. Department of Rehabilitation and Correction* (1987), 86-02821-AD.

{¶ 18} 11) Plaintiff cannot recover for property loss when he fails to produce sufficient evidence to establish defendant actually assumed control over the property. *Whiteside v. Orient Correctional Inst.*, Ct. of Cl. No. 2002-05751, 2005-Ohio-4455 obj. overruled, 2005-Ohio-5068.

{¶ 19} 12) Plaintiff has failed to show any casual connection between any property damage and any breach of duty owed by defendant in regard to protecting inmate property. *Druckenmiller v. Mansfield Correctional Inst.* (1998), 97-11819-AD;

Melson v. Ohio Department of Rehabilitation and Correction (2003), Ct. of Cl. No. 2003-04236-AD, 2003-Ohio-3615.

{¶ 20} 13) Plaintiff has failed to prove, by a preponderance of the evidence, any losses as a proximate result of any negligent conduct attributable to defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.



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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 defendant. Court costs are assessed against plaintiff.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

Richard Fernbach, #508-012
4104 Germantown Street
Dayton, Ohio 45417

RDK/laa
8/4
Filed 8/25/09
Sent to S.C. reporter 12/23/09

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