

[Cite as *Moralevitz v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5701.]

WILLIAM MORALEVITZ

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00836-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, William Moralevitz, an inmate, filed a complaint against defendant, Ohio Department of Rehabilitation and Correction (“ODRC”), asserting that on December 12, 2013, at approximately 8:30 a.m., Correctional Officer (“C.O.”) Mettler conducted a search of his locked locker box with the use of a master key. After the search was concluded, plaintiff was handcuffed and escorted to the front desk of the E-2 dorm. Plaintiff alleged the C.O. left the property contained in his locker box strewn on the floor and on his bunk. The C.O. did not secure plaintiff’s property when asked. Plaintiff related at that time he was taken to segregation, and requested that his bunkmate, Foxx, secure his property.

{¶2} Plaintiff stated he was taken to segregation at 9:30 a.m. and was not allowed to inspect his packed up property until 11:00 p.m. At that time he noticed none of his hygiene items were included in his pack up, but he signed the property receipt because he was under the impression that his bunkmate was in possession of these items.

{¶3} On December 29, 2013, plaintiff was released from segregation and when he confronted Foxx about the missing property, Foxx told him he had given his property to C.O. Cochenour. Plaintiff related after a series of conversations with a variety of defendant’s agents his leather wallet, miscellaneous business cards, address book, and

blue fishing hat was returned to him. However, C.O. Cochenour refused to return two black t-shirts with the POW/MIA insignia.

{¶4} Plaintiff related that he followed the administrative process to have his missing property returned to him but to no avail.

{¶5} Plaintiff related the following property items and their values were lost or stolen as the result of ODRC's negligence in not securing his property in his locker box: two black t-shirts, \$25.00; beard trimmer, \$21.70; two bags of coffee, \$5.00; shaving kit bag, \$12.00; Multivitamins, \$4.52; jockstrap, \$4.35; a pair of sunglasses, \$3.50; starlight mints, \$2.90; ten cans of soup, \$2.60; three bars of cocoa butter soap, \$2.40; shampoo, \$1.70; scissors, \$1.50; saltine crackers, \$1.41; chocolate chip cookies, \$1.38; two handkerchiefs, \$1.30; cocoa butter lotion, \$1.23; deodorant, \$1.09; Ripple chips, \$1.08; tweezers, \$1.04; toenail clipper, \$1.01; hairbrush, \$.89; pair of dark blue socks, \$.87; hot sauce, \$.68; fingernail clipper, \$.63; toothbrush, \$.41; and earplugs, \$.31. Plaintiff's lost property totaled \$100.50.

{¶6} Plaintiff seeks damages in the amount of \$100.50. Plaintiff was not required to submit the \$25.00 filing fee.

{¶7} Defendant submitted an investigation report denying liability in this matter. Defendant contended that since plaintiff instructed his cellmate to secure his property, defendant's agents never took control over the property plaintiff contended was missing. Furthermore, plaintiff did not report the alleged missing property and complete a theft/loss report until May 16, 2014, over four months after the property went missing. Defendant, when notified, conducted a search for plaintiff's missing property, but since the property consisted of commissary items, nothing could be located. Plaintiff presented no documentation supporting proof of ownership of the missing property. Finally, plaintiff signed the inmate property record acknowledging that all his property was returned to him. Accordingly, plaintiff's claim should be denied.

{¶8} Plaintiff submitted a response to defendant's investigation report. Plaintiff asserted that a bailment was created when defendant's agent removed the lock from his locker box. Plaintiff asserted that he was not familiar with the procedure to follow when property is lost or stolen, since he experienced no property thefts in his prior 35 years of incarceration. He acknowledged that he informed Unit Manager, Jeff Mustard of the theft of his property on January 2, 2014. Plaintiff contended he was mislead by Mustard into believing that C.O. Cochenour had possession of his property. When confronted, C.O. Cochenour stated he did not know where plaintiff's property was other than the property which was confiscated because it was contraband.

{¶9} Plaintiff noted that C.O. Cochenour did not follow OAC5120-9-55(B), which requires:

- a) "Any staff member who confiscates contraband from an inmate shall enter the fact of such confiscation on a log designed for such a purpose. The log shall specify the date of the confiscation, the person or inmate from whose possession the contraband was taken, if known, and a brief description of the contraband."

{¶10} Plaintiff asserted that this procedure was never followed. Plaintiff related in conversations with C.O. Cochenour, Cochenour asserted that plaintiff's two black POW/MIA t-shirts were contraband, even though the required paperwork was never completed.

{¶11} Plaintiff acknowledged that when questioned by Mustard concerning the loss of his property, he indicated among other possibilities that his bunkmate, Jeremy Foxx might have stolen some of his property.

{¶12} Plaintiff stated he was mistaken concerning the type of soap missing, initially, he thought it was cocoa butter soap, but now realized it was gold and spring soap. The difference in price would lower his prayer amount to \$100.11 from \$100.50. Plaintiff submitted commissary receipts from June to December 2013, to evidence his

purchasing patterns. Plaintiff related he has no titles on the beard trimmer, and has no documentation to prove the purchase price. Plaintiff acknowledged that he obtained the multivitamins, jockstrap, sunglasses, ripple chips, and ear plugs through trades with other inmates.

{¶13} While plaintiff acknowledged that he signed the Inmate Property Receipt while in segregation, he said he did so even though some of his property was missing, since the segregation cell had “little heat,” and he signed only to receive “much needed blankets and clothing.” However, plaintiff again acknowledges that upon his release from segregation on December 29, 2013, he again signed the Inmate Property Receipt prior to his assignment in D-1. Plaintiff related on January 2, 2014, the following property was returned to him “leather wallet, misc. business cards, address books, and a blue fishing hat.”

{¶14} Plaintiff submitted the affidavit of his bunkmate, Jeremy Foxx. Mr. Foxx related on December 12, 2013, C.O. Mettler conducted a search of plaintiff’s locked locker box, at which time the property contained in the box was thrown “on the floor and on the bunk” in E-2 126-bottom. A short time later, after plaintiff was handcuffed and lead away, C.O. Mettler, returned to retrieve a portal phone. At that time, he locked plaintiff’s locker box, but did not return the removed items to the box. Foxx related he gave the following property to C.O. Cochenour: “a leather wallet, miscellaneous business cards, address books, papers, and some clothing items.” Foxx acknowledged that other inmates stole plaintiff’s property before he could secure it.

{¶15} Accordingly, plaintiff seeks judgment in his favor in the amount of \$100.11.

CONCLUSIONS OF LAW

{¶16} In order to prevail, in a claim for 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).

{¶17} “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. 2003), 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).

{¶18} 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*, 76-0356-AD (1979).

{¶19} 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. It is not clear from the evidence how soon after the theft occurred plaintiff informed defendant. Therefore, this court cannot find viewing the surveillance footage twelve hours after the incident was reasonable or relevant to the alleged earlier events.

{¶20} 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 (1979).

{¶21} 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*, 85-01546-AD (1985).

{¶22} 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, as to any

essential issue in the case, he fails to sustain the burden as to such issue. *Landon v. Lee Motors, Inc.*, 161 Ohio St. 82, 118 N.E.2d 147 (1954).

{¶23} “When prison authorities obtain possession of an inmate’s property, a bailment relationship arises between the correctional facility and the inmate. *Buhrow v. Dept. of Rehab. & Corr.*, (July 26, 1985), Ct. of Cl. 85-01562-AD, unreported. ‘A bailment is defined as a delivery of something * * * by one party to another, to be held according to the purpose or object of the delivery, and to be returned * * * when that purpose is accomplished.’ (Footnotes omitted.) 8 Ohio Jurisprudence 3d (1978), 401, Bailments, Section 2.” *Bacote v. Ohio Department of Rehabilitation and Correction*, 61 Ohio Misc.2d 284, 578 N.E.2d 565 (Ct. of Cl. 1988). A bailment relationship was created when ODRC’s agent opened plaintiff’s locker box and did not return the property to the locker box after the search and subsequent removal of plaintiff to segregation.

{¶24} OAC 5120-9-55(2)(c) states:

- a) “(2) ‘Minor contraband’, as used in this rule, shall refer to items possessed by an inmate without permission and:
- b) “(c) The manner or method by which the item is obtained was improper.”

{¶25} OAC 5120-9-33(J) in pertinent part states:

- a) “(J) Inmates shall not trade, sell, barter, loan, or give away any personal property to another inmate.”

{¶26} Accordingly, plaintiff’s claim for multi-vitamins, jock strap, sunglasses, ripple chips, and ear plugs are denied, since based on plaintiff’s admission these items were obtained through trades with other inmates.

{¶27} The inmate handbook pages 25 states “Receipts that contain food items beyond 30 days after the date of purchase is considered contraband and treated as such.” Only the following commissary items will be considered for reimbursement: eight

starlight mints, \$4.64; hot sauce, \$.63; one bag of coffee, \$6.16; and saltine crackers, \$1.32.

{¶28} Defendant is not responsible for thefts committed by inmates unless an agency relationship is shown or it is shown that defendant was negligent. *Walker v. Southern Ohio Correctional Facility*, 78-0217-AD (1978). In the case at bar, ODRC is responsible for the theft of plaintiff's property due to the failure to place plaintiff's property in his locker box and lock it. Accordingly, defendant is responsible for the theft of plaintiff's property.

{¶29} 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). The court finds plaintiff's assertions credible with regard to the loss of the following property items: two black POW/MIA t-shirts, beard trimmer, a bag of coffee, shaving kit, scissors, saltine crackers, tweezers, toenail clippers, hairbrush, pair of dark blue socks, fingernail clippers, and toothbrush.

{¶30} Negligence on the part of defendant has been shown in respect to the issue of property protection. *Billups v. Department of Rehabilitation and Correction*, 2000-10634-AD (2001).

{¶31} 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).

{¶32} 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).

{¶33} 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). While this court finds plaintiff suffered the loss of two black POW/MIA t-shirts, however plaintiff by his own admission states his t-shirts were 15 years old. The court does not recognize damages for 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 (10th Dist. 1976).

{¶34} Accordingly, the court finds defendant is responsible for the loss of the following property items and their respective values: two black POW/MIA t-shirts, \$2.00; beard trimmer, \$5.00; bag of coffee, \$6.16; eight starlight mints, \$4.64; hot sauce, \$.63; saltine crackers, \$1.32; shaving kit, \$12.00; tweezers, \$1.04; toenail clippers, \$1.01; hairbrush, \$.89; pair of dark blue socks, \$.87; fingernail clippers, \$.63; and toothbrush, \$.41.

{¶35} Plaintiff has suffered damages in the amount of \$36.60.

WILLIAM MORALEVITZ

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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 plaintiff in the amount of \$36.60, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

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