

[Cite as *Byerly v. Ohio Dept. of Rehab. & Corr.*, 2015-Ohio-5707.]

STEPHEN W. BYERLY

Plaintiff

v.

OHIO DEPARTMENT OF
REHABILITATION AND CORRECTION

Defendant

Case No. 2015-00079-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶1} Plaintiff, Stephen Byerly, an inmate, filed a complaint against defendant, Ohio Department of Rehabilitation and Correction (“ODRC”). Plaintiff asserted on July 19, 2014, a power surge damaged his typewriter. Plaintiff related at the time the power was turned off, and no investigation was conducted until eleven days after the event. At that time, plaintiff asserted his outlet was not replaced. Plaintiff also asserted his constitutional rights were violated.

{¶2} Plaintiff seeks the following damages: \$350.00 for his damaged Smith Corona typewriter; \$100.00 for mailing costs; \$50.00 for research and supplies; \$500.00 for pain and suffering attributable to the loss of use of his typewriter; and \$300.00 for punitive damages. Plaintiff seeks total damages in the amount of \$2,300.00.

{¶3} Plaintiff submitted the affidavit of fellow inmate, David C. Sopko, who verifies that the power outage occurred on July 19, 2014, and the power was off in his cell for 40+ hours. Plaintiff also submitted the affidavits of Michael Bennett, Adam Crabtree, Robert Baker, and James Garling, who all attest to the fact that a power outage occurred on July 19, 2014, and they were without electricity for 40+ hours.

{¶4} Defendant submitted the investigation report denying liability. Defendant’s investigation revealed the following: “a breaker tripped on July 19, 2014 causing power to be lost in Plaintiff’s cell and three other cells. The GFI outlet in Plaintiff’s cell was tested and found in working order, not needing replacement. Defendant’s Maintenance

Superintendent stated that any power surge in Plaintiff's cell would have been immediately stopped by the GFI outlet, therefore, the Plaintiff's typewriter would not have been damaged (Attachments #1 and #2). Additionally, Plaintiff's typewriter was connected to a circuit which provided electrical power to approximately three other cells and no other inmates complained of damage to their electrical components (Attachment #1). In other words, if Plaintiff's typewriter was damaged by a power surge or 'voltage/static discharge,' all electrical components connected to the same circuit would have been damaged. After power was restored to these cells, Plaintiff has operated a borrowed typewriter with no electrical issues which indicates the GFI outlet in Plaintiff's cell is operating correctly and didn't need replaced (Attachment #1). According to Defendant's agents, Plaintiff's typewriter was the only electrical appliance in the institution with mechanical trouble; therefore, unknown mechanical problems in the typewriter itself may have caused the damage."

{¶5} Defendant submitted a Disposition of Grievance dated October 6, 2014, which in pertinent part stated: "Mr. Phillips requested that the typewriter be delivered to him so that maintenance could assess the damage and determine a cause of malfunction and determine if it could be fixed. You refused to allow maintenance that opportunity."

{¶6} Plaintiff asserted he denied this request because "warranty parts would be violated if I allowed maintenance to inspect/work on my typewriter." To support this contention plaintiff submitted a copy of the warranty.

{¶7} The product warranty for plaintiff's Smith Corona Typewriter in pertinent part states:

- a) **"90 Day Warranty** Smith Corona warrants this typewriter against defects in material or workmanship for a period of 90 days from the date of original purchase for use, and agrees to repair or, at our option, replace any defective unit without charge for either parts or

labor. All associated costs for shipment of the product to the repair destination are the responsibility of the consumer. Proof of Purchase will be required.

- b) **“Limited Warrant** Following the first 90 days from the date of purchase and thereafter until 1 year from the date of purchase Smith Corona will replace any defective part at no charge. There will be a standard charge for labor and the cost of transportation.”

{¶8} However, in his pleadings, plaintiff stated the following: “Smith Corona no longer makes typewriters, but does repair them.” Plaintiff provided no documentation that he purchased his typewriter 90 days or within a year prior to July 19, 2014.

{¶9} On June 2, 2014, plaintiff filed a motion for extension of time to submit a response to defendant’s investigation report.

{¶10} Plaintiff filed a response to defendant’s investigation report. Initially, plaintiff contends defendant is unaware of the damage suffered to his typewriter since only authorized agents are allowed to inspect it. Furthermore, plaintiff contended ODRC agents did not conduct a thorough investigation of the incident.

CONCLUSIONS OF LAW

{¶11} Plaintiff has the burden of proving his property damage was caused by a power surge, outage, or an electrical malfunction attributable to negligent acts or omissions on the part of defendant. *Pryor v. Southern Ohio Correctional Facility*, 97-03026-AD, jud (1997).

{¶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). Plaintiff claimed his typewriter was damaged by a power surge caused by defendant.

As a necessary element of his particular claim, plaintiff was required to prove proximate cause of his damage by a preponderance of the evidence. See e.g. *Stinson v. England*, 69 Ohio St.3d, 451, 1994-Ohio-35, 633 N.E.2d 532. This court, as trier of fact, determines questions of proximate causation. *Shinaver v. Szymanski*, 14 Ohio St.3d, 51, 47 N.E.2d 477 (1984).

{¶13} “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.*, 6 Ohio St.3d 155, 160, 451 N.E.2d 815 (1983), quoting *Neff Lumber Co. v. First Natl. Bank of St. Clairsville, Admr.*, 122 Ohio St. 302, 309, 171 N.E.327 (1930). In a situation such as the instant claim, expert testimony is required regarding the issue of causation and that testimony must be expressed in terms of probability. *Stinson*, at 454. In the case at bar, plaintiff has presented no expert witness and relies on his self-serving statements to prove his case. While plaintiff submitted the affidavits of other inmates effected by the power outage, none are qualified as experts.

{¶14} 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).

{¶15} Plaintiff has failed to prove, by a preponderance of the evidence, that he sustained any loss as the result of negligence on the part of defendant.

{¶16} To the extent that plaintiff alleges ODRC’s actions violated his civil rights, actions against the state pursuant to 42 U.S.C. 1983 may not be brought in the Court of Claims because the state is not a “person” within the meaning of Section 1983. See

e.g. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 109 S. Ct. 2702, 105 L. Ed.2d 598 (1989); *Burkey v. Southern Ohio Correctional Facility*, 38 Ohio App.3d 170, 528 N.E.2d 607 (10th Dist. 1988); *White v. Chillicothe Correctional Institution*, 10th Dist.No. 92-AP-1230 (Dec. 29, 1992). Thus, this court is without jurisdiction to hear those claims. Moreover, if plaintiff seeks redress for alleged violations of his constitutional rights, such claims are dismissed. It is well-settled that this court lacks jurisdiction to hear a claim that asserts constitutional violations. *Gersper v. Ohio Dept. of Hwy. Safety*, 95 Ohio App.3d 1, 641 N.E.2d 1113 (10th Dist. 1994).

{¶17} The Supreme Court of Ohio has held that “{t}he language in R.C. 2743.02 that ‘the state’ shall ‘have its liability determined***in accordance with the same rules of law applicable to suits between private parties***’ means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion.” *Reynolds v. State*, 14 Ohio St.3d 68, 70, 471 N.E.2d 776 (1984); see also *Von Hoene V. State*, 20 Ohio App.3d 363, 364, 486 N.E.2d 868 (1st Dist. 1985). The defendant’s procedures for dealing with electrical problems requires a high degree of official judgment or discretion.

{¶18} Plaintiff is not entitled to expenses related to the prosecution of his case. *Hamman v. Witherstine*, 20 Ohio Misc. 77, 252 N.E.2d 196 (C.C.P. 1969).

{¶19} The state cannot be sued for punitive damages. *Drain v. Kosydar*, 54 Ohio St. 2d 49, 374 N.E.2d 1253 (1978).

{¶20} Accordingly, judgment is rendered in favor of defendant.

STEPHEN W. BYERLY

Plaintiff

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ENTRY OF ADMINISTRATIVE
DETERMINATION

Plaintiff's motion for extension of time is MOOT, since he filed a response to the investigation report.

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