[Cite as *Fhiaras v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-2992.]

GEORGE FHIARAS Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2017-00970JD Magistrate Anderson M. Renick DECISION OF THE MAGISTRATE

{¶1} Plaintiff brought this action alleging that an employee of defendant used excessive force upon him. Plaintiff also alleges negligence related to the loss of his property. The case came to trial on the issues of liability and damages.

{¶2} As an initial matter, the court notes that during the trial, plaintiff announced that he wanted to voluntarily dismiss his case. Civ.R. 41(A)(1)(a) provides, in relevant part, that a plaintiff, "without order of court, may dismiss all claims asserted by that plaintiff against a defendant by * * * filing a notice of dismissal at any time before the commencement of trial * * *." The Ohio Supreme Court has determined that "'a civil trial commences when the jury is empaneled and sworn, or, in a bench trial, at opening statements.'" *Schwering v. TRW Vehicle Safety Sys*., 132 Ohio St.3d 129, 2012-Ohio-1481, ¶ 16, quoting *Frazee v. Ellis Bros. Inc*., 113 Ohio App.3d 828, 831 (5th Dist.1996). Furthermore, Ohio courts have observed that "under this rule, 'commencement of the trial * * * takes place when the case is called by the court and counsel indicates that they are ready to proceed.'" *Kracht v. Kracht*, 8th Dist. Cuyahoga Nos. 70005 and 70089, 1997 Ohio App. LEXIS 2412, 17 (June 5, 1997), quoting McCormac, *Ohio Civil Rules Practice*, Section 13.03, at 352, (2d Ed.1992). Although plaintiff argued that he had informed opposing counsel that he had intended to dismiss his case before the trial began, the court informed plaintiff that he could not use a notice of voluntary dismissal to terminate the action because trial had commenced.

{¶3} At all times relevant, plaintiff was an inmate in the custody and control of defendant at the Warren Correctional Institution (WCI). Plaintiff testified that on September 14, 2017, he walked into his cell and, without warning, he was assaulted by a corrections officer (CO).

{¶4} "Allegations of use of unnecessary or excessive force against an inmate may state claims for battery and/or negligence. To prove a claim for battery, a plaintiff must demonstrate that the defendant 'act[ed] intending to cause a harmful or offensive contact, and * * * a harmful contact result[ed].'" *Brown v. Dept. of Rehab. & Corr*., 10th Dist. Franklin No. 13AP-804, 2014-Ohio-1810, ¶ 13, quoting *Love v. Port Clinton*, 37 Ohio St.3d 98, 99 (1988). In a civil action for battery, defendant has the burden of proving a defense of justification, such as the exercise of lawful authority. *Id*. Furthermore, the state owes a duty of reasonable care to provide for its prisoners' health, care, and well-being. *Id.* at ¶ 14.

Ohio Adm.Code 5120-9-01 provides, in pertinent part:

"(C) Guidelines regarding the use of force. * * *

"* * *

"(2) Less-than-deadly force. There are six general circumstances in which a staff member may use force against an inmate or third person. A staff member may use less-than-deadly force against an inmate in the following circumstances:

"(a) Self-defense from physical attack or threat of physical harm;

"(b) Defense of another from physical attack or threat of physical attack;

"(c) When necessary to control or subdue an inmate who refuses to obey prison rules, regulations or orders;

"(d) When necessary to stop an inmate from destroying property or engaging in a riot or other disturbance;

"(e) Prevention of an escape or apprehension of an escapee; or

"(f) Controlling or subduing an inmate in order to stop or prevent self-inflicted harm."

{¶5} Ohio Adm.Code 5120-9-01(B)(3), defines "excessive force" as "an application of force which, either by the type of force employed, or the extent to which such force is employed, exceeds that force which reasonably appears to be necessary under all the circumstances surrounding the incident."

{¶6} Plaintiff testified that on September 14, 2017, he entered his cell and observed CO Brecheen in a squatting position and that, without provocation, the CO stood up and administered a burst of "OC spray" at his face. Plaintiff alleges that CO Brecheen "ambushed" him and that he did not know CO Brecheen was in his cell when he first entered the unit. Plaintiff testified that he was subsequently taken to a segregation cell. After plaintiff was released from segregation, he learned that defendant was unable to locate his personal property.

{¶7} CO Brecheen testified that on the day in question, he was assigned to the second shift in housing unit 3A. According to CO Brecheen, he was required to perform two cell searches each shift. CO Brecheen testified that he was conducting a search of plaintiff's cell when plaintiff entered the cell and stood four to five feet away from him, blocking the door. CO Brecheen stated that he issued a loud verbal order for plaintiff to leave the cell and that plaintiff responded by using profanity and demanding to know what he was doing in plaintiff's cell. After plaintiff refused to obey a second order to leave, CO Brecheen deployed a short burst of OC spray, whereupon plaintiff complied. CO Brecheen testified that no other force was used upon plaintiff and that he issued a conduct report to plaintiff for resisting a direct order. (Defendant's Exhibit D.)

{¶8} Nurse Jeremy Barnett identified a medical exam report which described the treatment provided to plaintiff on September 14, 2017. Nurse Barnett testified that he did not recall the examination, but that according to the report, plaintiff was alert, oriented, and mostly cooperative when he was treated for exposure to OC spray.

(Defendant's Exhibit E.) Plaintiff was allowed to use an eye-wash station and medical staff blotted exposed areas with a paper towel.

{¶9} Based upon the evidence, the court finds that CO Brecheen was more credible than plaintiff. Specifically, plaintiff's testimony that CO Brecheen "ambushed" him conflicts with his written statements. Although plaintiff maintains that he did not know CO Brecheen was in his cell when he entered, during cross examination, plaintiff acknowledged that he stated in his complaint that CO Brecheen was conducting a cell search at the time of the incident and that he entered the cell after his cellmate had notified him that CO Brecheen wanted to talk to him. (Defendant's Exhibit A.) Furthermore, plaintiff identified his affidavit wherein he stated that CO Brecheen called him to his cell to tell him "to perform a 2.4 cubic feet pack-up of [his] personal belongings." (Defendant's Exhibit B, ¶3.) In his affidavit, plaintiff related that he asked CO Brecheen whether his legal materials were required to be in the foot locker before he was sprayed with OC spray and placed in handcuffs. (*Id*.) Although documents attached to plaintiff's complaint indicate that he has some hearing impairment, the court notes that plaintiff did not appear to have any difficulty hearing or communicating at trial. The court finds that plaintiff's hearing is not so impaired that he would have been unable to hear an order from CO Brecheen, who was only few feet away from plaintiff at the time of the incident.

{¶10} Based upon the totality of the evidence, the court finds that CO Brecheen's use of OC spray to obtain plaintiff's compliance was reasonable. The court concludes that CO Brecheen used appropriate force at all times during the confrontation. Accordingly, judgment is recommended in favor of defendant on plaintiff's excessive use of force claim.

{¶11} Regarding plaintiff's property claim, Sargeant Nick Winkler testified that he prepared an inmate property record disposition and receipt for plaintiff's personal property on September 18, 2017. (Defendant's Exhibit C.) Sgt. Winkler recalled

escorting plaintiff to the property "vault" to sort out and place his property in a 2.4 cubic foot box. The property record indicates that plaintiff was present at the time of the pack-up. According to Winkler, plaintiff had excess property, including paperwork, that did not fit into the box. Winkler signed an "inmate property theft/loss report" that he completed on October 27, 2017, which shows that following a search and investigation, plaintiff's "entire pack-up" box could not be located. (Defendant's Exhibit G.)

{¶12} "When prison authorities obtain possession of an inmate's property, a bailment relationship arises between the correctional facility and the inmate. By virtue of this relationship, [defendant] must exercise ordinary care in handling and storing appellant's property." (Citations omitted.) *Triplett v. S. Ohio Corr. Facility*, 10th Dist. Franklin No. 06AP-1296, 2007-Ohio-2526, ¶ 7. However, "[defendant] does not have the liability of an insurer (i.e., is not liable without fault) with respect to inmate property, but it does have the duty to make reasonable attempts to protect such property." *Id*. Furthermore, to establish that defendant is liable for the loss of an inmate's property, "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." *Freeman v. S. Ohio Corr. Facility,* Ct. Cl. No. 2006-06949, 2007-Ohio-1758, ¶ 14, citing *Landon v. Lee Motors, Inc*., 161 Ohio St. 82 (1954).

{¶13} "As a general rule, the appropriate measure of damages in a tort action is the amount which will compensate and make the plaintiff whole." *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-589, 2013-Ohio-1677, ¶ 17. "Where damages are established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability." *Hoover v. Wherry*, 10th Dist. Franklin No. 98AP-890 (May 25, 1999). However, "damages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture *

* *." *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, ¶ 20 (10th Dist.).

{¶14} Steve Ball testified that he has served as a correctional commissary manager for approximately 21 years. Ball reviewed plaintiff's property report and he testified regarding the monetary value of plaintiff's property based upon the cost of items that were available for sale in the institution's commissary, as reflected in the current price list. (Defendant's Exhibits G and H.) Ball testified that several items listed on plaintiff's property record were "state issue," meaning that those items were provided to inmates without cost, including some clothing items, dentures, and a back brace. Ball explained that items of inmate property were subject to possession limits which were indicated on the property record and that the limit for certain items was "a reasonable amount." Ball testified that the total cost to replace the items that were inventoried on plaintiff's property record amounted to $50.52.

{¶15} Plaintiff testified that he did not dispute Ball's testimony about the value of the items that were available at the commissary. However, he stated that he was not allowed to keep certain legal papers and books that did not fit in the locker box. Plaintiff further testified that certain food and clothing items that were not listed on the inventory record were also not returned to him.

{¶16} It is well-established that "a correctional institution cannot be held liable for the loss of contraband property that an inmate has no right to possess." *Triplett, supra*, at ¶ 7, citing *Beaverson v. Ohio Dept. of Rehab. & Corr.*, 61 Ohio Misc.2d 249, 250 (Ct. of Cl.1988); *Strutton v. Ohio Dept. of Rehab. & Corr.*, 61 Ohio Misc.2d 248, 249 (Ct. of Cl.1988). "In Ohio, inmates 'may not possess more than 2.4 cubic feet of combined state and personal property unless specifically authorized * * *.' Ohio Adm.Code 5120-9-33(B)." *In re Forfeiture of Unauthorized Items Confiscated from Inmates Pursuant to AR 5120-9-55*, 157 Ohio App.3d 411, 2004-Ohio-2905, ¶ 10 (12th Dist.). "Each inmate is responsible for ensuring that his personal property remain in conformity with the [2.4

cubic foot] limitations. Property in excess of these limitations will be deemed contraband * * *." Ohio Adm.Code 5120-9-33(D).

{¶17} The court finds that plaintiff's property was properly inventoried after he selected what would fit in the locker box. Defendant conceded that it was unable to locate plaintiff's property after he was released from segregation. Defendant presented credible evidence to show that a reasonable estimate for plaintiff's property totaled $75, including the items in the locker box ($50.52) and the books and clothing (gym and boxer shorts) that were not available for purchase at the commissary. Inasmuch as plaintiff did not offer any evidence as to the value of his clothing and he agreed with Ball's testimony regarding the value of the items that were available at the commissary, the court finds that $75 is a reasonable estimate of the replacement cost of the items that were in the locker box. The court finds that defendant is not liable for the contraband property which did not fit into plaintiff's locker box. Furthermore, plaintiff failed to established damages for the loss of such property to a reasonable degree of certainty.

{¶18} Based upon the foregoing, judgment is recommended in favor of defendant on plaintiff's excessive use of force claim and judgment is recommended in favor of plaintiff in the amount of $75 regarding the loss of his property.

{¶19} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ANDERSON RENICK
Magistrate

Filed June 13, 2019
Sent to S.C. Reporter 7/24/19