

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

NEAL V. SMITH

Plaintiff

v.

DEPARTMENT OF REHABILITATION AND CORRECTION

Defendant

Case No. 2007-08341-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Neal V. Smith, an inmate incarcerated at defendant's Warren Correctional Institution ("WCI"), alleged multiple items of his personal property were deliberately thrown away by WCI personnel during a shakedown search on August 31, 2007. Plaintiff related the discarded property items included the following: one beard trimmer, one pair of Koss headphones, one headphone extension wire, three packs of AA batteries, three pens, five disposable razors, one nail clipper, one toe nail clipper, two bowls with lids, one "Jug-a-chug," three packs of cigarette rolling papers, one bottle of aspirin tablets, one bottle of ibuprofen tablets, one bottle of shampoo, one bottle of body lotion, one calculator, one pomade, and one jar of petroleum jelly. Plaintiff pointed out that all the claimed discarded property items had been stored in his locked locker box.

{¶ 2} 2) Plaintiff contended defendant's employees had no right to throw away his property incident to a shakedown search. Consequently, plaintiff filed this complaint seeking to recover \$69.80, the estimated replacement value of the property

items claimed. Plaintiff also requested \$25.00 for filing fee costs. Plaintiff was not required to pay a \$25.00 filing fee and did not submit any filing fee. Plaintiff's damage claim is \$69.80.

{¶ 3} 3) Plaintiff submitted a written statement from fellow inmate, Porter E. Thomas, who was subject to the August 31, 2007 shakedown search with plaintiff. Thomas recalled he and plaintiff were ordered to step out of the cell (3B-152) they shared and "face the wall" while four WCI personnel entered cell 3B-152 to conduct a search. Thomas related plaintiff was ordered away from the area to the "Captain's office" to transport property items he intended to mail from the institution. Thomas further related he observed WCI employees "tossing items out (of plaintiff's) locker box out on the Pod floor" during the time plaintiff was away. Additionally, Thomas noted, "I stood there and personally witness the following items of inmate Smith's being thrown on the Pod floor with some other trash and placed in trash bags by the inmate porters who were under the supervision" of one of defendant's employees. Thomas recorded, "[t]hese are the items I seen thrown away; 1 beard trimmer, 1 pr. Koss CL/2 headphones, 1 headphone extension wire, 2-1.6 quart bowls/w lids, 1 chug-a-jug, 1 calculator, 1 bt V05 shampoo, 1 btl Aspirin, 1 btl Ibuprofen, 3 pks AA batteries, 5 disposable razors, 3 ink pens, 1 large nail clippers, 1 small nail clippers, 1 btl Next Body Lotion, 1 Petroleum Jelly, and his current issues of TV Guide." Thomas drafted the submitted statement at sometime around October 9, 2007 recording his recollections of events that occurred on August 31, 2007. According to Thomas, he was able to remember he observed over twenty-five precisely described items being thrown away in trash bags by inmate porters while he faced a cellblock wall during a shakedown search. Thomas also recalled that when plaintiff returned to their cell from the Captain's office all the property placed in the trash bags had been removed from the area. Thomas stated he then had a conversation with plaintiff and "I did inform him of all the items that I seen thrown out of the cell and placed in trash bags."

{¶ 4} 4) Defendant asserted plaintiff has not offered sufficient evidence to prove his property items were thrown away by WCI personnel. Defendant acknowledged the Special Response Team ("SRT") at WCI conducted a shakedown search on August 31, 2007. However, defendant denied any SRT staff member discarded any personal property owned by plaintiff during the course of the August 31,

2007 shakedown search. Defendant stated "Inmate Smith was not able to provide a name of the staff that allegedly took the listed items.

{¶ 5} 5) Plaintiff filed a response insisting his property items were confiscated and then discarded by WCI staff. Plaintiff urged the court to rely on the submitted statement of Porter E. Thomas as sufficient evidence to prove his property was confiscated and then thrown away. Plaintiff acknowledged he did not witness his property being removed and discarded. Plaintiff explained he attempted to identify the four WCI employees who searched his cell on August 31, 2007, but could not obtain their names. Plaintiff related: [i]n late October 2007 inmate Porter E. Thomas #177-905 pointed out Correctional Officer Ewing (a white male on WCI's SRT team) as one of the SRT members who went through my locker box and threw away my property. A couple of days later he also pointed out a Black female (dark skinned, about 5'6" tall, keeps her hair pulled back into a tight bun) Correctional Officer who also refused to give me her name. But she was the SRT member who oversaw and made sure that the inmate porters placed all the items thrown from cells onto the pod floor into trash bags."

CONCLUSIONS OF LAW

{¶ 6} 1) In order to prevail, plaintiff must prove, by a preponderance of the evidence, that defendant owed him a duty, that defendant 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 *Meniffee v. Ohio Welding Products, Inc.* (1984), 15 Ohio St. 3d 75, 77, 15 OBR 179, 472 N.E. 2d 707.

{¶ 7} 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, at ¶41, citing *Miller v. Paulson* (1994), 97 Ohio App. 3d 217, 221, 646 N.E. 2d 521; and *Mussivand v. David* (1989), 45 Ohio St. 3d 314, 218, 544 N.E. 2d 265.

{¶ 8} 3) It has been previously held an inmate plaintiff may recover the value of property destroyed by agents of defendant when those agents acted without authority or right to carry out the property destructions. *Berg v. Belmont Correctional Institution* (1998), 97-09261-AD; *Wooden v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2004-01958-AD, 2004-Ohio-4820; *Hemsley v. N. Central Correctional Inst.*, Ct. of Cl. No. 2005-03946-AD, 2005-Ohio-4613; *Mayfield v. Richland Correctional Inst.*, Ct. of Cl. No.

2005-07976-AD, 2006-Ohio-358.

{¶ 9} 4) 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.

{¶ 10} 5) 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.

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} 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, as 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.

{¶ 14} 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 the assertions of Porter E. Thomas to be particularly persuasive.

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

{¶ 16} 11) Plaintiff has failed to show any causal connection between any property loss 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.

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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:

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