

[Cite as *Swain v. Richland Correctional Inst.*, 2004-Ohio-4835.]

IN THE COURT OF CLAIMS OF OHIO

SEAN SWAIN :
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 Plaintiff :
 :
 v. : CASE NO. 2003-12077-AD
 :
 RICHLAND CORRECTIONAL : MEMORANDUM DECISION
 INSTITUTION :
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 Defendant :
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FINDINGS OF FACT

{¶1} 1) On or about December 3, 2002, employees of defendant, Richland Correctional Institution (RiCI), packed the personal property of plaintiff, Sean Swain, an inmate. Plaintiff alleged that at sometime between December 3 and December 18, 2002, his cassette player, typewriter, legal papers, and trial transcripts were lost or stolen while under the control of RiCI staff.

{¶2} 2) Plaintiff filed this complaint seeking to recover \$2,500.00, the estimated replacement cost of his alleged missing property and the statutory maximum damage claim under R.C. 2743.10. The requisite material filing fee was paid.

{¶3} 3) Plaintiff submitted a written statement from a fellow inmate, identified as Mark Roberts. Roberts wrote he observed two RiCI employees load plaintiff's property onto a wooden cart on December 3, 2002. Roberts claimed he saw plaintiff's typewriter, cassette player, and legal transcript documents among

the property placed on the wooden cart. After making this mental inventory, Roberts stated he went to lunch and then returned to his cellblock where he noted the cart containing plaintiff's property was positioned "by the officer's station unattended." Roberts related he noticed plaintiff's legal transcripts and typewriter were not among the property items stored on the cart. Roberts made a further observation, professing he had a prior personal experience involving RiCI mailroom staff who allegedly destroyed his magazines during a time when he was housed in a segregation unit.

{¶4} 4) Defendant admitted liability for the loss of plaintiff's cassette player in the amount of \$34.95. Defendant also admitted liability for the \$25.00 filing fee. However, defendant denied plaintiff's legal transcript documents were lost or stolen while under the control of RiCI staff. Defendant contended plaintiff has failed to produce evidence establishing he possessed the legal transcript documents represented in this claim.

Defendant denied receiving delivery of any legal transcript documents on December 3, 2003. Defendant acknowledged plaintiff possessed a typewriter when he entered RiCI in April, 2002. Defendant disputed the fact plaintiff rightfully owned the typewriter. On December 18, 2002, plaintiff filed a theft/loss report complaining of the loss of his cassette player. Plaintiff did not reference a typewriter on this report. A typewriter is not listed on plaintiff's property inventory compiled on December 3, 2002.

{¶5} 5) Plaintiff insisted he did own a typewriter and that device was lost or stolen while under the control of RiCI personnel before a property inventory was compiled. The trier of fact agrees. Furthermore, plaintiff maintained his legal transcript documents were destroyed by someone while in the custody of RiCI

employees on December 3, 2002.¹

{¶6} 6) Plaintiff submitted a written statement from a fellow inmate, Jason West, who among other things claimed to be a witness to certain events at RiCI on December 3, 2002. West related he saw "like 3 guys," presumably inmates, rummaging through plaintiff's property which had been left unattended by the officer's station at RiCI. West further related he observed, "one of his (plaintiff's) legal books was on the floor it was part of his (plaintiff's) trial papers."

{¶7} 7) Plaintiff submitted a statement from his mother, Nancy Swain, in which she wrote she sent plaintiff a typewriter around 1996 or 1997 valued at \$99.50. Nancy Swain also noted that bound legal transcript documents were mailed to plaintiff at sometime during plaintiff's incarceration.

{¶8} 8) On July 29, 2004, plaintiff filed a motion to compel. Plaintiff seeks this court to issue an order requiring the clerk of the Erie County Common Pleas Court to provide information as to the costs of the legal transcripts plaintiff alleges defendant lost. However, this motion does not address the threshold issue in this case which is, did plaintiff possess the transcripts at the time of the pack up.

CONCLUSIONS OF LAW

{¶9} 1) 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} 2) Although not strictly responsible for a prisoner's property, defendant had at least the duty of using the same degree

¹ Plaintiff filed a response (April 13, 2004).

of care as it would use with its own property. *Henderson v. Southern Ohio Correctional Facility* (1979), 76-0356-AD.

{¶11} "3) 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.

{¶12} 4) However, 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.

{¶13} 5) 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.

{¶14} 6) 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, paragraph one of the syllabus. The court is free to believe or disbelieve, all or any part of each witness's testimony. *State v. Anthill* (1964), 176 Ohio St. 61. The trier of fact does not find the statements of Mark Roberts and Jason West particularly persuasive.

{¶15} 7) Plaintiff's failure to prove delivery of legal transcript documents 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.

{¶16} 8) Plaintiff has failed to prove, by a preponderance of

the evidence, his legal transcript documents were destroyed as a proximate result of any negligent conduct attributable to defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.

{¶17} 9) Negligence on the part of defendant has been shown in respect to the loss of plaintiff's cassette player and typewriter. *Baisden v. Southern Ohio Correctional Facility* (1977), 76-0617-AD.

{¶18} 10) The assessment of damages is a matter within the province of the trier of fact. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42.

{¶19} 11) Where the existence of damage is established, the evidence need only tend to show the basis for the computation of damages to a fair degree of probability. *Brewer v. Brothers* (1992), 82 Ohio App. 3d 148. Only 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* (1995), 102 Ohio App. 3d 782.

{¶20} 12) The court finds defendant liable to plaintiff in the amount of \$100.00, plus the \$25.00 filing fee, which may be reimbursed as compensable damages pursuant to the holding in *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19.

IN THE COURT OF CLAIMS OF OHIO

SEAN SWAIN :
Plaintiff :
v. : CASE NO. 2003-12077-AD
RICHLAND CORRECTIONAL : ENTRY OF ADMINISTRATIVE

INSTITUTION

DETERMINATION

:

Defendant

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Plaintiff's motion to compel is DENIED. 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 \$125.00, which includes the filing fee. Court costs are assessed against defendant. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
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