

[Cite as *Beery v. Ohio Dept. of Rehab. & Corr.*, 2004-Ohio-4742.]

IN THE COURT OF CLAIMS OF OHIO

BETH ELLEN BEERY :
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 Plaintiff :
 :
 v. : CASE NO. 2004-03543-AD
 :
 OHIO DEPT. OF REHABILITATION : ENTRY OF DISMISSAL
 AND CORRECTIONS :
 :
 Defendant :
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{¶1} On March 16, 2004, plaintiff filed a complaint against defendant, Department of Rehabilitation and Correction. Plaintiff alleges on or about June 27, 2003, she sent inmate Bauman a food box. The food box contained the drink mixes Healthy Blast and Strawberry Emer'genC. These drink mixes were considered contraband by defendant and returned to plaintiff. Plaintiff asserts defendant wrongfully and erroneously classified the above mentioned drink mixes as contraband. Plaintiff asserts defendant's agents were acting beyond the scope of their employment in making such a determination and their determination was arbitrary, as other food and drink mixes were allowed into the institution where inmate Bauman was housed.

{¶2} Plaintiff seeks damages in the amount of \$48.09, which represented \$5.00 for postage and the remainder for the drink mixes. Plaintiff acknowledges that the drink mixes were returned to her via the postal service. Plaintiff submitted the filing fee with the complaint.

{¶3} On May 24, 2004, this court issued an entry requiring

defendant to submit an investigation report within 14 days of the date of the entry.

{¶4} On June 14, 2004, defendant filed a motion to dismiss, pursuant to Civ.R. 12(B)(6), failure to state a claim upon which relief can be granted. Defendant also questions plaintiff's capacity and standing to sue defendant in this matter. In support of the motion to dismiss, defendant stated in pertinent part:

{¶5} "The plaintiff cannot prove any set of facts entitling her to recovery based on her averments, even assuming that all of the averments are true, because (1) the plaintiff lacks the legal capacity [to] sue the defendant on behalf of inmate Bauman; (2) the plaintiff lacks standing to sue the defendant; and (3) the defendant submits it does not owe a general duty of care to a member of the public when it confiscated contraband from an inmate pursuant to rule 5120-9-55 of the Ohio Administrative Code. . .

{¶6} "The defendant denied that the plaintiff has the capacity to sue the defendant. The defendant submits that the drink mixes were the property of inmate Bauman. For this reason, the proper party in interest is inmate Bauman. Only inmate Bauman has the capacity to sue the defendant on a claim that the defendant negligently deprived him of his property. Because the plaintiff lacks capacity to sue, she has failed to state a claim upon which relief can be granted. . .

{¶7} "Finally, the defendant submits that it has no general duty of care to a member of the public when it confiscates contraband from an inmate pursuant to rule 5120-9-55 of the Ohio Administrative Code. Because the defendant owed the plaintiff no general duty of care with respect to confiscating contraband from inmate Bauman, she has failed to state a claim upon which relief can be granted."

{¶8} On June 21, 2004, plaintiff filed a reply to the motion to dismiss. Plaintiff asserts default judgment should be rendered

in her favor pursuant to Civ.R. 55(A) and (C), since defendant failed to comply with this court's entry of May 24, 2004. In support of the reply, plaintiff states in pertinent part:

{¶9} "According to the first paragraph in the 'Memorandum in Support' by Christina M. Wendell, she states that the two drink mixes were confiscated. According to OAC 5120-9-55, the items were not confiscated because Bauman did not possess them, therefore when the defendant found the drink mixes contraband, it was clearly defying the *Approved Inmate Food Package List* (enclosed). I paid for the drink mixes and sent them to Bauman as a gift, according to the Food Package List. So I lost the money, not Bauman.

{¶10} "In paragraph 3 of the 'Memorandum in Support' by Ms. Wendell, she states 3 reasons why the plaintiff cannot sue the defendant. (1) The plaintiff is not suing for Inmate Bauman, because he did not pay for the drink mixes, nor were they confiscated according to OAC 5120-9-55. Therefore, there is a claim for which relief can be granted. (2) The plaintiff does not lack standing to sue the defendant, because the drink mixes were not Inmate Bauman's until he had them in his possession. (3) The defendant does owe duty to the plaintiff, because according to the *Approved Inmate Food Package List* the drink mixes were found contraband (not confiscated) for no logical reason. There is no law, no rule that gave permission to employees not to give pre-sweetened drink mixes. All the excuses I was given, clearly can be defied by other actions. Nutritious-Instant breakfast is given and it has 21 Vitamins and minerals. Meal Replacement-Instant breakfast is a meal replacement along with canned and dried meats and pizza's.

{¶11} High Protein-The FDA has not listed what is high protein, and the one drink mix that Bauman did not receive didn't have protein in it.

{¶12} "To prove my averment-to assert or affirm with

confidence-; Ms. Wendell confirmed my statement by saying Bauman should be the one to sue as the contraband (Ms. Wendell said confiscated) drink mixes were his property. . ."

{¶13} Finally, plaintiff asserts defendant's agents who made the decision concerning the drink mixes, Major Fox and Captain Diane Cordell, were security personnel. Plaintiff contends security personnel were acting beyond the scope of their employment making decisions concerning drink mixes which, in her opinion, were not security issues.

{¶14} On June 25, 2004, defendant filed a motion contra. Defendant asserts plaintiff should not be granted default judgment based on the failure to timely submit the motion to dismiss. Plaintiff argues "excusable neglect" caused by an administrative assistant resulted in an improper date being placed on the file for action. As soon as the mistake was discovered, the motion was promptly filed. Defendant also asserted, a copy of the motion to dismiss was mailed to plaintiff on June 9, 2004. Defendant contends plaintiff did not suffer harm from not receiving the motion to dismiss since plaintiff downloaded a copy of the motion from the court's website.

{¶15} On July 2, 2004, plaintiff filed a reply to the motion contra. Plaintiff contends defendant cannot prove the late filing was inadvertent. Accordingly, plaintiff asserts a default judgment should be rendered in her favor.

{¶16} Civ.R. 55(D) in pertinent part states:

{¶17} "No judgment by default shall be entered against this state . . . or agency . . . unless the claimant establishes his claim or right to relief by evidence satisfactory to the court."

{¶18} Clerical errors made by defendant are not a sufficient basis for granting a motion for default judgment against the state or its agencies. Plaintiff has not established she has suffered any prejudice as the result of the late filing of the motion to

dismiss by defendant.

{¶19} "The issue of standing is a threshold test that, once met, permits a court to determine the merits of the question presented. *Tiemann v. Univ. of Cincinnati* (1998), 127 Ohio App. 3d 312, 325. 'Standing' concerns the question of whether a plaintiff can show an injury traceable to the conduct of the defendant. *Country Club Townhouses - North Condominium Unit Owners Assn. v. Slates* (Jan. 24, 1996), 9th Dist. No. 17299. A plaintiff must have a personal stake in the matter; the plaintiff's injury cannot be merely speculative but must be palpable and, also, must be an injury to himself personally or to a class. *Tiemann*, 127 Ohio App. 3d at 325." *Hicks v. Meadows*, 2003-Ohio-1473 at 1476.

{¶20} In the case at bar, plaintiff has no standing to question administrative rules adopted by defendant to control what items can or can not enter a penal institution. This issue of contraband is a question best decided by penal authorities who have the experience and expertise in these matters. See *Bell v. Wolfish* (1979), 441 U.S. 520. Also, the determination of what materials are considered contraband is a policy decision. The state cannot be sued for the exercise of any executive or planning function involving the making of a policy decision characterized by a high degree of discretion. *Reynolds v. State* (1984), 14 Ohio St. 3d 68.

{¶21} Finally, plaintiff lacks the standing and capacity to sue in this matter. Plaintiff was not an inmate at the time the property was deemed contraband, she received the return of the property she had sent, and has no basis for challenging the administrative rules which apply to the relationship of defendant with inmates. Accordingly, plaintiff's case is dismissed.

{¶22} Having considered all the evidence in the claim file, the pleadings of the parties, and for the reasons set forth above, plaintiff's motion for default judgment is DENIED and defendant's motion to dismiss is GRANTED. Plaintiff's case is DISMISSED.

Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this entry of dismissal and its date of entry upon the journal.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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