

IN THE COURT OF CLAIMS OF OHIO

MARK TRAWICK :

Plaintiff :

v. : CASE NO. 2004-06348-AD

DEPT. OF REHABILITATION AND : MEMORANDUM
DECISION
CORRECTION

:
Defendant

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FINDINGS OF FACT

{¶ 1} 1) Plaintiff, Mark Trawick, an inmate incarcerated at defendant's Ohio State Penitentiary (OSP), explained that many items of his personal property have been stored in the OSP property room since August, 2003. Plaintiff asserted his Converse gym shoes, robe, long underwear top, and a book titled *Nicolae* were lost or misplaced by OSP personnel at sometime after being placed in the property room.

{¶ 2} 2) Plaintiff, consequently filed this complaint seeking to recover \$89.39, the estimated replacement value of the alleged missing property items. Plaintiff implied his property was lost as a proximate cause of negligence on the part of OSP staff in exercising control over the items. Plaintiff was excused from paying the requisite material filing fee.

{¶ 3} 3) Defendant stated plaintiff has in his possession a robe and a long underwear top. Defendant related a pair of Nike gym shoes and a book titled *Nicolae* are

among plaintiff's property articles stored in the OSP property room. Defendant asserted plaintiff has failed to show he possessed a pair of Converse gym shoes. Defendant has no record of plaintiff owning a pair of Converse gym shoes. Defendant denied ever exercising control over Converse gym shoes which belonged to plaintiff.

{¶ 4} 4) Plaintiff submitted a copy of his property inventory dated October 28, 2002. This inventory shows plaintiff was in possession of an item identified as "Converse" on October 28, 2002. There is no supporting documentation to establish this item identified as "Converse" and listed under "Miscellaneous" property is a pair of Converse gym shoes. On this inventory, under the designated category "Shoes/Gym" is marked one pair of Nike high top white and black shoes. Defendant's internal regulations limit inmate possession of gym shoes to one pair.

{¶ 5} 5) Plaintiff asserted the long underwear top and the robe found in his possession were not the same articles of clothing claimed in his complaint. Plaintiff insisted a different long underwear top and robe were stored in the OSP property room and subsequently lost. Plaintiff's property inventory dated October 28, 2002, shows he possessed one robe and long underwear top on that date. Defendant's internal regulations limit inmate possession of robes to one.

{¶ 6} 6) Plaintiff acknowledged the book titled Nicolae was not misplaced and is stored in the OSP property vault.¹

CONCLUSIONS OF LAW

{¶ 7} 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.

{¶ 8} 2) 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.

{¶ 9} 3) 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.

¹ Plaintiff filed a response to defendant's investigation report on September 3, 2004.

{¶ 10} 4) 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.

{¶ 11} 5) In order to recover against a defendant in a tort action, if plaintiff produces evidence which furnishes a basis for only a guess, among different possibilities, as to any essential issues in the case, he fails to sustain the burden as to such issue. Landon v. Lee Motors, Inc. (1954), 161 Ohio St. 82.

{¶ 12} 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.

{¶ 13} 7) Plaintiff has failed to prove, by a preponderance of the evidence, he sustained any loss as a result of any negligence on the part of defendant. Fitzgerald v. Department of Rehabilitation and Correction (1998), 97-10146-AD.

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ENTRY OF ADMINISTRATIVE
DETERMINATION

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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. 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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DRB/RDK/laa

9/28

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