

[Cite as *Smiley v. Ohio State Penitentiary*, 2003-Ohio-3123.]

IN THE COURT OF CLAIMS OF OHIO

CHARLES SMILEY, JR. :  
Plaintiff :  
v. : CASE NO. 2003-02195-AD  
OHIO STATE PENITENTIARY : MEMORANDUM DECISION  
Defendant :

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FINDINGS OF FACT

{¶1} 1) On or about January 4, 2003, plaintiff, Charles Smiley, Jr., an inmate incarcerated at defendant, Ohio State Penitentiary (OSP), was escorted from his cell to the institution infirmary for medical treatment.

{¶2} 2) Plaintiff stated he returned from the infirmary to his cell on January 7, 2003 and discovered several property items which had been secured in his cell were missing. Plaintiff assumed the property had been stolen at some time while he was assigned to the OSP infirmary. Plaintiff maintained the following items were stolen: soap, lotion, toothbrush, toothpaste, hair dress, shoes, and five books.

{¶3} 3) Plaintiff filed this complaint seeking to recover \$59.19, the replacement cost of the purportedly stolen articles.

{¶4} 4) Defendant denied any liability in this matter. Defendant acknowledged certain hygiene items were forwarded to plaintiff while he was in the OSP infirmary. Defendant denied ever exercising control over plaintiff's books. A theft report was filed and an investigation was conducted, but none of the alleged stolen property was recovered. Defendant conducted a search of plaintiff's cell on or about January 24, 2003. This search

revealed plaintiff had soap, toothpaste, a toothbrush, shoes, and books in his possession, although it appears the particular books plaintiff claimed as stolen were not in his possession. Evidence has shown plaintiff purchased a toothbrush from the OSP commissary on January 9, 2003.

{¶5} 5) Plaintiff filed a response. Plaintiff insisted all items claimed were stolen from his cell. Plaintiff argued defendant should bear liability for the loss of his property.

#### CONCLUSIONS OF LAW

{¶6} 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.

{¶7} 2) 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.

{¶8} 3) 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.

{¶9} 4) 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.

{¶10} 5) 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 issues in the case, he fails to sustain the burden as to such issue. *Landon v. Lee Motors, Inc.* (1954), 161 Ohio St. 82.

{¶11} 6) Plaintiff has failed to prove, by a preponderance of the evidence, his property items were lost or stolen as a proximate result of any negligence on the part of

defendant. *Fitzgerald v. Department of Rehabilitation and Correction* (1998), 97-10146-AD.

{¶12} 7) Allegations that a theft occurred are insufficient to show defendant's negligence. *Williams v. Southern Ohio Correctional Facility* (1990); *Custom v. Southern Ohio Correctional Facility* (1985), 84-02425. Plaintiff must show defendant breached a duty of ordinary or reasonable care. *Williams, supra*. Plaintiff has failed to prove his property items were lost or stolen as a proximate cause of defendant breaching a duty of care owed to plaintiff.

{¶13} 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.

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DANIEL R. BORCHERT  
Deputy Clerk

Entry cc:

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RDK/tad  
5/29  
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