

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

DEVIN L. PATCHELL

Plaintiff

v.

OHIO UNIVERSITY

Defendant

Case No. 2008-09911-AD

Deputy Clerk Daniel R. Borchert

MEMORANDUM DECISION

{¶ 1} Plaintiff, Devin L. Patchell, filed this action against defendant, Ohio University (“OU”), seeking to recover damages for the loss of his 20GB iPod that was stolen while under the control of OU employees. On May 28, 2008, at approximately 1:00 p.m., plaintiff left his iPod on the sundeck of the OU Aquatic Center. The device was subsequently located by either a patron or employee of the Aquatic Center and turned in to the staff office. When the turned in iPod was examined, plaintiff’s phone number was found and he was contacted on that same day to come to the Aquatic Center to retrieve his iPod. Upon arriving at the Aquatic Center, about twenty to thirty minutes after receiving the phone call, plaintiff was informed his iPod could not be located in the staff office and was presumably stolen while under the custody and care of OU personnel. All Aquatic Center staff at the time were questioned about the matter and all parties denied any knowledge of how the iPod went missing from the staff office. Plaintiff asserted his iPod was stolen as a proximate cause of negligence on the part of OU Aquatic Center personnel in failing to protect his property from theft after voluntarily assuming control of the device. Consequently, plaintiff filed this complaint seeking to

recover \$350.00, the stated replacement cost of the iPod and rubber case, plus \$990.00 for “1,000 purchased songs from internet (\$0.99 per song)” downloaded on the iPod. Plaintiff did not provide any record establishing he actually purchased any songs downloaded from the internet and did not provide any documentation to prove the purchase price or value of the iPod and case. The filing fee was paid.

{¶ 2} The matter of the missing iPod was investigated by the OU Police Department. Plaintiff submitted copies of various reports from the OU Police Department regarding their findings. According to one submitted report, Aquatic Center Director, Joe Wakely, advised the theft of plaintiff’s iPod occurred in early June, 2008 and had been apparently stolen from the Aquatic Center staff office before plaintiff could retrieve his property. Wakely related “[i]t was reported to me on June 2nd (2008) that an IPOD was turned in to the front desk and had gone missing.” Furthermore, Wakely related he had talked to all personnel working at the Aquatic Center on the day plaintiff’s iPod was stolen and written statements from some of the seven identified employees were submitted as part of the investigation. All submitted written statements from the Aquatic Center employees confirm plaintiff’s iPod was turned in to Aquatic Center staff who took possession of the item, stored it at the Aquatic Center front desk, and it was later discovered the device was missing.

{¶ 3} Defendant acknowledged plaintiff left his iPod on the sun deck at the OU Aquatic Center on May 28, 2008 and the iPod was subsequently turned in to Aquatic Center staff who voluntarily exercised control over the item. Defendant admitted that when plaintiff “arrived to pick up the iPod the Aquatic Center staff were unable to locate it.” Additionally, defendant disputed plaintiff’s damage claim stating “[p]laintiff has not provided any documentary evidence of the value of the iPod and its case at the time they were purchased, the date on which these items were purchased and their value as used items at the time they were lost.” Furthermore, defendant disputed plaintiff’s claim of \$990.00 for the purchase of one thousand songs from the internet at \$.99 per song. Defendant maintained plaintiff has not offered sufficient proof to show he actually suffered the loss claimed. Defendant presented the following explanation:

{¶ 4} “Songs purchased through the internet are first downloaded to a computer. They may then be transferred to devices such as an iPod. It is customary for purchasers of internet songs to retain them on their computer.”

{¶ 5} In the instant claim, the court concludes defendant entered into a constructive or gratuitous bailment relationship with plaintiff when Aquatic Center staff took possession of plaintiff's iPod. "A constructive bailment can occur where property is mislaid and found by one who then assumes custody of the property, or property is mislaid and custody is assumed by the owner of the premises upon which it is mislaid." *Johnson v. Akron Mgt. Corp.* (May 30, 1990) Summit App. No. 14320, paragraph one of the syllabus. A gratuitous or constructive bailment relationship is one for the sole benefit of the bailor. *Jackman v. Karg* (April 30, 1985), Wyandot App. No. 16-84-2.

{¶ 6} The standard of care for a gratuitous/constructive bailee is that which he is accustomed to exercise in his own concerns, with proper regard to the nature, value, and quality of the subject of the bailment and all attendant circumstances, including the customary course of dealing between the parties. *Hershey v. Happy Days Boating Co.* (1976), 52 Ohio App. 2d 95, 6 O.O. 3d 64, 368 N.E. 2d 318, paragraph one of the syllabus. Other courts have reviewed the standard of care owed by a gratuitous bailee and determined that there must be a finding of more than mere negligence, the conduct must amount to gross negligence or slight care. See e.g. *State Farm Fire & Casualty v. Schwarzel* (March 8, 1983), Athens App. No. 1146. However, even when reviewing the lessened standard of care, it has been held that: "But what constitutes gross negligence can not be determined by any rule which will furnish a reliable test in all cases. It must be determined as a question of fact in each particular case by the jury, under proper instructions from the court. The degree of care due from the depositary depends upon circumstances, such as the nature and quality of the goods bailed, and the character and customs of the place where they are to be kept." *State Farm Fire & Casualty, citing Griffith v. Zipperwick* (1876), 28 Ohio St. 338, 401.

{¶ 7} Violation of the foregoing duty of care by a bailee permits a bailor to recover damages from the bailee. *The Deli Table, Inc. v. Great Lakes Mall* (Dec. 31, 1996), Lake App. No. 95-L-012. In order to establish a prima facie case for violation of a bailment duty, the bailor must show that the bailment relationship existed, that the bailee had taken possession of the property, and the bailee failed to return the property. *The Deli Table, Inc.* Under the facts and circumstances of the instant action, the court finds defendant breach its duty of care owed to plaintiff which resulted in the loss of his iPod. Consequently, defendant is liable to plaintiff for damages that can be proven.

Initially, the court finds plaintiff has failed to prove he suffered any damages that can be proven. Initially, the court finds plaintiff has failed to prove he suffered any damages from the loss of any downloaded songs. No documentation or other record has been submitted to prove plaintiff actually purchased songs or suffered permanent loss claimed. Damages are therefore confined to the value of the iPod at the time of loss. Plaintiff's damage claim is limited to the fair market value of the iPod and case. *Maloney v. Gen. Tire Sales* (1973), 34 Ohio App. 2d 177, 63 O.O. 2d 289, 296 N.E. 2d 831.

{¶ 8} The assessment of damages is a matter within the province of the trier of fact. *Litchfield v. Morris* (1985), 25 Ohio App. 3d 42, 25 OBR 115, 495 N.E. 2d 462. As trier of fact, this court has the power to award reasonable damages based on evidence presented. *Sims v. Southern Ohio Correctional Facility* (1988), 61 Ohio Misc. 2d 239, 577 N.E. 2d 160. The court determines plaintiff has sustained damages in the amount of \$200.00. Furthermore, plaintiff may recover the \$25.00 filing fee, which may be awarded as compensable costs pursuant to R.C. 2335.19. *Bailey v. Ohio Department of Rehabilitation and Correction* (1990), 62 Ohio Misc. 2d 19, 587 N.E. 2d 990.

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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 plaintiff in the amount of \$225.00, which includes the filing fee. Court costs are assessed against defendant.

DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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RDK/laa
7/17
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