IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW BIGBEE,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

OPINION AND ORDER

05-C-66-C

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This is a civil action for monetary relief brought pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-80. Plaintiff Andrew Bigbee contends that officials at the Federal Correctional Institution in Oxford, Wisconsin, violated the Act when they confiscated and destroyed five handmade leather purses discovered in the institution's machine shop. Jurisdiction is present. 28 U.S.C. § 1331.

Now before the court is defendant United States of America's motion for summary judgment. Defendant contends that plaintiff's claim is barred by Wisconsin's comparative negligence statute, Wis. Stat. § 845.045, which provides that a plaintiff's own negligence constitutes a bar to recovery when it is as great or greater than that of the defendant. Defendant contends that plaintiff was contributorily negligent because he failed to properly

mark the purses, stored them in a prohibited area and did not send them out of the institution within the time required. I conclude that there are material facts in dispute and that a decision regarding the comparative negligence analysis under Wisconsin law is more appropriate for trial in this case. Accordingly, defendant's motion for summary judgment will be denied.

From the parties' proposed findings of fact, I find the following to be material and undisputed.

UNDISPUTED FACTS

A. Policies Governing Participation in Hobby Craft Programs

Regulations of the Federal Bureau of Prisons and the Federal Correctional Institution at Oxford state that no leatherwork projects will be permitted "in the unit." The institution requires an inmate to identify hobby craft materials by indelibly marking his last name and complete registration number on the reverse or bottom side of the item. Inmates enrolled in a hobby craft program may participate for a period of six months. After the six-month enrollment period, an inmate may place his name on the waiting list to re-enroll in the program. Completed hobby craft projects must be mailed to a verified relative or approved visitor at the inmate's expense.

After prison officials seize an item as contraband, they are required to inventory and

store confiscated materials pending identification of the true owner.

B. Confiscation and Destruction of Plaintiff's Purses

Plaintiff Andrew Bigbee is an inmate at the Federal Correctional Institution at Oxford, Wisconsin. On August 8, 2004, Senior Officer Specialist Phillip Urbanek conducted an area search of the institution's machine shop. During the search, Urbanek found five leather purses inside a welding helmet box on a shelf. The purses were found outside the arts and hobby crafts area. Officer Urbanek took the purses to the Lieutenant's office. Prison staff did not inventory and store the purses pending identification of the true owner. On August 10, 2004, Officer Urbanek discarded the purses into the "hot trash" as contraband and they were destroyed.

Plaintiff did not mark the purses in accordance with the institution's policy. However, because of the skill required for leather work and the expense of enrollment in the program, prison staff have determined that indelibly marking leather projects would mar them. Therefore, they require only that inmates note their projects on a project sheet.

Staff at the institution have made it their practice to allow inmates to automatically re-enroll in the leatherwork program when no waiting list exists. Plaintiff has participated in the program from February 1998 to June 2005 and has never been asked to leave the program. The leatherwork program has never had a waiting list and prison staff have re-

enrolled inmates automatically. Plaintiff did not mail the purses to an appropriate individual in accordance with the institution's policy.

OPINION

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). Evidence must be viewed and inferences must be drawn in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the nonmoving party must set forth specific facts sufficient to raise a genuine issue for trial. Celotex v. Catrett, 477 U.S. 317, 324 (1986).

The Federal Tort Claims Act provides in part that the United States "shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Because a claim brought under the Tort Claims Act is governed by "the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b), Wisconsin law applies in this case. Kaniff v. United States, 351 F.3d 780, 790 (7th Cir. 2003). Under Wisconsin law, contributory negligence bars an action for recovery by any person if that negligence was as great or greater than the negligence of the person against whom recovery is sought. Wis. Stat. § 895.045;

Hofflander v. St. Catherine's Hospital, 2003 WI 77, ¶28, 262 Wis. 2d 539, 664 N.W.2d 545. "[I]n negligence actions summary judgment is only to be granted to a defendant in those rare cases where it is clear and uncontroverted that the plaintiff's negligence is, as a matter of law, greater than that of the defendant." Huss v. Yale Materials Handling Corp., 196 Wis. 2d 515, 535, 538 N.W.2d 630, 637 (Ct. App. 1995).

Under the Wisconsin comparative negligence statute, "the totality of the causal negligence present in the case will be examined to determine the contribution each party has made to that whole." Cirillo v. City of Milwaukee, 34 Wis. 2d 705, 716-17, 150 N.W.2d 460, 466 (1967). Summary judgment is a poor device for deciding questions of comparative negligence because a weighing of the "respective contributions to the result" is required to determine "who is most negligent, and by how much." Id. In the present case this weighing is better achieved through the trial process.

The undisputed facts indicate that Urbanek violated at least two Bureau of Prisons regulations after he confiscated plaintiff's purses. First, he failed to inventory and store the purses pending identification of the true owner as required by 28 C.F.R. § 553.13(b)(2)(i). Also, he failed to wait seven days following confiscation of the items to allow plaintiff to claim ownership before destroying them, as required by 28 C.F.R. § 553.13(b)(2)(ii). In addition, there is a factual dispute whether plaintiff attempted to claim the purses before

their destruction. Defendant contends that no inmate or individual claimed ownership of the purses until August 11, 2004. Plaintiff attempts to dispute this contention by citing to a document attached to his responses to defendant's proposed findings of fact. The attached document, which appears to be a notarized certification of other documents attached to plaintiff's responses, contains the following handwritten text at the bottom:

> 8-10-04 8:00 a.m.
> Asbury contacted Lt. about purses and they stated purses were in confiscation room
>
> 8-11-04 5:00 p.m.
> I contacted Lt. Johnson he said he would speak to Cptn.
>
> 8-12-04 11:45 a.m. spoke with Lt. Williams and he said Johnson was in charge of property and that nothing would be thrown out till he returns on Sat.

From this text, I understand plaintiff to allege that (1) he spoke with a correctional officer named Asbury on August 10, 2004 to claim his purses and that he was told they were in the confiscation room; (2) he spoke to Lieutenant Johnson on August 11, 2004; and (3) he spoke with Lieutenant Williams on August 12, 2004 and was told that the purses would not be thrown out until August 14, 2004.

Plaintiff did not make these allegations the subject of proposed findings of fact. However, pro se submissions are to be given a liberal construction. Plaintiff has done

enough to put the court on notice that there may be a dispute concerning whether he claimed ownership of the purses before August 11, 2004. Plaintiff's version of events, which I must accept as true for purposes of deciding defendant's motion, suggests that he made repeated attempts to fulfill his obligation to claim ownership of the purses within the seven days as required by Bureau of Prisons regulations. 28 C.F.R. § 553.13(b)(2)(ii).

Defendant contends that plaintiff was contributorily negligent because he failed to properly mark the purses, stored them in a prohibited area and did not send them out of the institution within the time required. With respect to the first point raised by defendant, Bureau of Prisons policy requires each inmate to identify completed hobby craft projects by showing his name and registration number on the reverse side of the item. 28 C.F.R. § 544.35(b). Plaintiff argues that prison staff did not strictly enforce this requirement for leatherwork projects. Moreover, there is a factual dispute whether the purses were actually marked. Defendant maintains that the purses had no marks to identify the owner. However, plaintiff alleges that he identified himself as the owner by prominently marking a capital "B" on all five purses.

With respect to defendant's argument that plaintiff was negligent because he stored his purses in a prohibited area, the institution's policy that governs the storage of hobby craft projects in prisoner cells is unclear with respect to where leather goods may be stored.

Defendant argues that the policy prohibits inmates from possessing leatherwork projects outside the arts and hobby crafts area. However, plaintiff points out that FCI Oxford Institutional Supplement 5370.08(G)(VI)(A)(3)(d) applies specifically to leatherwork projects, and states, "[n]o leatherwork projects will be permitted in the unit." It does not require that they be stored only in the arts and hobby crafts area. The parties dispute what area of the institution is encompassed by the phrase "the unit." Plaintiff argues that the phrase "the unit" extends only to inmate living quarters. If this is true, defendant's argument that plaintiff stored his purses in a prohibited area would be weakened considerably.

Finally, the institution's policy is that inmates enrolled in a hobby craft program may participate for a period of six months. After the six-month enrollment period, an inmate may place his name on the waiting list to re-enroll in the program. At the end of the six-month enrollment period, an inmate must mail his completed hobby craft projects out of the institution to an approved contact. FCI Oxford Institutional Supplement 5370.08(G)(2). Defendant argues that the seized purses were made of materials that were purchased more than six months before their destruction. However, defendant concedes that some of the materials used to make the purses were less than six months old at the time they were seized. Although plaintiff admits he did not send the completed purses to an approved contact, he contends that he was allowed to re-enroll in the leatherwork program automatically at the

end of each six-month period. This contention suggests that plaintiff's enrollment period may not have expired every six months. Therefore, the requirement that he mail his purses out of the institution may not have been triggered.

After weighing all of the evidence in the light most favorable to plaintiff, I conclude that there are disputes of material fact that preclude granting summary judgment for defendant. Only after resolving these disputes can I compare the negligence of both parties. This is not one of those rare cases in which it is clear that plaintiff's negligence was greater than defendant's.

ORDER

IT IS ORDERED that the motion of defendant United States of America for summary judgment is DENIED.

Entered this 15th day of February, 2006.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge