

[Cite as *Pullen v. Dept. of Rehab. & Corr.*, 2019-Ohio-5475.]

TERRY TYRONE PULLEN, JR

Plaintiff

v.

DEPARTMENT OF REHABILITATION
AND CORRECTION

Defendant

Case No. 2015-00259JD

Judge Patrick M. McGrath
Magistrate Robert Van Schoyck

JUDGMENT ENTRY

{¶1} On July 9, 2019, the magistrate issued a decision recommending judgment in favor of defendant on plaintiff’s claim of negligence. Civ.R. 53(D)(3)(b)(i) states, in part: “[a] party may file written objections to a magistrate’s decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i).” Plaintiff filed his objections on August 7, 2019, twenty-nine (29) days after the filing of the magistrate’s decision. Thus, plaintiff’s objections were untimely. Furthermore, on August 20, 2019, plaintiff filed a document captioned “MOTION FOR AN EXTENSION OF TIME,” which seeks an extension of time to file objections. Plaintiff’s motion for an extension of time to file objections is untimely and follows plaintiff’s August 7, 2019 objections. Thus, plaintiff’s motion for an extension of time is DENIED as moot. Due to plaintiff’s failure to timely file objections to the magistrate’s decision, the court will not consider the August 7, 2019 objections. Even if plaintiff had timely filed objections that conformed with Civ.R. 53, and the court had considered those objections, plaintiff would not have been successful because the lack of a transcript means the court cannot review objections to the magistrate’s rulings on the admissibility of the evidence and the court finds the magistrate did not err in concluding defendant lacked notice and was not liable for negligence.

{¶2} When ruling on objections to a magistrate’s decision, a “court shall undertake an independent review as to the objected matters to ascertain that the

magistrate has properly determined the factual issues and appropriately applied the law.” Civ.R. 53(D)(4)(d). Additionally, when a party objects to a magistrate’s decision, “whether or not specifically designated as a finding of fact * * * [it] shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.” Civ.R. 53(D)(3)(b)(iii). “If an objecting party fails to submit a transcript or affidavit, the trial court must accept the magistrate’s factual findings and limit its review to the magistrate’s legal conclusions.” *Triplett v. Warren Corr. Inst.*, 10th Dist. Franklin No. 12AP-728, 2013-Ohio-2743, ¶ 13. To the extent plaintiff makes any factual objections, he failed to support his objections with a transcript of the proceedings. Accordingly, the court accepts the magistrate’s factual findings, and limits its review to the magistrate’s legal conclusions.

{¶3} According to the magistrate’s decision, plaintiff’s claim for negligence arose out of an alleged attack by another inmate, as a result of defendant’s negligence, while plaintiff was housed at defendant’s Southern Ohio Correctional Facility (SOCF). Plaintiff makes three objections. First, plaintiff objects to the magistrate’s finding that plaintiff failed to prove that defendant had actual notice of the impending attack by a preponderance of the evidence. Second, plaintiff objects to the magistrate’s finding that plaintiff failed to prove defendant had constructive notice of such an attack by a preponderance of the evidence and acted negligently in placing plaintiff in the housing unit in question. Third, plaintiff objects to the magistrate’s exclusion of certain evidence at trial.

{¶4} If a party wishes to raise an error based on a ruling excluding evidence at trial, the party must proffer the excluded evidence or the nature of the excluded evidence must be apparent from the context of the questions asked of a witness. Evid.R. 103(A)(2); see also *In re Bunting*, 5th Dist. Delaware No. 99 CA F 03 012, 2000 Ohio App. LEXIS 130, 7 (Jan. 11, 2000) (“The appellant had a duty to proffer evidence which she believed was improperly excluded. Evidence Rule 103(A)(2). This proffer

then would have appeared in the transcript and the trial court could have properly reviewed the evidentiary ruling of the Magistrate.”). Plaintiff states that the magistrate excluded a 2013 Correctional Institution Inspection Committee Report that evidenced the defendant’s knowledge of such attacks in plaintiff’s housing unit prior to his attack on September 8, 2013. (Plaintiff’s Objections, p. 8.) Even assuming plaintiff did proffer the evidence, the lack of a transcript means the court cannot review the evidence itself or the nature and context of the magistrate’s rulings on the admissibility of the evidence. Therefore, the court has no basis to find error with the magistrate’s evidentiary rulings. *See Cargile v. Ohio Dept. of Adm. Servs.*, 10th Dist. Franklin No. 11AP-743, 2012-Ohio-2470, ¶ 15 (trial court did not err in overruling objections to evidentiary ruling when no transcript was provided); *City of Columbus v. Flex Tech Professional Servs.*, 10th Dist. Franklin No. 04AP-417, 2004-Ohio-6255, ¶ 8 (“Because appellant failed to provide the trial court with a transcript, the trial court did not err in adopting the magistrate’s decision or in finding that the magistrate did not err in permitting an undisclosed witness to testify or admitting exhibits that had not been disclosed by the city.”); *Bunting* at 7 (“There was no way for the trial court to know what the Magistrate’s rulings on the evidence were without a transcript.”).

{¶5} “The law is well-settled in Ohio that ODRC is not liable for the intentional attack of one inmate by another, unless ODRC has adequate notice of an impending assault.” *Williams v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 18AP-720, 2019-Ohio-2194, ¶ 18, quoting *Watson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-606, 2012-Ohio-1017, ¶ 9. “Notice may be actual or constructive, the distinction being the manner in which the notice is obtained rather than the amount of information obtained.” *Lucero v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 11AP-288, 2011-Ohio-6388, ¶ 18. The magistrate concluded that there was no evidence that plaintiff notified any staff members at SOCF that he feared an attack by inmate Showes, nor that any other inmate notified prison staff that Showes had

threatened an attack. (Magistrate's Decision p. 5). Further, the magistrate found that the fact that some inmates housed in plaintiff's housing unit had assaulted others with bodily substances and could purchase bottles of shampoo did not give rise to a reasonable inference of constructive notice. *Id.* Based upon the foregoing, the magistrate did not err in concluding defendant lacked notice and was not liable for negligence.

{¶6} Plaintiff did not timely file objections that conform with the requirements of Civ.R. 53. Therefore, plaintiff's objections are not properly before the court for consideration. Even if plaintiff's objections were properly before the court, the court finds that the magistrate properly determined the factual issues and appropriately applied the applicable law. Therefore, the court adopts the magistrate's decision and recommendation as its own, including the findings of fact and conclusions of law contained therein. 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.

PATRICK M. MCGRATH
Judge