

[Cite as *Harris v. Dept. of Rehab. & Corr.*, 2019-Ohio-506.]

HERMAN HARRIS, JR.	Case No. 2016-00883JD
Plaintiff	Judge Patrick M. McGrath Magistrate Robert Van Schoyck
v.	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION	<u>JUDGMENT ENTRY</u>
Defendant	

{¶1} Plaintiff's complaint asserts a negligence claim based on a fall that occurred, while plaintiff worked in the kitchen at Pickaway Correctional Institution (PCI), when plaintiff fell while pushing a rack of food after the rack's wheels caught on a recessed drain in the kitchen's floor. The parties tried the case to the magistrate on the issue of liability only. The magistrate issued a decision recommending judgment for defendant on plaintiff's negligence claim on May 23, 2018 after finding defendant lacked notice regarding the defective drain. After obtaining an extension, plaintiff filed objections on July 19, 2018, as well as a transcript of the proceeding.

{¶2} 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)." As to the trial court's duty when considering objections, Civ.R. 53(D)(4)(d) provides, in pertinent part:

Action on objections. If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the 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. (Emphasis added).

Objections "shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). In reviewing objections, the court does not act as an appellate

court but rather “must conduct a de novo review of the facts and conclusions in the magistrate’s decision.” *Ramsey v. Ramsey*, 10th Dist. No. 13AP-840, 2014-Ohio-1921, 2014 Ohio App. Lexis 1868, ¶¶ 16-17 (internal citations omitted). Defendant asserts four objections to the magistrate’s decision.

{¶3} Plaintiff’s first objection asserts, “[t]he Magistrate erred in sustaining a relevant question concerning the response of maintenance to work orders, leading to identification and condition of the drain, asked of C.O. Butler at page 23 of the record.” At trial, the magistrate sustained an objection to a line of questions plaintiff asked corrections officer Butler regarding information in work orders which reflected repairs performed on the drain after plaintiff’s accident. The magistrate, applying Evid. R. 407, sustained the objection after finding plaintiff’s questions were attempting to elicit evidence of subsequent remedial measures.

Evid. R. 407 provides:

When, after an injury or harm allegedly caused by an event, measures are taken which, if taken previously, would have made the injury or harm less likely to occur, *evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event*. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment. (Emphasis added).

At trial, plaintiff asked a question about “work on the drain cover.” In addressing the objection at trial, plaintiff indicated “[w]e need to know whether somebody actually responded to the work orders that were issued by someone * * * to show * * * the fact that the thing was actually broken in the first place.” Further, plaintiff asserts in his objections that questions concerning work on the drain cover are relevant to constructive notice and the drain’s condition at the time of the accident.

{¶4} Ownership, control, or feasibility of precautionary measures were not controverted at trial and plaintiff did not offer the evidence for impeachment. Rather,

plaintiff attempted to offer the evidence to establish a defect in the drain and/or constructive notice. As to constructive notice, the magistrate properly sustained the objection pursuant to Evid. R. 407, as the rule prohibits introducing evidence of subsequent remedial measures to establish negligence. However, the existence of a defect in the drain was controverted at trial and evidence of work performed on the drain could be offered for the limited purpose of establishing that the drain was defective. In fact, as discussed *infra*, the magistrate later admitted work orders solely for the purpose of establishing a defect in the drain. Therefore, plaintiff's first objection to the magistrate's decision is SUSTAINED, in part, and OVERRULED, in part. Though testimony regarding work on the drain could not be offered to establish constructive notice, it was admissible to establish the existence of a defect in the drain.

{¶5} The court finds plaintiff's second and third objections are interrelated and, therefore, addresses them together. Plaintiff's second objection asserts, “[t]he Magistrate erred in ruling the evidence failed to establish the hazard existed for a long enough time so Defendant knew of the hazard.” Plaintiff's third objections asserts, “[t]he Magistrate erred in finding the photographs, Defendant's Exhibit 'A' and Plaintiff's Exhibit 4, did not establish the condition of the drain had existed for sufficient time to prove constructive notice of the hazard.” As stated in *Sharp v. Andersons, Inc.* 10th Dist. No. 06AP-81, 2006-Ohio-4075, ¶ 11, “[a] plaintiff cannot prove constructive notice of a hazard without a factual basis that the hazard existed for a sufficient time to enable the exercise of ordinary care.”

{¶6} In support of his third and fourth objections, plaintiff points to Exhibit 3, one of the work orders, as well as Exhibits A and 4, two photographs of the drain. The court finds plaintiff's arguments unavailing. As to the work order, the court would first note that the magistrate, again relying on Evid. R. 407, admitted the work orders into evidence solely for the purpose of establishing a defect with the drain, a ruling to which plaintiff offers no objection. Therefore, plaintiff's reliance on one of the work orders as

evidence of constructive notice or any other aspect of negligence, violates both the prohibition set forth in Evid. R. 407 and the magistrate's unchallenged ruling.

{¶7} Further, the work order is dated May 4, 2017; it contains no other dates. The statement regarding "wheels" getting stuck does not indicate when this event occurred. It is just as likely that this statement refers to plaintiff's accident as it is that the statement refers to prior accidents. In short, the court finds the work order, in addition to being admitted for a limited purpose, does not establish that the defect in the drain existed at any time before plaintiff's accident.

{¶8} Likewise, the photographs and testimony stating the photographs either did or may have depicted the drain's condition at the time immediately after plaintiff's fall establish that the drain was broken at the time the photographs were taken. However, they do not establish the length of time, if any, that the drain existed in the condition depicted in the photographs. As the pictures themselves were taken at an unknown time by an unknown person after plaintiff's accident, they do not establish the drain's condition prior to plaintiff's accident. At best, the court finds the photographs establish the condition immediately after the wheels of the fully loaded cart plaintiff pushed across the floor caught on the drain with such force that it bent the cart's aluminum wheels, a fact to which plaintiff testified.

{¶9} Finally, plaintiff presented no other evidence sufficient for the magistrate or the court to find defendant had constructive notice of any defect in the drain. For example, plaintiff did not present evidence of prior falls or of repairs to the drain prior to plaintiff's fall. Plaintiff himself offered no testimony he noticed or was informed of any defect with the drain before his fall. For these reasons, the court finds plaintiff failed to present evidence establishing constructive notice and, therefore, OVERRULES plaintiff's second and third objections.

{¶10} Plaintiff's fourth objection asserts, "[t]he Magistrate erred in ruling the record did not support regular inspection of the kitchen which should have revealed the hazard." To an extent, this objection is a restatement of plaintiff's arguments regarding

constructive notice. In support of this objection, plaintiff initially points to Ex. 3, the work order discussed in relation to plaintiff's second and third objections. The court finds plaintiff's reliance on the work order in support of this objection unavailing for the reasons already stated in its decision on plaintiff's second and third objections.

{¶11} Plaintiff also argues that regular inspections would have revealed there was a defect in the drain and points to an ODRC policy, policy 10SAF-08, which mandates weekly fire, safety and sanitation inspections. As already discussed, plaintiff did not present evidence establishing that the drain was defective before plaintiff's fall; the work order is devoid of dates while the photos were taken after plaintiff's fall by an unknown person at an unknown time. Without evidence establishing the length of time, if any, that the defect existed, prior to plaintiff's accident, there is no evidence that the defect would have been revealed during an inspection.

{¶12} Further, it is true that violations of internal rules and policies, though not supporting an independent claim, may be used to support a negligence claim. *Peters v. Dep't of Rehab. and Corr.*, 10th Dist. No. 14AP-1048, 2015-Ohio-2668, 2015 Ohio App. Lexis 2677, ¶ 10. However, despite plaintiff's assertion to the contrary, the evidence of record does not establish that defendant failed to perform and/or document the inspections required by 10SAF-08. Rather, the scant evidence relative to inspections failed to establish if inspections are performed, how they are performed, and who, if anyone, performs them.

{¶13} The only testimony on inspections came from PCI's maintenance supervisor Larry Parker who testified, in response to questions from plaintiff about inspections, that he has an employee assigned to the kitchen daily for maintenance, that his employees do not file reports but that there is a work order database, that PCI has a preventative maintenance program, and that "if there's something broke, we fix it." Plaintiff never asked whether Mr. Parker or his subordinates are responsible for the inspections required by 10SAF-08, who, if anyone is responsible for the inspections, or whether Mr. Parker has any personal knowledge regarding the inspections required by

10SAF-08. Though defendant could have but did not present evidence of the inspections, plaintiff nonetheless failed to prove that the inspections did not take place.

{¶14} Plaintiff did not present sufficient evidence establishing that required inspections would have revealed the defective drain or evidence that the required inspections did not occur. Therefore, the court OVERRULES plaintiff's fourth objection.

{¶15} Plaintiff's fifth and last objection asserts, “[t]he Magistrate's Decision is against the manifest weight of the evidence and is contrary to law.” This objection attacks the magistrate's decision as a whole and, to a large degree, summarizes arguments the court has already rejected relative to plaintiff's other objections. Further, the manifest weight standard, though applicable to civil cases, is normally applied to appellate review of verdicts. Manifest weight challenges require the challenging party “to demonstrate that the evidence could lead to only one conclusion and that conclusion is contrary to judgment.” *Galay v. ODOT*, 10th Dist. No. 05AP-383, 2006-Ohio-4113. 2006 Ohio App. Lexis 4049, ¶ 14. Where a judgment is supported by some competent, credible evidence, it is not against the manifest weight of the evidence. *Id.* However, when reviewing objections to a magistrate's decision, the trial court does not sit as a court of appeals. Rather, as indicated, the court's duty is to conduct an independent, *de-novo* review as to the objected matters and to determine whether the magistrate properly determined the facts and appropriately applied the law.

{¶16} Based on its *de novo* review of the record, the court finds the magistrate properly determined the facts and appropriately applied the law. Plaintiff failed to establish that defendant had notice, constructive or otherwise, regarding the broken floor drain which led to his fall. As already discussed, neither the pictures of the drain nor the post-accident work orders establish notice. In addition, Mr. Parker testified that PCI has a preventative maintenance program and that “if there's something broke, we fix it.” This testimony, as well as the lack of evidence regarding the length of time, if any, the defect existed supports the magistrate's conclusion that there was insufficient

evidence “to allow an inference that defendant’s not warning against [the broken drain] or repairing it resulted from a failure to exercise reasonable care.” Applying a manifest-weight standard, which is much more deferential to the underlying decision, does not change the result. Plaintiff fails to demonstrate that the evidence in the case could lead to only one conclusion. Rather, the evidence, as recited throughout this decision, is competent and credible and supports the magistrate’s decision. The court OVERRULES plaintiff’s fifth objection.

{¶17} The court finds the magistrate properly determined the facts and appropriately applied the law and OVERRULES plaintiff’s objections. Therefore, the court adopts the magistrate’s decision and recommendation as its own, including 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