

[Cite as *Evans v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-4323.]

WILLIAM H. EVANS, JR

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00732JD

Judge Patrick M. McGrath  
Magistrate Gary Peterson

DECISION

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{¶1} Plaintiff, William Evans, Jr., brought this action for negligence against defendant, Ohio Department of Rehabilitation and Correction (ODRC). The case went to trial before a magistrate of this court. The magistrate issued a decision recommending judgment in favor of ODRC. Plaintiff timely filed objections, which are now before the court for consideration. For the reasons set forth below, the court overrules plaintiff’s objections and adopts the magistrate’s decision as its own.

### **Background**

{¶2} At all times relevant to this case, plaintiff was an inmate in the custody and control of ODRC. According to his complaint, plaintiff was eating lunch at Ross Correctional Institution (RCI) in August 2014 when he bit into a hard object in his food. Plaintiff removed the object from his mouth and took it back to his cell. After rinsing the object, plaintiff concluded that it was the internal body part of a rodent. Plaintiff filed this negligence action against ODRC, seeking monetary damages and injunctive relief. His complaint was initially dismissed for failure to state a claim upon which relief can be granted. The Tenth District Court of Appeals reversed and remanded the decision back to this court for further proceedings. *Evans v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 15AP-463, 2015-Ohio-3492.

{¶3} Following the trial, the magistrate found that plaintiff failed to prove his negligence claim by a preponderance of the evidence. The magistrate determined that

plaintiff did, in fact, discover an object in his food. However, the magistrate determined that plaintiff failed to prove that the object was foreign to the lunch meal RCI served plaintiff—a noodle casserole with vegetables, beef, and either turkey or chicken. The magistrate considered it equally likely that the object was part of the food. Furthermore, the magistrate found that plaintiff failed to establish how the object ended up in his food. Finally, the magistrate found that plaintiff failed to offer any evidence that the object caused him any injury or damages.

{¶4} Plaintiff raises six objections to the magistrate’s decision: (1) the magistrate erred in refusing to consider documents plaintiff filed after the trial; (2) the magistrate erred in sustaining objections to evidence the plaintiff attempted to offer concerning prior lawsuits against RCI’s contracted food service provider; (3) the magistrate erred in finding that plaintiff failed to prove negligence by a preponderance of the evidence; (4) the magistrate erred in considering ODRC’s arguments at trial after ODRC failed to file a pretrial statement; (5) the magistrate erred in considering arguments that were barred by res judicata; and (6) the magistrate erred in sustaining objections to the admission of the written testimony of other inmates.<sup>1</sup>

### **Standard of Review**

{¶5} Civ.R. 53(D)(3)(b)(i) provides, “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

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<sup>1</sup>Plaintiff specifically identifies five objections to the magistrate’s decision, and uses all-capitalized, underlined headers to delineate each objection. However, before his first header, plaintiff discusses the magistrate’s alleged error in refusing to consider documents that plaintiff submitted to the court after the trial. (Objections at 1.) The court interprets this as an additional objection to the magistrate’s decision and considers it separately from plaintiff’s five specifically delineated objections.

Civ.R. 53(D)(4)(e)(i).” “Whether or not objections are timely filed, a court may adopt or reject a magistrate’s decision in whole or in part, with or without modification.” Civ.R. 53(D)(4)(b). 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.” Civ.R. 53(D)(4)(d). In reviewing the objections, the court does not act as an appellate court but rather conducts “a de novo review of the facts and conclusions in the magistrate’s decision.” *Ramsey v. Ramsey*, 10th Dist. Franklin No. 13AP-840, 2014-Ohio-1921, ¶ 17. (Internal citations omitted.) Objections “shall be specific and state with particularity all grounds for objection.” Civ.R. 53(D)(3)(b)(ii). They must be supported “by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if the transcript is not available.” Civ.R. 53(D)(3)(b)(iii).

{¶6} Plaintiff did not provide a transcript of the evidence to support his objections and instead filed an affidavit of evidence. “Civ.R. 53 does not provide an objecting party the option of filing an affidavit instead of a transcript where the transcript is available.” *Gill v. Grafton Corr. Inst.*, 10th Dist. Franklin No. 09AP-1019, 2010-Ohio-2977, ¶ 10. If the objecting party offers no explanation on the record for a failure to obtain a transcript, he cannot support his objections with an affidavit of evidence and the trial court cannot consider such an affidavit. *JP Morgan Chase Bank, N.A. v. Liggins*, 10th Dist. Franklin No. 15AP-242, 2016-Ohio-3528, ¶ 10; *see also Gordon v. Ohio Dept. of Rehab & Corr.*, 10th Dist. Franklin No. 15AP-1081, 2016-Ohio-3142, ¶ 19 (Court of Claims was not required to consider affidavit of evidence when nothing in the record indicates the transcript was unavailable to objecting party). When an objecting party fails to properly support his objections with 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. Plaintiff offers no explanation as to why he did not provide a transcript. Therefore, the

court cannot consider plaintiff's affidavit of evidence. Accordingly, the court accepts the magistrate's factual findings as true, and restricts its consideration of plaintiff's objections to a review of the magistrate's legal conclusions.

### **Plaintiff's First Objection**

{¶7} Plaintiff's first objection concerns the magistrate's refusal to consider two documents that plaintiff filed with the court after the trial. Six days after the trial, plaintiff filed a document labeled "Notice That Defendant Did Not File a Pretrial Statement [and] Post-Trial Information to Court." Thirteen days after the trial, plaintiff filed a second document labeled "Submission for Mandatory 'Judicial Notice' Under Evid.R.201(D) with Information on Damages and Theory of Recovery." In his decision, the magistrate acknowledged the two documents and determined, "the proceedings concluded on the day of the trial and plaintiff's documents filed thereafter will not be considered." (Decision of the Magistrate at 2.) Plaintiff contends the magistrate had no basis to refuse to consider plaintiff's post-trial filings. (Objections at ¶ 2.)

{¶8} In absence of a transcript, plaintiff can provide no evidence that the record was left open at the end of trial for the submission of additional evidence or post-trial arguments. Therefore, the court must accept the magistrate's finding that the proceedings concluded on the day of trial. The magistrate was under no obligation to consider evidence or arguments submitted after the close of proceedings. Nor is the court obligated to consider plaintiff's post-trial filings now. Civ.R. 53(D)(4)(d) provides, "Before [ruling on objections], the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate." Plaintiff has not demonstrated that either of his post-trial filings include evidence he could not have produced before the magistrate. To the contrary, plaintiff acknowledges that he "specifically argued [all] points brought in those documents in the trial." (Objections at ¶ 2.) Therefore, the court finds no basis to consider plaintiff's post-trial filings and no

basis to reverse or modify the decision of the magistrate due to the magistrate's refusal to consider those filings. Plaintiff's first objection is OVERRULED.

### **Plaintiff's Second and Sixth Objections**

{¶9} Plaintiff's second and sixth objections both concern evidentiary rulings the magistrate made during the trial. Both rulings excluded evidence that plaintiff attempted to introduce. Specifically, plaintiff contends the magistrate erred in twice sustaining ODRC's objections to and striking from the record statements the plaintiff made concerning the existence of other lawsuits against Aramark, the company contracted to provide food service at RCI. (Objections at ¶ 3-7). Plaintiff further contends that the magistrate erred in sustaining ODRC's hearsay objections to the admission of written statements plaintiff obtained from other inmates. (Objections at ¶ 15.)

{¶10} 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."). Without a transcript, the court cannot tell whether plaintiff proffered the excluded evidence or if the nature of the evidence was clear from the context.<sup>2</sup> Even assuming plaintiff did proffer the evidence,

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<sup>2</sup>Plaintiff states that the evidence concerning other lawsuits against Aramark was attached as Exhibit A to the "Submission for Mandatory 'Judicial Notice' Under Evid.R.201(D) with Information on Damages and Theory of Recovery" that plaintiff filed with the court after the trial. (Objections at ¶ 3.) Plaintiff also states that the written statements from other inmates that he attempted to introduce at trial were attached as exhibits to plaintiff's pretrial statement, filed February 19, 2019. (Objections at ¶ 15.) However, without a transcript of the proceedings or reviewable affidavit of evidence, the court cannot assume these exhibits are identical to the evidence excluded by the magistrate at trial.

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."). Plaintiff's second and sixth objections are OVERRULED.

### **Plaintiff's Third Objection**

{¶11} Plaintiff's third objection concerns the magistrate's ultimate conclusion that plaintiff failed to prove his claim of negligence by preponderance of the evidence. To the extent plaintiff's objection disputes the magistrates' factual findings, the court is unable to consider the objection. As noted above, plaintiff's failure to file a transcript or demonstrate that a transcript was unavailable requires the court to accept the magistrate's factual findings. These include the finding that plaintiff did not prove that there was a foreign object in his food, the finding that plaintiff did not prove how the object ended up in his food, and the finding that plaintiff did not suffer any injury or harm due to the object.

{¶12} In order to prevail on a negligence claim, a plaintiff must show: (1) defendant owed plaintiff a duty; (2) defendant breached that duty; and (3) defendant's breach proximately caused plaintiff's injury. *Ford v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 05AP-357, 2006-Ohio-2531, ¶ 10, citing *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565, 697 N.E.2d 198 (1998). There is no question that

ODRC owed plaintiff a duty. “Ohio law imposes a duty of reasonable care upon the state to provide for its prisoners’ health, care, and well-being.” *Ensman v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 06AP-592, 2006-Ohio-6788, ¶ 5. However, the relationship between a correctional institution and an inmate “does not expand or heighten the duty of ordinary reasonable care.” *Franks v. Ohio Dept. of Rehab. & Corr.*, 195 Ohio App.3d 114, 2011-Ohio-2048, 958 N.E.2d 1253, ¶ 12, quoting *Woods v. Ohio Dept. of Rehab. & Corr.*, 130 Ohio App.3d 742, 745, 721 N.E.2d 143 (10th Dist.1998). (Internal quotations omitted.)

{¶13} Plaintiff did not establish that ODRC breached its duty of reasonable care. Plaintiff never established by a preponderance of the evidence that there was a foreign object in his food. The evidence suggested that the object plaintiff encountered was just as likely to be a natural part of the food served for lunch at RCI that day. Even assuming the object was foreign, plaintiff did not establish by a preponderance of the evidence that its presence in his lunch was due to an act or omission attributable to ODRC.

{¶14} Plaintiff also provided no evidence that he suffered an injury. A plaintiff must prove actual injury to prevail on a claim for negligence. *Lautner v. Chen Chin Lin*, 10th Dist. Franklin No. 04AP-983, 2005-Ohio-4549, ¶ 16; see also 88 Ohio Jurisprudence 3d, Torts, Section 12 (“To constitute an actionable tort, the injury the tortious act has caused must be real and substantial and not imaginary.”). Plaintiff provided no evidence that he suffered actual harm of any sort due to the presence of the object in his food. Moreover, plaintiff does not assert in his objections that he suffered any specific, actual injury. Rather, plaintiff argues “there is automatic harm, when a person discovers a rodent part in is food and has it in his mouth, even if he spit it out.” (Objections at ¶ 9.) Aside from the fact that plaintiff did not prove by a preponderance of the evidence that the object in his food was a rodent part, plaintiff cites no Ohio law to support the assertion that the requirement of actual injury is

abrogated or presumptively met in cases involving rodent parts in food.<sup>3</sup> His failure to establish by a preponderance of the evidence that he suffered actual injury is fatal to his negligence claim. Plaintiff's third objection is OVERRULED.

#### **Plaintiff's Fourth Objection**

{¶15} Plaintiff's fourth objection concerns ODRC's failure to file a pretrial statement. Plaintiff contends that, because ODRC did not file a pretrial statement as required by the court's local rules, the magistrate erred in considering any of the arguments ODRC presented at trial.

{¶16} As an initial matter, the magistrate did not base any part of his decision on arguments or evidence presented by ODRC. To the contrary, the magistrate specifically noted that plaintiff's testimony was the only evidence presented at trial. (Decision of the Magistrate at 2.) The magistrate found that plaintiff failed to prove all elements of negligence by a preponderance of the evidence, and this finding was the sole basis for the magistrate's recommendation that judgment be entered in favor of ODRC. (Decision of the Magistrate at 3.) ODRC's failure to file a pretrial statement did not relieve plaintiff of the burden of proving his claim.

{¶17} Furthermore, the court is not obligated to enforce its local rules in every instance. "[C]ourts are given latitude in following their own local rules. As such, enforcement of such rules is generally within the sound discretion of the court." *Peterson v. Butikofer*, 10th Dist. Franklin No. 18AP-364, 2019-Ohio-2456, ¶ 18. Additionally, the local rules neither require the court to penalize a party for failing to file a pretrial statement nor impose automatic waiver of arguments as a penalty. L.C.C.R. 8(F) provides that "sanctions stated in Civil Rule 37(B)(1) may be assessed" for failure

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<sup>3</sup>The sole Ohio case cited by plaintiff on this point is *Stackhouse v. Steele Canning Co.*, 22 Ohio Misc. 1, 257 N.E.2d 424 (Lorain C.P. 1969). While that case involved the presence of a rodent foot in a can of food, the case was not a negligence action but an injunctive action brought by the Ohio Director of Agriculture to enforce compliance with a food safety statute. The case does not stand for the proposition that the presence of a rodent part in food automatically establishes injury in a negligence action.



to timely comply with the rules governing pretrial statements. (Emphasis added.) The plain language of this rule makes it clear that the court may choose not to sanction a party for failure to file a pretrial statement. Furthermore, Civ.R. 37(B)(1) lists a wide range of possible sanctions. Thus, even if the magistrate had sanctioned ODRC for failure to file a pretrial statement, that sanction need not necessarily have included a refusal to consider any arguments presented by the sanctioned party.

{¶18} Given the court's latitude in enforcing its local rules, the broad discretion provided by L.C.C.R. 8 itself, and the fact that ODRC did not call any witnesses or introduce other evidence at trial, the court finds that the magistrate did not err in considering ODRC's arguments despite its failure to file a pretrial statement. Plaintiff's fourth objection is OVERRULED.

#### **Plaintiff's Fifth Objection**

{¶19} Plaintiff's fifth objection concerns the doctrine of res judicata. Specifically, plaintiff argues the magistrate erred in allowing ODRC to present arguments about whether the object in plaintiff's food was a foreign object and whether ODRC was responsible for the object ending up in plaintiff's food. Plaintiff claims that the doctrine of res judicata barred ODRC from raising these arguments at trial because ODRC did not previously raise them before this court or the Tenth District Court of Appeals when the parties were litigating ODRC's motion to dismiss. (Objections at ¶ 12-13.)

{¶20} Under the doctrine of res judicata, "[a] valid, final judgment upon the merits bars all subsequent actions based upon any claim arising out of the same transaction or occurrence that was the subject matter of the previous action." *Grava v. Parkman Township*, 73 Ohio St.3d 379, 653 N.E.2d 226, paragraph one of the syllabus (1995). The doctrine is inapplicable in this case for two closely related reasons. First, no final judgment upon the merits was entered in this case before now. Plaintiff correctly points out that a dismissal for failure to state a claim upon which relief can be granted is a judgment upon the merits and implicates the doctrine of res judicata. *State ex rel. Acres*

*v. Ohio Dept. of Ohio Dept. of Jobs & Family Servs.*, 123 Ohio St.3d 54, 2009-Ohio-4176, 914 N.E.2d 170, ¶ 15. However, the appellate court reversed this court's dismissal for failure to state a claim. As a result, there was no final judgment upon the merits in this case prior to trial. Relatedly, neither the trial nor these objections are part of a *subsequent action* based on the same occurrence as a previous action. They are both part of the same case in which the motion to dismiss was argued before this court and the appellate court. Therefore, the doctrine of res judicata is inapplicable and plaintiff's fifth objection is OVERRULED.

### **Conclusion**

{¶21} The court finds that the magistrate properly determined the factual issues and appropriately applied the law in this case. Therefore, plaintiff's objections are OVERRULED. The court shall adopt the magistrate's decision and recommendation as its own, including all findings of fact and conclusions of law. Judgment shall be rendered in favor of defendant.

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PATRICK M. MCGRATH  
Judge

[Cite as *Evans v. Ohio Dept. of Rehab. & Corr.*, 2019-Ohio-4323.]

WILLIAM H. EVANS, JR

Plaintiff

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION

Defendant

Case No. 2014-00732JD

Judge Patrick M. McGrath  
Magistrate Gary Peterson

JUDGMENT ENTRY

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{¶22} Upon review of the record, the magistrate's decision and the objections, the court finds that the magistrate properly determined the factual issues and appropriately applied the law. Therefore, plaintiff's objections are OVERRULED. The court adopts the magistrate's decision and recommendation, including the findings of fact and conclusions of law contained therein, as its own. 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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PATRICK M. MCGRATH  
Judge

Filed September 3, 2019  
Sent to S.C. Reporter 10/21/19