[Cite as *Dillon v. Ohio Dept. of Rehab. & Corr.*, 2022-Ohio-2731.]

ANNA C. DILLON Plaintiff v. OHIO DEPARTMENT OF REHABILITATION AND CORRECTION Defendant	Case No. 2020-00158JD Judge Patrick E. Sheeran Magistrate Holly True Shaver DECISION

{¶1} Plaintiff, who at all relevant times was an inmate in the custody and control of Defendant, brought this action alleging that Defendant was negligent in harboring a dangerous dog that bit her and that Defendant improperly destroyed the notes that would have shown that the dog was dangerous. The case was tried before a Magistrate. On September 15, 2021, the Magistrate issued a Decision, in which she recommended judgment in favor of Defendant on both claims.

{¶2} On September 29, 2021, Plaintiff filed Objections to the Magistrate's Decision.[1] Within her Objections, Plaintiff requested leave to file the transcript within 30 days and to supplement the objections within 30 days following the filing of the transcript. However, the next day Plaintiff filed the transcripts and withdrew her request to supplement the objections. Plaintiff's Objections are now before the Court for consideration. For the reasons set forth below, the Court will overrule Plaintiff's objections.

Standard of Review

[1] Plaintiff entitled her Objections as "Objection to Magistrate's Decision," but she presents multiple objections therein.

{¶3} "A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision * * *." Civ.R. 53(D)(3)(b)(i). Objections "shall be specific and state with particularity all grounds for objection." Civ.R. 53(D)(3)(b)(ii). "An objection to a factual finding, whether or not specifically designated as a finding of fact * * *, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding * * *." Civ.R. 53(D)(3)(b)(iii).

{¶4} 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, ¶ 16-17. 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." Civ.R. 53(D)(4)(d). "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).

Procedural and Factual Background

{¶5} Plaintiff asserts in her Objections that the facts of this case are largely undisputed. (Objections, p. 3.) After this assertion, however, Plaintiff proceeds to cite as fact materials that were not admitted into evidence. Plaintiff cites a deposition given by Emily Hood. However, Hood testified during the trial, and her deposition was not

admitted into evidence.[2] Plaintiff similarly cites to her own deposition despite testifying at trial herself. Plaintiff does not request that the Court hear additional evidence or attempt to demonstrate, in accordance with Civ.R. 53(D)(4)(d), why the evidence was not available for consideration by the magistrate. Therefore**,** the Court will not consider Plaintiff's references to either deposition or any other deposition not admitted into evidence at trial.

{¶6} According to the evidence before the Court, Plaintiff was an inmate in the custody and control of Defendant at the Ohio Reformatory for Women at all times relevant to this action. While in prison, Plaintiff participated in a dog training program through the prison, Pawsabilities. Through the program, Plaintiff was instructed on how to care for and train different types of dogs. The inmates kept notes about the dogs in a folder for each dog regarding the dog's training history, preferences, and demeanor. When a dog was assigned to a new inmate, that inmate would receive the folder. That inmate then has the responsibility to write further notes about the dog in the folder. Other records for the program, such as the kenneling records, applications to the program, shot records, and owner information, are kept separately and are not accessible by the inmates.

{¶7} One of the dogs in the Pawsabilities program was named Roosevelt. Most of the dogs in the program rotated handlers, but Roosevelt was only regularly handled by two women, Emily Hood and Angel Jayne, due to his aggressive and reactive nature. Hood and Jayne were trained on aggressive, "alpha" dogs and experienced enough to assert dominance over Roosevelt. Hood testified that for the first few weeks she trained Roosevelt, she noted that she thought he was going to hurt someone.

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[2] During the trial, Plaintiff's counsel asked Hood about her deposition in order to refresh her memory. (Trial Transcript 380:14-16.) Hood disagreed with Plaintiff's counsel as to what Hood said in her deposition. Hood clarified that the only thing she ever said about Roosevelt hurting people was that he was going to hurt people. (Trial Transcript 385:15-23.) Plaintiff's counsel then moved on to another question. Hood's deposition was not offered or admitted into evidence. (Trial Transcript 574-577.)

{¶8} One time, Roosevelt went up on his hind legs and gnashed his teeth at Jayne when being handled by her, in order to assert dominance. Jayne flipped him over and laid him on his back, as she had been trained to do, in order to reassert dominance. During the tussle, Roosevelt scratched Jayne, which left a scar. Jayne informed Jeffrey Coleson, the unit manager in charge of the Pawsabilities program, of the scratch. She also noted the incident in Roosevelt's folder. According to Plaintiff, there were two other times that Roosevelt stood up on his hind legs and was aggressive with a certain passive trainer. Plaintiff took Roosevelt from the passive trainer each time and put him in his kennel. Plaintiff also testified that Roosevelt sometimes growled and bared his teeth at other dogs, but never bit the other dogs or got in an actual fight. Nor had Roosevelt bitten a person before he bit Plaintiff. Plaintiff testified that Roosevelt had previously mouthed or nipped people; however, she and other witnesses distinguished such nips and mouthing from a bite. A bite pierces the skin; a nip does not pierce the skin.

{¶9} Hood asked Plaintiff to walk Roosevelt while Hood attended a class on March 19, 2018. Plaintiff really liked Roosevelt and agreed to walk him. Plaintiff had handled Roosevelt previously in her role as a residential advisor, including walking him to a room and putting him in his kennel. Plaintiff agreed to take Roosevelt on a walk while Hood attended her class. A few days before Plaintiff walked Roosevelt on her own, she walked him with Hood, to make sure Roosevelt would respond to her. Roosevelt responded to Plaintiff and did not bite anyone during that walk.

{¶10} On the morning of March 19, Plaintiff approached Roosevelt's kennel. He was wagging his tail. She gave him a cookie, and they played for a few minutes with him still in the kennel. She asked him if he needed to "hurry," which is how the inmates ask the dogs if they need to eliminate. He signaled that he did, and she turned around to pick up the collar. When she went to put the collar around his neck, he went "whale-eyed," which is a sign that a dog is about to bite. Plaintiff had time to let go, but Roosevelt bit

her first arm. She then backed away from him, but he kept coming at her, biting both arms. She managed to back up to the door, exit the room, and slam the door to keep him in. She then reported the bites and sought medical care. Plaintiff suffered a total of 16 puncture wounds between both arms. Roosevelt was removed from the Pawsabilities program.

{¶11} Coleson, the unit manager in charge of Pawsabilities, testified that there was no specific retention policy for the inmate handler notes at the time of the attack. He himself did not consider the inmate notes to be records of the institution because they were inmate to inmate communications. He further testified that when an audit is performed for the Pawsabilities program's records, the audit does not cover the inmate handler notes. By the time Coleson knew that Plaintiff had hired an attorney—several months after the incident—the inmate handler notes for Roosevelt had already been destroyed. Katrina Custer, one of the inmate secretaries for the dog training program, testified that the inmate handler folder for Roosevelt would have been discarded 90 days after he left the program according to the normal practice for the program. Angela Yaeger, the inmate program secretary for the dog program, also testified that the inmate handler notes were inmate-to-inmate communications, and the staff normally did not look at them. She further testified that she discarded the files for dogs who had left the program when the filing cabinet became full.

Plaintiff's Objections to the Magistrate's Decision

{¶12} Plaintiff raises four objections to the Magistrate's Decision. First, Plaintiff objects to the Magistrate's finding that Plaintiff failed to prove that Roosevelt was vicious. Second, Plaintiff objects to the Magistrate's finding that "Defendant did not know or should have, of Roosevelt's viciousness." Third, Plaintiff objects to the Magistrate's finding that Roosevelt was not kept in a negligent manner after Defendant knew of his viciousness. Fourth, Plaintiff objects to the Magistrate's finding that Defendant's employees destroyed the available notes about Roosevelt because he was no longer at the institution.

Plaintiff's First, Second, and Third Objections

{¶13} Plaintiff objects to the magistrate's finding that Plaintiff failed to prove that Roosevelt was vicious. "[I]n a common law action for bodily injuries caused by a dog, a plaintiff must show that (1) the defendant owned or harbored the dog, (2) the dog was vicious, (3) the defendant knew of the dog's viciousness, and (4) the dog was kept in a negligent manner after the keeper knew of its viciousness." *Beckett v. Warren*, 124 Ohio St.3d 256, 2010-Ohio-4, 921 N.E.2d 624, ¶ 7. Perhaps because there is statutory cause of action that provides for strict liability, the Court was unable to find a bright line standard for when a dog is vicious for purposes of common law.[3] Nevertheless, one thing that is clear within Ohio case law is that once a dog bites or otherwise attacks someone, it is thereafter considered to be vicious. *See Maggard v. Pemberton*, 178 Ohio App.3d 382, 2008-Ohio-4735, 897 N.E.2d 1168 (2d Dist.); *see also Volz v. Hudson*, 761 N.E.2d 711 (M.C.2001); *Beckett*, at ¶ 15 (contrasting a statutory claim with the common law by commenting that the statutory claim was intended not to permit "one free bite"); *Croley v. Moon Enters.*, 118 Ohio Misc.2d 151, 2001-Ohio-4366, 770 N.E.2d 148 (C.P.) (dog was not vicious because it had not previously bitten).

{¶14} The evidence before the Court indicates that Roosevelt at various times nipped, mouthed, lunged at, stoop up on his hind legs, and scratched inmate handlers. One time, a handler had to roll him in order to assert dominance and received a scratch in the tussle. However, Roosevelt did not bite[4] or otherwise seriously attack anyone prior to attacking Plaintiff.

{¶15} In support of her assertion that Roosevelt was vicious despite not previously biting someone, Plaintiff cites *Pickett v. Ohio Dept. of Rehab. & Corr.*, Ct. of Cl. No. 2000-

[3] The Court previously concluded that Plaintiff, as a matter of law, could not prevail on a claim pursuant to R.C. 955.28(B). (Judgment Entry, May 3, 2021.)

[4] As distinguished from mouthing or a nip.

02755JD, 2001-Ohio-3960. *Pickett* also involved an inmate plaintiff who participated in a prison dog training program. On the dog's first day in the program, he lunged at an inmate and then lunged at a correction officer. The prison decided not to remove the dog, and it later attacked and bit an inmate. Though the prison did not have knowledge of the dog previously biting anyone, the court concluded that defendant had notice of the vicious propensity of the dog because it lunged at both the inmate and the officer.

{¶16} Nevertheless, the facts of this case are distinct from *Pickett*. The vicious propensity of the dog in *Pickett* was immediately apparent. That dog displayed two instances of aggressive behavior in just one day. Furthermore, one of the lunges was directed towards—and thus witnessed by—a correction officer. In contrast, the testimony in this case established that Roosevelt had been in the Pawsabilities program for a long time, and—though aggressive—he was generally regarded to be a safe dog. Every witness who was asked testified that they were surprised that Roosevelt attacked Plaintiff.

{¶17} The Ohio General Assembly has defined a vicious dog as "a dog that, without provocation and subject to division (A)(6)(b) of this section, has killed or caused serious injury to any person." R.C. 955.11(A)(6)(a).

> "Serious injury" means any of the following:
>
> (a) Any physical harm that carries a substantial risk of death;
>
> (b) Any physical harm that involves a permanent incapacity, whether partial or total, or a temporary, substantial incapacity;
>
> (c) Any physical harm that involves a permanent disfigurement or a temporary, serious disfigurement;
>
> (d) Any physical harm that involves acute pain of a duration that results in substantial suffering or any degree of prolonged or intractable pain.

R.C. 955.11(A)(5).

{¶18} Under the definition set forth in R.C. 955.11, the Court cannot conclude that Roosevelt was vicious prior to biting Plaintiff. None of his previous behavior caused a

serious injury. When Roosevelt scratched Jayne, it left a scar. But she did not describe the scratch as a serious injury, and in the absence of such testimony, or other evidence (e.g. photographic), the Court cannot infer that it was one. *See Henry Cty. Dog Warden v. Henry Cty. Humane Soc.*, 2016-Ohio-7541, 64 N.E.3d 1076 (3d Dist.) (A dog that scratched and bit two children, with non-severe bites, was deemed "dangerous" under the same statutory scheme.). Furthermore, the description of the scar—which was not shown—cannot be said, based on the evidence, to amount to a disfigurement.

{¶19} The Court concludes that Roosevelt could not have been considered vicious under any of the standards set forth above prior to attacking Plaintiff. Therefore, the Court OVERRULES Plaintiff's first objection. Furthermore, because Plaintiff's second and third objections also rely on Roosevelt being vicious, the Court OVERRULES Plaintiff's second and third objections.

Plaintiff's Fourth Objection

{¶20} Plaintiff objects to the Magistrate's finding that Defendant's employees destroyed the available notes about Roosevelt because he was no longer at the institution. Plaintiff argues that the Court should instead find that the destruction of the notes constituted spoliation. Ohio recognizes the tort of intentional spoliation of evidence, which consists of the following elements:

> (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt the plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts[.]

Smith v. Howard Johnson Co., 67 Ohio St.3d 28, 29, 1993-Ohio-229, 615 N.E.2d 1037.

{¶21} As a preliminary matter, Plaintiff requests that the Court allow the list of record retention policies to be admitted into evidence. Plaintiff's request is unclear as to whether she is describing Plaintiff's Exhibit 2, which was already admitted into evidence

during the trial, or whether she intends for the Court to download the specific policies from Defendant's website. While the Court will consider Plaintiff's Exhibit 2, it will not access Defendant's website to download the specific policies described in Exhibit 2. Furthermore, a cause of action based on the failure of an agency to follow its records retention schedule—pursuant to R.C. 149.351(B)—is separate and distinct from a spoliation claim, and this Court does not have jurisdiction over such a claim. *Patriot Water Treatment, LLC v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 13AP-370, 2013-Ohio-5398.

{¶22} The evidence before the Court clearly shows that the inmate handler notes were destroyed and thus not available for Plaintiff to use in her case. However, Plaintiff has not presented any evidence that the notes were destroyed willfully in order to disrupt her case. Instead, Plaintiff merely refers to various retention schedules and requests that the Court infer a nefarious purpose behind the destruction of the notes. However, the evidence suggests an innocent—or, at the very worst, negligent[5]—purpose. Coleson, the unit manager, credibly testified that he did not consider the notes taken by the inmate handlers to be records of the institution. The testimony of Custer and Yeager, the inmate secretaries, differed some as to when they would discard the folders for dogs who left the program. But regardless of who discarded the folder for Roosevelt, Custer or Yeager, there is no evidence that they discarded it in order to disrupt Plaintiff's case. Furthermore, the two inmate handlers who regularly dealt with Roosevelt—and thus would have written notes in the folder—testified as to what they wrote about him. So Plaintiff has not shown that the destruction of the notes disrupted her case. Therefore, even if Defendant should have known that litigation involving Plaintiff was probable, Plaintiff has failed to establish a prima facie case of spoliation. Accordingly, the Court OVERRULES Plaintiff's fourth objection.

[5] "Ohio does not recognize a cause of action for negligent spoliation of evidence." *Marok v. Ohio State Univ.*, 10th Dist. Franklin No. 13AP-12, 2014-Ohio-1184, ¶ 36.

Conclusion

{¶23} The Court finds that the Magistrate has properly determined the factual issues and appropriately applied the law in this case. Therefore, Plaintiff's objections shall be overruled. The Court shall adopt the Magistrate's Decision and recommendation and its own, including all findings of fact and conclusions of law. Judgment shall be rendered in favor of Defendant.

PATRICK E. SHEERAN
Judge

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{¶24} Upon an independent, de novo review of the record, the Magistrate's Decision, and Plaintiff's objections, the Court finds that the Magistrate properly determined the factual issues and appropriately applied the law. Therefore, Plaintiff's objections are OVERRULED, and 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. Plaintiff's motion for a pretrial status conference is DENIED as moot. 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 E. SHEERAN
Judge

Filed June 6, 2022
Sent to S.C. Reporter 8/8/22