

[Cite as *Gill v. Grafton Corr. Inst.*, 2010-Ohio-2977.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ali Gill,	:	
	:	
Plaintiff-Appellant,	:	
	:	No. 09AP-1019
v.	:	(C.C. No. 2005-09847)
	:	
Grafton Correctional Institution,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on June 29, 2010

Swope and Swope – Attorneys at Law, and Richard F. Swope, for appellant.

Richard Cordray, Attorney General, *John P. Reichley*, and *Daniel R. Forsythe*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, Ali Gill ("Gill"), appeals the judgment of the Court of Claims of Ohio in favor of defendant-appellee, Grafton Correctional Institution ("GCI"), on Gill's claim for compensatory damages for injuries he allegedly sustained in a fall. For the following reasons, we reverse.

{¶2} Gill, an inmate housed at GCI, initiated this action on September 19, 2005, by filing a complaint against GCI in the Court of Claims. On March 10, 2004, Gill was transferred from the Special Management Unit ("SMU") at GCI to Unit D2, a dormitory-style living unit. According to Gill, he told various GCI employees that he would be unable to see when the Unit D2 lights were turned off at night due to his blindness in one eye and visual impairment in the other eye, and, also, that he had a medical restriction, requiring that he be housed in a non-smoking unit, which Unit D2 was not. Gill alleged that, at approximately 3:30 a.m. on March 15, 2004, he arose from bed to use the restroom and, in route, tripped over a garbage can at the foot of another inmate's bed and fell to the floor, striking his face. Gill alleged that GCI breached duties owed him by "willfully choos[ing] not to act to correct the dangerous situations [GCI] placed [him] in," causing him severe damage, pain, and suffering. GCI admitted Gill's inmate status and transfer from SMU to Unit D2, but denied Gill's remaining allegations.

{¶3} A bifurcated trial on the issue of liability was held before a magistrate on August 7, 2007. The magistrate issued a decision on June 12, 2009, recommending judgment for GCI. Although not expressly delineated, the magistrate's decision included findings of fact and conclusions of law. In part, the magistrate stated as follows:

Plaintiff testified that he is blind in his right eye and has had four surgeries on his left eye. As a result, he carries a permanent "non-smoking" restriction that prevents him from being placed in housing units where smoking is permitted because the smoke "bothers" his eyes. Plaintiff submitted a medical restriction form dated December 7, 2000, that states he "is to be placed in a non-smoking pod, when one is available"; it is further labeled "permanent." * * * Plaintiff further testified that he has been granted accommodations under the Americans with Disabilities Act (ADA) because of

his poor vision. These accommodations include being permitted to possess special magnifiers to aid in reading and being provided with a special badge that designates him as visually impaired. * * *

* * * Plaintiff stated that smoking is permitted in D2, that the lights are shut off after the evening "count" at approximately 9:30 p.m., and that the "night lights" are not bright enough for him to see where he is going. * * *

The magistrate also cited testimony by Michelle Viets, RN, Healthcare Administrator for GCI, that the "'when available' designation on [Gill's] non-smoking medical restriction meant that the restriction was not medically necessary and that the inmate had simply made a request for a non-smoking housing assignment."

{¶4} Noting the "when available" language in Gill's non-smoking restriction and the lack of Americans with Disabilities Act accommodations specifying that Gill was to be placed in a well-lit housing unit, the magistrate concluded that GCI did not owe Gill a duty to place him in either a non-smoking or well-lit housing unit and that Gill's placement in Unit D2 was not unreasonable. The magistrate further concluded that Gill did not act reasonably to ensure his own safety at the time of his fall because, although he was aware of his vision impairment and the location of the garbage can, he did not request assistance to travel to the restroom or to relocate the garbage can. Finally, the magistrate found that an inmate's claims regarding the conditions of his confinement arise under 42 U.S.C. 1983 and are not actionable in the Court of Claims. Thus, to the extent Gill raised such claims, the magistrate concluded that they were not properly before the court.

{¶5} On July 30, 2009, having already been granted an extension of time to object to the magistrate's decision, Gill moved for a second extension, stating that he could not afford the cost of a transcript and that he needed additional time to prepare an App.R. 9(C) statement in support of his objections. The trial court granted a second extension, until August 31, 2009, "to prepare an affidavit pursuant to Civ.R. 53(D)(3)(b)(iii)." On August 27, 2009, Gill filed objections to the magistrate's decision along with a statement of proceedings "for settlement, approval and inclusion in the record," pursuant to App.R. 9(C). Gill also filed an affidavit of indigency. On September 9, 2009, GCI moved for an extension of time to respond to Gill's objections and App.R. 9(C) statement, stating, in part, that it was researching the appropriateness of an App.R. 9(C) statement in support of objections to a magistrate's decision. The trial court did not rule on GCI's motion.

{¶6} On September 28, 2009, the trial court summarily overruled Gill's objections, adopted the magistrate's decision, and entered judgment in favor of GCI. The court cited Civ.R. 53(D)(3)(b)(iii), which states that an objection to a magistrate's factual finding "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." The court stated that, when a transcript can be produced, the transcript is available and must be furnished in support of objections to a magistrate's decision. The court therefore concluded that the transcript was not unavailable despite Gill's claim that he could not afford the transcription. Accordingly, the court rejected Gill's statement of the proceedings without addressing whether that statement would be sufficient upon a finding

of unavailability. Although Gill subsequently filed a motion for reconsideration and for leave to file an affidavit affirming the accuracy of the statement of proceedings, the trial court denied the motion as a nullity.

{¶7} Gill filed a timely notice of appeal, and he presently raises the following assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED WHEN IT FAILED TO PROVIDE [GILL] WITH A SETTLED 9(C) OR RULE 53 RECORD, [GILL] HAVING ESTABLISHED HIS INDIGENCY.

ASSIGNMENT OF ERROR NO. 2:

THE TRIAL COURT AND MAGISTRATE ERRED IN RULING [GCI] HAD NO DUTY TO PLACE A VISUALLY IMPAIRED INMATE IN A CELL OR A LIGHTED AREA SO HE WOULD NOT FALL OVER OBJECTS HE COULD NOT SEE.

ASSIGNMENT OF ERROR NO. 3:

THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN RULING [GILL] DID NOT CLAIM ACCOMMODATION UNDER HIS ESTABLISHED STATUS AS A VISUALLY IMPAIRED PERSON.

ASSIGNMENT OF ERROR NO. 4:

THE TRIAL COURT AND MAGISTRATE ERRED IN RULING [GILL'S] KNOWLEDGE A GARBAGE CAN WAS IN THE AISLE PROTECTED [GCI] FROM LIABILITY WHEN IT WAS CLEAR [GILL] WAS PARTIALLY BLIND, IT WAS 3:00 A.M. AND THERE WAS NO ONE IMMEDIATELY AVAILABLE TO ASSIST [GILL].

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT AND MAGISTRATE ERRED IN RULING THE CLAIM WAS MADE AS DELIBERATE INDIFFERENCE UNDER TITLE 42, §1983, SINCE THE CLAIM WAS BASED

ON [GCI'S] FAILURE TO HONOR [GILL'S] VISUAL IMPAIRMENT AND ACCOMMODATE HIS CONDITION UNDER THE AMERICANS UNDER DISABILITY ACT, ALL OF WHICH CONSTITUTE[S] NEGLIGENCE.

ASSIGNMENT OF ERROR NO. 6:

THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY RULED THE PERMANENT RESTRICTION AUTOMATICALLY TERMINATED WITHOUT NOTICE TO [GILL], THE CURRENT MEDICAL RESTRICTION POLICY HAD NOT GONE INTO EFFECT UNTIL JUNE 1, 2004, AND THERE BEING NO OTHER GUIDELINES OFFERED TO JUSTIFY [GCI'S] POSITION AND EVIDENCE IS CLEAR THE RESTRICTION WAS HONORED UNTIL APPELLANT WAS PLACED IN SEGREGATION.

ASSIGNMENT OF ERROR NO. 7:

THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY FOUND NO NEGLIGENCE IN [GCI] IGNORING [GILL'S] PERMANENT PHYSICAL IMPAIRMENT IN LIGHT OF HIS AMERICANS UNDER DISABILITY ACT, A PRIOR PERMANENT RESTRICTION AND CLEAR ACKNOWLEDGEMENT BY [GCI] HE WAS DISABLED.

{¶8} By his first assignment of error, Gill contends that the trial court erred by not considering his statement of proceedings, under either App.R. 9(C) or Civ.R. 53, in support of his objections to the magistrate's decision. Gill filed his statement of proceedings, purportedly pursuant to App.R. 9(C), as an alternative to a transcript, claiming that he was unable to afford a transcript of the evidence submitted to the magistrate. The trial court refused to consider Gill's statement of proceedings after concluding that the transcript of the evidence submitted to the magistrate was available and that, therefore, pursuant to Civ.R. 53(D)(3)(b)(iii), Gill was required to file the transcript in support of his objections. The trial court did not mention App.R. 9(C) in its

judgment entry. The issue under this assignment of error essentially resolves to whether the transcript of proceedings before the magistrate was available.

{¶9} Civ.R. 53(D)(3)(b) governs objections to a magistrate's decision, and Civ.R. 53(D)(3)(b)(iii) provides, in part, as follows:

* * * An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), 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. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. * * *

App.R. 9(C) addresses the record on appeal and provides, in pertinent part, as follows:

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement shall be served on the appellee * * * who may serve objections or propose amendments to the statement * * *. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. The trial court shall act prior to the time for transmission of the record pursuant to App.R. 10, and, as settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal.

App.R. 9(C) is not directly relevant to the trial court's proceedings on Gill's objections because the appellate rules "govern procedure in appeals to courts of appeals from the trial courts of record in Ohio." App.R. 1(A). Nevertheless, judicial interpretations and applications of App.R. 9(C) inform our decision with respect to the availability of a transcript under Civ.R. 53(D)(3)(b)(iii).

{¶10} Although App.R. 9(C) addresses the record on appeal and Civ.R. 53(D)(3)(b)(iii) addresses the record before the trial court on objections to a magistrate's

decision, both authorize alternatives to the requirement of filing a transcript where a transcript is unavailable. Citing *Gladden v. Grafton Correctional Inst.*, 10th Dist. No. 05AP-567, 2005-Ohio-6476, the trial court rejected Gill's argument that a transcript was unavailable based on his indigency. In *Gladden* at ¶7, this court stated that "[a] transcript is not unavailable merely because the original stenographic notes have not been transcribed or because a party elects not to order a transcript of the proceedings. Where a transcript can be produced, the transcript is available and must be provided to the trial court in support of objections to a magistrate's decision." We stated that Civ.R. 53 does not provide an objecting party the option of filing an affidavit instead of a transcript where the transcript is available. The appellant in *Gladden*, however, did not offer any reason why a transcript of the proceedings before the magistrate was unavailable, nor did he claim that he could not afford a transcript. Thus, while *Gladden* established that a transcript is not unavailable merely because an objecting party has not ordered a copy, it does not answer the question of whether a transcript is unavailable to an indigent party for purposes of Civ.R. 53.

{¶11} The Supreme Court of Ohio has addressed the meaning of "unavailable" in the context of App.R. 9(C) and rejected the contention that "unavailable" refers only to physical unavailability. See *State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56. Stating that an App.R. 9(C) narrative statement "is an available, reliable alternative" to an appellant who cannot afford a transcript, the court held that "a transcript is unavailable for the purposes of App.R. 9(C) to an indigent appellant unable to bear the cost of providing a transcript." *Id.* at 58. The Supreme Court reasoned that defining "unavailable" for

purposes of App.R. 9(C) as only physically unobtainable "would significantly limit the indigent appellant's right to appeal." *Id.* The court based its conclusion on civil litigants' statutory right to appeal an adverse judgment from a lower court, coupled with the requirement that the appealing party, in order to exercise that right, must ensure that the trial court transcript is sent to the court of appeals for review. This court has described the Supreme Court's holding in *Motley* as well-settled. See *Murphy v. Dept. of Rehab. & Corr.* (Nov. 18, 1993), 10th Dist. No. 93AP-521.

{¶12} Relying on cases construing availability under App.R. 9(C), Gill contends that a transcript was similarly unavailable to him for purposes of supporting his objections to the magistrate's decision. Gill has not cited any case holding that a transcript is unavailable under Civ.R. 53 as a result of the objecting party's indigency, and this court's research has not uncovered any Ohio case law addressing that precise question. Nevertheless, the Fifth District Court of Appeals has treated a statement of the evidence under App.R. 9(C) as "the functional equivalent" of a Civ.R. 53 affidavit and concluded that a trial court did not err in addressing objections to a magistrate's decision by reference to an App.R. 9(C) statement in the absence of either a transcript or a sworn affidavit under Civ.R. 53. See *Zartman v. Swad*, 5th Dist. No. 02CA86, 2003-Ohio-4140, ¶¶69-70, 79. The unavailability of a transcript in that case, however, was unrelated to the objecting party's ability or inability to pay for a transcript.

{¶13} After careful consideration, we discern no persuasive basis for concluding that, although a transcript is unavailable to an indigent appellant for purposes of App.R. 9(C), a transcript is not similarly unavailable for purposes of supporting an indigent party's

objections to a magistrate's decision under Civ.R. 53. Civ.R. 53(D)(3)(b)(iii) requires an objecting party to support any objection to a magistrate's factual findings with a transcript unless a transcript is unavailable, in which case the party may submit an affidavit of the evidence submitted to the magistrate instead. Absent an objecting party's compliance with Civ.R. 53(D)(3)(b)(iii), the trial court must accept the magistrate's factual findings and may only examine the legal conclusions drawn from those facts. *Farmers Mkt. Drive-In Shopping Ctrs., Inc. v. Magana*, 10th Dist. No. 06AP-532, 2007-Ohio-2653, ¶¶27-28, citing *Forth v. Gerth*, 10th Dist. No. 05AP-576, 2005-Ohio-6619, ¶9; *In re Estate of Haas*, 10th Dist. No. 07AP-512, 2007-Ohio-7011, ¶23, citing *Wade v. Wade* (1996), 113 Ohio App.3d 414, 418. Thus, a holding that a transcript is available, despite an indigent party's inability to pay for it, would effectively preclude the indigent party from challenging the magistrate's findings of fact with objections, as authorized by Civ.R. 53.

{¶14} A holding that a transcript is available, despite an indigent party's inability to pay for it, would also effectively preclude the indigent party from challenging the magistrate's findings of fact on appeal. In order to appeal the magistrate's findings of fact, the appellant must have first objected to those findings in the trial court; "if a party fails to object to a magistrate's finding or conclusion, that party waives the right to challenge the finding or conclusion on appeal." *Patrick v. Ressler*, 10th Dist. No. 04AP-149, 2005-Ohio-4971, ¶25, quoting *Brott Mardis & Co. v. Camp*, 147 Ohio App.3d 71, 2001-Ohio-4349, ¶22. In addition, where a party files objections to a magistrate's decision in the trial court, but does not support those objections with a transcript or affidavit, that party is precluded from arguing on appeal that the trial court erred in its

factual determinations. See *Baddour v. Rehab. Servs. Comm.*, 10th Dist. No. 04AP-1090, 2005-Ohio-5698, ¶28; *Schofield v. Benton* (Aug. 20, 1992), 10th Dist. No. 92AP-161. The orderly procedure established by Civ.R. 53 "would be substantially upset if the objecting party could bypass the trial court and ask the court of appeals to review the transcript and to find error on the part of the trial court even though * * * the trial court did not err by adopting the [magistrate's] factual finding without further consideration" in the absence of a transcript or other acceptable record under Civ.R. 53. *Schofield*, quoting *Stearns v. Stearns* (Dec. 11, 1990), 10th Dist. No. 90AP-785. Thus, defining a transcript as unavailable for purposes of Civ.R. 53(D)(3)(b)(iii) only where the transcript is physically unavailable not only essentially prohibits an indigent party from maintaining objections to the magistrate's factual findings in the trial court, but also directly impacts the indigent party's right to appeal those findings.

{¶15} A holding that an indigent party's inability to afford a transcript does not render the transcript unavailable for purposes of Civ.R. 53(D)(3)(b)(iii) would also create an interesting paradox. Under that scenario, the trial court would be entitled to summarily overrule an indigent party's objections to a magistrate's findings of fact for lack of a transcript. On appeal, however, the objecting party would be entitled to take advantage of App.R. 9(C) and provide the appellate court with an alternative record of the trial court proceedings because, under App.R. 9(C), the party's indigency equates to unavailability of the transcript. See *Motley*. Nevertheless, the appellate court would be precluded from considering the App.R. 9(C) statement in its review of the trial court's adoption of the magistrate's decision. "When a party objecting to a [magistrate's decision] has failed to

provide the trial court with the evidence and documents by which the court could make a finding independent of the [decision], appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision], and the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St.3d 728, 730, 1995-Ohio-272. See also *Schofield* ("where * * * a party objects to the trial court's adoption of the referee's findings of fact without filing in the trial court a transcript or affidavit, our review of the case on appeal is premised on the referee's findings of fact adopted by the trial court"); *Daniel v. Daniel*, 2d Dist. No. 2005CA9, 2006-Ohio-411, ¶13, citing *High v. High* (1993), 89 Ohio App.3d 424 ("[w]e are precluded from considering the transcript that was filed in relation to the error assigned on appeal because the transcript was not before the trial court when it overruled * * * objections to the magistrate's decision").

{¶16} Upon review of the cited authorities and Gill's affidavit of indigency, we conclude that the trial court erred by concluding that the transcript of the liability trial before the magistrate was available, thus precluding Gill from utilizing an alternative method of putting the evidence before the court for purposes of ruling on Gill's objections to the magistrate's factual findings. Because this was the only basis given by the trial court for its rejection of Gill's statement of proceedings and its adoption of the magistrate's decision, we reverse the trial court's judgment. Nevertheless, we recognize that there remains a question as to whether Gill's statement of proceedings is an appropriate means of supporting his objections to the magistrate's decision, even where

a transcript is unavailable. The trial court did not decide that question, however, and we decline to address it in the first instance on appeal. Instead, the trial court should make that determination on remand and proceed accordingly.

{¶17} For these reasons, we sustain Gill's first assignment of error, as stated in this decision, reverse the judgment of the Court of Claims of Ohio, and remand this matter to that court for further proceedings. As a result, Gill's remaining assignments of error are rendered moot.

Judgment reversed and cause remanded.

CONNOR, J., concurs in judgment only.
SADLER, J., dissents.

SADLER, J., dissenting.

{¶18} Being unable to agree with the majority's disposition of appellant's first assignment of error, I respectfully dissent.

{¶19} The magistrate's decision in this matter was filed with the trial court on June 12, 2009. On June 17, 2009, appellant filed a motion seeking a 45-day extension of the time period for filing objections to the magistrate's decision, stating that the extension was necessary to determine whether funds were available to obtain the transcript necessary to support objections to the magistrate's decision. The trial court granted the extension, stating that appellant could file any objections to the magistrate's decision on or before August 10, 2009.

{¶20} On July 30, 2009, appellant filed a motion seeking a second extension of time for filing objections. The reason given for the extension was that appellant could not afford to pay for preparation of the transcript, and wished to instead prepare "a 9(C)

statement" in order to support the objections to be filed. Nowhere in the motion did appellant make any mention of a desire to file an affidavit, pursuant to Civ.R. 53(D)(3)(b)(iii), instead of a transcript.¹ In granting the second extension, the trial court recast appellant's motion as one seeking to file a Civ.R. 53(D)(3)(b)(iii) affidavit, and granted the extension for that purpose.

{¶21} Rather than filing an affidavit conforming with Civ.R. 53(D)(3)(b)(iii), appellant filed an App.R. 9(C) statement of proceedings in support of his objections to the magistrate's decision. In overruling the objections, the trial court focused on the provision in Civ.R. 53(D)(3)(b)(iii) that allows use of an affidavit to support objections to a magistrate's decision when a transcript is not available, and concluded that the indigence of a party does not render the transcript unavailable for purposes of allowing that party to provide an affidavit rather than the transcript in support of the objections.

{¶22} In his first assignment of error, appellant urges reversal based on the trial court's failure to provide him with a "settled [App.R.] 9(C) or [Civ.R.] 53 record." Although the trial court focused on whether appellant could have used a Civ.R. 53(D)(3)(b)(iii) affidavit rather than a transcript in this case, I believe that analysis is irrelevant because the evidentiary material offered by appellant to support his objections did not comport, or even purport to comport, with Civ.R. 53(D)(3)(b)(iii), instead relying only on App.R. 9(C) as the basis.

¹ It should be noted that Civ.R. 53(D)(3)(b)(iii) only requires provision of a transcript or affidavit to support objections to a magistrate's findings of fact. A party objecting to the magistrate's conclusions of law is not required to file a transcript or affidavit in support of such objections.

{¶23} The pleading designated as an App.R. 9(C) statement by appellant cannot be treated as an affidavit under Civ.R. 53(D)(3)(b)(iii) for two reasons. First, the pleading does not appear in the form of an affidavit, i.e., there is nothing in the pleading stating that it was being made under oath and sworn to before a proper officer. Second, an affidavit provided under Civ.R. 53(D)(3)(b)(iii) must contain a description of " 'all the relevant evidence presented at the hearing, not just the evidence that the objecting party feels is significant.' " *Levine v. Brown*, 8th Dist. No. 92862, 2009-Ohio-5012, ¶18, quoting *In re E.B.*, 8th Dist. No. 85035, 2005-Ohio-401, ¶11.

{¶24} The trial court provided appellant with an opportunity to support his objections with an affidavit under Civ.R. 53(D)(3)(b)(iii). Appellant elected not to do so. Therefore, I do not believe it is necessary for us to determine on appeal whether the trial court's conclusion that a party's indigence makes the transcript "unavailable" for purposes of Civ.R. 53(D)(3)(b)(iii) was correct.

{¶25} I believe the only issue actually before us is whether appellant could have used an App.R. 9(C) statement of the evidence rather than a Civ.R. 53(D)(3)(b)(iii) affidavit to support his objections to the magistrate's decision. Under the plain language of Civ.R. 53, a transcript of the proceedings or an affidavit describing all of the evidence offered at the proceedings are the two proper means for supporting objections to a magistrate's factual findings. Therefore, I do not believe that an App.R. 9(C) statement can be used to support a party's objections to a magistrate's decision.

{¶26} Arguably, Civ.R. 53(D)(3)(b)(iii) does provide for means other than the transcript or an affidavit when it provides that "[w]ith leave of court, alternative technology

or manner of reviewing the relevant evidence may be considered." Even assuming that an App.R. 9(C) statement would constitute an "alternative" manner of reviewing the evidence for purposes of that provision, appellant did not seek leave of court to use App.R. 9(C) as an alternative manner of reviewing the evidence under Civ.R. 53(D)(3)(b)(iii).²

{¶27} Consequently, I would overrule appellant's first assignment of error, and would then address appellant's remaining assignments of error. Because the majority does not, I respectfully dissent.

² Appellant mentioned App.R. 9(C) in his motion seeking to extend the time for filing his objections to the magistrate's decision, but nothing in the motion could be interpreted as a request for leave to use App.R. 9(C) as an alternative method of supporting those objections under Civ.R. 53(D)(3)(b)(iii).