No. 25- _____

In The
SUPREME COURT OF THE UNITED STATES

ROBERT LEE FOSTER,
Petitioner-Plaintiff,

v

JEREMY BUSH,
Respondent-Defendant.
_____/

PETITION
APPENDIXES AND EXHIBITS

Appendixes

(A) **United States Court of Appeals, Sixth Circuit Order** – Dec. 9, 2024
(District Court Judgment, **AFFIRMED)**

(B) **U.S. Dist. Ct. - E.D. Mich., Order** - March 19, 2024
(Motion, **DENIED**)

(C) **U.S. Dist. Ct. - E.D. Mich., Order Adopting R & R** – Sept. 2, 2022
(Report and Recommendation, **ADOPTED**)

(D) **U.S. Dist. Ct. - E.D. Mich., Report and Recommendation** – Aug. 4, 2022
(District Court Report and Recommendation, **ISSUED)**

Exhibits

(1) Step II Grievance Appeal Response – **No. JCF-2019-09-1632-03E**

(2) Step III Grievance Decision – **No. JCF-19-09-1671-~~03e~~ 28e**[1]

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[1] Grievance Id # JCF-2019-09-1632-03e was changed to JCF-2019-09-1632-28e

APPENDIX A1-A4

Foster v Bush, 2024 U.S. App. LEXIS 31279

Order and Judgment of the United States Court of Appeals
for the Sixth Circuit

Judges: GILMAN, GIBBONS, and THAPAR, Circuit Judges

AFFIRMING the Judgment of the District Court

(Dec. 9, 2024; # 24-1337)

NOT RECOMMENDED FOR PUBLICATION

No. 24-1337

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT LEE FOSTER,	)	
	)	
Plaintiff-Appellant,	)	
	)	ON APPEAL FROM THE UNITED
v.	)	STATES DISTRICT COURT FOR
	)	THE EASTERN DISTRICT OF
JEREMY BUSH,	)	MICHIGAN
	)	
Defendant-Appellee.	)	

ORDER

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

Robert Lee Foster, a pro se Michigan prisoner, appeals the district court's order denying his Federal Rule of Civil Procedure 60(b) motion to reopen his 42 U.S.C. § 1983 civil rights case. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a). For the following reasons, we affirm.

According to the complaint, on October 20, 2019, while Foster was incarcerated at G. Robert Cotton Correctional Facility (JCF), his cellmate attacked him in their cell. Foster alleged that the emergency intercom in his cell was "inoperable" and that he made several attempts to alert officers of the attack. Without any response from prison staff, he defended himself by biting off his cellmate's nose and biting his finger.

Foster brought a civil rights action against JCF Warden Jeremy Bush, claiming that Bush violated Foster's Eighth Amendment rights and state law. He alleged that he had a right "to personal safety and to be protected from harm while incarcerated" and that "the inoperable intercom/emergency lighting system posed a threat to [his] health and safety." He further alleged

that, in September 2019, six weeks before the attack, he complained about the inoperable emergency services in his cell through JCF's grievance system, but JCF failed to correct the issue.

In September 2022, upon a magistrate judge's recommendation and over Foster's objections, the district court granted Bush's motion for summary judgment. The court reasoned that Foster failed to exhaust his administrative remedies regarding the attack because he filed his grievance about the emergency intercom *before* the attack occurred. Then, in July 2023, Foster filed a Rule 60(b) motion to reopen. He argued that the court should reopen his case under Rule 60(b)(1) because his September 2019 grievance included a complaint regarding the facility's "lack of an emergency lighting system or intercom system."

The district court denied Foster's motion, concluding that Foster failed to raise the issue in his objections to the magistrate judge's report and recommendation and that the magistrate judge explicitly considered and rejected whether the September 2019 grievance properly exhausted his claims. On appeal, Foster argues that his September 2019 grievance about the emergency intercom "goes to the very heart of the complaint" and thus exhausted his Eighth Amendment claim.

We review the denial of a Rule 60(b) motion under the abuse-of-discretion standard. *Jones v. Ill. Cent. R.R.*, 617 F.3d 843, 850 (6th Cir. 2010). When a party appeals the denial of a Rule 60(b) motion, we do not review the underlying judgment, but determine whether one of the six circumstances specified by Rule 60(b) for reopening a judgment exists. *See Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). Foster cites only Rule 60(b)(1), which provides for relief from a final judgment based on "mistake, inadvertence, surprise, or excusable neglect." This rule "is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order." *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002).

Foster's argument that the district court made a mistake of law and fact by determining that his September 2019 grievance did not properly exhaust his claims is an attempt to challenge the merits of the district court's exhaustion conclusion. Foster cannot use Rule 60(b) to relitigate his

case. *See Tyler v. Anderson*, 749 F.3d 499, 509 (6th Cir. 2014). Accordingly, the district court did not abuse its discretion in denying Foster's motion for relief from judgment.

For these reasons, we **AFFIRM** the district court's order.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-1337

ROBERT LEE FOSTER,

Plaintiff-Appellant,

v.

JEREMY BUSH,

Defendant-Appellee.

Before: GILMAN, GIBBONS, and THAPAR, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the order of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

APPENDIX B1 – B5

Foster v Bush, 2024 U.S. Dist. LEXIS 74224

Opinion and Order of the U.S. Dist. Ct. - E.D. Mich.
Hon. Laurie J. Michelson, United States District Judge

DENYING Plaintiff's Motion for Relief From Judgment (ECF No. 52), and

DENYING Motion To Expedite (ECF No. 55)

(Mar. 19, 2024; # 20-11103)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT LEE FOSTER, Plaintiff, v. JEREMY BUSH, Defendant.	Case No. 20-11103 Honorable Laurie J. Michelson Magistrate Judge Anthony P. Patti

ORDER DENYING PLAINTIFF'S MOTION FOR RELIEF FROM JUDGMENT [52] AND DENYING MOTION TO EXPEDITE [55]

The factual background and procedural history of this case is set forth in detail in the Court's September 2, 2022, Opinion and Order. *Foster v. Bush*, No. 20-11103, 2022 WL 4009177, at *1–2 (E.D. Mich. Sept. 2, 2022) *available at* (ECF No. 49, PageID.342–345). That Order overruled Robert Lee Foster's objection to Magistrate Judge Anthony P. Patti's Report and Recommendation, adopted Judge Patti's recommended disposition, and granted Jeremy Bush's motion for summary judgment. *Id.* at *2. The Court entered a corresponding judgment in favor of Bush that same day. (ECF No. 50.)

Judge Patti recommended that the Court grant Bush's motion for summary judgment because Foster failed to exhaust his administrative remedies. (ECF No. 44, PageID.329.) More specifically, Foster's Eighth Amendment claim was based on injuries Foster allegedly suffered from a fight with his cellmate. (*Id.* at PageID.318.) This occurred in October 2019. (*Id.*) Yet the only relevant grievance Foster filed with

the prison was submitted in September 2019, before the fight occurred. (*Id.* at PageID.323–324.) In this grievance, Foster complained of the lack of an intercom system (or working intercom system) in his cell to alert guards in the event of a possible medical emergency. (*Id.*) Foster believed this was sufficient to exhaust his administrative remedies. Judge Patti disagreed. He recommended the Court grant Bush's motion for summary judgment because the September 2019 grievance predated "the October 2019 attack alleged in the complaint," and "could not exhaust the claims arising out of the attack." (*Id.* (internal citations and quotation marks omitted).)

Foster raised a single objection to the Report and Recommendation—namely, that his failure to timely appeal some of his grievances was due to Bush's conduct. (ECF No. 47.) The Court overruled this objection because it failed to address, let alone demonstrate an error in, Judge Patti's reasoning. The Court explained that the dispositive exhaustion issue was that Foster's grievance predated the events that gave rise to his claims in this lawsuit and not whether the grievance was timely appealed. *Bush*, 2022 WL 4009177, at *2, *available at* (ECF No. 49, PageID.346). Indeed, the Court noted "even if Foster is correct about his grievance appeal being timely, it would not undermine the Magistrate Judge's determination." *Id.*

Foster now challenges the Court's ruling through Federal Rule of Civil Procedure 60(b)(1). (ECF No. 52.) This Rule provides several grounds for relief from a judgment. As relevant here, Rule 60(b)(1) provides that "the court may relieve a party or its legal representative from a final judgment . . . for . . . mistake,

inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). The Sixth Circuit has explained that "Rule 60(b)(1) 'is intended to provide relief in only two situations: (1) when a party has made an excusable mistake or an attorney has acted without authority, or (2) when the judge has made a substantive mistake of law or fact in the final judgment or order.'" *Vargo v. D & M Tours, Inc.*, 841 F. App'x 794, 799 (6th Cir. 2020) (quoting *United States v. Reyes*, 307 F.3d 451, 455 (6th Cir. 2002)). And because Rule 60(b) is limited by "public policy favoring finality of judgments and termination of litigation," Foster must prove his case by clear and convincing evidence. *See Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 454 (6th Cir. 2008). But he has not done so.

Foster primarily reiterates his argument that his September 11, 2019 grievance included a complaint regarding the facility's "lack of an emergency lighting system or intercom system." (ECF No. 52, PageID.359.) And the lack of an emergency intercom system is what forms the basis of his complaint concerning the October 2019 fight—that is, if there was a working emergency intercom system in his cell at the time of the fight, "the attack may have been prevented." (*Id.* at PageID.356.) But this does not warrant relief from judgment.

First, Foster did not raise this argument in his objections to the Magistrate's Report and Recommendation, and thus, it is forfeited. *Harris v. Aramark Corr. Servs., LLC*, No. 20-3343, 2021 WL 7543808, at *2 (6th Cir. Dec. 27, 2021) ("'The failure to file specific objections to a magistrate's report constitutes a [forfeiture] of those objections.'" (alterations in original)); *see also Jinks v. AlliedSignal, Inc.*, 250 F.3d

381, 385 (6th Cir. 2001) ("Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof.")

Second, Judge Patti specifically considered and rejected this argument in his Report and Recommendation. (*See* ECF No. 44, PageID.324.) And Foster has identified no error in Judge Patti's ruling and thus, no error in this Court's ruling adopting it. The point of the Prison Litigation Reform Act's exhaustion requirement is to give prison officials "a fair opportunity" to address the issue before a plaintiff comes to court. *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010). As Judge Patti explained, "'[h]owever legitimate [the plaintiff's] fears may have been, . . . it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment. [A] claim of psychological injury does not reflect the deprivation of 'the minimal civilized measures of life's necessities,' that is the touchstone of a conditions-of confinement case.'" (ECF No. 44, PageID.324 (citing *Wilson v. Yaklich*, 148 F.3d 596, 601 (6th Cir. 1998)) (alterations and omissions in original).) In other words, Foster's Eighth Amendment claim did not arise in September 2019 when he complained about the lack of a working intercom; it arose in October 2019 when the alleged assault occurred. The fact that Foster previously complained of a theoretical or potential medical injury from the lack of a working intercom system in his cell did not give prison officials a "fair opportunity" to address his Eighth Amendment claim arising out of injuries sustained in a subsequent fight with his cellmate.

In short, Foster has not shown by clear and convincing evidence any mistake, inadvertence, surprise, or excusable neglect that would warrant granting relief from judgment under Federal Rule of Civil Procedure 60(b). Accordingly, his motion for relief from judgment (ECF No. 52) is DENIED. Having now ruled on that motion, Foster's motion to expedite (ECF No. 55) is DENIED AS MOOT.

IT IS SO ORDERED.

Dated: March 19, 2024

s/Laurie J. Michelson
LAURIE J. MICHELSON
UNITED STATES DISTRICT JUDGE

APPENDIX C1 – C3

Foster v. Bush, 2022 U.S. Dist. LEXIS 159446

Opinion and Order of the U.S. Dist. Ct. - E.D. Mich.
Hon. Laurie J. Michelson, United States District Judge

OVERRULING Plaintiff's Objections [47] and

ADOPTING the Report and Recommendation [44] and

GRANTING Defendant's Motion for Summary Judgment [27] and

DISMISSING WITHOUT PREJUDICE Plaintiff's case

(Sept. 2, 2022 ; # 20-11103)

Foster v. Bush

United States District Court for the Eastern District of Michigan, Southern Division

September 2, 2022, Decided; September 2, 2022, Filed

Case No. 20-11103

Reporter
2022 U.S. Dist. LEXIS 159446 *; 2022 WL 4009177

ROBERT LEE FOSTER, Plaintiff, v. JEREMY BUSH, Defendant.

Core Terms

grievance, intercom, cellmate, exhaust, cell, report and recommendation, emergency

Counsel: [*1] Robert Lee Foster, Plaintiff, Pro se, Carson City, MI USA.

For Jeremy Bush, Defendant: Joseph Yung-Kuang Ho, Michigan Department of Attorney General, Lansing, MI USA.

Judges: LAURIE J. MICHELSON, UNITED STATES DISTRICT JUDGE. Magistrate Judge Anthony P. Patti.

Opinion by: LAURIE J. MICHELSON

Opinion

OPINION AND ORDER OVERRULING PLAINTIFF'S OBJECTIONS [47], ADOPTING REPORT AND RECOMMENDATION [44], AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [27]

In 2019, Robert Lee Foster was incarcerated at the G. Robert Cotton Correctional Facility in Jackson, Michigan (JCF). At the time, he resided in a Level IV cell. According to Foster, Level IV cells come equipped with an intercom button to communicate with correctional officers in emergencies. (ECF No. 1, PageID.2.)

In September 2019, Foster filed a prison grievance stating that "there is no emergency light nor intercom in [my cell] to alert staff members in case of [an] emergency situation." (ECF No. 27-3, PageID.222.) (It is unclear if Foster meant that his cell had no intercom button or that it had one that did not work; in his complaint, he asserts that there was one that did not work. (*See* ECF No. 1, PageID.3.).) The grievance indicated that without the intercom, [*2] officers only checked on him every 30 minutes when completing their rounds. (ECF No. 27-3, PageID.222.) Foster grieved that this was problematic because of his medical conditions. (*Id.*) He also indicated that he "fear[ed] retaliation." (*Id.*)

Foster did not suffer a medical emergency that went unnoticed. Instead, the next month, Foster and his cellmate got into a fight. Foster alleges that he was in his sixties with medical conditions while his cellmate was "much younger" and "robust in stature." (ECF No. 1, PageID.2.) Foster says that he "felt his life was in danger." (*Id.*) According to Foster, he "made numerous attempts to alert Housing Unit Officers during the attack" and they "finally arrived after hearing loud noises coming from [his] cell." (*Id.* at PageID.13.) By the time officers arrived, the fight had progressed. In fact, Foster had "bit off" his cellmate's nose and bit his cellmate's finger. (ECF No. 1, PageID.3, 15.) Foster does not allege any prior issues with his cellmate or that he advised prison authorities that he was in any danger from his cellmate.

Foster maintained that he acted in self-defense, but a prison hearing officer found that Foster "participated in the physical [*3] confrontation by mutual agreement." (ECF No. 1, PageID.17.) Foster was found guilty of fighting and ordered to pay restitution for medical care. (ECF No. 1, PageID.3, 18.)

About five months after the fight, Foster filed this suit against JCF's warden, Jeremy Bush. In addition to state-law claims, Foster brought a claim under the *Eighth Amendment*. (ECF No. 1, PageID.5.) He asserted that he had "a constitutional right under the *Eighth Amendment* to personal safety and to be protected from harm while incarcerated" and that "the inoperable intercom/emergency lighting system posed a

threat to [his] health and safety in violation of [his] rights under [the] *Eighth Amendment*." (ECF No. 1, PageID.5.)

In time, Bush moved for summary judgment. (ECF No. 27.) Although the sole basis for Bush's motion was that Foster did not properly exhaust his administrative remedies, that affirmative defense came in several flavors. According to Bush, for incidents occurring at JCF, Foster had only appealed three grievances to the third and final step of the process. (ECF No. 27, PageID.189; *see also* ECF No. 27-3, PageID.213.) And, argued Bush, all three of those grievances were initiated before the October 2019 attack, so they "could not exhaust the claims **[*4]** arising out of the attack." (ECF No. 27, PageID.196.) Alternatively, Bush argued that he was not the person grieved in the only two JCF grievances relating to conditions of confinement. (ECF No. 27, PageID.197.) Bush also argued that Foster appealed those two grievances to the third and final step of the process without step-two responses. (*Id.*) As yet another argument that Foster did not properly exhaust, Bush claimed that Foster only had until December 3, 2019 to file his step-three appeal for his grievance concerning the intercom, but his step-three appeal was not received until December 20, 2019. (*Id.*) As a final argument for non-exhaustion, Bush claimed that Foster filed this suit before receiving responses to his step-three appeal. (ECF No. 27, PageID.198.)

Bush's motion was referred to Magistrate Judge Anthony P. Patti for a report and recommendation. (ECF No. 18.) He recommends granting Bush's motion. (ECF No. 44.) The Magistrate Judge was skeptical about many of Bush's theories for why Foster did not properly exhaust his grievance about the intercom, including Bush's claim that Foster's appeals were untimely. (*See* ECF No. 44, PageID.328.) But the Magistrate Judge credited one **[*5]** of Bush's arguments. He noted that Foster's complaint stated that "the injuries complained of in this lawsuit occurred on October 20, 2019 in [my] Housing Unit Cell No. J39/40." (ECF No. 1, PageID.2.) Yet, Foster's grievance about the intercom was filed in September 2019. In other words, the grievance predated the October 2019 attack. It followed, said the Magistrate Judge, that the September 2019 grievance "could not exhaust the claims *arising out of the attack*." (ECF No. 44, PageID.324 (emphasis in original).)

Foster has filed an objection. But his objection does not address the Magistrate Judge's reasoning. Although Foster's handwriting is very difficult to read, his objection apparently asserts that Bush's failure to respond to his grievance for three months caused his appeals to be untimely. (ECF No. 47, PageID.337; *see also* ECF No. 48, PageID.340 (similar).)[1] While this may be responsive to one of Bush's non-exhaustion arguments, it is not responsive to the Magistrate Judge's determination that the claims in this suit were unexhausted because the grievance about the intercom predated the attack. Accordingly, Foster's objection will be overruled. *See Shophar v. Gyllenborg, No. 18-2125, 2019 U.S. App. LEXIS 11633, 2019 WL 4843745, at *2 (6th Cir. Apr. 19, 2019)* ("In his objections, Shophar **[*6]** did not present any arguments that challenged any specific portion of the report and recommendation. Consequently, Shophar forfeited his right to appeal the unobjected-to issues."). Indeed, even if Foster is correct about his grievance appeal being timely, it would not undermine the Magistrate Judge's determination.

* * *

In short, Foster has not shown that the Magistrate Judge erred. Accordingly, this Court ADOPTS the Magistrate Judge's report and recommendation (ECF No. 44) and GRANTS Bush's motion for summary judgment insofar as it seeks to dismiss Foster's claims under *42 U.S.C. § 1983* (ECF No. 27). Foster's claims under *§ 1983* are DISMISSED WITHOUT PREJUDICE for failure to exhaust. As for Foster's state-law claims, the Court declines to exercise supplemental jurisdiction over those claims and so they too are DISMISSED WITHOUT PREJUDICE.

Foster's motion for an injunction ordering installation of an emergency intercom system and emergency lighting at JCF (ECF No. 46) is DENIED as moot.

Foster's filings at ECF No. 47 and ECF No. 48 are not truly motions, and the Court has treated them as objections to the Magistrate Judge's report and recommendation. To the extent they are motions, they are DENIED.

SO ORDERED. **[*7]**

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[1] In full, Foster's objection states: "Objection #1[.] Plaintiff received Step II response from Warden Jeremy Bush in December 2019. From September when Plaintiff submitted grievances Step II [indecipherable] Step II date in the record signed[?] by Jeremy Bush 3 months from September 2019. He did this intentionally [so] that Plaintiff's Step II will be untimely. Therefore, Plaintiff specifically requests the Court to dismiss Defendants' motion to dismiss Plaintiff's lawsuit. Defendant continues to deliberate[ly] disregard and mislead with the help of the attorney general representing him in this case." (ECF No. 47, PageID.337.)

Dated: September 2, 2022

/s/ Laurie J. Michelson

LAURIE J. MICHELSON

UNITED STATES DISTRICT JUDGE

JUDGMENT

In accordance with the opinion and order entered today, it is hereby ORDERED and ADJUDGED that this case is DISMISSED WITHOUT PREJUDICE.

Dated this 2nd day of September 2022 in Detroit, Michigan.

APPROVED:

/s/ Laurie J. Michelson

LAURIE J. MICHELSON

UNITED STATES DISTRICT JUDGE

Dated: September 2, 2022

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APPENDIX D1 – D20

Foster v. Bush, 2022 U.S. Dist. LEXIS 159453

U.S. Dist. Ct. - E.D. Mich.
Hon. Anthony P. Patti, United States Magistrate Judge

Report and Recommendation to Grant Defendant's Motion for Summary Judgment on the Basis of Exhaustion (ECF No. 27)

(Aug. 4, 2022 ; # 2:20-cv-11103)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT LEE FOSTER,

Plaintiff

v.

JEREMY BUSH,

Defendant.
_____/

Case No. 2:20-cv-11103
District Judge Laurie J. Michelson
Magistrate Judge Anthony P. Patti

REPORT AND RECOMMENDATION TO GRANT DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE BASIS OF EXHAUSTION (ECF No. 27)

I. RECOMMENDATION: The Court should **GRANT** Defendant's motion for summary judgment on the basis of exhaustion (ECF No. 27).

II. REPORT:

A. Background

Plaintiff Robert Lee Foster is a prisoner currently incarcerated at the Carson City Correctional Facility (DRF) in Montcalm County, Michigan. (ECF No. 37.) He filed this action on March 20, 2020 against Jeremy Bush, the sole defendant and warden at the G. Robert Cotton Correctional Facility (JCF), where Plaintiff was previously confined. (ECF No. 1, PageID.2, ¶ 1.) Plaintiff is proceeding *in forma pauperis*. (ECF Nos. 2, 4.) Defendant Bush appeared via counsel on November 12, 2021. (ECF No. 22.)

B. Instant Motion

This case has been referred to me for pretrial matters. (ECF No. 18.) Currently before the Court is Defendant's motion for summary judgment on the basis of exhaustion. (ECF No. 27.) Plaintiff timely filed two timely responses – one on January 31, 2022 (ECF No. 31) and another on February 23, 2022, in which he asks the Court "to dismiss defendant['s] summary judgment against plaintiff base[d] on no genuine dispute" and also "request[s] this court grants plaintiff['s] summary judgment . . . ." (ECF No. 35, PageID.254, 258). (*See also* ECF No. 28).[1] Defendant filed his reply on February 28, 2022. (ECF No. 32.)

[1] At the same time Plaintiff filed his supplemental response (ECF No. 35), he also filed: (a) a February 22, 2022 letter, in which he, *inter alia*: (i) quotes *The Bible* (Romans 13); (ii) asks to be protected; (iii) claims Defendant Bush's review and denial of JCF-1632 was intended to ensure his "day in Court would never be validated[,]" and repeats some of the statements he makes in his latter response (ECF No. 35); (iv) seemingly mentions Defendant's Step II appeal response to JCF-1632; (v) contends this case is about "installing systems in prisons that will save lives . . . [;]" and, (vi) quotes the U.S. Constitution (Preamble) (ECF No. 33); and, (b) a February 24, 2022 letter, which is addressed to FBI Headquarters in Washington, D.C. and in which Foster claims his "life is in serious danger at [JCF][,]" (ECF No. 34). My Practice Guidelines on "*Pro Se* Prisoner and Habeas Corpus Cases" explain that ""[l]etters to the Court are neither pleadings nor motions and will be stricken." *See* www.mied.uscourts.gov (last visited July 27, 2022). Accordingly, these letters (ECF Nos. 33, 34) will be stricken under separate cover.

C. Standard

Under Federal Rule of Civil Procedure 56, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A fact is material if it might affect the outcome of the case under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (internal citations omitted).

"The moving party has the initial burden of proving that no genuine issue of material fact exists . . . ." *Stansberry v. Air Wis. Airlines Corp.*, 651 F.3d 482, 486 (6th Cir. 2011) (internal quotations omitted); cf. Fed. R. Civ. P. 56 (e)(2) (providing that if a party "fails to properly address another party's assertion of fact," then the court may "consider the fact undisputed for the purposes of the motion."). "Once the moving party satisfies its burden, 'the burden shifts to the nonmoving party to set forth specific facts showing a triable issue.'" *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 453 (6th Cir. 2001) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). The nonmoving party must "make an affirmative showing with proper evidence in order to defeat the motion." *Alexander v. CareSource*, 576 F.3d 551, 558 (6th Cir. 2009); *see also*

Metro. Gov't of Nashville & Davidson Cnty., 432 F. App'x 435, 441 (6th Cir. 2011) ("The nonmovant must, however, do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]here must be evidence upon which a reasonable jury could return a verdict in favor of the non-moving party to create a genuine dispute.") (internal quotation marks and citations omitted).

Summary judgment is appropriate if the evidence favoring the nonmoving party is merely colorable or is not significantly probative. *City Management Corp. v. United States Chem. Co.*, 43 F.3d 244, 254 (6th Cir. 1994). In other words, summary judgment is appropriate when "a motion for summary judgment is properly made and supported and the nonmoving party fails to respond with a showing sufficient to establish an essential element of its case. . . ." *Stansberry*, 651 F.3d at 486 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

The fact that Plaintiff is *pro se* does not lessen his obligations under Rule 56. Rather, "liberal treatment of pro se pleadings does not require lenient treatment of substantive law." *Durante v. Fairlane Town Ctr.*, 201 F. App'x 338, 344 (6th Cir. 2006). In addition, "[o]nce a case has progressed to the summary judgment stage, . . . 'the liberal pleading standards under *Swierkiewicz* [*v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002)] and [the Federal Rules] are inapplicable.'" *Tucker v. Union of Needletrades, Indus. & Textile Employees*, 407 F.3d 784, 788

(6th Cir. 2005) (quoting *Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004)). The Sixth Circuit has made clear that, when opposing summary judgment, a party cannot rely on allegations or denials in unsworn filings and that a party's "status as a pro se litigant does not alter [this] duty on a summary judgment motion." *Viergutz v. Lucent Techs., Inc.*, 375 F. App'x 482, 485 (6th Cir. 2010); *see also United States v. Brown*, 7 F. App'x 353, 354 (6th Cir. 2001) (affirming grant of summary judgment against a pro se plaintiff because he "failed to present any evidence to defeat the government's motion").

D. Analysis

1. Factual allegations

Plaintiff alleges that "the injuries complained of in this lawsuit occurred on October 20, 2019 in Plaintiff's Housing Unit Cell No. J39/40 [at JCF]." (ECF No. 1, ¶¶ 1, 3.) This cell "is located in the Level IV (Close Custody) section of [JCF][,]" and "Level IV cell[] doors are electronically opened and closed from the Officer's Station in the central hub of the Housing Unit." (*Id.*, ¶ 4.) Plaintiff explains that, in emergencies, "there is a button located in every Level IV cell that is connected to an intercom system to alert Housing United Officers of any impending danger and/or emergency in that particular cell[,]" *i.e.*, "Plaintiff had no ability to open the cell door on his own." (*Id.*, ¶ 5.)

Plaintiff describes himself as "a 62-year old prisoner with medical conditions"[2] and his cellmate, Prisoner Williams, as "much younger and . . . robust in stature." (*Id.*, ¶ 7.) Plaintiff "believed the threats given by Prisoner Williams that Williams would put Plaintiff in the hospital if Plaintiff got off his bed[,]" and "felt his life was in danger and that the threats were imminent." (*Id.*, ¶ 8.) At some point, Williams attacked Plaintiff in their cell. (*Id.*, ¶ 6.) Alleging he "had no means of escape or ability to alert Housing Unit Staff and had no choice but to defend himself from his attacker[,]" Plaintiff contends that, "in the process of defending himself from his attacker, [he] bit off Prisoner Williams' nose and bit his finger." (*Id.*, ¶¶ 9, 11.)[3] Plaintiff claims he "made numerous attempts to alert Housing Unit Officers during the attack, and when Housing Unit Officers finally arrived after hearing loud noises coming from Plaintiff's cell, Plaintiff was found on his top bunk trying to get away from his attacker Prisoner Williams." (*Id.*, ¶ 12.) According to Plaintiff, he "was placed in Segregation, written a misconduct ticket[,] and placed in restraints until the disciplinary hearing." (*Id.*, ¶ 14.)

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[2] He seemingly supports this allegation by separately filing 45 pages of medical exhibits on the docket. (ECF No. 26; *see also* ECF No. 35, PageID.276-285.)

[3] As Plaintiff would later describe it in response to the motion at bar, he "had to f[end] for himself from a known assaultive, violent aggressive prisoner who exercised sole mobility from a wheelchair constantly in segregation for assaultive behavior[.]" (ECF No. 35, PageID.259.)

2. Misconduct for fighting

On October 20, 2019, Officer Doosey issued Plaintiff a Class I misconduct report for fighting. (ECF No. 1, PageID.15; ECF No. 35, PageID.264.) Officer Allen Bednarski, Jr.'s memorandum of the same date explains:

> While investigating loud banging noises and some yelling coming from the Lower Right Level[,] I saw through the window Prisoner Williams #131532 covered in blood from his nose and right hand. Prisoner Foster #151207 was on the top bunk attempting to fight back. . . . Doosey and I went into [sic] handcuff Prisoner Williams. In doing so[,] Prisoner Williams stated that he and his Bunkie (Prisoner Foster) were fighting in the cell and that Prisoner Foster bit his finger and his nose off.

(*Id.*, PageID.20; ECF No. 35, PageID.268.) Officer Derek H. Gowdy's memorandum – also of October 20, 2019 – states:

> While escorting Prisoner Foster #151207 over to Health Care I asked Foster, "Did you hit Williams?" Foster stated, "Yes, because he don't know when to shut his mouth." I then asked Foster, "What happen to his nose?" Foster stated, "When he pulled me off the bunk all I could do is bite his nose. Then I got back on top of my bunk he then went to punch me and then I bit his finger."

(ECF No. 1, PageID.21 (punctuation regularized).) In Plaintiff's October 21, 2019 personal statement, he explained he "was defending [his] life and was being attacked[,]" "[t]here was no way of alerting staff of this emergency[,]" and "[he] was unable to sign as he was in segregation and in restraints." (*Id.*, PageID.19; ECF No. 35, PageID.269.) (*See also* ECF No. 1, ¶ 15.)

Hearing Officer Sutherland conducted a hearing on October 29, 2019 and found Plaintiff guilty. (*Id.*, PageID.16-18; ECF No. 35, PageID.265-267.) Sutherland noted, *inter alia*: "No decision is reached on restitution at this time as medical expenses have not been finalized regarding costs incurred for outside medical services." (ECF No. 1, PageID.18; *see also* ECF No. 1, ¶ 15.) On or about November 6, 2019, Plaintiff submitted a request for rehearing, but it was denied in January 2020. (*Id.*, PageID.23-24.)

3. Causes of action

In his March 20, 2020 complaint, Plaintiff alleges that the emergency cell intercom / lighting system "was inoperable and had been for months prior to the attack." (ECF No. 1, ¶ 10.) Plaintiff specifically contends he "had previously reported the inoperable intercom/emergency lighting system no less than 6-weeks prior to the attack . . . [,]" – which may be a reference to JCF-19-09-1632-28e (ECF No. 1, PageID.9-11, 22) – and Defendant "acknowledged that the system was inoperable," but "the deficiency was never repaired." (*Id.*, ¶ 13.) After describing multiple duties and theories of causation (*id.*, ¶¶ 16- 24, 28), Plaintiff alleges Defendant was "grossly negligent" (*id.*, ¶¶ 24, 25), "was not acting nor reasonably believed that he was acting within the scope of his authority[,]" (*id.*, ¶ 26), did not act in good faith, and "acted maliciously, with a.wanton or reckless

disregard of Plaintiff's rights[,]" (*id.*, ¶¶ 27-28).[4] Plaintiff alleges that Defendant's "failure to adhere to . . . well-established principles of constitutional and common law resulted in damage to Plaintiff." (ECF No. 1, ¶ 29.)

Plaintiff frames his causes of action as: (a) a civil rights claim under the Eighth Amendment; (b) a state law claim of nuisance *per se*; and, (c) a state law claim of tortious conduct. (*Id.*, PageID.5-6, ¶¶ 30-38.)

4. Exhaustion

Defendant argues that "Foster failed to properly exhaust administrative remedies on any of his claims against MDOC Defendant Bush." (ECF No. 27, PageID.186.) "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). The MDOC's 3-step prisoner/parolee grievance procedure is set forth in MDOC PD 03.02.130 (effective March 18, 2019). (ECF No. 27-2.) Importantly, this policy directive

[4] Plaintiff's assertions of "gross negligence" and citations to Mich. Comp. Laws § 691.1407 and *Ross v. Consumers Power Co.*, 420 Mich. 567, 593-595, 363 N.W.2d 641, 648-650 (1984) may well have been intended to anticipate a governmental immunity defense. (ECF No. 1, ¶¶ 24, 25.) *See also In re Bradley Est.*, 494 Mich. 367, 377–78, 835 N.W.2d 545, 551 (2013) ("Th[e] common-law concept of sovereign immunity has since been replaced in Michigan by the GTLA [Governmental Tort Liability Act] and is codified by MCL 691.1407(1), which limits a governmental agency's exposure to tort liability.").

provides: "[c]omplaints filed by prisoners regarding grievable issues as defined in this policy serve to exhaust a prisoner's administrative remedies only when filed as a grievance through all three steps of the grievance process in compliance with this policy." (*Id.*, ¶ C.)

5. Plaintiff's JCF grievances

Plaintiff's Step III grievance report (January 1, 2013 to January 4, 2021) lists three JCF grievances pursued to Step III:

- JCF-19-09-1632-28e was written against the JCF Warden (the originally named individual is "Warden Lindsey K." but at some point this name was crossed-out and amended with "Noel Naggy," which was likely intended to be "Noah Nagy") and complains there "is no emergency light [or] intercom in J-39 to alert staff members in case of [an] emergency situation," claims he has a medical condition and is put "in a dangerous situation" due to the lack of an emergency light or intercom, and "fear[s] retaliation." It was received at Step I on September 11, 2019 and at Step III on December 20, 2019 (rejection upheld). Although the date it was received at Step II is not clear, Defendant (Warden Jeremy Bush) signed the Step II response (denied) on November 9, 2019. (ECF No. 27-3, PageID.220-223; *see also* ECF No. 1, PageID.9-11, 22; ECF No. 31, PageID.237-239; ECF No. 35, PageID.271-275.)

- JCF-19-09-1671-28e was written against the JCF Warden and concerns ventilation and air circulation in cell J39. (ECF No. 27-3, PageID.216-219, 224; *see also* ECF No. 1, PageID.12-14.)

- JCF-19-09-1677-09B was written against the JCF Food Service Director and concerns cookies, apple crisp and apples. (ECF No. 27-3, PageID.225-230.)

(*See also* ECF No. 27-3, PageID.213-215.)

Plaintiff claims he properly exhausted his administrative remedies prior to filing his lawsuit, with clear reference to Defendant Bush's November 9, 2019 Step II Grievance Appeal Response in JCF-1632. (*See* ECF No. 35, PageID.258.) And, he questions the relevance of JCF-1671 and JCF-1677, seemingly referring to them as "ha[ving] nothing to do with [his] case." (*Id.*, PageID.262; *see also* ECF No. 27, PageID.196-197.) I agree with that assessment. Only JCF-1632 is relevant here.

6. Timing and subject matter of JCF-19-09-1632-28e

a. JCF-1632 pre-dates the October 20, 2019 attack.

JCF-1632 does not properly exhaust Plaintiff's available administrative remedies as to the claims set forth in the complaint, which, in Plaintiff's words, concerns injuries that "occurred on October 20, 2019 in Plaintiff's Housing Unit Cell No. J39/40." (ECF No. 1, ¶ 3.) Quite simply, consistent with Plaintiff's claims that he "filed his grievance on [September 3, 2019] and submitted it on [September 9, 2019][,]" (ECF No. 35, PageID.259), JCF-1632 was received at Step I on September 11, 2019 (ECF No. 27-3, PageID.213). Therefore, this grievance "predate[s] the October 2019 attack alleged in the complaint," (ECF No. 27,

PageID.189), and "could not exhaust the claims *arising out of the attack*." (ECF No. 27, PageID.196 (emphasis added).)[5]

b. It is not clear whether Plaintiff sufficiently named Defendant Bush in JCF-1632.

Defendant's other failure to exhaust arguments are not quite as potent. First, he claims that Plaintiff did not name him in JCF-1632. (ECF No. 27, PageID.197.) "The point of the PLRA exhaustion requirement is to allow prison officials 'a fair

[5] The Court recognizes Plaintiff's allegations about Prisoner Williams's threats and the threat posed by the inoperable intercom/emergency lighting system. (ECF No. 1, ¶¶ 8, 31.) The Court also notes Plaintiff's allegations about avoiding "unreasonable risk of foreseeable harm or injuries to prisoners." (ECF No. 1, ¶¶ 16, 18.) Still, "[h]owever legitimate [the plaintiff's] fears may have been, . . . it is the reasonably preventable assault itself, rather than any fear of assault, that gives rise to a compensable claim under the Eighth Amendment. [A] claim of psychological injury does not reflect the deprivation of 'the minimal civilized measures of life's necessities,' that is the touchstone of a conditions-of-confinement case." *Wilson v. Yaklich*, 148 F.3d 596, 601 (6th Cir. 1998) (*quoting Babcock v. White*, 102 F.3d 267, 272 (7th Cir. 1996) (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991)). To the extent, if at all, Plaintiff sought relief for threats and risk, he "alleges, not a 'failure to prevent harm,' *Farmer [v. Brennan]*, 511 U.S. [825, 834 (1994)], ..., but a failure to prevent exposure to risk of harm." *Yaklich*, 148 F.3d at 601 (quoting *Babcock*, 102 F.3d at 272). While "injunctive relief may be ordered by the courts when necessary to remedy prison conditions fostering unconstitutional threats of harm to inmates[,]" *Yaklich*, 148 F.3d at 601, Plaintiff does not seem to seek injunctive relief (*e.g.*, an order or judgment requiring Defendant Bush to repair (if inoperable) or install (if not yet existent) emergency lights or an intercom system). While Plaintiff claims to have suffered various type of damages (ECF No. 1, ¶¶ 23, 24, 29, 37), his prayer for relief merely requests that the Court "enter judgment against Defendant as the Jury deems just, together with costs and interests." (ECF No. 1, PageID.6.) It is also questionable whether the alleged "gross negligence" of Defendant not supplying an alarm system or intercom in an individual cell (or not repairing such existing items) could rise to the level of a constitutional violation.

opportunity' to address grievances on the merits, to correct prison errors that can and should be corrected and to create an administrative record for those disputes that eventually end up in court." *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010) (citing *Woodford v. Ngo*, 548 U.S. at 81, 94-95 (2006) and *Porter v. Nussle*, 534 U.S. 516, 525 (2002)). The MDOC's grievance policy explains:

> The issues should be stated briefly but concisely. Information provided is to be limited to the facts involving the issue being grieved (i.e., who, what, when, where, why, how). Dates, times, places, and names of all those involved in the issue being grieved are to be included.

MDOC PD 03.02.130 ¶ S (ECF No. 27-2). *See also Reed-Bey*, 603 F.3d at 324 ("Under the Department of Corrections' procedural rules, inmates must include the '[d]ates, times, places and names of all those involved in the issue being grieved' in their initial grievance.") (quoting MDOC PD 03.02.130).

While JCF-1632 concerns the lack of an emergency light or intercom in J-39, it does not appear that Plaintiff named Defendant Bush in JCF-1632. This is so, because JCF-1632 originally named "Warden Lindsey K.[,]" seemingly because the Warden is "the sole repository of all executive power above all other authorities of this facility." (ECF No. 1, PageID.9.) However, the originally named individual was at some point crossed-out and amended with "Noel Naggy" (likely intended to be "Noah Nagy"). (ECF No. 27-3, PageID.222.) Therefore, to the extent Plaintiff relies upon JCF-1632 to exhaust his available administrative

remedies as to his claims against *Bush* in the instant case, "Foster's failure to name Bush at Step I [*was likely*] fatal . . . [,]" (ECF No. 32, PageID.244), though it certainly seems Plaintiff intended to grieve the JCF Warden, whoever it was at the time he initiated JCF-1632. If Bush became the successor of Lindsey or Nagy during the grievance process, this may not have been as dispositive as Defendant would have the Court believe, particularly if Plaintiff were asserting an official capacity claim. *See, e.g.*, Fed. R. Civ. P. 25(d). But even so, the Warden must be shown to have been individually involved with respect to Plaintiff's damage claims, and may not be sued on a theory of *respondeat superior*. *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (". . . § 1983 liability must be based on more than respondeat superior, or the right to control employees.") (referencing *Hays v. Jefferson County, Ky.*, 668 F.2d 869, 874 (6th Cir.1982)).

c. It is not clear whether Plaintiff timely appealed JCF-1632 to Step III.

Second, Defendant questions whether JCF-1632 was properly exhausted, alleging that JCF-1632 was rejected at Step III as untimely. (ECF No. 27, PageID.197.) "[T]he PLRA exhaustion requirement requires proper exhaustion." *Woodford v. Ngo*, 548 U.S. 81, 93 (2006). Contrary to Plaintiff's statement that "not exhau[s]ting one[']s administrative[] remedies is not filing a grievance[,]" (ECF No. 35, PageID.262), "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative

system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford*, 548 U.S. at 90–91.[6] The Step II Grievance Appeal Response for JCF-1632 was dated November 9, 2019 and reflects that an extension was given until November 15, 2019. (ECF No. 1, PageID.11, 22.)[7] Plaintiff's Step III grievance appeal was due "within ten business days after receiving the Step II response or, if no response was received, within ten business days after the date the response was due, including any extensions." MDOC PD 03.02.130 ¶ HH. (ECF No. 27-2, PageID.208.) Thus, giving Plaintiff the benefit

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[6] At the same time Plaintiff misinterprets the exhaustion requirement, he also seems to question the meaningfulness of the grievance process, saying: (a) grievances "are always rebuttled [sic] throughout the M.D.O.C. and denied[;]" (b) he's been told "nothing will come of his grievance[;]" and, (c) "the prison institution is a smoke screen of propaganda and dec[ei]t." (ECF No. 35, PageID.262.) Not only are these conclusory statements, but also these assertions do not acknowledge that the point of the PLRA exhaustion requirement is to give prison officials "a fair opportunity" to address the issue before Plaintiff comes to court. *Reed-Bey v. Pramstaller*, 603 F.3d 322, 324 (6th Cir. 2010).

[7] Plaintiff acknowledges that Defendant Bush signed the Step II Grievance Appeal Response and, in so doing, "acknowledge[d] and denied responsibility." (ECF No. 31, PageID.236.) Plaintiff also suggests Defendant Bush disregarded the Step II Grievance Appeal by agreeing with the Step I response and denying the Step II appeal. (ECF No. 35, PageID.261.) However, to the extent Plaintiff's claim against Defendant Bush is based on his November 9, 2019 Step II Grievance Appeal Response in JCF-1632 (ECF No. 1, PageID.11, 22), the Sixth Circuit has explained that, where a defendant's "only role[] . . . involve[s] the denial of administrative grievances or the failure to act[,]" he or she "cannot be liable under § 1983." *Shehee*, 199 F.3d at 300. Accordingly, "Bush's involvement in the grievance process at Step II does not otherwise impose liability." (ECF No. 32, PageID.244-245.)

of the doubt by assuming he did not receive the November 9th response, his Step III grievance appeal was due ten business days from November 15th – *i.e.*, December 3, 2019 (subtracting 3 Saturdays, 3 Sundays and 2 holidays). Plaintiff's Step III grievance appeal states he was submitting it on November 18, 2019 (ECF No. 27-3, PageID.221), in which case it would have been timely. However, it appears some delay occurred, because Grievance JCF-1632 was not received at Step III until December 20, 2019 – *i.e.*, 32 days after Plaintiff allegedly submitted it. (ECF No. 27-3, PageID.213.) The record does not make clear why it would have taken nearly one month for acknowledgment of the Step III grievance appeal (*e.g.*, did Plaintiff actually submit the appeal on November 18th or was the delay the MDOC's fault?). To complicate matters, the reason for the rejection is not clear from the record, and the fact that the March 30, 2020 Step III Grievance Decision states "the *rejection* is *upheld*" (ECF No. 27-3, PageID.220 (emphases added)) suggests the Step III grievance appeal was *originally* rejected sometime prior to March 30, 2020. In sum, the record before the Court does not clarify the reason for the rejection of Plaintiff's Step III grievance appeal, nor does it clarify the timeliness of Plaintiff's Step III grievance appeal.

d. It is not clear that Plaintiff's lawsuit was premature.

Defendant's final exhaustion argument is also far from a sure bet. Defendant points out that JCF-1632 "[was] not completed at Step III when Foster

filed this complaint [on March 20, 2020][.]" (ECF No. 27, PageID.197-198.) "The plain language of [42 U.S.C. § 1997e(a)] makes exhaustion a precondition to filing an action in federal court . . . ." *Freeman v. Francis*, 196 F.3d 641, 645 (6th Cir. 1999) (emphasis added). Assuming *arguendo* Plaintiff timely submitted his Step III grievance appeal, JCF-1632 was received at Step III on December 20, 2019, but it was not rejected until March 30, 2020, *i.e.*, 101 days after receipt. (ECF No. 27-3, PgaeID.213.) Considering Paragraph II of the MDOC grievance policy directive states that, "[g]enerally, Step III responses will be responded to within 60 business days[,]" (ECF No. 27-2, PageID.208), which in the case of JCF-1632 would have been by approximately February 18, 2020, Plaintiff may not have filed his March 20, 2020 complaint prematurely.

Nonetheless, however questionable the remainder of Defendant's exhaustion arguments, one is definitive – JCF-1632, which was initiated in September 2019, cannot operate to exhaust Plaintiff's claims against Defendant Bush arising out of the October 20, 2019 attack.

E. Conclusion

Plaintiff urges the Court to move forward "with the [December 20, 2021] initial scheduling order," (ECF No. 25), presumably to engage in "pretrial" matters. (ECF No. 31, PageID.235.) Citing the Eighth Amendment and protection from harm while incarcerated, he explains that his "cell posed a threat[,] because

[it was] inoperable and the Defendant allowed it . . . ." (*Id.*, PageID.236.) He also attempts to argue that his Eighth Amendment "right to saf[e]ty and protection from harm" claim should not be dismissed, because it is facially plausible, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and Defendant is not entitled to qualified immunity, *see Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). (ECF No. 35, PageID.260-261.)

However, even though "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it[,]" *Farmer*, 511 U.S. at 847, Plaintiff still must exhaust available administrative remedies as to his Section 1983 prison conditions claims in accordance with 42 U.S.C. § 1997e(a). For the reasons stated above (in particular as set forth in Section II.D.6), he has not done so with respect to injuries that "occurred on October 20, 2019 in Plaintiff's Housing Unit Cell No. J39/40." (ECF No. 1, ¶ 3.) Accordingly, the Court should **GRANT** Defendant's motion for summary judgment on the basis of exhaustion (ECF No. 27). This report casts no aspersion on the merits of Plaintiff's state law claims – whether gross negligence, nuisance *per se*, or tortious conduct – over which the Court should decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367.

III. PROCEDURE ON OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to file any objections within 14 days of service, as provided for in Fed. R. Civ. P. 72(b)(2) and E.D. Mich. LR 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991). Filing objections that raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1273 (6th Cir. 1987). Pursuant to Local Rule 72.1(d)(2), any objections must be served on this Magistrate Judge.

Any objections must be labeled as "Objection No. 1," and "Objection No. 2," *etc.* Any objection must recite precisely the provision of this Report and Recommendation to which it pertains. Not later than 14 days after service of an objection, the opposing party may file a concise response proportionate to the objections in length and complexity. Fed. R. Civ. P. 72(b)(2); E.D. Mich. LR 72.1(d). The response must specifically address each issue raised in the objections, in the same order, and labeled as "Response to Objection No. 1," "Response to

Objection No. 2," *etc.* If the Court determines that any objections are without merit, it may rule without awaiting the response.

Dated: August 4, 2022

Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

EXHIBIT 1

Step II Grievance Appeal Response

Step II Grievance Appeal Response

JCF-2019-09-1632-03E

Name: Foster **Number:** 151207 J39

Summary of Step I Complaint:

Grievant states there is no emergency light or intercom in J39 to alert staff in case of emergency situation.

Summary of Step I Response:

The Step I Response indicates the grievant states he has medical issues and is afraid that something could happen to him and there would be no way to notify staff if there is an emergency. Grievant is correct that there are no emergency lights or an intercom system but staff conduct their rounds as required. Staff will be advised of Grievant' s medical issues.

Summary of Reason for Appeal:

Grievant reiterates Step I complaint.

Summary of Step II Investigation:

Upon review of the Step I grievance, Step II grievance appeal form and investigative information, Step I response was appropriate. No policy violation.

Conclusion:

The grievance was denied in accordance with PD 03.02.130 Prisoner/Parolee Grievances and there was no policy violation of PD 03.03.130 Human Treatment and Living Conditions for Prisoners.

Extension 11/15/19

Based on the above, your grievance is considered Denied at Step II.

Jeremy Bush, Warden

Respondent's Name (Print) Respondent's Signature 11/9/19 Date

EXHIBIT 2

Step III Grievance Decision

STATE OF MICHIGAN
DEPARTMENT OF CORRECTIONS
LANSING

GRETCHEN WHITMER
GOVERNOR

HEIDI E. WASHINGTON
DIRECTOR

STEP III GRIEVANCE DECISION

114734

[redacted]

To Prisoner: Foster #: 151207
Current Facility: URF
Grievance ID #: JCF-19-09-1671-~~03e~~ 28e
Step III Received: 12/20/2019

Your Step III appeal has been reviewed and considered by the Grievance Section of the Office of Legal Affairs in accordance with PD 03.02.130, "Prisoner/Parolee Grievances".

Gr. Id changed 03e to 28e

THE REJECTION IS UPHELD.

THIS DECISION CANNOT BE APPEALED WITHIN THE DEPARTMENT.

Date Mailed: MAR 30 2020

Richard D. Russell, Manager Grievance Section, Office of Legal Affairs

cc: Warden, Filing Facility: JCF