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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.
Delmar R. WEBSTER, Plaintiff-Appellee Cross-Appellant,
v.
OGLEBAY NORTON COMPANY, Defendant-Appellant Cross-Appellee.

No. 65502.
Jan. 26, 1995.

Civil Appeal from Common Pleas Court, No. CV-195607.
Keith L. Carson, Richard C. Binzley, Harold W. Henderson, Thompson, Hine and Flory, Cleveland, for Oglebay Norton Co.

Cary R. Cooper, Keith A. Wilkowski, Cooper, Straub, Walinski & Cramer, Toledo, Dennis M. O'Bryan, Birmingham, MI, Christopher D. Kuebler, Lakewood, for Delmar R. Webster.

JOURNAL ENTRY AND OPINION

JAMES D. SWEENEY, Presiding Judge:

***1** Defendant-appellant/cross-appellee Oglebay Norton Company ("Oglebay") appeals from the jury verdict of $1,825,000.00 entered in favor of plaintiff-appellee/cross-appellant Delmar R. Webster ("Webster") [FN1]. The cross-appeal argues that the trial court erred in denying prejudgment interest and the taxation of certain costs. For the reasons adduced below, we: affirm in part and reverse and remand in part for a new trial on Oglebay's notice of appeal; affirm the trial court in regard to Webster's cross-appeal.

FN1. Pending appeal, Mr. Webster died on May 20, 1993. Catherine Webster, Executrix of the Estate of Delmar Webster and wife of the decedent, has been substituted as a party pursuant to Loc.App.R. 29.

A review of the voluminous and contentious record on appeal indicates that Webster filed his complaint on August 22, 1990, seeking damages for personal injuries allegedly sustained in the Toledo, Ohio, harbor area when, as the ship was docking, he slipped and fell at 1:00 a.m. on December 17, 1988, on ice on the deck of the Oglebay Great Lakes freighter S.S. Courtney Burton, on which he was then serving as master/captain, sustaining injuries to his back, shoulder, and left elbow. The complaint alleged that the slip and fall occurred due to the failure of a subordinate crew member on the ship to spread salt or sand on the icy area of the fall. The complaint was based on negligence under the Jones Act [46 U.S.C. Section 688] [FN2] and unseaworthiness pursuant to general maritime law.

FN2. The Jones Act allows a seaman plaintiff to sue for death or personal injury either in federal court under admiralty jurisdiction or in a state or federal court under legal jurisdiction, if the seaman meets other jurisdictional requirements. See generally G. Gilmore & C. Black, The Law of Admiralty (2 Ed.1975) 340-343.

The jury trial began on February 23, 1993. At the close of the trial, the jury returned a verdict on March 8, 1993, in favor of Webster in the amount stated previously. This award was journalized on March 10,

1993. Also on March 10, 1993, Webster filed a motion for prejudgment interest. This motion for prejudgment interest was opposed by Oglebay on March 22, 1993.

On March 24, 1993, Oglebay filed the following: (1) motion for a new trial and/or judgment notwithstanding the verdict; (2) motion to strike the amended demand for judgment; and, (3) motion to set off pension benefits. On March 26, 1993, Webster filed a motion for taxation of costs. The parties opposed the respective motion(s) filed by the opposing party.

Subsequent to a hearing on the motion(s), the court, on May 4, 1993, denied Oglebay's three motions and granted in part Webster's motion to tax certain litigation expenses as costs. This appeal and cross-appeal followed. Oglebay presents eight assignments of error. Webster presents two cross-assignments of error.

Oglebay's first assignment of error provides:

THE VERDICT OF $1,825,000 IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

In this assignment, Oglebay argues that the verdict is against the weight of the evidence because the award for future pain and suffering and permanency of injuries was not supported by any expert medical testimony, as required for subjective injuries, in this case, back injuries, thereby improperly basing the award on speculation and conjecture. *Day v. Gulley* (1963), 175 Ohio St. 83, 86; *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230-231, motion and cross-motions to certify the record overruled in (1992), 65 Ohio St.3d 1479; *Corwin v. St. Anthony Med. Ctr.* (1992), 80 Ohio App.3d 836, 840-841.

***2** In analyzing this assignment, we are mindful that a judgment supported by competent, credible evidence on all essential elements will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578. We also recognize that the procedure governing the litigation in this case is to be judged in accordance with the rules and practice of the state court. *Jones v. Erie Railroad Co.* (1922), 106 Ohio St. 408, paragraph one of the syllabus.

Applying the state procedural law to the record before us, we conclude that Webster did elicit medical expert evidence in support of his claim of future pain and suffering and the permanency of his alleged injuries. Webster's medical expert, Dr. Kalb, did testify that Webster was experiencing a number of physical complaints stemming from the back injuries, that it was his professional opinion that the fall caused the injuries, and that as a result of Webster's heart medication, Webster may have to do without corrective surgery and live with his condition. (R. 387-393.) Based upon this evidence, the jury could conclude that the back condition was permanent in nature and find accordingly.

The first assignment of error is overruled.

Oglebay's second assignment of error provides:

THE VERDICT OF $1,825,000 IS EXCESSIVE AND WAS THE RESULT OF PASSION OR PREJUDICE.

In analyzing this assignment, we recognize "that passion and prejudice is not proved by the mere size of a verdict." *Sindel v. Toledo Edison Co.* (1993), 87 Ohio App.3d 525, 532. Further, "[I]t must appear that the jury's assessment of damages was so disproportionate as to shock reasonable sensibilities." *Id.*

The evidence at trial indicated that at the time of his injury and at the time of his forced retirement approximately six months later, Webster earned approximately $100,000.00 gross income per year as a

captain in the employment of Oglebay. Webster also testified that at the time of his forced retirement he was fifty-three years old and had planned to work until the age of sixty-five. Evidence also demonstrated through actuarial tables that at the time of retirement, Webster had a life expectancy of approximately eighteen additional years. The jury concluded that Webster had sustained lost income in the amount of $1,400,000. The remaining $425,000.00 in the verdict would therefore represent pain and suffering. This overall assessment of total damages is, without closer scrutiny, not so disproportionate as to shock one's sensibilities after considering the severity of Webster's alleged back injuries which were found to preclude physical exertion in the slightest degree and the pain, loss of motion, and psychological distress experienced by Webster. Yet, the record indicates that: (1) Webster had a twenty-year history of back problems prior to the slip and fall at issue and had ignored his doctor's advice in the 1970's to have back surgery; (2) Webster worked for two years following the slip and fall in a series of maritime jobs, each time passing physical examinations and being declared fit for duty; (3) Webster was treated by Dr. Buck until May of 1991, yet Webster did not inform Dr. Buck that he was experiencing back problems; (4) Webster was observed in 1990 using a stationary bicycle, lifting weights, and playing billiards without outward signs of discomfort; (5) Webster's application for Social Security disability stated that his disability was unrelated to his work, thereby implying that his cardiac condition was the reason for his decision to end his maritime service; and, (6) Webster told Dr. Warkentin that his decision to leave the M.V. Ranger was due to cardiac problems. These factors call into question the size of the award, where it would appear on the weight of this evidence that Webster's injuries from the slip and fall were not as dramatic or permanent as to justify the award of $1,825,000.00. *Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222.

***3** In determining whether a jury's award is the result of passion or prejudice, we must consider not only the amount of the verdict but whether,

> the record discloses that the excessive damages were induced by (a) admission of incompetent evidence, (b) by misconduct on the part of the court or counsel, or (c) by any other action occurring during the course of the trial which *can reasonably be said to have swayed the jury* in their determination of the amount of damages that should be awarded. (Emphasis added.)
>
> *Sindel, supra,* at 531.

In the present case, Webster's counsel made repeated arguments concerning retaliatory discharge (even though this action was not pled as a wrongful termination case), Webster's alleged longstanding fear of poverty, and Webster's feelings of inadequacy and emotional hurt in being forcibly terminated from the company he had faithfully served throughout his work career. By appealing to the passion and prejudice of the jury through these repeated arguments, the jury was undoubtedly swayed in returning a verdict of such monumental proportions for a slip and fall of dubious permanency.

The second assignment of error is affirmed.

Oglebay's third assignment of error provides:

THE TRIAL COURT ERRED IN VACATING THE ORDER GRANTING DEFENDANT'S MOTION *IN LIMINE* AND, THUS, ADMITTING EVIDENCE REGARDING PLAINTIFF'S FORCED RETIREMENT.

On July 8, 1992, Oglebay filed a motion *in limine* on the grounds of judicial estoppel to preclude Webster from taking a position at trial inconsistent with representations he made in his August 28, 1990, application for disability benefits from the Social Security Administration. Webster never filed a brief in

opposition to the motion. On February 17, 1993, the assigned judge granted the motion *in limine*. Later that same day on February 17, 1993, Webster filed a motion for relief from judgment seeking reconsideration from the court's ruling on the motion *in limine*. On February 19, 1993, the assigned judge denied reconsideration of the ruling. Subsequent to this denial of reconsideration, the case was transferred to a visiting judge for trial. On the first day of trial, prior to opening arguments and the impanelling of the jury, Webster orally motioned the court to be heard on the motion *in limine* and to vacate the ruling on the motion *in limine*. The visiting trial judge heard arguments from the parties relative to the motion *in limine* and vacated the ruling at issue.

The purpose of a motion *in limine* is to prevent the introduction at trial of irrelevant or inadmissible evidence. *State v. Grubb* (1986), 28 Ohio St.3d 199, 201; *Detling v. Chockley* (1982), 70 Ohio App.2d 134. By virtue of it not being a final order, such a motion, as Oglebay admits at page 24 of its appellant's brief, is interlocutory in nature and may be reviewed prior to the issuance of a final order. Oglebay's reliance upon the doctrine of "the law of the case" to preclude reconsideration of the motion is misplaced since that doctrine applies to decisions of a reviewing court upon a case before a lower court. *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3. Here, the decisions complained of, all occurred in the trial court, with no input from a reviewing court.

***4** This returns us to whether or not the evidence sought to be excluded was irrelevant or inadmissible. We conclude that it was neither. The application for disability benefits noted the reason for the disability as heart condition and back (lumbar disc) condition. The back condition was relevant and admissible as it related to Webster's allegation that he had been disabled as a result of his fall on board the S.S. Courtney Burton in 1988, and tended to show the ongoing nature of the back problems and how these problems interfered with his attempts at employment following his forced retirement from Oglebay. Further, we fail to see how this introduction of this disability application prejudiced the defense. If anything, the statements made by Webster in this application certainly do not hurt the defense, but tend to bolster the defense argument that Webster's injuries occurred after his retirement, after August, 1990, and were not work related. Furthermore, we fail to see that the case was transformed from a slip-and-fall case into a retaliatory discharge case with the introduction of this evidence. The court took care to restrict the jury from this conclusion when it instructed the jury to not award damages as punishment for Webster's discharge from Oglebay, and the parties told the jury that this was not a discharge case during closing arguments. Accordingly, the trial court did not err in denying the motion *in limine*.

The third assignment of error is overruled.

Oglebay's fourth assignment of error provides:

THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT DAMAGES SHOULD NOT BE AWARDED IN CONNECTION WITH PLAINTIFF'S TERMINATION.

Prior to charging the jury, Oglebay requested that the court give the jury a proposed instruction. The record states:

THE COURT: ..., this proposed jury instruction was submitted to the Court, and I quote: "This case does not involve a claim by Plaintiff that his employment by Defendant Oglebay Norton Company was wrongfully terminated, whether Plaintiff's termination with Oglebay Norton Company was wrongful or justified, is not an issue in this lawsuit. You are to determine damages for Plaintiff's personal injuries, if any, from these instructions only."

The Plaintiff objects to the first sentence of the proposed charge, and the Defendant wishes to have

that first sentence in the charge.

The Court has ruled that the first sentence will be eliminated, and preserving to the Defendant any exception to the Court's ruling. (Supp.R. at 38.)

The charge of the court indicates that the jury was to award damages, if at all, only in relation to personal injuries derived from the slip and fall accident in question. (R. 702.) This charge sufficiently informed the jury that it was not to award damages for matters outside personal injuries from the accident, to-wit, any retaliatory discharge. The failure of the court to give the first sentence of the proposed instruction was therefore non-prejudicial.

***5** The fourth assignment of error is overruled.

Oglebay's fifth assignment of error provides:

THE COURT ERRED IN REFUSING TO ADMIT EVIDENCE THAT THE SOCIAL SECURITY ADMINISTRATION HAD FOUND PLAINTIFF DISABLED BY REASON OF HEART DISEASE.

At trial, the court precluded the defense from inquiring into or admitting into evidence proposed defense exhibit number 27b, the Social Security Administration's disability finding that Webster was totally disabled from all employment by reason of heart disease with angina, with no mention of the back condition, effective August 28, 1990.

Evid.R. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 generally provides that all relevant evidence is admissible at trial. The document sought to be admitted from the Social Security Administration, a quasi-judicial determination pursuant to *Muellner v. Mars, Inc.* (N.D.Ill.1989), 714 F.Supp. 351, 358, is admissible as a public record and report under Evid.R. 803(8). The information contained therein concerning heart disease as the reason for ceasing to work in August, 1990, makes it less probable that Webster was disabled as a result of the slip and fall approximately twenty months prior to the Social Security Administration's finding of disability and should have been admitted into evidence for the jury's consideration. This evidence was especially relevant and probative because Webster was questioned about the federal disability application and he testified that he was not disabled from working due to heart disease, in direct contradiction to the federal disability finding. The prejudice to Oglebay in not allowing this evidence before the jury calls into question the entire damage award (particularly those damages attributable to after August, 1990) and the element of proximate cause supporting liability.

The fifth assignment of error is affirmed.

Oglebay's sixth assignment of error provides:

THE COURT ERRED IN INSTRUCTING THE JURY TO TAKE INFLATION INTO ACCOUNT AS A MATTER OF COMMON KNOWLEDGE IN AWARDING LOST FUTURE EARNINGS.

In the present case, no expert testimony was offered forecasting future inflation rates. Rather, the court, over Oglebay's objection, instructed the jury that it could rely on its common knowledge in applying inflation to the damage award. In closing argument, Webster argued that an inflation rate of 5% would be proper.

In *Jones & Laughlin Steel Corp. v. Pfeifer* (1983), 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768, the court provided three methods to be used in accounting for the effects of inflation on future lost earnings in federal maritime personal injury cases. These three methods, succinctly stated by Oglebay in its appel-

lant's reply brief at page 21, footnote 10, are the following:

(1) If expert testimony is admitted to forecast the future rate of price inflation, plaintiff's projected lost annual wages may be increased on the basis of projected future price inflation, and the market interest rate is used as the discount rate. *Pfeiffer* (*sic.*), *supra*, 462 U.S. at 547-548. (2) If there is no expert testimony forecasting future inflation rates, plaintiff's projected lost annual wages are not increased by the rate of inflation, and inflation is accounted for by using a below-market discount rate between 1 and 3%. *Id.*, at 548-549. (3) The parties may stipulate that future price inflation and the market interest rate will be assumed to offset each other, so that no adjustment is made for inflation with regard to wages or discounting to present value.

***6** The first and third methods are inapplicable to the case *sub judice.* There remains the second method, which the trial court erred in not so instructing the jury. The court's instruction, that the jury could rely on common knowledge in adjusting the award for inflation, allowed the jury to apply the first method of *Pfeifer* without the benefit of expert testimony. This was error, permitting the jury to return an award with excessive inflation rates applied thereto.

The sixth assignment of error is affirmed.

Oglebay's seventh assignment of error provides:

A SEAMAN WHO MAINTAINS A HOME ASHORE FOR HIS FAMILY IS NOT ENTITLED TO RECOVER THE VALUE OF LOST SHIPBOARD LODGING AS A "FRINGE BENEFIT."

It is undisputed that Webster, while employed by Oglebay, received as part of his compensation the amount of $28.00 per day for the value of shipboard lodging. It is also undisputed that Webster maintained homes for him and his family in Oregon, Ohio, (during the Great Lakes shipping season) and in Florida (while the ship was layed up for the winter) when not sailing. In maintaining these homes, it cannot be said that Webster incurred an additional out-of-pocket expense by reason of his losing his shipboard lodging benefit since he would have maintained his homes in any event. Thus, the shipboard lodging had no pecuniary value in terms of economic reality, and the value of shipboard lodging cannot be recovered as an element of damages. *Alexandervich v. Gallagher Bros. Sand & Gravel Corp.* (2d Cir.1961), 298 F.2d 918; *Conte v. Flota Mercante del Estado* (2d Cir.1960), 277 F.2d 664.

The court erred in including shipboard lodging as an element of damages. Coupling this error with the jury's excessive inflation factor, and the conclusion that this panel is unable to determine from the record how many days Webster worked per year so as to arrive at a reasonable remittitur by excising the improperly included shipboard lodging damages, a new trial is warranted.

The seventh assignment of error is affirmed.

Oglebay's eighth assignment of error provides:

THE NEW TRIAL SHOULD EXTEND TO ALL ISSUES.

Oglebay's ninth assignment of error provides:

IN THE ALTERNATIVE, THE JUDGMENT SHOULD BE MODIFIED AND REDUCED TO THE SUM CONTAINED IN THE DEMAND SERVED UPON DEFENDANT SHORTLY BEFORE TRIAL COMMENCED.

Given the failure to admit the finding of heart disease and the infirmities with the assessment of damages, a new trial is warranted on liability and

damages. Accordingly, the eighth assignment of error is affirmed. By virtue of our determination of the eighth assignment of error, the ninth assignment of error is moot and will not be addressed. App.R. 12(A)(1)(c).

We now turn our attention to Webster's cross-assignments of error.

Webster's first cross-assignment of error provides:

APPELLEES ARE ENTITLED TO PREJUDGMENT INTEREST UNDER OHIO STATUTE SINCE SUCH STATUTORY INTEREST DOES NOT INVOLVE PART OF APPELLEES' COMPENSATORY DAMAGE AWARD BUT IS ASSESSED INSTEAD TO PUNISH THE APPELLANT'S POST-FILING MISCONDUCT: THE *MONESSEN* CASE DOES NOT APPLY TO APPELLEES' CLAIM FOR PREJUDGMENT INTEREST BECAUSE THAT CASE IS LIMITED TO SUCH INTEREST AS A SPECIFIC AND EXPRESS SETTLEMENT TO COMPENSATORY DAMAGES.

***7** In *Monessen Southwestern Ry. Co. v. Morgan* (1988), 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349, the United States Supreme Court held that state courts may not award prejudgment interest pursuant to local practice in FELA actions because: (1) the availability of prejudgment interest is a substantive matter governed by federal law in FELA actions; (2) FELA does not authorize awards for prejudgment interest; and, (3) state courts cannot avoid the application of FELA by characterizing the state prejudgment statute as procedural rather than substantive.[FN3] It is also noted that the general federal interest statute, 28 U.S.C.A. Section 1961, fails to mention prejudgment interest. The Jones Act incorporates by reference, and makes applicable to seamen, the substantive recovery provisions of the FELA. *Miles v. Apex Marine Corp.* (1990), 489 U.S. 19, 111 S.Ct. 317.

FN3. FELA stands for Federal Employers' Liability Act. See 45 U.S.C.A. Section 51 *et seq.*.

The purpose of the Ohio prejudgment interest statute, R.C. 1343.03(C), is to encourage settlement, conserve legal resources, and preserve judicial economy. *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167. The Pennsylvania rule at issue in *Monessen*, Rule 238, had a similar purpose. The effect of both is to increase the potential liability to a defendant in wrongfully delaying settlement and increase the potential award to a victorious plaintiff, thereby directly influencing the substantive remedies available under the federal law. To conclude that the state statute is procedural, as urged by the cross-appellants, and thus not controlled by the federal substantive law is without merit. Under the authority of *Monessen*, the trial court properly denied Webster's motion for prejudgment interest.

The first cross-assignment of error is overruled.

Webster's second cross-assignment of error provides:

THE TRIAL COURT ERRED AS A MATTER OF FACT AND LAW BY FAILING TO AWARD OTHER LITIGATION EXPENSES AS TAXABLE COSTS PURSUANT TO CIV.R. 54(D) APPARENTLY ON THE BASIS THAT ONLY THOSE ITEMS OF EXPENSES SPECIFICALLY DESIGNATED BY STATUTE WERE RECOVERABLE.

Following the trial, Webster sought an award of costs in the amount of $11,856.52 relating to costs in obtaining depositions, photocopying, telefaxes, postage, travel costs, parking and mileage, long distance telephone charges, and an advance on expenses by prior counsel. See Webster's March 26, 1993, Motion

for Taxation of Costs. This motion for costs was opposed by Oglebay with a brief in opposition filed on April 5, 1993. Following a reply brief by Webster, the trial court granted the motion for costs in part and denied it in part, allowing Webster to recover as costs the following: (1) $800.00-Preservation of witness testimony of Dr. Kalb, who testified on behalf of Webster at the trial; (2) $774.00 [$492.00 and $282.00]-Preservation of witness testimony of Dr. Buck, who testified via videotape deposition on behalf of Oglebay at trial; (3) $400.00-Preservation of witness testimony of Dr. Evers; and, (4) $68.60-Webster's mileage and parking for his attendance at defense medical examination. The total amount awarded as costs was $2,042.60.

***8** In this cross-assignment, Webster argues that the trial court erred in not assessing certain non-statutory litigation expenses as costs under Civ.R. 54(D). Due to the case being reversed and remanded for a new trial, the assessment of costs in this matter are of necessity vacated as well. Accordingly, this cross-assignment is moot.

In summary, Oglebay's notice of appeal is affirmed in part and reversed and remanded in part. Webster's cross-appeal is overruled. The case is returned to the trial court for a new trial on liability and damages.

This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with the opinion herein.

It is, therefore, considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

HARPER, J., concurs.

BLANCHE KRUPANSKY, J., concurs in part and dissents in part with attached concurring and dissenting opinion.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

KRUPANSKY, Judge, concurring and dissenting in part:

I concur with the majority's decision to sustain appellant's second assignment of error and reverse and remand the case *sub judice* since the within verdict was excessive and based upon passion and/or prejudice. However, I respectfully dissent from the majority opinion with respect to appellant's first and fourth assignments of error.

Based upon the forthcoming analysis, it is my opinion the verdict in the case *sub judice* was against the manifest weight of the evidence and I, therefore, would sustain appellant's first assignment of error. In addition, the trial court in my opinion erred when it failed to give a cautionary jury instruction to the effect that Webster was not entitled to damages predicated upon a wrongful discharge claim and I, therefore, would sustain appellant's fourth assignment of error.

Appellant's first assignment of error follows:

I. THE VERDICT OF $1,825,000 IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

This assignment has merit, however, the majority overrules it.

An appellate court may find that a verdict is against the manifest weight of the evidence and reverse accordingly only if the verdict is so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice. *Hardiman v. Zep Mfg. Co.* (1984), 14 Ohio App.3d 222.

In the case *sub judice*, the following facts were essentially undisputed: (1) Webster was the captain of the Courtney Burton; (2) Webster suffered for nearly twenty years with prior back problems and, at some point in the 1970's, a physician recommended Webster undergo back surgery which recommendation Webster did not follow; (3) In December, 1988, the Courtney Burton was subjected to a winter storm on the Great Lakes which deposited snow and ice upon the decks of the Courtney Burton; (4) Webster had knowledge of the snow and ice deposits since he ordered the crewmembers to remove the snow and ice from the decks of the Courtney Burton; (5) Webster slipped and fell on the deck of the Courtney Burton; and (6) Webster allegedly sustained back injury proximately caused by his fall on the deck of the Courtney Burton.

***9** In addition, the following facts were also essentially undisputed: (1) Webster worked in the capacity of captain and third mate for two entire years following his slip and fall on the Courtney Burton; (2) Although Webster received medical treatment from Dr. Buck until May, 1991 for pain in his elbow and forearm, Webster never informed Dr. Buck that he, Webster, was suffering from back pain; (3) Webster was seen, in 1990, using a stationary exercise bicycle, lifting weights and playing pool without demonstrating physical pain; (4) Webster stated to the Social Security Administration that his disabling condition was unrelated to his work; (5) Webster informed Dr. Warkentin that he, Webster, decided to quit sailing due to the cardiac pain he experienced while aboard the Ranger in 1990 and not due to his fall on the Courtney Burton; and (6) Dr. Kalb could not say within a reasonable degree of medical certainty that Webster's fall aboard the Courtney Burton was the proximate cause of Webster's back injury.

Based upon the foregoing undisputed facts, clearly the verdict in the case *sub judice* finding Oglebay liable for negligence and awarding Webster $1,825,000.00 was so manifestly contrary to the natural and reasonable inferences to be drawn from the evidence as to produce a result in complete violation of substantial justice. *Hardiman, supra.*

It is significant that Webster worked aboard ship for two years following his fall aboard the Courtney Burton. Two years after his fall on the deck of the Courtney Burton, Webster was observed riding an exercise bike and lifting weights without any outward signs of physical pain. In addition, Webster never informed his personal physician that he, Webster, suffered with back pain. These facts undercut the contention that Webster, in actuality, sustained back injury from the fall.

Furthermore, Webster failed to establish that his back injury, was proximately caused by the fall aboard the Courtney Burton. The element of proximate causation must be established in order to create a *prima facie* case of negligence. It was undisputed that Webster suffered nearly twenty years with prior back problems for which he refused, in the 1970's, to undergo surgery.

Although Dr. Kalb testified that Webster was suffering from two herniated discs, Dr. Kalb testified he could not establish that Webster's herniated disks were, in fact, the proximate result of Webster's fall aboard the Courtney Burton. Furthermore, Webster informed Dr. Warkentin that he quit sailing due to cardiac rather than back pain. Moreover, Webster informed the Social Security Administration that his disability was unrelated to his work as a captain.

In addition, the jury found that Webster was not contributorily negligent with respect to his slip and fall aboard the Courtney Burton. Webster, however, was responsible, as captain, for all actions of the crewmembers of the Courtney Burton. Therefore, even if the crewmembers failed to de-ice the decks of the ship, clearly, as captain, Webster was contributorily negligent with respect to his slip and fall since he was responsible for any failure of the crewmembers to clear the snow and ice from the decks.

***10** To say that Webster, even though he was the captain, was not contributorily negligent is to essentially say that Oglebay has no means by which to protect itself from liability in negligence actions. Oglebay's executive officers cannot personally be aboard every vessel that sails the Great Lakes.

Based upon the foregoing analysis, appellant's first assignment of error has merit and, therefore, I would sustain it.

Appellant's second and fourth assignments of error follow:

II. THE VERDICT OF $1,825,000 IS EXCESSIVE AND WAS THE RESULT OF PASSION OR PREJUDICE.

IV. THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT DAMAGES SHOULD NOT BE AWARDED IN CONNECTION WITH PLAINTIFF'S TERMINATION.

Appellant's second and fourth assignments of error in my opinion have merit, however, the majority sustains only the second assignment of error and overrules the fourth assignment of error.

In order to conclude that a verdict was the result of passion or prejudice, it must appear in the record that the award was induced by (1) the admission of incompetent evidence; (2) misconduct on the part of the court or counsel; or (3) any other action occurring during the course of the trial which can reasonably be said to have swayed the jury in their determination of the amount of damages that should have been awarded. *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53.

In the case *sub judice*, the majority correctly states that the within action was not based upon a theory of wrongful termination but, rather, constituted only a personal injury action. However, a wealth of testimony was adduced by both parties at trial concerning Webster's forced retirement from Oglebay and the concomitant emotional pain experienced thereafter by Webster. Notably, Webster testified at trial that when Oglebay terminated his position as captain, Oglebay, metaphorically, cut off Webster's legs.

In addition, plaintiff's counsel stated during closing argument in relevant part as follows:

We are not here-and Mr. Carson is right. This isn't a claim for wrongful discharge. We are not saying, "Here, there should be punishment, damages against this company for," as Mr. Carson said, "his being forced to resign." We are not asking that.

We are asking for punishment damages, being forced to resign.

We all know what kind of things go on in the workplace. Compare this as to any other company: 55-year-old, injured, complaining.

You have got the June 29th personal injury report here: "Can't sleep-" everything else, problems.

And then right after that he gets called down.

This isn't for that. This is for the loss of earnings and capacity arising out of his injury, and the loss of

employment because of that injury.

And he related truthfully the events of that meeting, and he also testified also with regard to that "*It was my belief that I was forced into voluntary retirement because of my accident.*"

***11** It is so ironic. Nobody came in here to back up. *Sure he said what they said at this meeting.*

You know, he has also testified or we were told that he complained too much. But there is no evidence that there were that substantiates or refutes [sic]. There is no evidence to refute his testimony.

What other evidence or what other reason could there be?

Sure, they said that, but, you know, let's get down to reality. Because it's so ironic that they come in here, and he is portrayed-and you look at the records. He is a very good captain, an exemplary captain. But they want you to find against him because he was a grumpy captain. You know that's what they are saying....

And anything that Captain Webster has said has been corroborated. He is not asking you to take a thing as face value, because everything that he said has been corroborated.

Contrast that with some lawyer standing up here saying that there was justified reasons for him being let go, and not related to this injury and not even producing a witness to even say that.... (Emphasis added).

Clearly, Webster's testimony and the foregoing excerpts from closing argument can reasonably be said to have swayed the jury in their determination of the amount of damages that should have been awarded. A strong inference, therefore, exists that the jury verdict was the result of passion and/or prejudice. *Shoemaker, supra.*

I am not unmindful that the jury, when considering the issue of damages, was required to determine whether or not Webster incurred a loss of wages proximately caused by his physical injury. In this respect, evidence and argument adduced to establish the causal connection between Webster's physical injury and his ultimate termination due to such physical injury was relevant and not unfairly prejudicial to Oglebay. Similarly, evidence and argument adduced to establish that Oglebay terminated Webster for reasons other than his physical injury, thereby establishing that Webster's physical injury was not the proximate cause of his loss of wages, was also relevant.

However, evidence and argument tending to focus upon Webster's wrongful termination rather than upon his physical injury, *i.e.*, evidence and argument which was primarily centered around portraying Webster as the emotionally bereft victim of a wrongful termination rather than merely the victim of Oglebay's negligence, tended to create not only undeserved sympathy for Webster but also unfair prejudice against Oglebay.

Interestingly enough, although the majority sustains appellant's second assignment of error, the majority cryptically overrules appellant's fourth assignment of error even though these assignments of error are in my opinion inextricably bound together.

Nevertheless, Civ.R. 51 states in relevant part as follows:

(B) Cautionary instructions. At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the

case.

***12** Prior to the trial court's charging the jury, Oglebay submitted the following proposed jury instruction which may be found at p. 38 of Oglebay's supplemental transcript of proceedings:

This case does not involve a claim by Plaintiff that his employment by Defendant Oglebay Norton Company was wrongfully terminated, whether Plaintiff's termination with Oglebay Norton Company was wrongful or justified, is not an issue in this lawsuit.

Webster objected to the foregoing proposed jury instruction. Thereafter, the trial court refused to charge the jury with the foregoing jury instruction and preserved to Oglebay any objection to the trial court's refusal to so charge.

Given Webster's emotional testimony and the passionate reference to wrongful termination in the closing argument, although Civ.R. 51(B) leaves the decision of whether or not to give cautionary jury instructions to the sound discretion of the trial court, I conclude that in the case *sub judice*, the trial court should have given the foregoing jury instruction proposed by Oglebay and by refusing to give such instruction, abused its discretion.

Clearly Webster's testimony and the passionate closing argument can reasonably be said to have swayed the jury. The trial judge should have recognized the prejudicial potential of such testimony and argument and gave Oglebay's foregoing proposed jury charge in an attempt to prevent the jury from being so swayed. Clearly, since Webster's testimony and the foregoing closing argument tended to precipitate the excessive verdict, a cautionary jury instruction would have tended to forestall precipitation of such excessive verdict.

Based upon the foregoing analysis, the trial court erred when it refused to give the foregoing proposed jury instruction. Appellant's fourth assignment of error, in addition to appellant's second assignment of error, has merit and I would sustain it.

I, therefore, concur with the majority opinion with respect to the remaining assignments of error but I dissent from the majority's determination to overrule appellant's first and fourth assignments of error.

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Not Reported in N.E.2d, 1995 WL 32628 (Ohio App. 8 Dist.)

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