**[Cite as *McKahan v. CSX Transp., Inc.*, 2009-Ohio-5359.]**

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

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| William E. McKahan, | : | |
| Plaintiff-Appellee, | : | No. 09AP-376<br>(C.P.C. No. 05CVC10-11612) |
| v. | : | (REGULAR CALENDAR) |
| CSX Transportation, Inc., | : | |
| Defendant-Appellant. | : | |

D E C I S I O N

Rendered on October 8, 2009

Stege & Michelson Co., LPA, and *Andrew J. Thompson*, for appellee.

*Burns, White & Hickton, LLC*, *David A. Damico*, *Ira L. Podheiser* and *Nicole E. Bazzy*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

**{¶1}** Plaintiff-appellee, William E. McKahan, was a veteran railroad employee of defendant-appellant, CSX Transportation, Inc. Towards the end of his employment with CSX, McKahan developed, among other things, carpal tunnel syndrome, which ultimately prevented him from working. He filed suit against CSX for failing to maintain a safe working environment, pursuant to the Federal Employers' Liability Act ("FELA"). During a jury trial, CSX objected to various trial court rulings over the admissibility of evidence, and jury instructions. The jury ultimately awarded McKahan damages totaling $459,487.64.

After the trial, the railroad filed numerous post-trial motions. The trial court denied CSX's motions, and this appeal ensued.

**{¶2}** Appellant, CSX, assigns seven errors for our review:

> I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY NOT GRANTING A JURY INSTRUCTION PERMITTING THE JURY TO APPORTION DAMAGES FOR MCKAHAN'S INJURIES BASED ON ALL CONTRIBUTING FACTORS, INCLUDING THOSE NOT INVOLVING MCKAHAN'S CONTRIBUTORY NEGLIGENCE.
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> II. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PRECLUDING CSX FROM REFERENCING MCKAHAN'S RAILROAD EMPLOYMENT PRIOR TO JUNE 1, 1999.
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> III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING TESTIMONY REGARDING DAMAGES OTHER THAN FOR THOSE CLAIMED IN THE COMPLAINT (BILATERAL CARPAL TUNNEL SYNDROME).
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> IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE JURY TO HEAR TESTIMONY FROM A CO-WORKER REGARDING MCKAHAN'S ALLEGED LOST WAGES DAMAGES.
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> V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ADMITTING THE EXPERT TESTIMONY OF MCKAHAN'S EXPERT WITNESSES, GERALD ROSENBERG AND MICHAEL SHINNICK, AND COMPOUNDED THIS ERROR BY REFUSING TO GRANT A DAUBERT HEARING.
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> VI. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GRANT CSX'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.
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> VII. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT GRANTING A NEW TRIAL, OR REMITTING THE VERDICT, DUE TO THE EXCESSIVENESS OF THE VERDICT.

**{¶3}** Our standard of review for all but the sixth assignment of error is abuse of discretion. Thus, to warrant reversal, appellant must present evidence that the trial court acted irrationally, or arbitrarily and capriciously. See, e.g., *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. An abuse of discretion is more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. Id.; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. We will therefore address each assignment of error in order, except for number six, which we will review last, de novo.

**{¶4}** The first assigned error concerns the trial court's refusal to allow one of appellant's proposed jury instructions—concerning the apportionment of damages related to McKahan's comparative negligence.

**{¶5}** Under the FELA, a railroad is liable for damages to any person who suffers an injury while in the railroad's employ, provided that the injury is the result, in whole or in part, of the railroad's negligence. *Gallick v. Baltimore & Ohio R.R. Co.* (1963), 372 U.S. 108, 116, 83 S.Ct. 659. If there is evidence that any employer negligence caused the harm, or enough to justify the jury's determination that employer negligence played a role in producing harm, it is error to refuse to accept the jury's verdict against a railroad in a suit under FELA, 45 U.S.C.A. § 51. Id.

**{¶6}** The only exceptions to the employer's liability are: 1) the employee's own (contributory) negligence; and 2) situations where the employer's negligence causes an injury that is better classified as the aggravation of a pre-existing condition. See *Norfolk & Western Ry. Co. v. Ayers* (2003), 538 U.S. 135, 159–60, 123 S.Ct. 1210; 45 U.S.C.A. § 53; cf. *Stevens v. Bangor and Aroostook R.R. Co.* (C.A.1, 1996), 97 F.3d 594, 601.

**{¶7}** In this case, the jury found that McKahan was five percent negligent, and the damage award was reduced appropriately. The railroad proffered other theories about how McKahan developed carpal tunnel—that he allegedly suffered from some underlying neurological disorder, he was old, and was a heavy drinker. The jury ultimately determined, however, that the railroad was 95 percent responsible for McKahan's injuries. Thus, the trial court followed applicable law in charging the jury, allowing it to apportion five percent of the negligence to the plaintiff. We do not see any evidence that the trial court abused its discretion with regard to the jury instruction at issue.

**{¶8}** The first assignment of error is overruled.

**{¶9}** In the second assigned error, appellant challenges one of the trial court's evidentiary rulings on its motion in limine relating to McKahan's pre-1999 employment record. A motion in limine is preemptive trial tactic that elicits a ruling to either exclude or admit certain evidence, usually on the basis of unfair prejudice. See, e.g., *Illinois Controls, Inc. v. Langham* (1994), 70 Ohio St.3d 512, 526; *State v. Black* , 172 Ohio App.3d 716, 719, 2007-Ohio-3133. As the decision to admit or exclude evidence is squarely left to the discretion of the trial court, we will not disturb a trial court's ruling on a motion in limine absent an "abuse of discretion that amounted to prejudicial error." Id.

**{¶10}** Appellant has not demonstrated that the trial court abused its discretion in this regard, and in fact, has failed to cite any case law, or present any cogent legal argument in support of this assigned error, as required by App.R. 16(A)(7). Accordingly, we overrule the second assignment of error, pursuant to App.R. 12(A)(2). See *Pearn v.*

*DaimlerChrysler Corp.*, 148 Ohio App.3d 228, 237–38, 2002-Ohio-3197 ("If an argument exists that can support this assignment of error, it is not this court's duty to root it out.").

**{¶11}** The third assignment of error is also evidentiary in nature. Here, appellant argues that the trial court's admission of testimony regarding damages not specifically described in the complaint was unfairly prejudicial. Although appellant makes a cursory citation to Evid.R. 401, describing what is "relevant evidence," appellant has again failed to put forth a cogent legal argument in support of its assignment of error, as required by App.R. 16(A)(7).

**{¶12}** The third assignment of error is overruled.

**{¶13}** The fourth assignment of error, also evidentiary in nature, concerns the trial court's decision allowing a non-expert witness to testify about McKahan's lost wages. The abuse of discretion standard of review applies here, too. See *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 616.

**{¶14}** Expert testimony is intended to "assist the trier of fact in determining a fact issue or understanding the evidence." Id. at 611. According to Evid.R. 702(A), an expert witness's testimony must either relate to matters "beyond the knowledge or experience possessed by the lay persons," or dispel a misconception common among lay persons. Id.; see also *Burens v. Indus. Comm.* (1955), 162 Ohio St. 549, paragraph two of the syllabus.

**{¶15}** Here, the trial court allowed McKahan to present evidence of his lost wages using a lay, or fact witness, who was one of his co-workers. Appellant argues that this was unfairly prejudicial because the fact witness McKahan presented "had a differing work schedule and earnings history." (Appellant's Brief, at 17.) Although appellant

asserts that the testimony concerning McKahan's lost wages was unreliable, appellant has again failed to prove it, and has again failed to demonstrate that the trial court abused its discretion in allowing the evidence to get to the jury.

**{¶16}** Simply because litigants often hire experts to proffer opinions and testimony concerning lost wages, does not mean that such an expert witness is necessary or required. Relevant evidence is that which tends to make any fact at issue either more probable or less probable than without considering the evidence. The trial court found that McKahan's witness had personal knowledge of the fact(s) at issue, and that the witness was competent to testify; thus, the court allowed the testimony.

**{¶17}** The fourth assignment of error is overruled.

**{¶18}** Appellant's final evidentiary challenge is in the fifth assignment of error, which asserts that the trial court erred by admitting McKahan's expert witnesses, Drs. Rosenberg and Shinnick. "In so doing, the trial court clearly abdicated its gatekeeper function, which is to prevent the jury from considering unscientific junk science." (Appellant's Brief, at 18.) Again, we review for abuse of discretion. See *Miller*, supra.

**{¶19}** Here, appellant sets forth the basic case law concerning the qualification of expert witnesses, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 596, 113 S.Ct. 2786, and its Ohio equivalent, *Miller*, supra. Again, appellant fails to demonstrate how the trial court abused its discretion in qualifying these experts. Appellant takes issue with Dr. Shinnick's qualifications by attacking the fact that he is not a medical doctor, and that he could not testify as to the medical causes of McKahan's injuries. Dr. Shinnick, however, is an expert in ergonomics, and did not opine on medical evidence per se. By contrast, McKahan's other medical expert, Dr. Rosenberg, is a

medical doctor, and he did opine on the medical causes of McKahan's injuries. Appellant fails to discredit either expert, and only succeeds at disagreeing with their opinions. Appellant makes a conclusory assertion that McKahan's experts were opining on "unscientific junk science" but appellant does not offer any support to its assertion. The fact that appellant disagrees with the other side's expert does not amount to an abuse of discretion by the trial court.

**{¶20}** Accordingly, we overrule the fifth assignment of error.

**{¶21}** In the seventh assigned error, appellant argues that the trial court abused its discretion by denying the railroad's request for a new trial, based on "excessiveness of the verdict." Again, we review for an abuse of discretion. See *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448.

**{¶22}** Under Civ.R. 59, a trial court may grant a motion for new trial when a jury's verdict is not supported by the manifest weight of the evidence. When considering a motion for new trial, the trial court must abstain from disturbing the verdict unless it determines that the jury's damage assessment was so overwhelmingly disproportionate as to shock reasonable sensibilities. *Driscoll v. NorProp, Inc.,* 129 Ohio App.3d 757, 766 (quoting *Pena v. N.E. Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 104). Thus, a trial court may not set aside a verdict upon the weight of the evidence based on a mere difference of opinion between the court and jury. *Poske v. Mergl* (1959), 169 Ohio St. 70, 73–74.

**{¶23}** The railroad's argument that the jury's verdict is not supported by the evidence is based entirely on McKahan's presentation of evidence of lost wages. (Appellant's Brief, at 24.) The argument here is essentially the same as the fourth

assignment of error. We have already said that there was nothing improper about using a lay witness to give testimony regarding lost wages. Furthermore, there is nothing "shocking" about a one-half million dollar verdict in a case such as this one. The jury found that the plaintiff could no longer perform his ordinary vocational duties, because of his employer's negligence. There was ample evidence to support the amount of lost wages, and medical bills, and the pain-and-suffering amount was not grossly disproportionate to the compensatory amount.

**{¶24}** The seventh assignment of error is overruled.

**{¶25}** In the sixth assignment of error, the railroad argues that the trial court erred by denying appellant's motion for judgment notwithstanding the verdict ("JNOV"), pursuant to Civ.R. 50. We review this assignment of error de novo. See *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶8.

**{¶26}** As with motions for directed verdict, JNOV motions present purely legal questions, which test the sufficiency of the evidence supporting the verdict. Id.; see also *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119, 1996-Ohio-85. Thus, on appeal, we consider neither the weight of the evidence, nor the credibility of the witnesses. If there is substantial, competent evidence to support the verdict, or non-moving party, evidence upon which reasonable minds might reach different conclusions, the motion must be denied. Id. (quoting *Kellerman v. J.S. Durig Co.* (1964), 176 Ohio St. 320).

**{¶27}** Appellant's argument that the verdict should be set aside is based on an alleged minor inconsistency in the jury interrogatories: "When the jurors returned their answers to interrogatories, five (5) jurors had found both parties negligent; however, one (1) of them found only CSX negligent, and did not find McKahan negligent (the other two

(2) jurors found CSX negligent, but found no causation)." (Appellant's Brief, at 23.) Counsel for McKahan argues that CSX waived this argument, having not properly preserved it for appeal.

**{¶28}** Appellee is correct in stating that the general rule in this circumstance is that any objection to an inconsistency between a general verdict and a jury interrogatory is waived unless it is made before the court discharges the jury. *Cooper v. Metal Sales Mfg. Corp.* (1995), 104 Ohio App.3d 34, 42. The reasoning for this rule is that in situations where an inconsistency is present, the best option is to recall the jury, so that they may clarify their position. Id. (citing *Shaffer v. Maier*, 68 Ohio St.3d 416, 1994-Ohio-134). By waiting until after the jury has been discharged, this best option is no longer available to the trial court.

**{¶29}** Here, the trial transcript makes clear that appellant's counsel did not make any sort of objection after polling the jury, and both counselors agreed that the jury be discharged. (Tr. 156–57.) Thus, appellant's first objection to the jury's interrogatories was presented in its motion JNOV. Appellant's argument was therefore waived.

**{¶30}** Even if we were to assume that appellant had properly preserved this argument for appeal, appellant has still failed to demonstrate that the trial court should have granted its motion. Eight jurors found the railroad negligent; six of those finding that the railroad's negligence was the cause of McKahan's injuries. Those same six jurors agreed on an apportionment of liability, and award of damages, and signed the general verdict form for McKahan. Appellant argues that because one of the jurors signed interrogatory No. 4 (plaintiff's causation), but not interrogatory No. 3 (plaintiff's negligence), that the verdict should somehow be disregarded or thrown out, as though it

is inherently suspect or unreliable. To void an entire verdict after a full jury trial because of such a minor inconsistency would mock our entire justice system, not to mention that it is flatly inconsistent with prevailing Ohio law. See *Klever v. Reid Bros. Exp.* (1949), 151 Ohio St. 467, 474 ("If it is reasonably possible so to do, special findings of a jury must be harmonized with its general verdict").

**{¶31}** Appellant has failed to demonstrate reversible error with regard to its JNOV motion, and we therefore overrule the sixth assignment of error.

**{¶32}** Having overruled all seven assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

*Judgment affirmed*.

CONNOR, J., concurs.
SADLER, J., concurs separately.

SADLER, J., concurring separately.

**{¶33}** While I concur in the disposition of appellant's assignments of error, I write separately to explain my rationale for overruling the fourth and seventh assignments of error.

**{¶34}** *Under the facts of this case*, evidence quantifying appellee's past lost wages was not "beyond the knowledge or experience possessed by lay persons" and there was no demonstrated need to "dispel[ ] a misconception common among lay persons" about the subject. Evid.R. 702. Thus, the trial court did not abuse its discretion insofar as it allowed a lay witness to provide testimony about appellee's past lost wages. Moreover, appellee's coworker, Bruce Carter, confined his testimony to the time periods for which appellee claimed past lost wages (during which, it was undisputed, the two men

would have performed the same job duties), Carter testified as to his own payroll records for those time periods, and he testified that had appellee been working during those periods the two men would have earned the exact same wages. Appellant's reference to appellee's work in a different position prior to developing his carpal tunnel syndrome does not render appellee's work history so different from that of the lay witness as to render the witness's testimony irrelevant or unreliable. For these reasons, I concur in overruling the fourth assignment of error.

**{¶35}** With respect to the seventh assignment of error, it is important to note that the jury's damages award consists of $109,487.64 for past lost wages and $350,000 for pain, suffering, emotional distress, and loss of quality of life. Appellant argues that both awards were not sustained by the weight of the evidence (pursuant to Civ.R. 59(A)(6)), and that the pain-and-suffering award is excessive and was given under the influence of passion or prejudice (pursuant to Civ.R. 59(A)(4)). The award for past lost wages is in the exact amount to which lay witness Carter testified. Thus, this award is supported by the weight of the evidence.

**{¶36}** With respect to the pain-and-suffering award, appellant's brief contains no specific argument as to why this award is not sustained by the weight of the evidence. The award encompassed both past and future pain and suffering. " '[P]ain and suffering are subjective feelings, [and] the injured person's testimony is the only direct proof of such damages. * * * Therefore, lay testimony is sufficient by itself to prove past pain and suffering damages.' " *Barker v. Netcare Corp.*, 147 Ohio App.3d 1, 18, 2001-Ohio-3975, quoting *Youssef v. Jones* (1991), 77 Ohio App.3d 500, 505. Both appellee and his wife testified about appellee's pain, suffering, and loss of quality of life. "Generally in the case

of an objective injury, such as the loss of a body member, the jury may draw their conclusions as to future pain and suffering from the fact of the injury alone, the permanency being obvious. However, in a case involving a subjective injury, expert medical testimony is needed to prove future pain and suffering or permanency." *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230-31. Here, Dr. Rosenberg testified as to the permanency of appellee's conditions. The trial court did not abuse its discretion in denying the motion for new trial under Civ.R. 59(A)(6).

**{¶37}** Appellant also argues that the pain-and-suffering award is grossly excessive and was given under the influence of passion or prejudice, but points to no evidence to support this claim. In considering a motion under Civ.R. 59(A)(4), "[t]he important consideration for trial judges * * * is the evidence *establishing grounds for a new trial*, not the evidence supporting the jury's verdict." (Emphasis sic.) *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, ¶36. "In order to conclude that the verdict was the result of passion or prejudice, it must appear in the record that the award was induced by: '3. * * * (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.' " *Shoemaker v. Crawford* (1991), 78 Ohio App.3d 53, 65, quoting *Fromson & Davis Co. v. Reider* (1934), 127 Ohio St. 564, paragraph three of the syllabus. Appellant has not argued that any of the foregoing occurred at trial to inflame the jury's passion or prejudice. "The amount of the verdict alone will not sustain a finding of passion or prejudice. There must be something contained in the record which the complaining party can point to that wrongfully inflamed

the sensibilities of the jury." Id. Appellant having failed to point to any such instance in the record, and none appearing therein, we must conclude that the trial court did not abuse its discretion in denying appellant's Civ.R. 59(A)(4) motion for new trial.

**{¶38}** For all of the foregoing reasons, I concur in the disposition of appellant's fourth and seventh assignments of error. I likewise concur in the disposition of the remaining assignments of error.

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