[Cite as *Szuch v. King*, 2010-Ohio-5896.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Edward J. Szuch, Jr., et al.

Appellants/Cross-Appellees

v.

Kenneth King, et al.

Appellees/Cross-Appellants

Court of Appeals No. E-09-069

Trial Court No. 2006-CV-614

DECISION AND JUDGMENT

Decided: December 3, 2010

* * * * *

Dennis E. Murray, Jr., and James S. Timmerberg, for appellants/ cross-appellees.

Harry Sigmier for appellees/cross-appellants Lake Fish Co., Dale Trent, and Craig Carr.

William H. Smith, Jr., for appellees Joe Smith and Joe Herr.

James W. Hart, for appellees Richard Stinson, Orvilee Stinson, and Port Clinton Fisheries, Inc.

Alan B. Dills and Amy M. Natyshak, for appellee Kenneth King.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal an unfavorable judgment entered on a jury verdict in the Erie County Court of Common Pleas on a suit brought by a commercial fisherman for tortious interference, civil conspiracy and antitrust violations against wholesale fisheries, their principals and other fishermen. For the reasons that follow, we affirm.

{¶ 2} The Ohio Department of Natural Resources ("ODNR") regulates commercial fishing in the Ohio waters of Lake Erie. ODNR licenses the fishermen and, in the case of the most prized catch, the Lake Erie yellow perch, the agency sets a "quota," dictating the maximum weight of catch a licensee may take. If a licensee exceeds the set quota for any year, it is considered poaching and is unlawful.

{¶ 3} Appellant is Edward J. "Buckshot" Szuch, Jr.[1] Appellant fished with his family beginning in 1985. He stopped in 1999 due to illness. When he returned to fishing in 2001, he fished on his own. In following years he sometimes fished with others.

{¶ 4} In 2001, appellant sold his fish to appellee Port Clinton Fisheries, Inc.[2] In 2002 and 2003, appellant sold his catch to appellee Lake Fish Co.[3]

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[1]His company, Buck's Fishery LLC, is also nominally an appellant. For purposes of this decision, we shall refer to Edward Szuch as appellant.

[2]Port Clinton Fisheries' principals are appellee Richard Stinson and his father, appellee Orvilee Stinson.

[3]Lake Fish is owned by appellees Dale Trent and Craig Carr.

{¶ 5} In January 2004, ODNR agents, investigating commercial poaching, executed search warrants on a number of fish houses, including Port Clinton Fisheries and Lake Fish. Agents seized sales records and accounting documents. In the course of the investigation, ODNR officers interviewed appellant.

{¶ 6} In a recorded audio statement in April 2004, and again in a 2005 videotaped statement, appellant told agents that he and several other commercial fishermen conspired with the fish house operators to underreport the yellow perch catch. According to appellant, when he dealt with Port Clinton Fisheries, a separate running tabulation of the weight of the yellow perch catch sold, but not reported, was kept. At the end of the season, the fish house would issue a "bonus" check to each participating fisherman to compensate for the previously unreported catch.

{¶ 7} Lake Fish operated slightly differently, according to appellant. Lake Fish paid an apparently higher rate per pound, but this was offset by a commensurate reduction in the reported weight of the catch. The result of both schemes was to allow commercial fishermen to poach yellow perch substantially in excess of the ODNR quota and the submission of falsified reports to the agency.

{¶ 8} In the fall of 2005, the Cuyahoga County Grand Jury handed down criminal indictments against Port Clinton Fisheries and its principals, Lake Fish and its owners, appellee Joe Smith and several other commercial fishermen and women. Appellant was not charged. In the course of the criminal prosecution, appellant's statements became

known and eventually a copy of his videotaped statement was provided to criminal defense counsel in discovery.

{¶ 9} In the allegations contained in the suit that underlies this appeal, appellant asserts that, in retaliation for his cooperation in the criminal investigation, appellees conspired to destroy his commercial fishing business, organized a boycott of the purchase of his fish and tortiously interfered with his business relationships. According to appellant's complaint, when the principals of Lake Fish viewed a copy of appellant's videotaped statement, they refused to buy more fish from appellant and ordered him off the property. Port Clinton Fisheries also refused to buy appellant's fish. Appellant insists that this forced him to sell the remainder of his 2005 catch to a Canadian wholesaler.

{¶ 10} Appellant also alleged that appellee Joe Smith provided a copy of appellant's videotaped statement to appellee Kenneth King, owner of the largest fishing operation on Lake Erie. King, appellant alleged, ordered Smith to take the tape to show to Canadian fishermen. Appellant also alleged that King told Lake Fish that he would no longer do business with them if they bought fish from appellant.

{¶ 11} King's purpose, according to appellant, was to block appellant from any market to sell his fish. King would economically benefit if appellant did not fish his quota because, under the ODNR rules then in effect, the underutilized portion of a quota was reallocated to other fishermen for the next season. As the largest, King would most benefit, as would appellee Joe Herr, who also fishes a large quota. Herr, appellant

alleged, told one Canadian wholesaler that he would no longer sell to the wholesaler if the wholesaler bought appellant's fish.

{¶ 12} The result of all this intrigue, according to appellant, was that appellant was unable to identify in advance anyone who would agree to purchase his catch if he went fishing. Appellant never fished during the 2006 season or again. He eventually sold his licenses, boat and equipment.

{¶ 13} Appellees responded to appellant's complaint, denying any conspiracy, interference or organized boycott. Following extensive discovery, the matter proceeded to a trial before a jury.

{¶ 14} At trial, appellant testified to his own role in the poaching scheme. He also testified that, while he was poaching, he heard appellees King and Herr rail against poachers as "stealing" their fish and depressing the price of fish by overproduction. It was from King, appellant said, that he first learned of the ODNR raid on the fish houses and the investigation into poaching.

{¶ 15} According to appellant, once the investigation became known, appellant's 2004 fishing partner, Gary Meinke, hosted a meeting in Meinke's "red barn" between appellant and appellees Trent and Carr. Appellant testified that Trent and Carr told him that the ODNR raid on Lake Fish had yielded potentially incriminating documents. Nevertheless, the meeting participants agreed to keep silent: "stick to your stories, meaning don't tell ODNR." Appellant testified that once the news of his cooperation got out with the release of the DVD, he feared for his safety and that of his family.

{¶ 16} According to appellant, at one point shortly after the disclosure of his involvement in the ODNR investigation, he found a stuffed purple monkey with a noose around its neck hanging on the anchor light of his boat. On the monkey was a note saying, "Good luck fishing." Appellant never identified the source of the monkey.

{¶ 17} Appellant claimed another result of the release of the DVD was that his crew quit, leaving his nets in the water at the end of the season. It was at this point that appellant approached appellee King, offering to sell him the nets where they were, or even his whole business. Eventually, appellant's brother helped him collect his nets.

{¶ 18} Appellant maintains that he, nevertheless, intended to fish the 2006 season. Over the winter, he put on hands to help him mend nets. He reached an understanding with a Lorain broker, Chris Bennett, to sell his catch to a Canadian fish house. This was not to happen.

{¶ 19} According to appellant, in March or April 2006, Bennett notified him that he would not be able to broker appellant's fish. Appellant testified he called several fish houses, but could not find a buyer. Since the principals of appellees Port Clinton Fisheries and Lake Fish had already indicated that they did not wish to do business with appellant and did not respond to letters he sent, appellant concluded that he would have no market for a catch. Appellant did not fish that year.

{¶ 20} Appellant then introduced the deposition testimony from two hands who were to have fished with him in 2006. One of the hands testified to being present when appellee King told the other hand, referring to the 12.5 percent of profit each hand was

promised, "12 and a half percent of nothing [is] nothing." The other hand, now an employee of appellee King, testified that he did not recall the remark.

{¶ 21} A founding member of the Ohio Fish Producers Association, the lobbying group for the commercial fishing industry, testified that it was "scuttlebutt" at the association meetings that it might not be a good idea to buy fish from appellant because of his cooperation with ODNR. The witness denied that this tactic was ever officially discussed and could not ascribe a particular source for the suggestion.

{¶ 22} Christopher Bennett testified that about half of the fish he bought came from appellee King, but denied any pressure from King or anyone else to refrain from purchasing from appellant. Bennett said he had acted as an intermediary between appellant and Canadian fish house All-Temp, because All-Temp's owner had no direct relationship with appellant and wanted a trusted partner to assure the weight and handling of the fish. All-Temp's owner said he did not want to deal directly with appellant, according to Bennett, because of appellant's poaching history and because other suppliers had indicated they might not be happy to have their fish on the same truck as appellant.

{¶ 23} When asked about having been quoted in the newspaper as saying that commercial fishermen had "black-balled" appellant, Bennett testified that the quote was based on statements appellant made to him and that he had no independent knowledge of any specific individuals acting in furtherance of such an action. Bennett said at one point appellee Herr asked if he was going to buy fish from appellant. Bennett testified that when he responded that he was, appellee Herr just "[s]hook his head like I was stupid, but

he didn't say anything." Bennett specifically denied making a statement that appellee King had threatened to stop selling fish to him if he bought from appellant.

{¶ 24} As to why Bennett withdrew his offer to buy appellant's fish in the spring of 2006, Bennett stated he found himself in financial trouble in February 2006 when the sale of his retail operation fell through and he was faced with substantial federal tax arrearages. According to Bennett, embarrassment over his financial troubles was the reason he had not explained to appellant his reason for pulling out. He testified that when he had straightened out his finances, he called appellant and asked for fish, but appellant told him that he was not fishing.

{¶ 25} Appellant also called appellees Richard and Orvilee Stinson, appellee Trent, appellee Carr and appellee King, all of whom denied any conspiracy to prevent appellant from selling fish. The Stinsons, Carr and Trent testified that they had decided not to buy fish from appellant, but in doing so they acted independently. They felt that after appellant's cooperation with ODNR, they could no longer trust him.

{¶ 26} Called by appellant, appellee Joe Smith testified that he had obtained a copy of appellant's DVD from appellee Trent and taken it for a Canadian colleague to view on the request of the colleague. The colleague did not have time to view the DVD while Smith was present and asked permission to make a duplicate. Smith testified that he allowed the copying and returned the original to Trent. Smith said he was unaware of how many people in Canada had seen the copy.

{¶ 27} Appellee Joe Herr testified during appellant's case in chief that when he first heard of the indictments he thought it "was about time them fellows [at ODNR] do their job." Herr conceded that he told the owner of All-Temp to be cautious of dealing with appellant, because, "he's a known poacher, admitted. And I would just as soon not have my high quality fish blended with his fish on the truck in the State of Ohio."

{¶ 28} At the conclusion of his case in chief, appellant proffered the testimony of an ODNR officer who, had he been allowed to testify, would have testified that Chris Bennett told him that Ken King had told Bennett that if Bennett wanted to buy any fish from King, he had better not buy any from appellant.

{¶ 29} With that appellant rested. The court denied appellees' motion for a directed verdict.

{¶ 30} Appellees called the owner of the Canadian fish house, All-Temp. The All-Temp owner testified that he was already cautious about dealing with appellant due to prior dealings with appellant and his brother. At one point, the owner said, the brothers reneged mid-season on a verbal agreement to supply to All-Temp when they found a better price at another fish house. There was also an issue of the Szuch brothers' failure to return three dozen $300 "totes" belonging to All-Temp.

{¶ 31} Nevertheless, the owner testified, he agreed to buy appellant's fish through Chris Bennett. The owner testified that he reconsidered this decision following his conversation with Joe Herr. Asked why Herr would not want his fish on the same truck as appellant's, the All-Temp owner testified:

{¶ 32} "Well, they have licenses and they are in jeopardy if Szuch plays games with the fish, for example, like getting undersized perch, and mixed them with Joe Herr's fish, taking the tags off Joe Herr's fish and putting Joe Herr's tags on his fish." The All-Temp owner testified that he had personally experienced such action previously. The result was a thousand dollar fine and ODNR seizure of the fish.

{¶ 33} In subsequent discussions with Chris Bennett, the owner testified, All-Temp agreed to accept appellant's fish through Bennett, if Bennett could get the fish to Detroit and meet a truck there. This would solve the mixed truck situation to which Herr objected.

{¶ 34} At the conclusion of evidence, the matter was submitted to the jury which found for appellees on all counts. The trial court entered judgment on the verdict and overruled appellant's motion for a new trial.

{¶ 35} Appellant now brings this appeal, setting forth the following four assignments of error:

{¶ 36} "First Assignment of Error: The trial court erred in instructing the jury on the rule of reason.

{¶ 37} "Second Assignment of Error: The jury's verdict that Joe Herr was not guilty of tortious interference with a business relationship between Plaintiff Ed "Buckshot" Szuch and Chris Bennett was against the manifest weight of the evidence.

{¶ 38} "Third Assignment of Error: The trial court erred in refusing to admit testimony of ODNR Officer Mike Tetzlaf that Chris Bennett told him that Defendant Ken

King, Bennett's largest supplier of fish, had told Bennett that if Bennett brokered Szuch's fish, King would bury his fish before he would sell any more fish to Bennett.

{¶ 39} "Fourth Assignment of Error: The trial court erred in excluding the testimony of Robert Collins that Attorney Bill Smith, acting in his capacity as an agent of the commercial fishing industry, had told Collins that Plaintiff Ed Szuch was a snitch."

I. Rule of Reason

{¶ 40} In his first assignment of error, appellant maintains that the trial court erred in denying his request that, with respect to his restraint of trade claim, the jury be instructed pursuant to the definition of "per se" restraint of trade, rather than the "rule of reason."

{¶ 41} R.C. 1331.01(B) provides:

{¶ 42} "(B) 'Trust' is a combination of capital, skill, or acts by two or more persons for any of the following purposes:

{¶ 43} "(1) To create or carry out restrictions in trade or commerce;

{¶ 44} "(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

{¶ 45} "(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

{¶ 46} "(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of

merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

{¶ 47} "(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

{¶ 48} "(6) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity.

{¶ 49} "* * *

{¶ 50} "A trust as defined in division (B) of this section is unlawful and void."

{¶ 51} Pursuant to R.C. 1331.08, one injured by any unlawful activity delineated in this section may sue and recover treble damages and costs.

{¶ 52} R.C. 1331.01, et seq., the Valentine Act, is patterned after the federal Sherman Antitrust Act. As a result, interpretation of the act is informed by federal judicial construction of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Center* (1980), 63 Ohio St.2d 201, 204.

{¶ 53} To establish a restraint of trade claim, a plaintiff must show both that there was a combination of effort, economically or by action, and that such effort unreasonably restrains trade in a relevant market. *N.H.L. Players' Assn. v. Plymouth Whalers Hockey* (2003), 325 F.3d 712, 718.

{¶ 54} "Two analytical approaches are used to determine whether a defendant's conduct unreasonably restrains trade: the per se rule and the rule of reason. The per se rule identifies certain practices that 'are entirely void of redeeming competitive rationales.' If a court determines that a practice is illegal per se, no examination of the practice's impact on the market or the procompetitive justifications for the practice is necessary for finding a violation of antitrust law. The rule of reason, however, requires a court to analyze the history of the restraint and the restraint's effect on competition." Id. (Citations omitted.)

{¶ 55} "Rule of reason analysis requires the plaintiff to prove (1) that the defendant(s) contracted, combined, or conspired; (2) that such contract produced adverse anticompetitive effects; (3) within relevant product and geographic markets; (4) that the objects of and conduct resulting from the contract were illegal; and (5) that the contract

was a proximate cause of plaintiff's injury." *Care Cooling and Heating, Inc. v. American Standard, Inc.* (2005), 427 F.3d 1008, 1014.

{¶ 56} The rule of reason is the presumptive standard to be applied. Id. at 1012. Per se rules are appropriate only when they relate to conduct that is manifestly anticompetitive. *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977), 433 U.S. 36, 49. "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements." *Northern Pac. Ry. Co. v. U.S.* (1958), 356 U.S. 1, 5. (Citations omitted.)

{¶ 57} Appellant insists that he alleged and made proof that appellees conspired to effect a group boycott of appellant, blocking him from any market within which to sell his fish. Since group boycotts are among the practices previously deemed per se anticompetitive, appellant contends that he was entitled to a per se instruction in the jury charge.

{¶ 58} Appellees respond that the purpose of the Sherman Act and, by extension, the Valentine Act is to protect the market as a whole and not an individual competitor. Moreover, they argue, in any event, the argument over the application of the rule of reason over the per se rule goes only to the unreasonable restraint of trade element of the claim. The jury, appellees point out, specifically found that there was no conspiracy among appellees. Absent a conspiracy, appellees insist, it does not matter what rule is applied to the restraint prong, because the absence of a conspiracy negates the claim.

{¶ 59} A trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287. By the same token, when the instruction requested is a correct statement of the law applicable to the facts of the case and reasonable minds might reach the conclusion sought by the instruction, ordinarily the instruction should be given. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. Nevertheless, it is within the discretion of a court to refuse a proposed jury instruction which is either redundant or immaterial to the case. *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph two of the syllabus.

{¶ 60} In this matter, there was evidence presented by which reasonable minds might infer that two or more appellees cooperated to boycott purchasing appellant's fish. In that respect, the requested per se instruction alone, or as an alternative to the rule of reason instruction, should have been in the charge.

{¶ 61} The next question is whether appellant was prejudiced by the omission of this charge. As appellees noted, in response to a specific interrogatory, the jury found that there was no civil conspiracy. While the dispute over application of the per se or rule of reason goes to the unreasonable restraint prong of the claim, a plaintiff must also prove that a combination of effort, economically or by action existed. Appellees argue that since the jury found that there was no conspiracy, the first prong of the claim was not met and any erroneous instruction with respect to the second prong is harmless. Appellant responds that a civil conspiracy and an antitrust conspiracy are different things: the

former requiring a malicious combination, the latter requiring alternatively, a contract, combination or conspiracy.

{¶ 62} While there may be circumstances in which a malicious combination may be distinguished from a conspiracy, in this matter the distinction is not a difference. In testimony, every appellee denied any collusion with respect to appellant. Each offered a neutral explanation for his own acts or statements that appellant sought to characterize as collusion. The jury found specifically and generally that there had been no conspiracy. Absent some sort of conspiracy, any erroneous instruction with respect to the restraint of trade element was harmless. Accordingly, appellant's first assignment of error is not well taken.

II. Tortious Interference

{¶ 63} In his second assignment of error, appellant contends that the jury's verdict that Joe Herr did not tortiously interfere with the business relationship between appellant and Chris Bennett was against the manifest weight of the evidence.

{¶ 64} As the plaintiff in this matter, appellant had the burden to prove that (1) appellant and Chris Bennett had a business relationship, (2) Joe Herr knew of this business relationship (3) and intentionally interfered, causing a breach or termination of such relationship (4) resulting in damages to appellant. *McConnell v. Hunt Sports Ent.* (1999), 132 Ohio App.3d 657, 689. If he failed to prove any one of these elements, his claim fails.

{¶ 65} The jury is the sole judge of the weight of the evidence and the credibility of the witnesses, and "may believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67. The findings of the jury are presumed correct. When a party is charged with the burden of proving his or her claim, the presumption is all the more rigorous and that party can hardly complain if the jury chooses not to believe some or all of his or her proofs. *Davis v. Firelands Reg. Med. Ctr.*, 6th Dist. No. E-10-013, 2010-Ohio-4051, ¶ 11, citing *In re Scott* (1996), 111 Ohio App.3d 273, 276.

{¶ 66} In this matter, the jury concluded that appellant failed to prove his claim. Accordingly, appellant's second assignment of error is not well-taken.

III. Witness Impeachment

{¶ 67} At trial, appellant called Chris Bennett and asked whether Bennett had told ODNR officers that appellee King said that "he would rather bury his fish, every single one of them, before he sold you another fish if you bought any of [appellant's] fish?" Bennett denied the truth of the statement, labeling it as "taken out of context." When appellant then sought to offer the testimony of ODNR Officer Mike Tetzlaf in impeachment of Bennett's testimony, the trial court sustained appellee King's objection and excluded the testimony. In his third assignment of error, appellant asserts this ruling was erroneous.

{¶ 68} The admission or exclusion of evidence in trial is within the sound discretion of the trial court. *In re Bobby D.*, 6th Dist. No. L-07-1160, 2008-Ohio-1291,

¶ 13. Decisions vested in the discretion of the court will not be reversed absent an abuse of that discretion. An abuse of discretion is more that an error of judgment or a mistake of law, the term connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219,

{¶ 69} Evid.R. 607(A) provides, in material part:

{¶ 70} "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage."

{¶ 71} The existence of "surprise" concerning prior inconsistent statements, like the broader decision to admit or exclude evidence is within the sound discretion of the trial court. *State v. Parsons*, 6th Dist. No. WD-03-051, 2004-Ohio-2216, ¶ 24, citing *State v. Diehl* (1981), 67 Ohio St.2d 389, 391; *State v. Reed* (1981), 65 Ohio St.2d 117, 124-125. "A crucial factor in determining whether or not a party has been 'surprised' for purposes of Evid.R. 607 is the quality of the warning a party has received that a witness may repudiate their prior statements on the stand." Id. at ¶ 25.

{¶ 72} Appellee King argues that appellant made no showing that Bennett had ever given appellant cause to believe that he would testify to the statements purportedly made with respect to King. The only formal pretrial statement by Bennett was a three page affidavit in which no mention whatsoever is made of King's statement. Appellee King suggests that while appellant may have heard the statement from a third party, the ODNR officer, there is nothing of record to suggest any prior communication from

Bennett suggesting that he would testify to having made such a statement. Absent some prior indication of such testimony from Bennett, appellee King insists, appellant had no reasonable expectation of such testimony and can hardly claim surprise when the testimony sought is not forthcoming. Moreover, appellee King maintains, the impeachment testimony sought is hearsay on hearsay, without a sustainable exemption for either branch.

{¶ 73} Notwithstanding the hearsay on hearsay question, the court was within its discretion in excluding the testimony in question for want of surprise. There is nothing in the record, save the ODNR officer's assertion, to suggest that Bennett had ever made such a statement; no affidavit, no deposition, no newspaper quote, no comment on or off the record to appellant's counsel. It is not unreasonable to conclude that, absent some indices from Bennett himself that he intended to give the expected testimony, appellant should not be surprised when such testimony was not provided. Accordingly, the court did not err in excluding the challenged testimony. Appellant's third assignment of error is not well-taken.

IV. Snitch

{¶ 74} In his remaining assignment of error, appellant asserts that the trial court erred in excluding testimony from a newsletter publisher of a comment made during a conversation with Bill Smith, the attorney for appellee Joe Smith and the Ohio Fish Producers Association. The publisher would have testified that, when asked what he thought of commercial fishermen putting appellant out of business, Bill Smith said,

"What do you expect them to do to a snitch?" The trial court granted appellees Orvilee and Richard Stinson's motion in limine to exclude this testimony and renewed its ruling during trial.

{¶ 75} Appellant insists that the statement was not hearsay, because it was not offered for the truth of the matter asserted, and that it was relevant because it tends to support appellant's theory of the case that commercial fishermen were punishing appellant for his cooperation in the poaching investigation. For these reasons, appellant maintains, admission of the statement should have been permitted.

{¶ 76} Even assuming that appellant's assertion that the excluded evidence was relevant, Evid.R. 403(A) provides:

{¶ 77} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 78} Thus, even relevant evidence may be excluded under certain circumstances. Like other evidentiary decisions, whether to admit or exclude evidence under Evid.R. 403(A) rests within the discretion of the court. *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶ 92.

{¶ 79} As appellee King points out, even if the statement is not hearsay, the statement is only peripherally relevant and then, arguably, only to the case against Joe Smith, because Bill Smith represented Joe Smith. Balancing that against the potential for unfair prejudice to the other multiple appellees for whom Bill Smith did not have even an

arguable agency relationship, merits exclusion of the evidence to prevent jury confusion. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 80} Appellees/cross-appellants Lake Fish Co., Dale Trent and Craig Carr have filed a cross-assignment of error. The court finds the cross-assignment of error moot.

{¶ 81} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellant pay the court costs, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE

Keila D. Cosme, J.,
DISSENTS.

COSME, J.

{¶82} I respectfully disagree with the majority's reasoning that the jury's rejection of a civil conspiracy claim negates the trial court's omission of the per se group boycott rule in the jury instructions.

{¶83} Appellant-plaintiff raised three claims against the appellees-defendants in this case: (1) tortious interference; (2) civil conspiracy; and (3) violations of Ohio antitrust laws. It is important to note that neither appellant nor the trial court relied on the wording of the Valentine Act, Ohio's antitrust statute, under R.C. 1331.01(B). Instead, both chose to frame their respective proposed and actual jury instructions on the language of the federal antitrust law, the Sherman Act. The error in the decision of the majority is the conclusion that the rejection of the claim of civil conspiracy automatically means a failure to satisfy the first prong of the Sherman Act. The language of the first prong of the federal act, however, contains broader language for concerted actions beyond that of conspiracy. Needing only to show a "contract, combination, or conspiracy" in order to satisfy the first prong, appellant was prejudiced by the omission of the 'per se' rule regarding group boycotts under the Sherman Act.

{¶84} While the majority correctly states that there may be little difference between a malicious combination and a conspiracy, that is not the distinction presented to us on appeal. Instead, we must consider the difference between a mere combination and a conspiracy. A plain language analysis of the statute requires that these be considered different levels of concerted action, otherwise there would be no need for both terms. Furthermore, case law supports a broader understanding of concerted actions than that found in civil conspiracy.

{¶85} The definition of conspiracy in the civil context differs from "contract, combination, or conspiracy" of the antitrust laws in that the former requires specifically a

malicious combination, unlawful conduct, while the latter more broadly requires a combination of two or more persons or businesses from working toward a common goal, which may be lawful when conducted individually except for the fact that as a concerted action it unreasonably restrains trade. Therefore, I would reverse and remand.

{¶86} A combination is defined as "[t]he union of two or more persons for the attainment of some common end." Black's Law Dictionary (6 Ed.1991) 266. See *Albrecht v. Herald Co.* (C.A.8, 1966), 367 F.2d 517, 523, reversed (1968), 390 U.S. 145.

{¶87} Additionally, a "combination in restraint of trade" is defined as "[a]n agreement or understanding between two or more persons in the form of a contract, trust, pool, holding company, or other form of association, for the purpose of unduly restricting competition, monopolizing trade and commerce in a certain commodity, controlling its production, distribution, and price, or otherwise interfering with freedom of trade without statutory authority." Black's Law Dictionary (6 Ed.1991) 266. Malice is not mentioned, nor is purpose or an unlawful act required.

{¶88} A civil conspiracy, however, is defined as "evidence that the defendant(s) participated in a malicious combination involving two or more persons, including the defendant(s), a result of which was the commission of an unlawful act that caused injury." 4 Ohio Jury Instructions (2007) Section 443.01. A "malicious combination" means "a common understanding or design, whether spoken or unspoken, entered into with malice by two or more persons to commit an unlawful act. It does not require the showing of an express agreement. It is sufficient that the participants, in any manner,

reached a mutual understanding to commit an unlawful act." Id. "Malice" is further defined as "that state of mind under which a person does an unlawful act purposely, without a reasonable or lawful excuse, that causes injury." Id.

{¶89} Ohio's antitrust statute, the Valentine Act, R.C. 1331.01 et. seq., *does not* require a finding of conspiracy, malice or purposeful engagement in an unlawful act, while civil conspiracy does. See *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475; *Pickle v. Swinehart* (1960), 170 Ohio St. 441, 443; 4 Ohio Jury Instructions (2007) Section 443.01.

{¶90} R.C. 1331.01(B) defines an "unlawful" activity in pertinent part as "a combination of capital, skill, or acts by two or more persons * * *

{¶91} "(1) To create or carry out restrictions in trade or commerce;

{¶92} "(2) To limit or reduce the production, or increase or reduce the price of merchandise or a commodity;

{¶93} "(3) To prevent competition in manufacturing, making, transportation, sale, or purchase of merchandise, produce, or a commodity;

{¶94} "(4) To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce, or commerce intended for sale, barter, use, or consumption in this state;

{¶95} "(5) To make, enter into, execute, or carry out contracts, obligations, or agreements of any kind by which they bind or have bound themselves not to sell, dispose

of, or transport an article or commodity, or an article of trade, use, merchandise, commerce, or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity, or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity, or transportation between them or themselves and others, so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers, or consumers in the sale or transportation of such article or commodity, or by which they agree to pool, combine, or directly or indirectly unite any interests which they have connected with the sale or transportation of such article or commodity, that its price might in any manner be affected;

{¶96} "(6) To refuse to buy from, sell to, or trade with any person because such person appears on a blacklist issued by, or is being boycotted by, any foreign corporate or governmental entity."

{¶97} The Valentine Act was modeled after the Sherman Act although written in "broader and stronger" terms. *List v. Burley Tobacco Growers' Coop.* (1926), 114 Ohio St. 361, 369. See *Schweizer v. Riverside Methodist Hospitals* (1996), 108 Ohio App.3d 539, 542. The Supreme Court of Ohio has interpreted the Valentine Act in light of federal judicial construction of the Sherman Act. *C.K. & J.K., Inc. v. Fairview Shopping Ctr.* (1980), 63 Ohio St.2d 201, 204. See *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶ 13.

{¶98} The Sherman Act, Section 1, Title 15, U.S. Code, prohibits "[e]very contract, combination * * *, or conspiracy, in restraint of trade or commerce." Section 1 prohibits those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Standard Oil Co. of New Jersey v. U.S.* (1910), 221 U.S. 1, 59-60. The effect is the "proscription of all 'contracts or acts which it was considered had a monopolistic tendency * * *' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce. (Citations omitted.)" *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 211.

{¶99} Under the federal interpretation, the plain language of the Valentine Act would prohibit any agreement or combination which would "create or carry out restrictions in trade or commerce." R.C. 1331.01(B)(1). However, the Supreme Court of Ohio in *List v. Burley Tobacco Growers' Coop.*, rejected such a strict and literal interpretation of the plain language of the Valentine Act, stating that "contracts in restraint of trade are not illegal except when unreasonable in character." Id. at 363.

{¶100} Similarly, the United States Supreme Court has made clear that the Sherman Act's prohibition of every agreement in restraint of trade "prohibits only agreements that unreasonably restrain trade." *Nat'l Hockey League Players' Assn. v. Plymouth Whalers Hockey Club* (C.A.6, 2003), 325 F.3d 712, 718, affirmed (2005), 419 F.3d 462, 469, quoting *Nat'l Collegiate Athletic Assn. v. Bd. of Regents of Univ. of Okla.* (1984), 468 U.S. 85, 98.

{¶101} The United States Supreme Court has held that group boycotts, or 'concerted refusals to deal,' are unlawful per se. *Eastern States Retail Lumber Dealers' Assn v. United* States (1914), 234 U.S. 600, 609-611; *Fashion Originators' Guild of America, Inc. v. FTC* (1941), 312 U.S. 457, 465; *Associated Press v. U.S.* (1945), 326 U.S. 1, 58; *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 212; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co*. (1961) 364 U.S. 656, 659 (per curiam). A group boycott, or 'concerted refusal to deal,' is an attempt by a group of competitors to exclude a fellow competitor or group from competition.

{¶102} In *Eastern States Retail Lumber Dealers' Assn. v. United States* (1914), 234 U.S. 600, the United States Supreme Court held to be per se illegal the circulation, among a retailer's association, of lists of "offending" wholesalers selling directly to consumers. The court noted that the circulation of blacklists had, and was intended to have, an anticompetitive effect. The court had no difficulty inferring a conspiracy to boycott. In holding that the agreement went beyond the "normal and usual agreements in aid of trade and commerce which may be found not to be within the act," the court emphasized that the group action placed involuntary restraints on the buying opportunities of those not party to the agreement. Id. at 612. See *Fashion Originators' Guild of America, Inc. v. FTC* (1914), 312 U.S. 457, 462.

{¶103} In *Klor's, Inc. v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207, 211, the United States Supreme Court concluded that group boycotts of a trader are among

those "classes of restraints which from their 'nature or character' were unduly restrictive and hence forbidden by both the common law and the statute." In *Klor's*, the court held:

{¶104} "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. * * * They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality.' * * * Even when they operated to lower prices or temporarily to stimulate competition they were banned. * * * 'such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.'" Id. at 212. (Citations omitted.)

{¶105} Boycotts vary by situation and include either a group of buyers threatening to no longer purchase from suppliers if the suppliers continue to deal with an excluded competitor, a group of sellers threatening to no longer sell to buyers if the buyers continue to buy from an excluded competitor, or simply by an agreement of a group of competitors that no member will deal with an excluded competitor. See, e.g., *United States v. General Motors Corp.* (1966), 384 U.S. 127 (Auto dealers attempted to prevent GM sales to discount outlets); *Silver v. New York Stock Exch.* (1963), 373 U.S. 341 (Broker-dealers of securities excluded plaintiff broker-dealer from exchange); *Klor's Inc. v. Broadway-Hale Stores, Inc.* (1959), 359 U.S. 207 (Defendant appliance retailer conspired with manufacturers to boycott plaintiff retailer); *Com-Tel, Inc. v. DuKane*

Corp. (C.A.6, 1982), 669 F.2d 404 (Combination of distributors and manufacturer to boycott competing distributor of sound equipment.)

{¶106} Prior to *Klor's*, a group boycott would be held per se illegal only after an examination of the facts showed that the boycott was intended to have a substantial effect upon the competition. However, the court in *Klor's* held that neither an injurious effect on competition, nor an anticompetitive motive was essential in order to find a group boycott per se illegal.

{¶107} It has long been recognized that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use," and that group boycotts are of this character. *Northern Pac. R. Co. v. U.S.* (1958), 356 U.S. 1, 5. See *Fashion Originators'*, 312 U.S. at 467-468, and *Eastern States*, 234 U.S. at 613-614.

{¶108} In *NYNEX Corp. v. Discon, Inc.*, (1998), 525 U.S. 128, the United States Supreme Court held that the per se rule for group boycotts should be limited to cases "involving horizontal agreements among direct competitors." See *Nova Designs, Inc. v. Scuba Retailers Ass'n* (C.A.9, 2000), 202 F.3d 1088, 1092.

{¶109} A horizontal agreement between competitors to exclude a direct competitor is a group boycott sufficiently repugnant to justify per se treatment. See, e.g., *Eastern States*, 234 U.S. 600. To establish a horizontal conspiracy there must be proof of

an agreement among competitors involving a "conscious commitment to a common scheme." *Monsanto v. Spray-Rite Serv. Corp.* (1984), 465 U.S. 752, 764.

{¶110} Cases to which the per se approach has been applied generally involve joint efforts to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." *Silver v. New York Stock Exchange* (1963), 373 U.S. 341, 365-366. In these cases, the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete, and frequently the boycotting firm possessed a dominant position in the relevant market. See *F.T.C. v. Indiana Federation of Dentists* (1986), 476 U.S. 447, 458.

{¶111} In *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.* (1985), 472 U.S. 284, 294, the United States Supreme Court held, however, that group boycotts among horizontal competitors that are designed to affect price, are "not justified by plausible arguments that they [are] intended to enhance the overall efficiency and make markets more competitive" remain per se unlawful without regard to the market power of the participants. See *F.T.C. v. Superior Court Trial Lawyers Assn.* (1990) 493 U.S. 411, 436, fn. 19.

{¶112} Appellees Joe Herr, Ken King, Joe Smith, Orvilee and Richard Stinson generally argue that the per se group boycott rule does not apply because there was: (1) no finding of a conspiracy by the jury; (2) the purpose of the Sherman Act and the Valentine Act is to protect the market as a whole and not an individual competitor; and

(3) they had a legitimate business reason for not wanting their fish to be commingled with appellant's fish.

(1) Conspiracy may be inferred

{¶113} In *Eastern States*, the United States Supreme Court had no difficulty inferring a conspiracy to boycott. In holding that the agreement went beyond the "normal and usual agreements in aid of trade and commerce which may be found not to be within the act," the court emphasized that the group action placed involuntary restraints on the buying opportunities of those not a party to the agreement. Id. at 612. While a retail dealer could stop dealing with a wholesaler for a reason sufficient to himself, once he joined with others to do this, the act became unlawful under the Sherman Act.

{¶114} A pattern of similar actions by a group of competitors, who appear to be acting individually, when done to restrain trade, may be evidence of conscious parallelism, which can be inferred to demonstrate the existence of an agreement. *Interstate Circuit, Inc. v. United States.* (1939), 306 U.S. 208, 221. See *Theatre Enterprises v. Paramount Film Distrib. Corp.* (1954), 346 U.S. 537, 541.

{¶115} The plaintiff must prove other facts and circumstances (often referred to as "plus factors") in combination with conscious parallelism to support an inference of concerted action. See, e.g., *Twombly v. Bell Atlantic Corp.* (C.A.2, 2005), 425 F.3d 99, 114, reversed (2007) 127 S.Ct. 1955. Courts generally have not articulated a specific hierarchy of plus factors. However, the most important plus factors are those that tend to show that the conduct would be in the parties' self-interest if they all agreed to act in the

same way, but would be contrary to their self-interest if they acted alone. *Interstate*, supra, 306 U.S. at 222. See *Todorov v. DCH Healthcare Authority* (C.A.11, 1991), 921 F.2d 1438, 1456 fn. 30 (It is "well settled in this circuit that evidence of conscious parallelism does not permit an inference of conspiracy unless the plaintiff establishes that, assuming there is no conspiracy, each defendant engaging in the parallel action acted contrary to its economic self-interest".)

{¶116} In this case, while appellees may each have justifiable reason for coercing the fisheries to refuse to buy appellant's fish, once they joined with others to pressure the fisheries, the act became unlawful.

{¶117} The same reasoning has been echoed in subsequent decisions where the court declared unlawful agreements among dominant groups of motion picture distributors not to supply films to an exhibitor unless he dealt with all the distributors. *Binderup v. Pathe Exchange, Inc.* (1923), 263 U.S. 291, 311-312. Similarly, in the present case, appellees exercised their leverage as fishermen licensed by the Ohio Department of Natural Resources ("ODNR"), under a quota system that limited the amount of fish that could be taken from Lake Erie, to coerce the fisheries not to buy fish from appellant.

{¶118} Judicial abhorrence of concerted refusal to deal intended to coerce action by third parties is further reflected in decisions outlawing concerted refusals to sell by members of cooperatives enjoying limited exemptions under the antitrust laws. *Hinton v. Columbia River Packers Assn. Inc.* (C.A.9, 1942), 131 F.2d 88 (Refusal by cooperative

formed under Fisheries Cooperative Marketing Act, 48 STAT. 1213-14 (1934), as amended, Sections 521 and 522, Title 15, U.S.Code (1952), to sell fish to packer who refused to agree not to purchase fish from non-members of cooperative held unlawful); *Manaka v. Monterey Sardine Industries, Inc.* (N.D.Cal.1941), 41 F. Supp. 531, 535.

{¶119} Proof of an agreement, or a conspiracy, may "ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged." *Esco Corp. v. U.S.* (C.A.9, 1965), 340 F.2d 1000, 1007. See *Daily v. U.S.* (C.A.9, 1960), 282 F.2d 818, 820.

{¶120} In *U.S. v. Paramount Pictures, Inc.* (1948), 334 U.S. 131, 142, the court stated that "[i]t is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated and that the defendants conformed to the arrangement." See *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.* (1954), 346 U.S. 537, 540-541. Cf. *C-O-Two Fire Equip. Co. v. U.S.* (C.A.9, 1952), 197 F.2d 489, certiorari denied (1952), 344 U.S. 892.

{¶121} In addition, mutual consent need not be based on express agreement, for any conformance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. *U.S. v. Twentieth Century-Fox Film Corp.* (S.D.Cal.1961), 137 F.Supp. 78, 85. Nor is an exchange of words required. *Frey & Son, Inc. v. Cudahy Packing Co.* (1921), 256 U.S. 208, 210. Not only action, but even a lack of action, may be enough from which to infer a combination or conspiracy. *Esco Corp.*, 340 F.2d at 1008.

{¶122} An agreement can also be inferred from circumstantial evidence, such as the parties' conduct or course of dealing. See, e.g., *U.S. v. Paramount Pictures, Inc.* (1948), 334 U.S. 131 (Agreement inferred from pattern of price-fixing by film distributors); *American Tobacco Co. v. U.S.* (1946), 328 U.S. 781 (Conspiracy to fix prices by cigarette-producing companies inferred from identical price changes); *Interstate*, 309 U.S. 208 (Common agreement inferred from uniform action of film distributors to restrict subsequent showings of first-run movies); *Eastern States*, 234 U.S. 600 (Conspiracy inferred from lumber associations' circulation of a list of wholesalers who sold directly to consumers.)

{¶123} It is undisputed that appellees and appellant met together prior to appellant's confession to ODNR that he was involved in a poaching scheme and that they had agreed not to assist ODNR's investigation of poaching. The meeting, along with participants' conduct before and after appellant's confession to ODNR of his own and the others' roles in the poaching scheme must be considered in determining whether appellees came to a mutual understanding, even though no meeting took place after appellant's taped confession.

{¶124} Additionally, in *United States v. General Motors Corp*. (1966), 384 U.S. 127, 142-143, the United States Supreme Court disagreed with the trial court's "conclusory 'finding' that there had been no 'agreement' among the defendants and their alleged co-conspirators," because "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy - certainly not where, as here, joint and

collaborative action was pervasive in the initiation, execution, and fulfillment of the plan." Id. (Citations omitted.)

{¶125} Here, there was evidence sufficient to permit a jury to consider whether there existed a horizontal group boycott separate from the civil conspiracy claim.

(2) Individual competitor

{¶126} Appellees' claim that the purpose of the Sherman Act, and by extension, the Valentine Act is to protect the market as a whole, and not an individual competitor, is unsupported by existing case law.

{¶127} In *Klor's*, the United States Supreme Court specifically rejected a defense to a group boycott based upon a claim that only one competitor had suffered injury. The court held that the conspiracy was "not tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's Inc.*, 359 U.S. at 213. See *Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.* (C.A.6, 1972), 459 F.2d 138, 155. Cf. *Care Heating & Cooling, Inc. v. American Standard* (C.A.6, 2005), 427 F.3d 1008, 1013-1014 (Servicer's allegations involved vertical restraint on trade, requiring analysis under rule of reason, rather than per se rule.)

(3) Lawful excuse not necessary to find agreement

{¶128} Similarly, appellees' claim that they had a legitimate business reason for asking that the fisheries not do business with appellant, is unsupported by existing case law. The United States Supreme Court in *United States v. General Motors Corp*. (1966),

384 U.S. 127, 142-143, held, "It is of no consequence, for purposes of determining whether there has been a combination or conspiracy under [section 1] of the Sherman Act, that each party acted in its own lawful interest." See *USX Corp. v. Penn Cent. Corp.* (2000), 137 Ohio App.3d 19, 26, fn. 3 (Proof of a civil violation of antitrust laws does not necessarily require proof of an unlawful intent; it may also be proved by demonstrating that the defendant's conduct had an anticompetitive effect.) At issue in this claim is the unlawful result of the concerted action. Thus, I would find that the jury's decision regarding the claim of civil conspiracy did not preclude a finding that appellant had satisfied the first prong of the Sherman Act.

B. Per Se Instruction

{¶129} Appellant challenges the trial court's omission of the per se rule instruction in favor of the rule of reason instruction. The standard of review is abuse of discretion. *Jaworowski v. Med. Radiation Consultants* (1991), 71 Ohio App.3d 320, 327-328. See *U.S. v. Echeverry* (C.A.9, 1985), 759 F.2d 1451, 1455, and *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶130} Such a review is limited to whether the trial court abused its discretion in refusing to give a proposed instruction and, if so, whether that refusal was prejudicial. *Jaworowski*, 71 Ohio App.3d at 327-328. Cf. *State v. Penson* (Feb. 26, 1990), 2d Dist. No. 9193; *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207; *Wagenheim v. Alexander Grant & Co.* (1983), 19 Ohio App.3d 7.

{¶131} A prejudicial error occurs only if the alleged instructional flaw cripples the entire jury charge. Id. See *U.S. v. Burgess* (C.A.9, 1986), 791 F.2d 676, 680 (Jury instructions are considered as a whole to determine if they are misleading or inadequate.) In this case, the proposed per se rule instruction constituted the entire antitrust charge.

{¶132} Here, the trial court abused its discretion in refusing to give the per se rule instruction choosing instead the rule of reason instruction. Appellant was prejudiced by the trial court's omission because, as the majority admits, there was evidence that appellee fishermen had concerted their actions in order to deprive appellant of the ability to sell fish. The per se rule precludes the court from inquiring into the economic motivation underlying appellees' conduct. It is also of no consequence whether each appellee fisherman acted in his own lawful interest. See *General Motors Corp.*, 384 U.S. at 145.

{¶133} Because the trial court abused its discretion in refusing to give the per se rule instruction and appellant was prejudiced by the trial court's refusal, I would reverse and remand this matter to the trial court for a new trial with a per se rule instruction as to appellant's antitrust claim.

{¶134} The trial court should revisit its evidentiary rulings prohibiting the impeachment testimony of ODNR Officer Tetzlaf and the testimony of Robert Collins given the more expansive level of concerted action and the relevance of this testimony to show the existence of a concerted action.