

IN THE SUPREME COURT OF OHIO

09-0305

CHRISTINE BANFORD, et al., :
 :
 Plaintiffs-Appellees, : On Appeal from the Montgomery
 : County Court of Appeals,
 v. : Second Appellate District
 :
 ALDRICH CHEMICAL COMPANY, INC., : Court of Appeals
 : Case No. CA022600
 Defendant-Appellant. :

NOTICE OF APPEAL OF APPELLANT ALDRICH CHEMICAL COMPANY, INC.

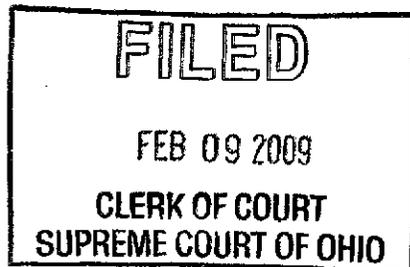
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Notice of Appeal of Appellant Aldrich Chemical Company, Inc.

Appellant Aldrich Chemical Company, Inc. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in Court of Appeals Case No. 022600 on December 24, 2008.

This case is one of public or great general interest.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT ALDRICH CHEMICAL COMPANY, INC.**

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TABLE OF CONTENTS

	<u>Page</u>
EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST.....	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....	6
<u>Proposition of Law No. I</u> : To recover annoyance and discomfort damages for a nuisance claim, the plaintiff must establish an appreciable, substantial, tangible harm resulting in actual, material, physical discomfort.	6
<u>Proposition of Law No. II</u> : Evidence that generates speculative fears and concerns about future harm is not relevant during a time period when the nuisance is not affecting the property.....	14
CONCLUSION.....	15
APPENDIX	<u>Appx. Page</u>
December 24, 2008 Court of Appeals Opinion	1
December 24, 2008 Judgment Entry of the Montgomery County Court of Appeals	5

TABLE OF AUTHORITIES

Page(s)

CASES

<u>Angerman v. Burick</u> , Wayne App. No. 02-CA-0028, 2003-Ohio-1469	11,13
<u>Antonik v. Chamberlain</u> (Summit Cty. 1947), 81 Ohio App. 465, 78 N.E.2d 752	7
<u>Blevins v. Sorrell</u> (Warren Cty. 1990), 68 Ohio App. 3d 665, 589 N.E.2d 438.....	13
<u>Bullock v. Oles</u> (Sept. 24, 2001), Mahoning App. No. 99 CA 223, 992001 Ohio App. LEXIS 4529	2, 7, 8, 9, 13
<u>Christensen v. Hilltop Sportsman Club, Inc.</u> (Feb. 17, 1993), Pickaway App. No. 91-CA-33, 1993 Ohio App. LEXIS 1112	2
<u>Chance v. BP Chem., Inc.</u> (March 30, 1995), Cuyahoga App. Nos. 66622, 66645, 67369, 1995 Ohio App. LEXIS 1250	3, 10, 14
<u>Christensen v. Hilltop Sportsman Club, Inc.</u> (Pickaway Cty. 1990), 61 Ohio App. 3d 807, 573 N.E.2d 1183	2, 7
<u>Columbus Gas Light & Coke Co. v. Freeland</u> (1861), 12 Ohio St. 392	6
<u>Cooper v. Hall</u> (1832), 5 Ohio 320	6
<u>Eller v. Koehler</u> (1903), 68 Ohio St. 51, 67 N.E. 89.....	6, 7
<u>Forrester v. Webb</u> (Feb. 16, 1999), Butler App. No. CA 98-04-010, 1999 Ohio App. LEXIS 474	9
<u>Frey v. Queen City Paper Co.</u> (Miami Cty. 1946), 79 Ohio App. 64, 66 N.E.2d 252	8, 11
<u>Frost v. Bank One of Fremont, N.A.</u> (Sept. 28, 1990), Sandusky App. No. S-89-32, 1990 Ohio App. LEXIS 4176	2
<u>Gertz v. Northern Ohio Rifle Club, Inc.</u> (Apr. 18, 1977), Geauga App. No. 676, 1977 Ohio App. LEXIS 7785	11
<u>Graham & Wagner, Inc. v. Ridge</u> (Stark Cty. 1931), 41 Ohio App. 288, 179 N.E. 693	11
<u>Harford v. Dagenhart</u> (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266.	2, 12

<u>Heiner v. Moretuzzo</u> (1995), 73 Ohio St. 3d 80, 652 N.E.2d 644	10
<u>Lasko v. Akron</u> (Summit Cty. 1958), 109 Ohio App. 409, 166 N.E.2d 771	9, 11
<u>Miller v. Horn</u> (June 28, 1996), Clark App. Nos. 95-CA-113, 95-CA-114, 1996 Ohio App. LEXIS 2678	8
<u>Park v. Langties</u> (Oct. 11, 1991), Portage App. No. 90-P-2252, 1991 Ohio App. LEXIS 4903	7
<u>Paugh v. Hanks</u> (1983), 6 Ohio St. 3d 72, 451 N.E.2d 759	4, 10
<u>Rautsaw v. Clark</u> , 22 Ohio App. 3d at 20	7
<u>Reeser v. Weaver Bros., Inc.</u> (Darke Cty. 1989), 54 Ohio App. 3d 46, 560 N.E.2d 819	11
<u>Reeser v. Weaver Bros., Inc.</u> (Darke Cty. 1992), 78 Ohio App. 3d 681, 605 N.E.2d 1271	9, 11
<u>Sanson Co. v. Granger Materials, Inc.</u> , Cuyahoga App. No. 89050, 2007-Ohio-5852	13
<u>Schoenberger v. Davis</u> (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345	2, 7, 8, 13
<u>Stechler v. Homyk</u> (Cuyahoga Cty. 1998), 127 Ohio App. 3d 396, 713 N.E.2d 44	11
<u>Stewart v. Seedorff</u> (May 27, 1999), Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375	1, 7
<u>Stoll v. Parrott & Strawser Properties, Inc.</u> , Warren App. Nos. CA2002-12- 133, CA2003-12-137, 2003-Ohio-5717.....	11
<u>Wells v. Foster</u> (Oct. 9, 1990), Madison App. No. CA89-10-024, 1990 Ohio App. LEXIS 4388.	2
<u>Widmer v. Fretti</u> (Lucas Cty. 1952), 95 Ohio App.7, 116 N.E.2d 728.....	8
<u>Wray v. Deters</u> (Hamilton Cty. 1996), 111 Ohio App. 3d 107, 675 N.E.2d 881.	11
<u>Zang v. Engle</u> (Sept. 19, 2000), Franklin App. No. 00 AP-290, 2000 Ohio App. LEXIS 4222	13

I. EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

When are damages for fear and hurt emotions recoverable under Ohio law? The law has given very careful and detailed answers to this question for two primary reasons: (1) to prevent windfalls for what are essentially subjective and easily manipulated facts relating to a person's internal fears and emotions, and (2) to prevent recovery for the everyday types of concerns, hassles, emotions and fears that people experience living in society. Accordingly, the law has imposed several limitations on recovery for emotional-type damages, including but not limited to the following:

(1) damages for emotional injury may only be recovered if the plaintiff meets the "severe and debilitating" standard necessary to prove the tort of infliction of emotional distress;

(2) damages for unrealized fears are not recoverable; and

(3) emotional damages from witnessing damage to property are not recoverable.

The decision of the Second District Court of Appeals ("Court of Appeals") has expanded Ohio law to permit another avenue for recovery for emotional harm. For the first time in Ohio history, the Court of Appeals has permitted plaintiffs to recover damages for fears, concerns and other emotions in a nuisance case. December 24, 2008 Court of Appeals Opinion ("Ct. App. Opin.") at ¶ 7 (Appx. 1). The Court of Appeals held that it was error to instruct the jury on the long-standing standard for annoyance and discomfort damages under Ohio nuisance law,¹ namely that a plaintiff may recover only for an "an appreciable, substantial, tangible injury resulting in actual material and physical discomfort." Stewart v. Seedorff (May 27, 1999),

¹ Ct. App. Opin. at ¶ 7.

Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375, at *21. This standard has been quoted by Ohio courts for over 60 years,² and is supported by caselaw from the Ohio Supreme Court using nearly identical language going back to the origins of Ohio as a state.³ No cases contradict this standard.

The Court of Appeals has held, for the first time ever, that proving physical discomfort is optional for the recovery of damages.⁴ This new standard contradicts the law, which states the standard using an "and," not an "or,"⁵ and which expressly rejects awarding annoyance and discomfort damages for emotions. "[D]amages for bare personal inconvenience, annoyance and discomfort . . . are not recoverable." Schoenberger v. Davis (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345, at *17. In Schoenberger, the court found that plaintiffs could not recover annoyance and discomfort damages for actions that "troubled" or "vexed" them. Id. at *10, 17.

The primary basis for the lower court's expansion of annoyance and discomfort damages is found in a solitary 1936 case from the Second District, Harford v. Dagenhart

² See footnote 10 below.

³ See Section III.A on pp. 6-9 below.

⁴ Ct. App. Opin. at ¶¶ 86-88 (holding that the proper interpretation of Ohio law is that a nuisance need only cause "substantial annoyance or physical discomfort" to award damages) (emphasis added).

⁵ The following are but a few examples of cases which quote the "appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort" standard word-for-word: Bullock, 2001 Ohio App. LEXIS 4529, at *6-7 (citation omitted); Christensen v. Hilltop Sportsman Club, Inc. (Feb. 17, 1993), Pickaway App. No. 91-CA-33, 1993 Ohio App. LEXIS 1112, at *3 (citation omitted); Wells v. Foster (Oct. 9, 1990), Madison App. No. CA89-10-024, 1990 Ohio App. LEXIS 4388, at *5; Frost v. Bank One of Fremont, N.A. (Sept. 28, 1990), Sandusky App. No. S-89-32, 1990 Ohio App. LEXIS 4176, at *15 (citation omitted).

(Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, at *17, which did not award damages, but held that a funeral home in a residential district could be declared to be a nuisance and enjoined because it caused "constant reminders of death" among the neighbors. This solitary case has never been followed to permit damages based on fear and emotion in Ohio nuisance law and it is clearly out-of-date with modern zoning practices, anti-discrimination rules, and a modern society that must tolerate the unwanted, and even the immoral, unless and until it has a real, substantial, material, tangible and physical impact on one's neighbor.

This is a case of great importance and general interest because, if permitted to stand, the decision of the Court of Appeals would circumvent long-standing jurisprudence regarding the importance of limiting claims for emotional damages. "Actions, driven purely by fear, could threaten entire industries, forcing them to mount costly defenses or submit to costly settlements potentially transforming our legal process into a vehicle for extortion." Chance v. BP Chems., Inc. (March 30, 1995), Cuyahoga App. Nos. 66622, 66645, 67369, 1995 Ohio App. LEXIS 1250, at *22.

This Court should accept jurisdiction of this appeal and clarify the law regarding the legal grounds for recovery of annoyance and discomfort damages in nuisance cases.

II. STATEMENT OF THE CASE AND FACTS

This case arises from an explosion that occurred at an Aldrich Chemical Co. facility, known as Isotec, in Miamisburg, Ohio on September 21, 2003. Only one person was injured -- an Aldrich employee who received minor cuts to his hand. The explosion damaged Aldrich's property, but was not strong enough even to break windows on any property other than Aldrich's. After the explosion, individuals living within a one-mile radius of the facility were

evacuated as a precautionary measure. No further explosions occurred, and the residents were permitted to return to their homes approximately twenty-four hours later.

In response to the explosion and evacuation, multiple lawsuits were filed. Those lawsuits sought money damages only and did not seek to enjoin the Defendant from continued operations of its facility.⁶ The trial court certified the matter as a partial class action, with the class members asserting claims for negligence, nuisance, and strict liability. None of the plaintiffs made claims of personal injury as a result of the explosion. The trial court granted summary judgment to Aldrich on Plaintiffs' claims of infliction of emotional distress due to a lack of severity under the standard in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 451 N.E.2d 759. That decision was never appealed.

The trial court separated the trial into four phases. The two phases relevant to this appeal are: Phase I, which asked whether Aldrich had a legal duty to the residents surrounding Isotec and whether it breach that duty when its Isotec plant exploded; and Phase II, which addressed the issues of causation and compensatory damages on an individualized basis.⁷

⁶ The explosion occurred in a nitric oxide (chemical symbol NO) distillation column. The column that exploded was not the only one on site, but the others were not affected by the explosion. On the day of the explosion, Aldrich put the other columns in a mode that would not produce additional product. Aldrich decided soon after to end its NO distillation operations altogether.

⁷ Oct. 21, 2005 Final and Appealable Decision, Order and Entry Sustaining the Plaintiffs' Motion for Class Certification, Subject to Specific Conditions and Modifications ("Class Cert. Order"), pp. 24-31. The Class Cert. Order specified that Phase II compensatory damages issues were not subject to class-wide treatment and would be determined on an individualized basis. Class Cert. Order, p. 25.

Prior to trial, Aldrich conceded the elements of duty and breach of duty, rendering the issues in Phase I moot. The case then proceeded to the first Phase II trial.⁸ The issue for the jury during the Phase II trials was the amount each individual plaintiff should have been awarded in compensatory damages for the explosion and subsequent evacuation. The compensatory damages claims for this Phase II trial consisted only of three categories of damages--loss of use, annoyance and discomfort, and out-of-pocket evacuation expenses.

During trial, plaintiffs testified extensively regarding their fears and concerns relating to the explosion. For example, some of the plaintiffs testified about fearing that another 9-11 was occurring, that a bomb or airplane had crashed, that they would develop some disease from the chemicals that had been released, that the environment had been polluted, or that there might be another explosion. The trial court did not exclude such testimony, but it did give a limiting instruction, explaining to the jury that testimony of the fears or subjective concerns of the plaintiffs "may have relevance in a limited degree with respect to other testimony," but that the jury would "not be awarding any damages based upon any of the individual homeowner's internal fears and concerns." At the end of trial, the court instructed the jury that annoyance and discomfort damages for nuisance could be recovered only if there was an "appreciable, substantial, tangible harm resulting in actual, material physical discomfort."

Plaintiff appealed to the Second District Court of Appeals. The Court of Appeals reversed the trial court on several of Plaintiff's assignments of error.⁹ Central to the court's decision was the trial court's limitation of annoyance and discomfort damages to an appreciable,

⁸ Not all class members participated in the first Phase II trial. Instead, thirty-one plaintiffs were randomly drawn to present their damages claims in the first Phase II trial.

⁹ December 24, 2008 Judgment Entry of the Montgomery County Court of Appeals (Appx. 2).

substantial, tangible harm resulting in actual, material, physical discomfort, and instruction to the jury not to award annoyance and discomfort damages for Plaintiffs' fears and concerns. Ct. App. Opin. at ¶¶ 3-7.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: To recover annoyance and discomfort damages for a nuisance claim, the plaintiff must establish an appreciable, substantial, tangible harm resulting in actual, material, physical discomfort.

To recover annoyance and discomfort damages from a nuisance claim, a plaintiff must establish an appreciable, substantial, tangible harm resulting in actual, material, physical discomfort. As a result, a plaintiff may not recover damages for fears and worries.

For the first time in Ohio history, the Court of Appeals held that damages for a plaintiff's fears, concerns, and other emotional reactions are recoverable as annoyance and discomfort damages for nuisance claims. This decision is at odds with the long-standing principle that annoyance and discomfort damages must stem from physical discomfort to the plaintiff, and creates a new avenue for the recovery of emotional harms in tort actions.

A. To Recover Annoyance and Discomfort Damages, a Plaintiff Must Establish an Appreciable, Substantial, Tangible Injury Resulting in Actual, Material, Physical Discomfort

It is well-established that recovery for annoyance and discomfort damages in nuisance cases requires an appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort. Cooper v. Hall (1832), 5 Ohio 320, 323 (requiring that nuisance injuries "be real and substantial," or "material, substantial") (emphasis in original); Columbus Gas Light & Coke Co. v. Freeland (1861), 12 Ohio St. 392, 400 ("[T]he plaintiff in the action must have suffered a real, material and substantial injury, to entitle him to recover[.]"); Eller v. Koehler (1903), 68 Ohio St. 51, 55, 67 N.E. 89 ("[I]t has always been the law that in order to

subject one to an action for nuisance the injury must be material and substantial. It must not be a figment of the imagination. It must be tangible.")

In 1947, an Ohio appellate court confirmed this long-standing principle, setting forth the modern statement of the standard for annoyance and discomfort:

"The question for decision is not simply whether the neighbor is annoyed or disturbed, but is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is 'an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort.'"

Antonik v. Chamberlain (Summit Cty. 1947), 81 Ohio App. 465, 476, 78 N.E.2d 752 (emphasis added) (quoting 39 Am. Jur., Nuisances, § 30 (1947), and citing Eller v. Koehler (1903), 68 Ohio St. 51, 67 N.E. 89). At least seven appellate districts have cited this exact formula as the standard for recovery.¹⁰

To meet the physical discomfort standard articulated in Antonik, the nuisance must affect one of the five senses—smell, hearing, sight, touch or taste. Annoyance and

¹⁰ Christensen v. Hilltop Sportsman Club, Inc. (Pickaway Cty. 1990), 61 Ohio App. 3d 807, 810-11, 573 N.E.2d 1183 (4th App. Dist.) (quoting Rautsaw v. Clark (Preble Cty. 1985), 22 Ohio App. 3d 20, 21, 488 N.E.2d 243) and Antonik v. Chambers (Summit Cty. 1947), 81 Ohio App. 465, 476, 78 N.E.2d 752); Bullock v. Oles (Sept. 24, 2001), Mahoning App. No. 99 CA 223, 2001 Ohio App. LEXIS 4529 at *6-7 (7th App. Dist.) (citing Rautsaw); Schoenberger v. Davis (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345, at *8-9 (8th App. Dist.) (quoting Antonik); Antonik, 81 Ohio App. at 476 (9th App. Dist.) (citations omitted); Stewart v. Seedorff (May 27, 1999), Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375, at *21 (10th App. Dist.) (citing Rautsaw); Park v. Langties (Oct. 11, 1991), Portage App. No. 90-P-2252, 1991 Ohio App. LEXIS 4903, at *4-5 (11th App. Dist.) (quoting Antonik); Rautsaw, 22 Ohio App. 3d at paragraph two of the syllabus, 21 (12th App. Dist.) (following Antonik).

discomfort damages are based on the "physical discomfort to the plaintiff in the enjoyment of his home and premises," not fears and concerns. Frey v. Queen City Paper Co. (Miami Cty. 1946), 79 Ohio App. 64, 69, 66 N.E.2d 252. As such, "trifling annoyances are not sufficient nor are unsubstantiated or unrealized fears." Miller v. Horn (June 28, 1996), Clark App. Nos. 95-CA-113, 95-CA-114, 1996 Ohio App. LEXIS 2678, at *11. Moreover, "damages for bare personal inconvenience, annoyance and discomfort . . . are not recoverable." Schoenberger v. Davis (June 23, 1988), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345, at *17. Thus, a plaintiff cannot recover for actions that "trouble[]" them, "vex[]" them, or cause any other emotional response. Id. at *10, 17.

"Cases supporting recovery for personal discomfort or annoyance involve either excessive noise, dust, smoke, soot, noxious gases, or disagreeable odors as a premise for awarding compensation." Widmer v. Fretti (Lucas Cty. 1952), 95 Ohio App. 7, 18, 116 N.E.2d 728; Schoenberger, 1983 Ohio App. LEXIS 12345, at *16-17 (same). Courts have awarded damages for annoyance and discomfort in the following circumstances: (1) the bad odor and noise associated with running a pet cemetery¹¹; (2) a leaking septic tank, which emitted foul odors and created visible effluent¹²; (3) excessive fly ash, which made it "unbearable" to sit on their porch; the fly ash was so heavy falling on a neighboring home and its occupants that it penetrated into the living room, bedrooms, and food inside the house¹³; (4) land fill operations

¹¹ Miller v. Horn (June 28, 1996), Clark App. Nos. 95-CA-113, 95-CA-114, 1996 Ohio App. LEXIS 2678 at *13-15.

¹² Bullock v. Oles (Sept. 24, 2001), Mahoning App. No. 99 CA 223, 2001 Ohio App. LEXIS 4529 at *7-8.

¹³ Frey v. Queen City Paper Co. (Miami Cty. 1946), 79 Ohio App. 64, 65-67, 71-73, 66 N.E.2d 252.

which caused noise, dust, "noxious and offensive odors," insects, and rodents to "permeate" and "infest" a neighbor's home¹⁴; (5) the stench and sight of mass quantities of dead fish at a commercial fishing enterprise¹⁵; and (6) the "nearly continuous and overwhelming" noise from a large rooster farm that forced neighbors to keep their windows closed and disrupted sleep.¹⁶

As even the Court of Appeals was forced to acknowledge,¹⁷ the Antonik standard relates not only to the question of whether a nuisance exists, but also to the issues of causation and damages. In Bullock v. Oles (Sept. 24, 2001), Mahoning App. No. 99 CA 223, 2001 Ohio App. LEXIS 4529, at *6-7, the court held that, when considering damages for a nuisance claim, "[t]he factual question is whether there is an 'appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort' during the reasonable use of the property." (citation omitted).

B. A Plaintiff Should Only Be Permitted to Recover for Emotional Reactions If a Plaintiff Meets the Requirements for a Claim for Infliction of Emotional Distress

The decision of the Court of Appeals is inconsistent with Ohio jurisprudence generally because it allows recovery for emotional damages in situations far less rigorous than the tort of infliction of emotional distress. In addition, it opens the door to fear and emotion

¹⁴ Lasko v. Akron (Summit Cty. 1958), 109 Ohio App. 409, 410, 166 N.E.2d 771.

¹⁵ Reeser v. Weaver Bros., Inc. (Darke Cty. 1992), 78 Ohio App. 3d 681, 684-85, 605 N.E.2d 1271.

¹⁶ Forrester v. Webb (Feb. 16, 1999), Butler App. No. CA98-04-070, 1999 Ohio App. LEXIS 474, at *3-4.

¹⁷ Ct. App. Opin. at ¶ 66-70.

damages in the context of a property law tort—nuisance—even though the law holds that one may not recover for witnessing damage to one's property.

To be successful on an infliction of emotional distress claim, a plaintiff must meet the "severe and debilitating" threshold established by this Court in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 78, 451 N.E.2d 759. If the law were to permit recovery of damages for emotions as annoyance and discomfort damages in nuisance claims, those damages should be recoverable only if the plaintiff meets the "severe and debilitating" standard articulated in Paugh.

Even under the Paugh standard, however, unrealized fears, including fears of potential future damages, are non-compensable, regardless if such fears are severe and debilitating. "Our legal system does not and cannot recognize actions for unsustained, conceptual, or future damage." Chance v. BP Chems., Inc., 1995 Ohio App. LEXIS 1250, at *22. "The courts of Ohio have not expanded this cause of action to include apprehension of a non-existent physical peril." Heiner v. Moretuzzo (1995), 73 Ohio St. 3d 80, 86, 652 N.E.2d 644 (denying recovery for negligent infliction of emotional distress where defendant hospital negligently informed plaintiff that she was HIV positive) (citation omitted). The fears to which Plaintiffs testified were all unrealized -- fears about a possible second explosion, fears about developing a disease, fears about another 9-11 occurring. None of these fears ever happened.

Thus, Ohio courts, when confronted with plaintiffs who have sought to recover in tort for fears and concerns, have held to the rule that such damages are not recoverable. However, the Court of Appeals' opinion would permit damages for fear and concern if a plaintiff can tie the subjective fear and concern to an incident involving the property-law concept of a nuisance. Such an exception to the general rule makes no logical sense and conflicts with Ohio

law, which holds that injuries to the psyche cannot be recovered for claims based on injury to property. "Ohio law simply does not permit recovery for serious emotional distress which is caused when one witnesses the negligent injury or destruction of one's property." Stechler v. Homyk (Cuyahoga Cty. 1998), 127 Ohio App. 3d 396, 399, 713 N.E.2d 44 (O'Donnell, J.) (citation omitted) (denying recovery for emotional distress to tenant who witnessed the sudden flooding of his apartment). No recovery is available for "one suffering emotional distress after witnessing the negligent damaging of property over a period of time." Reeser v. Weaver Bros., Inc. (Darke Cty. 1989), 54 Ohio App. 3d 46, 49, 560 N.E.2d 819.

C. The Caselaw Cited by the Court of Appeals Does Not Support its Holding

Although cases have expressly held that annoyance and discomfort damages are not recoverable without proving physical discomfort, the Court of Appeals asserts that "[o]ther cases have held that the plaintiff is entitled to recover damages for 'personal discomfort and annoyance,' without including a physical component." Ct. App. Opin. at ¶ 77. However, every case cited by the Court of Appeals to support this proposition involved a physical component,¹⁸

¹⁸ Graham & Wagner, Inc. v. Ridge (Stark Cty. 1931), 41 Ohio App. 288, 292, 179 N.E. 693 (damages for annoyance and discomfort based on dust, noise and vibration); Frey, 79 Ohio App. at 66-67, (damages awarded because fly ash settled in dining room, bedrooms and penetrated food, and plaintiff could not open windows or sit on porch without being covered in ash); Lasko, 109 Ohio App. at 410, (damages arose from noxious and offensive odors, and insect and rodent infestation); Reeser, 78 Ohio App. 3d at 684-85 (annoyance and discomfort damages from the stench and sight of mass quantities of dead fish); Wray v. Deters (Hamilton Cty. 1996), 111 Ohio App. 3d 107, 111, 675 N.E.2d 881 (annoyance and discomfort damages from "dirt, noise, and disruption"); Angerman v. Burick, Wayne App. No. 02 CA 0028, 2003-Ohio-1469, ¶35 (damages for annoyance and discomfort arose from noise and dust); Stoll v. Parrott & Strawser Props., Inc., Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio-5717, ¶25 (damages awarded because items were washing up on property from an old dump and plaintiffs had to clean up debris). The remaining case cited by the Court of Appeals, Gertz v. N. Ohio Rifle Club, Inc. (Apr. 18, 1977), Geauga App. No. 676, 1977 Ohio App. LEXIS 7785, at *3-4, does not support the Court's conclusion because it does not discuss the factual grounds on which

(footnote cont'd. . .)

and not one stated that a plaintiff could recover damages for fears and concerns. In fact, no Ohio court has ever stated that annoyance and discomfort damages are recoverable for fears and concerns.

The Court of Appeals relied heavily on Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, stating that Harford "found the existence of a nuisance in situations where only personal annoyance, rather than physical discomfort has been involved." Ct. App. Opin. at ¶ 79. In Harford, the court granted an injunction preventing the operation of a funeral home in a residential area because it would "be distressing to the plaintiff and others who live in the immediate vicinity, interfere with the comfortable use of their homes, cause them mental distress resulting in lessened resistance to disease, [and] the value of property in the vicinity will [] materially decrease" Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, at *5-6. While this case may represent the single instance where the Court of Appeals found a nuisance when only personal, non-physical annoyance existed, it does not support the proposition that annoyance and discomfort damages are recoverable for fears and concerns.

As an initial matter, the plaintiffs in Harford sought injunctive relief, not damages. Harford, 1936 Ohio Misc. LEXIS 1266, at *1. In the present case, by contrast, Plaintiffs are seeking money damages only and not an injunction. Harford is irrelevant for determining the standard for awarding annoyance and discomfort damages because Harford did not address the issue of damages.

annoyance and discomfort damages were awarded, let alone state that annoyance and discomfort damages are recoverable for emotional reactions.

Injunctions are sometimes granted in nuisance cases based on the likelihood or danger of future harm. Sanson Co. v. Granger Materials, Inc., Cuyahoga Cty. App. No. 89050, 2007-Ohio-5852, ¶10 ("Furthermore, while the past damage to plaintiffs may have been compensable, it was proper for the court to enjoin repetition of the harm in the future, to avoid a multiplicity of suits."). However, compensatory damages are not available except as compensation for real, physical, material harm. Bullock, 2001 Ohio App. LEXIS 4529, at *6-7. Moreover, "[a]n award of damages does not inevitably follow the finding of a nuisance." Id., at *5; Blevins v. Sorrell (Warren Cty. 1990), 68 Ohio App. 3d 665, 669 (noting that the "finding of nuisance will permit recovery for inconvenience or annoyance caused by the maintenance of the nuisance," but holding that "the award of money damages does not inevitably follow a finding of nuisance") (citation omitted); Angerman v. Burick, Wayne App. No. 02-CA-0028, 2003-Ohio-1469, ¶¶32-35 (upholding trial court's decision to enjoin defendants from operating motor cross track because of excessive noise, but declining to award damages for annoyance and discomfort).

No court has ever cited Harford as support for an award of annoyance and discomfort damages for fears and concerns. In fact, no Ohio court has ever held that a plaintiff may be awarded annoyance and discomfort damages for these types of fears and emotions, not even Harford. What courts have held is that "damages for bare personal inconvenience, annoyance and discomfort . . . are not recoverable." Schoenberger, 1983 Ohio App. LEXIS 12345, at *17. Accord: Zang v. Engle (Sept. 19, 2000), Franklin App. No. 00 AP-290, 2000 Ohio App. LEXIS 4222, at *12 ("[A] trial court must look at what persons of ordinary tastes and sensibilities would regard as an inconvenience or interference materially affecting their physical comfort.").

To recover annoyance and discomfort damages for a nuisance claim, a plaintiff must establish an appreciable, substantial, tangible harm resulting in actual, material, physical discomfort. A plaintiff may not recover annoyance and discomfort damages for fears, concerns, or other emotional responses as was held by the Court of Appeals.

Proposition of Law No. II: Evidence that generates speculative fears and concerns about future harm is not relevant during a time period when the nuisance is not affecting the property.

As discussed above, the Court of Appeals improperly held that annoyance and discomfort damages could be awarded for a plaintiff's fears and concerns. Based on this erroneous holding, the Court of Appeals also found that a plaintiff's speculative fears and concerns of future harm are a part of annoyance and discomfort damages, even when the nuisance is no longer affecting the property. Ct. App. Opin. at ¶¶ 134-37.

At trial, Plaintiffs testified that they learned of prior incidents at the Isotec facility during town hall meetings that were held in the months after the explosion. Ct. App. Opin. at ¶ 144. The trial court instructed the jury that such evidence could not be considered to award annoyance and discomfort damages. The Court of Appeals found this limiting instruction to be an abuse of discretion,¹⁹ and held that the evidence should have been admitted "for the limited purpose of proving their [the plaintiffs'] claim of diminished loss of use and annoyance and discomfort for the continuing nuisance," because the plaintiffs were "uncomfortable or fearful in their homes after the explosion." Ct. App. Opin. at ¶ 145.

A plaintiff cannot recover for unrealized fears and concerns. "Our legal system does not and cannot recognize actions for unsustained, conceptual, or future damages." Chance

¹⁹ Ct. App. Opin. at ¶ 145.

v. BP Chems., Inc. (March 30, 1995), Cuyahoga App. Nos. 66622, 66645, 67369, 1995 Ohio App. LEXIS 1250, at *22. Therefore the law does not support an award of annoyance and discomfort damages based on speculative fears about unsubstantiated future harms, particularly when the nuisance is no longer affecting the property.

IV. CONCLUSION

This case presents issues of public and great general interest because the outcome may reshape the landscape of Ohio law concerning when a plaintiff may recover damages for emotional injuries. The Appellant requests that this Court accept jurisdiction in this case so that this important issue will be reviewed on the merits.

Respectfully submitted,



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APPENDIX I

.....
FAIN, J.

Plaintiff-appellant Taylor Ferguson appeals from a judgment awarding Ferguson \$100 in compensatory damages against defendant-appellee Aldrich Chemical Company, Inc. Ferguson's claim arose from an explosion that occurred at the Isotec Factory, which was owned and operated by Aldrich Chemical, and was located in Miamisburg, Ohio. The explosion resulted in the evacuation of residents within a one-mile range of the factory, for approximately twenty-four hours. A class action was subsequently filed against Aldrich Chemical, and Ferguson was one of the class members who claimed damages based on theories of nuisance, negligence, and strict liability.

Ferguson contends that the trial court erred by omitting the phrase "ultimately resulting in injury" in its definition of "nuisance" for the jury, and by instructing the jury that it could only award damages for annoyance and discomfort if there were an "appreciable, tangible harm resulting in actual, material physical discomfort."

Ferguson also contends that the trial court erred in excluding evidence of fear and upset that she suffered, and in holding that she and other plaintiffs could not recover for the loss of use and enjoyment of their property for any period of time after the twenty-four hour evacuation period.

In addition, Ferguson contends that the trial court erred in excluding evidence of prior explosions, detonations, leaks, and similar calamities at Isotec. Finally, Ferguson contends that the jury verdict, which awarded zero damages for Ferguson's loss of use and enjoyment of her home, and for her annoyance and discomfort, was against the manifest weight of the evidence.

We conclude that the trial court did not err in omitting the words "results in injury" from the definition of nuisance. Although Aldrich Chemical admitted liability, plaintiffs were still required to establish that the wrongful conduct or hazardous condition proximately caused their damages. We do agree that the definition of nuisance would have been less confusing if it had mentioned enjoyment of property. This was not an error meriting reversal in itself, but is something that can be corrected on remand.

We also conclude that the trial court erred in instructing the jury that a plaintiff must show an appreciable, substantial, tangible injury resulting in actual material, physical discomfort in order to recover damages for annoyance and discomfort. This error materially misled the jury and requires reversal of the judgment.

The trial court did not err in refusing to admit evidence of fear and upset, because the court actually allowed plaintiffs to present considerable evidence on this point. Where the court did err was in instructing the jury that fear and upset could not be considered in deciding whether the plaintiffs should recover damages for personal annoyance and discomfort.

We further conclude that the trial court erred in holding that Ferguson could not recover for the loss of use and enjoyment of her property for any period of time that did not directly follow the twenty-four hour evacuation period. The plaintiffs alleged a continuing nuisance after the explosion, and the trial court's reason for limiting damages was the requirement that plaintiffs show actual, material physical discomfort in order to recover.

The trial court also erred in excluding evidence of prior explosions or detonations at Isotec, as the relevance of this evidence was not outweighed by any potential prejudice. Finally, in view of the disposition of the first four assignments of error, the issue of whether

the judgment is against the manifest weight of the evidence is overruled as moot. Accordingly, the judgment is Reversed and this cause is Remanded for further proceedings.

I

Aldrich Chemical purchased the Isotec factory in 2001. At that time, and until December 2003, Isotec was engaged in the process of cryogenic distillation of nitric oxide, which is a highly hazardous, poisonous, and volatile chemical. The distillation process took place in a column or cylinder known as NO3 that contained 500 to 600 pounds of nitric oxide. During the distillation process, liquid nitric oxide was used for cooling.

At about 7:15 a.m. on September 21, 2003, a nitrous oxide leak occurred in NO3, and caused nitric oxide to be pumped out into the environment. When nitrous oxide combines with oxygen, it immediately forms nitrous dioxide, which is also a hazardous material and a toxic gas.

After the leak was discovered, Isotec called the Miami Township Police Department to report that one of its units was not being cooled properly. Isotec indicated that an additional cooling source would run out in approximately two hours, and that an explosion could occur if the problem were not brought under control. Consequently, the police and fire departments arrived at Isotec around 8:30 a.m., and shut down the road in front of the plant. Around 10:15 a.m., the NO3 column suddenly exploded. The explosion was variously described as "massive," like a "sonic boom" or an "enormous crack," and as a huge blast that sounded like a bomb going off. The explosion caused homes, doors, and windows to move, rattle, and shake. Eyewitnesses also reported seeing a big cloud of

rust-colored gas or a purplish-mixture plume immediately after the blast.

Officer Dipietro of the Miami Township Police Department was quite close to the explosion. Dipietro indicated that the NO₃ column basically came out of the ground and pieces of debris were going everywhere. As a result, Dipietro and others took shelter under a fire department vehicle. After the explosion, officials and Isotec personnel drew back from the immediate area. At that time, the fire command was focused on a carbon monoxide tank that had moved, was unstable, and was on fire.

Because of concerns about further explosions, people living within a one-mile radius of the plant were evacuated, along with some others who lived outside that area. Police officers went door-to-door in the affected areas, explaining to residents that there had been an explosion and that they should evacuate as soon as possible. At the time of the evacuation, no one could give residents an idea of how long the evacuation would last. Residents in the area left suddenly, often without necessary clothing, medicine or their pets, and people who were away from their homes at the time of the explosion were not able to return to retrieve their belongings. Approximately twenty-four hours later, residents were allowed to return home.

On December 1, 2003, two of the evacuated residents, Christine Banford and Doug Graeser, filed a class action suit against Aldrich Chemical (Montgomery County Common Pleas Case No. 03-8704). The complaint indicated that the plaintiffs sought to represent about 2,000 people in 500 homes in the evacuation area. Subsequently, on December 5, 2003, a second class action was filed by William and Melissa O'Donnell (Montgomery County Common Pleas Case No. 2003-CV-8865).

An agreed order consolidating the two cases was filed in September 2004.¹ Other pending actions were also consolidated, including a complaint brought by 36 plaintiffs who lived in the "general area" of the Isotec facility, but outside the one-mile radius (*Grooms v. Aldrich Chemical Company, Inc.*, Montgomery County Common Pleas Case No. 2005-CV-7221), and a complaint filed by eleven other plaintiffs living in the immediate area of Isotec (*Gray v. Aldrich Chemical Company, Inc.*, Montgomery County Common Pleas Case No. 2006-CV-4053). In June 2006, these cases were consolidated with the *Banford* and *Grooms* cases by agreed order.

Previously, in October 2005, the trial court had filed an order certifying a class action and establishing a four-phase procedure. Phase One was to consist of a jury trial on liability issues, said to be: "whether Aldrich factually breached a duty for purposes of the negligence cause of action; whether the conduct and resulting explosion demonstrates strict liability; [and] whether the conduct constitutes an absolute or qualified nuisance * * *." Order and Entry Sustaining the Plaintiffs' Motion for Class Certification, Subject to Specific Conditions and Modifications, pp. 24-25.

The court also noted that, assuming a liability verdict were to be returned against Aldrich Chemical:

"[T]he class action will decertify into a 'second phase' to allow the Plaintiffs and all putative Plaintiffs to individually present their causation and compensatory damages claims to separate juries. Notably, the 'second phase' juries will be instructed as a matter of law that the 'liability' verdict was previously determined and that the only issues for their

¹ The O'Donnells filed a motion to voluntarily dismiss their action, under Civ. R. 41(B), in October, 2005, which the court granted.

determination are individualized causation and compensatory damages." Id. at 25.

Assuming a recovery in Phase Two, the case would be re-certified for Phase Three, where a jury would consider whether, factually, Aldrich Chemical had acted maliciously, with the result that punitive damages and an attorney fee award would be appropriate. Id. Finally, in the event of a finding of malicious conduct, the Phase Three jury would decide, in Phase Four, the amount, if any, of punitive damages that would be awarded. Id. at 26.

In October 2006, Aldrich Chemical filed a notice with the trial court indicating that it would not contest Phase One liability and would accept legal responsibility for the damages caused by the explosion. The trial court, therefore, canceled the jury trial that was scheduled for that month, and moved forward with Phase Two.

In January 2007, the trial court randomly selected a group of claimants who would proceed to jury trial on Phase Two. The Phase Two jury trial was held in April 2007, and included testimony from 31 claimants who lived in seventeen households in the evacuation area. The jury was given interrogatories for each claimant, which asked the jury to state whether Aldrich Chemical's "negligence, ultrahazardous activity and/or nuisance had proximately" caused damage to the particular claimant. Other interrogatories required the jury to specify sums that would compensate a claimant for any one of six potential items of damages. These items included: "Loss of Use of a Property before the 24-hour evacuation period"; "Loss of Use of a Property during the 24-hour evacuation period"; "Annoyance and Discomfort before the 24-hour evacuation period"; "Annoyance and Discomfort during the 24-hour evacuation period"; "Annoyance and Discomfort after the 24-hour evacuation period"; and "Evacuation Expenses."

Before the case was submitted to the jury, the trial court decided which items of damage would be submitted to the jury for each claimant. For example, one claimant may have set forth evidence of annoyance and discomfort during the evacuation period, but not after. Another claimant may have set forth proof on both these items, but may not have had evacuation expenses, and so forth. Based on its own interpretation of the evidence and applicable law, the trial court told counsel which categories of damage would be included on each particular claimant's jury interrogatory.

The jury subsequently returned verdicts in favor of the individual claimants in amounts ranging from \$35 to \$625. Most claimants received compensation for loss of use of property during the evacuation, with the vast majority receiving what appeared to be a standard rate of \$35. Taylor Ferguson was the only claimant who did not receive any compensation for loss of use of property during the evacuation.

Ferguson was also one of only a handful of claimants who received an award for annoyance and discomfort before the evacuation. Several claimants received amounts ranging from \$50 to \$250, and Ferguson received \$100. Less than a third of the claimants received damages for annoyance and discomfort during the evacuation period. Ferguson was not one; she was awarded zero dollars for this particular claim.

The trial court did not include the remaining items of damages in Ferguson's interrogatories, so the jury did not consider whether Ferguson was entitled to damages for loss of use before the evacuation period, annoyance and discomfort after the evacuation period, or evacuation expenses. Notably, only one claimant was awarded damages (\$35) for loss of use of property before the evacuation period, and only three claimants received an award for loss of use after the evacuation period. Again, these were minimal amounts,

ranging from \$50 to \$200. Finally, only one claimant was awarded damages for annoyance and discomfort after the evacuation period (\$50).

Following the jury's verdict, Ferguson dismissed her claim for punitive damages, and the trial court entered a judgment that included a finding of no just reason for delay. Taylor appeals from the judgment in her favor in the amount of \$100.

II

Ferguson's First Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN ITS INSTRUCTIONS AND/OR ADMONITIONS TO THE JURY."

Under this assignment of error, Ferguson contends that the trial court erred in three ways when instructing or admonishing the jury: (1) by omitting the phrase "which results from injury" from the definition of a nuisance, and/or failing to define nuisance in terms that included a disruption of the peaceful enjoyment of property; (2) by admonishing the jury that fears or subjective concerns of homeowners were not compensable; and (3) by instructing the jury that it could not award damages for annoyance and discomfort unless a claimant established "appreciable, tangible harm resulting in actual, material physical discomfort." Each of these items will be considered separately.

A. Proximate Cause Requirement

At a pre-trial conference, the court discussed its proposed jury instruction on the definition of nuisance. The court's original draft proposed the following definition:

"Nuisance is premised on negligence. It consists of a lawful act that is so negligently or carelessly done as to have created an unreasonable risk of harm which results in injury to another." Transcript of April 10, 2007 Conference, p. 36.

Aldrich Chemical objected to the instruction, and on consideration, the trial court agreed with Aldrich Chemical that the portion stating "which results in injury" could mislead or confuse the jury because it seemed to imply that injuries had, in fact, resulted, when Aldrich Chemical had reserved the right to contest causation as to particular claimants. Accordingly, the trial court said that it would eliminate this clause in the final jury instructions.

Ferguson contends that removing the phrase "which results in injury" from the definition was prejudicial because it forced claimants to show that an injury had occurred, even though Aldrich had already conceded that it had caused injury by conceding liability and waiving the liability phase of the trial.

The law provides that:

"A trial court should ordinarily give a requested jury instruction if it is a correct statement of the law as applied to the facts of the case, and if there was evidence presented at trial from which reasonable minds could reach the conclusion sought by the instruction. * * * When considering whether to use a jury instruction, it is within the sound discretion of the trial court to refuse to admit proposed jury instructions that are either redundant or immaterial to the case. * * * Accordingly, a reviewing court will not reverse unless an instruction is so prejudicial that it may induce an erroneous verdict. * * * An appellate court's duty is to review the instructions as a whole, and, '[i]f, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence

presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled.' " *Anousheh v. Planet Ford, Inc.*, Montgomery App. Nos. 21960, 21967, 2007-Ohio-4543, at ¶ 15 (citations omitted).

We find no abuse of discretion or prejudice as a result of the omission of the phrase in question. Aldrich Chemical filed a notice with the trial court indicating that it accepted legal responsibility for the explosion. Subsequently, in January 2007, the trial court resolved a dispute about the meaning of Aldrich Chemical's "no-contest notice."

The trial court first concluded that the "no-contest notice" was ambiguous. The court then construed the notice as an amendment to Aldrich Chemical's answer and as an admission of the factual averments pertinent to the liability issues in the pending cause of action. Trial Court Decision and Entry Sustaining in Part and Overruling in Part the Plaintiffs' Motion for Judgment on Phase One Liability Issues, p. 20.

According to the court, the liability issues under consideration were negligence, strict liability, and nuisance. The court concluded that Aldrich Chemical's stipulation of liability had satisfied the existence of a duty and its breach. However, the court also concluded that Aldrich Chemical still intended to contest the third element of negligence, pertaining to proximate causation and injury. Likewise, Aldrich Chemical had stipulated the conduct of an ultrahazardous activity for purposes of the strict liability claim, but not issues of proximate cause and injury.

During its discussion of these matters, the trial court noted the lack of precise definition in the area of nuisance, and the blending of absolute and qualified nuisance with the elements of strict liability and negligence. The court concluded that Aldrich Chemical had stipulated that its conduct constituted a nuisance, leaving for resolution whether the

plaintiffs had sustained injury as a proximate result of the nuisance.

We agree with the trial court on these points. Aldrich Chemical admitted that it had engaged in conduct which created a nuisance. Aldrich Chemical also admitted that it had been negligent and that it was liable under the theory of strict liability. However, under any of these liability theories, the plaintiff must still establish that the wrongful conduct or hazardous condition proximately caused damages. See, e.g., *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 321, 364 N.E.2d 267 (strict liability in tort requires a defective product and proof that the defect was the "direct and proximate cause of the plaintiff's injuries or loss"); *James v. Cincinnati*, Hamilton App. No. C-070367, 2008 -Ohio- 2708, at ¶ 31 (in a nuisance action, the plaintiff must prove breach of duty to maintain premises free of nuisance and that the breach proximately caused plaintiff's injuries); and *Collins v. National City Bank*, Montgomery App. No. 19884, 2003-Ohio-6893, at ¶ 22 (elements of a negligence claim include a duty, breach of the duty, and damages caused by the breach). See, also, e.g., *Goldman v. Johns-Manville Sales Corp.* (1987), 33 Ohio St.3d 40, 46, 514 N.E.2d 691 (noting that plaintiffs traditionally have the burden of demonstrating that their injuries are caused by the defendant). Accordingly, the trial court did not err in requiring plaintiffs to prove that Aldrich Chemical proximately caused their injury and damages.

Ferguson also contends that the trial court's definition omitted the concept of "peaceful enjoyment of property," and was inconsistent with established definitions of nuisance. Traditionally, nuisance is defined as "the wrongful invasion of a legal right or interest." * * * "Wrongful invasion' encompasses the use and enjoyment of property or of personal rights and privileges." *Kramer v. Angel's Path, L.L.C.*, 174 Ohio App.3d 359, 366-367, 2007-Ohio-7099, 882 N.E.2d 46, at ¶ 15 (citations omitted). A private nuisance

has also been defined as "a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Brown v. Scioto Cty. Bd. of Commrs.* (1993), 87 Ohio App.3d 704, 712, 622 N.E.2d 1153 (citation omitted).

The trial court did not define "nuisance" in the jury instructions, beyond noting that it is a lawful act so negligently done that it creates an unreasonable risk of harm. Transcript of Jury Trial, Volume VIII, p. 1616. The court went on to discuss the three potential types of recovery for a nuisance: loss of use, annoyance and discomfort, and evacuation expenses. The court described loss of use simply as compensation for the "reasonable loss of use" of property, without mentioning the concept of enjoyment of the property. *Id.* at 1617.

"A trial court is not required to give a proposed jury instruction in the precise language requested by its proponent, even if the proposed instruction states an applicable rule of law. Instead, the court has the discretion to use its own language to communicate the same legal principles. * * * Moreover, if the court's instruction correctly states the law pertinent to the issues raised in the case, the court's use of that instruction will not constitute error, even if the instruction is not a full and comprehensive statement of the law. * * * Finally, the court has the discretion to refuse to give a proposed jury instruction if that instruction is either redundant or immaterial to the case." *Henderson v. Spring Run Allotment* (1994), 99 Ohio App.3d 633, 638, 651 N.E.2d 489 (citations omitted).

The trial court's explanation of nuisance would probably have been more helpful if it had included the traditional definitions that we have recited, but the omission by itself would probably not require reversal. However, since the judgment is being reversed, and this cause is being remanded for further proceedings, the definitions of nuisance quoted

from *Kramer* and *Brown* would be helpful to the jury and should be included.

B. Requirement of Physical Discomfort

Ferguson's next argument is that the trial court should have allowed the claimants to recover for annoyance, fear, or concern without imposing a requirement that they must have encountered actual, material physical discomfort. Ferguson contends that the trial court further erred in giving a "physical discomfort" instruction, which caused the jury to believe that Ferguson and other claimants must show a physical injury before they could recover damages for annoyance and discomfort.

Before the trial, both sides filed motions to exclude or limit evidence, and also submitted proposed jury instructions. A critical consideration was whether the plaintiffs had to show an appreciable, substantial, tangible injury resulting in actual material, physical discomfort in order to recover damages for annoyance and discomfort under the nuisance claim. The defendants contended that such a showing was necessary, while plaintiffs asserted that the concept of material or substantial physical discomfort was merely related to the existence of a nuisance, and was not a prerequisite for recovering damages for annoyance.

During a March 2007 hearing, the trial court stressed that "physical harm" and "physical discomfort" are two different concepts. The trial court also concluded that the jury would need guidance as to what was meant by annoyance and discomfort damage. After reviewing some case law, the trial court stated that:

" * * * I'm sort of gravitating to the thought that what the jury would be instructed would be that there must be, quote, appreciable, substantial, tangible injury resulting in

actual material and physical discomfort. That text is pulled verbatim out of the Bullock case and it's the text that is repeated in the other appellate districts.

"And so I'm really gravitating to the position that the Court would not tell the jury – instruct the jury that there must be substantial physical discomfort but the Court would instruct the jury that there must be appreciable, substantial, tangible injury resulting in actual material and physical discomfort. But there must be physical discomfort as opposed to nonphysical discomfort. But, again, discomfort doesn't mean harm." Transcript of March 20, 2007 Conference, p. 42.

The court allowed the parties to submit written memoranda on the issue, and then held another conference in early April 2007. At this conference, the court concluded that the plaintiffs must establish physical discomfort in order to recover compensatory damages. The court also rejected plaintiffs' contention that non-physical personal annoyance and discomfort could be a compensable item of nuisance damages. In particular, the court reasoned that if the plaintiff must show appreciable, tangible injury resulting in actual material and physical discomfort to prove nuisance, then the compensable item must also be physical discomfort. By the same token, if non-physical personal discomfort were compensable, that item would have been included in the definition of a nuisance. The trial court, therefore, rejected plaintiff's suggested use of 3 Ohio Jury Instructions (2006), Section 345.13(4). This standard Ohio jury instruction states, in pertinent part, that:

"If you find by the greater weight of the evidence that the defendant created a nuisance and the nuisance proximately caused damages to the plaintiff, you will further decide what damages, if any, should be awarded to the plaintiff.

"ANNOYANCE AND DISCOMFORT. If you find by the greater weight of the evidence that the defendant created a nuisance and the nuisance proximately caused damages to the plaintiff, you will further decide whether the plaintiff suffered personal annoyance and discomfort. When considering annoyance and discomfort damages, no precise rule for ascertaining the damage can be given as, in the very nature of things, the degree of personal annoyance and discomfort is not susceptible to exact measurement. Therefore, you must decide what the plaintiff should have in money, if any, and what the defendants ought to pay, if any, in view of the discomfort or annoyance to which the plaintiff may have been subjected." 3 Ohio Jury Instructions (2006), Section 345.13(2) and (4)

In rejecting this instruction, the trial court again stressed that "physical discomfort is not equivalent to bodily injury," and that the jury would be instructed that bodily injury need not be shown. Transcript of April 10, 2007 Conference, p. 15. The court also stated that the plaintiffs would not be permitted to testify that they were fearful or emotional, or that they had experienced non-physical subjective discomfort, because such testimony, standing alone, was neither relevant nor admissible. *Id.* at 16. However, the court commented that this evidence might be relevant and admissible in the context of other factual issues.

The court followed this up at trial by instructing the jury during the testimony of one witness that:

"[I]n this trial one of the items that is not the subject of a damage calculation by the jury are the fears or the subjective concerns of the homeowners, and there may be testimony of upcoming witnesses that may have relevance in a limited degree with respect to other testimony, but just so you understand at this point you are not to be – you will not be awarding any damages based upon any of the individual homeowner's internal fears or

concerns." Transcript of Jury Trial, Volume II, p. 548.

At the end of the trial, the court instructed the jury that it would address three categories of damages: "loss of use of property, annoyance and discomfort, and evacuation expenses." Transcript of Jury Trial, Volume IX, p. 1617. The court instructed the jury that:

"When considering annoyance and discomfort damages, no precise rule for ascertaining damage can be given, as, in the very nature of things, the degree of personal annoyance and discomfort is not susceptible to exact measurement. However, a plaintiff may not recover for trifling annoyance and unsubstantiated or unrealized fears. There must be an appreciable, substantial, tangible harm resulting in actual, material physical discomfort. However, the plaintiffs need not establish bodily injury to establish physical discomfort. Furthermore, evidence of pecuniary loss is not required to establish damages for discomfort and annoyance." Transcript of Jury Trial, Volume IX, pp. 1618-19.

Again, we review the instructions and admonitions for abuse of discretion and prejudice. As a preliminary point, we note that "[t]he measure of damages for tort harm to land is the same whether the theory of recovery is trespass, nuisance, negligence, or strict liability." *Francis Corp. v. Sun Co., Inc.* (Dec. 23, 1999), 8th Dist. No. 74966, 1999 WL 1249534, * 1. Accord, *Weber v. Obuch*, Medina App. No. 05CA0048-M, 2005 -Ohio- 6993, at ¶ 12. Thus, parties who sustain injury to real property may recover: "(1) reasonable restoration costs * * *; (2) compensation for the loss of the use of the property between the time of the injury and the restoration * * *; and (3) damages for personal annoyance and discomfort if the plaintiff is an occupant of the property * * *." *Horrisberger v. Mohlmaster* (1995), 102 Ohio App.3d 494, 499-500, 657 N.E.2d 534 (citations omitted).

Aldrich Chemical does not dispute that Ferguson may recover damages for annoyance and discomfort. However, Aldrich Chemical argues that under *Antonik v. Chamberlain* (1947), 81 Ohio App. 465, 78 N.E.2d 752, Ohio law has always required "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort" before a party can recover damages for annoyance and discomfort in nuisance cases. In opposition, Ferguson contends that *Antonik* and other cases simply include a physical component to define the existence of an actionable nuisance, not to restrict the damages that may be recovered for annoyance and discomfort.

In *Antonik*, the Ninth District Court of Appeals considered whether to dismiss a petition for an injunction against a company that wanted to build an airport. The petition had been brought by neighboring landowners, who objected to the potential noise, dust, trespassing crowds, annoyance, fright and fear of physical harm, and depreciation of property values that could occur if the airport were built. In deciding whether the plaintiffs had shown sufficient evidence to warrant an order for an injunction, the Ninth District observed that "nuisance in law, for the most part consists in so using one's property as to injure the land or some incorporeal right of one's neighbor." 81 Ohio App.3d at 475. The Ninth District further noted that:

"The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existence of equal rights in his neighbor to the use of his property. This rule has sometimes been erroneously interpreted as a prohibition of all use of one's property which annoys or disturbs his neighbor in the enjoyment of his property. The question for decision is not simply whether the neighbor is annoyed or disturbed, but

is whether there is an injury to a legal right of the neighbor. The law of private nuisance is a law of degree; it generally turns on the factual question whether the use to which the property is put is a reasonable use under the circumstances, and whether there is 'an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort, and not merely a tendency to injure. It must be real and not fanciful or imaginary, or such as results merely in a trifling annoyance, inconvenience, or discomfort.' " *Id.* at 476-77.

Because *Antonik* involved the issue of injunctive relief, not damages, the court used the above standard only in discussing whether a nuisance had occurred. The court concluded in *Antonik* that the maze of conflicting evidence prevented it from stating the plaintiffs' legal injury with any accuracy. *Id.* at 478. As a result, the court held that the plaintiffs had failed to establish the irreparable injury needed for an injunction, and dismissed the case. *Id.*

As noted, *Antonik* does not contain any discussion of the potential elements of damage in nuisance cases. Despite this fact, the above language in *Antonik* has been used in a damages context. In *Bullock v. Oles*, Medina App. No. 99 CA 223, 2001-Ohio-3220, 2001 WL 1199858, * 2, the trial court awarded \$10,000 in damages to the plaintiffs, after finding that the defendant's defective septic tank was a nuisance. *Id.* at * 1. On appeal, the defendants contended that the judgment was against the weight of the evidence. Before discussing the evidence, the Ninth District noted that:

"An award of damages does not inevitably follow the finding of a nuisance. * * * However, in assessing the damages for the maintenance of a nuisance, the trier-of-fact may look 'to injury as occurs to the use of the property as a residence, taking into consideration the discomfort and annoyance which the owner has suffered from the nuisance.' * * * The

amount of annoyance or inconvenience that will constitute a legal injury, resulting in actual damage, cannot be precisely defined and must be left to the discretion of the trier-of-fact.

"Damages may be awarded simply for discomfort or annoyance in the use of the property; the discomfort does not need to be constant, the value of the property depreciated, the health of the occupants compromised, or the rental value of the property impaired. * * * The factual question is whether there is an 'appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort' during the reasonable use of the property. *** Evidence of pecuniary loss is not required to recover damages for discomfort and annoyance caused by a nuisance. *** The assessment of those damages is within the province of the trier-of-fact and the reviewing court should not substitute its judgment unless the judgment appears to be the result of passion or prejudice and manifestly excessive." *Id.* at * 2 (citations omitted).

In applying the above standards, the Ninth District commented on the following evidence during a two-year period when effluent continued to drain into the plaintiffs' yard:

"The Bullocks lost the use of their backyard and the pool located there for family and neighborhood get-togethers due to the standing effluent on the surface of their yard. Mrs. Bullock could not let her grandchildren play in the backyard because she was afraid they may get diseases from the waste. Cutting the lawn in the affected area also caused problems. Mr. Bullock had to wear a mask, take frequent breaks, and suffered from nausea, headaches and unusual fatigue after the chore. The effluent saturation on the Bullocks' yard altered the grading of the ground, requiring fill dirt to repair the damage. Further, due to the altered grading, the damage to the pool area necessitated pool repairs.

Finally, doors and windows to the house had to remain closed because the noxious odor produced by the effluent made the Bullock's yard smell 'like an outhouse.' " *Id.* at * 3.

Ferguson and Aldrich both rely on *Bullock* as support for their respective positions. Ferguson contends that physical discomfort is not required because the damages in *Bullock* included worry about grandchildren playing on the property. Aldrich cites *Bullock*, among other cases, for the severity of the annoyance or intrusion on which damages are based, such as foul odors, stench from dead fish, excessive fly ash, and nearly continuous and overwhelming noise.

In the case before us, the trial court focused on the fact that physical discomfort is part of the definition of a nuisance, and reasoned that damages for nuisance could not, therefore, include non-physical discomfort. The problem with this reasoning, however, is that courts have used various standards that do not necessarily include a physical discomfort component. Instead, the pertinent focus is on whether the annoyance or discomfort is material and substantial, as opposed to trifling. Furthermore, even if a physical component is present, as in *Bullock*, the appropriate focus is on the impact "during" the reasonable use of the property. In the present case, the explosion had a substantial physical impact, and the explosion is the event from which the claims for damages flow. Furthermore, as plaintiffs contend, this issue is really more pertinent to the question of whether a nuisance exists.

In *Columbus Gaslight & Coke Co. v. Freeland* (1861), 12 Ohio St. 392, the Ohio Supreme Court focused on whether the plaintiff had suffered a "legal injury" – which was described as "a real, material and substantial injury." *Id.* at 400. Subsequently, in *Eller v. Koehler* (1903), 68 Ohio St. 51, 67 N.E. 89, the plaintiff claimed a nuisance due to the

vibration and noise of the defendant's machinery. The Ohio Supreme Court stated that:

"[I]t has always been the law that, in order to subject one to an action for nuisance, the injury must be material and substantial. It must not be a figment of the imagination. It must be tangible. In *Columbus Gas, etc., Co. v. Freeland*, 12 Ohio St. 392, this court settled this question for this state in the following definite resolution: 'What amount of annoyance or inconvenience will constitute a nuisance, being a question of degree, dependent on varying circumstances, cannot be precisely defined.' " 68 Ohio St. at 55.

In a subsequent situation involving a city's discharge of sewage into natural water, a circuit court concluded that:

"In a case for injury to the comfortable enjoyment of property, by the owner and occupant thereof, no precise rule for ascertaining the damage can be given, as in the very nature of things, the subject matter affected is not susceptible of exact measurement, therefore the jury must be left to say what in their judgment the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance, together with such additional sum as will compensate plaintiff for loss of time and expenses caused by sickness of himself and family due to the nuisance. The recovery is only limited to the actual damage sustained." *City of Mansfield v. Hunt* (1900), 10 Ohio C.D. 567, 19 Ohio C.C. 488, 1900 WL 1068, * 6.

Other cases have held that the plaintiff is entitled to recover damages for "personal discomfort and annoyance," without including a physical component. *Graham & Wagner v. Ridge* (1931), Ohio App. 288, 293, 179 N.E. 693. Accord, *Frey v. Queen City Paper Co.* (1946), 79 Ohio App. 64, 71-72, 66 N.E.2d 252 (using personal discomfort and annoyance

standard in case involving fly ash that settled on plaintiff's property. There, the court stated that "[t]he authorities strongly preponderate in support of the doctrine that an occupant of real estate (whether owner or not) may recover damages for personal discomfort, annoyance, etc., resulting to him from a nuisance, in addition to, or separate from, damages suffered in respect of the market value of the premises, or injuries to or destruction of building, crops, etc., thereon.'")

Other cases using a similar approach include: *Lasko v. City of Akron* (1958), 109 Ohio App. 409, 412-13, 166 N.E.2d 771 (no specific claims of physical discomfort in case; "measure of damage for nuisance is * * * the discomfort, annoyance and inconvenience in the use of the plaintiff's property."); *Gertz v. The Northern Ohio Rifle Club, Inc.* (April 18, 1977), Geauga App. No. 676, 1977 WL 199383, * 1 (no indication of physical discomfort where a rifle club obtained a permit to engage in trap-shooting on property near plaintiff's home; the appellate court affirmed a \$1,000 damages award against the club for "personal discomfort and annoyance"); *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App.3d 681, 694, 605 N.E.2d 1271 (the discussion by the Second District Court of Appeals does not indicate that the damages involve physical discomfort; the Second District held that an occupier of land where a "fish-kill" in a lake occurred due to pollution could recover the damages, if any, which resulted from "discomfort and annoyance."); *Wray v. Deters* (1996), 111 Ohio App.3d 107, 113, 675 N.E.2d 881 (a trench dug in the plaintiff's backyard involved noise, danger, annoyance, dirt, and disruption of life, but there was no indication of physical discomfort. The court held that temporary nuisance elements of inconvenience and annoyance may be considered in determining the fair market value of a temporary easement).

We have found the existence of a nuisance in situations where only personal annoyance, rather than physical discomfort has been involved. In *Harford v. Dagenhart* (1936), 21 Ohio Law Abs. 308, 1936 WL 2027, the plaintiff sought to enjoin the defendant from operating an embalming or undertaking establishment or funeral home in the defendant's house, which was located in a residential area. 1936 WL 2027, at *1. There was no indication in *Harford* that the use would expose the plaintiff to noxious smells or chemicals, or to the risk of disease. *Id.* at * 1-2. Instead, the contention was that operation of the funeral parlor would:

"Be distressing to the plaintiff and others who live in the vicinity, interfere with the comfortable use of their homes, cause them mental distress resulting in lessened resistance to disease, that the value of property in the vicinity will be materially decreased * * *." *Id.* at * 2.

In considering whether an injunction against the operation should be granted, we discussed the trend toward finding that the operation of a funeral parlor in a residential area is a nuisance. We noted authority rejecting the conclusion that nuisances could not exist in the absence of "questions of communicating disease or fouling the air * * *." *Id.* In this regard, we quoted as follows from a decision of the Missouri Supreme Court:

" 'In other words, for such an establishment to constitute a nuisance, its character must be such as to directly affect the health or grossly offend the physical senses. This position is without support in the decided cases. * * * A careful reading of the cases will disclose that what has been stressed, and * * * made the basis of injunctive relief, is this: Constant reminders of death, such as an undertaking establishment and the activities associated with it, give rise to, impair in a substantial way the comfort, repose, and

enjoyment of the homes which are subject to them.' " *Id.* at * 5, quoting from *Streett v. Marshall* (1927), 316 Mo. 698, 706, 291 S.W. 494, 497.

In *Harford*, we went on to note that:

"In an early leading case, *Saier et v. Joy et* (Mich.), 164 NW 507 it is said:

" 'It requires no deep research in psychology to reach the conclusion that a constant reminder of death has a depressing effect upon the normal person.'

" 'A mere trifling annoyance, inconvenience or discomfort to one with too fastidious or refined tastes will not constitute a nuisance, yet a nuisance exists where noxious odors or other conditions are a substantial annoyance or a physical discomfort to an ordinary person, or an injury to his health or property.' Joyce on Nuisances, Par. 157 & 162; Wood on Nuisances, Par. 600, 20 R.C.L. 382-3.

"Disturbance of the enjoyment of the comfort of one's home has been classified as within the sphere of the physical.' * * * " 1936 WL 2027, at * 5-6 (citations omitted).

Accordingly, we concluded in *Harford* that the injunction against operation of the funeral home should be granted. *Id.* at * 11. Notably, we used the disjunctive standard of "substantial annoyance or physical discomfort." *Id.* at * 5.

Likewise, in *Angerman v. Burick*, Wayne App. No. 02CA0028, 2003-Ohio-1469, the Ninth District Court of Appeals affirmed a permanent injunction against operation of a motorcross track, where the "noise generated by the track was piercing and annoying and interfered with the peace and quiet * * * enjoyed in the area before the track was opened." *Id.* at ¶ 20.

The Ninth District Court of Appeals did conclude in *Angerman* that the trial court had properly refused to award damages for annoyance. However, this decision was not based

on the plaintiff's failure to prove physical discomfort. Instead, the Ninth District noted that a few items of testimony about annoyance and inconvenience from dust and noise "fell short" of proving that the trial court had lost its way in refusing to award damages. *Id.* at ¶ 35. In addition, the Ninth District Court of Appeals noted that the plaintiffs had requested economic damages for diminution in value, but did not also seek compensatory damages for annoyance and discomfort. *Id.* at ¶ 36.

Similarly, in *Stoll v. Parrott & Strawser Properties, Inc.*, Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio-5717, a jury awarded the plaintiffs \$175,000 in damages for discomfort and annoyance, where the evidence showed sixteen occasions on which water from an adjacent development had overflowed onto their property. *Id.* at ¶ 25. On appeal, the Twelfth District Court of Appeals affirmed, finding that the verdict was not against the manifest weight of the evidence. *Id.* at ¶ 26. The evidence recounted by the Twelfth District Court of Appeals reveals inconvenience and annoyance, but not necessarily "physical discomfort." Specifically, the family in *Stoll* was unable at times to leave the property and get to work, and had to clean up debris after flooding. *Id.* at ¶ 25. These matters were unquestionably annoying, but there is no indication that actual, material physical discomfort was involved.

In *Polster v. Webb* (June 21, 2001), Cuyahoga App. No. 77523, 2001 WL 703875, the trial court concluded after a bench trial that the plaintiffs had failed to sustain their burden on damages. *Id.* at * 1. The Eighth District Court of Appeals reversed, finding that the plaintiffs' testimony that they were "annoyed by the condition of the * * * [defendants'] property constitutes sufficient evidence to prove their entitlement to damages." *Id.* at * 4. The alleged nuisance was the defendants' operation of a commercial landscaping/snow

blowing business on residential property. *Id.* at * 1. The Eighth District Court of Appeals noted that:

"Pursuant to Section 929(1)(c) of the Restatement of Law 2d, Torts, appellants, as occupants, are entitled to damages for the annoyance and discomfort caused by the nuisance on the Webbs' property. At trial, Mrs. Polster testified that for three years, her family was unable to open the windows on the side of her house due to the dust, dirt, noise, and smell from the Webbs' property. She also testified that the situation lessened her enjoyment of her property. Mr. Polster testified that the Webbs' trash would blow onto their yard and that debris including old tires located behind a shed on the Webbs' property was an eyesore. He also testified that John Webb dug up his drain tile, causing a swamp-like condition on their property and that the condition lessened their enjoyment of the property." *Id.* at * 4, citing Restatement of the Law 2d, Torts (1965), Section 929(1).

Notably, Section 929(1) of the Restatement says nothing about a requirement of physical discomfort – it merely states that one element of damages is "discomfort and annoyance" to occupants. Comment e to Subsection (1), clause (c) also states as follows:

"e. Discomfort and other bodily and mental harms. Discomfort and annoyance to an occupant of the land and to the members of the household are distinct grounds of compensation for which in ordinary cases the person in possession is allowed to recover in addition to the harm to his proprietary interests." We note that if recovery were limited to physical discomfort only, the Restatement would not refer to "other bodily and mental harms."

On remand, the trial court in *Polster* awarded \$10,000 in damages to the plaintiffs. See *Polster v. Webb*, 160 Ohio App.3d 511, 514, 2005-Ohio-1857, 827 N.E.2d 864, at ¶ 9.

In view of the above discussion, we conclude that the trial court erred in instructing the jury that plaintiffs had to establish "an appreciable, substantial, tangible harm resulting in actual, material physical discomfort." This error was further compounded by two matters that would likely have confused the jury even if the instruction were legally correct.

The first problem is that the court substituted the word "harm" for the word "injury" in the standard taken from *Antonik*. See *Antonik*, 81 Ohio App. 465, 476 (noting that a "nuisance" requires "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort"). The court then told the jury that bodily injury was not required.

This may have been the trial court's attempt to distinguish between "harm" and "injury" and add clarity, but it would likely have had the reverse effect of confusing the jury. A layperson would typically equate the word "harm" with the word "injury." A layperson would also likely see little difference between "bodily injury" and an "appreciable, substantial harm" causing "actual, material physical discomfort." Nonetheless, the jury was told that these two items are different, when they appear to be similar.

The second area of likely confusion involves the trial court's division of annoyance and discomfort into separate phases (pre-evacuation, evacuation, and post-evacuation). These distinctions are artificial and confusing. As only one example, this led to the court's willingness to let the jury consider the pre-evacuation annoyance and discomfort of an individual who testified that she heard a "terrible boom" and "felt" it in her stomach. Transcript of Jury Trial, Volume VII, p. 1469. By the same token, the jury was not allowed to consider the same individual's annoyance and discomfort during the twenty-four-hour period after the evacuation, because she did not testify about having "substantial physical"

discomfort during that time frame. *Id.* at 1472-76.² Again, these distinctions are artificial and narrow, as a result of which they were likely to have been confusing to the jury.

"A jury charge must be considered as a whole and a reviewing court must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights." *Becker v. Lake County Memorial Hosp. West* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165. In the case before us, the jury charge was incorrect and would likely have misled the jury even if it had been a correct statement of the law.

In case before us, the explosion was the nuisance or precipitating event that necessitated the need for an evacuation of residents within about a one-mile radius. The explosion created a substantial physical impact. Nonetheless, this type of situation differs from *Bullock* and many other nuisances cases, where the nuisance, although temporary, occurs over a period of time during which the plaintiffs continue to use their property.³

In *Bullock*, the nuisance arose from a defective septic tank located on the defendants' property, which had been declared a nuisance by the Board of Health. The nuisance continued for two years, and was still in existence at the time of trial, but was considered "temporary" because it was capable of being abated. *Bullock*, Mahoning App. No. 99 CA 223, 2001-Ohio-3220, 2001 WL 1199858, at * 1. The annoyance and discomfort arose from the plaintiffs' exposure to foul odors in their backyard, the loss of the use of their

² The party in question did testify that she was uncomfortable where she ended up staying during the evacuation and that the experience was a big inconvenience.

³ The plaintiffs did contend at trial that the nitrous oxide distillation was a continuing nuisance until December 2003, when the process was finally abated. We will discuss this matter later in our opinion.

yard, and the husband's nausea while cutting his grass during the two-year period. *Id.* In discussing the issue of damages for annoyance and discomfort, the court observed that:

"It is not necessary that the property owners be driven from their dwelling before an award of damages for nuisance is justified. * * * Damages may be awarded simply for discomfort or annoyance in the use of the property; the discomfort does not need to be constant, the value of the property depreciated, the health of the occupants compromised, or the rental value of the property impaired. * * * The factual question is whether there is an 'appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort' *during* the reasonable use of the property." *Id.* at * 2 (citations omitted) (emphasis supplied).

In contrast, the plaintiffs in the present case were driven from their property by the nuisance and did not continue to use the property. Furthermore, the court in *Bullock* did distinguish between "physical discomfort" and annoyance or inconvenience, by stating that "[t]he testimony, if believed, establishes injuries in the form of inconvenience, annoyance and physical discomfort supporting an award of damages." *Id.* at * 3. Had the court felt that there must be a physical component to annoyance and inconvenience, the court would not have made such a distinction. Accordingly, we see no conflict or significant difference between *Bullock* and the present case.

We review the trial court's instructions for abuse of discretion, which " 'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. However, "an abuse of discretion most commonly arises from a decision that was unreasonable." *Wilson v. Lee*, 172 Ohio App.3d 791, 795, 2007 -Ohio- 4542, 876

N.E.2d 1312, at ¶ 11. "Decisions are unreasonable if they are not supported by a sound reasoning process." *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 300, 741 N.E.2d 155, citing *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3d 157, 161, 553 N.E.2d 597. Because the trial court incorrectly stated the law as to the plaintiffs, the trial court abused its discretion. Furthermore, the instructions were prejudicial, since they inserted an element that restricted plaintiffs to damages based on actual, material, physical discomfort, and were confusing, in any event. Accordingly, this part of the First Assignment of Error has merit and is sustained.

C. Recovery for Fear and Concern

The final issue in the First Assignment of Error concerns the trial court's rejection of fear or concern as a compensable item of damages. Ferguson contends that other Ohio cases, including *Reeser*, *Bullock*, *Polster*, and *Stoll*, have included mental upset and inconvenience, fears, and worries, within the damages for nuisance. In contrast, Aldrich Chemical contends that nuisance awards are based on physical discomfort, not subjective concerns. Aldrich Chemical also points out that Ferguson has not alleged, and cannot satisfy, the standards for emotional distress.

We have already concluded that personal annoyance and inconvenience differ from "physical discomfort." Consequently, evidence illustrating personal annoyance and inconvenience was both admissible and relevant. Legitimate fear and safety concerns caused by an upsetting event are relevant to the issue of whether the claimants had suffered substantial personal annoyance. The trial court, in fact, did let the claimants testify about their reactions to the explosion and evacuation, even though the court had previously

said it would not permit testimony on these matters. But the court instructed the jury that it would not be awarding damages for the plaintiffs' internal fear and concerns.

We have concluded that the trial court erred when it imposed a "physical discomfort" requirement. We also conclude that internal fears and concerns should neither be excluded as potential elements of the annoyance damages, nor segregated as discrete components of annoyance damages.

Since 1983, Ohio has permitted a cause of action for the negligent infliction of serious emotional distress without a contemporaneous physical injury. *Schultz v. Barberton Glass Co.* (1983), 4 Ohio St.3d 131, 447 N.E.2d 109, syllabus. "Serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Paugh v. Hanks* (1983), 6 Ohio St.3d 72, 72, 451 N.E.2d 759, paragraph three(a) of the syllabus.

Ferguson and other claimants presented testimony about fear, anxiety, or other emotional reactions to the explosion and evacuation, but they did not assert claims at trial for serious emotional distress. This was presumably because the trial court had granted summary judgment to Aldrich Chemical in January 2006, on the plaintiffs' claims for negligent infliction of emotional distress. Since plaintiffs did not present this claim at trial, they should not be able to indirectly insert a serious mental distress claim into the annoyance equation.

Our review of Ohio case law indicates that courts allow evidence of worry and fear, but do not separately itemize recovery for these items. For example, in *Weaver v. Yoder*

(1961), 89 Ohio Law Abs. 402, 21 O.O.2d 95, 184 N.E.2d 622, the plaintiff asked for an injunction and \$10,000 in damages to his home, based on the defendants' creation of a nuisance by setting off explosives. The plaintiff alleged that his house was being damaged and that "the defendants by their continuing operations, are causing great inconvenience, annoyance, discomfort, fear, injury and damage to the plaintiff in the enjoyment of his property." After a bench trial, the court concluded that the evidence showed some cracks in plaster and minor damage to the plaintiff's house, and that: "the detonation of black powder to blast as high as 100 tons or more of sand stone from its base at one time, within 400 feet of the plaintiff's residence, causes the plaintiff and his family to live in constant fear, causes his residence to vibrate, resulting in damage thereto, and that the smoke, noise and dust resulting from the explosions constitutes a great discomfort to the plaintiff and his family." 89 Ohio Law Abs. at 405.

The fact that a family is living in constant fear due to a nuisance is evidence of personal annoyance. In *Weaver*, the trial court issued a permanent injunction limiting the blasting, and awarded \$1,000 for damages to the residence. However, the court did not comment on the breakdown of the damages.

Other courts have subsequently allowed evidence of fear or worry associated with an alleged nuisance, but have not directly stated whether these items are specific elements of damage. See, e.g., *Stoll*, 2003-Ohio- 5717, at ¶ 26 (noting evidence in nuisance action indicating that the affected family "now worries each time it rains, wondering whether they will be able to get out the driveway and hoping that there are no emergencies requiring them to leave.")

3 Ohio Jury Instructions (2006), Section 345.13(4), adequately discusses the applicable damages standard, by allowing recovery for personal annoyance and discomfort. The evidence presented at trial aided the jury's understanding of these potential damages by explaining the discomforting and annoying effect of the explosion and evacuation. Therefore, we agree with Ferguson that worry and fear are relevant and may be included within potential damages. However, we also conclude that the jury should not be instructed separately that recovery can be had for fear and concern, because these items are already encompassed within the claim for personal annoyance, and should not be an indirect substitute for claims of serious emotional distress.

We should stress that while fear has a subjective element, it cannot be irrational. *Eichenberger v. Eichenberger* (1992), 82 Ohio App.3d 809, 815, 613 N.E.2d 678. The plaintiffs' fears and concerns, therefore, must be sufficient to affect a person of ordinary sensibilities. *Jams v. DaimlerChrysler Corp.* (2007), 174 Ohio App.3d 537, 551, 2007-Ohio-6709, 883 N.E.2d 466, at ¶ 44 (noting that under the Ohio Lemon Law, the question of whether a vehicle is non-conforming is "whether a reasonable person would conclude that the alleged defect or condition substantially impairs the vehicle's use, value, or safety").

Ferguson's First Assignment of Error is sustained in part and overruled in part.

III

Ferguson's Second Assignment of Error is as follows:

"THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF THE FEAR AND UPSET SUFFERED BY THE PLAINTIFFS."

Under this assignment of error, Ferguson contends that the trial court erred in excluding or strictly limiting the admission of evidence about fear or emotion during trial. We have concluded, above, that evidence of the residents' legitimate fear, anxiety, worry, and concerns for safety is material to the issue of whether they sustained personal annoyance as the result of the explosion and evacuation. Contrary to Ferguson's claim, however, the trial court did admit considerable evidence on this point. Where the court erred was in instructing the jury that these items were not the subject of the damages calculation and were of limited relevance. Accordingly, on remand, the court should allow the evidence without the limiting instruction.

Ferguson's Second Assignment of Error is overruled.

IV

Ferguson's Third Assignment of Error is as follows:

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT THE PLAINTIFFS-APPELLANTS COULD NOT RECOVER FOR THE LOSS OF USE AND ENJOYMENT OF THEIR PROPERTY FOR ANY PERIOD OF TIME AFTER THE 24 HOUR EVACUATION PERIOD."

Under this assignment of error, Ferguson argues that the trial court erred in preventing plaintiffs from recovering for the diminished use and enjoyment of their property for periods other than the twenty-four hour evacuation period. Ferguson contends that the trial court should have allowed evidence about the fact that the nuisance at Aldrich Chemical was not abated until the nitrous oxide distillation process ceased in December 2003. Allegedly, this caused plaintiffs to suffer diminished use and enjoyment of their

property.

Prior to trial, Aldrich Chemical moved to exclude evidence of loss of use or annoyance and discomfort that occurred after the twenty-four hour evacuation period, contending that plaintiffs could recover only for the time period they were away from their property. Aldrich Chemical also contended that while certain plaintiffs may have had unsupported and speculative fears about Isotec after the twenty-four hour period, they could not recover for these fears. In response, plaintiffs argued that the nuisance continued until Isotec abated the NO distillation process, which was an ultrahazardous activity.

In ruling on the motions prior to trial, the court concluded that plaintiffs could offer evidence as to loss of use of property and annoyance and discomfort after the twenty-four evacuation period. However, the court restricted the evidence to damages that were the result of the explosion or evacuation. The court, therefore, did not reject all consideration of damages after the evacuation, nor did the court limit the jury's consideration only to the twenty-four hour period of the evacuation. Instead, the court limited the evidence in general, and the jury's consideration of the evidence, to damages directly resulting from the explosion or evacuation. This recovery, in turn, was further limited by the court's restriction of annoyance and discomfort damages.

During trial, plaintiffs questioned Isotec's general manager, Diane Szydel, at length about nitrous oxide and its harmful, explosive, and hazardous qualities. Szydel was additionally asked about Isotec's statements during town meetings, which indicated that Isotec did not know why the NO₃ column had exploded. Szydel also testified that the hazards of the plant were discussed with concerned citizens and that citizens and township trustees had questions about what had happened and what Aldrich Chemical was going to

do with the remaining column (NO6), which contained nitrous oxide and was still in operation. The court restricted further discussion of what happened at the town meetings, because it did not consider this relevant to proximate cause.

Plaintiffs subsequently made a proffer as to testimony they would have elicited about town hall meetings following the evacuation, where Isotec was unable to indicate why the explosion occurred and could not provide assurances to citizens that another explosion would not occur during Isotec's continuing distillation of NO in the remaining active column on the property. Plaintiffs also proffered other evidence as to past detonations and explosions in 1985, 1995, and 1998, and the fact that these incidents came up at the town meetings. According to plaintiffs, many of them were present at the town meetings, and this increased their fear regarding their safety and security and impacted the peaceful enjoyment of their homes. In response, the trial court again stressed that no recovery would be permitted for subjective fears of the homeowners.

"A trial court has broad discretion in determining whether to admit or exclude evidence. Absent an abuse of discretion that materially prejudices a party, the trial court's decision will stand." *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66, 567 N.E.2d 1291.

After reviewing the record, we find that the trial court abused its discretion to the material prejudice of the plaintiffs. At one point, the trial court stated that it could accept the relevance of an ongoing nuisance. Transcript of Jury Trial, Volume II, p. 484. However, the court found that the issue of a continuing nuisance was not connected to the issues of annoyance and discomfort, because the court had already concluded that a physical component was required. *Id.* at 485. A harm resulting in an actual, material physical discomfort would not have been present after the plaintiffs returned to their homes and

normal lives. When the plaintiffs proffered their evidence, the court commented that:

“ * * If I heard you a minute ago, you were indicating that the entire thrust of what you placed into the record would speak to evidencing subjective fears as an element of damages, subjective fears, and of course this Court has ruled – and you strongly disagree with the Court’s ruling – that subjective fears are not as a matter of law compensable damages. I’ve told the jury that.

“ * * *

“ * * But in any event * * that’s the Court’s ruling that – that testimony is not legally admissible * * .” Transcript of Jury Trial, Volume III, p. 674-75.

As was noted above, we agree that plaintiffs may not attempt to indirectly assert claims for negligent infliction of serious emotional distress. We also agree that the damages must be related to the explosion and evacuation. However, to the extent that testimony of a continuing nuisance was offered below, it may impact the issue of damages for loss of use of property, and annoyance and discomfort following the explosion and evacuation.

“A continuing trespass or nuisance occurs when the defendant’s tortious activity is ongoing, perpetually creating fresh violations of the plaintiff’s property rights. The damage caused by each fresh violation is an additional cause of action.” *Weir v. East Ohio Gas Co.*, Mahoning App. No. 01 CA 207, 2003-Ohio-1229, at ¶ 18 (citations omitted).

Accordingly, plaintiffs may attempt to recover for the existence of a continuing nuisance, and may present evidence related to the continuing nuisance and their alleged loss of use, and personal annoyance and discomfort during the three-month period between the explosion and the time that the NO distillation process was abated in December 2003.

Again, we stress that internal fears and concerns should not be listed as separate elements of the personal annoyance and discomfort damages.

Ferguson's Third Assignment of Error is sustained.

V

Ferguson's Fourth Assignment of Error is as follows:

"THE LOWER COURT ERRED WHEN IT EXCLUDED EVIDENCE OF PRIOR EXPLOSIONS, DETONATIONS, LEAKS AND SIMILAR CALAMITIES AT THE ISOTEC FACTORY AS WELL AS EVIDENCE CONCERNING ISOTEC'S ACTIVITIES BEFORE IT ABATED THE NUISANCE."

Under this assignment of error, Ferguson contends that the trial court erred in refusing evidence of prior leaks and detonations, and of Isotec's activities before it abated the nuisance. Ferguson contends that Isotec has been a threat to the surrounding community for twenty years, and that the jury could not understand the extent of the nuisance unless it heard about prior calamities.

We review decisions on exclusion of evidence for abuse of discretion. *Krischbaum*, 58 Ohio St.3d at 66. In the present case, the trial court excluded evidence about the cause of the explosion, because it was a Phase I or liability issue, and the probative value would be outweighed by unfair prejudice or confusion. The court made the same ruling as to prior incidents at the plant.

" 'Prior occurrences are sometimes relevant 'to show that a party knew or had notice of a dangerous condition.' " *Lykins v. Miami Valley Hosp.*, 157 Ohio App.3d 291, 311, 2004-Ohio-2732, 811 N.E.2d 124, at ¶ 67. However, Aldrich Chemical's notice of

knowledge of a dangerous condition was not at issue, since Aldrich Chemical admitted liability for the explosion.

The prior acts in question occurred long before the 2001 explosion. In fact, the most recent event was at least three years earlier, and the statute of limitations for that event had long since expired by the time of trial. See R.C. 2305.09(D) and *Davis v. Allen*, Hamilton App. Nos. C-010165, C-010202, C-010260, 2002-Ohio-193, 2002 WL 63560 (four-year statute of limitations applies to nuisance actions).

Nonetheless, the evidence might have been of some relevance in explaining the issue of the alleged damages for the continuing nuisance. In this regard, we note the proffer of evidence that some plaintiffs learned of the prior explosions during town meetings that occurred before the nitrous oxide distillation process was stopped in December 2003. The issue, therefore, is whether evidence of prior detonations and problems at the facility would have been unduly prejudicial. Even if evidence is relevant, Evid. R. 403(A) provides for exclusion of such evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Since Aldrich Chemical has already admitted liability for the wrongful acts or creating a hazardous condition, it would not likely be prejudiced by limited admission of evidence about the prior explosions. This evidence should be restricted to what plaintiffs learned after the September 2003 explosion, and should be admitted for the limited purpose of proving their claim of diminished loss of use and annoyance and discomfort for the continuing nuisance.

As to events after the explosion, we noted in discussing the Third Assignment of Error, that plaintiffs were able to present some evidence from Isotec's general manager

about the cause of the explosion and about the town hall meetings. Plaintiffs also presented testimony from a registered professional geologist, James Ludwiczak, on the explosive characteristics of nitrous oxide and the severity of the blast. Ludwiczak additionally testified about pre-blast programs that should be done by companies handling explosive materials, and the fact that Isotec did not conduct these activities.

As a further matter, various claimants testified about being uncomfortable or fearful in their homes after the explosion, with some even indicating that they still were uneasy or did not feel safe in their homes at the time of the trial. The trial court indicated during trial that it was not issuing a blanket rule prohibiting any witness from testifying about town hall meetings. The court stressed, however, that this evidence had to be relevant to proximate cause and damages. Transcript of Jury Trial, Volume III, p. 672.

Thus, the trial court did allow some evidence of annoyance and discomfort after the explosion, including post-explosion events. However, where the court erred was in restricting the evidence to, and in limiting plaintiffs to recovery only for, actual, material physical discomfort.

Accordingly, the Fourth Assignment of Error is sustained in part and is overruled in part.

VI

Ferguson's Fifth Assignment of Error is as follows:

"THE JURY'S VERDICT OF ZERO DAMAGES FOR TAYLOR FERGUSON'S LOSS OF USE AND ENJOYMENT OF HER HOME AND FOR HER ANNOYANCE AND DISCOMFORT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL."

Under this assignment of error, Ferguson contends that the verdict awarding zero damages for loss of use and enjoyment of her home and for annoyance and discomfort was against the manifest weight of the evidence.

At the time of the explosion, Taylor Ferguson was a ten-year-old girl who experienced the explosion and was evacuated, along with her parents. The trial court decided at the end of the case what damages would be included on the interrogatory of each particular claimant. The court concluded that Ferguson's interrogatory would include potential recovery for annoyance and discomfort before and during the evacuation, and for loss of use of her home during the twenty-four evacuation period. The jury returned a verdict of \$100 for annoyance and discomfort before the evacuation, zero dollars for loss of use of property during the evacuation period, and zero dollars for annoyance and discomfort during the evacuation period. Ferguson's potential claims for loss of use before the evacuation period, annoyance and discomfort after the evacuation period, and evacuation expenses were not submitted to the jury.⁴

We conclude that this assignment of error is moot, given the resolution of the other assignments of error. Ferguson's Fifth Assignment of Error, therefore, is overruled as moot.

VII

The First and Fourth Assignments of Error are overruled in part and are sustained in part, the Second Assignment of Error is overruled, the Third Assignment of Error is sustained, and the Fifth Assignment of Error is overruled as moot. Accordingly, the

⁴The evidence does not indicate that Ferguson had any evacuation expenses.

judgment of the trial court is Reversed, and this cause is Remanded for further proceedings consistent with this opinion.

.....

WOLFF, P.J., and WALTERS, J., concur.

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.)

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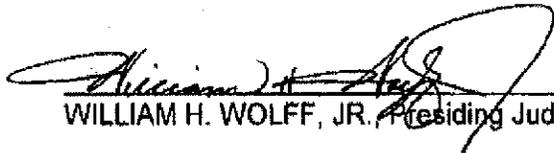
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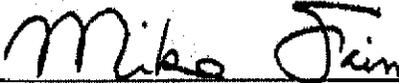
APPENDIX II

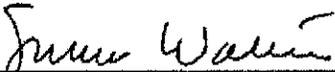
**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

CHRISTINE BANFORD, et al. :
Plaintiff-Appellants : Appellate Case No. 22600
v. : Trial Court Case No. 05-CV-7143
ALDRICH CHEMICAL COMPANY, INC. : (Civil Appeal from
et al. : Common Pleas Court)
Defendant-Appellant : **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 24th day
of December, 2008, the judgment of the trial court is **Reversed**, and this cause is
Remanded for further proceedings consistent with the opinion.
Costs to be paid as stated in App.R. 24.


WILLIAM H. WOLFF, JR., Presiding Judge


MIKE FAIN, Judge


SUMNER E. WALTERS, Judge
(Sitting by Assignment)

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