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**EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC OR GREAT
GENERAL INTEREST**

The decision of the Second District Court of Appeals in this case followed well-established Ohio law which states that actual physical discomfort is not required in order to be entitled to annoyance and discomfort damages in a nuisance claim. The Court of Appeals further properly held according to Ohio law that evidence of fear and concern is admissible in establishing annoyance and discomfort damages in a nuisance claim.

In an attempt to persuade this Court to accept jurisdiction of this case, Defendant-Appellant Aldrich Chemical Company (“Defendant-Appellant”) attempts to frame this case as one involving the expansion of the recoverability for emotional injuries under Ohio law. However, the Court of Appeals holding in this case did not make any change in Ohio law regarding emotional damages, but merely restated what type of damages are recoverable in a nuisance action. As the Court of Appeals properly held, annoyance and discomfort damages, including annoyance damages for fear and concern, are properly recoverable in a nuisance action, regardless of whether the plaintiff also suffered physical discomfort as a result of the nuisance. Therefore, contrary to the Defendant-Appellant’s incorrect assertion in its memorandum in support of jurisdiction, the Court of Appeals decision in this case has absolutely no effect on “long-standing jurisprudence regarding the importance of limiting claims for emotional damages.” As this case is merely a restatement of existing Ohio law, it is not of any great general or public interest.

Further, the unique circumstances and facts of this case dictate that its holding has no general or public interest. First, this case is a class action which involves thousands of residents who were affected by an explosion at Defendant-Appellant’s chemical factory. Second, the trial court in this

case divided the trial of this case into phases, a liability phase, an individual compensatory damage phase, a phase to determine if punitive damages were appropriate, and a phase to determine the amount of punitive damages to be awarded. Third, the Defendant-Appellant in this case admitted its liability for nuisance prior to the beginning of the trial, leaving the proper amount of damages caused by the nuisance as the only issue to be determined at trial. Finally, the trial court judge in this case refused to use the standard definition of “annoyance and discomfort” in its instructions to the jury and improperly added a requirement that physical discomfort was a prerequisite to being awarded damages for annoyance and discomfort.

Based on all of these unique facts and circumstances, as well as the fact that the Court of Appeal’s decision merely restated well-established existing law regarding nuisance, the decision of the Court of Appeals in this case has no general application and is not of great public or general interest. This Court should therefore refuse to accept jurisdiction of this appeal.

STATEMENT OF THE CASE AND FACTS

This case arises out of a complaint for a class action initially filed on December 1, 2002. The complaint sought the certification of a class for those harmed by the negligence and other wrongful acts of Defendant-Appellant Aldrich Chemical Company (“Defendant-Appellant”) in the operation of its chemical plant in Miamisburg, Ohio known as Isotec. After a period of discovery, the Plaintiffs-Appellees moved for class certification, and eventually, the trial court certified a class for homeowners within one mile of an explosion that occurred at the facility on September 21, 2003. Children, who had been evacuated, were not members of the class because they were not homeowners. Several children of class members filed separate actions for their own individual claims, which were then consolidated with the class action. Among these children, who filed a

separate action, was Plaintiff-Appellee Taylor Ferguson.

In its decision certifying the class, the trial court ruled that the matter would be decided in a series of phases. In the first phase, a trial would be conducted to determine Defendant-Appellant liability for compensatory damages. In the second phase, the court would determine individual compensatory damage awards. In the third phase, the trial court would conduct a trial on the issue of whether Defendant-Appellant's conduct was malicious and thus, whether punitive damages were warranted. Finally, in the last phase, the amount of punitive damages would be determined. The trial on the first phase was scheduled for the fall of 2006. Shortly before trial, Defendant-Appellant took the highly unusual step of attempting "to accept responsibility" for compensatory damages but not be found liable for the claims raised by Plaintiffs-Appellees. Plaintiffs-Appellees objected to this maneuver and filed a Motion for Judgment as to the claims of negligence, nuisance, and strict liability. After the matter was briefed, the trial court held as a matter of law that Defendant-Appellant was liable for negligence, nuisance, and strict liability as a result of its filing in which it attempted to concede responsibility only.

In order to determine the amount of compensatory damages for each individual, in the second phase of the litigation, individual hearings or trials had to occur. Initially, the parties held hearings before a special master for two rounds of compensatory damages claims with awards issued after the hearings. Then, in April of 2007, the court held the first jury trial on individual compensatory damages to determine the damages award for approximately 18 individuals. Several briefs on jury instructions and motions in limine were filed by both sides on a variety of issues. Among the issues debated was whether damages for "annoyance and discomfort" were to only be awarded for physical harm - not mental annoyance, fear upset or discomfort. The Plaintiffs-Appellees had suffered great

upset and fear as a result of the explosion and they argued this was a compensable damage for nuisance. In a pre-trial ruling, on April 10, 2007, the trial court issued a decision finding that these injuries were not compensable and that damages for “annoyance and discomfort” could only compensate a plaintiff for material physical discomfort. Therefore, the trial court excluded all evidence of fear, upset, or worry except for a few limited circumstances at the trial.

Among those whose compensatory damages was determined at the trial was Taylor Ferguson. The jury awarded Taylor Ferguson zero damages on her claim for the loss of use of her property during the evacuation and on her claim for annoyance and discomfort during the time she was evacuated. The jury did return a verdict in her favor of \$100 for her annoyance and discomfort prior to the evacuation. Shortly thereafter, she voluntarily dismissed her claim for punitive damages and filed her notice of appeal from the trial court’s judgment with the Second District Court of Appeals. *Banford v. Aldrich Chemical Co.* (Jan. 23, 2008), Montgomery County Common Pleas No. 03 CV 8704, 05 CV 7221, 06 CV 4053.

On December 24, 2008, the Second District Court of Appeals determined the trial court committed reversible error in the trial determining the amount of compensatory damages for Taylor Ferguson and reversed and remanded the case to the trial court. The Court of Appeals held in its decision that the trial court erred when it instructed that in order to recover annoyance and discomfort damages in a nuisance claim, a plaintiff must first experience some form of physical discomfort. The Court of Appeals further held in its decision that evidence of fear and concern is acceptable evidence in a nuisance claim because it goes toward establishing annoyance damages. Defendant-Appellant has now appealed to this Court asking the Court to accept jurisdiction of this case. However, as set forth herein, the Appeals Court’s Decision was a correct interpretation of Ohio

law on nuisance damages and the unique circumstances of this case do not make this case one of great public or general interest.

ARGUMENT IN OPPOSITION TO PROPOSITIONS OF LAW

Proposition of Law No. 1: Annoyance and discomfort damages for a nuisance claim are recoverable without prior evidence of physical discomfort.

As the Court of Appeals properly held in its decision, in nuisance cases several Ohio courts have awarded plaintiffs damages for among other things, mental upset, inconvenience, fears, worries, or concerns of the plaintiff. *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App.3d 681 (for clarity, this will hereinafter be referred to as “*Reeser II*”) (holding that a property owner may recover damages for the discomfort and annoyance even though there was no evidence she suffered physical harm); *Frey v. Queen City Paper Co.* (1946), 79 Ohio App. 64 (holding that an owner of a residence is entitled to compensation for annoyance, discomfort and inconvenience); *Bullock v. Oles*, Seventh Dist. No. 99 CA 223, 2001-Ohio-3220 (finding a damages award was appropriate when the property owners suffered annoyance and discomfort from a neighbor’s damaged septic tank, including worry for grandchildren playing on the property); *Polster v. Webb* (June 21, 2001), Eighth Dist. No. 77523; *Stoll v. Parrott & Strawser Properties, Inc.*, Twelfth Dist. No. CA2002-12-133, CA2002-12-137, 2003-Ohio-5717; *Tullys v. Brookside Condominium Association* (July 15, 1985), Fifth Dist. No. CA-6604.

In *Reeser*, it is clear from the initial appeal that the plaintiffs only suffered damages in the form of lost profits, damage to the lakes, and upset from the nuisance. *Reeser v. Weaver Bros.*, (1989), 54 Ohio App.3d 46, 47. Yet, the in the second appeal, *Reeser II*, supra, the appellate court specifically found that because the defendant had created a nuisance the plaintiff was entitled to

annoyance and discomfort damages. As the only evidence of damages suffered by the plaintiffs in those cases, which could qualify as “annoyance and discomfort”, was their upset that resulted from seeing the fishing lakes destroyed, the emotional state or upset must have been compensable as “annoyance and discomfort.”

Similarly, the Eighth District Court of Appeals in *Polster*, found that a plaintiff was entitled to damages for nuisance because they had suffered “annoyance.” The evidence of “annoyance” was the inability to open windows on one side of her home because of the defendant’s conduct, defendant’s trash blowing into her yard, and the general eyesore created by defendant’s property. Although the *Polster* plaintiff suffered no physical discomfort, she was permitted to recover for this mental discomfort she suffered at defendant’s hands. The court determined that this “annoyance” was compensable.

In *Bullock*, supra the Seventh District addressed a nuisance where sewage seeped from defendant’s property into the plaintiff’s backyard. Although the plaintiff’s did suffer some physical harm in the form of nausea, the plaintiff’s damages also included compensation for plaintiff’s fear of letting her grandchildren play in her backyard.

Likewise, the Twelfth District in *Stoll*, supra, upheld an award of “annoyance and discomfort” damages, specifically finding that the plaintiff’s worry was proper evidence supporting the jury’s award. Specifically, the plaintiffs, who suffered flooding due to defendant’s conduct, “worri[ed] each time it rain[ed], wondering whether they will be able to get out of the driveway and hoping that there are no emergencies requiring them to leave.” *Id.* The Appellate Court held that this worry and concern was compensable damages for the nuisance.

Additionally, in *Tullys*, supra, the Fifth District Court of Appeals examined whether a

plaintiff could recover damages for a nuisance in the form a street light which shone into her condominium. The *Tullys* plaintiff suffered an inability to move freely about the inside of their home, disturbed their sleep, and made them uncomfortable in their own home. Even if one were to conclude that disturbed sleep was a “physical discomfort,” the inability to move about freely in their home and the resulting general discomfort were non-physical conditions that the court found compensable.

In this case, the trial court held that fear, worry, or mental upset was not a compensable form of damages. 4-10-07 Conference at 4-5,14-16; Tr. at 283-284. Rather, the court found that only loss of use one’s home during the evacuation, expenses associated with evacuation, and **physical** discomfort were compensable. Tr. at 1617-1619. In enforcing this ruling, the court admonished the jury at the beginning of the trial, “one of the items that is not subject of a damage calculation by the jury are the fears or the subjective concerns of the homeowners, * * * you will not be awarding any damages based upon any of the individual homeowner’s internal fears or concerns.” Tr. at 548. Additionally, at the end of the trial in its instructions to the jury, the trial court again reiterated to the jury, “Fear, standing alone, is not an item of compensable damages.” Tr. at 1619. Thus, the trial court instructed the jury at the outset that it was not to consider the fears, worries, or concerns of the Plaintiffs-Appellees in awarding damages compensation.

Significantly, the trial court in this case did not just require that there be evidence of physical discomfort along with the mental upset in order to recover for upset, fear, or concerns, but specifically held and instructed the jury that fear or mental condition was not compensable. The trial court stated, “Fear, even though it’s in conjunction with physical discomfort, is not a compensatory item of damages. It’s not. And that’s my ruling.” Tr. at 283-284. In so doing, the trial court ruling

was contrary to Ohio law as set forth in the above cases.

In *Reeser II*, *Bullock*, *Stoll* and *Tullys*, the plaintiffs recovered damages for the fear, concerns, worry, and discomfort caused by the nuisance. Likewise, here, Taylor Ferguson should have been allowed to recover damages for her fear, worry, and concern as a result of the explosion Defendant-Appellant caused. Ferguson was separated from her parents when she heard the house-shaking explosion. Tr. at 950-951. She had to cower in a crawl space with her friends's siblings while they cried, worrying about her parents and what had happened. Tr. at 949-950. Even once she was finally reunited with her parents, she had to flee with her family without any knowledge of what had happened or when she could return home. Tr. at 951-952, 957. Just as the *Stoll* plaintiff recovered for the worry she had about whether they would be able to leave their home whenever it rained, Ferguson should have been able to recover for her fear, worry and concerns.

Further, the cases are clear that physical injury or discomfort is sufficient **but not necessary** to recover annoyance and discomfort damages. However, the "physical discomfort" instruction given in this case mistakenly caused the jury to find that physical injury or harm to the Plaintiff was necessary to recover annoyance and discomfort damages.

The Ohio Jury Instructions provides the following suggested instruction for "annoyance and discomfort,":

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. O.J.I. §345.13, Vol. 3.

In *Frey*, supra, the appellate court examined whether a plaintiff had stated a claim for nuisance where the plaintiff could show no damage to his real property or personal property. Although the *Frey* court noted that physical discomfort is a compensable part of damages for nuisance, it stated a plaintiff was entitled to “just compensation for annoyance, discomfort, and inconvenience caused by [the] nuisance. The Court did give a definition for “annoyance, discomfort and inconvenience.” Since the Court did not state that one phrase was preferable to another, the only point that may be taken from this case (for purposes of the issue before this Court) is that physical discomfort is sufficient to establish damages for a nuisance, **but it is not necessary** and personal discomfort is also sufficient to obtain damages for nuisance. See, generally, *Frey*, supra, at 71-72 (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).

The “physical discomfort” language may be helpful in determining the existence of a nuisance, but it is not helpful in assessing damages. In reality, the “physical discomfort” language is nothing more than one of many attempts to define a nuisance, an elusive term. See, e.g., *Morton v. Coles* (1921) 14 Ohio App. 209 (“Numerous definitions of a nuisance have been given, but so much depends on the facts, conditions and surrounding circumstances that a definition to fit all cases seems impossible.”).

Indeed, the cases dealing with this issue do not consider the “physical discomfort” language in a vacuum, but also consider it as part of a balancing test in determining whether a nuisance exists weighing the risk of harm to the plaintiff(s) and the utility of the activity alleged to be a nuisance. See, e.g., *Antonik v. Chamberlain* (1947), 81 Ohio App. 465, (denying an injunction for a claimed nuisance because the benefit of the operation of an airport outweighed any discomfort the airport

may cause to Plaintiffs).

The *Antonik*, court exemplifies how the “physical discomfort” language is used as one of many tests by Ohio court’s to determine if a nuisance exists:

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.' 39 American Jurisprudence, Nuisances, Section 30. And, see, *Eller v. Koehler*, 68 Ohio St., 51, 67 N. E., 89.

It is not everything in the nature of a nuisance which is prohibited. There are many acts which the owner of land may lawfully do, although it brings annoyance, discomfort or injury to his neighbor, which are *damnum absque injuria*. * * *

* * * The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all interests affected, his own and those of his neighbors, and having in view also public policy?' *Booth v. Rome, W. & O. Terminal Rd. Co.*, 140 N. Y., 267, 35 N. E., 592, 37 Am. St. Rep., 552, 24 L. R. A., 105.”

Id. at 476-477.

Likewise, the appellate court in *Stewart v. Seedorff* (May 27, 1999), Franklin Co. App. No. 98AP-1049, used this standard to determine the existence of a nuisance in the first place. In that case, the plaintiff alleged that defendants maintained a “line of trees and shrubs” two feet from their lot lines and that such created an impassable barrier to common properties and completely blocked their view of the pond. The Court granted summary judgment in favor of defendant and found that there was no nuisance because the trees, although obstructing a view, did not constitute a dangerous condition and had not created an unreasonable risk of harm.

However, the damages one sustains as a result of a nuisance may not seem so tangible as compared to the event or activity that caused the nuisance. Rather, such damages are personal to the plaintiff, as recognized by the O.J.I. §345.13 Instruction when it states, “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.” Ohio Jury Instruction §345.13, Vol.3 (emphasis added). Even the Court in *Bullock, supra* recognized this fact when it opined that “[t]he 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.” (citations omitted).

Restated, the critical difference is that there are cases which consider whether a nuisance exists and there are cases that consider annoyance and discomfort damages as a separate element of damages for a nuisance claim. The former category at times has considered “physical discomfort” language, whereas the latter category merely states that plaintiffs are entitled to damages for **personal** annoyance and discomfort and does not consider the “physical discomfort” language. To find that “annoyance and discomfort” damages only compensate physical discomfort ignores the term “annoyance” and basically eliminates it from the phrase.

Ohio courts have repeatedly found that plaintiff may recover “personal” annoyance and discomfort damages that result from the lost use of his or her property. This is true even if the “personal” annoyance and discomfort has nothing to do with physical harm or other “tangible injury.” This principle is exemplified in cases where annoyance and discomfort damages were awarded when flooding caused plaintiffs to lose the use of their homes. *See, e.g., Athens Co. Regional Planning Commission v. Simms* (May 5, 2006), 2006-Ohio-2342 (awarding damages to

the Jolleys, who “presented evidence to support their loss of use damages, including the cost of renting a house, water bills and their inability to use their property for family gatherings,” and to the McCollisters who “presented evidence of loss of use of their property, including their inability to utilize their toilets, water well and outbuilding.”); *Stoll, supra* (upholding an award of damages to plaintiffs who were unable to leave property and to get to work on some occasions, and lost the use of their pond as well as about four acres of property where the jury was given the OJI Instruction on annoyance and discomfort as is set forth later in this document); *Cf., City of North Royalton v. Romano*, Eighth Dist. No. 84414, 2004-Ohio-6423, (in a misdemeanor case, the placement of pipes in such a manner as to cause a hazard on the roadway found to be a nuisance). This principle is also applicable in *Reeser II*, which approved annoyance and discomfort damages to plaintiffs when defendant’s activities polluted a lake and killed Plaintiffs’ fish.

As stated above, that standard of **personal** annoyance and discomfort for damages caused by a nuisance is found in the OJI Instruction. Although few appellate courts have considered the issue *sub judice*, other Courts have stated that plaintiffs are entitled to personal annoyance and discomfort damages once a nuisance is established. *See, e.g., Reeser II, supra*. Additionally, in *Stoll, supra*, the lower Court read the OJI instruction, just as Plaintiffs-Appellees requested here. *See*, page 399 of Transcript of Proceedings in Lower Court, *Stoll v. Parrott & Strawser Properties, Inc.*, Warren County Case No. 99 CV 56322.

For the foregoing reasons, the Court of Appeals correctly held that the trial court erred in refusing to give the jury instruction on “annoyance and discomfort” as contained in the Ohio Jury Instruction, Vol. 3, Section 345.13 preventing the jury from deciding which damages, if any, would be awarded for personal annoyance and discomfort, as contemplated under the OJI Instruction. The

trial court incorrectly interjected a requirement that when compensating for either “annoyance” or “discomfort” only physical harm can be compensated. As this requirement is not stated in Ohio law and is inconsistent with several Ohio court’s awards for annoyance and discomfort, the Court of Appeals correctly held that the trial court’s decision was in error. Further, this abuse of discretion clearly prejudiced Taylor Ferguson as it limited the kind of damages the jury could compensate.

Proposition of Law No. 2: In a nuisance claim, evidence of fear and concern is admissible in support of the annoyance damages portion of the nuisance claim

As set forth in detail in Proposition of Law No. 1 above, fear, worry, and the concerns of the plaintiff in a nuisance action are a compensable element of damages. Therefore, the Court of Appeals properly held that evidence of fear, worry, and subjective concerns of the plaintiff was admissible. As is set out more fully above and incorporated herein, in *Reeser II*, supra; *Bullock*, supra; *Stoll*, supra; *Polster*, supra; and *Tullys*, supra, the plaintiffs were all permitted to give evidence of their fears, worries, concerns, and mental discomfort. Thus, a plaintiff in a nuisance action should be permitted to present evidence of their concerns and fears caused by the nuisance.

At the trial where Taylor Ferguson’s compensatory damages were determined, the trial court only allowed evidence of fear or a plaintiff’s worry or concerns if it was relevant to explain why the plaintiff took the actions he did or to explain why they were having physical discomfort. Tr. at 286-287. As several Ohio appellate courts, supra, have previously allowed evidence of mental concerns, fears, and upset, the trial court’s exclusion of the evidence was unreasonable and reversible error. The trial court’s determination was based upon a statement in several cases that a plaintiff in a nuisance action can recover for “appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort.” Tr. of 4-10-07 conference at 4-17. However, none of these cases state that

this is a definition for “annoyance or discomfort damages” nor does this state this is the only kind of damages the plaintiff may recover in a nuisance. Moreover, none of these cases state that worries, concerns, or fears of the plaintiff in a nuisance when accompanied by physical discomfort is not compensable. Yet, the trial court excluded virtually all evidence of the Plaintiffs-Appellees’ fears, upset, or concerns.

The trial court’s determination, particularly in light of the cases described above which considered evidence of worries, fears, and concerns in awarding damages, was unreasonable. Therefore, the Court of Appeals properly held that the trial court abused its discretion in excluding nearly all evidence of the plaintiffs, including Taylor Ferguson’s, fears, concerns, and mental upset.

CONCLUSION

For the above stated reasons, this case does not involve a matter of public or great general interest and the Court of Appeals Decision was correct. This Court should, therefore, refuse to accept this discretionary appeal and deny jurisdiction.

Respectfully submitted,

DYER, GAROFALO, MANN & SCHULTZ

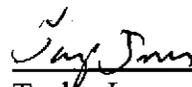


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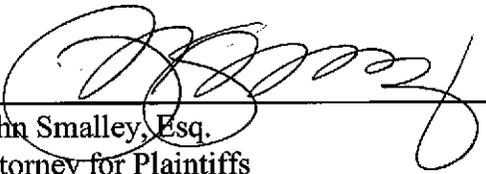

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by regular U.S. mail, postage paid, this 14th day of March, 2009.

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