ORIGINAL

IN THE SUPREME COURT OF OHIO

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| CHRISTINE BANFORD, et al., | : | |
| Plaintiffs-Appellees | : | Case No. 2009-0305 |
| v. | : | On Appeal from the Montgomery County Court of Appeals, Second Appellate District |
| ALDRICH CHEMICAL COMPANY, INC., | : | |
| Defendant-Appellant. | : | |

# MERIT BRIEF OF APPELLANT ALDRICH CHEMICAL COMPANY, INC.


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## INTRODUCTION

The decision of the Second District Court of Appeals ("Court of Appeals") 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. (Appx. 9, December 24, 2008 Court of Appeals Opinion ("Ct. App. Opin."), ¶ 7).[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,[2] 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), Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375, at *21 (citation omitted) (emphasis added). This standard has been quoted by Ohio courts for over 60 years,[3] and is supported by caselaw from the Ohio Supreme Court using nearly identical language going back to the origins of Ohio as a state.[4] No cases contradict this standard.

By changing the words of the standard, the Court of Appeals held, for the first time ever, that proving physical discomfort is optional for the recovery of damages. (Appx. 31-32, Ct. App. Opin., ¶¶ 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)

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[1] Pursuant to the Ohio Manual of Citations, pinpoint citations to the opinion of the Second District Court of Appeals rendered below coincide with the opinion found on the website of the Supreme Court of Ohio. The opinion as published by LexisNexis mistakenly inserts an extra paragraph number in paragraph 63, resulting in a partially inconsistent opinion regarding the numbering of paragraphs.

[2] Appx. 9, Dec. 24, 2008 Opinion of the Montgomery County Court of Appeals ("Ct. App. Opin."), ¶ 7.

[3] See footnote 21 below.

[4] See Section I.A. on pp. 13-15 below.

(emphasis added). 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 conditions 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, Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, at *17, 29, 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.

The Court of Appeals cited cases other than Harford, and tried to turn them into support for its expansion of nuisance damages. Its reading of those cases is incorrect, however,

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[5] The following are but a few examples of recent cases which quote the "appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort " standard word-for-word: Bullock v. Oles, Mahoning App. 99-CA-223, 2001-Ohio-3220, ¶11 (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).

and demonstrates just how far one must stretch the law to reach the conclusion of the Court of Appeals.[6]

The law has never and will never be able to compensate plaintiffs for every bad emotion or feeling caused by another. Instead, the law sometimes permits recovery for hurt emotions but under tough restrictions. The motivation behind those restrictions is twofold: (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. Some of the limitations include 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 never recoverable; and

(3) emotional damages from witnessing damage to property are never recoverable.

If permitted to stand, the decision of the Court of Appeals would circumvent these limitations on recovery of emotional-type damages and create a new zone of recovery in nuisance cases where none of these standards need be proved or followed. Seeking recovery for hurt feelings for harm to property ought to result in more restrictions on recovery, not less.

The jury instructions that the Court of Appeals and Plaintiffs would have the trial court give in this case are truly standardless. The decision of the Court of Appeals would not

[6] See Section V below.

permit the trial court to clarify for the jury that fears and subjective concerns that were not severe enough to satisfy the Paugh standard would not be compensable. In fact, the Court of Appeals would not even permit the trial court to define "annoyance and discomfort" for the jury.

The primary impact of the decision of the Court of Appeals would often not be felt in individual actions because the amount at stake in such actions would likely be small. Its impact would not be severe in those actions involving significant and prolonged physical discomforts. The proof in those cases would focus on the physical discomforts and would not try to stretch a jury's tolerance toward purely emotional harms. And the decision of the Court of Appeals would not impact cases in which evidence of "severe and debilitating"[7] emotional distress existed.

Those cases would assert and be able to prove the separate tort of negligent infliction of emotional distress. Instead, the decision of the Court of Appeals would affect primarily cases such as this one: class actions brought against companies that cause an actual, but short-lived physical intrusion on its neighbors' use of their land, with class members who seek relief based on anger, fear, anxiety, and other emotions. The result of this new zone of recovery would be devastating for Ohioans. "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, aff'd, 77 Ohio St. 3d 17, 670 N.E.2d 985 (1996).

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[7] This standard comes from Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 451 N.E.2d 759, and is discussed more fully in Section III below.

## STATEMENT OF FACTS

This Appeal arises from the Court of Appeals's reversal of the trial court's judgment following a jury trial in April 2007. Specifically, the Court of Appeals found error in the jury instructions relating to annoyance and discomfort damages in a nuisance case. (Appx. 8-9, Ct. App. Opin., ¶¶ 3-7).

Appellant Aldrich Chemical Company, Inc. ("Aldrich") owns Isotec, a facility located in Miamisburg, Ohio. Isotec makes stable isotopes and isotopically labeled compounds that are used in life science research and medical diagnostics. Before September 21, 2003, Isotec distilled nitric oxide (chemical symbol NO) to generate stable isotopes of nitrogen and oxygen.

On September 21, 2003, an explosion occurred in one of Isotec's NO distillation columns. The explosion damaged Isotec's property, but was not strong enough even to break windows on any property other than Isotec's. (Supp. 64; Tr. 1009). Other than one Isotec employee who received minor cuts to his hand, no other person was injured by the explosion. (Supp. 34; Tr. 516-17).[8] As a precautionary measure, individuals living within a one-mile radius of the facility were evacuated, but were permitted to return to their homes approximately twenty-four hours later. (Supp. 76; Tr. 1614). No subsequent explosions occurred, and on the date of the explosion, Isotec put the other NO distillation columns in a mode that would not produce additional NO product. In December 2003, Aldrich decided to cease permanently Isotec's NO distillation operations. (Supp. 76; Tr. 1614-15).

The day after the explosion, Aldrich instituted a claims reimbursement process for individuals, businesses, and government agencies that suffered either (1) property damage or

[8] The injured employee has never submitted a claim and is not a member of the class.

(2) expenses relating to the evacuation, including lodging expenses, transportation, meals, clothes, toiletries, lost wages, and similar expenses. Over five hundred people submitted claims, and nearly all of them received the requested reimbursement.

In December 2003, multiple lawsuits were filed in response to the explosion and evacuation. (Supp. 1, Complaint for Money Damages and Class Certification with Jury Demand Endorsed Hereon ("Complaint")). The lawsuits sought solely monetary damages, and did not seek to enjoin Aldrich from continued operation of its Isotec facility. (Supp. 12, Complaint, p. 12). The trial court certified the matter as a partial class action, with the class members asserting claims for negligence, nuisance, and strict liability. (Appx. 143-44, Oct. 21, 2003 Final and Appealable Decision, Order and Entry Sustaining the Plaintiffs' Motion for Class Certification Subject to Specific Conditions and Modifications ("Class Cert. Order"), p. 93-94). None of the class members made claims of personal injury as a result of the explosion. (Supp. 1-12, Complaint, pp. 1-12). The trial court granted summary judgment to Aldrich on the 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. (Appx. 182, January 6, 2006 Decision, Order & Entry Sustaining in Part and Overruling in Part Defendant Aldrich's Partial Summary Judgment Motion ("Partial Summary Judgment Award"), p. 7). That decision was never appealed.

As part of its order on certification, the trial court separated the case into four phases. Phase I addressed whether Aldrich had a legal duty to the residents surrounding Isotec and whether it breached that duty. Phase II concerns the issues of causation and compensatory damages on an individualized basis. Phase II was the subject of the April 2007 trial and is the

subject of this Appeal. Phases III and IV would determine questions regarding punitive damages. (Appx. 74-81, Class Cert. Order, pp. 24-31).[9]

Prior to the April 2007 trial, Aldrich conceded the elements of duty and breach of duty, rendering the issues in Phase I moot. (Supp. 14-15, Oct. 11, 2006 Notice of Defendant Aldrich Chemical Company, Inc's Decision Not to Contest Phase I Liability and Motion for Scheduling Conference "Decision Not to Contest," p. 2-3). The case then proceeded to the first Phase II trial. 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. None of the class members in the first Phase II trial asserted claims for property damage. 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. (Appx. 75, Class Cert. Order, p. 25). 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. (Appx. 74-81, Class. Cert. Order, pp. 24-31).

Testimony and reference to fear was pervasive throughout the trial. During opening statement, reference was made to atomic weapons. (Supp. 23; Tr. 223). Counsel spoke of "toxic" chemicals that could "poison" a person, even though no one had ever claimed to have been poisoned. (Supp. 22; Tr. 215). Also, Plaintiffs' counsel made a concerted effort to introduce "terrorist" attacks into voir dire and opening statement. (Supp. 21, 23; Tr. 90, 223). Most of the 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

[9] Phases III and IV have not yet occurred, as the issues surrounding this Appeal involve the Phase II trials.

occurring,[10] that a bomb or airplane had crashed,[11] that the environment had been polluted,[12] or that there might be another explosion.[13] Testimony about fears and concerns was so prevalent, the trial court commented at the end of the trial that: "[T]here was testimony -- reference to fear in opening statement and really throughout a great bulk of these witnesses there was free -- testimony freely given -- about how all of these witnesses were fearful." (Supp. 72; Tr. 1597-98).

Only one Plaintiff appealed her jury award to the Court of Appeals: Taylor Ferguson, who was ten years old at the time of the explosion. (Supp. 56; Tr. 947). Ferguson testified that she was at a friend's house across the street when she heard the explosion. Her friends' parents sent the children to the basement in a crawl space "for five or six minutes." (Supp. 56-57; Tr. 949-50). Ferguson "wasn't crying or anything," (Supp. 56; Tr. 949), but "it was really weird," "everybody was upset," and "it was just really awkward." (Supp. 56-57; Tr. 949-50). She then went home and left with her parents to her grandparent's house. (Supp. 57; Tr. 951). Ferguson had been to her grandparent's house before (after school) and had spent the night a couple of times. (Supp. 57; Tr. 952). By going to her grandparent's house, she did not get the chance to "hang outside and stuff like that" with friends. (Supp. 57; Tr. 952-53). That night, the couch was "itchy." (Supp. 58; Tr. 955). The time spent at her grandparent's house on Sunday was "just kind of a boring day." (Supp. 58; Tr. 954). The next day, Monday, "I think I just woke up because I don't think I had school the next day and just pretty much watched

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[10] Supp. 31, 47; Tr. 407, 764-65.

[11] Supp. 45, 47; Tr. 686-87, 764-65.

[12] Supp. 51; Tr. 848-49.

[13] Supp. 46, 52; Tr. 696-97, 852-53.

craft shows with my grandma." (Supp. 58; Tr. 955-56). She returned to her house when her mother picked her up after work Monday evening. (Supp. 58; Tr. 956).

The trial court did not exclude any testimony relating to Ferguson's or any other Plaintiffs' fears or concerns, but it did give a limiting instruction:

> "[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 in the upcoming witnesses that may have relevance in a limited degree with respect to other testimony, but just so you understand at this point you're not to be -- you will not be awarding any damages based upon any of the individual homeowner's internal fears or concerns."

(Supp. 38; Tr. 548).[14]

At the close of the trial, the judge instructed the jury as follows:

> "Annoyance and discomfort: By a preponderance of the evidence, you will determine whether the plaintiffs suffered any personal annoyance and discomfort as a proximate result of the explosion and/or evacuation and, if so, what reasonable amount of money, if any, Aldrich ought to pay to the plaintiffs for that discomfort and annoyance.
>
> 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. <u>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.</u> However, the plaintiffs need not demonstrate bodily injury to establish physical discomfort. Furthermore, evidence of pecuniary loss is not required to recover damages for discomfort and annoyance.
>
> <u>Fear, standing alone, is not an item of compensable damages.</u> However, testimony of fear may be considered for the limited

[14] The limiting instruction was given during the testimony of Plaintiff Darlene Hayden. No limiting instruction was given during Ferguson's testimony.

> purpose of determining whether the plaintiffs have suffered the compensable items of damages of loss of use of property and annoyance and discomfort as defined by this Court."

(Supp. 77; Tr. 1618-19) (emphasis added).[15]

At one point in the trial, during the recross-examination of Diane Szydel, Plaintiffs attempted to introduce both a letter sent by Miami Township to Isotec after the explosion and evidence regarding the substance of certain town hall meetings held by Isotec in late 2003. (Supp. 35-36; Tr. 528-33) (Appx. 43-44, Ct. App. Opin., ¶ 127). Plaintiffs' proffer about these subjects asserted that the evidence would have related to the fears and concerns of some of the citizens of Miami Township about Isotec's operations, the explosion, the uncertainty of what caused the explosion, prior incidents, the gas that was released, and whether there was a risk for future explosions. (Supp. 42-44; Tr. 667-75) (Appx. 43-44, Ct. App. Opin., ¶ 127). There was no proffer that Ferguson knew about any of these subjects. Id. Prior to trial, the court ruled that evidence relating to Isotec's past history, as well as evidence regarding the cause of the explosion, was irrelevant and inadmissible as to the Phase II issues of proximate causation and damages. (Appx. 189-90, March 20, 2007 Transcript of Pretrial Rulings of Montgomery County Court of Common Pleas ("Pretrial Rulings"), pp. 12-15). These topics would be admissible as to Phases I, III, and IV, which would consider the culpability of Aldrich's conduct, but not in the Phase II trial, which was limited to causation and damage. The trial court further found that such evidence could not withstand Ohio R. Evid. 403, because any relevance was "substantially

[15] The basis for this instruction can be found in OJI-CV 621.13; Antonik v. Chamberlain (Summit Cty. 1947), 81 Ohio App. 465, 476, 78 N.E.2d 752; Rautsaw v. Clark (Preble Cty. 1985), 22 Ohio App. 3d 20, 21, 488 N.E.2d 243; Bullock, 2001-Ohio-3220, ¶11; and Miller v. Horn (June 28, 1996), Clark App. Nos. 95-CA-113, 95-CA-114, 1996 Ohio App. LEXIS 2678, at *11.

outweighed by unfair prejudice, confusion of the issues and misleading the jury[.]" (Appx. 190, Pretrial Rulings, pp. 14-15).[16]

Upon Aldrich's objection during the recross-examination of Ms. Szydel, the trial court again ruled at sidebar that the proposed evidence regarding the substance of the town hall meetings had no relevance to proximate causation and damages, the only two issues under consideration in Phase II of the trial. (Supp. 36; Tr. 532-33). The court similarly sustained Aldrich's objection to the introduction of the letter as irrelevant to Phase II, and even if it had any relevance, the probative value was substantially outweighed by the unfair prejudice engendered by the letter's reference to past history at Isotec. (Supp. 36; Tr. 530-531). Later, during Plaintiffs' proffer, the trial court clarified its ruling as to the town hall meetings, stating that it was not issuing a blanket ruling that no evidence about the town hall meetings would be allowed, but again finding that the evidence as proffered by Plaintiffs was irrelevant to proximate causation and damages. (Supp. 43; Tr. 672-73).[17]

At the conclusion of trial, the trial court submitted all of the Plaintiffs' cases to the jury, finding that a jury could properly make awards for reimbursement of expenses, for loss of use of property, or for annoyance and discomfort. In many cases, the jury made awards under all three categories. The average verdict for all thirty-one Plaintiffs was approximately $210 per

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[16] For the same reasons, the trial court sustained a motion by the Plaintiffs to exclude evidence relating to Isotec's claims reimbursement process as inadmissible during Phase II. (Appx. 187-88, March 20, 2007 Transcript of Pretrial Rulings of Montgomery County Court of Common Pleas ("Pretrial Rulings"), pp. 5-8).

[17] During the proffer, Plaintiffs' counsel also admitted that the evidence at issue dealt with the types of subjective emotional discomforts that the court had already found inadmissible. (Supp. 43; Tr. 670-71). In response to counsel's admission, the court reiterated its ruling (outside the presence of the jury) that subjective fears and concerns are not compensable elements of damages under annoyance and discomfort. (Supp. 44; Tr. 674-75).

Plaintiff. The jury awarded Ferguson $100 for annoyance and discomfort. (Supp. 81-82; Tr. 1783-84). The jury declined to make an award to Ferguson for loss of use, although both of her parents received loss of use awards.

On July 15, 2008, Ferguson appealed,[18] asserting five assignments of error. (Appx. 8, Ct. App. Opin. ¶¶ 2-4). The Court of Appeals affirmed in part and reversed in part. (Appx. 49-50, December 24, 2008 Judgment Entry of the Montgomery County Court of Appeals). With respect to the issues on which it reversed, the Court of Appeals held that the trial court erred: (1) 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 an discomfort; (2) in instructing the jury that fear and subjective concerns could not be considered in deciding whether the plaintiffs should recover damages for personal annoyance and discomfort, and (3) in excluding certain evidence from the trial. (Appx. 8-9, Ct. App. Opin., ¶¶ 5-9).

Aldrich filed its Memorandum in Support of Jurisdiction with this Court on February 9, 2009. (Appx. 1). On June 4, 2009, the Supreme Court granted jurisdiction to hear the case and allowed the appeal. (Appx. 202).

## ARGUMENT

**Proposition of Law No. 1: 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.**

[18] To produce a final appealable order, Ferguson dismissed her punitive damages claims, and the trial court entered a judgment that included a finding of no just reason for delay. (Appx. 200-01, May 22, 2008 Entry of the Montgomery County Court of Common Pleas).

## I. ANNOYANCE AND DISCOMFORT DAMAGES ARE LIMITED TO RECOVERY FOR PHYSICAL DISCOMFORTS

The Court of Appeals erred when it held that a plaintiff could recover damages for hurt emotions as a part of annoyance and discomfort damages for nuisance claims. It is well-established under Ohio jurisprudence that recovery for annoyance and discomfort[19] requires a showing that the plaintiff suffered a material, physical discomfort. Damages for hurt emotions are not available under a nuisance theory of recovery.

### A. Only Material, Tangible, Physical Discomforts Qualify for Nuisance Damages

At least by 1832, the Supreme Court of Ohio required that nuisance injuries "be real and substantial," or "material, substantial." Cooper v. Hall (1832), 5 Ohio 320, 323 (emphasis in original). Thirty years later, the Ohio Supreme Court confirmed a trial judge's instructions that "the plaintiff in the action must have suffered a real, material and substantial injury, to entitle him to recover[.]" Columbus Gas Light & Coke Co. v. Freeland (1861), 12 Ohio St. 392, 1861 Ohio LEXIS 154, at *15 (emphasis added) (describing further that a nuisance was an "inconvenience materially interfering with their physical comfort . . ."). Id. at *13 (emphasis in original, emphasis added). At the turn of the twentieth century, the Supreme Court held that "it 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." Eller v. Koehler (1903), 68 Ohio St. 51, 55, 67 N.E. 89 (emphasis added).

In 1947, Ohio courts clarified this long-standing principle, setting forth the modern statement of the standard for recovery of annoyance and discomfort nuisance damages:

[19] "Annoyance and discomfort" is just one category of damages available in a nuisance case. The other categories are a) restoration costs, or in the appropriate case diminution in value, and b) loss of use. Reeser v. Weaver Bros. (Darke Cty. 1992), 78 Ohio App. 3d 681,686, 691, 605 N.E.2d 1271.

> "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.'"

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, 68 Ohio St. 51.

The Antonik standard has been cited by Ohio courts for sixty years, and it remains the standard for recovery today. Rautsaw v. Clark (Preble Cty. 1985), 22 Ohio App. 3d 20, 488 N.E.2d 243, paragraph two of the syllabus (quoting Antonik v. Chamberlain with approval). Antonik itself was an injunction case; it used the standard to determine when a nuisance existed. Courts have applied the Antonik standard in the damages context as well. In Bullock v. Oles, Mahoning App. No. 99 CA 223, 2001-Ohio-3220, ¶11, the court held that "[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." (quoting Rautsaw).[20]

In addition to Antonik, Rautsaw, and Bullock, the caselaw supporting a full recitation of the "appreciable, substantial, tangible injury resulting in actual, material and physical discomfort" standard for annoyance and discomfort is overwhelming. At least seven

[20] Not surprisingly, the current edition of Ohio Jurisprudence, the basic textbook of Ohio law, cites verbatim this same language. 72 O. Jur. 3d Nuisances § 9.

appellate districts have cited this exact litany as the standard for recovery.[21] In other cases, Ohio courts have found that the plaintiff must prove physical discomfort.[22]

The caselaw overwhelmingly supports the notion that to recover annoyance and discomfort damages, a plaintiff must establish an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort. It is unreasonable to suggest that courts used multiple words to mean the same thing -- tangible, material, and physical -- and not really intended those words to mean physical.

B. To Be Recoverable Under a Nuisance Theory, Physical Discomforts Must Affect One of the Five Senses

"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). In accord with this

[21] 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 and Antonik); Bullock, 2001-Ohio-3220, ¶11 (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 (12th App. Dist.) (following Antonik). No cases contradict this standard.

[22] Miller, 1996 Ohio App. LEXIS 2678, at *11, *14 (using the term "substantial physical discomfort" and later adding the words "actual, and material"); O'Neil v. Atwell (Portage Cty. 1991), 73 Ohio App. 3d 631, 636, 598 N.E.2d 110 ("In essence, the 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 a degree which would constitute a nuisance."); Wells, 1990 Ohio App. LEXIS 4388, at *4-5 ("A nuisance is that which annoys and disturbs one in possession of his property, rendering its ordinary use or occupation physically uncomfortable to him.").

description, Ohio courts have awarded damages for annoyance and discomfort in the following circumstances: (1) the bad odor and noise associated with running a pet cemetery, which prevented neighbors from engaging in outdoor activities or opening their windows;[23] (2) a leaking septic tank, which emitted foul odors and created visible effluent, preventing a family from using their backyard;[24] (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 house;[25] (4) land fill operations which caused noise, dust, "noxious and offensive odors," insects, and rodents to "permeate" and "infest" a neighbor's home;[26] (5) the stench and sight of mass quantities of dead fish at a commercial fishing enterprise;[27] (6) the "nearly continuous and overwhelming" noise from a large rooster farm that forced neighbors to keep their windows closed and disrupted sleep;[28] and (7) an intensely bright light shining into a home, which interfered with sleep.[29]

In each of these cases, awards for annoyance and discomfort were based upon some type of "physical discomfort to the plaintiff in the enjoyment of his home and premises." Frey v. Queen City Paper Co. (Miami Cty. 1946), 79 Ohio App. 64, 69, 66 N.E.2d 252. These

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[23] Miller, 1996 Ohio App. LEXIS 2678, at *13-15.

[24] Bullock, 2001-Ohio-3220, ¶12.

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

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

[27] Reeser, 78 Ohio App. 3d at 684-85.

[28] Forrester v. Webb (Feb. 16, 1999), Butler App. No. CA98-04-070, 1999 Ohio App. LEXIS 474, at *3-4 (Appx. Tab 14).

[29] Tullys v. Brookside Condo. Assoc. (June 2, 1986), Stark App. No. CA-6849, 1986 Ohio App. LEXIS 7081, at *2-4.

cases demonstrate that, to meet the physical discomfort standard articulated in Antonik, the nuisance must affect one of the five senses--smell, hearing, sight, touch or taste.

The Court of Appeals misread these and other cases (see Section V below) when it concluded that physical discomfort affecting one of the five senses was not a requirement for annoyance and discomfort damages.

### C. Emotional Harms and Fears Are Not Physical Discomforts and Are Not Recoverable Under a Nuisance Theory

Fears, concerns and other emotional reactions are not recoverable as annoyance and discomfort damages because they do not involve a physical discomfort. "[D]amages for bare personal inconvenience, annoyance and discomfort [appellee] may have suffered are not recoverable." Schoenberger, 1983 Ohio App. LEXIS 12345, at *17 (citing Antonik and finding that feelings of harassment, vexation, ill temper and being upset were not recoverable under the annoyance and discomfort category of damages).[30] Instead, plaintiffs must show physical discomforts, such as "excessive noise, dust, smoke, soot, noxious gases, or disagreeable odors . . . ." Id. at *16-17. Thus, the Court of Appeals erred when it held that a plaintiff could recover for emotional harms as annoyance and discomfort damages in nuisance claims.

[30] Accord: Miller, 1996 Ohio App. LEXIS 2678, at *11 ("[I]t is clear that trifling annoyances are not sufficient nor are unsubstantiated or unrealized fears."); Ohio Jury Instructions CV 621.07(5) (stating that "unsubstantiated or unrealized fears do not constitute nuisance").

## II. NUISANCE INVOLVES HARM TO LAND; PLAINTIFFS CANNOT RECOVER DAMAGES FOR HURT EMOTIONS AND FEARS RESULTING FROM HARM TO PROPERTY

It is not surprising that annoyance and discomfort damages, an element of damages for harm to land,[31] does not encompass one's fears and emotions. Injuries to subjective feelings and 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.) (denying recovery for emotional distress to tenant who witnessed the sudden flooding of his apartment); Strawser v. Wright (Preble Cty. 1992), 80 Ohio App. 3d 751, 610 N.E.2d 610 (recognizing that an individual may suffer a true sense of loss by the death of a pet, but finding that the plaintiff could not recover for emotional harms resulting from witnessing the death of her puppy because the puppy was considered "property" under the law); Reeser v. Weaver Bros., Inc. (Darke Cty. 1989), 54 Ohio App. 3d 46, 49, 560 N.E.2d 819 (holding that no recovery could be had for "one suffering emotional distress after witnessing the negligent damaging of property over a period of time").

[31] Plaintiffs allege three causes of action: nuisance, negligence, and strict liability. (Supp. 1-11, Complaint, ¶¶ 36-41, 48-54, 67-71). However, the measure of damages is the same under all three theories. "The 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), Cuyahoga App. No. 74966, 1999 Ohio App. LEXIS 6306, at *4. There is "no potential for a different or larger recovery under any of these theories." Id. at *5.

Annoyance and discomfort damages are recoverable as part of a claim for harm to property. Restatement (Second) of Torts § 929 (1979) lists annoyance and discomfort among the categories of recoverable damage in the section entitled, "Harm to Land From Past Invasions."[32]

To prove actual damages for trespass to land, a plaintiff must establish "physical damages or interference with use," not merely fears and concerns relating to the trespass. Chance v. BP Chems., Inc. (1996), 77 Ohio St. 3d 17, 26-28, 670 N.E.2d 985 (emphasis added). Just as these harm to land torts do not permit recovery for emotional harm, a plaintiff cannot recover for emotional harm in nuisance actions. Schoenberger, 1983 Ohio App. LEXIS 12345, at *17. Thus, prohibiting recovery for emotional harms as annoyance and discomfort damages fits squarely within the law's limitations on recovery for emotional damages.

Restricting damages for hurt emotions in cases involving harm to land or property is a practical limitation that comports with common sense. Witnessing harm to one's land or property does not and should not involve the same level of emotions that are involved with near-accidents involving persons or by witnessing a loved one's personal injury or death.

## III. EMOTIONAL HARMS ARE RECOVERABLE UNDER A THEORY OF HARM TO PERSONS UNDER STANDARDS ALREADY ESTABLISHED BY THIS COURT

Holding that Plaintiffs may not recover for emotional harms under claims designed to compensate plaintiffs for harm to land does not mean that Plaintiffs could never have recovered damages for emotional harms in this case. Plaintiffs might have recovered damages for emotional harms if they had met the standards for a negligent infliction of emotional distress

[32] This section of the Restatement has been adopted by several Ohio courts. Reeser, 78 Ohio App. 3d at 686; Parker v. Hegler, Lake App. No. 2006-L-062, 2006-Ohio-6495, ¶¶30-36; Krofta v. Stallard, Cuyahoga App. No. 85369, 2005-Ohio-3720, ¶¶15-21; Horrisberger v. Mohlmaster (Wayne Cty. 1995), 102 Ohio App. 3d 494, 499, 657 N.E.2d 534.

claim articulated by this Court in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 78, 451 N.E.2d 759. The fact that none of the Plaintiffs in this case satisfy those standards does not mean the standards are incorrect or should be ignored. The decision of the Court of Appeals would allow Plaintiffs to work an end run around Paugh in situations involving a claim for nuisance.

### A. A Plaintiff Cannot Recover for Emotional Injuries Unless the Plaintiff Meets the Seriousness Standard of Paugh

This Court established in Paugh, 6 Ohio St. 3d at 78, that when a plaintiff is not physically injured,[33] recovery for emotional injuries requires proof that the injury is serious. Not all emotional harms are recoverable.[34] To be recoverable, the emotional harm must be "both severe and debilitating." Id. Emotional harm is severe and debilitating "where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." Id.[35]

Paugh's adoption of the "severe and debilitating" standard arose from an attempt to balance two competing legal concepts: (1) the acknowledgement that "[e]motional injury can be as severe and debilitating as physical harm and is deserving of redress," Schultz v. Barberton

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[33] Neither Ferguson nor any other member of the class has asserted claims for physical injury.

[34] The law cannot protect against every irritation and annoyance that arises as a result of societal interactions:

> "It would be absurd for the law to seek to secure universal peace of mind, and many interferences with it must of necessity be left to other agencies of social control. Against a large part of the frictions and irritations and clashing of temperaments incident to participation in a community life, a certain toughening of the mental hide is a better protection than the law could ever be. . . ."

Yeager v. Local Union 20, Teamsters (1983), 6 Ohio St. 3d 369, 374, 453 N.E.2d 666 (recognizing a cause of action under Ohio law for the intentional infliction of emotional distress) (quotations and citations omitted).

[35] Examples of emotional distress sufficiently serious so as to rise to the level of "severe and debilitating" include "traumatically induced neurosis, psychosis, chronic depression, or phobia." Paugh, 6 Ohio St. 3d at 78.

Glass Co. (1983), 4 Ohio St. 3d 131, 135, 447 N.E.2d 109, and (2) the idea that "trifling mental disturbance, mere upset or hurt feelings" cannot serve as a basis for recovery under the law. Paugh, 6 Ohio St. 3d at 78. Thus, the purpose of the standard in Paugh is the same as the standard in Antonik: to ensure that a "trifling annoyance, inconvenience, or discomfort" is not actionable. Antonik, 81 Ohio App. at 476.

The Paugh standard was well-considered and should not be set aside or ignored in this case. Before settling on the "severe and debilitating" standard as the dividing point between actionable and non-actionable claims for emotional distress, Paugh contemplated several alternative standards that have been adopted by other states. First, the Court considered the limitation of permitting recovery for emotional injury only when it was "parasitic" to a provable physical injury (i.e. pain and suffering), or accompanied by a contemporaneous physical injury or impact. Id. at 75.[36] The Court rejected this restriction and held that the public policy justifications supporting this limitation were no longer valid. Schultz, 4 Ohio St. 3d at 135. Second, Paugh rejected the "zone of danger" rule, which requires a plaintiff to be in close enough proximity to an accident to have been placed in actual physical danger, thereby ensuring that a plaintiff's emotional suffering was genuine due to the fear of physical danger. Paugh, 6 Ohio St.

[36] At least eight states limit recovery of emotional damages in this way. Arkansas does not even recognize a cause of action for the negligent infliction of emotional distress, Mechs. Lumber Co. v. Smith (Ark. 1988), 752 S.W.2d 763, 765, but does allow an award for mental injuries when those injuries are "parasitic." McQuay v. Guntharp (Ark. 1998), 963 S.W.2d 583, 585 (citation omitted). Likewise, with few exceptions, Alaska holds that "damages are not awarded . . . in the absence of physical injury." Kallstrom v. United States (Ala. 2002), 43 P.3d 162, 165. Georgia, Indiana, Kansas, Kentucky, Missouri, and Oregon all require that a plaintiff suffer a physical impact as a result of the defendant's conduct prior to allowing for recovery of emotional harm. John J. Kircher, The Four Faces of Tort Law: Liability for Emotional Harm, 90 Marq. L. Rev. 789, 883-906 (2007).

3d at 75.[37] The Paugh Court found this rule to be unduly restrictive because it served as an inadequate measure of the reasonable forseeability of possible injury resulting from anxiety arising from harm to the bystander's loved one. Id. at 75-76. Third, the Court decided not to require an objective, physical manifestation of the harm resulting from the serious emotional distress. Id. at 77.[38] The Court found that advancements in modern science had demonstrated that mental harm could be proven absent a physical manifestation of the injury. Id. Finally, the Court rejected the notion that expert medical testimony is necessary to prove the seriousness of the emotional injury,[39] holding instead that lay witnesses familiar with the plaintiff could testify as to changes in the emotional makeup of the plaintiff as a result of the accident. Id. at 80.

By rejecting all of these limitations, Paugh established that the only remaining criteria separating recoverable emotional distress from the non-recoverable variety is the requirement that the injury be serious. Schultz, 4 Ohio St. 3d at 149 (Holmes, J. dissenting) (noting that, in Ohio, a claim for emotional distress is "limited only by the requirement that 'serious' mental stress must result"). It is this sole remaining standard that the holding of the Court of Appeals permits a plaintiff to evade by asserting annoyance and discomfort damages in nuisance claims. There is no justification for circumventing the Paugh standard, especially as part of claims seeking recovery for harms to land.

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[37] At least six states impose the "zone of danger" limitation on claims alleging emotional harm, including: Alabama, Colorado, District of Columbia, Iowa, Nebraska and Vermont. Kircher, 90 Marq. L. Rev. at 883-906.

[38] A plurality of states limit recovery for emotional harms with the requirement of a physical manifestation, including: Arizona, Connecticut, Delaware, Florida, Idaho, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Dakota, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, and Washington. Kircher, 90 Marq. L. Rev. at 883-906.

[39] Some jurisdictions with this requirement include Tennessee, Utah and West Virginia. Kircher, 90 Marq. L. Rev. at 883-906.

Allowing unfettered recovery for emotional harms as annoyance and discomfort damages in nuisance cases would create two undesirable results under Ohio jurisprudence. First, it would permit a plaintiff to circumvent this Court's deliberate and carefully articulated seriousness standard for recovery of emotional harm, and would leave the trier-of-fact to make its decisions with no guidance or limitations for awarding emotional damages. Second, the lack of meaningful restrictions on the recovery of emotional damages as annoyance and discomfort damages could subject Ohio businesses to an unascertainable amount of damages for common law nuisance claims, allowing Ohio courts to serve as vehicles for extortion. Chance, 1995 Ohio App. LEXIS 1250, at*22 (finding that actions based completely on fear could threaten entire industries by forcing them to accumulate large defense costs or submit to massive monetary settlements).[40]

B. A Plaintiff Cannot Recover Annoyance and Discomfort Damages for Emotional Harm Relating to Unrealized Fears and Non-Existent Perils

The decision of the Court of Appeals permits damages for a plaintiff's subjective emotions over unrealized fears and non-existent perils whenever a plaintiff can tie the subjective emotions to an incident involving a nuisance. Even if a plaintiff were to be permitted to recover for emotional harms as annoyance and discomfort damages, he or she should not be permitted to recover damages for unrealized fears and non-existent perils.

[40] This second undesirable consequence would be most severe in class action cases, such as this one. In the class action context, the potential liability for trifling mental disturbances could add up to be quite significant, depending on the number of class members involved.

Fears and subjective concerns, including fears of potential future damages, are not compensable. In Chance, 1995 Ohio App. LEXIS 1250, at *22, the court held that "[o]ur legal system does not and cannot recognize actions for unsustained, conceptual, or future damage."[41]

Similarly, Ohio does not award damages for the "apprehension of a non-existent physical peril." Heiner v. Moretuzzo (1995), 73 Ohio St. 3d 80, 86, 652 N.E.2d 664 (denying recovery for negligent infliction of emotional distress where defendant hospital negligently informed plaintiff that she was HIV-positive, when in fact she was not) (citation omitted); Dobran v. Franciscan Med. Ctr. (2004), 102 Ohio St. 3d 54, at paragraph one of the syllabus, 806 N.E.2d 537 (finding that a fear of metastasis of cancer stemming from defendant doctor's negligence could not be the basis for a claim of emotional distress).

In the present action, Plaintiffs testified extensively regarding their unrealized fears and non-existent perils. For example, some of the plaintiffs testified about fearing that another 9-11 was occurring,[42] that a bomb or airplane had crashed,[43] that the environment had been polluted,[44] or that there might be another explosion.[45] None of these events actually occurred. Plaintiffs should not be permitted to recover for their fears or concerns of what might

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[41] In Ramirez v. Akzo Nobel Coatings, Licking App. No. 02CA70, 2003-Ohio-2859, ¶20, the court held that the plaintiffs, who lived near a toxic waste dump, could not recover for alleged diminution in value to their properties. The court found that plaintiffs' allegations of diminished value were based "solely upon fear and public perception." Id. at ¶23.

[42] Supp. 31, 47; Tr. 407, 764-65.

[43] Supp. 45, 47; Tr. 686-87, 764-65.

[44] Supp. 51; Tr. 848-49.

[45] Supp. 46, 52; Tr. 696-97, 852-53.

have happened, but did not.[46] The decision of the Court of Appeals would allow recovery for all of these unrealized fears.

## IV. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY WERE NOT AN ABUSE OF DISCRETION

The Court of Appeals erred when it held that the trial court's instructions to the jury were an abuse of discretion. The trial court's jury instructions defining the Antonik standard were not an abuse of discretion because (1) they properly articulated the standard for recovery of annoyance and discomfort damages under Ohio law, and (2) they provided the jury with the guidance necessary to determine whether the Appellee's allegations were compensable, and if so, to what degree. Furthermore, the trial court's limiting instruction regarding the nonrecovery for Plaintiffs' fears and emotions should have been upheld because (1) it was a correct statement of the law applicable to the case, and (2) the trial court gave the limiting instruction in response to Plaintiffs' efforts to emphasize fear and concern as a basis for recovery of annoyance and discomfort damages.

### A. The Trial Court Did Not Err by Instructing the Jury with the Antonik Standard for Annoyance and Discomfort

At the close of trial, the trial court instructed the jury that, among other things, to recover for annoyance and discomfort damages, "[t]here must be an appreciable, substantial, tangible harm resulting in actual, material physical discomfort." (Supp. 77; Tr. 1618-19). As demonstrated above (Section I), this jury instruction was a correct statement of the law. So long as the trial court charges the jury with instructions "that are a correct and complete statement of the law," the "precise language of a jury instruction is within the discretion of the trial court."

[46] Accord: Boughton v. Cotter Corp. (10th Cir. 1995), 65 F.3d 823, 831-835 (holding that plaintiffs could not recover for unrealized fears of cancer and disease as annoyance and discomfort damages).

Chambers v. Adm'r, Bureau of Worker's Comp. (Summit Cty.), 164 Ohio App. 3d 397, 2005-Ohio-6086, 842 N.E. 2d 580, ¶5 (instruction upheld where it was similar to but not direct quote from language from caselaw on the subject). Thus, it was not reversible error for the trial court to instruct the jury on the well-established Antonik standard.[47]

Moreover, the trial court's jury instructions needed to include the Antonik standard to guide the jury in arriving at a proper verdict. "The sole and only purpose of an instruction, by court to jury, is to furnish guidance to the jury in their deliberations, and to aid and assist them in arriving at a proper verdict." Atkinson v. Braddock (Knox Cty. 1920), 14 Ohio App. 205, 208. Accord: B.C. Indus., Inc. v. Oglesby & Hug Paving, Inc. (Aug. 26, 1991), Jefferson App. No. 89-J-34, 1991 Ohio App. LEXIS 4071, at *8 ("The general purpose of jury instructions is to clearly and succinctly define the issues of the case, and by a statement of the law applicable to the facts developed at trial, assist the jury in arriving at a correct verdict by proper guidance, aid and assistance.").

Plaintiffs' assert that the Ohio Pattern Jury Instructions ("OJI") provide the proper standard of instruction for annoyance and discomfort damages in this case. (Appx. 21-22, Ct. App. Opin., ¶¶ 51-55). OJI suggests the following instruction for annoyance and discomfort damages:

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[47] Even if this Court finds that a plaintiff may recover for emotional harms as annoyance and discomfort damages by establishing the seriousness standard of Paugh, the trial court's jury instruction is still a correct statement of the law as applicable to the case. The trial court granted summary judgment to Aldrich on the Plaintiffs' claims of negligent infliction of emotional distress due to a lack of severity under the standard in Paugh. (Appx. 182, Partial Summary Judgment Award, p. 7). The only remaining avenue available for Appellee to recover annoyance and discomfort damages was to prove physical discomfort. Thus, under the facts of this case, it was not error for the trial court to use the Antonik standard to define annoyance and discomfort damages.

> "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 damages 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." OJI-CV 621.13.

This instruction does not define what annoyance and discomfort is, nor does it explain to the jury how to treat evidence of emotions, fears, and concerns about future possibilities that did not occur. The trial court foresaw the jury's need for additional guidance at a pretrial telephone conference on March 20, 2007:

> ". . . I also specifically in my decision said that what remains to be tried are proximate cause and damages, I think it would be virtual error to instruct -- essentially to tell the jury that they must award damages for nuisance without any determination of proximate cause or those damages or without giving them any guidance as to -- well, how do they -- what does the Court mean by annoyance and discomfort damage? <u>There has to be some sort of explanation to the jury as to what that means and how they measure it</u>."

(Appx. 196, Pretrial Rulings, p. 40) (emphasis added). The full <u>Antonik</u> standard had to be given to the jurors to help them determine whether Plaintiffs' allegations were compensable, and if so, to what degree.

The only guidance OJI provides for annoyance and discomfort damages is that they are not susceptible to precise measurement. OJI-CV 621.13. The OJI instructions may provide sufficient guidance in most nuisance cases, where the physical discomfort is obvious and is the overwhelming focus of the evidence. In the present case, however, the pattern jury instruction was insufficient because so much of the evidence, confusingly, was of the type and

quality that would not qualify as annoyance and discomfort damages. So much of the evidence was of emotions that were not substantial, tangible, material, or physical. For example, the OJI instruction would allow recovery for non-physical and unrealized fears such as the fear that another 9-11 was occurring. Such a result is clearly wrong, yet the OJI instruction in the context of the evidence of this case would have allowed it.

OJI does not provide exclusive instructions on Ohio law, and a trial court is not confined to them. Callahan v. Akron Gen. Med. Ctr., Summit App. No. 22387, 2005-Ohio-5103, ¶10 ("[T]he instructions found in Ohio Jury Instructions are not mandatory, but rather, are recommended instructions based primarily upon case law and statutes.") (citation and internal quotations omitted). The trial court did not abuse its discretion when it provided the Antonik standard to the jury as an aid for deciding what was (or was not) legally recoverable as annoyance and discomfort damages.

B. The Trial Court Did Not Abuse its Discretion Giving Limiting Instructions on Fears and Emotions

The trial court admitted all of Plaintiffs' evidence of fears and concerns, subject to two limiting instructions, one given on the second day of trial (Supp. 38; Tr. 548) and one given during the full instructions at the close of trial (Supp. 77; Tr. 1619). These instructions were proper because (1) they were correct statements of the law applicable to the case, and (2) the court gave them to prevent juror confusion in response to Plaintiffs' efforts to emphasize fear and concern as a basis for recovery.

The limiting instructions given by the trial court regarding Plaintiffs' speculative fears were a correct statement of the law and did not mislead the jury. "[I]f the instructions fairly and correctly state the law applicable to evidence presented at trial, reversible error will not be

found merely on the possibility that the jury may have been misled." Smart v. Nystrom (Montgomery Cty. 1997), 119 Ohio App. 3d 738, 743, 696 N.E.2d 268. "'Reversible error ordinarily can not be predicated upon one paragraph, one sentence or one phrase of the general charge to the jury.'" Kendig v. Martin, Franklin App. No. 02AP-408, 2003-Ohio-1525, ¶32 (quoting Snyder v. Stanford (1968), 15 Ohio St. 2d 31, 41, 238 N.E.2d 563). Accord: Miller v. BancOhio Nat'l Bank (Apr. 23, 1991), Franklin App. Nos. 90AP-380, 90AP-551, 1991 Ohio App. LEXIS 2051, at *26-27 ("[A] jury charge is to be viewed in its totality and, if the law is clear and fairly expressed, reversal will not be warranted upon any alleged error in a part of the charge."). Instead, the instruction will be upheld unless, viewed in the context of the totality of the jury instructions, the challenged instruction "probably misled the jury in a matter materially affecting the complaining party's substantial rights." Nystrom, 119 Ohio App. 3d at 743 (citing Kokitka v. Ford Motor Co. (1995), 73 Ohio St. 3d 89, 93, 652 N.E.2d 671). As discussed above (Section III, B), a plaintiff cannot recover emotional damages for unrealized fears and non-existent perils. Thus, the trial court's limiting instructions were a proper statement of the law.

Despite the non-recoverability, and thus, irrelevance of damages for unfounded fears and concerns under Ohio law, testimony regarding Plaintiffs' fears was pervasive.[48] The trial court allowed the testimony because it determined that it was possibly relevant to other purposes. (Supp. 29, 72; Tr. 280-81, 285-86). A plaintiff's fears or emotions would likely explain the context and reason for the subsequent actions taken by that plaintiff. Id. (If those

[48] In fact, testimony about fears and concerns was so prevalent, the trial court commented at the end of the trial that: "[T]here was testimony -- reference to fear in opening statement and really throughout a great bulk of these witnesses there was free -- testimony freely given -- about how all of these witnesses were fearful." (Supp. 72; Tr. 1597-98).

subsequent actions involved physical discomfort or loss of use, then the jury compensated the plaintiff accordingly.)[49]

The trial court's limiting instructions were necessary to prevent juror confusion in response to Plaintiffs' efforts to emphasize fear and concern as a basis for recovery. When evidence is admissible for some purposes but not for others, a court should give a limiting instruction under Ohio R. Evid. 105 to limit the evidence to its proper scope. Dunkelberger v. Hay, Franklin App. No. 04AP-773, 2005-Ohio-3102, ¶25, 27, 29 (holding trial court did not abuse its discretion in admitting evidence of prior injuries where it twice made clear in a limiting instruction that the evidence was to be used only for the limited purpose of considering damages).

The trial court decided that it was necessary to instruct the jury that fear and subjective concerns were not compensable items of damage, but that they may be relevant for other purposes. (Supp. 38, 77; Tr. 548, 1619). It was within the court's discretion to give the limiting instructions. Due to the pervasiveness of the testimony regarding fear and subjective concerns, the limiting instructions were necessary to prevent the jury from confusing the issues.

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[49] A trial court's decision to admit or exclude evidence is within its discretion and will not be overturned absent an abuse of that discretion that materially prejudices a party. Wightman v. CONRAIL (1999), 86 Ohio St. 3d 431, 437, 715 N.E.2d 546, cert. denied, (2000), 529 U.S. 1012, 120 S. Ct. 1286 ("The decision of whether or not to admit evidence rests in the sound discretion of the court and will not be disturbed absent an abuse of that discretion."). Accord: State v. Chinn (Dec. 27, 1991), Montgomery App. No. 11835, 1991 Ohio App. LEXIS 6497, at *43-44, cert. denied, (1993), 506 U.S. 1063, 113 S. Ct. 1063, cert. denied, (2000), 528 U.S. 1120, 120 S. Ct. 944 (finding no abuse of discretion).

## V. THE CASES CITED BY THE COURT OF APPEALS DO NOT STAND FOR THE PROPOSITION THAT DAMAGES FOR FEARS AND EMOTIONS CAN BE RECOVERED IN NUISANCE CASES

The Court of Appeals (Appx. 29-34, Ct. App. Opin., ¶¶ 76-96) cited to cases allegedly standing for the proposition that subjective fears and emotions are compensable in nuisance cases. Such an assertion is simply incorrect. None of the cases cited by the appellate court answered, or even raised, the question of whether feelings and emotions were compensable as annoyance and discomfort damages. Further, as the cases bear out, a court's occasional use of the phrase "personal" discomfort is irrelevant to the issue at hand, and in no away distinguishes between physical discomfort cases and those where damages are allegedly based on non-physical discomforts. In fact, the cited cases, except one, all involved physical discomforts. The only case (cited by the Court of Appeals) that relied on fears and emotions, Harford, 1936 Ohio Misc. LEXIS 1266, at *29, did not award damages. Harford provides no basis for the unprecedented expansion of nuisance damages contemplated by the Court of Appeals.

### A. The Cases Cited by the Court of Appeals Regarding Fears and Emotions Support Aldrich's Position Regarding Physical Discomforts

The cases relied upon by the Court of Appeals to support its ruling on emotional damages actually support Aldrich's argument that damages for annoyance and discomfort can be recovered only for actual, tangible, physical discomforts.

For example, the Court of Appeals cited Polster v. Webb (June 21, 2001), Cuyahoga App. No. 77523, 2001 Ohio App. LEXIS 2736, as a non-physical discomfort case, which is remarkable since the Court of Appeals in this case expressly recounted numerous physical discomforts suffered by the Polster plaintiffs. (Appx. 33-34, Ct. App. Opin., ¶¶ 91-96). "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." Polster, 2001 Ohio App. LEXIS 2736, at *13. Mr. Polster testified that "trash would blow onto their yard" and that his enjoyment of the property was further lessened by the eyesore created by debris on defendants' property and the swamp-like conditions on his own property caused by defendants' conduct. Id. These are all physical discomforts because they plainly assaulted the senses of smell, sight, and hearing. Polster mentioned no fears, emotions, or feelings experienced by the Polsters.

The Court of Appeals cited Reeser v. Weaver Bros., Inc. (Darke Cty. 1992), 78 Ohio App. 3d 681, 605 N.E.2d 1271, as another non-physical discomfort case that supported its reasoning. (Appx. 29-30; Ct. App. Opin., ¶ 77 ). In Reeser, the defendant's chicken egg production business resulted in the killing of "all the fish and other living organisms" in plaintiff's lake. Id. at 684. Far from supporting Court of Appeals' position, Reeser did not uphold any award for annoyance and discomfort damages; the court simply found that the plaintiff qualified as an occupant of the land and was eligible to receive such damages, and therefore remanded the matter "for consideration of Reeser's alleged damages for annoyance and discomfort." Id. at 694 (emphasis added). The court did not even mention, much less analyze, any arguments regarding fears and emotions in relation to nuisance damages. Even if the question of what would qualify as annoyance and discomfort damages had been addressed in Reeser, such damages could have been properly premised on the physical assault on the senses engendered by "egg production operations involving 380,000 chickens[,]" which "produced over a million pounds of organic matter consisting of chicken manure and egg rinse waste-water" a year. Reeser, 78 Ohio App. 3d at 684-685. This organic matter also produced a "scum" floating on top of the lake, and resulted in the killing and rotting of an entire lake full of fish. Id.

The physical discomforts caused by runoff from a defective septic tank in Bullock, 2001-Ohio-3220, ¶12, included the necessity of keeping doors and windows closed "because the noxious odor produced by the effluent made the Bullocks' yard smell 'like an outhouse.'" Mr. Bullock, when attempting to cut the grass, "had to wear a mask, take frequent breaks, and suffered from nausea, headaches and unusual fatigue after the chore." Id. These are not physical injuries, but rather physical discomforts caused by the noxious odors affecting plaintiffs' sense of smell. The Bullock court did make a passing reference to Mrs. Bullock not letting her grandchildren play in the yard because she was afraid they may catch disease. However, the court never addressed the issue of whether fears and emotions were compensable under annoyance and discomfort damages, and there is no indication that defendants even objected to such evidence. The court merely summarized the testimony that was admitted into evidence. When it analyzed the law that applied to that evidence, however, the court expressly held that when determining damages, "[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." Id. at ¶11 (internal quotation marks and citation omitted). The evidence of physical annoyances and discomforts easily satisfied this standard. The damages in another case cited by the Court of Appeals, Lasko v. Akron (Summit Cty. 1958), 109 Ohio App. 409, 410, 166 N.E.2d 771, arose from land fill operations. Those operations caused noise, dust, "noxious and offensive odors," and insects and rodents to "permeate" and "infest" a neighbor's home. Id. Lasko made no mention of fears or emotions.[50]

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[50] The following cases cited by the Court of Appeals were physical discomfort cases as well: Columbus Gas Light & Coke Co. v. Freeland (1861), 12 Ohio St. 392, 1861 Ohio LEXIS 154, at *1, *11, *13-14 (sense of smell assaulted where potential nuisance involved allegations of "unwholesome and annoying odors, gases, and stenches arising from conduct" of coke and gas manufacturing business; court found that damages could not "merely [be] in [one's]

The Court of Appeals also cited several cases that failed to address the question of whether fears and emotions were compensable. Similar to the Bullock case, the single-sentence reference to the plaintiffs' concerns about flooding during rain storms in Stoll v. Parrott & Strawser Props., Inc., Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio 5717, ¶26, in no way reflects an appellate court's deliberate analysis of whether emotional damages should be compensable under nuisance damages for annoyance and discomfort. As the Court of Appeals conceded in its opinion below, this question was not at issue, and was thus never addressed in Stoll. (Appx. 40, Ct. App. Opin., ¶ 113) (conceding that the Stoll court did "not directly state[] whether [fear and worry] are specific elements of damage"). The plaintiffs' damages in Stoll were brought about after defendant's conduct led to 16 floodings of plaintiffs' yard, resulting in items washing up on plaintiffs' property from an old dump and requiring extensive clean-up efforts. Stoll, 2003-Ohio-5717, ¶25. These are all physical discomforts. The appellate court considered only whether the jury's award of annoyance and discomfort damages was against the manifest weight of the evidence. Id. at ¶¶25-26.[51]

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*imagination*," and must "materially interfer[e] with their physical comfort") (italics in original); Eller v. Koehler (1903), 68 Ohio St. 51, 56, 67 N.E. 89 (analyzing jury instruction where plaintiff's senses of hearing and touch were affected by the alleged "noise or vibration of machinery" on defendant's adjoining lot); City of Mansfield v. Hunt (Jan. 1900), Fifth Cir. Richland Cty., 19 Ohio C.C. 488, 1900 Ohio Misc. LEXIS 282, at *12 (affirming nuisance where city discharged sewage into plaintiff's creek "whereby the waters of said stream were rendered impure and unwholesome, causing offensive and noxious odors and fumes to arise therefrom, . . . and . . . plaintiff and his family frequently became and were made sick in consequence thereof"); Angerman v. Burick, Wayne App. No. 02-CA-0028, 2003-Ohio-1469, ¶¶11, 20, 21 (affirming nuisance where operating motor cross track caused "a great deal of noise" that was "piercing," and so loud that "it would be difficult for two people to carry on a conversation at a distance of one meter").

[51] The analysis in Stoll also confused evidence of loss of use under the umbrella of annoyance and discomfort. Instead of analyzing loss of use damages as a separate and independent element of nuisance damages, Stoll merged lost use damages with annoyance and discomfort. As a result, the court justified annoyance and discomfort damages by referencing evidence that

Other cases cited by the Court of Appeals similarly fail to support its assertion regarding fears and emotions. Wray v. Deters (Hamilton Cty. 1996), 111 Ohio App. 3d 107, 111-113, 675 N.E.2d 881, held that temporary nuisance damages were compensable in a temporary taking. The court accounted for the "attendant dirt, noise, and disruption for a possible period of three years" while the state dug a large trench through the defendants' property. Id. at 111. The court noted that the trench may be dangerous, but there was no testimony or evidence that the appellees were afraid. Furthermore, the court failed to break down the temporary easement valuation, preventing an analysis of what items it considered compensable. Gertz v. N. Ohio Rifle Club, Inc. (Apr. 18, 1977), Geauga App. No. 676, 1977 Ohio App. LEXIS 7785, at *3-4, never discussed the factual grounds upon which the annoyance and discomfort damages were based, much less state that annoyance and discomfort damages were recoverable for fears and emotions. Weaver v. Yoder (Oct. 3, 1961), Tuscarawas Cty. C.C.P. No. 35361, 184 N.E.2d 662, 1961 Ohio Misc. LEXIS 259, at *5, 8, enjoined the defendants' blasting operations because "the smoke, noise and dust resulting from the explosions constitutes a great discomfort." There was also evidence of significant and repetitive vibrations and concussions. Id. at *5. The plaintiff received $1000, but not for his fear and emotions. Rather, Weaver awarded damages on the trespass claim for the damage to plaintiff's home -- namely cracking caused by the vibrations. Id. at *8. No monetary damages were awarded for the nuisance claim despite the fact that the court mentioned in passing that plaintiff was fearful.

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plaintiffs were "unable to use their back field because they lost use of a pond due to flooding," and testimony that "established that there are about four acres of property that the family cannot use, four-wheeler trails were lost, and a rear entrance to the property is not usable." Stoll v. Parrott & Strawser Props., Inc., Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio-5717, ¶25.

Id.[52] None of these cases ever addressed the question of whether emotional harms were compensable as annoyance and discomfort damages.

B. The "Personal" Discomfort Cases Cited by the Court of Appeals Also Fail to Demonstrate that Feelings and Emotions Are Compensable as Annoyance and Discomfort Damages

In addition to the cases analyzed above, the Court of Appeals cited to additional cases that purportedly "have held that the plaintiff is entitled to recover damages for 'personal discomfort and annoyance' without including a physical component." (Appx. 29, Ct. App. Opin., ¶ 76). Again, those cases fail to address the question of whether fear and emotion are compensable as annoyance and discomfort damages. The use of the term "personal" in a few of the cases cited does not mean that non-physical discomfort qualifies as annoyance and discomfort. The adjective "personal" gives no guidance whatsoever with regard to whether the discomfort must be physical (i.e., both physical and non-physical discomforts can be "personal"). A close reading of the opinions analyzed below demonstrates both the mischaracterization of those opinions by the Court of Appeals, and the physical nature of the discomforts involved.

In Graham & Wagner, Inc. v. Ridge (Stark Cty. 1931), 41 Ohio App. 288, 179 N.E. 693, the court, in dicta (and not in any type of "holding"), borrowed the "personal discomfort" language from a 1926 California nuisance case that was itself based on physical discomfort. Id. at 293 (quoting Dauberman v. Grant (1926), 198 Cal. 586, 246 P. 319, 321 ("'offensive smelling, thick, black smoke,' which emanated from the defendant's smoke-stack,

[52] On page 34 of the opinion of the Court of Appeals, the Court cited Weaver v. Yoder (Oct. 3, 1961), Tuscarawas Cty. C.C.P. No. 35361, 184 N.E.2d 662, 1961 Ohio Misc. LEXIS 259, and asserted that Weaver "did not comment on the breakdown of damages." (Appx. 40, Ct. App. Opin., ¶ 112). This assertion is false. Weaver explained the breakdown at 1961 Ohio Misc. LEXIS 259, at *8.

was saturated with soot" and carried into plaintiff's house, creating a nuisance)). The discomfort in Ridge stemmed from a tombstone manufacturing business, which plaintiff complained "was accompanied by much noise and vibration, distinctly noticeable in her premises, and by reason thereof she was made nervous and otherwise ill." Ridge, 41 Ohio App. at 290. Of course, noise and vibrations affect the senses of hearing and physical feeling, which are physical discomforts.

In Frey, 79 Ohio App. at 67, the question determined on appeal was whether the trial court should have sustained a defendant's motion for a directed verdict at the close of plaintiff's case regarding nuisance damages. The defendant claimed "there was no express testimony as to the measure of this damage in dollars and cents." Id. at 70. The court held that the jury should have been allowed to assess "damage by way of physical discomfort to the plaintiff in the enjoyment of his home and premises." Id. at 69 (emphasis added).[53] That physical discomfort was brought about by excessive fly ash that was released from defendant's coal-fired furnace and heating plant. Id. at 66-67. The fly ash inundated plaintiff's premises inside and out, making it physically intolerable to sit on the porch without cover, and penetrating the plaintiff's living room, bedrooms, and food. Id. The case made no reference to fears or emotions.

[53] The "personal discomfort" language in Frey that was quoted in the decision of the Second Appellate District (Appx. 28-29, Ct. App. Opin., ¶ 76) below does not represent a holding or finding of the Frey court, but rather was part of a quotation referenced in dicta that was lifted from an annotation in the American Law Reports. Frey, 79 Ohio App at 71. The Frey court held in the syllabus that "[i]n an action for damages resulting from personal inconvenience . . . caused by a continuing nuisance," it was error to sustain the defendant's directed verdict motion "where the evidence tends to show damages by way of physical discomfort to the plaintiff in the use of his home and premises." Id. at paragraph two of the syllabus. Thus, far from using the term "personal" to distinguish physical from non-physical discomforts, the Frey court explicitly equated physical discomfort to personal discomfort.

C. Reliance by the Court of Appeals on a 1936 Funeral Parlor Case Is Misplaced

Finally, the heavy reliance placed by the Court of Appeals on the 1936 case of Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, demonstrates how far the Court of Appeals was reaching to justify its expansion of nuisance damages. (Appx. 30-32, Ct. App. Opin., ¶¶ 78-87). The Court of Appeals cited Harford as a case that "found the existence of a nuisance in situations where only personal annoyance, rather than physical discomfort, has been involved." (Appx. 30, Ct. App. Opin., ¶ 78). Harford found the proposed operation of a funeral parlor in a purely residential area to be a nuisance 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 . . . ." Id. at *1-2, *5-6, paragraph one of the syllabus. Citing almost exclusively to out-of-state caselaw, Harford represents the lone instance where the Court of Appeals found that a nuisance based principally on non-physical annoyance existed. Even so, the case says nothing about the availability of nuisance damages.[54]

Can this 1936 funeral parlor case, championed by the Court of Appeals, really justify the unprecedented expansion of annoyance and discomfort damages to include feelings and emotions? First, this Court has never adopted Harford or its reasoning. Harford, when faced with the issue of determining whether the funeral parlor should have been deemed a nuisance,

[54] Antonik, too, was an injunction case, not a damages case. Nonetheless, the Court of Appeals recognized that caselaw supports using the Antonik standard "in a damages context." (Appx. 25, Ct. App. Opin, ¶ 65) (citing Bullock, 2001-Ohio-3220). Despite this authority, the Court of Appeals criticized the Antonik standard as being "really more pertinent to the question of whether a nuisance exists." (Appx. 27-28, Ct. App. Opin., ¶ 71). How can the Court of Appeals criticize Antonik for not being a damages case (even though Bullock and other cases did analyze damages) and then follow Harford with respect to damages issues?

simply chose to follow the holdings of certain out-of-state cases over the holdings of other out-of-state cases. Harford could have easily chosen to follow those states where funeral parlors were deemed nuisances only where physical discomforts were involved.[55] Until this case, neither this Court nor any other court in Ohio has followed Harford on these grounds. Since Harford, at least one court has rejected its reasoning, ruling instead that "damages for bare personal inconvenience, annoyance and discomfort . . . are not recoverable." Schoenberger, 1983 Ohio App. LEXIS 12345, at *17 (rejecting damages for feelings of anxiety, nervousness, and vexation). Therefore, the holding in Harford is not binding authority.[56]

Second, Harford is easily distinguished from the present case because the plaintiffs in Harford sought injunctive relief, not damages. Harford, 1936 Ohio Misc. LEXIS, at *1. By contrast, Plaintiffs here seek money damages only and not an injunction. Harford is

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[55] For example, a case contrary to Harford was L. D. Pearson & Son v. Bonnie (1925), 272 S.W. 375, 376-378, 209 Ky. 307 (holding that the alleged "mental annoyance," "depression," or "sentimental repugnance" created by a proposed funeral parlor was not enough to create a nuisance and basing its holding in part on a case preventing a white neighborhood from prohibiting the establishment of an African-American church; "annoyance which warrants relief is of a real and substantial character and such as impairs the ordinary enjoyment, physically, of the property").

Kentucky continues to prohibit recovery for hurt emotions in nuisance cases. Ky. Rev. Stat. § 411.560.

[56] Harford is also out-of-date. It emphasized the "depressed feeling" that would be generated by a funeral parlor built in a residential area. Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266, at *1, *3, paragraph one of the syllabus. However, social mores, sensitivities, and tolerances have evolved in the last 70-plus years such that it would be difficult to imagine a court today reaching the same conclusion as the pre-World War II Harford court. Today, it is not uncommon to find funeral homes in modern residential districts. Simply because one group of people do not like, or are scared by, a certain type of business (or another group of people, for that matter), the law will not -- and cannot -- redress such feelings with monetary compensation. The rationale of Harford, even if providing only for an injunction, stands as an anachronism in modern jurisprudence and tolerances.

irrelevant for determining the standard for awarding annoyance and discomfort damages because Harford never addressed the issue of damages.

Injunctions, unlike damages, are sometimes granted in nuisance cases based on the likelihood or danger of future harm. Sanson Co. v. Granger Materials, Inc., Cuyahoga App. No. 89050, 2007-Ohio-5852, ¶10 ("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 that has already occurred. Bullock, 2001-Ohio-3220, ¶11. Accord: Reynolds v. Akron-Canton Reg'l Airport Auth., Stark Cty. App. No. 2008CA00143, 2009-Ohio-567, ¶31 (granting motion to dismiss plaintiffs' nuisance claim for damages because it was "based upon possible future actions and damages" although "it might be a valid claim for injunctive relief"). Further, neither a finding of nuisance nor an award of injunctive relief entitles a plaintiff to monetary damages. "An award of damages does not inevitably follow the finding of a nuisance." Bullock, 2001-Ohio-3220, ¶10; Blevins v. Sorrell (Warren Cty. 1990), 68 Ohio App. 3d 665, 669, 589 N.E.2d 438 (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). Accord: Myers v. Wild Wilderness Raceway, Hocking App. No. 08CA3, 2009-Ohio-874, ¶39 ("[A]lthough finding a private nuisance allows for the recovery of damages for annoyance caused by the nuisance, an award of damages does not inevitably follow the finding of a nuisance.") (internal quotations and 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).

It is not surprising that no court, until this case, has ever cited Harford as support for an award of annoyance and discomfort damages for fears and concerns. Harford never addressed the question of damages.

**Proposition of Law No. II: In a trial in which liability has already been admitted and the questions for the jury are limited to causation and compensatory damages, it is not an abuse of discretion to exclude evidence relating solely to punitive damage questions.**

## VI. THE COURT OF APPEALS SHOULD HAVE UPHELD THE EVIDENTIARY RULINGS OF THE TRIAL COURT

The trial court's admissibility rulings (both before and during the trial) under Rules 402 and 403 were not abuses of discretion, and should have been upheld. (Supp. 35-36, 42-44; Tr. 528-33, 667-75) (Appx. 189-90, Pretrial Rulings, pp. 12-15) (Appx. 43, 44, 46, Ct. App. Opin., ¶¶ 127, 141).[57] The April 2007 trial focused on only two issues: proximate causation and damages. The trial court excluded the evidence because it related to liability questions (Phase I) and to questions of punitive damages (Phases III and IV). By excluding the evidence, the trial court kept the trial focused on relevant issues, prevented tangential trials-within-trials, and avoided jury confusion. The Court of Appeals sidestepped the trial court's reasoning and found that Plaintiffs might have been able to recover damages after the 24-hour evacuation period, and that evidence potentially related to such damages should have been admitted by the trial court. (Appx. 42-46, Ct. App. Opin., ¶¶ 121-136). The Court of

[57] The excluded evidence included testimony about Isotec's past history, the substance of town hall meetings held after the explosion, and a letter sent to Isotec by Miami Township after the explosion. The letter and town hall meetings referenced the uncertain cause of the explosion, the past history at Isotec, and Plaintiffs' fears of future harm. (Supp. 35-36, 42-44; Tr. 528-33, 667-75).

Appeals speculated as to the possibility that the past history at Isotec "might have been of some relevance" to a potential continuing nuisance. (Appx. 47, Ct. App. Opin. ¶143) (emphasis added). An appellate court exceeds its authority when it reverses a lower court's evidentiary ruling for abuse of discretion based on the appellate court's speculation about the facts. Furthermore, a continuing nuisance did not exist because nothing further happened to affect Plaintiffs' properties.

A. A Trial Court Has Broad Discretion in Admissibility Determinations

"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." Krishbaum v. Dillon (1991), 58 Ohio St. 3d 58, 66, 567 N.E.2d 1291 (citations omitted). "The term 'abuse of discretion' 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 (citations omitted). "In applying the abuse of discretion standard, an appellate court is not free to substitute its own judgment for that of the trial court." Lumpkin v. Wayne Hosp., Darke App. No. 1615, 2004-Ohio-264, ¶12 (citing Berk v. Matthews (1990), 53 Ohio St. 3d 161, 169, 559 N.E.2d 1301).

This Court has further found that:

> "[A]n abuse of discretion involves far more than a difference in . . . opinion . . . . The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias."

Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248 (quotation and citation omitted; deletions in original).

There are good reasons for trial courts to be given ample discretion when determining the admissibility of evidence. Unlike appellate courts, the trial court views the witnesses, has a better view of the intentions of trial counsel, hears the proffered testimony, and examines the trial exhibits in context with the rest of the trial. "An appellate court must be guided by a presumption that the findings of the trial court are correct, since the trial court is in the best position to view the witnesses and weigh the credibility of the proffered testimony." Eitel v. Eitel (Aug. 23, 1996), Pickaway App. No. 95CA11, 1996 Ohio App. LEXIS 3821, at *8 (setting forth the standard of review for determining "the propriety of the trial court's order limiting the admissibility of evidence"; citations omitted). The trial court, with its ground-level vantage point, is also ideally situated to make careful Rule 403 determinations weighing relevancy versus prejudice of potential evidence. Aerosol Sys. v. Wells Fargo Alarm Servs. (Cuyahoga Cty. 1998), 127 Ohio App. 3d 486, 497, 713 N.E.2d 441 ("the trial court is in the best position to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, or of confusing or misleading the jury") (citation omitted).

B. The Evidence Excluded Was Not Relevant to the Nuisance Damages at Issue

After weighing the competing arguments, the trial court ruled that evidence relating to the cause of the explosion, Isotec's past history, and post-explosion events and conduct were irrelevant and inadmissible as to Phase II compensatory damages. (Appx. 189-90, Pretrial Rulings, pp. 12-15) (Appx. 43, 46, Ct. App. Opin., ¶¶ 126, 140) (Supp. 35-36, 42-44; Tr. 528-33, 667-75). In large part, this ruling flowed from the structure of the litigation. In October of 2005, the trial court established a four-phase procedure to organize how this class

action would be conducted. (Appx. 12, Ct. App. Opin., ¶ 17). Phase I would determine liability. Id. Phase II would be decertified, allowing Plaintiffs to prove causation and compensatory damages claims individually. (Appx. 12, Ct. App. Opin., ¶ 19). The damages available included evacuation expenses, loss of use, and annoyance and discomfort. Phase III would then be re-certified to consider whether punitive damages would be appropriate. (Appx. 12, Ct. App. Opin., at ¶ 20). If needed, Phase IV would determine the amount of punitive damages to be awarded. Id. Only Phase II issues -- proximate causation and compensatory damages -- were under consideration at the April 2007 trial. The jury charge did not include the issues relating to Aldrich's culpability, i.e., issues of liability for the explosion or whether punitive damages should be awarded.

The evidence excluded by the trial court had no bearing on the annoyance and discomfort or loss of use damage categories. Stories heard at a town hall meeting after September 21, 2003, regarding Isotec's past history could not have affected how any of the Plaintiffs experienced the explosion and evacuation. As the Court of Appeals acknowledged, "[t]he prior acts in question occurred long before the 2001 (sic) explosion. In fact, the most recent event was at least three (sic) years earlier, and the statute of limitations for that event had long since expired by the time of trial." (Appx. 47, Ct. App. Opin., ¶ 142) (citations omitted).[58] Such evidence could not have added to their physical discomforts in 2003. Furthermore, the

[58] The appeals court correctly found that the statute of limitations had expired, but misquoted the dates. The most recent alleged event took place five years before the explosion in 2003.

Plaintiffs had already returned to their residences by the time of the town hall meetings, negating a relationship with loss of use damages.[59]

The trial court's rulings also prevented the trial from devolving into endless trials-within-the-trial regarding past history and events that had nothing to do with causation and damages. If the trial court had admitted the proffered evidence, then it would have also had to allow Aldrich the opportunity to rebut the evidence by proof that the past situations did not occur or were falsely described by Plaintiffs' witnesses, that zoning authorities found that Aldrich had not violated the zoning code, and other similar rebuttals. The trial court would have also had to allow Aldrich the opportunity to show that it had acted reasonably and responsibly after the explosion by, among other things, establishing a claims reimbursement process the day after the explosion to reimburse everyone for their expenses, lost wages, property damage, and other reimbursements. All this evidence would have required numerous additional witnesses, including experts, to analyze and rebut allegations regarding prior incidents, greatly lengthening the trial. Cetlinski v. Brown (6th Cir. 2004), 91 Fed. Appx. 384, 393, 2004 U.S. App. LEXIS 629 (holding under Fed. R. Civ. P. 403 that the trial court properly excluded evidence for reasons of confusion of issues and undue delay that would result from a series of "mini-trials" relating to past incidents). The trial court was well within its broad discretion to avoid such irrelevant back-and-forth between the parties. The trial judge, far from being "unreasonable, arbitrary or unconscionable," should have been given the discretion required by law.

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[59] Similarly, a letter sent to Isotec by Miami Township after the explosion, and evidence regarding the cause of the explosion would not "have any tendency to establish as more probable that the plaintiffs experienced annoyance and discomfort." (Appx. 189-90, Pretrial Rulings, pp. 13-14).

C. The Court of Appeals's Continuing Nuisance Speculation Fails

In its opinion, the Court of Appeals explored the possibility of a continuing nuisance theory. (Appx. 45, 47, Ct. App. Opin., ¶¶ 133-135, 143). Despite "agree[ing] that the damages must be related to the explosion and evacuation," which were concluded as of September 22, 2003, approximately twenty-four hours after the explosion, the Court of Appeals found that if Plaintiffs could prove the existence of a continuing nuisance, then evidence of Isotec's past history should be admissible because it "might have been of some relevance" regarding potential damages. (Appx. 47, Ct. App. Opin., ¶ 143).[60] The continuing nuisance theory is wholly speculative and fails under the law and facts of this case. Furthermore, such factual speculations provide a clear example for why appellate courts should give deference to trial courts on evidentiary questions.

"A continuing . . . 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. E. Ohio Gas Co., Mahoning App. No. 01 CA 207, 2003-Ohio-1229, ¶18 (citations omitted). Ohio courts have found continuing nuisances in a variety of situations, often involving constant or recurrent noises, odors, or pollution. Haas v. Sunset Ramblers Motorcycle Club (Crawford Cty. 1999), 132 Ohio App. 3d 875, 877-78, 726 N.E.2d 612 (noise from recurrent motorcycle races and practice sessions at motorcycle racing track); Morgan v. Carlson (Apr. 8, 1987), Summit App.

[60] The appeals court stated that this hypothetical continuing nuisance, if it existed, could not have lasted longer than three months (from the time of the explosion until the NO distillation process was shut down in December 2003). (Appx. 45, Ct. App. Opin., ¶ 135). The appellate court also conceded that some evidence was presented regarding the cause of the explosion, the town hall meetings, and Plaintiffs' post-explosion fears. (Appx. 47-48, Ct. App. Opin., ¶¶ 145-147). "However, where the trial court erred was in restricting the evidence to, and in limiting plaintiffs to recovery only for actual, material, physical discomfort." (Appx. 48, Ct. App. Opin., ¶ 147).

No. 12768, 1987 Ohio App. LEXIS 6392, at *2 (seasonal odor from horse manure, where defendant kept horses too close to plaintiff's property); Orsuto v. Franks Transp., Inc. (Dec. 30, 1983), Ashtabula App. No. 1129, 1983 Ohio App. LEXIS 11209. On the other hand, when a plaintiff's claim arises from a single tortious act or event, a single nuisance is created, for which there can only be one cause of action. Weir, 2003-Ohio-1229, ¶32 (no continuing nuisance where single leak released contaminants onto plaintiffs' properties).

A continuing nuisance did not exist here because Plaintiffs did not suffer any continuing or refreshed physical discomforts after the explosion, evacuation, and immediate after-effects. The cryogenic distillation operations at Isotec, standing alone, are not sufficient to award damages. Damages can be awarded only for actual injuries to Plaintiffs that satisfy legal standards, such as physical discomfort. Angerman, 2003-Ohio-1469, ¶12 ("Properly maintained . . . roads, buildings, trees, electrical wires, and oil tanks did not constitute nuisances for they did not cause injury to anyone."). Plaintiffs' only potential recovery relates to the September 21, 2003, explosion and the evacuation that followed. (Appx. 45, Ct. App. Opin., ¶ 133). Since that day, there have been zero -- much less recurrent or continuous -- explosions, evacuations, releases of gas, or any other event at the Isotec plant that could have caused the Plaintiffs physical discomfort. Not a single "fresh violation" of property rights has been visited upon Plaintiffs by Aldrich. Weir, 2003-Ohio-1229, ¶18. Even the Court of Appeals stated that "[a] harm resulting in actual, material, physical discomfort would not have been present after the plaintiffs returned to their homes and normal lives." (Appx. 44, Ct. App. Opin., ¶ 129).

The lack of recurring physical discomforts leaves only fear and speculation as the basis for any continuing nuisance as envisioned by the Court of Appeals. As demonstrated above, however, a compensable nuisance cannot reside solely in the minds and subjective

feelings of Plaintiffs.[61] Because Plaintiffs cannot recover damages for speculative fears about what might happen in the future, evidence related to such speculation is not admissible. The trial court did not abuse its discretion in excluding such evidence.

D. The Trial Court Did Not Abuse Its Discretion By Ruling That Any Relevance of the Excluded Evidence Was Substantially Outweighed By Its Prejudicial Effect

The trial court excluded the evidence at issue not only because it was irrelevant, but also because any relevance was "substantially outweighed by unfair prejudice, confusion of the issues and misleading the jury[.]" (Appx. 190, Pretrial Rulings, pp. 14-15) (Appx. 46, Ct. App. Opin. ¶ 140). Ohio R. Evid. 403 mandates that such evidence be excluded.

None of the evidence proffered by Plaintiffs and excluded by the trial court related to how Aldrich's use of its property affected the Plaintiffs and the use of their properties. Before the explosion, Taylor Ferguson and most other Plaintiffs had never even heard of Isotec, let alone experienced anything. After the Plaintiffs returned to their homes at the conclusion of the evacuation, Isotec's use of its property did not affect the Plaintiffs' properties or their occupants in any way. The Plaintiffs emotions may have continued beyond their return home, but those are not compensable under a nuisance theory (at least not where the emotional harm is not severe and debilitating, as was the case here).

The unfair prejudice to Aldrich by the admission of this evidence would have been severe. The jury would have been confused as to the basis for admissibility of the evidence. Plaintiffs spent a significant portion of the trial attempting to inflame the jury's

[61] Plaintiffs' counsel conceded that the proffered evidence dealt with the types of subjective emotional discomforts that the court had already found inadmissible. (Supp. 43; Tr. 670-71). In response to counsel's admission, the court reiterated to counsel (outside the presence of the jury) that subjective fears and concerns are not compensable elements of damages under annoyance and discomfort. (Supp. 44; Tr. 674-75).

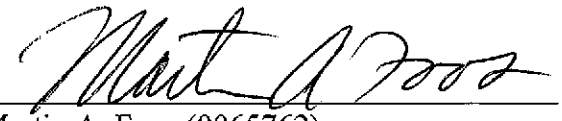
emotions; admitting evidence related to Aldrich's past history or alleged culpability might have confused the jury into awarding damages because they did not like Aldrich or wanted to punish Aldrich. Aldrich would have been forced to counter Plaintiffs' evidence with evidence of its own, showing that it did not engage in conduct worthy of punishment. The trial court decided that such evidence was relevant to Phase III and entirely prejudicial in a Phase II trial that was supposed to be solely about causation and damage.

All these problems arise from evidence that the Court of Appeals speculated "might have been of some relevance." Such threadbare postulations cannot establish an abuse of discretion that requires "more than an error of law or judgment." Blakemore, 5 Ohio St. 3d at 219 (citations omitted). The trial court properly found the excluded evidence to be irrelevant, and that any relevance was substantially outweighed by its prejudice to Aldrich, confusion of the issues, and tendency to mislead the jury.

## VII. CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals and reinstate the judgment of the trial court.

Respectfully submitted,



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IN THE SUPREME COURT OF OHIO

| | | |
|---|---|---|
| CHRISTINE BANFORD, et al., | : | |
| Plaintiffs-Appellees | : | Case No. 2009-0305 |
| v. | : | On Appeal from the Montgomery County Court of Appeals, Second Appellate District |
| ALDRICH CHEMICAL COMPANY, INC., | : | |
| Defendant-Appellant. | : | |

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**APPENDIX TO THE MERIT BRIEF OF APPELLANT ALDRICH CHEMICAL COMPANY, INC.**

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IN THE SUPREME COURT OF OHIO

09-0305

| | | |
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| CHRISTINE BANFORD, et al., | : | |
| Plaintiffs-Appellees, | : | On Appeal from the Montgomery County Court of Appeals, Second Appellate District |
| v. | : | |
| 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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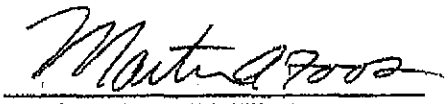
**Notice of Appeal of Appellant Aldrich Chemical Company, Inc.**

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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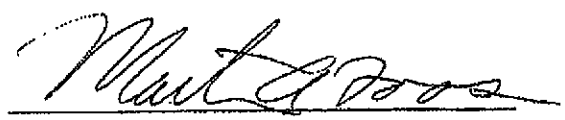

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**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

| | | |
|---|---|---|
| CHRISTINE BANFORD, et al. | : | |
| Plaintiff-Appellants | : | Appellate Case No. 22600 |
| v. | : | Trial Court Case No. 05-CV-7143 |
| ALDRICH CHEMICAL COMPANY, INC. et al. | : | (Civil Appeal from 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)

THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT

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[Cite as *Banford v. Aldrich Chem. Co.*, 180 Ohio App.3d 107, 2008-Ohio-6837.[

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

BANFORD et al.,

Appellants,

v.

ALDRICH CHEMICAL COMPANY, INC.,
et al.,

Appellees.

Appellate Case No. 22600

Trial Court Case No. 03-CV-8704

(Civil Appeal from
Common Pleas Court)

. . . . . .

OPINION

Rendered on the 24th day of December, 2008.

. . . . . .

Behnke, Martin & Schulte, Richard W. Schulte, and Stephen D. Behnke; Dyer, Garofalo, Mann & Schultz, John A. Smalley, and Jeffrey G. Chinault; and Taylor Jones Jr. and Cheryl Washington, for appellants.

Faruki Ireland & Cox P.L.L., Martin A. Foos, and Nicholas M. Smith, for appellee.

. . . . . .

FAIN, Judge.

{¶ 1} 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 24 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.

{¶ 2} 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."

{¶ 3} 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 24-hour evacuation period.

{¶ 4} 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.

{¶ 5} 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.

{¶ 6} 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.

{¶ 7} 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.

{¶ 8} 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 24-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.

{¶ 9} 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

{¶ 10} 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.

{¶ 11} 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.

{¶ 12} 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.

{¶ 13} 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.

{¶ 14} 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 24 hours later, residents were allowed to return home.

{¶ 15} On December 1, 2003, two of the evacuated residents, Christine Banford and Doug Graeser, filed a class action suit against Aldrich Chemical. 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.

{¶ 16} 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

[1] The O'Donnells filed a motion to voluntarily dismiss their action under Civ.R.

who lived in the "general area" of the Isotec facility, but outside the one-mile radius, and a complaint filed by 11 other plaintiffs living in the immediate area of Isotec. In June 2006, these cases were consolidated with the present case by agreed order.

{¶ 17} 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: "[W[hether 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 * * *."

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

{¶ 19} "[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 determination are individualized causation and compensatory damages."

{¶ 20} Assuming a recovery in Phase Two, the case would be recertified 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. 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.

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41(B), in October 2005, that was granted by the court.

{¶ 21} 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.

{¶ 22} 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 17 households in the evacuation area. The jury was given interrogatories for each claimant that 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."

{¶ 23} 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.

{¶ 24} 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.

{¶ 25} 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.

{¶ 26} 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).

{¶ 27} 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

{¶ 28} Ferguson's first assignment of error is as follows:

{¶ 29} "The trial court erred in its instructions and/or admonitions to the jury."

{¶ 30} 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

{¶ 31} At a pretrial conference, the court discussed its proposed jury instruction on the definition of nuisance. The court's original draft proposed the following definition:

{¶ 32} "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."

{¶ 33} 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.

{¶ 34} 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.

{¶ 35} The law provides that:

{¶ 36} "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 and 21967, 2007-Ohio-4543, ¶ 15, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

{¶ 37} 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."

{¶ 38} 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.

{¶ 39} 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.

{¶ 40} 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.

{¶ 41} We agree with the trial court on these points. Aldrich Chemical admitted that it had engaged in conduct that 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, quoting *State Auto Mut. Ins. Co. v. Chrysler Corp.* (1973), 36 Ohio St.2d 151, 152 (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. Natl. 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 *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.

{¶ 42} 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.' *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 432, 28 O.O. 369, 55 N.E.2d 724. '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, 2007-Ohio-7099, 882 N.E.2d 46, ¶ 15. 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.

{¶ 43} 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. 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.

{¶ 44} "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.

{¶ 45} 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

{¶ 46} 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.

{¶ 47} 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.

{¶ 48} 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:

{¶ 49} "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.

{¶ 50} "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."

{¶ 51} 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 nonphysical 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 nonphysical 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:

{¶ 52} "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.

{¶ 53} " * * *

{¶ 54} "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).

{¶ 55} 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. The court also stated that the plaintiffs would not be permitted to testify that they were fearful or emotional, or that they had experienced nonphysical subjective discomfort, because such testimony, standing alone, was neither relevant nor admissible. However, the court commented that this evidence might be relevant and admissible in the context of other factual issues.

{¶ 56} The court followed this up at trial by instructing the jury during the testimony of one witness:

{¶ 57} "[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."

{¶ 58} At the end of the trial, the court instructed the jury that if would address three categories of damages: "loss of use of property, annoyance and discomfort, and evacuation expenses." The court instructed the jury:

{¶ 59} "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."

{¶ 60} 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.

{¶ 61} 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.

{¶ 62} 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:

{¶ 63} "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 476-477, quoting 39 American Jurisprudence (1942), Nuisances, Section 30.

{¶ 64} 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.

{¶ 65} As noted, *Antonik* does not contain any discussion of the potential elements of damages in nuisance cases. Despite this fact, the above language in *Antonik* has been used in a damages context. In *Bullock v. Oles* (Sept. 24, 2001), Mahoning App. No. 99 CA 223, 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:

{¶ 66} "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.' *Frey v. Queen City Paper Co.* (1946), 79 Ohio App. 64, 70. 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. * * *

{¶ 67} "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. *Rautsaw v. Clark* (1985), 22 Ohio App.3d 20, 21. 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." *Bullock* at * 2.

{¶ 68} 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:

{¶ 69} "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.' " *Bullock* at * 3.

{¶ 70} 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.

{¶ 71} 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 nonphysical 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.

{¶ 72} 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:

{¶ 73} "[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.' " *Eller*, 68 Ohio St. at 55.

{¶ 74} In a subsequent situation involving a city's discharge of sewage into natural water, a circuit court concluded:

{¶ 75} "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." *Mansfield v. Hunt* (1900), 19 Ohio C.C. 488, 10 Ohio C.D. 567, 1900 WL 1068, * 6.

{¶ 76} 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), 41 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' ").

{¶ 77} Other cases using a similar approach include *Lasko v. Akron* (1958), 109 Ohio App. 409, 412-413, 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. N. 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 trapshooting 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, that 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).

{¶ 78} 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:

{¶ 79} "[B]e 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, that the value of property in the vicinity will be materially decreased." Id. at * 2.

{¶ 80} 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." *Harford* at * 5. In this regard, we quoted from a decision of the Missouri Supreme Court:

{¶ 81} " '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 connected with it, give rise to, impair in a substantial way the comfort, repose, and enjoyment of the homes which are subject to them.' " Id., quoting from *Street v. Marshall* (1927), 316 Mo. 698, 706, 291 S.W. 494.

{¶ 82} In *Harford,* we went on to note that:

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

{¶ 84} " '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.'

{¶ 85} " '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.

{¶ 86} " 'Disturbance of the enjoyment of the comfort of one's home has been classified as within the sphere of the physical.' *Bragg v. Ives* (1927) (va.) 140 SE 656."

1936 WL 2027 at * 5-6.

{¶ 87} 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.

{¶ 88} 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 motocross 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.

{¶ 89} 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.

{¶ 90} Similarly, in *Stoll v. Parrott & Strawser Properties, Inc.*, Warren App. Nos. CA2002-12-133 and CA2002-12-137, 2003-Ohio- 5717, a jury awarded the plaintiffs $175,000 in damages for discomfort and annoyance, when the evidence showed 16 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.

{¶ 91} 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:

{¶ 92} "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).

{¶ 93} 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:

{¶ 94} "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."

{¶ 95} 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.

{¶ 96} 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.

{¶ 97} 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.

{¶ 98} 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.

{¶ 99} The second area of likely confusion involves the trial court's division of annoyance and discomfort into separate phases (preevacuation, evacuation, and postevacuation). These distinctions are artificial and confusing. As only one example, this led to the court's willingness to let the jury consider the preevacuation annoyance and discomfort of an individual who testified that she heard a "terrible boom" and "felt" it in her stomach. By the same token, the jury was not allowed to consider the same individual's annoyance and discomfort during the 24-hour period after the evacuation, because she did not testify about having "substantial physical" discomfort during that time frame.[2] Again, these distinctions are artificial and narrow, as a result of which they were likely to have been confusing to the jury.

{¶ 100} "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 Cty. Mem. Hosp. W.* (1990), 53 Ohio St.3d 202, 208, 560 N.E.2d 165. In the case before us, the jury charge was incorrect

[2] The party in question did testify that she was uncomfortable where she ended

and would likely have misled the jury even if it had been a correct statement of the law.

{¶ 101} 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 nuisance cases, where the nuisance, although temporary, occurs over a period of time during which the plaintiffs continue to use their property.[3]

{¶ 102} 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 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 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:

{¶ 103} "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

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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.

whether there is an 'appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort' *during* the reasonable use of the property." (Emphasis added.) Id. at * 2.

{¶ 104} 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.

{¶ 105} 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, 2007-Ohio-4542, 876 N.E.2d 1312, ¶ 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 Ents., 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

{¶ 106} 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.

{¶ 107} 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.

{¶ 108} 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.

{¶ 109} 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, 6 OBR 114, 451 N.E.2d 759, paragraph three (a) of the syllabus.

{¶ 110} 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.

{¶ 111} 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.

{¶ 112} 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.

{¶ 113} 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").

{¶ 114} 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.

{¶ 115} 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. *Iams 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 nonconforming is "whether a reasonable person would conclude that the alleged defect or condition substantially impairs the vehicle's use, value, or safety").

{¶ 116} Ferguson's first assignment of error is sustained in part and overruled in part.

III

{¶ 117} Ferguson's second assignment of error is as follows:

{¶ 118} "The trial court erred in excluding evidence of the fear and upset suffered by the plaintiffs."

{¶ 119} 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 concern 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.

{¶ 120} Ferguson's second assignment of error is overruled.

IV

{¶ 121} Ferguson's third assignment of error is as follows:

{¶ 122} "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."

{¶ 123} 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 24-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.

{¶ 124} Prior to trial, Aldrich Chemical moved to exclude evidence of loss of use or annoyance and discomfort that occurred after the 24-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 24-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.

{¶ 125} 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 24-hour 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 24-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.

{¶ 126} 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.

{¶ 127} 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 nitrous oxide 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.

**{¶ 128}** "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.

**{¶ 129}** 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. 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. 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:

**{¶ 130}** "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.

{¶ 131} "* * *

{¶ 132} "* * * But in any event * * * that's the Court's ruling that – that testimony is not legally admissible * * *."

{¶ 133} 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.

{¶ 134} "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. E. Ohio Gas Co.*, Mahoning App. No. 01 CA 207, 2003-Ohio-1229, ¶ 18.

{¶ 135} 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 nitrous-oxide-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.

{¶ 136} Ferguson's third assignment of error is sustained.

V

{¶ 137} Ferguson's fourth assignment of error is as follows:

{¶ 138} "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."

{¶ 139} Under this assignment of error, Ferguson contends that the trial court erred in excluding 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 20 years and that the jury could not understand the extent of the nuisance unless it heard about prior calamities.

{¶ 140} 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.

{¶ 141} " ' 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, quoting *Lumpkin v. Wayne Hosp.,* Darke App. No. 1615, 2004-Ohio-264, ¶ 13. However, Aldrich Chemical's notice of knowledge of a dangerous condition was not at issue, since Aldrich Chemical admitted liability for the explosion.

{¶ 142} 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* (Jan. 18, 2002), Hamilton App. Nos. C-010165, C-010202, and C-010260, 2002 WL 63560 (four-year statute of limitations applies to nuisance actions).

{¶ 143} 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."

{¶ 144} 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.

{¶ 145} 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 preblast programs that should be done by companies handling explosive materials, and the fact that Isotec did not conduct these activities.

{¶ 146} 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.

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

{¶ 148} Accordingly, the fourth assignment of error is sustained in part and is overruled in part.

VI

{¶ 149} Ferguson's fifth assignment of error is as follows:

{¶ 150} "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."

{¶ 151} 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.

{¶ 152} 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 24-hour 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]

{¶ 153} 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

{¶ 154} 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

[4]The 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.

Judgment reversed

and cause remanded.

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

SUMNER E. WALTERS, J., retired, of the Third District Court of Appeals, sitting by assignment.

A

**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO**

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| **CHRISTIE BANFORD, et al.,** | : | Case No. 03-CV-8704 |
| Plaintiffs, | : | (Judge Dennis J. Langer) |
| v. | : | |
| **ALDRICH CHEMICAL COMPANY, INC.,** | : | |
| Defendant. | : | |

| | | |
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| **WILLIAM O'DONNELL, et al.,** | : | Case No. 03-CV-8865 |
| Plaintiffs, | : | (CONSOLIDATED) |
| v. | : | **FINAL AND APPEALABLE DECISION, ORDER AND ENTRY SUSTAINING THE PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, SUBJECT TO SPECIFIC CONDITIONS AND MODIFICATIONS** |
| **ALDRICH CHEMICAL COMPANY, INC.,** | : | |
| Defendant. | : | |

This matter is before this Court on the *Motion for Class Certification Filed Under Seal* [hereinafter the "*Mot. Class Cert.*"][1] filed March 3, 2005 collectively[2] by Plaintiff Christie Banford [hereinafter individually "Banford"], Plaintiff Doug Graeser [hereinafter individually "Graeser"], Plaintiff William O'Donnell [hereinafter individually "W. O'Donnell"], and Plaintiff Melissa O'Donnell [hereinafter individually "M. O'Donnell" and collectively with W. O'Donnell "the O'Donnells"]. Defendant Aldrich Chemical Company, Inc. [hereinafter "Aldrich"] filed a *Memorandum in Opposition to Plaintiffs' Motion for Class Certification* [hereinafter the "*Cert. Opp.*"] on March 31. The Plaintiffs filed a *Reply* [hereinafter "*Cert. Reply*"] on April 18. Aldrich filed a *Sur-Reply* on May 6 and a second *Surreply* on June 17 [hereinafter respectively the "*First Cert. Sur-Reply*" and the "*Second Cert. Sur-Reply*"]. This matter is properly before this Court.

This matter is also before this Court on the *Motion to Strike Plaintiffs' New Evidence and Arguments, or in the Alternative, Motion for Leave to File a Sur-Reply Memorandum to Plaintiffs' Reply to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Class Certification* [hereinafter the "*Mot. Strike New Evid.*"] filed by Aldrich on April 25, 2005. The Plaintiffs' filed a *Response* [hereinafter the "*New Evid. Response*"] on May 2. Aldrich filed a *Reply* [hereinafter "*New Evid. Reply*"] on May 6. This matter is properly before this Court.

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[1] For purposes of clarity, two motions for protective order filed in November 2004 were approved in a *Stipulated Protective Order Governing Confidentiality and Privilege* submitted by t parties and filed by this Court. Subsequently, an *Agreed Entry* on April 20, 2005 stipulated to retaining only portions of the submitted materials under seal. Pursuant to its inherent authority to inspect materials submitted under seal, see *State ex rel. Abner v. Elliott* (1999), 85 Ohio St. 3d 11, 16, this Court has examined in camera all submitted materials.

[2] The individually named plaintiffs in both cases are hereinafter collectively referenced as "Plaintiffs."

This matter is also before this Court on the *Motion to Strike the Affidavit of Michael Wright or, in the Alternative, for Leave to File a Sur-Reply After Taking Wright's Deposition* [hereinafter "*Mot. Strike Wright*"] filed by Aldrich on April 27, 2005. The Plaintiffs filed a *Response* [hereinafter "*Wright Response*"] on May 9. Aldrich filed a *Reply* [hereinafter "*Wright Reply*"] on May 17. This matter is also properly before this Court.

This matter is also before this Court on the *Motion to Bifurcate the Determination of Compensatory and Punitive Damages Pursuant to Revised Code 2315.21* [hereinafter the "*Mot. Bifurcate*"] filed by Aldrich on April 27, 2005. On May 2, the Plaintiffs filed a *Response* [hereinafter the "*Bifurcate Response*"]. On May 9, Aldrich filed a *Reply* [hereinafter the "*Bifurcate Reply*"].

This matter is also before this Court on the *Motion for Leave to File a Supplemental Reply* filed by Aldrich on May 15.[3] Responsive memoranda were not filed. This matter is also properly before this Court.

This matter is also before this Court on the *Motion for a Case Management Conference* filed by Aldrich on May 9, 2005. Responsive memoranda were not filed. This matter is also properly before this Court.

## I. PROCEDURAL HISTORY

Before this Court are two cases that were respectively assigned Case Numbers 03-CV-8704 [hereinafter "the 8704 case"] and 03-CV-8865 [hereinafter "the 8865 case"]. The 8704 case was commenced by Banford and Graeser filing a *Complaint for Money Damages and Class Certification* on December 1, 2003 [hereinafter the "Banford/Graeser *Complaint*"] . The

[3] Attached was a proposed *Supplemental Reply to Bring the Court's Attention to New Applicable Caselaw*. This Court references hereinafter the May 16 *Motion* and the proposed *Supplemental Reply* collectively the "*Bifurcate Supplement*."

8865 case was commenced by W. O'Donnell and M. O'Donnell filing a *Class Action Complaint* on December 5, 2003 [hereinafter the "O'Donnells' *Complaint*"]. Both cases were removed to the federal District Court for the Southern District of Ohio. See December 31, 2003 *Notice of Filing for Removal* in the 8704 case and January 2, 2004 *Notice of Filing for Removal* in the 8865 case. The cases were returned from the federal District Court in mid-2004. On September 15, 2004, pursuant to an *Agreed Consolidation Order* filed by the parties, the 8704 case and the 8865 case were formally consolidated on this Court's docket.

A motion to dismiss regarding some of the claims in the 8704 case filed by Aldrich on July 2, 2004, to which Banford and Graeser responded on July 16. The motion was overruled in part and sustained in part on August 13, 2004. See 8704 case *Decision, Order and Entry Sustaining in Part and Overruling in Part Defendants' Motion to Dismiss* [hereinafter "the Aug. *Part. Dismissal*"] at 27. A similar motion to dismiss regarding some of the claims in the 8865 case was overruled in part and sustained in part on October 12, 2004. See 8865 case *Decision, Order and Entry Sustaining in Part and Overruling in Part Defendants' Motion to Dismiss or Strike* [hereinafter the "Oct. *Part. Dismissal*"] at 2.

On September 10, 2004, in the 8704 case only, Banford and Graeser filed a *Motion for Determination of This Suit as a Class Action* [hereinafter the "*Prior Class Cert. Mot.*"] and a *Motion in Opposition to Pre-Certification Discovery.* On September 21, Aldrich filed a *Motion to Postpone Briefing* regarding the *Prior Class Cert. Mot.* The foregoing three motions were briefed by the parties. On October 8, 2004, this Court filed a *Decision* that, inter alia, allowed pre-certification discovery and stayed the responsive briefing on the *Prior Class Cert. Mot.*

The October 8 *Decision* provided that the duration of the briefing stay would be addressed in an October 12, 2004 telephonic conference with the parties. In light of the parties'

representations to this Court during the October 12 conference, this Court filed a *Scheduling Order* providing two distinct briefing schedules.

The first schedule provided for the parties to brief this Court on case plan proposals. The Plaintiffs filed their *Proposed Litigation Plan* on November 5, to which Aldrich filed an opposing memorandum on December 1 [hereinafter the "*Plan Opp.*"] On January 11, 2005, this Court held a telephonic conference with the parties, in which a disposition on the case plan proposals was deferred.

The second schedule presented in the October 12 *Scheduling Order* addressed the deadlines for pre-certification discovery and for any renewed motions for class certification. Furthermore, in light of discussions with the parties on January 11, this Court filed an *Amended Scheduling Order* and *Second Amended Scheduling Order* addressing discovery deadlines and setting a trial date.

On December 22, 2004, Aldrich filed a *Motion for Summary Judgment on Recovery for Personal Injuries, Negligent Infliction of Emotional Distress, Recovery for Personal Property Damage, Recovery for Evacuation Expenses and, as to the O'Donnell Plaintiffs, Recovery for Real Property Damage and Diminution in Property Value* [hereinafter the "*Damages MSJ*"]. The Plaintiffs filed a *Response* on February 7, 2005. Aldrich filed a *Reply* on February 17. On February 24, this Court filed a *Decision* that deferred disposition of the *Damages MSJ* until after class certification, as raised by the *Prior Class Cert. Mot.*, was resolved.

On April 25, 2005, Aldrich filed a *Motion to Strike False and Misleading Affidavits* [hereinafter the "*Mot. Strike False Affidavits*"]. The Plaintiffs filed a *Response* [hereinafter "*Affidavits Response*"] on May 2. Defendant Aldrich filed a *Reply* [hereinafter "*Affidavits*

*Reply*"] on May 6. On June 30, this Court filed a *Decision* [hereinafter the "*Affidavits Decision*"] overruling the *Mot. Strike False Affidavits*.

**II. STATEMENT OF FACTS & PERTINENT LEGAL ANALYSIS**

In the memoranda pertaining to the instant *Mot. Class Cert.* and in memoranda pertaining to other prior motions, the parties have contested whether this Court must accept the facts pled in the complaints as true or whether this Court must reach factual determinations supported by submitted evidence. First, the propriety of a trial court analyzing beyond the pleadings the alleged facts is addressed as a matter of law. Second, the pertinent evidentiary materials are identified. Third, for purposes of deciding the instant *Mot. Class Cert.* only, a statement of facts derived from the evidentiary materials is provided.

**A. While not requiring the Plaintiffs to affirmatively prove their claims, to properly perform a rigorous analysis of the class certification factors in the cases at bar, this Court must analyze beyond the pleadings into the evidence submitted.**

The Plaintiffs argue that the substantive factual allegations pled in the two complaints must be assumed as true. See *Mot. Class Cert.* at 29-30 (citing *Pyles v. Johnson* (2001), 143 Ohio App. 3d 720, 731; *Ojalvo v. Bd. of Trustees of Ohio State Univ.* (1984), 12 Ohio St. 3d 230, 233; *Szabo Bridgeport Machines, Inc.* (C.A. 7, 2001), 249 F.3d 672, 675; *Eisen v. Carlisle & Jacqueline* (1974), 417 U.S. 156, 177; *Elkins v. American Showa, Inc.* (S.D. Ohio 2002), 219 F.R.D 414, 420). In rebuttal, Aldrich argues that the cases cited by the Plaintiffs do not support their proposition. It distinguishes *Ojalvo* by highlighting that the pleadings were never at issue in that case. See *Cert. Opp.* at 4 (citing *Ojalvo*, 12 Ohio St. 3d at 233). It distinguishes *Pyles* by highlighting that the parties did not appear to contest the underlying facts in that case. See *Cert. Opp.* at 4 (citing *Pyles*, 143 Ohio App. 3d at 731). Notably, Aldrich relies on *Szabo*,

highlighting that the portion cited by the Plaintiffs was actually the district court's reasoning that was expressly rejected with considerable explanation by the Seventh Circuit. See *Cert. Opp.* at 4 (citing *Szabo*, 249 F.3d at 675-676).

Aldrich additionally cites caselaw for the proposition that inquiry into the merits--including the factual allegations--may be necessary insofar as such inquiry is probative of the class certification factors. Inter alia, it cites *Thomas v. Moore USA, Inc.* (S.D. Ohio 1999), 194 F.R.D. 595, 597-598, 601 n.8 and *Petty v. Wal-Mart* (2002) 148 Ohio App. 3d 348, 355 [hereinafter "*Petty II*"]. In *Thomas*, Judge Walter Rice deferred addressing the class certification issues until after allowing a summary judgment motion to be filed. Id., 194 F.R.D. at 602-603. In *Petty II*, the Second District distinguished improperly focusing on the underlying merits from incidental examination of some merits to otherwise properly ascertain a class certification factor. See id., 148 Ohio App. 3d at 355.

In the *Cert. Reply*, the Plaintiffs again reference *Ojalvo*, then argue that the quantum of supporting evidence necessary in a class certification context is only "enough evidence to establish that the claims have some basis." *Cert. Reply* at 4-5. They cite two sister-state decisions in support. Id. at 5 (citing *Cabana v. Littler* (R.I. 1992), 612 A.2d 678, 686, and *Branden v. Chefetz* (N.Y. App. 1985), 106 A.D.2d 162, 168).

As noted above, the parties have previously argued this issue in the cases sub judice. Prior to the Plaintiffs' filing of the instant *Mot. Class Cert.*, this Court was "not persuaded that its analysis * * * is limited to the factual allegations in the two complaints." October 8, 2004 *Decision* at 5; see also id. at 4-5 (providing the reasoning for this Court's determination, which included express review of *Pyles* and *Ojalvo*). Additionally, in the June 30, 2005 *Decision*, this Court recognized that "'[t]he party pursuing certification of a class action bears the burden of

showing *by a preponderance of the evidence* that the prerequisites set forth in Civ. R. 23 are present and that the action falls within one of the categories of Civ. R. 23(B).'" June 30, 2005 *Decision* at 6 (quoting *Coles-Morgan v. Flagship Mortgage Corp.*, 2005 Ohio 2994 at ¶ 9 (citing *State ex rel. Ogan v. Teater* (1978), 54 Ohio St. 2d 235, 247) (emphasis added)).

This Court finds that in the *Cert. Reply*, the Plaintiffs implicitly abandoned their argument that the factual allegations must be assumed to be true. Furthermore, the arguments and legal citations by the parties were previously considered in two prior decisions, which this Court has not been persuaded to reject. Accordingly, this Court hereby finds persuasive as a matter of law that while the class certification analysis may not be judicially modified to require a named plaintiff to affirmatively prove the merits of the case, a properly rigorous analysis may require inquiry into aspects of the merits that relate to contested class certification factors. Furthermore, when applicable, persuasive caselaw demonstrates that summary judgment may be preemptively used to narrow the cognizable claims that the named plaintiffs may assert for possible class certification.[4] Additionally, Ohio precedent establishes that the quantum of proof that the party seeking class certification must provide is a preponderance of the evidence. The Plaintiffs' reliance on purportedly contrary sister-state precedent is unpersuasive.

Therefore, this Court finds that in analyzing the instant *Mot. Class Cert.* and the related memoranda, the factual allegations must be demonstrated by a preponderance of the evidence.

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[4] This Court previously exercised its discretion in the February 24, 2005 *Decision* to defer directly addressing the summary judgment arguments. Accordingly, the instant *Decision* addresse only whether the named Plaintiffs have satisfied the rigorous analysis for class certification. The instant *Decision* reaches no determination regarding whether summary judgment in favor of Aldri and against the individual claims of the four named Plaintiffs.

**B. For purposes of the class certification analysis only, this Court may consider all of the evidentiary materials submitted by the parties.**

This Court has determined above that probing beyond the allegations in the pleadings is appropriate in conducting the class certification analysis in this case and that the standard of proof on the movant, the Plaintiffs, is a preponderance of the evidence. Notably, the parties have contested in numerous memoranda whether certain items of proffered evidence may be properly considered. For the reasons that follow, this Court finds that at the class certification stage, all evidence proffered by the parties may be properly considered.

This Court first notes that its research has not identified any Ohio appellate decisions[5] that address what evidentiary limitations, if any, apply to the class certification analysis. Furthermore, unlike other procedural rules such as Civ. R. 56 (summary judgment) that expressly limit the forms of evidence that may be properly considered, Civ. R. 23 is silent regarding the scope of pre-certification evidence.[6] As a matter of interpretation, because the Civil Rules of Procedure have demonstrated that evidentiary limitations have been expressly provided in some provisions but notably omitted from pertinent portions of Civ. R. 23, this Court finds that evidentiary limitations were not intended for the class certification analysis.

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[5] The federal courts, as potential persuasive authority, appear split on this issue. Compare *Unger v. Amedisys Inc.*, 401 F.3d 316 (5th Cir. 2005) ("Like our brethren in the Third, Fourth, Seventh and Ninth Circuits, we hold that a careful certification inquiry is required and findings m be made based on adequate *admissible* evidence to justify class certification.") (emphasis added) with *Charleswell v. Chase Manhattan Bank, N.A.*, 223 F.R.D. 371, 378-379 (D.V.I. 2004) (citing numerous federal district court decisions that approved consideration of submitted evidence even when the evidence was not admissible in its proffered form); *Force v. ITT Hartford Life & Annuit Ins. Co.* (In re Hartford Sales Practices Litig.), 192 F.R.D. 592, 597 (D. Minn. 1999) (citing additional cases, including *Eisen v. Carlisle & Jacquelin* (1974), 417 U.S. 156, 178, for the proposition that the class certification analysis is not restrained by the more formal rules and procedures of civil trials). Accordingly, this Court finds federal caselaw unpersuasive on this issu

[6] Notably, Civ. R. 23(D) does address the presentation of evidence, but that provision expressly applies only to civil actions already certified for class treatment.

In light of the foregoing, regarding the specific evidentiary materials challenged by the parties, particularly those items identified in the motions to strike, this Court is unpersuaded that the evidence may be stricken at this procedural stage in the cases at bar. Furthermore, in previous telephonic conference with the parties, this Court orally[7] overruled in part the *Mot. Strike New Evid.* and the *Mot. Strike Wright*, but sustained the alternative motions for leave to file additional memoranda to specifically address the evidentiary issues. Furthermore, in a telephonic conference with the parties on August 19, 2005, this Court orally ruled that based on an initial review of the memoranda and evidentiary materials submitted, an evidentiary hearing in open court was unnecessary.[8]

This Court notes that the amount of evidentiary materials submitted with the various class certification memoranda[9] is substantial. For purposes of clear identification for the record, an inventory of the evidentiary materials examined by this Court is attached to this *Decision* as Appendix A, Appendix B, and Appendix C.

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[7] This Court is mindful that "[a] court of record speaks only through its journal entries." *State ex rel. Geauga County Bd. of Comm'rs v. Milligan* (2003), 100 Ohio St. 3d 366, 370. Accordingly, for completeness of the record, this Court hereby overrules in part and sustains in pa the *Mot. Strike New Evid.* and the *Mot. Strike Wright*, whereby striking the evidentiary materials denied but the alternative request to file supplemental memoranda is granted.

[8] For purposes of completeness of the record, this Court hereby finds that an evidentiary hearing in open court is unnecessary. In light of this finding, the *Motion for a Case Management Conference* filed by Aldrich is overruled as moot.

[9] The *Mot. Class Cert.*, the *Cert. Opp.*, the *Cert. Reply*, the *First Sur-Reply*, and the *Secon Sur-Reply*. Additionally, in the *Affidavits Decision*, this Court expressly recognized that the materiality of the residents' affidavits submitted by the Plaintiffs may be addressed for purposes c their use as evidentiary support for class certification. Accordingly, the evidentiary materials submitted with the *Mot. Strike False Affidavits* are also considered herein.

**C. Statement of Facts for Class Certification Analysis**

In light of the foregoing, for purposes of conducting the class certification analysis only, this Court hereby finds the following summarized[10] facts have been demonstrated by a preponderance of the evidence. For purposes of organization, this Court first summarizes the distillation process being performed at Aldrich's Isotec Factory [hereinafter "Isotec"] located at 3858 Benner Road in Miamisburg, Montgomery County, Ohio and the circumstances of the explosion. Second, the evacuations in the surrounding Miamisburg neighborhoods occurring close in time after the explosion are summarized. Third, descriptions of subsequent events related to the explosion and the commencement of the instant civil actions are provided. Fourth, a summary of other alleged incidents, investigations, and citations pertaining to Aldrich's operations at Isotec.

**1. Summarized Facts regarding the September 21, 2003 explosion at Isotec**

Isotec was engaged in a process of cryogenic nitric oxide distillation. The process involves the reaction of sulfur dioxide in water and oxygen to make nitric oxide (NO). The NO is put through a purifier then pumped into a distillation column. The pertinent distillation column at Isotec was designated the third nitric oxide column (the TNO column). The TNO column was comprised of a 300 foot cylindrical steel column encased in a cylindrical "vacuum jacket." Within the framework of a building on the Isotec property, only approximately 10 feet of the 300 foot column was above ground level, with the remainder of the TNO column being buried subsurface. The bottom of the column was a boiler and a condenser was the top.

[10] The purpose of the instant factual summaries is to provide a context for the legal analysi without limiting or excluding reference to facts otherwise presented by the entire evidentiary reco submitted by the parties. Accordingly, certain factual disputes between the parties have not been summarized because this Court found them to be immaterial to the pertinent legal issues.

The NO that is pumped into the TNO column is boiled at the bottom until it becomes gaseous, and then the gas rises up the column until it reaches the condenser at the top of the column. The condenser cools the gaseous NO until it becomes liquid NO, which falls to the bottom of the column. During this continuous distillation cycle, heavy isotopes of nitrogen ($N_{15}$) and heavy isotopes of oxygen ($O_{18}$) are pulled off from the rising gases at various levels of the column.

On September 21, 2003, around 7:15 A.M., an automated alarm was activated by the TNO column at Isotec. Employees responded to find a brownish-colored gas leaking from the TNO column into the air above the distillation building. Various efforts were made to stop and divert the leaking gas. However, around 10:00 A.M., the TNO column exploded in a flash of light followed by a shock wave.

**2. Summarized Facts regarding the post-explosion evacuation of the area surrounding Isotec**

After the TNO column exploded at Isotec, numerous local emergency services personnel responded. Members of those emergency agencies reached a decision to issue an evacuation order to the area surrounding the Isotec. Police officials were dispatched to proceed by traveling through the surrounding area streets, using loudspeakers to announce the evacuation order and setting up police-maintained roadblocks. Notably, while many putative residents[11] evacuated, some did not. See Affidavit of Jana Frey, attached as Exhibit 7 to the *Cert. Opp.* Furthermore, the undisputed facts demonstrate that while some of the putative

[11] For purposes of collective reference, this Court hereinafter refers to any person, excludi the Plaintiffs, who was allegedly evacuated on the date of the explosion as a "putative resident." discussed further below, a "putative resident" may or may not also qualify as a putative plaintiff, because some putative residents live outside the one-mile radius used in the definition the Plaintif originally propose to define the class.

residents obtained temporary substitute lodging at hotels, others stayed with nearby friends or family. Eventually, all of the putative plaintiffs were able to return.

This Court notes, however, that the parties have contested numerous factual issues related to the post-explosion events, which are addressed separately below.

**a. This Court finds by a preponderance of the evidence presented that the evacuation was mandatory.**

The parties have contested whether the evacuation maintained by the local emergency officials is properly characterized as mandatory. Aldrich has presented David Fulmer, Chief of the Miami Township Fire Department, who represented that he understood the evacuation was not mandatory, residents were not ordered to leave, and police officers were instructed to not use force to remove people from the evacuation area. See Affidavit of David B. Fulmer, attached as Exhibit 6 to the *Cert. Opp.*, at ¶ 1-3. In rebuttal, the Plaintiffs have presented multiple putative residents who have represented that when they heard the police officials' loudspeaker announcements and encountered the police-maintained roadblocks, they understood the evacuation to be mandatory. See *Cert. Reply* at 5 n. 5 (listing six putative residents' affidavits). Aldrich counter-argues that all six affidavits should not be found credible because the language used appears to be substantially similar for each affidavit, and one affidavit (Rhonda Benson's) is facially inconsistent (her affidavit states that she was "home with my *wife* * * *." Id. at ¶ 2). Aldrich concludes that because the six affidavits should be afforded no evidentiary weight, the only remaining evidence demonstrates that the evacuation was not mandatory.

Fire Chief Fulmer's affidavit, while worthy of credibility, only demonstrates the understanding of the emergency officials when the evacuation order was issued. The facial

inconsistency of Rhonda Benson's affidavit, attached as Exhibit 4 to the *Cert. Reply.*, diminishes its persuasive weight, but does not, as a matter of law, require invalidation of the affidavit. See *Chase Manhattan Mortgage Corp. v. Locker*, 2003 Ohio 6665, ¶ 24-28 (Second District holding that mere clerical or "scrivener's error" on face of affidavit does not require invalidation of substance of affiant's statements). Furthermore, the general similarity of the other affidavits diminishes their persuasive weight.

However, this Court notes that the undisputed facts show that emergency officials authorized the use of roadblocks maintained by police officials who prohibited putative residents from entering. Additionally, while the actual statements conveyed by loudspeaker has not been provided in the evidence, the evidence does reflect the usage of loudspeakers to announce the evacuation. For purposes of deciding the instant *Class Cert. Mot.* only, this Court finds by a preponderance of the evidence that the evacuation was understood by many of the putative residents to be mandatory.

**b. This Court finds by a preponderance of the evidence presented that while some putative residents assert that they were also evacuated, the status of putative plaintiff factually requires the putative resident to have lived within the one-mile radius around Isotec, which twelve of the putative residents factually did not.**

The Plaintiffs have presented this Court with numerous putative residents who state by affidavit that they were evacuated after the explosion at Isotec. See generally the affidavits listed in Appendix B (as discussed infra, this Court's list of non-excluded putative residents) and Appendix C (as discussed infra, this Court's list of excluded putative residents). Aldrich has argued that many of the putative residents' affidavits inaccurately state that they lived within the one-mile radius around Isotec on September 21, 2003. In support, Aldrich cites the

April 2005 Affidavit of David C. Cowherd, M.S., P.E., attached as Exhibit 2 to the *Mot. Strike False Affidavits* [hereinafter the "April Cowherd Affidavit"] and the map attached as Exhibit A thereto [hereinafter "the one-mile radius map"]. Mr. Cowherd has opined that twelve of the putative residents live beyond the one-mile radius, supporting his opinion with a demonstrative aerial photograph. The Plaintiffs factually reply[12] by summarily contesting the authenticity of the aerial photograph and the markings on it, including the scale used to delineate the one-mile radius.

This Court has identified above the general evidentiary framework provided by Ohio law for addressing evidentiary issues, including whether a submitted piece of evidence may be properly considered. Therefore, the Plaintiffs' general counter-argument regarding the evidentiary authenticity of Mr. Cowherd's opinions and supporting map are unpersuasive. For purposes of deciding the instant *Class Cert. Mot.* only, this Court accordingly finds by a preponderance of the evidence that twelve putative residents[13] factually lived outside of the one-mile radius surrounding Isotec.

**c. This Court finds by a preponderance of the evidence presented that although many putative plaintiffs may have remained away for more than one day, the duration of the official evacuation was approximately twenty-four hours.**

The parties have also contested the length of the official evacuation. The Plaintiffs have presented affidavits from multiple putative plaintiffs and their own affidavits that state that they

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[12] The Plaintiffs also address this issue as a matter of law in their discussion of the class definition issue, infra.

[13] Those putative residents who lived beyond the one-mile radius are: (1) Michelle Barr, (2 Randal Barr, (3) Donald Benson, (4) Rhonda Benson, (5) Bobby Croley, (6) Shirley Croley, (7) Eddie Davis, (8) Andrew Grooms, (9) Susan Grooms, (10) Donald Koverman, (11) Earl Lutz, (12 George Lynch. These excluded affidavits have been collectively listed in Appendix C.

remained away for more than a day. Aldrich has responded with Fire Chief Fulmer's affidavit, which states that the official duration of the evacuation was slightly greater than twenty-four hours.

This Court finds that the foregoing arguments are not factually inconsistent. The Plaintiffs have focused on the factual amount of time the putative residents remained away. Aldrich has focused on the factual amount of time that the emergency officials maintained the mandatory evacuation. Notably, no evidence has been presented that the length of time–in excess of the twenty-four hours–that the putative residents remained away logically connects to the duration of the official evacuation.

For purposes of deciding the instant *Class Cert. Mot.* only, this Court finds by a preponderance of the evidence that the duration of the official evacuation was approximately twenty-four hours. While factually some putative residents may have stayed away longer than the duration of the official evacuation, that additional time away is not factually connected to the duration of the official evacuation.

**3. Summarized Facts regarding post-evacuation dealings between some evacuated residents and Aldrich**

After the evacuation ended, Aldrich established an extrajudicial claims investigation and compensation process through an agency named Crawford & Company [hereinafter "Crawford"]. Numerous putative residents presented claims to Crawford that were fully compensated. Other putative plaintiffs, however, were unsatisfied with the extrajudicial process. Two of the Plaintiffs' counsels' firms provided advertising literature to putative residents regarding the potential for a class action against Aldrich. Multiple public meetings

were held for the putative residents and others to appear and speak publicly. The two instant cases were subsequently filed.

**4. Summarized Facts regarding alleged prior misconduct by Aldrich**

While the cases sub judice relate directly to the TNO column explosion on September 21, 2003, explosions have previously occurred at Aldrich involving other cryogenic nitric oxide distillation columns. The federal Department of Labor Occupational Safety and Health Administration [hereinafter "OSHA"] has issued multiple regulatory citations to Aldrich. See generally the "Citation and Notification of Penalty" dated March 18, 2004, from U.S. Department of Labor Occupational Safety and Health Administration to Aldrich, attached as Exhibit E to the *Mot. Class Cert.* [hereinafter collectively "the OSHA Citations"]. Pursuant to applicable federal law, 29 C.F.R. § 1903.17(a), Aldrich contested and defended against the OSHA Citations in appropriate federal administrative proceedings. Subsequently, a Stipulation and Settlement Agreement [hereinafter "the OSHA Settlement"] was reached between Aldrich and the Secretary of the United States Department of Labor, in which many of the OSHA Citations were vacated/withdrawn or otherwise modified. Some of the OSHA Citations were affirmed.

## III. LEGAL ANALYSIS & FINDINGS OF LAW

The Ohio Supreme Court has stated that class certification is a procedural issue that must be raised by pre-trial motion. See *Warner v. Waste Management, Inc.* (1988), 36 Ohio St. 3d 91, 94. Furthermore, a grant or denial of class certification constitutes a procedural determination, not a determination of substantive rights. See *Warner*, 36 Ohio St. 3d at 94; *Woods v. Oak Hill Community Med. Ctr.* (1999), 34 Ohio App. 3d 261, 273-274. The underlying substantive merits of a potential class action are derived from the civil complaint.

Accordingly, to provide context, this Court first identifies the substantive causes of actions and damages claims pending in the cases sub judice. Second, this Court addresses the preliminary procedural issue of bifurcation raised by the parties. Third, this Court identifies the general legal standards applicable to motions for class certification. Fourth, this Court analyzes the parties' arguments regarding certification in light of the general standards of law and the pending claims. Fifth, this Court addresses the additional procedural matter of finality and appealability pertinent to the cases at bar in light of this *Decision* and other matters in the Procedural History, supra.

**A. Summary of Pending Causes of Action and Damages Claims**

This Court previously sustained in part two motions to dismiss, which effectively narrowed the causes of action and damages claims pending in the cases sub judice. See Aug. *Part. Dismissal* at 27; Oct. *Part. Dismissal* at 2. The causes of action that remain pending after those decisions[14] are:

1. **Negligence**--Count I (¶ 36-38, 40-41)in the Banford/Graeser *Complaint*; Second Claim for Relief (¶ 43-48) in the O'Donnells' *Complaint*;
2. **Strict Liability**--Count III (¶ 48-54) in the Banford/Graeser *Complaint*; First Claim for Relief (¶ 36-43) in the O'Donnells' *Complaint*;
3. **Negligent Infliction of Emotional Distress**--Count V (¶ 61-66) in the Banford/Graeser *Complaint*; Fifth Claim for Relief (¶ 60-64) in the O'Donnells' *Complaint*;
4. **Nuisance**--Count VI (¶ 67-71) in the Banford/Graeser *Complaint*; Sixth Claim for Relief (¶ 65-68) in the O'Donnells' *Complaint*.

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[14] Notably, the O'Donnells' *Complaint* initially included a second class of unnamed businesses with purported claims for lost profits. See id. at Tenth Claim for Relief (¶ 86-93). The Oct. *Part. Dismissal* did not expressly dismiss those claims. However, in examining the Plaintiffs' collective arguments regarding certification, this Court notes that the second class of unnamed businesses and lost profits claims have not been addressed. Accordingly, for purposes of determining whether class certification is appropriate, this Court finds those claims to be implicitl abandoned. Accordingly, pursuant to Civ. R. 23(D)(4), this Court orders the O'Donnell *Complai* to be amended to withdraw allegations related to representing unnamed businesses for claims of l profits.

Furthermore, based on the respective prayers for relief and the Aug. *Part. Dismissal* and the Oct. *Part. Dismissal*, the categories and sub-categories of damages sought are:

1. Compensatory damages, including compensation for:
   a. Damage to real property;
   b. Diminution of real property value;
   c. Evacuation expenses/loss of enjoyment of property;
   d. Damage to personal property;
   e. Personal Injuries; and
   f. Emotional Distress;
2. Punitive damages;
3. Interest on awarded damages;
4. Litigation expenses, including attorneys fees and expert witnesses fees.

**B. Based on pertinent constitutional and statutory law and the arguments of the parties, the cases sub judice shall proceed in four distinct phases.**

Having examined the submitted memoranda, this Court finds that as a preliminary procedural matter the parties have contested whether some form of bifurcation is procedurally appropriate for the cases at bar. This issue was in addressed in the *Proposed Litigation Plan* and responsive memoranda, on which this Court deferred disposition. This issue was again raised in the parties' responsive memoranda for the *Damages MSJ*, on which this Court also deferred disposition. While the *Prior Class Cert. Mot.* did not propose bifurcation, the Plaintiffs expressly raised the issue at the beginning of the *Mot. Class Cert.*, moving "to certify the instant action as a class action *as to the issues of liability and entitlement to punitive damages*." Id. (emphasis added). Aldrich opposed the Plaintiffs' proposed bifurcation in the *Cert. Opp.*, and provided a subsequent counter-proposal for bifurcation in the *Mot. Bifurcate*.

This Court finds that the parties' arguments regarding the class certification issues are premised on their respective bifurcation arguments. Pursuant to Civ. R. 23(D), the trial court is authorized to issue administrative orders regarding the course of proceedings in a certified class action. Also, a trial court inherently has broad administrative authority over cases pending on

its docket. See *Mayer v. Bristow* (2000), 91 Ohio St. 3d 3, 7; *Teffer v. Hornbeck*, 2002 Ohio 3788, ¶ 11 (quoting *State ex rel. Buck v. McCabe* (1942), 140 Ohio St. 535, 537). Accordingly, this Court will preliminarily address the bifurcation issue and apply the determination in resolving the class certification issues in Section III.D. infra.

Regarding the trial-related portion of the Plaintiffs' *Proposed Litigation Plan*, a certified class action is proposed to proceed initially on only liability. If liability is established, the second phase of the proposal is for a court-appointed Special Master "to review claims for damages and hold damages hearings if, and when, necessary." *Proposed Litigation Plan* at [3]. The Plaintiffs' proposed bifurcation is repeated in the *Mot. Class Cert.* They propose that a certified class action proceed first to a determination of liability/entitlement to punitive damages and second, assuming the first determination is favorable to the class, the cases would proceed to a determination of the amount of compensatory/punitive damages to be awarded. *Mot. Class Cert.* at 20. The Plaintiffs cite for support *Reynolds v. CSX Transportation Inc.* (1989), 55 Ohio. App. 3d 19, 24-25 [hereinafter "*CSX II*"], in which the Second District affirmed a class action bifurcated in a manner similar to the instant proposal. They also highlight that factually the *Reynolds* case involved a class action involving an evacuation and putative class claims for varied injuries and damages.

In rebuttal, Aldrich argues that the proposed bifurcation is an attempt to manufacture predominantly common issues in order to obtain class certification and that it improperly infringes on Aldrich's right to a jury trial. Aldrich recognizes that Civ. R. 23(C)(4) allows a civil action, when appropriate, to be "brought or maintained as a class action with respect to particular issues." *Plan Opp.* at 5 n.3 (quoting Civ. R. 23(C)(4)). However, Aldrich argues that Civ. R. 23(C)(4) should not be used in the instant cases because the issues within the

entirety of the civil action that may severed are such relatively small portions that judicial economy will not be advanced. Aldrich cites two federal circuit court cases–*Blyden v. Mancusi* (C.A. 2, 1999), 186 F.3d 252, 268 and *Castano v. Am. Tobacco Co.* (C.A. 5, 1996), 84 F.3d 734, 745 n.21–in support of its argument.

Aldrich's second objection to the proposed bifurcation is that it impliedly would require the Plaintiffs to present the punitive damages liability issue before an assessment of actual/compensatory damages is made. They argue that the Plaintiffs' proposal defers for non-certified treatment the individualized issues of proximate causation and compensatory damages, but that the Plaintiffs want to present in the first part of the bifurcated trial evidence related to potential punitive damages liability. In support, Aldrich cites *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 419, 424-426, and *Bacon v. Honda of Am. Mfg.* (S.D. Ohio 2001), 205 F.R.D. 466, 485, 489-490, affirmed (C.A. 6, 2004), 370 F.3d 565, cert. denied (Feb. 22, 2005), 2005 U.S. LEXIS 1537. It argues the cases provide that punitive damages may only be properly determined after liability for compensatory damages and the amount of compensatory damages have been decided. See *Plan Opp.* at 6-8.

Aldrich raises additional arguments and a counter-proposal in the *Cert. Opp.* and the *Mot. Bifurcate*. Aldrich argues that the bifurcation used by Judge Kessler and affirmed by the Second District in the *CSX II* case is no longer appropriate in light of the United States Supreme Court's decision in *Campbell* and the recently amended R.C. § 2315.21(C)(2). In response, the Plaintiffs argue that the recently effective version of R.C. § 2315.21 may not be applied in the cases at bar because doing so would result in an unconstitutional retroactive application of the statute. The parties cite numerous conflicting cases from Ohio and other jurisdictions.

In light of the parties' arguments, bifurcation of the trial in some manner will be procedurally necessary. To do so, this Court finds that Ohio's procedural rules have provided it with broad case management authority. With respect to certified class actions, arguendo, Civ. R. 23(D)(4) provides that "the court may make appropriate orders: (1) *determining the course of proceedings* or prescribing measure to prevent undue repetition or complication in the presentation of evidence or argument * * *." Id. (emphasis added). Additionally, Civ. R. 23(C)(4) provides that "[w]hen appropriate (a) an action may be brought or maintained as a class action *with respect to particular issues* * * *." Id. (emphasis added). Furthermore, the more general provisions of Civ. R. 42(B) allows the trial court "after a hearing, in furtherance of convenience or to avoid prejudice, or *when separate trials will be conducive to expedition and economy*, may order a separate trial of any claim, * * * or of any separate issue * * *, always preserving inviolate the right to trial by jury." Id. (emphasis added).[15]

On the assumption that class certification is granted, the Plaintiffs' bifurcation proposal involves two distinct "trial phases." The "first trial phase" would be a jury trial to determine "liability." The "second trial phase" would involve a court-appointed Special Master reviewing damages claims and, if necessary, conducting hearings. Although not specifically stated, the Plaintiffs' proposal implies that the Special Master's damages hearings would be bench hearings. See *Proposed Litigation Plan* at [3].

The Plaintiffs' bifurcation proposal generally reflects the format used by Judge Kessler in the *CSX* case. See *Reynolds v. CSX Transportation Co.* (Feb. 28, 1989), Montgomery Cty.

[15] In the context of a consolidation motion pursuant to Civ. R. 42(A), an Ohio court has he that "[h]earings conducted by the court need not be 'oral hearings.'" *Wagner v. Cleveland* (1988) 62 Ohio App. 3d 8, 17. This Court finds no distinction in the similar language of Civ. R. 42(B) th would otherwise require an oral hearing regarding bifurcation. Therefore, this Court finds that consideration of the multiple memoranda submitted by the parties regarding bifurcation satisfies t hearing requirement.

C.P.C. Case Nos. 86-CV-2053, 86-CV-3585 at 6-7 (Decision and Order on Objections to Special Master's Findings and Recommendations and Conditionally Approving a Class Action) (J. Kessler) (hereinafter "*CSX I*").[16] Judge Kessler expressly certified for trial "the issues of negligence and malice, if any * * *." Id. at 7. The Second District found no abuse of discretion, even remarking that "it was a well-reasoned decision based upon the trial court's unique ability to determine *which procedural devices are best* for handling such unwieldy cases." *CSX II*, 55 Ohio App. 3d at 24 (emphasis added). Notably, the parties do not contest that the bifurcation format used in *CSX I* and approved in *CSX II* is incompatible with the recently amended provisions of R.C. § 2315.21(B).

In contrast, Aldrich's bifurcation proposal applies the recently amended provisions of R.C. § 2315.21(B). It proposes a "first trial phase" involving jury determinations of liability and compensatory damages, and if those are established, then a "second trial phase" that would present the same jury with evidence related to potential punitive damages and a separate determination of whether punitive damages should be awarded, and if so, how much. See *Mot. Bifurcate* at 1-2. Aldrich cites caselaw in support of applying the amended version, but none of the caselaw actually addresses R.C. § 2315.21(B). See generally *Mot. Bifurcate*; *Bifurcate Reply*; *Bifurcate Supplement*. For example, in the *Bifurcate Supplement*, Aldrich argues that in *Huntsman v. Aultman Hosp.*, 2005 Ohio 1482, the Fifth District demonstrated that the amended version of R.C. § 2315.21(B) must be applied in these cases. However, Aldrich explains that *Huntsman* does not directly address R.C. § 2315.21(B), but another unrelated statute regarding a narrow aspect of pretrial discovery.

[16] In light of the unreported status of *CSX I*, this Court has attached a copy as Court's Exhi 2.

The parties citations are conflicting and not directly on point. Furthermore, this Court's independent research has also found no Ohio case that specifically decided whether the recent amendments to the statute may be applied to cases pending before the effective date but commencing trial after the effective date. The specific issue, therefore, is of some constitutional import without the benefit of direct precedent.

However, this Court finds that the constitutional issue would only be pertinent if the provisions of the revised statute are applied by mandate herein. In contrast, the bifurcation format used in *CSX I* was not mandatory, but represents that trial court's case-specific determination. Furthermore, notwithstanding the potential that revised R.C. § 2315.21(B) is mandatory, this Court may in its discretion find the statutory format presents the best use of Ohio's procedural devices for the cases sub judice.

In light of this Court's determination below, the constitutional issue should not be decided here. A well-settled principal of Ohio jurisprudence is that constitutional questions should only be decided when absolutely necessary. See *Norandex, Inc. v. Limbach* (1994), 69 Ohio St. 3d 26, 28 (citing *State ex rel. Hofstetter v. Kronk* (1969), 20 Ohio St.2d 117, 119). Having considered the parties' arguments with the constitutional question omitted, this Court finds that the interests of economy and efficiency will be best served when the trials of the cases at bar are conducted in bifurcated trial phases as described below.

**1. The First Phase**

The Plaintiffs have set forth four substantive causes of action, but have only sought class certification on "liability" and "entitlement to punitive damages," thereby expressly excluding the causation and amounts of damages issues. This Court finds that the "liability" issues (e.g. whether Aldrich factually breached a duty for purposes of the negligence cause of

action; whether the conduct and resulting explosion demonstrates strict liability; whether the conduct constitutes an absolute or qualified nuisance) should be presented on a class basis[17] in a "first phase" jury trial. However, in order to limit the jury's determination to only "liability" related to the instant causes of action, the first jury trial will not include any evidence or argument that solely relates to the "malice" or punitive damages issue.

**2. The Second Phase**

Assuming that the first jury trial results in a "liability" verdict finding that Aldrich committed culpable misconduct, the 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 determination are individualized causation and compensatory damages.

**3. The Third Phase**

Assuming that the "second phase" juries return verdicts finding causation and compensable damages, the cases will re-certify to proceed in a "third phase" class action jury trial to determine whether factually Aldrich acted maliciously such that punitive damages and an attorneys' fee award are appropriate. Notably, the "third phase" jury will be instructed as a matter of law regarding the verdicts from the "first phase" and "second phase" juries, thereby limiting the successor "third phase" jury to only determine whether punitive damages should be awarded and whether attorneys fees should be awarded.

[17] The reasoning for certifying class treatment of the "liability" issue is set forth below.

**4. The Fourth Phase**

Assuming the "third phase" jury finds that factually Aldrich engaged in malicious conduct, the "third phase" jury will determine in a "fourth phase" the amount of punitive damages. The amount of the attorneys fees award will not be submitted in the "fourth phase," but will be determined as a matter of law in subsequent proceedings by this Court. See *Digital & Analog Design Corp. v. N. Supply Co.* (1992), 63 Ohio St. 3d 657, 662-663. Furthermore, the parties will not be permitted to present evidence or argument related to legal standards limiting the maximum amount of awardable punitive damages or to the potential amounts for the attorneys fees award.

**5. The Constitutionality of Multiple Juries Within a Single Civil Action**

This Court is mindful that the foregoing four-phase litigation format involves multiple separate juries and that Aldrich has raised the constitutional issue of the right to trial by jury. See the Seventh Amendment to the United States Constitution and Section 5, Article I of the Ohio Constitution. Because this Court finds that the individualized compensatory damages issue must intervene between the "liability" phase and the "punitive damages" phases, the use of multiple juries is unavoidable. Accordingly, the constitutionality of using multiple juries must be addressed.

Based on this Court's research and the citations provided by the parties, this Court initially notes these cases likely provide the first impression in Ohio for the use of multiple juries in different phases of a potential class action. However, a few federal circuit courts have addressed the issue, which this Court may consider as persuasive authority. See Section III.C. infra (citing Ohio Supreme Court caselaw that recognizes federal caselaw as persuasive

authority in class certification issues). Furthermore, because the federal Seventh Amendment provisions regarding jury trial rights are implicated, federal caselaw is highly instructive.

For purposes of completeness, the case of *Layne v. McGowen* (Nov. 14, 1997), 2d Dist. Case No. 16400, 1997 Ohio App. LEXIS 5081, identified by this Court's research, appears to raise the issue of a successive jury re-deciding matters presented to a prior jury. However, on close examination, *Layne* is distinguishable and does not resolve the matter on point.

The pertinent argument in *Layne* was the applicability of collateral estoppel in subsequent proceedings in a remanded case. See id. at *3, *11. The arguments that the second jury would re-determine the identical issues submitted to the first jury were rejected by the Second District. The court found that the reversible error required that the matters be retried, precluding collateral estoppel from applying. See id. at *11.

The Second District never addressed the use of successive juries within a single, un-remanded civil action. The issue herein is not collateral estoppel, but the right to a jury trial. Therefore, while *Layne* on its face appears to raise the issue of a second jury re-deciding an issue presented to a first jury, the analysis was distinguishable and the decision therefore is not on point with the issue herein.

In *Robinson v. Metro-North Commuter R.R. Co.* (C.A. 2, 2001), 267 F.3d 147, the federal Second Circuit Court of Appeals analyzed the denial of a class certification. In pertinent part, the court found that "the district court erred in refusing to bifurcate * * * and certify the liability stage of the claim for (b)(2) class treatment." Id. at 167. The right to jury trial argument is presented by the amicus curiae:

> The Equal Employment Advisory Council, as amicus curiae on behalf of Metro-North, advances an additional argument against partial class certification which, though speculative at this stage, nonetheless warrants mention: that partial certification would risk violating the Re-examination Clause of the

> Seventh Amendment. The Re-examination Clause provides in relevant part that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States." U.S. Const. amend. VII. Amicus curiae contends that given the number of members in the putative class, the district court is likely to try the remedial phase of each class member's claim before a separate jury from the one that considers the liability phase, and that, should this occur, overlapping factual issues would be presented to the liability-phase and remedial-phase juries in violation of the Re-examination Clause. We disagree.

Id. at 169. The Second Circuit states that "[t]rying a bifurcated claim before separate juries does not run afoul of the Seventh Amendment, but a 'given [factual] issue may not be tried by different, successive juries.'" Id. (second bracketed modification sic; end citation omitted). The court approves commentary identifying the use of carefully-crafted jury interrogatories to manage a bifurcated case with successive juries. Id. (citing Gensler, Bifurcation Unbound (2000), 75 Wash. L. Rev. 705, 736-737).

The federal Seventh Circuit Court of Appeals is in accord with the Second Circuit:

> [Q]uestions in a single suit can only be tried by different juries if they are "so distinct and separable from the others that a trial of [them] alone may be had without injustice." *Gasoline Products Co. v. Champlin Refining Co.* (1931), 283 U.S. 494, 500. In other words, the district court "must not divide issues between separate trials in such a way that the same issue is reexamined by different juries." *Matter of Rhone-Poulenc Rorer Inc.* (C.A. 7, 1995), 51 F.3d 1293, 1303. While both juries can examine overlapping evidence, they may not decide factual issues that are common to both trials and essential to the outcome. *PaineWebber, Jackson & Curtis v. Merrill Lynch, Pierce, Fenner & Smith* (D. Del. 1984), 587 F. Supp. 1112, 1117.

*Houseman v. U. S. Aviation Underwriters* (C.A. 7, 1999), 171 F.3d 1117, 1126 (internal parallel citations omitted); see also *E.E.O.C. v. Dial Corp.* (N.D. Ill. 2001), 156 F. Supp.2d 926, 957-958 and cases cited therein. The federal Sixth Circuit Court of Appeals, while being more cautious in its endorsement of a district court's discretion to bifurcate and use successive juries, is also generally in accord. See *Olden v. Lafarge Corp.* (C.A. 6, 2004), 383 F.3d 495, 509.

In contrast, this Court has found only one circumstance in which a trial court clearly could bifurcate, but could not use successive separate juries. In *City of El Monte v. Superior Court of Los Angeles County* (1994), 29 Cal. App. 4th 272, a state appellate court analyzed a California state code section that expressly provided for bifurcation upon motion, but also expressly provided that the evidence for the "second phase" regarding punitive damages must be presented to the same jury that was presented the "first phase" regarding liability. See id. at 274-275. Notably, no comparable procedural statute was applicable in the federal circuit court cases cited above. Also, this Court finds that Ohio has no comparable procedural statute or rule requiring single-jury adjudications in bifurcated cases.

In light of the foregoing analysis, this Court finds no absolute bar in Ohio from a trial court managing a class action with bifurcation and successive juries. However, the caselaw above implicitly requires support for exercising its discretion to bifurcate and empanel successive juries. In the cases sub judice, this Court finds that the four-phase trial plan best serves the interests of judicial economy, reduced potential prejudice, and sound case management.

By separating the issue of "liability"-determinations related to the four causes of action and, if necessary, to the amount of compensatory damages-the parties' evidentiary burdens will be narrowed, thereby likely condensing number of witnesses and exhibits presented and the trial time expended. Additionally, focusing on compensatory liability separate from punitive liability, the verdict of the "first phase" jury will likely be insulated from the potentially prejudicial evidence necessary to establish punitive liability and, if necessary, the appropriate amount of punitive damages. By requiring the "third phase" determination that punitive damages are warranted before proceeding to the "fourth phase" determination of the amount of

punitive damages, this Court's proposed format requires an appropriate culpability finding before proceeding to assess monetary considerations.

For purposes of contrast, this Court finds that the four-phase format avoids some of the potential concerns other possible formats present. First, as highlighted above, by independently finding that determinations of compensatory liability precedes determinations of punitive liability, the constitutional question of whether the amended statute applies is avoided. Second, the parties have not contested that determining the amount of compensatory damages, if any, will be an individualized process that is unmanageable on a classwide basis. However, as discussed more fully below, the determinations in the other "phases" are common issues that may be once-and-for-all-parties determined rather than requiring highly repetitive evidence to be presented individually.

The necessity for multiple, successive juries results from the intervention of the individualized compensatory damages phase between the liability phase and the punitive phases. Arguendo, without using a second successive jury in the third and fourth trial phases, the class action jury from the first phase would be conditionally discharged while the decertified second phase proceeded. Then, likely months later, the same class jury would be re-empaneled. This Court finds that the admonition on the jurors necessary to maintain their "open minds" during the interim would be questionable. Also, circumstances beyond all control, such as the death or illness of a juror, may occur that could possibly jeopardize the integrity of the empaneled jury. These possibilities weigh against maintaining a single jury.

Therefore, as detailed above, this Court finds that bifurcation is appropriate for the trial of the cases at bar. Accordingly, this Court sustains in part Aldrich's *Mot. Bifurcate*, but does not herein decide whether the provisions of amended R.C. § 2315.21(B) would mandatorily

apply. Furthermore, insofar as the Plaintiffs' *Mot. Class Cert.* also raises the bifurcation issue, this Court sustains in part and overrules in part that issue. Specifically, this Court hereby rejects presenting any evidence regarding entitlement to punitive damages during the "liability" first phase.

Also, the Plaintiffs proposed using an appointed Special Master to conduct any compensatory damages trials. Aldrich opposed, maintaining its right to jury trial on all elements. This Court is persuaded that absent consent by the parties to use of the Special Master, the jury trial right must be preserved. Therefore, this Court also rejects the proposal to appoint a Special Master for purposes of conducting the second trial phase; individualized jury trials conducted by this Court will be used to address the amounts of compensatory damages, if any.

**C. General Legal Standards for Class Certification Motions**

Civil actions that present claims seeking class treatment are governed by the provisions of Ohio Civ. R. 23 and attendant Ohio caselaw. In light of the substantially similar provisions in the federal counterpart to Ohio Civ. R. 23, the Ohio Supreme Court has recognized that federal cases may provide additional persuasive legal authority. See *Wilson v. Brush Wellman, Inc.*, 2004 Ohio 5847, ¶ 17 n. 4 (citing *Marks v. C.P. Chemical Co.* (1987), 31 Ohio St. 3d 200, 201); see also the Staff Note to Ohio Civ. R. 23; Fed. R. Civ. P. 23(a)-(e). In *Hamilton v Ohio Savings Bank* (1998), 82 Ohio St. 3d 67, the Ohio Supreme Court enumerated the distinct legal issues pertinent to a class certification motion:

> The following seven requirements must be satisfied before an action may be maintained as a class action under Civ. R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous; (2) the named representatives must be members of the class; (3) the class must be so numerous that joinder of all members is impracticable; (4) there must be questions of law or fact common to the class; (5) the claims or defenses of the representative

> parties must be typical of the claims or defenses of the class; (6) the representative parties must fairly and adequately protect the interests of the class; and (7) one of the three Civ. R. 23(B) requirements must be met.

Id. at 71 (end citations omitted). "The burden of establishing the elements of a class action rests on the party seeking certification." *American Medical Systems, Inc. v. Pfizer* (C.A.6, 1996), 75 F. 3d 1069 (citing *Gen. Tel. Co. of the Southwest v. Falcon* (1982), 457 U.S. 147, 161). "The trial court must find, by a preponderance of the evidence, that all seven requirements have been met in order to grant class certification." *Petty II*, 148 Ohio App. 3d at 352 (citing *Warner*, 36 Ohio St. 3d at 96); *Williams v. Countrywide Home Loans, Inc.*, 2002 Ohio 5499.

The Ohio Supreme Court has found that "[a] trial judge has broad discretion in determining whether a class action may be maintained * * *." *Warner*, 36 Ohio St. 3d at 99 n.10 (citing *Marks*, 31 Ohio St. 3d 200 at the syllabus) (bracketed modification sic); *Petty II*, 148 Ohio App. 3d at 352 (citing *Baughman v. State Farm Mut. Auto. Ins. Co.* (2000), 88 Ohio St.3d 480, 483). Specifically, the Ohio Supreme Court has recognized the pertinence of "the trial court's special expertise and familiarity with case-management problems and its inherent power to manage its own docket." *Hamilton*, 82 Ohio St. 3d at 70 (citing *Marks*, 31 Ohio St. 3d at 201). However, a trial court is not unguided in determining whether class certification is appropriate, because class certification is expressly governed by the provisions of Civ. R. 23. Id.; *Petty II*, 148 Ohio App. 3d at 352. Furthermore, the *Hamilton* court strongly suggested–absent an explicit requirement in the text of Civ. R. 23–that in rendering its decision regarding class certification, the trial court should make express written findings for each of the seven class certification issues. Id. at 70-71.

**D. Specific Legal Findings and Analysis for the Seven Class Certification Requirements**

Based on the general standard of law, supra, and in light of the parties' arguments in the pertinent memoranda and the applicable factual record, this Court will address separately the seven class certification requirements. Each of the legal findings is by a preponderance of the evidence, with the Plaintiffs, as movants, bearing the burden of proof.

**1. The class definition issue: "an identifiable class must exist and the definition of the class must be unambiguous"**

The first class certification requirement is commonly referenced as the "class definition" issue. The Ohio Supreme Court has instructed:

> "The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Thus, the class definition must be precise enough "to permit identification within a reasonable effort."
> * * *
> The focus at this stage is on how the class is defined. "The test is whether the means is specified at the time of certification to determine whether a particular individual is a member of the class." The question as to whether there are differing factual and legal issues "does not enter into the analysis until the court begins to consider the Civ.R. 23(B)(3) requirement of predominance and superiority."

*Hamilton*, 82 Ohio St. 3d at 71-72, 73 (citations omitted); *Petty II*, 148 Ohio App. 3d at 353 (citing *Hamilton*).

In the *Mot. Class Cert.*, the Plaintiffs have proposed "a class consisting of individuals residing in and homeowners within a one (1) mile radius of the [Isotec] facility on September 21, 2003." Id. at 30. [hereinafter the"Proposed Definition"].[18] The Plaintiffs argue that

[18] On the first page of the *Prior Class Cert. Mot.*, Banford and Graeser proposed a considerably different class definition [hereinafter the "Prior Definition"]. Although the Prior Definition has not been expressly withdrawn or revised by the Proposed Definition, this Court fin that by collectively proposing a different definition post-consolidation when the Prior Definition was expressly proposed by only Banford and Graeser, the Plaintiffs' collective implication was to

members that satisfy the Proposed Definition are readily identifiable and definite. They argue that putative class members may be identified, in part, by referencing Montgomery County Recorder records. *Mot. Class Cert.* at 31. Specifically, they propose retrieving street address listings that exist within a one-mile radius of Isotec. In other part, to identify putative class members who were non-property-owning residents within the one-mile radius, the Plaintiffs propose correspondence with the homeowners and "verification of residents at the subject property." Id. The Plaintiffs highlight that the one-mile radius corresponds to the geographical boundary of the mandatory evacuation enforced by the local emergency officials. Id. at 33. They conclude that "[w]ith these numerous methods of identifying putative class members, along with a definite geographical boundary for determining class membership, there is no undue hardship in complying with notice requirements and no risk to [Aldrich] of participation in the class by unqualified persons." Id. at 31.

As a reluctant alternative, see id. at 31 n.9, the Plaintiffs propose using damages-related subclasses to achieve a sufficiently unambiguous and definite class definition. Id. at 31-33. In support of the alternative proposal, the Plaintiffs rely on the Second District's decision in *CSX II*, 55 Ohio App. 3d at 23, and *In re Fernald Litigation* (S.D. Ohio 1986), Case No. C-1-85-149, 1986 U.S. Dist. LEXIS 20723, *5-*6, *8-*9. Specifically, they argue that the definitions accepted in those cases and the proposed class/subclasses definitions in the cases at bar are substantially similar, demonstrating the propriety of using a definition based on a definite

proceed under only the Proposed Definition. Furthermore, as discussed infra, the Plaintiffs have also attempted to implicitly amend the Proposed Definition in the *Cert. Reply*.

geographical boundary surrounding the site of the alleged harmful incident. See *Mot. Class Cert.* at 32.[19]

In rebuttal, Aldrich argues that the Proposed Definition is overbroad and inappropriate because numerous people that have no cognizable claims would nevertheless satisfy its express terms. *Cert. Opp.* at 4-5 (citing *Barber v. Meister Prot. Servs.*, 2003 Ohio 1520 at ¶ 33). It argues that not every homeowner or non-owner resident complied with the evacuation order, but pursuant to the Proposed Definition, those people would still be putative plaintiffs. Furthermore, Aldrich argues that for many of the pending substantive claims, no evidence is presented that a person exists who satisfies the Proposed Definition and has a viable claim. Id. at 5. Additionally, it argues that the extrajudicial Crawford claims reimbursement process has already fully compensated local residents with substantiated claims. It argues that the people who accepted such compensation have no viable claim–any possible claim being fully compensated–but the Proposed Definition does not exclude those putative class members.

To redress any of its rebuttal arguments, Aldrich argues that the Plaintiffs would necessarily amend their Proposed Definition to specifically exclude categories of people, which would result in requiring individualized analyses and undermine a benefit of using the class action device. See *Cert. Opp.* at 5 (citing the Second District's decision in *Hall v. Jack Walker Pontiac Toyota, Inc.* (2000), 143 Ohio App. 3d 678, 682) [hereinafter "*Hall II*"].

In reply, the Plaintiffs argue that the Proposed Definition is not overbroad. They argue that the putative class members are individuals that lived within the one-mile radius of Isotec on the date of the explosion that were subject to the mandatory evacuation order. To provide

[19] As discussed below, the subclass alternative argument is unnecessary for purposes of the class definition issue. However, in light of the parties' arguments regarding "standing" for purpo of the class membership issue, the proposal to identify damages subclasses is pertinent.

additional factual support for their argument that the evacuation was mandatory, the Plaintiffs have identified the six resident-affiants identified in footnote 13, supra. The Plaintiffs argue that while some of the putative class members may have voluntarily evacuated by personal choice rather than by being ordered to leave by the emergency officials, those putative class members likely did so anticipating the same danger reflected in the local emergency officials decision to order the mandatory evacuation. Furthermore, regarding the argument that determining which putative class members suffered actual injuries, the Plaintiffs counter-argue that the one-mile radius is clearly definable and that the areas and streets evacuated are easily determined by testimony from the emergency officials who conducted the evacuation. See *Cert. Reply* at 5-6.

In the *First Sur-Reply*, Aldrich argues that the Plaintiffs' counter-arguments have relied on either irrelevant evidence or on an implicit modification of the Proposed Definition. See id. at 5. It argues that because four of the six affiants identified in the *Cert. Reply* live beyond the one-mile radius, their affidavits are irrelevant. In the alternative, Aldrich argues that to include the putative residents that live beyond the one-mile radius in the putative class, the Proposed Definition would be implicitly modified. It argues that by rejecting the one-mile radius definition, the substituted definition of all putative residents that evacuated, by order or by personal choice, would necessarily require individualized inquiries into whether they have actual claims against Aldrich, thereby making the modified definition improperly ambiguous and unidentifiable.

This Court finds that a brief examination of binding precedent on the "class definition" issue is helpful. In *CSX II*, the Second District noted that the parties agreed in oral argument "that the class as a whole was sufficiently defined * * *." Id., 55 Ohio App. 3d at 23.

However, the court also recognized the preliminary nature of the class definition, stating that the as the factual record of the case further developed, the trial court could refine the class definition. Id.

In *Adair v. Dayton Walther Corp.* (April 13, 1992), Montgomery Cty. C.P.C. Case Nos. 90-CV-1660, 91-CV-0369 (Decision and Order Denying Plaintiffs' Motion for Class Certification) (J. Kessler), unreported [hereinafter "*Adair I*"],[20] the putative class definition was proposed as "[a]ll persons, residing as an owner or tenant in [a roughly one-mile radius] who were adversely affected by smoke, soot, dust, or odor from the Dayton Walther foundry * * * at any time between February, 1987 and October 1990." Id. at 3-4. The trial court recognized that the named plaintiffs lived only a short distance from the foundry and that the evidence "fail[ed] to demonstrate that this broad class definition unambiguously describe[d] the parties that were allegedly damaged by emissions from the Dayton Walther foundry." Id. at 4. The trial court therefore concluded that the proposed definition was ambiguous and did not readily identify the putative class members. Id. The Second District affirmed the trial court's denial of class certification in *Adair v. Dayton Walther Corp.* (Feb. 4, 1993), 2d Dist. Case No. 13429, 1993 Ohio App. LEXIS 573 [hereinafter "*Adair II*"], but focused on a completely separate basis. See id. at *3-*8 (finding that the predominance factor was unsatisfied).

In *Hall v. Jack Walker Pontiac Toyota, Inc.* (Montgomery Cty. C.P.C. Sept. 24, 1999), 1999 Ohio Misc. LEXIS 64 (J. Gorman) [hereinafter "*Hall I*"], the trial court found, inter alia, that the proposed class definition was ambiguous because the identity of the putative plaintiffs was dependent on a individualized determination. See id. at *34-*35, *43-*45. The Second

[20] In light of the unreported status of *Adair I*, this Court has attached a copy as Court's Exhibit 1.

District affirmed the trial court's denial of class certification in *Hall II*. See id., 143 Ohio App. 3d at 682-683.

In *Petty v. Wal-Mart Stores, Inc.* (Sept. 19, 2001), Montgomery Cty. C.P.C. Case No. 00-CV-2396 (Decision, Order & Entry Overruling Plaintiffs' Motion for Class Certification) (J. Langer) [hereinafter "*Petty I*"], this Court found that the originally proposed definition was ambiguous, even though the defendant's own business records would provide some assistance in identifying the putative class members. This Court found that the business records–time clock records–were insufficient, because the facts admittedly provided by time clock records were broader than the facts necessary to identify only putative class members. Specifically, the allegations were that the defendant forced employees to work "off the clock" or to miss breaks. The time clock records, while demonstrating when breaks were missed, did not correlate to the employee being forced to miss that break because the defendant forced the employee to continuing working. Furthermore, the time clock records provided no assistance in identifying when employees worked off the clock. This court therefore found that the originally proposed class definition was ambiguous. See id. at 2-4.

Notably, the plaintiffs in *Petty I* also proposed a modified class definition in the reply memorandum, to wit: all past and present employees of defendant in Ohio. This Court examined the modified class definition and found that it also was overbroad. The defendant highlighted that many employees–putative class members under the modified definition proposal–asserted that they were never forced to work "off the clock" or to miss breaks. This Court found that an individualized inquiry would be necessary to identify which putative class members actually had potential claims against the defendant. The modified class definition proposal was therefore also rejected. See id. at 5.

The Second District affirmed on the determination regarding the originally proposed definition. See *Petty II*, 148 Ohio App. 3d at 353-354. Regarding the modified definition proposal, the Second District affirmed on a different basis:

> In our view, the problem with the expanded class proposed by Petty is not that its members are not identifiable. The problem is that it has been expanded so far beyond any rational relationship to plaintiffs' theory of recovery that no common issues predominate.

Id. at 355. The distinction, therefore, is that an arguably overbroad but readily ascertainable class may satisfy the class definition issues, but fail to meet the separate and distinct predominance issue.

This Court finds that the Proposed Definition provides a readily ascertainable boundary and an administratively feasible means for the named Plaintiffs to identify putative plaintiffs to this Court for purposes of providing appropriate notice. For example, this Court notes that for purposes of deciding the instant *Mot. Class Cert.*, a "bright line" demonstrating a one-mile radius around the Isotec factory has been proffered in Mr. Cowherd's expert testimony using the one-mile radius map.[21] This Court is persuaded that by using means such as the one-mile radius and county recorder records for the appropriate time period, the owners and lessees of residential real property are sufficiently identifiable.

Notably, Aldrich argues that while the Proposed Definition uses a readily identifiable "bright line," it does not limit the putative class to only those people with viable claims. This Court finds that Aldrich's argument is substantially identical to the defendant's argument in *Petty II*, which the Second District found mistaken. The test for whether a proper class definition has been presented is "whether means are specified at the time of the certification

[21] See supra notes 12-13 and accompanying discussion (finding by a preponderance of the evidence that the one-mile radius map provided a "bright line" beyond which twelve putative residents live, thereby excluding them from being putative plaintiffs).

that will permit a determination of whether a particular individual is a member of the class." *Petty II*, 148 Ohio App. 3d at 354 (cnd citation omitted). In part, the unmodified Proposed Definition meets that test.

For purpose of completeness, this Court finds that the modified definition proposed by the Plaintiffs does not meet the class definition test. Notably, the arguments in the *Cert. Reply* expressly continues to use the one-mile radius language, but the Plaintiffs do not limit their proposal to within the one-mile radius when they argue that emergency officials could testify to which areas and streets were evacuated. See id. at 6. Furthermore, in their rebuttal arguments in the *Affidavits Response*, the Plaintiffs implicitly argue that the putative class should include all persons evacuated by the emergency officials, regardless of whether those persons live within the "bright line" one-mile radius. The Plaintiffs argue that limiting the class to only those who lived within an artificial one-mile radius when the emergency officials clearly evacuated entire streets and areas results in an absurd exclusion of putative plaintiffs.

The modified proposal, however, would require not only a potential investigation involving testimony from the emergency officials regarding the streets and areas they covered, but would require individualized inquiry with the owners and residents to ascertain whether they did evacuate, whether by order or by choice. This expanded definition is analogous to the originally proposed definition in *Petty II*, whereby the sources proposed would be insufficient to adequately define a class. Therefore, this Court hereby rejects modifying the Proposed Definition to include all purportedly evacuated owners and lessees of residential real property, including those beyond the one-mile radius.

This Court also notes, however, that the Proposed Definition potentially presents two classes: homeowners (i.e. residential real property owners) [hereinafter the "Homeowners

Class"] and residents (i.e. individuals residing in residential real property but not owning the real property). The Homeowners Class has been addressed above; the class definition test has been met for them. This Court has also identified the implicit class of lessees--people who rented residential real property and resided therein but did not own the residential real property [hereinafter the "Lessees Class"]. The implicit Lessees Class has also been addressed above; the class definition test has been met for them.

However, this Court notes that the "resident" status used in the Proposed Definition also implicitly includes non-owners/non-lessees, which likely includes spouses, children, other family members, and potentially non-relatives who resided in various residential real properties within the one-mile radius [hereinafter the "Other Residents Class"]. Notably, putative members of the Other Residents Class will not be identifiable by referencing the county recorder records or lease records. The Plaintiffs have proposed that putative members of the Other Residents Class be identified by sending correspondence to members of the Homeowners Class.

The correspondence proposal is clearly highly individualized and dependent on first establishing members of a different class, the Homeowners Class, to be able to proceed. The large number of residential real properties within the one-mile radius is discussed in the numerosity issue, infra, but for purposes of the class definition issue, this Court finds that the putative plaintiffs in the Homeowners Class are likely numerous. The proposal to use individualized correspondence with putative Homeowners Class members to identify members of the Other Residents Class is therefore administratively unfeasible, ambiguous, and indefinite. Therefore, the class definition test for the implied Other Residents Class is not met.

Accordingly, for purposes of the first class certification issues, class definition, this Court hereby finds that the Proposed Definition satisfies the issue in part and fails to satisfy the issue in part. This Court finds that the one-mile radius specification in the Proposed Definition is appropriate. Expanding the Proposed Definition to include putative residents beyond the one-mile radius is rejected as administratively infeasible, ambiguous, and indefinite. The Homeowners Class is sufficiently identifiable and definite. The Lessees Class is sufficiently identifiable and definite. The Other Residents Class is rejected as administratively infeasible, ambiguous, and indefinite.

Therefore, the class is defined as residential real property owners and lessees of residential real property within the one-mile radius surrounding the Isotec factory on September 21, 2003.

**2. The class membership issue: "the named representatives must be members of the class"**

The second class certification requirement is commonly referenced as the "class membership" issue. The Ohio Supreme Court has instructed:

> The class membership prerequisite requires only that "the representative have proper standing. In order to have standing to sue as a class representative, the plaintiff must possess the same interest and suffer the same injury shared by all members of the class that he or she seeks to represent."

*Hamilton*, 82 Ohio St. 3d at 74 (quoting 5 Moore's Federal Practice (3 Ed.1997) 23-57, Section 23.21[1], and citing Wright, Miller & Kane, Federal Practice and Procedure (2 Ed.1986) 137-141, 149-150, Section 1761 [hereinafter "Fed. Practice & Proc."]); see also *Amchem Prods., Inc. v. Windsor* (1997), 521 U.S. 591, 625-626. In light of the *Hamilton* standing requirement for purposes of class membership, Ohio caselaw has further explained:

> The concept of standing asks whether a particular plaintiff may properly raise a particular claim. Where no statute confers standing on a particular plaintiff, the question depends on whether the party has alleged a "personal stake in the

> outcome of the controversy." *Cleveland v. Shaker Heights* (1987), 30 Ohio St. 3d 49, 51; *Middletown v. Ferguson* (1986), 25 Ohio St. 3d 71, 75-76, quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 731-32. This "personal stake" requirement has three basic elements: (1) "injury in fact" to the plaintiff that is concrete and particularized; (2) a causal connection between the injury and the conduct complained of; and (3) redressability, i.e. that it is likely that the injury will be redressed by a favorable decision granting the relief requested. *Lujan v. Defenders of Wildlife* (1992), 504 U.S. 555, 560-61. *The fact that a plaintiff seeks to bring a class action does not change this standing requirement. Individual standing is a threshold to all actions, including class actions. Fallick v. Nationwide Mut. Ins. Co.* (C.A.6, 1998), 162 F.3d 410, 423.

*Woods*, 134 Ohio App. 3d at 268-269 (internal parallel citations omitted; emphasis added). The parties have extensively contested this class certification issue. Therefore, this Court first summarizes all of the parties' arguments, then identifies a sufficiently-defined class in which the Plaintiffs clearly fail to demonstrate factual membership. Next, this Court analyzes whether the Plaintiffs have demonstrated membership in the remaining Homeowners Class, which requires an analysis of "injury in fact" standing and results in the use of damage category subclasses.

**a. Summarized arguments regarding the class membership issue.**

In the cases at bar, there are four named Plaintiffs: Banford, Graeser, M. O'Donnell, and W. O'Donnell. The pending causes of action and categories of damages claimed have been identified. See supra Section III.A. (summarizing the causes of action remaining and the different categories of damages sought). This Court has organized the cases sub judice to proceed in a quadripartite format. See supra Section III.B. Furthermore, the class of people within the one-mile radius on the date of the explosion has been appropriately defined into two classes, the Homeowners Class and the Lessees Class. See supra Section III.D.1. Accordingly, this Court finds that the class membership "standing" issue must be applied in light of the foregoing determinations.

The Plaintiffs did not address the class membership issue in the *Mot. Class Cert.* Aldrich highlights the omission, then additionally argues that the Plaintiffs cannot assert class membership, i.e. individual standing in the defined class, because each testified in deposition that they had not sustained injuries correlating to many of the requested compensatory damages categories. Specifically, it argues that the Plaintiffs lack standing to seek compensatory damages relating to personal injuries, actionable emotional distress, damage to personal property, or evacuation expenses/loss of enjoyment of property. See *Cert. Opp.* at 6. Aldrich argues that the O'Donnells have admittedly not suffered damage to real property or diminution in property value, id. at 6-7, and that their experts opine that none of the named Plaintiffs' homes were impacted by the explosion, precluding all four from having the standing necessary to seek compensation for damage to real property or diminution in property value. Id. at 7. As supporting caselaw, Aldrich cites *Thomas*, 194 F.R.D. at 600-602; *Castillo v. Nationwide Finance Services, Inc.*, 2003 Ohio 4766, ¶ 26; and *Woods*, 134 Ohio App. 3d at 268-269.

In rebuttal, the Plaintiffs argue that they are members of the class. They argue that the evidence demonstrates that their homes are within the one-mile radius and that the foundations to their homes cracked as a result of the Isotec explosion. In support, Banford and Graeser cite their own affidavits--with attached photographs and an appraisal report--and an expert opinion. See *Cert. Reply* at 7 (citing the Affidavit of Plaintiff Christie Banford, attached as Exhibit 8 to the *Cert. Reply* [hereinafter the "Banford Affidavit"]; the Affidavit of Plaintiff Douglas Graeser, attached as Exhibit 9 to the *Cert. Reply* [hereinafter the "Graeser Affidavit"]; and the Affidavit of James Ludwiczak, attached as Exhibit 10 to the *Cert. Reply* [hereinafter the "Ludwiczak Affidavit"]).

Regarding Aldrich's argument that they lack standing to claim emotional distress damages, the Plaintiffs argue that they "have suffered emotional distress caused by the Explosion [sic], the evacuation, fear for their safety and that of their family, and fear over the safe integrity of their now damaged homes." *Cert. Reply* at 8. In support, they cite an email purporting to show that counselors were made available after the explosion. Id. (citing the Email sent September 25, 2003 from Glenn Jirka, attached as Exhibit 11 to the *Cert. Reply* [hereinafter the "Jirka Email"].

Regarding the"annoyance and discomfort" damages sought by the Plaintiffs, they argue that Ohio law provides standing relating to their nuisance cause of action. Id. at 8-9 (citing *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App. 3d 681). Regarding the damage to personal property sub-category of compensatory damages, the Plaintiffs highlight that Banford testified in her deposition that items did fall off her walls, but that she is uncertain whether she suffered personal property damage. Id. at 9. The remaining named plaintiffs argue that they are members of the class because they need not suffer all categories of harm suffered by the class. See id. at 8-9. They similarly argue that they have standing to pursue claims for personal injuries on behalf of the putative plaintiffs, while implicitly admitting that they did not individually suffer any personal injuries. See id. at 12.

Regarding the compensatory damages sub-category addressing evacuation expenses/loss of enjoyment of property, the Plaintiffs argue that "every single putative plaintiff has suffered loss of use, yet no putative plaintiff has been properly reimbursed for loss of use." Id. at 9 (footnote omitted). They argue that while some homeowners have been reimbursed for expenses relating to obtaining out-of-pocket substitute lodging, the Plaintiffs assert that no putative plaintiff have been fully compensated for the loss of use and enjoyment of their

property. Id. In support, the Plaintiffs cite *Carrollton Woods Condominium Homeowner's Ass'n v. Procario* (May 29, 1992), 2d Dist. Case No. 12743, 1992 Ohio App. LEXIS 2759; *Hitchings v. Cleveland Elec. Illuminating Co.* (Dec. 19, 1974), 8th Dist. Case No. 33544, 1974 Ohio App. LEXIS 2967; *Shepherd v. Shea* (Oct. 25, 1995), 9th Dist. Case No. 17090, 1995 Ohio App. LEXIS 4747; *Miller v. Miller*, 2003 Ohio 1342; and *Lowe v. Sun Refining & Marketing Co.* (1992), 73 Ohio App. 3d 563. See *Cert. Reply* at 10-11.

Aldrich argues that the Banford Affidavit, Graeser Affidavit, and the Plaintiffs' experts are insufficient. It argues that the referenced home appraisals do not affirmatively conclude that cracks in the homes' foundations were not present. See *First Sur-Reply* at 6-7. Regarding the Plaintiffs' rebuttal arguments, Aldrich highlights that for most of the damages sub-categories sought, the Plaintiffs' arguments implicitly concede that the individual named Plaintiffs have not suffered the related injuries. Aldrich notes that the Plaintiffs have counter-argued that not all categories of harm purportedly sustained by the putative class members must be sustained by class representatives. It responds by re-citing cases from its opposition for the proposition that class representatives must have sustained the same injury as the putative class members. See id. at 9 and cases cited therein.

Aldrich argues that the Plaintiffs misconstrue the caselaw regarding the evacuation and loss of enjoyment of property compensatory damages subcategory. Specifically, Aldrich argues that reimbursement for out-of-pocket substitute lodging expenses was appropriate to fully compensate putative plaintiffs who presented proper claims to the Crawford reimbursement process. Id. at 10 (citing *Shepherd*, 1995 Ohio App. LEXIS 4747 at *22-*23). Regarding putative plaintiffs that did not incur out-of-pocket substitute lodging expenses because they stayed with nearby friends or family, Aldrich argues that loss of use compensation is

inappropriate as a matter of law because the damages have been mitigated. Id. at 11, n. 12 and accompanying text.

**b. None of the Plaintiffs have factually demonstrated that they have standing to be members of the Lessees Class.**

The evidence is not contested that the four Plaintiffs live in residential real property located within the one-mile radius surrounding the Isotec factory. The evidence clearly demonstrates that each of the Plaintiffs own their respective residential real properties. See Banford/Graeser *Complaint* at ¶ 11-12; Banford Depo. I at 10:6-8; Graeser Depo. I at 23:7-12; O'Donnells' *Complaint* at ¶ 12-13; W. O'Donnell Depo. I at 20:1-3; M. O'Donnell Depo. I at 4:15-20. The Plaintiffs have presented no evidence, however, that demonstrates that they are non-owner lessees of residential real property within the one-mile radius around the Isotec factory. Accordingly, this Court finds that none of the Plaintiffs have demonstrated membership in the Lessees Class. Furthermore, assuming arguendo a definition that is definite and unambiguous, this Court finds that none of the Plaintiffs have demonstrated membership in the Other Residents Class. Therefore, certification of the Lessees Class and, arguendo, the Other Residents Class is inappropriate because the Plaintiffs have failed to satisfy the class membership issue for those classes.

**c. For the purposes of the instant class certification analysis only, the individual Plaintiffs have demonstrated standing for different compensatory damages sub-categories. Membership in the Homeowners Class is therefore divided into subclasses, with some damages subclasses having no Plaintiff members.**

Regarding the Homeowners Class, the Plaintiffs have demonstrated membership insofar as it involves the factual status of owning residential real property within the one-mile radius.

However, the standing requirement of class membership involves more. While the cases sub judice have been procedurally divided into four parts, with the determination of the amount of compensatory damages, if any, being decertified for individual determination, the binding Ohio caselaw cited above requires the Plaintiffs, quadripartite format notwithstanding, to demonstrate standing.

Arguendo, this Court notes that if purported class plaintiffs were otherwise allowed to proceed in the "liability phase" of a liability-damages bifurcated class action, and the class plaintiffs clearly had not suffered individual, distinct "injuries in fact" to be potentially remedied in the "damages phase," then the "liability" determination would be advisory for the class plaintiffs. The class membership of the named plaintiffs would be incomplete, undermining the other putative class members' due process rights that were assigned to the class plaintiffs for litigation-by-representation.

Class certification is only an ancillary procedural device; even with a clearly defined class, without substantive standing, no person has a right to proceed as a class representative. See *Deposit Guar. Nat'l Bank v. Roper* (1980), 445 U.S. 326, 332. Notably, cautionary language in the caselaw regarding not requiring affirmative proof on the merits in a class certification determination does not preclude this Court from rigorously analyzing whether the Plaintiffs have presented any evidence demonstrating the necessary standing to even raise arguably meritorious claims. An Ohio court has found that "[s]ome factual screening is inevitable in determining membership in any plaintiff class." *Grant v. Becton Dickinson & Co.*, 2003 Ohio 2826, ¶ 27. Therefore, this Court finds as a matter of law that the standing requirement--including demonstrating an individualized "injury in fact"--must be satisfied in any class action, including Civ. R. 23(C)(4)(a) issue-bifurcated class actions.

Accordingly, the Plaintiffs in the cases at bar must demonstrate their *personal* stakes in the various causes of action and damages claims before Ohio law will procedurally allow them to pursue *class* stakes as class representatives. As noted above, see supra footnote 19 and accompanying text, the Plaintiffs proposed using damages subclasses.

Accordingly, based on the different compensatory damages sub-categories identified above, this Court hereby recognizes: (1) a Real Property Damages Subclass, (2) a Diminution Damages Subclass, (3) an Evacuation Damages Subclass, (4) a Personal Property Damages Subclass, (5) a Personal Injury Damages Subclass, and (6) an Emotional Distress Subclass. Pursuant to the authority governing the use of subclasses, Civ. R. 23(C)(4)(b),[22] the Plaintiffs individually[23] are not required to prove, but must present some evidence of a sustained "injury in fact," to satisfy the class membership standing issue for each subclass enumerated above.

**(1) Banford and Graeser have standing and membership in the Real Property Damages Subclass. The O'Donnells do not have standing or membership.**

Regarding the Real Property Damages Subclass, this Court finds that the O'Donnells have failed to present evidence, other than insufficient speculation, of an "injury in fact." Aldrich cited adverse deposition testimony from W. O'Donnell and M. O'Donnell, but the Plaintiffs' rebuttal focused only on Banford and Graeser, completely omitting rebuttal arguments focused on the O'Donnells. In his deposition, W. O'Donnell stated that in the summer of 2004, he found some minor cracks behind a rarely-closed door. W. O'Donnell Depo. I at 10:15-18. He equivocated on whether those cracks resulted from the explosion or

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[22] "When appropriate, * * * a class may be divided into subclasses and *each subclass treat as a class*, and the provisions of this rule shall then be construed and applied accordingly." Civ. F 23(C)(4) (emphasis added).

[23] For clarity, while this Court and the parties have collectively referenced Banford, Graes and the O'Donnells as the Plaintiffs, they remain individuals for purposes of assessing standing.

from "normal settling." Id. at 11:13-18; 12:15-19. Regarding other problems inside the house, he denied that they were related to the explosion. Id. at 11:19-12:15, 20-25. He similarly denied any exterior problems with the house related to the explosion. Id. at 13:1-20. No evidence from M. O'Donnell has been presented regarding damage to the real property.

Banford has submitted by affidavit her personal observations of approximately 16 large cracks in her home's foundation that were not there prior to the explosion. See Banford Affidavit at ¶ 4-5. Graeser has submitted by affidavit his personal observations of approximately 12 large cracks in his home's foundation that were not there prior to the explosion. See Graeser Affidavit at ¶ 5-6. In support, they reference appraisals on their homes, which Aldrich contests. Banford and Graeser also cite for support the expert opinions in the Ludwiczak Affidavit, which Aldrich also contests by means of highlighting purported inconsistencies between the opinions proffered in the Ludwiczak Affidavit and those provided in a prior deposition. Aldrich also presents counter-expert opinions in the *First Sur-Reply*.

A few Ohio courts have recognized without criticism the use of expert opinions in class certification contexts. See e.g. *Breedlove v. Ohio DOT* (Ct. Cl. 1991) 62 Ohio Misc. 2d 298, 301-302 (recognizing the presentation of multiple experts by the parties); *Hensley v. New Albany Co.* (Aug. 25, 1994), 10th Dist. Case No. 93APE11-1562, 1994 Ohio App. LEXIS 3694, *10-*11 (finding that an expert witness may have provided information to support class certification that was otherwise lacking). However, the federal District Court for the Southern District of Ohio has found based on cited federal precedents that a resolution between "dueling experts" in a class certification context is an inappropriate merits-determination. See *Bentley*, 223 F.R.D. at 479.

This Court need not decide whether conflicting expert opinions should be resolved. Applying arguendo the rule of law from *Bentley*, the conflicting experts are immaterial. Applying arguendo the implied rule of law from the Ohio cases, this Court finds for purposes of the instant *Class Cert. Mot.* only that the parties' conflicting experts equally counter-balance. However, the statements by Banford and Graeser that the cracks did not exist before the explosion but were noticed immediately after the explosion is persuasive, thereby satisfying each of their burdens to demonstrate by a preponderance of the evidence a sustained "injury in fact" sufficient for standing and membership in the Real Property Damages Subclass.

**(2) Banford and Graeser have standing and membership in the Diminution Damages Subclass. The O'Donnells do not have standing or membership.**

In Ohio, compensation for diminution in value for real property may not based on purely speculative stigma damages. See *Chance v. BP Chems.* (1996), 77 Ohio St. 3d 17, 27; *Ramirez v. Akzo Nobel Coatings*, 2003 Ohio 2859, ¶ 20-21 ("pure environmental stigma, defined as when the value of real property decreases due solely to public perception or fear of contamination from a neighboring property, does not constitute compensable damages in Ohio. Rather, a plaintiff must show actual harm.") The valuation of the real property, particularly a residential home, does not always require expert testimony, but may be established by an owner's opinion. See *Stoll v. Parrott & Strawser Properties, Inc.*, 2003 Ohio 5717, ¶ 12. Notably, diminution in value of real property is an alternative methodology of calculating compensatory damages to be awarded for harm sustained to the real property. See *Reeser*, 78 Ohio App. 3d at 686 (applying *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238); *Price v. Parker* (March 9, 2000), 10th Dist. Case No. 99AP-298, 2000 Ohio App. LEXIS 856, *12-*13 (applying *Reeser* and *Ohio Collieries*).

As discussed in the foregoing subsection, the O'Donnells have not presented evidence regarding actual harm to their real property. Based on the caselaw cited above, they have failed to present evidence--other than speculative stigma claims--regarding a diminution of real property value.

As discussed in the foregoing subsection, Banford and Graeser have satisfied the standing requirement regarding the Real Property Damages Subclass--that is, they provided some evidence that their homes had been actually damaged from the explosion. However, although familiar with the purchase price of their homes and the pre-explosion appraisal values, neither Banford or Graeser testified that they personally know how much, if at all, their homes' values had been diminished post-explosion. See Banford Depo. I at 10:9-13:18; Graeser Depo. I at 24:7-29:14. Proof of the amount of damages, however, is a merits-issue beyond the scope of class certification. Based on *Reeser*, *Ohio Collieries*, and *Price*, this Court finds that Banford and Graeser have demonstrated an actual "injury in fact" that may or may not be compensable by a diminution of value methodology. Therefore, they have demonstrated standing and membership in the Diminution Damages Subclass.

**(3) Each of the four Plaintiffs has standing and membership in the Evacuation Damages Subclass.**

The Evacuation Damages Subclass includes claims for not only expenses directly related to the evacuation (i.e. hotel fees for substitute lodging, meals eaten away from their homes), but also for the loss of use and enjoyment of the residential real property. Factually, Aldrich argues that many of the putative plaintiffs have already been compensated for their evacuation expenses through the Crawford reimbursement process. It argues those putative plaintiffs no longer have standing because their claims have been satisfied. The Plaintiffs

counter-argue that not all of the reasonable evacuation expenses have been reimbursed and that none of putative plaintiffs' loss of use and enjoyment damages have been satisfied. The arguments essentially regard the "redressability" of the Plaintiffs evacuation and loss of use and enjoyment damages.

The parties have each cited caselaw purportedly supporting their conflicting positions. Having considered those cases and the facts presented regarding the Plaintiffs' expenses regarding substitute lodging at hotels and with nearby friends and family, this Court finds that the partial reimbursement for out-of-pocket evacuation expenses does not fully satisfy the Plaintiffs' claims for loss of use and enjoyment.

The Second District specifically stated:

> The expense of rental quarters appears to be the limit of the amount of the award for such purposes where the damage for loss of home use was, or may have been, *proportionally less than complete* evacuation.

*Carrollton Woods*, 1992 Ohio App. LEXIS 2759 at *10 (emphasis added). In that same year, the Second District also recognized, with regard to damages claimed as a result of an alleged nuisance, that "annoyance and discomfort" damages are separate and distinct from physical damage to structures or other property. See *Reeser*, 78 Ohio App. 3d at 692-693. This Court specifically notes that limiting a putative plaintiff's compensation to only out-of-pocket substitute lodging expenses would restore the unexpected substitute lodging expenses but ignore the distinct harm of being temporarily excluded from that person's own home. This Court is unpersuaded that such a limitation applies.

Therefore, finding that each of the Plaintiffs have allegedly lost the use and enjoyment of their residential real property for the duration of the evacuation, they have standing. For purposes of the instant *Decision* only, because the evacuation expenses and loss of use and

enjoyment claims are conjoined and standing has been established for the latter, this Court declines to address the arguments regarding the purported lack of redressability for evacuation expenses. Accordingly, each of the four Plaintiffs is a member of the Evacuation Damages Subclass.

**(4) None of the Plaintiffs have presented any evidence regarding their individual standing to claim damages to their personal property. They are not members of the Personal Property Damages Subclass.**

Regarding claims that the Plaintiffs' personal property has been damaged, Aldrich argues that they have presented no evidence supporting their standing for this sub-category. In her deposition, although Banford stated that some personal property items may have fallen as a result of the explosion, she did not consider any of the items broken or damaged such that monetary compensation would be necessary to fix the damages. See Banford Depo. I at 22:3-24:2. Graeser and the O'Donnells similarly did not identify any items of personal property damaged by the explosion. See Graeser Depo. I at 12:4-13:5; W. O'Donnell Depo. I at 14:2-14; M. O'Donnell Depo. I at 10:19-11:3. The Plaintiffs' counter-argument is that they are not required to provide evidence that they suffered each sub-category of damage. See *Cert. Reply* at 9.

As discussed above, the Plaintiffs are not required at this procedural stage to affirmatively prove their claims. However, for purposes of standing, some evidence must be presented to satisfy the class membership issue. Based on the deposition testimony cited above, none of the four Plaintiffs have presented such standing-based evidence. Therefore, this Court finds that none of the Plaintiffs are members of the Personal Property Damages Subclass, precluding certification for that subclass.

**(5) None of the Plaintiffs have presented any evidence regarding their individual standing to claim personal injury damages. They are not members of the Personal Injury Damages Subclass.**

Aldrich presents a similar argument that the Plaintiffs' depositions demonstrate that they do not have standing to raise personal injury claims. See *Cert. Opp.* at 6 n. 10. The Plaintiffs' response is that while they were not personally injured, they are still members of the class because they suffered other types of injuries. See *Cert. Reply* at 12.

The depositions of the Plaintiffs demonstrate that they were not physically injured by the explosion. See Banford Depo. I at 6:2-6; Graeser Depo. I at 58:19-59:4; W. O'Donnell Depo. I at 38:20-39:12; M. O'Donnell Depo. I at 11:14-16. Accordingly, this Court finds that the Plaintiffs have not presented evidence supporting their standing to claim personal injury damages. Therefore, none of the Plaintiffs are members of the Personal Injury Damages Subclass, precluding certification of that subclass.

**(6) The Plaintiffs have presented some evidence–deposition testimony regarding fear and anxiety–which establishes their individual standing to claim an "injury in fact" for emotional distress damages. They are members of the Emotional Distress Subclass.**

Aldrich argues that the Plaintiffs have not presented sufficient evidence to support their standing to bring emotional distress claims. It cites portions of each of the Plaintiffs' depositions in which they deny developing any severe and debilitating emotional-distress illnesses. See *Cert. Opp.* at 6 n. 11; see also *First Sur-Reply* at 13-14 (citing inter alia *Buckman-Pierson v. Brannon*, 2004 Ohio 6074, discretionary appeal allowed (March 16, 2005), 2005 Ohio 1024, application to dismiss appeal granted (Sept. 22, 2005), 2005 Ohio 4949).

The Plaintiffs' rebuttal is that they each testified in deposition that they are fearful, stressed, and otherwise emotionally distressed by the explosion, the evacuation, and the purported damages to their homes. They also argue that the emotionally distressing nature of the explosion and evacuation is shown by the purported establishment of available counselors. *Cert. Reply* at 11 (citing the Jirka Email).

The Jirka Email, while showing that counselors were made available, is unpersuasive because the Plaintiffs testified that they did not seek treatment with any medical practitioner, including those counselors, for any injuries purportedly relating to emotional distress from the explosion and evacuation. See e.g. Banford Depo. II at 141:16-142:8; Graeser Depo. I at 55:11-15; W. O'Donnell Depo. I at 49:12-25; M. O'Donnell Depo. I at 35:13-36:8. The persuasiveness of the *Buckman-Pierson* decision is diminished because the holding was specific to the procedural posture of that case, which was a summary judgment motion. See id. at ¶ 55 (noting that the threshold at issue regards the evidence necessary to successfully oppose summary judgment). Aldrich specifically relies on the *Buckman-Pierson* precedent for the proposition of law that the Plaintiffs must provide some additional lay or expert testimony as a "guarantee of genuineness" to establish a viable emotional distress claim.

The matter presently before this Court is not whether the Plaintiffs' claim for emotional distress damages is viable, that is, whether summary judgment in favor of Aldrich and against the Plaintiffs is appropriate. See supra note 4 (deferring any summary judgment determinations until after class certification). Additionally, this Court finds that arguments pertaining to whether the Plaintiffs have presented sufficient supporting evidence to prevail on their claims inappropriately delve into the merits. The Plaintiffs have each individually stated that they

have experienced fear and anxiety as a result of the explosion and evacuation. Those statements provide some evidence of an "injury in fact" to each of the Plaintiffs.

Therefore, this Court finds that the Plaintiffs have presented some evidence regarding their standing to claim emotional distress damages. They are members of the Emotional Distress Subclass.

Based on the foregoing, for purposes of the class membership issue, this Court has recognized six subclasses and finds:

(1) Banford and Graeser are members in the Real Property Damages Subclass; the O'Donnells are not members;

(2) Banford and Graeser are members in the Diminution Damages Subclass; the O'Donnells are not members;

(3) Banford, Graeser, and the O'Donnells are members in the Evacuation Damages Subclass;

(4) None of the Plaintiffs are members in the Personal Property Damages Subclass;

(5) None of the Plaintiffs are members in the Personal Injury Damages Subclass; and

(6) Banford, Graeser, and the O'Donnells are members in the Emotional Distress Subclass.

**3. The numerosity issue: "the class must be so numerous that joinder of all members is impracticable"**

The third class certification requirement is commonly referenced as the "numerosity" issue. The express language in Civ. R. 23(A)(1) requires a determination that "the class is so numerous that joinder of all members is impracticable." Id. The "impracticality" standard has not been formalized with a specific minimum number, but involves a case-by-case analysis. *Warner*, 36 Ohio St. 3d at 97; *Arroyo v. Wagon Wheel Auto Sales* (Aug. 11, 2000), 2d Dist. Case No. 18235, 2000 Ohio App. LEXIS 3612, *6 [hereinafter "*Arroyo II*"]. However, an

often quoted phrase regarding the numerosity issue is that "if the class has more than forty people in it, numerosity is satisfied; if the class has less than twenty-five people in it, numerosity is probably lacking; if the class has between twenty-five and forty, there is no automatic rule * * *." *Warner*, 36 Ohio St. 3d at 97 (citing Fed. Practice & Proc., Section 1760).

Ohio caselaw provides additional guidance. If class members can be assumed to lack the ability or motivation to pursue individual civil actions, joinder is more likely to be impracticable. *Hamilton*, 82 Ohio St. 3d at 75. Putative class members would be unlikely to file individual civil actions where individual claims involve only a small amount of damages, which would support a finding that joinder is impracticable. Id.

The Plaintiffs allege that 2000-3000 people were within the one-mile radius and were evacuated. They cite their own answer to Aldrich's interrogatories. They also argue that they do not need to establish the exact number of putative plaintiffs, but may satisfy their burden through the use of common sense or common knowledge. *Mot. Class Cert.* at 34 (citing inter alia *Martin v. Services Corp. Internatl.* (June 20, 2001), 9th Dist. Case No. 20392, 2001 Ohio App. LEXIS 2702, *9-*10). Plaintiffs highlight that they have submitted multiple sample affidavits of other putative class members.

In response, Aldrich argues that the Plaintiffs have presented no evidence to support their allegations that the putative class numbers in the thousands. To contrast the Plaintiffs' reliance on *Martin*, Aldrich quotes a more recent Ninth District case. See *Cert. Opp.* at 8 (quoting *Adkins-Bagola v. Universal Nursing Servs.*, 2004 Ohio 6082, ¶ 18) ("The mere 'possibility' that members of a class exist is insufficient. Rather, the movant must provide evidence that a number of people have been harmed by the nonmovant's actions.") (end citation

omitted). Citing *Currey v. Shell Oil Co.* (1996), 112 Ohio App. 3d 312, 318-319, Aldrich also argues that the evidence presented is insufficient to satisfy the numerosity issue.

Furthermore, assuming damages subclasses are used, Aldrich argues that no evidence has been presented that any other residential real properties have been damaged or experienced a diminution in value. It argues that no specific putative plaintiffs have been identified for purposes of showing that personal property was damaged or that personal injuries occurred. It also highlights that no other putative plaintiffs who suffered emotional distress have been identified.

Aldrich also presents purported expert testimony pertaining to the alleged zone impacted by the explosion and the subsequent chemical release into the air. The experts opine that the air wave and the chemical release did not travel far enough to support an assumption that damages occurred one mile away. Based on the caselaw and experts' opinions, Aldrich concludes that the existence of any other putative plaintiff is completely speculative.

In reply, the Plaintiffs argue that the burden of proof for the numerosity issue should not be restrictively construed to require them to demonstrate numerosity for each of the damages subclasses. See *Cert. Reply* at 13 (citing inter alia *Anderson v. Bank of the S., NA* (M.D. Fla. 1987) 11[8] F.R.D. 136). They argue that assuming Aldrich's experts are correct, the evidence demonstrates that multiple houses were potentially impacted by the explosion and chemical release. They also argue that the number of people evacuated is not readily contested.

The Plaintiffs' reliance on *Anderson* is unpersuasive. The language from *Anderson* that the Plaintiffs apparently relied upon was dicta. See id, 118 F.R.D. at 145 ("*If* [on remand] the court determines that the plaintiff class should include subclasses, they *may not* be required to satisfy independently the numerosity factor.") (emphases added). Furthermore, as determined

above, Ohio Civ. R. 23(C)(4)(2) expressly requires that subclasses be analyzed using the same seven requirements as any proposed class and insofar as *Anderson* conflicts with that express requirement in Ohio, the two decades old sister-state district court precedent is rejected.

The two Ninth District cases cited, *Martin* and *Currey*, are not in actual conflict. The Plaintiffs cite *Martin* for the proposition that common sense assumptions may be used, which this Court finds is an accurate but incomplete analysis of the decision. The case involved factual testimony that more than ten people per week entered into a specific contract. The common sense assumption was mathematical, extrapolating that approximately twelve people a week for an entire year would result in over 600. Notably, before making a common sense assumption, specific and concrete evidence was provided.

In *Currey*, the plaintiffs presented a two-part argument in their attempt to indirectly satisfy the numerosity issue:

> First, the representative plaintiffs testified about the extent of their own personal injuries and property damage. [They] then offered expert testimony regarding alleged widespread chemical contamination revealed by environmental tests conducted in the surrounding residential communities.

Id. at 319. The two-part argument was found insufficient because, even accepting arguendo the expert testimony, evidence of potential contamination does not equate into evidence of numerous people injured by the contamination. "[I]t is the plaintiffs' burden to prove the existence of a large class of putative plaintiffs, not simply that there are many parties that could possibly be members of the class." Id. In footnote dictum, the court identifies possible sources of evidence that, if presented, may have helped satisfy the plaintiffs' numerosity burden. See id. at n. 2. *Currey*, therefore, also stands for the proposition that specific concrete evidence is required before any assumptions may be used.

This Court finds that *Arroyo II*, cited by Aldrich, provides the most recent binding precedent to guide the numerosity analysis. Notably, the trial court relied on the precedent in *Currey* that the numerosity burden requires evidence of a large group of putative plaintiffs, not evidence that shows only a large number of people who possibly could be putative plaintiffs. See *Arroyo v. Wagon Wheel Auto Sales, Inc.* (March 8, 2000), Montgomery Cty. C.P.C. Case No. 99-CV-1501 (Decision, Order, and Entry Overruling Plaintiff's Motion for Class Certification) (J. Sunderland) [hereinafter "*Arroyo I*"] at 4. Class certification was denied in *Arroyo I* on the sole basis of lack of numerosity. Id. at 5.

The Second District affirmed, stating that the "real dispute" was "over how numerosity should be shown." *Arroyo II*, 2000 Ohio App. LEXIS 3612 at *7. Plaintiff Arroyo argued that reasonable assumptions based on allegations in the complaint were sufficient. The defendant and trial court found that more than speculation was necessary. Id. at *7-*8. Notably, this Court has previously found that when the named plaintiffs present over forty affidavits from other putative plaintiffs as a representative sample of the much larger number alleged, numerosity is likely satisfied. See *Petty I* at 7 (noting that the named plaintiffs' provided the affidavits of forty-eight additional putative plaintiffs).

Accordingly, specific evidence is necessary before reasonable assumptions based on that specific evidence may be used to satisfy the numerosity issue. Furthermore, the numerosity issue is separately applied to each subclass.

**a. The numerosity evidence presented regarding the Real Property Damages Subclass is speculative. The subclass is not certifiable.**

The Real Property Damages Subclass involves claims that the residential real properties were physically damaged by the explosion. Banford and Graeser established their membership

in the subclass by identifying multiple cracks in their homes' foundations that allegedly appeared after the explosion. However, the O'Donnells lacked the necessary standing for membership because, while concerned that their home had been damaged, they presented no evidence supporting their otherwise speculative concern.

To demonstrate the existence of other putative members of the Real Property Damages Subclass, the Plaintiffs cite two expert opinions and the affidavits of putative residents. See *Mot. Class Cert.* at 34; *Cert. Reply* at 14-15. They highlight that the expert opinion of Mr. Cowherd, proffered by Aldrich, includes a map that visually depicts approximately forty homes within the range he identifies. *Cert. Reply* at 14 (citing the March 2005 Affidavit of David C. Cowherd, M.S., P.E., attached as Exhibit 17 to the *Cert. Opp.* [hereinafter the "March Cowherd Affidavit"] and the map attached thereto as Exhibit G). The Plaintiffs also reference Ludwiczak's opinion that the damage he observed in the foundations of the Banford and Graeser homes is consistent with explosion damage. See *Cert. Opp.* at 14 (citing Ludwiczak Affidavit, ¶ 5, 7). The Plaintiffs also highlight their proffered sample of putative plaintiffs,[24] summarily characterizing the factual allegations in those affidavits as substantially similar to the allegations in the instant cases.

Aldrich argues that the Plaintiffs have misconstrued Cowherd's expert testimony. It argues his opinion is that homes outside the 1200 foot radius could not have sustained damage from an air blast. Aldrich argues that opinion does not equate to an opinion that homes within the 1200 foot radius did sustain damage. See *First Sur-Reply* at 11-12. Aldrich further highlights that the Plaintiffs have not presented any evidence pertaining to the approximately

[24] This "sample" originally included the affidavits of all identified putative residents, including those who have been excluded by this *Decision*. See supra n. 13 and accompanying tex This Court has listed the non-excluded affidavits in Appendix B.

forty homes within that 1200 foot radius showing similar "before and after" cracked foundations. It argues that the absence of such evidence demonstrates that those homes have not likely sustained physical damage. Id. at 12 (footnote citing inter alia *Adkins-Bagola* and *Arroyo II*).

The Plaintiffs arguments considerably parallel the failed arguments in *Currey*. The Plaintiffs have presented the first-step by relying on their own allegations (complaint and self-serving interrogatory answer) and Ludwiczak's expert opinion, which involves his inspection of only the Banford and Graeser homes, not any other putative residents' homes. The Plaintiffs then argue a similar second-step by citing expert testimony that essentially opines that some number of surrounding homes may have been impacted by an air wave or a ground wave. Assuming arguendo that the experts' testimony is viewed in the light most favorable to the Plaintiffs, this Court finds that assumption is insufficient. Similar to *Currey*, this Court finds that the mere identification of homes and homeowners within the 1200 foot radius or the one-mile radius only shows that approximately 500 homes or 40 homes, respectively, *could possibly be* members of the Real Property Damages Subclass.

However, the Plaintiffs have notably proffered more evidence than the plaintiffs in *Currey*. The use of affidavits from other putative plaintiffs is never discussed. In *Petty I*, this Court previously approved arguendo a numerosity argument that relies on multiple affidavits from other putative plaintiffs. As discussed above, however, only eighteen of the putative residents' affidavits are pertinent. Including Banford and Graeser, the potential subclass membership only totals twenty.

Furthermore, upon close examination of the eighteen putative residents' affidavits, none of them expressly state that their home has actually been physically damaged. In nearly

identical terms for most of the affidavits, the various affiants express "*concern* * * * that my home *potentially* sustained structural damage * * *." (emphases added). This Court finds that such language, without more, is merely speculative and does not provide any supporting evidence that the homes were actually damaged.

Therefore, this Court finds that the Plaintiffs have presented only speculative evidence that the Real Property Damages Subclass membership is so numerous that joinder is impracticable. Accordingly, the numerosity issue is not satisfied and certification of the Real Property Damages Subclass is not proper.

**b. Because the Real Property Damages Subclass is not certifiable, as a matter of Ohio law, the numerosity evidence presented regarding the Diminution Damages Subclass is only evidence of speculative stigma damages. The subclass is not certifiable.**

Regarding the numerosity issue for the Diminution Damages Subclass, this Court finds that the analysis pertaining to the O'Donnells' purported membership in the Diminution Damages Subclass, supra, is equally applicable to any arguments that numerous putative residents sustained diminution in their property value. Stigma-only diminution damages are not compensable under Ohio law; actual property damage is a condition precedent. Therefore, the Plaintiffs have not satisfied the numerosity issue for purposes of the Diminution Damages Subclass and certification of that subclass is also not proper.

**c. The numerosity evidence presented regarding the Evacuation Damages Subclass is sufficient.**

The insufficiency attributed to the eighteen affidavits in the foregoing analyses is not applicable to the Evacuation Damages Subclass. The affiants expressly state that they were

evacuated from their homes for one day. A reasonable assumption from that factual evidence is that those affiants lost the use and enjoyment of their homes for that same period of time. Furthermore, the extent of the evacuation has been otherwise established above. Although the evidence demonstrates that some putative residents resisted the mandatory evacuation, this Court finds by a preponderance of the evidence that the considerable number of streets blockaded and the homes visually depicted on the one-mile radius map clearly satisfies the numerosity issue for the Evacuation Damages Subclass.

**d. Arguendo, no pertinent evidence was presented regarding the numerosity of the Personal Property Damages Subclass and the Personal Injury Damages Subclass. The subclasses are not certifiable.**

For the sake of argument, this Court notes that no evidence has been presented that any putative resident suffered a personal injury or had personal property damaged. Accordingly, this Court finds that even if one of the named Plaintiffs had membership in the Personal Property Damages Subclass or the Personal Injury Damages Subclass, numerosity for those subclasses has not been satisfied.

**e. Because joinder of the highly individualized emotional distress claims for the named Plaintiffs and the eighteen putative plaintiff affiants is impracticable, the numerosity issue for the Emotional Distress Subclass is satisfied.**

Regarding the Emotional Distress Subclass, this Court notes that the eighteen putative resident affiants state that they experienced and continue to experience anxiety and fear as a result of the explosion and evacuation. The parties' arguments pertaining to the numerosity of the putative subclass membership are substantially similar to the arguments pertaining to the four named Plaintiffs. This Court therefore finds that the evidence presented is sufficient to

demonstrate that the affiants are putative members of the Emotional Distress Subclass. Although the sum of the named Plaintiffs and the eighteen affiants is less than twenty-five members, this Court finds that joinder is impracticable. The joinder of potentially twenty-two emotional distress claims, which are usually highly individualized,[25] is impracticable because the potential for a variety of manifestations is apparent. Therefore, the numerosity issue for the Emotional Distress Subclass is satisfied.

Based on the foregoing, this Court finds that the numerosity issue has been satisfied for only the Evacuation Damages Subclass and the Emotional Distress Subclass. Notably, although Banford and Graeser have demonstrated membership in the Real Property Damages Subclass and the Diminution Damages Subclass, the evidence is speculative regarding the numerosity of other putative subclass members. Therefore, numerosity for the Real Property Damages Subclass and the Diminution Damages Subclass is not satisfied.

**4. The commonality issue: "there must be questions of law or fact common to the class"**

The fourth class certification requirement is commonly referenced as the "commonality" issue. The Ohio Supreme Court has instructed:

> Courts generally give this requirement a permissive application. It is not necessary that all the questions of law or fact raised in the dispute be common to all the parties. If there is a common nucleus of operative facts, or a common liability issue, the rule is satisfied. The issue of whether there are any additional questions affecting only individual class members does not enter the class certification analysis until the Civ.R. 23(B)(3) requirement of predominance and superiority is applied.

*Hamilton*, 86 Ohio St. 3d at 77 (citations omitted). "The test for commonality under Civ.R. 23(A) is typically met without difficulty." *Howland v. Purdue Pharma L.P.*, 2004 Ohio 6552, ¶ 19 (citing *Warner*, 36 Ohio St. 3d at 97).

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[25] The considerably individualized characteristic of emotional distress claims is pertinent t the predominance issue, discussed infra.

Notably, Aldrich does not expressly contest the commonality issue, concluding that it is subsumed in the subsequent predominance issue. See *Cert. Opp.* at 12 (citing *Hoang v. E*Trade Group, Inc.*, 2003 Ohio 301, ¶ 16).[26] The Plaintiffs present specific commonality arguments in the *Mot. Class Cert.* at 36-43, and in light of Aldrich's arguments, combines its commonality arguments with predominance arguments in the *Cert. Reply* at 17.

Having considered the arguments presented, this Court finds that a common nucleus of operative facts has been presented and that common legal issues regarding the remaining causes of action and Aldrich's potential liability to the two remaining subclasses. Therefore, the commonality issue is satisfied.

**5. The typicality issue: "the claims or defenses of the representative parties must be typical of the claims or defenses of the class"**

The fifth class certification requirement is commonly referenced as the "commonality" issue. The Ohio Supreme Court has instructed:

> [T]he requirement of typicality serves the purpose of protecting absent class members and promoting the economy of class action by ensuring that the interests of the named plaintiffs are substantially aligned with those of the class. Typicality is a distinct prerequisite to class certification that must be independently satisfied. Thus, the typicality requirement "must be taken seriously and cannot be satisfied solely by conclusory allegations."

*Baughman*, 88 Ohio St. 3d at 484 (citations omitted). Furthermore, the *Baughman* court cautioned that "typicality does not require exact identity of claims." Id. at 485; see also id. (extensively quoting 1 Newberg on Class Actions (3 Ed.1992) 3-74 to 3-77, Section 3.13) (highlighting that the rationale for the distinct typicality issue in class certification is to assure

[26] For purposes of clarity, not all potential class actions involve the Civ. R. 23(B)(3) requirement of predominance, as the seventh class certification issue, infra, is an alternative of the three sub-parts of Civ. R. 23(B).

that the individual claims of the named plaintiffs are sufficiently connected with the claims of the absent putative plaintiff class members).

The potential that unique affirmative defenses may apply to the named plaintiffs' claims does not necessitate a finding of atypicality. Id. at 486, 487. The Ohio Supreme Court instructed that "absent some serious discrepancy between the position of the [named plaintiffs] and that of the class, the focus at this [typicality] stage should properly remain on the essential conforming characteristics of the defendant's conduct and the claims arising therefrom." Id. at 487; see also *Hamilton*, 82 Ohio St. 3d at 78 ("[A] unique defense will not destroy typicality * * * unless it is 'so central to the litigation that it threatens to preoccupy the class representative to the detriment of the other class members.'") (end citation omitted).

Furthermore, some Ohio courts have notably recognized that the commonality and typicality issues may involve substantial overlap. See *Grant*, 2003 Ohio 2826 at ¶ 35 (citing *Falcon*, 457 U.S. at 158 n. 13). The distinction is that per the text of the two portions of Civ. R. 23(A), the commonality issue focuses on the claims of the putative class, while the typicality issue inquires into whether the specific claims of the class representatives are sufficiently aligned with the claims of the absent putative plaintiffs that a determination of the former necessitates a determination of the latter.

As an initial matter, some of the parties' arguments pertaining to the typicality issue are predicated on certain assumptions regarding the viability of the proposed classes and subclasses. This Court has previously addressed those arguments above. However, the distinctive arguments presented are addressed below.

The Plaintiffs argue that their claims are typical of the putative class claims because the claims are based on a common event, which is the explosion and attendant evacuation. They

argue that their interests are substantially similar to the interests of the putative class members, insofar as a determination of liability would be equally applicable to the named Plaintiffs' claims and the putative plaintiffs' claims. See generally *Mot. Class Cert.* at 44-48.

Aldrich counter-argues that the negligent infliction of emotional distress cause of action and the attendant Emotional Distress Subclass involves such highly individualized matters–personal emotions and thoughts–that typicality cannot be satisfied. *Cert. Opp.* at 17 (citing inter alia *Sanna v. Delta Airlines* (N.D. Ohio 1990), 132 F.R.D. 47, 50, and *Ikonen v. Hartz Mountain Corp.* (S.D. Cal. 1988), 122 F.R.D. 258, 263). It further references the proffered expert testimony of psychology professor Dr. Tamera Schneider to support the proposition that individuals may react differently to a given situation and that the "normal" emotional state for any person varies considerably from other people's "normal" emotional state. She further opines that susceptibility to stress varies and that, assuming emotional distress is found, making a proximate causation connection between that emotional distress and the explosion/evacuation or some other unrelated circumstance becomes a highly individualized analysis. See id. at 17-18 (citing Affidavit of Tamera R. Schneider, attached as Exhibit 29 to the *Cert. Opp.*) Aldrich concludes that all emotional distress claims are highly individualized, thereby precluding the Plaintiffs' claims from being typical of any other claim, including the putative subclass members' claims. Id. at 18.

The Plaintiffs reply that the "highly individualized" argument is a mis-applied predominance argument. *Cert. Reply* at 18. They argue that the claims are only required to be typical, not identical and that, in light of the potential bifurcation of liability from damages, the potential that the damages vary is immaterial. See id. at 18-19.

The personalized nature of emotional distress is generally undisputable and Dr. Schneider's expert opinion supports that proposition. The contested inquiry, therefore, is whether Ohio essentially excludes emotional distress claims from proceeding in class actions because those claims are atypical as a matter of law.

Initially, this Court recognizes that the explicit language of Civ. R. 23 and the Staff Notes makes no distinction against emotional distress claims. Second, this Court is not convinced by *Sanna*, a decision by the federal District Court of the Northern District of Ohio, *Ikonen*, a decision by the federal District Court for the Southern District of California, or the other federal district court decisions cited by the Plaintiffs. This Court finds persuasive the reasoning provided by the only Ohio appellate decision on point, *Walker v. Firelands Community. Hosp.* (Oct. 5, 2001), 6th Dist. Case No. E-01-006, 2001 Ohio App. LEXIS 4494.

In *Walker*, the defendant argued that the class plaintiffs relied on federal district cases such as *Sanna* and *Ikonen* to argue that "emotional damages are so individualized and 'idiosyncratic' that they are never 'typical.'" *Walker*, 2001 Ohio App. LEXIS 4494, *9-*10 (end citations omitted). The Sixth District identified other federal district cases that found emotional distress claims may be typical and the differences in damages could be otherwise addressed. See id. at *10 (citing *Day v. NLO, Inc.* (S.D. Ohio 1992), 144 F.R.D. 330, 334-335, appeal dismissed on other grounds (1993), 3 F.3d 153; *Sterling v. Velsicol Chem. Corp.* (C.A. 6, 1988), 855 F.2d 1188, 1197). Analyzing the cases, the Sixth District stated:

> While we recognize the split of authority on the question of whether emotional damages can ever be "typical," we believe that the better reasoned view is that expressed by the courts in Day and Sterling that, as long as common questions exist as to liability, any differences in damages can be handled on an individual basis. As the Supreme Court of Ohio has noted, "typical" does not mean "identical."

Id. at *11 (citing *Planned Parenthood Assn. of Cincinnati, Inc. v. Project Jericho* (1990), 52 Ohio St. 3d 56, 64).

Notably, Aldrich's argument is substantially identical and relies on the same cases as the argument presented by the defendant in *Walker*. The Sixth District found that potentially disparate damages could be addressed on an individual basis after resolving a partial class action on the liability issue. Ohio law, represented by the only Ohio appellate decision on point, appears to reject an absolute typicality bar on class actions presenting emotional distress claims. The typicality analysis for emotional distress claims is therefore the same general analysis as any other claim.

The common factual event at issue in these cases has not been contested in the commonality issue supra. Additionally, common legal questions relating to liability and punitive damages have been presented. For purposes of the Evacuation Damages Subclass, the claims of the named Plaintiffs are substantially similar. For purposes of the Emotional Distress Subclass, the claims of the named Plaintiffs are also substantially similar.

Having analyzed the arguments presented, this Court finds that the claims of the putative members of the two subclasses are not in conflict or otherwise subject to a considerable discrepancy. The cases at bar, as discussed above in Section III.B., are formatted similar to the *Walker* case, addressing the common liability issue on a class basis, then if necessary, proceeding to individualized damages determinations. Therefore, this Court finds that the Plaintiffs' claims are typical of the two subclasses' claims and this issue is accordingly satisfied.

**6. The adequacy of representation issue: "the representative parties must fairly and adequately protect the interests of the class"**

The sixth class certification requirement is commonly referenced as the "adequacy of representation" issue. The Ohio Supreme Court has instructed:

> Federal courts have referred to this requirement as being of crucial importance in terms of ensuring due process to members of the proposed class who will not have their individual day in court. The requirement is generally divided into a consideration of the adequacy of the representative and the adequacy of counsel.

*Marks*, 31 Ohio St. 3d at 203 (citations omitted); *Warner*, 36 Ohio St. 3d at 98. The parties have presented separate arguments regarding the adequacy of the Plaintiffs and the adequacy of the Plaintiffs' current counsel. Therefore, this Court will consider the two matters separately.

**a. The Plaintiffs are adequate class representatives.**

The Ohio Supreme Court has stated that the adequacy of the class representatives is generally satisfied if his interests are not antagonistic to the interests of the other, non-present putative class members. *Marks*, 31 Ohio St. 3d at 203. Notably, some of the parties' arguments involve matters previously resolved in other portions above; therefore, only the remaining distinct arguments are analyzed herein.

The Plaintiffs have argued that their interests are not antagonistic because they live within the same one-mile radius, were evacuated from their homes like most of the other putative plaintiffs, and generally have sustained the same emotional distress from the explosion and evacuation as the other putative plaintiffs. See *Mot. Class Cert.* at 49. The Plaintiffs also argue that they are adequate class representatives, any arguments regarding ignorance of the facts and law notwithstanding, because they have otherwise demonstrated sufficient interest in pursuing the cases. See id. at 49-50.

In rebuttal, Aldrich argues that the Plaintiffs have emphasized the "broader" punitive damages aspect of the claims and de-emphasized seeking compensatory recovery for actual damages incurred. It argues that this demonstrates antagonism against, arguendo, any putative class member whose claims for compensatory damages would outweigh any interest in punitive damages. See *Cert. Opp.* at 21-22.

Aldrich also argues that by demonstrating in their depositions that they are completely unaware of other putative class members who may factually have viable claims, the Plaintiffs' adequacy is unsatisfactory. Id. at 22 (citing *In re Am. Commercial Lines, LLC* (E.D. La May 28, 2002), No. 00-252, 2002 U.S. Dist. LEXIS 10116 [hereinafter "*Commercial Lines*"]). Aldrich cites multiple portions of the Plaintiffs' depositions to demonstrate the lack of knowledge about other putative plaintiffs' claims and the purported disinterested characteristic of the Plaintiffs--not their counsel--to the instant cases. See id. at 23-24. Furthermore, Aldrich argues that no evidence has been provided through requested discovery relating to any other putative plaintiffs' claims. See id. at 23 n. 48; see also supra Section III.D.3.a. (discussing the speculative nature of the evidence presented to show that the other putative members of the Real Property Damages Subclass had also sustained cracks in their foundations or other explosion-attributable structural damage).

The Plaintiffs' reply highlights that Aldrich's rebuttal argument regarding the purported inadequacy of unknowledgeable class representatives is premised on a decision from one sister-state's federal district court. *Cert. Reply* at 21. The Plaintiffs highlight various statements by the *Commercial Lines* district court showing the absolute inactivity by the purported class representatives and their unfamiliarity with basic details regarding the claim. See id. (quoting portions of *Commercial Lines*, 2002 U.S. Dist. LEXIS 10116 at *37-*38). The Plaintiffs argue

that they, in contrast, actively contacted counsel, monitored pertinent print and television reports, and attended multiple "town meetings." See id. at 21-22 (citing Banford Affidavit at ¶ 10-12; Graeser Affidavit at ¶ 9, 11).

The Plaintiffs cite for support *Surowitz v. Hilton Hotels, Inc.* (1966) 383 U.S. 363 and *Lerner v. Haimsohn* (D. Colo. 1989), 126 F.R.D. 64, 67 ("Generally, as long as the plaintiffs, as class representatives, know something about the case, even though they are not knowledgeable of the complaint's specific allegations, the class should be certified.") While they do not have precise details about the extent of the other putative plaintiffs' damages, the Plaintiffs argue that they have shown a genuine interest in pursuing their claims and, without demonstrable antagonism, in pursuing the putative class members' claims to obtain appropriate compensation for all. See id. at 23. Furthermore, the Plaintiffs also argue that Aldrich has mis-characterized the cited portions of their depositions. They argue that the deposition testimony does not reflect that they lack any knowledge, but that they lack expertise in legal and technical areas. See id. at 23-25.

Aldrich responds that its adequacy arguments are appropriate because the role of class representative requires a heightened standard. *First Sur-Reply* at 7-8 (citing *Commercial Lines*, 2002 U.S. Dist. LEXIS 10116 at *37-*38, and *Scott v. N.Y. City Dist. Council of Carpenters Pension Plan* (S.D N.Y. 2004), 224 F.R.D. 353, 355-357). It argues that the Plaintiffs in these cases have failed to meet that heightened standard for adequacy. Id.

As a general proposition of law, this Court recognizes that the adequacy of class representatives is a distinct issue because the class plaintiffs will likely litigate-by-representation the claims of the other putative class members, which is an important due process consideration. However, this Court also notes that textually the class representatives

must demonstrate they will *adequately protect* the absent members' interests, not be the superior or best of all possible plaintiffs. See Civ. R. 23(A)(4).

Notably, this Court gives little weight to Aldrich's citations to the fragmented, de-contextualized depositions. This Court has examined not only the actual quotes, but also the contexts. For many of the quotes or summaries provided by Aldrich, the Plaintiffs' counsel objected on the basis that the questions improperly sought legal or expert conclusions. This Court finds that for many of the "unknowledgeable" answers provided by the four lay Plaintiffs, the preceding questions used legal terms of art. The Plaintiffs did not appear to know nothing at all, but only to be unfamiliar with the more intricate distinctions of law. Accordingly, Aldrich's rebuttal arguments premised on the depositions are unpersuasive.

The citations by the parties to *Commercial Lines* and *Lerner*, which are sister-states' federal district court decisions, is similarly given little weight in light of the two Ohio appellate district decisions identified in this Court's research. In *Hansen v. Landaker* (Dec. 7, 2000), 10th Dist. Case Nos. 99-AP-1191 and 99AP-1192, 2000 Ohio App. LEXIS 5674, the Tenth District affirmed[27] the trial court's class certification. See id. at *5-*6, *25. Regarding the defendant's argument, based on the plaintiffs' depositions, that they were so unfamiliar with the case that they were inadequate class representatives, the court stated:

> It is true that plaintiffs' depositions reveal plaintiffs to be unfamiliar with both the underlying facts and the nature of the litigation they are pursuing. However, this shortcoming does not make them inadequate class representatives. It is well-established that it is not necessary that proposed class representatives be knowledgeable, intelligent or have a firm understanding of the legal or factual basis on which their case rests in order for them to be deemed adequate to represent the class. *This rule would appear to stem from the realization that*

[27] The denial of the plaintiffs' request to proceed with a shareholder derivative suit and the requirement that one person's class membership be withdrawn are immaterial to the otherwise affirmed trial court decision on class representative adequacy.

> *class representatives who are laypersons inherently rely on their counsel to identify the relevant facts and understand and argue the salient law.*

Id. at *16-*17 (citing *Supowitz*, 383 U.S. at 371) (emphasis added). The court concluded that the plaintiffs' interests were not antagonistic to the absent putative members' claims, thereby finding class representative adequacy satisfied. Id. at *17.

In *Mominey v. Union Escrow Co.*, 2003 Ohio 5933, the Eighth District affirmed in part and reversed in part[28] the trial court's "unexplained order" denying class certification. See id. at ¶ 1, 4. Regarding the arguments on the adequacy of class representative issue, the defendant argued that the plaintiff had little memory of the specific transaction and was unfamiliar with the legal and factual issues in her case. The defendant's concerns were that such an unknowledgeable class representative would allow the class counsel to unduly influence the litigation. Id. at ¶ 11. Rejecting the arguments, the court found:

> However, a class representative's familiarity with legal and factual issues varies depending on the individual case; some litigation does not require him to have an extensive knowledge of the issues, and in some cases it may be unreasonable to expect him to have knowledge. The adequacy inquiry focuses on [the plaintiff's] factual or legal knowledge *only to the extent that such knowledge is necessary to her role as class representative*, and certification is denied on this ground *only in extreme cases*, such as where the proposed representative's lack of knowledge shows a lack of interest in or lack of connection with the proceedings or threatens to prejudice the class.

Id. (footnote citations omitted; emphases added).

In the instant cases, the Plaintiffs have demonstrated a hesitancy when questioned in matters involving legal terms of art, legal conclusions, or expertise. They have presented evidence demonstrating that they were aware of the explosion, became aware of the putative

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[28] The reverse and remand was to allow the trial court to provide a more "rigorous analysis on other class certification issues and to proceed by instructions with other class claims. See *Mominey*, 2003 Ohio 5933 at ¶ 13. The adequacy of class representatives determination, however was essentially affirmed. See id. at ¶ 11-12.

defendant Aldrich, initially sought some redress for their individual claims from the Crawford reimbursement process, as well as appearing and sometimes speaking at "townhall meetings" likely attended by many of the potential putative plaintiffs they now seek to represent. While the Plaintiffs have not gone door-to-door asking about the cost of being displaced or inquiring into potentially personally-sensitive medical conditions, the Plaintiffs have demonstrated an intent to actively pursue this litigation. Except for the matter addressed in the next subsection, this Court finds that evidence has been presented that the Plaintiffs are sufficiently independent in their roles as class representatives from the distinct roles of the class counsels. Therefore, based on the applicable Ohio law and this Court's foregoing factual determinations, the adequacy of class representatives sub-issue has been satisfied.

**b. In light of the familiar relationship between the O'Donnells and one of the Plaintiffs' counsel, which presents a potential antagonism between the unrepresented subclass members and the O'Donnells, this Court finds that the firm of Dyer, Garofalo, Mann and Schultz may not adequately protect those interests. The Plaintiffs' other two counsel have presented evidence that satisfies the adequacy of representation issue.**

The second adequacy of representation sub-issue analyzes the competency of the proposed class counsel. The Ohio Supreme Court has instructed:

> The issue of whether counsel is competent to handle the action can be the most difficult in the Rule 23 analysis. The fact that an attorney has been admitted to practice does not end the judicial inquiry. An attorney should be experienced in handling *litigation of the type involved in the case* before class certification is allowed. *Close scrutiny should be given to the attorney's qualifications* to handle the matter with which he is entrusted. For example, a gifted intellectual property lawyer might not be qualified to handle an environmental case. It also follows that a personal injury attorney probably should not be entrusted with a complex antitrust case under the Valentine Act. Since crucial questions of due process are involved, *the trial court should exercise great care* in its

> determination of this element. *Although this task may be most unpleasant, it is one of the most vital.*

*Warner*, 36 Ohio St. 3d at 98 (emphases added).

Two distinct arguments have been presented regarding the adequacy of counsel, which this Court will separately address. However, for purposes of clarity, this Court preliminarily identifies for the record that collective references will be to "Plaintiffs' counsel" and individual references will be to the three firms and the signing attorneys' last names.[29] Notably, as reflected in the Banford Complaint in the 8704 case pre-consolidation, Banford and Graeser were represented by only Attorney Schulte and BB&S. Similarly reflected in the O'Donnell Complaint in the 8865 case pre-consolidation, the O'Donnells were jointly represented by Attorney Smalley, DGM&S, Attorney Jones and Attorney Washington, and J&W. This Court notes that in documents filed post-consolidation, the Plaintiffs' counsel have maintained their separate representations but have collectively signed matters filed by the Plaintiffs.

First, regarding the general qualifications of Plaintiffs' counsel, they state without detail that they have "extensive experience in the complex litigation area." *Mot. Class Cert.* at 50. They also reference their experienced support staff in relation to class action litigation. Id. They also provide supporting details of their experience by affidavits. See *Cert. Reply* at 25 (citing the Affidavit of Attorney Schulte, attached as Exhibit 19 to the *Cert. Reply*; Affidavit of Attorney Smalley, attached as Exhibit 20 to the *Cert. Reply*; Affidavit of Attorney Jones, attached as Exhibit 21 to the *Cert. Reply*).[30]

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[29] The list includes: Attorney Schulte and Attorney Behnke from Botros, Behnke & Schult [hereinafter "BB&S"]; Attorney Smalley and Attorney Chinault from Dyer, Garofalo, Mann & Schultz [hereinafter "DGM&S"]; Attorney Jones and Attorney Washington from Jones and Washington [hereinafter "J&W"].

[30] By apparent mistake, while the affidavit of Attorney Washington is referenced as being attached as Exhibit 22 to the *Cert. Reply*, the affidavit was not attached.

In rebuttal, Aldrich argues that the Plaintiffs' counsel have not provided evidence demonstrating experience in "mass tort/mass accident" civil litigation. While recognizing the general experience and some class action litigation experience, it impliedly argues that the "mass tort/mass accident" type is sufficiently distinct that experience in that type must be shown. See *Cert. Opp.* at 29-30; *First Sur-Reply* at 8 n. 9.

This Court has reviewed the submitted affidavits and the pertinent case law. The Ohio Supreme Court provided two examples in *Warner*. First, the intellectual property attorney may not be adequate to try an environmental class action. Second, a personal injury attorney may not be adequate to try a complex antitrust class action. In the instant cases, the causes of action presented are negligence, strict liability, negligent infliction of emotional distress, and nuisance. Applying the examples in *Warner*, the intellectual property attorney or the complex antitrust attorney would probably not be adequate to try the causes of action in the these cases, but experienced civil litigators are. Aldrich's characterization of this case as a "mass tort/mass accident" case is not dispositive. The adequacy of the Plaintiffs' counsel on the basis of their experience with the type of litigation has been satisfied.

Aldrich presents a second rebuttal argument, however, that this Court does find persuasive. It highlights that the O'Donnells have a close familiar relationship with Mike Dyer, a named partner at DGM&S. See *Cert. Opp.* at 29, 30 n. 55. In her deposition, M. O'Donnell states that her sister is married to Attorney Dyer. M. O'Donnell Depo. II at 108:10-18. She admits that during the evacuation after the explosion, her sister contacted her. Id. at 108:19-24. She is unaware of the fee arrangement with DGM&S in the instant cases and she has had Attorney Dyer or DGM&S represent her in previous unrelated matters for free. See id. at

114:10-115:18. She states that the topic of litigation related to the explosion and evacuation arose between her husband and Attorney Dyer. Id. at 108:25-109:4.

W. O'Donnell also states that he has been represented by DGM&S in multiple prior unrelated matters. W. O'Donnell Depo. II at 131:14-25. He indicates that he selected DGM&S to represent him and his wife in the instant cases because of the familiar relationship. Id. at 132:2-4.

This Court notes that in the *Cert. Reply* the Plaintiffs do not respond in any manner to the argument regarding the potential for a close-family conflict of interests between the O'Donnells and DGM&S. The issue was extensively argued in the *Cert. Opp.*, but the Plaintiffs' arguments in the *Cert. Reply* address only the experience and expertise of Plaintiffs' counsel.

In its arguments, Aldrich cites decisions by four federal Circuit Courts of Appeals. In *Turoff v. May Co.* (C.A. 6, 1976), 531 F.2d 1357, the four named plaintiffs were three attorneys with the proposed class counsel's firm and the wife of one of those attorneys. Id. at 1360. The court stated:

> If the interests of a class are to be fairly and adequately protected, if the courts and the public are to be free of manufactured litigation, and if proceedings are to be without cloud, the roles of class representative and of class attorney cannot be played by the same person.

Id. (and citations omitted). In *Susman v. Lincoln Am. Corp.* (C.A. 7, 1977), 561 F.2d 86, because the issue was on first impression in the circuit, the court extensively analyzed other circuits' precedents and the twice-used decision by the district court. See generally id. at 89-93. The circuit declined to adopt the district court's "per se rule,"[31] but otherwise affirmed the

[31] Notably, Aldrich parenthetically quotes only the district court's "per se rule" see *Cert. Opp.* at 29 n. 53, but does not otherwise analyze the holding of the circuit court.

district court's exercise of discretion in that particular case. See id. at 93-94. The circuit court also notes that "[w]hile 'mere imaginative speculation' [of conflicting interests] is not enough, the district court must assess *the likelihood that a conflict of interest may exist*." Id. at 95 n. 11 (citations omitted; emphasis added); see also *Greisz v. Household Bank, N.A.* (C.A. 7, 1999), 176 F.3d 1012, 1014 (citing *Susman*, Seventh Circuit found an attorney's attempts to repeatedly pursue class actions using his own relatives clearly improper).

The Eighth Circuit reaches its case of first impression on the issue in *Petrovic v. Amoco Oil Co.* (C.A. 8, 1999), 200 F.3d 1140, 1154. The court similarly surveys the other circuits' precedents and the slightly different ethical rules used in some jurisdictions. Id. The conclusion is:

> In situations where there is a close familial bond between a class counsel and a class representative, it seems to us that there is a clear danger that the representative may have some interests in conflict with the best interests of the class as a whole *when making decisions that could have an impact on attorney fees.*

Id. at 55 (emphasis added).

The parties have not cited and this Court's research has not found any decisions by Ohio courts addressing this issue. This Court has examined the four cases cited above and the argument presented by Aldrich. This Court is also mindful that the Plaintiffs, who bear the burden of proof by a preponderance of the evidence, see e.g. *Coles-Morgan*, 2005 Ohio 2994 at ¶ 9, have presented no evidence or counter-argument addressing the familiar relationship. Furthermore, similar to some of the federal circuit courts, this Court notes the general ethical rules governing attorneys' conduct.

Canon 5 of the Code of Professional Responsibility, EC 5-1, provides that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for

the benefit of his client and free from compromising influences and loyalties." In Ohio, when an attorney proposed to act as class counsel for a class that includes close family and non-familial members, the potential for a compromising influence and loyalty exists. However, this Court, similar to the *Susman* court, does not find that a "per se rule" comports with the "rigorous analysis" required by the Ohio Supreme Court and does not consider the specific facts and arguments of the case. Accordingly, this Court finds that a case-by-case analysis into whether the potential conflict demonstrates an actual inadequacy of proposed class counsel.

In the cases at bar, the evidence demonstrates that the O'Donnells have relied on DGM&S on multiple prior occasions for representation at an admitted discount. The immediate contact during the evacuation by Mrs. Dyer to M. O'Donnell, while clearly reasonable familial conduct, also clouds the interests of Attorney Dyer, and by imputation, of DGM&S. This Court also notes that the O'Donnells' are still represented by the independent counsel of J&W, and in these consolidated cases, apparently also by BB&S.

Therefore, based on the foregoing, this Court hereby finds that DGM&S cannot serve as adequate class counsel in the cases sub judice. For clarity, as discussed above, this Court finds that all of the Plaintiffs' counsel, including Attorney Smalley and DGM&S, have sufficient experience to serve as class counsel. However, this Court finds that the experience notwithstanding, a conflict of interests exists between DGM&S representing the O'Donnells and DGM&S representing the other non-familial putative plaintiffs. Therefore, certification of Attorney Smalley and by imputation DGM&S as class counsel is hereby denied.

However, this Court recognizes that the qualifications of the remaining Plaintiffs' counsel have been demonstrated and the familiar relationship issue is inapplicable. Conditioned on the disqualification of Attorney Smalley and DGM&S to proceed hereinafter in

the cases sub judice, this Court otherwise finds that the adequacy of class counsel sub-issue has been satisfied. Therefore, as conditioned above, the adequacy of representation issue has been satisfied.

**7. The Civ. R. 23(B) alternatives requirement: "one of the three Civ. R. 23(B) requirements must be met"**

The seventh class certification requirement actually presents three specific alternatives and requires only satisfaction of one of them. See Civ. R. 23(B). Because the movants bear the burden of proof, the Civ. R. 23(B) analysis is guided by their arguments. In the cases at bar, the Plaintiffs have chosen to present only the third alternative [hereinafter a "Type III Class Action"]. See *Mot. Class Cert.* at 50 ("Plaintiffs assert they meet the requirements of Ohio Civ. R. 23(B)(3).)

The Ohio Supreme Court has recognized that the purpose of a Type III Class Action, a "so called 'damage' action[,] * * * was to bring within the fold of maintainable class actions cases in which the efficiency and economy of common adjudication outweigh the interests of individual autonomy." *Hamilton*, 82 Ohio St. 3d at 79-80 (citations and paragraph breaks omitted). Textually, a Type III Class Action requires that:

> the court finds that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior* to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

Civ. R. 23(B)(3) (emphases added). Ohio law has accordingly identified two distinct but conjoined sub-issues in a Type III Class Action. The Plaintiffs must satisfy the commonly-

referenced "predominance" and "superiority" sub-issues. The letter-identified matters are pertinent to the two sub-issues, but need not be additionally satisfied as sub-issues. See *Schmidt v. Avco Corp.* (1984), 15 Ohio St. 3d 310, 314.

**a. The predominance sub-issue**

The Ohio Supreme Court has instructed:

> "It is now well established that 'a claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.'"

*Baughman*, 88 Ohio St. 3d at 489 (quoting *Cope v. Metro. Life Ins. Co.* (1998), 82 Ohio St. 3d 426, 429-430).

> [W]hile what is meant by "predominate" is not made clear by the rule, it is generally held that in determining whether common questions of law or fact predominate over individual issues, it is not sufficient that common questions merely exist; rather, the common questions must represent *a significant aspect of the case* and they must be able to be resolved for all members of the class in a single adjudication.

*Schmidt*, 15 Ohio St. 3d at 313 (emphasis added).

The Plaintiffs argue that the common factual questions regarding what Aldrich, through its employees, did to the TNO column around the time of the explosion will require a class action jury trial involving considerable amounts of non-testimonial evidence and multiple witnesses' testimonies to resolve. They argue that these questions, evidence, and witness testimony will be substantially similar for each putative plaintiff's claim. The Plaintiffs recognize that the compensatory damages phase will also require individualized treatment, but argue that the liability determination will either be individually done repeatedly or only once before the necessarily-individualized portion occurs. They argue that this "liability"

determination is therefore a significant aspect of the case, because it is the necessary predicate for all of the remaining portions of the claims. See *Mot. Class Cert.* at 52-53.

Aldrich counter-argues that predominance is not satisfied because the Plaintiffs have recognized that the proximate causation and compensatory damages elements require individualized resolution. It argues that "[d]etermining duty and breach of duty -- the only issues that can realistically be tried on a class-wide basis -- will not achieve judicial economy because determinations of proximate causation and the existence of damages, which will take the most time at trial, must be made on an individual basis." *Cert. Opp.* at 31. Aldrich also argues that "mass accident" class actions categorically fail to satisfy the predominance issue because generally a nominal portion would be tried on a class-wide basis to almost assuredly degenerate into multiple individual lawsuits. Id. at 31 (citing inter alia Ohio Civ. R. 23(B)(3) Staff Notes).

In support of the "mass accident" categorical preclusion, the Plaintiffs cite the Second District's 1993 decision in *Adair II*. They highlight that *Adair II* involved causes of action and a proposed class involving people within a one-mile radius, which the Plaintiffs characterize as substantially similar to the instant cases. *Cert. Opp.* at 32. They also argue that the Second District has provided a distinction between the "mass accident" and the "accident en masse." For the "mass accident," predominance is lacking because the liability and damages components must each be individually determined. In contrast, the "accident en masse" would involve substantially identical injuries and a liability determination that more readily would be class-wide. Id.

Initially, this Court notes that *Adair II* repeatedly emphasized that the trial court was affirmed because it did not abuse its discretion in denying certification. See id., 1993 Ohio

App. LEXIS 573 at *6, *8. Furthermore, while *Adair II* bears some similarities to the cases at bar, this Court also finds pertinent distinctions. The claims in *Adair II* involved a purported three year time period in which constant emissions created an odorous thick cloud that over lengths of time allegedly impaired the putative class' use and enjoyment of their properties. Id. at *3-*4. Pertaining to the presence of the thick cloud, the trial court recognized

> The area described for class certification contains *numerous industrial plants that could cause* the type of air emissions that are complained of in this action. The damages allegedly sustained by the Plaintiffs have not been demonstrated to be uniform by type or *necessarily the exclusive result* of [defendant's] foundry * * *."

*Adair I*, attached as Exhibit 1, at 5 (emphases added). The commonality issue failed in *Adair I* and the predominance issue is only reached in combination with the superiority issue. See id. at 7 n.1. Judge Kessler identified the distinction between his decision in *Adair I* and his prior decision in *CSX I*:

> The Court in Reynolds found that negligence and malice were issues that predominated over individual issues during the then current stage of the proceedings. Therefore, resolution of these [negligence and malice] issues were superior to issues of proximate cause and damage and formed the basis for the conditional class certification. The Court in Reynolds refused to certify on the issue of proximate causation because the questions of injury and damage were so individualized that *they were not common* to all members of the class.

*Adair I*, attached as Exhibit 1, at 7 n.1 (italics added; underlining sic). Notably, the decision in *Adair I* never addressed bifurcation with a certification of the liability phase only, but the bifurcation was presented to the court in *CSX I* by the Master's Report cited therein. See *CSX I*, attached as Exhibit 2, at 6-7.

In *CSX I*, the underlying factual situation was one accident (the train derailment). The plaintiffs sought liability determinations against multiple corporate defendants. The court found that, the potential for diverse liability notwithstanding, the opportunity to reach one-time

answers on the liability and malice questions represented a significant portion of the entire litigation that predominance was satisfied in *CSX I*.

In contrast, the "event" in *Adair I* spanned three years and had numerous defendants. Some of the claims--particularly the nuisance cause of action seeking compensation for loss of use and enjoyment of property--necessarily encompassed the entire three year "event." The lack of commonality and, necessarily, the lack of predominance, is the result of the length of time covered.

In the cases at bar, the "event" is more similar to the train derailment in *CSX I* than the consistent dirty fog in *Adair I*. As a result of the phosphorous fires resulting from the train car breach and the potential for contamination, the authorities in *CSX I* evacuated the surrounding area. The liability and malice issues addressed those common issues and were found to predominate. In the cases at bar, the TNO column explosion occurred in a relatively short time span. As a result of the potential NO contamination, the authorities evacuated the surrounding area. As this Court has discussed above, the liability and punitive damages issues involve a common nucleus of facts and legal questions.

Notably, Aldrich has speculated that the individual damages determinations will require more time than the class-certified liability determinations. This Court finds that argument unpersuasive for two distinct reasons.

First, while conservation of judicial resources is a laudable aim for using Type III Class Actions, the Ohio Supreme Court has instructed against using time comparisons to resolve the predominance sub-issue:

> It is conceivable that a significant amount of time may be spent in this case litigating questions affecting only individual members of the classes. However, clockwatching is neither helpful nor desirable in determining the propriety of class certification. A court should not "determine predominance by comparing

> the time that the common issues can be anticipated to consume in the litigation to the time that individual issues will require. Otherwise, only the most complex common questions could predominate since such issues tend to require more time to litigate than less complex issues."
>
> As one court has so astutely explained:
>
> "Arguably it is true that as a class action more time in toto will be spent in proof of individual damage claims in any of the class actions than will be spent in proof of conspiracy. * * * [However,] if there were to be but a single case for trial, the court would expect that the great bulk of the time of that trial would be consumed with proof or the attempted proof of the existence and effect of a conspiracy and that the fraudulent concealment and damage issues would be far less predominant in the sense of time consumed at the trial. Were there to be 500 separate suits, this same pattern undoubtedly would prevail as to each. It seems specious and begging the question to say that if these 500 law suits were brought into a class so that proof on the issues of conspiracy need be adduced only once and the result then becomes binding on all 500, * * * thereby the common issue of conspiracy no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer."

*Hamilton*, 86 Ohio St. 3d at 85-86 (bracketed and ellipses modifications sic; internal citations omitted).

Second, arguendo, this Court has examined the substantial amounts of documentary evidence presented regarding the Isotec's cryogenic nitric oxide distillation process. This Court has examined the lengthy depositions from various Aldrich employees. Regarding the third and fourth phases pertaining to potential punitive damages, this Court has examined the OSHA citations. In light of the arguments already presented regarding the significance, if any, of the OSHA citations, a considerable amount of testimony may also be necessary for those phases. Therefore, this Court rejects any argument regarding lengths of time for the difference trial phases as highly speculative.

Based on the foregoing, this Court finds that the four-part format involves mostly class-based determinations. The "first phase" jury trial on liability involves common factual and legal questions that are susceptible to a once-and-for-all determination. The "third phase," if necessary, also involves common factual and legal questions related to evidence of Aldrich's

purported malicious misconduct prior to the date of the explosion and on the date of the explosion. Those common questions are susceptible to once-and-for-all determinations. Assuming arguendo that malicious conduct is found, the "fourth phase" would present to the same jury as the "third phase" the common factual and legal questions regarding evidence pertinent to assessing appropriate punitive damages. Those common questions are also susceptible to once-and-for-all determinations. Therefore, this Court finds that the predominance sub-issue for purposes of Civ. R. 23(B)(3) is satisfied.

**b. The superiority sub-issue**

The Ohio Supreme Court has instructed:

> Whether or not a class action is the superior method of adjudication requires a comparative evaluation of other available procedures to determine if the judicial time and energy involved would be justified.

*Marks*, 31 Ohio St. 3d at 204 (citing *Schmidt*, 15 Ohio St. 3d at 313); *Adair II*, 1993 Ohio App. LEXIS 573 at *5 (same). The four factors listed in the text of Civ. R. 23(B)(3) are also pertinent considerations.

The Plaintiffs argue that proceeding as a class action is superior to other possible adjudicatory methods because the evidence and testimony regarding common issues will be presented once, not numerous times, thereby conserving judicial time and energy. *Mot. Class Cert.* at 59-60. They also argue that without the cost-reducing collaborative characteristics of a class action, the numerous individual plaintiffs may be financially foreclosed from separately pursuing their relatively small claims. They also argue that the relatively small size of the individual claims also supports an inference that the putative plaintiffs will not insist on maintaining control of their own claims to the detriment of the class. See id. at 60-61. The Plaintiffs also argue that no undue difficulties are anticipated in managing the class action

because the common issues are subject to common laws–as contrasted to proposed multi-state class actions that may have variable laws–and the presentation of evidence may be condensed into once-and-for-all presentations instead of completely repetitive individual cases. Id. at 61.

In rebuttal, Aldrich argues that proceeding as a class action is not superior because it has already established an extrajudicial claims reimbursement process through Crawford. It argues that the class action is considerably redundant of those voluntary compensation efforts. See *Cert. Opp.* at 40. Furthermore, Aldrich argues that certification will effectively create litigation that otherwise is nonexistent. Id. (citing *In re Phenylpropanolamine Prods. Liability Litigation* (W.D. Wash. 2003), 214 F.R.D. 614, 622). It argues that, in light of the Plaintiffs' conduct related to the Crawford reimbursement process, instant cases and the proposed class action is an attempt to obtain inappropriate additional compensation on the premise of obtaining compensation for an already compensated class. Id. at 41. Aldrich argues that through Crawford it has already compensated "those with actual, meritorious expenses and damages." Id. (emphasis sic); see also id. at 42-43 (citing *Jones v. Allercare, Inc.* (N.D. Ohio 2001), 203 F.R.D. 290, in which Aldrich similarly used Crawford to "reimburse every reasonable or non-frivolous claim").

In reply, the Plaintiffs argue that a class action is not required to be most ideal, but only superior to other possible methods. They argue that accordingly opposing class certification on superiority grounds requires a defendant to propose a better method. See *Cert. Reply* at 32. They also argue that a class action in this forum is superior to Aldrich's self-administered extrajudicial reimbursement process because Aldrich has demonstrated a self-interested tendency in deciding which claims are meritorious and deserving of compensation. The Plaintiffs argue that their dissatisfaction with the reimbursement process, as highlighted by

Aldrich in the *Cert. Opp.*, is the result of Aldrich's determinations being unfair and purportedly inconsistent with applicable law such as the *Reeser* "annoyance and discomfort" damages.

As a preliminary matter, this Court rejects the Plaintiffs' argument that to successfully oppose the superiority issue, Aldrich must counter-propose a superior method. This argument is contrary to the well-established burden of proof for class certification motions.

Regarding the four factors, this Court finds that the interest of the other putative class members in maintaining individual control of their claims appears minimal. For example, the eighteen putative plaintiffs who provided affidavits have not otherwise acted to maintain individualized control of their potential claims.

In contrast, however, Aldrich has implied an alternative reason for the purported lack of interest in maintaining individual control. It argues that the considerable number of putative plaintiffs who have sought compensation through the Crawford reimbursement process demonstrates that those people maintained individualized control until compensated, and therefore the present lack of interest only reflects satisfaction with their reimbursements.

Aldrich's argument, arguendo, does not demonstrate a present interest by members to maintain individual control. Notably, a Type III Class Action includes opt-out provisions. See Civ. R. 23(C)(2). A strong interest by numerous putative class members to maintain their individual control would be indicative that the opt-out provision may be overly used, resulting in a minimized class action *and* numerous individual actions. Accordingly, this Court finds that the first factor weighs slightly in favor of superiority.

The two and only cases in this jurisdiction are sub judice. No evidence shows that other cases have been filed in this Court or the federal counterpart, the Southern District. Accordingly, this factor weighs in favor of superiority.

The factor regarding the desirability of concentrating litigation in this forum weighs in favor of superiority. The presentation in this Court of the otherwise individual claims of putative class members-assuming they would pursue those claims absent class certification-would involve considerably more time and effort than proceeding in a class action, whereby the resources used will predominately be used on once-and-for-all determinations. This Court is familiar with the evidence presented and the motions, some of which remain deferred and some of which have previously been decided. Without concentration of the putative class claims in this Court, other courts may be required to expend resources to achieve a similar level of familiarity.

Additionally, this Court is mindful that while Aldrich's extrajudicial claims process has provided a relatively speedy monetary distribution, the claims process is admittedly one-sided. Aldrich, through its claims adjuster Crawford, determines which claims are meritorious and which claims are frivolous. As an example, Aldrich reimbursed out-of-pocket hotel expenses, but has denied compensation for the loss of use and enjoyment, arguing that those expenses are not recoverable. This Court's determination above that damages for loss of use and enjoyment are distinct may be concentrated in this forum for neutral adjudication as opposed to having a reticent claims adjuster reopen its incomplete process. Based on the foregoing, this Court finds that this factor weighs in favor of superiority.

Lastly, the manageability factor is equally balanced. Based on the determinations above, certification of the cases at bar involves managing a quadripartite format with two distinct class juries and numerous juries for the decertified compensatory damages phase. To ensure that jury trial rights are not violated, specialized jury instructions and interrogatories must be prepared. Only one of three class definitions and only two of six subclasses are

certifiable. The amount of documentary evidence, lay testimony, and expert testimony pertinent to the three class action phases is considerable, in addition to the amount of evidence and testimony required for the non-certified compensatory damages phase.

However, by proceeding in the four-part trial format, this Court may manage the distinct phases to address specific components that are not subject to inappropriate influence by the other phases. As an example, by separating liability for the actual damages from liability for possible malicious conduct, this Court may ensure that the first jury's determination is based on the elements of the causes of action, not a "premature" punitive verdict that finds compensatory liability from the "prior bad acts" evidence.

Considering all of the factors and the other arguments by the parties, this Court finds that the superiority issue has been satisfied.

## IV. CONCLUSION

Subject to the express conditions and modification specified above, this Court hereby sustains the *Mot. Class Cert.* In summary, this Court hereby finds:

- The required "rigorous analysis" and well-established burden of proof for class certification requires the trial court to go beyond the factual allegations in the complaint, thereby weighing the evidentiary materials submitted only to resolve the seven class certification issues, but not to require the plaintiffs to affirmatively prove the merits of their individual claims.
- The cases will proceed to a four-part trial format. The first phase is a class determination regarding compensatory liability. If necessary, the second phase involves decertified individual compensatory damages determinations. If necessary, the third phase is a class determination regarding maliciousness for purposes of punitive liability.

If necessary, the fourth phase involves a class determination of the amount of punitive damages.

- Four causes of action have been presented: negligence, strict liability, negligent infliction of emotional distress, and nuisance.
- The Homeowners Class, which includes the owners of real property within a one-mile radius of the Isotec factory at the time of the explosion, is unambiguously defined.
- The Lessees Class fails for lack of class representative membership.
- The Other Residents Class fails for lack of class representative membership and ambiguity of definition.
- The Plaintiffs are members of two subclasses: the Evacuation Damages Subclass and the Emotional Distress Subclass. The two sub-categories of compensatory damages correlate to the two subclasses.
- The putative members of both subclasses are too numerous to be practically joined in the cases at bar.
- Common issues of fact and law exist, including the issues of compensatory liability and potential maliciousness.
- The Plaintiffs' claims are typical of the claims of the subclasses' putative members.
- The Plaintiffs, as class representatives, may adequately protect the interests of the absent putative plaintiffs.
- The Plaintiffs' counsel have demonstrated sufficient experience. However, due to a familial-relationship conflict of interest, Attorney Smalley and DGM&S are disqualified from serving as class counsel. Conditioned on the foregoing exclusion, the remaining Plaintiffs' counsel are adequate class counsel.

- The cases sub judice may proceed as a Type III Class Action because the common issues predominate over the individual issues.
- The cases sub judice may proceed as a Type III Class Action because the class action is a superior method of adjudication.

## V. ANCILLARY MOTIONS CONCLUSION

In deciding the *Mot. Class Cert.*, this Court has also resolved or officially journalized previous oral decisions regarding multiple ancillary motions. In summary, this Court finds:

- The *Mot. Strike New Evid.* is overruled in part and sustained in part.
- The *Mot. Strike Wright* is overruled in part and sustained in part.
- The *Mot. Bifurcate* is sustained in part with modifications.
- The *Mot. for Leave to File a Supplemental Reply* is sustained.
- The *Mot. for a Case Management Conference* is overruled as moot.
- Notably, the *Damages MSJ* remains deferred.

Furthermore, this Court notes that a telephonic status conference is set for **4:00 P.M. on Monday, October 24**. At that time, this Court will discuss with the parties matters relating to this Court's class action management authority pursuant to Civ. R. 16 and 23(D).

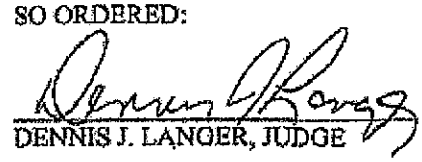
## VI. FINAL AND APPEALABLE ORDER CERTIFICATION

Pursuant to R.C. § 2505.02(B)(5), the portion of this *Decision* "that determines that an action may or may not be maintained as a class action" constitutes a final order. Pursuant to R.C. § 2505.03(A), that final order is appealable. This Court notes, however, that other portions of this *Decision* do not directly determine whether class certification was proper, but may otherwise constitute final orders pursuant to other portions of R.C. § 2505.02. This *Decision* clearly does not resolve all claims against all parties. However, this Court hereby

factually finds that concurrent review, if any, of the other final orders with the class certification determination is in the best interests of judicial economy by avoiding numerous split trials and split appeals. See e.g. Donald I. Gitlin, Student Author, "Special Proceedings in Ohio: What is the Ohio Supreme Court Doing With the Final Judgment Rule?" 41 Clev. St. L. Rev. 537, 565 (1993) (citing Professor Robert Martineau's observation that "the requirement of finality before an appeal often conflicts with a litigant's need to receive review of intermediate determinations made in judicial proceedings to avoid irreparable harm.") (footnote omitted); Mark J. Chumley, Student Author, "Fairness and Finality: Rethinking Final Appealable Orders Under Ohio Law." 64 U. Cin. L. Rev. 143, 144-145 (Fall 1995) ("The Ohio Supreme Court has stated that the purpose of Civil Rule 54(B) is to make a 'reasonable accommodation of the policy against piecemeal appeals with the possible injustice sometimes created by the delay of appeals . . . .'") (citing *Alexander v. Buckeye Pipe Line Co.* (1977), 359 N.E.2d 702, 703) (ellipses sic); *Denham v. City of New Carlisle* (1999), 86 Ohio St. 3d 594, 597 ("This court has previously stated its desire to avoid piecemeal litigation.") (citing *Gen. Elec. Supply Co. v. Warden Elec., Inc.* (1988), 38 Ohio St. 3d 378, 380, 381-382); *Toledo Heart Surgeons v. The Toledo Hosp.*, 2002 Ohio 3577, ¶ 23-24 (citing *Nobel v. Colwell* (1989), 44 Ohio St. 3d 92, 96 (citing *Alexander v. Buckeye Pipe Line Co.* (1977), 359 N.E.2d 702, 703)). Accordingly, for purposes of all otherwise interlocutory decisions pursuant to Civ. R. 54(B), this Court hereby expressly finds that there is no just cause for delay for purposes of immediate appealability.

**THIS IS A FINAL APPEALABLE ORDER. PURSUANT TO APP. R. 4, THE PARTIES SHALL FILE A NOTICE OF APPEAL WITHIN THIRTY (30) DAYS.**

SO ORDERED:



DENNIS J. LANGER, JUDGE

**To the Clerk of Courts:**
**Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.**

DENNIS J. LANGER, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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JULENE POWERS, Bailiff (937-225-4055).

**Appendix A**

| | |
|---|---|
| 1 | Affidavit of Michael Fox, Ph.D., attached as Exhibit A to the *Mot. Class Cert.* |
| 2 | Letter dated October 3, 2003, from John B. Ramsay, Ph.D., to Tom Fahey, attached as Exhibit B to the *Mot. Class Cert.* |
| 3 | "Process Hazard Analysis Summary" dated March 7, 1996, attached as Exhibit C to the *Mot. Class Cert.* |
| 4 | "Explosions in Condensed-Phase Nitric Oxide," attached as Exhibit D to the *Mot. Class Cert.* |
| 5 | "Citation and Notification of Penalty" dated March 18, 2004, from U.S. Department of Labor Occupational Safety and Health Administration to Aldrich, attached as Exhibit E to the *Mot. Class Cert.* |
| 6 | Affidavit of David B. Fulmer, attached as Exhibit 6 to the *Cert. Opp.* |
| 7 | Affidavit of Jana Frey, attached as Exhibit 7 to the *Cert. Opp.* |
| 8 | Affidavit of Larry Roeder dated March 23, 2005, attached as Exhibit 8 to the *Cert. Opp.* |
| 9 | Affidavit of Larry Roeder dated June 16, 2005, attached as Exhibit 2 to the *Second Sur-Reply.* |
| 10 | Deposition of Plaintiff Christine Rene Banford, attached as Exhibit 10 to the *Cert. Opp.* |
| 10.1 | Non-attachment copy of the Banford Depo. I, filed on October 7, 2005. |
| 11 | Continuation Deposition of Plaintiff Christine Rene Banford, attached as Exhibit 14 to the *Cert. Opp.* |
| 11.1 | Non-attachment copy of the Banford Depo. II, filed on October 7, 2005. |
| 12 | Affidavit of Plaintiff Christie Banford, attached as Exhibit 8 to the *Cert. Reply.* |
| 13 | Deposition of Plaintiff Douglas R. Graeser, attached as Exhibit 11 to the *Cert. Opp.* |
| 13.1 | Non-attachment copy of the Graeser Depo. I, filed on October 7, 2005. |
| 14 | Continuation Deposition of Plaintiff Douglas R. Graeser, attached as Exhibit 31 to the *Cert. Opp.* |
| 14.1 | Non-attachment copy of the Graeser Depo. II, filed on October 7, 2005. |
| 15 | Affidavit of Plaintiff Douglas Graeser, attached as Exhibit 9 to the *Cert. Reply.* |
| 16 | Deposition of Plaintiff William C. O'Donnell, attached as Exhibit 12 to the *Cert. Opp.* |
| 16.1 | Non-attachment copy of the W. O'Donnell Depo. I, filed on October 7, 2005. |
| 17 | Continuation Deposition of Plaintiff William C. O'Donnell, attached as Exhibit 15 to the *Cert. Opp.* |
| 17.1 | Non-attachment copy of the W. O'Donnell Depo. II, filed on October 7, 2005. |
| 18 | Deposition of Plaintiff Melissa L. O'Donnell, attached as Exhibit 13 to the *Cert. Opp.* |
| 18.1 | Non-attachment copy of the M. O'Donnell Depo. I, filed on October 7, 2005. |
| 19 | Continuation Deposition of Plaintiff Melissa L. O'Donnell, attached as Exhibit 16 to the *Cert. Opp.* |
| 20 | Non-attachment copy of the M. O'Donnell Depo. II, filed on October 7, 2005. |
| 21 | March 2005 Affidavit of David C. Cowherd, M.S., P.E., attached as Exhibit 17 to the *Cert. Opp.* |

| | |
|---|---|
| 22 | April 2005 Affidavit of David C. Cowherd, M.S., P.E., attached as Exhibit 2 to the *Mot. Strike False Affidavits* |
| 23 | Affidavit of M. Robert Garfield, attached as Exhibit 18 to the *Cert. Opp.* |
| 24 | Affidavit of George J. Schewe, attached as Exhibit 23 to the *Cert. Opp.* |
| 25 | Affidavit of Michael L. Dourson, attached as Exhibit 24 to the *Cert. Opp.* |
| 26 | Affidavit of Martin A. Foos, attorney for Aldrich, attached as Exhibit 25 to the *Cert. Opp.* |
| 27 | "Isotec Victims" advertisement, attached as Exhibit 26 to the *Cert. Opp.* |
| 28 | Affidavit of Tamera R. Schneider, attached as Exhibit 29 to the *Cert. Opp.* |
| 29 | Deposition of Laura Baird, filed under seal in 8704 case on March 4, 2005. |
| 30 | Affidavit of Diane J. Szydel, attached as Exhibit 38 to the *Cert. Opp.* |
| 31 | Deposition of Diane J. Szydel, filed under seal in 8704 case on March 4, 2005. |
| 32 | Deposition of Michael Schuck, filed under seal in 8704 case on March 4, 2005. |
| 33 | Deposition of Jimmy Gammell, filed under seal in 8704 case on March 4, 2005. |
| 34 | Deposition of William Fox, filed under seal in 8704 case on March 4, 2005. |
| 35 | Deposition of Gabriel Reed, filed under seal in 8704 case on March 4, 2005. |
| 36 | Deposition of Alex Christofis, filed under seal in 8704 case on March 4, 2005. |
| 37 | Affidavit of James Ludwiczak, attached as Exhibit 10 to the *Cert. Reply* |
| 38 | Deposition of James Ludwiczak, attached as Exhibit 2 to the *First Sur-Reply* |
| 39 | Email sent September 25, 2003 from Glenn Jirka, attached as Exhibit 11 to the *Cert. Reply* |
| 40 | Affidavit of Richard W. Schulte, attorney for Banford, attached as Exhibit 19 to the *Cert. Reply.* |
| 41 | Affidavit of John Smalley, attorney for the O'Donnells, attached as Exhibit 20 to the *Cert. Reply.* |
| 42 | Affidavit of Taylor Jones, Jr., attorney for the O'Donnells, attached as Exhibit 21 to the *Cert. Reply.* |
| 43 | Affidavit of Michael Wright, attached as Exhibit 23 to the *Cert. Reply.* |
| 44 | Deposition of Michael Wright, attached as Exhibit 1 to the *Second Sur-Reply.* |
| 45 | Aldrich-produced document Bates-stamped ALD011131, attached as Exhibit 26 to the *Cert. Reply.* |
| 46 | "The Blasting Primer," attached as Exhibit 5 to the *Second Sur-Reply.* |

**Appendix B**

1 Affidavit of Charlene Marker, attached as Exhibit 3 to the *Cert. Reply.*
2 Affidavit of Molly Baker, attached as Exhibit 6 to the *Cert. Reply.*
3 Affidavit of Patricia A. Gray, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
4 Affidavit of Robert K. Gray, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
5 Affidavit of Joel Householder, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
6 Affidavit of Judy H. Lambert, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
7 Affidavit of Paul Lambert, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
8 Affidavit of Christie Lane, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
9 Affidavit of Sidney Lane, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
10 Affidavit of Charlene Marker, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
11 Affidavit of Edward Marker, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
12 Affidavit of Eldon Marker, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
13 Affidavit of Eulah M. Snader, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
14 Affidavit of Jimmie Snader, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
15 Affidavit of Douglas Snedden, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
16 Affidavit of C. W. Stocks, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot.*

*Class Cert.* at 1 n.1.

17 Affidavit of Eileen Stocks, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.

18 Affidavit of Kelly B. Wessling, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.

**Appendix C**

1 Affidavit of Randal Barr, attached as Exhibit 1 to the *Cert. Reply*.
2 Affidavit of Michelle Barr, attached as Exhibit 2 to the *Cert. Reply*.
3 Affidavit of Rhonda Benson, attached as Exhibit 4 to the *Cert. Reply*.
4 Affidavit of Donald Benson, attached as Exhibit 5 to the *Cert. Reply*.
5 Affidavit of Bobby Croley, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
6 Affidavit of Shirley Croley, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
7 Affidavit of Eddie Davis, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
8 Affidavit of Andrew C. Grooms, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
9 Affidavit of Susan K. Grooms, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
10 Affidavit of Donald Koverman, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
11 Affidavit of Earl A. Lutz, originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.
12 Affidavit of George W. Lynch, Sr., originally filed in *O'Donnell v. Aldrich Chemical Co., Inc.* (S.D. Ohio), Case No. C-3-03-477, incorporated by reference after remand in *Mot. Class Cert.* at 1 n.1.

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

| | | |
|---|---|---|
| RONALD ADAIR, et al., | : | |
| Plaintiffs, | : | CASE NO. 90-1660<br>CASE NO. ~~91-368~~ 91-369 |
| -vs- | : | (Judge John W. Kessler) |
| DAYTON WALTHER CORPORATION, et al., | : | DECISION AND ORDER |
| Defendants. | : | DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION |

: : : : :

-1-

This matter is before the Court on the Plaintiffs', Ronald Adair, et al., Motion for Class Certification pursuant to Ohio Civil Procedure Rule 23. The Plaintiffs assert that class certification is appropriate because the necessary requirements of Rule 23(a) and 23(b)(3) have been satisfied. The Defendants, Dayton Walther Corporation and Varity Corporation, oppose this motion.

-2-

The Plaintiffs are residents who abide or work in the neighborhood immediately adjacent to Dayton Walther's foundry located at 1366 Miami Chapel Road in Dayton, Ohio. They allege that they have been the unwilling recipients of unlawful air pollution emissions produced by Dayton Walther's foundry from the spring of 1987 through the spring of 1990. The Plaintiffs claim that emissions from Dayton Walther's foundry have caused

particulate matter to be deposited, with aid from the wind, on their property and the surrounding properties. They claim that these emissions have caused damage to, diminished the value of, and impaired the use and enjoyment of their properties. As a result of Dayton Walther's practices, the Plaintiffs seek redress for nuisance and trespass and seek to have the action qualified for class status.

-3-

The requirements for class action certification are set forth in Ohio Civil Procedure Rule 23. The Supreme Court of Ohio has articulated that seven affirmative findings must be made before a case may be certified as a class action. The first two prerequisites are implicitly required by Rule 23 while the other five are explicitly set forth. Warner v. Waste Management, Inc. (1988), 36 Ohio St. 3d 91. The Warner court articulated the seven factors as follows:

1. An identifiable class must exist before certification is permissible.
2. Class representatives must be members of the proposed class.
3. The proposed class must be so numerous that joinder of all members is impracticable.
4. There must be questions of law or fact common to the class.

5. The claims or defenses of the representative parties must be typical of the class.
6. The representative parties must fairly and adequately protect the interest of the class.
7. Class action must be superior to other available methods for the fair and efficient adjudication of the controversy.

If Plaintiffs fail to demonstrate any of the factors by a preponderance of the evidence, then Rule 23 class certifica tion must fail. Warner, at 94. Each factor in the instant case will be examined in order.

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First, class certification requires that an identifiab class must exist, and that the definition of said class must be unambiguous. Warner, at 96. The proposed class in the instan case is defined by Plaintiffs as follows:

> "All persons, residing as an owner or tenant in, operating a business in, or working for an employer in, the geographic area bounded on the north by Third Street; on the east by the Great Miami River; on the southeast by Carillon Park and Calvary Cemetary; on the west by Abby Avenue, Groveland Avenue, and McArthur Avenue; and on the south from Vance Road due east to Moraine Drive North, who were adversely affected by smoke, soot, dust, or odor from the Dayton Walther foundry on Morris Avenue and Miami Chapel Avenue at any time between February, 1987 and October, 1990."

This describes a radius of approximately one mile around the Dayton Walther foundry. All the current named Plaintiffs, however, are located only a short distance from the foundry. The evidence presented fails to demonstrate that this broad class definition unambiguously describes the partie that were allegedly damaged by emissions from the Dayton Walth foundry. Consequently, the proposed class must be construed as ambiguous and not an identifiable class. Plaintiffs fail to establish the first implied prerequisite.

Next, the named class representatives must be membe of the proposed class. Warner, at 96. Again, the fact that no named representatives are at the outer boundaries of the allegedly affected area, by necessity, prohibits Plaintiffs from establishing that they are representative members of the proposed class. Therefore, the second implied prerequisite fails.

Next, numerosity of class members must make joinder impracticable. Although no numerical limits have been set to describe the necessary size of a class, it has been held that if the class has more than forty people, the numerosity requirement is satisfied; if the class has less than twenty-five people, numerosity is lacking; and if the class has between twenty-five and forty, there is no automatic rule Warner, at 97 (quoting Miller). In the instant case, only

nine parties have demonstrated an interest in pursuing this litigation. During the depositions, there was evidence to the effect that others did not want to get involved. It has not been demonstrated by a preponderance of the evidence that there are substantially more than the original nine Plaintiffs who desire to pursue this action. As such, numerosity is not satisfied. Further additions of parties may be easily handled by joinder requests. Therefore, the numerosity requirement fails.

Next, commonality of law or fact must exist. As stated in Warner, the courts have generally given a permissive application to the commonality requirement. Marks v. C. P. Chemical Co. (1987), 31 Ohio St. 3d 200. Even with permissive application, this prerequisite requires a common nucleus of operative facts. Marks, at 202. In this situation, it is not conclusive to the Court that a common nucleus exists. The area described for class certification contains numerous industrial plants that could cause the type of air emissions that are complained of in this action. The damages allegedly sustained by the Plaintiffs have not been demonstrated to be uniform by type or necessarily the exclusive result of Dayton Walther's foundry, and, therefore, factual commonality appears problematical. Therefore, the commonality prerequisite fails.

Next, the class representatives' claims must be typical

of the class's claims or defenses. This occurs where there is no express conflict between the class representatives and the proposed class. Warner, at 98. The Plaintiffs in this action bring suit for trespass and nuisance caused by the allege air emissions from the Dayton Walther foundry. The emissions are allegedly carried by the wind and do not remain airborne indefinitely. They settle out as they travel farther away from the source of the pollution. As this occurs, the members of the community that are in the closest proximity to the foundry and in the path of the prevailing wind logically receive the greatest concentration of particulate matter, while those farther away or to the windward may not receive any of the fallout at all. This appears to cause an inherent conflict even amongst the claims of the "close proximity" representatives, which clearly may not be similar to those of the rest of the class. Therefore, the typicality prerequisite fails.

Next, the interests of the class must be fairly and adequately protected by the representative parties. This analysis examines not only the adequacy of the representatives' claims but the adequacy of counsel as well. Warner, at 98. A representative is deemed adequate so long as his interest is not antagonistic to that of other class members, and counsel is deemed adequate if he is experienced in handling litigation of the type involved. Id. There is no evidence in the record

that is indicative of any conflict between the representatives and the class, and counsel for the Plaintiffs has demonstrated that he has experience in similar types of litigation.[1] Therefore, this prerequisite is satisfied.

Finally, other existing methods of adjudication must be subordinate to class action. The policy behind a class action suit is to simplify complex litigation and expedite its resolution If a class action is not demonstrated to be superior to other forms of litigation, it should not be used. Factors pertinent to a determination of superiority include: the interest of members of the class in individually controlling the prosecution of separate actions, the extent and nature of any litigation concerning the controversy already commenced by members of the class, the desirability of concentrating the litigation in the particular forum, and difficulties likely to be encountered in the management of the class action. Ohio Civil Procedure Rule 23(b)(3).

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1 It is understood that the plaintiffs' counsel, in the instant case, opposed class certification in Reynolds v. CSX Transportation Co. (1989), 55 Ohio App. 3d 19, 561 N.E.2d 1047. It is appropriate to distinguish Reynolds from the current action.

Reynolds and Adair differ on the issue of superiority. In order for superiority to exist, common issues of law and fact must predominate over individual issues. Marks v. C. P. Chemical Co. (1987), 31 Ohio St. 3d 200. These issues must be capable of being resolved in a single adjudication for all members of the class. Id. The Court in Reynolds found that

The Ohio Attorney General has already completed an action against Dayton Walther (Mont. Cty. Common Pleas Court Case No. 90-109), which resulted in the closing of the foundry and the cessation of air emissions produced by the plant. As Dayton Walther's present activities no longer present a probl to the surrounding residents, this litigation appears capable of proceeding more effectively by a consolidated suit that jo the interested parties to this action. Class action certification appears to be an unnecessary administrative burden on

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negligence and malice were issues that predominated over individual issues during the then current stage of the proce ings. See CSX Trial Court Decision at 7. Therefore, resolution of these issues were superior to issues of proxima cause and damage and formed the basis for the conditional cla certification. The Court in Reynolds refused to certify on the issue of proximate causation because the questions of inj and damage were so individualized that they were not common to all members of the class.

The issues in Adair of proximate cause, injuries and damages vary dramatically from plaintiff to plaintiff and can be efficiently dealt with on a class wide basis. Other avail methods are better suited to resolve these issues.

Reynolds and Adair are also distinguishable on the issue of numerosity. In Reynolds, the original suit included more than 100 individual claimants and a half dozen business entit A second suit was filed that included 32 individual plaintiff and business entities and alleged a class in excess of 50,000 persons. Numerosity was clearly demonstrated from the initia complaints. In Reynolds, a single suit would have been unmanageable and would not have promoted judicial efficiency. Adair differs in that there are only nine plaintiffs and litt evidence that other individuals have claims or wish to join the action. As such, numerosity is not satisfied, and judici economy is not promoted by a single suit joining the parties.

this litigation. Therefore, the Court finds that class action is not superior to other existing methods of adjudication, and this superiority prerequisite fails.

Accordingly, Plaintiffs' Motion for Certification is DENIED.

SO ORDERED:

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

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R. Joseph Parker, Attorney for Defendants, 1800 Star Bank Center, 425 Walnut Street, Cincinnati, Ohio 45202

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

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| ROBERT REYNOLDS, JR., et al., | | |
| Plaintiffs, | : | CASE NO. 86-2053 |
| -vs- | : | (Judge John W. Kessler) |
| CSX TRANSPORTATION CO., et al., | : | DECISION AND ORDER ON OBJECTIONS TO SPECIAL MASTER'S FINDINGS AND RECOMMENDATIONS AND CONDITIONALLY APPROVING A CLASS ACTION |
| Defendants. | : | |

: : : : :

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|---|---|---|
| DALE ZINK, et al., | : | |
| Plaintiffs, | : | CASE NO. 86-3585 |
| -vs- | : | |
| CSX CORPORATION, et al., | : | |
| Defendants. | : | |

: : : : :

This case is before the Court on Objections to the Master's Report and Recommendation relating to Plaintiffs' Motion to Certify a Class Action. Both Plaintiffs and Defendants have objected.

The Master found:

1) All Plaintiffs' proposed subclasses at this juncture are indefinite and do not permit a ready identification of their membership. (Ohio Rule of Civil Procedure 23(C)(3))

2) Numerosity is satisfied by the Displaced Subclass, the Wage Loss Subclass, and the Lost Profits Subclass, but not the Damaged Property or the Personal Injury Subclasses. (Ohio Rule of Civl Procedure 23(A)(1))

3) Commonality is satisfied by all proposed subclasses. (Ohio Rule of Civil Procedure 23(A)(2))

4) Typicality is satisfied for all subclasses, save one alleged personal injury claim and one alleged property damage claim. (Ohio Rule of Civil Procedure 23(A)(3))

5) Adequate representative parties exist within each subclass to protect the interests of the entire subclass. (Ohio Rule of Civil Procedure 23(A)(4))

6) No risk of inconsistent adjudications exists if the claims were individually prosecuted by subclass claimants such as would create incompatible standards of conduct for Defendants. (Ohio Rule of Civil Procedure 23(B)(1)(a))

7) No risk exists of individual adjudications which would be dispositive, or impair or impede the ability of other individuals within the subclasses to protect their interests. (Ohio Rule of Civil Procedure 23(B)(1)(b))

8) Common questions of law and fact do not predominate in any subclass over questions affecting individual claimants. (Ohio Rule of Civil Procedure 23(B)(3))

9) Certification would not advance disposition of the litigation as a whole. (Ohio Rule of Civil Procedure 23(B)(3))

10) The alleged "medical monitoring" class meets none of the requirements of Rule 23 of the Ohio Rules of Civil Procedure.

Plaintiffs' objections are to all the Master's findings

not favorable to their Motion, and Defendants object to the findings of numerosity (#2), typicality (#4), and adequacy of representation (#5) as to each proposed subclass.

This Court adopts the Master's "Overview" as an accurate factual and procedural history of this case, to-wit:

OVERVIEW

On July 8, 1986, at approximately 4:25 p.m., fifteen cars of the Baltimore & Ohio Railroad Company's Southland Flyer derailed as the train proceeded over Bear Creek in Miamisburg, Ohio. A tank car containing yellow phosphorous breached as a result of the derailment, and its contents ignited upon exposure to the air. The phosphorous burned for approximately three and one half hours, until extinguished by safety personnel.

On the following evening of July 9, 1986, the substantial quantity of phosphorous remaining in the disabled tank car again ignited. The resulting fire was not finally extinguished until the morning of July 12, 1986.

During each of the two episodes of fire, the burning phosphorous emitted a dense, billowing cloud of white smoke which was carried by winds at ground level beyond the immediate site of the derailment. Mass evacuations ensued, both by orders of public officials and by personal choice. A great number of individuals in nearby residential neighborhoods and commercial districts were directly exposed to the smoke cloud; a significant number of those exposed sought medical treatment at local hospital emergency rooms. Some businesses, even at points relatively

distant from the derailment site, ceased operations, sending employees home and closing the doors to their clientele.

On July 11, 1986, while the second fire was still burning, a Complaint was filed in this Court against the Railroad, the lessee of the tank car and consignee of the phosphorous, and the manufacturer of the phosphorous. Relief in damages was sought by eleven named individuals and one business entity, and on behalf of a class estimated to consist of more than 25,000 other claimants, each of whom allegedly suffered harm as a result of the derailment. The Complaint was almost immediately amended to join approximately 100 additional individuals and a half dozen business entities as named party-Plaintiffs. On July 24, 1986, Plaintiffs filed a motion for certification of the action as a class action pursuant to Ohio Civil Rule 23.

A second lawsuit concerning the derailment was filed in this Court in November, 1986, by thirty-two individuals and business entities. The Plaintiffs in that action sought monetary relief against the Railroad and the lessor of the tank car, for themselves and on behalf of a class of more than 35,000 unnamed claimants. The two actions were consolidated on December 12, 1986.

On October 5, 1987, the Court appointed a special "Master," pursuant to Ohio Civil Rules 23(D) and 53, to hear Plaintiffs' motion for class certification of the consolidated actions, and to make recommendations to the Court regarding the disposition of the motion.

The Order of Appointment authorized the Master to hear all matters relating to class certification issues. Proceedings under the Order of Appointment included two general meetings between the Master and counsel, the consideration and disposition of a variety of discovery disputes related to certification issues, and ultimately culminated in a two day hearing on the merits of the certification motion, accompanied by extensive pre- and post-hearing briefs. The Master's Report and Recommendation was submitted pursuant to the Order of Appointment and Ohio Rule of Civil Procedure 53(E) on July 8, 1988.

The primary goal of this Court in referring this case to the Master for his findings and in considering the objections to those findings is to come to a decision on how best to manage this litigation to a prompt and final conclusion. To do this, the Court must ultimately balance the interests of judicial economy with full protection of the rights of all the parties.

The basic elements of any certification of a class or subclass in this case are described in Rule 23 of the Ohio Rules of Civil Procedure. As found by the Master, and simply stated, they are: numerosity, commonality, typicality, and adequacy of representation (23(A)); and a <u>predominance</u> of common questions of law and fact <u>and</u> a determination that class action is a <u>superior</u> method to other available methods for the fair and efficient adjudication of the claims of the parties (23(B)(3)). (emphasis added) The Master's findings that the requirements of 23(B)(1) are not met in this case are approved and adopted

by this Court over Plaintiffs' objections. It is with particular attention to the concepts of "predominance" and of "superiority" under Rule 23(B)(3) that this Court has reviewed the Master's findings and recommendations. Ohio Rules of Civil Procedure 23(C)(1) and (C)(4) provide particularly useful tools to the Court which must be considered when comparing the "other available methods for the fair and efficient adjudication of the controversy." Ohio Rule of Civil Procedure 23(B)(3) Certification orders under these provisions may be conditional, and they may be altered or amended prior to decision on the merits. Further, the action may be separated into subclasses or separated by an issue or a group of issues.

The Master found that common issues of law and fact do not predominate within this lawsuit over individual questions and that, therefore, class action is not superior to other available methods. The Master, applying Marks vs. C. P. Chemical Co., 31 Ohio St. 3d 200 (1987), found that for a common issue to predominate it must represent a significant aspect of the case and must be capable of resolution for all members of the class or subclass in a single adjudication. Common questions that were found to exist were all those which pertain to the conduct of the Defendants up to the time of the derailment and fire on July 8, 1986. These may be described as the negligence (fault) and malice (punitive damage) issues. The questions that the Master found were so individualized as to preclude a recommendation for certification were those of proximate cause

as it relates to the various claims of injury and damage. Without agreeing that the proximate cause question is incapable of a single adjudication for any potential subclass designation, the Court finds that the common questions of law and fact which the Master recognized to exist in every single claim in this action, do predominate at this stage of the proceedings and can be singly adjudicated. (emphasis added) One time answers can be had to the issues of negligence and malice, such as: What were the duties of the respective Defendants? What did they undertake to do or not do in respect to those duties, if any? Was there a breach of duty? Was there a conscious disregard for the rights and safety of others that had a great probability of causing substantial harm?

No other "available method" that this Court can conceive can get final answers to these questions any faster or better than class action. This Court, therefore, rejects those findings of the Master which are inconsistent with the following order and approves all findings consistent with it, to-wit:

A class action is herein conditionally approved as to all described claimants within each proposed subclass, excluding all claimants who have released their claims by a valid and binding release in return for payment as to these Defendants. The certification is as to the issues of negligence and malice, if any, of Defendants. This order is made under the provisions of Ohio Rules of Civil Procedure 23(A), (B)(3), (C)(1), and (C)(4) with findings appropriate to those requirements. Further,

a draft of a Notice as required by Ohio Rule of Civil Procedure 23(C)(2) shall be prepared by both counsel for Plaintiffs and counsel for Defendants along with a plan for the circulation and distribution of said Notice to all potentially affected claimants. In addition, a draft detailed Questionnaire shall be prepared by both counsel for Plaintiffs and counsel for Defendants which shall be used, if approved by the Court, to determine the nature and extent of injury or damages claimed by prospective claimants. This Questionnaire will be used by the Court in further determination of potential subclass divisions and further orders of the Court. The Notice shall be submitted to the Court within fourteen (14) days of this Order, and the Questionnaire within thirty (30) days of same. A pretrial conference for establishing a trial date on the certified issues shall be held in this court on March 13, 1989, at 9:30 a.m. Any proposed pretrial orders for the Court's consideration must be submitted no later than 3:00 p.m. on March 10, 1989.

In making this order, this Court wants to recognize the excellent work of the Special Master in carrying out the Court's orders and particularly in the quality of the Report and Recommendation which was filed for the Court's consideration. The service of the Special Master has been of invaluable aid to the Court particularly in furtherance of the Court's obligations pursuant to Ohio Rule of Civil Procedure 23(B)(1). This rule provision allows the Court to "make appropriate orders: (1) determining the course of the proceedings or prescribing measures

to prevent undue repetition or complication in the presentation of evidence or argument." With this in mind, and so counsel can better understand this Court's thinking at this juncture as to the future of this litigation, a brief review of the Master's findings vis-a-vis the proposed subclasses may be appropriate.

The Displaced Subclass

These persons include primarily the evacuees - persons residing in proximity to the derailment site moved by order of civilian authority. Others who may be included are those persons who undertook to remove themselves from a zone of potential danger if it may later be determined that said zone was a reasonable geographic extension of the mandatory evacuation areas. The Master found that this subclass, if properly redefined, was sufficiently unambiguous and identifiable to meet the tests of Warner vs. Waste Management, Inc., 36 Ohio St. 3d 91 (1988) and that all Rule 23(A) requirements were met. The Master determined that the most significant questions pertaining to the individuals within this subclass are the questions for proximate cause for any personal expenses. The Master found that since there were multiple evacuation orders applying to different geographic locations and for different durations of time, as well as voluntary evacuations, and possible alternative reasons for those, plus the differing nature of evacuation expenses incurred by the individuals, the "predominance" requirement was not met. The Court agrees that the Plaintiffs at this stage have not met their burden to define a sufficiently clear criteria

for identification of individuals contained within this proposed subclass so that the question of proximate cause for all members of this subclass can be determined in a single adjudication. The Court, however, is inclined to feel that this can still be done. More significantly, however, the Court believes that the conjunctive consideration - that being the superiority of the class method over other available methods for resolving the claims - is present for this subclass.

Basically, this Court has available to it the methods of joinder, consolidation, intervention, bifurcation, arbitration, referees and masters, and jury trial. Multiple party litigation is generally unwieldy, but certainly manageable and perhaps preferred with the judicious use of the aforementioned tools. In this instance, however, class action is the only viable method available that the Court can envision to render a just result to the evacuation claimants if liability is determined in their favor. It is clear now, even without questionnaires, that the individual evacuation/displacement claims are small in amount. Additionally, almost three years have passed since the evacuations occurred. The ultimate result of noncertification of this subclass would appear to be that most of the claims, despite an ultimate finding of entitlement, would be abandoned. Such a situation would, in effect, reward a wrongdoer. Few claimants are going to take the time and expense to individually prosecute a reimbursement claim for three year old evacuation expenses, even in a small claims court. The aspect of "superiority" here is related

not only to the other legal vehicles which may be available, but also to assuring that a full measure of compensation for a large group of otherwise entitled individuals is forthcoming.

The Wage Loss Subclass

These are individuals who suffered lost wages attendant to the evacuation orders. The Master's findings as to this subclass were virtually identical to those regarding the Displaced Subclass, save the recognition of even more individualized variances of proximate cause. The Court agrees that the Plaintiffs here also have not met their burden of fashioning a subclass wherein proximate cause can be singly adjudicated. The Court does not know whether this may be possible. Given some very precise definitional requirements, this subclass may be able to coattail a certification of a Displaced Subclass. Again, however, the concerns of the Court focus toward the "superiority" requirement. These wage loss claims are also claims of modest size by people of modest means. A failure to certify could easily impair the ability of the subclass members to effectively protect their interests. Many of these claims, like the evacuation expense claims, conceivably would simply be abandoned which, in effect, rewards the wrongdoer.

The Lost Profits Subclass

These are individuals or businesses which may have had business losses due to the evacuations or other related matters. The Master's findings in relation to the lack of the "predominance" requirement and the "superiority" requirement

are especially compelling here. Too many individualized factors appear to exist for a sufficiently common determination as to proximate cause as to this subclass. Further, the number of claimants in this proposed subclass appears manageable through the usual methods of litigation available to the Court.

The Property Damage and Personal Injury Subclasses

These are individuals who allegedly sustained personal injury or property damage as a result of the acts of Defendants. The Master's findings that the proximate cause of these claims is not a common question and that ample alternative methods exist to resolve these claims are, likewise, compelling. These subclasses were found to fail to meet numerosity under Ohio Rule of Civil Procedure 23(A), and the Court concurs in this finding.

One of the overriding considerations in class action litigation, and a primary purpose for the use of the vehicle by a court, is the promotion of settlement. Hopefully, the foregoing discussion will enhance the potential of that between the parties. Whether this is premature or whether it has served to ripen that discussion remains to be seen. Nevertheless, the priority of disposing of these cases is recognized by the Court, and a vigorous schedule will be established to accomplish that goal.

Finally, the Court adopts the findings of the Master that none of the Ohio Rule of Civil Procedure 23 requirements

has been met in relation to the Medical Monitoring Subclass and overrules Plaintiffs' objections thereto.

SO ORDERED:

JOHN W. KESSLER, JUDGE

Copies of this Decision and Order were forwarded to all parties listed below by ordinary mail this filing date.

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James L. O'Connell, 1700 Central Trust Center, 201 E. Fifth Street, Cincinnati, Ohio 45202, Attorney for Defendant CSX Transportation

David C. Greer/Howard P. Krisher/A. Mark Segreti, 400 Gem Plaza, Third and Main Streets, Dayton, Ohio 45402, Attorneys for Defendant CSX Transportation

Case: 2003 CV 08704
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CLERK OF COURTS
MONTGOMERY CO., OHIO

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IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

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| **CHRISTIE BANFORD, et al.,** | : | Case No. 03-CV-8704 |
| Plaintiffs, | : | (Judge Dennis J. Langer) |
| v. | : | **DECISION, ORDER & ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT ALDRICH'S PARTIAL SUMMARY JUDGMENT MOTION** |
| **ALDRICH CHEMICAL COMPANY, INC.,** | : | |
| Defendant. | : | |

This matter is again before this Court on the *Motion for Summary Judgment on Recovery for Personal Injuries, Negligent Infliction of Emotional Distress, Recovery for Personal Property Damage, Recovery for Evacuation Expenses and, as to the O'Donnell Plaintiffs, Recovery for Real Property Damage and Diminution in Property Value* [hereinafter the "*Damages MSJ.*"] filed December 22, 2004 by Defendant Aldrich Chemical Company, Inc. [hereinafter "Aldrich"]. Plaintiff Christie Banford [hereinafter individually "Banford"], Plaintiff Doug Graeser [hereinafter individually "Graeser"], Plaintiff William O'Donnell and Plaintiff Melissa O'Donnell collectively[1] filed a *Response* on February 7, 2005. Aldrich filed a *Reply* on February 17. This matter is again properly before the Court.

[1] Notably, Plaintiff William O'Donnell, Plaintiff Melissa O'Donnell, and their respective civil action, numbered 03CV8865, have subsequently been dismissed. See the November 18, 2005 *Unopposed Order Granting Rule 41(B) Dismissal Without Prejudice*. The *Response*, however, addresses each of the four originally named plaintiffs. Therefore, this Court will herein limit its consideration to only Ms. Banford and Mr. Graeser, collectively referenced as "Plaintiffs."

## I. FACTS & PROCEDURAL HISTORY

The pertinent facts and procedural history underlying the case at bar have been previously set forth in this Court's *Final and Appealable Decision, Order and Entry Sustaining the Plaintiffs' Motion for Class Certification, Subject to Specific Conditions and Specifications* [hereinafter the "*Cert. Dec.*"] filed October 21, and those facts and procedural history are adopted as though fully set forth herein. Specifically, this Court highlights:

> On December 22, 2004, Aldrich filed a *Motion for Summary Judgment on Recovery for Personal Injuries, Negligent Infliction of Emotional Distress, Recovery for Personal Property Damage, Recovery for Evacuation Expenses and, as to the O'Donnell Plaintiffs, Recovery for Real Property Damage and Diminution in Property Value* [hereinafter the "*Damages MSJ*"]. The Plaintiffs filed a *Response* on February 7, 2005. Aldrich filed a *Reply* on February 17. On February 24, this Court filed a *Decision* that deferred disposition of the *Damages MSJ* until after class certification, as raised by the *Prior Class Cert. Mot.*, was resolved.

*Cert. Dec.* at 5; see also id. at 7 n. 4 (noting that the *Cert. Dec.* was focused only on the narrow issue of conducting the "rigorous analysis" for purposes of class certification and expressly recognizing that the propriety of summary judgment was not addressed). Furthermore, this Court notes for the record the concurrently filed *Decision, Order & Entry Overruling Plaintiffs' Motion to Continue Deadline to Respond to Motion for Summary Judgment and Overruling Plaintiffs' Alternative Motion to Supplement Response* [hereinafter the "*Continue-Supplement Mot.*"]. Pursuant to this Court's inherent authority to address motions pending on its docket and to judicially manage a certified class action, see *Mayer v. Bristow* (2000), 91 Ohio St. 3d 3, 7; *Teffer v. Hornbeck*, 2002-Ohio-3788, ¶ 11; Civ. R. 16 and 23(D); the previously-deferred *Damages MSJ* is now pending for disposition.

In light of the applicable legal standard set forth below, this Court also notes that all properly submitted evidentiary materials were considered in deciding the instant matter, see

*Murphy v. Reynoldsburg* (1992), 65 Ohio St. 3d 356, 360; Civ. R. 56(C), (E). However the following evidentiary materials are particularly relevant:

1. Deposition of Plaintiff Christine Rene Banford taken November 23, 2004 [hereinafter "Banford Depo. I"];
2. Deposition of Plaintiff Christine Rene Banford taken December 15, 2004 [hereinafter "Banford Depo. II"];
3. Deposition of Plaintiff Douglas R. Graeser taken November 23, 2004 [hereinafter "Graeser Depo. I"];
4. Deposition of Plaintiff Douglas R. Graeser taken December 16, 2004 [hereinafter "Graeser Depo. II"]
5. Affidavit of Plaintiff Christie Banford, attached as Exhibit 8 to the *Cert. Reply.*
6. Affidavit of Plaintiff Douglas Graeser, attached as Exhibit 9 to the *Cert. Reply.*[2]

## II. LAW & ANALYSIS

### A. Summary Judgment Standard

"Trial courts should award summary judgment with caution." *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 269. In *Harless v. Willis Day Warehousing Inc.*

[2] Notably, while the Banford Affidavit and the Graeser Affidavit were filed at some time after the filing of the *Response* and are therefore not referenced therein, the affidavits are part of the entire evidentiary record of this case. Affidavits are an expressly proper form of evidentiary materials pursuant to Civ. R. 56(C). The clear and unambiguous language of Civ. R. 56(C) also provides that "[t]he adverse party, *prior to the day of hearing*, may serve and file opposing affidavits." Id. (emphasis added). The two affidavits were filed with the *Cert. Reply*, which preceded the *Cert. Dec.* and were notably considered therein. As discussed above, the *Cert. Dec.* expressly deferred deciding–that is, hearing–the *Damages MSJ.* A fortiori, the two affidavits were clearly filed prior to this Court's instant hearing of the *Damages MSJ.* Therefore, by clear force of the Civ. R. 56(C), the Banford Affidavit and the Graeser Affidavit are proper evidentiary materials for consideration herein.

(1978), the Ohio Supreme Court stated in order for summary judgment to be appropriate, it must appear that:

> (1) There is no genuine issue as to any material fact;
> (2) The moving party is entitled to judgment as a matter of law; and
> (3) Reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.

54 Ohio St.2d 64, 66.

The moving party bears the initial burden of informing the court of the basis of the motion and identifying those portions of the pleadings, depositions and other such material which it believes demonstrates the absence of a genuine issue of material fact. *Misteff v. Wheeler* (1988), 38 Ohio St.3d 112, 114; *Harless,* 54 Ohio St.2d at 66. The burden on the moving party may be satisfied by "showing" that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett* (1986). 477 U.S. 317, 323-325. Furthermore, any inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Leibreich,* 67 Ohio St.3d 266, 269; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152.

Thereafter, the non-moving party bears the burden of coming forward with specific facts and evidence showing that there is a genuine issue of material fact for trial. *VanFossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, 117. The non-moving party has the burden "to produce evidence on any issue for which that party bears the burden of production at trial." *Leibreich,* 67 Ohio St.3d at 269; *Wing v. Anchor Media, Ltd.* (1991) 59 Ohio St.3d 108, 111 (citing *Celotex Corp.*, 477 U.S. 317, 322-323). Therefore, the non-moving party may not rest upon unsworn or unsupported allegations in the pleadings. *Benjamin v. Deffet Rentals* (1981), 66 Ohio St.2d 86; *Harless,* 54 Ohio St.2d at 66. The non-moving party must respond with

affidavits or other appropriate evidence to controvert the facts established by the moving party. *Id.* Further, the non-moving party must do more than show there is some metaphysical doubt as to the material facts of the case. *Matsushita Electric Ind. Co. v. Zenith Radio* (1980), 475 U.S. 574.

Notably, the non-movant's reciprocal burden is only applicable when the movant has satisfied the initial burden. Ohio courts have cautioned that when the movant fails to meet the initial burden, summary judgment is not proper, regardless of whether an opposing memorandum is filed by the non-movant. *Brandimarte v. Packard* (May 18, 1995), 8th Dist. Case No. 67872, 1995 Ohio App. LEXIS 2095, *4 (citing *Glick v. Dolin* (1992), 80 App. 3d 592, 595) ("[W]hen the movant's evidentiary materials do not establish the absence of a genuine issue of material fact, summary judgment must be denied even if no opposing evidentiary matter is presented."); *Sohio Oil, Div. of BP Oil v. Neff* (June 29, 1993), 10th Dist. Case No. 93AP-48, 1993 Ohio App. LEXIS 3416, *4-*5 (citing *Morris v. Ohio Cas. Ins. Co.* (1988). 35 Ohio St. 3d 45, 47; *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St. 3d 157, 161) ("[T]he nonmoving party's failure to respond, by itself, does not mandate granting summary judgment because the moving party bears the burden of showing that all of the requirements of Civ. R. 56(C) are satisfied.)

**B. Because the Plaintiffs have not produced rebuttal evidence demonstrating the necessary "severe and debilitating" degree of emotional distress, summary judgment is proper on those claims. Some rebuttal evidence has been produced regarding evacuation expenses and loss of use and enjoyment damages, precluding summary judgment on those claims.**

In the *Cert. Dec.*, this Court maintained the February 24, 2005, deferral of the merits of the *Damages MSJ*. Two subclasses–the Emotional Distress Subclass and the Evacuation Damages Subclass–were identified in the *Cert. Dec.* and the Plaintiffs were identified as members in those two subclasses. See id. at 52-57, 94. Notably, this Court specifically stated that the analysis of the standing issue in the *Cert. Dec.* was not dispositive of any distinct summary judgment issues. See id. at 8 n. 4, 55. In deciding the instant *Damages MSJ*, this Court will separately address the pertinent summary judgment arguments below, but does not herein decide any matters pertaining to class certification.

**1. Summary judgment in favor of Aldrich and against the Plaintiffs is proper regarding the negligent infliction of emotional distress claims.**

Aldrich argues that the Plaintiffs have demonstrated through their individual depositions that they cannot prevail on the negligent infliction of emotional distress claims. Specifically, citing the "severe and debilitating" emotional injury standard from *Paugh v. Hanks* (1983), 6 Ohio St. 3d 72, 78, Aldrich argues that the evidence shows only that the Plaintiffs have not sought treatment for their purported emotional injuries or otherwise demonstrated the requisite degree of emotional injury. See generally *Damages MSJ* at 7-13.

Regarding Ms. Banford, Aldrich highlights her deposition testimony in which she only indicates that she has suffered stress, worry, fear, and anxiety, but has not sought any form of medical treatment or counseling relating to the explosion and evacuation. See Banford Depo. I at 72:10-19; Banford Depo. II at 141:16-142:8, 268:12-275:7.[3] Similarly, regarding Mr. Graeser, he indicated in his deposition that he has suffered stress, worry, fear, and anxiety, but

[3] Notably, Ms. Banford did identify in her second deposition that she had been counseled for marital issues. She did not correlate any of the identified counseling to the instant matters. Accordingly, the counseling Ms. Banford did identify is immaterial to the case sub judice.

has not sought any form of medical treatment or counseling relating to the explosion and evacuation. See Graeser Depo. I at 54:12-15, 55:11-15, 57:2-58:5.

In rebuttal, the Plaintiffs argue that they suffered "annoyance and discomfort" injuries, which they argue are sufficient injuries in light of *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App. 3d 681. See *Response* at 7-9. Aldrich counter-argues in the *Reply* that *Reeser* is inapplicable to the case at bar. See *Reply* at 8-10.

In *Buckman-Pierson v. Brannon*, 2004-Ohio-6074, discretionary appeal allowed (March 16, 2005), 2005-Ohio-1024, application to dismiss appeal granted (Sept. 22, 2005), 2005-Ohio-4949, the Second District extensively analyzed the evidentiary requirements for an emotional distress claim in Ohio. See id., 2004-Ohio-6074 at ¶ 35-56. Referencing the *Paugh* requirement that some "guarantee of genuineness" be presented, the *Buckman-Pierson* court required some affirmative evidence of a plaintiff's severe emotional injury. In the case at bar, the Plaintiffs have failed to produce any such affirmative evidence related to the severity and debilitating nature of the emotional injuries. In light of the binding precedents referenced above, Aldrich is entitled to judgment as a matter of law against the Plaintiffs' negligent infliction of emotional distress claims.

**2. The Plaintiffs have presented a genuine issue of material fact through their affidavits that they were not compensated for the distinct injury of the loss of use and enjoyment of their homes.**

This Court previously addressed in full the parties' arguments pertaining to the claims relating to the purported loss of use and enjoyment of their homes damages. The arguments in the instant memoranda are substantially similar to those arguments. In summary, Aldrich argues that evacuation damages are generally limited to out-of-pocket substitute lodging

expenses. The Plaintiffs counter-argue that loss of use and enjoyment damages are separately compensable. This Court previously held:

> This Court specifically notes that limiting a putative plaintiff's compensation to only out-of-pocket substitute lodging expenses would restore the unexpected substitute lodging expenses but ignore the distinct harm of being temporarily excluded from that person's own home. This Court is unpersuaded that such a limitation applies.

Id. at 53. Regarding the evidentiary burden, this Court notes that the affidavits create a genuine issue of material fact. The Plaintiffs state that they did not receive compensation from Aldrich for the distinct expenses related to the loss of use and enjoyment of their homes. See Banford Affidavit at ¶ 8; Graeser Affidavit at ¶ 7. Accordingly, this Court finds that partial summary judgment on the Plaintiffs' claims relating to their alleged loss of use and enjoyment of their homes is not proper.

## III. CONCLUSION

Accordingly, this Court hereby sustains in part and overrules in part the pertinent portions of the *Damages MSJ*. Pursuant to Civ. R. 56(D), this Court hereby sets forth, as much as practicable, the facts that are without controversy in light of the foregoing partial summary judgment adjudications.[4] This Court expressly finds that, based on the evidence presented, the Plaintiffs did not suffer severe and debilitating emotional injury and therefore partial summary judgment in favor of Aldrich and against the Plaintiffs' Negligent Infliction of Emotional Distress cause of action–Count V (¶ 61-66) in the Banford/Graeser *Complaint*–and the attendant claim for compensatory damages related to alleged emotional distress.[5]

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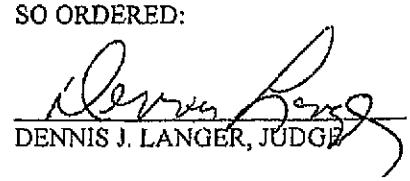
[4] As discussed above, this Court does not herein decide any matters pertaining to class certification. Therefore, insofar as the *Cert. Dec.* did not certify other causes of action and damages claims not expressly addressed herein, this *Decision* adopts those findings without modification.

[5] For reference, a summary of all of the causes of action and attendant forms of damages claimed is found on page 18-19 of the *Cert. Dec.*

SO ORDERED:



DENNIS J. LANGER, JUDGE

Copies of this Decision, Order and Entry were forwarded to all parties listed below by ordinary mail this filing date.

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IN THE COURT OF COMMON PLEAS

MONTGOMERY COUNTY, OHIO

* * *

CHRISTIE BANFORD, et al.,

Plaintiffs, CONSOLIDATED

vs. CASE NO. 2003 CV 08704

ALDRICH CHEMICAL CO., INC.,

Defendant.

---

WILLIAM O'DONNELL, et al.,

Plaintiffs,

vs.

ALDRICH CHEMICAL CO., INC.,

Defendant.

* * *

BE IT REMEMBERED, that upon the proceedings of the above-entitled matter held in the Montgomery County Common Pleas Court before the Honorable Dennis J. Langer, Judge Presiding, and commencing on Tuesday, March 20, 2007, when the following proceedings were had.

* * *

1 APPEARANCES:
2 On behalf of the Plaintiffs Banford, Grooms,
and Gray:
3
By: Richard W. Schulte
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and
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Cheryl R. Washington
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On behalf of the Defendant Aldrich Chemical
17 Company, Inc.
18 By: Martin A. Foos (telephonically)
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19 10 North Ludlow Street
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21 and
22 Gordon L. Ankney (telephonically)
Attorney at Law
23 One US Bank Plaza
St. Louis, MO 63101
24
25 * * *



1 THE COURT: This record is being
2 taken by Stacey Kimmel of Mike Mobley and it
3 would probably be a good idea, if you want, to
4 get a transcript of my rulings because I'm making
5 these rulings into the record and for purposes of
6 clarity at the trial, it's probably a good idea
7 that you obtain from her a transcript. Her phone
8 number is 222-2259.
9 And so this is the case of -- the
10 case numbers here -- Christie Banford,
11 B A N F O R D, et al., versus Aldrich,
12 A L D R I C H, Chemical Company, Incorporated,
13 case number 03 CV 8704, consolidated with the
14 Susan Grooms, G R O O M S, et al., versus the
15 Aldrich Chemical Company, Incorporated, case
16 number 05 CV 7221; Patricia Gray, G R A Y,
17 et al., versus Aldrich Chemical Company,
18 Incorporated, case number 06 CV 4053.
19 Today's date is March 20 and I'm
20 going to have counsel -- we have two attorneys in
21 chambers and I have several on the phone here.
22 So as we speak or as you speak, if you speak,
23 make sure you identify your name so we have it
24 into the record. So in chambers.
25 MR. SCHULTE: Richard Schulte for



1 the plaintiffs.
2 MR. BEHNKE: Stephen Behnke for the
3 plaintiffs.
4 THE COURT: Continuing with the
5 plaintiffs on the phone we have --
6 MR. JONES: Taylor Jones.
7 MS. WASHINGTON: And Cheryl
8 Washington.
9 MR. CHINAULT: And Jeff Chinault.
10 THE COURT: Jeff Chinault for the
11 plaintiffs. For the defendant.
12 MR. FOOS: Marty Foos and Gordon
13 Ankney. My name is spelled F O O S.
14 THE COURT: Okay. There were a
15 number of motions in limine or trial motions
16 filed and fully briefed and the Court has
17 scheduled this telephonic conference to rule upon
18 these various motions in limine and I want to
19 begin with the plaintiffs' motions.
20 MR. JONES: Judge, may I ask one
21 question? Was this supposed to be in chambers or
22 by telephone?
23 THE COURT: No. Telephone is fine
24 because I'm simply making my rulings into the
25 record. So you didn't need to be here in person.



1 By the way, you need to state your name --
2 MR. JONES: Taylor Jones.
3 THE COURT: -- whenever you speak.
4 Again, that was Taylor Jones. But the first
5 motion filed by the plaintiffs is a motion to
6 exclude evidence regarding defendant's claims
7 reimbursement process. That motion was filed
8 March 5. A response filed by the defendant March
9 13. I did get an e-mail from Mr. Behnke in which
10 he stated, and I'm reading from an e-mail dated
11 March 16, plaintiffs will not be filing a reply
12 to the memorandum in opposition to exclude
13 evidence pertaining to the claims reimbursement
14 process.
15 Now, this motion is sustained for
16 the following reasons: Number one is that the
17 plaintiffs represent and the defendant does not
18 dispute that the claims reimbursement process
19 cannot compensate a person for loss of use of
20 property and for annoyance and discomfort
21 resulting from the explosion. The defendant's
22 argument that the availability of this claims
23 reimbursement process somehow counters the
24 plaintiffs' claim for that annoyance and
25 discomfort is simply not persuasive.

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1 Secondly, the Court isn't convinced,
2 and there's reference by the defendant to the
3 doctrine of the duty to mitigate -- the Court's
4 not persuaded that that doctrine really has
5 applicability.
6 I cite into the record this point of
7 law made by the Second District Court of Appeals
8 in the case of Mercer Savings Bank v. Worster,
9 spelled W O R S T E R. This is found at Darke
10 App. No. CA-1273. It's also cited at 1991 Ohio
11 App. LEXIS 5417. And the point of law that I
12 quote from this case is, quote, it is a cardinal
13 rule that one who seeks damages for injury
14 resulting from a wrongful act or omission has a
15 duty to use reasonable care to avoid loss and to
16 minimize the resulting damage. Should one fail
17 to perform this duty to mitigate, he may not
18 recover those damages which reasonably could have
19 been avoided.
20 Now, as the Court views the case,
21 all of the damages allegedly the plaintiffs
22 sustained occurred prior to the offer of the
23 claims reimbursement. The plaintiffs did not
24 incur any additional injury or damages that could
25 have been avoided by not engaging in the claims

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1 reimbursement process. And so the defendant in
2 this case will not be required to pay any
3 additional damages at trial as the result of the
4 plaintiffs' refusal or decision to participate in
5 the claims reimbursement process.
6 So the Court isn't convinced that
7 the duty to mitigate doctrine really applies to
8 this situation. Certainly, if any of the
9 plaintiffs in this upcoming trial had been
10 compensated by the defendant for their evacuation
11 expenses, and my understanding is based upon the
12 representation of the plaintiffs that isn't the
13 case, but if that were the case, then that fact
14 would be relevant vis-a-vis their claim against
15 the defendant for evacuation damages, but that's
16 apparently not the case.
17 Finally, the Court finds that the
18 relevance that the defendant asserts that the
19 claims reimbursement as this Court finds for
20 reasons cited by the plaintiff in their
21 memorandum in opposition that relevance cited by
22 the defendant is substantially outweighed by the
23 confusion of issues and misleading the jury and
24 therefore it's not admissible under Evidence Rule
25 403.

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1 And to elaborate upon that somewhat,
2 the two issues in this upcoming trial are were
3 the plaintiffs -- or the issue of proximate
4 causation and damages. In other words, were the
5 plaintiffs damaged as a proximate result of the
6 explosion? And if so, what's the measure of
7 those damages? The insertion of the claims
8 reimbursement process which applied only to the
9 evacuation expenses which none of the plaintiffs
10 in this trial benefitted from and which had no
11 application whatsoever to the other two
12 categories of damages, loss of use of the
13 property and annoyance and discomfort will only
14 mislead and confuse the jury in its duty to focus
15 on the very two specific issues which are
16 proximate cause and the measure in damages -- and
17 the measure of those damages. For those reasons
18 that motion by the plaintiff to exclude the
19 evidence regarding the defendant's claims
20 reimbursement process is sustained.
21 The next motion of the plaintiff is
22 captioned motion to exclude testimony of Carol,
23 spelled C A R O L, Korros, spelled K O R R O S.
24 That motion was filed March 5. The defendant
25 Aldrich filed a memorandum in response to that

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1 March 9. And the plaintiff filed a reply
2 memorandum on March 16. Now, in addressing this
3 motion the Court first notes that relevant
4 evidence is defined at rule -- Evidence Rule 401.
5 And it means any -- it means evidence having any
6 tendency to make the existence of any fact that
7 is of consequence to the determination of the
8 action more probable or less probable than it
9 would be without the evidence.
10 Now, certainly, if as the plaintiffs
11 contend and the Court agrees, as the Court will
12 later indicate in ruling on the defendant's
13 motion in limine, if as the plaintiffs contend
14 and the Court agrees that public officials such
15 as police officers, firefighters, other emergency
16 responders may testify as to their objective
17 observations that pertain to the explosion, well,
18 then, so may Carol Korros who lives approximately
19 one thousand feet from Isotec and was home at the
20 time of the explosion.
21 So she would be an objective witness
22 as would be the responding emergency responders.
23 So she can certainly testify to her objective
24 observations that pertain to the explosion. But
25 if as the defendant Aldrich asserts and the Court

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1 agrees that those public officials, the emergency
2 responders, may not testify as to their
3 subjective reactions to the explosion, well,
4 likewise, the witness Carol Korros may not
5 testify to her subjective reactions to the
6 explosion.
7 So her initial internal personal
8 emotional reactions to the explosion this Court
9 finds does not have any tendency to prove or
10 disprove that the plaintiffs in this case
11 objectively sustained annoyance and discomfort
12 damages. So Carol Korros will not be permitted
13 to testify, again, to her subjective, personal,
14 emotional reactions but she certainly will
15 testify to her objective observations of the
16 events relating to the explosion.
17 Also, the court finds that
18 Ms. Korros may not testify or refer to the
19 defendant's claims reimbursement process because
20 the Court has already ruled any reference to the
21 claims reimbursement process is inadmissible.
22 And also she may not testify to her -- or refer
23 to her decision to on the -- out of the class
24 action suit because that decision has no
25 relevance whatsoever as to whether the individual

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1 plaintiffs in this upcoming decertified phase two
2 of this trial individually suffered damages as a
3 proximate result of the explosion.
4 The third motion of the plaintiff is
5 a motion for view of the nitric oxide explosion
6 site and storage room filed March 13. There was
7 no response to this motion by the defendant. The
8 Court overrules the motion. Certainly, if this
9 were a phase one proceeding in which the jury
10 would be called upon to determine if Aldrich
11 engaged in an ultrahazardous activity or
12 nuisance, that request would be very compelling.
13 Liability is established and the jury will be so
14 informed.
15 So that's a given that this was a --
16 and the jury will be told. It's a given that
17 this was an ultrahazardous activity, a nuisance
18 and negligence. So the only issue for this jury
19 in this upcoming trial is whether the plaintiffs
20 were damaged as a proximate result of the
21 explosion. The jury's view of the inside of
22 Isotec, and this is the Court's opinion, does not
23 assist them in any demonsterous way in any
24 determination, so that motion's overruled.
25 Now the court will address the

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1 defendant's motion -- motions in limine. And
2 just as a side here, at 4:00 o'clock I've got
3 another phone conference with seven other lawyers
4 that I need to -- we'll have to break off this so
5 I can deal with this other conference. It's just
6 a matter of setting another hearing. It's just a
7 brief interruption at 4:00 o'clock in what we're
8 doing here.
9 The next motion filed by Aldrich is
10 a motion to exclude all evidence relating solely
11 to phases one, three, and five. A response was
12 filed by the plaintiffs on March 16 and a reply
13 by the defendant later that same day on March 16.
14 The Court, in addressing this motion, begins with
15 the observation that the sole issues before this
16 jury in this upcoming trial on March 26 is
17 proximate -- are proximate cause and damages.
18 Liability is not an issue. That was a phase one
19 issue.
20 The Court has determined that
21 Aldrich has admitted negligence -- so liability's
22 established. Therefore, evidence or testimony
23 which has relevance only as to liability is not
24 admissible in this phase two trial. And so in
25 that sense and to that degree this Court sustains

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1 the motion as to that type of evidence, evidence
2 which is only pertinent to phase one --
3 naturally, I don't think there's really any
4 disagreement on the part of the plaintiffs to
5 that proposition of law. However, it may be that
6 there will be evidence or testimony which has
7 relevance as to both phase one, the liability
8 phase, and phase two, the proximate cause and
9 damage phase that we're about to have a trial on.
10 The Court finds the following would
11 be -- is admissible in phase two as it would be
12 in phase one: Factual testimony as to the
13 intensity of the explosion is admissible in phase
14 two as it would be in phase one; also, the
15 factual testimony as to the degree and smoke from
16 the explosion, likewise, admissible in both
17 cases.
18 This Court finds it has relevance as
19 to the plaintiffs' claim, damages for annoyance
20 and discomfort. Not admissible in phase two and
21 that would only be admissible in phase one are --
22 it would be evidence as to the acts or omissions
23 that caused the explosion. The Court is not
24 persuaded by the plaintiffs who would be the
25 proponent of this testimony that this evidence --

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1 again, that would delineate the precise acts and
2 omissions that actually caused the explosion.
3 The Court is not convinced this
4 evidence would have any tendency to establish as
5 more probable that the plaintiffs experienced
6 annoyance and discomfort as the result of this
7 explosion. Also, for reasons Aldrich sets forth
8 in its memorandum, whatever slight probative
9 value it might have the Court finds that it is
10 substantially outweighed by unfair prejudice,
11 confusion of issues and misleading the jury and,
12 therefore, it's not admissible under Evidence
13 Rule 403. Again, the Court's referring to
14 evidence of the facts relating to the acts or
15 omissions that caused the explosion.
16 Also, the Court finds not admissible
17 in phase two and it would only be admissible in
18 phase one. The Court notes in the memorandum in
19 response to the plaintiffs really do not argue to
20 the contrary that the following are not
21 admissible in phase two: Any testimony or
22 reference to the OSHA violations, Aldrich's final
23 agreement with OSHA, zoning violations, and prior
24 incidents relating to Aldrich's safety -- prior
25 incidents and also Aldrich's safety measures.

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1 None of those are admissible. And whatever
2 relevancy they might have, those items that I've
3 just listed, the Court finds for reasons set
4 forth in the Aldrich memorandum that probative
5 value would be substantially outweighed by unfair
6 prejudice, confusion of the issues and misleading
7 the jury and therefore would not be admissible
8 under Evidence Rule 403.
9 Lastly, the plaintiffs agree and the
10 Court so finds that the defendant Aldridge's
11 income or net worth is admissible only in phase
12 four. We're getting a little chuckle here in
13 chambers. Let the record show the plaintiffs are
14 being very generous in their -- okay. Let me
15 start on this next one here. I'm still looking
16 at the clock. Let me get started here.
17 The next motion is a motion -- and,
18 actually, there were kind of double motions that
19 were doubly briefed. A motion -- this is again
20 by Aldrich -- a motion to exclude irrelevant and
21 unnecessary testimony of public officials and
22 also a motion to exclude evidence of damages
23 occurring outside the established 24-hour time
24 period. Those two motions were responded to in a
25 single -- let me get this here -- those motions

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1 were filed March 5. There was a -- a responding
2 memorandum to -- let me make sure I've got this
3 right here. Okay. Yes. There were responding
4 memoranda in opposition to both of those motions
5 on March 16 filed by the plaintiffs -- actually,
6 there was a single memorandum in opposition to
7 both motions filed by the plaintiff March 16 and
8 then there were reply memoranda filed by Aldrich
9 later that day on March 16.
10 Now, starting with the motion to
11 exclude irrelevant and unnecessary testimony of
12 public officials. In here we're referring to
13 firefighters, police officers and other emergency
14 responders regarding evidence as to the
15 subjective reactions of these, I'll call them
16 public officials, to the explosion and evidence
17 as to how the public officials personally or
18 internally experienced annoyance and discomfort.
19 The Court for reasons set forth in the defendant
20 Aldrich's memorandum and reply brief, the Court
21 finds that testimony's not relevant under
22 Evidence Rule 401.
23 However, evidence as to the
24 objective observations of these public officials
25 pertaining to the motion, the aftereffects of the

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1 explosion, the evacuation, this testimony may be
2 relevant as to the two issues that are the
3 subject of this trial, proximate causation and
4 damages. And I believe really the defendant
5 concedes this point in their motion in the reply
6 brief.
7 Regarding the motion to exclude
8 evidence of damages occurring outside the
9 established 24-hour time period. First of all,
10 this Court is in complete agreement with the
11 plaintiffs as to the following points of law:
12 Number one, loss of use of property can be the
13 proximate result of the explosion itself,
14 therefore, may proceed the official evacuation.
15 Number two, nuisance, damages, annoyance and
16 discomfort are independent of loss of use of
17 property damages. It is, therefore,
18 theoretically possible that the plaintiffs could
19 have experienced annoyance and discomfort after
20 the explosion and because of the explosion and
21 prior to the evacuation.
22 Likewise, it is theoretically
23 possible that a nuisance could have continued
24 after the 24-hour evacuation period which caused
25 continued, ongoing annoyance and discomfort.

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1 Therefore, any admissible testimony that the
2 plaintiffs can offer, and I underline admissible,
3 that the plaintiffs can offer as to the loss of
4 use of property and annoyance and discomfort
5 outside the 24-hour official evacuation period
6 will be admissible and the Court will modify the
7 Court's instructions to read that the loss of use
8 damages and the annoyance and discomfort damages
9 are -- must be the result of the explosion and/or
10 evacuation. And I'll not necessarily tie it to
11 the 24-hour evacuation period.
12 So the instruction, again, will read
13 something to the effect that the loss of use of
14 property damages and the annoyance and discomfort
15 damages must result from the explosion and/or
16 evacuation. Now the question becomes what will
17 be the admissible testimony, and that must be
18 within the perameters this Court will set for
19 what are compensable damages for loss of property
20 and annoyance and discomfort and that will be a
21 matter of discussion subsequently.
22 One final point. The Court is going
23 to -- intends to require the jury to delineate
24 the monetary damages it will award for loss of
25 use and annoyance and discomfort damages within

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1 the 24-hour evacuation period, before the 24-hour
2 evacuation period and after the 24-hour
3 evacuation period. So that for purposes of the
4 record and preserving this matter for appeal, the
5 Court will require the jury to break down damages
6 before the 24-hour period, during the 24-hour
7 period, after the 24-hour period.
8 And let me take a pause here. Let
9 me just check -- go off the record here and check
10 with Julene about this phone conference here. So
11 one second here.
12 (Pause in proceedings.)
13 THE COURT: Okay. We're back on the
14 record. We've got more time before this next
15 phone conference is set up. The next -- wait a
16 minute. I think I addressed --
17 MR. SCHULTE: 35 to go.
18 THE COURT: The next motion of
19 Aldrich is a motion to exclude references to
20 nonexistent personal injury or speculation of the
21 error or omissions from the Isotec, I S O T E C,
22 facility. That motion filed March 9 and a
23 plaintiffs' response filed March 16, and later
24 that same day Aldrich filed a reply memorandum.
25 MS. WASHINGTON: Cheryl Washington.

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1 I'm sorry. Your voice faded. What motion are
2 you looking at now?
3 THE COURT: The motion I'm looking
4 at now is Aldrich's motion to exclude references
5 to nonexistent personal injury or speculations of
6 the error or omissions from the Isotec facility.
7 That motion was filed March 5. The plaintiff
8 filed a response March 16 and Aldrich filed a
9 response later that day on March 16. The
10 plaintiffs agree in their response to this motion
11 that references to potential personal injuries
12 and medical conditions are inadmissible and the
13 plaintiffs agree that the plaintiffs may not
14 refer to any error or omissions that may have
15 resulted from the incident.
16 And so the Court is in agreement and
17 the Court will prohibit any such testimony or
18 reference to those two items. The Court,
19 however, agrees with the plaintiff that the
20 plaintiffs may testify as to what they
21 objectively saw, heard, smelled, felt on the day
22 of the explosion. Testimony -- that sort of
23 objective testimony, it's obvious that is
24 admissible.
25 Now, the Court -- there is a

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1 discussion about personal injury damages. This
2 Court has previously ruled that personal injury
3 is not a compensable item of damages in this
4 class action suit. In this Court's decision
5 sustaining the plaintiffs' motion for class
6 action suit this Court finds that personal injury
7 damages as well as real property damages and
8 diminution damages were not certifiable because
9 of the plaintiffs' failure to establish the
10 numerosity of these -- of these sub classes.
11 But annoyance and discomfort is a
12 compensable item of damages and the Court in
13 this -- will discuss in more detail. The Court
14 has drafted an initial set of instructions that
15 propose how the Court will define the measure of
16 damages for annoyance and discomfort. There is
17 disagreement based upon the e-mail communications
18 the Court has had with plaintiffs' counsel as to
19 whether the Court's instruction makes reference
20 to requirement of the showing of substantial
21 physical discomfort.
22 And, again, I'm putting that aside
23 and that I'm going to address a little bit later.
24 But certainly even if the Court ultimately does
25 require, and I'm not indicating the Court will or

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1 will not, it's in the Court's draft. But if
2 there is a requirement of substantial physical
3 discomfort, then the testimony as to excessive
4 coughing, labored breathing, nausea, is certainly
5 evidence of substantial physical discomfort and
6 physical discomfort.
7 I think there's a disagreement on
8 behalf of the plaintiffs on even whether there
9 needs to be physical discomfort for annoyance and
10 discomfort damages. I'm given to understand from
11 the plaintiffs' memorandum that at least some of
12 the plaintiffs will be testifying to excessive
13 coughing, labored breathing and nausea and other
14 similar manifestations. All of that is certainly
15 physical discomfort and certainly in this Court's
16 opinion it becomes a jury issue as to whether
17 it's substantial physical discomfort. That's
18 assuming the Court requires the showing of
19 substantial physical discomfort.
20 The next motion is a motion by
21 Aldrich for a jury view of the plaintiffs' homes
22 and the Isotec facility, and there was no
23 response by the plaintiffs although the
24 plaintiffs filed their own motion to view the
25 interior of the Isotec facility. And for reasons

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1 the Court overruled the plaintiff's motion, the
2 Court likewise will overrule Aldrich's motion.
3 The rationale, as I read it from
4 this motion, was -- is basically to assist the
5 jury in understanding the spatial relationship
6 among the plaintiffs' properties and between the
7 plaintiffs' properties and the Isotec facility.
8 The Court finds this is not particularly
9 persuasive. The Court finds that any jury with
10 the assistance of maps or diagrams can accurately
11 ascertain these spatial distances and a jury view
12 really is not necessary to accomplish that
13 purpose. So the Court overruled that motion for
14 a jury view.
15 Now, a couple things here and I want
16 to get to the annoyance and discomfort issue of
17 damages. The Court conducted a final pretrial
18 conference, and I wanted to make a record of the
19 schedule for the trial. The Court had set --
20 actually, we had set three separate phase two
21 trials, one-week trials, and they were set with
22 the understanding that they would be one-week
23 trials apiece and those trials, those single week
24 trials, were to be March 26, then a separate
25 one-week phase two jury trial April 16, and then

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1 a third and final single one-week phase two jury
2 trial April 30.
3 And as the Court in the original
4 pretrial order and the original discussions with
5 counsel, the Court couldn't have been clearer
6 that the Court was setting aside those three
7 weeks. And, you know, in the meantime the Court
8 has scheduled other cases around those three
9 weeks including criminal cases with time
10 deadlines and those cases have to be tried.
11 So we have -- we had a discussion at
12 the final pretrial conference and the Court
13 basically wanted to establish the mechanism or
14 the way by which we can have this trial on March
15 26 completed and to the jury by Friday afternoon,
16 March 31. Now, the upshot of our discussion was
17 the week of the trial of April 16, we've decided
18 to convert that one-week trial into a two week
19 trial and we scratched the April 30 trial.
20 So we now have two phase two trials
21 which are scheduled, a two-week trial April 16
22 and April 23 and this upcoming one-week phase two
23 trial March 26. Now, pause for a second. Is
24 anybody, and I'll assume from your silence, is
25 anybody disagreeing with what the Court just

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1 said? Yes?
2 MR. SCHULTE: I don't disagree with
3 that. I do have some concerns because I'm in a
4 trial next door that's not moving quite as fast.
5 THE COURT: Well, that may kind of
6 shortcut --
7 MR. SCHULTE: I know where you're
8 probably headed. I can tell by looking.
9 THE COURT: From the silence
10 everyone agrees that that's now a one-week March
11 26 and a two-week trial starting April 26 --
12 April 16. You're concerned. Go ahead and
13 explain your situation.
14 MR. SCHULTE: Jack Davis passed away
15 and so we had a visiting judge come in.
16 MR. FOOS: Your Honor, I'm having a
17 hard time --
18 MR. SCHULTE: Marty, just to be
19 clear for the record, I'm not moving for a
20 continuance but I'm in Jack Davis's courtroom and
21 Judge McCracken was gotten for this at the last
22 moment. We had scheduled for a quadruple
23 drowning trial. Days before trying we found out
24 a criminal trial would be -- I have two other
25 co-plaintiff's counsel with me. I planned on

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1 putting on my 11 witnesses this week prior to the
2 defense putting on their case and rebuttal
3 witnesses and therefore going right into the
4 Isotec case, and I'm concerned whether or not I'm
5 going to get that done. I intended to pick the
6 jury here. I'm going to respectfully stay moot
7 at this point.
8 THE COURT: So what are you saying,
9 if your case flows over to next week, are you
10 suggesting we start our trial in your absence on
11 Monday or if you are in trial next week, then are
12 you indicating that we simply can't start this
13 trial in this court on Monday, March 26?
14 MR. SCHULTE: I'm not going to
15 formally move for a continuance, your Honor.
16 UNIDENTIFIED SPEAKER: Can't hear
17 you, Rick.
18 MR. SCHULTE: I'm not going to
19 formally move for a continuance. I think we'd
20 have to make a different arrangement. Taylor
21 would have to pick the first jury. I would come
22 over and join the trial at some point after that.
23 That may have to happen if the Court says we're
24 going to trial next week.
25 I do think this is very important.

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1 This is the first set of jury trials. We're
2 trying to get an overall view both in front of
3 the special master and also the jury trial, and
4 it's certainly going to be important because both
5 sides are going to be looking for the result.
6 That's my thought. The judge has concerns about
7 whether or not we can get this in or not. I
8 certainly do too. The last thing I do want to do
9 is spend money on experts and not get the trial
10 done in one week.
11 THE COURT: I certainly know it's
12 simply out of the question to start this trial on
13 Monday and get it done by Friday.
14 MR. SCHULTE: One of the reasons I
15 was hopeful, your Honor, we had discussed whether
16 or not we're going to call Jim Ludlozek. At this
17 point we're looking towards calling him.
18 THE COURT: Hold on a second. We're
19 going to go off the record here. You can hold
20 here. Can we do this one out here? Let's go off
21 the record.
22 (Pause in proceedings.)
23 THE COURT: We had a discussion off
24 the record and Mr. Schulte has a trial that is
25 going to carry over to next week and Mr. Jones

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1 has a personal matter that he must attend to.
2 And really the consensus here is that the
3 Court -- unless plaintiffs' counsel would want
4 this trial to start on Monday, March 26, the
5 Court is not going to force plaintiffs' counsel
6 and Mr. Schulte's indicated his preferences to
7 cancel this trial date and then simply go forward
8 to the two-week trial; is that right?
9 MR. SCHULTE: Correct, your Honor.
10 THE COURT: We've canceled the March
11 26 trial date.
12 MR. JONES: This is Taylor. I just
13 want to be clear on the record. Notwithstanding
14 the personal tragedy, that I would arrange my
15 schedule to be back if the Court would be
16 inclined to want the case to go forward on the
17 26th. I would certainly make every arrangement
18 to get back in here Sunday night and be all set
19 to go forward. I just want that clear in the
20 record.
21 THE COURT: Okay. I think maybe the
22 greater reason is that Mr. Schulte has emphasized
23 that he personally wants to be involved in this
24 jury selection is really the primary reason.
25 Mr. Schulte, you're asking to cancel this trial

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1 on Monday and just go forward to the April 16
2 trial; am I right?
3 MR. SCHULTE: Yes, your Honor.
4 THE COURT: All right. So now I'm
5 prepared to discuss the annoyance and discomfort
6 instruction. The court e-mailed to counsel what
7 I called a survey of annoyance and discomfort
8 caselaw which cites in that -- cites experts from
9 various cases including the follows cases:
10 Antonik, A N T O N I K, v. Chamberlain, a
11 decision from the Ninth Appellate District in
12 1947 cited at 81 Ohio App. 465, pages 476 to 477.
13 That case was cited with approval by the Eighth
14 District Court of Appeals in Schoenberger,
15 S C H O E N B E R G E R, v. Davis, decided June
16 23, 1983, cited at Cuyahoga App. No. 45611. Also
17 from the Eleventh Appellate District, 1991 O'Neal
18 v. Atwell, A T W E L L, cited at 73 Ohio App. 3d.
19 631, specifically page 636. That case was also
20 cited with approval by the Eighth Appellate
21 District in Harris v. Liston, L I S T O N,
22 decided August 16, 1998, Cuyahoga App. No.
23 72244.
24 Also, I shared with counsel the case
25 of Bullock, B U L L O C K, v. Oles, spelled

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1 O L E S, from the Seventh Appellate District,
2 September 24, 2001, cited at Mahoning App. No.
3 99 CA 223, and then two decisions from the Second
4 District Court of Appeals, Miller v. Horn decided
5 June 28, 1996, Clark App. No. 95-CA-113 and
6 95-CA-114 and a 1946 decision from the Second
7 District Court of Appeals, Frey, F R E Y, v.
8 Queen City Paper company, 79 Ohio App. 64.
9 Now, the Court received proposed
10 jury instructions from both Aldrich and from the
11 plaintiff. And the, Court after reviewing the
12 proposed jury instructions and after having
13 conducted the Court's research on not only
14 annoyance and discomfort but loss of use of
15 property and other areas that the Court also
16 researched, the Court put together a set of jury
17 instructions which are a draft and the draft the
18 Court will mark as -- will mark as Court's
19 Exhibit Number 2. We're going to go off the
20 record and the Court will go ahead and mark this
21 Court's Exhibit Number 1.
22 (Thereupon, Court's Exhibit Number 1
23 was marked for purposes of identification.)
24 THE COURT: That draft that has been
25 circulated amongst counsel, Court's Exhibit

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1 Number 2, is the draft of preliminary
2 instructions that I've also circulated by e-mail
3 amongst counsel. Now, with regard to the first
4 draft of instructions, Court's Exhibit Number 1,
5 I now focus on page 9, lines 11 through 19, and
6 that reads as follows: By the preponderance of
7 the evidence you will determine whether the
8 plaintiffs suffered any personal annoyance and
9 discomfort as a proximate result of the explosion
10 and I'm going to add and/or -- and/or evacuation
11 and if so, what reasonable amount of money, if
12 any, Aldrich ought to pay to the plaintiff for
13 that discomfort or annoyance.
14 When considering annoyance and
15 discomfort damages, no precise rule for
16 ascertaining the damage can be given. As in the
17 very nature of things, the degree of personal
18 annoyance and discomfort are not subspecialist to
19 exact measurement. However, a plaintiff may not
20 recover for annoyance and unsubstantiated or
21 unrealized fears. The plaintiff must have
22 experienced substantial physical discomfort.
23 Evidence of pecuniary loss is not
24 required to recover damages for discomfort and
25 annoyance. So that's the draft based on

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1 instructions on annoyance and discomfort damages
2 based on what the Court will -- before the Court
3 and also based upon the Court's research and, in
4 particular, the survey of caselaw that I've
5 already cited into the record, the various cases
6 the Court relied upon.
7 The Court received an e-mail from
8 John Smalley which was shared with plaintiffs'
9 counsel and I know he expresses in the strongest
10 possible way his, shall I say, his discomfort
11 with the Court's instruction. I believe, and I
12 don't want to speak for the plaintiffs, and I'm
13 going to turn it over to the plaintiffs, really,
14 I think at least he, and he is not here -- part
15 of this conversation, but I think he takes
16 exception with the proposition that there must be
17 physical discomfort, that that is not an element
18 necessarily of damages for discomfort and
19 annoyance.
20 But that's my reading of his e-mail
21 but -- and he asked that we have a hearing and I
22 said most certainly I would have input, whatever
23 other input, whatever other caselaw might be
24 provided to the Court. And so let me just open
25 it up for discussion. Is there --

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1 MR. BEHNKE: Jeff, I'll kind of
2 speak for both of us. Steve Behnke. Jeff, I'll
3 kind of speak for both of us. Please jump in.
4 We've conducted our own initial review of the
5 caselaw cited by the judge and we have some
6 initial thoughts on that but we would certainly,
7 with the Court's permission, welcome the
8 opportunity to, I guess, file a written brief of
9 some kind outlining our position regarding those
10 issues.
11 THE COURT: All right.
12 MR. BEHNKE: You know, whether we're
13 ready right now. I don't believe that we are,
14 but we're certainly on that track and we could
15 have something very shortly.
16 THE COURT: Okay. That's fine.
17 We're not in trial Monday anyway so no reason not
18 to do the brief.
19 MR. SCHULTE: Jeff, correct me if
20 I'm wrong in my reading of your e-mail to me.
21 Wasn't the gist of whether you have to find
22 substantial physical discomfort had to do with
23 when you're doing the initial analysis and
24 whether or not this is a nuisance? This case is
25 different in that the defense has stipulated to

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1 the fact that it's a nuisance. Therefore, it's a
2 question of damages and the analysis is a little
3 bit different.
4 MR. CHINAULT: Correct. All of the
5 cases cited in that memorandum or the caselaw
6 listing the Antonik case, Bullock, and all of
7 those cases, they're dealing with establishing a
8 nuisance in the first instance. None of those
9 cases ever got to the issue of damages. In fact,
10 in Miller v. Horn they outlined the types of
11 damages, concerns that people had that would go
12 towards the annoyance and discomfort. Among
13 those were odors, hearing cat fights, worried
14 that drinking water was contaminated from pet
15 cemetery nearby.
16 Those aren't all physical discomfort
17 and I know they don't -- in outlining whether
18 damages are recoverable. They are essentially
19 witnessing the harm to the plaintiffs versus the
20 benefit or the utility of the use of land, and
21 that's how they're analyzing those damages.
22 They're not looking at substantial discomfort in
23 those cases when they're talking about that.
24 It's all in establishing the nuisance in the
25 first instance. Is there a nuisance there?

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1 That's essentially a position that Steve said we
2 can certainly outline in a brief and I would be
3 willing to do that.
4 THE COURT: Mr. Foos, did you want
5 to add anything?
6 MR. FOOS: Yeah, just briefly. I
7 think what we'll do -- we'll get their brief and
8 we can respond to it that way. Certainly, with
9 regard to what Jeff said, your order on phase one
10 liability, that was filed on January 9 of 2007
11 and we quoted this in our reply brief on the
12 24-hour time period. I think that brief goes a
13 long way towards addressing this very issue.
14 On page three of that brief it
15 says -- it quotes from your decision where you
16 say that the first two elements of each of the
17 claims have been established but the last two,
18 approximate cause and damages, have not been
19 established. And certainly the annoyance and
20 discomfort standards as quoted throughout your
21 survey would go to those second two elements,
22 causation and damages.
23 I would also like to point out
24 though that even if -- even if, and I don't --
25 I'm not conceding this point because your prior

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1 order correctly said -- it says that we can still
2 contest proximate causation and damages. Even if
3 that was not being contested, we would still be
4 entitled to this instruction and the answer we
5 found in the case that you cited on page one of
6 your survey, Bullock v. Oles. The very first
7 line there says an award of damages does not
8 inevitably follow the nuisance.
9 Blevins v. Sorrell, the Court in
10 that case found that there was a nuisance, went
11 so far as to issue an injunction to stop the
12 nuisance. So there was a, you know, an actual
13 full judgment on the injunction measure of
14 relief. And the Court then acting as trier of
15 fact, damages for annoyance and discomfort. And
16 the Court in that case said the law -- the law of
17 degree must have appreciable, substantial,
18 tangible injury resulting in actual material and
19 physical discomfort.
20 They talked about how the plaintiff
21 had said that so long as they establish a
22 nuisance, there is no need anymore to show
23 appreciable, substantial, tangible, physical.
24 And the Court rejected that for the reason that
25 plaintiff had not been able to show those kinds,

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1 that sort of a standard. The Court said that the
2 award of money damages is not inevitably
3 following a finding of nuisance and the Court
4 denied recovery in that case.
5 In so doing, the Clark case is not
6 one of the main cases cited in your survey but
7 comes up several times as talking about how
8 nuisance is a law of degree, that you need to
9 have not just a showing of some sort of
10 negligence on the one property but you need to
11 show some sort of -- and it goes through the
12 litany again, appreciable, substantial, tangible
13 resulting in physical discomfort on the property
14 before you can get an award.
15 What that means is that that
16 standard applies as a standard for whether
17 there's a nuisance at all. It applies as to
18 whether there's causation to any damages. It
19 applies to whether or not they get any damage at
20 all even if you have all those elements
21 established. Because of the nature of nuisance,
22 it applies to all of those elements.
23 MR. CHINAULT: Following up. I
24 think you hit the nail on the head when you say
25 they were dealing with a nuisance. That's

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1 exactly what they're doing. Even in Sorrell they
2 didn't base their decision on -- there was no
3 physical injury which they were not claiming.
4 They based it on the fact they didn't think it
5 was a nuisance. That's what the decision was
6 based off of. It was not based on no physical
7 harm, even though there was none alleged.
8 None of the other cases, even
9 Antonik, was not based on the lack of physical
10 harm. It was based on the witnessing, the
11 competing interest between having an airport in
12 the area versus not having an airport. The
13 Reeser Brothers case, no physical harm. And I
14 think we can keep going on and on about that.
15 The cases don't support that there has to be
16 substantial physical harm in any way other than
17 they talk about that is caused when you're making
18 a decision on whether a nuisance is there in the
19 first instance. But, you know, if the Court
20 wants, we can file --
21 MR. SCHULTE: We'd like to brief it,
22 your Honor.
23 THE COURT: Just a couple and we're
24 going to have to brief it. So, you know, short
25 of my frame of thinking, and you can address in

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1 your briefs my frame of thinking based upon what
2 I'm seeing and reading. And, again, this is all
3 very tentative, but this is a very important
4 issue that the Court has to get right because of
5 the ramifications because you know you've got to
6 project this out, this ruling across the entire
7 class. So I want to be very careful, and I want
8 to give you the benefit of my thinking as I go
9 along here.
10 Just a couple quick things. I think
11 there's a difference between physical harm and
12 physical discomfort. I don't think you have to
13 show physical harm. In fact, one of the cases
14 specifically says you don't have to show medical
15 injury. I don't know that you -- I'm not at all
16 of the opinion that you must demonstrate your
17 clients were physically harmed. You may very
18 well be required to show that they had physical
19 discomfort and things such as the smell of fish
20 in one case, you know. Even a terrible smell may
21 not be physically harmful but it's discomfort.
22 So the other point is I did note the
23 opening line of that quote from Bullock v. Oles
24 which is an award for damages does not inevitably
25 follow a finding of nuisance. The fact that this

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1 Court determined that Aldrich has admitted
2 nuisance, and I also specifically in my decision
3 said that what remains to be tried are proximate
4 cause and damages, I think it would be virtual
5 error to instruct -- essentially to tell the jury
6 that they must award damages for nuisance without
7 any determination of proximate cause or those
8 damages or without giving them any guidance as
9 to -- well, how do they -- what does the Court
10 mean by annoyance and discomfort damage?
11 There has to be some sort of
12 explanation to the jury as to what that means and
13 how they measure it. I am very resistant to the
14 argument but again, I mean, I'm telling you this
15 now so you can work all the harder to research to
16 disabuse me of this notion that simply because
17 the Court is determined there's nuisance, that
18 necessarily means there must be damages, and
19 without any guidance to the jury as to how they
20 measure the damages.
21 The other point I want -- couple
22 other points and just throwing this out. You can
23 address this in your briefs. The theme that I
24 see in the cases at least that I've surveyed --
25 and here you have language that is from the

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1 Seventh District, the Eighth, the Ninth and the
2 Eleventh Appellate District, and the Second
3 District Court of Appeals alluded to this
4 language in the two decisions, language to the
5 effect that there should be appreciable,
6 substantial, tangible injury resulting in actual
7 material and physical discomfort, and that
8 language is throughout these cases.
9 So the commonality here is, first of
10 all, the reference to physical discomfort. I say
11 that that's different from physical harm. But
12 there's this uniformity of reference to physical
13 discomfort. One thing that I am second-guessing
14 the Court on is the following: I stated in the
15 Court's draft that there must be proof of
16 substantial physical discomfort and I pulled that
17 quote, what I stated in the instruction.
18 It's Court Exhibit Number 1, page 9
19 at line 18. The plaintiff must have experienced
20 substantial physical discomfort. Well, that
21 sentence is in there simply because I pulled it
22 out of the Second District Court of Appeals
23 decision in Miller v. Horn, the 1996 decision.
24 In reflection, I'm sort of gravitating to the
25 position that while substantial physical

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1 discomfort is sufficient to constitute annoyance
2 and discomfort, I'm not really of the mind now
3 that it's necessary for an award of -- for
4 damages for discomfort and annoyance.
5 I'm of the -- I'm sort of
6 gravitating to the thought that what the jury
7 would be instructed would be that there must be,
8 quote, appreciable, substantial, tangible injury
9 resulting in actual material and physical
10 discomfort. That text is pulled verbatim out of
11 the Bullock case and it's the text that is
12 repeated in the other appellate districts.
13 And so I'm really gravitating to the
14 position that the Court would not tell the
15 jury -- instruct the jury that there must be
16 substantial physical discomfort but the Court
17 would instruct the jury that there must be
18 appreciable, substantial, tangible injury
19 resulting in actual material and physical
20 discomfort. But there must be physical
21 discomfort as opposed to nonphysical discomfort.
22 But, again, discomfort doesn't mean harm.
23 So, anyway, that's the Court -- I'm
24 just sharing that with counsel so you can address
25 it in your memorandum, and I'll certainly factor

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1 it all in, too, and then ultimately make the
2 decision on that instruction.
3 One other since we're talking about
4 instructions on loss of use of property. The
5 Court -- I've considered the requested jury
6 instructions, you know, particularly from
7 Aldrich, and I've reviewed the applicable
8 caselaw, which there are a number of cases that I
9 won't, at this point, put into the record but a
10 number of cases that I've reviewed. There is a
11 distinction to be drawn between recovery for
12 reasonable restoration costs and the reasonable
13 value of the loss of use of property between
14 injury and the restoration of the property.
15 All of the caselaw that I've
16 reviewed would stand for the proposition that --
17 with regard to recovery of reasonable restoration
18 costs that requires an objective -- objective
19 evidence of preinjury versus postinjury fair
20 market value of real property. So that type of
21 damage requires that objective evidence.
22 But that is separate and distinct
23 from an award of damages for reasonable value of
24 loss of use of property, and that item is
25 compensable over and above recovery for

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1 reasonable restoration costs. There's no caselaw
2 -- there's no case that I've reviewed that
3 requires -- with regard to reasonable value of
4 loss of use of property requires an objective
5 fair market evaluation or the application of
6 some -- some mathematical formula. I simply
7 don't see that in any of the caselaw.
8 There does have to be objective
9 evidence and objective testimony as to the manner
10 in which the property was used and the importance
11 of that use and that that use was locked for
12 whatever period of time. And that sort of
13 objective testimony provides more of a
14 speculative basis for a jury to attach a value
15 then to the reasonable value of the loss of the
16 use of the property.
17 That really calls upon the jury to
18 do nothing different than it would do, for
19 example, attaching a dollar figure to pain and
20 suffering. The jury is capable of attaching a
21 dollar figure to pain and suffering. It's
22 capable once it understands the importance of the
23 property and how the property was used and then
24 was not used for whatever period of time. They
25 can attach a dollar figure to that just as they

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1 would attach a figure for something like pain and
2 suffering.
3 So that's the Court's current view
4 of the issue of loss of use and how that -- and
5 if the request -- the request by Aldrich would be
6 to require that there be objective -- some sort
7 of objective fair market calculation or some
8 mathematical calculation in support of loss of
9 use of -- loss of use of property damages, the
10 Court is not persuaded that that request, if that
11 is the request by Aldrich, is supported by the
12 law -- caselaw.
13 MR. FOOS: Your Honor, this is Marty
14 Foos. I think our point in regards to this is
15 more one of duplication than anything else, and
16 the reason why I think we had the difficulty with
17 the special master in the first round of hearing
18 had more to do with duplication with annoyance
19 and discomfort than anything else.
20 MR. SCHULTE: We're in complete
21 disagreement.
22 MR. FOOS; I think most important to
23 us is the instruction from -- the jury
24 instructions dealing with duplication between
25 loss of use and annoyance and discomfort. I

1 think so long as that's there, we can obviously
2 argue that to the jury on closing and whatnot but
3 I think that that's going to be fine.
4 THE COURT: I believe plaintiffs'
5 counsel is in agreement with the proposition that
6 annoyance and discomfort is separate and distinct
7 from loss of use. They're two independent
8 categories of damage, and the jury must be told
9 they cannot overlap those items of damages. They
10 cannot duplicate one with the other. Everyone's
11 in agreement; right?
12 MR. SCHULTE: Straight OJI.
13 THE COURT: That instruction is in
14 Court's Exhibit Number 1. And so I guess then
15 the Court is not going to deviate from the
16 instructions regarding loss of use because I'm
17 hearing you. Actually, Mr. Foos, you're really
18 in agreement with what the Court just stated as
19 to the state of law regarding the calculation of
20 loss of use damages not requiring some
21 mathematical formula? You're in agreement with
22 the court; am I right?
23 MR. FOOS: I don't know an
24 agreement. We'll note an objection for the
25 record and we'll accept it.



1 THE COURT: Okay.
2 MR. FOOS: I think that comes down
3 to just an evaluation of the term speculative and
4 the damage law. So I think our biggest concern
5 that I think we would seek to discuss further
6 with you would be the duplication point.
7 THE COURT: All right.
8 MR. FOOS: Just note it for the
9 record.
10 THE COURT: All right. Now, for a
11 briefing schedule on the annoyance and
12 discomfort. Do you want to do simultaneous
13 briefs or -- no. I guess who goes first on this?
14 MR. SCHULTE: Why don't each side
15 just do one brief to the Court.
16 THE COURT: Mr. Schulte is saying
17 just do simultaneous briefs. I think you both
18 know what the issues are. Simultaneous briefs
19 and just give me your next -- give it your best
20 shot, and I'll take it from there. So let's do
21 the simultaneous briefs. Today is the 20th. So
22 let's say two weeks from today. Two weeks from
23 today, April 3, at 4:00 o'clock e-mail
24 simultaneous briefs on the annoyance and
25 discomfort issue. Now, does everybody want a



1 copy of what we've placed on the record from
2 Stacey?
3 MR. FOOS: This is Marty Foos, and
4 yes, I would.
5 MR. SCHULTE: Yes, we do. Rick
6 Schulte.
7 THE COURT: Is that it? Just you
8 two? Okay. And a copy for the Court, Stacey.
9 At what point do you need that? Prior to -- do
10 you need that to look at? Maybe you should.
11 (Pause in proceedings.)
12 THE COURT: Stacey could do maybe a
13 week from today? So she'd have the transcript by
14 a week from today. Then are we still okay then
15 or do you want to bump it -- let's say Friday,
16 April 6. Friday, April 6, will be the deadline
17 to e-mail simultaneous briefs. So you would have
18 her transcript by March 27. That's more than
19 enough time. Friday, April 6, will be the
20 deadline to fax to me your briefs. Okay.
21 Anything else? Okay.
22 (Thereupon, the proceedings were
23 concluded at 5:13 o'clock p.m.)
24
25



1 STATE OF OHIO )
2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE
3 I, Stacey L. Kimmel, a Notary Public
4 within and for the State of Ohio, duly
5 commissioned and qualified,
6 DO HEREBY CERTIFY that the above-named
7 proceedings were reduced to writing by me
8 stenographically in the presence of the parties
9 and thereafter reduced to typewriting.
10 I FURTHER CERTIFY that I am not a
11 relative or Attorney of either party nor in any
12 manner interested in the event of this action.
13 IN WITNESS WHEREOF, I have hereunto set
14 my hand and seal of office at Dayton, Ohio, on
15 this ___ day of _____, 2007.
16
17 _____
STACEY L. KIMMEL
18 NOTARY PUBLIC, STATE OF OHIO
My commission expires 6-10-2011
19
20
21
22
23
24
25

1 STATE OF OHIO )
2 COUNTY OF MONTGOMERY ) SS: CERTIFICATE
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11 relative or Attorney of either party nor in any
12 manner interested in the event of this action.
13 IN WITNESS WHEREOF, I have hereunto set
14 my hand and seal of office at Dayton, Ohio, on
15 this 27th day of March, 2007.
16
17 Stacey L. Kimmel
STACEY L. KIMMEL
18 NOTARY PUBLIC, STATE OF OHIO
My commission expires 6-10-2011
19
20
21
22
23
24
25

Case: 2003 CV 08704
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**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO**
**CIVIL DIVISION**

| | | |
|---|---|---|
| **CHRISTIE BANFORD, et al.** | * | Consolidated Case No. 2003 CV 8704 |
| Plaintiffs | * | Judge Langer |
| v. | * | |
| **ALDRICH CHEMICAL COMPANY, INC., and ALDRICH CHEMICAL COMPANY, INC., d.b.a. ISOTEC** | * | **ENTRY** |
| Defendants | * | |
| **SUSAN GROOMS,** et al. | * | Case No. 2005 CV 7221 |
| Plaintiffs | * | Judge Langer |
| v. | * | (CONSOLIDATED) |
| **ALDRICH CHEMICAL COMPANY, INC.,** et al. | * | |
| Defendants | * | |
| **PATRICIA GRAY,** et al. | * | Case No. 2006 CV 4053 |
| Plaintiffs | * | Judge Langer |
| v. | * | (CONSOLIDATED) |
| **ALDRICH CHEMICAL COMPANY, INC.,** et al. | * | |
| Defendants | * | |

This matter coming before the Court upon Plaintiff's Motion To Dismiss Without Prejudice, the Court hereby grants Plaintiff's Motion to Dismiss the punitive damages claims of Taylor Ferguson, a minor, without prejudice. In addition, this Court, having found that adequate basis so exists, this Court determines that this is a final appealable order and there is no just reason for delay.

Judge Langer

Prepared by:

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# The Supreme Court of Ohio

Case: CA 022600
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Dkt: CRORDE

JUN 05 2009

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MONTGOMERY CO. OHIO
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Christine Banford, et al. Case No. 2009-0305

v. ENTRY

Aldrich Chemical Company, Inc., et al.

Upon consideration of the jurisdictional memoranda filed in this case, the Court accepts the appeal. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for Montgomery County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

Upon consideration of the motion for admission pro hac vice of Gordon L. Ankney by Martin A. Foos,

It ordered by the Court that the motion for admission pro hac vice is granted.

(Montgomery County Court of Appeals; No. 22600)

THOMAS J. MOYER
Chief Justice