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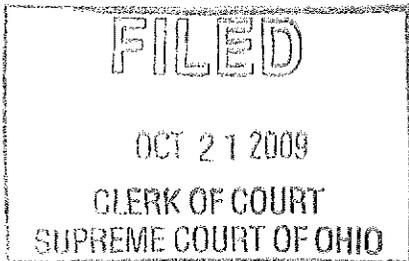
IN THE SUPREME COURT OF OHIO

Christine Banford, <i>et al.</i> ,	:	
	:	Case No. 2009-0305
Plaintiffs-Appellees,	:	
	:	
v.	:	On Appeal from the Montgomery
	:	County Court of Appeals,
Aldrich Chemical Company, Inc.,	:	Second Appellate District,
	:	
Defendant-Appellant.	:	

**BRIEF OF *AMICUS CURIAE*
 THE OHIO ASSOCIATION FOR JUSTICE
 ON BEHALF OF PLAINTIFFS-APPELLEES**

Paul Giorgianni (0064806)
 Giorgianni Law LLC
 1538 Arlington Avenue
 Columbus, Ohio 43212-2710
 Phone: 614-205-5550
 Fax: 614-481-8242
 E-mail: Paul@GiorgianniLaw.com
*Attorney for Amicus Curiae
 The Ohio Association for Justice*

Martin A. Foos (0065762)
 Faruki Ireland & Cox P.L.L.
 500 Courthouse Plaza, S.W.
 10 North Ludlow Street
 Dayton, Ohio 45402
 Phone: (937) 227-3729
 Fax: (937) 227-3717
 Email: mfoos@ficlaw.com
*Counsel of Record for Appellant
 Aldrich Chemical Company, Inc.*



John A. Smalley (0029540)
 Dyer, Garofalo, Mann & Schultz
 Talbott Tower, Suite 1400
 131 N. Ludlow Street
 Dayton, Ohio 45402
 Phone: 937-223-8888
*Counsel of Record for Appellees
 Christine Banford, et al.*

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PROPOSITIONS OF LAW

1. Once the existence of a nuisance has been proven, whether and to what extent the plaintiff's proximate harms should be compensated is a question for the jury. Thus, it is error for the trial judge to instruct the jury that each discrete annoyance and discomfort proximately caused by a proven nuisance is compensable only if it is "appreciable, substantial, tangible harm resulting in actual, material, physical discomfort."
2. Generally, evidence regarding the cause of a proven or admitted nuisance, to the tortfeasor's history relevant to the nuisance, and to the tortfeasor's efforts to abate the nuisance is relevant to the question of whether and to what extent the plaintiff should be compensated for annoyance and discomfort proximately caused by the nuisance

ABOUT THE OHIO ASSOCIATION FOR JUSTICE

The Ohio Association for Justice is Ohio's largest victims-rights advocacy association, comprised of 2,000 attorneys dedicated to promoting the public good through efforts to secure a clean and safe environment, safe products, a safe workplace, and quality health care. The Association is devoted to strengthening the civil justice system so that deserving individuals can get justice and wrongdoers are held accountable.

STATEMENT OF FACTS

Amicus curiae the Ohio Association for Justice adopts the Statement of Facts in the brief of Plaintiffs-Appellees.

ARGUMENT

I. **Proposition of Law 1. Once the existence of a nuisance has been proven, whether and to what extent the plaintiff's proximate harms should be compensated is a question for the jury. Thus, it is error for the trial judge to instruct the jury that each discrete annoyance and discomfort proximately caused by a proven nuisance is compensable only if it is "appreciable, substantial, tangible harm resulting in actual, material, physical discomfort."**

A. Summary.

Ohio adheres to the common-law rule that the harms compensable in a nuisance claim include "annoyance" and "discomfort." No Ohio court has ever placed a categorical limitation on such damages. Defendant-Appellee Aldrich Chemical Company now asks this Court to do so – to rule that "annoyance" is never compensable and that "discomfort" is compensable only when the discomfort is "appreciable, substantial, tangible harm resulting in actual, material, physical discomfort." This Court should keep Ohio law as it is and affirm the court of appeals's judgment.

B. Annoyance is a harm compensable in a nuisance claim.

The first thing to note regarding Aldrich's argument is that it seeks to reverse the centuries-old rule that "annoyance" is a harm compensable in a nuisance claim. The rule was recognized in Ohio at least as far back as 1832:

[T]he term *nuisance* signifies anything that causes *hurt, inconvenience, annoyance, or damage*. . . . [I]f it causes either in the least degree, the person creating it must be answerable for consequences. No matter how small the damage, the person sustaining it will have a right of action.

Cooper v. Hall (1832), 5 Ohio 320, 323 (quotation marks omitted). It continues to be the rule recognized by Ohio's courts of appeals, even in the cases Aldrich cites. Nevertheless, Aldrich is asking this Court to eliminate "annoyance" as a compensable harm and create a new rule that the

only emotional harms compensable in a nuisance claim are “appreciable, substantial, tangible harms resulting in actual, material, physical *discomfort*.”

C. Aldrich’s Brief fails to acknowledge the difference between proving the nuisance and proving the harm.

Aldrich’s argument is founded upon using, out of context, a phrase that appears in many Ohio court of appeals opinions – “appreciable, substantial, tangible harm resulting in actual, material, physical discomfort.” The mere finding of a nuisance does not give rise to a remedy. A plaintiff must also prove harm proximately caused by the nuisance. Courts of appeals have used the phrase “appreciable, substantial, tangible harm resulting in actual, material, physical discomfort” to describe the “seriousness” threshold for a nuisance. No Ohio court has ever held, as Aldrich asks this Court to do, that that phrase is a restriction on damages recoverable for an admitted or proven nuisance.

In all of the following cases upon which Aldrich relies, the issue was whether a nuisance was proven; there was no discussion about annoyance or discomfort harms or damages:

- *Cooper v. Hall* (1832), 5 Ohio 320, 324 (finding no nuisance, because the defendant’s dam, although raising the water level a small degree, did not cause any harm).
- *Columbus Gas Light & Coke Co. v. Freeland* (1861), 12 Ohio St. 392, 399-400 (ruling that the trial judge’s instruction “may have led the jury [when determining whether or not there was a nuisance] into a mere comparison of the situation of the plaintiff . . . with that of his neighbors – into an inquiry simply whether *any* difference was perceptible,” rather than determining, as required by nuisance law, whether there was “that degree of annoyance and inconvenience which constitutes a legal harm, and gives a claim for damages”).
- *Eller v. Koehler* (1903), 68 Ohio St. 51, 58 (ruling that trial court erred in excluding defendant factory’s testimony indicating that plaintiff’s harms were caused by non-party railroad: “[T]his testimony ought to have been admitted, not to apportion the damage between the defendant and the railroad company, but because it would tend to show that the alleged harms resulted, not from defendant’s hammers, but from the railroad trains.”).

- *Antonik v. Chamberlain* (9th Dist. 1947), 81 Ohio App. 465, 475-477 (finding no nuisance, because the public interest in developing airport outweighed harm to plaintiff neighbors).
- *Rautsaw v. Clark* (12th Dist. 1985), 22 Ohio App.3d 20, 21 (finding that “the growth of [defendant’s] trees onto [plaintiff’s] property was not an unreasonable interference with the use and enjoyment of appellant’s land” – that is, not a nuisance).
- *Christensen v. Hilltop Sportsman Club, Inc.* (4th Dist. 1990), 61 Ohio App.3d 807, 810-812 (affirming trial court’s finding of a nuisance).
- *Wells v. Foster* (Oct. 9, 1990), Madison App. No. CA89-10-024, 1990 Ohio App. LEXIS 4388, *5-6 (affirming finding that animal shelter was a nuisance).
- *O’Neil v. Atwell* (11th Dist. 1991), 73 Ohio App. 3d 631, 636-637 (finding that deck added to condominium unit was a nuisance).
- *Park v. Langties* (Oct. 11, 1991), Portage App. No. 90-P-2252, 1991 Ohio App. LEXIS 4903, *6 (affirming finding that cattle farm in agricultural zone was not a nuisance).
- *Miller v. Horn* (June 28, 1996), Clark App. No. 95-CA-113, 1996 Ohio App. LEXIS 2678, *11-15 (affirming trial court’s finding that pet shelter and cemetery was a nuisance).
- *Chance v. BP Chemicals, Inc.* (1996), 77 Ohio St.3d 17, 23, 26-27 (affirming jury’s finding of no nuisance and no trespass).
- *Forrester v. Webb* (Feb. 16, 1999), Butler App. No. CA98-04-070, 1999 Ohio App. LEXIS 474, *3-5.
- *Stewart v. Seedorff* (May 27, 1999), Franklin App. No. 98AP-1049, 1999 Ohio App. LEXIS 2375, *21-23 (holding that plaintiff’s dislike for her neighbors’ trees did not render the trees a nuisance).

Indeed, these cases support the court of appeals’s judgment and the proposition that the standard of “appreciable, substantial, tangible harm resulting in actual, material, physical discomfort” is a standard for proving a nuisance – not a standard for proving that a discrete annoyance or discomfort is compensable.

Aldrich cites the following cases that do mention money damages, but none of these cases support Aldrich's argument:

Frey v. Queen City Paper Co. (Miami Cty. 1946), 79 Ohio App. 64. *Frey* supports Plaintiffs' argument, not Aldrich's. *Frey* contains an extended analysis of a plaintiff's right to money damages for annoyance and discomfort, without a hint of any limitation that the discomfort be "physical." The word "physical" appears in the opinion twice, both on page 69 in the context of the requirements for the finding of a nuisance. And in *Frey*, the discomfort *was* physical discomfort, so the case did not present the issue this case presents.

Lasko v. Akron (9th Dist. 1958), 109 Ohio App. 409. As in *Frey*, the court in *Lasko* used the word "physical discomfort" in the context of whether a nuisance exists and used the words "annoyance" and "discomfort" unqualified in the context of money damages.

Bullock v. Oles, 7th Dist., 2001-Ohio-3220, ¶11. Aldrich cites *Bullock* for the proposition that each discrete harm caused by an admitted nuisance must be "an appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort." *Bullock* involved an obvious nuisance and obviously compensable harms, and the lone assignment of error challenged only the weight of the evidence. This context indicates that the author of the opinion had no reason to consider whether "physical discomfort" is a standard for proving a nuisance or a standard for each discrete harm for which the plaintiff seeks damages. Aldrich's interpretation of *Bullock* would make *Bullock* a precedent-setting case – not likely the author's intention, given the absence of any real issue in the appeal. Moreover, the only case the court of appeals cited in support of the statement Aldrich quotes is *Rautsaw*, 22 Ohio App.3d 20, which contains nothing sympathetic to Aldrich's interpretation.

Incident to citing *Bullock*, Aldrich cites 72 O.Jur.3d, Nuisances, Section 9, which uses the phrase "physical discomfort." (Aldrich Brief 14, n. 20). But Section 9 is in Part II of the article,

and Part II, titled “Nature and Incidents of Nuisances,” concerns the standard for proving a nuisance. The sections of the article addressing damages are Sections 22, 60, 63, and 66 (“recovery may be had for personal discomfort and annoyance”) – none of which even hint that an annoyance or discomfort must be “physical” discomfort.

***Schoenberger v. Davis* (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345.** In *Schoenberger* the court of appeals held that there was no nuisance. *Id.* at *11-16. The court then briefly mentioned the plaintiffs’ allegations of annoyance and discomfort, and correctly stated that “damages for *bare* personal inconvenience, annoyance and discomfort they may have suffered are not recoverable,” *id.* at *17 (emphasis added) – that is, personal inconvenience, annoyance, and discomfort *alone* do not establish a nuisance.

***Widmer v. Fretti* (6th Dist. 1952), 95 Ohio App. 7, 15-21.** In *Widmer* the plaintiffs failed to prove that their alleged harm was proximately caused by the nuisance: “The annoyance resulting from trespassers . . . is one of the vicissitudes of country life, and the evidence with respect thereto is purely speculative *so far as having any connection* with the gambling operation.” *Id.* at 18 (emphasis added). “With regard to persons inquiring as to the location of the [casino] and the telephone calls for [the owner], damages asserted are also *too remote* and speculative.” *Id.* (emphasis added). The court also noted, regarding increased traffic, that “when a right of way has been dedicated or is taken for a highway, an abutting owner must accept whatever increased volume of traffic results thereon.” *Id.* at 17.

***Reeser v. Weaver Bros. Inc.* (2nd Dist. 1992), 78 Ohio App.3d 681, 692-694.** The extended damages discussion in *Reeser* is limited to the proposition that only an “occupier” of land may recover money damages for discomfort or annoyance. There is no hint of a holding that the discomfort or annoyance must be physical.

Tullys v. Brookside Condo. Assoc. (June 2, 1986), Stark App. No. CA-6849, 1986 Ohio App. LEXIS 7081. In *Tullys*, the record contained no evidence upon which to question the trial court's award of damages, and the court of appeals opinion does not discuss nuisance law.

Thus, even the cases Aldrich cites that mention money damages do not support Aldrich's argument.

D. Aldrich mischaracterizes Plaintiffs' claims as claims for negligent infliction of emotional distress.

Aldrich mischaracterizes Plaintiffs' claims as claims for negligent infliction of emotional distress and mischaracterizes Plaintiffs' annoyance and discomfort harms as merely harms from witnessing harm to Plaintiffs' property. (Aldrich Brief 18-19.) Plaintiffs' property was not harmed at all. Plaintiffs' annoyance and discomfort arose from being ousted from their property and the risk of recurrence. Thus, the cases Aldrich cites in this part of its brief are irrelevant.

In *Stechler v. Homyk* (8th Dist. 1998), 127 Ohio App.3d 396, 399, the court held that "Ohio simply does not permit recovery for negligent infliction of emotional distress caused by witnessing the destruction of one's property." *Stechler* is irrelevant, because the plaintiff did not allege or prove a nuisance, and the court of appeals opinion does not mention nuisance law.

Similarly, in *Strawser v. Wright* (12th Dist. 1992), 80 Ohio App.3d 751, the court held: "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. Likewise, no recovery can be had for emotional distress resulting from the breach of a contract." *Id.* at 755 (citations omitted). *Strawser* is irrelevant, because the plaintiff did not allege or prove a nuisance, and the court of appeals opinion does not mention nuisance law.

In *Reeser v. Weaver Bros., Inc.* (2nd Dist. 1989), 54 Ohio App.3d 46, 48, the court held that “the recent extensions [of the tort of negligent infliction of emotional distress] do not extend recovery to one suffering emotional distress after witnessing the negligent damaging of property over a period of time arising out of the ongoing negligence of a defendant.” The court’s holding is limited to the tort of negligent infliction of emotional distress and fails to consider whether the emotional harms might be compensable under the tort of nuisance.

Plaintiffs contend that their claims are for nuisance. Their claims were tried as such. This Court should, as the lower courts did, treat them as such, and apply nuisance law, not the law governing infliction of emotional distress.

E. *Paugh v. Hanks* did not create a floor for proof of harm in nuisance cases.

Aldrich argues that no emotional harm should ever be compensable in a nuisance claim unless the harm is so severe as to state an independent claim for infliction of emotional distress. (Aldrich Brief 19-23 (citing *Paugh v. Hanks* (1983), 6 Ohio St.3d 72).) That argument throws centuries of nuisance law out the window. Aldrich’s brief is not a serious effort to substantiate that argument.

Nuisance law already provides a “seriousness” threshold for emotional harm: there is no nuisance unless there is “appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort.” Only if the plaintiff satisfies that standard of proof is the plaintiff entitled to compensation for annoyance and discomfort. And if that standard of proof is satisfied, it is up to the jury to parse the testimony and value each discrete component of annoyance and discomfort. In this case, Aldrich admitted the existence of a nuisance, and it was for the jury to value each component of harm, including annoyance and discomfort.

F. Plaintiffs' fears in this case are realized fears, not unrealized fears.

Aldrich cites the Ohio law supporting the proposition that unrealized fears are not compensable. (Aldrich Brief 23-25.) That law does not apply in this case, because in this case Plaintiffs' fears *were* realized.

In the cases Aldrich cites, the fears were unrealized:

- fear of harmless hazardous-waste disposal – *Chance v. BP Chems., Inc.* (Mar. 30, 1995), Cuyahoga App. No. 66622, 1995 Ohio App. LEXIS 1250, affirmed (1996), 77 Ohio St.3d 17;
- fear of non-existent disease – *Heiner v. Moretuzzo* (1995), 73 Ohio St.3d 80, 87-88 (holding that plaintiff's "real and debilitating" emotional harms are not compensable because they arose from a false positive test for infectious disease);
- fear of developing metastatic cancer – *Dobran v. Franciscan Med. Ctr.* (2004), 102 Ohio St.3d 54, ¶18.

In this case, however, there *were* explosions and leaks, and Plaintiffs *were* ousted from their homes. Moreover, *Heiner* and *Dobran* were not nuisance cases.

Aldrich also mischaracterizes Plaintiffs' testimony about their emotions during their forced evacuation of their homes. (Aldrich Brief 24.) The emotional harm Plaintiffs described was fright. The fact that Plaintiff's described that fright in terms of "another 9-11" or "a bomb or airplane crashed" does not render their fright non-compensable. Plaintiffs did not merely fear a terrorist attack, bomb, or plane crash that never happened. Plaintiffs experienced something real, and Aldrich has admitted the nuisance. The fact that Plaintiffs did not instantly know in their moment of terror that Aldrich's hazardous materials had just exploded does not render Plaintiffs' harms non-compensable.

G. The policy of maintaining the integrity of the jury process militates in favor of maintaining Ohio nuisance law as it stands.

There is a powerful reason why, once a defendant has admitted the existence of a nuisance, the jury should be the one to determine whether and the extent to which the plaintiffs' harms should be compensated. It respects the limited gate-keeping role of trial judge and the wide berth juries must be given with the difficult task of parsing the components of a plaintiff's harms and determining whether, and to what extent, each discrete harm should be compensated.

In all civil cases, trial judges can prevent unworthy claims from going to a jury by utilizing Rule 12 dismissal, Rule 56 summary judgment, and Rule 50 directed verdict. But when, as in this case, the defendant has admitted the nuisance and there has been physical harm (plaintiffs being ousted from their property), it is the jury's responsibility to parse the testimony and determine which harms warrant compensation and to what extent. Say a nuisance evacuee is distraught that he missed his high-school football game. Perhaps that harm warrants compensation of five cents. Perhaps the game was his audition for a college scholarship and the harm is orders of magnitude greater. Either way, it should be for the jury to decide, not for a judge to rule that such discrete components of harm are categorically non-compensable.

It is for this reason that Ohio courts in nuisance claims have upheld awards for so-called emotional harms:

- exposure to “eyesores” and “lessened enjoyment of property,” *Polster v. Webb* (8th Dist. June 21, 2001), No. 77523, 2001 WL 703875, *4-5;
- “worries [of flooding] each time it rains,” *Stoll v. Parrot & Strawser Properties, Inc.*, 12th Dist. 2003-Ohio-5717, ¶26;
- “noise, danger, annoyance, dirt and disruption of life,” *Wray v. Deters* (1st Dist. 1996), 111 Ohio App.3d 107, 111; and
- “personal discomfort and annoyance, injury to health, [lessened] comfortable enjoyment of property,” *Gertz v. Northern Ohio Rifle Club, Inc.* (11th Dist. Apr. 18, 1977), 1977 Ohio App. LEXIS 7785, *3.

The Ohio Jury Instruction on annoyance and discomfort damages in nuisance claims is thus entirely appropriate and should be left as it is:

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.*

Ohio Jury Instruction § 621.13(4) (emphasis added). The trial court erred by giving an additional, restricting instruction to the effect that annoyance is not compensable and that discomfort is compensable only if it is “appreciable, substantial, tangible harm resulting in actual, material, physical discomfort.”

II. Proposition of Law 2. Generally, evidence regarding the cause of a proven or admitted nuisance, to the tortfeasor’s history relevant to the nuisance, and to the tortfeasor’s efforts to abate the nuisance is relevant to the question of whether and to what extent the plaintiff should be compensated for annoyance and discomfort proximately caused by the nuisance.

Consider the hypothetical situation of a firearms shooting range situated adjacent to a home. The shooting is audible daily from the adjoining land but is no louder than the resident woodpeckers. The homeowners are terrified of guns and morally opposed to guns. The homeowners’ fear causes them to lose sleep and to avoid being at home as often as they otherwise would be. Yet, because the shooting would not offend a person of ordinary sensibilities, the shooting range is not a nuisance.

But after a change in management at the shooting range, stray bullets occasionally enter the homeowners’ property, and the homeowners hear the bullets striking their property. The shooting range is now a nuisance. The homeowners’ fear is no greater than before – they had been at wit’s end even before the change in management. But now, because there has been a physical intrusion upon their property – that is, now that there is a nuisance – the very same emo-

tional harms that previously were not compensable are now compensable. And as the homeowners learn more about what led to the stray bullets, about the shooting-range management's plan (or lack thereof) for abating the nuisance, and the risk of recurrence, their fears might increase or decrease. But either way, such evidence is relevant to their emotional harm (annoyance, discomfort, fear, sleeplessness, *etc.*).

Thus, evidence relating to the cause of a proven or admitted nuisance, to the tortfeasor's history relevant to the nuisance, to the tortfeasor's conduct after the nuisance commences, and to the risk of recurrence is relevant to the question of whether and to what extent the plaintiff should be compensated for annoyance and discomfort proximately caused by the nuisance.

Here, the trial court was wrong to exclude such evidence – namely, 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.” (Aldrich's Brief 41, n. 57.) The court of appeals correctly reversed the trial court's exclusion of this evidence.

CONCLUSION

This Court should affirm.

Respectfully submitted,



Paul Giorgianni (0064806)
Giorgianni Law LLC
1538 Arlington Avenue
Columbus, Ohio 43212-2710
Phone: 614-205-5550
Fax: 614-481-8242
E-mail: Paul@GiorgianniLaw.com
Attorney for Amicus Curiae
The Ohio Association for Justice

CERTIFICATE OF SERVICE

A copy of this document was sent this 21st day of October 2009 by regular, first-class

U.S. Mail to:

Martin A. Foos
Faruki Ireland & Cox P.L.L.
500 Courthouse Plaza, S.W.
10 North Ludlow Street
Dayton, Ohio 45402
Counsel of Record for Appellant
Aldrich Chemical Company, Inc.

John A. Smalley
Dyer, Garofalo, Mann & Schultz
Talbot Tower, Suite 1400
131 N. Ludlow Street
Dayton, Ohio 45402
Counsel of Record for Appellees
Christine Banford, et al.



Paul Giorgianni