

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

---

**REPLY BRIEF OF APPELLANT ALDRICH CHEMICAL COMPANY, INC.**

---

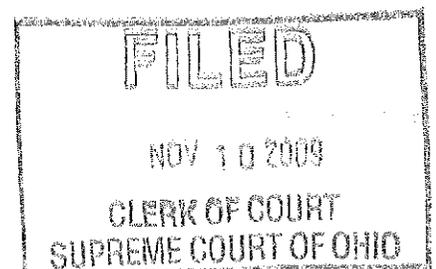
OF COUNSEL:

Martin A. Foos (0065762)  
COUNSEL OF RECORD  
FARUKI IRELAND & COX P.L.L.  
500 Courthouse Plaza, S.W.  
10 North Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 227-3729  
Telecopier: (937) 227-3717  
Email: mfoos@ficlaw.com

Charles J. Faruki (0010417)  
FARUKI IRELAND & COX P.L.L.  
500 Courthouse Plaza, S.W.  
10 North Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 227-3705  
Telecopier: (937) 227-3717  
Email: cfaruki@ficlaw.com

Gordon L. Ankney  
THOMPSON COBURN LLP  
One US Bank Plaza  
St. Louis, Missouri 63101  
Telephone: (314) 552-6003  
Telecopier: (314) 552-7003  
Email: gankney@thompsoncoburn.com

COUNSEL FOR APPELLANT,  
ALDRICH CHEMICAL COMPANY, INC.



Richard W. Schulte, Esq.  
Stephen D. Behnke, Esq.  
BEHNKE, MARTIN & SCHULTE, LLC  
Talbot Tower, Suite 840  
131 N. Ludlow Street  
Dayton, Ohio 45402

Taylor Jones, Esq.  
LEPPLA ASSOCIATES  
2100 S. Patterson Blvd.  
Wright Brothers Station  
P.O. Box 612  
Dayton, OH 45409-0612

John A. Smalley, Esq.  
Jeffrey G. Chinault, Esq.  
DYER, GAROFALO, MANN & SCHULTZ  
Talbot Tower, Suite 1400  
131 N. Ludlow Street  
Dayton, Ohio 45402

Cheryl Washington, Esq.  
CR WASHINGTON CO., LPA  
130 W. Second St., Suite 1600  
Dayton, OH 45402

COUNSEL FOR APPELLEES  
TAYLOR FERGUSON AND CHRISTINE BANFORD, et al.

**TABLE OF CONTENTS**

	<u>Page</u>
INTRODUCTION .....	1
ARGUMENT .....	2
<b>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. ....</b>	<b>2</b>
I. ALDRICH'S ADMISSION OF DUTY AND BREACH OF DUTY DOES NOT ENTITLE PLAINTIFFS TO DAMAGES WITHOUT ESTABLISHING ACTUAL INJURY .....	2
II. THE SUBSTANTIAL PHYSICAL DISCOMFORT REQUIREMENT IS THE STANDARD FOR AWARDED ANNOYANCE AND DISCOMFORT DAMAGES .....	5
III. A PLAINTIFF CANNOT RECOVER FOR EMOTIONAL HARMS WITHOUT ESTABLISHING THE SERIOUSNESS STANDARD OF THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS .....	7
IV. APPELLEE AND OAJ'S CASE CITATIONS FAIL TO SUPPORT THEIR ERRONEOUS PROPOSITIONS OF LAW .....	11
A. Appellee's "Personal" Annoyance Cases Do Not Support Her Argument Regarding Annoyance and Discomfort Damages .....	11
B. Appellee and OAJ's Cases Regarding Fears and Emotions Support Aldrich's Position Regarding Physical Discomforts .....	13
C. Appellee's Out-of-State Cases Are Not Controlling .....	14
<b>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.....</b>	<b>16</b>
V. THE EVIDENTIARY RULINGS OF THE TRIAL COURT SHOULD BE UPHOLD .....	16
A. Appellee's Failure to Follow the Second District's Speculative Continuing Nuisance Theory Demonstrates the Theory's Futility.....	16
B. The Evidence at Issue Was Not Relevant to Proximate Cause and Compensatory Damages, and the Trial Court Was Well Within Its Broad Discretion to Exclude It .....	17
VI. CONCLUSION .....	20

## TABLE OF AUTHORITIES

Page(s)

### FEDERAL CASES

Cetlinski v. Brown (6th Cir. 2004), 91 Fed Appx. 384 .....19

### OHIO CASES

Angerman v. Burick, Wayne App. No. 02-CA-0028, 2003-Ohio-1469 .....17

Antonik v. Chamberlain (Summit Cty. 1947), 81 Ohio App. 465, 78 N.E.2d 752 .....5, 6,  
11

Athens County Reg'l Planning Comm'n v. Simms, Athens App. No. 05CA15,  
2006-Ohio-2342 .....12

Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217, 450 N.E.2d 1140 .....16

Bohannon v. City of Cincinnati, Hamilton App. No. C-020629, 2003-Ohio-2334 .....4, 18

Brownlee v. Pratt (Huron Cty. 1946), 77 Ohio App. 533, 68 N.E.2d 798 .....8, 10

Bullock v. Oles, Mahoning App. No. 99 CA 223, 2001-Ohio-3220 .....5

Callahan v. Akron Gen. Med. Ctr., Summit App. No. 22387, 2005-Ohio-5103 .....7

Chance v. BP Chems., Inc. (1996), 77 Ohio St. 3d 17, 670 N.E.2d 1985 .....14

Chance v. BP Chems., Inc. (March 30, 1995), Cuyahoga App. Nos. 66622,  
66645, 67369, 1995 Ohio App. LEXIS 1250 .....14, 17

City of N. Royalton v. Romano, Cuyahoga App. No. 84414, 2004-Ohio-6423 .....12

Clark Rest. Co. v. RAU (Cuyahoga Cty. 1931), 41 Ohio App. 23, 179 N.E. 196 .....9

Columbus Fin. v. Howard (1975), 42 Ohio St. 2d 178, 327 N. E.2d 654 .....8, 9

Cooper v. Hall (1832), 5 Ohio 320 .....5

Eller v. Kohler (1903), 68 Ohio St. 51, 67 N.E. 89 .....5

Fantozzi v. Sandusky Cement Prods. (1992), 64 Ohio St. 3d 601, 597 N.E.2d 474 .....9

Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc.  
LEXIS 1266 .....1

<u>Housh v. Peth</u> (1956), 165 Ohio St. 35, 133 N.E.2d 340.....	8
<u>Huffman v. Hair Surgeon, Inc.</u> (1985), 19 Ohio St. 3d 83, 482 N.E.2d 1248 .....	16
<u>Krishbaum v. Dillon</u> (1991), 58 Ohio St. 3d 58, 567 N.E.2d 1291 .....	18
<u>P.C. &amp; S.L. R.R. Co. v. Hedges</u> (1884), 41 Ohio St. 233.....	12
<u>Paugh v. Hanks</u> (1983), 6 Ohio St. 3d 72, 451 N.E.2d 759 .....	7, 9, 10, 11
<u>Polster v. Webb</u> (June 21, 2001), Cuyahoga App. No. 77523, 2001 Ohio App. LEXIS 2736 .....	12
<u>Reeser v. Weaver Bros.</u> (Darke Cty. 1989), 54 Ohio App. 3d 46, 560 N.E.2d 819 .....	14
<u>Reeser v. Weaver Bros., Inc.</u> (Darke Cty. 1992), 78 Ohio App. 3d 681, 605 N.E.2d 1271 .....	13
<u>Schoenberger v. Davis</u> (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345 .....	6, 12
<u>Schultz v. Barberton Glass Co.</u> (1983), 4 Ohio St. 3d 131, 447 N.E.2d 109.....	10
<u>Smith v. Nat'l Home Life Assurance Co.</u> (Aug. 13, 1983), Clermont App. Number CA 1168, 1983 Ohio App. LEXIS 13929.....	8
<u>Stoll v. Parrott &amp; Strawser Props., Inc.</u> , Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio-5717.....	13
<u>Telxon Corp. v. Smart Media of Del., Inc.</u> , Summit App. Nos. 22098, 22099, 2005-Ohio-4931 .....	12
<u>Tullys v. Brookside Condo. Assoc.</u> (July 15, 1985), Stark App. No. CA-6604, 1985 Ohio App. LEXIS 6944 .....	13
<u>Vill. of Monroeville v. Gfell</u> (Aug. 31, 2001), Huron App. No. H-01-004, 2001 Ohio App. LEXIS 3889 .....	4
<u>Whitaker v. M.T. Automo., Inc.</u> (2006), 111 Ohio St. 3d 177, 2006-Ohio-5481, 855 N.E.2d 825 .....	8
<u>Widmer v. Fretti</u> (Lucas Cty. 1952), 95 Ohio App. 7, 116 N.E.2d 728.....	6

**CASES FROM OTHER STATE JURISDICTIONS**

Webster v. Boone (Colo. App. 1999), 992 P.2d 1183 .....15

**STATUTES**

Ohio Rev. Code §2307.44.....8

**MISCELLANEOUS**

Fed. R. Civ. P. 403.....18

151 Cong. Rec. S10168, 10172 .....14

39 Am Jur. Nuisances §30 (1947).....5

73 O Jur. 3d Parties § 99 (2009) .....1

Ohio R. Civ. P. 23(D) .....3, 18

Ohio R. Evid. 403(A).....19

The American Heritage Dictionary of the English Language, 4th Edition (2004).....19

## INTRODUCTION

The Merit Brief of Appellee Christine Banford ("Appellee Brief") advocates recovery for emotional harms in nuisance cases that is truly standardless. It circumvents this Court's carefully articulated seriousness threshold for recovery of emotional harms.

In supporting her contentions, Appellee all but abandons the rationale of the Second District Court of Appeals ("Ct. App. Opin."). Appellee makes a lone, unadorned citation to Harford v. Dagenhart (Jan. 27, 1936), Clark App. No. 362, 1936 Ohio Misc. LEXIS 1266 -- the case so heavily depended upon by the Court of Appeals -- and fails to quote, analyze, or use the reasoning of Harford in any way. Similarly, Appellee barely acknowledges the reasoning of the Court of Appeals to support the admission of evidence relating to Isotec's past history, as demonstrated by her single reference to that court's continuing nuisance theory.

Under Ohio law, a plaintiff must meet the standard of appreciable, substantial, tangible harm resulting in actual, material, physical discomfort, both to establish a nuisance and to recover annoyance and discomfort damages. Thus, the trial court's jury instructions were not an abuse of discretion. Moreover, it was within the trial court's discretion to exclude the irrelevant and prejudicial evidence relating to Isotec's past history. This Court should reverse the Court of Appeals and reinstate the judgment of the trial court.

The Brief of Amicus Curiae ("Amicus Brief") filed by the Ohio Association for Justice ("OAJ") is unpersuasive and lacks independence. An amicus brief is meant to be a "friendly intervention in a judicial proceeding of a counselor not representing a party to the cause . . . ." 73 O.Jur. 3d Parties § 99 (2009) (emphasis added). Here, the OAJ (an association of plaintiffs' attorneys formerly known as the Ohio Academy of Trial Lawyers) has failed to

disclose its close relationship with Appellee's counsel. In fact, Richard W. Schulte, one of Appellee's lead counsel, currently serves as the President of the OAJ.<sup>1</sup> Mr. Schulte also serves on OAJ's Board of Trustees.<sup>2</sup> Michael Dyer, managing partner of another of Appellee's law firms -- Dyer, Garofalo, Mann & Schultz L.P.A. -- also sits on OAJ's Board of Trustees.<sup>3</sup> Thus, the Amicus Brief of OAJ in no way represents an independent or disinterested point of view in this matter.

### 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.**

I. ALDRICH'S ADMISSION OF DUTY AND BREACH OF DUTY DOES NOT ENTITLE PLAINTIFFS TO DAMAGES WITHOUT ESTABLISHING ACTUAL INJURY

Appellee's arguments are heavily premised on the fundamental misconception that "[Aldrich] has admitted that an actual injury has already occurred." Appellee Brief, p. 11. Thus, Appellee asserts, "because Defendant-Appellant has already admitted liability for nuisance in this case, it is liable for the emotional harm and mental anguish caused by its tortious conduct." Appellee Brief, p. 19. Appellee's assertions are in direct contradiction with the trial court's holding in this case and the stringent requirements of Ohio law on the recovery of damages for hurt emotions.

---

<sup>1</sup> <http://www.oajustice.org/OH/index.cfm?cvent=showPage&pg=leadership> (last visited 11/3/09).

<sup>2</sup> <http://www.legaldayton.com/schulte.php> (last visited 11/3/09).

<sup>3</sup> <http://www.dgmslaw.com/partners.htm> (last visited 11/3/09).

The trial court separated this case into four phases. Phase I addressed the elements of duty and breach of duty. (Appx. 74-75, Oct. 21, 2005, Final and Appealable Decision, Order and Entry Sustaining the Plaintiffs' Motion for Class Certification Subject to Specific Conditions and Modifications ("Class Cert. Order"), pp. 24-25).<sup>4</sup> The April 2007 trial related only to Phase II causation and compensatory damages elements for the thirty-one Plaintiffs selected. Aldrich accepted responsibility on the Phase I elements (duty, breach of duty), but not on the Phase II elements (causation, damages). (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, p. 2).

When Plaintiffs (Appellee in this Appeal) raised questions about the extent and meaning of Aldrich's decision not to contest Phase I issues, the trial court interpreted its own Class Cert. Order, which set forth the definitions of "Phase I" and "Phase II." (Supp. II 1-39; Jan. 9, 2007 Decision, Order And Entry Sustaining In Part And Overruling In Part The Plaintiff's Motion For Judgment On Phase I Liability Issues ("Decision on Phase I Liability"), pp. 1-39). The trial court explained the effect of Aldrich's decision not to contest the Phase I issues:

"• Judgment is granted in favor of the Plaintiffs . . . regarding . . . the liability elements of the negligence claim. In particular, judgment is granted on the existence of a duty and the breach of duty elements. Aldrich contests the proximate causation and damages elements.

---

<sup>4</sup> The trial court's decision to separate the case into four phases was made as part of its Class Cert. Order. Ohio R. Civ. P. 23(D) permits a court to "make appropriate orders . . . determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument." The Class Cert. Order was never appealed.

- Judgment is granted in favor of the Plaintiffs . . . regarding . . . the strict liability claim . . . . Aldrich contests the proximate causation and damages elements.
- Judgment is granted in favor of the Plaintiffs . . . regarding . . . the existence of a nuisance. Aldrich contests the proximate causation and damages elements."

(Supp. II 45; Decision on Phase I Liability, p. 45) (emphasis added).

Thus, as the trial court ruled, Aldrich did not admit all of the elements necessary to prove the tort of private nuisance. In particular, it did not admit the elements of causation and damages with respect to any Plaintiff. Those elements remained to be proven, which was the entire purpose of the trial in April 2007.<sup>5</sup>

Even if this Court were to have questions about the scope of the four phases, it must give deference to the trial court's interpretation of its own orders. The above-quoted explanation is the trial court's interpretation of the scope of the four phases, as set forth in its Class Cert. Order and in light of Aldrich's decision not to contest Phase I. A trial court "is in the best position to interpret its own orders." Vill. of Monroeville v. Gfell (Aug. 31, 2001), Huron App. No. II-01-004, 2001 Ohio App. LEXIS 3889, at \*3 (citation omitted). "It is well settled that a trial court has the discretion to interpret or to clarify its own orders and that such an interpretation will not be reversed absent an abuse of discretion." Bohannon v. City of Cincinnati, Hamilton App. No. C-020629, 2003-Ohio-2334, ¶9.

---

<sup>5</sup> Even OAJ concedes this point. Amicus Brief, p. 3 ("The mere finding of a nuisance does not give rise to a remedy. A plaintiff must also prove harm proximately caused by the nuisance.").

II. THE SUBSTANTIAL PHYSICAL DISCOMFORT REQUIREMENT IS THE STANDARD FOR AWARDING ANNOYANCE AND DISCOMFORT DAMAGES

Appellee (Appellee Brief, pp. 10-17) and OAJ (Amicus Brief, pp. 2-7) argue that, under Ohio law, the substantial physical discomfort standard is applicable only to determining whether a nuisance exists but is not the standard for recovering annoyance and discomfort damages.<sup>6</sup>

There is no dispute in Ohio law that to establish a nuisance, a plaintiff must prove "an appreciable, substantial, tangible injury resulting in actual, material, physical discomfort." Antonik v. Chamberlain (Summit Cty. 1947), 81 Ohio App. 465, 476, 78 N.E.2d 752 (quoting 39 Am. Jur. Nuisances § 30 (1947), and citing Eller v. Kohler (1903), 68 Ohio St. 51, 67 N.E. 89); Aldrich's Brief, pp. 14-15. Appellee ignores the fact, however, that Ohio courts have also applied the physical discomfort standard in the context of damages evaluations in nuisance cases. Bullock v. Oles, Mahoning App. No. 99 CA 223, 2001-Ohio-3220, at ¶10, used the physical discomfort standard "in assessing damages for the maintenance of a nuisance" because nuisance is a matter of degree and "[a]n award of damages does not inevitably follow the finding of a nuisance." (Citation omitted.) For damages, "[t]he factual question is whether there is an appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort

---

<sup>6</sup> Although both Appellee (Appellee brief, p. 10) and OAJ (Amicus Brief, p. 2) cite the same quotation from Cooper v. Hall (1832), 5 Ohio 320, Cooper was actually a decision that limited recovery to injuries that were "material, substantial." Id. at 323 (emphasis in original). The Court affirmed the trial court's jury instruction that a nuisance was not actionable "unless productive of real or substantial injury." Id. at 322 (emphasis in original).

during the reasonable use of the property." Id. at ¶11 (internal quotations and citation omitted).<sup>7</sup> This factual question must be resolved by the jury in determining whether to award damages to the plaintiff. Otherwise, the jurors would be free to award damages for insubstantial, immaterial and trivial harms.

Similarly, the court in Schoenberger v. Davis (June 23, 1983), Cuyahoga App. No. 45611, 1983 Ohio App. LEXIS 12345, at \*16-17, while analyzing "the matter of the injury and damages which appellees argue they have sustained," declared the following: "Contrary to the appellees' assertion, damages for bare personal inconvenience, annoyance and discomfort they may have suffered are not recoverable." (Citing Antonik.) Schoenberger recognized that "[c]ases 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." 1983 Ohio App. LEXIS 12345, at \*16-17. Accord: Widmer v. Fretti (Lucas Cty. 1952), 95 Ohio App. 7, 18, 116 N.E.2d 728. Ohio courts have awarded annoyance and discomfort damages consistently with this principle. Aldrich's Brief, pp. 15-16.<sup>8</sup>

---

<sup>7</sup> In Bullock v. Oles, the board of health declared the defendant's property a nuisance prior to trial, and thus, the only issue at trial was the plaintiffs' damages award. Mahoning App. No. 99 CA 223, 2001-Ohio-3220, at ¶5.

<sup>8</sup> Appellee asserts that the dictionary definitions of the words "annoyance" and "discomfort" demonstrate that emotional harms are recoverable. Thus, Appellee claims, requiring physical discomfort to recover annoyance and discomfort damages "would require an absurd result that is contrary to the plain meaning of the words 'annoyance' and 'discomfort.'" Appellee Brief, pp. 24-25. However, as articulated in Antonik v. Chamberlain (Summit Cty. 1947), 81 Ohio App. 465, 78 N.E.2d 752, Ohio has rejected the broad dictionary meaning of "annoyance and discomfort":

"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  
(footnote cont'd. . .)

Disregarding the "appreciable, substantial, tangible injury resulting in actual, material, and physical discomfort" standard at the damages stage would force the jury to award damages with absolutely no guidance or standard for recoverability, permitting the jury to award annoyance and discomfort damages for trivial, unsubstantial, intangible harms; minor irritations; trifling annoyances; puzzlement; vexation; or unsubstantiated or unrealized fears.<sup>9</sup> It was not an abuse of discretion for the trial court to provide the jury with guidance regarding what is and what is not recoverable as annoyance and discomfort damages in this case.<sup>10</sup>

III. A PLAINTIFF CANNOT RECOVER FOR EMOTIONAL HARMS WITHOUT ESTABLISHING THE SERIOUSNESS STANDARD OF THE TORT OF NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Ohio does not permit a plaintiff to recover for emotional injury unless the plaintiff can first establish the seriousness standard of the tort of negligent infliction of emotional distress announced in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, 78, 451 N.E.2d 759. Appellee asserts

---

(. . . footnote cont'd)

the neighbor is annoyed or disturbed, but whether there is an injury to a legal right of the neighbor." *Id.* at 476.

<sup>9</sup> Plaintiffs testified extensively regarding their fears and concerns resulting from the nuisance. Aldrich's Brief, pp. 7-8. Plaintiffs' fears were unrealized fears. For instance, a terrorist attack did not happen, homes were not looted, additional explosions did not occur, and the environment was not polluted.

<sup>10</sup> Appellee asserts that, if the substantial physical discomfort standard "must be included to be a correct recitation of Ohio law, then any Court [sic] that has provided the OJI Instruction has committed reversible error . . . ." Appellee Brief, p. 16. Appellee's concern is misplaced. As discussed in Aldrich's Merit Brief (pp. 25-28), 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 was of the type and quality that would not qualify as annoyance and discomfort damages. The full Antonik standard had to be given to the jurors to help them determine whether Plaintiffs' allegations were compensable, and if so, to what degree. Moreover, so long as the trial court provides a proper recitation of Ohio law, 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.

that Plaintiffs need not meet the seriousness standard to recover for emotional harms resulting from a nuisance because "once the underlying tort is established, the defendant is responsible for all of the plaintiff's resulting damages, including damages for emotional harm resulting from the underlying tort." Appellee Brief, p. 17. To support this proposition, Appellee cites cases where courts have allowed plaintiffs to recover for emotional harms resulting from an underlying tort without first proving the Paugh standard. *Id.* at 17-19. These cases, however, do not support Appellee's argument in this case.

Ohio common law<sup>11</sup> permits recovery for emotional harms without proving the seriousness standard of Paugh in only two circumstances: (1) when the defendant acts intentionally or maliciously, or (2) when the underlying claim provides an indicia of genuineness as to the resulting emotional harm. Every case cited by Appellee to support the notion that a plaintiff may recover annoyance and discomfort damages without proving the seriousness standard of Paugh falls into one of these two easily distinguishable categories.

First, as Appellee's cases demonstrate, Ohio law permits a plaintiff to recover for emotional damages without proving the Paugh standard when a defendant acts intentionally or maliciously.<sup>12</sup> Emotional damages are recoverable under these circumstances without meeting

---

<sup>11</sup> The Ohio legislature has granted a right to recover for emotional harms in certain statutory causes of action. *E.g.*, Ohio Rev. Code §2307.44 (allowing a plaintiff to recovery damages for hazing, "including mental and physical pain and suffering"). Plaintiffs have alleged no statutory causes of action, and thus, any statutory right to recover emotional damages is irrelevant.

<sup>12</sup> Whitaker v. M.T. Auto., Inc. (2006), 111 Ohio St. 3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶31 (finding that emotional damages were recoverable under Ohio's Consumer Sales Practices Act, and holding that "[t]o the extent that the evidence shows intentional or malicious actions on the part of [Defendant], [Plaintiff] may recover damages for mental anguish or emotional distress as part of his CSPA remedy"); Columbus Fin. v. Howard (1975), 42 Ohio St. 2d 178, paragraph two of the syllabus, 327 N.E.2d 654 ("Damages for mental suffering, anguish and humiliation (footnote cont'd. . .)

the Paugh standard because "[i]n such a factual situation, the courts are confronted with an innocent victim and an intentional wrongdoer, and hence it is not surprising that the interest of the victim in obtaining full compensation is placed above the interest of the wrongdoer in protecting himself against potentially speculative [emotional] damage awards." Columbus Fin. v. Howard (1975), 42 Ohio St. 2d 178, 185, 327 N.E.2d 654. Plaintiffs assert no intentional tort claims against Aldrich.<sup>13</sup>

Second, Ohio law permits recovery for emotional harms without meeting the Paugh standard where the basis of the underlying tort ensures that a plaintiff's resulting emotional harm is genuine. For example, under Ohio law the seriousness of an emotional injury need not be shown when a plaintiff suffers a physical injury because there is a presumption that the emotional harm that results from an underlying physical injury is genuine. Paugh, 6 Ohio St. 3d at 75; Columbus Fin., 42 Ohio St. 2d at 185 ("[T]he observable physical injury caused by

---

(. . . footnote cont'd)

are not recoverable in an action for wrongful execution in the absence of malice on the part of the wrongdoer or contemporaneous physical injury inflicted on the aggrieved party by the wrongdoer."); Housh v. Peth (1956), 165 Ohio St. 35, 41, 133 N.E.2d 340 (mental damages award for outrageous invasion of right of privacy upheld where jury found that the "defendant committed such acts maliciously"); Smith v. Nat'l Home Life Assurance Co. (Aug. 13, 1983), Clermont App. No. CA 1168, 1983 Ohio App. LEXIS 13929, at \*11 (determining that emotional damages were recoverable on a fraud claim, and stating that "[t]he key is not the nature of the right invaded, but whether the conduct complained of was wanton or malicious"); Brownlee v. Pratt (Huron Cty. 1946), 77 Ohio App. 533, 539, 68 N.E.2d 798 (where defendant intentionally transgressed the right of the burial of the dead, holding that "where the act complained of is not only wrongful but was done intentionally and wilfully, mental suffering and anguish resulting proximately therefrom are recognized elements of damage and may be considered in determining the amount of recovery").

<sup>13</sup> Plaintiffs' Dec. 1, 2003 initial Complaint for Money Damages and Class Certification with Jury Demand Endorsed Hereon ("Complaint") included claims for intentional infliction of emotional distress and battery. (Supp. 1-12; Complaint, pp. 1-12). However, Plaintiffs amended their Complaint and abandoned any intentional tort claims. (March 21, 2007 First Amended Complaint for Money Damages with Jury Demand Endorsed Hereon, pp. 6-11).

the wrongdoer sufficiently corroborates the injured party's allegation of unobservable psychic injury." ).<sup>14</sup>

Ohio law also permits recovery for emotional harm without establishing the Paugh standard under certain additional, "special circumstances." Schultz v. Barberton Glass Co. (1983), 4 Ohio St. 3d 131, 135, 447 N.E.2d 109. For instance, in Brownlee, 77 Ohio App. at 537-38 -- a case cited by Appellee -- the court acknowledged that genuine emotional injury arises from mishandling the deceased because society "recognizes the tender sentiments uniformly found in the hearts of men, the natural desire that there be repose and reverence for the dead, and the sanctity of the sepulcher." Brownlee demonstrates the type of special circumstances under Ohio law that permit recovery for emotional harms without meeting the seriousness standard of Paugh -- cases where the "especial likelihood of genuine and serious mental distress, arising from the special circumstances, . . . serves as a guarantee that the claim is not spurious." Paugh, 6 Ohio St. 3d at 77 (citation omitted).

The rationale supporting the recovery of emotional damages without proving the Paugh standard in these circumstances does not support allowing unfettered recovery for emotional harms arising from nuisance claims. Nuisance is not an intentional tort; it is a property law concept premised on a theory of negligence. Moreover, no Ohio court has ever held that emotional harms arising from nuisance claims carry with them the same hallmarks of

---

<sup>14</sup> Appellee relies heavily on Fantozzi v. Sandusky Cement Prods. (1992), 64 Ohio St. 3d 601, 617-618, 597 N.E.2d 474 to demonstrate that a plaintiff is permitted to recover for emotional harms resulting from a nuisance claim without meeting the seriousness standard of Paugh. Appellee Brief, p. 19. The plaintiff in Fantozzi suffered a physical injury and a resulting emotional harm. Appellee also cites Clark Rest. Co. v. RAU (Cuyahoga Cty. 1931), 41 Ohio App. 23, 26, 179 N.E. 196, another case which allowed recovery for mental harm because the plaintiff established a physical injury.

genuineness as claims of emotional injury resulting from an underlying physical injury, nor are nuisance claims akin to other special circumstances that have a likelihood of resulting in genuine and serious mental distress. Allowing a plaintiff unfettered recovery of emotional harms as a result of a nuisance claim is contrary to Ohio jurisprudence and would permit a plaintiff to circumvent this Court's deliberate and carefully articulated seriousness standard in Paugh.

Applying the seriousness standard in Paugh to nuisance cases involves no change to the current law. In fact, the two standards both prohibit recovery for trifling mental harms:<sup>15</sup>

<u>Antonik</u>	<u>Paugh</u>
To recover for a nuisance, the plaintiff's injury cannot be "fanciful or imaginary, or such as results merely in a <u>trifling</u> annoyance, inconvenience, or discomfort." 81 Ohio App. at 476 (emphasis added).	"[T]rifling mental disturbance, mere upset or hurt feelings" cannot serve as a basis for recovery for negligent infliction of emotional distress. 6 Ohio St. 3d at 78 (emphasis added).

IV. APPELLEE AND OAJ'S CASE CITATIONS FAIL TO SUPPORT THEIR ERRONEOUS PROPOSITIONS OF LAW

The case citations and attempted refutations of Appellee (and OAJ) are irrelevant, mischaracterized, or actually support Aldrich's arguments regarding annoyance and discomfort damages.

A. Appellee's "Personal" Annoyance Cases Do Not Support Her Argument Regarding Annoyance and Discomfort Damages

Appellee asserts that "Ohio courts have repeatedly found that plaintiff may recover 'personal' annoyance and discomfort damages that result from the lost use of his or her

---

<sup>15</sup> OAJ admits as much -- albeit inadvertently: "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.'" Amicus Brief, p. 8.

property." Appellee Brief, p. 15. As explained in Aldrich's Merit Brief (p. 36), using the term "personal" has no talismanic powers; it does not mean that non-physical discomfort qualifies as recoverable annoyance and discomfort under Ohio law. The adjective "personal" simply means that a plaintiff cannot recover for someone else's annoyance and discomfort. Moreover, contrary to Appellee's position, Schoenberger explicitly found that "[c]ases 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." Schoenberger, 1983 Ohio App. LEXIS 12345, at \*16-17 (emphasis added; quotation and citation omitted).

The second problem with Appellee's assertion is that annoyance and discomfort damages do not "result from the lost use of . . . property." Appellee Brief, p. 15. Losing the use of one's property might qualify as "loss of use" damages, but not annoyance and discomfort. Annoyance and discomfort and loss of use damages are independent items of recovery in a tort such as nuisance that involves temporary damage to property. Polster v. Webb (June 21, 2001), Cuyahoga App. No. 77523, 2001 Ohio App. LEXIS 2736, at \*12. Appellee cannot receive duplicate damages by using one to prove the other. Telxon Corp. v. Smart Media of Del., Inc., Summit App. Nos. 22098, 22099, 2005-Ohio-4931, ¶97 (plaintiffs "cannot recover [damages] twice on the same incident"; "duplicate damages awards . . . indicate manifest excessiveness") (citing P.C. & S.L. R.R. Co. v. Hedges (1884), 41 Ohio St. 233, 233-34).<sup>16</sup> Athens County Reg'l Planning Comm'n v. Simms, Athens App. No. 05CA15, 2006-Ohio-2342, is irrelevant to this appeal because only loss of use damages resulting from the nuisance were at issue and

---

<sup>16</sup> The Banford jury correctly awarded lost use damages (to Appellee-Homeowners that evacuated their homes) separately from the awards that were given for annoyance and discomfort. (Appx. 13, Ct. App. Opin., ¶22).

considered on appeal. Id. at ¶¶19, 21 ("The only element of compensatory damages that Appellees challenge in their brief is the element relating to loss of use."). City of N. Royalton v. Romano, Cuyahoga App. No. 84414, 2004-Ohio-6423, ¶¶2, 13-18, does not assist Appellee because the court did not address nuisance damages of any kind.<sup>17</sup> N. Royalton dealt with a public nuisance citation under a city ordinance because the defendant's pipes entered the public roadway.

B. Appellee and OAJ's Cases Regarding Fears and Emotions Support Aldrich's Position Regarding Physical Discomforts

On page 19 of the Appellee Brief, Appellee contends that "[i]n nuisance cases, several Ohio courts have awarded plaintiffs damages for, among other things, fear, mental upset, inconvenience, worries, or concerns."<sup>18</sup> This assertion is false. Aldrich has already explained why the cases cited by Appellee and OAJ do not support this contention. Aldrich Merit Brief, pp. 31-35, 37. Those cases were physical discomfort cases affecting one of the five senses: sight, sound, touch, taste, or smell.

For example, Tullys v. Brookside Condo. Assoc. (July 15, 1985), Stark App. No. CA-6604, 1985 Ohio App. LEXIS 6944, was a physical discomfort case. In Tullys, the source of physical discomfort was a "high intensity [sic] street light that shown continuously throughout the night and into appellant's unit (residence) and interfered with her and her

---

<sup>17</sup> The other two cases cited to support Appellee's proposition, Stoll v. Parrott & Strawser Props., Inc., Warren App. Nos. CA2002-12-133, CA2002-12-137, 2003-Ohio 5717, and Reeser v. Weaver Bros., Inc. (Darke Cty. 1992), 78 Ohio App. 3d 681, 605 N.E.2d 1271, actually support Aldrich's arguments regarding annoyance and discomfort damages. Reeser and Stoll are fully analyzed in Aldrich's Merit Brief, pp. 32 and 34, respectively.

<sup>18</sup> OAJ similarly states that "Ohio courts in nuisance claims have upheld awards for so-called emotional harm[.]" Amicus Brief, p. 10.

daughter's sleep and enjoyment of the unit (residence)." *Id.* at \*3. This high-intensity light assaulted plaintiff's sense of sight (*id.* at \*9-10), which is a physical discomfort.

Appellee's reading of Reeser is also incorrect. Appellee states on page 21 of her brief that "[t]he only evidence of damages suffered by plaintiffs in Reeser, which could qualify as 'annoyance and discomfort', was their upset that resulted from seeing the fishing lakes destroyed[;] the emotional state or upset must have been compensable as 'annoyance and discomfort.'" However, the only time emotional damages are referenced in the Reeser matter refutes the assertion that emotional damages are available for watching fishing lakes being destroyed. Reeser v. Weaver Bros. (Darke Cty. 1989), 54 Ohio App. 3d 46, 49, 560 N.E.2d 819, held that no emotional damages are available for "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."<sup>19</sup>

#### C. Appellee's Out-of-State Cases Are Not Controlling

Finally, Appellee argues that other states have found that "fear and worry as a result of the nuisance is compensable." Appellee Brief, p. 23. This cherry-picked caselaw from foreign jurisdictions is neither controlling here nor an accurate expression of Ohio law.<sup>20</sup>

---

<sup>19</sup> Appellee also takes issue with Aldrich's citation to Chance v. BP Chems., Inc. (1996), 77 Ohio St. 3d 17, 670 N.E.2d 1985, and Chance v. BP Chems., Inc. (March 30, 1995), Cuyahoga App. Nos. 66622, 66645, 67369, 1995 Ohio App. LEXIS 1250, aff'd, 77 Ohio St. 3d 17, 670 N.E.2d 985 (1996). Appellee's Brief, pp. 22-23. However, Appellee does not explain what is wrong with that case. In fact, Chance is a correct statement of Ohio law: "Our legal system does not and cannot recognize actions for unsustained, conceptual, or future damage." Chance, 1995 Ohio App. LEXIS 1250, at \*22; Aldrich Merit Brief, p. 24.

<sup>20</sup> As stated by Chief Justice John G. Roberts at his Senate confirmation hearing when asked about using foreign law to interpret the United States Constitution:

(footnote cont'd. . .)

Furthermore, Aldrich can just as easily cite to different jurisdictions holding that fear and emotions are not compensable as annoyance and discomfort damages in nuisance cases. For example, Webster v. Boone (Colo. App. 1999), 992 P.2d 1183, cert. denied, 2000 Colo. LEXIS 3 (2000), overturned a trial court's instructions allowing for emotional distress damages in a nuisance case under the guise of annoyance and discomfort damages:

"We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the 'annoyance and discomfort' for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like."

Id. at 1185-86 (citations omitted).

The cases cited by Appellee from other jurisdictions do not assist this Court, which must make its decision based on Ohio precedent and the rule of law, not on highly selective cases from other jurisdictions whose law relating to the recovery of damages for emotional harms is far different from Ohio's.

---

(. . .footnote cont'd)

"In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. . . . It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent." 151 Cong. Rec. S10168, 10172 (daily ed. Sept. 19, 2005).

**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.**

V. THE EVIDENTIARY RULINGS OF THE TRIAL COURT SHOULD BE UPHeld

The trial court did not abuse its discretion<sup>21</sup> by excluding irrelevant and highly prejudicial evidence related to the cause of the explosion, Isotec's past history, and post-explosion events and conduct.

A. Appellee's Failure to Follow the Second District's Speculative Continuing Nuisance Theory Demonstrates the Theory's Futility

The Court of Appeals speculated that if Appellee 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). As stated by the Court of Appeals, "[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." (quotation and citation omitted). As shown in Aldrich's Merit Brief (pp. 46-48), however, the Second District's speculation fails because Appellee cannot meet this standard. In turn, Appellee does not to point to any evidence in the record (i.e., renewed and refreshed violations after Appellee returned to her home) that would support the Second District's continuing nuisance

---

<sup>21</sup> The abuse of discretion standard "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). The ruling must be "palpably and grossly violative of fact and logic[.]" Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St. 3d 83, 87, 482 N.E.2d 1248 (quotation and citation omitted). The trial court's evidentiary rulings fit well within this standard and should not have been reversed by the Court of Appeals.

theory. Appellee's failure to rely on or analyze the continuing nuisance rationale of the Court of Appeals confirms that the court was merely speculating.

B. The Evidence at Issue Was Not Relevant to Proximate Cause and Compensatory Damages, and the Trial Court Was Well Within Its Broad Discretion to Exclude It

Ignoring the theory of the Court of Appeals (requiring renewed and refreshed violations) as to why the excluded evidence might possibly be relevant, Appellee focuses on the nitric oxide distillation process. Appellee Brief, pp. 30-33. The cryogenic distillation operations at Isotec, standing alone, however, are not sufficient to award damages. Appellee maintains that Aldrich "admitted that a legal injury has occurred" (id. at p. 32), despite a court order directly contradicting this fiction (see Section I). Recovery is available only for legally cognizable injuries that meet threshold compensability standards, such as physical discomfort. Angerman v. Burick, Wayne App. No. 02-CA-0028, 2003-Ohio-1469, ¶12. Appellee's vision of compensability is truly standardless, allowing recovery for the types of trifling bothers and petty annoyances forbidden by Schoenberger and Antonik.<sup>22</sup>

The evidence related to the cause of the explosion, Isotec's past history, and post-explosion events and conduct did not affect Appellee's experiences during the explosion and evacuation of September 21 and 22, 2003. Like the other Plaintiffs, Appellee was not even aware of any prior incidents at Isotec, rendering such evidence irrelevant during the time frame

---

<sup>22</sup> Because there were no physical discomforts experienced by Plaintiffs after the explosion and evacuation, Plaintiffs testified to fears and emotions. The emotions of Plaintiffs may have continued beyond their return home, but those are not compensable under a nuisance theory (at least not where, as here, the emotional harm is not severe and debilitating). Speculative and unrealized fears about what might happen in the future are similarly non-compensable. Chance, 1995 Ohio App. LEXIS 1250, at \*22.

when Appellee experienced compensable nuisance damages. Aldrich Merit Brief, pp. 44-45. Appellee's assertion that "[e]vidence of prior explosions helps explain the true nature of the situation and danger facing the community at the time of the explosion and during the evacuation" promotes only revisionist history because that past history was outside the knowledge of the Appellee or any of the other Plaintiffs. Appellee Brief, p. 32.

Furthermore, the trial court's rulings were consistent with the four-phased structure of the litigation and the judge's discretion in controlling the trial and determining evidentiary issues. Krishbaum v. Dillon (1991), 58 Ohio St. 3d 58, 66, 567 N.E.2d 1291 ("A trial court has broad discretion in determining whether to admit or exclude evidence.") (citations omitted). The exclusions in question applied only to Phase II of this class action litigation, a decertified stage of the proceeding requiring Plaintiffs individually to prove proximate causation and damages. (Appx. 12, Ct. App. Opin., ¶19). Ohio R. Civ. P. 23(D) permits a court to make appropriate orders "prescribing measures to prevent undue repetition or complication in the presentation of evidence," which is what the trial court's evidentiary rulings accomplished. The trial court may decide at a future time that the evidence may be relevant to Phase I (breach of duty, causation) or Phases III and IV (punitive damages), but it had no relation to Appellee's Phase II compensatory damages.<sup>23</sup>

---

<sup>23</sup> To the extent that the trial court excluded evidence from Phase II that might be admissible in other phases, the trial court's definition and interpretation of the scope of those phases is entitled to this Court's deference. Bohannon v. City of Cincinnati, Hamilton App. No. C-020629, 2003-Ohio-2334, ¶9 ("It is well settled that a trial court has the discretion to interpret or to clarify its own orders and that such an interpretation will not be reversed absent an abuse of discretion.").

The rulings also represented the trial court's exercise of its broad discretion to prevent the trial from devolving into endless trials-within-the-trial regarding past history and events that had nothing to do with causation and damages. Cetlinski v. Brown (6th Cir. 2004), 91 Fed. Appx. 384, 393 (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). Those determinations kept the trial focused, and certainly prevented no small amount of jury confusion regarding what was at issue and truly compensable.

Although Appellee fails to address the trial court's ruling that the excluded evidence was inadmissible because any relevance was "substantially outweighed by unfair prejudice, confusion of the issues and misleading the jury,"<sup>24</sup> her brief provides this Court with a perfect example of Appellee's counselors' inability to stop themselves from mischaracterizing evidence. In this regard, Aldrich highlights the gross exaggeration of the prior incidents occurring at Isotec by their description as "calamities." Appellee Brief, pp. 32, 33. A calamity is defined as "[a]n event that brings terrible loss, lasting distress, or severe affliction; a disaster."<sup>25</sup> Appellee uses this hyperbole to describe four prior NO leak-related incidents at Isotec, the worst of which resulted in the closing of a nearby golf course and the evacuation of a few of Isotec's

---

<sup>24</sup> Appx. 190, March 20, 2007 Transcript of Pretrial Rulings of Montgomery County Court of Common Pleas, pp. 14-15; Appx. 46, Ct. App. Opin. ¶140. The evidence was excluded under the mandatory provisions of Ohio R. Evid. 403(A). On page 29 of Appellee's Brief, Appellee misquotes Ohio R. Evid. 403(A).

<sup>25</sup> The American Heritage Dictionary of the English Language, Fourth Edition. Houghton Mifflin Company, 2004.

immediate neighbors for less than four hours in September 1998.<sup>26</sup> No one was ever hurt during any of the prior incidents, no property was ever damaged (apart from Aldrich equipment), no law suits were ever filed, and no Plaintiff in the case at bar ever testified that they were even aware of such prior incidents. If Plaintiffs are unfazed in describing Isotec's past history in such cataclysmic terms in their brief to the Supreme Court of Ohio, then one can only imagine the parade of embellishments and mischaracterizations they would march before a jury. Aldrich would need to refute all of these falsehoods with evidence that would only take time away from the real issues: causation and damages. The trial court did not abuse its discretion by prohibiting such unduly prejudicial evidence.

VI. CONCLUSION

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

---

<sup>26</sup> Appellee asserts that the leak led to an explosion; Aldrich disputes that characterization. In any event, nothing similar to the explosion of September 21, 2003 has ever occurred at Isotec.

OF COUNSEL:

Charles J. Faruki (0010417)  
FARUKI IRELAND & COX P.L.L.  
500 Courthouse Plaza, S.W.  
10 North Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 227-3705  
Telecopier: (937) 227-3717  
Email: cfaruki@ficlaw.com

Gordon L. Ankney  
THOMPSON COBURN LLP  
One US Bank Plaza  
St. Louis, Missouri 63101  
Telephone: (314) 552-6003  
Telecopier: (314) 552-7003  
Email: gankney@thompsoncoburn.com

Respectfully submitted,



---

Martin A. Foos (0065762)  
COUNSEL OF RECORD  
FARUKI IRELAND & COX P.L.L.  
500 Courthouse Plaza, S.W.  
10 North Ludlow Street  
Dayton, Ohio 45402  
Telephone: (937) 227-3729  
Telecopier: (937) 227-3717  
Email: mfoos@ficlaw.com

Attorneys for Appellant  
Aldrich Chemical Company, Inc.

**CERTIFICATE OF SERVICE**

I certify that a copy of this Reply Brief Of Appellant Aldrich Chemical Company, Inc. was sent on November 10, 2009, by first-class U.S. mail to counsel for Appellees:

Richard W. Schulte, Esq.  
Stephen D. Behnke, Esq.  
BEHNKE, MARTIN & SCHULTE, LLC  
Talbot Tower, Suite 840  
131 N. Ludlow Street  
Dayton, Ohio 45402

John A. Smalley, Esq.  
Jeffrey G. Chinault, Esq.  
DYER, GAROFALO, MANN & SCHULTZ  
Talbot Tower, Suite 1400  
131 N. Ludlow Street  
Dayton, Ohio 45402

Taylor Jones, Esq.  
LEPPLA ASSOCIATES  
2100 S. Patterson Blvd.  
Wright Brothers Station  
P.O. Box 612  
Dayton, OH 45409-0612

Cheryl Washington, Esq.  
CR WASHINGTON CO., LPA  
130 W. Second St., Suite 1600  
Dayton, OH 45402



---

Martin A. Foos