[Cite as *Hammar v. Ohio Univ.*, 2004-Ohio-1364.]

IN THE COURT OF CLAIMS OF OHIO

MATTHEW HAMMAR	:	
Plaintiff	:	
v.	:	CASE NO. 2003-09050-AD
OHIO UNIVERSITY	:	MEMORANDUM DECISION
Defendant	:	

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{¶1} Plaintiff, Matthew Hammar, alleged that from September 2001 through August 2003, smokestack emissions from the coal and gas burning power plant at defendant, Ohio University, damaged the paint on his 1990 Toyota Corolla automobile. Plaintiff claimed paint has been removed from his car and he has asserted the cause of this paint removal was sulfur dioxide residue from the smokestack at the Lausche Heating Plant located on the campus of defendant, University. Plaintiff explained from September 1, 2001 to August 20, 2003, he lived at the Athens Station Apartments which is located adjacent to the Lausche Heating Plant. Plaintiff further explained he parked his car at a space provided near his residence which is also located adjacent to the Lausche Heating Plant. Plaintiff related he eventually began to notice "small black specks approximately 3-3 millimeters in size" covering the body of his car. Plaintiff further related that when he tried to wash the small specks from his car the car's paint as well as the specks were removed from the vehicle during washing. Plaintiff maintained his automobile body was damaged by settling corrosive ash emanating from the smokestack at defendant's heating plant. Plaintiff contended defendant is responsible for this damage to his automobile. He has consequently filed this complaint seeking to recover $1,991.74, the cost of repainting his

car. Plaintiff submitted the filing fee with the complaint. Plaintiff implied defendant maintained a nuisance condition which proximately caused his property damage. Plaintiff acknowledged he carries insurance coverage with a $100.00 deductible to pay for damage to his car such as the type described in his complaint. Therefore, pursuant to the statutory directives of R.C. 3345.40(B)(2) and R.C. 2743.02(D), plaintiff's damage claim shall be limited to his insurance coverage deductible, plus filing fee reimbursement.[1]

{¶2} Plaintiff submitted an article from The Post, the newspaper of Ohio University, regarding emissions from the Lausche Power Plant. The article, dated May 17, 2001, contained observations from student athletes and coaches who engaged in sports practices and games at facilities located adjacent to the Lausche Power Plant. When participating in practices and games some athletes and coaches noted a smell of sulphur in the air when the power plant was in operation. Further comments dealt with noticing a residue from the plant smokestack settling on the athletic fields. Other coaches observed they had not noticed any strange odors or anything else emanating from the plant. The

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[1]R.C. 2743.02(D) states:

"(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."

R.C. 3345.40(B)(2) states:

"(B) Notwithstanding any other provisions of the Revised Code or rules of a court to the contrary, in an action against a state university or college to recover damages for injury, death, or loss to persons or property caused by an act or omission of the state university or college itself, by an act or omission of any trustee, officer, or employee of the state university or college while acting within the scope of his employment or official responsibilities, or by an act or omission of any other person authorized to act on behalf of the state university or college that occurred while he was engaged in activities at the request or direction, or for the benefit, of the state university or college, the following rules apply:

"(2) If a plaintiff receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against the state university or college recovered by the plaintiff. No insurer or other person is entitled to bring a civil action under a subrogation provision in an insurance or other contract against a state university or college with respect to such benefits.

"Nothing in this division affects or shall be construed to limit the rights of a beneficiary under a life insurance policy or the rights of sureties under fidelity or surety bonds."

May 17, 2001 article also noted the Lausche Heating Plant met all Environmental Protection Agency regulations on mass emissions for carbon monoxide, ozone, sulfur dioxide, and other particulates. No information was contained in the article regarding any effects of smokestack emissions upon paint.

{¶3} Plaintiff submitted a second article from The Post, dated July 3, 2002, containing information about the Lausche Power Plant. This article essentially provided information that the existing thirty-five year old power plant was approaching the end of its useful life and planning was being initiated to seek funding for the construction of a new heating plant. The article did not provide any information regarding the effects of prolonged exposure to smokestack emissions on paint.

{¶4} Plaintiff insisted the paint damage to his automobile was proximately caused by corrosive chemicals contained in ash emitted from the smokestack at the Lausche Heating Plant. In support of his argument, plaintiff submitted a copy of a complaint filed in the United States District Court For The Southern District of Ohio Eastern Division captioned *United States of America v. Ohio Edison Company*. In this public nuisance action plaintiff, United States of America, was seeking injunctive relief and monetary penalties against defendant, Ohio Edison Company, for defendant's alleged failure to comply with set standards of federal law to control emissions of nitrogen oxides, sulfur dioxide, and particulate matter from a coal-fired electricity generating power plant in Jefferson County. It was asserted emissions in excess of allowable standards were released into the atmosphere by defendant's coal-fired generating plant. Plaintiff, United States of America maintained in the complaint that sulfur dioxide and nitrogen oxides interact in the atmosphere forming acid rain. This "[a]cid rain accelerates the decay of building materials and paints." The trier of fact, in the instant action, shall give the submitted complaint containing all allegations, the proper weight it deserves when assessing probative value.

{¶5} Defendant, University, has agreed plaintiff's action is one founded in nuisance. However, defendant has denied the operation of its heating plant constituted a nuisance. Defendant has asserted plaintiff has failed to prove sufficient facts to establish

his claim to relief. Defendant explained the Lausche Heating Plant operated under a permit issued by the Environmental Protection Agency and complied with all regulations set by the agency.

{¶6} Nuisance is a "distinct civil wrong consisting of anything wrongfully done which interferes with or annoys another in the enjoyment of his legal rights." *Taylor v. Cincinnati* (1994), 143 Ohio St. 426, 436. Under Ohio law, a nuisance has been classified as one of the following: (1) an absolute nuisance, which imposes strict liability, or (2) a qualified nuisance, which depends on proof of negligence. Id. at paragraphs two and three of the syllabus. In *Metzger v. Pennsylvania, Ohio & Detroit RR Co.* (1946), 146 Ohio St. 406, paragraphs one and two of the syllabus declared:

{¶7} "1. An absolute nuisance, or nuisance *per se*, consists of either a culpable and intentional act resulting in harm, or an act involving culpable and unlawful conduct, causing unintentional harm, or a nonculpable act resulting in accidental harm, for which, because of the hazards involved, absolute liability attaches notwithstanding the absence of fault.

{¶8} "2. A qualified nuisance, or nuisance dependent on negligence, consists of an act lawfully but so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another."

{¶9} Nothing in the instant claim has supported any contention that the operation of the power plant could be classified as an absolute nuisance. At best plaintiff's arguments are based on defendant maintaining a qualified nuisance. Under a claim of qualified nuisance, the allegations of nuisance merge to become a negligence action. *Allen Freight Lines, Inc. v. Consol. Rail Corp.* (1992), 64 Ohio St. 3d 274. In an action of this type plaintiff has the burden to prove his property damage was actually caused by negligent conduct on the part of defendant. Plaintiff has failed to establish the paint damage to his vehicle was caused by smokestack emissions at defendant's heating plant. Plaintiff has not produced a qualified expert report stating his property damage was caused by emissions emanating from defendant's plant. In order to prevail on his nuisance claim, plaintiff has to prove a nuisance existed and he must prove actual damages were caused

by the nuisance. See *Eller v. Koehler* (1903), 68 Ohio St. 51. Plaintiff has not met his burden of proof. Consequently, his claim is denied.

{¶10} Having considered all the evidence in the claim file and, for the reasons set forth in the memorandum decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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2/18
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