[Cite as *Belt v. Buckeye Lake State Park*, 2005-Ohio-3074.]

IN THE COURT OF CLAIMS OF OHIO

TERRY R. BELT	:	
Plaintiff	:	
v.	:	CASE NO. 2004-10264-AD
BUCKEYE LAKE STATE PARK	:	MEMORANDUM DECISION
Defendant	:	

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{¶ 1} Plaintiff, Terry R. Belt, owns a home located in Millersport, Ohio near the grounds of defendant, Buckeye Lake State Park ("park"). Plaintiff explained that during a two week period from late August through early September, 2004, he parked his 1987 Porsche automobile in the driveway outside the garage of his Millersport residence. Plaintiff asserted, on several occasions during this two week time frame, park employees burned wood material on park land across the canal from his house. Plaintiff maintained smoke and airborne ash from these burning activities carried from the park burning site onto his property. According to plaintiff, hot flying ash from the burning fell upon his parked automobile and damaged the vehicle's paint finish. Plaintiff stated, "I have found no other damage to my home as a result of the burning." However, plaintiff contended he did suffer damage to his automobile as a proximate cause of defendant's employees burning material on land adjacent to his property. Plaintiff further contended, defendant should bear financial responsibility for the damage to his car due to the acts of park personnel. Consequently, plaintiff filed this complaint seeking to recover $1,212.80, the cost to repair the paint finish on his vehicle. This damage figure

was determined from a repair estimate obtained by plaintiff on September 24, 2004. The $25.00 filing fee was paid.

{¶ 2} Defendant denied any liability in this matter. Defendant acknowledged a brush pile was burned by park staff on park land adjacent to plaintiff's property during August, 2004. Defendant described this burning operation as a "controlled burn." Contrary to plaintiff's assertion, defendant related a controlled brush pile burn was conducted by park employees near plaintiff's property on one occasion, August 9, 2004. Defendant asserted park personnel take care to burn brush piles on days when there is little or no wind. Defendant insisted previous burnings were performed without complaint from adjacent landowners. Defendant disputed plaintiff's allegation regarding hot ash traveling from the controlled burn location to his property. Based on past experience of park personnel, defendant argued fire residue such as wind blown ash would rapidly lose heat and, therefore, be incapable of burning anything in the time taken to travel from the fire source to the site where plaintiff's car was parked. Distance from the brush pile burning location to plaintiff's driveway where his car was parked was measured at "91 yards or 274 feet." From evidence available, defendant asserted plaintiff failed to prove any damage to his car was caused by hot ash residue emanating from the park's controlled burn on August 9, 2004.

{¶ 3} On September 24, 2004, plaintiff made a complaint with park staff about damage to his automobile. Defendant's employee, Greg A. Bushee, investigated plaintiff's complaint and filed a report. The report contained a voluntary witness statement from plaintiff wherein he alleged his car was damaged by hot falling ash produced from burning activity conducted on park property, "[d]uring the time period of the end of August or sometime in September." Plaintiff wrote he did not observe any additional

damage to his home or personal property. As part of defendant's investigation, photographs of plaintiff's car were taken on two occasions, September 24, 2004, and December 1, 2004. Copies of the photographs were submitted. The trier of fact, after examining the photographs, cannot discern any depicted damage to the body of plaintiff's automobile.

{¶ 4} Defendant filed a copy of recorded weather conditions for the Columbus, Ohio area on August 9, 2004, the day the controlled burn was conducted on Buckeye Lake State Park property. Air temperatures in the Columbus vicinity were recorded between 59°F and 79°F during the 24 hour period of August 9, 2004. Measured wind speeds ranged from a low of 4.6 mph to a high of 13.8 mph. Average wind speed was 7 mph with a maximum wind gust velocity topping out at 20 mph.

{¶ 5} From the assertions raised and circumstances involved, the court finds plaintiff's claim is grounded in nuisance. 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* (1984), 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:

{¶ 6} "1. An absolute nuisance, or nuisance *per se*, consists of either a culpable and intentional act result 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 liable attaches notwithstanding the absence of fault.

{¶ 7} "2. A qualified nuisance, or nuisance dependent upon 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."

{¶ 8} Nothing in the instant claim has supported any contention that the park's controlled burn operation 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 any damage to his vehicle was caused by airborne ash residue emanating from defendant's lawful brush pile burn. Plaintiff has not produced a qualified expert report stating his property damage was caused by defendant's burn emissions. See *Hammar v. Ohio University* (2004), 2003-09050-AD, 2004-Ohio-1364. 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.

IN THE COURT OF CLAIMS OF OHIO

TERRY R. BELT	:	
Plaintiff	:	
v.	:	CASE NO. 2004-10264-AD
BUCKEYE LAKE STATE PARK	:	ENTRY OF ADMINISTRATIVE DETERMINATION
Defendant	:	

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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.

_____
DANIEL R. BORCHERT
Deputy Clerk

Entry cc:

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