

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cynthia Madej 13152 Dutch Creek Rd. Athens, Ohio 45701	:	
	:	Case No. 2:16-cv-658
and	:	JUDGE EDMUND A. SARGUS, JR.
Robert Madej 13152 Dutch Creek Rd. Athens, Ohio 45701	:	Magistrate Judge Kemp
	:	
Plaintiffs	:	
vs.	:	
Athens County Engineer Jeff Maiden 16000 Canaanville Rd. Athens, OH 45701	:	
	:	
Defendant.	:	

**PLAINTIFF'S THIRD AMENDED COMPLAINT (FIRST AMENDED COMPLAINT
SINCE DEFENDANT REMOVED THE CASE TO FEDERAL COURT)**

**- COUNT ONE -
(INJUNCTIVE RELIEF)**

1. Plaintiff Cynthia Madej (hereinafter "Cindi" or "Mrs. Madej") is a resident of Athens County, Ohio.
2. Defendant is an Athens County resident sued in his official capacity as Athens County Engineer.
3. This case involves a dispute over a paving project that has begun and is scheduled to continue on Dutch Creek Rd. in Athens County, Ohio.

4. For many years Defendant and his predecessor in office had been on notice that Cindi suffers from chemical sensitivity, also known as environmental illness, which renders many substances used in road paving highly toxic to her, including but not limited to petrochemicals used in “chip and seal” road surfacing.
5. Despite the County Engineer’s knowledge of Mrs. Madej’s medical condition, the Defendant went forward with a plan to apply a chip and seal road surface to Dutch Creek Rd. Plaintiffs learned only about two weeks and four days before filing their September 15th, 2015 Complaint in state court that such a project would apparently be moving forward.
6. After Plaintiffs learned of the proposed road surfacing plans, Plaintiffs provided Defendant with copies of two physician’s letters confirming that road paving projects which use petrochemicals within one mile of Cindi’s residence could cause serious physical harm or be life threatening to Mrs. Madej (e.g. could cause respiratory or heart failure, or paralysis). One of the letters also informed Defendant that Mrs. Madej suffers from a life-threatening anemic condition that has placed her health in a precarious position and that in light of her weakened condition even small exposures to chemical stressors create a serious hazard for her. The letters further informed Defendant that Cindi is unable to relocate from her home due to the severity of her sensitivities and the specialized living environment she requires. An affidavit from Cindi’s doctor confirming these facts and indicating that any such road work on Cindi’s road (Dutch Creek Road) would be injurious and could cause death is attached hereto as Exhibit 1.
7. Though Defendant had notice that serious injury or death would likely result from the use of chip and seal surfacing within one mile of Cindi’s residence, he nevertheless moved forward with the plan to use chip and seal within one mile of her residence.
8. Defendant refused to consider options for treating or surfacing the road that would be safe for Cindi, and refused to delay the project to give sufficient time to investigate options to treat or surface the road that would not pose a risk of serious physical harm or death to Cindi, though NUMEROUS other options do exist. See Exhibit 2 (list of dust control and surfacing options not involving the use of tars and petrochemicals).
9. Defendant mailed a letter dated Friday September 11th, 2015 to Dutch Creek Road residents including Plaintiffs (which Plaintiffs’ received on Monday September 14th, 2015) indicating a that the Dutch Creek Road chip and seal project would begin on Monday September 14th, 2015. See Exhibit 3.
10. Defendant in fact commenced grading and road preparation on Dutch Creek Road

on Monday September 14th, 2015.

11. Defendant proceeded with the project with full knowledge that applying the chip and seal surface would cause death or serious physical harm to Cindi.
12. On September 15th, 2015 the Athens County Common Pleas Court granted a temporary restraining order to halt the installation of chip and seal on Dutch Creek Road which was already underway. The Temporary Restraining Order prohibited the Defendant from installing chip and seal on Dutch Creek Road past its intersection with Stanley Road, approximately one mile from the Plaintiffs' residence.
13. On September 23, 2015, after a hearing in open court, the Athens County Common Pleas Court granted a preliminary injunction ordering that no chip and seal paving occur within a one mile radius of Plaintiffs' house, and finding that Plaintiffs had a substantial likelihood of success on the merits, that there was no unjustifiable harm to other residents of the road, and that Plaintiffs proved by clear and convincing evidence the necessity of preliminary injunctive relief. See Decision Granting Preliminary Injunction; Journal Entry, attached hereto as Exhibit 4.
14. Plaintiff promptly violated the aforementioned temporary restraining order by extending chip and seal within the prohibited section beyond Stanley Road and closer than one mile from the Plaintiffs' house.
15. Should Defendant proceed with the chip and seal project Defendant would negligently, recklessly, knowingly and intentionally cause physical harm and/or death to Cindi and cause severe emotional distress to Cindi and her husband, Plaintiff Robert Madej.
16. In such instance, the Defendant's aforesaid negligent, reckless, knowing, and intentional acts would be the proximate cause of Plaintiffs' injuries.
17. Plaintiff seeks only injunctive relief at this time, and does not seek damages. Thus political subdivision immunity contained in O.R.C. §2744.01, et seq. (which explicitly applies only to actions for damages) is in no way implicated.
18. Plaintiff seeks and is entitled to a permanent injunction ordering the Defendant to improve Dutch Creek Road within one mile of Plaintiff's residence with an alternative or alternatives to chip and seal and asphalt that would not harm Cindi (preferably but not necessarily with one of the options proposed by Plaintiffs in Exhibit 2).

19. Plaintiff has an excellent chance of prevailing on the merits of its claims given that political subdivision immunity does not apply and there is ample evidentiary support from her physician.
20. No third parties will be harmed given the numerous dust control and road surfacing options that the county has which do not involve substances that would cause injury or death to Mrs. Madej.
21. The public interest will be served given that public officials should be strongly discouraged from intentionally and unnecessarily causing serious physical harm or death to citizens when numerous non-injurious and non-fatal alternatives exist.

**-COUNT TWO-
(CIVIL ASSAULT AND BATTERY AND/OR WRONGFUL DEATH)**

22. Plaintiffs incorporate all of the foregoing allegations as if fully rewritten herein.
23. Though Defendant knew, has long known, and knew with substantial certainty that Plaintiff Mrs. Madej would suffer serious physical harm or death if a chip and seal project proceeded, Defendant assured the Plaintiffs both in the spring of 2015 and throughout the summer of 2015 that there were no plans chip and seal to Dutch Creek Road. When plans to chip and seal Dutch Creek Road were made, Defendant assured Plaintiffs it would not proceed with applying chip and seal.
24. Defendant further knew, has known, and knows with substantial certainty that Mrs. Madej cannot be relocated given that she requires a specialized living environment, and is physically frail. See e.g. Exhibit 1. Defendant has been informed of this very explicitly by both the Plaintiffs and their physicians.
25. Despite its knowing with substantial certainty that Mrs. Madej could not be relocated Defendant recklessly, wantonly and/or in bad faith gave Plaintiffs grossly insufficient notice that they were reversing their earlier statements and were in fact proceeding with the chip and seal project on Dutch Creek Road.
26. Defendant recklessly, wantonly and/or on bad faith gave so little notice of the reversal of the decision not to chip and seal Dutch Creek Road that there was and is insufficient time to find a new location and build a new sealed residence for Ms. Madej so as to protect her from serious physical harm or death. Relocation is currently an impossibility as Cindi's doctor has indicated. See Exhibit 1.
27. Defendant recklessly wantonly and/or in bad faith refused to discuss alternatives

and provide sufficient time to identify alternatives to applying chip and seal to Dutch Creek Road with the Plaintiffs.

28. Pursuant to O.R.C. § 2744.03(5) a political subdivision is liable in damages if its “judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources” is exercised in a wanton or reckless manner, or in bad faith. See *id.*
29. As a result of the wanton, reckless, and/or bad faith exercise of discretion of the defendant the plaintiff will suffer serious physical harm or death proximately caused by the defendant’s actions.
30. The aforementioned actions of the Defendant were all taken with malice.
31. Defendant knows with substantial certainty that its actions will bring serious physical harm or death to Mrs. Madej.

-COUNT THREE-
(DECLARATORY JUDGMENT - CIVIL ASSAULT AND BATTERY AND/OR
WRONGFUL DEATH)

32. Plaintiffs incorporate all of the foregoing allegations as if fully rewritten herein.
33. Plaintiffs seek a declaratory judgment to the effect that should the defendant proceed with the threatened chip and seal project on the section of Dutch Creek Road extending from S.R. 550 to Stanley Road Mrs. Madej will suffer serious physical harm or death and that the Defendant will be liable for civil assault and battery and/or wrongful death.

-COUNT FOUR-
(PLAINTIFF CYNTHIA MADEJ’S CLAIMS UNDER THE FAIR HOUSING
AMENDMENTS ACT, 42 U.S.C § 3601, ET SEQ.)

34. Plaintiffs incorporate all of the foregoing allegations as if fully rewritten herein.
35. Plaintiff Cynthia Madej is a person with a disability or handicap for the purposes of the Fair Housing Amendments Act. She has been determined to be completely disabled by the U.S. Social Security Administration, suffers from environmental illness, fibromyalgia, and chemical sensitivities.
36. The Fair Housing Amendments Act (42 U.S.C. § 3601 et seq., including but not limited to 42 U.S.C. § 3601(f)) (hereinafter FHAA) makes it unlawful to “discriminate against any person in the terms, conditions, or privileges of sale or

rental of a dwelling, *or in the provision of services or facilities in connection with such dwelling*, because of a handicap.” 42 U.S.C. § 3604(f)(2) (emphasis added).

37. Such discrimination includes a “refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]” *Id.* at § 3604(f)(3)(B).
38. The FHAA requires reasonable accommodations necessary for a disabled individual to receive the “same enjoyment from the property that a non-disabled person would receive.” See *Anderson, et al. v. City of Blue Ash*, (6th Cir.Ct.App., August 14, 2015), Case No. 14-3745, p. 24-25.
39. Though the Defendant has been made aware of Ms. Madej’s disability and has been informed by two of her physicians that proceeding with chip and sealing of Dutch Creek Road would cause her serious physical harm or death the Defendant has refused to make reasonable accommodations for Ms. Madej’s disability that would not deprive her of the use and enjoyment of her home and property.
40. Reasonable accommodations not involving the use of chip and seal or other products toxic to Cindi exist, and include but are not limited to the use of one or more of those products listed in Exhibit 2.
41. The failure to make these accommodations deprives Ms. Madej of equal opportunity in the use and enjoyment of her home and property, given that she will be forced to suffer serious physical harm or death in order to remain in her home and live on her property.
42. The failure to make these accommodations further deprives Ms. Madej of equal opportunity in the use and enjoyment of her home, given that she will be forced to suffer serious physical harm or death in order to have ingress and egress from her home across the chip and seal road that is physically harmful to her.
43. The failure to make these accommodations will constructively evict Ms. Madej from her home.
44. Reasonable accommodations are necessary in order to allow Mrs. Madej to use and enjoy her home and property.

-COUNT FIVE-
(PLAINTIFF CYNTHIA MADEJ’S CLAIMS UNDER THE AMERICANS WITH
DISABILITIES ACT PURSUANT TO 42 U.S.C. 12101, ET SEQ.)

45. Plaintiffs incorporate all of the foregoing allegations as if fully rewritten herein.

46. Plaintiff Cynthia Madej is an individual with a disability under the Americans with Disabilities Act (hereinafter the “ADA”).

47. The ADA prohibits public entities from discriminating against individuals with disabilities by,

“fail[ing] to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations.” 42 U.S.C. § 12812(b)(2)(A)(ii).

48. Though the Defendant has been made aware of Mrs. Madej’s disability and has been informed by two of her physicians that proceeding with chip and sealing of Dutch Creek Road would cause her serious physical harm or death the Defendant has refused to make reasonable modifications in its policies, practices, or procedures by failing to identify and use alternatives to the chip and seal that would not cause serious physical harm or death to Mrs. Madej, and which would not deprive her of the use of Dutch Creek Road and her home.

49. Alternatives to traditional chip and seal to deal with the issues that the Defendant has identified as the reason for wanting to apply chip and seal to Dutch Creek Road (primarily dust control) exist and would not fundamentally alter the nature of the road maintenance services provided by the Defendant.

50. Reasonable modifications to traditional chip and seal are necessary in order to afford Mrs. Madej the services, facilities, privileges, advantages, and accommodations the Defendant provides (e.g. the advantages of road maintenance services, access to the road itself, access across the road providing ingress and egress that people without disabilities enjoy).

WHEREFORE Plaintiff prays for the following relief:

1. For a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendants and/or their agents, servants, assigns, licensees or employees, from causing serious physical harm or death to Plaintiff Madej, and from causing serious emotional distress to both Plaintiffs by applying any road surfacing or dust-control treatments to

- Dutch Creek Road that would harm Ms. Madej including but not limited to chip and seal, asphalt, or any other petrochemical-based road surfacing or dust-control products.
2. For damages in excess of \$25,000.00 on Count 2, along with a preliminary injunction and permanent injunction preventing the application of chip and seal to Dutch Creek Road, punitive damages, and attorney fees.
 3. For a declaratory judgment on Count 3.
 4. On Count 4, for injunctive relief requiring the Defendant to make reasonable accommodations, for damages in excess of \$25,000, and for costs and attorney fees.
 5. On Count 5, for injunctive relief requiring the Defendant to make reasonable modifications, for damages in excess of \$25,000, and for costs and attorney fees.
 6. For any other relief that the Court determines to be warranted in the premises.

Respectfully submitted,

/s/ Sky Pettey

Sky Pettey - 0072041

Attorney for Plaintiffs

LAVELLE AND ASSOCIATES

449 E. State Street

Athens, OH 45701

sky@johnplavelle.com

(740) 593-3348 - telephone

(740) 594-3343 - facsimile

CERTIFICATE OF SERVICE

I hereby certify that the foregoing PLAINTIFF'S THIRD AMENDED COMPLAINT (FIRST AMENDED COMPLAINT SINCE DEFENDANT REMOVED THE CASE TO FEDERAL COURT) has been filed with the Court's electronic filing system this 14th day of October 2016 and will be served upon all parties through that system.

/s/ Sky Pettey

Sky Pettey - 0072041

Attorney for Plaintiffs

AFFIDAVIT OF DR. BARBARA SINGER

STATE OF Ohio, COUNTY OF Fairfield, SS:

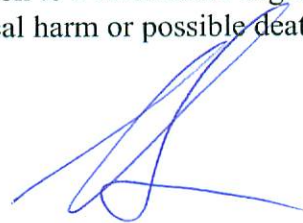
The Affiant, after duly sworn and cautioned, states the following information is true and correct as she verily believes.

1. My name is Dr. Barbara Singer, and my address is 4773 Carroll Cemetery Rd., Carroll, OH 43112.
2. Cynthia Madej is a patient that suffers from severe chronic chemical sensitivity resulting from toxic exposure. She presents with a wide array of symptoms caused by organ and neurological damage and has limitations that require non-standard level of care and special considerations in handling and treatment. She has been legally disabled since 1997. She also currently suffers from a life-threatening anemic condition as evidenced by very low hemoglobin levels and severe vitamin B12 deficiency, as well as extreme weight loss and cardiometabolic decompensation. She is in a precarious state and even small exposures to chemical stressors create a serious hazard for her.
3. Ms. Madej requires limited exposure or avoidance of many common materials and chemicals which include but are not limited to:
 - diesel, jet and other fuels,
 - exhaust
 - tar and asphalt
 - oil
 - herbicides and pesticides
 - smoke.
4. Roadway construction and maintenance activities are of particular concern. Exposures, even in small amounts, to numerous volatile organic compounds found in petrochemical products like tar (e.g. anthracene, benzene, and phenols), many of which outgas for months are dangerous and even life-threatening for Cynthia. Potential impacts include:
 - Difficulty breathing
 - Heart attack
 - Paralysis
 - Migraines
 - Neurologic stress and damage.
5. Avoiding exposure is crucial. Cynthia is unable to relocate from her home due to the severity and breadth of her sensitivities and the specialized living environment she requires. She does not receive adequate protection from closing windows and doors, due to the severity of her illness. In addition, this patient's sensitivities limit her ability to receive administration of standard medical care. Strong

reactions may occur from many plastic-based materials (e.g. oxygen masks and tubing) and most pharmaceuticals.

6. If Cynthia's road has a chip and seal or asphalt surface (or other surfacing that contains volatile organic compounds or toxins to which she is sensitive) especially while she is already in a weakened state from her anemia condition, weight loss, and cardiometabolic decompensation it is my opinion to a reasonable degree of medical certainty that she will suffer serious physical harm or possible death.

Further, Affiant sayeth naught.



Dr. Barbara Singer

Sworn to before me and subscribed in my presence this 15th day of September,
2015.



Notary Public

GAIL M. SWATZEL
NOTARY PUBLIC, STATE OF OHIO
My Commission Expires 1/9/2017

EXHIBIT 2

NON-EXHAUSTIVE LIST OF ALTERNATIVES TO CHIP AND SEAL

Terrazyme	Adherex	Permazyme
Earthzyme	Road Dust Suppressant	Dust Stop
Durasoil	Beet with Chloride	Dustless
Dust Fyghter	MAG Liquid, Pellets, or Flakes	RoadKill
ProGuard Mag	Envirokleen	Concrete



ATHENS COUNTY ENGINEER'S OFFICE

Jeff Maiden, P.E., P.S., Athens County Engineer
16000 Canaanville Road • Athens, Ohio 45701
Office (740) 593-5514 • Fax (740) 592-4616

September 11, 2015

Mr. Bob and Cynthia Madej
13152 Dutch Creek Road
Athens, Ohio 45701

Re: Dutch Creek Road (CR 34)-- Chip and Seal Resurfacing

Mr. and Mrs. Madej,

Thank you for attending the public meeting at my office last night. I am empathetic with your wife's health issues, but it was clear that the current dusty road condition is causing potential safety and health issues for the other residents that live on Dutch Creek Road. The only reasonable solution is to proceed with the planned chip and seal resurfacing of Dutch Creek Road. I'm going to separate our planned road maintenance activities to two different areas of work as follows:

Dutch Creek Rd. between SR 690 and Stanley Road (Ames T217)

1. Monday-9/14- Begin Grading Operations and Base Preparation for chip and seal
2. Tuesday-9/15- Begin Chip and Seal Operations on this section
3. Wednesday- 9/16 – Complete Chip and Seal Operations on this section

Dutch Creek Rd. between Stanley Road (Ames T217) and SR 550

1. Thursday-9/17- Begin Grading Operations and Base Preparation for chip and seal
2. Friday-9/18- Begin Chip and Seal Operations on this section
3. Monday- 9/21 – Complete Chip and Seal Operations on this section

The intersection of Stanley Road and Dutch Creek Road is approximately 1 mile from your house. The letters you submitted to me from Barbara Singer, DO, of Willow Wellness Center, LLC, and from Allan Lieberman, MD, state that you should be notified at least 5 days (Singer) or 3 days (Lieberman) before road construction or maintenance activity is performed within 1 mile of your residence. I called you today and informed you verbally of the above schedule. This letter has been sent to you today (9/11) via Certified Mail.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jeff Maiden", is written over a circular blue ink stamp or seal.

Jeff Maiden, PE, PS
Athens County Engineer

IN THE ATHENS COUNTY, OHIO, COURT OF COMMON PLEAS
GENERAL DIVISION

FILED
ATHENS COUNTY, OHIO

SEP 23 2015

Cynthia Madej, et al.,

Plaintiffs,

vs.

Athens County Engineer
Jeff Maiden,

Defendant.

Case No. 15CI0179

Judge Patrick J. Lang

DECISION GRANTING PRELIMINARY
INJUNCTION; JOURNAL ENTRY

Patrick J. Lang
CLERK
OF COMMON PLEAS COURT

This matter came before the court for hearing on Plaintiff's Motion for Preliminary Injunction on September 21, 2015. Plaintiff Robert Madej was present in court, represented by Attorney Sky Pettey. Defendant Athens County Engineer Jeff Maiden was also present, represented by Assistant Prosecuting Attorney Zach Saunders. The court has considered all evidence and argument before it and issues the following decision.

FACTUAL BACKGROUND

Plaintiffs Robert and Cynthia Madej reside at 13512 Dutch Creek Road in Athens County. Cynthia Madej suffers from numerous health conditions that, Plaintiffs allege, will be badly or fatally exacerbated by a planned "chip and seal" paving project (hereinafter, "project") that the county engineer, Jeff

Maiden, (hereinafter, "engineer") intends to initiate.¹ At the hearing, both Mr. and Mrs. Madej testified at length about their living conditions and the extreme measures they feel they must take on a daily basis to accommodate Mrs. Madej's health.² Such measures include avoiding even remote contact with numerous chemicals, eating only very specific foods, and sleeping in a small glass-lined room, with an old recliner being the only furniture she feels her health can tolerate. In winter, the only heat source in the room is a string of incandescent light bulbs, augmented on extremely cold nights by the addition of glass bottles filled with hot filtered water. Mrs. Madej further testified about the negative physical reactions she has to even the most minor exposures to certain chemicals, including past bouts of illness which she attributes to being exposed to diesel exhaust, even at some distance. She testified to having similar past illness brought on by what she believes was her exposure to chemicals involved in the paving of Peach Ridge Road, roughly a mile away, when the wind was coming from that direction. Mrs. Madej further testified that she could not be easily moved from her home, that she suffers severe symptoms whenever she travels in a car or leaves the house to visit her

¹ The court granted a Temporary Restraining Order on September 15, 2015, which allowed the project to move forward on Dutch Creek Road from State Route 690 to Stanley Road. The TRO enjoined any chip and seal work on the section of road nearest the Madej residence, from Stanley Road to State Route 550.

² With the agreement of both parties, the court allowed Mrs. Madej to testify from home via telephone.

doctor, and that she believes these symptoms are caused by exposure to chemicals.

Finally, plaintiffs offered testimony from Dr. Barbara Singer, a licensed medical doctor and Mrs. Madej's treating physician. Dr. Singer testified that Mrs. Madej is in extremely poor health, and suffers from ailments including anemia, several vitamin deficiencies, protein deficiency, anxiety and depression. Dr. Singer further testified that Mrs. Madej's health has been declining recently, and that she has experienced extreme weight loss, currently weighing 97 pounds, despite her 5 foot, 7 inch frame.

Dr. Singer testified that in her professional medical ~~opinion, these symptoms are caused by extreme chemical~~ sensitivity, and that Mrs. Madej would likely suffer severe physical injury or death if the project moved forward at the current time. Finally, Dr. Singer testified that hospitalization is not a viable option, because the plastics and chemicals used at hospitals would exacerbate Mrs. Madej's illness.

While Mr. and Mrs. Madej have known for some time that chip and seal paving was a possibility on Dutch Creek Road, they allege that they were given assurances from the engineer that such work would not be done, as an accommodation to Mrs. Madej's health condition. The engineer disputes that any commitments of

this nature were made, although he did agree to hold a public meeting on the issue. A meeting was convened by the engineer on September 10, at which several residents appeared in support of the chip and seal project, and also at which Mr. Madej argued against it. The final decision to move forward with the project was made after the meeting, and both Mr. and Mrs. Madej testified that they were made aware of the project's approval when they received a certified letter from the engineer's office on September 14. They immediately sought counsel and filed their initial Complaint and Motion for Temporary Restraining Order on September 15, which the court granted after a brief hearing.

LEGAL STANDARD

In order to grant a preliminary injunction, a court must determine, by clear and convincing evidence, whether: (1) there is a substantial likelihood that plaintiff will prevail on the merits; (2) plaintiff will suffer irreparable injury if the injunction is not granted; (3) any third parties will be unjustifiably harmed if the injunction is granted; and (4) the public interest will be served by the injunction.³ "Clear and convincing" evidence is that measure or degree of proof which

³ Vanguard Transp. Sys. Inc. v. Edwards Transfer & Storage Co., 109 Ohio App.3d 786, 790 (10th Dist. 1996) (citing Valco Cincinnati, Inc. v. N&D Machining Serv., Inc., 24 Ohio St.3d 41 (1986)).

will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established.⁴ It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.⁵ It does not mean clear and unequivocal.⁶

Applying these standards, the court finds that plaintiffs have demonstrated their entitlement to a preliminary injunction.

FACTOR 1 - SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

This factor does not require that a plaintiff fully prove the ultimate merit of the case at a preliminary injunction hearing.⁷ Rather, it is sufficient that a plaintiff at least show serious questions going to the merits.⁸ Stated another way, a plaintiff must demonstrate "more than a mere possibility of success" and "raise questions going to the merits so serious, substantial, difficult, and doubtful as to make them a fair ground for litigation and thus for more deliberative investigation."⁹

⁴ See Cross v. Ledford, 161 Ohio St. 469, 477 (1954); see also State v. Ingram, 82 Ohio App.3d 341 (2d Dist 1992).

⁵ Id.

⁶ Id.

⁷ Union Twp. v. Union Twp. Professional Firefighters Local 3412, 12 Dist. No. CA99-08-082 (Feb. 14, 2000); see also Brakefire, Inc. v. Overbeck, 144 Ohio Misc.2d 35, 2007 Ohio 6464.

⁸ Id.

⁹ Six Clinics Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393, 402 (6th Cir. 1997).

In the present case, plaintiffs allege in their First Amended Complaint that the engineer's plan to complete the project will amount to a civil assault and battery likely to cause serious injury or death to Mrs. Madej. Plaintiffs acknowledge the engineer's statutory duty to repair and improve public roads and his broad discretion, as well as statutory immunity, in selecting appropriate methods, materials and timeframes for such projects. However, plaintiffs claim that Mrs. Madej's illness, and the fact that the engineer has been made aware of it, would invoke R.C. 2744.03(A)(5), removing immunity for injurious actions undertaken recklessly. Plaintiffs point to uncontroverted medical testimony indicating ~~that Mrs. Madej is gravely ill and will suffer serious injury or~~ death from exposure to the project's components. They also highlight the engineer's testimony that he is aware of the risks to Mrs. Madej's health or life and intends to proceed with the project regardless.

While there may be some cause to doubt the diagnosis, it is undisputed that Mrs. Madej is a very sick woman. The question of what is causing her symptoms is one for medical science. The court is limited to deciding this Motion based only upon the facts in evidence before it, and the only medical testimony offered at hearing is that Mrs. Madej is likely to suffer serious injury or death if the project moves forward at the

present time. In the absence of contrary medical opinion, the court is not willing to disregard Dr. Singer's testimony outright.

Based upon these observations, as well as the record as a whole, the court concludes plaintiffs have raised serious questions going to the merits - questions relating to recklessness that, due to the prospect of death or serious injury - are substantial and difficult, and worthy of more deliberate investigation than is possible in the abbreviated preliminary injunction context.

Accordingly, Factor 1 weighs in favor of plaintiffs.

FACTOR 2 - IRREPARABLE INJURY IF INJUNCTION NOT GRANTED

From a preliminary standpoint, plaintiffs have also established a likelihood of serious physical injury or death to Mrs. Madej should the project proceed at the present time. Whatever the weaknesses of the plaintiffs' medical evidence, it remained uncontroverted by competing medical evidence or expert testimony. The possibility of death and/or serious physical injury present extreme circumstances that clearly meet the standard of irreparable injury. Moreover, the uncontroverted evidence demonstrates that Mrs. Madej is presently home-bound. Nobody at the hearing - witness or party - advanced a viable alternative, should the project proceed at the present time, to

Mrs. Madej simply waiting in her home for the effects of the project to manifest.

Accordingly, Factor 2 weighs in favor of plaintiffs.

FACTOR 3 - NO UNJUSTIFIABLE HARM TO THIRD PARTIES

The evidence presented at the hearing demonstrates that, although the remaining unpaved portion of Dutch Creek Road remains dusty, potholed and less-than-ideal, there is no safety emergency present. The engineer testified that he is not aware of any accidents on the road, that the primary annoyance, dust, will substantially abate from late Fall until early Spring, and that the road, in most respects, is in similar condition to other gravel roads in Athens County. While a delay in the project will likely cause annoyance, irritation, and minor disruption of travel and convenience, the court cannot find on the evidence before it that the delay will, or is likely to, result in unjustifiable harm to third parties. This is especially true when weighed against the risk of harm to Mrs. Madej, discussed in Factors 1 and 2 above.

Accordingly, Factor 3 weighs in favor of plaintiffs.

FACTOR 4 - PUBLIC INTEREST

The general public's interest will be served by completion of the improvements to Dutch Creek Road, a public road under the

care and supervision of the engineer. But the general public also benefits from the preliminary protection of one of their number while serious issues of health and safety, a county official's statutory and discretionary authority, governmental immunity, and potential recklessness are fully and deliberately investigated and litigated.

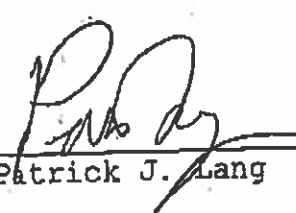
Accordingly, Factor 4 weighs evenly for both sides.

CONCLUSION

Having weighed the foregoing factors and balanced them without giving determinative weight to any single factor, the court finds that plaintiffs have met their burden of demonstrating through clear and convincing evidence the necessity of preliminary injunctive relief.

Accordingly, the preliminary injunction is GRANTED. The temporary restraining order issued September 15, 2015, is hereby vacated and replaced with a preliminary injunction requiring that no chip and seal paving occur on Dutch Creek Road within a one-mile radius of plaintiff's house until further order of the court.

IT IS SO ORDERED.



Judge Patrick J. Lang

The Court's preliminary injunction findings do not have preclusive effect and do not estop the parties on the merits at a future trial. The findings are neither determinative of the issues in the case nor binding upon the parties or the Court at a subsequent trial.

cc:

Sky Pettey, Attorney for Plaintiffs Robert and Cynthia Madej

Zach Saunders, Assistant Prosecuting Attorney, Attorney for Defendant County
Engineer Jeff Maiden