

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

FILED  
ATHENS COUNTY, OHIO

SEP 23 2015

*Adrian* CLERK  
OF COMMON PLEAS COURT

Cynthia Madej, et al., : Case No. 15CI0179  
Plaintiffs, : Judge Patrick J. Lang  
vs. : **DECISION GRANTING PRELIMINARY**  
Athens County Engineer : **INJUNCTION; JOURNAL ENTRY**  
Jeff Maiden, :  
Defendant. :

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

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Maiden, (hereinafter, "engineer") intends to initiate.<sup>1</sup> 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.<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> "Clear and convincing" evidence is that measure or degree of proof which

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<sup>3</sup> Vanguard Transp. Sys. Inc., v. Edwards Transfer & Storage Co., 109 Ohio App.3d 786, 790 (10<sup>th</sup> 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.<sup>4</sup> 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.<sup>5</sup> It does not mean clear and unequivocal.<sup>6</sup>

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.<sup>7</sup> Rather, it is sufficient that a plaintiff at least show serious questions going to the merits.<sup>8</sup> 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."<sup>9</sup>

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

<sup>5</sup> Id.

<sup>6</sup> Id.

<sup>7</sup> 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.

<sup>8</sup> Id.

<sup>9</sup> Six Clinics Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393, 402 (6<sup>th</sup> 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.

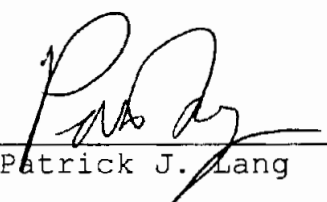
Accordingly, Factor 4 weighs evenly for both sides.

#### 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.

  
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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