

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

CYNTHIA MADEJ, et al.,	:	
Plaintiffs,	:	Case No.: 2:16-cv-00658
v.	:	Chief Judge Sargus
ATHENS COUNTY ENGINEER,	:	Magistrate Judge Vascura
Defendant.	:	

**DEFENDANT ATHENS COUNTY ENGINEER'S MOTION
FOR SUMMARY JUDGMENT**

Now comes Defendant Athens County Engineer, Jeff Maiden, and moves this Court for summary judgment. All of Plaintiffs' claims fail because:

- Plaintiffs have no medical evidence to demonstrate that Ms. Madej is highly sensitivity to chip seal such that paving Dutch Creek Road will likely result in grave injury or her death;
- Plaintiffs' requested accommodation to resurface Dutch Creek Road with a chemical dust control product in lieu of chip seal is unreasonable as it is not necessary to afford them an equal opportunity to enjoy their residence, it imposes an undue fiscal burden on the Engineer and it alters the fundamental nature of the Engineer's road paving program.

Support for this motion is set forth in more detail in the attached memorandum. There are no genuine issues of material fact and judgment on all of Plaintiffs' claims in favor of Defendant Athens County Engineer is appropriate as a matter of law.

Respectfully submitted,

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1. Ms. Madej’s claimed sensitivity, MCS, has an etiology that is only hypothetical and not a plausible diagnosis, and therefore not a recognized valid medical condition by the World Health Organization, the International Classification of Diseases or by federal courts.....	15
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Snyman v. W.A. Baum Co., Inc., No. 04 Civ. 2709, 2008 U.S. Dist. LEXIS 103266 (S.D.N.Y. 2008); *Gabbard v. Linn-Benton Hous. Auth.*, 219 F. Supp. 2d 1130 (Ore. 2002); *Comber v. Prologue, Inc.*, No. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331 (Md. 2000); *Coffin v. Orkin Exterminating Co.*, 20 F. Supp. 2d 107 (Me. 1998); *Frank v. New York*, 972 F. Supp. 130 (1997); *Summers v. Missouri Pac. R.R. Sys.*, 897 F. Supp. 533 (E.D. Okl. 1995); *Treadwell v. Dow-United Technologies*, 970 F.Supp 9742 (M.D. Ala. 1997); *Sanderson v. Int’l Flavors & Fragrances*, 950 F. Supp. 981 (C.D. Cal. 1996); *Bradley v. Brown*, 852 F. Supp. 690 (N.D. Ind.)

2. Plaintiffs lack the required medical expert to demonstrate causation between Ms. Madej’s claimed sensitivity and the petrochemicals routinely used on our roadways.	19
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Plaintiffs must establish both general and specific causation by providing evidence through medical expert testimony that common chip seal is capable of causing and will in fact cause the threatened injury. Plaintiffs lack the necessary medical expert testimony as their medical witnesses’ opinions do not meet Fed.R.Evid. 702 or *Daubert*.

Pluck v. BP Oil Pipeline Co., 640 F.3d 671 (6th Cir. 2011); *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865 (S.D. Ohio W.D. 2010); *Terry v. Caputo*, 115 Ohio St. 3d 351 (Ohio 2007)

3. Plaintiffs’ medical experts have not demonstrated and cannot demonstrate that Ms. Madej is sensitive to chip seal by the necessary causation inquiries.	20
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Plaintiffs’ medical witnesses did not conduct a differential diagnosis to rule out the many other chemicals that Ms. Madej claims have also have made her ill. She has never been tested for sensitivity to chip seal or asphalt.

Plunk, supra; *Best v. Lowe’s Home Ctrs., Inc.*, 563 F.3d 171 (6th Cir. 2009); *Roche v. Lincoln Property Co.*, 278 F.Supp.2d 744 (E.D Va. 2003); *Baker v. Chevron U.S.A., Inc.*, 533 Fed. App’x 509 (6th Cir. 2013); *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244 (6th Cir. 2001); *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665 (6th 2010).

4. Ms. Madej cannot base her claims on her own testimony nor does her testimony demonstrate that she suffers from a heightened sensitivity to chip seal.....25

Causation must be proved by a medical expert since this case involves scientific analysis beyond the experience of laymen.

Baker v. Chevron USA, 680 F. Supp.2d 865 (S.D. Ohio W.D. 2010) *aff’d* 533 Fed. App’x 509 (6th Cir. 2013); *Sanderson v. International Flavors & Fragrances, Inc.*, 950 F. Supp. 981 (C.D. Ca. 1996); *Parker v. Employers Mut. Liability Ins. Co. of Wisconsin*, 440 S.W.2d 43 (Tex. 1969).

B. Athens County Engineer is entitled to have the injunction lifted.....25

Plaintiffs cannot meet the elements of an injunction. They cannot demonstrate that Ms. Madej will suffer a continuing irreparable injury if the court fails to issue an injunction as there is no admissible evidence that Ms. Madej has any sensitivity to chip seal much less that it would cause her grave injury or death. The balancing of hardships falls in favor of the residents of Dutch Creek Road who are living with inordinate amounts of dust and the citizens of Athens County who will shoulder the extreme financial cost of any alternative product.

ACLU of Ky. v. McCreary County, Ky., 607 F.3d 4395 (6th Cir. 2010); *Sherful v. Gassman*, 899 F. Supp.2d 676 (S.D. Ohio 2012)

C. Athens County Engineer is entitled to summary judgment on Plaintiffs’ claim for civil assault, battery and wrongful death, as such claims are not yet ripe and the Engineer is immune from liability under Ohio Rev. Code Ann. § 5543.01....26

1. Plaintiffs’ claims are not ripe.....27

Ms. Madej’s claims are not ripe because the actions which she claims will cause her harm have not yet been taken. Ms. Madej’s claims regarding her injury are merely speculative, and are based solely on the opinions of herself, her husband and two treating physicians who never tested her for sensitivity to chip seal. As for their wrongful death claim, such action requires the death of a person. Ms. Madej is still alive.

U.S. Const., art. III, §2, cl. 2; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

2. Ms. Madej's assault, battery and wrongful death claims independently fail as a matter of law.28

An assault is an *unlawful* attempt, coupled with a present ability, to inflict an injury upon the person of another. Maintenance of public roads is not unlawful and is mandated by the Ohio Revised Code. Plaintiffs present no evidence that the Engineer intends to cause her harm by an unlawful act or that paving with chip seal will in fact cause her grievous harm. The chip seal will not be applied directly to Ms. Madej's skin, but instead will be applied to the road in front of her house. Plaintiffs cannot demonstrate an intent to harm Ms. Madej with the use of the chip seal or that there is a "substantial certainty" that the particulate will touch Ms. Madej.

Ohio Rev. Code Ann. § 5543.01(A); *Woods v. Miamisburg City Schools*, 254 F.Supp.2d 868(S.D.Ohio 2003); *Daniel v. Maxwell*, 176 Ohio St. 207 (Ohio 1964)); *Helton v. Scioto County Bd. of Comm'rs*, 123 Ohio App. 3d 158; *Barnette v. Grizzly Processing, LLC*, 809 F.Supp.2d 636 (E.D.Ky.2011); *Leichtman v. WLW Jacor Communications*, 92 Ohio App.3d 232 (1st Dist. 1994); *Gerber v. Veltri*, 702 Fed. App'x. 423 (6th Cir. 2017).

3. The Engineer is immune from liability on Plaintiffs' state law claims pursuant to Ohio Rev. Code Ann. § 2744.02(A)(1)31

The Engineer is immune from liability for the exercise of a governmental function which includes the maintenance and repair of roads. There are no facts to support an exception to the immunity for the Engineer from Plaintiffs' state law claims.

Ohio Rev. Code Ann. § 244.01(C)(1)(e); Ohio Rev. Code Ann. § 2744.02(A)(1)

D. Athens County Engineer is entitled to summary judgment on Plaintiffs' claim for violation of the Fair Housing Act ("FHA") because it does not apply to Plaintiffs' situation and Plaintiffs cannot demonstrate that their requested accommodation is reasonable.31

1. The FHA does not apply to a county engineer's road maintenance program.32

Plaintiffs bring their claims under section 3604(f) of the FHA which prohibits discrimination based on disability in rules, policies, practices, or services, when accommodations thereto may be necessary to afford such person equal opportunity to use and enjoy a dwelling. That section is analogous to its precursor 42 U.S.C. § 3604(b) which prohibited such discrimination based on race. Courts have held that section does not extend to every decision of a governmental agency that may have an indirect impact on housing.

S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot., 254 F. Supp.2d 486 (N. J. 2003); *Graoch Assocs. # 33 Ltd. P'ship v. Louisville & Jefferson County Metro Human Rels. Comm'n*, 430 F. Supp. 2d 676 (WD KY 2006).

2. Plaintiffs cannot demonstrate that Ms. Madej is disabled.....33

Ms. Madej cannot prove she is disabled. There is no admissible evidence that she has a heightened sensitivity to chip seal that would prohibit her from residing in her housing of choice if Dutch Creek Road was paved with chip seal.

3. Plaintiffs cannot demonstrate the three operative elements of the FHA reasonable accommodation – equal opportunity, necessity, and reasonableness34

A claim under the FHA for failure to provide a reasonable accommodation focuses on whether the proposed accommodation is reasonable and whether it is necessary to afford disabled persons an equal opportunity for enjoyment of their dwelling. Plaintiffs cannot show that their request to use chemical products on the road will do anything to help Ms. Madej as she claims that she is also sensitive to vehicle exhaust, pesticides, herbicides and her neighbors landscaping equipment, all of which will remain.

Hollis v. Chestnut Bend Homeowner’s Assn., 760 F.3d 531 (6th Cir. 2014); *Smith & Lee v. City of Taylor, MI*, 102 F.3d 781 (6th Cir. 1996); *Horn v. Knight Facilities Mgmt.-GM*, 556 Fed.App’x 452, 455 (6th Cir. 2014); *Temple v. Gunsalus*, No. 95-3175, 1996 U.S. App.LEXIS 24994 *aff’d* 97 F.3d 1452 (6th Cir. 1996)

E. Athens County Engineer is entitled to summary judgment on Plaintiffs’ claim for violation of the American with Disabilities Act (“ADA”).38

1. Title III of the ADA does not apply to the Athens County Engineer, as it does not apply to public entities nor does this case involve a public accommodation.38

42 U.S.C. §12181(7); *Miller v. City of Knoxville*, No. 3:03-cv-574, 2006 U.S. Dist. LEXIS 61786

2. ADA Title II does not apply as Dutch Creek Road is not a service, program or activity.40

42 U.S.C. §12131(2); *Ability Ctr. of Greater Toledo v. City of Sandusky*, 385 F.3d 901 (6th Cir. 2004); *Wolfe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11 AP-345, 2011-Ohio-6825

3. Plaintiffs cannot demonstrate that Ms. Madej is disabled.42

4. The Athens County Engineer did not violate Title II of the ADA as Plaintiffs’ request for accommodation was not reasonable, because it is not necessary, there is no evidence it would work, it is too costly, and it would fundamentally alter the nature of the services.42

28 C.F.R. § 35.130(b)(7); Joint Statement of The Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 14, 2014); *McNamara v. Ohio Bldg. Auth.*, 697 F. Supp. 2d 820 (N.D. Ohio

2010 W.D.); *Roell v. Hamilton Cty.*, 870 F.3d 471, 488 (6th Cir. 2017);; *Wis. Community Servs., Inc. v. City of Milwaukee*, 465 F.3d 737 (7th Cir. 2006);; *PGA Tour v. Martin*, 532 U.S. 661, 121 S.Ct. 1879 (2001)

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MEMORANDUM

I. INTRODUCTION

All of Plaintiffs' claims in this lawsuit arise out of Cynthia Madej's belief that she suffers from multi-chemical sensitivity which has rendered her highly sensitive to a host of smells, chemicals and substances, but for purposes herein, anything derived from petroleum, "including but not limited to petrochemicals used in 'chip and seal'¹ road surfacing." (ECF No. 16 at Page ID # 133.) Consequently, she insists that the Athens County Engineer not be permitted to use any asphalt or chip seal product within one mile of her home. Rather, she requests that this stretch of road be returned to gravel and treated with alternative non-petroleum products such as a water based salt and chloride spray to reduce the dust that is certain to come. Ms. Madej proposes a list of alternative products to accomplish this end. (Id. at Page ID # 142.)

Plaintiffs further claim that Ms. Madej's disorder is a disability and the Engineer's failure to change its practice and policy of paving its roadways to accommodate her is a violation of the Americans with Disabilities Act and the Fair Housing Act. (Id. at Page ID # 136-138.) Even if these statutes applied to a county's paving practices, they do not apply here. Ms. Madej is not disabled. MCS is not recognized by the American Medical Association, or the federal courts, as a disease or disorder. And not one of Plaintiff's three medical witnesses can demonstrate she has a heightened sensitivity to chip seal. Even so, requesting that the Engineer substantially alter its paving practices for an arbitrary two mile stretch of road in front of Plaintiffs' house is unduly financially burdensome and not a reasonable accommodation because it will not alleviate the harm Ms. Madej complains of. That is especially true when Ms. Madej's own expert witnesses

¹ Throughout the course of this case, the substance has been referred to as "chip and seal." The correct term for the process is "chip seal." The terms will be used interchangeable throughout the course of this briefing, as it is reflected in the applicable record in this case.

cannot determine whether the chemicals that might reach the home from an application of chip seal differ in quantity or content from the daily traffic passing her house, the diesel farm equipment operating down the road, or the chemicals and particulates emitting from the current oxidation of the road itself which is presently paved with chip seal, none of which have thus far resulted in her death and all of which will continue regardless of whether Dutch Creek Road is chip sealed.

Plaintiffs' case hinges on 'might' or 'maybe' or 'possibly.' They have no evidence that the emissions from an application of chip seal are injurious to the residents along the road generally, and no medical evidence that it will cause Ms. Madej's alleged individual symptoms, or further injury. Without an expert witness to testify that these chemicals cause the injuries alleged, none of her claims can succeed. Moreover, despite alleging that the use of chip seal will be life threatening, the only symptoms Ms. Madej complains of have not resulted in her attending a hospital or seeing a medical provider. Moreover, Ms. Ms. Madej's symptoms can be attributed to an alternative diagnosis, specifically, the condition of Diabetes Insepidus. For all of these reasons, summary judgment is proper for the Engineer.

II. CASE HISTORY

This matter was first filed in the Athens County Common Pleas Court. (Id at Page ID # 144.) The Court granted Plaintiffs' request for a preliminary injunction and ordered no paving occur on Dutch Creek Road within one-mile radius of Plaintiffs' home until further order of the Court." (Id. at Page ID # 152.) Plaintiffs subsequently amended their complaint to add claims under the American with Disabilities Act and the Fair Housing Act. (Id. at Page ID # 136-137.) Defendant removed the matter to this Court pursuant to 28 U.S.C. § 1441. The injunction remains in place and Dutch Creek Road has not been resurfaced, despite a sore need to do so, since this matter first commenced in 2015.

III. FACTS

Ms. Madej's claims stem from her alleged illness, characterized by her "chemical sensitivity, also known as environmental illness, which allegedly renders many substances used in road paving highly toxic to her, including 'chip seal' road surfacing." (ECF 16, Page ID # 133). Her sensitivities are not limited to chip seal but include a vast array of chemicals found in herbicides, fertilizers, pesticides, petroleum products, exhaust, paints, varnishes, smoke combustion bi-products (ECF 91 at Page ID # 3135) plastics and chemicals used at hospitals (ECF 16 at Page ID # 146) newsprint, adhesives, wood products, plywood, gasoline, asphalt, new carpet, cologne (ECF 76 at Page ID # 679), vinyl, propane and new clothes regardless of fabric (Id. at Page ID # 680.) Ms. Madej testified she is "symptomatic from anything." (ECF 77 at Page ID # 1016.)

Ms. Madej's claimed sensitivities are based on a "diagnosis" by her non-local primary treating physician, Dr. Allan Lieberman, establishing that she suffers from chronic fatigue syndrome, fibromyalgia, as well as MCS. (Id.; ECF 91 at Page ID # 2907.) While all of these illnesses undoubtedly work together, it is Ms. Madej's alleged MCS, and her exquisite sensitivity to petrochemicals that mandates the accommodation, specifically in the form of an injunction and declaratory judgment prohibiting the Athens County Engineer from using asphalt or chip seal on Dutch Creek Road. (ECF 10 at Page ID # 89; Page ID # 90; ECF No. 16 at Page ID # 133). In its simplest terms, application of a chip seal requires the laying of an asphalt emulsion to an existing asphalt or gravel surface, with the application of a fine grade stone on top of it with a spreader. (ECF 96 at Page ID # 3570.) Chip seals in Athens county use a standard asphalt emulsion, meeting Ohio Department of Transportation specifications in construction. These emulsions are water-based, allowing the product to be sprayed as low as 160 degrees Fahrenheit. The asphalt is dispersed in the water, using a colloid mill with an emulsifier. Once sprayed on

the road using a distributor at .04 gallons per square yards, stone chips are dropped in the fresh mat. The water then evaporates, leaving an asphalt film which bonds to the underlying pavement and stone chips. The entire process occurs in minutes at any given location and dries within one hour to allow traffic to return. (ECF 105 at Page ID # 5132.)

MCS is a condition not recognized by either the International Classification of Diseases or the World Health Organization. (ECF 91 at Page ID # 2941.) Proponents of such condition, (including Ms. Madej's treating physician Dr. Lieberman), characterize it as a "description, not a diagnosis." (Id.) Notably, there is no way to treat MCS and the only way to mitigate symptoms is "avoidance behavior." (ECF 91 at Page ID # 2918.) Ms. Madej alleges that her symptoms are not triggered by any specific concentration or levels of any antigen, nor are they determinate based on her proximity to alleged antigens or substances to which she claims reactivity. (ECF 76 at Page ID # 823.) Indeed, Ms. Madej testified that she could potentially become reactive to things that were over two miles away regardless of the substance concentration. (Id. at Page ID # 716.)

Plaintiffs allege that road paving projects which use "petrochemicals within one mile of Cindi's residence could cause serious physical harm or be life threatening." (ECF 16, Page ID # 133.) In addition, Ms. Madej alleges that the Engineer 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, and nevertheless moved forward with the plan to use chip and seal within one mile of her residence." (Id.) Based on these allegations, Ms. Madej brings claims for "civil assault and battery and/or wrongful death" (Id. at Page ID # 135); seeks declaratory judgment regarding these claims (Id. at Page ID # 136); alleges a violation of the Fair Housing Act (Id.); and a violation of the Americans with Disabilities Act (Id. at Page ID # 137.) It is undisputed that the

only medical evidence Ms. Madej relies upon to prove her claims is the subjective beliefs of herself, her husband, Dr. Barbara Singer, and Dr. Allan Lieberman. (ECF 76, Page ID # 770.) A brief history of Ms. Madej's living environments and medical treatment is instructive in illuminating the basis for this medical evidence.

A. The Madejs move to Dutch Creek Road.

Cynthia Madej is a 53 year old woman who resides with her husband and co-Plaintiff Robert Madej in Athens County. (ECF 16 at Page ID # 128.) Despite her alleged multi-chemical sensitivity to petroleum products, the Madejs moved to Dutch Creek Road, a road surfaced with chip seal, in or about May 2010. (ECF 76 at Page ID # 651, ECF 79 at Page ID # 1342). The Madejs purchased a home that was previously constructed by Habitat for Humanity and occupied by a woman who also allegedly suffered from MCS. (Id. at Page ID # 780.) Prior to such time, the Madejs resided at a myriad of different addresses, specifically 199 Ainsworth Court in Gahanna, Ohio from 1997 until May, 2010; 8499 Monticello Drive in West Chester, Ohio from 1994 to 1997; and multiple residences in Bloomington, Indiana and Columbus, Ohio; including occupying a dorm at Ohio State University wherein Ms. Madej obtained her Master's degree in biology. (Id. at Page ID # 653.) All of these residences were located on or near paved roads and were constructed with a variety of building materials including brick, plywood trim, and soffit. (Id. at Page ID # 657.)

Despite moving to Athens County in an effort to alleviate Ms. Madej's sensitivities, Ms. Madej presently lives a life of isolation, whereby she only leaves her house "a couple of times a year" to treat with her various medical providers. (ECF 76 at Page ID # 745.) She sees these health care providers outside because she is sensitive to plastics and chemicals in their offices and hospitals. (Id. at Page ID ## 760, 797.) In 2017 she only left her house four times by her

own testimony. (Id. at Page ID # 796.) Even though her primary residence was allegedly built with MCS in mind by its former owner, Ms. Madej sleeps in an upright foil covered recliner in a glass cottage located on the property due to contaminants remaining in the home that she cannot identify with any specificity. (ECF 76 at Page ID # 852, 853; ECF 79, Page ID # 1340-1341). In order to spend time outdoors she has requested her neighbors to provide her advance notice before using their lawn mowers or tractors. (ECF 76 Page ID # 747, 783).

She requires her husband to take up to three showers per day and wipe down with alcohol upon returning to their home in order to become tolerable for her to be around. (ECF 79 at Page ID # 1320.) Mr. Madej testified that the only place in the state of Ohio that he can get water that Ms. Madej can tolerate is a place in Cleveland. (Id. at Page ID # 1385.) Mr. Madej drives to the unspecified location, the water is then boiled and filtered through “filtering charcoal filtered through a carbon block to make it safe and tolerable for her.” (Id. at Page ID # 1395.) All of the Madejs’ meals are prepared out of doors. (ECF No. 79 at Page ID # 1314.)

It is undisputed that no healthcare provider has ever informed Ms. Madej that she must engage in these ritualistic behaviors, but she has done so based on her belief that avoidance of triggers is essential. (ECF 76 at Page ID # 789.) Ms. Madej could not recall what items she was instructed by healthcare providers to avoid. (Id.) While it would likely be shorter to list items that Ms. Madej is **not** sensitive to, she specifically identified a “wide variety of chemicals from fertilizers and pesticides to asphalt and tar products, cleaning products, fragrances, a very big list.” (Id.) Specifically, Ms. Madej noted that she is sensitive to “newsprint like newspapers, various wood products, glues, adhesives, paint, polyurethane, varnish, carpet, particularly new carpet, OSB, plywood, exhaust, gasoline, tar, vinyl, rubber, plastics, oil, gasoline, propane, and new clothes.” (Id. at Page ID # 680.) Further underscoring the subjective nature of her illness,

Ms. Madej indicated that she can associate certain symptoms with certain items, testifying as follows:

A. There are frequently symptoms that I can associate with particular items or a group of symptoms that help to identify which thing I may be experiencing symptoms from.

Q. Okay. I'll need you to tell me the individual item and the symptoms you experience with it and how it's different from another individual item and the symptoms you might experience with that.

A. Asphalt and tar products cause chest tightness, difficulty breathing, throat and eye burning, severe headaches, sometimes with light and sound sensitivity and sometimes nausea. Fertilizers and herbicides cause severe debilitating headaches, almost always with light and sound sensitivity, bad taste in my mouth, mid back pain, weakness and sometimes weakness, specific weakness in my limbs fragrance causes throat and eye burning, chest tightness, sleep disruption, wood products cause a lot of waking and sleeping or just inability to sleep. Newsprint and receipts and things like that cause hives. New clothes cause a lot of difficulty thinking and a great deal of indecisiveness. Lets see. I'm trying to think. Exhaust causes difficulty breathing, chest tightness, foggy headedness, sometimes feeling very dazed. Vinyl causes irritability, grumpiness, sometimes anger, very great deal of difficulty getting comfortable, increased pain.

(Id. at Page ID # 682-683.) While Ms. Madej has treated with many different healthcare providers, she bases her beliefs on the testimony of two treating physicians, Dr. Barbara Singer and Dr. Allan Lieberman. (ECF 76 at Page ID # 770.)

B. Ms. Madej's diagnosis and treatment with Dr. Allan Lieberman.

Ms. Madej was originally treated for her alleged illness in November, 1999 by physicians at the Center for Occupational and Environmental Medicine ("The Center"). (ECF No. 91 at Page ID # 2980.) Dr. Lieberman characterizes Ms. Madej's multiple chemical sensitivity as "toxic effect of organophosphate pesticides resulting in injury to and dysfunction of multiple organs and symptoms manifesting of which her sensitivity is one." (Id. at Page ID # 2964.) Dr. Lieberman bases his conjecture on Ms. Madej's alleged exposure to a pesticide called Dursban in 1995. (Id.). It is undisputed that the initial visit in 1999 is the only time she was ever seen in

person at the Center. (Id.) Dr. Lieberman could not recall if he ever examined Ms. Madej in person and records indicate that she was seen by his colleague, Dr. Shear in 1999. (Id. at Page ID # 2964, 2903.) Ms. Madej continually treats over the phone with Dr. Lieberman and is routinely billed for these remote visits. (Id.). These phone treatments consist of fifteen to thirty minutes of discussion during which she tells him of her subjective symptoms and he may order blood work or additional tests, and note a need for a prescription for oxygen. (ECF 91 at Page ID # 2905.)²

During the period of time she treated with Dr. Lieberman, Ms. Madej frequently requested letters of medical necessity to stop activity in and around her living environments. (ECF 76 at Page ID # 761.) On or about September 1, 2015, Ms. Madej contacted Dr. Lieberman and requested a “letter for asphaltting.” (Id. at Page ID #3052, 3176.) It is undisputed that prior to such time, there was no medical evidence (via either objective medical evidence, or subjective report of symptoms) regarding any sensitivity to asphalt or petroleum based products, and all evidence regarding Ms. Madej’s issues related to sensitivities to vinyl that were located in her home. Notably, the first mention in Lieberman’s records of any sensitivity to asphalt is noted on or about September 1, 2015. In response, Dr. Lieberman wrote several letters in a ten day period, dated September 2, 2015, September 4, 2015, and September 10, 2015. Notably, the September 10, 2015 letter, opined that “...it is strongly advised that activities be avoided within 1 mile of her [Ms. Madej] residence.” (“the September 10, 2015 letter”.) (Id.) This letter was in direct contradiction to a letter written some six days prior, wherein Dr. Lieberman recommended only that “Cynthia Madej be *contacted* prior to planning and a minimum of three days before initiating any road construction or maintenance activity within a 1 mile radius of her residence.”

² Ms. Madej’s Medical records may be found in the deposition of Dr. Allan Lieberman, set forth at ECF No. 91. Progress notes produced therein detail the full extent of her treatment.

(“the September 4, 2015 Letter”).) (ECF 91, Page ID # 3136.) Moreover, the September 10, 2015 letter further contradicted a letter written five years prior indicating that a three block restriction was required for the spraying of pesticides (“the June 29, 2010 letter”).) (Id. at Page ID # 3134.) Dr. Lieberman testified that he had no basis for this one mile restriction – it was arbitrary. (Id. at Page ID # 2930.)

Despite the September 10, 2015 letter opining that “[e]xposures cause her a wide variety of symptoms (migraines, shortness of breath, dizziness, heart racing) and could cause a life-threatening situation (respiratory or heart failure,)” Dr. Lieberman indicated that he had no medical evidence that the asphalt was the specific item that would cause her harm. (Id. at Page ID # 2935.) Further, it is undisputed that Ms. Madej’s most severe symptoms in the presence of the use of asphalt have included headaches, chest tightness, shortness of breath and dizziness. (Id.) Such symptoms can hardly be described as “life threatening.”

C. Ms. Madej’s treatment with Dr. Barbara Singer.

Ms. Madej also relies on the testimony of Barbara Singer, an Osteopath with the Willow Wellness Center with whom Ms. Madej began treating in 2011. (ECF No. 81 at Page ID # 1640.) Dr. Singer has no experience with MCS – testifying it is not her specialty and she would not know how to test for it. (Id. at Page ID ## 1657, 1662, 1694, 1714, 1736.) Like Dr. Lieberman, Dr. Singer indicated that she has no basis for a one mile restriction, and no medical evidence that the use of asphalt chip seal will cause Ms. Madej serious physical harm or death. (Id. at Page ID # 1757.) Dr. Singer testified she advocated for the one mile restriction because that is what Ms. Madej told her she needed. (Id. at Page ID # 1790.) Dr. Singer also admitted she has no independent evidence that any chemicals caused Ms. Madej’s symptoms and in fact, diagnosed her with severe anemia and gastrointestinal disorders. (Id. at Page ID #1674, 1686, 1748, 1784.)

The medical records reveal that Dr. Singer recommended that Ms. Madej see a gastrologist but Ms. Madej did not do so. (Id. at Page ID # 1692, 1784.) Dr. Singer does not dispute that non-use of asphalt or chip seal is not a recommended treatment for anemia. (ECF No. 81 at Page ID # 1760.)

D. The Athens County Engineer determines to chip seal Dutch Creek Road due to residents' complaints about dust.

Dutch Creek Road was the subject of more complaints regarding the dust than any other road in the Athens County. (ECF 96 at Page ID # 3621, see also Page ID #3591, 3631.) There was so much dust the trees appeared brown due to the dust that covered them. (Id. at Page ID # 3623.) The dust on Dutch Creek Road was so problematic someone had put up a sign renaming it to "Dust Creek Road." (Id. at Page ID # 3632.) Residents also complained the dust was affecting their health. (Id. at Page ID # 175.) On account of these complaints, as well as per his required statutory obligations to maintain the roads of Athens County, the Engineer decided to chip seal Dutch Creek Road. (Id. at Page ID # 3631.) Presently, approximately 162.5 miles (45 percent) of the County's total 362.3 miles are chip sealed. (ECF 102-1 at Page ID # 4736.) The remaining roads consist of 47 percent that are paved with hot mix asphalt and 8 percent that are gravel surfaced. (Id.). "Chip seals are widely used to provide a dust free surface and to enhance the performance of rural gravel surfaced roadways, as well as maintain the quality of asphalt surfaced roads." (ECF 102-1 at Page ID # 4736.)

E. The Madejs contact the Athens County Engineer seeking to prohibit the use of standard asphalt chip seal on Dutch Creek Road.

On or about August 2015, Plaintiff herein Robert Madej contacted the Athens County Engineer's Office and informed a staff member that in the event Dutch Creek Road was chip sealed, Ms. Madej would die. (ECF 79 at Page ID # 1302.) Mr. Madej contacted the Athens

County Engineer's Office in response to a phone call he received from Lyle Fuller that the Engineer planned to do roadwork the following day. (ECF 79 at Page ID 1303.) Mr. Maiden directed his road superintendent, Lyle Fuller, to make this call based on a representation regarding the Madejs from his employee, Michael Sheetz. (Id.) It is undisputed that at this time, Ms. Madej was ill with an anemic condition. (ECF 79 at Page ID # 1308.) Such condition was not related to the use of asphalt based chip seal. (Id.)

On August 27, 2015, Athens County Engineer Jeff Maiden met with Robert Madej in person regarding his concerns for Cynthia Madej's health. (ECF 96 at Page ID # 3638.) During that time, the Engineer informed Mr. Madej that they were going to have a "public meeting" in order to allow the neighbors, as well as the Madejs to voice their concerns about the road. (Id.) On or about this time, Mr. Madej presented the June 29, 2010 letter from Dr. Lieberman. (Id. at Page ID # 3640.) As this documentation was from 2010, Mr. Maiden informed Mr. Madej that he would require an updated letter of medical necessity. (Id.) Thereafter, a letter of medical necessity was obtained by the Madejs from Dr. Allan Lieberman, containing the arbitrary one mile restriction. (ECF 91 at Page ID # 3052.)

Thereafter, in a further effort to accommodate the Madejs, Mr. Maiden scheduled a public meeting in order to address the Madejs' concerns and to hear from neighborhood residents regarding the paving of the road. (ECF 96 at Page ID # 3639.) Mr. Maiden notified all residents of Dutch Creek Road about the meeting. (Id. at Page ID # 3641.) Mr. Madej attended, as did residents of Dutch Creek Road who were concerned about their safety. (Id. at Page ID # 3720.) These residents included the principal of the local elementary school and a bus driver who testified that the dust was so thick that he could not see to drive the school bus and he feared for the safety of the children. (Id. at Page ID # 3720.) At the meeting, the residents came together

as a community to discuss how they could help accommodate the Madejs during the paving project. They offered them space in which to camp on their neighboring camp grounds while the chip seal was being applied and offered to bring them food and water. (Id. at Page ID # 3658.) Hotel accommodations during the paving process were also offered to the Madejs at this time but the Madejs rejected such offers because of Ms. Madej's stated sensitivity to carpet fibers. (Id.) After input by Mr. Madej and the residents, Mr. Maiden concluded that there did not appear to be a mechanism for accommodating Ms. Madej. (Id. at Page ID ## 3658-3659.) Notably, no alternatives to standard asphalt chip seal were presented at the time of the meeting. (Id.) Two days after the meeting, the Athens County Engineer acted within his discretion pursuant to his statutory duties in R.C. § 5543.01 to proceed with chip sealing the road. (Id. at Page ID # 3663.) Mr. Maiden did so upon using a Global Positioning System tracking device, measuring the Madejs' home distance from the road at 280-285 feet, almost a full football field, from the road. (Id.) Upon so doing, he concluded that it was unlikely that the fumes would reach Ms. Madej. Mr. Maiden also reviewed the letters of medical necessity from the Madejs, and noted that the proposed restrictions had changed significantly in a five year period from a three block radius to avoid spraying of pesticides and chemicals to a one mile radius, advising that all activity be restricted. (Id. at Page ID # 3663-3664.)

On September 11, 2015, the Engineer informed Mr. Madej that he had decided to move forward with the project. (Id. at Page ID # 3671.) Mr. Maiden notified the Madejs, as well as all residents of Dutch Creek Road via a letter. (Id. at Page ID # 3673.) This letter was sent to the Madejs via certified mail. (Id.) Notably, such letter also provided the Madej with a one-week notice, as requested by Ms. Madej in the September 10, 2015 letter. (Id. at Page ID # 3674.)

On September 18, 2015, the Madejs filed their Complaint in Athens County Common Pleas Court, seeking a preliminary injunction prohibiting the Athens County Engineer from using asphalt chip seal on Dutch Creek Road.

F. The Athens County Common Pleas Court issues an injunction based on the testimony of Robert Madej and Dr. Barbara Singer.

On September 23, 2015, the Athens County Common Pleas Court issued 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.” (ECF 76 at Page ID # 900.) The court issued a written decision, noting as follows:

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.

(Id. at Page ID # 897.)

Subsequently, the Madejs presented Mr. Maiden with a list of alternatives to chip seal. Mr. Maiden reviewed these products and determined that they were not legitimate alternatives to chip and seal. (Id. at Page ID # 3680)

G. Comparative costs of chip seal and the alternative products favor chip seal.

Mr. Maiden took office as the County Engineer on January 7, 2013. (ECF 96-1 at Page ID # 3935.) He worked for his father’s highway construction project from the time he was fifteen years old until he started his own design engineering company in 1999. (ECF 96 at Page ID ## 3553, 3557, 3559)(ECF 96-1 at Page ID # 3936). Mr. Maiden conducted an independent investigation of the products proposed by the Madejs. First, he contacted the Terrazyme provider to discuss the possibility of using such a product in Ohio. (ECF 96 at Page ID # 3682.) He looked into calcium chloride, but residents complained it would rust out their cars. (Id. at Page

ID # 3700.) Notably, he could not find any information or projects to determine whether these products were used in Ohio. (Id. at Page ID # 3567, 3572.) The Engineer testified he had never seen a base stabilizer used as a permanent treatment in Ohio, given issues with rain and clays altering the treatment. (Id. at Page ID # 3572-3, 3682-3.) The Engineer also determined he does not have the necessary equipment for application of these alternative enzyme products, including a stabilizer (grader) to mix in the product, the cost of which is \$800,000.00. He also did not have a sheep's foot roller and necessary water truck. (Id. at Page ID #3628, 3743-3744.)

Jonathan Raab was engaged as an expert witness for the Engineer. He is a licensed professional engineer in the state of Ohio and works for Geo-Technology Associates, Inc. ("GTA"). (ECF 102-1 at Page ID # 4731.) Mr. Raab has extensive experience with road pavement surfaces, including serving as the principal geotechnical engineer, managing pavement design services for reconstruction of 480 projects encompassing over 750 miles of state, county and municipal owned public roadways in Pennsylvania, West Virginia, and Ohio. (Id. at Page ID # 4727.) Raab analyzed the comparative costs between two of the products suggested by Plaintiffs and chip seal. He concluded that the costs of the alternatives grossly exceeded the Engineer's costs to chip seal the two mile section of Dutch Creek Road. Per Mr. Raab, the cost for a double check seal, with an assumption of 23,644 square yards of application, would range from \$70,398 to \$93,864. (Id. at Page ID # 4741.) In contrast, Mr. Raab estimated that the cost for Proguard over a seven year life cycle (similar to chip seal) would be \$146,506 for just the application of a dust suppressant. (Id. at Page ID # 4743). With the required stabilization to an 8" depth accompanying the dust suppressant application, such cost would increase to \$346,313. (Id.) Those costs would be exacerbated if it was necessary to use them on the entirety of Dutch Creek Road which is what Plaintiffs' own expert, Dr. Zannetti recommended. (ECF 83 at Page

ID # 2131-3.) The cheapest dust suppressant the Engineer found would cost six times six times the cost of chip seal. (ECF 96 at Page ID # 3717.)

Although Plaintiffs' expert Dr. David Jones opined that his figures for an alternative treatment were closer or less than the cost of the chip seal, his entire opinion is based solely on information provided by Mr. Madej and therefore not reliable under Fed. R. 702 and *Daubert*. (See Defendant's Motion in Limine to Exclude Plaintiffs' Purported Engineering Experts, ECF No. 108).

IV. ARGUMENT

Plaintiffs assert five claims:

Count I seeks injunctive relief to prevent the paving of Dutch Creek Road with asphalt or chip seal. (ECF No. 16 at Page ID # 132.)

Count II claims civil assault, battery and wrongful death. (Id. at Page ID # 135.)

Count III seeks declaratory judgment that should the Athens County Engineer proceed with chip seal she will suffer assault, battery and/or death. (Id. at Page ID # 136.)

Count IV claims a violation of the Fair Housing Act. (Id. at Page ID # 136.)

Count V asserts claims under the Americans with Disabilities Act. (ECF No. 16 at Page ID # 138.)

For the reasons set forth herein, Plaintiffs' claims fail as a matter of law.

A. Athens County Engineer is entitled to summary judgment on all of Plaintiffs' claims because Ms. Madej's claimed sensitivity is not a medical condition and Plaintiffs cannot demonstrate that Ms. Madej suffers from such sensitivity.

1. Ms. Madej's claimed sensitivity, MCS, has an etiology that is only hypothetical and not a plausible diagnosis, and therefore not a recognized valid medical condition by the World Health Organization, the International Classification of Diseases or by federal courts.

Overriding all of Plaintiffs' claims in their Third Amended Complaint is Ms. Madej's assertion that she suffers from multiple chemical sensitivity ("MCS"). (ECF 16 at Page ID # 133.) According to Plaintiffs, her MCS leaves her with a heightened sensitivity to multiple

chemicals including the chemicals derived from petroleum (“petrochemicals”) used in chip and seal road surfacing. (Id.)

MCS, however, is not recognized as a disease by the World Health Organization or the International Classification of Diseases. (ECF 81 at Page ID # 1792-1793, 1767.) Indeed, Ms. Madej’s primary treating physician put it best when he described MCS as a description, not a diagnosis. (ECF 91 at Page ID # 2941.) MCS’s non-specific medical etiology has lead federal courts to reject evidence of such a condition under *Daubert*, finding that it is not a medically recognized diagnostic condition. See *Snyman v. W.A. Baum Co., Inc.*, No. 04 Civ. 2709 (LTS)(DFE) 2008 U.S. Dist. LEXIS 103266, at *3 (S.D.N.Y. Dec. 22, 2008) *aff’d* 360 F. App’x. 251 (2d Cir. 2010) (“Courts have consistently rejected MCS claims for failing to meet the *Daubert* standard”); *Gabbard v. Linn-Benton Hous. Auth.*, 219 F. Supp. 2d 1130, 1134 (Ore. 2002) (Court granted motion *in limine* to exclude expert testimony on MCS because “[t]o the court’s knowledge, no district court has ever found a diagnosis of [MCS] to be sufficiently reliable to pass muster under *Daubert*”); *Coffin v. Orkin Exterminating Co.*, 20 F. Supp. 2d 107, 110 (Me. 1998) (Court excluded all evidence related to MCS as “every federal court that has addressed the issue of admissibility of expert witness testimony on MCS under *Daubert* has found such testimony too speculative to meet the requirement of ‘scientific knowledge’”); *Summers v. Missouri Pac. R.R. Sys.*, 897 F. Supp. 533, 542 (E.D. Okl. 1995), *aff’d*, 132 F.3d 599 (10th Cir. 1997) (Plaintiffs failed to show that the theories relating to the causes of MCS had been adequately tested); *Frank v. New York*, 972 F. Supp. 130, 136-37 (N.D.N.Y.1997) (Granting motion *in limine* as the theory underlying MCS is “untested, speculative and far from the general acceptance in the medical or toxicology community.”); *Bradley v. Brown*, 852 F. Supp. 690, 698-99 (N.D. Ind.) *aff’d* 42 F.3d 434 (7th Cir. 1994) (finding “the science of MCS’s etiology has not progressed from the plausible,

that is, the hypothetical, to knowledge capable of assisting the fact-finder, jury or judge”); *Sanderson v. Int’l Flavors & Fragrances*, 950 F. Supp. 981, 1002 (C.D. Cal. 1996) (declining to admit any testimony regarding MCS because there is no scientific evidence that it exists as a physiological illness); *Bradley v. Brown*, 852 F. Supp. 690, 698-99 (N.D. Ind.) *aff’d* 42 F.3d 434 (7th Cir. 1994) (finding “the science of MCS’s etiology has not progressed from the plausible, that is, the hypothetical, to knowledge capable of assisting the fact-finder, jury or judge.”).

The *Gabbard* court’s explanation for its decision not to admit MCS related evidence is instructive and applicable here:

Although a great deal has been written about MCS, such writing generally does not constitute “publication” of research contemplated by *Daubert*. Of the scholarly articles which have been peer-reviewed and which discuss MCS as a condition, most, if not all, are anecdotal rather than quantitative, and do not produce scientific support for the existence of the condition. Many of the articles are more properly characterized as advocacy pieces, attempting to persuade clinicians that MCS is a possible diagnosis when other (i.e. testable) conditions have been ruled out. None of them, as far as the court can tell, provide methodologically sound, quantitative research support for the proposition that MCS is a valid diagnosis. It is the publication of this sort of research – basic research, using accepted research techniques, providing scientific (as opposed to anecdotal) evidence of MCS – to which the *Daubert* inquiry is directed.

* * *

MCS is not a complete unknown in the scientific community. There is a great deal of lay literature on the subject, as well as anecdotal and, to a degree, quantitative research publications. Many, even most, physicians probably know that some doctors and researchers promote MCS as a valid diagnosis for some patients when no other appropriate diagnosis can be made. However, **knowledge of a diagnosis is not acceptance of it.**

Gabbard, 219 F.Supp.2d at 1137-1138. (Emphasis added.)

Although some Ohio courts have allowed evidence of MCS for purposes of determining BWC eligibility, intentional torts, STRS eligibility, disability discrimination and home construction, MCS is seldom found determinative. See *Googash v. Conrad*, 2nd Dist. No. 20191, 2004-Ohio-5796 (October 15, 2004)(BWC claim allowed for MCS and other maladies, MCS not distinguished); *Ogilbee v. Bd. of Edu. of Dayton Public Schools*, 2nd Dist. App. No. 23432,

2010-Ohio-1913 (April 30, 2010)(Failed to establish MCS was a disability); *State ex rel Pipoly v. STRS*, 95 Ohio St.3d 327 (2002)(MCS not a basis for disability retirement); *Murray v. E. Ohio Gas Co.*, 110 Ohio App. 3d 57 (7th Dist. 1996) (remanded and allowed for purposes of determining whether there was an intentional tort); *Temple v. Fence One, Inc.*, 8th Dist No. 85703, 2005-Ohio-6628 (December 15, 2005) (fence company not liable for plaintiff's MCS for installing fence two doors down).

Plaintiffs' multiple subsequent re-characterizations of her condition as something other than MCS³ are nothing more than transparent attempts to work around the refusal of federal courts to decline to consider evidence of MCS. Regardless, such efforts are futile because neither Ms. Madej does not present any evidence that the product the Engineer seeks to use on the road will cause her harm. Distilled to their essence, the alleged manifestations of her medical condition are a heightened sensitivity to a vast array of chemicals, the hallmark of an MCS complaint, and not the other conditions she later proposes.

This subterfuge was tried by the plaintiff without success in *Comber v. Prologue, Inc.*, D.Md. CIVIL NO. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331 (Sep. 28, 2000). In *Comber*, Plaintiff also claimed she suffered from asthma as a basis for her claim of disability under the Americans with Disabilities Act. *Id.* at * 11. Her treating physician later expanded his definition of asthma to include "chemical triggers" testifying, "Regardless of whether the diagnosis of [MCS] is recognized in the medical community, persons who suffer bronchial spasms when exposed to

³ ECF 1-1 at Page ID # 5 (life threatening anemic condition); *Id.* at Page ID # 8 (environmental illness and fibromyalgia); ECF 16 at Page ID # 133 (organophosphate poisoning); ECF 91 at Page ID # 2964 (toxic effect of organophosphate poisoning resulting in injury to and dysfunction of multiple organs and symptoms manifesting.) Plaintiffs introduction of these latter named conditions make it questionable whether Athens County Engineer even had fair notice of such claims. See *Comber v. Prologue, Inc.*, No. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331, *6-7 (D. Md. 2000) citing *Smerdell v. Consolidated Coal Co.*, 806 F.Supp. 1278, 1284-85 (N.D. W. Va. 1992.)

even low levels of chemical or physical irritants must avoid such exposure or risk the onset of a life threatening bronchial spasm.” *Id.* at * 17.

The court declined to admit the “readjusted” opinion, noting,

The refusal of the medical community to recognize the existence of a disease known as “MCS” means that under *Daubert*, this Court cannot admit as medical testimony the claim that [plaintiff] “suffer[s] bronchial spasms when exposed to even low levels of chemical or physical irritants,” ***because the claim is based on a diagnosis that is not generally accepted in the medical community.*** [Plaintiff’s] internist admits that he himself has not confirmed and cannot confirm by testing that [Plaintiff] does suffer spasms in response to such stimulants, and so his testimony could only be based on the inadmissible diagnosis.

Id. at *15. (emphasis added).

Because MCS is not a recognized medical condition or disease by any national medical authority, Plaintiff’s medical experts’ opinions do not rest on sound scientific grounds and cannot be validated with any accepted methodology. It cannot be credibly suggested that the diagnosis made by these medical experts has been tested, peer reviewed or generally accepted by the medical community when no established medical association recognizes it as a legitimate medical condition. Therefore they are inadmissible under *Daubert* and Rule 702.

2. Plaintiffs lack the required medical expert to demonstrate causation between Ms. Madej’s claimed sensitivity and the petrochemicals routinely used on our roadways.

Plaintiffs claim that the petrochemicals inherent in chip seal products will undoubtedly cause her serious physical injury or death. In order to prevail on that theory, Plaintiffs must establish both general and specific causation by proving evidence that these petrochemicals are capable of causing and will in fact cause the threatened injury. *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 677 (6th Cir. 2011).

Demonstrating general causation entails establishing that the allegedly injurious chemical is capable of causing a particular injury or condition in the general population. Specific

causation requires a showing that the chemical in fact caused the plaintiff's medical condition. *Baker v. Chevron USA, Inc.*, 680 F. Supp. 2d 865, 874 (S.D. Ohio W.D. 2010), *aff'd*, 533 App'x 509 (6th Cir. 2013). As to specific causation, a plaintiff "must show that [s]he was exposed to the toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition (commonly called a 'dose-response relationship')." *Pluck*, 640 F.3d at 677 *quoting Valentine v. PPG Indus., Inc.*, 158 Ohio App. 3d 615 (Ohio Ct. App. 2004).

Notably in this action, Ms. Madej has yet to be injured by the chip seal product to be used on Dutch Creek Road. Her claim rests on a future unknown. It is a mystery as to how she will demonstrate specific causation. Regardless of her challenge, both of these "causation inquiries involve scientific assessments that must be established through the testimony of a medical expert." *Id.* citing *Baker v. Chevron USA, Inc.*, 680 F. Supp.2d 865, 874 (S.D. Ohio 2010), *aff'd*, 533 Fed. App'x. 509 (6th Cir. 2013) and *Terry v. Caputo*, 115 Ohio St. 3d 351, 356 (Ohio 2007). Without this expert medical testimony, "a plaintiff's toxic tort claim will fail." *Id.* citing *Baker*, 680 F. Supp. 2d at 874.

3. Medical experts have not demonstrated and cannot demonstrate Ms. Madej is sensitive to petrochemicals or the necessary causation inquiries.

Even if the Court declines to disqualify Drs. Lieberman, Singer or Molot, none of their testimony demonstrates the necessary causation between chip and seal components and her alleged sensitivity. None of them have opined on general causation – which any compounds, chemicals or particulates in chip seal applied to the roadway impact the health of residents who live along the road or travel upon it. Plaintiffs' engineer confirmed it presents no such harm to the general public. (ECF 89 at Page ID # 2767, 2784.)

The Sixth Circuit has clarified what is required to prove specific causation and adopts a "differential diagnosis" as an "appropriate method for making a determination of causation for

an individual instance of disease.” *Plunk*, 640 F.3d at 671; *see also Baker*, 533 App’x. at 521 (“We have held previously that the absence of a differential diagnosis is fatal to the admissibility of an expert’s opinion regarding disease causation in cases involving hazardous substances.”)

A differential diagnoses is “a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated.” *Id.* The Sixth Circuit explained further, “a physician who applies a differential diagnosis to determine causation ‘considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and thorough case history.’” *Id.* quoting *Best v. Lowe’s Home Ctrs., Inc.*, 563 F.3d 171, 178 (6th Cir. 2009). Ms. Madej’s medical witnesses failed to perform such diagnosis as they did no clinical tests to determine the causes of her symptoms. Instead, they relied on her own subjective statements and recollection about when she felt poorly and what she might have been exposed to. (ECF 81 at Page ID #, 1649, 1659, 1670, 1712; ECF 91 at Page ID # 2919, 2924, 2926-7, 2994.)

Irrespective of the admissibility of Ms. Madej’s diagnosis of MCS, is the impossibility of relating all of her varying symptoms with the exhaustive list of chemicals to which she is allegedly sensitive that precludes a differential diagnoses. As the *Gabbard* court recognized, “[a]s touched above in the *Daubert* analysis, one of the difficulties with the MCS diagnosis shared by plaintiffs is the breadth of its scope.” *Id.*, 219 F.Supp. at 1140. The court pointed to the medical records provide by plaintiff which presented an array of symptoms he associated with exposure to the contents of a vacuum cleaner bag. Medical personnel could not determine or verify that his reported symptoms were caused by that exposure. The court concluded:

The unfairness of subjecting defendants to civil rights and torts liability based on subjected self-diagnosis which is beyond the pale of scientific or otherwise reliable validation is readily apparent. The cases against the [defendants] have no more

evidentiary support than the case against the contents of the vacuum cleaner bag. They are all far too speculative and unprovable to support a finding of liability.

Id. at 1141.

Even if Drs. Singer, Lieberman and Molot claim to have performed a differential diagnosis, not every opinion reached by way of such a method meets the standard of reliability under *Daubert*. As noted by the Sixth Circuit in *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010), “calling something a ‘differential diagnosis’ or ‘differential etiology’ does not by itself answer the reliability question but prompts three more...” Those ensuing questions that still must be answered are (1) did the expert make an accurate diagnosis of the nature of the disease, (2) did the expert reliably rule in the possible causes of the disease and (3) did the expert reliably rule out rejected causes for the disease. *Id.* “If the court answers ‘no’ to any of these questions, the court must exclude the ultimate conclusion reached. *Id.* The answer to all of these questions in this case is a resounding “no.”

Pluck involved a claim by residents that exposure to benzene caused by a gas pipeline failure caused Non-Hodkins lymphoma (“NHL”). The Sixth Circuit affirmed the district court’s disqualification of plaintiff’s medical expert because he did not provide a specific causation opinion. He failed to conduct a proper differential diagnosis to “rule in” benzene and “rule out” alternative causes such as plaintiff’s smoking and exposure to other solvents.

First, the expert in *Pluck* never discerned plaintiff’s level of exposure to the benzene or whether she was exposed to concentrations greater than EPA safety regulations, which the court found to be a required first step. The expert concluded only that “‘chronic low-level exposure can and does cause NHL;’ that [plaintiff] ‘probably had an injurious exposure to benzene *** considerable above background’; and that ‘[t]here is no safe level for benzene in terms of causing cancer.’” *Id.* at 679. The Court found that analysis unpersuasive and to constitute “pure

conjecture” because the benzene in the plaintiff’s well never exceeded the EPA’s stated maximum permissible contaminant level. *Id.* The court did not allow the expert to just assume the plaintiff was made ill by mere exposure. As the Sixth Circuit also noted in *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 253 (6th Cir. 2001), “an association does not mean there is a cause and effect relationship.” That court further observed, “Before any inferences are drawn about causation, the possibility of other reasons for the association must be examined, including chance, biases such as selection or informational biases, and confounding causes.” *Id.*

Unquestionably, more is required than simply proving the existence of the presence of a toxin in the environment. *Pluck*, at 679. There must be proof that the level of toxin present caused the plaintiff’s symptoms. *Id.*

Second, the expert failed to “rule out” other potential causes of her illness such as her extensive smoking habit. Cigarettes contain benzene and smoking could have produced similar symptoms and contributed to her development of NHL. Plaintiff’s expert also failed to identify other organic solvents to which she may have been exposed and determine her potential level of exposure to them. *Id.* at 679. See also *Roche v. Lincoln Property Co.*, 278 F.Supp.2d 744 (E.D Va. 2003)(A differential diagnoses that failed to rule out other potential causes other than mold or plaintiff’s significant allergies to mites, grass and trees rendered his conclusion unreliable.)

In a subsequent case involving claims of petrochemical poisoning, the Sixth Circuit affirmed summary judgment and the exclusion of the medical expert because plaintiffs could not present individualized exposure data and failed to identify a specific chemical that could cause serious latent disease. Specifically, the court agreed the expert’s report was inadmissible because the expert (1) failed to identify the dose of benzene that was causally related to plaintiff’s claimed blood diseases, (2) failed to present any specific information as to the dose of benzene to

which each plaintiff was exposed, (3) did not cite any scientific literature that established that short term exposure to benzene was capable of causing plaintiffs' diseases, (4) relied on studies that contained results that were statistically insignificant, and (5) did not conduct a differential diagnosis or other accepted scientific methodology for ruling out non-benzene explanations for plaintiffs' diseases. *Baker v. Chevron U.S.A., Inc.*, 533 Fed. App'x. 509, 519 (6th Cir. 2013). Similar to the *Nelson* case, the appellate court noted that benzene originates from other sources such as vehicle exhaust, cigarette smoke and common household products such as glue and paint. 533 Fed. App'x. at 512.

Similarly, Ms. Madej's medical experts did not even try to ascertain a level of unsafe exposure to petrochemicals, only claiming that any trace amount, however slight, will be sufficient to trigger her reported symptoms. Given they did no clinical testing and relied only on her own anecdotal evidence, such conclusions are speculative. Speculation is not a valid methodology. *Tamraz*, 620 F.3d at 674. See also *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579, 590, 113 S. Ct. 2786 (1993) ("the word 'knowledge' [in Fed. R. Evid. 702] connotes more than subjective belief or unsupported speculation.")

Ms. Madej is also exposed to petrochemicals on a daily basis such as those chemicals that off-gas through oxidation of the chip seal on Dutch Creek Road over the past ten years and fuel exhaust from traffic on the road. (ECF 91 at Page ID # 2766.) Her primary concerns as related to Dr. Singer were exhaust, pesticides and herbicides. (ECF 81 at Page ID # 1734-5.) Yet, none of these sources of potential contaminants were considered by her medical experts as contributing factors to her alleged symptoms. Moreover they are contraindicated to Plaintiffs' claims as Ms. Madej has been exposed to them for years and has not died.

4. Ms. Madej cannot base her claims on her own testimony nor does her testimony demonstrate that she suffers from a heightened sensitivity to chip seal.

Plaintiffs cannot rely on Ms. Madej's own testimony to support her claimed heightened sensitivity. First, causation must be proved by a medical expert since this case involves scientific analysis beyond the experience of laymen. She cannot withstand summary judgment by relying on her testimony as to her alleged symptoms and personal beliefs as to the cause of those symptoms. *Baker*, 680 F. Supp. 2d at 874; *Sanderson v. International Flavors & Fragrances, Inc.*, 950 F. Supp. 981, 985 (C.D. Ca. 1996); *Parker v. Employers Mut. Liability Ins. Co. of Wisconsin*, 440 S.W.2d 43, 49 (Tex. 1969).

B. Athens County Engineer is entitled to have the injunction lifted.

Plaintiffs request in Count One that the Athens County Engineer be enjoined from paving Dutch Creek Road and ordered him to use an alternative product not harmful to Ms. Madej. (ECF No.16 at Page ID # 134.) As demonstrated herein paving the road with chip seal will not threaten the health of Ms. Madej and there are no viable reasonable alternatives.

The standard for granting a preliminary and permanent injunction is essentially the same except that for the latter, Plaintiffs must demonstrate actual success on the merits rather than a likelihood of success. *ACLU of Ky. v. McCreary County, Ky.*, 607 F.3d 439, 445 (6th Cir. 2010). Therefore, Plaintiffs must show "(1) that they will suffer a continuing irreparable injury if the court fails to issue an injunction; (2) that there is no adequate remedy at law; (3) that, considering the balance of hardships between the [Plaintiffs and the Athens County Engineer], a remedy in equity is warranted; and, (4) that it is in the public's interest to issue the injunction." *Sherful v. Gassman*, 899 F. Supp.2d 676, 708 (S.D. Ohio 2012), *aff'd sub nom.*, *Sherfel v. Newson*, 768

F.3d 561 (6th Cir. 2014). These are not all necessary requirements, rather they are factors for the court to weigh and balance in determining whether to issue a permanent injunction.

(i) *Plaintiffs cannot show they will suffer a continuing irreparable injury.*

As demonstrated above, there is no admissible evidence that Ms. Madej has any sensitivity to chip seal much less that would cause her grave injury or death. Plaintiffs have resided on Dutch Creek Road since 2010 which has been treated with chip seal before they moved there and Ms. Madej has not suffered severe injury or death.

(ii) *Plaintiffs cannot show that the balancing of hardships is in their favor.*

In this matter the balancing of hardships falls in favor of the residents of Dutch Creek Road who are living with inordinate amounts of dust and potholed travel and the citizens of Athens County who will shoulder the financial cost of any alternative product. The road is in bad need of resurfacing. It is used by school buses and dust is ever present danger not able to be cured with alternative products without great expense to the County. County residents will suffer from a depletion of fiscal reserves to treat the road with a more costly product.

(iii) *Plaintiffs cannot show that the injunction is in the public's interest.*

For the same reasons stated above, the injunction is not in the public's interest and there is no evidence that it is a reasonable measure to alleviate Ms. Madej's claimed health concerns.

C. Athens County Engineer is entitled to summary judgment on Plaintiffs' claim for civil assault, battery and/or wrongful death as such claims are not yet ripe and the Engineer is immune from liability under R.C. 2744.

Plaintiffs claim in Count Two that the Athens County Engineer recklessly, wantonly and in bad faith gave Plaintiffs too little notice of his intent to pave Dutch Creek Road and to discuss alternative surface treatments. However, Plaintiffs do not allege that Ms. Madej has in fact been assaulted, harmed or died given the Athens County Engineer's lack of notice. In Count Three,

Plaintiffs seek declaratory judgment that should the Athens County Engineer proceed with chip sealing the road, Ms. Madej will suffer serious physical harm and that the Athens County Engineer will then be liable for civil assault and battery and/or wrongful death. Essentially Plaintiffs ask the Court to foretell future liability and damages as to events that have not yet occurred. Plaintiffs' claims in Counts Two and Three are not yet ripe for adjudication.

1. Plaintiffs' claims are not ripe.

It is well established that "[t]he power of the federal courts is limited to hearing actual cases and controversies." U.S. Const., art. III, §2, cl. 2; *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The U.S. Supreme Court has articulated three requirements for ripeness. First, the Plaintiff must have "...suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual and imminent, not conjectural or hypothetical." *Id.* Second, a plaintiff must demonstrate causation—*i.e.*, that her injury is "fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court." *Id.* Lastly, the plaintiff must prove that it is likely, rather than merely speculative, that a favorable decision could redress the injury. *Id.* at 561.

Here, Ms. Madej's claims are not ripe because the actions which she claims will cause her harm have not yet been taken. It is axiomatic that at this time, Ms. Madej is alive and was subject to a deposition. (ECF 76.) With respect to her assault and battery claims, Ms. Madej testified that her claims are prospective in nature, *i.e.*, that they "will happen if he [the County Engineer] goes forward with the project." (ECF 76 at Page ID # 770.) Ms. Madej testified as follows: "My husband and I, my doctors have made him aware that medical harm *will* happen if he puts chip and seal in, and he has decided to pursue putting chip and seal in. Thus it *will* cause physical harm if he continues down that path." (ECF 76 at Page ID # 770.) (Emphasis added.)

As Ms. Madej has sustained no harm (let alone one which is concrete and particularized) from the Engineer, her claims are not ripe for adjudication. Moreover, as set forth above, Plaintiffs fail to prove causation via the use of their experts because no differential diagnosis testing was performed. Finally, Ms. Madej's claims regarding her injury are merely speculative, and are based solely on the opinions of herself, her husband and her two treating physicians who never tested her for the chip seal substance. (ECF 76 at Page ID # 770.) For these reasons, Ms. Madej's assault, battery, and wrongful claims fail as a matter of law.

2. Ms. Madej's assault, battery and wrongful death claims independently fail as a matter of law.

Even assuming *arguendo* that Ms. Madej's claims for assault met the ripeness requirement, her assault claims still fail as a matter of law. In Ohio, an assault is an *unlawful* offer or attempt, coupled with a present ability, to inflict an injury upon the person of another. *Woods v. Miamisburg City Schools*, 254 F.Supp.2d 868, 878 (S.D.Ohio 2003) citing *Daniel v. Maxwell*, 176 Ohio St. 207, 208 (Ohio 1964). It is undisputed that the chip sealing of the road is not unlawful, but, moreover, is mandated by the Ohio Revised Code. Ohio Rev. Code Ann. § 5543.01(A) states in pertinent part:

...the county engineer shall have general charge of the following: (1) Construction, reconstruction, ***improvement, maintenance, and repair of all bridges and highways within the engineer's county, under the jurisdiction of the board of county commissioners***, except for those county roads the board places on non-maintained status pursuant to section 5541.05 of the Revised Code.

(Emphasis added). In fact, courts have found county engineers liable for improper maintenance of such roads. See *Helton v. Scioto County Bd. of Comm'rs*, 123 Ohio App. 3d 158, 164 (4th Dist. 1997) (holding that improper maintenance of a drainage ditch, resulting in an accumulation of water on a county road, may render the county liable for maintaining a nuisance on the roadway.) It is undisputed that Dutch Creek Road is not presently on unmaintained status, and

is within the jurisdiction of the Athens County Board of County Commissioners. (ECF 96-1 at Page ID # 3832.)

Ms. Madej testified that her assault claim is based on the fact that “My husband and I, my doctors have made him aware that medical harm will happen if he puts chip and seal in, and he has decided to pursue putting chip and seal in. Thus it will cause physical harm if he continues down that path.” (ECF 76 at Page ID # 770.) Plaintiffs’ Complaint alleges that “should Defendant proceed with the chip and seal project...” (ECF 16 at Page ID # 134.) It is undisputed that at present no chip seal has been applied to Dutch Creek Rd. since before the injunction issued in September, 2015. (ECF 76 at Page ID # 846.) Ms. Madej presents no evidence that the Engineer intends to cause her harm by an unlawful act. In fact, the record establishes that the Engineer went to great lengths in order to accommodate her and listen to her and her husband’s concerns. (ECF 96 at Page ID # 3659.) The Engineer testified that his decision to pave the road was based on his recollection of a public meeting, which occurred as follows:

Basically, what I got out of it was that the road could not be chip and sealed. Alternative products were not mentioned at that point. There was nothing like that. And they couldn’t meet – they couldn’t leave or go anywhere else, even if we paid for it. Even if it was anything like that, there wasn’t an opportunity to go to another location so that we could fix the road. There were no alternatives, and I think that was –the frustration that gradually built up in the room was there was no alternative. The alternative was, we’re going to live here, and you can’t touch – you can’t do anything with the road, basically, is what came out in that meeting.

(Id.) As the Madejs include no evidence that the Engineer intends, via an unlawful offer or attempt to harm Ms. Madej, her claims for assault fail as a matter of law.

Ohio law defines a battery as “an intentional contact with another that is harmful or offensive.” *Gerber v. Veltri*, 702 Fed. App’x. 423, 433 (6th Cir. 2017)(citing *Love v. City of Port Clinton*, 37 Ohio St. 3d 98, 99 (Ohio, 1988)). Federal courts, in addressing particulate touching, apply state law to determine if a state law battery claim has been construed to apply to particulate

touching. See *Barnette v. Grizzly Processing, LLC*, 809 F.Supp.2d 636, 648 (E.D.Ky. 2011). Ohio law has extended the definition of battery to include particulate touching. See *Leichtman v. WLW Jacor Communications*, 92 Ohio App.3d 232, 235 (1st Dist.1994). Importantly, such claims will not stand where there is no “intent” and only a “substantial certainty” that the substance will reach the plaintiff. *Leichtman* involved a party intentionally blowing cigar smoke in Leichtman’s face. *Id.* In holding that this constitutes a battery, Ohio courts specifically rejected the notion that a battery may occur only where this is a “substantial certainty” that the particulate could touch the Plaintiff.

We do not, however, adopt or lend credence to the theory of a "smoker's battery," which imposes liability if there is substantial certainty that exhaled smoke will predictably contact a nonsmoker. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke* (1990), 63 S.Cal.L.Rev. 1061, 1090. Also, whether the "substantial certainty" prong of intent from the Restatement of Torts translates to liability for secondary smoke via the intentional tort doctrine in employment cases as defined by the Supreme Court in *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St.3d 115, 570 N.E.2d 1108, paragraph one of the syllabus, need not be decided here because Leichtman's claim for battery is based exclusively on Furman's commission of a deliberate act. Finally, because Leichtman alleges that Furman deliberately blew smoke into his face, we find it unnecessary to address offensive contact from passive or secondary smoke under the "glass cage" defense of *McCracken v. Sloan* (1979), 40 N.C.App. 214, 217, 252 S.E.2d 250, 252, relied on by the defendants.

Id. at 235-236. At most, Plaintiffs’ allege that the Engineer “knew with substantial certainty.” (ECF 16 at Page ID # 135.) Such allegations are insufficient to meet the definition of battery for purposes of a particulate exposure. Moreover, it is undisputed that the chip seal will not be applied directly to Ms. Madej’s skin, but instead will be applied to the road in front of her house. (ECF 76 at Page ID # 771.) As Plaintiffs fail to demonstrate intent to harm Ms. Madej with the use of the chip seal, or that there is a “substantial certainty” that the particulate will touch Ms. Madej, the Plaintiff’s claims for battery fail as matter of law.

It is undisputed that Ms. Madej is still presently alive. Ohio Rev. Code Ann. § 2125.01 sets forth the statute of limitations for wrongful death at 2 years. Such an action requires “the death of a person...” Ohio Rev. Code Ann. § 2125.01. As Ms. Madej is not dead, her wrongful death claim fails as a matter of law.

3. The Engineer is immune from liability on Plaintiffs’ state law claims pursuant to Ohio Rev. Code Ann. § 2744.02(A)(1)

Ohio Rev. Code Ann. § 2744.02(A)(1) provides:

For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in division (B) of this section, a political subdivision is not liable in damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

Ohio Rev. Code Ann. § 244.01(C)(1)(e) specifically defines a governmental function as “the regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, and public grounds.” It is undisputed that Plaintiffs’ claims are solely against Jeff Maiden in his official capacity as the Athens County Engineer. (ECF 16 at Page ID # 132.) As Plaintiffs allege no facts which would demonstrate an exception to the immunity conferred in Ohio Rev. Code Ann. § 2744.02(A)(1), the Engineer in his official capacity is immune from Plaintiffs’ state law claims.

Moreover, for the same reasons that none of Plaintiffs’ other claims have merit due to her inability to demonstrate that she suffers from MSC or that chip seal will cause the grave injury she fears, these claims fail.

D. Athens County Engineer is entitled to summary judgment on Plaintiffs’ claim for violation of the Fair Housing Act (“FHA”) because it does not apply to Plaintiffs’ situation and Plaintiffs cannot demonstrate that their requested accommodation is reasonable.

1. The FHA does not apply to a county engineer's road maintenance program.

Plaintiffs claim in Count Four that the Athens County Engineer has discriminated against them in violation of the Fair Housing Act. Their claimed basis for the discrimination is the Athens County Engineer's failure to honor their requested accommodation in the surfacing of Dutch Creek Road. Plaintiffs rely on two federal statutes, neither of which is applicable here.

First they cite to 42 U.S.C. §3604(f)(2) which provides that it is 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." This matter does not involve the sale or rental of a dwelling.

Next they cite to 42 U.S.C. §3604(f)(3)(B) which provides that such discrimination includes a "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." This statute is analogous to its precursor 42 U.S.C. § 3604(b) which prohibited such discrimination on race. The latter has been held not to extend to every decision of a governmental agency that may have an indirect impact on housing. Otherwise, the FHA would be a "civil rights statute of general applicability rather than one dealing with the specific problems of fair housing." *S. Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot.*, 254 F. Supp.2d 486, 503 (N. J. 2003) quoting *Jersey Heights Neighborhood Assoc. v. Glendening*, 174 F.3d 180, 193 (4th Cir. 1999). In *S. Camden*, the residents claimed nuisance and violations of the FHA based on the state environmental agency's allowance of a permit to a cement company which they believed would cause substantial harm to the community of minority residents. The court determined that because the state agency did not provide specific residential services and was not responsible for door-to-door ministrations such as those

provided by police and fire or other municipal units, plaintiffs failed to state a claim under the FHA.

Similarly, the Western District of Kentucky, when confronted with a lawsuit under this section refused to conclude that every action which produces a discriminatory effect is illegal. Such a *per se* rule would go beyond the intent of Congress and would lead courts into untenable results in specific cases.'" *Graoch Assocs. # 33 Ltd. P'ship v. Louisville & Jefferson County Metro Human Rels. Comm'n*, 430 F. Supp. 2d 676 (WD KY 2006) quoting *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977). In *Graoch*, the owner of an apartment complex withdrew his participation in the federal section 8 housing program and was promptly sued by several African American tenants who could no longer afford to live there. The court held that the landlord's decision, standing alone, was not sufficient to establish a *prima facie* case of discrimination even if it disproportionately impacted a protected class. To include road paving by a state or local agency in the swath of "rules, policies, practices or services" covered by §3604(f)(3)(B) of the FHA is equally untenable, as it is too attenuated from the provision of housing. To include county services such as road maintenance converts the FHA into a general civil rights statute.

Plaintiffs rely on *Anderson v. Blue Ash*, 798 F3d. 338 (6th Cir. 2015). However that is distinguishable to the situation present here. *Anderson* involved a zoning law that prohibited plaintiff from housing a miniature horse that was allegedly necessary to accommodate her daughter's disability. That impacted the plaintiff's property directly. In the instant matter, Plaintiffs complain of a service that occurs off the property that they find offensive, much like the plaintiffs in *S. Camden*.

2. Plaintiffs cannot demonstrate that Ms. Madej is disabled.

As demonstrated above, Ms. Madej cannot prove she is disabled. There is no evidence that she has this claimed sensitivity to chip seal that would prohibit her from residing in her housing of choice if Dutch Creek Road was paved with chip seal. Thus she cannot meet a primary element of her claim under the FHA.

3. Plaintiffs cannot demonstrate the elements of the FHA's three operative elements of the FHA reasonable accommodation – equal opportunity, necessity and reasonableness.

A disabled individual may rely on one of several different theories to establish a violation under this section of the FHA. Those include disparate treatment, disparate impact, a failure to make a reasonable accommodation or a failure to permit a reasonable modification. *Hollis v. Chestnut Bend Homeowners Assn*, 760 F.3d 531, 539 (6th Cir. 2014). Plaintiffs are relying on the theory of a failure to make a reasonable accommodation. (ECF 16 at PageID # 137, ¶¶ 38-44.) Such theory focuses on the “operative elements” of Section 3604(f)(3)(B) – “whether the proposed accommodation is reasonable and whether it is necessary to afford disabled persons an equal opportunity for enjoyment” of their dwelling. *Hollis*, 760 F.3d at 539.

“Equal opportunity” means that disabled individuals are entitled to live in the same residences and communities as non-disabled individuals, insofar as that can be accomplished through a reasonable accommodation or modification.” *Id.* at 541 . “The necessity element is *** a causation inquiry that examines whether the requested accommodation *** would redress injuries that otherwise would prevent a disabled resident from receiving the same enjoyment from the property as a non-disabled person would receive.” *Id.* “Plaintiffs must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice.” *Smith & Lee Associates, Inc. v. City of Taylor, Michigan*, 102 F3d 781, 795 (6th Cir. 1996).

Important to Ms. Madej's situation, "[t]he concept of necessity requires at a minimum the showing that the desired accommodation will affirmatively enhance a disabled plaintiff's quality of life by ameliorating the effects of the disability." *Smith & Lee*, 102 F.3d at 795. See also *Horn v. Knight Facilities Mgmt.-GM*, 556 Fed.App'x 452, 455 (6th Cir. 2014) (holding that the proposed accommodation of "no exposure to cleaning solutions" was not reasonable because plaintiff's job would still have to involve exposure to cleaning chemicals, and where plaintiff provided no evidence that the provision of a respirator would significantly reduce her respiratory exposure.) Ms. Madej cannot prove that her claimed MCS will be ameliorated by use of the alternative products instead of chip seal. She currently claims to suffer ill effects from vehicle exhaust that currently exists on Dutch Creek Road. She also cannot presently spend time outside of her home due to the neighbors' use of lawn mowers and tractors. None of those conditions will be alleviated by these alternative products. She will remain as isolated and home bound as she is now. Importantly, it is undisputed that Ms. Madej ***continues to become sicker***, despite the presence of the injunction on the road – ergo, there is no medical or anecdotal evidence that the proposed accommodation will alleviate her alleged harm. (ECF No. 76 at Page ID # 807.)

Ms. Madej presents no evidence that such an accommodation will alleviate her symptoms. See Ms. Madej, as well as all of her physicians agree they have no medical evidence that the proposed alternative products are safer. (Id. at Page ID # 821.) Notably, it is also undisputed that some of the products proposed by Ms. Madej (Durasoil, Dustless and Envirokleen) are considered to be organic petroleum products and could contain petroleum compounds. (ECF 102-1 at Page ID # 4737, 4740.) Where she provides no evidence that the proposed accommodation will alleviate her sensitivity, such an accommodation is not reasonable.

Reasonableness is a balancing test measured by weighing the burden imposed on the defendant against the benefit received by the disabled individual. “A modification should be deemed reasonable if it ‘imposes no “fundamental alteration in the nature of the program” or “undue financial and administrative burdens.” *Hollis*, 760 F.3d at 542. Undue hardship is not an element of a reasonable accommodation claim. It is only one consideration in the determination of reasonableness and the balancing between the plaintiffs need and the defendants’ interest. *Id.* at 543; *Smith & Lee Associates*, 102 F.3d at 795. Therefore the burden to show the accommodation is reasonable and necessary is on the Plaintiffs. *Hollis*, 760 F.3d at 543. Plaintiffs have no evidence to sustain their burden of showing reasonableness or necessity.

In this case, the requested accommodation is also unreasonable as it imposes a financial burden on the Engineer’s Office and the County, as well as its residents, as funds would have to be diverted for the alternative product and the purchase of the additional equipment. Plaintiffs’ proposed two categories of alternative products: dust suppressants and enzyme products. As set forth in Defendant’s expert report, the enzyme products proposed by Plaintiffs’ expert Dr. Jones, Fusion and Envirokleen, were significantly more expensive than chip seal, and therefore were not evaluated based as to performance. (# ECF 201-1 at Page ID # 4742.) Raab did cost out Terrazyme, but it failed to meet ODOT standards for required compressive strength of 300 pounds per square inch (psi) and only had a strength of approximately 69 psi. (*Id.* at Page ID # 4775.) Mr. Raab also did not believe in his expert opinion that Terrazyme was an appropriate stabilizer for the roadway. (*Id.* at Page ID # 4735.) The comparison performed by Defendant’s expert places the annual cost of the use of dust suppressants at \$146,506 versus the double chip seal application cost of \$82,771. These costs do not even account for equipment that the Engineer would have to purchase. There is also no likelihood that the alternative product would

work. Mr. Maiden could not find anyone to tell him about their experience using these products in Ohio. Plaintiff's own expert, Dr. Jones, has never compared chip seal with any of these alternative products. He has no experience with actually building a road with any of these products. He cannot give a reliable opinion and his testimony should be excluded under Daubert. (See Defendant's Motion in Limine to Preclude Plaintiffs' Expert Engineers, ECF 108.) Finally, there is no evidence that the alleged alternative products will not reach Ms. Madej and cause her to become ill. In contrast, Dr. Kreich testified that the particulates from solid asphalt do not travel more than 50 feet from the edge of the road. (ECF 105 at Page ID # 5062.) The record reflects that Ms. Madej's property is approximately 280 feet from the roadway. (ECF 96 at Page ID # 3663.) For these reasons, and those set forth in the Engineer's expert reports, the proposed alternatives are not reasonable.

Lastly, Plaintiffs ignore the impact on the other residents of Dutch Creek Road who would be subjected to increased dust which poses its own health hazards especially for those suffering from asthma and whose cars would be subject to rust if Dr. Jones's recommendation to use a chloride product was followed. Third party interests are an important consideration in any analysis of the reasonableness of an accommodation. The Sixth Circuit noted in *Temple v. Gonsalus*, No. 95-3175, 1996 U.S. App.LEXIS 24994 *aff'd* 97 F.3d 1452 (6th Cir. 1996) that "[t]he requirement of reasonable accommodation does not entail an obligation to do everything humanely possible to accommodate a disabled person." *Id.* quoting *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995). In *Temple*, the court refused to evict one tenant whose cleaning products allegedly inflamed another tenant's MCS. The *Temple* court relied on *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041 (7th Cir. 1996) which involved a plaintiff who suffered from epilepsy that claimed a violation of the ADA when employer refused to let him bump a

more senior employee out of a job that the plaintiff would have been able to perform. The Seventh Circuit affirmed summary judgment where the district court had held that in a conflict between the rights of the disabled employee and the rights of his co-workers, “as a matter of law the co-workers rights did not have to be sacrificed on the altar of “reasonable accommodation.”

The requested accommodation is unreasonable as it imposes a fundamental alteration in the nature of the county’s road maintenance services and causes undue financial burden on the County. Plaintiffs have not met their burden to prove the requested accommodation is reasonable and necessary.

E. Athens County Engineer is entitled to summary judgment on Plaintiffs’ claim for violation of the American with Disabilities Act (“ADA”).

1. Title III of the ADA does not apply to the Athens County Engineer as it does not apply to public entities nor does this case involve a public accommodation.

Count Five of Plaintiffs’ Third Amended Complaint asserts that the Athens County Engineer failed to make reasonable modifications on behalf of Plaintiffs in the resurfacing of Dutch Creek Road. Plaintiffs claim that the Athens County Engineer’s refusal to consider alternatives to chip seal for surfacing Dutch Creek Road violates the ADA, particularly 42 U.S.C. § 12812(b)(2)(A)(iii) which includes as discrimination:

a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

That statute however is the implementing statute for Title III of the ADA which provides:

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of

any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

To establish a prima facie case of discrimination under Title III, Plaintiffs must demonstrate that (1) Ms. Madej has a disability, (2) the Athens County Engineer owns, leases, or operates a place of public accommodation; and (3) the Athens County Engineer discriminated against them on the basis of the Ms. Madej's disability in the full and equal enjoyment of that place of public accommodation. *C.S. v. Ohio High Sch. Ath. Ass'n*, No. 1:14-cv-525, 2015 U.S. Dist. LEXIS 99003, *16-17 (S.D. Ohio W.D. 2015). Dutch Creek Road is not a place of public accommodation and Title III does not apply.

"Public accommodation" is defined at 42 U.S.C. 12181(7) to specifically include the following:

The following private entities are considered public accommodations for purposes of this title [42 USCS §§ 12181 et seq.], if the operations of such entities affect commerce--

(A) an inn, hotel, motel, or other place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, lecture hall, or other place of public gathering;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other sales or rental establishment;

(F) a laundromat, dry-cleaner, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other service establishment;

(G) a terminal, depot, or other station used for specified public transportation;

- (H) a museum, library, gallery, or other place of public display or collection;
- (I) a park, zoo, amusement park, or other place of recreation;
- (J) a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education;
- (K) a day care center, senior citizen center, homeless shelter, food bank, adoption agency, or other social service center establishment; and
- (L) a gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation.

None of those entities are involved here. Moreover, the Sixth Circuit has held that Title III does not apply to public entities. *Miller v. City of Knoxville*, No. 3:03-cv-574, 2006 U.S. Dist. LEXIS 61786, *5-6 (E.D. Tenn. 2006) citing *Sandison v. Michigan High School Athletic Assoc., Inc.*, 64 F.3d 1026, 1036 (6th Cir. 1995). Therefore this provision relied upon by the Plaintiffs is inapplicable to their claims.

2. ADA Title II does not apply as Dutch Creek Road is not a service, program or activity.

Should the Court instead apply Title II of the Americans with Disabilities Act, Plaintiffs' claim still fails. Title II provides that that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the *services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.*" (Emphasis added.) 42 U.S.C. § 12132. Dutch Creek Road is not a service, program or activity of a public entity.

The goal of Title II was to assure that disabled persons were not deprived of government services and programs because of discrimination and such impediments as physical or other barriers to their access and enjoyment of such services, programs or activities. As the Sixth Circuit has stated:

By separately identifying as requirements of public entities that they not deny qualified disabled individuals the benefits of public services and that they not discriminate against such individuals, the provision demands more of public entities than simply refraining from intentionally discriminating against disabled individuals. ***"Congress not only required all public entities to refrain from discrimination"). In stating that public entities shall not deny qualified disabled individuals the benefits of public services, § 202 necessarily requires that public entities provide such individuals the means necessary to acquire access to these services. (Citations omitted.)

Ability Ctr. of Greater Toledo v. City of Sandusky, 385 F.3d 901, 910 (6th Cir. 2004).

Decisions involving violations of Title II consistently speak to access and eligibility to government provided services and programs. See e.g. *Ability Ctr. of Greater Toledo*, *supra*. Plaintiffs claimed in *Ability Ctr.* that the City's failure to install curb cuts in its new sidewalks violated Title II. The court held:

In conclusion, § 202 of Title II does not merely prohibit intentional discrimination. It also imposes on public entities the requirement that they provide qualified disabled individuals with meaningful access to public services, which in certain instances necessitates that public entities take affirmative steps to remove architectural barriers to such access in the process of altering existing facilities.

Id. at 913.

See also *Wolfe v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11 AP-345, 2011-Ohio-6825. "Title II requires public entities to make reasonable accommodations to enable disabled individuals to receive meaningful access to the services, programs, or activities that the public entities offer." *Id.* citing *Ability Ctr.*, 385 F.3d at 907. The court further stated "[a] proposed modification only qualifies as a reasonable accommodation if it allows the disabled individual to obtain access that he or she would not normally have by reason of his or her disability." *Id.* at *3.

Additionally, the definition of "qualified individual with a disability" is defined under the regulations as "an individual with a disability who, *with or without* reasonable modifications to rules, policies, or practices, *the removal of architectural*, communication, or transportation *barriers*, or the provision of auxiliary aids and services, meets the essential eligibility

requirements for the receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. §12131(2).

As can be seen, the goal of Title II is to provide meaningful access to the provision of services by removing the barriers to that service. Plaintiffs here are not claiming they are deprived of or made ineligible for government services, programs or activities. Their claim is that Ms. Madej will be injured by the paving process and that they will not have access to their home or property if the road is paved with chip seal. This court has no subject matter jurisdiction of this claim as the ADA does not apply.

3. Plaintiffs cannot demonstrate that Ms. Madej is disabled.

As demonstrated above, Ms. Madej cannot prove she is disabled. There is no evidence that she has this claimed sensitivity to chip seal that would prohibit her from residing in her housing of choice if Dutch Creek Road was paved with chip seal. Thus, Plaintiffs cannot meet a primary element of their ADA claim.

4. The Athens County Engineer did not violate the Title II of the ADA as Plaintiffs’ request for accommodation was not reasonable because it was not necessary, there is no evidence that it will work, it is too costly and it would fundamentally alter the service.

To state a claim under Title II or the Rehabilitation Act, Plaintiffs must show that Ms. Madej is: 1) disabled; 2) otherwise qualified; and 3) "excluded from participation in" a program, "denied the benefits of" a program, or "subjected to discrimination" by an entity receiving Federal money or by a public entity. *McNamara v. Ohio Bldg. Auth.*, 697 F. Supp. 2d 820, 826 (N.D. Ohio 2010 W.D.); *see also Dillery v. City of Sandusky*, 398 F.3d 562, 567 (6th Cir. 2005) citing *Jones v. City of Monroe*, 341 F.3d 474, 477 (6th Cir. 2003). Even if Ms. Madej could satisfy the elements of an ADA claim, which the above shows she cannot, the claim fails because

her requested accommodation is unreasonable. Nonetheless, they still cannot prove this claim as their accommodation is unreasonable.

Two types of claims are cognizable under Title II: claims for intentional discrimination and claims for a reasonable accommodation. *Roell v. Hamilton Cty.*, 870 F.3d 471, 488 (6th Cir. 2017) citing *Ability Ctr. of Greater Toledo*, 385 F.3d at 907. Plaintiffs' allege a failure to provide a reasonable accommodation.

The implementing regulations of Title II state:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modification is necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter the nature of the service, program or activity*.

Id. at 827 citing 28 C.F.R. § 35.130(b)(7). (Emphasis added.)

Plaintiffs requested accommodation is unreasonable as it is not necessary, there is no evidence it would work, it is too costly, and it would fundamentally alter the nature of the services. An accommodation is generally necessary only "when it allows the disabled to obtain benefits they ordinarily could not have by reason of their disabilities, and not because of some quality they share with the public generally." *Wis. Community Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 754 (7th Cir. 2006); *Henrietta D. v. Bloomberg*, 331 F.3d 261, 276 (2d Cir. 2003) (same principle). There must be an "identifiable relationship, or nexus, between the requested accommodation and the individual's disability." Joint Statement of The Department of Housing and Urban Development and the Department of Justice, Reasonable Accommodations Under the Fair Housing Act (May 14, 2014); *see also PGA Tour v. Martin*, 532 U.S. 661, 688, 121 S.Ct. 1879 (2001) (Stating that Title III of the ADA requires courts to examine whether a requested accommodation is necessary for the disabled person). "Ordinarily, an accommodation of an

individual's disability operates so that the *disability* is overcome and the disability no longer prevents the individual from participating." *Sandison v. Michigan High School Athletics Assn*, 64 F.3d 1026, 1035 (6th Cir. 1995) (emphasis in the original). As demonstrated for purposes of Plaintiffs' FHA claim, they will not be in a better situation if the road were paved with chip seal. Importantly, Title II does not require public entities to employ any and all means to make services, programs and activities accessible to persons with disabilities and does not require them "to compromise their essential eligibility criteria for public programs." *Ability Ctr.* 385 F.3d at 907 quoting *Tennessee v. Lane*, 541 U.S. 509, 530, 124 S. Ct. 1978 (2003). "It requires only "reasonable modifications" that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service. *Id.* Plaintiffs' requested modifications would essentially turn Dutch Creek Road in to a gravel road at great expense thus fundamentally altering the Engineer's road maintenance services.

V. Fed. R. Civ. P. 56(c) Summary Judgment Standard.

Federal Rule of Civil Procedure 56(c) empowers the court to render summary judgment forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." There is no genuine issue of material fact when the "record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 136, 89 L.Ed.2d 538 (1986). The Court is not required to adopt a non-moving party's version where it is "so utterly discredited by the record" as to be rendered a "visible fiction." *Harvey v. Campbell County, Tennessee*, 453 Fed.App'x. 557, 561 (6th Cir. 2011), citing

Chappell v. Cleveland, 585 F.3d 901, 906 (6th Cir. 2009), citing *Scott v. Harris*, 550 U.S. 372, 380-1, 127 S.Ct. 1769 (2007).

The Supreme Court instructs “the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion” against a party who fails to make that showing with significantly probative evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 211, 91 L.Ed.2d 202 (1986). “Summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules of civil procedure as a whole.” *Silver Constr. v. Franklin Township*, 966 F.2d 1031, 1034 (6th Cir. 1992). Even cases involving state of mind issues are not necessarily inappropriate for summary judgment. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

VI. CONCLUSION

Plaintiffs’ primary basis for their claims, Ms. Madej’s alleged multi-chemical sensitivity to chip seal, is not supported by the required medical expert testimony or any facts in the record. Nor can they demonstrate that there requested accommodation to use alternative chemical products, untried in Ohio, on an arbitrary two mile stretch of road, is reasonable. There are no genuine issues of material fact and the Athens County Engineer is entitled to judgment in his favor as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2018, a copy of the foregoing Motion for Summary Judgment was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Maribeth Meluch
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