IN THE COURT OF COMMON PLEAS
ATHENS COUNTY, OHIO

Cynthia Madej, et al.,	:	
	:	
Plaintiffs,	:	Case No. 22CI0122
	:	
vs.	:	Visiting Judge Crawford
	:	
Athens County Engineer Jeff Maiden, et al.	:	
	:	
Defendants.	:	

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

I. Introduction

From September 2015 through October 2020, Cynthia Madej and her husband maintained a lawsuit against Athens County Engineer Jeff Maiden in which the Plaintiffs alleged that Ms. Madej suffers from a disability that is aggravated by the petrochemicals contained in "chip seal" asphalt which is commonly used to pave roads. The Plaintiffs asked that the Engineer be prohibited from using such materials within a one-mile radius of her home. The Engineer was ultimately granted summary judgment on Plaintiff's claims because Plaintiffs could not show the requisite causation that the chemicals in asphalt chip seal would make Ms. Madej ill. This ruling was upheld on appeal.

On August 1, 2022, Ms. Madej and her husband again filed a lawsuit against the Engineer (as well as the Athens County Board of Commissioners) in which they allege that she suffers from a disability that is aggravated by petrochemicals contained in chip seal asphalt. The Plaintiffs again ask that the Engineer be prohibited from using such materials within a one-mile radius of her home.

The law is well established that once plaintiffs bring a lawsuit and loose on the merits, they do not get to turn around and file a second lawsuit based upon the same transaction or occurrence in the first lawsuit in an effort to achieve a different result.

Accordingly, Plaintiffs cannot establish that there is a substantial likelihood that they will prevail on the merits of their claims. Therefore, Defendants respectfully submit that Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction ("Plaintiffs' Motion") should be denied.

II. Statement of Facts and Procedural Background

A. *Madej I*

Since 2015, and following dozens of residents petitioning the Athens County Board of Commissioners to improve pothole-ridden Dutch Creek Road, the Engineer has been attempting to fulfill his legal duty to pave that road. See R.C. 5543.01(A).[1] Since that time, Plaintiffs have used the judicial system to attempt to stop him. Despite their efforts being rejected by the United States District Court for the Southern District of Ohio, the United States Court of Appeals for the Sixth Circuit, and the United States Supreme Court ("*Madej I*"), they now renew their attempts before this Court ("*Madej II*").

Plaintiff's Third Amended Complaint, the subject of the *Madej I* lawsuit, filed October 18, 2016 in the District Court alleged in pertinent part the following:

> 3. This case involves a dispute over a paving project that has begun and is scheduled to continue on Dutch Creek Rd. in Athens County, Ohio.
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> 4. For many years Defendant and his predecessor in office had been on notice that Cindi suffers from chemical sensitivity, also known as environmental

[1] Importantly, 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.).

> illness, which renders many substances used in road paving highly toxic to her, including but not limited to petrochemicals used in "chip and seal" road surfacing.
>
> * * *
>
> 8. Defendant refused to consider options for treating or surfacing the road that would be safe for Cindi, and refused to delay the project to give sufficient time to investigate options to treat or surface the road that would not pose a risk of serious physical harm or death to Cindi, though NUMEROUS other options do exist. See Exhibit 2 (list of dust control and surfacing options not involving the use of tars and petrochemicals).

Exhibit A.

The injunctive relief sought by Ms. Madej in her Third Amended Complaint was an order to the Defendant "to improve Dutch Creek Road within one mile of Plaintiff's residence with an alternative or alternatives to chip and seal and asphalt that would not harm Cindi." ¶18 of Exhibit A. More specifically, she sought the following:

> For a temporary restraining order, preliminary injunction and permanent injunction enjoining Defendants and\or their agents, servants, assigns, licensees or employees, from causing serious physical harm or death to Plaintiff Madej, and from causing serious emotional distress to both Plaintiffs by applying any road surfacing or dust-control treatments to Dutch Creek Road that would harm Ms. Madej including but not limited to chip and seal, asphalt, or any other petrochemical-based road surfacing or dust-control products.

(Pgs. 7-8 of Exhibit A). The Plaintiffs' based their Third Amended Complaint on the following legal claims for and/or under: (1) Civil Assault and Battery and/or Wrongful Death (Count Two); (2) Declaratory Judgment – Civil Assault and Battery and/or Wrongful Death (Count Three); (3) Plaintiff The Fair House Amendments Act, 42 USC 3601, et sq.; (Count Four); and (4) Americans with Disabilities Act, 42 USC 12101, et seq.; (County Five). Exhibit A.

Following years of costly and time-consuming discovery wherein the Madejs were given every opportunity to demonstrate that the chemicals used in asphalt chip seal would result in harm

to Ms. Madej, the Court dismissed her case based upon her inability to establish with any admissible medical evidence that she would be hurt by the application of asphalt. As set forth in the prior briefing, Ms. Madej's "exquisite sensitive" involves sensitivity to most all substances and there is simply no amount of accommodation that will ameliorate the harms she alleges will befall her. Interestingly, paving and other activity has proceeded on or around the Madej residence since the dismissal of *Madej I* and Ms. Madej has not yet suffered death, as Plaintiffs alleged she would. The Engineer moved for summary judgment and the Plaintiffs moved for partial summary judgment. *Madej v. Maiden*, Case No. 2:16-cv-658, 2018 U.S. Dist. LEXIS 178776, at *1 (S.D. Ohio October 17, 2018). The Defendants further moved to exclude the testimony of Ms. Madej's treating physicians, Dr. Singer and Dr. Liberman, as well as Plaintiff's medical expert, Dr. Molot for failing to meet the requirements for expert opinion testimony. Id. at *9. In granting these three motions, the District Court found that the causation opinions of all three doctors were not reliable under the standards enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and consequently, were inadmissible. Id. at **24, 29, 40.

As to the Engineer's Motion for Summary Judgment on the Plaintiffs' claim for permanent injunctive relief, the District Court held as follows:

> Count I seeks permanent injunctive relief to prevent the paving of Dutch Creek Road with asphalt or chip seal. (*Third Am. Comp.*, ECF No. 16, p. 1.) The standard for granting a permanent injunction requires that Plaintiffs demonstrate "(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 defendant[], a remedy in equity is warranted; and (4) that it is in the public's interest to issue the injunction." *Sherfel 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). *Inasmuch as the Court has ruled that the medical opinions are not admissible, Plaintiffs are unable to establish a material issue of fact on the first element of this claim, and the claim must fail.*

Id. at *40-41 (emphasis added). After granting summary judgment to Engineer on the Plaintiffs' remaining legal claims, the District Court concluded that it "encourages the County Engineer to give Ms. Madej notice far in advance of road work and to explore any remedial measures which could reduce environmental emissions near her home." Id. *44-45.

The Madejs subsequently appealed the District Court's evidentiary ruling and its rejection of their federal claims. *Madej v. Maiden*, 951 F.3d 364, 369 (6th Cir. 2020). While they abandoned their state-law clams, they did separately challenge the District Court's rejection of what they call their "injunction count" (the Sixth Circuit noted an injunction is a remedy, not a claim, and that if they cannot show "actual success" on their claims, they cannot obtain a permanent injunction). Id. at 369. The Sixth Circuit summed up the legal issue on appeal as follows:

> In this case, if the asphalt in chip seal would not cause Ms. Madej's negative reactions, the Madejs could not show that the roadwork would create an unequal opportunity for her to enjoy her home. Without that causal connection, the Madejs' proposed alternatives would also not be necessary (that is, "'indispensable,' 'essential,' something that 'cannot be done without'") to redress what turned out to be non-existent harms.

Id. at 371-372. In affirming the District Court's decision, the Sixth Circuit held as follows:

> All told, the district court did not abuse its discretion in finding the opinions of these doctors inadmissible. Because the Madejs do not challenge the need for expert causation testimony, the absence of that evidence compels summary judgment for the Athens County Engineer. That said, we second the district court's hope that the county engineer will give the Madejs "notice far in advance of road work." *Madej*, 2018 U.S. Dist. LEXIS 178776, 2018 WL 5045768, at *16. But that is all we can do. Our task is solely to answer the legal questions arising out of the parties' dispute. *The policy questions about how best to reconcile the needs of the residents who travel Dutch Creek Road with the needs of Cynthia Madej are for the county engineer and the local community to whom he answers.*

Id. at 377 (emphasis added).

The Plaintiffs subsequently filed with the Sixth Circuit a petition for rehearing en banc. *Madej v. Maiden*, No. 18-4132, 2020 U.S. App. LEXIS 9593 (6th Cir. Ohio March 26, 2020).

Although the petition then was circulated to the full court, no judge requested a vote on the suggestion for rehearing en banc, and therefore, the petition was denied. Id. at *1.

While the Plaintiffs then filed with the United States Supreme Court a petition for writ of certiorari, that petition was denied on October 13, 2020. *Madej v. Maiden*, 2020 U.S. LEXIS 4869 U.S., October 13, 2020).

B. *Madej II*

The Plaintiffs' Verified Complaint filed on August 1, 2022 in *Madej II* raises the same facts as that alleged *Madej I*. The Verified Complaint states in pertinent part:

> 2. Plaintiff Cynthia Madej is substantially impaired by a disability that makes her extremely sensitive to petrochemicals, including asphalt. Every time Defendant Jeff Maiden (Defendant Maiden), the Athens County Engineer, directs his crews to use asphalt and other petroleum products on roads within approximately one mile of Ms. Madej's house on Dutch Creek Road, a home specially built for her disability, she suffers from severe reactions that exacerbate her impairments and her ability to engage in major life activities and enjoy her home for days and even months.
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> 3. The solution is simple: reasonably accommodate Ms. Madej by using an effective and available alternative at a comparable cost. There are alternative road treatment methods that do not use asphalt products yet are just as effective in maintaining roads, especially low-traffic volume roads like those within one mile of Plaintiffs' home. These products would substantially decrease the impact on Plaintiff Cynthia Madej's disability and allow her to participate equally in many life activities. Moreover, some alternatives cost no more than "chip sealing" (also known as "chip and seal"), which is road surfacing with asphalt emulsion and other petrochemicals detrimental to Ms. Madej.
>
> 4. Ms. Madej requested the use of one of these alternatives as a reasonable accommodation for her disability. Yet, Defendants have repeatedly rejected this simple solution.

See Verified Complaint.

Also as in *Madej I*, the Plaintiffs in *Madej II* again ask that the Engineer be "enjoined from chip sealing and applying additional asphalt products to the segments of road that are within one

mile of Plaintiffs' home." Paragraph 10 of Verified Complaint. More specifically, Plaintiffs have stated:

> Plaintiffs respectfully request that the Court **GRANT** their Motion for a Temporary Restraining Order and Preliminary Injunction, and issue a temporary restraining order and preliminary injunction (1) enjoining Defendant Athens County Engineer Jeff Maiden from applying any petrochemical-based road surfacing, maintenance products, or dust-control products to which Ms. Madej is sensitive to roads *within a one mile radius of Plaintiffs' home*, including the section of Dutch Creek Road from its intersection with Stanley Road to its intersection withSR550, and the section of N. Peach Ridge Road that lies within a one-mile radius of Plaintiffs' home; (2) requiring Defendant Maiden to remove the 200 tons of asphalt he has applied to N. Peach Ridge Road; (3) requiring Defendant Maiden to provide notice at least 3 days in advance for any work being performed on Dutch Creek Road or. Peach Ridge Road within a one-mile radius of Plaintiffs' home; (4) requiring Defendant Maiden to provide notice at least 30 days in advance of larger or extended activities on Dutch Creek Road or N. Peach Ridge Road within a one-mile radius of Plaintiffs' home; and (5) requiring Commissioners Eliason, Chmiel and Adkins to rescind their approval of Defendant Maiden's asphalt projects on Dutch Creek Road and Peach Ridge Road.

See pgs. 26-27 of Plaintiffs' Motion (emphasis added).

III. Law and Argument

In deciding whether to grant a preliminary injunction, a court must look at: (1) whether there is a substantial likelihood that plaintiff will prevail on the merits; (2) whether plaintiff will suffer irreparable injury if the injunction is not granted; (3) whether third parties will be unjustifiably harmed if the injunction is granted; and (4) whether the public interest will be served by the injunction. *Valco Cincinnati, Inc. v. N & D Machining Service, Inc.* (1986), 24 Ohio St. 3d 41, 492 N.E.2d 814; *Goodall v. Crofton* (1877), 33 Ohio St. 271. Further, the party seeking the preliminary injunction must establish their right to a preliminary injunction by showing clear and convincing evidence of each element of the claim. *Mead Corp., Diconix, Inc., Successor v. Lane* (1988), 54 Ohio App. 3d 59, 560 N.E.2d 1319. The injunction must be sufficiently specific to permit compliance without the fear of an accidental violation. *Id.* at 67.

In *Migra v. Warren City School District Bd. of Educ.*, the United States Supreme Court expressed its preference for the use of the term "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing future litigation rather than the more traditionally utilized term of "res judicata." 465 U.S. 75, 77 n. 1 (1984). In Ohio, "[t]he doctrine of *res judicata* encompasses the two related concepts of claim preclusion, also known as *res judicata* or estoppel by judgment, and issue preclusion, also known as collateral estoppel." *O'Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, 862 N.E.2d 803, ¶ 6. "The applicability of res judicata is a question of law that is subject to de novo review." *Althof v. State*, 4th Dist. Gallia No. 04CA16, 2006-Ohio-502, at ¶ 13.

Prior to 1995, claim preclusion in Ohio was referred to as "a final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction . . . is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them." *Grava v. Parkman Township* (1995), 73 Ohio St. 3d 379, 381, 653 N.E. 2d 226 (citing *Norwood v. McDonald* (1943), 142 Ohio St. 299, 52 N.E. 2d 67, paragraph one of the syllabus). In 1995, the Supreme Court of Ohio greatly expanded the application of *res judicata*/claim preclusion:

> In recent years, this court has not limited the application to the doctrine of *res judicata* to bar only those subsequent actions involving the same legal theory of recovery as a previous action. [] 'It has long been the law of Ohio that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.' We also declared that 'the doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.'
>
> Today, we . . . hold that a valid judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.

Grava, 73 Ohio St. 3d at 382, 653 N.E. 2d 226.[2] Citing to 1 Restatement of the Law 2d, Judgments (1982), Section 24(1), the *Grava* Court explains that:

> When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar, the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. . . That a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories depend on different shadings of the facts, or would emphasis different elements of the facts, or would call for different measures of liability or different kinds of relief.

Id. 382-383, 653 N.E. 2d 226.[3]

The Supreme Court of Ohio in *Grava* even noted that "[t]he instability that would follow the establishment of a precedent for disregarding the doctrine of *res judicata* for 'equitable' reasons would be greater than the benefit that might result from relieving some cases of individual hardship." *Id.* at 384, 653 N.E. 2d 226. The holding in *Grava* is entirely dispositive of such a contention, since it makes clear that this issue is no longer whether a party could have brought a claim in a first action, but instead it is whether or not a "subsequent action is based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action." *Grava*, 73 Ohio St. 3d 379, 653 N.E. 2d 226, at syllabus 1. "Transaction" is defined as a "common nucleus of operative facts." Id. at 382.

As set forth above, *Madej I* involved Plaintiffs' allegation that Ms. Madej suffered from a disability that is aggravated by petrochemicals contained in "chip seal" asphalt, and they asked

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[2] The *Grava* Court noted that the case before it involved claim preclusion only. *Id.* at 381.

[3] The doctrine of *res judicata*/issue preclusion, on the other hand, sets forth that a "fact or a point" that has been determined by a court in a competent jurisdiction may not be drawn into question amongst the same parties "whether the cause of action in the two actions be identical or different." *Fort Frye Teachers Ass'n v. State Empl. Rels. Bd.*, 81 Ohio St.3d 392, 395, 692 N.E.2d 140 (1998). Issue preclusion is intended to preclude parties from contesting matters which they have already had a full and fair opportunity to litigate. *Montana v. United States*, 440 U.S. 147, 153-154 (1979).

that the Engineer be prohibited from using such materials within a one-mile radius of her home. This was the "transaction or occurrence" at issue *Madej I*. A final determination was reached on the merits. *Madej II* involves claims arising out of the same "transaction or occurrence" (namely, Ms. Madej's alleged exquisite sensitive to asphalt) that was present in *Madej I*. Accordingly, *Grava* makes clear that because *Madej II* is a "subsequent action [] based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action," which was *Madej I*, the Plaintiffs' claims for injunctive relief are barred by the doctrine of claim preclusion.

The fact that the Plaintiffs were careful in *Madej II* not to plead any of their causes of action under the same statutes or torts that they pled in *Madej I* does not stop claim preclusion from applying. As the *Grava* Court made clear: "[t]hat a number of different legal theories casting liability on an actor may apply to a given episode does not create multiple transactions and hence multiple claims." Id. at 382. The Supreme Court of Ohio has since reiterated that whether the original claim explored all the possible theories of relief is not relevant, since:

> [i]t has long been the law of Ohio that 'an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit.' (Emphasis added.) * * * The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it.

Brown v. City of Dayton, 89 Ohio St. 3d 245, 248, 730 N.E.2d 958, 962, 2000 Ohio LEXIS 1603, *9, 2000-Ohio-148 (citing *Natl. Amusements, Inc. v. Springdale* (1990), 53 Ohio St. 3d 60, 62, 558 N.E.2d 1178, 1180, quoting *Rogers v. Whitehall* (1986), 25 Ohio St. 3d 67, 69, 25 Ohio B. Rep. 89, 90, 494 N.E.2d 1387, 1388); *Ensley v. City of Dayton* (Aug. 16, 1995), 2nd Dist. No. 14487, 1995 Ohio App. LEXIS 3366, at *12-13 (holding that "the critical question in determining whether *res judicata* precludes a second suit *is not whether the causes of action are identical but whether*

the factual issues underlying the causes of action are essentially identical and all that has been changed in the second suit is the legal implication of those facts")(emphasis added).

Similarly, claim preclusion still applies despite Plaintiffs' claim that Ohio law and federal law is different concerning what evidence is sufficient to make expert testimony reliable[4], or despite the fact that neither the District Court nor the Sixth Circuit addressed all of the substantive legal issues under the ADA raised by the Plaintiffs in *Madej I*. Verified Complaint at ¶¶68-71. *Grava* make clear that claim preclusion still applies even if "several legal theories depend on different shadings of the facts, or would emphasis different elements of the facts, or would call for different measures of liability or different kinds of relief." *Grava* at 382-383. In fact, the Supreme Court of Ohio was clear that:

> The present trend is to see [a] claim in factual terms and to make it conterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff * * *; *regardless of the variations in the evidence needed to support the theories or rights.*

Grava at 229. Regarding the Plaintiffs' argument that she should be permitted to maintain a claim for denial of a reasonable accommodation of Ms. Madej's disability under R.C. Chapter 4112 because neither the District Court nor the Sixth Circuit addressed the merits of that same claim under the ADA, the Supreme Court of Ohio has been clear that even a dismissal founded on a complaint's "'failure to state a claim upon which relief can be granted' constitutes a judgment that is an 'adjudication on the merits.'" *State ex rel. Acres v. Ohio Dep't of Job & Family Servs.*, 2009-Ohio-4176, at ¶15, 123 Ohio St. 3d 54, 914 N.E.2d 170.

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[4] While an exception to *issue preclusion* found at Restatement (Second) of Judgements § 28(4) can be found when "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with regard to the issue in the initial action," this exception only applies to *issue preclusion* and is therefore inapplicable to *claim preclusion*. *Dennis v. Berne Twp. Trs.* Case No. C2-04-CV-1185, 2006 U.S. Dist. LEXIS 2450, *10 (S.D. Ohio January 24, 2006).

Further instructive is the case of *Powell v. Doyle*, where the Eighth District applied *Grava* and held that a valid, final judgment on the merits bars all subsequent litigation arising out of the same transaction or occurrence that was the subject matter of the prior litigation. *Powell v. Doyle* (Oct. 8, 1998), 8th Dist. No. 72900, 1998 Ohio App. LEXIS 4812. Distinctly, the *Powell* court held:

> In *Grava, supra*, at syllabus, the Court held that "[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action."
>
> ****
>
> Therefore, *even though the federal court's dismissal order attempts to limit the order to "only those claims that were brought in this case," the order also governs the state claims based on the same operative facts*. Therefore, because plaintiff's federal discrimination claim and state breach of contract claim present the same cause of action, the trial court's limiting language does not prevent the application of res judicata to plaintiff's state breach of contract claim. *Accordingly, res judicata bars plaintiff's state claims*.

Id. at *16-18 (emphasis added).

Footnote number 2 in the Plaintiffs' Motion, and the two cases cited therein, do not allow for the Plaintiffs to avoid the preclusive effect of claim preclusion. They first cite to *State of Ohio ex rel. Susan Boggs v. City of Cleveland,* 655 F.3d 516, 523-24 (6th Cir. 2011), which they claim holds that "under Ohio law, res judicata does not apply due to change in scope of project." Plaintiffs' Motion at FN. 2. *Boggs*, however, determined that claim preclusion did not apply because "Ohio law instructs that dismissals for lack of standing do not trigger res judicata." Id. at 521. Unlike the prior state court suit in *Boggs* that was dismissed based upon a determination that the plaintiffs' lacked standing, there is no dispute that *Madej I* was determination upon the merits.

Boggs did also find that the 2004 and 2007 runway expansions were distinct events from an earlier expansion which could not have been raised in the earlier 2002 lawsuit, and therefore, these subsequent expansions resulted a new transaction or occurrence such that res judicata could

not apply. Id. at 523-524. Nevertheless, there is no dispute that *Madej I* did involve the same transaction or occurrence alleged in *Madej II*, which is whether Ms. Madej has a disability aggravated by the petrochemicals contained in chip seal such that the Engineer should be prohibited from paving with the same within a one-mile radius of her home. The fact that the Plaintiffs' attempt to differentiate *Madej I* by claiming at Footnote 2 of their Motion that N. Peach Ridge Road, which Plaintiffs actually conceded is also within a mile of their home, has been paved with asphalt, or that the Engineer allegedly intends to double the amount of asphalt to the paving of Dutch Creek Road, does not change the fact that *Madej II* involves the same occurrence or transaction as *Madej I* (again, that Ms. Madej has a disability aggravated by petrochemicals in chip seal such that the Engineer should be prohibited from paving within a one mile radius of her home). Thus, not only could the Plaintiffs have brought such claims in *Madej I*, the Plaintiffs actually did bring such claims in *Madej I*.

The second case that the Plaintiffs cite in Footnote Number 2 is *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St. 3d 193, 195 (1983), which they assert holds that "issue preclusion only bars 'the relitigation in a second action of an issue or issues that have been actually and necessarily litigated and determined in a prior action.'" They claim that *Madej I* involved the admissibility of expert medical testimony under the Federal Rules of Evidence, and that *Madej II* involves the admissibility of expert medical testimony under the Ohio Rules of Evidence. Id.[5]

[5] In any event, the most recent Staff Notes to Ohio Evidence Rule 702 (Testimony by Experts) make clear that his no difference between the Federal and Ohio Rules of Evidence on this issue: "(While decisions under the federal rules of evidence are frequently inapposite to the interpretation of the Ohio rules, see Evid.R. 102, the federal counterpart to Evid.R. 702 has been interpreted as incorporating a reliability requirement. *Daubert*, supra. To that extent, the United States Supreme Court's discussion of the considerations that may be relevant to a reliability determination may also be helpful in construing the Ohio rule. See id., 113 S.Ct. at 2795-2796.)."

The Plaintiffs are correct that the holding in *Goodson* concerns issue preclusion/collateral estoppel. Id. Defendants here, however, have not argued that the Plaintiffs' claims for injunctive relief are barred by the doctrine of *issue preclusion*. Because the Defendants' argument is that the Plaintiffs' claims are barred by the doctrine of *claim preclusion*/estoppel by judgment, *Goodson* is wholly inapplicable. Moreover, *Powell* makes clear that a final judgment on the merits of federal claims governs state claims based on the same operate facts such that claim preclusion applies. *Powell* at *18.

Finally, the Plaintiffs claim that "this matter includes parties who were not parties to the prior case (Commissioners)" such that "[r]es judicata thus does not apply." Motion at FN. 2. The Supreme Court of Ohio has reiterated the holding in *Grava* that claim preclusion provides that "'[a] final judgment or decree rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction * * * is a complete bar to any subsequent action on the same claim or cause of action between the parties *or those in privity with them.*'" *State ex rel. Harsh v. Oney*, 138 Ohio St. 3d 192, 193, 2014-Ohio-458, ¶4, 5 N.E.3d 610, 611 (citing *Grava* at 381)(emphasis added). To decide if identity of parties exists, courts look beyond nominal parties to discover the real party in interest. *State ex rel. Hofstetter v. Kronk* (1969), 20 Ohio St. 2d 117, 119, 254 N.E.2d 15. It is well established that a county is the real party in interest in actions brought against county agencies or heads of agencies. Id. at paragraph three of the syllabus; see also *Bd. of Comm'rs v. City of Hamilton*, 145 Ohio App. 3d 454, 465, 763 N.E.2d 618, 626 ("Consequently, contrary to the County's claims, Butler County was the real party in interest in the bond validation proceeding, even though the City sued only the County auditor"). Accordingly, the Engineer is in privity with the Athens County Board of Commissioners such that claim preclusion applies.

Accordingly, the law is clear that the Plaintiffs' attempts to re-litigate the transaction or occurrence in *Madej I*, which is whether Ms. Madej has a disability aggravated by exposure to petrochemicals and if so, whether the Engineer should be prohibited from using chip seal within a one-mile radius of her home, tearing up the application of other already applied asphalt products, and the provision of other notice items, is barred by the doctrine of claim preclusion. Therefore, the Plaintiffs cannot carry their burden of establishing a substantial likelihood that they will prevail on the merits of their claims. Thus, this Court's should deny the Plaintiffs' Motion.

IV. In the alternative, this Court must require the Plaintiffs to post sufficient security.

Should this Court somehow find that Plaintiffs' request for injunctive relief is not barred by the doctrine of claim preclusion and that the Plaintiffs can otherwise carry their burden to obtain injunctive relief, this Court must require the Plaintiffs to post sufficient security. Civil Rule 65 (Injunctions) provides in pertinent part as follows:

> (C) Security. *No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety*, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.
>
> The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court.

(emphasis added).

The Engineer has been attempting to pave a deteriorating Dutch Creek Road since 2015. Even cost and delays caused by *Madej I* (and now, *Madej II*) notwithstanding, the planning, preparation, and cost of paving any road is significant. It requires that a contract be prepared and put out to public bid as required by R.C. 307.90. Any significant delay in the execution of the publicly awarded paving contract, particularly in light of the fact that road paving in Ohio, due to

weather, typically cannot be performed after October, will cost the Defendants hundreds of thousands of taxpayer dollars.

Accordingly, if this Court grants injunctive relief to the Plaintiffs, it must first require the Plaintiffs to post a sufficient surety to protect the financial interest of the Defendants and the taxpayers they have been elected to represent.

V. Conclusion

For the above reasons, this Court should deny the Plaintiffs' Plaintiffs' Motion For Temporary Restraining Order and Preliminary Injunction. If this Court nevertheless grants the Plaintiffs injunctive relief, it must require the Plaintiffs to post sufficient security.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 5, 2022, a copy of the foregoing was filed served on the following by the undersigned counsel via email:

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EXHIBIT A

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

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

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

- COUNT ONE -
(INJUNCTIVE RELIEF)

1. Plaintiff Cynthia Madej (hereinafter "Cindi" or "Mrs. Madej") is a resident of Athens County, Ohio.

2. Defendant is an Athens County resident sued in his official capacity as Athens County Engineer.

3. This case involves a dispute over a paving project that has begun and is scheduled to continue on Dutch Creek Rd. in Athens County, Ohio.

4. For many years Defendant and his predecessor in office had been on notice that Cindi suffers from chemical sensitivity, also known as environmental illness, which renders many substances used in road paving highly toxic to her, including but not limited to petrochemicals used in "chip and seal" road surfacing.

5. Despite the County Engineer's knowledge of Mrs. Madej's medical condition, the Defendant went forward with a plan to apply a chip and seal road surface to Dutch Creek Rd. Plaintiffs learned only about two weeks and four days before filing their September 15th, 2015 Complaint in state court that such a project would apparently be moving forward.

6. After Plaintiffs learned of the proposed road surfacing plans, Plaintiffs provided Defendant with copies of two physician's letters confirming that road paving projects which use petrochemicals within one mile of Cindi's residence could cause serious physical harm or be life threatening to Mrs. Madej (e.g. could cause respiratory or heart failure, or paralysis). One of the letters also informed Defendant that Mrs. Madej suffers from a life-threatening anemic condition that has placed her health in a precarious position and that in light of her weakened condition even small exposures to chemical stressors create a serious hazard for her. The letters further informed Defendant that Cindi is unable to relocate from her home due to the severity of her sensitivities and the specialized living environment she requires. An affidavit from Cindi's doctor confirming these facts and indicating that any such road work on Cindi's road (Dutch Creek Road) would be injurious and could cause death is attached hereto as Exhibit 1.

7. Though Defendant had notice that serious injury or death would likely result from the use of chip and seal surfacing within one mile of Cindi's residence, he nevertheless moved forward with the plan to use chip and seal within one mile of her residence.

8. Defendant refused to consider options for treating or surfacing the road that would be safe for Cindi, and refused to delay the project to give sufficient time to investigate options to treat or surface the road that would not pose a risk of serious physical harm or death to Cindi, though NUMEROUS other options do exist. See Exhibit 2 (list of dust control and surfacing options not involving the use of tars and petrochemicals).

9. Defendant mailed a letter dated Friday September 11th, 2015 to Dutch Creek Road residents including Plaintiffs (which Plaintiffs' received on Monday September 14th, 2015) indicating a that the Dutch Creek Road chip and seal project would begin on Monday September 14th, 2015. See Exhibit 3.

10. Defendant in fact commenced grading and road preparation on Dutch Creek Road

on Monday September 14th, 2015.

11. Defendant proceeded with the project with full knowledge that applying the chip and seal surface would cause death or serious physical harm to Cindi.

12. On September 15th, 2015 the Athens County Common Pleas Court granted a temporary restraining order to halt the installation of chip and seal on Dutch Creek Road which was already underway. The Temporary Restraining Order prohibited the Defendant from installing chip and seal on Dutch Creek Road past its intersection with Stanley Road, approximately one mile from the Plaintiffs' residence.

13. On September 23, 2015, after a hearing in open court, the Athens County Common Pleas Court granted a preliminary injunction ordering that no chip and seal paving occur within a one mile radius of Plaintiffs' house, and finding that Plaintiffs had a substantial likelihood of success on the merits, that there was no unjustifiable harm to other residents of the road, and that Plaintiffs proved by clear and convincing evidence the necessity of preliminary injunctive relief. See Decision Granting Preliminary Injunction; Journal Entry, attached hereto as Exhibit 4.

14. Plaintiff promptly violated the aforementioned temporary restraining order by extending chip and seal within the prohibited section beyond Stanley Road and closer than one mile from the Plaintiffs' house.

15. Should Defendant proceed with the chip and seal project Defendant would negligently, recklessly, knowingly and intentionally cause physical harm and/or death to Cindi and cause severe emotional distress to Cindi and her husband, Plaintiff Robert Madej.

16. In such instance, the Defendant's aforesaid negligent, reckless, knowing, and intentional acts would be the proximate cause of Plaintiffs' injuries.

17. Plaintiff seeks only injunctive relief at this time, and does not seek damages. Thus political subdivision immunity contained in O.R.C. §2744.01, et seq. (which explicitly applies only to actions for damages) is in no way implicated.

18. Plaintiff seeks and is entitled to a permanent injunction ordering the Defendant to improve Dutch Creek Road within one mile of Plaintiff's residence with an alternative or alternatives to chip and seal and asphalt that would not harm Cindi (preferably but not necessarily with one of the options proposed by Plaintiffs in Exhibit 2).

19. Plaintiff has an excellent chance of prevailing on the merits of its claims given that political subdivision immunity does not apply and there is ample evidentiary support from her physician.

20. No third parties will be harmed given the numerous dust control and road surfacing options that the county has which do not involve substances that would cause injury or death to Mrs. Madej.

21. The public interest will be served given that public officials should be strongly discouraged from intentionally and unnecessarily causing serious physical harm or death to citizens when numerous non-injurious and non-fatal alternatives exist.

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

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

23. Though Defendant knew, has long known, and knew with substantial certainty that Plaintiff Mrs. Madej would suffer serious physical harm or death if a chip and seal project proceeded, Defendant assured the Plaintiffs both in the spring of 2015 and throughout the summer of 2015 that there were no plans chip and seal to Dutch Creek Road. When plans to chip and seal Dutch Creek Road were made, Defendant assured Plaintiffs it would not proceed with applying chip and seal.

24. Defendant further knew, has known, and knows with substantial certainty that Mrs. Madej cannot be relocated given that she requires a specialized living environment, and is physically frail. See e.g. Exhibit 1. Defendant has been informed of this very explicitly by both the Plaintiffs and their physicians.

25. Despite its knowing with substantial certainty that Mrs. Madej could not be relocated Defendant recklessly, wantonly and/or in bad faith gave Plaintiffs grossly insufficient notice that they were reversing their earlier statements and were in fact proceeding with the chip and seal project on Dutch Creek Road.

26. Defendant recklessly, wantonly and/or on bad faith gave so little notice of the reversal of the decision not to chip and seal Dutch Creek Road that there was and is insufficient time to find a new location and build a new sealed residence for Ms. Madej so as to protect her from serious physical harm or death. Relocation is currently an impossibility as Cindi's doctor has indicated. See Exhibit 1.

27. Defendant recklessly wantonly and/or in bad faith refused to discuss alternatives

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

28. Pursuant to O.R.C. § 2744.03(5) a political subdivision is liable in damages if its "judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources" is exercised in a wanton or reckless manner, or in bad faith. See *id.*

29. As a result of the wanton, reckless, and/or bad faith exercise of discretion of the defendant the plaintiff will suffer serious physical harm or death proximately caused by the defendant's actions.

30. The aforementioned actions of the Defendant were all taken with malice.

31. Defendant knows with substantial certainty that its actions will bring serious physical harm or death to Mrs. Madej.

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

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

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

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

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

35. Plaintiff Cynthia Madej is a person with a disability or handicap for the purposes of the Fair Housing Amendments Act. She has been determined to be completely disabled by the U.S. Social Security Administration, suffers from environmental illness, fibromyalgia, and chemical sensitivities.

36. The Fair Housing Amendments Act (42 U.S.C. § 3601 et seq., including but not limited to 42 U.S.C. § 3601(f)) (hereinafter FHAA) makes it unlawful to "discriminate against any person in the terms, conditions, or privileges of sale or

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

37. Such discrimination includes a "refusal to make reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]" *Id.* at § 3604(f)(3)(B).

38. The FHAA requires reasonable accommodations necessary for a disabled individual to receive the "same enjoyment from the property that a non-disabled person would receive." See *Anderson, et al. v. City of Blue Ash*, (6th Cir.Ct.App., August 14, 2015), Case No. 14-3745, p. 24-25.

39. Though the Defendant has been made aware of Ms. Madej's disability and has been informed by two of her physicians that proceeding with chip and sealing of Dutch Creek Road would cause her serious physical harm or death the Defendant has refused to make reasonable accommodations for Ms. Madej's disability that would not deprive her of the use and enjoyment of her home and property.

40. Reasonable accommodations not involving the use of chip and seal or other products toxic to Cindi exist, and include but are not limited to the use of one or more of those products listed in Exhibit 2.

41. The failure to make these accommodations deprives Ms. Madej of equal opportunity in the use and enjoyment of her home and property, given that she will be forced to suffer serious physical harm or death in order to remain in her home and live on her property.

42. The failure to make these accommodations further deprives Ms. Madej of equal opportunity in the use and enjoyment of her home, given that she will be forced to suffer serious physical harm or death in order to have ingress and egress from her home across the chip and seal road that is physically harmful to her.

43. The failure to make these accommodations will constructively evict Ms. Madej from her home.

44. Reasonable accommodations are necessary in order to allow Mrs. Madej to use and enjoy her home and property.

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

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

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

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

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

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

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

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

WHEREFORE Plaintiff prays for the following relief:

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

Dutch Creek Road that would harm Ms. Madej including but not limited to chip and seal, asphalt, or any other petrochemical-based road surfacing or dust-control products.

2. For damages in excess of $25,000.00 on Count 2, along with a preliminary injunction and permanent injunction preventing the application of chip and seal to Dutch Creek Road, punitive damages, and attorney fees.
3. For a declaratory judgment on Count 3.
4. On Count 4, for injunctive relief requiring the Defendant to make reasonable accommodations, for damages in excess of $25,000, and for costs and attorney fees.
5. On Count 5, for injunctive relief requiring the Defendant to make reasonable modifications, for damages in excess of $25,000, and for costs and attorney fees.
6. For any other relief that the Court determines to be warranted in the premises.

Respectfully submitted,

/s/ Sky Pettey
Sky Pettey - 0072041
Attorney for Plaintiffs

LAVELLE AND ASSOCIATES
449 E. State Street
Athens, OH 45701
sky@johnplavelle.com
(740) 593-3348 - telephone
(740) 594-3343 - facsimile

CERTIFICATE OF SERVICE

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

/s/ Sky Pettey
Sky Pettey - 0072041
Attorney for Plaintiffs

AFFIDAVIT OF DR. BARBARA SINGER

STATE OF Ohio, COUNTY OF Fairfield, SS:

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

1. My name is Dr. Barbara Singer, and my address is 4773 Carroll Cemetery Rd., Carroll, OH 43112.

2. Cynthia Madej is a patient that suffers form severe chronic chemical sensitivity resulting from toxic exposure. She presents with a wide array of symptoms caused by organ and neurological damage and has limitations that require non-standard level of care and special considerations in handling and treatment. She has been legally disabled since 1997. She also currently suffers from a life-threatening anemic condition as evidenced by very low hemoglobin levels and severe vitamin B12 deficiency, as well as extreme weight loss and cardiometabolic decompensation. She is in a precarious state and even small exposures to chemical stressors create a serious hazard for her.

3. Ms. Madej requires limited exposure or avoidance of many common materials and chemicals which include but are not limited to:
   - diesel, jet and other fuels,
   - exhaust
   - tar and asphalt
   - oil
   - herbicides and pesticides
   - smoke.

4. Roadway construction and maintenance activities are of particular concern. Exposures, even in small amounts, to numerous volatile organic compounds found in petrochemical products like tar (e.g. anthracene, benzene, and phenols), many of which outgas for months are dangerous and even life-threatening for Cynthia. Potential impacts include:
   - Difficulty breathing
   - Heart attack
   - Paralysis
   - Migraines
   - Neurologic stress and damage.

5. Avoiding exposure is crucial. Cynthia is unable to relocate from her home due to the severity and breadth of her sensitivities and the specialized living environment she requires. She does not receive adequate protection from closing windows and doors, due to the severity of her illness. In addition, this patient's sensitivities limit her ability to receive administration of standard medical care. Strong

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

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

Further, Affiant sayeth naught.

Dr. Barbara Singer

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

Notary Public

S E A L

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

EXHIBIT 2

NON-EXHAUSTIVE LIST OF ALTERNATIVES TO CHIP AND SEAL

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

ATHENS COUNTY ENGINEER'S OFFICE

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

September 11, 2015

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

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

Mr. and Mrs. Madej,

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

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

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

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

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

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

Sincerely,

Jeff Maiden, PE, PS
Athens County Engineer

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

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

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

FACTUAL BACKGROUND

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

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

[1] The court granted a Temporary Restraining Order on September 15, 2015, which allowed the project to move forward on Dutch Creek Road from State Route 690 to Stanley Road. The TRO enjoined any chip and seal work on the section of road nearest the Madej residence, from Stanley Road to State Route 550.
[2] With the agreement of both parties, the court allowed Mrs. Madej to testify from home via telephone.

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

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

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

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

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

LEGAL STANDARD

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

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

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

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

FACTOR 1 - SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

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

[4] See Cross v. Ledford, 161 Ohio.St. 469, 477 (1954); see also State v. Ingram, 82 Ohio App.3d 341 (2d Dist 1992).
[5] Id.
[6] Id.
[7] Union Twp. v. Union Twp. Professional Firefighters Local 3412, 12 Dist. No. CA99-08-082 (Feb. 14, 2000); see also Brakefire, Inc. v. Overbeck, 144 Ohio Misc.2d 35, 2007 Ohio 6464.
[8] Id.
[9] Six Clinics Holding Corp., II v. Cafcomp Sys., Inc., 119 F.3d 393, 402 (6th Cir. 1997).

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

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

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

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

Accordingly, Factor 1 weighs in favor of plaintiffs.

FACTOR 2 - IRREPARABLE INJURY IF INJUNCTION NOT GRANTED

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

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

Accordingly, Factor 2 weighs in favor of plaintiffs.

FACTOR 3 - NO UNJUSTIFIABLE HARM TO THIRD PARTIES

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

Accordingly, Factor 3 weighs in favor of plaintiffs.

FACTOR 4 - PUBLIC INTEREST

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

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

Accordingly, Factor 4 weighs evenly for both sides.

CONCLUSION

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

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

IT IS SO ORDERED.

Judge Patrick J. Lang

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

cc:

Sky Pettey, Attorney for Plaintiffs Robert and Cynthia Madej

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