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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CYNTHIA MADEJ; ROBERT MADEJ, *Plaintiffs-Appellants*, v. JEFF MAIDEN, Athens County Engineer, *Defendant-Appellee*.	No. 18-4132

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:16-cv-00658—Edmund A. Sargus, Jr.,
District Judge.

Argued: October 22, 2019

Decided and Filed: February 24, 2020

Before: GUY, BUSH, and MURPHY, Circuit Judges.

COUNSEL

ARGUED: David T. Ball, ROSENBERG & BALL CO., LPA, Granville, Ohio, for Appellants. Molly Gwin, ISAAC, WILES, BURKHOLDER & TEETOR, LLC, Columbus, Ohio, for Appellee. ON BRIEF: David T. Ball, ROSENBERG & BALL CO., LPA, Granville, Ohio, Fazeel S. Khan, HAYNES, KESSLER, MYERS & POSTALAKIS, INC., Worthington, Ohio, for Appellants.

Molly Gwin, Maribeth Meluch, ISAAC, WILES, BURKHOLDER & TEETOR, LLC, Columbus, Ohio, for Appellee. Donald Horak, DIOCESE OF STEUBENVILLE, Athens, Ohio, for Amici Curiae.

OPINION

MURPHY, Circuit Judge. Cynthia Madej is very ill. On top of her other ailments, her doctors say she has "multiple chemical sensitivity." She thus goes to great lengths to avoid everyday materials that she believes will trigger harmful reactions like burning eyes and throat, dizziness, or nausea. This suit arose because Ms. Madej fears that the use of asphalt on a road near her home will cause more harm still. She and her husband sued the county engineer to stop the roadwork, alleging violations of the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. Applying the well-known rules from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the district court excluded the opinions of the Madejs' experts that the asphalt would injure Ms. Madej. Without expert causation evidence, the court added, the Madejs could not withstand summary judgment. As far as we are aware, "no district court has ever found a diagnosis of multiple chemical sensitivity . . . to be sufficiently reliable to pass muster under *Daubert*." *Gabbard v. Linn-Benton Hous. Auth.*, 219 F. Supp. 2d 1130, 1134 (D. Or. 2002), *aff'd sub nom. Wroncy v. Or. Dep't of Transp.*, 94 F. App'x 559 (9th Cir.

2004). We thus see no abuse of discretion in the district court's evidentiary ruling and affirm its judgment for the county engineer.

I.

Cynthia Madej has suffered through decades of debilitating maladies, including chronic fatigue syndrome, fibromyalgia, anemia, and severe vitamin deficiencies. Since 1997, the Social Security Administration has found her completely disabled and entitled to benefits. Two of her doctors, Barbara Singer (a primary-care physician) and Allan Lieberman (an environmental-medicine specialist), have opined that she also suffers from multiple chemical sensitivity, which is not a disease recognized by the World Health Organization or the American Medical Association. Dr. Lieberman takes the view that the phrase "multiple chemical sensitivity" (like the word "headache") is more description than diagnosis because it conveys that many chemicals negatively affect Ms. Madej's health. Ms. Madej says that she has reacted to countless substances, including fertilizers, pesticides, fragrances, cleaning products, glues, paint, newsprint, polyurethane, varnish, vinyl, gas, oil, propane, rubber, plastics, carpet, wood, and new clothes. Her reactions have included burning eyes and throat, chest tightness, shortness of breath, chronic headaches, nausea, and dizziness.

Ms. Madej takes extraordinary measures to avoid the common materials that trigger these harmful

reactions. She is effectively homebound, leaving her home maybe a couple of times per year, largely for medical appointments. She also sleeps in a structure on her property that is lined with glass (floors, walls, and ceiling) to avoid the wood in her house. She stays warm in this glass structure over the winter by using a string of incandescent light bulbs (supplemented by glass bottles filled with hot filtered water on extremely cold nights).

In 2010, given her sensitivities, Ms. Madej and her husband, Robert, moved to a home in rural Athens County, Ohio. Located some 280 feet off of Dutch Creek Road, their home was built for another individual with chemical sensitivities. After moving there, the Madejs gave a letter from Dr. Lieberman to the existing Athens County Engineer asking for advance notice of planned chemical sprayings within three blocks of their home. The letter stated that "[e]xposure to even small doses of certain substances, including "herb[i]cides, pesticides, fertilizers, oil, road tar, asphalt, diesel exhaust and other petroleum and roadway materials, could create a life-threatening situation [for Ms. Madej]."

A new county engineer, Jeff Maiden, took office in January 2013. In 2014, when Maiden's office paved a nearby road, Ms. Madej reportedly experienced headaches, throat and eye burning, and chest tightness for months. So, beginning in the spring of 2015, her husband repeatedly called the office to remind Maiden's staff of his wife's poor health. Each time, employees responded that the office had no maintenance plans for Dutch Creek Road.

In March 2015, however, dozens of residents had petitioned the county commissioners to improve this pothole-ridden road. Maiden had also received more complaints about the dust on Dutch Creek Road than the dust on any other road in the county. When cars drove on the road in the summertime, billowing dust turned nearby foliage brown. One resident even vandalized a road sign to read "*Dust* Creek Road" rather than "*Dutch* Creek Road."

To address these complaints, Maiden decided to "chip seal" the road. The chip-seal process helps maintain rural roads and prevent dust. Workers spray a thin layer of heated asphalt liquid on the surface, place small stones or "chips" on top of the liquid, compress the chips into the liquid, and sweep excess chips off the roadway.

Maiden's staff recalled Ms. Madej having asphalt allergies. In late August 2015, therefore, an employee informed the Madejs that the office planned to start work on the road the next day. The Madejs objected. Maiden agreed to delay things until after a public meeting at which the Madejs could air their concerns to the community. That same day, though, workers patched two smaller areas of the road, located a half mile from the Madejs' home. Even this work reportedly left Ms. Madej feeling ill.

On September 10, the public meeting generated a standing-room-only crowd. Maiden discussed the roadwork while Mr. Madej explained his wife's poor health. Neighbors proposed various accommodations—such as

paying for the Madejs' hotel or helping them stay at a campsite during the work—to no avail. Seeing no room for compromise, Maiden chose to start the roadwork on September 14. The parties dispute whether Mr. Madej had told Maiden at or before this meeting about his research into fixing the road with non-asphalt alternatives to chip seal. But we will assume that he did so given the case's procedural posture.

On September 15, the Madejs brought a tort suit against Maiden in his official capacity. A state court granted preliminary relief halting any chip-seal work within a mile of the Madejs' home. The Madejs later amended their complaint to assert claims under the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990. Maiden removed the suit to federal court. He then moved to exclude the opinions of the Madejs' three doctors: her two treating doctors (Drs. Singer and Lieberman) and an expert (Dr. John Molot). Maiden also sought summary judgment on all claims.

The district court initially held that the opinions of the Madejs' doctors did not satisfy the reliability requirements of Federal Rule of Evidence 702. *Madej v. Maiden*, No. 2:16-cv-658, 2018 WL 5045768, at *4–14 (S.D. Ohio Oct. 17, 2018). Invoking the causation rules from toxic-tort cases, the court noted that the Madejs must show both general causation (that the asphalt in chip seal can cause the type of injury that a plaintiff alleges) and specific causation (that this asphalt will, in fact, cause Cynthia Madej's injury). *Id.* at *4–5. The court found that the doctors did not offer reliable

opinions on specific causation: that chip seal would harm Ms. Madej. *Id.* at *5–14.

The court next held that the Madejs' lack of expert causation evidence warranted summary judgment for Maiden. *Id.* at *14–16. It noted that the Fair Housing Amendments Act requires a reasonable accommodation for a person with a handicap when that accommodation is necessary to give the person an equal opportunity to enjoy a dwelling. *Id.* at *15. Finding that this "necessary" element contains a causation test, the court reasoned that the Madejs could not show that chip seal would harm Ms. Madej and so could not show any need for alternatives. *Id.* The court rejected the Madejs' claim under the Americans with Disabilities Act for an identical reason. *Id.*

The Madejs now appeal the district court's evidentiary ruling and its rejection of their federal claims. They have abandoned their state-law claims. And while they separately challenge the court's rejection of what they call their "injunction" count, an injunction is a remedy, not a claim. If they cannot show "actual success" on their claims, they cannot obtain a permanent injunction. *Jolivette v. Husted*, 694 F.3d 760, 765 (6th Cir. 2012) (citation omitted).

II.

The opinion testimony of a doctor (whether an expert or a treating physician) generally must pass muster under Rule 702. *See Gass v. Marriott Hotel Servs., Inc.*, 558 F.3d 419, 426 (6th Cir. 2009). Before a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may" testify, the party who seeks to call the witness must prove: (1) that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue"; (2) that "the testimony is based on sufficient facts or data"; (3) that "the testimony is the product of reliable principles and methods"; and (4) that "the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(a)–(d). These factors, in short, require "scientific testimony" to be both "relevant" and "reliable." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, (1993)). A district court must perform a "gatekeeping role" to ensure that the testimony meets those mandates, *Daubert*, 509 U.S. at 597, and we review its conclusion for an abuse of discretion, *Kumho Tire*, 526 U.S. at 142, 158.

The Madejs assert that the district court committed both relevancy and reliability errors when undertaking this gatekeeping role. As for relevancy, they argue that the district court mistakenly required them to meet common-law tort standards that do not apply to their federal statutory claims. As for reliability, they argue that their doctors had a sufficient factual basis

for opining that the chip seal would harm Ms. Madej. Neither argument warrants reversal.

A. Relevancy

Rule 702's first condition requires that an "expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). *Daubert* tells us that "[t]his condition goes primarily to relevance." 509 U.S. at 591. "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* (citation omitted). Or, as we have said, "[t]he issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994). Whether an opinion "relates to an issue in the case" or helps a jury answer a "specific question" depends on the claims before the court. Thus, when analyzing the relevancy of expert testimony, a court should consider the elements that a plaintiff must prove.

Here, the Madejs argue that the district court focused on irrelevant causation standards from *state tort law*, not on the standards for their *federal statutory claims.* They have a point. The court said things like the following: "In cases involving exposure to toxic substances, the plaintiff 'must establish both general and specific causation through proof that the toxic substance is capable of causing, and did cause, the

plaintiff's alleged injury.'" *Madej v. Maiden*, No. 2:16-cv-658, 2018 WL 5045768, at *4 (S.D. Ohio Oct. 17, 2018) (quoting *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 676–77 (6th Cir. 2011)). But *Pluck* and other cited cases addressed tort claims. *E.g.*, *Pluck*, 640 F.3d at 674–77. This is not a toxic-tort case. It involves claims under the Fair Housing Amendments Act and the Americans with Disabilities Act.

Ultimately, though, the Madejs' argument that the district court wrongly relied on toxic-tort cases does them no good. When we turn to the federal statutes on which they rely, we are not even sure that the Madejs have stated cognizable claims. At the least, these statutes require the Madejs to show that the use of chip seal on Dutch Creek Road will cause Ms. Madej harm. In the end, then, the district court properly asked whether the doctors' opinions were reliable enough to help answer this causation question for these federal claims. *See Berry*, 25 F.3d at 1351.

1. *Fair Housing Amendments Act.* The Madejs allege that the county engineer violated the Fair Housing Amendments Act by rejecting their proposed "reasonable accommodation": using alternatives to chip seal that do not contain asphalt. This Act "amended the Fair Housing Act to bar housing discrimination against the handicapped." *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 489 (6th Cir. 2019) (citing 42 U.S.C. § 3604(f)). Section 3604(f) makes it unlawful "[t]o discriminate against any person . . . in the provision of services or facilities in connection with [a] dwelling, because of a handicap of" that person. 42

U.S.C. § 3604(f)(2)(A). It defines "discrimination" to include "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.* § 3604(f)(3)(B).

Before deciding if the Madejs' claim requires them to prove any type of causation, we must express uncertainty over whether the claim even falls within the Act. As its name implies, the Fair Housing Amendments Act does not bar discrimination in all services; it bars discrimination in the "provision of services or facilities *in connection with [a] dwelling.*" *Id.* § 3604(f)(2) (emphasis added). In other contexts, the Supreme Court has viewed the phrase "in connection with" as "essentially 'indeterminat[e]' because connections, like relations, 'stop nowhere.'" *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (citation omitted). The Court has thus told us to read this relational text as adopting the "limiting principle" most "consistent with the structure of the" statute. *Maracich*, 570 U.S. at 60; *see also Chadbourne & Parke LLP v. Troice*, 571 U.S. 377, 387–88 (2014).

Lower courts have done just that in this housing context. They have refused to extend the Fair Housing Act "to any and every municipal policy or service that touches the lives of residents" because that view would "expand that Act into a civil rights statute of general applicability rather than one dealing with the specific problems of fair housing opportunities." *Ga. State Conference of the NAACP v. City of LaGrange*, 940 F.3d 627, 633 (11th Cir. 2019) (citation omitted). The Fourth

Circuit, for example, rejected a claim that public agencies violated another subsection, 42 U.S.C. § 3604(b), when selecting a new highway's path. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 192–94 (4th Cir. 1999). The court reasoned that treating the highway siting as a "housing 'service'" was a "strained interpretation of the word." *Id.* at 193 (citation omitted); *see also A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 349–50 (4th Cir. 2011).

Here too, it is not obvious that roadwork on Dutch Creek Road amounts to a "provision of services" "in connection with" the Madejs' home. 42 U.S.C. § 3604(f)(2); *compare Bullock v. City of Covington*, No. 16-56-HRW, 2016 WL 6694486, at *6 (E.D. Ky. Nov. 14, 2016), *aff'd* 698 F. App'x 305 (6th Cir. 2017), *with Vance v. City of Maumee*, 960 F. Supp. 2d 720, 732–33 (N.D. Ohio 2013). Yet the county engineer did not raise this argument on appeal, so we merely flag it for future cases, lest our opinion be taken as impliedly accepting the validity of the Madejs' claim.

Even if the Act applies, the Madejs still must show that their "accommodation" (a chip-seal alternative that does not use asphalt) is "necessary to afford [Ms. Madej] equal opportunity to use and enjoy" her home. 42 U.S.C. § 3604(f)(3)(B). We have noted that this "necessity element" mandates "a causation inquiry that examines whether the requested accommodation or modification 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." *Hollis v. Chestnut Bend*

Homeowners Ass'n, 760 F.3d 531, 541 (6th Cir. 2014). In other words, "[n]ecessity functions as a but-for causation requirement, tying the needed accommodation to equal housing opportunity." *Vorchheimer v. Philadelphian Owners Ass'n*, 903 F.3d 100, 110 (3d Cir. 2018).

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. *Davis*, 945 F.3d at 490 (quoting *Cinnamon Hills Youth Crisis Ctr. v. St. George City*, 685 F.3d 917, 923 (10th Cir. 2012)).

2. *Americans with Disabilities Act.* The Madejs also allege that the county engineer violated the Americans with Disabilities Act by refusing their same proposed "reasonable modification": using alternatives to chip seal that do not contain asphalt. Their textual support for this theory has been a moving target. The Americans with Disabilities Act forbids disability discrimination in employment (Title I), public services (Title II), and public accommodations (Title III). The complaint alleged that the use of chip seal violated Title III's reasonable-modification rules for public accommodations. 42 U.S.C. § 12182(b)(2)(A)(ii). But the Act defines "public accommodation" to cover "private entities," not public entities. *Id.* § 12181(7); *Sandison v. Mich. High Sch. Athletic Ass'n, Inc.*, 64 F.3d 1026, 1036

(6th Cir. 1995). When the county engineer made this point in the district court, the Madejs switched to Title II. On appeal, however, they do not tell us the title on which they rely. We assume they mean to invoke Title II.

Title II provides 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." 42 U.S.C. § 12132. Unlike Title III or the Fair Housing Amendments Act, Title II does not expressly define "discrimination" to include a refusal to make a reasonable accommodation for a person with a disability (in addition to intentional discrimination). *Wis. Cmty. Servs. v. City of Milwaukee*, 465 F.3d 737, 750 (7th Cir. 2006) (en banc). The Attorney General has instead passed a regulation imposing that mandate: "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are 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." 28 C.F.R. § 35.130(b)(7)(i). Like the Attorney General, we have read § 12132 to cover "claims for a reasonable accommodation." *Roell v. Hamilton County*, 870 F.3d 471, 488 (6th Cir. 2017). Yet we have also said that a Title II "plaintiff must show that the defendants intentionally discriminated against him *because* of his disability." *Smith v. City of Troy*, 874 F.3d 938, 947 (6th Cir.

2017). We need not reconcile these cases here, as the county engineer does not challenge the reasonable-modification regulation under the statute. So we take as a given that "discrimination" includes a failure to accommodate.

Even so, it is not clear how the Madejs' claim fits within Title II. Section 12132 indicates that no "qualified individual with a disability" shall "by reason of such disability" (1) "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity," or (2) "be subjected to discrimination by any such entity." We have read even the "subjected to discrimination" text to require discrimination that "relate[s] to services, programs, or activities" of a public entity. *Johnson v. City of Saline*, 151 F.3d 564, 569 (6th Cir. 1998); *cf. Brumfield v. City of Chicago*, 735 F.3d 619, 627–29 (7th Cir. 2013). And we have distinguished the "services, programs, or activities" covered by § 12132 from the noncovered "facilities" in which they are conducted. *Babcock v. Michigan*, 812 F.3d 531, 535–40 (6th Cir. 2016).

How does this caselaw play out here? It is debatable. The Madejs primarily allege that the use of chip seal will deny Ms. Madej the benefits of her home, but her private dwelling is not a "service, program, or activity" of a public entity. When questioned on this point at argument, counsel responded that the roadwork qualifies as a "service" and that the use of chip seal would deny Ms. Madej the "benefit" of the road. Those theories, too, raise difficult interpretive questions. *Babcock* holds that "facilities" (in contrast to "services,

programs, or activities") generally are not covered by § 12132, 812 F.3d at 535–40, and regulations define "facility" to include "roads," 28 C.F.R. § 35.104. But *Babcock* involved the "design features in a building" and suggested that those facts might distinguish it from a case that found a transportation facility (a sidewalk) covered. 812 F.3d at 538 n.5 (discussing *Frame v. City of Arlington*, 657 F.3d 215, 221 (5th Cir. 2011) (en banc)). The *Babcock* plaintiff also did not argue (as the Madejs suggested here) that the construction of a facility can itself qualify as a "service." *Id.* Because the county engineer raised none of these issues on appeal, we again merely flag them for future cases and will assume that Title II extends to the denial of the benefits of Dutch Creek Road.

Nevertheless, the Madejs' claim again requires proof of causation. The regulation compels reasonable modifications "when the modifications are *necessary* to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7)(i) (emphasis added). Like the Fair Housing Amendments Act's text, this text "links necessity to a causation inquiry," albeit one with a different object. *Wis. Cmty. Servs.*, 465 F.3d at 752. While the Fair Housing Amendments Act asks whether an accommodation is needed for an "equal opportunity" to enjoy a home, 42 U.S.C. § 3604(f)(3)(B), the regulation asks whether the modification is needed "to avoid discrimination on the basis of disability," 28 C.F.R. 35.130(b)(7)(i). Given our prior assumptions, we read this text to be satisfied in this case if a plaintiff "show[s] that, 'but for' [her] disability, [she] would have

been able to access the services or benefits desired." *Wis. Cmty. Servs.*, 465 F.3d at 752. Here, then, if the asphalt in chip seal would not cause Ms. Madej's reactions, the Madejs could not show that the chip seal would deny her access to the road. Without that causal connection, the Madejs' proposed modifications would not be necessary "to avoid" that non-existent denial of access.

* * *

In sum, while the Madejs are correct that these laws do not codify a toxic-tort regime, the laws require proof of causation all the same. This conclusion—that the Madejs must prove that the chip seal will cause Ms. Madej harm—leads to one final question: Did the district court correctly hold that they needed expert causation testimony to survive summary judgment? *See Madej*, 2018 WL 5045768, at *14. Courts have been unclear about whether this question raises a matter of substance (and so depends on the meaning of the federal laws) or a matter of procedure (and so depends on the meaning of Federal Rule of Civil Procedure 56). *Cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

On the one hand, some cases seem to treat this question as substantive by asking whether the plaintiff's claim should be read to require expert testimony. When considering tort suits under our diversity jurisdiction, for example, we have held that a party needs expert causation testimony if a state supreme court has imposed that mandate on its courts. *Vaughn v. Konecranes, Inc.*, 642 F. App'x 568, 578 (6th Cir. 2016);

Pluck, 640 F.3d at 677; *Kolesar v. United Agri Prods., Inc.*, 246 F. App'x 977, 981–82 (6th Cir. 2007). While these cases overlook this initial process-versus-substance question, other courts that have addressed the question have likewise found it substantive. *See Wallace v. McGlothan*, 606 F.3d 410, 419 (7th Cir. 2010); *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prods. Liab. Litig.*, 227 F. Supp. 3d 452, 467–69 (D.S.C. 2017), *aff'd* 892 F.3d 624, 646 (4th Cir. 2018). Under this view, whether the Madejs need expert causation evidence would turn on our interpretation of their two federal claims.

On the other hand, none of these cases accounts for *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). That decision directs courts to consider "whether the Federal Rules of Civil Procedure answer the question in dispute" before analyzing anything else. *Gallivan v. United States*, 943 F.3d 291, 293 (6th Cir. 2019). And Rule 56 does have something to say on a question about the evidence needed to create a fact issue for trial. *Cf. McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 60 (7th Cir. 1990). After all, it says that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under this view, the requirement that the Madejs offer expert causation evidence would turn on whether only that kind of evidence can create a factual dispute that we would consider "genuine" under Rule 56.

We leave this issue for another day too. The Madejs' counsel conceded at oral argument that they do not challenge the district court's ruling that they need expert testimony on causation to survive summary judgment. If the court properly found their experts unreliable, it correctly granted summary judgment on their federal claims. We end with that reliability ruling.

B. Reliability

Two general factors (one about the standard of review, the other about precedent) show that the Madejs face a daunting task in challenging the district court's conclusion that their three doctors provided unreliable opinions under Federal Rule of Evidence 702. Start with the standard of review. District courts have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable," *Kumho Tire*, 526 U.S. at 152, and so we will review that type of decision only for an abuse of discretion, *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 248 (6th Cir. 2001). This deferential standard makes sense because *Daubert* establishes a "flexible" test that considers many indicia of reliability, some of which may have more relevance than others depending on the particular science and the particular scientist before the court. *Kumho Tire*, 526 U.S. at 150 (quoting *Daubert*, 509 U.S. at 594).

Turn to precedent. The Madejs' doctors based their opinions that asphalt would harm Ms. Madej in large

part on their views that she suffers from multiple chemical sensitivity. Many courts have held that similar expert testimony did not pass muster under Rule 702. As the Tenth Circuit noted, multiple chemical sensitivity "is a controversial diagnosis that has been excluded under *Daubert* as unsupported by sound scientific reasoning or methodology." *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 603 (10th Cir. 1997); *see, e.g.*, *Bradley v. Brown*, 42 F.3d 434, 438 (7th Cir. 1994); *Snyman v. W.A. Baum Co.*, No. 04 Civ. 2709, 2008 WL 5337075, at *1 (S.D.N.Y. Dec. 22, 2008), *aff'd* 360 F. App'x 251 (2d Cir. 2010); *Gabbard v. Linn-Benton Hous. Auth.*, 219 F. Supp. 2d 1130, 1134 (D. Or. 2002), *aff'd sub nom. Wroncy v. Ore. Dep't of Transp.*, 94 F. App'x 559 (9th Cir. 2004); *Comber v. Prologue*, No. 99-2637, 2000 WL 1481300, at *4–5 (D. Md. Sept. 28, 2000); *Coffey v. Cty. of Hennepin*, 23 F. Supp. 2d 1081, 1086 (D. Minn. 1998); *Zwillinger v. Garfield Slope Hous. Corp.*, No. CV 94–4009, 1998 WL 623589, at *21–22 (E.D.N.Y. Aug. 17, 1998); *Coffin v. Orkin Exterminating Co., Inc.*, 20 F. Supp. 2d 107, 110–11 (D. Me. 1998); *Frank v. State of New York*, 972 F. Supp. 130, 133–37 (N.D.N.Y. 1997); *Sanderson v. Int'l Flavors and Fragrances Inc.*, 950 F. Supp. 981, 1001–02 (C.D. Cal. 1996); *see also Kuxhausen v. Tillman Partners, L.P.*, 197 P.3d 859, 862–68 (Kan. Ct. App. 2008), *aff'd* 241 P.3d 75 (Kan. 2010).

To prevail, therefore, the Madejs must establish that the district court abused its discretion by declining to shun a mountain of precedent. That is a tall order. To be sure, most of these cases are over a decade

old. That could be significant because "[s]cientific conclusions are subject to perpetual revision." *Daubert*, 509 U.S. at 597. But "[l]aw lags science; it does not lead it." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010) (citation omitted). And the Madejs have not shown that more recent scientific advancements have led the scientific community to come to accept a multiple-chemical-sensitivity diagnosis, one of the relevant reliability factors. *See Kumho*, 526 U.S. at 150. Instead, their own doctors acknowledged that the diagnosis remains unrecognized by the American Medical Association and unlisted in the World Health Organization's International Classification of Diseases. *Madej*, 2018 WL 5045768, at *9.

Reviewing the district court's decision against this general backdrop, we find no reversible error in its exclusion of the opinions of the Madejs' three experts on more fact-specific grounds.

1. *Dr. Molot.* We begin with Dr. John Molot, the Madejs' expert. The district court could reasonably conclude that his causation opinion was not "based upon sufficient facts or data" or the "product of reliable principles and methods . . . applied . . . reliably to the facts of the case." *Tamraz*, 620 F.3d at 670 (quoting Fed. R. Evid. 702(b)–(d)); *see Madej*, 2018 WL 5045768, at *5–8. Courts have repeatedly found opinions unreliable when they were based more on an expert's "subjective belief" than on an objective method that can be tested. *Tamraz*, 620 F.3d at 670 (quoting *Daubert*, 509 U.S. at 590); *see*, *e.g.*, *Nelson*, 243 F.3d at 254; *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996). As

we have said, "[t]he '*ipse dixit* of the expert' alone is not sufficient to permit the admission of an opinion." *Tamraz*, 620 F.3d at 671 (citation omitted).

Dr. Molot's opinion shares this defect. He opined that asphalt would cause Ms. Madej to suffer harmful reactions. When asked to list the chemicals that cause those reactions, however, he responded: "I have no idea, because there's no way to test it. We can't test. And I get asked that question, well, which chemicals is it exactly, do you think? Nobody knows, including me." He thus did not observe Ms. Madej display any sensitivity to asphalt because he did not conduct any objective tests. Instead, he reaches his opinions about the chemicals causing a patient's harmful reactions based "[o]nly from the history of what the patient identifies"; that is, his opinions rest "strictly on a subjective criteria of history and reported symptoms." He also conceded that he controls for the possibility that other chemicals might be the true root of a patient's reactions based on the patient's own self-reporting: "How do you control for that? You know, patients make their observations based on, I smelled this and it makes me sick. And that's all we have."

Dr. Molot's reliance on Ms. Madej's opinions gave the district court an adequate ground to find that he did not "reliably rule out" non-asphalt causes for her sensitivities. *Tamraz*, 620 F.3d at 674. Indeed, "lay speculations on medical causality, however plausible, are a perilous basis for inferring causality." *Rosen*, 78 F.3d at 318. But that sort of speculation appears to undergird Dr. Molot's opinion here. Not only that, the

Madejs identify nothing suggesting that the relevant scientific community would accept this subjective method of proving causation "in their professional work." *Id.* So they failed to show that the "methodology underlying [Dr. Molot's] testimony is scientifically valid." *Daubert*, 509 U.S. at 592–93; *cf. Summers*, 132 F.3d at 604.

2. *Dr. Lieberman.* We next turn to Dr. Allan Lieberman, the environmental-medicine specialist who treated Ms. Madej from his clinic in Charleston, South Carolina. The district court could reject Dr. Lieberman's opinion that asphalt (as opposed to other items) would cause Ms. Madej's sensitivities for the same reasons that it rejected Dr. Molot's opinion. *Madej*, 2018 WL 5045768, at *10–14. Despite being Ms. Madej's treating physician for many years, Dr. Lieberman is not even sure he ever met her in person. She visited his center one time in 1999 and was seen by another doctor. *Id.* at *10. Instead, Dr. Lieberman treated Ms. Madej only over the phone. So, for the most part, Dr. Lieberman (like Dr. Molot) relied primarily on Ms. Madej's self-reporting to form his opinion concerning her sensitivities. What we have said about Dr. Molot's opinion thus fully applies to Dr. Lieberman's opinion too, with one exception.

The exception: At the initial 1999 visit, Dr. Lieberman's colleague conducted a test of Ms. Madej, and she reacted when he "plac[ed] a substance he described as 'petroleum derived ethanol' under her tongue." *Madej*, 2018 WL 5045768, at *10. Yet Dr. Molot opined that "testing for sensitivity using sublingual challenges"

(under the tongue) "has not been documented as reliable for the diagnosis of chemical sensitivity." And Dr. Lieberman himself admitted that it was possible that those test results would change over time. So the district court could reasonably conclude that this decades-old test did not fill in the gap in the doctors' causation testimony.

3. *Dr. Singer.* That leaves Dr. Barbara Singer, Ms. Madej's primary-care physician. The district court did not abuse its discretion in finding her opinion unreliable because her "qualifications" did not "provide a foundation . . . to answer" this causation question. *Berry*, 25 F.3d at 1351; *Madej*, 2018 WL 5045768, at *8–10. When a doctor's opinion "strays from" the doctor's "professional experience," the opinion is "less reliable, and more likely to be excluded under Rule 702." *Gass*, 558 F.3d at 427–28; *United States v. Farrad*, 895 F.3d 859, 884 (6th Cir. 2018). Dr. Singer's opinion fits that bill. As a primary-care physician, she conceded that "it's not my skill set to diagnose" multiple chemical sensitivity and that she does not "know the criteria for diagnosing" that trait. When asked if she tested Ms. Madej for sensitivity to asphalt, she responded: "I don't even know where we begin with that, if there are tests that are accurate for that. That's again in that chemical sensitivity specialty that I don't have." Instead, she formed her opinion that asphalt would harm Ms. Madej only "[b]ecause she had the diagnosis of multiple chemical sensitivity from Dr. Lieberman." Yet Dr. Lieberman did not actually diagnose "multiple chemical sensitivity." Unlike Dr. Molot, he does not view that

phrase as a "diagnosis" since it is not a recognized disease. Instead, he calls it "a wonderful description of what the patients have" just as "headache" and "muscle pain" describe the pain that patients feel. So Dr. Singer's opinion rested not only on another doctor's views, but also on an apparent misunderstanding of those views.

* * *

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 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.

We affirm.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

CYNTHIA MADEJ, et al.,

Plaintiffs,

v.

ATHENS COUNTY ENGINEER JEFF MAIDEN,

Defendant.

Case No. 2:16-cv-658
CHIEF JUDGE EDMUND A. SARGUS, JR.
Magistrate Judge Chelsey M. Vascura

OPINION AND ORDER

(Filed Oct. 17, 2018)

This matter is before the Court on Plaintiffs Cynthia and Robert Madej's ("Ms. Madej," "Mr. Madej", or collectively, "Plaintiffs") Motion for Partial Summary Judgment (*Pl.'s Mot. S.J.*, ECF No. 109), Defendant's memorandum in opposition (*Def. Mem. Opp.*, ECF No. 119), Plaintiffs' Reply (*Pl. Reply*, ECF No. 135), Plaintiffs' motion in limine to exclude the testimony of Jonathan Raab (*Pl. MIL*, ECF No. 138), Defendant's response (*Def. Response MIL*, ECF No. 141), and Plaintiffs' Reply (*Pl. Reply MIL*, ECF No. 143). Also before the Court are Defendant's Motion for Summary Judgment (*Def. Mot. S.J.*, ECF No. 117), Plaintiffs' memorandum in opposition (*Pl. Mem. Opp.*, ECF No. 120), Defendant's Reply (*Def. Reply*, ECF No. 134), Defendant's motion in limine to exclude the testimony of Dr. John Molot (*Def. MIL*, ECF No. 106), Plaintiffs'

response (*Pl. Response MIL*, ECF No. 126), Defendant's Reply (*Def. Reply MIL*, ECF No. 134), Defendant's motion in limine to exclude the testimony of Dr. Barbara Singer and Dr. Allan Lieberman (*Def.'s MIL*, ECF No. 107), Plaintiffs' response (*Pl. Response MIL*, ECF No. 125), Defendant's Reply (*Def. Reply MIL*, ECF No. 133); Defendant's motion in limine to exclude Plaintiffs' engineering experts (*Def. MIL*, ECF No. 108), Plaintiffs' response (*Pl. Response MIL*, ECF No. 124), and Defendant's Reply (*Def. Reply MIL*, ECF No. 132). Additionally, Defendant has filed a Motion for Leave to File a Sur-reply (*Def. Mot. Sur-reply*, ECF No. 140), Plaintiffs have filed a response (*Pl. Response Sur-reply*, ECF No. 144), and Defendant has filed a Reply (*Def. Reply*, ECF No. 145). The issues are joined and ripe for consideration. For the reasons that follow, Defendant's motions to exclude the opinions of Dr. John Molot (*Def.'s MIL*, ECF No. 106), and Dr. Barbara Singer and Dr. Allan Lieberman (*Def.'s MIL*, ECF No. 107) are well-taken, and are GRANTED. As a consequence of granting those motions, Defendant's motion for summary judgment (*Def. Mot. S.J.*, ECF No. 117) is also well-taken and is GRANTED, and the remaining motions are **DENIED** as **MOOT**.

I. BACKGROUND

This dispute arose out of the road resurfacing "chip and seal" or "chip seal" project on Dutch Creek Road in Athens County, Ohio. (*Third Am. Comp.* ¶¶ 3, 4, ECF No. 16.) Residents complained that the dust on the road was affecting their health, and as part of his

statutory obligation to maintain the roads of Athens County, the Engineer decided to chip seal Dutch Creek Road (*Def. Mot. S.J.*, ECF No. 117, p. 10.)

Plaintiffs allege that the completion of the "chip and seal" project within one mile of their residence could cause Mrs. Madej serious physical harm or even death. (*Id.* at ¶¶ 6, 7, 8, 11, 15, 23, 33, 39, 41, 42, 48.) Specifically, Plaintiffs allege 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." (*Id.*, at ¶ 4.) In support of their claims, Plaintiffs rely on three medical experts, John Molot, M.D., a Canadian physician whom they engaged as an expert witness, and treating physicians Barbara Singer, M.D. and Allan Lieberman, M.D. Discovery was completed in June, 2018, and the issues were fully joined on September 11, 2018.

A. The State Court Preliminary Injunction

On September 15, 2015, Plaintiffs filed an action in state court against the Athens County Engineer, Jeff Maiden, in the Athens County Court of Common Pleas seeking "a temporary restraining order, preliminary injunction, and permanent injunction" to stop the paving project. (ECF No. 1-1, PgId 10). Judge Patrick Lang granted a temporary restraining order, and then replaced the temporary restraining order with a preliminary injunction on September 23, 2015, following a

hearing on the preliminary injunction on September 21, 2015. (*Decision*, ECF No. 16, PgId 144.) The state court injunction remains in place, and Dutch Creek Road has not been resurfaced. (*Def. Mot. S.J.*, ECF No. 117, p. 2.)

During the hearing on the preliminary injunction, the Court heard testimony from Mr. Madej, and from Ms. Madej, who was permitted to testify via telephone, including testimony that Ms. Madej sleeps "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." (*Decision*, ECF No. 16, PgId 145-46.) The Court also heard testimony from Dr. Barbara Singer, who testified that Ms. Madej "is in extremely poor health, and suffers from ailments including anemia, several vitamin deficiencies, protein deficiency, anxiety and depression." (*Id.*, PgId 146.) "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." (*Id.*) In granting the preliminary injunction, the Court explained:

> 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.

(*Id.*, PgId 149-50.) On June 30, 2016, Plaintiffs filed a second amended complaint adding federal claims, and on July 7, 2016, Defendant removed the case to this court. (ECF No. 1.)

B. Plaintiffs' Third Amended Complaint

Plaintiffs filed a third amended complaint on October 18, 2016 ("complaint") asserting claims arising under the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, as well as state-law claims. In addition to monetary relief, Plaintiffs seek an order enjoining Defendant Athens County Engineer Jeff Maiden ("Engineer" or "Defendant") from completing the road resurfacing "chip and seal" project, and 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." (*Third Am. Comp.*, ECF No. 16, PgId 138-39.) In support of the injunction, Plaintiffs attached as Exhibit 1 to the complaint an affidavit dated September 15, 2015, from Dr. Barbara Singer, Ms. Madej's treating physician, declaring that Ms. Madej "suffers from chronic chemical sensitivity resulting from toxic exposure." (*Singer Aff.*, ECF No. 16, Ex. 1, PgId 140.) "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." (*Id.*) Dr. Singer stated that 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." (*Id.*) She stated that "[r]oadway 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 [Ms. Madej]. Potential impacts include: difficulty breathing, heart attack, paralysis, migraines, neurologic stress and damage." (*Id.*) Additionally, "[a]voiding exposure is crucial. [Ms. Madej] is unable to relocate from her home due to the severity and breadth of her sensitivities and the specialized living environment she requires." (*Id.*) "If [Ms. Madej'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." (*Id.*, PgId 141.)

Count I seeks injunctive relief to prevent the paving of Dutch Creek Road with asphalt or chip seal (*Third Am. Comp.*, p. 1); Count II claims civil assault, battery, and/or wrongful death (*Id.*, p. 4); Count III seeks a declaratory judgment that, should Defendant proceed with chip seal Ms. Majed will suffer assault, battery and/or death (*Id.*, p. 5); Count IV claims a violation of the Fair Housing Amendments Act, 42 U.S.C. § 3601, *et seq*. (*Id.*); and Count V claims a violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*. (*Id.*, p. 6.)

II. EVIDENTIARY MOTIONS

Defendant moves to exclude the testimony of the Ms. Madej's treating physicians, Dr. Singer and Dr. Lieberman (*Def.'s MIL*, ECF No. 107); Plaintiff's medical expert, Dr. Molot (*Def.'s MIL*, ECF No. 106); and the three engineers (*Def.'s MIL*, ECF No. 108). Plaintiff moves to exclude the opinion testimony of Defendant's geotechnical engineer, Mr. Raab (*Pl.'s MIL*, ECF No. 138). Both parties move to exclude this proffered expert testimony pursuant to *Daubert v. Merrell Dow*

Pharmaceuticals, Inc., 509 U.S. 579 (1993). The parties have fully briefed the issues, filed the relevant reports, and have provided relevant portions of the experts' depositions.

III. STANDARD

Federal Rule of Evidence 702 requires the trial judge to perform a "gatekeeping role" when considering the admissibility of expert testimony. *Daubert*, 509 U.S. at 597. The rule provides as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. The Supreme Court explained the gatekeeping role:

> To summarize: "General acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—

> especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Daubert, 509 U.S. at 597.

The Sixth Circuit has described the district court's gatekeeping function under *Daubert* as an "obligation . . . to exclude from trial expert testimony that is unreliable and irrelevant." *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 792 (6th Cir. 2002) (internal quotation marks omitted). The gatekeeping role progresses in three steps: First, the witness must be qualified according to his or her "knowledge, skill, experience, training, or education." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 529 (6th Cir. 2008) (quoting Fed. R. Evid. 702). Second, the expert's testimony must be relevant, in that it will help "the trier of fact to understand the evidence or to determine a fact in issue." *Id.* (same). On this point, the Court's inquiry focuses on whether the expert's reasoning or methodology can be properly applied to the facts at issue. *See Daubert*, 509 U.S. at 591-93. Third, the testimony must be reliable. *See Kendall Holdings, Inc. v. Eden Cryogenics, LLC*, No. 2:08-cv-390, 2013 WL 53661 (S.D. Ohio Sept. 24, 2013). To determine whether expert testimony is "reliable," the court's role, and the offering party's responsibility, "is to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant

field." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Generally, the expert's opinions must reflect "scientific knowledge . . . derived by the scientific method," representing "good science." *Daubert*, 509 U.S. at 590, 593. Reliability hinges on whether the reasoning or methodology underlying the testimony is scientifically valid. *See Daubert*, 509 U.S. at 590. The expert must ground his or her testimony in the methods and procedures of science and must entail more than unsupported speculation or subjective belief. *Id.* Plaintiffs bear the burden to prove by a preponderance of the evidence that the testimony is reliable. *Wellman v. Norfolk & Western Railway Co.*, 98 F. Supp.2d 919, 923 (S.D. Ohio 2000) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3d Cir. 1994)).

Daubert outlines several factors for courts to consider to help determine reliability, including "testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community." *United States v. Langan*, 263 F.3d 613, 621 (6th Cir. 2001) (citing *Daubert*, 509 U.S. at 593-94). This inquiry is "flexible," however, and *Daubert's* factors "do not constitute a definitive checklist or test." *Kumho Tire Co.*, 526 U.S. at 150 (emphasis in original, citation and internal quotation marks omitted). The Court's gatekeeper role "is not intended to supplant the adversary system or the role of the jury." *Wellman v. Norfolk and Western Ry. Co.*, 98 F.Supp.2d 919, 924 (S.D. Ohio 2000) (citing *Daubert*, 509 U.S. at 596). Rather, it is "to keep unreliable and irrelevant

information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value." *Id.*

IV. DISCUSSION

The inquiry of whether a witness qualifies as an expert depends on his or her "knowledge, skill, experience, training, or education." Fed. R. Evid. 702. After review of the expert's qualifications, the district court makes this determination as a preliminary question under Fed. R. Evid. 104(a). *Kingsley Associates, Inc. v. Del-Met, Inc.*, 918 F.2d 1277, 1286 (6th Cir. 1990). In doing so, the district court "has broad discretion in the matter of the admission or exclusion of expert evidence." *United States v. Kalymon*, 541 F.3d 624, 636 6th Cir. 2008) (quoting *United States v. Demjanjuk*, 367 F.3d 623, 633 (6th Cir. 2004)). As a guiding principle, the decision of whether to allow expert testimony depends on whether "it will assist the trier of fact." *Id.* "The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question." *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994).

A. Medical Causation

Plaintiffs' complaint asserts that "[Ms. Madej] 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 resurfacing." (*Third Am. Comp.*, ¶ 4, ECF No. 16.) In cases involving exposure to toxic substances, the plaintiff "must establish both general and specific causation through proof that the toxic substance is capable of causing, and did cause, the plaintiff's alleged injury." *Pluck v. BP Oil Pipeline Co.*, 640 F.3d 671, 677 (2011). Thus, causation has two levels, general and specific, and a plaintiff must prove both. As to specific causation, "[t]he plaintiff must show that [s]he was exposed to a toxic substance and that the level of exposure was sufficient to induce the complained-of medical condition (commonly called the 'dose-response' relationship')." *Valentine v. PPG Indus., Inc.*, 158 Ohio App.3d 615, 821 N.E.2d 580, 588 n. 1 (2004).

> General causation establishes whether the substance or chemical at issue is capable of causing a particular injury or condition in the general population. [*Terry v. Caputo*, 115 Ohio St.3d 351, 875 N.E.2d 72, 76 (2007)]. If the plaintiff establishes general causation, then she must establish specific causation. Specific causation establishes whether the substance or chemical in fact caused the plaintiff's medical condition. *Id.* at 77. In order to establish both general causation and specific causation, the plaintiff must present expert medical

> testimony. *Id.* at 74 syl. 2. Without expert medical testimony on both general causation and specific causation, a plaintiff's toxic tort claim will fail. *Id.* syl. 3.

Baker v. Chevron USA, Inc., 680 F.Supp.2d 865 (2010).

It is well-established in the Sixth Circuit that employing a differential diagnosis is an appropriate means to establish causation. *See Best v. Lowe's*, 563 F.3d 171, 178-80 (6th Cir. 2009) (citing *Hardyman v. Norfolk & Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001)). "Differential diagnosis, or differential etiology, 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." *Hardyman*, 243 F.3d at 260. "A differential diagnosis seeks to identify the disease causing a patient's symptoms by ruling in all possible diseases and ruling out alternative diseases until (if all goes well) one arrives at the most likely cause." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 674 (6th Cir. 2010). "[C]ourts must apply the *Daubert* principles carefully in considering [etiology]. 'The ability to diagnose medical conditions is not remotely the same . . . as the ability to deduce . . . in a scientifically reliable manner, the causes of those medical conditions.' *Gass v. Marriott Hotel Servs., Inc.*, 501 F.Supp.2d 1011, 1019 (W.D. Mich. 2007), *rev'd on other grounds*, 558 F.3d 419 (6th Cir. 2009). Doctors thus may testify to both, but the reliability of one does not guarantee the reliability of the other." *Id.* at 673-74.

In the case at bar, Plaintiffs assert that Ms. Madej suffers from multiple chemical sensitivity ("MCS") or environmental illness. Plaintiffs claim that the petrochemicals inherent in chip seal 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 by a preponderance of the evidence that these petrochemicals in chip seal are capable of causing and will in fact cause the threatened injury. *Pluck*, 640 F.3d at 677.

1. Dr. Molot

Plaintiffs retained as an expert witness Dr. John Molot, a Canadian physician who also works on a Canadian task force studying the gaps in science surrounding MCS, fibromyalgia, and chronic fatigue syndrome. (*Molot Dep.*, ECF No. 95, PgId 3288, 3292.) Dr. Molot explained that environmental medicine is not a recognized board certification, and he is not board certified in any medical specialty. (*Id.*, PgId 3311.) Dr. Molot explained that MCS is "diagnosed by the history and the history is somewhat complex." (*Id.*, PgId 3302.) The history is the subjective criteria as relayed by the patient. (*Id.*)

> A. So part of that, of course, is to—there's a pattern to these patients that is common. Usually middle-aged women. They have multiple system complaints. The brain is the most common system involved. We usually see complaints of pain, fatigue, poor cognition, mood change. Tied for second place are probably

> respiratory and/or gastrointestinal complaints. To start to see a pattern. And respiratory complaints may—will include both upper and lower respiratory system. Upper respiratory, possibly partially explained by allergy. Allergies are more common. I'm talking about classical allergy. These patients will also complain of lower respiratory symptoms. So asthma is more common. So you start to identify patterns.
>
> Q. Is there an objective analysis that can be performed for multiple chemical sensitivity? Does blood work show multiple chemical sensitivity?
>
> A. No. There are no blood tests that will demonstrate chemical sensitivity. There are no clinical tests. So it's one of those conditions which is made by making sure there is no other biological phenomena that could explain these symptoms and—but like I said, there are no biological markers.
>
> * * *
>
> Q. How do you control for—how do you control for the other variables and determine that it's asphalt in patients that are exquisitely sensitive?
>
> A. How do you control for that? You know, patients make their observations based on, I smelled this and it makes me sick. And that's all we have.

(*Id.*, PgId 3302-3303, 3324.) Dr. Lieberman explained further that he has "no idea" which chemicals Ms.

Madej is reacting to, "because there's no way to test it." (*Id.*, PgId 3338.)

> Q. Okay and Ms. Madej's complaints are not related solely to the indoor quality of her home, correct?
>
> A. Correct.
>
> Q. They're related to the use of chip seal and the outdoor air quality, correct?
>
> A. That's what the issue is, but her medical condition is that she is sensitive to a variety of different chemicals.
>
> Q. Can you identify with any specificity what those chemicals are?
>
> A. Only from the history of what the patient identifies.
>
> Q. Okay. There's no way to test if she's actually sensitive to those?
>
> A. No.

(*Id.*, PgId 3339-3340.)

> Q. . . . What symptoms did you observe her demonstrate when exposed to chip and seal?
>
> A. I've never observed her demonstrate any symptoms. I had not exposed her to chip seal.
>
> Q. Okay. So it's your testimony that diagnosis for this condition is based strictly on a subjective criteria of history and reported symptoms; is that correct?

> A. Yes.
>
> Q. And you've never observed her display sensitivity to chip and seal, correct?
>
> A. Correct.
>
> Q. And you've never observed her display sensitivity to asphalt products?
>
> A. Correct.
>
> Q. Have you ever observed her display sensitivity to anything?
>
> A. I spent a couple hours with her outside in a rural environment on a lovely sunny day with a minimal breeze if there was one at all. I don't remember. It was just a lovely day. And as a Canadian, I have great appreciation of those lovely days. So that's my memory of it. And the purpose of being in that environment was so that it would be tolerated by her, that I could talk to her and do the physical exam. So that's my experience in being with Ms. Madej to make observations clinically.
>
> . . . Sorry? Did she display sensitivity to anything to me? No.

(*Id.*, PgId 3341-3342.) Dr. Molot explained that he based his opinion on the "couple of hours" he spent with her during that one clinical visit, and on clinical notes and records from other physicians. (*Id.*, PgId 3349.) He did not recall asphalt sensitivity being mentioned in the medical records until September of 2015. (*Id.*, PgId 3350.)

Q. Do you recall whether or not Dr. Lieberman ever tested Ms. Madej for petroleum products?

A. That testing technique uses various mixtures. I do not recall whether—what exactly he used, but some of them represent petroleum products, could be natural gas, could be something else again, I'm not sure where he got his substances for testing from.

Q. So could we say that that test would not be a reliable biological indicator of MCS?

A. Yeah, the testing for sensitivity using sublingual challenges has not been documented as reliable for the diagnosis of chemical sensitivity.

Q. And if Dr. Lieberman testified that he had no medical evidence that Ms. Madej would die if she was exposed to asphalt or chip seal, would that change your medical opinions in this report?

A. No.

Q. Do you believe Ms. Madej will die if the road is chip sealed?

A. Extremely unlikely, maybe change extremely to highly. Yeah.

Q. Have you ever seen a patient die from multiple chemical sensitivity strictly?

A. Have I seen that? No.

> Q. Have you ever seen a patient die from chronic fatigue syndrome?
>
> A. No.
>
> Q. Have you ever seen a patient die from fibromyalgia?
>
> A. No.
>
> Q. So is it fair to say these are not life threatening conditions?
>
> A No, they're not. What they do create is a biological response.

(*Id.*, 3350-3351.) Dr. Molot further opined that he did not think chip sealing the road would cause cardiac arrest, paralysis, or respiratory failure. (*Id.*, PgId 3353.) Dr. Molot also testified that he has no evidence that the alternative products Plaintiffs prefer to chip seal would be safe for Ms. Majed. "Q. Have you ever tested her for exposure to any of these alternative products? A. There's no test available. Q. Okay. Have you ever seen her become symptomatic around any of these alternative products? A. I only spent two hours with her." (*Id.*, PgId 3389.)

Assuming *arguendo* that general causation was proved (and the Court is not convinced that is is), it is Plaintiffs' burden to establish specific causation. "When specific causation of an injury is at issue, the Sixth Circuit requires that the expert conduct a 'differential diagnosis' in order to prove such causation." *Best*, 563 F.3d 179; *Pluck*, 640 F.3d at 678, *Tamraz*, 620 F.3d at 674. (*Def. MIL*, ECF No. 106, p. 4.) Plaintiffs

assert that Dr. Molot did a complete differential diagnosis, and they offer an affidavit from Dr. Molot dated June 28, 2018 (*Pl. Response MIL*, ECF No. 126, pp. 12-13.) Dr. Molot's affidavit states in relevant part:

> I did complete a differential diagnosis in diagnosing Ms. Madej with MCS as follows:
>
> I reviewed all the medical records for Ms. Madej as well as other pertinent information regarding this case (notably lab tests), and conducted an extensive history from birth to present requiring more than 5 hours to complete. That history included an environmental exposure history. I also administered and reviewed approximately 80 pages of validated and standardized medical test questionnaires to assess other conditions as well as function and disability and reviewed all laboratory data (including blood work, an x-ray, and an EKG which were performed on Ms. Madej at the request of her treating physicians within a week prior to the physical exam), all of which were used to identify potential medical or psychological conditions that would require further consideration. I conducted a physical exam of Ms. Madej including vital signs, evaluating her appearance and effect, mobility, examining her eyes, ears, nose, and throat, performed a NASA lean test, Romberg and tandem gait with multitasking to rule out balance disorders. I listened to her heart and lungs, tested her reflexes, conducted an abdominal exam, and examined her skin. I examined her joints and muscle strength and performed an evaluation of tender points. She

> did not present with edema or other physical findings at that time. I observed her coordination, affect, mood, and body language. Nothing from this examination, Ms. Madej's history, or the recent blood work and tests were indicative of a need for further tests. The medical condition has been present for many years. There were numerous lab tests performed by medical practitioners during these many years that were all normal indicating no need to be repeated. I used case criteria to evaluate her for multiple conditions, and eliminated a multitude of possible explanations for her complaints.

(*Molot Aff.*, ECF No. 122, ¶¶ 16-17.)

Defendant asserts that Dr. Molot's affidavit contradicts his testimony. (*Def. Response MIL*, ECF No. 134, p. 2.) To the extent that the affidavit contradicts Dr. Molot's prior testimony, such testimony is inadmissible. *See Compton v. Midwest Specialties, Inc.*, 142 F.3d 296, 302-303 (6th Cir. 1998). However, even if the affidavit is accepted, it is insufficient to establish specific causation. Dr. Molot's affidavit states that "[t]he medical condition has been present for many years." Ms. Madej's alleged sensitivity to chip seal was first raised in 2015. There is simply no medical evidence to support the assertion that the specific chemicals in chip seal are the cause Ms. Madej's illness. "Specific causation establishes whether the substance or chemical in fact caused the plaintiff's medical condition." *Baker*, 680 F.Supp.2d, at 874. As the Sixth Circuit explained in *Tamraz:*

> Calling something a "differential diagnosis" or "differential etiology" does not by itself answer the reliability question but prompts three more: (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 it? (3) Did the expert reliably rule out the rejected causes? If the court answers "no" to any of these questions, the court must exclude the ultimate conclusion reached. *See Best v. Lowe's Home Ctrs., Inc.*, 563 F.3d 171, 179 (6th Cir. 2009).

620 F.3d at 674.

Whether or not Dr. Molot attempted to conduct a differential diagnosis, his testimony is insufficient to answer "yes" to the reliability questions, and does not supply the needed proof that the products in chip seal are the cause of Ms. Madej's injury. As the Sixth Circuit noted in *Nelson v. Tenn. Gas Pipeline Co.*, 243 F.3d 244, 253 (6th Cir. 2001), "an association does not mean there is a cause and effect relationship." "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.* More is required than simply proving the existence of the presence of a toxin in the environment – there must be proof that the level of the toxin present caused the plaintiff's symptoms. *Id.* In the case at bar, "[t]here is 'too great an analytical gap between the data and the opinion proffered' for the court to admit [Dr. Molot's] opinion as testimony." *Tamraz*, 620 F.3d at 675-76. His

testimony is also insufficient to support a finding that the proposed alternatives to chip seal would be safe for Ms. Majed.

The Court finds that Dr. Molot's causation opinions are not reliable under the standards enunciated by *Daubert* and, consequently, are inadmissible. Accordingly, Defendant's motion to exclude the opinions of Dr. Molot is well-taken and is **GRANTED**.

2. Dr. Singer

Ms. Madej began treating with Dr. Singer in 2011. (*Singer Dep.*, ECF No. 81, PgId 1640.) Dr. Singer is a board certified primary care physician who holds a doctorate of Osteopathic Medicine. (*Id.*, PgId 1631.) She testified that, in the past, Ms. Madej has traveled by car to her medical facility, and she examined her outside of the building, on the concrete pavement, which ran from an asphalt road. (*Id.*, PgId 1660.) This protocol was used because Ms. Madej thought the cleaning products, paints, and carpeting inside the building would make her ill. (*Id.*, PgId 1657.) Dr. Singer testified that she has never examined another patient outside, before or since Ms. Majed. (*Id.*) Dr. Singer testified that she does not have the skill set to diagnose MCS. (*Id.*, PgId 1663.) "I don't know the criteria for diagnosing multiple chemical sensitivity." (*Id.*, PgId 1664.) For that diagnosis, she relied on Ms. Madej's statements and a letter from Dr. Lieberman.

> Q. You never spoke with Dr. Lieberman regarding any of the tests he did on Miss Madej

to assess her for her claim of multiple chemical sensitivity?

A. No, I didn't.

Q. And she never told you, hey, he did allergy testing, prick testing?

A. No.

Q. She just presented and said, I have this?

A. Correct. And I did have the letter.

(*Id.*, PgId 1665.)

Q. Did you ever test her for petrochemicals or organic compounds?

A. I don't even know where we begin with that, if there are tests that are accurate for that. That's again in that chemical sensitivity specialty that I don't have.

(*Id.*, PgId 1690.)

Q. What evidence do you have that external chemical stressors caused these symptoms?

A. I have just the letter from Dr. Lieberman and her reports.

(*Id.*, PgId 1740.)

Q. So these symptoms that are characteristic of her MCS, these are all subjective, meaning she reported them, correct?

A. Right. So I'm looking at an ill appearing patient who's saying this is why, and this is what I'm experiencing.

> Q. But they were not objectively measured symptoms, correct?
>
> A. Because I don't even know how you do that, because it's not my field.

(*Id.*, PgId 1723.)

> Q. Okay. And then you've concluded that if the road – Cynthia's road – has chip and seal or asphalt surface or other surfacing that contains volatile organic compounds or toxins, coupled with her weakened state, that she'll suffer physical harm or possibly death?
>
> A. She may. . . . I don't know what state she's in now, but back then she had just barely come through what I though was a very frightening experience.
>
> Q. What evidence do you have that any of that was based on the use of chip and seal?
>
> A. I don't know that it was. I just think I you take a vulnerable organism and you subject them to their stressors, you put them at risk.
>
> Q. But how did you know that those things were going to stress her?
>
> A. Because she had the diagnosis of multiple chemical sensitivity from Dr. Lieberman.

(*Id.*, PgId 1752.)

Dr. Lieberman testified that he did not diagnose Ms. Majed as having multiple chemical sensitivity, as that is not a diagnosis, but is rather a description. (*Lieberman Dep.*, ECF No. 91, PgId 2941.) As

Defendant notes, Dr. Singer testified that MCS or environmental illness is not recognized by the American Medical Association, the World Health Organization, or the ICD-10 (International Statistical Classification of Diseases and Related Health Problems or "International Classification of Diseases"), a medical classification list of the World Health Organization. (*Def. Mot. S.J.*, ECF No. 117, p. 16 (citing *Singer Dep.*, ECF No. 81, PgId 1792-1793, 1767).) Dr. Singer further concedes that she "does not have the skill set" to speak to a diagnosis of MCS. Rather, she had diagnosed Ms. Majed with, among other things, severe anemia, lack of protein, and gastrointestinal orders. (*Id.*, PgId 1674, 1686, 1748, 1784.) Regarding Ms. Majed's precarious health, Dr. Singer conceded, "I still don't know what caused all of this, you know, but something did. Something caused all this." (*Id.*, PgId 1779.) This is not sufficient information to support a differential diagnosis. As the Sixth Circuit explained in *Tamraz*, "testimony still must be judged by its methodology, not its conclusion." 620 F.3d at 675.

As for the letter that she wrote to the County Engineer recommending that construction or maintenance activities not occur within one mile of the Madej home, Dr. Singer concedes that the one mile distance paving restriction was based solely on the request from the Madejs. (*Singer Dep.*, ECF No. 81, PgId 1790.)

> Q. You never did any independent analysis?
>
> A. No.
>
> Q. You never went out and saw the property? They said, a mile, and you put that in there?
>
> A. Correct.

(*Id.*) Furthermore, when asked to opine about the list of alternatives to chip and seal proposed by the Plaintiffs as their preferred alternatives to chip seal, Dr. Singer testified that she is not familiar with any of these compounds. (*Id.*, PgId 1755.) As Dr. Singer concedes, she is "not a specialist in chemical sensitivity." (*Id.*, PgId 1799.)

While it is clear that Dr. Singer is a caring physician, her testimony is insufficient to support a finding of specific causation that Ms. Majed's illness is caused by the chemicals in chip seal, and is also insufficient to support a finding that the proposed alternatives to chip seal would be safe for Ms. Majed. The Court finds that Dr. Singer's causation opinions are not reliable under the standards enunciated by *Daubert* and, consequently, are inadmissible. Accordingly, Defendant's

motion to exclude the opinions of Dr. Singer is well-taken and is **GRANTED**.

3. Dr. Leiberman

Ms. Madej's primary treating physician, Dr. Allan Lieberman, is the sole shareholder of The Center for Occupational and Environmental Medicine ("Center") in Charleston, South Carolina. (*Lieberman Dep.*, ECF No. 91, PgId 2897.) Dr. Lieberman testified that MCS is not a diagnosis, but it is a description. (*Id.*, PgId 2941.) He explained that he "did not diagnose [Ms. Madej]. There is no diagnosis of multiple chemical sensitivities. . . ." (*Id.*, PgId 2961.) The only time Ms. Madej appeared at the Center in person was in 1999, and she was not seen by Dr. Lieberman personally, but was seen by his colleague. (*Id.*, PgId 2980, 2903.) Dr. Lieberman has treated Ms. Madej via telephone, except for a hiatus in treatment from 2000 through 2006. (*Id.*, PgId 3000.) Defendant asserts that it is undisputed that, prior to 2015, Ms. Madej had never mentioned a sensitivity to asphalt. (*Def. MIL*, ECF No. 107, p. 5, citing *Lieberman Dep.*, ECF No. 91, PgId 3058.) Dr. Lieberman testified that the only testing conducted on Ms. Madej at her initial visit consisted of placing a substance he described as "petroleum derived ethanol" under her tongue. (*Lieberman Dep.*, ECF No. 91, PgId 3086.) He did not test Ms. Madej to determine whether she was sensitive to "asphalt".

Q. Is asphalt a generic term?

A. Yes.

Q. So there are varieties of different asphalts, correct?

A. Yes.

Q. And they don't all have the same chemical composition, correct?

A. And probably each batch is probably different because they're rather crude materials.

Q. Did you ever administer any tests to determine if she was sensitive to asphalt other than the discussions we've had already?

A. No.

Q. Other than what you've told me about already?

A Not specific to asphalt, no.

A. Only that asphalt is a petrochemical.

Q. Then how did you determine that the potential exposure to asphalt could cause her to have respiratory or heart failure or paralysis? How did you determine that?

A. Well, it didn't say that's specific to asphalt, did it?

Q. Well, it says, work to maintain roads and/or to clear vegetation poses a hazardous situation for this patient. Exposure will cause her a wide variety of symptoms: Migraines, shortness of breath, dizziness, heart racing, and could create a life-threatening situation, respiratory or heart failure, paralysis.

A. Right.

Q. So what did you mean when you said that? That doesn't mean asphalt?

A. No, not necessarily because it also could be the road. Many of the roads, for example, use herbicide in order to take down the vegetation and clear. Specifically, Ms. Madej in one of her letters specifically talks about becoming temporarily paralyzed from an exposure as she went past the field, for example. Now, what was in that field, I do not know. The suggestion was that it was an agricultural product, most likely a pesticide.

Q. Okay. Have you – do you know what products the county engineer uses to maintain roads?

A. No, I do not.

Q. Do you know what products the county engineer uses to clear vegetation on roads?

A. Specifically, no, I do not.

Q. Do you have any evidence that work to maintain roads or to clear vegetation on roads would cause Ms. Madej to have respiratory failure to the point of death?

A. I can't answer that specifically except, based upon my education, training, and experience, and especially the latter, for example, I have many patients who have become extremely sick as a result of herbicide and chemicals that were sprayed in order to clear

> vegetation from particular areas, especially utility poles which are near their homes.
>
> Q. Okay. And again, have you ever – you never observed Ms. Madej become extremely sick as a result of herbicides, have you?
>
> A. No. Only historically.

(*Id.*, PgId 2925-2927.)

Dr. Lieberman testified that Ms. Madej stated she had been exposed to the pesticide Dursban in the 1990's, but he did not know at what dose or for what period of time. (*Id.*, PgId 2986.) "[I]t's the toxic exposure to organophosphate pesticide that's her diagnosis, and she manifests all of these signs and symptoms related to that." (*Id.*, PgId 2965.) However, Dr. Lieberman testified that other tests also found arsenic:

> Q. Has blood work that's been performed ever revealed high percentages of toxic elements?
>
> A. She underwent hair analysis and urine analysis looking for heavy metals, and the only one that was found was arsenic, and the arsenic is in her. Unfortunately, it's in all of us now because if we eat a lot of rice – and she eats rice two to three times a day. Rice, unfortunately, is heavily contaminated with arsenic, and that's what you're picking up in Madej, for example, with regard to the arsenic. Now, I did a cholinesterase level on her, and . . . I believe that supports the fact that she's constantly being exposed to organophosphate pesticides. . . .

(*Id.*, PgId 2965-2966.)

Q. Is there any living environment that would be totally safe for Ms. Madej, given her exquisite sensitivities?

A. No. Everything is relative.

Q. And you're aware that there's presently an injunction on the road, correct?

A. I think so, yes.

Q. But yet, Ms. Madej is still ill and continues to treat with you, correct?

A. Yes.

Q. So is it possible that something else besides the road is causing her to be ill?

A. Oh. It's the entire environment which consists of a lot of the pollutants we've been talking about here –

* * *

Q. She had a lengthy history of medical problems even prior to 1999, it's your testimony, correct?

A. Oh, yes.

* * *

Q. And when she came to you in 1999, you did not believe the cause of her illness was asphalt, correct?

A. Correct.

(*Id.*, PgId 2954-2955, 2957, 2961.) Dr. Lieberman testified that one of the basic principles of environmental medicine is the "concept of total load":

> Q. . . . And we've had a lot of testimony regarding [Ms. Madej's] vulnerability. Does that have anything to do with paving the road, though, from a medical standpoint?
>
> A. No. But one of the basic principles of environmental medicine is the concept of the total load, and part of that total load certainly would be nutrition, and nutrition was a very big concern for us, as we noticed that her weight – when I believe I looked was like 125 pounds. She's 5 foot 7½, if I recall correctly, and so she was sort of thin to being with. And then she goes all the way down, I think, to maybe 107 or 117. So she's lost quite a bit of weight because she's so restricted in terms of what she's eating, and that was a big danger for her. And I noticed that Dr. Weirs, probably in 2018 or '17, cautions her that she has to try to eat even if she doesn't want to.
>
> Q. Yes. Absolutely. And again, her nutrient deficiencies, they are not related at all to the substance that the engineer uses on the road.
>
> A. Yes. That's correct.

(*Id.*, PgId 2039-2940.)

> Q. Do any of your other patients who have been exposed to Dursban seek an accommodation regarding paving a mile around their home?

A. to my knowledge.

Q. And is it conceivable that even if an accommodation is provided, Ms. Madej could still be sick?

A. Yes.

(*Id.*, PgId 2966-2967.)

Dr. Lieberman testified that he wrote three letters of medical necessity in September 2015 at the request of Ms. Madej. In his letter of September 2, 2015, he described her as suffering from "severe chemical sensitivity" and that she could be placed "in a life threatening situation by even minimal exposures to common materials and chemicals, particularly those originating from petrochemicals." Examples include heribicides/fertilizers, pesticides, petroleum products such as tar and blacktop, oil, fuels, exhaust, paints, varnishes and polyurethanes, and smoke combustion byproducts. (*Id.*, PgId 3135.) The letter stated that Ms. Madej should be contacted "a minimum of three days before initiating any road construction or maintenance activity within 1 mile of her residence." (*Id.*) The September 4, 2015 letter changes the requirement from notification to restriction such that activities must be restricted within one mile from her home. (*Id.*, PgId 3137.) Finally, Dr. Lieberman wrote a September 10, 2015 letter of necessity, also requesting that activities be avoided within one mile of Ms. Madej's home:

To Whom It May Concern:

Cynthia Madej has been under my care for the past 15 years for severe chemical sensitivity from toxic chemical exposure that has resulted in her being legally disabled since 1997. Because of her sensitivities, she can be placed in a life-threatening situation by even minimal exposures to many common materials and chemicals, particularly those originating from petrochemicals. Examples of some of the concerning chemicals include: herbicides/fertilizers, pesticides, petroleum products such as tar and blacktop, oil, fuels: exhaust, paints, varnishes, polyurethanes, and smoke/combustion bi-products.

Work to maintain roads and/or to clear vegetation poses a hazardous situation for this patient. Exposures cause her a wide variety of symptoms (migraines, shortness of breath, dizziness, heart racing) and could create a life-threatening situation (respiratory or heart failure, paralysis).

Avoidance of exposures is essential for Cynthia. She cannot relocate from her residence to avoid exposure, even for short periods, because she requires specialized living conditions that cannot be easily replicated. Remaining indoors with the windows closed does not provide adequate protection against chemical stressors because of the level of her sensitivity. At this time, avoidance is the only viable protection.

> To avoid risk to my patient, it is strongly advised that activities be avoided within 1 mile of her residence. It is also strongly advised that Cynthia is contacted prior to a minimum of 3 days before initiating any road construction or maintenance activity within 1 mile of her residence.

(*Id.*, PgId 3137.)

Dr. Lieberman testified that he believed the reason he wrote the letters was to support Ms. Madej's request for an injunction. The letters were not based on new medical evidence. (*Id.*, PgId 2936.) Dr. Lieberman also conceded that the one mile restriction on road paving was arbitrary. (*Id.*, PgId 2930.)

Plaintiffs assert that Dr. Singer and Dr. Lieberman, the treating physicians, should be permitted to testify "like any other witness," that is, like a fact witness. (*Pl. Response MIL*, ECF No. 125, p. 6.) However, the issue is not whether Ms. Madej is ill. The issue is whether chip seal caused or will cause her illness. The testimony is that there is no safe exposure to any environmental pollutant for someone as sensitive as Ms. Madej, and this testimony would not help the trier of fact determine whether chip seal will harm the plaintiff and whether she has proven both general and specific causation.[1] Additionally, Plaintiffs assert that

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[1] After the state court granted the paving injunction, Dr. Lieberman wrote a letter to the County Engineer on February 26, 2016, stating that the County should refrain from "spraying chemicals within a three mile radius of [Ms. Madej's] above stated address." (*Id.*, PgId 3138.)

"[a]s to recognition by leading medical authorities, at a 1996 World Health Organization (WHO) conference, the conferees recommended that a different term, Idiopathic Environmental Intolerance (IEI), be used instead of MCS, and called for continuing research on the condition." (*Id.*, p. 8.)[2] However, this information is not sufficient to meet the *Daubert* standard for reliability as to long-term or permanent symptoms arising from the exposure to a particular toxic chemical.

> The issue is the reliability of his opinion from a *legal* perspective. And what science treats as a useful but untested hypothesis the law should generally treat as inadmissible speculation. As the Supreme Court has explained, "[t]he scientific project is advanced by broad and wide-ranging considerations of a multitude of hypotheses, for those that are incorrect will eventually be shown to be so. . . . Conjectures . . . are of little use, however, in the project of reaching a quick, final, and binding legal judgment – often of great consequence – about a particular set of events in the past." *Daubert*, 509 U.S. at 597, 113 S.Ct. 2786. "Law lags science; it does not lead it." *Rosen* [*v. Ciba-Geigy Corp.*, 78 F.3d 316] at 319 [(7th Cir. 1996)].

Tamraz, 620 F.3d at 677.

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[2] A condition described as idiopathic, meaning one for which the cause is unknown, is by definition not linked to chip seal asphalt or any other specific chemical.

Defendant also asserts that Dr. Lieberman's affidavit of June 28, 2018 contradicts his testimony. (*Def. Reply MIL*, ECF No. 133, p. 5.) To the extent that the affidavit contradicts Dr. Lieberman's prior testimony, such testimony is inadmissible. *See Compton*, 142 F.3d at 302-303. The affidavit attempts to clarify Dr. Lieberman's testimony regarding exposure levels. (*Lieberman Aff.*, ECF No. 121.) He states that Ms. Madej's sensitivity level is tied to small amounts, like parts per billion. However, "the mere existence of a toxin in the environment is insufficient to establish causation without proof that the level of exposure could cause the plaintiffs' symptoms." *Pluck*, 650 F.3d at 679. The information Dr. Lieberman relies upon for this opinion is based solely on Ms. Majed's self-reports of when she felt she had symptoms. (*Lieberman Aff.*, ECF No. 121, ¶ 5.) In any event, even with the additional information provided in the affidavit, there is no differential diagnosis evidence or other evidence sufficient to tie Ms. Majed's numerous symptoms and long years of illness to the chip seal at issue. The Court finds that Dr. Leiberman's causation opinions are not reliable under the standards enunciated by *Daubert* and, consequently, are inadmissible. Accordingly, Defendant's motion to exclude the opinions of Dr. Leiberman is well-taken and is GRANTED.

B. Summary Judgment

Defendant moves for summary judgment, asserting that Plaintiffs "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." (*Def. Mot. S.J.*, ECF No. 117, p. 2.) Defendant's motion is well-taken. In the absence of a valid, scientific basis to support a finding of specific causation, Plaintiffs are unable to establish a genuine issue of fact for trial.

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." *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). 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.

Claim II asserts civil assault and battery and/or wrongful death. (*Third Am. Comp.*, ECF No. 16, p. 5.) 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). Battery

is defined 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). Defendant asserts that the claim is not yet ripe, because the County has not proceeded with the paving project. (*Def. Mot. S.J.*, ECF No. 117, p. 26.) However, an assault may be supported by an offer, and certainly the planned paving project could constitute an offer. Defendant notes that chip sealing the road is not of itself unlawful, and maintenance of the road is part of Defendant's duties, *see* Ohio Rev. Code § 5543.01(A). (*Id.*, p. 28.) However, Plaintiffs assert that the County is liable as a result of "wanton, reckless, and/or bad faith exercise of discretion" because Defendant "knows with substantial certainty that its actions will bring serious physical harm or death to Mrs. Majed." (*Third Am. Comp.*, ECF No. 16, ¶¶ 28-31.) Inasmuch as the Court has ruled that the proffered medical opinions are not admissible, the scienter requirement for this claim is unsupported, and the claim must fail.

Claim III seeks 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." (*Third Am. Comp.*, ECF No. 16, ¶ 33.) Inasmuch as Claim II is unsupported, Claim III must also fail.

Claim IV asserts that Ms. Madej has been discriminated against in violation of the Fair Housing Amendments Act, 42 U.S.C. § 3601 *et seq.*, because of a failure to make a reasonable accommodation for her disability. (*Id.*, pp. 5-6.) Plaintiffs assert that there is a genuine issue of material fact as to the reasonableness of the accommodation sought by the Madejs. (*Pl. Mem. Opp.*, ECF No. 120, p. 28.) The "three operative elements" of the FHAA's reasonable accommodation requirement are "equal opportunity," "necessary," and "reasonable." *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 102 F.3d 781, 794 (6th Cir. 1996). The first two elements are closely related. The first asks "whether the requested accommodation would afford the disabled resident an equal opportunity to enjoy the property." *Hollis v. Chestnut Bend Homeowners Ass'n*, 760 F.3d 531, 541 (6th Cir. 2014). The FHAA "links the term 'necessary' to the goal of equal opportunity. 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 Assocs.*, 102 F.3d at 795 (citations omitted). "The necessity element is, in other words, a causation inquiry that examines whether the requested accommodation or modification 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." *Hollis*, 760 F.3d at 541. There is simply no medical evidence to support the assertion that the alternative proposed

products would, in fact, provide such redress.[3] Inasmuch as the Court has ruled that the proffered medical opinions are not admissible, the claim must fail.

Claim V asserts that Ms. Madej will has been discriminated against under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, because of the County's failure to make a reasonable modification to accommodate her disability. (*Id.*, pp. 6-7.) The specific modification Plaintiffs seek is the use of an alternative product to chip seal on the portion of Dutch Creek Road at issue. Because there is no admissible medical evidence to support Plaintiffs' claims relative to chip seal, let alone to support the safety of the proposed alternatives, there is no issue of material fact, and summary judgment is appropriate. Accordingly, Defendant's motion for summary judgment is well-taken and is **GRANTED**.

Finally, the Court notes that Ms. Madej is quite ill, a fact that is undisputed. As a citizen, her health is important to officials serving Athens County. The Court encourages the County Engineer to give Ms. Majed notice far in advance of road work and to explore any remedial measures which could reduce environmental emissions near her home.

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[3] To the contrary, the medical evidence indicated that no level of chemical exposure is safe for Ms. Madej, and none of the doctors could testify that the proposed alternative chemicals would be safe.

IV. CONCLUSION

For the reasons set forth above, Defendant's motion for summary judgment (*Def. Mot. S.J.*, ECF No. 117) is **GRANTED**. The claims of Plaintiffs are **DISMISSED WITH PREJUDICE**, and the preliminary injunction is **VACATED**.

IT IS SO ORDERED.

10-12-2018 /s/ [Illegible]
DATE **EDMUND A. SARGUS, JR.**
CHIEF UNITED STATES
DISTRICT JUDGE

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
Eastern Division

CYNTHIA MADEJ,
***et al.*,**

Plaintiffs,

v.

ATHENS COUNTY ENGINEER JEFF MAIDEN,

Defendant.

JUDGMENT IN A CIVIL CASE

CASE NO. 2:16-cv-658
CHIEF JUDGE EDMUND A. SARGUS, JR.
MAGISTRATE JUDGE CHELSEY M. VASCURA

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court.** A decision has been rendered by the Court without a hearing or trial.

Pursuant to the Order filed October 17, 2018 the Court GRANTS Defendant's motion for summary judgment [ECF No. 17]. The claims of Plaintiffs are DISMISSED WITH PREJUDICE, and the preliminary injunction is VACATED.

Date: October 17, 2018

RICHARD W. NAGEL, CLERK

/S/ Christin Werner
(By) Christin Werner
Courtroom Deputy Clerk

No. 18-4132

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA MADEJ; ROBERT MADEJ, Plaintiffs-Appellants, v. JEFF MAIDEN, ATHENS COUNTY ENGINEER, Defendant-Appellee.	ORDER (Filed Mar. 26, 2020)

BEFORE: GUY, BUSH, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Deb S. Hunt
Deborah S. Hunt, Clerk

Americans with Disabilities Act:

42 U.S.C. § 12131:

As used in this subchapter [ADA Title II]:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4) of Title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means 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.

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42 U.S.C. § 12132:

Subject to the provisions of this subchapter, 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.

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28 C.F.R. § 35.108

(d) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

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28 C.F.R. § 35.130

(a) No qualified individual with a disability shall, on the basis of 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 public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

* * *

(vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

* * *

(7)(i) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are 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.

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6 C.F.R. § 36.105

(d) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity.

(vii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical evidence. Nothing in this paragraph (d)(1) is intended, however, to prohibit or limit the presentation of scientific, medical, or statistical evidence in making such a comparison where appropriate.

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29 U.S.C. § 1630.2

(g) Definition of "disability"—

(1) In general. Disability means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

* * *

(h) Physical or mental impairment means—

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) Major life activities—

(1) In general. Major life activities include, but are not limited to:

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes

the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) Substantially limits—

(1) Rules of construction. The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate. . . .

Fair Housing Amendments Act:

42 U.S.C. § 3602:

(h) "Handicap" means, with respect to a person—

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities. . . .

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42 U.S.C. § 3604:

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

* * *

(f)(2) 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 of

(A) that person

* * *

(3) For purposes of this subsection, discrimination includes—

* * *

(B) 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. . . .

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24 C.F.R. § 100.201:

(a) Physical or mental impairment includes:

(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or

(2) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term physical or mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech and hearing impairments, cerebral palsy, autism, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, Human Immunodeficiency Virus infection, mental retardation, emotional illness, drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism.

(b) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
