[Cite as *Edwards v. Ohio Dept. of Transp.*, 2016-Ohio-1277.]

JESSICA EDWARDS, et al. Plaintiffs v. OHIO DEPARTMENT OF TRANSPORTATION Defendant	Case No. 2014-00553 Magistrate Anderson M. Renick DECISION OF THE MAGISTRATE

{¶1} Plaintiffs bring this action alleging negligence, trespass, nuisance, and both negligent and intentional infliction of emotional distress. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.

{¶2} In June 2010, plaintiffs Jessica and Cameron Edwards purchased a home that is located on property which is adjacent to State Route (SR) 86, in Lake County Ohio. The home is supplied with water from a well on the property. Plaintiffs' claims arise from the alleged contamination of the shallow aquifer from which their well draws water. Specifically, plaintiffs contend that defendant, the Ohio Department of Transportation (ODOT), used road salt or other deicing chemicals which leached into the soil on their property and contaminated the groundwater.

{¶3} The previous owners testified by deposition regarding their use of the water system and the quality of the water. Earl Tate, the original owner of the home, testified by deposition that he lived on the property with his wife and children from 1991 until 2008. According to Tate, the well water was "hard," which caused him to install a water softener, but he testified that the water was not salty. Tate denied having any problem with corrosion or rust forming on his plumbing or appliances. Tate testified that Davis Water Systems performed routine maintenance on his water system.

{¶4} Ray and Janet Kennedy purchased the home at a sheriff's sale in September 2008 as an investment property and they subsequently spent at least $40,000 in repairs. Ray Kennedy testified by deposition that the house had a water softener system, and although he did not use the system, he had the system repaired before he sold the home. Kennedy also replaced a pipe that was connected to a footer drain in the basement after the original pipe had become blocked by dirt that had washed over the opening at the end of the pipe. Kennedy explained that he installed a new solid pipe that discharged into a ravine which is located approximately ten feet below the elevation of the basement. The Kennedys did not disclose any problems with the home when they sold it to plaintiffs.

{¶5} Jessica testified that she called defendant in the spring of 2011 to report that there was standing water in the drainage ditch which runs along plaintiffs' property and SR 86. Jessica complained that the standing water had an unpleasant odor. Defendant's representative informed Jessica that the machine used to perform drainage ditch maintenance was not available and that her name would be placed on a list to have the work completed. Jessica testified that she called again in the fall of 2011 and received a similar reply from defendant.

{¶6} In November 2011, plaintiffs had their home water system inspected by Kinetico after their recently purchased stainless steel dishwasher tub had rusted. The Kinetico representative informed plaintiffs that their water softener system was working properly and "that there was nothing they could do" for the water system. Jessica called Davis Water Systems on August 20, 2012, to get an estimate for the cost of drilling a new well.

{¶7} Dave Davis testified that he was familiar with plaintiffs' water system because his company, Davis Water Systems, had performed work for plaintiffs, Tate, and the Kennedys. Davis stated that, after the Kennedys acquired the property, he "cleaned the system up" and replaced the water softener because Tate had neglected

to perform some routine maintenance. Davis testified that he did not test the quality of the water in 2012 because he had previously tested the water when he installed the water system. Davis related that he had an "ongoing" conversation with plaintiffs about their water system and he advised them that, based upon his experience and knowledge of their property and the shallow aquifer that serviced their system, road salt placed on SR 86 could affect the quality of their water. According to Davis, neither Tate nor the Kennedys complained about having salty water, including when Davis installed a reverse osmosis system for the Kennedys to improve the quality of their drinking water.

{¶8} After contacting the Lake County Health Department, Jessica Edwards talked to Kyle Tharp, a geologist for the Ohio Department of Natural Resources (ODNR) – Division of Oil and Gas Resources Management, who conducted an investigation to determine whether plaintiffs' complaint of salt in their well water might be related to oil and gas drilling activity in the area, such as oilfield brine use. On October 25, 2012, Tharp sent plaintiffs a report which described his investigation and the results he obtained. (Plaintiffs' Exhibit 8.) Tharp explained that he collected and analyzed a water sample from plaintiffs' well, inspected all oil and gas wells within one-quarter mile of the well, and reviewed water well logs for homes in the area. Tharp found no evidence of oilfield brine in plaintiffs' water supply. Tharp concluded that the chloride chemistry of plaintiffs' water sample was "consistent with that of road salt (halite) and/or domestic sewage (i.e. water softener) discharge." (Plaintiffs' Exhibit 8, page 4.) Tharp eliminated naturally occurring causes of the salt contamination in plaintiffs' well, such as "upconing," which involves salt leaching from surrounding bedrock.

{¶9} In October 2012, after Tharp advised Jessica that he believed road salt had migrated onto plaintiffs' property, she called defendant again to complain about water in the ditch and the well contamination. In November 2012, plaintiffs replaced their driveway culvert pipe which allowed water in the ditch to flow under the driveway. Scott

Pirc, who replaced the culvert pipe, testified that the new pipe was placed at the same elevation as the old pipe. In December 2012, defendant sent a maintenance crew to work on the ditch and defendant's crew had to reinstall the culvert pipe at a lower elevation to match the new grade of the ditch. Plaintiffs called defendant again after they observed that the ditch still did not flow properly.

{¶10} Thomas Henderson, a transportation manager for ODOT District 12, testified that he learned that plaintiffs had called to have maintenance performed on the ditch in front of their property. According to Henderson, performing ditch maintenance is not a priority unless water is overflowing from the ditch onto the roadway. Henderson recalled that Jessica requested ditch maintenance after plaintiffs' culvert pipe was replaced. Henderson testified that the preferred equipment to perform ditch maintenance was a Gradall brand ditching machine; however that equipment was broken at the time in question. Henderson explained that while the Gradall was not available, complaints related to ditches were referred to Geauga County for maintenance. In the event of priority ditch maintenance, a "track hoe" could be obtained from the ODOT District 12 culvert crew. Henderson testified that he did not like to use the track hoe because it could cause damage to pavement. Henderson related that his crew did their best to regrade plaintiffs' ditch to flow toward Carter road, but that was a difficult task due to the relatively flat terrain. Henderson testified that his crew replaced or reset the culvert pipe under both plaintiffs' driveway and the driveway on the adjacent property which had become clogged. Henderson recalled that Jessica told him that road salt had corroded fixtures in her home and that she wanted to get the ditch graded so that water would flow toward Carter road.

{¶11} In May 2013, plaintiffs contacted Fredebaugh Well Drilling to drill a new well on their property. Hewitt Fredebaugh testified by deposition the he helped select a site for the new well that was away from the existing well, septic system, and SR 86. Fredebaugh drilled to a depth of 42 feet and he detected water at only 6 to 7 feet below

the surface, a level between two types of shale. The water from the newly drilled well was tested and showed an extremely high reading for "total dissolved solids" (TDS), a level that was comparable to the level detected in water from the original well. Fredebaugh explained that sodium is one of the minerals included in TDS calculations.

{¶12} After receiving Tharp's report, Jessica also contacted Laura Kuns, the Deputy Director of the Lake County Health Department. Kuns obtained a copy of the report and she visited plaintiffs' property twice to view the well and surrounding area, including the drainage ditch and sewage system. During her visits in both May and August 2013, Kuns observed salt crystals along SR 86 and in the ditch. Kuns testified by deposition that the distance between plaintiffs' well and the sewage system was greater than twice that which is required to isolate the well from sewage contamination. According to Kuns, plaintiffs' sewage system is down-gradient from their well and she did not find any evidence indicating that the sewage system had caused the salt contamination. Kuns was aware of complaints of road salt contamination from property owners who lived adjacent to other state roads.

{¶13} Myron Pakush, the deputy director for ODOT's District 12, testified that he was contacted by Congressman David Joyce's office regarding plaintiffs' complaint. Pakush stated that he asked Mark Carpenter, a civil engineer employed as an environmental coordinator for District 12, to work with Patrick Piccininni, ODOT's chief legal counsel, to address plaintiffs' complaint. Carpenter, who specialized in water resources, learned of plaintiffs' concern about salt contamination in 2013 and he was directed by Juliet Denniss, an environmental specialist for ODOT, to investigate plaintiffs' complaints.

{¶14} In August 2013, Carpenter retained Lawhon and Associates (Lawhon) to determine whether road salt had contaminated plaintiffs' property. Thomas Powell, a geologist, was Lawhon's project manager for the investigation. Powell determined that the ground water on plaintiffs' property flowed in a northerly direction, from the well to

the back of their yard. Lawhon conducted a survey of property owners who lived within 1000 feet of plaintiffs' property; 12 of 36 property owners responded and four of those responses indicated they had salty water. Powell observed corrosion in plumbing valves and joints in plaintiffs' basement, and he noted that there was no moisture in the basement that could be attributed to the corrosion.

{¶15} Powell testified that he compared the test results from the samples which were collected by Kinetico, Biosolutions, and ODNR, and analyzed by three independent laboratories. Powell found that the test results were similar in that the level of sodium chloride exceeded the secondary maximum containment levels (MCLs) for drinking water as established by the U.S. EPA. Powell explained that MCLs are guidelines that address aesthetic considerations for drinking water, such as taste, color, and odor, which are used to determine whether water is contaminated or not suitable for drinking.

{¶16} As a result of Powell's investigation, Lawhon recommended that defendant perform a site investigation to obtain soil borings to assess the level of sodium chloride in the soil on plaintiffs' property. Lawhon collected 18 soil samples that included 15 samples from around the well, and three in the back of the yard closer to the septic system. According to Lawhon's site investigation report, "the areal distribution of sodium and chloride at higher concentrations in shallow soil adjacent to SR-86 and a decreasing concentration gradient moving both inwards on the property and at depth, it appears that the application of sodium chloride road salt to SR-86 has resulted in some migration of salt onto the subject property in the vicinity of the onsite potable well." (Plaintiffs' Exhibit 19, ¶ 1.1.2.)

{¶17} Powell testified that Lawhon made recommendations for further investigation to make a definitive determination whether plaintiffs' well was contaminated by road salt, but ODOT declined further investigation. Carpenter acknowledged that Lawhon's report indicated that at least three other property owners

who lived near plaintiffs' property had reported salty water, but Carpenter testified that neither he nor any other employee of ODOT took further action as a result of Lawhon's report. Although Lawhon recommended that ODOT determine the composition of salt and chemicals ODOT used in Lake County so that those chemicals could be compared to the salts or contaminates in the well water, Carpenter testified that such a comparison was not performed. Carpenter testified that he was aware that the Lake County Health Department concluded that plaintiffs' well water contamination was not caused by sewage discharge. Carpenter stated that he had no criticism of either Tharp's or Lawhon's reports. According to Carpenter, ODOT did not follow Lawhon's recommendation to monitor a couple of the wells in question so that samples could be compared during the application of salt in the winter. Carpenter testified that he was instructed not to provide the results of Lawhon's investigation to either plaintiffs or the Lake County Health Department.

{¶18} After she reviewed Lawhon's report, Denniss informed Carpenter and Piccininni that she did not believe the contamination of plaintiffs' well was caused by road salt. Denniss testified by deposition that she advised Carpenter and Piccininni that she believed that the former owner of plaintiffs' property who had lost his property through foreclosure "probably dumped salt down the well in order to make it unusable." Denniss further testified that she disagreed with the Lawhon report and that the basis for her conclusion regarding the cause of the contamination was her experience in attempting to purchase foreclosed properties which appeared to be deliberately damaged by former inhabitants. Denniss testified that she declined to recommend any further investigation. Although ODOT acknowledged that plaintiffs fully cooperated with Lawhon's investigation, plaintiffs were not provided with a copy of the investigation report until they obtained it through civil discovery in this action.

{¶19} Plaintiffs alleges negligence, nuisance, and trespass resulting from defendant's application of road salt which migrated to plaintiffs' property through the

flow of surface water and, eventually, into the underground aquifer that supplied plaintiffs' well water system.

Affirmative Defenses:
Statute of Limitations

{¶20} Defendant contends that plaintiffs' claims are barred by the applicable statute of limitations. Pursuant to R.C. 2743.16(A), "civil actions against the state permitted by sections 2743.01 to 2743.20 of the Revised Code shall be commenced no later than two years after the date of the accrual of the cause of action * * *."

{¶21} Generally, a cause of action accrues at the time the wrongful act is committed. *O'Stricker v. Jim Walter Corp*., 4 Ohio St.3d 84, 87 (1983). Under the discovery rule, the statute of limitations begins to run when the plaintiff discovers or, through the exercise of reasonable diligence, should have discovered a possible cause of action. *Id*. at 90. Ohio courts have applied the discovery rule to cases involving latent property damage. *Dalesandro v. Ohio Dept. of Transp*., 10th Dist. Franklin No. 10AP-241, 2010-Ohio-6177.

{¶22} Although plaintiffs became concerned about the quality of their well water in November 2011, they maintain that they first learned of the possibility that the well was contaminated by road salt after Tharp advised them of the results of his investigation in October 2012. Based upon the evidence presented, the court finds that the discovery rule applies under the facts of this case.

{¶23} Furthermore, a continuing trespass or nuisance arises when defendant's tortious conduct is ongoing, thereby perpetually generating new violations. *Adams v. Pitorak & Coenen Invs., Ltd.*, 11th Dist. Geauga No. 2011-G-3019, 2012-Ohio-3015, ¶ 70, citing *Weir v. E. Ohio Gas Co*., 7th Dist. Mahoning No. 01 CA 207 2003 Ohio 1229, ¶ 30; *Wright v. Ohio Dept. of Transp.*, 10th Dist. Franklin No. 12AP-974, 2013-Ohio-2162, ¶ 7. For the reasons stated below, the court finds that the salt contamination is a

continuing trespass or nuisance and that the statute of limitations does not bar plaintiffs' claims.

Discretionary Immunity

{¶24} Defendant next contends that plaintiffs' claims are barred by the doctrine of discretionary immunity. The Supreme Court of Ohio has held that "[t]he language in R.C. 2743.02 that 'the state' shall 'have its liability determined * * * in accordance with the same rules of law applicable to suits between private parties * * *' means that the state cannot be sued for its legislative or judicial functions or the exercise of an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion." *Reynolds v. State*, 14 Ohio St.3d 68, 70 (1984); *Von Hoene v. State*, 20 Ohio App.3d 363, 364 (1st Dist.1985). The Tenth District Court of Appeals has held that "discretionary immunity is appropriate only as to determinations of policy and procedures and that '[o]nce the decision has been made to engage in a certain activity or function, the state may be held liable, in the same manner as private parties, for the negligence of the actions of its employees and agents in the performance of such activities.'" *Foster v. Ohio Dept. of Rehab. & Corr.,* 10th Dist. Franklin No. 12AP-503, 2013 Ohio App. LEXIS 812 (Mar. 12, 2013), ¶ 22, citing *Reynolds* at paragraph one of the syllabus. Furthermore, "'the negligent implementation of a basic policy decision may also be actionable, even if such implementation allows state employees to exercise some degree of discretion.'" *Id.,* quoting *Young v. Univ. of Akron,* 10th Dist. Franklin No. 06AP-1022, 2007-Ohio-4663.

{¶25} Defendant argues that its decisions regarding both the type of deicing chemicals it used and the timing for scheduling road maintenance was subject to discretionary immunity. However, "application of the discretionary immunity doctrine requires more than a finding that a state employee * * * made a decision that required

the exercise of a high degree of discretion--it requires a finding of the exercise of a high degree of official judgment or discretion as to an executive or planning function involving the making of a basic policy decision." *Id*. at ¶ 23.

{¶26} The court finds that plaintiffs' claims concern defendant's implementation of its duty to maintain state roads through established maintenance procedures, rather than an executive or planning function involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. Accordingly, defendant is not entitled to discretionary immunity for actions or inactions related to plaintiffs' claims.

Public Duty

{¶27} Defendant also contends that it is immune under the public duty doctrine for any action or inaction related to monitoring, inspecting, or regulating the use of salt on SR 86.

{¶28} R.C. 2743.02(A)(3)(a) states, "[e]xcept as provided in division (A)(3)(b) of this section, the state is immune from liability in any civil action or proceeding involving the performance or nonperformance of a public duty, including the performance or nonperformance of a public duty that is owed by the state in relation to any action of an individual who is committed to the custody of the state."

{¶29} R.C. 2743.01(E)(1) states, in pertinent part: "'Public duty' includes, but is not limited to, any statutory, regulatory, or assumed duty concerning any action or omission of the state involving any of the following:

{¶30} "(a) Permitting, certifying, licensing, inspecting, investigating, supervising, regulating, auditing, monitoring, law enforcement, or emergency response activity * * *."

{¶31} "(b) The state immunity provided in division (A)(3)(a) of this section does not apply to any action of the state under circumstances in which a special relationship

can be established between the state and an injured party. A special relationship under this division is demonstrated if all of the following elements exist:

{¶32} "(i) An assumption by the state, by means of promises or actions, of an affirmative duty to act on behalf of the party who was allegedly injured;

{¶33} "(ii) Knowledge on the part of the state's agents that inaction of the state could lead to harm;

{¶34} "(iii) Some form of direct contact between the state's agents and the injured party;

{¶35} "(iv) The injured party's justifiable reliance on the state's affirmative undertaking."

{¶36} Defendant contends that it is immune from liability for any public duty that was owed to plaintiffs and that plaintiffs have not established a "special relationship" with the state which would serve as an exception to the public duty statute. However, defendant has not cited any authority for its assertion that defendant is entitled to statutory immunity regarding highway maintenance. Rather, ODOT is subject to a general duty to exercise "ordinary, reasonable care" in maintaining state highways. *White v. Ohio DOT*, 56 Ohio St.3d 39, 42 (1990); *N. Coast Premier Soccer, LLC v. Ohio Dept. of Transp.,* Ct. of Cl. No. 2009-07091, 2012-Ohio-5297 (finding that ODOT was liable for trespass regarding discharging surface water and sediment onto plaintiff's property.) Although defendant contends that plaintiffs' claim involves ODOT "monitoring, inspecting, or regulating" the amount of salt that was applied to SR 86, the court finds that neither defendant's application of deicing chemicals to the highway nor maintenance of the SR 86 road drainage ditch constitute a public duty pursuant to R.C. 2743.01(E)(1)(a).

ODOT's Duty and Notice

{¶37} Pursuant to R.C. 5501.11(A), ODOT is responsible for establishing "state highways on existing roads, streets, and new locations and [to] construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon." ODOT's duty to maintain SR 86 includes a duty to clean and maintain the adjacent ditches which provide drainage for the roadway. *See* 1981 Ohio Op. Atty. Gen. No. 39, paragraph three of the syllabus. "[I]t is apparent that when a [government entity] undertakes to establish a road or highways, it must also provide for the drainage of that highway. Roadside ditches which handle the road drainage must be deemed to be part of the highway system. Thus, the [government entity] with the responsibility for the repair and maintenance of a particular road must, as a part of that responsibility, clean and maintain the ditches which run along the side of the road." *Id*. page 5.

{¶38} ODOT may be held liable for damage caused by defects, or dangerous conditions, on state highways where it has notice of the condition, either actual or constructive. *McClellan v. Ohio Dept. of Transp*., 34 Ohio App. 3d 247 (10th Dist.1986), paragraph one of the syllabus. "Actual notice exists where, from competent evidence, the trier of fact can conclude the pertinent information was personally communicated to, or received by, the party." *Kemer v. Ohio Dept. of Transp*., 10th Dist. Franklin No. 09AP-248, 2009-Ohio-5714, ¶ 21, citing *In re Fahle's Estate*, 90 Ohio App. 195, 197 (6th Dist.1950). Constructive notice is that notice which the law regards as sufficient to give notice and is regarded as a substitute for actual notice. *Id*. at ¶ 24. However, proof of notice of a damage-causing condition is not necessary when defendant's own agents actively caused such condition. *Bello v. City of Cleveland*, 106 Ohio St. 94 (1922), paragraph one of the syllabus.

Trespass and Nuisance

{¶39} Trespass is defined as "an interference or invasion of a possessory interest in property." *Abraham v. BP Exploration & Oil, Inc*., 149 Ohio App.3d 471, 2002-Ohio-4392, ¶ 14 (10th Dist.). "[I]n order to set forth a prima facie case of trespass to real property, a plaintiff must demonstrate an unauthorized and intentional act, and entry onto the land in possession or control of another." *Id*.

{¶40} There are generally two categories of trespass in the context of water interference, permanent and continuing. *Sexton v. Mason*, 117 Ohio St.3d 275, 2008-Ohio-858, ¶ 28. "A permanent trespass occurs when the defendant's tortious act has been fully accomplished, but injury to the plaintiff's estate from that act persists in the absence of further conduct by the defendant." *Reith v. McGill Smith Punshon, Inc*., 163 Ohio App.3d 709, 2005-Ohio-4852, ¶ 49 (1st Dist.). "In contrast, a continuing trespass results when the defendant's tortious activity is ongoing, perpetually creating fresh violations of the plaintiff's property rights." *Id*.

{¶41} Plaintiffs also alleges a private nuisance inasmuch as they contend that defendant interfered with the use and enjoyment of their land. *Scott v. Nameth*, 10th Dist. Franklin No. 14AP-630, 2015-Ohio-1104, ¶ 11; *Arkes v. Gregg*, 10th Dist. Franklin No. 05AP-202, 2005-Ohio-6369, ¶ 43. Actions affecting the natural drainage of water as a result of regrading or excavation, such as ditching, generally fall into the category of a qualified nuisance. *Adams*, *supra* at ¶ 69. "A qualified nuisance is essentially a tort of negligent maintenance of a condition that creates an unreasonable risk of harm, ultimately resulting in injury." *State ex rel. R.T.G., Inc. v. State*, 98 Ohio St.3d 1, 2002-Ohio-6716, ¶ 59. As with a continuous trespass, a continuing nuisance arises when the wrongdoer's tortious conduct is ongoing, perpetually generating new violations. *Weir v. E. Ohio Gas Co.*, 7th Dist. Mahoning No. 01 CA 207, 2003-Ohio-1229, ¶ 30; *Adams, supra* at ¶ 70.

{¶42} The evidence shows that ODOT has had continuing involvement in applying salt either on or adjacent to plaintiffs' property. The testimony established that

road salt remained visible in or near the drainage ditch during summer months, including the months after plaintiffs' filed this action. Even if the court found that ODOT had no control of the salt after it was placed on plaintiffs' property and had seeped into the soil, such that the trespass became permanent, subsequent applications would result in fresh violations of plaintiffs' property rights, resulting in a continuing trespass. *Adams, supra* at ¶ 64. Similarly, as to plaintiffs' nuisance claim, ODOT's ongoing application of salt would give rise to a continuing nuisance claim. *See State v. Swartz*, 88 Ohio St.3d 131, 135, 2000-Ohio-277.

{¶43} This case involves plaintiffs' rights regarding both surface water (water flow in ditches) and underground water (aquifer contamination). With regard to surface water, the Supreme Court of Ohio has adopted a reasonable use rule for surface water disputes. *McGlashan v. Spade Rockledge Terrace Condo Dev. Corp*., 62 Ohio St.2d 55, (1980), syllabus. "Under the reasonable-use rule, unless the defendant's conduct is unlawful or subject to strict liability, the defendant's liability for interference with surface water flow is controlled by principles of common law negligence, regardless of whether the plaintiffs' cause of action sounds in nuisance or trespass." *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, ¶ 30 (10th Dist.). In other words, plaintiffs' nuisance and trespass claims involving surface water merge with the negligence claim. *See Paulus v. Citicorp N. Am., Inc.*, S.D.Ohio No. 2:12-cv-856, 2013 U.S. Dist. LEXIS 141353 (Sep. 30, 2013), fn. 1, citing *Allen Freight Lines*, 64 Ohio St.3d at 274-76, 1992-Ohio-113 (finding that for recovery under a qualified private nuisance theory, the nuisance and negligence claims "merge, as the nuisance claims rely upon a finding of negligence.")

{¶44} In order to prevail under a theory of negligence, plaintiffs must prove by a preponderance of the evidence that defendant owed them a duty, that defendant's acts or omissions resulted in a breach of that duty, and that the breach proximately caused

their injuries. *Armstrong v. Best Buy Co., Inc*., 99 Ohio St.3d 79, 2003-Ohio-2573, ¶ 8, citing *Menifee v. Ohio Welding Prods., Inc*., 15 Ohio St.3d 75, 77 (1984).

Foreseeability

{¶45} "The existence of a duty depends on the foreseeability of the injury. The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act. The foreseeability of harm usually depends on the defendant's knowledge. In determining whether [defendant] should have recognized the risks involved, only those circumstances which [it] perceived, or should have perceived, at the time of [its] actions should be considered. Until specific conduct involving an unreasonable risk is made manifest by the evidence presented, there is no issue to submit to the [trier of fact]." *Menifee, supra* at 77. The standard is that injury is foreseeable, not that the precise injury is predicted to occur. *Little Hocking Water Assn. v. E.I. du Pont de Nemours & Co.*, 91 F. Supp. 3d 940, 975 (S.D.Ohio 2015), citing *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 130.

{¶46} ODOT argues that road salt is generally not harmful and that its use on SR 86 near plaintiffs' property did not create a foreseeable risk of harm. Plaintiffs contend that defendant was aware of the harmful effects of deicing chemicals, including road salt, on shallow aquifers in Ohio. One of the references reviewed by Powell involved a 15-year study (1988-1993) by the U.S. Department of the Interior and U.S. Geological Survey, in cooperation with ODOT and the U.S. Department of Transportation, addressing concerns about salt intrusion into drinking water aquifers. (Plaintiffs' Exhibit 20.) Eight locations in northeast Ohio were selected for the study, including Ashtabula County which is contiguous to Lake County, and Portage County which shares a border with Ashtabula County. Evidence from the study showed that three sites, including those in the counties of Portage and Ashtabula, were affected by direct application of

deicing chemicals. Powell testified that the study was important to his investigation because it showed that highway deicing materials can contaminate shallow aquifers. According to the report, ODOT intended to use the study to determine how deicing practices affect groundwater quality.

{¶47} Tim Hill, an administrator in ODOT's Environmental Services Office, testified that he was involved with the study from 1977-2004 and that he had communicated the significance of the report to both Carpenter and Denniss after learning of plaintiffs' complaints of contamination and that he provided them with the internet website address for the report. The court finds that the environmental administrators who were in charge of the investigation of plaintiffs' contamination complaints were aware of the study at the time of the investigation.

{¶48} Furthermore, several of plaintiffs' neighbors testified about standing water in the ditches adjacent to SR 86. Russell Hawthorne testified that he lives approximately 300 yards from plaintiffs' home, on the other side of the road, and that he had called ODOT several times to complain about standing water in the ditch in front of his house. Charles Gillespie testified that he lives directly across the street from plaintiffs' property and that water does not flow through the ditches in front of either his home or other nearby homes. In addition to complaints from property owners, defendant also obtained information regarding the condition of the ditches along SR 86 from its own routine road inspections. The court finds that defendant's knowledge of the environmental impact report, combined with information it received regarding the condition of ditches along SR 86, presented a foreseeable risk that failure to maintain proper water flow in the ditches would result in contamination of the nearby shallow aquifers.

Causation

{¶49} Plaintiffs' expert, Anthony Datillo, is a chemical engineer and environmental consultant who has worked on projects involving ground water remediation for over 30 years. Datillo investigated the cause of plaintiff's well water contamination by obtaining and analyzing samples from the well and surrounding property. Datillo also reviewed samples and analysis obtained by Fredebaugh, Tharp, and Kinetico. Datillo found that the results for the samples were similar; each showed high levels of chloride and sodium, or salt. Datillo testified that the chloride level in plaintiffs' water system was 6.6 times the MCL that the U.S. EPA has established for drinking water. Datillo found that both efflorescence on the wall in plaintiffs' basement and corrosion on a bathroom pipe valve consisted predominantly of sodium (salt), rather than calcium which can leach from masonry cement. Datillo explained that detecting sodium efflorescence in a basement is uncommon and indicates the soil layer against the house has a substantial amount of sodium to cause such efflorescence.

{¶50} Datillo analyzed the data contained in the soil boring logs that Lawhon had produced. (Plaintiffs' Exhibit 19.) Datillo explained that the soil consisted of a silty clay that was permeable, allowing moisture and sodium from road salt to migrate throughout the soil. Datillo noted that Lawhon's soil borings were approximately nine to nine and one half feet deep, showing water at a depth of approximately five feet. According to Datillo, water that ponded in the ditches leached down into the soil and laterally across plaintiffs' property.

{¶51} Datillo testified that the sodium chloride brine water from plaintiffs' water softener discharged through a pipe into an intermittent creek that is located approximately 300 feet behind and 10 feet down-gradient from the house. Datillo also inspected plaintiffs' septic system and leach bed which is down-gradient from the well. Datillo performed a fecal coliform test on the well water which showed that the well had not been impacted by any discharge from the septic system. Datillo opined that the

ground water on plaintiffs' property that supplied their well had been contaminated by road salt that defendant had applied to the road and surrounding area, which leached into the ground from the roadside ditch where water had ponded.

{¶52} Defendant presented the testimony of Brent Huntsman, a hydrogeologist with over 40 years of experience evaluating surface and groundwater quality, including road salt contamination. Huntsman testified that there were three possible sources of the salt that contaminated plaintiffs' well water: salt from oil field brine use; road salt that had been applied on or near plaintiff's property; and discharge from plaintiffs' water softener to "the septic system." Huntsman stated that Tharp's investigation did not indicate that oil field brine was the cause of contamination; which left road salt and water softener discharge as potential sources.

{¶53} Huntsman testified that he reviewed the soil samples that were obtained by Lawhon and the water quality analysis for the well samples. According to Huntsman, there was a significant disparity between the chloride concentrations shown in the shallow soil samples and the chloride concentration from the water samples. Huntsman opined that the chloride levels in the soil and well water should have been similar if road salt had migrated from the road into the aquifer and caused the contamination of plaintiffs' well water. Huntsman testified that the chloride concentrations in the soil near SR 86 were significantly lower than the levels detected in plaintiffs' well. Based upon this information, Huntsman opined that road salt did not cause the contamination of plaintiffs' water supply.

{¶54} According to Huntsman, brine that was discharged from plaintiffs' water softener into the basement footer drain was the cause of the contamination. Huntsman described the footer drain as a depression at the base of plaintiffs' home that is covered with gravel and discharges water near the basement walls through a pipe that leads away from the home. Huntsman opined that brine from the water softener enters the

footer drain and "percolates" near shale bedrock where it enters the aquifer that supplies plaintiffs' well water.

{¶55} The court finds that Datillo's testimony regarding the cause of groundwater contamination on plaintiff's property was more credible than Huntsman's testimony. Huntsman conceded that he had not visited plaintiffs' property or performed any tests related either to their water system or damage to the property. Significantly, Huntsman admitted that his opinion regarding the source of contamination would change if he knew that the footer drain pipe was a solid, closed pipe that discharged softener water from the foundation to the ravine that is located downgradient, at least 125 feet away from the home. Jessica provided credible testimony that the integrity of the pipe in question had been dye tested on two occasions, showing that water from the footer drain does indeed discharge into the stream in the back of the property. Although Huntsman testified that plaintiffs' water softener was the cause of contamination, he was not aware of the extent of its use, if any, by plaintiffs', Kennedy, or Tate. Huntsman testified that the "source of chloride coming from the water softener has been going on for years;" however, he admitted that he did not know when the well was contaminated, or that previous owners testified that they had not experienced salty water.

{¶56} Furthermore, ODOT's own consultant, Lawhon, determined that road salt applied to SR 86 had migrated onto the soil near plaintiffs' well. Nevertheless, ODOT declined Lawhon's recommendation to conduct further investigation to make a definitive determination whether plaintiffs' well water was contaminated by road salt. Denniss' decision to reject Lawhon's recommendation for further investigation was based, at least in part, upon an unfounded suspicion that Tate had sabotaged the well prior to the foreclosure.

{¶57} Based upon the totality of the evidence, the court finds that defendant negligently failed to maintain the drainage ditch and that defendant's negligence allowed

salt to seep into the ground and contaminate the shallow aquifer that supplied plaintiffs' well.

Indirect Trespass (Groundwater)

{¶58} Under Ohio law an indirect trespass includes the unauthorized, intentional physical entry or intrusion of a chemical by groundwater which causes substantial physical damage to the land or substantial interference with the reasonable and foreseeable use of the land. *See Little Hocking Water Association, Inc. v. E.I. du Pont Nemours and Co*., 91 F. Supp. 3d 940, 978-81 (S.D. Ohio 2015); *Abrams v. Nucor Steel Marion, Inc.*, N.D.Ohio No. 3:13 CV 137, 2015 U.S. Dist. LEXIS 154161 (Nov. 9, 2015).

{¶59} The Supreme Court of Ohio has held that landowners do not have an absolute right to the subsurface waters beneath their property. *Chance v. BP Chemicals, Inc*., 77 Ohio St. 3d 17, 26 (1996); *Id*. at 978. However, plaintiffs' "subsurface rights in their properties include the right to exclude invasions of the subsurface property that actually interfere with appellants' reasonable and foreseeable use of the subsurface." *Id*. In *Little Hocking, supra,* the federal court found that a factory's waste disposal practices contaminated groundwater based upon concentrations of a chemical, C8, that was detected in the soil and groundwater. *Id*. at 982. The court noted that while C8 contamination on one property may not cause substantial damage because it did not interfere with the use or cause any appreciable harm, it must be determined whether the indirect trespass of the chemical actually interfered with the owner's possessory interests. *Id*. The court concluded that the groundwater had been substantially damaged inasmuch as it "rendered the groundwater unusable without remediation." *Id*.

{¶60} The analysis of what constitutes substantial or actual damage to the property due to indirect invasion is determined on a case-by-case basis. *Id*. at 981. The court notes that in *Chance,* the Supreme Court of Ohio determined that plaintiffs'

can recover with only some type of physical damage or interference with their use of their groundwater. *Chance* at 27. "'A property owner has a potential cause of action against anyone who unreasonably interferes with his property right in groundwater,' but an Ohio landowner only has a property right in groundwater 'to the extent he actually uses that water.'" *Little Hocking*, at 981, quoting *Baker v. Chevron U.S.A., Inc.*, 533 F.Appx. 509, 521 (6th Cir.2013); *McNamara v. Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433.

{¶61} In this case, plaintiffs used their water system until the contamination required them to install a different system. Plaintiffs now purchase water that is delivered and stored in tanks that are located in their garage. Plaintiffs made reasonable attempts to drill another well, which failed. Datillo testified that the chloride level detected in plaintiffs' well water was 6.6 times the MCL the U.S. EPA has established for drinking water. The evidence established that the extremely high levels of both sodium and chloride resulted in contamination of plaintiffs' water supply which rendered it unfit for drinking and general household use. Huntsman admitted that the U.S. EPA has determined that elevated levels of sodium in drinking water can be harmful. As discussed above, Kinetico advised plaintiffs that plaintiffs' water softener was working and that there was nothing else that could be done to improve the quality of their well water. In addition, as Datillo explained, plaintiffs' home was damaged by corrosion on plumbing and appliances, and efflorescence on the basement walls, which was caused by salt that had migrated from the water and soil surrounding the home.

{¶62} Based upon the evidence, the court finds that the presence of high levels of salt in plaintiffs' groundwater was caused by the application of road salt on SR 86 and plaintiffs' land which borders the roadway. The court further finds that the contamination of the groundwater resulted in substantial damage which interferes with reasonable and foreseeable use of the water. Accordingly, the court concludes that plaintiffs have proved their trespass claim by a preponderance of the evidence.

Negligent Infliction of Emotional Distress

{¶63} Ohio does not recognize a claim of negligent infliction of emotional distress caused by witnessing the injury or destruction of property. *Stechler v. Homyk*, 127 Ohio App.3d 396, 397-398 (8th Dist.1998). Ohio limits recovery for negligent infliction of emotional distress to situations where a plaintiff-bystander observes an accident and suffers "emotional injury that is both severe and debilitating." *Oberschlake v. Veterinary Assocs. Animal Hosp.*, 151 Ohio App.3d 741, 2003-Ohio-917 ¶ 15 (2d Dist.), citing *Paugh v. Hanks*, 6 Ohio St.3d 72, 78 (1983).

{¶64} Although plaintiff testified that the contamination of the water system had caused the family great inconvenience and stress, the evidence does not support a finding of emotional injury that is severe and debilitating. Therefore, plaintiffs cannot prevail on their claim for negligent infliction of emotional distress.

Intentional Infliction of Emotional Distress

{¶65} With respect to plaintiffs' claim of intentional infliction of emotional distress, "[a] claim for intentional infliction of emotional distress requires plaintiff to show that (1) defendant intended to cause emotional distress, or knew or should have known that actions taken would result in serious emotional distress; (2) defendant's conduct was extreme and outrageous; (3) defendant's actions proximately caused plaintiff's psychic injury; and (4) the mental anguish plaintiff suffered was serious." *Hanly v. Riverside Methodist Hosps.*, 78 Ohio App.3d 73, 82 (10th Dist.1991). Liability in such cases "'has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"'"

Yeager v. Local Union 20, 6 Ohio St.3d 369, 374 (1983), quoting Restatement of the Law 2d, Torts, Section 46, comment d (1965).

{¶66} The court finds that the totality of the evidence does not demonstrate any conduct on the part of defendant's employees that would be so extreme and outrageous as to sustain a claim of intentional infliction of emotional distress. Furthermore, "[p]arties cannot generally be held liable for intentional infliction of emotional distress for having performed an act they were legally entitled to perform." *Morrow v. Reminger & Reminger Co. LPA*, 183 Ohio App.3d 40, 2009-Ohio-2665, ¶ 49 (10th Dist.).

{¶67} For the foregoing reasons, judgment is recommended in favor of plaintiffs.

{¶68} *A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

ANDERSON M. RENICK
Magistrate

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