IN THE SUPREME COURT OF OHIO

KURT STEIGERWALD, Administrator For Estate of Joan Steigerwald,	:	CASE NO. 2024-1077
Plaintiff-Appellee,	:	On Appeal from Eighth District Court of Appeals, Cuyahoga County
v.	:	Case No. 112933
CITY OF BEREA, ET AL.,	:	
Defendants-Appellants.	:	

BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS IN SUPPORT OF CITY OF BEREA AND URGING REVERSAL OF LOWER COURT JUDGMENT

Todd O. Rosenberg (0037401)
Amy L. Higgins (0075023)
PAULOZZI CO. LPA
600 East Granger Road, Second Floor
Brooklyn Heights, Ohio 44131
Telephone: 216-812-2100
Facsimile: 216-771-3387
E-Mail: rosenberg@lawohio.com
higgins@lawohio.com

Counsel for Plaintiff-Appellant,
Kurt Steigerwald, Administrator

Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
Telephone: 330-849-6602
Facsimile: 330-376-4577
E-Mail: sfunk@ralaw.com

Counsel for Amicus Curiae,
Ohio Association of Civil Trial Attorneys

Frank H. Scialdone, Esq. (0075179)
Zachary W. Anderson, Esq. (0095921)
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row, 34305 Solon Road
Cleveland, OH 44139
Telephone: 440-248-7906
Facsimile: 440-248-88611
E-Mail: fscialdone@mrrlaw.com
zanderson@mrrlaw.com

Counsel for Defendant-Appellant
City of Berea, Ohio

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys ("OACTA") is a statewide organization whose members include attorneys, corporate executives, and managers who devote a substantial portion of time to the defense of civil lawsuits and the management of claims against individuals, corporations and governmental entities. The legal question presented in this case directly concerns OACTA and its members because of the widespread new source of potential tort liability that may result to political subdivisions if the Court does not reverse the Eighth District's opinion in this case, which wrongfully expands the scope of the limited exception to political subdivision immunity for physical defects under R.C. 2744.02(B)(4).

As discussed more fully below, the Ohio General Assembly amended the language in R.C. 2744.02(B)(4) in 2003 in order to restrict the scope of premises liability claims only to negligence claims arising from a "physical defect" in a government's buildings. *See Doe v. Greenville City Schools*, 2022-Ohio-4618, ¶ 20 (plurality opinion) (citing Am. Sub. S.B. No. 106, eff. Apr. 9, 2003). Here, there is no evidence that there was a physical defect in the locker room bench itself. It was not damaged, and there is no allegation that the bench itself was not manufactured in accordance with its original design and specifications. Rather, Plaintiff's allegation of an alleged "defect" is based upon the argument that the City of Berea should have selected a *different*, safer locker room bench due to the narrow width of the walkways in the Berea Recreational Center. This allegation, however, does not mean that the bench itself was defective. Rather, it is merely an improper attempt to establish premises liability based upon *other* alleged acts of "negligence" that fall outside the scope of R.C. 2744.02(B)(4).

This Court, however, should refuse to expand the scope of the limited exception in R.C. 2744.02(B)(4) in this manner. Rather, as discussed below, Ohio's appellate courts have

consistently held that a "physical defect" does not exist unless there is a physical defect in the instrumentality itself, *i.e.*, that the instrumentality or object that actually caused the injury either (i) contained "a perceivable imperfection that diminishes the worth or utility of the object," or (2) "did not operate as intended." *Howard v. Columbus*, 2024-Ohio-5181, ¶ 28 (10th Dist.); *see also Lewis v. Ayersville Local School Dist.*, 2023-Ohio-3685, ¶ 20 (3d Dist.); *Shaw v. Washington Courthouse City School Dist.*, 2022-Ohio-4226, ¶ 20 (12th Dist.); *Nonprasit v. Ohio Teaching Assn.*, 2022-Ohio-3685, ¶ 36-38 (6th Dist.); *McCullough v. Youngstown City School Dist.*, 2019-Ohio-3965, ¶ 38 (7th Dist.); *Smiley v. City of Cleveland*, 2018-Ohio-2847, ¶ 24 (8th Dist.); *Nicholas v. Lake Cty.*, 2013-Ohio-4294, ¶ 23 (11th Dist.); *Jones v. Delaware City School Dist. Bd. of Edn.*, 2013-Ohio-3907, ¶ 22 (5th Dist.); *Hamrick v. Bryan City School Dist.*, 2011-Ohio-2572, ¶ 28, quoting Merriam Webster's New Collegiate Dictionary 877 (10th Ed. 1996).

While this Court ruled in *Doe*, 2022-Ohio-4618, that a "physical defect" also can arise from the *absence* of a safety device (*i.e.*, the absence of a fire extinguisher in a science classroom), this limited expansion of R.C. 2744.02(B)(4) was adopted only by a plurality opinion jointed by only three justices (Stewart, J., Brunner, J., and O'Connor, C.J.), and should not be adopted by a majority of this Court. Indeed, as set forth in the dissenting opinion authored by Justice Kenney and joined by Justices DeWine and Donnelly, the "absence of a fire extinguisher" is not a physical defect, but involves "a matter of judgment or policy that is outside the scope of the exception to immunity provided by R.C. 2744.02(B)(4)." *Id.* at ¶ 38 (Kennedy, J. dissenting). Thus, given the manifest intent by the General Assembly to restrict liability only if the injury was caused by a "physical defect," any expansion of R.C. 2744.02(B)(4) should be undertaken by the General Assembly, not this Court. *Id.* at ¶ 40-41.

Here, of course, Steigerwald is not alleging that the City of Berea was negligent because it failed to install certain safety equipment in the locker room. Rather, Steigerwald is simply alleging that the City of Berea was negligent because it should have purchased and installed a *different* bench that would allegedly have been "safer" than the locker room bench that was actually selected, purchased and installed in the locker rooms. As discussed below, however, the appellate courts in Ohio have consistently determined that the "premises are not considered physically defective based solely upon the allegation that modifications or improvements may render them safer." *Smiley*, 2018-Ohio-2847, at ¶ 22; *see also Nonprasit*, 2022-Ohio-3685, at ¶ 38; *Jacobs v. Oakwood*, 2016-Ohio-5237, ¶ 23 (8th Dist. 2016); *Piispanen v. Carter*, 2006-Ohio-2382, ¶ 21 (11th Dist.); *see also Shaw*, 2022-Ohio-4226, at ¶ 23 ("Just because a place could be safer does not mean that there is a 'physical defect.'") (citations omitted). Thus, in *Smiley*, the Eighth District held that the City of Cleveland was entitled to immunity for a negligence claim filed by a woman who slipped and fell on a "wet metal strip" in the floor between the indoor swimming pool and the outdoor water park because there was "no evidence that the wet metal strip by itself constitutes a physical defect" and because "the record does not demonstrate that the metal strip failed to operate properly as a track for the sliding glass door or that the strip's worth or utility was somehow diminished or impaired." *Id.* at ¶ 23-25.

The same conclusion should be reached by this Court. Here, there is no evidence that the locker room bench "by itself" was physically defective. It did not fail to operate as intended and did not contain any imperfections in the bench itself. The Court therefore should not expand the scope of the limited exception to political subdivision immunity by holding that the "physical defect" exception applies. The General Assembly amended R.C. 2744.02(B)(4) in order to restrict liability only to negligence claims arising from a physical defect. This Court therefore

should not use its judicial authority to expand the scope of R.C. 2744.02(B)(4), but instead should reverse the Eighth District's opinion and grant immunity to the City of Berea for the negligence claim alleged in this case.

STATEMENT OF FACTS

The relevant facts of this case are set forth in the Eighth District's Opinion and the City of Berea's Merit Brief, which is fully incorporated herein by reference. As set forth in the Eighth District's Opinion, Plaintiff Kurt Steigerwald ("Steigerwald"), Administrator for the Estate of his deceased mother, Joan Steigerwald, alleges a claim for negligence against the City of Berea because his mother tripped and fell on the extended legs of a locker room bench that the City of Berea had purchased and installed in the locker rooms at the Berea Recreational Center. *See Steigerwald v. Berea*, 2024-Ohio-2260, ¶ 2-3.

In his Complaint, Steigerwald alleged that the City of Berea and the Berea Recreational Center should be held liable for negligence because they "negligently and/or recklessly purchased benches with extended legs and placed them in a narrow locker room that was a safety hazard causing Joan's death." *Id.* at ¶ 3. Although Steigerwald retained an expert who testified that the locker room bench's legs "posed a danger" because they extended into the "normal, expected, and foreseeable area of anyone using or walking by the bench, especially in narrow, cramped, or crowded locker rooms," the Plaintiff's expert did not allege that the locker room bench itself was defective because it was negligently designed, manufactured, or installed. *Id.* at ¶ 30-31. Rather, Steigerwald's allegation of negligence was based upon the allegation that the City of Berea should have purchased a different, safer bench that did not have extended legs due to the allegedly "narrow" walkways in the Center's locker room. *Id.* at ¶ 3.

In the proceedings below, the trial court agreed with the City of Berea that it was entitled to political subdivision immunity for the alleged negligence claim, and granted summary judgment in favor of the two Berea Defendants. *Id.* at ¶ 4-6. Upon review, however, the Eighth District reversed, holding that a reasonable jury could conclude that "[a] bench that supports one's weight that also possesses legs that extend into the aisles in a small or crowded locker room" can constitute a "physical defect" under R.C. 2744.02(B)(4). *Id.* at ¶ 31. This Court then accepted jurisdiction over the following propositions of law:

> Proposition of Law No. 1: An allegedly negligent or reckless decision to use otherwise non-defective equipment cannot constitute a "physical defect" within or on the grounds of buildings used in connection with governmental functions under R.C. 2744.02(B)(4).
>
> Proposition of Law No. 2: The decision to use a bench that is specifically designed to have legs that extend 5.75 inches beyond the bench seat in a locker room cannot constitute a physical defect within or on the grounds of buildings used in connection with governmental functions to establish an exception to political subdivision immunity under R.C. 2744.02(B)(4).

OACTA's Amicus Brief therefore will address both propositions of law, and will explain more fully why this Court should reverse the Eighth District's interpretation of the "physical defect" exception as a matter of law.

ARGUMENT

I. PROPOSITION OF LAW NO. 1: THE PHYSICAL DEFECTS EXCEPTION IN R.C. 2744.02(B)(4) DOES NOT APPLY TO A CITY'S ALLEGEDLY RECKLESS OR NEGLIGENT DECISION TO PURCHASE AND USE AN OTHERWISE NON-DEFECTIVE PIECE OF EQUIPMENT WITHIN OR ON THE GROUNDS OF A BUILDING USED FOR A GOVERNMENTAL FUNCTION.

A. The Limited Exception In R.C. 2744.02(B)(4) Was Adopted By The General Assembly In Order To Restrict Liability Only To Negligence Claims Arising From A Physical Defect In The Instrumentality Itself.

This appeal involves the proper interpretation and application of the physical defects exception to political subdivision immunity in R.C. 2744.02(B)(4). Ohio Revised Code Chapter

2744 sets forth the statutory provisions of Ohio's Political Subdivision Tort Liability Act, which was adopted by the General Assembly in response to the judicial abrogation of common law immunity in order to provide broad immunity to political subdivisions subject to the limited exceptions in R.C. 2744.02(B). *See Est. of Graves v. Circleville*, 2010-Ohio-168, ¶ 21. "The manifest statutory purpose of R.C. Chapter 2744 is the preservation of the fiscal integrity of political subdivisions." *Wilson v. Stark Cty. Dep't of Hum. Serv.*, 70 Ohio St. 3d 450, 453 (1994). Thus, as this Court explained in *Summerville v. Forest Park*, 2010-Ohio-6280, the "General Assembly enacted R.C. Chapter 2744 because it found that 'the protections afforded to political subdivisions and employees of political subdivisions by this act are urgently needed in order to ensure the continued orderly operation of local governments and the continued ability of local governments to provide public peace, health, and safety services to their residents.'" *Id.* at ¶ 38 (quoting Am.Sub.H.B. No. 176, Section 8, 141 Ohio Laws, Part I, 1733).

In determining whether a political subdivision is entitled to immunity under R.C. Chapter 2744, this Court adopted a three-tier analysis:

1) "The first tier is the general rule that a political subdivision is immune from liability incurred in performing either a governmental function or a proprietary function" unless one of the statutory exceptions applies.

2) "The second tier of the analysis requires a court to determine whether any of the five exceptions to immunity listed in R.C. 2744.02(B) apply to expose the political subdivision to liability."

3) Then, if any of the exceptions to R.C. 2744.02(B) apply, "the third tier requires a court to determine whether any of the defenses in R.C. 2744.03 apply."

Pelletier v. Campbell, 2018-Ohio-2121, ¶ 15 (citations omitted).

Here, the legal issue presented relates to the second tier of the three-tier analysis, i.e., whether the limited exception to immunity under R.C. 2744.02(B)(4) applies. In particular, R.C. 2744.02(B)(4) provides:

> Except as otherwise provided in section 3746.24 of the Revised Code, political subdivisions are liable for injury, death, or loss to person or property that is caused by the negligence of their employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function, including, but not limited to, office buildings and courthouses, but not including jails, places of juvenile detention, workhouses, or any other detention facility, as defined in section 2921.01 of the Revised Code.

Thus, under the plain language of the statute, R.C. 2744.02(B)(4) only applies "if the injury (1) resulted from a political subdivision employee's negligence, (2) occurred within or on the grounds of buildings used in connection with the performance of governmental function, and (3) resulted from a physical defect within or on those grounds." *Shaw*, 2022-Ohio-4226, ¶ 8, quoting *Leasure v. Adena Local School Dist*., 2012-Ohio-3071 (4th Dist.). "The injured party must establish *all three* circumstances to defeat the immunity afforded to a political subdivision under the first step of the immunity analysis." (Emphasis sic.) *Shaw*, 2022-Ohio-4226, at ¶ 18, quoting *O'Brien v. Great Parks of Hamilton Cty.*, 2020-Ohio-6949, ¶ 13 (1st Dist.).

In this regard, R.C. 2744.02(B)(4) originally did not contain the "physical defects" limitation when Ohio's Political Subdivision Tort Liability Act was adopted in 1985. As this Court explained in *Doe*, however, "R.C. 2744.02(B)(4) was amended in 2000" by Am. Sub. S.B. No. 106, effective April 9, 2003, to provide that "the exception to immunity requires that the injury, death, or loss be due to a physical defect on or within the grounds or buildings of the political subdivision." *Id.*, 2022-Ohio-4618, at ¶ 20. By so doing, the General Assembly clearly sought to restrict the scope of the immunity exception in R.C. 2744.02 by requiring more than just negligence, but requiring that the injury be caused by a "physical defect." *Lynch v. Gallia*

Cty. Bd. of Commrs., 79 Ohio St.3d 251, 254, 680 N.E.2d 1222 (1997) ("When confronted with amendments to a statute, an interpreting court must presume that the amendments were made to change the effect and operation of the law"). Thus, the legal issue presented in this case relates to the meaning of the term, "physical defect," as it was adopted by the General Assembly in 2000 to restrict the scope of the immunity exception in R.C. 2744.02(B)(4).

While the General Assembly did not define the term, "physical defect" in Am. Sub. S.B. No. 106, this Court has consistently relied upon dictionary definitions in determining the usual, normal, and customary meaning of statutory terms, particularly where, as here, they involve the usual, normal and customary meaning of legal terms. *See State ex rel. Renner v. Athens Cnty. Bd. of Elections*, 2024-Ohio-356, ¶ 22 (relying upon Black's Law Dictionary in defining statutory terms); *State v. Gwynne*, 2023-Ohio-3851, ¶ 21 (same); *Ohio Power Co. v. Burns*, 2022-Ohio-4713, ¶ 23 (same); *State ex rel. Grendell v. Walder*, 2022-Ohio-204, ¶ 44 (same). Here, the word, "defect" is defined by Webster's New Collegiate Dictionary as "an imperfection that impairs worth and utility." *See Hamrick v. Bryan City School Dist.*, 2011-Ohio-2572, ¶ 28, quoting Merriam Webster's New Collegiate Dictionary 877 (10th Ed. 1996). Moreover, "defect" is defined by Black's Law Dictionary to mean the "[a]n imperfection or shortcoming, esp[ecially] in a part that is essential to the operation or safety of a product." *See Black's Law Dictionary*, 1331 (10th Ed. 2014). Thus, the usual and customary meaning of the word, "defect," in both Webster's Dictionary and Black's Law Dictionary makes clear that the Plaintiff must not merely prove an unsafe or dangerous condition, but must prove that there was a physical defect (*i.e.*, an imperfection or shortcoming") in the instrumentality itself. Otherwise, it would conflict with the manifest purpose of the General Assembly's 2000 amendment to R.C. 2744.02(B)(4).

For this reason, Ohio's appellate courts (including the Eighth District) have consistently defined the term, "physical defect," in accordance with the above-referenced dictionary definitions as arising only if there is "a perceivable imperfection that diminishes the worth or utility of the object at issue." *Hamrick v. Bryan City School Dist.*, 2011-Ohio-2572, ¶ 28 (quoting Merriam Webster's New Collegiate Dictionary 877 (10th Ed. 1996); *see also Howard v. Columbus*, 2024-Ohio-5181, ¶ 28 (10th Dist.), quoting *Lewis v. Ayersville Local School Dist.*, 2023-Ohio-3685, ¶ 20 (3d Dist.), and *Shaw v. Washington Courthouse City School Dist.*, 2022-Ohio-4226, ¶ 20 (12th Dist.); *McCullough v. Youngstown City School Dist.*, 2019-Ohio-3965, ¶ 38 (7th Dist.), quoting *Stanfield v. Reading Bd. of Edn.*, 2018-Ohio-7604, ¶ 14 (1st Dist.); *Smiley v. City of Cleveland*, 2018-Ohio-2847, ¶ 24 (8th Dist.); *Nicholas v. Lake Cty.*, 2013-Ohio-4294, ¶ 23 (11th Dist.); *Jones v. Delaware City School Dist. Bd. of Edn.*, 2013-Ohio-3907, ¶ 22 (5th Dist.). While there are some Ohio appellate courts that "have expanded the definition of 'physical defect' to include equipment that did not operate as intended due to a perceivable condition," all of Ohio's appellate courts have agreed that there must be some physical defect in the instrumentality itself due to either that it (i) contained "a perceivable imperfection that diminishes the worth or utility of the object at issue" or (2) "did not operate as intended." *Howard*, 2024-Ohio-5181, at ¶ 28; *Shaw*, 2022-Ohio-4226, at ¶ 20; *McCullough*, 2019-Ohio-3965, at ¶ 38; *Smiley*, 2018-Ohio-2847, at ¶ 24.

Here, there is no evidence that there was a physical defect in the locker room bench itself. It was not damaged, and there is no allegation that the bench itself was not designed, manufactured, or installed in accordance with its specifications, and did not operate in accordance with its intended use as a locker room bench. Rather, Plaintiff's allegation of an alleged "defect" is based upon the argument that the City of Berea's purchasing manager should

have selected a *different* and *safer* locker room bench that did not have extended legs due to the alleged "narrow" width of the walkways in the Berea Recreational Center. *Steigerwald*, 2024-Ohio-2260, at ¶ 3. This allegation, however, does not mean that the bench itself was defective. Rather, it is simply a meritless attempt to establish premises liability based upon *other* acts of alleged "negligence" by the City of Berea's employees in selecting which type of bench to purchase for the locker room. The alleged negligence, therefore, does not arise from a "physical defect" in the bench itself, but involves a matter of policy and judgment that falls outside the scope of the limited exception in R.C. 2744.02(B)(4). Accordingly, the Court should overrule the Eighth District's ruling because it constitutes an unwarranted expansion of the physical defects exception in R.C. 2744.02(B)(4).

B. Existing Case Law Supports Berea's Interpretation Of R.C. 2744.02(B)(4).

A review of the applicable case law shows why it is so critically important for this Court to recognize that there is a fundamental difference between a negligence claim arising from a "physical defect" in the instrumentality itself, and any other type of negligence claim that may arise from an injury that may have been caused by the instrumentality or object at issue. For example, in *Smiley v. City of Cleveland*, 2018-Ohio-2847 (8th Dist.), the plaintiff alleged a negligence claim against the City of Cleveland because "she slipped and fell on a metal strip in the floor while exiting the indoor swimming pool area into the outdoor water park area at the Cudell Recreation Center owned by Cleveland." *Id.* at ¶ 2. In filing this negligence claim, however, Smiley did not present any evidence to show that "the wet metal strip by itself constitutes a physical defect" or "to demonstrate that the metal strip failed to operate properly" for its intended use "as a track for the sliding glass door." *Id.* at ¶ 23-25 (emphasis added). Thus, while Smiley alleged that the "wet metal strip" created an unsafe condition for swimmers

who were "wet all over" while walking barefoot across the metal strip, the Eighth District ruled that her injury was not due to a "physical defect" in the metal strip itself because the strip "operated as intended" and did not contain "a perceivable imperfection" that impaired "the strip's worth or utility." *Id.*

Other appellate courts have adopted similar interpretations of the "physical defects" exception. In *Hamrick v. Bryan City School Dist.*, 2011-Ohio-2572 (6th Dist.), for example, a utility worker was seriously injured when he fell to the bottom of an "unmarked service pit" in a school district's multi-bay school bus garage. *Id.* at ¶ 2-6. Although Hamrick argued that the unmarked pit created an unsafe condition, the Sixth District held that it was not a "physical defect" because there was no "perceivable imperfection that diminished the utility of either the bus garage or the service pit," and because there was "nothing of record to suggest that either did not perform as intended or was less useful than designed." *Id.* at ¶ 29.

Similarly, in *Shaw v. Washington Courthouse City School Bd. of Ed.*, 2022-Ohio-4266 (12th Dist.), the plaintiff alleged that she was injured when she sustained a fall as a result of a "hole" in the high school's parking lot. *Id.* at ¶ 2-8. Although Shaw alleged that "her fall was the result of a dangerous and/or hazardous condition in the high school's parking lot," the Twelfth District held that the alleged "hole" was not a "physical defect" because there was no showing that "the high school's parking lot failed to operate as intended because of the hole, or that the utility of the high school's parking lot was impaired or diminished in any way by the hole." *Id.* at ¶ 22-23 (citing *Nicholson v. LoanMax, LLC*, 2018-Ohio-375, ¶ 22-25 (11th Dist.) (finding a "pothole in a parking lot" that a board of education had an easement to use for students to exit from a school bus was not a 'physical defect' under R.C. 2744.02(B)(4)). In so doing, the Court held that a physical defect does not exist "just because a place could be safer." *Id.* at ¶ 23.

The same interpretation of what constitutes a "physical defect" under R.C. 2744.02(B)(4) was also adopted and followed by the Seventh District in *McCullough v. Youngstown City School Dist.*, 2019-Ohio-3965 (7th Dist.). In that case, a 14-year-old high school student died when he rolled down the hillside of the District's East High School, and then "fell into a public road and under the back wheels of a passing school bus." *Id.* at ¶ 1. Although McCullough alleged that the existence of an "unprotected" public roadway at the bottom of the hill was a "physical defect," the Seventh District rejected this argument as a matter of law because there was no evidence that the hillside itself contained any "internal defects." *Id.* at ¶ 39-40. "A hill bordering a sidewalk and street does not become defective because a person decides to roll down it, just as the unfenced flat portions of the high school's grounds would not become defective because a student decides to run into the street." *Id.* at ¶ 40. Thus, the Seventh District held that the injury was not caused by a "physical defect" because "the hill operated as a hill would be expected to operate; the hill was not alleged to contain a physical or perceivable imperfection in itself; there was no impairment of the hill's utility as a physical support for the school grounds or even as a path for traversing the property; and any appreciable danger near the hill existed outside the school grounds." *Id.*

The same reasoning applies equally to this case. Here, there is no evidence that the locker room bench "by itself" was physically defective, or that it failed to operate as intended due to any imperfections in the bench itself. Rather, Steigerwald is alleging that the City of Berea was negligent because it should have selected and purchased a *different* bench without extended legs that would allegedly have been "safer" bench in light of the narrow walkways in the locker room. *Steigerwald*, 2024-Ohio-2260, at ¶ 3. As previously discussed, however, the Ohio courts have consistently determined that "premises are not considered physically defective

based solely upon the allegation that modifications or improvements may render them safer." *Smiley*, 2018-Ohio-2847, at ¶ 22; *see also Nonprasit*, 2022-Ohio-3685, at ¶ 38; *Jacobs*, 2016-Ohio-5237, at ¶ 23; *Piispanen*, 2006-Ohio-2382, at ¶ 21; *see also Shaw*, 2022-Ohio-4226, at ¶ 23 ("Just because a place could be safer does not mean that there is a 'physical defect.'") (citations omitted). Otherwise, any alleged "unsafe" condition would give rise to potential tort liability under R.C. 2744.02(B)(4) even if the instrumentality itself contains no physical defects. Accordingly, the Court should reject the Eighth District's overly expansive interpretation of R.C. 2744.02(B)(4), and conclude that the limited exception in R.C. 2744.02(B)(4) only applies of the instrumentality, by itself, contains a physical defect.

C. Any Expansion Of The Physical Defects Exception Should Be Undertaken By The General Assembly, Not This Court.

As previously discussed, it is manifestly clear that the General Assembly amended R.C. 2744.02(B)(4) in order to restrict political subdivision liability only to negligence claims arising from a physical defect. While there may be a significant number of personal injuries that may arise from other types of premises liability claims, the General Assembly has exercised its legislative discretion in deciding to restrict political subdivision liability only to injuries caused by a "physical defect" in the instrumentality itself, and it is not the role of this Court to second-guess the legislature's policy choices. As this Court explained in *Erickson v. Morrison*, 2021-Ohio-746, ¶ 34, "[i]t is the function of the General Assembly to balance [ ] competing interests when enacting legislation," and it is beyond the role of this Court to engage in "[s]econd-guessing the wisdom of the legislature's policy choices in striking that balance." *Id.* at ¶ 34. Rather, this Court's "role, in the exercise of judicial power granted to us by the Constitution, is to interpret and apply the law enacted by the General Assembly." *Houdek v. ThyssenKrupp Materials N.A., Inc.*, 2012-Ohio-5685, ¶ 29.

For this reason, therefore, this Court should not use its judicial authority to expand the scope of R.C. 2744.02(B)(4) beyond the limited scope of the "physical defect" exception that has been adopted by the appellate courts. *Shaw*, 2022-Ohio-4226, at ¶ 20-22; *McCullough*, 2019-Ohio-3965, at ¶ 38-40; *Smiley*, 2018-Ohio-2847, at ¶ 24; *Nicholas*, 2013-Ohio-4294, at ¶ 22-25; *Hamrick*, 2011-Ohio-2572, at ¶ 28-29. While this Court ruled in *Doe*, 2022-Ohio-4618, that a physical defect also can arise from the *absence* of a safety device in certain circumstances, this expansion of R.C. 2744.02(B)(4) was adopted only by a plurality opinion joined by three justices (Stewart, J., Brunner, J., and O'Connor, C.J.), and should not be adopted by a majority of this Court. Indeed, as set forth in the dissenting opinion authored by Justice Kennedy and joined by Justices DeWine and Donnelly, the "absence of a fire extinguisher" is not a physical defect, but involves "a matter of judgment or policy that outside the scope of the exception to immunity provided by R.C. 2744.02(B)(4)." *Id.* at ¶ 38 (Kennedy, J. dissenting). Thus, the Court should not adopt the reasoning of the plurality opinion in *Doe* and refrain from undertaking any further expansions of R.C. 2744.02(B)(4). *Id.* at ¶ 41.

Indeed, as previously discussed, any expansion of the scope of the "physical defect" exception would be directly contrary to the legislative intent of the General Assembly in amending R.C. 2744.02(B)(4). The General Assembly manifestly sought to restrict (not expand) the liability of political subdivisions for premises liability claims in order to protect and preserve the fiscal integrity of political subdivisions. While the legislature provided for limited exceptions to political subdivision immunity in certain narrowly-defined circumstances, it clearly "sought to strike a balance between the policy of protecting the fiscal integrity of political subdivisions against the policy of ensuring compensation to victims of negligence." *Doe*, 2022-Ohio-4618, at ¶ 40 (Kennedy, J., dissenting). In so doing, the Legislature "necessarily had to draw lines that

leave some parties who are injured by a political subdivision uncompensated." *Id.* Thus, the Court should adhere to the existing definition of a "physical defect" that is set forth in *Shaw*, *McCullough*, *Smiley*, *Nicholas*, and *Hamrick*, and reverse the Eighth District's opinion as a matter of law.

CONCLUSION

For these reasons, the Court should reverse the judgment of Eighth District Court of Appeals and rule that (1) the limited immunity exception in R.C. 2744.02(B)(4) for physical defects does not apply to the negligence claim alleged in this case, and (2) that the Berea Defendants are entitled to political subdivision immunity in its favor as a matter of law.

Respectfully submitted,

/s/ Stephen W. Funk
Stephen W. Funk (0058506)
ROETZEL & ANDRESS, LPA
222 S. Main Street, Suite 400
Akron, Ohio 44308
Telephone: (330) 376-4577
sfunk@ralaw.com

Counsel for Amicus Curiae The Ohio Association of Civil Trial Attorneys

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of January, 2024, a true and correct copy of the foregoing *Amicus Curiae Brief of the Ohio Association of Civil Trial Attorneys* was served via electronic mail upon the following counsel of record:

Todd O. Rosenberg (0037401)
Amy L. Higgins (0075023)
PAULOZZI CO. LPA
600 East Granger Road, Second Floor
Brooklyn Heights, Ohio 44131
E-Mail: rosenberg@lawohio.com
higgins@lawohio.com

Counsel for Plaintiff-Appellant, Kurt Steigerwald, Administrator

Frank H. Scialdone, Esq. (0075179)
Zachary W. Anderson, Esq. (0095921)
Mazanec, Raskin & Ryder Co., L.P.A.
100 Franklin's Row, 34305 Solon Road
Cleveland, OH 44139
E-Mail: fscialdone@mrrlaw.com
zanderson@mrrlaw.com

Counsel for Defendant-Appellant City of Berea, Ohio

Respectfully submitted,

/s/ Stephen W. Funk
Stephen W. Funk (0058506)

Counsel for Amicus Curiae The Ohio Association of Civil Trial Attorneys