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IN THE
INDIANA SUPREME COURT

MAHARI MRACH OUKBU and NITSIHITI ABRAHAM, *Appellants-Plaintiffs*, v. AMAZON, INC.; AMAZON.COM, INC.; AMAZON LOGISTICS, INC.; AMAZON.COM SERVICES LLC, MQJ1; CF MOUNT COMFORT DST; BRUCE L. GIBSON; CITY OF GREENFIELD, INDIANA; HANCOCK COUNTY BOARD OF COMMISSIONERS; HANCOCK COUNTY PLANNING COMMISSION; and HANCOCK COUNTY HIGHWAY DEPT. *Appellees-Defendants.*	)	ON PETITION TO TRANSFER FROM THE INDIANA COURT OF APPEALS CAUSE NO. 24A-CT-00254 APPEAL FROM THE HAMILTON SUPERIOR COURT NO. 5 TRIAL COURT CAUSE NO. 29D05-2308-CT-007700

PETITION TO TRANSFER BY APPELLEES AMAZON LOGISTICS, INC., AMAZON, INC., AMAZON.COM, INC., and AMAZON.COM SERVICES, LLC, MQJ1

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QUESTION PRESENTED ON TRANSFER

This case arises from a motor vehicle accident that occurred on a public roadway in Hancock County, adjacent to an Amazon fulfillment center. Tractor trailer driver Mahari Oukbu parked his truck in the middle of the public roadway, attempted to cross the street on foot, and was struck and injured by a passing motorist. Oukbu and his spouse sued Amazon, alleging that Oukbu parked in the middle of the street because the facility signage confused him. The trial court ruled that Amazon owed no duty to protect Oukbu under these circumstances. The Court of Appeals reversed, holding that the Oukbus pled facts "sufficient to demonstrate that Amazon owed a duty of reasonable care to Oukbu, and that Amazon's actions—or inactions—created a condition that made passage unsafe on the abutting public road." Specifically, the Court of Appeals panel found that the Oukbus sufficiently established the existence of a legal duty by pleading that Amazon created an "artificial hazard"—"no trucks" signage at the first two of three entrances to the fulfillment center—which purportedly caused "arriving truck drivers . . . to become confused and exit their trucks on the public road across from the facility."

The question presented on transfer is whether Indiana law imposes a duty upon land possessors to protect individuals traveling on public roadways—including those intending to enter but who have yet not entered the premises—from injury inflicted by a third-party tortfeasor where the allegedly hazardous condition created by the land possessor does not visit itself—*i.e.*, does not physically intrude—upon the public roadway.

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I. BACKGROUND AND PRIOR TREATMENT OF ISSUE ON TRANSFER

A. Factual Background

Amazon operates a fulfillment center in Hancock County. (App. 2: 25). Vehicles access the fulfillment center via three entrances from the adjacent public roadway, County Road 300. (Appellees' App. 2: 49). When traveling west to east, the first two entrances are marked with "no trucks" signage. (Appellees' App. 2: 15–16, 49). The third and final entrance is the tractor trailer entrance. (Appellees' App. 2: 15–16, 49).

On September 2, 2022, Mahari Oukbu was en route to deliver goods to the Greenfield fulfillment center. (App. 2: 56). Oukbu approached from the west, passing the first and second entrances before stopping his truck just shy of the third tractor trailer entrance in the two-way turn lane in the center of County Road 300. (App. 2: 47). Oukbu then exited the cab of his truck to cross on foot the westbound lane of County Road 300. (App. 2: 49). As he was doing so, Oukbu was struck in the westbound lane by a motor vehicle operated by Bruce L. Gibson. (App. 2: 49). There is no allegation that Gibson had any relationship with Amazon or was coming to or from the Amazon fulfillment center. Oukbu alleges Gibson was negligent and he is a defendant in the lawsuit below. (App. 2: 61). It is further undisputed that neither Oukbu nor his vehicle ever physically entered the fulfillment center premises and that the accident occurred entirely on the public roadway. (App. 2: 47–49).

B. The trial court grants Amazon's motion for judgment on the pleadings.

Oukbu initiated this negligence action on April 24, 2023, alleging that Amazon owed Oukbu a duty of reasonable care that it breached by failing to provide adequate lighting and signage to guide delivery drivers to the facility. (App. 2: 50–51). Amazon moved for judgment on the pleadings, arguing it owed no duty to Oukbu. (App. 2: 72–74). On January 4, 2024, the trial court

granted Amazon's motion, dismissing the Oukbus' claims against Amazon and finding Amazon owed no duty to Oukbu. (App. 2: 18–23). Specifically, the trial court found that Amazon owed no "duty to guard against injury to [Oukbu] from the negligent acts of someone over whom [it] had no control and when the injury occurred off [its] premises." (App. 2: 22). The trial court relied primarily upon *Precedent Partners I, L.P. v. Hulen*, 863 N.E.2d 328 (Ind. Ct. App. 2007), in support of this conclusion and rejected the Oukbus' reliance upon *Lutheran Hospital of Ind. v. Blaser*, 634 N.E.2d 864 (Ind. Ct. App. 1994), because in *Lutheran Hospital* "the hospital's use of their premises proximately caused the plaintiffs' injuries," which was not the case here. (App. 2: 21–23). The Oukbus filed their Notice of Appeal on February 2, 2024. (App. 2: 17).

C. The Court of Appeals reverses, relying in part upon a Restatement section never adopted in Indiana.

On September 27, 2024, a panel of the Court of Appeals reversed the trial court's decision in a to-be-published opinion (the "Opinion"). The Court of Appeals rejected Amazon's argument that this Court's opinion in *Reece v. Tyson Fresh Meats, Inc.*, 173 N.E.3d 1031, 1041 (Ind. 2021), applied here because, in the panel's view, *Reece* addresses only visual obstructions and the duties owed to the traveling public, not other dangerous conditions on the premises and the duties owed to would-be invitees. (*See* Opinion, pp. 8–9). The Court of Appeals also generally failed to address or distinguish numerous other Indiana appellate court decisions supporting Amazon's position and cited approvingly by *Reece*. Instead, the Court of Appeals relied solely on *Lutheran Hospital*, explaining:

> Similar to the circumstances in *Lutheran Hospital*, Oukbu pled facts demonstrating that Amazon knew or should have known that truck drivers attempting to enter its premises were confused about where to enter to make their deliveries. . . .
>
> Given these circumstances, Oukbu sufficiently alleged in his complaint that Amazon used its premises in a manner that harbored a dangerous condition off its own premises, i.e., on the county road, that affected the risk of injury to others. And

> in accordance with the reasoning advanced in *Lutheran Hospital*, Oukbu properly alleged that Amazon had a duty to provide a "safe and suitable means of ingress and egress," including a "warning of or protection from danger. . . ."

(*Id.*, pp. 11–12).

The Court of Appeals further relied upon Section 54 of the *Restatement (Third) of Torts*, which provides, in pertinent part, that "[t]he possessor of land has a duty of reasonable care for artificial conditions or conduct on the land that poses a risk of physical harm to persons or property not on the land." (*Id.*, pp. 12–13 (quoting *Restatement (Third) of Torts* § 54 (2012)). The panel acknowledged that Section 54 has not been adopted in Indiana, but nonetheless applied it to reverse the trial court's ruling because "Oukbu alleged that Amazon controlled the way that delivery drivers enter the premises and that it placed an artificial hazard, *i.e.*, the "no trucks" signage on its premises." (*Id.*, p. 13). Judge Mathias concurred, writing separately to "urge our colleagues on the Supreme Court" to adopt Section 54.[1] (*Id.*, p. 16).

For additional background, Amazon incorporates fully the Statement of Facts and Statement of the Case from its Appellate Brief. *See* Ind. App. R. 57(G)(3).

II. ARGUMENT

Transfer is appropriate where the appellate court's opinion, *inter alia*: (a) conflicts with precedent from this Court on an important issue; (b) significantly departs from accepted law or practice so as to warrant the exercise of Supreme Court jurisdiction; (c) conflicts with precedent from the Court of Appeals on the same issue; or (d) decides an important question of law on a case of great public importance, which should be decided by the this Court. *See* Ind. App. R. 57(H)(1),

[1] That same day, the Court of Appeals panel decided *Kaur v. Amazon et al.*, Case No. 23A-CT-02059 (Ind. Ct. App. Sept. 27, 2024), which involved essentially the same facts. The panel's decision and reasoning in *Kaur* is identical to the one reached in this case. The panel's decision in *Kaur* is the subject of a separate Petition to Transfer.

(2), (4), and (6). Transfer is warranted on all four grounds in this case. Only three and a half years ago, this Court decided *Reece* and articulated a bright-line rule delineating a land possessor's legal duty to those off its premises. The Court of Appeals panel's decision in this case reverses course, shifting back to the "meandering" and "unworkably malleable" analysis this Court abandoned in *Reece*. This Court should intervene to reinforce and clarify *Reece* and eliminate the uncertainty and confusion the Opinion below will cause for litigants and courts throughout Indiana.

A. The Opinion conflicts with precedent from this Court on an important issue.

1. The Opinion is irreconcilable with the bright-line rule articulated in *Reece*.

This case presents a question of law: the scope of a land possessor's duty to nearby motorists. In *Reece*, this Court undertook a thorough analysis of the "meandering evolution of Indiana law in this area over the past eighty years[.]" *Reece*, 173 N.E.3d at 1034. While the facts of *Reece* involved a visual obstruction, the decision broadly canvassed the state of Indiana law on the issue of a land possessor's duty with respect to injuries occurring off its premises:

> Precedent has touched upon various aspects of landowners' duty to nearby motorists. . . . Some of those cases use broad language to support narrow holdings, while others conflict with one another. Yet, despite any inconsistencies, our common law has always sought to delicately balance owners' property rights with the motoring public's safety—without imposing undue or unreasonable burdens on either.

Id.

In *Reece*, a plaintiff injured in a motor vehicle accident claimed that the accident was caused by tall grass on the northwest corner of the intersection that obstructed the view of the traveling public. *Id.* at 1033. The grass grew in a ditch on Tyson's property, and the ditch had been dredged and cleaned at various times. At the time of the collision, the grass did not extend onto the road. *See id.* This Court resolved longstanding disagreement about the scope of a land possessor's duty to the traveling public by adopting a "bright-line" rule, holding:

> [L]andowners owe a duty to passing motorists on adjacent highways not to create hazardous conditions that visit themselves upon the roadway; **but when a land use or condition that may impose a visual obstruction is wholly contained on a landowner's property, there is no duty to the traveling public**.

Id. at 1034 (emphasis added). In *Reece*, "the tall grass in the ditch was indisputably confined to Tyson's property, and because that visual obstruction did not intrude on the public right of way, Tyson did not owe a duty to the traveling public." *Id.* The Court emphasized that "[g]iven [this] applicable bright-line principle, there [was] no need to determine preliminary factual questions, such as whether the grass was an artificial or natural condition, or how dense the population in the area was." *Id.* In adopting this bright-line rule, the Court reiterated its long-held view that "it would be too onerous to impose a duty on a 'property owner to continually inspect the perimeters of his property, particularly along an adjacent highway, to make sure that dangerous conditions do not arise for those traveling on the highway.'" *Id.* at 1040 (quoting *Blake v. Dunn Farms, Inc.*, 413 N.E.2d 560, 564 (Ind. 1980)). In adopting a bright-line rule addressing the duty question, *Reece* sought to discard "unworkably malleable" methods of determining whether and when a landowner owes a duty to those injured outside its premises. *Id.*

Reece is the product of this Court's effort to advance a predictable, "bright-line rule" that "lends itself to easy application." *Id.* As clear as this Court's motivation and holding were in *Reece*, the decision below confirms that further clarity is needed. The Court of Appeals panel found that *Reece*'s holding and underlying reasoning is applicable only to cases involving visual obstructions confined wholly to the land, not other dangerous conditions or activities that do not pose a visual obstruction to the traveling public but are indisputably confined to the land. (*See* Opinion, p. 9). As this Court explained, *Reece*'s rule is "the correct approach for **conditions** that do not intrude on the public right-of-way." *Reece*, 173 N.E.3d at 1040 (emphasis added). While *Reece* involved a visual obstruction, neither the Court of Appeals nor the Oukbus have identified any logical or

principled reason why a duty analysis should treat visual obstructions differently than other allegedly dangerous conditions or activities where neither intrude upon the public right-of-way.

The Court of Appeals interpreted *Reece* as limited to visual obstructions, such that *Reece*'s bright-line rule does not govern dangerous conditions wholly contained on the land. That interpretation is based upon this Court's observation that its holding was "confined to visual obstructions that do not come in contact with traveling motorists[.]" *Reece*, 173 N.E.3d at 1041. But the Opinion does not quote the entire sentence contained in *Reece*, which reads: "[O]ur holding is confined to visual obstructions that do not come in contact with traveling motorists, and it **does not address situations where a motorist comes in contact with a condition that is wholly contained on the land**." *Id.* (emphasis in original). *Reece*'s bright-line rule therefore focuses on whether or not the allegedly dangerous condition was wholly contained on the land, not on whether the condition constitutes a "visual obstruction." In addition, the Court in *Reece* discussed multiple cases that did not involve visual obstructions at all. *See, e.g.*, *Holiday Rambler Corp. v. Gessinger*, 541 N.E.2d 559, 560–61 (a plant allowed hundreds of employees to leave all at once, failing to control or direct traffic and presenting a risk to the traveling public); *Blake*, 413 N.E.2d 560 at 562 (the defendant allegedly failed to maintain a fence, causing a horse to escape and the plaintiff to then collide with the horse). If, as the Oukbus and the Court of Appeals believe, *Reece* was concerned only with the rule of law applicable to visual obstructions, this Court would not have discussed so extensively Indiana cases not involving visual obstructions.

The Opinion, if left in place, would create a decidedly incongruous dynamic: a bright-line rule under *Reece* would bar recovery where a visual obstruction is completely contained to the defendant's property and does not physically invade the roadway, but the Court of Appeals' decision here would allow recovery for allegedly dangerous conditions or activities that—like the

visual obstruction—do not extend beyond the property's boundaries. Consider this hypothetical: under the Court of Appeals' and the Oukbus' view of *Reece*, an allegation that Amazon's "no trucks" signs—completely contained within Amazon's property— were too large and obstructed the view of the traveling public would not be actionable. But an allegation, as here, that the signs were confusing or distracting would be actionable. That result is legally and practically untenable. Regardless, if such incongruity is to be the law of Indiana—which it should not be—then this Court alone should make that momentous judgment and articulate the applicable standard.

2. The Opinion is contrary to this Court's recent precedent holding that historical evidence is not relevant in determining the existence of a legal duty.

The Opinion conflicts with another line of recent precedent from this Court—the question of whether historical evidence may be considered as part of the duty analysis. The Opinion relies upon allegations that Amazon knew about the purported hazard presented by the signage and lighting on the fulfillment center premises based on prior incidents. This Court has repeatedly held that "**historical evidence**, while 'appropriate in evaluating foreseeability in the context of proximate cause,' **should play no role when we evaluate 'foreseeability as a component of duty**.'" *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 844 (Ind. 2020) (quoting *Goodwin*, 62 N.E.3d at 393) (emphasis added). As the Court explained:

> [F]oreseeability in this context—as a component of duty—is evaluated differently than foreseeability in proximate cause determinations: while the latter foreseeability analysis requires a factfinder to evaluate the specific facts from the case, the former "involves a lesser inquiry," requiring a court, as a threshold legal matter, to evaluate "the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence."

Id. at 840 (citing *Goodwin*, 62 N.E.3d at 393, which rejected the previously used totality test because it emphasized the particular facts of the case rather than a broader inquiry and was "ill-suited to determine foreseeability in the context of duty"). By focusing "on the general class of

persons of which the plaintiff was a member and whether the harm suffered was of a kind normally to be expected," this expression of the duty analysis ensures "that landowners do not become the insurers of their invitees' safety." *Id*. (citing *Rogers*, 63 N.E.3d at 324 (quotation omitted)). Amazon made these arguments to the Court of Appeals, but the panel failed to address this issue or these cases, relying upon Amazon's alleged knowledge of the purported hazard as a key component of its decision. This failure only further compounds the Opinion's erroneous duty analysis, which is inconsistent not only with *Reece*, but also with *Goodwin* and *Cavanaugh's Sports Bar*.

B. The Opinion significantly departs from accepted law or practice and conflicts with precedent from the Court of Appeals on the same issue.

The Opinion significantly departs from both accepted law and practice. As discussed above, the Opinion is manifestly irreconcilable with this Court's decisions in *Reece* and the *Goodwin/Cavanaugh Sport's Bar* line of cases. But even leaving those more recent precedents aside, the Opinion is contrary to a wealth of appellate case law addressing the question of a land possessor's duty and corresponding liability for injuries occurring off the premises. For example, in *Precedent Partners*, the Court of Appeals explained that "[t]he law does not impose a duty on a business to guard against injury to the public from the negligent acts of someone over whom the business has no control and which injury occurs off the business' premises." *Precedent Partners*, 863 N.E.2d at 330. Here, the allegedly dangerous condition was located entirely on the fulfillment center premises, and it is not alleged that Amazon had any control over or responsibility for the third-party motorist who struck Oukbu, nor any allegation that it controlled the public roadway.

The Oukbus and the Court of Appeals below appear to make much of the fact that Oukbu was on his way to the fulfillment center. The Oukbus argue that this makes Oukbu an invitee, even

though he never made it to the property. In fact, this is one of the principal reasons offered by both the Oukbus and the Court of Appeals for distinguishing this case from *Reece*. *Reece* involved a member of the traveling public, the argument goes, while this case involves an individual intending to enter Amazon's premises.[2] But that line of reasoning is inconsistent with Court of Appeals authority on this same issue. Consider *State v. Flanigan*, 489 N.E.2d 1216 (Ind. Ct. App. 1986), *trans. denied.* In that case, two pedestrians were struck by a third-party motorist while walking on a public roadway on their way to the defendant's flea market. *See id.* at 1217–20. The plaintiffs alleged "[t]here was not adequate parking provided adjacent to the business" and so they had to park their vehicle on the highway. *See id.* at 1217. The plaintiffs claimed that the flea market owners "were negligent in failing to provide a safe place to park and/or adequate traffic control to allow pedestrian travel, and in failing to warn them of the dangers incident to parking adjacent to the highway and walking along the highway to attend the flea market." *Id.* In other words, the plaintiffs in *Flanigan*, like Oukbu here, claimed they were forced to park on a public roadway and sustained injury because of the land possessor's negligence ***while they were walking to the defendant's property***. The Court of Appeals reversed the trial court's denial of the defendants' motion for summary judgment, holding:

> [G]enerally the owner of commercial premises adjacent to a public highway owes no duty to a patron who was injured when struck by an automobile as that patron was crossing or walking upon or along such highway. **We declare such to be the law in Indiana**.

[2] The Court of Appeals cites footnote 3 of this Court's opinion in *Reece* for the proposition that *Reece* "involved a landowner's duty to passing motorists on an adjacent highway, and the Court specifically rejected that such a duty should be the same as that owed to a business invitee." (Opinion, p. 9) (citing *Reece*, 173 N.E.3d at 1040, n.3). The Court of Appeals panel and the Oukbus believe this makes *Reece*'s reasoning inapplicable to would-be invitees. But this reads too much into too little. This footnote in *Reece* simply explains that passing motorists are not invitees, and therefore not entitled to the same duty of care that a landowner owes to an invitee. *Reece* does not hold that a duty may exist for would-be invitees who have yet to enter the premises but not for passing motorists.

Id. at 1218–19 (emphasis added). The *Flanigan* Court further recognized that to impose liability "for the acts of a third party over whom [the landowner] had no control, and which occurred not on their property **but on a public highway over which they had no control would clearly be contrary**" to Indiana law. *Id.* at 1218 (emphasis added). *Flanigan* remains good law in Indiana, but the Court of Appeals below—despite extensive discussion of this case in the parties' briefs—did not meaningfully discuss or distinguish it. The Opinion below and *Flanigan* cannot be reconciled.

The same is true of *Sizemore v. Templeton Oil Co*., 724 N.E.2d 647, 650 (Ind. Ct. App. 2000), where the Court of Appeals found no liability on the part of a gas station owner to a plaintiff who tripped and fell over a pothole located on the public right-of-way just next to the entrance of the gas station parking lot. Echoing *Flanigan*, the Court of Appeals explained:

> In order to affirm the decision of the trial court, we would be required to hold that under the facts alleged in this case, the law imposed a duty upon the [defendants] to provide traffic control, issue warnings, or take other action to protect [plaintiffs] from being struck by a vehicle not under [defendants'] control while [plaintiffs] were walking along the highway on their way to [defendants' premises]. In our opinion the law imposes no such duty.
>
> Accordingly, . . . **the owner of commercial premises adjacent to a public highway owes no duty to a patron who was injured when struck by an automobile as that patron was crossing or walking upon or along such highway**.

Id. at 653 (quoting *Flanigan*, 489 N.E.2d at 1217–19) (cleaned up) (emphasis added). The Opinion below and *Sizemore* are also irreconcilable.

The Oukbus will likely oppose transfer by relying on *Lutheran Hospital*, which along with Section 54 of the Third Restatement was the lynchpin of the Court of Appeals' analysis below. For reasons already discussed in Amazon's underlying briefing, Amazon believes that the facts of *Lutheran Hospital* are distinguishable and its holding therefore inapposite here. But even assuming

that the Court of Appeals panel and the Oukbus are correct and *Lutheran Hospital* supports a finding of duty, this only strengthens the argument for transfer because it reveals a material gap in how different Court of Appeals panels have resolved this question over the years. Whether a party owes a legal duty should not be a matter of serendipity; either Amazon owes a duty or it does not, and the Opinion's failure to address—much less clarify or resolve—contrary authority necessitates review by this Court.

C. The Opinion decides an important question of law on a case of great importance, which should be decided by this Court.

The Opinion decides several important questions of law—it impermissibly limits *Reece*, adopts an untenable and "unworkably malleable" standard for determining duty, ignores or contradicts prior precedent on the same or similar issues, and threatens to open the floodgates of litigation in a manner this Court explicitly endeavored to curtail in *Reece*. What is more, the Opinion adopts Section 54 of the Third Restatement as the law in Indiana—a sea change with significant and likely unintended consequences. Amazon strongly believes that Section 54 should not be adopted in Indiana, as Section 54 and *Reece* are in direct conflict and no authority from this Court holds—or even suggests—that Indiana land possessors owe such a broad duty of protection to those not on their premises. If Section 54 is to be adopted, that decision should be made by this Court.[3]

III. CONCLUSION

For the above-stated reasons, the Petition to Transfer should be granted, the Court of Appeals opinion vacated, and the trial court's judgment reinstated.

[3] The parties below did not meaningfully brief Section 54. To the extent it would be helpful to the Court, Amazon would welcome the opportunity for the parties to file supplemental briefs on that issue.

DATED: November 12, 2024.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this Petition to Transfer complies with the type volume limitation of Appellate Rule 44(E). The Petition does not exceed 4,200 words. The Petition contains 4,159 words (including those used in footnotes) based upon the count of the word processing system employed to prepare the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2024**,** the foregoing was electronically served through the IEFS in accordance with Appellate Rule 68(F)(I) upon the following counsel of record:

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