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IN THE INDIANA SUPREME COURT
CAUSE NO. 24A-CT-00254

MAHARI MRACH OUKBU and NITSIHITI ABRAHAM, Appellants, Plaintiffs below, v. AMAZON, INC., a corporation; AMAZON.COM, INC., a corporation; AMAZON LOGISTICS, INC., a corporation; AMAZON.COM SERVICES, LLC, MQJ1, a limited liability company; CF MOUNT COMFORT DST, a limited liability company; and, BRUCE L. GIBSON, an Individual, CITY OF GREENFIELD, INDIANA HANCOCK COUNTY BOARD OF COMMISSIONERS, HANCOCK COUNTY PLANNING COMMISSION, and HANCOCK COUNTY HIGHWAY DEPT., Appellees, Defendants below	On Petition to Transfer from the Indiana Court of Appeals Appeal from the Hamilton Superior Court No. 5 TRIAL COURT CASE NO.: 29D05-2308-CT-007700 THE HONORABLE DAVID K. NAJJAR, JUDGE.

APPELLANTS' RESPONSE BRIEF IN OPPPOSITION TO PETITIONS TO TRANSFER

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Response Brief of Appellants, Mahari Mrach Oukbu and Nitsihiti Abraham,
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I. Background and Prior Treatment of Issues on Transfer

Pursuant to Ind. R. App. P. 57(G)(3), Appellants Mahari Mrach Oukbu ("Mahari") and Nitsihiti Abraham (collectively, the "Oukbus") incorporate by reference the Statement of the Case and Statement of Facts sections of their Appellants' Brief in the Court of Appeals. *See* Appellants' Brief, pp. 4-10.

The Court of Appeals issued its Opinion on September 27, 2024, reversing the trial court's entry of judgment on the pleadings in favor of the Amazon Defendants[1] and CF Mount Comfort DST ("Mount Comfort"), and finding that the Oukbus pled facts sufficient to support a finding of a duty owed by Amazon and Mount Comfort.

II. Argument

A. The Court of Appeals' Opinion is consistent with this Court's precedent and no further clarification is necessary.

Both Amazon and Mount Comfort incorrectly argue, as they did before the Court of Appeals, that this Court's precedent in *Reece v. Tyson Fresh Meats, Inc.*, 173 N.E.3d 1031, 1041 (Ind. 2021), should absolve them of any liability to the Oukbus. However, the Court of Appeals' Opinion recognizing a duty owed by Amazon and Mount Comfort in no way conflicts with this Court's narrowly-tailored rule set forth in *Reece*. As noted in the briefing and argument before the Court of Appeals, this Court expressly cautioned in *Reece* that "our holding is confined to visual obstructions that do not come in contact with traveling motorists." *Id*. at 1041. This case does not

[1] For the purposes of this appeal and the Motion for Judgment on the Pleadings giving rise to this appeal, the parties have not distinguished between Defendants Amazon, Inc.; Amazon.com, Inc.; Amazon Logistics, Inc.; and Amazon.com Services, LLC, MQJ1, and have collectively referred to them as either "Amazon" or the "Amazon Defendants."

involve a visual obstruction, so Reece is, by this Court's own express guidance, inapplicable.

Further, the reason this Court chose to limit landowners' liability for injuries to passing motorists caused by visual obstructions wholly contained on the landowner's property is 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 this case, the Court of Appeals' finding of a duty owed by Amazon and Mount Comfort does not impose such a burden. Instead, it simply holds Amazon and Mount Comfort to the well-settled standard that a possessor of land may not use its property in a manner that creates a danger to its invitees. *See*, *e.g.*, *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991); *cf. Lutheran Hospital v. Blaser*, 634 N.E.2d 864, 870 (Ind. Ct. App. 1994) (finding hospital owed a duty to invitee injured off-premises where it "used its premises, the parking lot, in such a way to affect the risk of injury of its invitees off its premises."). As such, the Court of Appeals' opinion does not burden landowners like Amazon or Mount Comfort with a duty to inspect the perimeters of their property for latent or natural hazards; it simply – and reasonably – requires landowners to refrain from affirmatively creating hazards that endanger their invitees. This is a simple, easily-applied bright line rule – not the "unworkably malleable" standard Amazon claims it to be.

The Court of Appeals also correctly noted that this Court's opinion in *Reece* dealt only with the duty owed by landowners to members of the traveling public – not to invitees.[2]

[2] Mount Comfort argues that Mahari was not an invitee, but that argument is waived because it was not raised at the Court of Appeals. *See Reiswerg v. Statom*, 926 N.E.2d 26, 30 n.3 (Ind. 2010) ("A party may not raise an issue for the first time on petition to transfer.").

Opinion, at 9-10. This Court in *Reece* expressly rejected the argument that a landowner's duty to passing motorists should be the same as that owed by a landowner to a business invitee. *Id*. at 1040 n.3 (citing *Blake v. Dunn Farms, Inc.*, 413 N.E.2d 560, 564 (Ind. 1980) (holding that landowner's duty to business invitee is greater than duty to members of traveling public on adjacent road). Nonetheless, both Amazon and Mount Comfort argue that this Court in *Reece* did "not hold that a duty may exist for would-be invitees who have yet to enter the premises but not for passing motorists." But the footnote in *Reece* referenced above directly cites *Blake* on this point, in which this Court held that it

> must totally reject the conclusion of the Court of Appeals that the duty of a landowner to a person on an adjacent road is similar to that of a landowner to a business invitee. The duty of the business property owner to an invitee is an extra burden based upon the relationship of the owner or occupier of the land to the one he invites for the benefit of the owner or occupier.

Blake, 413 N.E.2d at 564. In short, this Court has unequivocally held that invitees are owed a greater duty of care than that which landowners owe to passing motorists on adjacent roads. Amazon and Mount Comfort's argument that the rule stated in *Reece* should be extended to foreclose duties otherwise owed to invitees is therefore unavailing.[3]

B. The Court of Appeals' Opinion is consistent with this Court's precedent with regard to foreseeability in the context of duty.

Amazon and Mount Comfort both argue that the Court of Appeals impermissibly considered evidence of prior similar occurrences in holding that they owed a duty to Mahari, citing to this Court's opinions in *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 844 (Ind. 2020) and *Goodwin v. Yeakle's Sports Bar & Grill*, 62 N.E.3d 384 (Ind. 2016).

[3] Amazon's complaints about the "incongruity" between the Court of Appeals' Opinion and this Court's decision in *Reece* ring hollow for the same reason.

Specifically, Amazon and Mount Comfort cite to *Cavanaugh's Sports Bar* for its summary of this Court's line of cases that began with *Goodwin* and held in part that when evaluating foreseeability as a component of duty, courts should evaluate "the broad type of plaintiff and harm involved, without regard to the facts of the actual occurrence," and should not consider "historical evidence." *Cavanaugh's Sports Bar*, 140 N.E.3d at 840 (quoting *Goodwin*, 62 N.E.3d at 393). This argument fails for two reasons.

First, the broad type of harm (injury in a traffic accident) is an obvious and foreseeable risk to the broad type of plaintiff (a delivery truck driver attempting to enter the Fulfillment Center) in this case. Mount Comfort argues that "the proper inquiry is whether a fulfillment center, or a landowner leasing to a fulfillment center, would ordinarily expect a truck driver to: (1) park his truck on the adjacent highway; and (2) walk into oncoming traffic, just as the proper inquiry in *Goodwin* was whether patrons of a neighborhood bar can be expected to shoot one another." *Mount Comfort's Petition to Transfer*, at 9. But as this Court noted in *Cavanaugh's Sports Bar*, a court evaluating foreseeability in the context of duty must evaluate "the broad type of plaintiff and harm involved, ***without regard to the facts of the actual occurrence***." 140 N.E.3d at 840 (emphasis added). The seemingly unusual nature[4] of the specific facts of this occurrence therefore has no bearing on whether Amazon and Mount Comfort should have foreseen that the defective and confusing nature of their entrance signage and layout could endanger delivery truck drivers

[4] In fact, as noted in the Amended Complaint and throughout the parties' briefing, the series of events leading to this incident appear to have been surprisingly common, with Amazon's own employee admitting that Amazon sees lost truck drivers get out of their trucks at that spot every day. (Appellant's App. Vol. II, p. 35), and another driver having been seriously injured in exactly the same manner just 48 days earlier. (Appellant's App. Vol. II, pp. 33-34).

attempting to enter the Fulfillment Center. Instead, all that is required to establish foreseeability as a component of duty is that "there is some probability or likelihood of harm that is serious enough to induce a reasonable person to take precautions to avoid it." *Cavanaugh's Sports Bar*, 140 N.E.3d at 840. A company owning and/or operating a large distribution center and warehouse should reasonably foresee that confusing signage and layout at the facility's entrance presents a serious enough risk of causing traffic accidents that the company should take reasonable precautions to avoid such risk.[5]

Second, this Court noted in *Cavanaugh's Sports Bar* that "[a] landowner's present knowledge, however, more conclusively elevates the knowledge of risk to 'some probability or likelihood of harm,' allowing courts to continue to find a duty when 'reasonable persons would recognize it and agree that it exists.'" 140 N.E.3d at 843-44 (quoting *Goodwin*, 62 N.E.3d at 393 and *Rogers v. Martin*, 63 N.E.3d 316, 325 (Ind. 2016)). Here, the Amended Complaint alleges that Amazon sees lost truck drivers get out of the trucks at the spot where Mahari was injured *every day*. (Appellant's App. Vol. II, p. 35). In other words, Amazon had actual, present knowledge of the dangerous condition that foreseeably led to Mahari's injury.

The prohibition against using "historical evidence" to determine foreseeability in the context of duty arose from the *Goodwin* court's rejection of a request to consider evidence of prior police reports and evidence of the character of the neighborhood when evaluating whether a

[5] Under the *Goodwin* standard as restated in *Cavanaugh's Sports Bar*, this foreseeability inquiry is generally a threshold legal matter for the Court to evaluate, not a question of fact for the jury. 140 N.E.3d at 840-41. However, this case suggests an exception to that general rule would be appropriate, as expert testimony in traffic management, human factors, and potentially other topics would be useful in establishing that a company operating a distribution center should reasonably foresee the risk that a confusing layout and/or signage would likely cause traffic accidents.

shooting at a bar was foreseeable. *Cavanaugh's Sports Bar & Eatery, Ltd. v. Porterfield*, 140 N.E.3d 837, 840 (Ind. 2020) (citing *Goodwin*, 62 N.E.3d at 392-94). Instead, a key factor that courts must consider is "whether the landowners knew or had reason to know about any present and specific circumstances that would cause a reasonable person to recognize the probability or likelihood of imminent harm." *Id*. Thus, while the general historical evidence of prior criminal activity in the neighborhood of the bar in *Goodwin* was impermissible to show that the shooting was foreseeable, a duty of care by a business was properly found in another case where a restaurant's staff recognized increasing hostilities between two groups of patrons before one customer brandished a gun and shot another. *Id*. at 841-42 (citing *Hamilton v. Steak 'n Shake Operations Inc.*, 92 N.E.3d 1166 (Ind. Ct. App. 2018)). Likewise, a college fraternity "had reason to recognize the probability or likelihood of looming harm" when it hosted a party and left a fraternity member who it knew had previously been accused of sexual assault alone with a drunken party guest. *Id*. at 842. Amazon's knowledge of the present and specific circumstances that endangered Mahari – *i.e.* the defective and confusing signage and layout at the Fulfillment Center – similarly would have caused a reasonable person to recognize the risk of imminent harm, and therefore establishes that Amazon owed its delivery truck driver invitees a duty to take reasonable precautions to protect against that harm. *Id*.

C. There is no conflict amongst the Court of Appeals' precedent on any of the issues in this case.

Amazon and Mount Comfort cite to the same long line of inapplicable Court of Appeals case law they cited in their briefs to the Court of Appeals, to suggest that there is a conflict between the Court of Appeals' Opinion in this case and its established precedent in other cases. As noted

in the briefing and argument before the Court of Appeals, the line of cases cited by Amazon and Mount Comfort simply stand for the proposition that Indiana law generally does not require a business to affirmatively protect invitees from pre-existing dangers before they arrive to the business' premises if the business did nothing to create or increase such dangers. *See, e.g.*, *State v. Flanigan*, 489 N.E.2d 1216, 1217–20 (Ind. Ct. App. 1986) (business owed no duty to invitees struck while walking along public road to reach business where business had done nothing to create or increase the danger to pedestrians); and *Sizemore v. Templeton Oil Co.*, 724 N.E.2d 647, 654 (Ind. Ct. App. 2000) (business owed no duty to invitee injured falling in pothole on public road outside business' entrance where business did nothing to create or increase the danger posed by the pothole).

The critical factual distinction between this case and the cases cited by Amazon and Mount Comfort is that both Amazon and Mount Comfort are alleged to have affirmatively created the dangerous condition that proximately caused Mahari's injuries. As the Court of Appeals correctly noted in its Opinion, "[w]hen the activities conducted on the business premises affect the risk of injury off the premises, 'the landowner may be under a duty to correct the condition or guard against foreseeable injuries.'" *Opinion* at 11-12 (quoting *Lutheran Hosp*, 634 N.E.2d at 870). This rule is easily harmonized with those stated in the cases cited by Amazon and Mount Comfort: while a landowner generally owes no duty to correct or guard invitees against latent hazards outside its premises, it does owe invitees a duty to refrain from *creating* hazardous conditions that could endanger those invitees as they attempt to enter the landowner's premises.

D. The Court of Appeals' Opinion does not break any new legal ground that would require a decision by this Court.

Amazon argues that the Court of Appeals' Opinion "threatens to open the floodgates of litigation in a manner this Court explicitly endeavored to curtail in *Reece*" and "adopts Section 54 of the Third Restatement as the law in Indiana—a sea change with significant and likely unintended consequences." *Amazon's Petition*, at 15-16. But nothing in the Court of Appeals' Opinion breaks new legal ground. As the Court of Appeals explained in great detail, it simply adhered to its own precedent in *Lutheran Hospital* in holding that the Oukbus properly alleged that Amazon and Mount Comfort owed and breached a duty to provide a "safe and suitable means of ingress and egress" and to refrain from using their premises in a manner that created a risk of injury to those outside their premises. *Opinion* at 10-13. Notably, *Lutheran Hospital* was decided in 1994 and there is no indication that the proverbial "floodgates of litigation" were opened in the intervening 30 years.

Finally, to the extent that Amazon argues that the Court of Appeals adopted Section 54 of the Restatement and that such a decision should have instead been made by this Court, it should be noted that Judge Mathias' concurrence in the Opinion suggests that the Court of Appeals did not formally adopt Section 54, and instead encourages this Court to do so. *Opinion* at 17 (Mathias, J., concurring). Nonetheless, there is no need to reach the question of whether Indiana should adopt Section 54 of the Restatement in order to resolve the questions at issue in this case, as the Court of Appeals' established precedent in *Lutheran Hospital* conclusively establishes that Amazon and Mount Comfort owed Mahari a duty regardless of whether Indiana were to adopt Section 54.

E. Mount Comfort waived any argument that Mahari was not an invitee by failing to raise such argument prior to its Petition to Transfer.

Mount Comfort argues that Mahari was not an invitee, but that argument is waived because it was not raised at the Court of Appeals. *See Reiswerg v. Statom*, 926 N.E.2d 26, 30 n.3 (Ind. 2010) ("A party may not raise an issue for the first time on petition to transfer.").

III. Conclusion

For the reasons stated herein, Appellants Mahari Mrach Oukbu and Nitsihiti Abraham respectfully requests that this Court deny transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Rules 24 and 68(F) of the Indiana Rules of Appellate Procedure, a copy of the foregoing has been served via E-Service through the Indiana E-Filing System, on December 5, 2024, to:

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