

Pursuant to S.Ct.Prac.R. 11.2(B)(1), Defendants-Appellants Lorain County Board of Mental Retardation, Lorain County Board of Mental Retardation and Developmental Disabilities, Connie J. Brown, Kimberly Muschitz, and Renee M. Oppenheimer (collectively, "Board") respectfully request that this Honorable Court reconsider its September 29, 2010 Journal Entry declining jurisdiction as the Memorandum in Support of Jurisdiction raises issues of both public and great general interest because (1) the "physical defects" language set forth under R.C. 2744.02(B)(4), which is not statutorily defined and (2) R.C. 2744.02(B)(4) mandates a causal connection between the "physical defects" and employee negligence elements. The basis for this motion is set forth in the accompanying memorandum in support.

MEMORANDUM IN SUPPORT

STATEMENT OF THE CASE AND FACTS

On February 16, 2010, the Board filed a notice of appeal and Memorandum in Support of Jurisdiction with the Ohio Supreme Court. See Notice of Appeal; Memorandum in Support of Jurisdiction (evidencing the same).

On March 18, 2010, Plaintiffs-Appellees Jacob Moss and Kim Moss filed a memorandum in response.

On April 26, 2010, the Board filed a list of additional authorities.

On August 23, 2010, the Board filed a second list of additional authorities.

On September 29, 2010, the Ohio Supreme Court issued a journal entry declining “jurisdiction to hear the case.” September 29, 2010 Journal Entry.

STANDARD OF REVIEW

S.Ct.Prac.R. 11.2(B)(1) provides that “[a] motion for reconsideration * * * may be filed * * * with respect to the * * * Supreme Court’s refusal to grant jurisdiction to hear a discretionary appeal.” While S.Ct.Prac.R. 11.2(B)(1) does not provide guidelines for determining whether a decision should be reconsidered or changed, the test generally applied to such motions is whether it “calls to the attention of the court an obvious error in its decision or raises an issue for [the Court’s] consideration that was either not considered at all or was not fully considered * * * when it should have been.” *State v. Black* (1991), 78 Ohio App.3d 130, 132, 604 N.E.2d 171. Application of this standard to the present matter demonstrates the Motion for Reconsideration should be granted.

LAW AND ARGUMENT

The Motion for Reconsideration should be granted in the present matter because the Memorandum in Support of Jurisdiction raises two issues of both public and great general interest which were either not considered or not fully considered by this Honorable Court. First, the Memorandum in Support of Jurisdiction raises issues regarding the “physical defects” language set forth under R.C. 2744.02(B)(4), which has never been statutorily defined. Second, the Memorandum in Support of Jurisdiction raises issues regarding the causal connection between the “physical defects” and employee negligence elements set forth in R.C. 2744.02(B)(4). If left unresolved, political subdivisions will be exposed to limitless liability and the jurisprudence with respect to statutory immunity will remain in a state of chaos. Each of these arguments is set forth below.

A. THE MEMORANDUM IN SUPPORT OF JURISDICTION RAISES ISSUES OF BOTH PUBLIC AND GREAT GENERAL INTEREST AS IT CONCERNS THE DEFINITION OF “PHYSICAL DEFECTS” IN R.C. 2744.02(B)(4).

First, the Motion for Reconsideration must be granted as this Honorable Court did not consider, or did not fully consider, whether the Memorandum in Support of Jurisdiction raises issues of both public interest and great general with respect to the “physical defects” language set forth under R.C. 2744.02(B)(4), which is not statutorily defined.

As explained more fully on pages 2-4 of the Memorandum in Support of Jurisdiction, the “physical defects” language in R.C. 2744.02(B)(4) has had a long and turbulent history. The General Assembly originally drafted R.C. 2744.02(B)(4) without including any “physical defects” language. Am.Sub.H.B. No. 176, 141 Ohio Laws, Part I, 1699 (evidencing the same). This resulted in a loophole which threatened to swallow the entire statutory immunity framework as any injury occurring on the grounds of a political subdivision could result in liability for that

subdivision. See, e.g., *Hubbard v. Canton City School Bd. of Edn.* (2002), 97 Ohio St.3d 451, 2002-Ohio-6718, 780 N.E.2d 543 (holding that a school district may be held liable for the sexual assault of a student based upon the R.C. 2744.02(B)(4) exception to statutory immunity). The General Assembly finally closed this loophole in 2003 by adding the “physical defects” language which occurs in the present version of the statute. Am.Sub.S.B. No. 106, 149 Ohio Laws, Part II, 3500, 3508 (evidencing the same). The fact that the General Assembly attempted, on three separate occasions, to insert the “physical defects” language demonstrates its importance to the statutory framework. See Am.Sub.H.B. No. 350, 146 Ohio Laws, Part II, 3867 (evidencing the same); Am.Sub.H.B. No. 215, 147 Ohio Laws, Part I, 909, 1150 (evidencing the same).

By declining jurisdiction, this Honorable Court will allow the Ninth District’s decision to destroy this framework by reopening the statutory loophole. Specifically, the decision reopens the statutory loophole by importing “design, maintenance and construction” defects into the definition of physical “physical defects. *Moss v. Lorain Cty. Bd. of Mental Retardation*, 2009-Ohio-6931, at ¶16. This expansive definition would permit plaintiffs to evade statutory immunity by simply alleging that the injuries were caused by design and/or construction defects occurring within or on the grounds of a political subdivision. Since it can be said that virtually any object occurring within or on the grounds of a political subdivision can be designed and/or constructed in a better manner the Ninth District decision has effectively written out the “physical defects” language in R.C. 2744.02(B)(4), thus reopening the statutory loophole.

This appeal presents a matter of great public and general interest as it seeks to clarify the “physical defects” language inserted by the General Assembly but never statutorily defined. At a bare minimum, this appeal seeks a determination that the “physical defects” language does not

embrace negligent design and construction defects as such a definition would effectively divest political subdivisions of statutory immunity under R.C. 2744.02(B)(4).

Based upon the foregoing, the Motion for Reconsideration must be granted as the Memorandum in Support of Jurisdiction raises issues of both public and great general interest with respect to the “physical defects” language in R.C. 2744.02(B)(4), which has never been statutorily defined.

B. THE MEMORANDUM IN SUPPORT OF JURISDICTION RAISES ISSUES OF BOTH PUBLIC AND GREAT GENERAL INTEREST AS IT CONCERNS THE CAUSAL CONNECTION BETWEEN HE “PHYSICAL DEFECTS” AND EMPLOYEE NEGLIGENCE ELEMENTS IN R.C 2744.02(B)(4).

Second, the Motion for Reconsideration must be granted as the Memorandum in Support of Jurisdiction raises issues of both public and great general interest with respect to the causal connection between the “physical defects” and employee negligence elements in R.C. 2744.02(B)(4).

As mentioned in the Memorandum in Support of Jurisdiction, in order for an exception to political subdivision immunity to be recognized under R.C. 2744.02(B)(4), the burden is on plaintiffs to plead specific factual allegations demonstrating (1) an injury, (2) employee negligence, (3) a physical defect, (4) causation between the employee negligence and physical defect, (5) causation between the injury and employee negligence, and (6) causation between the injury and physical defect. See, also, Memorandum in Support of Jurisdiction at 9-11 (stating the same).

By embracing design and construction defects, the Supreme Court is allowing the Ninth District’s decision to destroy the causal connection between the “physical defect” and employee negligence elements in R.C. 2744.02(B)(4). See *Yeater v. Bd. of Edn., Labrae School Dist.*, 2010-Ohio-3684, at ¶14 (holding that the plaintiff “had to demonstrate that her injury was caused

by the negligence of a School District Employee *and* that the injury was due to a physical defect”). See, also, *Dunfee v. Oberlin School Dist.*, 2009-Ohio-3406, at ¶13 (holding the same). Specifically, political subdivisions will be liable for the actions of individuals over which they have little or no control – i.e., individuals who are not their employees. Stated differently, political subdivisions do not design kitchen areas, nor do they construct them. This work is done through architects, construction companies and other third parties hired from outside the political subdivision. The employees involved in the present litigation certainly did not design and construct the kitchen area in question. If the Ninth District decision is permitted to stand, political subdivisions will be divested of immunity by the actions of individuals – actions potentially taken years prior to the injury – over which the political subdivision has little or no control.

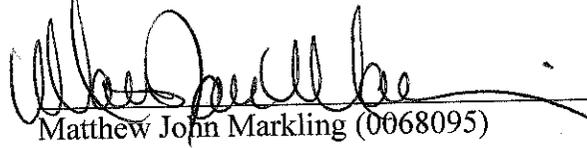
Based upon the foregoing, the Motion for Reconsideration must be granted as the Memorandum in Support of Jurisdiction presents issues of raises issues of both public and great general interest with respect to the causal connection between the “physical defects” and employee negligence elements in R.C. 2744.02(B)(4).

CONCLUSION

For the reasons discussed above, as well as the reasons stated in the Memorandum in Support of Jurisdiction, the Board respectfully requests that this Honorable Court reconsider its September 29, 2010 Journal Entry declining jurisdiction as the Memorandum in Support of Jurisdiction raises issues of great general and public interest because (1) the “physical defects” language set forth under R.C. 2744.02(B)(4), which is not statutorily defined and (2) R.C. 2744.02(B)(4) mandates a causal connection between the “physical defects” and employee negligence elements. If jurisdiction is declined, political subdivisions will be exposed to

limitless liability and the jurisprudence with respect to statutory immunity will remain in a state of chaos.

Respectfully Submitted,
Matthew John Markling, Counsel of Record

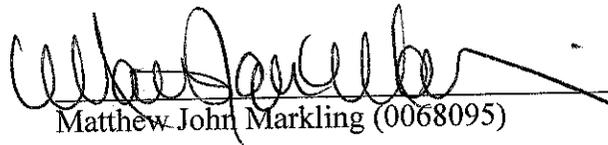


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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent by ordinary U.S. mail to counsel for Appellees, Michael D. Shroge, Plevin & Gallucci Co., L.P.A., 55 Public Square, Suite 2222, Cleveland, Ohio 44113, and Paul W. Flowers, Paul W. Flowers Co., L.P.A., Terminal Tower, 35th Floor, 50 Public Square, Cleveland, Ohio 44113 on October 8, 2010.



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