

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *Wilkes v. Ohio Dept. of Transp.*, Slip Opinion No. 2026-Ohio-3897.]

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SLIP OPINION NO. 2026-OHIO-3897

**WILKES, PERSONAL REPRESENTATIVE OF THE ESTATE OF BYRD, APPELLEE,
v. OHIO DEPARTMENT OF TRANSPORTATION, APPELLANT.**

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may be cited as *Wilkes v. Ohio Dept. of Transp.*, Slip Opinion No.**

2026-Ohio-3897.]

Civil law—Negligence—Discretionary immunity—R.C. 2743.02—In the absence of a policy detailing use of temporary vandal-protective fencing during bridge reconstruction, decision by Ohio Department of Transportation not to erect such fencing during overpass-bridge reconstruction involved exercise of high degree of discretion, giving it discretionary immunity from negligence suit brought by estate of vehicle passenger who died after being struck by a sandbag that a juvenile threw over a bridge during its reconstruction—Court of appeals’ judgment reversed and cause remanded to Court of Claims with instructions to dismiss action.

(No. 2025-0632—Submitted January 8, 2026—Decided October 6, 2026)

APPEAL from the Court of Appeals for Franklin County,

No. 24AP-106, 2025-Ohio-1030.

KENNEDY, C.J., authored the opinion of the court, which DEWINE, DETERS, HAWKINS, and SHANAHAN, JJ., joined. FISCHER, J., concurred, with an opinion. BRUNNER, J., dissented, with an opinion.

KENNEDY, C.J.

{¶ 1} In this appeal from a judgment of the Tenth District Court of Appeals, we are asked whether appellant, the Ohio Department of Transportation (“ODOT”), is immune from tort liability for its decision not to erect temporary vandal-protective fencing on a bridge undergoing reconstruction when the roadway, sidewalk, and vandal-protective fencing on one side of the bridge was removed and pedestrian traffic was relegated to the other side of the bridge, where vandal-protective fencing remained intact. We hold that ODOT is immune from suit for negligence based on its basic policy decision not to install temporary vandal-protective fencing on the side of the bridge that was closed to pedestrian traffic during the reconstruction.

{¶ 2} In this case, a juvenile killed an occupant of a vehicle, Marquise Shawndell Byrd, when he dropped a sandbag from an overpass bridge that was undergoing reconstruction. Appellee, Patricia Wilkes, as personal representative of Byrd’s estate, sued ODOT in the Court of Claims for wrongful death, and ODOT asserted its immunity from suit. The Court of Claims rejected ODOT’s claim of immunity but found that the estate had not proved that ODOT was liable for Byrd’s death. On appeal, the Tenth District agreed that ODOT lacked immunity from the wrongful-death suit but reversed the Court of Claims’ judgment, concluding that the estate had established ODOT’s liability and remanding the matter to the Court of Claims for a determination of damages.

{¶ 3} In deciding whether ODOT enjoys discretionary immunity as an instrumentality of the State of Ohio, a distinction must be made between ODOT's policymaking decisions and its policy implementation. When a public official makes a basic policy decision that involves the exercise of a high degree of official judgment or discretion, the State is immune from tort liability. However, discretionary immunity does not apply when a public employee acts negligently in implementing the policy decision that has been made.

{¶ 4} Whether to use temporary vandal-protective fencing during a bridge reconstruction is a basic policy decision that involves the exercise of a high degree of discretion and, as such, is one for which ODOT is immune from liability. And because the State has not consented to being sued for this type of policy decision, the Court of Claims lacked subject-matter jurisdiction over this action.

{¶ 5} We therefore reverse the court of appeals' judgment and remand this matter to the Court of Claims with instructions to dismiss the cause.

I. FACTS AND PROCEDURAL POSTURE

A. Vehicular Vandalism

{¶ 6} On December 19, 2017, the Toledo Police Department responded to an injury accident on southbound Interstate 75 ("I-75") near the overpass bridge at the Washington Street 201A exit in Toledo. At the time of the accident, the bridge was undergoing reconstruction and was partially open to vehicular and pedestrian traffic.

{¶ 7} When Officer Jonathan Curtis arrived at the scene, he observed that the passenger-side windshield of the only vehicle involved was shattered and that Byrd was unconscious in the front passenger seat with blood coming from his nose. Byrd never regained consciousness and later died at the hospital from his injuries.

{¶ 8} According to Officer Curtis, a sandbag had gone through the passenger-side windshield of the vehicle in which Byrd had been traveling. Sand

covered the exterior of the car and was also in the interior. Given the injuries Byrd sustained, Officer Curtis completed a felonious-assault report.

{¶ 9} Detective Scott Smith photographed the scene and collected two pieces of evidence: a sandbag from the southbound side of the I-75 roadway and a sandbag from the back seat of the vehicle that Byrd had been traveling in.

{¶ 10} While at the scene, police detained a group of juveniles who were walking eastbound across the overpass bridge along Indiana Avenue headed toward 15th Street. A juvenile, identified as “Suspect 5,” told police that another juvenile, identified as “Suspect 1,” had said, “I’m going to throw this over the bridge and run because the cops are going to come.” Four juveniles were eventually adjudicated delinquent for vehicular vandalism, three were adjudicated delinquent for involuntary manslaughter, and one was adjudicated delinquent for murder.

B. Indiana Avenue–Bridge Reconstruction

{¶ 11} The Indiana Avenue–bridge reconstruction began in August 2017. Nick Zenk worked as a project engineer for ODOT at the time and was involved in the demolition and reconstruction of the bridge.

{¶ 12} Mark Mondora worked as an area engineer in ODOT’s construction division and was the area engineer for the bridge reconstruction. As the area engineer, Mondora received direct reports from the project engineer, and his personnel directly conferred with the project contractor, Kokosing Construction Company. An ODOT staff member was on the construction site every day.

{¶ 13} David Slatzer worked as the deputy director of engineering for ODOT at the time of the bridge reconstruction. ODOT’s deputy director of engineering has “policy oversight” in the Office of Real Estate Consultant Services and ODOT’s office of CAD. In 2017, the Office of Structural Engineering was also under Slatzer’s supervision. That office is where ODOT’s policy regarding bridges is made.

{¶ 14} In 2014, when Slatzer started working for ODOT, vandal-protective fencing was required for bridges undergoing reconstruction if the “existing” bridge had it, and new bridges may have required the fencing if certain criteria were met, such as the bridge had sidewalks, was within the proximity of a neighborhood or school that would generate pedestrian traffic, and was being constructed over interstate traffic.

{¶ 15} Before 2016, ODOT used a rating system to determine whether vandal-protective fencing should be installed on bridges. Eventually, that policy changed, but between January and December 2017, the provisions in ODOT’s bridge-design manual about including vandal-protective fencing for bridges did not change. The policy manual required that vandal-protective fencing be installed “on all bridges over vehicular traffic except as noted” in the policy. For existing bridges, vandal-protective fencing was to be installed when “new concrete or refaced concrete barriers [were] installed.” According to Slatzer, this policy did not apply to “structures that [were] under construction” but instead applied to the “permanent condition of the structure.” Before December 19, 2017, Slatzer did not work on the Indiana Avenue–bridge reconstruction.

{¶ 16} Craig Wing was Kokosing’s project manager for reconstruction of the Indiana Avenue bridge. While not involved in the day-to-day construction activities, he scheduled resources and managed contractual issues related to the project. The day-to-day construction activities were managed by a superintendent who reported to Wing. And Wing reviewed the plans for the reconstruction in detail. He visited the construction site on multiple occasions before December 19, 2017.

{¶ 17} Todd Lezon was the regional manager for Kokosing in 2017, and as such, he was involved in the Indiana Avenue–bridge reconstruction.

{¶ 18} Before the reconstruction began, the Indiana Avenue bridge had three lanes of vehicular travel and two pedestrian sidewalks—one on the north side

of the bridge and one on the south side—and vandal-protective fencing was in place on both sides of the bridge. As Lezon explained, vandal-protective fencing is used to deter people from dropping or throwing things off bridges. This purpose was also reflected in ODOT’s 2017 bridge-construction policy manual.

{¶ 19} Kokosing presented ODOT with a “value engineering proposal,” in which it sought to close the Indiana Avenue bridge for the entirety of the project and to tear it down and rebuild it all at once instead of in phases. ODOT, after weighing the pros and cons of that proposal, decided to leave one lane open for vehicular traffic and to leave the sidewalk open for pedestrian traffic on the side of the bridge that was not then undergoing reconstruction, because the bridge was one of the main arteries into downtown Toledo. Mondora testified that closing the bridge completely to vehicular traffic was not an option and that because several neighborhoods were in the area, the city had expressed the need to permit pedestrian traffic also to continue during the reconstruction.

{¶ 20} The reconstruction had two phases: a design phase and a construction phase. The construction phase itself also had two phases: demolition and reconstruction of the north side of the bridge and demolition and reconstruction of the south side of the bridge.

{¶ 21} Phase I of construction entailed the demolition and reconstruction of the north side of the bridge, which required closing the bridge to both vehicular and pedestrian traffic on the north side, removing the bridge beams and deck, removing the vandal-protective fencing from the north side of the bridge, and installing temporary cement barricades that were approximately 42 inches tall. Because the substructure was being modified for the future widening of I-75 northbound and southbound through Toledo, the bridge was basically being removed and replaced in phases.

{¶ 22} During Phase I of construction, the south side of the bridge had only one open lane of vehicular traffic and a sidewalk open to pedestrian traffic. On that side of the bridge, the existing vandal-protective fencing remained intact.

{¶ 23} Mondora testified that because pedestrian traffic was limited to the south side of the bridge, he had no concerns about the removal of the vandal-protective fencing from the north side of the bridge, and he did not instruct the contractor to “do anything above and beyond what was in the contract.” At that time, ODOT policy required vandal-protective fencing to be in place only where there was pedestrian traffic. And law enforcement provided only traffic control on the bridge, not security of the construction site. Traffic-control devices and signage also helped maintain the flow of vehicular and pedestrian traffic on the south side of the bridge, and barricades and signage showed the closure of the north side of the bridge.

{¶ 24} ODOT has traditionally used sandbags to keep barricades and signage in place at construction sites because of their effectiveness. And sandbags were used to keep the barricades and signs in place at the Indiana Avenue bridge’s construction site.

{¶ 25} Kokosing had a Site Specific Safety Orientation form that anyone working at any of Kokosing’s job sites had to complete. Paragraph 12 of the form related to security and instructed the employee that he or she would be working in an area where vehicle break-ins and thefts frequently occur. The form reminded the employee to place personal items in the trunk of his or her vehicle or out of sight, to secure small tools and equipment at the end of the day, and to not leave keys in equipment. And paragraph 13 of the form reminded the employee that construction work can be dangerous, so he or she should know and follow safety rules. Wing testified that Kokosing takes the same level of care for safety at all its construction sites, regardless of whether a project is in an urban or rural area.

{¶ 26} Before the sandbag-throwing incident on December 19, 2017, Kokosing did not experience any incidents at the construction site in which a person attempted to throw something off the north side of the bridge while it was closed for reconstruction. And according to Lezon, Kokosing did not have safety concerns at the site before the sandbag-throwing incident.

C. The Action Against ODOT

{¶ 27} On January 7, 2019, Wilkes filed an action against the State, specifically ODOT, in the Court of Claims. In her complaint, Wilkes alleged that on the date in question, ODOT “had a duty to exercise due care and diligence in the proper maintenance and repair of State highways and roads.” And Wilkes alleged that ODOT had negligently and carelessly breached its duty when it failed to “remove, or mitigate dangerous conditions, which presented an obvious, foreseeable, or known risk to the traveling public, along the relevant portion of I-75 near the Indiana [Avenue] overpass” by allowing sandbags to be left at the overpass bridge’s construction site.

{¶ 28} The Court of Claims denied ODOT’s motion for summary judgment, rejecting ODOT’s argument that it had discretionary immunity against Wilkes’s negligence suit. After a trial on the merits, the Court of Claims determined that Wilkes had not established her claims by a preponderance of the evidence and entered judgment in favor of ODOT. *See* 2024 WL 1491500, *7 (Jan. 12, 2024).

{¶ 29} The Tenth District reversed that judgment. Relevant here, the court of appeals concluded that ODOT lacked immunity against Wilkes’s negligence suit given not only its decision not to install temporary vandal-protective fencing on the bridge but also its failure to take any action to prevent vandalism after demolition of the fencing from the north side of the bridge during the reconstruction. *See* 2025-Ohio-1030, ¶ 51-52 (10th Dist.). It explained, “ODOT did not make a discretionary policy decision to take no action; it took no action [to prevent vehicular vandalism] because it did not perceive a problem.” *Id.* The Tenth District decided that Wilkes

had proved that ODOT was liable for Byrd’s death, and it remanded the cause to the Court of Claims to determine the amount of damages to award to the estate. *See id.* at ¶ 54.

{¶ 30} This court accepted two propositions of law for review:

[1.] Holding the State to the “same rules” that govern private-party torts means not elevating the State’s burden to defend tort suits.

[2.] The State’s design decisions are not reviewable through tort lawsuits even if no evidence shows that a State actor consciously considered and rejected the design element alleged to cause the tort injury.

See 2025-Ohio-2537.

{¶ 31} Because deciding the second proposition of law resolves the case, we decline to answer the first proposition of law.

II. LAW AND ANALYSIS

{¶ 32} “Under the doctrine of sovereign immunity, ‘a state is not subject to suit in its own courts unless it expressly consents to be sued.’” *Smith v. Ohio State Univ.*, 2024-Ohio-764, ¶ 12, quoting *Proctor v. Kardassilaris*, 2007-Ohio-4838, ¶ 7. As amended in 1912, Article I, Section 16 of the Ohio Constitution allows “[s]uits [to] be brought against the state, in such courts and in such manner, as may be provided by law.” This court has recognized that that constitutional provision “is not self-executing but requires the passage of legislation to activate it.” *Schaffer v. Franklin Cty. Veterans Mem. Bd. of Trustees*, 171 Ohio St. 228, 229 (1960).

{¶ 33} The General Assembly exercised its prerogative to waive the State’s sovereign immunity with respect to certain claims by enacting the Court of Claims Act, R.C. 2743.01 et seq. *See* Am.Sub.H.B. No. 800, 135 Ohio Laws, Part II, 869,

871 (effective Jan. 1, 1975). Under R.C. 2743.03(A)(1), the Court of Claims “has exclusive, original jurisdiction of all civil actions against the state permitted by the waiver of immunity contained in [R.C. 2743.02].”

{¶ 34} With some exceptions, R.C. 2743.02 provides that the State “consents to be sued, and have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties.” R.C. 2743.02(A)(1). Private parties, however, do not engage in the “essential acts of governmental decisionmaking,” *Smith* at ¶ 15, quoting *Wallace v. Ohio Dept. of Commerce*, 2002-Ohio-4210, ¶ 34; *see also Semadeni v. Ohio Dept. of Transp.*, 1996-Ohio-199, ¶ 17-20. Therefore, “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,” *Smith* at ¶ 15, quoting *Reynolds v. State*, 14 Ohio St.3d 68 (1984), paragraph one of the syllabus. And “the Court of Claims does not have subject-matter jurisdiction when discretionary immunity applies.” *Id.* at ¶ 16.

{¶ 35} This court has recognized that for purposes of discretionary immunity, a distinction exists between policymaking and policy implementation:

Even though a discretionary decision is immune from suit, the implementation of that decision can be carried out in a negligent manner. When carrying out the mandates of a public employer, the actions of the agents or employees of that employer are distinguishable from the original decision to take action and thus could be actionable.

(Cleaned up.) *Risner v. Ohio Dept. of Transp.*, 2015-Ohio-4443, ¶ 21.

{¶ 36} In *Risner*, the plaintiff alleged that ODOT was negligent in designing a highway intersection to have flashing red and yellow lights rather than a stoplight. *Id.* at ¶ 3. The court explained that ODOT is immune from liability when it decides to improve a particular portion of a roadway and not to improve other portions of the roadway and that it is also immune when selecting the type of improvement to be made. *Id.* at ¶ 17. We explained that “[e]ach of these decisions entail[s] the exercise of a planning function involving the making of a basic policy decision characterized by the exercise of a high degree of official judgment and discretion.” *Id.* However, the court also indicated that ODOT could be held liable for how it executed such decisions, noting that ODOT “is not immune from liability for damages resulting from negligence that occurs in implementing [these] decisions,” *id.* at ¶ 24.

{¶ 37} The court’s decision in *Semadeni* is also instructive. In that case, a driver died when a six-pound chunk of concrete was dropped from an overpass and crashed through his windshield. *Semadeni*, 1996-Ohio-199, at ¶ 1. The executor of the victim’s estate sued ODOT for the negligent failure to install vandal-protective fencing on the overpass bridge. *Id.* at ¶ 2. While the court indicated that ODOT made a basic policy decision for which it was immune from liability when it required the overpass bridge to have vandal-protective fencing installed, it decided that ODOT was liable in that case for failing to implement its decision to install the fencing within a reasonable period. *Id.* at ¶ 21-22.

{¶ 38} In this case, ODOT made a discretionary decision to complete the Indiana Avenue–bridge reconstruction in two construction phases. During Phase I, the north side of the bridge was removed, including its existing vandal-protective fencing. Vehicular traffic was rerouted between concrete barriers to the north and the sidewalk to the south. The sidewalk remained open to pedestrian traffic, and the existing vandal-protective fencing remained in place along that side of the bridge. ODOT exercised its discretion when it chose not to install temporary

vandal-protective fencing along the concrete barriers on the north side of the bridge while that side of the bridge was undergoing reconstruction.

{¶ 39} Witnesses testified that ODOT had no policy requiring the installation of vandal-protective fencing on the bridge while it was under reconstruction; rather, ODOT policy required the installation of such fencing only after reconstruction was complete. Further, ODOT’s bridge-design manual—which detailed when vandal-protective fencing is required on bridges—applied to the design of new bridges only. So in the absence of a policy, ODOT’s employees had discretion to decide whether to install temporary vandal-protective fencing during the Indiana Avenue–bridge reconstruction. And Mondora, the area engineer for ODOT, indicated that a choice had been made: he explained that temporary fencing was unnecessary because the north side of the bridge along the concrete barriers was closed to pedestrian traffic during Phase I of construction.

{¶ 40} The decision not to erect temporary vandal-protective fencing while the Indiana Avenue bridge was undergoing reconstruction was a basic policy decision made by ODOT involving the exercise of a high degree of discretion. Consequently, ODOT has discretionary immunity from Wilkes’s negligence suit, and the Court of Claims therefore lacked subject-matter jurisdiction over this case.

III. CONCLUSION

{¶ 41} Byrd’s death is tragic. However, in deciding whether injured parties should be permitted to sue the State, the General Assembly—the arbiter of public policy—necessarily had to draw lines regarding which claims may be pursued against the State and which claims may not. “It is the function of the General Assembly to weigh such competing policy concerns when enacting legislation.” *McConnell v. Dudley*, 2019-Ohio-4740, ¶ 32. “[I]t is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly.” *Kaminski v. Metal & Wire Prods. Co.*, 2010-Ohio-1027, ¶ 61.

{¶ 42} By enacting the Court of Claims Act, the General Assembly has determined that the State cannot be sued for injuries sustained as a result of governmental decision-making. And in this case, ODOT’s decision not to install temporary vandal-protective fencing on the Indiana Avenue bridge during its reconstruction was a basic policy decision marked by a high degree of discretion. ODOT therefore is immune from tort liability for Byrd’s death, and because the State has not consented to be sued for that type of claim, the Court of Claims lacked subject-matter jurisdiction over it.

{¶ 43} For these reasons, we reverse the Tenth District Court of Appeals’ judgment and remand the cause to the Court of Claims with instructions to dismiss the action.

Judgment reversed
and cause remanded to the Court of Claims.

FISCHER, J., concurring.

{¶ 44} Both parties ask this court to resolve this case based on an application of *Reynolds v. State*, 14 Ohio St.3d 68 (1984), and its progeny. And the majority opinion obliges, applying *Reynolds* and its progeny to reverse the Tenth District Court of Appeals’ judgment and remand the matter to the Court of Claims to dismiss the cause. While I agree with the legal analysis set forth by the majority opinion, which is based on the arguments presented by the parties, I write separately to address the validity of this court’s determination in *Reynolds* that the State of Ohio has discretionary immunity—a determination that serves as the foundation for the court’s holding in this case.

{¶ 45} As I noted in my dissenting opinion to this court’s denial of jurisdiction in *Smith v. Ohio State Univ.*, 2025-Ohio-2119, ¶ 5 (Fischer, J., dissenting), *Reynolds* lacked a proper statutory-interpretation analysis of R.C. 2743.02. And without that analysis, we cannot be sure that the discretionary

immunity that this court applied in *Reynolds* is conferred by statute, as opposed to being judicially created. *See Smith* at ¶ 6. After further review, I can confidently say that it is not.

{¶ 46} The General Assembly, in accordance with Article I, Section 16 of the Ohio Constitution, enacted R.C. 2743.02, waiving the State’s sovereign immunity with limited exceptions, none of which are applicable here. In *Reynolds*, this court interpreted the language of R.C. 2743.02(A)(1)—the State shall “have its liability determined . . . in accordance with the same rules of law applicable to suits between private parties”—to mean that the State has discretionary immunity when it makes decisions involving “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* at 70. But this court in *Reynolds* reached that conclusion without performing any statutory-interpretation or legal analysis. *See Smith* at ¶ 5-6.

{¶ 47} Frankly, it is difficult to see how this court’s holding in *Reynolds* could be reconciled with the plain language of the statute. There is absolutely nothing in R.C. 2743.02 that would give the State broad discretionary immunity regarding its basic policy decisions. In fact, the statute supports the opposite conclusion. The statute says, “The state hereby waives its immunity from liability . . . and consents to be sued, and have its liability determined” with explicit exceptions, R.C. 2743.02(A)(1), none of which are applicable here. And the statute demands that the State be subjected to the “same rules of law applicable to suits between private parties,” *id.*, which should mean that the same rules that apply to private parties also apply to the State. The fact of the matter is that the State does not have broad discretionary immunity under the plain language of R.C. 2743.02(A)(1).

{¶ 48} And if the plain language of the statute is not enough, this court’s

abrogation of municipal sovereign immunity supports the conclusion that *Reynolds* was wrongly decided. See *Haverlack v. Portage Homes, Inc.*, 2 Ohio St.3d 26, 30 (1982) (holding that a municipal corporation is liable for its negligence in the performance or nonperformance of an act unless immune by statute), superseded by statute as stated in *Moore v. Lorain Metro. Hous. Auth.*, 2009-Ohio-1250, ¶ 7. If this court treated the General Assembly’s abrogation of the State’s sovereign immunity in R.C. 2743.02 the same as this court’s abrogation of municipal sovereign immunity in *Haverlack*, the State would be excepted from liability only in circumstances that are explicitly set forth in the statute. And again, the plain language of R.C. 2743.02 does not explicitly except the State from liability in circumstances that involve a basic policy decision.

{¶ 49} This court “must give effect to the words used in the statute[] and refrain from adding or deleting words or phrases to the language chosen by the General Assembly” and must refrain from “creat[ing] an exception to a statute where none exists.” *Vandercar, L.L.C. v. Port of Greater Cincinnati Dev. Auth.*, 2024-Ohio-1501, ¶ 12. And as the majority recognizes, “it is not the role of the courts to establish their own legislative policies or to second-guess the policy choices made by the General Assembly.” Majority opinion, ¶ 41, quoting *Kaminski v. Metal & Wire Prods. Co.*, 2010-Ohio-1027, ¶ 61. But in *Reynolds*, it appears that that is exactly what this court did. If this court instead looked at the plain language of R.C. 2743.02(A)(1) and abided by the notion that the General Assembly, not this court, is the arbiter of public policy that decides which claims may be pursued against the State, then this court would not enforce, impose, or find discretionary immunity outside the exceptions listed in the statute.

{¶ 50} It is clear that “[t]his court’s decision in *Reynolds* shields the State from liability and in doing so, fails to treat the State like any private litigant as contemplated by R.C. 2743.02(A)(1)—all without a proper statutory-interpretation analysis.” *Smith*, 2025-Ohio-2119, at ¶ 6 (Fischer, J., dissenting). And without a

proper analysis, this court cannot be sure that its interpretation of the statute as stated in *Reynolds* “does not unnecessarily deny Ohioans the right to bring suits against the State in a manner ‘as may be provided by law’ and eliminate the possibility of citizens having a ‘remedy by due course of law’ and having ‘justice administered without denial or delay,’ Ohio Const., art I, § 16.” *Id.*

{¶ 51} Even though I am confident that *Reynolds* and its progeny were incorrectly decided, since neither of the parties in this case have challenged this court’s decision in *Reynolds*, a reevaluation of that area of the law is best left for another day. *See Dayton v. State*, 2017-Ohio-6909, ¶ 31 (lead opinion) (declining to overrule the test set forth in *Canton v. State*, 2002-Ohio-2005, because neither party set forth any developed argument that the test should be modified or overruled). *But see Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (“When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.”); *State ex rel. Martens v. Findlay Mun. Court*, 2024-Ohio-5667, ¶ 21-23 (overruling *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 1999-Ohio-123), and ¶ 31 (Brunner, J., concurring in judgment only) (pointing out that the parties did not request that the court overrule *Sheward*). As this court has recognized time and again, “justice is far better served” when this court has the benefit of briefing and argument before it makes a final determination. *Sizemore v. Smith*, 6 Ohio St.3d 330, 333, fn. 2 (1983).

{¶ 52} For these reasons, I agree with the majority opinion in its application of *Reynolds*, 14 Ohio St.3d 68, and its progeny to reverse the Tenth District Court of Appeals’ judgment and remand this matter to the Court of Claims to dismiss the cause.

BRUNNER, J., dissenting.

{¶ 53} In *Reynolds v. State*, we explained that the State of Ohio may not 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.” 14 Ohio St.3d 68 (1984), paragraph one of the syllabus. I share several of the concerns expressed in the concurring opinion regarding how this holding was reached in *Reynolds*, but I believe it can be workable and reliable as a rule of law. The real problem in this case is this court’s inability or unwillingness to abide by the rule of law announced in *Reynolds*. More directly put, this court should not shield from private redress behavior by government officials that is careless, callous, fraudulent, or negligent by framing that behavior as discretionary decision-making.

{¶ 54} In *Reynolds*, the issue was whether the plaintiffs could maintain their claims for money damages against the State for personal injury, even if the State was barred from suit for making the decision from which the injuries and money damages flowed. We said they could. *See Reynolds* at 70-71. In that case, this court established that while discretionary immunity, if applicable, renders the State immune from suit for a *decision* that the State made, it does not shield the State from liability for an injury or loss that occurs in implementing that decision. *See Smith v. Ohio State Univ.*, 2024-Ohio-764, ¶ 39 (Brunner, J., dissenting), citing *Reynolds* at 70-71. And “on remand, the Court of Claims reviewed the evidence of the state’s conduct following its decision . . . and found the state liable for the plaintiffs’ injuries, ordering the state to pay money damages to the plaintiffs.” *Id.* at ¶ 40 (Brunner, J., dissenting), citing *Reynolds v. Div. of Parole & Community Servs.*, 23 Ohio Misc.2d 31, 39 (Ct. of Cl. 1985).

{¶ 55} This court’s recent use of *Reynolds* to expand the application of discretionary immunity moves our jurisprudence in the wrong direction and unduly

minimizes governmental responsibility and accountability. In *Smith v. Ohio State Univ.*, 2025-Ohio-2119, ¶ 16, I dissented from this court’s determination that we lacked jurisdiction over questions whether Ohio State University’s decision to cancel in-person instruction during the COVID-19 pandemic without fully refunding a student’s fees and charges constituted a breach of contract. In not accepting the appeal for review, *see id.* at ¶ 1, this court let stand the Tenth District Court of Appeals’ determination that discretionary immunity barred the student’s claims for redress against the university because she had challenged the university’s conduct in implementing its decision. *See Smith v. Ohio State Univ.*, 2024-Ohio-5887, ¶ 39, 52-53 (10th Dist.). I continue to have concerns that applying discretionary immunity beyond the confines established in *Reynolds* will have wide-ranging implications on the public’s confidence in not only this court but in the whole of state government, as the public is increasingly denied a remedy for harms caused by the State’s exercise of its governmental authority, even when that conduct is negligent, willful, or malicious. *See Smith*, 2025-Ohio-2119, at ¶ 21 (Brunner, J., dissenting).

{¶ 56} The precedent set in this case will allow essentially any decision of the State and any consequences that flow from that decision to be insulated from judicial redress by discretionary immunity. Public service involves the stewardship of public interests and treasure. When a decision made by a public servant causes harm, R.C. 2743.02 explicitly permits the State to be sued “in accordance with the same rules of law applicable to suits between private parties.” Here, when appellant, the Ohio Department of Transportation (“ODOT”), decided not to erect vandal-protective fencing on the Indiana Avenue bridge during a reconstruction project, it made a technical decision, not one subject to discretion. That decision was not made in the exercise of ODOT’s executive function akin to decisions made by lawmakers enacting laws or by judges issuing orders. Nor was that decision characterized by a high degree of official discretion. *See Reynolds*, 14 Ohio St.3d

68, at paragraph one of the syllabus.

{¶ 57} The policy decision that ODOT made in this case that required a high degree of official discretion was the decision to require the installation of vandal-protective fencing on certain bridges based on certain criteria. In *Semadeni v. Ohio Dept. of Transp.*, we concluded that ODOT’s decision to adopt a policy addressing the installation of protective fencing on existing bridges was not actionable but that the manner in which ODOT implemented the policy was. 1996-Ohio-199, ¶ 21-26. The same is true here. ODOT may not be sued for adopting its bridge-safety policy. But having adopted such a policy, ODOT does not have the discretion to disregard it or to implement it in a negligent or reckless manner. *See id.* at ¶ 24-26.

{¶ 58} For the foregoing reasons, I dissent from the court’s judgment and would affirm the Tenth District Court of Appeals’ decision.

Breen Law, L.L.C., and John E. Breen, for appellee.

D. Andrew Wilson, Attorney General, Mathura J. Sridharan, Solicitor General, Michael J. Hendershot, Chief Deputy Solicitor General, and William Becker and Lauren Emery, Assistant Attorneys General, for appellant.
