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IN THE
INDIANA SUPREME COURT

No. _____

KIERA ISGRIG, Appellant/Plaintiff, v. TRUSTEES OF INDIANA UNIVERSITY Appellee/Defendant.	)	On Petition to Transfer from the Indiana Court of Appeals Cause No. 23A-CT-01332 Appeal from the Monroe Circuit Court 1 Trial Court Cause No. 53C01-2004-CT-000723 The Honorable Geoffrey J. Bradley

BRIEF OF *AMICUS CURIAE*, DEFENSE TRIAL COUNSEL OF INDIANA, IN SUPPORT OF APPELLEE (DEFENDANT BELOW)

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I. STATEMENT OF INTEREST

Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers who defend clients in civil litigation. DTCI has an interest in the outcome of this appeal inasmuch as this Court's determination regarding the application of the doctrine *res ipsa loquitur* in premises liability cases, will have a substantial impact upon the defense of premises liability cases and defense counsel advising clients in such cases. Furthermore, the Court of Appeals' expansion of the doctrine of *res ipsa loquitur* from a rule of evidence limited to the issue of a breach of duty, to a rule of law creating a duty, will have far reaching effects in areas other than premises liability.

II. SUMMARY OF ARGUMENT

This Court should grant transfer because the Court of Appeals misinterpreted *Griffin v. Menard,*175 N.E.3d 811 (Ind. 2021). The Court in *Griffin* noted that prior Indiana case law, specifically *Rector v. Oliver*, 809 N.E.2d 887 (Ind. Ct. App. 2004), completely foreclosed the application of *res ipsa loquitur* to a premises liability case, and declined to address the issue, of whether *res ipsa loquitur* can apply to save a claim if there is no liability under the premises liability standard. In declining to establish a bright line rule that *res ipsa loquitur* could never apply in a premises liability case, this Court stated that if an injury results from a fixture or other component that customers did not or could not disturb, and the incident would not normally occur absent negligence, *res ipsa loquitur could* be appropriate. Nonetheless, the Court ruled that this issue was not before it.

From this hypothetical situation, the Court of Appeals reversed the trial court's entry of summary judgment in the present case and ruled that because the case involved a fixture, *res ipsa loquitur* applied. However, in doing so, the Court of Appeals applied *res ipsa loquitur* not only as a rule of evidence to raise an inference of a breach of duty, but also as a rule of law creating a duty in the absence of any evidence that a duty existed. Such application is not supported by Indiana law and, in fact, runs counter to Indiana law. This Court should therefore grant transfer, thereby vacating the opinion of the Court of Appeal, and affirm the decision of the trial court.

III. ARGUMENT

Defense Trial Counsel of Indiana's focus as amicus is limited to the issue of the trial court's expansion of *res ipsa loquitur* from a rule of evidence applicable in very few situations to raise an inference of a breach of duty to a rule of law whereby a duty is established without any evidence supporting the existence of a duty. This improper and significant expansion needs to be rectified by this Court by granting transfer before the state of Indiana law on *res ipsa loquitur* becomes uncertain, leading to unwarranted litigation where no legal duty exists.

Premises liability is a part of Indiana law on liability for negligence. Like all negligence cases, liability requires the existence of a duty, a breach of that duty, and damages resulting from that breach. *See, e.g. D.H. v. Converse v. Elkhart General Hospital*, 120 N.E.3d 621,624-25 (Ind. Ct. App. 2019) In a premises liability case involving an invitee, the duty arises only when the possessor of the premises knows, or should have known, (actual or constructive knowledge), of the condition of

the premises and realizes that the condition involves an unreasonable risk of harm to the invitee. *See Griffin v. Menard, Inc.,* 175 N.E.3d 811, 813 (Ind. 2021); *Burrell v. Meads,* 569 N.E.2d 637, 639-40 (Ind. 1991). A breach of the duty occurs when the defendant fails to exercise reasonable care to protect the invitee.

The existence of a duty is a question of law for the court to decide. *Pennington v. Memorial Hospital of South Bend*, 223 N.E.3d 1086, 2024 Ind. Lexis 5 at *16 (Ind. 2024), In order for liability to exist in a premises liability case involving an invitee, the possessor of the land: 1) must know or by the exercise of reasonable care would discover the condition of the premises and that it involves an unreasonable risk of harm to invitees; 2) should expect that the invitee will not discover or realize the danger, or will fail to protect themselves against it; and 3) fails to exercise reasonable care to protect them against the danger. *Pennington*, *supra*, at * 16. In terms of duty and breach, elements one and two create the duty. Element three establishes the breach. In this premises liability case, there must be evidence that IU knew or should have known that the window was in a condition which posed an unreasonable risk of harm to invitees. There is no duty absent such evidence. There can be no breach absent a duty. *Id.*

The doctrine of *res ipsa loquitor* is not a separate cause of action. *Rector v. Oliver,* 809 N.E.2d 887, 895 (Ind. Ct. App. 2004.) Instead, it is a rule of evidence. *Id.* It is a mechanism for proving a breach of duty, but only once the duty is established. *Stubbs v. Hook*, 467 N.E.2d 29, 32 (Ind. Ct. App. 1984).

The existence of a duty is a separate and threshold question. *Till v. Dolgencorp, LLC*, 801 Fed Appx. 428, 431 (7th Cir 2020) (applying Indiana law). Again, absent a duty, there can be no breach and therefore no liability. *Pennington*, *supra*, at *16.

Although not binding precedent, *Salata v. Coca-Cola*, 2016 U.S. Dist. LEXIS 54508 (N.D. Ill, 2016), illustrates this point. Plaintiff was injured when she fell on a loose or displaced floor tile in the women's locker room on premises owned by Defendant, Coca-Cola. Coca-Cola moved for summary judgment on the grounds that plaintiff failed to produce evidence that Coca-Cola had actual or constructive notice of the defective tile. *Id.* at *9. Plaintiff argued that the evidence was sufficient to infer negligence under *res ipsa loquitur*. *Id.* at *16. Plaintiff asserted that the condition at issue, a loose tile, does not happen in the absence of negligence. As to the second prong Plaintiff argued the locker room was under the exclusive control and management of the defendant. *Id.* at *17.

In rejecting the application of *res ipsa loquitur*, the court explained, as an initial matter, that "*res ipsa loquitur* does not apply, as a matter of law, unless a duty of care is owed to the plaintiff." (internal quotations and citation omitted.) *Id.* The court concluded that "[t]his lack of legal duty bars [Plaintiff's] recovery under a *res ipsa loquitur* theory. *Id.*

Similarly, in the present case, there is no evidence that IU knew or should have known, of the condition of the window. The trial court found "that there is insufficient evidence in the record that the Defendant had actual or constructive knowledge of any defect or dangerous condition of the window." (Appealed order at

10.) Appellant did not dispute this finding. This finding was also not addressed by the Court of Appeals which, instead, focused entirely on the issues of exclusive control and whether a window falling out of a wall, with no one interacting with it, is the sort of thing that can happen without negligence. *Isgrig v. Trustees of Indiana University*, 2023 Ind. App. LEXIS 360 at *15-17 (Ind. Ct. App. 2013). These issues, however, are relevant only to the issue of whether there was a breach of duty. They are not relevant to the existence of the duty itself. Without a duty, there can be no liability.

Application of the doctrine of *res ipsa loquitur* is a rule of evidence used to raise an inference of a breach of duty in appropriate cases. The Court of Appeals expanded the application of the doctrine to create a question of law to establish the duty itself. This unwarranted expansion is not supported by, and is contrary to, Indiana law. Failure to reverse the Court of Appeals could lead to unnecessary litigation in negligence cases, other than premises liability, wherein plaintiffs seek to use *res ipsa loquitur* to create duties where none exist instead of o rule of evidence to simply raise an inference of breach of an existing duty. This Court should therefore grant transfer and affirm the decision of the trial court.

IV. CONCLUSION

Amicus Curiae Defense Trial Counsel of Indiana respectfully requests that this Court grant Appellee's petition to transfer and affirm the judgment of trial court.

/s/Robert J. Palmer

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WORD COUNT CERTIFICATE

COMES NOW Robert J. Palmer, pursuant to Indiana Rules of Procedure, Appellate Rule 44(F), and verifies the following:

1. He is the attorney responsible for preparing the Brief of Amicus Curiae, Defense Trial Counsel of Indiana, in Support of Appellants.

2. The Brief of Amicus Curiae, Defense Trial Counsel of Indiana, in Support of Appellee's Petition to Transfer contains 1,408 words, as established by Microsoft Word 2016.

I affirm, under the penalties for perjury, that the foregoing representations are true.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of February 2024, the foregoing was filed with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court through the Court's I.E.F.S.

I also certify that on this 12th day of February 2024, the foregoing was served upon the following through the Court's I.E.F.S.

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