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IN THE INDIANA COURT OF APPEALS

CASE NO. 23A-CT-013332

KIERA ISGRIG, Appellant/Plaintiff below, v. INDIANA UNIVERSITY and TRUSTEES OF INDIANA UNIVERSITY, Appellee/Defendant below,	)	Appeal or Petition from the Monroe Circuit Court No. 1 Trial Ct. Cause No. 53C01-2004-CT-000723 The Honorable Geoffrey J. Bradley, Judge.

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

ISGRIG, not IU, is entitled to summary judgment on the issue of res ipsa loquitor. The Trial Court misinterpreted Indiana's law on res ipsa loquitor in granting summary judgment in favor of IU. ISGRIG has presented evidence to establish each of the elements of res ipsa loquitor. IU's failure to present any evidence and instead rely on pure speculation that the window in question may have been vandalized or tampered with by unknown persons at some unknown time in the past is not enough to defeat the application of *res ipsa loquitor* to this case. At the very least, the question of whether the inference of IU's negligence under the doctrine of *res ipsa loquitor* is one for the jury to decide after hearing all of the evidence. *Hammond. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind. App. 1982). Contrary to the Trial Court's decision, ISGRIG established all of the elements necessary to apply the doctrine of res ipsa loquitor to the facts of this case giving rise to the inference of negligence and IU failed to present any evidence to refute that inference of negligence.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT

A. THE DOCTRINE OF RES IPSA LOQUITOR

The facts of the present case are very similar to those in the seminal case of *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 Eng. Reprint 299 where the plaintiff was struck by a flour barrel which fell from a window above the street. The Indiana Supreme Court in *New York, C. & S. L. R. Co. v. Henderson*, 146 N.E.2d 531, 536 (Ind. 1957) noted that "Barrels do not ordinarily fall out of windows unless someone is negligent . . .." Like the injured party in *Byrne* v. *Boadle* who was struck by the falling barrel of flour, ISGRIG had no interaction with the window that fell from its casing and struck her from behind as she was studying for her finals.

In *New York, C. & S. L. R. Co. v. Henderson*, 146 N.E.2d 531, 536 (Ind. 1957), the Indiana Supreme Court wrote:

> Negligence, as any other fact or condition, may be proved by circumstantial evidence, and it has been urged that there is nothing distinctive about the doctrine of *res ipsa loquitur*, since it involves merely the permissible drawing of an inference of negligence from certain surrounding facts. This no doubt is true except that the law permits the inference of negligence to be drawn under certain sets of facts known as *res ipsa loquitur*. The basis or reasoning for this principle, in its origin at least, seemed to have been that the defendant had exclusive control over the injuring agency and the plaintiff normally had no access to any information about its control and operation. 3 Cooley on Torts (4th Ed.), Sec. 480, p. 369.
>
> Frequently it is said the doctrine is applicable and negligence may be inferred "where the thing (injuring instrumentality) is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care." *Scott* v. *London & St. Katherine Docks Co.* (1865), 3 H. & C. 596, p. 601; 159 Eng. Rep. 665, p. 667.
>
> The leading case which established the rule of *res ipsa loquitur* was *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 Eng. Reprint 299. In this case the evidence merely showed that the plaintiff was struck by a flour barrel which fell from a window above the street. Barrels do not ordinarily fall out of windows unless someone is negligent, decided the court, and the court held the plaintiff had made out a prima facie case. Since then the doctrine has been applied to train derailment cases, falling objects, surgical and dental operations and treatment resulting in unusual injuries, and failure of mechanical devices within the exclusive control of the defendant, among various other sets of facts. As complicated mechanical devices of our modern age achieve greater perfection and greater reliance upon them is justified, it follows that the doctrine has a broader application than originally.

It is well established that the weighing of the evidence regarding the doctrine of *res ipsa loquitor* is to be done by the trier of facts, not the trial court. The United States Supreme Court has acknowledged that:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense.

> **When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff."**

Sweeney v. Erving, 228 U.S. 233, 240, 33 S. Ct. 416, 57 L. Ed. 815, 819 (1913). [Emphasis added.]

Similarly, in *Hammond. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind. App. 1982), the Court wrote:

> Once a plaintiff has presented sufficient evidence to bring himself within the operation of the doctrine the burden of going forward with the evidence to explain the accident (not the burden of persuasion) is cast upon the defendant. *See Snow v. Cannelton Sewer Pipe Company,* (1965) 138 Ind.App. 119, 210 N.E.2d 118. However, ***even though the defendant comes forward with an explanation of the accident and evidence of his careful inspection, tests, and due care, the inference of negligence drawn from the facts does not disappear from the case, but remains, and is placed upon the scales to be weighed by the trier of facts with any and all explanations of the defendant, and all of the other evidence***. *Snow, supra.*

Hammond. Scot Lad Foods, Inc., 436 N.E.2d 362, 364 (Ind. App. 1982). [Emphasis added.]

As was discussed in Appellant's Brief, both IU and the Trial Court relied upon pure speculation to support the finding of summary judgment in IU's favor and to prevent the evidence from being heard by a jury – the finder of fact. Contrary to the Trial Court's ruling in favor of IU, the inference of negligence drawn from the facts does not disappear from the case, but remains, and is placed upon the scales to be weighed by the trier of facts with any and all explanations of the defendant, and all of the other evidence. See *Hammond. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind. App. 1982).

It is for the jury to decide if IU's explanation of the accident and claimed evidence of IU's careful inspection, tests, and due care overcome the inference of negligence created by the doctrine of *res ipsa loquitor*.

Indiana's appellate courts have repeatedly implored Indiana trial courts to exercise caution in granting summary judgment to ensure a party retains its right to a fair determination of genuine issues. *Art Country Squire, L.L.C. v. Inland Mortg. Corp.*, 745 N.E.2d 885, 891 (Ind. Ct. App. 2001); *see also Rogier*

v. American Testing and Engineering Corp., 734 N.E.2d 606, 613 (Ind. Ct. App. 2000 ("[S]ummary judgment is a lethal weapon and . . . courts must be ever mindful of its aims and targets and beware of overkill in its use").

Negligence cases are particularly fact-sensitive and are governed by a standard of the objective reasonable person—one best applied by a trier of fact after hearing all of the evidence. *Id.* (citing *Patterson v. Seavoy*, 822 N.E.2d 206, 209 (Ind. Ct. App. 2005).

Here, ISGRIG produced sufficient evidence to apply the doctrine of res ipsa loquitor to the facts of this case and it is for the trier of fact to weigh that evidence, not the trial court.

Additionally, Rule 301 of the Indiana Rules of Evidence also sheds light on this issue:

> Rule 301. Presumptions in Civil Cases Generally
>
> In a civil case, unless a constitution, statute, judicial decision, or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden or persuasion, which remains on the party who had it originally. **A presumption has continuing effect even though contrary evidence is received**. [Emphasis added.]

In the proceedings below, the Trial Court relied upon pure speculation to create an alternative set of facts upon which it granted summary judgment in favor of IU.

A simple reading of the Order Granting Summary Judgment reveals that, in order to reach its conclusion in this case, the Trial Court engaged in speculation. In particular the Trial Court wrote:

> This Court cannot discount the possibility that a previous occupant of Room 138 vandalized the southeastern window or accidentally damaged the window and either did not notice the defect or did not report it to maintenance staff.

(*Appellant's App., v. 3, p. 138.)*

There is no evidence in the record to support such speculations. Moreover, it is impossible for an injured plaintiff to refute any potential unsupported speculation that a defendant or a trial court may wish to engage in.

If this cased were to proceed to trial, there would be no evidence presented by IU showing that a previous occupant of Room 138 vandalized the southeastern window or accidentally damaged the window and either did not notice the defect or did not report it to maintenance staff. In fact, in light of the absence of any evidence to support such conclusory claims, no witness would be permitted to speculate before the jury as to these unsupported and wholly speculative assertions.

The Indiana Supreme Court has cautioned that "speculation has no part in a rational judicial process, as it leads this Court to weigh evidence." *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 265 Ind. 457, 464 (Ind. 1976).

Simply put, it is improper for a trial court to speculate on possible other causes of an injury causing event to the exclusion of the evidence presented before it. Just as the Trial Court below relied upon speculation as to vandalism or accidental damage to the window in question, the case law the Trial Court relied upon also is based upon speculation.

The Trial Court relied heavily on *Cergnul* in reaching its conclusion that the window in question was not under the exclusive control of IU. In fact, the appealed Order specifically notes that "This Court finds that the facts of CERGNUL control this case." (*Appellant's App., v. 3, p. 138.)*

A close reading of *Cergnul* reveals that that Court also engaged in speculation when it stated:

> For instance, a screw behind the wall **could have** fractured or another guest **could have** vandalized the railing just before Cergnul used it.

Cergnul v. Heritage Inn of Ind., Inc., 785 N.E.2d at 332. [Emphasis added.]

Again, it must be noted that the injured party in *Cergnul* was pulling on the railing at the time the fall occurred. Just like in *Griffin*, the injured party was actively engaged with and was manipulating the instrumentality that caused their injury. Such is not the case here.

Here, ISGRIG was an entirely innocent occupant of the classroom who was struck when a permanently affixed window spontaneously fell out of its frame and struck her from behind. It is axiomatic that fixtures should not spontaneously fall off of a building striking and injuring persons

who merely happen to be in the vicinity. This scenario is virtually identical to a person being struck by a barrel of flour falling from the second story of a building as described in *Byrne* v. *Boadle* (1863), 2 H. & C. 722, 159 Eng. Reprint 299.

In the Trial Court below, ISGRIG established that she was an invitee who was using the classroom in question to study for finals. The building was owned by IU and the windows in the classroom were under the exclusive management of IU and its employees. The window in question was a fixture permanently attached to the building. Neither ISGRIG nor any occupant in the classroom had any interactions with the window prior to it spontaneously falling out of its casing and striking ISGRIG from behind.

B. THE ELEMENT OF "EXCLUSIVE CONTROL" IS A BROAD CONCEPT

The Indiana Court of Appeals in *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999), trans. denied, discussed what constitutes "exclusive control" under the doctrine of res ipsa loquitor:

> The element of "exclusive control" is a broad concept which focuses upon who has **the right or power of control and the opportunity to exercise it, rather than actual physical control.** *Id.* Exclusive control is satisfied if the defendant had control at the time of the alleged negligence. *Vogler*, 624 N.E.2d at 61-62. Exclusive control may be shared control if multiple defendants each have a nondelegable duty to use due care. *Vogler,* 624 N.E.2d at 62. In proving the element of exclusive control, the plaintiff is not required to eliminate with certainty all other possible causes and inferences, but must show either that the injury can be traced to a specific instrumentality or cause for which the defendant was responsible, or that the defendant was responsible for all reasonably probable causes to which the accident could be attributed. *Id.* The reason for this is because proof in a res ipsa loquitur case seldom points to a single specific act or omission; typically, it points to several alternative explanations involving negligence without indicating which of them is more probable than the other. *Id.* Hence, a plaintiff may offer such evidence as may be available tending to show specifically the items of negligence and still rely upon the inference permitted under res ipsa loquitur. *Id.* [Emphasis added.]

This is also consistent with the finding in *New York, C. & S. L. R. Co. v. Henderson*, 146 N.E.2d 531, 536 (Ind. 1957) that the instrumentality causing the injury must be ". . . shown to be under the ***management*** of the defendant or his servants." [Emphasis added.] See also *Hammond. Scot Lad Foods,*

Inc., 436 N.E.2d 362, 364 (Ind. App. 1982) (res ipsa proper where "injuring instrumentality is shown to have been exclusively under the **management and control** of the defendant or his servants."); *New York, C. & S. L. R. Co. v. Henderson*, 146 N.E.2d 531, 536 (Ind. 1957) (instrumentality causing injury must be under "the management of the defendant or his servants."). [Emphasis added.]

Here, there is no question that the window in question was under the management and control of IU and its servants. The unrefuted testimony of Keith Thompson establishes that the window which fell out of its casing was under the management of IU and was maintained by IU's facilities management department. As noted above, "actual physical control" is not required; rather, it is the "right or power of control and the opportunity to exercise it" that is the focus.

The Trial Court erred when it found that the injury causing window was not in IU's exclusive control or management.

C. THE DOCTRINE OF RES IPSA LOQUITOR STILL APPLIES TO FIXTURES

The Indiana Supreme Court in Griffin acknowledged that the doctrine of *res ipsa loquitor* still applies to fixtures such as the window that fell and injured ISGRIG. Although the Court in *Griffin* ruled that the doctrine of res ipse loquitor did not apply under those circumstances, the Indiana Supreme Court was careful to caution that:

> . . . we decline to hold that *res ipsa* can never apply to a premises liability case. If an injury results from a **fixture** or other component that customers did not or could not disturb—such as a chandelier suspended from the ceiling, or a set of shelves bolted to the wall—and the incident would not normally occur absent negligence, *res ipsa* could be appropriate. *See Rust v. Watson, 141 Ind. App. 59, 64-65, 215 N.E.2d 42, 44-45 (1966).*

Griffin v. Menard, Inc., 175 N.E.3d 815. [Emphasis added.]

Here, IU does not dispute that the window in question was a fixture.

Fixtures, by their very nature, are intended to be used by occupants of the building to which they are attached. These include lighting fixtures and plumbing fixtures as well as heating & cooling

fixtures. All of these are intended to be routinely used by occupants of the building. There is nothing about their customary and normal use that would cause these fixtures to fall off the building.

Both of the examples given by the Indiana Supreme Court in *Griffin* are items that were permanently attached to the building and are the type of items that should not simply fall off of the building absent negligence. Such is the case with the window in question here, it was permanently attached to the building and should not have spontaneously fallen off the building striking a completely innocent by-stander such as ISGRIG. IU has admitted that windows falling out of their casing is not a common occurrence. (*Appellant's App., v. 3, pp. 22.)*

The underlying facts in *Griffin* and *Cergnul* are fundamentally and critically different than the factual situation before the Court in this case. ISGRIG had no interaction whatsoever with the window in question and there is no evidence before the Court that anyone interacted with the window in question on the day of the incident. Additionally, despite the Trial Court's speculation, there is no evidence that anyone ever tampered with the window at some point prior to it spontaneously falling out of its casing. Both IU and the Trial Court speculated that other users of the building could have tampered or altered the window but that speculation is not based upon any evidence in the record before this Court.

The facts present here represent a textbook case of *res ipsa loquitor* and the facts leading up to the INCIDENT are not in dispute. Additionally, IU has admitted that it is not in possession of any evidence or facts to refute the inference of negligence that arises from the occurrence of the INCIDENT.

The practical affect that the Trial Court's decision has must also be acknowledged. According to its ruling, a completely innocent person who is injured by a permanently attached fixture spontaneously falling off of a building will receive no compensation while the party that owns the building and fixtures and who was responsible for the management and maintenance of the building

and its fixtures avoids any liability for the damages caused by permanently attached fixtures falling from its building.

Such a result is inherently unfair and bad public policy for the State of Indiana. The citizens of Indiana will no longer be able to obtain compensation when they are injured through no fault of their own by fixtures falling off of buildings. The State of Indiana and its taxpayers will be forced to provide resources to injured parties while the entity whose building caused the injury avoids any responsibility. According to the result reached by the Trial Court, completely innocent parties – such as ISGRIG – injured by fixtures falling off of buildings would be forced to bear the consequences and financial burden caused by those injuries while the building's owner – such as IU – would be shielded from responsibility for injuries and damages caused by a condition of the building which is under their management and control.

Here, the practical effect of the Trial Court's ruling is that the doctrine of res ipsa does not apply to fixtures despite the Indiana Supreme Court's specific language to the contrary in *Griffin*.

Contrary to the Trial Court's ruling, ISGRIG satisfied each of the elements required for the application of res ipsa loquitor and the creation of the inference of negligence on the part of IU. This is important because once the inference of negligence arises, the burden of persuasion shifts to IU.

> Once a plaintiff has presented sufficient evidence to bring himself within the operation of the doctrine the burden of going forward with the evidence to explain the accident (not the burden of persuasion) is cast upon the defendant. *See Snow v. Cannelton Sewer Pipe Company,* (1965) 138 Ind.App. 119, 210 N.E.2d 118. However, even though the defendant comes forward with an explanation of the accident and evidence of his careful inspection, tests, and due care, the inference of negligence drawn from the facts does not disappear from the case, but remains, and is placed upon the scales to be weighed by the trier of facts with any and all explanations of the defendant, and all of the other evidence. *Snow, supra.*

Hammond. Scot Lad Foods, Inc., 436 N.E.2d 362, 364 (Ind. App. 1982).

IU has admitted that it has no evidence to refute ISGRIG's description of how the INCIDENT occurred and it has no explanation as to why the window spontaneously fell from its casing and struck ISGRIG from behind. Additionally, IU has admitted that it did not proactively inspect the windows in its buildings and that its procedures for inspecting and maintaining the windows in its buildings are purely reactionary only. (*Appellant's App., v. 3, p. 59-60.*) IU has acknowledged that it does not possess any evidence to negate the inference of negligence created by the application of the doctrine of *res ipsa loquitor.*

Based upon the evidence in the record before this Court, ISGRIG is entitled to have summary judgment entered in her favor and against IU.

CONCLUSION

As specifically acknowledged by the Indiana Supreme in *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021) the doctrine of res ipsa loquitor still applies to fixtures such as the window that spontaneously fell and struck ISGRIG. In light of the facts, case law and authorities cited above, the Trial Court erred in granting summary judgment in favor of IU and against ISGRIG. Rather, the well settled law of Indiana – when applied to the undisputed facts in the record before the Court – supports the entry of summary judgment in favor of ISGRIG and against IU. At the very least, all of the evidence concerning the event that caused ISGRIG's injuries should be ". . . ***placed upon the scales to be weighed by the trier of facts with any and all explanations of the defendant, and all of the other evidence***. See *Hammond. Scot Lad Foods, Inc.*, 436 N.E.2d 362, 364 (Ind. App. 1982). [Emphasis added.]

ISGRIG respectfully requests this Court to reverse the entry of summary judgment entered in favor of IU and, instead, direct the Trial Court to enter summary judgment in favor of ISGRIG. In the alternative, ISRIG respectfully requests this Court to reverse the entry of summary judgment

entered in favor of IU and to remand this case to be determined by a jury after it has had the opportunity to hear all of the relevant evidence.

Respectfully submitted,

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VERIFIED STATEMENT OF WORD COUNT OF BRIEF

Pursuant to Indiana Appellate Rules 44 (E) & (F), I verify that the Brief contains no more than 7,000 words as counted by Microsoft Word, the word processing system used to prepare the Brief.

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VERIFIED PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Reply Brief was electronically filed with the Clerk of the Indiana Court of Appeals on this 15th day of September, 2023, using the Indiana E-Filing System (IEFS) and that the foregoing was served upon the following person(s) electronically by using the Court's IEFS System.

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