IN THE INDIANA COURT OF APPEALS

Cause No. 23A-CT-01332

KIERA ISGRIG Appellant (Plaintiff below), v. INDIANA UNIVERSITY and TRUSTEES OF INDIANA UNIVERSITY Appellees (Defendants below).	)	Motion for Summary Judgment Appeal from the Monroe Circuit Court 1 Monroe County Circuit Court Cause No. 53C01-2004-CT-000723 The Honorable Geoffrey J. Bradley

APPELLEES' BRIEF

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I. STATEMENT OF ISSUE

Whether the trial court correctly entered summary judgment in favor of The Trustees of Indiana University where Kiera Isgrig failed to make a prima facie case of negligence.

II. STATEMENT OF CASE

Pursuant to Ind. Appellate Rule 46(B)(1), Appellee The Trustees of Indiana University agree with Appellant Kiera Isgrig's Statement of Case, except to add the following procedural facts.

Kiera Isgrig's Complaint For Damages named both Indiana University and Trustees of Indiana University. *Appellant's App. v. 2, p. 26.* However, pursuant to Ind. Code § 21-27-4-2 (2007), Indiana University is not a properly named defendant; only The Trustees of Indiana University may sue or be sued. Defendant's Answer and Affirmative Defenses, as well as subsequent trial court filings, have noted the improper addition of Indiana University. *Appellant's App. v. 2, pp. 30, 37.* The Monroe Circuit Court No. 1's Order on Motions for Summary Judgment similarly noted the improper addition of Indiana University and Ordered that Indiana University is an improperly named party and dismissed pursuant to I.C. § 21-27-4-2. *Appellant's App. v. 2, pp. 124*. Kiera Isgrig does not appeal the dismissal of Indiana University pursuant to I.C. § 21-27-4-2. Thus, Indiana University is not a proper party to this appeal.

III. STATEMENT OF FACTS

On Saturday, April 28, 2018, Kiera Isgrig ("Isgrig") and a few of her classmates were studying for final exams in room 138 of the Francis Morgan Swain Building when the southeast window inside the classroom fell from its casing and struck Isgrig. *Appellant's App. v. 2, p. 27, ¶¶ 7-9; p. 56, 43:24-44:3*. According to Isgrig, prior to the incident, the condition of the window caused her no concerns that it might fall, and nobody in the room was near the window or

touched the window immediately prior to the incident. *Appellant's App. v. 2, p. 57, 46:9-15; p. 60, No. 3; pp. 61-62, No. 20*. The window fell suddenly and with "no warning." *Appellant's App. v. 2, p. 57, 46:18-47; see also p. 60, No. 3; p. 62, No. 22.* Isgrig has no clue as to what caused the window to fall from its casing. *Appellant's App. v. 2, pp. 57-58, 49:23-50:3; p. 62, No. 22.* Indeed, she claims, "[t]he window fell out of the casing for no reason." *Appellant's App. v. 2, p. 62, No. 22.*

After the incident, Kevin Ashley, at the time Indiana University Bloomington Physical Plant Carpenter, responded to the Francis Morgan Swain Building to secure the window, i.e., board up the window opening, clean-up the mess, and take the subject window back to the shop for repair. *Appellant's App. v. 2, p. 64 ¶¶ 2, 5.* Mr. Ashley has worked as a carpenter on the Indiana University Bloomington Campus for over 25 years with approximately 15 of those years focused on window work. *Id. at ¶¶ 3-4.* In repairing and reinstalling the window, Mr. Ashley found only the glass broken and at least two of the window's four sash springs to be broken. *Id. at ¶ 6.* Nothing else on the window or its casing were damaged. *Id.* Significantly, Mr. Ashley found no defect with the window or its casing which could have allowed the window to fall out of its casing. *Appellant's App. v. 2, p. 64, ¶ 6; p. 66, ¶ 14.* Rather, he concluded that the only way the window could have fallen free of its casing was with human involvement. *Appellant's App. v. 2, p. 66, ¶ 14.*

On a spring sash window, such as the window at issue in this lawsuit, the sash springs are located within a vertical track built into both sides of the window casing. *Appellant's App. v. 2, p. 65, ¶ 10.* The window itself is then attached to the sash springs and secured inside a track. *Id.* The sash springs allow the window to stay in place when raised and lowered, and the track secures the window in its casing. *Id*. Unless something is broken, the sash springs can only be

observed when the window is removed from the window casing. *Id*. Below are photographs of the repaired and reinstalled window taken on February 9, 2022.

That sash springs for the window at issue were found broken does not help to explain how the window fell from its casing. Sash springs are a window component that experience wear and tear and occasionally break and need to be replaced; this is nothing unusual or unexpected. *Appellant's App. v. 2, p. 65, ¶ 11.* In addition to wear and tear, sash springs sometimes break as a result of removing a window from its casing for other repairs. *Id.* When a sash spring is broken, a window may be difficult to open and close and may not stay put precisely to where it is raised or lowered. *Id.* In the instant case, there is no way to know whether the sash springs were broken before the window fell or broke as a result of the window falling from its casing. *Id. at ¶ 12.*

More importantly, regardless of when the sash springs broke and how many were broken, broken sash springs alone do not cause a window to fall out of its casing without warning. *Appellant's App. v. 2, pp. 65-66, ¶ 13.* This is because a window with one or more broken sash springs is still held in place by its track in the casing; broken sashes do not affect the track. *Id.* With or without broken sashes, the window must be maneuvered in a precise manner within the frame in order to remove the window from its track. *Id.* Thus, although The Trustees of Indiana University ("IU") does not know precisely what caused the window to fall from its casing, the unrefuted evidence rules out any defect with the window or its casing as a cause and points conclusively to some form of human interaction. This was not a maintenance issue.

When such human interaction occurred or what occurred is unknown. As demonstrated by Isgrig's ability to access the room to use for studying on a Saturday, the Francis Morgan Swain Building is open and accessible to anyone venturing onto campus, even when classes are not occurring. *Appellant's App. v. 2, p. 56, 43:24-44:12*. The windows in room 138 are not screwed shut, so at any point in time, any student or other occupant of the room could open/close the window as desired. *Appellant's App. v. 2, p. 65, ¶ 9.*

IU can, however, rule out that its maintenance staff's interaction with the window allowed it to fall out of its casing. Prior to the date of this accident on April 28, 2018, the subject window was last serviced by IU in March, 2017. *Appellant's App. v. 2, p. 77.* This repair was due to an issue with the blinds not adjusting properly. *Id.* The subject window has two blinds – one fully encased between the two panes of glass of the window and one pull shade blind. *Appellant's App. v. 3, p. 43, 41:16-20.* Regardless of which was repaired, the repair had nothing to do with the integrity of the window or issues within the window's casing. The pull shade blinds above the window have no effect on the window or its casing. The blinds encased between

the two panes of glass of the window have no external component other than a magnet used to adjust the blinds. *Appellant's App. v. 2, p. 64-65, ¶ 8.* Servicing the built in blinds necessitates that the window be fully removed from its casing. *Appellant's App. v. 2, p. 66, ¶ 16.* Any sash springs not in good condition at the time of removal would have been replaced. *Id.* Again, regardless of which blinds were serviced, the ticket for the service request pertaining to the window was completed. *Appellant's App. v. 2, p. 83.*

After the March, 2017, blinds repair, IU received no notice of any issues or concerns with the window in room 138. *Appellant's App. v. 2, 82-83; Appellant's App. v. 3, p.* 26:19-25. Had notice been received, a record would have been generated through the maintenance management system. *Appellant's App. v. 2, p. 66, ¶ 15; Appellant's App. v. 3, p.* 26-27, 24:19-25:15. In the absence of a maintenance ticket, IU's maintenance staff would not have performed any work on the window. *Id.* Thus, the last time IU's maintenance staff interacted with the window was over a year before the April 28, 2018 incident involving Kiera Isgrig.

IU owns the Francis Morgan Swain Building. The window at issue was installed in approximately 1992 as part of renovations of the Francis Morgan Swain Building. *Appellant's App. v. 2, p. 69, No 2.* During that renovation, all windows in the building were replaced with metal frame windows containing adjustable blinds encased between two panes of glass. *Appellant's App. v. 2, p. 65, ¶ 8.* The bottom window panel can be lifted to open the window vertically, and the blinds can be adjusted with an external magnet. *Id.* Most windows on campus that were installed during this timeframe were of the same type, although the manufacturer may vary. *Id.* IU has no record of any prior incidents on campus involving this type of window falling from its casing. *Appellant's App. v. 2, pp.* 70-71, No. 9. IU is also unaware of any manufacturers'

notice, warning, or recall relating to the function or malfunction of any window of a similar type on its campus. *Appellant's App. v. 2, p. 71, No 9.*

IV. SUMMARY OF ARGUMENT

IU moved for summary judgment on the grounds that Isgrig failed to make a prima facie case of negligence. Specifically, she had not and could not produce evidence that IU knew or should have known of any dangerous or defective condition of the window. In response, Isgrig did not argue that IU knew or should have had knowledge of any dangerous or defective condition of the window. Instead, she argued that the doctrine of res ipsa loquitor applies to her claim, saves her case from summary judgment, and entitles her to summary judgment in her favor. The trial court disagreed and properly entered judgment in favor of IU, finding that IU did not have actual or constructive knowledge of any defect or dangerous condition of the window, that res ipsa loquitor does not apply to Isgrig's claim, and that, even if res ipsa loquitor did apply, it would not save her claim from summary judgment. IU asks this Court to affirm the ruling of the trial court.

V. ARGUMENT

A. Standard of Review

The purpose of summary judgment is to terminate litigation about which there can be no factual dispute and which can be determined as a matter of law. *Lamb v. Mid Ind. Serv. Co.,* 19 N.E.3d 792, 793 (Ind. Ct. App. 2014). Although the designated evidence must be viewed in the light most favorable to the non-movant, summary judgment must be granted when the designated evidence shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See* Ind. Trial Rule 56(C); *Hughley v. State,* 15 N.E.3d 1000, 1003 (Ind. 2014). "A fact is material if its resolution would affect the outcome of the case, and an issue

is genuine if a trier of fact is required to resolve the parties' differing accounts of the truth, or if the undisputed material facts support conflicting reasonable inferences." *Hughley*, 15 N.E.3d at 1003 (quoting *Williams v. Tharp*, 914 N.E.2d 756 (Ind. 2009)). However, "mere speculation is insufficient to create a genuine issue of material fact to defeat summary judgment." *Mann v. Arnos*, 186 N.E.3d 105, 115 (Ind. Ct. App. 2022).

Once the moving party has shown the court that no genuine issue of material fact exists, the burden shifts to the non-movant to come forward with contrary evidence showing an issue for the trier of fact. *Hughley*, 15 N.E.3d at 1003. The non-moving party may not rest upon its pleadings alone to establish a genuine issue of material fact. T.R. 56(E); *Hughley*, 15 N.E.3d at 1004.

Indiana appellate courts review the entry or denial of summary judgment in the same manner as trial courts. T.R. 56(C); *Hughley*, 15 N.E.3d at 1003. However, the "trial court's judgment arrives on appeal 'clothes with a presumption of validity,' and the challenging party 'bears the burden of proving that the trial court erred in determining that there are no genuine issues of material fact and that the moving party was entitled to judgment as a matter of law." *Williams v. Tharp*, 914 N.E.2d 756, 762 (Ind. 2009) (quoting *Rosi v. Bus. Furniture Corp.*, 615 N.E.2d 431, 434 (Ind. 1993)).

B. The trial court properly entered summary judgment because Isgrig cannot make a prima facie case of negligence.

A plaintiff seeking damages for negligence must establish: (1) a duty owed to the plaintiff by the defendant; (2) a breach of the duty; and (3) an injury proximately caused by the breach of duty. *Pfenning v. Lineman*, 947 N.E.2d 392, 403 (Ind. 2011). Negligence cannot be inferred simply from the fact that an accident occurred. *Wright Corp. v. Quack*, 526 N.E.2d 216, 217 (Ind. Ct. App. 1988).

The duty owed by a defendant to a plaintiff differs based on the nature of the negligence claim at issue. In the case of a premise liability claim, such as here, a landowner's liability to persons on the premises depends on the person's status as a trespasser, licensee, or invitee. *Burrell v. Meads*, 569 N.E.2d 637, 639 (Ind. 1991).

The parties do not dispute that Isgrig was an invitee on the Indiana University campus at the time of the incident. As an invitee on its property, IU owed a duty to Isgrig to exercise reasonable care for her protection while she was on its premises. *Burrell*, 569 N.E.2d at 639. A defendant is liable for injury to an invitee caused by the property's condition only if the defendant: (1) knew or should have discovered the unreasonably dangerous condition of the property; (2) should have expected the invitee would not discover or realize the danger of the condition; and (3) failed to use reasonable care to protect the invitee against the danger. *Burrell*, 569 N.E.2d at 639-40.

While a landowner owes an invitee a duty to exercise reasonable care to protect the invitee from foreseeable dangers on the premises, there is no duty to insure the invitee's safety while on the premises. *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Such an interpretation would imply that all premise liability incidents must suffer strict liability standards. Rather, "before liability may be imposed on the invitor, it must have actual or constructive knowledge of the danger." *Id.* Actual knowledge means the premises owner in fact was aware of the allegedly dangerous or defective condition of the property. *See Id.* Constructive knowledge exists where a "condition [which] has existed for such a length of time and under such circumstances that it would have been discovered in time to have prevented injury if the storekeeper, his agents or employees had used ordinary care." *Id.* (citing *Wal-Mart Stores, Inc. v.*

Blaylock, 591 N.E.2d 624, 628 (Ind. Ct. App. 1992), *trans. denied* (citing *F.W. Woolworth Co. v. Jones*, 126 Ind. App. 118, 130 N.E.2d 672, 673 (Ind. Ct. App. 1955))).

IU has offered evidence that it did not have actual or constructive knowledge of any dangerous or defective condition of the window. Specifically, IU has a process for the reporting and addressing of maintenance concern such that when a maintenance issue is reported, a ticket is generated in the maintenance management system. *Appellant's App. v. 2, p. 66, ¶ 15.* Records indicate that no report was made regarding the window in room 138 between a prior request to repair the window's blinds in March, 2017, and the time of this incident in April, 2018. *Appellant's App. v. 2, 82-83; Appellant's App. v. 3, p.* 26:19-25. The absence of any record in the maintenance management system confirms IU had no actual knowledge of any dangerous or defective condition of the window prior to April 28, 2018.

IU also lacked constructive knowledge of any defect with the window. Once the repair was made to the blinds in March, 2017, IU had no reason to know of or suspect any concerns with the window. While Isgrig is critical that IU only conducts reactive maintenance on windows, this criticism is insufficient to establish constructive knowledge. *See Griffin v. Menard, Inc.*, 175 N.E.3d 811, 814 (Ind. 2021). Furthermore, even Isgrig saw nothing with respect to the window that caused her to suspect any issue with the window that might cause it to fall. *Appellant's App. v. 2, p. 57, 46:9-15; p. 60, No. 3; p. 62, No. 22.*

Isgrig neither offers contrary evidence nor argues that IU had actual or constructive knowledge of any dangerous or defective condition of the window. Thus, she cannot satisfy her burden to make a prima facie case of negligence against IU, and the trial court correctly entered summary judgment in IU's favor.

C. The evidentiary doctrine of res ipsa loquitor does not save Isgrig's premises liability claim from dismissal because she cannot satisfy her burden with respect to the premises liability standard.

Unable to satisfy the premises liability standard, Isgrig, incorrectly, argues she is entitled to a permissive inference of negligence via the doctrine of res ipsa loquitor and that this permissive inference of negligence saves her claim from summary judgment. However, even if res ipsa loquitor applied to her claim, which it does not, it cannot save her claim from summary judgment because she cannot satisfy her burden with respect to the underlying premises liability standard.

The doctrine of res ipsa loquitor or "the thing that speaks for itself" permits an inference that in some situations an occurrence is so unusual that, absent a reasonable justification or explanation, those persons in control of the situation should be held responsible. *Shull v. B.F. Goodrich Co.*, 477 N.E. 2d 924, 926 (Ind. Ct. App. 1985), *trans denied*. Res ipsa loquitor is not a separate cause of action. *Rector v. Oliver*, 809 N.E.2d 887, 885 (Ind. Ct. App. 2004). It is a rule of evidence which allows a permissive inference of negligence under certain circumstances. *Rector*, 809 N.E.2d at 889. It does not shift the burden of proof, and the fact finder may weigh the permissive inference with all other evidence presented as he or she sees fit. *See K-Mart Corp. v. Gibson*, 563 N.E.2d 667, 669-70 (Ind. Ct. App. 1990).

In 2004, in a case involving a store light fixture which fell on a customer, the Court of Appeals questioned the interplay between the premises liability standard and res ipsa loquitor:

> To say that a premises owner may be liable under the doctrine of res ipsa loquitor when they could not be liable under the premises liability standard would seem to fly in the face of the standard adopted in *Burrell*.

Rector, 809 N.E.2d at 895. Then in 2021, referring back to the opinion in *Rector*, the Indiana Supreme Court confirmed that the underlying premises liability standard must be satisfied regardless of the application of res ipsa loquitor, stating:

> While we do not believe that *Rector* completely forecloses the application of *res ipsa* to a premises liability action, it also makes clear that **if there is no liability under a premises liability standard, res ipsa cannot apply.**

Griffin, 175 N.E.3d at 815 (emphasis added). Thus, where a plaintiff cannot make a prima facie case for negligence under the premises liability standard, application of res ipsa loquitor can never save the case from dismissal. If, on the other hand, a plaintiff can make a prima facie case for negligence under the premises liability standard, res ipsa loquitor, if applicable, could grant the plaintiff a permissive inference of negligence. Isgrig falls into the former category. That is, because the unrefuted evidence shows that she did not make a prima facie case of negligence under the premises liability standard adopted in *Burrell*, application of res ipsa loquitor cannot save her claim, and the trial court correctly entered summary judgment in favor of IU.

D. Res ipsa loquitor does not apply to the facts of Isgrig's claim.

The doctrine of *res ipsa loquitur* applies where a plaintiff makes a showing: (1) that only the defendant controlled the instrumentality of plaintiff's injury; and, (2) that under normal circumstances the event would not have occurred unless the defendant was negligent. *Griffin*, 175 N.E.3d at 815. Res ipsa loquitor does not apply to this case because IU did not have exclusive control of the window and, independently, because IU has offered unrefuted evidence excluding its negligence as a possible cause of the window falling from its casing.

"Exclusive control is an expansive concept which focuses upon who has the right or power of control and the opportunity to exercise it." *Rector*, 809 N.E.2d at 890 (citing *Shull v. B.F. Goodrich Co.*, 477 N.E.2d 924, 933 (Ind. Ct. App. 1985), *trans. denied*). Where, as here, customers or others have access to the injuring instrumentality, exclusive control is unlikely to exist. *See Griffin*, 175 N.E.2d at 816 ("Indeed, the showing of exclusive control is difficult when the injuring instrumentality is accessible to customers.").

Griffin involved a Menard customer who was injured when he attempted to remove a box containing a sink from a display shelf and the bottom of the box opened and the sink fell on him. *Griffin*, 175 N.E.2d at 812. Griffin was unable to show that Menard had actual or constructive knowledge of the defective condition of the box. *Id.* at 813-14. Unable to satisfy the underlying premises liability standard, Griffin sought application of res ipsa loquitor. *Id.* at 812. The Indiana Supreme Court found res ipsa loquitor inapplicable, first noting that Menard could not have exclusive management and control because customers had access to the sink box. *Id.* at 815. The Court reasoned that it was speculation to assume that the only way the sink could have fallen out of the box was because Menard was negligent when the box could have been handled/tampered with by another customer. *Id.* at 816.

The Indiana Supreme Court in *Griffin* found analogy with *Cergnul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*, a case in which a hotel patron fell when a handrail detached from a wall. In *Cergnul*, the hotel had a stair rail removed and reinstalled to allow for the placement of wallpaper several months prior to the incident giving rise to the lawsuit. *Id.* at 329-30. The court noted that although the hotel could be described as in exclusive possession of the railing, the fact that another guest could have vandalized the railing before Cergnul used it and thus the railing could have come loose and fallen through no negligence on the part of the hotel made application of res ipsa loquitor inappropriate. *Id.* at 332.

This case is analogous with both *Griffin* and *Cergnul*. The window, while it does belong to IU, was not in IU's exclusive management and control. Room 138 of the Francis Morgan Swain Building is open and accessible to those on the IU campus, *see Appellant's App. v. 2, p. 56, 43:24-44:12*, and those who enter the room have the ability to open/close the windows as desired, *Appellant's App. v. 2, p. 65, ¶ 9.* That students or others had access to the room and access to

open/close the window precludes IU from having exclusive management and control in the same way that a stairwell hand railing being accessible to hotel patrons in *Cergnul* and a product in a box on a shelf open to the public in *Griffin* precluded application of res ipsa loquitor in those cases. Here, as in *Griffin* and *Cergnul*, it is speculation to assume that the injuring instrumentality was put in a dangerous or defective condition because of IU's negligence when others had access to tamper with these instrumentalities.

Isgrig's assertion that neither she nor her friends interacted with the window on April 28, 2018, is irrelevant. The undisputed facts establish that IU's maintenance staff did not interact with the window for more than a year prior to the incident. *Appellant's App. v. 2, 82-83; Appellant's App. v. 3, p.* 26:19-25. Yet during the same time period numerous actors for whom IU had no legal responsibility had the opportunity to exercise control over the window. Such opportunities preclude IU from having had exclusive control either at the time the human interaction occurred which put the window in the condition which allowed it to fall from its casing or at the time it fell; such opportunities, thus, preclude application of res ipsa loquitor to this case.

In addition to establishing IU had exclusive management and control of the window, Isgrig must, but cannot, make a showing that "the incident more probably resulted from the defendant's negligence as opposed to another cause." *See Johnson v. Blue Chip Casino, LLC*, 110 N.E.3d 375, 378 (Ind. App. 2018). Here, the undisputed material facts establish the absence of any physical defect with the window which could have caused it to fall out of its casing. *Appellant's App. v. 2, p. 65, ¶ 14.* The undisputed material facts also show that IU had no knowledge of any concern with the window prior to it falling out of its casing. See discussion *supra* Sec.V.B. This evidence refutes the proposition that the window fell from its casing more probably as a result of IU's negligence. Rather, this supports IU's only plausible explanation that, without IU's knowledge, an

unknown actor engaged with the window at some point in time, creating the condition that resulted in the window falling from its casing.

While the existence of an alternative explanation for an accident does not necessarily negate the application of res ipsa loquitor, in this case, the unrefuted evidence leaves open only the possibility that some explanation other than IU's negligence caused the window to fall from its casing and, therefore, res ipsa loquitor cannot apply. See *Prest-o-Light Co. v. Skeel*, 182 Ind. 593, 196 N.E. 365, 368 (Ind. 1914) (explaining that where an injury may result from any number of causes, the plaintiff must exclude those for which the defendant has no legal obligation); *Ogden v. Decatur County Hosp.*, 509 N.E.2d 901, 903-04 (Ind. Ct. App. 1987) (plaintiff required to come forth with evidence to put defendant's negligence back at issue where testimony of witnesses refuted plaintiff's claim that the defendant's alleged negligent moping of a hospital bathroom caused slip and fall accident); *cf. Aldana v. School City of East Chicago*, 769 N.E.2d 1201, 1207-08 (Ind. Ct. App. 2022) (res ipsa loquitor applicable in a case involving claim against a school corporation for injuries to school bus passengers where evidence negated the school district's offered alternative explanations to the bus driver's negligence.).

In order to avoid its application, Isgrig attempts to distinguish the facts of this cases from *Griffin*, on the grounds that a window is a fixture and that the window fell from its casing without anyone interacting with it. Both of these issues are red herrings.[1]

[1] As are policy arguments that the practical implication of the trial court's ruling is that a plaintiff injured by a fixture spontaneously falling off a building will have no recourse. To the contrary, examples exist where res ipsa loquitor was applied in cases involving fixtures spontaneously falling from buildings. *E.g., Rector v. Oliver*, 809 N.E.2d 887 (Ind. Ct. App. 2004) (ceiling light fixture). And, regardless of whether res ipsa loquitor is applicable in any given case, a plaintiff may still prevail on such a claim by satisfying the underlying premises liability standard. That res ipsa loquitor does not apply only means that a plaintiff does not get the benefit of a permissive inference of the defendant's negligence because such inference would be unfair to the defendant under the specific facts of the case.

IU does not dispute Isgrig's characterization of the window as a fixture. However, whether the window is a fixture and how long it had been installed are inconsequential facts. In *Griffin*, the Court stated that there may be premises liability cases where res ipsa loquitur applies, for example, "[i]f 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." *Griffin*, 175 N.E.3d at 816. This passage does not stand for the proposition that where a fixture results in an injury, res ipsa loquitor applies. Rather, it clarifies that res ipsa loquitor can be appropriate in premises liability cases where there is exclusive management and control of the injuring instrumentality regardless of whether that instrumentality is a fixture or something else.

In declining to apply res ipsa loquitur in *Griffin*, the Indiana Supreme Court's opinion did not hinge on whether the source of Griffin's injury was a fixture. 175 N.E.3d at 815-16. Indeed the *Griffin* opinion cited favorably to *Cergnul*, in which the Indiana Court of Appeals held that res ipsa loquitur did not apply in the case of a hotel stair handrail that became detached from a wall and injured Cergnul, a hotel patron. 785 N.E.2d at 330-332. There was no dispute the stair handrail was a fixture; nonetheless, the Court of Appeals held that res ipsa loquitur did not apply. Thus, the fact that the window is a fixture is in no way dispositive to whether res ipsa loquitur applies in this case. Rather, the courts in *Griffin* and *Cergnul* were more concerned with the opportunity for someone other than the defendants to interfere with the instrumentality causing injury – here, as in both of these cases where res ipsa loquitur was found not to apply, that opportunity existed.

Finally, IU must clarify Isgrig's assertions regarding the cause of the accident and whether any person interacted with the window prior to the accident. Isgrig offers evidence that neither she nor any of the students studying in room 138 with her on April 28, 2018, interacted with the window or had any reason to suspect the window may fall from its casing. For purposes of

summary judgment, IU has not disputed this. That Isgrig was not the one to interact with the window and cause it to fall out of its casing is inconsequential. The res ipsa loquitor criteria focuses on negligent conduct (i.e., who had exclusive control and opportunity for negligent conduct); it is not concerned with the conduct of a plaintiff. Significantly, neither the *Griffin* nor the *Cergnul* opinions expressed that plaintiffs' interactions with the injuring instrumentalities were in any way dispositive on the application of res ipsa loquitor.

Furthermore, evidence that neither Isgrig nor her friends interacted with the window does not preclude the possibility that someone interacted with the window at some point in time between March, 2017, and April, 2018. Indeed, while Isgrig is correct that IU is unable to confirm how this window fell out of its casing, IU has offered evidence that human involvement of some kind was involved. Specifically, Kevin Ashley, with 25 year of carpenter experience and 15 of those year focused on window work, inspected and repaired the window after the accident and in the process found no defects which could explain how the window fell out of its casing without human involvement at some point in time. *Appellant's App. v. 2, pp. 64-65, ¶¶ 3-4, 14.* Isgrig has offered nothing to rebut this. So, while Isgrig is correct that IU does not know specifically what happened to cause the window to fall out of its casing, IU does know that no defect or maintenance issue caused it to fall out and that the only plausible explanation to be deduced involves human involvement at some point in time. This is squarely on point with the *Griffin* case where Menard could not know specifically when the box became damaged or how, and it would be pure speculation to assume Menard's negligence when the public had access to tamper with the box. Similarly, it would be inappropriate to assume IU's negligence when anyone in the classroom could have tampered with the window.

For the reasons set forth above, the trial court properly entered summary judgment in favor of IU.

E. Even if res ipsa loquitor applied to this case, Isgrig is not entitled to summary judgment because res ipsa loquitor only provides a permissive inference of negligence.

Where res ipsa loquitor is applicable, its application does not entitle a plaintiff to summary judgment. See *Sweeny v. Erving*, 228 U.S. 233, 241 (1913). This is because res ipsa loquitor is an evidentiary principle to be weighed. *Id.* at 240. It allows an inference of negligence but it does not compel it. *Id.*

Thus, application of res ipsa loquitor in this case would not entitle Isgrig to summary judgment even if IU offered no evidence refuting its negligence. However, IU has offered evidence that there was no defect with the window that explains the window falling out of its casing, that the only explanation requires human involvement, and that IU's maintenance staff did not interact with the window for over a year before the window fell out of its casing. Therefore, the trial court properly denied Isgrig's motion for summary judgment.

VI. CONCLUSION

For the foregoing reasons, Appellee, The Trustees of Indiana University, respectfully request the Court of Appeals affirm the trial court's grant of summary judgment in its favor.

Respectfully submitted,

/s/ Angela J. Della Rocco
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WORD COUNT CERTIFICATE

I verify that this Appellees' brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 2023 a copy of the foregoing document was filed electronically with the Clerk of the Indiana Court of Appeals. I also certify that September 7, 2023, a copy of the foregoing document was served electronically through the Indiana E-Filing System upon the following persons:

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