

**IN THE
INDIANA SUPREME COURT**

No. _____

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

**REPLY IN SUPPORT OF APPELLEE
TRUSTEES OF INDIANA UNIVERSITY'S PETITION TO TRANSFER**

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SUMMARY OF ARGUMENT

Appellant Isgrig seeks a black and white rule that *res ipsa loquitor* always applies to cases where the injuring instrumentality is a “fixture.” Such a rule is contrary to this Court’s holding in *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021) and would significantly expand the duty of landowners as described in *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991).

Appellant also seeks to expand the concept of exclusive control such that a landowner’s exclusive control would exist where a person is injured by a fixture which they do not touch regardless of whether third-parties have the opportunity to exercise control over the fixture. Such a holding would expand the duties owed by landowners to invitees as set forth in *Burrell*.

Finally, Appellant makes the policy argument that not allowing *res ipsa* in cases like this precludes innocent plaintiffs from obtaining compensation. However, *res ipsa* is an evidentiary rule granting a permissive inference of negligence; where *res ipsa* does not apply, a plaintiff may offer evidence to otherwise prove their claim. The boundaries for the application of *res ipsa* as set forth in *Griffin* fairly balance the interests of plaintiffs and defendants.

This Court should grant transfer to address these issues.

ARGUMENT

Accepting Appellant’s arguments that: (1) *res ipsa* applies in all case cases involving fixtures; and, (2) an injured party’s lack of engagement with a fixture necessitates a finding of exclusive control on the part of the landowner, effectively expands landowners’ duty to those on their property. Such an expansion allows landowners, like The Trustees of Indiana University (“IU”), to be held responsible for the negligence of third-parties not within their control.

While this Court uses the word fixture in its Opinion in *Griffin*, contrary to Appellant’s assertion, the word fixture was not the operative word. This Court stated:

If an injury results from a fixture or other component that customers did not or could not disturb—such as a chandelier suspected 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.

Griffin, 175 N.E.3d at 816. The operative point was whether the injuring instrumentality was something, “...customers did not or could not disturb...and the incident would not normally occur absent negligence.” *Id.* It is the opportunity for direct interaction with the instrumentality that is important, not how that instrumentality is defined. While some fixtures are typically not directly interacted with by those other than the landowner (*e.g.*, light fixtures suspended from the ceiling and operated by a switch), some are commonly interacted with by those other than the landowner (*e.g.*, operable windows and doors). Thus, not all fixtures should be treated the same. This is consistent with *res ipsa* applying in the case of a ceiling light, *Rector v. Oliver*, 809 N.E.2d 887 (Ind. Ct. App. 2004), but not in the case of a handrail, *Cernul v. Heritage Inn of Indiana*, 785 N.E.2d 328 (Ind. Ct. App. 2003), *reh'g denied, trans. denied*. Notably, this Court cited favorably to both *Rector* and *Cernul* in the *Griffin* Opinion.

Where third-parties have the opportunity to interact with the injuring instrumentality, the exclusive control requirement of *res ipsa* is not satisfied. *Griffin*, 175 N.E.3d at 815-16; *see Cernul*, 785 N.E.2d at 330-31. Contrary to Appellant's assertion, IU does not take the further position that exclusive control requires actual physical control of the injuring instrumentality. But, where third-parties have the “right or power of control and the opportunity to exercise it,” a defendant cannot have exclusive control. *Gold v. Ishak*, 720 N.E.2d 1175, 1182 (Ind. Ct. App. 1999), *trans. denied*. Because the window in this case could be used by the occupants of the building, IU did have exclusive control. Appellant's lack of interaction with the injuring instrumentality does not, in and of itself, prove the existence of exclusive control. Exclusive control is about the defendant's control, not the plaintiff's.

While landowners owe a duty of care to invitees to exercise reasonable care to protect them from foreseeable dangers on the property, there is no duty to insure an invitee's safety while on the premises. *See, e.g., Rogers v. Martin*, 63 N.E.3d 316, 324 (Ind. 2016); *Schulz v. Kroger Co.*, 963 N.E.2d 1141, 1144 (Ind. Ct. App. 2012). Because Appellant can satisfy neither the underlying premises liability burden nor establish that IU had exclusive control of the window, application of *res ipsa* in this case would make IU the insurer of Appellant's safety and, by extension, expand landowners' duty to invitees. IU does not dispute that *res ipsa* is a long recognized doctrine in Indiana. IU disputes application of *res ipsa* here because doing so expands IU's duty to Appellant such that it must insure her from all harms regardless of whether the underlying premises liability standard can be satisfied and regardless of the opportunities for the negligence of third-parties over which IU has no control to have caused the dangerous condition of the window. This is a significant expansion of a landowner's duty to its invitees.

Appellant claims that not allowing *res ipsa* in this case harms innocent plaintiffs. However, allowing *res ipsa* in cases like this where the underlying premises liability standard is lacking and where exclusive control does not exist puts landowners in the position of being responsible for the negligent acts of others. Given *res ipsa* is a rule of evidence which allows the jury a permissive inference of negligence, and a plaintiff is not otherwise precluded from offering other evidence in support of their claim, application of *res ipsa* is appropriately guarded and should not be expanded here.

CONCLUSION

For the foregoing reasons along with the reasons articulated in Appellee's Petition to Transfer, Appellee, The Trustees of Indiana University, respectfully requests the Indiana Supreme

Reply in Support of Appellee Trustees of Indiana University's Petition to Transfer

Court accept transfer, vacate the decision of the Court of Appeals, and affirm the trial court's entry of summary judgment in favor of The Trustees of Indiana University.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this REPLY IN SUPPORT OF PETITION TO TRANSFER contains no more than 1,000 words, excluding the items enumerated in Appellate Rule 44(C), in compliance with Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that on March 21, 2024, a copy of the foregoing document was filed electronically with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court. I also certify that on March 21, 2024, a copy of the foregoing document was served electronically through the Indiana E-Filing System upon the following persons:

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