Filed: 2/12/2024 1:57 PM

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

APPELLEE TRUSTEES OF INDIANA UNIVERSITY'S PETITION TO TRANSFER

Angela J. Della Rocco, #29252-53
Amy K. Fisher, #23079-49
McCarter & English, LLP
10 E. Main Street, Suite 200
Carmel, IN 46032
Tel. (317) 810-5482

Attorneys for Appellee The Trustees of Indiana University

QUESTIONS PRESENTED ON TRANSFER

1. The Court of Appeals' published opinion below ("Opinion") concludes that a plaintiff in a premises liability case seeking application of *res ipsa loquitur* is not always required to satisfy their premises liability burden of proof; in *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021) this Court held that "if there is no liability under a premises liability standard, *res ipsa* cannot apply." Should this Court grant transfer under Ind. Appellate Rule 57(H)(2) to clarify whether *res ipsa loquitur* can apply in a premises liability case where the plaintiff cannot satisfy their premises liability burden of proof?
2. The Court of Appeals' Opinion concludes that the exclusive control requirement of *res ipsa loquitur* was satisfied despite undisputed evidence that the injuring instrumentality was accessible for use by third-parties; previous decisions of this Court and the Court of Appeals have found that exclusive control did not exist where the injuring instrumentality was accessible to third-parties. Should this Court grant transfer under App. R. 57(H)(1) and/or (2) to clarify whether the exclusive control requirement of *res ipsa loquitur* can be satisfied where the injuring instrumentality is accessible for use by third-parties?
3. The Court of Appeals' Opinion does not address unrefuted evidence which excludes Defendant/Appellee's negligence as a cause of Plaintiff/Appellant's injury; previous decisions of this Court and the Court of Appeals have found that where the unrefuted evidence leaves open only the possibility that some explanation other than the defendant's negligence caused the injury, *res ipsa loquitur* cannot apply. Should this Court grant transfer under App. R. 57(H)(1) and/or (2) to clarify whether *res ipsa loquitur* can apply where the defendant's negligence is excluded as a possible cause of the injury?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On April 28, 2018, while studying for final exams in room 138 of the Francis Morgan Swain Building on the Indiana University Bloomington campus, the southeast window inside the classroom fell from its casing and struck Plaintiff/Appellant Kiera Isgrig ("Isgrig"). *Appellant's App. v. 2, p. 27, ¶¶ 7-9; p. 56, 43:24-44:3.* According to Isgrig, the condition of the window had caused her no concerns that it might fall, *Appellant's App. v. 2, p. 57, 46:9-15; p. 60, No. 3; pp. 61-62, No. 20,* and she does not know 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.*

After the incident, Kevin Ashley, at the time Indiana University Bloomington Physical Plant Carpenter repaired and replaced the window. *Appellant's App. v. 2, p. 64 ¶¶ 2, 5.* In doing so, he 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.* The Trustees of Indiana University ("IU") does not know precisely what caused the window to fall from its casing, but the unrefuted evidence rules out any defect with the window or its casing as the cause and points only 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 evening, 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.*

Appellee Trustees of Indiana University's Petition to Transfer

IU's maintenance staff performs only reactionary maintenance on windows and only in response to maintenance tickets. Prior to the date of this accident, the subject window was last serviced by IU in March, 2017. *Appellant's App. v. 2, p. 77.* After the March, 2017, 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 at issue.

IU moved for summary judgment on the grounds that Isgrig failed to make a prima facie case of negligence under the applicable premises liability standard. 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 known of any dangerous or defective condition of the window. Instead, she argued that the doctrine of *res ipsa loquitur* applies and saves her case from summary judgment. The trial court disagreed and properly entered judgment in favor of IU, finding that Isgrig failed to satisfy her premises liability burden of proof, that this Court's ruling in *Griffin v. Menard, Inc.*, 175 N.E.3d 811 (Ind. 2021) precluded application of *res ipsa loquitur* in a premises liability case where the plaintiff could not satisfy the underlying premises liability standard, and that even if *res ipsa loquitur* could apply it did not apply because IU did not have exclusive possession and control of the window.

The Court of Appeals reversed the trial court finding that *res ipsa loquitur* can apply in a premises liability case where the plaintiff fails to satisfy the underlying premises liability standard

and that IU had exclusive control of the window such that *res ipsa loquitur* applied in this case. In doing so, the Court of Appeals acknowledged that a plain reading of this Court's Opinion in *Griffin* supports the trial court's conclusion that in a premises liability case a plaintiff must satisfy their premises liability burden before they may invoke the doctrine of *res ipsa loquitur*. The Court of Appeals also contradicted *Griffin* along with other precedents when it found that *res ipsa loquitur* applied to this case despite the fact that exclusive control did not exist because third-parties have access to the window and despite the fact that unrefuted evidence excluded IU's negligence as a possible cause of the window falling from its casing.

IU, pursuant to App. R. 57(H)(1) and (2), respectfully petitions the Indiana Supreme Court to accept transfer of this case in order to resolve conflict between the Court of Appeals' Opinion and existing Indiana Supreme Court and Indiana Court of Appeals precedent.

ARGUMENT

I. THIS COURT SHOULD ACCEPT TRANSFER TO CLARIFY THAT WHERE THERE IS NO LIABILITY IN PREMISES LIABILITY, RES IPSA LOQUITUR CANNOT APPLY.

There is no dispute that Isgrig cannot satisfy her premises liability burden of proof as set forth in *Burrell v. Meads*, 569 N.E.2d 637 (Ind. 1991). Thus, the threshold issue in this case is whether she may nonetheless rely on the doctrine of *res ipsa loquitur* to save her claim from summary judgment.

The doctrine of *res ipsa loquitur* 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 loquitur* 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.

In a 2004 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 loquitur*:

> To say that a premises owner may be liable under the doctrine of res ipsa loquitur 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*, this Court confirmed that the underlying premises liability standard must be satisfied before *res ipsa loquitur* can apply, 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 in a premises liability case cannot make a prima facie case for negligence, *res ipsa loquitur* 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 loquitur*, 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*, *res ipsa loquitur* cannot be invoked to save her claim.

The Court of Appeals acknowledged that a plain reading of *Griffin* supports this conclusion; however, the Court of Appeals stated that "to adopt such a strict reading seems, to us, illogical". *Isgrig v. Trustees of Indiana University*, --- N.E.3d ---, 2023 WL 8899620, at *5 (Ind. Ct. App. Dec. 27, 2023). Instead, the Court of Appeals held that *res ipsa loquitur* could apply in a premises liability case, despite a plaintiff's failure to satisfy the premises liability standard, where

the 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. *Id.* This Court reserved the issue of when the requirements of *res ipsa loquitur* might be satisfied in a premises liability case and stated it "could be appropriate" where "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." *Griffin*, 175 N.E.3d at 815-16. But, by this statement, this Court did not limit its holding that "if there's no liability under a premises liability standard, *res ispa* cannot apply." *Id.* This Court should accept transfer to affirm this holding.

Regardless, even under the Court of Appeal's interpretation, *res ipsa loquitur* cannot apply to this case. The undisputed evidence confirms that the window was accessible for use by anyone who entered the classroom and that the classroom was accessible even outside of times when class was in session. Whether the window is a fixture is inconsequential. The appropriate inquiry is whether there is exclusive management and control of the injuring instrumentality regardless of whether that instrumentality is a fixture or something else. Indeed, this Court's opinion declining to apply *res ipsa loquitur* in *Griffin*, did not hinge on whether the source of Griffin's injury was a fixture. 175 N.E.3d at 815-16. Rather, 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. *Cergnul v. Heritage Inn of Indiana, Inc.*, 785 N.E.2d 328, 330-332 (Ind. Ct. App. 2003). 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. Because the window does not fall into the category of fixtures or other components that customers did not or could not disturb, *res ipsa loquitur* cannot apply in this premises liability case.

II. THE REQUIREMENTS OF RES IPSA LOQUITUR ARE NOT SATISFIED.

Assuming arguendo that *res ipsa loquitur* can apply in a premises liability case where a plaintiff is unable to satisfy their premises liability burden of proof, *res ipsa loquitur* still does not apply to this case. 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. Contrary to the findings of the Court of Appeals, r*es ipsa loquitur* 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.

A. THIS COURT SHOULD ACCEPT TRANSFER TO CLARIFY THAT WHERE THIRD-PARTIES HAVE ACCESS TO AN INJURING INSTRUMENTALITY THE EXCLUSIVE CONTROL REQUIREMENT OF *RES IPSA LOQUITUR* IS NOT SATISFIED.

"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.").

Appellee Trustees of Indiana University's Petition to Transfer

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. 175 N.E.2d at 812. Unable to satisfy the underlying premises liability standard, Griffin sought application of *res ipsa loquitur*. *Id.* at 812. This Court found that the requirements of *res ipsa loquitur* were not satisfied because Menard could not have exclusive management and control when customers had access to the sink box. *Id.* at 815. This 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 Court in *Griffin* found analogy with *Cergnul*, a case in which a hotel patron fell when a handrail detached from a wall. In *Cergnul*, the hotel had a stair railing removed and reinstalled to allow for the placement of wallpaper several months prior to the incident giving rise to the lawsuit. *Cergnul*, 785 N.E.2d. 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 loquitur* 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 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 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 loquitur* 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.

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 loquitur* to this case.

The Court of Appeals' reliance on Am. Jur. 2d Premises Liability § 60 (Oct 2023 Update) to reach its conclusion that *res ipsa loquitor* applies to windows which inexplicably fall from walls is misplaced. While this non-binding precedent provides examples of cases involving windows/doors meriting application of *res ipsa loquitor*, it also states that the doctrine "is not available if the instrumentality causing the injury was not within the defendants' exclusive control…" Indeed, specific examples cited in § 60 where *res ipsa loquitur* does or does not apply to cases involving windows hinge on the exclusive control element. *E.g., Young v. Marlas*, 243 Iowa 367, 51 N.W.2d 443 (1952) (*res ipsa loquitor* applied where transom glass above display window fell during windstorm and the defendant's exclusive control of the window was not disputed); *cf., Britton v. University of Chicago Hospitals*, 889 N.E.2d 706 (Ill. 1st Dist. 2008) (*res ipsa loquitor* did not apply due to lack of exclusive control where glass surrounding revolving door shattered). The Appellate Court of Illinois' rationale in *Britton* for why it declined to allow application of *res ipsa loquitur* is instructive:

> The operation of a revolving door is not within the exclusive control of the owner of the premises. Persons using them take a distinct part in their operation and are chargeable with the exercise of ordinary care in the use thereof. Injuries may occur in their operation from a lack of due care, either on the part of the person injured or from that of those using the door at or near the same time as the person injured. Under conditions of that character, a proprietor cannot be considered liable. Further, where a structure not obviously dangerous has been in daily use for an extended period of time and has proven adequate, safe, and convenient for the purposes to which it was being put, it may be further continued in use without the imputation of negligence.
>
> Moreover, the *res ipsa loquitur* doctrine applies only when the facts proved by the plaintiff admit of the single inference that the accident would not have happened unless the defendant had been negligent. Here, that is not the case. If it is reasonable to presume from the facts that defendant's negligence proximately caused plaintiff's injury, it is equally logical to infer that some third party passing through the door just prior to plaintiff had carelessly subjected it to an unusual strain which caused the glass to break and that such an act was the proximate cause of plaintiff's injury. Clearly if two reasonable inferences are deducible from the same facts, one of which comports with defendant's responsibility and the other is directly contra thereto, neither should be indulged to permit recovery by use of the doctrine of *res ipsa loquitur* for the apparent reason that, if such a practice is permissible, a jury is called upon to enter the field of speculation and engage in a guessing contest.

889 N.E.2d at 709. Similarly, persons using the window at issue in this case took a distinct part in its operation, and, thus, it is equally logical to infer that such third-party carelessly subjected the window to some unusual manipulation allowing it to fall as it is to infer that IU was negligent. This Court should accept transfer to clarify that *res ipsa loquitur* does not apply where, such as here, third-parties have access to the injuring instrumentality.

B. THIS COURT SHOULD ACCEPT TRANSFER TO CLARIFY THAT WHERE A DEFENDANT'S NEGLIGENCE IS EXCLUDED AS A POSSIBLE CAUSE OF THE INJURY, *RES IPSA LOQUITUR* DOES NOT APPLY.

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. Ct. App. 2018). 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. *Appellant's App. v. 2, 82-83; Appellant's App. v. 3, p.* 26:19-25. 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 loquitur*, 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 loquitur* 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 mopping 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 loquitur* 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.).

Appellee Trustees of Indiana University's Petition to Transfer

The Court of Appeals found that a window falling out of its casing is the sort of thing that does not happen in the absence of negligence. It also found that a trier of fact could reasonably conclude that IU was negligent because a third-parties' interactions with the window should not cause a window to fall. On the basis of these findings, the court held that *res ipsa loquitur* could apply in this case. The Court of Appeals misses the point. First, it is speculation to assume that the nature of the unknown third-party's interaction with the window could not create the condition that allowed the window to fall out of its casing. Second, such speculation is contrary to the undisputed evidence which reflects that no maintenance/mechanical defect with the window caused this incident, that IU had no maintenance tickets on the window in the year prior to this incident and, thus, did not interact with the window in that timeframe, and that the only explanation for the incident is that some third-party interacted with the window in an unexpected manner. It cannot be said that the incident more probably resulted from IU's negligence as opposed to another cause and, therefore, this Court should accept transfer to clarify that *res ipsa loquitur* does not apply under the facts of this case.

CONCLUSION

For the foregoing reasons, Appellee, The Trustees of Indiana University, respectfully requests the Indiana Supreme 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,

/s/ Angela J. Della Rocco
Angela J. Della Rocco, #29252-53
/s/ Amy K. Fisher
Amy K. Fisher, #23079-49
Attorneys for Appellee The Trustees of Indiana University

Angela J. Della Rocco, #29252-53
Amy K. Fisher, #23079-49
McCarter & English, LLP
10 E. Main Street, Suite 200
Carmel, IN 46032
Tel. (317) 225-6080
Attorneys for Appellee The Trustees of Indiana University
adellarocco@mccarter.com
afisher@mccarter.com

WORD COUNT CERTIFICATE

I verify that this PETITION TO TRANSFER contains no more than 4,200 words, excluding the items enumerated in Appellate Rule 44(C), in compliance with Appellate Rule 44(E).

/s/ Angela J. Della Rocco
Angela J. Della Rocco

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 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 February 12, 2024, a copy of the foregoing document was served electronically through the Indiana E-Filing System upon the following persons:

Timothy F. Devereux
Wagner Reese, LLP
11939 N. Meridian St., Ste. 100
Carmel, IN 46032
TDevereux@WagnerReese.com
Attorney for Appellant, Kiera Isgrig

/s/ Angela J. Della Rocco
Angela J. Della Rocco, #29252-53